HIGH COURT OF AUSTRALIA

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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

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 OF THE AMICI CURIAE

PART I FORM OF SUBMISSIONS

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

PART II ISSUES PRESENTED BY THE APPEAL

2. The amici agree with the issue identified by the appellant (referred to hereafter as the State to avoid confusion in light of the multiple proceedings below).

PART III NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT

3. The State gave appropriate notice under s 78B of the *Judiciary Act 1903* (Cth) on 22 March 2024 in relation to the appeal: CAB 138.

PART IV FACTS

4. The amici agree with the State's summary of facts at AS [5]-[10]. It is useful to note some further context for the purposes of illustrating why there is a live issue as to the Tribunal's jurisdiction to determine an application for review of conduct under the *Privacy and Personal Information Protection Act 1998* (NSW) (**PPIP Act**) which includes a request for an order under s 55(2)(a) requiring the payment of damages.

5. For the purposes of the appeal (as opposed to the cross-appeal), the only relevant proceedings in the Tribunal below are 2019/382033 (summarised at J[17]ff CAB 78) and 2022/194626 (summarised at J[29] CAB 81). In the former, Ms Wojciechowska lodged an application under s 55 of the PPIP Act with the Tribunal in December 2019: Amici's Book of Further Materials (**ABFM** 1). The application alleged a breach of s 16 of the PPIP Act, but did not seek specific relief under s 55(2)(a) or otherwise. The Court of Appeal treated it as an application seeking damages under s 55(2)(a), in circumstances where Ms Wojciechowska did expressly seek such relief in the corresponding proceedings in the District Court of NSW, where she also seeks damages in tort and leave for her s 55 claim in 2019/382033 to be heard by the District Court under s 34B of the *Civil and Administrative Tribunal Act 2013* (NSW) (**CAT Act**): ABFM 12, 29. The District Court matter has been listed as inactive pending the resolution of the Supreme Court proceedings: J[21] CAB 79.

6. Meanwhile, in the Tribunal proceedings, Ms Wojciechowska brought an interlocutory application asking the Tribunal to confirm that it had no jurisdiction to determine her claim in light of *Burns v Corbett* (2018) 265 CLR 304. On 12 March 2021, the Tribunal held that it did have jurisdiction: [2021] NSWCATAD 55, CAB 5. On 22 March 2022, the Tribunal delivered another judgment regarding procedural orders which are not presently relevant: [2022] NSWCATAD 99, CAB 22. The substantive hearing was adjourned pending the resolution of the proceedings in the Court below: J[21] CAB 79.

7. In 2022/194626, Ms Wojciechowska lodged a Tribunal application under s 55 of the PPIP Act in June 2022: ABFM 52. It alleged a breach of ss 8-14 and 16-18 of the PPIP Act and expressly sought damages under s 55(2)(a). Ms Wojciechowska challenged the Tribunal's jurisdiction on *Burns v Corbett* grounds, but the Tribunal considered it unnecessary to decide the issue, concluding it did not have jurisdiction in any event because there had been no application for internal review as required by the PPIP Act: [2022] NSWCATAD 322, CAB 39. If the Tribunal lacked jurisdiction to deal with the application, on *Burns v Corbett* grounds, that determination is of doubtful status.

PART V ARGUMENT

Summary

8. The State and intervenors characterise the Court of Appeal's conclusion as turning solely on the effect of s 78 of the CAT Act. However, the Court's judgment should not be read so narrowly. The characterisation of power as judicial is necessarily multi-factorial. While accepting that there were a number of factors pointing towards an exercise of administrative power, Kirk JA (with whom Mitchelmore JA and Griffiths AJA agreed) also noted factors pointing the other way, including that the Tribunal was not exercising a traditional administrative or merits review function (it was not merely "standing in the shoes" of the agency: J[119]-[120] CAB 110), and that the award of damages for breach of a legal duty was "characteristically and historically awarded by courts as an exercise of judicial power": J[129], [134], CAB 113-4. The latter observation is consistent with the reasoning in ***Brandy*** *v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 269.

9. Kirk JA did not need to decide whether, absent the registration facility under s 78 of the CAT Act, these factors alone were sufficient to establish that the Tribunal was exercising judicial power: J[134], [143] CAB 115, 118. That is because his Honour concluded that "the effect of s 78 on an order made under s 55(2)(a) of itself leads to the conclusion that the Tribunal would be exercising judicial power" (J[141] CAB 117, also J[143] CAB 118) (underlining added). Kirk JA was not purporting to say that the mere ability to register a Tribunal order was determinative, or will always be determinative, irrespective of the nature of that order or the Tribunal's function in the relevant proceeding. The question was rather the effect of s 78 on a particular kind of order in a particular kind of proceeding – an order for damages made in response to an application under s 55.

10. In any event, it falls to this Court to consider all of the relevant factors, including the provision for registration, in characterising the exercise of power by the Tribunal. The function of the Tribunal in determining applications of the kind brought by Ms Wojciechowska has the classic characteristics of adjudicative determination. The Tribunal makes findings of fact, applies pre-existing legal standards (embodied in the Information Privacy Principles (**IPPs**) or an applicable Code of Practice (**Code**)) to those facts, ascertains whether the applicant has suffered financial loss, or physical or psychological harm and, if so, whether that loss or harm was caused by the contravention of the legal standards and determines if damages should be awarded. The outcome binds the parties to the Tribunal proceeding. Other administrative actions referred to by the

State and the intervenors involving the payment of money having a compensatory character, such as act of grace and workers compensation payments, do not depend on a finding of a contravention of a legal norm or duty and the contrast only serves to reinforce the judicial character of the Tribunal's powers here.

11. Although the Tribunal's role in determining an application under s 55 of the PPIP Act is called "administrative review" by the *Administrative Decisions Review Act 1997* (NSW) (**ADR Act**), that is a mere label which does not reflect the substance of what the Tribunal is doing. In determining such an application, the Tribunal is not "standing in the shoes" of any decision-maker. It is not exercising the same statutory powers which the agency did. Rather, it is making a fresh determination, directed to remedial powers unique to the Tribunal, of whether conduct engaged in by the agency breached the IPPs or an applicable Code.

12. An order for damages under s 55(2)(a) is also able to be rendered enforceable as a court judgment through the certification and registration process in s 78 of the CAT Act. However, the binding nature of the determination does not depend upon the enforcement mechanism: ***Citta*** *Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 at [16]. An order made under s 55 of the PPIP Act is binding when made.

13. The Tribunal was exercising judicial power in respect of a "matter" here, being the controversy between the parties as to whether the conduct of the agency breached legal duties arising under the PPIP Act, causing harm to Ms Wojciechowska.

14. The Court's orders of 7 May 2024 appoint the amici to contradict the State's arguments on the appeal. The amici take no position in relation to the cross-appeal.

The Tribunal exercised judicial power

"Administrative review" in name, but not in substance

15. Under s 55(1) of the PPIP Act, a person who is not satisfied with the outcome of an internal review by an agency may apply to the Tribunal for "an administrative review under the [ADR Act] of the conduct that was the subject of" the internal review application. Section 52(1) identifies the "conduct" being referred to. Relevantly, s 52(1) provides that Pt 5 applies to the "conduct" in the form of "the contravention by a public sector agency of an [IPP] that applies to the agency" and "the contravention by a public sector agency of a [Code] that applies to the agency".

16. The subject of an application to the Tribunal is thus conduct, and conduct of a particular kind defined by reference to norms imposed by the Act. The Tribunal is not reviewing any decision made by the internal reviewer or the agency, as that concept is ordinarily understood: contra NT [26].

17. On reviewing the "conduct of the public sector agency concerned", the Tribunal may decide not to take any action on the matter, or may make any one or more of the orders listed in s 55(2). Only the Tribunal may make such orders. They include "an order requiring the public sector agency to pay to the applicant damages not exceeding $40,000 by way of compensation for any loss or damage suffered because of the conduct": s 55(2)(a). The other orders that may be made under s 55(2) are, like an award of damages, directed to remedying any breach of the IPPs or Code that the Tribunal may find. Putting aside the power to make "such ancillary orders as the Tribunal thinks appropriate" (s 55(2)(g)), each subparagraph of s 55(2) is expressed in terms of a power to make an order "requiring" the relevant public sector agency to do, or refrain from doing, something. There is a clear analogy with the power of courts to issue prohibitory and mandatory injunctions: J[128].

18. Section 55(1) labels this an "administrative review under" the ADR Act. Despite that label, the review that occurs in the context of an application under the PPIP Act is fundamentally different from typical merits or administrative review.

19. Under the usual model of merits review, a tribunal "re-exercise[s] the functions of original administrative-decision makers".[1] The tribunal "stand[s] in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review".[2] The tribunal "exercises the same power or powers as the primary decision-maker, subject to the same constraints".[3] The tribunal decides the correct and preferable decision to be made in the exercise of that same power and will affirm, vary or set aside the decision previously made in the exercise of that power.

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[1] ***Frugtniet*** *v Australian Securities and Investments Commission* (2019) 266 CLR 250 at [14] (Kiefel CJ, Keane and Nettle JJ). See also ***Shi*** *v Migration Agents Registration Authority* (2008) 235 CLR 286 at [134], [142] (Kiefel J).

[2] *Frugtniet* (2019) 266 CLR 250 at [51] (Bell, Gageler, Gordon and Edelman JJ).

[3] *Frugtniet* (2019) 266 CLR 250 at [51] (Bell, Gageler, Gordon and Edelman JJ), see also [14]-[15] (Kiefel CJ, Keane and Nettle JJ).

20. By contrast, in exercising its function of review under s 55 of the PPIP Act, the Tribunal is not standing in the shoes of the agency. The breach alleged against the agency may or may not have occurred in the exercise of a statutory power (eg, a power to use or disclose information). But regardless the Tribunal is not determining what should now be decided or done in the exercise of that power. Rather, the Tribunal is deciding whether the conduct that is the subject of complaint was in breach of the IPPs or a Code, and what if any remedy should issue. The distinction is an important one when it comes to the characterisation of power, as recognised in the treatment of the different schemes of taxation review in *Shell Co of Australia Ltd v Federal Commission of Taxation* (1930) 44 CLR 530 at 541-542 and *British Imperial Oil Company Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422; as referred to in argument in *Brandy* at 249.

21. This functional difference is reflected in the language of s 55(2). As Kirk JA noted, orders made under that subsection "are not ones made in the voice of the agency; rather they are orders directed *to* the agency": J[120] CAB 110. The State dismisses this language as merely reflecting that the Tribunal is not the agency: AS [44]; also Vic [22]. But it does more than that. It reflects a different conception in the review structure of the relation of the Tribunal to both agency and applicant. The Tribunal's function is not to re-exercise any power given to the agency, but rather to decide whether conduct of the agency breached the norms imposed by the PPIP Act and if so what compulsory orders should be made against the agency. In *Huddart Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330 at 357 Griffith CJ referred to judicial power as the power which "every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects". Here the Tribunal is exercising that authority to resolve controversies between State agencies and subjects.

22. Section 55(3) provides that s 55 "does not limit any other powers the Tribunal has" under Div 3, Pt 3, Ch 3 of the ADR Act. Section 55 does not apply the provisions of the ADR Act to the Tribunal when determining an application under s 55; rather, it leaves their application to be decided according to their terms.

23. The application of any powers of the Tribunal conferred by the ADR Act is informed by the context of a review under s 55 of the PPIP Act. Section 63(1) of the ADR Act requires the Tribunal to decide what the "correct and preferable" decision is. In context, that does not mean the Tribunal is acting as if it were the agency making a decision. That is the orthodox model of merits review, which is inapplicable here. The Tribunal must instead decide what is the correct and preferable decision to be made about the character of the

agency's conduct and the orders that should issue. Section 63(2) (which provides that the Tribunal may exercise all the functions conferred or imposed by any relevant enactment on the administrator who made the decision) may have little or no practical impact on this process. It certainly cannot change the character of the Tribunal's review, which is dictated by s 55 of the PPIP Act.

24. Section 63(3), read in the context of its application to review under s 55 of the PPIP Act, is not engaged. The concept of a "decision" under the ADR Act, as it applies to "conduct" that is subject of review under the PPIP Act, has a special meaning: see ss 6(1) and 7(2) of the ADR Act. The Court should reject the State's attempts to strain the language of that provision to accommodate the Tribunal's powers under s 55: AS [34], [42]. The outcome of a review of conduct under s 55 of the PPIP Act may be an order requiring the agency to engage in further acts to deal with the consequences of the conduct that is under review (including the payment of damages to compensate for the loss that flowed from that conduct). But the Tribunal is not making any orders to "vary" or "substitute" the impugned conduct itself.

25. This contextual reading is consistent with the legislative history. When the PPIP Act was passed, s 55(1) enabled a person to apply to the Tribunal "for a review of the conduct" that was the subject of the internal review application, without any reference to "administrative review" or the ADR Act. Section 55(3) preserved "any powers" the Tribunal had under Ch 5 Pt 3 Div 3 of the former *Administrative Decisions Tribunal Act 1997* (NSW) (**ADT Act**). These provisions were amended in 2014 on the creation of the NSW Civil and Administrative Tribunal. Reviews previously conducted by the ADT under the ADT Act were now to be conducted by the Tribunal under the ADR Act. The *Civil and Administrative Legislation (Repeal and Amendment) Act 2013* (NSW) amended a range of NSW legislation to change references to the "Tribunal" to the "Civil and Administrative Tribunal", the ADT Act to the ADR Act, and reviews to "administrative reviews" under that Act.[4] In circumstances where the language of "administrative review" in s 55(1) was inserted as part of a wide scale change to the review system in NSW, little weight can be placed on that language in s 55 as suggesting a specific intention that the Tribunal's powers should be understood as involving the affirmation, variation or setting

[4] The *Civil and Administrative Legislation (Repeal and Amendment) Act 2013* (NSW), Sched 2, item 2.118 amended the PPIP Act to replace various references to the "Tribunal" with "Civil and Administrative Tribunal"; replaced references to the ADT Act with the ADR Act; replaced reference to "review" with "administrative review"; and inserted into s 55(1) the language of "may apply to the Civil and Administrative Tribunal for an administrative review under the [ADR Act]".

aside of the conduct under review. A more harmonious reading is that the Tribunal's powers in that regard do not need to be engaged where the review is of conduct of the kind referred to in s 52(1) of the PPIP Act.

26. None of the above is determinative of whether the Tribunal was exercising judicial power, but it negates one of the key arguments advanced by the State as to why the power is administrative.

Damages for breach of a legal norm

27. Part 2 of the PPIP Act imposes obligations on public sector agencies regarding the collection, retention, access, use and disclosure of personal information. Although described as "principles", they are not mere "guides for good administration" (cf AS [60]) or objects to be strived at.[5] They are given legal force by the command in s 21(1): "A public sector agency must not do any thing, or engage in any practice, that contravenes an [IPP] applying to the agency". Section 32(1) imposes an equivalent obligation in respect of Codes. Conduct which breaches an IPP or Code is described as a "contravention", which reinforces the binding normative character of IPPs and Codes.

28. The State is wrong in submitting that a finding of a contravention "is not a finding that a legal duty has been breached" but rather a finding of "maladministration": AS [60]; see also Qld [14]. That submission goes against the plain terms of ss 21(1) and 32(1). By virtue of those provisions, the IPPs and Codes impose legal duties on public sector agencies. The fact that the PPIP Act lays down the mode of enforcement of those duties, under Parts 4 and 5 (see ss 21(2), 32(2), 45(2) and 52) does not alter that conclusion. Section 69 reinforces rather than undermines that conclusion. While s 69(1) says that nothing in Pt 2 or Pt 3 creates any new legal rights, that is "subject to" sections 21 and 32: see s 69(2). Those are the very provisions which impose legal duties on agencies and create corresponding legal rights.

29. The legal duties imposed on agencies exist independently of any process being engaged under Part 5 by a person aggrieved about conduct as it affects them. Part 5 is concerned with a particular process for dealing with alleged contravention. Part 4 provides for different processes directed to compliance with the legal duties of agencies, including investigations by the Privacy Commissioner (ss 36-38, 45).

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[5] Contrast, eg, the "water management principles" set out in s 5 of the *Water Management Act 2000* (NSW).

30. As noted above, the Tribunal may order a range of relief under s 55(2) designed to remedy a contravention, including various remedies resembling prohibitory and mandatory injunctions.[6] Under s 55(2)(a) the Tribunal may make an order requiring the agency to pay "damages … by way of compensation for any loss or damage suffered because of the conduct". A precondition to any award of damages is thus the Tribunal ascertaining that the applicant has suffered "loss or damage" and that it was suffered "because" of the conduct. The Tribunal may only award damages if satisfied that the applicant has suffered "financial loss, or psychological or physical harm, because of the conduct": s 55(4)(b). Damages are excluded in certain circumstances relating to the position of convicted inmates: s 55(4A).

31. In this way, the Tribunal will be determining questions of breach of legal duties and what relief should issue, including questions of causation and quantum. This goes far beyond the application of statutory criteria to factual findings, as administrative decision-makers often do, or the forming of an opinion as to legal rights and obligations as a step along the way to an administrative decision: see the cases cited at J[77] CAB 95-96; cf NT [46].

32. This exercise is also fundamentally different from "act of grace" payments and other administrative awards of compensation relied on by the State and intervenors: AS [58], Vic [33], WA [36]. Those examples do not involve a decision-maker awarding damages for a contravention of a legal norm or duty: J[131] CAB 114. That is the very point of an act of "grace". A claim for unfair dismissal may involve the taking into account of a norm to the effect of the dismissal being "harsh, unjust or unreasonable" (J[131] CAB 114), but that does not involve the tribunal determining whether a statutory duty, which agencies are commanded to comply with, has been breached or what loss that breach has caused.

33. Moreover, such awards are not usually described as "damages". The use of the word "damages" is significant, because it is usually understood as being an award of money for a civil wrong.[7] The use of that word in s 55(2)(a) has added significance, given that the legislature conferred on agencies (through the internal review process) a different power to "take such remedial action as it thinks appropriate (eg the payment of monetary *compensation* to the applicant)": s 53(7). Irrespective of what meaning "compensation" may bear at common law (NT [36]-[37]), the point for present purposes is that the legislature gave that power to the internal reviewer but chose to adopt the more formal

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[6] Compare ***Meringnage*** *v Interstate Enterprises Pty Ltd* (2020) 60 VR 361 at [103]ff.

[7] Edelman, *McGregor on Damages* (21st ed, 2021) at [1-001].

language of "damages" in s 55(2)(a), in a context where there are different preconditions to an award of "damages" by the Tribunal that are analogous to those attending awards for civil wrongs.

34. The exercise undertaken by the Tribunal is similar to the exercise undertaken by the Human Rights and Equal Opportunity Commission (**HREOC**) in *Brandy*. Pt II of the *Racial Discrimination Act 1975* (Cth) (**RDA**) prohibited various acts of racial discrimination. The legal duties thereby created were purely statutory. The only mechanism for enforcing those obligations in the first instance was via the process provided for in s 22, which enabled a complaint to be lodged with HREOC. Unless the complaint was summarily dismissed, HREOC was to hold an inquiry, and under s 25Z could determine the matter by, inter alia, making a declaration that the respondent should pay to the complainant damages by way of compensation for any loss or damage suffered by reason of the respondent's conduct.

35. While the registration provisions (discussed further below) assumed importance for the Court's decision in *Brandy*, the Court also considered that the nature of the exercise being undertaken by HREOC pointed towards the exercise of judicial power. Mason CJ, Brennan and Toohey at 258 explained that it was accepted that the trial of actions for breach of contract and for wrongs are "inalienable exercises of judicial power" not just because of history and precedent but also because of the principle that "the process of the trial results in a binding and authoritative judicial determination which ascertains the rights of the parties". So, their Honours held at 258 (underlining added):

> *when A alleges that he or she has suffered loss or damage as a result of B's unlawful conduct and a court determines that B is to pay a sum of money to A by way of compensation, there is an exercise of judicial power. The determination involves an exercise of such power not simply because it is made by a court but because <u>the determination is made by reference to the application of principles and standards "supposed already to exist"</u>. And the determination is binding and authoritative in the sense that there is what has been described as an immediately enforceable liability of B to pay A the sum in question.*

36. Their Honours concluded at 259 that "the determinations by [HREOC] for the payment of damages by the appellant and ATSIC were made by reference to the application of the pre-existing principles and standards prescribed by the provisions of ss 9 and 15 of the [RDA]". Deane, Dawson, Gaudron and McHugh JJ reasoned to a similar effect at 269, while also noting that the remedies which HREOC could award, including damages, and declaratory and injunctive relief, also made "its functions closely analogous to those of a court in deciding civil or criminal cases". The reason such determinations were not

"binding and authoritative" was because the statute expressly said so: s 25Z(2). The registration process was of particular significance in that scheme because it operated to revise that position and transform the determination into one that was both binding and amenable to the enforcement machinery of a court

37. The exercise being undertaken by the Tribunal under s 55 of the PPIP Act is materially the same: statutory obligations, which have no close common law analogues, and which are enforceable solely by reference to a statutory mechanism, are said by an applicant to have been breached and the Tribunal is tasked with determining, by applying the law to the facts before it, whether the obligations have been breached and what relief should issue. The outcome binds the relevant agency and quells the controversy.

38. The judicial nature of the exercise being undertaken by the Tribunal – determining breach, loss, causation and quantum – is reinforced by the judicial-like process that the Tribunal adopts. Although the process is informal and the rules of evidence do not apply,[8] the process involves a dispute between two parties, the service of evidence and submissions, the adducing of oral and written evidence at the hearing (and the ability to object), and the making of findings based on that material: see J[93]-[94] CAB 101.

39. The registration process under s 78 of the CAT Act must be seen as operating in this context. On that basis, Kirk JA was right to conclude that *Brandy* was "materially indistinguishable": J[140] CAB 117.[9] The various attempts by the State and intervenors to distinguish the Tribunal's function here, to which we now turn, should be rejected.

Nature and scope of obligations under IPPs

40. The State and intervenors submit that the IPPs are "amorphous": AS [17], citing J[123] CAB 111; see also Vic [18], Qld [12], WA [34]. It is unremarkable that the IPPs are drafted at a level of generality, particularly given their default application to all public

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[8] CAT Act, s 38.

[9] See *Commonwealth v Anti-Discrimination Tribunal* (2008) 169 FCR 85 at [205] (Kenny J) and *Meringnage* (2020) 60 VR 361 at [102] (the Court), where comparable exercises undertaken by State tribunals were considered to be judicial power. See also *Kentish Council v Wood* (2011) 21 Tas R 59 at 68-69 (Blow J, with whom Evans and Porter JJ agreed), albeit in the context of determining whether the Tribunal's decision was administrative for the purposes of the *Judicial Review Act 2000* (Tas): "If one looks at what, in substance, the tribunal did in this case, there are excellent reasons for regarding its two decisions as judicial in nature. It conducted a hearing in relation to a complaint by an individual who alleged that the council had broken the law, and who sought compensation. It concluded that the council had broken the law, and made a binding and enforceable order for the payment of compensation to her for the consequences of that breach as suffered by her. Hearing and determining a case about an alleged breach of the law, and assessing and awarding compensation for consequences of that breach, are activities routinely undertaken by civil courts, and are essentially judicial in nature."

sector agencies.[10] That does not deny them the character of legally enforceable norms. The IPPs are no more "amorphous" than other legal standards that are applied by courts on daily basis. For example, s 8 and a number of exemptions adopt the concept of "reasonable necessity", which is well familiar to courts.[11] The law of negligence has evolved around concepts of reasonableness that are necessarily evaluative and general in nature. Some of the IPPs require an assessment of whether information is relevant, accurate, up to date, complete and/or misleading (eg ss 8, 11, 15, 16), in circumstances where this assessment is expressly tethered to the purpose for which the information is proposed to be collected, used or disclosed. None of the concepts involved are alien to a judicial process or inapt to be described as giving rise to legal rights and duties.

41. The State and intervenors also note that the IPPs only apply to government agencies and not to the world at large: AS [15], Vic [20], NT [54]; WA [33]; see also J[109] CAB 106. The fact that a body of law is limited in its application to particular persons does not mean that the duties it imposes do not give rise to justiciable disputes which can be resolved in the exercise of judicial power. The concept of such limited application is foundational to administrative law. The same may be said of common law norms, such as misfeasance in public office. In a statutory context, it is entirely orthodox to have legal rights and duties directed only to particular governmental agencies – for example, the regulation of police powers under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) – in circumstances where the resolution of disputes about such rights and duties is unquestionably the subject of judicial power.

Modification by codes of practice

42. The application of the IPPs may be modified by codes of practice: ss 20(2)(a), 30: AS [18], [63]; Vic [20]. However, this does not mean the application of IPPs is simply at the whim of public sector agencies. The executive does not have power to grant case by case exemptions.[12] There is a statutory process for creating new legal instruments that serve to modify the default norms imposed by the Act. An agency (or the Privacy Commissioner) may prepare a draft Code of Practice for approval by the Minister: s 20(1). That process is carefully regulated: the agency is required to consult with the Privacy Commissioner

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[10] Subject to modification of their application: see PPIP Act, s 20(2).

[11] *Thomas v Mowbray* (2007) 233 CLR 307 at [20]-[26] (Gleeson CJ), discussing "reasonably necessary".

[12] Particular exemptions are prescribed by the Act itself: see Pt 2, Div 3. The Privacy Commissioner also has a power to direct that an agency is not required to comply with an IPP or Code or to modify their application: s 41.

on the draft Code (s 20(2)), the agency must submit the draft Code to the Minister (s 20(4)), the Minister is required to take into account any submissions made by the Privacy Commissioner (s 20(4)) and the Minister then decides whether or not to make the Code: s 20(4). The Code is made by order of the Minister and is to be published in the Gazette, and only takes effect upon publication: s 20(5), (6). The agency is to comply with any such Code, in the same way that it is required to comply with an IPP: s 32.

43. Thus the making of a Code has similarities to the making of regulations by the executive: an instrument of general application is prepared, consulted on, made by order of the Minister, publicly notified, and only takes effect on being publicly notified. Regulations can, like a Code, modify the application of the parent Act (as long as the parent Act permits). It is accepted that the Codes are not statutory rules and are not disallowable by Parliament (AS [18]), but they are nevertheless subject to the statutory prerequisites. Nothing in the scheme for such instruments changes the binding character of either the default norms or modified norms. The ability to modify the application of the IPPs does not favour the Tribunal's function being characterised as non-judicial.

The role of government policy

44. The State and various intervenors also rely on the fact that s 64 of the ADR Act requires it to "give effect to any relevant Government policy in force": AS [33], Vic [29], NT [42], WA [30]. However, it is necessary to be clear about how government policy would actually feed into the function the Tribunal is exercising in determining an application under s 55. Section 64 of the ADR Act is primarily concerned with "Government policy" as defined in s 64(5), being a Cabinet or Ministerial policy to be applied "in the exercise of discretionary powers by administrators". Such policies may be apt to apply in a more orthodox form of administrative review directed to a "decision" (as ordinarily understood) where the Tribunal "stands in the shoes" of the original decision-maker and decides whether or not to exercise a statutory discretion in the same way.

45. However, the Tribunal in this context is not exercising an administrative review function of that kind. Its role is to determine whether or not the IPPs or the Code have been breached and to issue an appropriate remedy. A policy is only to be given effect by the Tribunal if it is "relevant" and "except to the extent that the policy is contrary to law": s 64(1). Plainly, a policy could not modify the IPPs or a Code, and so could not alter the Tribunal's essential function of determining whether or not a breach has occurred. Although there is an element of discretion involved in a Tribunal determining the appropriate relief to grant in the event of a contravention, that is not the "exercise of

discretionary powers" to which s 64 of the ADR Act is directed: contra NT AG [45]. Read in context, s 64 is concerned with the policies that agencies themselves apply (see ss 64(1) and (4) of the ADR Act), and here the agency under review does not exercise any discretion of the kind exercised by the Tribunal under s 55(2).

46. It can therefore be seen that this is not a case where "considerations of policy have an important part to play in the determination to be made".[13] This case is starkly different from *Precision Data*, where the Panel was not involved in determining whether legal obligations had been breached at all, but rather whether it was, inter alia, in the "public interest" to declare an acquisition "unacceptable", having regard to matters such as "commercial policy" as well as "any other matters the Panel considers relevant". In any event, the taking into account of policy is not necessarily conclusive.[14] It is not a factor of significance here given the nature of the Tribunal's functions described above.

Discretionary nature of relief

47. The Court below characterised an award of damages as "discretionary" (J[115] CAB 109), presumably by reference to the use of the word "may" in the chapeau to s 55(2). This feature is relied on by the State and intervenors: AS [58], [61]; NT [39]. However, all this means is that, having found a breach, the Tribunal may decline to make an order under s 55(2) if the breach has already been remedied in some other fashion.[15] It is not the case that the Tribunal, having found that a breach occurred, and that the breach caused a loss that has not otherwise been remedied, could nevertheless decline to award any damages. In this way the Tribunal would approach the issue as a court would. In any event, having a discretion to fashion appropriate relief and, if appropriate, decline relief is not an indication of non-judicial power. To return to the example of administrative law, prerogative relief is discretionary.[16] Yet plainly the courts exercise judicial power when engaging in judicial review of administrative decisions. Indeed the exercise of judicial discretion, where appropriate, is characteristic of judicial power.[17]

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[13] *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191 (the Court).

[14] *Attorney-General (Cth) v Alinta Limited* (2008) 233 CLR 542 at [14] (Gummow J), [40] (Kirby J), [169] (Crennan and Kiefel JJ); *Thomas v Mowbray* (2007) 233 CLR 307, [89]-[91] (Gummow and Crennan JJ).

[15] *Vice Chancellor Macquarie University v FM (No 2) (GD)* [2004] NSWADTAP 37 at [54]; *KP v Narrandera Shire Council (GD)* [2011] NSWADTAP 15 at [23] (both cited at J[115]).

[16] *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at [52]-[59].

[17] *Rizeq v Western Australia* (2017) 262 CLR 1 at 23 [52] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Palmer v Ayres* (2017) 259 CLR 478 at [47] (Gageler J).

Similarity to internal reviewer's powers

48. It is of little moment that an internal reviewer also has the power to award compensation under s 53(7)(c): cf AS [57], [59]; NT [35]-[38]. In fact the observation points the other way once it is appreciated that the legislature conferred distinct powers on agency internal reviewers, on the one hand, and the Tribunal on the other. This is done in a way that departs substantially from the usual scheme for merits review. The Tribunal, unlike the agency, is given power to award damages, in the form of an order directed to the agency, only in the specific circumstances laid down by subsections (2)(a), (4) and (4A) and only after following a process that has judicial characteristics (quite unlike the process followed by the internal reviewer). Understood in this context, the power to award damages is a strong factor pointing towards the exercise of judicial power.

Registration of certificate

49. Before addressing the application and effect of s 78 of the CAT Act, it is important to emphasise that, even absent registration, an order made by the Tribunal under s 55 is binding: J[142] CAB 142.[18] In *Citta*, the plurality observed that, under s 89 of the *Anti-Discrimination Act 1998* (Tas) (which, for the purposes of this point, is relevantly similar to s 55 of the PPIP Act) an order made by the Tribunal on finding a complaint established takes immediate effect as an order with which the person to whom it is directed is bound to comply.[19] Registration of the order under s 90 of that Act was an aid to enforcement but was not a precondition to the order being required to be complied with.[20] Likewise, Edelman J observed that "even without enforcement, s 89 is a remedial provision that is the epitome of judicial power".[21] Thus, even absent registration, the binding effect of the Tribunal's orders weighs heavily in favour of the power being judicial in nature.

50. The fact that orders of the Tribunal under s 55 of the PPIP Act are directed to public sector agencies is itself significant. In *Brandy* Mason CJ, Brennan and Toohey JJ observed that the registration procedure in the *HREOC Act* did not apply to Commonwealth agencies, and concluded that the Parliament "apparently assumed that in those cases the

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[18] That is in contrast to the orders made by HREOC in *Brandy*, which were expressly stated by the statute not to be binding, which position was "reversed" by the provisions providing for registration.

[19] ***Citta*** *Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 at [16] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[20] *Citta* (2022) 276 CLR 216 at [16] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

[21] *Citta* (2022) 276 CLR 216 at [56] (Edelman J). His Honour continued at [57]: "After a decision that can include the findings of fact and application of law, s 89 empowers the Tribunal to impose remedies to settle a dispute about a legal relation between persons for the future, creating a binding norm".

determination will be met, so far as the Commonwealth is concerned, without the need for registration": 254. The point applies with added force in relation to s 55(2) of the PPIP Act, given that orders of the Tribunal take the form of an order "requiring" the relevant public sector agency to do, or refrain from doing, a specified thing.

Section 78 applies to orders made under s 55(2)(a)

51. Section 78(1) provides that "for the purposes of the recovery of any amount ordered to be paid by the Tribunal … the amount is to be certified by a registrar". Once that certificate is filed in a relevant court, it operates as a judgment of that court: s 78(3). The State properly accepts that an order made under s 55(2)(a) is capable of answering the description of an "amount ordered to be paid by the Tribunal": AS [67]. Its arguments as to why s 78 nevertheless does not apply should be rejected.

52. The State submits that an order made under s 55 is not an order of the "Tribunal", because it is deemed by s 66(2) to be a decision of the administrator: AS [68]. However, for s 66(2) to be engaged, it must be a decision which "varies, or is made in substitution for, an administrator's decision". For the reasons given above, a finding that an agency has breached an IPP or Code does not in any sense "vary" or "substitute" the agency's impugned conduct.

53. In any event, s 66 does not mean that a decision of the Tribunal otherwise loses the character of being a decision of the Tribunal. Section 66(2)(a) provides that the Tribunal's decision is taken to be the decision of the administrator "other than for the purposes of an administrative review under this Act". That carve out ensures that the Tribunal's decision will still be treated as a decision of the Tribunal for the purposes of any further consequential orders or procedural steps to be taken following the decision. The words "under this Act" do not limit the carve out to orders or steps made under the ADR Act. Those words merely describe the nature of the review. The Tribunal's decision must remain a "decision of the Tribunal" for the purposes of the CAT Act as well, which deals with a range of post-decision matters: including the internal appeal jurisdiction under s 32 (which applies to a "decision made by the Tribunal"), giving notice of the decision under s 62(1) (which applies to "any decision [the Tribunal] makes"), and the making of appeals to the Supreme Court under s 83(1) (which applies to "any decision made by the Tribunal"). If the State's construction of s 66(2) were correct, there would be no right to appeal a Tribunal decision's made under s 55 of the PPIP Act which varies or substitutes the decision under review, or indeed to appeal any sort of decision in its administrative review jurisdiction which varies or substitutes the decision under review. That goes

against the plain terms of s 32(1)(a) which expressly envisage an internal appeal jurisdiction over decisions "in proceedings for [an] … administrative review decision".

54. As to the argument that s 78 does not apply to public sector agencies, while it may be unlikely that a public sector agency would fail to comply with an order for damages, that is not a reason to construe the plain terms of s 78 narrowly: cf AS [70]. It is far from unusual for delays and mistakes to occur in government administration and it is not beyond the realm of possibility that an applicant might usefully avail themselves of the registration mechanism: see J[138] CAB 116.

55. The State notes that the certificate needs to identify the "person" liable to pay that amount (s 78(2)): AS [71]. It is true that, given the terms of s 55(2)(a), the order to pay damages will be directed to the "public sector agency", which may be a legal person or an emanation of the State with no separate legal personality. That is hardly an insurmountable problem – if the latter situation arises the State is the relevant person.

56. Finally, it is not "incoherent" that one kind of order under s 55(2) would be enforceable via s 78 but the other forms of orders are not: cf AS [72]. The legislature has chosen through s 78 to create a mode of enforcement for the recovery of monetary awards. There are sound reasons in policy not to create any equivalent arrangement for non-monetary awards made from time to time by the Tribunal, which tend to involve significantly greater complexity of enforcement. There is nothing surprising or incoherent about this legislative discernment.

Effect of registration

57. Once it is accepted that s 78 applies to an order under s 55(2)(a), then, leaving aside the requirement for a "matter" (addressed below), *Brandy* is materially indistinguishable. Both cases involve the resolution of a dispute between two parties by applying pre-existing legal standards, to the facts as found and rendering a binding award which is enforceable as an order of the court. The Tribunal's task falls squarely within the description of judicial power given by Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374.

58. It also coheres with what has been described as the "essential character" of judicial power stemming from the "unique and essential function that judicial power performs by

quelling controversies about legal rights and legal obligations through ascertainment of facts, application of law and exercise, where appropriate, of judicial discretion".[22]

The Tribunal was determining a "matter"

59. A matter exists only if "'there is some immediate right, duty or liability to be established by determination of the Court' in the administration of a law" and if the "determination can result in the Court granting relief which both quells a controversy and is available at the suit of the party seeking that relief": AS [47], citing *Unions NSW v New South Wales* (2023) 97 ALJR 150 at [15] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

60. The same factors which point in favour of the Tribunal exercising judicial power also point towards there being a "matter". The PPIP Act establishes various legal duties via s 21(1) and 32(2). Where conduct occurs that an affected person considers involves a contravention of those legal duties, a controversy arises between that person and the public sector agency. Different processes might then be applied to seek to resolve that controversy. A complaint might be made to the Privacy Commissioner which may trigger an investigation under Part 4: ss 45 and 48. An application for review might be made under Part 5, which may result in the Tribunal quelling the controversy, including by granting binding relief under s 55(2). The existence of the controversy, as a thing that exists independent of the particular process invoked to address the controversy, is borne out by the alternative avenues for redress under Parts 4 and 5.

61. The State and intervenors rely on the observation in *Citta* at [31] that a matter "encompasses 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". The State and intervenors submit that because the relevant obligations are established by the PPIP Act, and cannot be enforced otherwise than through Pt 5 of the PPIP Act (see ss 21(2), 31(2), 69), they fail to meet that test: AS [54]-[55], Vic [14]-[15], NT [65], WA [20]-[21]; see also J[84].

62. However, the observation in *Citta* at [31] should be understood in context. The plurality cited *Fencott v Muller* (1983) 152 CLR 570 at 603 as authority for that proposition. In *Fencott*, Mason, Murphy, Brennan and Deane JJ cited the passage from *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265, holding that "matter" refers not to a "legal proceeding" but the "subject matter for determination in a legal proceeding". Their

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[22] *Rizeq v Western Australia* (2017) 262 CLR 1 at 23 [52] (Bell, Gageler, Keane, Nettle and Gordon JJ), citing *Fencott v Muller* (1983) 152 CLR 570 at 608.

Honours noted at 603 that a particular federal matter may be only part of a proceeding, and a particular legal proceeding may relate to part only of what should properly be seen as the one larger "matter". This led their Honours to describe a matter as a "justiciable controversy, identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of the controversy": at 603. It was the controversy that was to be identified independently of the proceeding to be brought.[23] It was not suggested in *Fencott*, which proceeded on the basis that a claim for relief under s 82 of the *Trade Practice Act 1975* (Cth) for misleading and deceptive conduct involved a "matter" for the purposes of s 76(ii) of the Constitution, was no less a "matter" because the relevant legal duty and enforcement mechanism were statutory.

63. In this way, the plurality in *Citta* was merely repeating the unexceptional proposition that the existence of the relevant controversy does not depend upon the commencement of a proceeding. They were not suggesting that the existence of the legal rights or duties must not depend on the commencement of a proceeding: contra AS [48]. In any event, for the reasons addressed above, the PPIP Act does create legal rights and duties which exist independently of the commencement of any particular process, and may be the subject of controversy independently of any particular process.

64. As explained above, the statutory regime in this case is very similar to that under consideration in *Brandy*. There, the RDA prohibited certain discrimination and provided a mechanism for enforcing those statutory rights and duties before HREOC. The rights and duties created by the RDA, like the rights and duties under the PPIP Act, did not exist independently of the statute and there was no mechanism to litigate them in the first instance outside of the inquiry process provided for in the statute. The rights and duties imposed by the anti-discrimination legislation in *Citta* were relevantly similar. The Court in *Citta* plainly regarded there to be a "matter" arising under the *Anti-Discrimination Act 1998* (Tas), notwithstanding that the Act prescribes (in Part 6) the mode for the resolution of complaints about non-compliance with the norms created by the Act. That follows the same structure as the PPIP Act.

65. By contrast, *Attorney General (NSW) v FJG* (2023) 111 NSWLR 105 concerned an entirely different statutory regime: contra AS [49], [55]; NT [63]-[64]. That was a true

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[23] See, to a similar effect, *Unions NSW v New South Wales* (2023) 97 ALJR 150 at [19] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ): A "'matter' can exist whether or not a proceeding has been commenced, and a 'matter' can cease to exist after a proceeding has been commenced."

case of "administrative review", where the Tribunal was being asked to "stand in the shoes" of the Registrar of Births, Deaths and Marriages and decide whether the correct and preferable decision was to refuse to make corrections to the Register which the Registrar had refused to make under s 45 of the *Births, Deaths and Marriages Act 1995* (NSW). Beech-Jones JA (as his Honour then was) concluded there was no "matter": at [93]. Having cited *Citta* at [31], his Honour observed that the application to the Tribunal "did 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": at [93]. The reason why the proceeding did not involve a "matter" was because the applicants were not seeking to enforce legal rights or duties at all; rather, they were seeking true merits review of the Registrar's decision. To the extent his Honour also considered it relevant that the rights and duties were not capable of enforcement otherwise than through the statutory review mechanism, the submissions at [62]-[64] above are repeated.

PART VI ORDERS

66. If the State is successful, there is no reason why the orders sought by the State should not be made.

PART VII ESTIMATE

67. The amici estimate that up to 2 hours will be required for oral argument.

Dated: 19 June 2024

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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

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

ANNEXURE TO THE SUBMISSIONS OF THE AMICI CURIAE

Pursuant to Practice Direction No. 1 of 2019, the amicus set out below a list of constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
Commonwealth			
1	*Commonwealth Constitution*	Current	s 76
2	*Racial Discrimination Act 1975* (Cth)	As at 1995 (at time	Pt II, Pt III

		Brandy decided)	
State and Territory			
3	*Administrative Decisions Review Act 1997* (NSW)	Current	ss 63-66
4	*Anti-Discrimination Act 1998* (Tas)	Current	s 89, 90
5	*Civil and Administrative Tribunal Act 2013* (NSW)	Current	ss 32, 34B, 38, 62, 78, 83
6	*Civil and Administrative Legislation (Repeal and Amendment) Act 2013* (NSW)	As passed	Item 2.118
7	*Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)	Current	
8	*Privacy and Personal Information Protection Act 1998* (NSW)	Current	s 8-21, 29-32, 36-38, 41, 45, 52-55, 69