



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

SDCV
Appellant

and

DIRECTOR-GENERAL OF SECURITY
First Respondent

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ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Respondent

**SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
STATE OF SOUTH AUSTRALIA (INTERVENING)**

Part I: CERTIFICATION

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

Part II: BASIS OF INTERVENTION

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes in this matter pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Part III: LEAVE TO INTERVENE

3. Not applicable.

Part IV: ARGUMENT

- 10 4. By Ground 1 of the Notice of Appeal (**CAB 113**), the appellant challenges the validity of s 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**). The appellant's case for invalidity proceeds by two steps.

- 4.1. First, the appellant says that there is a limit on the legislative power of the Commonwealth, the States and the Territories, derived from Ch III of the *Commonwealth Constitution*, which precludes a law that denies a person, whose rights or interests may be finally altered or determined by a court order, a fair opportunity to respond to evidence on which that order might be made (**the Procedure**).¹ This limitation is said to arise because, the appellant says, the Procedure is a minimum requirement of procedural fairness² and procedural fairness is an essential characteristic of a court or inherent in the exercise of judicial power.³ It follows, the appellant says, that the Procedure may never be excluded.⁴
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- 4.2. Second, the appellant says that s 46(2) of the AAT Act infringes this limit.⁵

¹ Appellant's submissions dated 11 April 2022 (**AS**), [18] and [26].

² **AS**, [23]-[28].

³ **AS**, [19]-[22].

⁴ **AS**, [24]. It is clear that the disavowal by the appellant that the Procedure is absolute (**AS**, [29]-[35]) is limited to a submission that the Procedure may be satisfied in a variety of different ways, rather than a concession that the Procedure may in some circumstances not be complied with. Put another way, the appellant contends that the limit on legislative power, on his case, would be infringed where a court is required to provide anything less than modified or adjusted disclosure of closed evidence.

⁵ **AS**, [36] ff.

5. South Australia confines its submissions to matters of principle regarding the first step in the appellant’s argument. In summary, South Australia submits that Ch III of the *Constitution* does not necessarily prohibit a departure from the Procedure because:

5.1. a departure from the Procedure will not in all cases deny a body the constitutional status of a court, because such a departure is not invariably incompatible with the court’s institutional integrity; and,

5.2. undertaking the evaluative task of assessing whether a departure from the Procedure is compatible with a court’s institutional integrity involves consideration of the effect of that departure on the court’s independence and impartiality, having regard to the degree and purpose of the departure from the usual application of the rules of procedural fairness.

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Chapter III of the Constitution does not prohibit, in all cases, a departure from the Procedure

6. The starting position from which the appellant’s contentions may be approached is, as recognised by Gummow and Crennan JJ in *Thomas v Mowbray*, that the authorities have “not gone so far” as to imply a requirement for “due process” from the text and structure of the *Constitution*.⁶

7. Rather, the appellant relies on various statements made by members of this Court,⁷ each attributable to one⁸ or both⁹ of the two limbs of the separation of powers doctrine. From this, the appellant appears to ground his case in either the constraint that only a Ch III “court” may exercise the judicial power of the Commonwealth (**Limb 1**), the constraint that a Ch III court may only exercise “judicial power” of the Commonwealth or power incidental to such power (**Limb 2**), or both.¹⁰

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⁶ *Thomas v Mowbray* (2007) 233 CLR 307, 355 [111] (Gummow and Crennan JJ); *International Finance Trust Company Ltd v New South Wales Crime Commission (International Finance)* (2009) 240 CLR 319, 353 [52] (French CJ).

⁷ AS, [15]-[16] and [20].

⁸ F Wheeler, “Due Process, Judicial Power and Chapter III in the New High Court” (2004) 32 *Federal Law Review* 205, 209-210.

⁹ J Stellios, “Due Process and Equality Before the Law” in *The Federal Judicature: Chapter III of the Constitution* (2nd ed, 2020, LexisNexis Butterworths) 317, 318-326.

¹⁰ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, affirmed in, eg, *Minister for Home Affairs v Benbrika (Benbrika)* (2021) 95 ALJR 166, 203 [144] (Gordon J), 217-218 [206] (Edelman J). Cf W Bateman, “Procedural Due Process under the Australian Constitution” (2009) 31 *Sydney Law Review* 411, 433-434.

Limb 1: A departure from the Procedure will not in all cases deny a body the constitutional status of a court

8. The appellant’s case invokes¹¹ the concepts, developed in the context of the limit on State legislative power associated with *Kable*,¹² of “institutional integrity” and a court’s “essential characteristics”.¹³
9. South Australia submits that departure from the Procedure is not necessarily offensive to a court’s institutional integrity. History, authority and principle tell against the contention advanced by the appellant, at least in the absolute terms by which it is articulated.

10 *History*

10. The appellant points to certain historical practices said to “respect” the Procedure and not constitute an “unfair” procedure.¹⁴ History, of course, can be relevant in evaluating institutional integrity, as the characteristics with which it is concerned are not “attributes plucked from a platonic universe of ideal forms”.¹⁵ Where a sufficiently similar function has historically been conferred upon a court, this will tend towards the conclusion that a particular function does not infringe a court’s institutional integrity.¹⁶ However, the lack of a direct historical analogue does not of itself spell incompatibility with a court’s institutional integrity.¹⁷
11. Contrary to the appellant’s submissions, history does provide a number of examples where Australian courts have received evidence presented by one party but not available to another party and on which the court is asked to act.¹⁸

¹¹ AS, [18].

¹² *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

¹³ AS, [18]. This submission appears to assume acceptance of the proposition that institutional integrity is a relevant aspect to the first limb of the separation of powers (as opposed to an articulation of one of the values which inspires and is served by the separation of powers) (*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11-12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ, referred to with approval in, eg, *Benbrika* (2021) 95 ALJR 166, 178 [20] (Kiefel CJ, Bell, Keane and Steward JJ), 201-203 [136], [141] (Gordon J)).

¹⁴ AS, [29]-[35].

¹⁵ *Condon v Pompano Pty Ltd (Pompano)* (2013) 252 CLR 38, 72 [68] (French CJ).

¹⁶ *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 257 [83] (Bell, Keane, Nettle and Edelman JJ).

¹⁷ *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA) (Gypsy Jokers)* (2008) 234 CLR 532, 550-551 [5] (Gleeson CJ), 559 [36] (Gummow, Hayne, Heydon and Kiefel JJ), 595 [178] (Crennan J); *Pompano* (2013) 252 CLR 38, 94 [138] (Hayne, Crennan, Kiefel and Bell JJ).

¹⁸ Cf AS, [32].

12. Such examples include cases where confidential material is relied on as going to an issue of an interlocutory nature, such as confidential evidence in support of a claim for public interest immunity,¹⁹ or inspection of confidential documents in determining a claim for legal professional privilege.²⁰ The appellant attempts to put these examples to one side by narrowing the minimum requirement for which he contends to the making of an order that finally alters or determines a right or legally protected interest.²¹ However, it is unexplained why a departure from the Procedure at an interlocutory stage should be distinguished, for the purpose of considering history, from a departure bearing directly on a final determination.²² The practical effect of a ruling on, for example, a claim for public interest immunity may, as a matter of substance, be determinative of the outcome of the proceeding. The appellant fails to adequately grapple with these long standing, yet confined, departures from the Procedure.
13. In any event, there are a number of historical examples where courts have received and relied upon confidential material that bears upon the court's final determination:
- 13.1. written opinions of counsel tendered in support of applications for (by way of example): judicial advice to a trustee;²³ approval to settle a claim made by a person under a disability;²⁴ or, approval to settle a representative proceeding;²⁵
- 13.2. confidential affidavit evidence in an application by a liquidator for a summons for examination;²⁶
- 13.3. documents, over which confidentiality is claimed and provided to the court for inspection, where access to documents is the substantive issue before the court (in cases regarding, for example, a statutory right to access a document);²⁷

¹⁹ *Parkin v O'Sullivan* (2009) 260 ALR 503, 509-511 [23]-[30].

²⁰ *Grant v Downs* (1976) 135 CLR 674, 689 (Stephen, Mason and Murphy JJ).

²¹ AS, [26].

²² Cf AS, [26], [30], [41].

²³ *Macedonian Orthodox Community Church St Petka Inc v Petar* (2008) 237 CLR 66, 86 [45], 121-122 [167]-[173] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

²⁴ *Fisher v Marin* [2008] NSWSC 1357 [42]-[43]; *Karvelas v Chikirow* (1976) 11 ACTR 22, 23.

²⁵ *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2018) 358 ALR 382, 403 [109]-[110].

²⁶ *Re Normans Wines Ltd (in liq)* (2004) 88 SASR 541, 554-555 [54]-[57] (Mullighan J).

²⁷ *Pratt Holdings Pty Ltd v Federal Commissioner of Taxation* (2004) 136 FCR 357, 370 [53]-[54], 374 [58] (Stone J), and in relation to the use of inspection see *Federal Commissioner of Taxation v Pratt Holdings Pty Ltd* (2003) 195 ALR 717; *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 300-301 [57]-[58] (Gleeson CJ, Gummow, Heydon and Kiefel JJ).

13.4. medical reports in proceedings for custody of a child;²⁸ and,

13.5. “gender restricted” evidence in a native title claim, including where the effect of the restriction is that no one person representing the party knows the whole of the evidence available to the court.²⁹

14. The variety of historical departures from the Procedure speaks strongly against the implication for which the appellant contends.

Authority

10 15. The appellant submits that the holding in *Graham* does not dictate the outcome of this case.³⁰ However, *Graham* provides a useful starting point from which consideration of the appellant’s challenge can be approached. In that case, the plaintiff and applicant contended that a court’s institutional integrity was impaired by a provision which precluded the disclosure of certain information classified by the executive government as confidential. That contention was unanimously rejected. This Court held that the executive’s control of disclosure of information “does not affect the appearance of the court’s impartiality”.³¹ The holding in *Graham* did not directly concern how the receipt by a court of secret information affected its institutional integrity, and it is this point on which the appellant’s case turns. However, *Gypsy Jokers*, *K-Generation* and *Pompano* point directly against the first step in the appellant’s case.

20 16. *Gypsy Jokers*: In *Gypsy Jokers*, the law challenged related to the non-disclosure of evidence before a court in reviewing a fortification removal notice. The provision, in providing for non-disclosure of confidential information available to the court, “den[ied] what otherwise would be any standing or entitlement of parties ... under the usual process of the Supreme Court in civil litigation to obtain ... disclosure”.³² The court, by majority, held the provision valid.³³ The appellant suggests that *Gypsy Jokers*

²⁸ *In re K (Infants)* [1965] AC 201, 212, 219, 232, 235, 241, referred to with approval in *J v Lieschke* (1987) 162 CLR 447, 457 (Brennan J).

²⁹ *Western Australia v Ward* (1997) 76 FCR 492, 499 (Hill and Sundberg J), 508 (Branson J); *Northern Territory v Griffiths (No 2)* (2019) 93 ALJR 803.

³⁰ AS, [60]-[61].

³¹ *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 24 [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), 35 [72] (Edelman J).

³² *Gypsy Jokers* (2008) 234 CLR 532, 559 [36] (Gummow, Hayne, Heydon and Kiefel JJ), see also 593-594 [173]-[174] (Crennan J).

³³ *Gypsy Jokers* (2008) 234 CLR 532, 549-550 [1] (Gleeson CJ), 553 [12] (Gummow, Hayne, Heydon and Kiefel JJ), 597-598 [192] (Crennan J).

does not foreclose the appeal before this Court, including on the basis that the plurality in that case did not “squarely address” a departure from the Procedure.³⁴ That reading of the plurality’s reasons is not open. The plurality made express reference to the “use” of confidential information by the court contemplated by the provision in issue, namely “all that is necessary or appropriate for the exercise by the Supreme Court of its jurisdiction to conduct the ‘review’”.³⁵

- 10 17. *K-Generation*: In *K-Generation*, the evidence in issue was inaccessible to one party, by reason of a statutory decision by the Commissioner of Police to classify the information as criminal intelligence. In reviewing a decision of the Liquor and Gambling Commissioner, the Licensing Court of South Australia was invited to consider the confidential evidence in determining the review. The impugned section which made provision for this procedure was described as “infring[ing] upon the open justice principle that is an essential part of the functioning of courts in Australia [and] upon procedural fairness to the extent that it authorises and effectively requires [the court] to consider, without disclosure to the party to whom it relates, criminal intelligence information submitted to the Court by the Commissioner of Police”.³⁶ Despite that characterisation, the court’s institutional integrity was not impaired and a majority of the Court held the provision valid.³⁷
- 20 18. *Pompano*: In *Pompano*, the State law in question made provision for the hearing of confidential “criminal intelligence” information in applications for a declaration by the court that an organisation was a “criminal organisation” in the absence of the respondent, and for the non-disclosure of that information to the respondent. While that scheme was described as “diminish[ing] the procedural protections ordinarily attendant upon the reception of evidence”,³⁸ the function conferred on the court did not impair the court’s institutional integrity and the scheme was held valid.³⁹

³⁴ AS, [55].

³⁵ *Gypsy Jokers* (2008) 234 CLR 532, 559 [35] (Gummow, Hayne, Heydon and Kiefel JJ). See also *Pompano* (2013) 252 CLR 38, 98 [152] (Hayne, Crennan, Kiefel and Bell JJ).

³⁶ *K-Generation Pty Ltd v Liquor Licensing Court (SA) (K-Generation)* (2009) 237 CLR 501, 512 [10] (French CJ), see also 575 [255] (Kirby J).

³⁷ *K-Generation* (2009) 237 CLR 501, 512 [10]-[11] (French CJ), 543 [149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 545 [159] (Kirby J).

³⁸ *Pompano* (2013) 252 CLR 38, 56 [30] (French CJ), see also 94 [138] (Hayne, Crennan, Kiefel and Bell JJ), 111 [198] (Gageler J).

³⁹ *Pompano* (2013) 252 CLR 38, 80 [89] (French CJ), 104 [173] (Hayne, Crennan, Kiefel and Bell JJ).

19. The appellant relies on *HT v The Queen*, in support of his submission that a court must adhere to the Procedure where it is to make an “order that finally alters or determines a right or legally protected interest of a person”.⁴⁰ Properly understood, the reliance placed by the appellant on this case goes no further than the invocation of the rules of procedural fairness to a particular scenario. Unlike in *Gypsy Jokers, K-Generation* and *Pompano*, *HT v The Queen* does not speak to a court’s procedures in circumstances where it is authorised to depart from the Procedure. Rather, *HT v The Queen* involved an obligation on a court to provide procedural fairness.⁴¹ For this reason, *HT v The Queen* does not assist the appellant in making out his case for a limit on legislative power based on the text and structure of the *Constitution*.

Principle

20. The requirement, implied from Ch III of the *Constitution*, that a court’s institutional integrity must not be substantially impaired, does not provide a principled foundation to support the appellant’s contention, at least in so far as it is articulated in the absolute terms proposed by the appellant.
21. In support of his case, the appellant invokes the language of “essential” characteristics of a court.⁴² It is descriptively accurate to refer to procedural fairness as a “defining characteristic”⁴³ or an “essential attribute”⁴⁴ of a court’s processes. This denotation is relevant to the constitutional question that the appellant poses, because it is to a court’s defining characteristics that the reference to institutional integrity alludes.⁴⁵ In determining whether a law is repugnant or incompatible with a court’s institutional integrity, attention is necessarily directed to the “maintenance of the defining characteristics of a ‘court’” because “if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies”.⁴⁶

⁴⁰ AS, [26].

⁴¹ *HT v The Queen* (2019) 269 CLR 403, 416 [17], 420 [32] (Kiefel CJ, Bell and Keane JJ), 427 [56] (Nettle and Edelman JJ), 430 [64] (Gordon J).

⁴² AS, [19]-[22].

⁴³ *Pompano* (2013) 252 CLR 38, 71 [67] (French CJ).

⁴⁴ *Pompano* (2013) 252 CLR 38, 99 [156] (Hayne, Crennan, Kiefel and Bell JJ).

⁴⁵ *Forge v Australian Securities and Investments Commission (Forge)* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ). However, while this denotation is relevant it may also be apt to mislead for the purpose of reaching a conclusion on a constitutional question, insofar as the words “defining” or “essential” could be taken (erroneously) to import a fixed or immutable quality.

⁴⁶ *Forge* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ).

22. However, contrary to the appellant’s submission,⁴⁷ a departure from a “defining characteristic” or an “essential attribute” of a court is not necessarily incompatible with that court’s institutional integrity. Rather “the central question” is whether, in all of the circumstances, the impugned law in question trenches upon the court’s independence and impartiality.⁴⁸ In the context of State courts, this approach reflects the structural and functional purpose which the limit on legislative power serves, namely the preservation of a court’s actual and perceived character as an “independent and impartial tribunal” and consequently its status as a fit repository of federal jurisdiction.⁴⁹
23. The following “essential attributes” concerning a court’s constitution, methods and processes can be seen to sustain its status as an independent and impartial tribunal:
- 23.1. The duty to give reasons promotes good decision-making, judicial accountability, and explanation of decision-making, in public, which in turn promotes judicial legitimacy.⁵⁰
- 23.2. The open court principle subjects court proceedings to exposure to public and professional scrutiny, and maintains public confidence in the integrity and independence of courts.⁵¹
- 23.3. The bias rule, including the apprehended bias principle, recognises that the integrity of the judicial system is affected by the fact of, or the appearance of, a departure from the court’s independence and impartiality.⁵²

⁴⁷ AS, [18].

⁴⁸ *Pompano* (2013) 252 CLR 38, 94 [138], see also 89 [125] (Hayne, Crennan, Kiefel and Bell JJ). Cf *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580-581 [98]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). While in that case the Court used the language of a “defining characteristic” to describe what Ch III requires of State courts, South Australia submits in that context the phrase was not deployed through the lens of institutional integrity. Rather, in that case the Court was concerned with the preservation of the integrated court structure for which s 73 of the *Constitution* provides, in the context of the single common law of Australia. See generally G Appleby and A Olijnyk, “The impact of uncertain constitutional norms on government policy: Tribunal design after *Kirk*” (2015) 26 *Public Law Review* 91, 94-97.

⁴⁹ *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832, 850 [86] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson CJ); *Kuczborski v Queensland (Kuczborski)* (2014) 254 CLR 51, 119 [228] (Crennan, Kiefel, Gageler and Keane JJ); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

⁵⁰ *Wainohu v New South Wales* (2011) 243 CLR 181, 214-215 [56], [58]-[59] (French CJ and Kiefel J); *Soulezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 278-279 (McHugh JA).

⁵¹ *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ); *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

⁵² *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Charistead v Charistead* (2021) 95 ALJR 824, 827-828 [11], 829 [18] (the Court).

23.4. Security of tenure and remuneration of judges ensure judicial independence from the executive and other sources of influence.⁵³

24. The essential characteristics of a court are not necessarily closed. New characteristics that contribute to a court’s actual and perceived independence and impartiality may emerge as the judicial method evolves to meet new social challenges.⁵⁴

25. In evaluating a law’s compatibility with a court’s institutional integrity it is relevant to have regard to departures from that court’s defining characteristics. The relevance of such departures is their effect, or the “quality of the ... intrusion”,⁵⁵ on the actuality or appearance of the court’s independence and impartiality. But, characteristics which sustain a court’s status as an independent and impartial tribunal lack the necessary basis in the text and structure of the *Constitution* to be given immediate normative operation independent from the functional values of independence and impartiality.⁵⁶

26. Once the relevance of defining characteristics to a court’s institutional integrity is understood in this matter, it may be accepted that measuring the effect of departures from such characteristics occurs by reference to questions of degree⁵⁷ and purpose.⁵⁸ This is because characteristics which sustain a court’s status as an independent and impartial tribunal will in some cases yield to competing demands, as may be demonstrated by reference to the “essential attributes” identified above:

26.1. The duty to give reasons has a variable content, depending on the nature of the jurisdiction and the particular subject-matter.⁵⁹

26.2. The open court principle accommodates circumstances where there is a need to maintain secrecy or confidentiality, or the interests of privacy or delicacy.⁶⁰

⁵³ *Forge* (2006) 228 CLR 45, 79-80 [74] (Gummow, Hayne and Crennan JJ).

⁵⁴ *Forge* (2006) 228 CLR 45, 76 [64] (Gummow, Hayne and Crennan JJ); M Gordon, “The Integrity of Courts: Political Culture and A Culture of Politics” (2021) 44 *Melbourne University Law Review* 863, 868. See also *Dietrich v The Queen* (1992) 177 CLR 292, 328 (Deane J).

⁵⁵ *International Finance* (2009) 240 CLR 319, 355 [57] (French CJ).

⁵⁶ Save for the direct constitutional dimension of the tenure of judges of Commonwealth courts, for which s 72 of the *Constitution* provides.

⁵⁷ *International Finance* (2009) 240 CLR 319, 353 [52] (French CJ); *Pompano* (2013) 252 CLR 38, 70 [64] (French CJ); *Kuczborski* (2014) 254 CLR 51, 98 [140] (Crennan, Kiefel, Gageler and Keane JJ).

⁵⁸ *Pompano* (2013) 252 CLR 38, 78 [86] (French CJ); *Hogan v Hinch* (2011) 243 CLR 506, 534 [26], 541-542 [46] (French CJ).

⁵⁹ *Wainohu v New South Wales* (2011) 243 CLR 181, 215 [56] (French CJ and Kiefel J).

⁶⁰ *Hogan v Hinch* (2011) 243 CLR 506, 552-554 [87]-[88], [90]-[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

26.3. The bias rule is capable of yielding to necessity in special cases,⁶¹ and is capable of waiver (by reason of unfairness if a tactical choice to take no objection were permitted).⁶²

26.4. Judges' tenure and remuneration do not have an absolute content entrenched in Ch III of the *Constitution*.⁶³

As the above survey demonstrates, departures from the “essential attributes” of courts may accommodate competing demands without necessarily undermining independence and impartiality: “the defining characteristics of courts are not and cannot be absolutes”.⁶⁴

- 10 27. The requirements of the hearing rule should be approached in the same way. The hearing rule promotes sound decision-making and ensures that a court must hear from all sides in a manner that promotes judicial legitimacy.⁶⁵ In this respect, the hearing rule contributes to a court’s actual and perceived impartiality. But, as the examples identified above demonstrate, the hearing rule may also be subject to qualification, or even departed from, where that is necessary to meet competing demands.⁶⁶
28. Considerations of degree or purpose are not the end of the constitutional inquiry. Neither a significant degree of departure from a traditional process⁶⁷ nor a purpose which is perceived to be unjustified or unnecessary⁶⁸ are, alone, a measure of constitutional invalidity. The evaluative task undertaken by reference to the particular statute in question⁶⁹ still has as its central focus the repugnancy to or incompatibility with the structural necessity mandated by Ch III, that courts upon which federal jurisdiction may be conferred must be independent and impartial tribunals.⁷⁰ It is for
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⁶¹ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 359 [64]-[65] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁶² *Vakauta v Kelly* (1989) 167 CLR 568, 572 (Brennan, Deane and Gaudron JJ).

⁶³ *Forge* (2006) 228 CLR 45, 76-77 [65] (Gummow, Hayne and Crennan JJ). Cf s 72 of the *Constitution*.

⁶⁴ *Pompano* (2013) 252 CLR 38, 72 [68] (French CJ).

⁶⁵ *International Finance* (2009) 240 CLR 319, 380-381 [142]-[145] (Heydon J).

⁶⁶ *J v Lieschke* (1987) 162 CLR 447, 457 (Brennan J); *Pompano* (2013) 252 CLR 38, 72 [68] (French CJ), 100 [157] (Hayne, Crennan, Kiefel and Bell JJ), cf 105 [177] (Gageler J).

⁶⁷ *Pompano* (2013) 252 CLR 38, 103 [169] (Hayne, Crennan, Kiefel and Bell JJ); *Fardon v Attorney-General (Qld)* (**Fardon**) (2004) 223 CLR 575, 601 [42] (McHugh J).

⁶⁸ *Kuczborski* (2014) 254 CLR 51, 119-120 [229]-[231] (Crennan, Kiefel, Gageler and Keane JJ).

⁶⁹ *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 246 [56] (Bell, Keane, Nettle and Edelman JJ).

⁷⁰ *Pompano* (2013) 252 CLR 38, 103 [169] (Hayne, Crennan, Kiefel and Bell JJ); *Kuczborski* (2014) 254 CLR 51, 119 [228] (Crennan, Kiefel, Gageler and Keane JJ); *Benbrika* (2021) 95 ALJR 166, 205 [150]

this reason that it has been said that “the boundaries of the *Kable* principle are not sharp”,⁷¹ and that “the critical notions of repugnancy and incompatibility are unsusceptible of further definition in terms which necessarily dictate future outcomes”.⁷²

Limb 2: Departure from the Procedure does not in all cases deny the characterisation of a function as judicial power

29. In addition to the reliance placed by the appellant on Limb 1 of the separation of powers doctrine, the appellant also relies on Limb 2. The appellant submits that the nature of judicial power is such that it inherently requires, without exception, the Procedure.⁷³
30. For the reasons advanced by the Commonwealth,⁷⁴ South Australia submits that the Procedure is not an immutable incident of the exercise of judicial power, at least in the absolute terms proposed by the appellant.
31. However, in the alternative, if Ch III does prohibit a Commonwealth law which does not provide for the Procedure, then, for the following reasons, that prohibition may be best-explained as a limitation derived from Limb 2 of the separation of powers doctrine, rather than Limb 1. First, a derivation from Limb 2 recognises that the passages in decisions of this Court on which the appellant relies⁷⁵ have been the subject of explanation under the rubric of judicial power and the associated notion of the exercise of judicial power in accordance with the judicial process.⁷⁶ Second, such a

(Gordon J). In the *Kable* context, the notions of independence and impartiality “connote separation from the other branches of government, at least in the sense that the State courts must be and remain free from external influence”: *Pompano* (2013) 252 CLR 38, 89 [125] (Hayne, Crennan, Kiefel and Bell JJ). For the purpose of this case, it may be unnecessary for this Court to decide whether there are different degrees of independence and impartiality required under the *Kable* doctrine and Limb 1.

⁷¹ *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 246 [56] (Bell, Keane, Nettle and Edelman JJ).

⁷² *Fardon* (2004) 223 CLR 575, 618 [104] (Gummow J).

⁷³ AS, [20].

⁷⁴ Second respondent’s submissions dated 6 May 2022, [17]-[21]. See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27-29 (Brennan, Deane and Dawson JJ).

⁷⁵ AS [15]-[16].

⁷⁶ *Nicholas v The Queen* (1998) 193 CLR 173, 208 [73] (Gaudron J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101 [42] (Gaudron and Gummow JJ); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 362-363 [80] (Gaudron J), 372 [115] (Kirby J); *International Finance* (2009) 240 CLR 319, 354-355 [55]-[56] (French CJ); *Benbrika* (2021) 95 ALJR 166, 217-218 [206], 222-223 [223] (Edelman J).

conclusion avoids inconsistency with the holdings in each of the *Pompano*, *K-Generation* and *Gypsy Jokers*.⁷⁷ Finally, the strictures associated with Limb 2 of the separation of powers doctrine⁷⁸ may be more likely to yield absolute limits of the kind advanced by the appellant in the present case.

Part V: ESTIMATED TIME FOR ORAL ARGUMENT

32. It is estimated that up to 15 minutes will be required for the presentation of South Australia's oral argument.

Dated: 18 May 2022

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⁷⁷ Given the premise of *Kable* accepts that a State court may exercise non-judicial power consistently with Ch III of the *Constitution: Pompano* (2013) 252 CLR 38, 89-90 [125]-[126] (Hayne, Crennan, Kiefel and Bell JJ); *Fardon* (2004) 223 CLR 575, 655-656 [219] (Callinan and Heydon JJ), see also 598 [36] (McHugh J); *Benbrika* (2021) 95 ALJR 166, 178 [20] (Kiefel CJ, Bell, Keane and Steward JJ), 207 [159] (Gordon J).

⁷⁸ *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 344 [32] (Kiefel CJ, Bell, Keane and Edelman JJ), 359-360 [95] (Nettle J).

IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

BETWEEN:

SDCV
 Appellant

and

DIRECTOR-GENERAL OF SECURITY

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First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH

Second Respondent

**ANNEXURE TO THE ATTORNEY-GENERAL FOR THE
 STATE OF SOUTH AUSTRALIA'S SUBMISSIONS**

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, South Australia sets out below
 20 a list of the particular constitutional provisions and statutes referred to in submissions.

	Description	Provisions	Version
1.	<i>Administrative Appeals Tribunal Act 1975 (Cth)</i>	s 46(2)	Compilation No 46 (11 May 2018 to 31 December 2020)
2.	<i>Commonwealth Constitution</i>	Chapter III	Current