HIGH COURT OF AUSTRALIA

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Details of Filing

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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 SUBMISSIONS

Part I: Internet publication

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

Part II: Issue

2. Would the NSW Civil and Administrative **Tribunal** exercise judicial power in a matter within the meaning of s 75(iv) of the Constitution, thus exceeding its jurisdiction as a non-court, by reviewing public sector agency conduct under Part 5 of the ***P**rivacy and **P**ersonal **I**nformation **P**rotection **Act** 1998* (NSW) and ***A**dministrative **D**ecisions **R**eview **Act** 1997* (NSW) on application by a resident of another State claiming "damages"?

Part III: Notice of constitutional matter

3. The appellant gave notice under s 78B of the *Judiciary Act 1903* (Cth) on 22 March 2024 (CAB 138). Further notice is required in relation to the cross-appeal (CAB 142).

Part IV: Citation

4. *Wojciechowska v Secretary, Department of Communities and Justice; Wojciechowska v Registrar, Civil and Administrative Tribunal* [2023] NSWCA 191 (**J**) (CAB 65).

Part V: Facts

5. In 2018, officers of the NSW Police Force attended a property belonging to Ms Wojciechowska. Ms Wojciechowska's dissatisfaction with the conduct of the Police, both during and after the visit to her property, has led to a large number of disputes in the Tribunal (J [2]; CAB 74). Since November 2018, Ms Wojciechowska has resided in Tasmania (J [4]; CAB 74). Between 2019 and 2022, she commenced various proceedings in the Tribunal against the third and fourth respondents, who are emanations of the State of New South Wales for the purpose of s 75(iv) of the Constitution (J [4], CAB 74). In some of those proceedings, she sought administrative review of conduct under the PPIP Act. In others, she sought administrative review of decisions under the ***G**overnment **I**nformation (**P**ublic **A**ccess) **Act** 2009* (NSW). Ms Wojciechowska's underlying complaints include that information contained in certain police records about the visit to her property in 2018 is inaccurate and was not checked or verified for accurate information by the NSW Police Force (CAB 24 [1]). She has also complained about the use, handling and dissemination of information, although the precise factual allegations about this are obscure (CAB 42 [9]).

6. Ms Wojciechowska challenged the jurisdiction of the Tribunal, relying on the holding in ***Burns v Corbett*** (2018) 265 CLR 304, that "a State Parliament lacks legislative capacity to confer on a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the Constitution judicial power with respect to any matter of a description in s 75 or s 76 of the Constitution": ***Citta Hobart** Pty Ltd v Cawthorn* (2022) 276 CLR 216 at [1]. The Tribunal is not a court: *Attorney General for New South Wales v Gatsby* (2018) 99 NSWLR 1. Ms Wojciechowska contended that the functions performed by the Tribunal when determining administrative review applications under the GIPA Act and the PPIP Act involved the exercise of judicial power in a matter within s 75(iv) of the Constitution and that her proceedings should be heard by the District Court: Part 3A of the ***C**ivil and **A**dministrative **T**ribunal **Act** 2013* (NSW) (J [10], [12], [16]; CAB 76-78).

7. In two proceedings heard together in its original jurisdiction, the Court of Appeal determined Ms Wojciechowska's jurisdictional challenges in relation to both the GIPA Act and the PPIP Act. In proceeding 2023/53137, Ms Wojciechowska challenged the Tribunal's exercise of jurisdiction in four proceedings, two for administrative review of police conduct pursuant to s 55 of the PPIP Act and two under the GIPA Act (J [16]-[34]; CAB 78-83). In those underlying PPIP Act proceedings (2019/382033; 2022/194626), she alleged contraventions of ss 8-14 and 16-18 of the PPIP Act, and sought the remedy of

damages pursuant to s 55(2)(a) of that Act (J [17]-[22], [34]; CAB 78-79, 83). Proceeding 2022/295461 related only to the GIPA Act (J [8]-[13]; CAB 75-77).

8. The Court of Appeal decided that determination of an application by a resident of another State for damages under s 55(2)(a) of the PPIP Act would involve the Tribunal exercising judicial power (J [141], [146]; CAB 117, 119). The Court of Appeal's conclusion turned on a single factor: the ability under s 78 of the CAT Act to file in the registry of a court a certificate stating an amount ordered by the Tribunal to be paid, which then operates as a judgment of the court (J [137]-[141], [143]; CAB 116-118). This factor was said to make the decision in ***Brandy*** *v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 "materially indistinguishable" (J [140]; CAB 117). The Court held that, if and when an order is sought under s 55(2)(a) in circumstances where the claim is of a kind that otherwise falls within federal jurisdiction, the matter is outside the Tribunal's jurisdiction (J [141]; CAB 117).

9. The Court's conclusion that the operation of s 78 sufficed to sustain this outcome meant that it left undecided the question whether s 55(2)(a) was sufficient to characterise the Tribunal's function as judicial (J [134], CAB 115). The Court was clear that all other factors pointed to a non-judicial characterisation (J [134], CAB 115) and that nothing in its analysis suggested that the orders provided for in s 55(2), apart from an order for damages under s 55(2)(a), involved the exercise of judicial power (J [144]; CAB 118).

10. The Court of Appeal also held, correctly, that an administrative review under the GIPA Act did not involve the exercise of judicial power (J [105]; CAB 105). That holding disposed of the balance of proceeding 2023/53137 and the entirety of proceeding 2022/295461. Ms Wojciechowska seeks to reverse these judgments by cross-appeal.[1]

Part VI: Appellant's argument

A. SUMMARY

11. The Court of Appeal was wrong to find that the Tribunal exercises judicial power in a matter in an application under s 55 of the PPIP Act by a resident of another State. Administrative review under s 55 of the PPIP Act is merits review of conduct. It does not involve the determination of a justiciable controversy. The PPIP Act, governing only

[1] The cross-appeal is incompetent in relation to proceeding 2022/295461, which is not under appeal. If the cross-appeal in relation to proceeding 2023/53137 is allowed, the State will not oppose an extension of time, a grant of special leave, and appropriate final orders in the other proceeding.

public sector agencies, establishes bureaucratic norms of public administration. Sections 21, 32 and 69 make clear that those norms do not give rise to legal rights capable of curial enforcement, except the right to a review performed in accordance with Part 5.

12. The Tribunal's functions in performing a review under Part 5 are not judicial. The power under s 55(2)(a) to "order" a public sector agency to pay "damages", properly construed, is not an essentially judicial power. It is a "borderland" function, which takes its administrative character from the administrative review jurisdiction of the Tribunal in which it is reposed and from its ultimate end, which is deciding the correct or preferable conduct in relation to the collection and handling of personal information. The Tribunal's power to order damages has the same character as the agency's power to pay compensation for maladministration (s 53(7)). It is not functionally different from the directions the Tribunal may give under s 63 of the ADR Act by way of merits review.

13. Section 78 of the CAT Act does not apply to orders for damages under s 55(2) of the PPIP Act. Even if s 78 does apply, *Brandy* does not, in the State context, mean that the enforceability of the Tribunal's order imparts to the preceding function an impermissible judicial character. The reason is that the Tribunal does not determine a "matter". A State legislature may pick up judicial mechanisms for enforcement of monetary judgments and apply them to administrative orders for payment of money in non-matters.

14. The precise nature of a "review" depends on the terms of the statute: *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [57]. Similarly, whether a particular function of a tribunal is judicial in character depends on the construction of the relevant statutory provisions: see, eg, *Attorney-General (Cth) v Alinta* (2008) 233 CLR 542 at [79] (Hayne J). These submissions therefore begin with the proper construction of interlocking provisions of the PPIP Act, ADR Act and CAT Act before turning to the constitutional issues and the relevance, if any, of the recovery mechanism in s 78 of the CAT Act, on which the Court of Appeal's judgment rests.

B. LEGISLATIVE SCHEME

PPIP Act

Norms of conduct have a bureaucratic character

15. The PPIP Act governs the collection, handling and use of personal information by NSW public sector agencies. Among its objects are "to provide for the protection of personal information, and for the protection of the privacy of individuals generally" (Long

Title). Despite the generality of this language, the norms of conduct prescribed by the Act apply only to public sector agencies (J [107]; CAB 106). The Act has nothing to say about the handling of personal information by the private sector or the protection of privacy as between private individuals. "Public sector agency" is defined in s 3(1) to include among others a Public Service agency, the Teaching Service, a political office holder, the NSW Police Force, a statutory body representing the Crown, and a person or body that provides data services for or on behalf such an agency. These are all entities or persons involved in public administration, only some of which have distinct legal personality.

16. The Act protects "personal information", defined broadly in s 4(1) as "information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion", subject to the exclusions in ss 4(3) and 4A. Section 4A excludes health information, which is dealt with by the *Health Records and Information Privacy Act 2002* (NSW).[2]

17. The Act pursues its object of protecting personal information and privacy primarily through the "information protection principles" set out in Div 1 of Part 2 (ss 8-19), which regulate how a public sector agency collects, holds or uses personal information and include restrictions on disclosure of personal information. The principles are in the nature of practical constraints on the manner in which an agency collects and holds personal information. They are principles of good public administration. They do not involve quintessentially legal standards. For example, if a public sector agency collects personal information from an individual, the agency must take reasonable steps to ensure that the information collected is relevant to that purpose, is not excessive, and is accurate, up to date and complete (s 11(a)). A public sector agency that holds personal information must ensure that the information is disposed of securely in accordance with any requirements for the retention and disposal of personal information (s 12(b)). A public sector agency that holds personal information must not use the information other than for certain purposes (s 17(c)). The Court of Appeal correctly described the operative criteria of the principles as "rather amorphous, evaluative and directed to the way in which administrative processes are undertaken" (J [123], CAB 111).

[2] This establishes analogous "Health Privacy Principles" applicable to health service providers. For public sector providers, Part 5 of the PPIP Act is applied (s 21). For private sector providers, there is a different scheme for conciliation by the Privacy Commissioner and inquiry by the Tribunal.

18. The application of the information protection principles is subject to the PPIP Act itself (s 20(2)(b)). Division 3 of Part 2 provides for specific exemptions from the principles, such as exemptions relating to law enforcement (s 23) and where non-compliance is lawfully authorised (s 25(a)). The principles may also be modified by "privacy codes of practice" (s 20(2)(a)), which are dealt with in Part 3 of the Act. A code of practice is made by order of the Minister (s 31), which is not a statutory rule and which is not disallowable: *Interpretation Act 1987* (NSW), ss 20, 40-41. A code must not impose on any public sector agency any requirements that are more stringent (or of a higher standard) than the information protection principles (s 29(7)(b)), and may exempt a public sector agency from any of the principles (s 30(2)(c)). In other words, the Act empowers the executive to relax the information protection principles.

19. Although the principles are expressed in normative language directed to public sector agencies, they do not themselves create legal duties or correlative legal rights. That follows from ss 21, 32 and 69 of the PPIP Act.

20. Section 69(1) provides that nothing in Part 2 or 3 (i.e. the information protection principles as modified by any code of practice) "gives rise to, or can be taken into account in, any civil cause of action". The breadth of that provision is spelled out in paragraphs (a) and (b), which make clear that the provisions do not create any legal rights or even provide grounds for judicial review. Thus, the information protection principles do not support an action for breach of statutory duty, nor are they enforceable by prohibition, mandamus or injunction (cf J [126]; CAB 112).

21. Section 69(2) provides that subsection (1) is "subject to sections 21 and 32". Section 21(1) provides that a public sector agency must not do any thing, or engage in any practice, that contravenes an information principle applying to the agency. This is the only source of legal duty which the PPIP Act, consistent with s 69, admits. The nature and extent of this duty is immediately clarified in s 21(2), which provides that the contravention by a public sector agency of an information protection principle that applies to the agency is conduct to which Part 5 (administrative review) applies. Similarly, s 32 provides that a public sector agency must comply with any applicable privacy code of practice, and the contravention by a public sector agency of a privacy code of practice is conduct to which Part 5 applies.

22. Part 5 is an exclusive and exhaustive source of remedies in relation to contraventions of information protection principles. The rights and duties arising from the principles are

inseparable from the mechanism in Part 5 giving effect to those rights and duties. The principles do not support any different or greater right capable of curial enforcement.

Part 5 review is distinctly administrative

23. Part 5 authorises a specific form of review by administrative bodies of public sector agency conduct contravening an information protection principle or privacy code of practice. There are two layers of review: internal review and administrative review.

24. Internal review is available to a person who is aggrieved by the conduct of a public sector agency: s 53(1). Internal review is conducted by an individual within the agency who must be, as far as practicable, not substantially involved in the conduct (s 53(4)), unless the agency requests the Privacy Commissioner to undertake the review on its behalf, pursuant to s 54(3). The reviewer must consider any relevant material submitted by the applicant and the Privacy Commissioner (s 53(5)) and must complete the review as soon as is reasonably practicable in the circumstances (s 53(6)).

25. Section 53(7) provides for the actions the public sector agency may take once the review is completed. These include taking such remedial action as it thinks appropriate including the "payment of monetary compensation" and providing undertakings or implementing administrative measures to ensure the conduct will not re-occur. Monetary compensation is not allowed to be paid to certain convicted inmates and their relatives and associates (s 53(7A)). The agency must notify the applicant of the findings of the review (and the reasons for those findings), the action proposed to be taken (and the reasons for taking that action), and the right of the person to have those findings, and the agency's proposed action, administratively reviewed by the Tribunal (s 53(8)).

26. Administrative review of the agency's initial conduct is available under s 55 if an applicant for internal review is not satisfied with the findings of the internal review or the action taken by the agency, or the review is not completed within 60 days.

27. The powers of the Tribunal on a review are set out in s 55(2) and s 55(3). Section 55(2)(a) confers the power to make an order requiring the agency to pay damages not exceeding $40,000 by way of compensation for any loss or damage suffered because of the conduct. An order for damages under s 55(2)(a) may be made only if the Tribunal is satisfied that the applicant has suffered financial loss or psychological or physical harm because of the conduct of the public sector agency (s 55(4)(b)). The same preclusion for convicted inmates and their relatives and associates applies (s 55(4A)).

28. The balance of s 55(2) confers power to make various orders requiring the agency to do or to refrain from doing certain things and "ancillary" orders. Section 55(3) makes clear that the Tribunal retains the powers under Div 3 of Part 3 of Ch 3 of the ADR Act.

29. If the Tribunal performing an administrative review forms the opinion that an officer of the relevant agency has failed to exercise a function conferred on them by the PPIP Act in good faith, the Tribunal may bring the matter to the attention of the responsible Minister for the public sector agency (s 55(5)).

30. The foregoing illustrates the nature of the only "right" created by the PPIP Act. That is to have an alleged contravention of the norms prescribed in Parts 2 or 3 reviewed in accordance with the procedure laid out in Part 5. A complainant is not entitled to any particular remedy arising from that review. Nor could they approach a court to complain of breach of an information protection principle or a code of practice. The "rights" under the Act are inseparable from the administrative mechanisms giving effect to them.

ADR Act

31. Administrative review under s 55 of the PPIP Act is created as "an administrative review under the ADR Act". Among the objects of the ADR Act are to "foster an atmosphere in which administrative review by the Tribunal is viewed positively as a means of enhancing the delivery of services and programs" (s 3(c)) and to "promote and effect compliance by administrators with legislation enacted for the benefit of the citizens of NSW" (s 3(d)). These objects recognise that a function of administrative review is to enhance service delivery and public administration, which is a broader objective than enforcement of legal rights.

32. In determining an application for an administrative review of an administratively reviewable decision, the Tribunal is to decide what the correct and preferable decision is, and in so doing, may exercise all of the functions that are conferred or imposed by relevant legislation on the administrator who made the decision (s 63(1) and (2)). An administratively reviewable decision may include conduct: ss 6(1)(g) and 7, the note to which refers to s 55 of the PPIP Act.

33. The Tribunal may decide to affirm, vary or set aside the administratively reviewable decision or conduct (s 63(3)). The Tribunal must give effect to any relevant Government policy in force at the time the decision was made, unless it is contrary to law or produces an "unjust" decision in the circumstances of the case (s 64(1)). These are not legal standards. At any stage of proceedings, the Tribunal may remit the decision for

reconsideration (s 65(1)). If the Tribunal decision varies, or is made in substitution for, an administrator's decision, the decision of the Tribunal is taken to be the decision of the administrator (s 66(2)(a)).

34. Because "administratively reviewable decision" includes conduct, ss 63-66 must be read as enabling the Tribunal to vary or substitute that conduct, or "set aside" the conduct and require the administrator to undertake different conduct in accordance with the Tribunal's "directions or recommendations" (s 63(3)(d)). These provisions allow the Tribunal to substitute correct or preferable conduct for, or cause the administrator to do something different from, that which is under review by directing or ordering the agency to perform the correct or preferable conduct. The statute's recourse to the legal form of directions or orders does not detract from the functional character of the Tribunal's task as one of merits review, as distinct from the adjudication of any existing rights.

35. In this light, "orders" under s 55(2) of the PPIP Act do not differ functionally from the kind of decision authorised by s 63(3)(b), (c) or (d) of the ADR Act, namely varying or substituting conduct under review, or requiring reconsideration in accordance with directions. That is especially so given the correspondence between the kinds of orders for which s 55(2) provides and the kinds of action available on internal review under s 53(7).

CAT Act

36. Administrative reviews under s 55 of the PPIP Act are within the "administrative review jurisdiction" of the Tribunal, which is distinct from its general, appellate, and enforcement jurisdictions: CAT Act, ss 28(2)(b), 30. They are heard by the Tribunal's Administrative and Equal Opportunity Division (Sch 3, cl 3(1)(b)), the members of which need not be legally qualified (ss 13, 27(1)(d)). Procedure in the Tribunal is informal. The Tribunal is generally not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice (s 38(2)). It is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (s 38(4)).

37. Enforcement of Tribunal orders is dealt with in Part 5 of the CAT Act. Tribunal orders are not generally enforceable as court orders are. Rather, there are distinct statutory obligations of compliance which are enforceable in separate criminal or civil penalty proceedings, depending on the kind of order, maintainable only by the Minister or authorised person: ss 72, 75-77. The Tribunal has powers to deal with contempt in the face

or in the hearing of the Tribunal (s 73(1)), but not with contemptuous breaches of an order, which may instead be referred to the Supreme Court for determination: ss 73(2), 73(5)-(6)).

38. Section 78 deals with the enforcement of orders for the payment of money. For the purposes of the recovery of any amount ordered to be paid by the Tribunal (including costs, but not including a civil or other penalty), the amount is to be certified by a registrar (of the Tribunal: s 4). A certificate which is filed in the registry of a court having jurisdiction to give judgment for a debt of the same amount as the amount stated in the certificate operates as a judgment of that court (s 78(3)). This provision does not prevent a person from appealing or reviewing a Tribunal order for the payment of money (perhaps supported by a stay of the order) prior to the amount being certified for the purposes of recovery. We return below at [66]-[77] to the effect of s 78 on the issue before the Court.

Tribunal "stands in the shoes" of the agency (Ground (c))

39. When it performs an administrative review under the ADR Act, the Tribunal generally performs the same exercise as that performed by the agency whose decision or conduct is being reviewed. The Tribunal considers afresh the decision under review, standing in the shoes of the agency which made that decision. That is reflected by the Tribunal's role, prescribed by s 63 of the ADR Act, to decide what the correct and preferable decision is, exercising all of the functions of the administrator, and then to affirm, vary or set aside that decision (s 63(3)). It is further reinforced by the fact that the Tribunal's decision to vary or substitute a decision is then taken to be the decision of the administrator (s 66(2)(a)). The Tribunal acts *as the administrator*.

40. In respect of administrative review under the GIPA Act, the Court of Appeal recognised that the Tribunal makes a decision standing in the shoes of the administrator, where the decision is treated as a decision of the administrator, and where the burden of the decision falls on the administrator. That feature was held, correctly, to weigh "significantly in favour of characterising the function as involving executive, not judicial, power" (J [98], [104]; CAB 102, 105).

41. The Court of Appeal was wrong to reason differently in respect of the PPIP Act. The Court of Appeal found, erroneously, that the Tribunal does not stand in the shoes of the public sector agency when determining a PPIP Act review (J [119]-[120], [136]). This conclusion was said to remove "a consideration in favour of [the Tribunal's powers] being characterised as administrative" (J [136]; CAB 115).

42. The legislature deliberately designated the Tribunal's review function under the PPIP Act as an administrative review under the ADR Act, assigning it not merely to the Tribunal, but to the Tribunal's administrative review jurisdiction, and preserving the Tribunal's ordinary merits review powers (PPIP Act, ss 55(1), 55(3)). The legislature thus conceived the Tribunal's function under s 55 as merits review of an agency's conduct. The Tribunal's function is not any less a merits review where what is being reviewed is conduct rather than a decision in the narrow sense. The Court was wrong to construe s 55(2) as conferring powers so different from those in s 63 of the ADR Act as not to attract the character described in s 66 of the ADR Act (J [120]; CAB 110). The powers conferred by s 55(2) ought instead be characterised as spelling out particular ways in which the Tribunal can, standing in the agency's shoes, make the correct and preferable decision. The "orders" which s 55(2) authorise are properly understood as effecting a variation or substitution of the conduct under review, or a reconsideration of the conduct in accordance with the Tribunal's directions, as s 63 generally permits.

43. The characterisation of the Tribunal's function as quintessential merits review is affirmed by a comparison of its powers under s 55(2) with those that the agency has on internal review under s 53(7). The powers conferred by s 55(2) generally align with those in s 53(7). The Tribunal is thus undertaking a function which the agency itself possesses. It is reviewing the alleged conduct and deciding whether to take no action, take some action (including payment of compensation) to remedy a breach of an information protection principle or code of practice, or to take action to prevent contravening conduct from occurring in the future (as the Court appeared to acknowledge at J [128]; CAB 112). It is immaterial that those powers are expressed differently from those in s 53(7) of the Act (J [120]). There are no "tensions at play" between the provisions of the ADR Act and the powers conferred by s 55(2) of the PPIP Act (J [119]).

44. The fact that the choices available to the Tribunal under s 55(2) are expressed as powers to make orders directed to the agency, and are not "made in the voice of the agency" (J [120]) is not determinative. That merely reflects that the Tribunal is not, in fact, the agency (unlike the usual author of an internal review).

45. The fact that the Tribunal's decision may be expressed as orders "to" the agency reflects also that what is being reviewed is conduct, rather than a decision in the strict sense. That means a decision to vary or set aside a "decision" (here, conduct) will generally involve some action which must be carried out by the agency, rather than a new decision that the Tribunal can simply express. Orders made on GIPA Act administrative

reviews which involve conduct are conventionally made *to* the agency without any suggestion that what is being performed is not merits review. For example, the Tribunal routinely orders agencies to conduct further searches or to provide access to information.[3]

C. TRIBUNAL DOES NOT DETERMINE A "MATTER" OR EXERCISE JUDICIAL POWER UNDER PPIP ACT (GROUND (B))

46. The foregoing features of the statutory scheme lead to the conclusion that the Tribunal does not determine any "matter" under the PPIP Act. Acceptance of this proposition would be sufficient to conclude that the Tribunal can determine PPIP Act reviews on application by residents of other States compatibly with the *Burns v Corbett* implication, which limits State legislative power only in relation to the adjudication of "matters". The scheme also discloses the related conclusion that the Tribunal does not exercise judicial power when performing a review under the PPIP Act.

Applicable principles

Matter

47. Generally, a matter exists only if "'there is some immediate right, duty or liability to be established by the determination of the Court' in the administration of a law" and if "the determination can result in the Court granting relief which both quells a controversy and is available at the suit of the party seeking that relief": *Unions NSW v New South Wales* (2023) 97 ALJR 150 at [15] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ). A justiciable controversy must concern legal rights, and it must involve a dispute about those legal rights that can be resolved in a judicial manner by a court: ***AZC20*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 674 at [68] (Edelman J). Attention is therefore necessary to whether there is any immediate right, duty or liability and whether corresponding relief of the requisite kind is available.

48. As to whether there is an immediate right, duty or liability, it must be a legal right, duty or liability which has an existence that is not dependent on the commencement of a proceeding in the forum in which the controversy might come to be adjudicated: *Citta Hobart* (2022) 276 CLR 216 at [31] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). This requirement has particular salience in relation to statutory rights and

[3] See, eg, *Tisdale v Cumberland City Council* [2021] NSWCATAD 132; *Wojciechowska v Blue Mountains City Council* [2020] NSWCATAD 264; *Karakaya v Commissioner of Police* [2023] NSWCATAD 282; *Gates v Port Macquarie-Hastings Council* [2022] NSWCATAD 193.

duties, because it is not uncommon for legislatures to create rights or duties which do *not* have existence independently of the statutory mechanisms for giving effect to them.

49. In *Attorney General (NSW) v* ***FJG*** (2023) 111 NSWLR 105, questions under the Constitution and Commonwealth law had arisen before the Appeal Panel of the Tribunal in relation to an administrative review of an agency's refusal to make corrections to the Births, Deaths and Marriages Register. The Tribunal had jurisdiction, notwithstanding the federal law issues, because it was not adjudicating a matter. The rights in issue, to have corrections made to the register, did not exist independently of the administrative mechanisms for which the State law provided: at [93] (Beech-Jones JA, Bell CJ and Ward P agreeing).

50. As to whether relief of the requisite kind is available, a controversy is justiciable if it is capable of being resolved in the exercise of judicial power by an order of the court which, if made, would operate to put an end to the question in controversy through the creation of "a new charter by reference to which that question is in future to be decided as between those persons or classes of persons": ***Hobart International*** *Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at [47] (Gageler and Gleeson JJ)), citing *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374. A legally enforceable remedy is as essential to the existence of a matter as the right, duty or liability which gives rise to the remedy. Without the right to bring a curial proceeding, there can be no matter: *Hobart International* at [48], citing *Abebe v Commonwealth* (1999) 197 CLR 510 at [31] (Gleeson CJ and McHugh J).

Judicial power

51. The exclusive area of judicial power is relatively narrow, encompassing the "quelling of controversies" by fact-finding, application of the law, and exercise of judicial discretion: *Fencott v Muller* (1983) 152 CLR 570 at 608. There is a much more expansive "borderland" within which "a particular act or thing done by a court through the application of a judicial process might equally be achieved through the application of a non-judicial process": *Palmer v Ayres* (2017) 259 CLR 478 at [47] (Gageler J). The "borderland" covers especially situations where the "rights involved spring from the statute which governs their creation and continuance" and where the question accordingly is "whether the features are inconsistent with the power, when it is vested in an administrative officer, being an administrative power": *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 10 (Jacobs J).

52. A borderland function may take its character from the nature of the body on which it has been conferred: *Pasini v United Mexican States* (2002) 209 CLR 246 at [12] (Gleeson CJ, Gaudron, McHugh and Gummow JJ); *Brandy* (1995) 183 CLR 245 at 267 (Deane, Dawson, Gaudron and McHugh JJ). It may take its character from the ultimate end to which it is directed: *Palmer v Ayres* (2017) 259 CLR 478 at [47]-[49] (Gageler J); *R v Davison* (1954) 90 CLR 353 at 368-370 (Dixon CJ and McTiernan J).

Application of principles

53. For the reasons set out above in analysis of the PPIP Act and ADR Act, the statutory scheme does not create legal rights or legal remedies that give rise to a justiciable controversy. Nor do they involve the Tribunal in an exercise of judicial power.

No legal rights sustaining a matter

54. Sections 21, 32 and 69 of the PPIP Act, in particular, make clear that the information protection principles do not give rise to any legal right, other than the right to a review in accordance with Part 5 of the PPIP Act and the ADR Act. That intention coheres with, and reinforces, the true nature of the information protection principles, which do not involve quintessentially legal standards, but which articulate bureaucratic norms of good public administration and which are capable of relaxation by privacy codes of conduct made by the Executive branch under Part 3.

55. The rights and duties arising under the PPIP Act have no existence independently of the merits review mechanism by which they are effected. The situation is equivalent to that in *FJG* as described above at [49].

No judicial remedies sustaining a matter

56. The nature of the remedies available in a Part 5 review, in particular, the availability of compensation or "damages", does not lead to a different conclusion.

57. The Tribunal's power under s 55(2)(a) to order the agency to pay "damages…by way of compensation for any loss or damage suffered because of the conduct" should be construed as having the same character as the agency's power under s 53(7)(c) to make a "payment of monetary compensation to the applicant". It could not be contended that the agency's power to pay monetary compensation under s 53(7)(c) is a judicial power. The Tribunal's corresponding power is simply one aspect of the Tribunal standing in the shoes of the administrator, just as the other remedies available in s 55(2) are. While a power to

order compensation is a power of a kind characteristically exercised by courts, it is not exclusively judicial and must be examined in its precise statutory context.

58. The context of the PPIP Act is governmental administration (J [134], CAB 115). Where the Tribunal exercises the power under s 55(2)(a), that is simply a decision by one part of government that it is appropriate for another part of government (the relevant agency) to make a payment to the applicant. Compensation under s 55(2)(a) is discretionary and does not follow as of course. The ability to give discretionary compensation for loss suffered as a result of maladministration is a recognised part of the executive power. Act of grace payments are discretionary executive payments that may be made even though not required to meet a legal obligation: there are both non-statutory and statutory schemes, as to which see, eg, *Government Sector Finance Act 2018* (NSW), s 5.7; *Public Governance, Performance and Accountability Act 2013* (Cth), s 65. Similarly, a Minister, on the recommendation of the NSW Ombudsman reporting upon maladministration, may authorise payment of compensation to any person: *Ombudsman Act 1974* (NSW), ss 26, 26A (J [132]; CAB 114). As the Court acknowledged at J [131], many statutory schemes, such as workers compensation and unfair dismissal, provide for administrative bodies to award compensation including by reference to conduct measured against statutory standards that are not essentially judicial.

59. The Court perceived s 55(2)(a) as distinguishable because it is conditioned on the finding of a contravention of an information protection principle or privacy code of practice (J [116], [131], [133]; CAB 109, 114, 115). Compensation under s 55(2)(a) is available only for "loss or damage suffered because of the conduct". Although that language does not appear in s 53(7)(c), it can hardly be supposed that the agency performing an internal review would pay "monetary compensation" in the absence of breach. In characterising s 55(2)(a), the Court gave insufficient weight to its place in the whole statutory scheme, including its correspondence with s 53(7).

60. The nature of the norms, contravention of which enlivens the power in s 55(2)(a), also sets this apart from a court's function of awarding damages for breach. For the reasons given above, the norms prescribed by Parts 2 and 3 of the PPIP Act are not freestanding legal duties, but rather guides to good administration in the collection and handling of personal information. They do not have close common law analogues. They do not abrogate any general law rights in relation to, for example, breach of confidence. A finding of a contravention is not a finding that a legal duty has been breached, but rather that there has been some maladministration.

61. The use of the word "damages" in s 55(2)(a) does not change the analysis. Damages have been described as "an award in money for a civil wrong": Edelman, *McGregor on Damages* (21st ed, 2021), [1-001]. A "wrong" is a "breach of a legal duty", which may include breach of contract, tort, an equitable duty or a statutory duty: [1-004]. An award of compensatory damages is made as a matter of right, and is not matter of discretion: [2-011]. In contrast, the power in s 55(2)(a) is discretionary (J [132]; CAB 114). A payment under s 55(2)(a) is not properly characterised as a payment for breach of a legal duty because s 69 makes clear that there is no civil cause of action, and because the nature of the standards in the information protection principles are bureaucratic rather than essentially legal and without close common law analogues. An order under s 55(2)(a) is not an award of damages in any sense that is characteristically and historically exclusive to courts as an exercise of judicial power (J [129], [134]; CAB 113 and 115).

62. Nor is it determinative that s 55(2)(a) is conditioned upon the Tribunal's satisfaction that the applicant has suffered loss or harm because of the agency's conduct (cf J [133]). That simply reflects the compensatory nature of the payment, and the fact that payment would not be made untethered from any harm resulting from the agency's conduct.

63. Apart from the power to order payment of "damages", nothing else in the Tribunal's function suggests the resolution of a "matter" or an exercise of judicial power. The Court of Appeal correctly identified that many features of the Tribunal's function pointed towards the power being characterised as administrative. The context of the scheme is governmental administration (J [134]; CAB 115). The nature of the norms in Part 2 are amorphous and directed to administrative processes (J [123]). They can be altered by the executive. They are not characteristically or historically determined in courts (J [124]). The rights created are not independent, pre-existing rights, but are given effect only in the administrative mechanism created by Part 5 of the scheme (J [125]). They cannot be enforced in a court (J [125]). The remedies the Tribunal may order are of a kind that may be exercised by an administrative decision-maker.

64. Moreover, the review mechanism in Part 5 has been deliberately assigned to administrative bodies, the agency itself and the Tribunal, and within the Tribunal, assigned to the administrative review jurisdiction. The Tribunal does not need to be constituted by lawyers. In the same proceeding in which relief is sought under s 55(2), the Tribunal can take the distinctly non-judicial step of bringing the bad faith exercises of functions under the PPIP Act by public servants to the attention of the responsible Minister (s 55(5)).

65. To the extent that the function performed under s 55 is in the "borderland" where powers may be exercised either administratively or judicially, it acquires an administrative rather than judicial character having regard to either or both of: first, the legislative choice to confer the function on the Tribunal in its administrative review jurisdiction; and, secondly, the ultimate end of the Tribunal's function, which is, through a form of merits review, to bring public sector agency conduct into conformity with bureaucratic information protection principles in the collection and handling of personal information in the course of their ordinary, day-to-day, administration. That end is not to quell any justiciable controversy.

D. SECTION 78 OF THE CAT ACT DOES NOT COMPEL A DIFFERENT CONCLUSION (GROUNDS (A) AND (B))

66. Section 78 of the CAT Act does not apply to orders under s 55(2)(a) of the PPIP Act. Even if it does, it would not impart to the Tribunal's antecedent function an impermissible judicial character. That is because there is no "matter" to which the order is directed.

Section 78 does not apply as a matter of construction

67. Section 78 is located in the constitutive statute of a tribunal which entertains many different kinds of disputes between different kinds of parties. It will always be a question of construction whether a particular monetary order is intended to fall within its terms. An order made under s 55(2)(a) of the PPIP Act is apparently capable of answering the general description in s 78. However, other features indicate that the recovery mechanism was not intended to apply to such an order.

68. First, an order under s 55(2)(a) of the PPIP Act engages s 66(2) of the ADR Act and is "taken to be" a decision of the administrator, rather than of the Tribunal. That deeming provision takes any compensation outside the description in s 78 of the CAT Act of an amount ordered to be paid "by the Tribunal". Section 66(2) of the ADR Act would be engaged because an order under s 55(2)(a): would be a "decision determining an application for administrative review under [the ADR Act]" (see s 66(1) of the ADR Act); and would properly be characterised as a decision varying or being made in substitution for the administrator's decision (see s 66(2) of the ADR Act).

69. This is the essence of s 55(2)(a) being a merits review of public sector agency conduct, corresponding with the power of the administrator itself to pay compensation under s 53(7). In this respect, it is different from monetary orders which the Tribunal

makes in its general jurisdiction. For example, the Tribunal may award damages in its anti-discrimination jurisdiction (see *Burns v Corbett* (2017) 96 NSWLR 247 at [30]), may make monetary orders by way of debt, damages or restitution or a refund in its home building jurisdiction (*Home Building Act 1989* (NSW), s 48O(1)), and may make orders for the payment of an amount of money or compensation in the residential tenancies jurisdiction (*Residential Tenancies Act 1987* (NSW), s 187(1)(c) and (d)). None of these are decisions on merits review, but rather involve a determination of legal rights.

70. Secondly, the certification mechanism in s 78 is expressed to be "for the purposes of the recovery" of an amount (s 78(1)). An order under s 55(2)(a) can only ever be directed to a public sector agency. It is inconceivable that an agency would not comply with a Tribunal order to pay compensation. Parliament would not have intended that such an order be "recoverable" in the sense which engages s 78.

71. Thirdly, s 78 requires a registrar to identify the "person" liable to pay the certified amount (s 78(2)). It is against this person that the certificate, once filed in the court's registry, will operate as a judgment (s 78(3)). This does not conform with s 55 of the PPIP Act, which comprehends payments not simply by the State, but by particular agencies of the State. Often, then, the "person" who is properly "liable" under s 55 to pay the amount will be an emanation of the State without legal personality. They could not be identified as the proper subject of a certificate for the purposes of s 78, and yet it cannot be supposed that a registrar acting under s 78 would alter the names of the parties to the proceeding.

72. Fourthly, other kinds of orders the Tribunal may make on administrative review under s 55(2) of the PPIP Act are not enforceable. It is incoherent that one form of relief available under s 55(2) would be enforceable, while the others are not. This may be contrasted with other schemes, such as that in *Burns v Corbett*, where monetary and non-monetary orders could be registered as a judgment: (2017) 96 NSWLR 247 at [30].

Alternatively, s 78 can validly apply

73. Even if s 78 applies to orders made under s 55(2)(a), the Court of Appeal was wrong to treat that feature as determinative of the question whether the Tribunal hearing an application for damages under s 55(2)(a) by a resident of another State exercises judicial power. *Brandy* is not "materially indistinguishable" (cf J [140]; CAB 117). In the State context, where a strict separation of powers is not required, it does not follow from the fact that the Tribunal's order may be enforceable as a judgment that the Tribunal's antecedent review function involves the resolution of a matter. State Parliaments have greater latitude

than the Commonwealth Parliament to enlist curial enforcement mechanisms for non-judicial decisions. State judicial power, unlike that of the Commonwealth, is not confined to the resolution of matters. The resolution of a "matter" is an essential ingredient of Commonwealth judicial power, but not of the judicial power of the State: ***Kable*** *v Director of Public Prosecutions* (1996) 189 CLR 51 at 137 (Gummow J); *Momcilovic v The Queen* (2011) 245 CLR 1 at [82]-[83] (French CJ). The *Burns v Corbett* limitation concerns only the resolution of matters.

74. *Brandy* concerned provisions of the *Racial Discrimination Act 1975* (Cth) which required the Human Rights and Equal Opportunity Commission, an administrative body, following an inquiry into a complaint of breach of the Act, to lodge its determination with the Federal Court. Prior to registration, the Commission's determination was "not binding or conclusive between any of the parties to the determination". Absent the registration provision, the Court would not have concluded that the Commission exercised judicial power. Upon registration, the Act provided that the determination had effect "as if it were an order made by the Federal Court". Mason CJ, Brennan and Toohey JJ held that that provision purported "to prescribe what the Constitution does not permit", because "an exercise of executive power…cannot create an order which takes effect as an exercise of judicial power; conversely, an order which takes effect as an exercise of judicial power cannot be made except after the making of a judicial determination" (at 260).

75. The observation that the Constitution does not permit an order which takes effect as an exercise of judicial power to be made otherwise than following a judicial determination is true only in the federal context. State legislation (subject only to the incompatibility doctrine in *Kable*) may pick up the enforcement mechanisms for monetary judgments and apply them to administrative decisions for the payment of money that do not resolve any matter.

76. Whether the judicial power of the Commonwealth is being exercised is not answered simply because there is a dispute between a State and a resident of another State: see *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at [64] (French CJ, Kiefel, Bell and Keane JJ) in relation to s 76(ii). In addition to having a subject-matter described in s 75 or s 76 of the Constitution, a "matter" is a justiciable controversy. State law may, without exceeding the *Burns v Corbett* limitation on its legislative power, impart a judicial character to a Tribunal order between the State and a resident of another State provided the Tribunal order, although made enforceable as a court order, does not quell a justiciable controversy.

77. Whether such legislation might be said to impart a "judicial" character to an otherwise administrative decision is constitutionally immaterial. Only if there were involved the resolution of a matter would *Burns v Corbett* be transgressed. For the reasons given above, review under Part 5 of the PPIP Act does not involve a matter.

E. CONCLUSION

78. The matters raised by the first respondent's notice of contention (CAB 150) are relevantly subsumed within the issues raised by the appeal and addressed above. For those foregoing reasons, the Tribunal does not lack jurisdiction to determine the proceedings brought by Ms Wojciechowska under the PPIP Act and the appeal should be allowed.

79. The appellant opposes special leave to cross-appeal. The Court of Appeal's conclusion in relation to the GIPA Act was plainly correct. The appellant will otherwise address the application in its reply.

Part VII: Orders sought

1. Application for special leave to cross-appeal filed by the first respondent refused with costs.

2. Appeal allowed.

3. Set aside Orders 2 and 3 made by the Court of Appeal of the Supreme Court of New South Wales on 17 August 2023 in Matter Number 2023/53137 and, in their place, order that Prayer 1 of the amended summons in that matter be dismissed.

4. In accordance with its undertaking as a condition of special leave, the appellant pay the first respondent's costs of and incidental to the appeal to this Court.

Part VIII: Estimate of time

80. The appellant would seek up to 2.5 hours for oral argument, including reply.

Date: 24 April 2024

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ANNEXURE A

Constitutional provisions, statutes and statutory instruments referred to.

	Statute	Version
1.	*Commonwealth Constitution*, ss 75-77	Current
2.	*Administrative Decisions Review Act 1997* (NSW), ss 3, 6, 7, 63-66	Current
3.	*Civil and Administrative Tribunal Act 2013* (NSW), ss 13, 27, 28, 30, 34A-34D, 38, 71-78, Sch 3, cl 3	Current
4.	*Government Information (Public Access) Act 2009* (NSW)	Current
5.	*Government Sector Finance Act 2018* (NSW), s 5.7	Current
6.	*Health Records and Information Privacy Act 2002* (NSW), ss 21, 41-54	Current
7.	*Home Building Act 1989* (NSW), s 48O	Current
8.	*Interpretation Act 1987* (NSW), ss 20, 40-41	Current
9.	*Ombudsman Act 1974* (NSW), ss 26-26A	Current
10.	*Privacy and Personal Information Protection Act 1998* (NSW), ss 3, 4, 4A, 8-19, 20, 21, 23, 25, 29-32, 52-55, 69	Current
11.	*Public Governance, Performance and Accountability Act 2013* (Cth), s 65.	
12.	*Residential Tenancies Act 1987* (NSW), s 187	Current