HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S142 of 2023

BETWEEN:

MJZP
Plaintiff

and

DIRECTOR-GENERAL OF SECURITY
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF TASMANIA (INTERVENING)

PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney-General for the State of Tasmania (**Tasmania**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Second Defendant (**the Commonwealth**).

PART III: ARGUMENT

A. *SDCV* should not be re-opened

3. Tasmania supports the submissions of the Commonwealth to the effect that *SDCV v Director-General of Security*[1] (***SDCV***) has a ratio; that even if it lacks a ratio it is binding in this case; and that it should not be re-opened.[2]

4. *SDCV* is a recent decision with respect to a challenge of the same provision as is impugned in this proceeding. As Gibbs J has said that:[3]

> It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.

5. The circumstances of this matter do not provide a reason to revisit *SDCV*. The comments made by Gibbs J, in deciding that it was his duty to follow a recent prior authority, are apposite:[4]

> But when it is asked what has occurred to justify the reconsideration of a judgment given not two years ago, the only possible answer is that one member of the Court has retired, and another has succeeded him. It cannot be suggested that the majority in *Western Australia* v. *The Commonwealth* failed to advert to any relevant consideration, or overlooked any apposite decision or principle. The arguments presented in the present case were in their essence the same as those presented in the earlier case. No later decision has been given that conflicts with *Western Australia* v. *The Commonwealth*. Moreover, the decision has been acted on….

6. The Plaintiff suggests that its proportionality argument is a reason to revisit *SDCV* (PS [23]). Agreeing with the Commonwealth that this argument, in substance, was

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1 (2022) 277 CLR 241.
2 DS [6]-[23].
3 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 (Gibbs J).
4 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 600 (Gibbs J).

considered in *SDCV* (DS [20]), even if it is regarded as a new argument, it is not a sufficient reason to reconsider previous authorities:[5]

> To regard the judgments of this Court as open to reconsideration whenever a new argument is found more attractive than the principle expressed in a standing decision is to overlook the function which a final court of appeal must perform in defining the law. In difficult areas of the law, differences of legal opinion are inevitable; before a final court of appeal, the choice between competing legal solutions oftentimes turns on the emphasis or weight given by each of the judges to one factor against a countervailing factor, as the judgments in the present case illustrate. In such cases, the decision itself determines which solution is, for the purposes of the current law, correct. It is not to the point to argue in the next case that, leaving the particular decision out of account, another solution is better supported by legal theory. Such an approach would diminish the authority and finality of the judgments of this Court. As the function of defining the law is vested in the Court rather than in the justices who compose it, a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration.

B. Section 46(2) of the AAT Act does not infringe Ch III of the Constitution

7. If the Court re-opens *SDCV*, it should confirm that s 46(2) of the *Administrative Appeals Tribunal Act 1975* (**AAT Act**) does not infringe Ch III of the Constitution and is therefore valid.

8. It is clear that Parliament cannot legislate to interfere with the institutional integrity of a Ch III court. Institutional integrity will be distorted if a court no longer exhibits the defining characteristics of a court, which includes the application of procedural fairness.[6] For the following reasons, s 46(2) does not impermissibly interfere with a defining characteristic of a Ch III court.

The "general rule" of procedural fairness is not absolute

9. Whilst it is recognised that "procedural fairness or natural justice lies at the heart of the judicial function",[7] and that the application of procedural fairness is one of the defining

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5 *Baker v Campbell* (1983) 153 CLR 52 at 102-103 (Brennan J). See also *John v Commissioner of Taxation (Cth)* (1989) 166 CLR 417 at 451 (Brennan J) and *Lee v New South Crime Commission* (2013) 251 CLR 196 at [65]-[66] (Crennan J).

6 *Assistant Commissioner Condon v Pompano Pty Ltd Pompano* (2013) 252 CLR 38 (***Pompano***) at [67] (French CJ).

7 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 (***International Finance Trust***) at [54] (French CJ); *HT v The Queen* (2019) 269 CLR 403 at [64].

characteristics of courts,[8] the defining characteristics (including procedural fairness) are not absolutes.[9]

10. It is not in doubt that, as a general proposition and subject to constitutional limits, Parliament can legitimately legislate to exclude or modify the rules of procedural fairness, provided that there is a "sufficient indication of an intention of the legislature"[10] to do so through the use of "plain words of necessary intendment".[11]

11. Therefore, the "general rule" that parties will know the case to be put by the other party and how it will be made,[12] cannot be said to be absolute, and departures from the rule may be justified in certain circumstances.[13] Departures may occur by legislative means or through a court shaping its procedures to the circumstances of a case (or a combination of both).

The content of the rules of procedural fairness are not fixed

12. Although the power to ensure fairness, so far as practicable, between the parties is an important characteristic of judicial power, it is recognised that the rules of procedural fairness are "essentially functional or procedural".[14] The content of the requirements of procedural fairness will vary according to, and be moulded to, the circumstances of the particular case, including by reference to public interest considerations.[15]

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8 *Pompano* (2013) 252 CLR 38 at [67] (French CJ), [156] (Hayne, Crennan, Kiefel and Bell JJ).

9 *Pompano* (2013) 252 CLR 38 at [68] (French CJ), [177] (Gageler J).

10 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396 (Dixon CJ and Webb J), 397 (Taylor J).

11 *SDCV* (2022) 277 CLR 241 at [56] (Kiefel CJ, Keane and Gleeson JJ); *Pompano* (2013) 252 CLR 38 at [152] (Hayne, Crennan, Kiefel and Bell JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 (***Gypsy Jokers***) at [182] (Crennan J); *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ); *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at [24] (Gleeson CJ).

12 *SDCV* (2022) 277 CLR 241 at [136] Gageler J, [176] (Gordon J); *HT v The Queen* (2019) 269 CLR 403 at [17] (Kiefel CJ, Bell and Keane JJ), [64] (Gordon J); *Pompano* (2013) 252 CLR 38 at [157] (Hayne, Crennan, Kiefel and Bell JJ).

13 *SDCV* (2022) 277 CLR 241 at [137] (Gageler J), [176] (Gordon J); *Gypsy Jokers* (2008) 234 CLR 532 at [189] (Crennan J); *Pompano* (2013) 252 CLR 38 at [68] (French CJ), [116] - [120], [157] (Hayne, Crennan, Kiefel and Bell JJ).

14 *International Finance Trust* (2009) 240 CLR 319 at [55] (French CJ); *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470 (Mason CJ, Dawson and McHugh JJ).

15 *International Finance Trust* (2009) 240 CLR 319 at [54] (French CJ); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [24] - [25] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

13. It follows that whether the obligation to afford procedural fairness is satisfied "will always depend on all the circumstances".[16] The obligation is flexible and adaptable. The concern is to avoid practical injustice.[17]

14. In that regard, the "deeply rooted common law tradition" of an open court affording procedural fairness may be adapted "to protect the public interest", including in cases of national security.[18] Importantly, parliaments are not prevented by constitutional restrictions arising from Ch III from passing laws to protect the public interest and "the hearing rule may be qualified by public interest considerations".[19] As Crennan J appreciated in *Gypsy Jokers*, by reference to legislative examples, "the availability and accessibility of all relevant evidence in judicial proceedings is not absolute".[20]

15. In appropriate circumstances, procedures may legitimately result in a party to proceedings not having information or evidence disclosed to them, although it is available to the court. The fact that a law which permits such procedures might cause a disadvantage to one party in favour of the protection of competing public interests "does not mean that the defining characteristics of the court required to administer such a law are impermissibly impaired".[21] Indeed, the ability for the legislature to provide for such procedures without impinging upon a court's institutional integrity has been demonstrated in a number of decisions of this Court.[22]

16. Although there is no apparent issue when a court is involved in determining whether a public interest might be infringed through the disclosure of certain information, it may also be accepted that "there is no constitutional principle which requires the courts to be the arbiter of that question".[23]

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16 *Gypsy Jokers* (2008) 234 CLR 532 at [182] (Crennan J).

17 *Pompano* (2013) 252 CLR 38 at [156] (Hayne, Crennan, Kiefel and Bell JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1 at [37] (Gleeson CJ).

18 *Pompano* (2013) 252 CLR 38 at [5], [67] - [68] (French CJ).

19 *Pompano* (2013) 252 CLR 38 at [5], [68] (French CJ).

20 *Gypsy Jokers* (2008) 234 CLR 532 at [189] (Crennan J).

21 *Pompano* (2013) 252 CLR 38 at [86] (French CJ).

22 *SDCV* (2022) 277 CLR 241; *Gypsy Jokers* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501. See also *HT v The Queen* (2019) 269 CLR 403 at [56] where Nettle and Edelman JJ recognise that the "competing needs of ensuring that sentencing judges are fully informed … and ensuring that the confidentiality of sensitive information is not compromised calls for a detailed legislative solution".

23 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [35] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), cited with approval in *SDCV* (2022) 277 CLR 241 at [94] (Kiefel CJ, Keane and Gleeson JJ).

The hearing is fair in all the circumstances

17. The non-disclosure of certified information as required by s 46(2) results in no practical injustice, and does not prevent an opportunity to be heard that is fair in all the circumstances. Tasmania supports the submissions of the Commonwealth in that regard (DS [45]-[51]), and makes the following additional submissions.

The legislative scheme does not provide a "blanket" procedure of non-disclosure of material and does not otherwise dictate how the material is to be used or assessed

18. Section 46 does not mandate non-disclosure of matters in all circumstances to which certificates of non-disclosure have been issued under the various provisions of the AAT Act referred to in s 46(2). As the Federal Court noted and as the plurality cited in *SDCV*, "the regime is rather nuanced, with different categories of material being addressed according to the basis of the certification, with only the core categories of public interest immunity falling within the mandated non-disclosure".[24] Similarly, Steward J describes the provisions of the AAT Act concerning merits review of security assessments as reflecting:[25]

> …choices made by the Parliament to enhance the rights of applicants who have been the subject of adverse security assessments, whilst at the same time preserving the confidentiality of intelligence held by the Director-General in the public interest. It is a legislative scheme that comprises a carefully balanced solution to conflicting rights and interests and that, when originally enacted in the ASIO Act, was a breakthrough in the common law world.

19. In the case of a certificate issued under s 39B(2) (which includes certificates issued for Tribunal proceedings for review of security assessments), disclosure is only taken out of the hands of the Court where the certificate is issued under s 39B(2)(a) (on the grounds that disclosure "would prejudice security or the defence or international relations of Australia"). The effect of s 46(3) is that the Court has a discretion to disclose information or documents that are the subject of certificates given under s 39B(2)(b) or (c) (which cover matters such as Cabinet deliberations and other matters for which a claim of public interest immunity could be made).

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24 *SDCV v Director General of Security* (2021) 284 FCR 357 at [154]; *SDCV* (2022) 277 CLR 241 at [48] (Kiefel CJ, Keane and Gleeson JJ).

25 *SDCV* (2022) 277 CLR 241 at [311] (Steward J).

20. Certificate are issued under s 39B(2) on a case-by-case basis, in contemplation of commenced proceedings. The bar set by the legislation means that the Minister must positively determine that the disclosure of the specified material "would be" (not "may be", or "is reasonably considered to be") contrary to the compelling public interest of protecting the security, defence or international relations of Australia. The safety net of judicial review offers further protection from the improper exercise of the Minister's power (such as where the public interest protected is trivial (DS [29])). The nuanced operation of the statutory scheme is evidenced by the circumstances of this proceeding. It can be seen from the Tribunal's open reasons (SCB 99) that a considerable amount of information was disclosed to the Plaintiff. There is nothing to suggest that the Minister has not properly confined the certificate to only those matters which need to remain secret.

21. While the effect of s 46(2) is that matters that are the subject of a s 39B(2)(a) certificate cannot be disclosed, the legislation does not otherwise impose any requirements as to the Federal Court's use of the certified material, or what is to be made of it. The Court can act judicially in determining how, or if, it is to have regard to the certified information. It will likely be guided by other available evidence and surrounding circumstances. In *Pompano,* French CJ considered it relevant to the question of validity that the court "retains the responsibility to determine what weight, if any, to give to [the information]" and that power to control its own proceedings, suggests a discretion to refuse to act upon the information.[26] As acknowledged in *SDCV*, the ability of the Federal Court, in some cases, to disclose the gist of certified evidence may also be sufficient to allow a fair opportunity to respond.[27] Further, the Court might determine not to take into account information which would otherwise be protected under the rules of public interest immunity.[28]

Specialist nature of subject matter

22. The legislature has legitimately chosen to put the assessment of the public interest in the hands of the Minister. This legislative choice is eminently acceptable given the special and complex subject matter: the security, defence and international relations of Australia.

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26 *Pompano* (2013) 252 CLR 38 at [88], [80], [87] (French CJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [148] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

27 *SDCV* (2022) 277 CLR 241 at [157] (Gageler J), [193] (Gordon J). [291] – [293] (Steward J).

28 *SDCV* (2022) 277 CLR 241 at [307]-[308] (Steward J).

The Minister will inevitably rely on expert advice and government intelligence. Given this context, the fact that the Court hearing an appeal to which s 46(2) applies may not hold responsibility for making a decision about the non-disclosure of certain evidence does not involve an unfair procedure that "saps confidence" in the judicial process.[29]

23. It is accepted that a court may determine where the public interest lies and thereby validly withhold information from a party to proceedings without that incursion upon procedural fairness being thought to be unconstitutional.[30] Therefore, there is no logical reason why Parliament cannot effect the same result by authorising the Minister to determine the issue, based upon criteria which are undoubtedly in the public interest. The resulting impact is the same. In both cases, the information is available to the court but is withheld from one of the parties. In both cases, the court may exercise its powers and discretions to adapt its processes in response to the withholding of the information.

24. As the plurality recognised in *SDCV*, Ch III does not deny Parliament the power to recognise and balance competing interests in the context of statutory rights which are susceptible to removal by administrative decisions.[31] Relatedly, the plurality accepted the legitimacy of the legislature undertaking a balancing exercise in determining the requirements of procedural fairness.[32]

25. As the Court accepted in *Graham v Minister for Immigration and Border Protection*,[33] determining whether information should be withheld for public interest reasons is not a matter falling exclusively to the courts according to any constitutional principle. Therefore, the fact that the legislature authorises the Minister rather than the courts to decide upon the withholding of information cannot be a determining factor as to constitutional validity. There is no constitutional imperative that the courts must decide the issue.

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29 *Pompano* (2013) 252 CLR 38 at [186] (Gageler J).

30 *Gypsy Jokers* (2008) 234 CLR 532.

31 *SDCV* (2022) 277 CLR 241 at [85], [90] (Kiefel CJ, Keane and Gleeson JJ). See also *Nicholas v The Queen* (1998) 193 CLR 173 at [37] (Brennan CJ), [55] (Toohey J), [167] (Kirby J), [233] (Hayne J).

32 *SDCV* (2022) 277 CLR 241 at [57] (Kiefel CJ, Keane and Gleeson JJ); *Gypsy Jokers* (2008) 234 CLR 532 at [182] – [183] (Crennan J).

33 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [35] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also *SDCV* (2022) 277 CLR 241 at [94] (Kiefel CJ, Keane and Gleeson JJ).

Appeal on questions of law only

26. Section 46 applies to appeals on questions of law only (s 44). In such an appeal the Court's focus is upon assessing the Tribunal's process and legal reasoning. It should not be necessary for the Court to consider the minutia of the evidence. The grounds of appeal filed by the Plaintiff demonstrate this, given their focus on errors of process (SCB 123).

27. In cases where the Tribunal complied with any non-disclosure obligation, the Court's assessment of asserted errors of law should be made in light of that lawful restriction upon the Tribunal. In other words, an error of law which can only be discovered by the Court upon consideration of additional submissions or evidence from an appellant (in response to freshly disclosed matters) would not necessarily reveal an error on the part of the Tribunal (which properly did not have the benefit of such additional submissions or evidence).

28. Asserted errors of law should be identifiable by examination of the process that the Tribunal was lawfully required to follow, including the restrictions as to how it dealt with the evidence and the inevitable consequence that it could not receive submissions from an applicant in regards to undisclosed matters. For example, if an asserted error is that the Tribunal's decision was legally unreasonable, then reasonableness must be assessed in light of the lawful restrictions that were placed upon the Tribunal (not by reference to what might have been reasonable *if* the Tribunal had the benefit of further submissions or evidence from the applicant that *might* have been made but for the lawfully required non-disclosure).

The undisclosed matters are used as a shield rather than a sword

29. This is not a situation in which the Federal Court is presented with undisclosed evidence and is asked to exercise judicial power to the detriment of a person. Rather, ASIO has power to issue an adverse security assessment (**ASA**) (and the exercise of that power is not challenged) and the Director relies on the undisclosed evidence in the Tribunal only to defend the exercise of the power, i.e. to justify the issue of the ASA. Thus it shields the 'attack' upon the ASA. Similarly, in the Federal Court, the Director only relies on the evidence as a shield in defending the challenge of the Tribunal's decision. Even in the case of an appeal by the Director, fundamentally the Director would be seeking to defend the initial decision to issue the ASA.

C. Proportionality?

30. The Plaintiff accepts that there may be a legislative departure from the "general rule" (PS [36] – [37]), but posits the question "How, then, is the Court to determine whether a particular legislative departure from the general rule infringes Ch III of the Constitution?" (PS [38]). The Plaintiff suggests that the answer can be derived by analogy with other constitutional requirements, such that a departure will be justified only if it is "no more than is reasonably necessary to protect a compelling public interest" (PS [39], adopting the suggestion of Gageler J in *SDCV* at [138]).

31. There are at least two flaws in that submission.

32. First, it incorrectly proceeds as if there were not already a substantial body of authority which responds to the Plaintiff's question (as referred to in these submissions). If it is necessary to reduce the authorities to a simple test, the test could be said to be whether the procedure affords an opportunity to respond to adverse evidence that is fair in all the circumstances, also encapsulating consideration as to whether practical injustice is avoided. Even though the minority judgments in *SDCV* reached a different conclusion to the majority as to whether a fair opportunity was capable of being provided by s 46(2), there is little divergence as to the applicable legal principles.

33. Secondly, the issue at hand is not analogous with "other constitutional requirements". Rather, it is accepted that both the legislature and courts are able to modify and adapt court procedures, and frequently do so. While the concept of justification may sit comfortably with the assessment of an infringement upon a fundamental or constitutionally guaranteed right or freedom (especially in the criminal context[34]), the present concern is not with any such right or freedom but with whether there is an impact upon institutional integrity. It would be unreasonable and impracticable if every legislative modification of procedure relevant to a defining characteristic of a court had to be "justified" in the sense that it was no more than was reasonable necessary to protect a compelling public interest.

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[34] For example, in *HT v The Queen* (2019) 269 CLR 403, which concerned sentencing of an offender, Kiefel CJ, Bell and Keane JJ asked whether the denial of procedural fairness was "justified" (at [27]), as did Nettle and Edelman JJ (at [58]), and Gordon J (at [82]) quoted from Lord Diplock in *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450, which relates to a restriction on a court exercising its inherent power to control the conduct of proceedings.

34. In the alternative, if this Court does consider some version of proportionality testing or assessment should be undertaken, it is submitted that s 46(2) is "justified" and "necessary" in that it is "reasonably appropriate and adapted" (PS [41]). In support of that submission, Tasmania draws attention to the following matters.

35. The chosen legislative scheme does not have to be judged as perfect in order to be "reasonably appropriate and adapted". A legislature's choice of legislative scheme will inevitably reflect a weighing of competing interests and policy considerations. The scheme should not be compared to alternative measures which may be materially more expensive or resource intensive or which may reach a higher standard of fairness.

36. The relevant purpose of s 46(2) can be identified as the prevention of the disclosure of information where that disclosure would prejudice the security of Australia. The Plaintiff does not assert that the purpose is not legitimate, or that it is not a compelling public interest (PS [44]). Ancillary to that, the scheme also protects the systemic importance of assuring sources of information that their confidentiality will be maintained.[35]

37. The scheme legitimately avoids the possibility of the parties and the Court engaging in lengthy and costly enquiries into the merits of the Minister's decision or possible methods of facilitating some additional disclosure or alternatives to disclosure. Also, if some other procedure (such as the use of special counsel) *could* be employed in a useful way in some cases (noting the limitations expressed in *SDCV*[36]), it would logically necessitate further changes to the scheme to allow the possibility of similar accommodations in the Tribunal review, which again, would likely be resource intensive.

38. Instead, the legislature has chosen a scheme which delivers a nuanced[37] yet straightforward process to restrict disclosures which would be contrary to the public interest, with judicial review available as a safety net. The scheme tightly controls and restricts the circumstances which may require non-disclosure: namely, when the disclosure *would* prejudice security or the defence or international relations of Australia.

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35 *SDCV* (2022) 277 CLR 241 at [86], [88] (Kiefel CJ, Keane and Gleeson J).
36 For example, the limitations upon special counsel are noted in *SDCV* (2022) 277 CLR 241 at 283 [99].
37 *SDCV v Director General of Security* (2021) 284 FCR 357 at [154].

PART IV: ESTIMATE OF TIME

39. It is estimated that Tasmania will require 10 minutes for the presentation of oral argument.

Dated: 18 October 2024



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S142 of 2023

BETWEEN:

MJZP
Plaintiff

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DIRECTOR-GENERAL OF SECURITY
First Defendant

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ANNEXURE TO THE ATTORNEY-GENERAL

FOR THE STATE OF TASMANIA'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, Tasmania sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in its submissions.

No.	Description	Version	Provisions
Commonwealth			
1.	*Constitution*	Current	Ch III
2.	*Administrative Appeals Tribunal Act 1975* (Cth)	As at 13 October 2024	ss 39B, 44, 46
3.	*Judiciary Act 1903* (Cth)	Current	s 78A