HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 23 Aug 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S142/2023
File Title:	MJZP v. Director-General of Security & Anor
Registry:	Sydney
Document filed:	Amended Plaintiff's submissions
Filing party:	Plaintiff
Date filed:	23 Aug 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

MJZP
Plaintiff

and

DIRECTOR-GENERAL OF SECURITY
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

SUBMISSIONS OF THE PLAINTIFF

PART I — CERTIFICATION

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

PART II — ISSUES

2 Does s 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) infringe Ch III because it requires the Federal Court to depart from the "general rule" of procedural fairness to an extent that is more than reasonably necessary to protect a compelling and legitimate public interest? The Plaintiff contends that the answer to that question is "yes". To the extent necessary, the Plaintiff seeks leave to argue that ***SDCV*** *v Director-General of Security*[1] be re-opened and overruled.

PART III — SECTION 78B NOTICES

3 The Plaintiff has given notice pursuant to s 78B of the *Judiciary Act 1903* (Cth): **SCB 13**.

PART IV — RELEVANT FACTS

4 The Plaintiff, a proprietary company registered under the *Corporations Act 2001* (Cth), is a carriage service provider within the meaning of the *Telecommunications Act 1997* (Cth): **SCB 37 [2]**. The Secretary of the Department of Home Affairs requested that the Australian Security Intelligence Organisation (**ASIO**) assess and, as appropriate, produce a security assessment in respect of the Plaintiff in connection with s 315A of the *Telecommunications Act*: **SCB 38 [9]**.[2]

5 ASIO furnished an adverse security assessment (**ASA**) to the Minister for Home Affairs in connection with s 315A, which was accompanied by a "statement of grounds" for the assessment: **SCB 38 [10]-[11]**. Under s 38A(3) of the ASIO Act, the Minister for Home Affairs, as the Minister administering that Act (**SCB 38 [8.1]**), certified that she was satisfied that the disclosure to the Plaintiff, its directors or its employees of certain information in the statement of grounds would be prejudicial to the interests of security.[3] The Home Affairs Minister then gave to the Plaintiff a notice that stated that ASIO had provided her with an ASA in respect of the Plaintiff in connection with s 315A of the

1 (2022) 96 ALJR 1002.

2 It is a function of ASIO to furnish to Commonwealth agencies security assessments relevant to their functions and responsibilities: *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**), ss 17(1)(c), 37(1).

3 See ASIO Act, s 37(2).

Telecommunications Act. Attached to the notice was an unclassified statement of grounds: **SCB 39 [13.1]-[13.2]**.[4]

6 The Plaintiff applied to the Administrative Appeals Tribunal (**Tribunal**) for a review of the ASA: **SCB 39 [14]**.[5] The Tribunal was obliged to conduct that review in accordance with s 39A of the AAT Act.[6] Section 39A(3) requires the Director-General to present to the Tribunal all relevant information available to the Director-General, whether favourable or unfavourable to the applicant. Under s 39A(8), the "ASIO Minister" (at all relevant times, the Home Affairs Minister: **SCB 38 [8.3]**) may certify that evidence proposed to be adduced or submissions proposed to be made by or on behalf of the Director-General are of such a nature that disclosure would be contrary to the public interest because it would prejudice security or the defence of Australia. If such a certificate is given, the applicant must not be present when the evidence is adduced or the submissions are made.[7]

7 Section 39B applies to proceedings to which s 39A applies.[8] Under s 39B(2), the ASIO Minister may certify that the disclosure of information with respect to a matter stated in the certificate, or the disclosure of the contents of a document, would be contrary to the public interest because it would prejudice security or the defence or international relations of Australia (para (a)) or because it would involve the disclosure of deliberations or decisions of the Cabinet (para (b)). Section 39B(3)(a) then provides that the Tribunal must do all things necessary to ensure that the information or the contents of the document the subject of such a certificate are not disclosed to anyone other than a member of the Tribunal as constituted for the purposes of the proceeding.

8 The ASIO Minister has issued three certificates under ss 39A and 39B.

8.1 On 19 January 2022, she issued two certificates. The first was made under ss 39A(8) and 39B(2)(a) and (b): **SCB 82**. The second was made under ss 39A(8) and 39B(2)(a): **SCB 84**.

8.2 On 21 April 2022, she issued a certificate under ss 39A(8) and 39B(2)(a): **SCB 98**.

[4] On 28 February 2022, after the s 38A(3) certificate was partially revoked, the Plaintiff was provided with a revised unclassified statement of grounds: **SCB 40 [18]**.

[5] ASIO Act, s 54(1).

[6] AAT Act, s 39A(1).

[7] AAT Act, s 39A(9)(a). While a representative of an applicant may be present when the evidence is adduced (s 39A(9)(b)), no such consent was given in the present case: **SCB 40 [17.4]**.

[8] AAT Act, s 39B(1).

9 Following a four-day hearing, the Tribunal affirmed the decision to issue the ASA. It provided "open" reasons to the Plaintiff and the Director-General of Security (being the respondent to the application[9]), and provided "closed" reasons to the Director-General only: **SCB 41 [20]**.

10 The Plaintiff appealed to the Federal Court under s 44(1) of the AAT Act: **SCB 41 [21]**. Section 46(1) of the AAT Act provides that when an appeal is instituted in accordance with s 44, the Tribunal shall, despite s 39B(3), cause to be sent to the court all documents that were before the Tribunal in connexion with the proceeding to which the appeal relates and are relevant to the appeal. Because s 39B(2) certificates were in force in respect of certain documents, s 46(2) is engaged. Section 46(2) relevantly provides:

> If there is in force in respect of any of the documents a certificate in accordance with subsection … 39B(2) of this Act … certifying that the disclosure of matter contained in the document would be contrary to the public interest, the Federal Court of Australia … shall, subject to subsection (3), do all things necessary to ensure that the matter is not disclosed to any person other than a member of the court as constituted for the purposes of the proceeding. …

11 Although s 46(3) confers power on the Federal Court to permit inspection of certified matter if a question arises as to "whether the matter should be disclosed to some or all of the parties to the proceeding before the Tribunal in respect of which the appeal was instituted" and "the court decides that the matter should be so disclosed", that power is not available in respect of material the subject of a certificate issued under s 39B(2)(a). As already noted, each of the three certificates issued by the ASIO Minister included a certification under s 39B(2)(a). It follows that the Federal Court lacks power to authorise inspection of the material the subject of those certifications.[10]

PART V — ARGUMENT

A INTRODUCTION

12 *SDCV* decided that s 46(2) of the AAT Act does not infringe Ch III of the Constitution.[11] However, beyond that result, no *ratio decidendi* can be extracted from the *reasoning* in that case.[12] The decision produced no binding statement on the proper construction of

[9] See AAT Act, s 30(1)(b).

[10] *SDCV* (2022) 96 ALJR 1002 at [188] (Gordon J). See also **SCB 42 [25]**.

[11] This Court dismissed an appeal from the Full Court of the Federal Court, which had made a declaration that "Section 46(2) of the [AAT Act] is a valid law of the Commonwealth".

[12] See *Re Minister for Immigration and Multicultural Affairs; Ex parte* ***Te*** (2002) 212 CLR 162 at [86] (McHugh J), see also at [19] (Gleeson CJ), [136] (Gummow J); ***Shaw*** *v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at [35] (Gleeson CJ, Gummow and Hayne JJ).

s 46(2) of the AAT Act and, therefore, no binding statement on the basis on which the provision does not infringe Ch III. It is in that context that, to the extent necessary, the Plaintiff seeks leave to argue that *SDCV* should be re-opened (**Section B**).

13 Properly construed, s 46(2) prohibits the Federal Court — in each and every case regardless of the circumstances — from providing an appellant with any opportunity to respond to evidence that has been certified under s 39B(2)(a) (**Section C**). Section 46(2) thereby requires the Federal Court to depart from the "general rule" of procedural fairness — that "opposing parties will know what case an opposite party seeks to make and how that party seeks to make it" — more than is "reasonably necessary" to protect a compelling and legitimate public interest (**Section D**). For that reason, s 46(2) infringes Ch III. The contrary conclusion in *SDCV* should be overruled.

B *SDCV* SHOULD BE RE-OPENED

B.1 The authority of *SDCV*

14 To discern the *ratio* (if any) of *SDCV*, the following analysis is required.

14.1 *First*, the reasoning of any dissenting judges is to be disregarded.[13] Therefore, for this purpose, only the reasons of the plurality (Kiefel CJ, Keane and Gleeson JJ) and of Steward J are relevant; the reasons of Gageler J, Gordon J and Edelman J can be put to one side.

14.2 *Second*, any *ratio* must reflect the reasoning of a majority of the Court as a whole, and not simply that of a majority of the majority of judges.[14] In the context of the 4:3 decision in *SDCV*, that means that a proposition will not be *ratio* unless the proposition was a *necessary* step in the reasoning of *both* the plurality and Steward J.

15 *SDCV* required the Court to resolve two issues: *first*, the proper construction of s 46(2); and *second*, so construed, whether s 46(2) infringed Ch III of the Constitution. On both issues, "the reasoning of none of the majority Justices had the support of four of the seven Justices".[15] Therefore, no *ratio* can be extracted from that reasoning on either issue. The

[13] See *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188 (Barwick CJ); *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314 (Mason CJ, Wilson, Dawson and Toohey JJ); *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [112] (Gaudron, McHugh and Gummow JJ).

[14] *Te* (2002) 212 CLR 162 at [86] (McHugh J); *Victoria v Commonwealth* (1971) 122 CLR 353 at 382 (Barwick CJ). See also Herzfeld and Prince, *Interpretation* (3rd ed, 2024) at [34.120].

[15] *Te* (2002) 212 CLR 162 at [86] (McHugh J).

decision has precedential value only in circumstances that are not reasonably distinguishable from those which gave rise to the decision.[16]

16 On the construction issue, the plurality concluded that s 46(2) operates so that there can be "no disclosure of the certificated matter save as permitted by the other provisions of s 46".[17] None of the other provisions of s 46 authorise disclosure of any certificated matter to an appellant in an appeal under s 44. As a consequence, the plurality concluded that s 46(2) does not permit the Federal Court to disclose to an appellant the "gist" of any information to be disclosed, nor to appoint a "special counsel".[18]

17 In contrast, Steward J reasoned that "the duty and the capacity of the Court to provide different forms of procedural fairness" were not "necessarily precluded" by s 46(2).[19] His Honour considered that the Federal Court could afford procedural fairness by a number of different means, including:

17.1 by ordering that "the gist of certified documents be disclosed by the Director-General to an applicant";[20]

17.2 by appointing a "special advocate who could examine certified material and unredacted reasons and make independent submissions to the Court";[21] or

17.3 if the Director-General sought to tender documents, whether in whole or part, that were the subject of certification pursuant to s 39B(2), it could require, "as a condition of admission into evidence, those documents, or parts of those documents, to be shown to an applicant's legal representatives on a confidential basis".[22]

18 More than that, his Honour concluded that, in respect of each appeal, "the Court will need to mould what relief can be given to overcome the disadvantage suffered by the applicant as a result of the provision to the Court, but not to the applicant, of certified material".[23] And, if that disadvantage cannot sufficiently be mitigated, his Honour considered that the

16 See *Te* (2002) 212 CLR 162 at [87]-[88] (McHugh J). See also *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 438 (Mason CJ and Deane J), discussing *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529.

17 See *SDCV* (2022) 96 ALJR 1002 at [97] (Kiefel CJ, Keane and Gleeson JJ).

18 *SDCV* (2022) 96 ALJR 1002 at [86], [98] (Kiefel CJ, Keane and Gleeson JJ).

19 *SDCV* (2022) 96 ALJR 1002 at [308], see also at [270].

20 *SDCV* (2022) 96 ALJR 1002 at [291] (Steward J).

21 *SDCV* (2022) 96 ALJR 1002 at [295] (Steward J).

22 *SDCV* (2022) 96 ALJR 1002 at [302] (Steward J).

23 *SDCV* (2022) 96 ALJR 1002 at [303] (Steward J).

Court would retain the option to decline "a tender of certified documents or otherwise to refuse to consider documents certified pursuant to s 39B of the AAT Act".[24] Nonetheless, his Honour acknowledged there will be "appeals where, by reason of the nature of the certified material, the Federal Court will not be able to provide an applicant with a fair opportunity to respond to the evidence against them" by any of the means he had identified.[25]

19 Because of the different constructions adopted by the plurality and Steward J, their Honours' reasoning on the constitutional issue diverged.[26] Accordingly, "there is no single strain of reasoning in the majority judgments" in *SDCV* that contains a "binding statement of constitutional principle".[27]

20 The plurality accepted that a Commonwealth law will infringe Ch III if it occasions "practical injustice".[28] However, their Honours said that s 46(2) does not occasion "practical injustice" for two reasons.

20.1 *First*, because the appellant was a non-citizen whose presence in Australia was dependent on him holding a valid visa, he suffered no practical injustice in circumstances where his right to hold a visa unless he was the subject of a valid ASA was "circumscribed by the requirement that he not be informed of security-sensitive information".[29]

20.2 *Second*, because s 46(1) confers a "forensic benefit to a litigant" in an appeal under s 44 (as compared to a judicial review proceeding under s 39B of the *Judiciary Act* or s 75(v) of the Constitution), there is no practical injustice in the person also suffering the forensic disadvantage imposed by s 46(2).[30]

21 In light of Steward J's different construction of s 46(2), his Honour considered the appellant's arguments through a different prism. Although Steward J endorsed some aspects of the plurality's reasoning,[31] his Honour's ultimate conclusion on the Ch III issue

[24] *SDCV* (2022) 96 ALJR 1002 at [303] (Steward J).
[25] *SDCV* (2022) 96 ALJR 1002 at [306] (Steward J).
[26] See *SDCV* (2022) 96 ALJR 1002 at [308] (Steward J).
[27] *Shaw* (2003) 218 CLR 28 at [35] (Gleeson CJ, Gummow and Hayne JJ). See also ***Lange*** *v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554-556 (the Court).
[28] See *SDCV* (2022) 96 ALJR 1002 at [66]-[67] (Kiefel CJ, Keane and Gleeson JJ).
[29] *SDCV* (2022) 96 ALJR 1002 at [74] (Kiefel CJ, Keane and Gleeson JJ).
[30] See *SDCV* (2022) 96 ALJR 1002 at [79], [83] (Kiefel CJ, Keane and Gleeson JJ).
[31] See *SDCV* (2022) 96 ALJR 1002 at [269]-[270], [290], [307] (Steward J).

necessarily depended upon his alternative construction of s 46(2). As his Honour put it, had he not adopted that construction, he "may well have formed the view that s 46(2) was not a valid law".[32]

B.2 Factors in favour of re-opening the result in *SDCV*

22 In those circumstances, the Plaintiff contends that "the appropriate course" is for the Court to examine the question of whether s 46(2) infringes Ch III "as a matter of principle and not of authority".[33] It should do so in order to "settle" the relevant "constitutional doctrine",[34] in circumstances where, as noted above, *SDCV* contains no binding statement of constitutional principle.[35] However, to the extent necessary,[36] the Plaintiff seeks leave to re-open *SDCV*.

23 There is an important preliminary point. Here, the Plaintiff seeks to make an argument that was not put in *SDCV*,[37] which depends upon the relationship between means and ends (or "proportionality"). When *SDCV* was argued, the place of such an analysis within Ch III was at least unclear and perhaps denied.[38] That position was later clarified by developments in this Court's Ch III jurisprudence,[39] in a way which supports the Plaintiff's new argument. *SDCV* does not stand as authority against the Plaintiff's new argument, because "[i]f a point is not in dispute in a case, the decision lays down no legal rule concerning that issue".[40]

24 The factors identified in ***John*** *v Federal Commissioner of Taxation* otherwise support the grant of leave.[41] In applying those factors, the Court "must take into account that the only

[32] *SDCV* (2022) 96 ALJR 1002 at [308] (Steward J).

[33] See *Lange* (1997) 189 CLR 520 at 556 (the Court).

[34] *Lange* (1997) 189 CLR 520 at 556 (the Court).

[35] *Lange* (1997) 189 CLR 520 at 554 (the Court).

[36] See *Shaw* (2003) 218 CLR 28 at [38] (Gleeson CJ, Gummow and Hayne JJ).

[37] *SDCV* (2022) 96 ALJR 1002 at [138] (Gageler J).

[38] *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at [32] (Kiefel CJ, Bell, Keane and Edelman JJ).

[39] See ***Jones*** *v Commonwealth* (2023) 97 ALJR 936 at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [78] (Gordon J), [154]-[155] (Edelman J), [188] (Steward J); ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [44] (the Court); ***ASF17*** *v Commonwealth* (2024) 98 ALJR 782 at [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ), [66], [104] (Edelman J).

[40] *Coleman v Power* (2004) 220 CLR 1 at [79] (McHugh J). See also *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at [28] (Kiefel CJ, Bell, Keane and Gordon JJ); *Namoa v The Queen* (2021) 271 CLR 442 at [17] (Gleeson J).

[41] (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

other way in which a particular interpretation of the Constitution can be altered … is by constitutional amendment pursuant to s 128 of the Constitution".[42]

25 *First*, *SDCV* does not rest upon a principle carefully worked out in a significant succession of cases,[43] nor does it form part of a "definite stream of authority".[44]

25.1 Prior to *SDCV*, the authorities had left open the question of whether the Commonwealth Parliament could enact a provision akin to s 46(2) without infringing Ch III.[45] Neither ***Gypsy Jokers*** *Motorcycle Club Inc v Commissioner of Police*[46] nor *Condon v* ***Pompano*** *Pty Ltd*[47] stood as authority against the argument advanced in *SDCV*.[48] Nor do they stand against the argument here.[49]

10 25.2 The Court had also explicitly warned that its reasoning and conclusions in respect of Ch III constraints on State Parliaments could not be "directly translated and applied to the exercise of the judicial power of the Commonwealth by a Ch III court".[50]

25.3 In addition, the plurality's conception of "practical injustice", reflected in the two points at paragraph 21 above, was novel and unsupported by any previous authority. And, for the reasons explained in Section D.3 below, it is contrary to principle.

26 *Second*, as is apparent from the above, the Justices who upheld the validity of s 46(2) reached that conclusion for different reasons.[51] Their reasoning diverged on the construction of s 46(2) and, consequently, on why the provision did not infringe Ch III.

42 *Alqudsi v The Queen* (2016) 258 CLR 203 at [66] (French CJ). See also *Lange* (1997) 189 CLR 520 at 554 (the Court); *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [68] (French CJ).

43 *John* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

44 *Queensland v Commonwealth* (1977) 139 CLR 585 at 630 (Aickin J).

45 See *Thomas v Mowbray* (2007) 233 CLR 307 at [31] (Gleeson CJ), [122]-[125] (Gummow and Crennan JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [186] (Crennan J; Gleeson CJ agreeing).

46 (2008) 234 CLR 532.

47 (2013) 252 CLR 38.

48 See *SDCV* (2022) 96 ALJR 1002 at [147], [148] (Gageler J), [204]-[213] (Gordon J); cf at [55]-[58] (Kiefel CJ, Keane and Gleeson JJ; Steward J agreeing). No member of the Court in *SDCV* accepted the Commonwealth's argument that *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 stood as authority against the appellant's argument: see *SDCV* (2022) 96 ALJR 1002 at [149] (Gageler J), [214] (Gordon J; Edelman J agreeing).

49 Both schemes can be understood as complying with the "reasonably necessary" limit discussed in Section D.1 below.

50 *Pompano* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ).

51 See *John* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

27 *Third*, the significant differences in the reasoning of the Justices comprising the majority have the effect that far from producing a "useful result", *SDCV* has been productive of "inconvenience".[52] So much may be demonstrated by considering the position in which *SDCV* places the Federal Court.[53] Because *SDCV* produced no binding statement on the proper construction of s 46(2), the construction adopted by the Full Court of the Federal Court in *SDCV*[54] remains binding on a single judge of the Federal Court. A single judge would therefore be precluded from affording an appellant any opportunity to respond to certified material, regardless of the particular circumstances of the case. The judge would be required to do so in circumstances where he or she would also be bound to proceed on the basis that s 46(2) does not infringe Ch III — even though there is no binding reasoning of this Court for that conclusion. More generally, the Commonwealth Parliament presently is in a position of not knowing whether a law that operates analogously to s 46(2) would infringe Ch III. If such a provision were interpreted consistently with the plurality's construction, then it "may well" be invalid.[55]

28 *Fourth*, with one exception, there is no evidentiary basis to conclude that *SDCV* has been independently acted upon in a manner that militates against reconsideration.[56] The exception is that the *Administrative Review Tribunal Act 2024* (Cth) (**ART Act**), which will abolish the AAT and replace it with a new Administrative Review Tribunal (**ART**), includes provisions equivalent to s 46 of the AAT Act.[57] However, that matter should be given little weight in circumstances where the Bill was introduced into Parliament under the shadow of this proceeding, and by the time this proceeding is heard and determined, the provisions will have been operative for only a brief period.[58] Unless the Commonwealth can identify some other legislative or administrative reliance, "the only

[52] *John* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

[53] Compare *Shaw* (2003) 218 CLR 28 at [34], [39] (Gleeson CJ, Gummow and Hayne JJ).

[54] (2021) 284 FCR 357.

[55] *SDCV* (2022) 96 ALJR 1002 at [308] (Steward J).

[56] See *John* (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

[57] ART Act, Pt 7 Div 6. The Revised Explanatory Memorandum states that apart from one provision that "had been added to provide clarity", Div 6 contains "minor updates to reflect modern drafting practices" that "do not affect the operation or effect of the provision[s]": at [1146], [1150], [1152], [1155], [1160], [1163].

[58] By s 2(1) of the ART Act, that Act will commence on a day to be fixed by proclamation or 1 July 2025, whichever is the earlier. As to transitional arrangements, see *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth), Sch 16 items 25-27.

responsible approach to be taken by the Court is to proceed on the basis that [*SDCV*] has not" otherwise been relied upon.[59]

C PROPER CONSTRUCTION OF SECTION 46(2)

29 Before considering the validity of s 46(2), the "starting point" is to construe the provision to determine its legal and practical operation.[60] That exercise must account for the framework within which the provision sits, being a "regime governing the merits review function conferred upon the Tribunal in relation to security assessments given by ASIO under the ASIO Act".[61] That regime was outlined in detail by Gordon J in *SDCV*.[62] Section 46 of the AAT Act may then be engaged if and when a party to the proceeding in the Tribunal commences an appeal under s 44 of the AAT Act.

30 In that event, s 46(1)(a) requires the Tribunal to "cause to be sent to the Court all documents that were before the Tribunal in connexion with the proceeding to which the appeal … relates and are relevant to the appeal".[63] Until the documents are returned to the Tribunal at the conclusion of the appeal,[64] "the documents are available to the Federal Court, and *ordinarily to the parties*, in the conduct of the appeal so as to be able to be considered by the Federal Court in the determination of the appeal".[65]

31 However, where a certificate under s 39B(2)(a) is in force, s 46(2) imposes an obligation, to do all things necessary to ensure non-disclosure of certified "matter"[66] to "any person other than a member of the court as constituted for the purposes of the proceeding". Although the Court may have some flexibility as to how to achieve that outcome, there is "no flexibility as to the outcome to be achieved: the wholesale preclusion of disclosure of any part of the certified information to any other person, including any party to the appeal as well as any legal representative of any party to the appeal".[67] The *only* exception

[59] *Vanderstock v Victoria* (2023) 98 ALJR 208 at [131] (Kiefel CJ, Gageler and Gleeson JJ), see also at [939] (Jagot J); cf at [437] (Gordon J), [785]-[788] (Steward J).

[60] *SDCV* (2022) 96 ALJR 1002 at [180] (Gordon J). See generally *Gypsy Jokers* (2008) 234 CLR 532 at [11] (Gummow, Hayne, Heydon and Kiefel JJ).

[61] *SDCV* (2022) 96 ALJR 1002 at [180] (Gordon J).

[62] (2022) 96 ALJR 1002 at [182]-[184].

[63] See also *Federal Court Rules 2011* (Cth), rr 33.23, 33.26.

[64] AAT Act, s 46(1)(b).

[65] *SDCV* (2022) 96 ALJR 1002 at [108] (Gageler J) (emphasis added), see also at [187] (Gordon J), [245] (Edelman J).

[66] "What the term 'matter' captures will depend on the terms of the certificate — for example, whether the certificate attaches a range of documents or simply identifies a particular piece of factual information, topic or issue as the subject of the certificate": *SDCV* (2022) 96 ALJR 1002 at [186] (Gordon J).

[67] *SDCV* (2022) 96 ALJR 1002 at [109] (Gageler J).

is that there may be disclosure "to an officer of the court in the course of the performance of his or her duties as an officer of the court".[68] That exception does not permit the Court to appoint a "special advocate".[69]

32 In short, s 46(2) imposes a "blanket and inflexible non-disclosure requirement".[70] That blanket requirement:[71]

> will not be a problem for a party to the appeal who is already aware of the certified information and is already aware that the certified information had been in a document before the AAT in connection with the proceeding to which the appeal relates. That party will have the benefit of knowing that the information will automatically be available to the Federal Court on the hearing of the appeal and will be able to tailor submissions on the appeal accordingly.

33 However, by reason of s 46(2), that matter will never be known to a person in the position of the Plaintiff.[72] It follows that "the blanket proscription may well be a problem" for such a person.[73]

D SECTION 46(2) INFRINGES CH III

D.1 Procedural fairness as an essential characteristic of Ch III courts

34 It is an "essential characteristic" [74] of Ch III courts that, in exercising *any* jurisdiction conferred upon them, they observe the requirements of procedural fairness *in the exercise of that jurisdiction*.[75] That characteristic is "essential" because procedural fairness lies at the "heart of the judicial function".[76] It is either inherent in the nature of "courts" themselves[77] or inherent in the nature of judicial power.[78]

68 AAT Act, s 46(4).

69 *SDCV* (2022) 96 ALJR 1002 at [98] (Kiefel CJ, Keane and Gleeson JJ), [199] (Gordon J), [220], [256]-[266] (Edelman J); cf at [295] (Steward J).

70 *SDCV* (2022) 96 ALJR 1002 at [189] (Gordon J). See also *SDCV* (2021) 284 FCR 357 at [21] (Rares J).

71 *SDCV* (2022) 96 ALJR 1002 at [110] (Gageler J), see also at [187] (Gordon J).

72 *SDCV* (2022) 96 ALJR 1002 at [111] (Gageler J), [187], [190] (Gordon J).

73 *SDCV* (2022) 96 ALJR 1002 at [111] (Gageler J).

74 *Pompano* (2013) 252 CLR 38 at [67] (French CJ), [156] (Hayne, Crennan, Kiefel and Bell JJ), [181]-[188] (Gageler J); *SDCV* (2022) 96 ALJR 1002 at [50] (Kiefel CJ, Keane and Gleeson JJ), [106] (Gageler J), [172] (Gordon J).

75 See ***Oakey*** *Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33 at [47] (Kiefel CJ, Bell, Gageler and Keane JJ). See also *SDCV* (2022) 96 ALJR 1002 at [129]-[130] (Gageler J), [196] (Gordon J).

76 ***HT*** *v The Queen* (2019) 269 CLR 403 at [64] (Gordon J), quoting *International Finance Trust v New South Wales Crime Commission* (2009) 240 CLR 319 at [54] (French CJ). See also *South Australia v* ***Totani*** (2010) 242 CLR 1 at [62] (French CJ).

77 *Cameron v Cole* (1944) 68 CLR 571 at 589 (Rich J), cited in *HT* (2019) 269 CLR 403 at [17] (Kiefel CJ, Bell and Keane JJ); *Pompano* (2013) 252 CLR 38 at [177] (Gageler J). See also *Gypsy Jokers* (2008) 234 CLR 532 at [103] (Kirby J); *Totani* (2010) 242 CLR 1 at [59]-[66] (French CJ).

78 See *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [79]-[82] (Gaudron J).

35 To say that a "court" must observe the requirements of procedural fairness is another way of saying that a court cannot adopt a procedure that is apt to cause "practical injustice".[79] The "injustice" to which that expression refers is *procedural* injustice,[80] for the "principles of procedural fairness focus upon procedures rather than outcomes".[81] That directs attention to the fairness afforded to the parties *within* the proceeding in which a court is exercising its jurisdiction.[82] And, in the context of an appeal under s 44 of the AAT Act, the focus must be on what is required in the context of an adversarial proceeding that will resolve a controversy between parties about existing legal rights or obligations.[83]

36 As a "general rule", in an adversarial system, "opposing parties will know what case an opposite party seeks to make and how that party seeks to make it".[84] The rationale for that general rule is revealed by consideration of the consequences of departing from it: an unyielding requirement for evidence that is acted upon by a court to be kept secret has the capacity to result in the denial to a particular party of an opportunity to respond to particular evidence which is "fair" in the circumstances of a particular case.[85] Therein lies the potential for "practical injustice", which stands to undermine the integrity of the court as an institution that exists for the administration of justice.[86] Of course, whether an opportunity to respond to evidence is "fair" in a particular case will depend upon all of the circumstances.[87] Relevant considerations include "the significance of the evidence to the resolution of the controversy before the court and to any competing public interest that might exist in maintaining the secrecy of the evidence".[88]

[79] See *SDCV* (2022) 96 ALJR 1002 at [67] (Kiefel CJ, Keane and Gleeson JJ), [132] (Gageler J).

[80] *SDCV* (2022) 96 ALJR 1002 at [132] (Gageler J).

[81] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [16] (the Court). See also *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [59] (Gaudron and Gummow JJ).

[82] See *Oakey* (2021) 272 CLR 33 at [47] (Kiefel CJ, Bell, Gageler and Keane JJ). See also *Pompano* (2013) 252 CLR 38 at [157] (Hayne, Crennan, Kiefel and Bell JJ) (emphasis added) ("if legislation provides for novel procedures which depart from the general rule described, the question is whether, taken as a whole, **the court's procedures for resolving the dispute** accord both parties procedural fairness and avoid 'practical injustice'").

[83] See *SDCV* (2022) 96 ALJR 1002 at [115]-[117], [121] (Gageler J).

[84] *HT* (2019) 269 CLR 403 at [17] (Kiefel CJ, Bell and Keane JJ), citing *Pompano* (2013) 252 CLR 38 at [157] (Hayne, Crennan, Kiefel and Bell JJ). See also *SDCV* (2022) 96 ALJR 1002 at [136] (Gageler J), [176] (Gordon J).

[85] *SDCV* (2022) 96 ALJR 1002 at [142] (Gageler J).

[86] *Pompano* (2013) 252 CLR 38 at [186], [188]-[189] (Gageler J).

[87] *SDCV* (2022) 96 ALJR 1002 at [141] (Gageler J). See also *Pompano* (2013) 252 CLR 38 at [195] (Gageler J); *HT* (2019) 269 CLR 403 at [18] (Kiefel CJ, Bell and Keane JJ), [78]-[79] (Gordon J).

[88] *SDCV* (2022) 96 ALJR 1002 at [141] (Gageler J), see also at [176] (Gordon J).

37 Attention to those matters makes plain that "[f]airness is not a one-size-fits-all concept"[89] and so the requirements of procedural fairness are not "absolute".[90] Rather, in some cases, a departure from the general rule may be "justified" having regard to all of the circumstances of a particular case.[91] That understanding of procedural fairness recognises that it is a requirement that is to be applied in the "real world".[92] In that way, it is inherent in the essential characteristic itself that, in some circumstances, a court may depart from the general rule.[93]

38 How, then, is the Court to determine whether a particular legislative departure from the general rule infringes Ch III of the Constitution?[94]

10 39 The answer can be derived by analogy with other constitutional requirements that are also not "absolute", in the sense that legislative departures from them may be "justified".[95] At least in circumstances where (as here) a law directly alters the requirements of procedural fairness, the appropriate standard is that a departure will be justified only if it is "no more than is reasonably necessary to protect a compelling public interest".[96]

40 For the countervailing purpose to be "compelling"[97] or "strong"[98], it "must be seen to be protective of a public interest of sufficient importance reasonably to warrant that label".[99] In addition, the purpose must be "legitimate", in the sense that it must be "compatible

89 *SDCV* (2022) 96 ALJR 1002 at [237] (Edelman J).

90 *SDCV* (2022) 96 ALJR 1002 at [176] (Gordon J), see also at [142] (Gageler J).

91 See *SDCV* (2022) 96 ALJR 1002 at [136] (Gageler J), [176]-[178] (Gordon J), [218], [235] (Edelman J).

92 *Pompano* (2013) 252 CLR 38 at [68] (French CJ). See also *Dietrich v The Queen* (1992) 177 CLR 292 at 363 (Gaudron J), quoted in *SDCV* (2022) 96 ALJR 1002 at [178] (Gordon J).

93 See ***Hogan*** *v Hinch* (2011) 243 CLR 506 at [21], [46] (French CJ), [85]-[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Pompano* (2013) 252 CLR 38 at [68] (French CJ).

94 See *SDCV* (2022) 96 ALJR 1002 at [137] (Gageler J). See also *Pompano* (2013) 252 CLR 38 at [169] (Hayne, Crennan, Kiefel and Bell JJ).

95 See *Lange* (1997) 189 CLR 520 at 561 (the Court); ***Mulholland*** *v Australian Electoral Commission* (2004) 220 CLR 181 at [40] (Gleeson CJ) (implied freedom); *Palmer v Western Australia* (2021) 272 CLR 505 at [61] (Kiefel CJ and Keane J), [85], [129]-[138] (Gageler J), [190]-[197] (Gordon J), [261] (Edelman J) (s 92); *Jones* (2023) 97 ALJR 936 at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [78] (Gordon J), [154] (Edelman J) (*Lim* principle); ***Garlett*** *v Western Australia* (2022) 277 CLR 1 at [142] (Gageler J), [257]-[258] (Edelman J) (*Kable* principle).

96 See *SDCV* (2022) 96 ALJR 1002 at [138] (Gageler J), see also at [218], [231], [235], [238]-[239], [241], [267] (Edelman J); *Mulholland* (2004) 220 CLR 181 at [40] (Gleeson CJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [24] (Gleeson CJ); *Hogan* (2011) 243 CLR 506 at [95]-[99] (the Court); ***Brown*** *v Tasmania* (2017) 261 CLR 328 at [201] (Gageler J), [478] (Gordon J); *Jones* (2023) 97 ALJR 936 at [154] (Edelman J).

97 See *SDCV* (2022) 96 ALJR 1002 at [138] (Gageler J), [231], [238], [267] (Edelman J). See also *Brown* (2017) 261 CLR 328 at [204] (Gageler J); *Clubb* (2019) 267 CLR 171 at [184] (Gageler J).

98 *SDCV* (2022) 96 ALJR 1002 at [218], [239], [241] (Edelman J).

99 *Brown* (2017) 261 CLR 328 at [207] (Gageler J).

with the constitutionally prescribed system of government".[100] Taken together, those requirements ensure that the circumstances in which Ch III permits a departure from the general rule are "exceptional".[101] Those circumstances must be confined, for otherwise the exceptions would swallow the rule.[102] That would "sap[] confidence in the judicial process and undermine[] the integrity of the court as an institution that exists for the administration of justice".[103]

41 As to the further limitation on the legislative *means* to achieve such a purpose, in this context, as in others, the term "necessary" does not mean "essential" or indispensable" but rather "reasonably appropriate and adapted".[104] That invokes a notion of "proportionality", but does not mandate the use of any particular analytical tool.[105] Put another way, a law that departs from the general rule will be valid if it is "closely"[106] or "narrowly"[107] tailored to the achievement of a "compelling" purpose.

42 In short, while Ch III does not preclude the Commonwealth Parliament from legislating to depart from the "general rule",[108] it does place some boundaries on the Parliament's ability to do so; and *every* legislative departure from the general rule must be justified. Otherwise, there would be nothing to stop the Parliament from "obliterat[ing]" the general rule,[109] thereby depriving a Ch III court of an essential characteristic and substantially impairing its institutional integrity.[110]

[100] *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court). See also *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 (***Benbrika (No 1)***) at [78] (Gageler J); *Garlett* (2022) 277 CLR 1 at [144] (Gageler J).

[101] See *SDCV* (2022) 96 ALJR 1002 at [177] (Gordon J), see also at [232]-[233], [238], [241] (Edelman J), [269] (Steward J) ("narrow").

[102] *Garlett* (2022) 277 CLR 1 at [140] (Gageler J).

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

[104] *Jones* (2023) 97 ALJR 936 at [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), citing *Mulholland* (2004) 220 CLR 181 at [39] (Gleeson CJ).

[105] See *Jones* (2023) 97 ALJR 936 at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

[106] See *Brown* (2017) 261 CLR 328 at [204] (Gageler J); ***Clubb*** *v Edwards* (2019) 267 CLR 171 at [184] (Gageler J); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [167], [171] (Gageler J).

[107] See *Comcare v Banerji* (2019) 267 CLR 373 at [54] (Gageler J); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1 at [100] (Gageler J). See also *Benbrika (No 1)* (2021) 272 CLR 68 at [151], [160], [177] (Gordon J).

[108] *Pompano* (2013) 252 CLR 38 at [116]-[120], [156]-[157] (Hayne, Crennan, Kiefel and Bell JJ); *SDCV* (2022) 96 ALJR 1002 at [137] (Gageler J), [177]-[178] (Gordon J).

[109] See *SDCV* (2022) 96 ALJR 1002 at [179] (Gordon J).

[110] See *SDCV* (2022) 96 ALJR 1002 at [172], [194] (Gordon J), [228], [231], [267] (Edelman J). See generally *Forge v Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ), see also at [41] (Gleeson CJ), [192] (Kirby J). An alternative means of analysis, which leads to the same result, is that Ch III prohibits the Parliament from requiring a court to adopt a procedure that has the capacity to result in the court making an order that finally alters or determines a right or legally protected interest of a person without affording that person a fair opportunity to respond to evidence on which that order

D.2 Section 46(2) infringes Ch III

43 When the Federal Court is hearing and determining an appeal under s 44 of the AAT Act, it is performing its adjudicative function within an adversarial system.[111] But for s 46(2), the proceeding would therefore be governed by the "general rule".[112] Because s 46(2) requires a departure from that rule, it must be assessed against the requirements of Ch III by applying the principles outlined above. The question is whether s 46(2) goes further than "reasonably necessary" to protect a legitimate and compelling public interest.

44 The end relevantly pursued by s 46(2) can be identified, at the appropriate level of generality,[113] as prevention of the disclosure of information where that disclosure would be injurious to the public interest because it would prejudice the security of Australia or involve the disclosure of deliberations or decisions of the Cabinet. That end is capable of being characterised as "compelling" and "legitimate".[114]

45 As explained at paragraph 33 above, s 46(2) achieves that end by the means of a "blanket and inflexible non-disclosure requirement".[115] By adopting that means, the Parliament has mandated that the general rule of procedural fairness be departed from to an extent far greater than reasonably necessary to protect the end. As Gageler J put it in *SDCV*:[116]

> The problem with s 46(2) in that operation lies in its rigidity in compelling a court never to disclose the certified information to a party or to a legal representative of a party **irrespective of the degree of relevance or perceived relevance of the information to the resolution of an issue in the appeal and irrespective of the degree of prejudice to security or the defence or international relations of Australia** that would result from disclosure to that party or legal representative.

might be made: see *Pompano* (2013) 252 CLR 38 at [177], [188] (Gageler J); *SDCV* (2022) 96 ALJR 1002 at [139]-[141], [150] (Gageler J).

111 *SDCV* (2022) 96 ALJR 1002 at [121] (Gageler J).

112 *Pompano* (2013) 252 CLR 38 at [157] (Hayne, Crennan, Kiefel and Bell JJ); *HT* (2019) 269 CLR 403 at [17] (Kiefel CJ, Bell and Keane JJ).

113 *NZYQ* (2023) 97 ALJR 1005 at [40] (the Court). See generally *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at [103]-[105] (Gageler J).

114 *SDCV* (2022) 96 ALJR 1002 at [239] (Edelman J). See also *Hogan* (2011) 243 CLR 506 at [21] (French CJ) and the authorities cited at fn 162 therein; *Pompano* (2013) 252 CLR 38 at [68] (French CJ).

115 *SDCV* (2022) 96 ALJR 1002 at [189] (Gordon J), see also at [110]-[112], [152]-[161] (Gageler J).

116 *SDCV* (2022) 96 ALJR 1002 at [152] (emphasis added).

46 To the same effect, Gordon J said that s 46(2) "impermissibly excludes procedural fairness **for a whole class of case** by removing the ability of the Federal Court to respond to potential 'practical injustice'".[117] Her Honour further explained that the provision:[118]

> deprives the Court of the power to determine whether procedural fairness, **judged by reference to practical considerations arising in a particular case**, requires disclosure of any aspect of the certified matter to the applicant or their legal representatives before an order is made, and it deprives the Court of the power to determine the procedure by which the disclosure might be made.

47 Edelman J identified the same problem:[119]

> There is … no provision in the AAT Act for a court to mitigate the procedural unfairness occasioned by s 46(2) by any measure that has **regard to both the interests of the appellant and the importance of the countervailing interest in s 39B(2)**. There is no power for a court to consider disclosure of some or all of the material by balancing that matter against the potential extreme procedural unfairness to an appellant, **even where the public interest involved under s 39B(2) might be trivial**, such as a minor aspect of the international relations of Australia or something at the low end of the spectrum of matters that could form the basis for a claim of privilege by the Crown in right of the Commonwealth in the documents.

48 Each of those passages recognises that, in a particular case brought under s 44 of the AAT Act, withholding some information from an appellant may be "justified" depending on the particular circumstances. That is consistent with the view adopted by Steward J.[120] The problem with s 46(2) is that it is vastly over-broad. Far from being closely tailored to cases where non-disclosure is properly "justified", it applies also to cases where it simply cannot be said that withholding the material is "reasonably necessary" to protect a legitimate and compelling public interest — for instance, where the information is centrally relevant and the public interest said to justify non-disclosure is trivial. In that way, s 46(2) "binds the Federal Court to a procedure that has the potential to result in unfairness".[121]

49 That is not to say that Ch III entrenches a requirement that procedural fairness can only be afforded by means of case-by-case decision-making by a court, as opposed to a standardised legislative rule.[122] It is open to the Parliament to fashion "novel

[117] *SDCV* (2022) 96 ALJR 1002 at [179] (emphasis added).

[118] *SDCV* (2022) 96 ALJR 1002 at [191] (emphasis added), see also at [189], [194]. Compare *Pompano* (2013) 252 CLR 38 at [88] (French CJ).

[119] *SDCV* (2022) 96 ALJR 1002 at [246] (emphasis added), see also at [255].

[120] *SDCV* (2022) 96 ALJR 1002 at [306], [309].

[121] *SDCV* (2022) 96 ALJR 1002 at [189] (Gordon J).

[122] Cf *SDCV* (2022) 96 ALJR 1002 at [84]-[90] (Kiefel CJ, Keane and Gleeson JJ).

procedures",[123] including by imposing a hard-edged, standardised rule.[124] But the imposition of a hard-edged, standardised rule creates a risk of invalidity, particularly where it is applied broadly and absolutely.[125] In short, a standardised rule will not necessarily be constitutionally infirm — but its validity or otherwise will ultimately depend upon whether the rule can be "justified" in the context of the particular statutory scheme in which it appears.[126]

50 The lack of reasonable necessity in s 46(2) is further illustrated by "what other course was available to the legislature".[127] For example, it could have adopted one or more of the following mechanisms:

10 50.1 The AAT Act could have permitted the Federal Court to "balance the prejudicial effect of non-disclosure on the ability of a party to present that party's case"[128] and, as a consequence, allowed the Court to "decline to use material where it would be procedurally unfair".[129] That would have accorded with Steward J's construction of the Act and drawn the scheme closer to that upheld in *Gypsy Jokers*.[130]

50.2 The AAT Act could have provided that the ASIO Minister, as the person who issues s 39B(2) certificates, must provide evidence to the court that justifies the issuance of the certificate.[131] Such evidence would enable the court to form a positive state of satisfaction that any procedural unfairness to an appellant is reasonably necessary. That would have drawn the scheme closer to that upheld in *Pompano*.[132]

[123] See, eg, the procedures set out in the *Justice and Security Act 2013* (UK) and the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**), respectively discussed in *SDCV* (2022) 96 ALJR 1002 at [160] (Gageler J), [259]-[266] (Edelman J).

[124] *SDCV* (2022) 96 ALJR 1002 at [178] (Gordon J), quoting *Pompano* (2013) 252 CLR 38 at [157] (Hayne, Crennan, Kiefel and Bell JJ).

[125] *SDCV* (2022) 96 ALJR 1002 at [150] (Gageler J). This is a manifestation of the more general point that hard-edged rules are prone to "produce[] errors of over- or under-inclusiveness": Sullivan, "Foreword: The Justices of Rules and Standards" (1992) 106 *Harvard Law Review* 22 at 58.

[126] *Pompano* (2013) 252 CLR 38 at [157] (Hayne, Crennan, Kiefel and Bell JJ); *SDCV* (2022) 96 ALJR 1002 at [178] (Gordon J).

[127] *Wainohu* (2011) 243 CLR 181 at [107]-[108] (Gummow, Hayne, Crennan and Bell JJ). See also *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [14] (Gleeson CJ); *Brown* (2017) 261 CLR 328 at [139] (Kiefel CJ, Bell and Keane JJ); *ASF17* (2024) 98 ALJR 782 at [104] (Edelman J).

[128] *SDCV* (2022) 96 ALJR 1002 at [148] (Gageler J).

[129] *SDCV* (2022) 96 ALJR 1002 at [207] (Gordon J; Edelman J agreeing).

[130] *SDCV* (2022) 96 ALJR 1002 at [244]-[246] (Edelman J).

[131] *SDCV* (2022) 96 ALJR 1002 at [250]-[251] (Edelman J).

[132] See *SDCV* (2022) 96 ALJR 1002 at [145]-[146] (Gageler J), [211] (Gordon J), [244] (Edelman J). In *Pompano*, the Court had a discretion to declare information to be "criminal intelligence" and, in exercising that discretion, it could consider unfairness to a respondent: (2013) 252 CLR 38 at [162] (Hayne, Crennan, Kiefel and Bell JJ).

50.3 The AAT Act could have provided that the court may disclose the "gist" of the material the subject of the certificate to an appellant, without revealing the "matter contained in the document". That would accord with Steward J's construction of the Act and with the position in comparable common law jurisdictions, where the importance of "gisting" to ensure procedural fairness has been recognised.[133]

50.4 The AAT Act could have mitigated the unfairness to an appellant by authorising the appointment of a special advocate. That would accord with Steward J's construction. Special advocate schemes are known to the Parliament: as Edelman J pointed out in *SDCV*, the NSI Act "makes careful provision" for the appointment of special advocates.[134] Such schemes are also well-known to the Parliaments of other common law jurisdictions.[135]

51 In short, s 46(2) requires a departure from the "general rule" that is more than reasonably necessary to protect the relevant public interest. In doing so, it substantially impairs the institutional integrity of the Federal Court. The provision therefore infringes Ch III.

D.3 A broader conception of "practical injustice"?

52 That outcome cannot be avoided by the broader conception of "practical injustice" adopted by the plurality in *SDCV*, reflected in the two points set out at paragraph 21 above. Neither of those points can be accepted.

53 The *first* point focuses on the nature of the appellant's rights. The plurality construed the appellant's statutory right to a visa as having a procedural condition attached to it: see paragraph 21.1 above. That conflates the *substance* of the right itself with the *procedure* by which it may be taken away. In that way, the reasoning is inconsistent with the fact that "practical injustice" refers to procedural injustice: see paragraph 36 above. The reasoning also assumes that the content of procedural fairness can be reduced to nothing if the substantive right is sourced in statute. That assumption is false: as explained above,

[133] As to the United Kingdom, see *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 at [6] (Lord Neuberger PSC; Lady Hale, Lords Clarke, Sumption and Carnwath JJSC agreeing), quoting *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at [59] (Lord Phillips). But see *Tariq v Home Office* [2012] 1 AC 452. As to Canada, see *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350 at [73] (McLachlin CJ for the Court) (describing the practice of gisting adopted by the Security Intelligence Review Committee established under the *Canadian Security Intelligence Service Act*, SC 1984, c 21).

[134] *SDCV* (2022) 96 ALJR 1002 at [261], see generally at [259]-[266].

[135] See, eg, *Justice and Security Act 2013* (UK), s 9; *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 85-85.6.

Ch III requires that any departure from the general rule must be justified, irrespective of whether the rights at issue are sourced in the common law or in statute.[136]

54 The focus of the *second* point was that "practical injustice" allows for consideration of matters wholly external to the proceeding in which procedural fairness was to be afforded (the proceeding under s 44 of the AAT Act) — namely, what might happen in a hypothetical judicial review proceeding in the Federal Court (under s 39B of the Judiciary Act) or in a different court altogether (the High Court, under s 75(v) of the Constitution): see paragraph 21.2 above. But those matters are "beside the point" in assessing whether s 46(2) gives rise to practical injustice.[137] There are five problems with that reasoning.

55 *First*, for the reasons given above, the test of validity involves a question as to the "justification" of any legislative departure from the general rule. While considerations of "practical injustice" may inform that analysis, they are not usefully applied as the sole criterion for validity.

56 *Second*, that question is specific to the particular conferral of federal jurisdiction in issue. While the Commonwealth Parliament is not required to confer federal jurisdiction on a court, if it chooses to do so, that conferral "is necessarily conditioned by the requirement that it observe procedural fairness **in the exercise of that jurisdiction**".[138] The risk to the Court's integrity lies in the potential for unfairness in one or more of its procedures to sap confidence in the judicial process[139] — that risk is not diminished (and may indeed be exacerbated) by the fact that there exists *another* assertedly fair procedure of which a litigant could have availed themselves.

57 *Third*, the reasoning assumes that a public interest immunity claim over certified material would inevitably be upheld. But that is not necessarily so.[140] A party claiming public interest immunity "bear[s] a heavy burden":[141] such claims must be "articulated with rigour and precision, and supported by evidence demonstrating the currency and sensitivity of the information, so as to constitute a compelling case for secrecy".[142]

[136] See *SDCV* (2022) 96 ALJR 1002 at [174] (Gordon J), [222] (Edelman J).
[137] *SDCV* (2022) 96 ALJR 1002 at [128] (Gageler J), see also at [196] (Gordon J).
[138] *Oakey* (2021) 272 CLR 33 at [47] (Kiefel CJ, Bell and Keane JJ) (emphasis added). See also *SDCV* (2022) 96 ALJR 1002 at [129]-[130] (Gageler J), [196] (Gordon J).
[139] *Pompano* (2013) 252 CLR 38 at [186] (Gageler J)
[140] See *SDCV* (2022) 96 ALJR 1002 at [124] (Gageler J).
[141] *Sagar v O'Sullivan* (2011) 193 FCR 311 at [90] (Tracey J).
[142] *Victoria v Brazel* (2008) 19 VR 553 at [68] (the Court).

58 *Fourth*, the reasoning also assumes that the Federal Court having the ability to use all of the documents that were before the Tribunal will be forensically advantageous to an applicant. But the fact that the Federal Court can have regard to, and adjust the weight that it gives to, certified information "is not part of the solution. Actually, it is part of the problem".[143] That is because evidence that has been insulated from challenge, or from contextual explanation, "may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial."[144]

59 *Fifth*, it is not to the point to observe that a person who is adversely affected by an ASA may seek judicial review of a decision to issue a certificate under s 39A or s 39B. The question in such a proceeding would be whether the decision was vitiated by jurisdictional error. That would involve no consideration of whether disclosure would in fact be contrary to the public interest or of the impact of non-disclosure on the fairness of the conduct of the appeal.[145] And if such a proceeding were to fail, s 46(2)'s "intransigent preclusive effect on disclosure" would remain.[146]

60 For those reasons, the plurality's approach to "practical injustice" in *SDCV* provides no answer to the Plaintiff's case in this proceeding.

PART VI — ORDERS SOUGHT

61 The Court should answer the questions arising in the proceeding for its opinion (see **SCB 42 [26]**) as follows: (1) Yes; (2) The Defendants.

PART VII — ESTIMATE OF TIME

62 It is estimated that up to 3 hours will be required for the Plaintiff's oral argument.

Dated: 23 August 2024

Craig Lenehan
02 8257 2530
craig.lenehan@stjames.net.au

Thomas Wood
03 9225 6078
twood@vicbar.com.au

Shawn Rajanayagam
03 9225 6524
rajanayagam@vicbar.com.au

Counsel for the Plaintiff

[143] *SDCV* (2022) 96 ALJR 1002 at [155] (Gageler J).
[144] *Al Rawi v Security Service* [2012] 1 AC 531 at [93] (Lord Kerr JSC).
[145] *SDCV* (2022) 96 ALJR 1002 at [156] (Gageler J), [197]-[198] (Gordon J).
[146] *SDCV* (2022) 96 ALJR 1002 at [156] (Gageler J).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

MJZP
Plaintiff

and

DIRECTOR-GENERAL OF SECURITY
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

ANNEXURE TO THE SUBMISSIONS OF THE PLAINTIFF

Pursuant to Practice Direction No 1 of 2019, the Appellant sets out below a list of the constitutional provisions, statues and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*	Current	Ch III
	Statutory provisions		
2.	*Administrative Appeals Tribunal 1975* (Cth)	Compilation 53 (12 August 2023 to 21 May 2024)	ss 38A, 39A, 39B, 44, 46
3.	*Administrative Review Tribunal Act 2024* (Cth)	As made	s 2, Pt 7 Div 6
4.	*Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth)	As made	Sch 16, items 25-27
5.	*Australian Security Intelligence Organisation Act 1979* (Cth)	Compilation 63 (24 July 2021 to 31 August 2021)	ss 17, 37, 54
6.	*National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)	Compilation 10 (9 December 2021 to present)	Pt 3A Div 3 Subdiv C
7.	*Telecommunications Act 1997* (Cth)	Compilation 100 (17 June 2021 to 31 August 2021)	s 315A