



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN:

MJZP
Plaintiff

and

DIRECTOR-GENERAL OF SECURITY
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

PLAINTIFF'S OUTLINE OF ORAL ARGUMENT

PART I — INTERNET PUBLICATION

This outline of oral argument is in a form suitable for publication on the Internet.

PART II — PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Background and legislative provisions

1 The Plaintiff is a carriage service provider within the meaning of the *Telecommunications Act 1997* (Cth). ASIO furnished an ASA in connection with s 315A of that Act. The ASIO Minister issued certificates under ss 39B(2)(a) and 39A(8) of the AAT Act: **PS [4]-[5]**.

2 The Tribunal affirmed the ASA. The Plaintiff appealed to the Federal Court under s 44(1) of the AAT Act. That appeal, which is pending, remains governed by 46 of the AAT Act:
10 **PS [6]-[11]; Reply [2]; Cth [5]**.

- *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth), Sch 16, items 1, 27 (**JBA v 2, Tab 6**).

3 Properly construed, s 46(2) of the AAT Act imposes a blanket and inflexible non-disclosure requirement: **PS [29]-[33]**.

Re-opening the result in *SDCV*

4 *SDCV* does not contain any binding *reasoning* on any relevant point. The plurality and Steward J adopted different constructions of s 46(2), which underpinned their respective conclusions on the Ch III issue: **PS [16]-[19]; Reply [4]-[5]**.

- *SDCV* (2022) 277 CLR 241 at [86], [97]-[98], [291], [295], [302], [306], [308] (**JBA v 7, Tab 49**).

5 *SDCV* produced a binding result. But in the absence of binding reasoning supporting that result, leave to re-open should be granted: **PS [22]; Reply [3], [6]**.

- *Te* (2002) 212 CLR 162 at [86]-[87] (**JBA v 7, Tab 45**);
- *Lange* (1997) 189 CLR 520 at 554, 556 (**JBA v 6, Tab 37**);
- *Jones* (2000) 207 CLR 166 at [201]-[202], [207] (**JBA v 5, Tab 34**).

6 The *John* factors also favour re-opening: **PS [23]**.

6.1 The reasoning of the Justices comprising the majority diverged on the construction of s 46(2), and therefore on the Ch III issue as well: **PS [26]**.

6.2 Neither *Gypsy Jokers* nor *Pompano* controlled the outcome in *SDCV*, nor do they
30 control the outcome here: **PS [25]; Reply [8]-[9]**.

- *Gypsy Jokers* (2008) 234 CLR 532 at [10], [30], [35]-[36] (**JBA v 5, Tab 28**);
- *Pompano* (2013) 252 CLR 38 at [105], [116], [162] (**JBA v 3, Tab 19**);
- *SDCV* (2022) 277 CLR 241 at [148], [207], [211]-[212].

6.3 *SDCV* is productive of inconvenience: **PS [27]**.

6.4 The manner in which *SDCV* has been acted upon does not militate against re-opening:
PS [28]; Reply [7].

Section 46(2) is invalid

7 The “general rule” of procedural fairness within an adversarial system is that opposing parties will know what case an opposite party seeks to make and how that party seeks to make it.

- *SDCV* (2022) 277 CLR 241 at [136].

8 Where a law purports to alter the general rule, it will infringe Ch III if it goes further than is reasonably necessary to protect a compelling and legitimate public interest: **PS [34]-[42]; Reply [11]; Cth [44]**. That approach is consistent with:

8.1 the approach taken by this Court to the question whether qualified constitutional requirements are infringed;

8.2 the approach taken by this Court to the closely related question of whether a legislated departure from the open justice principle infringes Ch III.

- *SDCV* (2022) 277 CLR 241 at [138], [218], [231], [238]-[239], [241], [267];
- *Hogan* (2011) 243 CLR 506 at [85]-[91] (**JBA v 5, Tab 29**).

9 The purpose of s 46(2) is to prevent the disclosure of information where disclosure would be injurious to the public interest because it would prejudice (relevantly) security or the defence or international relations of Australia. That purpose is legitimate and compelling:
PS [44].

10 Section 46(2) is not reasonably necessary to protect the identified purpose because it prevents disclosure to an appellant of material the subject of an s 39B(2)(a) certificate irrespective of the relevance of the material to the appeal and irrespective of the degree to which disclosure would prejudice the security, defence or international relations of Australia: **PS [45]-[49]**.

- *SDCV* (2022) 277 CLR 241 at [152], [191], [246].

11 That s 46(2) goes further than reasonably necessary is confirmed by consideration of the various options that were available to the Parliament to accord procedural fairness. For example, s 46(2) could have:

11.1 permitted the court to balance the prejudicial effect of non-disclosure and to decline to use certified matter where doing so would result in unfairness;

- 11.2 required the ASIO Minister to provide evidence justifying the issuance of the certificate; and/or
- 11.3 authorised the appointment of a special advocate: **PS [50]**.
- 12 The matters relied upon by the Commonwealth do not establish that s 46(2) is reasonably necessary:
- 12.1 The fact s 46(2) only applies to s 44 appeals does not establish that it is reasonably necessary. That there exists an alternative procedure which is fair does not mean that the departure that s 46(2) effects from the general rule is justified. Further, contrary to the assumption underlying this point, the Court having the secret material compounds the unfairness to an appellant: **PS [54]-[59]**.
- 10
- *Oakey* (2021) 272 CLR 33 at [47] (**JBA v 7, Tab 42**);
 - *SDCV* (2022) 277 CLR 241 at [130], [155], [196].
- 12.2 The cases to which s 46(2) does not apply says nothing about whether it is reasonably necessary in those to which it does: **Reply [14]**.
- 12.3 Because s 46(2) does not apply in judicial review proceedings, it provides no foundation for the Commonwealth to give assurances of confidentiality to sources of intelligence: **Reply [12]**; cf **Cth [56]**; **Qld [25]**.
- 12.4 On judicial review of a certificate, the reviewing court would not be able to consider the impact of non-disclosure on fairness to an appellant: **PS [59]**; **Reply [15]**.
- 20
- *SDCV* (2022) 277 CLR 241 at [156], [197], [250].
- 12.5 Section 46(3) does not assist to demonstrate the reasonable necessity of s 46(2) in its application to a certificate made under s 39B(2)(a): **Reply [18]**.
- 12.6 The extent to which “gisting” is possible is controlled by the ASIO Minister: **Reply [17]**.
- *SDCV* (2022) 277 CLR 241 at [157], [193], [253].
- 13 Nor does the statutory nature of an appellant’s rights support the proposition that s 46(2) is valid. The concept of “practical injustice” is concerned with *procedural* injustice. In any event, any departure from the general rule must be justified, regardless of the source and nature of an appellant’s rights: **PS [53]**.
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- *SDCV* (2022) 277 CLR 241 at [132], [174], [222].



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12 December 2024