HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 16 Dec 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	A22/2022
File Title:	Disorganized Developments Pty Ltd & Ors v. State of South A
Registry:	Adelaide
Document filed:	Form 27E - Reply
Filing party:	Appellants
Date filed:	16 Dec 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

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

BETWEEN: **DISORGANIZED DEVELOPMENTS PTY LTD**
First Appellant

PETER KEITH STACY
Second Appellant

STEPHEN JOHN TAYLOR
Third Appellant

and

THE STATE OF SOUTH AUSTRALIA
Respondent

APPELLANTS' REPLY

Part I: The Appellants' Reply is in a form suitable for publication on the internet.

Part II: Ground 1 – 2015 Schedule Regulations not a 'convenient consolidated list'

1. In answer to the Appellants' construction of the Cowirra Regulations as a purported variation of the 2015 Schedule Regulations, the Respondent seeks to characterise the consolidated version as a "convenient consolidated list" of declared places (*RWS,* [17]).[1] The argument then follows (*RWS,* [22]) that this removes any obstacle to its being found (impliedly) in the Cowirra Regulations themselves.
2. The consolidated version of the 2015 Schedule Regulations is not, and cannot be, a mere convenient list. Section 7 (not s 8) of *Legislation Revision & Publication Act 2002* (LRPA) (*RS,* [23]-[24]) does not authorise the Commissioner to revise a regulation to such an end.[2]
3. The Cowirra Regulations purport to "*vary*" the *Criminal Law (Consolidation (Criminal Organisations) Regulations 2015* – the title given to them by Schedule 1 of the 2015 Act. Their status as "amendments or variations made" is all that enables them (if valid)[3] to be incorporated by the Commissioner into the Schedule Regulations. If, as the Respondent contends, the Cowirra Regulations contain their own (implied) declaration, they are complete in themselves and cannot be "amendments or variations made". They cannot therefore be incorporated into a consolidated version of the 2015 Schedule Regulations. The 2015 Schedule Regulations were re-instated as Regulations so as to permit the later deletion of any of the declared places appearing there.[4]
4. The Cowirra Regulations say expressly they are *varying* the *Criminal Law (Consolidation (Criminal Organisations) Regulations 2015*, and do not themselves seek to declare.[5]

---

[1] In doing so, the Respondent has wrested the phrase "convenient consolidated list" employed by the Court of Appeal (**CA**) (at [31]) to a different purpose. The CA was not endorsing the Schedule Regulations as being a mere list, indeed it regarded them as the intended, but failed, source of the declaration – it then asked further whether the Cowirra Regulations had nonetheless themselves done enough: at [41].

[2] "*Legislation*" includes "*regulation*": s 3, LRPA. "Revise" is defined to include "consolidate", and "consolidate" is defined to mean "incorporate into legislation *amendments or variations made* by subsequent instrument"– that is, effected as *amendments or variations* of the initial or principal regulations. s 3, LRPA. Revisions can only be undertaken under the supervision of the Commissioner: s 6.

[3] An incorporation cannot render valid what is invalid: s 7(2), LRPA.

[4] The 4 titles comprising "7 Dalgleish Street Thebarton" initially declared as prescribed places in Schedule 1, were deleted by regulation in 2022 (No. 2-5 of 2022).

[5] This is the case with every additional regulation identifying a "place" since 2015 – *either*, they *add* a CT reference and address to reg 3 in the 2015 Regs (Para Hills, No 207/17; Cowirra, No 313, 314 of 2020); *or* they *insert* a new reg 4 in the 2015 Regs where it then *declares* an address only (Salisbury South, No 208 of 2017), *or* they designate existing reg 4 in the 2015 Regs as reg 4 (1) and add successively a new reg 4 (2) and a new reg 4 (3) each then *declaring respectively* an address only (Para Hills West, No 266 of 2020 and (Burton, No 315 of 2020) to be a prescribed place.

No implied declaration

5. The Respondent does not support the CA's finding of a declaration *in addition to,* rather than *instead of,* seeking to vary the 2015 Schedule Regulations (CA, [40]-[41]) – contending that there is no attempt to vary the 2015 Schedule Regulations, and the Court is free to imply a declaration from a "statement of regulatory intent": CA, [33]. The *AWS* explain why it is not possible to imply a declaration *inconsistently* with the *evident* methodological purpose[6] of treating the 2015 Schedule Regulations as the source of the declaration.

A declaration cannot be "read in"

6. As an alternative, the Respondent has contended (*RWS,* [22]), for the first time, that it "would be appropriate to read words into the Regulations" and the conditions for doing so are "clearly met". The conditions for reading in are not met: condition 1 (purpose clearly identified) – the methodological purpose points elsewhere; condition 2 (an 'eventuality' overlooked) – the design of the Regulation was deliberate; condition 3 (the words overlooked clearly identified) – the submission does not identify the words said to constitute a declaration, (a formal statement announcing the commencement of the condition of being prescribed), nor the place they are to occupy in the text; condition 4 (the drafting must be consistent with the existing language used in the Regulations[7]) – any operative statement of declaration to be "read in" will be positively inconsistent with the language of "variation", and the methodology of inserting the identified "place" into the 2015 Schedule Regulations. In effect, the Respondent's contention would not merely have the Court "repair" – it would have the Court build a new regulation among the ignored ruins of an attempted variation.

Ground 2 – The Cowirra Regulations are ineffective

7. The Respondent's submissions fail, with respect, to maintain the authoritative delineation between the conditions leading to a presumptive *attachment* of the obligation to accord procedural fairness, and the finding of an unmistakable legislative intention to *displace* the presumption.

8. Contrary to the contentions of the Respondent –

   (a) whether the obligation to accord procedural fairness *is to be implied* is not answered by reference to general canons of statutory construction (*RWS,* [28]).

---

[6] *Wainohu v New South Wales* (2011) 243 CLR 181, [146] (Heydon J); *Alexander v Minister for Home Affairs* [2022] HCA 19, [101], [114]-[116] (Gageler J).
[7] *Taylor v The Owners, Strata Plan 11564* (2014) 253 CLR 531, [39] (French CJ, Crennan and Bell JJ).

Insofar as the Respondent asserts general principles of statutory construction,[8] it is contrary to authority about presumption and displacement.[9]

(b) whether or not the making of the regulations for the purposes of s 83GA(1) is conditioned upon the obligation to accord procedural fairness does not turn "*in large measure*", or at all, on "*whether the exercise of power should be understood to focused upon the circumstances of individuals ... or alternatively upon the social mischief of disrupting criminal organisations [sic]*" (*RWS*, [30]). Insofar as that applies to the *attachment* of the presumption, it is contrary to authority. Insofar as it applies to *displacement*, it fails to focus upon the discernment of legislative intent or reflect the tenacity of the attachment,[10] and erects as general principle expressions directed to considering displacement in the circumstances in *FAI*.[11]

9. As a result, the Respondent's submissions are a collation of considerations, some of which may be relevant to the issue of *attachment*;[12] others of which may be relevant to the issue of *displacement*.[13]

10. **No "shift in focus":** Contrary to the (erroneous) complaint (*RWS*, [36], [40], fn 63), the Appellants have never contended that all "participants" must be accorded procedural fairness – or that the distinct interests of owners and occupiers depend on the rights of all participants. The focus is *express* in the Case Stated. The CA correctly understood, and recited, the Appellants' argument: CA, [84], [95], [97], [102] and [135].

11. **The significance of standing:** The Appellants identify that the very *interest* that imports an obligation to give procedural fairness will also entitle an applicant to standing. The CA recognised the Appellants' standing *based on that very interest*, but erred in not accepting that it gave rise to the obligation: CA, [85]. That submission is not one of standing "subsuming" the right (*RWS,* [38]) – rather the same underlying

---

[8] As to the Respondent's fn 13, *MZACP* and *SZTAL* are statements about statutory construction, (not about the implication of an obligation to accord procedural fairness). The cited passage in *SZSSJ* at [75] is a classic statement of the position for which the Appellants' contend, not the proposition advanced by the Respondent.
[9] See cases in *AWS* at footnote 27.
[10] *Nathanson v Minister for Home Affairs* [2022] HCA 26, [88] (Edelman J) and the cases cited therein.
[11] The passage in *FAI Insurances PL v Winneke* (1982) 151 CLR 342 (***FAI***), 410 (Brennan J) commences: "*In the present case*, the chief matters for consideration .....", and is concerned with *displacement* of the presumption. See also: Gibbs CJ (348-350); Stephen J, (351-355); Mason J, (360-362; 366-369); Wilson J, (390-398). The further passage in *FAI*, 366 (Mason J) deals solely with whether the legislation conferred an unlimited discretion suited to high policy which, if established (it was not), might raise by necessary implication a legislative intention to displace the presumption
[12] *RWS* [32], [37]-[39], [41]-[43], [44]-[47].
[13] *RWS* [33], [34], [46], [48]-[51].

interest establishes both. *Botany Bay* (see *RWS,* [39]) does not establish otherwise.[14]

12. **"Diffusion" a distraction:** the Respondent's submission (*RWS,* [41]-[42]) that "owners" and "occupiers" are a "diffuse class" repeats the error of searching for a class as opposed to looking at the Appellants' individual interest, and fails to acknowledge that the exercise of the power selects a *place*, of which there will be an owner and occupier - here, there are three such persons. There is no practical difficulty in identifying and notifying them.

13. **The irrelevance of a "public interest case" category:** there is no authority for the proposition (*RWS*, [45]) that "the present case is of a kind that is directed to the public interest", rather than to individual interests (echoing *RWS*, [30]). The cases relied on for this submission (*RWS,* fn 67 and 75, notably *Kawasaki*), address an entirely different question – whether the interests of the applicant are apt to be affected in any way *other than* as a member of the public. Most public powers are directed to public interest concerns, but that is not the source of the presumption – it is "interests apt to be affected". The pathway of "public interest" leads (as it led the CA, [118]-[119]) to an impermissible focus on the "purpose" of the power, rather than on its potential effect, relegating the capacity of the power to affect individual interests to indistinct categories of "incidental": *RWS,* [46]. The legitimate discourse for "public interest" is whether its pursuit in the legislation discloses a very clear intention to displace.

14. **The "breadth" of the discretion:** *RWS,* [31]-[32]. The significance of this as a factor displacing the presumption has long been doubted – and has now been identified as a matter that may, on the contrary, justify it.[15] As explained by Professor de Smith:

> the mere fact that the discretionary power is wide is inconclusive. .... Would one say today that *because* a public authority is entitled to make an order for the compulsory purchase of land on unreviewable grounds of national policy, it is *therefore* entitled to refuse to entertain any representations from persons who are going to be directly affected? [16]

15. So long as the exercise of the power may involve considerations personal to the individual (in the sense of affecting their individual interest) the presumption attaches[17]

---

[14] Lehane J in *Botany Bay CC v Minister of State for Transport* (1996) 66 FCR 537, addressing "person aggrieved" under the *ADJR Act*, decides only that an exercise of power may not be apt to *affect an applicant's interest* other than as a member of the public (denying both an entitlement to procedural fairness and standing to claim it) but may nevertheless result in same applicant having such a *special interest in the subject-matter of the litigation* as to give them standing to challenge it on *other* grounds. See also, *ACF v The Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa* (1981) 149 CLR 27.

[15] *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 56 [25] (Gleeson CJ).

[16] Professor De Smith, *Judicial Review of Administrative Action*, (2nd edition, 1968), p170-1.

[17] Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 2022, 7th ed), [8.130], p436; *FAI*, 362-365 (Mason J); 397-399 (Wilson J); *O'Shea v South Australia* (1987) 163 CLR 378, 388-9 (Mason CJ).

leaving the content of the obligation to hold the balance between policy and individual effect.

16. **Parliament not bound by procedural fairness when listing "places"** *RWS,* [33]: Parliament is never bound to accord procedural fairness before enacting legislation. No inference can be drawn from the enactment of the 2015 Schedule Regulations as to whether Parliament intended the executive not to observe procedural fairness when making regulations.

17. **Parliamentary Committee oversight** (*RWS,* [34]): The availability of disallowance (s83GA(2)) does not give any guarantee of scrutiny or any right to be heard. Oversight by the Crime and Public Integrity Policy Committee is an even more distant source of an implication. It has functions of review and inquiry with respect to the operation of the Act generally and cannot access relevant information.[18] There is no guarantee of timely scrutiny. With respect to a targeted measure, fairness is not ensured by oversight by Parliament, (it cannot displace "the duty of fairness in general or the duty of prior consultation in particular.")[19] nor can it be supposed that Parliament enacting s 83GA ever thought it was.[20]

18. **The Governor-in-Council as repository of the power (*RWS,* [48]-[51]):** There is nothing significant about the commonplace designation of the Governor as the repository of a regulation-making power. In *FAI,* the Governor was identified as a "*conventional instrument for the formal making of subordinate legislation and of a host of routine administrative decisions*".[21] This is simply the method adopted for placing control of regulation-making in the hands of the Executive. There are no practical impediments to it being accorded – that can be the role of the responsible Minister.

Dated: **15 December 2022**

WJN Wells KC
Hanson Chambers
Telephone: 08 8212 6022
wells@hansonchambers.com.au

C Jacobi KC
Edmund Barton Chambers
Telephone: 0437 810 110
cjacobi@ebchambers.com.au

[18] s 15O, *Parliamentary Committees Act 1991,* and particularly s 15O(3).
[19] *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 763, 780 [44].
[20] *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, 763, 783 [47].
[21] *FAI,* 349-350 (Gibbs CJ); 352-355 (Stephen J); 369-370 (Mason J); 398-401 (Wilson J); 414-417 (Brennan J).