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

PLAINTIFF'S OUTLINE OF ORAL ARGUMENT — HEARING ON 11 MARCH 2025

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

Proper construction of s 46 of the AAT Act

1 Section 46 of the AAT Act (**JBA v 1, Tab 3**) authorises and requires the Federal Court to determine an appeal under s 44 on the basis of all of the material that was before the Tribunal, including certified material, without any need for that material to be tendered and admitted into evidence: **PS [30]**; **P PHS [2]**.

1.1 Section 46(1)(a) is akin to certiorari to call up the record: its effect is that the "record" of the Tribunal proceedings is before the Federal Court for the purposes of the appeal. There is therefore no further process of "tendering" and "admission" of evidence.

- *SDCV* (2022) 277 CLR 241 at [185], [187], [242]-[243]; see also at [126], [154] (**JBA v 7, Tab 49**).

1.2 Whereas the Commonwealth's construction gives rise to large questions as to the Federal Court's power to act on secret evidence (**P PHS [14]-[16]**), no such questions arise on the Plaintiff's construction.

1.3 This construction is supported by the text of s 46(1) and (2), which distinguishes between "the court" as an institution and its "members". The Federal Court obtains the record under s 46(1)(a), and the judicial officer(s) obtain the record under s 46(2) without any act by the parties. So much is consistent with rr 33.23 and 33.26 of the *Federal Court Rules 2011* (Cth).

1.4 Section 44(7) and (8) of the AAT Act (**JBA v 1, Tab 3**) support the proposition that in an s 44 appeal, all of the evidence that was before the Tribunal is taken to be before the Court.

1.5 This construction is consistent with the purpose of the statutory scheme: namely, to create an avenue of appeal where all of the material that was before the Tribunal is also before the Court.

2 Section 15A of the *Acts Interpretation Act 1901* (Cth) does not permit the Court to adopt the Commonwealth's construction. Section 15A is engaged where there is a choice between reading a statutory provision in a way that will invalidate it and reading it in a way that will not. Where the latter construction is "reasonably open", s 15A requires the

Court to choose it. The Commonwealth's construction is not reasonably open having regard to the matters identified in paragraph 1 above: see **P PHS [5]-[8]**.

- *Residual Assco* (2000) 202 CLR 628 at [29] (**Supp JBA v 2, Tab 9**).

3 By advancing a construction that was not adopted by either the plurality or Steward J, the Commonwealth is attempting to "re-explain" *SDCV*. In those circumstances, the appropriate course is to grant leave to re-open and to consider the issues of construction and validity afresh.

Refusing to admit evidence, conditional tender and reversion to ordinary procedures

4 Assuming, contrary to paragraphs 1-2 above, that s 46(1)(a) is "mechanical" only, then s 46(2) would be valid by reason of the third, fourth and fifth mechanisms identified by the Commonwealth: **P PHS [44]-[45]**.

5 Contrary to the assumption underlying the Commonwealth's submissions, the appropriate course is for the Director-General, not the applicant, to tender the material provided to the Court under s 46(1)(a): **P PHS [19] fn 29**.

6 As to the third mechanism, being the Court's power to refuse to admit evidence:

6.1 Section 135 of the Evidence Act is insufficient on its own to render s 46(2) valid.

(a) *First*, the balancing exercise under s 135 is weighted in favour of admission because of the requirement that probative value be "substantially" outweighed by the danger of unfair prejudice.

(b) *Secondly*, the balancing exercise under s 135 is different to the exercise called for under Ch III.

(c) *Thirdly*, if s 135 confers a discretion, then a court may admit evidence even if the criteria for exclusion are satisfied: **P PHS [20]-[23]**.

6.2 The Court should recognise an implied power to refuse to admit evidence. That power ensures that s 46(2) conforms with the requirements of Ch III by requiring the Federal Court to refuse to admit certified matter into evidence where its use would not be congruent with an aspect of the normative structure of the Australian legal system — here, the requirements of procedural fairness in an adversarial proceeding: **P PHS [24]-[30]**.

- *Dunstall* (2015) 256 CLR 403 at [26], [31], [48], [59] (**Supp JBA v 2, Tab 8**).
- *Dupas* (2010) 241 CLR 237 at [15] (**Supp JBA v 2, Tab 5**).

7 As to the fourth mechanism (conditional tender), the extent to which this alleviates procedural unfairness will turn on the relevance of the certified matter to the grounds of appeal and the extent to which the appellant's legal representatives can make submissions in respect of the certified matter in the absence of instructions. The conditions could also include provision for a special advocate procedure: see **P PHS [32]-[33]**.

8 As to the fifth mechanism (reversion to ordinary procedures), if the Court were to apply its ordinary procedures there would be no departure from the general rule because the Court would not be deciding the appeal by reference to secret evidence: **P PHS [37]-[38]**.

9 The third, fourth and fifth mechanisms identified by the Commonwealth would ensure
10 that s 46(2) does not effect a departure from the general rule that is greater than reasonably necessary to protect a compelling and legitimate public interest (again, assuming that the Commonwealth is correct in its submission that s 46(1)(a) is "mechanical" only): **P PHS [43]-[45]**.

- *GLJ* (2023) 97 ALJR 857 at [18]-[19], [22] (**Supp JBA v 3, Tab 11**).

11 March 2025

Craig Lenehan **Thomas Wood** **Shawn Rajanayagam**