



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

B E T W E E N:

SDCV
Appellant

AND

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DIRECTOR-GENERAL OF SECURITY
First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Respondent

**SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN
AUSTRALIA (INTERVENING)**

20 **PART I: SUITABILITY FOR PUBLICATION**

1. These submissions are in a form suitable for publication on the internet.

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes pursuant to section 78A of the *Judiciary Act 1903* (Cth) in support of the orders sought by the respondents.

PART III: ARGUMENT

The Legislative Context

3. Section 46(1) of the of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) requires the Administrative Appeals Tribunal (**AAT**) to transmit documents to the Federal Court of Australia (**Federal Court**) where there is an appeal on a question of law against a decision of the AAT pursuant to s 44; or where a question of law is referred to the Federal Court pursuant to s 45.
4. Section 46(2) requires the Federal Court to keep those transmitted documents confidential, and not to disclose to any person other than a member of the Court any transmitted material, where there is a certification by the Commonwealth Attorney-General pursuant to s 39B(2)(a) of the AAT Act that such disclosure

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would be contrary to the public interest because it would prejudice security or the defence or international relations of Australia.

5. The appellant is a person subject to an Adverse Security Assessment (ASA) pursuant to the *Australian Security Intelligence Organisation Act 1979* (Cth). He challenged the ASA in the AAT. A certificate was issued by the Commonwealth Attorney-General pursuant to s 39B(2)(a) of the AAT Act. The AAT affirmed the ASA.¹ The appellant appealed to the Federal Court pursuant to s 46(1) of the AAT Act.² He has challenged the constitutional validity of s 46(2), upon the basis that it effectively denies a person procedural fairness before the Federal Court and is inconsistent with Ch III of the *Commonwealth Constitution*.
6. The existence and content of a duty of procedural fairness in this context must take into account two particular considerations. First, that the Federal Court is conducting an appeal on a question of law. Secondly, that the Attorney-General regards disclosure of the information as contrary to the public interest, as it would prejudice security or the defence or international relations of Australia.

The Appellant's Reasoning

7. In effect, the appellant's case turns upon two propositions. First, the Federal Court has a general *duty* to provide procedural fairness to the appellant, as this is an essential characteristic required by Ch III courts.³ Secondly, in the present case, the *content* of that duty means that the first respondent must have disclosed to the appellant the information which is the subject of the certification under s 39B(2).⁴ That second step is taken because the appellant contends that, generally, the content of a duty of procedural fairness has, as a minimum requirement, that a party shall have been given an opportunity to challenge the evidence led against them.⁵
8. This reasoning bifurcates the *existence* of a duty of procedural fairness and the *content* of that duty. By doing so, the appellant relies upon cases about the *content* of a duty of procedural fairness in relation to particular functions to derive a

¹ *SDCV v Director-General of Security* [2019] AATA 6112.

² *SDCV v Director-General of Security* [2021] FCAFC 51; (2021) 284 FCR 357 (*SDCV Full Court*).

³ Appellant's submissions dated 8 April 2022 at [19]-[22] (AS).

⁴ AS at [37].

⁵ AS at [25].

minimum standard of procedural fairness applicable in all cases. The appellant then submits that it would be contrary to Ch III of the *Constitution* for the Commonwealth Parliament to exclude that generally applicable minimum standard of procedural fairness.⁶

9. In deriving the minimum standard of procedural fairness applicable in all cases, the appellant seeks to distinguish or challenge the basis of two decisions concerning the constitutionally applicable requirements of procedural fairness in relation to functions conferred by State legislation on State courts (which were Ch III courts), by reason of the *Kable* principle.⁷ These are the decisions in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (Gypsy Jokers)*⁸ and *Assistant Commissioner Condon v Pompano Pty Ltd (Pompano)*.⁹
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10. The appellant contends that *Gypsy Jokers* proceeded upon the erroneous premise that "a Parliament can exclude procedural fairness in the judicial context".¹⁰ The appellant says that there is a question as to whether the plurality proceeded upon the same assumption in *Pompano*.¹¹ The appellant claims that: "If necessary, the Appellant will address the question of leave to re-open those cases in reply".¹²
11. These submissions make it necessary to address the flaw in the reasoning in the appellant's case, to demonstrate that there was no erroneous assumption in *Gypsy Jokers* or *Pompano*, and that there is no reason to consider re-opening these cases.
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The Constitutional Requirement of Procedural Fairness in State Courts

12. Due to the *Kable* principle,¹³ State legislation cannot impair the institutional integrity of a State court in a way which makes it unsuitable to exercise federal

⁶ AS at [54], [57].

⁷ AS at [50]-[59].

⁸ *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532 (*Gypsy Jokers*).

⁹ *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 252 CLR 38 (*Pompano*).

¹⁰ AS at [54]-[55].

¹¹ AS at [57].

¹² AS at [50], footnote 94. The cases which the Appellant will seek leave to re-open also include a case about federal legislation, namely *Graham v Minister for Immigration* [2017] HCA 33; (2017) 263 CLR 1.

¹³ As derived from *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*).

judicial power.

13. In *Attorney-General (NT) v Emmerson*, the principle was described by French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ as follows:

"The principle for which *Kable* stands is that because the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid".¹⁴

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14. It is not possible to state exhaustively what features of legislation may be regarded as impermissibly impairing a court's institutional integrity.¹⁵ It is a matter of examining the substantive effect of the totality of the legislation in each particular case,¹⁶ rather than elevating a particular form of adversarial procedure to constitutional status.¹⁷

15. The rules of procedural fairness do not have an immutably fixed content.¹⁸ They are concerned to ensure that the overall procedures of a court achieve practical justice.¹⁹ Overall, achieving practical justice may mean that certain information is not disclosed to one party where the consequence would destroy the subject matter of the action (eg trade secrets),²⁰ or would be detrimental to the public interest (eg prejudice ongoing police operations).²¹ That does not mean that the rules of procedural fairness are reduced to "nothingness".²² As French CJ said in *Pompano*:

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¹⁴ *Attorney-General (NT) v Emmerson* [2014] HCA 13; (2014) 253 CLR 393 at 424 [40] (citations omitted). See also *Australian Education Union v Fair Work Australia* [2012] HCA 19; (2012) 246 CLR 117, 140-141 [48] (French CJ, Crennan and Kiefel JJ); *Minister for Home Affairs v Benbrika* [2021] HCA 4; (2021) 95 ALJR 166 at 207 [158] (Gordon J) (*Benbrika*).

¹⁵ See, for example, *Forge v ASIC* [2006] HCA 44; (2006) 228 CLR 45 at 76 [63]-[64] (Gummow, Hayne and Crennan JJ); *Pompano* at 89 [124] (Hayne, Crennan, Kiefel and Bell JJ), 108 [188] (Gageler J).

¹⁶ See, for example, *Kuczborski v Queensland* [2014] HCA 46; (2014) 254 CLR 51 at 90 [106] (Hayne J); *Pompano* at 94 [137] (Hayne, Crennan, Kiefel and Bell JJ).

¹⁷ *Pompano* at 88 [119] (Hayne, Crennan, Kiefel and Bell JJ).

¹⁸ *Pompano* at 99 [156] (Hayne, Crennan, Kiefel and Bell JJ), 108 [188] (Gageler J). See also *International Finance Trust Company Ltd v New South Wales Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 at 354 [54] (French CJ).

¹⁹ *Pompano* at 99 [156]-[157] (Hayne, Crennan, Kiefel and Bell JJ), 108 [188] (Gageler J).

²⁰ *Pompano* at 100 [157] (Hayne, Crennan, Kiefel and Bell JJ), 109 [192] (Gageler J).

²¹ *Gypsy Jokers* at 550 [5] (Gleeson CJ), 558 [33] (Gummow, Hayne, Heydon and Kiefel JJ).

²² *Pompano* at 109-110 [192] (Gageler J).

"That a law imposes a disadvantage on one party to proceedings in order to restrict, mitigate or avoid damage to legitimate competing interests does not mean that the defining characteristics of the court required to administer such a law are impermissibly impaired".²³

16. It follows that whether any particular procedure or rule applicable to a court so alters what is required for a court to be regarded as procedurally fair is a matter which depends upon *the nature of the function* affected by the procedure or rule, judged in the overall context of the court's decision-making role. As the plurality observed in *Pompano*:

10 "To observe that procedural fairness is an essential attribute of a court's procedures is descriptively accurate but application of the observation requires close analysis of all aspects of those procedures and the legislation and rules governing them."²⁴

17. Where State courts are concerned, it is possible that they may undertake non-judicial functions as well as judicial functions, so long as these functions are consistent with the State court being a repository of federal judicial power.²⁵ The requirements of procedural fairness may differ as applied to different functions (whether judicial or non-judicial), but the overriding question is still whether any function vested in a State court makes it unsuitable to be a repository of federal
20 judicial power.

The Flaw in the Appellant's Reasoning

18. As explained, the precise content of the requirements of procedural fairness relate to the particular function undertaken by a court in its specific context. That is consistent with *procedural* fairness depending upon the particular procedures necessary to achieve practical justice in every case. It is erroneous to try and derive a general statement of what constitute the irreducible minimum requirements of procedural fairness in every context, which can never be excluded.

19. The type of error which the appellant advances here was explicitly dismissed in
30 *Pompano* by Hayne, Crennan, Kiefel and Bell JJ:

²³ *Pompano* at 78 [86] (French CJ).

²⁴ *Pompano* at 100 [156] (Hayne, Crennan, Kiefel and Bell JJ).

²⁵ Eg *Benbrika* at 178 [20] (Kiefel CJ, Bell, Keane and Steward JJ).

"... The argument for invalidity asserted that in deciding any dispute a State Supreme Court *must always* follow an adversarial procedure by which parties (personally or by their representatives) know of *all* of the material which the Court is being asked to make its decision. Otherwise, so it was asserted, there would be such a departure from procedural fairness that the institutional integrity of the Supreme Court would be impaired.

10 Several observations must be made about this central proposition. First, it is absolute. Secondly, because it is absolute, it entrenches a particular form of adversarial procedure as a constitutionally required and defining characteristic of the State Supreme Courts. Thirdly, as will be seen, it seeks to found this result not in any particular constitutional text but in what is said to be the logical consequence of earlier decisions of this Court.

Examination of this central proposition, which underpinned the argument for invalidity, will demonstrate that it cannot be adopted."²⁶ (emphasis in original)

20. There can be no suggestion that there are two different qualities or grades of justice, depending upon whether the source of jurisdiction is a State or federal law.²⁷ There is no difference between the requirements of procedural fairness applicable to the same function conferred upon a Ch III court, whether by State or federal law. However, the requirements of procedural fairness may vary according to different functions.

21. Treating procedural fairness in this manner demonstrates that the same quality or grade of justice applies to the same functions, whatever the source of the law conferring the function. The content of procedural fairness will be the same for a State court or a Federal court if the function exercised is the same.

22. It follows that the appellant's attempt to derive non-negotiable minimum requirements of procedural fairness from specific cases should not be countenanced. What is relevant in this case is whether practical justice can be achieved in the determination of an appeal on a question of law where s 46(2) of the AAT Act requires the exclusion of the certified material which the Commonwealth Attorney-General has certified would prejudice Australia's defence, security or international relations if disclosed.

23. The State supports the submissions made by the second respondent on this issue.²⁸

²⁶ *Pompano* at 88 [118]-[120] (Hayne, Crennan, Kiefel and Bell JJ).

²⁷ AS at [18] citing *Kable* at 103 (Gaudron J) and *Benbrika* at 178 [20] (Kiefel CJ, Bell, Keane and Steward JJ).

²⁸ Second Respondent's Submissions dated 6 May 2022 at [35]-[45] (SRS).

In effect, two particular considerations show that practical justice will be achieved, even if there is no disclosure of the certified information to the appellant:

- 10 (a) it is significant that the function performed by the Federal Court is determining an appeal on a question of law. The Federal Court is considering whether the AAT was incorrect in affirming the ASA. There is no suggestion that the AAT could not withhold the certified information from the appellant in the exercise of its functions. There was no challenge to the certificate issued by the Commonwealth Attorney-General.²⁹ As the Federal Court is simply considering whether the AAT acted correctly (in carrying out an executive function³⁰), there is no practical injustice if the Federal Court does not disclose the certified information to the appellant;
- 20 (b) it is also important that the certification is by the Commonwealth Attorney-General to the effect that disclosure would be against the public interest because it would prejudice Australian security, defence or international relations. In considering how procedural fairness should be achieved in that type of case, the court has not required disclosure of information where that causes the very harm which is to be guarded against. That is illustrated by the trade secret cases, as well as by the criminal intelligence cases such as *Gypsy Jokers* and *Pompano*.

The Decisions in *Gypsy Jokers* and *Pompano*

24. The appellant contends that the decision in *Gypsy Jokers* was made on the erroneous premise that a Parliament can *exclude* procedural fairness in the judicial context.
25. While Crennan J did speak in terms of a statutory modification of the rules of

²⁹ "[T]he premise for the s 44 appeal is that the information to which s 46(2) applies is material that was properly certificated because the validity of the certificate was never put in issue in the proceedings": *SDCV Full Court* at 363 [71] (Bromwich and Abraham JJ). The certificate could have been challenged before the AAT. See SRS at [36].

³⁰ *SDCV Full Court* at 363 [9] (Rares J). See also SRS at [8]-[13], summarising the critical features of the merits review procedure to challenge an ASA contained in the AAT Act.

procedural fairness,³¹ the plurality did not. As well, Crennan J analysed the overall issue as whether a legislative requirement that prevented disclosure of confidential information which might prejudice police operations was contrary to the institutional integrity of the State Supreme Court and therefore contrary to Ch III. She concluded that it was not.³² This case should be understood as considering whether the requirements of procedural fairness were satisfied in a way which achieved overall justice; not as a case about the exclusion of the requirements of procedural fairness.

26. The same is also true of *Pompano*. As has been explained, this case focused upon the particular requirements of procedural fairness in the context of the specific statutory functions involved. As indicated, Gageler J expressly rejected the submission that the requirements of procedural fairness had been reduced to "nothingness".
27. So understood, neither *Gypsy Jokers* nor *Pompano* should be distinguished, confined or re-opened.

PART IV: LENGTH OF ORAL ARGUMENT

28. It is estimated that the oral argument for the Attorney General for Western Australia will take 10-15 minutes.

Dated: 18 May 2022

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³¹ *Gypsy Jokers* at 596 [183] (Crennan J).

³² *Gypsy Jokers* at 597 [192] (Crennan J).

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**ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR
 WESTERN AUSTRALIA (INTERVENING)**

20 Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Attorney General for Western Australia sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

	Description	Version	Provision
Constitutional Provisions			
1.	<i>Commonwealth Constitution</i>	Current (Compilation No. 6, 29 July 1977 – present)	Ch III
Statutory Provisions			
2.	<i>Administrative Appeals Tribunal Act 1975 (Cth)</i>	Current (Compilation No. 49, 18 February 2022 – present)	ss 39B, 44, 45, 46
3.	<i>Australian Security Intelligence Organisation Act 1979 (Cth)</i>	Current (Compilation No. 68, 2 April 2022 – present)	
4.	<i>Judiciary Act 1903 (Cth)</i>	Current (Compilation No. 49, 18 February 2022 – present)	s 78A