



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S65/2021
File Title: Abdel-Hady v. Commonwealth of Australia
Registry: Sydney
Document filed: Plaintiff's Submissions
Filing party: Plaintiff
Date filed: 14 Oct 2025

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

SAFWAT ABDEL-HADY

Plaintiff

and

10

COMMONWEALTH OF AUSTRALIA

Defendant

PLAINTIFF'S SUBMISSIONS

Part I: Form of Submissions

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

Part II: Concise statement of the issues

2. The Commonwealth seeks that this Court recognise a defence of lawful justification in actions for false imprisonment which applies to tortious acts done in compliance with a legislative, rather than judicial, command. There are three issues which are raised by this matter: *first*, whether the basis for the defence recognised by this Court in *Queensland v Stradford* (2025) 99 ALJR 396 (*Stradford*) gives rise to an analogous defence where the detention is justified as compliance with a legislative not judicial requirement; *second*, whether, where the justification of the detention depends on an interpretation of the statute in question, being an interpretation by this Court that has later been held to be incorrect, that is sufficient to change the character of the duty to detain to being one imposed by statute; *third*, whether the Crown and its agents should be able to escape liability for the unlawful exercise of a purported executive power. For the reasons which follow, each of these issues should be answered “no”.

Part III: Section 78B Notices

3. The defendant provided notice under s 78B of the *Judiciary Act 1903* (Cth) on 29 August 2025.

Part IV: Facts

4. The plaintiff does not contest the facts as summarised at **DS [5]-[12]**, or at **[17]**.

Part V: Argument

5. The detention in this case, by officers of the executive, had a legislative, not judicial source of authority. There is no institutional need for an immunity to be granted to the officers of the executive in this case. That is sufficient for the Court to dispose of any analogy of the present matter to *Stradford*.
6. The position of the Commonwealth and of the detaining officer are not exactly the same. *First*, s 64 of the *Judiciary Act 1903* (Cth) should be read as denying any special immunity for the Commonwealth, along with other matters as argued below. *Second*, the act of detention, by the detaining officer as agent, should be attributed directly to the Commonwealth as its conduct, and the lawful justification defence is precluded by the place of the polity in relation to the rule of law.¹ *Third*, even if the defence recognised in *Stradford* is available to the detaining officer as a justification, it would not preclude true vicarious liability on the part of the Commonwealth.

***Stradford* can be distinguished because the immunity arises from the institutional need for compliance with judicial orders**

The rationale for the judicial immunity recognised in Stradford

7. The policy of the common law views personal liberty as a fundamental right which the tort of false imprisonment both protects and vindicates.² But that is a consideration which is balanced with both the rule of law and the administration of justice.³ The institutional need for judicial officers to be protected from

¹ *Bird v DP* (2024) 98 ALJR 1349 at 1358 [31] per Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ; *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 98 ALJR 655 at 685 [143]-[144] per Edelman J.

² *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 203 [14] per Kiefel CJ and Keane J; 212 [45] per Gordon J; *Trobridge v Hardy* (1955) 94 CLR 147 at 152 per Fullagar J, writing separately but agreeing.

³ *Queensland v Stradford* (2025) 99 ALJR 396 at 423 [106] per Gageler CJ, Gleeson, Jagot and Beech-Jones JJ, at 444 [209] per Gordon J, citing *Moll v Butler* (1985) 4 NSWLR 231 at 238 per Wood J. See also, *R (Majera (formerly SM (Rwanda)) v Secretary of State for the Home Department* [2022] AC 461 at 482 [49] per Lord Reid PSC, with Lords Sales, Leggatt, Burrows and Lady Rose JJSC agreeing.

liability rests on the ground that:⁴

if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice.

8. This rationale for judicial immunity long precedes the decision of this Court in *Stradford*. As was held in *Garnett v Ferrand*:⁵

... 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.

9. It is a rationale that has remained largely unchanged in the development of the Australian common law. As explained by Gleeson CJ, in *Fingleton v The Queen*:⁶

the public interest in maintaining the independence of the judiciary requires security, not only against the possibility of interference and influence by governments, but also against retaliation by persons or interests disappointed or displeased by judicial decisions.

10. In the Australian judicature, impartiality, and the related virtue of independence, “are so fundamental to the judicial process that they are defining features of judicial power”.⁷ Both independence and impartiality go to the “essential character of a court as an institution”.⁸ This being what the immunity recognised in *Stradford* protects, there is no occasion to expand its protection to the other

⁴ *Anderson v Gorrie* [1895] 1 QB 668 at 670 per Lord Esher MR; cited with approval in *Sirros v Moore* [1975] QB 118 at 137, 140 per Buckley LJ; see also *Miller v Hope* [1824] 2 Shaw Sc. App. Cas. 125 per Lord Gifford; *Haggard v. Pelicier Frères* [1892] AC 61 at 68 per Lord Watson for the Board; *Fray v. Blackburn* (1864) 3 B & S 576 at 578; 122 ER 217 at 217 per Crompton J.

⁵ (1827) 6 B & C 611 at 625–626; 108 ER 576 at 581 per Lord Tenterden CJ; cited with approval in *Queensland v Stradford* (2025) 99 ALJR 396 at 417 [75] per Gageler CJ, Gleeson, Jagot and Beech-Jones JJ, at 443 [204] per Gordon J.

⁶ *Fingleton v The Queen* (2005) 227 CLR 166 at 186 [39] per Gleeson CJ.

⁷ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 362 [80] per Gaudron J. It is a defining feature of all courts in Australia, it is of course not a protection only conferred by Chapter III of the Commonwealth Constitution: *Wainohu v New South Wales* (2011) 243 CLR 181 at 208–210 [44]–[47] per French CJ and Kiefel J.

⁸ *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 553 [27] per French CJ and Gageler J.

branches of Government absent institutional need occasioned by the role and function of those branches (contra **DS [39]**). Though of course, the different roles and functions of the other branches of government may give rise to different immunities such as the privileges of members of the Houses of Parliament invoked through section 49 of the Constitution.

The rationale for extending the immunity to the “detaining officers” in Stradford

11. The defence of justification for tortious acts undertaken in the performance of a duty of executing or enforcing a warrant or order of a court has the same rationale as the judicial immunity. It extends “to those who have a legal duty to enforce or execute orders or warrants made or issued by a court in judicial proceedings”.⁹ It can be seen in many respects as an extension of the judicial immunity.¹⁰ It is the case that “[a]cts done according to the exigency of a judicial order afterwards reversed are protected [because] they are ‘acts done in the execution of justice, which are compulsive’”.¹¹ Those acts are “rooted in the order and underlying process being judicial”,¹² and importantly, they are “an aspect of the ‘protection of the authority of judicial proceedings’”.¹³
12. None of the authorities relied on by the defendant offers a different perspective on the rationale for the immunity which was recognised in *Stradford*.¹⁴ The warrant which authorised the imprisonment in *Smith v Collis* was issued by a court.¹⁵ The sheriff in *Ward v Murphy*, who worked under the *Prisons Act 1899* (NSW), was required by that statute to hold in custody persons imprisoned under

⁹ *Queensland v Stradford* (2025) 99 ALJR 396 at 433 [149]-[150] per Gageler CJ, Gleeson, Jagot and Beech-Jones JJ, with Gordon J agreeing at 446 [218], at 472 [320] per Edelman J, with Steward J agreeing at 473 [327].

¹⁰ *Queensland v Stradford* (2025) 99 ALJR 396 at 472 [322] per Edelman J.

¹¹ *Commissioner for Railways (NSW) v Cavanough* (1953) 53 CLR 220 at 225 per Rich, Dixon, Evatt and McTiernan JJ; citing *Dr Drury's Case* (1610) 8 Co Rep 141; 77 ER 688 at 691.

¹² *Kable v New South Wales* (2012) 268 FLR 1 at 12 [27] per Allsop P.

¹³ *Queensland v Stradford* (2025) 99 ALJR 396 at 428 [128] per Gageler CJ, Gleeson, Jagot and Beech-Jones JJ, quoting *Kable v New South Wales* (2012) 268 FLR 1 at 13 [35] per Allsop P.

¹⁴ *Smith v Collis* (1910) 10 SR (NSW) 800; *Ward v Murphy* (1937) 38 SR (NSW) 85; *Posner v Collector for Interstate Destitute Persons (Vic)* (1946) 74 CLR 461; *Robertson v The Queen* (1997) 92 A Crim R 115; *Kable v New South Wales* (2012) 268 FLR 1.

¹⁵ *Smith v Collis* (1910) 10 SR (NSW) 800 at 813 per Cullen CJ; see *Queensland v Stradford* (2025) 99 ALJR 396 at 460 [271] per Edelman J.

mesne process.¹⁶ In *Robertson*, a prison superintendant was relying on a court warrant.¹⁷ In *Kable*, the plaintiff was detained by an order of the Supreme Court in reliance on a statute which, it was later found by this Court, was invalid.¹⁸ Save for *Posner* which concerned, in effect, interstate recognition and enforcement of maintenance orders and so has no useful analogy to the present matter, in each case the duty to detain arose from the enforcement or execution of an order of, or warrant issued by, a court.¹⁹

- 10 13. Cases like *Kable* and *Ward* make clear that when assessing institutional need, in the case of persons acting on behalf of the polity, care needs to be taken to identify the institutional source of the direction said to have directed those persons to take those actions. In both cases, there was a statutory authority to detain. But in both cases, the detention was ordered by, or in aid of, the judicial process. These reflect the two examples given by Edelman J in *Stradford* to the effect that:²⁰

[t]here is no basis in principle to distinguish between, on the one hand, those who fulfil their duty, and the requirement imposed by the court, to execute court process as officers of the court and, on the other hand, those who fulfil their duty based upon a statutory role following a legal direction from the court.

- 20 14. Neither captures the facts of the present matter. As much is recognised by the defendant at **DS [24]** in acknowledging that the duty to detain under consideration in *Stradford* arose from the officers' obligation to enforce orders of the Court. In respect of the detaining officers, the institutional need for judicial orders to be followed, including in the sense of decisions being final, leads to the relevant aspect of the public interest for judges to be able to make their decisions without fear or favour.²¹

¹⁶ *Ward v Murphy* (1937) 38 SR (NSW) 85 at 92-93 per Davidson J; see *Queensland v Stradford* (2025) 99 ALJR 396 at 431-432 [143] per Gageler CJ, Gleeson, Jagot and Beech-Jones JJ.

¹⁷ *Robertson v The Queen* (1997) 92 A Crim R 115 at 123-124 per Steytler J, with Malcolm CJ and Franklyn J agreeing; *Queensland v Stradford* (2025) 99 ALJR 396 at 460 [271] per Edelman J.

¹⁸ *Kable v New South Wales* (2012) 268 FLR 1.

¹⁹ *Posner v Collector for Interstate Destitute Persons (Vic)* (1946) 74 CLR 461.

²⁰ *Queensland v Stradford* (2025) 99 ALJR 396 at 458 [264] per Edelman J.

²¹ *Queensland v Stradford* (2025) 99 ALJR 396 at 417-418 [74]-[76], 433 [149]-[150], 434 [156], 435 [159] per Gageler CJ, Gleeson, Jagot and Beech-Jones JJ; at 443-444 [204]-[208] per Gordon J, at 462 [276], 465 [287]-[288] per Edelman J; *Fingleton v The Queen* (2005) 227 CLR 166 at 186 [38]

The rationale for the judicial immunity does not apply in this case

15. There is a difference in the value for the rule of law between obeying an order of a court, whether inferior or superior, and obeying a perceived command of the Parliament. It is not in dispute that the interpretation of ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) (**Act**) by this Court in *Al-Kateb v Godwin*,²² occasioned the detention of the plaintiff. But the putative source of the duty to detain the plaintiff was not the interpretation of the Act by this Court in *Al-Kateb*. It was the Act itself. Contrary to **DS [29]**, the authority of this Court is not institutionally diminished by appropriately reconsidering the interpretation of statutes. That aspect of the administration of justice requiring the interpretation of statutes provides no support for shielding the executive from observance of statutes according to their interpretation in the matter at hand. Were it otherwise, an incoherent, generalised justification of “good faith” would undermine the significance of the rule of law as it controls the legality of conduct by a polity, which can only ever be carried out by human agents.
16. None of the rationales for the immunity which was set out in *Stradford* is engaged by the application of the reasons of a court to the interpretation of a statute. There are no considerations of independence or impartiality which are raised when decisions are later relied on by non-parties.
17. The orders of a superior court are valid until they are set aside.²³ But the same is not true of the reasons. As explained by Lord Hobhouse in *Evans [No 2]*:²⁴

[A]ny legal decision is no more than evidence of the law. ... They are a source of law but not a conclusive source. Judicial decisions are only conclusive as between the parties to them and their privies. The doctrine of precedent may give certain decisions a more authoritative status but this is relative... A decision or judgment may on examination be shown to be inconsistent with

per Gleeson CJ; *R (Majera (formerly SM) Rwanda) v Secretary of State for the Home Department* [2022] AC 461 at 480-481 [44] per Lord Reed PSC.

²² (2004) 219 CLR 562.

²³ *New South Wales v Kable* (2013) 252 CLR 118 at 135 [38] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

²⁴ *R v Governor of Brockhill Prison; ex parte Evans [No 2]* [2001] 2 AC 19 at 45; *Giannarelli v Wraith* (1988) 165 CLR 543 at 584 per Brennan J; *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 275 per Isaacs J.

other decisions. The value, force and effect of any decision is a matter to be considered and assessed. They are not statutes which ... have an absolute and incontrovertible status.

18. While a prior decision may amount to a “thing in fact”, beyond this it merely “record[s] the perception of [the law] which was then current”, it does not “necessarily represent [the law] of the earlier time”.²⁵
19. The Court’s orders in *Al-Kateb* did not compel the false imprisonment of the plaintiff. The reasoning in that case, as to the interpretation of the Act, meant that the Act was regarded as providing the lawful justification for the plaintiff’s detention. That interpretation was later ruled to have been wrong.²⁶ This court cannot overrule a previous decision with only prospective effect;²⁷ it “decides what in truth [the law] is and, of course, always has been”.²⁸ And so the interpretation of the Act in *Al-Kateb* was always wrong, and the plaintiff’s detention was always unlawful.
20. This is a fundamental aspect of judicial power which distinguishes it from non-judicial power. As was held in *Ha*, “[a] hallmark of the judicial process has long been the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct ... If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law”.²⁹ The Commonwealth properly does not contend to the contrary (**DS [37]**), but it offers no satisfactory answer to the eliding of this key aspect of judicial power were the defence of lawful justification to be recognised in the context of the present matter.

²⁵ *Giannarelli v Wraith* (1988) 165 CLR 543 at 584 per Brennan J, citing *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617 at 623 per Barwick CJ.

²⁶ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137.

²⁷ *Ha v New South Wales* (1997) 189 CLR 465 at 503-504 per Brennan CJ, McHugh, Gummow and Kirby JJ, Dawson, Toohey and Gaudron JJ agreeing at 515. See also *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 353-354 [55]-[56] per Kiefel CJ, Bell, Keane and Gordon JJ.

²⁸ See *Atlas Tiles Ltd v Briers* (1978) 144 CLR 202 at 208 per Barwick CJ. See also *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 586 per Barwick CJ.

²⁹ *Ha v New South Wales* (1997) 189 CLR 465 at 503-504 per Brennan CJ, McHugh, Gummow and Kirby JJ.

The consequences of retrospectivity can be harsh

21. It is no answer to contend, as the Commonwealth does, that a subsequent judicial declaration of the law may produce harsh consequences (see **DS [40]-[53]**). This has been frequently acknowledged by this Court. As Callinan J held in *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia*, “[l]egislators can, and usually do enact transitional provisions when they change the law. The courts have so far found and provided no like means of cushioning the impact of decisions which effect significant changes”.³⁰ It is not unfamiliar that this would lead to harsh consequences.³¹

10 *The defence in Stradford should be confined to the judiciary*

22. The Commonwealth contends at **DS [17]** that the extension of the defence recognised in *Stradford*, as contended for in this matter, should only apply where there is “current and binding High Court authority” which would support the validity of the detention. It is not clear why, on the arguments made by the Commonwealth to support the defence, the defence contended for would or should be so confined as a matter of principle.

23. The conclusion of unfairness is an unconvincing reason to find the immunity sought by the Commonwealth. It would surely be just as unfair for the detaining officer to be liable in tort for acting in reliance on “seriously considered *dicta*”,
20 as opposed to *ratio decidendi*, or even to act contrary to common assumptions of validity.³²

The institutional need of the Parliament

24. The source of the detaining officer’s duty is statutory [**SCB 42 [18]**]. They were

³⁰ (1999) 201 CLR 49 at 104 [164] per Callinan J. See also, *R v MJR* (2002) 54 NSWLR 368 at [52] per Mason P.

³¹ For example, a judicially declared change to the law as previously declared may have the effect of rendering a party liable to repay significant sums of money paid to it under a mistake of law. See, eg, *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; *Ha v New South Wales* (1997) 189 CLR 465 (which necessitated the passing of the *Franchise Fees Windfall Tax (Collection) Act 1997* (Cth), the *Franchise Fees Windfall Tax (Imposition) Act 1997* (Cth) and the *Franchise Fees Windfall Tax (Consequential Amendments) Act 1997* (Cth) to ensure the invalid State measures were converted, retrospectively, into federal legislative measures which would allow the State to retain the revenues they had derived from the unconstitutional taxing measures).

³² *Boilermakers* (1956) 94 CLR 254 at 296 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

employed by the executive to carry out that statutory duty. It follows that the institutional source of the duty is the Parliament. Parliament does not have the same institutional need as the judicature. For example, as is set out in *South Australia v Commonwealth*:³³

[a] pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally [they] will feel safer if [they have] a decision of a court in [their] favour—but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it—and thereafter invalid. If it is beyond power it is invalid *ab initio*.

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25. The position may be different for courts and public officials, in that there is a public interest in the conformity by them with the law stated by Parliament.³⁴ But that is not a reflection of any institutional need on the part of Parliament. Rather, it is a reflection of the ordinary functioning of the civil compact between the branches of government which the constitution creates. That explains the distinction drawn in *Kable v New South Wales*, that:³⁵

there is every reason to consider that an officer of a court should be protected by his actions in obedience to an order of the court of which he is either part or an officer. Orders directed to police or gaolers in the form of a court order, not issued in the course of judicial process, but having the true legal character of an executive warrant, which is wholly lacking authority, do not stand as necessarily bringing the same protection to those who obey them as might be thought appropriate to officers of the court itself, even in such circumstances.

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26. This is consistent with the earlier decision in *Feather v Rogers*,³⁶ where the immunity did not apply to officers who relied on invalid warrants issued by inferior courts. That decision, as was held in *Stradford*, is to be understood on the basis that the warrant in that case was “not issued in the course of judicial

³³ (1942) 65 CLR 373 at 408 per Latham CJ.

³⁴ *Hong Phuc Truong v The Queen* (2004) 223 CLR 122 at 198 [158] per Kirby J.

³⁵ (2012) 268 FLR 1 at 13-14 [35] per Allsop P.

³⁶ (1909) 9 SR (NSW) 192.

process, but having the true legal character of an executive warrant”.³⁷

27. Contrary to **DS [33]**, the observation of Allsop J in *Commissioner of Taxation v Indooroopilly Children’s Service (Qld) Pty Ltd*, where it was held that the executive government cannot ignore the declaration by the Courts of the meaning of a statute in carrying out its execution and maintenance of the law of the Commonwealth, lends no support to the Commonwealth’s case.³⁸ Contrary to **DS [22]-[25]**, it was not just the duty to detain which justified the defence in *Stradford*. Rather, it was that the duty arose in circumstances that enlivened the institutional need of the judicature for the defence to apply. In this case, the duty of the detaining officer arises in circumstances where the defendant has identified no institutional need of the Parliament which would justify the application of an analogous defence.

Support for the plaintiff’s position in previous authority

28. The New South Wales Court of Appeal, in *Cowell v Corrective Services Commission of New South Wales*,³⁹ held the Commission liable for false imprisonment on facts similar to this case. Cowell, a prisoner, claimed damages on the ground that their entitlement to remissions had been calculated to their detriment in accordance with a decision which had subsequently been overruled.⁴⁰ The statutory scheme was such that Cowell was deemed to be in the custody of the governor.⁴¹
29. A majority of the Court held that the Commission was directly liable for false imprisonment, even though those responsible for the detention acted in good faith in accordance with the law as they understood it.⁴² In that case, the governor’s power to detain prisoners after the expiration of their sentence, and so after the duty to detain was owed to the judicature, arose from the operation

³⁷ *Kable v New South Wales* (2012) 268 FLR 1 at 13-14 [35] per Allsop P; *Queensland v Stradford* (2025) 99 ALJR 396 at 429 [131] per Gageler CJ, Gleeson, Jagot and Beech-Jones JJ, at 460 [271] per Edelman J.

³⁸ (2007) 158 FCR 325 at 326 [3] per Allsop J with Stone J agreeing, both agreeing with Edmonds J.

³⁹ (1988) 13 NSWLR 714.

⁴⁰ *Prisons Act 1952* (NSW) s 41(3); overruled in *Smith v Corrective Services of New South Wales* (1980) 147 CLR 134.

⁴¹ (1988) 13 NSWLR 714 at 735D per Clarke JA, with Priestly JA agreeing.

⁴² (1988) 13 NSWLR 714 at 734E per Clarke JA, with Priestly JA agreeing.

of the relevant legislation. The source of the duty had become statutory.⁴³

30. The consequence of this Court’s decision in *NZYQ* is that the plaintiff’s liberty was withdrawn without sufficient cause.⁴⁴ No reason founded in the justification for the defence offered in *Stradford* has been advanced in this case as to why that should not sound in damages.

The nature of the defence recognised in *Stradford* is an immunity on which the Crown has no entitlement to rely

- 10 31. Contrary to **DS [14]**, the “defence” recognised by the majority in *Stradford* was in the nature of an “immunity”.⁴⁵ It bears parallels with the Crown’s historical immunity from action for tort, which was abrogated by s 75(iii) of the Constitution and, relevantly, s 64 of the *Judiciary Act 1903* (Cth).⁴⁶ Although the immunity could be pleaded in bar to any action to recover judgment for damages in respect of a common law cause of action in tort against the Crown, “the Crown’s substantive responsibility existed in contemplation of law”, despite not being “the subject of legal remedy”.⁴⁷ It can now, and should be in this case, the subject of legal remedy. Historical exceptions to the maxim that “the King can do no wrong” which applied in the colonies before Federation inform this construction of s 64 of the *Judiciary Act*.⁴⁸
32. Whether the defence contended for is properly to be considered an immunity, or

⁴³ (1988) 13 NSWLR 714 at 730B-D per Clarke JA, with Priestly JA agreeing.

⁴⁴ *Williams v The Queen* (1986) 161 CLR 278 at 292 per Mason and Brennan JJ; *Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714 at 717-718 per Priestly JA.

⁴⁵ *Queensland v Stradford* (2025) 99 ALJR 396 at 433 [149]-[150], 434-435 [155]-[159] per Gageler CJ, Gleeson, Jagot and Beech-Jones JJ.

⁴⁶ *Maguire v Simpson* (1977) 139 CLR 362 at 372-373 per Barwick CJ; *Commonwealth v Asiatic Steam Navigation Co Ltd* (1955) 96 CLR 397 at 416-417 per Dixon CJ, McTiernan and Williams JJ, at 428 per Kitto J; *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 at 352 per Starke J agreeing but writing separately; cited with approval in *Parker v Commonwealth* (1965) 112 CLR 295 at 300 per Windeyer J; *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 263-265 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ; Graeme Hill, “Private Law Actions Against the Government – Part 2” (2006) 29(3) *UNSW Law Journal* 1 at 2; Susan Kneebone, “Claims Against the Commonwealth and States and Their Instrumentalities in Federal Jurisdiction; Section 64 of the Judiciary Act” (1996) 24 *Federal Law Review* 93 at 96-97.

⁴⁷ *Werrin v Commonwealth* (1938) 59 CLR 150 at 167-168 per Dixon J; cited with approval in *Commonwealth v Mewett* (1997) 191 CLR 471 at 550 per Gummow and Kirby JJ.

⁴⁸ See *Maguire v Simpson* (1977) 139 CLR 362 at 372-373 per Barwick CJ; citing *Farnell v Bowman* (1887) 12 App. Cas. 643 at 649.

a justification, does not affect the analysis in this matter.⁴⁹ That which was always unlawful is either without remedy against the detaining officer, or in a particular sense the detaining officer's conduct is rendered not unlawful.⁵⁰ On either construction of the immunity, as excuse or justification, the elements of the tort will have been made out before its application. There is no issue as to this in the present matter (**DS [13]**). As is set out below, that is crucial for the claim in true vicarious liability.⁵¹

The liability of the Commonwealth in this matter can be direct or vicarious

- 10 33. The Commonwealth is capable of being held directly liable for the false imprisonment of the plaintiff on the basis that the acts of the detaining officer can be attributed to the Commonwealth either through the ordinary principles of agency,⁵² or because the detaining officer was exercising an exclusively governmental power. The Commonwealth is also capable of being held vicariously liable for the liability of the detaining officer.⁵³ In either respect, there is no good reason for the common law defence (if it exists) to “have the same application to the Commonwealth as it does to Commonwealth officers” (cf **DS [58]**).

Establishing direct liability – Detention by the Commonwealth

- 20 34. The Commonwealth as a *persona ficta* cannot physically detain a person. Like a company its “existence, capacities and activities are only such as the law attributes to it”.⁵⁴ The “reality” is that “for practical reasons” the Commonwealth

⁴⁹ *Queensland v Stradford* (2025) 99 ALJR 396 at 442 [198] per Gordon J; 446-447 [220]-[221] per Edelman J.

⁵⁰ *O'Dea v Western Australia* (2022) 273 CLR 315 at 329-330 [65] per Gordon, Edelman and Steward JJ. See further *Pickett v Western Australia* (2020) 270 CLR 323 at 365-366 [99] per Nettle J, writing separately but agreeing. *Queensland v Stradford* (2025) 99 ALJR 396 at 442 [198] per Gordon J, at 447 [222] per Edelman J.

⁵¹ *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 189-195 [59]-[69] per Edelman and Steward JJ;

⁵² *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 187-189 [55]-[58] per Edelman and Steward JJ. *Bird v DP* (2024) 98 ALJR 1349 at 1358-1359 [31]-[35] per Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ.

⁵³ *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 189-195 [59]-[69] per Edelman and Steward JJ; *Bird v DP* (2024) 98 ALJR 1349 at 1361-1362 [44]-[47] per Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ.

⁵⁴ Cf *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 171 per Brennan J.

must “operate through ... servants, agents and emanations”.⁵⁵ In *Baume v The Commonwealth*, it was held that:⁵⁶

The Commonwealth acts, as all Governments must act, by its servants, and whenever the relation of the Commonwealth to its servants is such that in a similar case an individual would be liable for the acts of his servant, the Commonwealth is liable for the acts of its servants.

35. For example, the Commonwealth has the capacity (acting by or through officers of the Executive Government) to exercise a right of payment,⁵⁷ to hold a right in respect of real property,⁵⁸ and to contract.⁵⁹ As explained by Edelman J in *Director of National Parks*:⁶⁰

[t]he exercise of any type of power of the body politic of the Commonwealth of Australia by any Commonwealth officer, employee or other agent (including sub-agents) will, subject to any immunity from liability, be attributed to the body politic of the Commonwealth of Australia on whose behalf the power was exercised.

36. The Commonwealth’s legal and constitutional personhood operates as “an anchor for rights/duties/liabilities”.⁶¹ Acts of Commonwealth officers, employees and other agents can be attributed to the Commonwealth in accordance with the usual rules of corporate agency.⁶²

⁵⁵ *Re Residential Tenancies Tribunal (NSW); Ex parte Henderson* (1997) 190 CLR 410 at 502 per Kirby J.

⁵⁶ (1906) 4 CLR 97 at 119-120 per O’Connor J, agreeing but writing separately.

⁵⁷ See, eg, *Re KL Tractors Ltd* (1961) 106 CLR 318 at 334-335 per Dixon CJ, McTiernan and Kitto JJ.

⁵⁸ See, eg, *The Commonwealth v Anderson* (1960) 105 CLR 303 at 313 per Dixon CJ; *A-G (NSW) v Stocks and Holdings (Constructors) Pty Ltd* (1970) 124 CLR 262 at 288 per Walsh J; *Sydney Training Depot Snapper Island Ltd v Brown* (1987) 14 ALD 464 at 465 per Wilcox J; *Clamback v Coombes* (1986) 13 FCR 55 at 64 per Evatt J.

⁵⁹ See, eg, *Williams v Commonwealth of Australia* (2012) 248 CLR 156 at 253 [201] per Hayne J.

⁶⁰ *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 98 ALJR 655 at 685-686 [145] per Edelman J.

⁶¹ Hartford Davis, “The Legal Personality of the Commonwealth of Australia” (2019) 47(1) *Federal Law Review* 3 at 6; cited with approval in *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 98 ALJR 655 at 685-686 [145] per Edelman J.

⁶² See, eg, *New South Wales v Bardolph* (1934) 52 CLR 455 at 495 per Rich J, at 503 per Starke J, at 508 per Dixon J, at 517-518 per McTiernan J; *Coogee Esplanade Surf Motel Pty Ltd v Commonwealth* (1976) 50 ALR 363 at 379 per Hutley JA, at 364 per Moffitt P, with Glass JA agreeing at 382; see further *Attorney-General v Lindegren* (1819) 146 ER 811 at 818 per Richards LCB.

37. As established in *James v The Commonwealth*,⁶³ this principle extends to attributing the tortious acts of the Commonwealth's agents to the Commonwealth as a constitutional or legal person. In that case, the plaintiff claimed to have suffered loss in their trade in dried fruit in consequence of the administration and enforcement of Acts held invalid by the Privy Council.⁶⁴ Part of the claim concerned five specific seizures of dried fruit by various State Dried Fruit Boards, acting under the direction and authorisation of the Secretary of the Commonwealth Department of Commerce (and on occasion the Minister himself). Dixon J held that the Commonwealth had granted to the State Dried Fruits Boards a *de facto* authority,⁶⁵ within the scope of which the tort of conversion had been committed. The Commonwealth's liability for conversion was not truly vicarious, but direct.
38. To be liable for false imprisonment, "it must be the act of the defendant or his agent that imprisons the plaintiff or the defendant must be active in promoting and causing the imprisonment".⁶⁶ In the present matter, it can be seen that the the detaining officer, in performing the physical action of detaining the plaintiff, was acting as the agent of the Commonwealth, which itself was thereby promoting and causing the imprisonment.
39. Contrary to **DS [58]** at 90, it is not relevant to this enquiry that the duty to detain was imposed on the detaining officer, rather than on the Commonwealth directly. This case is not concerned with a breach of that duty as between employee and employer. It is concerned with the exercise of the Commonwealth's governmental power to detain,⁶⁷ which was exercised by the detaining officer on the Commonwealth's behalf.⁶⁸ That aspect of executive

⁶³ (1939) 62 CLR 339; cited with approval in *McClintock v The Commonwealth* (1947) 75 CLR 1 at 19 per Latham CJ. See also *Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714 at 737 per Clarke JA with Priestley JA agreeing.

⁶⁴ In *James v The Commonwealth* (1936) 55 CLR 1.

⁶⁵ *James v The Commonwealth* (1939) 62 CLR 339 at 359-360 per Dixon J.

⁶⁶ *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 629 per McDonald J.

⁶⁷ See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 67 [30] per French CJ, Kiefel and Nettle JJ, 124 [239] per Keane J; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

⁶⁸ See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 84-85 [93] per Bell J, 108 [173] per Gageler J, at 153-154 [352]-[354] per Gordon J.

power can arise only with the conferral of a positive authority – which can arise either from judicial warrant or statutory mandate.⁶⁹

Proof of the Commonwealth's intention

40. If it is necessary to do so, it is for the Commonwealth to prove its lack of intention to detain, or promote or cause the detention of, the plaintiff.⁷⁰ As above, intention can be imputed to the Commonwealth through its agents.⁷¹

The conventional common law principle that the Commonwealth's liability must be vicarious has no application in the present matter

- 10 41. The cases relied upon by the Commonwealth at **DS [58]** at footnote 92 all concern the Commonwealth's liability for the actions of members of the defence force. The "conventional common law principle" said to be expressed in these cases has no application in the present matter.
42. The cases of *Shaw Savill and Albion Co Ltd v The Commonwealth*,⁷² *Parker v The Commonwealth*,⁷³ and *Groves v The Commonwealth*,⁷⁴ were each concerned with the Commonwealth's liability for the negligence of its naval officers or members of the armed forces. The Commonwealth could not be held directly liable in these cases, because there was no "immediate duty lying on the Crown itself".⁷⁵ The relevant duty of care was that of the service personnel personally,

⁶⁹ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 153 [27] per Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528 per Deane J; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 19 per Brennan, Deane and Dawson JJ, at 63 per McHugh J; *Williams v The Queen* (1986) 161 CLR 278 at 292 per Mason and Brennan JJ; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 340-341 [14]-[17] per Kiefel CJ, Bell, Keane and Edelman JJ. Cf *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 118 per Kitto J agreeing but writing separately.

⁷⁰ *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 206 [24]-[25] per Gageler J, at 238 [134] per Edelman J; *Clerk & Lindsell on Torts* (Thomson Reuters, 24th eds, 2023) at [14-24]; see further, *Stingel v Clark* (2006) 226 CLR 442 at [47] per Gummow J.

⁷¹ *James v The Commonwealth* (1939) 62 CLR 339 at 359-360 per Dixon J; *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 118 per Kitto J; see *Lewis v Australian Capital Territory* (2020) 271 CLR 129 at 208 [28] per Gageler J, citing with approval *Ruddock v Taylor* (2005) 222 CLR 612 at 642-644 [112]-[118] per McHugh J (albeit in dissent) and the reasoning there cited.

⁷² (1940) 66 CLR 344.

⁷³ (1965) 112 CLR 295.

⁷⁴ (1982) 150 CLR 113.

⁷⁵ (1940) 66 CLR 344 at 360 per Dixon J.

for example, in the navigation and conduct of a ship at sea outside of combat.⁷⁶ The plaintiff accepts that in the context of negligence, the Commonwealth can only be held vicariously liable, in the true sense, absent an immediate duty owed by the Commonwealth (in the form of an ordinary duty of care, or a non-delegable duty of care).

43. This same reasoning does not apply in the context of false imprisonment. To the extent *Haskins v Commonwealth*,⁷⁷ suggests otherwise that has to be read in light of its reliance on *Shaw* and *Groves*. For example, in *Groves* at least, it seems it was the vicarious attribution of acts which was being considered.⁷⁸ Until recently, a reference to vicarious liability could also refer to the attribution of acts committed by the employee, to the employer.⁷⁹ As in the present matter, and unlike in the other cases discussed in this section, the act of detention is necessarily the product of “the ostensible performance of [the employer's] work... committed under cover of the authority the [employee] is held out as possessing”.⁸⁰

Establishing vicarious liability – Absent the defence, true vicarious liability will apply to the Commonwealth

44. The detention being in the course or scope of the detaining officer’s employment, their liability is the Commonwealth’s liability. Liability for the tort of the detaining officer will be attributed to the Commonwealth as their employer.⁸¹ The Commonwealth accepts that the plaintiff was falsely imprisoned by the detaining officer [DS 13]]. The Commonwealth also accepts the detaining officer was acting in the course or scope of their duty [SCB 46 [38]].

⁷⁶ See, for example, *Shaw Savill and Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344 at 362 per Dixon J with Rich ACJ, and McTiernan and Williams JJ agreeing.

⁷⁷ (2011) 244 CLR 22 at 41 [43]-[44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

⁷⁸ (1982) 150 CLR 113 at 121-122 per Stephen, Mason, Aickin and Wilson JJ; see *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 187-189 [55]-[58] per Edelman and Steward JJ.

⁷⁹ *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 187-189 [55]-[58] per Edelman and Steward JJ; *Bird v DP* (2024) 98 ALJR 1349 at 1358 [30]-[31], 1361 [44] per Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ.

⁸⁰ *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 381 per Dixon J; cited with approval in *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 187-189 [55]-[58] per Edelman and Steward JJ.

⁸¹ *CCIG Investments v Schokman* (2023) 278 CLR 165 at 175 [12] per Kiefel CJ, Gageler, Gordon and Jagot JJ, at 191 [65] per Edelman and Steward JJ.

In any event, should the defence apply to the detaining officer, vicarious liability can apply to the Commonwealth

45. Without reopening the “tortured history” of true vicarious liability in this Court,⁸² if the Court is minded to accept the policy considerations raised by the defendant in respect of the detaining officer (**DS [40]-[45]**),⁸³ consistent with the nature of the defence being a justification of a tort the elements of which have been made out (and so the preconditions for liability having been met),⁸⁴ the Commonwealth should nonetheless be vicariously liable.⁸⁵

10 46. The policy of the law that applies to an innocent misunderstanding on the part of a detaining officer has no corresponding force in the case of the Commonwealth being the polity itself. The rule of law does not need to accommodate the notion of the Commonwealth misunderstanding its own legislation; that is a concept which is likely to undermine the rule of law.

The case law from other jurisdictions offers the Commonwealth no assistance in this matter

Authority from England and Wales

20 47. Contrary to **DS [55]**, the case of *Evans [No 2]*,⁸⁶ is directly analogous to the present matter and should be treated by this Court as persuasive. In *Evans [No 2]*, the plaintiff had been sentenced to imprisonment, and their conditional release date calculated by the governor of the prison under the relevant

⁸² *Bird v DP* (2024) 98 ALJR 1349 at 1362 [48] per Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ.

⁸³ See further in the nature of the United States authorities addressed below.

⁸⁴ *O’Dea v Western Australia* (2022) 273 CLR 315 at 340 [65] per Gordon, Edelman and Steward JJ. See further *Pickett v Western Australia* (2020) 270 CLR 323 at 365 [99] per Nettle J, writing separately but agreeing; and *R v Rowan* (2024) 278 CLR 470 at 497-499 [75]-[81] per Edelman J. Though these authorities refer to the criminal law defences, they are clear statements of the cognate principle in the tort law as picked up and applied by the Court in *Queensland v Stradford* (2025) 99 ALJR 396 at 442 [198] per Gordon J, at 447 [222] per Edelman J. See further, *Fairfax Media Publications Pty Ltd v Voller* (2021) 273 CLR 346 at 368 [74] per Gageler and Gordon JJ, at 382 [118] per Edelman J.

⁸⁵ *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at 686 per Lord Pearce; citing *Broom v Morgan* [1953] 1 QB 597. See *New South Wales v Lepore* (2003) 212 CLR 511 at 611 [300] per Kirby J. Contra *Parker v Commonwealth* (1965) 112 CLR 295 at 303 per Windeyer J; *Bird v DP* (2024) 98 ALJR 1349 at 1358 [30] per Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ; *Cowell v Corrective Services Commissioner* (1988) 13 NSWLR 714 at 732-734 per Clarke JA.

⁸⁶ [2001] 2 AC 19.

legislation in accordance with guidance provided by earlier decisions of the Divisional Court which were later held to be incorrect. The calculation of the release date was a statutory discount to a sentence which is applied by the governor to the person detained.⁸⁷ The result was that the plaintiff spent 59 days more in custody than she would have done if the provisions of the relevant legislation had been construed correctly when the governor calculated their conditional release date. The House of Lords held that the plaintiff was entitled to recover compensation for false imprisonment.

10 48. Similar arguments to those put by the Commonwealth in this case were put before the House of Lords — relevantly, it was argued that although the plaintiff’s detention was unlawful, the governor was nevertheless justified in detaining them because they were obliged to obey the law as declared by the court and it was reasonable to do so; to fail to do so would be to ignore the separation of powers between the judiciary and the executive.⁸⁸ Just as in the present case, the argument was developed by analogy with cases where a person had been detained in obedience to the order of a court which was *ex facie* lawful at the time it was made or for breach of a byelaw which was only subsequently found to have been unlawful (discussed below). These arguments were unanimously rejected by the House of Lords, for reasons equally applicable in this case:

20

(a) Lord Slynn relied on the fact that the courts had declared what was always the correct meaning of the relevant legislation.⁸⁹ That meant that the legislation never had the meaning the governor thought it did, and the plaintiff was never lawfully detained after the date she should have been released.

(b) Lord Steyn (with whom Lord Browne-Wilkinson agreed) held that although the justice of the case pulled “in opposite directions”, the injustice of holding the governor liable for “doing his job in accordance with the law” was outweighed by the fact that no member of the executive can interfere with

⁸⁷ *Criminal Justice Act 1967* (UK) s 67(1); [2001] 2 AC 19 at 30-31 per Lord Hope.

⁸⁸ [2001] 2 AC 19 at 33-34 per Lord Hope.

⁸⁹ [2001] 2 AC 19 at 26-27 per Lord Slynn.

the liberty of a person “except on the condition that he can support the legality of his action before a court of justice”,⁹⁰ such that the plaintiff was entitled to recover compensation where the executive could no longer support the lawfulness of the detention.

- 10 (c) Lord Hope (with whom Lord Browne-Wilkinson agreed) and Lord Hobhouse held that it was the governor’s obligation to make the calculation in the manner laid down by the statute, “so the responsibility for any error in the calculation lies with [them]”.⁹¹ Relying on “such guidance as is available from decision of the courts... is not the same thing as complying with the terms of a court order”.⁹² Lord Hobhouse observed that “legal decisions are a source of law, but not a conclusive source”, save for as between the parties and their privies.⁹³ Had the governor been acting within the four corners of an order which had been made by the court for the respondent’s detention (because such an order must be complied with unless it is on its face unlawful), he would have been justified in continuing to detain the plaintiff, but as it was, the justification “had to be found in the terms of the statute”.⁹⁴
49. The case of *Percy v Hall* (**DS [53]**),⁹⁵ was distinguished by the Court of Appeal,⁹⁶ and the House of Lords in *Evans [No 2]*.⁹⁷ Like in *Evans [No 2]*, the detaining officer in the present matter had to form a view as to whether detaining the plaintiff was required by law. It was not the case that the detaining officer was
- 20 able to rely on the Act or *Al-Kateb* as of itself justifying the detention, as with the byelaws in *Percy*.

⁹⁰ [2001] 2 AC 19 at 28-29 per Lord Steyn (with whom Lord Browne-Wilkinson agreed at 27), citing *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] AC 662 at 670 per Lord Atkin; also citing *Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714.

⁹¹ [2001] 2 AC 19 at 34-35 per Lord Hope (with whom Lord Browne-Wilkinson agreed at 27), at 44 per Lord Hobhouse.

⁹² [2001] 2 AC 19 at 35 per Lord Hope (with whom Lord Browne-Wilkinson agreed at 27), at 44-45 per Lord Hobhouse.

⁹³ [2001] 2 AC 19 at 45 per Lord Hobhouse.

⁹⁴ [2001] 2 AC 19 at 35 per Lord Hope (with whom Lord Browne-Wilkinson agreed at 27).

⁹⁵ [1997] QB 924.

⁹⁶ See *R v Governor of Brockhill prison; ex parte Evans [No 2]* [1999] QB 1043 at 1056-1057 per Lord Woolf, at 1077-1078 per Judge LJ.

⁹⁷ [2001] 2 AC 19 at 34-35 per Lord Hope (with whom Lord Browne-Wilkinson agreed at 27), at 46 per Lord Hobhouse.

Canadian authority and United States authority

50. The defence contended for by the Commonwealth has been recognised in a much wider form in Canada on the basis that the effectiveness and efficacy of government action, which is conducted in good faith, depends on the freedom from liability.⁹⁸ That line of authorities is inconsistent with *James v The Commonwealth*, and the general principle that in Australia “the law always countenances resort to the courts, whether by criminal or civil process, as the proper means of determining any assertion of right”.⁹⁹

10 51. The same is not true of the authorities in the United States. 42 USC § 1983 provides a qualified immunity only against a judicial officer. It otherwise ensures liability for a person who deprives a person of their rights, privileges or immunities under the Constitution and law. To the extent that has been given a broader application by judicial decision in respect of agents of the Government,¹⁰⁰ it is inconsistent with the authorities of this Court set out above.

Part VI: Orders sought

52. The question in the special case should be answered “no”. It has been agreed that the defendant will pay the plaintiff’s costs of the special case.

Part VII: Estimate

53. The plaintiff estimates that two hours will be required for its oral argument.

20 14 October 2025



Bret Walker

Fifth Floor St James’ Hall
+61 2 8257 2527

caroline.davoren@stjames.net.au



Michael Tanevski

Sir Owen Dixon Chambers
+61 2 8076 6604

mtanevski@sirowendixon.com.au



Adam Khadra

Sixth Floor Selborne Wentworth
+61 2 8915 2683

akhadra@sixthfloor.com.au

⁹⁸ *Central Canada Potash Co v Government of Saskatchewan* [1979] 1 SCR 42 and the others referred to at DS [47]-[50].

⁹⁹ *Northern Territory v Mengel* (1995) 185 CLR 307 at 372-373 per Deane J; citing *James v The Commonwealth* (1939) 62 CLR 339 at 349 per Dixon J; and *Central Canada Potash Co v Government of Saskatchewan* [1979] 1 SCR 42. See *Werrin v Commonwealth* (1938) 59 CLR 150 at 157-158 per Latham CJ.

¹⁰⁰ See *Filarsky v Delia* (2012) 566 US 377; *Pierson v Ray* (1967) 386 US 547 at 555 per Warren CJ.

ANNEXURE TO PLAINTIFF'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1.	<i>Commonwealth Constitution</i>	Current	61, 75	In force at all relevant times	All relevant times
2.	<i>Judiciary Act 1903 (Cth)</i>	C49, (18 February 2022 – 11 June 2024)	64	Version in force at time of orders in <i>NZYQ</i>	All relevant times
3.	<i>Migration Act 1958 (Cth)</i>	C156 (1 Nov 2023 – 17 Nov 2023)	5, 189, 196	Version in force immediately prior to orders in <i>NZYQ</i>	All relevant times
4.	<i>The Public Health and Welfare Act 1927 (Cth)</i>	Current	§ 1983	In force at all relevant times	All relevant times