10 **IN THE HIGH COURT OF AUSTRALIA**

MELBOURNE REGISTRY **M47 of 2012**

BETWEEN:

HIGH COURT OF AUSTRALIA
FILED
18 JUN 2012
THE REGISTRY SYDNEY

PLAINTIFF M 47/2012

Plaintiff

AND

DIRECTOR-GENERAL OF SECURITY AND OTHERS

Defendants

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WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I: Publication of Submissions

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

Part II: Intervention

2. The Attorney General for New South Wales, intervenes in this Court pursuant to
30 s 78A of the Judiciary Act 1903 (Cth) in support of the Defendants, in relation to such issues (if any) as may need to be determined by the Court concerning Chapter III of the Constitution, and "the principle in Australian Communist Party v Commonwealth (1951) 83 CLR 1."

Part III: Statement of Issues

3. The Attorney is conscious of the urgency with which the matter has been brought on and the limited time for hearing and if, having heard the oral submissions of the other parties, he seeks to present additional oral submissions, they will be very

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Dated: 17 June 2012

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short; should that be necessary, a division of time has been agreed with the Defendants.

4. In summary, the Attorney-General generally adopts the submisions made on behalf of the Defendants that the legislation authorising the continued detention of the Plaintiff (and Plaintiff s138) does not contravene the Constitution, including Chapter III and the "the principle in Australian Communist Party v Commonwealth (1951) 83 CLR 1."

5. Noting that not all factual material in evidence is available to him, the Attorney-General agrees with Plaintiff M47's statement of the issues, material facts, and applicable provisions of the Constitution, statutes and regulations, as they are set out in the Plaintiff's written submissions.

Part IV: Chapter III and its present relevance to States

6. As the Chief Justice said in Crump v New South Wales [2012] HCA 20:

> [31] Limits upon the power of State legislatures to make laws affecting State courts and their decisions are derived by implication from Ch III of the Constitution as explained in a number of decisions of this Court beginning with *Kable v Director of Public Prosecutions (NSW)*.

7. As was said by the whole Court in H A Bachrach Pty Ltd v The State of Queensland [1998] HCA 54:

> *[14]* *Kable* took as a starting point the principles applicable to courts created by the Parliament under s 71 and to the exercise by them of the judicial power of the Commonwealth under Ch III. If the law in question here had been a law of the Commonwealth and it would not have offended those principles, then an occasion for the application of *Kable* does not arise.

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See also: Silbert v DPP (WA) [2004] HCA 9; (2004) 217 CLR 181 at [10], Baker v R [2004] HCA 45; (2004) 223 CLR 513; at [22-23].

8. Thus, the States have a direct interest in the construction of Chapter III in relation to their own legislative powers, as well as their interest in ensuring that the powers of the Commonwealth Parliament are confined within their proper limits.

9. That interest becomes acute in relation to State legislative capacity to detain without trial: Fardon v Attorney-General (Qld) [2004] HCA 46; (2004) 223 CLR
20 575.

10. Further, bearing in mind the definition of 'security' in the Australian Security and Intelligence Organisation Act 1979 (Cth) a person who is assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to 'security', as so defined, may be a person whose actions, if that person is permitted to enter into and remain in Australia, might threaten the body politic of a State as well as that of the Commonwealth, hence the importance to New South Wales of maintaining the efficacy of such assessments, and their place in current immigration law.

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11. An overlap of State preventative detention laws with such matters of 'security' may occur, indeed they are contemplated by the terms of the Terrorism (Police Powers) Act 2002 (NSW) which permit NSW Police officers to effect preventative detention for up to 48 hours which may be extended by the NSW Supreme Court for up to 14 days, for the purpose of preventing terrorist acts occurring or preserving evidence of terrorist acts that have occurred.

12. The circumstances in which deprivation of liberty may permissibly be imposed upon a citizen by the State otherwise than by way of an exercise of judicial power
40 are limited, although as Gummow J said in Fardon at [83], p 613 "It may be accepted that the list of exceptions to which reference was made in Lim is not

closed." Justice Kirby was to the same effect in Vasiljkovic v Commonwealth (2006) 227 CLR 614 at [183], citing Kruger v The Commonwealth (1997) 190 CLR 1 at 162 per Gummow J.

13. While those circumstances have not been exhaustively defined, they extend to a power to detain a non-citizen in custody to permit the executive to receive, investigate and determine an application to enter or remain in Australia and, after determination to admit or remove the non-citizen: Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 10.4, 32.4.

14. The statutory powers in question are squarely within s 51(xix) of the Constitution. There is no basis for the contention advanced by the Plaintiff and the AHRC that the exception relating to detention of non-citizens is subject to a temporal assessment as to whether it is "proportionate" or "appropriate and adapted" to the current likelihood of removal: cf. Plaintiff's submissions at [67]; AHRC submissions at [34].

15. The conclusion that a law is not offensive to Chapter III is not affected by the fact that, in a particular case, the removal of a non-citizen may not be likely in the forseeable future. When conferred upon the Executive, the authority to detain a non-citizen takes its character from the executive powers to exclude, admit and deport of which it is an incident – it is neither punitive in nature nor part of the judicial power of the Commonwealth: Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 32 per Brennan, Deane and Dawson JJ; Al-Kateb v Godwin (2004) 219 CLR 562 at 582 [36] per McHugh J. Whilever the purpose of the detention continues to be for the purpose of exclusion from the Australian community, the detention of the non-citizen is within the power of the executive.

Part V: The Communist Party case principle

16. Paragraph 23 of Plaintiff S138's submissions is too absolute when it states the "principles governing public interest immunity claims apply as a means of reconciling the conflict between, on the one hand, the public interest in the administration of justice which dictates that all relevant material should be available to the parties and the court and, on the other hand, the public interest in ensuring that harm is not caused by the disclosure of material that ought not, for one reason or another, be disclosed".

17. Preventing a party to proceedings from seeing some (or even all) of the evidence to be relied upon by a court undertaking limited judicial review in a civil case is not antithetical, or repugnant to the judicial process, nor does it contravene Chapter III, although it is not common: see, eg, Nicopoulos v Commissioner for Corrective Services (2004) 148 A Crim R 74 and the cases there cited, including Amer v Minister for Immigration, Local Government and Ethnic Affairs (BC8908599, FCA, 18 December 1989, Lockhart J.) As Lockhart J there said, while, acknowledging that 'there is no perfect solution to a problem such as has arisen here.'....:

> [82] For the Court not to disclose evidence to a party who may be affected by it, and to decline to disclose it on a restricted basis to counsel or solicitors for that party is a serious step *which is taken only when necessary*. This is a case where it is said that there is a conflict between the interests of the proper determination of issues between parties on the one hand and the balancing of national security on the other. [emphasis added]

18. Furthermore, there are cases where any details of the grounds of the claim on a public interest immunity case have been denied to the person seeking revelation: eg Haj-Ismail v. Minister for Immigration and Ethnic Affairs (No. 2) (1982) 64 FLR 112.

19. In Commonwealth v Northern Land Council (1993) 176 CLR 604 at 620, this Court held that it is impermissible for the documents or confidential affidavits to be provided to those acting for the parties issuing the subpoenas, even on a restricted basis, before the claim for immunity is decided by the Court, because that would be an 'encroachment upon the confidentiality claimed for the documents...'. This matter is not the occasion to consider whether, notwithstanding that rule, general case management notions stated in the Civil Procedure Act 2005 (NSW) permit the imposition by the Court of a special counsel who does see the confidential material albeit not disclosing it to the applicant:- New South Wales v Public Transport Ticketing Corporation (No 3) [2011] NSWCA 200.

17 June 2012

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