HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY **NO C3 OF 2024**

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

AND: **MR STRADFORD (A PSEUDONYM)**
First Respondent

HIS HONOUR JUDGE SALVATORE PAUL VASTA
Second Respondent

STATE OF QUEENSLAND
Third Respondent

NO C4 OF 2024

BETWEEN: **HIS HONOUR JUDGE SALVATORE PAUL VASTA**
Appellant

AND: **MR STRADFORD (A PSEUDONYM)**
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

STATE OF QUEENSLAND
Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S24 OF 2024**

BETWEEN: **STATE OF QUEENSLAND**
Appellant

AND: **MR STRADFORD (A PSEUDONYM)**
First Respondent

HIS HONOUR JUDGE SALVATORE PAUL VASTA
Second Respondent

COMMONWEALTH OF AUSTRALIA
Third Respondent

SUBMISSIONS OF THE COMMONWEALTH OF AUSTRALIA

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES PRESENTED BY THE APPEALS

2. Three appeals have been removed into this Court. The primary judge held that Judge Vasta, the Commonwealth and Queensland were each liable to Mr Stradford for false imprisonment. The appeals involve a number of overlapping grounds.[1] So far as is relevant to the Commonwealth's appeal, the following questions arise:

   (a) Notwithstanding the status of the Federal **Circuit Court** of Australia as an inferior court, did s 17 of the *Federal Circuit Court of Australia Act 1999* (Cth) (**FCC Act**), which conferred the same power to punish contempt as is possessed by this Court, empower the Circuit Court to make contempt orders that were valid until set aside? If so, do Pts XIIIA and XIIIB of the *Family Law Act 1975* (Cth) (**Family Law Act**) constitute an "exclusive code" with respect to contempt in matters arising under that Act, so as to exclude the power otherwise conferred by s 17 of the FCC Act? The Commonwealth and Judge Vasta contend that the answer to the first question is "yes", and the second is "no": **Cth grounds 1 and 3**; Vasta grounds 1 and 2.

   (b) Did the officers who executed Judge Vasta's orders have a common law defence because their conduct involved the execution of orders that appeared valid on their face? The Commonwealth and Queensland submit that the answer is "yes": **Cth grounds 2 and 3**; Qld ground 1.

   (c) Was Judge Vasta protected by judicial immunity, either because he relevantly acted "within jurisdiction", or because there is no distinction between the judicial immunity afforded to judges of superior and inferior courts? The Commonwealth and Judge Vasta submit the answer is "yes": **Cth ground 4**; Vasta ground 3.

PART III SECTION 78B NOTICE

3. The Attorney-General of the Commonwealth issued a notice under s 78B of the *Judiciary Act 1903* (Cth) in relation to his application for removal of the

[1] Each appellant appeals against different combinations of orders. The Commonwealth appeals from orders 2 and 3 (C3 of 2024); Judge Vasta appeals from orders 2, 3, 4 and 5 (C4 of 2024); Queensland appeals from orders 2, 4 and 6 insofar as they relate to Queensland (S24 of 2024).

Commonwealth's appeal. That notice related to ground 1(b), which is not pressed.[2]

PART IV REPORT OF DECISION BELOW

4. The judgment of Wigney J has not been reported. Its medium neutral citation is *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020.

PART V FACTS

5. In April 2017, Mr Stradford brought an application in what was then the Circuit Court seeking property adjustment orders under s 79 of the Family Law Act in respect of matrimonial assets owned by him and his then wife (**CAB 261 [18]**). In the context of that application, Judge Vasta formed the view that Mr Stradford had failed to comply with certain disclosure orders. As a result, on 6 December 2018, Judge Vasta:

   (a) made a declaration that Mr Stradford was in contempt of the disclosure orders;

   (b) ordered that Mr Stradford be sentenced to 12 months' imprisonment, to be served immediately (to be released on 6 May 2019, with the balance of the sentence suspended for two years) (the **imprisonment order**); and

   (c) signed a Warrant of Commitment, which directed (inter alia) the Marshal to take and deliver Mr Stradford to the Commissioner of Queensland Corrective Services, and directed the Commissioner keep Mr Stradford in custody in accordance with the imprisonment order (see **CAB 267-268 [38]-[39]**).

6. MSS Security Pty Ltd (**MSS**) was engaged by the Commonwealth to provide security-related services at the Circuit Court in Brisbane (**CAB 268 [40]**). Shortly after Judge Vasta made the orders and signed the Warrant of Commitment, and in compliance with them, two guards employed by MSS took custody of Mr Stradford for approximately 30 minutes. During that period, the guards escorted Mr Stradford out of the courtroom, through a public concourse for approximately 14 metres, through a service door to a goods lift, and then to a holding cell within the court complex. There was no dispute below that the guards' conduct constituted a detention of Mr Stradford for and on behalf of the Commonwealth (**CAB 268 [42]-[43]**). Mr Stradford was then taken into the custody of the Queensland Police Service. He remained in Queensland's custody until

[2] Commonwealth Book of Further Materials (**CBFM**) at 138. The Commonwealth also does not press the parts of ground 1(c) and 1(d) that refer to ground 1(b).

12 December 2018 (**CAB 268-271 [44]-[52]**).

7. On 12 December 2018, the matter was listed again before Judge Vasta to hear an oral application to stay the contempt orders made on 6 December 2018. Mr Stradford was by this time represented by counsel, and had filed an appeal against the contempt judgment and orders (**CAB 269 [49]**). Judge Vasta delivered an *ex tempore* judgment in which he "effectively conceded that he erred" in finding Mr Stradford in contempt and sentencing him to imprisonment (**CAB 269 [50]**).[3] Judge Vasta stayed the imprisonment order and ordered that Mr Stradford be released forthwith pending the appeal (**CAB 270 [51]**). Mr Stradford was released from Queensland's custody that day (**CAB 271 [52]**).

8. On 15 February 2019, a Full Court of the Family Court of Australia allowed Mr Stradford's appeal and set aside the declaration and order sentencing him to imprisonment (**CAB 271-272 [56]-[57]**).[4] The Full Court found numerous and grave errors on the part of Judge Vasta, which led it to describe his declaration and orders as "a gross miscarriage of justice" (**CAB 274 [66]**). The Commonwealth does not cavil with those findings.

9. On 7 December 2020, Mr Stradford commenced proceedings in the Federal Court, alleging that Judge Vasta had committed the torts of false imprisonment and collateral abuse of process, and that the Commonwealth and Queensland were vicariously liable for the actions of their officers in detaining him. On 30 August 2023, Wigney J delivered judgment in that proceeding, finding that Judge Vasta's declaration and orders involved myriad and serious errors (largely aligning with the Full Family Court) (**CAB 274-290 [67]-[136]**). Again, the Commonwealth does not cavil with those findings.

10. The primary judge held that Judge Vasta, the Commonwealth and Queensland were liable to Mr Stradford for false imprisonment because: (a) ***first***, there was no lawful justification for Mr Stradford's detention because contempt orders made by the Circuit Court were not, unlike those of a superior court, valid until set aside so as to afford a defence to a claim of false imprisonment (**CAB 299-305 [171]-[198], 344-346 [349]-[357]**); (b) ***secondly***, Judge Vasta was not protected by judicial immunity because an inferior court judge is not immune if, even though acting within subject-matter jurisdiction, they act in excess of that jurisdiction by a gross or obvious irregularity in

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3 See *Stradford & Stradford (No 2)* [2018] FCCA 3961 at [6]: "I could very well have been in error" in assuming Judge Turner found Mr Stradford "prima facie in contempt" of the orders; see also [10], [12].

4 *Stradford v Stradford* (2019) 59 FamLR 194.

procedure or breach of natural justice (**CAB 304-349 [199]-[375]**); (c) ***thirdly***, there was no common law defence available to the officers of the Commonwealth and Queensland by reason that they were acting in the execution of an apparently valid order (**CAB 349-387 [376]-[524]**, **393 [551]**); and (d) ***fourthly***, a statutory defence relied upon by Queensland was not available in this case (**CAB 387-392 [525]-[548]**).

11. The primary judge found that Judge Vasta did not commit the tort of collateral abuse of process (**CAB 297-298 [165]-[170]**). That finding has not been appealed. Mr Stradford was awarded damages in respect of the false imprisonment (**CAB 466 [843]-[847]**). The assessment of damages is not in issue in these appeals.

10 PART VI ARGUMENT

GROUND 1: THE CONTEMPT ORDERS WERE VALID UNTIL SET ASIDE

12. Upon the proper construction of s 17(1) of the FCC Act, Judge Vasta's orders provided the necessary authority for the MSS guards to detain Mr Stradford because, although those orders were affected by serious errors, they were valid until set aside, and they had not been set aside at the time that the relevant detention occurred.

13. The primary judge's contrary conclusion started from the uncontroversial proposition that orders of an inferior court infected by jurisdictional error[5] are generally void ab initio (**CAB 300-302 [177]-[184]**). His Honour concluded that the orders made by Judge Vasta in the exercise of the contempt power were in no different position, 20 notwithstanding that s 17 confers the "same power" to make contempt orders as that possessed by the High Court. More specifically, his Honour held, erroneously, that:

(a) s 17 did not give contempt orders of the Circuit Court the attribute of being valid until set aside (**CAB 304-305 [194]-[195]**, **344-345 [352]-[355]**); and

(b) in any event, the only available contempt powers were those conferred by Pts XIIIA or XIIIB of the Family Law Act, which operated to oust any power otherwise conferred by s 17 (**CAB 279 [93]-[99]**, **304 [193]**, **345 [356]-[357]**).

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[5] Note, however, that "the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine", such that error with respect to those matters is ordinarily an error within jurisdiction: ***Craig*** *v South Australia* (1995) 184 CLR 163 at 179; ***Kirk*** *v Industrial Court (NSW)* (2010) 239 CLR 531 at [68] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 374-375 (Latham CJ), 389 (Dixon J, Evatt and McTiernan JJ agreeing).

Section 17(1) made contempt orders of the Circuit Court valid until set aside

14. The Circuit Court was a "court of record", as opposed to a "superior court of record": FCC Act, s 8(3). That being so, the primary judge found, correctly, that orders of the Circuit Court did not generally have the typical or presumptive attribute of orders of a "superior court" that they are valid until set aside (**CAB 300-302 [177]-[184]**).

15. But that is not the end of the analysis. Courts that are not designated as "superior courts" may nevertheless have some of the powers and attributes of such courts. Specifically, Parliament may create a court that, though generally not having the characteristics or attributes of a superior court, for some purposes has those characteristics or attributes.[6]

16. For example, in ***Day*** *v The Queen*, this Court considered the *District Court of Western Australia Act 1969* (WA). Section 8(1) of that Act constituted the District Court as a "court of record". However, s 42(1) provided that "the Court has all the jurisdiction and powers that the Supreme Court has in respect of any indictable offence". This Court held that, by reason of s 42(1), "the District Court is a superior court" for the purpose of providing authority for the execution of an order for imprisonment, such that "[a]s is the case elsewhere, the sentence being imposed by a superior court is itself sufficient authority for its execution".[7] Thus, despite its status as an inferior court, orders for imprisonment made by the District Court provided authority for their own execution.

17. Section 17 of the FCC Act operated in the same way. It was an express statutory indication that, for the purpose of punishing contempts, the orders of the Circuit Court were to be treated in the same way as those of this Court. Specifically, s 17(1) provided:

> The … Circuit Court … has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court.

18. This Court is, of course, a "superior court of record".[8] If it makes orders punishing contempt, one attribute of those orders is that, even if affected by error, they are valid until set aside. Section 17(1) conferred a corresponding power upon the Circuit Court. If s 17(1) did not confer power to make orders punishing contempt that were valid until set aside, it would not have conferred the "same power" as is possessed by this Court.

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6 See, eg, *Cameron v Cole* (1944) 68 CLR 571 at 606-607 (Williams J), 585 (Latham CJ), 599 (McTiernan J). See also *In re New Par Consols Ltd (No 2)* [1898] 1 QB 669 at 672 *Skinner v Northallerton County Court Judge* [1898] 2 QB 680 at 686 affirmed in [1899] AC 439.

7 *Day v The Queen* (1984) 153 CLR 475 at 479 (Gibbs CJ, Mason, Wilson and Dawson JJ).

8 *High Court of Australia Act 1979* (Cth) s 5; see also *Re Macks* (2000) 204 CLR 158 at [137] (McHugh J).

Indeed, it would have conferred a contempt power that would have been considerably less efficacious, not least because persons charged with executing such orders would have been more hesitant to do so due to the risk of suit if the orders turned out to be invalid (subject, of course, to this Court's decision in respect of ground 2). Such uncertainties would inevitably undermine the very purpose of the power to punish contempt, which is to ensure the integrity of the Court and the administration of justice. That power is so fundamental that statutory provisions conferring contempt powers upon federal courts have been said to be "declaratory of an attribute of the judicial power of the Commonwealth".[9]

10 19. The primary judge appears to have concluded that s 17 did not empower the Circuit Court to make orders punishing contempt that were valid until set aside because it did not expressly state that orders would have that effect (**CAB 304 [194]**), and because it was in different terms to the provision considered in *Day* (**CAB 344-345 [352]-[355]**). Those are insufficient reasons for disregarding the express statutory stipulation that the Circuit Court had "the same" power to punish contempt as this Court. That stipulation was broad and directive. It did not invite a search for the limited ways in which the power was "the same"; rather, it required a firm basis for any conclusion that, in any respect, the power was <u>not</u> "the same". Here, there was no such basis. Accordingly, unless the operation of s 17(1) was fully and completely ousted by Pts XIIIA and XIIIB
20 operating as a "code", contempt orders made by the Circuit Court were valid until set aside because, notwithstanding its status as an inferior court, Parliament's intention was that its contempt powers were the same as those of this Court.

Parts XIIIA and XIIIB do not constitute a "code" that excluded s 17(1)

20. The primary judge concluded that Pts XIIIA and XIIIB of the Family Law Act wholly excluded s 17(1) (**CAB 279-281 [93]-[94], [97]**). He held that those Parts are a "code for dealing with contempts arising in the context of the jurisdiction under the Family Law Act" (**CAB 280 [94]**, **280-282 [95]-[99]**). That reasoning treated Pts XIIIA and XIIIB as containing an "implicit negative"[10] to the effect that there should be no other law addressing any aspect of the topic of contempts arising in the exercise of Family
30 Law Act jurisdiction. However, once regard is had to the text, context and purpose of

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9 ***Re Colina**; Ex parte Torney* (2000) 200 CLR 386 at [16] (Gleeson CJ and Gummow J). See also Rolph, *Contempt* (2023) at 7-11.

10 *Masson v Parsons* (2019) 266 CLR 554 at [45] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

Pts XIIIA and XIIIB, it is apparent that there is no such implicit negative proposition.

21. ***Statutory text***: Section 17(2) of the FCC Act made it clear that s 17(1) "ha[d] effect subject to any other Act". However, s 17(2) only operated where "there would in truth be a conflict without it".[11] The body of Commonwealth statute law should be read as a whole and, "if possible, apparent inconsistencies should be reconciled".[12] The FCC Act and the Family Law Act are therefore presumed to have operated harmoniously.

22. The Commonwealth accepts that the text of Pts XIIIA and XIIIB make clear that in various specified respects those Parts regulate the pre-existing contempt powers of any court exercising jurisdiction under the Family Law Act (relevantly, here, s 17 of the FCC Act).[13] However, the primary judge failed to distinguish between[14] the proposition that the pre-existing contempt powers operated subject to Pts XIIIA and XIIIB (such that, if the power conferred by s 17 was exercised inconsistently with those Parts, that exercise of power was liable to be set aside on appeal) and the proposition that Pts XIIIA and XIIIB excluded s 17 entirely because they are a "code". The former proposition is correct. The latter is not.

23. As to the former proposition, the subject-matter of Pts XIIIA and XIIIB is orders that are directed to "enforcement of the process and orders of the court"[15] and "vindicat[ing] the court's authority".[16] Indeed, s 112AP (being the only provision in Pt XIIIB) states that it "applies to a contempt of court that: (a) does not constitute a contravention of an order under this Act; or (b) constitutes a contravention of an order under this Act and involves a flagrant challenge to the authority of the court". That language assumes (correctly) that a contravention of an order under the Family Law Act (whether flagrant or otherwise) may constitute "contempt". The overlap suggests that Pts XIIIA and XIIIB

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11 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 580 fn 195 (McHugh J), quoting *Harding v Coburn* [1976] 2 NZLR 577 at 582 (Cooke J).

12 *Maclean Shire Council v Nungera Co-operative Society Ltd* (1995) 86 LGERA 430 at 434 (Handley JA, Priestley and Sheller JJA agreeing); *Commissioner of Police (NSW) v Cottle* (2022) 276 CLR 62 at [23] (Kiefel CJ, Keane, Gordon and Steward JJ).

13 The Commonwealth accepts a failure to comply with Pts XIIIA and XIIIB involves error: cf **CAB 278 [88], 281-282 [97], [100]**.

14 See, eg, **CAB 281 [98]**, asserting that when a court exercises jurisdiction under the Family Law Act punishes for contempt, is must exercise that power "pursuant to, or in accordance with, Pt XIIIB", without recognising that those are entirely different propositions.

15 *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 106 (Gibbs CJ, Mason, Wilson and Deane JJ).

16 *Witham v Holloway* (1995) 183 CLR 525 at 533 (Brennan, Deane, Toohey and Gaudron JJ).

were intended to confine and regulate the existing contempt powers of the courts that exercise jurisdiction under the Family Law Act[17] (eg, by s 112AE limiting the power to impose a sentence of imprisonment); but it does not suggest that those Parts were intended to "exclude any other power to deal with contempt": cf **CAB 281 [97]**. Parliament could readily have said as much, but did not do so. Indeed, as is discussed below, the legislative history indicates that Parliament had no such intention.

24. As to the latter proposition, there are several reasons why Pts XIIIA and XIIIB should not have been interpreted as excluding any other power to deal with contempt. Most obviously, neither Part contains any express language that displaced s 17 as a source of power that supported contempt orders made by the Circuit Court, or that altered the characteristics of such orders. The absence of such language is significant, because a court should avoid discerning implications or imposing limitations on powers given to courts that are not found in the express words of the empowering instrument.[18] Thus, when Parliament confers jurisdiction or power on a court, it will be understood in the absence of express or clear words to the contrary to intend that the court be "take[n] as it finds it with all its incidents".[19] The relevant "incidents" include the powers of a court relating to the punishment of contempts[20] and to protect the administration of justice.[21]

25. ***Statutory context and history***: Parts XIIIA and XIIIB were initially inserted by the *Family Law Amendment Act 1989* (Cth) (the **1989 Act**). Their genesis was the 1987 Australian Law Reform Commission report, *Contempt* (**ALRC Report**). At the time that report was written, several provisions in the Family Law Act empowered courts exercising jurisdiction under that Act to impose sanctions for failing to obey orders. Power was conferred on the Family Court (s 35) and other courts (s 108) to punish contempts: see [589]. Sections 70(6) and 114(4), to which the ALRC referred as "quasi-contempt" provisions, empowered courts exercising jurisdiction under the Act to impose

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17 That includes the Family Court of Western Australia, the Supreme Court of the Northern Territory, and State and Territory courts of summary jurisdiction: see, eg, Family Law Act, ss 39, 39B, 69H, 69J.

18 See, eg, *Deputy Commissioner of Taxation v Huang* (2021) 273 CLR 429 at [23]-[24] (Gageler, Keane, Gordon and Gleeson JJ); *Owners of the Ship, "Shin Kobe Mare" v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421 (the Court).

19 *Mansfield v DPP (WA)* (2006) 226 CLR 486 at [7] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ), quoting *Electric Light and Power Supply Corporation Ltd v Electricity Commission (NSW)* (1956) 94 CLR 554 at 560 (the Court).

20 *Thomas v Mowbray* (2007) 233 CLR 307 at [29] (Gleeson CJ); *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460 at 473 (Mason J); ***Lee*** *v New South Wales Crime Commission* (2013) 251 CLR 196 at [195] (Kiefel J), [255] (Bell J), [319] (Gageler and Keane JJ).

21 *Lee* (2013) 251 CLR 196 at [41], [49].

sanctions for breaches of specified kinds of order: see [591]. The ALRC recommended that there be a "single unified" procedure for addressing non-compliance with court orders: see [568], [632]. To that end, it recommended the repeal of ss 35 and 108 (the so-called "contempt" provisions) and ss 70(6) and 114(4) (the "quasi-contempt" provisions): see [85]. The ALRC Report also explains (at [652]) why the term "contempt" does not appear in Pt XIIIA: it was felt that this "label" should not be used because it "has ideological overtones which render it unsuitable for situations such as one-off or intermittent denials of access or maintenance" and the "term should disappear, in family matters as in other contexts".

26. A purpose of the 1989 Act was to implement the recommendations of the ALRC Report.[22] However, the 1989 Act departed in a significant respect from those recommendations because, while it repealed three of the four contempt/quasi-contempt provisions mentioned in the report,[23] it did not repeal s 35. Section 35 stated:

> Subject to this and any other Act, the Family Court has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court.

27. As is apparent, that provision was the model for s 17 of the FCC Act. The decision to retain s 35 points to an important aspect of Parliament's intention in enacting the 1989 Act. While Parliament intended Pts XIIIA and XIIIB to prescribe a new procedure for punishing contempts in the exercise of jurisdiction given by the Family Law Act, and to regulate the circumstances in which particular kinds of order punishing contempt should be made,[24] it did not intend to wholly displace the source of that power or the attributes of orders made in the purported exercise of that power.

28. One consequence of regulating particular kinds of order punishing contempt was that errors might be made when making such orders (eg, because the practice and procedure contemplated by s 112AP(3) was not followed, or a sentence of imprisonment was imposed in circumstances not permitted by s 112AE). If such an error were made, then the order would be liable to be set aside.

29. However, the critical point for present purposes is that nothing in Pts XIIIA and XIIIB manifested an intention to displace the legal effect that the order would otherwise have

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22 Explanatory Memorandum, Family Law Amendment Bill 1989 (Cth) at [1(a)], [2(2)]; Commonwealth, House of Representatives, Hansard, 21 December 1989 at 3470.

23 See s 10(b) (repealing s 70(6)), s 15 (repealing s 108) and s 18 (repealing s 114(4)).

24 See *Re Colina* (1999) 200 CLR 386 at [15] (Gleeson CJ and Gummow J).

had, being that the order was valid until set aside. Those Parts do not speak to that topic at all (let alone constitute a code on it). That is particularly true once it is recognised that the Family Law Act conferred, and continues to confer, jurisdiction with respect to family law matters on both superior and inferior courts of record (see fn 18 above). In those circumstances, it is implausible to treat Pts XIIIA and XIIIB as making uniform provision with respect to whether orders made under those Parts are valid until set aside. If it did, even orders made by the Family Court (a superior court) would not have been valid until set aside. That implausible result is avoided by construing Pts XIIIA and XIIIB as taking those courts as they find them, and regulating such contempt powers as they independently possess. If the ordinary contempt power of the court that makes an order punishing contempt empowers the making of orders that are valid until set aside (as does s 17(1)), there is nothing in Pts XIIIA and XIIIB to displace that effect.

30. ***Statutory purpose***: An evident purpose of Pts XIIIA and XIIIB is to maintain the authority of courts dispensing justice in family law proceedings.[25] More generally, the purpose of contempt powers is to "ensure that … courts are able effectively to discharge the functions, duties and powers entrusted to them"[26] and to ensure "the integrity of the system of justice".[27] The invidious consequences that would result if people can be liable in tort for doing no more than a judge has ordered them to do have long been recognised, and are addressed below in Ground 2 (see paragraph 37 below).

31. ***Contrary authority?*** In reaching the contrary conclusion that Pts XIIIA and XIIIB were a "code", the primary judge emphasised that he was bound to follow several decisions of the Full Court of the Family Court of Australia which, he considered, were to the effect that Pts XIIIA and XIIIB were an exhaustive code for contempt.[28] However, the decisions relied upon by the primary judge were directed to a different issue, being whether s 112AP (which sets out sentencing options for those found guilty of contempt) ousted general legislation relating to sentencing of offenders.[29] Those cases do not hold

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25 See ALRC Report at [626].

26 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 187 (Deane J).

27 *Lee* (2013) 251 CLR 196 at [194] (Kiefel J). See also *Re Colina* (1999) 200 CLR 386 at [112] (Kirby J); *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at [41] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

28 ***DAI*** *v DAA* (2005) 191 FLR 360; ***Rutherford*** *v Marshal of the Family Court of Australia* (1999) 152 FLR 299; *In the marriage of* ***Schwarzkopff*** (1992) 106 FLR 274.

29 *DAI* (2005) 191 FLR 360 at [81] (the Court); *Rutherford* (1999) 152 FLR 299 at [80] (the Court); *Schwarzkopff* (1992) 106 FLR 274 at 283.

that Pts XIIIA and XIIIB operate as an exhaustive code for all purposes; indeed, they recognise that it is not such a code.[30] That recognition is also arguably implicit in the focus on s 35 of the Family Law Act in *Re Colina*, despite the Court being aware of Pts XIIIA and XIIIB.[31]

32. For the above reasons, it was an error for the primary judge to conclude that Pts XIIIA and XIIIB were a "code" that displaced s 17(1) of the FCC Act. As a result of the Circuit Court having relevantly the "same power" to punish contempt as the High Court, its orders punishing contempt were valid until set aside.

GROUND 2: COMMON LAW DEFENCE TO UNLAWFUL IMPRISONMENT

33. Ground 2 concerns the existence and application of a common law defence to the tort of false imprisonment, which is available in respect of acts done in executing an apparently valid order of an inferior court even though that order is later held invalid. The Commonwealth contends that, even if it is unsuccessful on ground 1, this common law defence should have been held to be available to the MSS guards.

34. The primary judge considered "whether police officers and gaolers have a defence when their otherwise tortious acts were committed in the execution of an order made, or warrant issued, by an inferior court which was later found to be invalid" (**CAB 357 [414]**). In addressing that question, his Honour undertook a lengthy examination of the authorities (**CAB 359-383 [418]-[509]**). He allowed for the possibility, without deciding, that such a defence might be available for a ministerial officer of the court or a sheriff (**CAB 383-384 [510]-[513]**). But he concluded that "only officers of the court who are bound, by their office, to obey the order or warrant are afforded any protection if the order or warrants turns out to be invalid or void". (**CAB 384 [515]**). That class was held not to include the MSS guards (**CAB 393 [551]**). The primary judge therefore held that, despite the fact that the warrant issued by Judge Vasta appeared valid on its face, no common law defence was available to the MSS guards based on them having acted pursuant to the warrant, and they were liable for false imprisonment (**CAB 387 [524], 393 [552]**).

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30 In *Schwarzkopff* (1992) 106 FLR 274 at 282, the Court said that "s 112AP (and see also s 35) restates the power of a court under the Family Law Act to deal with a contempt of Court". Other authority also recognises the ongoing and parallel operation of s 35: see *Ibbotson v Wincen* (1994) 122 FLR 385 at 396 (the Court); *Newett & Newett* [2021] FedCFamC1F 11 at [11]-[16] (Howard J).

31 (1999) 200 CLR 386 at [15]-[16] (Gleeson CJ and Gummow J), [113] (Hayne J), [121]-[122] (Callinan J).

35. These conclusions were the product of an erroneous analysis of the relevant authorities. Rather than examining the tenor and purpose of the common law defence as explained in those authorities – including, particularly, the most relevant High Court and intermediate appellate authority – the primary judge conducted a granular examination of the authorities that: placed undue emphasis on specific expressions used in some cases but not in others; overlooked significant distinguishing features of some cases and, conversely, emphasised such matters in others; and strained the rules of precedent. Further, at various points, his Honour's analysis treated statements in the cases as if they were the words of a statute, which were applied without sufficient consideration of the underlying principles or the circumstances in which each case was decided.[32] Finally, but most significantly, his Honour apparently thought it necessary to find "clear or unequivocal" authority for the defence before he would recognise it as part of the common law (**CAB 384-385 [515]-[517]**). That reflected a cramped view of the common law.[33] While it may be accepted that the authorities do not all speak with a clear and unequivocal voice, that is commonly so, particularly where a case involves the application of common law principles that are rarely applied. Here, the defence should have been found to be applicable for the following reasons.

36. It is clear that there is a defence to the tort of false imprisonment which is available to at least <u>some</u> people when acting to enforce judicial orders that are later held to be invalid. That defence has been recognised in numerous Australian authorities, which themselves draw on English cases going back centuries.[34] The Australian authorities, in chronological order, are as follows:

    (a) *Smith v Collis* concerned an action against the governor of a gaol for a penalty for having imprisoned the plaintiff. The governor did so under a warrant which was invalid, although valid on its face. The Chief Justice saw the position as "absolutely clear", stating that "[i]n the ordinary course of things the discharge of the governor's

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32 Cf *Comcare v PVYW* (2013) 250 CLR 246 at [14]-[16] (French CJ, Hayne, Crennan and Kiefel JJ); *R v GW* (2016) 258 CLR 108 at [28] (the Court); *NSW v Kable* (2013) 252 CLR 118 at [69] (Gageler J).

33 See generally, particularly as to the significance of practical problems and consequences in the development of the law, *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at [79]-[81], [84]-[85] (Gageler J) and [199]-[200] (Nettle, Gordon and Edelman JJ).

34 As to which, see, eg, *Olliet v Bessey* (1682) 84 ER 1223 at 1224; *Moravia v Sloper* (1737) 125 ER 1039; *Andrews v Marris* (1841) 113 ER 1030; *Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239 at 263; *Greaves v Keene* (1879) 40 LT Rep 216; *Henderson v Preston* (1888) 21 QBD 362; *Demer v Cook* (1903) 88 LT 629 at 631; ***Sirros*** *v Moore* [1975] QB 118.

duties would become impossible if he were called upon to decide upon the validity of a warrant good on the face of it, and his duty is simply to obey and not to question. In the case of actions for false imprisonment this has been made absolutely clear".[35] Similarly, Pring J said that "there can be no doubt I suppose that if this action had been for false imprisonment the warrant would have been an absolute answer".[36]

(b) *Commissioner for Railways (NSW) v* ***Cavanough*** concerned the effect of a summary conviction that was overturned on appeal. This Court explained that the conviction was void ab initio, but noted that "[a]cts done according to the exigency of a judicial order afterwards reversed are protected: they are 'acts done in the execution of justice, which are compulsive' … For 'collateral acts executory are barred, but not collateral acts executed'".[37]

(c) In ***Posner*** *v Collector for Interstate Destitute Persons (Vic)*, this Court considered the effects of an order which had been wrongly made by an inferior court. Starke J distinguished between the position of a party executing the process of an inferior court in a matter beyond its jurisdiction (who is "liable to action and cannot justify under such process whether he knows the defect or not") and that of the magistrate (who "is only liable if he knew of the defect of jurisdiction"), before stating that "an officer executing and obeying such process is protected".[38] To similar effect, Dixon J explained that "a conviction or order might be inefficacious in favour of a party but might have some operation as against the other party in favour of officers".[39] That was because "[t]here would … be something very unreasonable in the law if it placed [an officer] in the position of being punishable by the Court for disobedience, and at the same time suable by the party for obedience to the warrant", even though the officer has "no means whatever of ascertaining whether they issue upon valid judgments or are otherwise sustainable or not".[40]

(d) In ***Robertson*** *v The Queen*, a Full Court of the Supreme Court of Western Australia

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35 *Smith v Collis* (1910) 10 SR (NSW) 800 at 813; see also at 818 (Gordon J agreeing).

36 *Smith v Collis* (1910) 10 SR (NSW) 800 at 815; see also at 818 (Gordon J agreeing).

37 (1935) 53 CLR 220 at 225 (Rich, Dixon, Evatt and McTiernan JJ), quoting from *Dr Drury's Case* (1610) 77 ER 688 at 691. This was endorsed in *Oakey Coal Action Alliance Inc v New Ackland Coal Pty Ltd* (2021) 272 CLR 33 at [88] (Edelman J).

38 (1946) 74 CLR 461 at 476 (citations omitted).

39 (1946) 74 CLR 461 at 482 (emphasis added).

40 (1946) 74 CLR 461 at 481-482, quoting *Andrews v Marris* (1841) 113 ER 1030.

held that the superintendent of a prison, who had detained the plaintiff on the basis of an invalid warrant issued by a magistrate, was protected by the common law defence in answering a false imprisonment claim.[41] The Full Court found that defence to be consistent with numerous authorities, and also to be supported by "sound policy reasons". Accordingly, the Court held that "the warrant, being ex facie an order of a court of competent jurisdiction, was required to be obeyed by the prison authorities until discharged by a court of competent jurisdiction".[42]

(e) In ***von Arnim*** *v Federal Republic of Germany (No 2)*, the applicant made a claim for false imprisonment arising from his arrest and imprisonment under two warrants issued by a magistrate in connection with an extradition request made by Germany.[43] Those warrants were valid on their face and, ultimately, not found to have been infected by error. However, Finkelstein J expressed the view, in obiter, that the claim was based on a false assumption, because "[a]ccording to the authorities there can be no action for false imprisonment if the imprisonment is in execution of an order which appears to have been regularly made by a judicial officer, even if the order is without jurisdiction".[44]

(f) In ***Kable*** *v New South Wales*, the NSW Court of Appeal considered the various authorities supporting the existence of the common law defence.[45] The Court held that any principle was "rooted in the order and underlying process being judicial" and derived from "the protection of the authority of judicial proceedings", as well as "courts … protecting third parties such as court officers … from the consequences of an invalid order (not being limited to an order of a superior court)".[46] Ultimately the Court was prepared to assume, without deciding, that the common law defence existed, noting that aspects of it were "less than clear".[47]

37. Three matters emerge clearly from the above authorities. ***First***, the common law defence serves important purposes. In *Smith v Collis*, Pring J said that protection was "merely in

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41 (1997) 92 A Crim R 115 at 122-125 (Steytler J, with whom Malcolm CJ and Franklyn J agreed).
42 *Robertson* (1997) 92 A Crim R 115 at 124-125 (Steytler J).
43 [2005] FCA 662.
44 *von Arnim* [2005] FCA 662 at [6].
45 (2012) 268 FLR 1 at [22]-[48] (Allsop P), with whom Campbell JA (at [173]), Meagher JA (at [174]) and McClelland CJ at CL (at [176]) relevantly agreed.
46 *Kable* (2012) 268 FLR 1 at [27], [35] (Allsop P).
47 *Kable* (2012) 268 FLR 1 at [48] (Allsop P).

accordance with fairness and justice to a gaoler, whose only duty is to obey the process of the Courts and to receive prisoners who are commited to his custody by them".[48] In *Roberston*, Steytler J referred to the unsatisfactory situation in which a gaoler might have to question the authority of an order and be at risk of damages if it was invalid, and equally at risk of disobeying the court if it was valid.[49] As noted, in *Kable*, the NSW Court of Appeal said that the principle derived from "the protection of the authority of judicial proceedings".[50] When that matter reached this Court, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ likewise emphasised the difficulties with individuals affected by orders – including the Executive – having "to choose whether to disobey the order (and run the risk of contempt of court or some other coercive process) or incur tortious liability", that giving rise to "almost a status of anarchy".[51] That same policy concern was evident in this Court's reasoning in ***Haskins*** *v Commonwealth* (in the context of military discipline), where the Court recognised that it would impair the efficacy of court orders if those charged with executing those orders must either "question and disobey the order, or take the risk of incurring a personal liability in tort".[52] Indeed, over 100 years ago, in *Mock Sing v Dat*, it was explained that if the people charged with executing an order cannot rely on its validity, then no one would dare to act under the order until they first satisfied themselves that it was correct; a result that Stephen ACJ described as "monstrous" and Owen J as a "ridiculous position" and "a perfect farce".[53] The same policy concerns are reflected in the English cases.[54]

38. ***Second***, the defence is not limited to orders made by superior courts. Many of the authorities concern inferior courts.[55] In *Smith v Collis*, Pring J said: "[i]t is, I think, hard to discover any logical reason why the gaoler should be protected by the warrant of the Superior Court, and not by that of an inferior tribunal … Protection would seem to be

48 (1910) 10 SR (NSW) 800 at 815.
49 (1997) 92 A Crim R 115 at 124-125.
50 (2012) 268 FLR 1 at [35] (Allsop P).
51 *NSW v Kable* (2013) 252 CLR 118 at [38]-[40].
52 (2011) 244 CLR 22 at [67] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
53 *Mock Sing v Dat* (1902) 2 SR (NSW) 333 at 338, 339 (Stephen ACJ) and at 340-341 (Owen J). See also *Revell v Blake* (1873) LR 8 CP 533 at 541-542.
54 See, eg, *Moravia v Sloper* (1737) 125 ER 1039; *Price v Messenger* (1800) 126 ER 1213 *Andrews v Marris* (1841) 113 ER 1030.
55 See, eg, *Smith v Collis* (1910) 10 SR (NSW) 800; *Posner* (1946) 74 CLR 461; *Robertson* (1997) 92 A Crim R 115; *Andrews v Marris* (1841) 113 ER 1030; *Henderson v Preston* (1888) 21 QBD 362.

more necessary in the latter case than in the former".[56] That proposition has evident force, given that a superior court's orders will generally be valid until set aside, meaning that imprisonment resulting from such orders is not unlawful even if the orders are liable to be set aside.[57] It is with respect to orders of inferior courts that the defence is needed. That said, it is possible – although it is not necessary to resolve the point here – that the defence does not apply in two (possibly overlapping and interrelated) situations: (i) where it is clear on the face of the inferior court's orders that they are not valid; and (ii) where the inferior court lacks even "subject-matter jurisdiction" to make the orders.[58]

39. ***Third***, the class of persons to whom the defence extends is not limited to employees, officers and officials of the court itself (such as sheriffs and "ministerial officers"). Consistent with the underlying rationale for the protection – to ensure the effective maintenance of the courts' authority – the cases have long recognised that the defence is available to a variety of officials who are acting, as required and expected by the court, to give effect to its orders. For example, the defence has been held to apply to police,[59] prison officials,[60] and even garnishees.[61]

40. Despite the fact that the above propositions emerge clearly from the authorities discussed above (and others), the primary judge discerned reasons why those cases – individually and collectively – did not support the common law defence. It suffices to identify the following four key deficiencies in that analysis.

41. ***First***, the primary judge erred as to the precedential effect of the statements of this Court in *Cavanough* and *Posner*. While those statements may have been *obiter*, there was nothing equivocal or ill-considered about them. Those statements explained the rationale for the defence, and should have been accorded weight they did not receive.

42. ***Second***, the primary judge perceived there to be a conflict between the intermediate appellate decisions in ***Feather*** *v Rogers*[62] and *Roberston*, which led his Honour to treat

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56 (1910) 10 SR (NSW) 800 at 817.
57 *NSW v Kable* (2013) 252 CLR 118 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
58 See, eg, *Moravia v Sloper* (1737) 125 ER 1039 at 1044; *Morse v James* (1738) 125 ER 1273; *Demer v Cook* (1903) 88 LT 629 at 631; *Ward v Murphy* (1937) 38 SR (NSW) 85.
59 See, eg, *Moravia v Sloper* (1737) 125 ER 1039 at 1044 ("a constable"); *Sirros* [1975] QB 118.
60 *Henderson v Preston* (1888) 21 QBD 362; *Demer v Cook* (1903) 88 LT 629; *Smith v Collis* (1910) 10 SR (NSW) 800; *Roberston* (1997) 92 A Crim R 115; .
61 *Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239 at 269.
62 (1909) 9 SR (NSW) 192.

it as open to him to conclude that *Roberston* had been wrongly decided (**CAB 375-377 [480]-[486]**). In reality, however, there was no such conflict, because *Feather* concerned a claim for trespass arising from the execution of a search warrant issued by a justice of the peace. As that warrant involved no exercise of judicial power,[63] it did not involve the common law defence at all. In contrast, *Roberston* was squarely on point. Further, it explained the common law defence by reference to earlier authority (including *Posner*), it was not doubted in *Kable*, and it was consistent with *Smith v Collis*. The primary judge erred in declining to follow *Robertson* (**CAB 377 [486]**).

43. ***Third***, the primary judge does not appear to have appreciated the significance of the numerous cases in which the defence was held to be available not just to "ministerial officers" and sheriffs, but to police officers and gaolers, and their servants and agents. In part, this appears to have been because his Honour read an implicit negative into cases in which the relevant executing officers were in the position of "ministerial officers". However, the fact that such persons were the subject of early statements of the common law defence demonstrates no more than that they were the individuals who gave effect to the orders in question in the circumstances of those cases. Those cases did not lay down a rule that no-one else could rely on that defence.

44. The primary judge distinguished the cases involving police officers and gaolers by treating them as concerning the statutory defence afforded to such persons under the *24 Geo II, c 44 (**Constables Protection Act**) 1750* (Imp). His Honour treated the existence of that Act as evidence that there must have been no common law defence, because otherwise there would have been no need for the Act (**CAB 358 [416]-[417]**). On that basis, even authority that discussed the liability of executing officers without any reference to that Act were not treated as supporting a common law defence (eg **CAB 358 [417]**, **376-377 [483]-[484]**). That reasoning was erroneous.

(a) It ignored the fact that authorities prior to 1750 had already identified, or were supportive of, the availability of the common law defence to such officers.[64]

(b) It placed heavy reliance on the proposition that legislation would not have been

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63 So much was clear from the case itself, and was also expressly recognised in *Kable* (2012) 268 FLR 1 at [35]. The issuing of a search warrant "has never been conceived of as an exercise of judicial power": *Palmer v Ayres* (2017) 259 CLR 478 at [81].

64 See, eg, *Dr Drury's Case* (1610) 77 ER 688; *Higginson v Martin* (1677) 86 ER 1021; *Olliet v Bessey* (1682) 84 ER 1223; *Hill v Bateman* (1725) 93 ER 800; *Moravia v Sloper* (1737) 125 ER 1039.

enacted which aligned with, or overlapped with, the common law. However, statutory rules commonly overlap with, but then extend, common law rules.[65] The *Constables Protection Act* was just such an Act. It provided protection to police in situations where they had acted in reliance on a facially valid warrant issued as an executive act, not a judicial one. Cases concerning the operation of the Act in that context say nothing as to the availability of the common law defence when police or gaolers acted in reliance on judicial orders. His Honour's reasoning failed to recognise the significance of this distinction.[66]

(c) It ignored the likelihood that the Act was reflective of the existing concerns of the common law, and that the common law itself would come to be informed by the operation of that legislation. This reflects what this Court has called the "symbiotic relationship" of legislation and the common law.[67]

45. ***Fourth***, the primary judge failed to appreciate the way in which the authorities dealt with the question of what kinds of error in the original orders would deprive an executing officer of the benefit of the defence. Judge Vasta's errors were plainly serious ones that warranted his orders being set aside on appeal. Nevertheless, Judge Vasta made those errors in the exercise of subject-matter jurisdiction that he undoubtedly possessed (as the primary judge accepted: **CAB 299 [174]**). The primary judge's conclusion that the common law defence was unavailable to the MSS guards and Queensland officials even with respect to errors made within subject-matter jurisidiction was contrary to the preponderance of authority discussed above (**CAB 386 [521]**). In support of the contrary conclusion, the primary judge referred to *Feather* (**CAB 385 [517]-[518]**) but, as noted above, that case did not involve the common law defence at all. He also referred to *Price v Messenger*,[68] but again this did not support his conclusion, as it did not concern the limits of the common law defence (but, rather, the defence under the *Constables Protection Act*, which applied "notwithstanding any defect of jurisdiction") (**CAB 364 [439]-[440], 385 [519]**).

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65 For example, s 18 of the *Australian Consumer Law* (and predecessor provisions) does not deny the existence of common law principles concerning fraudulent or negligent misstatement.

66 See, eg, *Morrell v Martin* (1841) 133 ER 1273; cf **CAB 359-360 [419]-[423]**.

67 ***Brodie*** *v Singleton Shire Council* (2001) 206 CLR 512 at [31] (Gleeson CJ); *Commonwealth Bank of Australia v* ***Barker*** (2014) 253 CLR 169 at [17] (French CJ, Bell and Keane JJ).

68 (1800) 126 ER 1213.

46. In the end, the determinative reason that the primary judge found that the common law defence was not available to the MSS guards was not because of the relationship between the defence and "jurisdiction", but because he held that any such defence was limited to "ministerial officers" (**CAB 383 [511], [513]**, **384 [515], 387 [524]**). That conclusion involved error, for the authorities discussed above establish that the defence is available at least to individuals: (i) whose duties include giving effect to orders of the court; or (ii) who are part of a class evidently intended to be given authority by an order to act in a way that would otherwise be tortious or otherwise unlawful. Even on the facts found by the primary judge at the close of the evidence (**CAB 355-356 [403]-[406]**), the MSS guards were within those categories. They were employees of MSS, which had contracted with the Commonwealth (represented by the Family Court and Circuit Court) to provide "in court guarding as directed".[69] Further, they were, in the course of that employment, providing security services for the court at the time of the orders made by Judge Vasta. Their supervisor (Mr Dunn) gave evidence that he reported to the Marshal of the Circuit Court; the Marshal was the "Project Authority" under the MSS Contract.[70] Judge Vasta ordered that Mr Stradford be detained, made a warrant directed to the Marshal, and said in Court that security "will have to escort [Mr Stradford] to the cell downstairs to await the officers to come and take him to prison".[71] The MSS guards complied with this direction,[72] as was consistent with MSS's written protocols.[73]

47. On those facts, even if Mr Dunn was not at risk of any sanction or action by the Marshal or by the Circuit Court in the event of disobedience, the fact is that the MSS guards were the individuals to whom the Court looked – both contractually, and in point of fact – to ensure the practical efficacy of the Judge's orders. Those orders were clearly intended to result in these particular guards detaining Mr Stradford. And that was precisely what they did.[74] The common law should not hold them to be liable for doing precisely what the Court intended that they do in order to implement the orders that it had made.

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69 CBFM 40 (cl 4.1.1), 64 (cl 10.1(d)).
70 CBFM 22 [32], 35, 38 (cl 2.1.1), 73 (cl A.1).].
71 CBFM 15.
72 CBFM 25 [55], [56].
73 See CBFM 94 ("Escort prisoners and detainees if required") and 96 ("If called upon by a Judge to take a person into custody and place in the cells…"). See also CBFM 109 ("Assist in Prisoner escort …").
74 CBFM 25 [55], [56].

GROUND 3: NO LIABILITY FOR FALSE IMPRISONMENT

48. Ground 3 is consequential on grounds 1 and 2. Its effect is that, if either of grounds 1 or 2 is upheld, it should be held that the primary judge erred in concluding that the Commonwealth was liable for the tort of false imprisonment. If ground 1 is upheld, that is because Judge Vasta's orders supply lawful authority for the MSS guards' conduct at the time it occurred. If ground 2 is upheld, that is because the common law defence was available to the MSS guards. In either case, no tort was committed.

GROUND 4: JUDICIAL IMMUNITY

49. The primary judge concluded that Judge Vasta did not have judicial immunity in relation to the contempt orders and warrant. His Honour concluded that:

(a) at common law an inferior court judge is not protected by judicial immunity if they make an order without having subject-matter jurisdiction (**CAB 342-343 [343]**) or if, in "exceptional circumstances", despite having subject-matter jurisdiction, they nevertheless make an order "in excess of … jurisdiction" (**CAB 343 [344]**);

(b) "exceptional circumstances" include "gross and obvious irregularity in procedure" or breach of the rules of natural justice, and making an order "for which there was no proper foundation in law" (**CAB 343 [345]-[346]**); and

(c) while Judge Vasta had subject-matter jurisdiction, this was an "exceptional circumstance" (**CAB 346-349 [358]-[374]**).

50. The above reasoning involved error for two reasons. ***First***, even if the common law of Australia continues to recognise any distinction between the immunity enjoyed by judges of superior and inferior courts, inferior court judges are immune from suit so long as they are acting within their jurisdiction (broadly understood as meaning subject-matter jurisdiction). That immunity is not subject to an "exceptional circumstances" limitation. ***Second***, at all material times, the common law did not recognise (or, alternatively, should not recognise) any distinction between the immunity of superior and inferior court judges.

Judge Vasta had subject-matter jurisdiction, and therefore enjoyed judicial immunity

51. The primary judge identified the critical issue as being when a judge ceases to act within "jurisdiction" in the relevant sense[75] (**CAB 307 [208]**). His conclusion that, even when a judge has subject-matter jurisdiction, immunity will not be available in "exceptional cases" seemingly had two bases. ***First***, his Honour identified historical English and Australian cases which indicated that liability could attach to an inferior court judge even where they had subject-matter jurisdiction (**CAB 308-317 [215]-[241], 322-323 [259]**). ***Second***, his Honour appears to have treated as decisive the decision of the House of Lords in ***In re McC*** *(A Minor)*,[76] which turned on the construction of an Irish statute that denied immunity where a judge acted "without jurisdiction or in excess of jurisdiction" (**CAB 317-321 [242]-[254]**). Both bases reveal error.

52. ***The modern Australian authorities***: The primary judge analysed many authorities. With respect, however, those authorities do not support the conclusion that his Honour reached, which paid insufficient regard to the actual reasoning in those cases, emphasised narrower or different bases upon which certain cases could have been decided, and dismissed reasoned statements of the law as unpersuasive obiter.

53. Before turning to the Austalian authorities, it is necessary to address two foreign decisions that were criticised by the primary judge,[77] notwithstanding that they have repeatedly been approved in Australia. The first is ***Sirros*** *v Moore*, where Lord Denning MR said, expressly addressing the position of "judges of all ranks, high or low":[78]

> Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action.

54. His Lordship went on to discuss the "old" position with respect to inferior court judges, which was that they were immune from liability when exercising a jurisdiction that

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75 The word "jurisdiction" is "used in a variety of senses and takes its colour from its context": see *Kirk* (2010) 239 CLR 531 at [63] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at [14] (French CJ, Gummow, Hayne and Crennan JJ). The relevant sense is discussed in paragraph 62 below.

76 [1985] 1 AC 528. See also *R v Manchester City Magistrates' Court;* ***Ex parte Davies*** [1989] QB 631.

77 **CAB 325 [267], 326 [272], 328 [282]**.

78 [1975] QB 118 at 132. See also at 139 (Buckley LJ), 150 (Ormrod LJ).

actually belonged to them – albeit wrongly – unless they did so maliciously. Lord Denning MR held that there was no warrant for maintaining the distinction previously made between decisions within and outside jurisdiction in respect of the immunity of inferior court judges, and that they should be held to be immune for anything done in the honest belief it was within subject-matter jurisdiction.[79] Ormrod LJ agreed, deprecating the "old rules", and saying that inferior court judges must be seen as having the same protection as superior court judges.[80] His Lordship made clear that an inferior court judge was protected, even when "having jurisdiction over the subject matter, he assumes a power which has not been given to him".[81]

10 55. The second decision is ***Nakhla*** *v McCarthy*, where the New Zealand Court of Appeal followed *Sirros*. In doing so, Woodhouse J (for the Court) held that, in the context of judicial immunity, "jurisdiction" refers "to the broad and general authority" conferred upon a court "to hear and to determine issues between individuals or between individuals and the Crown".[82] His Honour went on to emphasise that what is "of crucial importance for present purposes is that there is no further qualification that the immunity will disappear if the general jurisdiction of the court is exercised on some occasion in a manner which may lie or seem to lie, outside the conventional exercise of its power to hear and determine that sort of issue".[83] In other words, "'[a]uthority to decide' is the test, not the mode of decision nor the manner in which the powers … have been
20 exercised or not exercised".[84] Thus, the fact that a judge has made an error – even of an egregious kind – does not deny that the judge has "jurisdiction" in the relevant sense.

56. Turning to the Australian authorities, and starting with judgments of this Court, in *Durack v Gassior*,[85] a Family Court judge had ordered the imprisonment of a father for contempt, and in doing so had made errors akin to those made by Judge Vasta. In an *ex tempore* judgment striking out a claim for damages against the Commonwealth (based on the conduct of the judge), Aickin J said that "no action may be brought under our

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79 [1975] QB 118 at 136.
80 [1975] QB 118 at 149.
81 [1975] QB 118 at 150.
82 [1978] 1 NZLR 291 at 301.
83 [1978] 1 NZLR 291 at 301.
84 [1978] 1 NZLR 291 at 301 (Woodhouse J).
85 Unreported, High Court of Australia, 13 April 1981, quoted in ***Rajski*** *v Powell* (1987) 11 NSWLR 522 at 538 (Priestley JA) and *Yeldham v Rajski* (1989) 18 NSWLR 48 at 67 (Hope AJA).

legal system against judges for acts done in the course of hearing or deciding cases which come before them". His Honour cited Lord Denning MR's reasons in *Sirros*, referring particularly to p 136 (on which page Lord Denning MR held that the same immunity was available to inferior and superior court judges alike), before stating: "I do not entertain any doubt that that rule is applicable" in Australia.[86]

57. In ***Re East****; Ex parte Nguyen*, the applicant sought redress against two inferior courts (the Magistrates' Court of Victoria and the County Court of Victoria) in respect of decisions taken by judicial officers of those courts which, he claimed, were in breach of the *Racial Discrimination Act 1975* (Cth). This Court held that the claim must fail in part due to the "well established immunity from suit which protects judicial officers from actions arising out of acts done in the exercise of their judicial function or capacity".[87] Plainly that does not support any narrow concept of "jurisdiction" in the present context.

58. In ***Gallo*** *v Dawson*, Wilson J summarily dismissed a claim against a High Court judge. His Honour cited *Nakhla* in support of the proposition that in this context "'jurisdiction' means the broad and general authority conferred upon a court to hear and determine a matter. It is authority to decide that is the test, not the mode of decision nor the manner in which the power has been exercised".[88] Wilson J also quoted Lord Denning MR's reasons in *Sirros* with approval, including the passage extracted above.[89] McHugh J refused an extension of time to appeal against Wilson J's order, on the ground that the order, being based on principles of judicial immunity almost 400 years old, was "unquestionably correct".[90] In an application to appeal against McHugh J's order, Mason CJ, Brennan, Deane, Toohey and Gaudron JJ said, "we agree with McHugh J that Wilson J was clearly correct in concluding that the appellant's case must fail by reason of the long-established principle of judicial immunity applying to acts done by a judge in the course of the performance of judicial duties".[91]

59. In ***Fingleton*** *v The Queen*, which concerned a magistrate's claim to a statutory

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86 *Durack v Gassior* (Unreported, High Court of Australia, 13 April 1981).
87 (1998) 196 CLR 354 at [30] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), citing *Rajski* (1987) 11 NSWLR 522.
88 (1988) 63 ALJR 121 at 122 (emphasis added).
89 (1988) 63 ALJR 121 at 122.
90 *Gallo* (1990) 64 ALJR 458 at 460.
91 *Gallo* (1992) 66 ALJR 859 at 859 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ).

immunity in the *Criminal Code* (Qld), Gleeson CJ observed that the statutory expression "excess of authority" reflected what was held in *Nakhla* to be the content of "jurisdiction".[92] His Honour also quoted the passage from *Sirros* extracted above with approval, before explaining the strong public policy considerations concerning the protection of an independent judiciary that underpin common law judicial immunity "even in respect of conduct alleged to be malicious and lacking in good faith".[93] Kirby J referred to the rules "now overtaken by statute and the common law, that formerly drew artificial distinctions … between judicial officers at different ranks in the hierarchy".[94]

60. Intermediate court authority (including cases cited with approval by this Court in the authorities discussed above) is to the same effect. For example, in *Attorney-General (NSW) v* ***Agarsky***,[95] the NSW Court of Appeal (Kirby P, with whom Hope and Mahoney JJA agreed) dismissed a claim relating to various magistrates and judges, without differentiating between the members of inferior and superior courts, on the basis that "the cause of action which the claimant seeks to pursue is manifestly without a basis in the present state of the law in Australia. Action is not maintainable where judicial officers act in good faith in the performance of their judicial duties".[96] Kirby P saw this as "virtually identical" to the law in England, citing *Sirros*.[97] Other NSW Court of Appeal decisions have reinforced that principle, including by reference to *Sirros* and *Nakhla*.[98] In particular, in *O'Shane v Harbour Radio Pty Ltd*,[99] it was held, including on the authority of *Sirros*, that the same judicial immunity as applies to superior court judges applies to magistrates in the exercise of their judicial function.

61. Other than the judgment now under appeal, there seem to be no Australian cases in which an inferior court judge, acting with subject matter jurisdiction, has been held to have lost the protection of the common law immunity because of a gross and obvious

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92 (2005) 227 CLR 166 at [35]. In a short judgment, Gummow and Heydon JJ (at [123]) appeared to agree with the relevant part of Gleeson CJ's reasons, but the precise boundaries of that agreement are unclear. McHugh J (at [59]) and Hayne J (at [193]) agreed with Gummow and Heydon JJ.

93 (2005) 227 CLR 166 at [40]. See generally at [38]-[41].

94 (2005) 227 CLR 166 at [137]. The primary judge criticised that statement: **CAB 338 [325]**.

95 (1986) 6 NSWLR 38.

96 (1986) 6 NSWLR 38 at 40.

97 (1986) 6 NSWLR 38 at 40.

98 See *Rajski* (1987) 11 NSWLR 522 at 528G-529A, 532E and 534C (Kirby P) and 538F-539B (Priestley JA, with whom Hope JA agreed); ***Yeldham*** (1989) 18 NSWLR 48 at 58 (Kirby P) and 70 (Hope AJA, with whom Priestly JA agreed).

99 (2013) 85 NSWLR 698 at [85]-[91] (Beazley P, with with whom McColl JA and Tobias AJA agreed). The primary judge criticised these statements as "not helpful": **CAB 339 [329].**

irregularity that enlivens an "exceptional circumstance" limitation. Indeed, the authorities leave no room for the idea of a qualification of that kind.

62. While the primary judge was at pains to emphasise that many of these judgments concerned superior court judges, several did not (eg *Agarsky*, *Yeldham*, *Re East*, *Fingleton*). Furthermore, even the cases that did concern superior court judges do not state the applicable legal principle in a manner that supports a limited approach to "jurisdiction", or that draws any distinction in the immunity of superior court and inferior court judges. To the contrary, the cases consistently describe the immunity in language applicable to all judicial officers, for example referring to it as applicable to all "acts done by a judge in the course of the performance of judicial duties".[100] To the extent that the authorities refer to immunity being available only where a judge has "jurisdiction", they repeatedly approve the statement in *Nahkla* (which denies that errors in the exercise of jurisdiction result in an absence of jurisdiction[101]), and Lord Denning MR's statements in *Sirros* (about immunity being available even to a judge who is "under some gross error or ignorance, or [who] was actuated by envy, hatred and malice, and all uncharitableness"). None of that is consistent with the primary judge's conclusion that, even when a court has subject-matter jurisdiction, judicial immunity is not available in "exceptional circumstances".

63. The primary judge's "exceptional circumstances" approach came primarily from the English cases, particularly *In re McC*, which his Honour considered "highly persuasive": **CAB 321 [254], 343 [345]-[346]**. The weight given to that case is surprising, for the result turned upon statutory provisions with no relevant Australian counterpart. Dealing first, and in *obiter*, with civil liability for things done within jurisdiction, Lord Bridge (with the concurrence of other members of the House) explained that superior court judges had absolute immunity from civil liability for their judicial acts (even for acts done maliciously and without reasonable cause). His Lordship then explained that "[i]f the old common law rule was different in relation to justices of the peace" then there was no longer any justification for the difference, which would be a "ludicrous anachronism".[102] On that basis, the House held that "the old

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100 *Gallo* (1992) 66 ALJR 859 at 859 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ).

101 Thus, even if a Court makes a "jurisdictional error" in the sense described in *Craig* (1995) 184 CLR 163, that is not relevant to the analysis of judicial immunity.

102 *In re McC* [1985] 1 AC 528 at 541.

common law 'action on the case as for a tort' against justices acting within their jurisdiction maliciously and without reasonable and probable cause no longer lies".[103] Thus, *In re McC* is squarely against the proposition that civil liability may arise for errors within jurisdiction, even in "exceptional circumstances".

64. As to errors made without jurisdiction, Lord Bridge "emphatically" rejected a submission that any error that would justify setting an order aside on appeal also deprived the inferior court of jurisdiction.[104] The relevant notion of "jurisdiction" was much broader. Critically, however, for errors made without jurisdiction, s 2 of the *Justices Protection Act (Ireland) 1849* (UK), which was substantially re-enacted as s 15 of the *Magistrates' Courts (Northern Ireland) Act 1964* (UK), provided that a person "may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this Act". The House of Lords held that those provisions gave "statutory force … to the old common law rule that justices were civilly liable for actionable wrongs suffered by citizens pursuant to orders made without jurisdiction".[105] It was that statute that was the reason the courts below had been correct to reject Lord Denning MR's reasoning in *Sirros* equating the immunity of inferior court justices with that of superior courts, because "however anomalous it may seem to some, the distinction unquestionably remains part of the law affecting justices and will continue to do so as long as the language of … section 15 of the Northern Ireland Act of 1964 … remains in legislative force".[106] In other words, the statute required the House of Lords to apply the "old rule". *Ex parte Davies* concerned the analogous English provision (s 45 of the *Justices of the Peace Act 1979* (UK)), and is irrelevant for the same reason. No doubt for these reasons, neither *In re McC* nor *Ex parte Davies* have been seen in Australia, other than by the primary judge, as indicating that inferior court judges have a lesser immunity then their superior court counterparts.[107]

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103 *In re McC* [1985] 1 AC 528 at 541.

104 *In re McC* [1985] 1 AC 528 at 542G, 543B, 546E-G, 547B. In *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, Latham CJ (at 376) and Dixon J (at 391) likewise rejected several old English cases supporting the contrary view. The actual decision in *Parisienne Basket Shoes* was that a court of petty sessions had jurisdiction to determine (even wrongly) whether a proceeding was commenced within an applicable time limitation.

105 *In re McC* [1985] 1 AC 528 at 541 (emphasis added).

106 *In re McC* [1985] 1 AC 528 at 541-542 (emphasis added).

107 *In re McC* was seen by Gleeson CJ in *Fingleton* (2005) 227 CLR 166 at [34] to have involved "strong criticism" of the historical distinction between inferior and superior court judges. In *Rajski,* it was seen only as affecting the position in Northern Ireland: (1987) 11 NSWLR 522 at 529A (Kirby P).

65. The only cases cited by the primary judge in support of the exception which involved a loss of common law immunity[108] long pre-date the authorities discussed above, and reflect the outdated understanding that those cases expressly rejected. It is particularly striking that his Honour's conclusions at **CAB 342-343 [340]-[346]** drew support from just two Australian cases, both of which were decided more than 120 years ago.[109] Those cases do not now reflect the common law of Australia.

No distinction between the immunity afforded to judges of superior and inferior courts

66. Further or alternatively, the common law of Australia either already recognises – or should now be held to recognise – that there is no longer any distinction between the immunity afforded to judges of superior and inferior courts. The better view is that this is already established by the authorities discussed above. But, if it is not, the common law should be developed to maintain a better connection with fundamental doctrines and principles,[110] having regard to: *first*, the principled bases for judicial immunity which emerge from those authorities; and, *second*, the absence of any rationale of ongoing relevance to justify a distinction. The absence of such a rationale has already been recognised by the Commonwealth Parliament with respect to Judges of the Federal Circuit and Family Court of Australia (Division 2).[111] As mentioned in paragraph 44(b) above, members of this Court have recognised the "symbiotic relationship" between statute and judge-made law, such that the two tend to, and should, develop alongside each other.[112]

67. ***The principled bases for judicial immunity***: The authorities reveal three principled bases for judicial immunity, each of which apply equally to inferior and superior court judges. The ***first*** rationale is the protection of judicial independence. As Gleeson CJ put

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108 See *Groome v Forrester* (1816) 105 ER 1066; *M'Creadie v Thomson* [1907] SC 1176; *O'Connor v Isaacs* [1956] 2 QB 288 (**CAB 343 [346]**).

109 See *Raven v Burnett* (1895) 6 QLJ 166; *Wood v Fetherston* (1901) 27 VLR 492. In fact, those cases showed that an inferior court judge who lacked subject matter jurisdiction may still retain the immunity, if the judge has no knowledge or means of ascertaining their lack of jurisdiction: **CAB 342-343 [343]**.

110 *Imbree v McNeilly* (2008) 236 CLR 510 at [45] (Gummow, Hayne and Kiefel JJ, Gleeson CJ relevantly agreeing at [13]).

111 See *Federal Circuit and Family Court of Australia Act 2021* (Cth), s 277A, inserted by the *Federal Courts Legislation Amendment (Judicial Immunity) Act 2023* (Cth).

112 See, eg, *Fairfax Media Publications Pty Ltd v Voller* (2021) 273 CLR 346 at [57] (Gageler and Gordon JJ); *Barker* (2014) 253 CLR 169 at [17] (French CJ, Bell and Keane JJ); Leeming, "Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room" (2013) 36(3) *UNSW Law Journal* 1002 at 1021; cf *In re McC* [1985] 1 AC 528 at 542B-C (Lord Bridge).

it in *Fingleton*, "[i]t is the right of citizens that there be available for the resolution of civil disputes between citizen and citizen, or between citizen and government, and for the administration of criminal justice, an independent judiciary whose members can be assumed with confidence to exercise authority without fear or favour".[113] It has long been recognised that affording judges immunity is crucial to the maintenance of judicial independence, and thus the protection of that public right.[114] Almost two hundred years ago, in *Garnett v Ferrand*, Lord Tenterden CJ held that the "freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who are to administer justice ought to be".[115] Those words "apply not only to the judges of the superior courts, but to judges of all ranks, high or low".[116] This Court has recognised that all courts capable of exercising federal judicial power (whether superior courts or inferior courts) must be, and appear to be, independent and impartial.[117]

68. The ***second***, and closely related, rationale underpinning judicial immunity is protecting against the risk of bias (including apprehended bias) that would arise if judges were subject to threats of litigation.[118] Judicial immunity "forecloses the assertion that the prospect of suit may have had some conscious or unconscious effect on the decision-making process or its outcome".[119]

69. The ***third*** rationale stems from the principle of finality. In ***D'Orta-Ekenaike*** *v Victoria Legal Aid*, Gleeson CJ, Gummow, Hayne and Heydon JJ emphasised that the exercise

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113 (2005) 227 CLR 166 at [38] (Gleeson CJ).

114 See ***Forge*** *v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [75] (Gummow, Hayne and Crennan JJ). See also, eg, *Fray v Blackburn* (1863) 122 ER 217 at 217; *O'Shane* (2013) 85 NSWLR 698 at [76]-[77] (Beazley P); *Nakhla* [1978] 1 NZLR 291 at 294 (Woodhouse J); *Sirros* [1975] QB 118 at 136 (Lord Denning MR); *Rajski* (1987) 11 NSWLR 522 at 535 (Kirby P).

115 (1827) 108 ER 576 at 581 (emphasis added). See also *Anderson v Gorrie* [1895] 1 QB 668 at 670 (Lord Esher MR, Kay and Smith LJJ agreeing), stating if judges were subject to civil proceedings in respect of their judicial acts, "judges would lose their independence, and … the absolute freedom and independence of the judges is necessary for the administration of justice".

116 *Sirros* [1975] QB 118 at 132 (Lord Denning MR).

117 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [24]-[25], [27], [29], [35], [44] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See also at [3]-[5] (Gleeson CJ).

118 See, eg, *Fingleton* (2005) 227 CLR 166 at [38]-[40] (Gleeson CJ), *Rajski* (1987) 11 NSWLR 522 at 539 (Priestley JA) and *Sirros* [1975] QB 118 at 136 (Lord Denning MR). See also ALRC, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (December 2021) at [2.83], citing McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (2019) at 202.

119 *Forge* (2006) 228 CLR 45 at [75] (Gummow, Hayne and Crennan JJ).

of judicial power has aims which are wider and more important than the concerns of the parties to a controversy: "the community at large has a vital interest in … [its] final quelling".[120] This is a modern formulation of an early rationale for the immunity.[121]

70. Each of these rationales applies equally to judges of superior and inferior courts: the principles are "enduring and universal".[122] In so far as certain English and historical Australian cases could support drawing a distinction between the immunity of inferior and superior court judges, they are not readily accommodated within the Australian constitutional context, which "does not permit of different grades or qualities of justice".[123] The importance of these principles to the work of both superior and inferior courts weighs heavily in favour of recognising that the common law of Australia draws no distinction between the immunity afforded to superior and inferior court judges.

71. ***No remaining justifications for the distinction***: The three rationales that once might have justified affording inferior court judges lesser immunity than their superior court counterparts no longer do so. The ***first*** rationale was jurisdictional. It was thought in the seventeenth century that a superior court could never exceed jurisdiction, since it was a superior court's prerogative to determine the limits of its own jurisdiction.[124] However, no Australian court is truly of unlimited jurisdiction,[125] such that even superior courts in Australia may commit jurisdictional errors.[126] The common law must be mindful of that aspect of the Australian constitutional context, which suggests that to maintain a distinction between the immunity of superior and inferior court judges based on this rationale would be an inappropriate borrowing from English law.[127]

72. The ***second*** rationale concerned discipline or accountability.[128] But the authorities

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120 (2005) 223 CLR 1 at [32]. See also *Mann v O'Neill* (1997) 191 CLR 204 at 239 (Gummow J); *Forge* (2006) 228 CLR 45 at [75] (Gummow, Hayne and Crennan JJ).

121 Olowofoyeku, ***Suing Judges****: A Study of Judicial Immunity* (1993) at 15. See also *Floyd v Barker* (1608) 77 ER 1305 at 1306.

122 *Rajski* (1987) 11 NSWLR 522 at 534 (Kirby P), citing *Pierson v Ray* (1967) 386 US 547 at 553-554.

123 *Wainohu v New South Wales* (2011) 243 CLR 181 at [105] (Gummow, Hayne, Crennan and Bell JJ).

124 See Olowofoyeku, *Suing Judges* (1993) at 20, citing Holdsworth, *A History of English Law*, vol 6 (1924) at 239 and *Peacock v Bell* (1666) 85 ER 84.

125 *NSW v Kable* (2013) 252 CLR 118 at [30] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

126 See, eg, *Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 96 ALJR 819 at [44]-[45] (Gordon, Edelman and Steward JJ).

127 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [75], [91] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), [110] (Kirby J); see also *Kirk* (2010) 239 CLR 531 at [66] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

128 As discussed in *Sirros* [1975] QB 118 at 133 (Lord Denning MR), 148-149 (Ormrod LJ).

supporting that rationale are reflective of a time when appellate rights were either non-existent or nascent.[129] That rationale is now served by rights of appeal and judicial review, which provides the basis for the correction of error by inferior courts.[130]

73. The ***third*** rationale concerned expertise. In *In re McC*, Lord Bridge said that, if the "old common law rule was different in relation to justices of the peace, I suspect the different rule had its origins in society's view of the justice, reflected in Shakespeare's plays, as an ignorant buffoon". As his Lordship noted, that rationale "clearly has no application whatever in today's world" to stipendiary magistrates, who are "competent professional judges".[131] The same is true of inferior court judges in Australia.

10 74. For all those reasons, the common law of Australia should be recognised as drawing no distinction between the immunity of superior and inferior court judges.

PART VII ORDERS SOUGHT

75. The Commonwealth seeks the orders set out in its notice of appeal (**CAB 474-475**).

PART VIII ESTIMATED TIME

76. The Commonwealth estimates that 3.5 hours will be required to present oral argument (including reply).

Dated: 28 March 2024

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129 See *Weiss v The Queen* (2005) 224 CLR 300 at [12]-[25] (the Court). As to civil appeals, see *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-620 (Mason J, Barwick CJ and Stephen J agreeing). The "modern" appellate structure in England was brought about by the *Common Law Procedure Act 1852* and the *Supreme Court of Judicature Act 1875*, and these reforms were quickly adopted in Australia: see Prince, "Recurring Issues in Civil Appeals – Part I" (2022) 96 *Australian Law Journal* 203 at 209-210.

130 By virtue of the *Constitution* ss 73 and 75(v): see *Kirk* (2010) 239 CLR 531 at [98]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

131 *In re McC* [1985] 1 AC 528 at 541.

ANNEXURE TO THE COMMONWEALTH'S SUBMISSIONS

Pursuant to *Practice Direction No 1 of 2019*, the Commonwealth sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No	Description	Version	Provisions
	Commonwealth statutory provisions		
1.	*Competition and Consumer Act 2010* (Cth)	Current (Compilation No. 149, 20 Mar 2024 – present)	Sch 2, s 18
2.	*Family Law Act 1975* (Cth)	As at 24 Jan 1990 (Reprint No. 2, reprinted as at 3 July 1985)	ss 35, 70, 108, 114
3.	*Family Law Act 1975* (Cth)	As at 6 Dec 2018 (Compilation No. 87, 22 Nov 2018 – 9 Mar 2019)	Pts XIIIA, XIIIB; ss 39, 39B, 69H, 69J, 79, 112AE, 112AP
4.	*Family Law Amendment Act 1989* (Cth)	As enacted, at 28 Dec 1989 (Act No. 182 of 1989)	ss 10, 15, 18
5.	*Federal Circuit and Family Court of Australia Act 2021* (Cth)	Current (Compilation No. 7, 28 Nov 2023 – present)	s 277A
6.	*Federal Circuit Court of Australia Act 1999* (Cth)	As at 6 Dec 2018 (Compilation No. 36, 1 Sep 2018 – 31 Dec 2019)	ss 8, 17
7.	*High Court of Australia Act 1979* (Cth)	Current (Compilation No. 15, 21 Oct 2016 – present)	s 5
8.	*Judiciary Act 1903* (Cth)	Current (Compilation No. 49, 18 Feb 2022 – present)	s 78B
	State statutory provisions		
9.	*District Court of Western Australia Act 1969* (WA)	As at 6 Feb 1978 (Reprinted as at 9 April 1973)	ss 8, 42
	Foreign statutory provisions		
10.	*24 Geo II, c 44 (Constables Protection Act) 1750* (Imp)	As enacted	

11.	*Justices of the Peace Act 1979* (UK)	As at 16 July 1986	s 45
12.	*Justices Protection Act (Ireland) 1849* (UK)	As enacted	s 2
13.	*Magistrates' Court (Northern Ireland) Act 1964* (UK)	As at 31 August 1978	s 15