HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

MJZP
Plaintiff

and

DIRECTOR-GENERAL OF SECURITY
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

POST-HEARING SUBMISSIONS OF THE PLAINTIFF

PART I — CERTIFICATION

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

PART II — ARGUMENT

A INTRODUCTION

2 The Plaintiff's case is, and has always been, that s 46(2) is invalid because it authorises an "unjustified" departure from the "general rule" of procedural fairness and therefore infringes Ch III: see **PS [43]-[51]**. That case depends, and has always depended, on s 46(2) being construed so that it authorises the Federal Court to determine an appeal under s 44 based upon certified material that has not been disclosed to an appellant, without the need for the material to be separately tendered and admitted into evidence (the **Plaintiff's construction**): see **PS [29]-[33]**. On that construction, the Court has no power to refuse to admit certified material that the Tribunal has sent to the Court under s 46(1)(a).

3 The Commonwealth contends for an alternative construction, the finer details of which were first identified at the hearing and have now crystallised in its post-hearing submissions (the **Commonwealth's construction**): see **Cth PHS [2]-[11]**.[1] A critical component of that construction is that s 46(1)(a) operates only as a "mechanical" provision that does nothing more than require the Tribunal to transmit documents to the Court: see **Cth PHS [7]**. As a result, all material (including certified material) must be separately tendered and admitted into evidence before the Court can use that material to determine the appeal.

4 Upon close analysis, the true effect of the Commonwealth's construction — specifically, the third to fifth "steps" it has identified — is that s 46(2) does not require or authorise the Court to admit certified material into evidence if it would be "unfair" to an appellant to do so. *If* s 46(2) were construed in that way, the departure from the general rule that it authorises would be "justified". Section 46(2) therefore would not infringe Ch III: see **Part C**. As such, if the Commonwealth's construction is "reasonably open" (and the Plaintiff's construction would lead to invalidity), the Court must therefore adopt it in accordance with what we have labelled the "**validity principle**": see **Part B**.

[1] As to the written position, see **Cth [57]** (first step), **[59]** (second step; a variation of third and fourth steps). As to the matters raised for the first time at the hearing, *MJZP* [2024] HCATrans 92-93, lines 2749-2767, 2858-2865, 4080-4129, 4332-4338 (fifth step), 4340-4345 (sixth step); 2774-2780, 4161-4254 (s 135 of the *Evidence Act 1995* (Cth)); 4250-4254 (implied power to reject evidence); 2893-2896, 4151-4160 (validity principle).

5 The Commonwealth has never explained precisely *how* its construction emerges from the text, context and purpose of s 46, aside from noting that s 46(1)(a) is "silent" on the question of tender and admission: **Cth PHS [7]**. For that reason, and because the Plaintiff does not understand the Court to have sought submissions on it, these submissions do not address that issue (except to the extent that the process of construction may be affected by s 15A of the *Acts Interpretation Act 1901* (Cth)[2] or precedent[3]). But the Plaintiff does not concede that the Commonwealth's construction is "reasonably open".[4] The submissions rather proceed on the assumption that the Commonwealth's construction is "reasonably open" and that at least the third to fifth steps identified by the Commonwealth
10 are "available" on that construction.[5]

B THE VALIDITY PRINCIPLE

6 "Courts in a federation should approach issues of statutory construction on the basis that it is a fundamental rule of construction that the legislatures of the federation intend to enact legislation that is valid and not legislation that is invalid".[6] Where there are two competing constructions of a provision, that rule manifests in the more specific "validity principle": "[i]f the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open".[7] If the validity principle is applied to choose one construction of a provision over another, the provision will have that meaning and
20 operation "in all its applications".[8]

7 That common law principle of "reading down" is reflected in s 15A of the Acts Interpretation Act.[9] But it is conceptually distinct from "severance" or "partial

2 In response to whether the Plaintiff accepts that "section 15A might lead the Court to adopt the construction proposed by the Commonwealth": see *MJZP* [2024] HCATrans 93, lines 6239-6240.

3 Addressing "the gravitational force of precedent as a matter which informs the appropriate interpretation that should be taken, even if that interpretation might not have been one that had been adopted by a majority of the Court in the decision which forms the precedent": *MJZP* [2024] HCATrans 93, lines 6241-6245.

4 The Plaintiff's reply on this issue was on the premise that the Court considers "that it **is** an available construction": *MJZP* [2024] HCATrans 93, lines 6124-6125 (Plaintiff) (emphasis added); cf 6240-6241 (Edelman J).

5 Noting the Court's indication that it would be "assisted by being very clear about the scope of your concession or acceptance of your constitutional test being satisfied **if some or all of those mechanisms were available**": *MJZP* [2024] HCATrans 93, lines 6187-6188 (emphasis added).

6 ***Residual Assco*** *Group Ltd v Spalvins* (2000) 202 CLR 629 at [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

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

8 ***YBFZ*** *v Minister for Immigration and Border Protection* [2024] HCA 40 at [75] (Gageler CJ, Gordon, Gleeson and Jagot JJ). Compare *Director of Public Prosecutions v Smith* (2024) 98 ALJR 1163 at [135] (Edelman J).

9 See, eg, *YBFZ* [2024] HCA 40 at [75] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

disapplication" under that provision.[10] The Commonwealth does not rely on those different operations of s 15A, so they can be put to one side.[11]

8 For the validity principle to operate in this case, two conditions must be satisfied.

8.1 *First*, the Court must conclude that the adoption of the Plaintiff's construction *would* lead to invalidity, while the adoption of the Commonwealth's construction *would* not.[12] The validity principle therefore will not be engaged if there is nothing more than "constitutional doubt" about the Plaintiff's construction.[13]

8.2 *Second*, the Court must conclude that both constructions are "reasonably open",[14] which is to be determined by applying the ordinary principles of statutory construction.[15] That condition recognises that the validity principle does not authorise the judiciary to "redraft" a statutory provision or to make policy choices that would be at odds with the statute actually enacted by the legislature.[16]

9 The operation of the validity principle is distinct from any question about the effect of precedent: cf **Cth PHS [25] n 33**. If leave to reopen *SDCV* is refused, the Court must adopt a construction that results in validity (which is what appears to be contemplated at **Cth PHS [26]**). In that sense, the *result* in *SDCV* will have "gravitational force" as a matter of statutory construction. As to the *reasoning* on statutory construction, the Commonwealth's construction does not reflect the construction adopted by the plurality and, as will be seen, does not reflect the construction adopted by Steward J (although it shares some of its central features).

[10] See *Clubb v Edwards* (2019) 267 CLR 171 at [139]-[142] (Gageler J), [415]-[433] (Edelman J). All three operations of s 15A are sometimes referred to as involving "reading down". Nothing turns on the use of any particular label: see *Thoms v Commonwealth* (2022) 276 CLR 466 at [75] (Gordon and Edelman JJ).

[11] The Appellant in *SDCV* relied on those separate operations (as well as the validity principle), but that attempt was rejected by six judges: see (2022) 277 CLR 241 at [97] (Kiefel CJ, Keane and Gleeson JJ), [162]-[164] (Gageler J), [200]-[202] (Gordon J), [221] (Edelman J).

[12] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 (***NAAJA***) at [79] (Gageler J) (emphasis added).

[13] *NAAJA* (2015) 256 CLR 569 at [76] (Gageler J). See also *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [341] (Heydon J).

[14] Compare *SDCV* (2022) 277 CLR 241 at [96]-[97] (Kiefel CJ, Keane and Gleeson JJ), rejecting an argument that s 46(2) should be read as if it provided to the effect that the Court "shall … do all things necessary *in the due exercise of judicial power* to ensure that the [certificated] matter is not disclosed to any person …" because that reading was "not open" on the text (emphasis in original); see also at [202] (Gordon J).

[15] *NAAJA* (2015) 256 CLR 569 at [76] (Gageler J), see also *YBFZ* [2024] HCA 40 at [75] (Gageler CJ, Gordon, Gleeson and Jagot JJ), [275] (Beech-Jones J).

[16] *YBFZ* [2024] HCA 40 at [75] (Gageler CJ, Gordon, Gleeson and Jagot JJ). See also *International Finance Trust Co Ltd v New South Wales Crime Commission* (2010) 240 CLR 319 at [42] (French CJ); *SDCV* (2022) 277 CLR 241 at [80] (Kiefel CJ, Keane and Gleeson JJ).

10 Conversely, if leave to reopen is granted, the result in *SDCV* will not have any gravitational force. The first question would be whether each of the Plaintiff's construction and the Commonwealth's construction is "reasonably open" on the text, context and purpose of s 46.[17] The second question would be whether the Plaintiff's construction would be invalid, and the Commonwealth's construction valid. On each of those matters, the reasoning of the judges (majority or dissenting) in *SDCV* may be *persuasive*, but will not be *binding*.

C THE COMMONWEALTH'S SIX STEPS

11 It is somewhat unclear whether the Commonwealth is contending that the adoption of its construction depends on the operation of the validity principle, or whether s 46(1) ought to read as a "mechanical" provision even in the absence of that principle: see **Cth PHS [7]**.[18] To the extent it is positively relying on the principle, it must be doing so on the premise that the Plaintiff's construction would spell invalidity. That position sits awkwardly with the Commonwealth's primary case on validity. On that argument, the precise construction of s 46(2) is irrelevant because all that matters is that an appellant has made a "choice" to proceed under s 44: see **Cth OOA [11]-[12]**.[19]

12 If the Commonwealth's primary argument on validity is wrong, the question is whether the Commonwealth's construction, if adopted, would result in s 46(2) infringing Ch III. That depends on whether, on that construction, s 46(2) would require or authorise the Court to depart from the "general rule" of procedural fairness to an extent that is more than reasonably necessary to protect a compelling and legitimate public interest: see **PS [38]-[42]**. The answer to that question must be judged by reference to the legal and practical operation of the construction: see **PS [29]**. The Commonwealth identifies six "steps" it says are available on its construction to "provide procedural fairness (or to mitigate any procedural unfairness)" to an appellant: **Cth PHS [2]**.

13 Before undertaking that analysis of each of the Commonwealth's six steps, it can immediately be observed that they appear to be framed as an "exhaustive list" (although it is not entirely clear), which departs from the position adopted by Steward J in *SDCV*.[20]

[17] See generally *AB (a pseudonym) v Independent Broad-Based Anti-Corruption Commission* (2024) 98 ALJR 532 at [21] (the Court).

[18] See further *MJZP* [2024] HCATrans 92-93, lines 2885-2896, 4155-4159.

[19] See *MJZP* [2024] HCATrans 92-93, lines 2898-2902 (Commonwealth), 6086-6089 (Plaintiff)

[20] See *SDCV* (2022) 277 CLR 241 at [303] (Steward J). That paragraph appeared to have been endorsed by the Commonwealth at the hearing: see *MJZP* [2024] HCATrans 92, lines 2749-2751, 2806-2808 (Commonwealth); see also at lines 1053-1065 (Gleeson J).

It also departs from his Honour's construction in so far as the appointment of a special advocate is not identified as one of the steps[21] (and indeed is said to be impermissible by the Commonwealth[22]).

C.1 Preliminary point: power to admit evidence not disclosed to opposing party

14 As noted, it is a critical aspect of the Commonwealth's construction that s 46(1)(a) is "mechanical" only. As will be seen, the third, fourth and fifth of the Commonwealth's steps necessarily depend on that proposition: see **Cth PHS [5], [8], [10]**.[23] It is true that the Commonwealth equivocates slightly, by suggesting that, "at least", s 46(1)(a) might somehow operate such that "the Court is entitled to adopt a procedure whereby the parties are required to tender the documents upon which they wish to rely in the appeal": **Cth PHS [6]**. The Court should not accept the possibility of giving s 46(1)(a) a differential operation depending on the view of the Federal Court, especially in the absence of any explanation of how that construction would be reached.

15 In any event, the Commonwealth's construction raises an important preliminary point: if s 46 depends on the tender and admission of evidence, what is the statutory source of the Federal Court's power to *admit* evidence without it being disclosed to the opposing party, outside of the recognised exceptional cases or specific statutory procedures? That issue does not arise on the Plaintiff's construction: s 46(1) operates to enable the Court to rely on any material that was before the Tribunal (including certified material), and s 46(2) prohibits the Court from disclosing that material to an appellant.

16 The Commonwealth has not addressed that anterior issue of power. Its position must be that s 46(2) impliedly confers that power on the Federal Court[24] or, alternatively, it has an "implied power"[25] to the same effect by reason of its status as a superior court.[26] Of course, if the Federal Court has an "implied power" of that kind, then the Court, in an

[21] Cf *SDCV* (2022) 277 CLR 241 at [295]-[301] (Steward J).

[22] That marks a departure from *SDCV*, in which the Commonwealth accepted, "although with some hesitation", that the Federal Court has power to appoint a special advocate consistently with s 46(2): see *SDCV* (2022) 277 CLR 241 at [295] (Steward J).

[23] See also *MJZP* [2024] HCATrans 92, lines 2879-2893, where the Commonwealth embraced the idea that it is the interpretation of s 46(1) as a "tender-type" provision that would "allow all of these alternative mechanisms".

[24] Perhaps together with ss 55 and 56 of the Evidence Act: see **Cth PHS [13]**.

[25] See, eg, *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623 (Deane J); *DJL v Central Authority* (2000) 201 CLR 226 at [25] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[26] See generally *HT v The Queen* (2019) 269 CLR 403 at [39]-[42] (Kiefel CJ, Bell and Keane JJ), [56] (Nettle and Edelman JJ), [67], [75]-[86] (Gordon J). In the United Kingdom, the existence of that kind of power was originally rejected: see *Al Rawi* [2012] 1 AC 531, discussed in *Pompano* (2013) 252 CLR 38 at [47]-[50] (French CJ), [170] (Hayne, Crennan, Kiefel and Bell JJ). But the position was later qualified in *Haralambous* [2018] AC 236.

ordinary exercise of its jurisdiction (ie, outside the context of an s 44 appeal), would be empowered to admit evidence without it being disclosed to an opposing party. That is a large proposition, which has not been the subject of submissions to date.

C.2 First step: validity of certificate

17 The *first* of the Commonwealth's steps is that the "the Court is entitled to examine the validity of a certificate given under s 39B(2) of the AAT Act on its own motion": **Cth PHS [3]**. However, that step neither provides procedural fairness nor mitigates any procedural unfairness. Assessment of the validity of a certificate given under s 39B(2) involves no consideration of: (a) the degree to which disclosure would prejudice security; or (b) any unfairness to the applicant that might arise from non-disclosure: see **PS [50.2]**.[27] Therefore, in the event the reviewing court considers it appropriate to examine the validity of the certificate,[28] those issues will be of no relevance to its assessment: see also **Reply [15]**.

C.3 Second step: the gist

18 The *second* step is that "the Court may give the applicant the gist of certificated matter, provided that it is possible to do so in a way that does not disclose the certificated matter": **Cth PHS [4]**. Framed in that way, the provision could never "provide" procedural fairness because the Court will necessarily be prevented from disclosing the very thing that gives rise to the unfairness in the first place: see also **Reply [17]**. Nonetheless, it is possible that, in some circumstances, "gisting" may mitigate unfairness to some degree: see **PS [50.3]**. In the context of s 46(2), that degree would very likely be very marginal. That possibility alone could not save s 46(2) from invalidity.

C.4 Third step: power to reject evidence

19 The *third* step is that if the Director-General seeks to tender certified matter, the Court may, in an appropriate case, refuse to admit that evidence: **Cth PHS [5]**; see also **PS [50.1]**.[29] The Commonwealth identifies two sources of power to refuse the admission of evidence: (1) s 135(a) of the *Evidence Act 1995* (Cth); and (2) as an incident of the Court's power to prevent an abuse of process.

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[27] Cf *SDCV* (2022) 277 CLR 24 at [148] (Gageler J), discussing *Gypsy Jokers* (2008) 234 CLR 532 at [33], [36] (Gummow, Hayne, Heydon and Kiefel JJ). See also *Pompano* (2013) 252 CLR 38 at [162] (Hayne, Crennan, Kiefel and Bell JJ).

[28] Assuming it is able to do so: cf *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at [41], [50] (the Court).

[29] Practically speaking, because only the Director-General will have access to the full record of the Tribunal, it can be expected that the Director-General, acting as a model litigant, would seek to tender the whole record (including the certified material).

20 ***Section 135:*** If the Director-General tenders the certified material,[30] an appellant could object on the basis that, because the appellant will not be able to challenge or make submissions in response to it, the evidence "might" be "unfairly prejudicial": **Cth PHS [16]**. Section 135(b) ("misleading or confusing") may also be available because evidence that has been insulated from challenge, or from contextual explanation, "may positively mislead".[31] If an objection were upheld, the evidence would not be admitted. In that situation, there would be no departure from the general rule. There are, however, three reasons why s 135(a) alone would not be sufficient to ensure the validity of s 46(2).

21 *First*, if the Court retains a discretion[32] to admit evidence even if the criterion in s 135(a) is satisfied,[33] it would mean that, in at least some circumstances, the certified material could be admitted even though the probative value of the evidence was substantially outweighed by the danger that the evidence might be unfairly prejudicial. That said, practically speaking, it is difficult to imagine the Court would exercise any residual discretion to admit the evidence in those circumstances.

22 *Second*, the power to refuse the admission of evidence under s 135(a) will only be enlivened if the danger that the evidence might be unfairly prejudicial "substantially" outweighs its probative value.[34] The balancing exercise required under s 135(a) is therefore tilted in favour of admission.[35] That tilting of the scales means that s 135(a) might permit departures from the general rule to an extent greater than "reasonably necessary".

[30] If an appellant seeks to admit the certified material "blind" (assuming such a thing is possible), the Plaintiff accepts that s 135 would not be available. However, that is because presumably the Director-General would not take an objection and, therefore, no occasion for the judge to rule on the issue would arise: see generally *Perish v The Queen* (2016) 92 NSWLR 161 at [261]-[271] (Bathurst CJ, Hoeben CJ at CL and Bellew J); cf **Cth PHS [15]**.

[31] *Al Rawi* [2012] 1 AC 531 at [93] (Lord Kerr JSC); see also *SDCV* (2022) 277 CLR 241 at [155] (Gageler J); **PS [58]**.

[32] Because s 135(a) uses the word "may", the power is presumed to be "discretionary": Acts Interpretation Act, s 33(2A). While that presumption is subject to a contrary intention, there is some difficulty in identifying such an intention in circumstances where: (1) the heading to Pt 3.11 refers to "Discretionary and mandatory exclusions"; (2) the heading to s 135 itself is "General discretion to exclude evidence"; and (3) within Pt 3.11, "may" (ss 135-136) is juxtaposed with "must" (s 137) and "is not to be admitted" (s 138).

[33] Whether the criterion is satisfied permits of only one legally correct answer: see *Moore v The King* (2024) 98 ALJR 1119 at [16], [18] (the Court).

[34] Cf Evidence Act, s 137.

[35] Thus, exclusion under s 135(a) "will only be justified in a clear case": *Smith v Aircraft Maintenance Services Australia (AMSA) Pty Ltd* [2018] FCA 264 at [38] (Rangiah J).

23 *Third*, and relatedly, the elements of the balancing exercise required by s 135(a) (unfairness vs probative value) do not necessarily align with the "reasonably necessary" analysis required under Ch III (unfairness vs security interests).

24 ***Abuse of process:*** In *CDJ v VAJ*, a majority of the High Court observed in passing that "[i]t is highly doubtful whether at common law, in proceedings other than criminal proceedings, otherwise admissible evidence could be rejected on the grounds of prejudice".[36] "There are many authorities to the same effect, and only a handful to the contrary".[37]

25 With that said, a residual power to reject evidence has been recognised by intermediate appellate courts in the context of criminal proceedings.[38] As a question of *power* (as opposed to the occasion for its exercise), it is difficult to see why any distinction should be drawn between civil and criminal proceedings.[39] That the implied power extends to rejecting otherwise admissible evidence is also supported by the consideration that the Federal Court "possess[es] **all** the necessary powers to prevent an abuse of process and to ensure a fair trial"[40] and that it should "mould its order to meet the exigencies of the particular case".[41]

26 There will be an "abuse of process" where: (a) "the use of the court's procedures is unjustifiably oppressive to one of the parties" or (b) "the use of the court's procedures would bring the administration of justice into disrepute'".[42] The admission of certified matter, in circumstances where the appellant has not seen that material, may fall into either or both of those categories.

[36] (1998) 197 CLR 172 at [142] n 106 (McHugh, Gummow and Callinan JJ).

[37] *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at [64] n 134 (Heydon J), citing, as authorities to the contrary, *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] Ch 119 at 127 (Lord Denning MR; Orr and Browne LJJ agreeing); *Pearce v Button* (1985) 8 FCR 388 at 402 (Pincus J); *Taylor v Harvey* [1986] 2 Qd R 137 at 141 (Carter J). See also *D F Lyons Pty Ltd v Commonwealth Bank of Australia* (1991) 28 FCR 597 at 604, 607 (Gummow J).

[38] See, eg, *R v Edelsten* (1990) 21 NSWLR 542 at 554 (the Court); *R v McLean; Ex parte Attorney-General* [1991] 1 Qd R 231 at 239-240 (Kelly SPJ), 241, 246 (Derrington J); *Haddara v The Queen* (2014) 43 VR 53 at [12], [16], [50] (Redlich and Weinberg JJA).

[39] See ***Batistatos*** *v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at [8] (Gleeson CJ, Gummow, Hayne and Crennan JJ). See also *Taylor v Harvey* [1986] 2 Qd R 137 at 141 (Carter J).

[40] *Barton v The Queen* (1980) 147 CLR 75 at 96 (Gibbs ACJ and Mason J) (emphasis added).

[41] *Jago v District Court (NSW)* (1989) 168 CLR 23 at 32 (Mason CJ).

[42] ***Moti*** *v The Queen* (2011) 245 CLR 456 at [10] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting *Rogers v The Queen* (1994) 181 CLR 251 at 286 (McHugh J).

26.1 Category (a) is concerned with the impact upon a party (here, an appellant) and consequently on the fairness of a trial.[43] Unjustifiable oppression (or "manifest[] unfair[ness]"[44]) is capable of being occasioned to an appellant wherever evidence that has been insulated from challenge or contextual explanation is before the Court: see **PS [58]**.

26.2 Category (b) is "concerned with the systemic protection of the integrity of the court within an integrated system of justice. It represents 'the trust reposed constitutionally in the courts'".[45] The capacity for the use of secret evidence to bring the administration of justice into disrepute stems from the fact that "[u]nfairness 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".[46]

27 However, "[w]hat amounts to abuse of court process is insusceptible of a formulation comprising closed categories. Development continues".[47] Even if the circumstances contemplated by the Commonwealth do not fit neatly into either of the categories above, the ultimate question for the Court — the "real issue"[48] — is whether the admission of the evidence would be congruent with "the normative structure of the Australian legal system".[49] As an incident of "the common law system of adversarial trial", the general rule — and the circumstances in which it may be departed from, consistently with the Constitution — is an aspect of that normative structure.[50]

28 Accordingly, if the admission of evidence would result in a departure from the general rule to an extent greater than reasonably necessary to protect a compelling and legitimate public interest, it would be incongruent with the normative structure of the legal system. The admission of the evidence in that scenario could accurately be described as "manifestly unfair" or "unjustifiably oppressive". It would amount to an abuse of process.

[43] ***Strickland*** *v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at [258] (Edelman J).
[44] *Walton v Gardiner* (1993) 177 CLR 378 at 393 (Mason CJ, Deane and Dawson JJ), quoted in **Cth PHS [20]**.
[45] *Strickland* (2018) 266 CLR 325 at [257] (Edelman J), quoting *Moti* (2011) 245 CLR 456 at [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[46] *Pompano* (2013) 252 CLR 38 at [186] (Gageler J).
[47] *Batistatos* (2006) 226 CLR 256 at [9] (Gleeson CJ, Gummow, Hayne and Crennan JJ).
[48] ***GLJ*** *v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at [22] (Kiefel CJ, Gageler and Jagot JJ).
[49] *GLJ* (2023) 97 ALJR 857 at [18] (Kiefel CJ, Gageler and Jagot JJ).
[50] See *GLJ* (2023) 97 ALJR 857 at [19] (Kiefel CJ, Gageler and Jagot JJ); see also at [163]-[167] (Gleeson J).

In that way, the law of abuse of process, which itself "should be seen to be … an attribute of the judicial power provided for in Ch III",[51] "conform[s] with the Constitution".[52]

29 Importantly, the Court cannot, as a matter of "discretion", decline to act on an abuse of process: if it concludes that a particular course would constitute an abuse of process, it *must* make orders to prevent that from occurring.[53] That may include, where appropriate, rejecting a tender of evidence.

30 On that approach, the Federal Court could not admit evidence where doing so would effect a departure from the general rule that is greater than reasonably necessary to protect the security interests underpinning the certified matter. The analysis will depend on all of the circumstances of the case.[54] For that reason, on the Commonwealth's construction, the existence of this implied power would ensure the validity of s 46(2):

30.1 If the Court concludes that the admission of the evidence would amount to an abuse of process arising from unfairness to an appellant, the Court must reject the evidence. In that scenario, there would be no departure from the general rule.

30.2 If the Court concludes that the admission of the evidence would not amount to an abuse of process even though an appellant has not seen the evidence, there would be a departure from the general rule. However, given the considerations that the Court must have taken into account in reaching that conclusion, it can be accepted that the departure would be "reasonably necessary" in the sense required by Ch III.

C.5 Fourth step: conditional tender

31 The *fourth step* is related to the third step: if the Director-General seeks to tender certified matter, the Court may indicate to the Director-General that the certified matter will be admitted only if the Director-General takes specified steps to remove the unfair prejudice (in the case of the power under s 135(a)) or the abuse of the Court's processes (in the case of the Court's implied power).

32 As accepted by the Commonwealth, one such condition may be that the Court could make acceptance of a tender conditional on the certified matter being shown to the appellant's

[51] *Dupas v The Queen* (2010) 241 CLR 237 at [15] (the Court). See also *Hogan v Hinch* (2011) 243 CLR 506 at [86]-[88] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Strickland* (2018) 266 CLR 325 at [257] (Edelman J).

[52] See *Lange* (1997) 189 CLR 520 at 566 (the Court). See also *MJZP* [2024] HCATrans 93, lines 4253-4254.

[53] *GLJ* (2023) 97 ALJR 857 at [23] (Kiefel CJ, Gageler and Jagot JJ).

[54] See *GLJ* (2023) 97 ALJR 857 at [26]-[27] (Kiefel CJ, Gageler and Jagot JJ). See also *Willmot v Queensland* [2024] HCA 42 at [17], [24]-[25] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ); **PS [36]-[37]**.

legal representatives on a confidential basis. That would involve no contravention of s 46(2), even if the Court were to "mould the conditions and restrictions governing the disclosure of certified materials" by the giving of directions,[55] because it would be the Director-General, not the Court, who would be disclosing the certified matter: see also **Cth PHS [8]**.

33 Logically, that must extend to making directions enabling the legal representatives to participate in a closed hearing and make submissions in relation to the certified material, for otherwise it is difficult to see what would be gained out of the legal representatives having access to that material.[56] And there is no reason why that same logic could not apply in relation to the making of directions that would permit the evidence to be tendered only if the Director-General, not the Court, were to disclose the material to a third party (including, for example, a special advocate).

34 The precise degree to which this step would mitigate procedural unfairness will depend upon the relevance of the certified matter to the grounds of appeal and the extent to which taking instructions from the appellant in respect of the certified matter is necessary. That being so, this step does not, of itself, ensure that s 46(2) departs from the general rule to an extent no greater than reasonably necessary.

35 If the Director-General were to decline to alleviate the procedural unfairness as proposed by the Court, then the Court would be required to reject the tender pursuant to the implied power of the Court under the third step.[57] In that situation, the third step would have an operation comparable with the law of public interest immunity (**PII**) in that the certified material (or part of it) the subject of the Court's proposed condition would not be before it on the appeal.

C.6 Fifth step: reversion to ordinary procedures

36 The *fifth step* is that the Court can revert to its "ordinary procedures": **Cth PHS [10]**.

37 If s 46(1)(a) is construed as mechanical only, then there is nothing requiring the Court to adopt a "closed material procedure". The Court could therefore revert to its ordinary procedures if it considered that none of the above measures is capable of sufficiently mitigating procedural unfairness to an appellant.[58] It might do so on its own motion,

[55] *SDCV* (2022) 277 CLR 241 at [302] (Steward J).

[56] It is also difficult to see how the condition would be effective if the condition was to show only *part* of the material that might be admitted, a possibility the Commonwealth appears to contemplate at **Cth PHS [8]**.

[57] Under s 135(a), there would be a further discretion whether to do so: see paragraph 21 above.

[58] See *SDCV* (2022) 277 CLR 241 at [300], [304] (Steward J).

balancing unfairness to the appellant against competing security considerations. Or it might do so at the request of the appellant. Further, to be consistent with Ch III, and building on the analysis outlined above concerning abuse of process, it would be required to revert to its ordinary procedures if that was the appropriate way to prevent such an abuse.

38 Under its ordinary procedures, an appellant could issue a subpoena in respect of the certified matter and the Director-General could then assert claims of PII over the subpoenaed material. If a subpoena were issued and a PII claim were upheld, or if an appellant were to decline to issue a subpoena, the certified matter would not be before the Court. And if a subpoena were issued and a PII claim were rejected wholly or in part, then any material that would go before the Court would also be available to both parties. In all of these scenarios, there would be no departure from the general rule. There would also be no barrier from that point onwards to the proceeding being consolidated with any separate proceeding under s 39B of the Judiciary Act.[59]

C.7 Sixth step: permanent stay

39 The *sixth* step is that the Court may, in an appropriate case, exercise its implied power to prevent an abuse of its processes to stay an appeal under s 44 of the AAT Act of its own motion: **Cth PHS [11]**.

40 A permanent stay is a measure of "last resort".[60] Thus, a permanent stay may only be ordered "where there is no other way to protect the integrity of the system of justice administered by the court".[61] Conversely, a permanent stay may not be ordered if the "substantial unfairness in the conduct of proceedings is capable 'of being averted through the adoption ... of measures less drastic than ordering a permanent stay'".[62]

41 A weighty factor in determining whether to order a permanent stay is the fact that the Federal Court would be preventing unfairness to an appellant by taking the "extreme step"[63] of summarily terminating the appellant's own proceeding. The Court is otherwise under a duty to "hear and determine" an appeal under s 44.[64] In those circumstances, and

[59] See *MJZP* [2024] HCATrans 93, lines 4058-4088.

[60] *GLJ* (2023) 97 ALJR 857 at [3] (Kiefel CJ, Gageler and Jagot JJ); *Willmot v Queensland* [2024] HCA 42 at [26] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

[61] *Victoria International Container Terminal Ltd v* ***Lunt*** (2021) 271 CLR 132 at [21] (Kiefel CJ, Gageler, Keane and Gordon JJ), quoting *Strickland* (2018) 266 CLR 325 at [248] (Edelman J).

[62] *Lunt* (2021) 271 CLR 132 at [22] (Kiefel CJ, Gageler, Keane and Gordon JJ), quoting *Strickland* (2018) 266 CLR 325 at [115] (Gageler J).

[63] *GLJ* (2023) 97 ALJR 857 at [21] (Kiefel CJ, Gageler and Jagot JJ).

[64] See AAT Act, s 44(4).

in light of the third to fifth steps discussed above, it is difficult to contemplate the circumstances in which a proceeding continued by an *appellant* could warrant the grant of a permanent stay.[65]

42 Assuming that possibility exists, however, the Court would only exercise this power if it had considered exercising all of the other powers discussed above and concluded that a permanent stay is nevertheless appropriate. If the power were exercised, the proceeding would not continue and, accordingly, there would be no departure from the general rule. In that event, the s 44 appeal would be rendered nugatory, but an appellant would not be precluded from commencing or continuing a proceeding under s 39B of the Judiciary Act.

D CONCLUSION ON THE SIX STEPS

43 In summary, neither the first (validity of certificate) nor second ("gisting") steps, either or alone or in combination, is sufficient to ensure that any departure from the general rule authorised by s 46(2) would be "justified". That would be the case on either the Plaintiff's construction or the Commonwealth's construction.

44 However, the ultimate result of the Commonwealth's construction is that the Court will be required to conduct a case-by-case analysis of fairness, balanced against the competing security interests.[66] That is because the Court:

44.1 under the third step, would be *required* to exercise its power to reject the admission of evidence if its admission would be unjustifiably unfair (unless the unfairness has been sufficiently mitigated by conditions placed on the tender under the fourth step); and

44.2 under the fifth step, would otherwise be *required* to revert to its ordinary procedures.

45 In short, as a result of the third to fifth steps, the Court will never be able to act on evidence that has not been disclosed to an appellant, unless the Court is satisfied that it would not be unjustifiably unfair to an appellant to do so. For that reason, the Plaintiff accepts that, on the Commonwealth's construction (if correct), s 46(2) would not infringe Ch III.

46 Finally, it can be noted that this differs from Steward J's construction, because his Honour contemplated appeals where the Federal Court would "not be able to provide an applicant

[65] Cf *Pompano* (2013) 252 CLR 38 at [178], [198], [212] (Gageler J).
[66] Cf *MJZP* [2024] HCATrans 93, lines 4536-4556, 4727-4735.

with a fair opportunity to respond to the evidence against them" by the adoption of any procedural mechanisms.[67] On the analysis above, no such possibility arises.

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[67] See *SDCV* (2022) 277 CLR 241 at [309] (Steward J).

ANNEXURE TO POST-HEARING SUBMISSIONS OF THE PLAINTIFF

Pursuant to Practice Direction No 1 of 2024, the Plaintiff sets out below a list of the constitutional provisions, statues and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions	Reasons for providing this version	Applicable date or dates
Statutory provisions					
1.	*Acts Interpretation Act 1901* (Cth)	Compilation No 37 (in force 12 August 2023 to 10 December 2024)	s 15A	Version in force when the AAT Act was repealed.	N/A
2.	*Administrative Appeals Tribunal Act 1975* (Cth)	Compilation No 54 (in force 22 May 2024 to 13 October 2024)	ss 39B(2), 44, 46	The AAT Act continues to apply to MJZP's pending appeal to the Federal Court by reason of *Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Act 2024* (Cth), Sch 16 item 27.	N/A
3.	*Evidence Act 1995* (Cth)	Current	s 135	Currently applies to regulate the admission of evidence in proceedings.	N/A