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

COMMONWEALTH OF AUSTRALIA
Second Defendant

OUTLINE OF ORAL SUBMISSIONS OF THE SECOND DEFENDANT

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* provides a complete answer to the Plaintiff's case**

2. This case invites the Court to consider precisely the same question that was decided in *SDCV* (2022) 277 CLR 241 (**Vol 7, Tab 49**). In that case, this Court held that s 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) is wholly valid. The Court should decline the invitation to hold that the same provision is wholly invalid.

3. ***The ratio of SDCV*.** There are two propositions common to the reasoning of the majority in *SDCV* (ie, the plurality and Steward J) which were steps in the reasoning that led to the order in *SDCV*, and which therefore constitute the *ratio* of the case: CS [11].

   (a) *First,* there is no constitutional "minimum requirement" or "baseline" of procedural fairness that must be afforded in every case. If a novel procedure does not cause practical injustice, it is valid without any further inquiry: *SDCV* (**Vol 7, Tab 49**) at [53], [54] (plurality), [269] (Steward J).

   (b) *Second,* even when s 46(2) prevents the Federal Court from providing an applicant with any means to respond to certificated matter, that provision does not infringe Ch III because it forms an inseverable part of an additional avenue for review that is beneficial (when compared to the other available avenues of review), and therefore causes no practical injustice: *SDCV* (**Vol 7, Tab 49**) at [12]-[14], [79], [82], [101] (plurality), [308]-[313] (Steward J).

4. The different constructions of s 46(2) adopted within the majority do not undermine this *ratio*: CS [12].

5. ***The Court cannot "proceed as a matter of principle" without re-opening SDCV*.** Even if the Court concludes that *SDCV* has no *ratio,* it is still necessary for that case to be re-opened and overruled before this Court can depart from its result: CS [14]-[15]. *Lange* (1997) 189 CLR 520 (**Vol 6, Tab 37**) is distinguishable, because that case did not require the Court to overrule the result in any prior decision.

6. ***SDCV should not be re-opened*.** Evaluating the appropriateness of re-opening a decision is to be "informed by a strongly conservative cautionary principle, adopted in the interests

of continuity and consistency in the law": CS [16]; *NZYQ* (2023) 97 ALJR 1005 (**Vol 9, Tab 62**) at [17] (the Court). A change in the composition of the bench is not a sufficient reason to depart from a decision made only two years ago, upholding the validity of the same provision against the same kind of Ch III challenge: *Second Territory Senators Case* (1977) 139 CLR 585 (**Vol 7, Tab 43**) at 597-600 (Gibbs J), 601-604 (Stephen J); *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 (**Vol 7, Tab 47**) at 37-39 (McHugh J); CS [17]. Further, the *John* factors do not support the re-opening of *SDCV*: CS [18]-[23].

If *SDCV* is re-opened it should be followed

7. If the Court grants leave to re-open *SDCV,* it should again hold that s 46(2) of the AAT Act is valid.

8. ***Statutory scheme.*** Section 46(2) forms part of a statutory scheme concerning the making and review of adverse security assessments (**ASAs**) and must be understood as part of that statutory scheme: CS [25]-[33]; *R* (*Haralambous)* [2018] AC 236 (**Vol 10, Tab 72**); ASIO Act (**Vol 2, Tab 8**) ss 37, 38A, 54; AAT Act (**Vol 1, Tab 3**) ss 39A, 39B, 44, 46.

9. ***Section 46(2) does not cause practical injustice.*** A law that permits or requires a court to depart from the general rule that a party to a proceeding should know the case an opposing party seeks to make will not infringe Ch III if the departure from the general rule would not give rise to practical injustice: CS [43]; *Pompano* (2013) 252 CLR 38 (**Vol 3, Tab 19**) at [86], [89] (French CJ), [156]-[157] (plurality); *SDCV* (**Vol 7, Tab 49**) at [66]-[67], [269]. If it is concluded that such a law would not give rise to practical injustice, that is sufficient to uphold the law without further inquiry.

10. In considering whether an impugned provision causes practical injustice, it is necessary to look at all the circumstances, including the choices available to and made by the parties. If a party freely accepts a procedure that amounts to less than full observance of the hearing rule, then adherence to that procedure does not involve any denial of procedural fairness: CS [45]-[46]; *MH6* (2009) VR 382 (**Vol 9, Tab 61**) at [30]; *Ayoub* [2011] NSWCA 263 (**Vol 9, Tab 55**) at [56]; *R (Hill)* [2014] 1 WLR 86 (**Vol 10, Tab 73**) at [44], [47]. See also *Michael Wilson v Nicholls* (2011) 244 CLR 427 (**Vol 6, Tab 38**) at [76].

11. The effect of ss 44 and 46 of the AAT Act is to give a person subject to an ASA an additional and beneficial mechanism that they may choose to utilise instead of seeking judicial review under s 75(v) of the Constitution or s 39B of the *Judiciary Act 1903* (Cth), if they consider that to be in their best interests. Choosing to proceed under ss 44 and 46

affords a person subject to an ASA a real advantage because a PII claim would almost inevitably succeed in any judicial review proceedings, which would make it difficult for an applicant for judicial review to discharge their burden of establishing some kinds of error: CS [47]-[50]; *SDCV* (**Vol 7, Tab 49**) at [79] (plurality), [314] (Steward J); *Plaintiff M46* (2014) 139 ALD 277 (**Vol 9, Tab 63**) at [13], [27], [30]-[32], [37].

12. Because the Plaintiff had a choice to seek the forensic advantage conferred by s 46(1), which was only available on the terms contained in s 46(2), the procedural consequences of that choice cannot accurately be described as involving practical injustice.

13. ***Alternatively, if s 46(2) does cause practical injustice, it is nevertheless justified.*** If a law that requires a court to depart from the general rule does cause practical injustice, that law nevertheless will not be contrary to Ch III if it is reasonably necessary for the achievement of a legitimate purpose: *SDCV* (**Vol 7, Tab 49**) at [138], [218], [238].

14. The Plaintiff accepts that preventing the disclosure of information that would prejudice national security is a legitimate purpose: PS [44].

15. Section 46(2) is reasonably appropriate and adapted to the achievement of that purpose. *First,* there is a very strong public interest in preventing prejudice to national security, and disclosure of the information relied upon by ASIO in preparing ASAs is particularly likely to have that consequence: CS [56]. *Second,* s 46(2) applies only where a valid certificate has been issued in accordance with s 39B(2) of the AAT Act: CS [57]. *Third,* the extent to which s 46(2) prevents the disclosure of certificated matter is tailored to the reason why disclosure would be contrary to the public interest: CS [58]. *Fourth,* s 46(2) only applies where a party appeals to the Federal Court on a question of law from a decision of the Tribunal in relation to an ASA: CS [55]. *Finally,* even where a certificate is given under s 39B(2)(a), there are measures the Court may take, at least in some cases, to minimise the departure from the general rule: CS [59].

16. ***Consequences of invalidity.*** If the Court holds that s 46(2) is invalid, it should hold that s 46 is wholly invalid. To sever s 46(2) would give s 46(1) a drastically different practical operation which would run counter to the purpose for which it was enacted: CS [60].

Dated: 12 December 2024

Stephen Donaghue Mark Hosking Penelope Bristow