HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

SDCV APPELLANT

AND

DIRECTOR-GENERAL OF SECURITY & ANOR RESPONDENTS

SDCV v Director-General of Security
[2022] HCA 32
Date of Hearing: 7 & 8 June 2022
Date of Judgment: 12 October 2022
S27/2022

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

C L Lenehan SC with T M Wood and S N Rajanayagam for the appellant (instructed by Michael Jones, Solicitor)

S P Donaghue QC, Solicitor-General of the Commonwealth, with M J H Varley and M F Caristo for the respondents (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with M W R Adams for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor's Office (NSW))

J A Thomson SC, Solicitor-General for the State of Western Australia, with J M Vincent for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

G A Thompson QC, Solicitor-General of the State of Queensland, with F J Nagorcka and K J E Blore for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

M J Wait SC, Solicitor-General for the State of South Australia, with L M Foran for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

CATCHWORDS

SDCV v Director-General of Security

Constitutional law (Cth) – Judicial power of Commonwealth – Where adverse security assessment of appellant, accompanied by statement of grounds, certified by Director-General of Security on behalf of Australian Security Intelligence Organisation ("ASA decision") – Where appellant's visa cancelled on character grounds in consequence of ASA decision – Where appellant applied to Administrative Appeals Tribunal for merits review of ASA decision – Where Minister administering *Australian Security Intelligence Organisation Act 1979* (Cth) issued certificates under s 39B(2)(a) of *Administrative Appeals Tribunal Act 1975* (Cth) ("AAT Act") stating that disclosure of some of contents of documents relating to ASA decision would be contrary to public interest because disclosure would prejudice security of Australia ("certificated matter") – Where Tribunal provided with certificated matter but certificated matter not disclosed to appellant or appellant's legal representatives – Where Tribunal affirmed ASA decision – Where appellant appealed to Federal Court of Australia pursuant to s 44 of AAT Act – Where s 46(1) of AAT Act allowed Federal Court to have regard to certificated matter in determining appeal – Where s 46(2) of AAT Act provided that Federal Court shall do all things necessary to ensure that certificated matter not disclosed to any person other than member of court as constituted for purposes of proceeding – Where certificated matter not disclosed to appellant or appellant's legal representatives in Federal Court – Whether s 46(2) of AAT Act invalid on basis that Ch III of *Constitution* precludes making of law that denied party to proceedings in court of federal judicature fair opportunity to respond to evidence on which order of court which finally altered or determined right or legally protected interest of party might be based – Whether s 46(2) of AAT Act invalid on basis that it required or authorised Federal Court to act in manner inconsistent with essential character of court or with nature of judicial power.

Words and phrases – "adverse security assessment", "all things necessary to ensure", "balancing exercise", "denial of disclosure", "essential characteristics of a court", "fair opportunity to respond", "forensic advantage", "gist", "judicial power of the Commonwealth", "national security", "officer of the court", "practical injustice", "procedural fairness", "public interest", "public interest immunity", "special advocate".

Constitution, Ch III.
Administrative Appeals Tribunal Act 1975 (Cth), ss 39A, 39B, 43AAA, 44, 46.
Australian Security Intelligence Organisation Act 1979 (Cth), s 54.

1 KIEFEL CJ, KEANE AND GLEESON JJ. The appellant's visa was cancelled on character grounds pursuant to s 501(3) of the *Migration Act 1958* (Cth) in consequence of an adverse security assessment ("ASA") certified by the first respondent, the Director-General of Security ("the Director-General"), on behalf of the Australian Security Intelligence Organisation ("ASIO") ("the ASA certificate"). The ASA certificate was accompanied by a statement of grounds, which is deemed part of that assessment and which is required to contain all information that has been relied upon by ASIO in making the assessment, other than information the inclusion of which would, in the opinion of the Director-General, be contrary to the requirements of security[1]. Together, the ASA certificate and the statement of grounds comprise "the ASA decision".

2 The ASA decision was authorised under the *Australian Security Intelligence Organisation Act 1979* (Cth) ("the ASIO Act"). The ASA certificate stated that the appellant had been assessed to be, directly or indirectly, a risk to security[2], and that it would not be consistent with the requirements of security for the appellant to continue to hold his visa, and recommended that his visa be cancelled[3]. The appellant was entitled to be informed that the ASA decision had been made and to be provided with a copy of it, except to the extent that the Minister administering the ASIO Act ("the ASIO Minister")[4] certified in writing that the Minister was satisfied, relevantly, that disclosure to a person of the statement of grounds, or of a particular part of that statement, would be prejudicial to the interests of security[5]. The appellant was provided with a statement of grounds noted to have sections omitted in consequence of a certificate signed by the ASIO Minister under s 38(2)(b) of the ASIO Act ("the public interest non-disclosure certificate")[6]. Accordingly, the appellant was not to be, and was never, informed of all the information with respect to the ASA decision.

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1 s 37(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth).

2 See s 4 of the ASIO Act, definition of "security".

3 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 371 [49].

4 *Administrative Appeals Tribunal Act 1975* (Cth), s 3(1), definition of "ASIO Minister".

5 s 38(1), (2) of the ASIO Act.

6 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 371 [50].

3 The ASA decision was furnished to the Department of Home Affairs[7]. Subsequently, as noted above, the Minister for Home Affairs cancelled the appellant's visa pursuant to s 501(3) and (6)(g) of the *Migration Act*, on the basis that the Minister reasonably suspected that the appellant did not pass the character test and was satisfied that the cancellation of his visa was in the national interest. On the same day, the appellant was provided with a notice of visa cancellation and the stated grounds accompanying the ASA certificate[8].

4 The appellant applied to the Administrative Appeals Tribunal ("the Tribunal") for review of the merits of the ASA decision.

5 For the purposes of the review by the Tribunal, the ASIO Minister issued certificates under s 39B(2)(a) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act") stating that disclosure of some of the contents of documents relating to the ASA decision would be contrary to the public interest because it would prejudice the security of Australia ("the certificated matter"). The Tribunal was provided with the certificated matter; but it was not disclosed to the appellant or to his lawyers[9].

6 Further, in order to prevent the disclosure of the certificated matter, the ASIO Minister issued certificates under s 39A(8) of the AAT Act, which had the effect that part of the hearing before the Tribunal was conducted in the absence of the appellant and his lawyers. In the "open" session, the Tribunal heard evidence called by both the Director-General and the appellant. Evidence was heard in the "closed" session in the absence of the appellant[10]. The Tribunal accordingly wrote two sets of reasons: "open" reasons, which did not refer to the certificated matter and were seen by the appellant and his lawyers; and "closed" reasons, which addressed matters in the "closed" session and were not seen by them[11].

7 The Tribunal affirmed the ASA decision. The Tribunal's "open" reasons recorded that the Tribunal was not able to form a view on whether the ASA

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7 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 371 [51].

8 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 370 [44], 371 [51].

9 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 373 [59], 377 [70].

10 *SDCV and Director-General of Security* [2019] AATA 6112 at [5]-[6].

11 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 373 [59]-[61], 377 [70].

decision was justified based on the evidence led in the "open" session[12]. The reasons continued[13]:

> "We have written closed reasons for decision based upon the classified evidence placed before us and have concluded, based upon that evidence, that the ASA [decision] is justified and that the reviewable decision should be affirmed."

8 The appellant appealed against the decision of the Tribunal to the Federal Court of Australia pursuant to s 44 of the AAT Act. The right of appeal under s 44 is confined to questions of law. The appellant raised five substantive grounds of appeal, including a contention that the Tribunal's decision was not open on the evidence before it. The appeal was heard in the original jurisdiction[14] of the Federal Court by a Full Court (Bromwich and Abraham JJ, Rares J agreeing). The Federal Court rejected each substantive ground of appeal, concluding, among other things, that the ASA decision was warranted by the evidence available to the Tribunal[15].

9 By reason of s 46(1) of the AAT Act, the Federal Court was allowed to have regard to the certificated matter in determining the appeal; but the certificated matter was not disclosed to the appellant or to his legal representatives. In that regard, s 46(2) of the AAT Act provided that the Court "shall … do all things necessary to ensure that the [certificated] matter is not disclosed to any person other than a member of the court as constituted for the purposes of the proceeding".

10 In the course of the appeal to the Federal Court, the appellant also challenged the constitutional validity of s 46(2) of the AAT Act. The Federal Court rejected the constitutional challenge[16], and made a declaration that s 46(2) is a valid law of the Commonwealth.

11 The appeal to this Court is concerned only with the appellant's challenge to the validity of s 46(2) of the AAT Act. The appellant's contention is that Ch III of the *Constitution* precludes the making of a law that denies a party to proceedings in a court of the federal judicature a fair opportunity to respond to the evidence on

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12 *SDCV and Director-General of Security* [2019] AATA 6112 at [19].

13 *SDCV and Director-General of Security* [2019] AATA 6112 at [20].

14 *Federal Court of Australia Act 1976* (Cth), s 19(2).

15 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 361 [1], 415 [245]-[247].

16 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 369 [40], 397 [168].

which an order of the court which finally alters or determines a right or legally protected interest of that party might be based, and that s 46(2) is such a law.

12 As will be explained, there is a fatal artificiality in the appellant's attempt to analyse the effect of s 46(2) without regard to the circumstance that it has no operation independent of s 46(1). Section 46, considered as a whole, does not disadvantage a person in the position of the appellant: it simply offers that person a statutory remedy in addition to the remedies otherwise provided by law, that additional remedy being attended with forensic consequences different from those attending those other remedies. But even if attention is confined to s 46(2) as if it stood alone, it was not apt to occasion practical injustice to the appellant in the determination of his appeal under s 44. In this regard, it is necessary to appreciate the limited statutory rights of the appellant to enter and remain in Australia, the susceptibility of those rights to cancellation upon the making of an ASA, and the undisputed validity, irrespective of any challenge to the ASA decision or its outcome, of the statutory denial of disclosure to the appellant of security-sensitive information including, on review and appeal, the certificated matter. The rights of a visa holder were always qualified by the statutory process of the executive government to deny the visa holder disclosure of security-sensitive grounds for the making of an ASA.

13 It should also be understood that s 46 of the AAT Act applies to an appeal under s 44, which is but one avenue of challenge to the decision of the Tribunal. The appellant might have challenged the Tribunal's decision in proceedings for judicial review under s 75(v) of the *Constitution*[17] or s 39B of the *Judiciary Act 1903* (Cth)[18], and in those proceedings s 46 would have had no application and so the appellant's alleged disadvantage under s 46(2) would have been avoided. Of course, if the appellant had chosen to bring his challenge to the decision of the Tribunal pursuant to one of those avenues, he would not have enjoyed the forensic advantage conferred by s 46(1) because public interest immunity would likely have prevented the use of the certificated matter by the Federal Court[19].

14 The appellant's argument in this Court is that the vice of s 46(2) of the AAT Act lies in allowing evidence adverse to him to be considered by the Federal Court without his being afforded the opportunity to know and respond to it. But on no view can it be supposed that s 46(2) could be construed such that the appellant might have pursued an appeal under s 44 with the benefit of s 46(1) and shorn of

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17 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 146 [376].

18 *Sagar v O'Sullivan* (2011) 193 FCR 311 at 312 [1].

19 See *SDCV v Director-General of Security* (2021) 284 FCR 357 at 396-397 [166].

the alleged disadvantage of s 46(2). The appellant's choice of s 44 as the avenue of challenge to the ASA decision reflects a judgment that ss 44 and 46 offered him the best chance of a successful challenge to the ASA decision. No practical injustice was caused to the appellant by reason of his choice of preferred remedy. One 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.

15 As to the possibility that the real vice of s 46(2) of the AAT Act lies in its creation of an institutional difficulty for the Federal Court in hearing and determining an appeal pursuant to s 44 by denying the appellant the ability to know and to respond to evidence adverse to him, it is necessary to appreciate that Ch III of the *Constitution* does not entrench the adversarial system of adjudication and its incidents as defining characteristics of the courts for which it provides[20]. The limitation imposed by s 46 on the ability of a person in the position of the appellant to participate in an appeal on a question of law under s 44 does not, in any way, compromise the functioning or impartiality or independence of the Federal Court.

16 Before discussing these matters further, it is necessary to summarise the appellant's circumstances, the statutory context in which the appellant's appeal came before the Federal Court, and the reasons of that Court.

The appellant's circumstances

17 This Court has before it the Tribunal's "open" reasons for its decision and a redacted version of the Federal Court's judgment. The following chronology of events leading up to this appeal is drawn from that material.

18 The appellant is a citizen of Lebanon. He married his wife, who is an Australian citizen, in 2010. On 13 December 2012, the appellant was granted a Class BS Subclass 801 Partner (Residence) visa. He made an application for Australian citizenship[21].

19 Several of the appellant's relatives were connected with an organisation known as the Islamic State of Iraq and the Levant ("ISIL")[22], which was, and

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20 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 100 [157].

21 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 370 [45].

22 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 370 [46].

remains, specified as a terrorist organisation[23]. In a summary of the statement of grounds for the ASA certificate, ASIO described ISIL as[24]:

> "an Iraq and Syria-based Sunni extremist group and former al-Qa'ida affiliate that adheres to the global jihadist ideology. ISIL follows an extreme interpretation of Islam which is anti-Western, promotes sectarian violence, and targets those who do not agree with its interpretation as infidels and apostates."

20 Some of the appellant's relatives were convicted of and sentenced to imprisonment for attempted terrorism offences committed in Australia. ASIO investigated the appellant as to whether he was involved in those terrorism offences but he was not found to have been involved. Nevertheless, the appellant was advised that his citizenship bestowal ceremony, which was necessary for the conferral of his citizenship, had been delayed pending consideration of whether his visa should be cancelled[25].

The ASA decision and the cancellation of the appellant's visa

21 As noted above, on 21 August 2018, the appellant's visa was cancelled, the ASA decision having been furnished to the Department of Home Affairs on 16 August 2018[26]. Pursuant to ss 37(2)(a), 38(1), 38(2)(b) and 38(5) of the ASIO Act, a person the subject of an ASA is to be informed of the grounds for the ASA and given all the information relied upon in making it, except to the extent that the Director-General, acting reasonably and under a correct understanding of the law, concludes that such disclosure would be "contrary to the requirements of security"; or the ASIO Minister is satisfied that disclosure "would be prejudicial to the interests of security". Parts of the statement of grounds that accompanied the ASA certificate were deleted in accordance with s 38(2)(b) of the ASIO Act. These

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23 See para (b) of the definition of "terrorist organisation" in s 102.1 of the *Criminal Code* (Cth); s 5 of the *Criminal Code (Terrorist Organisation – Islamic State) Regulations 2020* (Cth).

24 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 372 [54].

25 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 370-371 [47]-[48], 372 [56].

26 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 371 [51].

deletions were consequent upon the public interest non-disclosure certificate signed by the ASIO Minister[27].

22 It is to be noted that statutory rights as a visa holder are subject to cancellation upon the making of an ASA, in respect of which the visa holder is to be kept uninformed of security-sensitive information bearing upon its making. So long as the administrative decisions concerning the non-disclosure of that information are valid, an ASA may be made, and the rights of a visa holder to enter and remain in Australia may be cancelled, on the basis that such information must not be disclosed to the subject of an ASA. Any claim by a visa holder to vindicate his or her rights as such must necessarily proceed subject to the prohibition on disclosure of security-sensitive information.

The application to the Tribunal

23 As noted above, the appellant sought review of the merits of the ASA decision by the Tribunal pursuant to s 54 of the ASIO Act[28]. Pursuant to ss 39A and 39B of the AAT Act, the review was conducted in the Security Division of the Tribunal constituted by two Deputy Presidents and a Senior Member.

24 The appellant was subsequently furnished with a revised statement of grounds, in consequence of a partial revoking of the public interest non-disclosure certificate upon the grounds that certain information was no longer prejudicial to security. This statement recorded that the appellant: had support for politically motivated violence and ISIL; and employed communications security tradecraft practices while engaging with individuals of security concern, including Syria-based individuals affiliated with ISIL[29].

25 In relation to the appellant's alleged support for politically motivated violence and ISIL, the revised statement of grounds recorded that the appellant had said in interviews that he had never supported or been affiliated with any group in the Syria/Iraq conflict, including ISIL. ASIO's assessment was that these statements were likely to have involved untruthful answers, because the appellant believed it would have had an adverse effect on his citizenship application or his ability to continue to hold his visa[30].

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27 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 371 [50].

28 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 371 [52].

29 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 371-372 [53].

30 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 372 [57].

26 In relation to the appellant's alleged employment of communications security tradecraft practices while engaging with individuals of security concern, the revised statement of grounds recorded that the appellant was found:

(1) to have used a covert phone obtained specifically to communicate with his brother based in Syria, using an encrypted messaging app;

(2) also to have used that covert phone to communicate with a relative who was an ISIL leadership figure and to communicate with Australian-based family members of security interest who had been convicted of very serious offences (as noted above, the appellant was not found to have been involved in those offences);

(3) to have disposed of that covert phone, as the appellant said he had done when interviewed by ASIO, because of fears that he may have done something illegal by using it; and

(4) to have provided inaccurate information to ASIO about the existence, use and disposal of the covert phone, and that this demonstrated a heightened security awareness which indicated that the communications were likely of security concern[31].

27 As noted above, the appellant's application to the Tribunal was unsuccessful. The Tribunal's "open" reasons record that it was not able to be satisfied whether the ASA decision was justified on the evidence led in open session, but that it was so satisfied based upon the evidence before it in the closed session[32].

The legislative framework for the proceedings in the Tribunal

28 Section 37(5) of the ASIO Act provides that no proceedings, other than an application to the Tribunal under s 54, shall be brought in any court or tribunal in respect of the making of a security assessment, including an ASA, or anything done in respect of a security assessment in accordance with the ASIO Act. Such a review is conducted in the Security Division of the Tribunal in accordance with ss 39A and 39B of the AAT Act.

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31 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 372-373 [58].

32 *SDCV and Director-General of Security* [2019] AATA 6112 at [19]-[20].

29 Pursuant to s 39A(3) of the AAT Act, the Director-General is obliged to present to the Tribunal all relevant information available to the Director-General, whether favourable or unfavourable to an applicant.

30 Section 39A(6) of the AAT Act provides that, subject to s 39A(9), an applicant and a person representing an applicant may be present when the Tribunal is hearing submissions made or evidence adduced by, relevantly, the Director-General.

31 Section 39A(8) of the AAT Act provides that the ASIO Minister may, by signed writing, certify that evidence proposed to be adduced or submissions proposed to be made by or on behalf of, relevantly, the Director-General are "of such a nature that the disclosure of the evidence or submissions would be contrary to the public interest because it would prejudice security or the defence of Australia". Section 39A(9) provides that, if such a certificate is given, an applicant "must not be present when the evidence is adduced or the submissions are made"; and "a person representing the applicant must not be present when the evidence is adduced or the submissions are made unless the ASIO Minister consents". If a person representing an applicant is present when such evidence is adduced or such submissions are made, it is an offence for the representative to disclose any such evidence or submission to the applicant or to any other person, punishable by two years' imprisonment[33].

32 The Tribunal must first hear evidence adduced and submissions made by, relevantly, the Director-General. The Tribunal must next permit an applicant, if he or she so desires, to adduce evidence before, and make submissions to, the Tribunal[34].

33 Section 39B of the AAT Act applies to a proceeding in the Security Division to which s 39A applies[35]. Section 39B(2)(a) provides that if the ASIO Minister certifies, by signed writing, 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 "because it would prejudice security or the defence or international relations of Australia", the remaining provisions of s 39B have effect. In this regard, s 39B(3) provides that where information has been disclosed or documents have been produced to the Tribunal for the purposes of a proceeding, the Tribunal "must, subject to subsections (4), (5) and (7) and

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33 s 39A(10) of the AAT Act.

34 s 39A(12), (13) of the AAT Act.

35 s 39B(1) of the AAT Act.

section 46, do all things necessary to ensure", relevantly, "that the information or the contents of the document are not disclosed to anyone other than a member of the Tribunal as constituted for the purposes of the proceeding".

34 Section 39B(7) of the AAT Act provides that s 39B does not prevent the disclosure of information or of the contents of a document to a member of the Tribunal's staff in the performance of his or her duties as a member of the Tribunal's staff.

35 Section 39B(8) of the AAT Act provides that s 39B excludes the operation, apart from s 39B, of any rules of law relating to the public interest that would otherwise apply in relation to the disclosure of information or of the contents of documents in a proceeding.

36 Section 39B(11) of the AAT Act further provides that it is the duty of the Tribunal, even though there may be no relevant certificate under s 39B, to ensure, so far as it is able to do so, that, in or in connection with a proceeding, information is not communicated or made available to a person contrary to the requirements of security.

37 Upon the conclusion of the Tribunal's review, it must make and record its findings in relation to the security assessment, and those findings may state the opinion of the Tribunal as to the correctness of, or justification for, any opinion, advice or information contained in the assessment[36]. The Tribunal must cause copies of its findings to be given to an applicant, the Director-General, the Commonwealth agency, State or authority of a State to which the assessment was given, and the ASIO Minister[37]. However, the Tribunal may direct that the whole or a particular part of its findings, so far as they relate to a matter that has not already been disclosed to an applicant, is not to be given to the applicant or to the Commonwealth agency, State or authority of a State to which the assessment was given[38].

The legislative framework for the proceedings in the Federal Court

38 Section 44(1) of the AAT Act provides that a party to a proceeding before the Tribunal may appeal to the Federal Court, on a question of law, from any decision of the Tribunal in that proceeding. The Federal Court "shall hear and

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36 s 43AAA(2) of the AAT Act.

37 s 43AAA(4) of the AAT Act.

38 s 43AAA(5) of the AAT Act.

determine the appeal and may make such order as it thinks appropriate by reason of its decision"[39]. In particular, the Federal Court may make "an order affirming or setting aside the decision of the Tribunal and an order remitting the case to be heard and decided again ... by the Tribunal in accordance with the directions of the Court"[40]. The Federal Court may make findings of fact in certain circumstances[41]. For those purposes, the Federal Court may have regard to evidence given in the proceeding before the Tribunal, and may receive further evidence[42].

39 Section 46(1)(a) of the AAT Act provides relevantly that when an appeal is instituted in the Federal Court in accordance with s 44:

> "the Tribunal shall, despite subsections 36(2), 36B(2) and 39B(3) of this Act, ... cause to be sent to the Court all documents that were before the Tribunal in connexion with the proceeding to which the appeal ... relates and are relevant to the appeal".

40 Section 46(2) of the AAT Act provides relevantly:

> "If there is in force in respect of any of the documents a certificate in accordance with subsection 28(2), 36(1), 36B(1) or 39B(2) of this Act ... certifying that the disclosure of matter contained in the document would be contrary to the public interest, the Federal Court of Australia ... shall, subject to subsection (3), 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."

41 In the course of the hearing of the appeal in this Court there was some discussion of whether s 46(1) and s 46(2) were merely machinery whereby the record of the proceedings in the Tribunal was transmitted to the Federal Court. It is not necessary to pursue this question further. It is sufficient to say that these provisions determined what material might be before the Federal Court and what material the appellant and his lawyers might see. As noted earlier, the Federal Court had before it the evidence and submissions that were before the Tribunal,

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39 s 44(4) of the AAT Act.

40 s 44(5) of the AAT Act.

41 s 44(7) of the AAT Act.

42 s 44(8) of the AAT Act.

from both the "open" and "closed" sessions, as well as the Tribunal's "open" and "closed" reasons[43].

42 Section 46(3) of the AAT Act provides relevantly:

"If:

(a) the certificate referred to in subsection (2) relating to matter contained in the document does not specify a reason referred to in paragraph 28(2)(a) or (b), 36(1)(a) or (b), 36B(1)(a), or 39B(2)(a) of this Act ... as the case may be;

(b) a question for decision by the Federal Court of Australia ... is whether the matter should be disclosed to some or all of the parties to the proceeding before the Tribunal in respect of which the appeal was instituted ...; and

(c) the court decides that the matter should be so disclosed;

the court shall permit the part of the document in which the matter is contained to be inspected accordingly."

43 Section 46(4) of the AAT Act provides that "[n]othing in [s 46] prevents the disclosure of information or of matter contained in a document to an officer of the court in the course of the performance of his or her duties as an officer of the court".

The Federal Court

44 In respect of the appellant's challenge to the validity of s 46(2) of the AAT Act before the Federal Court, his counsel argued that legislation providing for a determination by a Ch III court must, without exception, ensure that a person whose right or interest may finally be altered or determined by a court order has a fair opportunity to respond to the evidence on which that order might be based[44]. The Federal Court rejected that argument.

45 Bromwich and Abraham JJ, with whom Rares J agreed[45], proceeded on the basis that it was uncontroversial that Parliament cannot require a court within

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43 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 373 [64].

44 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 380 [86].

45 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 361 [1].

Ch III of the *Constitution* to exercise the judicial power of the Commonwealth in a manner that is inconsistent with the essential character of a court or with the nature of judicial power[46]. Their Honours stated that "it may be accepted that procedural fairness is an essential feature of a Ch III court"[47]. For their Honours, as for this Court, the question was "whether, taken as a whole, the Court's procedures avoid practical injustice"[48].

46 In this regard, their Honours noted that the only circumstance in which s 46(2) of the AAT Act applies is when an appeal is brought against a decision of the Tribunal on a question of law; the appellant did not suggest that he was, or should have been, entitled to the certificated matter either at the stage at which the administrative decision was made by the Director-General, or at the stage of merits review in the Tribunal[49]. Their Honours also noted that they were not concerned with a case where the impugned legislation allowed a party to move the Court for an order which affected or altered the rights or interests of a person on the basis of evidence which was not available to the person affected by the order because of public interest and national security issues[50].

47 Bromwich and Abraham JJ said that the Commonwealth Parliament may validly create a regime in which, for good reason, the court may have access to information that a party affected may not. Their Honours noted that this Court has, on numerous occasions, upheld the validity of legislation which had that very consequence[51]. In their Honours' view, s 46 of the AAT Act could be described, as

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46 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 380 [84], citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

47 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 380 [84], citing *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71 [67], 99 [156], 105 [177], 108 [188], 110 [194].

48 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 380 [85], citing *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 100 [157].

49 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 392 [140].

50 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 392 [141].

51 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 393 [148]-[149], citing *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 and *South Australia v Totani* (2010) 242 CLR 1. See also *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 31-32 [62].

the legislation was in those decisions, as having "an outcome comparable with that of the common law respecting public interest immunity, but with the difference that the Court itself may make use of the information"[52].

48 Their Honours also reasoned that when assessing the validity of s 46(2) of the AAT Act and whether there is a practical injustice, one must do so against the background of the legislative scheme as a whole and the counterfactual situation – that is, the position if s 46(2) did not exist[53]. In relation to these considerations, their Honours said[54]:

> "It is plain that the regime involves significant modifications of the requirements of procedural fairness. That said, the regime is rather nuanced, with different categories of material being addressed according to the basis of the certification, with only the core categories of public interest immunity falling within the mandated non-disclosure. This is in the context where the regime provides that all the material is to be provided to the Tribunal, favourable and unfavourable, and that that material is to be before the Court on appeal. The Court can take that material into account in considering the appeal, albeit without submissions on it from the appellant, he or she having not seen the material. In respect to any submissions on the material by the respondent, either in writing or orally in closed court, it is to be expected that the obligations of the type that apply in ex parte hearings, in addition to the respondent's model litigant obligations, would apply.
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> This is to be contrasted with what would occur in such a situation absent s 46(2), in the context of this regime. The material before the decision-maker would not be before the Court on any appeal. Such material could be the subject of a subpoena, but inevitably there would be a public interest immunity claim and where those claims are made and supported by cogent material, the claim would ordinarily or likely succeed".

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52 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 393 [149], quoting *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 31-32 [62], referring to *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532.

53 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 394 [154].

54 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 396 [161]-[162], citing *Plaintiff M46 of 2013 v Minister for Immigration and Border Protection* (2014) 139 ALD 277 at 282-284 [26]-[30] and *Sagar v O'Sullivan* (2011) 193 FCR 311 at 326-327 [84]-[91].

49 Their Honours concluded that if the Federal Court were not provided with the certificated matter pursuant to s 46, the appellant "would likely be in a worse position than he is now"[55]. Their Honours explained[56]:

> "Absent the provision for a merits review, the only challenge would be by way of judicial review of the ASA, which would occur without access to the material upon which the decision was based. The material before the decision-maker may be subpoenaed, but if there was a successful claim of public interest immunity, that material would not be before the Court. For the reasons set out above, in the context where the material relates to national security, it can safely be assumed that any claim of public interest immunity would have significant prospects of success.
>
> When regard is had to the regime considered as a whole, and the context in which s 46(2) exists, it cannot be contended that an appellant having appealed by way of s 44 from the decision of the Tribunal has suffered a practical injustice such that s 46(2) is invalid."

The appellant's argument in this Court

50 It was common ground in this Court, as it was in the Federal Court[57], that Parliament cannot require a court within Ch III of the *Constitution* to exercise the judicial power of the Commonwealth in a manner inconsistent with the character of a court or the nature of judicial power. It was also common ground that procedural fairness is an essential feature of a Ch III court and that, as was said by the plurality in *Condon v Pompano Pty Ltd*[58], the ultimate question is "whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid 'practical injustice'".

51 The appellant submitted that a law that requires a court to adopt an unfair procedure infringes the limitation identified by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[59] that Ch III of the *Constitution* precludes the enactment of a law that requires or authorises a court to exercise the judicial power of the Commonwealth

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55 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 396 [165].

56 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 396-397 [166]-[167].

57 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 380 [84]-[85].

58 (2013) 252 CLR 38 at 100 [157].

59 (1992) 176 CLR 1 at 27.

"in a manner which is inconsistent with the essential character of a court or with the nature of judicial power". The appellant, while acknowledging that the requirements of procedural fairness are not fixed, argued that there is a "minimum requirement" of procedural fairness such that, if a court is to make an "order that finally alters or determines a right or legally protected interest of a person", the court must afford to that person "a fair opportunity to respond to evidence on which that order might be made"[60]. The appellant submitted that that opportunity may be afforded in different ways, namely allowing the affected person to be given the "gist" of the evidence, to have special advocates appointed to represent a person's interests, or both, as a means to achieve the necessary minimum requirement of procedural fairness.

52 The critical divergence between the appellant and the respondents is that the respondents argued that the "minimum requirement" of an opportunity to know and respond to adverse material before the Federal Court, insisted upon by the appellant, is not invariably required to prevent practical injustice in an appeal under s 44 of the AAT Act from the Tribunal to the Federal Court.

Practical injustice and a "minimum requirement"

53 As to the appellant's reliance upon *Chu Kheng Lim* as the foundation of his argument, it is to be noted that the passage from *Chu Kheng Lim* quoted above focussed upon the exclusivity of the constitutional function of Ch III courts to adjudge and punish criminal guilt. That passage was a step in the reasoning to the conclusion that Ch III "precludes the enactment ... of any law purporting to vest any part of that function [namely the adjudgment and punishment of criminal guilt] in the Commonwealth Executive"[61]. *Chu Kheng Lim* did not suggest that the content of procedural fairness, characteristic of a Ch III court, is fixed by a "minimum requirement"; and it cast no doubt on the proposition that the requirements of procedural fairness are "adaptable to the environment in which it is applied"[62]. Nor does any subsequent decision of this Court establish that there is a "minimum requirement" of procedural fairness applicable to all proceedings in a Ch III court. As will be seen, those statements of high authority are to the contrary.

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60 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 105 [177]. See also 108 [188].

61 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

62 *Pathan v Secretary of State for the Home Department* [2020] 1 WLR 4506 at 4522 [55]; [2021] 2 All ER 761 at 777. See also *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99-100 [156]-[157].

54 The question whether practical injustice may be caused to a litigant is not to be resolved by reference to fixed rules as to the "minimum requirement" of procedural fairness that apply in every case in which the judicial power of the Commonwealth is engaged. Whether practical injustice may be occasioned to a litigant depends upon the nature of the proceedings and the rights and interests at stake[63]. So, in the adjudgment and punishment of criminal guilt, a person's liberty may, speaking generally, be taken away only in judicial proceedings involving observance of all the procedural safeguards that attend a criminal trial; but there is no support in the decided cases for the view that the requirements of procedural fairness that attend a criminal trial are also guaranteed by Ch III in relation to an appeal to a court as an adjunct to a statutory regime under which statutory rights depend upon administrative decisions. Indeed, it is salutary to acknowledge that, as French CJ said in *Pompano*, even in a criminal proceeding, where the claim to the full gamut of procedural protections of the accused in the interest of fairness is at its strongest, the accused may be denied disclosure of information that may lead to the identification of an informant. In that regard, French CJ said[64]:

> "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."

And that may be so even where only the "gist" of the information is sought, because the gist of the information will often suffice to identify the informant[65].

Gypsy Jokers

55 That practical judgments, legislative or judicial, about the content and application of procedural fairness may vary with the claim to consideration of matters of public interest is illustrated by this Court's decision in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[66]. In that case, the *Corruption and Crime Commission Act 2003* (WA) ("the CCA") authorised the Commissioner of

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63 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99-100 [156]-[157].

64 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 72 [68].

65 *R (Haralambous) v Crown Court at St Albans* [2018] AC 236 at 273 [63].

66 (2008) 234 CLR 532.

Police to issue a "fortification removal notice" in respect of premises[67]. Section 72(2) of the CCA provided that the Commissioner could not issue such a notice unless the Commissioner "reasonably believe[d]" that the premises were "heavily fortified" and "habitually used as a place of resort by members of a class of people a significant number of whom may reasonably be suspected to be involved in organised crime"[68]. Section 76 of the CCA conferred on the Supreme Court of Western Australia a power to review whether the Commissioner could have reasonably held the belief required by s 72(2) when issuing the fortification removal notice[69]. The impugned provision was s 76(2), which stated[70]:

> "The Commissioner of Police may identify any information provided to the court for the purposes of the review as confidential if its disclosure might prejudice the operations of the Commissioner of Police, and information so identified is for the court's use only and is not to be disclosed to any other person, whether or not a party to the proceedings, or publicly disclosed in any way."

56 The plurality (Gummow, Hayne, Heydon and Kiefel JJ) rejected the challenge to the validity of s 76(2) on the basis that, on its proper construction, it did not render unexaminable by the Supreme Court the decision of the Commissioner[71], noting that the legislative regime had "an outcome comparable with that of the common law respecting public interest immunity, but with the difference that the Court itself may make use of the information in question"[72].

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67 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553-555 [13]-[16].

68 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 554 [16].

69 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 557 [26].

70 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 558 [30].

71 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 558 [31].

72 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 559 [36].

Crennan J, with whom Gleeson CJ agreed[73], came to the same conclusion[74] and also considered an argument advanced on behalf of the appellant that the procedure established by s 76(2), whereby information identified as confidential by the Commissioner could not be disclosed to an applicant for judicial review, constituted a denial of procedural fairness[75]. Crennan J said[76]:

> "The appellant's particular complaints alleging a want of procedural fairness were that it did not have access to material adverse to it and the Court was deprived of the benefit of its submissions on such material. Parliament can validly legislate to exclude or modify the rules of procedural fairness provided there is 'sufficient indication'[77] that 'they are excluded by plain words of necessary intendment'[78]. Whether the obligation to accord procedural fairness is satisfied will always depend on all the circumstances. For example, in a joint judgment of five members of this Court in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[79], it was recognised, by reference to *Sankey v Whitlam*[80] and *Alister*

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73 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 549-550 [1].

74 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 593-594 [173]-[174].

75 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 592 [166].

76 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 595-596 [182]-[183].

77 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396.

78 *Annetts v McCann* (1990) 170 CLR 596 at 598; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 56 [24].

79 (2005) 225 CLR 88.

80 (1978) 142 CLR 1.

> *v The Queen*[81], that courts 'mould their procedures to accommodate what has become known as public interest immunity'[82].
>
> The statutory modification of procedural fairness achieved by s 76(2) (including any effect on the giving of reasons) is indistinguishable from the modification of procedural fairness which can arise from the application of the principles of public interest immunity."

57 This passage recognises that the balancing exercise undertaken by the legislature in its determination of the requirements of procedural fairness is no less legitimate than the balancing exercises conducted in the exercise of judicial power. Of this passage in *Gypsy Jokers*, the plurality in *Pompano* said[83]:

> "The plurality [in *Gypsy Jokers*] said nothing to indicate that s 76(2), by allowing only the Court to have access to the confidential information, might, on that account, be of doubtful validity. Rather, the plurality's conclusion in *Gypsy Jokers* proceeded from an acceptance that, as Crennan J rightly pointed out, 'Parliament can validly legislate to exclude or modify the rules of procedural fairness'."

58 True it is that *Gypsy Jokers* was concerned with State legislation, and was decided on the basis of the principles in *Kable v Director of Public Prosecutions (NSW)*[84], whereas the impugned legislation here is a Commonwealth law and no reference to *Kable* is necessary to explain why the implications of Ch III of the *Constitution* are engaged. But 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. The *Kable* doctrine is derived from the requirement of Ch III that State courts must conform to the description of a court in Ch III in order to fulfil their role as potential repositories of federal jurisdiction and as part of the integrated court system in Australia; and as Gaudron J said in *Kable*, "there is nothing anywhere in the Constitution to suggest that it permits of different grades or qualities of justice,

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81 (1984) 154 CLR 404.

82 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 98 [24].

83 (2013) 252 CLR 38 at 98 [152] (footnote omitted).

84 (1996) 189 CLR 51.

depending on whether judicial power is exercised by State courts or federal courts created by the Parliament"[85].

59 It may be noted that s 46(2) of the AAT Act applies only when there is in force a valid certificate in accordance with, relevantly, s 39B(2) of the AAT Act. In *Hussain v Minister for Foreign Affairs*[86], *Sagar v O'Sullivan*[87] and *Traljesic v Attorney-General (Cth)*[88] it was recognised that a person adversely affected by an ASA is entitled to seek judicial review of the decision to issue such a certificate. The appellant did not seek to challenge the validity of the ASIO Minister's certificates issued under s 39A(8) or s 39B(2) in the Federal Court or otherwise[89]. In addition, as Bromwich and Abraham JJ observed[90], the appellant could have argued before the Tribunal that the certificates of the ASIO Minister were invalid as an improper exercise of an administrative discretion, and that, accordingly, ss 39A and 39B were not applicable to the review before the Tribunal.

60 The circumstance that a person in the position of the appellant may test the validity of a certificate of the ASIO Minister in any of these ways forecloses one argument that might have been advanced, but was not pursued in this Court, against the validity of s 46(2)[91]. That argument might have been to the effect that legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals[92]. Section 46 of the AAT Act does not purport to direct the Federal Court to act upon an unexaminable opinion of the ASIO Minister as to whether disclosure of certificated matter would be

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85 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103.

86 (2008) 169 FCR 241 at 258 [47]-[49].

87 (2011) 193 FCR 311 at 312 [1].

88 (2006) 150 FCR 199. See also *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 146 [376]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 438 [18].

89 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 377 [71].

90 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 377 [72].

91 See *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 558 [31], [33].

92 See *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 [39].

contrary to the public interest because, relevantly, it would prejudice security or the defence or international relations of Australia[93]. But where there is no challenge to the decision to issue a certificate, no question can arise as to the lawfulness of the denial of disclosure to a person in the position of the appellant of security-sensitive information (at the time of the making of an ASA) or certificated matter (at the review before the Tribunal). The bringing of an appeal to the Federal Court does not change that state of affairs.

HT v The Queen

61 Before the Federal Court, the appellant relied "heavily"[94] on a passage from this Court's decision in *HT v The Queen*[95]. In that case, the issue was whether the appellant, who was a police informer, was denied procedural fairness in a Crown appeal against sentence because confidential evidence about her assistance to the police was provided by the Crown to the sentencing judge and the Court of Criminal Appeal of New South Wales, but was not seen by the appellant or her legal representatives[96]. All members of this Court held that the appellant was denied procedural fairness[97]. Before the Federal Court[98], and in this Court, the appellant relied, in particular, on the following passage from the judgment of Kiefel CJ, Bell and Keane JJ[99]:

> "It is a fundamental principle of our system of justice that all courts, whether superior or inferior, are obliged to accord procedural fairness to parties to a proceeding[100]. This obligation requires not only that courts be open and judges impartial but that the person against whom a claim or charge is made be given a reasonable opportunity of being heard, which is

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93 cf *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 579-581 [95]-[99].

94 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 391 [136].

95 (2019) 269 CLR 403.

96 *HT v The Queen* (2019) 269 CLR 403 at 412 [2], 413 [4], 414 [9], 415 [10].

97 *HT v The Queen* (2019) 269 CLR 403 at 419 [27], 426 [55], 430-431 [66].

98 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 378 [75]-[76].

99 *HT v The Queen* (2019) 269 CLR 403 at 416 [17].

100 *Cameron v Cole* (1944) 68 CLR 571 at 589; *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396; *Taylor v Taylor* (1979) 143 CLR 1 at 4; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156].

> to say appearing and presenting his or her case[101]. In an adversarial system it is assumed, as a general rule, that opposing parties will know what case an opposite party seeks to make and how that party seeks to make it[102]. A party can only be in a position to put his or her case if the party is able to test and respond to the evidence on which an order is sought to be made[103]."

62 The appellant's reliance on this passage as support for his argument was misconceived. *HT* was concerned with the legitimacy of a departure by a court from the general principles of procedural fairness applicable to criminal proceedings within the adversarial system. *HT* was not concerned with any question as to the limit of legislative power to enact measures that may curtail the familiar incidents of any other type of hearing, much less with the legitimacy of measures intended to accommodate national security considerations that would be compromised by full disclosure. There is nothing in the passage cited to suggest otherwise.

63 Similarly, in relation to the appellant's reliance upon remarks, apparently helpful to his argument, in the decision of the Supreme Court of the United Kingdom in *Al Rawi v Security Service*[104] by Lord Kerr of Tonaghmore JSC, his Lordship was not concerned with the limits of legislative power to modify the principles of procedural fairness. As French CJ noted in *Pompano*, in *Al Rawi* the Supreme Court was addressing the limits of the inherent power of a trial court in the exercise of civil jurisdiction to develop procedural innovations to accommodate public interest immunity claims at common law[105]. French CJ went on to observe that *Al Rawi* did not provide an answer to the constitutional question as to the validity of the legislation under challenge in *Pompano*[106].

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101 *Cameron v Cole* (1944) 68 CLR 571 at 589; *Taylor v Taylor* (1979) 143 CLR 1 at 4.

102 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 100 [157].

103 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56]; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 348 [39]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 105 [177], 108 [188].

104 [2012] 1 AC 531 at 592-593 [91], [93].

105 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 63 [47].

106 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 64 [49].

Finally altering or determining rights

64 In support of the appellant's contention that the denial by s 46(2) of the AAT Act of an opportunity to know and respond to evidence adverse to him is inconsistent with Ch III of the *Constitution*, the appellant relied principally upon dicta of Gageler J in *Pompano*. There his Honour stated[107]:

> "My view, in short, is that Ch III of the *Constitution* mandates the observance of procedural fairness as an immutable characteristic of a Supreme Court and of every other court in Australia. Procedural fairness has a variable content but admits of no exceptions. A court cannot be required by statute to adopt a procedure that is unfair. A procedure is unfair if it has the capacity to result in the court making an order that finally alters or determines a right or legally protected interest of a person without affording that person a fair opportunity to respond to evidence on which that order might be made."

65 This statement was made in relation to legislation which affected property rights and individual liberty[108]. His Honour, in speaking of legislation that might "result in the court making an order that finally alters or determines a right or legally protected interest of a person", was not speaking of procedural rights whereby a right or legally protected interest, much less a wholly statutory right, might be vindicated. Rather, his Honour was concerned with the loss of rights or legally protected interests that cannot be determined other than fairly by judicial proceedings. The point is that this passage cannot be understood as supporting the notion that full disclosure of adverse material is mandated merely by the conferral of a right of appeal. In any event, it should be noted that the view expressed by Gageler J did not command the support of the other members of the Court in *Pompano*; and that this view has not, before or since, garnered the support of a majority of this Court.

66 This Court's decision in *Pompano* involved consideration of the principles stated in *Kable*. The plurality, in rejecting the argument for the invalidity of the legislation challenged in that case, said[109]:

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107 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 105 [177]. See also 108 [188], 110-111 [194]-[196].

108 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 48 [7].

109 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99-100 [156]-[157].

> "The rules of procedural fairness do not have immutably fixed content. As Gleeson CJ rightly observed[110] in the context of administrative decision-making but in terms which have more general and immediate application, '[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'. To 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[111].
>
> Consideration of other judicial systems may be taken to demonstrate that it cannot be assumed that an adversarial system of adjudication is the only fair means of resolving disputes. But if an adversarial system is followed, that system assumes, as a general rule, that opposing parties will know *what* case an opposite party seeks to make and *how* that party seeks to make it. As the trade secrets cases show, however, the general rule is not absolute. There are circumstances in which competing interests compel some qualification to its application. And, 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'." (emphasis in original)

67 This passage makes the important point, uncontradicted by any decision of this Court, that the question whether legislative alteration of the rules of procedural fairness is apt to cause practical injustice in any particular proceeding is not to be resolved on the basis that Ch III mandates adherence to the adversarial system of litigation, much less to all the incidents familiar within that system. It has never been suggested that the *Constitution* denies the legitimacy of legislative curtailment of disclosure in litigation involving trade secrets or confidential information, or the protection of children, or informants in criminal cases. That being so, there is no reason to complicate the analysis of whether the prescription of a particular procedure occasions practical injustice by asking whether the proceeding is adversarial and then asking what the adversarial system requires. One may simply ask the question whether, having regard to "all aspects of [a

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110 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37].

111 See, eg, *RCB v Justice Forrest* (2012) 247 CLR 304.

court's] procedures and the legislation and rules governing them"[112], the impugned legislation is an occasion of practical injustice.

68 The passage from the plurality in *Pompano* also directs attention to the need for consideration of the rights and interests of the appellant at stake in an appeal under s 44 of the AAT Act from the Security Division of the Tribunal. To a consideration of those rights one may now turn.

The appellant's rights

69 The appellant is a non-citizen. His rights to enter and remain in Australia depend on his holding a valid visa under the *Migration Act*[113]. Other statutory provisions circumscribe those rights: in particular, the appellant was liable to have his visa cancelled under s 501(3) of the *Migration Act* in consequence of the making of an ASA under the ASIO Act[114]. Any entitlement of the appellant to disclosure of information with respect to an ASA was statutory; under statute, it could be denied by decisions of officers of the executive government where those officers considered that the public interest in Australia's security required non-disclosure of that information[115]. It is undisputed that, apart from s 46(2) of the AAT Act, the denial of disclosure to the appellant of security-sensitive information, including the certificated matter, was effected lawfully. And that was so irrespective of any challenge to the validity of the ASA decision and of the outcome of that challenge. The appellant's rights were always circumscribed by the denial of disclosure of security-sensitive information pursuant to unchallenged administrative decisions made under unchallenged laws. The statutory provisions that allowed the appellant to challenge the ASA decision in the Tribunal maintained that state of affairs in consequence of the certificates issued by the ASIO Minister under the AAT Act.

70 The right of appeal to the Federal Court is itself a creature of statute. On the appellant's appeal under s 44 of the AAT Act, s 46(2) maintained the position regarding non-disclosure of security-sensitive information relating to the ASA decision, while s 46(1) allowed the Federal Court to consider all of the material that was before the Tribunal in reviewing the ASA decision and which was relevant

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112 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156].

113 *Migration Act 1958* (Cth), s 42.

114 *Migration Act 1958* (Cth), s 501(3)(c), (d), (6)(g); s 4 of the ASIO Act, definition of "security".

115 ss 37(2), 38(1), (2) of the ASIO Act.

to the appeal. The Federal Court was thereby enabled to decide the appeal before it on the same material as that on which the Tribunal proceeded[116].

71 In considering the rights and interests of the appellant that were at stake in his appeal, it must be appreciated that he was, at all times, denied disclosure of the certificated matter by the laws regulating his presence in Australia. It may be observed that the statement by Gageler J in *Pompano* on which the appellant's argument relied presupposes that the rights the protection of which are at stake in the proceeding in question are different from the "right" to bring that proceeding. The unfairness which is to be avoided is the loss of those rights otherwise than by a fair judicial process. In the present case, the only right of the appellant that was relevantly at stake in the appeal to the Federal Court was his right to hold his visa or, more precisely, his right to hold his visa unless he had been the subject of a valid ASA[117].

72 The appellant's right to hold his visa free of the consequences of an erroneous ASA was subject to the qualification that an ASA was to be made with him having no access to security-sensitive information relating to the ASA. The lawfulness of that qualification upon the appellant's rights has not been challenged. The determination of the appeal without disclosure of the certificated matter reflected the substance of the appellant's rights to access that material, that is to say, that he was by law denied disclosure. The Federal Court's duty to "do all things necessary to ensure that the [certificated] matter is not disclosed to any person other than a member of the court as constituted for the purposes of the proceeding" meant that the appellant had no right to disclosure of security-sensitive information relating to the ASA decision; and whether he was entitled to hold his visa free of the consequences of an erroneous ASA was to be determined on that footing.

73 The denial of an opportunity for the appellant to know the totality of information that justified the making of the ASA decision was an incident of the statutory regime under which the appellant was permitted lawfully to enter and remain in Australia. The statutory regime under which he was present in Australia as a visa holder denied him that information when the ASA decision was made. That was also the case before the Tribunal. There is no question that this state of affairs was lawfully imposed. Section 46(2) of the AAT Act maintained that state of affairs on the appeal to the Federal Court.

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116 cf *R (Haralambous) v Crown Court at St Albans* [2018] AC 236 at 271 [57].

117 *Migration Act 1958* (Cth), s 501(3)(c), (d), (6)(g); s 4 of the ASIO Act, definition of "security".

74 The appellant suffered no practical injustice in the determination of his appeal to the Federal Court without either him or his lawyers having access to the certificated matter. He suffered no loss of rights by reason of being denied full disclosure because his right to hold a visa unless he was the subject of a valid ASA was circumscribed by the requirement that he not be informed of security-sensitive information in relation to that decision. Indeed, it would be "productive potentially of injustice and absurdity" if the Federal Court were to allow the appeal and remit the matter for determination by the Tribunal "on a basis different from that which the [Tribunal] had quite rightly adopted and been required to adopt when first considering the matter"[118].

An additional remedy but no additional right

75 The same conclusion may be reached by considering more closely the operation of s 46 of the AAT Act as a whole.

76 The appellant attacked the reasoning of the Federal Court[119] that s 46(2) did not cause practical injustice to the appellant because, if s 46(2) did not exist, the certificated matter would still have been covered by public interest immunity and so would have been unavailable to the Court. The appellant argued that, in the absence of s 46(2), if a claim for public interest immunity were upheld, the certificated matter would not be available to either party or to the Court. On that basis, the appellant would not be subject to the alleged forensic disadvantage of being denied the opportunity to know and respond to the certificated matter that was available to the Federal Court. The appellant's argument is flawed in its focus upon the operation of s 46(2) as if it has an operation independent of s 46(1).

77 Had the appellant challenged the validity of the ASA decision by judicial review proceedings under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act* immediately upon the making of that decision, there can be no doubt as a practical matter that those proceedings would have been heard and determined on the footing that the certificated matter could not be disclosed to the appellant for the purposes of those proceedings[120]. Nothing in the legislative regime which provided, validly, for the making of the ASA decision altered the position that the law required that the certificated matter not be disclosed to the appellant on appeal to the Federal Court. Section 46(2) of the AAT Act confirmed that this state of

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118 See *R (Haralambous) v Crown Court at St Albans* [2018] AC 236 at 271 [57].

119 *SDCV v Director-General of Security* (2021) 284 FCR 357 at 396-397 [162]-[167].

120 See, eg, *Sagar v O'Sullivan* (2011) 193 FCR 311 at 313 [4]-[6].

affairs was not altered by the operation of s 46(1) in relation to an appeal under s 44.

78 It is clear, as a matter of statutory construction, that s 46(2) of the AAT Act has no operation independently of s 46(1), and so one cannot begin to answer the question whether the determination of the appellant's appeal to the Federal Court involved practical injustice by focussing exclusively on s 46(2) as if it does. When one considers the operation of s 46 as a whole, it is readily apparent that it confers an additional remedy upon a person in the position of the appellant but does not alter the state of affairs under which that person is lawfully denied disclosure of security-sensitive information.

79 As noted above, s 46 of the AAT Act applies to an appeal to the Federal Court under s 44, which provides an alternative to the constitutionally entrenched avenue of judicial review in s 75(v) of the *Constitution*[121] and the further statutory avenue of judicial review under s 39B of the *Judiciary Act*[122] as a means of challenge to an ASA. On one hand, pursuing one of those avenues would have avoided the procedural disadvantage identified by the appellant. On the other hand, neither of those avenues would have included the advantage assured to the appellant by s 46(1), in having the certificated matter placed before the Court. Without s 46(1), a person in the position of the appellant might struggle to make out the error for which he or she contends before the Federal Court[123], especially in a case such as the appellant's where one of the asserted errors was that the Tribunal's decision was not open on the evidence before it. Section 46(1) thus provides a forensic benefit to a litigant in the position of the appellant.

80 It cannot be supposed that, if this Court were to hold that Parliament may not validly call upon a Ch III court to entertain an appeal under s 44 of the AAT Act which is affected by s 46(2), it would follow that a person in the position of the appellant could proceed with the appeal free of the forensic "disadvantage" imposed by s 46(2) but with the forensic advantage of s 46(1). If s 46(2) is invalid by reason of its inconsistency with Ch III, then s 46 is invalid in its entirety. The provisions of s 46 cannot have been intended to operate otherwise than as a

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121 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 146 [376].

122 *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at 258 [47]-[49]; *Sagar v O'Sullivan* (2011) 193 FCR 311 at 312 [1].

123 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 556 [24]; *Sagar v O'Sullivan* (2011) 193 FCR 311 at 313 [4]-[6].

package: in this regard s 46(2) makes no sense at all without s 46(1). The courts have no power to engage in a rewriting of s 46 to alter its intended effect.

81 If s 46 of the AAT Act were invalid in its entirety, it is, as a practical matter, distinctly unlikely that the Federal Court would ever be able to consider information precluded from disclosure by certificates issued by the ASIO Minister on an appeal under s 44. Public interest immunity could be expected to prevent the use of such information by the Federal Court. As a practical matter, it is safe to say that, in the appellant's case, there is no good reason to think that the certificated matter could have been disclosed to the Federal Court in the absence of s 46(1).

82 The choice of an alternative avenue of challenge under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act* would not have offered the forensic advantage provided by an appeal under s 44 of the AAT Act; but it would have obviated the forensic "disadvantage" that is said to be the basis of the appellant's argument in this Court. That being so, it is difficult to accept that the avoidable consequences of s 46(2) caused him any practical injustice. The appellant chose the remedy that carried the benefit of s 46(1) available only on the terms contained in s 46(2).

83 That s 46 of the AAT Act stands or falls in its entirety highlights the artificiality of the appellant's complaint, and helps to demonstrate that s 46(2) was not apt to cause him any practical injustice in the determination of his appeal to the Federal Court. That is because the effect upon his appeal of the forensic consequences of s 46(2) cannot be considered separately from the forensic advantage conferred by s 46(1): one comes with the other. To the extent that the benefit of s 46(1) may be thought to outweigh the limitation imposed by s 46(2) so that a person in the position of the appellant chooses to pursue an appeal under s 44 rather than the other available avenues of challenge, no practical injustice is suffered. There is only the choice of a remedial procedure that is less advantageous for an appellant than it might have been, but, nevertheless, more advantageous for an appellant than the alternatives, none of which can sensibly be said to be practically unjust. Each alternative remedy is simply what the law provides, that being indisputably a matter for the Parliament. The choice of remedy was a matter for the appellant.

Case-by-case decisions – by the court?

84 The appellant argued that s 46(2) of the AAT Act operates impermissibly in a "blanket" fashion to deny an appellant information about the case against him or her, whereas cases involving trade secrets or confidential information proceed on a case-by-case analysis by a court of what fairness requires in the particular case before that court, with the appropriate procedure being moulded by the court itself. The appellant argued that, in considering a claim for public interest

immunity, a court must, in each case, engage in a balancing exercise which takes into account both whether any harm would be done by the production of the documents, and whether the administration of justice would be frustrated or impaired if the documents were withheld[124]; in contrast, s 46(2) does not allow for this case-by-case balancing of competing interests by the Federal Court. Rather, the appellant argued, s 46(2) precludes the Court from tailoring an order to ensure "basic procedural fairness"[125].

85 The appellant's argument cannot be accepted. No decision of this Court supports a constitutional imperative that the balance of competing public interests in litigation must always be left to be struck on a case-by-case basis by a court. Indeed in *Nicholas v The Queen*[126], this Court rejected the contention that "only the courts may determine what the public interest requires" in balancing competing considerations relating to the protection of the integrity of the court's processes and the pursuit of other objectives within legislative power[127].

86 Nor does Ch III give rise to a constitutional impediment to the Parliament deciding that s 46(2) of the AAT Act was necessary or appropriate to maintain the balance of the competing public interests struck by the provisions in the ASIO Act limiting the appellant's rights to disclosure of security-sensitive information. Disclosure of the information on which an ASA has been made, or even the "gist" of that information, is apt to enable the identification by the person the subject of an ASA of the sources of information adverse to his or her interests. Parliament was entitled to proceed on the basis that, given the security context in which that information is provided, the human sources of that information will be willing to co-operate with the authorities only on the basis of assurances that their identities, and the information that may identify them, would be kept confidential.

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124 *Alister v The Queen* (1983) 154 CLR 404 at 412.

125 *HT v The Queen* (2019) 269 CLR 403 at 426 [52].

126 (1998) 193 CLR 173.

127 *Nicholas v The Queen* (1998) 193 CLR 173 at 272 [233]. See also 197 [37], 203 [55], 239 [167].

87 In *Gypsy Jokers*[128], the plurality approved the following remarks of Deane J in *Australian Broadcasting Commission v Parish*[129]:

> "The results of an undue discounting of legitimate claims to confidentiality are likely to be both the deterrence of the subject from having recourse to courts of justice for the vindication of legal rights or the enforcement of criminal law and the discouragement of willing co-operation on the part of witnesses whose evidence is necessary to enable the ascertainment of truth. The interests of the administration of justice plainly make it desirable that obligations of confidence be not lightly overruled and that legitimate expectations of confidentiality as to private and confidential transactions and affairs be not lightly disregarded.
>
> In some cases, where publicity would destroy the subject matter of the litigation, the avoidance of prejudice to the administration of justice may make it imperative that the ordinary prima facie rule of open justice in the courtroom gives way to the overriding need for confidentiality."

88 The exercise of judicial discretion to balance the public interest in open justice with the competing public interest in encouraging complainants and witnesses to come forward may require close consideration of the evidence by the court before which the proceedings are pending. But in the context of the administration of laws establishing the system of migration into this country, a systemic approach to the assessment of risks to national security within that system calls, reasonably and rationally, for the establishment of procedures for the making of ASAs by officers of the executive government who are in a position to give reliable assurances of confidentiality, backed by appropriate legislation, to persons who are potential sources of relevant information concerning immigrants. The systemic importance of maintaining the confidentiality assured by these provisions supports the conclusion that the reliability of assurances of confidentiality to sources of information should not be jeopardised on appeal from the Tribunal to the Federal Court by a "case-by-case" assessment by the Court.

89 In *D v National Society for the Prevention of Cruelty to Children*[130], Lord Simon of Glaisdale said:

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128 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560-561 [41].

129 (1980) 29 ALR 228 at 255.

130 [1978] AC 171 at 235.

> "The overriding rule is the general one that courts of law must recognise their limitations for decision-making – that there are many matters in which the decision is more appropriately made by the collective wisdom of Parliament on the advice of an executive (itself collective in a system of Cabinet government) briefed by officials who have investigated over a wide field the repercussions of the decision. Such, for example, are those decisions which may affect ... the public safety, in contradistinction to decisions where the court can feel reasonably confident that there are unlikely to be unforeseen repercussions requiring extra-forensic action – for example, where the subject matter is 'lawyers' law': see, for example, *Director of Public Prosecutions v Shannon*[131]."

90 The primary responsibility for balancing the competing interests of open justice and national security in relation to immigration matters rests with the Parliament elected by the people and the executive government responsible to the Parliament[132]. Chapter III of the *Constitution* does not deny Parliament the power to recognise, and balance, the competing interests that rationally and reasonably bear upon the terms on which a person may seek to vindicate in a court a claim to enjoy rights conferred by statute which are susceptible to removal by administrative decisions authorised by statute. Striking the balance of competing public interests requires consideration of expert opinion, predictive assessments, and political and social evaluations, the making of which is legislative rather than judicial in character. Chapter III of the *Constitution* separates the judicial power of the Commonwealth from legislative power; it does not diminish the legislative power of the Parliament within its proper field.

The integrity of the Federal Court

91 The appellant argued that a court's institutional integrity hinges on its possessing, and maintaining, the essential characteristics that mark it apart from other decision-making bodies, and a law which purports to remove those characteristics altogether will therefore infringe the *Chu Kheng Lim* principle. Section 46(2) of the AAT Act does not require the Federal Court to act in a way that is inconsistent with the essential characteristics of a court. Chapter III of the *Constitution* precludes the imposition by the Parliament upon the courts of the federal judicature of the "grossly unjudicial chore" of determining an appeal by a process inconsistent with the due exercise of judicial power[133]; but the task of the

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131 [1975] AC 717.

132 cf *A v Hayden* (1984) 156 CLR 532 at 548-549.

133 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 133.

Federal Court under s 44 is not rendered unduly complex or difficult by s 46(2). Nor is the integrity of the Federal Court affected by s 46(2).

92 In *Graham v Minister for Immigration and Border Protection*[134], this Court was concerned with a challenge to the validity of s 503A(2) of the *Migration Act*. The effect of s 503A was that if a certain category of confidential information was communicated to the Minister for Immigration and Border Protection, the Minister could not be required to divulge or communicate that information to a court, a tribunal, a parliament or parliamentary committee, or any other body or person[135].

93 The plaintiff in *Graham* argued, relevantly, that s 503A(2) was invalid under Ch III of the *Constitution* on the basis that it required a federal court to exercise judicial power in a manner which was inconsistent with the essential character of a court or with the nature of judicial power[136]. In particular, the plaintiff submitted that it is an essential function of courts to find facts relevant to the determination of rights in issue, and that s 503A(2) prevented the courts from doing so, thereby constituting an impermissible interference with their function[137]. It is to be noted that the majority in *Graham* (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) rejected that submission, holding that s 503A(2) was valid, except to the extent that s 503A(2)(c) operated to prevent the Minister for Immigration and Border Protection from being required to divulge or communicate information to this Court when exercising jurisdiction under s 75(v) of the *Constitution*, or to the Federal Court when exercising jurisdiction under s 476A(1)(c) and (2) of the *Migration Act*[138].

94 Importantly for present purposes, the majority in *Graham* recorded a submission by the parties defending the validity of the legislation that "as a matter of policy, it may be accepted that admissible evidence should be withheld only if and to the extent the public interest requires it, but that there is no constitutional

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134 (2017) 263 CLR 1.

135 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 18 [14].

136 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 17 [7].

137 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 21-22 [29].

138 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 32 [64], 32-33 [66].

principle which requires the courts to be the arbiter of that question"[139]. Their Honours stated that this submission "should be accepted to the extent that 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"[140].

95 Their Honours went on to observe that "[t]he fact that a gazetted agency and the Minister may control the disclosure of information does not affect the appearance of the court's impartiality"[141]. And so, in the instant case, the impartiality and independence of the Federal Court is not affected by the maintenance of the limitations on the appellant's entitlement to disclosure of the certificated matter.

Partial invalidity

96 The appellant advanced an alternative argument to the effect that s 46(2) of the AAT Act may be only partially invalid. This alternative argument proceeded on the basis that s 15A of the *Acts Interpretation Act 1901* (Cth) requires s 46(2) to be read down to comply with the constitutional limitation. In this regard, it was argued on behalf of the appellant that s 46(2) should be read as if it provided to the effect that the Court "shall ... do all things necessary *in the due exercise of judicial power* to ensure that the [certificated] matter is not disclosed to any person ..."; the point being that, read in this way, s 46(2) would afford an appellant the minimum opportunity to know and respond to the evidence adverse to him or her, and s 46(2) would be valid. Alternatively, the appellant argued that any operation of s 46(2) that exceeds the constitutional limit be severed or disapplied. The argument concluded that if s 46(2) cannot be read down or disapplied, as the appellant suggested, then it is wholly invalid.

97 The reading of the statutory text proposed by the appellant is not open. For good or ill, it is clear that the intention of s 46(2) of the AAT Act is to ensure that there be no disclosure of the certificated matter save as permitted by the other provisions of s 46. The terms of s 46 are clear beyond peradventure that the only

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139 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 23 [35].

140 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 23 [35].

141 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [37].

exceptions to the express requirement of s 46(2) are expressly stated in the other provisions of s 46.

98 It should also be said that s 46 of the AAT Act cannot be construed to allow the appointment of special counsel to whom the matter the subject of ministerial certificates might be disclosed. Section 46(4), which allows disclosure to an "officer of the court", does not contemplate the appointment of special counsel to whom disclosure of such matter might be made so as to overcome the effect of s 46(2). As Foster J rightly held in *National Archives of Australia v Fernandes*[142], when one pays due regard to the objects and purposes of the AAT Act, and of s 46 in particular, one cannot understand the expression "officer of the court" in s 46(4) as including "any legal practitioner admitted to practice by an appropriate Court in Australia ... [T]he expression ... is meant to refer to public servants employed in the Court to assist the judges in the performance of their judicial function."

99 In addition, the appointment of special counsel to represent a person in the position of the appellant, as urged on the appellant's behalf, would not resolve the practical consequences otherwise occasioned by s 46(2). As the plurality noted in *Pompano*, special counsel to whom the certificated material was disclosed "could not, without disclosing the existence or content of the information ... ask [the appellant] to comment on what the lawyer had been told. The lawyer could assemble no ammunition to launch an attack upon the veracity of a confidential source alleged to have provided [certificated matter] without disclosing that source's existence"[143].

Conclusion and orders

100 The appellant was lawfully denied the right to know the totality of information which led to the making of the ASA decision under unchallenged laws and unchallenged administrative decisions directed to the preservation of confidentiality in the interests of national security. Section 46(2) of the AAT Act was consistent with the statutory provisions establishing the rights of the appellant to enter and remain in Australia. Moreover, s 46(2) did not affect the integrity of the Federal Court in the independent and impartial performance of its functions.

101 An appeal under s 44 of the AAT Act, to which s 46 applies, is additional to the available remedies under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act*. As a practical matter, any "disadvantage" to the appellant occasioned by s 46(2) would have been avoided by the choice of proceedings under these other

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142 (2014) 233 FCR 461 at 468 [44].

143 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 100-101 [161].

remedies. But such a choice would have denied the appellant the forensic advantage offered by s 46(1) in having the certificated matter provided to the Court. Section 46(2) operated inseparably from s 46(1) to provide the appellant with forensic advantages different from those otherwise provided by law. The appellant, having chosen to pursue the remedy that afforded those advantages, suffered no practical injustice.

102 The decision of the Federal Court was correct.

103 The appeal to this Court should be dismissed. The appellant should pay the costs of the appeal to this Court.

104 GAGELER J. The question in this appeal is of a kind which has arisen in numerous national jurisdictions on numerous occasions since the notorious events of 11 September 2001. To what extent is the ordinary principle that a party to litigation is entitled to know the evidence relied on against them capable of legislative modification in the interests of national security?

105 Questions of that kind have been addressed in the United States under the rubric of the constitutional guarantee of "procedural due process"[144]. They have been addressed in Canada by reference to constitutionally enshrined "principles of fundamental justice"[145]. In the European Union[146], and in the United Kingdom[147], they have been addressed by reference to the human right to a "fair hearing".

106 In Australia, a question of that kind engages Ch III of the *Constitution*. In particular, it engages the requirement of procedural fairness, which "lies at the heart of the judicial function"[148]. Procedural fairness is essential to the exercise of the judicial power of the Commonwealth[149]. Observance of procedural fairness is an essential characteristic of any "court" capable of being invested by the Commonwealth Parliament with the judicial power of the Commonwealth[150].

107 The precise question in the appeal is to be addressed within that constitutional frame of reference. The question concerns s 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act") in its application to a document containing information disclosure of which has been certified by the Minister administering the *Australian Security Intelligence Organisation Act 1979* (Cth) ("the ASIO Minister") under s 39B(2)(a) of the AAT Act to be contrary to

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144 The "due process" clause of the Fifth Amendment to the *Constitution of the United States*. Eg *Hamdi v Rumsfeld* (2004) 542 US 507.

145 Section 7 of the *Canadian Charter of Rights and Freedoms*. Eg *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350; *Canada (Citizenship and Immigration) v Harkat* [2014] 2 SCR 33.

146 Article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*. Eg *A v United Kingdom* (2009) 49 EHRR 29.

147 Article 6 of Sch 1 to the *Human Rights Act 1998* (UK). Eg *Tariq v Home Office* [2012] 1 AC 452; *Al Rawi v Security Service* [2012] 1 AC 531; *R (Haralambous) v Crown Court at St Albans* [2018] AC 236.

148 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 354 [54].

149 See *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56].

150 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71 [67], 99 [156], 105 [177].

the public interest "because it would prejudice security or the defence or international relations of Australia". The question is whether s 46(2), in that application, operates to require the Federal Court of Australia to adopt a procedure that is unfair when exercising the judicial power of the Commonwealth to hear and determine an appeal on a question of law from a decision of the Administrative Appeals Tribunal ("the AAT") under s 44 of the AAT Act.

108 Section 46(2) of the AAT Act operates against the background of the general requirement of s 46(1). The general requirement is that, upon the institution of an appeal under s 44, the AAT must send to the Federal Court all documents that were before the AAT in connection with the proceeding to which the appeal relates and that are relevant to the appeal. Having been sent to the Federal Court, the documents remain within the custody and control of the Federal Court until the conclusion of the appeal, when the Federal Court must return them to the AAT. The documents in the meantime are available to the Federal Court, and ordinarily to the parties, in the conduct of the appeal so as to be able to be considered by the Federal Court in the determination of the appeal.

109 Where triggered by the ASIO Minister's prior certification under s 39B(2)(a) of a document sent to the Federal Court by the AAT under s 46(1), s 46(2) requires that the Federal Court "do all things necessary to ensure that the [certified information] is not disclosed to any person other than a member of the court as constituted for the purposes of the proceeding". Disclosure "to an officer of the court in the course of the performance of his or her duties as an officer of the court" is specifically permitted by s 46(4). The requirement to ensure non-disclosure is otherwise unqualified. There may be some flexibility as to the means adopted. There is no flexibility as to the outcome to be achieved: the wholesale preclusion of disclosure of any part of the certified information to any other person, including any party to the appeal as well as any legal representative of any party to the appeal[151].

110 That blanket proscription of disclosure of certified information will not be a problem for a party to the appeal who is already aware of the certified information and is already aware that the certified information had been in a document before the AAT in connection with the proceeding to which the appeal relates. That party will have the benefit of knowing that the information will automatically be available to the Federal Court on the hearing of the appeal and will be able to tailor submissions on the appeal accordingly. Typically, that party will be a respondent before the Federal Court. Typically, that party will be an executive officer of the Commonwealth.

111 Depending on the issues in the appeal and on the degree of relevance or perceived relevance of the certified information to the resolution of those issues,

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151 *National Archives of Australia v Fernandes* (2014) 233 FCR 461 at 468 [44].

the blanket proscription may well be a problem for a party to the appeal who is unaware of the information. By force of the proscription, that party will never know the information despite it being able to be considered by the Federal Court in the determination of the appeal. Typically, that party will be an applicant before the Federal Court. Typically, that party will be an individual.

112 My opinion is that the blanket proscription by s 46(2) of the AAT Act of disclosure of information certified under s 39B(2)(a) of the AAT Act renders the process by which the Federal Court is to hear and determine an appeal under s 44 of the AAT Act procedurally unfair.

113 To explain that opinion, I will say something more about the nature of an appeal under s 44 of the AAT Act and about the parameters of the inquiry to be undertaken in considering whether s 46(2) renders the process by which the Federal Court is to hear and determine such an appeal procedurally unfair. I will address the minimum content of procedural fairness as an aspect of a judicial process. I will then explain, in a manner responsive to various arguments of the respondents and interveners, why s 46(2) results in the process by which the Federal Court is to hear and determine an appeal failing to meet that minimum content.

The nature of an appeal under s 44 of the AAT Act

114 The Commonwealth Parliament can invest the judicial power of the Commonwealth in the Federal Court only through the conferral under s 77(i) of the *Constitution* of federal jurisdiction with respect to a "matter" of a kind described in s 75 or s 76 of the *Constitution*. The constitutional term "matter" is broad[152]. The term encompasses subject-matters appropriate for the exercise of judicial power which do not involve a controversy about existing legal rights or obligations[153].

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152 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 96 ALJR 234 at 249 [46]; 399 ALR 214 at 227.

153 *R v Davison* (1954) 90 CLR 353 at 367-368; *Secretary, Department of Health and Community Services v JWB (Marion's Case)* (1992) 175 CLR 218 at 257; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (footnote 39); *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at 91 [64]; *Palmer v Ayres* (2017) 259 CLR 478 at 516 [102].

115 That said, a controversy between parties about existing legal rights or obligations is the paradigm[154]. "The unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion."[155]

116 The federal jurisdiction conferred on the Federal Court by s 44 of the AAT Act to hear and determine an appeal on a question of law from a decision of the AAT is a conferral of judicial power to hear and determine a matter within that paradigm. Although styled an "appeal", the federal jurisdiction conferred is original jurisdiction[156]. The original jurisdiction is conferred under s 77(i) of the *Constitution* with respect to a matter arising under the AAT Act, being a matter of a kind described in s 76(ii) of the *Constitution*.

117 The terms in which that original federal jurisdiction is legislatively conferred by s 44 of the AAT Act make plain that the jurisdiction is invoked by one party to a proceeding before the AAT (typically, an individual aggrieved by the primary decision which was reviewed by the AAT and in turn by the decision of the AAT on the review[157]) raising against another party to that same proceeding before the AAT (typically, the executive officer of the Commonwealth who made the primary decision which was reviewed by the AAT[158]) a controversy as to whether the decision made by the AAT on the review[159] was materially affected by an error of law[160]. The duty of the Federal Court on the hearing and determination of the appeal[161] is limited to resolving the controversy so raised, and the power of the Federal Court to make final orders in the appeal[162] is limited to

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154 See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

155 *Fencott v Muller* (1983) 152 CLR 570 at 608. See also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11, 21-22.

156 *Committee of Direction of Fruit Marketing v Australian Postal Commission* (1980) 144 CLR 577 at 585.

157 See s 30(1)(a) of the AAT Act.

158 See s 30(1)(b) of the AAT Act.

159 Section 43 of the AAT Act.

160 Section 44(1) of the AAT Act. See *Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd* (2020) 270 CLR 494 at 513 [40].

161 Section 44(3) of the AAT Act.

162 Section 44(4)-(5) of the AAT Act.

the making of orders appropriate to reflect that resolution[163]. To facilitate performance of that duty and the exercise of that power, the Federal Court is given ancillary jurisdiction to find facts supplementary to those which were found by the AAT in making the decision under appeal[164]. But neither the principal jurisdiction to hear and determine the appeal nor the ancillary jurisdiction to find additional facts requires or permits the Federal Court to engage in a process that is directed to anything other than the quelling of the controversy between the parties before it about existing legal rights.

118 Whether the Commonwealth Parliament could invest the Federal Court, or any other court, with federal jurisdiction to determine the lawfulness of an administrative decision made under Commonwealth legislation outside the paradigm of that court being called upon to quell a controversy between parties about existing legal rights is a large question. The question has not been argued and need not be resolved in order to answer the specific question in this appeal.

119 Were the question ever squarely to arise for consideration, the impact of moving outside the paradigm on the independence of the judiciary underpinned by Ch III's separation of the judicial power of the Commonwealth would need to be examined. Within a constitutional system built on the understanding that "the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive"[165], the perception if not the actuality of judicial independence would be called into question were the function of a judge reviewing the legality of administrative action to merge into that of an auditor or an ombudsman. To adopt an observation made by Isaacs J in *New South Wales v The Commonwealth*[166] and endorsed by the majority in *R v Kirby; Ex parte Boilermakers' Society of Australia*[167], were a court to have an active duty to "watch the observance of ... laws, to insist on obedience to their mandates, and to take steps to vindicate them if need be", "its essential feature as an impartial tribunal would be gone, and the manifest aim and object of the constitutional separation of powers would be frustrated".

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163 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at 356-357 [34], quoting *Minister for Immigration and Ethnic Affairs v Gungor* (1982) 42 ALR 209 at 220.

164 Section 44(7)-(10) of the AAT Act.

165 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 13, quoting *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 540; [1957] AC 288 at 315.

166 (1915) 20 CLR 54 at 93.

167 (1956) 94 CLR 254 at 271.

120 The AAT, and the executive officer of the Commonwealth who made the primary decision reviewed by the AAT so as to become a party to the proceeding before the AAT, are situated by the AAT Act in an administrative continuum[168]. The administrative continuum ends with the AAT. The Federal Court is not part of it.

121 The function performed by the Federal Court when hearing and determining an appeal under s 44 of the AAT Act is the quintessential judicial function of exercising judicial power to quell a controversy between the parties to an administrative process about the lawfulness of the resultant administrative decision. The judicial function performed by the Federal Court is adjudicative, not procuratorial. The judicial process engaged in by the Federal Court in the performance of that judicial function is adversarial, not inquisitorial.

The need for procedural fairness within the judicial process

122 That brings me to the parameters of the inquiry to be undertaken in considering whether s 46(2) of the AAT Act renders the process by which the Federal Court is to hear and determine an appeal under s 44 procedurally unfair.

123 The respondents argue that a broad and pragmatic inquiry is warranted. They argue that s 46(2) cannot be divorced from s 46(1) and that s 46 cannot be considered in isolation from s 44. They say that the provisions together constitute a legislative package by means of which a peculiar statutory jurisdiction is conferred on the Federal Court with its own peculiar process. The respondents argue that it is the fairness of the package as a whole which needs to be assessed. They argue that the fairness of the package as a whole can only be assessed having regard to the alternatives available to a party seeking to challenge the lawfulness of a decision of the AAT.

124 The respondents point out that, absent an appeal under s 44 of the AAT Act, a party to a proceeding before the AAT seeking to challenge the lawfulness of its decision would be relegated to applying for judicial review of the decision on the basis of jurisdictional error either in the original jurisdiction conferred on this Court by s 75(v) of the *Constitution* or in the equivalent original jurisdiction conferred on the Federal Court under s 77(i) of the *Constitution* by s 39B(1) of the *Judiciary Act 1903* (Cth). On any application for judicial review, that party would bear the onus of proving the facts necessary to establish that the decision of the AAT is affected by jurisdictional error. To discharge that onus of proof, the party would be able to invoke the compulsory processes of the court to obtain production of the documents that had been before the AAT. An attempt by the party to do so would likely be met by a claim of public interest immunity if and to the extent that

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168 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 300-301 [45], quoting *Jebb v Repatriation Commission* (1988) 80 ALR 329 at 333-334.

a document contained information disclosure of which might be considered by a responsible executive officer of the Commonwealth to prejudice security or the defence or international relations of Australia. That claim of public interest immunity from production would not inevitably be upheld by the court in whole or in part on a balancing of considerations. But to the extent the claim was upheld by the court, it would result in the document containing the information being withheld from the party and also from the court. Not only would the party be handicapped in discharging the onus of proof, but the court would "arrive at a decision on something less than the entirety of the relevant materials"[169].

125 The respondents go on to point out that the jurisdiction to hear and determine an appeal on a question of law legislatively conferred on the Federal Court by s 44 of the AAT Act is not confined to an error of law which has resulted in jurisdictional error. To that extent, the jurisdiction conferred by s 44 of the AAT Act is broader than the jurisdiction conferred by either s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*[170].

126 What is more, the respondents point out, a party invoking the additional jurisdiction conferred on the Federal Court by s 44 of the AAT Act is relieved of the need to invoke compulsory processes to obtain the production of documents and to run the gauntlet of a claim for public interest immunity. That is because s 46(1) ensures that all documents that were before the AAT and that are relevant to the appeal will automatically be available to the Federal Court on the hearing of the appeal. For that considerable procedural benefit, so the argument goes, the party pays the small price imposed by s 46(2). The price is that, if certified by the ASIO Minister under s 39B(2)(a), the information contained in those documents will not be disclosed to that party.

127 Taking the downside of s 46(2) together with the upside of s 46(1), the respondents argue, a party to a proceeding before the AAT who wants to challenge the lawfulness of its decision is better off with an appeal under s 44 of the AAT Act than without an appeal under s 44 of the AAT Act. The party has not lost any right to challenge the lawfulness of the decision under s 75(v) of the *Constitution* or s 39B(1) of the *Judiciary Act*. The party has gained an additional and more expansive right to challenge the lawfulness of the decision by a dedicated streamlined process. Being no more than an incident of the process by which that additional and more expansive right to challenge the lawfulness of the decision is exercised, the respondents argue, the requirement of s 46(2) of the AAT Act occasions no "practical injustice".

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169 *Church of Scientology v Woodward* (1982) 154 CLR 25 at 61. See eg *Sagar v O'Sullivan* (2011) 193 FCR 311.

170 *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 172-173 [11].

128 I cannot accept that mode of analysis. The with-jurisdiction-and-without-jurisdiction comparison proffered by the respondents is to my mind beside the point. It can be no answer to an argument that a process required to be followed in the purported exercise of jurisdiction is unfair to say that something is better than nothing.

129 Chapter III of the *Constitution* does not admit of "grades or qualities of justice"[171]. "The circumstance that [an institution] has been established by legislation as a court means that any jurisdiction conferred on it is necessarily conditioned by the requirement that it observe procedural fairness *in the exercise of that jurisdiction*."[172]

130 The Commonwealth Parliament is not constitutionally required to confer any federal jurisdiction on any court under s 76 or s 77 of the *Constitution*. But whatever federal jurisdiction it chooses to confer is constitutionally incapable of being exercised by a court other than in accordance with a judicial process. Procedural fairness is a requirement to be observed within a judicial process.

131 At least where a matter with respect to which jurisdiction is conferred is within the paradigm of a controversy between parties about existing legal rights, procedural fairness requires that each party to the controversy be afforded a fair opportunity to be heard in the course of the judicial process by which that controversy gets resolved. That involves being afforded a fair opportunity to be heard in relation to the facts to be found, in relation to the ascertainment of the applicable law, and in relation to the application of that law to the facts.

132 The expression "practical injustice" is appropriately used as a synonym for procedural unfairness[173]. What is important to bear in mind in using that synonym, however, is that the practical injustice referred to is procedural injustice. Gleeson CJ coined the expression in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*[174]. His Honour there described a procedural irregularity in the process by which an administrative decision was

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171 *Wainohu v New South Wales* (2011) 243 CLR 181 at 229 [105].

172 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 95 ALJR 128 at 137 [47] (emphasis added); 386 ALR 212 at 222.

173 Eg *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99-100 [156]-[157]; *HT v The Queen* (2019) 269 CLR 403 at 417 [18].

174 (2003) 214 CLR 1 at 13-14 [37].

made as having occasioned no "practical injustice" in circumstances where "[t]he applicant lost no opportunity to advance his case"[175].

The content of procedural fairness within a judicial process

133 More than half a century ago, in England, Upjohn LJ said[176]:

> "It seems to be fundamental to any judicial inquiry that a ... properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial."

134 That explanation of the content of procedural fairness in an adversarial judicial process within the common law tradition might here and now be said to be a purist view expressed in a less complicated age in a place where the term "judicial" bore no constitutional significance. The explanation might be said to have been an overstatement even then and there. Exigencies of national security and public safety in this century have prompted recognition of the historical truth that judges have in fact taken information undisclosed to one or more parties into account in reaching conclusions in a variety of atypical cases over a long period without the processes in which they have engaged having been thought unjudicial[177].

135 Nonetheless, the statement of Upjohn LJ reflects the historical norm and continues to reflect the institutional ideal. The statement encapsulates the standard method of application within a judicial process of a standard incident of procedural fairness. Expressed at a level of generality, that standard incident of procedural fairness is that a party liable to be affected by an exercise of power has an entitlement "to put information and submissions to the decision-maker in support of an outcome that supports his or her interests", being an entitlement which "extends to the right to rebut or qualify by further information, and comment by

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175 (2003) 214 CLR 1 at 14 [37]-[38].

176 *In re K (Infants)* [1963] Ch 381 at 405-406, quoted in *Tariq v Home Office* [2012] 1 AC 452 at 513 [103] and cited in *Al Rawi v Security Service* [2012] 1 AC 531 at 592 [89].

177 Eg *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 100 [157], 109 [192].

way of submission, upon adverse material from other sources which is put before the decision-maker"[178].

136 The historical norm and institutional ideal are reflected in what was described in *HT v The Queen*[179] as a "general rule" within "an adversarial system": "that opposing parties will know what case an opposite party seeks to make and how that party seeks to make it". The want of procedural fairness found in *HT v The Queen*, where a court of criminal appeal had re-sentenced an offender having regard to evidence which was withheld from the offender, was explained in terms of an unjustified departure from the general rule in the circumstances of the case[180].

137 *Condon v Pompano Pty Ltd*[181] can be treated as authority for the proposition that a legislated departure from the general rule does not necessarily result in non-compliance with the standard of procedural fairness required by Ch III of the *Constitution* of a court engaged in a judicial process. How then is the difference between compliance and non-compliance with that standard determined?

138 There is much to be said for an approach which would require any legislated departure from the general rule to be no more than is reasonably necessary to protect a compelling public interest. That approach might be thought to cohere with the approach favoured in *Hogan v Hinch*[182] to determining the consistency with Ch III of the *Constitution* of a legislated departure from "the general rule that judicial proceedings shall be conducted in public"[183]. French CJ often emphasised that open justice and natural justice are closely related aspects of a judicial process[184]. Be that as it may, the appellant does not argue for such an approach. In the absence of argument, I do not propose to explore the approach further.

139 The argument of the appellant approaches the question from a different direction. The argument posits that the procedural fairness required of a court engaged in a judicial process has a minimum content. For the identification of that

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178 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592, quoted in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 161-162 [29].

179 (2019) 269 CLR 403 at 416 [17].

180 (2019) 269 CLR 403 at 424 [46], 426 [52]. See also at 427-428 [57]-[58], 430 [64].

181 (2013) 252 CLR 38 at 87-88 [116]-[120].

182 (2011) 243 CLR 506 at 552-554 [85]-[91].

183 *Russell v Russell* (1976) 134 CLR 495 at 520.

184 See, eg, *South Australia v Totani* (2010) 242 CLR 1 at 43 [62].

minimum content in terms adequate to resolve the precise question in the appeal, the appellant relies on something I said in *Pompano*. There I said[185]:

> "A court cannot be required by statute to adopt a procedure that is unfair. A procedure is unfair if it has the capacity to result in the court making an order that finally alters or determines a right or legally protected interest of a person without affording that person a fair opportunity to respond to evidence on which that order might be made."

140 That statement of principle was formulated in the context of considering a procedure in accordance with which evidence undisclosed to a party might be used as a sword in seeking an order against that party. But the principle, if sound, must apply equally to a procedure in accordance with which evidence undisclosed to a party might be used as a shield in resisting an order sought by that party.

141 I see no reason to resile from the principle as formulated. Of course, a great deal turns on what is taken to be meant by a "fair opportunity". In formulating the principle, I used the expression in the orthodox sense of meaning an opportunity that is fair in the "circumstances of the particular case"[186]. Whether a process is fair in the circumstances of a particular case, as the Full Court of the Federal Court subsequently noted in *Shrestha v Migration Review Tribunal*[187] with reference to *Lam*, cannot be determined by reference to a single consideration but depends on "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". A fair opportunity to respond to evidence in the circumstances of a particular case is an opportunity that is fair having regard, amongst other considerations, to the significance of the evidence to the resolution of the controversy before the court and to any competing public interest that might exist in maintaining the secrecy of the evidence.

142 I did not mean in *Pompano* to convey that a fair opportunity to respond to evidence could only ever be provided by full disclosure of that evidence to a party. I did mean to convey that an unyielding requirement for evidence that is acted upon by a court to be kept secret has the capacity to result in the denial to a particular party of an opportunity to respond to particular evidence which is fair in the circumstances of a particular case.

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185 (2013) 252 CLR 38 at 105 [177].

186 *Kioa v West* (1985) 159 CLR 550 at 585. See also at 563, 611, 633.

187 (2015) 229 FCR 301 at 310 [49]. See also *Roberts v Harkness* (2018) 57 VR 334 at 354-355 [46]-[50].

143 Understood in that sense, my statement of principle does not appear to have been contradicted by anything in other reasons for judgment in *Pompano*.

144 The judicial process in issue in *Pompano* was one pursuant to which the Supreme Court of Queensland was empowered to make a control order against a respondent. The Supreme Court could make the control order on the basis of information not disclosed to the respondent if it had declared that information to be "criminal intelligence". The power of the Supreme Court to declare information to be criminal intelligence was to be exercised in advance of the application for the control order and was discretionary. In exercising that discretion, the Supreme Court was expressly permitted to consider whether such prejudice as disclosure might cause to a designated public interest "outweigh[ed] any unfairness to a respondent"[188].

145 All members of this Court in *Pompano* reasoned to the conclusion that the judicial process in issue was consistent with Ch III of the *Constitution*. Hayne, Crennan, Kiefel and Bell JJ reached that conclusion taking the view that fairness to a known respondent was a matter to which the Supreme Court was bound to have regard when deciding whether to declare information to be criminal intelligence[189]. I took the view that the requirement for the Supreme Court to weigh unfairness to a respondent when deciding whether to declare information to be criminal intelligence went a long way towards ensuring that non-disclosure to the respondent would not be unfair, but not quite far enough[190]. My concern was that an assessment made by the Supreme Court, in advance of an application for a control order, that a protected public interest outweighed unfairness to a respondent might turn out to be wrong on the hearing of an application[191]. That concern was assuaged by the inherent jurisdiction of the Supreme Court to stay an application in the event of insurmountable unfairness emerging[192]. French CJ likewise considered that the Supreme Court "would have a discretion to refuse to act upon criminal intelligence where to do so would give rise to a degree of unfairness in the circumstances of the particular case which could not have been contemplated at the time that the criminal intelligence declaration was made"[193].

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188 See s 72(2) of the *Criminal Organisation Act 2009* (Qld).

189 (2013) 252 CLR 38 at 101 [162].

190 (2013) 252 CLR 38 at 112-113 [201]-[204].

191 (2013) 252 CLR 38 at 113 [205].

192 (2013) 252 CLR 38 at 115 [212].

193 (2013) 252 CLR 38 at 80 [88].

146 Thus, all members of the Court in *Pompano* treated the capacity of a court to be satisfied that non-disclosure of particular information to a particular party would not be unfair as important to the consistency with Ch III of the *Constitution* of the judicial process in issue. *Pompano* does not deny the proposition that an inflexible legislative requirement for a court to withhold from a party information on which the court can base an order adverse to that party may be inconsistent with Ch III of the *Constitution*.

147 Neither *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[194] nor *Graham v Minister for Immigration and Border Protection*[195] is authority to the contrary.

148 *Gypsy Jokers* was considered in *Pompano*. As I pointed out in *Pompano*[196], the statement of Crennan J (with whom Gleeson CJ agreed) in *Gypsy Jokers* that "Parliament can validly legislate to exclude or modify the rules of procedural fairness"[197] must be read in light of her Honour's conclusion that the provision there in issue[198] effected no more than a "modification"[199]. Moreover, her Honour's conclusion was expressed in terms that "[t]he statutory modification of procedural fairness achieved ... [was] indistinguishable from the modification of procedural fairness which can arise from the application of the principles of public interest immunity"[200]. To similar effect, Gummow, Hayne, Heydon and Kiefel JJ observed that the provision produced "an outcome comparable with that of the common law respecting public interest immunity, but with the difference that the Court itself may make use of the information in question"[201]. Necessarily implicit in that explanation of the operation of the provision was an understanding that the provision not only left it to the court "to determine upon evidence provided to it whether the disclosure of the information might have the prejudicial effect spoken

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194 (2008) 234 CLR 532.

195 (2017) 263 CLR 1.

196 (2013) 252 CLR 38 at 108 [190].

197 (2008) 234 CLR 532 at 595 [182].

198 Section 76(2) of the *Corruption and Crime Commission Act 2003* (WA).

199 (2008) 234 CLR 532 at 595-597 [181]-[189].

200 (2008) 234 CLR 532 at 596 [183].

201 (2008) 234 CLR 532 at 559 [36].

of"[202] but also permitted the court to balance the prejudicial effect of non-disclosure on the ability of a party to present that party's case[203].

149 *Graham* had nothing to say about procedural fairness as an aspect of judicial process. Indeed, no argument about procedural fairness was put or considered in *Graham*. That is hardly surprising given that the provision there centrally in issue prevented disclosure not only to a party but also to a court[204]. The principle on which *Graham* turned was that a Commonwealth law cannot impair the ability of the court, through the application of a judicial process, to discern and declare whether or not the conditions of and constraints on the lawful exercise of a power legislatively conferred on an officer of the Commonwealth have been observed in a particular case[205].

150 For the reasons I set out in *Pompano*, it should be recognised that a court determining a justiciable controversy between parties cannot be required by statute to adopt a procedure that has the capacity to result in the court making a final order without affording a party adversely affected by the order an opportunity – fair in the circumstances of the particular case – to respond to evidence on which the order might be made. To recognise that constitutional minimum is not to deny the capacity of a legislature to enact standardised rules of procedure by which sensitive information might be received into evidence without being disclosed to a party. The broader and more inflexibly a standardised rule proscribing disclosure is framed, however, the greater must be the danger of breach of the constitutional minimum. At least that is so absent some form of safety valve by means of which the court can ensure either that the adverse order is not made or that disclosure will occur if the court forms the view that non-disclosure is unfair in the circumstances of the particular case.

151 Observance of the constitutional minimum where a court is authorised by statute to engage in a process of adjudication taking account of information which relates to national security does no violence to the allocation of functional responsibilities inherent in the constitutional separation of the judicial power of the Commonwealth. Subject to regulation by the Commonwealth Parliament[206], functional responsibility for national security undoubtedly lies, as it has always lain, with the Executive Government of the Commonwealth. Yet the onetime

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202 (2008) 234 CLR 532 at 558 [33].

203 See *Alister v The Queen* (1983) 154 CLR 404 at 412.

204 Section 503A(2)(c) of the *Migration Act 1958* (Cth).

205 (2017) 263 CLR 1 at 27-29 [48]-[53].

206 *Brown v West* (1990) 169 CLR 195 at 202; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 93 [122].

notion that "those who are responsible for national security must be the sole judges of what the national security requires"[207] has long been regarded as "too absolute"[208]. Courts can and do weigh considerations of national security when doing so is necessary for the performance of the judicial function. They do so aware of their institutional limitations and of the consequent need for them to adopt a cautious approach[209]. If a court can be trusted to receive national security information into evidence in determining the rights of the parties to a particular case, it is not too glib to say that the court should be trusted to weigh the interests of national security appropriately in considering what fairness to one or more of those parties requires in the circumstances of that case.

The problem with s 46(2) of the AAT Act

152 Because it has the capacity to result in the Federal Court having regard to information to which a party has not been afforded an opportunity to respond that is fair in the circumstances of the particular appeal, s 46(2) of the AAT Act in its application to information certified under s 39B(2)(a) renders the process by which the Federal Court is to hear and determine an appeal under s 44 procedurally unfair. The problem with s 46(2) in that operation lies in its rigidity in compelling a court never to disclose the certified information to a party or to a legal representative of a party irrespective of the degree of relevance or perceived relevance of the information to the resolution of an issue in the appeal and irrespective of the degree of prejudice to security or the defence or international relations of Australia that would result from disclosure to that party or legal representative.

153 The problem of rigidity – of insensitivity to the possibility that some measure of disclosure might be needed to ensure procedural fairness in the circumstances of a particular appeal – is not alleviated by the miscellany of other considerations relied on by the respondents and interveners in argument.

154 True it is that having automatic access to the whole of the relevant information that had been before the AAT and that is relevant to the appeal through the operation of s 46(1) avoids the unedifying prospect of the Federal Court being forced to determine the appeal on incomplete information. But having access to the whole of the material does not make the procedure by which the Federal Court determines the appeal by reference to that information fair.

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207 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 442, quoting *The Zamora* [1916] 2 AC 77 at 107.

208 *A v Hayden* (1984) 156 CLR 532 at 548. See also at 591.

209 See *Church of Scientology v Woodward* (1982) 154 CLR 25 at 74-76; *Alister v The Queen* (1983) 154 CLR 404 at 435, 455.

155 The Federal Court in determining the appeal can adjust the weight which it gives to certified information having regard to the circumstance that the information has been withheld from disclosure under s 46(2). But that is not part of the solution. Actually, it is part of the problem. Lord Kerr JSC eloquently explained in *Al Rawi v Security Service*[210] that evidence insulated from challenge has the potential to mislead. The same is true of evidence insulated from contextual explanation.

156 The capacity of a party unable to respond to certified information to seek judicial review of the certification decision of the ASIO Minister in this Court under s 75(v) of the *Constitution* or the Federal Court under s 39B(1) of the *Judiciary Act* does not solve the problem. The question for either court on an application for judicial review would be limited to whether the certification decision was invalid by reason of jurisdictional error. The court would not itself enter into the merits of whether disclosure would in fact be contrary to the public interest. The court would not have any occasion to consider the impact of non-disclosure on the fairness of the conduct of the appeal. No order the court could make could relieve against the intransigent preclusive effect on disclosure of a valid certification.

157 The ability of the Federal Court sometimes to disclose the "gist" or substance of certified information without breach of the proscription in s 46(2) might ameliorate the problem in some cases. But it cannot solve the problem in every case. Whether something of use might be disclosed about certified information without disclosing the information itself (and thereby potentially jeopardising security, defence or international relations) is a fine question the answer to which must be highly context specific. The gist might sometimes be able to be given without disclosing the certified information. Not always. And giving the gist might often be enough to allow a fair opportunity to respond. Again, not always.

158 Nor, it should be added, would the problem of rigidity be solved were the power of the Federal Court to control its own procedure to extend to the appointment of an officer to advocate for the interests of a party unable to respond to certified information. The absolute ban on disclosure to a party or to a legal representative of a party would remain. Whether the power of the Federal Court would extend to the appointment of such an officer is a topic on which I prefer to express no opinion.

159 Comparison with a "closed material procedure" of a kind judicially fashioned by the Supreme Court of the United Kingdom in *R (Haralambous) v*

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210 [2012] 1 AC 531 at 592 [93]. See also Zuckerman, *Zuckerman on Civil Procedure*, 4th ed (2021) at 1027 [19.107].

Crown Court at St Albans[211] for the purpose of conducting judicial review of a decision based on national security information serves only to highlight the rigidity of s 46(2) of the AAT Act. It was said in *Haralambous* that "[a]s a matter of principle, open justice should prevail to the maximum extent possible" and that "[a]ny closed material procedure 'should only ever be contemplated or permitted by a court if satisfied, after inspection and full consideration of the relevant material ... that it is essential in the particular case' and should, of course, be restricted as far as possible"[212].

160 The rigidity of s 46(2) of the AAT Act is further pointed up when its operation is contrasted with the statutory "closed material procedure" for which provision is made in the *Justice and Security Act 2013* (UK)[213]. The procedure applies in a particular civil proceeding only where the court itself first declares that the procedure will apply in that proceeding. To declare that the procedure will apply, the court itself must be satisfied not only that disclosure of the material would be damaging to the interests of national security but also that application of the procedure is in the interests of the fair and effective administration of justice in the proceeding[214]. A declaration once made must be kept under review by the court and can be revoked by the court at any time if the court considers that application of the procedure is no longer in the interests of the fair and effective administration of justice in the proceeding[215]. For so long as a declaration remains in force, sensitive material can be withheld from a party only with permission of the court[216]. The entire procedure by which sensitive material considered by a court can be withheld from a party is therefore subject to the control of the court and is tailored to the circumstances of the individual case.

161 Finally, little assistance is to be gained by looking to the United States. A number of United States Courts of Appeals have rejected facial challenges brought on procedural due process grounds to a number of rigid congressional proscriptions of disclosure of certified national security information able to be

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211 [2018] AC 236.

212 [2018] AC 236 at 272 [61], quoting *Tariq v Home Office* [2012] 1 AC 452 at 499-500 [67].

213 See Zuckerman, *Zuckerman on Civil Procedure*, 4th ed (2021) at 1018-1023 [19.81]-[19.97].

214 Section 6 of the *Justice and Security Act 2013* (UK).

215 Section 7 of the *Justice and Security Act 2013* (UK).

216 Section 8 of the *Justice and Security Act 2013* (UK); Pt 82 of the *Civil Procedure Rules 1998* (UK); see also Zuckerman, *Zuckerman on Civil Procedure*, 4th ed (2021) at 1022-1023 [19.93]-[19.95].

considered by a court *ex parte* and *in camera*[217]. In so doing, they have applied a balancing test derived from the decision of the Supreme Court of the United States in *Mathews v Eldridge*[218]. That test does not draw a clear distinction between procedural due process in an administrative process and procedural due process in a judicial process. The manner of its application is therefore of marginal utility in considering the content of procedural fairness as an aspect of a judicial process under Ch III of the *Constitution*. Noteworthy nevertheless is that the Court of Appeals for the District of Columbia appears to have accepted that a proscription of disclosure of national security information has the potential to result in a denial of procedural due process in its application to the circumstances of a particular case in which a court, having considered the material *ex parte* and *in camera*, forms the view that it "cannot discharge its responsibility ... unless a petitioner's counsel has access to as much as is practical of the classified information"[219].

Section 46(2) of the AAT Act is inseverable

162 Being incompatible with Ch III of the *Constitution* because it renders the process by which the Federal Court is to hear and determine an appeal under s 44 of the AAT Act procedurally unfair, s 46(2) is invalid in its application to information certified under s 39B(2)(a). Being invalid in its application to information certified under s 39B(2)(a), s 46(2) must also be invalid at least in its application to information certified under s 28(2)(a) or s 36(1)(a), which are in terms indistinguishable from s 39B(2)(a).

163 Section 15A of the *Acts Interpretation Act 1901* (Cth) requires 46(2) in those applications to be severed from the remainder of the AAT Act unless and to the extent that the requirement is displaced by a contrary intention appearing in the AAT Act. An intention to the contrary of s 15A exists if and insofar as the AAT Act manifests a positive intention that its provisions are to operate as a whole or not at all[220].

164 The respondents argue that the AAT Act manifests a positive intention that s 46 is to have no operation if s 46(2) cannot have full operation. I accept that argument. Section 46 operates as an integrated scheme. To sever s 46(2) in its application to information certified under s 39B(2)(a) would give s 46(1) a

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217 Eg *In re National Security Agency Telecommunications Records Litigation* (2011) 671 F 3d 881 at 902-904; *Fares v Smith* (2018) 901 F 3d 315 at 323-326.

218 (1976) 424 US 319 at 335.

219 *Fares v Smith* (2018) 901 F 3d 315 at 322-323, quoting *Bismullah v Gates* (2007) 501 F 3d 178 at 187.

220 See *Knight v Victoria* (2017) 261 CLR 306 at 325 [35].

drastically different practical operation which would run counter to the purpose for which s 46(2) was evidently enacted.

165 No party or intervener argues that s 46 is inseverable from the remainder of the AAT Act. Section 44 remains unaffected. The compulsory processes of the Federal Court, including by way of subpoena and notice to produce, also remain unaffected. Those processes are available to be used to ensure that documents relevant to an appeal under s 44 that were before the AAT in connection with the proceeding to which an appeal relates, subject to any successful claim to public interest immunity from production and subject to any confidentiality orders which the Federal Court might be persuaded to make, are available to both parties and can also be placed before the Federal Court on the hearing of the appeal.

Orders

166 I would allow the appeal and make the consequential orders proposed by Gordon J.

167 GORDON J. This is an appeal from a decision of the Full Court of the Federal Court of Australia, on appeal from a decision of the Security Division of the Administrative Appeals Tribunal ("the Tribunal") under s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act").

168 In the Tribunal, the appellant had unsuccessfully sought merits review[221] of an adverse security assessment given by the Australian Security Intelligence Organisation ("ASIO") under the *Australian Security Intelligence Organisation Act 1979* (Cth) ("the ASIO Act"). In the Tribunal proceeding, the Minister administering the ASIO Act ("the ASIO Minister")[222], as a member of the Executive, issued certificates under s 39B(2)(a) of the AAT Act on the ground that disclosure of the material the subject of the certificates ("the certified matter") would be contrary to the public interest because it would prejudice the security of Australia[223]. The appellant did not challenge the validity of the certificates.

169 On the Federal Court proceeding being instituted by the appellant, s 46(1) of the AAT Act required the Tribunal to send to the Court all documents before the Tribunal which were relevant to the appeal, including the certified matter. Section 46(2), however, required the Federal Court to adopt a procedure that allowed the Director-General of Security and the Court to rely upon the certified matter but prevented any disclosure of that material to the appellant and his legal representatives, thereby denying the appellant any opportunity to respond to the certified matter. One of the appellant's grounds of appeal in the Federal Court alleged that the Tribunal's decision was not open on the evidence. The Director-General addressed that ground by reference to the certified matter and by reference to submissions to which the appellant could not respond. The Federal Court concluded, on the basis of the certified matter and submissions, that there was ample evidence for the conclusion that the adverse security assessment was justified.

170 The appellant challenged the validity of s 46(2) of the AAT Act as infringing Ch III of the *Constitution* on the basis that it denied him procedural fairness. The Full Court of the Federal Court unanimously rejected that challenge. For the reasons that follow, s 46 of the AAT Act is contrary to Ch III of the *Constitution* and is wholly invalid.

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221 *Australian Security Intelligence Organisation Act 1979* (Cth), s 54.

222 AAT Act, s 3(1) definition of "ASIO Minister".

223 See [184] below.

Chapter III and procedural fairness

171 Two principles underpin the strict separation of Commonwealth judicial power: the judicial power of the Commonwealth may only be exercised by a body that is a "court" within the meaning of Ch III of the *Constitution*[224] (a "Ch III court") and a federal court may only exercise the judicial power of the Commonwealth or a power incidental thereto[225].

172 Flowing from Ch III's exclusive vesting of the judicial power of the Commonwealth in Ch III courts and the implication that no Parliament can require a court to act in a manner repugnant to its institutional integrity[226], "there is implicit a requirement that those 'courts' exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially"[227]. While the essential characteristics of a court and the meaning and content of "judicial power" may defy exhaustive and precise definition[228], observance of procedural fairness is both an essential characteristic of a court[229] and an essential incident of the exercise of

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224 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270.

225 *Boilermakers* (1956) 94 CLR 254 at 269-270.

226 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15], 598-599 [37], 648 [198]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 88-89 [123]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40]; *Kuczborski v Queensland* (2014) 254 CLR 51 at 98 [139]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 245-246 [55].

227 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 487. See also *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 442, 451; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607, 689, 703-704; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; *Nicholas v The Queen* (1998) 193 CLR 173 at 185 [13], 208-209 [73]-[74].

228 As to the essential or defining characteristics of courts see, eg, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64]; *Emmerson* (2014) 253 CLR 393 at 426 [44]. As to the meaning of "judicial power" see, eg, *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 204 [146]; 388 ALR 1 at 43-44 and the authorities there cited.

229 See, eg, *Hogan v Hinch* (2011) 243 CLR 506 at 541 [45]; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [44]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 672 [117]; *Pompano* (2013)

judicial power[230]. Put simply, "[p]rocedural fairness lies at the heart of the judicial function"[231] – to "act judicially" is to observe the requirements of "procedural fairness"[232]. The "[a]brogation of natural justice" is, therefore, "anathema to Ch III of the *Constitution*"[233].

173 The requirement to accord procedural fairness is to be understood as inhering or lying in the very nature of the common law system of adversarial trial administered in Australian courts[234]. Fairness "transcends the content of more particularized legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be

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252 CLR 38 at 71-72 [67]-[68], 99 [156], 105 [177], 106-108 [181]-[188], 110 [194]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 594 [39(3)] ("*NAAJA*").

230 See, eg, *Leeth* (1992) 174 CLR 455 at 469-470; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 22; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101 [42]; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 354-355 [53]-[57], 366-367 [97]-[98], 379-381 [141]-[145]; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 553 [27].

231 *HT v The Queen* (2019) 269 CLR 403 at 430 [64] (footnote omitted). See also *International Finance Trust* (2009) 240 CLR 319 at 354 [54], 380-381 [143]-[144].

232 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 366. See also *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353 at 363, 372; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373; *Grollo v Palmer* (1995) 184 CLR 348 at 359-360; *Wilson* (1996) 189 CLR 1 at 17, 23.

233 *Pompano* (2013) 252 CLR 38 at 110 [194].

234 cf *International Finance Trust* (2009) 240 CLR 319 at 374 [127]. See also *Harris v Caladine* (1991) 172 CLR 84 at 150; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496; *Gipp v The Queen* (1998) 194 CLR 106 at 122-123 [48]-[50]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 343-344 [3]-[4]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 136 [22]-[23]; *Forge* (2006) 228 CLR 45 at 76 [64]; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 188-189 [23]-[24]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 266 [176], 267 [181]; *Pompano* (2013) 252 CLR 38 at 46 [1]; *Kuczborski* (2014) 254 CLR 51 at 118-119 [226]-[227].

observed in the administration of the substantive criminal [and civil] law"[235]. The method of "administering justice" that lies at the heart of the common law tradition[236] requires that courts adopt "a procedure that gives each interested person an opportunity to be heard and to deal with any case presented by those with opposing interests"[237]. "[T]he right of a party to meet the case made against him or her"[238] – "to know key elements of the case against them"[239] – is "intrinsic to the integrity of courts"[240] operating in an adversarial system.

174 It follows that "[n]o court in Australia can be required by statute to adopt an unfair procedure"[241], recognising, of course, that a procedure is "not necessarily unfair because it is less than perfect"[242]. That is so even where the unfair procedure operates to disadvantage an applicant who brings proceedings (including judicial review or equivalent proceedings to enforce the limits on the lawful exercise of administrative power) at their own motion. And it is so irrespective of the fact that the legal rights at issue are statutory and irrespective of the applicant's unchallenged legal status in Australia. With that said, "[t]he rules of procedural fairness do not have immutably fixed content ... '[F]airness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural

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235 *Dietrich v The Queen* (1992) 177 CLR 292 at 326, quoted in McHugh, "Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?" (2001) 21 *Australian Bar Review* 235 at 240.

236 *Pompano* (2013) 252 CLR 38 at 46 [1] (footnote omitted). See also *NAAJA* (2015) 256 CLR 569 at 621 [134]; *Garlett v Western Australia* [2022] HCA 30 at [115], [118], [122]-[123], [134], [162], [182].

237 *Wilson* (1996) 189 CLR 1 at 17.

238 *Nicholas* (1998) 193 CLR 173 at 208 [74]. See also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56]; *Pompano* (2013) 252 CLR 38 at 46 [1].

239 Groves, "Exclusion of the Rules of Natural Justice" (2013) 39 *Monash University Law Review* 285 at 285.

240 Groves, "Exclusion of the Rules of Natural Justice" (2013) 39 *Monash University Law Review* 285 at 286. See also *Forge* (2006) 228 CLR 45 at 76 [63]; see also 67-68 [41], 121 [192]; *Hogan* (2011) 243 CLR 506 at 541 [45]; *Wainohu* (2011) 243 CLR 181 at 208 [44].

241 *Pompano* (2013) 252 CLR 38 at 110 [194]; see also 105 [177]. See also Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed (2020) at 545-546 [9.95].

242 *Dietrich* (1992) 177 CLR 292 at 365 (footnote omitted).

fairness or natural justice, the concern of the law is to avoid practical injustice'"[243]. Procedural fairness necessarily has a variable content; it can be "provided by different means in different contexts and may well be provided by different means in a single context"[244]. It "is defined by practical judgments about its content and application"[245].

175 It is unnecessary in this case to traverse the metes and bounds of the sorts of procedures that might transgress the constitutional limitation – that is, by impermissibly abrogating natural justice or reducing the content of procedural fairness to "nothingness"[246]. The essential point is that a legislative procedure, viewed as a whole, cannot validly operate in a way that renders a court unable to respond to potential "practical injustice"[247]. Put differently, legislation cannot deprive a court of "the power to ensure, so far as practicable [and, it might be added, having regard to the particular context of the case], fairness between the parties"[248]. To conclude otherwise would render any limitation derived from Ch III which purported to protect the fairness of the judicial process meaningless. It would be "to construe Ch III ... as being concerned only with labels and as requiring no more than that the repository of judicial power be called a court", which "would be to convert it into a mockery, rather than a reflection, of the doctrine of separation of powers"[249]. As members of this Court have said on many

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243 *Pompano* (2013) 252 CLR 38 at 99 [156] (quoting *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]); see also 105 [177], 108 [188]. See also *HT* (2019) 269 CLR 403 at 424 [46], 430 [64].

244 *Pompano* (2013) 252 CLR 38 at 105 [177], 111 [195]. See also *Dietrich* (1992) 177 CLR 292 at 364; *International Finance Trust* (2009) 240 CLR 319 at 354 [54].

245 *Pompano* (2013) 252 CLR 38 at 72 [68].

246 *Pompano* (2013) 252 CLR 38 at 110 [192]; see also 105 [177]. See also *Kioa v West* (1985) 159 CLR 550 at 615-616.

247 See *Pompano* (2013) 252 CLR 38 at 100 [157], 108 [188]. See also *HT* (2019) 269 CLR 403 at 424 [46].

248 *International Finance Trust* (2009) 240 CLR 319 at 355 [55].

249 *Polyukhovich* (1991) 172 CLR 501 at 607.

occasions, the concern of Ch III is with substance, not form[250]: it "cannot be evaded by formal cloaks"[251].

176 As a "general rule" within an adversarial system "opposing parties will know *what* case an opposite party seeks to make and *how* that party seeks to make it"[252]. That "general rule" is not "absolute"[253]. It will not always be the case that parties (personally or by their representatives) "know of *all* of the material on which the Court is being asked to make its decision"[254]. In certain classes of case, a departure from the "general rule" may be justified. Where there is such a departure, how a court moulds its procedures to afford a fair opportunity for a party to respond to the case put by another party varies from case to case and from issue to issue; it depends, among other things, on the particular decision-making context, the competing interests to be balanced, and the rights and interests at stake.

177 Examples of circumstances where the "general rule" may be modified include: public interest immunity claims[255]; confidential information cases,

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250 *Leeth* (1992) 174 CLR 455 at 486-487; *Lim* (1992) 176 CLR 1 at 27; *Nicholas* (1998) 193 CLR 173 at 233 [148]; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 35 [82]; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 27 [48]; *Benbrika* (2021) 95 ALJR 166 at 190-191 [78], 209 [168], 217 [203]; 388 ALR 1 at 26-27, 50, 60; *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 578 [72], 580 [79], 595 [158], 632 [337]; 401 ALR 438 at 454, 456, 476, 525.

251 *Re Woolley* (2004) 225 CLR 1 at 35 [82].

252 *Pompano* (2013) 252 CLR 38 at 100 [157] (emphasis in original). See also *Bass* (1999) 198 CLR 334 at 359 [56]; *International Finance Trust* (2009) 240 CLR 319 at 348 [39], 354 [54], 374-375 [127], 379-380 [141]-[143]; *Magaming v The Queen* (2013) 252 CLR 381 at 401 [65]; *HT* (2019) 269 CLR 403 at 416 [17], 429-430 [62]-[64].

253 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 597 [189]; *Pompano* (2013) 252 CLR 38 at 72 [68], 100 [157].

254 cf *Pompano* (2013) 252 CLR 38 at 88 [118] (emphasis in original); see generally 87-88 [116]-[120].

255 See *Pompano* (2013) 252 CLR 38 at 109 [192]; *HT* (2019) 269 CLR 403 at 420 [32], 421 [34], 432 [71]-[72]. See also *Alister v The Queen* (1983) 154 CLR 404 at 412; *New South Wales v Public Transport Ticketing Corporation [No 3]* (2011) 81 NSWLR 394 at 397 [10], 398 [20]; *Al Rawi v Security Service* [2012] 1 AC 531 at 592 [92]; *Jaffarie v Director-General of Security* (2014) 226 FCR 505 at 514-515 [27]; *Re Timor Sea Oil & Gas Australia Pty Ltd (In liq)* (2020) 389 ALR 545 at 550 [29].

including trade secrets cases[256]; legal professional privilege claims[257]; receipt of confidential affidavits in support of an application by a liquidator for an examination summons[258]; and cases where gender-restricted evidence is involved in native title claims[259]. Certain cases which are not "adversarial" in the ordinary sense, where the role of the court is "protective", have also justified departures from the "general rule", including: cases concerning children within a statutory jurisdiction that originated from the historical parens patriae welfare jurisdiction[260]; judicial advice proceedings for the purpose of protecting the interests of a trustee and trust[261]; cases invoking the court's power (which is "protective in nature") to approve a settlement claim by a person under a legal incapacity[262]; and applications for approval of representative proceedings, in respect of which the court assumes a "protective role in relation to the interests of

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256 See *Gypsy Jokers* (2008) 234 CLR 532 at 596 [184]-[185] and the cases there cited; *Pompano* (2013) 252 CLR 38 at 100 [157], 101 [161]; *HT* (2019) 269 CLR 403 at 423-424 [44]-[46], 427-428 [58], 431 [67], 433-434 [75]-[77]. See also *Al Rawi* [2012] 1 AC 531 at 585 [64]; *Renshaw v New South Wales Lotteries* [2020] NSWSC 360 at [68].

257 See *Pompano* (2013) 252 CLR 38 at 109 [192]; *Hancock v Rinehart* [2016] NSWSC 12 at [7], [27]-[29], [31], [34]; *Rinehart v Rinehart* [2016] NSWCA 58 at [29]-[31].

258 See *Simionato v Macks* (1996) 19 ACSR 34 at 62-63; *Re Normans Wines Ltd (Receivers and Managers Appointed) (In liq)* (2004) 88 SASR 541 at 554-555 [54]-[57].

259 See *Western Australia v Ward* (1997) 76 FCR 492 at 495; see also 499, 508.

260 See *In re K (Infants)* [1965] AC 201 at 240-241; *Fountain v Alexander* (1982) 150 CLR 615 at 633; *M v M* (1988) 166 CLR 69 at 76; *Secretary, Department of Health and Community Services v JWB (Marion's Case)* (1992) 175 CLR 218 at 258-259; *Palmer v Ayres* (2017) 259 CLR 478 at 516 [102].

261 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 378 [8]; *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at 91 [64], 94 [72].

262 See *Fisher v Marin* [2008] NSWSC 1357 at [29].

class members"[263] "akin to that of a guardian"[264] and not unlike the role of the court in approving compromises on behalf of infants or persons under a legal incapacity[265].

178 Equally, Parliament may fashion "novel procedures" that balance competing interests in certain classes or categories of case, which depart from or qualify the "general rule"[266], provided that the procedures adopted include adequate safeguards to enable the court to respond to potential "practical injustice"[267] and to ensure, "so far as practicable [having regard to the particular context of the case], fairness between the parties"[268]. In other words, Parliament must ensure that the processes of the court, viewed as a whole, are not unfair. Chapter III courts must retain their ability to protect the fairness of the judicial process whilst recognising that it is implicit within "the notion of 'fairness'" that "sometimes, the rules governing practice, procedure and evidence must be tempered by reason and commonsense to accommodate the special case that has arisen because, otherwise, prejudice or unfairness might result"[269].

179 As will be seen, the immediate difficulty is that s 46(2) of the AAT Act impermissibly excludes procedural fairness for a whole class of case by removing the ability of the Federal Court to respond to potential "practical injustice"[270]; it removes the ability of the Court to ensure, "so far as practicable [having regard to the particular context of the case], fairness between the parties"[271]. Section 46(2)

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263 See *Kelly v Willmott Forests Ltd (In liq) [No 4]* (2016) 335 ALR 439 at 443 [3]; see also 454 [62]. See also *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 408.

264 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8].

265 *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* [2002] VSC 457 at [4], cited with approval in *Richards* [2013] FCAFC 89 at [8].

266 *Pompano* (2013) 252 CLR 38 at 100 [157]; see also 47 [5], 103 [169], 110 [193].

267 See *Pompano* (2013) 252 CLR 38 at 100 [157], 108 [188]. See also *HT* (2019) 269 CLR 403 at 424 [46].

268 *International Finance Trust* (2009) 240 CLR 319 at 355 [55].

269 *Dietrich* (1992) 177 CLR 292 at 363.

270 See *Pompano* (2013) 252 CLR 38 at 100 [157], 108 [188]. See also *HT* (2019) 269 CLR 403 at 424 [46].

271 *International Finance Trust* (2009) 240 CLR 319 at 355 [55].

purports to "obliterate one of [the] most important attributes"[272] of Ch III courts – the observance of procedural fairness. It cannot do so consistently with Ch III of the *Constitution*.

Construction of s 46 of the AAT Act

180 In considering validity, the starting point is the proper construction of s 46(2) of the AAT Act[273]. It is necessary to consider the operation of s 46(2) within the framework of the statutory scheme within which it sits – a regime governing the merits review function conferred upon the Tribunal in relation to security assessments given by ASIO under the ASIO Act[274].

181 One of the functions of ASIO under the ASIO Act is to provide advice to Ministers and Commonwealth authorities in respect of matters relating to security insofar as those matters are relevant to their functions and responsibilities[275], including furnishing "security assessments"[276] to Commonwealth agencies. An "adverse security assessment" or a "qualified security assessment" must be accompanied by a "statement of the grounds for the assessment", which forms part of the assessment[277]. The statement of grounds must "contain all information that has been relied on by [ASIO] in making the assessment, other than information the

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272 cf *Russell v Russell* (1976) 134 CLR 495 at 520.

273 See *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 498-499 [53]; *Coleman v Power* (2004) 220 CLR 1 at 21 [3], 68 [158]; *Gypsy Jokers* (2008) 234 CLR 532 at 553 [11]; *NAAJA* (2015) 256 CLR 569 at 581 [11]; *Brown v Tasmania* (2017) 261 CLR 328 at 428-429 [307], 433-434 [326], 479-480 [485]-[486], 481 [488].

274 ASIO Act, s 54.

275 ASIO Act, s 17(1)(c).

276 ASIO Act, s 37(1). "[S]ecurity" is defined to include, among other things, "the protection of, and of the people of, the Commonwealth and the several States and Territories from: (i) espionage; (ii) sabotage; (iii) politically motivated violence; (iv) promotion of communal violence; (v) attacks on Australia's defence system; or (vi) acts of foreign interference; whether directed from, or committed within, Australia or not": ASIO Act, s 4 definition of "security".

277 ASIO Act, s 37(2); see also s 35(1) definitions of "adverse security assessment" and "qualified security assessment".

inclusion of which would, in the opinion of the Director-General, be contrary to the requirements of security"[278].

182 Where a security assessment in respect of a person is furnished by ASIO to a Commonwealth agency, the agency must "within 14 days ... give to that person a notice in writing, to which a copy of the assessment is attached, informing him or her of the making of the assessment"[279]. However, if the Minister issues a certificate certifying that they are satisfied that the withholding of notice "is essential to the security of the nation"[280] then s 38(1) does not require a notice to be given[281]; and if the Minister issues a certificate certifying that disclosure of the statement of grounds or a particular part of that statement "would be prejudicial to the interests of security"[282], then the copy of the assessment attached to a notice under s 38(1) "shall not contain *any matter* to which the certificate applies"[283].

183 There are two mechanisms available to a person to challenge a security assessment made in respect of them. The first is by seeking judicial review in the High Court under s 75(v) of the *Constitution* or in the Federal Court under s 39B of the *Judiciary Act 1903* (Cth). As the Solicitor-General of the Commonwealth properly accepted, in light of *Plaintiff S157/2002 v The Commonwealth*[284], s 37(5) of the ASIO Act – which relevantly provides that no proceedings, other than an application to the Tribunal under s 54, shall be brought in any court or tribunal in respect of the making of an assessment – would not prevent review for jurisdictional error.

184 The second is by seeking merits review under s 54 of the ASIO Act in the Tribunal[285]. Where an applicant seeks merits review under s 54 of the ASIO Act, the Director-General must "present to the Tribunal all relevant information available to the Director-General, whether favourable or unfavourable to the

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278 ASIO Act, s 37(2)(a).

279 ASIO Act, s 38(1).

280 ASIO Act, s 38(2)(a).

281 ASIO Act, s 38(4).

282 ASIO Act, s 38(2)(b).

283 ASIO Act, s 38(5) (emphasis added).

284 (2003) 211 CLR 476.

285 See AAT Act, s 17B(2)(a).

applicant"[286]. However, the ASIO Minister *may* issue a written certificate certifying 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: (a) because it would prejudice security or the defence or international relations of Australia; (b) because it would involve the disclosure of deliberations or decisions of the Cabinet or a Committee of the Cabinet or of the Executive Council; or (c) for any other reason stated in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the contents of the document should not be disclosed (a "s 39B(2) certificate")[287]. If a s 39B(2) certificate is given then, subject to s 39B(4), (5) and (7) and s 46, the Tribunal must "do all things necessary to ensure", relevantly, "that the information or the contents of the document are *not* disclosed to anyone other than a member of the Tribunal as constituted for the purposes of the proceeding"[288].

185 A party to a proceeding before the Tribunal may appeal to the Federal Court, on a question of law, from any decision of the Tribunal in that proceeding[289]. The regime for placing the record of the Tribunal proceeding before the Federal Court is akin to the historical use of the writ of certiorari, issued by a superior court to direct that the record of the lower court or tribunal be sent to the superior court for review[290]. When a party to a proceeding before the Tribunal appeals to the Federal Court on a question of law under s 44(1) of the AAT Act, s 46(1)(a) of the AAT Act states that the Tribunal must, relevantly, "cause to be sent to the Court all documents that were before the Tribunal in connexion with the proceeding to which the appeal ... relates and are relevant to the appeal". Rules 33.23 and 33.26 of the *Federal Court Rules 2011* (Cth) provide that an appeal book in a prescribed form is to be prepared whereby the formal decision of the Tribunal and the reasons for the decision as well as the record of the Tribunal proceeding are effectively lifted up and placed before the Federal Court; indeed, all of the material in the Comprehensive Reference Index – being a complete index of the record of the

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286 AAT Act, s 39A(3).

287 AAT Act, s 39B(2); see also s 39A(8)-(10) regarding certificates issued by the ASIO Minister in respect of evidence proposed to be adduced or submissions proposed to be made by or on behalf of the Director-General.

288 AAT Act, s 39B(3)(a) (emphasis added).

289 AAT Act, s 44(1).

290 See Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (1963) at 84, 89-91; *Griffiths v The Queen* (1977) 137 CLR 293 at 313; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 470 [276].

evidence in the Tribunal – is taken to "form part of the appeal book for the appeal". When the Federal Court proceeding has ended, the Court must "cause the documents" provided to the Court under s 46(1)(a) "to be returned to the Tribunal"[291].

186 Section 46(2) relevantly provides that "[i]f there is in force in respect of any of *the documents* a certificate in accordance with [s 39B(2) of the AAT Act] certifying that the disclosure of *matter contained in the document* would be contrary to the public interest, the Federal Court ... shall, subject to subsection (3), *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" (emphasis added). Read in context, "the documents" is a reference to the documents provided to the Federal Court under s 46(1). What the term "matter" captures will depend on the terms of the certificate – for example, whether the certificate attaches a range of documents or simply identifies a particular piece of factual information, topic or issue as the subject of the certificate.

187 Although the entirety of the relevant record of the Tribunal proceeding must be made available to the Federal Court and may be relied upon by both the Director-General and the Court, the Court is obliged, by reason of s 46(2), not to permit the applicant to inspect any part of the record that is the subject of a s 39B(2) certificate or to order the disclosure of any certified matter, including, for example, an unredacted copy of the Tribunal's reasons insofar as the reasons contain certified matter.

188 Section 46(3) relevantly provides that if the s 39B(2) certificate "does not specify a reason referred to in [s] 39B(2)(a)", and a question arises as to whether "the matter should be disclosed to some or all of the parties to the proceeding before the Tribunal in respect of which the appeal was instituted", and the Court decides that the matter should be disclosed, then the Court must permit the part of the document in which the matter is contained to be inspected. In other words, the regime varies depending on the basis on which a s 39B(2) certificate is issued. If a certificate is issued under s 39B(2)(a) (on the basis that disclosure would prejudice security or the defence or international relations of Australia) then the Court can never authorise the material to be inspected.

Section 46 wholly invalid

189 By forbidding the Court in any and every case from making any certified matter available to the applicant or any representative of the applicant, s 46(2) binds the Federal Court to a procedure that has the potential to result in

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291 AAT Act, s 46(1)(b).

unfairness[292]. Viewed as a whole, s 46 renders the Federal Court unable to respond to potential "practical injustice"[293]. Put differently, s 46(2) deprives the Federal Court of "the power to ensure, so far as practicable [having regard to the particular context of the case], fairness between the parties"[294]. Insofar as s 46(2) operates in respect of a certificate issued under s 39B(2)(a), it imposes a blanket and inflexible non-disclosure requirement, operating as a strait-jacket on the Court's ability to minimise or alleviate practical injustice and requiring the Court to act "unjudicially"[295].

190 Section 46(2) assumes and requires that if a certificate has been issued under s 39B(2)(a) of the AAT Act, the certified matter can never be disclosed to any person[296] (including the applicant and their legal representatives) in any circumstance, notwithstanding that it must be "relevant to the appeal"[297] and despite the fact that it is provided to the Court and may be relied upon by both the Director-General and the Court. That is, it starts from an assumption "that procedural fairness should altogether be denied in order that sensitive information be kept confidential"[298] and it permits of no exceptions.

191 Section 46(2) deprives the Court of the power to determine whether procedural fairness, judged by reference to practical considerations arising in a particular case, requires disclosure of any aspect of the certified matter to the applicant or their legal representatives before an order is made, and it deprives the

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292 *Pompano* (2013) 252 CLR 38 at 110 [194]; see also 105 [177]. See also Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed (2020) at 545-546 [9.95].

293 See *Pompano* (2013) 252 CLR 38 at 100 [157], 108 [188]. See also *HT* (2019) 269 CLR 403 at 424 [46].

294 *International Finance Trust* (2009) 240 CLR 319 at 355 [55].

295 cf *Benbrika* (2021) 95 ALJR 166 at 222-223 [223]; 388 ALR 1 at 68. See also *Testro Bros* (1963) 109 CLR 353 at 363, 372; *Tasmanian Breweries* (1970) 123 CLR 361 at 373; *Bond* (1990) 170 CLR 321 at 366; *Leeth* (1992) 174 CLR 455 at 487; *Grollo* (1995) 184 CLR 348 at 359-360; *Wilson* (1996) 189 CLR 1 at 17, 23.

296 Other than a member of the Court as constituted for the purposes of the proceeding or an officer of the Court in the course of the performance of their duties as an officer of the Court: see AAT Act, s 46(2) and (4).

297 AAT Act, s 46(1).

298 cf *HT* (2019) 269 CLR 403 at 423 [43].

Court of the power to determine the procedure by which the disclosure might be made[299].

192 Section 46(2) does not modify, or depart from, the "general rule" – that a party has a right to know and meet the case made against them – in a manner that ensures the judicial process, as a whole, is not unfair[300]. It is to the opposite effect: it requires the Court to "do all things necessary to ensure" that the certified matter is *not* disclosed to any person other than a member of the Court as constituted for the purposes of the proceeding. The express terms and stated purpose of s 46(2) do not permit the Court to *refuse* to consider relevant certified matter unless that certified matter was disclosed to an applicant or an applicant's legal representatives. Unless s 46(2) is invalid, the Court simply cannot disobey the statutory command. That conclusion is reinforced by the fact that, as the Solicitor-General of the Commonwealth acknowledged, if the Court was to refuse to consider the certified matter unless it was disclosed to an applicant or an applicant's legal representatives, there would be an "endless loop" – the appeal under s 44 of the AAT Act would be conducted as if the decision-maker was not entitled to rely on the certified matter, and the Court would allow the appeal and remit it to the Tribunal, only for the Tribunal to again rely on the certified matter and make the same decision. Put simply, it would make no sense to conduct an appeal on a question of law on a different evidentiary record to the evidentiary record upon which the primary decision-maker relied[301].

193 In some contexts, depending on the terms of the certificate issued by the Executive, the Court may be able to disclose the gist of the certified matter at a sufficiently high level of generality, such that it would avoid disclosing the "matter contained in the document" within the meaning of s 46(2). Whether that is so will depend not on the degree of sensitivity of the information, but on the level at which the Executive described the certified matter. In at least some cases, the Court must be prevented from disclosing even the gist of the certified matter even where the disclosure would pose a trivial risk to security or the defence or international relations of Australia relative to the prejudice that non-disclosure would cause to an individual. The Court would be precluded from addressing that practical injustice.

194 The point of present importance is that the Court is deprived of any capacity to consider and mould its procedures to avoid practical injustice to the parties in a

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299 cf *International Finance Trust* (2009) 240 CLR 319 at 355 [56].

300 See [176]-[179] above.

301 cf *R (Haralambous) v Crown Court at St Albans* [2018] AC 236 at 265 [42], 271 [57].

particular proceeding. That deprives the Court of an essential incident of the judicial function and thus an essential characteristic of a court.

Obscuring the proper inquiry

195 The Director-General and the Attorney-General of the Commonwealth (together, "the Commonwealth") submitted that any want of procedural fairness was irrelevant because, first, providing any form of appeal from a merits review was better than none and, second, an applicant could always seek judicial review of the validity of the certificate. Each argument obscured the proper inquiry.

196 The jurisdiction of the Federal Court to hear and determine appeals under s 44(1) of the AAT Act from decisions of the Tribunal reviewing a security assessment "is necessarily conditioned by the requirement that it observe procedural fairness in the exercise of *that jurisdiction*"[302]. Having established a mechanism for seeking merits review of a security assessment (which Parliament did not have to do) and having established an avenue of appeal on a question of law to the Federal Court (which Parliament also did not have to do), the question is whether that regime impairs an essential characteristic of the Court or an essential incident of the exercise of judicial power. The availability and possible forensic advantages or disadvantages of a separate avenue of review (judicial review under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act*) – as well as the nature or extent of an applicant's unchallenged legal status in Australia – have no bearing on that question; they are irrelevant to the validity of s 46(2).

197 The fact that an applicant can test the validity of a certificate issued under s 39B(2) also says nothing about whether the procedure mandated by s 46(2) is practically unjust. While the ability of an applicant (or the Court on its own motion) to consider the validity of a certificate might be relevant in the context of an argument of the kind in issue in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[303] and *K-Generation Pty Ltd v Liquor Licensing Court*[304] to the effect that the independence of the Court was undermined by the Executive controlling or directing the Court, it may be put to one side for present purposes. Judicial review of the validity of a certificate is directed to the process adopted by *the ASIO Minister* in issuing the certificate – namely, whether the certificate was lawfully issued. Judicial review of the validity of a certificate is not directed to, and cannot address, whether s 46(2) requires *the Federal Court* "to adopt an unfair

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302 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 95 ALJR 128 at 137 [47]; 386 ALR 212 at 222 (emphasis added).

303 (2008) 234 CLR 532.

304 (2009) 237 CLR 501.

procedure"[305] in a particular class of case because, viewed as a whole, s 46(2) renders the Federal Court unable to respond to potential "practical injustice"[306].

198 Put differently, the ability to review the validity of a certificate – and, if the certificate is valid, the lawfulness of the denial of disclosure to the applicant of security-sensitive information (at the time of the making of the adverse security assessment) or the certified matter (at the review before the Tribunal) – does not change the fact that s 46(2) deprives the Federal Court of "the power to ensure, *so far as practicable* [having regard to the particular context of the case], fairness between the parties"[307]. The Federal Court is a Ch III court. The question is whether the state of affairs prescribed by s 46(2) is permitted under Ch III. It is not.

Section 46(4)

199 Some reference was made in argument to whether s 46(4) would permit the appointment of a special counsel "to assist the Court" hearing an appeal from the Tribunal. There is no basis to read into s 46(4) of the AAT Act a power to permit the appointment of a special counsel "to assist the Court" in determining whether the certified matter reveals error in a security assessment. Neither a legal practitioner representing a party nor a special counsel is "an officer of the court" within the meaning of s 46(4)[308]. That would not remedy the lack of flexibility afforded to the Court under s 46(2) to respond to potential practical injustice in the circumstances of a particular case.

Section 46(2) not severable

200 Section 46(2) and the other sub-sections in s 46 form part of an inseverable scheme. It is evident from the text of s 46, considered as a whole, that Parliament would not have enacted a regime whereby the Tribunal would provide to the Court "all documents that were before the Tribunal" that were relevant to the appeal[309] in

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305 *Pompano* (2013) 252 CLR 38 at 110 [194]; see also 105 [177]. See also Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed (2020) at 545-546 [9.95].

306 See *Pompano* (2013) 252 CLR 38 at 100 [157], 108 [188]. See also *HT* (2019) 269 CLR 403 at 424 [46].

307 *International Finance Trust* (2009) 240 CLR 319 at 355 [55] (emphasis added).

308 See *National Archives of Australia v Fernandes* (2014) 233 FCR 461 at 468 [44(a)].

309 AAT Act, s 46(1).

the absence of the statutory protection afforded by s 46(2) preventing disclosure of a certified matter.

201 Section 46(3) is a clear indication that Parliament turned its mind to the circumstances in which the Court could balance competing interests in determining whether or not to disclose a certified matter, and that, having done so, Parliament made a conscious choice not to permit such balancing in respect of certificates issued on the basis that disclosure would be contrary to the public interest "because it would prejudice security or the defence or international relations of Australia"[310]. That is, Parliament intended that s 46 would apply in its entirety or not at all to certified matter of that kind.

202 Any form of the appellant's proposed reading down or severance would involve reversing the balance struck by Parliament regarding competing public interests and would result in a radical departure from the regime contemplated by Parliament[311]. "The Court cannot re-write a statute and so assume the functions of the legislature"[312].

Appellant's argument not foreclosed by existing authority

203 The Commonwealth submitted that previous decisions of this Court compelled the view that s 46(2) was valid. That submission is rejected. The Commonwealth relied principally on three cases – *Gypsy Jokers*[313], *Condon v Pompano Pty Ltd*[314] and *Graham v Minister for Immigration and Border Protection*[315].

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310 AAT Act, s 39B(2)(a).

311 cf *Gypsy Jokers* (2008) 234 CLR 532 at 551 [5]. See also *Pidoto v Victoria* (1943) 68 CLR 87 at 111; *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 372; *Pompano* (2013) 252 CLR 38 at 87 [114]; *Spence v Queensland* (2019) 268 CLR 355 at 414-416 [87]-[90].

312 *Bank of New South Wales* (1948) 76 CLR 1 at 164.

313 (2008) 234 CLR 532.

314 (2013) 252 CLR 38.

315 (2017) 263 CLR 1.

Gypsy Jokers

204 In *Gypsy Jokers*[316], the Court upheld the validity of s 76(2) of the *Corruption and Crime Commission Act 2003* (WA), a State law challenged on *Kable* grounds[317]. Section 76 provided for a limited form of judicial review by the Supreme Court of fortification removal notices issued by the Commissioner of Police under s 72.

205 *Gypsy Jokers* does not foreclose the appellant's argument in this case for four reasons. First, only two Justices in *Gypsy Jokers* squarely dealt with the procedural fairness argument put by the appellant. Only Crennan J, with whom Gleeson CJ agreed[318], expressly rejected that argument[319]. Her Honour concluded that "Parliament can validly legislate to *exclude or modify* the rules of procedural fairness provided there is 'sufficient indication' that 'they are excluded by plain words of necessary intendment'"[320]. Crennan J left open the question of whether the Commonwealth Parliament could enact a provision analogous to s 76(2)[321]. Gummow, Hayne, Heydon and Kiefel JJ did not address the appellant's procedural fairness argument[322]. Instead, their Honours focused on whether there was a "legislative mandate for dictation to the Supreme Court by the Commissioner of the performance of its review function"[323]. Kirby J, in dissent, held that s 76(2) involved "an impermissible legislative direction to the Supreme Court"[324], without separately addressing the appellant's procedural fairness argument.

206 In this appeal, the Commonwealth asked the Court to read a single sentence of the plurality's judgment – where their Honours stated that "the operation of [the] legislative regime [had] an outcome comparable with that of the common law

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316 (2008) 234 CLR 532.

317 See *Kable* (1996) 189 CLR 51 at 95-96, 103, 116, 143.

318 *Gypsy Jokers* (2008) 234 CLR 532 at 549-550 [1].

319 *Gypsy Jokers* (2008) 234 CLR 532 at 596 [183], 597 [191].

320 *Gypsy Jokers* (2008) 234 CLR 532 at 595-596 [182] (footnotes omitted, emphasis added); see also 551 [7].

321 *Gypsy Jokers* (2008) 234 CLR 532 at 596 [186].

322 cf *Gypsy Jokers* (2008) 234 CLR 532 at 552-553 [10], 592 [166]. See also *Pompano* (2013) 252 CLR 38 at 98 [152]-[153].

323 *Gypsy Jokers* (2008) 234 CLR 532 at 559 [36].

324 *Gypsy Jokers* (2008) 234 CLR 532 at 563 [52].

respecting public interest immunity, but with the difference that the Court itself [could] make use of the information in question"[325] – as if it constituted a considered rejection of the appellant's procedural fairness argument. That contention is rejected. Read fairly and in context[326], that observation of the plurality was part of their Honours' analysis of why the legislative regime did not involve a legislative mandate for dictation to the Court by the Commissioner of the performance of its review function.

207 Second, in considering the second part of s 76(2), which stated that confidential information provided by the Commissioner was "for *the court's use* only and [was] not to be disclosed to any other person ... or publicly disclosed in any way"[327], Gummow, Hayne, Heydon and Kiefel JJ held that "'use' entails all that is *necessary or appropriate* for the exercise by the Supreme Court of its jurisdiction to conduct the 'review' identified in s 76(1)"[328]. In other words, their Honours contemplated that the passive voice adopted in the provision necessarily accommodated a discretion – the Court could decline to use material where it would be procedurally unfair. Indeed, this explains why their Honours did not separately address the appellant's procedural fairness argument. It was unnecessary to do so.

208 Third, while it is true that in *Pompano*, Hayne, Crennan, Kiefel and Bell JJ said that the decision in *Gypsy Jokers* "point[ed] firmly against" accepting the central proposition advanced in *Pompano* as to the invalidity of the impugned provisions in that case[329], that observation must be understood in light of a proper understanding of what that central proposition was. As their Honours explained, the argument for invalidity "asserted 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" because otherwise "there would be such a departure from procedural fairness that the institutional integrity of the Supreme Court would be impaired"[330]. Their Honours observed that that central proposition was

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325 *Gypsy Jokers* (2008) 234 CLR 532 at 559 [36].

326 See *Gypsy Jokers* (2008) 234 CLR 532 at 558-559 [31]-[36].

327 See *Gypsy Jokers* (2008) 234 CLR 532 at 558 [30] (emphasis added).

328 *Gypsy Jokers* (2008) 234 CLR 532 at 559 [35] (footnote omitted, emphasis added).

329 *Pompano* (2013) 252 CLR 38 at 98 [153].

330 *Pompano* (2013) 252 CLR 38 at 88 [118] (emphasis in original); see also 87-88 [116]-[117], 100 [157].

"absolute", permitting of no qualification or exception[331]. The procedural fairness argument raised by the appellant in this case is not absolute. That *Gypsy Jokers* was thought to "point[] firmly against" the procedural fairness argument in *Pompano* does not, therefore, provide an answer to this case[332].

209 Fourth, although the respondents in *Pompano* did not seek leave to reopen *Gypsy Jokers*, Hayne, Crennan, Kiefel and Bell JJ did not treat *Gypsy Jokers* as a complete answer to the absolute procedural fairness argument made by the respondents. After considering *Gypsy Jokers*, their Honours said that "lest it be said that the point was not dealt with expressly by a majority of the Court in *Gypsy Jokers*, it [was] as well to explore the issue further"[333], following which their Honours went on to consider the absolute argument put by the respondents. Gageler J was similarly of the view that the procedural fairness argument put in *Pompano* was not foreclosed by *Gypsy Jokers*[334].

Pompano

210 Nor is anything that was said in *Pompano*[335] determinative of the validity of s 46(2) of the AAT Act. In *Pompano*, the Court upheld the validity of provisions in the *Criminal Organisation Act 2009* (Qld) that prevented disclosure of declared "criminal intelligence" information to an affected party to certain proceedings.

211 As the Solicitor-General of the Commonwealth properly acknowledged, the statutory regime in issue in *Pompano* contained a number of features that are distinguishable from the regime in issue in this case, such that it is *not* "a very close analogue" of s 46 of the AAT Act. First, in deciding whether to declare information to be "criminal intelligence", the Supreme Court was permitted to have regard to whether the considerations of prejudice to criminal investigations, enabling discovery of the existence or identity of an informer, or danger to anyone's life or physical safety "outweigh[ed] any unfairness to a respondent"[336]. In other words, a balancing exercise was expressly contemplated. Indeed, the plurality held that "[i]n many cases, including those where the respondent to a

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331 *Pompano* (2013) 252 CLR 38 at 88 [119]; see also 87-88 [116]-[118].

332 cf *Pompano* (2013) 252 CLR 38 at 98 [153].

333 *Pompano* (2013) 252 CLR 38 at 98 [153].

334 *Pompano* (2013) 252 CLR 38 at 108-109 [189]-[190].

335 (2013) 252 CLR 38.

336 *Criminal Organisation Act*, s 72(2).

substantive application is known or can be ascertained, [fairness to a respondent] is a matter to which the Court would be bound to have regard"[337].

212 Second, the plurality held that the respondents' constitutional challenge had to be determined on the basis of their Honours' construction of ss 8 and 10[338]. On that construction, the Commissioner of the Queensland Police Service was required to "give, in the application for a declaration that an organisation is a criminal organisation, and the affidavits accompanying the application, *detailed particulars of what [was] alleged against the respondent organisation and how the Commissioner put[] the case for making a declaration*"[339]. The plurality said that, in combination, the provisions required "the Commissioner to tell the respondent the whole of the case which the Commissioner [sought] to make in support of the application for a declaration"[340]. Put in different terms, "the criminal intelligence provisions den[ied] a respondent knowledge of *how* the Commissioner [sought] to prove an allegation; they [did] not deny the respondent knowledge of *what* [was] the allegation that [was] made"[341]. Those features of the regime in *Pompano* are distinguishable from the regime in issue in this case.

213 Further, and in any event, the Court in *Pompano* was not concerned with an argument of the kind in issue in this case. As explained above, the argument put by the respondents in *Pompano* was "absolute"[342].

Graham

214 Nor does *Graham*[343] foreclose the appellant's argument in this case. In *Graham*, insofar as the plaintiff advanced an argument in favour of invalidity of s 503A(2) of the *Migration Act 1958* (Cth) on the basis that it substantially impaired a court's "institutional integrity", the argument was focused on s 503A(2)(c) operating to preclude information from being provided to *the*

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337 See *Pompano* (2013) 252 CLR 38 at 101 [162]; see also 112-113 [203].

338 *Pompano* (2013) 252 CLR 38 at 84 [105].

339 *Pompano* (2013) 252 CLR 38 at 84 [105] (emphasis added); see also 84 [104]. See also *Criminal Organisation Act*, ss 8(2)(c), 8(2)(d) and 8(3).

340 *Pompano* (2013) 252 CLR 38 at 84 [103] (footnote omitted).

341 *Pompano* (2013) 252 CLR 38 at 101 [163] (emphasis in original). See also Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed (2020) at 550 [9.100].

342 See [208] above.

343 (2017) 263 CLR 1.

court[344]. It was argued that, *in that operation*, it had the effect of "striking at the heart of the court's ability to ascertain the facts"[345]. The majority relevantly said that the plaintiff's argument proceeded on the basis that "it is an essential function of courts *to find facts* relevant to the determination of rights in issue" and that s 503A(2) prevented courts from doing so *and, therefore, constituted an interference with their function*[346]. The plaintiff's argument in *Graham* was not squarely put (or considered) on the basis that the legislative regime in issue in that case undermined the court's essential characteristic of affording procedural fairness. Nothing in this Court's reasoning in *Graham* should, therefore, be understood as having endorsed the validity of s 503A(2) insofar as it concerned non-disclosure to the plaintiff. Moreover, and in any event, s 503A(2)(c) relevantly operated so that the relevant Minister or officer could not be "required" to divulge or communicate information or material to a court or any person, but there was nothing to stop *the court* from divulging information to a person.

Conclusion and orders

215 For those reasons, s 46 of the AAT Act is wholly invalid. The appeal should be allowed and it should be declared that s 46 of the AAT Act is wholly invalid. Paragraphs 1 to 3 of the order of the Full Court of the Federal Court of Australia of 9 April 2021 should be set aside and the matter remitted to the Federal Court for determination according to law.

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344 See *Graham* (2017) 263 CLR 1 at 21-22 [29].

345 *Graham* (2017) 263 CLR 1 at 6; see also 22 [29].

346 *Graham* (2017) 263 CLR 1 at 22 [29] (emphasis added).

EDELMAN J.

The extremes of procedural unfairness and institutional injustice

216 Could it ever be procedurally fair for a court to decide that a person was lawfully stripped of their permanent right to remain in Australia for reasons which the person will never be given, based upon specific allegations about which the person will never be told, involving evidence which the person will never see and will never be able to address, and without hearing from any counsel to represent the person's interests?

217 No.

218 "[A] trial procedure can never be considered fair if a party to it is kept in ignorance of the case against [them]."[347] The circumstance described above would not be a fair process if conducted by an administrative tribunal. But administrative tribunals are not required to meet the standards of judicial fairness and this appeal is not concerned with the fairness of a tribunal procedure. Nor would it be a fair process if conducted by a court. But it must be accepted that such a process will not substantially impair the institutional integrity of a court if it is justified as being no more than is reasonably necessary to protect a strong countervailing interest.

219 The question raised by this appeal thus reduces to whether s 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act") is justified in requiring a court to deny an appellant procedural fairness in reliance upon the countervailing interests, no matter how weak, in three categories of confidential information set out in s 39B(2).

220 That denial of procedural fairness is not justified. The absence of two obvious means of protecting the interests of an appellant, and the institutional integrity of the court, is fatal to validity: (i) a power for the court to consider the interests of an appellant when refusing disclosure under s 46(2); or (ii) a power to appoint a special advocate to represent the interests of an appellant, to the extent possible without full instructions. The appeal should be allowed and orders made as proposed by Gordon J.

Agreement with other reasons and the structure of these reasons

221 The background and legislative provisions are set out in detail in the reasons of Gordon J and those of Steward J. I agree with Gordon J's interpretation of s 46 and with her Honour's reasoning and conclusions that s 46(2) is inseverable from the other provisions in s 46 and cannot be read down. As the appellant conceded in oral argument, this also means that it cannot be disapplied. I also agree with her

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347 *Home Secretary v AF [No 3]* [2010] 2 AC 269 at 355 [63].

Honour's reasons for concluding that the question on this appeal is not resolved by the decisions of this Court in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[348], *Condon v Pompano Pty Ltd*[349] or *Graham v Minister for Immigration and Border Protection*[350].

222 I emphatically agree with Gordon J that the appellant's unchallenged legal status in Australia is irrelevant to this appeal. The threshold at which a court's procedures become instruments of injustice, threatening to compromise substantially the institutional integrity of the court, cannot vary according to the labels assigned to a person by Commonwealth legislation – citizen, permanent resident, or anything else. Those labels cannot be used to create different grades or qualities of justice in the *Constitution*[351]. Hence, legislation that impairs the institutional integrity of a court by a procedure of gross injustice cannot be saved merely because the injustice is meted out upon a long-term permanent resident of Australia who has not obtained the statutory status of an Australian citizen.

223 I agree with Steward J that s 46(2) gives rise to potential procedural unfairness to an appellant. Steward J interprets s 46 as permitting the court to respond to that procedural unfairness in ways including the appointment of a special advocate to represent the interests of an appellant. With great respect, I have concluded that such an interpretation is not open. If it were open, then the validity of s 46(2) would be much more finely balanced.

224 The remainder of these reasons are concerned with the following steps toward my conclusion:

(1) The *Constitution* does not prohibit all procedural unfairness.

(2) Procedural unfairness must be justified.

(3) The AAT Act does not permit balancing the interest of an appellant and the countervailing interest.

(4) The ASIO Minister controls the extent of permitted disclosure.

(5) The AAT Act does not authorise the appointment of a special advocate.

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348 (2008) 234 CLR 532.

349 (2013) 252 CLR 38.

350 (2017) 263 CLR 1.

351 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103.

(1) The *Constitution* does not prohibit all procedural unfairness

225 In *Garlett v Western Australia*[352], I explained the nature of the principle that derives from *Kable v Director of Public Prosecutions (NSW)*[353] as one that is "based upon a presupposition in Ch III of the *Constitution* that Australian courts, including federal and State courts recognised in Ch III of the *Constitution* and possessing, or capable of possessing, federal jurisdiction, remain institutions of justice". The *Kable* principle has been expressed variously as one that is concerned with legislation that affects a court in a manner that is "incompatible with", or "repugnant to", or which "substantially impairs", its "institutional integrity" or role as a repository of judicial power[354]. The ultimate effect of the *Kable* principle is that there will come a point at which the administration of justice by a court is substantially impaired, either in the formal manner in which judicial power is exercised or in its substantive application, such that the court may no longer be seen as an institution of justice.

226 The application of the *Kable* principle has become notoriously difficult to predict. Unmoored from any legal rules, it is a principle dripping with open texture: when is the administration of justice "impaired"? How much impairment is "substantial"? When is the exercise of power "repugnant to" the integrity of a court? What matters are part of the "institutional integrity" of a court?

227 In relation to procedural fairness, it is not merely the outcome of the application of the *Kable* principle that is difficult to predict. There is also inconsistency in reasoning. Professor Gray has observed that some of the reasoning in this Court concerning an absolute constitutional limit upon Parliament's power, precluding a denial of procedural fairness by a court, is difficult to reconcile intellectually with other reasoning that would permit such denial in some circumstances. He asserts that if this Court "wishes to depart from its previous positions, it should state so"[355].

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352 [2022] HCA 30 at [242].

353 (1996) 189 CLR 51.

354 See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15], 598-599 [37], 617 [101], 648 [198], 655-656 [219]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 88-89 [123]; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 424 [40]. See also *Kuczborski v Queensland* (2014) 254 CLR 51 at 98 [139]; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at 245-246 [55].

355 Gray, *Criminal Due Process and Chapter III of the Australian Constitution* (2016) at 132.

228 On the one hand, members of this Court have said that to require a court to act contrary to procedural fairness "may well" be to require a court to act in a non-judicial manner[356] and that a "defining characteristic" or "essential attribute" of a court is the application of procedural fairness[357]. Consequently, on this view, the institutional integrity of a court would be "distorted"[358], or a court would act in a manner "repugnant to"[359] the exercise of judicial power, if it no longer exhibited procedural fairness. It has been said that establishing a body as a court by legislation "means that any jurisdiction conferred on it is necessarily conditioned by the requirement that it observe procedural fairness"[360]. It has even been said that the essential character of a court necessitates that a court cannot be authorised to proceed in a manner that does not ensure the right of a party to meet the case against them[361] or "at the very least" ensure a party "a fair opportunity to respond to evidence on which [a court] order might be based"[362].

229 On the other hand, it has also been said, sometimes even in the same cases, that "the hearing rule may be qualified by public interest considerations"[363] and that open justice has "long been subject to qualifications"[364]. And the results in cases such as *Gypsy Jokers*[365] and *Pompano*[366] involve this Court upholding as

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356 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470.

357 See *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [44]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71 [67], 99 [156]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 594 [39].

358 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71 [67].

359 *Hogan v Hinch* (2011) 243 CLR 506 at 541 [45].

360 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 95 ALJR 128 at 137 [47]; 386 ALR 212 at 222.

361 *Nicholas v The Queen* (1998) 193 CLR 173 at 208 [74].

362 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 108 [188].

363 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 72 [68].

364 *Hogan v Hinch* (2011) 243 CLR 506 at 541 [46].

365 (2008) 234 CLR 532.

366 (2013) 252 CLR 38.

valid legislation that authorises a court to act in a manner that, at least in some circumstances, will be procedurally unfair.

230 One way to resolve this tension might be on the basis that procedural fairness must look beyond fairness to a person. On this view, procedural fairness requires either a diluted notion of "fairness between the parties"[367] or some philosophical notion of fairness of "process" abstracted from the individual and the decision-maker (the "process" being anthropomorphised with a mind capable of making decisions and taking actions[368]). If this view were taken, there might be circumstances in which strong countervailing interests could somehow make it "fair" for a court to order the deportation of a permanent resident of this country, without providing that person with: (i) the determinative evidence against them; (ii) an opportunity to respond to that evidence personally or through a person acting as a representative of their interests; or (iii) the determinative reasons for their deportation. No true notion of fairness could support such a conclusion. That is because fairness is individual. It is not a zero sum game. Its most basic rationale is respect for the human dignity of an individual[369].

231 The tension should be resolved in a different way. It should be accepted that it is always procedurally unfair, and individually unjust, to deprive a person of the right to be heard on any significant issue that might affect the final result of a proceeding. Nevertheless, for legislation to be constitutionally invalid, the institutional integrity of a court must be "substantially impair[ed]" by the absence of procedural fairness[370]. As Rawls wrote, "[b]y the principle of fairness it is not possible to be bound to unjust institutions, or at least to institutions which exceed the limits of tolerable injustice (so far undefined)"[371]. There will be instances of

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367 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 355 [55].

368 Compare *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 95 ALJR 128 at 143 [81]; 386 ALR 212 at 230.

369 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 381 [144]; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 137 [40], 147-148 [72]; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 465 [100]; 390 ALR 590 at 614-615; *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497 at 515 [53]; 400 ALR 417 at 433.

370 *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [44]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 593-594 [39].

371 Rawls, *A Theory of Justice*, rev ed (1999) at 96.

procedural unfairness where the injustice is tolerable, and the institutional integrity of the court is not substantially impaired, because the procedural unfairness is justified by a compelling countervailing interest and that injustice is the minimum that is reasonably necessary to protect that interest.

232 Some of those instances might involve circumstances where relevant material held by one party is denied to the other party. As Gordon J explains in her reasons in this case[372], there are exceptional cases where the substantial interest of one person justifies a court derogating from the procedural fairness generally afforded in adversarial litigation to another person: confidential information and trade secrets cases; legal professional privilege claims; a liquidator's application for an examination summons; and gender-restricted evidence in native title cases. These are circumstances in which a procedure that is less fair, or even potentially unfair, to one party has been repeatedly tolerated. The Solicitor-General of the Commonwealth was therefore correct to submit on this appeal that "a fair judicial procedure ... is not the only public interest in play". But that is not a licence for a court to be empowered or required to act unfairly in a wholesale manner.

233 Two points must be made about those exceptional cases. First, none involves the extreme procedural unfairness of: (i) preventing a person, in a case involving serious consequences, from knowing the case against them; (ii) preventing a person from responding to that case personally or through counsel; or (iii) depriving a person of reasons to explain why they lost. Such an extreme circumstance aptly fits the description given by Lord Neuberger of Abbotsbury MR in *Al Rawi v Security Service*[373] of violating "an irreducible minimum requirement of an ordinary civil trial".

234 That extreme circumstance contrasts with gender-restricted evidence in native title cases, where the court can make orders to ensure that the evidence is available to legal representatives or anthropologists of the relevant gender[374]. It also contrasts with trade secrets cases, where, as Lord Dyson JSC observed[375], it is "commonplace to deal with the issue of disclosure by establishing 'confidentiality rings' of persons who may see certain confidential material which is withheld from one or more of the parties to the litigation at least in its initial stages". Indeed, his Lordship added that he was not aware of any trade secrets case in which "one party

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372 At [176]-[177].

373 [2012] 1 AC 531 at 546 [30].

374 See, eg, *Western Australia v Ward* (1997) 76 FCR 492 at 495.

375 *Al Rawi v Security Service* [2012] 1 AC 531 at 585 [64]. See also *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 at 39-40; *HT v The Queen* (2019) 269 CLR 403 at 423 [44], 427-428 [58].

was denied access to evidence which was being relied on at the trial by the other party".

235 Secondly, although many of these exceptional cases will involve procedural unfairness, that unfairness is justified by the strength of the countervailing interest and by confining the unfairness to the minimum degree that is reasonably necessary to protect that interest. For instance, in claims for public interest immunity or legal professional privilege, if the claim is upheld, the document cannot be used and no decision can be made adversely to a person in reliance upon the document. Further, even in the process of claiming the privilege, the party making the claim is required to set out, in evidence available to the other party to scrutinise and test, the facts from which the court can assess the basis for the claim of privilege in order to avoid unfairness to the other party[376]. And in public interest immunity claims, the unfairness to a party opposing the claim has sometimes been further mitigated such as by appointment of a special advocate, who might be chosen and paid for, at least in part, by that party[377]. Even in applications that are sometimes non-adversarial, such as judicial advice to trustees, for reasons of procedural fairness to interested parties, those applications are no longer commonly made ex parte and confidential expert opinions on matters of law are difficult to justify[378].

(2) Procedural unfairness must be justified

236 In *Vella v Commissioner of Police (NSW)*[379], four members of this Court said that "the boundaries of the *Kable* principle are not sharp" and clarity requires that the categories in which the principle applies "must develop in a principled, coherent, and systematic way rather than as evaluations of specific instances". This is particularly apparent in the tensions that have arisen, sometimes within the same cases or even the same judgments, in considering whether a denial of procedural fairness has so "substantially impaired" the institutional integrity of the court that it casts doubt upon its character as an institution of justice.

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376 See *Rinehart v Rinehart* [2016] NSWCA 58 at [29]-[31].

377 *New South Wales v Public Transport Ticketing Corporation [No 3]* (2011) 81 NSWLR 394 at 398 [20], 404 [34], 406 [40(g)].

378 *Plan B Trustees Ltd v Parker [No 2]* (2013) 11 ASTLR 242 at 253 [43].

379 (2019) 269 CLR 219 at 246 [56].

237 The starting point must be that, since procedural fairness can be variable in quality[380], the mere fact that a procedure might be improved, or made fairer, is not sufficient to substantially impair the institutional integrity of a court. The procedure must be positively unfair. Some procedures might be less fair than others, or they might exhibit less than "absolute fairness", without crossing the threshold at which they become unfair[381]. Fairness is not a one-size-fits-all concept.

238 Even procedural unfairness is not sufficient. As explained in the section above, there are exceptional cases which might sometimes involve procedural unfairness to one party but where that procedural unfairness is justified by the need to protect a countervailing interest. But the procedural unfairness must be no more than is reasonably necessary to protect that countervailing interest, and the interest must be sufficiently compelling.

239 Although it was not put in these terms, there was effectively no dispute on this appeal that the countervailing interests in the three categories of confidentiality set out in s 39B(2) are sufficient to justify some procedural unfairness. Those categories in s 39B(2) include information that, if disclosed, would be contrary to the public interest: (i) because it would prejudice security or the defence or international relations of Australia; (ii) because it would involve disclosure of the deliberations or decisions of the Cabinet or a Committee of the Cabinet or of the Executive Council; or (iii) for any other reason that could form the basis for a claim in judicial proceedings of non-disclosure by the Crown in right of the Commonwealth. Whilst some circumstances in those categories might not involve considerations of great importance, others may. But even where the matter is of great importance, the existence of that strong countervailing interest cannot justify procedural unfairness beyond that which is reasonably necessary to protect the interest. Otherwise, the court would become an instrument of plain and unnecessary injustice.

240 In forgoing any constraint that would require the minimisation of procedural unfairness, the submissions of the respondents overreached. The respondents' argument was that a countervailing interest set out in s 39B(2) could permit *any* procedural unfairness under the AAT Act because, if the Commonwealth Parliament had not legislated for an appellant to have a right of merits review and an "appeal" on a question of law, many of those who contested

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380 *Dietrich v The Queen* (1992) 177 CLR 292 at 364; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 354 [54]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156], 105 [177], 111 [195]; *HT v The Queen* (2019) 269 CLR 403 at 417 [18], 430 [64].

381 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 49. See also *Dietrich v The Queen* (1992) 177 CLR 292 at 365; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 477 [160]; 390 ALR 590 at 630.

adverse security assessments would fail. This is a submission that the end can always justify the means. In other words, the "gift" to an appellant of an administrative merits review hearing and an appeal on a question of law can justify requiring a court to act in a manner that so substantially impairs its institutional integrity that it may cease to be seen as an institution of justice. Such a submission has never been accepted in this Court. It cannot be accepted on this appeal.

241 Similarly, it is a simple logical fallacy to treat the existence of some exceptional cases where the court's institutional integrity is not substantially impaired by the denial of procedural fairness as permitting legislation that authorises a denial of procedural fairness in any case at all. Without any constraint limiting procedural unfairness to that which is reasonably necessary to protect a strong countervailing interest, the *Kable* principle would not even prohibit Parliament from authorising judicial proceedings that treated an applicant for judicial review as though they were attending a dress rehearsal for a clown show.

(3) The AAT Act does not permit balancing the interest of an appellant and the countervailing interest

242 An "appeal" on a question of law under s 44 of the AAT Act is not an appeal in any legal sense. It is, instead, a proceeding in the original jurisdiction of the court[382]. It is in the nature of judicial review[383]. Although it is now common to conceive of the issue of a writ of certiorari in judicial review proceedings as quashing a decision, that was not the original role of the writ. Historically, the writ of certiorari was used only to remove the record of the proceedings to the court. It only became common practice at the end of the 19th century to combine a motion to quash a decision with an application for a writ of certiorari[384]. In other words, by the writ of certiorari[385]:

> "the Queen's Bench Division in England and the Supreme Courts of the colonies required the judges or officers of inferior jurisdictions to certify or send proceedings before them to the Queen's Bench or Supreme Courts. The proceedings were removed 'for the purpose of examining into the legality

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382 *Committee of Direction of Fruit Marketing v Australian Postal Commission* (1980) 144 CLR 577 at 585.

383 See *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 79 [15]; *Osland v Secretary to Department of Justice [No 2]* (2010) 241 CLR 320 at 331-332 [18]-[19].

384 Short and Mellor, *Crown Practice* (1890) at 110.

385 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 412 [86].

of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below'".

243 Section 46(1) of the AAT Act is a modern version of such a removal mechanism. On an "appeal" under s 44, the Tribunal is required by s 46(1)(a) to "cause to be sent to the Court all documents that were before the Tribunal in connexion with the proceeding to which the appeal ... relates and are relevant to the appeal". It was by this means that the documents in this case were before the court. Whether or not they were tendered by one of the parties, or incorporated into an "appeal" book, the documents formed part of the record for review by the court.

244 As Gordon J observes in her reasons, four members of this Court in *Gypsy Jokers*[386] said that the statutory regime in that case, which provided that tendered material was "for the court's use only", contemplated all that was necessary or appropriate for the exercise of jurisdiction to conduct the review. That regime readily accommodated the ability of the court to refuse to use material that was prejudicial to a respondent due to concerns of procedural unfairness. Similarly, as Gordon J also observes, the statutory regime considered in *Pompano*[387] expressly contemplated a balancing exercise which took into account any procedural unfairness to the party deprived of the information.

245 By contrast, the regime in this case contains no provision for the court to consider the interests of an appellant: the statutory presupposition in s 46(2) is that the court will consider the documents. This is unsurprising. It would not mitigate the procedural unfairness occasioned by s 46(2) for a court to refuse to consider s 44 material on an "appeal". Unlike the denial of procedural fairness to a respondent to an application under the legislative regime in *Gypsy Jokers*, a refusal by a court to consider s 44 material would exacerbate the procedural unfairness to an appellant. In many cases, such a refusal would make it impossible for an appellant, acting with propriety, even to make a submission that an error of law existed in the unredacted reasons for decision. Further, in many cases, it would be impossible for an appellant to demonstrate, or even to identify the existence of, an error of law without the court considering the underlying materials upon which the Tribunal relied.

246 There is, therefore, no provision in the AAT Act for a court to mitigate the procedural unfairness occasioned by s 46(2) by any measure that has regard to both the interests of the appellant and the importance of the countervailing interest in s 39B(2). There is no power for a court to consider disclosure of some or all of the material by balancing that matter against the potential extreme procedural unfairness to an appellant, even where the public interest involved under s 39B(2)

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386 (2008) 234 CLR 532 at 559 [35]; see also at 558 [30].

387 (2013) 252 CLR 38.

might be trivial, such as a minor aspect of the international relations of Australia or something at the low end of the spectrum of matters that could form the basis for a claim of privilege by the Crown in right of the Commonwealth in the documents. It may be a large step to say that such a trivial countervailing interest supports the non-disclosure of relevant documents that will never be used against a party. But it is a giant leap to say that such a trivial countervailing interest supports the non-disclosure of a document that will be used against a party.

(4) The ASIO Minister controls the extent of permitted disclosure

247 The literal terms of s 39B(2) appear to contemplate that a certificate issued by the ASIO Minister[388] might be expressed in one of two manners. First, the ASIO Minister might certify that the "disclosure of information with respect to a matter stated in the certificate" would be contrary to the public interest because it falls within one or more of the three confidentiality categories. This would extend not merely to the most trivial instances within those categories but to anything "with respect to" those matters. In the context of confidentiality, the words "with respect to" have "a very wide meaning"[389]. They extend to anything that could have the potential to disclose the information. Secondly, the ASIO Minister might certify that "the disclosure of the contents of a document" would be contrary to the public interest because it falls within one or more of the three confidentiality categories.

248 It was not submitted by any party to this appeal that there was any difference in substance between the two manners in which a certificate under s 39B(2) might be issued by the ASIO Minister. It was implicitly accepted by all parties that a certificate issued in either manner would express the "matter contained in the document" which, by s 46(2), the court must do all things necessary to ensure is not disclosed to any person other than a member of the court as constituted for the purposes of the proceeding.

249 The decision of the ASIO Minister that a matter, however trivial, might fall within one or more of the three confidentiality categories, and the decision of the ASIO Minister as to the level of generality at which the "matter" in the certificate is expressed, will both significantly affect what the court is permitted to disclose. By leaving these powers to the ASIO Minister rather than the court, the court is deprived, without any reason or justification, of two means by which it might

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388 The "ASIO Minister" is the Minister administering the *Australian Security Intelligence Organisation Act 1979* (Cth): *Administrative Appeals Tribunal Act 1975* (Cth), s 3(1).

389 See *Technical Products Pty Ltd v State Government Insurance Office (Q)* (1989) 167 CLR 45 at 47. See also *Workers' Compensation Board (Q) v Technical Products Pty Ltd* (1988) 165 CLR 642 at 653-654; *Technical Products Pty Ltd v State Government Insurance Office (Q)* (1989) 167 CLR 45 at 54.

otherwise have been authorised to mitigate the extreme procedural unfairness to an appellant caused by the non-disclosure. This contrasts sharply with at least two ways in which the court might have been authorised to consider the reasonable necessity of the extreme procedural unfairness, and to mitigate it.

250 First, provision could have been made requiring the ASIO Minister to provide evidence to the court that could justify the certification that a matter falls within a category in s 39B(2). This would have empowered the court to ensure that any procedural unfairness to an appellant is reasonably necessary. Although reference was made in submissions on this appeal to the mechanism of judicial review of a certificate given by the ASIO Minister, that mechanism affords almost no protection to the interests of an appellant. It would be nearly impossible for an appellant to obtain orders on judicial review quashing the certificate, given the likelihood of a claim for public interest immunity over the underlying material. Even making a submission to that effect is one of extreme difficulty[390].

251 In a submission designed to respond to the near-impossibility of judicial review of a certificate by an appellant, the Solicitor-General of the Commonwealth submitted that the court could review the validity of a certificate of its own motion. Although a court would not be required to do so[391], it is theoretically possible that a court might seek to satisfy itself that the certificate was valid, establishing the jurisdictional fact in s 46(2) that "there is in force in respect of any of the documents a certificate"[392]. But even if a court did seek to satisfy itself of that validity, there is little more than a theoretical possibility at the very outer reaches of the realms of remoteness of the court concluding, without any evidence of the practical effect or consequences of the material being disclosed, that there is even a prima facie case that the ASIO Minister had no rational or reasonable basis to issue the certificate.

252 Secondly, and compounding the first point, the court might have been authorised to disclose to an appellant, after submissions and evidence from interested parties including the ASIO Minister, the gist of the material where that was possible in a way that did not reveal, at the appropriate level of specificity, the "matter contained in the document" that the court (rather than the ASIO Minister) was satisfied required protection.

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390 See *Traljesic v Attorney-General (Cth)* (2006) 150 FCR 199 at 212 [33]; *Kim v Attorney-General (Cth)* (2013) 215 FCR 228 at 252 [106].

391 See *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at 256-257 [41].

392 Compare *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 438 [18]-[19].

253 This way of mitigating procedural unfairness would allow the court to engage in what the Supreme Court of the United Kingdom described as "gisting"[393]. But by leaving the description of the "matter contained in the document", and therefore the decision about the level of generality at which it is expressed, to the ASIO Minister rather than the court, the extent to which any "gisting" is possible under s 46(2) is effectively controlled by the ASIO Minister.

254 There is, again, little to no ability for the court to mitigate any procedural unfairness where the ASIO Minister has described the material at a high level of generality. The prospect of any review of the generality of the description of "the matter", either by an appellant or by the court of its own motion, is even further removed from the realms of reality than the prospect of any review of the certificate to ascertain whether the material falls within a category in s 39B(2).

255 It can immediately be accepted that in any regime the importance of "countervailing interests of state security"[394] might sometimes mean that even "gisting" is not possible, resulting in procedural unfairness. But there will be other cases where the force of such interests is not present. The court has little to no authority to mitigate that injustice.

(5) The AAT Act does not authorise the appointment of a special advocate

256 Another manner in which the procedural unfairness of s 46(2) might have been mitigated is by providing for the appointment of a special advocate to whom disclosure of the certified matter could be made, and who would represent the interests of an appellant, although without the ability to inform an appellant about the content of the certified matter. There would still remain significant procedural unfairness to an appellant due to the limited ability of the special advocate to obtain instructions relating to the material unless, after viewing the material, the special advocate were to make a successful judicial review application to invalidate the certificate and thus remove the legal barrier to disclosure to the appellant of the material. But the availability of a special advocate to represent the interests of an appellant would have been a significant step towards ensuring that the procedural unfairness was no more than is reasonably necessary to protect the countervailing interest.

257 The Solicitor-General of the Commonwealth submitted that, if it were necessary to save the validity of s 46, it was open to apply the power in s 46(4) in a manner that extended to appointment of a special advocate. That sub-section provides that nothing in s 46 "prevents the disclosure of information or of matter

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393 *R (Haralambous) v Crown Court at St Albans* [2018] AC 236 at 253 [14], 272-273 [60]-[63].

394 See *R (Haralambous) v Crown Court at St Albans* [2018] AC 236 at 273 [63].

contained in a document to an officer of the court in the course of the performance of his or her duties as an officer of the court". Even if, with or without the saving grace of s 15A of the *Acts Interpretation Act 1901* (Cth), the application of "an officer of the court" could extend to a special advocate, s 46(4) would still fall short of a regime that could permit the appointment of a special advocate who could represent the interests of an appellant.

258 It is arguable that an existing statutory regime for the appointment of a special advocate, coupled with either an inherent or a general power of the court to protect its own processes from injustice, could permit the extension of the special advocate regime to related circumstances[395]. It is also arguable that a court has the power to appoint a special advocate for the limited purpose of assisting with issues concerning public interest immunity to establish the admissible evidence or record, rather than the actual deployment of evidence or consideration of the record[396]. But, in the absence of a statutory regime, there is no power for a court to appoint a special advocate to mitigate the procedural unfairness that arises from matters including an inability to access the very record upon which the court is to adjudicate.

259 The many policy and functional decisions required to create a scheme for appointment of a special advocate in the context of a final judicial adjudication are not matters that can be resolved by a court. Those decisions are the province of the legislature, as can be seen by comparison with the statutory regime for the appointment of a special advocate in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ("the NSICCP Act").

260 First, an immediate question that would need to be confronted is who is suitable for appointment as a special advocate? In matters that might involve highly sensitive Commonwealth issues, what level of security clearance is necessary? How is the court to judge the level of sensitivity of the information? How is the court to know whether the special advocate has any conflict of interest that should prevent them from accessing the information?

261 The NSICCP Act makes careful provision for these issues. A court may only appoint a person as a special advocate if: (i) the person meets any requirements specified in the regulations[397], which include that the person has

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395 *R v Collaery [No 11]* (2022) 364 FLR 418.

396 *New South Wales v Public Transport Ticketing Corporation [No 3]* (2011) 81 NSWLR 394 at 405 [38].

397 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 38PA(2)(a).

received relevant training[398], meets the satisfaction of the Attorney-General[399], is an eligible former judge, an eligible senior counsel or an eligible legal practitioner[400], and is not otherwise disqualified[401]; and (ii) the court has given the parties to the proceedings and the Attorney-General, and their legal representatives, the opportunity to make submissions about who the court should appoint[402].

262 Further, in order to avoid the prospect of conflicts of interest, regulations made under the NSICCP Act provide that a special advocate must give the court written notice of all interests that the special advocate has or acquires that conflict, or could conflict, with the proper performance of their functions, or the exercise of their powers[403].

263 Secondly, what are the boundaries of the role of the special advocate? Can the special advocate take any instructions from the appellant prior to seeing the material? How should communication occur after the special advocate has seen the material? Could the special advocate be the subject of a subpoena to reveal any instructions given by the party whose interests are to be represented?

264 The NSICCP Act provides for the special advocate to represent the interests of the party in the proceeding, but limits that role to making written and oral submissions, adducing evidence, and cross-examining witnesses at any part of a hearing in the proceeding during which the party and the party's legal representative are not entitled to be present[404]. The NSICCP Act provides that the special advocate may only communicate with the party and the party's legal

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398 *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (Cth), s 20A(b).

399 *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (Cth), s 20A(d).

400 *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (Cth), s 20A(a).

401 *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (Cth), s 20A(c).

402 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 38PA(2)(b).

403 *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (Cth), s 20C.

404 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 38PB.

representative in written communication approved by the court[405]. The party and the party's legal representative may only communicate with the special advocate in writing, and the party may only do so through their legal representative[406]. But the NSICCP Act also provides that, although the relationship between the special advocate and the party is not that of legal representative and client, legal professional privilege applies[407].

265 Thirdly, if the special advocate is appointed by the court, who is to pay the fees of the special advocate? And does the special advocate obtain the protection of counsel immunity?

266 Regulations made under the NSICCP Act provide that the special advocate may charge the Commonwealth in accordance with the *Legal Services Directions 2017* (Cth) or at a higher rate as the Attorney-General approves[408]. They further provide that no action, suit, or proceeding may be brought against a special advocate in relation to anything done, or omitted to be done, in good faith by the person in the performance of their functions or the exercise of their powers as a special advocate[409].

Conclusion

267 The *Kable* principle invalidates legislation where it substantially impairs the institutional integrity of a court such that the court may cease to be seen as an institution of justice. If anything more than lip service is to be paid to that principle, it should apply where a court is required to act in a manner that perpetuates extreme procedural unfairness upon an individual in circumstances where that unfairness is not reasonably necessary to protect a compelling countervailing interest. On the only interpretation of s 46 of the AAT Act which I consider to be open, the extreme procedural unfairness contained in s 46(2) is an unfairness that is plainly beyond that which is reasonably necessary to protect the compelling interests in s 39B(2).

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405 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 38PF(2)(b), 38PF(3)-(6).

406 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 38PF(8)-(9).

407 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 38PC.

408 *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (Cth), s 20B.

409 *National Security Information (Criminal and Civil Proceedings) Regulation 2015* (Cth), s 20E.

268 Orders should be made as proposed by Gordon J.

269 STEWARD J. I agree with Kiefel CJ, Keane and Gleeson JJ that s 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act") is a valid law of the Commonwealth. Generally, for the reasons given by their Honours, the decisions of this Court in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[410] and in *Condon v Pompano Pty Ltd*[411] necessarily foreclose the proposition advanced by the appellant that a "baseline" and elementary standard of procedural fairness exists which must be upheld *in every case*. It was said that whenever a court is required to make an order that finally alters or determines a right or legally protected interest of a person without affording that person a "fair opportunity" to respond to evidence on which that order might be made, that baseline is offended, and the court thereby acts inconsistently with Ch III of the *Constitution*[412]. Such a proposition is, with great respect, too broadly expressed. There are narrow circumstances where a court may justifiably deny an applicant a fair opportunity to respond to evidence deployed against them without causing "practical injustice"[413].

270 I, otherwise, and with very great respect, differ with some parts of the reasons of Kiefel CJ, Keane and Gleeson JJ. Those differences are explained below. In addition, for the reasons that follow, I do not consider that s 46(2), properly construed, necessarily prevents the Federal Court of Australia from affording such a fair opportunity in every case.

The applicable statutory scheme

271 In considering whether the Federal Court could afford a person such as the appellant a fair opportunity to meet adverse allegations, one must commence with the statutory scheme. The Minister administering the *Australian Security Intelligence Organisation Act 1979* (Cth) ("the ASIO Act"; "the ASIO Minister") here issued four certificates pursuant to s 39A of the AAT Act. That provision prescribes the power of the Administrative Appeals Tribunal ("the AAT") to review the correctness of security assessments made by the first respondent ("the Director-General") in accordance with Div 2 of Pt IV of the ASIO Act. Section 39A was introduced into the AAT Act by the *Law and Justice Legislation Amendment Act (No 1) 1995* (Cth). In general terms, this Act abolished the former Security Appeals Tribunal and transferred relevant functions of that Tribunal to a

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410 (2008) 234 CLR 532.

411 (2013) 252 CLR 38.

412 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 105 [177] per Gageler J.

413 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156] per Hayne, Crennan, Kiefel and Bell JJ.

new Security Division of the AAT. Section 39A was modelled on what was previously s 58 of the ASIO Act[414].

272 Section 39A was drafted to resolve two potentially conflicting interests. On the one hand, there is the need for an applicant to be afforded procedural fairness. Section 39A serves that objective in various ways: by giving an applicant who has been issued with a security assessment an opportunity for merits review of that assessment by an independent tribunal (s 39A(1)); by imposing a "duty" on the Director-General to present to the AAT "all relevant information available ... whether favourable or unfavourable to" an applicant (s 39A(3)); by giving the AAT the power to require either or both parties to attend or be represented in order to identify the matters in issue or to facilitate the conduct of the hearing (s 39A(4)); subject to a qualification, by giving an applicant a right to be present when the AAT is hearing submissions made or evidence adduced by the Director-General or the governmental agency to which the security assessment was given (s 39A(6)); by giving an applicant a right to adduce evidence and make submissions to the AAT (s 39A(13)); by giving the AAT the right to invite, on its own initiative, a person to give evidence, or to summon a person to give evidence (s 39A(14)); and by obliging the AAT, subject to what follows, to give a party an opportunity to give further evidence where the AAT considers that such a party "should be further heard" (s 39A(16)).

273 On the other hand, there is the public interest in preserving the secrecy of highly sensitive information in the possession of the Director-General concerning Australia's security. This is reflected in the provisions of the ASIO Act. Section 17(1)(a) of the ASIO Act provides, amongst other things, that a function of ASIO is to "obtain, correlate and evaluate intelligence relevant to security". Section 17(1)(b) provides further that a function of ASIO is also to communicate such intelligence "for purposes relevant to security". However, pursuant to s 18 of the ASIO Act, such a communication can only be made by the Director-General or a person acting with the Director-General's authority; otherwise, it is generally an offence to disclose intelligence gathered by ASIO (s 18(2)). The term "security" is defined in s 4 as follows:

> "***security*** means:
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> (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
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> (i) espionage;

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414 Australia, House of Representatives, *Law and Justice Legislation Amendment Bill (No 3) 1994*, Explanatory Memorandum at 7 [32].

(ii) sabotage;

(iii) politically motivated violence;

(iv) promotion of communal violence;

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa)."

274 The public interest in protecting the confidentiality of secret intelligence gathered by ASIO has long been recognised by this Court. Because of the special nature of that public interest, the Director-General's obligation to give discovery in a given case has usually been regarded as limited in nature. Thus, in *Church of Scientology v Woodward*, Brennan J observed[415]:

> "[D]iscovery would not be given against the Director-General save in a most exceptional case. 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." (citation omitted)

275 Section 39A of the AAT Act also recognises this public interest. Pursuant to s 39A(5), the hearing of a proceeding concerning the correctness of a security assessment must take place in private. If the Director-General so requests, the AAT must do all things necessary to ensure that the identity of a person giving evidence on behalf of the Director-General is not revealed (s 39A(11)). Pursuant to s 39A(9), an applicant and their representative must be excluded from proceedings when certified "evidence" is adduced or certified "submissions" are made to the AAT. Evidence or submissions may be certified if disclosure of such material

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415 (1982) 154 CLR 25 at 76. See also *R v Lewes Justices; Ex parte Secretary of State for Home Department* [1973] AC 388 at 407 per Lord Simon of Glaisdale; *Leghaei v Director-General of Security* (2007) 241 ALR 141 at 147 [52] per Tamberlin, Stone and Jacobson JJ.

would be contrary to the "public interest because it would prejudice security or the defence of Australia" (s 39A(8)).

276 Some observations should be made about these provisions. First, the AAT does not itself decide whether particular evidence or submissions should be certified; rather, that is a matter reserved to the ASIO Minister. Secondly, the scope of what evidence and what submissions may not be disclosed is a matter determined in accordance with what each certificate identifies and describes. Thirdly, the validity of a certificate can be challenged, on judicial review grounds, in a court[416]. A precondition for the lawfulness of a given certificate would be whether the ASIO Minister had acted within the bounds of legal reasonableness and on a correct understanding of the law, in certifying that the disclosure of evidence or a submission would be contrary to the public interest[417]. Where a certificate describes evidence and submissions in only a highly generalised or broad fashion, that may show that the ASIO Minister has misunderstood what is in the public interest for the purposes of s 39A(8). That may be because the boundaries of what evidence and what submissions cannot be disclosed are circumscribed only by what it is in the public interest to keep secret. The validity of a certificate may also be susceptible to challenge before the AAT, even though any opinion formed by that Tribunal concerning that issue would have no binding legal effect. Nonetheless, in determining its procedures under s 39A, the AAT is entitled to form a view as to whether a certificate given by the ASIO Minister is, in a given case, valid[418].

277 The ASIO Minister also issued certificates pursuant to s 39B(2) of the AAT Act. Section 39B was also inserted into the AAT Act in 1995, and was modelled on what was previously s 59 of the ASIO Act[419]. It is central to this appeal. Like s 39A, s 39B includes rules which promote procedural fairness and rules which protect sensitive material from disclosure. The section only applies to a proceeding to which s 39A applies (s 39B(1)). Unlike s 39A, which applies to "evidence" and to "submissions", s 39B applies to the non-disclosure of "information with respect

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416 *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at 258 [47]-[48] per Weinberg, Bennett and Edmonds JJ. See also *Traljesic v Attorney-General (Cth)* (2006) 150 FCR 199; *Kim v Attorney-General (Cth)* (2013) 215 FCR 228.

417 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 438 [19] per Bell, Gageler and Keane JJ.

418 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 438 [18] per Bell, Gageler and Keane JJ; cf *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307.

419 Australia, House of Representatives, *Law and Justice Legislation Amendment Bill (No 3) 1994*, Explanatory Memorandum at 7 [32].

to a matter stated in the certificate" or the "contents of a document". Pursuant to s 39B(2), the ASIO Minister may certify that disclosure of information or the contents of a document would be contrary to the public interest for one of three reasons: first, because it would prejudice security or the defence or international relations of Australia; secondly, because it would involve disclosure of Cabinet documents and the like; or thirdly, because the information or the contents of the document could be the subject of a claim for public interest immunity.

278 Consistently with the public interest in maintaining confidentiality over sensitive intelligence held by ASIO, the AAT must "do all things necessary" to prevent disclosure of certified information or the certified contents of a document to anyone other than a member of the Tribunal (s 39B(3)). Even without a certificate, the AAT is obliged to ensure that information is not made available to a person "contrary to the requirements of security" (s 39B(11)). However, consistently with the need to provide procedural fairness, the giving of a relevant certificate does not excuse a person who is required by the AAT Act to disclose information or to produce a document to the AAT (eg pursuant to s 39A(3)) from performing that duty. In addition, if a given certificate does not invoke, as a reason for non-disclosure, either of the first or second reasons set out above, the presiding member may authorise the disclosure of the information, or of the contents of the document, to the applicant, if the member is satisfied that the "interests of justice" outweigh the reason given for non-disclosure (s 39B(5)). In so deciding, the member must have regard to the desirability that the parties should be made aware of all relevant matters (s 39B(6)).

279 The observations I have made about the certification of evidence or submissions for the purposes of s 39A apply equally to the certification of information or the contents of a document for the purposes of s 39B.

280 Pursuant to s 43AAA of the AAT Act, the AAT must, generally speaking, make findings about whether a security assessment was correct and then disclose those findings to the applicant, the Director-General, the ASIO Minister, and the Commonwealth agency, State or State authority to which the assessment was given. Section 43AAA(5) empowers the AAT to direct that the whole or a part of its findings are not to be given to the applicant or to the applicable Commonwealth agency, State or State authority. Significantly, it is the AAT that is empowered to decide what findings, or parts thereof, are not to be disclosed. In making such a decision, the AAT must comply with its obligation of non-disclosure in relation to any certified information and the certified contents of any document for the purposes of s 39B(3), as well as its duty in relation to information pursuant to s 39B(11). A finding may, no doubt, be expressed without breaching these obligations because, for example, of the use of highly generalised language.

281 Pursuant to s 44 of the AAT Act, a party may relevantly "appeal" a decision of the Security Division to the Federal Court. The appeal is generally limited to

"question[s] of law"[420]. Pursuant to s 45, the AAT may, with the agreement of its President, refer a question of law to the Federal Court for decision. In either case, pursuant to 46(1)(a), and despite s 39B(2) and (3), the AAT must send to the Federal 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 or reference". Section 46(2) provides that where, relevantly, there is in respect of any of the "documents" a certificate "in force" in accordance with s 39B(2) certifying that disclosure of a "matter contained in the document" would be "contrary to the public interest", the Federal Court shall "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". Section 46(4) creates an exception to this rule for disclosure to "an officer of the court in the course of the performance of his or her duties as an officer of the court". Section 46(3) permits disclosure of a "matter" in circumstances similar to those set out in s 39B(5) as described above.

282 The following observations about s 46 should be made. First, the reference in s 46(2) to a certificate certifying the non-disclosure of a matter contained in a document is apt to refer to a certificate made pursuant to s 39B(2) that identifies the contents of a document that should not be disclosed. Secondly, the reference in s 46(2) to a certificate "in force" should, in context, be read as a reference to a certificate that has not been withdrawn, or to a certificate the validity of which has not been successfully challenged in a court. Thirdly, s 46(2) does not address the admissibility into evidence of any certified document, or part thereof, in the Federal Court. Nor does it directly seek to interfere with the Federal Court's obligation to conduct a fair hearing. Instead, having been given custody of documents from the AAT, s 46(2) simply prohibits the Court from itself disclosing any certified matters contained in those documents to anyone other than a member or officer of the Court.

283 Whilst s 44 of the AAT Act refers to an appeal to the Federal Court, and whilst the *Federal Court Rules 2011* (Cth) refer to a person filing a "notice of appeal"[421] for that purpose, the Court nonetheless exercises its original, and not appellate, jurisdiction when hearing any such appeal[422]. Upon the filing of a notice of appeal, r 33.18 of the *Federal Court Rules* then obliges the Registrar of the AAT to lodge with the Registry of the Federal Court "a copy of the decision", a "copy of the reasons" (if any), a copy of the transcript (if any), and a list of the documents sent to the Court pursuant to s 46(1) of the AAT Act. Curiously, in a case where

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420 As to what is a "question of law", see generally *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315.

421 Rule 33.12.

422 *Federal Court of Australia Act 1976* (Cth), s 19(2).

the AAT has redacted its reasons in accordance with s 43AAA(5) of the AAT Act, r 33.18 does not specify whether the decision to be lodged is the redacted copy, the unredacted copy, or both. Pursuant to r 33.23(1), an applicant must file an appeal book, which must include[423]: "the formal decision of the Tribunal and the reasons for the decision"; a "complete index of the record of the evidence in the Tribunal"; a "chronological list of all documents received in evidence"; a "list of the affidavit evidence"; a "list of exhibits"; and the "exhibits and evidence to which the parties refer in the parties' submissions". Pursuant to r 33.24, a Registrar of the Federal Court must settle the index for Part A of the appeal book (dealing with the core set of standard items) as well as for Part B (a comprehensive reference index). These Rules are silent as to how an applicant, even with the assistance of a Registrar of the Federal Court, is to comply with this obligation where s 39B certificates have been issued. However, pursuant to r 33.22, the Federal Court may give directions "for determining what documents and matters were before the Tribunal" and concerning the "contents of the appeal book". In a case where certificates have been issued pursuant to s 39B, this will require the Court to take such steps as it can, consistently with its obligation under s 46(2), to ensure that the record of what was before the AAT is, to the extent the applicant requires it, included in the appeal book.

284 It does not follow from the foregoing process for the filing of the AAT decision and of an appeal book that the material is thereby before the Court. The preparation of the appeal book conveniently identifies the material the parties wish to rely upon. But if a party wishes to rely upon documents that were before the AAT, then the documents will need to be tendered into evidence. It is the act of tendering the documents and having them adduced into evidence that places them before the Court[424]. That act may be express or, as is sometimes the case with appeals pursuant to s 44 of the AAT Act, it may be implied from the joint conduct of the parties in relying upon the contents of an agreed appeal book.

285 In that respect, the supply of documents to the Federal Court pursuant to s 46 of the AAT Act is not analogous to the provision by an inferior court to a superior court of the "record" of that lower court in judicial review proceedings. That "record" only comprises the documentation that initiates a proceeding, the

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423 Rule 33.26.

424 *Evidence Act 1995* (Cth), s 48.

pleadings (if any) and the adjudication[425]. It has never included the evidence before the lower court or the transcript (if any)[426].

286 It follows that the act of supplying documents, including certified documents, to the Federal Court pursuant to s 46 does not result in the Court being obliged to receive them into evidence or otherwise to consider them. Section 46(1) simply provides a means of transporting the documents to the Court, and implicitly thereafter authorises their ongoing custody by the Court until their return to the AAT in accordance with s 46(1)(b). Section 46 otherwise does not oblige the Court to do anything with the documents, save for the obligation of non-disclosure imposed by s 46(2).

The capacity to afford procedural fairness

287 The Federal Court's capacity to ensure that it relevantly provides procedural fairness – including for the purposes of making directions pursuant to r 33.22, settling certain parts of a proposed appeal book, and considering a tender (whether express or implied) of documents contained in an appeal book – is not inhibited by s 46(2) of the AAT Act, save that, if the obligations of procedural fairness required the Court itself to disclose certified documents, or their contents, to an applicant, it could not do so. However, the capacity of a court to alter its ordinary procedures to secure a measure of procedural fairness, or to ameliorate procedural unfairness arising from the need to maintain a competing interest, is well known. As Kiefel CJ, Bell and Keane JJ observed in *HT v The Queen*[427]:

> "It should not be assumed that procedural fairness should altogether be denied in order that sensitive information be kept confidential. Just as the principle of open justice has been held to yield to the need to do justice in a particular case, so must the requirements of natural justice in a particular case yield to some extent." (footnote omitted)

288 Their Honours then observed[428]:

> "It is well known that the courts have modified and adapted the content of the general rules of open justice and procedural fairness in particular kinds of cases. ... [E]ach case has to be decided on its own facts

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425 *Hockey v Yelland* (1984) 157 CLR 124 at 142-143 per Wilson J.

426 *Hockey v Yelland* (1984) 157 CLR 124 at 143 per Wilson J; *Craig v South Australia* (1995) 184 CLR 163 at 180-182 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

427 (2019) 269 CLR 403 at 423 [43].

428 (2019) 269 CLR 403 at 423 [44].

> and on the broad principle that the court has the task of deciding how justice can be achieved taking into account the rights and needs of the parties. The relevant party should have as full a depth of disclosure as would be consistent with the adequate protection of the secret."

289 In my view, the last sentence of the foregoing passage is the decisive consideration.

290 On one view, it is unfair, in the colloquial sense of that word, for evidence to be admitted and then deployed against a party without that party having an opportunity to see that evidence and then to test its accuracy and probative value. But as the reasons of Kiefel CJ, Keane and Gleeson JJ explain, practical injustice is not a necessary consequence of the denial of such an opportunity[429]. Moreover, even where, by reason of s 46(2), the Federal Court itself cannot supply certified documents to an applicant, any resulting unfairness might nonetheless be capable of being cured in a number of different ways in order to ensure that "justice can be achieved"[430]. In a given case, those solutions may be less or more effective; indeed, in some cases, they may not be effective at all. Everything will depend on the given circumstances. But nothing in s 46(2) expressly addresses the duty of the Court to avoid presiding over an unfair trial. Some of the possible ways of fulfilling that duty include the following.

291 First, it would be open to the Court to order that the gist of certified documents be disclosed by the Director-General to an applicant. So long as this fell short of disclosing any certified matters, the Solicitor-General of the Commonwealth accepted that such an order would be permissible, unless the countervailing interests of state security made that impossible. The communication of the gist of information which is immune from disclosure on public interest grounds has been developed by the courts in the United Kingdom in the interests of procedural fairness. In *R (Haralambous) v Crown Court at St Albans*, Lord Mance DPSC observed[431]:

> "As a matter of principle, open justice should prevail to the maximum extent possible. Any closed material procedure 'should only ever be contemplated or permitted by a court if satisfied, after inspection and full consideration of the relevant material as well as after hearing the submissions of the special advocate, that it is essential in the particular case': *Tariq v Home Office* [2012] 1 AC 452, para 67; and should, of course, be restricted as far as possible. Further, the nature of the issue may require,

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429 See [67].

430 *HT v The Queen* (2019) 269 CLR 403 at 423 [44] per Kiefel CJ, Bell and Keane JJ.

431 [2018] AC 236 at 272 [61].

> as a minimum, disclosure of the 'gist' of the closed material, to enable the person from whom it is withheld to address the essence of the case against him: *A v United Kingdom* (2009) 49 EHRR 29, *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 (a control order case). This will be so, where the issue affects the liberty of the person".

292 The reference in the foregoing passage to a "closed material procedure" is to a court in judicial review proceedings receiving and considering confidential evidence that cannot be disclosed due to public interest immunity, which is equivalent, in substance, to the procedure provided for by s 46 of the AAT Act. The rationale for such a procedure is to enable judicial review to be "effective" where a lower tribunal or court has considered the very material subject to public interest immunity[432].

293 The references in s 46(2) to a "matter contained in [a] document" and to "the contents of a document" in s 39B(2) are references not only to what is actually said in a document but also to the substance of what has been said. However, acceptance of the proposition that disclosure of the gist of a certified document might, in a given case, be communicated to an applicant without breaching s 46(2) suggests that a high-level summary of what has been said in a certified document may not constitute disclosure of either the contents of a document or a matter contained in it. For example, the type of activity alleged might be communicated without the need to identify the specifics of what took place, the names of individuals involved, or other like details. Such a generalised disclosure might not be contrary to the public interest.

294 Having said that, there may be occasions when even disclosing the general nature of an activity might, by reason of its nature, imperil, for example, the safety of a foreign informant. As the Victorian Court of Appeal recognised in *Chief Commissioner of Police v Nikolic*[433], there is no minimum standard of "gisting" that applies in every case; in some contexts, "the importance of protecting highly sensitive information may have the consequence that the principles of procedural fairness do not require the disclosure of even the substance or gist of that information to the person who is the subject of the decision in question"[434]. Plainly, what might be disclosed would depend on the particular facts and circumstances.

295 Secondly, both the appellant and the Solicitor-General of the Commonwealth accepted, although with some hesitation, that it was possible for

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432 *R (Haralambous) v Crown Court at St Albans* [2018] AC 236 at 269 [52] per Lord Mance DPSC.

433 (2016) 338 ALR 683.

434 (2016) 338 ALR 683 at 703 [74] per Maxwell P, Osborn and Kaye JJA.

the Federal Court to appoint a special advocate who could examine certified material and unredacted reasons and make independent submissions to the Court. Such an advocate would do so subject to an obligation not to say or do anything that might tend to disclose certified material to an applicant. It was also accepted, however, that this would only be possible if such a special advocate could constitute an "officer of the court" for the purposes of s 46(4) of the AAT Act. In *National Archives of Australia v Fernandes*[435], Foster J rejected a submission that the phrase "officer of the court" in s 46(4) should include any lawyer acting on behalf of a party. That is plainly correct. But in reaching this conclusion, his Honour decided that the phrase "officer of the court" only referred to "public servants employed in the Court to assist the judges in the performance of their judicial function"[436].

296 With respect, that construction of the phrase is too narrow. In *New South Wales v Public Transport Ticketing Corporation [No 3]*[437], Allsop P (as his Honour then was) observed that whilst there was no statutory foundation for the appointment of a special advocate in public interest immunity cases, the Supreme Court of New South Wales had an inherent power to do so where disclosure to the special advocate did not injure the public interest and where there existed exceptional circumstances[438]. With respect, that conclusion is correct, although the need for exceptional circumstances in every case may be doubted. The Federal Court has the same inherent power, arising as it does from a court's jurisdiction to do that which is incidental to its judicial function[439]. An independent lawyer appointed by the Court to be a special advocate to assist it in exercising judicial power is an "officer of the court" for the purposes of s 46(4); such a person holds an office, that of special advocate, and does so at the direction of and for the benefit of the Court in the discharge of its duty to afford procedural fairness. That interpretation is more consistent with the constitutional imperative that the Court adhere to the requirement to provide procedural fairness in its exercise of federal judicial power[440].

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435 (2014) 233 FCR 461.

436 (2014) 233 FCR 461 at 468 [44(a)].

437 (2011) 81 NSWLR 394.

438 (2011) 81 NSWLR 394 at 397 [10].

439 *New South Wales v Public Transport Ticketing Corporation [No 3]* (2011) 81 NSWLR 394 at 397 [15].

440 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71 [67] per French CJ, 99 [156] per Hayne, Crennan, Kiefel and Bell JJ; *Acts Interpretation Act 1901* (Cth), s 15A.

297 In *Public Transport Ticketing Corporation*, Allsop P also usefully explained the procedural fairness dilemma that can arise when a party is denied access to relevant material, and how this can be ameliorated by the appointment of a special advocate. His Honour said[441]:

> "There are a number of circumstances in which the courts have been faced with a handicap or a difficulty in efficiently or justly resolving an aspect of a dispute where one party cannot see the material upon, or in respect of which, the court must adjudicate. Fairness may be compromised because the nature of the right or privilege asserted or claimed is one that excludes the other party from an examination of relevant material, but to disclose it to the other party for the purpose of resolving the claim of right would destroy that very right (if legitimately claimed). Further, fairness may be compromised by the court examining the material without a contradictor. This is, in part, alleviated by the recognition that the hearing without the substantive participation of the other party will have features of an ex parte application, thereby requiring appropriate disclosure from the party claiming the right. Nevertheless, it is easily seen how the other party may feel less than fully satisfied with the decision of the court, the foundation of which it cannot know or understand. Further, efficiency, to a degree, is impeded. A court, without a contradictor, must seek to understand the litigious context of the claim of right and assess it with only one side assisting. ...
>
> The promotion of fairness and expedition in the resolution of proceedings may be seen to justify the court, in a proper case and without destroying or affecting the right concerned, making a properly fashioned order for the employment of a special counsel to make submissions in relation to documents or information to which the other party is not privy. The circumstances of what is a proper case and the fashioning of the order to avoid any deleterious effect on the claimed right will be particular to each case. It will be important, in the fashioning of such orders, to retain a focus upon substance, not form or labels. Thus, what I have said by way of general approach could extend to the appointment of an amicus curiae or assessor who could be seen as acting on behalf of, and assisting, the court in a manner that would support the conclusion that the right to non-publication beyond the court's necessary examination of the documents had not been affected or breached".

298 The use of a special advocate as a contradictor to assist the court, and as a means of mitigating any procedural unfairness, is a device known in the United

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441 (2011) 81 NSWLR 394 at 398 [19]-[20].

Kingdom and in Canada. In *Secretary of State for the Home Department v MB*[442], Lord Hoffmann adopted the following description of the "Canadian procedure" given by the Grand Chamber of the European Court of Human Rights[443]:

> "[A] Federal Court judge holds an *in camera* hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant."

299 The foregoing represents a sensible combination of both the appointment of special advocate and the disclosure of the gist of the certified documents. Lord Hoffmann made the following additional observations about the adoption of the Canadian procedure in the United Kingdom[444]:

> "The Canadian model is precisely what has been adopted in the United Kingdom, first for cases of detention for the purposes of deportation on national security grounds (as in *Chahal*) and then for the judicial supervision of control orders. From the point of view of the individual seeking to challenge the order, it is of course imperfect. But the Strasbourg court has recognised that the right to be informed of the case against one, though important, may have to be qualified in the interests of others and the public interest. The weight to be given to these competing interests will depend upon the facts of the case, but there can in time of peace be no public interest which is more weighty than protecting the state against terrorism and, on the other hand, the Convention rights of the individual which may be affected by the orders are all themselves qualified by the requirements of national security. There is no Strasbourg or domestic authority which has gone to the lengths of saying that the Secretary of State cannot make a non-derogating control order (or anything of the same kind) without disclosing material which a judge considers it would be contrary to the public interest to disclose. I do not think that we should put the Secretary of State in such an impossible position and I therefore agree with the Court of Appeal that

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442 [2008] AC 440 at 484-485 [51]-[54].

443 *Chahal v United Kingdom* (1996) 23 EHRR 413 at 472 [144].

444 [2008] AC 440 at 485 [54].

in principle the special advocate procedure provides sufficient safeguards to satisfy [the right to a fair hearing]."

300 Of course, the terms of appointment of a special advocate by an order of the Court would need to be carefully calibrated to the needs of a given appeal. Orders of the kind made in the *Public Transport Ticketing Corporation* case illustrate this. They included: an order for the nomination of a special advocate; an order for the obtaining of initial instructions from the excluded party before giving the special advocate access to the confidential material; an order that the special advocate not disclose the contents of that confidential material to anyone other than the Court and the relevant State body; an order that the special advocate make submissions to the Court; and an order that the excluded party pay the costs of the special advocate in the first instance[445].

301 It may also be accepted that the utility of the appointment of a special advocate will depend upon the circumstances of the case. There will be cases where, because disclosure to an applicant of even the gist of the allegations made is not possible, the special advocate will be unable to obtain sufficient instructions from the applicant. There will also be cases where, even with disclosure of the gist of what is alleged, adequate instructions may not be capable of being given. In such cases, the special advocate may be unable to give the court any real assistance. But such possibilities may ultimately and practically prove largely to be illusory given that appeals to the Federal Court pursuant to s 44 of the AAT Act are almost always limited to questions of law; an inability to obtain instructions will often have little practical effect on the capacity of the special advocate to make submissions to the Court about the presence of error. In any event, notwithstanding the difficulties that might arise in a given case, it does not follow that the appointment of a special advocate could *never* cure any shortcoming in procedural fairness in a given case.

302 Thirdly, to the extent the Director-General sought to tender documents, whether in whole or part, that were the subject of certification pursuant to s 39B(2), it would be open to the Court to require, as a condition of admission into evidence, those documents, or parts of those documents, to be shown to an applicant's legal representatives on a confidential basis. The Court, cognisant of the ethical obligations owed by an applicant's legal representatives to the administration of justice, has the ability to mould the conditions and restrictions governing the disclosure of certified materials by the Director-General on a case-by-case basis with a view to balancing, to the extent possible, the competing imperatives of national security and procedural fairness[446]. No such direction would involve the Court itself failing to do "all things necessary to ensure" that certified matters in

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445 (2011) 81 NSWLR 394 at 405-406 [40] per Allsop P.

446 cf *R v Khazaal* [2006] NSWSC 1061 at [33]-[39] per Whealy J.

the documents held by the Court pursuant to s 46(1) were not disclosed to another person. The Solicitor-General of the Commonwealth agreed with this proposition. Whether the Director-General, as a model litigant, would be obliged to tender certified documents is not a matter that needs to be decided.

303 The foregoing is not intended to be an exhaustive list of the means by which the Federal Court could afford a sufficient degree of procedural fairness, or a sufficient reduction in any procedural unfairness, in appeals from the Security Division of the AAT. In respect of each appeal, the Court will need to mould what relief can be given to overcome the disadvantage suffered by the applicant as a result of the provision to the Court, but not to the applicant, of certified material.

304 If, notwithstanding the aforementioned options, the Court considers that it cannot sufficiently mitigate the disadvantage suffered by the applicant and that to proceed with the appeal without affording the applicant a fair opportunity to respond to the case against them would be productive of practical injustice, it is not compelled to do so. Contrary to what might be assumed, neither s 46(1) nor s 46(2) obliges the Federal Court to adopt a "closed material procedure"[447] in an appeal from a decision of the Security Division of the AAT. As previously explained, s 46(1) provides for the transfer of documents to the Federal Court, and s 46(2) prohibits disclosure of certified material to any person other than a member of the Federal Court. But the provisions do not compel the Court to adopt any other specific course of action[448].

305 In *Al Rawi v Security Service*, Lord Kerr of Tonaghmore JSC said of the closed material procedure adopted in the United Kingdom[449]:

> "The defendants' second argument proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive – for what, the defendants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge

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447 See *R (Haralambous) v Crown Court at St Albans* [2018] AC 236.

448 cf *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 105 [177]-[178] per Gageler J.

449 [2012] 1 AC 531 at 592-593 [93].

> it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable."

306 In a given case, it would be open to a judge, mindful of the concerns of Lord Kerr, to decline a tender of certified documents or otherwise to refuse to consider documents certified pursuant to s 39B of the AAT Act. But there will be other cases where it will be justifiable for a judge to consider the certified documents, especially when urged to do so by an applicant and where this will make adjudication of the questions of law the subject of the appeal more "effective".

307 In neither of those scenarios is a judge compelled to preside over a hearing that would be productive of practical injustice. That is because, even where the Court declines to consider the certified documents transmitted to it pursuant to s 46(1) of the AAT Act, it would remain open to the Court, in the exercise of its original jurisdiction, to revert to the principles and procedures that would have governed the appeal in the absence of s 46 – including, for example, the rules of public interest immunity, which would almost certainly apply to deny both the appellant and the Court any access to certified material[450]. For the reasons explained below and by Kiefel CJ, Keane and Gleeson JJ[451], that counterfactual position forecloses the appellant's contention that s 46 mandates the adoption of an unfair procedure.

308 Because the duty and the capacity of the Court to provide different forms of procedural fairness, of the kind described above, are not necessarily precluded by s 46(2) of the AAT Act, it is a valid law. If it were otherwise, like Gordon J and Edelman J, I may well have formed the view that s 46(2) was not a valid law. It follows that what in substance divides us is the way we construe s 46(2).

Appeal not inimical to the exercise of judicial power

309 As mentioned, there will be appeals where, by reason of the nature of the certified material, the Federal Court will not be able to provide an applicant with a fair opportunity to respond to the evidence against them by any of the above means. The certified material may be so sensitive that any form of disclosure would be too dangerous. The possibility of such a case, however, of itself does not make s 46(2) an invalid law. That is because this type of appeal, even with its

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450 See *SDCV v Director-General of Security* (2021) 284 FCR 357 at 396 [161]-[162] per Bromwich and Abraham JJ.

451 See [75]-[83].

adoption of an unfair procedure, is not inimical to an exercise of federal judicial power.

310 In that respect, one commences with the observation that some degree of caution should be exercised in drawing implications from the essential nature of judicial power which fetter the exercise of legislative or executive authority. That is because, as Kitto J famously observed, "it has not been found possible to frame an exhaustive definition of judicial power"[452]. Indeed, Sir Owen Dixon, writing extra-judicially, once remarked that the doctrine of the separation of powers was an "artificial and almost impractical classification"[453]. In determining here what is inimical to the exercise of judicial power, one cannot consider the operation of s 46, to the extent that it has inhibited, or even denied, the provision of the usual norms of procedural fairness, in isolation. If an appeal from the Security Division is ultimately and otherwise beneficial to an applicant, justice is not denied but is served. And that is so even though, as Edelman J observes, the resulting procedure adopted by the Court may be seen, in and of itself, to be unfair – indeed, in some cases, acutely so.

311 The provisions of the AAT Act concerning merits review of security assessments reflect choices made by the Parliament to enhance the rights of applicants who have been the subject of adverse security assessments, whilst at the same time preserving the confidentiality of intelligence held by the Director-General in the public interest. It is a legislative scheme that comprises a carefully balanced solution to conflicting rights and interests and that, when originally enacted in the ASIO Act, was a breakthrough in the common law world. Thus, in the Second Reading Speech for the Bill that became the ASIO Act, the following was noted[454]:

> "The statutory procedures for notification of security assessments and for rights of appeal in large part implement the recommendations of Mr Justice Hope. They represent the first attempt, at least in a common law country, to provide a comprehensive statutory framework regulating the making of security assessments of individuals and providing a right of appeal to an independent judicial tribunal. They therefore represent one of

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452 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373.

453 Dixon, "The Law and the Constitution", in Crennan and Gummow (eds), *Jesting Pilate and Other Papers and Addresses*, 3rd ed (2019) 170 at 181.

454 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 May 1979 at 2175.

> the most important steps taken in this Parliament for many years directed to the protection of the rights of individuals."

312 The Second Report of the Hope Royal Commission on Intelligence and Security, which recommended the establishment of a statutory right of merits review of security decisions in what is now the Security Division of the AAT, records Hope J's acute recognition of the need to balance private and public rights. His Honour described the "central problem" of a proposed security appeals system as "the difficulty of reconciling the needs and rights of the state with the needs and rights of the individual"[455]. Hope J wrote[456]:

> "The understandable desire of individuals to have all the rules of natural justice applied to security appeals must be denied to some extent, unfortunate though this may be. ... I do not think, however, that a security appeals system in which the appellant always had the right to hear all the evidence and to cross-examine all the witnesses, without restriction, would be either possible or desirable. In some cases, it may not be possible to inform the appellant of the whole of the case against him, although he must always be told as much of that case, and all the rules of natural justice must be applied as fully as is consistent with the national interest.
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> The most common difficulty in any appeal against a security assessment is the protection of intelligence sources. ... If this protection is to be maintained, despite the existence of an appeals system, it will be necessary for the appeals tribunal to be able to allow evidence to be given in the absence of the appellant or his representatives, to be able to disallow cross-examination, and to admit hearsay evidence. Indeed, the description of some material relied upon to support an adverse or qualified assessment may be such as to identify the source. It may therefore be necessary to limit or totally to prohibit the giving of information in relation to that material to the appellant. These propositions derogate from the rules of natural justice, but they have been proved necessary in other countries which respect those rules. They are justified, and are only justified, by reference to the security of the nation.
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> In some cases, in addition to the protection of sources, the security issue involved in the case may be so sensitive that to give any information concerning it to the appellant will be impossible."

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455 Australia, *Royal Commission on Intelligence and Security: Second Report* (1977) at 68 [132].

456 Australia, *Royal Commission on Intelligence and Security: Second Report* (1977) at 68-70 [134]-[136].

313 The provisions of the AAT Act, described above, faithfully implement Hope J's concerns and reflect a measured "trade-off" between the need to protect the security interests of the nation and the benefit of providing independent merits review of security assessments. The resulting legislation is plainly beneficial. It is even more beneficial with the existence of judicial oversight pursuant to s 44 of the AAT Act. Without this regime, a person who has been the subject of an adverse security assessment would have a less effective right of appeal from a decision of the Security Division. That is because it is practically inevitable in such proceedings that the Director-General would successfully claim public interest immunity over certified documents[457], and the Court would be unable to understand fully the reasons of the AAT based on all of the evidence that was before it. Parliament has sought to avoid such an iniquitous result by enacting appeal rights which provide for the possibility of the Court considering all of that evidence. It follows that an appeal from the Security Division of the AAT to the Federal Court – notwithstanding the limitations imposed on the Court by s 46(2) of the AAT Act, which, in a given case, may deprive an applicant of a fair opportunity to respond to adverse evidence – is nonetheless beneficial to a litigant in the position of the appellant. For that reason, the adoption by the Court of such a procedure does not result in an applicant suffering "practical injustice"[458], and is not inconsistent with Ch III of the *Constitution*. In unadorned terms, the regime is better than nothing. In the context of a clearly recognised public interest in protecting the non-disclosure of highly sensitive intelligence, s 46(2) is a valid and necessary law of the Commonwealth, which forms part of an otherwise beneficial regime.

314 Edelman J would criticise the foregoing conclusion as an example of an end justifying the means. With respect, that may well be so. But it nevertheless represents an acceptance that in order to provide an applicant in circumstances such as these with a meaningful – as distinct from meaningless – chance of independent review with subsequent judicial oversight, there is a necessary and regrettable cost that may need to be incurred. In this context, that cost does not offend justice.

315 I agree with the orders proposed by Kiefel CJ, Keane and Gleeson JJ.

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457 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 550-551 [5] per Gleeson CJ, 556 [23]-[24] per Gummow, Hayne, Heydon and Kiefel JJ. See also *Church of Scientology v Woodward* (1982) 154 CLR 25 at 60 per Mason J, 76 per Brennan J; *R v Khazaal* [2006] NSWSC 1061 at [30]-[32] per Whealy J; *Leghaei v Director-General of Security* (2007) 241 ALR 141 at 147 [52] per Tamberlin, Stone and Jacobson JJ.

458 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156] per Hayne, Crennan, Kiefel and Bell JJ.