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

APPELLANT'S REPLY

Part I: Certification for internet publication

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

Part II: Reply

Section 78 of the CAT Act does not apply

2. Contrary to the amici curiae's submissions (**ACS**) at [51]-[56], s 78 of the CAT Act does not apply to an order for "damages" under s 55(2)(a) of the PPIP Act. The carve-out in s 66(2)(a) of the ADR Act, for "the purposes of an administrative review under [the ADR] Act", does not cover the enforcement provision in s 78 of the CAT Act. Nor are provisions within the CAT Act for appeals of Tribunal decisions analogous. Enforcement pursuant to s 78 is a particular regime, and one that, unlike provisions for appeal, is inapt to be applied to a Tribunal order made in the shoes of an agency. The ACS do not satisfactorily answer the points that: (1) many public sector agencies could not be identified in the certificate required by s 78(2) as the "person" liable to pay the certified amount; and (2) it would be unthinkable for an agency not to comply with a Tribunal order.

Section 78, if it applies, does not render the Tribunal's powers judicial

3. Contrary to ACS [57]-[58], and also the Commonwealth's submissions (**CS**) at [48]-[52], s 78 would not render the Tribunal's powers "judicial". Its practical effect would be to make available in respect of a monetary order the enforcement mechanisms also available for judgment debts. Without other indicia of judicial power, to which we turn next, s 78 is insufficient to govern the characterisation of the Tribunal's function.

There are no other indicia of judicial power

4. ***PPIP Act does not create independent legal rights or duties***: The amici emphasise ss 21(1) and 32(1) (ACS [27]-[28]). But those provisions cannot be read in isolation from ss 21(2), 32(2), and s 69. The duty not to "contravene" the IPPs or codes of practice, is correlative only to the specific review mechanism in Part 5, and must be understood in that limited sense.

5. Of course statutory rights "may give rise to a matter" (CS [30]). But at least where the "rights" in question are bespoke statutory creations without strong common law analogues, there will be a question of construction, whether the interest that the legislature intended to create is of sufficient substance to sustain a justiciable "matter" or instead is a

lesser form of interest inseparable from the statutory mechanisms by which it is given effect.

6. PPIP Act norms are unlike other legal regimes to which the amici seek to analogise, like the scheme in *Brandy* (1995) 183 CLR 245: cf ACS [34]-[37], [64]. So too is the exclusive scheme for review, which is not merely a mandatory prerequisite to judicial proceedings (like conciliation in the human rights context). Section 69 means that the IPPs and codes do not represent standards "supposed already to exist" or "pre-existing principles and standards" (259). There is no equivalent to s 69 in the legal regimes considered in ***Citta Hobart*** *Pty Ltd v Cawthorn* (2022) 276 CLR 216, *Meringnage v Interstate Enterprises Pty Ltd t/as Tecside Group* (2020) 60 VR 361, *Kentish Council v Wood* (2011) 21 Tas R 59 or *Commonwealth v Anti-Discrimination Tribunal* (2008) 169 FCR 85.

7. The requisite independence of the legal duty cannot be discerned from the Privacy Commissioner's functions under Part 4 of the PPIP Act: cf ACS [28]-[29], [60], [63]. The Privacy Commissioner exercises a function of informal inquiry, conciliation and reporting akin to the integrity function of an Ombudsman, concerned to oversee appropriate standards of bureaucratic conduct. Indeed, the Privacy Commissioner is empowered under s 41 to direct that an agency is not required to comply with an IPP or a code, or that the application of an IPP or code to an agency is to be modified. Codes themselves can modify IPPs, or create new guidelines for an agency (s 29), without Parliamentary intervention. All of this highlights that the IPPs and codes do not create freestanding legal rights or standards of the requisite character.

8. ***PPIP Act does not create binding or otherwise legal remedies***: It does not follow from the binding nature of orders made under s 89 of the *Anti-Discrimination Act 1998* (Tas) that orders under s 55 of the PPIP Act have the same quality. That observation in *Citta Hobart* (2022) 276 CLR 216 at [16] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) and [56]-[57] (Edelman J) turned expressly on the construction of the Tasmanian Act. Nothing in the PPIP Act makes Tribunal orders enforceable and the context of governing public sector agencies, which are subject to bureaucratic norms of compliance, means there is no reason to imply enforceability. The legislature assumed that agencies would comply with those orders. The passage from *Brandy* (1995) 183 CLR 245 quoted at ACS [50] supports this construction.

9. Nor are the remedies available as of right. ACS [47], submitting that "the Tribunal would approach the issue as a court would", assumes the answer to the question for

decision. There is no textual basis for the Tribunal being *required* to order a remedy if breach and loss have been demonstrated. Section 55(2) gives the Tribunal a wide-ranging discretion to decide on the appropriate course of action. The considerations that bear on that exercise are not purely legal. While some judicial remedies are, of course, discretionary, damages are not ordinarily of that kind.

10. ***Section 55 review is administrative review***: Taking into account the nature of the "rights" and "remedies" under the PPIP Act, "administrative review" is not a "mere label" (cf ACS [11], [18]). It is a designation reflective of a legislative choice to repose the relevant function not merely in a non-court but within a jurisdiction of the non-court that is tasked with merits review. That legislative choice goes beyond "labelling" and substantively informs the characterisation of powers that might have been conferred judicially on a court (or at least in a jurisdiction of the non-court that was not so pointedly non-judicial) but designedly were not.

11. It is not beyond the competence of a legislature to provide for the administrative reconsideration of agency conduct, and administrative determination of what should be done to bring the agency's conduct into line with the correct and preferable view of what ought to have been done. Whatever descriptive differences there may be between such a function and the form of merits review in which a decision is re-made, they do not consign Australian legislatures to dealing with agency conduct *only* by judicially enforceable rights. And yet that is the consequence of the amici's construction of the PPIP Act, which could not be clearer in its intention to create a scheme of merits review, rather than legal rights.

12. ***Frugtniet*** *v Australian Securities and Investments Commission* (2019) 266 CLR 250 and *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 cited at ACS [19] describe a particular mode of review which does not exhaust the concept of merits review. The statute is governing: *Frugtniet* at [51]. That those passages may not perfectly align with the nature of a review under s 55 of the PPIP Act does not mean that such a review is not an administrative review.

13. The concept of an administrative review of conduct must accommodate some backward-looking remedial powers without necessarily engaging notions of judicial power. There is nothing inherently un-administrative about an agency reviewing its own past conduct, forming the view that it ought to have conducted itself differently, and taking steps to do so for the future, or offering an apology or compensation for the past shortcomings. The same is true if that review task is undertaken by the Tribunal. In such a scheme, there is nothing strained about describing the powers on review as involving a

substitution of the conduct that is seen to be out of line with the correct and preferable conduct in the circumstances.

14. Contrary to ACS [25], the legislative history supports the State. As enacted, s 55(1) of the PPIP Act provided for the **A**dministrative **D**ecisions **T**ribunal to perform a "review" of conduct. The ***A**dministrative **D**ecisions **T**ribunal **Act** 1997* (NSW) at the time defined "decision" to include conduct (s 6(1)(g)). Section 55(3) of the PPIP Act preserved the ADT's powers under Div 3 of Part 3 of Ch 5 of the ADT Act. Those provisions were in substance identical to those which remain in what is now Div 3 of Part 3 of Chapter 3 of the ADR Act, including the direction to decide on the "correct and preferable decision", the conferral of "all of the functions" of the administrator, and the powers to affirm, vary or set aside.

Chapter III does not impliedly preclude the conferral of State judicial power in non-"matters" involving a State and a resident of another State

15. Contrary to CS [8]-[21], the negative implication from Ch III does not preclude a State from lending judicial enforcement mechanisms to a monetary order made against a State agency in favour of a resident of another State.

16. The Commonwealth's contrary contention can arise in this case only in a very narrow circumstance. The considerations on which the State relies to submit that there is no matter in the Tribunal are the same as those on which it relies to submit that the Tribunal does not exercise judicial power. The State could conceivably succeed on the proposition that there is no matter, but fail on the proposition that there is no judicial power, if s 78 of the CAT Act applies and imparts a judicial character to the monetary order. In that narrow circumstance, the State contends and the Commonwealth denies that *Burns v Corbett* is not transgressed.

17. ***First***, even if the reasons of Gageler J in *Burns v Corbett* (2018) 265 CLR 304, and of McTiernan and Jacobs JJ in *Queen of Queensland Case* (1975) 134 CLR 298, were adopted, they would not govern this case. Even if Chapter III precludes the conferral of judicial power by a State with respect to a "subject matter" in ss 75 or 76 of the Constitution, s 75(iv) does not have a "subject matter" independent of the constitutional conception of a "matter" between the identified parties. Alike with s 75(iii) and 75(v), but unlike any other head of federal jurisdiction (such as matters arising under or involving the interpretation of the Constitution in s 76(i), which the Commonwealth invokes in CS [12]), s 75(iv) is defined by the identity of the parties to the matter, not by a subject matter. Thus,

even the broader view of the negative implication would not preclude the judicial enforcement of a monetary order made by a non-court against an agency in a non-matter in favour of a resident of another State. The Commonwealth's proposition would preclude a State law enabling, say, decisions to make act of grace payments to be enforced as debts just because the beneficiary is a resident of another State. If there is no "matter" between the State and the non-resident, no constitutional purpose is served by requiring the relationship to be dealt with as a matter in a Ch III court.

18. ***Secondly***, the negative implication restated in *Citta Hobart* (2022) 276 CLR 216 at [1] should not be expanded. Contrary to CS [13], in *Burns v Corbett*, Kiefel CJ, Bell and Keane JJ did identify the premise from which the necessity for an implication flowed: "adjudicative authority in respect of the matters listed in ss 75 and 76 of the Constitution may be exercised only as Ch III contemplates and not otherwise" (at [43]). That accords with what Gibbs J identified in *Queen of Queensland Case* as the foundation for the implication: Parliament may "achieve the result that all of the matters mentioned in ss 75 and 76" should be finally decided by the High Court. There is no need to go beyond this.

19. ***Thirdly***, *Queen of Queensland Case* was not obviously concerned with judicial power in a non-matter. Although Queensland contended that the reference involved a request for "advice", at least Questions 2 and 3 of the notice of motion (at 304) concerned operative Commonwealth legislation and likely involved a dispute about its effect on Queensland's legal rights sufficiently concrete to constitute a matter. Gibbs J did not perceive that the Privy Council was being invited to give an advisory opinion divorced from a concrete dispute (at 308-310; cf *Burns v Corbett* at [103] (Gageler J)).

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