SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**R v Collaery (No 7)**
Citation:	**[2020] ACTSC 165**
Hearing Dates:	25 May 2020 – 29 May 2020
Decision Date:	26 June 2020
Before:	Mossop J
Decision:	[See 157]
Catchwords:	**NATIONAL SECURITY –** APPLICATION FOR ORDERS PROHIBITING DISCLOSURE – Nature of task under s 31(7) and (8) of *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) – Real risk of prejudice to national security – no substantial adverse effect on defendant's right to fair hearing – orders consistent with the Attorney-General's certificate should be made
Legislation Cited:	*Classified Information Procedures Act* (18 USC App III) *Criminal Code 2002* (ACT), s 712A *Criminal Code Act 1995* (Cth), s 11.5 *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s 74, Ch 4 *Intelligence Services Act 2001* (Cth), s 39, 41A *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 3, 6, 7, 8, 9, 10, 17, 24, 26, 27, 29, 31, 43 *Parliamentary Privileges Act 1987* (Cth)
Cases Cited:	*Alister v The Queen* (1984) 154 CLR 404 *Commonwealth v Vance* [2005] ACTCA 35; 158 ACTR 47 *Gilbert v The Queen* [2000] HCA 15; 201 CLR 414 *Hogan v Hinch* [2011] HCA 4; 243 CLR 506 *Lodhi v The Queen* [2007] NSWCCA 360; 179 A Crim R 470 *Maxwell v The Queen* (1996) 184 CLR 501 *R v Collaery (No 6)* [2020] ACTSC 164 *R v Lappas and Dowling* [2001] ACTSC 115 *R v Lodhi* [2006] NSWSC 571 *R v Scerba* [2015] ACTSC 176; 299 FLR 221 *Sankey v Whitlam* (1978) 142 CLR 1
Texts Cited:	Australian Law Reform Commission, *Keeping Secrets*, Report No 98 (2004) Walker, B, Independent National Security Legislation Monitor Annual Report (7 November 2013) Whealy, A, "Difficulty in obtaining a fair trial in terrorism cases" (2007) 81 ALJ 743
Parties:	The Queen (Crown) Bernard Collaery (Defendant)
Representation:	**Counsel**

R Maidment QC and C Tran (Crown)

P Boulton SC, C Ward SC and R Khalilizadeh (Defendant)

J Kirk SC, A Mitchelmore SC, T Begbie and D Forrester (Attorney-General (Cth))

Solicitors

Commonwealth Director of Public Prosecutions (Crown)

Gilbert + Tobin (Defendant)

Australian Government Solicitor (Attorney-General (Cth))

File Number: SCC 195 of 2019

MOSSOP J:

Introduction

1. Bernard Collaery is facing five charges on an indictment dated 12 September 2019. Four of the counts on the indictment allege breaches of s 39 of the *Intelligence Services Act 2001* (Cth). A further count on the indictment (Count 1) is a charge of conspiracy to breach s 39, alleged to have been entered into with a person known as Witness K.

2. These reasons relate to an application by the Attorney-General of the Commonwealth for orders under s 31 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act), which would have the effect of requiring that significant parts of the trial on those charges not be conducted in public and that persons involved in the trial, including the jurors, not disclose the information given during those closed portions of the hearing. The nondisclosure obligations would continue after the trial.

3. It is a mandatory requirement of the NSI Act that the hearing of this application be conducted in closed court. That is because the "closed hearing requirements" set out in s 29 of the NSI Act applied to the hearing: NSI Act s 27(5). This meant that members of the public and the media were excluded from the hearing.

The charges

4. Count 1 is an allegation of conspiracy contrary to s 11.5 of the *Criminal Code Act 1995* (Cth) and s 39 of the *Intelligence Services Act*. It charges that between 1 December 2012 and 31 May 2013 at Canberra and elsewhere, the defendant conspired with a person known to him as Witness K to communicate information or matter to the government of Timor-Leste that was prepared by or on behalf of the Australian Secret Intelligence Service (ASIS) in connection with its functions or related to the performance of those functions. It is alleged that the information came to the knowledge of Witness K by reason of him being or having been a staff member of ASIS and that the communication was not made in any of the four ways which might have rendered it lawful under s 39(1)(c) of the *Intelligence Services Act*.

5. Count 2 alleges that on or about 3 December 2013 in the Netherlands, Canberra and elsewhere, the defendant communicated information that was prepared by or on behalf of ASIS in connection with its functions or related to the performance of its functions. The

communication was made to Emma Alberici on the ABC Television 'Lateline' program and to others who obtained access to the content of that broadcast. It is alleged that the information came to the defendant by reason of him having entered into a contract agreement or arrangement with ASIS and that the communication was not made in any one of the four ways which might have rendered it lawful.

6. Count 3 is in a similar form to Count 2 but charges communication on 3 December 2013 to Peter Lloyd of ABC Radio and others who obtained access to the content of the broadcast.

7. Count 4 is in a similar form to Count 2 except that it relates to communication on 4 December 2013 to Connor Duffy of ABC Television's '7.30 Report' program and others who obtained access to the content of that broadcast.

8. Count 5 alleges that on or about 17 March 2014 in London, Canberra and elsewhere the defendant communicated information to Marian Wilkinson and Peter Cronau of ABC Television's '4 Corners' program and others who obtained access to the content of the broadcast. It is otherwise in a similar form to Count 2.

9. Transcripts of the broadcasts the subject of Counts 2, 3, 4 and 5 were in evidence. As part of the prosecution it will be necessary for the Crown to establish that some part of the information communicated was "prepared by or on behalf of ASIS in connection with its functions" or that it "relates to the performance by ASIS of its functions": *Intelligence Services Act* s 39(1)(a). In order to do so, it will be necessary for the prosecution to prove that some part of the information was true.

10. The substance of the application made by the Attorney-General is that orders should be made which permit the evidence led by the Crown that establishes what part of the matters communicated by Mr Collaery were true, to be confined to those immediately involved in the case and not otherwise disclosed. By this mechanism the Attorney-General hopes to maintain a position of 'neither confirm nor deny' (NCND) in relation to the subject matter of the [redacted]. The Attorney-General contends that to do otherwise would create a risk of prejudice to "national security", as that expression is defined in s 8 of the NSI Act.

Background to the NSI Act

11. The NSI Act was enacted to meet what was perceived to be inadequacies of the law relating to the protection of information that related to, or the disclosure of which may affect, national security. The explanatory memorandum for the bill which became the NSI Act provided that in prosecutions for espionage, treason, terrorism or other security-related crimes, the Commonwealth may be faced with a choice between accepting the damage resulting from the disclosure of such information or protecting that information by abandoning the prosecution.

12. One impetus for the development of the NSI Act was the case involving Simon Lappas and Sherryll Dowling in this court, in which proceedings on at least one charge were stayed as a result of the inability to protect certain documents from public disclosure: *R v Lappas and Dowling* [2001] ACTSC 115 (*Lappas*). It is likely that the *Lappas* case prompted the then Attorney-General to refer the issue of the protection of classified and security sensitive information in the course of investigations and proceedings to the Australian Law Reform Commission (ALRC): see ALRC, *Keeping Secrets*, Report 98 (2004) at [1.28]. While the Commission reported in May 2004, the bill which became the

NSI Act had been introduced into Parliament a few days earlier: see ALRC at [1.29]. The history of the *Lappas* case and the issues that it raised in relation to security sensitive material is described in some detail in Appendix 4 of the ALRC report.

13. The constitutional validity of the Act and, in particular, s 31(8) of the Act, was considered by Whealy J in *R v Lodhi* [2006] NSWSC 571 (*R v Lodhi*). His Honour's decision was upheld by the New South Wales Court of Criminal Appeal: see *Lodhi v The Queen* [2007] NSWCCA 360; 179 A Crim R 470 (*Lodhi v The Queen*).

The s 26 certificate

14. The NSI Act contains provisions which regulate the disclosure of national security information in certain federal criminal proceedings and civil proceedings. The Act applies to a federal criminal proceeding if the prosecutor gives notice in writing to the defendant, the defendant's legal representative and the court that the Act applies: s 6.

15. Where the Act applies, a significant part of the regime set out in the Act involves requiring the prosecutor, the defendant or a defendant's legal representative to give notice to the Attorney-General if the person knows or believes that national security information will be disclosed in the proceeding: s 24. Where notice has been given, the Attorney-General may issue a certificate in relation to that information: s 26(2)(b). Such a certificate may only be issued if "the Attorney-General considers that the disclosure is likely to prejudice national security": s 26(1)(c). Where a certificate is issued, it is an offence for a person who has been given a certificate to disclose information in contravention of the certificate: s 43. After a certificate has been issued it is then necessary for the court to hold a hearing to decide what orders should be made in relation to the information the subject of the certificate: s 27(3). Orders must then be made by the court under s 31. When those orders are made then the s 26 certificate ceases to have effect: s 26(5). By this regime it is possible to protect security sensitive information required to be disclosed in federal criminal proceedings up until the point where the court decides what orders should be made in relation to that information.

16. On 29 May 2018 the Commonwealth Director of Public Prosecutions gave notice pursuant to s 6(2) of the NSI Act that the Act applied to the proceedings. On 21 August 2019 the prosecutor gave notice to the Attorney-General pursuant to s 24(1) of the NSI Act that he believed he would disclose national security information in the proceeding which was contained in documents in certain parts of the Classified Prosecution Brief. Those parts were marked with yellow highlighting.

17. On 18 September 2019 the Attorney-General issued a certificate under s 26 of the NSI Act. It was amended by a further certificate on 20 November 2019. The scope of the certificate was defined by reference to those yellow highlighted portions of the brief but extends beyond simply those documents. The "Sensitive Information" covered by the certificate comprises:

    (a) the information highlighted in yellow in the Classified Prosecution Brief;

    (b) information which might directly or indirectly reveal information highlighted in yellow in the Classified Prosecution Brief; and

    (c) information that tends to confirm or deny information highlighted in yellow in the Classified Prosecution Brief.

18. The certificate identified the circumstances in which disclosure of the Sensitive Information was permitted. Those circumstances involved a detailed regime limiting disclosure and controlling the handling of documents containing that information.

19. Because the certificate had been issued it was necessary for the court to conduct a hearing in order to determine what, if any, orders should be made in relation to the Sensitive Information.

20. It is important to note that, subject to the s 26 certificate, the whole of the Classified Prosecution Brief has been disclosed to the defendant. It is not a case in which information in the prosecution brief is being withheld from an accused person. Rather, the restrictions imposed by the s 26 certificate and proposed by the Attorney-General to be made under s 31 relate to the handling and public disclosure of that information.

Orders sought by the Attorney-General

21. The Attorney-General has proposed draft orders. As revised following the conclusion of the hearing, the orders sought by the Attorney-General are as follows:

> The Court orders, pursuant to s 31(4) *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), that:
>
> (a) those persons to whom the Attorney-General's certificate of 18 September 2019 as amended on 20 November 2019 (the Certificate) was given; and
>
> (b) those persons identified in the Certificate as Relevant Persons; and
>
> (c) any other person to whom the contents of the Certificate are disclosed by the Attorney-General or the Court for the purpose of the hearing (in the case of the Attorney-General, upon notification by the Commonwealth Director of Public Prosecution that such disclosure is reasonably necessary for the conduct of the proceeding),
>
> must not, except in the permitted circumstances provided by the Certificate or by s 16(a) of the NSI Act, disclose (within the proceeding or otherwise) the information which is the subject of the certificate.

22. As will become apparent, the reference to the disclosure of the "contents of the Certificate" picks up the language in s 31(4) of the NSI Act. This appears to assume that the Sensitive Information forms part of the s 26 certificate itself which is not, in this case, true. This is a matter to which I will return at the conclusion of these reasons.

23. Because the proposed orders pick up the terms of the s 26 certificate, they would impose the range of restrictions on the storage and handling of Sensitive Information set out in that certificate. Those procedures are relatively standard ones for the management of security sensitive information. They clearly impose burdens upon both the prosecution and the defence. However, they were not the subject of any debate at the hearing. The most significant restrictions that were in contest at the hearing related to the closure of the court when Sensitive Information was being disclosed or was the subject of submissions. It was the defendant's contention that at least some of the yellow highlighted information in the Classified Prosecution Brief should not be the subject of orders which prevented it from being disclosed or referred to in open court.

The relevant provisions of the NSI Act

24. Section 3 of the NSI Act:

> **3 Object of this Act**

(1) The object of this Act is to prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.

(2) In exercising powers or performing functions under this Act, a court must have regard to the object of this Act.

25. The expression "likely to prejudice national security" is defined in s 17:

17 Meaning of likely to prejudice national security

Something is likely to prejudice national security if there is a real, and not merely a remote, possibility that it will prejudice national security.

26. Section 7 of the NSI Act defines "national security information" as follows:

national security information means information:

(a) that relates to national security; or

(b) the disclosure of which may affect national security.

27. Section 8 defines "national security":

8 Meaning of *national security*

In this Act, national security means Australia's defence, security, international relations or law enforcement interests.

28. Section 9 defines "security" by picking up the definition in the *Australian Security Intelligence Organisation Act 1979* (Cth) which is as follows:

security means:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

(i) espionage;

(ii) sabotage;

(iii) politically motivated violence;

(iv) promotion of communal violence;

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

29. Section 10 defines "international relations":

10 Meaning of *international relations*

In this Act, international relations means political, military and economic relations with foreign governments and international organisations.

30. In this case [redacted] and the parties did not place any emphasis on 'law-enforcement' interests. Some evidence was given in relation to Australia's defence interests, but this issue was not prominent in the submissions that were made.

31. Where, in a federal criminal proceeding, the Attorney-General has given a certificate under s 26 prior to the trial beginning, the court is obliged to hold a hearing to decide whether to make an order under s 31 of the NSI Act in relation to the disclosure of the information: s 27(3). The "closed hearing requirements" set out in s 29 of the Act apply to the hearing conducted under s 27(3): s 27(5). For convenience, in the balance of these reasons, I will refer to the hearing required under s 27(3) for the purposes of making orders under s 31 of the Act as **the s 31 hearing**.

32. Section 31(1) requires the court to make an order under one of three subsections of s 31. In the present case the power which the Attorney-General seeks to have exercised is that in s 31(4). That permits the court to make an order restricting disclosure of information "except in permitted circumstances". The relevant order binds:

> (a) any person to whom the certificate mentioned in subsection 26(2) … was given in accordance with that subsection; and
>
> (b) any person to whom the contents of the certificate have been disclosed for the purposes of the hearing; and
>
> (c) any other specified person;
>
> …

33. Of critical importance to making orders under s 31 are the terms of s 31(7)-(8). Those subsections are as follows:

> (7) The Court must, in deciding what order to make under this section, consider the following matters:
>
> (a) whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if:
>
> (i) where the certificate was given under subsection 26(2) or (3)—the information were disclosed in contravention of the certificate; or
>
> (ii) [not relevant];
>
> (b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence;
>
> (c) any other matter the court considers relevant.
>
> (8) In making its decision, the Court must give greatest weight to the matter mentioned in paragraph (7)(a).

34. For the purposes of s 31(7)(b) the expression "substantial adverse effect" is defined in s 7 to mean "an effect that is adverse and not insubstantial, insignificant or trivial".

The nature of the task under s 31(7)-(8)

35. For the purposes of considering the matters in s 31(7)(a)(i) the issue posed is "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". Two points can be made about the terms of paragraph (a).

36. First, "whether … there would be a risk of prejudice…" is a lower threshold than the expression defined in s 17, "likely to prejudice national security". That is the definition relevant to the object of the Act, as outlined in s 3. However, having regard to the definition in s 17, the practical difference is negligible as the court is unlikely to be persuaded by possible prejudice to national security that is "merely a remote… possibility" as referred to in that definition. In other words, the threshold articulated in the definition of "likely to prejudice national security" is low enough that any difference in language is unlikely to make a practical difference.

37. Second, the words "having regard to the Attorney-General's certificate" must be given some meaning. These words have been described as "a trifle peculiar" having regard to the fact that a s 31 hearing only occurs because the Attorney-General has issued a certificate and in those circumstances it would be impossible not to have regard to that certificate: Walker, B, Independent National Security Legislation Monitor Annual Report (7 November 2013) at 136. The words do not indicate that the certificate is to be treated as, in any way, determinative. That is because the provision does not say that that is the effect for the purposes of s 31(7). There is also a negative implication arising from s 27(1), which provides that the certificate is "conclusive evidence" prior to the beginning of a s 31 hearing that is conducted prior to the commencement of the trial. The negative implication arises because s 27(1) gives the certificate a particular effect prior to the s 31 hearing, denying, by implication, any particular effect after that hearing commences.

38. In my view, it is appropriate to give the most straightforward effect to those words, even if to do so is "a trifle peculiar" because of the limited work done in the paragraph by their inclusion. That is to treat the reference to the certificate as simply emphasising the need to have regard to the terms of the certificate and the restrictions in it when making the assessment of whether a risk of prejudice to national security would arise if disclosure was made in contravention of the certificate. This emphasis may be seen to be redundant having regard to the balance of the paragraph, but it is a more appropriate interpretation than allowing the expression to give the certificate some weight or significance that has not been articulated by the legislation.

39. Because s 31(7)(b) picks up the definition of "substantial adverse effect" in s 7, the paragraph has effect as if it read "Whether any such order would have an effect that is adverse and not insubstantial, insignificant or trivial on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence".

40. Section 31(7)(c) is only constrained by relevance, that is, relevance having regard to the subject matter, scope and purpose of the provision read in its total context. It is broad enough to encompass the desirability of the open conduct of court proceedings if that is not incorporated in s 31(7)(b).

41. Section 31(8) requires that the court "must give greatest weight" to the consideration referred to in s 31(7)(a). That does not mean that the consideration will necessarily predominate over other considerations. In *Lodhi v The Queen*, Spigelman CJ (at [36]) quoted with approval Whealy J's explanation of the operation of s 31(8) as follows:

> [108] The mere fact that the legislation states that more weight, that is the greater weight, is to be given to one factor over another does not mean that the other factor is to be disregarded. The use of the expression 'greatest weight' appears to be grammatically correct since the legislation is contemplating three (or more) considerations. Nor do I consider that the discretion is an exercise that, as was argued, will almost inevitably lead to one result namely, prevention of disclosure. Mr Boulten SC described it as 'filling in the dots'. I cannot agree with this description. Read fairly, it seems to me that the legislation does no more than

> to give the Court guidance as to the comparative weight it is to give one factor when considering it alongside a number of others. Yet the discretion remains intact and, particularly for the reasons I have outlined, it seems to me that there is no warrant for supposing other than that, in a proper case, the Court will order disclosure or a form of disclosure other than that preferred by the Attorney-General. The legislation does not intrude upon the customary vigilance of the trial judge in a criminal trial. One of the court's tasks is to ensure that the accused is not dealt with unfairly. This has extended traditionally into the area of public interest immunity claims. I see no reason why the same degree of vigilance, perhaps even at a higher level, would not apply to the Court's scrutiny of the Attorney's certificate in a s 31 hearing.

42. As Spigelman CJ went on to explain (at [38]), this interpretation means that even if there is a significant risk of prejudice to national security, the giving of that consideration greater weight will not necessarily lead to nondisclosure if the adverse effect on the defendant's right to receive a fair hearing is substantial enough.

43. The exercise required by s 31(7) and (8) involves comparison between conflicting interests that are incommensurable: *Lodhi v The Queen* at [40]. Section 31(8) does tilt the balance or "put a thumb on the scales" but this "is perfectly consistent with the traditional judicial decision making process": *Lodhi v The Queen* at [41].

Matters no longer in dispute

44. As part of the preparation for the s 31 hearing the defendant undertook an exercise of identifying those portions of the Classified Prosecution Brief in relation to which he had no objection to the making of orders under s 31(4). This exercise had the effect of reducing the scope of the contest between the parties. The marked up version of the Classified Prosecution Brief became Exhibit 13. References to yellow and blue highlighting in the balance of these reasons are to the highlighting that appears in Exhibit 13.

45. The Sensitive Information identified in the s 26 certificate was defined by reference to those portions of the Classified Prosecution Brief which were highlighted in yellow. As part of the exercise of identifying the scope of the dispute between the parties, those yellow highlighted parts of the Classified Prosecution Brief that the defendant accepted should not be publicly disclosed remained yellow. Those yellow highlighted areas that the defendant contended should be disclosed were highlighted in blue. The blue areas of the Classified Prosecution Brief represented a subset of the portions which had previously been marked yellow. As a consequence, the blue highlighting identified those portions of the Classified Prosecution Brief where there remained a dispute between the parties. Therefore, it was uncontroversial that those areas remaining yellow would be subject to orders regulating their disclosure and it was only in relation to the areas marked blue that there was a contest. I will refer to the position adopted by the defendant contending for disclosure of the blue highlighted material as the **Defendant's Initial Position**.

46. However, the defendant's position changed at the hearing. In addition to amendments to the colouring of the Confidential Prosecution Brief that would shift a number of areas from blue to yellow (hence rendering them uncontroversial), Senior Counsel for the defendant suggested a completely different approach to orders under s 31. He submitted that the defendant sought only the disclosure of certain **Identified Matters** which were narrower in their scope than the blue highlighted portions of the marked up Classified Prosecution Brief. These matters were in the form of a list of a number of particular facts [redacted]. They are listed in a schedule to these reasons. [Redacted].

Senior Counsel submitted that it would be appropriate for the court to make an "in principle" decision in relation to whether or not evidence relating only to the Identified Matters should be excluded from any s 31 orders. It would then be a matter for the parties and, in default of agreement, the court, to undertake the exercise of identifying the information in the brief relating to only those matters and to require that evidence to be given or tendered without any limits on the circumstances of its disclosure. I will refer to this as the **Defendant's Revised Position**.

47. This approach had the forensic benefit for the defendant that it apparently reduced the potential for collateral information that was sensitive from being disclosed along with the evidence that the defendant wished to have disclosed. It therefore narrowed the focus of the defendant's contentions on disclosure to that evidence going to the Identified Matters. However, because what was suggested was an "in principle" determination, it involved dealing with the matter at a level of abstraction which precluded detailed consideration of the actual nature of the public disclosure that would be required. It deferred for subsequent consideration any practical issues involved in setting out the information in the Confidential Prosecution Brief in this way.

48. While this alternative approach allowed a very clear focus upon the assertions of the Attorney-General in relation to the national security consequences of disclosure, it tended to undermine the submissions made by the defendant as to any prejudice arising from orders limiting the openness of the trial because it accepted, to an even greater extent than previously, that substantial portions of the evidence would be given in closed court and the subject of nondisclosure orders.

49. In summary the position was:

    (a) the defendant did not oppose the making of orders under s 31 that would protect from disclosure the yellow highlighted portions in the marked up Classified Prosecution Brief;

    (b) the defendant contended that orders under s 31 restricting disclosure should not be made in relation to:

        (i) the blue highlighted portions in the marked up Classified Prosecution Brief (Defendant's Initial Position); or

        (ii) a yet to be identified subset of the blue highlighted portions in the marked up Classified Prosecution Brief which disclosed only the Identified Matters (Defendant's Revised Position).

50. In what follows, both the Defendant's Initial Position and the Defendant's Revised Position are considered.

Summary of the position of the Attorney-General

51. The Attorney-General submitted that there would be no direct consequence of the making of orders in the terms sought for the conduct of the defence because the whole of the Classified Prosecution Brief has been provided to the defendant.

52. He submitted that, in relation to those charges which allege unlawful disclosures (Counts 2, 3, 4 and 5), the central question is whether the truth or otherwise of particular aspects of the statements made by Mr Collaery should be publicly confirmed or denied. He submitted that notwithstanding the widespread reporting of Mr Collaery's statements, the

NCND principle still has work to do in this case both generally and because of the risk of harm arising from disclosure in the particular circumstances of this case.

53. He submitted that the principle of open justice is a matter which the court would consider relevant and take into account pursuant to s 31(7)(c) of the NSI Act. However, he submitted that in the circumstances of this case the principle must give way to ensure that the proceedings are conducted in a way that does not endanger national security and that such a modification is consistent with the objects of the NSI Act.

54. The Director of Public Prosecutions, who will prosecute the case in the name of the Crown, adopted an approach consistent with that sought by the Attorney-General. The Director drew attention to the fact that the whole of the Confidential Prosecution Brief had been provided to the defendant and that procedural burdens arising from the terms of the s 26 certificate fell on both the prosecution and the defence.

Summary of the position of the defendant

55. The defendant's approach to the application was based upon the contention that some of the material sought to be kept from public disclosure should be required to be publicly disclosed. As explained at [43]-[47], precisely what information fell into this category altered over time. The position that was adopted by the defendant was based upon a number of separate arguments:

    (a) There is a very strong public interest in open justice which itself is an element of a fair trial.

    [Subparagraphs (b) to (e) redacted]

    (f) If any harm was to occur [redacted] such harm would have already occurred.

    (g) There would be prejudice to the defendant in the conduct of the trial before a jury if those matters were to be kept from public disclosure because of the need to open and close the court.

The evidence

56. The evidence was principally by way of affidavit.

57. The affidavits relied upon by the Attorney-General were as follows:

    (a) Heather Cook (dated 23 September 2019);

    (b) Frances Adamson (dated 24 February 2020 and 24 February 2020);

    (c) Richard Maude (dated 23 September 2019, 23 September 2019, 28 February 2020 and 28 February 2020);

    (d) Paul Symon (dated 23 September 2019, 23 September 2019, 2 March 2020 and 2 March 2020);

    (e) Michael Burgess (dated 6 March 2020);

    (f) Michael Pezzullo (dated 5 March 2020 and 5 March 2020); and

    (g) Nicholas Warner (5 March 2020 and 5 March 2020).

58. Ms Cook was not required for cross-examination. Each of the other witnesses were cross-examined.

59. The affidavits relied upon by the defendant were as follows:

    (a) Kathleen Harrison (dated 24 May 2020);

    (b) Christopher Barrie (dated 12 November 2019 and 7 January 2020);

    (c) John McCarthy (dated 12 November 2019 and 22 January 2020);

    (d) Anthony Whealy (dated 13 November 2019);

    (e) Kim McGrath (dated 13 November 2019);

    (f) Hugh Bennett (dated 18 November 2019);

    (g) Kay Rala Xanana Gusmao (dated 9 November 2019 and 15 January 2020);

    (h) Jose Ramos-Horta (dated 12 November 2019 and 15 January 2020);

    (i) Stephanie Wee (dated 13 November 2019); and

    (j) Gareth Evans (dated 7 November 2019 and January 2020).

60. Only Mr Evans, Mr Barrie and Mr McCarthy were required for cross-examination.

61. 16 exhibits were also tendered. It is not necessary to list them in these reasons.

62. An issue arose about whether the admission of certain very minor parts of the evidence was precluded by s 16 of the *Parliamentary Privileges Act 1987* (Cth). I have given my reasons in relation to that question separately: see *R v Collaery (No 6)* [2020] ACTSC 164. I observe that although an objection was taken by the Attorney-General to the admission of that material, that objection was taken without enthusiasm and only in order to ensure that the court did not fall into error as a consequence of the issue not being properly drawn to its attention: see *Commonwealth v Vance* [2005] ACTCA 35; 158 ACTR 47. In case my ruling on the issues raised by the objection is wrong I indicate that the evidence the subject of the ruling was largely peripheral and the admission or not of that evidence makes no difference to my findings or conclusions on the substance of the application.

The witnesses

63. Each of the witnesses who gave oral evidence were distinguished, honourable and intelligent people, expressing nuanced opinions based upon significant experience. The Timor-Leste witnesses whose affidavits were read but who were not required for cross-examination are each obviously internationally respected statesmen whose opinions were unchallenged and must be given significant weight.

64. The Australian witnesses called by the Attorney-General were differentiated from those called by the defendant by the fact that they were serving or very recently retired senior officers of the government. On the other hand, the witnesses called on behalf of the defendant were each retired senior officers of the Commonwealth who had been retired from their Commonwealth positions for some time.

65. So far as the assessments of risks to national security are concerned, it is unsurprising that current officers of the government would be acutely conscious of the current risks which they face when doing their jobs, as those are matters which they need to confront on a daily basis. It is also unsurprising that those who have been retired from Commonwealth service for some time would tend to have a broader perspective upon

the significance of risks created by public disclosure, as they are not confronting the manifestation of those risks on a daily basis and may be better able to perceive the "big picture" significance or otherwise of those risks in the context of Australia's place in the world.

66. In pre-NSI Act cases there are numerous statements that in matters of national security, significant weight is to be given to the opinion expressed by the Attorney-General or other senior government officials in relation to national security: *Alister v The Queen* (1984) 154 CLR 404 at 435; *Sankey v Whitlam* (1978) 142 CLR 1 at 44. The NSI Act does not itself mandate such an approach. In a usual case, such an approach will be adopted by courts because the evidence of such a person will be uncontradicted and courts recognise that they have very limited capacity to assess for themselves matters relating to national security. This case is obviously an unusual one in that the defendant directly challenged, with significant evidence from experienced and respected former senior government officials, the assertions made in the Attorney-General's evidence about the ongoing applicability of the NCND principle, as well as the extent of any risk to national security that would arise if the orders sought by the Attorney-General were not made.

67. Because of the particular issues and evidence in the present case, I have addressed the competing evidence without placing any additional presumptive weight upon the evidence of witnesses called by the Attorney-General. I have done so without attempting to resolve the issue of principle as to whether or not any such presumptive weight should be accorded to such evidence in addition to the weight that would be accorded to it having regard to its source, content and cogency. Rather, I have assessed the evidence based upon its inherent merits having regard to those matters. In doing so I have adopted a course which is consistent with the submission made on behalf of the defendant, that the NSI Act gives no special status to certain types of witnesses or witnesses holding particular positions in relation to the subject of national security. However, I have done so without attempting to reach that conclusion as a matter of law.

68. Notwithstanding the submissions of the defendant to the contrary, I do consider that the evidence of witnesses called by the Attorney-General who are currently engaged, or have been very recently engaged in national security and international relations, should be given some additional weight because of the currency and immediacy of their experience. That is not on the basis of any presumption but is instead because I consider that the currency and immediacy of their experience is relevant to the probative value of their evidence. I recognise that there is a risk that witnesses in such a position will "toe the party line" having regard to the position adopted by the government in the proceedings and that their level of anxiety concerning questions of disclosure may be influenced by the immediacy of their responsibilities. I have assessed the evidence of the witnesses called by the Attorney-General with that in mind. Each of them impressed me as fairly and earnestly calibrating their evidence in relation to the value of the NCND principle and the risks of prejudice that would arise from disclosure appropriately in the circumstances.

The factual background against which the issue is to be decided

[Paragraphs 69 to 79 redacted]

80. In December 2013 the Attorney-General confirmed that ASIO had executed search warrants at addresses in Canberra and that those warrants had been issued by him on

the grounds that the documents contained "intelligence related to security matters". [Redacted].

81. On 4 March 2014 the Attorney-General, Senator George Brandis, took part in an interview with Sky News in which he indicated that he neither confirmed nor denied reports about intelligence matters.

82. In broadcasts on the ABC on 17 March 2014 Mr Brandis and former Foreign Affairs Minister Alexander Downer both made statements neither confirming nor denying allegations made by the defendant.

[Paragraphs 83 to 85 redacted]

86. On 28 June 2018 the current Attorney-General confirmed that the defendant and a former staff member of ASIS had been summonsed on charges including conspiracy to communicate ASIS information and communicating ASIS information.

[Heading redacted]

[Paragraphs 87 to 90 redacted]

Summary of the evidence

91. [Redacted]

92. The evidence called by the Attorney-General supported the following propositions:

    (a) The NCND principle was a significant and long-standing policy of the Australian government.

    [Subparagraphs (b) to (f) redacted]

    (g) The confidence that underpins intelligence sharing relationships with Australia's network of foreign intelligence relationships, including the Five Eyes countries, would be undermined if ASIS was unwilling or unable to protect its secret information.

93. The evidence led from witnesses called by the defendant supported the following propositions:

    (a) The NCND principle is a generally accepted policy. The issue is whether it should continue to be applied in the particular circumstance of the current case.

    [Subparagraphs (b) to (g) redacted]

    (h) Conduct of any part of the prosecution in secret would harm Australia's international reputation.

Findings in relation to the risk of prejudice to national security

94. The statutory issue under s 31(7)(a) is whether there would be a risk of prejudice to national security if information was disclosed other than in accordance with the conditions outlined in the s 26 certificate. Because the consideration in s 31(7)(a) forms part of a discretionary exercise involving the weighing of other matters, it is necessary to go further than simply deciding that threshold question and to consider the extent of risk of prejudice to national security. That in turn involves considering the nature of the prejudice. The overall weight to be given to the consideration in s 31(7)(a) will be a

function of the extent of the risk and the nature of the prejudice. Therefore, a low risk of a catastrophic prejudice may be as significant as a high risk of some lesser prejudice.

95. In the present case, the nature of the prejudice asserted on behalf of the Attorney-General that would arise from the disclosure of information in the proceedings involves nothing catastrophic. It involves the public disclosure of material which creates a risk of incremental prejudice [redacted]. When and how that prejudice will occur and how grave it will be is impossible to identify with certainty. Having regard to [redacted] it may well be the case that even after any prejudice has occurred, it will not be possible to determine whether the cause of that prejudice is the disclosure.

96. **Widespread disclosure and acceptance:** It was uncontroversial between the parties that the allegations made by the defendant in the broadcasts the subject of the charges have been widely disseminated and reported upon. The affidavit of Ms Wee made reference to over 600 public media reports, publications and records of the International Court of Justice making reference to the matters alleged by the defendant [redacted].

[Paragraphs 97 to 98 redacted]

99. **NCND principle**: At an appropriate level of generality, the NCND is an important tool [redacted].

100. Mr McCarthy said that while the NCND response had long been acknowledged by politicians and their spokespersons as the most prudent response to alleged revelations on intelligence matters, that approach was no longer effective. He gave recent examples of cases in Australia and the United States when the NCND approach was departed from. While I accept that it is possible to identify cases in which the principle has been departed from, that does not, in my view, detract from the ongoing significance of the principle. [Redacted].

101. [Redacted]

102. [**Subheading** and paragraph redacted]

103. [Redacted]

104. In the context of s 31(7)(a), the assessment needs to be of the prejudice that would arise from disclosure other than in accordance with the constraints in the s 26 certificate. Therefore, the existence of an alternative approach to [redacted] can be relevant if it indicates that any risk of prejudice from disclosure would not be as great as suggested by the Attorney-General. [Redacted].

105. **Intelligence relationships**: I accept that there would be some harm done to Australia's intelligence activities as a result of the disclosure contended for by the defendant. The extent of any prejudice would be significantly influenced by whether the Defendant's Initial Position or the Defendant's Revised Position in relation to disclosure was adopted. Clearly the Defendant's Initial Position, which would involve the disclosure of the blue highlighted material, would carry with it very significantly greater risks of prejudice than the Defendant's Revised Position. That is because the information content that would be disclosed by reason of the disclosure of the blue highlighted material is much greater than a disclosure effectively limited to some disembodied facts.

106. There is a risk of prejudice in a number of different ways. First, there is a reputational harm arising amongst intelligence partners, most particularly the Five Eyes group of countries. That would not arise from any decisive reaction by any of those countries to

the intelligence sharing arrangements, but instead would be reputational harm arising from the inability of the Australian government to effectively prosecute what are alleged to be significant breaches of the law by officers or former officers of the intelligence services. There may be some reduction in the risk of reputational harm from the fact that the disclosure would not be one voluntarily undertaken by the government but rather occur as a consequence of a court order. However, contrary to the submissions made by the defendant, I do not think that that would significantly qualify the risk of reputational harm because the disclosure would still occur by reason of a voluntary decision of the government to proceed with the prosecution of the defendant and demonstrate the incapacity to punish and deter breaches of intelligence laws.

107. Second, particularly on the Defendant's Initial Position, the information content of the material that would be publicly disclosed would be sufficient to give a significant advantage to foreign intelligence services that would be of benefit to other countries and would be able to be deployed at the expense of Australia's intelligence services and national interest. I accept Mr Symon's evidence about the identity of and level of threat posed by foreign intelligence services targeting Australia. The risk posed would be eliminated or substantially reduced on the Defendant's Revised Position, although as Mr Symon pointed out, even the disclosure of those facts is likely to affect the assessment of a broader range of information.

108. Third, there is a risk that the information content of material that was publicly disclosed could be used for the purposes of mosaic analysis by foreign intelligence services. This would be significant on the Defendant's Initial Position but much more limited on the Defendant's Revised Position. It is true to say that the risks arising from a mosaic analysis are lessened as a result of the passage of significant time, however I accept the evidence of Mr Symon that this remains a risk of prejudice, particularly from those countries which have sophisticated intelligence capabilities and persistently target Australia.

109. Fourth, the public disclosure of the material will be prejudicial to the capacity of Australia's intelligence services because it will provide an incentive for persons disclosing national security information to do so in a very public manner because that will undermine the government's claim to be entitled to protect the information, make it more likely that public disclosure of the truth or falsity of that information will be required and provide a disincentive to the prosecution of persons alleged to have disclosed such information.

110. [**Subheading** and paragraph redacted]

[Paragraphs 111 to 112 redacted]

113. [**Subheading** and paragraph redacted]

114. I accept that the damage so arising may be reduced by taking into account the potential to characterise full disclosure of the contested material in the trial as consistent with Australia's liberal values, commitment to transparency and the rule of law.

115. Mr Barrie and Mr McCarthy pointed to the potential for damage to Australia's international reputation if the trial were to proceed without disclosure of the matters in contest. Mr Barrie also points to the significance of maintaining the position within Australia's defence force that Australia is "a force for good" (as, I interpolate, it undoubtedly was in Timor-

Leste, as part of INTERFET). He expressed the opinion that the level of nondisclosure proposed would erode trust and diminish Australia's international reputation.

116. I accept that these views are legitimate ones deserving weight. They properly identify the reputational costs involved in any lack of the usual transparency of the court process in a high profile case such as this. They demonstrate that there is no cost-free approach to prosecution of charges in a case like this, where what is alleged is that there have been serious breaches of secrecy laws and the alleged disclosures have been widely reported and had international consequences.

117. Care must be taken however, to not overstate any reputational harm from proceeding in the manner proposed by the Attorney-General. First, Australia's commitment to political, economic and religious freedoms, our liberal democracy, the rule of law and mutual respect for our foreign partners should not obscure the nature of international relations. [Redacted]. Second, any restriction on the disclosure of information in the proceedings is likely to be understood in the context of the need to prosecute what are alleged to be unauthorised disclosures of classified information and the general perception that Australia has an independent and fair judiciary. Any restrictions imposed would be imposed by the court as a result of the operation of a law passed by the Commonwealth Parliament which provides a regime not dissimilar to that which exists elsewhere, most obviously in the United States under the *Classified Information Procedures Act* (18 USC App III).

118. Notwithstanding the points made by Mr McCarthy and Mr Barrie, it cannot be said that the reputational advantages of an increased degree of transparency in the proceedings would be a complete antidote to the bane of [redacted].

Practical consequences for the trial

119. It is uncontroversial that some parts of the trial will not be conducted in public. That is because even the defendant accepts that on either the Defendant's Initial Position or the Defendant's Revised Position, there is material in the Confidential Prosecution Brief the disclosure of which would create a risk of prejudice to national security and where the other matters referred to in s 31(7) would not lead to their public disclosure. These matters correspond to the portions of the Confidential Brief of Evidence that remain highlighted yellow or, on the alternative approach, those portions as well as some additional portions currently highlighted blue. The matters that remain highlighted yellow are substantial, particularly in relation to the evidence in the Confidential Prosecution Brief of David Irvine (a former Director-General of ASIS) and of a serving Deputy Director-General of ASIS.

120. As a consequence, any consideration of the practical consequences for the conduct of the trial is not between a scenario in which there is complete openness and one in which the court is substantially closed. Rather, it must be a comparison between two scenarios in both of which significant parts of the evidence will need to be heard in closed court and the subject of nondisclosure orders.

121. As part of the preparation for the s 31 hearing, the Director of Public Prosecutions prepared a list of witnesses identifying whether or not all of their evidence could be publicly disclosed and, if not, the extent to which orders closing the court or otherwise restricting the evidence would need to be made. Eight witnesses were identified whose evidence could be heard in open court. 22 witnesses fell into a second category whose evidence contained some sensitive information (mainly relating to the disclosure of

identity) where the defendant accepts that the relevant evidence will need to be given in closed court (or otherwise given in a manner which does not disclose its contents to the public). A third category of witnesses is identified whose evidence involves sensitive information. In relation to two of these witnesses (Samantha Cork and Federal Agent Peter Dean), the Director submitted that the sensitive portions of their evidence may be able to be given in open court. In relation to the other three witnesses (Nick Warner, David Irvine and a Deputy Director-General of ASIS), the Director submitted that it is likely that a substantial part, or the whole of their evidence, will need to be given in closed court.

122. In relation to those witnesses it is worth assessing the practical differences that exist between the different levels of restriction proposed by the parties.

    (a) In relation to Mr Irvine, much of his evidence is highlighted either blue or yellow. Similarly, many of the documents to be tendered through him are highlighted either blue or yellow in roughly equal parts. On any view, a substantial part of his evidence would need to be given in closed court and documents tendered subject to restrictions on their disclosure. [Redacted].

    (b) The evidence of Mr Warner includes references to identities which the defendant accepts should not be published. That evidence may be able to be given in open court by the use of pseudonyms or other techniques. There is an annexure to his statement which is wholly coloured either blue or yellow. It is likely that the tender of that document would need to occur in closed court on either view of the appropriate orders. However, at least on the Defendant's Initial Position, parts of the document would be able to be made public. That would also likely be the case on the Defendant's Revised Position, but to a lesser extent.

    (c) The evidence of a Deputy Director-General of ASIS is the subject of much yellow highlighting. On any view, that evidence would need to be given in closed court. So too would the documents tendered through this witness which contained substantial portions of yellow highlighting. There is an area of blue highlighting relating to the role of ASIS. This would be given in open court if the Defendant's Initial Position was adopted but would be given in closed court on the Defendant's Revised Position.

123. It is likely that two important issues at the trial will be whether and to what extent the matters alleged by the defendant are true and whether or to what extent his disclosures were of matters in connection with the functions of ASIS or related to the performance of its functions. On those issues the evidence of Mr Irvine, Mr Warner and the Deputy Director-General of ASIS will be of fundamental importance. While, having regard to the positions adopted by the defendant, the issue is the degree to which public access to the proceedings should be limited, rather than whether there should be any limitations at all, it is correct to identify that the position contended for by the Attorney-General involves restrictions on the openness of the court and the evidence given to it which go to the heart of the allegations against the defendant. To that extent the orders contended for by the Attorney-General do involve a significant limitation upon the open justice principle that is greater than that which is accepted as necessary by the defendant.

Open justice

124. Unsurprisingly, the defendant, the Attorney-General and the Director of Public Prosecutions all recognised the significance of the open justice principle. Each accepted that it was a matter that should be taken into account as part of the exercise undertaken by the court under s 31(7) of the NSI Act. There was some difference between the parties as to whether or not it should be taken into account as part of the defendant's right to receive "a fair hearing" under s 31(7)(b), or whether it should be taken into account under s 31(7)(c). There is a potential for some consequence to flow from this taxonomic exercise because of the use of the defined term "substantial adverse effect" in s 31(7)(b) and the link between the reference to a "fair hearing" in that paragraph and the object of the Act and its reference to matters which "would seriously interfere with the administration of justice". Neither of these matters arise in relation to s 31(7)(c) and hence there is potential for some difference in outcome depending upon where the consideration is placed. However, in my view, in this case no different conclusion is reached if the issue of open justice is considered in one paragraph as opposed to the other. Bearing these issues in mind, I have outlined my reasons below under the heading relating to s 31(7)(c)

125. A useful articulation of the open court principle is provided in the concurring judgment of French CJ in *Hogan v Hinch* [2011] HCA 4; 243 CLR 506 (*Hogan*) at [20]-[22] which was as follows:

> 20. An essential characteristic of courts is that they sit in public. That principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts. Under the Constitution courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The open-court principle serves to maintain that standard. However, it is not absolute.
>
> 21. It has long been accepted at common law that the application of the open justice principle may be limited in the exercise of a superior court's inherent jurisdiction or an inferior court's implied powers. This may be done where it is necessary to secure the proper administration of justice. In a proceeding involving a secret technical process, a public hearing of evidence of the secret process could "cause an entire destruction of the whole matter in dispute". Similar considerations inform restrictions on the disclosure in open court of evidence in an action for injunctive relief against an anticipated breach of confidence. In the prosecution of a blackmailer, the name of the blackmailer's victim, called as a prosecution witness, may be suppressed because of the "keen public interest in getting blackmailers convicted and sentenced" and the difficulties that may be encountered in getting complainants to come forward "unless they are given this kind of protection." So too, in particular circumstances, may the name of a police informant or the identity of an undercover police officer. The categories of case are not closed, although they will not lightly be extended. Where "exceptional and compelling considerations going to national security" require that the confidentiality of certain materials be preserved, a departure from the ordinary open justice principle may be justified. The character of the proceedings and the nature of the function conferred upon the court may also qualify the application of the open-court principle. The jurisdiction of courts in relation to wards of the State and mentally ill people was historically an exception to the general rule that proceedings should be held in public because the jurisdiction exercised in such cases was "parental and administrative, and the disposal of controverted questions … an incident only in the jurisdiction." Proceedings not "in the ordinary course of litigation", such as applications for leave to appeal, can also be determined without a public hearing.
>
> 22. It is a common law corollary of the open-court principle that, absent any restriction ordered by the court, anybody may publish a fair and accurate report of the proceedings,

> including the names of the parties and witnesses, and the evidence, testimonial, documentary or physical, that has been given in the proceedings. [Footnotes omitted]

126. In the context of the NSI Act, the principle of open justice has also been referred to and the authorities discussed by this court in *R v Scerba* [2015] ACTSC 176; 299 FLR 221 at [7]-[16].

127. The only aspect of the principle in relation to which it is necessary to make any additional comment is the importance of open justice in permitting scrutiny of decisions made to prosecute in a particular case. The discretion of the executive government to bring proceedings against a particular defendant for particular charges is a matter over which the court has very limited control: *Maxwell v The Queen* (1996) 184 CLR 501 at 514, 534. Clearly, placing prosecutorial decisions in the hands of statutorily independent prosecuting authorities will usually mean that the power to prosecute is exercised responsibly and uncontroversially. However, it remains true that the necessity to conduct criminal proceedings in open court ensures that those who are directly or indirectly responsible for the initiation of the prosecution bear any public opprobrium associated with the decision to prosecute. This ensures political accountability for prosecutorial decisions and thereby a degree of control over a very significant power of the executive government. In this case, the importance of accountability for prosecution decisions is legislatively emphasised through the requirement for the consent of the Attorney-General to the institution of prosecutions under the *Intelligence Services Act*: s 41A(3).

128. As the quote from *Hogan* makes clear, the open court principle is subject to qualification where the subject matter of the proceedings requires it. Cases involving attempted blackmail provide a useful example. It would clearly be contrary to the proper administration of justice if, as part of the prosecution for an offence of attempted blackmail, the identity of the victim was made publicly known during the course of the trial. Another exception to the open justice principle are proceedings involving sensitive issues of national security. Where, as in this case, what is being prosecuted is an alleged unlawful disclosure of sensitive information, it would be contrary to the proper administration of justice to compel the prosecution to disclose to the world the sensitive information which the law required to be kept secret. That, of course, is subject to the argument put by the defendant in the present case, that the information has been so widely disseminated that there is no longer any utility in maintaining secrecy at the trial.

129. The legislature has seen fit to provide a framework for dealing with sensitive national security information in the NSI Act. That Act recognises that the open justice principle may be qualified where national security information is involved. It permits the court to make a discretionary decision as to how national security information may be dealt with, but does, by s 31(8), put "a thumb on the scales" that favours the avoidance of a risk of prejudice to national security over other considerations. As pointed out in *Lodhi v The Queen*, that discretionary exercise involves the weighing of incommensurables.

130. The present case is one in which the open justice principle has particular work to do [redacted]. Having regard to the nature of the disclosures alleged to have been made by the defendant and the context in which they are alleged to have been made, there is considerable public interest in the initiation, conduct and outcome of the proceedings against the defendant.

131. Having regard to the terms of the public statements made by the defendant which give rise to Counts 2, 3, 4 and 5, it is clear that the defendant considers that [redacted].

132. One final but important aspect of the operation of the open justice principle and the significance in the present case of any qualification upon it, is that if the defendant is convicted upon any of the charges there will be limitations upon the reasons for sentence that can be made publicly available. The effect of that will be to obscure from public understanding the basis upon which any particular sentence is imposed. If an apparently severe sentence is imposed, because the ASIS information the subject of the charge has not been publicly disclosed it will not be apparent to members of the public whether the information disclosed was of particular sensitivity warranting a severe sentence or whether the sentence imposed is simply a harsh penalty for the disclosure of less significant information. Alternatively, if an apparently lenient sentence is imposed it will not be readily apparent whether that is because of the nature of the information disclosed or by reason of the subjective circumstances of the defendant. These limitations upon what will be known about any sentence imposed will, even if the limitations are imposed after a fair hearing conducted pursuant to statute, be limitations which will detract from the transparency of the judicial process and hence have a tendency to undermine public confidence in that process.

Fair hearing

133. However, in addition to emphasising the extent of interference with the open justice principle in relation to the trial, the defendant says that specific prejudice will arise because of the effect upon the jury of the need to open and close the court or use other techniques designed to protect parts of the evidence from public disclosure. The submission was that this will affect the jury's perception of the defendant and the significance of the allegations against him in a way that is prejudicial to his interests. The defendant submitted that the existence of orders is likely to prejudice the defendant in the eyes of the jury. That is because the jury will be aware that portions of the trial are held in closed court and will be instructed that the evidence heard in closed court may not be disclosed by them. This, according to the defendant, will contrast in the mind of the jurors with the previous publicity given to the circumstances surrounding the statements made by the defendant and will give jurors the impression that the defendant's acts have caused and continue to cause significant risks to national security. That reasoning is likely to cause the jury to be set against the defendant and any evidence that he calls. The defendant contended that any direction will not cure the problem and will exacerbate it. Further, he submitted that the disruptions to the trial caused by the protection of the evidence will cause frustration to the jury for which the defendant will be blamed. As a consequence, the defendant submitted that the trial procedure would be unfair.

134. I accept that even if the uncontentious orders protecting the yellow highlighted information is made, the management of the trial and, in particular, the jury, will be significantly complicated. It will clearly be necessary to manage the sensitive evidence in a way that minimises any possible prejudice against the defendant arising from restrictions upon that evidence. That will require directions to the jury that there are some restrictions associated with the evidence, including restrictions which apply to them personally. It will require some care as to the scheduling of witnesses, the opening and closing of the court so that the restrictions upon who may be present in court does not become a prejudicial distraction to members of the jury or leave them with any impression prejudicial to the defendant. It is not possible to identify now precisely what measures might be adopted by the trial judge. However, they are challenges which, in my view, may quite readily be overcome.

135. The fundamental premise upon which jury trials take place is that jurors understand and comply with the directions that they are given by the trial judge: *Gilbert v The Queen* [2000] HCA 15; 201 CLR 414 at [31]. While trials involving the NSI Act or the subject matter of the present charges are not common, the issues as to the management of sensitive information or the nature of directions that need to be given to members of the jury are not so significantly different from the issues that often arise in jury trials as to prevent the conclusion that with careful management and appropriate directions the jury will be able to fairly perform its function.

136. The need to explain to jurors the restrictions on their disclosure of information that they have access to is not unusual. It must be recognised that in the day-to-day work of this court, nondisclosure regimes will often apply in circumstances which require care to ensure that the procedures required by law to be adopted do not prejudice a defendant. The most commonly arising situation involves cases in which there is a statutory prohibition on identifying a complainant (*Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 74) or a defendant who was a child at the time of the alleged offending (*Criminal Code 2002* (ACT) s 712A). Orders of broader scope are not uncommonly made under s 111 of the *Evidence (Miscellaneous Provisions) Act*. Like the orders proposed in this case, those statutory provisions also bind members of the jury. Such provisions require some explanation to the jury so that they are both aware of their obligations and that those obligations do not prejudice the interests of the defendant in the trial. So too with the specific provisions for giving evidence which apply in many sexual offence proceedings (*Evidence (Miscellaneous Provisions) Act*, Ch 4). While the NSI Act is, in some ways, a significant departure from other court related legislation, the need to explain matters to juries and conduct the case so as to avoid prejudice to a defendant because of requirements for nondisclosure or the need for special measures for some part of the evidence is not an unfamiliar one.

137. I accept, however, that on either the Attorney-General's or the defendant's approach to disclosure, the exercise in this case will be more burdensome than in those more familiar categories of case. That is first because of the fact that the boundaries between disclosable and nondisclosable information are more complex than if the subject matter of nondisclosure is simply an identity of a party or a witness. Second, it is because the non-disclosable material goes to the heart of the charges against the defendant, not one or two readily compartmentalised facts.

138. In the trial against Mr Lodhi, Justice Whealy "considered that careful and appropriate directions could be crafted in relation to the imposition of protective orders and that they would be respected and taken into account by the jury": A Whealy, "Difficulty in obtaining a fair trial in terrorism cases" (2007) 81 *ALJ* 743 at 752-753.

139. In my view, given that protective orders will need to be made in any event, the additional scope of those orders contended for by the Attorney-General are not such as to give rise to a significant prejudice to the defendant by reason of the practical consequences of the making of protective orders and the effect of those orders on the members of the jury. I consider that the additional restrictions that would be imposed as a result of the orders contended for by the Attorney-General would not be such as to render the defendant's trial unfair or to create a significant risk of the jury being unfairly prejudiced against the defendant.

(a) 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;

140. For the reasons given at [94]-[118] I consider that there is a risk of prejudice to Australia's national security if disclosure occurred contrary to the restrictions in the Attorney-General's certificate, either in accordance with the Defendant's Initial Position or Defendant's Revised Position. As I have endeavoured to point out above, that risk is neither immediate nor catastrophic. [Redacted]. Precisely how those risks will manifest themselves is not possible to determine. However, they are real risks. [Redacted].

(b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence;

141. As pointed out at [20] above, the starting point when considering this issue is that the whole of the Confidential Prosecution Brief has been disclosed to the defendant and he will be able to deploy the material in that brief as he sees fit at trial. Any material in that brief (save for some presently uncontroversial redactions) will be able to be put before the jury. It is not a case like *Lappas* where the security sensitive nature of the material will preclude the defendant from, for example, tendering it in order to contest the charges against him. He will be substantively unconstrained in his capacity to deploy the Sensitive Information within the trial. The constraints that would be imposed are procedural constraints in relation to the handling of that information, and constraints on its public disclosure.

142. So far as the mechanics of the trial are concerned, both the restrictions in the Attorney-General's Certificate and the restrictions that would be involved in the Defendant's Initial Position or Defendant's Revised Position would require the opening and closing of court, the management of confidential information and the need to give directions to the jury so as to ensure that those aspects of the trial do not cause prejudice to the defendant.

143. When comparing the alternative scenarios, I do not consider that additional prejudice of any significance will be caused to the defendant. Further, when comparing the position proposed by the Attorney-General and a situation where no orders were made I consider that, having regard to the capacity to give directions to a jury, that there will be no substantial adverse effect on the defendant's right to receive a fair hearing. To pick up the statutory language in the definition of "substantial adverse effect", I consider that, if properly managed, the adverse effect upon the fairness of the hearing will be "insubstantial".

144. As indicated at [124] above, I have considered the open justice principle in the context of s 31(7)(c). The conclusion that I have reached in relation to my exercise of discretion under s 31(7) would be no different had I considered the open justice principle here in paragraph (b) rather than under paragraph (c).

(c) any other matter the court considers relevant.

145. The operation of the open justice principle coincides with the defendant's desire to compel the prosecution to disclose [redacted].

146. Clearly the open justice principle is a matter that needs to be given significant weight. There must be a very good reason to depart from it which is compelled by the proper administration of justice. In a case involving allegations that information has been unlawfully disclosed, it is not inconsistent with the proper administration of justice that the public disclosure of the accuracy or otherwise of that information not be compelled as a condition of enforcing the law. To approach the matter otherwise would tend to undermine the law in question.

147. [Redacted]. Regard must also be had to the high profile nature of the case [redacted]. Those are matters which emphasise the desirability of the conduct of the proceedings in public so as to not detract from public confidence in the administration of justice.

148. Thus, there is clearly some infringement or some additional infringement of the open justice principle in making orders sought by the Attorney-General as opposed to either of the alternatives proposed by the defendant. If this issue should, as a matter of taxonomy, be considered as a component of the defendant's right to receive a fair hearing in s 31(7)(b) then I would conclude that notwithstanding the detraction from the openness of the hearing, the impact upon the defendant's right to a fair hearing was one which was "insubstantial" and hence of itself did not amount to a "substantial adverse effect" (as defined in s 7 of the NSI Act) on his right to a fair hearing.

149. So far as the defendant contended that there would be benefits of disclosure in accordance with the Defendant's Initial Position or Defendant's Revised Position, any such benefits would, in my view, be substantially outweighed by the adverse consequences of disclosure. I consider that any damage to Australia's international reputation as a result of the additional level of nondisclosure contended for by the Attorney-General would be minor.

Conclusion

150. In considering the three categories of matters referred to in s 31(7), the court is obliged by s 31(8) to give "greatest weight" to whether there would be a risk of prejudice to national security if information was disclosed other than in accordance with the Attorney-General's certificate. As the decisions involving Mr Lodhi make clear, the command in s 31(8) does not mean that the risk of prejudice to national security will necessarily determine what order should be made under s 31. However, in the present case I consider that the risk of prejudice to national security is a real risk which is entitled to significant weight. In reaching that conclusion I have been conscious of the risk that an assertion of prejudice to national security in the very broad sense that it is defined in the Act may be used as a cover to protect from disclosure in a trial material which is merely politically embarrassing to a government or to avoid legitimate scrutiny of its conduct. I consider that the making of orders consistent with the restrictions set out in the Attorney-General's certificate would be appropriate because to do so would not have a substantial adverse effect on the defendant's right to receive a fair hearing and that, in a case such as the present, the principle of open justice does not outweigh the desirability of protecting the information originally highlighted in yellow in the Confidential Prosecution Brief from public disclosure in circumstances other than those outlined in the certificate. In reaching that conclusion I have had regard to the object of the NSI Act set out in s 3 and I consider that such an outcome is consistent with that object.

151. I have reached that conclusion without regard to the "court only" material which the Attorney-General wished to rely upon and that material has not been provided to the

court. Because of the conclusion that I have reached it is not necessary to hear any further argument on the admissibility or use of that evidence.

Orders

152. For the reasons I have given, it is appropriate to make orders substantially in the terms sought by the Attorney-General.

153. Because I have accepted the position identified by the Attorney-General, the s 31 order may be made by reference to the version of the Confidential Prosecution Brief referred to in the s 26 certificate rather than the marked up version that became Exhibit 13.

154. As pointed out above, the form of the order proposed by the Attorney-General was expressed to operate upon those to whom "the contents of the Certificate are disclosed". That follows the statutory language in s 31(4)(b). However, given that the certificate itself does not contain any Sensitive Information it does not make the knowledge of that information the trigger for the imposition of obligations under the order upon a person. Rather, it appears to make knowledge of the content of the s 26 certificate (as a result of disclosure of the terms of that certificate by the Attorney-General or the court) the trigger for the operation of the orders upon a person. The orders may therefore notionally operate upon a person even prior to any disclosure of Sensitive Information to the person but would then operate in a substantive way once some such information was disclosed to the person.

155. The orders may require some future modification in relation to issues arising during the trial or in relation to the management of the Court file after the proceedings are concluded. I will make that express by making the orders "until further order of the Court". Consistently with that approach it is appropriate to grant liberty to apply in relation to the order ultimately made so that any practical difficulty or new issue that arises in the course of preparation for the trial or during the trial can be addressed

156. It is also appropriate that these reasons be made publicly available at some stage to the fullest extent possible, consistent with the orders that I make. The general approach to a pre-trial ruling such as this would be to defer publication until the conclusion of the trial in order to avoid any prejudice to the defendant arising from that publication. Having regard to the extent of publicity given to this case, including by the defendant, it is appropriate that I hear submissions as to whether publication of these reasons in some form prior to the trial is appropriate. If they are to be published then they are likely to require some redaction in order to be consistent with the orders that I make. I will direct the Attorney-General to propose any redactions that are required before these reasons may be published on the internet.

157. The orders of the Court are:

    1. The Court orders, pursuant to s 31(4) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), that, until further order of the Court:

        (a) those persons to whom the Attorney-General's certificate of 18 September 2019 as amended on 20 November 2019 (the Certificate) was given; and

        (b) those persons identified in the Certificate as Relevant Persons; and

(c) any other person to whom the contents of the Certificate are disclosed by the Attorney-General or the Court for the purpose of the hearing (in the case of the Attorney-General, upon notification by the Commonwealth Director of Public Prosecution that such disclosure is reasonably necessary for the conduct of the proceeding),

must not, except in the permitted circumstances provided by the Certificate or by s 16(a) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), disclose (within the proceeding or otherwise) the information which is the subject of the certificate.

2. The parties and the Attorney-General have liberty to apply to Mossop J or the trial judge in relation to the orders made under s 31 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

3. The Attorney-General is to serve on the parties and provide to the associate to Mossop J by 7 July 2020 a marked up copy of these reasons identifying any redactions that he says should be made prior to publication on the internet.

4. The parties are to identify their position in relation to redaction and publication of the reasons at the hearing on 10 July 2020.

Schedule

Defendant's list of Identified Matters (see [46] of the reasons):

[Redacted]

I certify that the preceding one hundred and fifty-seven [157] numbered paragraphs and the schedule are a true copy of the Reasons for Judgment of his Honour Justice Mossop.

Associate:

Date: 26 June 2020

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Amendment

30 July 2020	Replace "the Director" with "the prosecutor"	Paragraph: [16]