HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 09 Mar 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	A22/2022
File Title:	Disorganized Developments Pty Ltd & Ors v. State of South A
Registry:	Adelaide
Document filed:	Form 27F - Appellants' Outline of oral argument
Filing party:	Appellants
Date filed:	09 Mar 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN: **DISORGANIZED DEVELOPMENTS PTY LTD**
First Appellant

PETER KEITH STACY
Second Appellant

STEPHEN JOHN TAYLOR
Third Appellant

and

THE STATE OF SOUTH AUSTRALIA
Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: This outline is in a form suitable for publication on the internet.

Part II: Division 2, Part 3B of the *CLCA* and the offence in s 83GD(1)

1. Section 83GD of the *CLCA* is part of a *distinct* scheme designed to disrupt the activities of "criminal organisations" by preventing participants engaging in joint activity of the kind referred to in s 83GA (1) [to plan, prepare or participate in criminal offences]. It creates a criminal offence which is committed by a mere solitary act (contrast, s 83GC; Part 4 of the 2015 amendments ("consorting")). ***AWS*, [58]-[59]**

2. The *function* of the regulation-making power in s 83GA(1) (and s 370) is to supply a factum for the penal provision in s 83GD(1) so as to trigger the operation of the prohibition on any "participant" (as defined) for the first time upon the place declared (the Cowirra land). ***AWS*, [6], [10], [12], [42]**

Ground 1 - The Regulations were ineffective

3. By design, the operative provision of the *Cowirra Regulations* (cl.3 and 4) was to "insert" its contents (the particulars of the Cowirra land) into the 2015 Schedule Regulations. ***AWS*, [15]-[16]**

4. The 2015 Schedule regulations did not, and could not, declare the Cowirra land, to be a prescribed place. Its legislative source enabled it to contain multiple declared places, despite s 83GA(2), but as a regulation it could not be varied pursuant to s 83GA(1) by adding to the list of particulars – it did not conform with s 83GA(2), and its declaratory mechanism was not of continuing operation and effect. ***AWS*, [17], CA, [35]**

5. By design, the *Cowirra Regulations* did not themselves, in terms, declare the Cowirra land as a prescribed place. Nor did they declare by implication. They could not, as the text is opposite. ***AWS*, [19], [22]-[24]**

6. In statutory construction there is a distinction between the ultimate purpose (or the objective) and the means adopted to achieve that purpose, the proximate purpose. While the ultimate objective of the Cowirra Regulations is clear, so are the means adopted. Those means are legally ineffective to achieve the objective. ***AWS*, [27]**

7. There is no text in the Cowirra Regulations to which an alternative construction might be given so as to accord with the ultimate purpose.

   ***AWS*, [30], *cf* CA, [38-45]**

8. The conditions for "reading in" (a declaration) are not satisfied. ***AR*, [6]**

Ground 2 - The Appellants were denied procedural fairness

The presumption attaches

9. The obligation to accord procedural fairness is presumed to attach as a condition of the exercise of a power whenever, according to its nature, the exercise of that power is "apt to affect" (has the potential to impact) the distinctive rights and interests of an individual alone or a notifiable class of individuals, in a way that is substantially different from the way it is apt to affect the public at large. The focus is on the capacity or potential of the power to affect particular individuals in that way. ***AWS*, [37]**

10. To the contrary, the Court of Appeal held the **only** class of persons "directly" (**CA, [91]**) or "immediately" (**CA, [97]**) affected by the Cowirra Regulations are "participants" (**CA, [97]**), but, for a policy-driven measure of general application (**CA, [79]-[90], [118-122]**), the class is too indeterminate (**CA, [94], [106]**), to qualify as a possible exception to the unavailability of procedural fairness, reflecting a legislative intention to deny the obligation (**CA, [96], [114]**). This is an erroneous approach:

    10.1. The power does not contemplate a measure of general application. It is the nature of the power, not the means by which it is exercised, that raises the presumption. Although the power is here exercised in the form of regulations, in substance it is not a measure of general application. The touchstone is its capacity to affect the right or interest of individuals distinctively, not simply as members of the public. ***AWS*, [37] [39]-[40] *ARS* [13]**

    10.2. The power does not contemplate a measure driven exclusively by policy, but rather the implementation of a policy (disruption). In any event, the targeting of a Place to further the legislative purpose requires for the validity of the regulation the assessment of facts in order to connect place and purpose. ***AWS*, [47]-[49]**

    10.3. The effect of the exercise of the power is not to be assimilated with its *function* - which is to supply a factum to extend the legislative restrictions on a "participant" (*cf* **CA, [91]**). That is not the only "relevant effect" of the exercise of the regulation-making *power* (*cf* **CA, [85]**). Beyond its bare function, it is apt to affect distinctively the rights and interests of **more than** one class of individuals, and in different ways. ***AWS*, [41]-[43], cf CA, [91]-[97]]**. Resort to "differential obligation" is misconceived. It is a product of the premise adopted by the Court of Appeal. ***cf* CA, [97]-[106], [135-140]**

11. In this case, it interferes with the appellants' use and enjoyment of the Cowirra land as

owner and occupier by triggering the operation of the *legislative* measure to create a risk of liability for them thereby exposing them to a new legal hazard not previously existing. ***AWS*, [44], CA, [109] - *cf* CA, [97]**

The presumption is not impliedly displaced

12. The presumption in favour of the appellants (owner, occupier) can only be displaced by legislative prescription either expressly or by irresistible implication.

    ***AWS*, [53]-[55]**

13. As the purpose of Part 3B, Div 2 is to disrupt the activities of declared criminal organisations, prior notice, as a necessary step in giving procedural fairness, carries no potential for frustrating the effective implementation of that purpose as it affords no opportunity to avoid the consequences of the proposed declaration.

    ***AWS*, [56],[60], CA [111]**

14. Far from "leaving no room" (***AWS* [54]**), the scheme *makes* room, for procedural fairness by delegating implementation of the scheme to the executive, and basing the choice of a *factum* on facts, so as to bridge the gap between a proscribed solitary act (entry) and the legislative goal of disrupting the activities of criminal organisations.

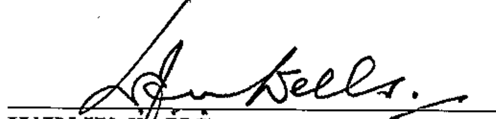
    ***AWS*, [61]**

15. The enactment of "places" in the 2015 Schedule Regulations did not imply displacement of the presumption for making a declaration under s 83GA (1) - it was, in recognition that it would otherwise have applied. ***AR*, [16] - *cf* CA, [123]-[124]**

16. General and limited oversight by a Parliamentary Committee is not a source of an implication to exclude procedural fairness. ***AR*, [17] - *cf* CA [132]-[134]**

17. The commonplace designation of the Governor-in-Council as the repository of a regulation-making power is not significant. ***AR*, [18], CA [131]**

9 March 2023



WJN Wells KC
Hanson Chambers
Telephone: 08 8212 6022
wells@hansonchambers.com.au

C Jacobi KC
Edmund Barton Chambers
Telephone: 0437 810 110
cjacobi@ebchambers.com.au