HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

P56/2021

BETWEEN:

PETER ROBERT GARLETT
Appellant

and

THE STATE OF WESTERN AUSTRALIA
First Respondent

THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA
Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF TASMANIA, INTERVENING

Part I:

1. The Attorney-General for the State of Tasmania ("Tasmania") certifies that these submissions are in a form suitable for publication on the Internet.

Part II & III:

2. Tasmania intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the Second Respondent.

Part IV: Argument

Summary of Argument

3. The issue before the Court is whether the provisions of the *High Risk Serious Offenders Act 2020* (WA) ("the Act") contravene Chapter III of the *Commonwealth Constitution* in so far as they apply to a serious offender under custodial sentence who has been convicted

of the offence of robbery. The argument for the Appellant invokes the principle in *Kable v Director of Public Prosecutions (NSW)*[1] ("*Kable*").

4. Tasmania submits that the provisions of the Act are not constitutionally invalid as contravening that principle. Further, to the extent to which the principle in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[2] ("*Lim*") is relied upon by the Appellant to support his argument, it does not assist as the plain object of the Act is to ensure community protection rather than to impose punishment, thereby giving rise to an exception to the *Lim* principle as confirmed in *Minister for Home Affairs v Benbrika*[3] ("*Benbrika*").

The operation of the Act

5. Tasmania gratefully adopts the Second Respondent's analysis of the operative provisions of the Act.[4]

Correct approach

6. It is submitted that there is no need for this Court to engage with the Appellant's arguments in relation to whether or not the power conferred by the Act is a 'judicial power' in the sense that it could be imposed by the Commonwealth Parliament upon a court created under Chapter III of the Constitution. That is because the doctrine of separation of powers does not apply to the States. Thus, consistent with the approach in *Fardon v Attorney-General (Qld)*,[5] ("*Fardon*") and *Condon v Pompano*[6] this Court may proceed directly to consider the *Kable* issue.

7. However, in the event that the Court prefers to first consider the issue of 'judicial power', it is addressed below.

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1 *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51.
2 (1992) 176 CLR 1 at 27.
3 [2021] HCA 4; (2021) 95 ALJR 166.
4 Second Respondent's Submissions [24] – [38].
5 (2004) 223 CLR 575, 586-587 [3] (Gleeson CJ); 569 [219] (Callinan and Heydon JJ). It is noteworthy that Gummow J also suggested that this approach was logical (at 614 [87]), but dealt with the judicial power issue first in order to address the detailed submissions by the Attorney-General for the Commonwealth.
6 *Condon v Pompano* (2013) 252 CLR 38; 88 [122] ff.

Preventative detention is within the exceptions to Lim; it is 'judicial power'

8. The Appellant appears to proceed on the basis of the principle in *Lim* that the involuntary detention of a citizen in custody is punitive in character and is an incident of the exclusive judicial function of adjudging and punishing criminal guilt.[7] However, that principle is subject to exceptions,[8] which effectively recognise that the power to detain can be non-punitive or preventative in nature.

9. The Appellant does not seek to challenge the correctness of *Benbrika*, yet implicitly challenges the reasoning upon which the plurality's decision is based.

10. In *Benbrika* the plurality rejected the contention that 'the exceptions to the *Lim* principle are confined to history and are insusceptible to analogical development'.[9] The plurality said that '[i]t is the protective purpose that qualifies a power as an exception to a principle that is recognised under our system of government as a safeguard on liberty'.[10] The plurality emphasised that, as a matter of substance, the power must have as its object the protection of the community from 'harm'.[11] It is plain from the plurality's reasoning that the exceptions to the *Lim* principle were not to be confined, provided that the essential non-punitive character of the legislation is present together with the object of the power being directed to the protection of the community and not the punishment of the offender.

11. However, the plurality's qualification that, as a matter of substance, the power must have as its object the protection of the community from harm was clearly an important one, which would not be met if the purpose of the detention is punitive.[12]

12. The power conferred by the Act has the clear purpose of protecting the community from harm. Its object is expressed in s 8 as providing for the detention in custody or supervision of high risk serious offenders to ensure adequate protection of the community and of victims of serious offences. That object is reflected in s 7(1) which requires the court to

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7 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

8 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28.

9 *Minister for Home Affairs v Benbrika* [2021] HCA 4; (2021) 95 ALJR 166, 181 [36] (Kieffel CJ, Bell, Keane and Steward JJ); see also [75] (Gageler J) and *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 613 [83] where Gummow J accepted that the list of exceptions to the principle in *Lim* is not closed.

10 *Minister for Home Affairs v Benbrika* [2021] HCA 4; (2021) 95 ALJR 166, 181 [36].

11 *Minister for Home Affairs v Benbrika* [2021] HCA 4; (2021) 95 ALJR 166, 181 [36].

12 *Minister for Home Affairs v Benbrika* [2021] HCA 4; (2021) 95 ALJR 166, 181-158 [37]-[47].

be satisfied that it is necessary to make a restriction order to ensure adequate protection of the community against an unacceptable risk that the offender will commit a serious offence. The Appellant does not argue that its purpose is punitive, nor should it be characterised as such. Therefore, it is submitted that the power plainly falls within an exception to the *Lim* principle.

13. The Appellant contends (by his sixth contention) that the relevant power is not a judicial power. That contention rests on the assertion that it would not fall within the exception to the *Lim* principle because there are no antecedents of a power to order preventative detention *per se* (his fourth and fifth contentions). Those contentions cannot be accepted unless the plurality's reasoning in *Benbrika* is rejected. It should not be. The reasoning in *Benbrika* rests on solid precedent and principle; and the outcome it achieves is desirable in that it avoids the potential curiosities referred to by Gleeson CJ in *Fardon*.[13]

14. Contrary to the Appellant's second contention, Gummow J's formulation of the *Lim* principle[14] should not be accepted, being clearly at odds with the plurality's reasoning in *Benbrika*.[15] Justice Gummow J's conclusion in *Fardon* that the law could not have been conferred by the Commonwealth Parliament derived from an analysis which characterised the hypothesised detention (if it were by a law of the Commonwealth) as being 'by reason of a finding of criminal propensity rather than an adjudication of criminal guilt'.[16] His honour's view that the detention would have been based on a finding of criminal propensity clearly affects his subsequent analysis and conclusion.[17] That characterisation of the hypothesised law contrasts to the plurality's characterisation of the legislative scheme considered in *Benbrika*, as being directed towards the protection of the community from harm, thus bringing it within the exception to *Lim*.

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13 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 586 [2].

14 *Fardon* at 612 [80] 'the "exceptional cases" aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts.'

15 *Minister for Home Affairs v Benbrika* [2021] HCA 4; (2021) 95 ALJR 166, 181-158, 180 [32].

16 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 611 [75].

17 It is submitted that this is at the core of Gageler J's view (in *Benbrika* 192 [85]-[88]) that Gummow J was wrong to reject the argument of the Attorney-General of the Commonwealth.

Kable

15. The issue in this case essentially is whether the Act infringes the principle enunciated in *Kable v Director Public Prosecutions (NSW)*[18] ("*Kable*"). That principle has been conveniently expressed by this Court in *Attorney-General (NT) v Emmerson*[19] as follows:

> The principle for which *Kable* stands is that because the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.

16. The conferral of powers on the Western Australian Supreme Court to make a restriction order in accordance with the scheme of the Act does not impair its institutional integrity. The statutory scheme is not incompatible with or repugnant to the judicial function and ordinary judicial processes of the Supreme Court as a Chapter III court.

17. The Appellant's submissions may tend to suggest that the powers of the Supreme Court conferred by the Act are non-judicial and thereby constitute an interference with the court's institutional integrity. However, a State legislature is not prevented from conferring non-judicial powers on a Chapter III court which is a court of a State. The separation of powers does not operate in a strict sense at the State level.[20] The conferral of administrative powers on a State court is therefore not itself an appropriate indicia by which to generally determine whether the institutional integrity of the court has been compromised. However, the nature of the power as judicial may be critical to determining that question in some cases.

18. In *Benbrika* the matter concerned a Commonwealth law so the question as to whether the power was judicial assumed a level of importance which does not arise in the present proceedings. It is not the nature of a power as judicial or otherwise which is generally determinative. Rather, the question depends upon an analysis of whether the power is

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18 (1996) 189 CLR 51.

19 [2014] HCA 13; 253 CLR 393, 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

20 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598 [37], 600 [40] (McHugh J), 614 [86] (Gummow J); *Condon v Pompano* (2013) 252 CLR 38, 89 [124]-[125] (Hayne, Crennan, Kiefel and Bell JJ).

repugnant to or inconsistent with the institutional integrity of the court as a Chapter III court.

19. However, the power of the Supreme Court to make a restriction order is undoubtedly judicial. That much is plain from the characterisation of the power to make preventative detention orders as being judicial in cases such as *Benbrika* and *Fardon*.[21] The Appellant's submissions to the contrary should not be accepted.

20. Unless it can be said that an order for preventative detention (as distinct from punitive detention) inherently compromises the institutional integrity of the court, it is difficult to understand how the distinction is relevant to the operation of the *Kable* principle.[22]

21. The question whether the Act otherwise impermissibly interferes with the institutional integrity of the Supreme Court so as to fall foul of the principle enunciated in *Kable* depends upon whether the process which the legislation requires of the Supreme Court is so far removed from a truly judicial process so as to render the court no longer suitable to be the receptacle of federal judicial power.

22. In *Fardon*, Callinan and Heydon JJ said:[23]

> So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised, then the legislation in question will not infringe Ch III of the Constitution.

23. The Act does not purport to require the Supreme Court to give effect to any decision of the executive or to act at the behest of the legislature. Rather, it confers powers and duties on the Supreme Court which engage the judicial process through evaluative decision-making having regard to relevant information and materials whilst affording procedural fairness.[24]

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21 *Minister for Home Affairs v Benbrika* [2021] HCA 4; (2021) 95 ALJR 166 at [14], *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

22 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 592, [20] (Gleeson CJ).

23 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 569 [219].

24 See *Attorney-General (NT) v Emmerson* [2014] HCA 13; 253 CLR 393, 430 [56] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

24. The power conferred on the Supreme Court to make a restriction order is subject to the usual incidents of an exercise of judicial power.[25] The fact that an application is to be made by the Attorney-General or the State Solicitor in the name of the State does not lead to any inference that the court is acting at the direction of the executive. Nor does the legislative selection of serious offences create a circumstance in which the court acts at the behest of the legislature. The court is to reach the required level of satisfaction according to an orthodox judicial process.

25. The Appellant argues that four features of the Act are relevant to assessing the impact upon the institutional integrity of the Supreme Court.[26] It will readily be seen that none of those features engage the matters identified by Callinan and Heydon JJ in *Fardon*.

26. *First*, the Appellant, asserts that central to the decision in *Fardon* was the nature of the crimes that the scheme concerned and the risk of reoccurrence. The Appellant argues that preventative detention in relation to sexual offending does not affect public confidence in the courts, but public confidence would be affected if the scheme extended to all crimes, or in any case, robbery.[27]

27. Although robbery plainly differs from violent sexual offences or sexual offences involving children, it is nevertheless by definition[28] a crime involving violence or an element of violence.[29]

28. The hallmark of preventative detention schemes is the goal of protecting the community from a real likelihood of violent crime, as opposed to non-violent crime.[30] In *Benbrika* the plurality said that the purpose of the power must be to protect the community from 'harm'.[31] As robbery involves violence (or an element of violence) it was rationally open to the legislature to include it as a serious offence. That is so regardless of whether a particular robbery is opportunistic or caused by poverty.[32] It is the element of violence,

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25 *Minister for Home Affairs v Benbrika* [2021] HCA 4; (2021) 95 ALJR 166, [11].
26 Appellant's Submissions [72]-[78].
27 Appellant's Submissions [69] and [72].
28 Section 392 *Criminal Code* (WA).
29 Section 392 *Criminal Code* (WA).
30 *Chester v R* (1988) 165 CLR 611, 618 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ).
31 *Minister for Home Affairs v Benbrika* [2021] HCA 4; (2021) 95 ALJR 166, 181 [36].
32 Appellant's Submissions [72].

and consequent risk to the community that is key. The cause or motive for the violence may be relevant to the assessment of unacceptable risk by the court.

29. *Second*, the Appellant makes the point that under the scheme created by the Act there need be no correlation between the nature of the prior offending and the risk against which a detention order is to protect.[33] In response it is submitted that the important 'correlation', or unifying element, is that all the crimes in Schedule 1 involve violence or an element of violence. The past crime is the factum upon which the powers rest, but it is rightfully not the object of focus in the court's assessment of whether a restriction order is necessary. The paramount consideration is the need to ensure the adequate protection of the community (s 48(2)).

30. *Third*, the Appellant argues that a lay-observer would consider it incredulous that the court is required to consider the risk to all communities, because the meaning of community is not limited to the community of Western Australia or Australia. In response, nothing in s 7 requires the court to pro-actively consider the risk that the person poses to all and every identifiable community around the world. Rather, an offender is only a 'high risk serious offender' if the court is satisfied that it is necessary to make a restriction order in relation to the offender to ensure adequate protection of the community against an unacceptable risk that the offender will commit a serious offence. Presumably, in most cases, the court will need to go no further than considering the risk to the community of Western Australia or some smaller community within Western Australia. However, if acceptable and cogent evidence in relation to a particular offender indicates that the offender poses an unacceptable risk to a different community, then there is a rational basis for the finding that the offender is a 'high risk serious offender', and there is nothing 'incredulous' about the legislature's choice to enable the court to have regard to such risk. If the asserted risk relates only to a community in Tunisia, the evidentiary requirements may simply mean that the court is not satisfied that it is necessary to make the order sought.

31. *Fourth*, the Appellant asserts that there are features of the process of the Act which depart fundamentally from the manner in which courts customarily exercise judicial power.[34]

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33 Appellant's Submissions [73].
34 Appellant's Submissions from [76].

These are addressed specifically in the following paragraphs. More generally, it is submitted that the nature and purpose of the court's task must inform an assessment of whether or not the processes employed result in the court being engaged in a function which is detrimental to its institutional integrity. The task to be undertaken by the court under the Act is the assessment of the necessity for a restriction order to ensure the protection of the community against an unacceptable risk that the offender will commit a serious crime. Such an assessment may involve similar considerations to those frequently dealt with by courts engaged in sentencing a person who has been found guilty of a violent crime, especially if the person has a history of violence. Just as the processes applicable to sentencing (such as the standard of proof and evidentiary standards) are not identical to those of a criminal trial, so it is for applications under the Act. Such matters do not support the assertion that the processes are incompatible with the institutional integrity of the Supreme Court.

32. It is hardly surprising that s 7(c) requires the court, in making its assessment, to consider information indicating whether or not the offender has a propensity to commit serious offences in the future – that goes to the heart of the court's assessment. The rules of evidence in relation to the use of propensity evidence in a criminal trial are designed to keep prejudicial evidence from a *jury* assessing guilt. A judge does not need to be 'protected' from potentially prejudicial evidence because a judge's legal training and experience equip the judge to disregard evidence as is necessary and appropriate. For the same reason it is appropriate for the court to have regard to 'acceptable and cogent evidence' rather than being constrained by tests of admissibility. Furthermore, although the outcome of both a criminal trial and in the assessment under the Act may affect a person's liberty, they involve inherently different concerns. Criminal trials place utmost importance on protecting a defendant's right to a fair trial. An assessment under the Act is concerned with the protection of the community. This difference in focus is also a rational justification for the lower standard of proof. In addition, proof 'beyond reasonable doubt', while appropriate to the judgment of *past* conduct, would be unattainable in the context of assessing *future* risk.

33. Having regard to a psychiatrist's report to assist in the assessment task makes sense because a person's mental state (past, present and likely future) has an obvious connection to their behaviour, and hence may be useful to the task of predicting the likelihood of

future behaviour of a particular or general type. The Appellant suggests that it is unreasonable to compel a psychiatric report if a person is in gaol for robbery 'due to poverty'[35]. This betrays an overly simplistic view of the causes of crime. Robbery involves violence or an element of violence; some factors besides poverty must surely contribute to the commission of the crime; an offender's mental state is likely to be significantly relevant. Requiring a psychiatric or psychological examination so that the court may have the benefit of an expert report in relation to the offender's mental state is hardly an unusual feature of the exercise of judicial power.

Conclusion

34. In summary, for essentially the same reasons given by this court in *Fardon*, the Act does not infringe the *Kable* principle. Nor is it constitutionally invalid as being contrary to the *Lim* principle. It differs in no significant sense from other legislative schemes which have been found by this Court to be valid.[36]

Part V: Estimate Time for Oral Argument

35. Tasmania will need no longer than 15 minutes to present its oral argument.

Dated: 18 February 2022

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35 Appellant's Submissions [48].
36 In addition to those already mentioned, see *Vella v Commissioner of Police (NSW)* [2019] 269 CLR 219, 234 [22] (Bell, Keane, Nettle and Edelman JJ).

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF TASMANIA, INTERVENING

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Attorney General for Tasmania sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

	Constitutional Provisions	**Version**
1.	*The Constitution*, Ch III	Current
	Statutes	
2.	*Criminal Code* (WA), s 392	Current
3.	*High Risk Serious Offenders Act 2020* (WA)	Current