



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S39/2024
File Title: State of New South Wales v. Wojciechowska & Ors
Registry: Sydney
Document filed: Form 27F - AG-WA (Int 7) Outline of Oral Argument
Filing party: Interveners
Date filed: 05 Feb 2025

Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S39 of 2024

B E T W E E N:

STATE OF NEW SOUTH WALES

Appellant

and

PAULINA WOJCIECHOWSKA

First Respondent

REGISTRAR OF NSW CIVIL AND ADMINISTRATIVE TRIBUNAL

Second Respondent

COMMISSIONER OF 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

ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

OUTLINE OF ORAL SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

There was no matter before the Tribunal

2. Exceptional categories aside, for there to be a "matter" there must be 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", and the controversy must involve a dispute about legal rights that is capable of being resolved by the exercise of judicial power. **WA [20]; cf Amici Curiae [62]–[63].**
3. The Commonwealth and Amici suggest that WA (as well as the appellant and other interveners) submits that there can be no "matter" if statutory rights can only be enforced by the commencement of a proceeding in a forum specified in the statute creating those rights: see **Cth [31]–[34]; Amici [61], [62], [64].**
4. That is not the submission advanced by WA: **WA [20]–[22].** A statute can give rise to rights which can sustain a "matter" litigated in the forum specified by the statute.
5. WA's submission is that the only legal rights the respondent had were to make an application for internal review and then external review to the Tribunal under Part 5 of the *Privacy and Personal Information Protection Act 1998* (NSW). Those rights and their exercise were not in controversy in this case. There was no "matter".

The Tribunal is not exercising judicial power in s 55 review proceedings

6. To the extent the powers exercised by the Tribunal fell in the "borderland", they were administrative in light of the legislative setting, character of the decision maker and nature of the decision making process: **WA [27]–[34].**
7. The final act, which may be an award of damages, does not cause what would be the exercise of administrative power to become judicial: **WA [35]–[38].**
 - (a) The use of the term "damages" in s 55(2)(a) of the PPIP Act needs to be understood in the context of the Act as a whole and the limited legal rights it confers: ss 21 and 32, Pt 5 and s 69(1)(a): **cf Amici [33].**
 - (b) The power to award compensation is not the sole purview of courts exercising judicial power. It can be and in the PPIP Act is administrative: **WA [36].**

Brandy does not require the opposite conclusion

8. If s 78(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) can apply to an order under s 55(2)(a) of the PPIP Act, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 does not require the conclusion that the Tribunal exercised judicial power.
9. ***There was no matter before the Tribunal.*** It was not in doubt in *Brandy* that the controversy before the Commission involved a "matter". The controversy before the Commission was as to rights and duties arising under a Commonwealth law.
10. The exercise of Commonwealth judicial power requires the existence of a "matter". There being no "matter" before the Tribunal, the Tribunal was not purporting to exercise Commonwealth judicial power when the subject matter of s 75(iv) of the Constitution arose in proceedings before it, even if such an order can be registered in a State court and take effect as a judgment of that court: **WA [40]**.
11. ***Registration of the order does not mean judicial power was exercised.*** In *Brandy*, registration of the Commission's order took effect as an order of the Federal Court. Due to the strict separation of powers at the federal level, an order of the Federal Court can only be made in the exercise of Commonwealth judicial power. Registration of the Commission's order therefore purported to take effect as an exercise of Commonwealth judicial power: **WA [41]**.
 - *Brandy*, 260 (Mason CJ, Brennan and Toohey JJ) (**JBA v 3, Tab 25**).
12. State Parliaments are not bound by the same constitutional limitations with respect to State courts as the Commonwealth Parliament is with respect to federal courts. The filing in a State court of a certificate certifying an amount ordered to be paid by the Tribunal, which takes effect as a judgment of the State court, does not necessarily take effect as an exercise of judicial power: **WA [41]-[45]**.

The Commonwealth submission on the Burns v Corbett implication

13. The Commonwealth contends the *Burns v Corbett* (2018) 265 CLR 34 implication extends to prevent State Parliaments conferring judicial power on non-courts with respect to "non-matters" falling within the subject matters identified in ss 75 and 76 of the Constitution: **Cth [4], [8]-[21]**.
14. The Court need only resolve this issue if it finds that: (i) the Tribunal was exercising judicial power; and (ii) there was no "matter" before the Tribunal.

15. The Court should refrain from deciding this issue unless it is necessary to do so.
- *Vunilagi v The Queen* (2023) 97 ALJR 627 [55] (Kiefel CJ, Gleeson and Jagot JJ).
16. If the Court decides this issue, WA adopts NSW's submissions on the issue in its reply (NSW Reply [17]–[19]).

Dated: 5 February 2025



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