HIGH COURT OF AUSTRALIA

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### Details of Filing

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### Important Information

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**Form 27C—Intervener's submissions**
**Note: see rule 44.04.4.**

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

SAFWAT ABDEL-HADY
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

## SUBMISSIONS OF BOE21, SEEKING LEAVE TO INTERVENE

### Part I: Certification

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

### Part II: Basis of intervention

2. BOE21 seeks leave to intervene in favour of the Plaintiff in this proceeding, to make the submissions developed in Part IV below, being submissions that the common law would not develop to give the defence claimed in this proceeding by the Commonwealth in its Defence at [33(c)(i) and (iii)] and [39] (**novel defence**), because such a development would not conform with the *Constitution*, and would run counter to constitutional imperatives, as proscribed by this Court in ***Lange*** *v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566 (the Court).

### Part III: Why leave to intervene should be granted

3. In seeking leave to intervene, BOE21 is following a course the "possibility" of which was identified by this Court as "the appropriate way of dealing with [BOE21's] quite legitimate concern".[1] That "legitimate concern" is that BOE21 be heard on the availability of the Commonwealth's claimed novel defence, in circumstances where such a defence is pleaded by the Commonwealth to BOE21's claim in the Federal Court of Australia in proceeding number NSD168/2024 for false imprisonment as a person affected by this Court's decision in ***NZYQ*** *v Minister for Immigration, Citizenship and*

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[1] ***BOE21*** *v Commonwealth of Australia* [2025] HCATrans 58, 4.122-3 (Gageler CJ). The application for removal dismissed by the Court (in a decision recorded in that transcript) was an application brought out of prudence, noting that "[i]ntervention will not ordinarily be supported by an indirect or contingent affection of legal interests following from the extra-curial operation of the principles enunciated in the decision of the Court or their effect upon future litigation": *Roadshow Films Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37, [2].

*Multicultural Affairs* (2023) 280 CLR 137. Further, BOE21 is seeking leave to make a form of argument that has not been put by the Plaintiff, and which this Court has acknowledged could, in that circumstance, possibly "be raised appropriately by an intervenor".[2] The Commonwealth has likewise acknowledged that "intervention is the appropriate way to deal with th[e] issue" of procedural fairness arising from the interaction between this matter and BOE21's Federal Court case.[3]

4. BOE21's circumstances giving rise to the reasons of procedural fairness for the grant of leave are as follows.

5. BOE21 is a Somalian national or a stateless person who in 2012 was granted a Class XB Subclass – Refugee visa, facilitating his migration from a refugee camp in Kenya. He has lived in Australia since. On 27 May 2019, a delegate of the Minister cancelled his visa pursuant to s 501(3A) of the ***Migration Act** 1958* (Cth). Consequently, on 13 August 2020 (following a term of imprisonment), he was detained pursuant to s 189 of that Act. On 15 February 2021, a delegate of the Minister decided not to revoke the cancellation decision. On 27 July 2022, BOE21 applied for a protection visa, which on 5 March 2024 would be refused, however with a "protection finding" (within the meaning of s 197C(5)) with respect to Somalia and a finding that BOE21 is a refugee.

6. On 19 February 2024, and in the light of *NZYQ* having been handed down on 8 November 2023, BOE21 made an application to the Federal Court including for a writ of habeas. On 5 March 2024 — the day his application for a protection visa was refused — BOE21 was granted, and then released upon, a Class WR Bridging Visa R (subclass 070) (**BVR**), with conditions imposed that he at all times wear a monitoring device and abide by a curfew (**Conditions**), which would later be held by this Court to be invalid. On 18 March 2024, BOE21 filed in the Federal Court an amended application relevantly to include a claim for damages. Also on 18 March 2024, BOE21 filed a notice pursuant to s 78B of the ***Judiciary Act** 1903* (Cth), served on all the Attorneys-General (**First 78B Notice**), limited to addressing the constitutional issue attending the Conditions. On 8 April 2024, his first BVR was substituted with a differently titled BVR which was otherwise in identical terms. On that same day, Markovic J stated as a separate question the lawfulness of the subjection of BOE21 to the Conditions. That question was then referred to the Full

2 *BOE21* [2025] HCATrans 58, 3.52-4 (Gageler CJ).

3 *BOE21* [2025] HCATrans 58, 4.116-7 (Solicitor-General for the Commonwealth). Similarly at: 4.105-11.

Court for hearing on 3 September 2024. However, on 2 July 2024, that hearing of a separate question was vacated and the proceeding was generally adjourned to await the decision of this Court in ***YBFZ*** *v Minister for Immigration, Citizenship and Cultural Affairs* (2024) 99 ALJR 1.

7. Following this Court's decision in *YBFZ*, BOE21 was issued a further bridging visa not containing either of the Conditions. BOE21 then amended his application to claim: 1) common law damages for a period of his detention (a claim based on the constitutional invalidity of the purported basis for his administrative detention, as per *NZYQ*) (**NZYQ claim**)); 2) common law damages for the intentional torts of subjection to the Conditions (a claim based on the constitutional invalidity of those Conditions, as per *YBFZ* (**YBFZ claim**)); and 3) a declaration that cl 070.612A(1) of Sch 2 to the *Migration **Regulations** 1994* (Cth), as amended on 7 November 2024, is invalid (a claim now corresponding to the constitutional challenge in *EGH19 v Commonwealth of Australia* (S55/2025), now reserved before this Court). A notice pursuant to s 78B of the *Judiciary Act* was filed on 7 January 2025, and served on the Attorneys-General (**Second 78B Notice**). Relevantly, it stated:

> [2] The first claim is for damages, in respect of a period during which the Applicant was deprived of his liberty, even though he was "NZYQ affected", meaning that, in accordance with the principle in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (***NZYQ***), the power to detain him pursuant to ss 189 and 196 of the Migration Act 1958 (Cth) (the **Act**), was not available.
>
> [3] The Applicant anticipates that the Commonwealth will argue that he was not "NZYQ affected", for all or at least part of the time in respect of which the claim for damages is made, and/or that unlawful detention of the kind to which he was subjected does not sound in damages. The Commonwealth's defence is yet to be filed, and what the Applicant "anticipates" must be understood in that context.

8. BOE21's Statement of Claim, filed on 23 December 2024, was annexed.

9. In April and May of this year, BOE21 and the Commonwealth respectively filed the Amended Statement of Claim (**ASOC**), and the Defence. (No amended Originating Application for relief was filed, given the Originating Application has contained a prayer for common law damages since 18 March 2024).

10. In the Defence, and responding to the NZYQ claim, the Commonwealth has pleaded that: 1) for the period 15 February 2021 to 27 July 2022, the duty to remove BOE21 from Australia pursuant to s 198 of the *Migration Act* was enlivened, while BOE21 was in

immigration detention; 2) for the duration of that period, there was a real prospect of his removal becoming practicable in the reasonably foreseeable future; 3) alternatively, in the circumstance of the decision in *Al-Kateb v Goodwin* (2004) 219 CLR 562, and other circumstances pleaded to have brought BOE21's case within the relevant ratio of that decision (Defence, [26(c)(iv)(1) and (2)]):

(a) the Commonwealth had a lawful justification to detain BOE21 between 15 February 2021 and 27 July 2022; and

(b) in the alternative, no liability arises in respect of the tort of false imprisonment for acts done in purported execution of a duty under a statute later held to be invalid.

11. In the present proceeding prosecuted by Safwat Abdel-Hady, this Court will decide in substance whether the defences pleaded as answers to BOE21's NZYQ claim are given to the Commonwealth by the common law. If the Court does decide that such defences are so given, that would (all being equal) put an end to BOE21's NZYQ claim for the period between 15 February 2021 and 27 July 2022. If this Court so decides, certain of the defences pleaded by the Commonwealth will have been made good by a ratio of this Court. It is unreal to suppose that, in that circumstance, the NZYQ claim would nonetheless be tried by the Federal Court to discern whether the Commonwealth's further defence — that BOE21 was not in the relevant period "NZYQ affected" — is good.

12. Further, the Court can feel assured that BOE21 has more than an arguable case that he was "NZYQ affected" between 15 February 2021 and 27 July 2022 or for some part of that period. It is a fact agreed between the parties that there is presently no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future. BOE21's bridging visas have been issued on that same assumption.

**Part IV: Submissions**

13. In *Lange* (1997) 189 CLR 520 at 566, this Court held that "[o]f necessity, the common law must conform with the Constitution"; and that "[t]he development of the common law in Australia cannot run counter to constitutional imperatives". In light of this principle, BOE21 seeks leave to make the following submissions, summarised as follows.

*(a)* *First,* the principle in *Lange* is properly understood as proscribing not only developments in the common law that would be directly inconsistent with

provisions of the *Constitution*, but also developments that would impair, detract from, or otherwise be incoherent with provisions in the *Constitution* or with definite and curially identified constitutional principles to which those provisions give expression.

(b) *Second,* there is a constitutional principle that is necessary for the *Constitution*'s efficacy, being the principle that when anything is prohibited by the *Constitution*, every means by which the thing may be accomplished is also prohibited (referred to here as the **non-circuity principle**). The principle is given expression in various provisions of the *Constitution,* including saliently: 1) s 51(xxxi), and its operation to extract from the other heads of Commonwealth legislative power a power to enact a law that would acquire property, including causes of action, other than on just terms; and 2) all heads of power so far as they are subject to an implied limitation that they do not carry with them a power to provide for the validity of earlier executive actions taken pursuant to statutes found invalid for want of a supportive head of power.

(c) *Third*, development of the common law to give the Commonwealth the claimed novel defence would impair, detract from and be incoherent with: 1) the non-circuity principle; and 2) those integers in the *Constitution* that give expression to the principle, which are identified at (b) above. The proposed development of the common law is therefore of a kind prohibited by the principle in *Lange*.

(d) *Fourth,* this Court's decision in *Queensland v* ***Stradford*** *(a pseudonym)* (2025) 99 ALJR 396, does not detract from any of the foregoing propositions — nor do the written submissions of the Commonwealth.

## IV.A The principle in *Lange*

14. In *Lange*, this Court made the statements of principle excerpted at [13] above (hereafter sometimes referred to, in the singular, as the principle in *Lange*). Those statements may be taken to reflect in part that the *Constitution* is "binding on the courts… [and] judges… of every State and of every part of the Commonwealth" including in the exercise by those courts and judges of their traditional function in stating and developing the common law.[4] So far as the principle in *Lange* gives expression to the supreme and binding nature of

4 *Constitution*, covering clause 5.

the law communicated by the terms of the *Constitution*, it can be taken to proscribe direct conflicts between common law rules and provisions made by the text of the *Constitution*.

15. However, the principle in *Lange* goes further. The affirmative injunction and then the proscription in *Lange* are respectively that "the common law must <u>conform</u> with the Constitution", and "development of the common law in Australia cannot <u>run counter</u> to <u>constitutional imperatives</u>" (underlining added). The underlined words have connotations that are general in character, and would refer to forms of inconsistency including, but not limited to, forms of direct inconsistency. This Court's selection of the underlined words would be taken to reflect: *firstly* the nature of the common law as not only a body of rules, but also of principles expressed in common law rules,[5] and whose inconsistency with provisions of the *Constitution* (if there be inconsistency) may not readily be described as a direct inconsistency; *secondly*, that the common law is a body of rules and principles that develops,[6] and in that sense may have the directionality conveyed by this Court's words: "run counter to";[7] *third*, that the text of the *Constitution* also gives expression to constitutional principles which may receive common expression in several (or all) provisions of the *Constitution*, and may count among those "ancillary principles…. so deeply embedded in our law as to be elementary and axiomatic".[8] This last consideration is reflected in this Court's choice of the phrase "constitutional imperatives" rather than any less accommodating phrase such as "constitutional provisions". The underlined words *fourthly* reflect that our system of common law, statutory law, and constitutional law, is approached by the courts, in their roles of declaring what the law is, as an integrous body of law[9] — and that the common law would as such not be developed to introduce incoherence into that overall body of law.

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5 *Skelton v Collins* (1966) 115 CLR 94, 135 (Windeyer J, "We have inherited a body of law. We take it as a universal legatee. We take its method and its spirit as well as its particular rules").

6 *Skelton v Collins* (1966) 115 CLR 94, 134, and then 135 (Windeyer J) quoting *Myers v. Director of Public Prosecutions* [1965] AC 1001, 1021 (Lord Reid, "[t]he common law must be developed to meet changing economic conditions and habits of thought"); *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 455 (Deane J); *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 650-1 (Murphy J); *Muschinski v Dodds* (1985) 160 CLR 583, 616 (Deane J, describing "the rule of ordered principle which is of the essence of any coherent system of rational law")

7 Such concepts, connoting a law's directionality, are familiar. See eg: *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* (2011) 243 CLR 492, [21] (Gummow ACJ, Hayne, Crennan and Bell JJ).

8 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, 549 (Isaacs J) affirmed in *Hogan v Hinch* (2011) 243 CLR 506, [87] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

9 *Hill v Van Erp* (1997) 188 CLR 159, 231 (Gummow J, describing "what should be one coherent system of law"); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, [122] (McHugh J).

16. So far as the principle in *Lange* gives expression to the foregoing four considerations, it can be taken to proscribe developments in the common law that — while they may not properly be characterised as directly conflicting with a provision of the *Constitution* — would undermine or detract from the operation of the *Constitution*, or would cause the common law to otherwise be incoherent with discrete principles which have been curially identified as such and that are given expression in provisions of the Commonwealth *Constitution*. Further, because the principle in *Lange* was stated, in one instance, in the form of an affirmative injunction as to what the common law "must" do, it is equally (in addition to being a proscription) a positive instruction to develop the common law to be coherent with the *Constitution* in the ways referred to earlier in this paragraph.

**IV.B The Commonwealth's claimed novel defence runs counter to the imperative that what the *Constitution* forbids directly cannot be achieved indirectly**

17. In the ways now explained:

(a) there is a constitutional imperative that what the Constitution forbids directly cannot be achieved indirectly or by means of some circuitous device; and

(b) development of the common law to include the Commonwealth's claimed novel defence would run counter to that imperative and to two discrete limits on Commonwealth legislative power that are expressive of that imperative, and so the development could not occur consistently with the principle in *Lange*.

18. *The non-circuity principle is a "constitutional imperative" in the sense identified in* Lange*:* The principle that *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud* — translated to mean "[w]hen any thing is prohibited, that also is prohibited by which we come to that"[10] — is a common law principle of ancient origin, first memorably stated in Coke's 29th chapter of his Commentary upon Magna Charta,[11]

[10] Peter Halkerston, *A Collection of Latin Maxims & Rules* (1823, printed for John Anderson & Co) 137. Similiarly: S S Peloubet, *A Collection of Legal Maxims in Law and Equity* (1985, Fred B Rothman & Co) 239 (translating the same maxim to mean "when anything is prohibited directly, it is also prohibited indirectly"; and JJS Wharton, *Dictionary of Jurisprudence* (1848), 845 (translating the same maxim to mean "when anything is prohibited, everything relating to it is prohibited").

[11] Edward Coke, *The Second Part of the Insititutes of the Laws of England* (Printed for E and R Brooke, MDCCXCVII), Cap 29, p 48; 288.

then having had diverse applications in the common law,[12] including as a "rule of common sense" in the construction of statutory instruments.[13]

19. The principle is also recognised as a general principle on the lines of which provisions of the *Constitution* are to be construed, so that prohibitions in the *Constitution* have efficacy. The principle was so identified, at that level of abstraction, in *Hornsby Shire Council v Commonwealth of Australia* (2023) 276 CLR 645, where at [43] this Court said it was "a basal principle that what the *Constitution* forbids directly cannot be achieved indirectly or by means of some circuitous device". The principle had earlier been stated, at a similar level of abstraction, in *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516 at 522-3, by Mason CJ, Gaudron and McHugh JJ, where, after identifying a rule that a conflict between a contractual provision or its operation and the purpose or policy of a statute would involve inconsistency voiding the contractual provision, their Honours wrote:

> The principle that it is not permissible to do indirectly what is prohibited directly, which is expressed in the maxim quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud, is a more traditional general statement of the same proposition. It has been acknowledged that, in conformity with this principle, the adoption of a circuitous device with a view to avoiding the need to comply with a constitutional requirement will be of no avail: *Bank of N.S.W. v. The Commonwealth* [(1948) 76 CLR 1, at pp. 349-350]*; Grannall v. Marrickville Margarine Pty. Ltd.* [(1955) 93 CLR 55, at p. 78]*; Wragg v. New South Wales* [(1953) 88 CLR 353, at pp. 387-388]*; Attorney-General (Cth) v. Schmidt* [(1961) 105 CLR 361, at p. 371].

20. In further decisions, the non-circuity principle has been stated similarly,[14] and it has been:

(a) recognised to be in the nature of a "doctrine" appropriately understood as being "applied" to certain constitutional provisions;[15]

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12 See e.g. *Poulerer's Case* (1610) 9 Co Rep 55, 57a; *Deane v Clayton* (1817) 129 E.R 196, 204 (Burrough J, describing the principle as part of the "storehouse of wisdom" of the "common law");

13 *R v Morris* (1894) 6 QLJ 9, 19 (Griffith CJ).

14 *Deakin v Webb* (1904) 1 CLR 585, 612-13 (Griffith CJ; Barton and O'Connor JJ agreeing; stating the non-circuity principle as one that is true of "the law"); *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 408 at 423; (Starke J, "[a] State cannot do indirectly what it may not do directly"); *Commonwealth v **WMC Resources** Ltd* (1998) 194 CLR 1, [246] (Gummow J, "It would allow the Commonwealth, by statutory modification or change of rights, to do by circuitous means what it could not successfully do directly").

15 *Grannall v Marrickville Margarine Pty Limited* (1955) 93 CLR 55, 78 (Dixon CJ, McTiernan, Webb and Kitto JJ). Similarly *Miller v Tcn Channel Nine Pty Ltd* (1986) 161 CLR 556, 572 (Mason J, describing the "the doctrine of 'circuitous device'" and "the 'circuitous device' doctrine").

(b) identified as a "principle embodied in the maxim quando aliquid [etc…]", being the principle most "proper to apply", "when a constitution undertakes to forbid or restrain some legislative course";[16]

(c) recognised as having general application "in relation to constitutional guarantees and prohibitions", "an important guide to construction, indicating that guarantees and prohibitions are concerned with substance not form";[17]

(d) recognised as a "principle, the soundness of which is not disputed", which "must be applied to all heads of the power of the Parliament";[18]

(e) treated as a principle informing the scope of the "absolute[] free[dom]" in s 92 of the *Constitution*,[19] and potentially informing the scopes of prohibitions in ss 114[20] and 116[21] of the *Constitution*.[22]

21. The non-circuity principle would be regarded as a definite constitutional principle of basal importance to the *Constitution*'s efficacy, and would thus be identified as a "constitutional imperative" of the kind referred to in *Lange* (1997) 189 CLR 520 at 566.

22. *Were the common law to be developed to give the Commonwealth's claimed novel defence, it would thereby be developed counter to the constitutional imperative that is the non-circuity principle:* The Commonwealth acknowledges, correctly, that in this proceeding it is asking this Court to develop the common law, so that the common law would then give to the Commonwealth its claimed novel defence: DS [16]. However, this

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16 ***Re Dohnert Muller Schmidt*** *& Co; Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, 371 (Dixon CJ); Fullagar, Kitto, Taylor and Windeyer JJ agreeing)). Similarly *Wragg v New South Wales* (1953) 88 CLR 353, 388 (Dixon CJ, describing "a time-honoured principle that you cannot do indirectly what you are forbidden to do directly" and that holding that "[i]t would be strange if the principle did not apply to the effectuation of a constitutional limitation or restriction like s. 92")

17 ***Georgiadis*** *v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297, 305 (Mason CJ, Deane and Gaudron JJ).

18 ***ICM Agriculture*** *Pty Ltd v Commonwealth* (2009) 240 CLR 140, [135] (Hayne, Kiefel and Bell JJ), affirming ***Wurridjal*** *v Commonwealth* (2009) 237 CLR 309, [185] (Gummow and Hayne JJ). Similarly: *Commonwealth v Tasmania* (1983) 158 CLR 1, 283 (Deane J).

19 *Duncan v Queensland* (1916) 22 CLR 556, 625 (Isaacs J); *Willard v Rawson* (1933) 48 CLR 316, 332 (Dixon J); *Grannall v Marrickville Margarine Pty Limited* (1955) 93 CLR 55, 78 (Dixon CJ, McTiernan, Webb and Kitto JJ).

20 *Hornsby Shire Council v Commonwealth of Australia* (2023) 276 CLR 645 at [43].

21 *Kruger v Commonwealth* (1997) 190 CLR 1, 161 (Gummow J).

22 As well, it was once treated as governing the consistency of State statutes with State Constitutions on an assumption, at the time, that those State Constitutions were rigid: *Deakin v Webb* (1904) 1 CLR 585, 612-13 (Griffith CJ; Barton and O'Connor JJ agreeing).

step could not be taken consistently with the principle in *Lange*, because it would be to develop the common law in a way that would run counter to the non-circuity principle, including as that principle is expressed in two integers of the *Constitution*.

23. The *first* integer is the requirement of just terms in s 51(xxxi) of the *Constitution*, and in particular that requirement's negative implication which is to "abstract[] the power to support a law for the compulsory acquisition of property from any other legislative power".[23] That negative implication affords s 51(xxxi) "'the status of a constitutional guarantee' operating 'to protect [any State or person] from being deprived [by the Commonwealth] of their property except on just terms'"[24], where the Commonwealth is correctly conceived as the body politic of Australia encompassing both the executive and legislative branches of that polity.[25] Further, it has been recognised as giving expression to the non-circuity principle: "what the Constitution forbids directly cannot be achieved indirectly or by means of some circuitous device"[26] — this being the "root principle" underpinning the negative implication drawn from s 51(xxxi).[27]

24. Were the common law to be developed to give the Commonwealth its claimed novel defence, it would result in a verdict for the Commonwealth (and, where a claim has also been brought against its officers as defendants,[28] a verdict for them as well), in respect of a particular class of presently existing claims of false imprisonment, notwithstanding that all elements of the tort would be established in the trials of those existing claims: DS [14]; cf *Fairfax Media Publications Pty Ltd v Voller* (2021) 273 CLR 346 at [74] (Gageler and Gordon JJ), [118] (Edelman J). The common law would thus develop to remove entirely the worth in that class of claims so as to confer a distinct financial benefit on the

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23 *Commonwealth v* ***Yunupingu*** (2025) 421 ALR 604, [15] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), quoting affirmingly ***Mutual Pools*** *& Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, 177.

24 *Yunupingu* (2025) 421 ALR 604, [15] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), quoting affirmingly *Mutual Pools* (1994) 179 CLR 155, 168.

25 *Williams v Commonwealth* (2012) 248 CLR 156, [21] (French CJ), [154] (Gummow and Bell JJ); *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1, [68] (Gordon J).

26 *Mutual Pools* (1994) 179 CLR 155, 173 (Mason CJ)).

27 *ICM Agriculture* (2009) 240 CLR 140, [135] (Hayne, Kiefel and Bell JJ). And similarly: *Cunningham v Commonwealth* (2016) 259 CLR 536, [62] (Gageler J); *Georgiadis* (1994) 179 CLR 297, 305-6 (Mason CJ, Deane and Gaudron JJ), 320 (Toohey J); *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 349-350 (Dixon J); *Re Dohnert Muller Schmidt* (1961) 105 CLR 361, 371 (Dixon CJ).

And see hypothetical application of the non-circuitry principle in this Court's recent decision of *G Global 120E T2 Pty Ltd v Commissioner of State Revenue* [2025] HCA 39, [88].

28 Which is not the case in BOE21's ASOC.

Commonwealth and release the Commonwealth from liability in damages. It is now well established that any Commonwealth enactment providing for that result would be invalid because it would fall within the absence of any legislative power to acquire property other than on just terms — being the absence effected by s 51(xxxi) so that what cannot be done directly cannot be done indirectly.[29]

25. Were the question in the Special Case answered "yes" and the common law developed to have the result just described, the common law would undermine and detract from s 51(xxxi), inconsistently with the principle in *Lange*, for the following reasons.

(a) In a simple and obvious sense, that development of the common law will have involved the Commonwealth achieving indirectly that which the Commonwealth could not, because of s 51(xxxi), have achieved directly. In that way, the common law will have brought about the circumstance which the negative implication of s 51(xxxi) is intended to have efficacy to prevent. Identified at the correct level of abstraction, it is the circumstance that the Commonwealth "achieve[s] indirectly" "what the Constitution forbids directly".

(b) Further, such development of the common law will undermine the efficacy of s 51(xxxi) as a "constitutional <u>guarantee</u>" of just terms. What s 51(xxxi) relevantly guarantees cannot happen — an acquiring by the Commonwealth, on no terms, of the benefit of the defeat of a claim against the Commonwealth — will have been brought about by a development of the common law.[30]

(c) Further still, such development in the common law — which the Commonwealth submits would occur in a way confined to dispose only of this case (DS [16]-[17]) — would apply to a class of cases pleading a cause of action inherently directed to the vindication of liberty: the tort of false imprisonment. However, s 51(xxxi) is intended as a "very great constitutional safeguard".[31] In that sense, the development would undermine a fundamental purpose of s 51(xxxi).

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29 *Georgiadis* (1994) 179 CLR 297, 306 (Mason CJ, Deane and Gaudron JJ), 311-12 (Brennan J). Further: *Commonwealth v Mewett* (1997) 191 CLR 471; *WMC Resources* (1998) 194 CLR 1; *Smith v ANL Ltd* (2000) 204 CLR 493.

30 *Yunupingu* (2025) 421 ALR 604, [15] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 202; *Mutual Pools* (1994) 179 CLR 155, 168, 180, 184, 223; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 568, 595.

31 *Trade Practices Commission v Tooth* (1979) 142 CLR 397, 403; *Wurridjal* (2009) 237 CLR 309, 385

26. For the foregoing reasons, a positive answer to the question stated would involve a development of the common law that would undermine and detract from s 51(xxxi), in a manner that may be identified as both involving non-conformity with s 51(xxxi), and running counter to the non-circuity principle as expressed in the operation of s 51(xxxi).

27. The *second* salient integer in the *Constitution* is a limitation upon the heads of Commonwealth legislative power, with the effect that where Parliament enacts a statute that is not supported by any head of power and is thus invalid, a later statute would similarly not be supported (and be similarly invalid) so far as it purports to validate executive actions taken under the first statute.[32] That limitation is not merely an item of logic. It has been recognised as another application of the principle that what the Commonwealth is directly forbidden to do, "it cannot do indirectly",[33] and as the principled reason why the Commonwealth may not validly enact a statute that would "bar[] the right to recover" for damages caused by an officer's actions taken in "good faith" pursuant to a separate, invalid Commonwealth enactment.[34]

28. Were the common law to develop to provide for the Commonwealth's proposed novel defence, the common law would to that extent give indirectly to the Commonwealth what the *Constitution*, by the presently relevant limitation upon heads of power, forbids. In bringing about that result, the common law of Australia would — as much as a statute purportedly barring the right to recover in transgression of the relevant limitation — "mock[]" the "Constitution… by substituting executive for legislative interference with freedom".[35] The common law will have developed in a way that undermined and detracted from the relevant limitation by both involving non-conformity with each of the heads legislative power; and running counter to the constitutional imperative of the non-circuity principle as a relevant limitation upon those heads of power.

29. *Finally*, while the vice in the development of the common law proposed by the Commonwealth may be identified in the ways stated at [26] and [28] above, it can as well

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[178]; *ICM Agriculture* (2009) 240 CLR 140, 169 [43]; *JT International SA v Commonwealth of Australia* (2012) 250 CLR 1, 95 [263].

32 *Mutual Pools* (1994) 179 CLR 155, 213-4 (McHugh J), referring to *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83, and *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633. Cf *Amax Potash Ltd v Government of Saskatchewan* [1977] 2 SCR, 592 (Dickson CJ, for the Court).

33 *Mutual Pools* (1994) 179 CLR 155, 212 (McHugh J).

34 *Mutual Pools* (1994) 179 CLR 155, 213 (McHugh J).

35 *Mutual Pools* (1994) 179 CLR 155, 213 (McHugh J).

be identified as being that it would run counter to the constitutional imperative of the non-circuity principle itself. That would be so, for all the foregoing reasons.

30. On the principle in *Lange*, the question stated would be answered "no".

## IV.C The decision in *Stradford* requires no different conclusion

31. In anticipation of how the Commonwealth may seek to answer the above submissions, BOE21 makes the following submissions for completeness.

32. *First* — and noting that the Commonwealth urges the development of the claimed novel defence by analogy to this Court's decision in ***Stradford*** — BOE21's submissions are consistent with *Stradford*.

33. That decision was notable because it was the first decision of this Court to recognise a rule of the common law which had long been recognised by Australia's lower courts and in "English authorities dating back to the 17th century": DS [21], citing seven such English authorities preceding the enactment of the Australian *Constitution*.

34. *Stradford* did not effect a "development" of the common law, in the sense contemplated in *Lange*, but rather recognised as continuously operative an ancient principle of the common law that would be taken to have informed the content of the law of the *Constitution* when, and since, the *Constitution* was enacted. The principle in *Stradford* is one that necessarily conforms with the *Constitution* because the principle was part of the body of law which the *Constitution*, when drafted, assumed. By contrast, the novel defence would be unprecedented.

35. *Second*, the Commonwealth's submissions focus upon "unfairness and legal incoherence, if the detaining officer were to be held liable for doing what he was required to do by a duty authoritatively held by this Court to have been validly imposed by the Parliament": DS [26]. The submission would be attributed no weight, for these reasons.

    (a) What the Commonwealth identifies as "unfairness and legal incoherence" is, in truth, an ordinary incident of our legal system, being that purported statements of the law in authoritative legal sources may prove to be incorrect statements of law. It is by reason of that ordinary incident of our legal system that our law must and does accommodate tortious claims against a Commonwealth officer for acts done in administering in good faith a statute later declared invalid, but which the officer understood at the time of their tortious acts to be valid. No less than a court, the officer administering that statute will have been bound as a matter of "duty… to respect, indeed, to defer to, the enactment of the legislature until that enactment is adjudged ultra vires".[36] To describe that overall situation as unfair and incoherent would be to give a mere moral appraisal (cf DS [26]). Just as executive power is exercised in the context of the courts' jurisdiction to review the validity of legislation and thus exercised subject to the liabilities which the exercise of that jurisdiction may cause, so too executive power is exercised in the context of — and subject to the liabilities that may flow from applications of — the settled principle that this Court may overturn its decisions.[37]

(b) Further (in passing), when appeals could be brought from this Court to the Privy Council, there was an inherent potential that: 1) this Court could decide that there was not, for reasons of constitutional principle, false imprisonment in a certain class of circumstances; 2) the decision of this Court might later be shown in the Privy Council to be wrong; and so 3) detention conducted in light of this Court's decision would have been false imprisonment. It is a mere happenstance of history that this course of events (apparently) never did occur.

**Part V: Estimated time**

36. If given leave to be heard orally, BOE21 estimates that he will require approximately 20 minutes to present oral argument.

Dated 17 October 2025


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[36] Cf *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 155–156.

[37] Thompson SC and Durand, *Overruling Constitutional Precedent* (2021) 95 ALJ 139; *John v Federal Commissioner Taxation* (1989) 166 CLR 417, 438; *Wurridjal* (2009) 237 CLR 309, [67], [69] (French CJ).

## ANNEXURE TO THE INTERVENER'S SUBMISSIONS

| No. | Description | Version | Provisions |
|---|---|---|---|
| 1. | Commonwealth *Constitution* | As in force | ss 51, 92, 114, 116 |