

**SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL**

Case Title: Collaery v The Queen (No 2)
Citation: [2021] ACTCA 28
Hearing Date(s): 17 and 18 May 2021
Decision Date: 6 October 2021
Before: Murrell CJ, Burns and Wigney JJ
Decision: Appeal allowed. See [127]–[130]
Catchwords: **APPEAL** – National security – appeal from order prohibiting disclosure – consideration of s 31 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) – whether statements had already been confirmed or denied – consideration of the risk of prejudice to national security – consideration of effect on appellant’s right to a fair trial – consideration of the risk of damage to public confidence in the administration of justice

Legislation cited: *Australian Security Intelligence Organisation Act 1979* (Cth) s 4
Criminal Code Act 1995 (Cth) s 11.5
Intelligence Services Act 2001 (Cth) s 39
Judiciary Act 1903 (Cth) ss 68(1), 79(1)
National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) ss 16, 24, 26, 27, 31, 37
Supreme Court Act 1933 (ACT) s 37N

Cases cited: *Aldi v Moroccanoil Israel Ltd* [2018] FCAFC 93; 261 FCR 301
Bright v The Queen [2018] ACTCA 39
Fox v Percy [2003] HCA 22; 214 CLR 118
Hogan v Hinch [2011] HCA 4; 243 CLR 506
House v The King (1936) 55 CLR 499
Jago v District Court (NSW) (1984) 168 CLR 23
Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119; 279 FCR 114
John Fairfax Publications Pty Ltd & Anor v District Court of New South Wales & Ors [2004] NSWCA 324; 61 NSWLR 344
Jovanovic v The Queen [2015] ACTCA 29
Lacey v Attorney-General for the State of Queensland [2011] HCA 10; 24 CLR 573
Lodhi v The Queen [2007] NSWCCA 360; 197 A Crim R 470
Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; 264 CLR 541
Moevao v Department of Labour [1980] 1 NZLR 464
R v Collaery (No 7) [2020] ACTSC 165
TS v DT [2020] ACTCA 43
Wainohu v New South Wales [2011] HCA 24; 243 CLR 181
Warren v Coombes (1979) 142 CLR 531

Parties: Bernard Collaery (Appellant)
The Queen (Respondent)
The Attorney-General (Intervenor)

Representation: **Counsel**
B Walker SC with C Ward SC and K Archer (Appellant)
R Maidment QC with C Tran (Respondent)
J Kirk SC with A Mitchelmore SC, T Begbie QC and D Forrester (Intervenor)

Solicitors
Gilbert + Tobin (Appellant)
Commonwealth Director of Public Prosecution (Respondent)
Australian Government Solicitor (Intervenor)

File Number(s): ACTCA 27 of 2020

Decision under appeal: Court/Tribunal: ACT Supreme Court
Before: Mossop J
Date of Decision: 26 June 2020
Case Title: R v Collaery (No 7)
Citation: [2020] ACTSC 165

THE COURT:

1. The appellant, Bernard Collaery, is awaiting trial on four charges of breaching s 39 of the *Intelligence Services Act 2001* (Cth) (the ISA), and one charge of conspiring with another person (referred to as Witness K) to breach s 39 of the ISA. Subject to exceptions, s 39 makes it an offence punishable by 10 years' imprisonment for a person to communicate any information that was acquired or prepared by or on behalf of the Australian Secret Intelligence Service (ASIS) in connection with its functions or that relates to the performance by ASIS of its functions, where the information has come to the person's knowledge by reason of them having entered into a contract, agreement or arrangement with ASIS.
2. On 26 June 2020 the primary judge made an order under s 31(4) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the NSIA) which has the effect of prohibiting public disclosure of certain information likely to be disclosed to the Court in the appellant's trial: *R v Collaery* (No 7) [2020] ACTSC 165; (2020) 283 A Crim R 524. A consequence of the order is that part, perhaps a large part, of the appellant's trial will be closed to the public and evidence that is important in the trial will not be disclosed to the public. The appellant has appealed from that order.
3. The charges concern the appellant's conduct between 2012 and 2014. It is said that the appellant disclosed, or conspired to disclose, information concerning [REDACTED].

4. Reports of an alleged espionage operation have long been in the public domain. As the primary judge observed, on 3 May 2013 the then Minister for Foreign Affairs and the then Attorney-General for Australia issued a joint press release stating that Timor-Leste had initiated arbitration under the 2006 Treaty challenging its validity on the ground that, “by engaging in espionage” in 2004, the Australian government had failed to conduct the Treaty negotiations in good faith. Many press articles referring to an alleged espionage operation were in evidence before the primary judge. There can be no doubt that the defendant’s allegations have received substantial coverage in the press and on television.
5. The Australian government has a policy that it neither confirms nor denies reports of matters relating to national security (the NCND policy). It has maintained that stance in relation to the defendant’s allegations.
6. As the primary judge observed, in the appellant’s trial the respondent must prove that some of the information communicated by the appellant 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”: s 39(1)(a) of the ISA.
7. During this appeal, there was debate about whether the respondent had to prove that information communicated by the appellant was factually true. It is unnecessary to resolve that issue because the respondent accepts that some of the information was factually true and, at the appellant’s trial, it proposes to tender documents that will prove that the defendant’s allegations were either true or false.
8. The Attorney-General maintains that the evidence that establishes which parts of the information communicated were factually true should be led in closed court and should be subject to orders prohibiting disclosure to persons other than those necessarily involved in the trial. By this means, the NCND policy would be maintained as far as the general public was concerned.
9. All relevant information has been provided to the appellant and his lawyers. The issue is not whether the information should be disclosed to an accused person but whether it should be publicly disclosed.
10. A certificate issued by the Attorney-General pursuant to s 26 of the NSIA defined the “sensitive information” by reference to the respondent’s brief of evidence, in which the Attorney-General had highlighted the parts that he said should not be publicly disclosed. In the proceeding below, the Attorney-General pressed for an order under s 31(4) of the NSIA preventing public disclosure of all the highlighted parts. Ultimately, the appellant accepted that much of the highlighted material should not be disclosed. He sought public disclosure only of information relating to the truth of six specific matters (the Identified Matters).
11. The primary judge concluded that none of the highlighted material, or any information that might reveal or tend to confirm or deny the truth of the material, should be publicly disclosed, including any material or information relating to the truth of the Identified Matters.
12. In the present appeal, the issue is whether in relation to the Identified Matters, that conclusion was wrong.
13. The Identified Matters are that:
[REDACTED]

The NSIA

14. A history of the background to the NSIA is found at [11] to [13] of the primary judge's reasons, and it is not necessary to repeat that history.
15. We draw attention to the relevant provisions of the NSIA.
16. The long title to the NSIA establishes that the purpose of the Act is to protect certain information from disclosure, inter alia, in federal criminal proceedings. The object of the NSIA is found in s 3:

3 Object of this Act

- (1) The object of this Act is to prevent the disclosure of information in federal criminal 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.
17. The NSIA obliges a prosecutor, a defendant or a defendant's legal representative who knows or believes that national security information will be disclosed in a federal criminal proceeding to notify the Attorney-General: s 24 of the NSIA. If the Attorney-General considers that the disclosure is likely to prejudice national security, the Attorney-General may, among other things, provide the potential discloser with a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information: s 26 of the NSIA. Until the commencement of the hearing required by s 27(3) of the NSIA, such a certificate is conclusive evidence that disclosure of the information is likely to prejudice national security: s 27(1) of the NSIA.
 18. Where a s 26 certificate is given by the Attorney-General to a potential discloser in federal criminal proceedings before the commencement of the trial, the court must hold a hearing to determine whether to make an order under s 31 in relation to the disclosure of the protected information: s 27(3) of the NSIA.
 19. After holding a hearing as required by s 27(3), the court must make an order under sub-section (2), (4) or (5) of s 31: s 31(1) NSIA.
 20. Orders under s 31(2) and s 31(4) are orders that specified persons must not, except in permitted circumstances, disclose the information in the proceeding. Section 16 of the NSIA defines permitted circumstances as follows:

16 Disclosure of information in permitted circumstances

A person discloses information *in permitted circumstances* if:

- (a) the person is the prosecutor in a federal criminal proceeding and the person discloses the information in the course of his or her duties in relation to the proceedings; or
 - (b) the person discloses the information in circumstances specified by the Attorney-General in a certificate or advice given under section 26, 28, 38F or 38H.
21. An order under s 31(5) permits the disclosure of the information in the proceeding.
 22. In deciding which order to make, the court must take into account the matters that are found in s 31(7)-(8):

Factors to be considered

(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;
...

(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).

23. The term "national security" is defined in s 8 of the NSIA to mean "Australia's defence, security, international relations or law enforcement interests". In s 9, the NSIA picks up the meaning of the term "security" in the *Australian Security Intelligence Organisation Act 1979* (Cth):

security means:

(a) the protection of, and 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).

24. The term "international relations" is defined in s 10 of the NSIA to mean "political, military and economic relations with foreign governments and international organisations".

25. The term "law enforcement interests" is defined in s 11:

11 Meaning of law enforcement interests

In this Act, **law enforcement interests** includes interests in the following:

- (a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;
 - (b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;
 - (c) the protection and safety of informants and of persons associated with informants;
 - (d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.
26. The NSIA deals with information and the extent to which certain information may be disclosed in court proceedings. It casts the net very wide when identifying the interests and activities that may come within its ambit. Of course, the information must pertain to a subject matter of a type that the NSIA seeks to protect; it is in the identification of those subject matters that the NSIA reveals a very broad approach.
27. In the present case, on 29 May 2018 the respondent gave notice pursuant to s 6(2) of the NSIA that the Act applied to the proceedings against the appellant. On 21 August 2019, the respondent gave notice to the Attorney-General under s 24(1) of the NSIA that she believed that she would disclose national security information in the proceedings against the appellant. On 18 September 2019, the Attorney-General issued a certificate under s 26 of the NSIA, which was amended by a further certificate issued on 20 November 2019. The effect of the certificates was that specified information in the prosecution brief relating to [REDACTED] and information which may directly or indirectly reveal that information or tend to confirm or deny that information, was not to be disclosed except in certain circumstances.

The hearing before the primary judge

28. In the hearing under s 27(3) of the NSIA, the evidence before the primary judge was principally by affidavit. Seven witnesses provided affidavits which were read in the Attorney-General's case. All but one of those witnesses were cross-examined on behalf of the appellant. Affidavits of 10 witnesses were read in the appellant's case, including affidavits from Xanana Gusmao and Jose Ramos-Horta, former Prime Ministers of Timor-Leste. Only three of the deponents were required for cross-examination.
29. The primary judge accepted that the witnesses were honest and credible. His Honour noted that the witnesses for the Attorney-General tended to be serving or recently retired senior officers of the government, which meant that they were likely to be more acutely aware of the currency and immediacy of risks to the national security. On the other hand, many of the appellant's witnesses were former senior officers of the Commonwealth who had been retired for some time. The primary judge considered that the appellant's witnesses had a broader perspective on the significance of risks created by the public disclosure of information.

The primary judge's decision

30. At [92], the primary judge found that 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.

[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.

31. At [93], the primary judge found that the evidence called by the appellant 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 circumstances of the current case.

[REDACTED]

- (f) Disclosure would improve Australian's reputation internationally by demonstrating its commitment to transparency and the rule of law.
- (g) The continuation of the prosecution itself would damage relations with Timor-Leste and its discontinuation would be of benefit to bilateral relations.
- (h) Conduct of any part of the prosecution in secret would harm Australian's international reputation.

32. This distillation of the evidence by the primary judge was not challenged in the present appeal.

33. The primary judge made the following findings:

- (a) The nature of the prejudice to national security risked by public disclosure of the information was "a risk of incremental prejudice [REDACTED]. It was not possible to determine with certainty when and how that prejudice may occur or, if an event occurred, whether the event was caused by disclosure.

[REDACTED]

- (f) If the information was disclosed, it was unlikely that there would be any dramatic, adverse consequences for Australia in its relationship with Timor-Leste.

[REDACTED]

- (j) Some harm would be done to Australian's intelligence activities if the information was published generally.
 - (i) There would be reputational harm to Australia arising from its inability to prosecute allegedly significant breaches of national security laws.
 - (ii) There was a limited risk that the Identified Matters could be used for "mosaic analysis" by foreign intelligence services.
 - (iii) Disclosure would provide an incentive for persons disclosing national security information to do so in a public manner and would disincentivise the prosecution of persons alleged to have disclosed national security information.

[REDACTED]

- (n) The impact of disclosure on Australia's international reputation may be ameliorated by the perception that disclosure was consistent with Australia's liberal values, and its commitment to transparency and the rule of law.
34. In the primary proceeding, it was common ground that some parts of the appellant's trial could not be conducted in public. Consequently, consideration of the practical consequences of the orders sought by the Attorney-General involved a comparison of two scenarios, each of which contemplated that significant parts of the evidence would be heard in closed court. However, the orders sought by the Attorney-General would involve a greater restriction on the openness of the court; impacting the open court principle.
35. The primary judge referred to the judgment of French CJ in *Hogan v Hinch* [2011] HCA 4; 243 CLR 506 at [20] to [22] regarding the open court principle:
- 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 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 matters 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 of 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.

[citations omitted]

36. In addition, his Honour referred to the importance of open courts in permitting scrutiny of prosecutorial decisions that would otherwise be difficult to scrutinise. His Honour noted that the allegations of impropriety by the Australian government had been widely publicised, and that there was considerable public interest in the appellant's prosecution.
37. Another aspect of the open court principle to which the primary judge referred is that, if the appellant is convicted, there will be limitations on the reasons for sentence that can be made publicly available, depriving the public of the ability to understand and scrutinise the sentencing exercise.
38. In the proceeding before the primary judge, the appellant submitted that, at the trial, he would experience specific prejudice because of the effect on the jury of the court being opened and closed and the use of other techniques to prevent public disclosure of parts of the evidence. The appellant submitted that those matters and the associated direction that the jury must not disclose evidence heard in closed court may give the jurors the impression that the appellant's acts had indeed caused and continued to cause significant risks to national security.
39. The primary judge acknowledged that, if the orders sought by the Attorney-General were made, the appellant's trial would be "significantly complicated". However, it was his Honour's view that any potential prejudice to the appellant could be overcome by appropriate directions to the jury. The primary judge concluded, at [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 injury being unfairly prejudiced against the defendant.
40. Having considered the matters referred to above, the primary judge turned to the statutory criteria in s 31(7) of the NSIA.
41. With regard to the first criterion (s 31(7)(a): whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if the information was disclosed in contravention of the certificate), the primary judge referred to his analysis of the risk to national security if the information was published (as summarised above), and concluded that there was such a risk. The primary judge said that the risk was "neither immediate nor catastrophic", but his Honour concluded that disclosure would be likely to cause some damage to [REDACTED]. His Honour was unable to determine how the risks identified by him would manifest or when, but he considered that they were real risks.
42. Turning to the second statutory criterion (s 31(7)(b): whether any order would have a substantial adverse effect on the appellant's right to receive a fair hearing, including in particular to the conduct of his defence), the primary judge noted that the appellant had received all the relevant information and would be "substantially unrestrained" in his capacity to use that information in the trial. Although the restrictions sought by the Attorney-General would require the opening and closing of the court at various times during the trial and it would be necessary to manage confidential information, his Honour was of the view that any potential prejudice to the appellant could be addressed by appropriate directions to the jury.

43. Regarding the third statutory criterion (s 31(7)(c): any other matter the court considers relevant), the primary judge acknowledged the importance of the open court principle but noted that the principle may be departed from if there are good reasons to do so in the proper administration of justice. His Honour went on to observe, at [146]:
- 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.
44. With regard to the appellant's contention that benefits would accrue to Australia if the information was disclosed, the primary judge considered that any such benefits would be substantially outweighed by the adverse consequences of disclosure.
45. The primary judge noted that, in applying the statutory criteria in s 31(7) of the NSIA, a court is obliged to give greatest weight to the risk of prejudice to national security if the information is disclosed: s 31(8) of the NSIA. By reference to the decision of *Lodhi v The Queen* [2007] NSWCCA 360; 179 A Crim R 470, his Honour concluded that the effect of s 31(8) was not that the statutory criteria set out in s 31(7)(b) and (c) were to be disregarded, but that s 31(8) guided the relative weight to be given to the criteria. While accepting that a risk of prejudice to national security would not necessarily determine the issue, his Honour considered that, in the subject case, the risk was a real one, and was entitled to significant weight. His Honour concluded that it was appropriate to make the orders sought by the Attorney-General because to do so would not have a substantial adverse effect on the appellant's right to a fair trial and, in the subject case, the open court principle did not outweigh the desirability of protecting the information from public disclosure.

The nature of the appeal

46. Appeals are creatures of statute; they do not exist at common law; *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573 at [8] (*Lacey*). In *Lacey* at [57], the majority of the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), identified the most common classes of appeal as:
1. Appeal in the strict sense – in which the court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given. Unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision that should have been given at first instance.
 2. Appeal de novo – where the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error.
 3. Appeal by way of rehearing – where the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error. In some cases in an appeal by way of rehearing there will be a power to receive additional evidence. In some cases there will be a statutory indication that the powers may be exercised whether or not that was an error at first instance.

[citations omitted]

47. The appeal from the decision of the primary judge is under s 37 of the NSIA, which is in the following terms:

37 Appeals against court orders under section 31

- (1) The prosecutor, the defendant or the Attorney-General may appeal against any order of the court made under section 31.
 - (2) The court that has jurisdiction to hear and determine appeals from the judgement on the trial in the proceeding has jurisdiction to hear and determine any appeal under this section.
48. This Court has jurisdiction to hear and determine any appeal from any judgment on the trial of the proceeding in the Supreme Court. Accordingly, it has jurisdiction to hear and determine the present appeal.
49. The parties agreed that the appeal was by way of rehearing, that is, it was an appeal within the third category referred to by the majority in *Lacey*. It was also common ground between the parties that the provisions of the *Judiciary Act 1903* (Cth) (Judiciary Act) “pick up”, the provisions of s 37N of the *Supreme Court Act 1933* (ACT) (SCA) as to the procedures applicable to the appeal. Of particular relevance is s 37N(3) of the SCA, which permits the Court to receive further evidence on appeal. There was disagreement between the Attorney-General and the respondent as to whether s 37N of the SCA was picked up by s 68(1) or 79(1) of the Judiciary Act, but it is unnecessary to resolve that point as, by some mechanism, s 37N of the SCA applies to the present appeal.
50. Later in these reasons, we will return to the appellant’s application to lead fresh evidence on the appeal.
51. On an appeal by way of rehearing, the appellate court is obliged to conduct a “real review” of the proceeding below and the primary judge’s reasons. In *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [25], the plurality of the High Court (Gleeson CJ, Gummow and Kirby JJ) said of such an appeal:
- Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge’s reasons. Appellate courts are not excused from the task of “weighing conflicting evidence and drawing [their] own inference and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect”. In *Warren v Coombes*, the majority of this Court reiterated the rule that:
- “[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it.”
52. In order to vary or reverse the decision of the primary judge, it is necessary for the appellate court to identify error in the primary judge’s findings or conclusions: *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119; 279 FCR 114 (*Jamsek*) at [165]. In *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; (2018) 261 FCR 301 at [45], Perram J (with whom Allsop CJ and Markovic J agreed on this point) said:
- Error is not demonstrated merely because the appellate court disagrees with the primary judge. At the risk of stating the obvious, error is demonstrated where it is shown that some aspect of the trial judge’s reasoning is wrong. How the trial judge’s reasoning may be shown to be wrong depends on what that reasoning is about.

[citations omitted]

53. In an appeal by way of rehearing, it is necessary to identify the nature of the decision from which the appeal is brought. In particular, it is necessary to distinguish between decisions that are truly discretionary (in the sense that they permit a range of outcomes or a latitude of choice) and those that have a single correct outcome (unique-outcome decisions). This distinction determines the standard of review applicable or, to express it another way, the degree of deference that the appeal court should give to the original decision. Where the decision under appeal is discretionary, the appellate court will not interfere unless there has been an error of fact or law (express or by implication) by the primary judge: *House v The King* (1936) 55 CLR 499. Where the decision under appeal is a unique-outcome decision, the decision of the majority in *Warren v Coombes* (1979) 142 CLR 531 obliges the appellate court to “substitute its own conclusion where it disagrees with that of the primary judge”: *Jamsek* at [169]. This may be referred to as the “correctness standard”
54. Regarding this distinction, in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541, Gageler J said at [49]:
- The line is drawn by reference to whether the legal criterion applied or purportedly applied by the primary judge to reach the conclusion demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v The King* standard applies. The resultant line is not bright, but it is tolerably clear and workable.
55. The task required by s 31(1) of the NSIA has features that suggest the exercise of a discretion, in that a court performing the task must determine what weight to give to disparate circumstances and principles in order to arrive at a conclusion. In the proper fulfilment of that task, different judges may give different weight to relevant circumstances or principles.
56. On the other hand, there cannot be two correct answers to the task, one being to permit publication of the subject material and the other being to prohibit it. Contradictory answers cannot both be correct in the circumstances of a particular case. As the task imposed by s 31(1) does not allow for a choice between multiple correct outcomes, the decision is a unique-outcome decision, and the applicable standard of review is the correctness standard.

The application to lead further evidence

57. The appellant applied to lead further evidence (evidence that was not before the primary judge). Ultimately, the proposed evidence as narrowed to:
- (a) a letter dated 8 February 2012 from the Senior Executive Advisor to the Prime Minister of Timor-Leste to the Australian Ambassador in Dili;
 - (b) a letter dated 6 February 2013 from the Prime Minister of Timor-Leste to the Honourable Julia Gillard, Prime Minister of Australia;
 - (c) a file note dated 14 January 2013 concerning a meeting between the Prime Minister of Timor-Leste and a special envoy representing the Australian Prime Minister;
 - (d) a document titled “Draft opening statement”;
 - (e) a document containing “talking points” for a meeting between the Senior Minister and Minister for Foreign Affairs and Cooperation for Timor-Leste and the Australian Government.

58. As noted above s 37N(3) of the SCA permits the Court to receive further evidence on the hearing of the appeal. The principles applicable to an application to lead further evidence were stated in *Jovanovic v The Queen* [2015] ACTCA 29, at [22] to [23]:

22 Ordinarily further evidence will not be admitted on an appeal if it was available, or could reasonably have been obtained at the time of the hearing: *Hillier v The Queen* (2008) 1 ACTLR 235 at [160]. Different considerations may apply where there is a question about whether an irregularity in the proceedings has prevented a party from putting his or her case effectively: *Hillier* at [161]. A decision to withhold evidence at trial will weigh heavily against its reception on appeal: *Hillier* at [164].

23 As noted in *Hillier* at [160], s 27(1) of the *Federal Court of Australia Act 1976* (Cth) similarly provides that when hearing an appeal, the court may ‘in its discretion receive further evidence’. In *August v Commissioner of Taxation* [2013] FCAFC 85 at [116] the Court observed:

The authorities make it clear that the exercising the discretion [to receive further evidence] the Court is not constrained by the factors relevant at common law as enunciated in *Orr v Holmes and Another* [1948] HCA 16: (1948) 76 CLR 632 and *Council of the City of Greater Wollongong v Cowan* [1955] HCA 16; (1955) 93 CLR 435. That is not to say that the common law factors are not relevant, only that they are not the only relevant factors. In many cases it would be most material to consider whether the evidence could have been called at trial and, if it could have been, the reasons it was not, and the extent to which the further evidence had the ability affect the result.

At [119] the Court further explained:

...it should be noted that it is well-established by the authorities that the power in s 27 of the *Federal Court of Australia Act 1976* (Cth) and equivalent sections in other Acts is a remedial power and that an important consideration in terms of the exercise of the power is whether the further evidence would have produced a different result had it been available to the trial or, at least, was likely to have produced a different result.

[citations omitted]

59. These principles were reiterated in *Bright v The Queen* [2018] ACTCA 39 and *TS v DT* [2020] ACTCA 43.

60. The proposed evidence was produced under subpoenas directed to various organs of the Australian government. A series of “cascading subpoenas” was issued by the appellant, commencing before the hearing at first instance and continuing until at least the end of 2020. Associated applications by the respondents to set aside the subpoenas or limit the material to be produced delayed production until 2021. As material was produced and inspected, it prompted further subpoenas. It is not suggested that the appellant’s conduct in issuing the subpoenas was improper or dilatory. He provided a satisfactory explanation for not placing the subpoenaed material before the primary judge.

61. [REDACTED]. This is relevant to the continuing efficacy of the NCND policy as it relates to these events.

62. The question that must be answered is: had this material been before the primary judge, is it likely that the result of the hearing would have been different? The clear answer is “no”. The primary judge accepted [REDACTED]. Consequently, the further

evidence would have made no difference to the findings and orders made by the primary judge.

63. The application to lead further evidence should be refused.

The grounds of appeal

64. The grounds of appeal pleaded by the appellant were legion. It is not necessary to set them all out. Where, as here, the decision appealed from is a unique-outcome decision, the ultimate question for the appellate court must be: was the decision correct?
65. We will adopt the general approach taken by the appellant and consider four questions before returning to determine the correctness of the primary judge's conclusions. These questions interrogate intermediate conclusions reached by the primary judge. They are:
- (a) Have the statements made by the appellant already been confirmed or denied?
 - (b) Did the evidence before the primary judge establish that publication of the Identified Matters involved a relevant risk of prejudice to national security?
 - (c) Will refusal to permit the publication of the Identified Matters prejudice the appellant's right to a fair trial?
 - (d) What matters concerning the proper administration of justice are relevant, and what weight should be given to them?
66. Before turning to these questions, we will set out detail of the charges against the appellant and briefly summarise the effect of the evidence directed towards establishing that publication of the Identified Matters would create a risk of prejudice to national security, as argued by the Attorney-General.

The charges

67. Count 1 alleges that an offence contrary to s 11.5 of the *Criminal Code 1995* (Cth) and s 39 of the ISA occurred between about 1 December 2008 and 31 May 2013. The charge alleges that the appellant conspired with Witness K to communicate information or matters to the government of Timor-Leste that was prepared by or on behalf of ASIS, in connection with, or related to, its functions.
68. Count 2 alleges that an offence contrary to s 39 of the ISA occurred on 3 December 2013, when the appellant communicated information to Emma Alberici on the ABC Television's "Lateline" program, which information was prepared by or on behalf of ASIS in connection with, or related to, its function.
69. The interview between the appellant and Ms Alberici occurred on the same day that a search warrant was executed by the Australian Security Intelligence Organisation (ASIO) at the appellant's home and office, at which time Australia and Timor-Leste were engaged in arbitration proceedings that had been commenced by Timor-Leste on 23 April 2013 in the International Court of Justice (ICJ). The appellant was retained by the government of Timor-Leste as a legal advisor in that arbitration. The interview with Ms Alberici was lengthy. In it, the appellant made many assertions of fact. He alleged that a "technical team" had been sent to Dili to liaise with an "Australian aid construction team" that was effecting renovations to rooms used by the Timor-Leste Prime Minister and his colleagues. The appellant told Ms Alberici that "bugs" had been inserted in a hollow wall and there had been a "listening post" where a transcript had

been prepared. The appellant said that the Australian Minister involved in the negotiations “knew what the Timorese were thinking”. The appellant made many other factual assertions.

70. Count 3 is in similar form to Count 2 but relates to a communication between the appellant and Peter Lloyd of ABC News Radio that occurred on 3 December 2013. In the interview with Mr Lloyd, the appellant made the numerous factual assertions, including many concerning [REDACTED].
71. Count 4 is also in a similar form to Count 2 but charges a communication between the appellant and Connor Duffy of ABC Television’s “7.30 Report” on 4 December 2013. The appellant made many factual assertions, some of which directly related to [REDACTED].
72. Count 5 is in similar form to Count 2 and alleges communication between the appellant and Marian Wilkinson and Peter Cronau of ABC Television’s “4 Corners”. The appellant made many factual assertions regarding [REDACTED].
73. The common factor in each of the interviews that form the basis of charge against the appellant is that he made many factual assertions and communicated information regarding [REDACTED] or the operations of ASIS generally, at least some of which had been prepared by or on behalf of ASIS.
74. Other than by reference to the indictment, there was little clarity about precisely what information formed the basis of each charge. The appellant had not sought, and the respondent had not provided, particulars of the charges.

The evidence of risk to national security

75. On an appeal by way of rehearing, the Court must conduct a real review of the proceeding before the primary judge. We have considered the affidavits before the primary judge, and the transcripts of the oral evidence before his Honour.
76. Little purpose would be achieved by summarising the evidence. The primary judge adequately summarised it.
77. The appellant submitted that his Honour should have been critical of a witness who gave evidence for the Attorney-General.
78. However, his Honour had the benefit of seeing and hearing the witness. We will not cavil with his Honour’s assessment of the credibility of the witness. We are not persuaded that the assessment was wrong.
79. The evidence called by the Attorney-General supports the proposition that there is a risk that some harm could come to Australia’s security interests, in the broad sense described in the NSIA, if information concerning the Identified Matters was published generally. It is not possible to assess the probability of harm occurring (the level of the risk), the nature of the possible harm, the exact category of national security interest that may be affected, or the duration of any harm.
80. It is appropriate that this consideration be given its full weight when conducting the balancing exercise required by s 31 of the NSIA. What weight the evidence is reasonably capable of bearing is another matter.

(a) Have the statements made by the appellant already been confirmed or denied?

81. The information that the primary judge ruled should not be made public shows that [REDACTED].
82. The appellant submitted that the Commonwealth has publicly confirmed the truth of the matters that were subject of the primary judge's non-disclosure orders by:
- (a) publicly disclosing the charges against the appellant by reference to the identified statements of the appellant;
 - (b) a public statement made by a former Attorney-General and a former Foreign Minister;
 - (c) the "fact of" the proceedings in the Permanent Court of Arbitration; and
 - (d) the formal written and oral statements made by Australia in the ICJ in the proceedings brought against Australia by Timor-Leste.
83. The Attorney-General accepted that, by bringing the charges against the appellant, the Commonwealth had "effectively confirmed" the truth of some statements of alleged fact made by the appellant. However, the Attorney-General pointed out that there had been no official confirmation of what parts of the appellant's statements were true and what parts were not; the bringing of charges did not confirm any particular part of the appellant's statements.
84. The Attorney-General's submission is correct. As a matter of logic, the bringing of the charges against the appellant cannot amount to a confirmation that any particular factual assertion made by the appellant is or is not true, particularly as the respondent has provided no particulars of the charges.
85. By letter dated 5 December 2012, the then Prime Minister of Timor-Leste, Kay Rala Xanana Gusmao, wrote to the then Prime Minister of Australia, the Honourable Julia Gillard, expressing the beliefs of the government of Timor-Leste concerning [REDACTED]
- [REDACTED]
86. On 17 December 2012, the Australian Prime Minister replied:
- [REDACTED]
87. On 23 April 2013, Timor-Leste initiated arbitration proceedings against Australia under the Treaty. On 3 May 2013, the then Australian Foreign Minister and the then Australian Attorney-General issued a press release in the following terms.
- ARBITRATION UNDER THE TIMOR SEA TREATY
- Timor-Leste notified Australia on April 23 that it has initiated arbitration under the 2002 Timor Sea Treaty of a dispute related to the 2006 *Treaty on Certain Maritime Arrangements in the Timor Sea* (CMATS).
- The arbitration relates to the validity of the CMATS treaty. Timor-Leste argues that CMATS is invalid because it alleges Australia did not conduct the CMATS negotiations in 2004 in good faith by engaging in espionage.
- These allegations are not new and it has been the position of successive Australian Governments not to confirm or deny such allegations.
- However, Australia has always conducted itself in a professional manner in diplomatic negotiations and conducted the CMATS treaty negotiations in good faith.

Australia considers that the CMATS treaty is valid and remains in force.

Australia remains committed to the Timor Sea treaty framework, including the CMATS treaty. The treaties provide certainty for investors and delivery benefits to both countries from our shared resources including equal sharing of upstream revenue from the Greater Sunrise area.

The Australian Government is considering its response to Timor-Leste's arbitration notification.

88. The appellant submitted that written and oral statements made by Australia in various ICJ proceedings relating to the arbitration requested by Timor-Leste [REDACTED]. The appellant relied on:
- (a) the Written Observations of Australia on Timor-Leste's Request for Provision Measures dated 13 January 2014;
 - (b) the Verbatim Record in the case concerning Questions relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v Australia*) held on 21 January 2014;
 - (c) the Verbatim Record in the case concerning Questions relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v Australia*) held on 22 January 2014; and
 - (d) the Counter-Memorial of Australia in the case concerning Questions relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v Australia*) dated 28 July 2014.
89. The proceeding to which these documents relate was commenced by Timor-Leste after ASIO executed a search warrant at the appellant's home office and seized documents and things said to be relevant to Timor-Leste's request for arbitration in the ICJ. In the proceeding relating to the seized documents and things, Timor-Leste argued, inter alia, that the things seized were the subject of legal professional privilege. Australia and its representative before the ICJ made statements to the effect that there was a reasonable apprehension that the appellant had committed national security offences by reason of which he had come into possession of the seized material. Consequently, so it was argued, the material was created or came in to the appellant's possession within an accepted exception to the principles governing legal professional privilege.
90. The appellant submitted that these statements were inconsistent with the NCND policy adopted by the Attorney-General in that the statements asserted that the information provided to the appellant by Witness K (and presumably used by the appellant as the basis of the appellant's statements that underpin the present charges) was information prepared by or on behalf of ASIS. Consequently, the truth or falsity of the information that was the subject of the suppression order made by the primary judge had already been confirmed and the NCND policy was not engaged.
91. We reject this submission. The statements made by Australia and its officials were ambiguous regarding which facts asserted by the appellant were correct and which were incorrect. There is no reason to doubt the evidence before the primary judge that [REDACTED].
92. The appellant placed great emphasis on the response by Prime Minister Gillard to [REDACTED] Prime Minister Gusmao's letter of 5 December 2012 as having a

particular meaning [REDACTED]. Grammatically, the appellant may be correct. However, in our view, the letter from Prime Minister Gillard should not be read as departing from the NCND policy [REDACTED].

93. The appellant submitted that, if the Identified Matters were not true, there could be no prosecution under s 39 of the ISA and Australia's representatives at the ICJ could not have asserted that the appellant had committed such an offence. This submission is based upon the proposition that the information the subject of a charge under s 39 must be factually "true" or "correct".
94. Although it is strictly unnecessary to determine the issue in order to resolve the present appeal, there is nothing in s 39 that supports the proposition. Even if, for the purposes of a prosecution under s 39, the information communicated must be factually true, there remains an ambiguity regarding which of the assertions of fact made by the appellant were true. [REDACTED].
95. The statements made by the appellant have not been confirmed.

(b) Did the evidence before the primary judge establish that publication of the Identified Matters involved a relevant risk of prejudice to national security?

96. In determining whether to permit or prohibit publication of the Identified Matters, the primary judge had to consider whether there would be a risk to national security if the material was disclosed: s 31(7)(a) of the NSIA. The appellant submitted that the primary judge had erred in failing to find that any incremental risk to Australia's national security by further public disclosure of the Identified Matters would be remote and not likely to prejudice Australia's national security; it was not a real risk.
97. The term "risk to national security" is not defined in the NSIA.
98. The appellant submitted that s 17 of the NSIA is of some assistance. Section 17 provides that, for the purposes of the NSIA, something is "likely to prejudice national security" if there is a real, and not merely a remote possibility that it will prejudice national security. The appellant submitted that s 17 suggests that the NSIA is not concerned with remote possibilities.
99. Consideration of the text of s 31(7)(a) suggests that it is directed to a "risk" that something will occur, being prejudice to national security if the material is published. The term "risk" refers to the possibility that something will occur in the future. Here, the relevant risk is that national security will be prejudiced, or harmed, if the material is published. On its face, s 31(7)(a) does not prescribe a level of risk that is relevant for the purposes of the provision. It does not require that an identified risk is likely to occur.
100. In any event, the question of whether s 31(7)(a) refers to a real risk and not merely a remote risk is academic. The terms of s 31 of the NSIA are mandatory, and the court must, after the hearing required by s 27(3) of the NSIA, make one of the available orders in s 31. In considering what order to make the court must consider those matters set out in s 31(7) of the NSIA. If a risk of prejudice to national security is merely remote, it is unlikely to outweigh the legitimate expectation that criminal proceedings will be conducted in open court.
101. We consider that the legislature deliberately chose a different and lower benchmark in s 31(7)(a) than the "likely to prejudice national security" benchmark employed elsewhere in the NSIA. In applying s 31, a court must undertake its own assessment

of the risk of prejudice to national security if the subject information is disclosed, and balance any identified risks against the other considerations mandated by s 31(7).

102. The primary judge referred to several ways in which the publication of the Identified Matters would create a risk of prejudice to national security: see [33] above. The appellant submitted that the [REDACTED] renders any incremental risk posed by the publication of the Identified Matters “remote, or even non-existent”.
103. [REDACTED] are matters relevant to determining whether there is a future risk to national security if the Identified Matters are published.
104. The primary judge described the risks that his Honour identified as “real”, i.e. not merely fanciful. The evidence supports the primary judge’s conclusion about “real” risk, but it rises no higher than an assessment that there is a non-fanciful risk that unknown but non-catastrophic consequences may flow from publication of the Identified Matters. We see uncertainty heaped upon uncertainty. However, we do not see error on the part of the primary judge.
105. We digress to say something about the NCND policy, and how that relates to the evaluation of any risk to national security if the Identified Matters are published. The Attorney-General argued that the NCND policy must be protected. However, this appeal is only concerned with the extent to which departure from the NCND policy in the present case may create a risk to national security. Although disclosure of the Identified Matters may result in the creation of risks to national security, this would be the case regardless of the NCND policy. There is no suggestion that the NCND policy will be abandoned generally if the Identified Matters are published. Publication would mean that the policy could no longer sensibly be maintained with regard to the Identified Matters, which may expand the areas of potential risk to national security. The extent or level of that indirect risk, and the nature of the consequences said to be risked, are speculative. Australia has, in the past, departed from the NCND policy.
106. We accept that publication of the Identified Matters would involve a relevant risk of prejudice to national security.

(c) Will refusal to permit publication of the identified Matters prejudice the Appellant’s right to a fair trial?

107. The appellant submitted that the right to fair trial encompasses the right to have charges determined in open court unless there are compelling grounds to hear the matter in secret. The appellant referred to the decision of Spigelman CJ in *John Fairfax Publications Pty Ltd v District Court of New South Wales* [2004] NSWCA 324; (2004) 61 NSWLR 344, where at [22] his Honour said:

The principle of a fair trial has been characterised in numerous High Court judgments in the most forceful of terms. It has been described as “the central thesis of the administration of criminal justice”; *McKinney v The Queen* (1991) 171 CLR 468 at 478; as the “central prescript of our criminal law”: *Jago v District Court (NSW)* (1989) 168 CLR 23 at 56; as a “fundamental element” or a “fundamental prescript”: *Dietrich v The Queen* (1992) 177 CLR 292 at 299, 326; and as an “overriding requirement”: *Dietrich* at 330. It is not a new principle. As Isaacs J put it in 1923 with reference to “the elementary right of every accused person to a fair and impartial trial”: “Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle”: *R v MacFarlane; Ex parte O’Flanagan & O’Kelly* (1923) 32 CLR 518 at 541-542.

108. Earlier, at [18], his Honour said:

It is well established that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public...is an essential quality of an Australian court of justice.

109. One of the defining characteristics of Australian courts is the adherence, as a general rule, to the open court principle: see *Wainohu v New South Wales* [2011] HCA 24; 243 CLR 181 per French CJ and Kiefel J at [44] and the cases there cited.
110. The Attorney-General submitted that the primary judge had considered the possible effect of making a non-publication order on the ability of the appellant to receive a fair trial and the appellant had not identified any error in the approach of the primary judge.
111. There is a significant overlap between this issue and the next issue, which concerns the proper administration of justice, as relevant to the evaluation required by s 31(1) of the NSIA.

(d) Matters relevant to the proper administration of justice

112. The provisions of s 31(7) of the NSIA do not directly refer to the administration of justice, but such matters may be considered under s 31(7)(c).
113. The appellant submitted that the Court should approach its task in such a way as to avoid harm to public confidence in the judicial process, which may bring the administration of justice into disrepute. In particular, the appellant submitted the Court was being asked to participate in misleading the public [REDACTED]. The appellant submitted that the orders sought by the Attorney-General are likely to significantly undermine the public's confidence in the Court's ability to administer justice in this case and in similar cases. The appellant referred to the judgement of Richardson J of the New Zealand Court of Appeal in the matter of *Moevao v Department of Labour* [1980] 1 NZLR 464 at 484:

It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that the end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that the exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice.

This passage was cited with approval by Mason CJ in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29-30, in the context of consideration of the powers of courts to avoid abuse of process.

114. The appellant also referred to the judgement of Gibbs J in *Russell v Russell* (1976) 134 CLR 495, where his Honour said, at 520:

It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted "publicly and in open view" ... This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character.

[citations omitted]

115. His Honour continued:

Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament. The need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court.

116. The appellant further submitted that, if he was convicted, the public would not know why he had been prosecuted or the basis of the conviction, which would so interfere with the open court principle as to amount to a serious interference with the administration of justice.

117. The Attorney-General submitted that the primary judge had carefully considered and applied the processes and requirements of the NSIA and had considered matters relevant to the administration of justice. The Attorney-General disputed the submission that the public would be misled [REDACTED].

118. The interests of the administration of justice include the legitimate public interest in ensuring that those charged with national security offences are brought to trial and, if convicted, they are punished.

119. It was not submitted that the prosecution of the appellant could not continue if the Identified Matters were published.

Consideration

120. The primary judge correctly identified the nature of the process that his Honour was required to undertake by s 31(1) of the NSIA and identified the matters that were relevant to the required evaluation.

121. Nevertheless, we are satisfied that the primary judge erred in his Honour's conclusion. Although it is strictly unnecessary to identify how that error came about by, for example, identifying error in the intermediate factual determinations made by the primary judge, it is likely that his Honour gave too much weight to the risk of prejudice to national security and too little weight to the interests of the administration of justice in the circumstances of this case.

122. The appellant's submission that the Identified Matters have been confirmed by the actions or statements of the Commonwealth, its agencies or its officers is not accepted. There is a respectable argument that the NCND policy has continuing application to the Identified Matters. However, the risk of prejudice to national security is low, and the consequences risked are not particularly significant. [REDACTED] makes it doubtful that there will be any significant risk of prejudice to national security if the Identified Matters are published. The evidence led by the Attorney-General was replete with speculation and devoid of any specific basis for concluding that significant risks to national security would materialise if the Identified Matters were published. It was implicit in the findings of the primary judge that it may be that no risk to national security would materialise.

123. On the other hand, the risk of damage to public confidence in the administration of justice where proceedings, or parts of proceedings, are held in closed court is very real. This is particularly so in the case of criminal prosecutions. From time to time, it is necessary for proceedings, even criminal proceedings, to take place wholly or partly

in closed court. It is necessary that there be a “gatekeeper” who determines whether proceedings should be heard in closed court. The Parliament has made the court the gatekeeper for the purposes of the NSIA. The public accepts such decisions when made by a court because the public has confidence in the proper administration of justice in this country. That confidence springs from the general adherence to the open court principle; the public accepts that a few matters must be heard in closed court because it is confident that courts are committed to the open court principle and will only close the courts for cogent reasons.

124. The administration of criminal justice encompasses more than the conduct of a criminal trial. It commences when a decision is made to commence a prosecution and concludes with an acquittal or the imposition of sentence. The decision to commence a criminal prosecution is an opaque process at the best of times. In the present case, there is the additional circumstance that the commencement of the prosecution required the consent of the Attorney-General. The open court principle stands as a bulwark against the possibility of political prosecutions by allowing public scrutiny and assessment of the actions of the respondent and the Attorney-General by reference to the evidence adduced in a criminal trial.
125. The appellant is a former Attorney-General of the Australian Capital Territory and he continues to practice as a lawyer. Convictions on the charges against him may raise questions of his fitness to continue in practice as a lawyer. Convictions may also cause clients, prospective clients, or others with whom the appellant has professional dealings, to question his character. If the orders made by the primary judge are allowed to stand and the appellant is convicted, those dealing with the appellant will have to form assessments of his character and of the significance of the convictions without important information. Those dealing with the appellant may well view the significance of any conviction differently if it is established that the appellant’s statements [REDACTED] were made as an exercise of conscience as opposed to disclosing national security information for personal gain or some other dishonourable motive. The maintenance of the present orders would act as a constraint upon the appellant’s prospects for rehabilitation.
126. The provisions of s 31(7) of the NSIA make it plain that the matters to which we have referred will not, in all cases, be determinative of what orders should be made under s 31, and that they must be weighed against any identified risk to national security. However, in this case we are satisfied that the interests of the proper administration of justice clearly outweigh any risk of prejudice to national security.

Orders

127. The appeal is allowed.
128. In the proceedings below, the Attorney-General sought to reply on “court only” material that had not been provided to the appellant because of its sensitivity. The appellant said that the primary judge should not receive the material. The primary judge did not feel compelled to address the admissibility and possible effect of the material because, without reference to it, his Honour was satisfied that the order under s 31(4) of the NSIA should prohibit publication of information concerning the Identified Matters.
129. Subject only to the primary judge’s consideration of the admissibility and effect of the “court only” material, the order made by the primary judge should be set aside. Pursuant to s 31(4) of the NSIA there should be an order that is limited to protecting from disclosure the highlighted parts of the brief that, ultimately, the appellant

conceded should not be disclosed. The final form of that order is a matter for the primary judge after his Honour has heard further submission from the parties.

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

I certify that the preceding one hundred and thirty [130] numbered paragraphs are a true copy of the Reasons for Judgment of their Honours Chief Justice Murrell, Justice Burns and Justice Wigney

Associate:

Date: