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

SUBMISSIONS OF THE SECOND DEFENDANT

PART I: FORM OF SUBMISSIONS

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

PART II: CONCISE STATEMENT OF THE ISSUE

2. The issue in this proceeding is whether s 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) is invalid on the basis that it infringes Ch III of the Constitution. The Commonwealth submits that s 46(2) is not invalid, and that the questions in the Special Case should be answered: (1) No; and (2) the Plaintiff.

PART III: SECTION 78B NOTICE

3. The Plaintiff's notice under s 78B of the *Judiciary Act 1903* (Cth) is adequate.

PART IV: RELEVANT FACTS

4. The facts agreed by the parties are set out in the Special Case. The Commonwealth accepts the summary in paragraphs 4 to 11 of the Plaintiff's amended submissions (**PS**).

5. With effect from 14 October 2024, the *Administrative Review Tribunal Act 2024* (Cth) (**ART Act**) will commence, and the *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth) (**Transitional Act**) will repeal the whole of the AAT Act.[1] The Transitional Act will operate such that the provisions of the former AAT Act concerning the protection of information or documents (including s 46(2)) will continue to apply in relation to the Plaintiff's appeal to the Federal Court.[2]

PART V: ARGUMENT

A. Introduction

6. The issue in this proceeding is whether s 46(2) of the AAT Act infringes Ch III of the Constitution. That precise issue was considered and determined less than two years ago, in *SDCV v Director-General of Security*,[3] where a majority of the Court upheld the validity of s 46(2). As explained in Part B below, *SDCV* provides a complete answer to the Plaintiff's case and it should not be re-opened.

7. If, contrary to that submission, the Court decides to re-open *SDCV*, the Plaintiff's challenge to s 46(2) should nevertheless be rejected. As explained in Part C below, s 46(2) does not require the Federal Court to exercise the judicial power of the

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1 See ART Act, s 2; Transitional Act, s 2 and Sch 17.
2 See Transitional Act, item 27 of Sch 16.
3 (2022) 277 CLR 241 (***SDCV***).

Commonwealth in a manner that is inconsistent with the essential character of a court or with the nature of judicial power. In summary, that is because:

7.1 for the reasons given by the majority in *SDCV*,[4] having regard to the statutory scheme as a whole, s 46(2) does not give rise to any practical injustice; and

7.2 alternatively, to the extent s 46(2) requires the Federal Court to depart from the general rule that a party should know the case put against it, that is reasonably necessary for the achievement of a legitimate purpose.

B. *SDCV*

B.1 *SDCV* has a *ratio*

10 8. The *ratio* of a case is a statement of principle which, applied to the material facts, is sufficient to explain the result in the case.[5] The following principles are relevant to the identification of a *ratio*. *First*, in identifying the *ratio* of a case, dissenting opinions are to be ignored.[6] *Second*, a *ratio* reflects the reasoning of a majority of the court as a whole, and not simply that of a majority of the majority of judges.[7] *Third*, the reasoning of the judges that supports the statement of principle sufficient to explain the result in the case "does not have to be, and often is not, uniform".[8]

9. The Plaintiff expressly agrees with the first two principles, although with respect to the second principle it emphasises that a proposition will not be *ratio* unless it was a *necessary* step in the reasoning of the relevant justices (PS [14.2]). It is not entirely clear
20 what the Plaintiff intends to convey by emphasising the word "necessary". That word means only that a proposition must have been an *actual* step in the reasoning adopted by the relevant judge in support of the order of the court, notwithstanding that the order might have been supported for different or narrower reasons.[9]

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4 (2022) 277 CLR 241 at [75]-[83] (Kiefel CJ, Keane and Gleeson JJ), [309]-[314] (Steward J).

5 Walker, *Oxford Companion to Law* (1980) at 1033 (entry on "ratio decidendi"); Cross and Harris, *Precedent in English Law* (4th ed, 1991) at 49, 72.

6 *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).

7 *Victoria v Commonwealth* (1971) 122 CLR 353 at 382 (Barwick CJ); *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 (***Ex parte Te***) at [86] (McHugh J).

8 *Vanderstock v Victoria* (2023) 98 ALJR 208 at [430] (Gordon J).

9 *Deakin v Webb* (1904) 1 CLR 585 at 604-605 (Griffith CJ). See also Cross and Harris, *Precedent in English Law* (4th ed, 1991) at 49, 72; Gageler and Lim, 'Collective Irrationality and the Doctrine of Precedent' (2014) 38 *Melbourne University Law Review* 525 at 545-546.

10. 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 that is inconsistent with the essential character of a court, and that an essential feature of a Ch III court is that it affords procedural fairness.[10] The question in that case was whether s 46(2) of the AAT Act required the Federal Court to exercise the judicial power of the Commonwealth in a manner inconsistent with that essential feature. The majority (Kiefel CJ, Keane, Gleeson JJ and, in separate reasons, Steward J) concluded that it did not. The order of the Court was "Appeal dismissed with costs". The order of the Full Court of the Federal Court that was thereby upheld was a declaration that "Section 46(2) of the [AAT Act] is a valid law of the Commonwealth".[11]

11. Contrary to the Plaintiff's submission that *SDCV* has no *ratio* (PS [15]), two legal propositions were necessary to explain the above order and are common to the reasoning of the majority. They are:

11.1 *first*, that there is no constitutional "minimum requirement" or "baseline" of procedural fairness that must be afforded in every case;[12] and

11.2 *second*, that, even where s 46(2) of the AAT Act prevents the Federal Court from providing an applicant with any means to respond to material subject to a certificate under s 39B(2) of that Act,[13] it is not contrary to Ch III because it forms an inseverable part of an *additional* avenue for review that is beneficial (when compared to the other available avenues of review), and therefore causes no practical injustice.[14]

12. The Plaintiff emphasises that Steward J adopted a different construction of s 46(2) to that adopted by the plurality (PS [21]). That is true. But Steward J expressly recognised that, even on his Honour's construction, there would be cases where "the Federal Court will not be able to provide an applicant with a fair opportunity to respond to the evidence against them".[15] In the last section of his reasons, Steward J then explained why, even in such a case, s 46(2) was valid. Like the plurality (whose reasoning he expressly

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10 See *SDCV* (2022) 277 CLR 241 at [50] (Kiefel CJ, Keane and Gleeson JJ).
11 *SDCV v Director-General of Security* [2021] FCAFC 51 (orders made on 9 April 2021).
12 *SDCV* (2022) 277 CLR 241 at [54]-[65] (Kiefel CJ, Keane and Gleeson JJ), [269] (Steward J).
13 *SDCV* (2022) 277 CLR 241 at [309] (Steward J).
14 *SDCV* (2022) 277 CLR 241 at [67], [75]-[83], [101] (Kiefel CJ, Keane and Gleeson JJ), [290], [307], [309]-[314] (Steward J).
15 *SDCV* (2022) 277 CLR 241 at [309] (Steward J).

adopted as foreclosing the "contention that s 46 mandates the adoption of an unfair procedure"[16]), Steward J held that the operation of s 46 cannot be considered "in isolation".[17] His Honour accepted that "[w]ithout this regime, a person who has been the subject of an adverse security assessment would have a less effective right of appeal", such that even when s 46(2) denied an applicant the opportunity to respond to adverse evidence it was "nonetheless beneficial", did not result in practical injustice, and was not inconsistent with Ch III.[18] That reasoning was necessary to his Honour's conclusion, for it is only because of that reasoning that Steward J could hold that s 46(2) is *wholly valid*. Given the identical reasoning of the plurality, it is therefore *ratio*.

10 **B.2 Even if *SDCV* lacks a *ratio*, it is binding in this case**

13. Even if the Court concludes that *SDCV* has no *ratio*, that does not mean it has no precedential value.

14. Putting to one side a case where the Court is equally divided, where a decision has no *ratio* because of a difference in reasoning among the majority justices, the result in the case is nonetheless binding in circumstances not reasonably distinguishable from those which gave rise to the decision.[19] In such circumstances, "the later court is free to decide the legal issues for itself and to adopt any reasoning which appears to it to be correct *so long as that reasoning supports 'the actual decision' in the earlier case*".[20] Indeed, the Plaintiff implicitly acknowledges this by observing that *SDCV* "has precedential value
20 only in circumstances that are not reasonably distinguishable from those which gave rise to the decision" (PS [15]).

15. The circumstances of this case are not merely not reasonably distinguishable from *SDCV*, they are — in all relevant respects — precisely the same. Both the constitutional principle and the statutory provision under consideration are identical to those at issue in *SDCV*. Accordingly, even if this Court concludes that *SDCV* has no *ratio*, it must not depart from the result reached in that case unless it re-opens and overrules that decision.

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16 *SDCV* (2022) 277 CLR 241 at [307] (Steward J), adopting [75]-[83] (Kiefel CJ, Keane and Gleeson JJ).
17 *SDCV* (2022) 277 CLR 241 at [310] (Steward J).
18 *SDCV* (2022) 277 CLR 241 at [313] (Steward J).
19 See *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 (***Ex parte Foley***) at 37-38 (McHugh J). See also *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188 (Barwick CJ); *Ex parte Te* (2002) 212 CLR 162 at [87] (McHugh J); *Western Australia v Ward* (2002) 213 CLR 1 at [695] (Callinan J); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at [50] (McHugh J), [82] (Kirby J); *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [133]-[134] (McHugh J).
20 *Jones v Bartlett* (2000) 205 CLR 166 at [204] (Gummow and Hayne JJ) (emphasis added).

B.3 *SDCV* should not be re-opened

16. The Court should not re-open *SDCV*. Although the Court has power to depart from its previous decisions, that course should not be lightly undertaken.[21] As the Court has recently reiterated, the evaluation of the appropriateness of reopening a decision is to be "informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law".[22] As Kitto J observed, "[e]ven in constitutional cases … it is obviously undesirable that a question decided by the Court after full consideration should be re-opened without grave reason".[23]

17. No such reason exists with respect to *SDCV*. It was decided only two years ago. All that has changed in the intervening period is the composition of the Bench, which plainly is "not reason enough to revisit the decision".[24] It would be highly destructive of the institutional authority of the Court were it to proceed "as though the authority of a decision did not survive beyond the rising of the Court".[25] Yet that is precisely what the Plaintiff invites the Court to do.

18. The *John* factors do not support the grant of leave to reopen *SDCV* (cf PS [24]).

19. *First*, the propositions common to the reasoning of the majority in *SDCV* rest on principles carefully worked out in a significant succession of cases.[26] As noted above, *SDCV* took as its starting point that the Commonwealth Parliament cannot require a

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21 See *John v Federal Commissioner Taxation* (1989) 166 CLR 417 (***John***) at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Wurridjal v Commonwealth* (2009) 237 CLR 309 (***Wurridjal***) at [70] (French CJ); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 (***Plaintiff M76***) at [192] (Kiefel and Keane JJ).

22 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 (***NZYQ***) at [17] (the Court), citing *Wurridjal* (2009) 237 CLR 309 at [70] (French CJ).

23 *Hughes and Vale Pty Ltd v State of New South Wales* (1953) 87 CLR 49 at 102 (Kitto J).

24 *Plaintiff M76* (2013) 251 CLR 322 at [125] (Hayne J). See *Queensland v Commonwealth* (1977) 139 CLR 585 (***Second Territory Senators Case***) at 599-600 (Gibbs J); *McKinney v The Queen* (1991) 171 CLR 468 at 481-482 (Brennan J); *Ex parte Foley* (1994) 181 CLR 18 at 38 (McHugh J); *Eastman v The Queen* (2000) 203 CLR 1 at [17] (Gleeson CJ); *Wurridjal* (2009) 237 CLR 309 at [70] (French CJ).

25 *Second Territory Senators Case* (1977) 139 CLR 585 at 599 (Gibbs J).

26 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Lim***) at 27 (Brennan, Deane and Dawson JJ; Mason CJ agreeing); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 (***Forge***) at [41] (Gleeson CJ), [63] (Gummow, Hayne and Crennan JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 (***Gypsy Jokers***) at [10], [36], [39] (Gummow, Hayne, Heydon and Kiefel JJ), [160]-[162], [191] (Crennan J; Gleeson CJ agreeing); *Wainohu v New South Wales* (2011) 243 CLR 181 (***Wainohu***) at [44] (French CJ and Kiefel J); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 (***Pompano***) at [67] (French CJ), [156] (Hayne, Crennan, Kiefel and Bell JJ), [177] (Gageler J); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 (***NAAJA***) at [39] (French CJ, Kiefel and Bell JJ); *HT v The Queen* (2019) 269 CLR 403 (***HT***) at [17] (Kiefel CJ, Bell and Keane JJ), [64] (Gordon J).

Ch III court to exercise the judicial power of the Commonwealth in a manner inconsistent with the essential character of a court, and that it is an essential feature of a Ch III court that it affords procedural fairness. The application of these principles to a law that requires a Ch III court to act on information that is not available to a party to a proceeding was specifically considered in both *Gypsy Jokers* and *Pompano*. The reasoning of the majority in *SDCV* built on those cases,[27] including to reject the proposition that there is a "minimum requirement" of procedural fairness that must be afforded in every case.[28] Further, although both *Gypsy Jokers* and *Pompano* concerned State laws, the question whether those cases could be distinguished on that ground was argued,[29] and no member of the Court accepted that those decisions could be so distinguished. In this respect, the plurality stated that "there is no principled basis to distinguish between State and federal courts as components of the federal judicature in relation to their institutional obligations to accord procedural fairness"[30] (cf PS [25.2]).

20. The Plaintiff's suggestion (PS [23]) that recent statements about the role of proportionality under Ch III[31] provide a basis for re-opening *SDCV* should be rejected. The observations of the plurality in *Falzon* about proportionality were expressly directed to Ch III's absolute prohibition on vesting judicial functions in the Executive.[32] They were not directed to the proper approach for evaluating legislative modifications of judicial procedures. In any case, it is clear from the passages from the dissenting judgments in *SDCV* cited at PS [45]-[47] that the attack on s 46(2) in *SDCV* included the argument that s 46(2) was contrary to Ch III because it was unjustifiably rigid — that being the same argument the Plaintiff now advances in this proceeding. Indeed, in some judgments in *SDCV*, that argument attracted analysis in terms of the very test that the Plaintiff now advances.[33]

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27 See *SDCV* (2022) 277 CLR 241 at [55]-[58], [66]-[68] (Kiefel CJ, Keane and Gleeson JJ), [269] (Steward J).

28 *SDCV* (2022) 277 CLR 241 at [54]-[65] (Kiefel CJ, Keane and Gleeson JJ), [269] (Steward J).

29 See *SDCV* (2022) 277 CLR 241 at 246.

30 See *SDCV* (2022) 277 CLR 241 at [58], [106] (Kiefel CJ, Keane and Gleeson JJ), [269] (Steward J); see also at [129]-[130] (Gageler J), [204]-[213] (Gordon J), [225], [229] (Edelman J).

31 See *Jones v Commonwealth* (2023) 97 ALJR 936 (***Jones***) at [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), [78] (Gordon J), [154]-[155] (Edelman J), [188] (Steward J); *NZYQ* (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). Cf *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 (***Falzon***) at [32] (Kiefel CJ, Bell, Keane and Edelman JJ).

32 *Falzon* (2018) 262 CLR 333 at [31] (Kiefel CJ, Bell, Keane and Edelman JJ).

33 See, eg, *SDCV* (2022) 277 CLR 241 at [218] (Edelman J), expressing the relevant question in terms nearly identical to those advanced by the Plaintiff in this case. See also at [138] (Gageler J).

21. *Second*, while there was not complete uniformity in the reasons of the majority justices in *SDCV*, on the reasoning decisive to the conclusion that s 46(2) is wholly valid there was no difference.

22. *Third*, *SDCV* achieved a useful result. It established that s 46 is valid and that the forensic advantage it provides to a party who chooses to proceed by way of an appeal under s 44 of the AAT Act — rather than by way of judicial review[34] — can be achieved. There is no basis to conclude that *SDCV* is productive of inconvenience (cf PS [27]), because *SDCV* confirms that s 46(2) takes nothing away from anyone. A person subject to an ASA remains free to apply for judicial review and to litigate any resulting public interest immunity claim in the normal way, if they think that is in their forensic interests.

23. *Fourth*, *SDCV* has been independently acted upon by the Parliament in passing the ART Act. Division 6 of Part 7 of that Act contains provisions in materially identical terms to s 46 of the AAT Act. The Parliament was entitled to proceed on the basis that such a provision is valid, given the recent holding to that effect in *SDCV*.

C. If *SDCV* is re-opened, it should not be overruled

24. If the Court re-opens *SDCV*, it should not overrule that decision, and should again hold that s 46(2) of the AAT Act does not infringe Ch III of the Constitution.

C.1 The statutory scheme

25. ***Security assessments***. One of ASIO's functions is to furnish security assessments to Commonwealth agencies.[35] An ASA may contain a recommendation that it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person.[36] In this context, "security" includes the protection of, and of the people of, the Commonwealth and the States and Territories from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system and acts of foreign interference,[37] and "prescribed administrative action" includes (relevantly here) the exercise of a power under s 315A(1) of the *Telecommunications Act 1997* (Cth).

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34 Section 37(5) of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) must be read as being subject to s 75(v): see *Plaintiff S157/2000 v Commonwealth* (2003) 211 CLR 476 at [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

35 ASIO Act, ss 17(1)(c), 37(1).

36 ASIO Act, s 35(1) ("adverse security assessment"); see also ("security assessment").

37 ASIO Act, s 4 ("security")

26. Where an ASA is given in respect of a person in connection with s 315A of the *Telecommunications Act*, that person must be given notice in writing, together with a copy of the ASA (including the statement of grounds for the ASA).[38] If the Minister administering the ASIO Act (**ASIO Minister**) is satisfied that the ASA contains any matter the disclosure of which would be prejudicial to the interests of security, the ASIO Minister "must exclude that matter" from the copy of the ASA given to the person.[39]

27. ***Merits review of an ASA***. A person who is the subject of an ASA can seek merits review of the ASA under s 54(1) of the ASIO Act. At the time relevant to this proceeding, such a review took place in the Security Division of the Tribunal, and the procedure for the review was governed by ss 39A, 39B and 43AAA of the AAT Act. Section 39A(3) required the Director-General of Security (**Director-General**) to present to the Tribunal all relevant information available to the Director-General, whether favourable or unfavourable to the applicant. Sections 39A and 39B of the AAT Act then dealt with the protection of information provided to the Tribunal. By reason of s 39B(8), they did so to the exclusion of the law relating to public interest immunity.

28. Relevantly, s 39B(2) permitted the ASIO Minister to 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 for one of the following reasons: *first*, on the basis that it would prejudice security or the defence or international relations of Australia (s 39B(2)(a)); *second*, on the basis that it would involve the disclosure of deliberations or decisions of the Cabinet or a Committee of the Cabinet or of the Executive Council (s 39B(2)(b)); or, *third*, for any other reason stated in the certificate that could form the basis for a claim of public interest immunity by the Commonwealth (s 39B(2)(c)). If the certificate was given on the basis in s 39B(2)(a) or (b), the Tribunal was required to do all things necessary to ensure that the information or document was not disclosed to anyone other than a member of the Tribunal as constituted for the purposes of the proceeding (or, in the case of s 39B(2)(a), to the Director-General).[40]

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38 ASIO Act, s 38A(2); see also s 37(2).

39 ASIO Act, s 38A(3).

40 AAT Act, s 39B(3)(a), (4) and (7). On the other hand, if the certificate was given on the basis in s 39B(2)(c), then the presiding member of the Tribunal may decide to disclose the information or document to the applicant, but must ensure that information is not made available to any person contrary to the requirements of security: AAT Act, s 39B(5), (6) and (11).

29. If the ASIO Minister gave a certificate under s 39A or s 39B of the AAT Act, the applicant could seek judicial review of the decision to issue the certificate under s 75(v) of the Constitution or s 39B of the *Judiciary Act*, including on grounds of unreasonableness. There were therefore safeguards against a certificate being issued "where the information is centrally relevant and the public interest said to justify non-disclosure is trivial" (PS [48]).

30. At the conclusion of the merits review, the Tribunal was required to record its findings in relation to the ASA, including its opinion as to the correctness of, and justification for, any opinion, advice or information contained in the assessment.[41] The Tribunal was required to provide copies of its findings to the applicant and the Director-General,[42] but could direct that the whole or a part of its findings, so far as they related to a matter that had not already been disclosed to the applicant, not be given to the applicant.[43]

31. The applicant could seek judicial review of the Tribunal's decision on the review under s 75(v) of the Constitution or s 39B of the *Judiciary Act*. In such a proceeding, the applicant could invoke the ordinary processes of the Court to seek access to *all* the information that was before the Tribunal (whether or not it was subject to any certificate). Any certificates issued under the AAT Act would have no legal effect in such a proceeding.[44] Accordingly, all the information that was before the Tribunal would need to be produced, subject to the effect of any public interest immunity claim.

32. ***Appeal on a question of law***. As an alternative to commencing judicial review proceedings under s 75(v) of the Constitution or s 39B of the *Judiciary Act*, a party before the Tribunal could also "appeal" to the Federal Court, on a question of law, from the Tribunal's decision pursuant to s 44(1) of the AAT Act.[45] When a party instituted such an appeal, s 46(1) of the AAT Act required the Tribunal to cause to be sent to the Court all documents that were before the Tribunal in connection with the proceeding to which the appeal relates and are relevant to the appeal.

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41 AAT Act, s 43AAA(2) and (3).
42 AAT Act, s 43AAA(4).
43 AAT Act, s 43AAA(5).
44 *SDCV* (2022) 277 CLR 241 at [13] (Kiefel CJ, Keane and Gleeson JJ).
45 Such a proceeding in fact invokes the original jurisdiction of the Federal Court: *Committee of Direction of Fruit Marketing v Australian Postal Commission* (1980) 144 CLR 577 at 585 (Mason and Wilson JJ); *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 at [96], [194] (the Court).

33. However, if, in the course of the Tribunal proceeding that was the subject of the appeal, the ASIO Minister gave a certificate under s 39B(2) of the AAT Act certifying that the disclosure of matter contained in a document would be contrary to the public interest, then, subject to s 46(3),[46] s 46(2) required the Federal Court to "do all things necessary to ensure that the matter [(the **certificated matter**)] is not disclosed to any person other than a member of the court as constituted for the purposes of the proceeding" .[47]

C.2 Relevant principles

34. ***The relevant constitutional limit***. The Commonwealth Parliament has the power to make laws regulating the processes and procedures of Ch III courts. That power is subject to limits derived from Ch III. One such limit is that the Parliament cannot require a Ch III court to exercise the judicial power of the Commonwealth in a manner that is inconsistent with the essential character of a court or the nature of judicial power.[48] The application of that limit directs attention to the essential characteristics of courts which, because they are "[h]istorically evolved … and requir[e] application in the real world, … are not and cannot be absolutes".[49]

35. One such characteristic is the requirement to afford procedural fairness. Although the observance of procedural fairness is an essential characteristic of a Ch III court,[50] the content of procedural fairness is not fixed.[51] Procedural fairness "can be provided by different means in different contexts and may well be provided by different means in a single context".[52] What procedural fairness requires in a given case will depend on all

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46 If a certificate was given on the basis in s 39B(2)(b) or (c), s 46(3) permits the Court to disclose the certificated matter to the applicant. That option is not available for a certificate given under s 39B(2)(a).

47 Or to "an officer of the court in the course of the performance of his or her duties as an officer of the court": see AAT Act, s 46(4).

48 *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ; Mason CJ agreeing). See also *Forge* (2006) 228 CLR 45 at [41] (Gleeson CJ), [63] (Gummow, Hayne and Crennan JJ); *Wainohu* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J); *SDCV* (2022) 277 CLR 241 at [50] (Kiefel CJ, Keane and Gleeson JJ), [104]-[106] (Gageler J), [172] (Gordon J).

49 *Pompano* (2013) 252 CLR 38 at [68] (French CJ). See also *Forge* (2006) 228 CLR 45 at [36] (Gleeson CJ), [63]-[65] (Gummow, Hayne and Crennan JJ).

50 *Pompano* (2013) 252 CLR 38 at [67] (French CJ), [156] (Hayne, Crennan, Kiefel and Bell JJ), [177] (Gageler J); *NAAJA* (2015) 256 CLR 569 at [39] (French CJ, Kiefel and Bell JJ); *SDCV* (2022) 277 CLR 241 at [50] (Kiefel CJ, Keane and Gleeson JJ), [106] (Gageler J), [172] (Gordon J), [228] (Edelman J).

51 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 (***Lam***) at [37] (Gleeson CJ); *Gypsy Jokers* (2008) 234 CLR 532 at [182] (Crennan J; Gleeson CJ agreeing); *Pompano* (2013) 252 CLR 38 at [68] (French CJ), [156] (Hayne, Crennan, Kiefel and Bell JJ), [177] (Gageler J); *HT* (2019) 269 CLR 403 at [18], [43] (Kiefel CJ, Bell and Keane JJ), [64] (Gordon J). See also *SDCV* (2022) 277 CLR 241 at [54] (Kiefel CJ, Keane and Gleeson JJ), [141] (Gageler J), [174] (Gordon J), [229], [237] (Edelman J).

52 *Pompano* (2013) 252 CLR 38 at [195] (Gageler J).

the circumstances, including the statutory context and competing interests.[53] Thus, "[t]o observe that procedural fairness is an essential attribute of a court's procedures is descriptively accurate but application of the observation requires close analysis of all aspects of those procedures and the legislation and rules governing them".[54]

36. Because the content of procedural fairness is not fixed, whether a Commonwealth law that regulates the processes and procedures of a Ch III court infringes Ch III cannot depend on the mere fact that the legislatively prescribed procedure could be made fairer.[55] Rather, in determining whether such a law requires a Ch III court to exercise the judicial power of the Commonwealth in a manner that is inconsistent with the essential character of a court, the relevant question is whether, taken as a whole (and taking account of all the circumstances, including the statutory context and competing interests), the court's procedures avoid practical injustice.[56]

37. ***The nature and content of procedural fairness***. Procedural fairness has been described as "fair play in action".[57] It is an "essentially practical" concept, the concern of which "is to avoid practical injustice".[58] What procedural fairness requires in a given case therefore depends on "the particular circumstances in which [the relevant] process occurs, including (but not limited to) the statutory setting, the characteristics of the parties involved, what is at stake for them, the nature of the decision to be made, and steps already taken in that process".[59] To that list may be added the conduct of the parties, including the forensic choices made by them,[60] and (as discussed below) the

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53 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [26] (the Court); *Pompano* (2013) 252 CLR 38 at [68]-[70], [86] (French CJ), [157] (Hayne, Crennan, Kiefel and Bell JJ).

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

55 *SDCV* (2022) 277 CLR 241 at [83] (Kiefel CJ, Keane and Gleeson JJ), [237] (Edelman J). See also *Coulter v The Queen* (1988) 164 CLR 350 at 356-357 (Mason CJ, Wilson and Brennan JJ); *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350 at [85] (McLachlin CJ for the Court).

56 *Pompano* (2013) 252 CLR 38 at [156]-[157], [169] (Hayne, Crennan, Kiefel and Bell JJ). See also *HT* (2019) 269 CLR 403 at [46] (Kiefel CJ, Bell and Keane JJ).

57 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 445 (Stephen J), citing *Furnell v Whangarei High Schools Board* [1973] AC 660 at 679 (Lord Morris of Borth-y-Gest for the majority of the Court).

58 *Lam* (2003) 214 CLR 1 at [37] (Gleeson CJ); *Pompano* (2013) 252 CLR 38 at [156] (Hayne, Crennan, Kiefel and Bell JJ).

59 *Shrestha v Migration Review Tribunal* (2015) 229 FCR 301 at [49] (the Court). See also *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552-553 (the Court).

60 *MH6 v Mental Health Review Board* (2009) 25 VR 382 (***MH6***) at [30], [51]-[53] (the Court). See *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-287 (Mason CJ and Gaudron J); *Lam* (2003) 214 CLR 1 at [34] (Gleeson CJ); *R (Hill) v Institute of Chartered Accountants* [2014] 1 WLR 86 (***Hill***) at [30] (Longmore LJ), [42]-[49] (Beatson LJ), [54] (Underhill LJ).

need to accommodate competing interests (including public interests that may be as important, or more important, than fairness in civil proceedings).

38. It is because the content of procedural fairness depends on all the circumstances that it cannot be said there is any fixed "minimum content" to procedural fairness that must be afforded in every case.[61] The Plaintiff does not contend to the contrary.

39. The specific aspect of procedural fairness relevant to this case is the general rule that, in an adversarial system, a party should know what case an opposing party seeks to make and how that party seeks to make it (the **general rule**).[62]

40. As the Plaintiff acknowledges (PS [37]), the general rule is not absolute. There are circumstances where courts make exceptions to it in recognition of competing interests. Those circumstances include:[63] the procedure followed when determining claims for public interest immunity or legal professional privilege; confidential information cases, including trade secrets cases; receipt of confidential affidavits in support of an application by a liquidator for an examination summons; cases where gender-restricted evidence is involved in native title claims; cases concerning children within a statutory jurisdiction that originated from the historical *parens patriae* welfare jurisdiction; judicial advice proceedings for the purpose of protecting the interests of a trustee and trust; cases invoking the court's power to approve a settlement claim by a person under a legal incapacity; and applications for approval of representative proceedings.

41. The exceptions demonstrate that it is not inconsistent with the essential character of a court for it to act on material that is not available to a party, where that occurs in recognition of a competing interest. They illustrate that, while procedural fairness in court proceedings is an important public interest, it is capable of being outweighed by other public interests. Once that is recognised, it inevitably follows that the public

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61 *SDCV* (2022) 277 CLR 241 at [53]-[54] (Kiefel CJ, Keane and Gleeson JJ), [269] (Steward J).

62 *Pompano* (2013) 252 CLR 38 at [157] (Hayne, Crennan, Kiefel and Bell JJ). See also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *HT* (2019) 269 CLR 403 at [17] (Kiefel CJ, Bell and Keane JJ), [64] (Gordon J); *SDCV* (2022) 277 CLR 241 at [176] (Gordon J).

63 See *SDCV* (2022) 277 CLR 241 at [177] (Gordon J), and the cases cited there. See also *Gypsy Jokers* (2008) 234 CLR 532 at [182]-[185] (Crennan J; Gleeson CJ agreeing); *Pompano* (2013) 252 CLR 38 at [68] (French CJ), [157] (Hayne, Crennan, Kiefel and Bell JJ); *HT* (2019) 269 CLR 403 at [44]-[46] (Kiefel CJ, Bell and Keane JJ).

interest in protecting national security is capable of justifying departures from the general rule.[64]

42. Further, in addition to *SDCV*, this Court's decisions in *Gypsy Jokers* and *Pompano* demonstrate that it is not necessarily inconsistent with the essential character of a court for it to comply with a legislatively mandated departure from the general rule, including by acting on material that is not available to a party.[65] As the Plaintiff accepts (PS [49]), the question of how observance of the general rule should be balanced against competing interests is not "the exclusive preserve of the courts".[66] Legislation can affect how the general rule is accommodated to competing interests.[67] This directs attention to how the constitutional limit identified in paragraph 34 above is to be applied where a Commonwealth law provides for a novel procedure which permits or requires a Ch III court to depart from the general rule.

43. ***The application of Ch III to legislated departures from the general rule***. In *Pompano*, the plurality said that, "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'".[68] All members of the Court in that case answered that question in the affirmative, without considering whether the departure from the general rule required by the *Criminal Organisation Act 2009* (Qld) was "justified" in the sense now contended for by the Plaintiff (PS [39], [42]). That is, no member of the Court considered whether the departure from the general rule required by the legislation was "no more than is reasonably necessary to protect a compelling public interest" (PS [39]). Instead, each member of the Court concluded that, having regard to the statutory scheme

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64 See, eg, *Alister v The Queen* (1984) 154 CLR 404 (***Alister***) at 412 (Gibbs CJ), 435-437 (Wilson and Dawson JJ); *Sankey v Whitlam* (1978) 142 CLR 1 at 39 (Gibbs ACJ); *Church of Scientology v Woodward* (1982) 154 CLR 25 (***Woodward***) at 76 (Brennan J); *Leghaei v Director-General of Security* (2007) 241 ALR 141 (***Leghaei***) at [48]-[49] (the Court).

65 See *Gypsy Jokers* (2008) 234 CLR 532 at [36] (Gummow, Hayne, Heydon and Kiefel JJ), [182]-[183] (Crennan J; Gleeson CJ agreeing); *Pompano* (2013) 252 CLR 38 at [86] (French CJ), [116]-[120], [152], [156]-[157] (Hayne, Crennan, Kiefel and Bell JJ); *SDCV* (2022) 277 CLR 241 at [137] (Gageler J).

66 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 (***Graham***) at [35] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

67 *Graham* (2017) 263 CLR 1 at [35] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Nicholas v The Queen* (1998) 193 CLR 173 at [37] (Brennan CJ), [55] (Toohey J), [167] (Gummow J), [233] (Hayne J); *SDCV* (2022) 277 CLR 241 at [85], [90], [94] (Kiefel CJ, Keane and Gleeson JJ).

68 *Pompano* (2013) 252 CLR 38 at [157] (Hayne, Crennan, Kiefel and Bell JJ). See also *SDCV* (2022) 277 CLR 241 at [178] (Gordon J).

as a whole,[69] the Supreme Court retained sufficient powers to ensure it could act fairly despite being required to depart from the general rule.[70] Put another way, the Court decided that, having regard to the statutory scheme as a whole, the departure from the general rule would *not* give rise to practical injustice. Having reached that conclusion, no further inquiry was necessary. Chapter III provides no warrant for departure from the balance struck by the Parliament between competing public interests simply because a court considers that a legislatively prescribed procedure could be made fairer.

44. Further, or alternatively, even in a case where a Commonwealth law requires a Ch III court to depart from the general rule in a way that *may* cause practical injustice, the Commonwealth law will not infringe Ch III if it is reasonably necessary for the achievement of a legitimate purpose.[71] That result is a manifestation of the fact that some public interests are more important than the public interest in fairness in civil proceedings. It is consistent with the approach taken by courts when departing from the ordinary requirements of procedural fairness to accommodate competing interests.[72] It is also consistent with the approach taken by this Court in relation to other constitutional limits on legislative power that are defined by reference to concepts that are not absolute.[73] However, care is required before borrowing too heavily from other areas of constitutional law in framing the relevant test (cf PS [39]-[42]). In particular, the Plaintiff's claim (PS [39]) that only a "compelling public interest" can justify a departure from the general rule is inconsistent with the exceptions identified in paragraph 40 above (not all of which appear to serve "compelling" interests). That is

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69 *Pompano* (2013) 252 CLR 38 at [87] (French CJ), [157] (Hayne, Crennan, Kiefel and Bell JJ), [199]-[212] (Gageler J); see also at [129] (Hayne, Crennan, Kiefel and Bell JJ).

70 *Pompano* (2013) 252 CLR 38 at [88]-[89], [92] (French CJ), [167], [169] (Hayne, Crennan, Kiefel and Bell J), [212] (Gageler J).

71 As the Plaintiff accepts (PS [41]), in this context "reasonably necessary" means "reasonably appropriate and adapted": compare *Jones* (2023) 97 ALJR 936 at [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

72 See *J v Lieschke* (1987) 162 CLR 447 at 457 (Brennan J; Mason and Dawson JJ agreeing); *R (Haralambous) v Crown Court at St Albans* [2018] AC 236 (***Haralambous***) at [61]-[62] (Lord Mance DPSC; Lord Kerr of Tonaghmore, Lord Hughes, Lady Black and Lord Lloyd-Jones JJSC agreeing); *HT* (2019) 269 CLR 403 at [43]-[44] (Kiefel CJ, Bell and Keane JJ). Further, in relation to the open justice principle, see *Hogan v Hinch* (2011) 243 CLR 506 at [85]-[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Director of Public Prosecutions v Smith* [2024] HCA 32 at [63] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

73 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561 (the Court); *Falzon* (2018) 262 CLR 333 at [30]-[31] (Kiefel CJ, Bell, Keane and Edelman JJ); *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).

not, however, a point that needs be explored in this case, because the protection of national security is obviously a compelling public interest.

C.3 No practical injustice

45. When a party has a choice between judicial procedures to be invoked to resolve a dispute, the party's choice to pursue a procedure that departs from the ordinary processes of a court will not result in practical injustice.[74] Assume, for example, that parties have a choice between pursuing a civil claim in the general division of a court following the ordinary processes of a court, or instead pursuing that claim in an expedited division in which, under Commonwealth law: each party is limited to affidavit evidence; oral argument (including cross-examination and submissions) may take no more than 2.5 hours per party; there is limited or no discovery; and there is a strict cap on costs. A party who elected to proceed in the expedited division, but who subsequently felt disadvantaged by its limits, could hardly complain of a denial of procedural fairness. That is because, while those limits may well be unfair if viewed in isolation, they would apply only to parties who chose to proceed in that division. The fairness of the procedure cannot sensibly be evaluated without taking account of that choice. As the plurality in *SDCV* put it, "[o]ne cannot maintain the proposition that one has been subjected to a practical impediment by reason of the presence of a known obstacle on the path that one has chosen to pursue".[75]

46. Even assuming that "any jurisdiction conferred on [a court] is necessarily conditioned by the requirement that it observe procedural fairness *in the exercise of that jurisdiction*",[76] determining what procedural fairness requires "in the exercise of that jurisdiction" remains an "essentially practical"[77] inquiry. One matter that is highly relevant to that inquiry is whether a party *chose* to accept particular constraints, when

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74 *MH6* (2009) 25 VR 382 at [51]-[53] (the Court); *Hill* [2014] 1 WLR 86 at [30] (Longmore LJ), [42]-[49] (Beatson LJ), [54] (Underhill LJ). See also *Hall v New South Wales Trotting Club Ltd* [1977] 1 NSWLR 378 at 382 (Hutley JA); *Escobar v Spindaleri* (1986) 7 NSWLR 51 at 62-63 (Samuels JA); *Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW* (2005) 145 FCR 523 at [87] (Weinberg J); *Ayoub v AMP Bank Ltd* [2011] NSWCA 263 at [64] (Whealy JA; Basten JA and Sackville AJA agreeing). In relation to apprehended bias, see *Smits v Roach* (2006) 227 CLR 423 at [43] (Gleeson CJ, Heydon and Crennan JJ); *Michael Wilson & Partners v Nicholls* (2011) 244 CLR 427 at [76] (Gummow ACJ, Hayne, Crennan and Bell JJ).

75 *SDCV* (2022) 277 CLR 241 at [14] (Kiefel CJ, Keane and Gleeson JJ).

76 *SDCV* (2022) 277 CLR 241 at [129] (Gageler J) and [196] (Gordon J), citing *Oakey Coal Action Alliance Inc v New Acland Coal Pty ltd* (2021) 272 CLR 33 at [47] (Kiefel CJ, Bell, Gageler and Keane JJ).

77 *Lam* (2003) 214 CLR 1 at [37] (Gleeson CJ); *SDCV* (2022) 277 CLR 241 at [174] (Gordon J).

they had the option to do otherwise. Where a party makes such a choice, that points strongly against the existence of practical injustice (meaning "procedural injustice"),[78] if the procedure that then applies is the very procedure the party chose.

47. The majority in *SDCV* were correct to hold that s 46(2) of the AAT Act does not infringe Ch III because s 46(2) does not give rise to any practical injustice. It applies only to a plaintiff who chooses to seek the forensic advantages that arise from s 46(1) of the AAT Act in an appeal under s 44, rather than to invoke the ordinary procedures of the Federal Court in a judicial review proceeding under s 39B of the *Judiciary Act*. If the Plaintiff had sought judicial review, it would not have had the benefit of s 46(1) of the AAT Act, which required that all the documents before the Tribunal in connection with the review be provided to the Federal Court.[79] The Plaintiff would therefore have needed to apply for production of those documents using the ordinary processes of the Court. Any such application could be expected to be met by a claim of public interest immunity,[80] which in light of its subject matter could be expected to succeed.[81] As Brennan J put it in *Woodward*, "the public interest in national security will seldom yield to the public interest in the administration of civil justice".[82]

48. A successful claim for public interest immunity will have the result that the material subject to the claim cannot be adduced in evidence,[83] meaning that the court "will arrive at a decision on something less than the entirety of the relevant materials".[84] In an application for judicial review of an ASA, where the applicant bears the onus of establishing jurisdictional error, inability to put material showing the reasoning process underlying the ASA before the court will ordinarily have the result that the proceeding will be dismissed.[85] Importantly, that would not involve any denial of procedural

78 *SDCV* (2022) 277 CLR 241 at [132] (Gageler J).
79 *SDCV* (2022) 277 CLR 241 at [79] (Kiefel CJ, Keane and Gleeson JJ), [307] (Steward J).
80 See *Gypsy Jokers* (2008) 234 CLR 532 at [23] (Gummow, Hayne, Heydon and Kiefel JJ).
81 *SDCV* (2022) 277 CLR 241 at [81] (Kiefel CJ, Keane and Gleeson JJ), [307], [313] (Steward J). See *Leghaei* (2007) 241 ALR 141 at [52] (the Court); *Parkin v O'Sullivan* (2009) 260 ALR 503 at [33] (Sundberg J); *SBEG v Secretary, Department of Immigration and Citizenship* (2012) 291 ALR 281 at [15]-[16] (Besanko J); *Plaintiff M46/2013 v Minister for Immigration and Border Protection* (2014) 139 ALD 277 (***Plaintiff M46***) at [31]-[32] (Tracey J). For a recent example, see *Imad v Director-General of Security* [2024] FCA 1115 (***Imad***) at [91]-[94] (Rofe J).
82 *Woodward* (1982) 154 CLR 25 at 76 (Brennan J).
83 *HT* (2019) 269 CLR 403 at [29], [32] (Kiefel CJ, Bell and Keane JJ), [55] (Nettle and Edelman JJ), [71]-[72] (Gordon J).
84 *Woodward* (1982) 154 CLR 25 at 61 (Mason J).
85 See *Woodward* (1982) 154 CLR 25 at 61 (Mason J); *Gypsy Jokers* (2008) 234 CLR 532 at [5] (Gleeson CJ), [24] (Gummow, Hayne, Heydon and Kiefel JJ); *Haralambous* [2018] AC 236 at [47], [54]-[57] (Lord Mance DPSC; Lord Kerr of Tonaghmore, Lord Hughes, Lady Black and Lord Lloyd-Jones

fairness because "public interest immunity procedure respects common law principles of natural justice"; if documents are not produced "they are not available to either [party] and the court may not use them", with the result that "[t]here is no question of unfairness or inequality".[86] But that will be little comfort to the unsuccessful applicant for judicial review.

49. By choosing to seek merits review of the ASA in the Tribunal and, subsequently, to appeal to the Federal Court under s 44 of the AAT Act, the Plaintiff avoided the forensic disadvantage associated with a judicial review proceeding and obtained the forensic advantage conferred by s 46(1) of the AAT Act (being that the Court itself could consider the national security material for the purpose of evaluating the appeal, which public interest immunity would otherwise have prevented).[87] But that forensic advantage is "available only on the terms contained in s 46(2)".[88] Having chosen to seek that forensic advantage, the procedural consequences of that choice cannot accurately be described as involving practical injustice. Section 46 of the AAT Act took nothing away from the Plaintiff, and so caused it no unfairness. The position is analogous to that of a party to litigation who, perceiving some forensic advantage, elects not to cross-examine a particular witness, or elects to waive its entitlement to an oral hearing and proceed on the papers.

50. Chapter III should not be held to prevent Parliament from providing for new or novel judicial procedures — being procedures *additional* to ordinary judicial procedures — that strike a different balance between competing public interests to that ordinarily struck. Such new or novel procedures involve no threat to the institutional integrity of a court, or to public confidence in courts, at least where it is known that the ordinary procedures remain available to any litigant who wishes to use them. At least in that situation, the public can be confident that any new or novel procedures will be engaged only if a party perceives that to be in their forensic interests.

JJSC agreeing). See also *SDCV* (2022) 277 CLR 241 at [79] (Kiefel CJ, Keane and Gleeson JJ). For examples of cases where this has occurred, see *Sagar v O'Sullivan* (2011) 193 FCR 311 at [41]-[42], [64], [69] (Tracey J); *Plaintiff M46* (2014) 139 ALD 277 at [73]-[74], [86]-[87], [90] (Tracey J); *BSX15 v Minister for Immigration and Border Protection* (2017) 249 FCR 1 at [21]-[24] (the Court). That outcome was also contemplated in *Imad* [2024] FCA 1115 at [76]-[77] (Rofe J).

86 *HT* (2019) 269 CLR 403 at [32] (Kiefel CJ, Bell and Keane JJ).

87 *SDCV* (2022) 277 CLR 241 at [79], [101] (Kiefel CJ, Keane and Gleeson JJ), [307], [313] (Steward J).

88 *SDCV* (2022) 277 CLR 241 at [82] (Kiefel CJ, Keane and Gleeson JJ).

51. The contrary view is productive only of rigidity. It would undermine the capacity of Parliament to address difficult problems where public interests are in tension. So much is illustrated by the practical consequence if s 46 of the AAT Act is invalid. In that event, if the subject of an ASA seeks to challenge that ASA (or a Tribunal decision upholding it), a court will be able to consider the reasons for the ASA (and/or the material on which it was based) only if the inevitable claim for public interest immunity over that material fails. Many authorities demonstrate that this will occur rarely, if ever, meaning that judicial review challenges of ASAs will ordinarily fail.[89] The practical result of seeking to ensure that every judicial procedure — viewed in isolation — is "fair" can reasonably be expected to be that plaintiffs are denied effective judicial review of ASAs.

C.4 A justified departure from the general rule

52. Alternatively, if the Court considers that the departure from the general rule that s 46(2) of the AAT Act requires does cause practical injustice, the next question is whether that departure from the general rule is nevertheless valid because it is reasonably necessary for the achievement of a legitimate purpose (see paragraph 44 above).

53. Having regard to the terms of s 39B(2) of the AAT Act, the purpose of s 46(2) can be identified as being to prevent the disclosure of information where that disclosure would be injurious to the public interest, either because it would prejudice security or the defence or international relations of Australia, or because it would involve the disclosure of deliberations or decisions of the Cabinet, or for another reason that could form the basis for a claim of public interest immunity. The Plaintiff accepts that that purpose is both compelling and legitimate (PS [44]).

54. For the following reasons, the departure from the general rule required by s 46(2) is reasonably necessary for the achievement of the above purpose.

55. *First*, whether a departure from the general rule is "reasonably" necessary depends, among other things, on the form of proceeding in which that departure occurs. In that respect, it is significant that s 46(2) only applies where a party appeals to the Federal Court on a question of law from a decision of the Tribunal in relation to an ASA. It does not apply in criminal proceedings,[90] or a proceeding in which the Executive is applying

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89 See footnotes 81 and 85 above.

90 Cf *HT* (2019) 269 CLR 403 at [33] (Kiefel CJ, Bell and Keane JJ), [57]-[58] (Nettle and Edelman JJ). See *SDCV* (2022) 277 CLR 241 at [54] (Kiefel CJ, Keane and Gleeson JJ).

for an order affecting the rights of a person on a basis not known to that person (that is, using secret information "as a sword").[91] It is not necessary for the Court to decide whether a provision like s 46(2) would infringe Ch III if applied in those contexts.

56. *Second*, in the context of s 46(1), s 46(2) serves an important public interest in providing a statutory foundation for ASIO to provide reliable assurances of confidentiality to sources of information,[92] including overseas intelligence agencies. If ASIO could say only that information will not be disclosed unless, on a case-by-case assessment, a judge considers that fairness requires its disclosure, the likely consequence is that the volume and quality of intelligence available to the Director-General may be reduced.[93]

10 57. *Third*, s 46(2) only applies where a certificate under s 39B(2) of the AAT Act is in force. Such a certificate will be "in force" only if it is valid, and has not been withdrawn.[94] The subject of an ASA can seek judicial review of such a certificate.[95] And, on an appeal under s 44 of the AAT Act, the Federal Court can consider the validity of the certificate on its own motion.[96] Section s 46(2) therefore does not purport to direct the Court to act on an unexaminable opinion as to whether disclosure of certificated matter would be contrary to the public interest.[97]

58. *Fourth*, as noted in paragraph 33 above, the extent to which s 46(2) prevents the disclosure of certificated matter depends on the reason why disclosure of that matter would be contrary to the public interest. Where a certificate is given on the basis in
20 s 39B(2)(b) (relating to Cabinet deliberations) or s 39B(2)(c) (relating to other grounds of public interest immunity), the Court has a discretion under s 46(3) to disclose the certificated matter. It is only where a certificate is given on the basis in s 39B(2)(a) (relating to information the disclosure of which would prejudice national security) that the Court is required to do all things necessary to ensure the certificated matter is not disclosed. This reflects that "[n]ational security undoubtedly forms a category of public

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91 Cf *Gypsy Jokers* (2008) 234 CLR 532; *Pompano* (2013) 252 CLR 38. See *SDCV* (2022) 277 CLR 241 at [65] (Kiefel CJ, Keane and Gleeson JJ).

92 See *SDCV* (2022) 277 CLR 241 at [88] (Kiefel CJ, Keane and Gleeson JJ). See also *Imad* [2024] FCA 1115 at [91] (Rofe J); *AIX20 v Director-General of Security (No 2)* [2024] FCA 1130 at [39] (Dowling J).

93 See *R v Khazaal* [2006] NSWSC 1061 at [39] (Whealy J).

94 *SDCV* (2022) 277 CLR 241 at [59] (Kiefel CJ, Keane and Gleeson JJ), [282] (Steward J).

95 See *SDCV* (2022) 277 CLR 241 at [59] (Kiefel CJ, Keane and Gleeson JJ).

96 *SDCV* (2022) 277 CLR 241 at [251] (Edelman J).

97 *SDCV* (2022) 277 CLR 241 at [60] (Kiefel CJ, Keane and Gleeson JJ).

interest of special importance".[98] The public interest in preventing the disclosure of information which may cause damage (including serious damage) to national security is a public interest of a kind particularly likely to justify departure from the general rule.

59. *Finally*, even when a certificate is given under s 39B(2)(a), there are measures the Court may take, at least in some cases, to minimise the departure from the general rule. Depending on the facts, in some cases the Court may be able to give the applicant the gist of the information subject to the certificate while still acting consistently with s 46(2).[99] Whether that can be done in a given case will depend on the particular circumstances of that case (including the nature of the information in question and the terms of the certificate).[100] Further, if the Court formed the view that the disclosure of a document to the applicant would cause minimal prejudice to the public interest, and that the non-disclosure of that document to the applicant would cause significant prejudice to the applicant, then, if the Director-General seeks to have the document admitted into evidence, the Court could require the Director-General to disclose the document to the applicant as a condition of the admission.[101]

D. Consequences of invalidity

60. If the Court holds that s 46(2) of the AAT Act is invalid, it should hold that s 46 is wholly invalid. To sever s 46(2) would give s 46(1) a drastically different practical operation, which would run counter to the purpose for which s 46(2) was enacted.[102]

PART VI: ESTIMATE OF TIME

61. Up to 2.5 hours will be required for the Commonwealth's oral argument.

Dated: 8 October 2024

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98 *Alister* (1984) 154 CLR 404 at 436 (Wilson and Dawson JJ). See also *Woodward* (1982) 154 CLR 25 at 76 (Brennan J); *Leghaei* (2007) 241 ALR 141 at [58]-[59] (the Court).
99 See *SDCV* (2022) 277 CLR 241 at [157] (Gageler J), [193] (Gordon J), [291] (Steward J).
100 See *SDCV* (2022) 277 CLR 241 at [157] (Gageler J), [193] (Gordon J), [294] (Steward J).
101 See *SDCV* (2022) 277 CLR 241 at [302] (Steward J); cf [192] (Gordon J).
102 *SDCV* (2022) 277 CLR 241 at [164] (Gageler J); see also at [80] (Kiefel CJ, Keane and Gleeson JJ), [200]-[202] (Gordon J), [221] (Edelman 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 SECOND DEFENDANT

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

No.	Description	Version	Provision(s)
Commonwealth			
1.	*Constitution*	Current	s 75(v)
2.	*Australian Security Intelligence Organisation Act 1979* (Cth)	Current	ss 4, 17, 35, 37, 38A, 54
3.	*Administrative Appeals Tribunal Act 1975* (Cth)	Current	ss 39A, 39B, 44, 43AAA, 46
4.	*Administrative Review Tribunal Act 2024* (Cth)	Current	s 2, Div 6 of Pt 7
5.	*Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth)	Current	s 2, Sch 16 (Item 27), Sch 17
6.	*Telecommunications Act 1997* (Cth)	Current	s 315A
7.	*Judiciary Act 1903* (Cth)	Current	s 39B
States and Territories			
8.	*Criminal Organisation Act 2009* (Qld)	As at 1 June 2012	