HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S27/2022
File Title:	SDCV v. Director-General of Security & Anor
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	11 Apr 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

SUBMISSIONS OF THE APPELLANT

PART I — CERTIFICATION

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

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PART II — ISSUES

2 Section 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) requires or authorises the Federal Court of Australia, in determining an appeal under s 44 of the AAT Act, to adopt a procedure that: (a) allows one party to the proceeding and the Court to rely upon certain evidence, being evidence that has been "certified" by a member of the Executive Government; but (b) denies the opposing party any opportunity to respond to that evidence. The Notice of Appeal (**CAB 113**) raises the following three issues about the operation of that provision.

Issue 1: *Does Ch III of the Constitution prohibit the Commonwealth Parliament from enacting a law that requires a "court" to adopt an "unfair" procedure?*

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The Commonwealth Parliament cannot enact a law that requires or authorises a "court" to exercise the judicial power of the Commonwealth "in a manner which is inconsistent with the essential character of a court or with the nature of judicial power".[1] A law that requires a court to adopt an unfair procedure infringes that limitation.

Issue 2: *Is the procedure required by s 46(2) of the AAT Act "unfair"?*

"A procedure is unfair if it has the capacity to result in the court making an order that finally alters or determines a right or legally protected interest of a person without affording that

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[1] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

person a fair opportunity to respond to evidence on which that order might be made".[2] Section 46(2) requires or authorises the Federal Court to adopt such a procedure.

Issue 3: *Is s 46(2) wholly invalid, or should it be "read down", "severed" or "partially disapplied"?*

Section 46(2) is partially invalid. The relevant constitutional limitation on the legislative power of the Commonwealth Parliament is "clear".[3] Section 15A of the *Acts Interpretation Act 1901* (Cth) therefore requires that s 46(2) of the AAT Act be "read down" to comply with that constitutional limit. Or, if that is not possible, it requires any operations of s 46(2) that exceed the limit to be "severed" (or "disapplied"), thus preserving any operations of s 46(2) that do not exceed the limit. Alternatively, s 46(2) is wholly invalid.

10 **PART III — SECTION 78B NOTICES**

3 The Appellant has given notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) to the Attorneys-General of the States and Territories (**CAB 115**).

PART IV — DECISIONS BELOW

4 The "open" reasons of the Administrative Appeals Tribunal (**Tribunal**) are published in *SDCV and Director-General of Security* [2019] AATA 6112 (**CAB 4**). The Tribunal also produced "closed" reasons. Those reasons are unavailable to the Appellant.

5 The decision of the Full Court of the Federal Court is *SDCV v Director-General of Security* [2021] FCAFC 51; (2021) 284 FCR 357 (**CAB 16**).

20 **PART V — FACTS**

6 The facts are set out at length in the judgment of Bromwich and Abraham JJ in the Full Court (see **CAB 38-42 [45]-[65]**). A short summary follows.

7 The Appellant was granted a visa in 2012, which granted him permanent residence in Australia. The Appellant later became the subject of investigations by the Australian Security Intelligence Organisation (**ASIO**). In 2018, the Appellant was assessed by the Director-General of Security to be, directly or indirectly, a risk to "security". The adverse security assessment (**ASA**), which was accompanied by a statement of grounds, recommended that the Appellant's visa be cancelled (**CAB 39 [49]**).

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[2] *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [177] (Gageler J), cited in *HT v The Queen* (2019) 269 CLR 403 at [17] (Kiefel CJ, Bell and Keane JJ), [64] (Gordon J).

[3] *Tajjour v New South Wales* (2014) 254 CLR 508 at [171] (Gageler J).

8 The Minister did so. On the same day that the Appellant was notified of that decision, he was also provided with an unclassified statement of grounds for the ASA. The unclassified statement of grounds had certain parts omitted after the Minister exercised the power in s 38(2)(b) of the *Australian Security Intelligence Organisation Act 1979* (Cth) to certify that he was satisfied that the disclosure to the Appellant of part of the statement of grounds would be prejudicial to the interests of security (**CAB 39 [50]-[51]**).

9 The Appellant sought review of the ASA decision in the Tribunal. The Tribunal was obliged to conduct that review in accordance with s 39A of the AAT Act.[4] Section 39A(3) requires the Director-General to present to the Tribunal all relevant information available to the Director-General, whether favourable or unfavourable to the applicant for review. Under s 39A(8), 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 disclosure would be contrary to the public interest because it would prejudice security or the defence of Australia. If such a certificate is given, the applicant must not be present when the evidence is adduced or the submissions are made.[5]

10 Section 39B applies to proceedings to which s 39A applies.[6] Under s 39B(2)(a), the ASIO Minister may certify that the disclosure of information with respect to a matter stated in the certificate, or the disclosure of the contents of a document, would be contrary to the public interest because it would prejudice security or the defence or international relations of Australia. Section 39B(3)(a) provides that the Tribunal must do all things necessary to ensure that the information or the contents of the document the subject of such a certificate are not disclosed to anyone other than a member of the Tribunal as constituted for the purposes of the proceeding.

11 The ASIO Minister gave certificates pursuant to ss 39A(8) and 39B(2)(a) (**CAB 47 [70]**). The Tribunal affirmed the decision to issue the ASA (**CAB 42 [61]**). The Appellant appealed to the Federal Court pursuant to s 44 of the AAT Act (**CAB 10**).

12 Section 46(1) of the AAT Act provides that when an appeal is instituted in accordance with s 44, the Tribunal shall, despite s 39B(3), cause to be sent to the court all documents that were before the Tribunal in connexion with the proceeding to which the appeal relates and

4 AAT Act, s 39A(1).
5 AAT Act, s 39A(9).
6 AAT Act, s 39B(1).

are relevant to the appeal. Because s 39B(2) certificates were in force in respect of certain documents, s 46(2) was engaged. Section 46(2) relevantly provides:

> If there is in force in respect of any of the documents a certificate in accordance with subsection … 39B(2) of this Act … certifying that the disclosure of matter contained in the document would be contrary to the public interest, the Federal Court of Australia … shall, subject to subsection (3), do all things necessary to ensure that the matter is not disclosed to any person other than a member of the court as constituted for the purposes of the proceeding. …

13 The appeal was heard by a Full Court. The Appellant contended that s 46(2) of the AAT Act was invalid because it contravened Ch III of the Constitution. The Court determined the constitutional question prior to the hearing of the five substantive grounds of appeal (see **CAB 42 [65]**). The Full Court went on to reject each of the substantive grounds. In doing so, it relied upon submissions and evidence to which the Appellant did not have access by reason of s 46(2) (**CAB 77 [180], 82 [197], 88 [219], 88 [221], 94 [237], 94-95 [240], 95 [243]-[244]**).[7] The Full Court dismissed the appeal and also made a declaration that: "Section 46(2) of the [AAT Act] is a valid law of the Commonwealth" (**CAB 97**).

PART VI — ARGUMENT

ISSUE 1: CONSTITUTIONAL PRINCIPLE

14 The "judicial power of the Commonwealth" may only be exercised by a body that is a "court" within the meaning of Ch III of the Constitution.[8] That requirement is not a "mere theoretical construct",[9] but rather a critical component of the separation of judicial power from legislative and executive power. That separation advances at least[10] two objectives: "the guarantee of liberty and, to that end, the independence of Ch III judges".[11]

15 Chapter III is therefore concerned with matters of substance and, accordingly, whether a body meets the description of a "court" for the purposes of Ch III must be approached in that way.[12] If it were otherwise, Ch III would be "a mockery, rather than a reflection, of

7 The Appellant accepts that, in relation to one ground, it did so "for completeness" and to provide an "additional basis" for finding no error in the Tribunal's decision (**CAB 77 [180]**).

8 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

9 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

10 See Stellios, *The Federal Judicature* (2nd ed, 2020) at [3.85]-[3.98].

11 *Wilson* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). See also *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 579-580 (Deane J); *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at [138]-[141] (Gordon J).

12 See *Leeth v Commonwealth* (1992) 174 CLR 455 at 487 (Deane and Toohey JJ). See also *Chu Kheng Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

the doctrine of separation of powers".[13] The particular question of substance is whether the body is a "court" in its "essential character".[14] So much was recognised by Deane and Toohey JJ in *Leeth*, where their Honours said:[15]

> in Ch III's exclusive vesting of the judicial power of the Commonwealth in the "courts" which it designates, there is implicit a requirement that those "courts" exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially.

16 Shortly afterwards, in *Chu Kheng Lim*, Deane J (together with Brennan and Dawson JJ) recognised a reflex of the proposition identified by his Honour and Toohey J in *Leeth*: that the grants of legislative power contained in s 51 of the Constitution do not "extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is
10 inconsistent with the essential character of a court or with the nature of judicial power".[16]

17 A further reflex of the proposition identified by Deane and Toohey JJ in *Leeth* is that the legislative power of the Parliaments of the States and Territories does not extend to the making of a law which purports to confer upon a State or Territory "court" a "power or function which substantially impairs the court's institutional integrity".[17] That principle:[18]

> hinges upon maintenance of the defining characteristics of a "court" … It is to those characteristics that the reference to "institutional integrity" alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.

18 The important point for present purposes is that the limitation identified in *Chu Kheng Lim*
20 and the limitation identified in *Kable* "share a common foundation in constitutional principle".[19] Both limitations are founded on "Ch III's requirement that the judicial power of the Commonwealth be invested only in institutions sufficiently distinct from other arms

[13] *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 607 (Deane J).

[14] *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 (1918) 25 CLR 434 at 442 (Griffith CJ), see also at 451 (Barton J).

[15] (1992) 174 CLR 455 at 487 (emphasis added). See also *Polyukhovich* (1991) 172 CLR 501 at 607 (Deane J), 689 (Toohey J), 704 (Gaudron J). To "act judicially" is to observe the requirements of procedural fairness: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 366-367 (Deane J).

[16] (1992) 176 CLR 1 at 27 (emphasis added), see also at 470 (Mason CJ, Dawson and McHugh JJ), 502 (Gaudron J); *Nicholas v The Queen* (1998) 193 CLR 173 at [13] (Brennan CJ), [73]-[74] (Gaudron J); *Thomas v Mowbray* (2007) 233 CLR 307 at [111] (Gummow and Crennan JJ).

30 [17] *A-G (NT) v Emmerson* (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[18] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ); see also at [41] (Gleeson CJ), [192] (Kirby J).

[19] Compare *Wainohu v New South Wales* (2011) 243 CLR 181 at [105] (Gummow, Hayne, Crennan and Bell JJ).

of government to answer the description of 'courts'".[20] Thus, in order for a body — whether Commonwealth, State or Territory — to answer the constitutional expression "court", it must possess certain essential characteristics.[21] And if a body is a "court", no Parliament — Commonwealth, State or Territory — can legislate so as to deprive it of an essential characteristic.[22] The Constitution thereby ensures the judicial power of the Commonwealth will always be exercised by a court with "institutional integrity",[23] which in turn ensures that there are not "different grades or qualities of justice".[24]

Procedural fairness is an essential characteristic

19 The essential characteristics of courts are "not attributes plucked from a platonic universe of ideal forms".[25] They are used to describe limits, which limits are "rooted in the text and structure of the Constitution informed by the common law, which carries with it historically developed concepts of courts and the judicial function".[26] And those concepts are "deeply rooted in a tradition within which judicial protection of individual liberty against legislative or executive incursion has been a core value".[27] History and the common law may therefore be highly relevant to an analysis of whether a law has the effect of depriving a court of an essential characteristic.[28]

20 Bearing that in mind, it is "neither possible nor profitable" to give some "single all-embracing statement" of the essential characteristics.[29] But it cannot be doubted that

[20] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [140] (Gageler J). See also Bateman, "Procedural Due Process under the Australian Constitution" (2009) 31 *Sydney Law Review* 411 at 433-436.

[21] See *Burns v Corbett* (2018) 265 CLR 304 at [70], [96] (Gageler J). See also *Harris v Caladine* (1991) 172 CLR 84 at 92 (Mason CJ and Deane J).

[22] See *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), quoted in *Burns* (2018) 265 CLR 304 at [54] (Kiefel CJ, Bell and Keane JJ).

[23] See *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [34] (French CJ and Gageler J), [100]-[110] (Hayne, Crennan, Kiefel and Bell JJ); *Magaming v The Queen* (2013) 252 CLR 381 at [40]-[41] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [107]-[108] (Keane J).

[24] *Kable v DPP (NSW)* (1996) 189 CLR 51 at 103 (Gaudron J); see also at 115 (McHugh J), 128 (Gummow J); *Benbrika* (2021) 95 ALJR 166 at [20] (Kiefel CJ, Bell, Keane and Steward JJ).

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

[26] *Pompano* (2013) 252 CLR 38 at [68], see also at [2]-[3] (French CJ); *South Australia v Totani* (2010) 242 CLR 1 at [47], [50]-[51] (French CJ). As to the history of "courts", see Owens, "The Judicature" in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) 643 at 646-651.

[27] *Vella* (2019) 269 CLR 219 at [141] (Gageler J), quoted in *Benbrika* (2021) 95 ALJR 166 at [139] (Gordon J).

[28] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531. But see *Palmer v Ayres* (2017) 259 CLR 478 at [37] (Kiefel CJ, Keane, Nettle and Gordon JJ); cf at [42], [61], [75]-[93] (Gageler J).

[29] *Forge* (2006) 228 CLR 45 at [64] (Gummow, Hayne and Crennan JJ). See also *Pompano* (2013) 252 CLR 38 at [124] (Hayne, Crennan, Kiefel and Bell JJ).

one such characteristic is the observance of "procedural fairness".[30] That arises either[31] directly (because it is inherent in the nature of the institution itself[32]), or indirectly (because it is inherent in the nature of judicial power[33]). Either way, the result is that "[n]o court in Australia can be required by statute to adopt an unfair procedure".[34] That is one way in which Ch III provides for the Constitution's "only general guarantee of due process".[35]

21 It is therefore not possible for the Commonwealth Parliament to legislate to *exclude* the rules of procedural fairness in relation to courts.[36] It may, of course, legislate to that effect in relation to the exercise of a statutory power by a member of the Commonwealth Executive.[37] That it cannot do so in relation to "courts" is one way in which those institutions are marked apart from other decision-making bodies.

10 22 The reason for the distinction is that procedural fairness lies at the "heart of the judicial function".[38] Its identification as an essential characteristic accords with the observation that "a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers".[39] In particular, unfairness

[30] *Wainohu* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J); *Pompano* (2013) 252 CLR 38 at [68] (French CJ), [156] (Hayne, Crennan, Kiefel and Bell JJ), [181]-[188] (Gageler J); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [39(3)] (French CJ, Kiefel and Bell JJ).

20 [31] See *TCL* (2013) 251 CLR 533 at [27] (French CJ and Gageler J); Parker, "Protection of Judicial Process as an Implied Constitutional Principle" (1994) 16 *Adelaide Law Review* 341 at 354-355; Wheeler, "Due Process, Judicial Power and Chapter III in the New High Court" (2004) 32 *Federal Law Review* 205 at 209-211.

[32] *Cameron v Cole* (1944) 68 CLR 571 at 589 (Rich J), cited in *HT* (2019) 269 CLR 403 at [17] (Kiefel CJ, Bell and Keane JJ); *Pompano* (2013) 252 CLR 38 at [177] (Gageler J). See also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [103] (Kirby J).

[33] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [79]-[82] (Gaudron J). See also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Kuczborski v Queensland* (2014) 254 CLR 51 at [226] (Crennan, Kiefel, Gageler and Keane JJ); *Benbrika* (2021) 95 ALJR 166 at [223], [234] (Edelman J).

[34] *Pompano* (2013) 252 CLR 38 at [194] (Gageler J).

[35] *Re Tracey* (1989) 166 CLR 518 at 580 (Deane J), quoted in *Pompano* (2013) 252 CLR 38 at [180] (Gageler J), *Palmer* (2017) 259 CLR 478 at [78] (Gageler J) and *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at [93] (Gordon and Steward JJ). See generally Wheeler, "Due Process" in Saunders and Stone (eds), *The Oxford Handbook of the Australian Constitution* (2018) 928 at 929, 936-940, 942, 949.

[36] Cf *Gypsy Jokers* (2008) 234 CLR 532 at [182] (Crennan J). See also **CAB 66 [143]**.

30 [37] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [97]-[100] (Gummow, Hayne, Crennan and Bell JJ).

[38] *HT* (2019) 269 CLR 403 at [64] (Gordon J), quoting *International Finance Trust Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 (***IFT***) at [54] (French CJ).

[39] *Leeth* (1992) 174 CLR 455 at 470 (Mason CJ, Dawson and McHugh JJ).

in the procedure of a court "saps confidence in the judicial process and undermines the integrity of the court as an institution that exists for the administration of justice".[40]

Minimum requirement of procedural fairness: opportunity to respond to evidence

23 As a general proposition, the requirements of "procedural fairness" are not fixed.[41] The content of the rules of procedural fairness may vary according to the circumstances of the case.[42] That is because they are directed to the avoidance of "practical injustice".[43]

24 But "some care" must be taken with the concept of "practical injustice".[44] That concept has developed in the context of administrative decision-making. What is required to afford procedural fairness in that context is not to be conflated with what is required to afford procedural fairness in a judicial context.[45] In an administrative context, procedural fairness may be excluded altogether. In contrast, in the judicial context, because "procedural fairness" is an essential characteristic of a "court", it can never be excluded.[46]

25 To determine whether a law purports to deprive a court of that essential characteristic, it is necessary to identify the minimum requirements of procedural fairness. The starting point for doing so is to acknowledge that "courts" administer justice in accordance with the "common law system of adversarial trial".[47] As a general proposition, that system requires, at a minimum, that "that the parties be given an opportunity to present their evidence and to challenge the evidence led against them".[48] That is because "it is not possible for a court to operate an adversarial system without the court having the evidence and arguments which each adversary wants to have considered".[49]

40 *Pompano* (2013) 252 CLR 38 at [186] (Gageler J). See also *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 375-376 (Street CJ); *Wilson* (1996) 189 CLR 1 at 22-23 (Gaudron J).

41 *IFT* (2009) 240 CLR 319 at [54] (French CJ); *HT* (2019) 269 CLR 403 at [18] (Kiefel CJ, Bell and Keane JJ), [64] (Gordon J).

42 See *HT* (2019) 269 CLR 403 at [18] (Kiefel CJ, Bell and Keane JJ), [78]-[79] (Gordon J).

43 *Pompano* (2013) 252 CLR 38 at [156]-[157] (Hayne, Crennan, Kiefel and Bell JJ), [188] (Gageler J).

44 Stellios at [9.99].

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

46 Cf *Gypsy Jokers* (2008) 234 CLR 532 at [182] (Crennan J).

47 *Forge* (2006) 228 CLR 45 at [64] (Gummow, Hayne and Crennan JJ). See also *Ebner* (2000) 205 CLR 337 at [3] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

48 *Bass* (1999) 189 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), cited in *HT* (2019) 269 CLR 403 at [17], [46] (Kiefel CJ, Bell and Keane JJ), [64] (Gordon J).

49 *IFT* (2009) 240 CLR 319 at [142] (Heydon J). See also *Pompano* (2013) 252 CLR 38 at [1] (French CJ); *Al Rawi v Security Service* [2012] 1 AC 531 at [89] (Lord Kerr JSC).

26 It is not necessary, in this proceeding, to identify every minimum requirement of procedural fairness. Rather, it is sufficient to state that one of those minimum requirements is as follows: if a court is to make an "order that finally alters or determines a right or legally protected interest of a person", the court must afford to that person "a fair opportunity to respond to evidence on which that order might be made".[50] Denial of that opportunity will always amount to "practical injustice".[51]

27 One justification for that minimum requirement is that "to act only on the version advanced by one adversary is to risk reaching unsound conclusions, and thus to risk both injustice and inefficiency".[52] That is because:[53]

> Experience teaches that commonly one story is good only until another is told. Where a judge hears one side but not the other before deciding, even if the side heard acts in the utmost good faith and makes full disclosure of all that that side sees as relevant, there may be considerations which that side had not entertained and facts which that side did not know which, if brought to the attention of the judge, would cause a difference in the outcome.

28 The justification is especially relevant in the present proceeding, in light of the Full Court's conclusion that without the Federal Court "having the material as provided by s 46(2) the [A]ppellant would likely be in a worse position than he is now" (**CAB 71 [165]**). That conclusion misses the point (and see paragraphs 43 to 44 below). Procedural fairness is concerned with *procedures*, not *outcomes*.[54]

The minimum requirement is not "absolute"

29 It is important to be clear about the scope of the minimum requirement identified above. It does not impose an "absolute"[55] requirement that *the affected person* be given *the evidence* that may be used against them. What it requires is that the person has a "fair opportunity" to respond to the evidence. That "fair opportunity" may be afforded in different ways. Once

[50] *Pompano* (2013) 252 CLR 38 at [188], see also at [177] (Gageler J), cf at [116]-[117] (Hayne, Crennan, Kiefel and Bell JJ). See also *Bass* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *HT* (2019) 269 CLR 403 at [46] (Gordon J).

[51] See *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [60] (Gageler and Gordon JJ); *Pompano* (2013) 252 CLR 38 at [188] (Gageler J); *HT* (2019) 269 CLR 403 at [34] (Kiefel CJ, Bell and Keane JJ).

[52] *IFT* (2009) 240 CLR 319 at [143] (Heydon J).

[53] *IFT* (2009) 240 CLR 319 at [143] (Heydon J), cited in *Pompano* (2013) 252 CLR 38 at [186] (Gageler J). See also *Al Rawi* [2012] 1 AC 531 at [93] (Lord Kerr JSC); *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350 at [50]-[52], [54], [63]-[64] (McLachlan CJ).

[54] *VEAL* (2005) 225 CLR 88 at [16] (the Court). See also *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [59] (Gaudron and Gummow JJ).

[55] Cf *Pompano* (2013) 252 CLR 38 at [111], [119] (Hayne, Crennan, Kiefel and Bell JJ); **CAB 51 [86], 56 [104], 64-65 [136]-[139]**.

that is understood, it is not correct to describe various common law principles and procedures as "exceptions" to the minimum requirement.[56] Rather, those principles and procedures illustrate various ways in which a "fair opportunity to respond" may be afforded.[57]

30 One example is the principle of "public interest immunity". That example played an important role in the reasoning of the Full Court. We discuss it in greater detail at paragraphs 41 to 49 below. The short point is that, if a claim is successful, a court is not permitted to have access to, or rely upon, the evidence that is the subject of the claim.

31 Another example is the "trade secrets cases".[58] Those cases concern "confidentiality orders", which deal with "how confidential material might be produced to an opposing party before trial, irrespective of its subsequent admission or receipt into evidence".[59] As Lord Dyson JSC observed in *Al Rawi*, in a passage cited by Kiefel CJ, Keane and Bell JJ in *HT*:[60]

> It is commonplace to deal with the issue of disclosure by establishing "confidentiality rings" of persons who may see certain confidential material which is withheld from one or more of the parties to the litigation at least in its initial stages. … I am not aware of a case in which a court has approved a trial of such a case proceeding in circumstances where one party was denied access to evidence which was being relied on at the trial by the other party.

32 The Appellant is equally unaware of any such case. In any event, a critical aspect of the principles governing confidentiality orders is that "it is for the court to ensure that each party has, so far as is practicable, access to information on which the court is asked to act".[61] That necessarily entails the court balancing the "competing interests in a fashion, to the extent possible, meets each of them".[62] How that balance is to be struck will necessarily depend on the circumstances of the particular case.[63] The conclusion should be consistent with the notion that the "relevant party should have as full a depth of disclosure as would

[56] Cf *Pompano* (2013) 252 CLR 38 at [117] (Hayne, Crennan, Kiefel and Bell JJ).

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

[58] *Pompano* (2013) 252 CLR 38 at [157] (Hayne, Crennan, Kiefel and Bell JJ); *HT* (2019) 269 CLR 403 at [46] (Kiefel CJ, Bell and Keane JJ). See also *Gypsy Jokers* (2008) 234 CLR 532 at [184]-[185] (Crennan J).

[59] *HT* (2019) 269 CLR 403 at [67] (Gordon J).

[60] [2012] 1 AC 531 at [64], cited in *HT* (2019) 269 CLR 403 at [44]; see also at [58] (Nettle and Edelman JJ).

[61] *HT* (2019) 269 CLR 403 at [78] (Gordon J).

[62] *HT* (2019) 269 CLR 403 at [76] (Gordon J).

[63] *HT* (2019) 269 CLR 403 at [44] (Kiefel CJ, Bell and Keane JJ); see also at [76]-[77] (Gordon J).

be consistent with the adequate protection of the secret".[64] That may be achieved, for example, 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.[65]

33 A third example is that a court may inspect documents for the purposes of resolving a claim for privilege. In that context, the party claiming privilege "must, by admissible direct evidence, set out the facts from which the court can see that the assertion [of privilege] is rightly made".[66] If it were otherwise, "[i]t would … be grossly unfair to the other party: if the only evidence of purpose is to be inferred from the document itself, the party seeking access is deprived of any opportunity to test the asserted purpose, which would defeat rather than promote the intent of enabling claims to be tested and scrutinised".[67] In other words, the inspection procedure takes place in a context where the party opposing the claim is sufficiently informed about the evidential basis for the claim, such that it is not denied a proper opportunity to respond. "The preferable explanation" of the power to inspect documents is thus not that it facilitates proof of the facts necessary to establish the privilege claim, but rather that it enables such a claim "to be scrutinised and tested".[68] The same outcome may be achieved, in the context of a court resolving a public interest immunity claim, by allowing a legal representative of the opposing party to have access to confidential evidence adduced in support of the claim.[69] For those reasons, this third example is, in truth, no different from the "trade secrets cases".

34 A fourth and final example is "cases concerning children".[70] Those cases must be understood within their historical context. The origin of the "ancient"[71] wardship jurisdiction is "the sovereign's feudal obligation as parens patriae to protect the person and property of his subjects, particularly those unable to look after themselves, such as

64 *HT* (2019) 269 CLR 403 at [44] (Kiefel CJ, Bell and Keane JJ). As to balancing in the national security context, see *Leghaei v Director General of Security* [2005] FCA 1576 at [100]-[105] (Madgwick J).

65 See *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 at 39 (Hayne JA).

66 *Hancock v Rinehart* [2016] NSWSC 12 at [27] (Brereton J); see also at [7]. That evidence may be tested by way of cross-examination: see at [28]-[29].

67 See *Rinehart v Rinehart* [2016] NSWCA 58 at [29]-[31] (the Court), approving *Hancock v Rinehart* [2016] NSWSC 12 at [18], [32] (Brereton J).

68 *Hancock v Rinehart* [2016] NSWSC 12 at [31] (Brereton J).

69 See *Re Timor Sea Oil and Gas Australia* (2020) 389 ALR 545 at [29] (Leeming JA); *Jaffarie v Director-General of Security* (2014) 226 FCR 505 at [27] (Flick and Perram JJ).

70 *Pompano* (2013) 252 CLR 38 at [117] (Hayne, Crennan, Kiefel and Bell JJ). See also *Al Rawi* [2012] 1 AC 531 at [63] (Lord Dyson JSC).

71 See *In re K (Infants)* [1965] AC 201 at 240 (Lord Devlin), quoting *In re K (Infants)* [1963] Ch 381 at 387 (Ungoed-Thomas J).

infants".[72] Proceedings in that jurisdiction, and related jurisdictions, are "not disputes inter partes in the ordinary sense of that expression".[73] Rather, "the judge is not sitting purely, or even primarily, as an arbiter but is charged with the paramount duty of protecting the interests of one outside the conflict".[74] Because such proceedings are not adversarial in the ordinary sense, they do not necessarily attract the ordinary incidents of procedural fairness. But, in any event, it is open in such cases for a court to tailor confidentiality orders for the purpose of affording the required "fair opportunity" to respond to the evidence.

35 In short, properly understood, the common law examples all "respect"[75] the minimum requirement. Legislative developments in other jurisdiction provide further illustrations of the same kind. They include giving the "gist"[76] of the evidence to the person, the appointment of "special advocates", [77] or a combination of both.

10

ISSUE 2: UNFAIR PROCEDURE MANDATED BY SECTION 46(2)

36 The circumstance that the Federal Court "has been established by legislation as a court means that any jurisdiction conferred on it is necessarily conditioned by the requirement that it observe procedural fairness in the exercise of that jurisdiction".[78]

37 Section 46(2) authorises the Federal Court to have regard to the certified evidence that was before the Tribunal for the purpose of resolving questions of law on an appeal under s 44 of the AAT Act (see **CAB 32 [23], 35 [37], 70 [160]**). The resolution of such questions has the capacity to result in the Court making an order that finally alters or determines a right or legally protected interest of the appellant But the Court is prevented from affording that

20 person a fair opportunity to respond to the certified evidence. That operation of s 46(2) excludes the minimum requirement of procedural fairness identified above. Unless saved by the operation of s 15A of the Acts Interpretation Act, it is therefore invalid for contravening Ch III of the Constitution.

[72] *Fountain v Alexander* (1982) 150 CLR 615 at 633 (Mason J).

[73] *M v M* (1988) 166 CLR 69 at 76. See further *Reynolds v Reynolds* (1973) 47 ALJR 499 at 501-502 (Mason J).

[74] *In re K (Infants)* [1965] AC 201 at 241 (Lord Devlin).

[75] See *Al Rawi* [2012] 1 AC 531 at [41] (Lord Dyson JSC).

[76] *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 at [6] (Lord Neuberger PSC), quoting *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 at [59] (Lord Phillips).

30 [77] See *Bank Mellat* [2014] AC 700 at [14], [74] (Lord Neuberger PSC); *Canada (Citizenship and Immigration) v Harkat* [2014] 2 SCR 33 at [67]-[73] (McLachlin CJ). See also the national security examples discussed in *Charkaoui* [2007] 1 SCR 350 at [70]-[84] (McLachlin CJ).

[78] See *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 95 ALJR 128 at [47] (Kiefel CJ, Bell, Gageler and Keane JJ). See also *Aala* (2000) 204 CLR 82 at [42] (Gaudron and Gummow JJ).

38 Notably, s 46(2) operates in a "blanket" fashion (**CAB 31 [21]**). It contains no mechanism by which the court might afford an appellant a "fair opportunity to respond" to evidence that might be used against the person. The Parliament did not attempt to satisfy that requirement by adoption of a common law analogue or by some other novel legislative means. That it did not implement such an alternative may be taken into account in assessing whether a court has been denied one of its essential characteristics.[79]

39 In particular, it is not correct to say that by enacting s 46(2), the Parliament "chose a procedure that is analogous to the general law's established curial procedures for hearing and determining cases involving trade secrets, secret processes or formulae, and confidential information" (**CAB 33 [26]**, see also at **35 [36]**). As explained at paragraph 31 above, those procedures depend on a case-by-case analysis of fairness by the court itself, which procedures seek to balance the competing interests of secrecy and fairness. Section 46(2) precludes the Court from undertaking that balancing exercise or otherwise moulding its own procedures having regard to the circumstances of the particular case (**CAB 34 [33]**).

40 Section 46(2) also stands in contrast with the scheme considered in *K-Generation*, which left the court with a "degree of flexibility in the steps to be taken to maintain the confidentiality of criminal intelligence".[80] That scheme permitted, but did not mandate, the reception of evidence and the hearing of argument in private in the absence of the parties and their representatives.[81] Unlike s 46(2), but like the common law, that scheme left open the possibility of the court tailoring an order to ensure "basic procedural fairness" was afforded to the parties.[82]

No comparison with public interest immunity

41 Nor is the validity of s 46(2) saved by drawing some analogy with the principles of public interest immunity. Because s 46(2) permits the Court to have access to the certified material, the Court is placed in a fundamentally different position to the position it would be placed in if a public interest immunity claim were made over that material. If a public interest immunity claim succeeds and documents are therefore not to be produced, "they

[79] See *Wainohu* (2011) 243 CLR 181 at [107]-[108] (Gummow, Hayne, Crennan and Bell JJ); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [14] (Gleeson CJ).

[80] *K-Generation* (2009) 237 CLR 501 at [76] (French CJ).

[81] *K-Generation* (2009) 237 CLR 501 at [147] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), [257] (points 5-6) (Kirby J).

[82] See *HT* (2019) 269 CLR 403 at [52] (Kiefel CJ, Bell and Keane JJ).

are not available to either party and the court may not use them".[83] Thus, "no question of unfairness or inequality" arises.[84]

42 Nonetheless, a critical component of the Full Court's reasoning was that s 46(2) does not operate to cause "practical injustice" because material that is the subject of a certificate would be material in relation to which "it can safely be assumed [that] any claim of public interest immunity would have significant prospects of success" (**CAB 72 [166]**). On that hypothesis, s 46(2) places a person such as the Appellant in a "better" position than he otherwise would be, because its operation allows the Federal Court to have access to material that it would otherwise be denied by a claim of public interest immunity (**CAB 71 [165]**). We make three points about that line of reasoning.

10 43 The *first* point is that the Full Court's reasoning reflects an argument advanced in *Al Rawi*, in that it "proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal material".[85] It is sufficient to refer to Lord Kerr JSC's powerful rejection of that premise:[86]

> This proposition is deceptively attractive — for what … could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge.

44 His Lordship went "further":[87]

> Evidence which has been insulated from challenge may positively mislead. It is precisely
20 because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.

45 The *second* point is that a claim for public interest immunity is not established by mere assertion. The claim "must be articulated with rigour and precision, and supported by evidence demonstrating the currency and sensitivity of the information, so as to constitute

[83] *HT* (2019) 269 CLR 403 at [32] (Kiefel CJ, Bell and Keane JJ); see also at [71]-[72] (Gordon J).
30 [84] *HT* (2019) 269 CLR 403 at [32] (Kiefel CJ, Bell and Keane JJ).
[85] [2012] 1 AC 531 at [93] (Lord Kerr JSC).
[86] *Al Rawi* [2012] 1 AC 531 at [93].
[87] *Al Rawi* [2012] 1 AC 531 at [93].

a compelling case for secrecy".[88] That is not a task to be undertaken lightly. That is so even in the context of claims relating to national security. As Tracey J explained in *Sagar v O'Sullivan*:[89]

> Australian courts have stressed that those whose evidence is relied on to make good a claim that disclosure of information would be contrary to the national interest bear a heavy burden and have insisted that decision-makers must give "personal genuine consideration" to the competing interests which are involved when such a claim is made.

46 Thus, contrary to the approach of the Full Court, it should not be assumed that any public interest immunity claim will necessarily be made or, if it is, that it will necessarily succeed. Having given "personal genuine consideration" to the relevant competing interests, a decision-maker may decide not to provide evidence in support of a claim. And, even if that evidence is provided, the claim may wholly or partly fail. Whether it does so will be a question for the court, depending on the evidence before it.

47 An analogous feature was present in the laws considered in each of *K-Generation*, *Gypsy Jokers* and *Pompano*. In each case, it was for the court to determine, on the evidence before it, whether information had the particular quality that meant that it could not be disclosed to the one of the parties to the proceeding.[90] Section 46(2) does not permit the Federal Court to undertake any such inquiry about the quality of the information provided to it. To the contrary, whether it has the particular quality is determined conclusively by a member of the Commonwealth Executive (ss 39A(8), 39B(2)). The Federal Court, upon receipt of material from the AAT, cannot look behind that determination.

48 The *third* and final point is that, when considering a claim for public interest immunity, the Court must necessarily engage in a balancing exercise. It must weigh the "two conflicting aspects of the public interest, namely whether harm would be done by the production of the documents, and whether the administration of justice would be frustrated or impaired if the documents were withheld, and … decide which of those aspects predominates".[91]

[88] *Victoria v Brazel* (2008) 19 VR 553 at [68] (the Court).

[89] (2011) 193 FCR 311 at [90] (citations omitted). See also *Jaffarie* (2014) 226 FCR 505 at [26] (Flick and Perram JJ).

[90] See *Gypsy Jokers* (2008) 234 CLR 532 at [7] (Gleeson CJ), [33] (Gummow, Hayne, Heydon and Kiefel JJ); *K-Generation* (2009) 237 CLR 501 at [143]-[144] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Pompano* (2013) 252 CLR 38 at [73]-[80] (French CJ), [107]-[110] (Hayne, Crennan, Kiefel and Bell JJ), [201] (Gageler J).

[91] *Alister v The Queen* (1984) 154 CLR 404 at 412 (Gibbs CJ).

49 The law considered in *Pompano* had an analogous feature: in considering whether to declare information to be "criminal intelligence", the Supreme Court was permitted to have regard to whether the considerations of prejudice to criminal investigations, enabling discovery of the existence or identity of an informer or danger to anyone's life or physical safety "outweigh any unfairness to a respondent".[92] The plurality considered that, in many cases, fairness to the respondent was a matter to which the Court would be "bound" to have regard.[93] In contrast, s 46(2) does not allow for any balancing of competing interests.

Prior authority does not foreclose the Appellant's argument

50 There is no existing authority that forecloses the Appellant's argument in this case.[94] The Full Court, in effect, concluded otherwise by reference to *Gypsy Jokers*, *Pompano* and *Graham* (see **CAB 66-68 [144]-[153]**). In light of the Full Court's approach, it is necessary to consider each case in more detail. We first make two overarching observations.

51 *First*, "[c]ases are only authorities for what they decide" and "[i]f a point is not in dispute in a case, the decision lays down no legal rule concerning that issue".[95] As will be seen, there is no case in which the argument now advanced by the Appellant has been considered and rejected by the Court. In any event, two of the cases concerned the consistency of State laws with the *Kable* principle. Notwithstanding the common foundation of that principle and the equivalent limitation on Commonwealth legislative power (see Issue 1 above), those cases do not dictate the outcome of this case. That was accepted by the Respondents before the Full Court (**CAB 66 [144]**), and so much is expressed in the cases themselves (see paragraphs 54-55 and 57 below).[96]

52 *Second*, "the constitutional validity of one law cannot be decided simply by taking what has been said in earlier decisions of the Court about the validity of other laws and assuming, without examination, that what is said in the earlier decisions can be applied to the legislation now under consideration".[97] That caution was made in circumstances where

[92] See (2013) 252 CLR 38 at [162] (Hayne, Crennan, Kiefel and Bell JJ), [202]-[204] (Gageler J).

[93] *Pompano* (2013) 252 CLR 38 at [162] (Hayne, Crennan, Kiefel and Bell JJ), see also at [203] (Gageler J).

[94] If necessary, the Appellant will address the question of leave to re-open those cases in reply.

[95] *Coleman v Power* (2004) 220 CLR 1 at [79] (McHugh J). See also *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at [28] (Kiefel CJ, Bell, Keane and Gordon JJ); *Namoa v The Queen* (2021) 95 ALJR 396 at [17] (Gleeson J).

[96] An alternative explanation for the outcome in those cases may lie in drawing a distinction between the nature of Commonwealth judicial power and the nature of State judicial power, for it has been said that federal judicial power is "not identical with" State judicial power: see *Fardon v A-G (Qld)* (2004) 223 CLR 575 at [219] (Callinan and Heydon JJ). See also *Benbrika* (2021) 95 ALJR 166 at [137] (Gordon J).

[97] *Pompano* (2013) 252 CLR 38 at [137] (Hayne, Crennan, Kiefel and Bell JJ).

statements in earlier cases were relied upon in support of a case for invalidity; but it applies equally where statements in earlier cases are relied upon in support of a case for validity.

53 ***Gypsy Jokers:*** The appellant in *Gypsy Jokers* advanced several arguments in favour of invalidity by reference to the *Kable* principle. One of those arguments was that "the procedure established by s 76(2) [of the *Corruption and Crime Commission Act 2003* (WA)], whereby information identified as confidential by the Commissioner could not be disclosed to an applicant for judicial review, constituted a denial of procedural fairness".[98]

54 Crennan J (with whom Gleeson CJ agreed) rejected the argument.[99] However, her Honour did so on the premise that a Parliament can *exclude* procedural fairness in the judicial context.[100] That premise is wrong for the reasons explained under Issue 1 above. Moreover, and importantly for present purposes, Crennan J expressly left open the question of whether the Commonwealth Parliament could enact a provision analogous to s 76(2).[101]

55 Gummow, Hayne, Heydon and Kiefel JJ did not squarely address[102] the appellant's "procedural fairness" argument; instead, their Honours focused on whether there was a "legislative mandate for dictation to the Supreme Court by the Commissioner of the performance of its review function".[103] It has subsequently been explained that the plurality proceeded on the same premise as Crennan J.[104] As such, the plurality must be taken to have adopted Crennan J's reservation about the validity of an analogous federal law.

56 Further, it can be noted that all judges in the majority considered there was some affinity between s 76(2) and public interest immunity. However, unlike public interest immunity, s 76(2) did not exclude the relevant evidence from the court's consideration. The plurality (and Gleeson CJ) noted that distinction but did not explain its significance.[105] Crennan J did not recognise the distinction at all, stating that the statutory modification of procedural fairness was "indistinguishable" from the modification that can arise from the application

[98] (2008) 234 CLR 532 at [166] (Crennan J).
[99] *Gypsy Jokers* (2008) 234 CLR 532 at [175]-[191].
[100] Stellios at [9.95].
[101] *Gypsy Jokers* (2008) 234 CLR 532 at [186].
[102] See *Gypsy Jokers* (2008) 234 CLR 532 at [10]; cf at [166] (Crennan J). See also *Pompano* (2013) 252 CLR 38 at [153] (Hayne, Crennan, Kiefel and Bell JJ).
[103] See *Gypsy Jokers* (2008) 234 CLR 532 at [36].
[104] *Pompano* (2013) 252 CLR 38 at [152] (Hayne, Crennan, Kiefel and Bell JJ); cf at [190] (Gageler J).
[105] *Gypsy Jokers* (2008) 234 CLR 532 at [5] (Gleeson CJ), [36] (Gummow, Hayne, Heydon and Kiefel JJ).

of public interest immunity.[106] That reasoning must now be doubted in light of *HT*, which demonstrates that the distinction is fundamental and cannot be sidelined, or wholly disregarded, for the purposes of assessing questions of procedural fairness.[107]

57 ***Pompano:*** Unlike *Gypsy Jokers*, all members of the Court in *Pompano* squarely confronted a "procedural fairness" argument grounded in the *Kable* principle. All rejected the argument. A question may arise as to whether the plurality proceeded on the same assumption made by Crennan J in *Gypsy Jokers* — being that procedural fairness could be *excluded* in relation to a court.[108] To the extent they did, the Appellant respectfully submits that that assumption was erroneous for the reasons given above. But, in any event, the plurality's reasoning does not stand in the way of the Appellant's argument in this case. At the very least, that is because their Honours expressly stated that their reasoning and conclusions could not be "directly translated and applied to the exercise of the judicial power of the Commonwealth by a Ch III court".[109]

58 Moreover, the plurality were "not forced to consider whether procedural fairness could be excluded entirely"[110] because the impugned law was held to ensure fairness in two relevant respects. *First*, as noted at paragraph 49 above, the law permitted the Court, in exercising its discretion to declare information to be criminal intelligence, to consider unfairness to a respondent.[111] *Second*, a respondent to an application was required to be given "detailed particulars" of the grounds for making the declaration and the information supporting those grounds, meaning the Commissioner was required to tell the respondent "the whole of the case"; it would only be denied knowledge of *how* the relevant allegations were sought to be proved.[112] Such features are entirely lacking in this legislative scheme.

59 French CJ took a different approach to the plurality. For present purposes, it can be noted that the impugned legislation in *Pompano* provided for the "Criminal Organisation Public Interest Monitor". His Honour's reasoning depended to some degree upon the "limited

[106] *Gypsy Jokers* (2008) 234 CLR 532 at [183] (emphasis added).
[107] *HT* (2019) 269 CLR 403 at [28]-[34] (Kiefel CJ, Bell and Keane JJ), [55] (Nettle and Edelman JJ), [69]-[74] (Gordon J).
[108] See *Pompano* (2013) 252 CLR 38 at [152], although cf [156], [157] and [169].
[109] *Pompano* (2013) 252 CLR 38 at [126].
[110] Stellios at [9.95], [9.100].
[111] *Pompano* (2013) 252 CLR 38 at [162].
[112] *Pompano* (2013) 252 CLR 38 at [102]-[104], [158], [163].

measure of redress" afforded by that feature of the scheme.[113] Gageler J took a different approach again. Although his Honour rejected the *Kable* challenge, his basis for doing so is consistent with, and indeed supports, the Appellant's argument in this case.

60 ***Graham:*** To understand the precedential effect of *Graham* it is important to have careful regard to the arguments advanced in that case.[114] The relevant argument in favour of invalidity, based on the "institutional integrity" of the Federal Court, was focused on s 503A(2)(c) of the Migration Act in so far as it operated to preclude information from being provided to *the court*.[115] It was argued that, in that operation, it had the effect of "striking at the heart of the court's ability to ascertain the facts".[116] In other words, the argument was squarely concerned with whether the provision operated to deprive the Federal Court of its essential characteristic of "independence and impartiality".[117]

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61 Contrary to what was said by the Full Court, that argument is not "very similar" to the argument advanced by the Appellant (cf **CAB 64 [134]**).[118] The Full Court also appeared to implicitly suggest (at **CAB 68 [152]**) that the fact that Gageler J was in the majority in *Graham* means his Honour has departed from the view he expressed in *Pompano*. On the applicant's explanation of *Graham*, no tension exists.

ISSUE 3: SECTION 46(2) IS PARTIALLY INVALID

62 Section 46(2) contravenes Ch III to the extent that it operates to deny an essential characteristic of the Federal Court, namely a particular minimum requirement of procedural fairness. That constitutional limitation is "clear".[119] That being so, s 15A of the

20 Acts Interpretation Act requires s 46(2) to be read as being subject to it.[120] That may be

[113] *Pompano* (2013) 252 CLR 38 at [51]-[54], [77], [87] (points 8 and 9).

[114] See *Ruddick v Commonwealth* [2022] HCA 9 at [75] (Gageler J; Kiefel CJ and Keane J agreeing).

[115] See *Graham* (2017) 263 CLR 1 at [29] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[116] See *Graham* (2017) 263 CLR 1 at 6, see also at 5 (B W Walker SC).

[117] That distinction between a "procedural fairness" argument and an "independence" argument was considered important by the plurality in *Pompano*: see (2013) 252 CLR 38 at [140].

[118] As regards what appears in the report of the oral argument at *Graham* (2017) 263 CLR 1 at 6, which refers to *Pompano* and "practical injustice", that is not in fact an argument that appears in the transcript of the argument made by Mr Walker SC: *Graham v Minister for Immigration and Border Protection* [2017] HCATrans 63. It appears that the reporter has there summarised what appeared in Mr Graham's written submissions: https://cdn.hcourt.gov.au/assets/cases/m97-2016/Graham_Plf.pdf. The point made at [31] of those submissions was that *both* the Court and the plaintiff were denied the relevant material (which self-evidently differs markedly from the argument put here).

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[119] See *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[120] *Industrial Relations Act Case* (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), quoted in *Clubb v Edwards* (2019) 267 CLR 171 at [148] (Gageler J), [340] (Gordon J).

achieved by reading the obligation in s 46(2) to "do all things necessary" as subject to a qualification that those things must be consistent with the essential character of a court or the nature of judicial power.[121] In that regard, it is to be noted that "the word 'necessary' has different shades of meaning".[122]

63 If s 46(2) cannot be read in those ways, its invalid operations must be severed (or disapplied). There is no "positive indication" of legislative intent that s 46(2) is inseverable.[123] Thus, s 46(2) is invalid to the extent that it results in a court making an order that finally alters or determines a right or legally protected interest of a person without affording that person a fair opportunity to respond to evidence on which that order might be made. Alternatively, if it cannot be severed (or disapplied) in that way, it must be held wholly invalid.

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PART VII — ORDERS SOUGHT

64 The Appellant seeks the following orders:

1. The appeal is allowed.
2. It is declared that s 46(2) of the AAT Act is invalid to the extent that it:
   a. precludes the Court from providing a party a fair opportunity to respond to evidence on which an opposing party relies; or alternatively
   b. requires or authorises the Court to act in a manner which is inconsistent with the essential character of a court or with the nature of judicial power,

   (or alternatively, that s 46(2) of the AAT Act is wholly invalid).
3. Paragraphs 1 to 3 of the Order of the Full Court of Federal Court, dated 9 April 2021, are set aside, and the matter is remitted to the Federal Court for determination of the appeal from the Tribunal consistently with order 2 above.
4. The respondents pay the costs of the appellant.

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PART VIII — ESTIMATE OF TIME

65 It is estimated that up to 3 hours will be required for the Appellant's oral argument.

Dated: 8 April 2022

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[121] See *SDCV v Director-General of Security* [2022] HCATrans 20 at lines 168-172 (Gageler J).
[122] See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [39] (Gleeson CJ).
[123] See *Clubb* (2019) 267 CLR 171 at [148]-[153] (Gageler J), [337]-[348] (Gordon J).

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 APPELLANT

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

No.	Description	Version	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*	Current	Ch III
	Statutory provisions		
2.	*Administrative Appeals Tribunal 1975* (Cth)	Compilation No 46 (11 May 2018 to 31 December 2020)	ss 39A, 39B, 46
3.	*Migration Act 1958* (Cth)	Compilation No 129 (24 March 2016 to 15 June 2016)	ss 501, 503A, 503B
4.	*Corruption and Crime Commission Act 2003* (WA)	Reprint 1 (5 January 2004 to 6 July 2006)	s 76
5.	*Criminal Organisation Act 2009* (Qld)	Reprint 1B (6 December 2011 to 4 April 2013)	ss 9, 10, 66, 70, 76, 78
6.	*Liquor Licensing Act 1997* (SA)	Historical version (1 February 2007 to 31 May 2007)	s 28A