



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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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

**OUTLINE OF ORAL SUBMISSIONS OF THE SECOND DEFENDANT FOR  
SUPPLEMENTARY HEARING ON 11 MARCH 2025**

## PART I INTERNET PUBLICATION

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1. This outline of oral submissions is in a form suitable for publication on the internet.

## PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

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### The framework within which the questions of construction arise

2. If the Court either (a) declines to re-open *SDCV* (2022) 277 CLR 241 (**Vol 7, Tab 49**), or (b) grants leave to re-open *SDCV* but holds that s 46(2) of the AAT Act does not cause practical injustice because it provides an additional and beneficial procedure that will apply only if an applicant chooses to adopt it, then the validity of s 46 does not turn upon the availability of the six mechanisms identified in the Commonwealth's post-hearing submissions (**CPHS**). Those mechanisms are relevant to the validity of s 46 only if the Court reaches the further alternative argument that, even if s 46(2) can cause practical injustice, it does so only to the extent reasonably necessary to achieve a legitimate competing public interest.

### The construction of s 46(2)

3. Independently of any question of constitutional validity, the Commonwealth agrees with the Plaintiff that the preferable construction of s 46 is that it not only requires the Tribunal to transmit documents to the Federal Court, but also authorises the Federal Court to consider certificated matter without the need for that material to be tendered: Plaintiff's post-hearing submissions (**PPHS**) [2]; *SDCV* (**Vol 7, Tab 49**) at [108] (Gageler J), [185] (Gordon J), [242]-[243] (Edelman J).
4. On this construction, mechanisms 1 and 2 of the six mechanisms identified by the Commonwealth at **CPHS** [3]-[11] are available (although they are not critical to the validity of s 46), but the other mechanisms are not.
5. This is not the only construction of s 46 that is reasonably open on the text. If necessary in order to preserve its validity, s 46(1) can and must be read as a purely mechanical provision concerning the transmission of documents from the Tribunal to the Federal Court: *SDCV* (**Vol 7, Tab 49**) at [282]-[286] (Steward J); *Acts Interpretation Act 1901* (Cth) s 15A; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 (**Supp Vol 2, Tab 9**) at [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); **CPHS** [7], [25]. So construed, s 46 says nothing about the manner in which the Court can use the transmitted documents in determining an appeal under s 44 of the AAT Act.

Accordingly, in common with other proceedings in the original jurisdiction of the Federal Court, the ordinary rule that a party who seeks to rely on a document must tender it applies: *Evidence Act 1995* (Cth) (**Supp Vol 1, Tab 3**), s 48.

6. On this alternative construction of s 46, all six mechanisms identified by the Commonwealth at CPHS [3]-[11] are available. Those mechanisms are not intended to be exhaustive.

### **The power to refuse to admit evidence**

7. On the alternative construction of s 46, both s 135 of the *Evidence Act* and the Court's inherent power to prevent an abuse of process will, in appropriate cases, allow the Federal Court to refuse to accept the tender of certificated matter.
8. **Power to prevent abuse of process (CPHS [19]-[24]).** The Federal Court has an implied power to control abuse of its processes. That power is not affected by the *Evidence Act* (**Supp Vol 1, Tab 3**): see s 11(2).
9. A hearing will involve an abuse of process if it will be “necessarily unfair” or “so unfairly and unjustifiably oppressive as to constitute an abuse of process”: *GLJ* (2023) 97 ALJR 857 (**Supp Vol 3, Tab 11**) at [17] (Kiefel CJ, Gageler and Jagot JJ).
10. In an appeal on a question of law under s 44 of the AAT Act involving certificated matter:
  - (a) an abuse of process will not arise if the applicant seeks to tender certificated matter, or does not object to the tender of such matter by the Director-General — in such a case, the applicant must have made a forensic judgment that it is in their interests that the Court have the complete record of the material that was before the Tribunal;
  - (b) the mere fact that the Court is permitted to act upon evidence that has not been disclosed to the applicant will not of itself constitute an abuse of process;
  - (c) however, if the admission into evidence of certificated matter would result in a departure from the general rule to an extent greater than is reasonably necessary to protect a legitimate public interest, that will constitute an abuse of process: see PPHS [27]-[28].
11. Although the usual remedy for an abuse of process is for the court to stay the proceeding, a permanent stay will not be ordered unless there is “nothing that a trial judge can do in the conduct of the trial to relieve against” the relevant unfairness: *Jago v District Court (NSW)* (1989) 168 CLR 23 (**Supp Vol 2, Tab 6**) at 31-32, 34 (Mason CJ), 77 (Gaudron J).

That being so, an available response to an abuse of process may be for the court to reject the tender of particular evidence if that will address the relevant unfairness: see, eg, *Haddara v The Queen* (2014) 43 VR 53 at [12], [16], [50].

12. **Section 135 of the Evidence Act (CPHS [13]-[18]).** Section 135 of the *Evidence Act* (**Supp Vol 1, Tab 3**) confers a discretion to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial.
13. In an appeal on a question of law under s 44 of the AAT Act involving certificated matter:
- (a) the probative value of the certificated matter will vary depending on the asserted error of law and the extent to which the certificated matter is relevant in determining whether the alleged error was made;
- 10 (b) unfair prejudice will not arise if the applicant seeks to tender certificated matter, or does not object to the tender of such matter by the Director-General: CPHS [15]; *GLJ* (2023) 97 ALJR 857 (**Supp Vol 3, Tab 11**) at [19]-[20] (Kiefel CJ, Gageler and Jagot JJ);
- (c) unfair prejudice will not arise merely because the Court is permitted to have regard to evidence not disclosed to the applicant: *Moore (A Pseudonym) v The King* (2024) 98 ALJR 1119 (**Supp Vol 3, Tab 12**).

### Conclusion as to validity

14. The Plaintiff accepts that, if the alternative construction of s 46 advanced above is reasonably open, then s 46 must be construed in that way and that, so construed, it does not infringe Ch III: PPHS [45].
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Dated: 11 March 2025

  
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