HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	A22/2022
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IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY **No A22 of 2022**

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

BETWEEN: **DISORGANIZED DEVELOPMENTS PTY LTD**

First Appellant

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PETER KEITH STACY

Second Appellant

STEPHEN JOHN TAYLOR

Third Appellant

and

THE STATE OF SOUTH AUSTRALIA

20 Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT

Part I: PUBLICATION OF SUBMISSIONS

1. This submission is in a form suitable for publication on the internet.

Part II: OUTLINE OF ORAL SUBMISSIONS

Ground 1: The Cowirra Regulations are legally effective to declare the Cowirra Land

2. It is important to distinguish three kinds of regulations promulgated for the purposes of Part 3B, Div 2 of the CLCA: (i) the Consolidated Regulations as enacted in their original form (SB, V1, T3); (ii) the individual Cowirra Regulations (SB, V1, T12 & 13); and, the Amended Consolidated Regulations (SB, V1, T11): AS, [14].

3. The Appellant does not challenge the Consolidated Regulations because, made by the Amending Act, they were not subject to the rule in s 83GA(2) of the CLCA (the '1 place rule'): COA, [22]; AS, [17]; s 12, Amending Act. The Cowirra Regulations did not breach the '1 place' rule because they each related to only 1 place. Rather, before the Court of Appeal, the Appellant challenged the validity of the Amended Consolidated Regulations on the basis that they were made in breach of the '1 place rule': COA, [23]-[24]; AS, [18].

4. In response, the Respondent submitted that the challenge to the Amended Consolidated Regulations was misdirected: COA, [30]. By contrast to the Cowirra Regulations which were *made* by the *Governor* pursuant to s 370 of the CLCA, the Amended Consolidated Regulations were *revised and published* by the *Commissioner for Legislation Revision and Publication* pursuant to the *Legislation Revision and Publication Act 2002*. Although the Appellants may be correct to observe that the Amended Consolidated Regulations perform a function that goes beyond providing a "mere consolidated list" (AR, [2]), the distinction between regulations made by the Governor (which must be laid before each House of Parliament, and which are therefore subject to the '1 place rule') and regulations revised and published by the Commissioner (which do not need to be laid before Parliament, and which do not need to comply with the '1 place rule') remains fundamental.

5. Given that the Respondent did not contend that the revision and publication of the Amended Consolidated Regulation *made* the regulation declaring the Cowirra Land, the contest before the Court of Appeal turned to whether the Cowirra Regulations were legally effective in doing so: COA, [30]-[32]. The Respondent adopts the reasoning of the Court of Appeal, drawing upon textual features, context and purpose of the Cowirra

Regulations, in support of its conclusion that the Cowirra Regulations impliedly declared the Cowirra Land to be prescribed places: COA, [32]-[48]; RS [18]-[27].

6. The critical point is that the Cowirra Regulations were *effective* in declaring the Cowirra Land to be prescribed places without breaching the '1 place rule'. Section 83GA(2) of the CLCA requires that regulations made "for the purposes of the definitions of … prescribed place … may only relate to … 1 place". It does not impose a further stricture that such a regulation must, in itself, declare the place to be a prescribed place: cf COA, [48]. The Cowirra Regulations, whether taken alone or when read together with the Consolidated Regulations, complied with that rule.

10 **Ground 2: Prescribing of places not conditioned by obligation to afford procedural fairness**

7. The general presumption, that where a repository of statutory power is bound or entitled to have regard to the interests of an individual then the power is conditioned by an obligation to afford procedural fairness, may be displaced: COA, [69]; *Kioa v West* (1985) 159 CLR 550 (*Kioa*), 620 (Brennan J) (V3, T27). Whether discretionary powers reposed in the Governor in Council are conditioned by an obligation to afford procedural fairness will depend on a variety of considerations, including the statutory text, the interests affected and the "peculiar character" of the chosen repository: *FAI v Winneke* (1982) 151 CLR 342 (*FAI*), 366 (Mason CJ), 410 (Brennan J) (V3, T25).

8. Statutory text: The primary textual feature upon which the Respondent relies is the
20 broad scope of the regulation making power conferred by s 370 of the CLCA: RS, [32]. Whilst not determinative, this feature weighs against a construction that the power in question is conditioned by a duty to afford procedural fairness: RS, [32]; *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 420 (Gibbs J) (V4, T32); *FAI*, 398 (Wilson J) (V3, T25); *Watson v South Australia* (2010) 208 A Crim R 1 (*Watson*), [80], [94] (Doyle CJ) (V5, T46); cf *O'Shea v South Australia* (1987) 163 CLR 378 (*O'Shea*), 404 (Wilson & Toohey JJ) (V3, T29).

9. Interests affected: In analysing the nature of the interests relevantly affected by the declaring of prescribed places for the purposes of s 83GA(1), the Court of Appeal drew upon a distinction recognised in the authorities between powers the exercise of which turn upon
30 considerations peculiar to the individual subjected to the exercise of power and powers the exercise of which turn upon matters of political, social or economic concern: COA, [82], [86], [89], [115]; RS, [29]; *O'Shea*, 387 (Mason CJ) (V3, T29). The Court acknowledged

that the drawing of this distinction may turn on a qualitative assessment and that it is important to avoid arbitrariness given that the exercise of statutory powers will commonly impact individual interests in pursuit of policy aims: COA, [115], [118]; *Customs v Kawasaki* (1991) 32 FCR 219, 239-240 (Hill & Heerey JJ) (V5, T38). Taking account, amongst other things, of the fact that the making of a regulation is directed to the prohibition on the conduct of participants in criminal organisations and the diffuse nature of that class, the Court concluded that Part 3B, Div 2 of the CLCA comprised a "suite of responses to perceived threats of criminal activity not at an individual level, but at the level of class of actor" such that procedural fairness was not required: COA, [91]-[94], [114], [119].

10. The Appellants seek to sidestep this reasoning by narrowing the procedural fairness obligation for which they contend to an obligation owed to owner / occupiers of prescribed places: AS, [51]; RS, [40]. This attempt fails because if, as the Appellants now correctly concede, participants whose interests are *directly* affected by the prescribing of places are not to be afforded procedural fairness, it seems implausible that Parliament should be taken to require the *incidental* affect upon owner / occupiers to give rise to such an obligation. Information about the disruption of criminal activity is likely to be derived from law enforcement agencies: RS, [46]. More fundamentally, the Appellants cannot overcome the conclusion reached by the Court of Appeal, that the focus of the regulation "is on the identified social mischief that the legislature has determined that 'criminal organisations' pose", by narrowing the obligation for which they now contend: COA, [119].

11. Repository of power: The substantive exercise of a statutory power conferred on the Governor in Council falls, in South Australia, to the Cabinet: RS, [48]. The conferral of the power to prescribe places in the Governor confirms the conclusion reached by the Court of Appeal, by reference to the nature of interests affected, that the focus of the power rests not on matters of individual concern, but with the social mischief to which Part 3B, Div 2 is directed: COA, [131]; RS, [49]; *FAI*, 362, 370 (Mason J) (V3, T25); *O'Shea*, 404 (Wilson & Toohey JJ), 411 (Brennan J), 416 (Deane J, in dissent) (V3, T29); *Watson*, [91], [94] (Doyle CJ) (V5, T46). Further, it may be doubted that Parliament intended to impose an obligation to afford procedural fairness that would require Cabinet to depart from its usual processes: RS, [50].

9 March 2023

MJ Wait SC, Solicitor-General **C Nolan, Counsel**