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NATIONAL SECURITY AND NATURAL JUSTICE

*Caroline Bush**

Introduction

The difficulty with national security as a subject of discussion is that it provokes a powerful response in most commentators. This is certainly true of discussion amongst lawyers. As his Honour Keith Mason (President of the New South Wales Court of Appeal) commented late last year[1], lawyers are well placed to understand the extent to which new laws depart from the fundamentals of our inherited rights and freedoms and to assess the impact of these new laws.

New powers for detention and questioning, increased secrecy provisions, the power to issue control orders for unconvicted citizens and a variety of other law enforcement measures introduced in recent times have seen a commentary from within the legal fraternity about the reaction and alleged over-reaction of western governments to the threat of terrorism.

Debate has also arisen as to the appropriate response of the judiciary to new national security measures. That debate has often been polarised between natural lawyers on one side calling for an end to judicial deference in relation to executive action concerning national security issues (and increased activism to counter unjust laws); and positivists on the other, who strongly assert that the exercise of judicial power in the service of abstract moral values is unacceptable in a democracy characterised by the rule of law[2].

This debate is broad ranging and accordingly, in the limited time allowed in this forum to consider administrative law issues I intend to look at the way in which national security considerations are impacting upon the administrative law landscape in Australia today. In particular, I want to address three issues:

- How the courts deal with cases that come before them which give rise to national security concerns. Are natural justice obligations owed in relation to decisions concerning national security and, if so, what is the impact upon the content of natural justice when national security considerations are at stake in Australia;
- How do national security considerations impact upon the way in which administrative law proceedings are conducted? Access to information in relation to national security matters is a constant theme in all cases in relation to which national security is a relevant consideration, not just in administrative law matters. There are issues as to what information has been used by a decision maker, whether applicants and/or their representatives can access that information and the ways in which government seeks to protect that information which it sees as critical to national security; and

A brief review of two recent cases in the United Kingdom dealing with, in part, the issue

- of whether substantive issues in relation to national security are justiciable.

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* *Special counsel, Clayton Utz.* *This paper was presented at the 2007 AIAL National Administrative Law Forum.*

The traditional approach to judicial review

The traditional Anglo Australian approach to cases that involve national security considerations is that an agency involved in a national security function does not have a licence to act unlawfully or ultra vires and that the legal principles that limit ordinarily decision-making functions apply equally across government.

The case ordinarily cited in support of the principle that national security agencies are subject to judicial review is *Church of Scientology v Woodward*[3].

That case concerned an action brought by the Church of Scientology against the Director-General of ASIO on the basis that the Director-General had unlawfully caused or permitted ASIO to obtain and communicate intelligence concerning the Church and to characterise the Church as a security risk. The Church sought an injunction preventing ASIO from continuing and a declaration stating that the activities were unlawful. The Church's Statement of Claim was struck out and the Church of Scientology appealed to the High Court arguing that certain provisions of the ASIO Act prohibited ASIO from dealing with intelligence unless it was relevant to security and that intelligence was not relevant to security if it related to a person who was not a risk to security. The Church's appeal was dismissed.

While the Court was satisfied that ASIO was not authorised to exceed its statutory functions, the Court was not so entirely consistent about the issue of whether the Court could determine if ASIO was obtaining intelligence that was not relevant to security. Gibbs CJ, in dismissing the appeal, found that the construction of the Act which the Church sought to rely on was unduly narrow and unworkable and that intelligence which fell short of establishing that a person was a risk to security may still be relevant to security if used in conjunction with other information. Furthermore, his Honour considered that the ASIO Act did not entrust to the courts the power to decide that ASIO may not obtain particular intelligence on the grounds that it is not relevant to security.[4]

Mason J determined that it was beyond question that the doctrine of ultra vires applied to ASIO's activities to the extent to which ASIO's activities exceed it power. His position was that if a violation of the law by ASIO was proved, then ASIO and its officers were amenable to legal process and to the remedies available under the Constitution and that if a case came before the courts where it was claimed that ASIO had misused its powers, it was to be expected that the courts would be astute to ensure that the misuse of power was not cloaked by claims of national security[5].

Mason J considered that while it was fair to say that security intelligence was not readily susceptible to judicial evaluation it was quite another to say that court cannot determine whether intelligence was relevant to security. However, his Honour did note that it was obvious that the Director General's opinion of what information is relevant would, if given, constitute important evidence in the decision of the question whether ASIO was acting ultra vires.[6]

Brennan J also noted the difficulty faced by an applicant in relation to a challenge against ASIO's activities. Brennan J found it was for the Court to determine whether a particular activity was within the functions of the Act stating that:

> The issue for curial determination is whether the activity of which the plaintiff complains is either an assembly of intelligence which is not relevant to security, or a dissemination of intelligence for a purpose which is not relevant to security... To prove either the plaintiff must be able to show that allowing for any deficiency in the court's ability to quantify the security risk precisely, the intelligence or purpose in question is not relevant to security. Although it is not essential that the court be able to quantify the security risk, its inability to do so will affect its finding as to whether the limit upon the

> functions of the Organisation has been exceeded. The evidentiary burden may be difficult to discharge, but the issue of excess of function is nevertheless justiciable.[7]

Brennan J then noted the other real problem faced by an applicant in relation to an action against ASIO, namely that discovery would not be given against the Director-General save in the most exceptional case. However, his Honour stated that the veil of secrecy was not absolutely impenetrable and that the public interest in litigation to enforce the limitations on function prescribed in legislation is never entirely excluded from consideration. In other words, in the appropriate case, where the public interest warrants it, the court can order discovery against ASIO.

In summary then, it is correct that ASIO (and any agency like it) is subject to judicial review and that it must act in accordance with its legislative functions and the courts do have a power to provide a remedy should a misuse of power be demonstrated. However, the reality is that it will be extremely difficult to obtain the information necessary to prove that an intelligence agency is acting outside its powers in any given situation and that the courts regard themselves as incapable of quantifying or assessing security risks.

The impact of national security considerations on natural justice obligations arose in a House of Lords decision from around the same time, *Council of Civil Service Unions v Minister for the Civil Service*[8]. That case involved a determination of the Minister for the Civil Service (Prime Minister Thatcher) for the immediate variation of the terms and conditions of the staff of Government Communications Headquarters (whose responsibilities were to ensure the security of military and official communications and provide Government with signals intelligence) to the effect that staff would no longer be permitted to belong to national trade unions.

The House of Lords found that the applicants (a union and a number of individual employees) would, apart from considerations of national security, have had a legitimate expectation that unions and employees would be consulted before the Minister issued the determination.[9] However, it was considered that where national security considerations arose, the Courts could not decide whether, in any particular case, the requirements of national security outweighed those of fairness. It was considered that this was a matter that fell to the executive for determination and that as the evidence established that the Minister had considered, with reason, that prior consultation about her determination would have involved a risk of disruption, and had shown that her decision had been based on her opinion that considerations of national security outweighed the applicants' legitimate expectation of prior consultation, the Court would not intervene.

Lord Fraser stated that[10]:

> The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security.

Lord Scarman stated that[11]:

> ... where a question as to the interest of national security arises in judicial proceedings the court has to act on the evidence..... Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officer as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the Crown would in the circumstances reasonably have held.

These comments are indicative of what may be regarded as traditional judicial deference to the executive in relation to issues concerning national security. The idea is that courts are not well placed to determine what action is in the interests of national security and that once it is established that national security considerations are relevant to a decision in issue and that the executive has considered that the relevant decision is in the best interests of national security, then unless that decision can be demonstrated to be patently ridiculous a challenge to its legality will be difficult to make out.

This approach is neatly reflected in a postscript to a judgment written by Lord Hoffman shortly after September 11. Lord Hoffman's judgment (which was itself written several months before September 11) had dismissed an appeal from a decision of the Secretary of State refusing leave to remain in the UK on the basis that the deportation of the applicant would be conducive to the public good and in the interests of national security. With reference to September 11, Lord Hoffman stated that the events in New York and Washington:

> ... are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need of the judicial arm of government to respect the decisions of Ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.[12]

His comments have been described as 'remarkable'[13], but they could be regarded as a restatement of conventional judicial wisdom on national security in the face of recent events.

What then is to become of the modern law of judicial review in the national security context? Is democracy to be the only remedy for those adversely affected by decisions involving national security considerations?[14]

There is no doubt that in the present legal environment, national security concerns have taken on heightened significance. In that context, I want now to turn to look at two recent Australian decisions concerning national security for the purpose of considering how courts are dealing with judicial review applications concerning Australia's security agency and to take a closer look at what applicants are doing to get access to information in order to challenge the decisions and activities of that agency. The decisions that I am addressing have often been covered by the media and accordingly the facts might be familiar.

The recent approach to judicial review and national security in Australia

The case of Sheikh Mansour Leghaei has attracted quite some media attention in the last year. The decision of the Federal Court concerning Sheikh Leghaei, being the decision of Madgwick J in *Leghaei v Director General of Security*[15], arose in the immigration context. Leghaei had made an application pursuant to s 39B of the *Judiciary Act 1913* (Cwlth) in relation to an adverse security assessment made by ASIO in relation to him, pursuant to s 37 of the *Australian Security and Intelligence Organisation Act 1979* (Cwlth) ('ASIO Act'). On the furnishing of the adverse assessment to the Minister for Immigration, the Minister was obliged to cancel the applicant's visa. Madgwick J's decision outlines the complex of legislative provisions that create this obligation.

In essence, the Minister for Immigration was compelled to cancel the visa because Leghaei had been assessed to be directly or indirectly a risk to Australian national security. Accordingly a question arose as to the legitimacy of the adverse security assessment made by ASIO in relation to Sheikh Leghaei.

By virtue of various provisions in the ASIO Act there is no requirement to provide a statement of the grounds for assessment in cases where the person who is the subject of the security assessment is not an Australian citizen, permanent resident or holder of a special category of visa. Furthermore there is no obligation for such a person to be notified that an assessment has even taken place in situations where the assessment is furnished to a Commonwealth agency. In this case however, Leghaei was presumably not ignorant of the fact that he was under investigation by ASIO as he was interviewed by ASIO officers on a number of occasions.

Leghaei claimed that the adverse security assessment that had been made in relation to him was void and inoperative for jurisdictional error constituted by denial of procedural fairness. In particular, it was contended on Leghaei's behalf that ASIO had failed to provide to him:

(a) any notice of the particular grounds on which it proposed to make the assessment;
(b) any specific issues to address as to why Leghaei was believed to be a risk to Australian national security; or
(c) any response to Leghaei's request for specific issues to which he might respond.

Leghaei also claimed that the assessment was void and inoperative by reason of other jurisdictional error, in that:

(d) ASIO had failed to consider and form an opinion on the essential question on which the assessment depended (namely whether the alleged acts and conduct that were the subject of the assessment meant that it was consistent with the requirements of security for administrative action to be taken and whether those alleged acts and conduct supported the making of an adverse security assessment);
(e) ASIO had misconstrued the definition of "security" in a relevant respect and consequently took irrelevant considerations into account.

Accordingly, the application itself was a fairly broad-ranging application seeking review of functions undertaken by ASIO that go to the very heart of national security. The first question that needed to be addressed was whether the applicant had any right to procedural fairness at the primary decision-making stage and secondly if the applicant had a right to natural justice, whether the national security context of ASIO's decision-making meant that such a right was devoid of any practical content.

Leghaei's case for procedural fairness depended upon four contentions. The first was the simple proposition that, in accordance with general principles, the process of furnishing an adverse security assessment to a Commonwealth agency was subject to a requirement to accord procedural fairness to a person who would be affected because of the potential for serious adverse consequences for the person who is the subject of the adverse security assessment[16].

The second contention was that the ASIO Act did not exclude procedural fairness because the necessary intention to do so is not apparent from the terms of the ASIO Act. It was submitted that while the ASIO Act expressly provides a degree of procedural fairness for some persons (in particular Australian citizens) that did not exclude a requirement for the basic elements of procedural fairness to be afforded to any other person who is the subject of a possibly adverse security assessment.

Third, it was contended that as the ASIO Act had not excluded procedural fairness, the minimum content of procedural fairness required that the attention of the affected person be brought to the critical issue or factor on which the decision was likely to turn. Fourth and finally it was asserted that the public interest in the maintenance of national security did not prevent ASIO from notifying the applicant of the nature of the allegations, even if only in

summary form as it was necessary that there must be credible evidence, rather than mere assertion, to establish that national security interests are involved.

It was said that national security interests did not effectively reduce the content of the procedural fairness obligation owed to Leghaei to such an extent that ASIO was not required, before making an adverse security assessment, to give the applicant sufficient information about the objections raised against him to enable him to answer them. While the applicant conceded that the content and procedural fairness may be 'adjusted downwards' to protect the public interest, the countervailing interest in ensuring natural justice was such that ASIO should not be released from the minimum requirement that the person whose interests are at stake be alerted to the critical issue or issues.[17]

The primary submission for ASIO was simply that the public interest in protecting national security precluded the applicant being given any notice of the particular grounds on which ASIO proposed to make the assessment. The respondents said that any requirement for procedural fairness had been excluded by necessary implication in the ASIO Act. It was said that it would be inconsistent with the statutory purposes of the ASIO Act to impose a free-standing, but unstated obligation to accord procedural fairness at the original decision-making stage.[18]

ASIO also maintained that no part of summary of the grounds for the assessment could have been provided to the applicant. In this context, ASIO sought to rely on what ASIO contended were two exceptions in relation to the obligations of procedural fairness. The first was that procedural fairness does not require disclosure of confidential information if to do so would harm the public interest or national security. ASIO relied on a number of authorities for this proposition, the most relevant of which where *Salemi* and *Amer*.[19]

Salemi was a 1977 High Court decision concerning immigration in which national security did not feature as an element of the case in issue, but some relevant obiter comments were made in relation to security, by Gibbs CJ in particular[20]. *Amer* did involve an adverse security assessment, but the decision available dealt with a 'no evidence' ground of review. However Lockhart J did decline to provide a copy of the assessment to the applicant noting national security as the basis of the order declining access.

The second exception that ASIO sought to rely on was that procedural fairness does not require the giving of notice, provision of information or a right to be heard where to do so would frustrate the purpose for which a particular power had been conferred. ASIO relied on comments of Mason J in *Kioa* and Finn J in *Slipper*[21].

Ultimately, the Court concluded that ASIO did owe the applicant an obligation of natural justice and that that obligation was not excluded by the terms of the ASIO Act as it was not unmistakably clear from the terms of the ASIO Act that is should be denied. His Honour stated that while the starting point created by the ASIO Act was that an Australian citizen who is the subject of an adverse assessment is ordinarily entitled to notification of that fact and to a statement of reasons, the existence of a discretion to exclude those requirements does not necessarily require the exclusion of procedural fairness at an earlier stage in the assessment process for non-citizens. In fact, his Honour flagged the possibility that the absence of these procedural fairness mechanisms for non-citizens arguably underscored the need for a right to be heard at the primary decision- making stage.[22]

As to whether natural justice obligations could arise in the context of national security considerations, Madgwick J noted that the capacity of avoiding error might be thought to grow in the sunlight of the opportunity for correction and to wither where unreviewability reigned. His Honour stated that while the nature of the subject matter was important:

> decision-makers in Australian agencies concerned with national security are unlikely to be less prone to mistakes than those decision makers...in our larger and longer practised allies, or in non-security agencies of many kinds[23]

He also thought it relevant that not all adverse security assessments will be based on material that demands confidentiality. While Madgwick J recognised that there was a degree of risk in requiring primary-decision makers to estimate what a court may later regard as being insufficient disclosure, an obligation to accord natural justice had not clearly been excluded by necessary statutory implication.[24]

Given the nature of the assessments that ASIO undertakes, his Honour concluded that the minimum level of procedural fairness that was necessary to ensure a fair decision-making process was an obligation to **positively consider** what concerns and how much detail might be disclosed to the visa holder to permit him/her to respond, without unduly detracting from Australia's national security.[25]

The all important rider however was that the court will, in practice, be very dependant on the Director-General's views about how release might prejudice national security. In the case before him Madgwick J concluded that having read and had debated before him the confidential material, he considered that the Director-General had given consideration to the possibility of disclosure but that the potential prejudice to the interests of national security appeared to be such that the content of procedural fairness in relation to Leghaei's case was reduced to nothingness. His Honour noted that without the benefit of countervailing expert evidence, he was not in a position to form a view contrary to that expressed in the confidential evidence in relation to disclosure. Again, it came back to the idea that it is the Executive, as the elected arm of government that must bear the burden of protecting the country and decide what steps are necessary to do so.[26]

Madgwick J briefly dealt with the other grounds of review noting that he had formed the view that the decision makers approach to the definition of 'security' was not infected by jurisdictional error and that there was no jurisdictional error in relation to whether the applicant acts and conduct meet the requirements of being 'acts of foreign interference'. The Court's reasoning in relation to these matters was set out in confidential reasons that can only be reviewed by a number of specific individuals in relation to whom access orders have been made. [27]

Leghaei did appeal to the Full Federal Court [28] and that appeal was dismissed in April 2007 by the Full Federal Court constituted by Tamberlin, Stone and Jacobson JJ. The Court originally ordered that the reasons for the judgment were confidential, until submissions could be considered from the parties as to what portions could be released, but a redacted version of the Full Federal Court decision has recently been made publicly available.

The redacted version of the judgment does not allow any real light to be shed on the question of whether ASIO misinterpreted the phrase 'acts of foreign interference', except to say that ASIO made no error. However, the judgment does allow an understanding of the Court's reasoning on the natural justice point. The appeal proceeded on the basis that there was no challenge to the primary judge's finding that the rules of procedural fairness were not excluded. The argument on appeal concerned the extent and content of those rules.[29]

The Full Court recognised that national security may make it impossible to disclose the grounds on which the executive proposes to act and concluded that Madgwick J was not in error in saying that the content of procedural fairness was in some circumstances reduced to nothingness to avoid a risk to national security. The Full Court found that in Leghaei's case, Madgwick J was plainly right to strike the balance in favour of the protection of the public

interest in national security and to give the weight he did to the unchallenged evidence of the Director-General on this point.[30]

The Full Court made reference to Madgwick J comments about courts being an inappropriate forum in which to evaluate national security risks and also to the prospects of an intelligence agency getting it wrong but stated that:

> ...his Honour correctly recognised that without the benefit of countervailing expert evidence he was not in a position to form an opinion contrary to that stated by the Director General..
>
> In coming to this view, the primary judge did not simply rubberstamp the opinion expressed by the Director General. He satisfied himself that the Director-General had given personal consideration to the question of whether disclosure would be contrary to the national interest.[31]

A special leave application has been filed in the High Court and on 14 June 2007 the High Court is conducting a hearing to determine the manner in which that special leave application will be conducted.

Madgwick J's approach to natural justice, approved by the Full Federal Court, of balancing the need to protect national security and the need to ensure the substance of allegations is disclosed to people whose interests may be affected, is in accordance with the current approach of the High Court in relation to natural justice issues.

In *Applicant VEAL of 2002 v Minister for Immigration and Multicultural Affairs*[32] the High Court was dealing with an applicant whose application for review had been refused by the Refugee Review Tribunal after it had received information in a letter accusing the applicant of serious criminal conduct. The author of the letter asked that the letter be kept secret. The Tribunal did not disclose the letter or the substance of the allegations in the letter to the applicant and in deciding against his application the Tribunal expressly stated that it placed no reliance on the letter.

The High Court determined that the applicant had been denied natural justice. The letter was relevant and credible and could not have been ignored. However that did not mean the applicant should have been given the letter. The Court acknowledged that the confidential nature of the document would affect the way in which the applicant was afforded natural justice in relation to the information in the letter i.e. he could not have expected to have been given a copy of the letter but rather should have been told the substance of the allegations contained in the letter and asked to respond to those allegations. The Court stated that:

> ... in identifying what the tribunal has to do in order to give the appellant procedural fairness, it is necessary to recognise that there is a public interest in ensuring that information that has been or may later be supplied by an informer is not denied to the executive government when making its decisions[33].

The Court's point is that if you disclose the identity of all your sources, you will not have many sources left.

In simple terms the Court resolved that the confidentiality of certain information did not necessarily mean that natural justice could not be afforded and that natural justice should be moulded to take into account the public interest in maintaining the confidentiality of certain material.[34]

Information - what applicants and others are doing in the Courts to try to get it.

One of the interesting aspects of *Leghael's case* is the way in which information sensitive to national security was dealt with. While Leghael himself was unable to review his adverse

security assessment, the Director-General of ASIO permitted counsel for the applicant and the applicant's instructing solicitor, after giving appropriate undertakings as to confidentiality, to undergo a process of obtaining a security clearance in order that they might obtain access to the confidential material put before the Court. This would have allowed counsel for the applicant to actually know what information was used by the Director-General in compiling the adverse security assessment, and in theory this would help counsel for the applicant to make out a case that the negative security assessment was void for jurisdictional error constituted by denial of procedural fairness or any other error for that matter.

Madgwick J acknowledged that the situation was less than perfect but noted that at least a judge had actually seen the relevant information and formed a view that procedural fairness was satisfied in the circumstances of the case. In this context he stated that

> the degree of comfort the applicant and interested members of the public may take from the fact of a judge having carefully and, so far as possible, critically read the relevant material before coming to the decisions I have, is regrettably limited.[35]

The reality is that access to relevant information is a significant problem for applicants looking to challenge decisions in relation to matters concerning national security and I wanted to turn now to look at recent developments on that very issue.

It is trite to say that when seeking to challenge the validity of a decision on natural justice grounds it is important for the applicant to know the information that was relied upon in making the decision.

The lack of a universally consistent approach to information concerning national security to date seems to have had the consequence that, in each new case in which national security concerns arise, individual applications, disputes and arrangements arise. The applications and arrangements are a consequence of the nature of the proceedings, the different kinds of information at issue and presumably from the different individuals conducting the cases on both sides.

There is no doubt that some of the information that the Commonwealth is seeking to protect in these cases is highly sensitive to national security. The only question is to what extent such information should be made available to the courts, applicants and their representatives, and under what conditions, in order to maintain the confidentiality of such information.[36]

There are a number of means by which the Commonwealth's can protect sensitive information.[37] Putting to one side the a new legislative regime applicable to civil proceedings, the *National Security Information (Criminal and Civil Proceedings)* Act 2004 (Cwlth) (referred to below), the courts have, as a matter of practice, jurisdiction to admit material into evidence without providing that material to the party adversely affected, if that evidence is of importance in the proceedings and the public interest in preserving its secrecy or confidentiality outweighs the public interest in making it available. Indeed, this power can be said to derive from the court's inherent jurisdiction to control its own process.[38]

There is also the doctrine of public interest privilege which, in essence, protects information the disclosure of which would be injurious to an identified public interest, including the interests of national security[39]. The public interest privilege has been included in the *Evidence Act 1995* (Cwlth) at s 130 which provides that:

> If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or documents not be adduced in evidence.

The National Security Information (Criminal and Civil Proceedings) Act 2004

Finally, there is the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cwlth) ('NSI Act') which originally only applied to criminal proceedings but was amended in 2005 to cover civil proceedings. A civil proceeding is defined in the NSI Act to mean any proceeding in a court of the Commonwealth, a State or Territory, other than a criminal proceeding. For the avoidance of doubt subsection 15(2) provides that each of the following is part of a 'civil proceeding':

(a) any proceeding on an ex parte application (including an application made before pleadings are filed in a court);
(b) the discovery, exchange, production, inspection or disclosure of intended evidence, documents and reports of persons intended to be called by a party to give evidence;
(c) an appeal proceeding;
(d) any interlocutory or other proceeding prescribed by regulations.

The Act applies to a civil proceeding if the Attorney General gives the parties and the court notice in writing that the Act applies to the civil proceedings (s 6A). Notice can be given at any time in the proceedings.

The processes set out in the Act are complicated but, at the risk of oversimplifying, in essence, they works something like this:

(a) if a party to a proceeding knows or believes that he or she will disclose information that relates to national security, they have to give the Attorney General Notice in writing (as well as the court and the other parties) (section 38D of the NSI Act);
(b) if the Attorney-General is so notified or if the Attorney of his/her own volition thinks such information may be disclosed the Attorney-General may give a certificate in relation to the information (section 38F of the NSI Act);
(c) in summary, the certificate issued by the Attorney-General is issued to the potential discloser and can:
    (i) remove or redact relevant information from attached source documents and prescribe the circumstances in which the information can be disclosed; or
    (ii) describe information and prescribe the circumstances in which the information can be disclosed;
    (section 38F)
(d) the Attorney-General must give a copy of the certificate to the court (subsection 38F(5));
(e) if the Attorney General gives a certificate then the court must either delay the commencement of the proceeding or adjourn the proceeding to hold a hearing to decide what orders to make in relation to the certificate (section 38G);
(f) only certain people are allowed to attend the hearing and a party and/or their legal representative may be excluded from this hearing if the party or their representative has not been given a security clearance and there is a risk to national security (section 38I);
(g) after conducting a hearing the court has to make an order about the disclosure of the relevant information. Those orders would relate to the further disclosure of the information (section 38L);
(h) in making its decision the court must consider:
    (i) whether, having regard to the Attorney General's certificate, there would be a risk of prejudice to national security if the information were disclosed in contravention of the certificate;
    (ii) whether any such order would have a substantial adverse effect on the substantive hearing in the proceeding; and
    (iii) any other matter the court considers relevant,
    (subsection 38L(7))
(i) in making its decision, the court must give greatest weight to the risk to prejudice to national security (subsection 38L(8)).

Constitutionality of the NSI Act

Notwithstanding that the NSI Act comprises a considerable imposition on the ordinary processes of the courts, the current iteration of the NSI Act withstood a challenge to it constitutional validity in 2006 based partly on a separation of powers type argument i.e. the legislative unlawfully interfering in the judiciary's processes.[40] The relevant application was launched by media interests in 2006 in relation to the effect of the NSI Act in the criminal trial of Feheem Lodhi, who was convicted in 2007 of various terrorism related offences. Mr Lodhi was the architect who had been collecting plans of electricity grids and military installations.

The media interests seeking to challenge the validity of the legislation, who had been excluded from hearings at various times during which the court decided what information would be disclosed, argued three points, namely that the relevant part of the NSI Act:

(a) had the effect of altering the character or nature of the Supreme Court of New South Wales, in that its effect was to obliterate an essential attribute of the Supreme Court of New South Wales namely its power to discharge, without interference, its fundamental object of determining guilt or innocence (this effect was said to arise because the consequence of the legislation was to deprive the court of its powers to retain control of criminal proceedings so as to bring them to an orderly conclusion - by imposing processes such as mandatory adjournments, interference with court personnel etc and because of the way in which the court was required to exercise it discretion under the NSI Act, which was not a real discretion but a "sham" discretion - intended to ensure that the interests of the accused in securing a fair trial were to be disregarded.)[41];
(b) purports to confer on the Supreme Court of New South Wales, in the exercise of the judicial power of the Commonwealth, a discretion which is incompatible with the exercise of that power (for the reasons referred to in (a) above);
(c) was inconsistent with the implied freedom of speech in relation to the discussion of political matters, which arises under the Constitution (in that the effect of the legislation was that it effectively burdened freedom of communication about government or political matters and was not reasonably appropriate to serve a legitimate end compatible with the maintenance of representative government).[42]

Whealy J disagreed. He considered that while the processes prescribed in the NSI Act, including mandatory adjournments plainly gave rise to the potential for a degree of disruption in ordinary court processes, the level of the disruption was not so great as to render the legislation unconstitutional.

In considering the fact that the NSI Act provided that, when considering what order to make in relation to the Attorney-General's certificate, the court was to give the greatest weight in the exercise of its discretion to the risk of national security, Whealy J noted that the court was not directed to have regard to this matter alone and nor was it precluded from determining, even after giving that matter 'greatest weight' that the defendant's right to receive a fair trial required the making of orders which had the effect of overriding a certificate.[43]

As to the issue of political communication, while he assumed, without deciding, that the law burdened political communication His Honour concluded that the object of the NSI Act, namely the protection of Australia's national security and thus its system of representative government was plainly compatible with the maintenance of representative government. Whealy J was also satisfied that the manner by which the Act sought to achieve that objective was also relevantly compatible and in this context His Honour noted that it is well established that courts may make appropriate orders, where authorised in relation to the suppression of evidence during a court hearing, to balance the competing interests of justice.[44]

Ultimately Whealy J concluded that closed hearings during which orders were made about the disclosure of information dealt only with a 'limited topic' and was satisfied that the constitutional challenge to their validity on the ground of political communication should fail.[45]

In finding in favour of the Commonwealth in relation to the challenge, Whealy J quoted Brennan CJ in *Nicholas v R*[46] when his Honour stated that:

> It is for the Parliament to prescribe the law to be applied by the court and if the law is otherwise valid, the court's opinion as to the justice, proprietary or utility of the law is immaterial. Integrity is the fidelity to legal duty, not a refusal to accept as binding a law which the court takes to be contrary to its opinion as to the proper balance to be struck between competing interests.

Time will tell if courts will, into the future, be satisfied that similar laws are valid. What cannot be in doubt is that the challenges are sure to continue.

Use of special counsel

Interestingly, none of this has dissuaded applicants from seeking to obtain relevant information by whatever means they can. For example, in the *Leghaei* case the applicant's counsel obtained clearance and reviewed the relevant information. In addition, counsel in at least two Australian cases involving national security information (both in the criminal context) have sought orders allowing the use of special counsel.[47]

Both Canada and the United Kingdom have developed the use of special counsel as a means of overcoming difficulties associated with the disclosure of information sensitive to national security. The use of special counsel was referred to with approval by the European Court of Human Rights in the decision of *Chahal v United Kingdom*[48]. It is a procedure which is described as a process in which a judge:

> holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the Court, who cross-examines the witnesses and generally assists the Court to test the strength of the state's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.[49]

While the regime is less than completely ideal because a party to proceedings does not have access to all the material to be relied upon by the court in the determination of the case, at least all of the relevant information is before the court and the strength of the state's case has been tested by the security-cleared counsel. The security of the information is protected but the applicant is given some opportunity to put the state to proof.

Discovery

Applicants are also not dissuaded from making more traditional applications. For example, the Federal Court is currently grappling with an application for discovery in judicial review proceedings concerning a negative security assessment.

The relevant proceedings were commenced in the Federal Court by Mr Scott Parkin, an American who was deported from Australia in September 2005 after arriving in Australia earlier that year. Mr Parkin was a self-confessed political activist and engaged in political activism upon arrival in Australia. In early September 2005 ASIO rang Mr Parkin and invited him to speak to them. Mr Parkin declined this invitation and ASIO staff subsequently prepared a security assessment concerning him. The security assessment was adverse for the purposes of the ASIO Act and was ultimately provided to the Minister for Immigration.

The security assessment recommended that Mr Parkin's visa be revoked in accordance with s 116 of the Migration Act (the same section pursuant to which Mr Leghaei's visa was revoked).

High profile complaints were made in the media and in Federal Parliament concerning Mr Parkin's adverse security assessment and his subsequent removal from Australia.

Mr Parkin commenced proceedings in the Federal Court and, together with two asylum seekers who had been similarly assessed as security risks (Mr Sagar and Mr Faisal) (together the 'applicants'), sought orders quashing the decision to make the adverse security assessments and to provide the adverse security assessments to the Department of Immigration and Citizenship. They also sought declaratory relief that the adverse security assessments were not made in accordance with law, that the Director-General contravened s 20 of the ASIO Act (which requires that ASIO act free from irrelevant considerations) by failing to make a lawful security assessment and that the Director-General had contravened s 20 of the ASIO Act in providing security assessments to the Department of Immigration and Citizenship.

Mr Parkin alleged that the adverse security assessment was not validly made because:

(d) it was not based on facts justifying an adverse assessment;
(e) it was not based on reasoning from which it could properly be inferred that he represented a risk to Australia's national security interests;
(f) it was not based on facts or reasoning justifying the making of an adverse security assessment;
(g) it contravened his rights under s17A of the ASIO Act ; and
(h) it was not authorised by law.

Mr Parkin did not deny that he engaged in political activism while in Australia. He claimed, however, that he did not engage in 'politically motivated violence' as that term is defined in the ASIO Act. Mr Parkin also asserted that his political activities while in Australia were protected by s 17A of the ASIO Act, which provides that the ASIO Act:

> shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly.

Mr Parkin sought discovery in the proceedings and wanted to see, at least, his adverse security assessment. It was his contention that without discovery, it would be difficult, if not impossible, for him to make out his claim that the assessment was not in accordance with law.

Sundberg J noted [50] that discovery in the Federal Court is discretionary (see Order 15 of the Federal Court Rules) and that various factors are relevant in determining whether or not the discretion should be exercised including the burden on the discovering party, the benefits of discovery and policy reasons not to order discovery.

The Director-General asserted that the ASIO Act evinced a legislative intent that had bearing on whether the Court should exercise its discretion to order discovery. Sundberg J examined whether discovery would circumvent the ASIO Act and therefore constitute an abuse of process. Further, the Director-General argued that 'the intention of the Act is to preclude a non-citizen who is the subject of an adverse security assessment from receiving a copy of the assessment or the material relied on in preparing it, or having that assessment reviewed by the AAT' [51]. The Director-General argued that this was a consideration in determining whether the Court should exercise its discretion to order discovery.

Sundberg J concluded that the 'ASIO Act does not, on its face, prohibit a Court from ordering discovery of an adverse security assessment' [52]. Further, Sundberg J noted that s 38 of the ASIO Act, which is a provision about notification of Australian citizens in relation to negative security assessments, does not actually **prohibit** the provision of the assessment to a non-citizen; it just does not require an agency to furnish a notice in relation to a security assessment where the Attorney-General certifies that withholding a security assessment is essential to the security of the nation. Accordingly, Sundberg J found that:

> it goes too far to imply into the ASIO Act an intention not to allow discovery of such a document if the justice of the case otherwise requires [53].

ASIO argued that discovery in Mr Parkin's case would be a fishing expedition but Sundberg J was unimpressed with that submission. His Honour acknowledged that the application constituted a fishing expedition but concluded it was not impermissible. Sundberg J concluded that Mr Parkin's case was that he had done nothing to constitute a threat to national security and that such a finding must therefore have been made in error. The purpose of discovery was to determine the nature of the error, not its existence. Furthermore the classes of documents sought were not overly broad and could be simply stated.[54].

Sundberg J also considered that it was also relevant that discovery and production were not the same thing and that an applicant is entitled to know the documents in dispute, by virtue of a list produced through the discovery process, even though the applicant may not then be able to compel production of the relevant documents. His Honour stated that if he were satisfied that under no circumstances could the documents sought by the applicants be produced, he would be inclined against ordering discovery on the grounds of futility. However, in the present case he was not satisfied that the documents sought would be immune from production. Sundberg J, commenting on Brennan J's comments in the Scientology case noted that the Scientology case may have 'critical implications for the parties at the production stage, but it is not determinative of the discovery question'[55].

The Director-General also submitted that there was no live issue between the parties and that discovery should therefore not be ordered. He submitted that for the applicants to succeed, they would need to demonstrate that there was no evidence on which ASIO could have formed the opinion that the applicants were security threats and that given the extreme difficulty of this task, the Court should be not satisfied that the applicants have a case which would be assisted by discovery.

Sundberg J found the argument to be circular and preferred the view that the applicants simply contended that that they had done nothing to justify their security assessments and that as such the assessments were wrong and that to demonstrate this the applicants needed to understand how ASIO had formed its view.[56]

Sundberg J found that in the present circumstances:

> ...it is not possible to say whether the applicants do or do not have any chance of making out a good case and it would be premature to say that there is no live issue between the parties[57].

Sundberg J then exercised his discretion to allow discovery and ordered that the parties confer as to the appropriate orders for discovery. The Director-General of Security sought leave to appeal Sundberg J's decision.

Heerey J granted leave to appeal for four reasons [58]:

(a) Sundberg J arguably 'did not correctly apply authorities binding on him which say that the bare assertion of a claim without any factual foundation will not justify an order for discovery'. Heerey J notes that it was argued before him that this approach was more justified in a case concerning national security issues[59];

(b) Sundberg J arguably did not give sufficient weight to the risk that identification of documents, in and of itself, may give rise to national security risks when stressing the distinction between discovery and production;

(c) the Director-General will be required to swear and file an affidavit of documents if leave is not granted, which of itself may reveal matters prejudicial to the national interest; and

(d) the balance to be struck between the exercise of normal litigation processes and the interests of national security raise issues of great public importance which favour judicial consideration at the appellate level.

The Full Federal Court was due to hear the appeal against the discovery orders on 22 May 2007. However, when the parties appeared before the Full Federal Court, the Court noted that there were no final orders from which an appeal could be made. In fact, the orders that were made by Sundberg J were that he would exercise his discretion to allow discovery and that the parties should confer as to the appropriate orders for discovery. If the parties were unable to agree by a particular date then each should file written submissions as to the orders that should be made. In fact, following Sundberg J's decision, the parties had not determined that they were unable to agree as to appropriate orders and accordingly no final orders had been made. In the absence of final orders, the Full Court ordered that the leave granted to appeal be revoked and that the matter be remitted to the primary judge.

It is reasonable to assume however that at some point it will be clear that the parties will not reach agreement, orders will be made and the Full Court will be called upon again to resolve the issue of discovery in Mr Parkin's case[60].

Of course, it is possible that if the Full Court resolves the issue in Mr Parkin's favour, then the Attorney General could issue a certificate under the NSI Act.

Interestingly, in a media interview given after Sundberg J's decision[61] Mr Parkin stated that he was not surprised by the decision ordering discovery as it seemed to him that Australia was more 'progressive' in relation to these issues than America and that he hoped that the Attorney General would not issue a certificate to prevent access to the relevant information. What Mr Parkin intends to instruct his lawyers to do if a certificate is ultimately issued is not known.

The experience in the United Kingdom

Finally, it is worth reflecting on the approach that jurisdictions which have similar common law traditions to Australia are taking in relation to review of decisions concerning natural security issues. Not only does it inform discussion about the approach taken in Australia but it may also provide some guidance as to future developments.

After September 11, some English judges were accused of deferring unnecessarily to executive assessments in relation to matters of national security. The most often cited case in this context is the House of Lords decision in *Secretary of State for the Home Department v Rehman*.[62] The issue in *Rehman's* case concerned an order of the Secretary of State that Rehman, who was a Pakistani national, be deported from the United Kingdom. The relevant provision of the Immigration Act had the effect that Rehman had no right of appeal in relation to the relevant order because the ground of the decision was that his deportation is conducive to public good as being in the interest of national security. However, Mr Rehman

had a right of appeal to the Special Immigrations Appeals Commission ('Commission) and he also had a further appeal to the Court of Appeal on questions of law.

The Commission had been set up in response to the decision of the European Court of Human Rights in *Chahal v United Kingdom*[63]. In that case the Court had decided that the existing form of review for deportation orders on the basis of risk to national security, being a non-statutory review process, was insufficient to meet the standards of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which relevantly provides that everyone deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detentions shall be decided. The Commission was set up to bring the United Kingdom into compliance with its obligations with the European Convention to provide greater protection for individuals who it intended to deport on national security grounds.

The Commission has the jurisdiction to allow an appeal if a decision is not in accordance with the law and/or the decision involved the exercise of discretion by the Secretary of State that should have been exercised differently.

In *Rehman's* case, the Commission determined that the definition of national security was a question of law in relation to which it had jurisdiction to decide.[64] It then found that the Secretary of State had interpreted the term "national security" too broadly because Mr Rehman's alleged activities did not, in its view, affect the United Kingdom's national security (it seemed unlikely that Mr Rehman was going to commit a terrorist act in the United Kingdom but rather that he was involved in terrorist activities outside of the United Kingdom).

The House of Lords rejected the Commission's reasoning. The Court agreed that the meaning of the term 'national security' was a question of law within the jurisdiction of the Commission but that the Commission had incorrectly given too narrow an interpretation to the concept of national security. In a climate of international cooperation on security issues it was simplistic to consider that the security interests of one's own country stopped at one's borders.

In addition, Lord Hoffman concluded that the function of the Commission was essentially that of a court as a member of the judicial branch of government. In his view, questions as to what was in the interests of national security where not questions that could be determined by a Court and accordingly, where not questions for the Commission to decide. He stated that the question of whether something was:

> --- in the interest of national security is not a question of law. It is a matter of judgment and policy. Under the Constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interest of national security are not a matter for judicial decision. They are entrusted to the executive.[65]

Lord Hoffmann therefore concluded that the Commission was not entitled to differ from the opinion of the Secretary of State on the question of whether, for example, the promotion of terrorism in a foreign country by the United Kingdom resident would be contrary to the interests of national security.

Lord Hoffman did not think that this defeated the purpose for which the Commission had been set up. Referring back to *CCSU v Minister for Civil Service*, Lord Hoffman saw that the commission had three important functions, namely[66]:

> (e) first, the Commission will have to verify that the decision of the Minister is in fact based on an assessment of the interests of national security and the Commission retains the power to conclude that there is no factual basis for the relevant conclusion;

(f) secondly, the Commission can reject the Minister's decision on the basis that the Minister's opinion is so unreasonable that no Minister advising the Crown could reasonably have held it; and

(g) third, the Commission's decision may turn on issues unassociated with national security issues, such as the likelihood that the applicant will be tortured.

This approach to national security issues in the United Kingdom seems to have changed somewhat recently. In 2004, the Court of Appeal handed down a decision which upheld a decision of the Commission overturing a deportation order made by the Minister.[67] In *Secretary of State for the Home Department v M*, the Court of Appeal noted that while the Commission's job is not to second guess the Secretary's decisions, it is to come to its own judgment as to whether reasonable grounds exist for the Secretary of States' belief or suspicion. In this case the Commission found that the Secretary's view:

> is in our judgement not reasonable and, as we have said, we are concerned that too often assessments have been based on material which does not on analysis support them. We have thought long and hard before deciding on this appeal since we are conscious of the heavy responsibility that is placed upon us where safety of the citizens of this country is at stake.[68]

The Court of Appeal could find no legal error with the Commission's decision although it went to some length to stress that the Commission was not overruling a decision of the Secretary of State but rather was coming to its own decision on material that was tested in a way which could not be tested before the Secretary of State. However, the effect of the Commission's decision, which is a superior court of record, is clearly that the Secretary's decision cannot stand.

This general trend has continued with the decision of the House of Lords decision in *A v Secretary of State for the Home Department*.[69]

Where to now?

The simple reality is that it is becoming harder for people adversely affected by decisions in relation to which national security considerations exist to challenge those decisions. The introduction of the new *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cwlth) and its extension to civil proceedings may make access to relevant information more difficult. However, the resilience of applicants and the preparedness of those who advocate on their behalf, and who presumably regard the work as of legal significance, means that they are unlikely to be deterred.

It is reasonable to think that at some point in the future, depending upon what applications come before the court, what further legislative changes emerge and the way in which current legislative provisions are used that further constitutional challenges based upon the doctrine of separation of powers will be launched.

While an assessment of the prospects of any such challenge is clearly beyond the scope of this paper, if it can be demonstrated that if, by legislation, Parliament is purporting to direct the courts as to the manner and outcome of the exercise of their jurisdiction, good grounds for a challenge to the validity of the relevant legislation would exist.

Endnotes

1 National Security Law Course, Opening Remarks, Justice Keith Mason 13 September 2006, University of Sydney.
2 Tom Campbell, 'Blaming Legal Positivism', (2003) 28 Australian Journal of Legal Philosophy, p 32.
3 (1982) 43 ALR 587.
4 Ibid at 594-595

5 Ibid at 599
6 Ibid at 603
7 Ibid at 614
8 [1985] AC 374.
9 Ibid at 401
Ibid at 402.
11 Ibid at 406
12 *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at 195. The alternative, 'let's not panic' approach is equally succinctly encapsulated by Kirby J. In a speech delivered to the National Security Law Conference in March 2005, titled 'National Security: Proportionality, Restraint and Common Sense', his Honour stated that:

> ... In the past, the Australian people and their highest court have been more temperate and prudent than others in evaluating their real risks to national security and judging the needs of draconian laws to respond to those risks. The United States of America, great a national as it is, sometimes gets swept up in the tides of nationalistic passion that Australians tend to avoid or keep firmly under control. We should keep this story of our country before us as we embark upon responses to contemporary problems of terrorism and risks to our national security.

13 David Dyzenhaus, 'Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security', Australian Journal of Legal Philosophy, (2003) 28 at p 7.
14 see Dyzenhaus above, n 13 in which it is observed, at p 21, that:
It was precisely because judges came to realize both that most of the legal action in society - the place where the citizen bumped against the law - happened in citizen's interactions with administrative officials rather than with courts, and that accountability of these officials to Parliament was largely a myth, that they began to craft the modern common law of judicial review.
15 *Leghaei v Director General of Security* [2005] FCA 1576 ('Leghaei')
16 *Kioa v West* and (1985) 159 CLR 550 (*'Kioa'*) and *Annetts v McCann* (1990) 170 CLR 596
17 Leghaei at [41]
18 Ibid at [49]
19 *Salemi v McKellar [No.2]* (1977) 137 CLR 396; *Amer v Minister for Immigration, Local Government and Ethnic Affairs (Nos 1 and 2)*, unreported per Lockhart J, 18 and 19 December 1989; *State of South Australia v Slipper* [2004] FCAFC 164 (*'Slipper'*"); *Fernando v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 975 and *Rigopoulos v Commissioner for Corrective Services* [2004] NSWSC 562.
20 (1977) 137 CLR 396 at 421 per Gibbs CJ who stated that:
Reasons of security may make it impossible to disclose the grounds on which the executive proposes to act. If the Minister cannot reveal why he intends to make a deportation order, it will be difficult to afford the prohibited immigrant a full opportunity to state his case, for he may not know what it is that he has to answer.
21 *Kioa* per Mason J at 586 and *Slipper* per Finn J at 113(ii).
22 *Leghaei* at [78]
23 Ibid at [80]
24 Ibid at [82]
25 Ibid at [82]
26 Ibid at [88]
27 Ibid at [93] - [97]
28 *Leghaei v Director General of Security* [2007] FCAFC 37 and [2007] FCAFC 56
29 *Leghaei v Director General of Security* [2007] FCAFC 37 at [43]
30 Ibid at [53]
31 Ibid at [60] -[61]
32 (2005) 222 ALR 411
33 Ibid at 418
34 Ibid
35 Leghaei at [90]
36 It is useful to have an idea of the kind of information that is actually at issue. This point was dealt with by Whealy J in relation to an interlocutory application in a criminal law matter (*R v Khazaal* [2006] NSWSC 1061) in which the accused made an application seeking access to affidavits filed by the Commonwealth in the relevant proceedings. Referring to the material contained within relevant affidavits before him, Whealy J made reference to Justice Brennan's comments in *Church of Scientology v Woodward* and gave a brief description of the information contained within the subject affidavits. The material was said to relate to sensitive sources of intelligence and to counter-terrorism strategies and activities. In His Honour's view:

> The protection of sensitive sources, the suppression of details relating to the police and the security agency's ongoing strategy to defeat and frustrate terrorist activities in this country must be of paramount importance to national security.

37 Particular legislation may also contain relevant provisions in relation to the use of confidential information. For example, see s 503A of the *Migration Act 1958* (Cth), which provides that if information is communicated by a gazetted agency, on the condition that it be treated as confidential, then it cannot be communicated to any person, including a court or tribunal.
38 *Amer v Minister for Immigration, Local Government and Ethnic Affairs (Nos 1 and 2)*, Unreported per Lockhart J, 18 and 19 December 1989 and *Nicopoulos v Commissioner for Corrective Services* [2004] NSWSC 562 at [82] - [92].
39 *Alister v R* 51 ALR 460
40 *R v Lodhi* [2006] NSWSC 571
41 Ibid at [56]
42 Ibid at [59]
43 Ibid at [107]- [108]
44 ibid at [120] -
45 Ibid at [122] - [125].
46 (1998) 151 ALR 312 at 326
47 See *R v Khazaal* [2006] NSWSC 106 and *R v Lodhi* Unreported 21 February 2006.
48 (1997) 23 EHRR 413.
49 Ibid at [144]
50 *O'Sullivan v Parkin* [2006] FCA 1654 at [19-20] (*'Parkin'*)
51 Ibid at [31]
52 Ibid at [31]
53 Ibid at [32]
54 Ibid at [37]
55 Ibid at [44]
56 Ibid at [46]
57 Ibid.
58 *O'Sullivan v Parkin* [2006] FCA 1654 at [11] - [15]
59 These authorities being noted as Scientology, *Lloyd and Costigan* (1983) 82 FLR 104 at 113-114, *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175 at 181, *Minister for Immigration v Wong* [2002] FCAFC 327 at [30] and *Jilani v Wilhelm* (2005) 148 FCR 225 at 273-274.
60 *Editor's note*: The Federal Court permitted discovery in *Parkin v O'Sullivan* [2007] FCA 1647
61 Interview between Ronan Sharkey and Steven Parkin on Triple J, broadcast on 3 November 2006
62 *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 ('Rehman')
63 (1997) 23 EHRR 413.
64 *Rehman* at [43]
65 Ibid at [50]
66 Ibid at [54]
67 *The Secretary of State for the Home Department v M* [2004] HRLR 22.
68 Ibid at [28]
69 [2005] HRLR 1.