



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 - A-G NT (Int 4) 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

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 AND NEW SOUTH WALES

Fifth Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY (INTERVENING)

Part I: FORM OF SUBMISSIONS

This outline of oral submissions is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. The Court of Appeal erroneously held that the mere capacity to register an order made under s 55(2)(a) of the *Privacy and Personal Information Act 1988* (NSW) (**PPIP Act**) (**JBA v 1 no. 6**) was determinative of the nature of the power being exercised: **NTS [6], [47]-[58], [66]-[75]**.
 - (a) That is the better reading of J [140]-[143] (**CAB 117-118**): cf **ACS [6]**; **CS [46]**.
 - (b) That approach is inconsistent with other authority, which has not treated registrability as determinative: *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 and 269 (**JBA v 3 no. 25**); *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361, [108] (**JBA v 9 no. 75**).
 - (c) If not clarified, that reasoning would have sweeping consequences. For example, in the Northern Territory, all Tribunal orders (including plainly administrative orders) can be registered: *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), ss 84 and 84A (**JBA v 2 no. 20**).
2. The Tribunal would not be exercising judicial power, in part because it may rely on government policy in performing a review under s 55 of the PPIP Act: **NTS [4], [42]-[45]; contra ACS [44]-[46]**.
 - (a) Such a review is concerned with both the original conduct of the agency which was the subject of the application under s 53 and the decision of the agency (if any) on internal review: **NTS [25]-[27]; contra ACS [16]**. See ss 53(8)(c) (“the right of the person to have those findings [on internal review], and the agency’s proposed action, administratively reviewed by the Tribunal”) and 55(1) and (2).
 - (b) Section 55(3) provides that, on such a review, the ordinary powers of the Tribunal under Ch 3, Part 3, Div 3 of the *Administrative Decisions Review Act 1997* (NSW) (**ADR Act**) (**JBA v 1 no. 4**) are available. That includes the capacity to take into account government policy under s 64 of the ADR Act.

- (c) Section 64 provides for the application of any policy which was to be applied, or was applied, by the “administrator”: s 64(1) and (4)-(5).
 - (d) The “administrator” is the agency which engaged in the original conduct and which conducted the internal review: ADR Act, ss 7-8.
 - (e) Therefore, any policy which the agency should have applied, or did apply, in exercising its discretion under s 53(7) of the PPIP Act following an internal review may be applied by the Tribunal in a review under s 55 when reviewing the reasons, and proposed action, of the agency.
3. The Attorney-General for the Northern Territory adopts the Appellant’s submissions concerning the requirement for a “matter” to engage the implication drawn in *Burns v Corbett* (2018) 265 CLR 304 (**JBA v 3 no. 26**): **NTS [59]-[65]; AR [15]-[19]**.

Dated: 5 February 2024



Nikolai Christrup SC