



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B11/2024

BETWEEN:

STATE OF NEW SOUTH WALES

Appellant

and

PAULINA WOJCIECHOWSKA

First Respondent

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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

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**OUTLINE OF THE ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR
THE STATE OF SOUTH AUSTRALIA (INTERVENING)**

Part I: PUBLICATION OF SUBMISSIONS

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

Part II: OUTLINE OF ORAL SUBMISSIONS

Chameleon doctrine

2. The chameleon doctrine is essentially practical. It acknowledges the legislative choice that may be made about whether a certain kind of authority should be exercised judicially, in light of the “skills and professional habits” engaged by the judiciary, or by tribunal members, more familiar with the application of government policies and the exercise of administrative discretions: SA, [12]; *R v Davison* (1954) 90 CLR 353, 382 (Kitto J) (V5, T41); *Thomas v Mowbray* (2007) 233 CLR 307, 326-327 [12] (Gleeson CJ) (V7, T58); *Attorney-General (Cth) v Alinta Limited* (2008) 233 CLR 542, 550-552 [5]-[6] (Gleeson CJ) (V3, T23).
3. Just as the doctrine is relevant to the characterisation of powers conferred by the Commonwealth Parliament, it is also relevant to the conferral of powers under State law: SA, [13]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 528-529 [83] (French CJ), 566 [230] (Kirby J) (V4, T36); *Court of Appeal*, [89] (CAB, 99-100).
4. Application of the chameleon doctrine in the present case supports the conclusion that the power conferred by s 55(2)(a) of the *Personal Information Protection Act 1998* (NSW) is administrative.

Enforcement mechanism

5. Subject to the availability of review or appeal rights, the exercise of judicial power, as a general rule, finally and authoritatively resolves a legal controversy concerning legal rights and obligations such that as between the parties there is no further question to be asked or answered: SA, [17]; *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234, 249 [47]-[48] (Gageler and Gleeson JJ) (V8, T70), citing *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J) (V5, T46). Accordingly, the provision of a mechanism by which an exercise of power may be immediately enforced “is a powerful indicator that a binding norm has been created”: SA, [17]; *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 (V3, T28), 240 [56] (Edelman J).

6. Whilst the provision of a means of enforcement may be important to determining whether a particular power is judicial or administrative, the presence of such a mechanism is not in itself determinative: cf *Court of Appeal*, [141] and [143]. An enforcement mechanism may simply serve the pragmatic objective of providing a convenient means by which the exercise of an administrative power may be given effect. Accordingly, and as the Amici and Commonwealth appear to accept, the presence of an enforcement mechanism does not relieve from the need to undertake a holistic assessment: *Submissions of the Amici Curiae*, [10]; *Submissions of the Attorney-General of the Commonwealth (Intervening)*, [46] and [50].

10 7. Undertaking a holistic assessment of the power conferred by s 55(2)(a) of the *Personal Information Protection Act 1998* (NSW) results in the conclusion that the power is administrative, even if s 78 of the *Civil and Administrative Tribunal Act 2013* (NSW) applies to orders made thereunder.

Dated: 5 February 2025



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MJ Wait SC
 Solicitor-General for South Australia



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JF Metzger
 Counsel for the Attorney-General