



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

MJZP
Plaintiff

and

DIRECTOR-GENERAL OF SECURITY
First Defendant

and

COMMONWEALTH OF AUSTRALIA
Second Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**

PART I: Internet publication

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II: Propositions to be advanced in oral argument

***SDCV* should not be re-opened**

2. *SDCV* builds on the principles worked out in *Pompano* and *Gypsy Jokers*. That the Plaintiff is now driven to seek leave to reopen not only *SDCV*, but also *Gypsy Jokers* and *Pompano* (**Reply [10]**) goes to show those cases constitute a ‘definite stream of authority’. *Gypsy Jokers*, in particular, ‘is of long standing’: *SDCV* [2022] HCATrans 102 (8 June 2022) line 7446 (Kiefel CJ).

***Gypsy Jokers* cannot be distinguished**

3. The Plaintiff’s written submissions suggest that *Gypsy Jokers* is distinguishable because it concerned State legislation: **PS [25.2]; Reply [9]**. That argument was rejected in *SDCV* (2022) 277 CLR 241, [58] (**vol 7, tab 49, 2881**) and was not pressed by the Plaintiff in this case in oral argument.

4. There is no other basis on which *Gypsy Jokers* can be distinguished:
 - a. Six judges upheld the validity of s 76(2) of the CCC Act (WA). The joint judgment cannot be treated as though it left the procedural fairness ground undecided: **QS [15]**; *Pompano* (2013) 252 CLR 38, [152] (**vol 3, tab 19, 840**).
 - b. The Court did not construe s 76(2) as involving *ad hoc* balancing akin to a public interest immunity claim: **QS [16]**; *Gypsy Jokers* (2008) 234 CLR 532, [36], [181], [183] (**vol 5, tab 28, 1590, 1626, 1627**). Cf **PS [50.1]**.
 - c. It was not the case that unfairness could have been ameliorated by the court declining to ‘use’ the material. If the court did that, the application for review would fail, thwarting meaningful review: **QS [17]**; *Gypsy Jokers* (2008) 234 CLR 532, [5] (**vol 5, tab 28, 1581-2**). Cf **PS [50.1]**. See also *SDCV* (2022) 277 CLR 241, [302]-[304] (**vol 7, tab 49, 2963-4**).

The principles are stated in *Pompano*

5. *Pompano* built on *Gypsy Jokers* and laid down the relevant test, which was then applied in *SDCV*. The test is ‘whether, taken as a whole, the court’s procedures for resolving the dispute accord both parties procedural fairness and avoid “practical injustice”’: *Pompano* (2013) 252 CLR 38, [157] (**vol 3, tab 19, 842**); *SDCV* (2022) 277 CLR 241, [66]-[67], [313] (**vol 7, tab 49, 2884-5, 2968**).

Recent cases on means-ends testing do not alter those principles

6. The line of cases most recently culminating in *YBFZ* [2024] HCA 40 establish that means-ends testing is relevant to the proper characterisation of a law as punitive or not. They say nothing about the *Kable* principle or the equivalent restrictions applying to federal courts. More specifically, they say nothing about whether competing interests compel a qualification to the ‘general rule’, which is not a question of characterisation. That is a question about the effect of the law, not its true purpose.

Application of test

7. Section 46(2) of the AAT Act (Cth) is part of a statutory scheme designed to ensure meaningful review of executive action by the courts and therefore does not cause ‘practical injustice’: **QS [10]**; *SDCV* (2022) 277 CLR 241, [74], [83], [311]-[314] (**vol 7 tab 49, 2887-8, 2890, 2966-8**); *Gypsy Jokers* (2008) 234 CLR 532, [5] (**vol 5, tab 28,**

1581-2).

- 8. The conclusion that s 46(2) is valid would follow even if proportionality were relevant: **QS [19]-[29]**.
- 9. The alternatives proffered by the Plaintiff are not equally effective and less restrictive.
 - a. Permitting the court to balance competing public interests and to decline to use certified matter would not ensure a meaningful review: cf **PI Oral Outline [11.1]**. It would leave the Plaintiff in the same position they would be in following a successful public interest immunity claim, which s 46 was intended to avoid.
 - b. Requiring the ASIO Minister to provide evidence justifying the issuing of the certificate would not be less restrictive of the departure from the general rule. It too would require the court to consider material that is not disclosed to one of the parties: cf **PI Oral Outline [11.2]**.
 - c. Special advocates are not a panacea: *SDCV (2022) 277 CLR 241*, [99] (**vol 7, tab 49, 2895**). Cf **PI Oral Outline [11.3]**. In any event, the Plaintiff concedes Parliament is not required to choose the single least restrictive means: **Reply [11]**.
- 10. The objective of ensuring meaningful review by the courts is consistent with the values underlying Ch III, particularly the rule of law, and weighs heavily in the balance in any means-ends analysis: **QS [27]-[29]**.

Dated: 13 December 2024.



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Kent Blore