Judicial review and public interest immunity

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Public interest immunity recognises that the administration of justice demands courts have due regard to public interests beyond those arising in dispute between the parties. Public interest immunity by its nature exposes tensions between competing public interests; but in no context are these tensions rendered starker than in judicial review proceedings. This is because, first, a successful public interest immunity claim in judicial review proceedings may substantially (if not totally) impair an applicant's practical ability to obtain review of a decision; and, second, the residual power of a court to prevent unfairness by ordering a stay of proceedings has no utility in judicial review proceedings.

In this context, this article first explains public interest immunity and its role in judicial review proceedings before considering how courts have used stays and, less frequently, other mechanisms (including closed evidence and special advocates) to grapple with the stark effects of public interest immunity. In doing so, this article seeks to expose the inherent tensions that arise in the context of public interest immunity claims in judicial review proceedings, and the limits of closed evidence and special advocates as potential 'solutions'.

Public interest immunity in judicial review

Public interest immunity

The core function of the courts is to deliver justice according to law. To this end, the common law has long recognised the principles of open justice and natural justice as fundamental. These principles take form in courtrooms every day as the common law trial. Modified only superficially by codified rules of evidence and procedure, the core ideas that informed the earliest common law trials remain to this today: proceedings are conducted and judgments are delivered in public, and parties should know and can respond to the case against them by calling witnesses and cross-examining opposing witnesses.[1]

The common law recognises instances in which the principles of open justice and natural justice may be curtailed. For example, in relation to the former, courts may protect secret information, such as the identity of informants, by closing courtrooms and suppressing information. While such exceptions are closely guarded, the instances where courts will exercise such power are not fixed.[2] As Kirby P (as he then was) observed in the seminal case of *John Fairfax Group v Local Court of New South Wales*:

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

2 *Hogan v Hinch* [2011] HCA 4; 243 CLR 506 [21] (French CJ).

> Open administration of justice serves the interests of society and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourages its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of a particular case.[3]

In this context, public interest immunity might be understood as a bargain struck by the executive and the courts to this effect: while the prevailing public interests in the disclosure of relevant information in a particular case might sometimes need to give way to the public interest in non-disclosure, natural justice demands that, as a general rule, non-disclosure apply equally to all. The price of a successful public interest immunity claim is thus denial of access to information not only for the party calling for it but the court and (for the purposes of the case) the party asserting the immunity as well.[4]

This understanding of public interest immunity as a 'deal' of sorts is reinforced by a consideration of the doctrine's historical origins. 'Crown privilege' (as public interest immunity was known until the mid-20th century) entitled the executive as of right to resist production in response to compulsory court processes on the grounds that public disclosure of the documents in question would be prejudicial to the public interest. In Australia and in the United Kingdom, a statement by the responsible Minister asserting that claim was regarded as determinative.[5]

This understanding of Crown privilege finds its roots in the Crown's immunity from suit more generally and, in particular, its prerogative to resist discovery sought against it. At the Commonwealth level, the High Court in *Commonwealth v Miller*[6] recognised that ss 56 and 64 of the *Judiciary Act 1903* (Cth) had the effect of submitting the Commonwealth (in right of the Crown) to the jurisdiction of the Courts, including in relation to its obligation to give discovery as any party would.[7] However, as Isaacs J went on to explain:

> The order to make a proper discovery does not destroy the privilege of public interest, and, when it comes to a question of disclosure as distinguished from proper discovery there the ground of public policy and interest may intervene and prevent the injury to the community which further coercive action might produce.[8]

The High Court in *The Marconi's Wireless Telegraph Company Limited v The Commonwealth [No 2]*[9] recognised that the courts have always had the power to test the basis of a claim of

3 (1992) 26 NSWLR 131, 141.
4 *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4; 234 CLR 532 [24] (Gummow, Hayne, Heydon and Kiefel JJ).
5 *Duncan v Cammell Laird* & Co [1942] AC 624.
6 [1910] HCA 46; 10 CLR 742.
7 To a similar effect, Crown immunity from suit had prior to federation already been abolished by each state, other than Victoria: see *Claims Against the Government and Crown Suits Act 1912* (NSW) s 4; *Crown Proceedings Act 1980* (Qld) s 8; *Crown Proceedings Act 1958* (Vic) s 23; *Crown Proceedings Act 1972* (SA) s 10; *Crown Suits Act 1947* (WA) s 5; *Supreme Court Civil Procedure Act 1932* (Tas) s 64.
8 Ibid 757.
9 (1913) 16 CLR 178.

public interest immunity.[10] However, a fundamental shift in the treatment of public interest immunity in Australia was effected by the High Court in *Sankey v Whitlam*[11] *(Sankey)* by the recognition of a duty of the court not only to test the basis for a claim but also to balance the public interest as expressed by the Minister and public interests in favour of disclosure.

The case law that developed following *Sankey* has grappled with conceptual difficulties between so-called 'class claims' and 'content claims', but on any view it is now clear that all public interest immunity claims whatever their species must be resolved by the courts on the balance of the competing aspects of the public interest.[12]

Under the modern law of public interest immunity, a party asserting a claim is required to identify a public interest favouring non-disclosure. Where such an interest is identified, and the party seeking disclosure identifies a public interest favouring such disclosure, it then falls to the court to weigh the competing interests favouring disclosure against those favouring non-disclosure.[13]

Section 130(1) of the Uniform Evidence Acts, to a similar effect, provides:

> 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 document not be adduced as evidence.[14]

While this section generally reflects the common law position, it is clearly not intended as an exhaustive codification of it.[15]

Unlike legal professional privilege, public interest immunity is not capable of waiver (even by express intendment),[16] save as perhaps in extraordinary circumstances with leave of the court. This reflects the status of public interest immunity not as a privilege of the Crown but, rather, as a true substantive immunity and an inherent aspect of the proper administration of justice.[17] One interesting consequence of this status is that, while the public interest at issue might be undermined by the disclosure of information properly the subject of a claim for public interest immunity, that is not necessarily determinative of claim (although, of course, it may affect both the balancing exercise and, indeed, whether a public interest in favour of non-disclosure remains at all).

10 See 186–7 (Griffiths CJ), 193–4 (Barton J) and 206–9 (Isaacs J, dissenting). See in this regard the discussion in G Goldring, 'Crown Privilege, Scrutiny of the Administration and the Public Interest — A Comment on *Sankey v Whitlam*' (1979) 10 *Federal Law Review* 80. See also *Conway v Rimmer* [1968] AC 910.

11 (1978) 142 CLR 1.

12 *Kamasaee v Commonwealth of Australia (No 3)* [2016] VSC 438 [8].

13 See, eg, *State of Victoria v Brazel* [2008] VSCA 37

14 Uniform Evidence Acts, s 130(1).

15 There is some debate emerging on the cases as to whether the scope of s 130 truly reflects the common law or whether it modifies its scope, but nothing presently relevant turns on that point.

16 See TG Cooper, *Crown Privilege* (1990), pp 2–3; *Air Canada v Secretary of State for Trade* (No 2) [1983] 2 AC 394, 436.

17 *R v Lewes Justices; Ex parte Secretary of State for the Home Department* [1973] AC 388, 400 (Lord Reid); *Attorney-General (NSW) v Lipton* [2012] NSWCCA 156; 224 A Crim R 177 (Basten JA) [34].

In recent years the common law concept of public interest immunity has been re-appropriated by the legislature for the executive. Various statutory frameworks at both the state/territory and Commonwealth levels provide for information to be withheld on the basis of certificates issued by the executive or on the basis that information meets a certain description.[18] Such frameworks should not be confused with the ministerial statements referred to above that were recognised by the common law, but they do provide a useful analogue and might perhaps be seen as a nod to bygone years where the courts took the executive on their word. The general idea is that a statutory framework will provide that, in a particular context, the certificate or statutory description is determinative of the confidentiality of the material specified. In some cases, that decision is not reviewable by a court; in others, the court may inspect the documents to ensure that they meet the description in the certificate or the statute.[19]

In *Graham v Minister for Immigration and Border Protection*,[20] the High Court considered a scheme in the Commonwealth context that provided for a public interest certificate issued by the Minister to be determinative of High Court's right to access the material referred to in the certificate, including for the purpose of considering whether there was a proper basis for the certificate. Entertaining an analogy with the common law doctrine of public interest immunity, the High Court held that the legislation was invalid on the basis that it was inconsistent with the minimum standard of judicial review effected by s 75(v) of the *Constitution* — at least insofar as it purported to exclude the High Court from being able to test the basis of the certificate.[21]

Public interest immunity in judicial review

As has been explained, public interest immunity can operate to protect the activities of the executive from scrutiny where the public interest in non-disclosure of information about those activities outweighs the public interest in disclosure. Judicial review is a mechanism by which the activities of the executive are scrutinised. There is an obvious potential for tension when public interest immunity is invoked in judicial review proceedings.

A decision-maker should consider all the relevant material available; a good decision-maker will ensure that all relevant material has been identified and considered. At the Commonwealth level, these obligations are reflected in para 4 of Appendix B to the *Legal Services Directions 2017* and in s 33(1AA) of the *Administrative Appeals Tribunal Act 1975* (Cth). It is unsurprising that information that the executive considers to be worthy of public interest immunity would be considered in the course of decision-making from time to time.

Where a public interest immunity claim is made over information to which the decision-maker had regard, or which was available to the decision-maker when the decision

18 For example, see ss 38A, 39A and 46 of the *Administrative Appeals Tribunal Act 1975* (Cth); see also *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4; 234 CLR 532.

19 *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4; 234 CLR 532; *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7; 252 CLR 38; *Commissioner of Police v Sleiman & AVS Group of Companies Pty Ltd & Ors* [2011] NSWCA 21; 78 NSWLR 340 [182].

20 [2017] HCA 33; 91 ALJR 890.

21 Ibid [60]–[61]

was made, a successful claim may prevent the court and the applicant from having regard to information that might otherwise reveal an error of law.[22] Where the claim is made over part of the reasons themselves, a successful claim may similarly prevent the court from having regard to information that might reveal error.[23]

Courts have accepted such 'self-imposed restraints' as an incidence of the proper administration of justice.[24] In some cases, the effect of a successful public interest immunity claim may be that a court does not have regard to all relevant information when reviewing a decision. In such a case the court weighs the public interests for and against disclosure and concludes that the latter outweighs the former.[25]

National security provides one obvious intersection between decision-making and secrecy. Several of the cases considered in this article concern the Australian Security Intelligence Organisation (ASIO). In some of those cases, ASIO made a security assessment, which was challenged directly by way of judicial review. In others, a security assessment was taken into account in the making of another decision — for example, a decision to refuse a visa.

For example, in *Parkin v O'Sullivan*,[26] the applicants sought orders quashing security assessments made by the Director-General of Security and declarations that various steps taken the Director-General were unlawful. The Director-General claimed public interest immunity from production of the security assessment of the applicant and documents that ASIO had created in the course of preparing that assessment. In *El Ossman v Minister for Immigration and Border Protection*[27] *(El Ossman)*, the Director-General claimed immunity from production of parts of the statement of grounds supporting the security assessment, among other documents.[28]

Claims over reasons and relevant information are not unique to national security cases. In a wide range of contexts, decision-makers receive information from informers,[29] obtain commercially sensitive reports[30] and rely on police intelligence.[31] Each such category of information (and, indeed, many more) can attract public interest immunity.

The fact that a decision may be made or has been made may itself be secret. While this sounds anathema to mainstream decision-making, decisions to issue warrants or to disclose information between investigators are routinely — perhaps invariably — made without notice to those affected by the decision.[32] Decisions of this kind are rarely challenged, either

22 *Chu v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314, 327–8.
23 *Sagar v O'Sullivan* [2011] FCA 182; 193 FCR 311 [64].
24 *Ibid [82]; Plaintiff M47 v Director-General of Security & Ors* [2012] HCA 46; 251 CLR 1 [361] (Heydon J).
25 *Graham v Minister for Immigration and Border Protection* [2017] HCA 33; 263 CLR 1 [61] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
26 [2009] FCA 1096; 260 ALR 503.
27 [2017] FCA 636; 248 FCR 491.
28 Ibid [27]–[28]
29 *Chu v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314.
30 *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* [2017] NSWCA 54; 95 NSWLR 1.
31 *Nicopoulos v Commissioner for Corrective Services* [2004] NSWSC 562; 148 A Crim R 74.
32 *Johns v Australian Securities Commission* (1993) 178 CLR 408 is one example.

because those affected do not know about them or because flaws in a criminal investigation can be challenged (to some extent) in a subsequent trial.[33]

If secret information is considered in the course of making a decision, or if the decision is made in secret, it necessarily follows that the reasons, or part of them, would be withheld from the subject of the decision, at least at the time the decision is made. Unsurprisingly, security assessments conducted by the Director-General of Security may be withheld pursuant to a ministerial certificate.[34] Also unsurprisingly, some subjects of such decisions seek the full security assessment in a judicial review of the assessment, and such attempts may be met with claims of public interest immunity.[35]

An attempt to compel the production of information that was withheld from the subject of the decision may engage the same public interests that led the information to be withheld at the decision-making stage.[36] In *Jaffarie v Director-General of Security*[37] *(Jaffarie)*, the Full Court, stated:

> [111] The touchstone of present relevance is whether enough information had been disclosed to Mr Jaffarie in the 'Unclassified Reasons' to enable him to make meaningful submissions. The mere fact that more information may have been made available to him during the course of the present hearing does not necessarily say anything as to whether the initial disclosure in the 'Unclassified Reasons' was sufficient to afford procedural fairness.
>
> [112] In resolving that question a balance necessarily must be struck between protecting that information which must remain undisclosed by reason of the claim for public interest immunity and the legitimate and important rights of ensuring procedural fairness to Mr Jaffarie: cf *Chu v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314.[38]

Given that the withholding of information or reasons at the decision-making stage may be followed by an allegation of denial of procedural fairness, care should be taken to distinguish the exercise involved at each stage. The matters that must be put to the subject of a decision are determined by the statutory framework and the issues to which the decision-maker proposes to have regard. The public interest may affect the content of that obligation.[39] That is not to say that the information will necessarily be the subject of a successful public interest immunity claim in subsequent proceedings; it is merely to say that similar although functionally distinct considerations will arise when determining the public interest immunity claim and the content of the obligation of procedural fairness.

33 See, eg, *Bunning v Cross* [1978] HCA 22; 141 CLR 54; cf *Ousley v The Queen* [1997] HCA 49; 192 CLR 69.

34 *Australian Security Intelligence Organisation Act 1979* (Cth) s 38(2).

35 *Parkin v O'Sullivan* [2009] FCA 1096; 260 ALR 503; *Jaffarie v Director-General of Security* [2014] FCAFC 102; 226 FCR 505; *Sagar v O'Sullivan* [2011] FCA 182; 193 FCR 311; *Plaintiff M46 of 2013 v Minister* for *Immigration and Border Protection* [2014] FCA 90; 139 ALD 227.

36 Whether or not an applicant takes steps to compel production of the reasons and the material that the decision-maker considered, court rules sometimes provide for the production of such documents early in the judicial review. For example, r 33.03 of the Federal Court Rules 2011 provides in a taxation appeal for the Commissioner of Taxation to file all relevant documents in his or her possession relevant to the hearing. More generally, it is common enough for courts to order the filing of documents relevant to the decision as a matter of course.

37 [2014] FCAFC 102; 226 FCR 505.

38 Ibid.

39 *Chu v Minister for Immigration and Ethnic Affairs (1997)* 78 FCR 314, 328; *Leghaei v Director-General of Security* [2007] FCAFC 27; 241 ALR 141 [43]–[55]; *Nicopoulos v Commissioner for Corrective Services* [2004] NSWSC 562; 148 A Crim R 74.

As has been explained, public interest immunity involves a claim by the executive to immunity from production or disclosure and a balancing of public interests by the judiciary. The public interest in national security that conditions the content of procedural fairness might be the same public interest identified by the executive when claiming immunity.[40] However the balancing exercise that characterises the judicial determination of a public interest immunity is not necessarily the same or even a part of determining the content of procedural fairness. Indeed, the content of that balancing exercise at the judicial review stage will depend on factors that may not be apparent, or perhaps even knowable, when the decision is made.

As an example, an applicant who defeats a public interest immunity claim over information that was withheld from them at the decision-making stage may be able to rely on the information to show that they were denied procedural fairness. But, to defeat the public interest immunity claim, they must persuade the court that the public interest in disclosure outweighs whatever public interest that tends towards confidentiality. The public interest immunity claim does not determine the issue of whether procedural fairness was denied, but — subject to the possibility of the court accepting closed evidence — the public interest immunity claim must necessarily be determined before the court turns its attention to the substantive complaint.

In a series of cases, the question of whether the Director-General has afforded procedural fairness has been tested through attempts to compel production of material available to the Director-General when the decision was made, or the entirety of the security assessment, or both. *Jaffarie*[41] was one such case; *El Ossman*[42] and *BSX15 v Minister for Immigration and Border Protection*[43] *(BSX15)* are two others. In each case, it was determined that information that had been withheld at the decision-making stage could not be withheld on the basis of public interest immunity in the judicial review. In both *El Ossman and BSX15*, the court held that there had been a denial of procedural fairness. But that result did not flow from the mere fact that information was withheld from the applicant at the decision-making stage that could not be withheld on the subsequent judicial review. Rather, it followed from a finding that the information available at the decision-making stage could have been disclosed to the applicant and, as a separate consideration, should have been disclosed so as to afford procedural fairness.

In contexts far removed from national security, the analysis may be the same. In *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government*,[44] a report was prepared by consultants engaged by the State of New South Wales, but only a summary of the report was provided to the delegate and the applicant council. A majority of the New South Wales Court of Appeal set aside the primary judge's orders upholding a public interest immunity claim over the full report.[45] It was at least possible that, despite that finding, some countervailing public interest in confidence could have been

40 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72; 225 CLR 88 [24].
41 [2014] FCAFC 102; 226 FCR 505.
42 [2017] FCA 636; 248 FCR 491.
43 [2017] FCAFC 104; 249 FCR 1
44 [2017] NSWCA 54; 95 NSWLR 1.
45 Ibid [93]–[95] (Basten JA, Macfarlan JA agreeing).

identified to save the decision from complaints of constructive failure to exercise statutory function[46] and procedural unfairness.[47]

A successful public interest immunity claim renders some information unavailable to the court. However, as Mason J said in *Church of Scientology Inc v Woodward:*

> The fact that a successful claim for [public interest immunity] handicaps one of the parties to litigation is not a reason for saying that the Court cannot or will not exercise its ordinary jurisdiction; it merely means that the Court will arrive at a decision on something less than the entirety of the relevant materials.[48]

Sometimes a successful public interest immunity claim impairs, or entirely defeats, an applicant's ability to establish certain grounds of review.[49] Nevertheless, the information subject to the immunity has been considered by the court 'in limine' and thus the court can and has exercised its jurisdiction.[50]

In this connection, it is interesting to consider the types of public interests that might loom large in the context of a public interest immunity claim in judicial review proceedings. A few cases illustrate the flexibility of the analysis.

In *SBEG v Secretary, Department of Immigration and Citizenship*,[51] the applicant sought an injunction for his release from immigration detention. In connection with that proceeding, the applicant sought to obtain from ASIO a decision explaining the basis for an adverse security assessment issued in respect of him. In this context, while ultimately upholding the claim for public interest immunity, the court appeared to take apparent account of the fact that the proceeding concerned the applicant's liberty, despite the proceeding being civil and not criminal.

In *Sankey*,[52] cabinet documents were found not to sustain a public interest immunity claim in a private prosecution brought against former Prime Minister Gough Whitlam and other politicians. The prosecution effectively entailed an allegation of misfeasance in public office. In view of the nature of the proceeding, the High Court found that it was appropriate for the documents to be disclosed despite the fact that such documents would ordinarily sustain a public interest immunity claim.

It remains to be seen whether, in an appropriate case, the effective inability of an applicant to obtain review of executive action is itself a consideration to be weighed in the public interest immunity balancing exercise.[53] It is already established that the maintenance of integrity of

46 Ibid [101] (Basten JA; Macfarlan JA agreeing).
47 Ibid [105]–[106] (Basten JA; Macfarlan JA agreeing).
48 [1982] HCA 78; 154 CLR 25, 61. Cited with approval in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; 234 CLR 532 [24]; see also *Plaintiff M47 v Director-General of Security & Ors* [2012] HCA 46; 251 CLR 1, 143 (Heydon J).
49 *Sagar v O'Sullivan* [2011] FCA 182; 193 FCR 311.
50 *Graham v Minister for Immigration and Border Protection ; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33; 263 CLR 1 [61].
51 [2012] FCA 277.
52 (1978) 142 CLR 1.
53 The High Court's reasoning in *Sankey v Whitlam* (1978) 142 CLR 1 seems consistent with this view. In this regard, see also *Church of Scientology v Woodward* [1982] HCA 78; 154 CLR 25, esp at 76 (Mason J); *Graham v Minister for Immigration and Border Protection* [2017] HCA 33; 91 ALJR 890 [61].

the criminal justice system is such a consideration.[54] Whatever weight may be given to the ability of an applicant to obtain review, cases like *Parkin v O'Sullivan*[55] suggest that it is not determinative.

After a claim: stays, closed evidence and special advocates

Yet courts have sometimes proven unwilling to proceed on 'something less than the entirety of the relevant materials'. Courts may order a stay of proceedings following the success of some public interest immunity claims, providing a check on the scope for such claims to undermine fairness in the justice system. However, given the nature of judicial review proceedings, a stay mechanism has no utility. Closed evidence and special advocates have emerged sporadically as ad hoc mechanisms to address the effect of public interest immunity, but they rest on a shaky doctrinal footing.

Stays

The absoluteness of a successful public interest immunity claim is rendered most stark in instances where both sides of the scale are heavily weighted.[56] For example, it is easy enough to imagine a situation where the disclosure of information might place large groups of people at a near certain risk of death but also give rise to a reasonable doubt in criminal proceedings. In such a case, there is both a clear public interest in disclosing and not disclosing relevant information. That information would give rise to a reasonable doubt in criminal proceedings (or be necessarily disclosed in order to prevent gross unfairness) will always weigh heavily in any public interest balancing exercise. However, it will not always mean that a public interest immunity claim should be overruled.

Such situations expose tension between public interests favouring non-disclosure and the specific public interest in the administration of justice. Courts remain reluctant to exercise their jurisdiction in a manner that will cause gross unfairness in a particular case and, relatedly, bring the administration of justice into disrepute.[57] That is notwithstanding the fact that the public interest balancing exercise may have resulted in a determination that the public interest in disclosure is outweighed by the public interest in non-disclosure. In exceptional circumstances, which nonetheless cast some light on the issue, the High Court in AB *(a pseudonym) v CD (a pseudonym)* unanimously held:

> [There is a clear public interest in maintaining the anonymity of a police informer, and so, where a question of disclosure of a police informer's identity arises before the trial of an accused, and the Crown is not

54 AB *(a pseudonym)* v CD *(a pseudonym) EF (a pseudonym) v CD (a pseudonym)* [2018] HCA 58; 93 ALJR 59.

55 [2009] FCA 1096; 260 ALR 503

56 See, eg, *The Queen v Yucel (Ruling No 6)* [2018] VSC 371.

57 *Strickland (A Pseudonym) v Commonwealth Director of Public Prosecutions* [2018] HCA 53; 93 ALJR 1; *Barton v R* (1980) 147 CLR 75, 96–97 (Gibbs ACJ and Mason J, with whom Aickin J and Wilson J agreed), 105 (Stephen J), 107 (Murphy J); *Jago v District Court of New South Wales* (1989) 168 CLR 23, 29 (Mason CJ), 57–8 (Deane J), 74–7 (Gaudron J); *Williams v Spautz* (1992) 174 CLR 509, 518–19 (Mason CJ; Dawson, Toohey and McHugh JJ); *Walton v Gardiner* (1993) 177 CLR 378, 392–5 (Mason CJ; Deane and Dawson JJ). Courts have recognised mechanisms other than stays to ensure fairness, including, for example, a power to strike out pleadings on this basis: see Sands v State of *South Australia* [2015] SASCFC 36; 122 SASR 195 [157].

> prepared to disclose the identity of the informer, as is sometimes the case, the Crown may choose not to proceed with the prosecution or the trial may be stayed.
>
> [However, in the unique situation of this case] [t]he public interest in preserving EF's anonymity must be subordinated to the integrity of the criminal justice system.[58]

In that case, the fact that the affected persons had already been convicted meant that the tension could only be resolved within the paradigm of the public interest immunity determination. However, the way in which this tension is usually resolved is through the exercise of the inherent power of superior courts to prevent a trial proceeding in a manner that will be unfair, including by ordering a stay of proceedings. The power to do so has been described as an example of the jurisdiction to supervise the executive's involvement in criminal justice.[59]

This power extends to circumstances where a successful public interest immunity claim deprives an accused of a fair trial according to ordinary principles. As Murphy J explained in *Alister v R:*

> There is a public interest in certain official information remaining secret; but there is also public interest in the proper administration of criminal justice. The processes of criminal justice should not be distorted to prevent an accused from defending himself or herself properly. If the public interest demands that material capable of assisting an accused be withheld, then the proper course may be to abandon the prosecution or for the court to stay proceedings.[60]

However, the power to order a stay following the success of a public interest immunity claim is rarely exercised. That is because, where the nature of information is such that it would cause unfairness of a magnitude justifying a stay, it typically follows that a public interest immunity claim would be unsuccessful. In cases where that is not the case, the Crown and/or the party asserting the claim have a strong imperative to seek some practical compromise.[61]

A similar mechanism to resolve this tension exists in non-criminal proceedings. In *Walton v Gardiner*,[62] Mason CJ, Deane and Dawson JJ said:

> The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness … The jurisdiction of a superior court in such a case was correctly described by Lord Diplock in Hunter v Chief Constable of the West Midlands Police as 'the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'.

58 *AB (a pseudonym) v CD (a pseudonym) EF (a pseudonym) v CD (a pseudonym)* [2018] HCA 58; 93 ALJR 59 [9]–[10].
59 Tim Game SC and Julia Roy, 'Unifying Principles in Administrative and Criminal Law', in Neil Williams (ed), *Key Issues in Public Law* (The Federation Press, 2017) 202.
60 (1984) 154 CLR 404, 431.
61 See, eg, *The Queen v Yucel (Ruling No 6)* [2018] VSC 371.
62 (1993) 177 CLR 378.

Consistent with this view, Bell P (Leeming JA and Emmett AJA agreeing) in the recent case of *Moubarak by his tutor Coorey v Holt* explained:[63]

> Coherence is a quality that the common law values. An incoherent legal system is one that is apt to undermine respect for the rule of law and bring the administration of justice into disrepute. It would, in my opinion, tend towards incoherence to maintain that what constitutes a fair trial should differ in cases involving identical factual allegations. If the defendant was not fit to face criminal charges in respect of the plaintiff's complaint to police because 'the minimum requirements for a fair trial' … would not be present, it would, in my opinion, offend commonsense simultaneously to maintain that the defendant could secure a fair civil trial in relation to identical factual allegations.[64]

His Honour was there engaging with a line of authority considering the applicability of the 'fair trial' principles in the civil context arising as a consequence of capacity to provide instructions. However, there is no reason in principle why the same reasoning does not apply equally to the question of whether a successful claim for public interest immunity could found an application for a permanent stay of civil proceedings.[65]

In *Sands v State of South Australia*[66] the Full Court of the Supreme Court of South Australia more clearly held in obiter that there was no reason in principle why a court could not strike out a pleaded defence if the information that substantiated the pleadings was subject to public interest immunity. The Full Court referred to bad faith and abuse of process in advancing such a defence. However, it is hard to imagine where fairness would require such an outcome, as the nature of a successful public interest immunity claim is that all parties are deprived from deploying information, not just the applicant.

In *Prebble v Television New Zealand Ltd*,[67] the Privy Council held that while it was an infringement of parliamentary privilege for any party to legal proceedings to question in those proceedings words spoken or actions done in Parliament, there may be extreme cases where the interests of justice require proceedings to be stayed if as a result of material being excluded by reason of parliamentary privilege it would be impossible for the issues between the parties to be determined fairly.[68]

The above cases illustrate that, even after a court trying a criminal charge or tortious cause of action has determined a public interest immunity claim and found that the public interest in disclosure is outweighed by the public interest in non-disclosure, proceedings may be stayed if the court's processes would result in manifest unfairness or would otherwise bring the administration of justice into disrepute. It may be that a successful public interest immunity claim will mean that a court 'will arrive at a decision on something less than the entirety of the relevant materials'.[69] However, in some cases, the overriding interest in

63 [2019] NSWCA 102.
64 Ibid 392–3.
65 See, generally, *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531.
66 [2015] SASCFC 36; 122 SASR 195 [157].
67 [1995] 1 AC 321.
68 While instructive as to the existence of a residual power to stay proceedings following determination of a claim, the context of parliamentary privilege is somewhat different, as, unlike public interest immunity where information is typically secret, unfairness is more likely to arise in a civil context as information may be in the public domain, despite being inadmissible in court proceedings.
69 *Church of Scientology v Woodward* [1982] HCA 78; 154 CLR 25, 61 (Mason J).

fairness and confidence in the administration of justice may mean that the court should not arrive at a decision on the substance of the proceedings at all. While a stay may be seen as accommodating both the public interest for and against disclosure, it demonstrates that the public interest in the administration of justice is not exhausted by the public interest balancing exercise.

By their nature, judicial review proceedings involve the post-facto review of executive action. An applicant who complains that he or she cannot obtain meaningful review by reason of a successful public interest immunity would have no interest in a stay of proceedings. The safeguard identified above thus does not exist in the context of judicial review.

Closed evidence

Perhaps informed by this context, and in a search for a way to enable meaningful review of decisions that are based on, or involved, information the subject of a successful public interest immunity claim, some courts have identified an ability to rely on closed evidence.

In *Chu v Minister for Immigration and Ethnic Affairs*[70] *(Chu)*, a majority of the Full Court of the Federal Court of Australia admitted closed evidence, withheld it from the applicant and his representatives, and considered it in the course of reaching their decision. Confidential information had been considered by the decision-maker but withheld from the applicant. Instead, a summary of that information had been prepared in purported discharge of the obligation to afford procedural fairness. A majority of the Full Court held:

> It seems to us that a balance can be struck between preserving that public interest and ensuring that there has been procedural fairness, by the Court examining the confidential material and assessing whether the summary is a fair one. We do not see this as any reflection upon the integrity of the decision-maker. The matter is one where there may well be room for differing opinions. Judicial review of the confidential material might be seen simply as the price payable, (on particular occasions such as this), for adjusting procedural fairness requirements downwards in the course of protecting another public interest.[71]

In *Nicopoulos v Commissioner for Corrective Services*[72] *(Nicopoulos)* the Supreme Court of New South Wales hearing an application for judicial review accepted closed evidence, withheld it from the applicant, and dismissed the application in reliance on that evidence. The evidence appears to have consisted of police intelligence about the applicant, who was a solicitor seeking to visit clients in custody. Justice Smart held that the inherent power of the Supreme Court extended to admitting evidence and withholding it from a party and their representatives. His Honour observed:

> There is a tension between the Court having all relevant material especially if it was before the decision-maker and unfairness to the party adversely affected by not being told of it so that party can respond to that evidence. In the circumstances envisaged the public interest in maintaining the secrecy or confidentiality of the material must be compelling. Of course, circumstances may vary greatly and this will affect the balancing exercise. For example, disclosure of the material may be necessary to enable the person affected to obtain a verdict of not guilty. It may destroy the credit of an essential Crown witness. Again, the nature

70 (1997) 78 FCR 314.
71 Ibid [328].
72 [2004] NSWSC 562; 148 A Crim R 74.

> and importance of the civil rights or privileges at issue will be an important consideration in the balancing exercise.[73]

Another example is *Eastman v Director of Public Prosecutions (No 2)*.[74] The court in that case was concerned with the appropriate orders after an inquiry into conviction conducted pursuant to the *Crimes Act 1900* (ACT). A question arose whether or not the Full Court, which was required to have regard to the report of the inquiry, could have regard to a confidential section of the report and closed evidence that was withheld from the parties. After referring to *Chu* and *Nicopoulos*, the Court concluded that:

> The interests of justice can require that one or more, or in very rare cases all, of the parties to the proceedings not be given access to confidential evidence, information or a document to which the court must have regard in order to exercise its jurisdiction. The facts, legislative context and nature of the proceedings will be relevant as to how the court balances the competition between the public interest in the protection of the confidentiality the subject of the immunity under s 130(1) on the one hand and in the administration of justice on the other.[75]

From time to time, closed evidence is contemplated in cases involving national security. In *Leghaei v Director-General of Security* [2005] FCA 1576 the primary judge had regard to closed evidence offered by the Director-General, a course that was apparently approved on appeal.[76] In *Jaffarie*[77] the Director-General sought to rely on an affidavit both in defending a claim of public interest immunity and on the substantive issues in the proceeding.[78] The role of the Director-General in offering, rather than resisting, recourse to closed evidence may have been critical.

Regard has also been had to closed evidence in statutory frameworks where the decision-maker was permitted by the statute to do so and an absurd result would flow if the court was unable to access the same evidence or the decision-maker's reasons dealing with that evidence.[79]

The use of closed evidence is well established in the course of making out claims of public interest immunity, applications for suppression and non-publication orders, and cases involving trade secrets or commercially sensitive information. It may also be more common in criminal proceedings than is generally recognised.[80] As has been identified above, statutory frameworks for the use of closed evidence in courts and tribunals are increasingly common. As more and more decisions are made under these frameworks, and as courts become

73 Ibid [83].
74 [2014] ACTSCFC 2; 9 ACTLR 178.
75 Ibid [167].
76 *Leghaei v Director-General of Security* [2007] FCAFC 37; 241 ALR 141 [61]–[62].
77 [2014] FCAFC 102; 226 FCR 505.
78 Ibid [29].
78 *Commissioner of Police v Sleiman & AVS Group of Companies Pty Ltd & Ors* [2011] NSWCA 21; 78 NSWLR 340 [225]–[226] (Sackville AJA, Allsop P and Handley AJA agreeing); *R (Haralambous) v Crown Court at St Albans* [2018] USKC 1; [2018] AC 236 [57]–[59]. *Eastman v Director of Public Prosecutions (No 2)* [2014] ACTSCFC 2; 9 ACTLR 178 might also fall within this category: see [184].
80 See *HT v R* (High Court of Australia, S123 of 2019), in which the appellant complains that closed evidence was considered by a judge of the District Court at her sentencing and by the Court of Criminal Appeal on appeal. The appeal is listed for hearing before a Full Court of the High Court on 10 September 2019.

familiar with statutory appeals from these decisions, the idea of closed evidence at common law may become more palatable.

Even where the court has regard to closed evidence, this may be of limited comfort to the applicant. After all, the court is not in the same position as the applicant's representatives to identify issues and test the evidence.[81] This is both a practical limitation of closed evidence and the foundation of the incompatibility between closed evidence and natural justice.[82]

Where closed evidence might allow a court to test a ground of judicial review proceedings upon which the applicant bears an onus they will not otherwise be able to discharge, it is easy to see the attraction of admitting such evidence. The alternative to closed evidence in this context is no evidence and certain failure of a ground of review that may have a proper basis. In particular, it may seem tempting to have regard to closed evidence on review, despite the difficulties that course presents to procedural fairness, for the purpose of considering an alleged denial of procedural fairness by the decision-maker. It is perhaps for this reason that several of the cases concerning closed evidence have involved courts seeking to determine the content of procedural fairness obligations and whether those obligations have been met. Further, perhaps objections to closed evidence based on procedural fairness principles have less force when a complaint is made of procedural unfairness on the part of the decision-maker.[83]

Finally, any proposal to have regard to closed evidence at common law, following a successful public interest immunity claim, would have to grapple with the traditional effect of a claim: that the information subject to the claim is wholly excluded.[84]

Special advocates

From time to time the use of 'special advocates' is proposed as a means of alleviating the perceived unfairness flowing from a successful public interest immunity claim, or the use of closed evidence in a statutory framework that permits such evidence.

The role of a special advocate is generally said to involve access to the closed evidence, either for the purpose of making submissions in opposition to a public interest immunity claim in the interests of party who has sought the production of the documents[85] or making submissions on the substantive issues in any closed hearings from which the non-state party is excluded.[86] In statutory frameworks that permit a tribunal to receive and consider closed

81 *Leghaei v Director-General of Security* [2005] FCA 1576 [90]–[91].

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

83 In this connection, it is unclear whether support might be drawn for this proposition from the dicta at *Church of Scientology v Woodward* [1982] HCA 78; 154 CLR 25, 76 (Mason J) citing *Sankey v Whitlam* (1978) 142 CLR 1 generally, or whether his observations were in that context directed at the more limited issue for which they were cited by the High Court in *Graham v Minister for Immigration and Border Protection* [2017] HCA 33; 91 ALJR 890 [61].

84 *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4; 234 CLR 532 [24] (Gummow, Hayne, Heydon and Kiefel JJ).

85 *State of New South Wales v Public Transport Ticketing Corporation (No 3)* [2011] NSWCA 200; 81 NSWLR 394.

86 *R v Lodhi* [2006] NSWSC 586; 163 A Crim R 475; *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531.

evidence, a power to appoint a special advocate to consider that same evidence and assist the tribunal may be implied.[87] However, in some instances, a special advocate procedure may be inconsistent with the statutory regime for review.[88]

From time to time, it is also suggested that the non-state party could appoint a lawyer who would access the closed evidence but be excused or restrained from disclosing that information to their client.[89] A similar proposal is one that the non-state party's existing lawyers might access the closed evidence but be excused or restrained from disclosing that material to their client.[90]

It can be seen that the possibilities for the special advocate's role, their relationship with the non-state party and the purpose to which their assistance is directed can be multiplied to create a large number of alternatives.

The difficulties posed by the appointment of special advocates have been identified elsewhere and include:

- where a special advocate is a lawyer retained by the non-state party, whether the court has the power to excuse them from their obligations to their client. If the court has no such power, how the special advocate can discharge their role without breaching those obligations;[91] and
- where a special advocate is unable to communicate with the non-state party after receiving the confidential information, how the special advocate can assist the court in circumstances where he or she cannot obtain instructions.[92]

The second difficulty may be less acute in judicial review proceedings. For example, where the closed evidence consists of a part of the decision maker's reasons and the applicant alleges an error that must appear in those reasons, it may be that the special advocate can assist the court without needing to take instructions to resolve any factual points. Nevertheless, given that a special advocate will only be of assistance when closed evidence is deployed, the conceptual questions identified above relating to closed evidence loom large in any proposal to deploy a special advocate.

Conclusion

Claims of public interest immunity in judicial review proceedings expose difficult tensions between the accountability of the executive and the wide range of public interests that can support such claims. In some cases, successful claims of public interest immunity may make judicial review proceedings difficult to prosecute. While courts have identified that the use of closed evidence may allow meaningful review, especially when an applicant complains of procedural unfairness, a comprehensive theoretical framework has yet to emerge.

87 *Commissioner of Police v Sleiman & AVS Group of Companies Pty Ltd & Ors* [2011] NSWCA 21; 78 NSWLR 340 [183]–[195] (Sackville AJA, Allsop P and Handley AJA agreeing).
88 *GWVR v Director-General of Security* [2010] AATA 1062 [19]–[25].
89 *Commissioner of Police v Sleiman & AVS Group of Companies Pty Ltd* [2011] NSWCA 21; 78 NSWLR 340 [24]–[25], [169]–[172].
90 *Plaintiff M46 of 2013 v Minister for Immigration and Border Protection* [2014] FCA 90; 139 ALD 227 [38].
91 *R v H* [2004] 2 AC 134 [22].
92 *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531 [36].