



# HIGH COURT OF AUSTRALIA

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### Details of Filing

File Number: S39/2024  
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### Important Information

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**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

**OUTLINE OF ORAL ARGUMENT OF THE AMICI CURIAE**

## **Part I: Certification**

S39/2024

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

## **Part II: Propositions to be advanced in oral argument**

### **A. The statutory context for the review performed by NCAT under the *PPIP Act***

2. The subject matter of NCAT's review is conduct, involving an alleged contravention of an information protection principle (**IPP**) or an applicable privacy code of practice (**Code**): *PPIP Act* ss 52, 55 (**JBA T6**); Amici submissions (**AS**) at [15]-[16].
3. IPPs involve legally binding norms of conduct concerning the collection, use, disclosure and holding of personal information: *PPIP Act* ss 8-19, 20, 21; **AS** [27].
4. There are various statutory exemptions applying to particular agencies and in respect of particular types of activities, and provision for further exemptions to be created: *PPIP Act* ss 23, 23A, 24, 25, 26, 41. The qualified nature of the norms affects their content in a given case, but does not detract from the conclusion that legal norms of conduct are imposed by the statute.
5. Codes are also a source of legally binding rules "regulating" the collection, disclosure, use and handling of personal information by public sector agencies: *PPIP Act* ss 29, 30, 31, 32.
6. The review functions of NCAT are materially different from those engaged by other complaint mechanisms: (a) complaints to the Privacy Commissioner: *PPIP Act* ss 45-50; (b) an application for internal review must be dealt with by a particular type of individual within an agency, or by the Privacy Commissioner: *PPIP Act* ss 53, 54(3). The agency has a broad discretion in responding: s 53(7).
7. The outcome of NCAT review where a contravention has occurred will involve "orders" that "require" that particular things be done or not done: *PPIP Act* s 55; **AS** [17].

### **NCAT is not engaged in orthodox "merits review": **AS** [15]-[26]**

8. Merits review involves reconsideration of an exercise of decision-making power by another person or Tribunal. That is the context in which a reviewer exercises the same functions and duties as the original decision-maker, "stands in the shoes" of that person, determines the "correct or preferable" decision and produces a decision that has the same consequences as if made by the original decision-maker: *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at [14]-[15], [51] (**JBA T32**); *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [134], [142] (**JBA T53**). For an example of such a merits review exercise, see *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 105-106 (**JBA T24**).

9. NCAT when conducting a review under Part 5 of the *PPIP Act* is not engaged in merits review<sup>S39/2024</sup> of this kind. The application of the *ADR Act* to NCAT must be adjusted accordingly: *PPIP Act* s 55(3); *ADR Act* ss 6, 7, 63 (**JBA T4**); *CAT Act* s 30 (**JBA T5**).
10. The distinction between merits review of the orthodox kind and adjudicative determination is significant for the characterisation of power: *Shell Co of Australia Ltd v Federal Commission of Taxation* (1930) 44 CLR 530 at 541-542 (**JBA T52**).
11. NCAT follows a procedure powers familiar to judicial proceedings, though not in every respect: *CAT Act* ss 13(1), 25, 26, 36, 38, 42, 44-51, 53, 55, 56, 60, 62, 73, 79-80.
- B. Various elements indicative of judicial power**
12. NCAT resolves a controversy about legal rights and obligations through the ascertainment of facts, the application of law and, where necessary, the Tribunal's discretion in determining the remedial response: *Rizeq v Western Australia* (2017) 262 CLR 1, 23 [52] (**JBA T50**); *R v Trade Practices Tribunal*; *Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374-5 (**JBA T46**). Determination of pre-existing rights or obligations is the hallmark of judicial power: *AG (Cth) v Alinta* (2008) 233 CLR 542, [153] (**JBA T23**).
13. Section 69 of *PPIP Act* reinforces, rather than undermines, the conclusion that NCAT is applying binding legal norms governing the conduct of agencies: AS [27]-[28].
14. An award of damages for breach of a legal duty is a function "characteristically and historically awarded by courts as an exercise of judicial power": J[129], [134], CAB 113-4; *Brandy v HREOC* (1995) 183 CLR 245 at 269 (**JBA T25**); Edelman, *McGregor on Damages* (21<sup>st</sup> ed, 2021) at [1-001] (**JBA T82**); AS [30]-[33].
15. Orders made by NCAT are binding: J[142] CAB 142; *ADR Act* s 66; *CAT Act* ss 43, 72, 73; *Tasmanian Breweries* (1970) 123 CLR 361 at 374-375; contrast *Brandy* (AS [49]-[50]).
  - (a) The critical characteristic is that orders are "binding". Enforceability is a separate question: *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 at [15]-[16], [56] (**JBA T28**).
  - (b) To the extent enforceability is also relevant, it is not necessary that the power to award execution must belong to the tribunal itself: *Brandy* at 257, 269 citing *R v Davison* (1954) 90 CLR 353 (**JBA T41**).
16. An order for damages under s 55(2)(a) is also enforceable as a court judgment through the certification and registration process in s 78 of the *CAT Act*. The terms of s 78 are apt to capture an order for the payment of damages by NCAT under the *PPIP Act*. Section 66(2) of the *ADR Act* does not lead to any different conclusion (AS [51]-[56]).

- (a) Public sector agencies are in a different position for aspects of execution because of s 7(2) [S39/2024](#) of the *Crown Proceedings Act 1988* (NSW). Agencies can also be expected to comply with orders. That does not render s 78 inapplicable: J[138] CAB 116.

17. NCAT applies a judicial like process: J[93]-[94] CAB 101.
18. The conclusion that NCAT exercises judicial power is consistent with treatment in the authorities of similar exercises of power by tribunals: *Commonwealth v Anti-Discrimination Tribunal* (2008) 169 FCR 85 at [205] (**JBA T67**); *Meringnage v Interstate Enterprises* (2020) 60 VR 361 at [102], [148] (**JBA T75**); *Kentish Council v Wood* (2011) 21 Tas R 59 at 68-69 (**JBA T72**); AS [39].

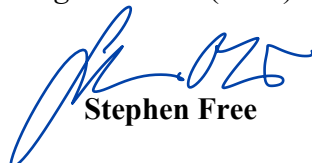
**C. Weight to be attached to elements said to indicate NCAT's power is non-judicial**

19. The *PPIP Act* is concerned with public sector agencies and government administration. This is not a significant factor pointing to the power being non-judicial: contra J[109] CAB 106; AS [41]. Core judicial functions like judicial review of exercises of public power, and determination of claims in tort such as misfeasance in public office and malicious prosecution are confined in their application to a governmental context.
20. If government policy has any role to play in NCAT review under s 55 of *PPIP Act* it is confined: *ADR Act* s 64; contrast *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191 (**JBA T40**); *Alinta* (2008) 233 CLR 542 at [14], [40], [169]; AS [44]-[46].
21. The discretionary aspect of NCAT's powers is confined, and not inconsistent with the type of discretion exercised by courts in exercising judicial power, including in relation to prerogative relief: *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at [52]-[59]; *Palmer v Ayres* (2017) 259 CLR 478 at [43] (**JBA T38**); AS [47].

**D. NCAT review involves a "matter"**

22. Determination of an application for review by NCAT resolves a controversy about an immediate right, duty or liability: *Unions NSW v New South Wales* (2023) 97 ALJR 150 at [15] (**JBA T80**). The subject matter of the application is alleged contravention of the legal duty imposed on the public sector agency. The predicate of an application for review is an applicant who remains aggrieved about the position of the agency.
23. The controversy, and the legal rights and duties at issue, exist independently of the procedure invoked for redress: *Citta* at [31], *Fencott v Muller* (1983) 152 CLR 570 at 603 (**JBA T31**); *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 (**JBA T48**); AS [59]-[65].

5 February 2025



Stephen Free

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