



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S27/2022
File Title: SDCV v. Director-General of Security & Anor
Registry: Sydney
Document filed: Form 27F - Outline of oral argument-AG (SA)
Filing party: Interveners
Date filed: 08 Jun 2022

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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

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

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Part I: Suitability for Publication

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

Part II: Oral Outline

The separation of powers and the Kable doctrine

2. The absolute proposition contended for by the Appellant is said to arise by implication from either the inherent nature of a court, the inherent nature of judicial power, or both (AS [15]-[16], SA [7]). In this way, the Appellant's submission draws upon both Limb 1 (only a "court" may exercise the judicial power of the Commonwealth) and Limb 2 (a federal court may only exercise "judicial power" of the Commonwealth) of the separation of powers doctrine (SA [7]).
3. In assessing whether a tribunal maintains its institutional integrity as a court for the purposes of the separation of powers doctrine (Limb 1), the *Kable* authorities concerning the institutional integrity of State courts are relevant (SA [15]-[18]). That is because the first limb of the separation of powers doctrine and the *Kable* doctrine each relate to the same structural implication derived from Ch III, namely bodies which may exercise the federal judicial power must meet the constitutional description of a court (SA [21]; *Wainohu v New South Wales* (2011) 243 CLR 181, 228 [105] (Gummow, Hayne, Crennan & Bell JJ), JBA, tab 37, p 2428); *Condon v Pompano Pty Ltd (Pompano)* (2013) 252 CLR 38, 89 [125] (Hayne, Crennan, Kiefel & Bell JJ), JBA, tab 11, p 439)).
4. It is in this institutionally focused sense that the statement that "there is nothing anywhere in the Constitution to suggest that it permits of different grades or qualities of justice" should be understood (*Kable v Director of Public Prosecutions* (1996) 189 CLR 51, 103 (Gaudron J), JBA, tab 26, p 1456). Conversely, it is well established, and accepted by the parties, that Limb 2 has no application to State courts. The strictures arising from Limb 2, that federal courts may only exercise judicial power, judicially, therefore, have no direct application to State courts.

Limb 1: Departure from the absolute proposition will not in all cases deny a body the constitutional status of a court

5. The *Kable* doctrine establishes that the institutional integrity of courts must not be substantially impaired (SA [21]; *Kuczborski v Queensland* (2014) 254 CLR 1, 98 [139]

(Crennan, Kiefel, Gageler & Keane JJ), JBA, tab 27, p 1636). Consideration of continued institutional integrity directs attention to the independence, impartiality and fairness of courts (SA [22]; *Pompano* (2013) 252 CLR 38, 103 [169] (Hayne, Crennan, Kiefel & Bell JJ), JBA, tab 11, p 439). However, it does not follow any particular rule of procedural fairness is constitutionally mandated by Ch III.

6. There are a number of important rules and principles that sustain the institutional integrity of courts, including the open court principle, the duty to give reasons and the rule against bias (SA [23]). However, it does not follow any departure from the rules associated with these principles will necessarily impair institutional integrity (SA [25]-[26]).
7. The hearing rule should be understood in the same manner. Whether a departure from the particular aspects of the hearing rule undermines institutional integrity entails an evaluative exercise the outcome of which will depend on the extent of the departure and the purpose for it, as against the functional values of independence and impartiality (or, of more direct relevance to the present case, the connected concept of fairness) (SA [26]-[27]). The presence of competing interests may be relevant to the exercise: *Pompano* (2013) 252 CLR 38, 47 [4]-[5], 72 [68], 73 [72], 79-80 [88]-[89] (French CJ), 99-100 [156]-[157] (Hayne, Crennan, Kiefel & Bell JJ), JBA, tab 11, pp 383, 408, 409, 415-416, 435-436).
8. It is because the ultimate question of whether institutional integrity has been impaired involves an evaluative exercise of the kind identified above that it has been said that “critical notions of ... incompatibility are unsusceptible of further definition in terms which necessarily dictate future outcomes” (SA [28]; *Pompano* (2013) 252 CLR 38, 89 [124] (Hayne, Crennan, Kiefel & Bell JJ), JBA, tab 11, p 425).

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

9. South Australia adopts the submissions put by the Commonwealth that the absolute proposition is not an immutable incident of the exercise of judicial power (Cth [17]-[21]).
10. In the event that the Court holds that the absolute proposition is to be implied from Ch III, then South Australia submits that the proposition would be best explained as derived from Limb 2, and not Limb 1, of the separation of powers for two reasons.

11. First, derivation from Limb 2 would avoid inconsistency with the authorities of this Court in *Gypsy Jokers, K-Generation Pty Ltd v Liquor Licensing Court (SA)* (2009) 237 CLR 501 and *Pompano*, which are concerned with institutional integrity of State courts (SA [31]).
12. Second, statements by various members of this Court that assign constitutional significance to procedural fairness frequently do so by tethering procedural fairness, not institutionally to courts, but rather to the exercise of federal judicial power, and the associated notion of the exercise of judicial power in accordance with the judicial process (SA [31], fn 76; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 [56], JBA, tab 12, p 479). It is noteworthy that the absolute proposition contended for by the Appellant is articulated in terms that seem to draw upon the notion of judicial power itself.
13. The Appellant's Reply also suggests that Limb 2 forms a more stable foundation for the absolute proposition (should the implication be drawn at all). The Appellant accepts that there are historical exceptions to the absolute proposition, but seeks to put them to one side because they fall outside the paradigm of adversarial proceedings (SA [13]; Reply [7]). The attempt by the Appellant to distinguish procedures adopted in the exercise of these historical jurisdictions appears to focus not upon the distinction between courts and other tribunals, but upon the distinction between the exclusive area of quelling controversies and the borderland of judicial power in which certain peculiar and historical functions lie.
14. Given that procedures adopted in the exercise of historical protective jurisdictions stand outside the Appellant's absolute proposition, by reference to interests beyond those of the parties, the Appellant's attempt to impugn any departures from the rules of procedural fairness in the protection of the national interest would seem to be unprincipled. Proceedings in which questions of national interest intrude may also be seen to stand outside the paradigm case of adversarial proceedings.

Dated: 8 June 2022

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