



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN:

SDCV

First Plaintiff

AND:

DIRECTOR-GENERAL OF SECURITY

First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH

Second Respondent

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OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Issue 1: Constitutional principle

- 1 The Commonwealth Parliament cannot require or authorise a “court” in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the “essential character” of a court or with the nature of judicial power: **AS [14]-[18]**.
 - *Leeth* (1992) 174 CLR 455 at 487 (Deane and Toohey JJ) (**JBA v 6, Tab 29**);
 - 10 • *Polyukhovich* (1991) 172 CLR 501 at 607 (Deane J), 689 (Toohey J), 704 (Gaudron J) (**JBA v 7, Tab 33**);
 - *Chu Kheng Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ) (**JBA v 3, Tab 13**).
 - *Forge* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ) (**JBA v 4, Tab 19**).

- 2 Procedural fairness is an essential characteristic of a “court” and is inherent in the nature of judicial power. The requirement to observe procedural fairness therefore cannot be excluded by legislation (in contrast to the position in relation to administrative decision-makers): **AS [19]-[22]; Reply [2]-[3]**.
 - 20 • *TCL* (2013) 251 CLR 533 at [26]-[27] (French CJ and Gageler J) (**JBA v 7, Tab 35**);
 - *Applicant VEAL* (2005) 225 CLR 88 at [24] (the Court) (**JBA v 3, Tab 10**);
 - *Aala* (2000) 204 CLR 82 at [39]-[42] (Gummow and Gaudron JJ).

- 3 In the judicial context, a minimum requirement of procedural fairness is that, when a court is making an order that may finally alter or determine a person’s right or legally protected interest, that person must be afforded a fair opportunity to respond to evidence upon which the order might be based: **AS [23]-[28]**.
 - *HT* (2019) 269 CLR 403 at [17] (Kiefel CJ, Bell and Keane JJ), [64] (Gordon J) (**JBA v 5, Tab 23**).
 - 30 • *Pompano* (2013) 252 CLR 38 at [177], [184], [188], [209] (Gageler J) (**JBA v 3, Tab 11**);
 - *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at [142]-[143] (Heydon J) (**JBA v 5, Tab 24**).

- 4 A “fair opportunity to respond” does not require that all of the evidence be provided to the person whose right or interest may be affected. That is one way in which the minimum requirement may be satisfied. But the common law and other statutory schemes illustrate

how the minimum requirement may be satisfied by the adoption of other safeguard measures: **AS [29]; Reply [11]**.

5 None of the examples cited by the Respondents and the Interveners is inconsistent with the Appellant’s submissions regarding the minimum requirement.

6 **Public interest immunity:** There is no analogy with public interest immunity. Nor can it be assumed that s 46(2) places the Appellant in a better position than would otherwise be the case, because it cannot be assumed that a claim of public interest immunity would be made over the certified material, or that such a claim would succeed: **AS [41]-[49]**.

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- *HT* (2019) 269 CLR 403 at [32], [34] (Kiefel CJ, Bell and Keane JJ), [71]-[72] (Gordon J) (**JBA v 5, Tab 23**);
 - *Al Rawi* [2012] 1 AC 531 at [91], [93] (Lord Kerr JSC) (**JBA v 9, Tab 38**);
 - *Sagar* (2011) 193 FCR 311 at [89]-[90] (Tracey J) (**JBA v 10, Tab 51**).

7 **“Trade secrets cases”:** No trade secrets case supports the proposition that evidence can be withheld from a party and their representatives: **AS [31]-[32], [39]; Reply [6]**.

- *Al Rawi* [2012] 1 AC 531 at [64] (Lord Dyson JSC);
- *HT* (2019) 269 CLR 403 at [44] (Kiefel CJ, Bell and Keane JJ), [76]-[77] (Gordon J).

8 **Legal professional privilege:** Inspection of documents over which privilege is claimed takes place in a context where evidence must be adduced to establish the claim and that evidence can be tested.

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- *Hancock v Rinehart* [2016] NSWSC 12 at [7], [27]-[30], [32], [34] (Brereton J) (**JBA v 9, Tab 42**);
 - *Public Transport Ticketing Corporation (No 3)* (2011) 81 NSWLR 394 at [10], [12], [19], [36]-[39] (**JBA v 10, Tab 53**).

9 **Children and other protective jurisdiction cases:** Such cases are not adversarial in the usual sense. They therefore do not attract the requirements of procedural fairness that attach to an adversarial trial.

Issue 2: Section 46(2) of the AAT Act contravenes the minimum requirement

10 Section 46(2) authorises the Federal Court to have regard to certified evidence for the purpose of resolving questions of law on an appeal under s 44. The resolution of such questions can result in the Court making an order that finally alters or determines a right or
30 legally protected interest without affording to an appellant a fair opportunity to test and respond to evidence upon which the order might be made. The unyielding nature of s 46 lacks any protective features that would prevent that unfairness.

11 The Appellant’s argument is not foreclosed by authority: **AS [50]-[61]; Reply [3]**.

- *Migration Act 1958* (Cth), s 503A, 503B (**JBA v 2, Tab 7**);
- *Graham* (2017) 263 CLR 1 at [14], [18], [29], [70] (**JBA v 5, Tab 20**);
- Mr Graham’s written submissions in *Graham* at [15.2], [31.4] (**JBA v 11, Tab 57**);
- *Gypsy Jokers* (2008) 234 CLR 532 at [182]-[183] (Crennan J) (**JBA v 5, Tab 21**);
- *K-Generation* (2009) 237 CLR 501 at [96]-[97] (French CJ), [139], [143], [146]-[147] (plurality) (**JBA v 5, Tab 21**);
- *Pompano* (2013) 252 CLR 38 at [103]-[104], [123], [125], [126], [152], [156]-[157], [162]-[163] (plurality) (**JBA, vol 3, tab 11**).

10 12 The fact that the right to seek merits review of a security assessment, and the right to appeal from the Tribunal to the Federal Court on a question of law, are “additional” to the right to seek judicial review does not mean that s 46(2) is consistent with Ch III: **Reply [12]**.

- *Oakey Coal Action Alliance* (2021) 95 ALJR 128 at [47] (Kiefel CJ, Bell, Gageler and Keane JJ) (**JBA v 9, Tab 47**).

13 An appellant is unlikely to be aware of the gist of any evidence to which s 46(2) applies: **Reply [14]**.

14 That the validity of a certificate may be challenged does not mean that s 46(2) does not contravene the minimum requirement: **Reply [13]**.

Issue 3: Section 46(2) can be read down or severed (or “partially disapplied”)

20 15 The obligation in s 46(2) to “do all things necessary” is to be read as subject to the qualification that those things must be consistent with the essential character of a court or the nature of judicial power. That reading may permit the certified material to be disclosed to an appellant’s legal representatives and the appointment of a special counsel to represent an appellant’s interests: **AS [62]; RS [47]**.

- *Residual Assco* (2000) 202 CLR 629 at [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (**JBA vol 7, Tab 34**).

16 Alternatively, the invalid operations of s 46(2) can be severed (or “partially disapplied”) so that s 46(2) does not prohibit disclosure of certified material in accordance with the minimum requirement: **AS [63]**.

30 • *Clubb v Edwards* (2019) 267 CLR 171 at [141], [148] (Gageler J), [340]-[342] (Gordon J), [422]-[433] (Edelman J), (**JBA vol 7, Tab 34**).

Dated: 7 June 2022



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