HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S39/2024

BETWEEN:

STATE OF NEW SOUTH WALES
Appellant

and

PAULINA WOJCIECHOWSKA
First Respondent

and

REGISTRAR OF NSW CIVIL AND ADMINISTRATIVE TRIBUNAL
Second Respondent

and

COMMISSIONER OF POLICE NSW POLICE FORCE
Third Respondent

and

SECRETARY OF NSW DEPARTMENT OF COMMUNITIES AND JUSTICE
Fourth Respondent

and

REGISTRAR OF DISTRICT COURT OF NEW SOUTH WALES
Fifth Respondent

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Filed on behalf of the Attorney-General for the State of Queensland, Intervening

22 May 2024

Document No: 16258903

PART I: Internet publication

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

PART II: Basis of intervention

2. The Attorney-General for Queensland (**Queensland**) intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the appellant.

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Submissions

SUMMARY OF ARGUMENT

4. In *Burns v Corbett*,[1] this Court derived from the reasoning in *R v Kirby; Ex parte Boilermakers' Society of Australia*[2] a further constitutional implication. That implication is that State Parliaments cannot confer on a body which is not a court of the State judicial power with respect to the matters in ss 75 and 76 of the Constitution (the ***Burns* limitation**).[3] In applying that principle in this case, the determinative question is whether the first respondent's application for administrative review involves a 'matter' in respect of which the Civil and Administrative Tribunal (the **Tribunal**) is to exercise 'judicial power'.[4]

5. Contrary to the conclusion reached by the Court of Appeal, s 55(2)(a) of the *Privacy and Personal Information Act 1998* (NSW) (**PIPP Act**) does not confer on the Tribunal a power which is exclusively judicial. The nature of the power denies that conclusion, and s 78 of the *Civil and Administrative Tribunal Act 2013* (NSW) (**CAT Act**) (assuming it applies) does not require it.

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1 (2018) 265 CLR 304.

2 (1956) 94 CLR 254.

3 *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216, 224 [1] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) ('***Citta***').

4 *Wojciechowska v Secretary, Department of Communities and Justice* [2023] NSWCA 191, [42](2) ('***Wojciechowska***'). It is accepted by the appellant that the subject-matter of the dispute—being between a State and a resident of another State—is within the scope of s 75(iv) and that the Tribunal is not a court of New South Wales: at [45].

STATEMENT OF ARGUMENT

6. The *Burns* limitation is an outworking of the principle established in *Boilermakers*. As Kiefel CJ, Bell and Keane JJ explained in *Burns*, the approach to Ch III adopted in *Boilermakers* is one 'whereby the statement of what may be done is taken to deny that it may be done otherwise'.[5] *Boilermakers* confirmed that this approach to Ch III denies the Commonwealth Parliament power to confer judicial power on 'any body or person except a court created pursuant to s 71 and constituted in accordance with s 72 or a court brought into existence by a State'.[6] *Burns* recognised that this approach to Ch III also denies the possibility that judicial power in respect of the matters described in ss 75 and 76 'might be exercised by, or conferred by any party to the federal compact upon, an organ of government, federal or State, other than a court referred to in Ch III of the *Constitution*'.[7]

7. The Commonwealth and State Parliaments therefore each lack legislative capacity to confer on a non-court judicial power with respect to the matters in ss 75 and 76.[8] Consequently, where a proceeding potentially involves a matter identified in s 75 or s 76, the question of whether State legislation impermissibly confers judicial power on a non-court (and hence exceeds the *Burns* limitation) is 'no different'[9] from the question of whether federal legislation impermissibly confers judicial power on a non-court (and hence infringes the principle confirmed in *Boilermakers*).

8. That question is not answered by a conclusion that the power could be conferred on a court.[10] A conclusion of that kind reveals no more than that the power is in 'the borderland in which judicial and administrative functions overlap'.[11] As *Boilermakers* also confirmed, such powers may be conferred on a court *or* a non-court without

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5 *Burns v Corbett* (2018) 265 CLR 304, 336 [45]. Justice Gageler agreed 'substantially with the reasoning' of Kiefel CJ, Bell and Keane JJ: at 346 [69].

6 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

7 *Burns v Corbett* (2018) 265 CLR 304, 337 [46] (Kiefel CJ, Bell and Keane JJ).

8 *Burns v Corbett* (2018) 265 CLR 304, 338-9 [49]-[50] (Kiefel CJ, Bell and Keane JJ), 346 [68]-[69] (Gageler J).

9 Compare *Citta* (2022) 276 CLR 216, 232 [30] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

10 As the Court of Appeal recognised: *Wojciecowska* [2023] NSWCA 191, [47], [81], [89], [128].

11 *Palmer v Ayres* (2017) 259 CLR 478, 497 [47] (Gageler J), citing *Labour Relations Board (Saskatchewan) v John East Iron Works Ltd* [1949] AC 134, 148.

offending 'any constitutional precept arising from Ch III'.[12]

9. Instead, the *Burns* limitation requires—as does the like limitation on Commonwealth legislative power—an analysis of whether the power conferred is *exclusively* judicial.[13] As Gageler J explained in *Palmer v Ayres*, exclusively judicial powers fall within two categories: first, those powers which are directed to the 'quelling of controversies [as to legal rights], by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion'; and second, 'other functions that have in the past been exercised only by courts'.[14] In both cases, such powers are 'directed to an ultimate end that can be achieved only through the exercise of judicial power'.[15]

10. The power in s 55(2)(a) provides that, on an administrative review of the conduct of a public sector agency, the Tribunal may make (subject to certain exceptions) 'an order requiring the public sector agency to pay the applicant damages not exceeding $40,000 by way of compensation for any loss or damage suffered because of the conduct'. Such an order can only be made where the public sector agency is held to have acted in contravention of certain 'information protection principles', and the Tribunal is satisfied that the applicant has 'suffered financial loss, or psychological or physical harm, because of the conduct' (s 55(4)(b)).

11. The power in s 55(2)(a) is not an exclusively judicial power. It is not a power historically exercised only by courts.[16] Nor is it a power for the quelling of controversies as to legal rights. Two key points support that conclusion.

12. *First*, no justiciable controversy as to a public sector agency's compliance with the information protection principles exists independently from a proceeding for 'administrative review' commenced under part 5 of the PIPP Act.[17] A 'justiciable

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12 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also *R v Davison* (1954) 90 CLR 353, 369-70 (Dixon CJ and McTiernan J).

13 *Attorney-General (Cth) v Alinta* (2008) 233 CLR 542, 552 [10] (Gummow J), citing *Albarran v Companies Auditors and liquidators Disciplinary Board* (2007) 231 CLR 350, 363-364 [36] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ). In *Boilermakers*, such powers were described as 'peculiarly and distinctively' judicial (at 279).

14 *Palmer v Ayres* (2017) 259 CLR 478, 497 [47], citing *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ).

15 *Palmer v Ayres* (2017) 259 CLR 478, 497 [47].

16 *Wojciechowska* [2023] NSWCA 191, [124].

17 See s 69 of the PIPP Act.

controversy' is a controversy which concerns legal rights;[18] but the 'amorphous, evaluative'[19] privacy protection principles create no legal rights. The principles are no more than 'aspiration[s] or exhortation[s]',[20] incapable of enforcement by a court and directed to entities including non-legal persons. Sections 21 and 69 confirm that, to the extent public sector agencies have any duty to comply with the principles, it is an unenforceable duty[21] which creates no correlative rights in others. As no legal rights or duties arise from the statutory scheme, there can be no *dispute* about any legal rights or duties let alone one which exists independently of a proceeding commenced under part 5.[22]

13. A proceeding under part 5 enables a person aggrieved by an agency's alleged contravention of the principles to seek review of that conduct, but the availability of review proceedings does not alter the legal character of an agency's 'duty'. Nor does the existence of the Tribunal's power in s 55(2)(a)—to order the agency to pay the applicant 'damages' for any loss caused by a 'contravention'—convert the privacy protection principles into substantive legal obligations. That is evident both from s 69, and from the nature of the part 5 review proceedings.

14. Part 5 review is initially conducted by the public sector agency itself[23] or the Privacy Commissioner if the agency so requests.[24] The agency or the Commissioner may then take the steps set out in s 53(7), which include paying compensation to the applicant. A person dissatisfied with the review's findings or the agency's actions may apply to the

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18 *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 674, 692 [68] (Edelman J). See also *Unions NSW v New South Wales [No 3]* (2023) 97 ALJR 150, 157-8 [19] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ); *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234, 249 [47] (Gageler and Gleeson JJ).

19 *Wojciechowska* [2023] NSWCA 191, [123].

20 *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 98 ALJR 623, 628 [25] (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ).

21 Or a 'duty of imperfect obligation': see *AVN20 v Federal Circuit Court of Australia* [2020] FCA 584, [109] (Kenny J), cited with approval in *ELA18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 371, 388 [65] (Besanko and Perry JJ).

22 *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 674, 693 [69], [72] (Edelman J) ('A legal controversy is a dispute about rights, duties or liabilities … It is also generally necessary that, independently of the proceeding itself, there is a real dispute about rights, duties or liabilities'). See also *Fencott v Muller* (1983) 152 CLR 570, 603 (Mason, Murphy, Brennan and Deane JJ). As the legislature may determine the scope of a matter, it may also determine not to create a matter: *Abebe v Commonwealth* (1999) 197 CLR 510, 605 [279]-[280] (Callinan J).

23 Section 53(2) of the PIPP Act.

24 Section 54(3)(a) of the PIPP Act.

Tribunal for 'administrative review'.[25] In determining an application for 'administrative review', the Tribunal 'is to decide what the correct and preferable decision is having regard to the material then before it'.[26] On reviewing the conduct of the agency, the Tribunal may decide not to take any action or may take one of the range of actions set out in s 55(2). While the Tribunal may only order compensation for loss if it finds the agency has contravened a privacy protection principle, in context such a finding is best understood as statement of opinion by the Tribunal that a public sector agency has failed to reach a required standard of good administration. The finding cannot be said to 'quell' a controversy as to legal rights, nor to bind the Privacy Commissioner or the public sector agency in their future performance of functions. Moreover, where the Tribunal's order provides for compensation, that order *creates* the person's entitlement to be paid.[27] The aggrieved person has no pre-existing legal right to compensation. In these respects, the character of the power in s 55(2)(a) reflects the like power given to a public sector agency in s 53(7)(c).

15. As no justiciable controversy exists independently from a proceeding under part 5, the proceedings do not concern a 'matter' and the *Burns* limitation is not engaged.[28] For the same reason, the power conferred by s 55(2)(a) cannot be characterised as judicial, let alone as exclusively judicial.[29]

16. *Second*, the Court of Appeal was wrong to reason that s 78 of the CAT Act 'of itself leads to the conclusion that the Tribunal would be exercising judicial power'.[30] *Brandy v Human Rights and Equal Opportunity Commission*[31] does not support that proposition. Registration mechanisms for tribunal orders have long been employed as a simple way to harness an existing enforcement regime.[32] *Brandy* does not establish that

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25 Section 55(1) of the PIPP Act.

26 Section 63 of the *Administrative Decisions Review Act 1997* (NSW). The Tribunal must also give effect to Government policy: s 64.

27 Compare *Luton v Lessels* (2002) 210 CLR 333, 357-8 [67] (Gaudron and Hayne JJ).

28 *Citta* (2022) 276 CLR 216, 232 [29] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

29 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265-7 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

30 *Wojciechowska* [2023] NSWCA 191, [141]. See also at [143].

31 (1995) 183 CLR 245.

32 Enid Campbell and Matthew Groves, 'Enforcement of administrative determinations' (2006) 13 *Australian Journal of Administrative Law* 121, 127. See, eg, *Industrial Peace Act 1912* (Qld) sch 3, s 11; *Queensland Law Society Act 1927* (Qld) s 5(3)(c).

every administrative process which results in a decision capable of being enforced by registration in a court is thereby converted into an exclusively judicial power.

17. *Brandy* concerned a power conferred on the Commission to consider whether a respondent had engaged in unlawful conduct and, if so, what consequences to impose. Those features of the power pointed towards it being judicial, but the Act expressly provided that the Commission's determinations were not binding or conclusive between any of the parties. That situation was 'reversed' by the registration provisions.[33] Registration thus 'converted a non-binding administrative determination into…a binding, authoritative and curially enforceable determination'.[34]

18. In this case, the Court of Appeal considered that an order made under s 55(2)(a) is binding 'regardless of whether or not it [is] registered pursuant to s 78'.[35] On that view, *Brandy* had nothing to say about whether the power is judicial. For if an order made under s 55(2)(a) is binding without registration then, as in *Citta*, registration is merely 'a step available to a person to enforce the order' in the event of non-compliance.[36] Moreover, it is a step which appears unnecessary where an order is made against a public sector agency.[37]

19. *Citta* demonstrates that an enforcement mechanism—such as registration—is not necessary to characterise a power as judicial.[38] Nor is such a mechanism sufficient.[39] That it is not sufficient can be seen in the example of an arbitral award, which is not judicial because it is consensual in nature,[40] and which does not become judicial merely because it may be enforced by a court 'as if' it had been made in an action in the

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33 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 269 (Deane, Dawson, Gaudron and McHugh JJ).

34 *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 110 [42], cited with approval in *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216, 228 [14] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

35 *Wojciechowska* [2023] NSWCA 191, [142].

36 Compare *Citta* (2022) 276 CLR 216, 228-9 [16] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

37 Compare AS [70].

38 *R v Davison* (1954) 90 CLR 353, 368 (Dixon CJ and McTiernan J).

39 That fact that orders are binding does not necessitate their characterisation as judicial: *Luton v Lessels* (2002) 210 CLR 333, 356 [62]-[63] (Gaudron and Hayne JJ).

40 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of Federal Court of Australia* (2013) 251 CLR 533, 555 [31] (French CJ and Gageler J), 575 [106]-[108] (Hayne, Crennan, Kiefel and Bell JJ).

court.[41] In this case, registration of the Tribunal's order is not sufficient to characterise the power as judicial because an order under s 55(2)(a) is not made with respect to a matter and quells no controversy as to legal rights.

20. It is true that three judges in *Brandy* observed that 'an order which takes effect as an exercise of judicial power cannot be made except after the making of a judicial determination'.[42] However, that observation cannot be read as meaning that the order necessarily takes its character from the mechanism for its enforcement. That would be to 'confuse[] the order of the Tribunal with the mechanism for enforcement of that order'.[43]

21. Part 5 review proceedings do not concern a 'matter' and the power conferred by s 55(2)(a) of the PIPP Act is not exclusively judicial. That power may therefore be exercised by the Tribunal in favour of a resident of a State other than New South Wales, without exceeding the *Burns* limitation.

PART V: Time estimate

22. It is estimated that Queensland will require 15 minutes for oral argument.

Dated 22 May 2024.

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41 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of Federal Court of Australia* (2013) 251 CLR 533, 555 [32] (French CJ and Gageler J), 574 [105] (Hayne, Crennan, Kiefel and Bell JJ). See also *South Australia v Totani* (2010) 242 CLR 1, 64 [136] (Gummow J); *Allianz Australia Insurance Ltd v Probuild Constructions (Aust) Pty Ltd* [2023] NSWCA 56, [7] (Leeming JA, Mitchelmore JA agreeing).

42 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 260 (Mason CJ, Brennan and Toohey JJ).

43 *Citta* (2022) 276 CLR 216, 228 [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

Annexure 1

IN THE HIGH COURT OF AUSTRALIA S39/2024
SYDNEY REGISTRY

BETWEEN: **STATE OF NEW SOUTH WALES**
Appellant

and

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ANNEXURE TO SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Statutes and Statutory Instruments referred to in the submissions
Pursuant to *Practice Direction No. 1 of 2019*, Queensland sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions**.**

No.	Description	Version	Provisions
Constitutional provisions			
1.	*Commonwealth Constitution*		Ch III

Statutes			
2.	*Administrative Decisions Review Act 1997* (NSW)	Current version (1 January 2014 to date)	ss 63-64
3.	*Civil and Administrative Tribunal Act 2013* (NSW)	Historical version (1 July 2022 to 13 July 2023)	s 78
4.	*Industrial Peace Act 1912* (Qld)	As enacted	sch 3, s 11
5.	*Judiciary Act 1903* (Cth)	Current version (18 February 2022 to date [C2022C00081])	s 78A
6.	*Privacy and Personal Information Act 1998* (NSW)	Historical version (5 September 2022 to 13 July 2023)	ss 21, 52-55 (part 5), 69
7.	*Queensland Law Society Act 1927* (Qld)	As enacted	s 5(3)(c)