HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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 ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I: Form of Submissions

1. The redacted version of these submissions is in a form suitable for publication on the internet.

Part II: Basis of Intervention

2. The Attorney General for New South Wales (**NSW Attorney**) intervenes in these proceedings pursuant to s 78A of the Judiciary Act 1903 (Cth) (**Judiciary Act**) in support of the defendants.

Part III: Argument

Background

3. The Plaintiff, a corporation, received an Adverse Security Assessment (**ASA**) which, if it stands, will affect its commercial interests. It sought merits review in the Security

Division of the former Administrative Appeals Tribunal (**Tribunal**). In that Division, the Administrative Appeals Tribunal Act 1975 (Cth) (**AAT Act**), now repealed, contained provisions designed to allow information which, in court proceedings, would generally be excluded as it would attract public interest immunity from production, to be deployed by the Tribunal, and taken into account by the Tribunal, in ways which altered the normal balance in the Tribunal of the interests of the Commonwealth and that of the Plaintiff. This was principally done by the issue of Ministerial non-disclosure certificates under former ss 39A and 39B of the AAT Act. Notwithstanding their issue – and that they could have been but were not the subject of challenge by way of judicial review – the Plaintiff was nevertheless provided with redacted reasons for the original decision, [redacted].

4. The Tribunal gave both closed and open reasons for affirming the decision under review. The Plaintiff received the latter. It then had at least two curial remedies to choose from. It could have chosen to judicially review the Tribunal's decision under s 75(v) of the Commonwealth Constitution (**Constitution**) or s 39B of the Judiciary Act but would then have inevitably been met by public interest immunity claims coextensive with the certificates, which if upheld, would have likely foreclosed most if not all grounds of review based on the certificated material and closed reasons. Alternatively, it could and did choose to take advantage of the appeal to the Federal Court on questions of law provided for by former s 44 of the AAT Act. The conduct of that appeal was relevantly governed by s 46, similarly to the Freedom of Information Act 1982 (Cth) (s 64) and the Archives Act 1983 (Cth) (s 53). Thus:

   i. s 46(1)(a) required that the Tribunal cause to be sent to the Federal Court all documents that were before the Tribunal in connexion with the proceeding to which the appeal related and which were "relevant to the appeal"; and

   ii. s 46(2) required that if there was in force a certificate issued under, relevantly, s 39B(2)(a), the Court must "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."

The Issue

5. This proceeding concerns the Plaintiff's challenge to the constitutional validity of s 46(2). Section 46(1) will stand or fall with that challenge as it is not severable: see Second Defendant's submissions (**DS**) **[60]**.

6. The Plaintiff frames the issue in these proceedings thus: does s 46(2) infringe Ch III of the Constitution because it requires the Federal Court to depart from the "general rule" of procedural fairness that a party should know what case an opposing party seeks to make and how that party seeks to make it, to an extent that is more than reasonably necessary to protect a compelling and legitimate public interest: see the Plaintiff's submissions (**PS**) **[2]**.

7. That framing should be rejected. It is inconsistent with the nature of the evaluative task that this Court considers when determining whether a law imposing a novel procedure, that departs from the "general rule", infringes the requirements of Ch III. That evaluative task, described below, asks "whether taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid "practical injustice"": Assistant Commissioner Condon v Pompano Pty Ltd (2013) 252 CLR 38 (**Pompano**) at [157] per Hayne, Crennan, Kiefel and Bell JJ. While considerations of the purpose of an impugned law are part of that evaluative task, whether the law is "no more than is reasonably necessary to protect a compelling public interest" is not part of that task: cf **PS [43]**.

8. Thus, the issue for this Court, should it decide to re-open SDCV v Director-General of Security (2022) 277 CLR 241 (**SDCV**), is whether:

   i. if the Minister administering the Australian Security Intelligence Organisation Act 1979 (Cth) (**ASIO Act**) (**ASIO Minister**) has issued a certificate under s 39B(2)(a) of the AAT Act that disclosure of that matter would be contrary to the public interest because it would prejudice the security or the defence or international relations of Australia; then

   ii. s 46(2) of the AAT Act, as the particular law regulating the jurisdiction invested in the Federal Court by s 44, permits the Court to accord both parties to the appeal procedural fairness and avoid "practical injustice" so as not to infringe Ch III of the Constitution.

9. The NSW Attorney makes the following submissions:

i. *First,* SDCV, unless re-opened, dictates dismissal of the Plaintiff's claim. For the reasons given by the Second Defendant, it should not be re-opened: **DS [16]-[23]**. Further, the provision challenged has now been repealed, will thus only apply to a closed, likely small, class of cases, and differs from the provision which replaces it.

ii. *Second*, procedural fairness is best understood as functional. The constitutional requirements of procedural fairness in any given case are to be determined by analysis of the statutory context underlying the function that has been conferred by Parliament. Here the context is compelling in justifying alteration of the general (although not invariable) rule of procedural fairness.

iii. *Third*, the broader statutory context of s 46(2) of the AAT Act tells against invalidity. Section 46 is not apt to occasion practical injustice to a person in the position of the Plaintiff because it provides that person with a statutory remedy to challenge the Tribunal's decision about an ASA *in addition to* the remedies otherwise provided by s 75(v) of the Constitution and s 39B of the Judiciary Act, and with forensic advantages not available in proceedings for those remedies given that the Court will have before it all the material that was before the Tribunal. Conversely, in proceedings under s 75(v) of the Constitution and s 39B of the Judiciary Act, s 46 does not apply and so if there is any comparative disadvantage to the appellant under s 46(2) it would be avoided.

Procedural fairness and the general rule

10. A court created by or under Ch III, or a State court capable of being vested with federal jurisdiction, must maintain the defining or essential characteristics of a court: see eg Wainohu v NSW (2011) 243 CLR 181 (**Wainohu**) at [44] per French CJ and Kiefel J. One of the essential characteristics of a "court" is that its proceedings are procedurally fair: Pompano at [67] per French CJ, [156] per Hayne, Crennan, Kiefel and Bell JJ, [194] per Gageler J (as he then was) and SDCV at [50] per Kiefel CJ, Keane and Gleeson JJ, [106] per Gageler J, [172] per Gordon J, [228] per Edelman J.

11. While State parliaments may confer non-judicial power upon a State court (Pompano at [22] per French CJ), when dealing with judicial power, as Kiefel CJ, Keane and Gleeson JJ said in SDCV at [58] "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". Hence the direct relevance of the Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 (**Kable**) line of authority especially Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532 (**Gypsy Jokers**), K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501 (**K-Generation**) and Pompano.

12. What then is required? Although there is and perhaps can be no exhaustive definition of the requirements of procedural fairness, in general it "requires that a court be and appear to be impartial, and provide each party to proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it": International Finance Trust Company Ltd v New South Wales Crime Commission (2009) 240 CLR 319 at [54] per French CJ; see also Pompano at [67] per French CJ.

13. However, "[t]he rules of procedural fairness do not have immutably fixed content" (Pompano at [156] per Hayne, Crennan, Kiefel and Bell JJ cited in SDCV at [66] per Kiefel CJ, Keane and Gleeson CJ) and there are numerous circumstances in which courts had made exceptions to the general rule to accommodate competing interests, which are collected at DS [40].

14. So, this Court has held that a law that requires a State Supreme Court to act on evidence or submissions that have been withheld from one or more of the parties will not of itself render the law inconsistent with the essential characteristics of a State court: see Gypsy Jokers, K-Generation and Pompano.

15. As Crennan J (with whom Gleeson CJ relevantly agreed at [1]) explained in Gypsy Jokers at [189] "the availability and accessibility of all relevant evidence in judicial proceedings is not absolute". And as French CJ explained in Pompano at [86], with reference to the observations in K-Generation at [22] per French CJ and [148] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ:

> That a law imposes a disadvantage on one party to proceedings in order to restrict, mitigate or avoid damage to legitimate competing interests does not mean that the defining characteristics of the court required to administer such a law are impermissibly impaired.

16. A key case is Pompano. In that case, this Court held that the power of the Queensland Supreme Court to declare an organisation to be a "criminal organisation", including

based on "criminal intelligence" withheld from that organisation, was not incompatible with that Court's institutional integrity and therefore not inconsistent with the doctrine first enunciated in Kable.

17. Relevantly, at [157] of Pompano, four Justices, Hayne, Crennan, Kiefel and Bell JJ observed that the "general rule, that opposing parties will know what case an opposite party seeks to make and how that party seeks to make it" is not absolute and that "[t]here are circumstances in which competing interests compel some qualification to its application": see also SDCV at [50], [66] per Kiefel CJ, Keane and Bell JJ, [178] per Gordon J. Their Honours held that a "particular form of adversarial procedure" is not entrenched "as a constitutionally required and defining characteristic of the State Supreme Courts" (at [119]) and that it is wrong to say "that in deciding any dispute a State Supreme Court *must always* follow an adversarial procedure by which parties (personally or by their representatives) *know* of all of the material on which the Court is being asked to make its decision": at [118] (emphasis added).

18. French CJ was similarly critical of any suggestion that there is a constitutional rule that parties must know all the material before the Court when it makes its decision. At [68] his Honour said:

> Procedural fairness, manifested in the requirements that the court be and appear to be impartial and that parties be heard by the court, is defined by practical judgments about its content and application which may vary according to the circumstances. Both the open court principle and the hearing rule may be qualified by public interest considerations such as the protection of sensitive information and the identities of vulnerable witnesses, including informants in criminal matters.

19. At [69] French CJ noted that procedural fairness has "been qualified or partially abrogated" on occasion by both common law and statute.

20. Pompano establishes that, ultimately, whether a law is procedurally unfair so as to impair impermissibly the essential characteristic of a court to provide procedural fairness turns on "whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid 'practical injustice'": at [157] per Hayne, Crennan, Kiefel and Bell JJ (and cited in SDCV at [59], [67] per Kiefel CJ, Keane and Gleeson JJ, see also [175] per Gordon J). That requires "a close analysis of

all aspects of those procedures and the legislation and rules governing them" (at [156] per Hayne, Crennan, Kiefel and Bell JJ) and "attention to the features of the statutory scheme taken as a whole": at [87] per French CJ.

21. The reference to "practical injustice" by the plurality at [157] in Pompano picks up the well-known observations by Gleeson CJ in Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1 (**Lam**) at [37] that "[f]airness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice". Although Gleeson CJ's observation was made in the context of administrative decision-making, the plurality in Pompano considered it to have general and immediate application: at [156], see also Gageler J in Pompano at [188] – "[p]rocedural fairness requires the avoidance of "practical injustice"".

22. The adaptation of observations made in an administrative law context to constitutional principle suggests that to a considerable degree, the constitutional and administrative law analyses of the requirements of procedural fairness converge. So much was recognised in Shrestha v Migration Review Tribunal (2015) 229 FCR 301 at [49] where Mansfield, Tracey and Mortimer JJ referred to Pompano at [156] per Hayne, Crennan, Kiefel and Bell JJ, [194] per Gageler J and Lam at [37] per Gleeson CJ and then said:

> It is always necessary, as Gleeson CJ emphasized in *Lam*, to assess whether a process meets the necessary standards of fairness by examining the particular circumstances in which that 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 the process.

23. It is submitted that this approach correctly directs attention beyond the immediate matter. Focusing solely on the statutory appeal without regard to the other choices available to the Plaintiff distorts the assessment of practical injustice. To use an analogy: a public interest immunity claim is a separate lis to the matter in which such a claim is made (see eg Sankey v Whitlam (1978) 142 CLR 1) but it would be equally artificial to ignore that wider context.

24. The decision of this Court in Pompano should be understood as requiring such an analysis to take place in every circumstance in which there is an asserted departure from the general rule.

25. Another aspect of the context in which the requirements of procedural fairness fall to be determined is the subject-matter with which a statute deals: Kioa v West (1985) 159 CLR 550 (**Kioa v West**) at 584-585 per Mason J, citing R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group (1969) 122 CLR 546 at 552-553 and National Companies and Securities Commission v News Corporation Ltd (1984) 156 CLR 296 at 311, 319-321. The subject-matter of a statute may explain why Parliament has adopted a particular framework restricting the requirements of procedural fairness in favour of another public interest: compare Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88 at [23]-[25] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

26. More recently, in SDCV, and with reference to Pompano at [156]-[157], Kiefel CJ, Keane and Gleeson JJ observed at [54] that whether "practical injustice may be occasioned to a litigant depends upon the nature of the proceedings and the rights and interests at stake": see also [176] per Gordon J. By way of example, the plurality noted at [54] that the requirements of procedural fairness that attend a criminal trial, in which a person may be sentenced to imprisonment following the finding of guilt, are not guaranteed by Ch III to apply to an appeal to a court in accordance with a statutory scheme under which statutory rights depend upon administrative decisions. Even there however, their Honours observed that an accused may be denied the gist of information sought because of competing public interest considerations consistent with the requirements of procedural fairness: see SDCV at [54] per Kiefel CJ, Keane and Gleeson JJ referring to Pompano at [68] per French CJ.

Application of the above principles to s 46(2) of the AAT Act

27. Section 44 of the AAT Act invests original jurisdiction in federal courts by virtue of a grant by Parliament in exercise of s 77(i) of the Constitution by reference to s 76(ii): Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577 at 581 per Bowen CJ and Deane J; TNT Skypak International (Australia) Pty Ltd v Federal Commissioner of Taxation (1988) 82 ALR 175 at 181 per Gummow J. The procedure

contemplated by ss 44 and 46 of the AAT Act involves a conferral of additional original jurisdiction by Parliament upon a federal court in respect of matters which otherwise arise under federal law.

28. Parliament's creation of rights and obligations and the determination of the content of a matter for the purposes of s 76(ii), and the definition of the court's jurisdiction over that matter pursuant to s 77(i), will necessarily require a determination of the statutory setting, the characteristics of the parties, what is at stake for them, the nature of the decision to be made, and steps already taken in the process. The present arrangements fall to be determined by reference to the requirements of procedural fairness that attach to the function performed by federal courts in the specific context in an appeal under s 44 of the AAT Act to which s 46(2) applies.

29. Having regard to those matters and to the above principles, when s 46(2) of the AAT Act is considered as a part of the overall scheme for resolving a dispute as to the making of an ASA, it accords procedural fairness to both parties on the appeal and avoids practical injustice.

The Court's function

30. In an appeal under s 44 of the AAT Act, including in an appeal from the Tribunal's decision affirming an ASA, s 46(2) maintains the position regarding non-disclosure of security-sensitive information relating to the ASA decision as required by extant Ministerial certificates, while s 46(1) allows the Federal Court to consider the entirety of the material that was before the Tribunal in reviewing the Tribunal's decision: see SDCV at [70] per Kiefel CJ, Keane and Gleeson JJ. That enables the Court better to fulfil the function conferred on it by s 44 of the AAT Act as it will have the same material as that on which the Tribunal proceeded, while also protecting the certificated security-sensitive information from disclosure: see SDCV at [70] per Kiefel CJ, Keane and Gleeson JJ.

31. In exercising its review function, s 46 of the AAT Act leaves it open to the Court to decide what weight to attach to the certificated material and to take into account, if it is necessary on an appeal on a question of law to ascribe weight to that material, the fact that the affected party has had no opportunity to see it or test it: see Pompano at [80] per French CJ referring to K-Generation at [148] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; contra **PS [58]**. Even though a special advocate cannot be

appointed, the Court is able to make the same kinds of inquiries of a party – here, a model litigant – that it might make in an *ex parte* application in which a party must give full and frank disclosure of all the facts known to it which the absent person could have been expected to have put before the court had they been present at the application for the order: see Aristocrat Technologies Australia Pty Ltd v Allam (2016) 90 ALJR 370 at [15] per Gageler J. Further, it does not prevent the Court from reviewing the validity of a certificate on its own motion and satisfying itself that the certificate was valid: SDCV at [251] per Edelman J, see also [60] per Kiefel CJ, Keane and Gleeson JJ. Nor does it prevent the Court from giving an applicant the gist of the information subject to the certificate provided that the Court acts consistently with s 46(2) when it does so: see SDCV at [157] per Gageler J, [193] per Gordon J, [291] per Steward J. Finally, and as with a public interest immunity claim, the Court could require detailed ex parte submissions from the Commonwealth parties on any matters of concern to it.

The Plaintiff's rights

32. The Plaintiff is a proprietary limited company registered under the Corporations Act 2001 (Cth) and a "carriage service provider" within the meaning of the Telecommunications Act 1997 (Cth) (**Telecommunications Act**): Special Case (**SC**) **[2]**. Section 313(1A) of the Telecommunications Act imposes obligations upon carriage service providers in relation to "security" as that term is defined in the ASIO Act.

33. Section 315A(1) of the Telecommunications Act relevantly empowers the Home Affairs Minister to give a carriage service provider a written direction not to use or supply, or to cease using or supplying, the carriage service or the carriage services. However, the Home Affairs Minister's power to give that direction is conditioned upon the Minister having first received an ASA in respect of the carriage service provider in connection with s 315A of the Telecommunications Act.

34. Any entitlement of a person in the position of the Plaintiff to information with respect to the ASA is statutory: see by analogy SDCV at [69] per Kiefel CJ, Keane and Gleeson JJ. Under statute it could be denied by a decision of the Minister for Home Affairs (as the ASIO Minister) if she was satisfied that the disclosure to the person, its directors or its employees would be prejudicial to the interests of security: see by analogy SDCV at [69] per Kiefel CJ, Keane and Gleeson JJ.

35. In the present case, the right or interest of the Plaintiff at stake in the appeal to the Federal Court is its right or interest to provide a carriage service unless directed by the Minister for Home Affairs under s 315A of the Telecommunications Act not to use or supply, or to cease using or supplying, the carriage service or the carriage services: see, by analogy, SDCV at [71] per Kiefel CJ, Keane and Gleeson JJ. As was the case for the appellant in SDCV, the Plaintiff's statutory rights "were always circumscribed by the denial of disclosure of security-sensitive information pursuant to unchallenged administrative decisions made under unchallenged laws": at [69] per Kiefel CJ, Keane and Gleeson JJ. Put another way, the denial of an opportunity for the Plaintiff to know the totality of information that supported the making of the ASA decision was an incident of the statutory scheme under which the Plaintiff operated a carriage service: SDCV at [73] per Kiefel CJ, Keane and Gleeson JJ.

The importance of the national security context

36. Certification under s 39B(2) of the AAT Act engages the duty in s 46(2). The significance of the certification is that it establishes the judgment of the responsible Minister that the security, defence or international relations of Australia would be prejudiced were the information or documents in question to be disclosed. [redacted] . Certification under s 39B(2) may be challenged or otherwise subjected to scrutiny, including in the ways contemplated in Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421 at [18]-[19] per Bell, Gageler and Keane JJ: see also SDCV at [59] per Kiefel CJ, Keane and Gleeson JJ. In circumstances where the validity of the certificate has not been questioned, the premise for the s 44 appeal is that the information to which s 46(2) applies is material that was properly certificated.

37. In a system of representative and responsible government "the constitutional responsibility for the protection of national security lies with the elected government", which is itself "ultimately accountable to Parliament": R (Miranda) v Secretary of State for the Home Department [2016] 1 WLR 1505 at [79] per Lord Dyson MR, see also A v Hayden (1984) 156 CLR 532 at 549 per Gibbs CJ, 576-578 per Wilson and Dawson JJ, 590 per Brennan J. It is understood that "[n]ational security undoubtedly forms a category of public interest of special importance": Alister v The Queen (1984) 154 CLR 404 at 436 per Wilson and Dawson JJ.

38. In Leghaei v Director-General of Security (2007) 241 ALR 141 (**Leghaei**), the Full Court of the Federal Court (Tamberlin, Stone, Jacobson JJ) considered the content of the obligation to afford procedural fairness in the context of an adverse security assessment challenge under s 39B of the Judiciary Act. Their Honours acknowledged (at [47]) that as a general rule a person affected by a decision should be informed of the critical issue or factor on which the decision is likely to turn so that the person can have an opportunity to deal with the issue: citing Kioa v West at 587 per Mason J, 628 per Brennan J. Their Honours noted (at [47]) that ordinarily this obligation requires that the specific grounds on which the decision is likely to turn be put to the person so that he or she may direct submissions to the critical issue or issues: citing Minister for Immigration and Ethnic Affairs v Kurtovic (1990) 21 FCR 193 at 223 per Gummow J.

39. They continued (at [48] and [50]):

> However, it is well recognised that reasons of national security may make it impossible to disclose the grounds on which the executive propose to act: Salemi v Mackellar (No. 2) (1997) 137 CLR 396 at 421. Thus, as Lockhart J said in Amer v Minister for Immigration, Local Government and Ethnic Affairs (FCA, Lockhart J, 19 December 1989, unreported) (**Amer No. 2**) at 1:
>
> > The case raises the old but important question for the courts of balancing two aspects of the public interest which have a potential for conflict, namely, that a party is entitled to know the case he has to meet yet the furtherance of the national interest may require that certain elements in the case should be withheld from him.
>
> …
>
> In Amer No. 2 (at 9-10), Lockhart J recognised that in some cases the balancing of the conflicting principles produces the ‘unsatisfactory’ feature that the content of a security assessment is withheld from the person affected. However, his Honour remarked that this is an inevitable result if the balance is determined in favour of the public interest in national security.

40. Although the Full Court in Leghaei was concerned with the requirements of procedural fairness in an individual case, its observations are apposite where Parliament undertakes the balancing exercise for itself when establishing procedures for reviewing the making of ASAs by the executive branch. As this Court in Graham v Minister for Immigration

and Border Protection (2017) 263 CLR 1 observed at [35] "the question of where the balance may lie in the public interest has never been said to be the exclusive preserve of the courts, nor has it ever been said that legislation may not affect that balance." That observation, made of the rule in former s 503A(2)(c) of the Migration Act 1958 (Cth) forbidding a Minister from being required to divulge or communicate certain confidential information to, relevantly, a court, may be taken to indicate that the entitlement of a person to have the benefit of information (either directly or because it has been put before a court) is itself a matter into which Parliament may have input.

41. Consistently with the submissions above, in considering the content of procedural fairness it is appropriate to consider the significance of action by Parliament in circumstances where questions of justiciability and the efficacy of court proceedings are likely to be affected by the presence of sensitive national security information.

Steps already taken in the process

42. Although an appellant under s 44 of the AAT Act (who is not a government party) will not have access to all the material upon which the ASA decision by the Tribunal was made, they are likely to have some understanding of the reasons for the ASA decision. [redacted]. That understanding will be derived from the statutory requirements on the making of an ASA as well as the procedure for review of an ASA before the Tribunal including:

   i. the requirement that an ASA be accompanied by a statement of grounds containing all the information that ASIO relied upon in making the assessment, other than information which would, in the opinion of the Director-General, be contrary to the requirements of security (s 37(2) of the ASIO Act) and other than any matter that the ASIO Minister has certified would be prejudicial to the interests of security if disclosed (ss 38(2)(b) and 38(5) of the ASIO Act);

   ii. the requirement that the Tribunal must make and record its findings in relation to the ASA, which may state the opinion of the Tribunal as to the correctness of, or justification for, any opinion in the ASA (ss 43AAA(2) and 43AAA(3)); and

   iii. the requirement that the Tribunal provide copies of its findings to the applicant (ss 43AAA(4)), albeit the Tribunal may direct that the whole or a part of the

findings, so far as they relate to a matter that has not already been disclosed to the applicant, is not to be given to the applicant (s 43AAA(5)).

43. In the Plaintiff's case, for example, it has received the ASA (Annexure SC-2 (**SC 47**)), a revised "unclassified" statement of grounds (Annexure SC-12 (**SC 86-96**)) and the Tribunal's "open" reasons for affirming the ASA decision: Annexure SC-14 (**SC 100-120**). [redacted].

Other remedies for the Plaintiff

44. When the Commonwealth enacts legislation under s 76(ii) and 77(i) of the Constitution, it is not legislating in a vacuum. It is important to consider the spectrum of remedies available given that the focus on invalidity is on whether the procedures for resolving the dispute accord both parties procedural fairness and avoid "practical injustice".

45. A person aggrieved by the Tribunal's decision may seek judicial review of the Tribunal's decision under s 75(v) of the Constitution or s 39B of the Judiciary Act, rather than proceed by way of an appeal under s 44 of the AAT Act: see SDCV at [82] per Kiefel CJ, Keane and Gleeson JJ. However, any attempt by that person to gain access to the material that was before the Tribunal would likely be met with a claim that the material was immune from disclosure because disclosure would prejudice security or the defence or international relations of Australia. Such a claim is likely to have very good prospects of success, reflecting Brennan J's observation in Church of Scientology Inc v Woodward (1982) 154 CLR 25 (**Woodward**) at 76 that:

> The secrecy of the work of an intelligence organization which is to counter espionage, sabotage, etc. is essential to national security, and the public interest in national security will seldom yield to the public interest in the administration of civil justice.

46. Where a successful claim to public interest immunity is made with respect to material, that material is then denied to both the Court and the applicant: see Gypsy Jokers at [5] per Gleeson CJ, [24] per Gummow, Hayne Heydon and Kiefel JJ. An applicant who

sought judicial review of an ASA under s 75(v) of the Constitution or s 39B of the Judiciary Act would face the same disadvantage: Sagar v O'Sullivan (2011) 193 FCR 311 at [52]-[54], [58]. As Mason J said in Woodward at 61:

> The fact that a successful claim for privilege handicaps one of the parties to litigation is not a reason for saying that the Court cannot or will not exercise its ordinary jurisdiction; it merely means that the Court will arrive at a decision on something less than the entirety of the relevant materials.

47. By comparison, in an appeal under s 44 of the AAT Act from a decision of the Tribunal the Court would have access to material that was before Tribunal relevant to the appeal. That is because:

    i. the material before the Tribunal would include information or documents to which public interest immunity might otherwise apply given the obligation on the Director-General, who is a party to the merits review proceeding (s 39A(2) of the AAT Act) to present to the Tribunal "all relevant information available to the Director-General, whether favourable or unfavourable to the applicant" (s 39A(3)), including information or the contents of documents to which public interest immunity would otherwise apply (s 39B(8) of the AAT Act); and

    ii. when an appeal is instituted under s 44 of the AAT Act, the Tribunal shall cause to be sent to the Court all documents that were before the Tribunal in connexion with the proceeding to which the appeal or reference relates and are relevant to the appeal: s 46(1) of the AAT Act.

48. Accordingly, even when s 46(2) denies a party the opportunity to make submissions on the material that was before the Tribunal, it is nonetheless "beneficial" compared with that party's position in the absence of s 46(2): SDCV at [313] per Steward J. In the Plaintiff's case, for example, without all the material that was before the Tribunal being before a Court on review, it might very well struggle making out the grounds of its appeal, particularly ground 5 in its notice of appeal to the Full Court which includes that the Tribunal "irrationally assume[d] facts or irrationally [drew] inferences from the material before it" and "otherwise fail[ed] to comply with its duty of legal reasonableness": Annexure SC-15 (**SC 125**), see also SDCV at [79] per Kiefel CJ, Keane and Gleeson JJ.

Conclusion

49. The issue at the heart of this proceeding – whether, taken as a whole, the Court's procedures for resolving a dispute about an ASA decision by the Tribunal accord both parties procedural fairness and avoid "practical injustice" where information is withheld from a party on the grounds of national security – is one that has long vexed countries, including the United States, the United Kingdom, Canada and Australia: see SDCV at [104]-[105] per Gageler J. But that issue is inevitable if there is to be any form of merits review and subsequent statutory appeal for the making (or denial) of an ASA.

50. The appointment of special advocates to whom disclosure of sensitive-security information has been made, and who represent the interests of a party to whom disclosure of such information has not been made, has been one way in which the United Kingdom has sought to balance the interests embodied in the general rule and the interest of national security. That mechanism, however, is not without its significant limitations as far as the special advocate can be said to represent a party: see, eg, SDCV at [256] per Edelman J and see the "Independent report on the operation of closed material procedure under the Justice and Security Act 2013" by Sir Duncan Ouseley published in November 2022.

51. There are also mechanisms in Australia that sit outside the judicial process, such as complaints by individuals concerning the legality and propriety of officials to the office of the Inspector-General of Intelligence and Security established under the Inspector-General of Intelligence and Security Act 1986 (Cth).

52. In Australia, the issue at the heart of this proceeding engages Ch III of the Constitution and, in particular, the essential characteristic required of a court created by or under Ch III, or a court capable of being vested with federal jurisdiction, to provide procedural fairness: see SDCV at [106] per Gageler J. The content of procedural fairness is something into which Parliament may have input. When that input concerns the subject-matter of national security, it can require the Commonwealth Parliament—in pursuit of the imperatives that were the cause of its foundation—to depart from the general rule that a party will know what case an opponent seeks to make and how it seeks to make it. Pompano should be understood to allow national security imperatives to be treated as significant for the purpose of constitutional analysis.

53. Parliament's departure from the general rule in this particular context nevertheless adds, in reality, to the role that information (that would very likely otherwise be the subject of exclusion from consideration by reason of a successful claim for public interest immunity) can play in the process of review, whilst also protecting the body politic as a whole. Any unfairness to the Plaintiff falls to be considered in the light of this underlying reality.

54. The NSW Attorney otherwise adopts the submissions of the Second Defendant.

Part IV: Estimated length of oral argument

55. It is estimated that oral argument on behalf of the NSW Attorney will take 15-20 minutes.

Dated 18 October 2024

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ANNEXURE

Constitutional provisions, statutes and statutory instruments referred to in the intervener's submissions

No	Statute	Version	Provisions(s)
1.	Constitution of Australia	Current	ss 75(v), 76(ii), 77(i)
2.	Administrative Appeals Tribunal Act 1975 (Cth)	Compilation as at 22 May 2024 (now repealed)	ss 39A, 39B, 44, 46 39A, 39B
3.	Archives Act 1983 (Cth)	Current	s 53
4.	Australian Security Intelligence Organisation Act 1979 (Cth)	Current	ss 37(2), 38(2)(b), 38(5)
5.	Freedom of Information Act 1982 (Cth)	Current	s 64
6.	Judiciary Act 1903 (Cth)	Current	s 39B
7.	Telecommunications Act 1997 (Cth)	Current	ss 313(1A), 315A