SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**R v Collaery (No 11)**
Citation:	**[2022] ACTSC 40**
Hearing Date:	9 February 2022
Decision Date:	11 March 2022
Before:	Mossop J
Decision:	See [79]
Catchwords:	**NATIONAL SECURITY** – JURISDICTION, PRACTICE AND PROCEDURE – Remittal following appeal – where Court of Appeal set aside primary decision subject to consideration of court-only evidence – in the interests of national security to permit reliance on court-only evidence – public interest in maintaining confidentiality of material – appropriate to allow the Attorney-General to rely on court-only evidence not disclosed to the defendant **NATIONAL SECURITY** – JURISDICTION, PRACTICE AND PROCEDURE – Attorney-General proposed court-appointed "special counsel" to represent the defendant's interests in relation to the court-only evidence – whether court has power to appoint special counsel under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) – court has inherent and statutory power **CONSTITUTIONAL LAW** – JURISDICTION, PRACTICE AND PROCEDURE – Whether reliance on court-only evidence would deny the defendant procedural fairness – whether orders sought would contravene chapter III of the *Constitution* – *Constitution* does not add to requirement for procedural fairness applicable in any event
Legislation Cited:	*Acts Interpretation Act 1901* (Cth), ss 15AA, 15AB(2) *Constitution* (Cth), Ch III *Counter-Terrorism Legislation Amendment Act (No 1) 2016* (Cth) *Criminal Code Act 1995* (Cth), Div 104, ss 90.1, 93.2 *Intelligence Services Act 2001* (Cth), s 39 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 7, 8, 9, 10, 11, 17, 19, 19(1A), 20B, 22, 25, 26, 29, 31, 32, 38PA, 38PB, 38PC, 38PD, 38PE, 38PF, 38PG, 38PH *National Security Legislation Amendment Act 2010* (Cth)
Cases Cited:	*Alistair v R* (1984) 154 CLR 404 *Al Rawi v Security Service* [2012] 1 AC 531 *Collaery v The Queen (No 2)* [2021] ACTCA 28 *Condon v Pompano Pty Ltd* [2013] HCA 7; 252 CLR 38 *Conway v Rimmer* [1968] AC 910 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; 234 CLR 532 *Hogan v Hinch* [2011] HCA 4; 243 CLR 506

	HT v The Queen [2019] HCA 40; 269 CLR 403 *Kable v DPP (NSW)* (1996) 189 CLR 51 *Commissioner of Police v Tanos* (1958) 98 CLR 383 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 *R v Collaery (No 7)* [2020] ACTSC 165 *R v Collaery (No 10)* [2021] ACTSC 311 *R v Khazaal* [2006] NSWSC 1061 *R v Lappas* [2001] ACTSC 115 *R v Lodhi* [2006] NSWSC 586; 163 A Crim R 475 *R v Massey* [2016] ACTSC 108; 309 FLR 299 *R v Scerba* [2015] ACTSC 176; 299 FLR 221 *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 14)* [2021] FCA 552 *Sankey v Whitlam* (1978) 142 CLR 1 *SDCV v Director-General of Security* [2021] FCAFC 51; 284 FCR 357 *State of New South Wales v Public Transport Ticketing Corporation (No 3)* [2011] NSWCA 200; 81 NSWLR 394
Texts Cited:	Commonwealth, *Parliamentary Debates*, Senate, 15 September 2016, 1029 (George Brandis, Attorney-General) Explanatory Memorandum, National Security Legislation Amendment Bill 2010 (Cth) Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment Bill (No. 1)* (February 2016) Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No.1) 2016 (Cth)
Parties:	The Queen (Crown) Bernard Collaery (Defendant)
Representation:	**Counsel** C Tran with A Haben-Beer (Crown) C Ward SC with K Archer (Defendant) T Begbie QC with T Glover (Attorney-General (Cth)) **Solicitors** Commonwealth Director of Public Prosecutions (Crown) Gilbert + Tobin (Defendant) Australian Government Solicitor (Attorney-General (Cth))
File Number:	SCC 195 of 2019

MOSSOP J:

Introduction

1. The procedural history of the matter to date is set out in the Court of Appeal's decision: *Collaery v The Queen (No 2)* [2021] ACTCA 28 at [1]-[11]. So far as is necessary for

present purposes, the Court of Appeal's decision and the remittal of the proceedings are summarised in *R v Collaery (No 10)* [2021] ACTSC 311 (*Collaery (No 10)*) at [1]-[10].

2. Following remittal of this matter by the Court of Appeal, it is necessary to consider whether the court should have regard to "court-only" evidence sought to be relied upon by the Attorney-General for the purposes of deciding the extent to which the defendant's trial will be conducted in public.

3. The relevant order made by the Court of Appeal, as perfected on 8 December 2021, was:

> 4. The matter is remitted to the primary judge to consider the admissibility of the "court only" material and, if it is admissible, the effect of that material on the s 31(4) order.

4. For the reasons given in *Collaery (No 10)*, the orders of the Court of Appeal did not permit the Attorney-General to provide updated court-only material. Instead, the court-only material was confined to that which was prepared for the purposes of the initial hearing in 2020.

5. In order to reduce any unfairness to the defendant arising from denying him and his lawyers access to the court-only material, the Attorney-General proposed that the court might appoint security-cleared "special counsel" to represent the defendant's interests in relation to the court-only material. It was proposed that both senior and junior counsel so appointed be paid for by the Commonwealth. A detailed proposal for the appointment and role of the special counsel was provided by the Attorney-General.

6. The defendant opposed any reliance upon court-only material and the associated appointment of special counsel. He advanced a variety of arguments in opposition to the court permitting reliance upon the material:

   (a) he submitted that there was no power under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) to appoint special counsel;

   (b) he submitted that for the court to make orders restricting disclosure of material on a court-only basis would be contrary to Chapter III of the *Constitution*; and

   (c) he submitted that there was no justification in the circumstances of the present case for permitting the Attorney-General to rely upon court-only evidence and that to do so would, for a variety of reasons, be fundamentally unfair.

7. The Director of Public Prosecutions, representing the Crown in the prosecutor, took a neutral stance in relation to the reliance on court-only material.

Context

8. The context in which the issue arises is a prosecution alleging unlawful communication of Australian Secret Intelligence Service (ASIS) information contrary to s 39 of the *Intelligence Services Act 2001* (Cth) and a conspiracy to communicate such information. The issue of court-only evidence arises not as part of the substantive trial of the defendant. Rather, it arises as part of the determination of an antecedent issue required to be determined under the NSI Act. That issue is the extent to which the information identified in the Attorney-General's certificate under s 26 of the NSI Act should be protected from public disclosure at the trial of the defendant. The defendant has access to all of the material relied upon by the Crown. There is therefore no issue of non-disclosure of material to the defendant in the substantive trial. Further, the parties

agreed that significant parts of the evidence in the trial would need to be protected from public disclosure. There was, however, certain categories of information in the prosecution brief of evidence which the Attorney-General sought to protect from public disclosure and the defendant sought to have publicly disclosed as part of his trial (the Contested Material). Those categories related to the truth or otherwise of some of the statements made by the defendant which are the subject of the charges against him. It was that issue in relation to which there was a contest as to what orders should be made pursuant to s 31 of the NSI Act.

The court-only evidence

9. The original hearing that was necessary to decide what orders should be made under s 31 of the NSI Act occurred in May 2020. At that hearing, both open and confidential affidavit evidence was relied upon. The confidential affidavits that were relied upon were those which were the subject of orders under s 22 of the NSI Act regulating their handling and disclosure. The affidavits relied upon are listed in *R v Collaery (No 7)* [2020] ACTSC 165 at [57] and [59].

10. Prior to the hearing in May 2020, a number of witnesses made affidavits which were identified as court-only affidavits. The nature of the content of those affidavits was explained in general terms in open affidavits. The defendant opposed any reliance upon those affidavits. I reached the conclusion that orders consistent with those sought by the Attorney-General should be made without needing to have regard to the court-only material. This avoided, at that stage, having to hear further submissions from the parties on that issue: *R v Collaery (No 7)* at [151]. The decision of the Court of Appeal and the terms of its remittal have required argument on the admission of the court-only evidence.

11. The court-only affidavits which are now sought to be relied upon by the Attorney-General are as follows:

    (a) Paul Symon dated 23 September 2019;

    (b) Richard Maude dated 23 September 2019;

    (c) Paul Symon dated 2 March 2020;

    (d) Richard Maude dated 28 February 2020;

    (e) Frances Adamson dated 24 February 2020;

    (f) Nicholas Warner dated 5 March 2020;

    (g) Michael Pezzullo dated 5 March 2020.

12. In order to be able to assess the consequences of refusing to permit the Attorney-General to rely upon the court-only evidence, she was required to identify any portions of the court-only material that would be sought to be relied upon subject to s 22 orders if the evidence could not be relied upon as court-only evidence. Minor portions of the proposed court-only material were so identified. The balance of the court-only material would not be relied upon by the Attorney-General unless it was possible to do so on a court-only basis.

Section 19

13. Section 19 of the NSI Act provides:

19 General powers of a court

Power of a court in a federal criminal proceeding

(1) The power of a court to control the conduct of a federal criminal proceeding, in particular with respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise.

(1A) In addition to the powers of a court under this Act in a federal criminal proceeding, the court may make such orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information if:

(a) the court is satisfied that it is in the interest of national security to make such orders; and

(b) the orders are not inconsistent with this Act; and

(c) …

…

(2) An order under section 31 does not prevent the court from later ordering that the federal criminal proceeding be stayed on a ground involving the same matter, including that an order made under section 31 would have a substantial adverse effect on a defendant's right to receive a fair hearing.

…

"Disclose information" is defined in s 7 of the NSI Act to mean the giving of information as evidence as well as otherwise disclosing the evidence to the court.

Power to appoint special counsel

Submissions

14. The defendant submitted that the court had no power under the NSI Act to appoint special counsel in the present circumstances. Counsel pointed to the existence of a framework within the NSI Act for the appointment of a "special advocate" but only in the context of the making of control orders: see ss 38PA-38PH. The defendant submitted that the maxim *expressio unius est exclusio alterius* applied and the fact that the NSI Act contains a regime for the appointment of a special advocate in one part of the Act but not in relation to a s 31 hearing means that there was no such power. He sought to distinguish the decisions in *R v Lodhi* [2006] NSWSC 586; 163 A Crim R 475 at [28]-[45] (*Lodhi*) and *R v Khazaal* [2006] NSWSC 1061 (*Khazaal*) at [51] on the basis that both decisions predated the amendments to the NSI Act in 2016 which introduced the special advocate procedure in relation to control orders.

15. Further, the defendant contended that the inherent power of the court was not sufficient to enable the appointment of special counsel. He sought to distinguish the decision in *State of New South Wales v Public Transport Ticketing Corporation (No 3)* [2011] NSWCA 200; 81 NSWLR 394 (*Public Transport Ticketing Corporation)* on the basis that the decision arose in the public interest immunity context where, if a claim was upheld, neither party would be able to use the documents.

16. Counsel for the Crown made submissions addressing the contention that the NSI Act in its current form impliedly excludes the capacity to appoint special counsel. He did this by reference to extrinsic materials which the court was entitled to take into account in interpreting the NSI Act pursuant to ss 15AB(2)(c), (e) and (f) of *the Acts Interpretation Act 1901* (Cth). The relevant extrinsic materials are identified in the reasons that follow.

Decision

17. In *Lodhi*, counsel for the defendant proposed the appointment of special counsel to represent his interests in a hearing to be conducted for the purposes of making orders under s 31 of the NSI Act as well as considering the scope of a claim for public interest immunity. The Attorney-General opposed the appointment of special counsel on the basis that the provisions of the NSI Act did not permit it for the purposes of a s 31 hearing because such special counsel could not be considered a "legal representative of the defendant" within the meaning of ss 29(2)(e) and (3), which governed who could be present at the hearing. Whealy J found that the provisions of the NSI Act were not inconsistent with the appointment of special counsel and that the language of s 29(2) of the NSI Act was sufficiently wide to allow such a person to take part in a s 31 hearing. In the circumstances of that case, he found (at [45]) that the appointment of special counsel was premature and that the court should do so "only if the Court is satisfied that no other course will adequately meet the overriding requirements of fairness to the defendant…".

18. The provisions relating to the appointment of special advocates in control order proceedings brought under div 104 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) were introduced into the NSI Act after the decision in *Lodhi* by the *Counter-Terrorism Legislation Amendment Act (No 1) 2016* (Cth). At the time that the bill for that Act was introduced, the Attorney-General said in his second reading speech:

> In addition, the Government has implemented Recommendation 5 of the Parliamentary Joint Committee on Intelligence and Security to create a special advocate role to represent the interests of persons subject to control order proceedings where the subject and their legal representative have been excluded from hearing or seeing sensitive national security information. The special advocate provides an important safeguard in ensuring that the procedural rights of the subject of a control order proceeding are upheld.
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> …
>
> Consistent with the recommendation of the Committee, the provisions in the Bill providing for the protection of sensitive information in control order proceedings will commence without delay. The court will be able to continue to exercise its inherent powers to appoint a special advocate on an ad hoc basis.

19. The Revised Explanatory Memorandum for the Counter-Terrorism Legislation Amendment Bill (No. 1) 2016 (Cth) referred (at [1018]), in the context of the introduction of the provisions relating to the appointment of special advocates, to the existing powers of the court as follows:

> The court already has the inherent power to appoint a special advocate on an ad hoc basis if it considers it appropriate. The amendments contained in Part 2 do not limit that power.

20. The Parliamentary Joint Committee on Intelligence and Security's *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No. 1)* (February 2016), to which the Attorney-General made reference in his second reading speech, included the following (at [2.197]):

> The Committee considers it important to note that prior to the establishment of a special advocates scheme, nothing in the proposed amendments to the NSI Act precludes the court from exercising its inherent discretion to appoint a special advocate on an ad hoc basis during control order proceedings where the subject of the control order and their legal representative have been excluded. The Committee further notes that in *R v Lodhi* [2006] NSWSC 586, Justice Whealy held that the framework of the NSI Act is not inconsistent with the appointment of a special advocate and that its provisions were sufficiently broad to permit special advocates to take part in specific hearings under the NSI Act.

21. The terms of the Committee's formal recommendation (Recommendation 5) also make clear its intention. That recommendation included the following: "The Committee notes that this approach does not preclude the court from exercising its existing discretion to appoint special advocates on an ad hoc basis."

22. The provisions of the NSI Act must be interpreted in a way which best achieves the purpose or object of the Act, whether or not that purpose or object is expressly stated in the Act: *Acts Interpretation Act*, s 15AA. The extrinsic materials clearly disclose the legislative intention and remove any ambiguity that might exist about the consequences of the enactment of the special advocate regime in relation to control orders. They make it clear that there was no intention, when enacting the provisions in relation to special advocates in control order proceedings, to qualify any inherent power of a court to appoint special counsel on an ad hoc basis, consistent with the decision in *Lodhi*.

23. Section 19(1A) was only inserted into the NSI Act by the *National Security Legislation Amendment Act 2010* (Cth), after the decision in *Lodhi*. The purpose of s 19(1A) of the NSI Act is explained by the Explanatory Memorandum for the National Security Legislation Amendment Bill 2010 (Cth) which provided:

> Section 19 of the Act currently provides that a court retains the power to control the conduct of a court proceeding. For example, a court retains the power to stay or dismiss a proceeding and to exclude persons from the court. The purpose of this provision is to ensure that the court's discretion is not unduly fettered. As presently drafted, section 19 may be interpreted to unduly restrain a court from making orders that relate to national security information that are not specifically provided for in the Act. Furthermore, lower level courts, such as the Magistrates Court, do not have inherent powers which allow them to make general orders relating to the protection of national security information. The proposed amendment will clarify that the powers of the court are not limited to those provided for by the Act.
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> …
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> This proposed amendment will reinforce a court's ability to control the conduct of a federal criminal proceeding under subsection 19(1) of the NSI Act.

24. These passages make clear that s 19(1A) was enacted in order to:

    (a) offset, by a separate grant of power, any potential that there may be an implication from the provisions of the NSI Act that qualified the powers of a court; and

    (b) address the situation of inferior courts without an inherent jurisdiction so as to ensure that they had ample power equivalent to, or more extensive than, the power that would be inherent in a superior court.

25. Having regard to the extrinsic materials, two propositions are clear:

    (a) the regime for the appointment of special advocates in control order proceedings was not intended to, and does not, impliedly exclude the power of a court to appoint a special counsel if that would otherwise be within its power; and

    (b) the powers in s 19(1A) are sufficient to involve a statutory grant of power which, in the case of the appointment of a special advocate, is no less broad than the inherent power of a superior court to do so.

26. It is not essential in this case to demarcate the boundaries between the inherent power of the court and s 19(1A) of the NSI Act. Section 19(1A), by its terms, is a sufficient power

to make orders restricting disclosure of evidence and also appointing special counsel to represent the interests of the defendant. Alternatively, the operation of s 19(1A) can be seen as the source of the power to restrict disclosure of evidence and the inherent power of the court as the source of power to appoint special counsel in light of the s 19(1A) order. In the circumstances of this case, it makes no difference of substance as to which demarcation is adopted. The court has power to appoint a special counsel in a case such as the present pursuant to its inherent power, pursuant to s 19(1A) of the NSI Act or a combination of both.

Defendant's constitutional argument

Submissions

27. The defendant contended that if the rules of procedural fairness were to be excluded, this needed to be done by "plain words of necessary intendment": *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; 234 CLR 532 (*Gypsy Jokers*) at [182]. He submitted that s 19(1A) is in general terms and not a sufficient basis upon which to exclude the obligation to provide procedural fairness.

28. Next, he recognised that courts may modify or adjust ordinary procedures but within an overall process that, viewed in its entirety, entailed procedural fairness. He submitted that reliance upon court-only affidavits, even with the appointment of special counsel, would be "significantly, inappropriately and incurably unjust".

29. He sought to distinguish the decisions in *Gypsy Jokers* and *Condon v Pompano Pty Ltd* [2013] HCA 7; 252 CLR 38 (*Pompano*) on the basis that the statutes considered in those cases expressly dealt with the prohibition on disclosure of some of the material relied upon.

30. The defendant appeared to submit that if the court was permitted to adopt the approach contended for by the Attorney-General, then that would not provide procedural fairness and the court would no longer have the defining characteristics of a court. The challenge therefore appeared to be a challenge based on *Kable v DPP* (NSW) (1996) 189 CLR 51, although the submissions were not very precise about this. It was not made clear how this argument, which sought to constitutionalise the issue of procedural fairness, would add to a simple assertion of a denial of procedural fairness.

31. The Attorney-General made a number points, some of which involved accepting aspects of the defendant's argument.

    (a) First, a Chapter III court cannot be required to exercise judicial power in a manner inconsistent with the essential character of a court or with the nature of judicial power.

    (b) Second, procedural fairness is an essential characteristic of a court for the purposes of Chapter III.

    (c) Third, the requirements of procedural fairness are not absolute, but the court's procedures for resolving the dispute should accord both parties procedural fairness and avoid practical injustice.

    (d) Fourth, procedural fairness can be achieved even though a court receives and considers information withheld from one of the parties.

(e) Fifth, the appointment of special counsel may enhance practical fairness to the party deprived of the information.

Decision

32. As will be apparent from the summary of the Attorney-General's submissions, she accepts that the defendant must be accorded procedural fairness. The issue is what procedural fairness requires in the circumstances of the case.

33. The Attorney-General's fourth proposition, that procedural fairness can be achieved even though a court receives and considers information withheld from one of the parties, requires some further consideration. There are two components to this contention.

34. *First*, common law and inherent powers of the court require that in certain circumstances, the requirement for procedural fairness can be met notwithstanding that the court receives and considers information withheld from a party. Obviously, the most closely analogous circumstance is when a court examines documents for the purposes of ruling on a claim of public interest immunity. There have been a variety of statements made in decisions of the High Court which reflect the fact that the requirements of procedural fairness can be met even in circumstances where one party is denied access to some evidence or information relevant to the proceedings. In *HT v The Queen* [2019] HCA 40; 269 CLR 403 (*HT*), the plurality judgment said (at [42]-[44]):

> 42 … It may be accepted that a superior court may vary its procedures to meet the exigencies of a particular case and on occasions have done so even with respect to matters such as open justice and procedural fairness …
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> 43 … It should not be assumed that procedural fairness should altogether be denied in order that sensitive information be kept confidential. Just as the principle of open justice has been held to yield to the need to do justice in a particular case, so must the requirements of natural justice in particular case yield to some extent. Although there have been statements that the variable nature of procedural fairness means that it may in some circumstances be reduced to nothingness, it is difficult to conceive of a case such as the present where orders could not be tailored to meet the competing demands.
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> 44 It is well known that the courts have modified and adapted the content of the general rules of open justice and procedural fairness in particular kinds of cases. Orders for non-publication are an example of the former. The non-disclosure of evidence in wardship cases is an example of the latter. More relevant for present purposes is litigation concerning trade secrets where disclosure is sometimes limited, for example with "confidentiality rings" being placed around disclosure and the persons who are permitted to see the confidential material. In *Roussel Uclaf v Imperial Chemical Industries Plc*, Aldous J observed that each case has to be decided on its own facts and on the broad principle that the court has the task of deciding how justice can be achieved taking into account the rights and needs of the parties. The relevant party should have as full a depth of disclosure as would be consistent with the adequate protection of the secret.
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> (Footnotes omitted.)

35. In *Pompano*, French CJ said at [5]:

> 5 Like most cases about constitutional limits the answer is not black and white. The deeply rooted common law tradition of the open court, presided over by an independent judge according procedural fairness to both parties, is adapted to protect the public interest in cases such as those involving national security, commercially sensitive documents and the protection of police informants. Similarly, the constitutional limits do not prevent parliaments from making laws for the protection of the public interest in such areas.

36. At [46] his Honour said:

> 46 An aspect of the inherent jurisdiction relevant, in a different way, to the constitutional question is the group of powers that courts have to order that all or part of a case be heard in camera, to prohibit publication of part of the proceedings, and to privately inspect documents the subject of a claim for public interest immunity. The existence of that group of inherent powers suggests that statutory analogues will not readily be regarded as impairing the defining or essential characteristics of the courts to which those analogues apply.
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> (Footnote omitted.)

37. Later in his reasons (at [68]), his Honour referred again to the fact that "the open court principle and the hearing rule may be qualified by public interest considerations such as the protection of sensitive information and the identities of vulnerable witnesses, including informants in criminal matters".

38. In the same case, the reasons given by a majority of the Court articulated the appellant's argument that Chapter III put beyond the legislative power of a State any enactment that would permit a State Supreme Court to decide a disputed issue by reference to evidence or information which one party does not know and to which that party can have no access. This was a contention that the judgment rejected. At [156], the Court referred to Gleeson CJ's observation in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 at [37] that "fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law as to avoid practical injustice". Their reasons continued at [157]:

> 157 Consideration of other judicial systems may be taken to demonstrate that it cannot be assumed that an adversarial system of adjudication is the only fair means of resolving disputes. But if an adversarial system is followed, that system assumes, as a general rule, that opposing parties will know *what* case an opposite party seeks to make and *how* that party seeks to make it. As the trade secrets cases show, however, the general rule is not absolute. There are circumstances in which competing interests compel some qualification to its application. And, if legislation provides for novel procedures which depart from the general rule described, the question is whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid "practical injustice".

39. Gageler J said at [192]-[193]:

> 192 Suggestions that there are exceptions to procedural fairness in the common practices of courts in Australia are unfounded. The suggested exceptions are more apparent than real. There are many instances in which a court may, or must, make ex parte orders; but invariably as a step in an overall process that, viewed in its entirety, entails procedural fairness. *International Finance* shows that a court cannot validly be required to make an ex parte restraining order within a statutory context which practically impedes the affected person from applying for discharge of that order. There are then cases, of which claims for the protection of some intellectual property or for the determination of client legal privilege or public interest immunity are examples, where the usual practices of courts are adjusted to protect confidentiality at the heart of a right or interest in issue which would be destroyed were confidential information to be disclosed in the curial process. There are also instances in which specific evidence given to a court is withheld from a party to protect commercial confidentiality, to protect the safety of a witness or an informant, or for some other reason sufficiently supported by the interests of justice. All are examples of modifications or adjustments to ordinary procedures, invariably within an overall process that, viewed in its entirety, entails procedural fairness. They are not, as submitted on behalf of the Attorney-General for New South Wales, examples of the content of procedural fairness in a court being reduced to "nothingness".
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> 193 Practices of courts in the United Kingdom and Canada, to which the parties and some interveners referred, point in no different direction. The Supreme Courts of those

> countries have in recent years been called on to consider the compatibility of various forms of novel court procedures with constitutional or quasi-constitutional norms requiring that the determination of rights and obligations occur in a fair and public hearing before an independent and impartial tribunal. Questions confronted have included: a non-citizen challenging executive detention on national security grounds being excluded from part of the hearing in which national security evidence is given; control orders judicially reviewed on the basis of material not disclosed to the affected person; a witness fearing intimidation giving anonymous evidence in a murder trial; a race discrimination claimant being excluded from part of a hearing on grounds of national security; and a Muslim witness in a sexual assault trial seeking to give evidence with her face covered by a niqab. Questions of that nature, if they arise in Australia, are best left for consideration in concrete cases. What sufficiently emerges from their consideration by those other national Supreme Courts is a common approach that, while other interests may be balanced in fashioning a procedure appropriate to the context, the processes of a court, viewed as a whole, can never be unfair.
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> (Footnotes omitted.)

40. The area in which the requirements of procedural fairness are modified that is most closely related to the present matter is that involving public interest immunity claims. In that context, courts will commonly receive information in private in order not to defeat the public interest claimed. The denial of access to the material over which the claim is made is an inevitable result when privilege is rightly claimed on the grounds of national security: *Alistair v R* (1984) 154 CLR 404 at 469. The authorities recognise that this accepted procedure does not involve a denial of procedural fairness.

41. *Second*, the existence of that procedure in relation to claims of public interest immunity and the acceptance that common law and inherent powers may be exercised in that way have been influential in the reasoning of the High Court when it has concluded that novel statutory procedures which involve the denial of evidence to a party can be consistent with the procedural fairness required by Chapter III. *Pompano* at [5], [46], [73]-[74], [78]; *Gypsy Jokers* at [36], [180]-[183]; *Hogan v Hinch* [2011] HCA 4; 243 CLR 506 at [46] and *SDCV v Director-General of Security* [2021] FCAFC 51; 284 FCR 357 at [26]-[27] are examples of that influence. In substance, the Attorney-General has invited the court to adopt a similar approach in the present case, examining how the issue of public interest immunity is dealt with and applying an analogous procedure in a new statutory context, namely the capacity to make orders under s 19(1A) of the NSI Act.

42. Returning to the ultimate issue, the contention that the making of the orders sought by the Attorney-General would contravene Chapter III of the *Constitution*, I do not accept that the defendant's constitutional argument adds anything to an argument based upon procedural fairness. There is no basis for "constitutionalising" the issue. Rather, it can be dealt with simply as a matter of procedural fairness. That is for the following reasons.

43. First, there is no challenge to a specific legislative provision which is said to be incompatible with Chapter III.

44. Second, in so far as there may be a contention that s 19 of the NSI Act needs, for constitutional reasons, to be read down in its application to the present circumstances, having regard to the requirement to afford procedural fairness, it adds nothing to the requirement for procedural fairness that would exist in any event.

45. Third, the requirement to afford procedural fairness is not as absolute as contended for by the defendant. Rather, as the extracts set out earlier illustrate, the High Court has accepted that whether or not procedural fairness has been afforded must be assessed

in a practical way having regard to competing interests of parties and the state, having regard to the relevant statutory framework and the issues before the court.

46. Therefore, there is no constraint on the power of the court arising under the *Constitution* which goes beyond the requirements of the general law and the current statutory context. The matter may therefore be determined by reference to the general law which requires that, overall, procedure fairness is accorded to the defendant.

The factual basis for the need for the evidence to be court-only

47. There are two sources of information concerning the factual basis for the claim that the evidence should be treated as court-only evidence. First, there is that which appears in the open affidavits of the deponents of the court-only affidavits. Second there is the court-only material itself.

Evidence in the earlier affidavits

48. The nature of the evidence in the court-only affidavits is described in the open affidavits filed for the purposes of the original hearing. These draw a distinction between the confidential affidavits which were disclosed to the defendant and court-only affidavits. The relevant explanations of the court-only affidavits were as follows.

    (a) Affidavit of Paul Symon, 23 September 2019:

    > Furthermore, some aspect of my concerns can only be explained by reference to certain information of an even more sensitive kind. This is information that is only available to a very small number of people within the Commonwealth. Further disclosure of this information could result in a real risk of extremely serious harm, including potentially catastrophic harm, to Australia's national security. This information is to be included in a version of the confidential affidavit by inserting sub-paragraphs which expand upon certain matters.

    (b) Affidavit of Richard Maude, 23 September 2019:

    > This affidavit contains further highly sensitive information which expands upon the harms identified in my open and confidential affidavits and identifies additional harms to Australia's international relations which, in my view, would be likely to arise in the event that the Sensitive Information did not have protections equivalent to those specified in the Certificate.

    (c) Frances Adamson, 24 February 2020:

    > My court-only affidavit: contains further highly sensitive information which expands upon the harms identified in my open and confidential affidavits and identifies additional harms to Australia's international relations.

    (d) Michael Pezzullo, 5 March 2020:

    > My Court-only affidavit is identical to my confidential affidavit, except that (i) it has different introductory paragraphs; and (ii) it contains additional highly sensitive information, highlighted in yellow, that is not contained in my confidential affidavit.

49. The open affidavit of Mr Warner does not explain the reason for the single additional paragraph that was in his court-only affidavit that was not included in his confidential affidavit.

50. The submission on behalf of the defendant was that these explanations of the sensitivity need to be read in light of the Court of Appeal's reasoning. No specific part of the reasons for the Court of Appeal was referred to. I do not consider that the reasons of the Court of

Appeal detract from the weight that should be given to this evidence. I accept that the evidence reflects the honestly held and considered opinion of the persons who were, at the time, senior Australian government officials with expertise relevant to the opinions expressed.

Inspection of the evidence

51. Because there was no relevant constitutional prohibition upon the admission of court-only evidence and the terms of s 19 of the NSI Act are sufficient to support orders of the kind sought, it was appropriate, in order to consider whether or not to make an order pursuant to s 19(1A), for the court to examine the evidence in question. It is only by doing so that the court can obtain knowledge, beyond the terms of the open affidavits referred to above, of the gravity (or otherwise) of the matters addressed in that evidence and their relevance to the s 31 issue. Counsel for the Attorney-General submitted that such an inspection may need to be supplemented by submissions from the Attorney-General if there were questions arising from the content of the material.

52. The need to examine the court-only material arises because the decision of whether or not it is appropriate to permit the Attorney-General to rely upon that material in the absence of disclosure to the parties will be significantly influenced by the court's impression of the cogency and sensitivity of that material. It may be that the material is such that the need for secrecy appears to be obvious and its probative value for the purposes of the s 31 issue appears to be high. Where these conditions exist, the case for allowing the Attorney-General to rely upon that material in the absence of disclosure would be strengthened. On the other hand, it may be that notwithstanding what is said in the open affidavits, the case for secrecy is less clear or the probative value of the material for the purposes of s 31 does not appear to be as high, or both. In such circumstances, the case for allowing the Attorney-General to rely upon the material in the absence of disclosure would be proportionately weakened.

53. For that reason, the court inspected the material proposed to be relied upon by the Attorney-General. This was done on a "read and return" basis.

Can the court-only evidence be relied upon?

Submissions

54. The Attorney-General submitted that each of the elements required for the making of an order under s 19(1A) were satisfied. The orders proposed related to the "disclosure" of information. That information was "national security information" as defined in s 7 by reference to ss 8-11 of the NSI Act. The court needs to be satisfied that it is "in the interest of national security" to make the orders: s 19(1A)(a). The concept of "in the interest of national security" is informed by the object, structure and purpose of the NSI Act. Making the orders proposed would be in the interests of national security because the court-only affidavits provide a clear assessment of how parts of the prosecution brief could most damagingly be used against Australia's interests for the purposes of informing the court for a s 31 hearing and that information is so sensitive in its own right that it would involve risks of serious prejudice to national security. The Attorney-General submitted that even if only disclosed to the defendant's lawyers, such information carried with it the risk of inadvertent disclosure as well as creating opportunities for foreign intelligence services.

55. The Attorney-General submitted that the proposed orders were not inconsistent with the NSI Act: s 19(1A)(b). Rather, she submitted that they would closely align with the precautionary protection of national security information which is the primary object and purpose of the NSI Act. In particular, the Attorney-General pointed to other provisions in the NSI Act which recognised that there will be situations in which a defendant and his or her lawyers will not be entitled to have complete access to national security information: ss 20B, 25, 26, 31(2), 31(4) and 32.

56. The Attorney-General also raised the possible application of s 93.2 of the *Criminal Code*. The potential for that provision to be applied is referred to in s 20B of the NSI Act. However, following the remittal from the Court of Appeal, no emphasis was placed on that alternative source of power and I have not considered it further.

57. The Attorney-General pointed to the following matters in favour of the admission of the court-only material:

    (a) No prosecution evidence would be withheld from the defendant. The court-only evidence goes only to the extent to which the trial will be conducted in public. It is therefore distinct from cases in which restricted evidence is used in substantive proceedings, for example, *HT* where the court-only material had been a significant consideration in the sentencing of the appellant.

    (b) The court-only affidavit contains highly classified information which is solely for the purpose of providing a more complete and detailed explanation of why the information covered by the s 26 certificate should be protected from public disclosure.

58. The Director of Public Prosecutions representing the Crown in the substantive criminal case only made limited submissions because the Director took no position on the Attorney-General's application. The submissions emphasised that the Crown sought no order to exclude evidence from the defendant. The submissions pointed to the distinction between the open court principle and the requirements of a fair trial. Any limit on the open court principle did not necessarily equate to a limit of a fair trial. A fair trial would not be affected by the Attorney-General's application to rely upon court-only evidence. However, the defendant plainly had an interest in the fairness of the determination of the s 31 question which the court needs to consider. In relation to the potential for appointment of special counsel to represent the interests of the Crown in relation to court-only evidence, the submission was that special counsel to represent the interests of the Crown in relation to s 31 orders were not required to be appointed at this stage. However, the submissions recognised the possibility that circumstances may arise at a later point where representation of the interests of the Crown via special counsel may be required.

59. The defendant made a number of submissions in opposition to the making of any order under s 19(1A) permitting non-disclosure of affidavits to be relied upon by the Attorney-General. These may be summarised as follows:

    (a) The fact that the proceedings were criminal proceedings was significant and distinguished the case from civil cases in which, for example, claims of public interest immunity might arise.

(b) It would be contrary to the public interest to allow confidence in the court system to be eroded by a concern that the courts' processes may lend themselves to oppression and injustice.

(c) The language of s 19(1A) does not detract from the importance of giving due and proper recognition to the need for fairness to the individual and balancing those principles against the need to protect national security.

(d) The power to make orders that the court "considers appropriate" involves a question of degree. The extent of departure from the principle of open justice is influenced by the fact that the proceedings are criminal proceedings.

(e) The body of evidence filed by the parties and contested at the earlier hearing was such that in this case, there would be a real practical injustice if the defendant was not able to test or challenge the evidence prepared on a court-only basis.

(f) The purpose for which the evidence is sought to be adduced was because the Attorney-General sought to have central issues at the trial "suppressed and the public excluded" and that was likely to cause substantial harm to the reputation of the court's administration of criminal justice.

(g) Adequate protections are available for national security information, having regard to the capacity of the defendant and his lawyers to comply with measures already imposed by s 22 orders made previously. There is no evidence of harm that would be caused by allowing the defendant's lawyers access to the affidavits and hence to properly respond and challenge the assertions therein.

(h) There may well be questions of admissibility of the evidence which cannot be addressed in the absence of giving access to the defendant and his lawyers.

60. The positions adopted by the parties were largely a contest between the Attorney-General's proposal for non-disclosure subject to the appointment of special counsel and the defendant's position that use of any court-only evidence should be rejected. Some mention was made during the course of submissions to the possibility of the court ordering 'gisting' of court-only material (disclosure of the gist of that material without disclosure of the detail of it) or disclosure to a subset of the defendant's legal team, one or more of the defendant's lawyers who would not appear at trial. These propositions were undeveloped. While I have recognised that it would be open to the court to make orders different to those proposed by the parties, I have not ultimately considered it appropriate to order a different regime.

Decision

Statutory preconditions

61. So far as statutory power is concerned, I am satisfied that s 19(1A) of the NSI Act (either by itself or in combination with the inherent power of the court as explained above) is a sufficient power to enable the court to make the orders sought if the court "is satisfied that it is in the interests of national security make such orders" and considers that they are "appropriate":

(a) the proceedings involve a federal criminal proceeding;

(b) the orders would relate to the "disclosure, protection, storage [or] handling" of information;

(c) that information is "national security information" as defined in the NSI Act; and

(d) the orders would not be inconsistent with the NSI Act.

62. The questions are what, if any, orders would be "appropriate" and whether the court "is satisfied that it is in the interest of national security to make such orders".

Orders are "in the interests of national security"

63. I am satisfied that it would be "in the interests of national security" to make an order which permitted the Attorney-General to rely upon the court-only material. The nature of the material is such that it is directly relevant to the consequences of failing to make orders that would protect from disclosure the Contested Material. The evidence is detailed and raises matters which may ultimately be found to significantly favour the making of orders protecting the Contested Material from disclosure. The subject matter and level of detail in the evidence are such that it can be readily distinguished from the material in the open and confidential affidavits already relied upon by the Attorney-General. The evidence of the deponents and my inspection of the material indicates the need for its confidentiality. Having inspected the material, it cannot be said that it would clearly be insufficient to support a conclusion different from that reached by the Court of Appeal. On the contrary it appears to provide support for the position adopted by the Attorney-General. Notwithstanding its age, the Attorney-General maintains that it remains current, having removed any part now identified as no longer current. My examination of the material supports the contention that its relevance and sensitivity has not significantly diminished by reason of the passage of time since the affidavits were made. It is not appropriate to reach any more detailed conclusion about the significance of the evidence at this stage. To allow the Attorney-General to rely upon that evidence would be in the interests of national security in that it would allow the Attorney-General to put before the court the full range of evidence relevant to assessing the consequences of disclosure of the Contested Material. The interests of national security would be advanced by permitting the court to make a decision based upon all relevant evidence.

Orders are "appropriate"

64. The critical issue is whether or not it is "appropriate" to allow the Attorney-General to rely upon such evidence in circumstances where it is not disclosed to the defendant. Orders permitting this will only be "appropriate" if the procedural fairness of the proceedings can be maintained. It is obviously significant that the proceedings against the defendant are for serious criminal offences and that the nondisclosure of evidence is unusual and, as a matter of generality, has the potential to give rise to oppression and injustice. The assessment of what orders are "appropriate" may be made differently in civil and criminal proceedings: *HT* at [33]; *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 14)* [2021] FCA 552 at [16]. I accept the defendant's submission that although s 19(1A) of the NSI Act enables the making of such an order, the interests of national security must not necessarily predominate. It is the court which is given the task of assessing whether such an order is appropriate. As part of that exercise, the court must give proper weight to the nature of the proceedings, the statutory context and the interests of the parties. It is therefore a situation where, as the defendant submitted, there are competing public interests: as identified in *Sankey v Whitlam* (1978) 142 CLR 1 at 38 quoting *Conway v Rimmer* [1968] AC 910 at 940:

> [T]here is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

65. I accept that adopting the course proposed by the Attorney-General will deny the defendant the opportunity to provide instructions in relation to the court-only material, even though there may be some matters in relation to which he has some personal knowledge. Contrary to the submissions of the defendant, I do not consider that the potential for the court to have a "false sense of security" arising from the involvement of special counsel is a significant reason not to embark on that process. Plainly, special counsel will be in a different position from counsel for the defendant. It will be clear that involvement of special counsel will not be a complete substitute for representation of the defendant. I accept the defendant's submission that admission of court-only evidence and the proposed special counsel process will further delay any substantive trial. While delay is undesirable, the nature of the issues involved in this case and the level of contestation between the Attorney-General and the defendant have meant that it has been on foot for a long time. However, that is not a reason to, at this stage, decide that delay is a reason to eliminate the potential for one party to rely upon evidence that may be significant (in circumstances where that reliance is coupled with a process designed to benefit the other party).

66. The defendant placed significant reliance upon the decision of the United Kingdom Supreme Court in *Al Rawi v Security Service* [2012] 1 AC 531 (*Al Rawi*). In that case, the court rejected the proposition that the inherent power of a superior court in civil proceedings extended to permitting defendants to plead a case and rely upon evidence that was not disclosed to the plaintiffs and the appointment of a special advocate to represent the interests of the plaintiffs in closed hearings from which they were excluded. The emphasis in the judgment of the court was that any such dramatic procedural innovation which abrogated the rights of a party was a matter for the Parliament and not for the courts. In rejecting the availability of that approach, no doubt was cast upon the appropriateness of the procedure adopted in relation to claims of public interest immunity: see [41]. Obviously of significance is the fact that what was being considered was an exercise of the inherent powers of a court, rather than the exercise of a statutory power provided by Parliament. Also of significance is the fact that the approach considered in *Al Rawi* related to the evidence to be adduced in the substance of the civil case rather than for an interlocutory process which would not affect the substance of the evidence in that case.

67. The defendant properly pointed out that there was a significant distinction between cases involving claims of public interest immunity and the attempt to rely upon court-only evidence in the present case. It has been long accepted that, for the purposes of ruling on a claim of public interest immunity, a court may examine the documents over which immunity is claimed notwithstanding that one or more of the parties the proceeding has not had access to those documents. The consequence of the upholding of a claim of public interest immunity is that the documents will not be made available to the parties and hence will not be able to be used in the proceedings. In the context of criminal proceedings, the denial of access to the documents may significantly interfere with the rights of the parties to the proceeding. In some criminal cases, the impact may be so great as to require that the prosecution be permanently stayed: see, for example, *R v Lappas* [2001] ACTSC 115. In contrast, in the present case, what is sought to be done

is have the court rely upon evidence that has not been disclosed to the parties, albeit in relation to an interlocutory issue rather than in the substantive trial.

68. However, in the same way as the long-established existence of the process for dealing with public interest immunity claims has been used to shed light on the constitutionality of specific statutory provisions which deny a party access to certain material, the process for dealing with such claims can also be seen as informing, if only by analogy, the approach to the use of sensitive information in the statutory context of the NSI Act. Plainly enough, the analogy is not perfect, but it does illustrate that courts will attempt to balance, where possible, the competing public interests in full disclosure for the purposes of court proceedings on the one hand and the legitimate interests of the state in protection of sensitive information. That exercise can involve the use of evidence not disclosed to one of the parties: see *R v Massey* [2016] ACTSC 108; 309 FLR 299 at [40]-[57]; *R v Scerba* [2015] ACTSC 176; 299 FLR 221 at [25].

69. In this case, the defendant has challenged the need for nondisclosure of the Contested Material by substantial evidence admitted at the hearing in May 2020. If the court-only material was disclosed to him, he may well be in a position to put on additional evidence contesting the facts or opinions in the court-only material. However, courts have recognised in relation to public interest immunity claims, there is material which is so sensitive that it must be examined by the court for the purposes of the aspect of the proceedings before it without disclosure to and hence the potential for contradictory evidence from the other party. The nature of the material in the present case is such that a similar approach is appropriate. To adopt the language used in *HT* and *Pompano* quoted above, the court may vary its procedures to "meet the exigencies of a particular case" and this may mean that "the requirements of natural justice in a particular case yield to some extent". Orders may need to be "tailored to meet the competing demands" of the parties. The court must decide "how justice can be achieved taking into account the rights and needs of the parties" but should ensure that the parties "have as full a depth of disclosure as would be consistent with the adequate protection of the secret".

70. One of the main purposes of the NSI Act is to allow the use of sensitive information in court proceedings. It permits national security information to be deployed in court proceedings subject to the protective regime for which the Act provides a framework. As a result, it puts the Commonwealth in a position where national security information may be used in those proceedings but without necessarily disclosing it to the world or a defendant.

71. Section 29 of the NSI Act identifies the "closed hearing requirements" that apply at hearings for the purposes of making orders under s 31 of the Act. Section 29(3) contains an express statutory power to exclude the defendant or legal representatives of the defendant who have not been given an appropriate security clearance from the court when certain information is dealt with. It is significant that in s 29(3)(e), the exclusion of the defendant or the defendant's legal representative may extend to times when the prosecutor or representative of the Attorney-General "gives information in arguing why the information should not be disclosed". The reference to "gives information" is likely, having regard to the broad definition of "information" (which is defined by reference to the definition in s 90.1(1) of the *Criminal Code*) to extend to evidence provided to the court in the course of the prosecutor or Attorney-General arguing that the information the subject of the s 26 certificate should not be disclosed. That provision does not cover the circumstances of the present case because it applies in circumstances where it is inappropriate for the information the subject of the s 26 certificate to be disclosed *to the*

defendant. It does not address the circumstances where what is in issue is the nondisclosure of that information to the public at large. It does, however, indicate that the Act contemplates that, in order to protect national security information, there may be circumstances in which courts will deal with matters without the defendant or the defendant's representatives being present.

72. In submissions in March 2020, counsel for the defendant submitted that the reference in s 29(3) to "information concerned" should be interpreted as extending to information relied upon in support of s 31 orders and hence that the threshold for making orders was that disclosure was "likely to prejudice national security". This, it was submitted, was a higher threshold than that in s 19(1A) ("in the interest of national security"). If s 29(3) applied, then it would be clear that there was a statutory power to deny information to the defendant even if it was provided to the court. It is perhaps for this reason that the same submissions were not repeated in 2022. However, if s 29(3) applied, I would have been satisfied that the threshold of "likely to prejudice national security" was met. The expression is defined in s 17. The risk of advertent disclosure or inadvertent disclosure is a real one. It forms the basis for the information security regime of the Commonwealth. The information in the court-only affidavits is of such a nature that its disclosure would be very significantly damaging to national security. The combination of a real risk of disclosure and significant prejudice that would arise is sufficient to meet the threshold in ss 17 and 29(3).

73. I am not satisfied that a regime of protective orders under s 22 of the Act would be sufficient to protect the information. The position of the defendant was that he would not agree to orders under s 22 which confined disclosure of the court-only material to one or more of his lawyers. Therefore, the issue of the court-only material must be assessed on the basis that, if it was to be disclosed, the disclosure would be to the defendant as well as his lawyers. The nature of the information and its relationship with information disclosed in the confidential affidavits is such that the risk of inadvertent disclosure by his lawyers is significant. It remains a real risk even where the court has absolute confidence in the lawyers to whom it would be disclosed: *Khazaal* at [34]-[37] and where the information is only relevant to the s 31 orders and not to the substantive criminal case. Further, having regard to the allegations made in the substantive proceedings, it would not be appropriate to have the information disclosed to the defendant himself.

74. I do not accept the submission that the making of orders in the present case will erode public confidence in the court system. That is because, although the non-disclosure of court-only evidence involves a significant departure from what would be the position that existed in the absence of the NSI Act, in the context of that Act and having regard to the sensitivity of the material involved, the public interest in maintaining its confidentiality and the interlocutory purpose for which it would be used, the course proposed is consistent with the proper administration of justice. Further, if orders are made, they will be made in terms and in circumstances where, looked at overall, procedural fairness is maintained.

75. In my view, subject to the making of an order for the appointment of special counsel to represent, to the extent possible, the interests of the defendant in relation to that material, it is appropriate to make an order under s 19(1A) permitting the use of court-only material in circumstances where it has not been disclosed to the defendant. I accept, having regard to the decisions in *Lodhi* and *Public Transport Ticketing Corporation*, that the court does have power to appoint special counsel to represent the interests of the defendant when the court is dealing with evidence which has not been disclosed to him.

The appointment of special counsel will, assuming the defendant wishes to participate in the process, reduce the disadvantage to the defendant arising from the nondisclosure of the material. It will allow any proper objections to the admissibility of the evidence to be made. It will allow submissions to be made about whether there should be cross-examination, and if that is permitted, allow a degree of testing of the evidence. Having examined the proposed court-only material, I cannot say that the involvement of special counsel would clearly add little to what I might do without their involvement: cf *Khazaal* at [42], [52]. Plainly, the position of special counsel will be different to the position that the lawyers for the defendant would be in if the material was disclosed to them. However, having regard to the nature of the material and the potential for advertent or inadvertent disclosure, the special counsel process involves the best accommodation of the competing interests of the Attorney-General and the defendant.

76. I have addressed the issue as if both the restriction on disclosure and appointment of special counsel were pursuant to orders made under s 19(1A): see the discussion at [26] above. If the appointment of special counsel must be pursuant to the inherent power of the court, then I consider, having regard to the interests of justice and the orders to be made under s 19(1A), that orders relating to special counsel are appropriate.

77. Plainly, the making of orders sought by the Attorney-General involves a qualification upon the rights of the defendant. However, the making of such an order is the best accommodation of the competing private and public interests in the circumstances of this case.

78. Finally, the portions of the court-only affidavits which the Attorney-General would rely upon subject to s 22 orders if the court declined to permit them to be treated as court-only evidence (see [11] above), should be disclosed to the defendant. There is no reason to treat them as court-only if the Attorney-General would seek to deploy them in the proceedings other than on a court-only basis.

Orders

79. The orders of the Court are:

    1. The Attorney-General is to identify whether any redactions to these reasons are required prior to their publication on the internet.

    2. The Attorney-General is to notify the associate to Mossop J, the defendant and the Crown by 4pm on Tuesday 15 March 2022 of any proposed redactions prior to the publication of the reasons on the internet.

    3. The Attorney-General is to provide to the associate to Mossop J, the defendant and the Crown short minutes of orders that are proposed to give effect to these reasons by 4pm on Tuesday 15 March 2022.

4. The proceedings are listed on Friday 18 March 2022 at 9:30am for the making of orders and directions.

I certify that the preceding seventy-nine [79] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Mossop.

Associate:

Date: 11 March 2022

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Amendments

11 March 2022	Replace “Mossop J and the defendant” with “Mossop J, the defendant and the Crown”	Order 2
	Replace “Mossop J and to the defendant” with “Mossop J, the defendant and the Crown”	Order 3