

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, STEWARD, GLEESON AND JAGOT JJ

DISORGANIZED DEVELOPMENTS PTY LTD
& ORS

APPELLANTS

AND

STATE OF SOUTH AUSTRALIA

RESPONDENT

Disorganized Developments Pty Ltd v South Australia
[2023] HCA 22
Date of Hearing: 10 March 2023
Date of Judgment: 2 August 2023
A22/2022

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of South Australia made on 16 February 2022 and, in their place, order that:*
 - (a) *It is declared that the Criminal Law Consolidation (Criminal Organisations) (Prescribed Place—Cowirra) Variation Regulations 2020 (SA) and the Criminal Law Consolidation (Criminal Organisations) (Prescribed Place—Cowirra) (No 2) Variation Regulations 2020 (SA) are invalid.*
 - (b) *The respondent pay the appellants' costs.*

On appeal from the Supreme Court of South Australia

Representation

W J N Wells KC and C Jacobi KC for the appellants (instructed by Jon Lister Barrister & Solicitor)

M J Wait SC, Solicitor-General for the State of South Australia, with C M Nolan for the respondent (instructed by Crown Solicitor for South Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Disorganized Developments Pty Ltd v South Australia

Statutes – Interpretation – Efficacy of regulations – Where s 83GD(1) of *Criminal Law Consolidation Act 1935* (SA) ("1935 Act") established offence for participant in criminal organisation to enter or attempt to enter "prescribed place" – Where "prescribed place" meant place declared by regulation – Where s 370 of 1935 Act empowered Governor in Council to make regulations – Where *Criminal Law Consolidation (Criminal Organisations) Regulations 2015* (SA) ("2015 Regulations") declared list of places to be "prescribed places" – Where Governor made two Regulations ("Cowirra Regulations") purporting to vary 2015 Regulations to include blocks of land at Cowirra, South Australia ("Cowirra land") – Where appellants owners and occupiers of Cowirra land – Where, if Cowirra Regulations valid, second and third appellants would commit criminal offence if they entered Cowirra land – Where Cowirra Regulations did not in terms "declare" Cowirra land to be "prescribed places" – Whether Cowirra Regulations valid exercise of regulation-making power in s 370 of 1935 Act.

Statutes – Interpretation – Presumption of duty to afford procedural fairness – Whether power to make regulations prescribing places under 1935 Act conditioned by duty to afford procedural fairness to owners and occupiers of land – Whether presumption displaced by statute.

Words and phrases – "declaration power", "displace", "duty", "Governor in Council", "owners and occupiers", "participant in a criminal organisation", "prescribed place", "presumption", "procedural fairness", "regulation-making power", "statutory interpretation".

Criminal Law Consolidation Act 1935 (SA), Pt 3B, Div 2.

Statutes Amendment (Serious and Organised Crime) Act 2015 (SA), Pt 5, Sch 1.

Criminal Law Consolidation (Criminal Organisations) (Prescribed Place—Cowirra) Variation Regulations 2020 (SA).

Criminal Law Consolidation (Criminal Organisations) (Prescribed Place—Cowirra) (No 2) Variation Regulations 2020 (SA).

Criminal Law Consolidation (Criminal Organisations) Regulations 2015 (SA).

1 KIEFEL CJ, GAGELER, GLEESON AND JAGOT JJ. Section 83GD(1) of the
Criminal Law Consolidation Act 1935 (SA) ("the 1935 Act") makes it an offence
for a participant in a criminal organisation to enter or attempt to enter a "prescribed
place". For the purposes of that offence, the Hells Angels motorcycle club is a
criminal organisation¹. The second and third appellants, Mr Stacy and Mr Taylor,
are members of that motorcycle club and, accordingly, they are participants in a
criminal organisation for the purposes of s 83GD(1)².

2 This appeal from a decision of the Court of Appeal of the Supreme Court
of South Australia concerns the validity of two Regulations³ ("the Cowirra
Regulations") which each purport to declare a portion of land in Cowirra, east of
Adelaide in South Australia ("the Cowirra land"), as a "prescribed place" for the
purposes of the 1935 Act. The first appellant ("Disorganized Developments") is
the registered proprietor of the two parcels of land that comprise the Cowirra land.
Mr Stacy and Mr Taylor are the directors and only shareholders of Disorganized
Developments and are occupiers of the Cowirra land.

3 There are improvements on the land including a cabin occupied by
Mr Stacy, and another occupied by Mr Taylor. If the Cowirra Regulations are
valid, then Mr Stacy and Mr Taylor, as participants in a criminal organisation,
commit an offence under s 83GD(1) of the 1935 Act if they enter or attempt to
enter the Cowirra land, and Disorganized Developments cannot, through its
directors, enter or attempt to enter its land.

4 On a case stated by a single judge of the Supreme Court of South Australia,
the Court of Appeal found that the Cowirra Regulations impliedly declare the
blocks of land comprising the Cowirra land to be prescribed places and,

1 1935 Act, s 83GA(1), definition of "criminal organisation" (paras (b) and (c)). See
also *Disorganized Developments Pty Ltd v South Australia* (2022) 140 SASR 206
at 212 [7]; *Criminal Law Consolidation (Criminal Organisations) Regulations 2015*
(SA), reg 2(f), enacted by Sch 1 to the *Statutes Amendment (Serious and Organised
Crime) Act 2015* (SA).

2 *Disorganized Developments* (2022) 140 SASR 206 at 212 [7].

3 *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place—
Cowirra) Variation Regulations 2020* (SA) ("Cowirra Regulation No 1") and
*Criminal Law Consolidation (Criminal Organisations) (Prescribed Place—
Cowirra) (No 2) Variation Regulations 2020* (SA) ("Cowirra Regulation No 2").

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accordingly, are valid⁴. Following a grant of special leave to appeal to this Court, the appellants argued that the Court of Appeal was in error in failing to find that the Cowirra Regulations are invalid on two grounds. The first ground was that the Cowirra Regulations do not declare the blocks of land comprising the Cowirra land to be prescribed places within the meaning of ss 83GA(1) and 83GD(1). As developed in argument, the second ground was that the Cowirra Regulations were made in breach of a duty to afford procedural fairness to the appellants as owners or occupiers of the land.

5 The validity of the Cowirra Regulations depends upon the proper construction of the Regulations themselves, and the proper construction of provisions of the 1935 Act which confer the power to make regulations to declare a place to be a prescribed place. For the following reasons, both grounds of appeal are made out. The appeal must therefore be allowed.

Legislative history and framework

6 In 2015, the South Australian Parliament passed the *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA) ("the 2015 Act"), which amended several Acts including the 1935 Act. One amendment was the addition of Div 2 of Pt 3B into the 1935 Act, comprising ss 83GA to 83GG. Part 3B was modelled on provisions of, inter alia, the *Vicious Lawless Association Disestablishment Act 2013* (Qld)⁵, and is a scheme directed at disrupting activities of criminal organisations. Division 2 comprises "a suite of responses to perceived threats of criminal activity not at an individual level, but at the level of a class of actor"⁶. The scheme of Div 2 is distinct from Div 1 of Pt 3B of the 1935 Act, which criminalises participation in criminal organisations, and from the various serious criminal offences that constitute the "serious criminal activity"⁷ intended to be disrupted by Div 2.

7 The Cowirra Regulations were made in the purported exercise of the power conferred upon the Governor by s 370 of the 1935 Act. In South Australia, the

4 *Disorganized Developments* (2022) 140 SASR 206.

5 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 3 June 2015 at 1479-1481.

6 *Disorganized Developments* (2022) 140 SASR 206 at 232 [114].

7 1935 Act, s 83GA(1) and *Serious and Organised Crime (Control) Act 2008* (SA), s 3.

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substantive exercise of a statutory power conferred on the Governor in Council⁸ falls to the Cabinet, reflecting the convention in South Australia that recommendations to the Governor in Council are based on a Cabinet decision, rather than a decision of the responsible Minister⁹. There was no evidence of the material that formed the basis of the recommendations to the Governor to exercise the declaration power in respect of the Cowirra land.

Prescribed places

8 By s 83GA(1), a "prescribed place" means a place declared by regulation to be a prescribed place. This enlivens the power in s 370 of the 1935 Act, which is a general regulation-making power by which the Governor may make such regulations as are "contemplated by, or as are necessary or expedient for the purposes of" the 1935 Act.

9 The power to declare a place as a prescribed place under these provisions ("the declaration power") supplies an integer or factum for the offence in s 83GD(1). There is no legislative process or criterion for the selection of a place to be declared as a prescribed place, although s 83GD(1) assumes a connection between a prescribed place and the wider objective of disruption of activities of criminal organisations. As the Court of Appeal observed, the South Australian Parliament can be taken to have intended that declarations would be used to preclude owners and occupiers from entering their own property, in furtherance of the disruption of the activities of criminal organisations¹⁰.

10 Section 83GA(1) is affected by s 83GA(2), which relevantly provides that each regulation made under s 83GA(1) for the purposes of the definition of "prescribed place", and required to be laid before each House of Parliament in accordance with the *Subordinate Legislation Act 1978* (SA)¹¹, may only relate to one place. Regulations made under s 370 are required to be laid before each House of Parliament in accordance with s 10(3) of the *Subordinate Legislation Act*.

11 Unlike the Cowirra Regulations, which were made by the Governor, Pt 5 of the 2015 Act made the *Criminal Law Consolidation (Criminal Organisations)*

8 *Legislation Interpretation Act 2021* (SA), s 21.

9 *South Australia v O'Shea* (1987) 163 CLR 378 at 387, 403, 414.

10 *Disorganized Developments* (2022) 140 SASR 206 at 237 [136].

11 Renamed the *Legislative Instruments Act 1978* (SA) by item 16 of Sch 1 to the *Legislation Interpretation Act 2021* (SA).

Regulations 2015 (SA) ("the 2015 Regulations") as Regulations under the 1935 Act¹². That is, the 2015 Regulations were not made in reliance on s 83GA(2) and s 370. The 2015 Regulations were set out in Sch 1 to the 2015 Act. By reg 3, 16 places, not including the Cowirra land, were declared to be prescribed places for the purposes of s 83GA(1). The *Subordinate Legislation Act* did not apply to the 2015 Regulations¹³. By enacting the 2015 Regulations as part of the 2015 Act, the South Australian Parliament was under no obligation to afford procedural fairness to any person affected by the declaration of the 16 prescribed places.

Other aspects of s 83GD(1)

12 The scope of s 83GD(1) is affected by the broad definition of "participant" in s 83GA(1), which is not founded on proof of the commission of a criminal offence of a defined kind, as illustrated by the express exclusion from the definition of a lawyer acting in a professional capacity. An offence against s 83GD(1) can be committed by a solitary act on the part of a participant in a criminal organisation by entering or attempting to enter a prescribed place¹⁴. The scope of s 83GD(1) is further extended by s 267 of the 1935 Act, by which a person who aids, abets, counsels or procures the commission of an offence against s 83GD(1) is also liable to be prosecuted and punished as a principal offender.

13 The maximum penalty for an offence under s 83GD(1) is three years' imprisonment. A person who commits that offence must be sentenced to a term of imprisonment, which cannot be suspended other than in "exceptional circumstances"¹⁵. Sections 25 and 26 of the *Sentencing Act 2017* (SA), which might otherwise operate to reduce a sentence, do not apply to the sentencing of a person for an offence under s 83GD(1)¹⁶.

12 2015 Act, s 13.

13 2015 Act, s 12.

14 cf 1935 Act, s 83GC, under which a participant in a criminal organisation will commit an offence by being "knowingly present in a public place with 2 or more other" participants; 1935 Act, s 83E, which creates the offence of participation in a criminal organisation; *Summary Offences Act 1953* (SA), s 13, inserted by Pt 4 of the 2015 Act, which establishes an offence of "consorting", an element of which is that the person habitually consorts with convicted offenders.

15 1935 Act, s 83GF(1) and (2).

16 1935 Act, s 83GF(1).

First ground: Proper interpretation of the Cowirra Regulations

14 The general principles relating to the interpretation of primary legislation are equally applicable to the interpretation of subordinate legislation¹⁷. Accordingly, the task of construing the Cowirra Regulations involves attributing legal meaning to the legislative text, read in context: expounding the meaning of the text and not seeking "to remedy perceived legislative inattention"¹⁸.

15 A purposive approach to the interpretative task is required by s 14(1) of the *Legislation Interpretation Act 2021* (SA), which provides that "the interpretation that best achieves the purpose or object of the Act or the instrument (whether or not that purpose or object is expressly stated in the Act or instrument) is to be preferred to any other interpretation". The court may consider the purposes of the relevant legislation in determining whether there is more than one possible construction but may not rewrite legislation in the light of its purposes¹⁹. Any meaning must be consistent with the language in fact used in the relevant legislation²⁰.

Text of the Cowirra Regulations

16 The Cowirra Regulations affect land contained in two certificates of title, more fully described in the judgment of the Court of Appeal²¹, which are

17 *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 110 [19]; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 398; *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 195.

18 *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 556-557 [65]. See also *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 at 127 [28]; *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 96 ALJR 208 at 222 [63]; 399 ALR 184 at 198.

19 *Mills v Meeking* (1990) 169 CLR 214 at 235.

20 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113; *Taylor* (2014) 253 CLR 531 at 549 [39].

21 *Disorganized Developments* (2022) 140 SASR 206 at 212 [9].

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conveniently called "block 1" and "block 2". Cowirra Regulation No 1 relates to block 1²² and Cowirra Regulation No 2 relates to block 2²³.

17 The Cowirra Regulations are in the same terms except for their names and short titles, and their different references to block 1 and block 2. The relevant portion of each of the Cowirra Regulations is in the following terms:

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 number]	[Address]
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18 As can be seen, the title of Pt 2 and the text of reg 3 of each of the Cowirra Regulations state the effect of reg 4 as a "variation" of reg 3(2) of the 2015 Regulations.

19 The appellants noted that the heading of reg 4 of each of the Cowirra Regulations repeats the language of the heading of reg 3 of the 2015 Regulations as made, with the addition of the words "by certificate of title". Regulation 4 is expressed to "insert" its contents, that is, the descriptions of block 1 and block 2, into the table found in the 2015 Regulations.

20 It was not in dispute that the 2015 Regulations, made by the 2015 Act, did not declare the blocks comprising the Cowirra land to be prescribed places. The Court of Appeal noted that the scheme of the 1935 Act is structured on the premise that, where places are declared to be prescribed places by regulation falling within

22 See Cowirra Regulation No 1, reg 4.

23 See Cowirra Regulation No 2, reg 4.

the scope of s 83GA(1) – that is, by the exercise of the general regulation-making power – a separate declaration is required for each place²⁴.

Court of Appeal's interpretation

21 The Court of Appeal correctly observed that the text of the Cowirra Regulations appeared only to vary the 2015 Regulations²⁵. Acknowledging that the text was "demonstrably insufficient for the task"²⁶ of identifying the land in each of the Cowirra Regulations as "a place declared by regulation to be a prescribed place", and that the Cowirra Regulations were "deficient"²⁷ and an "apparent folly" insofar as they purported to vary the 2015 Regulations²⁸, the Court of Appeal posed the question whether, having regard to the context and manifest purpose of the Cowirra Regulations, they nevertheless impliedly declared the blocks comprising the Cowirra land to be prescribed places²⁹ in addition to varying the 2015 Regulations³⁰. The Court of Appeal answered that question in the affirmative.

22 The matters relied upon by the Court of Appeal to discern that the Cowirra Regulations, by necessary implication, declared the blocks comprising the Cowirra land to be prescribed places are: (1) the Cowirra Regulations complied with s 83GA(2), so that they were capable of individual disallowance by Parliament³¹; (2) the evident purpose of each Regulation was to declare a place to be a prescribed place, that purpose being expressed in the words "[p]laces declared to be prescribed places" in the heading of reg 4 in each case³²; (3) the long titles and the

24 *Disorganized Developments* (2022) 140 SASR 206 at 219 [48].

25 *Disorganized Developments* (2022) 140 SASR 206 at 216 [32], 217 [35].

26 *Disorganized Developments* (2022) 140 SASR 206 at 217 [35].

27 *Disorganized Developments* (2022) 140 SASR 206 at 219 [48].

28 *Disorganized Developments* (2022) 140 SASR 206 at 218 [41].

29 *Disorganized Developments* (2022) 140 SASR 206 at 217 [35].

30 *Disorganized Developments* (2022) 140 SASR 206 at 218 [41].

31 *Disorganized Developments* (2022) 140 SASR 206 at 218 [42].

32 *Disorganized Developments* (2022) 140 SASR 206 at 218 [43]-[44].

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short titles to the Regulations; and (4) the listing of the relevant land by certificate of title and address³³.

Cowirra Regulations do not declare places to be prescribed places

23 As a matter of ordinary English, a "declaration" is a positive statement or proclamation³⁴. To declare a place to be a prescribed place by regulation requires a positive statement that the relevant place is a prescribed place. By design, the Cowirra Regulations do not declare the blocks comprising the Cowirra land to be prescribed places. Even assuming that a declaration could be made impliedly, the language of the Cowirra Regulations is to the opposite effect, purporting to leave the operative act of declaring the blocks comprising the Cowirra land prescribed places to the 2015 Regulations, which do not have that effect. The principle that an interpretation of a legislative instrument that best achieves the purpose of the instrument is to be preferred to any other interpretation³⁵ does not assist if there is no available interpretation of the Cowirra Regulations as declaring the blocks comprising the Cowirra land to be prescribed places. As the Court of Appeal recognised, there is no ambiguity in the text of the Cowirra Regulations³⁶. While the aim of the Cowirra Regulations is clear, the means adopted in the Regulations failed to achieve that aim.

24 Finally, the fact that the publication of a consolidated version of the 2015 Regulations³⁷, as amended by other regulations including the Cowirra Regulations, did not declare the blocks comprising the Cowirra land to be prescribed places does not imply, contrary to the plain words of the Cowirra Regulations, that the Cowirra Regulations do declare the blocks comprising the Cowirra land to be prescribed places³⁸. The apparent inefficacy of the Cowirra Regulations cannot be relied upon to support a conclusion that efficacy must be implied.

25 As the Cowirra Regulations do not declare any place to be a prescribed place, and as the variation of the 2015 Regulations is ineffective for that purpose,

33 *Disorganized Developments* (2022) 140 SASR 206 at 218 [45].

34 See *Macquarie Dictionary*, 8th ed (2020), vol 1 at 405.

35 *Legislation Interpretation Act 2021* (SA), s 14(1).

36 *Disorganized Developments* (2022) 140 SASR 206 at 217 [38].

37 Pursuant to the *Legislation Revision and Publication Act 2002* (SA).

38 cf *Disorganized Developments* (2022) 140 SASR 206 at 218 [40].

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it follows that the Regulations are not contemplated by, or necessary or expedient for the purposes of, the 1935 Act and are not supported by the Governor's regulation-making power. The Court of Appeal erred in finding to the contrary, and should have found that the Cowirra Regulations were invalid by reason of their lack of efficacy.

Second ground: Procedural fairness

26 As the determination of the first ground of appeal is dispositive of the appeal, it is not strictly necessary to address the second ground, which contended that the declaration power is conditioned by a duty to afford procedural fairness to the appellants as owners and occupiers of the Cowirra land. However, it is appropriate to do so in the light of South Australia's stated intention to seek to remake the declarations without affording procedural fairness to the appellants if the first ground of appeal is successful.

Appellants' rights and interests in the Cowirra land

27 As owners and occupiers, the appellants have property rights in the Cowirra land. Mr Stacy and Mr Taylor seek access to the Cowirra land in order to exercise their rights as occupiers including, from time to time, to reside on the land. Disorganized Developments also has interests in accessing the Cowirra land through its directors in order to maintain it and otherwise to discharge its obligations as owner of the land. The obligations include statutory obligations under various South Australian statutes and regulations³⁹ and common law duties to protect invitees and trespassers from harm or injury arising from conditions on the land⁴⁰.

28 Decisions made in the exercise of statutory powers that affect the rights of individuals with respect to property are a category of cases that has a long history of attracting a duty of procedural fairness as a matter of "fundamental justice"⁴¹,

39 See *Environment Protection Act 1993* (SA), ss 25, 82(2); *River Murray Act 2003* (SA), s 23; *Fire and Emergency Services Act 2005* (SA), s 105F; *South Australian Public Health Act 2011* (SA), ss 56, 58(3); *South Australian Public Health (Wastewater) Regulations 2013* (SA), reg 12(1); *Landscape South Australia Act 2019* (SA), ss 8, 192.

40 See, eg, *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

41 *Sydney Corporation v Harris* (1912) 14 CLR 1 at 14.

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"long-established doctrine"⁴² and a "deep-rooted principle of the law"⁴³, subject to displacement by Parliament through express words or necessary implication in the relevant statute⁴⁴. Even so, the Court of Appeal found that the declaration power was not conditioned by a duty of procedural fairness.

Court of Appeal's reasons

29 In the Court of Appeal, the appellants contended that they were owed procedural fairness as owners and occupiers and as members of the Hells Angels motorcycle club as the criminal organisation associated with the Cowirra land. In this Court, the appellants relied only on their rights and interests as owners and occupiers.

30 The Court of Appeal acknowledged that the effect of declaring land to be a prescribed place may be to interfere severely with rights and obligations of ownership and occupation⁴⁵, and accepted that the appellants' rights were directly affected in a manner sufficient to give them standing to challenge the Cowirra Regulations, but did not consider that this was determinative of the question whether procedural fairness was required⁴⁶.

31 The Court of Appeal concluded that the legislature did not intend that there should be an obligation to afford procedural fairness to an owner or occupier of land, whether or not the owner or occupier is a participant in a criminal organisation, having regard to: (1) the "general and preventative policy [of Div 2] of disruption of an apprehended sphere of criminal activity"⁴⁷, which the Court considered may be undermined by a duty of procedural fairness; (2) the incidental nature of the interests of owners and occupiers to the prohibition in s 83GD(1), and the lack of any necessary correspondence between these interests and interests of

42 *Delta Properties Pty Ltd v Brisbane City Council* (1955) 95 CLR 11 at 18.

43 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396.

44 *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 [143 ER 414]; *Sydney Corporation v Harris* (1912) 14 CLR 1 at 14; *Tanos* (1958) 98 CLR 383 at 396.

45 *Disorganized Developments* (2022) 140 SASR 206 at 231 [109], 237 [135].

46 *Disorganized Developments* (2022) 140 SASR 206 at 227 [85].

47 *Disorganized Developments* (2022) 140 SASR 206 at 237 [140].

persons to whom the prohibition is directed⁴⁸; (3) the indeterminacy of the class of persons who are the subject of s 83GD(1), that is, participants in a criminal organisation⁴⁹; and (4) Parliament's initial determination by the 2015 Regulations to declare 16 places as prescribed places, in an exercise of "unequivocally legislative power that did not require procedural fairness"⁵⁰ to any person, such that it could not be inferred to have intended a differential obligation to owners and occupiers of places in the exercise of delegated legislative power to make further declarations⁵¹.

Procedural fairness applies

32 The existence of a duty to afford procedural fairness is a question of statutory interpretation⁵². In *Twist v Randwick Municipal Council*, Barwick CJ described the common law rule that a statutory authority having power to affect the rights of a person is bound to hear her or him before exercising the power as "both fundamental and universal", although subject to legislative displacement⁵³. Barwick CJ explained that, if it appears that the legislature "has not addressed itself" to the question of natural justice, the court will approach the task of statutory interpretation "with a presumption that the legislature does not intend to deny natural justice to the citizen", and "may presume that the legislature has left it to the courts to prescribe and enforce the appropriate procedure to ensure natural justice"⁵⁴.

48 *Disorganized Developments* (2022) 140 SASR 206 at 230 [105].

49 *Disorganized Developments* (2022) 140 SASR 206 at 230-231 [106].

50 *Disorganized Developments* (2022) 140 SASR 206 at 234 [123].

51 *Disorganized Developments* (2022) 140 SASR 206 at 237 [139]-[140].

52 *Kioa v West* (1985) 159 CLR 550 at 584; *O'Shea* (1987) 163 CLR 378 at 400; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 205 [75].

53 (1976) 136 CLR 106 at 109.

54 *Twist* (1976) 136 CLR 106 at 110.

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33 Since *Twist*, the law has evolved to include an established and "strong"⁵⁵ common law presumption, generally applicable to any statutory power the exercise of which is capable of having an adverse effect on legally recognised rights or interests, that the exercise of the power is impliedly conditioned on the observance of procedural fairness⁵⁶. Consistent with the historical scope of the duty of procedural fairness, the core operation of the presumption requires the provision of procedural fairness where the relevant power directly affects the rights or interests of a particular individual. In such a case, the presumption operates "unless clearly displaced by the particular statutory scheme"⁵⁷.

34 Notwithstanding the breadth of the stated presumption, there remain statutory powers that are not conditioned upon a duty to give procedural fairness. In particular, powers that affect individuals in an undifferentiated way from the general public may not attract an obligation of procedural fairness. Thus, in *Kioa v West*, members of this Court emphasised the need for people to be affected *as individuals* for procedural fairness to apply where a decision affects many people⁵⁸. Mason J adopted a distinction between a decision which directly affects the person individually and one which simply affects her or him as a member of the public or of a class of the public⁵⁹. Brennan J considered that (subject to displacement by the text of the statute, the nature of the power and the administrative framework created by the statute) the presumption "applies to any statutory power the exercise of which is apt to affect the interests of an individual alone or apt to affect his

55 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 622 [367].

56 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97]; *SZSSJ* (2016) 259 CLR 180 at 205 [75]; *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 at 42 [30].

57 *SZSSJ* (2016) 259 CLR 180 at 205 [75]. See also *Annetts v McCann* (1990) 170 CLR 596 at 598; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 576; *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 470; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 73 [43], 84 [90], 93 [126]; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 56 [24]-[25], 61 [51], 88 [138]-[139]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [14]; *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 352 [74].

58 (1985) 159 CLR 550 at 584, 619, 632.

59 *Kioa* (1985) 159 CLR 550 at 584.

interests in a manner which is substantially different from the manner in which its exercise is apt to affect the interests of the public"⁶⁰. Deane J referred to a direct effect on, relevantly, rights and interests of a person in her or his individual capacity, as distinct from a member of the general public or of a class of the general public⁶¹.

35 This is not a case that requires consideration of the scope of procedural fairness in relation to a power liable adversely to affect a large group of persons⁶². In this Court, the appellants' case was based squarely upon their individual property rights and interests that would be directly affected by a valid declaration of the blocks comprising the Cowirra land as prescribed places. Declarations of land as prescribed places affect owners and occupiers of the land to a significant degree, and in a manner markedly different from other persons who might be adversely affected by such a declaration, in the sense envisaged in *Kioa*. The possible interests of a broader class of participants in criminal organisations do not detract from the application of the presumption in this case.

36 South Australia argued that several features of the 1935 Act supported a conclusion that the declaration power is not conditioned by a duty to afford procedural fairness despite its capacity to affect the rights and interests of owners and occupiers of land, being: (1) the Governor in Council as the repository of the power; (2) the unfettered nature of the declaration power; (3) the Parliament's power to make regulations by statute, as evidenced by the 2015 Regulations; and (4) the provisions for parliamentary oversight of the declaration power. There was no suggestion that the rights and interests of the appellants were not a permissible consideration. Significantly, and contrary to the Court of Appeal's view⁶³, South Australia did not press that the legislative purpose of disrupting activities of criminal organisations might be frustrated or compromised by the affording of that procedural fairness.

60 *Kioa* (1985) 159 CLR 550 at 619.

61 *Kioa* (1985) 159 CLR 550 at 632.

62 cf *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404; *Comptroller-General of Customs v Kawasaki Motors Pty Ltd [No 1]* (1991) 32 FCR 219; *Wasantha v Minister for Immigration and Multicultural Affairs* [1999] FCA 1158; *Dighton v South Australia* (2000) 78 SASR 1; *Bank Mellat v Her Majesty's Treasury [No 2]* [2014] AC 700 at 780-781 [44].

63 *Disorganized Developments* (2022) 140 SASR 206 at 237 [140].

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37 The features of the 1935 Act identified by South Australia are insufficient, individually and cumulatively, to establish an intention to displace the common law presumption.

38 Since *FAI Insurances Ltd v Winneke*⁶⁴, it has been established that the mere vesting of decision-making authority in the Governor in Council is not a sufficient manifestation of a legislative intention to exclude the duty of procedural fairness⁶⁵.

39 In *South Australia v O'Shea*⁶⁶, Mason CJ did not discern a legislative intention to exclude a duty to act fairly by the vesting of authority in the Governor in Council, at least where the relevant decision was not to be made principally by reference to issues of general policy. In concluding that the critical question was whether Mr O'Shea had an adequate opportunity to make submissions, Mason CJ rejected an argument that the political or policy aspects of the decision placed it outside the ambit of procedural fairness. Rather, there were issues on which Mr O'Shea was not entitled to be heard⁶⁷. Wilson and Toohey JJ, and Brennan J, focused on the nature of the decision and the political responsibility attaching to the determination of the public interest, rather than the repository of the power⁶⁸. Writing in dissent, Deane J rejected the identity of the decision maker as a relevant factor⁶⁹.

40 In *O'Shea*, Mason CJ also addressed the significance of the participation by Cabinet in the process by which the South Australian Governor in Council exercises statutory power. He rejected a submission that the primarily political, social and economic concerns of Cabinet would deny the existence of a duty to act fairly in a matter which turned on considerations "peculiar to the individual"⁷⁰. He also rejected the further objection that the private and confidential nature of Cabinet processes precludes the imposition of a duty to act fairly, observing that,

64 (1982) 151 CLR 342.

65 *O'Shea* (1987) 163 CLR 378 at 386.

66 (1987) 163 CLR 378.

67 *O'Shea* (1987) 163 CLR 378 at 388-389.

68 *O'Shea* (1987) 163 CLR 378 at 402, 404 per Wilson and Toohey JJ, 411 per Brennan J.

69 *O'Shea* (1987) 163 CLR 378 at 418-419.

70 *O'Shea* (1987) 163 CLR 378 at 387.

in an appropriate case, a requirement that there be placed before Cabinet submissions of an individual affected by the relevant decision would not intrude upon Cabinet's control of its own proceedings⁷¹.

41 Contrary to South Australia's submission, in the absence of any clear words that would displace the presumptive obligation to afford procedural fairness, the broad scope of the regulation-making power conferred by s 370 has no significance. While there are earlier decisions supportive of the view that the unfettered nature of a power is inconsistent with a duty of procedural fairness⁷², requirements of procedural fairness conditioning the exercise of unfettered statutory powers are now commonplace⁷³.

42 There is no reason to conclude that the scope of the regulation-making power is unconstrained by a duty of procedural fairness simply because the exercise of legislative power is not so constrained. Similarly, the general and limited oversight of the regulation-making power by a Parliamentary Committee and the availability of disallowance are not a source of an implication to exclude procedural fairness: South Australia did not suggest that oversight of this kind was likely to afford procedural fairness to owners or occupiers, or that it would involve consideration of matters that might be raised by an owner or occupier if procedural fairness was afforded and that might avoid the arbitrary exercise of the regulation-making power⁷⁴.

Content of the obligation to afford procedural fairness

43 A distinction is sometimes drawn between exercises of statutory power that concern considerations personal to an individual and those that concern issues of general policy⁷⁵. Undoubtedly, the focus of the scheme which includes the declaration power is the disruption of criminal activity⁷⁶. In that context, considerations personal to the owners and occupiers of land ordinarily can be

71 *O'Shea* (1987) 163 CLR 378 at 387-388.

72 See, eg, *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 421; *Winneke* (1982) 151 CLR 342 at 398.

73 See, eg, *Jarratt* (2005) 224 CLR 44.

74 *Bank Mellat* [2014] AC 700 at 780-781 [44], 782-783 [46]-[48].

75 cf *O'Shea* (1987) 163 CLR 378 at 387.

76 *Disorganized Developments* (2022) 140 SASR 206 at 221 [59], 232 [111].

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expected to be secondary to broader policy considerations. However, the proper exercise of the declaration power requires the identification of facts to connect the proposed prescribed place with the purpose of disruption. In this way, the exercise of the declaration power is an application of the policy to disrupt criminal activity, rather than the formulation of policy⁷⁷.

44 There is no reason to doubt that an owner or occupier may have something to say of relevance about the characteristics of the land or its uses, or about possible adverse impacts of declaring a place as a prescribed place, which might affect an assessment of whether to make such a declaration⁷⁸.

45 Procedural fairness under this scheme requires reasonable notice to an owner or occupier of a proposal to declare a place a prescribed place, to give them an opportunity to supply information or make submissions as to matters within their knowledge as an owner or occupier that may be relevant to a decision to exercise the declaration power. It does not require an opportunity to make more general submissions as to the likely efficacy of the exercise of the declaration power in disrupting serious criminal activity. Accordingly, this is not a case where procedural fairness would require owners or occupiers to be informed of the nature or content of information that might form the basis of a recommendation to the Governor to declare a place to be a prescribed place⁷⁹.

Orders

46 The appeal should be allowed. The orders of the Court of Appeal should be set aside and, in lieu thereof, it should be declared that the Cowirra Regulations are invalid. South Australia should pay the appellants' costs in this Court and below.

77 Winneke (1982) 151 CLR 342 at 398. See also *O'Shea* (1987) 163 CLR 378 at 389, 411, 418-419.

78 cf *Kioa* (1985) 159 CLR 550 at 633; *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 at 119.

79 cf *SZSSJ* (2016) 259 CLR 180 at 207 [83].

- 47 STEWARD J. I agree with the reasons of Kiefel CJ, Gageler, Gleeson and Jagot JJ that the *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) Variation Regulations 2020* (SA) and *Criminal Law Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) (No 2) Variation Regulations 2020* (SA) ("the Cowirra Regulations") are ineffective to declare what has been described as the "Cowirra land" to be a "prescribed place" for the purposes of s 83GA(1) of the *Criminal Law Consolidation Act 1935* (SA) ("the CLC Act"). I do not, and with great respect, agree that the Governor of South Australia⁸⁰ owed the appellants, as the owner and occupiers of the Cowirra land, a duty of procedural fairness prior to the making of the Cowirra Regulations. Whether the Governor of South Australia owed obligations of procedural fairness to any other third party, prior to the making of the Cowirra Regulations, and whether the Governor owes obligations of procedural fairness, more generally, when making regulations for the purposes of s 83GA(1), is not a matter before the Court.

The presumption of procedural fairness

- 48 As the Cowirra Regulations are ineffective, it is strictly speaking unnecessary to consider the alternative ground relied upon by the appellants, namely that the regulations were also invalid because there had been a breach of procedural fairness owed to them. Nonetheless, the Court was urged to consider that contention even in the event that the first ground succeeded.

- 49 One must start with the proposition that there is a strong common law presumption that the exercise of a statutory power which is apt directly to affect an individual is subject to an obligation to provide procedural fairness⁸¹. However, it is equally well established that Parliament may exclude such an obligation, whether expressly or by necessary implication⁸². As Crennan J observed in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*⁸³:

80 In South Australia the acts of the Governor in Council are "based on" decisions of cabinet: *South Australia v O'Shea* (1987) 163 CLR 378 at 387 per Mason CJ.

81 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 622 [367] per Gageler J.

82 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396 per Dixon CJ and Webb J; *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 56 [24] per Gleeson CJ, 61 [51] per McHugh, Gummow and Hayne JJ, 88 [138] per Callinan J.

83 (2008) 234 CLR 532 at 595-596 [182] (footnotes omitted).

"Parliament can validly legislate to exclude or modify the rules of procedural fairness provided there is 'sufficient indication' that 'they are excluded by plain words of necessary intendment'."

50 Here, any duty of procedural fairness, if it exists, must ultimately arise as an implication which conditions the power to make regulations under s 370 of the CLC Act for the purposes of s 83GA(1)⁸⁴. Whether it should *not* be presumed, in a given case, that such a condition exists turns on whether the legislation, properly construed, extinguishes the obligation to afford procedural fairness⁸⁵. This requires, for the purposes of this appeal, an examination of Pt 3B of the CLC Act, which is headed "Offences relating to criminal organisations".

Part 3B of the CLC Act

51 Division 1 of Pt 3B of the CLC Act is headed "Participation in criminal organisation", and contains a series of offences for when a person participates in a "criminal organisation" or in certain criminal activities of such an organisation⁸⁶. Division 2 of Pt 3B of the CLC Act is headed "Public places, prescribed places and prescribed events"⁸⁷. Relevantly, s 83GD makes it an offence for any "person who is a participant in a criminal organisation" to enter, or attempt to enter, a "prescribed place". The term "criminal organisation" is defined in s 83GA(1) of the CLC Act as follows:

"***criminal organisation*** means –

- (a) an organisation of 3 or more persons –
 - (i) who have as their purpose, or 1 of their purposes, engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity; and
 - (ii) who, by their association, represent an unacceptable risk to the safety, welfare or order of the community; or

84 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 205 [75] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

85 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 83-84 [90] per Gaudron J.

86 CLC Act, s 83E.

87 Division 2 was introduced by the *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA).

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- (b) a declared organisation within the meaning of the *Serious and Organised Crime (Control) Act 2008*; or
- (c) an entity declared by regulation to be a criminal organisation".

52 The phrase "participant in a criminal organisation" is defined in s 83GA(1) as follows:

"**participant**, in a criminal organisation, means –

- (a) if the organisation is a body corporate – a director or officer of the body corporate; or
- (b) a person who (whether by words or conduct, or in any other way) asserts, declares or advertises his or her membership of, or association with, the organisation; or
- (c) a person who (whether by words or conduct, or in any other way) seeks to be a member of, or to be associated with, the organisation; or
- (d) a person who attends more than 1 meeting or gathering of persons who participate in the affairs of the organisation in any way; or
- (e) a person who takes part in the affairs of the organisation in any other way,

but does not include a lawyer acting in a professional capacity".

53 The term "prescribed place" is defined in s 83GA(1) as a place "declared by regulation to be a prescribed place". Pursuant to s 83GA(2), a regulation which declares a place to be prescribed must be "laid before each House of Parliament in accordance with the *Subordinate Legislation Act 1978*" and may only relate to "1 place".

54 Other offences prescribed in Div 2 of Pt 3B include that of a person who is a participant in a criminal organisation being knowingly present in a public place with two or more participants in a criminal organisation (s 83GC); a participant in a criminal organisation attending, or attempting to attend, a "prescribed event" (s 83GD(2)); and a participant in a criminal organisation recruiting, or attempting to recruit, anyone to become a member of a criminal organisation (s 83GE).

55 The purpose of s 83GD of the CLC Act, as it applies to "prescribed places", is not in dispute. It is to disrupt the activities of serious criminal organisations. That

purpose was well described by the Court of Appeal of the Supreme Court of South Australia in the following terms⁸⁸:

"It is a manifest purpose of s 83GD to curtail rights and freedoms of participants in criminal organisations with respect to prescribed places, in pursuit of a preventative approach to law enforcement. More broadly, Division 2 is intended to disrupt the activities of criminal organisations. Expressed at the most general level, to make it an offence for participants to meet at places in respect of which one or some of them hold proprietary interests is manifestly in furtherance of that purpose. Participants in criminal organisations who own or occupy prescribed places are obvious targets of the regime."

56 In the Second Reading Speech for the *Statutes Amendment (Serious and Organised Crime) Bill 2015* (SA), which introduced Div 2 of Pt 3B, the Attorney-General stated that in specifying who is to be a "criminal organisation", and what are to be "prescribed places", "detailed advice" had been taken from the police⁸⁹. The Attorney-General said⁹⁰:

"I have taken extensive and detailed advice from police both on names and places in Schedules 1 and 2 and have considered their inclusion by reference to the proposed statutory criteria for the making of regulations."

57 It is not in dispute that the "Hells Angels" motorcycle club is a "criminal organisation" for the purposes of Div 2 of Pt 3B of the CLC Act⁹¹. The second and third appellants, who are occupiers of the Cowirra land, are members of that club, and thus "participants in a criminal organisation" for the purposes of s 83GD. They are the directors and only shareholders of the first appellant, which is the owner of the land the subject of the Cowirra Regulations.

58 Finally, there is the regulation making power in s 370(1) of the CLC Act. It provides:

88 *Disorganized Developments Pty Ltd v South Australia* (2022) 140 SASR 206 at 221 [59] per Livesey P, Doyle and Bleby JJA.

89 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 3 June 2015 at 1476.

90 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 3 June 2015 at 1482.

91 *Criminal Law Consolidation (Criminal Organisations) Regulations 2015* (SA), reg 2.

21.

"The Governor may make such regulations as are contemplated by, or as are necessary or expedient for the purposes of, this Act."

59 This is the context for determining whether the Governor of South Australia owed the second and third appellants, who are members of a declared criminal organisation, and a company they own, an obligation of procedural fairness, and if so its content, before making the Cowirra Regulations. For the reasons which follow, any such obligation would be antithetical to the statutory regime enacted in Div 2 of Pt 3B of the CLC Act. It is, with great respect, a remarkable proposition to require the South Australian Government to consult with a criminal organisation before declaring one of that organisation's properties to be a prescribed place. In such particular circumstances, the presumption in favour of conditioning the power to make regulations for the purpose of s 83GA(1) with an obligation to provide procedural fairness to the appellants is rebutted.

Public policy, matters of generality, security and procedural fairness

60 It has long been the case that high-level governmental decisions which are essentially political in nature, or which involve policy decisions affecting numerous individuals, do not ordinarily attract an obligation to provide procedural fairness before they are made⁹². In *South Australia v O'Shea*, Brennan J gave the following explanation as to why this is so⁹³:

"[A] Minister is not bound to hear an individual before formulating or applying a general policy or exercising a discretion in the particular case by reference to the interests of the general public, even when the decision affects the individual's interests. When we reach the area of ministerial policy giving effect to the general public interest, we enter the political field. In that field a Minister or a Cabinet may determine general policy or the interests of the general public free of procedural constraints; he is or

92 *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 452 per Jacobs J; *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404 at 416-417 per Gibbs CJ; *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J; *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning* (1997) 95 LGERA 33 at 52 per Beazley JA (with whom Powell JA agreed); *Transport Action Group Against Motorways Inc v Roads and Traffic Authority* (1999) 46 NSWLR 598 at 622 [90] per Mason P; *Sita Queensland Pty Ltd v Beattie* [2000] 2 Qd R 433 at 444-445 [47] per Williams J; *Cornwall v Rowan* (2004) 90 SASR 269 at 328 [232] per Bleby, Besanko and Sulan JJ; *McGuinness v New South Wales* (2009) 73 NSWLR 104 at 120 [88] per Hall J.

93 (1987) 163 CLR 378 at 411.

they are confined only by the limits otherwise expressed or implied by statute."

61 More recently in *SDCV v Director-General of Security*, Kiefel CJ, Keane and Gleeson JJ affirmed the general rule that⁹⁴:

"[P]ractical judgments, legislative or judicial, about the content and application of procedural fairness may vary with the claim to consideration of matters of public interest".

62 Even decisions which only affect a narrow and easily identifiable class of individuals may yet exhibit that high level of generality in decision making which may rebut any obligation of procedural fairness⁹⁵. The well-known decision of the Full Court of the Federal Court of Australia in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd [No 1]*⁹⁶ is an illustration of this principle. In that case judicial review was sought of a decision to revoke a commercial tariff concession order made under the *Customs Act 1901* (Cth) concerning "jet ski watercraft". The decision specifically affected the commercial interests of Kawasaki Motors. It claimed that procedural fairness required that it should have been given notice of the proposal to revoke the order and also an opportunity to make submissions. The Court rejected this submission. Hill and Heerey JJ recognised that a distinction should be drawn between a decision which directly affects a person individually and one which only affects that person as a member of the public or of a class of the public⁹⁷. Hill and Heerey JJ also reasoned that the decision to revoke the tariff concession order involved a consideration of issues of national interest and that, accordingly, there was no duty of procedural fairness. Their Honours said⁹⁸:

"The regime of Customs duties, including variations effected by [tariff concession orders], is at any given time the scoreboard of the enduring contest waged between the forces of free trade and protection. As well as the direct commercial interests ... there are social, political and

94 (2022) 96 ALJR 1002 at 1020 [55]; 405 ALR 209 at 223.

95 See, eg, *Kioa v West* (1985) 159 CLR 550 at 619 per Brennan J; *Wasantha v Minister for Immigration and Multicultural Affairs* [1999] FCA 1158 at [7] per Finn J.

96 (1991) 32 FCR 219.

97 *Comptroller-General of Customs v Kawasaki Motors Pty Ltd [No 1]* (1991) 32 FCR 219 at 239, 240-241.

98 *Comptroller-General of Customs v Kawasaki Motors Pty Ltd [No 1]* (1991) 32 FCR 219 at 240-241.

economic considerations affecting the whole Australian community. The rules of natural justice are in our opinion inapplicable in such a setting."

63 The national or public interest includes a concern with national as well as community security – for example, the detection and prosecution of crime and the protection of sensitive criminal intelligence⁹⁹. Thus, in *R (Tucker) v Director-General of the National Crime Squad*, Scott Baker LJ said¹⁰⁰:

"It is clearly established that, where there are real concerns about national security, the obligations of fairness may have to be modified or excluded".

64 There may also be cases where a duty of procedural fairness may be found to exist, but its content is reduced to "nothingness"¹⁰¹ due to countervailing considerations. *Leghaei v Director-General of Security*¹⁰² was such a case. The applicant claimed that he had been denied procedural fairness in the context of a decision to issue him with an adverse security assessment for the purposes of the *Australian Security Intelligence Organisation Act 1979* (Cth). Madgwick J said¹⁰³:

"In the circumstances of the present case, I am persuaded, having read and had debated the confidential material before me, that genuine consideration has been given, by the Director-General, to the possibility of disclosure, but that the potential prejudice to the interests of national security involved in such disclosure appears to be such that the content of procedural fairness is reduced, in practical terms, to nothingness."

65 Three other considerations which may be relevant, in a case such as this, to a determination of whether a "sufficient indication" exists that Parliament intended

99 *Chief Commissioner of Police v Nikolic* (2016) 338 ALR 683 at 708 [95] per Maxwell P, Osborn and Kaye JJA; *R v Gaming Board for Great Britain; Ex parte Benaim and Khaida* [1970] 2 QB 417 at 431 per Lord Denning MR; *Rogers v Secretary of State for the Home Department* [1973] AC 388 at 407.

100 [2003] ICR 599 at 611 [43].

101 *Kioa v West* (1985) 159 CLR 550 at 615 per Brennan J. See also *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 472 per McHugh J.

102 [2005] FCA 1576.

103 [2005] FCA 1576 at [88]. See also *Leghaei v Director-General of Security* (2007) 241 ALR 141 at 146-147 [51]-[55] per Tamberlin, Stone and Jacobson JJ.

to exclude, or limit, any obligation to provide procedural fairness were summarised by Brennan J in *FAI Insurances Ltd v Winneke* as follows¹⁰⁴:

"[T]he chief matters for consideration in ascertaining whether the legislature intended that the principles of natural justice should be applied are the statutory text, the interests affected by the statute and the repository of the power."

66 With respect to the first factor, being the statutory language, it is well established that the conferral of an unconstrained power is an indicator that Parliament intended to exclude any duty of procedural fairness. As Gibbs J said in *Salemi v MacKellar [No 2]*¹⁰⁵:

"This is a field in which it is unwise to generalize, but the fact that the power is conferred quite unconditionally is a circumstance that suggests – not necessarily conclusively – that the principles of natural justice are not intended to apply."

67 In contrast, an exercise of a power which is subject to more detailed conditions for its application is likely to attract the need to provide procedural fairness to those affected by it. In *FAI v Winneke*, the applicable regulation required the Governor in Council to consider the "commitments and financial position" of an applicant insurance company. That criterion, directed as it was to the individual attributes of an applicant, amongst other things, justified the conclusion that there was an obligation in that case to provide procedural fairness¹⁰⁶.

68 The second factor is more self-evident. The more directly affected an individual is by an exercise of public power, the more likely it is that they are owed a duty to be heard¹⁰⁷. This is discussed below.

104 (1982) 151 CLR 342 at 410.

105 (1977) 137 CLR 396 at 420.

106 (1982) 151 CLR 342 at 349-350 per Gibbs CJ, 356 per Stephen J, 369 per Mason J, 384 per Aickin J, 395 per Wilson J, 411-412 per Brennan J.

107 *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J, 619 per Brennan J, 632 per Deane J.

69 The third factor mentioned by Brennan J concerns the repository of the power. In *FAI v Winneke*, the decision maker was, as here, the Governor in Council. Brennan J said¹⁰⁸:

"The Governor in Council is not an administrative agency fitted to investigate or adjudicate upon disputed matters of fact. By clear convention, if not by strict constitutional obligation, the Governor in exercising statutory powers which are conferred upon the Governor in Council is accustomed to act upon the advice of his Ministers. The legislature cannot be taken to have intended to interfere with so central a function of responsible government unless it has expressed such an intention in the clearest terms."

70 This last factor is not determinative of the existence of any obligation to provide procedural fairness. Even cabinet may be required to provide natural justice. As Mason CJ observed in *South Australia v O'Shea*¹⁰⁹:

"Cabinet is a political institution primarily concerned with the 'political, economic and social concerns of the moment': *Attorney-General (Canada) v Inuit Tapirisat of Canada*. So it is, but in some instances Cabinet is called upon to decide questions which are much more closely related to justice to the individual than with political, social and economic concerns. The fact that Cabinet ordinarily directs its attention to concerns of this kind is not a reason for denying the existence of a duty to act fairly in a matter which turns not on such concerns, but on considerations peculiar to the individual. A Minister is to some extent, like Cabinet, concerned to make political judgments. Yet in appropriate cases he will be subject to a duty to act fairly."

71 Ultimately, whether, and to what extent, public powers designed to ensure community safety should, when exercised, be conditioned by obligations of procedural fairness is a matter of statutory construction¹¹⁰.

108 (1982) 151 CLR 342 at 414.

109 (1987) 163 CLR 378 at 387 (footnote omitted).

110 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 205 [75] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ; *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 521 [30] per Kiefel CJ, Gageler, Keane and Gleeson JJ.

Disrupting the Hells Angels: The presumption is rebutted

72 The appellants submitted that the decision to make the Cowirra Regulations would, if valid, have directly affected the second and third appellants, who are individual members of the Hells Angels, as occupiers and the first appellant as the owner of the prescribed place. This is the second factor mentioned by Brennan J in *FAI v Winneke*. This case, the appellants said, was quite unlike the circumstances considered in *Kawasaki*. The appellants were not merely members of a class affected by a public decision; the decision was specifically made in relation to a single criminal organisation and with respect to an identifiable plot of land. It affected, or purported to affect, no other South Australians (save for other members of the Hells Angels) and no other land. In that respect, they contended that it did not matter whether the regulations had an administrative or legislative character; rather, the proper question to be asked was what effect is the exercise of power apt to have and on whom¹¹¹. The fact that the decision was one made by cabinet in advising the Governor of South Australia was of no moment; that could not immunise the decision from a duty to provide natural justice¹¹².

73 Notwithstanding the foregoing, there are four considerations (including the other two matters mentioned by Brennan J in *FAI v Winneke*) which demonstrate that a "sufficient indication" exists of Parliament's intention to exclude any obligation of procedural fairness that might otherwise have been owed to the appellants.

74 The first is the very subject matter of Div 2 of Pt 3B of the CLC Act. Whilst it must be accepted that the decision to make the Cowirra Regulations would, if valid, have directly affected the appellants, that decision nonetheless bore another character: it necessarily involved important issues of community safety at a high level. As the Court of Appeal said¹¹³:

"Any regime that has a distinct impact on an individual group will also generally have some broader policy focus. It is important not to be arbitrary or dogmatic in the characterisation of underlying policy. Nevertheless, there will be some arenas of regulation where large social, political or economic considerations dominate.

111 cf *Bread Manufacturers of New South Wales v Evans* (1981) 180 CLR 404 at 415-416 per Gibbs CJ, 432-433 per Mason and Wilson JJ.

112 cf *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

113 *Disorganized Developments Pty Ltd v South Australia* (2022) 140 SASR 206 at 233 [118]-[119] per Livesey P, Doyle and Bleby JJA.

The wholesale disruption of a legislatively identified sphere of criminal activity invites such a description. The focus of regulation is not relevantly on the imputed 'wayward' actions of individuals, but rather on the identified social mischief that the legislature has determined that 'criminal organisations' pose."

75 Earlier their Honours had observed¹¹⁴:

"It is in this context that the prohibitions with respect to public places (in company), events and places all place restrictions on movement, either on a point-in-time or an ongoing basis. They comprise a suite of responses to perceived threats of criminal activity not at an individual level, but at the level of a class of actor. In this sense, the purpose of the Division and the indeterminacy of the class that it affects are intertwined. The Division's purpose of disruption of the (indeterminate) class of 'criminal organisation', informed by the offence provisions and the supporting definitions, speaks against the legislature having intended to accord procedural fairness to the participants in those very organisations."

76 I respectfully agree with the foregoing reasons.

77 Division 2 of Pt 3B of the CLC Act, from the perspective of the declared criminal organisation, is not beneficial legislation. Rather, the legislative object is the injury and disruption of the criminal activities carried out by offensive and dangerous organisations. It uses unambiguous, if not blunt, methods. Decisions are based on police advice and criminal intelligence. The aim is to leave the criminal organisation diminished and wounded. The appellants rightly accepted as much.

78 In such circumstances it is simply incongruous to conclude that Parliament did not intend to eliminate the presumption in favour of the giving of procedural fairness in the case of participants in criminal organisations and any entity associated with such participants. A simple, and perhaps typical, example illustrates why this must be so. Suppose, as a result of police surveillance, it is discovered that prohibited drugs are stored at a property owned and occupied by a participant in a declared criminal organisation. On police advice, a decision is made to make a regulation declaring that property to be a prescribed place. It would be nonsensical to conclude that, in such circumstances, Parliament intended to impose a requirement that the South Australian Government "tip off" the participant in the criminal organisation first, before making the regulation. Indeed, courts have long accepted that the need for urgent action may result in the

114 *Disorganized Developments Pty Ltd v South Australia* (2022) 140 SASR 206 at 232 [114] per Livesey P, Doyle and Bleby JJA.

exclusion of procedural fairness¹¹⁵. Any such obligation would therefore greatly undermine the very purpose and object of Div 2 of Pt 3B of the CLC Act and would sit in direct tension with the confidential nature of the material upon which the cabinet of South Australia is to act.

79 Compounding the incongruity of affording criminal organisations with procedural fairness is that if such an obligation is to have any meaningful content, the criminal organisation would need to be told, in some informed way, why its property was about to be declared a "prescribed place". But that, in turn, would lead to difficult issues concerning the disclosure of police intelligence and methods. A problem analogous to that recently considered by this Court in *SDCV v Director-General of Security*¹¹⁶ would arise: how is one to balance the need to provide procedural fairness with the countervailing interest of protecting the confidentiality of sensitive material. As Gibbs J stated in *Salemi v Mackellar [No 2]*¹¹⁷, "[r]easons of security may make it impossible to disclose the grounds on which the executive proposes to act". This all suggests that it is most unlikely that Parliament intended for such disclosures to be made; and if that is so, what is the merit of providing to a criminal organisation a bland notice, devoid of any detail, that a property is to become a prescribed place? It cannot be likely that Parliament intended to conjure up so impotent a duty of procedural fairness.

80 The second consideration is the applicable statutory language. Neither s 370(1), nor the definition of "prescribed place" in s 83GA(1), contains any conditions or prescribes any requirements for the making of a regulation that declares property to be a "prescribed place". No doubt, inferentially, this was to give the South Australian Government maximum flexibility to disrupt the activities of criminal organisations and to permit it to take into consideration a very large number of matters, some of which may involve matters of public policy. It follows that this factor is another indication of Parliament's intention to exclude procedural fairness in the case of affected criminal organisations.

115 *White v Redfern* (1879) 5 QBD 15 at 18 per Field J, 19 per Manisty J; *R v Davey* [1899] 2 QB 301 at 305 per Darling J, 306 per Channell J; *Toy Centre Agencies Pty Ltd v Spencer* (1983) 46 ALR 351 at 357-358 per Lockhart J; *Marine Hull and Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234 at 240-241 per Wilcox J; *Grech v Featherstone* (1991) 33 FCR 63 at 67 per Heerey J; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 622-623 [368] per Gageler J.

116 (2022) 96 ALJR 1002; 405 ALR 209.

117 (1997) 137 CLR 396 at 421. See also *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 76 per Brennan J.

81 The third consideration is that the repository of the power to make regulations is the Governor in Council, or, in substance, the South Australian cabinet. On its own, this is not a powerful consideration. But when combined with the first and second considerations, it is another indication that Parliament intended relevantly to exclude procedural fairness in the case of relevant criminal organisations.

82 A fourth and further consideration is that any regulation which declares a property to be a "prescribed place" must be laid before each House of Parliament in accordance with the *Subordinate Legislation Act 1978* (SA)¹¹⁸ (now titled the *Legislative Instruments Act 1978* (SA)¹¹⁹). This obliges the Legislative Review Committee of Parliament to inquire into and consider the regulation¹²⁰. The Committee can, if it so wishes, form an opinion that the regulation ought to be disallowed and, if so, it must report that opinion to both Houses of Parliament¹²¹. A further layer of parliamentary oversight is provided for by the Crime and Public Integrity Policy Committee¹²². The existence of effective parliamentary supervision and oversight of the making of regulations of this kind strongly suggests that Parliament intended for this to be the principal way of ensuring that regulations made for the purposes of s 83GA(1) are both effective and appropriate¹²³.

83 The procedure for the making of regulations declaring property to be a prescribed place may be contrasted with the legislative regime for declaring an organisation to be a "declared organisation" for the purposes of the *Serious and Organised Crime (Control) Act 2008* (SA). That Act sets out a complex procedure whereby an application can be made by the Commissioner of Police to a court for an order that a particular organisation be declared to be a "declared organisation"¹²⁴. The application must, amongst other things, set out the grounds

118 CLC Act, s 83GA(2).

119 cf *Legislation Interpretation Act 2021* (SA), s 36(2).

120 *Legislative Instruments Act 1978* (SA), s 10A(2).

121 *Legislative Instruments Act 1978* (SA), s 10A(4).

122 See *Parliamentary Committees Act 1991* (SA), s 15O.

123 See, eg, *Wasantha v Minister for Immigration and Multicultural Affairs* [1999] FCA 1158 at [5] per Finn J; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 584 [246] per Callinan J; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 648-649 [30] per French CJ and Kiefel J, 656 [55] per Gummow, Hayne, Crennan and Bell JJ.

124 *Serious and Organised Crime (Control) Act 2008* (SA), s 9.

on which the declaration is sought and the information supporting those grounds, and be supported by at least one affidavit from a police officer¹²⁵. Subject to information classified as "criminal intelligence", a copy of the application and any supporting affidavit must be made available for inspection to a representative of the affected organisation and any member or former member who may be directly affected by the application¹²⁶. The application must also first be published in the South Australian gazette and in a newspaper circulating generally in that State, and must advise interested parties of their right to, for example, provide submissions to the court at the hearing of the application¹²⁷. The organisation to which the application relates is entitled to make submissions to the court, whether orally or in writing¹²⁸. A very similar statutory regime was considered by this Court in *Condon v Pompano Pty Ltd*¹²⁹. The absence of anything like this complex procedure, involving as it does a clear statutory mechanism for the giving of procedural fairness, is a further indication of Parliament's intention of what was required when making regulations of the kind the subject of this appeal.

84 No part of the foregoing reasoning would necessarily apply to any obligation of procedural fairness that might be owed to affected third parties who are not criminal organisations, or participants in such organisations.

85 I would allow the appeal with costs.

125 *Serious and Organised Crime (Control) Act 2008* (SA), s 9(2).

126 *Serious and Organised Crime (Control) Act 2008* (SA), s 9(6) and (7).

127 *Serious and Organised Crime (Control) Act 2008* (SA), s 10(1).

128 *Serious and Organised Crime (Control) Act 2008* (SA), s 15.

129 (2013) 252 CLR 38.

