SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**R v Collaery (No 12)**
Citation:	**[2022] ACTSC 108**
Hearing Dates:	26 and 27 April 2022
Decision Date:	16 May 2022
Before:	Mossop J
Decision:	The subpoenas to the Director-General of the Australian Secret Intelligence Service, the Proper Officer of the Department of Foreign Affairs and Trade, the Director-General of the Office of National Intelligence and the Secretary of the Department of the Prime Minister and Cabinet issued on 1 November 2021 are set aside.
Catchwords:	**NATIONAL SECURITY** – JURISDICTION, PRACTICE AND PROCEDURE – Subpoenas issued to governmental entities – whether subpoenas had a legitimate forensic purpose – matters required to prove the offence under s 39(1) of the *Intelligence Services Act 2001* (Cth) – communication of "any information or matter that was prepared by or on behalf of ASIS in connection with its functions or relates to the performance by ASIS of its functions" – whether the prosecution needs to prove that information was generated as a result of activities "within" functions of ASIS or that complied with all of the requirements of the *Intelligence Services Act* – text, context and purpose of the provision indicate that there is no need to prove compliance with every provision in the *Intelligence Services Act* to prosecute an offence under s 39(1) – subpoenas related to the issues that might arise if the Crown had to prove compliance – subpoenas had no legitimate forensic purpose given these matters would not be in issue at the trial – unnecessary to decide whether subpoenas involved "fishing" or were oppressive – subpoenas set aside
Legislation Cited:	*Acts Interpretation Act 1901* (Cth), ss 15AA, 15AB *Criminal Code 1995* (Cth), s 5.6 *Inspector-General of Intelligence and Security Act 1986* (Cth), ss 8(2), 17, 18(6), 19, 22, 23(2) 24, 34 *Intelligence Services Act 2001* (Cth), ss 3, 6, 6A, 8, 9, 11, 12, 12A, 18, 28(1), 29, 32, 39, 39A, 40, Pt 4, schs 1, 2 *National Security Information (Criminal and Civil Proceedings) Act 2001* (Cth), ss 22, 26
Cases Cited:	*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 *Alister v The Queen* (1984) 154 CLR 404 *AMS v AIF* [1999] HCA 26; 199 CLR 160 *Beckwith v The Queen* (1976) 135 CLR 569 *Channel Seven Adelaide Pty Ltd v Australian Communications and Media Authority* [2014] FCAFC 32; 223 FCR 65 *Chu Kheng Lim v Minister for Immigration, Local Government*

and Ethnic Affairs (1992) 176 CLR 1
Church of Scientology v Woodward (1982) 154 CLR 25
Grain Growers Ltd v Chief Commissioner of State Revenue (NSW) [2016] NSWCA 359; 93 NSWLR 415
Hogan v Australian Crime Commission [2010] HCA 21; 240 CLR 651
Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association (1908) 6 CLR 309
Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273
PJ v The Queen [2012] VSCA 146; 36 VR 402
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355
R v A2 [2019] HCA 35; 269 CLR 507
R v Collaery (No 7) [2020] ACTSC 165
R v Saengsai-Or [2004] NSWCCA 108; 61 NSWLR 135
R v Saleam (1989) 16 NSWLR 14
R v Saleam [1999] NSWCCA 86
R v Tang [2008] HCA 39; 237 CLR 1
Secretary of the Department of Planning, Industry and Environment v Blacktown City Council [2021] NSWCA 145
State of New South Wales v Robinson [2016] NSWCA 334; 93 NSWLR 280
Sweet v Parsley [1970] AC 132
*Waugh v Kippen (*1986) 160 CLR 156

Texts Cited:

Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 2021, 28635 (Alexander Downer, Minister for Foreign Affairs)
Explanatory Memorandum, Intelligence Services Bill 2001 (Cth)
Royal Commission on Intelligence and Security (5th Report, 1976) vol 1

Parties:

The Queen (Crown)

Bernard Collaery (Defendant)

Commonwealth of Australia (Applicant)

Representation:

Counsel

L Crowley QC and A Haban-Beer (Crown)

P Boulten SC, C Ward SC and R Khalilzadeh (Defendant)

T Begbie QC, P Herzfeld SC and C Ernst (Commonwealth)

Solicitors

Commonwealth Director of Public Prosecutions (Crown)

Gilbert + Tobin (Defendant)

Australian Government Solicitor (Commonwealth)

File Number:

SCC 195 of 2019

MOSSOP J:

Introduction

1. These reasons explain why four subpoenas served by Bernard Collaery must be set aside.

2. Bernard Collaery is facing five charges on an indictment dated 12 September 2019. Four of the counts on the indictment allege breaches of s 39 of the *Intelligence Services Act 2001* (Cth) (IS Act). A further count on the indictment (count 1) is a charge of conspiracy to breach s 39, alleged to have been entered into with a person known as Witness K. The offences are alleged to have occurred on various dates between 1 December 2012 and 17 March 2014. Each offence carries a maximum penalty of two years' imprisonment.

3. As part of the pre-trial process, Mr Collaery served subpoenas dated 1 November 2021 upon the Australian Secret Intelligence Service (ASIS), the Department of Foreign Affairs and Trade (DFAT), the Office of National Intelligence and the Department of the Prime Minister and Cabinet.

4. By application in proceeding dated 9 December 2021, the Commonwealth of Australia sought to have those subpoenas set aside or alternatively the time for compliance extended. The grounds for that application were that the subpoenas did not have a legitimate forensic purpose and that the subpoenas to ASIS and DFAT were oppressive.

5. The application was heard on 26 and 27 April 2022. Also listed on that day were other applications relating to subpoenas but, having regard to the length of the oral submissions made in relation to the present application, argument on the other applications was, by consent, adjourned to a later date convenient to the parties.

6. The principal issue in contention was whether or not the subpoenas had a legitimate forensic purpose. The difference between the defendant on the one hand, and the Commonwealth and the Director of Public Prosecutions (who prosecutes the case in the name of the Crown) on the other, was as to what was required to be proved in order to establish the offence under s 39(1) of the IS Act. Although the offences were alleged to have occurred on different dates between December 2012 and March 2014, the arguments were presented by reference to the compilation of the Act as at 28 May 2013.

7. Section 39 of the IS Act provides:

> **39 Communication of certain information—ASIS**
>
> (1) A person is guilty of an offence if:
>
> (a) the person communicates any information or matter that was prepared by or on behalf of ASIS in connection with its functions or relates to the performance by ASIS of its functions; and
>
> (b) the information or matter has come to the knowledge or into the possession of the person by reason of:
>
> (i) his or her being, or having been, a staff member or agent of ASIS; or
>
> (ii) his or her having entered into any contract, agreement or arrangement with ASIS; or

(iii) his or her having been an employee or agent of a person who has entered into a contract, agreement or arrangement with ASIS; and

(c) the communication was not made:

(i) to the Director-General or a staff member by the person in the course of the person's duties as a staff member; or

(ii) to the Director-General or a staff member by the person in accordance with a contract, agreement or arrangement; or

(iii) by the person in the course of the person's duties as a staff member or agent, within the limits of authority conferred on the person by the Director-General; or

(iv) with the approval of the Director-General or of a staff member having the authority of the Director-General to give such an approval.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

(2) A prosecution for an offence against subsection (1) may be instituted only by the Attorney-General or with the Attorney-General's consent.

8. The focus of the argument was in relation to s 39(1)(a). That identifies the information which is the subject of the offence. It does so by referring to the functions of ASIS. It was uncontroversial that the prosecution would need to prove beyond reasonable doubt that the information or matter the subject of the respective charges was either prepared by or on behalf of ASIS in connection with its functions or related to the performance of its functions. The issue in contention was what proof of that involved.

9. Put at a high level of generality, the defendant contended that the reference to the functions of ASIS required the Crown at the trial to prove beyond reasonable doubt that any information or matter communicated was information or matter generated as a result of activities within" the functions of ASIS and that complied with the IS Act. As a consequence, if the Crown failed to prove beyond reasonable doubt compliance with each of a number of specific provisions within the IS Act, then the charge as a whole would not have been proved. The Commonwealth and the Director contended that it was only necessary to prove the connection or relationship to the functions of ASIS and not necessary to prove that the "information or matter" disclosed involved activities of ASIS that complied with all of the provisions of the IS Act.

10. The provisions of the IS Act upon which reliance was placed by the defendant included limitations upon the functions or activities of ASIS. Those limitations are expressed using general language which would open up, as areas of potential contest, broad issues relating to Australia's national security and foreign relations. For example, one of the provisions relied upon was s 11(1) of the IS Act which required that ASIS's functions be performed "only in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being". The defendant contended that the Crown was required to prove beyond reasonable doubt that the information or matter the subject of the charges arose from activities of ASIS that met these requirements. In other words, were the activities of ASIS in the interests of Australia's national security, in the interests of Australia's foreign relations or in the interests of Australia's national economic well-being? The defendant would then be entitled to contest each of these matters, cross-examine witnesses about these issues and lead evidence related to them. On the defendant's interpretation, he would be entitled to an acquittal if a jury had a reasonable doubt as to whether or not the activities of ASIS which it was alleged he disclosed satisfied these requirements.

11. The defendant therefore contended that because s 39 necessarily opened up such issues, he had a legitimate forensic purpose in subpoenaing from the Commonwealth documents relevant to those issues.

12. The significance of the question of statutory interpretation went beyond the immediate issue of whether or not the subpoenas should be set aside. That was because it raised for consideration what the Crown was required to prove at trial and, as a consequence, what the issues would be at trial.

13. For the reasons that follow, I have concluded that s 39(1)(a) requires the Crown to prove that the information or matter communicated was "prepared by or on behalf of ASIS in connection with its functions" or "relates to the performance by ASIS of its functions". That does not require the Crown to prove that the subject matter of the disclosure involved only activities that were "within" the functions of ASIS under the IS Act or that each of the requirements of the IS Act was complied with in relation to those activities. In light of that interpretation of what is required by s 39(1)(a), the subpoenas do not have a legitimate forensic purpose and must be set aside.

Statutory provisions

14. In addition to s 39, which is set out above, it is necessary to have regard to a number of other provisions of the IS Act.

15. The most relevant provisions of the IS Act are as follows. The references in these provisions to DSD and DIGO are to the Defence Signals Directorate and the Defence Imagery and Geospatial Organisation, which are also regulated by the IS Act.

> **6 Functions of ASIS**
>
> (1) The functions of ASIS are:
>
> (a) to obtain, in accordance with the Government's requirements, intelligence about the capabilities, intentions or activities of people or organisations outside Australia; and
>
> (b) to communicate, in accordance with the Government's requirements, such intelligence; and
>
> (c) to conduct counter-intelligence activities; and
>
> (d) to liaise with intelligence or security services, or other authorities, of other countries; and
>
> (da) to co-operate with and assist bodies referred to in section 13A in accordance with that section; and
>
> (e) to undertake such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia.
>
> (2) The responsible Minister may direct ASIS to undertake activities referred to in paragraph (1)(e) only if the Minister:
>
> (a) has consulted other Ministers who have related responsibilities; and
>
> (b) is satisfied that there are satisfactory arrangements in place to ensure that, in carrying out the direction, nothing will be done beyond what is necessary having regard to the purposes for which the direction is given; and
>
> (c) is satisfied that there are satisfactory arrangements in place to ensure that the nature and consequences of acts done in carrying out the

direction will be reasonable having regard to the purposes for which the direction is given.

(3) A direction under paragraph (1)(e) must be in writing.

Note: If the Minister gives a direction under paragraph (1)(e), the Minister must give a copy of the direction to the Inspector-General of Intelligence and Security as soon as practicable after the direction is given to the head of ASIS (see section 32B of the *Inspector-General of Intelligence and Security Act 1986*).

(3A) A direction under paragraph (1)(e) is not a legislative instrument.

(4) In performing its functions, ASIS must not plan for, or undertake, activities that involve:

(a) paramilitary activities; or

(b) violence against the person; or

(c) the use of weapons;

by staff members or agents of ASIS.

Note 1: This subsection does not prevent ASIS from being involved with the planning or undertaking of activities covered by paragraphs (a) to (c) by other organisations provided that staff members or agents of ASIS do not undertake those activities.

Note 2: For other limits on the agency's functions and activities see sections 11 and 12.

Note 3: For ***paramilitary activities*** see section 3.

(5) Subsection (4) does not prevent:

(a) the provision of weapons, or training in the use of weapons or in self-defence techniques, in accordance with Schedule 2; or

(b) the use of weapons or self-defence techniques in accordance with Schedule 2.

(6) ASIS must not provide weapons, or training in the use of weapons or in self-defence techniques, other than in accordance with Schedule 2.

(7) In performing its functions, ASIS is not prevented from providing assistance to Commonwealth authorities, including to the Defence Force in support of military operations, and to State authorities.

6A Committee to be advised of other activities

If the responsible Minister gives a direction under paragraph 6(1)(e), the Minister must as soon as practicable advise the Committee of the nature of the activity or activities to be undertaken.

Note: For ***Committee*** see section 3.

16. Section 3 defines the "Committee" as the Parliamentary Joint Committee on Intelligence and Security.

8 Ministerial directions

(1) The responsible Minister in relation to ASIS, the responsible Minister in relation to DIGO and the responsible Minister in relation to DSD, must issue a written direction under this subsection to the relevant agency head. The direction must:

(a) require the agency to obtain an authorisation under section 9 from the Minister before:

(i) undertaking an activity, or a series of activities, for the specific purpose, or for purposes which include the specific purpose, of producing intelligence on an Australian person; or

(ii) undertaking, in accordance with a direction under paragraph 6(1)(e), an activity, or a series of activities, that will, or is likely to, have a direct effect on an Australian person; and

(b) specify the circumstances in which the agency must, before undertaking other activities or classes of activities, obtain an authorisation under section 9 from the Minister.

(2) The responsible Minister may give written directions to be observed:

(a) in the performance by the relevant agency of its functions; or

(b) in the case of ASIS—in the exercise of the powers of the Director-General under section 33 or 34.

(3) Each agency head must ensure that the agency complies with any direction given by the responsible Minister under this section.

(4) Directions under paragraph (2)(b) must not relate to a specific staff member.

(5) A direction given under this section is not a legislative instrument.

Note: The Inspector-General of Intelligence and Security has oversight powers in relation to Ministerial directions and authorisations given under this Act. See in particular section 32B of the *Inspector-General of Intelligence and Security Act 1986* (which requires the Minister to give a copy of a direction under this section to the Inspector-General of Intelligence and Security as soon as practicable after the direction is given).

9 Ministerial authorisation

(1) Before a Minister gives an authorisation under this section, the Minister must be satisfied that:

(a) any activities which may be done in reliance on the authorisation will be necessary for the proper performance of a function of the agency concerned; and

(b) there are satisfactory arrangements in place to ensure that nothing will be done in reliance on the authorisation beyond what is necessary for the proper performance of a function of the agency; and

(c) there are satisfactory arrangements in place to ensure that the nature and consequences of acts done in reliance on the authorisation will be reasonable, having regard to the purposes for which they are carried out.

(1A) Before a Minister gives an authorisation under this section for an activity, or a series of activities, of a kind mentioned in subparagraph 8(1)(a)(i) or (ii), the Minister must also:

(a) be satisfied that the Australian person mentioned in that subparagraph is, or is likely to be, involved in one or more of the following activities:

(i) activities that present a significant risk to a person's safety;

(ii) acting for, or on behalf of, a foreign power;

(iii) activities that are, or are likely to be, a threat to security;

(iv) activities related to the proliferation of weapons of mass destruction or the movement of goods listed from time to time in the Defence and Strategic Goods List (within the meaning of regulation 13E of the *Customs (Prohibited Exports) Regulations 1958*);

(iva) activities related to a contravention, or an alleged contravention, by a person of a UN sanction enforcement law;

(v) committing a serious crime by moving money, goods or people;

(vi) committing a serious crime by using or transferring intellectual property;

(vii) committing a serious crime by transmitting data or signals by means of guided and/or unguided electromagnetic energy; and

(b) if the Australian person is, or is likely to be, involved in an activity or activities that are, or are likely to be, a threat to security (whether or not covered by another subparagraph of paragraph (a) in addition to subparagraph (a)(iii))—obtain the agreement of the Minister responsible for administering the *Australian Security Intelligence Organisation Act 1979*.

(1B) In subsection (1A):

security has the same meaning as in the *Australian Security Intelligence Organisation Act 1979*.

Note: For ***serious crime*** see section 3.
UN sanction enforcement law has the same meaning as in the *Charter of the United Nations Act 1945*.

(2) The Minister may give an authorisation in relation to:

(a) an activity, or class of activities, specified in the authorisation; or

(b) acts of a staff member or agent, or a class of staff members or agents, specified (whether by name or otherwise) in the authorisation; or

(c) activities done for a particular purpose connected with the agency's functions.

(3) An authorisation is subject to any conditions specified in it.

(4) An authorisation must be in writing and must specify how long it will have effect. The period of effect specified in an authorisation for an activity, or a series of activities, of a kind mentioned in subparagraph 8(1)(a)(i) or (ii), must not exceed 6 months.

(5) If a Minister gives an authorisation under this section in relation to an agency, the relevant agency head must ensure that a copy of the authorisation is kept by the agency and is available for inspection on request by the Inspector-General of Intelligence and Security.

...

11 Limits on agencies' functions

(1) The functions of the agencies are to be performed only in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations outside Australia.

(2) The agencies' functions do not include:

(a) the carrying out of police functions; or

(b) any other responsibility for the enforcement of the law.

However, this does not prevent the agencies from:

(c) obtaining intelligence under paragraph 6(1)(a), 6B(a), (b), or (c) or 7(a) and communicating any such intelligence that is relevant to serious crime to the appropriate law enforcement authorities; or

(d) in the case of ASIS—performing the function set out in paragraph 6(1)(da) or providing assistance as mentioned in subsection 6(7); or

(e) in the case of DIGO—performing the functions set out in paragraphs 6B(e) and (f); or

(f) in the case of DSD—performing the functions set out in paragraphs 7(e) and (f).

Note: For ***police functions*** and ***serious crime*** see section 3.

(2AA) An agency may communicate incidentally obtained intelligence to appropriate Commonwealth or State authorities or to authorities of other countries approved under paragraph 13(1)(c) if the intelligence relates to the involvement, or likely involvement, by a person in one or more of the following activities:

(a) activities that present a significant risk to a person's safety;

(b) acting for, or on behalf of, a foreign power;

(c) activities that are a threat to security;

(d) activities related to the proliferation of weapons of mass destruction or the movement of goods listed from time to time in the Defence and Strategic Goods List (within the meaning of regulation 13E of the *Customs (Prohibited Exports) Regulations 1958*);

(e) committing a serious crime.

(2A) The agencies' functions do not include undertaking any activity for the purpose of furthering the interests of an Australian political party or other Australian political organisation.

(3) Subsection (1) does not apply to the functions described in paragraphs 6(1)(da), 6B(b), (c), (d), (e), (f) and (g), and 7(c), (d), (e) and (f).

12 Limits on agencies' activities

An agency must not undertake any activity unless the activity is:

(a) necessary for the proper performance of its functions; or

(b) authorised or required by or under another Act.

12A Special responsibilities of Directors and Director-General

The Director of DIGO, the Director of DSD and the Director-General must take all reasonable steps to ensure that:

(a) his or her agency is kept free from any influences or considerations not relevant to the undertaking of activities as mentioned in paragraph 12(a) or (b); and

(b) nothing is done that might lend colour to any suggestion that his or her agency is concerned to further or protect the interests of any particular section of the community, or with undertaking any activities other than those mentioned in paragraph 12(a) or (b).

17. The reference to "the Director-General" is a reference to the Director-General of ASIS: s 3.

The charges

18. It is sufficient for present purposes to note that both count 1 (the conspiracy charge) and counts 2, 3, 4 and 5 (which charge substantive offences) each require proof that the information or matter was prepared by or on behalf of ASIS "in connection with its functions or related to the performance by ASIS of its functions". That picks up the language of s 39(1)(a).

The relevant fault element

19. The submissions of the defendant on the one hand and the Director on the other differed as to the physical and fault elements of the offence created by s39(1). The debate focused upon the elements arising from s 39(1)(a). At least in his primary

submissions, the defendant contended that this involved two separate physical elements, namely:

(a) a person communicates any information or matter; and

(b) that information or matter:

(i) was prepared by or on behalf of ASIS in connection with its functions; or

(ii) relates to the performance by ASIS of its functions.

20. The defendant contended that for the first element, being an element that consisted of conduct, the requisite fault element was intention: *Criminal Code 1995* (Cth), s 5.6(1). He next contended that the second element consisted of a circumstance and that therefore the requisite fault element was recklessness: *Criminal Code*, s 5.6(2).

21. In contrast, the Director contended that s 39(1)(a) gave rise to only one physical element. That element was that the defendant communicates any information or matter that was acquired or prepared by or on behalf of ASIS in connection with its functions or relates to the performance by ASIS of its functions. This was said to be a physical element involving conduct and, as a consequence, the relevant fault element was intention. The Director contended that splitting s 39(1)(a) into two physical elements was contrary to the analytical approach in *R v Saengsai-Or* [2004] NSWCCA 108; 61 NSWLR 135 at [72], *R v Tang* [2008] HCA 39; 237 CLR 1, *PJ v The Queen* [2012] VSCA 146; 36 VR 402 and *Channel Seven Adelaide Pty Ltd v Australian Communications and Media Authority* [2014] FCAFC 32; 223 FCR 65. In oral submissions, counsel for the defendant accepted that the Director's submission as to the elements of the offence may well be correct. However, he submitted that whether or not there was a single element with a single fault element, or two elements with differing fault elements, did not substantially affect the critical question for present purposes, namely, what was required to be proved in order to establish that the information in question had the required relationship to the functions of ASIS for the purposes of s 39(1)(a).

22. It is not essential for present purposes that I finally resolve this issue. None of the Director, the defendant or the Commonwealth contended that resolution of that issue would influence the outcome of the present application. For the purposes of this application, I proceed on the basis contended for by the Director, namely that there is a single physical element for which the fault element is intention.

Submissions

23. The submissions of the parties were extensive. They were made in writing as well as orally at the hearing. Some of the submissions were "open" submissions not involving reference to matters the subject of the s 26 certificate issued under the *National Security Information (Criminal and Civil Proceedings) Act 2001* (Cth) (NSI Act): see the explanation of the relevant provisions of the NSI Act and the certificate in *R v Collaery (No 7)* [2020] ACTSC 165 at [14]-[20]. Others were "classified" submissions which were subject to the constraints under that certificate and orders made under s 22 of the NSI Act. It is not necessary in these reasons to make reference to material that is subject to the s 26 certificate.

Submissions of the defendant

24. The defendant contended that both within s 6 of the IS Act as well as in ss 6A, 8, 9 11, 12 and 12A were relevant restrictions on the functions or activities of ASIS. He contended that the "functions" of ASIS as referred to in s 39(1)(a) must exclude the carrying out of activities conducted in breach of the IS Act. He submitted that to interpret the provision otherwise would undermine the objects of the Act and those other provisions that expressly or impliedly limit the activities undertaken by ASIS.

25. The defendant made specific submissions about what was required to be established in order to prove compliance with the provisions that he relied upon. These detailed submissions will be addressed later in these reasons.

26. The defendant contended that if there was any doubt or ambiguity with respect to the interpretation of s 39, or if the provision was reasonably capable of multiple interpretations, the interpretation most favourable to the defendant should be adopted: *Sweet v Parsley* [1970] AC 132 at 149.

Submissions of the Commonwealth

27. The Commonwealth accepted that, in order to establish the offence, the Crown was required to prove beyond reasonable doubt that the information or matter disclosed met the description set out in s 39(1)(a). The issue was what the description in that subsection, properly construed, required to be proved.

28. The Commonwealth submissions were to the effect that the history and purpose of the Act, as well as the statutory text and context all pointed to the conclusion that s 39(1)(a) was concerned with the character of the information and its relationship with the subject of ASIS's functions, not with an assessment of the various procedural and substantive requirements of the IS Act.

29. The Commonwealth contended that the extrinsic materials indicated that the IS Act was intended to maintain the secrecy essential to the discharge of ASIS's functions. It contended that there were a variety of mechanisms by which the accountability of ASIS is sought to be ensured and that those mechanisms themselves incorporate and recognise the requirement for secrecy of ASIS activities. Particular reference was made to the role of the Inspector-General of Intelligence and Security (IGIS) and the Parliamentary Joint Committee on Intelligence and Security.

30. So far as the text and context was concerned, the submissions of the Commonwealth drew a distinction between references to the functions of ASIS and the performance of those functions in the text of the Act. In relation to s 39(1)(a), the Commonwealth pointed to the discrete statement of the functions of ASIS in s 6(1) and the broad connecting expressions "in connection with" and "relates to" used in s 39(1)(a). In relation to s 39(1) as a whole, the Commonwealth pointed to the fact that the provision only applied to a limited class of trusted persons who had acquired the information or matter in the circumstances set out in s 39(1)(b). As a result, it should be seen as requiring information to be kept within such a cohort except in the circumstances described in the provision and should not be given a narrow or technical operation which would provide protection to only a limited subset of what might be, in substance, ASIS information.

31. Further, the Commonwealth submitted that the defendant's submissions also involved incorrect interpretation of the operation of the various other provisions of the IS Act

which he relied upon. That was because he sought to interpret those provisions as involving strict constraints and limits upon the operation of ASIS which, on a proper interpretation of the Act consistent with its purpose, do not exist.

32. The Commonwealth also submitted that the principle of interpretation that resolved ambiguities or competing interpretations by adopting an interpretation most favourable to a defendant was one which was now of lesser relevance and was only a technique of interpretation of last resort.

Director of Public Prosecutions

33. The Director of Public Prosecutions essentially adopted the submissions made on behalf the Commonwealth in relation to the proper interpretation of s 39(1)(a). The distinct submissions made in relation to the elements of the offence have been referred to earlier.

The proper interpretation of s 39(1)(a) of the IS Act

34. The task of statutory construction must begin with the consideration of the text of the statute itself. The language which has actually been employed in the text of the legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context which includes the general purpose and policy of a provision and, in particular, the mischief it is seeking to remedy. Historical considerations and extrinsic materials cannot be relied upon to displace the clear meaning of the text. When interpreting a statute, the primary objective is to construe the relevant provisions so that they are consistent with the language and purpose of all the provisions of the statute. These general and fundamental propositions are drawn from *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 (*Alcan*) at [47] and *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 (*Project Blue Sky*) at [69].

35. Although there is considerable attraction in adopting an historical approach so as to put the enactment of the relevant legislation in its proper context, consistent with the statements in *Alcan* it is appropriate to start with the text of the provision in question, move to the text of the Act as a whole and then give consideration to relevant extrinsic materials (which include reference to matters of history) before reaching a conclusion.

The text of s 39(1)(a)

36. The text of the provision is set out earlier. Three points may be made about the text.

37. ***First***, it refers to ASIS's functions. Having regard to the fact that s 6, which is headed "Functions of ASIS", expressly sets out the functions of ASIS, it would be reasonable to interpret the reference to the functions of ASIS as being a reference to the functions of ASIS as expressed in that section as qualified by such other provisions which expressly qualify the scope of its functions (for example, ss 11(2) and 11(2A)) rather than a reference only to the functions of ASIS as carried out in compliance with every relevant provision of the Act.

38. ***Second***, the paragraph refers to two different categories of "information or matter". The first is "information or matter that was prepared by or on behalf of ASIS in connection with its functions". The second is "information or matter that … relates to the performance by ASIS of its functions". The first relates to the reason the information or matter was prepared. The second is more general. Those categories are not

necessarily mutually exclusive. It is likely that, in many cases, information or matter will be both prepared by or on behalf of ASIS in connection with its functions and relate to the performance by ASIS of its functions. The inclusion of two broadly expressed and overlapping categories of information or matter points to an intention to make the scope of the provision broad. Such an intention is emphasised by the fact that the same formulation is used in s 39A in relation to the DIGO and s 40 in relation to the DSD. The inferred intention to make the scope of the provision broad tends against an interpretation that would then qualify the scope of the paragraph by reference to detailed constraints on the activities of ASIS found elsewhere in the Act. That position is reinforced by the next point.

39. ***Third***, the connectors used to describe the required relationship between the information or matter and the functions of ASIS –"in connection with" and "relates to"– are very broad ones and well established as such: *Grain Growers Ltd v Chief Commissioner of State Revenue (NSW)* [2016] NSWCA 359; 93 NSWLR 415 at [122]; *Project Blue Sky* at [87]. Plainly, given the variety of circumstances in which these expressions are used, in any particular case the use of such expressions must be considered in the statutory context in which they appear. In this case, both are undeniably broad expressions and there is nothing in the text of s 39 or in the context in which they appear which would indicate that they should be given anything other than their broad meaning. Once again, the breadth of these connectors suggests that the legislation is casting a broad net over information or matters connected with ASIS. The use of such broad connectors does not support reading s 39(1)(a) as if it required the underlying activity of ASIS to which the "information or matter" relates to be "within" the functions of ASIS.

The balance of s 39

40. Section 39(1)(a) must be understood in the context of the balance of s 39.

41. Most importantly, s 39(1)(b) confines the range of persons to whom the offence provision can apply. The paragraph identifies the need for a causal connection between the information or matter coming to the knowledge or into the possession of the person and one of the various statuses outlined in subparagraphs (i)-(iii). Although the concept of an "arrangement" with ASIS is not defined and plainly extends beyond "contracts" and "agreements", as a general proposition, s 39(1)(b) can be seen as confining the scope of the offence provision to a limited class of persons who are permitted to have access to information or matter that falls within s 39(1)(a). Counsel for the Commonwealth described the scope of s 39(1)(b) as covering "a trusted, authorised cohort, in respect of information that those persons have acquired only by reason of being in that cohort". This may be putting it somewhat too definitively because of the uncertain content of the term "arrangement", but the limited category of persons who may fall within s 39(1)(b) is a matter which tends against a restrictive interpretation of s 39(1)(a). There is less of an interpretive imperative to limit the scope of a criminal provision such as this in circumstances where, although the information or matter is broadly described, only a limited class of persons are subject to the obligation. That is all the more so where that limited class of persons is largely, if not exclusively, made up of persons who are in positions where they are required to be trusted by ASIS.

42. The other paragraph of s 39(1), s 39(1)(c), provides exceptions to the prohibition on communication of information or matter. The various subparagraphs permit

communication consistent with the various statuses in s 39(1)(b): s 39(1)(c)(i)-(iii). In addition, s 39(1)(c)(iv) permits approval to be given for a communication by the Director-General. The exceptions in the paragraph reinforce the limited category of persons to whom the prohibition in s 39(1) applies.

The qualifications on powers and functions

43. Sections 6, 6A, 8, 9, 11, 12 and 12A of the IS Act form part of the context of s 39. The defendant contends that they are significant not merely as part of the context for s 39, but directly affect what the Crown is required to prove when establishing the matters in s 39(1)(a). The written submissions of the defendant summarised the position as follows:

> In order for an activity of ASIS to therefore be within the functions of ASIS, it must:
>
> (a) Fit within the functions of ASIS as contained at s 6;
>
> (b) Be within the limitations on ASIS' functions as contained in s 11;
>
> (c) Be within the limitations on ASIS' activities as contained in s 12; and
>
> (d) Adhere to the procedural requirements stipulated in the [IS Act], being:
>
> (i) The requirement for Ministerial directions in accordance with s 8;
>
> (ii) The requirement for Ministerial authorisation in accordance with s 9; and
>
> (iii) The requirement to advise the Parliamentary Joint Committee on Intelligence and Security in accordance with s 6A, to the extent that it is applicable.

44. The submissions of the defendant also pointed to the need to prove compliance with s 12A.

Section 6

45. Section 6 contains a number of different functions of ASIS. Section 6(1)(a) relates to the obtaining of foreign intelligence. Section 6(1)(e) is in similar terms to s 6(1)(a) but relates to "other activities" rather than the obtaining of intelligence dealt with in s 6(1)(a). Section 6(1)(e) involves the constraints and requirements set out in s 6(2)-(3A) and s 6A. Subsections 6(4)-(7) deal, expressly or implicitly, with limits on the performance of the functions of ASIS as distinct from the functions themselves.

46. So far as s 6 is concerned, the defendant made four submissions.

47. ***First***, he made specific submissions in relation to the meaning of "in accordance with the Government's requirements". This expression is used in s 6(1)(a) and (b). He contended that it was necessary to prove that, if the relevant function was that in s 6(1)(a), the information or matter was prepared in connection with or was related to the obtaining of intelligence that was "in accordance with the Government's requirements". He then submitted that "'the Government's requirements' should be interpreted as being the requirements of the Government as expressly stated in the national intelligence priorities of the National Security Committee of Cabinet". He submitted that he was entitled to test the inclusion of a matter within those priorities so as to ensure that it was "genuine, and supported by adequate evidence which shows it to be an appropriate and valid inclusion". He submitted he was entitled to test whether the identification of the government requirements was "capricious, or without basis, or made for a purpose other than furthering Australia's national security interests".

48. There is no basis for imposing such a specific meaning upon the words used in s 6(1)(a). There is nothing in the IS Act which would confine the meaning of the words "in accordance with the Government's requirements" to requirements set by the National Security Committee of Cabinet. In its context, the expression clearly distinguishes between ASIS itself and "the Government". The latter appears intended to be the executive government of the Commonwealth as a whole. The expression appears to be intended to ensure that in carrying out functions in ss 6(1)(a) and (b), ASIS is the servant of the executive government as a whole and not, in this respect, the master of its own destiny. How the executive government determines what it requires from ASIS will be a matter internal to the executive government. Plainly, the National Security Committee of Cabinet would be one way in which "the Government's requirements" might be set, but there is nothing in the Act that requires that "the Government's requirements" be set in that way or only in that way.

49. Further, there is no basis for the defendant's contention that for the purposes of determining whether any ASIS activity was connected or related to the function in s 6(1)(a), he is entitled to investigate or contest the basis for the setting of "the Government's requirements". Those requirements either exist or do not exist. Just because the functions of ASIS are defined by reference to "the Government's requirements" does not mean that their merits are opened up in a prosecution for breach of s 39(1). The foundation for the "Government's requirements" or their merits, are not, for the purposes of s 39(1)(a), matters which are relevant. The existence of any "Government requirement" for particular foreign intelligence may be relevant to determining under s 39(1)(a) whether any particular "information or matter" has the required connection or relevance to the functions of ASIS, but that is very different from permitting the foundation or merits of those "Government's requirements" to be contested.

50. ***Second***, the defendant also submitted in relation to the expression "in accordance with the Government's requirements", that this expression should be read down so as to be consistent with Australia's international obligations. He referred to general statements as to the relevance of international law to the construction of statutes found in *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363-364; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 and *AMS v AIF* [1999] HCA 26; 199 CLR 160 at [50]. The defendant then identified various international legal obligations which he submitted were applicable to the subject matter of the defendant's disclosures and submitted that these obligations should affect the interpretation of the statutory functions of ASIS and the meaning of "in accordance with Government requirements".

51. While, for present purposes, the statements in these authorities can be accepted, the asserted obligations under international law are not of any significance in the determination of the content of the relevant statutory provisions. As the Royal Commission on Intelligence and Security conducted by Justice Hope said in its Fifth Report at [60], [66], [130]:

> ASIS exists to run spying operations in the Australian interest. We should not allow any euphemism to cover that essential point.
>
> …

> In all cases, however, espionage is illegal and the clandestine service's job is to break those laws without being caught. Espionage is deceptive, covert, underhand.
>
> …
>
> All of ASIS' activities, in common with those of every espionage service in the world, are out of harmony with one view of international law.

52. This rather bluntly explained reality, of which the Parliament was no doubt aware, makes it vanishingly unlikely that it intended the language it used and the obligations that it imposed to be qualified by the range of different international obligations that conceivably might apply to the subject matter of ASIS's activities. In the context of an organisation dedicated to obtaining foreign intelligence with clearly stated functions, it cannot be assumed that Parliament intended the language it used to be qualified either by the whole of Australia's various international obligations or the fact-specific legal obligations asserted by the defendant to apply in this case.

53. ***Third***, the defendant submitted in relation to the reference in s 6(1)(a) to "the capabilities, intentions or activities of people or organisations outside Australia" that:

> … understood in proper context, must involve some threat, or harm, or potential threat or harm to, or some real impact on, Australia's national security, foreign relations or national economic well-being, and have a nexus to legitimately stated "Government's requirements"

54. This submission involves an unwarranted gloss upon the words used. The words "capabilities, intentions or activities of people or organisations outside Australia" mean what they say. They are broad and unqualified. It can be inferred that they are deliberately so. The submission of the defendant, which involves requiring "threat" or "harm" or a "real impact upon" the subject matters referred to in s 11(1), involves an unwarranted elaboration upon the language actually used in s 6 and s 11(1).

55. ***Fourth***, in the event that s 6(1)(a) was not the relevant function under which any activity the subject of the "information or matter" disclosed was carried out, then s 6(1)(e) may be a relevant function. In those circumstances, the defendant contended that the Crown would need to prove the relevant direction under s 6(1)(e) as well as compliance with s 6A.

Section 6A

56. Section 6A requires notification of the Parliamentary Joint Committee on Intelligence and Security where the Minister gives a direction under s 6(1)(e). As pointed out above, compliance with s 6A would be required if s 6(1)(e) was the relevant ASIS function.

Sections 8 and 9

57. The procedural requirements in ss 8 and 9 require ministerial authorisation of certain activities and permit, in limited circumstances, the Minister to give written directions to ASIS. Where an authorisation is required as a result of a direction under s 8, then s 9 imposes requirements of which the Minister must be satisfied before an authorisation is given. The matters identified in s 9(1) require consideration of whether the activities are "necessary for the proper performance of a function of the agency", whether arrangements are in place to ensure that "nothing will be done … beyond what is necessary for the proper performance of a function of the agency" and whether arrangements are in place to ensure that "the nature and consequences of acts done in reliance on the authorisation will be reasonable, having regard to the purposes for which they are carried out".

58. The defendant contended that he was entitled, if s 9 applied, to contest whether the Minister was satisfied of the matters in s 9(1) and, if so, whether there was a "proper basis" for that satisfaction.

Section 11

59. In relation to s 11, the Commonwealth pointed to the distinction between s 11(1) which referred to the manner in which the functions were to be performed ("The functions … are to be performed only …) and s 11(2) which excluded particular matters from the functions ("The … functions do not include …").

60. The defendant placed emphasis upon the qualification in s 11(1) that the functions of agencies, including ASIS are to be performed only "in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being". He contended that this provision required the prosecution to establish that the information or matter alleged to have been disclosed related to activities which met this description. That would open up for contest at trial what were "the interests of Australia's national security", "the interests of … Australia's foreign relations" or "the interests of … Australia's national economic well-being" in relation to any conduct of ASIS alleged to have been disclosed. The defendant made specific submissions about the meaning of the undefined terms in s 11: "national security", "Australia's foreign relations" and "Australia's national economic well-being". Each of these submissions involved a restrictive interpretation of what might be covered by those expressions. However, the submissions made clear that if compliance with s 11(1) was a matter required to be proved at trial, then in order for the charge to be established, the jury would need to be satisfied beyond reasonable doubt that the activity which gave rise to the "information or matter" the subject of the charge was in "the interests of Australia's national security", "the interests of … Australia's foreign relations" or "the interests of … Australia's national economic well-being". That, the defendant contended, would need to occur in combination with his asserted requirement under s 6(1)(a) (rejected at [54] above) that the people or organisations outside Australia give rise to some form of threat or harm, or potential threat or harm.

Section 12

61. The defendant identified s 12 as a constraint upon the activities of ASIS. The section refers to an activity being "necessary for the proper performance of its functions". This is a provision which applies to each of the agencies covered by the IS Act, not just ASIS.

62. The defendant contended that, in its statutory context, "necessary" meant something "which is needed to be done or which is required to be done or something that cannot be dispensed with": *State of New South Wales v Robinson* [2016] NSWCA 334; 93 NSWLR 280 at [43]; see also *Hogan v Australian Crime Commission* [2010] HCA 21; 240 CLR 651 at [30]-[31].

63. Once again, the defendant submitted that because of the terms of s 12, the necessity of any ASIS activity that gave rise to the disclosed "information or matter" would be open to contest. This would open up whether, in relation to the gathering of foreign intelligence, there were other methods by which such intelligence could be gathered.

64. That would open up the whole of the circumstances surrounding the ASIS activity, including establishment of the sources and methods available to ASIS at the relevant

time and require that the Crown satisfy the jury that, in all the circumstances, the activity was "necessary for the proper performance of [ASIS's] functions".

Section 12A

65. The defendant contended that compliance with s 12A is a matter which the Crown must prove. He pointed to the positive obligation on the Director-General in the section to "take all reasonable steps". He submitted that in the absence of evidence of compliance with s 12A then, noting the low threshold in s 12A(b), the subject matter of the "information or matter" disclosed may have involved a contravention of the Act.

The accountability mechanisms in the statute and related statutes

66. Section 39 must be interpreted in the context of the IS Act as a whole. A feature of the IS Act is that it incorporates a very particular regime for ensuring the accountability of ASIS. That is a regime which preserves the secrecy of its operations. The existence of such a regime for accountability and the emphasis on the maintenance of secrecy tends against an interpretation of s 39 which made an apparently broad provision subject to a range of other qualifications which incorporate contestable propositions, compliance with which would only be determined after the relevant disclosure occurred. That is because the Act is to be understood as a coherent whole and to interpret one part of the Act in a manner which would undermine the apparent purpose of another part would be to introduce incoherence into the statute.

67. Section 18(1) provides that ASIS is under the control of the Director-General. Section 18(2) provides that the Director-General "must advise the Minister in matters relating to ASIS". The clear responsibility of the Director-General for ASIS is notable. Other provisions of the Act emphasise the security of tenure and authority of the Director-General over the organisation.

68. Part 4 of the Act (ss 28-32) requires a Committee on Intelligence and Security be established after the commencement of the first session of each Parliament: s 28(1). Section 29(1) outlines the functions of the Committee. Notably, s 29(3) excludes a range of generally operational matters relating to ASIS and the other intelligence organisations from the functions of the Committee.

69. Section 32 provides that Sch 1 of the IS Act applies to the Committee. Notably, cl 1 of Sch 1 provides that the Committee "must not require a person or body to disclose to the Committee operationally sensitive information or information that would or might prejudice Australia's national security or the conduct of Australia's foreign relations". Clause 4 of Sch 1 permits the Minister to give a certificate which has the effect of preventing the Committee from receiving evidence or documents from a person where to do so would disclose operationally sensitive information. Clause 6 places restrictions on the publication of certain evidence or the contents of certain documents without the head of the relevant intelligence agency. Clause 7 imposes restrictions on what may be disclosed in a report of the Committee to a House of Parliament. Clause 9 creates an offence relating to unauthorised disclosure of proceedings of the Committee conducted in private. Clause 12 creates an offence of disclosing information acquired because the person was a member or a member of staff of the Committee. Clause 21 requires that each member of staff of the Committee must be security cleared in the same way as a member of ASIS. Clause 22 requires that the Committee to make arrangements acceptable to all of the agency heads for the security of any information and records made by the Committee.

70. The notable point arising out of these provisions is that the Act itself, while providing a degree of oversight and hence accountability through the Committee, contains within it demarcation of the areas where operational secrecy is allowed to be maintained and restrictions on disclosure by the Committee and its members.

Other legislative context

71. It is also open, when interpreting s 39 within the IS Act, to take into account the provisions of other legislation which provide the context in which s 39 exists. In particular, it is open to take into account an Act which existed when the IS Act was enacted to which reference is made in the IS Act itself. That is the *Inspector-General of Intelligence and Security Act 1986* (Cth) (IGIS Act). The IGIS is a statutory position established by the IGIS Act with functions in relation to various agencies. The functions in relation to ASIS are set out at s 8(2). Between September 2012 and January 2014, s 8(2) provided:

> (2) Subject to this section, the functions of the Inspector-General in relation to ASIS, DIGO or DSD are:
>
> (a) at the request of the responsible Minister, of the Inspector-General's own motion or in response to a complaint made to the Inspector-General by a person who is an Australian citizen or a permanent resident, to inquire into any matter that relates to:
>
> (i) the compliance by that agency with the laws of the Commonwealth and of the States and Territories; or
>
> (ii) the compliance by that agency with directions or guidelines given to that agency by the responsible Minister; or
>
> (iii) the propriety of particular activities of that agency; or
>
> (iv) an act or practice of that agency that is or may be inconsistent with or contrary to any human right, that constitutes or may constitute discrimination, or that is or may be unlawful under the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975* or the *Sex Discrimination Act 1984*, being an act or practice referred to the Inspector-General by the Australian Human Rights Commission; and
>
> (b) at the request of the responsible Minister or of the Inspector-General's own motion, to inquire into the procedures of that agency relating to redress of grievances of employees of that agency; and
>
> (c) at the request of the responsible Minister or of the Inspector-General's own motion, to inquire into the effectiveness and appropriateness of the procedures of that agency relating to the legality or propriety of the activities of that agency.

72. The breadth of the subject matter of inquiries that may be made by the IGIS is notable, extending to matters going beyond their legality. Also notable is the fact that all of the inquiries may be undertaken on the IGIS's own motion and the inquiries referred to in paragraph (a) may be undertaken in response to a complaint made by an Australian citizen or permanent resident. The breadth of these provisions emphasises the importance, for accountability of ASIS, that the legislative scheme places upon the role of the IGIS.

73. The IGIS Act contains provisions dealing with complaints and inquiries undertaken under the Act. In relation to inquiries, there are provisions which relate to the protection of information. Inquiries are to be undertaken in private: s 17(1). The obligation to allow

persons who may be criticised in a report an opportunity to appear before the IGIS is qualified where, in the opinion of the IGIS, to do so would "prejudice security, the defence of Australia or Australia's relations with other countries": s 17(5). The power of the IGIS to obtain documents is a broad one which prevents objection on the ground of public interest immunity or the privilege against self-incrimination. It also overcomes any legal professional privilege in relation to advice given to a Minister or a Commonwealth agency: s 18(6). The powers also include a power of entry of premises occupied by a Commonwealth agency: s 19. The IGIS Act imposes obligations upon the IGIS to make appropriate arrangements for the security of any documents taken from the possession of an agency. Reports of the IGIS must be given to the responsible Minister and in certain circumstances to the Prime Minister: s 22. Where an inquiry is made as a result of a complaint, there is a limitation upon the IGIS giving a written response to the complainant in order to avoid prejudicing "security, the defence of Australia or Australia's relations with other countries": s 23(2) Where an inquiry has been conducted in relation to a Commonwealth agency, if the IGIS considers that the agency has not taken action that is "adequate and appropriate", the IGIS may provide a report to the Prime Minister: s 24. The IGIS and any member of the staff of the IGIS have imposed upon them limitations upon recording or communicating information acquired under the IGIS Act or making use of any such information: s 34.

74. These provisions emphasise both the significant role and powers of the IGIS as well as the strong emphasis that the IGIS Act places upon the maintenance of secrecy where that is necessary to protect the integrity of the operations of the body being inquired into.

Extrinsic material

75. When interpreting s 39 if the IS Act, it is open to take into account material not forming part of the Act if it is "capable of assisting in the ascertainment of the meaning of the provision": *Acts Interpretation Act 1901* (Cth), s 15AB. It may be used to confirm the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act: s 15AB(1)(a). Extrinsinc material may also be used to determine the meaning of the provision where the provision is ambiguous or obscure or where giving the ordinary meaning conveyed by the text would lead to a result that is manifestly absurd or is unreasonable: s 15AB(1)(b).

76. Section 15AB(2)(f) of the *Acts Interpretation Act* makes it clear that a Minister's second reading speech may be taken into account under s 15(1). The second reading speech on the Intelligence Services Bill made by Minister Downer on 27 June 2001 provides a useful explanation of the historical and policy background to the enactment of the IS Act. ASIS was established by executive direction on 13 May 1952 but its existence was only officially acknowledged by the government on 25 October 1977. In 1995, a commission of inquiry determined that ASIS should be put on a statutory footing. It was that recommendation which ultimately led to the IS Act. The second reading speech indicates that the Bill sought to achieve the objective of ASIS obtaining from the Parliament "the maximum authority and control consistent with the essential need for secrecy". The Minister referred to the existing oversight arrangement provided by the IGIS Act and that the commission of inquiry considered that the accountability and oversight arrangements in place were already "comprehensive and effective". He said, in relation to ASIS and DSD, "the agencies focus on intelligence and their activities

must remain secret if they are to be conducted effectively. This bill does not shy away from that fact." In relation to limitations on the functions of the agencies the Minister said: "The bill clearly details the limits that are to be placed on ASIS and DSD. They may only perform their functions in the national interest as determined by government – in particular, in the interests of Australia's national security, Australia's foreign relations or Australia's national economic wellbeing – and only to the extent that those matters are affected by people or organisations outside Australia." Relevant to s 39 is the following passage in the speech:

> **Protection of ASIS and its staff**
>
> Having earlier noted the special nature of ASIS and DSD in respect of their functions externally, this bill, quite appropriately, seeks to protect ASIS staff, the intelligence it produces and its sources and methods. As was noted by the commission of inquiry in its report to the government, it would be important to dispel any public impression that the introduction of legislation would imply any complete opening up of ASIS to public view. The commission of inquiry report also commented that the collection of intelligence information `depends on people who often put their lives and liberties at considerable risk'. It is for that reason that secrecy about ASIS's activities and the people engaged in them is necessary in the national interest. To lay ASIS bare would be to irreparably damage its capabilities and assets. The men and women of ASIS perform difficult and, at times, dangerous tasks in distant locations. Information about their work and, indeed, their identities needs to be closely held. Accordingly, the government, in line with recommendations from the commission of inquiry, has sought to provide ASIS and its officers with appropriate legislative protection. This bill generally prohibits the identification of a staff member or agent of ASIS, other than the Director-General of ASIS, and provides protection for information produced by or on behalf of ASIS in connection with its functions.

77. Plainly, the emphasis upon the significance of secrecy for an organisation such as ASIS, which is dedicated to the collection of foreign intelligence, is emphasised by these portions of the second reading speech. The last sentence of the quoted passage clearly refers to the obligation in s 39 of the IS Act. That the operation of this provision is put in the context of a general requirement for secrecy in relation to the operation of the organisation is notable.

78. The "General Outline" in the explanatory memorandum for the Bill (to which regard may be had under s 15AB(2)(e) of the *Acts Interpretation Act*) makes reference to the fact that "the legality and propriety of the agencies' activities will continue to be overseen by the Office of the [IGIS]". It says: "it is intended that this Bill will provide a workable framework for the oversight and accountability of the intelligence services, achieving a balance between accountability and transparency and necessary secrecy".

79. In relation to s 39, the explanatory memorandum provides:

> Subclause (1) relates to persons who acquired or came into possession of information as a result of being a staff member or working under a contract with ASIS. Subclause (1) prohibits the communication of information which relates to the performance of agency functions unless communicated in a manner as specified in sub-clause (1)(c).
>
> Due to the national security ramifications of the disclosure of information of this kind, which could potentially endanger ASIS and its agents, breaches of this provision attract a criminal penalty.

80. It is notable that the explanatory memorandum emphasises the importance of s 39 for the protection of both ASIS and its agents. It refers to the operation of the provision in language which corresponds to that used in the Act itself ("which relates to the performance of agency functions") in a manner which does not suggest a requirement that any activity to which a communication of information relates be demonstrated to be

in compliance with every provision of the Act or any of the provisions specifically identified by the defendant.

Decision

81. The text, context and purpose of the IS Act all indicate that the burden upon the prosecution is to prove that which is stated in s 39(1)(a) and that does not extend to a requirement to prove compliance with every provision of the IS Act relevant to the activity of ASIS which gives rise to the information or matter disclosed.

82. The most significant feature in reaching this conclusion is the text of the provision and the use of the broad connecting expressions. The submissions put on behalf of the defendant did not undermine the significance of those broad connecting expressions. The defendant's submissions sought to read into the provision a requirement that the subject matter of the "information or matter" disclosed be within the functions of ASIS and that there be full compliance with the requirements of the IS Act in relation to the underlying activities where that is not stated in s 39(1)(a).

83. The statutory context in which the provision appears is one which involves a recognition of the need for secrecy in the operations of ASIS and provides mechanisms for accountability in relation to those operations other than through qualifications upon the obligations of persons subject to s 39(1)(a).

84. The purpose of the provision and the Act as a whole, both as indicated by its text and having regard to its legislative history, tends strongly against an interpretation of the provision which would read into s 39(1)(a) a requirement to prove complete compliance with the provisions of the IS Act. Rather, the provision, which is of a type essential to the proper operation of an organisation dedicated to obtaining foreign intelligence and conducting counterintelligence activities, would only be effective if it was interpreted in a manner which gave effect to the broad connectors between the information or matter disclosed and the functions of ASIS. It would be rendered practically ineffective if any failure to comply with the provisions pointed to by the defendant destroyed the obligation of confidentiality imposed upon the limited class of persons referred to in s 39(1)(b).

85. Consideration of three of these provisions serves to illustrate the consequences that would flow if s 39(1)(a) was interpreted in the manner contended for by the defendant.

86. First, if, as the defendant contends, the prosecution is required to establish compliance with s 6A in cases to which it applied, then a failure by the Minister to give notice to the Committee of having given a direction under s 6(1)(e) would mean that a prosecution for the disclosure of information or matter relating to what might be an authorised operation could not succeed. That would mean that, by reason of a procedural error on the part of the Minister, the details of the operation, details of ASIS operational methods and capacities, the identity of its agents and the identity of persons overseas who cooperated with ASIS might all be disclosed without fear of prosecution. The same consequences would flow if there was non-compliance with any of the other provisions identified by the defendant. Those consequences may well be fatal for persons connected with the operation and would certainly be fatal to the capacity of ASIS to obtain foreign intelligence. That cannot have been the intention of the Parliament.

87. Second, as pointed out earlier, if s 39(1)(a) is interpreted in a manner which required proof beyond reasonable doubt of compliance with s 11(1), then this would open up as

an area of contest at the trial, whether the performance by ASIS was "in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being". Those would be contestable matters, the determination of which would range widely across areas of public policy. The protection of the secrecy of ASIS information and hence the viability of Australia's foreign intelligence operations would be dependent upon the resolution of these potentially difficult and contestable questions of public policy by the members of the jury. That cannot have been the intention of the Parliament.

88. Third, if the provision in question was s 12 and the matter put in issue was whether the activity was "necessary", the proceedings would open up for investigation before the jury the whole of the sources and methods of ASIS relevant to the subject matter of the disclosure and the other intelligence available to ASIS (or the government more generally) in relation to that subject matter. It cannot have been Parliament's intention, by using the words that it did in s 39(1)(a), to require this.

89. That courts in other contexts have recognised the reviewability of conduct of security agencies (for example, in *Church of Scientology v Woodward* (1982) 154 CLR 25) does not make it possible that Parliament intended to open up for determination by a jury the issues that would be opened up if the defendant's interpretation of s 39(1) was correct.

90. A consequence of the defendant's interpretation would be that, because questions of high public policy such as those that would be raised by ss 11 and 12 are contestable and only finally determined in the context of a prosecution, well after the disclosure had occurred, the determination of whether or not to disclose would be, in practice, dependent upon the judgment of the individual making the disclosure. That contrasts with an interpretation which requires only the general connection with the functions of ASIS indicated by the language used in s 39(1)(a), which provides a broad and thereby more certain scope of the offence provision and hence more effectively secures the necessary secrecy of ASIS operations.

91. The consequences of the defendant's interpretation of s 39(1)(a) would be that the scope of the secrecy provision would be so narrowed or rendered so uncertain and difficult to prosecute that the secrecy necessary for the effective performance of ASIS's functions would be destroyed.

92. The obligation of the court is to prefer an interpretation of s 39 that best achieves the purpose or object underlying the Act over any other interpretation: *Acts Interpretation Act* s 15AA. It is therefore not open to prefer an interpretation which would render the provision practically ineffective.

93. Insofar as the defendant relied upon the principle of interpretation that a penal statute should be construed narrowly and any ambiguity resolved in favour of the liberty of the subject, that is a principle of interpretation of last resort: *Beckwith v The Queen* (1976) 135 CLR 569 at 576; *Waugh v Kippen* (1986) 160 CLR 156 at 164-165; *R v A2* [2019] HCA 35; 269 CLR 507 at [52]. Having regard to the other factors which are overwhelmingly against the defendant's proposed interpretation, the principle of interpretation is insufficient to warrant adopting the interpretation that he proposed.

94. In summary, the defendant's proposed interpretation is not required by the language of s 39(1)(a), nor the legislative and non-legislative context and would render the provision ineffective to protect the necessary secrecy surrounding ASIS's operations. It would be inconsistent with the express and inferred legislative intention for the

provision. In contrast, the interpretation contended for by the Commonwealth and the Director gives proper effect to the broad language used in s 39(1)(a), is consistent with the legislative and non-legislative context of the provision and is consistent with both the express and inferred legislative intention of the provision.

95. Those considerations indicate that for the purposes of a prosecution of an offence under s 39(1), the question posed is that which is indicated by the text of s 39 rather than that text supplemented by a requirement that any activities on the part of ASIS that are the subject of the "information or matter" be proven to have been within the functions of ASIS or carried out in compliance with all of the provisions of the IS Act.

96. Therefore, as the language of s 39(1)(a) of the IS Act indicates, the Crown needs to establish that the defendant communicated any information or matter that was prepared by or on behalf of ASIS in connection with its functions or relates to the performance by ASIS of its functions. As pointed out above at [47]-[54], in determining the functions of ASIS, s 6(1) is to be interpreted without the glosses upon its language contended for by the defendant. In establishing the matter required under s 39(1)(a), the Crown is not required to prove beyond reasonable doubt compliance with s 6A, ss 8 and 9, s 11(1) s 12 and s 12A.

Legitimate forensic purpose

97. Whether or not there is a legitimate forensic purpose for the issue of the contested subpoenas must be assessed in light of the conclusions above as to what the Crown is required to prove for the purposes of an offence under s 39(1) of the IS Act. The conclusion means that the Crown does not need to establish beyond reasonable doubt compliance with each conceivably relevant provision of the IS Act. The subpoenas to ASIS, DFAT, the Office of National Intelligence and the Department of the Prime Minister and Cabinet were, having regard to their terms, plainly drafted on the basis that these were live issues in the trial.

98. The defendant contended that:

    (a) the documents bore directly on an element of the offence that must be proven beyond reasonable doubt which was a fact in issue in the proceedings; and

    (b) would materially assist with cross-examination.

99. Although it related to civil proceedings, the decision in *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145 (*Blacktown*) rejected the proposition that an inability to demonstrate that it is "on the cards" that the documents sought to be subpoenaed "will materially assist" the issuing party's case will automatically require that the subpoena be set aside or that access to the documents be refused: [80], [89], [98].

100. The court in that case was careful not to reach a conclusion on the position in criminal cases. In particular, it was not necessary to resolve whether a more generous approach was required to be taken in such cases in light of the "sea change in the law relating to disclosure in the criminal law": [76], [79].

101. The position in criminal cases was summarised in *R v Saleam* [1999] NSWCCA 86 at [11] as requiring that the issuing party must "(i) identify a legitimate forensic purpose for which access is sought; and (ii) establish that it is 'on the cards' that the documents will materially assist his case." The Commonwealth submitted that this formulation, which is

based upon that in *Alister v The Queen* (1984) 154 CLR 404 (*Alister*), was the test to be applied in criminal cases. As interpreted in *R v Saleam* (1989) 16 NSWLR 14 (*Saleam)* (an earlier case involving the same Mr Saleam), that required the establishment of a legitimate forensic purpose and that "it is 'on the cards' that the documents would materially assist the accused in his defence": at 18. The requirement that a defendant establish that the documents would "materially assist" the defendant's case can be seen as a reaction to the sort of subpoena issued in that case which, according to the headnote, required production of "every document relating to the investigation and prosecution of the offences with which the accused and another had been charged, together with the reports of any investigation into allegations of perjury committed by the principal Crown witness in the committal proceedings and at the trial".

102. However, as pointed out in the reasons of Brereton JA in *Blacktown,* there are other examples where it may readily be seen that it would not be reasonable to require a defendant to establish in advance that the evidence would assist the defendant's case. Subpoenas for telephone records or medical records provide an example: see *Blacktown* at [90]; see also [57]. Similarly, apparently relevant documents may assist a party in the conduct of its case by knowing what they say even if those documents may not ultimately materially advance that case: Bell P at [40]. Thus, assistance to a defendant may be in the form of allowing proper investigation of the facts, without the need to identify the likelihood that the material will assist the defendant's substantive case. The difficulty in attempting to establish a verbal formula which achieves an appropriate outcome in the factual circumstances identified in *Saleam* as well as those given in the examples in *Blacktown* illustrates the wisdom of adopting a cautious approach in relation to such verbal formulae: *Blacktown* at [33]-[34], [88], [98].

103. In this case it is undesirable to attempt to engage in a reconciliation of the reasons in *Blacktown* with the statements in *Alister*, which arose in a somewhat different context and at a time when the approach to prosecution disclosure was different. It is sufficient to dispose of the matter on the basis most favourable to the defendant, namely, that he must establish a legitimate forensic purpose and in doing so is not necessarily required to establish that it is likely that the documents that he has not seen will assist his case and do so in a manner which is "material". Even on this approach, however, it must be the case that the likelihood or otherwise of the documents to be produced would materially assist the defendant's case would be a factor relevant to determining whether there was a legitimate forensic purpose.

104. The subpoenas are drafted on the basis that the issues that might arise if the Crown was required to establish beyond reasonable doubt compliance with ss 6, 6A, 8, 9, 11, 12 and 12A of the IS Act as interpreted by the defendant. Each of the subpoenas had a number of different items in its schedule which would require production of a large range of documents relating to the subject matter of the "information or matter" alleged to have been communicated by the defendant. The argument before the court was conducted by reference to the issue of statutory construction and the defendant did not seek to maintain individual items within the subpoenas even if the statutory construction issue was decided against him. In those circumstances, it is not necessary to consider the schedules to the subpoenas on an item-by-item basis. Because of the interpretation of s 39 outlined above, the issues that would have arisen in relation to ss 6, 6A, 8, 9, 11, 12 and 12A had they been interpreted in the manner contended for by the defendant, are not issues which will be in contest at the trial. In those

circumstances, each of the subpoenas does not have a legitimate forensic purpose. As a consequence, they must be set aside.

Alternative argument

105. Having regard to the conclusions set out above in relation to legitimate forensic purpose, it is not necessary to consider the alternative argument put forward by the Commonwealth that the subpoenas lacked a legitimate forensic purpose because they amounted to "fishing" or the argument that the subpoenas to ASIS and DFAT are oppressive.

Order

106. The order of the Court is: The subpoenas to the Director-General of the Australian Secret Intelligence Service, the Proper Officer of the Department of Foreign Affairs and Trade, the Director-General of the Office of National Intelligence and the Secretary of the Department of the Prime Minister and Cabinet issued on 1 November 2021 are set aside.

I certify that the preceding one-hundred and six [106] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Mossop

Associate:

Date: 16 May 2022