HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S65/2021

BETWEEN

SAFWAT ABDEL-HADY
Plaintiff

AND

COMMONWEALTH OF AUSTRALIA
Defendant

SUBMISSIONS IN REPLY OF THE DEFENDANT

PART I FORM OF SUBMISSIONS

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

PART II REPLY

2. The plaintiff's submissions (**PS**) misunderstand the relevance of *Stradford* and do not engage with key aspects of the Commonwealth's case.

The analogy to *Stradford*

3. ***The relevance of judicial immunity***: The plaintiff does not answer the principled basis for the analogy to *Stradford* as explained in the Commonwealth's submissions (**CS**). The plaintiff resists the analogy on the basis that the defence recognised in *Stradford* "has the same rationale as" and "can be seen as an extension of" judicial immunity: **PS [11]**. That is not correct. The issue of judicial immunity in *Stradford* arose only in relation to the liability of Judge Vasta and not in relation to the availability of the common law defence for the enforcing officials. Judicial independence – "the public interest for judges to be able to make their decisions without fear or favour" (**PS [14]**) – was not what underpinned that common law defence. Instead, *Stradford* explains the defence as being concerned with the ability of courts to "perform their role effectively"[1] and the "protection of the authority of judicial proceedings",[2] through ensuring that orders are enforced and complied with: **CS [26]-[27]**. Judicial independence was, likewise, irrelevant to the concerns in *Stradford* about the incoherence and unfairness of making the officers liable for discharging their duty: **CS [28]**. Exposing this error shows that the submissions at **PS [7]-[10]** are irrelevant.

4. Likewise, it is no answer to the Commonwealth's argument to say that *Stradford* and the earlier cases to which it referred were concerned with the protection of the authority of judicial proceedings: **cf PS [11]-[14]**. That may be accepted. But that is not a reason for denying the analogy between *Stradford* and the present situation, because the defence for which the Commonwealth contends likewise protects judicial authority: see **CS [29]-[45]**.

5. ***Institutional need for the common law defence***: The plaintiff also attempts to deny an analogy with *Stradford* by characterising the detaining officer's duty in this case as deriving solely from the Act, as a single "putative source": **PS [15], [24]**. On this basis the plaintiff asserts that there is no "institutional need of the Parliament" for a defence, by contrast with

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1 *Stradford* (2025) 99 ALJR 396 at [149] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).
2 *Stradford* (2025) 99 ALJR 396 at [128] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), quoting *Kable v New South Wales* (2012) 268 FLR 1 at [35] (Allsop P).

the "institutional need" of the judiciary justifying the defence recognised in *Stradford*: **PS [27]**. That argument proceeds from two false premises.

6. *First*, it proceeds from the erroneous premise that the "institutional need" of a single branch of government (the Parliament) is the sole basis for this Court to recognise the defence. But that is not the Commonwealth's argument. The analogy with *Stradford* arises because there is a need to protect the authority of this Court's binding ruling as to the validity of a statute (being a ruling that required officers to keep people in detention), just as in *Stradford* the Court recognised the need to protect the authority of orders that required detention (notwithstanding the invalidity of those orders). Indeed, the protection of the authority of the judiciary is in one respect more compelling here than that recognised in *Stradford*: whereas *Stradford* concerned the need to ensure obedience to court orders in individual cases, the present issue implicates larger rule of law concerns involving the obedience of the executive to the law as declared by this Court. The plaintiff does not grapple in any serious way with these rule of law concerns as developed at **CS [31]-[37], [40]**. Instead, he draws upon *South Australia v Commonwealth*[3] to assert that "anybody in the country is entitled to disregard" an invalid law: (**PS [24]**), while nevertheless recognising that "[t]he position may be different for courts and public officials": **PS [25]**. This Court would not countenance the idea that the Commonwealth or its officers could "disregard" a law that this Court has held to be valid. The argument that the plaintiff needs to meet, but instead seeks to marginalise, turns upon the intersection of the institutional roles of all three branches of government, not just the Parliament.

7. *Second*, the asserted lack of an institutional need for the common law defence proceeds from the erroneous premise that the overruling of *Al-Kateb* in *NZYQ* involved simply a change in the interpretation of a statute: see **PS [2], [15]-[16], [19]**. The plaintiff submits that "the authority of this Court is not institutionally diminished by appropriately reconsidering the interpretation of statutes" and that such matters of interpretation provide no support for "shielding the executive from observance of statutes": **PS [15]**. It is possible that, in some future case, the Court will need to consider the extent to which the executive should be held liable for acting in accordance with a binding judicial interpretation of a statute which is later overruled. But that is not the present case. It was not the interpretation of ss 189(1) and 196(1) of the Act that had been adopted in *Al-Kateb* that was overruled in *NZYQ*. Indeed, leave to re-open that interpretation was refused.[4] Instead, what was overruled was the

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3 (1942) 65 CLR 373 at 408 (Latham CJ).

4 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at [23] (the Court).

constitutional ruling that those provisions were valid in their relevant operations. In effect, therefore, the majority in *Al-Kateb* held that officers were under a statutory duty to detain certain unlawful non-citizens when actually they were under no such duty because that statutory duty never validly applied. For that reason, it is inaccurate (or, at least, incomplete) to assert that the plaintiff's detention "had a legislative, not judicial source of authority" (**PS [5]**) or that the source of the duty to detain was "the Act itself": **PS [15]**. Indeed, the premise of the plaintiff's damages claim is that his detention did not have a legislative source.

8. In a very real sense, the plaintiff was detained only because this Court had held that ss 189 and 196 validly required the detention of persons in his position. The point is illustrated by considering the situation of Mr Al-Kateb. This Court's orders did not direct the detaining officer to continue to detain him.[5] However, the effect of the plaintiff's submission is that it would have been consistent with the detaining officer's statutory duties and the rule of law (including Parliament's supremacy over the executive, and the authority of this Court) for the detaining officer to have unilaterally adopted their own view that ss 189(1) and 196(1) were invalid and, on that basis, to have released Mr Al-Kateb. That is not a tenable position. Like the duty to enforce a judicial order that turns outto be invalid, the duty to comply with a law that this Court has held to be valid has a source external to that law. It is not accurately described as arising from "the Act itself". It arises, instead, from the institutional role of this Court, it being emphatically "the province and duty of the judicial department to say what the law is".[6] That is what engages the rule of law concerns, and the correlative duty on the detaining officer, explained at **CS [30]-[31]**.

9. ***Ramifications***: The uncontroversial observation that harsh consequences may flow from this Court overruling a previous decision does not answer the Commonwealth's submission: cf **PS [21]**. In the present context, as in *Stradford*,[7] recognising or denying the common law defence will have harsh consequences one way or the other. The Commonwealth does not contend that the common law defence is needed to ameliorate harshness per se, but rather to avoid the incoherence that would arise from holding officers liable for acting as the rule of law required: **CS [40]-[45]**.

10. The plaintiff also indirectly raises a question of indeterminacy in asking why the common law defence should be confined only to acting in compliance with decisions of this Court, and not inferior or intermediate appellate courts: **PS [22]-[23]**. However, consistently with

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5 *Al-Kateb* (2004) 219 CLR 562 at 663.
6 *Marbury v Madison* (1803) 5 US 137 at 177.
7 (2025) 99 ALJR 396 at [4] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

the conventional principle that the Court should develop the common law by deciding only so much as is necessary to dispose of the case before it, the Commonwealth does not assert either that the defence should – or should not – be so confined: **CS [16]-[18]**. It takes no position on that issue because it is not necessary for the Court to chart the boundaries of the defence, but simply to decide whether it applies in this case. That is particularly true as there are relevant differences between constitutional holdings of this Court and holdings of other courts, which might involve a different balance being struck between competing considerations. Such questions should be determined in the context of a concrete controversy.

11. Nor does s 64 of the Judiciary Act prevent recognition of the common law defence: cf **PS [31]-[32]**. While it does not arise on the facts, the defence would also be available in a suit between subject and subject (eg a claim against an employee of a contracted detention service provider who was under a duty to detain[8]), again by analogy with the availability of the defence in *Stradford* to contracted court security officers. If the defence is not available in such a case, that could only be because of a particular duty of the executive to comply with the law, which would deny any analogy with a suit between subject and subject.

12. ***Contrary authority***: The plaintiff has identified no contrary authority not already addressed by the Commonwealth. Indeed, he concedes that the Canadian and US authorities at **CS [47]-[51]** support the Commonwealth: **PS [50]-[51]**. Those authorities, and *Stradford*, illustrate that the defence is not inimical to justice and the rule of law in common law systems. The two authorities relied upon by the plaintiff may be dealt with very briefly.

    a. *Cowell v Commissioner of Corrective Services* (1988) 13 NSWLR 714 does not assist the plaintiff: cf **PS [28]-[30]**. It did not consider rule of law implications in the executive's adherence to a constitutional holding of this Court, but rather an erroneous interpretation of a statute in a lower court. Further, it must be read in light of *Stradford*.

    b. *Evans [No 2]* likewise does not assist for at least two reasons (**CS [55];** cf **PS [47]-[49]**). *First*, because it concerned a different situation. The Lords had different views on the extent to which the detention resulted from the governor's actions or from a binding court decision, and (obviously enough) it was not a case concerning any question of constitutional validity.[9] Secondly, the Court was influenced by art 5 of the

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[8] Eg a person authorised by the Minister under para (f) of the definition of "officer" in s 5 of the Act.

[9] See, eg, *Evans [No 2]* [2001] 2 AC 19 at 33 (Lord Hope of Craighead).For example, Lord Browne-Wilkinson acknowledged at 27E that the decision in that case was not "necessarily decisive of the different questions which arise where a defendant has acted in accordance with statutory provisions which are subsequently held to be ultra

European Convention for the Protection of Human Rights and Fundamental Freedoms.[10] And in any case, like *Cowell*, *Evans [No 2]* needs now to be seen in light of *Stradford*.

The liability of the Commonwealth itself

13. The plaintiff argues that, regardless of the liability of the detaining officer, the Commonwealth itself is either directly or vicariously liable. No principled basis is advanced to support either submission. However, the better view is that the foundational difficulties with both arguments need not be reached, because the availability of the defence will determine the outcome either way.

14. On the one hand, if the defence is not available to the detaining officer, the Commonwealth has accepted that it will be vicariously liable in the sense explained in *DP v Bird*: **SCB 45 [33(b)]**; **CS [57]**. It would be unnecessary in those circumstances to consider whether the Commonwealth might be liable for other reasons.

15. On the other hand, if the defence is available to the detaining officer it should, likewise, be available to the Commonwealth. The plaintiff says that the policy of the law which addresses an "innocent misunderstanding" on the part of a detaining officer would be different for the Commonwealth: **PS [46]**. But an "innocent misunderstanding" is not the foundation for recognising a defence in respect of the detaining officer, and thus provides no relevant point of distinction. As the defence is necessary for a detaining officer for reasons relating to the rule of law and legal coherence, it is equally necessary that it apply to the Commonwealth itself. It would be confounding for the law to demand that the Commonwealth (and its detaining officers) must adhere to what this Court has stated to be the law, and simultaneously to make the Commonwealth (but not its detaining officers) liable for having done so. Such an approach would serve to compound, not ameliorate, the difficulties that the common law defence would otherwise address. The plaintiff does not identify any reason that would justify an approach of that kind.

16. If it is considered necessary to address the plaintiff's arguments on direct liability and vicarious liability, they would not be accepted for the following reasons.

17. ***No direct liability***: It may be accepted that the Commonwealth can only "operate through … servants, agents and emanations":[11] **PS [34]-[35]**. It may also be accepted that, at least for

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vires and void". And see also the different approaches at 29B (Lord Steyn), 33D (Lord Hope of Craighead), 45B (Lord Hobhouse of Woodborough).

[10] See, eg, *Evans [No 2]* [2001] 2 AC 19 at 29D (Lord Steyn), 46H-47D (Lord Hobhouse of Woodborough).

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

some purposes and in some contexts, acts of the Commonwealth's officers, employees and agents can be attributed to the Commonwealth itself: **PS [36]**. But those generalised propositions do not mean that a detaining officer's acts and intentions are the acts and intentions of the Commonwealth itself, so as to make the Commonwealth directly liable. The contrary is so for at least four reasons.

18. *First*, the statutory provisions make clear that the relevant acts and intention were those of the detaining officer acting in his own capacity, not "as the agent for the Commonwealth": cf **PS [38]**. The relevant provisions say expressly that detention is done by a detaining officer, as distinct from the Commonwealth itself: see **CS [58]**. Section 189(1) requires that if "an officer" knows or reasonably suspects that the person is an unlawful non-citizen "the officer" must detain the person. "Detain" is defined in s 5 to mean (a) take into immigration detention; or (b) keep, or cause to be kept, in immigration detention; and "immigration detention" is in turn defined to mean being held or restrained by or on behalf of "an officer" (not by or on behalf of "the Commonwealth"). Section 196(1) provides that a person so detained must be kept in "immigration detention", and so continues to be held or restrained by or on behalf of "an officer". The plaintiff does not grapple with this statutory context, but simply seeks to answer it by asserting (at **PS [39]**) that it is not relevant and the government's power to detain was here "exercised by the detaining offer on the Commonwealth's behalf", citing in support the dissenting reasons in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*.[12] However, if anything, that case reinforces the Commonwealth's position because it concerned s 198AHA in which the capacity to detain was expressly given to "the Commonwealth". The situation in that case was therefore far removed from the present, where a statute imposes a duty directly upon officers rather than upon the Commonwealth.

19. There is no warrant for asserting or assuming that all acts taken by officers are taken as agents for the Commonwealth, particularly bearing in mind that "officers" include State or Territory police officers and can include persons employed by private companies (s 5). Further, other provisions of the Act likewise point up the distinction between actions of officers and actions "on behalf of the Commonwealth".[13] For the same reasons, there is no warrant for attributing the intentions of detaining officer to the Commonwealth: cf **PS [40]**.[14]

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[12] (2016) 257 CLR 42.

[13] See, eg, ss 252BA, 252G, 261E, 272, 273.

[14] The authorities cited by the plaintiff do not support the assertion that it is for the Commonwealth to prove a lack of intention to detain. Those passages, at most, refer to the onus on a defendant to show lawful authority for the detention: see, eg, *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at [24] (Gageler J). Here, of course, the Commonwealth does not contend that there was any lawful authority to detain.

20. *Second*, the plaintiff's reliance on ***Baume*** *v Commonwealth* is misplaced. That case, and the passage quoted at **PS [34]**, does not stand for a general proposition that the Commonwealth will be directly liable by reason of the acts of its officers being treated as acts of the Commonwealth. Rather, *Baume* explained that the maxim *respondeat superior* would generally apply to make the Commonwealth liable for the tortious acts of its servants (just as other employers would be, in modern terms, vicariously liable for the torts of their employees).[15] Importantly, the Court in *Baume* went on to apply the (then recent) decision in ***Enever*** *v The King*[16] to explain that this general principle of vicarious liability did not apply where a duty prescribed by statute "is to be performed by a designated person, and in the performance of that duty [the person] is required to exercise independent judgment on a preliminary question of fact".[17] That was why the Commonwealth was not vicariously liable for the actions of the Collector in respect of the statutory duties cast upon him. Obviously, and critically, it could not have been directly liable in the way suggested by the plaintiff.

21. *Baume*, *Enever* and a line of later cases together establish "the doctrine that any public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he may commit in the course of his office and that for such acts the government or body which he serves or which appointed him incurs no vicarious liability".[18] In light of that doctrine, the contention that the Commonwealth is not merely vicariously liable, but is in fact directly liable, for the tortious conduct of the detaining officer cannot be accepted.

22. *Third*, the plaintiff's reliance on ***James*** *v Commonwealth*[19] is similarly misplaced: cf **PS [37]**. Insofar as liability against the Commonwealth was established in that very unusual case, it had nothing to do with a general rule of attribution of the kind for which the plaintiff contends. Instead, it arose from the fact that the specific instances of tortious conduct of the dried fruit boards had been directly authorised and directed by the Secretary (and on two occasions with the express authority of the Minister). Thus, the case was one in which the Commonwealth acted directly through persons who were its relevant controlling mind and will. It is thus a rare case of the kind identified at **CS [58]** (footnote 91) in which the individual actor can truly be said to stand in the shoes of the Commonwealth

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15 (1906) 4 CLR 97 at 110 (Griffith CJ, Barton and O'Connor JJ agreeing).
16 (1906) 3 CLR 969.
17 *Baume* (1906) 4 CLR 97 at 110 (Griffith CJ), and see more generally at 112-113 and 122-124 (O'Connor J).
18 *Little v Commonwealth* (1947) 75 CLR 94 at 114 (Dixon J). That doctrine has been reinforced on a number of occasions in various contexts: see, eg, *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 637 to 640 (Gibbs CJ) and the cases there discussed.
19 (1939) 62 CLR 339 at 359-360 (Dixon J); also *McClintock v Commonwealth* (1947) 75 CLR 1 at 19 (Latham CJ).

itself. No such thing has been alleged, or could be said, of the detaining officer in this case. The plaintiff cites numerous other cases at **PS [35]-[36]** in support of its generalised agency proposition but they no more support that proposition than does *James*.[20]

23. *Fourth*, the misplaced reliance on *Baume* and *James* exposes the error in the plaintiff's attempt to distinguish the conventional authorities establishing that liability of the Commonwealth can only be vicarious (absent the unusual case involving a controlling mind and will such as a Secretary or Minister). The cases identified at **CS [58]** (footnote 92) are not limited by, or to, situations involving members of the defence force, but represent general statements of the law: cf **PS [41]-[42]**. Further, there is no relevant distinction between false imprisonment and negligence in this context: cf **PS [41]-[43]**.[21] Both categories of case involve a lack of direct responsibility on the Commonwealth's part: in *Shaw Savill*, *Parker* and *Groves*, the Commonwealth itself owed no "immediate duty"; and in the present case, the Commonwealth itself did not detain the plaintiff. *Haskins v Commonwealth*[22] reflects this conventional approach, and there is therefore no reason to treat it with caution: cf **PS [43]**.

24. ***"True" vicarious liability cannot arise***: Contrary to **PS [45]**, true vicarious liability involves attributing the liability, not the acts, to the principal.[23] As such, unless the detaining officer is first liable, there can be no attribution of that liability to the Commonwealth. As explained at **CS [14]** the defence recognised in *Stradford* was one which operated as a "protection from civil liability" so as to render the conduct in question not "civilly or criminally wrongful". It is, quite clearly, a defence which operates to deny liability. As such, it necessarily answers both the direct liability of the detaining officer and any vicarious liability of the Commonwealth. The cases relied upon at **PS [45]** concern different principles and contexts and do not suggest any different understanding of the principle clearly stated in *DP v Bird*.[24]

BOE21's application for leave to intervene

25. ***The constitutional argument is unmeritorious***: There is no dispute that the common law must develop conformably with the Constitution: **IS [14]**. But the application of that principle calls for careful attention to what the Constitution actually requires. *Lange*, on

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[20] The contracting cases referred to at footnote 62, like *James*, illustrate no more than that the Crown can be bound by the acts of its most senior representatives (in those cases permanent heads of departments and the Navy Board). The cases which the plaintiff cites at footnotes 57, 58 and 59 are even less to the point.

[21] Citing ***Shaw Savill*** *and Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344; *Parker v Commonwealth* (1965) 112 CLR 295; ***Groves*** *v Commonwealth* (1982) 150 CLR 113.

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

[23] *Bird* (2024) 98 ALJR 1349 at [31], [44] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ); *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at [51] (Steward and Edelman JJ).

[24] Eg, the criminal authorities are dealing with the quite different context of Code based criminal responsibility.

which BOE21 relies (**IS [22]**), was decided in a context where the common law of defamation itself imposed a burden on political communication. It was that burden that provided the foundation for the Court to recognise that the qualified privilege defence should be developed, because "the common law rights of persons defamed … cannot be enlarged so as to restrict the freedom required by the Constitution".[25] *Lange* is far removed from the present case, for at least three reasons.

26. *First*, in *Lange* the development of the single common law of Australia to accord with the implied freedom of political communication was coherent, both because the common law itself imposed a burden on such communication to which the development of the common law responded, and because the implied freedom limits both the Commonwealth and the States.[26] By contrast, there is no constitutional limitation that prevents acquisition of property by the States on other than just terms.[27] There is therefore no principled basis upon which a constitutional restraint on one legislature in Australia could constrain the development of the single common law of Australia.

27. *Second*, the guarantee upon which the plaintiff relies is s 51(xxxi), which "carves out" of "every other [Commonwealth] legislative power" the power to make any law properly characterised as a law with respect to an acquisition of property.[28] It is in that way that s 51(xxxi) operates as a "safeguard" to "ensure[] that no one may, by virtue of a Commonwealth statutory provision, acquire his property except upon just terms".[29] As that statement reveals, in the absence of any exercise of Commonwealth legislative power to acquire property, the abstraction that results from s 51(xxxi) is irrelevant. Here, there is no legislation that is said to acquire any property. The development of the common law of Australia through the exercise of judicial power occurs in a sphere within which s 51(xxxi) simply has nothing to say. Any suggestion that to develop the common law in the manner for which the Commonwealth contends would involve the Court in a "circuitous device" to avoid the just terms guarantee is scandalous and readily dismissed: cf **IS [22]**.

28. *Third*, the premise for the intervener's argument is that recognition of the common law defence would "acquire" his chose in action. However, the development of the common law

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[25] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566 (the Court).
[26] See, eg, *Lange* (1997) 189 CLR 520 at 561 (the Court).
[27] See, eg, *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [7] (Gaudron, McHugh, Gummow and Hayne JJ), [77] (Kirby J); *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 at [84] (Kiefel J).
[28] *Commonwealth v Yunupingu* (2025) 99 ALJR 519 at [17] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) (emphasis added), quoting *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [107] (Gageler J); *Cunningham v Commonwealth* (2016) 259 CLR 536 at [271] (Gordon J).
[29] *Trade Practices Commission Tooth & Co Ltd* (1979) 142 CLR 397 at 403 (Barwick CJ) (emphasis added).

cannot be equated with the legislative removal of a chose in action. That follows because, if the common law defence is recognised, any claim for false imprisonment was always subject to that defence.[30] Unlike a legislative provision that alters or bars a cause of action, the settled theory of the common law makes it analytically impossible for a "development" of the common law to acquire a chose in action (cf **IS [22])** or to "remove" an otherwise complete chose of action (cf **IS [24])**.

29. ***BOE21's argument is inconsistent with* Stradford**: BOE21 asserts that his constitutional argument is not inconsistent with *Stradford*: **IS [32]**. That submission is made primarily on the basis that, unlike the present case, *Stradford* did not involve a relevant "development" of the common law, because it involved the application of centuries-old authority: **IS [33]-[34]**. That submission glosses over the constant development of the common law.[31] It also ignores the closeness of the analogy with *Stradford*: **CS [29]-[45]**.

30. ***Basis for intervention***: In BOE21's Federal Court proceedings, it is not agreed (and it has not been established) that the *NZYQ* limit was engaged in respect of BOE21 in the relevant period. That being so, the common law defence is pleaded in that matter only in the alternative, and it may never be reached (meaning that BOE21 has, at most, a contingent interest[32] in whether or not that defence should be recognised). Further, while BOE21's argument may be "additional" to the plaintiff's submissions (**IS [3]**), the argument is wholly unmeritorious, and would therefore be of little assistance in correctly determining the case.[33] As such, leave to intervene should be refused. In the alternative, if the Court is minded to grant leave to intervene, in circumstances where the matter is listed for a one-day hearing (and having regard to the time estimates of the parties), the Commonwealth submits that any such intervention should be limited to the written submissions already filed.

Dated: 28 October 2025

Stephen Donaghue
Solicitor-General (Cth)

Tim Begbie
Tim.Begbie@ags.gov.au
(02) 6253 7521

Joanna Davidson
jdavidson@sixthfloor.com.au
(02) 8915 2625

Olivia Ronan
ronan@elevenwentworth.com
(02) 8231 5008

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[30] Judge made law cannot be altered prospectively: *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at [55] (Kiefel CJ, Bell, Keane and Gordon JJ); *Ha v New South Wales* (1997) 189 CLR 465 at 503-504 (Brennan CJ, McHugh, Gummow and Kirby JJ), 515 (Dawson, Toohey and Gaudron JJ); *Director of Public Prosecutions Reference No 1 of 2019* (2021) 274 CLR 177 at [59] (Gageler, Gordon and Steward JJ).

[31] See, eg, *Stradford* (2025) 99 ALJR 396 at [148] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), [227], [274]-[275], [292] (Edelman J).

[32] *ASF17 v Commonwealth* (2024) 98 ALJR 782 at [16] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

[33] See, eg, *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).