HIGH COURT OF AUSTRALIA

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File Number:	S142/2023
File Title:	MJZP v. Director-General of Security & Anor
Registry:	Sydney
Document filed:	Form 27C - Intervener's submissions (WA)
Filing party:	Interveners
Date filed:	18 Oct 2024

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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

DIRECTOR-GENERAL OF SECURITY
First Defendant

AND

COMMONWEALTH OF AUSTRALIA
Second Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes pursuant to section 78A of the *Judiciary Act 1903* (Cth) in support of the second defendant.

PART III: REASON WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: ARGUMENT

4. In ***SDCV*** *v Director-General of Security* this Court determined that s 46 of the *Administrative Appeals Tribunal Act* 1975 (Cth) (**AAT Act**) does not infringe Ch III of the Commonwealth *Constitution* by requiring the Federal Court to adopt an unfair procedure.[1]

5. The plaintiff seeks leave to argue that *SDCV* should be re-opened and overruled "to the extent necessary".[2]

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1 (2022) 277 CLR 241. See second defendant's submissions, [10].
2 Plaintiff's submissions, [2].

6. The Attorney General for Western Australia submits that:

   (a) the plaintiff requires leave to re-open *SDCV*;

   (b) leave to re-open *SDCV* should not be granted; and

   (c) if the Court decides to re-open *SDCV*, it should not overrule the decision that s 46 is valid.

Leave to re-open *SDCV* is necessary

7. Leave of the Court is required to re-open one of its previous decisions, although the application for leave may in an appropriate case be dealt with, not at the time of argument, but in the reasons for the disposition of the case after full argument.[3]

10 8. To the extent the plaintiff submits that leave to re-open is unnecessary because *SDCV* does not have a ratio, that argument should not be accepted for the reasons set out below ([14]-[28]).[4]

9. Even if (which is not accepted) *SDCV* does not have a ratio, it still has precedential authority in respect of circumstances that are not reasonably distinguishable from those which gave rise to the decision.[5] For the reasons set out below ([29]-[33]), the material facts of the present case are not reasonably distinguishable from those in *SDCV*.

Leave to re-open *SDCV* should not be granted

10. The principle of *stare decisis* promotes continuity and consistency of judicial
20 decisions and facilitates the giving of legal advice.[6]

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3 See, eg, *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311, 316 (Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ); *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399, 409; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388, [5], [7] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Re Kakoschke-Moore* (2018) 92 ALJR 364, [35] (the Court); ***Vanderstock*** *v Victoria* (2023) 98 ALJR 208, [8], [10], [128], [133], [145], (Kiefel CJ, Gageler and Gleeson JJ), [206]-[207], [374], [425]-[439] (Gordon J), [606]-[612], [653]-[654], [665]-[666] (Edelman J), [709], [731], [749], [782]-[789], [808]-[811], [856], [933]-[940] (Steward J), [856], [886]-[887], [933]-[940] (Jagot J); ***Vunilagi*** *v The Queen* (2023) 97ALJR 627, [153]-[158] (Edelman J).

4 Cf plaintiff's submissions, [22].

5 *Re Tyler; Ex purte Foley* (1994) 181 CLR 18, 37-39 (McHugh J); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, [50] (McHugh).

6 *Perpetual Executors & Trustees Association of Australia Ltd v Commissioner of Taxation* (1949) 77 CLR 493, 496 (Latham CJ, delivering judgment on behalf of the Court). See also *Telstra Corporation Ltd v Treloar* (2000) 102 FCR 595, [23] (Branson and Finkelstein JJ).

11. While there is no doubt that this Court has power to review and depart from its previous decisions, such a course is not lightly undertaken.[7] As Brennan J (as his Honour then was) said in *John v Federal Commissioner of Taxation*:

> [A] decision of this Court has authority as a precedent precisely because it is the Court's decision, not because it is the decision of the participating justices or a majority of them. The overruling of a decision is in a sense a diminution of the Court's authority as well as an acknowledgment of Justices' past error. An overruling must therefore be an exceptional course to adopt.[8]

12. Even in constitutional cases, it is undesirable that a question decided by the Court after full consideration should be re-opened without grave reason.[9]

13. This is particularly so where there is no relevant difference between the reasons of the Justices constituting the majority in the earlier decision; the earlier decision has achieved a useful result and not caused considerable inconvenience; and the earlier decision has been independently acted upon in a way that militates against change.[10]

SDCV is a recent decision with a ratio

14. This Court upheld the validity of s 46 of the AAT Act on 12 October 2022 by a majority comprising Kiefel CJ and Keane and Gleeson JJ (the **plurality**) and Steward J.

15. The plaintiff submits that no *ratio decidendi* can be extracted from the reasoning of the plurality and Steward J in the case.[11] That submission should not be accepted.

16. The ratio comprises the principles of law at an appropriate level of generality that can be identified from the reasons of a majority that are necessary (or sufficient

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7 *Queensland v The Commonwealth* (1977) 139 CLR 585, 593 (Barwick CJ), 598 (Gibbs J), 602 (Stephen J), 610 (Murphy J), 620 (Aickin J); ***John*** *v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); ***Lange*** *v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554 (the Court).

8 (1989) 166 CLR 417, 451.

9 *Hughes and Vale Pty Ltd v State of New South Wales* (1953) 87 CLR 49, 102 (Kitto J), cited with approval in *Lange*, 554 (the Court); *Vanderstock*, [426] (Gordon J).

10 Cf *John*, 438–439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Private R v Cowen* (2020) 94 ALJR 849, [122] (Nettle J); *Minogue v Victoria* (2019) 268 CLR 1, [24] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

11 Plaintiff's submissions, [12], [15], [19], [26].

where the decision has more than one basis) for the decision, based on the material facts before the Court.[12]

17. Discerning the ratio in appellate courts does not require focus upon a majority agreeing on the resolution of the case by reference to reasoning at every level of particularity.[13] It may involve points of law treated by the court, expressly *or implicitly*, as a necessary step in reaching a conclusion.[14]

18. *SDCV* concerned an appeal to the Federal Court on a question of law against a decision of the Administrative Appeals Tribunal (**Tribunal**) to affirm an adverse security assessment made by the Director-General of Security pursuant to the *Australian Security Intelligence Organisation Act 1979* (Cth).[15] The adverse security assessment had formed the basis of a decision by the Minister for Home Affairs to cancel SDCV's visa under s 501(3) of the *Migration Act 1958* (Cth).

19. The Federal Court had before it certain "closed" evidence and submissions that had been before the Tribunal as well as "closed" reasons of the Tribunal, which had not been disclosed to the appellant or their lawyers because of certificates issued by the Minister for Home Affairs under ss 39A(8) and 39B(2)(a)) of the AAT Act.[16]

20. The Director-General had not been ordered to disclose the "gist" of the "closed" documents to the appellant and the Federal Court had not appointed a special advocate who could examine the "closed" documents and make independent submissions to the court. One of the contentions raised by the appellant was that the Tribunal's decision was not open on the evidence before it[17] (including the "closed" evidence) and therefore illogical or irrational.[18]

21. *As to the principle to be applied in determining invalidity* – the plurality in *SDCV* rejected the proposition that there is a "minimum requirement" of procedural fairness applicable to all proceedings in a Ch III court and held that the question

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12 ***Garlett*** *v Western Australia* (2022) 277 CLR 1, [239] (Edelman J); *Vunilagi*, [155] (Edelman J), *Vanderstock*, [430] (Gordon J).
13 *Garlett*, [240] (Edelman J).
14 *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232, 267 (Brennan J); *Wu v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 39, [29]-[30] (the Court); *Vunilagi*, [155] (Edelman J); *Vanderstock*, [430] (Gordon J).
15 *SDCV*, [1]-[2], [4], [7], [8] (Kiefel CJ, Keane and Gleeson JJ), [281], [313] (Steward J).
16 *SDCV*, [5]-[6], [8]-[9], [41] (Kiefel CJ, Keane and Gleeson JJ), [313] (Steward J).
17 *SDCV*, [8] (Kiefel CJ, Keane and Gleeson JJ).
18 *SDCV v Director-General of Security* (2021) 284 FCR 357, [242] (Bromwich and Abraham JJ with whom Rares J agreed).

to be asked and answered by the Court in determining the validity of s 46 was: "whether, having regard to all aspects of [a court's] procedures and the legislation and rules governing them, the impugned legislation is an occasion of practical injustice."[19]

22. Steward J also rejected the submission that there is a "minimum requirement" or "elementary standard" of procedural fairness applicable to all proceedings in a Ch III court and held that the question ultimately was whether the impugned legislation resulted in practical injustice.[20]

23. Practical injustice is a synonym for procedural unfairness, involving a litigant losing the opportunity to advance their case.[21]

24. *As to the application of that principle to a case where "closed" documents were before the Federal Court and the appellant was not provided with any opportunity to respond to them* – the plurality held that s 46 did not occasion practical injustice because, together with s 44, the section:

(a) offers an appellant an additional statutory remedy (which they can choose to pursue or not) as an adjunct to a statutory regime under which their statutory rights (to reside in Australia) depended on administrative decisions that could lawfully be made without disclosure to them of security-sensitive information;[22] and

(b) confers a forensic advantage on an appellant relative to the remedies otherwise provided to them by law and consequently offers them the best chance of a successful challenge to the Tribunal's decision.[23]

25. Steward J also held that, *in such a case*, s 46 did not result in practical injustice because, together with s 44, it confers on an appellant the opportunity for beneficial judicial oversight of a Tribunal decision regarding the merits of a security assessment (which his Honour recognised as involving administrative decisions that could lawfully be made without disclosure of security-sensitive information), relative to an appellant's other legal remedies.[24]

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19 *SDCV*, [51]-[67].
20 *SDCV*, [269], [290], [307], [313].
21 *SDCV*, [132] (Gageler J), citing Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs Ex parte Lam* (2003) 214 CLR 1, [37].
22 *SDCV*, [12]-[14], [54], [60], [69]-[74], [78], [83], [101].
23 *SDCV*, [12]-[14], [77], [79]-[83], [101].
24 *SDCV*, [269], [273]-[280], [290], [306]-[307], [309]-[314].

26. Contrary to the plaintiff's submissions,[25] the binding statement of the basis on which s 46 of the AAT Act does not infringe Ch III that derives from the majority judgments is: even where s 46 prevents the Federal Court from providing an appellant with an opportunity to respond to evidence against them, it does not occasion practical injustice because it is part of a legislative scheme that, on the whole, provides an appellant with an additional beneficial statutory remedy, which they can choose to pursue or not.

27. Notably, this binding statement is generally consistent with that which emerged from the unanimous decision of the Full Federal Court at first instance.[26]

10 28. It may be accepted that Steward J adopted a broader construction of s 46 than the plurality as to the measures that could be taken in particular cases to afford an appellant an opportunity to respond to adverse evidence.[27] However, properly understood, his Honour nevertheless held that, even absent those measures, the provision is valid because it is "nonetheless beneficial to a litigant in the position of the appellant" by providing them with "meaningful – as distinct from meaningless" judicial oversight of a Tribunal decision.[28]

SDCV has precedential authority in this case in any event

29. Even if (which is not accepted) *SDCV* does not have a ratio, it has precedential authority in the present case,[29] which is not reasonably distinguishable from
20 *SDCV*.

30. The present case concerns a proposed appeal to the Federal Court on questions of law under s 44(1) of the AAT Act against a decision of the Tribunal to affirm an adverse security assessment made by the Director-General of Security pursuant to the *Australian Security Intelligence Organisation Act 1979* (Cth): **SCB 38-39, 41 [10], [14], [20]-[21]**. The adverse security assessment could potentially form the basis of a written direction by the Minister for Home Affairs to the plaintiff, in its capacity as a carriage service provider, not to supply, or to cease supplying,

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25 Plaintiff's submissions, [12].
26 *SDCV v Director-General of Security* (2021) 284 FCR 357, [1], [8]-[18], [27], [40] (Rares J), [85], [140]-[141], [154], [161]-[168] (Bromwich and Abraham JJ).
27 Plaintiff's submissions, [16]-[21].
28 *SDCV*, [313].
29 See [9] above.

a carriage service pursuant to s 315A of the *Telecommunications Act 1997* (Cth): **SCB 37-39, [2], [9], 45, 47**.[30] (Compare paragraph [18] above.)

31. When making its decision, the Tribunal had before it certain "closed" evidence and submissions and it published both "open" and "closed" reasons for its decision: **SCB 40-41 [17], [19]-[20]**. (Compare paragraph [19] above.)

32. One of the questions of law raised by the appeal to the Federal Court is "[d]id the Tribunal reason irrationally or illogically in reaching conclusions of fact; irrationally assume facts or irrationally draw inferences from the material before it; fail to have regard to substantial, clearly articulated arguments relying upon established facts; and/or otherwise fail to comply with its duty of legal reasonableness?": **SCB 41 [21], 125**. (Compare paragraph [20] above.)

33. In support of its appeal on this question, the plaintiff relies upon the Tribunal's "closed" reasons for decision: **SCB 128**. The Federal Court has not yet heard the appeal. Given the plaintiff's reliance upon the Tribunal's "closed reasons" it may be inferred that the Federal Court will consider them, and related certified documents, in order to effectively adjudicate this question of law.

All relevant considerations were ventilated in *SDCV*

34. The plaintiff further seeks to justify the re-opening of *SDCV* by "making an argument that was not put in *SDCV*".[31]

35. The argument advanced by the plaintiff is that:

(a) a different principle should be applied to determine whether s 46 infringes Ch III, namely, whether the provision departs from the "general rule" (that a party to a proceeding should know the case against them) no more than is "reasonably necessary" (meaning reasonably appropriate and adapted) to protect a compelling and legitimate public interest (**Proportionality Principle**); and

(b) section 46 goes further than necessary to protect the compelling and legitimate end of the security of Australia.[32]

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30 While a carriage service provider does not need a licence in order to carry on a carriage service under the *Telecommunications Act 1997* (Cth), their right to carry on such a service is subject to Minister's power under s 315A of the Act.

31 Plaintiff's submissions, [23].

32 Plaintiff's submissions, [2], [34]-[51].

36. However, the plaintiff's arguments in support of this principle and its application in the present case, do not raise any considerations that were not ventilated in *SDCV* and they do not therefore justify re-opening *SDCV*.[33]

37. In *SDCV*, the Proportionality Principle was referred to with apparent approval by Gageler J but not discussed in detail[34] and was discussed and applied by Edelman J.[35] While neither the plurality, Gordon J, nor Steward J expressly referred to it, all members of the Court considered the nature and strength of the public interests supporting non-disclosure of certified documents and whether s 46 goes too far (so as to infringe Ch III) by prohibiting disclosure of information without conferring any discretion on the Federal Court as a "safety valve".[36] Further, all members of the Court considered (albeit to varying degrees) the extent to which s 46 enables or prevents the Federal Court from taking other measures to ensure procedural fairness.[37]

It cannot be said that *SDCV* was manifestly wrong

38. It was common ground in *SDCV* that the Commonwealth Parliament cannot require a Ch III court to exercise the judicial power of the Commonwealth in a manner inconsistent with the character of a court or the nature of judicial power and that procedural fairness is an essential feature of a Ch III court.[38]

39. The differences between the majority judgments and the dissenting judgments lay in their Honours' assessment of what is sufficiently fair for constitutional purposes having regard to: the nature of the rights and interests affected; the nature of the proceedings in question; the nature of the decision to be made; the characteristics of the parties; relevant public interest considerations (including those supporting non-disclosure of material) and how they are dealt with; the statutory scheme as a whole and relevant counterfactual situations.

40. Given the protean nature of fairness, its sufficiency is inherently a matter of fact and degree and something on which reasonable minds may differ.

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33 Cf *Vanderstock*, [8] (Kiefel CJ, Gageler and Gleeson JJ), [437] (Gordon J), [856] (Jagot J); *Queensland v The Commonwealth* (1977) 139 CLR 585, 600 (Gibbs J).

34 *SDCV*, [138].

35 *SDCV*, [218]-[220], [238]-[239], [267].

36 *SDCV*, [84]-[90] (Kiefel CJ, Keane and Gleeson JJ), [152], [160] (Gageler J), [178]-[179], [189]-[191] (Gordon J), [244]-[256], [267] (Edelman J), [311]-[314] (Steward J).

37 *SDCV*, [54], [86], [98]-[99] (Kiefel CJ, Keane and Gleeson JJ), [153]-[158] (Gageler J), [193] (Gordon J), [249]-[266] (Edelman J), [291]-[293], [295]-[300], [302],[304]-[307] (Steward J).

38 *SDCV*, [50] (Kiefel CJ, Keane and Gleeson JJ).

41. This is relevant to the force with which it may be considered (by those who disagree with it) that the result in *SDCV* or the ratio of *SDCV* cannot be justified.[39] The majority in *SDCV* cannot be said to have been "clearly wrong" or "manifestly wrong" so as to justify the serious step of overruling their decision.[40]

Other factors weighing against re-opening *SDCV*

42. The Attorney General for Western Australia adopts [17]-[23] of the second defendant's submissions.

43. Even if *SDCV* could not be said to rest upon a principle carefully worked out in a significant succession of cases, that is not a factor that positively supports *SDCV* being re-opened, it is simply a factor that does not count against it being re-opened.

44. In the short period since *SDCV* was decided, the ratio in the case has not been applied to determine the constitutional validity of other legislative provisions. However, the decision of the majority that s 46 is valid has been more generally referred to, and relied upon, in at least one subsequent case.[41]

45. As the plaintiff acknowledges, the validity of s 46 has been relied upon by the Commonwealth Parliament in enacting the *Administrative Review Tribunal Act 2024* (Cth), which contains an equivalent to s 46 of the AAT Act.[42]

46. It should not be accepted that *SDCV* has produced "inconvenience" and a "far from useful result".[43] The decision has preserved a potentially beneficial avenue for review (that need not be taken by a person if they do not consider it would be beneficial to them). The decision has also clarified that, in assessing practical injustice, it is relevant to look at the broader statutory and procedural context, including the procedural options available to a litigant.[44]

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39 Cf *Vunilagi*, [155], [160]-[164] (Edelman J); *Vanderstock*, [607]-[609] (Edelman J).

40 Cf *Perpetual Executors & Trustees Association of Australia Ltd v Commissioner of Taxation* (1949) 77 CLR 493, 496 (Latham CJ, delivering judgment on behalf of the Court); *Queensland v The Commonwealth* (1977) 139 CLR 585, 593 (Barwick CJ), 599 (Gibbs J), 602-603 (Stephen J), 606 (Mason J), 620-630 (Aickin J); J Thomson SC and M Durand, "Overruling Constitutional Precedent" (2021) 95 *Australian Law Journal* 139, 140-141, 144-147.

41 *AIX20 v Director-General of Security (No 2)* [2024] FCA 1130 [60] (Dowling J).

42 Plaintiff's submissions, [28].

43 Cf plaintiff's submissions, [27].

44 *SDCV*, [75]-[83] (Kiefel CJ, Keane and Gleeson JJ), [307], [313]-[314] (Steward J).

***SDCV* should not be overruled**

47. The Attorney General for Western Australia does not seek to be heard as to the proper construction of s 46 of the AAT Act. The following submissions proceed on the assumption that the proper construction is as set out by the plaintiff.[45]

48. The Attorney General for Western Australia adopts the second defendant's submissions on why *SDCV* should not be overruled,[46] and makes the following additional submissions.

49. In support of adoption of the Proportionality Principle in relation to legislative departures from the "general rule", the plaintiff calls in aid, by analogy, other constitutional requirements or protections that are not "absolute", in the sense that legislative departures may be "justified" as being "no more than reasonably necessary to protect a compelling public interest".[47]

50. A requirement of reasonable necessity has been applied by this Court in the context of legislative burdens upon the implied freedom of political communication[48] and the guarantee in s 92 of the *Constitution* that "trade, commerce, and intercourse among the States … shall be absolutely free".[49]

51. However, care should be taken to avoid a "domino method of constitutional adjudication…wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation".[50]

52. The principles derived from Ch III of the *Constitution* relevantly protect the institutional integrity of courts. The implied freedom of political communication and s 92 of the *Constitution* concern constitutional freedoms or guarantees.

53. This Court has recognised that these freedoms and guarantees may be burdened, including *absolutely* in a particular respect, if the law doing so is reasonably appropriate and adapted to achieving a legitimate end.[51] While the requirements of procedural fairness are not fixed, procedural fairness cannot be burdened into

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45 Plaintiff's submissions, [29]-[31].
46 Second defendant's submissions, [24]-[59].
47 Plaintiff's submissions, [23], [39].
48 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [40] (Gleeson CJ).
49 *Palmer v Western Australia* (2021) 272 CLR 505, [61] (Kiefel CJ and Keane J), [85], [138]-[139] (Gageler J), [192] (Gordon J), [265] (Edelman J).
50 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [137] quoting Friendly, "The Bill of Rights as a Code of Criminal Procedure", *California Law Review*, vol 53 (1965) 929, 950.
51 Cf ***Falzon*** *v Minister for Immigration and Border Protection* (2018) 262 CLR 333, [30]-[32] (Kiefel CJ, Bell, Keane and Edelman JJ).

non-existence given that the Commonwealth Parliament cannot require a Ch III court to exercise the judicial power of the Commonwealth in a manner inconsistent with the character of a court or the nature of judicial power and procedural fairness is an essential feature of a Ch III court. Application of the Proportionality Principle advanced by the plaintiff could conceivably enable that to occur if the departure is "reasonably appropriate and adapted to achieving a legitimate end".

54. The plaintiff's reliance upon the principle in *Chu Kheng* ***Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs*[52] is inapt in justifying adoption of the Proportionality Principle. The principle in *Lim* is directed to a single question of characterisation: whether the power conferred by the impugned law is properly characterised as punitive and therefore as exclusively judicial.[53] It is not concerned with the justification of legislative departures from constitutional requirements that are not "absolute".[54] ***Jones*** *v Commonwealth*[55], ***NZYQ*** *v Minister for Immigration and Citizenship and Multicultural Affairs*[56] and ***ASF17*** *v Commonwealth*[57] are not authority to the contrary.[58]

55. Additionally, the "reasonable necessity" enquiries applied in the context of the implied freedom of political communication, s 92 of the *Constitution* and the *Lim* principle focus on characterising the purpose of an impugned law. The question of whether a law requires a Ch III court to exercise the judicial power of the Commonwealth in a manner inconsistent with the character of a court or the nature of judicial power by adopting an unfair procedure does not depend on the law's purpose, but ultimately on its effect.

56. Further, and alternatively, even if the Proportionality Principle is adopted in relation to legislative departures from the "general rule", s 46 of the AAT Act does not infringe that principle.

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52 (1992) 176 CLR 1.

53 *Falzon*, [27]-[32] (Kiefel CJ, Bell, Keane and Edelman JJ). Cf plaintiff's submissions, [39].

55 (2023) 97 ALJR 936.

56 (2023) 97 ALRJ 1005.

57 (2024) 98 ALJR 782.

58 *Jones*, [39]-[43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [76]-[78] (Gordon J), [188] (Steward J); *NZYQ*, [41]-[44], [51] (the Court); *ASF17*, [31]-[32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ). Cf plaintiff's submissions, [23].

57. The plaintiff accepts that preventing the disclosure of information is "compelling" and "legitimate" where disclosure would be injurious to the public interest because it would prejudice the security of Australia.[59] However, the plaintiff asserts that s 46 goes further than is reasonably necessary to achieve that end because of the availability of alternative legislative options to address the protection of security-sensitive information.[60]

58. Parliament is afforded a significant degree of latitude in formulating laws to advance a legitimate purpose.[61] In the "analogous" constitutional contexts relied upon by the plaintiff, the necessity of a law is not determined by the mere existence or availability of alternative legislative options. Rather, it is recognised that there is a range within which it is for Parliament, and not the courts, to decide what is necessary to achieve a legitimate purpose, and "it is no part of the judicial function to determine 'where, in effect, the balance should lie'".[62] In those contexts, it is only "when and if parliament's selection lies beyond the range of what could reasonably be regarded as necessary that the law will be adjudged as unnecessary".[63]

59. Similarly, as the plaintiff accepts,[64] the question of how observance of the "general rule" should be balanced against competing interests is not the exclusive preserve of the courts.[65] The protection of security-sensitive information in a blanket fashion does not lie beyond the range of what can reasonably be regarded as necessary. As identified by the plurality in *SDCV*, in making legislative decisions that balance competing interests, the Commonwealth Parliament was entitled to proceed on the basis that, given the security context in which an adverse security assessment is made, the human sources of relevant information would be willing to cooperate with the authorities only if assured that their identities and any identifying information would be kept confidential.[66]

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59 Plaintiff's submissions, [44].
60 Plaintiff's submissions, [45]-[51].
61 *ASF17*, [104] (Edelman J); ***Clubb*** *v Edwards* (2019) 267 CLR 171, [478] (Edelman J).
62 *Clubb*, [69] (Kiefel CJ, Bell and Keane JJ) quoting *Brown v Tasmania* (2017) 261 CLR 328, [290] (Nettle J).
63 *Clubb*, [266] (Nettle J).
64 Plaintiff's submissions, [49].
65 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, [35] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
66 *SDCV*, [86].

60. In those circumstances, it was reasonable for the Parliament to adopt a blanket prohibition, rather than a legislative model that incorporates various mechanisms for disclosing information to an extent and in a manner that cannot be guaranteed to those human sources from the outset.

61. Cases where the use of 'gisting' or the appointment of a special advocate have been found inadequate to safeguard national security information support the reasonable necessity of Parliament's choice.[67]

62. In relation to the plaintiff's suggestion that the AAT Act could have required the ASIO Minister to provide evidence to the Federal Court to justify the issuance of a s 39B(2) certificate – to the extent that the certified documents already available to the Federal Court do not justify the issuance of the certificate, the degree to which further "open" evidence may be provided to the Court and disclosed to an appellant to justify a certificate may be open to doubt. If the suggestion is that the Minister could provide further "closed" evidence to the Court to justify the certificates, it is not clear how that affords the appellant any greater degree of procedural fairness.

63. Section 46 reflects a balance struck by the Commonwealth Parliament between protecting national security and providing an additional statutory remedy to a person in the position of the plaintiff. That there are, conceivably, alternative options available to Parliament to make s 46 fairer to a person in the position of the plaintiff is insufficient to invalidate Parliament's legislative choice.

64. A law that promotes access to the Federal Court should not be characterised as one tending to impair its institutional integrity. While s 46 impedes "equality of arms", it increases access to the Federal Court by providing an additional avenue for review of a Tribunal decision relating to an adverse security assessment, which an appellant may choose to pursue or not. Provision of this additional avenue promotes the scrutiny of executive decisions by the Federal Court. This highlights the difficulty in attempting to prioritise a particular aspect of the adversarial system, divorced from a consideration of other aspects of the system and what might be reasonably necessary to achieve other legitimate ends.

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67 *AIX20 v Director-General of Security (No 2)* [2024] FCA 1130, [37]-[45] (Dowling J); *Hu v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FedCFamC2G 86, [28]-[32] (Humphreys J); *Imad v Director-General of Security* [2024] FCA 1115, [102]-[111] (Rofe J). Cf, plaintiff's submissions, [50.3] and [50.4].

PART V: LENGTH OF ORAL ARGUMENT

65. It is estimated that the oral argument will take up to 15 minutes.

Dated: 18 October 2024

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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

DIRECTOR-GENERAL OF SECURITY
First Defendant

AND

COMMONWEALTH OF AUSTRALIA
Second Defendant

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Attorney General for Western Australia sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

	Description	Version	Provision
	Constitutional Provisions		
1.	*Commonwealth Constitution*	Current	Ch III, s 92
	Statutory Provisions		
2.	*Administrative Appeals Act 1975* (Cth)	Current	ss 39A, 39B, 44 and 46
3.	*Administrative Review Tribunal Act 2024* (Cth)	Current	
4.	*Australian Security Intelligence Organisation Act 1979* (Cth)	Current	
5.	*Judiciary Act 1903* (Cth)	Current	s 78A
6.	*Migration Act 1958* (Cth)	Current	s 501(3)
7.	*Telecommunications Act 1997* (Cth)	Current	s 315A