Non-disclosure of Relevant Material and Chapter III: The Tantalising Promise of Due Process Rights Protection by the Australian Constitution in the Gageler High Court Using Separation of Powers Principles

Anthony Gray and Pauline Collins*

Recent times have seen an increase in the use of secrecy measures in the context of a legal proceeding, by which a person the subject of legal action may not see or hear evidence being used against them. This is contrary to fundamental characteristics of judicial process, including procedural fairness. This article discusses a recent High Court decision where growing dissatisfaction with the use of such procedures is evident, with three members finding such provisions unconstitutional. The article places these developments within the broader context of the development of Chapter III jurisprudence. The recent decision shows the Court in a phase where it seeks to more robustly apply the separation of powers reflected in Chapter III, with positive implications for liberty. It might also herald the eventual adoption of proportionality analysis in this context.

I. Introduction

We have seen in recent years an increase in use of procedures by which decisions are made regarding an individual based on information not disclosed to that person. These secretive methods have been used to seek control orders or preventive detention orders, particularly in the terrorism context,[1] but their reach is expanding. While traditionally our courts are open, the law has long recognised exceptions, permitting closed hearings in areas like family law, cases involving children, and involving sensitive commercial information. Those seeking to justify use of closed procedures and denial of natural justice argue such procedures are known to and accepted by the law, and that the list of exceptions to the traditional rule is not closed. However, growth of these "exceptional cases" can reach a point where the axiomatic principle of open courts is threatened.[2] They are contrary to fundamental longstanding common law traditions,[3] and require careful limiting and justification. Of course, traditionally in Australia while a requirement of procedural fairness in the exercise of statutory powers is generally presumed, this may be abrogated by express words or necessary implication.[4] Natural justice is not

* Anthony Gray: Professor and Associate Dean (Research) in the Faculty of Law, Bond University. Pauline Collins: Professor in the School of Law and Justice, University of Southern Queensland.

[1] Tamara Tulich, "Adversarial Intelligence? Control Orders, TPIMs and Secret Evidence in Australia and the United Kingdom" (2012) 12(2) *Oxford University Commonwealth Law Journal* 341, 342. See Grant Donaldson, *The Operation and Effectiveness of the National Security Information (Criminal and Civil Proceedings) Act 2004* (Commonwealth of Australia, 2023).

[2] John Jackson, "The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition" (2016) 20(4) *International Journal of Evidence and Proof* 343, 343–345.

[3] *Duke of Dorset v Girdler* (1720) Prec Ch 531, 532: "the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method for discovering of the truth"; *Bank Mellat v HM Treasury (No 2)* [2014] 1 AC 700; [2013] UKSC 38.

[4] *Disorganized Developments Pty Ltd v South Australia* (2023) 97 ALJR 575, [28] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); [2023] HCA 22.

THOMSON REUTERS

© 2024 Thomson Reuters (Professional) Australia Limited for further information visit **www.thomsonreuters.com.au** or send an email to **care.anz@tr.com**

Please note that this article is being provided for research purposes and is not to be reproduced in any way. If you refer to the article, please ensure you acknowledge both the publication and publisher appropriately. The citation for the journal is available in the footline of each page.

For information concerning permission to republish material from this journal, either in part or in its entirety, in any medium, please refer to **http://sites.thomsonreuters.com.au/journals/permissions.**
For general permission queries, contact **LTA.permissions@thomsonreuters.com**

an absolute requirement.[5] This is not applicable to *constitutional* protection of procedural fairness, however, which is the focus of this article.[6]

Secretive measures are often justified on national security grounds, that disclosure of such material would/might prejudice Australia's security interests, and/or that would-be witnesses might be in danger if their identity were known.[7] However, evidence can be unreliable.[8] Factual errors occur.[9] Judges often defer to claims by the Executive in areas of national security.[10] Sometimes claims confidentiality is necessary for national security are exaggerated.[11] Our legal system typically relies on cross-examination as the primary way of determining whether evidence is reliable.[12] The right to cross-examine is seen as fundamental to traditional judicial process.[13] Clearly, cross-examination would not be effectively possible if neither the person against whom the material is being used, nor their legal representative, knows of the detail of the information. This would offend fundamental principles of natural justice,[14] typically regarded as essential to judicial process,[15] and connected with general requirements of fair

[5] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 271 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); [2010] HCA 23; Matthew Groves, "Exclusion of the Rules of Natural Justice" (2013) 39(2) *Monash University Law Review* 285.

[6] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 referred briefly to an alternative argument by the applicant that natural justice might be protected by *Constitution*, Ch III; however the matter was left open, the Court deciding on other grounds: 257 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). Matthew Groves notes acceptance of the principle of legality as a means of protecting natural justice does not preclude constitutional recognition: Groves, n 5, 298–299.

[7] These concerns are not new: *Al Rawi v Security Service* [2012] 1 AC 531, 577 (Lord Dyson); [2011] UKSC 34; *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 76 (Brennan J).

[8] Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales*, Report No 325 (2011) 3–6; Gary Edmond and Andrew Roberts, "Procedural Fairness, the Criminal Trial and Forensic Science and Medicine" (2011) 33 *Sydney Law Review* 359, 374: "most Australian judges have also been inattentive to the reliability of incriminating expert evidence"; Kent Roach, "The Eroding Distinction between Intelligence and Evidence in Terrorism Investigations" in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond* (Routledge, 2010).

[9] This was noted to have occurred in the context of a closed court procedure and lack of natural justice in *Bank Mellat v HM Treasury (No 2)* [2014] 1 AC 700, 776 (Lord Sumption, with whom Baroness Hale, Lord Kerr and Lord Clarke agreed); [2013] UKSC 38.

[10] Aileen Kavanagh, "Special Advocates, Control Orders and the Right to a Fair Trial" (2010) 73 *Modern Law Review* 836, 854.

[11] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006) 302; *Minister for Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness v Mohamed Harkat* [2014] 2 SCR 33, 65–66 (McLachlin CJ, LeBel, Rothstein, Moldaver, Karakatsanis and Wagner JJ); Adam Tomkins, "National Security and Due Process of Law" (2011) 64 *Current Legal Problems* 215, 252: "courts must be alert to guard against the possibility that they may be dazzled by overblown government claims as to sensitivity, risk and security … such claims may often be exaggerated and are sometimes wholly spurious"; Donaldson, n 1 noting "overweening secrecy" and "rabid (executive) claims for secrecy": 19.

[12] Sir William Blackstone noted: "This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination … the occasional questions of the judge, the jury and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than … any other method of trial … by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour and inclination of the witnesses": Sir William Blackstone, *Commentaries on the Laws of England* (1783) 373–374.

[13] *Scott v Scott* [1913] AC 417, 437 (Viscount Haldane), 446 (Earl Loreburn), 480 (Lord Shaw).

[14] Natural justice is the right of a person to see and hear allegations made against them, the evidence upon which the allegations are based, and a chance to respond to them fully, including to test evidence being led by others: *Al-Rawi v Security Service* [2012] 1 AC 531, 572 (Lord Dyson); [2011] UKSC 34; *Kioa v West* (1985) 159 CLR 550, 582 (Mason J). This typically occurs through cross-examination. This right applies both in the criminal and civil context.

[15] "Judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process. And that *requires* (emphasis added) that the parties be given an opportunity to present their evidence and to challenge the evidence led against them": *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); [1999] HCA 9. Sir Robert Megarry noted: "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justices … (but) as everybody who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; or unanswerable charges which, in the event, were completely answered, of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change": *John v Rees* [1970] Ch 345, 402.

judicial process.[16] A person's perception they have been treated in accordance with procedural fairness and natural justice is crucial in how that person views our justice system.[17]

The precise contours of traditional judicial process are important because the High Court has held the separation of powers required by the *Constitution* protects (constitutionally) these characteristics from legislative interference. In other words, the separation of powers in the *Constitution* is not simply a structural feature. It is not *merely* that judicial bodies can only exercise judicial powers, and non-judicial bodies can only exercise non-judicial powers, important though that is.[18] Instead, it has substantive content which potentially significantly limits the ability of parliaments (federal and state)[19] to legislate concerning features of courts and exercise of judicial powers.[20] How the judiciary performs its functions is an essential part of this content.

Laws offending the institutional integrity of a Chapter III court[21] in Australia are constitutionally invalid. One way in which such integrity may be offended is by conferring powers on a court that are non-judicial.[22] Another is by requiring *or authorising* courts to depart from traditional judicial process.[23] Another is by involving a court in an essentially pre-determined outcome, removing the court's discretion, and seeking to cloak proceedings in legitimacy by borrowing the court's imprimatur.[24] Laws like this are vulnerable to constitutional challenge, as explained below, because of the separation of powers enshrined in the Australian *Constitution*.

In recent years, secretive measures have been held valid (unanimously or nearly so) against constitutional challenge on this basis.[25] However, in 2022 in *SDCV v Director-General of Security* (*SDCV*),[26] the Court split 4-3 on the constitutionality of such measure,[27] and one member of the majority only found constitutionality by reading in amendment to the challenged law. With the subsequent retirement of

[16] *Dietrich v The Queen* (1992) 177 CLR 292 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ). Of these justices, Deane J (326) and Gaudron J (362) specifically connected this right with Ch III.

[17] Tina Popa et al, "Procedural Justice in a Tribunal Context: An Exploration and Extension of the Concept from a Human-centred Design Perspective" (2022) 45(2) *University of New South Wales Law Journal* 1657.

[18] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[19] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[20] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27: "In exclusively entrusting to (Chapter III) courts the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the *Constitution*'s concern is with substance and not mere form" (Brennan Deane and Dawson JJ); George Winterton, "The Separation of Powers as an Implied Bill of Rights" in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 187.

[21] For present purposes, a Chapter III court is a federal court and, at the very least, a state court that is invested with federal jurisdiction: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. There is conjecture over the precise application of Chapter III principles to state courts. Suri Ratnapala and Jonathan Crowe, "Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power" (2012) 36(1) *Melbourne University Law Review* 175, 200 argue "a state parliament may not make any law that negates a defining characteristic of the state supreme court". The learned authors state that the orthodox view that the separation of powers principle is not constitutionally enshrined at state level "no longer represents the constitutional law of Australia": 175.

[22] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*) (court given power to order a person's (continued) incarceration based on an assessment they were more likely than not to offend in future, where ordinary rules of evidence did not apply).

[23] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; [2009] HCA 49 (requiring a court to hear a matter ex parte with a reverse onus provision); *Wainohu v New South Wales* (2011) 243 CLR 181; [2011] HCA 24 (prohibiting a court from giving reasons). The alternative "or authorising" is important, as will be shown below. I paraphrase the terms used by the High Court in this respect. It is *they* who have used the phrase "or authorising".

[24] *South Australia v Totani* (2010) 242 CLR 1; [2010] HCA 39 (effectively requiring a court to make a control order).

[25] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; [2008] HCA 4; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; [2009] HCA 4.

[26] *SDCV v Director-General of Security* (2022) 96 ALJR 1002 (Kiefel CJ, Keane, Steward, and Gleeson JJ, Gageler Gordon and Edelman JJ dissenting); [2022] HCA 32.

[27] *SDCV v Director-General of Security* (2022) 96 ALJR 1002 (Kiefel CJ, Keane, Steward, and Gleeson JJ, Gageler Gordon and Edelman JJ dissenting); [2022] HCA 32.

two members of that majority,[28] the question of the constitutionality of the use of material against an individual without that person being aware of its nature or detail is "live".[29]

This article will explain *SDCV* and the apparent growing preparedness of the High Court to strike out laws that offend human rights contemplated by Ch III. It places those developments in both historical context, identifying three separate phases of development, during which the Court's apparent interpretation of the ambit of Chapter III has waxed and waned. It also places them in comparative context, considering how United Kingdom courts have viewed equivalent provisions. It then discerns in the most recent pronouncements an apparent acceptance of proportionality by members of the Court regarding Ch III, even if tacit and incomplete. This is a very important development, but one relatively unnoticed to date. It may herald the start of a "fourth phase". This article argues such a development should be applauded. It is still nascent, so it must be supported and nurtured. These developments will potentially enshrine fundamental criminal due process rights into the Australian *Constitution*, a fundamentally important evolution.

The article is structured as follows. Part II considers the recent decision in *SDCV*. Part III demonstrates three different phases of approach to Ch III in the past 30 years. We are currently in a more progressive phase, and *SDCV* fits that mould. It represents a substantial departure from decisions in the recent past (second phase) which affirmed the constitutionality of secrecy measures. The extent to which the Court's approach to Ch III is gradually shifting has occurred somewhat "under the radar", and has thus been under-analysed in the literature. This is partly because evidence of this shift has appeared (and is still appearing) in dissenting judgments, which attract less attention. However, when it underpins the judgment of *three* dissenting judgments, the shift is practically of more importance and, in fact, in some cases this new progressive approach has become a majority, as will be shown. These developments are potentially significantly rights-enhancing. The trend is clear.

Part IV explains how courts in the United Kingdom have assessed the validity of secrecy measures in light of national security arguments. Obviously, these cases have been decided in a constitutional environment different from our own, and care is appropriate before applying them here.[30] Nonetheless, those judgments indicate significant concern with judicial decision-making based on information not available to one side of the argument, and moves to re-assert the fundamental importance of natural justice and open courts as indispensable aspects of fair process.

Part V argues strains of proportionality are evident in many judgments, in a possible "fourth phase". On one hand, this would not surprise, given the surge in popularity of proportionality principles elsewhere. It has been applied in Australia to the implied freedom of political communication and s 92, in the constitutional law context so far, as will be shown. Given its genesis in rights protection, it would not surprise to see it in Chapter III discourse, given the chapter evidences a strict constitutional separation of powers, which is designedly rights-protective, as will be shown. The surprise is that the evolution seems to be being led by declared *opponents* of proportionality in the other contexts, though the view of one of these opponents may be softening. Some Part IV analysis may give substance to the proportionality analysis discussed in Part V. Part VI concludes.

II. SDCV v Director-General of Security

A. Facts and Proceedings

The applicant was an Australian resident who sought Australian citizenship. Some of his relatives were associated with terrorist organisation ISIS, and had been jailed here for terrorism offences. There was

[28] Keane J retired in October 2022 and Kiefel CJ in August 2023.

[29] Natalie Ng, Steven Gardiner and Sarah Lim, "SDCV v Director-General of Security: Statutory Secrecy Provisions and the Courts" (2023) 30 AJ Admin L 162, 166. The mere fact there has been a change in personnel is insufficient to justify a change in the law. The High Court outlined what generally justifies a reconsideration of past cases in *John v Commissioner of Taxation (Cth)* (1989) 166 CLR 417. Rather, the point is practical – current members of the High Court may not consider themselves bound by previous decisions in a particular area, particularly where they were not privy to the decision.

[30] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 66 (French CJ); [2013] HCA 7; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 597 (Crennan J); [2008] HCA 4.

no evidence the applicant had been personally involved in terrorist activity. He had not been charged, let alone convicted, of any offence. However, there was evidence he had communicated with "persons of concern". The Director-General issued an adverse security assessment of the applicant, and the Minister cancelled his visa. The assessment was based on information, disclosure of which the Australian Security Intelligence Organisation (ASIO) had declared prejudicial to national security (declared material). As such, it was not disclosed to the applicant.

The applicant sought judicial review of the Minister's decision by the Administrative Appeals Tribunal (AAT). The hearing took place partly without the applicant being present so it could consider the "declared material". It affirmed the Minister's decision, issuing both an open judgment (which indicated no decision could be made on the Minister's decision) and a closed judgment which included reference to the declared material (under which the Minister's decision was affirmed). The applicant appealed to the Federal Court. Of particular note was s 46 of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*), permitting the Court to receive material declared under various statutes to be "declared material". Section 46(1) provided where an appeal was taken from the AAT to the Federal Court, the Tribunal must send all relevant documents to the appeal court. Section 46(2) stated the Federal Court would do everything necessary to ensure only members of the court could access the material. An exception in s 46(3) permitted the court to determine that the matter, or part of it, could be disclosed, but only where a certificate had *not* been issued by the Attorney-General or "ASIO Minister" that disclosure would prejudice national security, defence, international relations, or law enforcement interests. Where such certificate had issued, the court had no discretion under s 46(3) to disclose the material to the applicant.

The applicant challenged the validity of proceedings against him. He argued s 46(2) was constitutionally invalid because it required a federal court to act contrary to Ch III of the *Constitution* in deciding an individual's case without permitting the individual access to at least some evidence used against them. That Court rejected the argument, and all others. On appeal, by 4-3, the High Court confirmed the Federal Court's decision. The appeal was confined to the question of the validity of s 46(2). The majority comprised Kiefel CJ, Keane and Gleeson JJ in joint judgment, with which Steward J generally agreed. Gageler J dissented, as did Gordon J (with whom Edelman J agreed). It is necessary to explain succinctly each judgment.[31] As indicated, retirement of two members of the majority make it realistically possible a similar case would be decided differently next time, given three dissents. Such a challenge could relate to the same provision challenged here or equivalent legislation.[32]

B. Joint Reasons

Kiefel CJ Keane and Gleeson JJ stated Ch III did not entrench an adversarial system of adjudication as a defining characteristic of a court, and thus subject to constitutional protection.[33] However, they acknowledged the *Constitution* precluded the Commonwealth Parliament from requiring a Chapter III court to exercise judicial power in a manner inconsistent with the character of a court or the nature of judicial power.[34] They acknowledged procedural fairness was an essential characteristic of Chapter III courts.[35] They stated there was no minimum content of such a requirement.[36] The question was whether

[31] See further Ng, Gardiner and Lim, n 29.

[32] See, eg, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 29(3), 31 (*2004 Act*). The anti-terrorism provisions in the *Criminal Code 1995* (Cth) specifically encompass possible use of secret evidence pursuant to the 2004 legislation (eg s 104.5(2A)). Section 104.12A(3) contemplates material may not be disclosed to a person subject to a control order where (1) it is national security information pursuant to the *2004 Act*; (2) would likely be the subject of a public interest immunity exemption; (3) would likely risk ongoing operations by security agencies; or (4) would likely put at risk the safety of law enforcement or intelligence officers. Thus, a control order can be confirmed by the use of secret evidence to which the affected party is not privy. In *Thomas v Mowbray* (2007) 233 CLR 307, 433–435; [2007] HCA 33 Kirby J (dissenting) would have invalidated these aspects of the *Criminal Code 1995* (Cth); Anthony Gray, "Alert and Alarmed: The National Security Information Act 2004 (Cth)" (2005) 24(2) *University of Tasmania Law Review* 1.

[33] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1014; [2022] HCA 32.

[34] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1019; [2022] HCA 32.

[35] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1019; [2022] HCA 32.

[36] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1020; [2022] HCA 32.

the proceedings effected "practical injustice" to the person affected in the particular case.[37] There was a difference between criminal and civil proceedings. In the former, proceedings would generally have to embrace typical procedural safeguards of such proceeding. However, in a non-criminal case, including one relating to a statutory scheme contemplating administrative decisions, the content of the requirement of procedural fairness might differ.[38]

The reasons stated the constitutionality of s 46(2) could not be decided without having regard to other subsections, specifically s 46(1).[39] That subsection effectively provided the applicant with "benefit" they would otherwise not enjoy had they pursued other avenues of review. The reasons noted that, in the alternative to an appeal under the *AAT Act*, the applicant might have sought review under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act 1903* (Cth). However, in either case, it was likely the federal government would make a successful public interest immunity (PII) claim to prevent evidence upon which the Minister relied in making their assessment being made available to the applicant.[40] In addition, if either of these alternatives were taken, declared material would likely not be placed before the court.[41] An advantage to the applicant of the avenue he chose was that such material *was* placed before the court, pursuant to s 46(1) of the *AAT Act*. In the absence of s 46(1), it was unlikely it would have been so made available. The joint reasons thus denied the applicant had suffered "practical injustice".[42]

They held Parliament was justified in limiting the availability of evidence considered in the security assessment to the applicant. This was because its disclosure would likely lead to identification of the source of information adverse to the applicant. Parliament could reasonably assume such informants would only be prepared to provide such information based on assurances their identity would remain confidential.[43]

Given the judgment of Steward J, to be discussed presently, the joint reasons considered whether s 46 should be interpreted to permit appointment of a special advocate to whom the contents of the declared material could be disclosed. They decided it could *not* be so interpreted. Nothing in the section indicated Parliament so intended. Reference in the section to an "officer of the court" could not reasonably be read to include a special advocate appointed by the court.[44] The reasons also referred to the *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (*Pompano*)[45] decision in noting special advocates would have limited practical ability to assist an applicant in these situations.[46]

Steward J agreed the legislation was valid. He held s 46 simply required the Court to receive documents from the Tribunal. It did not require it to take them into account in decision-making. The Court could make it a condition of accepting such material into evidence that it was shown to the applicant's legal representative. Further, it was not inevitable failure to make available to one side of proceedings evidence tendered by the other side would cause "practical injustice".[47] The Court could, consistently with s 46, provide the gist of the evidence being led against the individual to them, to potentially permit them an adequate response.[48] The court could order use of a special advocate to hear/see the

[37] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1024; [2022] HCA 32.

[38] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1020; [2022] HCA 32.

[39] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1025; [2022] HCA 32.

[40] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1025–1026; [2022] HCA 32.

[41] If PII is successfully claimed, the material is not made available to the Court: *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ), 50 (Stephen J) (with whom Aickin J agreed).

[42] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1030; [2022] HCA 32.

[43] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1027; [2022] HCA 32.

[44] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1029; [2022] HCA 32.

[45] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38; [2013] HCA 7 (discussed further below).

[46] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1029–1030; [2022] HCA 32.

[47] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1061; [2022] HCA 32.

[48] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1066; [2022] HCA 32.

confidential evidence.[49] He claimed care should be taken in making implications from essential nature of judicial power to fetter legislative/executive authority. This was because of difficulties in framing an all-encompassing definition of judicial power.[50] Steward J claimed s 46 was "plainly beneficial" to individuals like the applicant in permitting the court to access "declared material". He agreed a PII claim would likely succeed if other avenues were taken. He indicated s 46 in operation "was better than nothing".[51] Respectfully, it is "novel" constitutional reasoning to validate a measure because it is considered "better" than an alternative. That has not until now been considered a basis of constitutional validity.

C. Dissentients

Gageler J held s 46(2) constitutionally invalid. He observed procedural fairness was essential to exercise of Commonwealth judicial power, and an essential characteristic of Australian courts.[52] The Australian *Constitution* did not permit "grades of justice".[53] Procedural fairness required each party to a dispute be afforded fair opportunity to be heard regarding facts, relevant law and application to the facts. He suggested support for the view *any* legislated departure from general rules of procedural fairness would need be no more than reasonably necessary to protect compelling public interests.[54] Procedural fairness had variable content, based on things like the circumstances in which the process occurred, including relevant statutory provision, characteristics of the relevant parties, stakes involved, nature of the decision to be made, steps already taken in the process, and significance of the evidence to resolution of the dispute.[55]

Gageler J noted s 46(2) inflexibly required material to be withheld from an applicant, regardless of how relevant it was to matters in dispute, and how significant the likely impact on national security/international relations.[56] It was in contrast with the provision in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (*Gypsy Jokers*).[57] There the legislation permitted the court to consider whether disclosure of the information would have the claimed deleterious effect, and balance this impact with the impact on the other party and their ability to present their case. He concluded:

> A court determining a justiciable controversy between parties cannot be required by statute to adopt a procedure that has the capacity to result in the court making a final order without affording a party adversely affected by the order an opportunity – fair in the circumstances of the particular case – to respond to evidence on which the order might be made (Gageler J referred to this as a *constitutional* minimum (emphasis added)) … the broader and more inflexibly a standardised rule proscribing disclosure is framed … the greater must be the danger of breach of the *constitutional* minimum.[58]

He concluded (correctly with respect) the fact the applicant might have sought review under s 75(v) of the *Constitution* or s 39B of the *Judiciary Act* was irrelevant.[59] Similarly, the problem of inflexibility would not be solved by appointment of a special advocate, because that person would not be able to disclose the information to the applicant.[60] It was sometimes possible that by providing the gist of declared material to someone against whom it was being used, the process may be procedurally fair.[61]

---

[49] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1066–1067; [2022] HCA 32.

[50] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1070; [2022] HCA 32.

[51] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1071; [2022] HCA 32.

[52] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1030; [2022] HCA 32.

[53] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1034; [2022] HCA 32.

[54] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1035; [2022] HCA 32.

[55] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1036; [2022] HCA 32.

[56] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1037; [2022] HCA 32.

[57] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; [2008] HCA 4.

[58] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1037–1038; [2022] HCA 32 (emphasis added).

[59] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1034; [2022] HCA 32.

[60] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1039; [2022] HCA 32.

[61] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1039; [2022] HCA 32.

Gordon J agreed Chapter III enshrined essential attributes of a court, including procedural fairness. She held abrogation of natural justice was "anathema" to Ch III of the *Constitution*.[62] Parliament could not require a court to act so as to undermine its institutional integrity, and courts must continue to reflect traditional characteristics of a court and judicial process, including procedural fairness.[63] Section 46(2) was problematic because it prohibited the Court from making declared material available to a party affected by it, potentially causing unfairness. This precluded the Court from avoiding "practical injustice" to an affected party.[64] That other mechanisms were available to challenge the decision, that the applicant's disputed legal rights were statutory, and the question of the applicant's legal status in Australia were irrelevant to the real question, constitutional validity of s 46(2).[65] So was the ability to seek judicial review of the Minister's certificate.[66] Gordon J interpreted s 46 not to permit appointment of special counsel to assist an applicant in this situation. Even if permitted, it would not cure lack of flexibility inherent in s 46(2).[67]

Edelman J held it could never be procedurally fair for a court to determine whether a person had been unlawfully deprived of the right to remain in Australia for reasons the person had not been given, based on allegations to which they were not privy, and based on evidence they had not been given the opportunity to test.[68] He subsequently accepted lack of procedural fairness would not be unconstitutional if minimally invasive – that is no more than reasonably necessary to protect a strong countervailing interest.[69] The person's status was irrelevant to whether the procedure was fair. He agreed with Gordon and Gageler JJ the *Constitution* did not permit different grades of justice depending on features of the applicant.[70]

He questioned the correctness of *Gypsy Jokers* and *Pompano*, noting the decisions had upheld as valid legislation authorising a court to act in a manner that could, at least sometimes, be procedurally unfair. He did not consider whether provisions challenged there could be justified as reasonably necessary to protect a strong countervailing interest.[71] That procedures were unfair was insufficient in itself for constitutional invalidity – it was necessary to also show the court's institutional integrity had been substantially impaired by absence of procedural fairness.[72] He claimed there were instances where admitted procedural unfairness was not constitutionally invalid, because justified by a compelling countervailing interest, and injustice was the minimum necessary to protect it. He acknowledged sometimes the law countenanced proceedings where one party to it was denied access to relevant evidence, such as cases involving confidential information and trade secrets, legal professional privilege, and native title cases. However, none involved the extreme unfairness of preventing a person from knowing the case against them in a proceeding with serious consequences, preventing them from responding.[73]

Edelman J distinguished *Gypsy Jokers* because there the court had discretion to refuse to accept evidence not made available to a party to the proceeding, and balance that against other considerations.[74] In contrast, s 46 contemplated no balancing. There was no means for the court to mitigate the impact of s 46 on rights of individuals like the applicant, or balance the importance of the countervailing interests with

[62] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1042; [2022] HCA 32.

[63] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1041; [2022] HCA 32.

[64] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1044; [2022] HCA 32.

[65] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1042, 1048; [2022] HCA 32.

[66] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1048–1049; [2022] HCA 32.

[67] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1049; [2022] HCA 32.

[68] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1052; [2022] HCA 32.

[69] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1052; [2022] HCA 32.

[70] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1053; [2022] HCA 32.

[71] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1054; [2022] HCA 32.

[72] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1055; [2022] HCA 32.

[73] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1055; [2022] HCA 32.

[74] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1057; [2022] HCA 32.

the applicant's rights. The court had no power to release some of the information, or give the applicant the "gist" of the case against them, as in the United Kingdom.[75] Edelman J agreed the Court lacked power to order appointment of special advocate in such cases.[76] If this is what Parliament intended, it needed to specifically provide for it.[77] Practically, the applicant's potential ability to seek judicial review of the Minister's decision was not strong. The applicant would likely have little material upon which to base their application.[78] He concluded s 46(2) worked extreme procedural unfairness on the applicant and exceeded what was reasonably necessary to protect national security interests.

We will comment about *SDCV* after explaining earlier Chapter III decisions.

III. High Court's Phases of Separation of Powers Jurisprudence

A. Background

It is necessary to consider some important decisions prior to *SDCV* to understand it in context, and why it provides an important signpost of change in Chapter III jurisprudence. We will do so having regard to the specific context discussed in this article – use of secret evidence against a person, giving special prominence to comments in cases related to that, and cases that considered it in the context of broader Chapter III challenges.

A logical starting point is *R v Kirby; Ex parte Boilermakers' Society of Australia*,[79] where a majority of the Court recognised the Australian *Constitution* contained a separation of powers between the legislature, Executive and judiciary, with important practical implications.[80] Specifically, as a general rule and subject to limited exceptions, only a Chapter III court could exercise judicial power, and a Chapter III court could not exercise power that was non-judicial in nature. If a non-Chapter III body purported to exercise judicial power, this was constitutionally invalid. In early cases, the doctrine was utilised to determine whether or not non-judicial power had been conferred on a judicial body, or vice versa.[81] The Court explained that functions could not be conferred upon a member of the judiciary if they were incompatible with the judicial function.[82]

However, the doctrine evolved to be most useful when legislation provided for, or required, a court to depart from traditional features or characteristics of courts or judicial processes. This had been portended in earlier cases. In *Commissioner of Police v Tanos*, Dixon CJ and Webb J referred to a "deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding, he must be afforded an adequate opportunity to be heard".[83] They indicated this was required in courts "as a matter of course". In the *R v Trade Practices Tribunal;*

[75] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1059; [2022] HCA 32.

[76] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1059; [2022] HCA 32.

[77] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1059; [2022] HCA 32.

[78] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1058–1059; [2022] HCA 32.

[79] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (Boilermakers).

[80] Some cases prior to *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 had apparently recognised that the Australian *Constitution* provided for a separation of powers: *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 355 (Griffith CJ, with whom Barton J agreed), 376–381 (O'Connor J), 384 (Isaacs J), 418 (Higgins J); *Commonwealth v New South Wales* (1915) 20 CLR 54, 62 (Griffith CJ), 88–90 (Isaacs J), though Barton J (74) and Gavan Duffy J (101–103) denied the exclusivity of Chapter III courts in exercising federal judicial power; *Waterside Workers' Federation (Aust) v JW Alexander Ltd* (1918) 25 CLR 434, 442 (Griffith CJ), 457 (Barton J), 466 (Isaacs and Rich JJ). The issue divided the Court in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 where Latham CJ claimed the Australian *Constitution* did not provide for a strict separation of powers (565), similarly Starke J (577). On the other hand, Dixon J (with whom Evatt J agreed) maintained that the *Constitution* contemplated a strict separation: 585, 588. That view prevailed in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[81] For example *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361.

[82] *Grollo v Palmer* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

[83] *Commissioner of Police v Tanos* (1958) 98 CLR 383, 395.

Ex parte Tasmanian Breweries Pty Ltd case, Kitto J sought to spell out traditional features of judicial process,[84] as did justices in *Russell v Russell*.[85]

This effort really gained momentum in the 1990s. Three justices stated in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (*Chu Kheng Lim*) Parliament could not make a law which authorised or required a Chapter III court to exercise judicial power in a manner *inconsistent with the essential character of a court or the nature of judicial power*.[86]

Inevitably, this approach drew attention to the definition and/or characteristics of judicial power. Despite an early attempt,[87] the Court has been reluctant to articulate a comprehensive definition,[88] though it would eventually do so.[89] These decisions might, at the risk of oversimplifying, be usefully split into three phases. In the first phase, the Court had a generally expansive view of the potential for Ch III to protect fundamental rights, including natural justice. In the second phase, the Court took a more conversative view. In the (current) third phase, the Court accords greater scope for Chapter III protection, particularly regarding use of secret information. *SDCV* is an instance of this, albeit in three *dissenting* judgments.

B. First Phase – Expansive View

In *Kable v Director of Public Prosecutions (NSW)* (*Kable*),[90] a majority of the Court invalidated a law which permitted the DPP to apply to the Supreme Court regarding a named individual.[91] This individual had been jailed for manslaughter, and due for release. The Supreme Court was given power to continue the individual's incarceration for a further period, if satisfied he was "more likely than not" to commit further offences if released. The Court held the provision constitutionally invalid. It compromised the independence of a court by conscripting it into implementation of an executive plan.[92] The power granted to the Supreme Court was not judicial. As a result, the legislation was apt to affect public confidence in the judicial system.[93] It undermined the institutional integrity of the court and was thus invalid.[94] Although the separation of powers doctrine appears expressly only in the Australian *Constitution*, and has been held not to apply to state constitutions,[95] the Court held the principle could be drawn down from

[84] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 373 stating that judicial power required judicial independence, investigation of the law, ascertainment of facts, and application of legal principles to resolve a dispute between parties.

[85] *Russell v Russell* (1976) 134 CLR 495, 506 (Barwick CJ), 520 (Gibbs J), 532 (Stephen J).

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

[87] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 354 where Griffith CJ defined judicial power as the power to decide controversies between subjects or between government and subjects, involving a tribunal making a binding and authoritative decision (with whom Barton J agreed).

[88] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 (Gummow Hayne and Crennan JJ); [2006] HCA 44.

[89] Compare Steward J in *SDCV* who gave the difficulty of defining judicial power as justification for his apparently preferred deferential approach by the judiciary to Chapter III breach questions: *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1070; [2022] HCA 32.

[90] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[91] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (Toohey, McHugh, Gaudron and Gummow JJ; Brennan CJ and Dawson J dissenting).

[92] This language is drawn from the United States Supreme Court in *Mistretta v United States*, 488 US 361, 407 (1989): "the legitimacy of the Judicial Branch ultimately depends upon its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action."

[93] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 98 (Toohey J), 107 (Gaudron J), 116–119 (McHugh J).

[94] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 107 (Gaudron J), 121 (McHugh J), 128 (Gummow J).

[95] *Building Construction Employees & Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372.

federal level to state courts, as repositories of federal judicial power within a national integrated court structure.[96]

In *Kable*, and a case decided in the same week (discussed below), the Court considered the importance of natural justice as characteristic of a court process. In *Kable*, there was no opportunity for the individual to make submissions to the Supreme Court regarding an application made about them. McHugh J stated "neither parliament (New South Wales or Australia) can legislate in a way that permits the Supreme Court while exercising federal judicial power to disregard the rules of natural justice".[97] In *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (*Wilson*), five justices reflected upon their understanding of the nature of judicial power:

> It will often be relevant to note whether the function to be performed must be performed judicially, that is, without bias and by a procedure that gives each interested person an opportunity to be heard and to deal with any case presented by those with opposing interests.[98]

Those reasons stated the separation of powers principle advanced two constitutional objectives – guarantee of liberty and, *to that end*, independence of the judiciary in Chapter III courts.[99] This significant connection of separation of powers to liberty, though not "unprecedented",[100] is important for the discussion below on the current approach by the Court to separation of powers issues.

In *Nicholas v The Queen* (*Nicholas*),[101] Gaudron J articulated the essence of judicial power:

> (C)onsistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required *or authorised* (emphasis added) to proceed in a manner that does not ensure equality before the law, impartiality and appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained … it means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which render its proceedings inefficacious or which brings or tends to bring the administration of justice into disrepute.[102]

In *Bass v Permanent Trustee Co Ltd* (*Bass*), six justices referred with approval to this passage.[103] These justices added judicial process "*requires* (emphasis added) that the parties be given an opportunity to present their evidence and to challenge the evidence led against them".[104]

In *Leeth v Commonwealth* Mason CJ Dawson and McHugh JJ noted:

> It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power, but the rules of natural justice are essentially functional or procedural and, as the Privy Council observed

[96] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 102–103 (Gaudron J), 114 (McHugh J), 127 (Gummow J) (*Kable*). For a defence of the *Kable* doctrine see Patrick Emerton, "The Integrity of State Courts under the Australian Constitution" (2019) 47 *Federal Law Review* 521.

[97] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 116.

[98] *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

[99] *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1, 11.

[100] *R v Davison* (1954) 90 CLR 353, 381 where Kitto J said it was "necessary for the protection of the individual liberty of the citizen that these three functions (legislative, executive, judicial) should be to some extent dispersed"; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 390–393 Windeyer J (referring to Montesquieu's explanation of separation of powers as being based on liberty); *Re Quinn and QUF Industries Ltd; Ex parte Consolidated Foods Corp* (1977) 138 CLR 1, 11 (Jacobs J).

[101] *Nicholas v The Queen* (1998) 193 CLR 173; [1998] HCA 9.

[102] *Nicholas v The Queen* (1998) 193 CLR 173, 208–209; [1998] HCA 9.

[103] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); [1999] HCA 9.

[104] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); [1999] HCA 9.

> in the *Boilermakers*' case, 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.[105]

At this point, the position was that legislation which required *or* permitted courts to deny a person natural justice would likely breach Chapter III requirements.[106] This would effectively accord *constitutional* protection to natural justice, not just protection through the principle of legality, which occurred in cases discussed in the next section.

In *Nicholas*, Gaudron J said a legislative attempt to *authorise or require* a court to proceed without the person affected by the proceeding from meeting the case against them breached Ch III. Six justices in *Bass* agreed. The word "or" here is important, given what follows. Invalidity was not dependent on legislation *requiring* courts to depart from traditional process such as natural justice; it was enough it *authorised* courts to so proceed. Effectively, Ch III protects traditional characteristics of court processes. When a legislation substantially altered one or more of these characteristics, the Court would likely find an infringement of requirements of Ch III. The key is whether the legislation undermines a court's institutional integrity. That public confidence in the judiciary is at risk of being jeopardised is an indicium of that. At this point, Wheeler could accurately state Chapter III was a "constitutional star … in the ascendant".[107]

C. Second Phase – Narrow View

The star would dim. This apparent constitutional protection of traditional judicial process, including natural justice, would not endure in this robust form.[108] A few short years after *Kable*, in *Fardon v Attorney-General (Qld)* (*Fardon*) six justices validated a preventive detention regime that was, on one view, relevantly indistinguishable from that declared invalid in *Kable*. A Chapter III challenge to the provisions was dismissed, Kirby J dissenting, on the basis preventive detention there was protective, not punitive, and based on assessment of high degree of probability those within a narrow class of offenders would re-offend, rather than the ad hominem, "more likely than not" standard in *Kable*.[109]

Fardon would portend a generally narrower approach to Chapter III issues by the Court. The next cases to consider natural justice occurred a decade later, after numerous changes to High Court personnel. They involved use of secret evidence, or what the legislation refers to as "criminal intelligence". Evidence could be provided to a court regarding a dispute which would not, or may not, be provided to the other side to the dispute. Obviously, this raised significant questions regarding Ch III. However, as will be seen, the Court in this phase adopted a more permissive attitude to such laws. Challenges to such provisions on Chapter III grounds typically failed. Respectfully, these decisions can seem inconsistent with previous decisions,[110] where strong effectively mandatory protection of natural justice was evident based on Chapter III.[111] However, the earlier decisions were not overruled.

---

[105] *Leeth v Commonwealth* (1992) 174 CLR 455, 470. See similarly the observation by Dixon CJ and Webb J in *Commissioner of Police v Tanos* (1958) 98 CLR 383, 395 that it was a "deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding, he must be afforded an adequate opportunity of being heard".

[106] Fiona Wheeler, "The Doctrine of Separation of Powers and Constitutionally Entrenched due Process in Australia" (1997) 23 *Monash University Law Review* 248, 252 referring to natural justice as the "heartland" of due process enshrined by Ch III; Groves, n 5, 285–286.

[107] Wheeler, n 106, 284; Leslie Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166, 167–168 also noted the significant potential of Ch III to protect natural justice and other fundamental rights.

[108] Fiona Wheeler, "Due Process, Judicial Power and Chapter III in the New High Court" (2004) 32 *Federal Law Review* 205, 206–207.

[109] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46.

[110] Rebecca Ananian-Welsh, "The Inherent Jurisdiction of Courts and the Fair Trial" (2019) 41(4) *Sydney Law Review* 423, 434–435.

[111] As discussed above – for example *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359; [1999] HCA 9 where six justices stated that the exercise of judicial power *required* that parties be given an opportunity to present their evidence and to challenge the evidence led against them (emphasis added to the absolute terms in which the obligation was explained).

Prior to discussing cases in this second phase, one point is necessary. Use of so-called secret evidence has superficial parallels with the well-established concept of PII. However, there are key differences between that immunity and the use of secret evidence in the cases discussed below.[112] First, if a PII exemption applies, the court *does not* consider the material at all.[113] In contrast, if material amounts to criminal intelligence, the court *does* consider the material. Second, if a court is asked to declare material to be subject to PII, it weighs the government argument for non-disclosure against the rights to due process of the individual concerned;[114] in contrast, criminal intelligence provisions do not always provide for this. In an earlier case involving claims of PII a prescient warning was issued regarding use of secret evidence, particularly in criminal matters:

> If state papers were absolutely protected from production great injustice would be caused in cases in which the documents were necessary to support the defence of an accused person whose liberty was at stake in a criminal trial, and it seems to be accepted that in those circumstances the documents must be disclosed.[115]

Similar remarks were made in different contexts.[116] Unfortunately, these dicta have not precluded use of secret evidence against a person accused of wrongdoing in quasi-criminal proceedings, as we now see.

Thus, in *Gypsy Jokers*,[117] the High Court considered legislation providing for removal of fortifications around motorcycle clubs. The Police Commissioner could order such removal. This decision was subject to judicial review. Section 76(2) of the relevant legislation provided:

> The Commissioner of Police may identify any information provided to the court for the purpose of the review as confidential if its disclosure might prejudice the operations of the Commission of Police, and information so identified is for the court's use only and is not to be disclosed to any other person, whether or not a party to the proceedings, or publicly disclosed in any way.

The Commissioner issued a fortification removal order on premises associated with the appellants. The appellants sought judicial review. Section 76 provided limited judicial review of the Commissioner's decision regarding fortification removal, on the basis they did not reasonably have the required belief regarding illicit use of the premises. The Commissioner argued some information relied upon in making the order should not be disclosed to the appellants. The appellants argued s 76(2) was constitutionally invalid because it impermissibly directed the court as to exercise of its discretion, compromising its decisional independence and undermining its institutional integrity. One would have thought this a strong argument, given the apparently clear words of s 76 that the court was not to disclose material it received in relation to a dispute to others, including the other party to a proceeding, based on Commissioner assessment. This apparently breaches the natural justice requirement earlier courts had declared a fundamental and essential characteristic of judicial process, protected by Ch III.

However, by 6-1[118] the Court held the provision constitutionally valid. This outcome occurred through the way in which the majority interpreted s 76(2). They interpreted it to mean the court retained discretion whether to accept material as confidential. It was not obliged to accept assessment of that issue

[112] *Al-Rawi v Security Service* [2012] 1 AC 531, 580 (Lord Dyson); [2011] UKSC 34; Tomkins, n 11, 247.

[113] *Al-Rawi v Security Service* [2012] 1 AC 531, 580 (Lord Dyson); [2011] UKSC 34; *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ), 50 (Stephen J, with whom Aickin J agreed).

[114] *Sankey v Whitlam* (1978) 142 CLR 1, 38–39 (Gibbs ACJ), 56–60 (Stephen J, with whom Aickin J agreed), 95–96 (Mason J); *Evidence Act 1995* (Cth) s 130.

[115] *Sankey v Whitlam* (1978) 142 CLR 1, 42 (Gibbs ACJ). Stephen J (62) (with whom Aickin J agreed) referred to the public interest that an innocent person should not be convicted of a crime was sufficiently strong as to outweigh the public interest in maintaining the confidentiality of police informants.

[116] *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 346 (Gibbs CJ), 350 ("it would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party … with reference to a case which he has to decide" (Mason J)), 371 (Dawson J).

[117] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; [2008] HCA 4.

[118] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 (Gleeson CJ, Gummow, Hayne, Heydon, Crennan and Kiefel JJ; Kirby J dissenting); [2008] HCA 4.

by the Commissioner.[119] Thus the court's decisional independence was retained. This was important, because members of the majority acknowledged that, generally speaking, legislation purporting to direct courts regarding the manner and outcome of the exercise of their jurisdiction would infringe Ch III.[120] Members of the majority also noted the subject matter of the proceeding, a property right, not something more fundamental like liberty, at risk in criminal proceedings.

With respect, this would not have passed the definition of judicial power by Gaudron J in *Nicholas*, adopted by six justices in *Bass*. That approach invalidated any provision which *requires or authorises* a court to depart from natural justice. The legislation in *Gypsy Jokers authorised* a court to depart from natural justice, though arguably not *requiring* it to do so. Either way, according to Gaudron J and the six in *Bass*, it would be invalid. Yet it was validated by a majority in *Gypsy Jokers*. Kirby J dissented.[121] Arguably, the majority's interpretation does not reflect Parliament's intention. Perhaps the Court felt compelled to this strained interpretation to validate the legislation. Earlier cases had found natural justice applied both to the criminal and civil context. The means used are (respectfully) highly questionable. Yet they indicate the new flavour of Chapter III analysis in this era.

Both *Gypsy Jokers* and another case involving dismissal of constitutional challenge to criminal intelligence provisions, *K-Generation Pty Ltd v Liquor Licensing Court* (*K-Generation*),[122] involved application of the principle of legality. This principle is that legislation is interpreted to not abrogate fundamental legal rights unless Parliament's intention to do so is clear.[123] Note that judicial review of the decision that material is confidential and should not be disclosed to a party affected does not solve the problem that a decision may be made without a party affected by it being heard. The decisions in *Gypsy Jokers* and *K-Generation* ensure only that the court retains discretion as to whether the material should remain confidential and not disclosed to the affected party; not that the party *will actually* get to see and hear the material. The "protection" these cases offer fundamental rights is flimsy. Dissentients in *SDCV* acknowledged this.[124]

Though the Court sidestepped questions regarding protection of natural justice via Ch III in *Gypsy Jokers* through statutory interpretation, it could not do so in the next decision, involving legislation targeted at so-called criminal organisations. In *Pompano*[125] a unanimous court validated legislation providing for the possibility evidence could be utilised by a court without a party to the proceeding having seen or heard it. The legislation relevantly permitted the Police Commissioner to apply to a court to have information declared "criminal intelligence". The Court was *required* to hear this application without the affected party being present. A public interest monitor could attend and make submissions. If the information were declared criminal intelligence, the court could use it to determine whether an organisation was

[119] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 551 (Gleeson CJ), 558 (Gummow, Hayne, Heydon and Kiefel JJ); 593–594 (Crennan J); [2008] HCA 4.

[120] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 560 (Gummow, Hayne, Heydon and Kiefel JJ); [2008] HCA 4.

[121] Kirby J (dissenting) claimed this was an artificial interpretation of the provision. On its natural reading, it amounted to an impermissible direction to the judiciary not to disclose particular material to other parties. The judiciary was being conscripted to give effect to a decision made by others, with no independent judgment. This breached Chapter III requirements. Respectfully, there is much to commend Kirby J's view of the import of the provision.

[122] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; [2009] HCA 4. There the legislation provided the Police Commissioner could declare evidence to be "criminal intelligence" based on criteria. If so declared, legislation required the court to "take steps" to maintain its confidentiality, including by not disclosing it to others, including the party affected by the application. Again, the Court read the legislation so as to make the Commissioner's declaration subject to judicial review. The Court retained power to make the information available to others if it did not believe the criteria for confidentiality were met. The court was not required to act on the evidence: 527 (French CJ), 542–543 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 576–578 (Kirby J).

[123] *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 109–110 (French CJ and Crennan J), 131–132 (Hayne and Bell JJ), 153 (Kiefel J); [2013] HCA 29.

[124] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1039 (Gageler J), 1048 (Gordon J), 1058–1059 (Edelman J); [2022] HCA 32.

[125] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38; [2013] HCA 7.

criminal in nature. Such a finding would have adverse consequences for the organisation and its members. No representative of the organisation would be present when the court heard the criminal intelligence. A closed court was *required*. Thus, at least in relation to the assessment of whether the material was criminal intelligence, the legislation inevitably directed a court to a closed hearing. Further, if the court considered the material to amount to criminal intelligence, it was then directed to further closed hearing. Obviously, both processes fundamentally infringe natural justice.

The Court noted although procedural fairness was an abiding, essential characteristic of a court, its content was not immutable or absolute.[126] The court's main concern was whether challenged provisions compromised a court's institutional integrity. Regarding procedural fairness, the question was whether the impugned provision effected practical injustice to the party who challenged it.[127] Here the court retained substantial discretion – it determined whether or not the material amounted to criminal intelligence. Possible fairness to the person affected would be relevant in exercise of this discretion.[128] It determined what weight, if any, should be placed on it, compared with other evidence.[129] The court's decisional independence was not compromised. The court noted use of information elsewhere in the law where a party to the proceedings would not see or hear it.[130]

With respect, it is unclear precisely how the court would appropriately weigh evidence not tested in cross-examination. How much "discount" should be applied? Respectfully, how would any court be able to determine this? There is serious doubt as to practicalities of the Court's approach.[131] It does not resolve concerns individuals may have adverse findings made against them based on evidence that is less than convincing. Again, it runs counter to the view of Gaudron J in *Nicholas*, accepted by six justices in *Bass*, that laws that *authorise* a court to proceed without natural justice infringe Ch III. In his recent review of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (2023), Donaldson noted:

> What the Queensland Supreme Court was required to do under the *Criminal Organisation Act 2009* (Qld) was of a wholly different nature and foreign to what courts have traditionally done and normally do.[132]

Yet all members of the Court validated the legislation.

This included Gageler J, though he stated procedural fairness was an immutable characteristic of courts.[133] He agreed its content in specific cases was variable, but added a court could not be required by legislation to adopt unfair process. A procedure was unfair if it could result in the court making an order finally altering or determining rights without affording that person fair opportunity to respond to relevant evidence. Such unfairness would *not* be "cured" by use of public interest monitors, or the ability of a court to determine what weight to be accorded such evidence. He stated the only thing that would save legislation of that kind from invalidity due to Ch III was the capacity of the Supreme Court to stay a

[126] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 72 (French CJ), 99 (Hayne, Crennan, Kiefel and Bell JJ); [2013] HCA 7.

[127] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 72 (French CJ), 99 (Hayne, Crennan, Kiefel and Bell JJ), 108 (Gageler J); [2013] HCA 7.

[128] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 101 (Hayne, Crennan, Kiefel and Bell JJ); [2013] HCA 7.

[129] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 80 (French CJ), 102 (Hayne, Crennan, Kiefel and Bell JJ); [2013] HCA 7.

[130] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 100 (Hayne, Crennan, Kiefel and Bell JJ); [2013] HCA 7. The legislation also featured a criminal organisation public interest monitor (COPIM), but this was not really comparable with the special advocate position eventually accepted in the United Kingdom and Canada. The COPIM did not represent the interests of the respondent in the challenged legislation.

[131] Anthony Gray, "Constitutionally Protected Due Process and the Use of Criminal Intelligence Provisions" (2014) 37(1) *University of New South Wales Law Journal* 125, 154–155; Anthony Gray, *Criminal Due Process and Chapter III of the Australian Constitution* (Federation Press, 2016) 122–126.

[132] Donaldson, n 1, 131.

[133] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 105; [2013] HCA 7.

substantive proceeding pursuant to its inherent discretion to prevent unfair process.[134] This view has been criticised as insufficiently protective of fundamental rights.[135] Gageler J agreed Ch III required a court maintain decisional independence. Courts must not be conferred with powers repugnant/antithetical to traditional characteristics of judicial process. Such laws compromised a court's institutional integrity in breach of Chapter III.[136]

International Finance Trust Co Ltd v New South Wales Crime Commission,[137] considered legislation specifically providing for one of the parties to make ex parte application to the court regarding a restraining order. The legislation stated the court *must* make the order if the application was supported by an affidavit from a relevant authorised officer, where the court was satisfied of reasonable grounds for the officer's suspicion. The Court invalidated this provision, because it removed the court's control over its processes. French CJ said interpretation of legislation should not be strained to depart from the ordinary meaning of words, to render legislation constitutionally valid.[138] Here, upon that ordinary meaning, the legislation required the court to hear and determine an application ex parte. This was an attempt to direct the court regarding the manner in which it exercised its jurisdiction, depriving it of decisional independence and its ability to accord the parties fairness.[139] Gummow and Bell JJ said the judiciary was being conscripted into the implementation of an executive plan involving mandatory ex parte sequestration of property. This was unconstitutional because it was repugnant to traditional judicial process.[140] Heydon J noted the court had no discretion to give notice to the other party, invalidating the measure.[141] These were rare instances of the court finding breach of Chapter III during this era.

Relatedly, the Court repeatedly confirmed it is a fundamental feature of court proceedings in Australia that they are accusatorial and adversarial.[142] As demonstrated above, the Court had provided constitutional protection to fundamental characteristics of court processes. Clearly, if some/all of the evidence used in the case against a person accused of wrongdoing is not made available to them but taken into account by the decision-maker, this can compromise the adversarial nature of proceedings.[143] Our system of justice is premised on the notion that generally the best way to ascertain truth is for the court to hear both sides, and for evidence to be tested through cross-examination. These classic features of our system of justice are clearly compromised when secret evidence is being led.[144] The Court also emphasised the need for

[134] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 105; [2013] HCA 7. This was similar to the view of Luke Beck in different context: Luke Beck, "Fair Enough? The National Security Information (Criminal and Civil Proceedings) Act 2004" (2011) 16(2) *Deakin Law Review* 405, 417–419.

[135] Ananian-Welsh, n 110, 452: "one judge may be deferential, another might not be, and the concentration of relatively unconstrained power in the judiciary under the inherent jurisdiction means that 'faith is placed in the judgment of the individual judge in each instance'. This is far from ideal for the rule of law or separation of powers and it highlights the potential for the inherent jurisdiction to undermine these fundamental constitutional principles".

[136] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 106–107; [2013] HCA 7.

[137] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; [2009] HCA 49.

[138] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 349; [2009] HCA 49.

[139] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354–355; [2009] HCA 49.

[140] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 366–367; [2009] HCA 49.

[141] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 384; [2009] HCA 49.

[142] *X7 v Australian Crime Commission* (2013) 248 CLR 92, 135 (Hayne and Bell JJ), 153 (Kiefel J); [2013] HCA 29; *Lee v NSW Crime Commission* (2013) 251 CLR 196, 266 (Kiefel J), 294 (Bell J); [2013] HCA 39; *Lee v The Queen* (2014) 253 CLR 455, 466 (all members of the Court); [2014] HCA 20.

[143] Tulich, n 1, 346: "The adversarial process involves an intricate web of procedural and evidentiary safeguards which promote fairness, enabling a party-led contest before an independent adjudicator in which evidence gathered by the parties is led and, importantly, subjected to challenge … (it) … is predicated upon the theoretical equality of the parties to the dispute, with each party having equal rights in respect of evidence and equal opportunity to examine and cross-examine witnesses in open court and to choose their own legal representation."

[144] *Thomas v Mowbray* (2007) 233 CLR 307, 435; [2007] HCA 33: "to expect a court to rely for its decisions solely upon the evidence supplied by the very officers seeking to secure or uphold the control order is fundamentally inconsistent with the adversarial and accusatorial procedures observed by the Australian judiciary until now in serious matters affecting individual liberty as contemplated by Chapter III of the *Constitution*" (Kirby J, dissenting); and "to the extent that federal courts are left

particularity of allegation of wrongdoing, so a person accused of it can properly present defence to the allegations.[145] This includes the "particular act, matter or thing",[146] or "time, place and manner",[147] of the alleged wrongdoing. Again, this could suggest constitutional difficulties with proceedings whereby a person accused of wrongdoing is not given specific details.

However, the Court did not link the fundamental fact Australia's judicial system is accusatorial and adversarial with *constitutional protection* of these features. This is unsatisfactory. As indicated, it had in the past indicated that where laws require or authorise courts to depart from traditional characteristics of judicial process, this indicated constitutional invalidity due to Ch III. In *Lee v NSW Crime Commission* and *X7 v Australian Crime Commission*, the Court referred to the accusatorial and adversarial nature of proceedings as fundamental to our justice system. But no judge would take the next logical step – to accord the adversarial and accusatorial nature of proceedings constitutional protection. This would have the effect of providing constitutional protection to matters like burden of proof, right to natural justice, right to challenge evidence being led by the other side etc. On one view, these rights are too important to be subject to legislative whim. The Court had the opportunity to constitutionally enshrine fundamental rights, but declined.

In summary, this phase of Chapter III jurisprudence involved narrowing of due process protection. The Court read in apparently non-existent judicial discretion, to avoid a finding legislation offended Ch III. It emphasised courts' ability to weigh evidence not subject to cross-examination, even if the practicalities of doing so are highly questionable. It emphasised the importance of maintaining the confidentiality of sources of intelligence for police, as if this were a novel requirement that past courts had not weighed in requiring evidence be led in open court. It conceded traditional court processes were adversarial and accusatorial, yet refused to accord them constitutional protection, as was open to it. It was timid about the potential of Ch III to accord due process protections, shrinking instead to an argument about the inherent power of a court to stay unfair proceedings. Clearly, this inherent jurisdiction was not the basis of the established Chapter III case law.

D. Third Phase – Expansive View

In the past seven or eight years, a different approach has been evident. Greater concern is again evident with constitutional protection of due process rights, including natural justice. This has occurred both in the context of s 75(v) of the *Constitution*, and the separation of powers principle providing protection for procedural fairness.

The s 75(v) case here was a continuation of earlier cases where the Court had determined the section entrenches at least some judicial review, at federal and state level.[148] In *Graham v Minister for Immigration and Border Protection*,[149] six justices invalidated secrecy provisions regarding a Minister's decision to cancel an individual's visa on character grounds.[150] The Act permitted the Minister to do so if they reasonably believed the person failed the character test, and was in the national interest. The Act provided where the Minister had been provided confidential information about a person, they must not

with no practical choice except to act upon a view proffered by the Executive, the appearance of institutional impartiality and the maintenance of public confidence in the courts are both damaged. To that extent the judiciary is apt to be seen as but an arm of the executive which implements the will of the legislature" (Hayne J, 477–478, dissenting).

[145] *Lee v NSW Crime Commission* (2013) 251 CLR 196, 270 (Kiefel J); [2013] HCA 39; *S v The Queen* (1989) 168 CLR 266, 274–275 (Dawson J); *Walsh v Tattersall* (1996) 188 CLR 77, 84 (Dawson and Toohey JJ).

[146] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 557–558 (French CJ Gummow, Hayne, Crennan, Kiefel and Bell JJ); [2010] HCA 1.

[147] *Johnson v Miller* (1937) 59 CLR 467, 486.

[148] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1.

[149] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1; [2017] HCA 33.

[150] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ; Edelman J dissenting); [2017] HCA 33.

be required to divulge it to a court. Similarly, where an authorised migration officer had been provided confidential information about a particular person, they must not provide the evidence to a court. These provisions were challenged on s 75(v) grounds.[151]

A majority held the relevant provisions were invalid because they applied a blanket and inflexible rule, by which a court would be denied information relevant to the Minister's decision. This meant the court would be unable to effectively carry out its constitutionally enshrined duty to judicially review ministerial acts to ensure they were within power.[152] There was no effective way a court could determine whether the Minister had made relevant findings reasonably open on the facts, including whether the person met the character test and/or whether removal was in the public interest. Effectively, it made the Minister's decision unreviewable, operating a substantial curtailment on the court's power of judicial review.[153] Section 75(v) prohibited this.

HT v The Queen[154] involved sentencing of an offender. Relevant sentencing provisions permitted the Court to take into account the extent to which the offender had assisted law enforcement authorities. HT was a police informant and had in the past assisted, and was expected in future to assist, police. At sentencing, the Court and prosecutors had access to details of the assistance HT had provided authorities. However, neither HT nor their counsel were given such details. The Crown appealed against the sentenced given to HT. Again, neither HT nor their counsel were given relevant details. The Court of Appeal increased HT's penalty. HT's appeal against those proceedings was successful, all judges finding in her favour.[155]

The Court noted the content of procedural fairness was not immutable; it varied according to the circumstances, designed to avoid *practical injustice*.[156] Here HT was subject to practical injustice. She was unaware of the details used by the court regarding her assistance to authorities. She was thus effectively unable to challenge, test its accuracy or completeness, or make submissions regarding its use by the court.[157] The details might have been insufficient or inaccurate. HT had no opportunity to present her view of that assistance. This caused her practical injustice. The Court rejected the Crown's argument keeping this information from the appellant was an extension of PII. There were important differences between PII and the procedure adopted here. If PII applied, the relevant evidence would not be admitted. This was materially different to the situation here, where one party to the case did not get access to the material, but the other did.[158] The Court suggested possible alternatives to deal with confidential information, including limiting access to the material to the offender and legal representative, or use of special advocates.[159]

Note also two dissenting judgments in *Vella v Commissioner of Police (NSW)* (*Vella*).[160] The case involved an unsuccessful challenge to the validity of provisions enabling a court to make a serious crime prevention order against an individual. In order to do so, the court had to be satisfied: (1) the person had been convicted of a serious criminal offence or involved in such activity (but not charged or convicted, including being acquitted); and (2) there were reasonable grounds to believe making the order would protect the public by preventing or restricting criminal activity. The majority validated the provision, consistently with the narrow view of Ch III taken in *Fardon*. However, two dissents invalidated the

[151] That subsection confirms the High Court's original jurisdiction with respect to matters where a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth.

[152] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 28–29; [2017] HCA 33.

[153] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 32; [2017] HCA 33.

[154] *HT v The Queen* (2019) 269 CLR 403; [2019] HCA 40.

[155] *HT v The Queen* (2019) 269 CLR 403 (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); [2019] HCA 40.

[156] *HT v The Queen* (2019) 269 CLR 403, 417 (Kiefel CJ, Bell and Keane JJ), 430 (Gordon J); [2019] HCA 40.

[157] *HT v The Queen* (2019) 269 CLR 403, 418 (Kiefel CJ, Bell and Keane JJ), 427 (Nettle and Edelman JJ); [2019] HCA 40.

[158] *HT v The Queen* (2019) 269 CLR 403, 420 (Kiefel CJ, Bell and Keane JJ); [2019] HCA 40.

[159] *HT v The Queen* (2019) 269 CLR 403, 423–424 (Kiefel CJ, Bell and Keane JJ), 429 (Nettle and Edelman JJ), 433–435 (Gordon J); [2019] HCA 40.

[160] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219; [2019] HCA 38.

measure. Gageler J strongly re-asserted the importance of separation of powers doctrine in preserving liberty. Gageler and Gordon JJ expressed concern regarding the extremely broad potential scope of the law, and basing decisions about incarceration around assessment of what an individual might do in future, not what they have done, with little guidance.[161]

The same justices dissented in *Minister for Home Affairs v Benbrika* (*Benbrika No 1*).[162] There the Court considered validity of continuing detention orders, permitting a court to make an order to detain an individual convicted of a terrorism offence beyond their original term of imprisonment, if satisfied there was an unacceptable risk they would commit further terrorism or related offences once released, and there was no other way to protect against that risk that was less restrictive. The majority validated the provisions on the *Fardon* principle that such detention was non-punitive.[163] Gageler and Gordon JJ dissented. Both indicated the legislation was overbroad, not confined to the unacceptable risk the offender would cause serious harm to the community if released.[164] Gageler J said the mere object of preventing future crime was insufficient to meet Chapter III requirements; the government would have to show the object of the legislation was to prevent grave, specific harm.[165]

These judgments show preparedness by Gageler and Gordon JJ to accord Ch III a broader scope than previous judgments suggested. Respectfully, they suggest closer adherence to the essence of *Kable* than *Fardon* did. A feature of judgments of Gordon J in this context is her repeated observation of the liberty-enhancing benefits of the separation of powers principle,[166] echoing five justices in *Wilson*.[167] Gordon J acknowledged "the first rationale underpinning the separation of Commonwealth judicial power under Chapter III is the role of the judiciary as the protector of liberty".[168] Gageler J also emphasised this.[169]

Others have observed a view of separation of powers strongly connected with liberty will likely affect outcomes when a provision is challenged on Chapter III grounds.[170] Not surprisingly, a liberty-infused view of separation of powers will increase the chance measures are inconsistent with it. This is particularly important, given Gageler CJ is now Chief Justice, and Gordon J the senior puisne justice. There are further examples where Gageler J (in dissent) gave greater scope to Chapter III limitations than his colleagues.[171] It is no coincidence that judges who most openly espouse the human rights protection aspect of the separation of powers doctrine accord it greatest scope.

---

[161] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 283–287 (Gageler J), 295–297 (Gordon J); [2019] HCA 38.

[162] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68; [2021] HCA 4.

[163] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 97 (Kiefel CJ, Bell, Keane and Steward JJ); [2021] HCA 4; Edelman J described the provision as "protective punishment" (149).

[164] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 113–114 (Gageler J); 145 (Gordon J); [2021] HCA 4.

[165] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 113–116; [2021] HCA 4; Andrew Dyer and Josh Pallas, "Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible With Human Rights (and What to Do about It)" (2022) 33 PLR 61.

[166] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 291–292; [2019] HCA 38; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 132; [2021] HCA 4 (*Benbrika No 1*); *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899, [51]; [2023] HCA 33. Liberty and the separation of powers are connected in the joint reasons in *Benbrika No 1*: 92 (Kiefel CJ, Bell, Keane and Steward JJ). Edelman J is less convinced: "there is insufficient constitutional foundation to expand the Lim principle from one which is concerned with the separation of powers to one which is also founded upon the liberty of the individual and is a substantive constraint upon all legislative, executive and judicial power": *Benbrika No 1*, 164.

[167] *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1, 11: "the separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Chapter III judges."

[168] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 132; [2021] HCA 4.

[169] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 275–276; [2019] HCA 38; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 610; [2015] HCA 41.

[170] Andrew Foster, "The Judiciary and Liberty: Assessing the Competing Rationales for the Lim Principle" (2022) 33 PLR 226, 240–245.

[171] See *Northern Australian Aboriginal Justice Agency Ltd and Another v Northern Territory* (2015) 256 CLR 569; [2015] HCA 41 where Gageler J (dissenting) invalidated on Chapter III grounds a provision permitting police to detain an individual for up to four hours based on reasonable suspicion they had committed a crime. Further, in *Magaming v The Queen* (2013) 252 CLR

In *Alexander v Minister for Home Affairs* (*Alexander*) six justices invalidated s 36B of the *Australian Citizenship Act 2007* (Cth).[172] That section permitted the relevant Minister to cancel an individual's citizenship, following determination the person had engaged in criminal conduct and repudiated their allegiance to Australia, where contrary to public interest to permit the person to remain. The majority found the power of stripping a person of citizenship punitive, and in accordance with *Chu Kheng Lim* could only be exercised by a court.[173] The Court indicated dissatisfaction with an argument citizenship stripping was valid, because exercised for a protective purpose.[174] Recall this was reasoning accepted in *Fardon* to constitutionally legitimate preventive detention. Two justices in *Alexander* suggested their non-acceptance of this reasoning. Similarly, recently in *Benbrika v Minister for Home Affairs* (*Benbrika No 2*),[175] six justices struck down s 36D of the *Australian Citizenship Act* (essentially very similar to s 36B but applying to a person convicted of a terrorism offence and jailed for at least three years) on similar grounds to *Alexander*.[176]

A unanimous court recently decided in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* indefinite detention of a non-citizen person convicted of a serious crime, who had served their time, but who could not be returned to their country of origin, was unlawful.[177] This overturned *Al-Kateb v Godwin* (*Al-Kateb*),[178] which narrowly dismissed a constitutional challenge to this regime. The majority in *Al-Kateb* found executive detention of an alien, because they could not be returned to their country of origin, did not offend constitutional separation of powers.[179] Gummow J found the regime did breach that doctrine. The Court found in *NZYQ* that a law providing for detention of an individual, other than through exercise of the judicial power of the Commonwealth, could only be valid on limited grounds – where reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.[180] This was not the case here. This decision is consistent with trends in this third phase of interpretation of Ch III. A stronger separation of powers is being asserted.

The decision of three dissentients in *SDCV* is further evidence. These justices do not absolutely prohibit departures from natural justice, as suggested in *Nicholas* and *Bass* in phase one. However, they require non-disclosure be no more than reasonably necessary to protect a compelling public interest identified by the government. This clearly departs from cases in phase two like *Pompano* and *K-Generation*. No member of the Court expressed themselves in such language there. There it was the court's power to

381; [2013] HCA 40 Gageler J (dissenting) invalidated on Chapter III grounds a mandatory sentencing regime with respect to "people smugglers". Gageler J found the prosecutorial discretion whether to charge the accused with an offence to which the minimum mandatory sentence applied, as opposed to another offence to which it did not apply, meant that effectively a member of the Executive was determining the sentence that one found guilty of an offence would receive, contrary to Chapter III, and the statement in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 that adjudgment and punishment of criminal guilt was an exclusively judicial function (412).

[172] *Alexander v Minister for Home Affairs* (2022) 276 CLR 336; 96 ALJR 560 (Kiefel CJ, Gageler, Keane, Gordon, Edelman and Gleeson JJ; Steward J dissenting); [2022] HCA 19; Andrew Foster and Joseph Aharfi, "Alexander v Minister for Home Affairs: Citizenship Stripping a Dreadful Punishment" (2023) (6) *University of New South Wales Law Journal Forum* 1.

[173] *Alexander v Minister for Home Affairs* (2022) 276 CLR 336; 96 ALJR 560, 579 (Kiefel CJ, Keane and Gleeson JJ), 587 (Gageler J), 595 (Gordon J), 613–614 (Edelman J); [2022] HCA 19.

[174] *Alexander v Minister for Home Affairs* (2022) 276 CLR 336; 96 ALJR 560, 585–586 (Gageler J), 613 (Edelman J); [2022] HCA 19.

[175] *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899; [2023] HCA 33.

[176] *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 (Kiefel CJ, Gageler, Gordon, Edelman, Gleeson and Jagot JJ; Steward J dissenting); [2023] HCA 33.

[177] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ); [2023] HCA 37.

[178] *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37.

[179] *Al-Kateb v Godwin* (2004) 219 CLR 562 (McHugh, Hayne, Callinan and Heydon JJ); [2004] HCA 37.

[180] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, 1015 (all members of the Court); [2023] HCA 37.

appropriately weight material provided to the court confidentially that was sufficient.[181] That does not feature in the dissents in *SDCV*. The Court is less satisfied special advocates/public interest monitors can provide the necessary protection of due process than in *Pompano*.[182] Judges evidently no longer believe the court's inherent jurisdiction to stay proceedings that would otherwise amount to an abuse of process is the response to unfair process.[183] Some are becoming unwilling to artificially strain the wording of provisions to deem them constitutional; rather, they are invalidating them. Chapter III itself has been rediscovered as the means to protect procedural fairness. And something else is emerging in the phase three case law, as we will discuss in Part V, which is also rights-enhancing.

IV. UK Decisions on Similar Provisions

We now consider how the UK courts have assessed similar provisions. Of course, Australia and that jurisdiction shares a fundamental basis in the common law protection of rights, and the traditional absence of express rights. That jurisdiction is signatory to the *European Convention on Human Rights*, enshrined in domestic law by the *Human Rights Act 1998* (UK). Article 6 of the *Convention* enshrines the right to fair and public hearing by an independent decision-maker in civil and criminal cases. Article 6(3)(d) provides that, in respect of criminal proceedings, an accused has the right to examine witnesses used against them. Obviously that jurisdiction lacks a written constitution and there is no equivalent to Ch III of our *Constitution*. Thus, care is required in considering that jurisdiction's decisions and their possible application here. They are considered most useful in articulating the fundamental requirement of fair hearing, and the extent to which use of closed or secret procedures is consistent with it. This justifies their inclusion. Both jurisdictions clearly regard a fair hearing as an axiomatic principle of justice. Historically, this has generally required natural justice.[184]

In *Secretary of State for the Home Department v MB*,[185] a majority of the House of Lords decided a closed hearing could be compatible with fair trial requirements. It was not inevitably necessary the accused be present while all evidence led against them was heard, for proceedings to be fair. The court validated provision for a closed hearing, but read into its enabling provisions that it would not occur where, in the circumstances, an unfair trial would result. This has similarities to the courts' inherent jurisdiction to stay unfair proceedings response in *Pompano* by French CJ and Gageler J.

However, in *A v United Kingdom*[186] the Grand Chamber of the ECHR took a stricter view on closed procedures. It found in limited cases it might be consistent with fair trial requirements that material submitted against them in a case might not be given to an accused. This might be, for example, where most material used by the court in making its decision was open and disclosed to them. Or it might be

[181] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 543 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); [2009] HCA 4; *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 101–102 (Hayne, Crennan, Kiefel and Bell JJ); [2013] HCA 7.

[182] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 75, 79 (French CJ); [2013] HCA 7.

[183] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 115 (Gageler J); [2013] HCA 7; French CJ made a similar point (80).

[184] In *Re K (Infants)* [1963] Ch 381, 405–406: "fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching the conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial" (Upjohn LJ) (cited with approval by Gageler J in *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1034; [2022] HCA 32; *Brinkley v Brinkley* [1965] P 75, 78: "for a court to take into consideration evidence which a party to the proceedings has had no opportunity during trial to see or hear, and thus to challenge, explain or comment upon, … strike(s) at the very root of the judicial process" (Lord Scarman); *Lee v The Queen* (1998) 195 CLR 594, 602; [1998] HCA 60 "confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial" (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ); *Bank Mellat v HM Treasury (No 2)* [2014] 1 AC 700, 761; [2013] UKSC 38 where Lord Reed referred to a "very serious question whether secret justice … is acceptable".

[185] *Secretary of State for the Home Department v MB* [2008] 1 AC 440; [2007] UKHL 46.

[186] *A v United Kingdom* [2009] ECHR 301.

that, although most material was closed, allegations in the open material were sufficiently specific that the accused could potentially mount effective defence. However, it was not permitted where the material bore decisively on the case the accused was required to meet and where it had not been disclosed to them, at least in summary or gist form, that they could sufficiently know the case against them, and respond.[187] As much information as possible regarding the evidence being submitted against the accused should be made available, consistent with national security.[188] The Court accepted possible use of special advocates to help ameliorate the risk of an unfair process. However, such use did not entirely obviate the risk of an unfair trial, because such advocates could not typically liaise with the accused after seeing the material. This could make it impossible for them to act on their behalf. They could only provide appropriate counterbalance where sufficient detail of the allegations was made available to the accused so they could appropriately brief the advocate.[189]

That decision was accepted by the UKSC. In *Home Secretary v AF (No 3)* (*AF*)[190] justices acknowledged a fair trial required the accused to know the evidence led against them.[191] Baroness Hale and Lord Brown commented on the limited way special advocates could practically assist accused persons in such cases.[192] This has been noted by the Joint Committee on Human Rights, who concluded trials involving closed material and special advocates

> ha(d) absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system … this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.[193]

There has been substantial criticism of use of special advocates, and arguments about their limited practical ability to secure fairness for the accused.[194] This is relevant, given the fourth member of the

[187] *A v United Kingdom* [2009] ECHR 301, [220].

[188] *A v United Kingdom* [2009] ECHR 301, [218].

[189] *A v United Kingdom* [2009] ECHR 301, [220]. In *Edwards and Lewis v United Kingdom* [2004] ECHR 560 the European Court emphasised the adversarial nature of a criminal process in the United Kingdom. This required equality of arms between the parties, and a general duty on the prosecution's part to disclose evidence to the defendant. This was subject to exceptions on the ground of national security. However, only that which was strictly necessary to be withheld could be so, and in such cases the court would need to adopt procedures to ensure proceedings were fair: [46] (Grand Chamber); similarly *Case of Rowe and Davis v United Kingdom* [2000] ECHR 91, [60]–[61]; *Case of Jasper v United Kingdom* [2000] ECHR 90, [51]–[52]; *Case of Bajic v North Macedonia* [2021] ECHR 470, [54].

[190] *Home Secretary v AF (No 3)* [2010] 2 AC 269; [2009] UKHL 28.

[191] *Home Secretary v AF (No 3)* [2010] 2 AC 269; [2009] UKHL 28: "There are strong policy considerations that support a rule that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against them … there will be many cases where it is impossible for the court to be confident that disclosure will make no difference … if the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust" (Lord Phillips, 355); "the fundamental principle is that everyone is entitled to the disclosure of sufficient material to enable him to answer effectively the case that is made against him.. if the rule of law is to mean anything.. it must insist that the person affected be told what is alleged against him … the judge must insist in every case that the controlled person is given sufficient information to enable his special advocate effectively to challenge the case that is brought against him" (Lord Hope, 360–362); "an essential requirement of a fair hearing is that a party against whom relevant allegations are made is given the opportunity to rebut the allegations. That opportunity is absent if the party does not know what the allegations are" (Lord Scott, 365). All justices (Lord Hoffmann, Lord Hope, Lord Scott, Lord Rodger, Lord Walker, Baroness Hale, Lord Carswell and Lord Brown) agreed with the judgments of Lord Phillips.

[192] *Home Secretary v AF (No 3)* [2010] 2 AC 269, 367 (Baroness Hale), 370 (Lord Brown); [2009] UKHL 28; *Al Rawi v Security Service* [2012] 1 AC 531, 578 (Lord Dyson); [2011] UKSC 34.

[193] *Joint Committee on Human Rights Counter-terrorism Policy and Human Rights* (16th Report, 2010); *Charkaoui v Canada* [2007] 1 SCR 350, 398–399 (McLachlin CJ, for the Court).

[194] For example, Chamberlain, who has undertaken the role, notes advocates cannot lead evidence to contradict allegations in the closed material, find it difficult to effectively challenge government arguments that non-disclosure is required by national security, and are constrained in communicating with an accused once closed material has been made available to them: Martin Chamberlain, "Special Advocates and Procedural Fairness in Closed Proceedings" (2009) 28 *Civil Justice Quarterly* 314; Adam Tomkins, "National Security and the Due Process of Law" (2011) 64 *Current Legal Problems* 215, 223 notes "grave concerns as to the fairness of closed material … at the very highest levels both of law and of politics and that these concerns are only partly

majority, Steward J in *SDCV*, read such a requirement into the legislation to apparently ease fairness concerns. There was also suggestion in *AF* that the allegations, but not necessarily evidence said to support them, would need to be disclosed to the accused.[195]

Later cases re-emphasised the importance of open courts as a fundamental principle of justice.[196] In *Al Rawi v Security Service*,[197] Lord Kerr noted that to be valuable, evidence must be capable of withstanding cross-examination.[198] Otherwise, it risked being misleading. For this reason, the right of an individual to know the case made against them, and opportunity to rebut it, was central to a fair trial. Lord Kerr noted the special advocate procedure should never be regarded as an acceptable substitute for the compromise of a fair trial caused when secret evidence is used against a person.

The UKSC has indicated at appellate level it should minimise use of closed hearings, and consider whether confidential material can be addressed in open court. The party relying on the closed material must ensure that, to the maximum extent possible, the other party is given indication of its content.[199] Open justice should prevail to the maximum extent.[200] At the very least, the gist of the closed material must be made available to the party against whom it is used.[201] The judges themselves acknowledge the principles are difficult to apply in practice.[202] This requirement of "gisting" has no counterpart in Australian law,[203] though justices in *SDCV* suggested it might be considered.[204]

The UK/European experience demonstrates the courts eventually determined the ability to stay unfair proceedings was insufficient to protect fair trial rights. A fair trial did not absolutely prohibit use of secret evidence and closed procedures, but the trial must be as open and transparent as possible. Use of secret evidence must be strictly limited. At least the gist of the case must be given to the accused/person affected, and as much specific detail as possible to permit them to fairly respond. Material that is potentially decisive must generally be revealed or adequately summarised to permit such response. Use of special advocates is not generally a panacea for due process concerns. These kinds of considerations should be relevant to the balancing some members of our court are engaged in currently when assessing Chapter III challenges, including relating to secret proceedings. Our attention turns to this developing trend.

---

tempered by the use of special advocates"; Kavanagh, n 10, 838; Greg Martin, "Outlaw Motorcycle Gangs and Secret Evidence: Reflections on the Use of Criminal Intelligence in the Control of Serious Organised Crime in Australia" (2014) 36 *Sydney Law Review* 501, 534 states these procedures "paper over the cracks" of the damage done to open justice and procedural fairness; Jackson, n 2, 357–358.

[195] *Home Secretary v AF (No 3)* [2010] 2 AC 269, 354 (Lord Phillips) (with whom Lord Hope, Lord Scott, Lord Rodger, Lord Walker and Baroness Hale agreed), 372 (Lord Brown); [2009] UKHL 28.

[196] *Bank Mellat v HM Treasury (No 2)* [2014] 1 AC 700, 746; [2013] UKSC 38: "the right to know and effectively challenge the opposing party's case is a fundamental feature of the judicial process. The right to a fair trial includes the right to be confronted by one's accusers and the right to know the reasons for the outcome … it is fundamental to our system of justice that … trials should be conducted and judgments given in public … the court has for centuries been the guardian of these fundamental principles" (Lord Hope, dissenting); similarly Lord Kerr (751, dissenting) and Lord Reed (760, dissenting).

[197] *Al Rawi v Security Service* [2012] 1 AC 531; [2011] UKSC 34.

[198] *Al Rawi v Security Service* [2012] 1 AC 531, 592–593; [2011] UKSC 34.

[199] *Bank Mellat v HM Treasury (No 2)* [2014] 1 AC 700, 744 (Lord Neuberger, with whom Baroness Hale, Lord Clarke, Lord Sumption and Lord Carnwath agreed); [2013] UKSC 38.

[200] *R (Haralambous) v Crown* [2018] AC 236, 272 (Lord Mance, with whom Lord Kerr, Lord Hughes, Lady Black and Lord Lloyd-Jones agreed); [2018] UKSC 1.

[201] *R (Haralambous) v Crown* [2018] AC 236, 272 (Lord Mance, with whom Lord Kerr, Lord Hughes, Lady Black and Lord Lloyd-Jones agreed); [2018] UKSC 1. There is criticism these disclosure requirements are insufficient for the defendant to adequately prepare their defence: Daphne Barak-Ercz and Matthew Waxman, "Secret Evidence and the Due Process of Terrorist Detentions" (2009) 48 *Columbia Journal of Transitional Law* 2, 26.

[202] *Home Secretary v AF (No 3)* [2010] 2 AC 269, 361 (Lord Hope), 368 (Baroness Hale); [2009] UKHL 28; Kavanagh, n 10, 856.

[203] Greg Martin, "Outlaw Motorcycle Gangs and Secret Evidence: Reflections on the Use of Criminal Intelligence in the Control of Serious Organised Crime in Australia" (2014) 36 *Sydney Law Review* 501, 512.

[204] Tomkins notes "it remains a monumental ongoing struggle to insist even on the 'core irreducible minimum' of procedural fairness in our national security law": Tomkins, n 194, 251.

V. Proportionality-type Analysis in SDCV – A Fourth Phase?

Noteworthy in two judgments in *SDCV* is the *apparent* introduction of proportionality-type analysis to separation of powers questions. The word "apparent" is appropriate because neither of the two justices who we argue have effectively suggested proportionality analysis in this context expressly use the word. This may herald the commencement of a "fourth phase" of jurisprudence in this area.

Although it remains controversial, a majority of the High Court has accepted proportionality analysis elsewhere in Australian constitutional law. It has been applied to the implied freedom of political communication.[205] It has been applied to the express freedom of trade, commerce and intercourse.[206] It has been applied to the constitutional right to vote.[207] These are clearly rights-based (and/or freedom-based) contexts. It has also been applied to determine whether a Commonwealth law is supported by a head of power, especially purposive powers,[208] and validity of delegated legislation.[209] It has been analogised to the orthodox test used to determine the validity of federal laws in Australia.[210] There is already a rich Australian literature generally supportive.[211] It is not suggested proportionality is or should be applied in exactly the same way in each public law context in Australia.[212]

The Court has applied *structured* proportionality to these constitutional law questions. This involves considering: (1) whether the law is *suitable* – whether rationally connected to its (legitimate) purpose, such that the purpose can be furthered; (2) whether the law is *necessary* – whether there is no obvious and compelling alternative, reasonably practicable way of achieving the same purpose with less impact on the freedom; and (3) whether the law is *adequate in its balance*, considering the importance of the purpose of the provision and the extent of the restriction it imposes.[213]

This process is similar, though not identical, to how proportionality is applied in comparable jurisdictions like Canada and the United Kingdom.[214] In Canada *Charter* human rights are generally not absolute.[215] They are subject to reasonable limits prescribed by law that can be demonstrably justified in a free

[205] *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34; *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1; [2021] HCA 18; *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655; [2022] HCA 23.

[206] *Palmer v Western Australia* (2021) 272 CLR 505, 527–529 (Kiefel CJ and Keane J), 596–602 (Edelman J); [2021] HCA 5; Gageler and Gordon JJ did not apply structured proportionality. Only five justices delivered judgments.

[207] *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 39 (French CJ), 139–140 (Kiefel J); [2010] HCA 46.

[208] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 344 (Barton J), 358 (O'Connor J).

[209] *Brett Cattle Co Pty Ltd v Minister for Agriculture, Fisheries and Forestry* (2020) 274 FCR 337, [300] (Rares J); [2020] FCA 732.

[210] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 567 fn 272 (all members of the Court).

[211] Shipra Chordia *Proportionality in Australian Constitutional Law* (Federation Press, 2020); Adrienne Stone, "Proportionality and its Alternatives" (2020) 48(1) *Federal Law Review* 123; Evelyn Douek, "All out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia" (2019) 47(4) *Federal Law Review* 551; Rosalind Dixon, "Calibrated Proportionality" (2020) 48(1) *Federal Law Review* 92; Murray Wesson, "The Reception of Structured Proportionality in Australian Constitutional Law" (2021) 49(3) *Federal Law Review* 352; Jeremy Kirk, "Constitutional Guarantees, Characterisation and the Concept of Proportionality" (1997) 21 *Melbourne University Law Review* 1.

[212] For example, in the context of the implied freedom of political communication, proportionality testing occurs after compatibility testing has occurred, considering whether the purpose of the law and the means adopted are compatible with the constitutionally prescribed system of representative government: *McCloy v New South Wales* (2015) 257 CLR 178, 194; [2015] HCA 34. This "compatibility" doctrine need not be applied to other applications of proportionality in Australian constitutional law. The High Court's use of proportionality in the context of *Constitution* s 92 demonstrates flexibility in use of the concept: *Palmer v Western Australia* (2021) 272 CLR 505; [2021] HCA 5.

[213] *McCloy v New South Wales* (2015) 257 CLR 178, 195 (French CJ, Kiefel, Bell, and Keane JJ); [2015] HCA 34; *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655, 666–667 (Kiefel CJ and Keane J), 703 (Edelman J); [2022] HCA 23. Steward J agreed with Kiefel CJ, Keane and Edelman JJ (707), and Gleeson J agreed with the principles expressed by Kiefel CJ and Keane J, including use of structured proportionality (708). Gageler J does not generally utilise proportionality analysis. Gordon J does not either, but accepted in *Farm Transparency* it could be a "tool of analysis" in some cases: 690.

[214] Wesson, n 211, 355 states the current Australian approach is similar to that utilised in Canada.

[215] *Charter of Rights and Freedoms*, RSC 1982.

and democratic society.[216] The Supreme Court of Canada has interpreted this to require proportionality analysis involving three stages – the Court considers whether the challenged measures are rationally and carefully designed to meet a legitimate, pressing objective, whether the measures impair the *Charter* right as minimally as possible, and whether there is proportionality between the state's legislative objective and the impact on the *Charter* freedom.[217] The UK approach is similar, having been strongly influenced by the Canadian approach.[218] UK courts consider whether the objective of the law is sufficiently important to justify limitation of a right enshrined in the *Human Rights Act*, whether rationally connected to the objective, whether a less intrusive measure could have been utilised, and having regard to these matters and the extent to which the right has been infringed, whether fair balance has been struck between the individual rights and community rights.[219]

Where is evidence of proportionality in *SDCV*? It is acknowledged the relevant judgments do not expressly use the word. However, Gageler J set out a possible new approach to determine questions of validity of legislation challenged on Chapter III grounds, in particular use of secret evidence. He indicated a general rule opposing parties to a case should know the case the other party seeks to make, and how they will make that case.[220] This rule was not absolute. Regarding exceptions, Gageler J indicated any legislated departure from the general rule "must be no more than reasonably necessary to protect a compelling public interest".[221] Edelman J agreed. He indicated it would be procedurally unfair to deny a party a meaningful right to be heard in proceedings affecting them. This would sometimes offend the institutional integrity of the court, and be invalid under Ch III. It would *not* do so where the unfairness was "justified by a compelling countervailing interest, and that injustice is the minimum that is reasonably necessary to protect that interest".[222]

Obviously, reference to minimal interference with a right/freedom in assessing constitutionality in these decisions is analogous to the second stage of structured proportionality analysis, which considers *necessity* – whether the legislative object could be achieved through alternative means that are compelling and less intrusive of the constitutional right/freedom. Reference to compelling justification for the intrusion is analogous to the first stage of structured proportionality analysis, which considers whether the measure is *suitable* to achievement of a legitimate objective. Consideration of whether the legislature can demonstrate a compelling countervailing interest justifying intrusion on the right is similar to arguments whether the measure is *adequate in the balance* in terms of the third part of structured proportionality. Edelman J has elsewhere acknowledged the utility of structured proportionality to Ch III.[223]

One could make similar observations about the judgments of Gageler and Gordon JJ in *Benbrika No 1* and *Vella*. Recall that in *Benbrika No 1*, the legislation permitted the Minister to apply to the court for a continuing detention order. This was applicable to a person convicted of a terrorism offence. The court was empowered to make the order if it believed there was a high degree of probability that, if released, the person posed an unacceptable risk of committing an offence against Pt 5.3 of the *Criminal Code 1995* (Cth). A majority of the Court dismissed the constitutional challenge to the provision, but Gageler and Gordon JJ found the law at least partially constitutionally invalid.

Gageler J indicated the general rule that an order for a person's involuntary detention was generally made for punitive purposes, and a judicial function. There were exceptions. Sometimes detention was

[216] *Charter of Rights and Freedoms*, RSC 1982 s 1.

[217] *R v Oakes* [1986] 1 SCR 103, 138–140 (Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ; Estey and McIntyre JJ concurring the result).

[218] *Bank Mellat v HM Treasury (No 2)* [2014] 1 AC 700, 790; [2013] UKSC 38, citing *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, [19]; [2007] UKHL 11.

[219] *Bank Mellat v HM Treasury (No 2)* [2014] 1 AC 700, 771 (Lord Sumption, with whom Baroness Hale, Lord Kerr and Lord Clarke agreed), 790 (Lord Reed, with whom Lord Dyson agreed); [2013] UKSC 38.

[220] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1035; [2022] HCA 32.

[221] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1035; [2022] HCA 32.

[222] *SDCV v Director-General of Security* (2022) 96 ALJR 1002, 1054–1055; [2022] HCA 32.

[223] *Jones v Commonwealth* (2023) 97 ALJR 936, [154]; [2023] HCA 34.

for non-punitive purposes, and did not offend the general rule. However, like his judgment in *SDCV*, he limited this exception. His focus on limiting the exception in *Benbrika No 1* was that non-punitive detention could only relate to prevention of *harm*. Mere prevention of a *crime* was not sufficient. He said the legislation was cast too broadly – there was a range of conduct that met the description of an offence against Pt 5.3 of the *Criminal Code*. Some if it was too remote from the objective of prevention of harm related to terrorism. Gordon J expressed similar views.[224]

Again, neither Gageler nor Gordon JJ uttered the word "proportionality". However, another way of describing their position is that the law was not *suitable* to achievement of its stated purpose, because of its breadth. It was insufficiently tailored towards preventing terrorism. Overbreadth of legislation has been used in past cases to conclude a law is not suitable in the proportionality context.[225] Obviously, the question of *suitability* is asked at the first stage of proportionality testing. These judges emphasised the effect of the order sought on a person's liberty. In other words, they concluded the interference with an individual's liberty, obviously a most fundamental interest, was not justified by the legislative object. Given the extent to which the legislation impacted on fundamental freedoms, and its tenuous links to legitimate purpose, it was not *adequate in its balance*. We do not discuss *necessity* in this instance. The legislation expressly *required* the court to consider whether the order sought was the minimal impairment of a person's liberty consistent with its objectives. Thus, neither Gageler nor Gordon JJ discussed that issue outside the context of the specific statutory provision, unlike the discussion in *SDCV* mentioned above.

In *Vella*, legislation permitted the court to make a "serious crime prevention order" against an individual, if the person had been convicted of a crime, or the court was satisfied they had been involved in serious criminal activity (though not convicted, or charged, even if acquitted), and reasonable grounds existed to believe an order would protect the public by disrupting involvement by the person in serious crime. The court could make orders it thought appropriate.

Again, in dissent both Gageler and Gordon JJ held the legislation constitutionally invalid. Again, concern was expressed regarding lack of tailoring of the legislation to achievement of legitimate ends.[226] It was overly broad, both in definition of serious criminal activity and the requirement of reasonable grounds to believe the order would achieve the required prevention etc.[227] In contrast, provisions validated in *Thomas v Mowbray* (*Thomas*)[228] required the court to be specifically satisfied the proposed order would "substantially assist in preventing a terrorist act".[229] Further, it was unsatisfactory to give the court extremely broad power to make whatever order/s it thought "appropriate" with no guidance given.[230] The order could be made applicable for up to five years, with the court only having power to revoke it if satisfied of material change in circumstances.[231] Unlike similar provisions, it did not require the court to consider the impact of the proposed order on the individual.[232]

Again, neither used the word proportionality. However, neither believed the legislation was *suitable* to the claimed objective, because it was overbroad. There were alternatives available to achieve the objectives of the legislation that were compelling and less invasive of freedom; both justices referring to comparable measures validated in *Thomas*. In other words, the provisions were not *necessary*. Both were seriously concerned with the effect of the potential orders on an individual's liberty. This meant

[224] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 145–146.

[225] *Brown v Tasmania* (2017) 261 CLR 328, 364–365 (Kiefel CJ, Bell and Keane JJ); [2017] HCA 43.

[226] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 287–288; [2019] HCA 38.

[227] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 285 (Gageler J), 294–295 (Gordon J); [2019] HCA 38.

[228] *Thomas v Mowbray* (2007) 233 CLR 307; [2007] HCA 33.

[229] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 284; [2019] HCA 38.

[230] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 290 (Gageler J), 295 (Gordon J); [2019] HCA 38.

[231] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 287 (Gageler J); [2019] HCA 38.

[232] *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 285 (Gageler J); [2019] HCA 38.

the legislation was not *adequate in its balance*, considering the potentially extreme impact on individual liberty, and the weak claimed law enforcement rationale.

Concededly, some justices have indicated structured proportionality is *not* appropriate in the Chapter III context. In *Falzon v Minister for Immigration and Border Protection*[233] Kiefel CJ Bell Keane and Edelman JJ indicated the inquiry in relation to Ch III was different than the implied freedom of political communication and s 92. In the latter two contexts, the freedom/right involved was not absolute, and the question was one of "reasonable necessity". There, proportionality analysis was useful. However, for Ch III, the question related to the true purpose of the detention.[234] Their Honours also claimed Ch III contained an *absolute* prohibition on laws involving exercise of the Commonwealth judicial power, unlike the implied freedom and s 92.[235]

Respectfully responding, judgments of Gageler and Gordon JJ discussed above clearly appear to move beyond considering the "true" purpose of the detention. In addition, they consider whether the legislation was sufficiently tailored towards achieving a particular objective, and they consider availability of means less restrictive on freedom to achieve the legitimate end. In other words, they are effectively considering both the suitability and the reasonable necessity for interference with fundamental rights. They are not confining discussion to the true purpose of the provision. In *Falzon* four justices said a consideration of reasonable necessity was *congruent* with proportionality analysis, not an alternative.[236]

Further, we cannot accept "Chapter III contains an absolute prohibition on laws which involve the exercise of the judicial power of the Commonwealth", in the joint reasons in *Falzon* as supposed justification for non-use of proportionality there.[237] First, not every law that technically infringes separation of powers principles is invalid. As noted above, the Court has found only laws which offend the institutional integrity of courts are invalid. Not every law infringing separation of powers will do so. Further, the Court has developed the so-called chameleon doctrine, under which the powers can take their nature from the kind of body in which they are reposed.[238] And it has developed a persona designata exception to the separation of powers principle.[239] It is not correct, with respect, to justify resort to proportionality in one constitutional context but not another by arguing that, in the one case, the prohibition is conditional, and in the other, it is absolute. Respectfully, we reject the explanation of some justices in *Falzon* as to why structured proportionality should *not* be applied to Ch III.

Further, of justices party to those joint reasons in *Falzon*, three of them have retired. The fourth, Edelman J, has recently expressly disowned this view in *Falzon* that structured proportionality analysis is not appropriate to Chapter III cases.[240] He acknowledged "proportionality testing is not infrequent

[233] *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333; [2018] HCA 2.

[234] *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 344; [2018] HCA 2.

[235] *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 344; [2018] HCA 2.

[236] Compare Guy Baldwin, "A Chance to Close the Proportionality Chapter in Australian Constitutional Law?", *AUSPUBLAW Blog* (17 November 2023), who apparently regards reasonable necessity as an alternative to proportionality. He opines that with the ascension of Gageler to Chief Justice, the High Court might "have a chance to close the unhappy proportionality chapter (and) … *instead* turn to a means-ends test of reasonable necessity" (emphasis added). With respect, the joint reasons in *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333; [2018] HCA 2 saw reasonable necessity *as part of* proportionality testing, not an *alternative* test: "the test of reasonable necessity *in proportionality analysis* asks whether the legislative measure is necessary at all": 344 (Kiefel CJ, Bell, Keane and Edelman JJ) (emphasis added); similarly in *McCloy v New South Wales* (2015) 257 CLR 178, 216; [2015] HCA 34: "in so far as proportionality may be considered to involve a conclusion that a statutory limitation is or is not reasonably necessary" (French CJ, Kiefel, Bell and Keane JJ).

[237] *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 344 (Kiefel CJ, Bell, Keane and Edelman JJ); [2018] HCA 2.

[238] *R v Davison* (1954) 90 CLR 353, 368–370 (Dixon CJ and McTiernan J).

[239] *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1, 13: "the separation of judicial functions from the political functions of government is not so rigid as to preclude the conferring on a Chapter III judge … certain kinds of non-judicial powers" (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Grollo v Palmer* (1995) 184 CLR 348, 365 (Brennan, Deane, Dawson and Toohey JJ).

[240] *Jones v Commonwealth* (2023) 97 ALJR 936, [151]–[154]; [2023] HCA 34.

when considering whether a law has transgressed the limits of Chapter III of the *Constitution*".[241] He utilised it in *NZYQ*,[242] though concededly there is no mention of it (one way or the other) in the joint reasons of the others. With respect, Edelman J is (now) correct.

If it is true there are signs justices are moving towards application of proportionality-type analysis in separation of powers challenges, the next question is whether such a move should be applauded. We believe it should. It has been well-documented structured proportionality is connected with enhancement of rights protection.[243] It reflects a culture of justification[244] – if parliaments wish to abrogate fundamental rights, they must demonstrate the need for such a law, it is appropriately tailored towards meeting legitimate ends, is not broader than it needs to be, and (crudely) is "worth it", in terms of the importance of the objective, and the extent to which human rights are infringed. It encourages parliaments to carefully consider law reform proposals, assess their likely impact on rights, and consider ways in which goals may be achieved in ways that minimally impact rights. It places human rights at the forefront of law reform proposals. Governments can sometimes be reactive, needing to be seen to be "doing something" in response to an identified need. Adoption of structured proportionality more broadly in constitutional law, including in relation to Ch III, might slow this kind of knee-jerk response, encouraging more considered and nuanced approaches to issues.

In reviewing secrecy provisions of the *National Security Information (Criminal and Civil Proceedings) Act*, Donaldson recently concluded:

> It will be rare indeed that legislation requiring courts to deal with federal criminal proceedings … in closed courts will be necessary or proportionate to the threat of terrorism or threat to national security (within the meaning of the Act). Such a requirement, imposed on a court presiding over federal criminal proceedings, is an extraordinary thing.[245]

Evidence of this appears in the UK in *A v Secretary of State for the Home Department* (*A*)[246] and in *Bank Mellat v HM Treasury (No 2*).[247] In *A* the House found a measure failed proportionality analysis because it discriminated against foreign nationals for non-justified reasons. The measure was arbitrary. Because of its limited application, it did not apply to a broad number of individuals, so it could not be described as "necessary". In the latter case, measures were applied to one bank (BM) over fears of connections with activities of the Iranian government. The measures were not applied to other Iranian banks. The government tried to explain why the measure was applied only to BM, but their argument changed substantially during proceedings. The government lacked evidence of special risk associated with BM, compared with other banks. Five members of the Supreme Court found the measures failed proportionality analysis.[248] They were arbitrary and irrational in applying only to BM, without justification. Like in *A*, the fact the law so discriminated compromised its ability to meet its intended objectives, also making it irrational.

---

[241] *Jones v Commonwealth* (2023) 97 ALJR 936, [154]; [2023] HCA 34 (*Jones*). It should be conceded that Kiefel CJ, Gageler, Gleeson and Jagot JJ in *Jones* quote *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333; [2018] HCA 2 on this point with evident approval: [43]–[44].

[242] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, 1018; [2023] HCA 37 (part of the unanimous judgment, but his different view on this noted explicitly).

[243] Stone, n 211, 132; Julian Rivers, "A Theory of Constitutional Rights and the British Constitution" in Robert Alexy (ed), *A Theory of Constitutional Rights* (OUP, 2009) xvii, xxxi.

[244] Moshe Cohen Eliya and Iddo Porat, "Proportionality and the Culture of Justification" (2011) 59(2) *American Journal of Comparative Law* 463; Mattias Kumm, "The Idea of Socratic Contestation: The Point of Rights-based Proportionality Review" (2010) 4(2) *Law and Ethics of Human Rights* 141; Vicki Jackson, "Constitutional Law in an Age of Proportionality" (2015) 124 *Yale Law Journal* 3094, 3108–3109.

[245] Donaldson, n 1, 131.

[246] *A v Secretary of State for the Home Department* [2005] 2 AC 68; [2004] UKHL 56.

[247] *Bank Mellat v HM Treasury (No 2)* [2014] 1 AC 700; [2013] UKSC 38.

[248] *Bank Mellat v HM Treasury (No 2)* [2014] 1 AC 700; [2013] UKSC 38: Lord Sumption, with whom Baroness Hale, Lord Kerr and Lord Clarke agreed (773–774); Lord Carnwath agreeing (821). Interestingly, a majority also found the Minister's relevant direction to be unlawful because of the failure to permit a representative of the bank to make submissions prior to its being issued: Lord Sumption, with whom Baroness Hale, Lord Kerr and Lord Clarke agreed (784); Lord Neuberger (817).

Further, though some have argued proportionality is anathema to Australian law, and its sometimes emphasis on legalism,[249] the principle is already applied by a majority of the Court to an implied freedom and express rights, and in determining whether Commonwealth legislation is valid. The Court equated it with the orthodox, heavily-used "reasonably appropriate and adapted" test of constitutional validity.[250] It is hardly radical to adopt it to separation of powers cases, and it will produce decisions more protective of fundamental rights than a more technical approach.

It is acknowledged (again) neither Gageler nor Gordon JJ used "proportionality" in these judgments, and nor did Edelman J in *SDCV*. In the case of Gageler and Gordon JJ, they do not currently accept proportionality analysis in the context of the implied freedom of political communication.[251] However, there are signs this resistance may be softening. Recently Gageler and Gordon JJ referred to and applied at least some proportionality factors in resolving cases concerning the implied freedom.[252] To some extent their objections in the context of the implied *freedom* of political communication are not as applicable in the context of separation of powers, where *rights* are clearly at stake.[253] They emphasised in implied freedom cases structured proportionality in that context risked masking reasons for the implied freedom.[254] There is less danger of that happening in the context of separation of powers. Their Honours have acknowledged the rationale of the separation of powers principle is rights protection. Edelman JJ agrees, as have decisions like *Wilson*. Proportionality provides greater rights enhancement. It makes logical sense that, when judges have found the purpose of a separation of powers is to enhance rights, and use of proportionality is rights-enhancing, there is a strong argument to use it *in that context*.

In initially rejecting proportionality analysis, Gordon J referred to Gleeson CJ in *Roach v Electoral Commissioner*.[255] He spoke of overseas proportionality analysis and dangers of importing it into Australian law:

> Human rights instruments which declare in general terms a right … and then permit derogation of that right, but only in the case of a legitimate objective pursued by means that are no more than necessary to accomplish that objective, and give the court the power to decide whether a certain derogation is permissible, confer a wider power of judicial review than that ordinarily applied under our *Constitution*.[256]

Clearly, this influenced Gordon J, who quoted it in *McCloy v New South Wales* for not accepting proportionality analysis.[257] Yet compare the test suggested by Gageler and Edelman JJ in *SDCV* for determining separation of powers questions. They started with a general rule a party should always have the right to hear evidence led against them, so as to potentially provide effective response to it. They accepted an exception where compelling countervailing considerations justified departure from the general rule. Respectfully, we do not see a material difference between the approach now favoured

[249] Douek, n 211, 555–558; Wesson, n 211, 365–367.

[250] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 567 fn 272 (all members of the Court).

[251] *McCloy v New South Wales* (2015) 257 CLR 178, 235–238 (Gageler J), 288–289 (Gordon J); [2015] HCA 34; *Brown v Tasmania* (2017) 261 CLR 328, 376–377 (Gageler J), 464–468 (Gordon J); [2017] HCA 43.

[252] *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 46–47 (Gageler J), 73–74 (Gordon); [2021] HCA 18; *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655, 679; [2022] HCA 23 (Gageler J discussing "adequacy in the balance" and 690–691 (Gordon J applying some of the factors, acknowledging structural proportionality may sometimes be a "(useful) tool of analysis".)

[253] *Brown v Tasmania* (2017) 261 CLR 328; [2017] HCA 43 where Gordon J pointed out the implied freedom of political communication was not a personal right, in contrast to how proportionality had developed in the context of express rights (466). Gageler J emphasised the implied freedom was not concerned with a right, but was a structural implication, while the context in which proportionality was developed elsewhere was a right (377). Obviously, these objections are muted in a different context which Gageler CJ and Gordon J freely admit is rights-based, that of Chapter III matters. Some may view Chapter III rights protection as an implied freedom from arbitrary and/or procedurally improper detention. If that argument were accepted, it is more difficult to distinguish the implied freedom of political communication from Chapter III "freedoms".

[254] *McCloy v New South Wales* (2015) 257 CLR 178, 238 (Gageler J); [2015] HCA 34.

[255] *Roach v Electoral Commissioner* (2007) 233 CLR 162; [2007] HCA 43.

[256] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178–179; [2007] HCA 43.

[257] *McCloy v New South Wales* (2015) 257 CLR 178, 289; [2015] HCA 34.

by two members of the Court and Gleeson CJ's description of apparently illegitimate legal reasoning employed elsewhere. Gageler and Edelman JJ required any exception to the general rights-protective rule be no more than reasonably necessary to achieve a legitimate objective.[258] This is effectively how Gleeson CJ described how proportionality works in Europe and Canada.

Gageler J expressed concern with the third requirement of proportionality analysis – that challenged measures must be "adequate in their balance". His concern was lack of guidance as to how conflicting interests were to be balanced and adequacy of balance gauged.[259] With respect, the same might be said of the *Lange v Australian Broadcasting Corp* test Gageler J continues to support, including whether measures are "reasonably appropriate and adapted to a legitimate end in a manner compatible with representative and responsible government".[260] There is room for uncertainty and difference in the application of that test. He also indicated natural justice rights could be required to yield to a "compelling public interest". There is room for argument regarding what is a "compelling" public interest, and it is considered likely that, if such a test were utilised in this context, balancing would occur (silently or overtly).

For these reasons, it is possible a majority of the Court will eventually come to apply what we consider to be proportionality analysis to laws said to infringe the separation of powers doctrine. Obviously, the label judges place on this process is not determinative; the substance is what is important. The dissenting judgments in *SDCV* portend this, and it should be applauded.

VI. Conclusion

This article has explained the potential importance of the Court's recent decision on a Chapter III challenge to use of secretive measures. Though a bare majority validated the provision, there is clear evidence, from this case and other decisions, that the Court is asserting a more robust separation of powers principle than was evident previously. The Court is well into its third phase of its approach to Ch III, a phase which holds great promise for those who wish to provide constitutional protection to fundamental due process rights, including natural justice, as part of fair process. Noteworthy too are the steps towards use of proportionality analysis in the Chapter III context in a possible fourth phase, even if some of those steps were taken by justices who have resisted proportionality analysis elsewhere. These steps too have the potential to significantly enhance rights protection. This is sensible in the context of a constitutional doctrine sourced in rights protection. Dissenting judgments in *SDCV* offer the tantalising prospect the Court will finally grasp the opportunity Chapter III provides to effectively enshrine and protect constitutionally rights recognised elsewhere as axiomatic and fundamental. We await that evolution in the Gageler High Court.

[258] In *Brown v Tasmania* (2017) 261 CLR 328; [2017] HCA 43, Gageler J criticised the "necessity" part of structured proportionality as being too mechanical if confined to an inquiry into less restrictive means (377). Yet, in *SDCV v Director-General of Security* (2022) 96 ALJR 1002; [2022] HCA 32, he included a no less restrictive means requirement in his suggested formulation. It is conceded they are in different constitutional contexts – the former in the context of the implied freedom of political communication, the other separation of powers. However, respectfully it has not (yet) been explained why necessity is apparently too restrictive in one context, but not the other.

[259] *Brown v Tasmania* (2017) 261 CLR 328, 377; [2017] HCA 43.

[260] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 567–568 (as slightly reworded in *Coleman v Power* (2004) 220 CLR 1; [2004] HCA 39).