HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

SDCV
Appellant

-and-

DIRECTOR-GENERAL OF SECURITY
First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Respondent

SECOND RESPONDENT'S SUBMISSIONS

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The two issues raised by the appeal are: *first*, is s 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) contrary to Ch III of the Constitution on the grounds alleged in the notice of appeal (CAB 113)? *Second*, if so, is s 46(2) wholly invalid?

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The second respondent (**the Commonwealth**) considers the notice under s 78B of the *Judiciary Act 1903* (Cth) issued by the appellant (CAB 116) to be sufficient.

PART IV FACTS

4. The Commonwealth agrees with the summary in the appellant's submissions (**AS**) at [6]-[13]. In addition, it notes that, in affirming the decision of the first respondent (**the Director-General**) to furnish an adverse security assessment (**ASA**) in respect of the appellant pursuant to s 37 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**), the Administrative Appeals Tribunal (**Tribunal**) considered — with the knowledge of the appellant and his representatives — certain evidence and submissions to which neither the appellant nor his legal representatives had access (**certificated material**). The appellant did not challenge the certificates issued by the Attorney-General under ss 39A and 39B of the AAT Act (J [72], CAB 47-48), or those provisions themselves, which together required the Tribunal to adopt that course. The Tribunal gave "open reasons" for affirming the ASA, as well as "closed reasons" referring to the certificated material (pursuant to s 43AAA(5) of the AAT Act).

PART V ARGUMENT

(a) The statutory context

5. A "grave responsibility" of the executive is to protect Australia's national security.[1] To enable the executive to discharge that responsibility, the ASIO Act continues ASIO in existence, and places it under the control of the Director-General (ss 6, 7 and 8(1)).

[1] *A v Hayden* (1984) 156 CLR 532 at 549 (Gibbs CJ), see also 576-578 (Wilson and Dawson JJ), 590 (Brennan J). See also ***Leghaei*** *v Director-General of Security* (2007) 241 ALR 141 at [58]-[59] (the Court), quoting *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [79] (Lord Nicholls of Birkenhead).

ASIO's functions include furnishing "security assessments" to Commonwealth agencies (ss 17(1)(c), 35 and 37(1)).

6. An ASA contains "a recommendation that prescribed administrative action be taken or not be taken in respect of the person, being a recommendation the implementation of which would be prejudicial to the interests of the person" (s 35(1)). "Prescribed administrative action" includes the exercise of the power conferred by s 501(3) of the *Migration Act 1958* (Cth) (**Migration Act**). An ASA must be accompanied by a statement of grounds (s 37(2)). However, that statement of grounds must not contain any matter that the ASIO Minister has certified would be prejudicial to the interests of security if disclosed (ss 38(2)(b) and 38(5)).

7. The subject of an ASA is entitled to seek judicial review of that decision pursuant to s 75(v) of the Constitution, which provides "an entrenched minimum provision of judicial review", or under s 39B of the *Judiciary Act 1903* (Cth).[2] In such a proceeding, the applicant could seek production of the reasoning and evidence underpinning the ASA using the ordinary processes of the Court. In practice, such an application is likely to be met by a claim of public interest immunity, such material having been held to comprise a class of documents the disclosure of which is contrary to the public interest.[3] Any such claim would be resolved by the Court applying the common law (s 130 of the *Evidence Act 1995* (Cth) not applying pre-trial) (J [72], CAB 48).

8. In *addition* to the option of seeking judicial review of an ASA, Parliament has created a procedure whereby a person who is subject to an ASA may seek merits review in the Security Division of the Tribunal (ASIO Act s 54(1)). There being no constitutional requirement that Parliament must permit merits review of administrative decisions, Parliament was free to design the merits review process as it saw fit. Unsurprisingly, it did so in a way that recognises that it will often be in the public interest to preserve the secrecy of the material on which an ASA is based. As a result, Parliament made specific modifications to the normal powers and procedures of the Tribunal for proceedings in

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[2] An example of such a case under s 75(v) is the challenge to the ASA in *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1. That illustrates that s 37(5) of the ASIO Act must be read subject to s 75(v): *Plaintiff S157/2000 v Commonwealth* (2003) 211 CLR 476 at [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). As to such a challenge under s 39B, see ***Sagar*** *v O'Sullivan* (2011) 193 FCR 311.

[3] See, eg, ***Parkin*** *v O'Sullivan* (2009) 260 ALR 503 at [33] (Sundberg J); ***SBEG*** *v Secretary, Department of Immigration and Citizenship* (2012) 291 ALR 281 at [15]-[16] (Besanko J); ***Plaintiff M46****/2013 v Minister for Immigration and Border Protection* (2014) 139 ALD 277 at [31]-[32] (Tracey J).

the Security Division, the most important of which are found in ss 39A and 39B of the AAT Act. The key features of the modified procedure are as follows.

9. *First*, the Director-General, who is a party to the merits review proceeding (s 39A(2)), *must* present to the Tribunal "all relevant information available to the Director-General, whether favourable or unfavourable to the applicant" (s 39A(3)), including information or documents to which public interest immunity might otherwise apply (s 39B(8)). That ensures that the Tribunal can make its findings based on all of the material on which an ASA is based.

10. *Second*, the ASIO Minister may certify that evidence proposed to be adduced or submissions proposed to be made by or on behalf of 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" (s 39A(8); also s 39B(2)(a)). An applicant cannot be present when submissions are made, or evidence is adduced, that are the subject of a certificate issued by the ASIO Minister under ss 39A(8) or 39B(2) (ss 39A(9)(a) and 39B(3)). The same is true for an applicant's legal representative (s 39A(6)), although the ASIO Minister may consent to them being present (s 39A(9)(b)), in which case the legal representative must not disclose any certificated evidence or submission to any other person, including the applicant (s 39A(10)).

11. *Third*, the applicant is permitted to adduce evidence, and to make submissions, after the Director-General has done so (s 39A(13)).

12. *Fourth*, upon conclusion of a review, the Tribunal must record its findings as to the correctness of, or justification for, an ASA (ss 43AAA(2) and 43AAA(3)) and provide copies of its findings to the applicant (ss 43AAA(4)). However, it may direct that the whole or a part of the findings, so far as they relate to a matter that has not already been disclosed to the applicant, is not to be given to the applicant (s 43AAA(5)).

13. The scheme summarised above reflects the balance that Parliament has struck between two important public interests. The first is the public interest in decisions about national security being made on the basis of all relevant information, even if that information is highly sensitive (such that it would clearly attract public interest immunity). The second is the public interest in preventing the pursuit of the first public interest from prejudicing the security or defence of Australia. The balance that Parliament has struck is to require the Director-General to present all relevant information to the Tribunal so that it can be

considered in reviewing an ASA, but then to restrict the circumstances in which some of that information may be disclosed to anyone else (including the applicant for review). That scheme plainly involves a modification of the ordinary requirements of procedural fairness in administrative decision-making. However, that modification is constitutionally unobjectionable,[4] as the appellant correctly concedes (AS [21]). For present purposes, the important point is that, while Parliament could have struck a different balance between the competing public interests, the regime as enacted confers rights that are *additional* to the right to seek judicial review of an ASA.

14. Of central relevance to the present appeal, as part of the above scheme Parliament conferred a right to appeal on a question of law from a decision of the Tribunal to the Federal Court (s 44(1)). In doing so, just as it did in the balance of the scheme, Parliament sought to ensure that the right of appeal did not prejudice the security or defence of Australia, while at the same time ensuring that the right of appeal was a meaningful one.

15. Parliament accommodated those competing public interests by providing that, when an appeal under s 44 is instituted, the Tribunal is required to send to the Federal Court all documents that were before the Tribunal when it made its decision (s 46(1)). That recognises that the appeal would be undermined (perhaps even rendered nugatory) if the Court did not have access to the full reasons of the Tribunal and the evidence that was before it.[5] However, recognising the potential for the right of appeal to defeat the procedures in the Security Division that are designed to prevent the disclosure of information from causing damage to national security, Parliament also provided that, if a certificate issued under specified sections of the AAT Act is in force, the Court shall "do all things necessary to ensure that the matter is not disclosed to any person" (s 46(2)). In that way, subject to s 46(3), Parliament sought to ensure that any material that was required to be withheld from the applicant in the Tribunal would again be withheld in the event that an appeal was instituted under s 44(1) of the AAT Act.

16. All of the provisions summarised above are *additional* to the right of a person who is subject to an ASA to seek judicial review of the ASA. For that reason, if such a person does not consider it to be in his or her interests to invoke the right of appeal conferred by s 44(1) (whether because of s 46(2), or for some other reason), it remains open to the

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4 See, eg, *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ).

5 Cf *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at [37]-[44]; *R (**Haralambous**) v Crown Court at St Albans* [2018] AC 236 at [42] (Lord Mance, for the Court).

person to seek judicial review of the Tribunal's decision instead. For reasons developed below, the Commonwealth submits that such a course of action would ordinarily be ill-advised, because an application for judicial review is likely to fail because public interest immunity will prevent the applicant from establishing reviewable error.[6] But whether or not that is correct, there is no doubt that the entire regime for merits review in the Security Division, and then if necessary an appeal on a question of law under s 44(1), *adds* to the constitutional right of the subject of an ASA to seek judicial review. The conferral of additional rights in that way does not produce practical injustice, simply because more extensive additional rights could have been conferred.

10 **(b) Chapter III and the hearing rule**

(i) Procedural fairness and the essential character of a court

17. The Commonwealth Parliament has ample powers to make laws regulating the processes and procedures of Ch III courts, subject to the requirements of Ch III. One such requirement is that a court created by or under Ch III must maintain the defining and essential characteristics of a "court".[7] In *Assistant Commissioner Condon v* ***Pompano*** *Pty Ltd*,[8] this Court accepted that the requirement to provide procedural fairness is an essential characteristic of a "court" for the purposes of the *Kable* doctrine. It may be accepted that it is likewise an essential feature of a court created by or under Ch III (such as the Federal Court), not least because such courts can exercise only judicial power or
20 power that is incidental to judicial power,[9] and one feature of judicial power is that it is exercised in accordance with the requirements of procedural fairness.[10]

18. While it is an essential feature of a court created by or under Ch III that it provides procedural fairness, it does not follow that procedural fairness has a fixed or invariable

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6 See paragraphs 42 to 43 below.

7 ***Wainohu*** *v State of New South Wales* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J); *South Australia v* ***Totani*** (2010) 242 CLR 1 at [70] (French CJ), [443] (Kiefel J); ***K-Generation*** *Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [89] (French CJ), [253] (Kirby J); ***Forge*** *v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ).

8 (2013) 252 CLR 38 at [67] (French CJ), [156] (Hayne, Crennan, Kiefel and Bell JJ).

9 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 271-272, 274-275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

10 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Pompano* (2013) 252 CLR 38 at [67] (French CJ), [139] (Hayne, Crennan, Kiefel and Bell JJ); ***International Finance Trust*** *Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [55] (French CJ); ***HT*** *v The Queen* (2019) 269 CLR 403 at [17] (Kiefel CJ, Bell and Keane JJ).

content, let alone content that is beyond legislative modification. Of particular relevance here, while one aspect of procedural fairness in an adversarial proceeding is ordinarily the provision of an opportunity to respond to the evidence and submissions relied upon by the opposing party, that is not invariably required. Instead, as explained by the plurality in *Pompano*, the adversarial system:[11]

> … 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*.

10 Similarly, French CJ observed:[12]

> 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.

19. The above passages recognise that it is not inconsistent with the essential character of a court for it to act on evidence or submissions that have been withheld from one or more of the parties, at least where that has occurred in recognition of some competing public
20 interest that outweighs the hearing rule in particular circumstances.[13] So much is illustrated by proceedings involving trade secrets and confidential information,[14] being a context where less weighty public interests than national security have nevertheless been accepted as justifying departure from the general rule that opposing parties will know the case that an opposite party seeks to make and how that party seeks to make it.

20. There are other examples of departures from the general rule. Of particular note, in resolving claims of public interest immunity or legal professional privilege concerning documentary evidence, the documents in question can be inspected by the court but not

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[11] *Pompano* (2013) 252 CLR 38 at [157] (Hayne, Crennan, Kiefel and Bell JJ) (emphasis altered).

[12] *Pompano* (2013) 252 CLR 38 at [68] (French CJ).

[13] See, eg, *HT* (2019) 269 CLR 403 at [43] (Kiefel CJ, Bell and Keane JJ), noting that procedural fairness may "yield … to some extent" to competing interests.

[14] See J [7] (CAB 27-28); ***Gypsy Jokers*** *Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532 at [40] (Gummow, Hayne, Heydon and Kiefel JJ); ***Graham*** *v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [63] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) referring to *Kizon v Palmer* (1997) 72 FCR 409 at 446. On cases concerning trade secrets and patents, see *Portal Software v Bodsworth* [2005] NSWSC 1115 at [41]-[45] (Brereton J).

by the party seeking access to the evidence.[15] Furthermore, if the affidavit evidence supporting such a claim would destroy the subject-matter of the claim, the court may receive that evidence without disclosing it to the party seeking production.[16] It is true that, in many cases, a ruling on a public interest immunity or legal professional privilege claim is incidental to the resolution of the main issue in dispute (with the main dispute then being determined without reference to any documents to which privilege or public interest immunity have been found to apply[17]). But that is not invariably the case. For example, there are proceedings where the only issue is whether a declaration should be made that legal professional privilege or public interest immunity attaches (or not) to particular documents.[18] Even in a case of that kind, the court may inspect the disputed documents in order to rule on that issue, even though one party is unaware of their contents.[19] On the appellant's argument, that would be inconsistent with the essential character of a court, because the court would be disposing of the only issue in dispute on the basis of material that one party had no opportunity to answer.

(ii) Legislative modification of the hearing rule

21. This Court has acknowledged that Parliament can modify or exclude the ordinary rules of procedural fairness – including as they apply to courts – by express words or necessary implication.[20] Chapter III does not "prevent parliaments from making laws for the protection of the public interest" by, for example, modifying the rules of procedural

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[15] See, eg, *Commonwealth v* ***Northern Land Council*** (1993) 176 CLR 604 at 620 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ); ***Alister*** *v The Queen* (1984) 154 CLR 404 at 469-470 (Gibbs CJ, Wilson, Brennan and Dawson JJ); *Gypsy Jokers* (2008) 234 CLR 532 at [24] (Gummow, Hayne, Heydon and Kiefel JJ), [174] (Crennan J), see also [180] (Crennan J) (Gleeson CJ agreeing at [1]); *Pompano* (2013) 252 CLR 38 at [74] (French CJ), [148] (Hayne, Crennan, Kiefel and Bell JJ); *Graham* (2017) 263 CLR 1 at [61] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *HT* (2019) 269 CLR 403 at [33] (Kiefel CJ, Bell and Keane JJ).

[16] See, eg, *Haj-Ismail v Minister for Immigration and Ethnic Affairs (No 2)* (1982) 64 FLR 112 at 124 (Lockhart J); *R v Bebic* (unreported, Court of Criminal Appeal of New South Wales, 27 May 1982); *Parkin* (2009) 260 ALR 503 at [23]-[30] (Sundberg J); ***Jaffarie*** *v Director-General of Security* (2014) 226 FCR 505 at [25]-[27] (Flick and Perram JJ; White J agreeing).

[17] *HT* (2019) 269 CLR 403 at [29] (Kiefel CJ, Bell and Keane JJ), [55] (Nettle and Edelman JJ), [71]-[72] (Gordon J); *Gypsy Jokers* (2008) 234 CLR 532 at [5] (Gleeson CJ), [24] (Gummow, Hayne, Heydon and Kiefel JJ). See also AS [30].

[18] *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357; *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30; *Australian Crime Commission v Stewart* (2012) 87 ATR 31; ***Sankey*** *v Whitlam* (1978) 142 CLR 1.

[19] See, eg, *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [49] (Gleeson CJ, Gaudron and Gummow JJ); *Sankey* (1978) 142 CLR 1 at 110.

[20] In *Pompano* (2013) 252 CLR 38 at [152], the plurality observed that the conclusions of the plurality in *Gypsy Jokers* proceeded from an acceptance of the observation of Crennan J (Gleeson CJ agreeing) in *Gypsy Jokers* (2008) 234 CLR 532 at [182]-[183]. See also *HT* (2019) 269 CLR 403 at [56] (Nettle and Edelman JJ); cf AS [53]-[57].

fairness in proceedings involving national security, commercially sensitive documents or the protection of police informants.[21] Indeed, in ***Graham*** *v Minister for Immigration and Border Protection*,[22] this Court accepted 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".[23] That confirms that there is nothing constitutionally objectionable about Parliament itself identifying the balance to be struck between competing public interests, rather than leaving that balance to be struck by the courts on a case-by-case basis. Such an approach may be particularly appropriate in the context of the protection of information the disclosure of which may prejudice national security, given the acknowledged difficulties that attend courts evaluating national security risks.[24] The appellant's submissions that Parliament cannot do this, and that case-by-case balancing by the court of competing public interests is constitutionally required, cannot be reconciled with *Graham* (cf AS [32], [39], [49]).

22. The appellant submits that the Court should hold that it is an irreducible minimum requirement of procedural fairness that a court must afford a person "a fair opportunity to respond to evidence on which" an "order that finally alters or determines a right or legally protected interest of a person" might be made (AS [26]). He asserts that denial of this opportunity "will always" amount to practical injustice (AS [26]), apparently irrespective of any competing public interest. Those submissions should be rejected.

23. In *Gypsy Jokers*, *K-Generation* and *Pompano*, this Court dismissed challenges to State laws providing for a State Supreme Court to consider material not disclosed to the person against whom an order is to be made on the grounds that they were inconsistent with the essential character of a court, and therefore infringed the *Kable* doctrine.[25] The plurality in *Pompano* were especially critical of the proposition that there is an absolute rule that requires parties to know of all of the material on which the Court is being asked to make

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21 *Pompano* (2013) 252 CLR 38 at [5] (French CJ).

22 (2017) 263 CLR 1.

23 *Graham* (2017) 263 CLR 1 at [35] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Nicholas v The Queen* (1998) 193 CLR 173 at [164] (Gummow J).

24 *Sagar* (2011) 193 FCR 311 at [84]-[85], [89] (Tracey J), citing *Alister* (1984) 154 CLR 404 at 435 (Wilson and Dawson JJ), 455 (Brennan J); *Church of* ***Scientology*** *Inc v Woodward* (1982) 154 CLR 25 at 74 (Brennan J).

25 *Gypsy Jokers* (2008) 234 CLR 532 at [7] (Gleeson CJ), [35]-[36], [44] (Gummow, Hayne, Heydon and Kiefel JJ), [174] (Crennan J); *K-Generation* (2009) 237 CLR 501 at [149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Pompano* (2013) 252 CLR 38 at [116], [118]-[120] (Hayne, Crennan, Kiefel and Bell JJ).

its decision.[26] That was in part because the fact that the "revelation of criminal intelligence could reasonably be expected to have consequences contrary to the public interest was treated as irrelevant to the issue of validity",[27] and in part because it sought to "entrench a particular form of adversarial procedure" whereby the parties must "know of *all* of the material on which the Court is being asked to make its decision" as a defining and essential characteristic of State Supreme Courts.[28] Both criticisms are equally applicable to the appellant's argument in this appeal.

24. It may be accepted that a conclusion that "a State law does not infringe the principles associated with *Kable* does not conclude the question whether a like Commonwealth law for a Ch III court would be valid".[29] However, when assessing the defining and essential characteristics of courts, there is no principled basis to distinguish between State and federal courts with respect to their obligation to act in a way that is procedurally fair when exercising judicial power (contrary to AS [55], [56]). That is for two key reasons.

25. *First*, the *Kable* doctrine is derived from the fact that State courts must meet certain requirements to satisfy the meaning of "court" (as that term is used in ss 71, 73(ii), 77(ii), 79 of the Constitution) in Ch III to fulfil their role as potential repositories of federal jurisdiction and as part of the integrated court system.[30]

26. *Second*, as Gaudron J observed in *Kable*, "there is nothing anywhere in the Constitution to suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by the Parliament".[31] This Court has repeatedly embraced that statement.[32] As such, the standard of procedural fairness to be observed in the exercise of State judicial power cannot be relevantly different from the standard of procedural fairness to be observed in the exercise of Commonwealth judicial power, for otherwise there would be "different grades or

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[26] *Pompano* (2013) 252 CLR 38 at [118]-[120] (Hayne, Crennan, Kiefel and Bell JJ).

[27] *Pompano* (2013) 252 CLR 38 at [118] (Hayne, Crennan, Kiefel and Bell JJ).

[28] *Pompano* (2013) 252 CLR 38 at [118]-[119] (Hayne, Crennan, Kiefel and Bell JJ) (emphasis in original).

[29] AS [51]. See *Pompano* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ). See also *Gypsy Jokers* (2008) 234 CLR 532 at [190] (Crennan J, Gleeson CJ agreeing at [1]); ***Fardon*** *v Attorney-General (Qld)* (2004) 223 CLR 575 at [36] (McHugh J).

[30] See *Wainohu* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J) and the cases cited there.

[31] ***Kable*** *v DPP (NSW)* (1996) 189 CLR 51 at 103 (Gaudron J). See also at 115 (McHugh J).

[32] See, eg, *Wainohu* (2011) 243 CLR 181 at [105] (Gummow, Hayne, Crennan and Bell JJ); *Pompano* (2013) 252 CLR 38 at [123] (Hayne, Crennan, Kiefel and Bell JJ); ***Vella*** *v Commissioner of Police for New South Wales* (2019) 269 CLR 219 at [147] (Gageler J); *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at [20] (Kiefel CJ, Bell, Keane and Steward JJ).

qualities of justice".

27. In light of these two reasons, the plurality's comment in *Pompano* that "the conclusions reached in this matter cannot be directly translated and applied to the exercise of the judicial power of the Commonwealth by a Ch III court" … because "[n]ot everything by way of decision-making denied to a federal judge is denied to a judge of a State"[33] should be read (as the immediate context of the paragraph suggests) as directed to the wider range of functions that may be conferred on State courts as opposed to federal courts, rather than as implying that the "essential characteristics" of such courts with respect to procedural fairness are different. So read, the rejection in *Pompano* of any general prohibition on courts acting on evidence that is withheld from a party points strongly against any inflexible rule with respect to the requirements of "procedural fairness" and Ch III courts of the kind for which the appellant contends.

28. Where Parliament enacts legislation that modifies the requirements of procedural fairness in a court, the question is whether, taken as a whole (and taking account of competing public interests), the court's procedures for resolving the dispute avoid practical injustice.[34]

29. Contrary to that evaluative approach, the appellant invites the Court to ignore the plurality's reasoning in *Pompano*, and to prefer the stricter approach favoured by Gageler J. However, Gageler J's statement in *Pompano* that procedural fairness "requires, at the very least, the adoption of procedures that ensure to a person whose right or legally protected interest may finally be altered or determined by a court order a fair opportunity to respond to evidence on which that order might be based"[35] must be read in context. Reading his Honour's judgment as a whole, it is clear that he did not equate a "fair opportunity to respond to evidence" with an entitlement for a party to be aware of all relevant evidence, because the judgment gives multiple examples of court procedures being modified or adjusted to protect or accommodate competing interests such that knowledge of evidence may be denied.[36] His Honour also acknowledged that "legislative

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[33] *Pompano* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ), citing *Fardon* (2004) 223 CLR 575 at [219] (Callinan and Heydon JJ).

[34] *Pompano* (2013) 252 CLR 38 at [138], [156]-[157], [169] (Hayne, Crennan, Kiefel and Bell JJ). See also *HT* (2019) 269 CLR 403 at [18], [46] (Kiefel CJ, Bell and Keane JJ).

[35] *Pompano* (2013) 252 CLR 38 at [188] (Gageler J); see also [177] (Gageler J).

[36] *Pompano* (2013) 252 CLR 38 at [192] (Gageler J).

choice as to how procedural fairness is provided extends to how procedural fairness is accommodated, in a particular context, to competing interests".[37] As such, Gageler J's reasons do not support the absolute proposition that the appellant advances. Similarly, to the extent that the appellant relies upon statements in *HT*[38] for the same purpose, that reliance should be rejected for the reasons given by the Full Court (J [1], [136]-[143]; CAB 26, 64-65).

30. Furthermore, Gageler J's statement in *Pompano* is distinguishable, because *Pompano* concerned a legislative regime that enabled secret evidence to be *used* to obtain orders from the Court (ie as a sword, not a shield).[39] That informs the meaning of the phrase "evidence on which that order might be based".[40] That phrase was not directed to the situation in which *an administrative decision* affects rights or legally protected interests, and where the issue before the court is *not* whether the court should itself make an order that will alter rights or interests, but whether the person affected by the administrative decision has discharged the burden of proving that that decision involved a reviewable error. In that latter context, unless the court can examine the evidence upon which the administrative decision-maker relied, it will frequently be impossible for the applicant to establish error. To allow a court to have regard to secret evidence in that context raises issues of a quite different kind to those which arose in *Pompano.*

31. The submission that Ch III does not invalidate legislation that requires evidence to be withheld from an applicant for judicial review derives considerable support from both *Gypsy Jokers*[41] and *Graham*.[42] The latter case – which involved the direct application of Ch III rather than the *Kable* doctrine – concerned the validity of s 503A(2)(c) of the Migration Act. That subsection relevantly provided, in respect of certain information[43] that was relevant to the Minister's decision to cancel a visa, that the Minister "must not be required to divulge or communicate the information to *a court*, a tribunal, a parliament or parliamentary committee *or any other body or person*" (emphasis added). This Court

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37 *Pompano* (2013) 252 CLR 38 at [195] (Gageler J).

38 (2019) 269 CLR 403.

39 *Pompano* (2013) 252 CLR 38 at [148] (Hayne, Crennan, Kiefel and Bell JJ).

40 *Pompano* (2013) 252 CLR 38 at [188] (Gageler J); see also [177] (Gageler J).

41 (2008) 234 CLR 532 at [5]-[7] (Gleeson CJ), [33], [36] (Gummow, Hayne, Heydon and Kiefel JJ).

42 (2017) 263 CLR 1.

43 Being information that was communicated to an authorised migration officer by a gazetted agency on condition that it be treated as confidential information (s 503A(1)).

held that s 503A(2)(c) was "invalid to the extent *only* that [it] would apply to prevent the Minister from being required to divulge or communicate information to this Court when exercising jurisdiction under s 75(v) … or to the Federal Court".[44] The majority explained that the "problem with s 503A(2)(c) is *limited* to its application to prevent the Minister from being required to divulge or communicate information to this Court when exercising jurisdiction under s 75(v)"[45] (or to the Federal Court when exercising equivalent jurisdiction). The remaining operation of s 503A(2)(c) – including its operation as an exception to any obligation to disclose information to the *other party* – was not held to be invalid, despite Mr Graham's complaint of the potential for that operation to cause practical injustice (cf AS [61]).[46] Thus, following *Graham*, s 503A operates in such a way that, when a court is determining a challenge to a visa cancellation decision, it may have access to information that would otherwise be covered by s 503A(2), even though such information must continue to be withheld from the applicant for review. That is very similar to the effect of s 46(2) of the AAT Act.

32. Before turning to apply the above principles to s 46 of the AAT Act, two residual aspects of the appellant's submissions should be addressed.

33. *First*, at one point the appellant attempts to make his submission at AS [26] more palatable by contending that a "fair opportunity" to respond to evidence may not require the affected person to be given all the evidence (AS [29]). He submits that a fair opportunity to respond may be provided, consistently with the protection of secret information, "by making orders that distinguish between the affected person, its officers (if it is a corporation), the person's legal representatives and the person's experts" (AS [32]). No doubt in some contexts such distinctions may be appropriate. However, there is a great deal of authority – including in this Court – that recognises that disclosure to legal representatives or others is *not* appropriate in the face of a claim that the disclosure of documents would damage the public interest by prejudicing national security or the protection of cabinet secrecy.[47] It is inappropriate because to adopt such a procedure

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[44] *Graham* (2017) 263 CLR 1 at 81 (answer to question 1) (emphasis added), see also [70] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[45] *Graham* (2017) 263 CLR 1 at [64] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) (emphasis added).

[46] See Mr Graham's written submissions (https://cdn.hcourt.gov.au/assets/cases/m97-2016/Graham_Plf.pdf) at [31.4]; *Graham* (2017) 263 CLR 1 at 6 (B W Walker SC).

[47] See, eg, *Northern Land Council* (1993) 176 CLR 604 at 620 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ); *Alister* (1984) 154 CLR 404 at 469-470; *R v* ***Khazaal*** [2006] NSWSC 1061 at [33]-[39]

involves a court ordering the disclosure of information (albeit on a restricted basis) *before* the court has decided whether a claim for non-disclosure should be upheld. As six Justices said in *Northern Land Council*,[48] "[w]hatever the safeguards", such an approach "represents an encroachment upon the confidentiality claimed for the documents" at a time "before the claim for immunity had been decided by the court". That is why, where inspection is required, "it ought to be carried out by the court" notwithstanding the "heavy burden" this may involve, that being "unavoidable if confidentiality is to be maintained until a claim for immunity is determined".

34. *Second*, where a public interest immunity claim is made, procedural fairness does *not* invariably require a party to be "sufficiently informed about the evidential basis for the claim" (whether directly, or through their legal representatives or special counsel) (cf AS [33]). For example, if an attempt were made by a violent criminal to compel the disclosure of information that (unknown to the criminal) in fact came from an informant in the criminal's inner circle, in some circumstances to disclose the basis of the public interest immunity claim would allow the criminal to deduce the existence, and then the identity, of the informant. In such a case, the criminal would be told nothing about the basis for the claim, because the public interest in protecting the safety of the informant would outweigh the public interest underlying the hearing rule.[49] That is why there is no invariable requirement to provide even the "gist" of the secret information (cf AS [35]).[50]

(c) Application of the principles to s 46(2) of the AAT Act

35. Having regard to the above principles, when s 46(2) is considered as a part of the overall scheme that confers a right (*additional* to that conferred by s 75(v) of the Constitution) to obtain review of ASAs, it should be held to be wholly valid. The scheme does not require the Federal Court to act in a way that is inconsistent with the essential character

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(Whealy J). The cases cited at AS fn 69 do not support the proposition that a party's legal representative should be given access to sensitive material which is led in support of a public interest immunity claim. In fact, they are to the opposite effect: *Jaffarie* (2014) 226 FCR 505 at [27] (Flick and Perram JJ); *Re Timor Sea Oil and Gas Australia Pty Ltd (in liq)* (2020) 389 ALR 545 at [25] (Leeming JA), and see [19].

48 (1993) 176 CLR 604 at 620 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

49 Compare *Attorney-General (NSW) v Lipton* (2012) 224 A Crim R 177 at [2]-[3], [8], [10] (Basten JA; Hoeben JA and McCallum J agreeing).

50 *Leghaei* (2007) 241 ALR 141 at [48]-[54] (the Court); *Pompano* (2013) 252 CLR 38 at [157] (Hayne, Crennan, Kiefel and Bell JJ). See also *Haralambous* [2018] AC 236 at [63] (Lord Mance, for the Court); *Tariq v Home Office* [2012] AC 452 at [25] (Lord Mance).

of a court, and does not cause practical injustice. That is so for the following reasons.

36. *First*, s 46(2) applies only when there is in force a *valid* certificate in accordance with, relevantly, s 39B(2) of the AAT Act. Accordingly, to the extent that an appellant's understanding of the basis for an ASA is incomplete, that will be the consequence of the Minister having validly assessed that further disclosure of the foundation for the ASA would prejudice Australia's security or defence. An appellant is entitled to test that assessment by seeking judicial review of the decision to issue the certificate,[51] including on the grounds that the Minister did not act within the bounds of reasonableness or on a correct understanding of the law.[52] Alternatively, it is open to an appellant to submit to the Tribunal that a certificate is invalid and that, accordingly, ss 39A and 39B are not applicable to the Tribunal's review (J [72], CAB 48), in which case the Tribunal must form a view as to the certificate's validity in order to decide whether it is bound by the certificate.[53] The fact that an appellant can test the validity of a certificate in those ways strongly supports the validity of s 46(2) of the AAT Act.[54]

37. *Second*, and relatedly, while authority indicates that the appellant could not have put the validity of a certificate in issue in the s 44 appeal (having not taken the point before the Tribunal),[55] in circumstances where s 46(2) imposes an obligation on the Federal Court itself which is conditioned on the existence of a valid certificate under s 39B(2), the Court would be entitled to raise the validity of such a certificate for itself, if it had any doubts in that regard, in order to determine its own obligations under s 46(2).[56]

38. *Third*, except for s 46(2), nothing in the AAT Act evinces an intention to modify the procedures of the Federal Court[57] or to direct the manner in which judicial power should

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51 As was recognised in both ***Hussain*** *v Minister for Foreign Affairs* (2008) 169 FCR 241 at [47]-[49] (the Court) and *Traljesic v Attorney-General (Cth)* (2006) 150 FCR 199.

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

53 *SZMTA* (2019) 264 CLR 421 at [18]-[19] (Bell, Gageler and Keane JJ); see also [112] (Nettle and Gordon JJ).

54 See, eg, *Gypsy Jokers* (2008) 234 CLR 532 at [33]; *K-Generation* (2009) 237 CLR 501 at [143]-[145] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

55 *Hussain* (2008) 169 FCR 241 at [35]-[38], [41], [50] (the Court); *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 at [62(9)], [82], [153]. As to the reasons for this, see in addition *SZMTA* (2019) 264 CLR 421 at [116] (Nettle and Gordon JJ); *Vakauta v Kelly* (1989) 167 CLR 568 at 572 (Brennan, Deane and Gaudron JJ), 587-588 (Toohey J); *MH6 v Mental Health Review Board* (2009) 25 VR 382 at [37]-[39], [51]-[53] (Redlich JA and Hargrave AJA).

56 *SZMTA* (2019) 264 CLR 421 at [19] (Bell, Gageler and Keane JJ); *Gypsy Jokers* (2008) 234 CLR 532 at [33] (Gummow, Hayne, Heydon and Kiefel JJ).

57 See *Gypsy Jokers* (2008) 234 CLR 532 at [19] (Gummow, Hayne, Heydon and Kiefel JJ).

be exercised[58] when the Court determines an appeal pursuant to s 44. To the contrary, ss 44 and 46 of the AAT Act assume the Court will approach its task in the usual way.

39. *Fourth*, although appellants under s 44 of the AAT Act will not have access to validly certificated information and documents, they are nevertheless likely to have some understanding of the basis on which an impugned ASA was made (contrary to AS [58]). Such an appellant will have received the ASA, a statement of grounds (containing non-certificated material) and the Tribunal's "open" reasons, and will have participated in the open proceedings before the Tribunal. Such participation may have included cross-examination of witnesses called on behalf of the Director-General, the opportunity to respond to the non-certificated information and documents upon which the Director-General relied, and the opportunity to adduce evidence and make submissions. For those reasons, such an appellant is likely to be aware of at least the "gist" of the ASA.

40. *Finally*, but most importantly, what constitutes a fair process is necessarily influenced by the nature of the decision-making process under review. Section 46(2) of the AAT Act applies only in statutory appeals on a question of law from an administrative tribunal. The function of the Court in such an appeal is akin to a judicial review function. It is to enforce the limits on the lawful exercise of administrative power.[59] That is very different to a scheme such as that in issue in *Pompano*, which allowed an applicant to seek orders from a court that affect a person's rights or interests in reliance upon evidence of which the affected person had no knowledge.[60] Such schemes have of course been upheld when tested against *Kable*, notwithstanding the fact that they involve a greater departure from ordinary judicial processes than occurs by reason of s 46(2). But this appeal does not require the Court to decide whether the Commonwealth Parliament could enact similar schemes consistently with Ch III.

41. The effect of s 46(2) – which cannot properly be divorced from that of s 46(1) – is much more modest. It is to protect the efficacy of the right of appeal conferred by s 44(1) by ensuring that the Court can consider all of the material upon which the Tribunal relied in upholding an ASA, even if public interest immunity would otherwise have prevented the

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58 *Nicholas v The Queen* (1998) 193 CLR 173 at [20], [22], [26] (Brennan CJ).

59 In that respect, the scheme has similarities to the limited form of judicial review (which could occur in part on the basis of information not seen by the applicant) that was upheld in *Gypsy Jokers* (2008) 234 CLR 532 at [4]-[6] (Gleeson CJ), [25], [29]-[31] (Gummow, Hayne, Heydon and Kiefel JJ).

60 *Pompano* (2013) 252 CLR 38 at [148] (Hayne, Crennan, Kiefel and Bell JJ).

Court from relying upon much or all of that material,[61] while at the same time ensuring that the appeal does not set at nought the protections that Parliament put in place in the Security Division to prevent the disclosure of information from damaging national security. The solution adopted in s 46(2) reflects what the United Kingdom Supreme Court has described as "the only sensible conclusion" to the question whether a court in judicial review proceedings can have regard to evidence that was relied upon by the administrative decision-maker, but which was and remains withheld from the affected party.[62] It can, because otherwise the application for judicial review would be either ineffectual, or would require the disclosure of highly classified material "to the very people to whom it is most important that national security information is not disclosed".[63]

42. If s 46(1) had not been enacted, then an appellant under s 44(1) who wished to challenge a decision of the Tribunal to uphold an ASA would have been forced to attempt to obtain the evidence needed to establish error by using the ordinary processes of the Court. However, any invocation of those processes to attempt to obtain material the subject of a certificate under s 39B(2) (and thus to obtain material that attracts the operation of s 46(2)) could be expected to be met by a strong claim of public interest immunity.[64] To say that is not to engage in speculation, for material revealing the reasoning process underlying the making of an ASA has been held to fall into a *class* of documents that it is not in the public interest to disclose because such documents invariably contain sensitive information about ASIO's "knowledge, assessments and methodology".[65] In those circumstances, a claim of public interest immunity over such material that is made in civil proceedings[66] will succeed in all but exceptional circumstances.[67] As Brennan J

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61 That follows because material revealing the reasoning process underlying the making of security assessments constitutes a class of documents the disclosure of which is contrary to the public interest: see *Parkin* (2009) 260 ALR 503 at [33] (Sundberg J); *SBEG* (2012) 291 ALR 281 at [15] (Besanko J); *Plaintiff M46* (2014) 139 ALD 277 at [32] (Tracey J).

62 *Haralambous* [2018] AC 236 at [59] (Lord Mance, for the Court). See also at [48], [51]-[52]; *R v Inland Revenue Commissioners; Ex parte Rossminster Ltd* [1980] AC 952 at 998 (Lord Wilberforce), 1006 (Viscount Dilhorne), 1013 (Lord Diplock).

63 *Parkin* (2009) 260 ALR 503 at [33] (Sundberg J). See also *Alister* (1984) 154 CLR 404 at 454-5 (Brennan J).

64 *Gypsy Jokers* (2008) 234 CLR 532 at [23] (Gummow, Hayne, Heydon, Kiefel JJ).

65 *Parkin* (2009) 260 ALR 503 at [33] (Sundberg J); *SBEG* (2012) 291 ALR 281 at [15]-[16] (Besanko J); *Plaintiff M46* (2014) 139 ALD 277 at [31]-[32] (Tracey J).

66 Cf criminal proceedings, as in *Alister* (1984) 154 CLR 404 at 414 (Gibbs CJ), 439 (Wilson and Dawson JJ) and 453, 456-457 (Brennan J). The relevance of the distinction between civil and criminal proceedings in balancing the competing public interests was also acknowledged in *HT* (2019) 269 CLR 403 at [33] (Kiefel CJ, Bell and Keane JJ).

67 See *Khazaal* [2006] NSWSC 1061 at [31]-[32] (Whealy J); *Leghaei* (2007) 241 ALR 141 at [52] (the Court);

put it in *Church of Scientology Inc v Woodward*, the secrecy of ASIO's work "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".[68]

43. When a public interest immunity claim over material revealing the reasoning process underlying an ASA is upheld, not only is the material the subject of the claim immune from production to the opposing party, but that material also cannot be put into evidence.[69] The effect this will have on judicial proceedings varies depending on the nature of the proceedings, and on which party bears the burden of proof. In proceedings in the nature of judicial review, where the applicant bears the burden of proof, inability to put any significant part of the material upon which an ASA was based into evidence will commonly mean that the claim for judicial review will fail, because without that material the applicant will commonly be unable to prove the errors that are alleged.[70] Section 46(1) overcomes that obstacle – and thereby enhances the ability of the Federal Court to supervise the Tribunal's exercise of jurisdiction – by ensuring that the Court can consider all the material upon which the Tribunal relied. However, in order to ensure that the benefit to an appellant that results from s 46(1) does not damage national security, any further disclosure of the certificated material is prohibited by s 46(2).

44. Consistently with this Court's holding in *Graham*, it was open to the Parliament to decide for itself that s 46(2) reflects the appropriate balance of the competing public interests, rather than to leave that balance to be struck by the Court on a case-by-case basis. In addition to prohibiting disclosure to the appellant, it was likewise open to Parliament to decide not to accept the risk to national security that would accompany the disclosure of certificated material to the appellant's lawyers or to a "special advocate". Even assuming the complete integrity of such lawyers, disclosure to them would increase the risk that

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Parkin (2009) 260 ALR 503 at [31] (Sundberg J).

68 *Scientology* (1982) 154 CLR 25 at 76 (Brennan J); see also 60 (Mason J), noting that public interest immunity "will almost certainly exclude from consideration some of the evidence that is material" to security.

69 *HT* (2019) 269 CLR 403 at [29], [32] (Kiefel CJ, Bell and Keane JJ), [55] (Nettle and Edelman JJ), [71]-[72] (Gordon J); *Gypsy Jokers* (2008) 234 CLR 532 at [5] (Gleeson CJ), [24] (Gummow, Hayne, Heydon and Kiefel JJ); *Sagar* (2011) 193 FCR 311 at [54] (Tracey J).

70 As was recognised in *Scientology* (1982) 154 CLR 25 at 61 (Mason J), which was quoted with approval in *Gypsy Jokers* (2008) 234 CLR 532 at [24] (Gummow, Hayne, Heydon and Kiefel JJ); see also [5] (Gleeson CJ). This in fact occurred in relation to grounds advanced in *BSX15 v Minister for Immigration and Border Protection* (2017) 249 FCR 1 at [21]-[24] (the Court); *Plaintiff M46* (2014) 139 ALD 277 at [37], [39], [65]-[66], [69]-[70], [73]-[74], [86]-[87], [90] (Tracey J); *Sagar* (2011) 193 FCR 311 at [41]-[42], [64], [69] (Tracey J). For a similar conclusion in the United Kingdom, see *Haralambous* [2018] AC 236 at [47], [54]-[57] (Lord Mance, for the Court).

certificated material would be inadvertently disclosed or would otherwise be compromised.[71] Parliament was entitled to conclude that, on balance, those risks justified restricting the use and disclosure of certificated material to the Court alone.

45. In any event, even if the above submissions are rejected, s 46 does not produce practical unfairness. It takes nothing away from the subject of an ASA. Such a person remains free to apply for judicial review of a Tribunal's decision, and if a person takes that course then s 46 has no application, and the application for judicial review will be decided only on material known equally to the Court and the parties. Accordingly, even if the Court considers that there may be cases where s 46 does not improve the position of a person in comparison with the position that would otherwise have existed in a judicial review claim, s 46(2) is nevertheless valid. It does not cause unfairness to the subject of an ASA, because if such a person does not think that s 46(1) will assist them, they can seek judicial review of the Tribunal's decision and then litigate any resulting public interest immunity claim in the normal way.

(d) Consequences of invalidity

46. For the reasons addressed above, s 46 of the AAT Act should be given effect in accordance with its terms, and is wholly valid.

47. If the Court rejects that submission, but takes the view that s 46 would be valid if it permitted the appointment of special counsel "to assist the Court" in determining whether certificated material reveals error in an ASA, it would be open to interpret s 46(4) as permitting such an appointment.[72] That being so, that construction must be adopted if that is necessary to preserve the validity of s 46.[73]

48. The appellant seeks a much more radical reading down or partial disapplication of s 46. He submits that, applying s 15A of the *Acts Interpretation Act 1901* (Cth), the words "do all things necessary" in s 46(2) of the AAT Act must be read as subject to the qualification

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[71] See, eg, *Jackson v Wells* (1985) 5 FCR 296 at 307-8 (Wilcox J); *Khazaal* [2006] NSWSC 1061 at [34]-[39] (Whealy J); *Traljesic v Attorney General (Cth)* (2006) 150 FCR 199 at [22]-[23] (Rares J); *Carbotech-Australia v Yates* [2006] NSWSC 269 at [13] (Campbell J); *R v Collaery (No 11)* [2022] ACTSC 40 at [72]-[73] (Mossop J).

[72] *New South Wales v Public Transport Ticketing Corporation (No 3)* (2011) 81 NSWLR 394 at [10] (Allsop P, Hodgson JA and Sackville AJA agreeing). By contrast, s 46(4) does not extend to allowing disclosure to a lawyer for a party: see *National Archives of Australia v Fernandes* (2014) 233 FCR 461 at [44] (Foster J).

[73] See, eg, *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), quoted in *Wainohu* (2011) 243 CLR 181 at [97] (Gummow, Hayne, Crennan and Bell JJ).

that those things must be consistent with the essential character of a court or the nature of judicial power (AS [62]). Reading that submission together with AS [26], the appellant appears to contend that s 46(2) must be disapplied to the extent necessary to ensure that an appellant under s 44(1) has "a fair opportunity to respond to evidence" on which an ASA was based (despite the fact that the appellant was not entitled to respond to that evidence either at the time the ASA was made, or on merits review before the Tribunal, because in both cases procedural fairness was validly modified to the extent necessary to deny access to that evidence). That submission should be rejected. It would give s 46 an operation radically different to that which Parliament intended.[74] Specifically, it would replace a regime that ensures that all certificated material is provided to the Court irrespective of whether or not that material would attract public interest immunity, but subject to a guarantee that it would not be disclosed to anyone else, with a regime whereby certificated material would be disclosed to the appellant (or, at least, to his or her representatives) in almost every case.[75] That would change the operation of s 46(2) so fundamentally that it is not a result that s 15A can support.[76] In effect, it would reverse Parliament's balancing of the competing public interests, giving determinative weight to procedural fairness, and no weight to the public interest in preventing the disclosure of information from causing prejudice to Australia's security.

49. Section 15A likewise does not permit s 46(2) to be read down or partially disapplied to the extent that a court considers that "fairness" requires disclosure of validly certificated material. Once again, that would radically alter the operation of s 46(2), the only purpose of which is to guarantee the non-disclosure of certain categories of certificated material. Further, s 46(3) provides a positive indication that Parliament did *not* intend to confer a discretion on the Court to disclose certificated material of the kind identified in s 39B(2)(a). That follows because s 46(3) prescribes a process by which a court *may* permit the disclosure of certificated material in some cases, but that provision is inapplicable to certificates issued under s 39B(2)(a), being certificates that identify material the disclosure of which would prejudice the security, defence or international relations of Australia. The express exclusion of certificated material under s 39B(2)(a)

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[74] See *Gypsy Jokers* (2008) 234 CLR 532 at [5] (Gleeson CJ), referring to the *Interpretation Act 1984* (WA) s 7.

[75] That follows because certificated material under s 39B(2)(a) would, by definition, be evidence on which the Tribunal might have relied to uphold an ASA.

[76] See *Victoria v Commonwealth (Industrial Relations Act Case*) (1996) 187 CLR 416 at 502-3 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), and the cases there cited.

is a positive indication that Parliament intended that s 46(2) would apply in its entirety, or not at all, to material of that kind.

50. In light of the above, if the Court finds that s 46(2) is invalid, it should hold that it is wholly invalid. And, if s 46(2) is invalid, then the words "despite subsections 36(2), 36B(2) and 39B(2)" in s 46(1)(a) should also be held to be invalid, because it could not be supposed that, in the absence of the statutory protection in s 46(2), Parliament intended to deny ASIO or the Minister the opportunity to claim public interest immunity to prevent any further use or disclosure of the certificated matter. The practical result would be that Div 33.2 of the *Federal Court Rules 2011* (Cth), which appears to require the Tribunal or a party to lodge certificated matter with the Court, should be read subject to the terms of the AAT Act. In the absence of the duty imposed by s 46(1) to provide certificated material to the Court on an appeal under s 44(1), an appellant who wishes to place such material before the Court would need to invoke the Court's compulsory processes to obtain that material. Whether that material would need to be produced to the appellant would depend on the resolution of any claims of public interest immunity that may be made with respect to it, being claims that would be determined by the Court in the ordinary way.

PART VI ESTIMATED HOURS

51. It is estimated that up to three hours will be required for the presentation of the oral argument of the second respondent.

Dated: 6 May 2022

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **SDCV**
Appellant

-and-

DIRECTOR-GENERAL OF SECURITY
First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Second Respondent

ANNEXURE TO THE SUBMISSIONS OF THE SECOND RESPONDENT

Pursuant to Practice Direction No.1 of 2019, the Second Respondent sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

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No.	Description	Version	Provisions
Constitutional provisions			
1.	*Constitution*	Current	Ch III
Statutory provisions			
2.	*Acts Interpretation Act 1901* (Cth)	Compilation No. 36 (20 December 2018 to date)	s 15A
3.	*Administrative Appeals Tribunal Act 1975* (Cth)	Compilation No. 46 (11 May 2018 to 31 December 2020)	ss 39A, 39B, 44, 43AAA, 46
4.	*Australian Security Intelligence Organisation Act 1979* (Cth)	Compilation No. 61 (13 August 2019 to 6 September 2020)	ss 6, 7, 8, 17, 35, 37, 38, 54
5.	*Evidence Act 1995* (Cth)	Compilation No. 34 (1 September 2021 to date)	s 130
6.	*Interpretation Act 1984* (WA)	Version 06-b0-01 (1 July 2007 to 26 June 2008)	s 7

No.	Description	Version	Provisions
7.	*Migration Act 1958* (Cth)	Compilation No. 129 (24 March 2016 to 15 June 2016)	s 503A
8.	*Migration Act 1958* (Cth)	Compilation No. 140 (12 August 2018 to 12 December 2018)	s 501(3)
Statutory instruments			
9.	*Federal Court Rules 2011* (Cth)	Compilation No. 7 (2 May 2019 to date)	Div 33.2