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
Filing party:	Interveners
Date filed:	07 Jun 2022

Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

B E T W E E N:

SDCV
Appellant

AND

DIRECTOR-GENERAL OF SECURITY
First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Respondent

ORAL OUTLINE OF SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: ORAL OUTLINE

2. In ***Condon v Pompano Pty Ltd*** (**JBA 3/11/374**) the plurality (Hayne, Crennan, Kiefel and Bell JJ) said, at [157], that in an adversarial system: (a) as a general rule, opposing parties will know *what* case an opposite party seeks to make and *how* that party seeks to make it; (b) that general rule is not absolute, and there are circumstances in which competing interests compel some qualification to its application; and (c) if legislation provides for a novel procedure which departs from the general rule, the question is "whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid 'practical injustice'".

Primary Declarations – Partial Invalidity

3. In the present case, the appellant primarily seeks declarations that s 46(2) of the AAT Act is invalid: (a) to the extent that it precludes the Court from providing a party a fair opportunity to respond to evidence on which an opposing party relies; or alternatively (b) to the extent that it requires or authorises the Court to act in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.

4. These declarations reflect the appellant's attempt to read an exception into the plain words of section 46(2) where none exists; or the appellant's attempt to disapply section 46(2) where the obvious and evident intention was for these provisions to apply to all certificated material. See **2RS** [48]-[50].

5. Further, the proposed declarations do not finally determine or adjudicate any right or liability in the present case, or determine the existence of error which may have affected the appellant. They simply declare that the operation of s 46(2) is subject to a general duty of the Court to provide procedural fairness, without the Court concluding that there was any real prospect that procedural fairness had in fact been denied to the appellant in this case.

6. The proposed primary declarations should not be made for these reasons.

Alternative Declaration – Complete Invalidity

7. The appellant alternatively contends that section 46(2) is wholly invalid. That is because it contains no mechanism by which the court might afford the appellant a fair opportunity to respond to evidence which might be used against him: **AS** [38]. A declaration that section 46(2) is wholly invalid is sought by the appellant as a final alternative.

8. There are three responses to the submission that section 46(2) is wholly invalid.

9. **First**, there is no immutable minimum requirement of procedural fairness: ***Pompano*** [119], [156], see also at [70].

10. The appellant effectively suggests to the contrary, by relying upon Gageler J's statement in ***Pompano*** [177]: **AS** [2] (Issue 2), [26], [29], [37], [38], [63]. Gageler J said that a procedure is unfair if it has the capacity to result in the court making an order that finally alters or determines a right or legally protected interest of a person without that person having a fair opportunity to respond to evidence which might be used against him or her.

11. However, this statement is a general application of a duty to provide procedural fairness. All members of the Court accept that procedural fairness is a matter of practical justice: [68] (French CJ), [156]-[157] (Hayne, Crennan, Kiefel and Bell JJ), [188] (Gageler J). See also ***HT v The Queen*** (**JBA 5/23/1272**) [18].

12. As well, in ***HT*** [17], Gageler J's statement at [177] was characterised as part of the "general rule" by Kiefel CJ, Bell and Keane JJ. That is, it was not an immutable minimum requirement. Gageler J himself said, at ***Pompano*** [177], that while a duty to provide procedural fairness was immutable, it has a variable content. See also ***HT*** [18]. Gageler J also said, at ***Pompano*** [195], that: "Procedural fairness can be provided by different means in different contexts and may well be provided by different means in a single context".

13. **Secondly**, and in any event, what constitutes a "fair opportunity to respond" depends upon the particular circumstances of the case. It does not always require disclosure of evidence where the confidentiality of that evidence "is at the heart of a right or interest in issue which would be destroyed were confidential information to be disclosed in the curial process": per Gageler J in ***Pompano*** [192].

14. That is evident from ***Gypsy Jokers*** and ***Pompano***. In the context of the legislative schemes in those cases, maintaining confidentiality in criminal intelligence from an adversely affected party did not mean that the institutional integrity of a court was adversely affected. The Court in those cases (as here) could see the confidential information for itself. These cases were correctly decided and should not be reconsidered.

15. In this case, WA supports the second respondent's submissions that the appellant had a fair opportunity to respond. The disclosure of confidential evidence goes to the heart of the national interest, which would be destroyed upon disclosure. Moreover, there has been a fair opportunity to challenge the basis for the non-disclosure, by the provisions allowing such a challenge before the AAT or Federal Court. The appellant cannot now complain on an appeal, concerning a question of law only, that he lacked a fair opportunity to respond before the Federal Court.

16. **Thirdly**, if legislative provisions may operate unfairly in a particular case, the Court has the capacity to stay a particular substantive application in the exercise of implied or inherent jurisdiction where the result would be manifest practical unfairness: ***Pompano*** [178], [212] (Gageler J). In other words, for legislative provisions to be invalid for denying procedural fairness, they must *always* operate in a manner which is manifestly unjust, not just in some particular cases.

17. The appellant has not demonstrated that the legislative provisions *always* apply in a manifestly unfair way, or that they apply in a manifestly unfair way which would justify a stay in this case (which the Federal Court could grant as part of its jurisdiction to prevent abuses of process). The appellant did not set out to demonstrate either of these matters, as it instead sought the limited primary declarations.

18. For these reasons, no declaration should be made that s 46(2) is wholly invalid.

Dated: 7 June 2022

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