HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

MJZP
Plaintiff

and

DIRECTOR-GENERAL OF SECURITY
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

PLAINTIFF'S REPLY

PART I — CERTIFICATION

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

PART II — REPLY

A REPEAL OF THE AAT ACT

2 Although the AAT Act has now been repealed, s 46(2) of that Act will continue to govern the Plaintiff's appeal to the Federal Court:[1] **Cth [5]**. That s 46 of the AAT Act has been repealed does not weigh against re-opening *SDCV* in circumstances where the ART Act contains provisions that are "materially identical" to s 46: **Cth [23]**; cf **NSW [9(i)]**.

B RE-OPENING

10 3 ***SDCV* has no *ratio*.** The Plaintiff's point about the absence of a ratio has been misunderstood. The reason for making that point was explained at **PS [22]**. The correct analogy is with *Lange*, where the difficulties in identifying any binding statement of constitutional principle from *Stephens* and *Theophanous* meant that: (a) those decisions did not have the same authority they would have had if Deane J had agreed with the reasoning of Mason CJ, Toohey and Gaudron JJ in each case; and (b) the "appropriate course" was to examine the relevant issues as a matter of principle and not authority.[2] "[G]eneral statements concerning the occasions when this Court will reconsider one of its previous decisions give little guidance in [such a] case";[3] however, to the extent they apply, they are addressed at **PS [24]-[28]** and further at [7] below.

20 4 The Commonwealth urges this Court to "strain to construct"[4] a *ratio* by sidelining the "*actual* step[s]" in the reasoning of Steward J: cf **Cth [9], [11]-[12]**; see also **WA [24]-[28]**. His Honour concluded that "*[b]ecause* the duty and capacity of the Court to provide different forms of procedural fairness" that his Honour had identified were "*not* necessarily precluded" by s 46(2), "it is a valid law".[5] His Honour expressly stated that "[i]f it were otherwise" — that is, if the different forms of procedural fairness he had identified *were* necessarily precluded by s 46(2) — he "may well have formed a different view".[6] In other words, if his Honour had construed the law in the same way as the plurality (and the minority), then his Honour might have held s 46(2) invalid.

5 It is against that backdrop that his Honour went onto consider that class of case in which

1 See *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth), s 2; Sch 16 item 27; Sch 17.
2 *Lange* (1997) 189 CLR 520 at 556 (the Court). See likewise *Jones v Bartlett* (2000) 205 CLR 166 at [207] (Gummow and Hayne JJ).
3 *Lange* (1997) 189 CLR 520 at 554 (the Court).
4 *Jones v Bartlett* (2000) 205 CLR 166 at [207] (Gummow and Hayne JJ).
5 *SDCV* (2022) 277 CLR 241 at [308] (emphasis added).
6 *SDCV* (2022) 277 CLR 241 at [308].

"the Federal Court will not be able to provide an applicant with a fair opportunity to respond to the evidence against them" by adopting one of the procedural measures he had identified.[7] In that context, his Honour stated the "unadorned" conclusion that the "regime" of which s 46(2) forms a part is "better than nothing".[8] But that conclusion can only be understood by reference to the regime as actually construed by Steward J. On his Honour's construction, a fair opportunity will be denied to an appellant *only* in a case where all of the other procedural mechanisms identified by his Honour are incapable of doing so. That is a critical difference from the position endorsed by the plurality — especially in undertaking any "reasonable necessity" analysis, which the Commonwealth accepts is a legitimate (and "further") way to approach the Ch III question: **Cth [44]**.

6 In any event, the Commonwealth seeks to have it both ways: it says that *SDCV* should not be re-opened because the reasoning of the plurality should be considered binding, but then seeks to have s 46(2) construed in a way that is inconsistent with the construction adopted by the plurality. Despite the question of construction being a necessary "first step" in constitutional analysis,[9] it provides no explanation of how it construes s 46(2): cf **PS [29]-[33]**. Then, on the final page of its submissions, it asserts that "there are measures the Court may take, at least in some cases, to minimise the departure from the general rule": **Cth [59]**. It identifies two such measures: "gisting" (which was denied by the plurality[10]) and a discretion to refuse to admit evidence (which was denied by six judges, including the plurality[11]). That the Commonwealth cannot defend *SDCV* without departing from the reasoning of the plurality is a powerful reason to reconsider *SDCV*.

7 **Legislative reliance.** The enactment of the two provisions referred to in **Qld [6]** does not point against re-opening. As with the commencement of the ART Act, the enactment of those provisions should be given little weight given that they were introduced after the commencement of this proceeding:[12] see **PS [28]**. Indeed, one of the provisions is yet to commence.[13] Further, on close analysis, the provisions are materially different to s 46(2)

7 *SDCV* (2022) 277 CLR 241 at [309].
8 *SDCV* (2022) 277 CLR 241 at [313].
9 See, eg, *Gypsy Jokers* (2008) 234 CLR 532 at [11] (Gummow, Hayne, Heydon and Kiefel JJ).
10 *SDCV* (2022) 277 CLR 241 at [86] (Kiefel CJ, Keane and Gleeson JJ).
11 *SDCV* (2022) 277 CLR 241 at [97] (Kiefel CJ, Keane and Gleeson JJ), [192], [194] (Gordon J), [152] (Gageler J), [246] (Edelman J).
12 The Corrective Services (Promoting Safety) and Other Legislation Amendment Bill 2024 (Qld) was introduced into the Parliament of Queensland on 13 February 2024 and the Queensland Community Safety Bill 2024 (Qld) was introduced into the Parliament of Queensland on 1 May 2024. The Administrative Review Tribunal Bill 2024 (Cth) was introduced into the Commonwealth Parliament on 7 December 2023. The writ of summons in this matter was filed on 15 November 2023 and the s 78B notice was served on 21 November 2023.
13 See *Queensland Community Safety Act 2024* (Qld), s 2(1)(b).

of the AAT Act: they operate in different contexts and each has procedural safeguards that mean that neither is as rigid as s 46(2).[14]

8 **The authority of *Gypsy Jokers* and *Pompano*.** Neither *Gypsy Jokers* nor *Pompano* stands as authority against the Plaintiff's case: **PS [25]**.

9 As to *Gypsy Jokers*, only two Justices squarely dealt with the procedural fairness argument,[15] in doing so leaving open the question whether the Commonwealth Parliament could enact a law akin to the impugned provision.[16] The statement in *Pompano* that *Gypsy Jokers* "point[ed] firmly against"[17] acceptance of the "central proposition" advanced in support of the argument for invalidity[18] provides no answer to the present case given that
10 the Plaintiff's central proposition is quite different: cf **Qld [18]**.[19] As to *Pompano*, the argument of the respondents in that case was "absolute"[20] in a way that the Plaintiff's argument is not. Further, as the Commonwealth accepted in oral argument in *SDCV*, the scheme in *Pompano* was quite different to s 46 of the AAT Act.[21] *Pompano* therefore "lays down no legal rule"[22] standing in the way of the Plaintiff's argument:[23] cf **NSW [24]**.

10 In any event, both schemes can be understood as complying with the "reasonable necessity" standard. Each contained *some* procedural safeguards.[24] Section 46(2) contains *none*. Alternatively, if either case truly establishes an authoritative proposition against the Plaintiff's case, the Plaintiff seeks leave to re-open it to have that proposition overruled.

C SECTION 46(2) INFRINGES CH III

20 11 **The standard of reasonable necessity.** As we have said, at least the Commonwealth accepts the legitimacy of adopting a standard of "reasonable necessity": see **Cth [44]**.

[14] As to s 340AA of the *Corrective Services Act 2006* (Qld), in deciding whether to not disclose information the decision-maker must weigh the need to avoid the reasonably expected consequences of disclosure against the need to avoid unfairness to an individual that the decision-maker is satisfied could reasonably be expected as a consequence of non-disclosure. As to s 141ZT of the *Weapons Act 1990* (Qld), the Commissioner of the Queensland Police Service may withdraw information from the consideration of the court if the court considers that that information has been incorrectly classified by the Commissioner as criminal intelligence, and the court must not consider information so withdrawn.

[15] *Gypsy Jokers* (2008) 234 CLR 532 at [183], [191] (Crennan J; Gleeson CJ agreeing). Further, Crennan J's statement (at [182]) that "Parliament can validly legislate to exclude or modify the rules of procedural fairness" must be read in light of her Honour's conclusion that the impugned provision "effected no more than a 'modification'": *SDCV* (2022) 277 CLR 241 at [148] (Gageler J).

[16] *Gypsy Jokers* (2008) 234 CLR 532 at [186].

[17] *Pompano* (2013) 252 CLR 38 at [153] (Hayne, Crennan, Kiefel and Bell JJ).

[18] See *Pompano* (2013) 252 CLR 38 at [116]-[118] (Hayne, Crennan, Kiefel and Bell JJ).

[19] *SDCV* (2022) 277 CLR 241 at [208] (Gordon J).

[20] (2013) 252 CLR 38 at [119] (Hayne, Crennan, Kiefel and Bell JJ).

[21] See *SDCV* (2022) 277 CLR 241 at [211]-[212] (Gordon J).

[22] *Coleman v Power* (2004) 220 CLR 1 at [79] (McHugh J).

[23] *SDCV* (2022) 277 CLR 241 at [138] (Gageler J).

[24] See *SDCV* (2022) 277 CLR 241 at [145]-[146], [148] (Gageler J), [207], [211]-[212] (Gordon J), [244] (Edelman J).

Pompano is not inconsistent with the adoption of that standard: cf **NSW [7], [24]**; **Qld [8]**. Indeed, on one view, the standard provides a familiar and transparent tool for explaining *why* the scheme in that case did not give rise to "practical injustice". Importantly, as in other constitutional contexts, the adoption of that standard does not mean that Parliament must choose the single least restrictive means available to pursue the relevant legislative purpose: cf **Cth [36]**; **Qld [9]**. The impugned provision simply must not depart from the general rule to a degree "significantly more" than is reasonably necessary.[25]

12 **The purpose of s 46(2).** Regardless of how the standard is expressed, it is common ground that the purpose of s 46(2) is relevant to the Ch III inquiry. It is also agreed that, at one level of generality, the purpose of s 46(2) is to prevent the disclosure of certain information: **PS [44]**; **Cth [53]**. But the government parties also suggest s 46(2) also serves two more specific purposes. The *first* suggestion is that s 46(2) prevents the "likely consequence" that the volume and quality of intelligence available to the Director-General may "dry up": **Cth [56]**; **Qld [25]**; **Tas [36]**; **WA [59]**. That appears to be founded on the notion that s 46(2) enables ASIO to provide "reliable assurances" to intelligence sources that go beyond saying that "information will not be disclosed unless, on a case-by-case assessment, a judge considers that fairness requires its disclosure": **Cth [56]**. But it would be misleading for ASIO to give any different assurance because, as the Commonwealth is at pains to emphasise, in any judicial review proceeding a case-by-case assessment would be required.

13 The *second* suggestion is that s 46(2) seeks to facilitate a "meaningful" review: **Cth [51]**; **NSW [48]**; **Qld [27]-[29]**; **WA [64]**. It is even said that s 46(2) promotes the rule of law: **Qld [29]**. The true position is that the capacity and duty of the Federal Court to act upon certified material compounds the procedural unfairness suffered by an appellant: **PS [58]**. And the rule of law is not promoted by requiring a court to receive and act upon material that has been "insulated from challenge" and "contextual explanation".[26]

14 **No reasonable necessity.** None of the matters relied upon by the Commonwealth demonstrates that s 46(2) is reasonably necessary.[27] *First*, that s 46(2) *does not* apply in some cases (eg, criminal proceedings and cases where secret information is sought to be used by the executive to seek an order) says nothing about whether it is reasonably

[25] *Clubb* (2019) 267 CLR 171 at [184] (Gageler J).
[26] *SDCV* (2022) 277 CLR 241 at [155] (Gageler J); cf at [310] (Steward J). See also *Al Rawi* [2012] 1 AC 531 at [93] (Lord Kerr JSC).
[27] By analogy with other constitutional justification requirements, "[t]he polity … bears the persuasive onus": *Unions NSW v New South Wales* (2023) 277 CLR 627 at [31] (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ).

necessary in relation to the cases to which it *does*: cf **Cth [55]**; **Tas [29]**.[28]

15 *Second*, the ability to seek judicial review of a certificate made under s 39B(2) "does not solve the problem" because the reviewing court would be precluded from "enter[ing] into the merits of whether disclosure would in fact be contrary to the public interest" and from making an order that "could relieve against the intransigent preclusive effect on disclosure of a valid certification":[29] cf **Cth [57]**; **Tas [20]**.

16 *Third*, that the Court may relieve against that "intransigent preclusive effect" in the case of certificates issued under s 39B(2)(b) and (c)[30] does nothing to make s 46(2) "reasonably necessary" in the context of a certificate issued under s 39B(2)(a): cf **Cth [58]**; **Tas**
10 **[18]-[19]**. The "special importance"[31] of national security does not justify the blanket approach to non-disclosure "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":[32] cf **Cth [58]**; **NSW [37]**.

17 *Fourth*, the value of "gisting" in reducing the unfairness to an appellant is illusory because the extent to which it is possible "is effectively controlled by the ASIO Minister".[33] cf **Cth [59]**; **NSW [31]**; **Tas [21]**.

18 *Fifth*, the Federal Court has no power to require disclosure of a document as a condition of admission into evidence: cf **Cth [59]**; **Tas [21]**. Rather, the "statutory presupposition" is
20 that the documents sent to the Court pursuant to s 46(1) will be used to decide the appeal.[34]

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28 See also *SDCV* (2022) 277 CLR 241 at [140] (Gageler J).
29 *SDCV* (2022) 277 CLR 241 at [156] (Gageler J); see also at [197] (Gordon J), [250]-[251] (Edelman J).
30 AAT Act, s 46(3).
31 *Alister v The Queen* (1984) 154 CLR 404 at 436 (Wilson and Dawson JJ).
32 *SDCV* (2022) 277 CLR 241 at [152] (Gageler J); see also at [191] (Gordon J), [246] (Edelman J). Further, the proposition that the elected branches bear sole constitutional responsibility for the protection of national security "has long been regarded as 'too absolute'": at [151] (Gageler J); cf **NSW [37]**; **Qld [26]**; **Tas [22]**.
33 *SDCV* (2022) 277 CLR 241 at [253] (Edelman J); see also at [157] (Gageler J), [193] (Gordon J).
34 *SDCV* (2022) 277 CLR 241 at [192] (Gordon J), [245] (Edelman J); see also at [108] (Gageler J); cf at [302] (Steward J).