

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

STATE OF NEW SOUTH WALES

APPELLANT

AND

PAULINA WOJCIECHOWSKA & ORS

RESPONDENTS

New South Wales v Wojciechowska
[2025] HCA 27
Date of Hearing: 5 & 6 February 2025
Date of Judgment: 6 August 2025
S39/2024

ORDER

- 1. Appeal allowed.*
- 2. Set aside the declaration in order 2 of the orders made by the Court of Appeal of the Supreme Court of New South Wales on 17 August 2023.*
- 3. Set aside order 3 of the orders made by the Court of Appeal of the Supreme Court of New South Wales on 17 August 2023 and, in its place, order that prayer 1 of the amended summons filed on 26 July 2022 as amended by order 1 of the Court of Appeal dated 17 August 2023 is dismissed.*
- 4. The appellant pay the first respondent's costs of and incidental to the appeal.*

On appeal from the Supreme Court of New South Wales

Representation

B K Lim with H D Ryan for the appellant (instructed by Crown Solicitor for NSW)

P Wojciechowska appeared in person

S J Free SC with Z C Heger SC appearing as amici curiae (instructed by Crown Solicitor for NSW)

S P Donaghue KC, Solicitor-General of the Commonwealth, with J D Watson and R S Amamoo on behalf of the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M J Wait SC, Solicitor-General for the State of South Australia, with J F Metzger on behalf of the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

N Chrstrup SC, Solicitor-General for the Northern Territory, with L S Spargo-Peattie on behalf of the Attorney-General for the Northern Territory, intervening (instructed by Solicitor for the Northern Territory)

G J D del Villar KC, Solicitor-General of the State of Queensland, with F J Nagorcka and K J E Blore on behalf of the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

C S Bydder SC, Solicitor-General for the State of Western Australia, with J M Carroll on behalf of the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

A D Pound SC, Solicitor-General for the State of Victoria, with M G Narayan on behalf of the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

Submitting appearances for the second to fifth respondents

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

New South Wales v Wojciechowska

Constitutional law (Cth) – Judicial power of Commonwealth – Where resident of Tasmania sought administrative review of decisions made on behalf of Commissioner of New South Wales Police Force – Where New South Wales Civil and Administrative Tribunal ("Tribunal") made order under s 55(2)(a) of *Privacy and Personal Information Protection Act 1998* (NSW) – Where order that public sector agency pay applicant damages by way of compensation for any loss or damage suffered as a result of conduct in contravention of information protection principle – Where Tribunal not "court of a State" within meaning of ss 77(ii) and (iii) of *Constitution* – Where State Parliament lacks legislative capacity to confer on State tribunal that is not court of a State judicial power with respect to any matter in s 75 or s 76 of *Constitution* – Where s 75(iv) of *Constitution* refers to "matters ... between a State and a resident of another State" – Whether Tribunal exercised judicial power – Whether *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 distinguishable.

Words and phrases – "administrative power", "administrative review", "administrative standards", "administratively reviewable decision", "certificate", "compensation", "correct and preferable", "court", "damages", "distinguishable", "information protection principles", "internal review", "judgment", "judicial decision", "judicial power", "jurisdiction", "legislative capacity", "loss or damage", "matter", "non-judicial", "norm of conduct", "order", "privacy codes of practice", "public sector agency", "resident of another State", "tribunal".

Constitution, ss 75, 76, 77(ii), 77(iii).

Administrative Decisions Review Act 1997 (NSW), ss 6, 7, 8, 9, 53, 63, 64, 66.

Civil and Administrative Tribunal Act 2013 (NSW), ss 13, 27(1)(a), 38, 72, 78.

Privacy and Personal Information Protection Act 1998 (NSW), ss 3(1), 8-19, 21, 29, 30, 32, 52, 53, 55(1), 55(2)(a), 55(3), 55(4A), 69.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. In making an order under s 55(2)(a) of the *Privacy and Personal Information Protection Act 1998* (NSW) ("the PPIP Act") that a public sector agency pay to an applicant damages by way of compensation for any loss or damage suffered as a result of conduct in contravention of an information protection principle specified in ss 8-19 of the PPIP Act, does the New South Wales Civil and Administrative Tribunal ("the Tribunal") exercise judicial power?

2 The Court of Appeal of the Supreme Court of New South Wales (Kirk JA, Mitchelmore JA and Griffiths A-JA agreeing) concluded that this Court's decision in *Brandy v Human Rights and Equal Opportunity Commission*¹ could not be distinguished and that *Brandy* dictated an affirmative answer to this determinative question.² The Court of Appeal consequentially declared that the "Tribunal had and has no jurisdiction" to determine certain claims against the State of New South Wales ("the State") commenced in the Tribunal by Ms Wojciechowska, who is a resident of Tasmania.

3 The State was granted special leave to appeal against that declaration. According to the State, the Court of Appeal erred in: (a) construing the registration and enforcement provision concerning an order of the Tribunal to pay money in s 78 of the *Civil and Administrative Tribunal Act 2013* (NSW) ("the CAT Act") as applying to an order under s 55(2)(a) of the PPIP Act; (b) holding that s 78 of the CAT Act imparted to the Tribunal's power under s 55(2)(a) of the PPIP Act the character of judicial power; (c) failing to hold that the Tribunal's power under s 55(2)(a) of the PPIP Act did not involve a "matter" within the meaning of s 75(iv) of the *Constitution* so that if s 78 of the CAT Act imparted to the Tribunal's power under s 55(2)(a) of the PPIP Act the character of judicial power, Ch III of the *Constitution* was nevertheless not infringed; and (d) not characterising the Tribunal's power under s 55(2)(a) of the PPIP Act as non-judicial.

4 The Attorneys-General for Victoria, Western Australia, South Australia, Queensland and the Northern Territory intervened in support of the arguments of the State.

1 (1995) 183 CLR 245.

2 *Wojciechowska v Secretary, Department of Communities and Justice* (2023) 379 FLR 256 at 285-286 [140]-[144].

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5 The Attorney-General of the Commonwealth intervened to argue that if s 78 of the CAT Act applies to an order under s 55(2)(a) of the PPIP Act then the Tribunal would be impermissibly purporting to exercise Commonwealth judicial power which, by negative implication from the provisions of Ch III of the *Constitution*, was not confined to a "matter".

6 Amici curiae appointed by the Court made written and oral submissions against the arguments for the State. Ms Wojciechowska made written and oral submissions and prosecuted a notice of contention contending that the Court of Appeal's conclusions should be affirmed on multiple bases.

7 The necessary and sufficient conclusions in this appeal are that *Brandy* is distinguishable and that the determinative question must be answered in the negative. The appeal is therefore to be allowed, and the declaration and related order set aside.

8 As the reasoning of the Court of Appeal does not otherwise involve material error, the relevant circumstances may be summarised in short order relying on the Court of Appeal's reasons.

The Court of Appeal's reasons

9 As Kirk JA explained, Ms Wojciechowska had sought administrative review by the Tribunal of several decisions, including decisions made on behalf of the Commissioner of the New South Wales Police Force under the PPIP Act in proceedings before the Tribunal in which she had claimed damages under s 55(2)(a) of the PPIP Act for conduct alleged to be in contravention of information protection principles.³ Ms Wojciechowska then filed proceedings in the Supreme Court of New South Wales alleging that the Tribunal had no jurisdiction to determine the administrative review applications, including those in respect of which she sought damages under s 55(2)(a) of the PPIP Act. The jurisdictional issue was referred to the Court of Appeal for determination.⁴

3 *Wojciechowska v Secretary, Department of Communities and Justice* (2023) 379 FLR 256 at 259 [3], 261-262 [17]-[22], 263 [29].

4 *Wojciechowska v Secretary, Department of Communities and Justice* (2023) 379 FLR 256 at 263 [31].

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10 Kirk JA correctly identified the relevant principle to be that stated in *Citta Hobart Pty Ltd v Cawthorn*⁵ citing *Burns v Corbett*⁶ "that a State Parliament lacks legislative capacity to confer on a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the *Constitution* judicial power with respect to any matter of a description in s 75 or s 76 of the *Constitution*".⁷ Because s 75(iv) of the *Constitution* refers to "matters ... between a State and a resident of another State", the determinative question was whether s 55(2)(a) of the PPIP Act, in enabling the Tribunal to make an order for damages in favour of Ms Wojciechowska as a resident of Tasmania, purported to invest in a non-court State tribunal judicial power with respect to any matter of a description in s 75(iv) of the *Constitution*, which could be vested only in, relevantly, courts of a State. It was not in dispute that: the Tribunal is not a court of a State; Ms Wojciechowska was a resident of a State other than New South Wales; and if the Tribunal, in making an order under s 55(2)(a) of the PPIP Act, were to exercise judicial power in a "matter", the matter would be between a State and a resident of another State as referred to in s 75(iv) of the *Constitution*.

11 Having completed an orthodox review of the nature and characteristics of the statutory scheme, Kirk JA concluded that the Tribunal would be exercising judicial power in making an order for damages under s 55(2)(a) of the PPIP Act because, once such an order was made, s 78 of the CAT Act would apply to such an order by which, for the purposes of the recovery of any amount ordered to be paid by the Tribunal, the amount was to be certified by a registrar (s 78(1) of the CAT Act); and if the certificate was "filed in the registry of a court having jurisdiction to give judgment for a debt of the same amount as the amount stated in the certificate", the certificate would operate as such a judgment of that court (s 78(3) of the CAT Act).⁸

5 (2022) 276 CLR 216.

6 (2018) 265 CLR 304.

7 (2022) 276 CLR 216 at 224 [1], referred to in *Wojciechowska v Secretary, Department of Communities and Justice* (2023) 379 FLR 256 at 264 [36].

8 *Wojciechowska v Secretary, Department of Communities and Justice* (2023) 379 FLR 256 at 284 [137].

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12 Kirk JA concluded that:⁹

"Given the conclusion that s 78 of the CAT Act can apply to orders made under s 55(2)(a) of the PPIP Act, the decision in *Brandy* becomes materially indistinguishable. Here, as in that case, a decision of an administrative body is given the effect of a decision of a court. As Mason CJ, Brennan and Toohey JJ said at 260, 'an order which takes effect as an exercise of judicial power cannot be made except after the making of a judicial determination'. The character of the order affects the characterisation of the power being exercised by the Tribunal. No argument was made that *Brandy* is distinguishable on the basis that non-federal courts may be authorised by States to exercise non-judicial power.

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 if and when such an order is sought. Section 78(1) is directed to 'recovery of any amount'. It does not apply to non-monetary orders, and thus is not relevant to orders made under s 55(2) otherwise than under para (a). However, if and when an order is sought under s 55(2)(a), in circumstances where the claim is of a kind that otherwise falls within federal jurisdiction, then the matter is outside the Tribunal's jurisdiction".

The reasoning in *Brandy*

13 In *Brandy* the complaint to the Human Rights and Equal Opportunity Commission ("the Commission") concerned alleged contraventions of prohibitions on racial discrimination contained in the *Racial Discrimination Act 1975* (Cth). The applicable statutory provisions made it unlawful for a person to do one or more of the proscribed matters. On the making of such a complaint the Commission had to inquire into the alleged contravening act or acts unless, for the reasons specified, the Race Discrimination Commissioner decided not to do so. The powers of the Commission to hold an inquiry were to be exercised by a single member of the Commission who was legally qualified, or by two or more members of the Commission at least one of whom was legally qualified. After holding the inquiry, the Commission could either dismiss the complaint or find the complaint to be substantiated. If it found the complaint substantiated, the Commission could make

⁹ *Wojciechowska v Secretary, Department of Communities and Justice* (2023) 379 FLR 256 at 285 [140]-[141].

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a determination including, for example, "a declaration that the respondent has engaged in conduct rendered unlawful by this Act and should not repeat or continue such unlawful conduct" and "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 conduct of the respondent". Another provision of the statute said that such a determination was "not binding or conclusive between any of the parties to the determination". Yet another provision, however, said that where such a determination had been made the Commission was required as soon as practicable thereafter to lodge the determination in a registry of the Federal Court and, thereupon, a registrar was required to register the determination. On registration, the determination had effect as an order of the Federal Court, subject to a period permitting review of a determination by the Federal Court.¹⁰

14 Deane, Dawson, Gaudron and McHugh JJ observed that it was "apparent that the Commission's functions point in many respects to the exercise of judicial power", but the Commission could not be doing so because its decisions had no binding force but for the registration provisions. As their Honours put it, the "situation [the non-exercise of judicial power] is ... reversed by the registration provisions".¹¹ Mason CJ, Brennan and Toohey JJ reasoned that the "fact that the Commission cannot enforce its own determinations is a strong factor weighing against the characterisation of its powers as judicial". As a result, the holding of an inquiry and the making of a determination could not of "itself be seen as an exercise of judicial power".¹² However, their Honours also concluded that the registration provision, which made the determination enforceable as an order of the Federal Court irrespective of review by that Court, purported to do that which Ch III of the *Constitution* did not permit (that is, provide for an exercise of judicial power by the Commission).¹³

10 (1995) 183 CLR 245 at 253-255, 264-265.

11 (1995) 183 CLR 245 at 269.

12 (1995) 183 CLR 245 at 257.

13 (1995) 183 CLR 245 at 260, 262, 264.

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Characterising power as judicial or non-judicial

15 As will be explained, there are several important distinguishing features between the statutory scheme considered in *Brandy* and that which applies in the present case. The importance of these features is exposed by the many observations in this Court concerning the impossibility of exhaustively and exclusively defining "judicial power not so much because it consists of a number of factors as because the combination is not always the same", so that "there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not".¹⁴

16 A judicial decision: is a "binding and authoritative decision of controversies between subjects or between subjects and the Crown made by a tribunal which is called upon to take action";¹⁵ "determines existing rights and duties and does so according to law", that is, "by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion";¹⁶ and is an "authoritative determination by means of the judicial method, that is, an enforceable decision reached by applying the relevant principles of law to the facts as found".¹⁷

17 As Kirby J put it in *Luton v Lessels*, a power may have a "double aspect"¹⁸ in that it "may take its character from the repository of the power – whether judicial or administrative – so long as the power, of its nature, is not forbidden to either".¹⁹ This reflects the observation of Aickin J in *R v Quinn; Ex parte Consolidated Food Corporation* that "some functions may, chameleon like, take their colour from their

14 *Brandy* (1995) 183 CLR 245 at 267.

15 *Brandy* (1995) 183 CLR 245 at 268.

16 *Brandy* (1995) 183 CLR 245 at 268.

17 *Brandy* (1995) 183 CLR 245 at 258.

18 See *R v Davison* (1954) 90 CLR 353 at 366, 368-370.

19 (2002) 210 CLR 333 at 373 [124]. See also *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-254 [12].

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legislative surroundings or their recipient".²⁰ In *R v Davison* Dixon CJ and McTiernan J opined that:²¹

"How a particular act or thing of this kind is treated by legislation may determine its character. If the legislature prescribes a judicial process, it may mean that an exercise of the judicial power is indispensable. It is at that point that the character of the proceeding or of the thing to be done becomes all important. Where the difficulty is to distinguish between a legislative and a judicial proceeding, the end accomplished may be decisive."

The PPIP Act and related statutory provisions

18 The statutory provisions in the present case create "information protection principles" (PPIP Act, ss 8-19) and "privacy codes of practice" (PPIP Act, s 29) which, in terms, apply only to a "public sector agency" (as defined in the PPIP Act, s 3(1)). The PPIP Act provides that a public sector agency "must not do any thing, or engage in any practice, that contravenes an information protection principle" that applies to the agency (PPIP Act, s 21(1)) and "must comply with any privacy code of practice" that applies to the agency (PPIP Act, s 32(1)). It also provides that nothing in Pts 2 and 3 of the PPIP Act, which create information protection principles and privacy codes of practice respectively, "gives rise to, or can be taken into account in, any civil cause of action, and without limiting the generality of the foregoing, nothing in Part 2 or 3 – (a) operates to create in any person any legal rights not in existence before the enactment of this Act, or (b) affects the validity, or provides grounds for review, of any judicial or administrative act or omission" (PPIP Act, s 69(1)). Section 69(1) of the PPIP Act is subject only to ss 21 and 32 of that Act (PPIP Act, s 69(2)). Those are the provisions which include, respectively, that the "contravention by a public sector agency of an information protection principle that applies to the agency is conduct to which Part 5 applies" (PPIP Act, s 21(2)) and the "contravention by a public sector agency of a privacy code of practice applying to the agency is conduct to which Part 5 applies" (PPIP Act, s 32(2)).

19 Part 5 of the PPIP Act provides for a scheme of internal review of conduct contravening or alleged to contravene an information protection principle or a

20 (1977) 138 CLR 1 at 18.

21 (1954) 90 CLR 353 at 370.

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privacy code of practice. This scheme operates in substitution for the general provisions of internal review of an administratively reviewable decision of an administrator in New South Wales under s 53 of the *Administrative Decisions Review Act 1997* (NSW) ("the ADR Act") (PPIP Act, s 52(4)). The person entitled to such an internal review is a person "aggrieved by the conduct of a public sector agency" (PPIP Act, s 53(1)), the conduct relevantly being the contravention or alleged contravention of an information protection principle or a privacy code of practice (PPIP Act, s 52(1)-(2)).

20 The internal review is to be undertaken by the public sector agency concerned (PPIP Act, s 53(2)). It is to be dealt with by an officer or employee of the agency who was not substantially involved in any matter relating to the conduct (PPIP Act, s 53(4)). Following completion of the internal review in accordance with s 53(4)-(6), the public sector agency concerned may do one of several things including taking no further action, making a formal apology, taking such remedial action as it thinks appropriate (including paying monetary compensation to the applicant for the internal review), and implementing administrative measures to ensure the conduct will not occur again (PPIP Act, s 53(7)). However, a public sector agency may not pay compensation to certain persons (eg, a convicted inmate or a former convicted inmate) (PPIP Act, s 53(7A)). By s 53(8) of the PPIP Act:

"As soon as practicable (or in any event within 14 days) after the completion of the review, the public sector agency must notify the applicant in writing of –

- (a) the findings of the review (and the reasons for those findings), and
- (b) the action proposed to be taken by the agency (and the reasons for taking that action), and
- (c) the right of the person to have those findings, and the agency's proposed action, administratively reviewed by the Tribunal."

21 Part 5 of the PPIP Act also contains s 55 which, as relevant, provides as follows:

"(1) If a person who has made an application for internal review under section 53 is not satisfied with –

- (a) the findings of the review, or

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- (b) the action taken by the public sector agency in relation to the application,

the person may apply to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of the conduct that was the subject of the application under section 53.

...

- (2) On reviewing the conduct of the public sector agency concerned, the Tribunal may decide not to take any action on the matter, or it may make any one or more of the following orders –
 - (a) subject to subsections (4) and (4A), 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,
 - (b) an order requiring the public sector agency to refrain from any conduct or action in contravention of an information protection principle or a privacy code of practice,
 - (c) an order requiring the performance of an information protection principle or a privacy code of practice,
 - (d) an order requiring personal information that has been disclosed to be corrected by the public sector agency,
 - (e) an order requiring the public sector agency to take specified steps to remedy any loss or damage suffered by the applicant,
 - (f) an order requiring the public sector agency not to disclose personal information contained in a public register,
 - (g) such ancillary orders as the Tribunal thinks appropriate.
- (3) Nothing in this section limits any other powers that the Tribunal has under Division 3 of Part 3 of Chapter 3 of the *Administrative Decisions Review Act 1997*.

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- (4) The Tribunal may make an order under subsection (2)(a) only if –
 - (a) the application relates to conduct that occurs after the end of the 12 month period following the date on which Division 1 of Part 2 commences, and
 - (b) the Tribunal is satisfied that the applicant has suffered financial loss, or psychological or physical harm, because of the conduct of the public sector agency.
- (4A) The Tribunal may not make an order under subsection (2)(a) if –
 - (a) the applicant is a convicted inmate or former convicted inmate or a spouse, partner (whether of the same or the opposite sex), relative, friend or an associate of a convicted inmate or former convicted inmate, and
 - (b) the application relates to conduct of a public sector agency in relation to the convicted inmate or former convicted inmate, and
 - (c) the conduct occurred while the convicted inmate or former convicted inmate was a convicted inmate, or relates to any period during which the convicted inmate or former convicted inmate was a convicted inmate.

..."

22 An "administrative review" under the ADR Act as referred to in s 55(1) of the PPIP Act involves the Tribunal exercising its "administrative review jurisdiction" over an "administratively reviewable decision" as referred to in ss 9 and 7 of the ADR Act respectively. As s 7 defines an "administratively reviewable decision" as a "decision" of "an administrator over which the Tribunal has administrative review jurisdiction", the definition of "decision" in s 6 of the ADR Act and "administrator" in s 8 of the ADR Act are also engaged. By s 6(2), for the purposes of the ADR Act, "a decision is made under enabling legislation if it is made in the exercise (or purported exercise) of a function conferred or imposed by or under the enabling legislation". By s 8(1) an "administrator", "in relation to an administratively reviewable decision, is the person or body that makes (or is taken to have made) the decision under enabling legislation". Section 8(2) provides that the "person or body specified by enabling legislation as a person or body whose

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decisions are administratively reviewable decisions is taken to be the only administrator in relation to the making of an administratively reviewable decision even if some other person or body also had a role in the making of the decision".

23 Division 3 of Pt 3 of Ch 3 of the ADR Act (referred to in s 55(3) of the PPIP Act) contains, in addition to one other provision, ss 63, 64 and 66 as follows:

"63 Determination of administrative review by Tribunal

- (1) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it, including the following:
 - (a) any relevant factual material,
 - (b) any applicable written or unwritten law.
- (2) For this purpose, the Tribunal may exercise all of the functions that are conferred or imposed by any relevant legislation on the administrator who made the decision.
- (3) In determining an application for the administrative review of an administratively reviewable decision, the Tribunal may decide:
 - (a) to affirm the administratively reviewable decision, or
 - (b) to vary the administratively reviewable decision, or
 - (c) to set aside the administratively reviewable decision and make a decision in substitution for the administratively reviewable decision it set aside, or
 - (d) to set aside the administratively reviewable decision and remit the matter for reconsideration by the administrator in accordance with any directions or recommendations of the Tribunal.

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64 Application of Government policy

- (1) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal must give effect to any relevant Government policy in force at the time the administratively reviewable decision was made except to the extent that the policy is contrary to law or the policy produces an unjust decision in the circumstances of the case.

...

- (4) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal may have regard to any other policy applied by the administrator in relation to the matter concerned except to the extent that the policy is contrary to Government policy or to law or the policy produces an unjust decision in the circumstances of the case.

- (5) In this section:

Government policy means a policy adopted by:

- (a) the Cabinet, or
- (b) the Premier or any other Minister,

that is to be applied in the exercise of discretionary powers by administrators.

...

66 Effect of administrative review decision

- (1) A decision determining an application for an administrative review under this Act of an administratively reviewable decision takes effect on the date on which it is given or such later date as may be specified in the decision.

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- (2) If any such decision varies, or is made in substitution for, an administrator's decision, the decision of the Tribunal is taken:
- (a) to be the decision of the administrator (other than for the purposes of an administrative review under this Act), and
 - (b) to have had effect as the decision of the administrator on and from the date of the administrator's actual decision, unless the Tribunal orders otherwise."

24 It follows that, in respect of an application under s 55(1) of the PPIP Act for an administrative review of the conduct or alleged conduct of the public sector agency that was the subject of the application for internal review under s 53 of the PPIP Act, the review involves the Tribunal's "administrative review jurisdiction" of an "administratively reviewable decision" in accordance with ss 6, 7, 8 and 9 of the ADR Act. By operation of those provisions, read with the relevant "enabling legislation" (being the PPIP Act, ss 53 and 55 in particular), the administrative review is of the conduct or alleged conduct of the public sector agency that was the subject of the application for internal review under s 53 of the PPIP Act, having regard to the findings (if any) of the review by the internal reviewer under s 53(4)-(6) of the PPIP Act, and the action (if any) taken or proposed to be taken by the agency under s 53(7) of the PPIP Act. Further, in determining such an application for an administrative review, "the Tribunal is to decide what the correct and preferable decision is", as required by s 63(1) of the ADR Act. The Tribunal is also to give effect to that decision by affirming or varying the administratively reviewable decision or setting it aside and either making a decision in substitution or remitting the matter under s 63(3) of the ADR Act and, in so doing, has available to it the powers conferred on the Tribunal by s 55(2) of the PPIP Act.

25 It further follows that any order that the Tribunal makes under s 55(2)(a) of the PPIP Act requiring a public sector agency to pay "damages ... by way of compensation for any loss or damage suffered because of the conduct" also has the character of an order that the Tribunal makes in substitution for or in variation of the public sector agency having taken or proposed to take "such remedial action as it thinks appropriate" under s 53(7)(c) of the PPIP Act. As such, the decision of the Tribunal to make the order under s 55(2)(a) of the PPIP Act is deemed by s 66(2)(a) of the ADR Act to be the decision of the public sector agency.

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26 It otherwise may be noted that further features of the CAT Act speak against the Tribunal exercising judicial power on an administrative review, including that: the Tribunal need not be composed of lawyers (CAT Act, ss 13 and 27(1)(a)); the Tribunal is not bound by the rules of evidence and can inform itself as it thinks fit subject to the rules of natural justice (CAT Act, s 38(2)); and the Tribunal is required to act with as little formality as the circumstances of the case permit and without regard to technicalities or legal forms (CAT Act, s 38(4)).

***Brandy* is distinguishable**

27 Against this background, it can be recognised that the statutory provisions alleged to have been contravened in this case are not comparable to those the subject of the complaint in *Brandy*.

28 First, and in contrast to the statutory scheme in *Brandy*, the PPIP Act does not create a norm of conduct binding on an individual or specify that conduct in contravention of such a norm is "unlawful". It creates norms confined in their application to public sector agencies. The only consequence of contravention of an information protection principle or a privacy code of practice is that Pt 5 of the PPIP Act applies to such conduct. While Pt 5 of the PPIP Act, reflecting the terms of ss 21 and 32, applies to the "contravention" by a public sector agency of an information protection principle or a privacy code of practice, "contravention" being typical language of a generally enforceable legal obligation, it is also relevant that the New South Wales Parliament chose to constitute the norms in the PPIP Act as "principles" and "codes of practice". These terms reflect the character of the obligations as imposing administrative standards on public sector agencies enforceable only under and in accordance with Pt 5 of the PPIP Act, and not otherwise. Further, the fact that the information protection principles are subject to modification by privacy codes of practice under s 30 of the PPIP Act indicates that the principles are not immutable. These differences from the scheme of the legislation in *Brandy* are stark.

29 Second, the Pt 5 internal review process is manifestly an exercise of administrative power by an administrative body or person. Section 53(7) of the PPIP Act gives a public sector agency a discretion to do any one or more of the specified things including, for example, taking no action. That is, an internal review creates no enforceable right to a particular remedy.

30 Third, while s 53(8)(c) of the PPIP Act refers to a "right" of the applicant for internal review, the "right" is one only to have the findings of the employee or

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officer on the internal review and the action proposed to be taken by the public sector agency "administratively reviewed by the Tribunal". In using this language of "administrative review", s 53(8) of the PPIP Act evinces the manifest intention of the New South Wales Parliament that the review by the Tribunal is within the Tribunal's "administrative review jurisdiction". This intention is reinforced by s 55(1) of the PPIP Act, in identifying the application to the Tribunal as for "an administrative review" under the ADR Act.

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The significance of the scheme of the PPIP Act and the ADR Act so operating is that each key aspect of the scheme indicates against any exercise of judicial power by the Tribunal. In making the correct and preferable decision based on the material then before it, the Tribunal is exercising a broad and evaluative power which must give effect to any relevant Government policy in force at the time the "administratively reviewable decision" of the public sector agency alleged to have contravened the PPIP Act was made. While the power in s 55(2)(a) of the PPIP Act is expressed in terms evocative of judicial power (in referring to "damages ... by way of compensation for any loss or damage suffered because of the conduct"), the context is otherwise to the contrary. The public sector agency itself is empowered by s 53(7) of the PPIP Act to pay "monetary compensation" to an applicant for internal review. Both the public sector agency and the Tribunal are prevented from making any such payment to specified persons (eg, convicted inmates) (PPIP Act, s 53(7A) and 55(4A)). In other words, there is not a generally enforceable "right" to such compensation available to any person who has suffered loss or damage because of a public sector agency contravening an information protection principle or a privacy code of conduct. So much is reinforced by the facultative and discretionary "may" in s 55(2) of the PPIP Act. That is, the Tribunal may "decide not to take any action on the matter" or may, amongst other things, decide to require the public sector agency to pay to the applicant damages if the applicant has suffered loss or damage because of the contravening conduct. A finding of contravening conduct and a finding that the applicant has suffered loss or damage because of such conduct does not give an applicant any right to damages. Rather, it enlivens the Tribunal's discretion across the full range of options in s 55(2) of the PPIP Act and s 63(3) of the ADR Act. The observation of Gleeson CJ in *Attorney-General (Cth) v Alinta Ltd*²² is therefore apt. His Honour said that in "decisions of this Court, there is a long history of treating power as non-judicial where an exercise of the power was, to use the words of Kitto J,

22 (2008) 233 CLR 542.

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'intended [by the Parliament] to be made upon considerations of general policy and expediency alien to the judicial method".²³

32 Fourth, and again in consequence of these considerations and in contrast to the position in *Brandy*, nothing in the text, context or operation of the statutory scheme to the point of the Tribunal making its decision convincingly bespeaks any exercise of judicial power. Contrary to an argument for the State, the Tribunal's order on administratively reviewing a decision of a public sector agency under the PPIP Act and ADR Act binds the public sector agency. There is no provision equivalent to that in *Brandy* which said that the decision of the Commission was not binding on the parties. To the contrary, s 72(3) of the CAT Act provides to the effect that a person must not, without reasonable excuse, contravene any order of the Tribunal (that is, any order which is not a designated order subject to s 72(1)) "made under this Act or any other legislation". An order made under s 55(2)(a) of the PPIP Act is such an order that a person must not, without reasonable excuse, contravene. That circumstance, however, is common to many kinds of non-judicial decision making and is not determinative.²⁴ As the Court of Appeal perceived it, the decisive factor was the operation of s 78 of the CAT Act. As will be explained, that factor is not decisive against the characterisation of an order under s 55(2)(a) of the PPIP Act as an exercise of administrative and not judicial power.

33 While the State contended that the Court of Appeal erred in concluding that s 78 of the CAT Act applied to an order by the Tribunal for a public sector agency to pay damages under s 55(2)(a) of the PPIP Act, this contention is unsustainable. An order for the payment of damages under s 55(2)(a) of the PPIP Act results in an "amount ordered to be paid by the Tribunal" within the meaning of s 78(1) of the CAT Act. That an order under s 55(2)(a) of the PPIP Act engages s 66(2) of the ADR Act is true. But this does not mean that such an order, taken by s 66(2) to be a decision of the public sector agency, is not also an order of the Tribunal as referred to in s 78(1) of the CAT Act. That the New South Wales Parliament must have assumed that a public sector agency would comply with any order of a

23 *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 550-551 [4], quoting *R v Spicer*; *Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305.

24 See, eg, *Brandy* (1995) 183 CLR 245 at 268; *R v Trade Practices Tribunal*; *Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 403; *R v Hegarty*; *Ex parte City of Salisbury* (1981) 147 CLR 617 at 627.

Tribunal directed to it may also be accepted. But that does not mean that s 78(1) of the CAT Act implicitly excludes public sector agencies from its reach. Nor does the fact that s 78(2) of the CAT Act provides that the certificate must identify the person liable to pay the certified amount implicitly exclude an order directed to a public sector agency under s 55(2)(a) of the PPIP Act from s 78(1). It is for the registrar of the Tribunal to comply with s 78(2) of the CAT Act in accordance with its terms and irrespective of whether the public sector agency has a separate legal personality from the State. If it does not, the relevant person will be the State. Nor is there any incoherence between s 78 of the CAT Act and the scheme of the PPIP Act once it is accepted, as it must be, that the Tribunal's orders are all subject to s 72 of the CAT Act, s 72(3) being a civil penalty provision.

34 Section 78 of the CAT Act, however, is different from the registration provision considered in *Brandy*. In *Brandy* the Commission had to lodge the Commission's determination in a registry of the Federal Court and a registrar of the Federal Court was required to register the determination; on registration, the determination had effect as an order of the Federal Court. Under s 78 of the CAT Act, a registrar of the Tribunal is to certify any amount ordered to be paid by the Tribunal (not including a civil or other penalty), but the Tribunal's function is then completed. The Tribunal does not have to do anything with the certificate. Section 78(3) of the CAT Act merely provides that a certificate that "is filed in the registry of a court having jurisdiction to give judgment for a debt of the same amount as the amount stated in the certificate ... operates as such a judgment". That is, the critical act of the filing of the certificate in a registry of a court having jurisdiction to give judgment for a debt of the same amount as the amount stated in the certificate, which is the end of the process, is not an end involving any act of the Tribunal. If the "nature of the final act determines the nature of the previous inquiry",²⁵ the relevant final act must be that of the body which conducted that inquiry. In the case of an order by the Tribunal for payment of an amount, that final act is the registrar of the Tribunal certifying the amount ordered to be paid. While that final act is for the purposes of the "recovery of any amount ordered to be paid by the Tribunal", it is the further and separate act of the filing of the certificate, done by another person (if it is done), which deems the certificate to operate as a judgment of a court.

25 *Prentis v Atlantic Coast Line* (1908) 211 US 210 at 227, quoted in *R v Davison* (1954) 90 CLR 353 at 370.

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35 Further, as noted above, in *Brandy* the Commission had to lodge the Commission's determination in a registry of the Federal Court and a registrar of the Federal Court had to register the determination and, on registration, the determination had effect as an order of the Federal Court. Section 78(3) of the CAT Act, however, requires the person filing the certificate to ascertain the relevant court in which the act of filing will engage the provision. The certificate must be filed in the registry of a court "having jurisdiction to give judgment for a debt of the same amount as the amount stated in the certificate". If the certificate is filed in a court which does not have that jurisdiction, s 78(3) is inoperative.

36 Accordingly, *Brandy* is distinguishable and should be distinguished from the present case. While, by operation of s 78(3) of the CAT Act, an order by the Tribunal under s 55(2)(a) of the PPIP Act may become binding, authoritative and enforceable as a judgment of a court, that status is conferred on the registrar's certificate certifying the amount ordered to be paid by the Tribunal being filed in a court of the requisite jurisdiction by the taking of a separate step by a person other than the Tribunal. If that step is not taken, or the certificate is not filed in the requisite court, the certificate will not be enforceable as a judgment of a court.

37 Therefore, and given the other features indicating that the Tribunal's power is administrative, an order by the Tribunal under s 55(2)(a) of the PPIP Act does not involve a purported exercise of judicial power by the Tribunal and, in consequence, does not engage Ch III of the *Constitution* because Ms Wojciechowska is a resident of a State other than New South Wales.

38 Given these conclusions it is unnecessary and therefore inappropriate²⁶ to deal with the State's further argument that the conclusion in *Burns v Corbett*,²⁷ namely, that State legislative power does not extend to conferring on a tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the *Constitution* judicial power with respect to any matter of a description in s 75 or s 76 of the *Constitution*, is confined to such "matters", which do not exhaust the conception of judicial power.

26 See, eg, *Vunilagi v The Queen* (2023) 279 CLR 259 at 278 [55].

27 (2018) 265 CLR 304.

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Orders

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For these reasons, the appeal is to be allowed, the declaration made in order 2 of the Court of Appeal's orders dated 17 August 2023 is to be set aside, order 3 of those orders is also to be set aside, and in lieu thereof it is to be ordered that prayer 1 of the amended summons filed on 26 July 2022 as amended by order 1 of the Court of Appeal dated 17 August 2023 is dismissed. In accordance with the conditions of the order of this Court granting the State special leave to appeal, the State is to pay Ms Wojciechowska's costs of and incidental to the appeal.