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

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY OF AUSTRALIA (INTERVENING)

PART I – CERTIFICATION

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

PARTS II AND III – INTERVENTION

2. The Attorney-General for the Northern **Territory** of Australia intervenes in support of the Appellant pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART IV – ARGUMENT

A. SUMMARY

3. The Court of Appeal held that the New South Wales Civil and Administrative **Tribunal** exercises judicial power where it entertains a proceeding for administrative review under the ***P**rivacy and **P**ersonal **I**nformation **P**rotection **Act** 1998* (NSW), but only where an order for compensation is sought. It identified two bases for that conclusion, neither of which justified that result.

4. The starting point is that the Court of Appeal misunderstood the nature of the Tribunal's functions when it entertains administrative review applications under the PPIP Act. Those proceedings are properly characterised as merits review because the Tribunal's powers are solely concerned with a review of government action, the Tribunal is required to produce the correct or preferable decision, the Tribunal must give effect to government policy, the Tribunal's powers are not relevantly different to those available to a public sector agency on internal review, and the Tribunal's decision takes effect as a decision of the public sector agency. Those functions fall within the core of administrative power: see [24]-[33] below.

5. The first factor which led the Court of Appeal to the opposite conclusion was that damages are historically a judicial remedy. However, an agency has substantially the same power on internal review, that power is plainly administrative when exercised by the agency, and nothing suggests that the power has a different character when exercised by the Tribunal. Further, there is nothing exclusively judicial about a decision that a government pay money for loss or damage: see [34]-[46] below.

6. The second factor, which was treated as sufficient, was that any compensation order could be registered in a court and, once registered, could be enforced as a judgment of that court. This 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. Even if it is assumed that the registration provision applied as a matter of construction (cf AS [67]-[72]), the reasons in *Brandy* did not treat registrability as a sufficient condition. Further, *Brandy* is distinguishable because it was not concerned with merits review, the Commission was required to give effect solely to the statute (not, as here, to government policy), and (unlike here) all other factors in *Brandy* pointed towards an exercise of judicial power: see [47]-[58] below.

7. The Court of Appeal's reasoning in respect of registration is at odds with other superior court authorities which have not treated the registrability of State tribunal orders as a sufficient indicator of judicial power, and which have suggested that exercises of merits review jurisdiction would involve non-judicial power: see [66]-[75] below.

8. Finally, an application for an order for damages pursuant to s 55(2)(a) of the PPIP Act does not give rise to a "matter" within the meaning of ss 75 and 76 of the Constitution so that the negative implication created by Ch III is not engaged: see [59]-[65] below.

9. The appeal should be allowed.

B. ARGUMENT ON THE APPEAL

Legal principles concerning judicial power

10. Because Ch III of the Constitution is an exhaustive statement of the bodies in which the judicial power of the Commonwealth may be vested, and because it provides for the authoritative adjudication of the "matters" listed in ss 75 and 76, a law of a State cannot confer judicial power "with respect to any of the matters listed in ss 75 and 76 of the Constitution on a tribunal that is not one of the courts of the States" within the meaning of s 77(ii) and (iii): ***Burns*** *v Corbett* (2018) 265 CLR 304, [2] (Kiefel CJ, Bell and Keane JJ) and [68]-[69] (Gageler J).

11. That implication required three questions to be asked in this case, namely whether:

    (a) the Tribunal would exercise "judicial power" in the proceedings before it;

    (b) that power would be exercised in respect of a "matter" in ss 75 and 76; and

    (c) the Tribunal is a "court of a State" within the meaning of s 77(iii).

12. The appeal only concerns the questions in [10(a)] and [10(b)], it being accepted that the Tribunal is not a court of a State: AS [6], cf J [45] CAB 86.

13. It is impossible to frame a definition of judicial power which is at once exclusive and exhaustive because a number of the features of judicial power are also common to administrative power: ***Precision Data Holdings*** *Pty Ltd v Wills* (1991) 173 CLR 167, 188-189 (the Court). The classic starting point is Griffith CJ's observation in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 that judicial power is:

> … the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

14. However, that description is "both too wide and too narrow": *R v* ***Quinn****; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 16 (Aickin J). A tribunal does not necessarily exercise judicial power because it gives a final decision, nor because it resolves claims inter parties, nor because it gives decisions which affect the rights of subjects: *Shell Co of Australia v Federal Commissioner of Taxation* (1930) 44 CLR 530, 544 (the Board). Those are functions which may equally be performed in the exercise of judicial power or administrative power.

15. As such, the majority in *Brandy* (1995) 183 CLR 245 said at 268 that:

> [I]t is not every binding and authoritative decision made in the determination of a dispute which constitutes the exercise of judicial power. A legislative or administrative decision may answer that description. Another important element which distinguishes a judicial decision is that it determines existing rights and duties and does so *according to law*. That is to say, *it does so by application of a pre-existing standard rather than by formulation of policy or the exercise of an administrative discretion*.

16. Consistent with that, the exercise of some functions has been recognised as being within the exclusive province of the judiciary, such as the determination and punishment of criminal guilt, the trial of common law suits in contract or tort, and the grant of remedies to enforce compliance by a trustee with the terms of the trust: *Attorney-General (Cth) v* ***Breckler*** (1999) 197 CLR 83, [40] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

17. Other functions are exclusively non-judicial. Relevantly, they include merits review of administrative action or the allocation of public moneys: *Attorney-General (NSW) v* ***Quin*** (1990) 170 CLR 1, 35-36 (Brennan J); *City of* ***Enfield*** *v Development Assessment Commission* (2000) 199 CLR 135, [43]-[44] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, [7] (Gleeson CJ). A review body exercises that same class of power if it stands in the shoes of an administrator and re-exercises the administrator's powers, even where it uses procedures which appear judicial: *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175-179 (Isaacs J); *R v* ***Hegarty****; Ex parte City of Salisbury* (1981) 147 CLR 617, 626 (Mason J (Gibbs CJ, Stephen and Wilson JJ agreeing)).

18. Within those two bounds, there will be many functions which are neither exclusively judicial nor exclusively administrative (*Luton v Lessels* (2002) 210 CLR 333, [188] (Callinan J)) so that they "chameleon like, take their colour from their legislative surroundings or their recipient": *Quinn* (1977) 138 CLR 1, 18 (Aikin J).

19. Whether the legislature intended to confer on the Tribunal only an administrative power is relevant, but not determinative, of the constitutional question: *Quinn* (1977) 138 CLR 1, 9-10 (Jacobs J (Barwick CJ, Gibbs, Stephen and Mason JJ concurring)). If that intention is disclosed, there is a further question "whether the power is capable of being administrative": ibid.

The judgment below

20. The Court of Appeal held (correctly) that the Tribunal's conduct of administrative review under the ***G**overnment **I**nformation (**P**ublic **A**ccess) **Act** 2009* (NSW) did not involve the exercise of judicial power: J [49]-[105] CAB 88-105. That was because, in conducting administrative review of decisions under that Act, the Tribunal was "in essence… an instrument of government administration": J [88] CAB 99, quoting ***Shi** v Immigration Agents Registration Authority* (2008) 235 CLR 286, [140] (Kiefel J). The Court of Appeal reached the opposite conclusion concerning the Tribunal's administrative review of conduct under the PPIP Act, but only where a party sought an order for compensation: J [144] CAB 118.

21. In reaching the latter result, the Court of Appeal noted that almost all features of the statutory scheme pointed towards the Tribunal exercising non-judicial powers when it engaged in administrative review: J [134] CAB 115. The sole focus of the scheme is government administration. The criteria involved are evaluative and administrative in nature. Enforcement of the types of norms in the PPIP Act are not characteristically or historically exercised by courts. The rights in issue are not independent, pre-existing rights, and they are only given effect in the manner and to the extent set out in the statutory scheme. The orders available to the Tribunal are generally of a kind that could be made by an administrator. The manner in which those functions are exercised was administrative: J [135], [89]-[96] CAB 99-102, 115.

22. Only two positive factors led the Court of Appeal to a different conclusion. The first was that "damages is a remedy characteristically and historically awarded by courts as an exercise of judicial power": J [129]-[134] CAB 113-115. The second was that an order for compensation under the PPIP Act could be registered with a court under s 78 of the ***C**ivil and **A**dministrative **T**ribunal **Act** 2013* (NSW) and, if registered, is enforceable in the same way as a judgment of that court: J [137]-[144] CAB 116-118.

23. Properly understood, neither feature required a different result from that which obtained under the GIPA Act. Before turning to those factors, it is convenient to address the Court of Appeal's characterisation of the Tribunal's function when engaging in administrative review.

The Tribunal exercises merits review functions

24. The Court of Appeal misunderstood the general nature of the Tribunal's functions on administrative review and suggested that, unlike under the GIPA Act, the Tribunal was not engaged in orthodox merits review when reviewing conduct under the PPIP Act. This was so because it perceived there to be "tensions at play" between the PPIP Act and the ***A**dministrative **D**ecisions **R**eview **Act** 1997* (NSW): J [119]-[121] CAB 110-111. Properly understood, there are no such tensions.

25. The PPIP Act establishes certain information protection principles (Part 2, Div 1) and requires a public sector agency to perform its bureaucratic functions in accordance with them: s 21(1). Importantly, those 'principles' do not give rise to any cause of action, do not create any enforceable right on the part of any person, and do not affect the validity of any administrative action: s 69(1). Rather, a person who is aggrieved by an agency's conduct may seek internal review of that conduct under Part 5: ss 21(2), 52(1)(a) and 53(1). After conducting that review, the agency may take one of the actions referred to in s 52(7) and must notify the applicant of (a) the findings of the review; (b) the action proposed to be taken by the agency; and (c) the right of the person to have those *findings*, and the agency's *proposed action*, administratively reviewed by the Tribunal: s 53(8).

26. That the Tribunal's review is concerned with the merits of those findings, and that proposed action, is made clear by the requirement in s 53(8)(a)-(b) that the agency give its reasons for its findings and the proposed action. One purpose of that requirement is to facilitate the Tribunal's review: see e.g. *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, [54]-[55] (the Court) in a different statutory context.

27. Consistent with that, a person may only apply to the Tribunal for administrative review under the ADR Act if the person is not satisfied with (a) the findings of the internal review, or (b) the action taken by the agency: s 55(1) PPIP Act. The tailpiece to s 55(1) suggests that the review is of "the conduct" which was the subject of the application for internal review: see also s 55(2) chapeau. Further, it is that conduct to which the ultimate powers in the ADR Act seem to be directed: ss 63(2)-(3) and 65 ADR Act. Read together, these features ensure that the Tribunal may undertake a complete review of the agency's initial conduct and its findings and proposed action on internal review.

28. By s 63(1) of the ADR Act, the object of the Tribunal's review is to decide "what the correct and preferable decision is having regard to the material then before it". As discussed below, in arriving at that result, the Tribunal is obliged to give effect to or have regard to certain government policy: s 64(1) and (4). The Tribunal's decision is then taken to be the decision of the agency (other than for the purposes of a further administrative review under the ADR Act): s 66(2)(a).

29. That process requires the Tribunal to engage in "merits review" of the impugned decision: *Commissioner of Police, New South Wales Police Force v Fine* (2014) 87 NSWLR 1, [46] (the Court); *Attorney-General (NSW) v* ***FJG*** (2023) 111 NSWLR 105, [93] (Beech-Jones J, Bell CJ and Ward P agreeing). The Tribunal's function goes beyond a review for legal error, which review is an accepted function of the judiciary, to include the re-exercise of power by the administrator: *Shi* (2008) 235 CLR 286, [134] and [140] (Kiefel J) and also [37], [40] (Kirby J) and [100] (Hayne and Heydon JJ); *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250, [14] (Kiefel CJ, Keane and Nettle JJ) and [51] (Bell, Gageler, Gordon and Edelman JJ). The Tribunal must "do over again" that which was done by the agency (*Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, [50] (the Court)) and the Tribunal's decision "replaces the decision of the primary administrative decision-maker within the Executive Government" and "[i]n law, and in effect, becomes the decision of the Executive Government": *Shi* (2008) 235 CLR 286, [40] (Kirby J). That is an exclusively executive function.

30. In relation to the Tribunal's functions under the GIPA Act, the Court said these merits review features "weigh[] significantly in favour of characterising the function as involving executive, not judicial, power": J [98] CAB 102-3. However, it considered the Tribunal's functions under the PPIP Act diverged from this in three ways.

31. The first was that the powers available to the Tribunal on administrative review were "distinct powers, expressed differently to the powers given to the agency itself in s 53(7) of the [PPIP] Act": J [120] CAB 110. A closer comparison suggests this is not the case. On administrative review, s 55(2) of the PPIP Act permits the Tribunal to:

    (a) decide not to take any action on the matter: s 55(2) chapeau, cf s 53(7)(a);

    (b) require the payment of damages not exceeding $40,000 by way of compensation for any loss or damage suffered because of the conduct: s 55(2)(a), cf s 53(7)(c);

(c) require the agency to refrain from any conduct or action in contravention of an information protection principle: s 55(2)(b), cf s 53(7)(d)-(e);

(d) require the performance of an information protection principle: s 55(2)(c), cf s 53(7)(c)-(e);

(e) require personal information that has been disclosed to be corrected by the public sector agency: s 55(2)(d), cf s 53(7)(c);

(f) require the public sector agency to take specified steps to remedy any loss or damage suffered by the applicant: s 55(2)(e), cf s 53(7)(c);

(g) require the public sector agency not to disclose personal information contained in a public register: s 55(2)(f), cf s 53(7)(c)-(e); and

(h) make orders ancillary to those orders.

32. The second reason was that orders under s 55(2) are not made "in the voice of the agency" but are "directed *to* the agency": J [120] CAB 110. As the Appellant submits, there is no inconsistency between the Tribunal stepping into the shoes of the agency whilst also making orders directed to that agency: AS [44]-[45]. The executive arm of government is not a single legal person – it comprises many entities with and without separate legal personality: *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1, [75]-[76] (Kiefel CJ, Bell, Gageler and Keane JJ); *CEO, Aboriginal Areas Protection Authority v Director of National Parks* [2024] HCA 16, [144] (Edelman J). As the "peak tribunal for external merits and administrative review of much government decision-making" (*DRJ v Commissioner of Victims Rights* [2020] NSWCA 136, [23] (Leeming JA, Bell P and Meagher JA agreeing)), it is unsurprising that the Tribunal addresses its orders to subordinate parts of that hierarchy.

33. The third matter (described by the Court of Appeal as an "oddity") was that applications under the PPIP Act are not expressly included in the list of matters allocated to the Administrative and Equal Opportunity **Division**: J [121] CAB 110-111. By s 16(3) of the CAT Act, a function of the Tribunal is allocated to the Division if it is included in a Division Schedule. Under cl 3(1)(b) of Schedule 3 of the CAT Act, that Division's functions include "any function of the Tribunal in relation to legislation that is not specifically allocated to any other Division of the Tribunal by another Division Schedule for a Division". The Tribunal's functions under the PPIP Act are not so allocated. Therefore, they are allocated to the Division.

Damages by way of compensation

34. The first of the two factors relied on by the Court of Appeal to suggest the powers of the Tribunal were judicial was that an order under s 55(2)(a) of the PPIP Act – requiring the public sector agency to pay damages by way of compensation – is a remedy "characteristically and historically awarded by courts as an exercise of judicial power": J [129]-[134] CAB 113-115. No authority was cited for that proposition and there are two reasons why that power does not have an exclusively judicial character.

It is the same function as that on internal review

35. The first reason is that the power is relevantly the same as that conferred on the public sector agency on internal review. There is nothing which suggests that the Tribunal is to approach the review application in "such a different fashion that one could say that the function which was administrative at first instance involves the exercise of judicial power" by the Tribunal: *Hegarty* (1981) 147 CLR 617, 626 (Mason J (Gibbs CJ, Stephen and Wilson JJ agreeing)) and see also J [73] CAB 94 regarding the GIPA Act.

36. After conducting an internal review, an agency may take such *remedial* action as it thinks appropriate, including "the payment of monetary *compensation* to the applicant": PPIP Act, s 53(7)(c). There is nothing in the PPIP Act which suggests that "compensation" in s 53(7)(c) bears anything but its ordinary meaning, being an amount of money paid for some loss or damage: *Nelungaloo Pty Ltd v Commonwealth* (1947) 74 CLR 495, 571 (Dixon J) ("compensation prima facie means recompense for loss"); Edelman, *McGregor on Damages*, 21st ed, [2-001].

37. That is the same function fulfilled by the power in s 55(2)(a), which permits the Tribunal to require a public sector agency to pay damages "by way of *compensation for any loss or damage suffered*". The word "damages" in this context imports no different concept – the "central idea" of damages "is compensation": *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 80 (Isaacs J), approved in *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221, 232 (Lord Morris of Borth-Y-Gest for the Board); see also; Edelman, *McGregor on Damages*, 21st ed, [1-001] and [2-001]; cf J [129] CAB 113. While there are some recognised categories of non-compensatory damages (e.g. Edelman, *McGregor on Damages*, 21st ed, Part 2), they are not relevant in a statutory scheme limited to the payment of compensation for loss or damage: *Registrar of Titles v Spencer* (1909) 9 CLR 641, 644-5 (Griffith CJ).

38. The criteria for making an order under s 55(2)(a) also suggest no different function. Section 55(4)(a) narrows the scope of the power on review by the Tribunal so that it only applies to conduct that occurred after 12 months from the commencement of the information protection principles. Sub-section 55(4)(b) requires the Tribunal to be satisfied that the applicant suffered financial loss, or psychological harm, because of the conduct. That aligns with the ordinary meaning of "compensation" in s 53(7)(c) and, if anything, may only narrow the relevant heads of loss compared to internal review. A similar narrowing existed on review under the GIPA Act without detracting from the function being administrative: J [62] CAB 91. Section 55(4A) replicates the limitation which applies during an internal review: s 53(7A).

39. Finally, the powers in ss 53(7)(c) and 55(2)(a) contain an overriding discretion not to pay (or order to pay) an amount of money (J [115] CAB 109) and is thus different to that which might be invested in a court awarding damages for breach of contract, negligence or misleading and deceptive conduct. An award of compensation by a court is not discretionary: Edelman, *McGregor on Damages*, 21st ed, [2-011].

<u>The function is not characteristic of judicial power</u>

40. The second reason is that it is not the payment of compensation *simpliciter* which has been historically associated with judicial power. In *Breckler* (1999) 197 CLR 83, the plurality observed at [40] that the determination of "actions in contract and tort" was an exclusively judicial function. However, the trial of those causes of action – which have their origins in the common law – is distinguishable from the adjudication of rights which have no existence outside of statute: Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed, [4.8], [4.58], [4.126].

41. The Tribunal's function falls within the latter category: J [125] CAB 111-2. The scheme is statutory and the processes it creates bear only superficial resemblance with a common law cause of action. The information protection principles create no legal rights or civil causes of action: s 69(1). The only right is to seek, in the first place, internal review of an agency's conduct, which is a plainly administrative. If an applicant is dissatisfied with the findings or proposed action of the agency, they then have a right to seek administrative review. At neither level does the applicant have a right to a remedy, even if a contravention is found. Any remedy is granted in exercise of an administrative discretion, not solely by applying a pre-existing legal standard: cf *Brandy* (1995) 183 CLR 245, 268 (Deane, Dawson, Gaudron and McHugh JJ).

42. Further, in undertaking that statutory process, the Tribunal does not merely apply the law to facts found, but must also take into consideration government policy. While considerations of *public* policy are not necessarily inconsistent with judicial power, the application of *government* policy exogenous to the statute is a powerful indicator of an administrative function: *Alinta* (2008) 233 CLR 542, [4] (Gleeson CJ), [14] (Gummow J), [40] (Kirby J), [71] (Hayne J), [153] and [168] (Crennan and Kiefel JJ); *Thomas v Mowbray* (2007) 233 CLR 307, [80]-[82] (Gummow and Crennan JJ); *Precision Data Holding* (1991) 173 CLR 167, 189-190 (the Court); *R v Davidson* (1954) 90 CLR 353, 366-7 (Dixon CJ and McTiernan J, Fullagar J generally agreeing).

43. The Tribunal *must give effect to* any relevant Government policy[1] in force at the time that the decision was made except to the extent that the policy is contrary to law or produces an unjust decision in the circumstances of the case: s 64(1). The latter capacity contemplates that the Tribunal will itself evaluate whether a general policy is adequate in a particular case, which is an administrative function.

44. Further, the Tribunal may *have regard to* any other policy applied by the agency in engaging in the original conduct or in making findings and taking actions on internal review: s 64(4). The words "have regard to" contemplate that the Tribunal may consider that policy and either follow it, not follow it, or modify it to suit the circumstances of the particular case. Again, that discretion is distinctly administrative.

45. Finally, the obligations to apply policy may intersect with the administrative review function at several levels. The criteria in the information protection principles being "evaluative and administrative in nature" (J [123], [134] CAB 111, 115), policy may inform whether an agency has complied with those principles. Similarly, neither an agency on internal review nor the Tribunal on administrative review is bound to require payment of compensation when a contravention of a principle is found: J [115] CAB 109. Policy may affect when compensation is to be paid, the criteria which are to be used in exercising that discretion, or the quantum to be awarded.

46. It is true that an order under s 55(2)(a) may only be made if the Tribunal is satisfied that the legislative criteria in s 55(4) and (4A) are met: J [131], [133] CAB 114-115. However, there is nothing inherently judicial about forming a view about such matters

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[1] "Government policy" means a policy adopted by the Cabinet, the Premier or any other Minister that is to be applied in the exercise of discretionary powers by administrators: s 64(5).

as a step along the way to making an order under s 55(2)(a): *Alinta* (2008) 233 CLR 542, [161] (Crennan and Kiefel JJ); *Hegarty* (1981) 147 CLR 617, 627 (Mason J (Gibbs CJ, Stephen and Wilson JJ agreeing)); J [77] CAB 95-96 concerning the GIPA Act. Where a body is given power, conditionally upon being satisfied as to a state of facts, a determination that it is so satisfied rarely has the "binding effect" associated with judicial power: *Alinta* (2008) 233 CLR 542, [171] (Crennan and Kiefel JJ). Further, the existence of that jurisdictional fact and the finality of the Tribunal's orders are subject to appeal which is in the nature of judicial review and are open to collateral attack: CAT Act, s 83(1); *Roy Morgan Research Centre P/L v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72, [15] (Gaudron, Gummow, Hayne and Callinan JJ); *Precision Data Holding* (1991) 173 CLR 167, 191 (the Court); *Alinta* (2008) 233 CLR 542, [100] (Hayne J), [175] (Crennan and Kiefel JJ)) *Breckler* (1999) 197 CLR 83, [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

Registrability of the order

47. The second factor relied on by the Court of Appeal was the capacity to register a compensation order in a court under s 78(3) of the CAT Act. That was treated as sufficient because it rendered this case "materially indistinguishable" from *Brandy* (1995) 183 CLR 245, the effect of s 78 on an order made under s 55(2)(a) "of itself" leading to the conclusion that the Tribunal would be exercising judicial power when such an order was sought: J [140]-[141] CAB 117. That is inconsistent with the general propositions that "no single combination of necessary or sufficient factors identifies judicial power" (*Alinta* (2008) 233 CLR 542, [93] (Hayne J)) and "[o]ne attribute of the decision of a court is not to be made the touchstone of judicial power": *R v Trade Practices Tribunal* (1970) 123 CLR 361, 402-403 (Windeyer J). More particularly, *Brandy* did not require that result even if s 78 applied as a matter of construction: cf AS [67]-[72].

Consequences of the Court of Appeal's reasoning

48. Before turning to the correctness of that reasoning, it may be noted that the level of generality at which the Court of Appeal resolved the question has potentially sweeping consequences. In the Territory, the Australian Capital Territory, Queensland, Victoria and Western Australia, all orders of civil and administrative review tribunals (monetary and non-monetary) may be filed or registered with a court and may be

enforced as a judgment of that court.[2] On the Court of Appeal's reasoning, every exercise of power by those tribunals (original and in merits review) would be judicial merely because a party *might* subsequently register an order. As explained below, that is inconsistent with other superior court authority which does not treat this factor as determinative and holds that merits review in such tribunals is administrative.

The majority reasoning in Brandy

49. Properly understood, the reasoning in *Brandy* (1995) 183 CLR 245 did not have the effect imputed to it by the Court of Appeal. In particular, that reasoning did not treat the registrability of an administrative order in a court as a sufficient condition for the exercise of judicial power.

50. The majority started from the proposition that judicial power is ordinarily marked out by a binding and authoritative decision, but said that this alone was not sufficient: at 268. Their Honours noted that another "important element" which distinguishes a judicial decision from administrative power is that it determines existing rights and duties and does so according to law, rather than by the formulation of policy or the exercise of an administrative decision. Where these factors are "*otherwise equivocal*" the enforceability of a decision "*may* serve to characterise a function as judicial" and was not said to be sufficient. That is borne out by the quoted passage from *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 163 CLR 140 at 149, where Barton J said that where a power of enforcement is conferred "*as part of the whole*", the judicial power is "undeniably *complete*". The surrounding passage makes clear that "the whole" is (at least in part) a judicial process "giving effect to … *the will of the law*" as opposed to other subjective considerations (e.g. policy).

51. Their Honours then applied those considerations in the same order. They noted that "the Commission's functions point in many respects to the exercise of judicial power": at 269 and see [53]-[58] below. Those facts were outweighed by s 25Z(2) of the RD Act, which rendered the Commission's determinations non-binding, but that was in turn "reversed by the registration provisions": at 269 (Deane, Dawson, Gaudron and

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2 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), ss 84 and 84A; *ACT Civil and Administrative Tribunal Act 2008* (ACT), s 71(1); *Queensland Civil and Administrative Tribunal Act 2009* (Qld), ss 131-132; *Victorian Civil and Administrative Tribunal Act 1998* (Vic), ss 121-122; *State Administrative Tribunal Act 2004* (WA), ss 85 and 86. In South Australia and Tasmania, only monetary orders may be registered: *South Australian Civil and Administrative Tribunal Act 2013* (SA), s 89(1); *Tasmanian Civil and Administrative Tribunal Act 2020* (TAS), s 126(2).

McHugh JJ). That cancelling out aside, the general features of the scheme pointed to the power being judicial.

52. The general features pointing towards an exercise of judicial power in *Brandy* are absent here, the scheme pointing towards administrative power: J [134] CAB 115.

53. First, the relevant norms in ss 9 and 15 of the RD Act applied to all "persons" and were not restricted to governmental entities: at 255 (Mason CJ, Brennan and Toohey JJ). They were therefore not part of an essentially bureaucratic scheme. Indeed, the minority and the majority noted that different procedures applied to government entities, including concerning the registration of determinations: at 254 (Mason CJ, Brennan and Toohey JJ) and 265 (Deane, Dawson, Gaudron and McHugh JJ).

54. By contrast, the information protection principles in the PPIP Act only apply to State government agencies, orders under s 55(2) can only be directed to those agencies, and it is only orders under s 55(2)(a) directed to agencies that can be registered with a court. As the Court of Appeal observed in relation to the GIPA Act, "the burden of the decision relevantly falls on the administrator", consistent with the power being part of a bureaucratic scheme: J [98] and [97], [122] CAB 102-103, 111.

55. Secondly, it was significant to the majority that the Commission decided "*controversies* between parties and [did] so by the determination of rights and duties based upon existing facts *and the law as set out in Part II of the [RD Act]*": at 269. There is no such controversy under the PPIP Act when the Tribunal conducts merits review. Further, the Tribunal does not determine proceedings before it solely by reference to pre-existing legal standards; it is obliged to give effect to government policy. Finally, the norms in ss 9 and 15 of the RD Act invoked in *Brandy* were well suited to judicial application, had previously only been applied by the Federal Court, and could be applied *de novo* by that Court in any review: at 259-260 (Mason CJ, Brennan and Toohey JJ). The norms in the PPIP Act do not have that quality: J [123]-[124], [134] CAB 111, 115.

56. Thirdly, the norms in the RD Act designated the proscribed conduct as "unlawful" and the Commission's powers included power to declare that conduct "unlawful": 253 (Mason CJ, Brennan and Toohey JJ) and 264, 269 (Deane, Dawson, Gaudron and McHugh JJ). By contrast, the PPIP Act describes its relevant norms as mere 'principles', it confers no power to declare conduct unlawful, and expressly provides that non-compliance with those principles does not have any such legal effect: s 69.

57. Fourthly, the relevant powers could only be exercised if an inquiry had been conducted by a legal member: at 253 (Mason CJ, Brennan and Toohey JJ). The Tribunal's powers do not depend on it being so constituted: J [90], [135] CAB 100, 115.

58. For those reasons, the majority reasons in *Brandy* did not compel the conclusion that the registrability of a State tribunal's decision with a State court was itself sufficient to characterise the State tribunal's exercise of power as judicial.

Brandy and the requirement for a "matter"

59. Many of those same factors demonstrate that there was no "matter" before NCAT, so that the negative implication identified in *Burns* (2018) 265 CLR 304 is not engaged.

60. As explained in [10] above, one of the questions arising from that negative implication is whether the power vested in a State body is exercised in respect of a "matter" listed in ss 75 and 76 of the Constitution. The Court of Appeal formulated that question differently, by asking whether the proceeding was "of a kind potentially falling within ss 75 and 76" because it concerned one of the topics in those sections: J [42(1)] CAB 21. It did not separately consider whether the proceedings before the Tribunal arose in a "matter" within the meaning of ss 75 and 76. This led the Court of Appeal to proceed on the basis that the question was uncontroversial: J [45] CAB 86.

61. However, the negative implication identified in *Burns* (2018) 265 CLR 304 only applies to the exercise of judicial power to resolve a "*matter* listed in ss 75 or 76 of the Constitution": [2] (Kiefel CJ, Bell and Keane JJ); ***Citta*** *Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216, [1] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). The negative implication is so limited because any implication must be "inherent" in the text and structure of the Constitution and can only go so far as is necessary to give effect to those textual and structural features which support it: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (the Court); *Re Gallagher* (2018) 263 CLR 460, [24] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). Federal jurisdiction is textually limited to authority to adjudicate a "matter": *Burns* (2018) 265 CLR 304, [71] (Gageler J); *Zurich Insurance Company v* ***Koper*** (2023) 97 ALJR 614, [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *Rizeq v Western Australia* (2017) 262 CLR 1, [51] (Bell, Gageler, Keane, Nettle, Gordon JJ).

62. By contrast, "State jurisdiction is not limited to authority to adjudicate a 'matter'" *Burns* (2018) 265 CLR 304, [71] and [104]-[105] (Gageler J); *Koper* (2023) 97 ALJR 614, [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). It follows that, even if s 78 of the CAT Act imparted a judicial character to orders of the Tribunal made under s 55(2)(a) of the PPIP Act, that would not engage the negative implication unless it did so in relation to a "matter".[3]

63. Applications under the PPIP Act and the ADR Act do not involve a "matter" because they concern the merits review of administrative conduct: see [24]-[33] above. That was the conclusion reached in relevantly analogous circumstances in *FJG* (2023) 111 NSWLR 105. In that case, the defendants applied to the Registrar of Births, Deaths and Marriages to correct the entry of their details in the Register of Births, Deaths and Marriages pursuant to s 45 of the *Births, Deaths and Marriages Registration Act 1995* (NSW). A question arose as to the capacity of the Tribunal to refer questions of law to the Supreme Court, in circumstances where issues were raised concerning the operation of Commonwealth legislation and s 109 of the Constitution: [87] (Beech-Jones J, Bell CJ and Ward P agreeing). The Court of Appeal had earlier determined that such a course was not open if a (non-court) State tribunal would be exercising federal jurisdiction: *Sunol v Collier* (2012) 81 NSWLR 619, [18]-[19] (the Court).

64. Beech-Jones J (Bell CJ and Ward P agreeing) held that the issue did not arise because there was no "matter" before the Tribunal. His Honour said at [93] (citations omitted):

> The proceedings initiated by FJG and FJH in NCAT seek merits review of the decision of the Registrar to refuse to correct the Register. This does not involve a "matter" within the meaning of Ch III of the Constitution and thus did not involve the exercise of federal jurisdiction. This is so because the subject matter of the proceedings in NCAT does not involve or constitute "a justiciable controversy about a legal right or legal duty having an existence that is not dependent on the commencement of a proceeding in the forum in which that controversy might come to be adjudicated". Leaving aside an order in the nature of mandamus which is not the relief granted by NCAT, FJG and FJH's capacity to apply to NCAT and possibly obtain a correction of the Register under s 45 does not involve the enforcement of a legal right or duty, and that capacity does not exist independently of the machinery provided for making an application to NCAT.

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[3] Cf *Commonwealth v Queensland* (1975) 134 CLR 298, 327-328 (Jacobs J); *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361, [110]-[148] (the Court). *Meringnage* dismissed a formal argument concerning the forum involved. The argument advanced here turns on the nature of the proceedings and the functions performed by the Tribunal.

65. The same is true of the instant proceedings: J [125] CAB 111-112. The PPIP Act creates no rights other than procedural rights to seek internal and administrative review, and any remedy is contingent on the application of policy: see [41]-[45] above. There is therefore no "justiciable controversy about a legal right or legal duty having an existence that is not dependent on the commencement of a proceeding in the forum in which that controversy might come to be adjudicated" and hence no matter: *Citta* (2022) 276 CLR 216, [31] (Kiefel CJ, Gageler, Keane, Gordon, Steward, Gleeson JJ).

Other judicial treatment of registrability

66. Consistent with those distinguishing features, authority concerning arrangements at the State level has not treated the registrability of a tribunal's order as sufficient to characterise a tribunal's power as judicial. Further, those cases have generally distinguished between a tribunal's exercise of original jurisdiction and merits review jurisdiction, suggesting the latter will be an exercise of administrative power.

67. In *Commonwealth v* ***A****nti-****D****iscrimination* ***T****ribunal (Tasmania)* (2008) 169 FCR 85, the Commonwealth challenged the jurisdiction of the ADT on several bases. The case was resolved on the threshold basis that the statute did not apply to the Commonwealth: at [54] (Weinberg J), [189] (Kenny J). Although it was unnecessary to decide, Kenny J went on to hold that the ADT would have impermissibly exercised federal jurisdiction if it entertained a suit against the Commonwealth: at [205]-[255].

68. In concluding that the ADT exercised judicial power, her Honour noted that orders of the ADT could be registered in the Supreme Court and would be enforceable accordingly: at [205]-[206]. However, this was not sufficient. It was only "in combination with [other] factors already mentioned" that her Honour characterised the power as judicial: at [207]. Those "factors" were that the ADT determined in a court-like way whether an anti-discrimination provision had been contravened and imposed court-like orders such as injunctions and orders for the avoidance of contracts: at [205]. Her Honour made clear that the ADT's functions would have been judicial even without the registration provision: at [253]. Her Honour also noted that this analysis concerned the ADT's original jurisdiction to determine complaints, not its review functions: at [205]. Unlike the Tribunal here, the ADT did not apply government policy and the anti-discrimination legislation regulated both private and public actors.

69. In *Director of Housing v* ***Sudi*** (2011) 33 VR 559, the Victorian Court of Appeal decided that the **V**ictorian **C**ivil and **A**dministrative **T**ribunal could not undertake collateral review of a decision of the Director of Housing in its tenancy jurisdiction. Only Weinberg J considered whether VCAT exercised judicial power: at [204]-[208]. His Honour said that "[t]he fact that a tribunal's decisions can be enforced simply by registration with a court is *generally an indication* that the tribunal is exercising judicial, and not executive, power": at [204]. His Honour later said that VCAT should be seen as "something of a hybrid" so that when it "exercises *original jurisdiction*, it discharges a function that resembles the exercise of judicial power": at [208]. His Honour did not extend this to the Tribunal's merits review jurisdiction. The statute did not require the consideration of any policy and it applied equally to private and public landlords and tenants. The resolution of tenancy disputes is a quintessentially judicial function: *Attorney-General for the State of South Australia v Raschke* (2019) 133 SASR 215, [96(1)] (Kourakis CJ (Kelly and Hinton JJ agreeing)).

70. In *Owen v Menzies* [2013] 2 Qd R 327, the Queensland Court of Appeal determined that the **Q**ueensland **C**ivil and **A**dministrative **T**ribunal was a "court of a state" for the purposes of s 77(iii) and was therefore able to exercise federal jurisdiction when resolving anti-discrimination claims in its original jurisdiction: [9]-[20] (de Jersey CJ), [43]-[52] (McMurdo P), [101] (Muir JA). The enforcement of QCAT orders in the Supreme Court was not given decisive weight in reaching that conclusion: [15(5)] (de Jersey CJ), [54] (McMurdo P), and [138]-[147] (Muir JA).

71. In *Qantas Airways Ltd v* ***Lustig*** (2015) 228 FCR 148, Perry J declared that VCAT, in adjudicating claims under the *Fair Trading Act 1999* (Vic), purported to exercise judicial power but was not a "court of a state" and therefore could not determine defences based on Commonwealth statutes. Her Honour referred to the capacity to register VCAT orders with an appropriate court and said that "[t]hese features… *indicate* that, in the exercise of *original jurisdiction*, the Tribunal is vested with judicial power": [41]. After setting out other features of that original jurisdiction which demonstrated the Tribunal was exercising judicial power, her Honour said that this conclusion was "*confirmed*" by the registration provisions: [65]. As in *ADT* and *Sudi*, the statute did not require the application of government policy and it regulated private actors. Perry J also considered that it was "plain" that VCAT was also vested with "non-judicial" powers: [65]. That was despite *all* VCAT orders being registrable.

72. In ***Meringnage*** *v Interstate Enterprises Pty Ltd* (2020) 60 VR 361, the Victorian Court of Appeal determined that, in adjudicating claims under the ***E****qual* ***O****pportunity* ***Act*** *2010* (Vic) in its original jurisdiction, VCAT would be exercising judicial power but was not a "court of a state" and therefore could not determine a claim against the Commonwealth. Again, the registrability of VCAT orders was not sufficient. After referring to Perry J's view in *Lustig* that VCAT is vested with "judicial (as well as non-judicial) power" (at [104]), the Court noted that VCAT was empowered by the EO Act to make orders "traditionally made in the exercise of judicial power" and that "the range and character" of those orders, "*together with* the unilateral enforceability of those orders in accordance with ordinary curial processes, *confirms* that VCAT is exercising judicial power": [105], [108]. As in the earlier cases, the statute did not require the application of government policy and it regulated private and public actors.

73. *Lustig* and *Meringnage* were tentatively distinguished in *Real Estate Victoria Pty Ltd v Owners Corporation No. 1 PS332430W* (2021) 64 VR 24 at [71], on the basis that the criterion to be applied by VCAT under the *Subdivision Act 1988* (Vic) "looks less like a judicial power to decide a controversy by reference to pre-existing rights, and more like an administrative or arbitral power to resolve a dispute". That was despite the orders made by VCAT in those proceedings being registrable.

74. The only other authority is *Attorney-General (NSW) v* ***2UE*** *Sydney Pty Ltd* (2006) 236 ALR 385. In that case, Spigelman CJ (Ipp JA agreeing) held that the former Administrative Decisions Tribunal had no jurisdiction to resolve a claim of vilification under the *Anti-Discrimination Act 1977* (NSW) where the respondent raised a constitutional defence. His Honour held that provisions for the registration of the tribunal's orders were determinative of that issue: at [75] and [114] (Hodgson JA).

75. That reasoning does not cohere with the other authorities above, which referred to *2UE*[4] but did not treat registrability as sufficient. Further, the issue in *2UE* was different to that raised here because the Administrative Decisions Tribunal was exercising original (not review) jurisdiction, it was applying a scheme which applied to private and public actors alike, and the tribunal was not obliged to apply government policy. Spigelman CJ's reasoning went beyond the parties' contentions in *2UE*, the Attorney-General having expressly disavowed registration as being sufficient: at [68].

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[4] *ADT* (2008) 169 FCR 85, [207] (Kenny J); *Owen v Menzies* [2013] 2 Qd R 327, [28], [48], [56]-[60] (McMurdo P), [108]-[120], [130], [139]-[139] (Muir JA); *Lustig* (2015) 228 FCR 148, [56] (Perry J).

Finally, aspects of the reasoning in *2UE* were subsequently doubted by the Court of Appeal: *Sunol v Collier* (2012) 81 NSWLR 619, [18], [20] (the Court); *FJG* (2023) 111 NSWLR 105, [91] (Beech-Jones J, Bell CJ and Ward P agreeing). The broad approach in *2UE* should not be preferred.

Conclusion concerning the appeal

76. For those reasons, the two factors relied upon by the Court of Appeal did not require the conclusion that the Tribunal would be exercising judicial power in conducting administrative review where one of the remedies sought was damages under s 55(2)(a) of the PPIP Act. The appeal should be allowed.

C. THE CROSS-APPEAL

77. The Territory makes no written submissions in relation to the cross-appeal, in respect of which there has been no grant of special leave: AS [79].

PART V – ESTIMATE OF TIME

78. The Territory estimates that no more than 20 minutes will be required for oral submissions.

Dated: 22 May 2024

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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

ANNEXURE TO INTERVENER'S SUBMISSIONS (ATTORNEY-GENERAL OF THE NORTHERN TERRITORY OF AUSTRALIA)

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Attorney-General of the Northern Territory sets out below a list of the constitutional, statutory and statutory instrument provisions referred to in these submissions.

No.	Description	Version	Provisions
1.	*ACT Civil and Administrative Tribunal Act 2008* (ACT)	Current	s 71(1)
2.	*Administrative Decisions Review Act 1997* (NSW)	Current	ss 63(1)-(3), 64(1), 64(4), 65, 66(2)(a)
3.	*Births, Deaths and Marriages Registration Act 1995* (NSW)	Current	s 45
4.	*Civil and Administrative Tribunal Act 2013* (NSW)	Current	ss 16(3), 78, 83(1) Sch 3, cl 3

5.	*Commonwealth Constitution*	Current	ss 75-77, 109
6.	*Government Information (Public Access) Act 2009* (NSW)	Current	
7.	*Northern Territory Civil and Administrative Tribunal Act 2014* (NT)	Current	ss 84, 84A
8.	*Privacy and Personal Information Protection Act 1998* (NSW)	Current	ss 21(1), 21(2), 52(1)(a), 53(1), 53(7), 53(7A), 53(8), 55(1), 55(2), 55(4), 55(4A), 63(7), 64(1), 64(4), 64(5), 69 Part 2, Div 1
9.	*Queensland Civil and Administrative Tribunal Act 2009* (Qld)	Current	ss 131-132
10.	*Racial Discrimination Act 1975* (Cth)	16 Dec 1992 – 7 Jan 1993	ss 9, 15, 25Z(2)
11.	*South Australian Civil and Administrative Tribunal Act 2013* (SA)	Current	s 89(1)
12.	*State Administrative Tribunal Act 2004* (WA)	Current	ss 85, 86
13.	*Tasmanian Civil and Administrative Tribunal Act 2020* (TAS)	Current	s 126(2)
14.	*Victorian Civil and Administrative Tribunal Act 1998* (Vic)	Current	ss 121-122