



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
COMMONWEALTH (INTERVENING)**

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The “*Burns* implication” does not depend on the existence of a “matter”

2. The implication recognised in *Burns v Corbett* (2018) 265 CLR 304 (**Vol 3, Tab 26**), as summarised by Gageler J at [106], is that “judicial power with respect to the subject matters identified in ss 75 and 76 of the *Constitution* is confined to judicial power of a kind that is: (1) exercisable in respect of justiciable controversies answering the constitutional description of ‘matters’; and (2) conferred on or invested in institutions answering the constitutional description of ‘courts’” (***Burns* implication**) (CS [14]).
3. The *Burns* implication is an example of the negative force of Ch III that was recognised in *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (**Vol 5, Tab 43**) (CS [10]). That negative force prevents the conferral of judicial power with respect to the nine subject-matters listed in ss 75 and 76 in any way other than on courts and in respect of “matters” (CS [11], [14]).
4. The structural necessity for the *Burns* implication is supported by the following factors (CS [12]). *First*, it ensures the Commonwealth retains “federal control” over the exercise of judicial power in respect of the subject-matters listed in ss 75 and 76, by ensuring that power is exercised only within the reach of s 77. *Second*, it ensures the availability of an appeal to this Court in relation to exercises of judicial power with respect to the subject-matters identified in ss 75 and 76, subject only to such exceptions or regulation as the Commonwealth Parliament may prescribe. *Third*, it ensures that judicial power with respect to those subject-matters is exercised only by a court that maintains minimum characteristics of independence and impartiality. If the *Burns* implication did not prevent the conferral of judicial power with respect to non-matters, States could empower tribunals to give advisory opinions with respect to any of the subject-matters in ss 75 and 76 with no appeal to this Court, irrespective of how they were constituted.
5. This Court has recognised on several occasions that the negative force of Ch III is not confined to judicial power with respect to “matters”.
 - (a) *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257 (**Vol 5, Tab 48**) at 263-267 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ) (CS [11]).

- (b) In *Commonwealth v Queensland (Queen of Queensland Case)* (1975) 134 CLR 298 (Vol 3, Tab 29) at 325-328 (Jacobs J, McTiernan J substantially agreeing) and 314-315 (Gibbs J, Barwick CJ, Stephen and Mason JJ agreeing) (CS [15]-[18], [20]) this Court held that State legislation purporting to confer judicial power on a non-Ch III court (the Judicial Committee) with respect to a non-matter (an advisory opinion) was invalid because it violated principles that are implicit in Ch III. That judgment was analysed, in terms that the Commonwealth adopts, in *Burns* (2018) 265 CLR 304 at [103]-[105]; also [52] (Vol 3, Tab 26). It is irreconcilable with an argument that the negative implications from Ch III apply only to judicial power with respect to matters.
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6. Neither *Burns* nor *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 (Vol 3, Tab 28) provide any support for confining the *Burns* implication to cases where an attempt is made to confer judicial power with respect to a “matter”: *Burns* at [38], [45]-[50], [106]; *Citta* at [1] (CS [13], [19]).
7. It follows that the *Burns* implication prevents the NSW Parliament from conferring judicial power on the Tribunal with respect to the subject-matters identified in ss 75 and 76, whether or not that power would involve the determination of a “matter”.

Judicial power

8. The determinative question in this appeal is whether the Tribunal would have purported to exercise judicial power in deciding the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) proceedings (CS [21]).
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9. If s 78 of the *Civil and Administrative Tribunal Act 2013* (NSW) (CAT Act) applies to an order for damages made under s 55(2)(a) of the PPIP Act, then the Tribunal’s order is enforceable without an independent exercise of judicial power. That fact, *in combination* with the nature of the Tribunal’s function to decide whether a contravention of a legislative norm has occurred and, if so, to grant the appropriate remedy, supports the Court of Appeal’s conclusion that the Tribunal purported to exercise judicial power (CS [49], CAB 117-118 [140]-[141]): *Brandy* (1995) 183 CLR 245 (Vol 3, Tab 25) at 269-270 (Deane, Dawson, Gaudron and McHugh JJ).
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10. If s 78 of the CAT Act does not apply, it is not sufficient to conclude that the function of the Tribunal is judicial to conclude that its orders are “binding”: *Brandy* (1995) 183 CLR 245 at 268 (Deane, Dawson, Gaudron and McHugh JJ) (Vol 3, Tab 25); *R v Trade*

Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361 at 403 (Windeyer J) (**Vol 5, Tab 46**); *R v Hegarty; Ex parte Salisbury City Corporation* (1981) 147 CLR 617 at 627 (Mason J) (**Vol 5, Tab 42**). *Citta* (2022) 276 CLR 216 (**Vol 3, Tab 28**) at [16] does not support the contrary conclusion, the result in that case depending upon the totality of factors under a (different) legislative scheme (**CS [55]-[56]**).

- 10 11. If s 78 of the CAT Act does not apply, the better view is that the Tribunal did not exercise judicial power. The main factors that support that conclusion are that Parliament chose to confer the function under Pt 5 of the PPIP on a Tribunal (which is not required to be composed of lawyers) and the fact that the Tribunal's orders would be enforceable only through an independent exercise of judicial power: *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [42]-[46] (**Vol 3, Tab 24**).

Dated: 6 February 2025


Stephen Donaghue

Julia Watson

Rachel Amamoo