



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

No. S39/2024

BETWEEN:

STATE OF NEW SOUTH WALES
Appellant

and

10

PAULINA WOJCIECHOWSKA and OTHERS
Respondents

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
STATE OF VICTORIA (INTERVENING)**

PART I: CERTIFICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. JUDICIAL POWER

- 20 2. Contrary to J [140] (**CAB 117**), *Brandy* is not “materially indistinguishable”. Where other indicia point to the characterisation of NCAT’s powers under s 55 of the PPIP Act as non-judicial (J [134] (**CAB 115**)), the enforceability of an order under s 55(2)(a) (assuming s 78 of the CAT Act applies) is not of itself conclusive of judicial power.

Vic [27], [36], [38]; *Brandy* (1995) 183 CLR 245 (**JBA Vol 3, Tab 25**) at 256-257 (Mason CJ, Brennan and Toohey JJ), 267-268 (Deane, Dawson, Gaudron and McHugh JJ).

3. Enforceability was only determinative in *Brandy* because there was also a determination of pre-existing rights.

30 Vic [39]-[40]; *Brandy* (1995) 183 CLR 245 at 257-259 (Mason CJ, Brennan and Toohey JJ), 269 (Deane, Dawson, Gaudron and McHugh JJ).

4. Unlike the Commission in *Brandy*, NCAT does not determine pre-existing rights or duties. The PPIP Act does not create any “rights to relief”, only rights to access the processes provided for in that Act (namely, internal review under s 53 and administrative review under s 55).

Vic [7], [15]-[19]; PPIP Act (**JBA Vol 1, Tab 6**), ss 21, 53, 55, 69.

B. STATE LEGISLATIVE COMPETENCE TO CONFER JUDICIAL POWER IN A “NON-MATTER” WITH RESPECT TO THE SUBJECTS IN SS 75 AND 76

5. By the proposition advanced at Cth [8]-[21], that Ch III denies State legislative competence to confer judicial power with respect to the subjects in ss 75 and 76 of the Constitution in a “non-matter”, the Commonwealth contends for a new (or extended) implication, not recognised in *Burns*.
6. Unlike *Burns*, the negative implication for which the Commonwealth contends does not mirror the conferral of judicial power on Ch III courts that is expressly authorised by Ch III.

10 *Burns* (2018) 265 CLR 304 (**JBA Vol 3, Tab 26**) at 336-339 [45]-[50] (Kiefel CJ, Bell and Keane JJ).

7. The question of whether that implication is nevertheless “logically or practically necessary” for the preservation of the constitutional structure should await a case in which it squarely arises for decision.

Burns (2018) 265 CLR 304 at 355 [94] (Gageler J), 383 [175] (Gordon J).

8. It does not arise in this case because, if the Court were to conclude that NCAT was exercising judicial power, it would also conclude that it was doing so in a “matter”, having regard to the overlap between the relevant indicia. Nor would it necessarily arise on the example at Cth [12] of an advisory opinion power conferred on a State tribunal.

20 **Dated:** 5 February 2025



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