HIGH COURT OF AUSTRALIA

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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

10 **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

20 **SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)**

PARTS I, II AND III — CERTIFICATION AND INTERVENTION

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

2. The Attorney-General of the Commonwealth intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the first respondent in the appeal generally and, if special leave is granted, in support of the appellant (**NSW**) in respect of the cross-appeal.

PART IV — ARGUMENT

A. Introduction and summary

3. These submissions address the circumstances in which a body that is not a court, and that is established by an exercise of State legislative power (a **State tribunal**), will lack jurisdiction as a result of the constitutional implication recognised in ***Burns*** *v Corbett* (the ***Burns*** **implication**).[1] On the facts, two criteria for the *Burns* implication to apply are not in dispute, it being accepted that the underlying proceedings in the New South Wales Civil and Administrative **Tribunal** are of a kind identified in s 75(iv) of the Constitution (being between a State and a resident of another State) and that the Tribunal is not a "court".[2]

4. Two issues are in dispute. *First*, NSW and the State and Territory interveners contend that, in order for the *Burns* implication to apply, the proceedings before the Tribunal must involve a "matter". As to that issue, the Commonwealth submits that there is no such requirement. In the alternative, if there is such a requirement, it is satisfied in this case.

5. *Second*, while there is general agreement that the *Burns* implication will apply only if the proceeding before the Tribunal involves the exercise of judicial power, there is a dispute about whether proceedings[3] in which a claim is made for damages in reliance on s 55(2)(a) of the *Privacy and Personal Information Protection Act 1998* (NSW) (**PPIP Act**) (**PPIP Act Proceedings**) involve the exercise of judicial power. If special leave to cross-appeal is granted, the same question arises in respect of the proceedings commenced by the first respondent under the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) (**GIPA Act Proceedings**).[4]

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1 (2018) 265 CLR 304.

2 *Wojciechowska v Secretary, Department of Communities and Justice; Wojciechowska v Registrar, Civil and Administrative Tribunal* [2023] NSWCA 191 (Kirk JA, Mitchelmore JA and Griffiths AJA agreeing) at CAB 86 [45], referring to *Attorney-General (NSW) v Gatsby* (2018) 99 NSWLR 1.

3 Being Tribunal proceedings No. 2019/382033 and No. 2022/194626.

4 Being Tribunal proceedings No. 2021/333475, No. 2022/123205 and No. 2021/322248.

6. As to that second issue, the Commonwealth submits that the determination of the PPIP Act Proceedings would involve the exercise of judicial power *only* if an order for damages made pursuant to s 55(2)(a) of the PPIP Act would attract the statutory enforcement mechanism in s 78 of the *Civil and Administrative Tribunal Act 2013* (NSW) (**CAT Act**), such that upon registration of such an order with a State court it would operate as a judgment of that court for a debt. There is a dispute between the parties as to whether s 78 applies to such an order as a matter of construction (that being a question in which the Commonwealth has no interest). If s 78 *does* apply to an order for damages under s 55(2)(a) of the PPIP Act, then the Commonwealth submits that the Court of Appeal was correct to hold that the Tribunal had no jurisdiction to determine the PPIP Act Proceedings. If s 78 does *not* apply to such an order, then the Commonwealth submits that the Tribunal would not exercise judicial power in resolving those proceedings, with the consequence that the *Burns* implication had no effect on the jurisdiction of the Tribunal.

7. In relation to the GIPA Act Proceedings, the Commonwealth submits that the Court of Appeal was correct to conclude that the Tribunal was not exercising judicial power in determining those proceedings, and therefore that the *Burns* implication had no effect on the jurisdiction of the Tribunal to determine those proceedings.

B. The *Burns* implication does not depend on the existence of a "matter"

8. NSW, Victoria, Western Australia, Queensland and the Northern Territory contend that the *Burns* implication limits State legislative power *only* to the extent that a State purported to confer judicial power with respect to "matters": NSW [13], [46]; Vic [4], [13]; WA [40]; Qld [4]; NT [8], [61]. The *amici* do not join issue on that argument: Amici [13], [60].

9. No doubt the *Burns* implication has its core operation with respect to "matters", given that the positive provisions in Ch III concern the judicial power pertaining to controversies having the characteristics of a matter. It is well settled that such "matters" have two aspects: (i) the subject matter for determination in a legal proceeding, defined by reference to the heads of jurisdiction in ss 75 and 76 of the Constitution;[5] and (ii) the concrete or adequate adversarial nature of the dispute sufficient to give rise to a justiciable controversy.[6]

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[5] *Palmer v Ayres* (2017) 259 CLR 478 at [26] (Kiefel, Keane, Nettle and Gordon JJ).

[6] *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 674 at [31] (Kiefel CJ, Gordon and Steward JJ), [61] (Edelman J), [111]-[112] (Gleeson J).

10. Nevertheless, proper attention to the foundations of the *Burns* implication requires the conclusion that it is not confined to judicial power with respect to "matters".[7] That follows because, as Queensland's submissions acknowledge, the *Burns* implication is "an outworking of the principle established in *Boilermakers*": Qld [6]. It reflects the recognition in *Boilermakers* that Ch III is properly interpreted in such a way that "the statement of what may be done is taken to deny that it may be done otherwise".[8]

11. For that reason, while it is true that Ch III *positively* provides only for the conferral of the judicial power of the Commonwealth on certain specified courts, and only with respect to the nine categories of "matter" identified in ss 75 and 76 of the Constitution, that does not mark the limits of its negative implications. This is because *negative* implications from Ch III prevent the conferral of judicial power with respect to the subject matter of those nine categories in any other way,[9] *whether or not* that conferral of judicial power concerns a "matter". So much is powerfully demonstrated by *In* ***Re Judiciary*** *and Navigation Acts*,[10] which held that Ch III prevented the Commonwealth Parliament from conferring judicial power to give an advisory opinion (thereby clearly illustrating a negative implication from Ch III denying power to confer jurisdiction with respect to a "non-matter"). The operation of that negative implication with respect to laws passed by a State Parliament is "no different".[11] As a result, for the same reasons that the Commonwealth Parliament cannot confer judicial power with respect to any of the subject matters identified in ss 75 or 76 of the Constitution with respect to a non-matter, a State Parliament cannot do so.

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7 Nor is it confined to the judicial power *of the Commonwealth*: cf CAB 74-75 [5], 85 [42]. In *Burns* (2018) 265 CLR 304 at [47], Kiefel CJ, Bell and Keane JJ (with whom Gageler J substantially agreed at [69]) pointed out that Ch III "is not concerned solely with the conferral of the judicial power of the Commonwealth". The *Burns* implication would be meaningless if it concerned only the judicial power of the Commonwealth, because only the Commonwealth Parliament can confer the judicial power of the Commonwealth: see ***Unions*** *New South Wales v New South Wales* (2023) 97 ALJR 150 at [13] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

8 *Burns* (2018) 265 CLR 304 at [45] (Kiefel CJ, Bell and Keane JJ); also [3]. See also *R v Kirby; Ex parte* ***Boilermakers'*** *Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

9 Subject to the power of State Parliaments to confer State judicial power with respect to some of the subject matters within ss 75 and 76 – being those that "belong[ed] to" State courts within s 77(ii) of the Constitution. Critically, however, the negative implications from Ch III mean that State Parliaments can confer State judicial power of that kind *only* in a way that is subject to the control of the Commonwealth Parliament under s 77(ii): that is, by conferring that jurisdiction on State courts, and by doing so with respect to "matters": see *Burns* (2018) 265 CLR 304 at [23], [41], [43], [59] (Kiefel CJ, Bell and Keane JJ), [71], [76] (Gageler J).

10 (1921) 29 CLR 257.

11 Compare *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 at [30] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

12. The conclusion that Ch III implicitly denies to both the Commonwealth and State Parliaments power to confer judicial power with respect to the nine subject matters in ss 75 and 76 in respect of a "non-matter" (just as it implicitly prevents the conferral of judicial power with respect to those nine subject matters on a tribunal that is not a court) is necessary, inter alia, to ensure the availability of an appeal to this Court[12] in relation to exercises of judicial power with respect to those subject matters (the preservation of such appeals having been one important component of the majority's reasoning in *Burns*[13]). It is also necessary in order to ensure that the Commonwealth retains "federal control"[14] over the exercise of judicial power in respect of those subject matters, consistent with the exclusivity for which s 77(ii) of the Constitution provides. Were it otherwise, a State Parliament could (for example) validly empower a State tribunal to give advisory opinions in the exercise of judicial power with respect to matters arising under the Constitution.

13. In *Burns* itself, it was common ground that the State tribunal would have been exercising judicial power in respect of a "matter".[15] That being so, Kiefel CJ, Bell and Keane JJ did not directly address the relevance or otherwise to the *Burns* implication of the existence of a "matter". The many references in their Honours' reasoning to "matters" reflects the terms of the positive provisions in Ch III. For the reasons just addressed, those references cannot properly be read as stating the outer boundaries of the negative implication, particularly as those outer boundaries were not in issue and were not the subject of argument.

14. By contrast, Gageler J did address that issue. His Honour concluded 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'".[16] While it was the second limb that was in issue in *Burns*, the same logic (concerning the exhaustive character of Ch III) supports the first limb. That limb denies "the capacity of a State Parliament to

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[12] Subject only to such exceptions and regulation as the Commonwealth Parliament may prescribe under s 73.

[13] See *Burns* (2018) 265 CLR 304 at [49] (Kiefel CJ, Bell and Keane JJ), [98]-[99] (Gageler J).

[14] See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 802.

[15] *Burns* (2018) 265 CLR 304 at [38] (Kiefel CJ, Bell and Keane JJ). The Attorney-General for Victoria initially argued that the complaints underlying the Tribunal proceedings in issue (regarding unlawful discrimination) were not "matters", but that argument was abandoned at the hearing.

[16] *Burns* (2018) 265 CLR 304 at [106] (emphasis added). See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

confer judicial power with respect to a subject matter identified in s 75 or s 76 other than by conferring State jurisdiction with respect to a 'matter' identified in s 75 or s 76".[17] In other words, State Parliaments cannot escape the *Burns* implication by conferring judicial power with respect to a subject matter within s 75 or s 76, but by doing so in a way that does not involve a "matter", because Ch III implicitly prevents them from conferring State judicial power with respect to those subjects *unless* it does so with respect to a "matter" (thereby ensuring that such power is exercised within the framework provided by Ch III).

15. In *Burns*, Gageler J pointed out that the above conclusion is consistent with the reasoning of both Gibbs J and Jacobs J in the *Queen of Queensland Case*.[18] That case concerned the *Appeals and Special* ***Reference Act*** *1973* (Qld), which purported to confer on the Judicial Committee of the Privy Council jurisdiction to provide advisory opinions on "questions or matters which, whether as part of any cause or otherwise, and whether in the course of proceedings in any court in Queensland or otherwise, arise under or concern any law in force in Queensland … or which otherwise substantially relate to the peace, welfare and good government of Queensland".[19] In attempting to defend the validity of that Act, Queensland submitted that any advice given by the Judicial Committee pursuant to the process for which the Act provided would be "advice in the literal sense", "not a judgment", and that the Reference Act "does not contemplate and could not contemplate that any question which was a matter within Ch III could be referred for judicial decision".[20] In reliance on *Re Judiciary*, Queensland submitted that giving advisory opinions — while a judicial function — was not within the judicial power of the Commonwealth,[21] and that it followed from this that Ch III did not "either in terms or by implication prevent a State from obtaining advice on any question from any person or body it chooses or selects".[22]

16. That submission was rejected by all members of the Court. Justice Gibbs (with whom Barwick CJ, Stephen and Mason JJ agreed) held that it was "implicit in Ch III" that it was not permissible for a State legislature to create a procedure that circumvented the Commonwealth Parliament's power to "ensure that … questions arising in the exercise of

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17 *Burns* (2018) 265 CLR 304 at [105] (Gageler J).
18 *Commonwealth v Queensland* (1975) 134 CLR 298 (***Queen of Queensland Case***).
19 See Reference Act, s 3, extracted in *Queen of Queensland Case* (1975) 134 CLR 298 at 305 (Gibbs J).
20 *Queen of Queensland Case* (1975) 134 CLR 298 at 302 (argument, CD Sheahan QC).
21 *Queen of Queensland Case* (1975) 134 CLR 298 at 325 (Jacobs J).
22 *Queen of Queensland Case* (1975) 134 CLR 298 at 302-303 (argument, CD Sheahan QC).

federal jurisdiction [other than inter se questions] … be finally determined in this Court and not in the Judicial Committee".[23] Accordingly, the Reference Act was invalid. As Gageler J explained in *Burns*, the outcome in the case (which denied the validity of a State law purportedly conferring judicial power with respect to a "non-matter") "was produced by a negative implication that was necessary to give efficacy" to the powers conferred on the Commonwealth Parliament by Ch III.[24]

17. Justice Jacobs (with whom McTiernan J substantially agreed) explained that "the judicial power delineated in Ch III is exhaustive of the manner in and the extent to which judicial power may be conferred on or exercised by any court in respect of the subject matters set forth in ss 75 and 76".[25] Thus, "[i]n respect of the *subject matters* set out in ss 75 and 76 judicial power may only be exercised within the limits of the kind of judicial power envisaged in Ch III".[26] That being so, "the limits of the Commonwealth power to invest State courts with federal jurisdiction with respect to the matters mentioned in ss 75 and 76 mark out the limits of the judicial power or function which in any case State courts can exercise in respect of those matters".[27] There is no "residuary State power" for a State to "empower one of its courts to give advisory opinions on those subject matters", because "Ch III is an exhaustive enunciation".[28] For the same reason, the State could not empower the Judicial Committee to exercise judicial power[29] in respect of the subject matters set out in ss 75 and 76 because those subject matters "may only be considered and determined in the exercise of the kind of judicial power envisaged under Ch III of the Constitution".[30]

18. In *Burns*, Gageler J described the reasoning of Jacobs J as "wholly consistent with the constitutional implication" identified in that case.[31] Prior to *Burns*, Jacobs J's reasoning had also been referred to with approval by Spigelman CJ in *Attorney-General (NSW) v*

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[23] *Queen of Queensland Case* (1975) 134 CLR 298 at 314-315.
[24] *Burns* (2018) 265 CLR 304 at [103]; see also [52]-[53] (Kiefel CJ, Bell and Keane JJ).
[25] *Queen of Queensland Case* (1975) 134 CLR 298 at 327.
[26] *Queen of Queensland Case* (1975) 134 CLR 298 at 327 (emphasis added).
[27] *Queen of Queensland Case* (1975) 134 CLR 298 at 327.
[28] *Queen of Queensland Case* (1975) 134 CLR 298 at 327-328.
[29] Justice Gibbs considered that the advice provided by the Judicial Committee, being "an independent court of law", was "judicial advice": *Queen of Queensland Case* (1975) 134 CLR 298 at 309-310; see also 325-327 (Jacobs J). See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [8]-[10] (Gleeson CJ).
[30] *Queen of Queensland Case* (1975) 134 CLR 298 at 328.
[31] (2018) 265 CLR 304 at [105].

2UE Sydney Pty Ltd[32] and by Kenny J in *Commonwealth v Anti-Discrimination Tribunal (Tas)* (***Commonwealth v ADT***).[33]

19. In light of the submissions above, no significance should be attached to the fact that, in the first paragraph of the plurality judgment in ***Citta*** *Hobart Pty Ltd v Cawthorn*, the plurality summarised *Burns* as having held that a State Parliament lacks legislative capacity to confer judicial power on a State tribunal "with respect to any matter of a description in s 75 or s 76 of the *Constitution*".[34] That statement was made in a case where the present point was not argued, in summarising the holding in another case where the point was not argued.

20. The argument of NSW and the supporting interveners in this case is remarkably similar to that advanced in the *Queen of Queensland Case*. This Court's unanimous conclusion that the Reference Act was invalid — despite the fact that the judicial power it purported to confer involved the provision of an advisory opinion (and thus did not concern a "matter") — is irreconcilable with the argument that the negative implications from Ch III apply only to judicial power with respect to "matters".

21. The *Burns* implication not being limited in that way, the correct analysis is that the determinative question is whether the Tribunal would have exercised *judicial power* in deciding an application under the PPIP Act seeking damages pursuant to s 55(2)(a). If so, then it was denied jurisdiction by the *Burns* implication, whether or not that proceeding involved a "matter". However, before turning to that issue, it is necessary to address (in the alternative) the claim that the PPIP Act Proceedings did not involve a "matter".

C. Alternatively, the PPIP Act Proceedings involved a "matter"

22. A matter exists only if there is some immediate right, duty or liability to be established by the determination of the court, which can result in the court granting relief which both quells the controversy and is available at the suit of the party seeking relief.[35]

23. In this case, the PPIP Act Proceedings involved a "matter" because they involved a controversy between the first respondent and the NSW Commissioner of Police about whether NSW's Police Force had contravened various information protection principles under the PPIP Act, and whether the Tribunal should make an award of damages to

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[32] (2006) 226 FLR 62 at [56].
[33] (2008) 169 FCR 85 at [221]-[222].
[34] (2022) 276 CLR 216 at [1] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).
[35] See, eg, *Unions* (2023) 97 ALJR 150 at [15] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

compensate the first respondent for loss suffered as a result of the alleged contraventions. That is a controversy of a kind that is plainly capable of coming before a court. Indeed, had NSW not appealed the decision of the Court of Appeal, the PPIP Act Proceedings would likely have been determined by an authorised court pursuant to Pt 3A of the CAT Act: CAB 119 [146].[36]

24. NSW advances three (interrelated) contentions in support of its submission that the Tribunal would not adjudicate a "matter" in the resolution of the PPIP Act Proceedings.

25. *First*, it contends that the information protection principles do not give rise to any legal rights, and do not involve "quintessentially legal standards, but … articulate bureaucratic norms of good public administration": NSW [54]. *Second*, it contends, primarily by relying on the statement of principle in *Citta* at [31], that there is no "matter" because the rights created by the PPIP Act did not exist independently of the statutory mechanisms for giving effect to them: NSW [48]-[49], [55].[37] *Third*, it contends that the relevant function is a merits review function without judicial remedies sustaining a "matter": NSW [56]-[65]. None of these submissions should be accepted.

(i) Legal duty to comply with information protection principles

26. Contrary to NSW's submissions, many (perhaps all) of the information protection principles state legal norms or impose "legal standards" (cf NSW [17]). They include requirements that public sector agencies "must" not collect personal information except for a lawful purpose directly related to a function or activity of the agency (s 8); that such information must be kept for no longer than is necessary for that purpose (s 12); and that the agency must not use (s 17) or disclose (s 18) personal information other than for the purpose for which it was collected (subject to limited exceptions).

27. It is true that some of the standards created by the PPIP Act are "rather amorphous [and] evaluative" (CAB 111 [123]). But there is no substance in the proposition that they are no more than "'aspiration[s] or exhortation[s]', incapable of enforcement by a court" (cf Qld [12]). The submission that there cannot be a justiciable controversy about whether an agency has contravened the information protection principles amounts to saying that a court

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[36] In fact, the first respondent sought leave to have PPIP Act proceeding 2019/382033 heard by the District Court under s 34B of the CAT Act: CAB 79 [20].

[37] Seeking to draw an analogy with *Attorney-General (NSW) v FJG* (2023) 111 NSWLR 105 at [93] (Beech-Jones JA, Bell CJ and Ward P agreeing).

exercising federal jurisdiction (including the High Court under its entrenched s 75(iv) jurisdiction) could not validly be empowered to determine whether a public sector agency had contravened such a principle.[38] That clearly is not the case. Statutes commonly impose obligations of that kind, and courts commonly decide cases concerning whether public sector agencies have complied with similar obligations.[39] Criteria in the PPIP Act that direct attention to what is "reasonably necessary", what are "reasonable" steps, what "is not excessive, and is accurate" (ie appropriate), what are "reasonable" safeguards and what is "reasonably practicable" in given circumstances are all sufficiently precise to allow for judicial application.[40] Even to the extent that policy may be relevant to a question concerning contravention of the principles (which is contestable: Amici [44]-[46]), that would not preclude the exercise of judicial power with respect to them (as NT [42] correctly acknowledges).[41] The evaluation of conduct against broadly expressed standards is common in the exercise of judicial power:[42] Amici [40]; cf WA [34]; Vic [18].

28. Any doubt as to whether public sector agencies are under a legal obligation to comply with the information protection principles is dispelled by s 21(1) of the PPIP Act (headed "Agencies to comply with principles"), which states that "[a] public sector agency must not do any thing, or engage in any practice, that contravenes an information protection principle". That language is unambiguous in mandating compliance with the principles.

29. The legal obligation that s 21(1) creates is not negated by s 69(1) of the PPIP Act, which provides that nothing in Pt 2 or 3 gives rise to, or can be taken into account in, any civil cause of action. Had s 69(1) stood alone, it might well have been correct to say that the PPIP Act does not "create legal duties or correlative legal rights": NSW [19]; Qld [12]. But it does not stand alone. By s 69(2), it is expressly made subject to s 21, including s 21(2), which provides that "[t]he contravention by a public sector agency of any

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38 Compare *R v* ***Quinn****; Ex parte Consolidated Food Corp* (1977) 138 CLR 1 at 10 (Jacobs J); see also 6 (Barwick CJ and Gibbs J agreeing), 7 (Stephen J and Mason J agreeing).

39 See, eg, *Johns v Australian Securities Commission* (1993) 178 CLR 408 (concerning s 127 of the *Australian Securities Commission Act 1989* (Cth)); *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177 (concerning s 3ZQU of the *Crimes Act 1914* (Cth)). See also *Competition and Consumer Act 2010* (Cth), s 44AAF; *Privacy Act 1988* (Cth), s 55A(5) (albeit not applying to an "agency" as defined in that Act) and ss 57-62 (with respect to the enforcement of determinations that apply to Commonwealth agencies).

40 PPIP Act, ss 8(1)(b), 10, 11(a), 12(c), 15(3).

41 *Attorney-General (Cth) v* ***Alinta*** *Ltd* (2008) 233 CLR 542 at [169] (Crennan and Kiefel JJ); ***Thomas*** (2007) 233 CLR 307 at [88] (Gummow and Crennan JJ).

42 *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [84]-[86] (Bell, Keane, Nettle and Edelman JJ, Kiefel CJ agreeing at [20]); *Thomas* (2007) 233 CLR 307 at [20]-[28] (Gleeson CJ), [72]-[79], [88] (Gummow and Crennan JJ), [596] (Callinan J).

information protection principle that applies to the agency is conduct to which Part 5 applies". The effect is "to confirm that such rights to relief as are created by the Act are to be pursued by the means provided in the Act": CAB 112 [126].

(ii) Rights and duties created by statute may give rise to a "matter"

30. That directs attention to NSW's second argument, regarding the significance of disputes concerning contravention of the information protection principles being required to be litigated pursuant to Pt 5 of the PPIP Act.

31. The premise of the argument advanced by NSW and the interveners is that there is no legal right, duty or liability giving rise to a "matter", because any such legal right, duty or liability must have an existence which is not dependent on the commencement of a proceeding in the forum in which the controversy might come to be adjudicated: NSW [47]-[48], [54]; Vic [14]-[15], [24]; WA [20]-[23]; NT [63]-[65]; cf Amici [29].

32. This submission is said to be supported by *Citta* at [31], where the plurality said that "[a] 'matter' referred to in s 75 or s 76 of the Constitution encompasses a justiciable controversy about a legal right or legal duty having an existence which is not dependent on the commencement of a proceeding in the forum in which that controversy might come to be adjudicated". In support, the plurality cited two passages from ***Fencott*** *v Muller*.[43] In the first, at 603, Mason, Murphy, Brennan and Deane JJ cited the famous passage from *Re Judiciary*[44] in which five Justices rejected the argument "that 'matter' meant no more than legal proceeding" and held that "matter" means the subject matter for determination in a legal proceeding. In the second, at 608, Mason, Murphy, Brennan and Deane JJ stated that:

> … [w]hat is and what is not part of the one controversy depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships. The scope of a controversy which constitutes a matter is not ascertained merely by reference to the proceedings which a party may institute.

33. When read with the two passages cited to support it, it is evident that the plurality in *Citta* at [31] was not purporting to state any new principle or requirement with "particular salience in relation to statutory rights": cf NSW [48]. Rather, it was doing no more than repeating a settled proposition of "matter" jurisprudence, being that a "matter" exists independently of the proceedings brought to determine it (and may therefore predate the

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[43] (1983) 152 CLR 570.
[44] (1921) 29 CLR 257 at 265.

commencement of any such proceedings). The citations to *Fencott* support no other proposition: Amici [62]-[63]. The point was the same as that made by Gageler J in *Burns* when his Honour observed that a matter "encompasses a concrete controversy about legal rights existing independently of the forum in which that controversy might come to be adjudicated", also citing *Fencott* at 603 and *Re Judiciary* at 265.[45]

34. The conclusion that *Citta* at [31] does not suggest that statutory rights will not give rise to a "matter" if they can be enforced only by the commencement of a proceeding in a forum specified in the statute itself is confirmed by the holding in *Citta*. Specifically, at [33], the plurality held that the rights in issue in that case — which concerned a complaint of discrimination made under the *Anti-Discrimination Act 1998* (Tas) (**Tas AD Act**) that had been referred to the Tasmanian Anti-Discrimination Tribunal (**Tas Tribunal**) for an inquiry to be determined under that Act — gave rise to a "matter".[46] That was so notwithstanding the fact that — just as is the case under the PPIP Act — those rights could be litigated only by commencing proceedings in the Tas Tribunal (under Pt 6).

(iii) Relevant function has all of the features typically required of a "matter"

35. Part 5 of the PPIP Act provides for the "review" of conduct of various kinds, including a *contravention* by a public sector agency of an information protection principle.[47] While it provides initially for internal review (s 53), if a person is not satisfied with the findings of an internal review or action taken by the public sector agency then s 55(1) provides that the person may apply to the Tribunal for an "administrative review" under the *Administrative Decisions Review Act 1997* (NSW) (**ADR Act**).

36. NSW seeks to characterise Pt 5 simply as a "merits review mechanism" (NSW [55]; cf Amici [20]-[23]), but that is a materially incomplete statement: cf NSW [41], [55]; Vic [21], [29]; NT [29]. It is true that Pt 5 of the PPIP Act picks up s 63(1) of the ADR Act, which provides that, in determining an application for review, the Tribunal is to decide what the "correct and preferable decision is having regard to the matters before it".[48] That is language typically employed to describe a merits review function (involving the exercise

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[45] (2018) 265 CLR 304 at [70]. See also *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at [27], [30] (French CJ, Kiefel, Bell and Keane JJ).

[46] *Citta* (2022) 276 CLR 216 at [33] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also [85] (Edelman J).

[47] PPIP Act, s 52(1)(a). It also applies to contravention of a privacy code, and to the disclosure by a public sector agency of personal information in a public register: s 52(1)(b) and (c).

[48] Section 55(3) of the PPIP Act provides that nothing in s 55 limits any other powers that the Tribunal has under Div 3 of Pt 3 of Ch 3 of the ADR Act (which includes s 63(1)).

of executive, rather than judicial, power). However, even in respect of that function, in the context of a proceeding under Pt 5, the Tribunal will rarely be called upon to substitute a new "decision" for a decision made by a public sector agency. Instead, the issue will be whether past "conduct" of the agency (s 52) was consistent with the information protection principles and, if not, what the agency should be required to do to comply with those principles and what other remedies are appropriate. In that context, there is little room for the ordinary operation of s 66(2) of the ADR Act, which provides that the Tribunal's decision is taken to be the initial decision, and to have effect on and from the date of that initial decision (such that the Tribunal "stands in the shoes" of the public sector agency).

10 37. More importantly, even if some aspects of a review under Pt 5 of the PPIP Act are properly described simply as "merits review", that is not the entirety of its function. Section 30(2) of the CAT Act provides that, in proceedings in its administrative review jurisdiction (as to which see s 9 of the ADR Act), the Tribunal may exercise "such other functions as are conferred or imposed on the Tribunal" by or under the CAT Act, the ADR Act or "enabling legislation" (defined in s 4 of the CAT Act in terms that relevantly include s 55 of the PPIP Act). There is therefore no difficulty with the conclusion that s 55(2) of the PPIP Act confers functions *in addition* to the merits review function under s 63(1) of the ADR Act. That s 55(2) involves such additional functions is confirmed by the fact that the merits review function is addressed separately in s 55(3): see CAB 110 [120].

20 38. The additional functions of the Tribunal under s 55(2) of the PPIP Act include making orders requiring a public sector agency to refrain from any conduct or action in contravention of an information protection principle or requiring the performance of an information protection principle (s 55(2)(b) and (c)) (functions analogous to the grant of a prohibitory or mandatory injunction: see CAB 112 [128]). Of central present relevance, they also include, by reason of s 55(2)(a), "an order requiring the public sector agency to pay to the applicant damages not exceeding $40,000 by way of compensation for any loss or damage suffered because of the conduct".[49] The loss that may be compensated is financial loss or psychological or physical harm: s 55(4)(b).

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[49] Whether that power is discretionary is a question of statutory construction about which the Commonwealth makes no submission: see notice of contention, ground 5(xxiii) CAB 154; cf Vic [32]-[33]; WA [38]; NT [39]. Even assuming that it is discretionary, that would not deny that it is a remedy that may be issued in consequence of the breach of a legal duty (many remedies for breaches of such duties being discretionary).

39. The power conferred by s 55(2)(a) is closely analogous to the power to award damages for breach of a duty created by the common law:[50] CAB 113 [129]. Its exercise requires the Tribunal, upon a conclusion that there has been a breach of a legal duty (relevantly, the duty imposed by s 21(1) of the PPIP Act not to contravene an information protection principle),[51] to determine what amount in money (not exceeding $40,000) would put the person whose right has been invaded in the same position as if it had been respected so far as the award of a sum of money can do so.[52]

40. In exercising the power to order damages under s 55(2)(a) of the PPIP Act, the Tribunal is making an order that is directed *to* a public sector agency, rather than an order that is taken (by reason of s 66(2) of the ADR Act) to have been made *by* that agency: CAB 110 [120], 115 [136]. Further, such an order is coercive:[53] it may "require" an agency to pay compensation against its will. For that reason, it is not analogous to the power of public sector agencies to decide for themselves that it is appropriate to pay compensation under s 53(7)(c): cf NSW [58]-[59]; Vic [22]; Qld [14]; NT [36]-[39]. Nor is it analogous to other payments of money that an agency may voluntarily decide to make (eg act of grace payments, payments made under victims of crime legislation and voluntary payments to compensate): Amici [32]; cf NSW [58]; Vic [33]; WA [36].

41. Where damages are sought under s 55(2)(a),[54] the Tribunal is required to determine, in response to a complaint by a person aggrieved alleging that a public sector agency has contravened an information protection principle,[55] whether to make orders that include an order that the agency pay compensation for breach of that principle. That involves the determination of a controversy that has all of the features typically required of a "matter", as summarised in paragraph 22 above.

42. Accordingly, even if the Court considers that the *Burns* implication requires the existence of a "matter", that requirement is satisfied. However, that issue would only be reached if

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[50] ***Brandy*** *v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245 at 269 (Deane, Dawson, Gaudron and McHugh JJ).

[51] CAB 109 [116] and 115 [133], holding that s 55(2)(a) damages are available only if a contravention is proved.

[52] *Butler v Egg & Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191 (Taylor and Owen JJ); *Johnson v Perez* (1988) 166 CLR 351 at 355 (Mason CJ), 367 (Wilson, Toohey and Gaudron JJ), 386 (Dawson J).

[53] Such powers, where they have compulsive force, being typically judicial in nature as discussed below: *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [28]-[29] (French CJ and Gageler J); *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 452 (Barton J).

[54] Here, damages were the only relief claimed by the first respondent: CAB 79 [22], 81 [29], 83 [34].

[55] Here, the first respondent alleged contraventions by NSW Police of the information protection principles in ss 8-14 and 16-18 of the PPIP Act: see CAB 78 [17], 81 [29], 83 [34].

the Court (i) concludes that the Tribunal would have exercised judicial power in deciding the PPIP Act Proceedings (ie the topic addressed immediately below); and (ii) rejects the Commonwealth's primary argument that the *Burns* implication applies whether or not the exercise of judicial power pertains to a "matter" (ie the topic addressed above).

D. Does a claim under s 55(2)(a) of the PPIP Act involve an exercise of judicial power?

43. For the reasons addressed above, the correct analysis is that the determinative issue as to whether the *Burns* implication applies in the PPIP Act Proceedings is whether the Tribunal would exercise *judicial power* in deciding that proceeding, being a proceeding in which the first respondent sought damages pursuant to s 55(2)(a) of the PPIP Act.[56]

44. Queensland submits that the relevant question in determining the application of the *Burns* implication is not whether the power in issue is judicial, but whether it is "*exclusively* judicial": Qld [9]. That submission should not be accepted. That is not to deny that there are many powers — sometimes described as "borderland" powers[57] — that take their character from the repository upon which Parliament has conferred the power.[58] For that reason, if a State Parliament confers power upon a tribunal, that may be an important indicator as to the character of the power that has been conferred. But it is only an indicator. A State Parliament may choose to confer judicial power on a tribunal to resolve disputes of a particular kind, by making its intent to confer judicial power sufficiently clear that it is not displaced by the chameleon doctrine.[59] Judicial power of that kind is subject to the *Burns* implication in precisely the same way as exclusively judicial power. What matters in applying the *Burns* implication is the character of the power that is *actually conferred*; not whether Parliament had a choice as to the character of the power that it conferred.

45. In characterising the power that the Tribunal would exercise in deciding an application seeking damages under s 55(2)(a) of the PPIP Act, the starting point is that such an application requires the Tribunal to determine, on the application of an aggrieved party

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[56] It is unnecessary for the Court to decide whether, absent a claim for damages, the mere fact that the Tribunal is empowered to order damages in proceedings under Pt 5 is itself sufficient to mean that the Tribunal would be exercising judicial power.

[57] *Palmer v Ayres* (2017) 259 CLR 478 at [47] (Gageler J); *R v Trade Practices Tribunal; Ex parte* ***Tasmanian Breweries*** *Pty Ltd* (1970) 123 CLR 361 at 373 (Kitto J). See also the authorities in NSW [52]; SA [9] fn 13.

[58] Many cases that support that proposition are cited in SA [11] fn 16.

[59] See, eg, ***Meringnage*** *v Interstate Enterprises Pty Ltd* (2020) 60 VR 361 at [135] (the Court). See also Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 2022, 7th ed) at 281-283 concerning the characterisation of power in the Commonwealth context.

(ss 53(1), 55(1)), whether on the facts a public sector agency has breached its obligation under s 21(1) of the PPIP Act not to contravene the information protection principles, and then to make such remedial orders as it considers appropriate (if any) in the event that it finds that a contravention has occurred. That is a function that shares many of the characteristics of judicial power.[60] As Mason CJ, Brennan and Toohey JJ said in *Brandy*, "when A alleges that he or she has suffered loss or damage as a result of B's unlawful conduct and [there is a determination] that B is to pay a sum of money to A by way of compensation, there is an exercise of judicial power".[61]

46. On the other hand, as the Court of Appeal recognised, many features of the PPIP Act point against the conclusion that the Tribunal on review under Pt 5 exercises judicial power (see CAB 115 [134]). Ultimately, the Court of Appeal held that it was not necessary to determine whether the particular characteristics of the power to order damages under s 55(2)(a) were themselves sufficient to require the conclusion that making such an order involved the exercise of judicial power: CAB 115 [134]. It so held because of its conclusion concerning the effect of s 78 of the CAT Act. Importantly, however, while the Court of Appeal did treat the applicability of s 78 as the determinative consideration (CAB 118 [143]), it did not hold that the nature of the function exercised under s 55(2)(a) was *irrelevant* to the characterisation of that power. It merely held that it was unnecessary to reach a concluded view of the character of an order under s 55(2)(a) alone, in circumstances where the nature of the function in *combination* with s 78 of the CAT Act produced a clear answer to the proper characterisation of the power.

47. In light of its conclusion as to the effect of s 78,[62] the Court of Appeal was correct to confine its decision to that basis and to refrain from deciding a constitutional issue where it was not necessary to do so.[63] While the Commonwealth makes no submissions concerning *whether* s 78 of the CAT Act applies to orders for damages made under s 55(2)(a), it does submit that it is only if s 78 does *not* apply to an order under s 55(2)(a) that it is necessary or

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60 See, eg, *Brandy* (1995) 183 CLR 245 at 258-259 (Mason CJ, Brennan and Toohey JJ), 269 (Deane, Dawson, Gaudron and McHugh JJ); *Commonwealth v ADT* (2008) 169 FCR 85 at [205] (Kenny J); *Meringnage* (2020) 60 VR 361 at [102] (the Court).

61 *Brandy* (1995) 183 CLR 245 at 258-259.

62 CAB 116 [138]-[139].

63 See, eg, *Vunilagi v The Queen* (2023) 97 ALJR 627 at [55] (Kiefel CJ, Gleeson and Jagot JJ); *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ, on behalf of the Court).

appropriate to determine the character of the power conferred by s 55(2)(a) independently of s 78.

(i) The position if s 78 of the CAT Act applies

48. Section 78(1) of the CAT Act provides that, 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". Such a certificate must identify the person liable to pay the certified amount (s 78(2)). Once filed in the registry of a court having jurisdiction to give judgment for a debt of the same amount, the certificate "operates as such a judgment" (s 78(3)).

10 49. In circumstances where the PPIP Act Proceedings would involve the Tribunal determining a claim by an aggrieved person for damages as a result of a public sector agency having contravened one or more information protection principles, the Court of Appeal held that the effect of s 78 of the CAT Act was that the scheme became "materially indistinguishable" from that which the High Court held in *Brandy* involved the purported exercise of judicial power: CAB 117 [140]; Amici [57]. That conclusion was correct.

50. In *Brandy*, federal legislation provided for a federal commission, the Human Rights and Equal Opportunity **Commission**, to determine whether there was a breach of anti-discrimination norms, and (among other things) to award the payment of "damages by way of compensation for any loss or damage suffered by reason of the conduct of the
20 respondent".[64] The registration of such a determination in the Federal Court was compulsory, and the automatic effect of such registration (subject to the possibility of review in the Federal Court) was to make the determination binding upon the parties and enforceable as an order of the Federal Court.[65] This Court unanimously held that the registration provisions, "which combine[d] to make a determination of the Commission binding, authoritative and enforceable, invalidly purport[ed] to invest judicial power in the Commission".[66] As Mason CJ, Brennan and Toohey JJ put it, the Commission was exercising judicial power because its determination was made by reference to the "application of the pre-existing principles and standards" *and* because the determination was binding and authoritative in the sense that there was "an immediately enforceable

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64 (1995) 183 CLR 245 at 253 (Mason CJ, Brennan and Toohey JJ).
65 *Brandy* (1995) 183 CLR 245 at 270 (Deane, Dawson, Gaudron and McHugh JJ).
66 *Brandy* (1995) 183 CLR 245 at 271 (Deane, Dawson, Gaudron and McHugh JJ).

liability of B to pay A the sum in question".[67] The significance of this combination has since been recognised in numerous authorities applying *Brandy*.[68]

51. *Brandy* cannot be distinguished on the basis that there is a strict separation of powers at the federal, but not State level, because that distinction is not material to the determinative reasoning in *Brandy*: cf NSW [73]-[77]; Vic [41]-[42]; WA [41]-[45]. That reasoning concerned the fact that a decision of the Commission could involve the exercise of judicial power only if it was binding and enforceable (that being a necessary characteristic of all judicial power, whether Commonwealth or State[69]). The Commission's order had that characteristic because it could be registered and would then take effect as a court order. The absence of a strict separation of powers at the State level is irrelevant to that reasoning.

52. Applying that reasoning, if an order of damages under s 55(2)(a) of the PPIP Act is binding and enforceable because it can be registered as an order of a court, then the Court of Appeal was correct to find that an application for such an order involves the purported invocation of judicial power, such that the *Burns* implication denies the Tribunal jurisdiction if the subject matter relates to any of the nine categories in ss 75 and 76 of the Constitution.

(ii) The position if s 78 of the CAT Act does not apply

53. The Court need decide whether an order for damages under s 55(2)(a) of the PPIP Act would *itself* involve an exercise of judicial power only if an order pursuant to that section cannot be registered under s 78 of the CAT Act. If that issue is reached, the better view is that the Tribunal would *not* exercise judicial power because, while the function performed by the Tribunal when such an order is sought has various features that point to the exercise of judicial power,[70] such an order would not be "binding" in the relevant sense (cf Amici [49]) and would require an independent exercise of judicial power to be enforced.[71]

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67 *Brandy* (1995) 183 CLR 245 at 259.

68 See, eg, *Commonwealth v ADT* (2008) 169 FCR 85 at [207] (Kenny J); *Qantas v Lustig* (2015) 228 FCR 148 at [65] (Perry J); *Meringnage* (2020) 60 VR 361 at [102]-[104], [108] (the Court); *Burns v Corbett* (2017) 96 NSWLR 247 at [30]-[31] (Leeming JA, Bathurst CJ and Beazley P agreeing.

69 See, eg, *Tasmanian Breweries* (1970) 123 CLR 361 at 374 (Kitto J); *Brandy* (1995) 183 CLR 245 at 258-259 (Mason CJ, Brennan and Toohey JJ), 267-269, 271 (Deane, Dawson, Gaudron and McHugh JJ).

70 *Brandy* (1995) 183 CLR 245 at 269 (Deane, Dawson, Gaudron and McHugh JJ).

71 See, eg, *Attorney-General (Cth) v* ***Breckler*** (1999) 197 CLR 83 at [45] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), referring to *Brandy* (1995) 183 CLR 245 at 261 (Mason CJ, Brennan and Toohey JJ); *Brandy* (1995) 183 CLR 245 at 257 (Mason CJ, Brennan and Toohey JJ), 268-269 (Deane, Dawson, Gaudron and McHugh JJ).

54. In *Brandy*, s 25Z(2) of the *Racial Discrimination Act 1975* (Cth) expressly provided that the orders of the Commission were *not* binding. Notwithstanding the nature of its function in deciding whether legal norms had been breached, the fact that its orders were not binding in itself made it "plain that the Commission does not exercise judicial power",[72] unless that position was altered by the registration provisions.[73] In this case, however, the PPIP Act contains no equivalent to s 25Z(2). It therefore leaves open the question whether an order of the Tribunal under s 55(2)(a) would be "binding" in the sense necessary to constitute judicial power, even if it cannot be registered pursuant to s 78 of the CAT Act.

55. *Citta* does not answer that question: cf CAB 117 [142]; Amici [12], [49]. As noted above, that case concerned the Tas AD Act, which provided for orders of the Tas Tribunal to be enforceable upon registration in the Supreme Court. The Australian Human Rights Commission (**AHRC**) submitted that, *before registration*, the Tribunal's order and the inquiry leading up to the making of that order were entirely administrative (such that any infringement of the *Burns* implication could be avoided by construing the registration provisions as being incapable of operating to the extent that registration would result in an exercise of judicial power contrary to that principle).[74] Chief Justice Kiefel, Gageler, Keane, Gordon, Steward and Gleeson JJ rejected that submission because an order made by the Tribunal under s 89(1) of the Tas AD Act "takes immediate effect as an order with which the person to whom it is directed is bound to comply".[75] Importantly, however, that conclusion was based squarely on the "proper construction" of the Tas AD Act. Their Honours placed particular reliance on s 90(1)(c) of the Tas AD Act, which indicated that registration of an order with the Supreme Court was a step available if the order "has not been complied with".[76] Those words conveyed Parliament's objective intention that orders made under s 89(1) of the Tas AD Act *should* be complied with, whether or not they were subsequently registered so as to become enforceable under s 90. Sections 89 and 90 therefore together conveyed that an order of the Tribunal was "binding" from the time it was made, irrespective of whether s 90 was later relied upon.

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[72] *Brandy* (1995) 183 CLR 245 at 269 (Deane, Dawson, Gaudron and McHugh JJ).

[73] *Citta* (2022) 276 CLR 216 at [14] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Breckler* (1999) 197 CLR 83 at [42] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Brandy* (1995) 183 CLR 245 at 269-270 (Deane, Dawson, Gaudron and McHugh JJ); also 264 (Mason CJ, Brennan and Toohey JJ).

[74] *Citta* (2022) 276 CLR 216 at [13] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[75] *Citta* (2022) 276 CLR 216 at [16]. See also [57] (Edelman J).

[76] *Citta* (2022) 276 CLR 216 at [16] fn 47 (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also [57] (Edelman J).

56. There is no equivalent language that attaches to the exercise of power under s 55 of the PPIP Act. In the absence of such language, *Citta* does not establish that the fact that the function of a tribunal was to determine whether a legislative norm has been contravened, and to make various court-like orders if it is found that such a contravention has occurred, is *itself* sufficient to require the conclusion that the tribunal exercised judicial power.

57. Further, as a matter of principle the function just described should not be held to be inherently judicial. As this Court has often recognised, "many positive features which are essential to the exercise of [judicial] power are not by themselves conclusive of it. Thus, although the finding of facts and … even the formation of an opinion as to the legal rights and obligations of parties … are common ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power".[77] The Court of Appeal gave examples to illustrate that point, noting that many statutory schemes provide for administrative bodies to make determinations of compensation, including for contravention of a legal norm (such as compensation for unfair dismissal if the dismissal was "harsh, unjust or unreasonable"): CAB 114 [131].

58. The above examples demonstrate that the functions of finding facts, determining whether those facts contravene a legal standard, and awarding an appropriate remedy are functions that "may, chameleon like, take their colour from their legislative surroundings or their recipient".[78] Unless they produce an order that is binding and enforceable, these functions do not "clearly and distinctively appertain to" the judicial branch of government.[79] In those circumstances, Parliament's choice (reflected in s 69(1) of the PPIP Act) that the information protection principles can be enforced only in the Tribunal's Administrative and Equal Opportunity Division (the members of which need not be legally qualified[80]) is itself a weighty factor in characterising the power conferred by s 55(2)(a) as administrative.[81] That is particularly so in circumstances where the Tribunal cannot

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77 ***Precision Data*** *Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189 (the Court), cited in *Brandy* (1995) 183 CLR 245 at 267 (Deane, Dawson, Gaudron and McHugh JJ). See also *Brandy* (1995) 183 CLR 245 at 257-258 (Mason CJ, Brennan and Toohey JJ), citing *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666.

78 *Quinn* (1977) 138 CLR 1 at 18 (Aickin J). See also *Precision Data* (1991) 173 CLR 167 at 189 (the Court); CAB 99-100 [89].

79 *Federal Commissioner of Taxation v* ***Munro*** (1926) 38 CLR 153 at 178-179 (Isaacs J), cited in *Quinn* (1977) 138 CLR 1 at 8 (Jacobs J), 6 (Barwick CJ and Gibbs J agreeing), 7 (Stephen J and Mason J agreeing).

80 CAT Act, ss 13, 27(1)(d).

81 *Munro* (1926) 38 CLR 153 at 175-177 (Isaacs J); *Pasini v United Mexican States* (2002) 209 CLR 246 at [12] (Gleeson CJ, Gaudron, McHugh and Gummow JJ), [53]-[60] (Kirby J); *White v Director of Military*

enforce its own orders (which, while not determinative, is a factor that weighs against the characterisation of its powers as judicial).[82] That conclusion is further reinforced by the "many features [of the PPIP Act] pointing to a non-judicial characterisation of the powers", including that it is a scheme for governmental administration, involving evaluative criteria, establishing norms not characteristically or historically enforced in courts, and given effect only in the manner and to the extent specified in the statutory scheme: CAB 115 [134].

59. The above factors together have the consequence that the Tribunal's function in determining an application for orders under s 55(2)(a) of the PPIP Act is not properly characterised as involving the exercise of judicial power, primarily because such orders cannot produce a binding and enforceable resolution of a controversy *unless* they can be rendered binding and enforceable by registration under s 78 of the CAT Act.

E. GIPA Act Proceedings do not involve an exercise of judicial power

60. The first respondent sought administrative review under s 100 of the GIPA Act of decisions made on behalf of the Secretary and the Commissioner: CAB 83 [34], 94 [71]. For the reasons that it gave, the Court of Appeal was correct to conclude that none of the impugned functions of the Tribunal in reviewing decisions under the GIPA Act involve an exercise of judicial power: CAB 105 [105]. That being so, the *Burns* implication did not deprive the Tribunal of jurisdiction to determine the GIPA Act Proceedings.

PART V — ESTIMATE OF TIME

61. The Commonwealth's oral argument will take up to one hour.

Dated

6 September 2024

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Prosecutions (2007) 231 CLR 570 at [48] (Gummow, Hayne and Crennan JJ); *Thomas* (2007) 233 CLR 307 at [11]-[12] (Gleeson CJ); *Alinta* (2008) 233 CLR 542 at [5]-[6] (Gleeson CJ).

[82] *Brandy* (1995) 183 CLR 245 at 256-257 (Mason CJ, Brennan and Toohey JJ), 268-269 (Deane, Dawson, Gaudron and McHugh JJ).

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

10 **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

ANNEXURE

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Commonwealth sets out below a list of the particular constitutional provisions and statues referred to in its submissions.

Commonwealth		Provision(s)	Version
1.	Commonwealth Constitution	ss 73, 74, 75, 76	Current
2.	*Australian Securities Commission Act 1989* (Cth)	s 127	Historical (Reprint as at 30 April 1993)[83]
3.	*Competition and Consumer Act 2010* (Cth)	s 44AAF	Current
4.	*Crimes Act 1914* (Cth)	s 3ZQU	Historical (Compilation No. 127, 29 December 2018 to 20 September 2019)
5.	*Privacy Act 1988* (Cth)	s 55A(5), 57-62	Current

[83] There is no reprint of the *Australian Securities Commission Act 1989* (Cth) as at the time of the hearing of *Johns v Australian Securities Commission* (1993) 178 CLR 408 that includes the amendments made by the *Corporations Legislation Amendment Act 1990* (Cth) and the *Corporations Legislation Amendment Act 1991* (Cth). The reprint as at 30 April 1993 reflects the form that s 127 was in as at the time of the hearing.

6.	*Racial Discrimination Act 1975* (Cth)	s 25Z(2)	Historical (Reprint No.5 as at 31 January 1993)[84]
State			
7.	*Administrative Decisions Review Act 1997* (NSW)	ss 9, 63(1)	Current (1 January 2014 to date)
8.	*Anti-Discrimination Act 1998* (Tas)	ss 78(1), 81, 85, 86, 87, 89, 90	Historical (8 May 2019 to 4 November 2021)
9.	*Appeals and Special Reference Act 1973* (Qld)	s 3	As passed
10.	*Civil and Administrative Tribunal Act 2013* (NSW)	ss 27, 30, 33, 38, 73, 75, 78	Historical (1 July 2022 to 13 July 2023)
11.	*Government Information (Public Access) Act 2009* (NSW)	s 100	Historical (5 September 2022 to 30 June 2023)
12.	*Personal Information Protection Act 1998* (NSW)	ss 8-14, 16-19, 21, 32, 52, 53, 55	Historical (5 September 2022 to 13 July 2023)

[84] There is no reprint of the *Racial Discrimination Act 1975* (Cth) that includes s 25Z of the *Racial Discrimination Act* and the amendments made by the *Law and Justice Legislation Amendment Act 1993* (Cth), but s 25Z of the *Racial Discrimination Act* was not amended by the latter Act.