



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

No. S27 of 2022

BETWEEN:

SDCV
Appellant

and

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DIRECTOR-GENERAL OF SECURITY
First Respondent

and

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Respondent

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ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)
OUTLINE OF ORAL SUBMISSIONS

PART I: Internet Publication

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

PART II: Outline of Propositions

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3. The court should not entrench a principle that there is no distinction between State and federal courts with respect to their obligation to act procedurally fair when exercising judicial power: cf **2RS [24]**.

4. The reasons advanced by the Commonwealth do not support the establishment of such a principle.

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5. Gaudron J's observation in *Kable* that Ch III does not permit 'of different grades or qualities of justice' does not mean that State judicial power necessarily has the same character or quality as federal judicial power: cf **2RS [26]**. Her Honour's point was, and the basis of the *Kable* doctrine is, that there cannot be two different grades of *federal* judicial power: *Kable* (1996) 189 CLR 51, 103-4 (Gaudron J), 115 (McHugh J), 127-8

Filed on behalf of the Attorney-General for
the State of Queensland, Intervening

7 June 2022

(Gummow J), **JBA 5.26, 1456-7, 1468, 1480-1**. Otherwise, contrary to the orthodox position of this Court, the *Kable* principle would ‘simply reflect what Ch III requires in relation to the exercise of the judicial power of the Commonwealth’: *Pompano* (2013) 252 CLR 38, [125]-[126]; **JBA 3.11, 426**.

10 6. Moreover, State courts may exercise Commonwealth judicial power, State judicial power or non-judicial power. To confine an assessment of a State court’s ‘essential characteristics’ to circumstances when it is exercising judicial power elides the nature of the institution with the nature of the function. The *Kable* principle protects the institutional integrity of State courts when exercising either judicial or non-judicial power: cf **2RS [25]**; *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166, [82] (Gageler J), **JBA 9.46, 2830**.

20 7. The *Kable* principle may tolerate modifications to procedural fairness which may be intolerable in relation to the exercise of Commonwealth judicial power: **QS [9], AR [2] n 1**.

8. As the required content of procedural fairness depends on the function being exercised, the true position is that there is no principled basis to distinguish between State and federal courts with respect to their obligation to act in a way that is procedurally fair when exercising *Commonwealth* judicial power: cf **2RS [24]**.

30 9. Nonetheless, it may be accepted that a function which does not cause practical injustice if conferred on a State court would also not cause practical injustice if conferred on a federal court.

Dated: 8 June 2022

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