HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A7 of 2022**

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
STATE OF SOUTH AUSTRALIA
Respondent

APPELLANTS' WRITTEN SUBMISSIONS

Part I:

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

Part II:

2. The issues are:
    a. First, accepting that as a matter of statutory construction the *Criminal Law Consolidation (Criminal Organisation) Regulations 2015* ("the **2015 Schedule regulations**") were ineffective to declare the Cowirra land to be prescribed places, whether the *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) Variation Regulations 2020 (SA)* ("***Cowirra No.1 Regulations***") and the *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) Variation Regulations (No. 2) 2020 (SA)*

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("***Cowirra No.2 Regulations***")[1] were ineffective to declare the Cowirra land, and invalid accordingly. It specifically raises whether an inferred "*statement of regulatory intent*"[2] is sufficient to constitute a "declaration" in the absence of any text in the regulation out of which a declaration might be construed and where the drafter intended the regulation not declare.

b. Secondly, whether there was an obligation to accord procedural fairness to the appellants, as owners and occupiers of the land, prior to the making of the *Cowirra Regulations* which declared the land to be a "prescribed place". That raises whether contrary to the approach of the Court of Appeal, the correct focus for ascertaining the existence of such a right (or it exclusion) was on the appellants as owners and occupiers of the declared "place", rather than directing attention more widely to an entire category of persons ("participants") who by reason of the declaration are subject to a legislative provision prohibiting their entry?

Part III:

3. The appellants do not consider that notices need to be given in compliance with s78B of the *Judiciary Act 1903 (Cth).*

Part IV:

4. The decision of the Court of Appeal is unreported, *Disorganized Developments Pty Ltd and Others v the State of South Australia* [2022] SASCA 6.

Part V:

5. The proceedings in the Court of Appeal were in the form of a case stated on agreed facts which can be found in the Core Appeal Book at pages 5-7.

Part VI: GROUND 1 – The Regulations were ineffective

The prohibition on entering prescribed places, the Regulations and their effect

6. The *Criminal Law Consolidation Act 1935 (SA)* ("the *CLCA*") creates a scheme of

[1] The *Cowirra No.1 Regulations* and *Cowirra No.2 Regulations* are described collectively as the ***Cowirra Regulations***.
[2] Court of Appeal "**CA**", [33].

offences directed at a "participant" in a "criminal organisation".[3] Apart from s 83GC (where a participant cannot be knowingly present in a public place with 2 or more other participants), a participant cannot enter a *prescribed place* (s 83GD(1)); attend a *prescribed event* (s 83GD (2)); or recruit anyone to become a participant (s 83GE). Section 83GD(1) relevantly provides:

> **83GD—Participants in criminal organisation entering prescribed places and attending prescribed events**
> (1) Any person who is a participant in a criminal organisation and enters, or attempts to enter, a prescribed place commits an offence.
> Maximum penalty: Imprisonment for 3 years.

7. A person who commits this offence must be sentenced to a term of imprisonment which cannot be suspended other than in "exceptional circumstances": s83GF(2). A person who stands to be sentenced for that offence includes a person who aids, abets, counsels or procures the commission of such an offence. Section 267 of the *CLCA* provides that an accessory of that kind "*is liable to be prosecuted and punished as a principal offender*".[4] Attempts to commit an offence constitute a separate offence: s 270A, *CLCA*. A person who attempts to enter a prescribed place commits an offence contrary to s 83GD(1) and will be sentenced in accordance with s 83GF, as will a person who is an accessory to an attempt.
8. The expressions "criminal organisation" and "prescribed place", are defined in s 83GA(1) of the *CLCA*. Relevantly,

> **83GA—Preliminary**
> (1) In this Division, unless the contrary intention appears—
> …
> ***criminal organisation*** means—
> …
> (c) an entity declared by regulation to be a criminal organisation
> …
> ***prescribed place*** means a place declared by regulation to be a prescribed place

9. The task of declaring fixed by s83GA(1) is straightforward. Such a regulation must declare a place to be a "prescribed place".
10. Sections 83GA(2) of the *CLCA* fixes a requirement for "*each regulation made*" under subsection (1); that is, a regulation that declares the place to be a prescribed place. The requirement introduced is one as to the content of the regulation that makes the

[3] The offences in Division 2, Part 3B were inserted by the *Statutes Amendment (Serious and Organised Crime) Act 2015*.

declaration:

> **83GA—Preliminary**
> (2) Each regulation made under subsection (1) for the purposes of the definitions of ***criminal organisation***, ***prescribed event*** or ***prescribed place*** and required to be laid before each House of Parliament in accordance with the *Subordinate Legislation Act 1978* may only relate to 1 entity, 1 event or 1 place (as the case may require).

11. Fulfilment of s 83GA(2) is a condition precedent for the making of a regulation under subsection (1) (it cannot not otherwise be a regulation). There is no question of its being a condition of a kind which can be breached without invalidity.[5]

The origin of the 2015 Schedule regulations

12. The 2015 Schedule regulations were made by Parliament as Schedule 1 to the *Statutes Amendment (Serious and Organised Crime) Act 2015 (SA)* ("the **2015 Act**"). The "preliminary" provisions in s 13 of the 2015 Act provides that Schedule 1 "has effect to make the [2015 Schedule regulations] (set out in Schedule 1) as regulations under the *CLCA*". At the time they were enacted, they comprised a list of ten "criminal organisations" declared for the purposes of s 83GA, including the "*motorcycle club known as the Hells Angels*".[6]
13. Section 3 of the Schedule enacted a list of sixteen places, described by their Certificate of Title and address, for the purposes of s 83GA of the *CLCA,* and declared them to be a "prescribed place".
14. It is s 3(1) of the Schedule that performs the operative task of declaring those places.
15. The *Cowirra Regulations* purport to vary the 2015 Schedule regulations.
16. They are drafted to add the "places" described by: "Certificate of title 5995/665", "591 Kenny Road, Cowirra" and the "Certificate of title 5880/413", "Lot 555 Kenny Road, Cowirra" to the list in the 2015 Schedule regulations. This was effected in the *Cowirra No. 1 Regulations* as follows:

> **3—Variation provisions**
> In these regulations, a provision under a heading referring to the variation of specified regulations varies the regulations so specified.
> **Part 2—Variation of *Criminal Law Consolidation (Criminal Organisations) Regulations 2015***

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[4] *Giorgianni v The Queen* (1985) 156 CLR 473.
[5] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.
[6] Section 13(2) of the 2015 Act "*removed any doubt*" declaring that the 2015 Schedule Regulation in Schedule 1 would "*stop being a provision of the Act and become regulations made under the [CLCA].*"

4—Variation of regulation 3—Places declared to be prescribed places (by certificate of title)—section 83GA

Regulation 3(2), table—after its present contents insert:

Certificate of title 5995/665	*591 Kenny Road, Cowirra*

and similarly in the *Cowirra No. 2 Regulations*:

3—Variation provisions

In these regulations, a provision under a heading referring to the variation of specified regulations varies the regulations so specified.

Part 2—Variation of *Criminal Law Consolidation (Criminal Organisations) Regulations 2015*

4—Variation of regulation 3—Places declared to be prescribed places (by certificate of title)—section 83GA

Regulation 3(2), table—after its present contents insert:

Certificate of title 5880/413	*Lot 555 Kenny Road, Cowirra*

17. As accepted by the Court of Appeal, the 2015 Schedule regulations did not, and could not, declare the Cowirra land, inserted by the *Cowirra Regulations,* to be a prescribed place. The list of places in the 2015 Schedule regulations could only have been enacted. Had they been made as a regulation they would not have complied with s 83GA(2).[7] Their continuing lawfulness (as a declared list not in conformity with s 83GA(2)) was supported by their legislative source. It was not separately a regulation which could be varied by adding to the list – it contained multiple places and did not conform with s 83GA(2) if added to (CA [22], [26]) and was not a declaratory mechanism of continuing operation and effect. Their re-instatement as regulations (s 13(2) 2015 Act) enabled the executive by regulation to remove either organisations or places from the list so enacted.
18. The result is that the attempt to vary the 2015 Schedule regulations to incorporate the Cowirra land, described by the Court of Appeal as an "apparent folly",[8] is invalid.
19. The Court of Appeal further accepted the Appellants' argument that the *Cowirra Regulations* did not, in terms, declare the Cowirra land as a prescribed place. Indeed, it concluded that the text of the regulations is "*demonstrably insufficient for the task*" (CA [35]).
20. Nevertheless, the Court of Appeal held, that, although the *Cowirra Regulations* do not

[7] The listing of "criminal organisations" and "places" in the 2015 Act was identified to have as a further purpose that "the making of a regulation is open to judicial review, the decision of Parliament is not": Second Reading speech of the Attorney-General (*Hansard*, House of Assembly, 3 June 2015, p1481).
[8] CA [41].

expressly declare anything, they achieve their "*desired legal effect by implication*": CA [41]. The Court of Appeal approached the task of implication by first identifying that in order to "declare" something, it was "*not indispensable to the text*" to use the expression "declare" (CA [33]). This may be accepted – provided there exists a word or phrase (text) out of which a declaration might be construed. But the Court of Appeal did not require this. Instead, a "*statement of regulatory intent*" to establish the Cowirra land as a prescribed place was held sufficient for the requirement of a declaration (CA [33]). In so reasoning, it erred.

A declaration cannot be implied when the text is opposite

21. The regulation manifestly set out not to declare.

22. The text of the regulations did not undertake to declare anything - importantly, it eschewed that task. Instead, the drafter of the *Cowirra Regulations* misconceived the effect of the 2015 Schedule regulation and drafted the *Cowirra Regulations* to leave the operative activity (declaring) to the 2015 Schedule regulations, which, as it was held, could not have that effect.

23. Nor is it the case that the *Cowirra Regulations* contain some synonymous word or collection of words to justify that it is not necessary to use the word "declare". Accepting that what might be necessary to "declare" is a constitutive act consisting of a formal and present statement of the required circumstance, nothing is to be found in the text from which to imply such a statement.

24. Moreover, the text of the *Cowirra Regulations* announce the purpose. Regulation 3 of each explains that the regulations to follow are "variation provisions". The substance of reg. 3 gives work to the headings in the following regulations as identifiers of the "variation of specified regulations" and that their inclusion "varies the regulations so specified". The Part heading and section heading that follow explain that the regulations are concerned with "variation" of the clauses of the 2015 Schedule Regulations. It is not possible to extract from that text the reference to "declare" in the heading of reg. 4 and free it from its work as describing what is to happen elsewhere.

25. The critical step in the Court of Appeal's reasoning (CA [44]) – drawing a statement of intent from part of a heading – is inconsistent with the text of the regulation.

A purpose cannot be used to fill gaps or repair

26. The task of construction of the regulation was to ascertain its operative legal effect

from the text construed in the totality of its context. The critical focus remains at all times on the operative text which was to be construed consistently with the ascertained purpose.

27. If the text is the beginning and the end of statutory interpretation[9], a distinction is to be drawn between the ultimate purpose or the objective and the means adopted to achieve that purpose, the proximate purpose.[10] The ultimate objective of the *Cowirra Regulations* is clear. The means adopted is also clear. The means adopted are legally ineffective to achieve the objective.

28. The Court of Appeal's approach to implication is inconsistent with the statements of principle that govern the implication of words into a statute or a regulation. This Court in *Taylor v The Owners - Strata Plan No 11564*[11] emphasised that whether a court is justified in doing so "*is answered against a construction that fills 'gaps disclosed in legislation' ... or makes an insertion which is 'too big or too much at variance with the language in fact used by the legislature*." Critically any modified meaning must be "*consistent with the language in fact used by the legislature*".[12] Though reaching a different result, the minority in *Taylor* did not differ in principle and emphasised that "*implicit words*" were "*always words of explanation.*" The task remains "*to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.*"[13]

29. The text supplied in those regulations is in precise opposition to the implication said by the Court of Appeal to arise from it. What can be inferred from the operative provision and the requirement to "*insert*" is a manifest purpose of *not* declaring in the *Cowirra Regulations*, and having the declaring occur in the 2015 Schedule regulations. To read it as declaring, is not to explain the text, but to wrest it to an opposing course.

30. That the Court of Appeal's approach to construction departed from the approach of construing text, and instead finding a purpose and giving effect to it, is most clearly

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[9] *Alcan (NT) Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 250 CLR 503, 519 (French CJ, Hayne, Crennan, Bell, Gageler JJ).
[10] *Wainohu v New South Wales* (2011) 243 CLR 181, [146] (Heydon J); *Alexander v Minister for Home Affairs* [2022] HCA 19, [101], [114]-[116] (Gageler J).
[11] *Taylor v The Owners – Strata Plan 11564* (2014) 253 CLR 531.
[12] *Taylor v The Owners – Strata Plan 11564* (2014) 253 CLR 531, [37]-[39] (French CJ, Crennan and Bell JJ).
[13] *Taylor v The Owners – Strata Plan 11564* (2014) 253 CLR 531, [65] (Gageler and Keane JJ). This expression of principle was later endorsed in *HFM043 v The Republic of Nauru* [2018] HCA 37, 92 ALJR 817, [24] (Kiefel CJ, Gageler and Nettle JJ).

shown at CA [47]. The regulatory text to which there might be an "*alternative construction*" or a "*reasonably open construction*" is nowhere identified. There is, with respect, no alternative construction that reg. 4 yields other than the purported variation of reg. 3 of the 2015 Schedule Regulations. That purposive aids are being treated as text is shown when the Court of Appeal explains that the *Cowirra Regulations* are "announcing *the purpose* that they be declared to be prescribed places". The purpose of the regulation is identified with its ultimate objective which fails to accord priority to the means adopted to achieve that purpose.

31. While the heading of reg. 4 speaks of "*Places declared*" and the title of the *Cowirra Regulations* of "*Prescribed place*" those references signpost the ultimate objective but not the means. Section 14 of the *Legislation Interpretation Act 2021 (SA)* does not elevate the argument (CA [36]). A provision that requires a construction that best achieves a purpose or object, does not bypass the necessity of construing the text of the regulation. Finding an ultimate objective, and using it to construct the required declaration out of "*a statement of regulatory intent that the place be a prescribed place*"[14] is not an interpretative task.

Ground 2 should be decided even if the Regulations are ineffective

32. The jurisdiction of this Court on appeal is attracted by special leave granted on grounds directed at two independent questions. There can be no difficulty with a decision of the Court having two independent *rationes*. It remains important to decide Ground 2 even if the *Cowirra Regulations* are invalid or ineffective to declare the land as "prescribed land", because a resolution of the first ground will not quell the controversy between the parties. The regulatory regime in the *CLCA* remains in force. Rehabilitated declarations would affect the rights of the Appellants (and other owners and occupiers), but on the authority of the Court of Appeal procedural fairness need not be accorded.

GROUND 2 – The Appellants were denied procedural fairness

33. No notice was given to the Appellants of the proposed making of *Cowirra Regulations*. No invitation was accordingly given to make any submission about the proposed exercise of the power to make a regulation under s 83GA(1). That was so despite there being no practical impediment to the giving of Notice to the owners and occupiers of

[14] CA [33].

the place to be declared. The land itself, and the system of registration of ownership of it supplies the relevant means for providing procedural fairness.

34. The Appellants contend that the making of the regulation was one that attracted the presumptive application of the obligation to accord procedural fairness and was not excluded.

The source of the obligation to accord procedural fairness

35. In its origins an exclusive focus on the adjudicative (or curial) model of decision-making *imported* a hearing rule[15] by reason of the necessary or inherent presence of "participants" in that process. This was the focus from which the principle was developed – and explains its initial limits.[16]

36. The common law adjudicative (curial) model came under challenge when statutes began to enter more fully into the social and economic life of the nation.[17] It did so by authorising decisions which did not involve or call for any adjudicative process. The response of the common law was to shift the focus to a feature of the model which was common to all decisions regardless of process; that fair decision-making requires 'participation' by those particularly affected.[18] This shift is what is identified in *Ainsworth v Criminal Justice Commission*[19]: "*... what is decisive is the nature of the power, not the character of the proceeding which attends its exercise.*"[20] This is the modern focus. Its release from the adjudicative (curial) model enabled the response to encompass effects on more than rights: "*rights, interests or expectations*"[21]; "'*right or interest' relating to personal liberty status, preservation of livelihood and reputation,*

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[15] In the same way that conferral of jurisdiction on a court *imports* the existing procedural rules for its exercise: *Electric Light and Power Supply Corporation Ltd v Electricity Commission of New South Wales* (1956) 94 CLR 554, 559 (the Court).

[16] In the United Kingdom: *Cooper v Wandsworth District Board of Works* (1863) 14 CB (NS) 180; 143 ER 414; *Board of Education v Rice* [1911] AC 179; *Local Government Board v Arldige* [1915] AC 120; *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Company* [1924] 1 KB 171; *Ridge v Baldwin* [1964] AC 40. In Australia: *Sydney Corporation v Harris* (1912) 14 CLR 1; *Delta Properties Pty Ltd v Brisbane City Council* (1955) 95 CLR 11; *Commissioner of Police v Tanos* (1958) 98 CLR 383 ("***Tanos***"); *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353; *Banks v Transport Regulation Board (Victoria)* (1968) 119 CLR 222; *Salemi v MacKellar (No 2)* (1977) 137 CLR 396.

[17] *Kioa v West* (1985) 159 CLR 550; 616-617 (Brennan J) (***"Kioa"***).

[18] See the rationales discussed in I Holloway, 'Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism' (Ashgate, Aldershot, 2002), p286-294 and in Chief Justice Robert S French, 'Procedural Fairness - Indispensable to Justice?' (7 October 2010, p1-2).

[19] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

[20] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 576 (Mason CJ, Dawson, Toohey and Gaudron JJ). The same shift was identified earlier in *Kioa v West* (1985) 159 CLR 550, 583-4 (Mason J).

[21] *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353, 375 (Menzies J).

as well as to proprietary rights and interests";[22] "*the rights, interests, status, or legitimate expectations*",[23] "*interest*" *including protection of reputation; including business or commercial reputation*;[24] "*legal exposure*"[25] or "*altered legal position*".[26]

37. Accordingly, the duty to act fairly (in the sense of acting in a manner that is procedurally fair) is imported whenever the exercise of statutory executive power is "apt to affect"[27] (or has the potential to impact) individuals in these ways separately from its impact on the public in general – unless excluded expressly or by necessary implication.[28] The focus is therefore on the capacity or potential of the power to affect particular individuals for which participation is demanded to ensure fair decision-
10 making. In other words, participation is a response to the effects *on* individuals, not to the consequences *for* the community, of the exercise of the power.

38. This is the analytical tool for approaching the issue of participation of individuals in regulation-making (in general) and in the specific case of a regulation which supplies a factum for a normative rule. This also has a consequence for exclusion to which these submissions return later.

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[22] *Kioa v West* (1985) 159 CLR 550, 582 (Mason J).
[23] *Haoucher v Minister for Immigration & Ethnic Affairs* (1990) 169 CLR 648, 652 (Deane J).
[24] *Annetts v McCann* (1990) 170 CLR 596, 599 (Mason CJ, Deane, McHugh JJ), 608 (Brennan J); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 577 (Mason CJ, Dawson, Toohey, Gaudron JJ).
[25] *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353, 367 (Kitto J); *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360, at 368 (Spender J).
[26] *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353, 375 (Menzies J).
[27] *Kioa v West* (1985) 159 CLR 550, 619 (Brennan J); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 591 (Brennan J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, at 658 [64] (Gummow, Hayne, Crennan, Bell JJ)
Or as otherwise expressed: "the potential for a decision to affect" – *Re MIMA; ex parte Miah* (2001) 206 CLR 57, 69 [31] (Gleeson CJ and Hayne J), 114 [186] (Kirby J); "would or might affect" or "might damage"– *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 583, 594 (Brennan J); "may be adversely affected" – *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, at 666 [97] (Gummow, Hayne, Crennan, Bell JJ); was likely to affect – *Re MIMA; ex parte Miah* (2001) 206 CLR 57, at 96 [140] (McHugh J); may "destroy, defeat or prejudice" – *Annetts v McCann* (1990) 170 CLR 596, 598; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 576 (Mason CJ, Dawson, Toohey, Gaudron JJ); 592 (Brennan J); *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 56 (Gleeson CJ); "prejudice those rights and interests" … ("Prospective, as well as existing") – *Haoucher v Minister for Immigration & Ethnic Affairs* (1990) 169 CLR 648, 680 (McHugh J); "may seriously prejudice the legal situation" and a "real prejudice in a legal respect" – *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353, 367, 368 (Kitto J); "expose … to a possibility not previously existing" – *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353, 368 (Kitto J); *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360, at 368 (Spender J); subjected to a new hazard ("creates against the company a ground of liability") – *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353, 367 (Kitto J); *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360, at 368 (Spender J); altered in its legal position to his disadvantage – *Rees v Crane* [1994] 2 AC 173, 195E; "subjecting them to a new [legal] hazard" – *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353, 370 (Kitto J); placed "in a different and less secure legal position" – *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353, 375 (Menzies J).
[28] The principle identifying the summons 'participation' was first expressed by Jacobs J (in the minority in *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 452) and later adopted by both Mason J and Brennan J in *Kioa v West* (1985) 159 CLR 550, 619 (Brennan J); 584 (Mason J).

'Participation' and the normative rule

39. Whether an exercise of statutory executive power by the making of a binding normative rule imports procedural fairness, will depend, not on the 'mechanism' the executive chooses, but on the direct effect of an executive act on the particular applicant.[29] Accordingly, as recognised by Selway J even a facially neutral regulatory instrument (such as one that governs the use of airspace around a particular airport[30]), can have direct and individual effects and attract procedural fairness.

40. So much vindicates Brennan J's extra-judicial contention that the distinction between powers that are "legislative" (and not reviewable on the grounds of procedural fairness) and powers which:

> "… depend on whether the exercise of the relevant power is apt to affect distinctively the interests of individuals rather than the interests of the public at large or a large segment of the public. The courts assume jurisdiction to review procedures when individual interests are involved by the processes affecting the interests of the public at large are left to political control".[31]

Multiple consequences

41. An exercise of power can have multiple effects on different persons. That was recognised in *Tanos,*[32] *Kioa,*[33] *McWilliam*[34] and *Bank Mellat*[35]. It is starkly seen in *King Island Council v Resource Planning and Development Commission.*[36] An amendment to the planning scheme had two legal consequences: on a Council (who were deprived of a power, and who were under an obligation subject to enforcement by prosecution and fine) and on "a small and identifiable group" of landholders (because they could not by reason of the amendment subdivide land).

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[29] *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 763, 775-776 [31]-[32] ("***Bank Mellat***").
[30] *McWilliam v Civil Aviation Safety Authority* (2004) 142 FCR 74.
[31] Brennan J, *The Purpose and Scope of Judicial Review* (1986) 2 Aust Bar Rev 93, at 105; citing *A-G (Canada) v Inuit Tapirisat of Canada* (1980) 115 DLR (3d) 1, 19 itself cited in *Kioa v West* (1985) 159 CLR 550, 620 (Brennan J). See for an analysis of the principles underpinning the development of the law in Canada: Genevieve Cartier, 'Procedural Fairness in Legislative Functions: The End of Judicial Abstinence' (2003) 53 U. Totonto LJ 217 (see especially p233). See also, Craven, *Legislative Action by Subordinate Authorities and the Requirement of a Fair Hearing* (1988) 16 MULR 569.
[32] Owners and customers.
[33] Parents and children.
[34] All users and a particular skydiving operator.
[35] The bank and those trading with the bank.

Regulation as factum

42. The distinctive nature of the *Cowirra Regulations* is that the singular exercise of executive power in the making of the regulations operates to supply a factum for the penal provision in s 83GD so as to extend the prohibition on all "participants" (as defined) from entry upon the place identified by the supplied factum. As to the legal significance of a regulation that supplies a factum:

    a. *Lim Chin Aik v The Queen*[37] correctly identifies a factum-selecting regulation as an executive act (but does not address the implications of this for procedural fairness);

    b. *Bread Manufacturers v Evans*[38] and *McWilliam v Civil Aviation Safety Authority*[39] recognise that an executive act in the form of a regulation or order can attract procedural fairness (but neither addresses the inclusion by regulation of a factum in a normative legislative provision);

    c. *Bank Mellat*[40] recognises that an executive act in the form of a direction targetting a bank by prohibiting others from dealings with it, and enforced by statutorily imposed civil and criminal penalties for contravention of the direction, can import procedural fairness for the bank.

43. Accordingly, that the *Cowirra Regulations* supply a factum to a legislative penal provision of general application (to all "participants" (as defined)) should not obscure the fact that the choice of factum has immediate consequences for the owners and occupiers of the place declared (the Appellants). It is not significant that those consequences arise by reason of the inclusion of their land in the reach of s 83GD(1).

44. The consequences for the owners and occupiers under the *CLCA* are individual and direct, and do not apply (either at all, or in the same way) to "*participants*" as a class. Reflecting the analysis of Dixon CJ and Webb J in *Tanos,*[41] the consequences here are that:

    a. an owner is exposed to criminal liability should they permit a known participant to continue to occupy the land; or enter the land;

    b. an occupier is exposed to criminal liability should they permit a known participant to enter the land;

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[36] *King Island Council v Resource Planning and Development Commission* [2007] TASSC 42, [18] (Blow J).
[37] *Lim Chin Aik v The Queen* [1963] AC 160, 171 (PC – Lord Evershed).
[38] *Bread Manufacturers of NSW v Evans* (1985) 159 CLR 550, 619 (Gibbs CJ).
[39] *McWilliam v Civil Aviation Safety Authority* (2004) 142 FCR 74.
[40] *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 763, 776 [32].

c. the width of the definition of "participant" is such that the owner or occupier was placed at additional risk of aiding, abetting, counselling or procuring the commission of an offence by someone whose association with "the affairs of a criminal organisation" might be known, but not appreciated as constituting them "participants" (see paragraph [7] above);

d. the value of the land is prejudiced or at real risk to the detriment of the owner;

e. the reputation of the owner or occupier (at least, if not a corporate owner), or the commercial goodwill of any business conducted on the land by the owner or occupier, is sullied or stained to their detriment;

f. the owner's use of the land was subjected to limitations not previously attaching to the land, for example, an owner might be deterred from holding an event on the land in apprehension for fear of attracting participants for whose entry onto the land they might be held criminally responsible;

g. the owner's and occupier's right freely to associate with others on the land was significantly impaired;

h. if, the owner or occupier were also a participant, they would be excluded altogether from personal enjoyment of the land, being liable to imprisonment should they enter upon it for any reason.

45. Such consequences are "*apt to affect the interest of [the owners/occupiers] in a way that is substantially different from the way it [the regulation] is apt to affect the interests of the public at large.*"[42]

46. The Court of Appeal apparently recognised this - but not its significance to the result. It recognised that certain individual would be "adversely affected".[43] Critically, it also accepted that the immediate effect of the *Cowirra Regulations* was "*sufficient to give the applicants standing to challenge the regulations, insofar as standing is required*",[44] but rejected the relevance of standing. This overlooked the peculiar nature of the right to procedural fairness as a personal right (capable of waiver[45]) belonging to the individual entitled to be heard – but not available to others.[46] This is the very point

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[41] *Commissioner of Police v Tanos* (1958) 98 CLR 383, 391-2 (Dixon CJ and Webb J).
[42] *Kioa v West* (1985) 159 CLR 550, 619 (Brennan J).
[43] CA [137]-[183].
[44] CA [85].
[45] *Vakauta v Kelly* (1989) 167 CLR 568; *Smits v Roach* (2006) 227 CLR 423, 439 [43], 442 [49], 465 [124]; 470 [129].
[46] *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 320 (CA, Lord Denning MR), 366 (House of Lords, Lord Diplock) referring to *Durayappah v*

made in *Plaintiff S10*[47] that (as observed in *Kioa* by Brennan J (at 622), and Deane J (at 634): "*the interest which tends to attract the protection of the principles of natural justice may be equated with the interest which, if affected, gives "standing" at common law (and, one might add, in equity), to seek a public law remedy*".[48]

Procedural fairness supplies the missing middle

47. The limited assistance provided by the legislative regime for the executive decision-makers is a further reason for according procedural fairness. A "prescribed place" is defined only as a place declared by regulation to be a prescribed place (s 85GA(1)). Subject to s 83GA(2), the Governor has power to make "such regulations as are contemplated by, or as are necessary or expedient for the purposes of, this Act" (s 370(1)). The discretionary power is broad, wide, and undirected[49]; and owes little to matters of policy.

48. The scheme does however require the assessment of facts to supply the "missing middle" between the legislative proscriptions and the choice of a factum by executive act. For these purposes a gathering of participants is not penalised (cf s 83GC); rather a solitary entry is. A declaration for proper purposes must bridge the gap between the solitary activity which is penalised, and the legislative goal of disrupting criminal organisations.

49. A significant consequence is that in order to carry out its delegated responsibility to respond to changing circumstances, the executive will have to inform itself properly about the facts. There must be a relevant connection between the penal provisions and the inclusion in those provisions of the chosen factum (place or event). Determining whether or not there are connecting facts can only be assisted by hearing from those who own and occupy the targeted land.[50]

50. It follows that the Court of Appeal made two principal errors. While it accepted that owners and occupiers stood to be "considerably affected" both as to property rights, and the effect on commercial interests:[51]

Fernando [1967] 2 AC 337. See also, Wade, *Administrative Law*, (7th ed, 1994) p 531; Allars, *Standing: the Role and Evolution of the Test* (1991) 20 Fed LR 83, 99-101.

[47] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.

[48] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 659 [68] (Gummow, Hayne, Crennan, and Bell JJ).

[49] *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746, 758 (Dixon J).

[50] *Kioa v West* (1985) 159 CLR 550, 586-7 (Mason J); *Jarratt v Commissioner of Police* (NSW) (2005) 224 CLR 44, 56 (Gleeson CJ); *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 763, 776, [32]).

[51] CA [137]-[138].

a. the Court at the outset focussed on the consequences for the legislative regime (the effect on "participants") of the exercise of the power: CA [91];

b. this led the Court to focus on "indeterminacy", questioning the "determinacy" of its chosen class ("participants") by reason of the "diffuse" definition of "participant" in s 83GA(1): CA [92]-[94]; CA [106];

c. this induced the Court to turn to the question of implied exclusion. The Court rejected the owners and occupiers of the land prescribed by regulation as the "specially affected class of individuals" because "ultimately" the obligation to accord procedural fairness – "is a question of whether the *legislature* can be taken impliedly to have excluded any obligation to accord procedural fairness in its conferral of the regulation-making power": CA [96]. Otherwise the notion of "differential obligation" would have to be introduced, an improbable intention of the Parliament (CA [97], [137]-[139]).

51. The first error was in the erroneous focus on "participants" as the relevant affected class, and then determining whether the rights of a different affected class were excluded by reason that rights were excluded for "participants". In short, contrary to the analysis of the Court of Appeal there was not a single class of affected persons to which there needed to be a "differential obligation" –rather there were two classes, to one of which only procedural fairness was owed.

52. The second error lies in justifying an implied exclusion of procedural fairness for owners and occupiers on the basis of the social policy of disrupting "participants". Owners and occupiers have an entirely separate and distinct interest which is not caught by the policy.

No exclusion of procedural fairness

53. Returning to the analytical tool explained at [37] above, the question whether a legislative intention to exclude the obligation is "manifested" with "irresistible clearness" can only be examined *after* the applicant has been identified as a person entitled to procedural fairness. This is so for three reasons:

a. first, the search for any such manifested will cannot be properly undertaken until it is determined who is otherwise to have the benefit of the right: the question will always be – is it necessarily intended by the legislature that this applicant, or these applicants, are to be denied procedural fairness:

> "Accordingly, the relevant question in the present proceedings is whether the terms of the Act … display a legislative intention to exclude the common law rules of natural justice. More specifically, the question is whether the Act intended to *deny an applicant* 'an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise"[52];
>
> (emphasis added)

b. secondly, since the obligation to accord procedural fairness is a fundamental principle/right attracting the principle of legality,[53] it must first be established that the right arises at all before determining whether its tenacity is overcome by a clearly manifested will of the Parliament;

c. thirdly, as explained above, the obligation to accord procedural fairness is imported by the nature of the power to be exercised, not the character of the process,[54] and the exclusion inquiry involves an examination of matters in the statute other than the character and nature of the power to be exercised and the circumstances of the applicant for relief.

54. The exclusion of an applicant (or the class to which they belong) from procedural fairness requires either express text or must arise by necessary implication. While express text can state an exclusion comprehensively without reference to the persons affected, a necessary implication must have an identified target. Further, a necessary implication must have force equivalent to an express exclusion leaving no room for procedural fairness.[55] This is why a legislative intention to exclude the rules will not be assumed or spelled out from indirect references, uncertain inferences or equivocal considerations.[56] An example is that an intention to exclude is not inferred merely from the presence in the statute of rights which are commensurate with some of the rules of

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[52] *Re MIMA; ex parte Miah* (2001) 206 CLR 57, 93 [127] (McHugh J, citing *Kioa v West* (1985) 159 CLR 550, 628 (Brennan J); See also, *Saeed v Minister for Immigration and Citizenship* (2020) 241 CLR 252 (held, s 51A only applied "in relation to the matters it deals with" – and not to offshore processing); *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 763, 776 [32]).

[53] *Saeed v Minister for Immigration and Citizenship* (2020) 241 CLR 252, 259 [15].

[54] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 576; *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

[55] *Furnell v Whangarei High School* [1973] AC 660 (PC), 679G – 682F fair code); *contrast* Viscount Dilhorne and Lord Reid in dissent, at 687D-690H (code did not address investigation leading to suspension; courts can supplement a code where it is unfair and additional steps would not frustrate the legislative purpose, citing *Wiseman v Borneman* [1971] AC 297, 308); *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 432-436, 440 (Stephen J, also citing *Wiseman v Borneman* [1971] AC 297, 308); *Re MIMA; ex parte Miah* (2001) 206 CLR 57, 83-88 (Gaudron J), 93-998 (McHugh J); 108-115 (Kirby J) (held, not a code); *Saeed v Minister for Immigration and Citizenship* (2020) 241 CLR 252.

procedural fairness.[57]

55. The presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with "irresistible clearness"[58] derives from the principle of legality which informs the working relationship between Parliament and the courts under the rule of law.[59] Of particular significance to this matter, the legislature, by using general language and a broad discretion, will be taken to have left it to the courts to decide when and how the principles of natural justice should be applied in the exercise of the executive power.[60]

10 56. An intention to exclude procedural fairness will no doubt be inferred where to accord it would in the circumstances frustrate the purpose for which a particular power has been conferred.[61]

57. There is no express exclusion in the *CLCA*. The question whether the *CLCA* has relevantly excluded procedural fairness by "necessary implication" will therefore have to focus upon owners and occupiers targeted by the declaration of their place.

58. The implication that procedural fairness is excluded was drawn by the Court of Appeal from the legislation's purpose in disrupting the activities of criminal organisations, and their participants.[62] This was identified as a "*broad social policy focus*" (CA [133]), "*not at an individual level*" (CA [114]), and held to be inconsistent with the giving of

20 procedural fairness to "*participants*" before declaring a place to be a "prescribed place", whether or not also the owner or occupier of the land to be declared (CA [137]) - or (so it was held) to any owner or occupier, who would have to be the beneficiary of a "*differential obligation*" not intended by the Parliament (CA [138]-[139]). It is significant that the Court of Appeal focused instead on the consequences *for the*

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[56] *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396; *Haoucher v Min for Immigration & Ethnic Affairs* (1990) 169 CLR 648, 680 (McHugh J); *Re MIMA; ex parte Miah* (2001) 206 CLR 57, 93 [126] (McHugh J); *South Australia v Slipper* (2004) 136 FCR 259 (FCAFC), at 279 [93] (Finn J)

[57] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 576; *Annetts v McCann* (1990) 170 CLR 596 at 598; *South Australia v Slipper* (2004) 136 FCR 259, 279 [93] (Finn J).

[58] *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

[59] *Saeed v Minister for Immigration and Citizenship* (2020) 241 CLR 252, 259 [15].

[60] *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 452 (Jacobs J).

[61] *Kioa v West* at 586 (Mason J); *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 440 (Stephen J, "*inconsistent or destructive of the apparent purpose of the legislation*", citing *Wiseman v Borneman* [1971] AC 297, 308); *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 431; *South Australia v Slipper* (2004) 136 FCR 259 (FCAFC), at 284 [113] (Finn J); *CPCF v Minister of Immigration & Border Protection* (2015) 253 CLR 514, 541-2 (French CJ), 558-9 (Hayne, Bell JJ), 621-4, (Gageler J (Crennan J conc)), 652-4 (Keane J) [safety a priority]; *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 763, 775 [31], 778 [37]).

[62] CA [111]-[114].

legislative regime (the effect on "participants") of the exercise of the power, rather than the effect on the exercise of the power (of the declaration of "place").

59. It may be accepted that a purpose of the 2015 Act was to disrupt the activities of declared "*criminal organisations*",[63] but, in the absence of express exclusion (as here), the implementation of that statutory purpose must be shown wholly to exclude the giving of procedural fairness to the Appellants *as owners and occupiers*.

60. An examination of the legislation reveals that prior notice to owners and occupiers, as a necessary step in giving procedural fairness, carries no potential for frustrating the effective implementation of the policy objectives of "disruption" because prior notice offers no opportunity to avoid the consequences of the proposed declaration. The effectiveness of the regulation "*does not depend on the ability to strike without warning*".[64] In fact, knowing of the declaration serves the purpose of the scheme.

61. Moreover, far from leaving no room for procedural fairness to the Appellants, the statutory scheme contains elements that rest on it:

    a. First, the Parliament has delegated the effective implementation of the scheme, in significant respects, to the executive, to aid flexibility – to enable a better assessment to be made of what is needed from time to time.

    b. Secondly, a significant consequence is that in order to carry out that responsibility, the executive will have to inform itself properly about the facts.[65] This is the "missing middle" – as explained from [46] above.

62. It is not without significance that the declared "criminal organisations" have never been judicially so adjudged, or their "participants" held to have been engaged in criminal activity by reason of their being "participants": these are all legislative labels attributed without any hearing or any independent and impartial determination, and upon the basis of undisclosed or untested information. In those circumstances, there is every reason to expect the Parliament in a liberal democracy under the rule of law will intend at least to accord procedural fairness in the implementation of the scheme to those directly and immediately affected by the legislative scheme. It is not unlawful to be a "participant", just as it is not unlawful to be an 'alien', and a "participant" is –

> [Not] without status or standing in the land. He can invoke the protection of the law … against any government official or private citizen who acts unlawfully

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[63] See the Second Reading speech of the Attorney-General (*Hansard*, House of Assembly, 3 June 2015, p1476 and continuing).
[64] Compare, *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 763, 778F, [37].
[65] *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 763, 776 [32] (4th Reason).

> against him or his property. He can look to, and demand the observance of, the ordinary restraints which control the exercise of administrative power including, unless they be excluded by reason of statutory provision or the special nature of the case, the standards of procedural fairness which are recognized as fundamental by the common law."[66]

63. Whether the measure would be effective or counter-productive, or would have unintended and undesirable consequences, is a compelling purpose for including and not excluding the Appellants from the exercise of the power.

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Part VII:

The Appellants seeks order that:

1. The appeal be allowed and the orders of the Court of Appeal dated 16 February 2022 be set aside.
2. The answers to the Questions on the Case Stated are as follows:

   2.1 As to Question 1: Yes, r 3 of the *Criminal Law Consolidation (Criminal Organisations) Regulations 2015 (SA)* is invalid to the extent it purports to include the Cowirra land and further the *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) Variation Regulations 2020 (SA)* and

20 the *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) Variation Regulations (No. 2) 2020 (SA)* do not validly declare land to be a prescribed place.

   2.2 As to Question 2: Yes, the *Criminal Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) Variation Regulations 2020* and the *Criminal Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) Variation (No 2) Regulations 2020* are invalid.
3. The Respondent is to pay the Appellants' costs of, and incidental, to the appeal to the High Court, and the proceedings in the Supreme Court of South Australia.

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[66] Compare, *Kioa v West* (1985) 159 CLR 550, 631 (Deane J).

Part VIII:

The Appellants estimate that their oral argument will require about 2.5 hours.

Dated: 28 October 2022

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ANNEXURE – RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS

1. *Criminal Law Consolidation Act 1935* (SA) (as currently in force).
2. *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA) (as enacted).
3. *Legislation Interpretation Act 2021 (SA)* (as currently in force).
4. *Criminal Law Consolidation (Criminal Organisations) Regulations 2015* (SA) (as currently in force).
5. *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place—Cowirra) Variation Regulations 2020* (SA) (as currently in force).
6. *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place—Cowirra) (No 2) Variation Regulations 2020* (SA) (as currently in force).