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**
Appellant

and

Director-General of Security
10 First Respondent

Attorney-General of the Commonwealth
Second Respondent

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

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Part I: Form of Submissions

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

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Part II: Basis of Intervention

2. The Attorney General for New South Wales (**NSW Attorney**) intervenes in these proceedings pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the respondents.

Part III: Argument

3. This appeal concerns the constitutionality of s 46(2) of the Administrative Appeals Tribunal Act 1975 (Cth) (**AAT Act**). The issue is whether Chapter III of the Constitution of Australia permits the national Parliament to exercise its legislative power to invest jurisdiction in the Federal Court of Australia to determine an appeal from the Security Division of the Administrative Appeals Tribunal (**Tribunal**) in which a document cannot be disclosed to any person other than a member of that Court. The disclosure of the document is certificated by the Minister responsible for the Australian Security Intelligence Organisation Act 1979 (Cth) under s 39B(2)(a) of the AAT Act as contrary to the public interest because it would prejudice the security or the defence or international relations of Australia.

4. When an appeal is instituted in the Federal Court of Australia in accordance with s 44, s 46(1)(a) of the AAT Act requires that the Tribunal cause to be sent to the Federal Court all documents that were before the Tribunal in connexion with the proceeding to which the appeal relates and which are "relevant to the appeal". Section 46(2) requires that when there is in force a certificate issued under, relevantly, s 39B(2)(a), the Court must "do all things necessary to ensure that the matter is not disclosed to any person other than a member of the court as constituted for the purposes of the proceeding."

5. In relation to this appeal, the NSW Attorney makes the following submissions:

   i. *First,* procedural fairness is properly understood as functional. The constitutional requirements of procedural fairness in any given case are to be determined by analysis of the statutory context underlying the function that has been conferred by Parliament. The wider variety of functions capable of being conferred by State parliaments upon State courts carries with it a *prima facie* wider latitude as to the requirements of procedural fairness across the spectrum of those functions.

   ii. *Second,* the present context, being one of the national security, is one in which action by Parliament and the executive government to define the requirements of procedural fairness is particularly necessary. The question of whether the proceeding involves the national security may be determined by scrutiny of the certification under s 39B(2)(a) of the AAT Act.

Procedural fairness and the general rule

6. An essential characteristic of a court is that its proceedings must be procedurally fair: Assistant Commissioner Condon v Pompano Pty Ltd (2013) 252 CLR 38 (**Pompano**). However, "[t]he rules of procedural fairness do not have immutably fixed content". Rather, what is fair in a particular context is "essentially practical": Pompano at [156], quoting Gleeson CJ in Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1 (**Lam**) at [37]. Procedural fairness must be accorded to both parties: Pompano at [157].

10 7. Accordingly, "[p]rocedural 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": Pompano at [68] per French CJ. "Whether the obligation to accord procedural fairness is satisfied will always depend on all the circumstances": Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police (2008) 234 CLR 532 (**Gypsy Jokers**) at [182] per Crennan J. How procedural fairness is to be achieved is a matter of "legislative choice" considered in its context, which "extends to how procedural fairness is accommodated, in a particular context, to competing interests": Pompano at [195] per Gageler J. Elsewhere it has been held that "certain
20 procedural protections might be constitutionally mandated in one context but not in another": R v Lyons [1987] 2 SCR 309 at 361 per La Forest J.

8. The "general rule" of the "adversarial system" stated in Pompano, at [157], is that "opposing parties will know what case an opposite party seeks to make and how that party seeks to make it." The "general rule" was reiterated in HT v The Queen (2019) 269 CLR 403 (**HT**) at [17] by Kiefel CJ, Bell and Keane JJ. But "the general rule is not absolute". In some circumstances, "novel procedures" may depart from the general rule, and in those circumstances, the question "is whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural
30 fairness and avoid 'practical injustice'": Pompano at [157].

9. In Pompano at [156], Hayne, Crennan, Kiefel and Bell JJ indicated how this analysis was to take place. Their Honours noted that "[t]o observe that procedural fairness is an essential attribute of a court's procedures is descriptively accurate but application of the observation requires close analysis of all aspects of those procedures and the legislation and rules governing them."

10. This passage of Pompano has been repeatedly deployed by courts engaged in judicial or appellate review. Considering this passage and the observations of Gleeson CJ in Lam in the context of a judicial review, in Shrestha v Migration Review Tribunal (2015) 229 FCR 301 at [49] Mansfield, Tracey and Mortimer JJ understood it to require the Court

> to assess whether a process meets the necessary standards of fairness by examining the particular circumstances in which that process occurs, including (but not limited to) the statutory setting, the characteristics of the parties involved, what is at stake for them, the nature of the decision to be made, and steps already taken in the process.

11. Considering the same passage in its application to a court, in Roberts v Harkness (2018) 57 VR 334 at [49]-[51], Maxwell P, Beach and Niall JJA understood the requirements of procedural fairness to depend on the circumstances of the case. The Court identified "[o]ne of the key considerations in determining the content of fairness in a particular case [as] the statutory framework governing the decision-making process", including its "main purposes."

12. The adaptation of the statement of constitutional principle in Pompano in an administrative law context suggests that, to a considerable degree, the constitutional and administrative law analyses of the requirements of procedural fairness converge. The difference between the two may be that, while the outcome of an administrative law analysis will serve to determine what procedure is owed in a particular statutory context, it may well be that the outcome of the analysis fails to satisfy the underlying general rule. However, the application of that general rule should itself be understood to be informed by an analysis of the nature of the proceedings and the circumstances under which the norms of procedural fairness depart from that general rule. In other words, analysis of the statute in context supplies the rationale, if any, for the departure from the general rule of constitutional law. The decision of this Court in Pompano should be understood as requiring such an analysis to take place in every circumstance in which there is a departure from the general rule.

13. One aspect of the context in which the requirements of procedural fairness fall to be determined is the subject-matter with which a statute deals: Kioa v West (1985) 159 CLR 550 at 584-585 per Mason J, citing R v Commonwealth Conciliation and

Arbitration Commission; Ex parte Angliss Group (1969) 122 CLR 546 at 552-553 and National Companies and Securities Commission v News Corporation Ltd (1984) 156 CLR 296 at 311, 319-321. The subject-matter of a statute works to explain why Parliament has adopted a particular framework restricting the requirements of procedural fairness in the public interest: compare Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88 at [23]-[25] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

14. That submission is also in conformity with the observation by this Court in Graham v Minister for Immigration and Border Protection (2017) 263 CLR 1 (**Graham**) at [35] 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." That observation, made of the rule in former s 503A(2)(c) of the Migration Act 1958 (Cth) forbidding a Minister from being required to divulge or communicate certain confidential information to, relevantly, a court, may be taken to indicate that the entitlement of a person to have the benefit of information (either directly or because it has been put before a court) is itself a matter into which Parliament may have input: see **RS [21]**.

15. The reservations expressed by the Court in Graham were in respect of the effect s 503A(2)(c) of the Migration Act had upon the supervisory jurisdiction of the Court as entrenched by s 75(v) of the Constitution. Relevant in this regard is that s 44 of the AAT Act invests original jurisdiction in federal courts by virtue of a grant by Parliament in exercise of s 77(i) by reference to s 76(ii) of the Constitution: Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577 at 581; TNT Skypak International (Australia) Pty Ltd v Federal Commissioner of Taxation (1988) 82 ALR 175 at 181 per Gummow J. As Gummow J there explained, under s 76(ii) "…it is for the Parliament to create the rights or obligations in question and in so doing to determine the content of matters arising under that law … The statute itself thus would govern the content of that matter."

16. Parliament's creation of rights and obligations and the determination of the content of a matter for the purposes of s 76(ii), and the definition of the court's jurisdiction over that matter pursuant to s 77(i), will necessarily require a determination of the statutory setting, the characteristics of the parties, what is at stake for them, the nature of the decision to be made, and steps already taken in the process. As has

been submitted, these are matters relevant to the question of what procedural fairness is owed in a given statutory context.

17. The above submissions apply *a fortiori* when a State parliament invests a function in a State court. The statutory contexts in which jurisdiction may be conferred upon a State court are potentially as diverse and novel as the scope of State legislative power allows, and "[n]ovelty does not, without more, supply the answer" to the question of constitutionality: Pompano at [138]. A State parliament may confer non-judicial power upon a State court: Pompano at [22] per French CJ. It is not the case that a
10 "particular form of adversarial procedure" is entrenched "as a constitutionally required and defining characteristic of the State Supreme Courts": at [119]. It is wrong to say "that in deciding any dispute a State Supreme Court must always follow an adversarial procedure by which parties (personally or by their representatives) know of all of the material on which the Court is being asked to make its decision": at [118]. In "applying the notions of repugnancy and incompatibility it may well be necessary to accommodate the accepted and constitutionally uncontroversial performance by the State courts of functions which go beyond those that can constitute an exercise of the judicial power of the Commonwealth": at [126].

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18. What follows from the above is that the breadth of State legislative power, even and perhaps especially considered in the light of "history and the common law" (**AS [19]**), may well allow the States considerably more latitude than is allowed to the Commonwealth. Whether or not that difference is principled, it is clearly functional: **RS [27]**. The difference follows from the breadth of State legislative power and the broader range of functions that may be performed by a State court, and the correspondingly broader range of arrangements as to procedural fairness that will inevitably attend the performance of those functions. The present arrangements fall to be determined by reference to the requirements of procedural fairness that
30 attach to the function performed by federal courts in the specific context in an appeal under s 44 of the AAT Act to which s 46(2) applies.

The national security context of ss 39B(2), 44 and 46(2) of the AAT Act

19. The procedure contemplated by ss 44 and 46 of the AAT Act involves a conferral of additional original jurisdiction by Parliament upon the federal courts in respect of matters which otherwise arise under federal law. The interests of the parties in this

matter must be understood by reference to s 39B(2)(a), which involves certification by the responsible Minister that the disclosure of information or documents would be contrary to the public interest "because it would prejudice security or the defence or international relations of Australia".

20. In a system of representative and responsible government "the constitutional responsibility for the protection of national security lies with the elected government", which is itself "ultimately accountable to Parliament": R (Miranda) v Secretary of State for the Home Department [2016] 1 WLR 1505 at [79] per Lord Dyson MR. It is understood that "[n]ational security undoubtedly forms a category of public interest of special importance": Alister v The Queen (1984) 154 CLR 404 (**Alister**) at 436 per Wilson and Dawson JJ.

21. It is a "matter of common knowledge that the necessity of a single authority for the defence of Australia was one of the urgent, perhaps the most urgent, of all the needs for the establishment of the Commonwealth": Joseph v Colonial Treasurer (NSW) (1918) 25 CLR 32 at 46 per Isaacs, Powers and Rich JJ. Under s 51(vi) of the Constitution Parliament is clothed "with full authority to take all such steps as are reasonably necessary to ensure the national safety under all circumstances" (Marcus Clark & Co Ltd v Commonwealth (1952) 87 CLR 177 at 234 per Williams J), and possesses all implied powers necessary to preserve its "internal security": Victoria v The Commonwealth and Hayden (the AAP Case) (1975) 134 CLR 338 at 397 per Mason J.

22. It is well recognised that the national security requires that material be kept secret. Clearly, "[r]easons of security may make it impossible to disclose the grounds on which the executive proposes to act": Salemi v MacKellar (No 2) (1977) 137 CLR 396 at 421 per Gibbs J. The need for secrecy gives rise to the "old but important question … that a party is entitled to know the case he has to meet yet the furtherance of the national interest may require that certain elements in the case should be withheld from him": Amer v Minister for Immigration, Local Government and Ethnic Affairs (FCA, Lockhart J, 19 December 1989, unreported) at 1, quoted in Leghaei v Director-General of Security (2007) 241 ALR 141 (**Leghaei**) at [48] per Tamberlin, Stone and Jacobson JJ. It "will be a rare case where the public interest in national security will yield to the public interest in the administration of justice":

Leghaei at [52], citing Church of Scientology Inc v Woodward (1982) 154 CLR 25 (**Woodward**) at 76 per Brennan J.

23. In The Zamora [1916] 2 AC 77, the Privy Council declared (at 107):

> Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public.

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24. This was once "unquestionable law": Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd (1922) 31 CLR 421 at 442 per Isaacs J. The days in which that reasoning operated uncritically are "long gone": Jaffarie v Director General of Security (2014) 226 FCR 505 (**Jaffarie**) at [44] per Flick and Perram JJ. The executive government may not assert its way into immunity from judicial scrutiny merely by invoking the national security: Jaffarie at [44], discussing Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 420. Nor will courts asked to recognise a privilege or immunity on the basis of national security "defer without question to the judgment of the executive as to what the national security requires": A v Hayden (1984) 156 CLR 532 (**Hayden**) at 549 per Gibbs CJ.

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The significance of certification

25. As Gummow J observed in South Australia v Totani (2010) 242 CLR 1 at [136], many matters within the meaning of s 76(ii) of the Constitution involve as a "significant element … some anterior decision or determination not made in the exercise of the federal judicial power." What is ultimately of concern is "the practical operation" of an enactment and the "significance" of the anterior decision or determination: Ibid at [138].

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26. The practical operation of an appeal under s 44 subject to s 46(2) is that it involves information that if disclosed would prejudice the security or the defence or international relations of Australia. Certification under s 39B(2) of the AAT Act engages the prohibition in s 46(2): **RS [36]**. The significance of the certification is that it establishes the judgment of the responsible Minister that the security, defence or international relations of Australia would be prejudiced were the information or documents in question to be disclosed. Although such a judgment is "not

conclusive", "very considerable weight must attach to the view of what national security requires as is expressed by the responsible Minister": Alister at 435 per Wilson and Dawson JJ.

27. As the court below found at **CAB 47 J [72]**, and as the Commonwealth argues at **RS [36]-[37]**, certification under s 39B(2) may be challenged or otherwise subjected to scrutiny, including in the ways contemplated in Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421 at [18]-[19] per Bell, Gageler and Keane JJ. Such submissions respond to the kinds of concerns about accountability
10 reflected in decisions such as Hayden.

28. Hayden does not require that the judiciary should refuse as a matter of principle to act on an anterior determination by an officer of the executive government that something is or is not necessary in the national security and where it is not the case that a "party contends otherwise": cf Hayden at 564 per Murphy J. Certification is presumptively regular (Hussain v Minister for Foreign Affairs (2008) 169 FCR 241 at [37]; **CAB 48 J [72]**) and, moreover, is capable of being a "thing in fact" upon which a superior court such as the Federal Court may make a judicial order of independent force and from which legal consequences could follow: New South
20 Wales v Kable (2013) 252 CLR 118 at [52]-[53] per Gageler J; see also [57]-[59], and [22] of the joint judgment.

29. In circumstances where the validity of the certificate has not been questioned, "the premise for the s 44 appeal is that the information to which s 46(2) applies is material that was properly certificated because the validity of the certificate was never put in issue in the proceedings": **CAB 47 J [71]**. Consistently with the submission above at **NSW [12]**, in considering the content of procedural fairness it is appropriate to consider the significance of action by Parliament in circumstances where questions of justiciability and the efficacy of court proceedings are likely to be affected by the
30 presence of sensitive national security information.

Closed procedures in the United Kingdom

30. Care must be taken before deriving conclusions about the content of procedural fairness from "different constitutional settings": Gypsy Jokers at [191] per Crennan J. However, the appellant has placed reliance at **AS [31]** and **[43]** on

Al Rawi v Security Service [2012] 1 AC 531 (**Al Rawi**) and its citation in HT. That reliance is misplaced.

31. As was explained by Hayne, Crennan, Kiefel and Bell JJ in Pompano at [170], in Al Rawi the question was whether the court could in exercise of its inherent powers "allow a procedure whereby one party and the court may rely upon material that cannot be disclosed to the other party or its legal representatives." That is, as their Honours went on to observe, "a proposition which does not bear at all upon the radically different question of the ambit of legislative power".

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32. As has been submitted at **NSW [12]**, when legislative power is exercised it can embody the basis upon which it is justified for there to be a departure from the general rule of procedural fairness. This is so in the United Kingdom, where it is significant that "Parliament has expressed a clear democratic judgment" in circumstances where "the use of an open procedure … cannot be resorted to without risk to the integrity of the system which in the national interest must be preserved": Tariq v Home Office [2012] 1 AC 452 (**Tariq**) at [77] per Lord Hope. Pursuant to statute, and subject to the European Convention on Human Rights and Fundamental Freedoms, "national security considerations may justify a closed material procedure, closed evidence *(even without use of a special advocate)* and, furthermore … a blanket decision leaving the precise basis of determination unclear": Tariq at [36] per Lord Mance (emphasis added).

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33. In Lord Kerr's dissent in Tariq, in which he developed his objection in Al Rawi, he considered that "[w]here insistence upon a fully fair hearing for a claimant will deny the defendant (or where it is not a party, the state) the protection of its vital interests that the law should recognise, then a truly fair proceeding is not possible and the trial should be halted in limine": Tariq at [110]. The effect of these observations is twofold; *first,* in the national security context, the question of fairness is one that falls to be determined by reference to the paramount interest of the state in the security of the body politic, and, *second*, that if a matter cannot be made truly fair in this regard then it will be effectively non-justiciable. This can "[t]otally … oust the court's supervisory jurisdiction": see R v Secretary of State for the Home Department; Ex parte Ruddock [1987] 2 All ER 518 at 527, discussed in Jaffarie at [44].

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34. Al Rawi has since been distinguished on the basis that "the only sensible conclusion is that judicial review can and must accommodate a closed material procedure, where that is the procedure which Parliament has authorised in the lower court or tribunal whose decision is under review": R (Haralambous) v Crown Court at St Albans [2018] AC 236 (**Haralambous**) at [59] per Lord Mance (in which Lord Kerr, as well as Lord Hughes, Lady Black and Lord Lloyd-Jones, agreed): see also **RS [41]**. Lord Mance added that such a procedure "would have been permissible on a purely common law judicial review": at [59]. He did not consider it "axiomatic in this context that even the gist of the relevant information must be supplied to any
10 person": at [65].

35. The difference between Al Rawi on the one hand and Haralambous and Tariq on the other reflects that the requirements of procedural fairness are, *first*, practical in the sense that the procedural fairness owed under statute is driven by an analysis of the consequences for justiciability of maintaining an inflexible rule, *second*, contextual in that the national security imperatives at issue are relevant considerations, and, *third*, constitutional in that the requirements are informed by whether the author of the special procedure is Parliament or the court.

20 ***Closed procedures in the United States of America***

36. The practical, contextual and constitutional considerations attending the requirements of procedural fairness in the national security context is reinforced by the fact that similar conclusions have been reached in the United States. The Due Process Clause is relevant in at least one specific respect; as with the requirement of procedural fairness, procedural due process "is flexible and calls for such procedural protections as the particular situation demands": Morrissey v Brewer (1972) 408 US 471 at 481.

37. U.S. federal courts have "consistently upheld *in camera* and *ex parte* reviews when national security information is concerned": In Re National Security Agency
30 Telecommunications Records Litigation (2011) 671 F 3d 881 (**NSA**) at 902, see the examples given at 903. The Due Process Clause is not violated by a statutory "certification process crafted for specific national security reasons and subject to judicial review": NSA at 903. The rationale is similar to that expressed in the United Kingdom, namely that a statutory *in camera* and *ex parte* procedure "serves to expand judicial review to an area that may have been previously non-justiciable": at 904 (citation omitted). Such procedures are only constitutional in a "narrow category

of cases" that have been "statutorily recognised": Fares v Smith (2018) 901 F 3d 315 at 319.

Conclusion

38. To summarise: the content of procedural fairness is something into which Parliament may generally have input. When that input concerns the subject-matter of national security, it can require the national Parliament—in pursuit of the imperatives that were the cause of its foundation—to depart from the general rule. Pompano should be understood to allow these imperatives to be treated as significant for the purpose of constitutional analysis. The significance of parliamentary input has been recognised in other jurisdictions where the elected branches also have responsibility for the protection of the national security. Parliament's departure from the general rule in this particular context adds, in practical terms, to the role that information that would very likely otherwise be the subject of a claim for public interest immunity can play in the judicial review whilst ensuring that fairness is also done to the body politic as a whole. The unfairness to the appellant falls to be considered in the light of this underlying reality: **RS [45]**.

39. The NSW Attorney otherwise adopts the submissions of the second respondent.

Part IV: Estimated Length of Oral Argument

40. It is estimated that oral argument on behalf of the NSW Attorney will take 15 minutes.

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ANNEXURE

Constitutional provisions, statutes and statutory instruments referred to in the intervener's submissions

	Provision	Version
1.	Constitution of Australia, ss 51(vi), 75, 76, 77	Version currently in force
2.	Administrative Appeals Tribunal Act 1975 (Cth), ss 39B, 44, 46	Compilation No 46 (11 May 2018 to 31 December 2020)
3.	Australian Security Intelligence Organisation Act 1979 (Cth)	Compilation No 61 (13 August 2019 to 6 September 2020)
4.	Migration Act 1958 (Cth), s 503A	Compilation No 129 (24 March 2016 to 12 June 2016)