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: **SDCV**

Appellant

AND: **DIRECTOR-GENERAL OF SECURITY**

First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH

Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENTS

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Legislative context of the impugned provision (2RS [5]-[16])

2. Sections 37(2) and 38(1) of the *Australian Security Intelligence Organisation Act 1979* (Cth) ensure that a person the subject of an Adverse Security Assessment (**ASA**) is aware of the grounds for the assessment and all the information relied upon in making it, except to the extent that, acting reasonably and under a correct understanding of the law, the Director-General affirmatively concludes that such disclosure would be "contrary to the requirements of security" or the Minister is satisfied that disclosure "would be prejudicial to the interests of security" (**JBA 2, Tab 5**).

3. A person can seek judicial review of an ASA under s 75(v) of the Constitution or s 39B of the *Judiciary Act 1903* (Cth).

4. In addition, Parliament has conferred a statutory right to merits review of an ASA in the Security Division of the Administrative Appeals Tribunal (**AAT**): ASIO Act, s 54(1) (**JBA 2, Tab 5**). The Security Division must follow the procedures and requirements specified in ss 39A, 39B and 43AAA of the *Administrative Appeals Tribunal Act 1975* (Cth) (**JBA 1, Tab 3**). These include s 39A(3) which obliges the Director-General to present to the AAT all relevant information, whether favourable or unfavourable to the applicant, and s 39B(2)(a) which empowers the Minister to certify that disclosure of information or the contents of a document would be contrary to the public interest on various identified grounds (**JBA 1, Tab 3**). Those procedures and requirements reflect the balance Parliament has struck between the public interest in decisions about national security being made on the basis of all relevant information and the public interest in preventing the disclosure of information from prejudicing national security.

5. An applicant can seek judicial review of the AAT's decision. In addition, Parliament conferred a right of appeal on a question of law from the AAT to the Federal Court: AAT Act, s 44. The AAT is required to send all material to the Court when an appeal is instituted, notwithstanding any certificates issued pursuant to s 39B: AAT Act, s 46(1) (**JBA 1, Tab 3**). Section 46(1) facilitates meaningful review of the AAT's decision based on the same information as was before the AAT, while s 46(2) ensures that this review does not come at the price of damage to national security.

Applicable constitutional principles (2RS [17]-[34])

6. The parties agree that procedural fairness is an essential characteristic of a Ch III court, and that the requirements of procedural fairness are not fixed but are directed to the avoidance of practical injustice: **AS [19]-[23]**, **2RS [17]-[18], [28]**. Nevertheless, the appellant attempts to fix a minimum requirement that a person must be afforded a "fair opportunity to respond to evidence" and submits that depriving a person of that minimum requirement "will always amount to practical injustice": **AS [26], [29]**.

7. While it is an ordinary feature of judicial proceedings that all parties will be aware of all the evidence before the court, Parliament may authorise federal or State courts to adopt a different procedure if that is necessary to accommodate competing public interests. There is no relevant difference between State and federal courts in the standard of procedural fairness required of courts by Ch III when they are exercising judicial power, for otherwise there would be two grades or qualities of justice: **2RS [26] fn 32; cf AS [51]**.

   - *Gypsy Jokers Motorcycle Club v Commissioner of Police* (2008) 234 CLR 532 at [5]-[6] (Gleeson CJ), [22]-[25], [28], [33], [36] (Gummow, Hayne, Heydon and KiefelJJ), [166], [182] (Crennan J) (**JBA 5, Tab 21**)
   - *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [97], [109], [116]-[120], [123]-[126], [139], [148], [152]-[157] (Hayne, Crennan, Kiefel and Bell JJ), [177], [188], [190]-[195] (Gageler J) (**JBA 3, Tab 11**)

8. The Constitution does not require courts to be left to balance the competing public interests of procedural fairness and national security case by case. It is open to Parliament to balance those interests itself: *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at pp 4-6 (argument), [33], [35], [62], [64] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) (**JBA 5, Tab 20**).

Section 46(2) of the AAT Act does not cause practical injustice (2RS [35]-[45])

9. Three features of the regime of which s 46(2) forms part mean that it does not cause practical injustice. ***First***, s 46 applies (relevantly) only where the Minister has *validly* certified under s 39B(2)(a) that the information withheld is of a kind that would prejudice national security. The courts have an important role in ensuring that litigants are not unjustifiably prevented from having access to that information, as the validity of a certificate can be tested:

   (a) in judicial review proceedings: *Hussain v Minister for Foreign Affairs* (2008) 169

FCR 241 at [47]-[49] (the Court) (**JBA 9, Tab 43**)

(b) before the AAT: *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [17]-[19] (Bell, Gageler and Keane JJ) (**JBA 6, Tab 31**); *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501 at [143]-[145] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ) (**JBA 6, Tab 27**)

(c) by the Federal Court in an appeal under s 44, in order for the Court to determine its own obligations under s 46(2): *SZMTA* (2019) 264 CLR 421 at [18] (Bell, Gageler and Keane JJ) (**JBA 6, Tab 31**).

10. ***Second***, proceedings seeking judicial review are unaffected by s 46(2). However, public interest immunity (**PII**) claims over evidence that is the subject of a certificate under s 39B(2)(a) are likely to succeed, which in turn would present a considerable obstacle to the applicant's success in such proceedings: *Plaintiff M46 v Minister for Immigration and Border Protection* (2014) 139 ALD 277 at [12]-[13], [17], [20], [23]-[24], [27]-[32], [37], [66], [74], [90] (**JBA 9, Tab 49**). Restricting disclosure to lawyers is no answer to such a PII claim: *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 620 (**JBA 4, Tab 16**); *R v Khazaal* [2006] NSWSC 1061 at [30]-[39].

11. ***Third***, in that context, s 46(2) provides an alternative review mechanism that avoids the substantial obstacle PII will commonly pose to success in judicial review proceedings: *R (Haralambous) v Crown Ct at St Albans* [2018] AC 236 at [22], [33], [46]-[48], [52]-[59] **(JBA 10, Tab 50)**; *In Re National Security Agency Telecommunications Records Litigation* (2011) 671 F 3d 881 at 892, 902-904 (**JBA 9, Tab 44**). There is no practical injustice in Parliament's provision of an additional review mechanism of that kind, which an applicant can elect to use if it will advance their interests better than judicial review.

Consequences for s 46(1) if s 46(2) invalid (2RS [46]-[50])

12. If 46(2) of the AAT Act is invalid, it is wholly invalid. Further, s 46(1) is likewise wholly invalid, for it could not be supposed that, in the absence of s 46(2), Parliament intended to deny the Director-General or the Minister the opportunity to claim PII to prevent any further use or disclosure of the certificated matter: *Gypsy Jokers* (2008) 234 CLR 532 at [5] (Gleeson CJ) (**JBA 5, Tab 21**); *Pompano* (2013) 252 CLR 38 at [114] (Hayne, Crennan, Kiefel and Bell JJ) (**JBA 3, Tab 11**).

Dated: 7 June 2022

Stephen Donaghue | Matthew Varley | Megan Caristo