

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

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MJZP

PLAINTIFF

AND

DIRECTOR-GENERAL OF SECURITY & ANOR

DEFENDANTS

*MJZP v Director-General of Security*

[2025] HCA 26

*Date of Hearing: 12 & 13 December 2024 & 11 March 2025*

*Date of Judgment: 6 August 2025*

S142/2023

## ORDER

*The questions stated for the opinion of the Full Court in the special case filed on 20 June 2024 be answered as follows:*

*Question (1): Is s 46(2) of the Administrative Appeals Tribunal Act 1975 (Cth) invalid on the basis that it infringes Ch III of the Constitution?*

*Answer: No.*

*Question (2): Who should pay the costs of the Special Case and of the proceeding?*

*Answer: The plaintiff.*

## Representation

C L Lenehan SC and T M Wood with S N Rajanayagam for the plaintiff  
(instructed by Corrs Chambers Westgarth)



S P Donaghue KC, Solicitor-General of the Commonwealth, with M A Hosking and P F Bristow for the second defendant (instructed by Australian Government Solicitor)

G J D del Villar KC, Solicitor-General of the State of Queensland, with F J Nagorcka and K J E Blore on behalf of the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

C S Bydder SC, Solicitor-General for the State of Western Australia, with J E Shaw SC and G M Mullins on behalf of the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

J G Renwick SC with M F Caristo on behalf of the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor for NSW)

J L Rudolf with E A Warner on behalf of the Attorney-General for the State of Tasmania, intervening (instructed by Solicitor-General (Tas))

Submitting appearance for the first defendant

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **MJZP v Director-General of Security**

Constitutional law (Cth) – Judicial power of Commonwealth – Where s 44(1) of *Administrative Appeals Tribunal Act 1975* (Cth) ("Act") provided party to certain proceedings before Administrative Appeals Tribunal ("Tribunal") may appeal to Federal Court of Australia on question of law from decision of Tribunal – Where s 46(2) of Act provided that if certificate in force certifying disclosure of matter contained in document would be contrary to public interest Federal Court must do all things necessary to ensure matter not disclosed to any person other than member of court as constituted for purposes of proceeding – Where in accordance with s 39B of Act such certificate included certificate issued by "ASIO Minister" certifying disclosure of matter would be contrary to public interest because it would prejudice security or defence or international relations of Australia – Where plaintiff sought declaration that s 46(2) of Act invalid on ground it infringes Ch III of the *Constitution* – Where earlier decision of High Court in *SDCV v Director-General of Security* (2022) 277 CLR 241 held s 46(2) of Act valid – Whether s 46(2) invalid because it required Federal Court to depart from "general rule" of procedural fairness more than reasonably necessary to protect compelling and legitimate public interest – Whether *SDCV* authority to contrary – Whether leave to re-open and overrule *SDCV* should be granted.

Words and phrases – "adverse evidence", "ASIO", "certificate", "certified matter", "defence", "disclosure", "essential characteristic of a court", "forensic advantage", "heavy persuasive burden", "international relations", "practical injustice", "procedural fairness", "proportionality", "public interest immunity", "ratio decidendi", "reasonably necessary to protect a compelling and legitimate public interest", "security assessment", "special advocate".

*Constitution*, Ch III.

*Administrative Appeals Tribunal Act 1975* (Cth), ss 39A, 39B, 44, 46.



1 GAGELER CJ, GORDON, STEWARD, GLEESON, JAGOT AND BEECH-  
JONES JJ. The special case filed in this proceeding posed one substantive  
question – is s 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the  
AAT Act") invalid on the basis that it infringes Ch III of the *Constitution*?

2 Section 46(2) applies to an appeal referred to in s 46(1) of the AAT Act,  
which includes an appeal under s 44 of that Act to the Federal Court of Australia  
on a question of law. If there is in force a certificate as specified in s 46(2)  
certifying that the disclosure of matter contained in a document would be contrary  
to the public interest, the Federal Court must "do all things necessary to ensure that  
the matter is not disclosed to any person other than a member of the court as  
constituted for the purposes of the proceeding". For the purposes of s 46(2) of the  
AAT Act, such a certificate in accordance with s 39B(2) includes, relevantly, a  
certificate issued by the "ASIO Minister" 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 on one or more  
of three specified grounds including "because it would prejudice security or the  
defence or international relations of Australia".

3 The one substantive question posed reflects the plaintiff's principal  
contention that s 46(2) of the AAT Act is invalid because it requires the Federal  
Court of Australia to depart from the "general rule" of procedural fairness more  
than is reasonably necessary to protect a compelling and legitimate public interest  
and thereby deprives it of an essential characteristic of a "court" under Ch III of  
the *Constitution*. The plaintiff submitted that the earlier decision of this Court in  
*SDCV v Director-General of Security*<sup>1</sup> is not authority to the contrary but, to the  
extent necessary, sought leave for *SDCV* to be re-opened and overruled.

4 In response, the second defendant, the Commonwealth,<sup>2</sup> submitted that  
*SDCV* provides a complete answer to the plaintiff's case and should not be re-  
opened. The Commonwealth alternatively proposed that, if the Court were to re-  
open *SDCV* and were to consider s 46(2) to be invalid, it would be reasonably open  
to construe s 46(2) as Steward J proposed in *SDCV* which would enable the Federal  
Court to adopt several strategies to avoid or ameliorate any practical injustice in  
an appeal to it as referred to in s 46(1) of the AAT Act.<sup>3</sup>

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1 (2022) 277 CLR 241.

2 Along with interveners the Attorneys-General for Tasmania, Queensland, Western  
Australia, and New South Wales.

3 (2022) 277 CLR 241 at 338 [270], 342 [280], 346-353 [291]-[309].

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5 For the reasons which follow the Commonwealth's principal submission, that *SDCV* provides a complete answer to the plaintiff's case and should not be re-opened, is correct.

### **The ratio of *SDCV***

6 The Full Court of the Federal Court, from which the appeal was brought to this Court in *SDCV*, had declared that s 46(2) of the AAT Act "is a valid law of the Commonwealth".<sup>4</sup> The parties joined issue on the appeal to this Court as to whether: (a) s 46(2) of the AAT Act was valid or invalid in its entirety;<sup>5</sup> and (b) alternatively, s 46(2) was to be construed in accordance with s 15A of the *Acts Interpretation Act 1901* (Cth) to mean that the Federal Court must "do all things necessary in the due exercise of judicial power 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.<sup>6</sup>

7 Kiefel CJ, Keane and Gleeson JJ concluded that s 46(2) was valid in its entirety<sup>7</sup> and that the arguments in support of its invalidity involved a "fatal artificiality".<sup>8</sup> As their Honours put it, s 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".<sup>9</sup> In these circumstances, their Honours were satisfied that s 46(2) did not impose any practical injustice on the appellant and was valid.

8 In contrast, Gageler J concluded that s 46(2) was invalid in its entirety on the basis that it compelled a court "never to disclose the certified information to a

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4 *SDCV v Director-General of Security* (2021) 284 FCR 357.

5 See, eg, (2022) 277 CLR 241 at 278 [83].

6 (2022) 277 CLR 241 at 282 [96]. See also *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28].

7 (2022) 277 CLR 241 at 278 [83], 281 [91].

8 (2022) 277 CLR 241 at 254 [12].

9 (2022) 277 CLR 241 at 254 [12].



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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".<sup>10</sup> Accordingly, his Honour concluded that "the blanket proscription by s 46(2) of the AAT Act of disclosure of information ... renders the process by which the Federal Court is to hear and determine an appeal under s 44 of the AAT Act procedurally unfair"<sup>11</sup> and thereby incompatible with Ch III of the *Constitution* and invalid in consequence.<sup>12</sup>

9           Gordon J concluded that s 46(2) was "wholly invalid"<sup>13</sup> on the basis that the section "impermissibly excludes procedural fairness for a whole class of case by removing the ability of the Federal Court to respond to potential 'practical injustice'"<sup>14</sup> and forbids "the Court in any and every case from making any certified matter available to the applicant or any representative of the applicant".<sup>15</sup>

10           Edelman J concluded that s 46(2) was invalid in its entirety<sup>16</sup> and that it was not open to construe the section as if the non-disclosure obligation it imposes on the Federal Court is qualified.<sup>17</sup>

11           Steward J concluded that s 46(2) did not necessarily prevent the Federal Court from avoiding practical injustice to an applicant<sup>18</sup> on the basis that the "act of supplying documents, including certified documents, to the Federal Court

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10   (2022) 277 CLR 241 at 298 [152].

11   (2022) 277 CLR 241 at 286 [112].

12   (2022) 277 CLR 241 at 301 [162].

13   (2022) 277 CLR 241 at 303 [170].

14   (2022) 277 CLR 241 at 309 [179].

15   (2022) 277 CLR 241 at 312-313 [189].

16   (2022) 277 CLR 241 at 322 [220].

17   (2022) 277 CLR 241 at 323 [223].

18   (2022) 277 CLR 241 at 338 [270].

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pursuant to s 46 does not result in the Court being obliged to receive them into evidence or otherwise to consider them",<sup>19</sup> with the consequence that the Federal Court could refuse to admit the documents or admit them only on conditions agreed to by the respondent.<sup>20</sup> Steward J also considered that the fact that the power of the Federal Court to ensure an applicant has a fair opportunity to know the evidence would not be available in every case (because the "certified material may be so sensitive that any form of disclosure would be too dangerous") did not mean that s 46(2) was invalid by operation of Ch III of the *Constitution*.<sup>21</sup> Rather, and consistently with the reasoning of Kiefel CJ, Keane and Gleeson JJ, Steward J considered that because the right of appeal to the Federal Court on a question of law which s 46 of the AAT Act regulated was itself a beneficial aspect of the overall statutory scheme, an applicant under that provision suffered no "practical injustice" by reason of s 46(2).<sup>22</sup> For these reasons, Steward J agreed with the making of the orders proposed by Kiefel CJ, Keane and Gleeson JJ dismissing the appeal.<sup>23</sup>

12 It follows that the plaintiff's submission that no *ratio decidendi* can be extracted from the reasoning in *SDCV* beyond that s 46(2) does not infringe Ch III of the *Constitution* is incorrect. It was necessary to the order dismissing the appeal in *SDCV* that four Justices (Kiefel CJ, Keane and Gleeson JJ, and Steward J) held that s 46(2), in its application to documents in respect of which there is a certificate in accordance with s 39B(2), did not infringe Ch III of the *Constitution* because, as the Commonwealth submitted in the present case, "even where s 46(2) of the AAT Act prevents the Federal Court from providing an applicant with any means to respond to material subject to a certificate ... , it is not contrary to Ch III because it forms an inseverable part of an *additional* avenue for review that is beneficial (when compared to the other available avenues of review), and therefore causes no

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<sup>19</sup> (2022) 277 CLR 241 at 344 [286].

<sup>20</sup> (2022) 277 CLR 241 at 345-352 [287]-[304].

<sup>21</sup> (2022) 277 CLR 241 at 353 [309].

<sup>22</sup> (2022) 277 CLR 241 at 353-356 [310]-[314].

<sup>23</sup> (2022) 277 CLR 241 at 356 [315].

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practical injustice".<sup>24</sup> In respect of the statutory and factual situation it resolved, that is the *ratio decidendi* of *SDCV*.

13 It is true that Steward J also said in *SDCV* that "[b]ecause 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" and "[i]f it were otherwise ... I may well have formed the view that s 46(2) was not a valid law".<sup>25</sup> These observations, however, cannot alter the fact that what was ultimately essential to Steward J agreeing with the making of the orders dismissing the appeal, and leaving undisturbed the Full Court's declaration, was his Honour's conclusion that even in a case where s 46(2) strictly applied in accordance with its terms it did not result in an applicant suffering any practical injustice because the provision forms part of an otherwise beneficial regime providing an applicant with a "meaningful ... chance of independent review with subsequent judicial oversight".<sup>26</sup>

14 It follows that to be granted the declaration sought in the summons in this case, that s 46(2) of the AAT Act infringes Ch III of the *Constitution* and is therefore invalid (or partially invalid), the plaintiff must obtain leave to re-open *SDCV* and this Court must overturn *SDCV*.

### **Leave to re-open *SDCV***

15 The plaintiff submitted that it should be granted leave to re-open *SDCV* on several bases. According to the plaintiff, it "seeks to make an argument that was not put in *SDCV*, which depends upon the relationship between means and ends (or 'proportionality')" and *SDCV* does not stand as authority against this new argument because "[i]f a point is not in dispute in a case, the decision lays down no legal rule concerning that issue".<sup>27</sup> Further, and having regard to the factors identified in *John v Federal Commissioner of Taxation*,<sup>28</sup> the plaintiff submitted

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24 (2022) 277 CLR 241 at 273 [67], 276-278 [75]-[83], 284 [101], 353-356 [309]-[314].

25 (2022) 277 CLR 241 at 353 [308].

26 (2022) 277 CLR 241 at 356 [314].

27 *Coleman v Power* (2004) 220 CLR 1 at 44 [79].

28 (1989) 166 CLR 417 at 438-439.

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that leave to re-open *SDCV* should be granted because: (a) *SDCV* does not rest upon a principle carefully worked out in a significant succession of cases,<sup>29</sup> nor does it form part of a "definite stream of authority";<sup>30</sup> (b) rather, "the plurality's conception of 'practical injustice' ... was novel and unsupported by any previous authority ... [and] is contrary to principle"; (c) the Justices who upheld the validity of s 46(2) in *SDCV* reached that conclusion for different reasons; (d) the significant differences in the reasoning of the Justices comprising the majority have the effect that, far from producing a "useful result", *SDCV* has been productive of "inconvenience"<sup>31</sup> – because *SDCV* produced no binding statement on the proper construction of s 46(2), the construction adopted by the Full Court in *SDCV* remains binding on a single judge of the Federal Court and "the Commonwealth Parliament presently is in a position of not knowing whether a law that operates analogously to s 46(2) would infringe Ch III"; and (e) there is no evidentiary basis to conclude that *SDCV* has been independently acted upon in a manner that militates against reconsideration other than in the *Administrative Review Tribunal Act 2024* (Cth), which contains provisions equivalent to s 46.

16 The plaintiff, however, overlooks the "strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law, that such a course [granting leave to re-open a decision] should not lightly be taken".<sup>32</sup> In particular, as Gibbs J said in *Queensland v The Commonwealth*, no Justice is entitled to arrive at their own judgment "as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court".<sup>33</sup> A party seeking to re-open an earlier decision of this Court and challenging the validity of the same provision that the earlier decision held to be valid, on precisely the same basis as the challenge rejected in the earlier

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29 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438.

30 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 630.

31 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438.

32 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 150 [17], quoting *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70].

33 (1977) 139 CLR 585 at 599.

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decision, carries a particularly heavy persuasive burden which the plaintiff in this case has not come close to discharging.

17 First, the substance of the plaintiff's "means and ends" or "proportionality" contention, as now framed, is that the "end" or object which s 46(2) of the AAT Act pursues is "prevention of the disclosure of information where that disclosure would be injurious to the public interest because it would prejudice the security of Australia or involve the disclosure of deliberations or decisions of the Cabinet". The plaintiff contends that s 46(2), as the means to achieve this end, is inflexible, operating in every case irrespective of all other countervailing considerations in that case. The essence of this complaint, however, is not new – it was captured in the submissions put for the appellant in *SDCV*. In that case the appellant submitted, and the minority accepted, that the constitutional invalidity of s 46(2) sprang from its "rigidity", inflexibility, and exclusion of the Federal Court's capacity to weigh any countervailing interest in a given case.<sup>34</sup> As explained, that submission was not accepted by Kiefel CJ, Keane and Gleeson JJ, nor (ultimately) by Steward J. Now characterising the same argument as one of "means and ends" or "proportionality" does not mean that the substance of this argument was overlooked in *SDCV* or that *SDCV* does not stand as authority against the argument.

18 Second, it may be accepted that the reasoning of Kiefel CJ, Keane and Gleeson JJ, and of Steward J, was responsive to the immediate context of s 46(2) of the AAT Act, rather than reflecting a more general principle which had been worked out in a series of cases. That fact, however, works against the application for leave to re-open *SDCV*. The appellant in *SDCV* appealed against the Full Court's rejection of the appellant's challenge to the constitutional validity of s 46(2) of the AAT Act, which had resulted in the Full Court specifically declaring that s 46(2) "is a valid law of the Commonwealth".<sup>35</sup> This Court in *SDCV*, by majority of 4:3, dismissed that appeal. The plaintiff in this matter now seeks to raise the very same question. Yet nothing has changed since *SDCV* was decided except the constitution of this Court.

19 Third, and importantly, Kiefel CJ, Keane and Gleeson JJ, and Steward J (on the one hand) and Gageler J, Gordon J, and Edelman J (on the other hand) all

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34 See, eg, (2022) 277 CLR 241 at 286 [110]-[112], 298-301 [152]-[161], 309-313 [179]-[191], 314 [194], 331 [246], 334 [255].

35 *SDCV v Director-General of Security* (2021) 284 FCR 357.

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accepted that an essential characteristic of a Ch III court is that it provides parties with procedural fairness. All the Justices also proceeded on the basis that procedural fairness is concerned with "practical injustice" to a party in the case, not abstract conceptions of possible unfairness.<sup>36</sup> The difference between the approaches of Kiefel CJ, Keane and Gleeson JJ, and of Steward J (on the one hand) and Gageler J, Gordon J, and Edelman J (on the other hand) was that: (a) the former considered that the question of "practical injustice" was to be determined in both the specific statutory context and the broader context of the options available to a person (relevantly, to challenge a decision of the Tribunal) and that s 46(2) of the AAT Act affects the exercise of only one of those options, whereas (b) the latter considered that the question of "practical injustice" was to be determined in the context that the specific right conferred to which s 46(2) of the AAT Act applies is a right of appeal to a Ch III court. This difference in focus yielded different answers to the question whether s 46(2) worked a practical injustice. The appellant in *SDCV* having obtained an unfavourable answer to that question, the plaintiff in this case now seeks to obtain a different answer to precisely the same question.

20 Fourth, it is not the case, as the plaintiff would have it, that the reasoning of Kiefel CJ, Keane and Gleeson JJ in *SDCV* assumes "that the content of procedural fairness can be reduced to nothing if the substantive right is sourced in statute". No such general proposition is apparent from the joint reasons. Their Honours did not express any free-standing principle to the effect that the content of procedural fairness can be reduced to nothing if the substantive right is sourced in statute. It is also not the case that, as the plaintiff would have it, the reasoning of Kiefel CJ, Keane and Gleeson JJ in *SDCV* "assumes that a public interest immunity claim over certified material would inevitably be upheld" in judicial review proceedings. Their Honours said no more than it was "likely" that in judicial review proceedings the doctrine of public interest immunity would have resulted in neither the Federal Court nor the appellant having access to the material the subject of the certificate.<sup>37</sup>

21 Fifth, and as apparent from the third and fourth points, the issue determined in *SDCV*, that s 46(2) of the AAT Act is not invalid by reason of Ch III of the *Constitution* requiring protection of the essential integrity of Ch III courts, does

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36 See, eg, *Condon v Pompano Pty Ltd* (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].

37 (2022) 277 CLR 241 at 254-255 [13]-[14].

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not concern any principle of constitutional interpretation or the meaning of any constitutional provision. It also does not concern the formulation of any general principle of procedural fairness. It concerns only the application of established constitutional and interpretative principles to one statutory provision applying to one kind of proceeding in the Federal Court – an appeal on a question of law from a decision of the Tribunal or a referral of such a question where there is in force a certificate in accordance with the provisions identified in s 46(2) certifying that "the disclosure of matter contained in the document would be contrary to the public interest". The differences in reasoning between the judgments in *SDCV* concern only the application of established principles to a single provision.

22 Sixth, it cannot be said that that the practical consequences of *SDCV* were not apparent to the majority in making the decision that was made.

### Conclusions and orders

23 *SDCV* is a complete answer to the plaintiff's claims in this case. Leave to re-open *SDCV* should not be granted.

24 The questions in the special case should therefore be answered:

- (1) Is s 46(2) of the AAT Act invalid on the basis that it infringes Ch III of the *Constitution*?

*Answer: No.*

- (2) Who should pay the costs of the Special Case and of the proceeding?

*Answer: The plaintiff.*

EDELMAN J.

**Precedent and integrity in application of the decision in *SDCV***

25 In *SDCV v Director-General of Security*,<sup>38</sup> this Court considered the effect of s 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act") in circumstances where, on character grounds,<sup>39</sup> the (then) Administrative Appeals Tribunal ("the Tribunal") had upheld an adverse security assessment decision, which led to SDCV being stripped of his liberty to remain in Australia. The adverse security assessment decision had been made, and consequentially SDCV's visa cancelled, essentially for reasons which he was not given, based upon allegations about which he was not told and evidence which he did not see.

26 On SDCV's application to the Federal Court of Australia under s 44 of the AAT Act asserting an error of law, documents containing matter certified by the Minister ("the ASIO Minister") administering the *Australian Security Intelligence Organisation Act 1979* (Cth) ("the ASIO Act") were transmitted to the Federal Court from the Tribunal under s 46(1) of the AAT Act. The Federal Court, exercising original jurisdiction, was required by s 46(2) of the AAT Act 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". Due to certification by the ASIO Minister,<sup>40</sup> the Federal Court followed the requirement of s 46(2) and had regard to the documents and the "closed" part of the reasons of the Tribunal, documents and reasons that SDCV and his legal representatives had not seen and which contained allegations and evidence about which SDCV and his legal representatives had not been told. A majority of this Court held that there was no practical injustice in this procedure.

27 The narrowest, and with respect most principled, approach taken in the majority in this Court in *SDCV* was that of Steward J. As explained in detail below, Steward J differed in his approach in significant respects from the other three members of the majority (Kiefel CJ, Keane and Gleeson JJ) because he recognised that, in some circumstances, practical injustice could arise from the operation of a provision that denied procedural fairness to an applicant even if the applicant had other, potentially less beneficial, routes of review. But Steward J considered that s 46(2) did not cause practical injustice because it was a beneficial provision within a scheme that provided for the possibility of amelioration of the denial of procedural fairness, albeit in ways not accepted by the plurality.

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38 (2022) 277 CLR 241.

39 *Migration Act 1958* (Cth), s 501(3).

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



28       At a high level of generality, it is possible to identify a ratio decidendi in *SDCV*. That ratio decidendi is capable of strong justification. But at low levels of generality, important to the procedure to be applied by lower courts when certified documents are transmitted to a court under s 46(1), the decision in *SDCV* has no ratio decidendi. In many cases, this might be a powerful reason to re-open a decision, even if only to re-explain the result in a way that would provide clarity and guidance for lower courts. Initially I was strongly inclined to do so if clear guidance could be provided. Ultimately, however, a clear restatement by this Court of the ratio decidendi of *SDCV* will have to await another case.

29       The answer to the principal question in this special case is that s 46(2) of the AAT Act is not invalid on the basis that it infringes Ch III of the *Constitution*. The creation of principles for the application of that provision at lower levels of generality will be left, for the time being, for development by lower courts.

### **How this issue arises in this special case**

30       Unlike the individual appellant in *SDCV*, the plaintiff in this special case is a corporation providing a carriage service pursuant to the *Telecommunications Act 1997* (Cth). Following an adverse security assessment by the Director-General of Security in connection with s 315A of the *Telecommunications Act*, the Minister for Home Affairs, being the ASIO Minister, certified under s 38A(3) of the ASIO Act that she was satisfied that the disclosure of certain information to the plaintiff, or its directors or its employees, would be prejudicial to the interests of security. The plaintiff was given a notice of the adverse security assessment and a statement of grounds.

31       The plaintiff applied under s 54(1) of the ASIO Act for a review by the Tribunal of the adverse security assessment. Prior to the hearing by the Tribunal of the plaintiff's application, the ASIO Minister partially revoked the certificate issued under s 38A(3) of the ASIO Act, permitting partial disclosure of information in the statement of grounds not previously disclosed due to the certificate. The plaintiff was provided with a revised unclassified statement of grounds.

32       The plaintiff's hearing before the Tribunal was heavily constrained. This was because, prior to the hearing, the ASIO Minister issued three certificates under ss 39A and 39B of the AAT Act. The first certificate certified that the disclosure, including by way of evidence or submissions, of the information and contents of specified documents, and other specified information, would be contrary to the public interest because it would prejudice the security of Australia within ss 39A(8) and 39B(2)(a) of the AAT Act and, in relation to two of those documents, involve the disclosure of deliberations or decisions of the Cabinet within s 39B(2)(b) of the AAT Act. The second and third certificates certified that the disclosure, including by way of evidence or submissions, of the information and contents of specified documents, and other specified information, would be

contrary to the public interest because it would prejudice the security of Australia within ss 39A(8) and 39B(2)(a) of the AAT Act.

33 Under s 39A(9) of the AAT Act, the Minister did not consent to the plaintiff or its representatives being present when that evidence was adduced or those submissions made. After a four-day hearing, at which the certified information and documents were not disclosed to the plaintiff or its legal representatives, the Tribunal decided to affirm the decision under review pursuant to s 43(1) of the AAT Act. The Tribunal provided "open" reasons to the plaintiff and the Director-General of Security and "closed" reasons only to the Director-General, pursuant to s 43AAA(5) of the AAT Act.

34 The plaintiff brought a proceeding under s 44(1) of the AAT Act in the Federal Court of Australia alleging error of law in the decision of the Tribunal. In this special case, the plaintiff challenges the validity of s 46(2) of the AAT Act which precludes the disclosure by the Federal Court to the plaintiff, or its legal representatives, of the certified matter.

35 The issue that arises in this proceeding is, therefore, as the Commonwealth submits, the "precise issue" that was considered in *SDCV*.

### **The ratio decidendi of a decision**

36 Courts at lower levels of the judicial hierarchy are generally bound by the *rationes decidendi* ("reasons for deciding") of a court at a higher level in the judicial hierarchy. As a general proposition, the *rationes decidendi* are the rules of law treated by the judge or judges as sufficient<sup>41</sup> to support the orders made based on the material facts before the court.<sup>42</sup> Since "in common law judicial reasoning a ratio is rarely spelled out explicitly" by the judge, the task for a later court in identifying the binding rules of law is to interpret what "the judge *must logically* have considered necessary or treated as material".<sup>43</sup> Even in the rare case where a ratio decidendi is positively expressed by a judge, that statement is not conclusive. A later court might determine that it was expressed at the wrong level of generality: either too low or too high. Whether the subsequent restatement of the ratio

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41 Since there can be alternatively expressed grounds for a decision.

42 See Paton, *A Text-book of Jurisprudence* (1946) at 159; Montrose, "Ratio Decidendi and the House of Lords" (1957) 20 *Modern Law Review* 124 at 124-125; Cross and Harris, *Precedent in English Law*, 4th ed (1991) at 72; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 543 [61].

43 Blackshield, "Ratio decidendi", in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 579 at 579 (emphasis in original).

decidendi should be described as the new ratio decidendi or, as McHugh J preferred,<sup>44</sup> the new "rule of the case" is semantic.

37 Since material facts can be expressed at different levels of generality, so too can the rules of law based on those facts:<sup>45</sup>

"[i]t might not have seemed sensible to confine the ratio of *Donoghue v Stevenson* (1932) to dead snails in ginger beer bottles; but it might have been sensible to confine it to deleterious foreign matter, undetectable before consumption, in articles of food or drink. In fact it has been understood much more broadly, as a general foundation for the law of negligence."

In many cases, therefore, it would not merely be a "near-miracle" for judicial discourse to yield only one possible ratio decidendi: it would be "logically impossible".<sup>46</sup> Different rationes decidendi can be identified depending upon the generality at which the relevant facts are identified.<sup>47</sup>

38 A complication arises in the identification of a ratio decidendi of a decision of an appellate court which is composed of multiple judges who give separate judgments. On a narrow view, where a ratio decidendi is treated as the essential reasons that are common to a majority of the appellate judges, expressed with a high degree of particularity, it has sometimes been thought that it is possible for a decision to have no ratio decidendi. But even on that view, a ratio decidendi does not exhaust the binding effect of a decision. For instance, seriously considered obiter dicta of this Court, which by any definition is not part of a ratio decidendi, is binding upon lower courts.<sup>48</sup> Indeed, that very rule of precedent, as enunciated by this Court in obiter dicta, could not be binding on lower courts unless such a

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44 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 542 [59].

45 Blackshield, "Ratio decidendi", in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 579 at 579. See also Montrose, "The Ratio Decidendi of a Case" (1957) 20 *Modern Law Review* 587 at 591; Lücke, "Ratio Decidendi: Adjudicative Rationale and Source of Law" (1989) 1 *Bond Law Review* 36 at 44.

46 Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985) at 124.

47 Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985) at 128.

48 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 150-151 [134].

rule were accepted. Hence, as McHugh J said in *Re Tyler; Ex parte Foley*<sup>49</sup> of decisions which might be thought to have no ratio decidendi in the narrow sense:

"that does not mean that the doctrine of stare decisis has no relevance or that the decisions in those cases have no authority as precedents ... But what is meant by saying that a case, whose ratio decidendi cannot be discerned, is authority for what it decided? It cannot mean that a court bound by that decision is bound only by the precise facts of the case ... the true rule is that a court, bound by a previous decision whose ratio decidendi is not discernible, is bound to apply that decision when the circumstances of the instant case 'are not reasonably distinguishable from those which gave rise to the decision'".

39 There is, however, a broader view of a ratio decidendi that has been applied to multi-member appellate courts. On a broader view, a ratio decidendi can be identified at a high level of generality, even coming close to an expression of the result itself. For instance, even if different members of a majority differ in all aspects of their dispositive reasoning, a ratio decidendi at a high level of generality would involve the formulation of a legal rule that respected the necessary aspects of the reasoning of all the members of the majority. As Goodhart explained, a ratio decidendi can emerge from a decision even if "the rules of law set forth by the different judges may have no relation to each other"; a ratio decidendi is the "principle which can be discovered on proper analysis".<sup>50</sup> The principle of the case "is not necessarily found in either the reasoning of the court or in the proposition of law set forth".<sup>51</sup> Hence, even if three appellate judges gave entirely divergent reasoning for allowing an appeal—judge 1 based the orders on fact A; judge 2 based the orders on fact B; and judge 3 based the orders on fact C—the ratio decidendi will be that the legal conclusion follows when facts A, B, and C all exist.<sup>52</sup>

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49 (1994) 181 CLR 18 at 37, quoting *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446 at 479. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 187 [87]; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 46-47 [133]. See further Oliphant, "A Return to Stare Decisis" (1928) 14 *American Bar Association Journal* 71 at 72-73.

50 Goodhart, "Determining the Ratio Decidendi of a Case" (1930) 40 *Yale Law Journal* 161 at 165.

51 Goodhart, "Determining the Ratio Decidendi of a Case" (1930) 40 *Yale Law Journal* 161 at 168.

52 Goodhart, "Determining the Ratio Decidendi of a Case" (1930) 40 *Yale Law Journal* 161 at 178-179.

40 On this broader view, as Sir Anthony Mason rightly said, the suggestion that a decision can be without a ratio decidendi is wrong: "Every decision has its *ratio*."<sup>53</sup> A ratio decidendi exists even if there is no commonality to the essential reasoning of a majority of the Court sufficient to support its orders at anything other than the highest level of generality. That broader view is now, as Nettle J has said, "orthodox".<sup>54</sup> For instance, even if (which is doubtful) there were no commonality at a low level of generality to the essential reasoning of any four members of this Court sufficient to support the orders made in *Mabo v Queensland [No 2]*<sup>55</sup> or in *Love v The Commonwealth*,<sup>56</sup> the ratio decidendi would exist at a higher level of generality by combining the essential reasons of the members of the majority in each of those decisions.<sup>57</sup>

41 That broader view of the rationes decidendi of multi-member appellate courts respects the long-standing premium placed by common law legal systems upon stability and integrity. For that reason, this Court has required leave to re-open the results of its previous decisions, even if those decisions might have lacked a ratio decidendi in a narrow sense.<sup>58</sup>

### **The ratio decidendi of *SDCV***

42 The ratio decidendi of *SDCV* can be identified only from the reasons of the majority of the Court who supported the orders made in that case. The reasons of the majority comprised a plurality judgment of Kiefel CJ, Keane and Gleeson JJ and a separate judgment of Steward J. The other members of this Court, including myself, were in dissent. Their reasons must be put to one side when determining the ratio decidendi.<sup>59</sup>

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53 Mason, "The Use and Abuse of Precedent" (1988) 4 *Australian Bar Review* 93 at 104.

54 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 105 [239].

55 (1992) 175 CLR 1.

56 (2020) 270 CLR 152.

57 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 15-16; *Love v The Commonwealth* (2020) 270 CLR 152 at 192 [81].

58 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316.

59 *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 267; *The Commonwealth v Yunupingu* (2025) 99 ALJR 519 at 533 [25], 564 [177], 585 [263]-[264]; 421 ALR 604 at 613, 652, 677-678.

*The plurality's reasons*

43 The plurality<sup>60</sup> reasons of Kiefel CJ, Keane and Gleeson JJ relied heavily upon the existence of alternative routes open to SDCV to institute judicial proceedings challenging his adverse security assessment to which s 46(2) did not apply. For instance, SDCV "might have challenged the Tribunal's decision in proceedings for judicial review under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act 1903* (Cth)".<sup>61</sup> By contrast, however, a proceeding for error of law under s 44 of the AAT Act provided SDCV with a "forensic advantage".<sup>62</sup> The forensic advantage identified was not the (vanishingly small) gap between, on the one hand, a proceeding for a material error of law and, on the other hand, a proceeding for judicial review which usually requires jurisdictional error. Rather, the forensic advantage was considered to arise because s 46(1) and (2) of the AAT Act required the documents before the Tribunal to be transmitted to, and made available to be considered by, the Federal Court ("these provisions determined what material might be before the Federal Court"<sup>63</sup>). By contrast, the process of tender in a judicial review proceeding would have meant that "public interest immunity would likely have prevented the use of the certificated matter by the Federal Court".<sup>64</sup> The net effect, therefore, was said to be a lack of "practical injustice" to SDCV due to SDCV's own choices. As the plurality expressed the point:<sup>65</sup>

"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."

44 If "practical impediment" was being used by the plurality as a euphemism for the injustice of a proceeding in which central accusations and evidence might not be seen by an applicant, then I confess that I find this reasoning very difficult to understand. If an accused person charged with a petty crime were to gamble on the choice of a novel court proceeding, which might be thought less likely to result

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60 In the sense of the largest group within a majority but not itself constituting a majority: see *The Oxford English Dictionary*, 2nd ed (1989), vol 11 at 1090, "plurality", sense 4.

61 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 254-255 [13] (footnote omitted).

62 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 255 [13].

63 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 261 [41].

64 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 255 [13].

65 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 255 [14].

in conviction but in which the penalty was amputation of a limb, would the plurality really say that there could be no injustice because the accused chose the proceeding for a "forensic advantage"? And if the answer to that (fortunately) rhetorical question is "no", then why is the result any different if the injustice involves a process with some Kafkaesque elements of secrecy rather than the amputation of a limb?

45 If the reasoning of the plurality were the ratio decidendi of *SDCV*, and if it were generally applicable beyond the specific context of s 46(2) of the AAT Act, then that decision might have been a rare example involving reasoning that is so fundamentally contrary to basic principle that my ethical duty would be one of perpetual dissent.<sup>66</sup> But the plurality's reasoning, at least as a matter of that general principle, was not the ratio decidendi of *SDCV*. The reasoning of the fourth member of the majority, Steward J, was, with respect, both narrower and more principled and depended upon a close assessment of the scheme in which s 46(2) operated.

*Steward J's reasons*

46 In Steward J's assessment of the scheme in which s 46(2) of the AAT Act operated, essential aspects of his Honour's reasoning differed from the reasoning of the plurality. In the very opening of his Honour's reasons, after expressing agreement with the conclusion reached by the plurality, his Honour then said:<sup>67</sup>

"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 [to respond to evidence deployed against an applicant] in every case."

47 From that opening onwards, the reasons of Steward J consistently and repeatedly tied his conclusion that s 46(2) was valid to his consideration of the particular scheme in which s 46(2) operated. Steward J began his reasons by saying that "[t]here 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'".<sup>68</sup> His Honour then explained how s 46(2) fell within those narrow circumstances by a consideration of the scheme of which s 46(2)

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66 *Vunilagi v The Queen* (2023) 279 CLR 259 at 311 [164].

67 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 338 [270].

68 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 337-338 [269], quoting *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156].

formed a part. In the course of that consideration, Steward J reiterated that s 46(2) "even with its adoption of an unfair procedure, is not inimical to an exercise of federal judicial power".<sup>69</sup> His Honour emphasised that if s 46(2) had not preserved "the duty and the capacity of the Court to provide different forms of procedural fairness ... I may well have formed the view that s 46(2) was not a valid law".<sup>70</sup>

48 Consistently with Steward J's focused consideration of the scheme of which s 46(2) formed a part, his Honour's ultimate conclusion was also tailored to the particular context of s 46(2). His Honour recognised that, although "in a given case" an applicant for relief under s 44 of the AAT Act might incur the cost of "a fair opportunity to respond to adverse evidence", overall in "an otherwise beneficial regime" there was no "practical injustice" and that "[i]n this context, that cost does not offend justice."<sup>71</sup>

49 In Steward J's careful assessment of the scheme of which s 46(2) formed a part, his Honour's interpretation differed in three very important respects from that of the plurality. In the first two of those respects, the reasoning of Steward J, which was essential to his Honour's conclusion, was inconsistent with that of the plurality.

50 **First**, his Honour's interpretation differed from the reasons of the plurality concerning the "forensic advantage" that their Honours had identified. Unlike the plurality, Steward J conceived of the operation of s 46(1) as involving the supply of documents to the Federal Court but not obliging the Court "to receive them into evidence or otherwise to consider them":<sup>72</sup> "It is the act of tendering the documents and having them adduced into evidence that places them before the Court".<sup>73</sup>

51 In the present special case, there was lengthy argument about the consequences and effect of this approach of Steward J to s 46(1). A requirement for tender of documents has the consequence that a court might refuse the tender. For instance, in a proceeding under s 44 of the AAT Act, if the Director-General of Security had sought to tender certified documents that had been transmitted to the Federal Court from the Tribunal then, arguably subject to waiver by the applicant, the Court might have refused the tender of those documents on the basis

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69 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 353 [309].

70 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 353 [308].

71 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 356 [313]-[314] (emphasis added).

72 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 344 [286].

73 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 344 [284], citing *Evidence Act 1995* (Cth), s 48.



that their receipt would have created manifest unfairness to the applicant since s 46(2) would have precluded the applicant or their legal representatives from seeing the documents. Independently of other rules of evidence, including those contained in the *Evidence Act 1995* (Cth) and cognate legislation,<sup>74</sup> courts have broad and general express or implied statutory powers (sometimes confusingly described as "inherent"<sup>75</sup>) to protect their own processes,<sup>76</sup> which include the power to exclude evidence based upon extreme unfairness,<sup>77</sup> even short of the gross injustice that could substantially impair the institutional integrity of a court.<sup>78</sup>

52 The power to exclude evidence to protect the processes of a court exists within the same court armoury as the power to grant a stay of proceedings. When speaking of the injustice caused to an accused person by undue delay, Mason CJ observed in *Jago v District Court (NSW)*<sup>79</sup> that "[t]here is no reason to confine the discretionary power of the courts by arbitrarily stipulating that a stay is the only proper remedy for undue delay" and that "it is important to bear in mind that the court may mould its order to meet the exigencies of the particular case".

53 In his reasons in *SDCV*, Steward J referred to a further possibility short of excluding the certified documents entirely. Where a respondent to an error of law proceeding under s 44 sought to tender certified material, "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".<sup>80</sup> At a further hearing of the present case, the Commonwealth submitted that in the event that a respondent rejects that condition, precluding the admission of the documents under a procedure brought in relation to s 44(1) of the AAT Act, it might be open to an applicant to fall back on a judicial review

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74 See, eg, *Evidence Act 1995* (Cth), ss 135, 136. See also *Haddara v The Queen* (2014) 43 VR 53 at 57-58 [12], 59-60 [16], 70 [50].

75 *Minister for Immigration and Multicultural Affairs v MZAPC* (2025) 99 ALJR 486 at 503 [57]; 421 ALR 483 at 503.

76 *Barton v The Queen* (1980) 147 CLR 75 at 96.

77 *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at 415-419 [264]-[272]. See *R v McLean; Ex parte Attorney-General* [1991] 1 Qd R 231 at 239-240, 241, 246; *R v Edelsten* (1990) 21 NSWLR 542 at 554; *Haddara v The Queen* (2014) 43 VR 53 at 57-58 [12], 59-60 [16], 70 [50].

78 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. See *Garlett v Western Australia* (2022) 277 CLR 1 at 94 [257]-[258].

79 (1989) 168 CLR 23 at 31, 32.

80 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 351 [302].

proceeding under s 39B of the *Judiciary Act 1903* (Cth) or s 75(v) of the *Constitution*, which would require the documents to be admitted if relevant unless they were excluded by public interest immunity or another exception. In those circumstances, the documents would be closely scrutinised by the court and there would be no doubt that any proper exclusion for public interest immunity would be proportionate to the legitimate interests that the immunity protects.

54 The same power by which a court could exclude the documents entirely must also permit the admission of the documents on condition. The power to impose such a condition depends upon an interpretation of s 46(2) that treats conduct by the Director-General to allow a plaintiff's legal representatives to view the documents, following a condition upon tender imposed by the court (that the consequence of a tender of documents must not deprive a party of procedural fairness), as not involving the *court* doing anything other than ensuring "that the matter is not disclosed to any person other than a member of the court as constituted for the purposes of the proceeding".

55 **Secondly**, a further respect in which the reasons of Steward J differed from those of the plurality was that his Honour held that "it was possible for the Federal Court to appoint a special advocate who could examine certified material and unredacted reasons and make independent submissions to the Court".<sup>81</sup> His Honour reached that conclusion by recognising that a special advocate would be an "officer of the court", a person to whom disclosure could be made within the terms of s 46(4).<sup>82</sup> By contrast, the plurality held 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".<sup>83</sup>

56 **Thirdly**, a potential inconsistency with the reasons of the plurality arises in so far as Steward J held that so long as a disclosure did not reveal the certified matters, "it would be open to the Court to order that the gist of certified documents be disclosed by the Director-General to an applicant".<sup>84</sup> Although the plurality did not reject this possibility, their Honours diminished it by reasoning, by analogy with criminal cases involving informants, that "the gist of the information will often suffice to identify the informant".<sup>85</sup> That reasoning was not supported by the

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81 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 347 [295].

82 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 348 [296].

83 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 283 [98].

84 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 346 [291].

85 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 266 [54].

authority cited in which the Supreme Court of the United Kingdom considered that gisting in some cases is not possible without undue prejudice.<sup>86</sup>

*The ratio decidendi by combining the reasons of the plurality and Steward J*

57 No ratio decidendi of *SDCV* can be identified which is inconsistent with those matters that were essential to Steward J's reasons, namely that it was the particular operation of the scheme of which s 46(2) formed a part that was beneficial and involved no practical injustice, including the three mechanisms rejected or (in the third instance) diminished by the plurality: (i) a tender requirement; (ii) availability of a special advocate; and (iii) the power to reveal the gist of certified information without revealing the certified content.

58 In the narrow sense of a ratio decidendi—requiring identification of the essential reasoning common to the majority judges at a low level of generality—there was no ratio decidendi in *SDCV*. At least two matters that were essential to the reasons of Steward J were rejected by the plurality. But in the broader sense, at a higher level of generality, the ratio decidendi of *SDCV* is that s 46(2) of the AAT Act, in its particular context, is consistent with Ch III of the *Constitution* because it is not productive of practical injustice.

### **Should the result in *SDCV* be re-opened in this special case?**

59 There are two broad dimensions of consideration when asking whether the reasoning or result of a case should be re-opened in order to determine whether it should be overruled. At the stage of re-opening, those dimensions must be more easily satisfied than when considering whether to overrule the reasoning or result. The two dimensions of consideration, reflected in the factors in *John v Federal Commissioner of Taxation*,<sup>87</sup> are the extent to which the reasoning or result is erroneous and the consequences of overruling the reasoning or result.<sup>88</sup>

60 If the decision in *SDCV* had rested only upon the reasons of the plurality, then there would have been great force to the application to re-open that reasoning.<sup>89</sup> There are grave difficulties with reasoning that treats any court procedure as beneficial, no matter how the litigants are required to be treated by the court, merely because it confers some advantages over other procedures. But the ratio decidendi of *SDCV* does not lie in this reasoning of the plurality. It lies in

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

87 (1989) 166 CLR 417 at 438-439.

88 *Vunilagi v The Queen* (2023) 279 CLR 259 at 310-311 [160]-[161].

89 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554; *Vunilagi v The Queen* (2023) 279 CLR 259 at 311 [162].

the much broader proposition that s 46(2) of the AAT Act is, in its particular context, consistent with Ch III of the *Constitution* because it is not productive of practical injustice.

61 Legislation will not be inconsistent with the requirements of Ch III of the *Constitution* merely because it obliges a court to act unjustly. Invalidity will arise only in the extreme category where the legislation is not reasonably capable of being seen as necessary for a legitimate purpose. In making such assessments, reasonable minds can differ. Indeed, on this issue, my conclusion changed between drafts of my reasons in *SDCV*. If, as a matter of interpretation, I had reached the same conclusion as Steward J in relation to either of the first two aspects of the scheme discussed above, then I would have concluded that s 46(2) was valid because it was not productive of sufficient practical injustice when compared with alternatives. In other words, it involved pursuit of a legitimate purpose by means that were reasonably capable of being seen as necessary.

62 More fundamentally, however, my reasoning in *SDCV* was not informed by the possibility that s 15A of the *Acts Interpretation Act 1901* (Cth), or the common law principle of conforming interpretation,<sup>90</sup> might apply so that the Court should prefer an interpretation of s 46(1) that reads that provision as requiring the tender of certified documents. No submission to that effect had been made in *SDCV*. But an argument to that effect was made in this special case.

63 For these reasons, not only do I consider it strongly arguable that, contrary to my reasons in that case, the result of *SDCV* is correct but I also consider that the result can be justified by the application of principles of proportionality which, by a variety of different labels, have been adopted in numerous areas as a discrimin between constitutional validity and invalidity. In the minority reasons given by Gageler J, Gordon J and me, it was suggested or held that a framework for consideration might involve asking a question such as whether s 46(2) was reasonably necessary to protect a legitimate public interest.<sup>91</sup> In that sense, the decision can be seen to be justified by a principle that has been worked out in a succession of cases.<sup>92</sup> Apart from one significant issue, addressed below, these matters involving justification weigh heavily against re-opening the result of *SDCV*.

64 The Commonwealth pointed to a number of consequential matters that were said to weigh against re-opening the result in *SDCV*. One of those matters was the

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90 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28].

91 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 293-294 [138], 307 [176], 326 [231].

92 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438.

reliance by the Commonwealth Parliament upon the decision in *SDCV* in re-enacting s 46(2) in terms to "materially the same effect" in the *Administrative Review Tribunal Act 2024* (Cth).<sup>93</sup> But that factor has no real weight in circumstances in which this litigation challenging s 46(2) had been brought before the new legislation was introduced into Parliament. Another matter, which was also the concern of the Attorneys-General for the States of Queensland and Western Australia, intervening, was the reliance by the plurality and by State Parliaments upon the decisions in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*<sup>94</sup> and *Condon v Pompano Pty Ltd*.<sup>95</sup> But neither of those decisions required the conclusion that s 46(2) was valid and neither decision established a clear test of validity for provisions closer to the border of invalidity such as s 46(2) of the AAT Act.

65 The one significant issue that weighs heavily in favour of re-opening is the lack of any ratio decidendi in *SDCV* at lower levels of generality. If the same issue were litigated in the Federal Court of Australia, a Federal Court judge would have no binding reasoning to follow concerning a procedure that would minimise injustice. Are certified documents required to be tendered in order to be considered by a court? The plurality reasons held that tender is not required because s 46(1) meant that the documents are already "before the Federal Court".<sup>96</sup> Steward J's reasons held that their tender is required. Could a special advocate be appointed by the Court? The plurality reasons held that one could not. Steward J's reasons held that one could. Is gisting generally available? The plurality doubt that it is but Steward J implicitly recognises the ingenuity of creative lawyers.

66 Ultimately, there is much to be said for re-opening *SDCV* to re-explain a result that has no ratio decidendi in a narrow sense, even if the result of the decision would just be reaffirmed. History reveals the danger of the opposite approach taken in *Evda Nominees Pty Ltd v Victoria*,<sup>97</sup> where six members of this Court refused leave to argue for a result that was contrary to earlier decisions of the Court,<sup>98</sup> even though those earlier decisions may have had no ratio decidendi in the narrow sense, standing instead "as authority for a result, rather than for any strand of reasoning

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93 *Administrative Review Tribunal Act 2024* (Cth), Pt 7, Div 6.

94 (2008) 234 CLR 532.

95 (2013) 252 CLR 38.

96 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 261 [41].

97 (1984) 154 CLR 311 at 316.

98 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177; *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475.

common to a majority of Justices".<sup>99</sup> The six members of this Court said, referring to those cases, that the impugned legislation was indistinguishable from legislation previously upheld and the Court should not "hear further argument urging it to depart from the actual decision reached in those cases".<sup>100</sup> With hindsight, that reasoning might be seen as short-sighted. It was, perhaps, inevitable that decisions lacking the support of any clear principle, and unsupported by any *ratio decidendi* in a narrow sense, would eventually be re-opened,<sup>101</sup> at least "in order to settle ... constitutional doctrine".<sup>102</sup>

67 On the other hand, there is a strong likelihood that any re-opening of *SDCV* for this Court to re-explain the result on a cogent basis could fail to achieve that objective and leave lower courts in a state of even greater uncertainty. The large variety of ways in which both the plaintiff and the Commonwealth conceived of a valid operation of s 46(2) within the scheme in which it existed, and the numerous permutations explored by the different members of this Court over two hearings of this special case, present a real possibility that the reasoning of this Court would splinter even further than it did in *SDCV*. My present view, therefore, is that the development of the principles underlying the result in *SDCV* should, for the time being, be left to lower courts.

68 There are numerous creative possibilities that might be explored in the lower courts to deal with potential injustice to an applicant. Some of those were explored during the hearing of this special case. Just to develop a single example: rather than relying upon the court, of its own motion, to review the validity of the certification of documents,<sup>103</sup> an applicant might arguably obtain court scrutiny of the certified documents by concurrent proceedings under s 39B of the *Judiciary Act* (or s 75(v) of the *Constitution*) and s 44(1) of the *AAT Act* (or its equivalent now in the *Administrative Review Tribunal Act*). A preliminary determination of public interest immunity could be made in the s 39B proceeding, with a s 44 proceeding to be commenced in the event that the public interest immunity challenge were upheld. Further, some potential injustice might be avoided by lower courts carefully disclosing the gist of certified information, including by

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99 *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 438. See also *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188.

100 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316.

101 *Ha v New South Wales* (1997) 189 CLR 465 at 504.

102 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 556.

103 *SDCV v Director-General of Security* (2022) 277 CLR 241 at 333 [251].

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close scrutiny of the generality with which the ASIO Minister has described "the matter".<sup>104</sup>

### Conclusion

69 I agree with the answers proposed by the joint judgment to the questions in this special case.

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**104** See *SDCV v Director-General of Security* (2022) 277 CLR 241 at 314 [193], 333-334 [252]-[255].