HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M 112 OF 2020**

BETWEEN: **MINISTER FOR HOME AFFAIRS**

Applicant

AND: **ABDUL NACER BENBRIKA**

Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH

Intervener

RESPONDENT'S REPLY

PART I FORM OF SUBMISSIONS

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

PART II REPLY

A. Principle derived from *Lim*

2. The parties join issue on the meaning and consequences of *Lim*.[1] The Commonwealth's argument that a Ch III court can be given the power to imprison a person so long as that imprisonment is for a reason other than that the person has breached the law (i.e, otherwise than as punishment for a breach of the law) [**Cth [22]**] should be rejected.

10 3. *First*, the Commonwealth claims that its approach does not elevate the distinction between punitive and protective detention [**cf Cth [23]**], but plainly it does so. To use the Commonwealth's own words, detention that is "directed to a purpose other than to punish for a breach of the law … will not intersect with the 'general proposition' from *Lim*" and, on this telling, can validly be done either by a court or by the executive. The Commonwealth claims to accept the "general proposition" in *Lim* that "the power to order that a citizen be involuntarily confined in custody is … part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts",[2] but it can scarcely be seen to do so [**cf Cth [21]**]. It confines that general proposition to a single application: subject to the "ordinary principles governing the separation of powers", both the executive and the
20 judiciary may imprison a citizen so long as it is not for a breach of the law [**Cth [22]**]. That the Commonwealth undermines *Lim* is clear from its criticism of Gummow J's analysis, which it says "turned on" one of the classic statements in *Lim* [**Cth [43]**].

4. *Second*, **Cth [19]** mischaracterises the critical passages in *Lim* by seeking to distinguish a "statement" and a "conclusion". The two quotations contain the plurality's explication of a single principle.[3] That principle is that imprisonment of a citizen is penal or punitive and must be imposed by court order for a breach of the law.

5. *Third*, **Cth [22]-[23]** treat imprisonment for breach of the law as the hallmark of punishment, such that imprisonment for anything else is, by definition, not punishment.

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1 (1992) 176 CLR 1.

2 (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).

3 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1085 (Lord Reid).

But that is not supported by *Lim*: the joint judgment focused on substance over form and recognised that detention could be punitive even if divorced from any breach of the law.[4]

6. *Fourth*, the only case involving the judicial power of the Commonwealth in which a "non-punitive" power of a similar kind was accepted as part of the judicial power of the Commonwealth was *Thomas*.[5] But *Thomas* is distinguishable and does not assist the Commonwealth's argument including because the majority's decision in that case did not rest **solely** on control orders serving a "non-punitive" purpose: see **RS [48]**. Also critical were historical analogues[6] – an important souce of guidance on the meaning of the judicial power of the Commonwealth.[7] There are no historical analogues here. The only examples to which the Commonwealth can point are of recent State legislation.

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B. State and Commonwealth judicial power

7. The parties join issue on whether the judicial power of the States is the same as the judicial power of the Commonwealth. This issue is said to inform the assessment of *Kable [No 2]*[8] and the analogical assistance gained, if any, from State preventative detention regimes.

8. The Commonwealth says that "the only differences … are those that arise from the different sources of the authority to adjudicate", but then says that "[t]he character of Commonwealth and State judicial power is the same, regardless of its source" [**Cth [14], [39]**]. Reading those sentences together, what the Commonwealth must mean is that the only difference between the judicial power of the Commonwealth and the judicial power
20 of the States is their source. The former is sourced in Ch III of the Commonwealth Constitution, whereas the latter is sourced in State Constitutions.

9. This assumes that the source of a power has no bearing upon its character. But as we submitted in **RS [63]**, the different source of power **is** important and consequential. What the "judicial power" of a polity can validly encompass is informed by what its Constitution mandates as to the division of that body politic's governmental power between the branches of government. Change the lines of separation, or indeed require no separation at all, and so change not only what each branch of government can do but

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4 (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

30 5 (2007) 233 CLR 307.

6 (2007) 233 CLR 307 at [16]-[17] (Gleeson CJ), [121] (Gummow and Crennan JJ), [463] (Hayne J).

7 See **RS fn 35**.

8 (2013) 252 CLR 118.

the very content of legislative, executive and judicial power itself. *Rizeq*[9] does not hold to the contrary. The quote from *Rizeq* in **Cth [39]** says that the character of judicial power is unaffected by the source of the law to be applied in the exercise of that power. The quote does **not** say that the source of judicial power is irrelevant to its character.

10. That the judicial power of the States is different from the judicial power of the Commonwealth in ways that extend beyond the trite circumstance that one emanates from a State Constitution and the other emanates from Ch III of the Commonwealth Constitution is not new: see **RS [61]**. And if the last sentence of **Cth [14]** is to be taken to mean that this Court has implicitly decided that they are otherwise the same, that submission should be rejected. As **RS [61]** noted, some Justices have left the question open, while others have determined it in the respondent's favour. If there has been any implicit assumption of homogeneity, that assumption is not authority for anything.[10]

11. Acceptance of the respondent's argument does not transgress the exhortation that the Constitution does not permit of "different grades or qualities of justice" [**Cth [40]**]. What is meant by that exhortation is that, "so far as concerns the judicial power of the Commonwealth", there can be no such different grades or qualities.[11] No case holds that the judicial power of the Commonwealth and the judicial power of the States are the same save for their different source. So to hold would markedly confine State judicial power.

12. Once it is accepted that the judicial power of the States can include more than the judicial power of the Commonwealth, the *Kable* line of cases are distinguishable. The respondent then relies on his submissions about *Lim* – applying as *Lim* does to the judicial power of the Commonwealth – to explain why it is that Div 105A of the *Criminal Code* is invalid when State preventive detention regimes have been upheld [**cf Cth [41]**].

C. Kable [No 2]

13. The parties join issue on *Kable* and *Kable [No 2]*. *First*, the Court should hold that *Kable* did not involve one matter, but a matter concerning the validity of the *CP Act* and a distinct and unrelated controversy as to whether an order should otherwise be made under the *CP Act* [**RS [57]**; cf **Cth [36]-[37]**]. The claim that the *CP Act* was invalid did not

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9 (2007) 262 CLR 1 at [53].

10 *CSR Ltd v Eddy* (2005) 226 CLR 1 at [13] (Gleeson CJ, Gummow and Heydon JJ).

11 See *Kable* (1996) 189 CLR 51 at 103 (Gaudron J); see also 82 (Dawson J), 115 (McHugh J), 127 (Gummow J).

arise out of a "common substratum of facts"[12] with the claim that an order should not be made. The former did not depend on constitutional facts. The latter depended on facts about the likelihood of Mr Kable commiting a serious act of violence. Mr Kable could readily have commenced a separate proceeding in the High Court's original jurisdiction seeking a declaration of invalidity in respect of the *CP Act* without any risk of inconsistent judgments on the substantive issues. And as we submitted in **RS [57]**, *Kable* is not authority for the proposition that there was only one matter because that was the mere assumption upon which the litigation in *Kable* proceeded.

14. *Second*, s 79(1) of the *Judiciary Act 1903* (Cth) did not pick up s 5(1) of the *CP Act* [**cf Cth [35]**]. Section 5(1) was a "double function" provision that "deal[t] with substantive liabilities and [gave] jurisdiction with respect to them to the Supreme Court".[13] Not falling within the two kinds of laws discussed in *Rizeq*,[14] such a double function provision does not require s 79 to operate, because it deals with substantive liaiblities and confers State jurisdiction[15] rather than "governing the manner of exercise of State jurisdiction".[16]

15. *Third*, the Commonwealth cannot account for *Fardon*.[17] If the raising of a constitutional defence results in only federal judicial power being exercised in the resolution of the proceedings, including as to the merits of the order sought under the impugned State Act, then this Court in *Fardon* should not have considered the institutional integrity of the Supreme Court but, rather, only whether there was a conferral of judicial power in accordance with *Boilermakers*.[18] That would be so either because it would need to be shown that the power to make the order was not incompatible with the Constitution such that it could be picked up by s 79(1) of the *Judiciary Act* (if the submission at [14] above is wrong);[19] or because it would need otherwise to be shown that the power could validly

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12 *Re Wakim* (1999) 198 CLR 511 at [140] (Gummow and Hayne JJ). See also, eg, *Petrotimor v Commonwealth* (2003) 128 FCR 507 at [24]-[28] (Black CJ and Hill J)

13 *Kable* (1996) 189 CLR 51 at 130 (Gummow J).

14 (2017) 262 CLR 1 at [103]-[104].

15 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165-166 (Dixon J).

16 *Masson v Parsons* (2019) 266 CLR 554 at [30].

17 (2004) 223 CLR 575.

18 (1956) 94 CLR 254.

19 See *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [72]-[74] (Gleeson CJ, Gaudron and Gummow JJ); W Bateman, 'Federal jurisdiction in State courts: An elaboration and critique' (2012) 23 *Public Law Review* 246 at 262-263.

be exercised as federal judicial power. But that is not how this Court approached the question. Nor did it in *International Finance Trust Co Ltd v NSW Crime Commission*.[20]

D. Criticism of Gummow J's analysis

16. Gummow J's analysis did not "critically depend" on the rejection of the distinction between detention for punitive and non-punitive purposes [**cf Cth [43]**]. The analysis remains the same if it is recognised that detention of a citizen otherwise than for breach of the law is, absent special reason, punitive. Gummow J can be understood as eschewing any top-down criterion unifying the exceptions to *Lim*'s general proposition, but that does not tell against the correctness of the analysis. It reflects common law incrementalism, an interest in history and a concern for liberty. Recognition that the exceptional cases are not closed is not, as the Commonwealth would have it, to be regarded as leaving the door for new exceptions wide open. That would sever the principle from its constitutional roots.

E. Division 105A of *Criminal Code*

17. The parties join issue on whether Div 105A is punitive. **Cth [51]-[53]** go only so far as to say that a CDO is designed to protect against a risk of future harm. But as we submitted in **RS [28]**, protection of the community is not necessarily inconsistent with punishment. Indeed, the most effective means of protecting the community may well be to punish a person by imprisonment. That is what is happening here, in contrast to *Fardon*, where one legislative object was the care or treatment of the offender.[21] As to **Cth [57]**, the respondent has not suggested that protection necessarily involves punishment; the point is that a protective purpose does not necessarily exclude punishment. The cases on aliens are not to the point [**Cth fn 25, 82, 83**], because detention of an alien for the purpose of expulsion is more apt to be regarded as non-punitive than the detention of a citizen.[22]

Dated: 27 November 2020

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[20] (2009) 240 CLR 319

[21] (2004) 223 CLR 575 at [5] (Gleeson CJ), [34] (McHugh J), [214] (Callinan and Heydon JJ).

[22] See *Plaintiff M76/2013 v Minister for Immigration and Citizenship* (2013) 251 CLR 322 at 385 [206] (Kiefel and Keane JJ); *Lim* (1992) 176 CLR 1 at 29 (Brennan, Deane and Dawson JJ).