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

## POST-HEARING SUBMISSIONS OF THE SECOND DEFENDANT

### INTRODUCTION

1. These submissions are in a form suitable for publication on the internet. They address the issues raised by the Court at the conclusion of the oral hearing on 13 December 2024, being:

   1.1 the mechanisms available to the Federal Court to provide procedural fairness in an appeal on a question of law under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) involving certificated matter (including the relevance of s 15A of the *Acts Interpretation Act 1901* (Cth) to that question);

   1.2 the source of the Federal Court's power to refuse to admit certificated matter into evidence on such an appeal; and

   1.3 the gravitational force of precedent as a matter which informs the appropriate construction of s 46 of the AAT Act.

### SUBMISSIONS

#### A. The mechanisms available to the Federal Court to provide procedural fairness

2. The Commonwealth submits that, on the proper construction of s 46 of the AAT Act, in an appeal on a question of law under s 44 of that Act involving certificated matter, the following steps are available to provide procedural fairness (or to mitigate any procedural unfairness) to the applicant.

3. *First*, because s 46(2) imposes a duty on the Court itself, the Court is entitled to examine the validity of a certificate given under s 39B(2) of the AAT Act on its own motion.[1] The Court may examine the validity of the certificate for the purpose of satisfying itself as to the existence of the jurisdictional fact that is a precondition to the existence of the duty in s 46(2)[2] — namely, that "there is in force in respect of any of the documents a certificate [meaning a *valid* certificate] in accordance with", relevantly, s 39B(2) of the AAT Act. In practice, the Court's capacity to examine the validity of a certificate on its own motion may be particularly important if, upon inspection of certificated matter, the Court is unable to see how the disclosure of that matter might damage the public interests identified in s 39B(2)(a).

4. *Second*, the Court may give the applicant the gist of certificated matter, provided that it is possible to do so in a way that does not disclose the certificated matter. Whether that is possible in any particular case will depend both on the content of the certificated matter and on the terms of the s 39B(2) certificate.[3]

5. *Third*, if the Director-General seeks to tender certificated matter, the Court may, in an appropriate case, exercise the power in s 135(a) of the *Evidence Act 1995* (Cth), or alternatively its implied power to prevent an abuse of its processes, to refuse to admit that evidence. The Court's powers in that respect are discussed further under sub-heading B below.

6. The proposition that the Federal Court may in some cases avoid procedural unfairness by refusing to accept the tender of certificated matter depends on the premise that, before the documents sent to the Court under s 46(1)(a) of the AAT Act are available for use on an appeal under s 44 of that Act, those documents must be tendered by a party (or, at least, that the Court is entitled to adopt a procedure whereby the parties are required to tender the documents upon which they wish to rely in the appeal). *SDCV* did not decide that point. The plurality in *SDCV* held that it was not necessary to

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1 See *MJZP v Director-General of Security* (***MJZP***) [2024] HCATrans 93 at lines 4409-4429. See also Submissions of the Second Defendant filed 8 October 2024 (**CS**) [57].

2 See *SDCV v Director-General of Security* (2022) 277 CLR 241 (***SDCV***) at [251] (Edelman J), citing *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [18]-[19] (Bell, Gageler and Keane JJ). See also *SDCV* (2022) 277 CLR 241 at [59] (Kiefel CJ, Keane and Gleeson JJ), [197] (Gordon J), [276] (Steward J).

3 See *MJZP* [2024] HCATrans 92 at lines 2694-2701, 2840-2844; *MJZP* [2024] HCATrans 93 at lines 4795-4796. See also CS [59], citing *SDCV* (2022) 277 CLR 241 at [157] (Gageler J), [193] (Gordon J), [291] (Steward J).

determine whether ss 46(1) and (2) were "merely machinery whereby the record of the proceedings in the Tribunal was transmitted to the Federal Court", because it was sufficient that they determined what material "might be" before the Court.[4] Justice Steward considered that s 46(1) "simply provides a means of transporting the documents to the Court" and that it did not oblige the Court to "receive [the documents] into evidence or otherwise to consider them".[5] As to the dissenting judgments, Gageler J held that the documents are "available" to the Federal Court "so as to be able to be considered by the Federal Court in the determination of the appeal".[6] Justice Gordon held that the Federal Court was able to "rely upon" certificated matter sent to the Court.[7] And Edelman J held that "[w]hether or not they were tendered by one of the parties, or incorporated into an 'appeal' book, the documents formed part of the record for review by the court".[8]

7. Section 46 is silent on the issue of tender or admission into evidence, providing only that the Tribunal must "cause to be sent to the Court" the documents that were before the Tribunal in connection with the proceeding to which the appeal relates and are relevant to the appeal. Given that silence, it is open to read s 46(1)(a) in the manner adopted by Steward J — that is, as a mechanical provision concerning the transmission of documents from the Tribunal to the Court that does not oblige the Federal Court to receive the documents into evidence or otherwise to consider them. That construction of s 46(1)(a) being open, if an alternative construction of s 46(1)(a) would lead to the conclusion that s 46 is invalid, s 15A of the *Acts Interpretation Act* requires the construction adopted by Steward J in *SDCV* to be preferred.[9]

8. *Fourth*, if the Director-General seeks to tender certificated matter, and if the circumstances are such that the Court has power to refuse to admit that evidence (but not otherwise), then the Court may indicate that the certificated matter will be admitted only if the Director-General takes specified steps to remove the unfair prejudice (in the case of the power under s 135(a) of the *Evidence Act*), or the abuse of the Court's processes (in the case of the Court's implied power), that has enlivened the power to

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4 *SDCV* (2022) 277 CLR 241 at [41] (Kiefel CJ, Keane and Gleeson JJ).
5 *SDCV* (2022) 277 CLR 241 at [286] (Steward J).
6 *SDCV* (2022) 277 CLR 241 at [108] (Gageler J).
7 *SDCV* (2022) 277 CLR 241 at [169] (Gordon J).
8 *SDCV* (2022) 277 CLR 241 at [243] (Edelman J).
9 See also *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 (***Residual Assco***) at [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

refuse to accept the tender of that material. Those steps could be, for example, agreeing to show some or all of the certificated matter to the applicant's legal representatives on a confidential basis.[10] The Court cannot require the Director-General to take the specified steps, and no adverse inference could be drawn against the Director-General for not doing so. It would be a matter for the Director-General to decide whether to take those steps and then press the tender, or instead to proceed without the certificated matter being in evidence. Either way, the Court would not have done anything to require disclosure contrary to s 46(2) of the AAT Act.[11]

9. By contrast, the Commonwealth submits that the Federal Court could not impose a regime for the appointment of a special advocate as a condition of acceptance of the tender of certificated matter. The establishment of such a regime, including in the circumstances contemplated in the Plaintiff's oral submissions in reply,[12] would go well beyond controlling the admission of material sought to be tendered by a party (that being the issue discussed immediately above). A special counsel regime could not work without the Court making orders appointing a person to the role of special advocate and governing the way in which that person was thereafter to participate in the proceeding (such as permitting them to be present in a closed court when the certificated matter was addressed). For the Court to make such orders would be contrary to the requirement in s 46(2) that the Court "do all things necessary to ensure that the [certificated] matter is not disclosed to any person".

10. *Fifth*, if, notwithstanding the above options, the Court considers that it cannot sufficiently mitigate unfairness that would result from the Court having regard to certificated matter that the applicant has not seen, it may refuse to proceed by a "closed material procedure" and revert to its ordinary procedures.[13] In that event:

10.1 If the applicant wished to attempt to use the certificated matter, it could issue the Director-General with a notice to produce that material, and the Court could hear any claim for public interest immunity from the Director-General with

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10 See *MJZP* [2024] HCATrans 92 at lines 2684-2692, 2749-2758, 2798-2808. See also CS [59], citing *SDCV* (2022) 277 CLR 241 at [302] (Steward J); cf [192] (Gordon J).

11 See *SDCV* (2022) 277 CLR 241 at [302] (Steward J).

12 See *MJZP* [2024] HCATrans 93 at lines 6142-6145.

13 See *SDCV* (2022) 277 CLR 241 at [304] and [307] (Steward J); *MJZP* [2024] HCATrans 92 at lines 2760-2767, 2865-2881; *MJZP* [2024] HCATrans 93 at lines 4080-4088, 4098-4113.

respect to that material in the ordinary way.[14] If such a claim is upheld, then the certificated matter could not be used by either party or by the Court. If, however, the public interest immunity claim was rejected, the Director-General would be required to produce the certificated matter directly to the applicant. If the applicant then tendered that material, the Court could use it in the appeal in the ordinary way.

10.2 If the applicant did not attempt to obtain or use the certificated matter in that way, the appeal would proceed without the Court having the complete record before it. The implications that would have for the result of the appeal would depend on the grounds of appeal.[15]

11. *Sixth*, and finally, the Court may, in an appropriate case, exercise its implied power to prevent an abuse of its processes to stay an appeal under s 44 of the AAT Act of its own motion.[16] Of course, it would rarely be in an applicant's interest for their appeal to be stayed, because that would leave in place the adverse decision that the applicant sought to overturn. In some cases, however, a stay might be appropriate (particularly if the Court considers that a public interest immunity claim over the certificated matter would be unlikely to succeed, because in such a case an applicant may be able to obtain that material and then challenge the adverse decision under s 39B of the *Judiciary Act 1903* (Cth)).[17]

## B. The Federal Court's power to refuse to accept the tender of certificated matter

12. There are two sources of power that may entitle the Federal Court to refuse to accept the tender of certificated matter in an appeal on a question of law under s 44 of the AAT Act. *First,* the Court could do so in the exercise of its discretion to exclude evidence under s 135(a) of the *Evidence Act*. *Second,* the Court could do so in the exercise of its implied power to prevent an abuse of it processes.

13. ***Section 135(a) of the Evidence Act.*** The *Evidence Act* applies to all proceedings in the Federal Court, including appeals under s 44 of the AAT Act.[18] Except as otherwise

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14 See *MJZP* [2024] HCATrans 92 lines 2760-2767, 2798-2808; *MJZP* [2024] HCATrans 93 at lines 4080-4088, 4098-4113.

15 See *MJZP* [2024] HCATrans 93 at lines 4276-4301; see also lines 4090-4096, 4389-4397.

16 See, eg, *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 (***Pompano***) at [187], [212] (Gageler J).

17 See *MJZP* [2024] HCATrans 93 at lines 4250-4268, 4348-4359.

18 *Evidence Act*, s 4(1).

provided by the *Evidence Act*, all evidence that is relevant in a proceeding is admissible in the proceeding.[19] However, under s 135(a), the Court has a discretion to refuse to admit evidence that is relevant and otherwise admissible, "if its probative value is substantially outweighed by the danger that the evidence might … be unfairly prejudicial to a party".[20] The exercise of that discretion will be justified only in a "clear case", as reflected in the statutory requirement that the probative value is "substantially" outweighed by the danger that the evidence might be unfairly prejudicial.[21]

14. The "probative value" of evidence is determined by "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue".[22] In the context of an appeal on a question of law under s 44 of the AAT Act, certificated matter will form part of the record upon which the decision of the Tribunal was made. On that basis, it will be relevant, and therefore *prima facie* admissible, in any appeal under s 44 of the AAT Act. However, the extent to which certificated matter is important when determining the existence (or lack thereof) of an error of law in the Tribunal's decision will depend on the particular error or errors of law asserted by the applicant. For that reason, the probative value of certificated matter will vary depending upon the content of that matter and its relevance to the grounds of review.

15. If, in an appeal under s 44 of the AAT Act, the applicant seeks to tender the certificated matter that has been provided to the Court pursuant to s 46(1), the Commonwealth submits that such a tender could not be rejected under s 135(a) of the *Evidence Act*. It is not unfairly prejudicial to a party to admit evidence tendered by that party. That is so because the applicant in such a case must have made a forensic judgment that it is in their interests that the Court consider the complete record that was before the Tribunal, notwithstanding the fact that the applicant is not aware of the content of parts of that record.

16. If, however, the applicant does not tender the certificated matter, but the Director-General then seeks to do so, s 135(a) of the *Evidence Act* may be enlivened. In that situation, unfair prejudice may arise because the Court is being invited to use evidence of which the applicant is unaware against the applicant (that is, to reject

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19 *Evidence Act*, ss 55, 56.
20 See *McNamara v The King* (2023) 98 ALJR 1 at [1] (Gageler CJ, Gleeson and Jagot JJ).
21 *Smith v Aircraft Maintenance Services Australia (AMSA) Pty Ltd* [2018] FCA 264 at [38] (Rangiah J).
22 See *Evidence Act*, s 55 and Dictionary ("probative value").

grounds of review advanced by the applicant). Among other things, that may be unfairly prejudicial because the fact that the applicant is unaware of the content of the certificated matter may "affect the ability of the [Court] to assess rationally the weight of the evidence".[23]

17. The extent to which this form of prejudice arises in a given case — and, if it does, the extent to which it significantly outweighs the probative value of the certificated matter — will depend in part on whether unfairness can be mitigated in one of the ways discussed under sub-heading A of these submissions, and in part upon the particular errors of law asserted by the applicant and the relationship between those errors and the certificated matter. In many cases, having regard to the nature of the errors of law alleged, there may be no real danger that the Court will be unable rationally to assess the certificated matter without the benefit of submissions from the applicant. For this reason, the capacity for prejudice to arise where a closed material procedure is used in a context where the issue is whether an administrative decision-maker made an error of law is significantly less than the capacity for such prejudice to arise where such a procedure is used in contexts that require a court to assess the weight to be given to different evidence.[24]

18. Nevertheless, in some cases s 135(a) of the *Evidence Act* will empower the Court to reject the tender of certificated matter by the Director-General, unless the Director-General takes certain steps to mitigate or prevent the unfairness. In such cases, it is open to the Court to inform the Director-General of those steps. It would then be a matter for the Director-General to decide whether to take those steps, thereby overcoming the barrier to the admission of the certificated matter, or instead to proceed without reliance upon the certificated matter.

19. ***The Court's implied powers.*** The Federal Court has express jurisdiction and powers created by statute, as well as such implied jurisdiction and powers as are necessary for

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23 See, by analogy, *Steven Moore (A Pseudonym) v The King* (2024) 98 ALJR 1119 at [32]-[35] (the Court), quoting with approval Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2005) at [16.45].

24 Compare *Al Rawi v Security Service* [2012] 1 AC 531 at [93] (Lord Kerr of Tonaghmore) (which involved a civil claim for damages) with *R (Haralambous) v Crown Court at St Albans* [2018] AC 236 at [60]-[65] (Lord Mance DPSC; Lord Kerr of Tonaghmore, Lord Hughes, Lady Black and Lord Lloyd-Jones JJSC agreeing) (which involved a judicial review proceeding).

or incidental to the exercise of its express powers and jurisdiction.[25] The Court's implied powers include a power to control abuse of its processes.[26] Section 11(2) of the *Evidence Act* expressly provides that "the powers of a court with respect to abuse of process in a proceeding are not affected" by that Act.

20. The categories of abuse of process are not closed.[27] They include cases where the use of the court's procedures is "unjustifiably oppressive to one of the parties"[28] or "manifestly unfair to a party".[29] Although most cases of abuse of process arise from the institution of proceedings, "any procedural step in the course of proceedings that have been properly instituted is capable of being an abuse of the court's processes".[30]

10 21. The usual remedy for an abuse of process is for the court to stay the proceeding. However, that is not the only available remedy. In exercising its power to prevent an abuse of process, "the court may mould its order to meet the exigencies of a particular case".[31] The Commonwealth submits that, in an appropriate case, an available response to an abuse of process may be for a court to refuse to accept the tender of evidence.[32]

22. Having regard to those principles, if, on an appeal on a question of law under s 44 of the AAT Act, the Federal Court considers that the admission of certificated matter that is tendered by the Director-General would be "unjustifiably oppressive" or "manifestly

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25 See *DJL v Central Authority* (2000) 201 CLR 226 at [24]-[27] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *HT v The Queen* (2019) 269 CLR 403 at [39] (Kiefel CJ, Bell and Keane JJ).

26 See *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 (***Jackson***) at 623-624 (Deane J); *Jago v District Court (NSW)* (1989) 168 CLR 23 (***Jago***) at 25 (Mason CJ), 56 (Deane J); *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 (***Batistatos***) at [8]-[15] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *Dupas v The Queen* (2010) 241 CLR 237 at [14]-[16] (the Court); *Moti v The Queen* (2011) 245 CLR 456 at [10] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

27 See *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at [26]-[27] (Kiefel CJ, Gageler and Jagot JJ).

28 *Rogers v The Queen* (1994) 181 CLR 251 (***Rogers***) at 286 (McHugh J). See also *Batistatos* (2006) 226 CLR 256 at [15] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *PNJ v The Queen* (2009) 83 ALJR 384 at [3] (the Court).

29 *Walton v Gardiner* (1993) 177 CLR 378 at 393 (Mason CJ, Deane and Dawson JJ). See also *Pompano* (2013) 252 CLR 38 at [187] (Gageler J).

30 *Rogers* (1994) 181 CLR 251 at 286 (McHugh J) See also *Batistatos* (2006) 226 CLR 256 at [15] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

31 *Jago* (1989) 168 CLR 23 at 32 (Mason CJ). See, eg, *Pompano* (2013) 252 CLR 38 at [43] (French CJ) (discussing the revocation of an *ex parte* order where the party seeking the order has failed to discharge its obligation of full disclosure); *Jackson* (1987) 162 CLR 612 at 616-617 (Wilson and Dawson JJ), 623-624 (Deane J) (discussing the grant of Mareva injunctions); *Batistatos* (2006) 226 CLR 256 at [9] (Gleeson CJ, Gummow, Hayne and Crennan JJ) (referring to anti-suit injunctions and asset preservation orders). But see *Commissioner for Corrective Services v Liristis* (2018) 98 NSWLR 113 at [35] (Beazley P).

32 Cf *CDJ v VAJ (No 1)* (1998) 197 CLR 172 at [142] (footnote 106) (McHugh, Gummow and Callinan JJ).

unfair" to the applicant, then the Court may address that consequence by refusing to admit that evidence.

23. That said, the mere fact that the Court is invited to act upon evidence that has not been disclosed to the applicant will not itself constitute an abuse of process. The exceptions to the general rule discussed in CS [40] demonstrate that there are circumstances where, in recognition of competing interests, courts act on material that is not available to a party. Rather, something more is required — such as a likelihood that the non-disclosure of the certificated matter to the applicant will affect the ability of the Court to assess rationally the weight of the evidence. As noted in paragraph 17 above, having regard to the nature of an appeal under s 44 of the AAT Act, there may be many cases where the admission of certificated matter into evidence does not give rise to this consequence.

24. Finally, the strength of the national security justification for non-disclosure of the certificated matter will be relevant to whether admission of that material into evidence would be "unjustifiably oppressive" or "manifestly unfair" to the applicant. Both the concept of "unjustifiable" oppression and the concept of "unfairness" accommodate the reality that there are circumstances where departure from the general rule that a party should know the case against it is justified by competing public interests.

**C. The gravitational force of precedent as a matter informing statutory construction**

25. If the Court considers that the correctness of the result in *SDCV* — upholding the validity of s 46 — depends upon that section being construed in the manner in which it was construed by Steward J, that consideration would support adopting his Honour's construction.[33] Both "the need for continuity and consistency in judicial decision"[34] that underpins the doctrine of precedent, and the "strongly conservative cautionary principle" that the Court applies to applications to re-open its previous decisions,[35] support that conclusion because both mean that — unless *SDCV* is reopened and overturned — the Court must reason to the conclusion that s 46 is valid.

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33 This may simply be a particular application of the principle in *Residual Assco* (2000) 202 CLR 629 at [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), discussed above.

34 *Queensland v Commonwealth* (1977) 139 CLR 585 at 600 (Gibbs J).

35 See *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [70] (French CJ); *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [17] (the Court).

26. Where there is authority with respect to the construction of a particular provision, but that authority lacks a *ratio,* the Court's duty "is to consider the statute for [itself] in light of the opinions [expressed in the earlier case], diverging as they are, and to give an interpretation; but that interpretation must necessarily be one which would not, if it applied to the facts of [the earlier case], lead to a different result".[36] In such cases, the Court is free to consider the issue of construction for itself but should do so within the confines of the holding of the previous case so as to ensure continuity and consistency in its decisions. For that reason, and in that way, the precedential force of the result in *SDCV* informs the available interpretations of s 46.

10 Dated: 24 January 2025


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[36] *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 37-38 (McHugh J), quoting *Great Western Railway Co v Owners of SS Mostyn* [1928] AC 57 at 74 (Viscount Dunedin). See also *Western Australia v Ward* (2002) 213 CLR 1 at [695] (Callinan J); *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [133]-[134] (McHugh J); *Jones v Bartlett* (2000) 205 CLR 166 at [204] (Gummow and Hayne JJ).

**ANNEXURE TO THE POST-HEARING SUBMISSIONS OF THE SECOND DEFENDANT**

Pursuant to Practice Direction No 1 of 2024, the Commonwealth sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

| No. | Description | Version | Provision(s) | Reasons for providing this version | Applicable date or dates |
|---|---|---|---|---|---|
| **Commonwealth** | | | | | |
| 1. | *Acts Interpretation Act 1901* (Cth) | Compilation No 37 (in force 12 August 2023 – 10 December 2024) | s 15A | In force as at the date of the repeal of the AAT Act (see below). | N/A |
| 2. | *Administrative Appeals Tribunal Act 1975* (Cth) | Compilation No 54 (in force 22 May 2024 – 13 October 2024) | ss 44, 46 | Despite repeal, continues to apply to the resolution of MJZP's appeal to the Federal Court: see *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth), item 27 of Sch 16. | N/A |
| 3. | *Evidence Act 1995* (Cth) | Current | s 135 | Governs admissibility of evidence in ongoing proceedings. | N/A |