



## 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

No. S142 of 2023

B E T W E E N:

**MJZP**  
Plaintiff

AND

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**DIRECTOR-GENERAL OF SECURITY**  
First Defendant

AND

**COMMONWEALTH OF AUSTRALIA**  
Second Defendant

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

**PART I: INTERNET PUBLICATION**

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

**PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT**

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***SDCV, Gypsy Jokers and Pompano should not be re-opened***

2. For the reasons submitted by the second defendant and the interveners:
  - (a) *SDCV v Director-General of Security* (2022) 277 CLR 241 (**JBA vol 7 tab 49**);
  - (b) *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 (**JBA vol 5 tab 28**); and
  - 10 (c) *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 (**JBA vol 3 tab 19**),  
should not be re-opened.
3. As to *Gypsy Jokers* and the fourth factor in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) (**JBA vol 5 tab 33**), *Gypsy Jokers* has been acted on to enact provisions in Western Australia under which a court must depart from the general rule if it considers that material is of a certain description specified in the statute: Bundle of Legislative Provisions referred to by the Attorney General for Western Australia (intervening), referring especially to the *Bail Act 1982* (WA) s 66C, the  
20 *Firearms Act 1973* (WA) s 22AA, the *Firearms Act 2024* s 337 (read with the *State Administrative Tribunal Act 2004* (WA) s 94) and the *Sentence Administration Act 2003* (WA) ss 119B and 119C.

**Proportionality testing should not apply to all departures from the general rule**

4. Fairness is not an abstract concept. It is essentially practical. As such, procedural fairness does not have immutably fixed content. Where an adversarial system is followed, the **general rule** is that opposing parties will know the case an opposite party seeks to make and how that party seeks to make it. The general rule is not absolute. Competing interests may compel some qualification to the application of the general rule. The concern of the law, in the context of procedural fairness, is to  
30 avoid practical injustice: *Pompano* [156]-[157] (Hayne, Crennan, Kiefel and Bell JJ), [188] (Gageler J) (**JBA vol 3 tab 19**); *SDCV* [54], [67] (Kiefel CJ, Keane and Gleeson JJ), [269] (Steward J) (**JBA vol 7 tab 49**).

5. This is consistent with the basis on which the observance of procedural fairness is an essential characteristic of a Ch III court. The essential characteristics of a court are used, *inter alia*, to describe limits, derived from Ch III of the *Constitution*, upon the commands to which legislatures may subject Ch III courts. They are rooted in the text and structure of the *Constitution* informed by the common law, which carries with it historically developed concepts of courts and the judicial function. As they are historically evolved and applied in the real world, they are not and cannot be absolutes: *Pompano* [67]-[68] (French CJ) (**JBA vol 3 tab 19**).
6. There is no minimum requirement of procedural fairness applicable to all proceedings in a Ch III court. Whether practical injustice may be caused to a litigant is not to be resolved by reference to fixed rules as to minimum requirements. It depends upon the nature of the proceedings and the rights and interests at stake: *SDCV* (2022) 277 CLR 241 [53]-[54] (Kiefel CJ, Keane and Gleeson JJ), [176]-[178] (Gordon J), [269] (Steward J) (**JBA vol 7 tab 49**).
7. What is fair – or, put in the terms of the applicable test, what avoids practical injustice – very often depends on the circumstances of the particular case. The inquiry into what is fair must be particular and individual and fairness must be evaluated in the context of principles and techniques available to deal with evidentiary imbalances. The evaluative inquiry in each case will be unique and may be highly fact-sensitive: see for example, in the context of a civil trial alleging sexual and physical abuse more than 50 years earlier, *Willmot v Queensland* [2024] HCA 42 [17], [24]-[25], [30] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ), [87], [101]-[102] (Edelman J), [138]-[141] (Steward J), [156] (Gleeson J).
8. The plaintiff's contention that any departure from the general rule should be justified on a proportionality (or "means and ends") analysis is not only contrary to authority in *Pompano* and *SDCV*. It is inconsistent with the nature of procedural fairness, which is not susceptible of fixed rules as to minimum requirements and instead involves individualised assessments of what is fair in a particular case.
9. This may be contrasted with the requirement of reasonable necessity which this Court has applied in the context of legislative burdens on the implied freedom of political communication and the guarantee in s 92 of the *Constitution* that "trade, commerce, and intercourse among the States ... shall be absolutely free". In those contexts, the analysis begins from a fixed starting point: the freedom or guarantee.

### **Proportionality testing could apply where there is practical injustice**

10. If, contrary to the Commonwealth's submissions (which Western Australia has adopted), there was practical injustice in this case on the test established in *Pompano* and upheld by the majority in *SDCV*, there is a baseline from which proportionality testing could be applied.
11. While there is no minimum requirement of procedural fairness applicable to all proceedings in a Ch III court, there is at least a requirement that there be no practical injustice. Put another way, in the context of permanent stays, there is an "irreducible minimum necessary for a fair trial" (which like practical injustice is not an absolute or immutable concept): *Willmot* [26] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ); see also *Pompano* [187], [212] (Gageler J).
12. Procedural unfairness, for example, constitutes the starting premise of Edelman J's expression of the principles of proportionality analysis in *SDCV* [231]-[241].
13. For the reasons explained by the Commonwealth and in *WAS* [56]-[64], if proportionality testing is applied to s 46(2) of the *Administrative Appeals Tribunal Act 1975* (WA), it is valid.

### **The tension between institutional integrity and justifying practical injustice**

14. However, proportionality analysis even at this stage is difficult to reconcile with the proposition that no Parliament can require a Ch III court to act in a manner repugnant to its institutional integrity as an independent and impartial tribunal. Retention of a Ch III court's capacity to act fairly and impartially is critical to its continued institutional integrity: *Pompano* [123] (Hayne, Crennan, Kiefel and Bell JJ), [182] (Gageler J) (**JBA vol 3 tab 19**); *SDCV* [45] (Kiefel CJ, Keane and Gleeson JJ), [106] (Gageler J) [172] (Gordon J), [225], [228] (Edelman J), [269], [313] (Steward J) (**JBA vol 7 tab 49**).
15. It may be doubted that a court which cannot avoid practical injustice can be said to have retained that capacity.

Dated: 13 December 2024

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Craig Bydder SC

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Gemma Mullins