

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

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**Matter No S24/2024**

STATE OF QUEENSLAND	APPELLANT
AND	
MR STRADFORD (A PSEUDONYM) & ORS	RESPONDENTS

**Matter No C3/2024**

COMMONWEALTH OF AUSTRALIA	APPELLANT
AND	
MR STRADFORD (A PSEUDONYM) & ORS	RESPONDENTS

**Matter No C4/2024**

HIS HONOUR JUDGE SALVATORE PAUL VASTA	APPELLANT
AND	
MR STRADFORD (A PSEUDONYM) & ORS	RESPONDENTS

*Queensland v Mr Stradford (a pseudonym)*  
*Commonwealth of Australia v Mr Stradford (a pseudonym)*  
*His Honour Judge Vasta v Mr Stradford (a pseudonym)*  
[2025] HCA 3  
*Date of Hearing: 14 & 15 August 2024*  
*Date of Judgment: 12 February 2025*  
S24/2024, C3/2024 & C4/2024



## **ORDER**

### **Matter No S24/2024**

1. *Appeal allowed.*
2. *Set aside orders 2 and 4 made by the Federal Court of Australia on 30 August 2023 and in their place order that the applicant's proceedings against the third respondent be dismissed.*
3. *The third respondent pay the first respondent's costs of the appeal.*

### **Matter No C3/2024**

1. *Appeal allowed.*
2. *Set aside orders 2 and 3 made by the Federal Court of Australia on 30 August 2023 and in their place order that the applicant's proceedings against the second respondent be dismissed.*
3. *The appellant pay the first respondent's costs of the appeal.*

### **Matter No C4/2024**

1. *Appeal allowed.*
2. *Set aside orders 2, 3, 4 and 5 made by the Federal Court of Australia on 30 August 2023 and in their place order that the applicant's proceedings against the first respondent be dismissed.*
3. *The second respondent pay the first respondent's costs of the appeal.*

On appeal from the Federal Court of Australia



## **Representation**

G J D del Villar KC, Solicitor-General of the State of Queensland, with J M Horton KC, D M Favell and F J Nagorcka for the State of Queensland in each appeal (instructed by Crown Law (Qld))

S P Donaghue KC, Solicitor-General of the Commonwealth, and T M Begbie KC with D P Hume and O J Ronan for the Commonwealth of Australia in each appeal (instructed by Australian Government Solicitor)

S J Wood KC with B W Jellis SC and T I Katz for His Honour Judge Salvatore Paul Vasta in each appeal (instructed by King & Wood Mallesons)

P D Herzfeld SC with D J Reynolds for Mr Stradford in each appeal (instructed by Ken Cush & Associates)

M J Wait SC, Solicitor-General for the State of South Australia, with J F Metzger for the Attorney-General for the State of South Australia, intervening in each appeal (instructed by Crown Solicitor's Office (SA))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

**Queensland v Mr Stradford (a pseudonym)**

**Commonwealth of Australia v Mr Stradford (a pseudonym)**

**His Honour Judge Vasta v Mr Stradford (a pseudonym)**

Constitutional law (Cth) – Chapter III court – Judicial immunity – Status of orders of Federal Circuit Court of Australia – Where judge of Federal Circuit Court of Australia ("Judge Vasta") declared Mr Stradford in contempt of disclosure orders ("contempt declaration") and sentenced Mr Stradford to imprisonment ("imprisonment order") – Where Mr Stradford was imprisoned by various agents, employees or contractors of the Commonwealth and Queensland acting in reliance upon imprisonment order – Where Full Court of Family Court of Australia set aside contempt declaration and imprisonment order due to lack of power to make the declaration and order and for failure to afford procedural fairness to Mr Stradford – Where primary judge in Federal Court of Australia found Judge Vasta liable to Mr Stradford for false imprisonment and Commonwealth and Queensland vicariously liable – Where primary judge held that imprisonment order and warrant of commitment were affected by jurisdictional error, invalid and of no legal effect – Where primary judge found Judge Vasta lost protection of judicial immunity from civil suit – Where primary judge did not accept that persons acting in reliance upon the imprisonment order and warrant of commitment were protected from liability for their actions in imprisoning Mr Stradford – Whether effect of s 17 of *Federal Circuit Court of Australia Act 1999* (Cth) was that contempt declaration and imprisonment order of Federal Circuit Court were valid unless and until set aside – Scope of common law immunity from civil suit arising out of acts done in exercise or purported exercise of judicial function or capacity – Whether persons acting in reliance upon imprisonment order and warrant of commitment liable to Mr Stradford despite acting pursuant to, or in accordance with, warrant of commitment which appeared regular on its face – Whether s 249 of *Criminal Code* (Qld) applied to warrant issued by Federal Circuit Court.

Words and phrases – "collateral challenge", "constables", "contempt", "correctional officers", "defence of justification", "gaolers", "inferior court", "judicial function", "judicial immunity", "judicial officer", "jurisdictional error", "justification", "ministerial officer", "officer of the court", "order", "police officers", "sheriff", "subject matter jurisdiction", "superior court", "superior court of record", "warrant".

*Family Law Act 1975* (Cth), Pts XIII A, XIII B.

*Federal Circuit Court of Australia Act 1999* (Cth), s 17.

*Criminal Code* (Qld), s 249.





1 GAGELER CJ, GLEESON, JAGOT AND BEECH-JONES JJ. Over hundreds of years, there has been a debate within the common law about the scope of the immunity from civil suit of judges of so-called "inferior courts" for acts and omissions in the performance or purported performance of the judicial function, and the extent to which that scope differs from the scope of the immunity afforded to judges of so-called "superior courts".

2 Although there are differences of significance between inferior courts and superior courts, there is no justification for differentiating between the scope of the immunity from civil suit afforded to judges of all courts. This is so because the purpose of the immunity is the same for judges of all courts. That purpose is to facilitate the independent performance of the judicial function free from the spectre of litigation,<sup>1</sup> as well as to enhance the finality of judgments quelling legal controversies.<sup>2</sup> The necessity for judicial independence, and the interests of finality of judgments, apply to the exercise of the judicial function by judges of both inferior courts and superior courts. Judicial immunity does not exist for the benefit of individual judges.

3 Recourse against a wrongful act or omission by a judicial officer (including a negligent, unjust, or even malicious act or omission by a judicial officer) in the performance or purported performance of a judicial function is to be found within such system of appeals as might be applicable, such means of collateral challenge as might be available, and such processes of discipline and removal from office to which the judicial officer might be amenable. It is not to be found in a civil suit against the judicial officer.

4 As the facts and outcome of these appeals demonstrate, the effect of this absolute immunity may be such that a victim of unjust treatment by a judicial officer will be left with no means of obtaining monetary compensation through the courts. If that is so, and the unjust treatment has caused harm to the victim, it may be that one or other of the legislative schemes for the making of an *ex gratia* or "act of grace" payment may compensate the victim.<sup>3</sup>

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1 *Fingleton v The Queen* (2005) 227 CLR 166 at 186 [38]-[39].

2 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 19 [40].

3 See, eg, *Public Governance, Performance and Accountability Act 2013* (Cth), s 65(1).

## Summary

5 On 6 December 2018, after what was rightly described by the primary judge as a "parody" of a court hearing, the first respondent, who has been given the pseudonym "Mr Stradford", was convicted of contempt of court and sentenced to a term of imprisonment by one of the appellants, his Honour Judge Salvatore Paul Vasta, a judge of the Federal Circuit Court of Australia.

6 The Federal Circuit Court was at that time designated by the *Federal Circuit Court of Australia Act 1999* (Cth)<sup>4</sup> as "a court of record",<sup>5</sup> and accordingly as an inferior court,<sup>6</sup> unlike the Federal Court of Australia and what was at that time the Family Court of Australia,<sup>7</sup> each of which was established as "a superior court of record".<sup>8</sup>

7 Upon being sentenced, Mr Stradford was escorted from the courtroom to a holding cell in the court complex by guards employed by MSS Security Pty Ltd ("the MSS Guards"), a contractor engaged by another appellant, the Commonwealth of Australia. Around half an hour later Mr Stradford was collected from the court complex by officers of the Queensland Police Service ("the Queensland police officers"), handcuffed, and transported in a police van to the Roma Street Watchhouse. On 10 December 2018, Mr Stradford was transferred to the Brisbane Correctional Centre where he was detained by officers of Queensland Corrective Services ("the Queensland correctional officers") until his release on 12 December 2018.

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4 The Federal Circuit Court is now continued in existence as the "Federal Circuit and Family Court of Australia (Division 2)" by the *Federal Circuit and Family Court of Australia Act 2021* (Cth), s 8(2).

5 *Federal Circuit Court of Australia Act 1999* (Cth), s 8(3).

6 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 272 CLR 329 at 343 [26].

7 The Family Court is now continued in existence as the "Federal Circuit and Family Court of Australia (Division 1)" by the *Federal Circuit and Family Court of Australia Act 2021* (Cth), s 8(1).

8 *Federal Court of Australia Act 1976* (Cth), s 5(2); *Family Law Act 1975* (Cth), s 21(2).

3.

8 Mr Stradford's time in custody was distressing. He witnessed and was subjected to acts of violence. He experienced suicidal thoughts.

9 The primary judge upheld a claim brought by Mr Stradford for damages for false imprisonment against each of Judge Vasta, the Commonwealth and another appellant, the State of Queensland.<sup>9</sup> The damages awarded in favour of Mr Stradford included an award of \$50,000 in exemplary damages against Judge Vasta.<sup>10</sup> His Honour found that Judge Vasta's conduct "demonstrated a thoroughly reckless disregard of, if not outright contempt for, Mr Stradford and his rights" and that the award of exemplary damages would "serve to deter any repetition of such a thoroughly unacceptable abuse of judicial power in the future".<sup>11</sup> The Commonwealth was held to be vicariously liable for the conduct of the MSS Guards.<sup>12</sup> Queensland was found to be vicariously liable for the conduct of the relevant Queensland police officers and the Queensland correctional officers.<sup>13</sup>

10 Removed into this Court<sup>14</sup> are appeals from that judgment by each of Judge Vasta, the Commonwealth and Queensland that were previously pending in the Full Court of the Federal Court of Australia. Three principal issues are raised by the appeals. The first issue is whether the effect of s 17 of the *Federal Circuit Court of Australia Act* was that the order made by Judge Vasta imprisoning Mr Stradford was valid even though it was affected by jurisdictional error. The second issue concerns the scope of the immunity from civil suit of judges of inferior courts, such as judges of the Federal Circuit Court. The third issue is whether persons such as the MSS Guards, the Queensland police officers and the Queensland correctional officers have a defence to Mr Stradford's action because they executed an order or warrant issued by a court that appeared valid on its face, even though it was invalid because of the various errors committed by Judge Vasta in sentencing Mr Stradford to imprisonment.

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9 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [3]-[4].

10 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [5], [666].

11 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [646].

12 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [553].

13 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [558].

14 *Judiciary Act 1903* (Cth), s 40(1).

11 For reasons to be explained, the resolution of each of those three principal issues is as follows. In respect of the first issue, the order made by Judge Vasta imprisoning Mr Stradford was invalid.

12 In respect of the second issue, the common law of Australia affords the same immunity from civil suit to judges of inferior courts as it does to judges of superior courts. Under that common law, judges of Australian courts<sup>15</sup> – being the "courts" referred to in s 71 of the *Constitution* including any court of a Territory<sup>16</sup> and any "court of a State" as referred to in s 77(iii) of the *Constitution* (irrespective of whether those courts are invested with federal jurisdiction) – are immune from civil suit arising out of acts done in the exercise, or purported exercise, of their judicial function or capacity.<sup>17</sup> As Judge Vasta purported to perform such a function in convicting and sentencing Mr Stradford, he is not liable to Mr Stradford for false imprisonment.

13 In respect of the third issue, the common law affords some protection from civil liability to those who have a legal duty to enforce or execute orders or warrants made or issued in judicial proceedings of the courts just described, including an inferior court, even if those orders or warrants are invalid for jurisdictional error. In the case of invalid orders or warrants, this protection does not extend to authorise acts done in enforcing or executing an order or warrant of a kind which, on its face, is beyond the power of the relevant court to make or issue.

14 Each of the Queensland police officers and the Queensland correctional officers had a legal duty to enforce or execute orders or warrants made or issued by the Federal Circuit Court. The MSS Guards also had a duty to enforce an oral order made by Judge Vasta requiring them to detain Mr Stradford. There was nothing apparent on the face of the orders made and warrant issued by Judge Vasta which suggested they were beyond his power to make. Otherwise, none of the Queensland police officers, the Queensland correctional officers and the MSS Guards were aware of any defect of authority on the part of Judge Vasta to imprison Mr Stradford. It follows that they also are not liable to Mr Stradford.

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15 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 425 [42].

16 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 595 [41].

17 *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 365-366 [30], citing *Rajski v Powell* (1987) 11 NSWLR 522 and *Mann v O'Neill* (1997) 191 CLR 204.

5.

15           Accordingly, the appeals must be allowed, the primary judge's decision set  
aside and Mr Stradford's proceedings dismissed.

16           The balance of this judgment is structured as follows:

**Part I – Background [17]-[30]**

**Part II – The primary judgment [31]-[34]**

**Part III – Were the imprisonment order and the warrant  
invalid? [35]-[73]**

**Part IV – Did Judge Vasta have immunity from Mr Stradford's  
suit? [74]-[114]**

**Part V – Could the MSS Guards, the Queensland police officers and  
the Queensland correctional officers rely on the imprisonment order or  
the warrant? [115]-[159]**

**Part VI – Conclusion and orders [160]-[161]**

**Part I – Background**

17           In April 2017, Mr Stradford commenced proceedings in the Federal Circuit  
Court against his then wife ("Mrs Stradford") seeking property adjustment orders  
under s 79 of the *Family Law Act 1975* (Cth).

18           The proceedings were listed for final hearing before Judge Vasta on  
10 August 2018. On that day, Mr Stradford and Mrs Stradford were not legally  
represented. Judge Vasta adjourned the proceedings to 26 November 2018 after  
concluding that Mr Stradford had failed to comply with previous orders for the  
disclosure of documents. Judge Vasta threatened to imprison Mr Stradford if he  
did not produce the documents sought by Mrs Stradford.

19           Judge Vasta ordered that Mr Stradford make "full and frank disclosure" of  
various categories of financial documents including bank and gambling account  
statements. Judge Vasta also made an order to the effect that, if on 26 November  
2018 the Court concluded that Mr Stradford had not made "full and frank  
disclosure", then Mr Stradford would be dealt with for contempt on 5 December  
2018 and that otherwise one day would be reserved for the final hearing.

20           On 26 November 2018, the proceedings were listed before her Honour  
Judge Turner. Again, Mr Stradford and Mrs Stradford each appeared  
unrepresented. Judge Turner made handwritten annotations on a copy of the orders

made on 10 August 2018 circling the categories of documents ordered to be produced by Judge Vasta that Mrs Stradford claimed Mr Stradford had failed to produce. Mr Stradford told the Court that he had produced all the documents that he was "physically able to provide". In lieu of 5 December 2018, Judge Turner adjourned the proceedings until 6 December 2018 "for hearing of the contempt application". At no time was a contempt application filed.

21 The proceedings were listed before Judge Vasta on 6 December 2018. As before, both Mr Stradford and Mrs Stradford appeared unrepresented. At the commencement of the hearing Judge Vasta purported to recite the history of the proceedings since 10 August 2018 and stated that the final hearing could not proceed as, according to Judge Vasta, it had been determined that Mr Stradford was "in contempt of the orders that [he] made on 10 August". Mr Stradford advised Judge Vasta that he tried to comply with the orders but that he was unable to produce some categories of documents. Mrs Stradford maintained that his disclosure was deficient.

22 Judge Vasta adjourned the proceedings for a brief period to allow the parties to discuss settlement, but no settlement was reached. After the adjournment Judge Vasta stated that he would "go ahead with the contempt hearing" and that he "hope[d]" Mr Stradford had brought his "toothbrush". Mrs Stradford repeatedly stated that, while she was dissatisfied with Mr Stradford's disclosure and approach to a property settlement, she did not want him to go to prison.

23 There was a further short adjournment. After the hearing resumed, Judge Vasta again asserted that on 26 November 2018 Mr Stradford had been found in contempt of the orders made on 10 August 2018. Judge Vasta asked Mr Stradford whether there was anything he wanted to say. Mr Stradford tried to explain that he had attempted to comply with the orders for disclosure, but he was cut off by Judge Vasta who dismissed his explanation as "rubbish".

24 Judge Vasta then delivered ex tempore reasons. Judge Vasta recorded that on 26 November 2018 Judge Turner had found that Mr Stradford had not complied with the orders made on 10 August 2018 and "[f]or that reason" Mr Stradford was in contempt of those orders.<sup>18</sup> Judge Vasta made a declaration as follows ("the contempt declaration"):

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18 *Stradford & Stradford* [2018] FCCA 3890 at [13]-[14].

7.

"That [Mr Stradford] is in contempt of Order 3(a), (h), (j), (k), (l), (m), (n) and (o) of Orders made by Judge Vasta on 10 August 2018 in that [Mr Stradford] has failed to make full and frank financial disclosure."

25 The sub-paragraphs of Order 3 referred to in this declaration were those parts of the orders made by Judge Vasta on 10 August 2018 for the production of documents that Mrs Stradford advised Judge Turner on 26 November 2018 that Mr Stradford had not produced. As noted, Mr Stradford had advised her Honour (and Judge Vasta) that he had made his best efforts to comply with the orders made on 10 August 2018.

26 Judge Vasta sentenced Mr Stradford to a period of imprisonment for 12 months to be served immediately, but also ordered that he be released from prison on 6 May 2019, with the balance of the sentence to be suspended for a period of two years commencing on 6 December 2018 ("the imprisonment order").

27 During the short adjournment prior to delivering judgment, Judge Vasta arranged for the MSS Guards to attend the courtroom. After delivering judgment and making orders, the hearing concluded with Judge Vasta stating:

"I will sign the warrant that will commit [Mr Stradford] to prison and the [Queensland police officers] will arrive soon to take him to prison. In the meantime, security [ie, the MSS Guards], *you* will have to escort [Mr Stradford] to the cell downstairs to await the officers to come and take him to prison. All right. Thank you. We will adjourn." (emphasis added)

28 Shortly after the hearing, Judge Vasta signed a document entitled "Warrant of Commitment Family Law Act 1975" ("the warrant"). The warrant was addressed to "[t]he Marshal", being the Marshal of the Federal Circuit Court,<sup>19</sup> all officers of the Australian Federal Police, all officers of the State and Territory police forces and the Commissioner of Queensland Corrective Services. The warrant commanded the Marshal and the officers of the police forces to "take and deliver [Mr Stradford] to the Commissioner of Queensland Corrective Services", along with the warrant. The Commissioner of Queensland Corrective Services was directed by the warrant to "receive [Mr Stradford] into [their] custody, and to keep [him] in accordance" with the imprisonment order.

29 The remainder of the actions taken to enforce the warrant have already been described above. While he was in custody, Mr Stradford obtained legal representation. On 12 December 2018, the matter was again listed before

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19 *Federal Circuit Court of Australia Act*, s 99(1)(d).

Judge Vasta who heard and granted an application to stay the imprisonment order.<sup>20</sup> Judge Vasta accepted that he may have been in error in assuming that Judge Turner had found Mr Stradford was "prima facie in contempt" of the orders made on 10 August 2018.<sup>21</sup>

30 On 15 February 2019, the Full Court of the Family Court (as it then was) upheld Mr Stradford's appeal against Judge Vasta's decision and set aside the contempt declaration and the imprisonment order.<sup>22</sup> It suffices to note that the Full Court concluded that "the processes employed by [Judge Vasta] were so devoid of procedural fairness" to Mr Stradford and the "reasons for judgment so lacking in engagement with the issues of fact and law to be applied" that it would be an "affront to justice" to permit the contempt declaration and the imprisonment order to stand.<sup>23</sup>

## Part II – The primary judgment

31 Mr Stradford sued Judge Vasta, the Commonwealth and Queensland for the tort of false imprisonment. He also sued Judge Vasta for the tort of collateral abuse of process, but that claim was dismissed<sup>24</sup> and he has not appealed that dismissal.

32 In relation to Mr Stradford's claim for false imprisonment, there was no dispute that Mr Stradford was imprisoned for the whole of the relevant period by reason of the conduct of Judge Vasta and imprisoned for particular periods by the MSS Guards, the Queensland police officers and the Queensland correctional officers. However, both the Commonwealth and Judge Vasta contended that Mr Stradford's imprisonment was lawful because the imprisonment order and the warrant were valid unless and until set aside (by the Full Court of the Family Court).<sup>25</sup> The primary judge rejected this contention. His Honour held that the imprisonment order and the warrant were affected by jurisdictional error, and were invalid and of no legal effect such that there was no lawful justification for

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20 *Stradford & Stradford [No 2]* [2018] FCCA 3961.

21 *Stradford & Stradford [No 2]* [2018] FCCA 3961 at [6].

22 *Stradford v Stradford* (2019) 59 Fam LR 194.

23 *Stradford v Stradford* (2019) 59 Fam LR 194 at 196 [9].

24 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [8], [166].

25 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [175].



Mr Stradford's imprisonment.<sup>26</sup> The Commonwealth and Judge Vasta challenge this finding, but only to the extent of contending that the effect of s 17(1) of the *Federal Circuit Court of Australia Act* is that, even if the imprisonment order and the warrant were affected by jurisdictional error, they were nevertheless valid unless and until set aside. The Attorney-General for the State of South Australia intervened and advanced a unique argument that the warrant was valid even though the imprisonment order was not.

33 The primary judge also concluded that, because of Judge Vasta's status as a judge of an inferior court and the nature of the errors he committed in making the imprisonment order, his actions were not protected by judicial immunity.<sup>27</sup> Both Judge Vasta and the Commonwealth challenge this finding.

34 Before the primary judge the Commonwealth and Queensland contended that, even if the imprisonment order and the warrant were invalid, they were not liable to Mr Stradford for damages for false imprisonment because the MSS Guards, the Queensland police officers and the Queensland correctional officers acted pursuant to, or in accordance with, a warrant which appeared regular on its face. The primary judge rejected this contention.<sup>28</sup> Each of the Commonwealth and Queensland challenge that rejection. A separate aspect of Queensland's challenge is the contention that the primary judge erred in failing to conclude that the actions of the Queensland police officers and the Queensland correctional officers in executing the warrant were rendered lawful by s 249 of the *Criminal Code* (Qld).<sup>29</sup>

### **Part III – Were the imprisonment order and the warrant invalid?**

35 The first issue that arises on the appeals is whether the imprisonment order and the warrant were valid until they were set aside by the Full Court of the Family Court. If they were valid during that period, then Mr Stradford's imprisonment was not unlawful.

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26 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [197], [373].

27 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [372]-[374].

28 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [524].

29 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [548].

Gageler CJ  
Gleeson J  
Jagot J  
Beech-Jones J

10.

*Section 17 of the Federal Circuit Court of Australia Act*

36 At all relevant times, s 17 of the *Federal Circuit Court of Australia Act* provided:

**"Contempt of court**

- (1) The Federal Circuit Court of Australia has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court.
- (2) Subsection (1) has effect subject to any other Act.
- (3) The jurisdiction of the Federal Circuit Court of Australia to punish a contempt of the Federal Circuit Court of Australia committed in the face or hearing of the Federal Circuit Court of Australia may be exercised by the Federal Circuit Court of Australia as constituted at the time of the contempt.

Note: See also section 112AP of the *Family Law Act 1975*, which deals with family law or child support proceedings."

37 A power in materially identical terms to that conferred on the Federal Circuit Court by this provision was conferred on the Family Court by s 35 of the *Family Law Act* and on the Federal Court by s 31 of the *Federal Court of Australia Act 1976* (Cth). From the time of the enactment of the *Judiciary Act 1903* (Cth), s 24 has provided that the High Court "shall have the same power to punish contempts of its power and authority as is possessed at the commencement of this Act by the Supreme Court of Judicature in England".

*Parts XIII A and XIII B of the Family Law Act*

38 Part XIII A of the *Family Law Act* is entitled "[s]anctions for failure to comply with orders, and other obligations, that do not affect children". Part XIII B is entitled "[c]ontempt of court".

39 Within Pt XIII A, s 112AD(1) provides:

"If a court having jurisdiction under this Act is satisfied that a person has, without reasonable excuse, contravened an order under this Act, the court may make an order for the imposing, in respect of the person, of one or more of the sanctions available to be imposed under subsection (2), being a sanction or sanctions that the court considers to be the most appropriate in the circumstances."

40 Within the meaning of s 112AD(1), the Federal Circuit Court was at all relevant times "a court having jurisdiction under this Act", being vested by the *Family Law Act* with jurisdiction to hear and determine "matrimonial causes",<sup>30</sup> including proceedings of the kind commenced by Mr Stradford. For the purposes of s 112AD(1), a person bound by an order under the *Family Law Act* is taken to have contravened the order if, and only if, they either intentionally failed to comply with the order or made no reasonable attempt to comply with the order.<sup>31</sup>

41 The sanctions referred to in s 112AD(2) are: the imposition of a requirement on the person to enter into a bond; the imposition of a fine; a sentence of imprisonment imposed in accordance with s 112AE; and certain non-custodial options provided for under the laws of participating States and Territories.<sup>32</sup> A sentence of imprisonment can only be imposed in respect of a contravention of a maintenance order if the court is satisfied that the contravention of that order was "intentional or fraudulent"<sup>33</sup> and, in any case, if it would not be appropriate to deal with the contravention pursuant to any of the other paragraphs of s 112AD(2).<sup>34</sup> The period of imprisonment cannot exceed 12 months.<sup>35</sup> The court may: suspend the sentence;<sup>36</sup> direct that the person be released upon entering into a bond;<sup>37</sup> or order the person's release if satisfied they will comply with the order concerned.<sup>38</sup>

42 Within Pt XIIIIB, s 112AP relevantly applies to a contempt of a "court" exercising jurisdiction in proceedings by virtue of the *Family Law Act*<sup>39</sup> that either "does not constitute a contravention of an order under this Act" or involves a

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30 *Family Law Act*, s 39(1A); *Federal Circuit Court of Australia Act*, s 10(1).

31 *Family Law Act*, s 112AB(1)(a).

32 *Family Law Act*, ss 112AD(2)(b), 112AG.

33 *Family Law Act*, s 112AD(2A).

34 *Family Law Act*, s 112AE(2).

35 *Family Law Act*, s 112AE(1).

36 *Family Law Act*, s 112AE(4A)(a).

37 *Family Law Act*, s 112AE(5).

38 *Family Law Act*, s 112AE(7).

39 *Family Law Act*, s 4.

contravention which is a "flagrant challenge to the authority of the court".<sup>40</sup> Thus, it includes contempts committed in the face of the court,<sup>41</sup> scandalising the court,<sup>42</sup> and "contumacious or defiant" failures to comply with court orders.<sup>43</sup> In those circumstances, s 112AP(2) provides that, "[i]n spite of any other law, a court having jurisdiction under this Act may punish a person for contempt of that court". In the case of a natural person, the court may punish the contempt by committal to prison, or fine, or both.<sup>44</sup> The court may also make an order for punishment on terms, suspension of punishment, or the giving of security for good behaviour.<sup>45</sup>

- 43 Section 112AP(3) of the *Family Law Act* provides that the applicable Rules of Court "may provide for practice and procedure as to charging with contempt and the hearing of the charge". As at 2018, such provision was made by r 19.02 of the *Federal Circuit Court Rules 2001* (Cth).

*Jurisdictional error and invalidity*

- 44 The primary judge found that, although Judge Vasta had jurisdiction to hear and determine the matter between Mr Stradford and Mrs Stradford, Judge Vasta committed five errors in making the imprisonment order each of which constituted a jurisdictional error.<sup>46</sup>

- 45 First, irrespective of the source of the Federal Circuit Court's power to punish for contempt, the primary judge found that Judge Vasta lacked power to

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40 *Family Law Act*, s 112AP(1).

41 See, eg, *Morris v Crown Office* [1970] 2 QB 114 at 116; *Lewis v Judge Ogden* (1984) 153 CLR 682 at 688; *Lane v Morrison* (2009) 239 CLR 230 at 261 [99].

42 See, eg, *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 at 300, cited in *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 405 [52].

43 *Doyle v The Commonwealth* (1985) 156 CLR 510 at 516, cited in *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at 396 [67].

44 *Family Law Act*, s 112AP(4).

45 *Family Law Act*, s 112AP(6).

46 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [134]-[135], [174].

make the imprisonment order in the absence of a finding that Mr Stradford had breached any court order.<sup>47</sup>

46 Second, the primary judge found that Judge Vasta lacked power to make the imprisonment order because he did not apply the provisions of either Pt XIII A or Pt XIII B of the *Family Law Act*.<sup>48</sup> In particular, Judge Vasta did not find that Mr Stradford's alleged non-compliance with the orders of 10 August 2018 was a "flagrant challenge to the authority of the court".<sup>49</sup> Judge Vasta had also not found: that Mr Stradford's alleged non-compliance involved an intentional failure to comply with those orders<sup>50</sup> or that Mr Stradford had made no reasonable attempt to comply with the orders;<sup>51</sup> that he did so without reasonable excuse;<sup>52</sup> and that no sanction but imprisonment was warranted.<sup>53</sup>

47 In making these findings, the primary judge appears to have assumed that the orders made by Judge Vasta on 10 August 2018 for the production of documents were an "order under this Act" (ie, the *Family Law Act*) for the purposes of both Pt XIII A<sup>54</sup> and Pt XIII B,<sup>55</sup> as opposed to, for example, an order under the *Federal Circuit Court of Australia Act* or the *Federal Circuit Court Rules*.<sup>56</sup> No submission to the contrary was made on appeal. However, even if the orders made

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47 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [81].

48 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [103]-[104].

49 *Family Law Act*, s 112AP(1)(b).

50 *Family Law Act*, s 112AB(1)(a)(i).

51 *Family Law Act*, s 112AB(1)(a)(ii).

52 *Family Law Act*, s 112AD(1).

53 *Family Law Act*, s 112AE(2).

54 *Family Law Act*, s 112AA.

55 See *Family Law Act*, s 112AP(9). This assumption was presumably made on the basis that the orders made on 10 August 2018 constituted "any other order ... which [the court] thinks it is necessary to make to do justice" in accordance with *Family Law Act*, s 80(1)(k).

56 See, eg, *Federal Circuit Court of Australia Act*, s 15(a); *Federal Circuit Court Rules 2001* (Cth), r 14.06.

on 10 August 2018 were not an "order under this Act", Pt XIII B would still have been engaged because the issue before Judge Vasta was an alleged contempt of a "court" exercising jurisdiction in proceedings by virtue of the *Family Law Act*, but not one which constituted a contravention of an order under that Act. The other findings of error would also be unaffected.

48 Third, the primary judge found that Judge Vasta failed to comply with r 19.02 of the *Federal Circuit Court Rules*.<sup>57</sup> In particular, contrary to r 19.02(2), no contempt application was filed in the Court and, contrary to r 19.02(3), no such application was filed by an appropriate person, the contempt hearing before Judge Vasta (such as it was) occurring on the Judge's own motion. Further, contrary to r 19.02(6), Judge Vasta did not tell Mr Stradford the particulars of the allegation of contempt or give him the opportunity to admit or deny the allegation, and Judge Vasta did not hear any evidence concerning the allegation. Contrary to r 19.02(7), there was also no assessment by Judge Vasta of whether there was a prima facie case and, even if there had been, Mr Stradford was not invited to state his defence, after which the Court would determine the charge.

49 Fourth, the primary judge found that Judge Vasta denied Mr Stradford procedural fairness (and acted in a "thoroughly unsatisfactory and unjudicial manner").<sup>58</sup>

50 Fifth, the primary judge found that Judge Vasta was affected by actual bias in prejudging or "predetermin[ing] that the appropriate sanction for Mr Stradford's non-compliance with the [orders of 10 August 2018] was a substantial sentence of imprisonment".<sup>59</sup>

51 The primary judge held that, as the imprisonment order was made by an inferior court and was affected by jurisdictional error, it lacked legal force from the time it was made and did not provide justification for Mr Stradford's imprisonment.<sup>60</sup>

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57 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [107]-[110].

58 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [118].

59 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [134]-[135].

60 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [184], [188], [195].

52 Subject to the Commonwealth's and Judge Vasta's contentions about the effect of s 17(1) of the *Federal Circuit Court of Australia Act*, the appellants did not challenge this holding in this Court. They were right not to do so.

53 It is established that an order of an inferior court that is affected by jurisdictional error has no legal force as an order of that court<sup>61</sup> so that, for example, a failure to obey such an order cannot be a contempt of that court.<sup>62</sup> Such an order of an inferior court is nevertheless "corrigible on appeal" (that is, subject to correction) and capable of being subject to prohibition.<sup>63</sup> By contrast, an order of a superior court is valid unless and until set aside including where the order is made without jurisdiction,<sup>64</sup> such as where the order of the superior court was based on a statute that was unconstitutional.<sup>65</sup>

*The effect of s 17 and Pts XIII A and XIII B*

54 The Commonwealth and Judge Vasta contended before the primary judge and on appeal that the effect of s 17 of the *Federal Circuit Court of Australia Act* was to render the Federal Circuit Court a superior court when exercising the power to punish for contempt conferred by s 17. They referred in support to *Day v The Queen*<sup>66</sup> where it was held that a statutory provision conferring on the District Court of Western Australia "all the jurisdiction and powers that the Supreme Court has in respect of any indictable offence"<sup>67</sup> (and a provision making the "practice

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61 *New South Wales v Kable* (2013) 252 CLR 118 ("*Kable*") at 140-141 [56].

62 *Pelechowksi v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 445 [27], 453 [55], 456-457 [71], citing *Attorney-General for New South Wales v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 357 and *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 335-336.

63 *Posner v Collector for Inter-State Destitute Persons (Vict)* (1946) 74 CLR 461 at 476.

64 *Cameron v Cole* (1944) 68 CLR 571 at 590, cited in *Kable* (2013) 252 CLR 118 at 133 [32].

65 *Kable* (2013) 252 CLR 118.

66 (1984) 153 CLR 475 at 479.

67 *District Court of Western Australia Act 1969* (WA), s 42(1).

and procedure" of both courts the same<sup>68</sup>) rendered the District Court a "superior court" for the purpose of imposing a sentence for an indictable offence, even though it is an inferior court of record for other purposes.<sup>69</sup>

55        Were this contention correct, then the imprisonment order made by Judge Vasta on 6 December 2018 would have been valid until set aside by the Full Court of the Family Court on 15 February 2019, even though it was affected by jurisdictional error.

56        One of the bases for the primary judge's rejection of this contention was his Honour's view that Pts XIII A and XIII B of the *Family Law Act* "exclude[] any other power to deal with contempt", such as s 17 of the *Federal Circuit Court of Australia Act*.<sup>70</sup> On appeal, this view was embraced by Mr Stradford but disputed by the Commonwealth. The Commonwealth contended that Pts XIII A and XIII B regulated the exercise of the power conferred by s 17 but did not exclude it as a source of power to punish for contempt.

57        The view of the primary judge that Pts XIII A and XIII B of the *Family Law Act* excluded s 17 of the *Federal Circuit Court of Australia Act* as a source of power to punish for contempt cannot be accepted. The contrary view is to be preferred having regard both to legislative history and to interpretative principle.

58        The original form of what is now Pt XIII A of the *Family Law Act* was inserted into the *Family Law Act* with effect from 25 January 1990.<sup>71</sup> From the time of enactment of the *Family Law Act* until 31 August 2021, s 35 of the Act was in relevantly identical terms to s 17 of the *Federal Circuit Court of Australia Act*, save that it applied to the Family Court. Immediately prior to the insertion of Pt XIII A, s 108(1) of the *Family Law Act* provided that, "[n]otwithstanding any other law, a court having jurisdiction under this Act may punish persons for contempt of that court". The balance of s 108 was consistent with the balance of s 112AP described above. The courts exercising jurisdiction under the *Family Law*

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68    *District Court of Western Australia Act 1969* (WA), s 44.

69    *District Court of Western Australia Act 1969* (WA), s 8(1).

70    *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [97].

71    *Family Law Amendment Act 1989* (Cth), s 17.



Act were also conferred with other powers to impose sanctions for breaching particular orders.<sup>72</sup>

59 Provisions such as the former s 108 were important because the courts that were (and are) vested with jurisdiction under the *Family Law Act* include not just the Family Court and other superior courts of record, but also the courts of summary jurisdiction of a State or Territory.<sup>73</sup> Reference has already been made to one difference between superior courts and inferior courts, namely the status of the orders of these courts when affected by jurisdictional error.<sup>74</sup> A further difference concerns the power and authority of such courts to punish for contempt. In the absence of a statutory provision to the contrary, superior courts of record possess the power to try and punish contempts of any kind relating to that court, as well as contempts of inferior courts over which they have supervisory jurisdiction.<sup>75</sup> However, without a statutory provision providing a power to do so, inferior courts of record can only punish for contempts committed "in the face of the [c]ourt".<sup>76</sup> Courts that are not courts of record, without statutory provision providing a power to do so, have no power to punish for contempts of any kind.<sup>77</sup> Thus, former s 108 of the *Family Law Act* ensured that, irrespective of how the courts of summary jurisdiction of a State or Territory were constituted by their respective legislature, when exercising jurisdiction conferred by the *Family Law Act* those courts

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72 See *Family Law Act*, ss 70(6), 114(4), which were repealed by ss 10 and 18 of the *Family Law Amendment Act*. See also Australian Law Reform Commission, *Contempt*, Report No 35 (1987) at 343 [591].

73 *Family Law Act*, s 39(1), (6).

74 See generally, Campbell, "Inferior and Superior Courts and Courts of Record" (1997) 6 *Journal of Judicial Administration* 249 at 250-253.

75 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 241-244, 254-256; *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 360, 363.

76 *R v Lefroy* (1873) LR 8 QB 134 at 137; *In re Dunn*; *In re Aspinall* [1906] VLR 493 at 501; *The Master Undertakers' Association of NSW v Crockett* (1907) 5 CLR 389 at 392; *Metal Trades* (1951) 82 CLR 208 at 241-244, 254.

77 *In re Dunn*; *In re Aspinall* [1906] VLR 493 at 495; *Davies v Davies* (1919) 26 CLR 348 at 363; *Reece v McKenna*; *Ex parte Reece* [1953] St R Qd 258 at 262; *Badry v Director of Public Prosecutions* [1983] 2 AC 297 at 307; *Varnavides v Victorian Civil and Administrative Tribunal* (2005) 12 VR 1 at 6 [18].

possessed the power to enforce orders made under that Act and ensure their processes were not disrupted.

60 The original form of what is now Pt XIII A was introduced following a report of the Australian Law Reform Commission on contempt.<sup>78</sup> The report recommended the enactment of a single piece of legislation prescribing and regulating the powers of all Federal Courts to punish for contempt.<sup>79</sup> The report also recommended the repeal of provisions such as ss 35 and 108 of the *Family Law Act*, along with the introduction of a specific regime to deal with non-compliance with orders made under the *Family Law Act* applicable to all courts exercising jurisdiction in proceedings under the Act.<sup>80</sup> The latter recommendation was taken up by the introduction of Pt XIII A and the provisions providing for penalties for contraventions of court orders were repealed.<sup>81</sup> However, the former recommendation was not accepted and, thus, s 35 of the *Family Law Act* remained. Former s 108 was "relocated" as s 112AP.<sup>82</sup> In light of the enactment of Pt XIII A, s 112AP was modified to apply to all contempts of any court exercising jurisdiction under the *Family Law Act*, save for those involving a contravention of an order, unless the contravention involved a "flagrant challenge to the authority of the court".

61 In concluding that Pts XIII A and XIII B excluded any other power on the part of the Federal Circuit Court to deal with contempt when it was exercising jurisdiction under the *Family Law Act*, the primary judge relied on *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section*<sup>83</sup> where it was held that the conferral on the Arbitration Court

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78 Australian Law Reform Commission, *Contempt*, Report No 35 (1987).

79 Australian Law Reform Commission, *Contempt*, Report No 35 (1987) at 28-29 [44], 41-42 [66].

80 Australian Law Reform Commission, *Contempt*, Report No 35 (1987) at 366-368 [630]-[632].

81 See *Family Law Act*, ss 70(6), 114(4), which were repealed by ss 10 and 18 of the *Family Law Amendment Act*.

82 Australia, Senate, *Family Law Amendment Bill 1989*, Explanatory Memorandum at 17 [47]. Section 112AP was originally located in Div 3 of Pt XIII A of the *Family Law Act* before Div 3 became Pt XIII B by item 32 of Sch 1 of the *Family Law Amendment Act 2000* (Cth).

83 (1951) 82 CLR 208.

of a power to deal with contraventions of its own orders carried with it an implication that the Arbitration Court could not punish such contraventions as a contempt, even though the Arbitration Court was expressly designated as a superior court of record.<sup>84</sup> *Metal Trades* was an example of the application of the principle stated by Gavan Duffy CJ and Dixon J in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*<sup>85</sup> that "[w]hen the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power".<sup>86</sup>

62 Even leaving aside that s 17 was found in different legislation from Pts XIII A and XIII B, there is no scope to apply the principle in *Anthony Hordern* to exclude s 17 as a source of authority for the orders made by Judge Vasta on 6 December 2018. On any view, s 17 expanded the ambit of the Federal Circuit Court's powers so that it could punish all forms of contempt in relation to its processes, rather than the limited range of contempts that an inferior court of record could deal with in the absence of a statutory provision to the contrary.<sup>87</sup> Section 17 also ensured that the Federal Circuit Court could impose the same penalties that a superior court could impose for contempt.<sup>88</sup>

63 Hence, s 17 expanded the power of a *particular court* to punish for contempt when it is exercising *any jurisdiction* conferred on that court. In contrast, Pts XIII A and XIII B dealt with contempt (and contraventions of orders) by *different courts* exercising the *same jurisdiction*. Thus, the two sets of provisions dealt with different subject matters.<sup>89</sup> The ambit of Pt XIII A, with all of its

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84 *Metal Trades* (1951) 82 CLR 208 at 254, 259, 265.

85 (1932) 47 CLR 1.

86 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7, cited in *Metal Trades* (1951) 82 CLR 208 at 266.

87 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 287.

88 *Metal Trades* (1951) 82 CLR 208 at 243, 254.

89 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589-590 [61], 592 [70].

restrictions, was not "ostensibly wholly within the ambit of" s 17.<sup>90</sup> To adopt the language of *Anthony Hordern*, Pt XIII A – and Pt XIII B – were not "particular provision[s]" and s 17 was not "generally express[ed]". Further, at least so far as s 112AP in Pt XIII B was concerned, that provision should not be understood to have imposed limitations and restrictions on the power to punish for contempt conferred by s 17. Instead, s 112AP should be understood as facilitating the exercise of the power to punish for contempt.<sup>91</sup>

64 In any event, *Anthony Hordern* is a principle of construction which, even when applicable, is to be weighed with other applicable principles of construction.<sup>92</sup> Generally, provisions granting powers to courts should not be read down by making implications or imposing limitations which are not found in the express words of the legislation.<sup>93</sup> This principle is applicable even though s 17(2) provided that s 17(1) had "effect subject to any other Act". It is one thing to treat the exercise of the power conferred by s 17 as regulated by Pt XIII A, and possibly Pt XIII B, and in that sense "subject to any other Act". It is however quite another to treat s 17 as wholly excluded if Pts XIII A and XIII B were engaged.

65 To accept that Pts XIII A and XIII B of the *Family Law Act* did not exclude s 17 of the *Federal Circuit Court of Australia Act* as a source of power to punish for contempt, however, is not to accept that the effect of s 17 was to render the Federal Circuit Court a superior court when exercising the power to punish for contempt conferred by s 17.

66 As noted, relevantly identical provisions confer such power on this Court, the Federal Court and the Family Court.<sup>94</sup> In *Re Colina; Ex parte Torney* three judges of this Court treated those provisions as "declaratory" of an attribute of the judicial power of the Commonwealth vested in those courts by s 71 of the *Constitution* as superior courts.<sup>95</sup> Regardless of the effect of those provisions on

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90 *Nystrom* (2006) 228 CLR 566 at 589 [59].

91 See *Re Colina* (1999) 200 CLR 386 at 394-395 [15].

92 *Nystrom* (2006) 228 CLR 566 at 586-587 [54], 589 [59].

93 *Deputy Commissioner of Taxation v Huang* (2021) 273 CLR 429 at 445 [23].

94 *Judiciary Act*, s 24; *Federal Court of Australia Act*, s 31; *Family Law Act*, s 35.

95 *Re Colina* (1999) 200 CLR 386 at 395 [16] per Gleeson CJ and Gummow J, 429 [113] per Hayne J; cf at 403 [48] per McHugh J, 416 [80] per Kirby J. See also

this Court, the Federal Court and the Family Court, the status of the orders of those courts as valid unless and until set aside flows from the designation of each of them as superior courts of record, and not from the conferral of any power to make a particular order.<sup>96</sup> Thus, if s 24 of the *Judiciary Act* has no effect upon the status of the orders made by this Court when punishing for contempt, there is no reason why s 17 of the *Federal Circuit Court of Australia Act* should have any greater effect on the status of such orders when they are made by the Federal Circuit Court.

67 Unlike the provisions considered in *Day v The Queen*, neither s 17, nor any other provision of the *Federal Circuit Court of Australia Act*, purported to confer "all the jurisdiction" that this Court has in relation to contempt on the Federal Circuit Court. An inferior court that exercises a particular power *and jurisdiction* of a superior court can itself become a superior court when exercising that particular jurisdiction.<sup>97</sup>

68 In particular, a provision that confers on an inferior court "all the jurisdiction" (emphasis added), as well as the "powers", that a superior court possesses over a particular subject matter can confer on the inferior court the same *authority* that a superior court possesses to effect a "final quelling of [a] controvers[y]" about that subject matter,<sup>98</sup> including the authority to do so by making an order which remains valid unless and until set aside and invulnerable to collateral challenge.<sup>99</sup> It was authority of that nature which was conferred on the District Court of Western Australia by the provision conferring "jurisdiction" considered in *Day v The Queen*. As s 17 did not purport to confer all the jurisdiction of this Court to deal with contempt on the Federal Circuit Court, no such authority was conferred either. It follows that this aspect of the appeals by the Commonwealth and Judge Vasta fails.

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Quick and Groom, *The Judicial Power of the Commonwealth with the Practice and Procedure of the High Court* (1904) at 76.

96 *Kable* (2013) 252 CLR 118 at 134 [34].

97 *Cameron* (1944) 68 CLR 571 at 606, citing *Skinner v Northallerton County Court Judge* [1899] AC 439 at 441.

98 *Kable* (2013) 252 CLR 118 at 134 [34] (emphasis omitted).

99 *Kable* (2013) 252 CLR 118 at 133 [32], 134 [36].

*Further arguments about the effect of s 17*

69 There remain two further arguments concerning s 17 of the *Federal Circuit Court of Australia Act* to be considered, one advanced by Judge Vasta alone and the other advanced by South Australia.

70 Judge Vasta argued that s 17 impliedly conferred on him the same judicial immunity applicable to members of this Court in relation to all purported exercises of the power to punish for contempt. Nothing in the text or context of s 17 supports this submission. Just as the statutory power to deal with contempt conferred by s 24 of the *Judiciary Act* is not a source of immunity for Justices of this Court, s 17 of the *Federal Circuit Court of Australia Act* did not confer immunity on members of the Federal Circuit Court.

71 The argument of South Australia was that, even though the imprisonment order was invalid, the warrant issued by Judge Vasta was nevertheless valid and justified Mr Stradford's imprisonment. There was no express power conferred on judges of the Federal Circuit Court to issue warrants. Any power that judges of the Federal Circuit Court had to issue warrants was "*confined* to so much as can be 'derived by implication'" from the express powers that the Federal Circuit Court had to sentence a person to imprisonment (emphasis added).<sup>100</sup>

72 South Australia argued that this implied power to issue warrants of commitment should not be limited by a power to issue such warrants only in aid of *valid* court orders. It suffices to state in response that, given the confined nature of the implied power to issue a warrant of commitment, the power cannot rise above its source in the *Federal Circuit Court of Australia Act* and the cognate legislation, which only conferred power on the Federal Circuit Court to make *valid* court orders for the arrest or imprisonment of a person.

*Conclusion on this part of the appeals*

73 It follows that the imprisonment order and the warrant were invalid.

**Part IV – Did Judge Vasta have immunity from Mr Stradford's suit?**

74 In *Fingleton v The Queen*<sup>101</sup> Gleeson CJ described the rationale for judicial immunity from civil liability as follows:

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<sup>100</sup> *Grassby v The Queen* (1989) 168 CLR 1 at 17.

<sup>101</sup> (2005) 227 CLR 166 at 186 [38]-[39].

"This immunity from civil liability is conferred by the common law, not as a perquisite of judicial office for the private advantage of judges, but for the protection of judicial independence in the public interest. It is the right of citizens that there be available for the resolution of civil disputes between citizen and citizen, or between citizen and government, and for the administration of criminal justice, an independent judiciary whose members can be assumed with confidence to exercise authority without fear or favour. As O'Connor J, speaking for the Supreme Court of the United States, said in *Forrester v White*,<sup>102</sup> that Court on a number of occasions has 'emphasi[s]ed that the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have'. She said that '[i]f judges were personally liable for erroneous decisions, the resulting avalanche of suits ... would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits'.

This does not mean that judges are unaccountable. Judges are required, subject to closely confined exceptions, to work in public, and to give reasons for their decisions. Their decisions routinely are subject to appellate review, which also is conducted openly. The ultimate sanction for judicial misconduct is removal from office upon an address of Parliament. However, 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."

75 This justification for judicial immunity by reference to the protection of judicial independence has been long and widely recognised.<sup>103</sup> The protection it provides from litigation by those disappointed with judicial decisions not only provides an institutional protection to the individual judge in performing their

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**102** (1988) 484 US 219 at 226-227.

**103** See, eg, *Garnett v Ferrand* (1827) 6 B & C 611 at 625-626 [108 ER 576 at 581]; *Bradley v Fisher* (1872) 80 US 335 at 347; *Anderson v Gorrie* [1895] 1 QB 668 at 670; *Pierson v Ray* (1967) 386 US 547 at 554; *Nakhla v McCarthy* [1978] 1 NZLR 291 at 294; *Stump v Sparkman* (1978) 435 US 349 at 368; *Rajski v Powell* (1987) 11 NSWLR 522 at 528, 535; *Yeldham v Rajski* (1989) 18 NSWLR 48 at 69; *Harvey v Derrick* [1995] 1 NZLR 314 at 324, 336; *Rawlinson v Rice* [1998] 1 NZLR 454 at 464; *Attorney-General v Chapman* [2012] 1 NZLR 462 at 466; *Praljak v Commonwealth of Australia (Federal Court of Australia)* [2022] FCA 1438 at [18]; *Singh v Harrowell* [2023] NSWSC 420 at [135].

judicial duty free of such concerns; the immunity also enhances public confidence in the impartiality of judicial decision making by "foreclos[ing] [even] the *assertion* that the prospect of suit [against the judge] may have had some conscious or unconscious effect on the decision-making process or its outcome" (emphasis added).<sup>104</sup>

76 Judicial immunity also exists to achieve finality in the quelling of disputes by the exercise of judicial power.<sup>105</sup> The finality of judicial decisions would be undermined if those disappointed with a decision could bring proceedings against a judge as a means of attacking the judge's decision. The interests of finality of judgments of inferior courts apply equally to judgments of superior courts, albeit that judgments of inferior courts are open to collateral challenge, whereas judgments of superior courts are not.<sup>106</sup> The law's concern to ensure the finality of judicial decisions is satisfied by judges of inferior courts having judicial immunity. The overwhelming proportion of criminal and civil disputes in this country are quelled by decisions of inferior courts. Absent a successful appeal or permissible collateral challenge to a decision, those disputes are resolved to finality. As will be explained, whatever the position was in the past, there is now no basis for contending that the immunity from civil suit of a judge of an inferior court applies only to the extent to which the decision of that judge is not capable of being collaterally challenged.

*The scope of immunity found by the primary judge*

77 The primary judge, having surveyed many of the authorities in the United Kingdom and this country concerning the scope of judicial immunity afforded to inferior court judges, fairly observed that the state of the common law on the topic was "somewhat unsatisfactory".<sup>107</sup>

78 Despite this observation, reflecting the analysis of Lord Bridge of Harwich in *In re McC (A Minor)*<sup>108</sup> the primary judge held that inferior court judges will not have immunity where they do not have subject matter jurisdiction, regardless of

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**104** *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 80 [75].

**105** *D'Orta-Ekenaike* (2005) 223 CLR 1 at 15 [25].

**106** See above at [53].

**107** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [341].

**108** [1985] AC 528.



whether they know, or do not know, that they do not have such jurisdiction.<sup>109</sup> The primary judge also held that "in certain exceptional circumstances" when an inferior court judge does have such subject matter jurisdiction, the judge may still not have immunity where the judge makes "an order without, or outside, or in excess of the jurisdiction he or she had to hear or entertain the proceeding".<sup>110</sup> One exceptional circumstance is where the inferior court judge "is guilty of some gross and obvious irregularity in procedure, or a breach of the rules of natural justice, other than an irregularity or breach which could be said to be a merely narrow technical".<sup>111</sup> Another exceptional circumstance is where the inferior court judge acts "in excess of jurisdiction" by making an order or imposing a sentence "for which there [is] no proper foundation in law, because a condition precedent for making that order or sentence had not been made out".<sup>112</sup>

79 The primary judge accepted that Judge Vasta had subject matter jurisdiction in respect of the proceeding between Mr Stradford and Mrs Stradford. His Honour characterised Judge Vasta's conduct as falling within both descriptions of exceptional circumstances.<sup>113</sup> There was no challenge to that characterisation of Judge Vasta's conduct on appeal.

80 Mr Stradford sought to uphold the primary judge's analysis of the common law. The Commonwealth and Judge Vasta challenged the primary judge's analysis of the scope of judicial immunity of an inferior court judge. Both contended that the common law does not, or should not, recognise any distinction between the scope of the immunity of superior court judges and inferior court judges. The Commonwealth contended in the alternative that, if the common law does recognise such a distinction, the scope of the immunity of inferior court judges should be co-extensive with the subject matter jurisdiction of the court to which they are appointed.

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**109** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [343].

**110** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [344].

**111** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [345].

**112** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [346].

**113** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [359]-[364].

81 "Jurisdiction' is an expression which is used in a variety of senses and takes its colour from its context."<sup>114</sup> Neither the primary judge nor the Commonwealth explained the sense in which they used the compound expression "subject matter jurisdiction". The primary judge appears to have used subject matter jurisdiction to mean "jurisdiction over the subject-matter of the action",<sup>115</sup> corresponding in the Australian constitutional context to the authority of the court to adjudicate the particular "matter" in controversy between the parties.<sup>116</sup> The Commonwealth appears to have used the compound expression in a somewhat broader sense to encompass what this Court referred to in *Craig v South Australia* as the "general area" of the jurisdiction of an inferior court in the course of explaining that "[a]n inferior court would ... act wholly outside the general area of its jurisdiction ... if, having jurisdiction strictly limited to civil matters, it purported to hear and determine a criminal charge".<sup>117</sup> It will be seen that such imprecision of meaning in the context of judicial immunity is not new. The one thing that is certain is that, in using the compound expression "subject matter jurisdiction" in the context of judicial immunity, neither the primary judge nor the Commonwealth meant "jurisdiction" in the sense used in the context of "jurisdictional error" to refer to all express or implied limits on the decision making authority of a court.<sup>118</sup>

*Sirroos and In re McC*

82 The primary judge's starting point in considering whether the distinction between superior court judges and inferior court judges as to their immunity has

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114 *Anisminic Ltd v Foreign Compensation Commission* [1968] 2 QB 862 at 889, quoted in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 570 [63]. See also *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at 246-247 [14]-[15].

115 See, eg, *Flaherty v Girgis* (1987) 162 CLR 574 at 598; *Lipohar v The Queen* (1999) 200 CLR 485 at 514 [69].

116 *Zurich Insurance Co Ltd v Koper* (2023) 277 CLR 164 at 176-177 [33].

117 *Craig v South Australia* (1995) 184 CLR 163 at 177; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 570 [63].

118 See *Stanley v Director of Public Prosecutions (NSW)* (2023) 278 CLR 1 at 8 [14]-[15]; *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610 at 613 [2]; 418 ALR 152 at 154.

been abolished, or can and should be abolished, was the decision of the Court of Appeal of England and Wales in *Sirros v Moore*.<sup>119</sup>

83 In *Sirros*, a judge of the Crown Court had dismissed an alien's attempt to appeal against a magistrate's recommendation that he be deported. During the hearing of the appeal the appellant was at liberty, but at the appeal's conclusion the judge directed police to detain him. The appellant obtained an order for habeas corpus on the basis that the judge was *functus officio* at the time of considering the appellant's detention. Lord Denning MR concluded that the judge had no "jurisdiction" to detain the appellant, but he "acted judicially and for that reason no action [would] lie against him".<sup>120</sup>

84 Under the heading "[a]cts within jurisdiction", Lord Denning observed:<sup>121</sup>

"Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action."

85 Lord Denning observed that this applied "not only to judges of the superior courts, but to judges of all ranks, high or low".<sup>122</sup>

86 Under the heading "[t]he superior courts", Lord Denning noted that judges of superior courts were also immune for acts committed outside their jurisdiction if they were "acting as a judge", "doing a judicial act" or "acting judicially", which Lord Denning took to mean "acting in the bona fide exercise of his office and under the belief that he has jurisdiction".<sup>123</sup> However, Lord Denning observed that for inferior court judges the authorities did not extend any immunity to those who

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119 [1975] QB 118.

120 *Sirros v Moore* [1975] QB 118 at 137.

121 *Sirros* [1975] QB 118 at 132.

122 *Sirros* [1975] QB 118 at 132.

123 *Sirros* [1975] QB 118 at 135.

acted outside the jurisdiction that "belonged to [them]".<sup>124</sup> Even so, Lord Denning held that the same rule of immunity should apply to inferior court judges as applied to superior court judges, such that, if either acted outside their jurisdiction, they should not be liable "so long as [they] honestly [believe] it to be within [their] jurisdiction".<sup>125</sup>

87 One concern that has arisen out of *Sirros* is that, in seeking to harmonise the scope of the immunity afforded to superior court judges and inferior court judges, Lord Denning appeared to reduce the former so that a superior court judge who acted beyond jurisdiction would only be immune if that judge honestly believed they had acted within jurisdiction.<sup>126</sup> As noted, Lord Denning adopted this formulation as a means of encapsulating the limit on the immunity of a superior court judge in that they must be "doing a judicial act"<sup>127</sup> or "acting judicially".<sup>128</sup>

88 The immunity afforded to superior court judges by the common law must have some limit referable to the exercise of their judicial function. Self-evidently, the immunity does not extend to the judge's private acts unrelated to their judicial office,<sup>129</sup> nor could it extend to them attempting to perform the judicial function of a court to which they were not appointed; eg, a probate judge purporting to try a criminal case.<sup>130</sup> In *Forrester v White* judicial immunity was found not to extend to the administrative acts of a judge in demoting and dismissing a probation officer.<sup>131</sup> However, it does not follow that, in this country at least, any such limit on judicial immunity should be directly translated to the circumstance of a judge knowingly acting beyond jurisdiction. This is particularly so given the ambiguities surrounding the meaning of "jurisdiction", the fact that all courts in this country

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124 *Sirros* [1975] QB 118 at 133.

125 *Sirros* [1975] QB 118 at 136.

126 *Sirros* [1975] QB 118 at 136. See also *Moll v Butler* (1985) 4 NSWLR 231 at 241; *Rajski v Powell* (1987) 11 NSWLR 522 at 529.

127 *Sirros* [1975] QB 118 at 135.

128 *Sirros* [1975] QB 118 at 135.

129 *Rajski v Powell* (1987) 11 NSWLR 522 at 528.

130 *Rajski v Powell* (1987) 11 NSWLR 522 at 533.

131 *Forrester v White* (1988) 484 US 219 at 229.

are courts of limited jurisdiction,<sup>132</sup> and the potential for the rationale for the immunity to be eroded by an inquiry into the judge's state of mind<sup>133</sup> when quelling a legal controversy. A better formulation would involve an objective inquiry into whether the conduct of the judge could be seen as a purported attempt to exercise the judicial function of the court to which they are appointed.

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The attempt in *Sirros* to harmonise the scope of the immunity of superior court judges with that of inferior court judges in cases where they both acted outside jurisdiction was rejected by Lord Bridge in *In re McC*<sup>134</sup> in the course of holding that a statutory exclusion of immunity for acts undertaken by justices of the peace "without jurisdiction or in excess of jurisdiction"<sup>135</sup> gave effect to "the old common law rule that justices were civilly liable for actionable wrongs suffered by citizens pursuant to orders made without jurisdiction".<sup>136</sup> His Lordship held that the immunity was excluded not only in cases where there was an absence of "jurisdiction of the cause", but also when, in hearing a case otherwise within such jurisdiction, justices committed "some gross and obvious irregularity of procedure".<sup>137</sup> He gave as examples of such an irregularity of procedure when one justice was absent for part of the hearing,<sup>138</sup> or when the conviction of the defendant or determination of the complaint did "not provide a proper foundation in law for the sentence imposed on him or order made against him".<sup>139</sup> Otherwise, Lord Bridge left open "for determination ... other more subtle cases" involving a

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132 *Kable* (2013) 252 CLR 118 at 132 [30].

133 See below at [110].

134 [1985] AC 528 at 541.

135 See *Justices Protection (Ireland) Act 1849* (UK) (12 & 13 Vict c 16), s 2; *Justices Protection Act 1848* (UK) (11 & 12 Vict c 44); *Justices of the Peace Act 1979* (UK), s 45. See also *In re McC* [1985] AC 528 at 535.

136 *In re McC* [1985] AC 528 at 541.

137 *In re McC* [1985] AC 528 at 546.

138 *In re McC* [1985] AC 528 at 546-547.

139 *In re McC* [1985] AC 528 at 549.

procedural irregularity or a breach of natural justice, which "would not ... necessarily expose the justices to liability in damages".<sup>140</sup>

*Judicial immunity in this Court since Sirros*

90 After *Sirros*, in *Durack v Gassior*<sup>141</sup> and then *Gallo v Dawson*,<sup>142</sup> single Justices of this Court applied *Sirros* in the context of an application for summary dismissal of a claim against a judge of a superior court. *Durack* involved a complaint that a judge of the Family Court had wrongly imprisoned a litigant for contempt. *Gallo* was a complaint of discrimination against a judge of this Court.

91 In *Durack* Aickin J observed that "no action may be brought under our legal system against judges for acts done in the course of hearing or deciding cases which come before them".<sup>143</sup> In *Gallo* Wilson J described the civil immunity of a judge of this Court as extending to conduct of the judge "undertaken in the performance of his judicial duties".<sup>144</sup> McHugh J refused an extension of time for leave to appeal from the judgment of Wilson J on the basis that his Honour was "unquestionably correct".<sup>145</sup> An appeal from McHugh J's refusal to a Full Bench of this Court was dismissed on the basis that Wilson J was clearly correct in concluding that the appellant's case must fail by reason of "judicial immunity applying to acts done by a judge in the course of the performance of judicial duties".<sup>146</sup>

92 In *Re East; Ex parte Nguyen* this Court rejected the contention that a magistrate and the Chief Judge of the County Court of Victoria could be subject to "legal redress" on the ground that they contravened the *Racial Discrimination Act 1975* (Cth) in their conduct of criminal proceedings.<sup>147</sup> This Court held that the

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140 *In re McC* [1985] AC 528 at 547.

141 Unreported, High Court of Australia, 13 April 1981.

142 (1988) 63 ALJR 121 at 122; 82 ALR 401 at 402.

143 *Durack v Gassior* (unreported, High Court of Australia, 13 April 1981) at 15.

144 *Gallo v Dawson* (1988) 63 ALJR 121 at 122; 82 ALR 401 at 402.

145 *Gallo v Dawson* (1990) 64 ALJR 458 at 460; 93 ALR 479 at 482.

146 *Gallo v Dawson* (1992) 66 ALJR 859 at 859; 109 ALR 319 at 320.

147 *Re East* (1998) 196 CLR 354.

magistrate and Chief Judge were entitled to the "well established immunity from suit which protects judicial officers from actions arising out of acts done in the exercise of their judicial function of capacity".<sup>148</sup> In reaching this conclusion, this Court cited *Rajski v Powell*,<sup>149</sup> which described the immunity of superior court judges from civil liability in the same terms.<sup>150</sup>

93 Mr Stradford noted that there was no discussion in *Durack*, *Gallo* or *Re East* of the difference between the scope of judicial immunity afforded to superior court and inferior court judges. Regarding *Re East*, Mr Stradford submitted that, had such an issue been raised, it would have been affected by various legislative provisions that gave the magistrate and Chief Judge the immunity of a Supreme Court judge.<sup>151</sup>

94 None of *Durack*, *Gallo* or *Re East* purported to abolish the distinction between inferior court judges and superior court judges. Instead, those cases treated that distinction as immaterial to the issue of judicial immunity and for good reason. In *Fingleton* Gleeson CJ noted the "strong criticism" of the distinction between inferior court judges and superior court judges in *Sirros* and *In re McC*.<sup>152</sup> Similarly, Kirby J referred to the "artificial distinctions ... between judicial officers at different ranks in the hierarchy", citing, inter alia, *Sirros*.<sup>153</sup>

*D'Orta-Ekenaike and the status of In re McC*

95 In *D'Orta-Ekenaike v Victoria Legal Aid*<sup>154</sup> Gleeson CJ, Gummow, Hayne and Heydon JJ noted the existence of various immunities from suit that are

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148 *Re East* (1998) 196 CLR 354 at 365-366 [30].

149 (1987) 11 NSWLR 522.

150 *Rajski v Powell* (1987) 11 NSWLR 522 at 527.

151 See, eg, *County Court Act 1958* (Vic), s 9A; *Magistrates Court Act 1987* (Tas), s 10A; *Magistrates' Court Act 1989* (Vic), s 14; *Magistrates Court Act 1991* (SA), s 44(1); *District Court Act 1991* (SA), s 46(1).

152 *Fingleton* (2005) 227 CLR 166 at 184 [34].

153 *Fingleton* (2005) 227 CLR 166 at 214 [137], citing *Sirros* [1975] QB 118 at 134-136.

154 (2005) 223 CLR 1.

designed to achieve finality in the quelling of disputes by the exercise of judicial power.<sup>155</sup> In relation to judicial immunity, their Honours observed:<sup>156</sup>

"[Judicial immunity] was bound up with the development of the law relating to *excess of jurisdiction*, and thus with the development of the principles governing when a judicial decision was open to collateral attack. Its history has been traced by Holdsworth. It is not necessary to examine that history in any detail, beyond noticing that the decisions of courts of record were conclusive, but those of inferior courts were open to collateral attack alleging excess of jurisdiction. Hence, while action might lie at common law for acts done in an inferior court in excess of jurisdiction, the decisions of supreme courts were final. *And there was an immunity from suit for any judicial act done within jurisdiction*. What is important to notice for present purposes is not the history of development of this immunity, but that both judicial immunity and the immunity of witnesses were, and are, ultimately, although not solely, founded in considerations of the finality of judgments." (emphasis added)

96 This passage correlates the development in the United Kingdom of the principles governing "excess of jurisdiction" and collateral challenges to judicial decisions on the one hand with the scope of judicial immunity of members of those courts whose decisions were vulnerable to such a challenge on the other. This correlation was explained by both Buckley LJ in *Sirros*<sup>157</sup> and the article by Professor Holdsworth<sup>158</sup> cited in *D'Orta-Ekenaike*. This correlation is of particular relevance to Mr Stradford's reliance on various authorities from the United Kingdom.

97 According to Professor Holdsworth, at least until the end of the 16th century, the common law did not distinguish between courts of record, either superior or inferior. Judges of all such courts had immunity when they acted within

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155 *D'Orta-Ekenaike* (2005) 223 CLR 1 at 15 [25].

156 *D'Orta-Ekenaike* (2005) 223 CLR 1 at 19 [40] (citations omitted); see also *Forge* (2006) 228 CLR 45 at 80 [75].

157 *Sirros* [1975] QB 118 at 138-139.

158 Holdsworth, "Immunity for Judicial Acts" [1924] *Journal of the Society of Public Teachers of Law* 17.



jurisdiction and did not have immunity when acting outside of it.<sup>159</sup> However, Professor Holdsworth concluded that, from the latter part of the 17th century, a difference emerged about the scope of the immunity afforded to judges of superior and inferior courts. During this time it was accepted that superior courts had unlimited jurisdiction and were seen as only answerable to the "God and the king", whereas inferior courts were restricted by subject matter, person, or place, and answerable to superior courts if they acted beyond jurisdiction.<sup>160</sup>

98 The parties and the primary judge referred to numerous cases in the United Kingdom and this country concerning the scope of the immunity so far as it concerns inferior court judges. There are many cases that described the scope of judicial immunity in terms that corresponded to subject matter jurisdiction in the sense in which that expression was used by the primary judge, such as jurisdiction over or in respect of particular persons,<sup>161</sup> locale,<sup>162</sup> the kinds of relief that may be granted,<sup>163</sup> or all three.<sup>164</sup> However, as Mr Stradford submitted, there are other decisions, including *In re McC* itself, that held a judge or justice of the peace liable in circumstances where the court had such jurisdiction but some precondition to the making of the order that imprisoned the aggrieved litigant was not established.<sup>165</sup> He submitted that his case was a "simple application" of those cases.

99 The observations from *D'Orta-Ekenaike* make clear that the cases relied on by Mr Stradford must be understood in a context in which the scope of the

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159 Holdsworth, "Immunity for Judicial Acts" [1924] *Journal of the Society of Public Teachers of Law* 17 at 19-20.

160 Holdsworth, "Immunity for Judicial Acts" [1924] *Journal of the Society of Public Teachers of Law* 17 at 20.

161 *The Case of the Marshalsea* (1612) 10 Co Rep 68b at 68b [77 ER 1027 at 1027]; *Calder v Halket* (1840) 3 Moo PC 28 at 57 [13 ER 12 at 27].

162 *Houlden v Smith* (1850) 14 QB 841 [117 ER 323].

163 "[A]djudication of the kind it purported to make": *Raven v Burnett* (1894) 6 QLJ 166 at 168; *Agnew v Jobson* (1877) 13 Cox CC 625.

164 *Raven* (1894) 6 QLJ 166; see also *Garthwaite v Garthwaite* [1964] P 356 at 387.

165 See, eg, *Hill v Bateman* (1726) 2 Str 710 [93 ER 800]; *Groome v Forrester* (1816) 5 M & S 314 [105 ER 1066]; *Wood v Fetherston* (1901) 27 VLR 492; *M'Creadie v Thomson* 1907 SC 1176; *O'Connor v Isaacs* [1956] 2 QB 288; *R v Manchester City Magistrates' Court; Ex parte Davies* [1989] QB 631.

immunity of inferior court judges was related to the extent to which their decisions were vulnerable to collateral challenge. That is no longer the case in this country or in the United Kingdom. There is no possible basis for suggesting that the scope of judicial immunity for an inferior court judge in this country depends on the absence of jurisdiction or jurisdictional error. Moreover, the rule of immunity with its exceptions, as articulated in *In re McC*, does not accord with this Court's statement of that immunity in any of *Durack*, *Gallo* or *Re East*, even allowing for the fact that *Durack* and *Gallo* concerned superior court judges.

100 Any description of judicial immunity which is subject to limits or exceptions described in uncertain or fact-intensive language ("some gross and obvious irregularity of procedure"<sup>166</sup>) and which is open to be developed on case-by-case basis ("subtle cases"<sup>167</sup>) is inconsistent with the underlying rationale for the immunity. To be effective, such an immunity must be clearly described and capable of summary application so that legally unmeritorious cases do not proceed to trial.<sup>168</sup> Of itself, the prospect of a trial against a judge undermines judicial independence by providing the perverse "powerful incentive[]", spoken of by O'Connor J in *Forrester v White*,<sup>169</sup> to make decisions that avoid the possibility of subsequent suit against the judge.

101 The reasoning of the primary judge, resting upon the premise that the scope of judicial immunity from civil suit described in *In re McC* represents, or should be taken as representing, the common law of Australia, cannot be accepted.

*The proper scope of judicial immunity*

102 What then is the proper scope of the immunity from civil suit afforded by the common law to judges of inferior courts?

103 Mr Stradford submitted that, in considering the scope of the immunity of inferior court judges and whether it should accord with the immunity afforded to superior court judges, this Court is not "writing on a blank slate" and should not "overthrow centuries of precedent". His submissions pointed to the legislative choices that were open to Parliament in enacting the *Federal Circuit Court of Australia Act* to deal with judicial immunity. However, no question of second-

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166 *In re McC* [1985] AC 528 at 546-547.

167 *In re McC* [1985] AC 528 at 547.

168 *Wentworth v Wentworth* (2000) 52 NSWLR 602 at 638 [260].

169 See above at [74].

guessing Parliament arises in this case. In enacting the *Federal Circuit Court of Australia Act*, Parliament left the immunity of judges of the Federal Circuit Court to the common law.

104 This is the first occasion that this Court has been required to address the scope of the common law immunity of a judge of an inferior court. This is not a case in which the Court is asked to overturn one of its earlier decisions.<sup>170</sup> There is also no established common law rule concerning the immunity of inferior court judges, much less one of certain definition and application. Accordingly, this Court is seized of the opportunity to authoritatively establish a coherent and contemporary resolution of the asserted inconsistency between the extent of immunity of judges of superior and inferior courts in this country.

105 The effect of Mr Stradford's submission is that this Court should resolve the uncertainty surrounding the scope of the immunity afforded to inferior court judges by preferring some among a multitude of cases decided in the United Kingdom over hundreds of years in a very different constitutional and, in some instances, legislative setting. That approach should be rejected.

106 As for that different constitutional setting, the independence of all courts referred to in s 71 of the *Constitution* is constitutionally guaranteed by the requirement that all must "satisfy minimum requirements of independence and impartiality".<sup>171</sup> That constitutional guarantee should not be undermined by acceptance of any common law doctrine of uncertain scope and application, which does not conform with its rationale. Nor should such a doctrine be permitted to undermine the role of all courts in finally quelling legal controversies. All courts "exercise jurisdiction as part of a hierarchical legal system entrusted with the administration of justice under the Commonwealth and State Constitutions".<sup>172</sup>

107 Once the scope of the judicial immunity is untethered from any connection to the circumstances in which the judgment of an inferior court can be the subject of collateral challenge, then any proper justification for a difference between the scope of the immunity of superior court judges and inferior court judges falls away. All courts of this country, other than this Court, are subject to an appellate

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170 cf *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 346-347 [29].

171 *Forge* (2006) 228 CLR 45 at 67 [41]; see also at 76 [63]-[64], 80-81 [78]; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29].

172 *Craig* (1995) 184 CLR 163 at 176.

structure, or at least judicial review.<sup>173</sup> The inferior courts of this country are now constituted by persons with either formal legal qualifications or practical legal training, or both.<sup>174</sup> As was recognised in *In re McC*,<sup>175</sup> any differences in the experience, training, and qualifications of those appointed to superior courts and those appointed to inferior courts (if such a difference exists at all in this country) cannot justify differential treatment in the scope of the immunity afforded to each judge.

108 Mr Stradford sought to justify the difference between the scope of the immunity afforded to judges of superior courts and inferior courts by reference to the need to safeguard the liberty of the subject and the circumstance that the work of the superior courts is exposed to a "far greater degree of publicity than that of inferior courts". The liberty of the subject and the accountability of all courts is enhanced by ensuring they are subject to effective schemes of appeal and review, but not by differentiating between the scope of the immunity of judges of each court. Otherwise, there is no basis for concluding that any greater level of publicity attaches to the work of particular courts in the judicial hierarchy. District, County and Magistrates Courts are open and accessible to all members of the public, including the media. Media reporting of the work of these courts, especially in the context of criminal proceedings, is commonplace.

109 Reference has already been made to the necessity for the scope of judicial immunity to be clearly defined and capable of summary application. Similarly, any limit on or exception to judicial immunity that might be sought to be derived from cases from the United Kingdom that involve a judicial officer's state of mind should be rejected as undermining the rationale for the immunity. As noted by Gleeson CJ in *Fingleton*, experience suggests that an allegation of judicial misconduct by a disappointed litigant will "often ... be accompanied by an accusation of malice or want of good faith in the exercise of judicial authority".<sup>176</sup> If such an accusation is made, then depending on the scope of the immunity that accusation may defeat an application for summary dismissal, contrary to the rationales of ensuring judicial independence and finality (to the extent possible) of all judgments.

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173 cf *Sirros* [1975] QB 118 at 123.

174 *Craig* (1995) 184 CLR 163 at 176.

175 *In re McC* [1985] AC 528 at 541.

176 *Fingleton* (2005) 227 CLR 166 at 185 [37].

110 Further, any rule of immunity that enhances the likelihood of judicial officers having to later give evidence of their state of mind when deciding cases to defeat a claim against them will not only provide the perverse "powerful incentive[]" spoken of by O'Connor J in *Forrester v White* for judges to avoid making hard decisions, but will also undermine the protection afforded to judicial officers from being "compelled to answer as to the manner in which they have exercised their judicial powers",<sup>177</sup> which is itself an aspect of judicial independence.<sup>178</sup> Judges are required to "give their reasons for their decisions – once" and, "[i]f it were otherwise, their impartiality would be compromised".<sup>179</sup> The prospect of judges giving evidence about what was said to be their actual reasons or state of mind when deciding a matter, as opposed to their published reasons, would undermine judicial independence and finality of judgments, and the public interest each serves.

111 For these reasons, the scope of immunity afforded to inferior court judges must: be clear in definition and application; be capable of summary application; not be tied to any contestable meaning of "jurisdiction"; and not invite any inquiry into the judicial officer's state of mind. The formulation of the immunity given by this Court in *Gallo*, and more specifically in *Re East*, meets this description.

112 As there should not be any difference between the scope of the immunity afforded to a superior court judge and an inferior court judge, this Court should now confirm that the scope of the immunity as stated in *Re East* applies to judges of both superior and inferior courts, save that it should be expressed as immunity from actions arising out of acts done in the exercise, *or purported exercise*, of their judicial function or capacity.<sup>180</sup> Describing the immunity as including any *purported exercises* of the judicial function confirms that the scope of the immunity extends to the circumstance where the court to which the judge is appointed ceases to have jurisdiction over the relevant matter or the judge commits a jurisdictional error in dealing with the relevant matter over which the court has

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177 *Herijanto v Refugee Review Tribunal* (2000) 74 ALJR 698 at 700 [13]; 170 ALR 379 at 382; see also *Hennessy v Broken Hill Pty Co Ltd* (1926) 38 CLR 342 at 349.

178 *Herijanto v Refugee Review Tribunal* (2000) 74 ALJR 698 at 700 [15]; 170 ALR 379 at 382-383; see also *Zanatta v McCleary* [1976] 1 NSWLR 230 at 237-239.

179 Gleeson, "Current Issues for the Australian Judiciary", speech delivered at the Supreme Court of Japan, Tokyo, 17 January 2000 at 10.

180 *Re East* (1998) 196 CLR 354 at 365-366 [30].

jurisdiction. The characterisation of the judge's acts is to be undertaken objectively. Instances of acts that fall outside the immunity have already been noted.<sup>181</sup>

- 113 This common law rule of immunity not only applies to this Court but to all courts referred to in s 71 of the *Constitution*, including any court of a Territory and any "court of a State" as referred to in s 77(iii) of the *Constitution* (irrespective of whether those courts are invested with federal jurisdiction). It is not necessary to determine whether the immunity extends to any other "courts", or to determine the scope of judicial immunity from criminal responsibility at common law.<sup>182</sup>

*Outcome of Judge Vasta's appeal*

- 114 Despite the many and egregious errors in Judge Vasta's treatment of Mr Stradford, at all times Judge Vasta was acting in the purported exercise of the judicial function of a judge of the Federal Circuit Court. It follows that Judge Vasta's actions were protected by judicial immunity. He is not liable to Mr Stradford.

**Part V – Could the MSS Guards, the Queensland police officers and the Queensland correctional officers rely on the imprisonment order or the warrant?**

- 115 The primary judge did not accept that any person who acts pursuant to a defective order or warrant is protected from liability for their actions.<sup>183</sup> However, his Honour accepted that there is "some authority" to the effect that an officer of the court (or "ministerial officer"), such as a sheriff, "who is required by virtue of their office, and under pain of punishment" to obey a court order may be immune if they act in accordance with an invalid order "if the defect or irregularity was not apparent on the face of the order, or was otherwise not apparent to the officer".<sup>184</sup> While his Honour accepted this protection from liability would extend to the Marshal of the Federal Circuit Court, he considered that it did not extend to the MSS Guards, the Queensland police officers or the Queensland correctional

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**181** See above at [88].

**182** See *Fingleton* (2005) 227 CLR 166 at 186-187 [40]-[41]; *Yeldham v Rajski* (1989) 18 NSWLR 48.

**183** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [515].

**184** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [513].

officers.<sup>185</sup> As noted above, the primary judge also rejected Queensland's contention that the actions of the Queensland police officers and the Queensland correctional officers in detaining Mr Stradford were justified under s 249 of the *Criminal Code*.<sup>186</sup>

*Section 249 of the Criminal Code*

116 It is convenient to deal with Queensland's reliance on s 249 of the *Criminal Code* first. Section 249 must be read with s 250, and together they protect some acts undertaken in executing a defective warrant. Those sections provide:

**"249 Execution of warrants**

It is lawful for a person who is charged by law with the duty of executing a lawful warrant issued by *any court* or justice or other person having jurisdiction to issue it, and who is required to arrest or detain another person under such warrant, and for every person lawfully assisting a person so charged, to arrest or detain that other person according to the directions of the warrant.

**250 Erroneous sentence or process or warrant**

If the sentence was passed, or the process was issued, by *a court having jurisdiction* under any circumstances to pass such a sentence or to issue such process, or if the warrant was issued by a court or justice or other person having authority under any circumstances to issue such a warrant, it is immaterial whether the court or justice or person had or had not authority to pass the sentence or issue the process or warrant in the particular case; unless the person executing the same knows that the sentence or process or warrant was in fact passed or issued without authority." (emphasis added)

117 The primary judge found that the Federal Circuit Court was not "any court" for the purposes of these provisions.<sup>187</sup> According to his Honour, this conclusion followed from s 35(1) of the *Acts Interpretation Act 1954* (Qld) which provides,

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<sup>185</sup> *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [513]-[514].

<sup>186</sup> See above at [34].

<sup>187</sup> *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [527], [548].

inter alia, that a reference in an Act to an "entity"<sup>188</sup> is a reference to such an entity "in and for Queensland" and a reference to an "other thing" is a reference to such an other thing "in and of Queensland".<sup>189</sup> According to the primary judge, while the Federal Circuit Court was an entity "in" Queensland, it was not an entity "for" Queensland.<sup>190</sup> Similarly, his Honour accepted that a court and a warrant could be a "thing" but found that a warrant issued by a federal court exercising federal jurisdiction could not be characterised as a warrant "of" Queensland issued by a court "of" Queensland.<sup>191</sup>

118 In this Court, Queensland contended that s 35 was displaced by a contrary intention that can be discerned from a consideration of the context, purpose and text of the *Criminal Code*.<sup>192</sup> Queensland noted that ss 249 and 250 appear in Ch 26 of the *Criminal Code*, which is entitled "[a]ssaults and violence to the person generally – justification and excuse". The first substantive provision of Ch 26 provides that an assault is unlawful and constitutes an offence unless it is authorised or justified or excused by law.<sup>193</sup> Chapter 30 of the *Criminal Code* is entitled "[a]ssaults" and defines various offences against the person including common assault.<sup>194</sup> Chapter 33 defines offences against liberty including deprivation of liberty.<sup>195</sup> Sections 12 to 14 deal with the territorial connection such offences are required to have within Queensland. In particular, s 12(1) provides that the *Criminal Code* "applies to every person who does an act in Queensland ... which ... constitutes an offence".<sup>196</sup>

119 Queensland submitted that these provisions suggested that s 249 and its cognate provisions were intended to apply to all attempts to execute warrants in

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188 *Acts Interpretation Act 1954* (Qld), s 35(1)(a).

189 *Acts Interpretation Act*, s 35(1)(b).

190 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [542].

191 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [544].

192 *Acts Interpretation Act*, s 4.

193 *Criminal Code* (Qld), s 246(1).

194 *Criminal Code*, s 335.

195 *Criminal Code*, s 355.

196 *Criminal Code*, s 12(1).



Queensland on behalf of any court of any country or jurisdiction. Queensland submitted that, like the provisions considered in *Birmingham University and Epsom College v Federal Commissioner of Taxation*,<sup>197</sup> ss 249 and 250 operate as an exemption to the liability imposed for acts in Queensland and should be construed commensurate with that liability, rather than by applying s 35(1) of the *Acts Interpretation Act* directly to ss 249 and 250. Queensland contended that the primary judge's approach meant that any officer who executed an apparently valid warrant of any federal court, or even a Queensland State court exercising federal jurisdiction, would be exposed to criminal liability for assault and deprivation of liberty. Further, it submitted that the primary judge's construction would otherwise discourage police officers and correctional officers from executing warrants of inferior federal courts in case they were subsequently held to be invalid.

120 Queensland's submission, that the only territorial nexus that s 249 and its cognate provisions such as s 250 are required to have to Queensland is that the acts which they justify must occur in Queensland, should be rejected. There is, for instance, nothing to suggest that the *Criminal Code* was directed to justifying any act committed in Queensland by officials charged by a law of another country with executing orders or warrants issued by courts of that country.

121 Queensland's argument derives no assistance from *Birmingham University*. In *Birmingham University* an analogous provision to s 35 was found to be inapplicable as it would render a tax exemption for charitable institutions only applicable to such institutions "in and of the Commonwealth" and not overseas charitable institutions. The tax liability in *Birmingham University* was imposed on all income in the case of a resident and in the case of a non-resident on all Australian income which was "not exempt income". Thus, the scope of the exemption for charitable institutions entered into the very definition of the tax liability.<sup>198</sup> It would have distorted the scheme of the legislation to apply the analogous provision to s 35 of the *Acts Interpretation Act* as excluding overseas charitable institutions from an exemption from liability for overseas residents in respect of their Australian income.

122 As far as Queensland State courts exercising federal jurisdiction are concerned, the primary judge held that the court that issued the warrant for the purposes of s 249 must be a court "in and for" Queensland "and the jurisdiction pursuant to which the warrant was issued must be jurisdiction 'in and of'

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<sup>197</sup> (1938) 60 CLR 572.

<sup>198</sup> *Birmingham University and Epsom College v Federal Commissioner of Taxation* (1938) 60 CLR 572 at 580.

Queensland".<sup>199</sup> The latter observation was not necessary for his Honour's decision on this point and should not be accepted. The "hinge"<sup>200</sup> or "central conception"<sup>201</sup> upon which s 249 operates to engage s 35 of the *Acts Interpretation Act* is the court that issues the warrant and not the jurisdiction that court possesses. To ascertain the relevant territorial nexus to Queensland, s 35 needs to be applied only to the phrase "any court" in s 249 and not to the references to a court's "jurisdiction" in s 250.<sup>202</sup> The term "jurisdiction" in s 250 is simply a reference to the jurisdiction possessed by courts that fall within s 249, which includes a Queensland State court exercising federal jurisdiction. Such a court would still be a court "in", "for" and "of" Queensland.

123        Otherwise, there is no realistic basis for Queensland's concern about criminal liability attaching to those persons charged by law with executing warrants or orders of inferior federal courts. Officers who are charged with executing warrants or orders would not be criminally responsible if they acted in "obedience to the order of a competent authority which he or she is bound by law to obey, unless the order is manifestly unlawful".<sup>203</sup> It is not necessary to resolve whether the phrase "competent authority" requires the same nexus to Queensland as the phrase "any court" in s 249.

124        Weighing strongly against the finding of a contrary indication to displace s 35 of the *Acts Interpretation Act* is that other provisions of the *Criminal Code* refer to "any court" in contexts that make it clear that the phrase refers only to a Queensland State court. For example, the *Criminal Code* specifies various offences regarding interference with the course of justice, which are framed by reference to "any court". This includes: preventing a witness from attending before any court;<sup>204</sup> obstructing or resisting the execution of an order or warrant issued by any court of

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**199** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [546].

**200** *BHP Group Ltd v Impiombato* (2022) 276 CLR 611 at 636-637 [59], citing *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 at 162 [36] and *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274 at 282-283 [22].

**201** *DRJ v Commissioner of Victims Rights [No 2]* (2020) 103 NSWLR 692 at 732 [157].

**202** *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 422.

**203** *Criminal Code*, s 31(1)(b).

**204** *Criminal Code*, s 130.

justice;<sup>205</sup> and disobeying any order issued by any court of justice.<sup>206</sup> The *Criminal Code* also makes it an offence for, inter alia, an officer "of any court" to omit or refuse to do any act which it is their duty to do by virtue of their employment.<sup>207</sup> The Queensland Parliament can be taken not to have legislated for the performance of duties by officers of federal courts or to have established offences of interfering with the processes of federal courts.

125 Further, some parts of the *Criminal Code* make provision for the conduct of criminal proceedings "in any court", such as the presenting of indictments for indictable offences.<sup>208</sup> These are clearly not references to any federal court. In contrast, there are express references to the Commonwealth in other contexts in the *Criminal Code*. For example, the definition of "law enforcement agency" includes "any other entity of ... the Commonwealth",<sup>209</sup> the definition of consorting includes an offence against the Commonwealth *Criminal Code*,<sup>210</sup> and the Commonwealth is expressly included as a "government entity" that can be the object of sabotage.<sup>211</sup>

126 The *Acts Interpretation Act* provides that its application "may be displaced, wholly or partly, by a contrary intention appearing in any Act".<sup>212</sup> The identification of a contrary intention is to be undertaken using both "judge-made rules of construction"<sup>213</sup> and the rules of construction specified in statutes, including the *Acts Interpretation Act* itself. Such rules include the necessity to

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205 *Criminal Code*, s 148.

206 *Criminal Code*, s 205.

207 *Criminal Code*, s 200

208 *Criminal Code*, ss 5, 561(1), 563(2).

209 *Criminal Code*, s 1.

210 *Criminal Code*, s 77(d).

211 *Criminal Code*, s 469A(5).

212 *Acts Interpretation Act*, s 4.

213 *DRJ* (2020) 103 NSWLR 692 at 720-721 [115].

construe the legislation as a whole in context<sup>214</sup> and the necessity to construe the legislation so as to give effect to its object or purpose.<sup>215</sup> Queensland's submission does not derive support from any of these rules of construction. Section 249 of the *Criminal Code* was not engaged by the warrant issued by Judge Vasta and therefore ss 249 and 250 did not render the actions of the Queensland police officers or the Queensland correctional officers in detaining Mr Stradford lawful.

127 This aspect of Queensland's appeal should be rejected.

*Is there any defence for reliance on an invalid court order or warrant?*

128 In *Commissioner for Railways (NSW) v Cavanough*<sup>216</sup> Rich, Dixon, Evatt and McTiernan JJ approved the statement in *Dr Drury's Case*<sup>217</sup> that "[a]cts done according to the exigency of a judicial order afterwards reversed are protected: they are 'acts done in the execution of justice, which are compulsive'".<sup>218</sup> This principle was explained by Allsop P in *Kable v New South Wales*<sup>219</sup> as "rooted in the order and underlying process being judicial"<sup>220</sup> and an aspect of the "protection of the authority of judicial proceedings".<sup>221</sup> Neither *Cavanough* nor *Dr Drury's Case* concerned the efficacy of acts undertaken pursuant to an order of an inferior court later found to be invalid by reason of a defect in jurisdiction. Even so, Allsop P's explanation for the principle those cases articulated resonates in ascertaining the appropriate common law principle applicable to such acts.

129 One historical difficulty identified by the primary judge in ascertaining the existence and scope of any common law principle justifying tortious acts

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**214** See, eg, *Schmidt v Government Insurance Office of New South Wales* [1973] 1 NSWLR 59 at 67.

**215** See, eg, *Acts Interpretation Act*, s 14A(1).

**216** (1935) 53 CLR 220.

**217** (1610) 8 Co Rep 141(b) [77 ER 688].

**218** *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225, quoting *Dr Drury's Case* (1610) 8 Co Rep 141(b) at 143(a) [77 ER 688 at 691].

**219** (2012) 293 ALR 719.

**220** *Kable v New South Wales* (2012) 293 ALR 719 at 728 [27].

**221** *Kable v New South Wales* (2012) 293 ALR 719 at 730 [35].

undertaken pursuant to an invalid warrant or order of an inferior court was the passage of the *Constables Protection Act 1750*.<sup>222</sup> This legislation gave protection to "any constable, headborough or other officer, or ... any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace ... notwithstanding any defect of jurisdiction".<sup>223</sup> The primary judge observed that this legislation (or its equivalents) justifies the exercise of caution in interpreting authorities from the United Kingdom (and Australia) on this topic as they may be based on the "suppressed premise" that the protection afforded to constables and others acting in obedience to court orders or warrants was based on the *Constables Protection Act* and not the common law.<sup>224</sup>

130 Nevertheless, that the common law recognises a defence justifying tortious acts undertaken in the performance of a duty of executing or enforcing a warrant or order issued by an inferior court that is found to be defective is supported by dicta of Starke J in *Corbett v The King*<sup>225</sup> and decisions of intermediate courts of appeal<sup>226</sup> that cited English decisions predating the *Constables Protection Act* acknowledging the existence of some form of defence to that effect.<sup>227</sup> The existence of such a defence is also supported by dicta in this Court<sup>228</sup> and intermediate courts of appeal<sup>229</sup> that cited post-*Constables Protection Act*

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222 24 Geo II c 44.

223 *Constables Protection Act 1750* (24 Geo II c 44), s 6.

224 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [416]-[417]. See also *Kable v New South Wales* (2012) 293 ALR 719 at 733-734 [48], 760 [164].

225 (1932) 47 CLR 317 at 339.

226 *Ward v Murphy* (1937) 38 SR (NSW) 85; *Smith v Collis* (1910) 10 SR (NSW) 800.

227 See, eg, *Moravia v Sloper* (1737) Willes 30 [125 ER 1039], cited in *Corbett v The King* (1932) 47 CLR 317 at 339 and *Ward v Murphy* (1937) 38 SR (NSW) 85 at 95. See also *Olliet v Bessey* (1682) T Jones 214 [84 ER 1223], cited in *Smith v Collis* (1910) 10 SR (NSW) 800 at 813.

228 *Posner* (1946) 74 CLR 461 at 476, 481-482; *Mooney v Commissioners of Taxation* (1905) 3 CLR 221 at 241-242.

229 See, eg, *Raven* (1894) 6 QLJ 166.

authorities<sup>230</sup> that in turn cited authorities predating that Act which acknowledge the existence of such a defence.<sup>231</sup> In *Robertson*<sup>232</sup> the Full Court of the Supreme Court of Western Australia recognised the existence of such a defence.<sup>233</sup>

131 To the extent that Mr Stradford sought to rely on the decision of the Full Court of the Supreme Court of New South Wales in *Feather v Rogers*<sup>234</sup> as support for the proposition that, without the passage of the *Constables Protection Act*, there would be no immunity or defence of any kind for officers who rely on invalid warrants issued by inferior courts,<sup>235</sup> that reliance is misplaced. *Feather v Rogers* should be understood as only concerned with a search warrant issued by a court; a search warrant is an order "not issued in the course of judicial process, but having the true legal character of an executive warrant".<sup>236</sup> In contrast, these appeals concern an order and warrant that were issued in the course of the judicial process.

132 Notwithstanding the doubts of some,<sup>237</sup> the lineage of authorities just noted and the necessity for inferior courts to function by having their orders enforced and warrants executed justifies an acceptance of the existence of a principle excusing some tortious acts undertaken in execution of such orders or warrants even though they are subsequently found to be invalid. That said, it remains necessary to consider: who is entitled to the benefit of the defence and for what conduct?

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230 *Andrews v Marris* (1841) 1 QB 3 [113 ER 1030], cited in *Posner* (1946) 74 CLR 461 at 481-482 and *Mooney* (1905) 3 CLR 221 at 242. See also *Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239, cited in *Posner* (1946) 74 CLR 461 at 476 and *Raven* (1894) 6 QJL 166 at 168.

231 *Moravia v Sloper* (1737) Willes 30 [125 ER 1039], cited in *Andrews v Marris* (1841) 1 QB 3 at 17 [113 ER 1030 at 1036] and *Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239 at 263. See also *Morse v James* (1738) Willes 122 [125 ER 1089], cited in *Andrews v Marris* (1841) 1 QB 3 at 17 [113 ER 1030 at 1036].

232 (1997) 92 A Crim R 115.

233 *Robertson* (1997) 92 A Crim R 115 at 122-123.

234 (1909) 9 SR (NSW) 192.

235 *Feather v Rogers* (1909) 9 SR (NSW) 192 at 196-198, 200.

236 *Kable v New South Wales* (2012) 293 ALR 719 at 730 [35]; see also 760 [165].

237 See, eg, Aronson and Whitmore, *Public Torts and Contracts* (1982) at 151.

133 The Commonwealth sought acceptance of a broad principle justifying acts done in the execution of an invalid order. Queensland's submission was not relevantly different. Mr Stradford sought to uphold the primary judge's confinement of any such protection to ministerial officers of the courts. For the reasons that follow, the primary judge's approach is too narrow and that of the Commonwealth (and Queensland) is too wide. The common law's protection is engaged by the existence of an obligation imposed by law to enforce an order or warrant. The persons who may be subject to such a legal obligation are not limited to those who are amenable to supervision and punishment by the court. However, mere reliance on, or acting in accordance with, an order or warrant as a party may do is not sufficient.

*Authorities pre and post the Constables Protection Act*

134 Queensland's submissions focussed on the common law position prior to the enactment of the *Constables Protection Act* and identified two lines of authority. In one line of authority, an officer who was bound to execute a warrant was not liable for acts done in execution of an apparently valid warrant, even though it exceeded the court's subject matter jurisdiction, where the officer had no means of knowledge of the defect.<sup>238</sup> In the other line of authority, the relevant officer was held strictly liable for acts done in execution of an apparently valid warrant when the court had no subject matter jurisdiction ("jurisdiction of the cause").<sup>239</sup> In this second line of authority, the officers could not rely on the warrant alone. They had to show that the court had general "jurisdiction of the cause" because there is no "necessity to obey him who is not [j]udge of the cause, no more than it is a mere stranger".<sup>240</sup> However, such officers were not liable for an invalid

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**238** "[I]t being impossible for them to know whether the cause of action did arise within their jurisdiction": *Olliet v Bessey* (1682) T Jones 214 at 215 [84 ER 1223 at 1224]; see also *Demer v Cook* (1903) 88 LT 629 at 631.

**239** *The Case of the Marshalsea* (1612) 10 Co Rep 68b [77 ER 1027]; *Morse v James* (1738) Willes 122 at 127-128 [125 ER 1089 at 1092]; *Moravia v Sloper* (1737) Willes 30 at 37-38 [125 ER 1039 at 1044]. See also *Morrell v Martin* (1841) 3 Man & G 581 [133 ER 1273] (not decided under the *Constables Protection Act*).

**240** *The Case of the Marshalsea* (1612) 10 Co Rep 68b at 76a-76b [77 ER 1027 at 1038-1039].

order issued within subject matter jurisdiction (ie, an order in excess of jurisdiction<sup>241</sup>), unless perhaps they had knowledge of the defect.<sup>242</sup>

135 Although it may be doubted that all the cases identified can be categorised so easily, three aspects of these cases are significant. First, on any view there was at least some protection afforded to officers for executing invalid orders or warrants. In his submissions, Mr Stradford referred to cases in this period that held a constable or gaoler liable, notwithstanding that they were executing an apparently valid order of an inferior court, as authority denying the existence of a common law defence of the kind under consideration. However, this submission confuses debate about the scope of the protection with the existence of the protection. None of the cases identified by the parties accepted that an officer was liable for executing an invalid order or warrant that was within the court's subject matter jurisdiction where the officer had no knowledge of the defect.<sup>243</sup>

136 Second, such protection as existed was expressed to be conferred on so-called "ministerial officers" of the court, which included constables.<sup>244</sup> However, some cases accepted that the protection was not confined to such "officers" and extended to gaolers.<sup>245</sup>

137 The reference to "constables" in the context of these cases warrants explanation. During the period up to and for a time after the passage of the *Constables Protection Act*, England did not have any professional police force of the kind that exists today. Instead, the role of keeping the peace was assigned to the justices of the peace operating under the *Justices of the Peace Act 1361*.<sup>246</sup> The

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**241** *Hill v Bateman* (1726) 2 Str 710 [93 ER 800]; *Webb v Batcheler* (1675) Freem KB 396 [89 ER 294]; *Webb v Batcheler* (1675) Freem KB 407 [89 ER 302]; *Moravia v Sloper* (1737) Willes 30 at 37-38 [125 ER 1039 at 1044].

**242** *Shergold v Holloway* (1735) Sess Cas KB 154 at 155 [93 ER 156 at 157].

**243** See, eg, *Moravia v Sloper* (1737) Willes 30 at 34-35 [125 ER 1039 at 1041-1042]; *Shergold v Holloway* (1735) Sess Cas KB 154 at 155 [93 ER 156 at 157].

**244** See *Morse v James* (1738) Willes 122 at 124-125 [125 ER 1089 at 1090-1091]; *Webb v Batcheler* (1675) Freem KB 396 [89 ER 294]; *Webb v Batcheler* (1675) Freem KB 407 [89 ER 302].

**245** *Ollet v Bessey* (1682) T Jones 214 [84 ER 1223]; *Smith v Dr Bouchier* (1734) 2 Str 993 [93 ER 989].

**246** 34 Edw III c 1.



office of constable was an ancient one of some scope, but by the 16th and 17th centuries constables were mainly responsible for keeping the peace and did so under the supervision of the justices of the peace.<sup>247</sup> By 1689, constables were mostly appointed by justices,<sup>248</sup> although there were limits on the power of justices to do so.<sup>249</sup> Thus, constables were described as a "proper officer of a justice of the peace" and as such were bound to execute lawful warrants issued by the justices.<sup>250</sup> As officers of the court, constables were liable to the exercise of the court's power to punish them for contempt for dereliction of their duties.<sup>251</sup>

138 Third, all the cases recognised the difficulties resulting from the imposition of liability for acts done in executing invalid orders or warrants on those who were obliged to execute them.<sup>252</sup> Thus, in *Moravia v Sloper*<sup>253</sup> the Lord Chief Justice described the position of sheriffs and officers as follows:

"For the inferior officer is punishable as a minister of the Court if he do not obey [its] commands; and it would be unjust that a man should be punished if he does not do a thing and should be liable to an action if he does."

139 It was in this context that the *Constables Protection Act* was passed. The *Constables Protection Act* sought to address the hardship occasioned by the common law, which effectively imposed a duty on constables and other officers to "inquire and ascertain whether the justice had jurisdiction or power" to make the

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247 Skyrme, *History of the Justices of Peace* (1991), vol 1 at 164; Blackstone and Ewell, *Blackstone's Commentaries* (1882), ch 9 at 61.

248 Skyrme, *History of the Justices of Peace* (1991), vol 2 at 50.

249 *R v Wakeford* (1727) Sess Cas KB 98 [93 ER 100].

250 Chitty, *A Summary of the Office and Duties of Constables*, 2nd ed (1837) at 108-109. See also Archbold, *The Justice of the Peace and Parish Officer* (1840), vol 1 at 115-116; Skyrme, *History of the Justices of Peace* (1991), vol 1 at 254.

251 See Australian Law Reform Commission, *Contempt*, Report No 35 (1987) at 122-123 [227]. See also *Re Sheriff of Surrey* (1860) 2 F & F 236 [175 ER 1039].

252 See, eg, *Webb v Batchelor* (1675) Freem KB 396 [89 ER 294]; *Webb v Batchelor* (1675) Freem KB 407 [89 ER 302]; *Olliet v Bessey* (1682) T Jones 214 [84 ER 1223].

253 (1737) Willes 30 at 34 [125 ER 1039 at 1042].

order or warrant they had to enforce or execute.<sup>254</sup> The "officers" found to be afforded protection by the *Constables Protection Act* included gaolers,<sup>255</sup> as well as churchwardens, overseers of the poor and rate collectors.<sup>256</sup>

140 Cases decided in the United Kingdom and this country since the passage of the *Constables Protection Act* continued to acknowledge the difficulty that court officers, who are bound to execute orders or warrants, would face if they were required to investigate whether the orders or warrants were valid. However, the position of these officers was contrasted with the position of *a party* seeking to rely on the orders. For example, in *Andrews v Marris*,<sup>257</sup> Lord Denman CJ referred to the position of a "serjeant" of the Caistor Court of Requests as follows:

"He is the ministerial officer of the commissioners, *bound to execute their warrants, and having no means whatever of ascertaining whether they issue upon valid judgments or are otherwise sustainable or not.* There would therefore be something very unreasonable in the law if it placed him in the position of being punishable by the Court for disobedience, and at the same time suable by the party for obedience to the warrant. The law, however, is not so. His situation is exactly analogous to that of the sheriff in respect of process from a Superior Court; and it is *the well known distinction between the cases of the party* and of the sheriff or his officer, that the former, to justify his taking body or goods under process, must [show] the judgment in pleading, as well as the writ; but for the latter it is enough to [show] the writ only; *Cotes v Michill*,<sup>258</sup> *Moravia v Sloper*.<sup>259</sup>" (emphasis added)

141 This passage from *Andrews v Marris* was cited with approval by Dixon J in *Posner v Collector for Inter-State Persons (Vict)*<sup>260</sup> and Griffith CJ in *Mooney v*

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254 Chitty, *A Summary of the Office and Duties of Constables*, 2nd ed (1837) at 120.

255 *Butt v Newman* (1819) Gow 97 [171 ER 850].

256 *Harper v Carr* (1797) 7 TR 270 at 274-275 [101 ER 970 at 972]; *Pedley v Davis* (1861) 10 CB (NS) 492 [142 ER 544].

257 (1841) 1 QB 3 at 16-17 [113 ER 1030 at 1036].

258 (1681) 3 Lev 20 [83 ER 555].

259 (1737) Willes 30 at 34 [125 ER 1039 at 1041].

260 (1946) 74 CLR 461 at 481-482.

*Commissioners of Taxation*,<sup>261</sup> again in the context of differentiating between a party seeking to take advantage of a defective order or warrant and persons (apparently) bound to give effect to it. This distinction was also highlighted by Starke J in *Posner*<sup>262</sup> and Sir Samuel Griffith as Chief Justice of Queensland in *Raven v Burnett*.<sup>263</sup>

142        These authorities did not differentiate between a court officer bound by law to execute an order or warrant and a person similarly bound but who was not a court officer liable to the supervision and punishment of the courts. However, those circumstances were treated as effectively the same by Willes J in giving advice to the House of Lords in *Mayor and Aldermen of the City of London v Cox*.<sup>264</sup> In describing a garnishee, who pays under compulsion of an attachment issued without jurisdiction, Willes J said that the garnishee "not being party or privy to the wrong, and paying honestly in obedience to process of law apparently valid, has the same protection [against the creditor] as an officer who executes process apparently regular, without knowing of the want of jurisdiction; and who, not being in a condition to resist, is protected, not because the proceeding was well founded, but notwithstanding it was ill founded".<sup>265</sup> Unlike a party, what bound the garnishee and the court officer was their obligation to execute an apparently valid court order.

143        Similarly, in *Ward v Murphy*<sup>266</sup> the Full Court of the Supreme Court of New South Wales considered the position of a sheriff, who was not included in relevant legislation as one of the class of officers who had to obey the order and writs of the Court, and did not have the "benefit of the rule of law [protecting such officers] laid down by the authorities".<sup>267</sup> Despite this position, the sheriff was found to be entitled to the benefit of that rule of law by reason of the "ministerial duties" cast

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<sup>261</sup> (1905) 3 CLR 221 at 241-242

<sup>262</sup> (1946) 74 CLR 461 at 476.

<sup>263</sup> (1894) 6 QLJ 166 at 168.

<sup>264</sup> (1867) LR 2 HL 239 at 269.

<sup>265</sup> *Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239 at 269.

<sup>266</sup> (1937) 38 SR (NSW) 85.

<sup>267</sup> *Ward v Murphy* (1937) 38 SR (NSW) 85 at 98.

upon him by the *Prisons Act 1899* (NSW).<sup>268</sup> The *Prisons Act* vested in the sheriff custody of persons imprisoned under mesne process, although the sheriff was not directly named in the process.<sup>269</sup> The Court considered that the sheriff's neglect of his duties under the *Prisons Act* "would render him liable to an action for damages and no doubt to other proceedings at the instance of the Court itself".<sup>270</sup>

144       Reference has already been made to ss 249 and 250 of the *Criminal Code*. They and their cognate provisions<sup>271</sup> replicate the corresponding provisions of Sir Samuel Griffith's *Draft of a Code of Criminal Law*.<sup>272</sup> Sir Samuel Griffith's Draft was in turn prepared having regard to the terms of a Draft Code submitted as an appendix to the report of a Royal Commission in the United Kingdom which was appointed to consider the law relating to indictable offences.<sup>273</sup> There were differences between the drafts as to the scope of the protection that was offered, but of present significance is that both drafts did not confine the category of persons who were able to invoke the provisions to ministerial officers of the courts. Like the *Criminal Code*, Sir Samuel Griffith's Draft provided protection to those "charged by law with the duty of executing a lawful warrant" (or sentence or process).<sup>274</sup> The Draft Code that was an appendix to the report of the Royal Commission provided protection to "ministerial officer[s]" of courts, as well as gaolers in relation to the execution of sentences and lawful process,<sup>275</sup> and "[e]very

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**268** See *Prisons Act 1899* (NSW), s 6; *Ward v Murphy* (1937) 38 SR (NSW) 85 at 99.

**269** *Ward v Murphy* (1937) 38 SR (NSW) 85 at 92-93.

**270** *Ward v Murphy* (1937) 38 SR (NSW) 85 at 99.

**271** *Criminal Code*, ss 247-251.

**272** Griffith, *Draft of a Code of Criminal Law* (1897) at 108 (ss 254-257).

**273** Sections 256 to 260 of Sir Samuel Griffith's *Draft of a Code of Criminal Law* were based on ss 28 to 31 of a Bill introduced to the House of Commons, which were in turn based on ss 25 to 28 of a Draft Code which had been prepared as an appendix to the report of a Royal Commission appointed to consider the law relating to indictable offences. See Griffith, *Draft of a Code of Criminal Law* (1897) at iv, 108-109.

**274** Griffith, *Draft of a Code of Criminal Law* (1897) at 108.

**275** United Kingdom, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (1879) [C-2345] at 68.

one duly authorised to execute a lawful warrant".<sup>276</sup> Both Sir Samuel Griffith and the Royal Commissioners understood these aspects of their drafts to represent the state of the common law.<sup>277</sup>

*Who is entitled to protection for enforcing an invalid court order or warrant?*

145 As noted, prior to the enactment of the *Constables Protection Act*, the common law acknowledged the hardship that could be occasioned by imposing liability on those who were duty-bound to execute or enforce orders or warrants that were found to be invalid. While the common law did offer some protection, it was uncertain in scope. The protection was mostly expressed to apply to officers of the court acting ministerially who were amenable to the court's supervision and powers of punishment, such as sheriffs and constables.

146 Mr Stradford submitted that any protection that exists for police officers and correctional officers who commit torts in executing invalid inferior court warrants or orders has only been provided by statute, namely the *Constables Protection Act* and its successors. Leaving aside the common law's recognition of some protection for gaolers,<sup>278</sup> Mr Stradford's submission overlooks the circumstance that, prior to the *Constables Protection Act*, there were no "police officers" executing court orders or warrants. Instead, as explained, that duty was performed by constables who happened to be court officers under the control of justices of the peace. The position must now be considered in the present day where the duties of constables have been assumed by police officers,<sup>279</sup> and the duties of gaolers assumed by correctional officers,<sup>280</sup> with neither under the control of courts or amenable to their punishment.

147 Whether an officer who is charged by law with the duty of enforcing court orders or executing warrants is or is not amenable to punishment by the court for

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**276** United Kingdom, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (1879) [C-2345] at 68.

**277** See Griffith, *Draft of a Code of Criminal Law* (1897) at iv; United Kingdom, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (1879) [C-2345] at 18, 68.

**278** *Olliet v Bessey* (1682) T Jones 214 [84 ER 1223]; *Smith v Dr Bouchier* (1734) 2 Str 993 [93 ER 989].

**279** See, eg, *Police Service Administration Act 1990* (Qld), s 3.2(2)-(3).

**280** See, eg, *Corrective Services Act 2006* (Qld), Ch 2, Pt 1.

contempt is an unsatisfactory basis for differentiating between those who have the benefit of a defence relating to the enforcement and execution of invalid orders of an inferior court and those who do not. In reality, neither police officers nor correctional officers are any less accountable than the other and each has a system of discipline outside of the courts.<sup>281</sup> Both the Sheriff and the Marshal of the Federal Circuit Court were required to be engaged under the *Public Service Act 1999* (Cth).<sup>282</sup> The Deputy Sheriffs and the Deputy Marshals could be so engaged.<sup>283</sup> The *Public Service Act* has an extensive regime dealing with the discipline of persons appointed under it.<sup>284</sup> How such a regime would interact with the exercise of the court's powers to punish such officers for contempt is far from clear. In any event the court's powers are rarely used. According to the Australian Law Reform Commission, as of 1987, there was no reported case in the 20th century of the court's power to punish a sheriff or marshal for contempt ever being exercised.<sup>285</sup>

148 This Court cannot simply adopt the terms of the *Constables Protection Act* as a statement of the common law. Equally, the *Constables Protection Act* affords no excuse to freeze the common law's development in the uncertain and unsatisfactory state that existed as at 1750. The public interest that the legislation embodies, being the conferral of protection from liability on those who act in obedience to a court order and who bear a "duty to execute a bad warrant",<sup>286</sup> is not the exclusive concern of the legislature. The protection of the authority of judicial proceedings,<sup>287</sup> that is the role of the courts in quelling justiciable controversies, is of no lesser importance now than it was in the past.

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**281** See *Police Service Administration Act*, Pts 6 and 7. See also *Corrective Services Act*, s 275; *Public Service Act 2008* (Qld), Ch 6.

**282** *Federal Circuit Court of Australia Act*, ss 106(1), 109(1).

**283** *Federal Circuit Court of Australia Act*, ss 107(1), 110(1).

**284** See *Public Service Act 1999* (Cth), s 13; *Public Service Regulations 2023* (Cth), Pt 2; *Australian Public Service Commissioner's Directions 2022* (Cth), Pt 7.

**285** Australian Law Reform Commission, *Contempt*, Report No 35 (1987) at 122-123 [227].

**286** *Corbett v The King* (1932) 47 CLR 317 at 328.

**287** *Kable v New South Wales* (2012) 293 ALR 719 at 730 [35].

149 The authority of judicial proceedings is best served by confirming that the common law affords some protection from civil liability to those who have a legal duty to enforce or execute orders or warrants made or issued by a court in judicial proceedings, including an inferior court, even if those orders or warrants are invalid. This is so regardless of whether such persons are amenable to the supervision and punishment of the court as court officers. To perform their role effectively, courts must have their orders enforced and that must be done by officials not subject to the unreasonable burden of having to investigate the validity of the orders or warrants presented to them.

150 Accordingly, the benefit of this protection is conferred on those charged with a legal duty to enforce or execute court orders or warrants made or issued by a court in judicial proceedings. For the purposes of resolving these appeals, it suffices to state that such proceedings are those in this Court and in other courts referred to in s 71 of the *Constitution*, including any court of a Territory and any "court of a State" as referred to in s 77(iii) of the *Constitution* (irrespective of whether those courts are invested with federal jurisdiction). As with judicial immunity, it is not necessary to determine whether this protection extends to orders made by any other court in quelling legal controversies.

*The scope of the protection for executing invalid orders or warrants*

151 The scope of legal authority conferred by a valid order or warrant of a court will depend on its terms. As noted, that authorisation will be effective for acts done pursuant to the order or warrant prior to it being set aside.<sup>288</sup> However, a valid order or warrant will not protect the acts of an official charged with its enforcement or execution from tortious liability if they exceed the authority the order or warrant confers.<sup>289</sup> Thus, any analysis of the scope of the protection available to such officials who, in discharge of their duty, enforce or execute an invalid order or warrant must accept that it is not unreasonable to expect the official to have scrutinised the order or warrant to ascertain the authority it purports to confer.

152 In *Corbett v The King* Starke J observed that a police officer, like a sheriff, "cannot justify under his warrant if *on its face it is such as no law authori[s]es*"

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**288** See *Cavanough* (1935) 53 CLR 220.

**289** See, eg, *Garland v Carlisle* (1837) 4 Cl & F 693 [7 ER 263]; *Harvey v Birrell* (1878) 12 SALR 58; *O'Connor v Sheriff of Queensland* (1892) 4 QLJ 213; *Corbett v The King* (1932) 47 CLR 317 at 339; Aronson and Whitmore, *Public Torts and Contracts* (1982) at 152.

(emphasis added).<sup>290</sup> Similarly, in *Ward v Murphy* Davidson J concluded that "the sheriff is not liable for executing a writ not *bad on the face of it* although issued without jurisdiction unless he did know of the defect"<sup>291</sup> and that "as the sheriff could not know more than appeared *on the face of the record* [ie, the writ or order], the absence of jurisdiction would have to appear on the face of such record if it were inspected" (emphasis added).<sup>292</sup>

153       The scope of the protection that may be afforded by the common law to someone bound to execute an order or warrant of an inferior court that is found to be affected by jurisdictional error was not the subject of detailed submissions in this Court. That said, a description of the scope of the immunity by reference to whether an invalid order or warrant was "bad on the face of it", such that no law applying to the relevant court justifies it, conforms with the rationale for affording protection from civil liability. Even so, questions still remain as to what knowledge of the scope of the court's jurisdiction is imputed to the officer and the effect of any knowledge extraneous to the order or warrant that the official may have acquired about some defect in the court's jurisdiction or power to make the particular order or issue the particular warrant. It is unnecessary to resolve those questions to determine these appeals. It suffices to observe that, if the order or warrant purports to authorise the official to give effect to an order of a "kind"<sup>293</sup> that is apparent on the face of the order to be beyond the power of the relevant court to grant, then the official will not be protected.

154       As a judge of the Federal Circuit Court, Judge Vasta was empowered to make an imprisonment order and issue a warrant of the kind that his Honour purported to make and issue, respectively. There was nothing apparent on the face of the imprisonment order or the warrant that could raise any issue about their validity. There was no finding that anything was conveyed to the MSS Guards, the Queensland police officers or the Queensland correctional officers that would warrant their having doubt about the validity of the imprisonment order or the warrant.

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**290** *Corbett v The King* (1932) 47 CLR 317 at 339.

**291** *Ward v Murphy* (1937) 38 SR (NSW) 85 at 97.

**292** *Ward v Murphy* (1937) 38 SR (NSW) 85 at 97; see also *Smith v Collis* (1910) 10 SR (NSW) 800 at 813.

**293** *Garthwaite* [1964] P 356 at 387.



*The Queensland police officers and the Queensland correctional officers are immune from suit*

155 The primary judge found that the Queensland police officers and the Queensland correctional officers who detained Mr Stradford were not officers of the Federal Circuit Court. More relevantly, his Honour accepted that "they may have been obliged to assist in the execution and enforcement of warrants issued by judges, including judges of the [Federal] Circuit Court".<sup>294</sup> In fact, it was the common premise of the argument concerning s 249 of the *Criminal Code* that the Queensland police officers and the Queensland correctional officers were "charged by law with the duty" of enforcing the imprisonment order and executing the warrant purporting to authorise Mr Stradford's imprisonment. They were named in the warrant and commanded to take custody of Mr Stradford and detain him.

156 As persons charged with a legal duty to enforce court orders and execute warrants issued by courts in judicial proceedings, including those made by the Federal Circuit Court purporting to authorise the imprisonment of Mr Stradford, the Queensland police officers and the Queensland correctional officers were entitled to protection for acts undertaken in discharge of that duty, even though the imprisonment order and the warrant were invalid. The scope of that protection is such that they are not liable to Mr Stradford for false imprisonment.

*The MSS Guards (and the Commonwealth) are immune from suit*

157 The primary judge found that the MSS Guards were employed by MSS Security which had contracted with the Commonwealth to provide "consultancy and/or professional services" at various sites including the Harry Gibbs Commonwealth Law Courts Building in Queensland.<sup>295</sup> The primary judge went on to note that, although one of the MSS Guards reported to the Marshal of the Federal Circuit Court, it could not be said that the MSS Guard was subject to the Marshal's control or the control of any other officer of the Federal Circuit Court.<sup>296</sup> The MSS Guards were not persons authorised under the *Federal Circuit Court of Australia Act* to assist the Marshal or a Deputy Marshal in the

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**294** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [411].

**295** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [403].

**296** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [406].

exercise of their powers or the performance of their functions.<sup>297</sup> The MSS Guards were also not named in the warrant.

158       The agreement between MSS Security and the Commonwealth included "[i]n court guarding as directed" among the duties of guards. Further, it is to be recalled that, at the conclusion of the hearing on 6 December 2018, Judge Vasta indicated that he still had to sign the warrant committing Mr Stradford and observed that the Queensland police officers were yet to arrive to take Mr Stradford to prison.<sup>298</sup> Judge Vasta then instructed the MSS Guards to escort Mr Stradford to the cell in the courthouse to await the arrival of the Queensland police officers ("security, you will have to escort ..."). The MSS Guards effected that direction.

159       In these circumstances it is a distraction to consider whether the MSS Guards were named in the warrant because when they escorted Mr Stradford to the cell no such warrant had been signed. Instead, they were compelled to detain Mr Stradford by Judge Vasta. In circumstances where the MSS Guards were performing contractual duties to provide security services, and specifically in court guarding at the Federal Circuit Court, and were compelled by Judge Vasta to detain Mr Stradford for a brief period, they are entitled to the same protection as the Queensland police officers and the Queensland correctional officers for their actions. A judge of the Federal Circuit Court specifically charged them to perform a particular task. There was no reason for them to doubt that the direction was of a kind that was within the Court's power to make and they acted in accordance with the direction they were given.

## **Part VI – Conclusion and orders**

160       It follows that all three appeals must be allowed, the orders of the primary judge must be set aside, and the proceedings brought by Mr Stradford against each appellant must be dismissed. The Commonwealth and Judge Vasta each agreed not to seek costs from Mr Stradford in this Court and not to seek to disturb the costs order in Mr Stradford's favour made by the primary judge. Queensland's appeal was removed into this Court on conditions to the same effect. The Commonwealth agreed to pay Mr Stradford's reasonable costs of the three appeals on a party-party basis.

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**297** *Federal Circuit Court of Australia Act*, s 111.

**298** See above at [27].

The proposed orders are:

**In Matter No C3/2024**

- (1) Appeal allowed.
- (2) Set aside orders 2 and 3 made by the Federal Court of Australia on 30 August 2023 and in their place order that the applicant's proceedings against the second respondent be dismissed.
- (3) The appellant pay the first respondent's costs of the appeal.

**In Matter No C4/2024**

- (1) Appeal allowed.
- (2) Set aside orders 2, 3, 4 and 5 made by the Federal Court of Australia on 30 August 2023 and in their place order that the applicant's proceedings against the first respondent be dismissed.
- (3) The second respondent pay the first respondent's costs of the appeal.

**In Matter No S24/2024**

- (1) Appeal allowed.
- (2) Set aside orders 2 and 4 made by the Federal Court of Australia on 30 August 2023 and in their place order that the applicant's proceedings against the third respondent be dismissed.
- (3) The third respondent pay the first respondent's costs of the appeal.

162 GORDON J. On 6 December 2018, Judge Salvatore Vasta, a judge of the Federal Circuit Court of Australia ("the Federal Circuit Court"),<sup>299</sup> sentenced the first respondent ("Mr Stradford") to a term of imprisonment ("the Orders") and issued a Warrant of Commitment for contempt of court ("the Warrant"). The decision of Judge Vasta was affected by jurisdictional errors: a failure to make a contempt finding;<sup>300</sup> mistakenly assuming that another judge had found Mr Stradford in contempt of court orders;<sup>301</sup> a failure to comply with either Pt XIII A or Pt XIII B of the *Family Law Act 1975* (Cth);<sup>302</sup> a failure to follow r 19.02 of the *Federal Circuit Court Rules 2001* (Cth);<sup>303</sup> a denial of procedural fairness;<sup>304</sup> and pre-judgment that he would sentence Mr Stradford.<sup>305</sup>

163 The Warrant, which appeared valid on its face, directed "all officers of the Police Forces of all the States and Territories of the Commonwealth of Australia ... to take and deliver [Mr Stradford] to the Commissioner of Queensland Corrective Services, together with this [W]arrant". Three categories of officers effected Mr Stradford's detention: security guards employed by MSS Security Pty Ltd, a company contracted by the Commonwealth to provide general guarding services for the Federal Circuit Court; Queensland Police Service officers; and Queensland Corrective Services officers (together, the "enforcing officials").

164 Mr Stradford was released from detention when Judge Vasta stayed the Orders and accepted he "could very well have been in error" to assume that another judge had found Mr Stradford in contempt.<sup>306</sup>

165 Mr Stradford successfully recovered damages in the Federal Court of Australia (Wigney J) from the Commonwealth, Judge Vasta and Queensland in

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**299** *Federal Circuit Court of Australia Act 1999* (Cth), s 8. This Act is no longer in force, having been superseded by the *Federal Circuit and Family Court of Australia Act 2021* (Cth). All references to the *Federal Circuit Court of Australia Act* are references to that Act as in force on 6 December 2018.

**300** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [80] ("*Stradford FC*").

**301** *Stradford FC* [2023] FCA 1020 at [80].

**302** *Stradford FC* [2023] FCA 1020 at [103].

**303** *Stradford FC* [2023] FCA 1020 at [110], [115].

**304** *Stradford FC* [2023] FCA 1020 at [117].

**305** *Stradford FC* [2023] FCA 1020 at [134]-[135].

**306** *Stradford & Stradford [No 2]* [2018] FCCA 3961 at [6].

respect of his detention.<sup>307</sup> The Commonwealth, Queensland and Judge Vasta appealed from that decision and each appeal was removed into this Court. The Attorney-General for South Australia intervened in the appeals to argue for the validity of the Warrant, notwithstanding the invalidity of the Orders.

166 These reasons will address three issues:

- (a) Whether the Orders, being orders for the punishment of contempt, and the Warrant, were valid until set aside or quashed because they were purportedly made pursuant to s 17 of the *Federal Circuit Court of Australia Act 1999* (Cth).
- (b) Relatedly, whether Pts XIII A and XIII B of the *Family Law Act* were a "code" which excluded the power in s 17 of the *Federal Circuit Court of Australia Act*.
- (c) Whether Judge Vasta had the benefit of a common law judicial immunity in respect of civil liability for his conduct in relation to Mr Stradford.

167 For the reasons which follow: (a) The Orders and Warrant were valid until set aside because they were made pursuant to s 17 of the *Federal Circuit Court of Australia Act*; (b) Pts XIII A and XIII B of the *Family Law Act* did not create a code which excluded the power in s 17 of the *Federal Circuit Court of Australia Act*; and (c) Judge Vasta had the benefit of a common law judicial immunity in respect of civil liability for his conduct in relation to Mr Stradford.

### **Orders sentencing Mr Stradford to prison and Warrant valid until set aside or quashed**

168 The first question is whether orders of the Federal Circuit Court punishing contempt, and any warrant, are valid until set aside or quashed, even if affected by jurisdictional error. The answer is yes. That conclusion is compelled by the text, context and purpose of the *Federal Circuit Court of Australia Act*, and the constitutional context.

169 Section 17(1) of the *Federal Circuit Court of Australia Act* provided that the Federal Circuit Court:<sup>308</sup>

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<sup>307</sup> *Stradford FC* [2023] FCA 1020.

<sup>308</sup> See also *Federal Circuit Court Rules* (as in force on 6 December 2018), r 19.01(1)(b): the Court may issue a warrant for the arrest of a person who appears to be guilty of contempt.

"has the *same power* to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court". (emphasis added)

Section 17(2) provided that s 17(1) "has effect subject to any other Act". The "jurisdiction" of the Federal Circuit Court to punish a contempt committed in the face or hearing of the Federal Circuit Court could be exercised by the Court as constituted at the time of the contempt.<sup>309</sup> A note to s 17, which formed part of the Act,<sup>310</sup> said "[s]ee also [s] 112AP of the *Family Law Act*".

170 Section 17(1) conferred on the Federal Circuit Court the "*same power* to punish contempts of its power and authority" as is possessed by the High Court. The power and authority of the High Court to punish contempts is reflected in orders that are valid until set aside, as is the position for all orders made by this Court.<sup>311</sup> In conferring the "same power" on the Federal Circuit Court, Parliament conferred power on that Court to make contempt orders which were valid until set aside.

171 Put in different terms, there is no reason to read the words "same power" in s 17(1) as directed only to the *scope* of contempt powers, rather than the characteristics of contempt orders once made. That distinction did not appear in the text of s 17. And a limitation on the words "same power", as dealing only with the scope of contempt powers, should not be read into s 17. A court should avoid discerning implications or limits on powers given to courts that are not express in the empowering instrument.<sup>312</sup> If the contempt orders of the Federal Circuit Court were not to be valid until set aside, then the power to punish contempt would be different from and less efficacious than that conferred on this Court.

172 Next, s 17(1) of the *Federal Circuit Court of Australia Act* protected the "power and authority" of the Federal Circuit Court. That was a reference to the powers and authority conferred by Pts 2 and 3 of the *Federal Circuit Court of Australia Act*. Part 2 established the Court. Part 3 dealt with subject-matter jurisdiction (in the sense of identifying the matters in which the Federal Circuit Court had the authority to decide, namely jurisdiction over matters conferred by

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309 *Federal Circuit Court of Australia Act*, s 17(3).

310 *Acts Interpretation Act 1901* (Cth), s 13(1).

311 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 210 [137]; *New South Wales v Kable* (2013) 252 CLR 118 at 133 [32].

312 *Deputy Commissioner of Taxation v Huang* (2021) 273 CLR 429 at 445 [23]-[24], citing *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

laws of the Commonwealth Parliament),<sup>313</sup> the scope of its powers to grant relief, and the nature of that relief.<sup>314</sup> So, for example, s 14 was a statutory direction to grant all remedies to which any of the parties appear entitled in "every matter" before the Court so that, as far as possible, all matters in controversy may be completely and finally determined<sup>315</sup> and all multiplicity of proceedings concerning any of those matters may be avoided.<sup>316</sup> Section 15 then provided that the Court had power to make orders or issue writs as it thought appropriate.<sup>317</sup> Section 16 provided that the Court may, "in relation to a matter in which it has original jurisdiction", make "binding declarations of right" whether or not any consequential relief is or could be claimed, thus overcoming any potential limitation on the scope of the power to grant declaratory relief. Those provisions reinforced each other.

173 Section 17(3) then referred to the "jurisdiction of the Federal Circuit Court ... to punish a contempt of the Federal Circuit Court ... committed in the face or hearing of the Federal Circuit Court". The similarity to the words "power to punish contempts" in s 17(1), and the fact that the provision was found in Pt 3, which was headed "Jurisdiction of the Federal Circuit Court of Australia", suggest that in s 17 the terms "power" and "jurisdiction" were intended to be and were used loosely such that s 17(1) dealt with both the characteristics of orders made in a contempt jurisdiction and the scope of its powers to punish for contempt. For those reasons, Mr Stradford's submission, that because s 17(1) did not use the word "jurisdiction" (unlike other provisions in Pt 3 of the *Federal Circuit Court of Australia Act*) it did not deal with the characteristics of contempt orders, must be rejected.

174 Moreover, s 17(1) was modelled on equivalent provisions principally used in respect of other courts established under Ch III of the *Constitution*, including the Federal Court of Australia,<sup>318</sup> the Family Court of Australia,<sup>319</sup> and the High

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313 *Federal Circuit Court of Australia Act*, s 10(1); see also ss 10AA and 10A(1).

314 See, eg, *Federal Circuit Court of Australia Act*, s 11 (which provided for the Federal Circuit Court's exercise of jurisdiction by a single judge) and s 13 (which dealt with the manner of exercise of jurisdiction in open court and in Chambers).

315 *Federal Circuit Court of Australia Act*, s 14(c).

316 *Federal Circuit Court of Australia Act*, s 14(d).

317 See also *Federal Circuit Court of Australia Act*, s 17A.

318 *Federal Court of Australia Act 1976* (Cth), s 31(1).

319 Section 35 of the *Family Law Act*, prior to the enactment of the *Federal Circuit and Family Court of Australia Act*, provided: "Subject to this and any other Act,

Court.<sup>320</sup> The orders of each of those courts are valid until set aside. The use of the same language suggests that Parliament intended s 17(1) to operate in the same way.

175 In *Re Colina; Ex parte Torney*<sup>321</sup> three Justices of this Court considered that s 35 of the then *Family Law Act* – and s 24 of the *Judiciary Act 1903* (Cth), upon which it was based – do not confer federal jurisdiction in respect of a particular species of matter but instead are declaratory of an *attribute* of the judicial power of the Commonwealth that is vested in those courts by s 71 of the *Constitution*.<sup>322</sup> Section 17, using the same language, was intended to have the same effect: to provide the Federal Circuit Court with a power – to punish for contempt – that would otherwise be part of the judicial power of a Ch III court such as the Family Court or the High Court. Once that is accepted, why should the attributes of that power differ as between Ch III courts? The attribute is of judicial power, not the repository of that power.

176 Moreover, it would be incoherent if Family Court orders addressing contempt are valid until set aside, but Federal Circuit Court orders are not, given the substantial similarities in the constitution of these courts and their jurisdictions, which form part of the relevant context within which s 17 falls to be construed. Section 39 of the *Family Law Act*<sup>323</sup> conferred relevantly identical jurisdiction on both courts in respect of matrimonial causes in which property of the marriage is in dispute. The Family Court could transfer any matter to the Federal Circuit Court (whether or not the Federal Circuit Court otherwise had jurisdiction to deal with it) and the Federal Circuit Court would have jurisdiction to deal with that matter.<sup>324</sup> The qualifications and tenure of judges in both courts were similar. In both courts, a person was eligible for appointment if they had been enrolled as a legal

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the Family Court has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court." Section 45(1) of the *Federal Circuit and Family Court of Australia Act*, which concerns the Federal Circuit and Family Court of Australia (Division 1), is in similar terms.

**320** *Judiciary Act 1903* (Cth), s 24.

**321** (1999) 200 CLR 386.

**322** *Re Colina* (1999) 200 CLR 386 at 395 [16], 429 [113].

**323** All references to the *Family Law Act* in this paragraph are to the version of that Act in force prior to the enactment of the *Federal Circuit and Family Court of Australia Act*.

**324** *Family Law Act*, s 33B.



practitioner for five years<sup>325</sup> (although a person was eligible for appointment to the Family Court if they had been a judge of another federal court) and had suitable experience to deal with matters of family law.<sup>326</sup> There was also capacity for dual appointment to both courts, by s 22(2AG) of the *Family Law Act*. Provisions with a similar effect have been included in the legislation governing the successors to the Family Court and the Federal Circuit Court.<sup>327</sup>

177 It is necessary to address the phrase "inferior court". Mr Stradford contended that the "starting point" was that the Federal Circuit Court was an inferior court, such that it is "uncontroversial" that any order it made which is affected by jurisdictional error is void ab initio. Recourse to the phrase "inferior court" is not helpful or determinative of whether the Federal Circuit Court's orders are valid until set aside or quashed. The process of statutory construction starts with the text and context of the statute, not by imputing legal meaning to a label which does not appear in the statute.<sup>328</sup> The phrase "inferior court" was not used in the *Federal Circuit Court of Australia Act*.<sup>329</sup> Whilst the *Federal Circuit Court of Australia Act* constituted the Court as a "court of record"<sup>330</sup> and not a "superior court of record", that says little about what Parliament intended when it provided that the contempt orders of the Federal Circuit Court are to have the same characteristics as those of this Court. Irrespective of the use of the label "superior court" or "inferior court", it will be necessary to interpret the specific power to assess the consequences of error.<sup>331</sup>

178 Consideration of the predecessor court to the Federal Circuit Court – the Federal Magistrates Court – does not compel a different approach. The *Federal Magistrates Act 1999* (Cth) did not use the term "inferior court" and did not expressly deal with whether its orders were valid until set aside. There is no decision of this Court which described the Federal Magistrates Court as an "inferior court" or otherwise dealt with the characteristics of its orders.

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325 *Federal Circuit Court of Australia Act*, s 9, Sch 1, cl 1(2); *Family Law Act*, s 22(2)(a).

326 *Family Law Act*, s 22(2)(b).

327 *Federal Circuit and Family Court of Australia Act*, ss 11, 21, 22, 25, 51, 111, 132.

328 See, eg, *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 390 [26].

329 cf *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 272 CLR 329 at 343 [26].

330 *Federal Circuit Court of Australia Act*, s 8(3).

331 *Cameron v Cole* (1944) 68 CLR 571 at 585, 607. See also *Day v The Queen* (1984) 153 CLR 475 at 479.

Accordingly, there is no basis to conclude that Parliament assumed that the orders of the Federal Magistrates Court or the Federal Circuit Court were not valid until set aside. Both courts were federal courts created by the Parliament under ss 71 and 77 of the *Constitution*.

179 That recourse to the phrase "inferior court" is not helpful is also reflected in this Court's decision in *New South Wales v Kable* ("*Kable (No 2)*").<sup>332</sup> Six Justices said that the "roots of the doctrine, *that the orders of a superior court of record are valid until set aside even if made in excess of jurisdiction*, lie in the nature of judicial power".<sup>333</sup> Whilst those Justices went on to say that the "effect which is given to the order" comes from the "status or nature of the court making the order (as a superior court of record)", that was said in the context of distinguishing administrative power from judicial power.<sup>334</sup> Indeed, the plurality in *Kable (No 2)* did not expressly state a rule for a court not established as a "superior court".

180 Contempt is directed to ensuring the "enforcement of the process and orders of the court"<sup>335</sup> and exists to "vindicate the court's authority".<sup>336</sup> It was common ground that a purpose of s 17 of the *Federal Circuit Court of Australia Act* was to confer a full complement of powers to punish for contempt where inferior courts could not deal with contempts other than in the face or hearing of the court.<sup>337</sup> The question is whether that was the *only* purpose. It was not. Section 17 had a *further* purpose: to create contempt orders which safeguard the administration of justice. As we have seen, s 17 was modelled on provisions used in courts including the Federal Court, the Family Court and the High Court. If the only purpose of the text of s 17 was to confer a wider complement of contempt powers, the text would have been otiose for the other courts, because s 24 of the *Judiciary Act* was declaratory of an aspect of judicial power.<sup>338</sup>

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332 (2013) 252 CLR 118.

333 *Kable (No 2)* (2013) 252 CLR 118 at 133 [33] (emphasis added).

334 *Kable (No 2)* (2013) 252 CLR 118 at 134 [34]-[36].

335 *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 106.

336 *Witham v Holloway* (1995) 183 CLR 525 at 533; see also *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at 388 [41].

337 See, eg, Rolph, *Contempt* (2023) at 35.

338 *Re Colina* (1999) 200 CLR 386 at 395 [16], 429 [113]; cf *Quick and Groom, The Judicial Power of the Commonwealth* (1904) at 76.

181 Secondly, the construction adopted is reinforced by the fact that the *Federal Circuit Court of Australia Act* created a court to produce judgments which can be enforced throughout Australia and resolve proceedings finally.<sup>339</sup> This emphasis on finality suggests the court's orders are intended to be effective in all circumstances and should not always have an open question as to their authority. Next (like a judge of the Family Court) a judge of the Federal Circuit Court, as a judge of a statutory federal court, was an "officer of the Commonwealth",<sup>340</sup> and therefore this Court has entrenched judicial review jurisdiction in respect of its decisions by s 75(v) of the *Constitution*. The fact that s 75(v) review by this Court is available suggests that the orders can, consistently with the rule of law, be valid until set aside or quashed by this Court. The exercise of the judicial power of the Commonwealth should not be able to be collaterally reviewed. The appropriate review pathway is judicial review or requesting that the order be discharged. The position is different in relation to the exercise of administrative power, such as the issue of a search warrant.<sup>341</sup>

182 Those purposes of s 17 are addressed by contempt orders which are valid until set aside or quashed. If the position were otherwise, "[t]he individuals affected by the order, and here the Executive, would have to choose whether to disobey the order (and run the risk of contempt of court or some other coercive process) or incur tortious liability to the person whose rights and liabilities are affected by the order".<sup>342</sup> Further, as was said earlier in *Commissioner for Railways (NSW) v Cavanough*,<sup>343</sup> it is necessary that acts "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".<sup>344</sup> Relatedly, often, criminal contempt orders require third party enforcement (such as taking into custody). But the possibility that orders of the court do not provide authority for lawful

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339 *Federal Circuit Court of Australia Act*, ss 10(3), 14(c).

340 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 22, 33, 41-42; *The Tramways Case [No 1]* (1914) 18 CLR 54 at 62. See also *Re Macks* (2000) 204 CLR 158 at 264 [296]; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 399 [40].

341 See, eg, *Ousley v The Queen* (1997) 192 CLR 69 at 79-80, 86-87, 100, 146; *Attorney-General for the Commonwealth v Breckler* (1999) 197 CLR 83 at 108 [36].

342 *Kable (No 2)* (2013) 252 CLR 118 at 135 [39].

343 (1935) 53 CLR 220 at 225.

344 See also *Mock Sing v Dat* (1902) 2 SR (NSW) 333 at 341; *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33 at 62 [88]; *R (Majera) v Home Secretary* [2022] AC 461 at 477 [32], 480-481 [44]-[46], 482 [49].

custody would deter officers from enforcing contempt orders and thus weaken the court's ability to safeguard the administration of justice.<sup>345</sup>

183 That contempt orders of the Federal Circuit Court are valid until set aside is reinforced by the constitutional context.<sup>346</sup> First, the integrated federal judicature facilitated by the *Constitution* should not be readily understood as permitting two systems of justice for litigants dealing with the same or similar matters. Parliament can make new federal courts which have the power to make orders that are valid until set aside. There is no constitutional impediment to doing so.<sup>347</sup> The Federal Circuit Court and its predecessor, the Federal Magistrates Court, were created by the Parliament under ss 71 and 77 of the *Constitution*. The nature of judicial power should not differ between federal courts, which would be the consequence of concluding that the Federal Circuit Court's orders are not valid until set aside. That would be at odds with the rule of law, an assumption upon which our *Constitution* is based.<sup>348</sup>

184 To the extent they have not already been addressed, it is necessary to deal with some particular submissions made by Mr Stradford concerning s 17 of the *Federal Circuit Court of Australia Act*. Mr Stradford submitted that s 17 "takes its place within the appeal structure" and that an order of the Federal Circuit Court is not identical to a High Court order, because it could not be appealed to a Full Court. Section 20(1) of the *Federal Circuit Court of Australia Act* did provide that an "appeal must not be brought directly to the High Court from a judgment of the Federal Circuit Court of Australia". But s 20 aside, there is a difference between the structural organisation of the federal judiciary and the characteristics of a particular type of order of the Federal Circuit Court. The nature of an order is different to a court's position in the judicial hierarchy.

185 Similarly, Mr Stradford submitted that s 17 of the *Federal Circuit Court of Australia Act* would not support orders that are identical in every respect to those of this Court because s 17 contained no words like s 25 of the *Judiciary Act*, which provides that "[t]he process of the High Court shall run, and the judgments and orders of the High Court shall have effect and may be executed, throughout the Commonwealth". That submission must be rejected. Section 10(3) of the *Federal Circuit Court of Australia Act* provided that the process of the Federal

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345 *Stanley v Director of Public Prosecutions (NSW)* (2023) 278 CLR 1 at 9 [17].

346 See *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 370 [11].

347 cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 559 [61]; see also 555 [51].

348 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [40], 25-26 [44].

Circuit Court ran, and its judgments "have effect and may be executed", throughout Australia.

186 Mr Stradford submitted that the construction adopted has the "practical consequence" of making all orders of the Federal Circuit Court valid until set aside because even invalid orders may be enforced by a contempt order that is valid until set aside. The submission ignores an important fact: a contemnor can challenge the validity of an order on the contempt application.<sup>349</sup>

187 For those reasons, the Orders of the Federal Circuit Court and the Warrant were valid until set aside.

### **Parts XIII A and XIII B of the *Family Law Act* not a code**

188 Mr Stradford submitted that regardless of the effect of s 17 of the *Federal Circuit Court of Australia Act*, Pts XIII A and XIII B of the *Family Law Act* are intended to be a code for dealing with contraventions of orders. If this is correct, the preceding analysis about the effect of s 17 of the *Federal Circuit Court of Australia Act* would be of no consequence. For the reasons that follow, Pts XIII A and XIII B are not a code.

189 There is no provision that states that Pts XIII A and XIII B of the *Family Law Act* are intended to be a code. A court should avoid discerning implications or limits on powers given to courts that are not express in the empowering instrument.<sup>350</sup>

190 Section 17(1) of the *Federal Circuit Court of Australia Act* had effect "subject to any other Act".<sup>351</sup> The use of "the expression 'subject to' is 'a standard way of making clear which provision is to govern in the event of conflict'".<sup>352</sup> It does not tell you if there is a conflict. And there was no conflict between s 17(1) and Pt XIII A or Pt XIII B of the *Family Law Act*. Read harmoniously,<sup>353</sup> Pt XIII A of the *Family Law Act* applied limitations on the exercise of the power in s 17(1) of the *Federal Circuit Court of Australia Act* which could render a contempt order

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**349** *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 444 [25].

**350** *Huang* (2021) 273 CLR 429 at 445 [23]-[24], citing *Owners of "Shin Kobe Maru"* (1994) 181 CLR 404 at 421.

**351** See [169] above.

**352** *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 580 fn 195.

**353** *Commissioner of Police (NSW) v Cottle* (2022) 276 CLR 62 at 73 [23].

liable to be set aside. Part XIII B confers a separate power to punish certain types of contempt.

191 The sole provision in Pt XIII B of the *Family Law Act*, s 112AP, applies to a "contempt of a court" which is *not* a contravention of an order under the *Family Law Act*, or constitutes a contravention of an order under the *Family Law Act* and involves a "flagrant challenge to the authority of the court".<sup>354</sup> The section does not comprehensively deal with contempt. It does not cover the field in a way that excludes all contempt powers in s 17 of the *Federal Circuit Court of Australia Act*.

192 Parliament had the opportunity to abolish general contempt powers and legislate a unified procedure but did not do so. Prior to the creation of the Federal Magistrates Court, the *Family Law Act* had "contempt" and "quasi-contempt" powers.<sup>355</sup> An example of the former was s 35 of the *Family Law Act*.<sup>356</sup> The Australian Law Reform Commission ("the ALRC") recommended a single unified procedure and to abolish the word "contempt".<sup>357</sup> The *Family Law Amendment Act 1989* (Cth) implemented recommendations of the ALRC,<sup>358</sup> including repealing s 108 – a general power to punish contempt – but did not repeal s 35. The fact that Parliament did *not* create a unified procedure which does not use the word "contempt" reinforces the conclusion that Pts XIII A and XIII B of the *Family Law Act* were not intended to be a "code" excluding all other powers.

193 Next, the note to s 17 of the *Federal Circuit Court of Australia Act* ("[s]ee also" s 112AP of the *Family Law Act*) was not recognition of Pt XIII B of the *Family Law Act* being a "code". It merely directed attention to s 112AP, which confers and regulates powers to deal with a specific type of contempt. That conclusion is further reinforced by the fact that the *Family Law Act* confers jurisdiction on a variety of courts.<sup>359</sup> That suggests s 112AP does not intend to deal

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354 *Family Law Act*, s 112AP(1).

355 Australian Law Reform Commission, *Contempt*, Report No 35 (1987) at 342-345 [589]-[593].

356 See [175] above.

357 Australian Law Reform Commission, *Contempt*, Report No 35 at 329-330 [568].

358 Australia, Senate, *Family Law Amendment Bill 1989*, Explanatory Memorandum at 2.

359 The following references to the *Family Law Act* are to the version of that Act in force prior to the enactment of the *Federal Circuit and Family Court of Australia Act*: s 39 (conferring jurisdiction in matrimonial causes on the Family Court or a Supreme Court of a State or Territory), s 39B(1)(d) and (2) (conferring

uniformly with the characteristics of orders made by those courts. Section 112AP(2) of the *Family Law Act* provides that "[i]n spite of any other law, a court having jurisdiction under this Act may punish a person for contempt of that court". While this may not have conferred additional powers on the Federal Circuit Court, it confers power on a variety of courts which may not have an equivalent provision to s 17 of the *Federal Circuit Court of Australia Act*, such as the courts of summary jurisdiction of a State or Territory which have jurisdiction over matrimonial causes.

194 Mr Stradford submitted that the provisions in Pts XIII A and XIII B of the *Family Law Act* would be "swept away" if they were not a code and could be circumvented by the more general power in s 17 of the *Federal Circuit Court of Australia Act*. That submission is wrong: non-compliance with Pt XIII A may require that the order be set aside.<sup>360</sup> The interpretive principle in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*<sup>361</sup> does not apply where there is no attempt to "cover the field" (being whether the orders are valid until set aside), as was the position here.<sup>362</sup>

### Judicial immunity

195 A judge of the Federal Circuit Court is protected by judicial immunity for all acts done in their judicial function or capacity,<sup>363</sup> in the purported exercise of judicial power in respect of a matter which the Federal Circuit Court had power to resolve ("the Immunity"). The Immunity is supported by the constitutional context; the statutory context; the rationales for judicial immunity; and legal history and authority.

196 In the present appeals, the Immunity covers the conduct which Judge Vasta engaged in – his acts were done in his judicial function or capacity, in the purported exercise of judicial power (a contempt power) in respect of a matter (being

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jurisdiction, with respect to matters arising under the Act in respect of which de facto financial causes are instituted, on State and Territory courts of summary jurisdiction), ss 69H to 69J (conferring jurisdiction in relation to proceedings concerning children on State Family Courts, the Supreme Court of the Northern Territory, the Federal Circuit Court and State courts of summary jurisdiction).

<sup>360</sup> *Stradford FC* [2023] FCA 1020 at [103].

<sup>361</sup> (1932) 47 CLR 1 at 7.

<sup>362</sup> *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 622-623 [158].

<sup>363</sup> *Rajski v Powell* (1987) 11 NSWLR 522 at 527-528, 538-539.

the matrimonial cause in respect of the property of the Stradfords' marriage) which the Federal Circuit Court had power to resolve.<sup>364</sup>

197 Although it is strictly unnecessary to decide whether the Immunity is identical to that of judges in other courts, the rationales for judicial immunity apply equally to all courts and there are powerful reasons why the immunity should be the same for all courts exercising federal judicial power and, at the very least, the immunity should be the same for the Federal Circuit Court and the Family Court. The Immunity does not extend to roles performed by judges acting *persona designata*.

198 The Immunity may be more usefully described as a "justification": it had the effect that acts of Judge Vasta that would otherwise have been unlawful, were lawful,<sup>365</sup> and that, as a consequence, the acts of the enforcing officials<sup>366</sup> were also lawful.

#### *Constitutional context*

199 In Ch III of the *Constitution* and the exclusive vesting of the judicial power of the Commonwealth in Ch III courts, "there is implicit a requirement that those 'courts' exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially" and "[a]t the heart of that obligation is the *duty* of a court to extend to the parties before it equal justice".<sup>367</sup>

200 A corollary is that Parliament cannot require a Ch III court to exercise the judicial power of the Commonwealth in a manner that is inconsistent with the essential character of a court or with the nature of judicial power.<sup>368</sup>

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**364** *Family Law Act*, s 79.

**365** *O'Dea v Western Australia* (2022) 273 CLR 315 at 339-340 [65]; see also *R v Anna Rowan (a pseudonym)* (2024) 278 CLR 470 at 497-498 [77]; Goudkamp, *Tort Law Defences* (2013) at 158.

**366** See [163] above.

**367** *Leeth v The Commonwealth* (1992) 174 CLR 455 at 487 (emphasis added).

**368** *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 442; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27, citing *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607, 689, 703-704; *Nicholas v The Queen* (1998) 193 CLR 173 at 185 [13], 208 [73]; *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [111]; *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899 at 913 [56]; 415 ALR 1 at 15-16.



That baseline requirement applies to all courts irrespective of the label "inferior court". That constitutional context supports an immunity that is the same for all courts exercising federal judicial power because, for at least those courts, the institution of the judiciary is less likely to produce injustice in the execution of its functions, bearing in mind the constitutional assumption of the rule of law.<sup>369</sup>

201 In this case, the above position is further reinforced by the fact that the Federal Circuit Court was exercising the same contempt power that is possessed by the High Court. Contrary to the submission made by Judge Vasta, this does not mean s 17 of the *Federal Circuit Court of Australia Act* impliedly conferred judicial immunity. The Immunity is a product of the common law, understood in the particular constitutional and statutory context.

#### *Statutory context*

202 The statutory context also supports the Immunity. There has been increasing jurisdiction, professionalism and independence of judges of all Ch III courts, which is required by and reflected in the legislation establishing or creating those courts. So, as has been identified, in relation to the Federal Circuit Court and the Family Court: (i) those courts had concurrent jurisdiction over family law matters; (ii) judges of both courts needed to be legally qualified and possess similar qualifications;<sup>370</sup> and (iii) both were a "court of record".<sup>371</sup> Given these common features, it would be incoherent for a different immunity to apply to Federal Circuit Court judges than would be available to a Family Court judge who is required to be similarly qualified and may be dealing with the same subject.

203 Further, these contextual factors tell against the application of legal principles concerning judicial immunity developed for inferior courts, and justices of the peace, in the 1600s. As Mr Stradford rightly accepted, the differences between inferior and superior court judges are "less pronounced" today than they once were.

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369 See [183] above.

370 *Federal Circuit Court of Australia Act*, s 9, Sch 1, cl 1(2); *Family Law Act* (prior to enactment of *Federal Circuit and Family Court of Australia Act*), s 22. See now *Federal Circuit and Family Court of Australia Act*, ss 11 and 111.

371 *Federal Circuit Court of Australia Act*, s 8(3); *Family Law Act* (prior to enactment of *Federal Circuit and Family Court of Australia Act*), s 21(2). See now *Federal Circuit and Family Court of Australia Act*, ss 9(1)(a) and 10(1)(a).

*Other rationales and purposes*

204 Judicial immunity is not at large. It has an important role in upholding the institution of the judiciary. It is based on the following rationales and purposes, which apply similarly to all Ch III courts, whether or not they are expressly constituted as superior courts of record. First, judicial immunity exists for the public interest in judicial independence, not for the private advantage of judges.<sup>372</sup> Judicial immunity is based in "high policy", which is that the immunity is "essential to the independence of judges".<sup>373</sup> "[F]reedom 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".<sup>374</sup>

205 Second, judicial immunity seeks to "secure the independence of the Judges, and prevent their being harassed".<sup>375</sup> It is conferred so that judges "may act fearlessly and without the harassing concern that they will be made personally liable for the performance of their functions before another judge at the suit of a person disgruntled by the decision".<sup>376</sup> The judicial function "requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have".<sup>377</sup> That rationale extends to more than just vexatious litigation.

206 Third, "[d]ecisional independence is a necessary condition of impartiality".<sup>378</sup> Judicial immunity protects against a risk of bias arising from threats of litigation; it "forecloses the assertion that the prospect of suit may have

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372 *Fingleton v The Queen* (2005) 227 CLR 166 at 186 [38].

373 *Fingleton* (2005) 227 CLR 166 at 186-187 [40], quoting *Yeldham v Rajski* (1989) 18 NSWLR 48 at 69.

374 *Garnett v Ferrand* (1827) 6 B & C 611 at 625-626 [108 ER 576 at 581].

375 *Fray v Blackburn* (1863) 3 B & S 576 at 578 [122 ER 217 at 217].

376 *Yeldham* (1989) 18 NSWLR 48 at 52.

377 *Fingleton* (2005) 227 CLR 166 at 186 [38], quoting *Forrester v White* (1988) 484 US 219 at 226.

378 *South Australia v Totani* (2010) 242 CLR 1 at 43 [62].

had some conscious or unconscious effect on the decision-making process or its outcome".<sup>379</sup>

207 Fourth, judicial immunity is an aspect of finality of litigation. A "central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances" and judicial immunity was "ultimately, although not solely, founded in considerations of the finality of judgments".<sup>380</sup> This rationale supports the Immunity applying to the Federal Circuit Court as judicial immunity applies to superior courts of record: the orders of these courts are all "final", in the sense they are valid until set aside.

208 Fifth, judicial immunity does not eliminate judicial accountability: judges must work in public, give reasons and be subject to appellate review conducted openly.<sup>381</sup> And the ultimate sanction for judicial misbehaviour is removal from office upon an address from both Houses of Parliament.<sup>382</sup> Further, judicial immunity is only from civil law: there are sanctions in the criminal law for egregious conduct such as taking bribes.<sup>383</sup>

### *Balancing*

209 Judicial immunity involves balancing "the public interest in an independent judiciary free from the fear of vexatious personal actions; and the fundamental policy of the [c]ommon [l]aw which seeks to provide an adequate remedy to a wrongfully injured member of the community".<sup>384</sup> But insofar as the Immunity will deny Mr Stradford a remedy in this case, that is an outcome that would have followed, and been readily accepted, if the events had occurred in the Family Court. Both the rationales for judicial immunity and the balancing of public and

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**379** *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 80 [75].

**380** *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [34], 19 [40]. See also *Forge* (2006) 228 CLR 45 at 80 [75]; *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698 at 717 [74].

**381** *Fingleton* (2005) 227 CLR 166 at 186 [39].

**382** *Fingleton* (2005) 227 CLR 166 at 186 [39]. See, eg, *Federal Circuit and Family Court of Australia Act*, ss 20 and 121; *Federal Court of Australia Act*, s 6(1)(b).

**383** *Fingleton* (2005) 227 CLR 166 at 186 [40]. See, eg, *Criminal Code* (Cth), s 141.1(3) (offence for "Commonwealth public official" who receives a bribe), Dictionary (definitions of "Commonwealth public official" and "Commonwealth judicial officer").

**384** *Moll v Butler* (1985) 4 NSWLR 231 at 238.

private interests (a) apply equally to all courts exercising judicial power; (b) support the Immunity not being confined to whether the actions were valid or invalid; and (c) do not involve an improper or unnecessary denial of a remedy to a wronged individual. The rationales for judicial immunity further suggest that there should not be exceptions to the Immunity for acts done with "malice" or in bad faith, because an allegation of judicial misconduct by a dissatisfied litigant will often, "perhaps even typically", be accompanied by an accusation of malice or want of good faith in the exercise of judicial authority.<sup>385</sup> The exceptions would undermine the Immunity.

### *Legal history*

210 In *Sirros v Moore*,<sup>386</sup> Buckley LJ explained that the development and form of judicial immunity owes much to the history of the judicial system.<sup>387</sup> To adopt and adapt Buckley LJ's language, the question is "how the principles evolved in the past apply to the modern pattern of judicial organisation and in particular where the [Federal Circuit Court] fits into that pattern".<sup>388</sup> The long lineage of judicial immunity cases must be understood with that ultimate task in mind.

211 From at least *The Case of the Marshalsea*<sup>389</sup> to the early twentieth century, there was a line of authority that provides some support for a more limited immunity, based on whether the order of the judicial officer was made within jurisdiction. A justice of the peace or magistrate would be liable if they acted with malice,<sup>390</sup> where the detention was "not lawful",<sup>391</sup> including where the specific order of commitment was beyond power,<sup>392</sup> or where the justices acted "without

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<sup>385</sup> *Fingleton* (2005) 227 CLR 166 at 185 [37].

<sup>386</sup> [1975] QB 118.

<sup>387</sup> *Sirros* [1975] QB 118 at 137.

<sup>388</sup> *Sirros* [1975] QB 118 at 137.

<sup>389</sup> (1612) 10 Co Rep 68b [77 ER 1027].

<sup>390</sup> *Windham v Clere* (1589) Cro Eliz 130 [78 ER 387].

<sup>391</sup> *Scavage v Tateham* (1601) Cro Eliz 829 at 829-830 [78 ER 1056 at 1056-1057]; *Davis v Capper* (1829) 10 B & C 28 [109 ER 362] (both cases involving detention for a generally lawful purpose but which, in the circumstances, was longer than permissible).

<sup>392</sup> *Groome v Forrester* (1816) 5 M & S 314 [105 ER 1066].

jurisdiction" and knew or had the means of knowing the facts giving rise to that absence of jurisdiction.<sup>393</sup>

212 By the late twentieth century, there was a gradual movement towards a wider immunity, notwithstanding that senior courts in the United Kingdom felt compelled by statute and perhaps the weight of precedent to maintain what they considered to be obsolete principles of judicial immunity.

213 In 1974, in persuasive obiter, the Court of Appeal in *Sirros*<sup>394</sup> (Lord Denning MR, Buckley and Ormrod LJ) reasoned that the long recognised more limited immunity for inferior court judges should be abolished. The Court held that a judge of a superior court<sup>395</sup> had judicial immunity where they acted judicially, albeit in a mistaken manner,<sup>396</sup> or alternatively were acting "within [their] jurisdiction".<sup>397</sup>

214 Lord Denning held that no action was maintainable against any judge for actions within jurisdiction,<sup>398</sup> and that there was no longer a valid reason for the distinction between inferior and superior court immunities for actions within jurisdiction. "[A]s a matter of principle", the superior court judges had "no greater claim to immunity" including for justices of the peace, who now "do their work with the highest degree of responsibility and competence".<sup>399</sup> As to acts "outside jurisdiction", his Lordship identified a historical distinction between inferior courts and superior courts of record.<sup>400</sup> A "judge of a superior court [was] protected when ... acting in the bona fide exercise of [their] office and under the belief that [they had] jurisdiction, though [the judge] may [have been] mistaken in that belief and

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**393** *Calder v Halket* (1840) 3 Moo PC 28 at 78-79 [13 ER 12 at 36], approved in *Raven v Burnett* (1894) 6 QJ 166 at 168. See also *Polley v Fordham [No 2]* (1904) 91 LT 525.

**394** [1975] QB 118.

**395** Two of the judges (Lord Denning MR and Ormrod LJ) seemed to proceed on the basis that the Crown Court was a "superior court": *Sirros* [1975] QB 118 at 136, 150.

**396** *Sirros* [1975] QB 118 at 137, 140. See also *Nakhla v McCarthy* [1978] 1 NZLR 291 at 301.

**397** *Sirros* [1975] QB 118 at 137, 144; see also 150.

**398** *Sirros* [1975] QB 118 at 132.

**399** *Sirros* [1975] QB 118 at 136.

**400** *Sirros* [1975] QB 118 at 133.

may not in truth have [had] any jurisdiction".<sup>401</sup> A judge of an inferior court was only immune if exercising a "jurisdiction which belonged" to the judge.<sup>402</sup> Buckley and Ormrod LJ (writing separately) also held that there was no longer a sound basis for maintaining the distinction between the principle applicable in the case of a judge of a superior court and that applicable in the case of a judge of an inferior court.<sup>403</sup>

215 In *In re McC (A Minor)*,<sup>404</sup> the House of Lords did not follow *Sirros* because the "old common law rule" had been given statutory force and it followed that *Sirros*, "which sought to equate the immunity from suit of those purporting to exercise the limited jurisdiction of inferior courts ... with that of judges of the superior courts", could not be applied.<sup>405</sup> The House of Lords, however, deprecated the limited immunity developed prior to *Sirros*, considering it based on antiquated conceptions of judicial competence.<sup>406</sup> Notwithstanding statements that it could not change the law,<sup>407</sup> the House appeared to widen the immunity by introducing the qualification that "only something quite exceptional" was sufficient for liability, such as a "gross and obvious irregularity of procedure".<sup>408</sup>

216 The development of the case law in the United Kingdom, at least since *Sirros*,<sup>409</sup> supports the Immunity.<sup>410</sup>

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401 *Sirros* [1975] QB 118 at 135.

402 *Sirros* [1975] QB 118 at 133.

403 *Sirros* [1975] QB 118 at 137, 139, 147-149.

404 [1985] AC 528.

405 *In re McC (A Minor)* [1985] AC 528 at 541.

406 *In re McC (A Minor)* [1985] AC 528 at 541.

407 *In re McC (A Minor)* [1985] AC 528 at 550.

408 *In re McC (A Minor)* [1985] AC 528 at 546.

409 [1975] QB 118.

410 See [195] above.

*Prior authority*

217       Matters of the kind considered in these reasons have been touched on in a number of previous decisions of this Court and other Australian courts.<sup>411</sup> Some of these decisions have been referred to in explaining the rationales and purposes of judicial immunity.<sup>412</sup> However, no consistent statement of principle emerges from those decisions. Nor does any clear statement of the Immunity that applies to a Federal Circuit Court judge. Those difficulties notwithstanding, basic principle requires that a judge of the Federal Circuit Court has immunity for all acts done in their judicial function or capacity, in the purported exercise of judicial power in respect of a matter which the Court had power to resolve.

**Orders**

218       In each appeal, I agree with the orders proposed by Gageler CJ, Gleeson, Jagot and Beech-Jones JJ.

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**411** See, eg, *Raven* (1894) 6 QLJ 166 at 169-170; *Wood v Fetherston* (1901) 27 VLR 492 at 501-502; *Durack v Gassior* (unreported, High Court of Australia, 13 April 1981) at 16-17; *Rajski* (1987) 11 NSWLR 522 at 538-539; *Gallo v Dawson* (1988) 63 ALJR 121 at 122; 82 ALR 401 at 402-403; *Yeldham* (1989) 18 NSWLR 48 at 52; *Gallo v Dawson* (1992) 66 ALJR 859 at 859; 109 ALR 319 at 319-320; *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 365-366 [28]-[30]; *Fingleton* (2005) 227 CLR 166 at 184-187 [34]-[40], 214 [137].

**412** See [204]-[208] above.

## EDELMAN J.

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## I. Introduction: issues of basic principle

219 In the absence of any other defences is a judge justified by a defence of authority in ordering and issuing a warrant for (and thus participating in) a person's detention if the order and warrant had no legal effect whatsoever? And are police officers, correctional officers, and contracted court guards justified in detaining that person if the order and warrant made by the judge and executed by the officers and guards had no legal effect whatsoever?

220 No and no. Every person in society has a right to liberty which, if wrongfully infringed, can lead to tortious liability for false imprisonment. No person—judge or other judicial officer, police officer, correctional officer, or contracted guard—who is part of a joint enterprise by which another is imprisoned can have a justification of legal authority if the purported legal authority has no legal effect at all. Absent a specific statutory defence, the cloak of judicial office can provide no freedom, privilege, or immunity to any judicial officer, police officer, correctional officer, or contracted guard to violate another person's basic and natural rights<sup>413</sup> by a purported judicial act, or by implementing a purported judicial act, if the purported judicial act had no legal effect whatsoever.

221 In this context,<sup>414</sup> as in others,<sup>415</sup> it is common to refer to a defence of authority as an immunity. But, absent a statutory provision to that effect, the label of immunity is inapt to describe a defence that relies upon authority for the performance of the impugned act rather than upon the status of the defendant irrespective of any authority. At common law, there is nothing about the mere status of a police officer, correctional officer, or contracted guard that attaches an immunity to that person's actions.<sup>416</sup> The general law of torts applies to them as much "as to anyone else".<sup>417</sup> And even in relation to a judicial officer, the status of that officer does not provide an immunity from wrongdoing which others in society do not have if the judicial officer acts entirely without authority. To use an example

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413 *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at 978 [90]; 418 ALR 639 at 664.

414 *Sirros v Moore* [1975] QB 118 at 136; *In re McC (A Minor)* [1985] AC 528 at 548, 550-551, 559; *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 365-366 [30].

415 *Wheeler v JJ Saunders Ltd* [1996] Ch 19 at 30; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 578 [4].

416 See, for instance, *Enever v The King* (1906) 3 CLR 969 at 976; *Little v The Commonwealth* (1947) 75 CLR 94 at 114. See also *A v Hayden* (1984) 156 CLR 532.

417 *Michael v Chief Constable of South Wales Police (Refuge intervening)* [2015] AC 1732 at 1748 [37].

given by Beech-Jones J during oral argument in this case, there can be no immunity for a judicial officer to descend from the bench and punch a counsel during a hearing.

222 The issue in this case concerns the circumstances in which an order made by a judicial officer, which was attended by jurisdictional error, has sufficient authority to provide a defence of justification to an action in tort against the judicial officer, as well as other participants—the police officers, correctional officers, and contracted guards—who enforced the consequential warrant supported by the order. Such a defence, if it exists, confers a privilege on those participants to whom the authority extends to engage in the conduct; it means that the conduct is not civilly or criminally wrongful.<sup>418</sup> By contrast with immunities or excuses, those who aid and abet any of the participants will not be liable.<sup>419</sup> This defence of justification thus derives from the authority of the court, notwithstanding the jurisdictional error.<sup>420</sup>

223 At first instance in the Federal Court of Australia, the primary judge held that the imprisonment order made by Judge Vasta in the (formerly named) Federal Circuit Court of Australia for imprisonment of the first respondent in each appeal, Mr Stradford,<sup>421</sup> "lacked legal force", was a "nullity", was "void" for all purposes, or was of "no legal effect".<sup>422</sup> The basis for this conclusion was that the Federal Circuit Court is an "inferior court". If the primary judge's holding about the effect of Judge Vasta's imprisonment order were correct then the primary judge's conclusion would be unassailable: an order that had no legal effect whatsoever could provide no justification for Judge Vasta, or for the MSS Guards (guards employed by MSS Security Pty Ltd), police officers or correctional officers, in ordering or effecting Mr Stradford's imprisonment. On these appeals, removed into this Court from the Full Court of the Federal Court of Australia, that holding was disputed by the Commonwealth, the State of Queensland, and Judge Vasta.

224 The holding that orders of an "inferior court" are nullities and devoid of any legal effect if made with jurisdictional error is not, or at least should no longer be

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**418** *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 74. See also Virgo, "Justifying Necessity as a Defence in Tort Law", in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Tort* (2015) 135 at 151.

**419** *R v Rowan (a pseudonym)* (2024) 278 CLR 470 at 497-498 [76]-[77]. See also Goudkamp, *Tort Law Defences* (2013) at 123, 158.

**420** See Fletcher, *Rethinking Criminal Law* (1978) at 771-773.

**421** A pseudonym.

**422** *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [180], [182], [184], [195], [379], [510], [550].

taken to be, correct. This Court has emphasised that great care must be taken when using expressions such as "void", "voidable", "irregularity" and "nullity", because they "state a conclusion about the legal effect of [an] order" and erroneously suggest "that the whole of the relevant universe can be divided between two realms whose borders are sharply defined and completely closed".<sup>423</sup> Although Judge Vasta made jurisdictional errors in his declarations and orders, including the sentence of imprisonment imposed on Mr Stradford, that did not mean that the imprisonment order of the Federal Circuit Court of Australia and the consequential warrant had no authority at all or lacked legal force for all purposes, including the purpose of providing a defence of justification for the tort of false imprisonment.

225        There is no doubt that if the imprisonment order had been made by a so-called "superior court" then the order would not have been a "nullity" for all purposes; the order and warrant could then have been a potential source of justification.<sup>424</sup> But, as the primary judge observed, in lengthy and meticulous reasons, many authorities historically proceeded on the basis that there is a fundamental difference between a "superior court" and an "inferior court" such that orders of the latter, if made with jurisdictional error, have sometimes been thought to be nullities for all purposes, with no binding effect on the parties, and therefore not affording a justification for otherwise tortious acts committed by third parties. The most basic question of principle that therefore arises on these appeals is whether it makes a difference that the imprisonment order in respect of Mr Stradford was made by a so-called "inferior court".

226        This most basic question of principle is fundamental for the coherent operation of a judicial system. The question invites consideration of whether, in an integrated legal system, Australian law recognises different grades of justice depending upon the court in which a person appears. In particular, the context in which the question arises in this case concerns the federal courts. In a system where all federal courts exercise the same judicial power under s 71 of the *Constitution*, can there be, in the absence of any statutory provision to that effect, different grades of justice based upon the federal court that is exercising that judicial power?

227        There is some development, and clarification, of Australian law required in order to satisfactorily answer these questions. In order to satisfactorily answer these questions it is also necessary to explain in some detail the way that the understanding of the principles which purport to underlie legal precedent has developed. That explanation shows that to the extent that Australian law recognises any distinction between "superior courts" and "inferior courts", it should no longer do so. The distinction between "superior courts" and "inferior courts" is an

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**423** *New South Wales v Kable* (2013) 252 CLR 118 at 129 [21].

**424** *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33 at 62 [87].

historical anachronism of English and Australian legal history which, if it ever had any sensible justification, lost that justification by the 18th century at the latest.

228 No rational basis was, or could have been, advanced on these appeals for identifying which courts should be treated as "inferior" where such a label is not specifically used in legislation. The historical rationales that were given for the treatment of some courts as "inferior" are now universally recognised as nonsense. And many of the consequences of the distinction have been rejected as anachronisms. The application of the distinction has the potential to cause real damage to the fabric of the legal system by creating a quality of justice in so-called "inferior courts" which is inferior. This Court should usually confront anachronisms and lay them to rest. It is time to abandon the label "inferior court" and, to the extent that it conveys that there are "inferior courts", the label "superior court". It is also necessary to abandon the consequences said to follow from those labels, other than in the unusual circumstance that legislation can be taken to have used those labels with the intention of creating or replicating anachronistic consequences.

229 The primary judge, whose scrupulous reasoning at first instance has shone much light upon the historical anomalies in this area, understandably felt constrained as a "single judge exercising the original jurisdiction of [the Federal Court of Australia]" in "abolishing the common law distinction between inferior and superior court judges when it comes to judicial immunity".<sup>425</sup> This Court should take that step and, consequentially, should recognise and reject the anachronism underlying the distinction, namely that different consequences can arise depending upon whether a court is described as "inferior" or "superior".

230 A judicial order that involves jurisdictional error, in circumstances such as the present where the error arises from a misunderstanding of power, a denial of procedural fairness, or the presence of bias, has the same effect no matter which court issues it. The order is not a complete nullity. It must be obeyed. Until it is quashed or set aside, the failure to obey it can amount to a contempt. The order provides a defence of justification for acts that would otherwise amount to false imprisonment by the judge or judicial officer who made the order. In this case, the limited authority of the order also provides justification for the acts of the police officers, correctional officers, and contracted guards who were required to enforce the warrant which was based upon the imprisonment order.

231 The appeals must be allowed.

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<sup>425</sup> *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [332].

## II. The unsupportable rationales for the historical distinction between "inferior courts" and "superior courts"

232 For centuries it has been common for a distinction between "superior courts" and "inferior courts" to be reflexively parroted, usually without enquiry into the rationale or rationality of that distinction. The distinction, and its consequences, might have made sense in the 17th and possibly early 18th centuries, but the distinction, and therefore its consequences, have had no rational justification for at least three centuries. It is therefore unsurprising that "[t]he ambiguity inherent" in the term "superior court" (and, conversely, in the term "inferior court") is "one which has consistently bedevilled expositions by even the most learned writers".<sup>426</sup>

233 The distinction between a "superior court" and an "inferior court" may have initially arisen to distinguish between those courts that were courts of record and those courts that were not. Serjeant Henry Stephen described the practice of drawing up and preserving the records of proceedings in a court as "confined to the higher courts of justice".<sup>427</sup> And Holdsworth explained that it was "the formal records of the king's court" which differed from "inferior courts, which keep no such formal records".<sup>428</sup> Thus it was said that the privilege of having such records "constitutes the great leading distinction in English and American law between Courts of record, and Courts not of record, or, as they are frequently designated, superior and inferior Courts".<sup>429</sup> In 1667, in *Peacock v Bell*,<sup>430</sup> the question arose whether the Court of County Palatine of Durham was an "inferior court". After an initial equal division of the judges, it was held by a majority that although the Court of County Palatine was inferior to the Court of King's Bench, it was nevertheless a "superior court" because it was a court of record that "ought to certify every thing precisely".<sup>431</sup>

234 The existence of a formal record in the king's courts may have been the reason for the difference in treatment of proceedings between those in "inferior courts", which were not of record, and in the "superior" king's courts of record. As

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426 Thompson, "Judicial Immunity and the Protection of Justices" (1958) 21 *Modern Law Review* 517 at 520.

427 Stephen, *New Commentaries on the Laws of England*, 3rd ed (1853), vol 3 at 585.

428 Holdsworth, *A History of English Law* (1923), vol 5 at 157.

429 *Hahn v Kelly* (1868) 34 Cal 391 at 422. See also Works, *Courts and their Jurisdiction* (1894) at 7.

430 (1667) 1 Wms Saund 73 [85 ER 84].

431 *Peacock v Bell* (1667) 1 Wms Saund 73 at 75 [85 ER 84 at 88].

Coke explained, the record was treated as providing "such incontrollable credit and verit[y], as [to] admit no averment, plea or proof[] to the contrar[y]".<sup>432</sup> The record was proved "only by itself" and could only be challenged by a writ of error rather than a writ of false judgment.<sup>433</sup> Coke, and following him Blackstone, considered that only courts of record could have the power to fine or imprison; the power to fine or imprison would instantly mark out a court as one of record with proceedings enrolled and recorded rather than as one of an "inferior jurisdiction".<sup>434</sup>

235 By the 17th century it was already recognised that there was an "absurdity of making the possession by a court of a Latin plea roll the crucial test of its possession of the status of a court of record".<sup>435</sup> Further, the growth in law reporting had revealed "the barrenness of the distinction drawn by the courts of common law between courts of record and courts not of record".<sup>436</sup> As more courts began to be treated as courts of record, and as it was recognised that justices of the peace could be made Judges of Record,<sup>437</sup> the natural result should have been the removal of any corresponding distinction between "superior courts" and "inferior courts". But courts perplexingly continued to distinguish between "courts of record" (or

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432 Coke, *The First Part of the Institutes of the Lawes of England* (1628), bk 3, ch 7 at 260, §438. See also Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 3 at 24.

433 Coke, *The First Part of the Institutes of the Lawes of England* (1628), bk 2, ch 11 at 117, §175; Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 25 at 405; Holdsworth, *A History of English Law* (1923), vol 5 at 158.

434 *Griesley's Case* (1588) 8 Co Rep 38a at 41a [77 ER 530 at 535]; *Thomlinson's Case* (1605) 12 Co Rep 104 at 104 [77 ER 1379 at 1379]; *Beecher's Case* (1608) 8 Co Rep 58a at 60b [77 ER 559 at 565-566]; *Lady Throgmorton's Case* (1610) 12 Co Rep 69 at 69 [77 ER 1347 at 1347]; *Richard Godfrey's Case* (1614) 11 Co Rep 42a at 43b [77 ER 1199 at 1202]; Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 3 at 24-25.

435 Holdsworth, *A History of English Law* (1923), vol 5 at 161, referring to *R v Berchet* (1690) 1 Show KB 106 at 119-120 [89 ER 480 at 488].

436 Holdsworth, *A History of English Law* (1923), vol 5 at 162.

437 *Miller v Seare* (1777) 2 Black W 1141 at 1146 [96 ER 673 at 675].

"superior courts of record") and "inferior courts".<sup>438</sup> That distinction was particularly nonsensical since "inferior courts" were commonly courts of record.<sup>439</sup>

236 Since the concept of an "inferior court" as a court that was not of record could not survive, another distinction emerged. In *Peacock v Bell*,<sup>440</sup> reference had been made to a *consequence* of a court being "superior": "nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so" whilst "nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged". That consequence might have made sense if a "superior court" was equated with a court of record. But, in a circular fashion, this asserted consequence of a determination that a court is "superior" or "inferior" came to be treated as the definition of whether a court is "superior" or "inferior".

237 The distinction between "inferior courts" and "superior courts", divorced from the status of a court as a court of record or not of record, came to be drawn in the following way. "Inferior courts" were seen as courts of "limited jurisdiction, limited either by person, place or subject matter"<sup>441</sup> (and where a plaintiff was required to plead and prove the jurisdiction of the court, at least where the lack of jurisdiction did not "specially appear[]"<sup>442</sup>). By contrast, "superior courts" were seen as courts of "unlimited jurisdiction" or courts where there was a presumption of "unlimited jurisdiction".<sup>443</sup> Hence, Lord Halsbury concluded that unlike the

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**438** *Davey v Hinde* [1901] P 95 at 124; *Keates v Lewis Merthyr Consolidated Collieries Ltd* [1910] 2 KB 445 at 461; *Hickman v Potts* [1940] 1 KB 29 at 42; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 216; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 19 [40]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 80 [75].

**439** *Jordan v Cole* (1790) 1 H Bl 532 at 532-533 [126 ER 305 at 305-306].

**440** (1667) 1 Wms Saund 73 at 74 [85 ER 84 at 87-88].

**441** *Sirros v Moore* [1975] QB 118 at 150, referring to *Gwinne v Poole* (1692) 2 Lutwyche, App 1560 at 1566 [125 ER 858 at 861].

**442** *Scott v Bennett* (1871) LR 5 HL 234 at 248, quoting *Peacock v Bell* (1667) 1 Wms Saund 73 at 74 [85 ER 84 at 88]. See also *Taylor v Blair* (1789) 3 TR 452 at 453 [100 ER 672 at 673]; *Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239 at 259; *R v Chancellor of St Edmundsbury and Ipswich Diocese; Ex parte White* [1948] 1 KB 195 at 205-206; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 399.

**443** *Levy v Moylan* (1850) 10 CB 189 at 210 [138 ER 78 at 86]; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 474 [121]. See also *Isaacs v Robertson* [1985] AC 97 at 101, 102-103.

limited jurisdiction of "inferior courts", a "superior court" such as the Court of King's Bench was "a court of universal jurisdiction", so that it "is in connection with jurisdiction that we find the chief distinctions between superior and inferior courts".<sup>444</sup> The most comprehensive attempt to justify this distinction was made by Holdsworth:<sup>445</sup>

"It follows that a superior court has jurisdiction to determine its own jurisdiction; and that therefore an erroneous conclusion as to the ambit of its jurisdiction is merely an abuse of its jurisdiction, and not an act outside its jurisdiction. On the other hand, as an inferior court cannot determine its own jurisdiction, an erroneous conclusion as to its ambit is an act outside its jurisdiction."

238 Apart from the jurisdiction of a "superior" court to determine its own jurisdiction, almost every word of what Holdsworth said is wrong. It is now indisputable that every court, whether classified as "superior" or "inferior", has the power to determine its own jurisdiction.<sup>446</sup> Further, the notion that there existed courts whose jurisdiction was unlimited, or presumed to be unlimited, is incoherent. No court has, or could be presumed to have, unlimited jurisdiction; the jurisdiction of every court is limited with respect to subject matter, person, and place.<sup>447</sup> Hence, as the House of Lords held in 1954, the Chancery Division of the High Court of Justice, described as a "superior court of record", has limited jurisdiction.<sup>448</sup> As McTiernan J held in *Cameron v Cole*,<sup>449</sup> the Federal Court of Bankruptcy was a court of limited jurisdiction although it was described as a

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<sup>444</sup> Halsbury, *The Laws of England* (1909), vol 9 at 11-12.

<sup>445</sup> Holdsworth, *A History of English Law* (1924), vol 6 at 239.

<sup>446</sup> *Grassby v The Queen* (1989) 168 CLR 1 at 16; *New South Wales v Kable* (2013) 252 CLR 118 at 133 [31]; *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 at 230 [23], 242 [62]. See also Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 35.

<sup>447</sup> *Rizeq v Western Australia* (2017) 262 CLR 1 at 47-48 [125]-[129]; *Zurich Insurance Co Ltd v Koper* (2023) 277 CLR 164 at 182 [48]. See also *Laurie v Carroll* (1958) 98 CLR 310 at 324.

<sup>448</sup> *Chapman v Chapman* [1954] AC 429 at 457, 470, 471; see also at 474.

<sup>449</sup> (1944) 68 CLR 571 at 599. See also *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 215.



"superior court of record". As Menzies J held in *R v Bull*,<sup>450</sup> the Supreme Court of South Australia had limited jurisdiction, including by subject matter and place, although it is described as a superior court of "unlimited jurisdiction". As Brennan J held in *R v Ross-Jones; Ex parte Green*,<sup>451</sup> the (formerly named) Family Court of Australia is a court of limited jurisdiction although it is described as a "superior court". So too, the Federal Court of Australia is a court of "paramount" but "limited" jurisdiction<sup>452</sup> even though it was established as "a superior court of record".<sup>453</sup> And the High Court of Australia has limited original and appellate jurisdiction<sup>454</sup> although it is "a superior court of record"<sup>455</sup> and is sometimes described as a court of "unlimited jurisdiction".<sup>456</sup>

239 Since every court has jurisdiction with limits as to subject matter, person, and place, it is equally irrational to speak of a requirement of pleading and proof of the absence of jurisdiction as arising in a "superior court" on the nonsensical basis that a "superior court" is presumed to be of unlimited jurisdiction. Indeed, even historically this approach to pleading was not applied rigidly: a defendant could successfully demur on the basis of lack of jurisdiction to a plea of trespass in a foreign locality even in a "superior court" of "unlimited jurisdiction".<sup>457</sup> But more fundamentally, it is an approach that is inconsistent with the position

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**450** (1974) 131 CLR 203 at 246. See also *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 652-653.

**451** (1984) 156 CLR 185 at 215.

**452** *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 546 [24], 558-559 [60], 574-575 [111].

**453** *Federal Court of Australia Act 1976* (Cth), s 5.

**454** *Constitution*, ss 73, 75, 76. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 737, §299.

**455** *High Court of Australia Act 1979* (Cth), s 5.

**456** Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 742, §305.

**457** *Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239 at 261.

repeatedly taken in this Court for more than a century, that it is the "very first duty of *any* Court" to consider its own jurisdiction.<sup>458</sup>

### III. The asserted consequences of the historical distinction between "inferior courts" and "superior courts"

240 The (formerly named) Federal Circuit Court of Australia, from which the issues in this case arise, is designated by statute as a court of record.<sup>459</sup> There is no statutory reference to that Court as "inferior". Hence, this case is not concerned with a circumstance, likely to be very rare if it occurs at all, where a Parliament uses the term "inferior court" with what must be taken to be a deliberate intention to adopt some or all of the five asserted consequences of the historical distinction.

#### (i) Five asserted consequences of the alleged distinction

241 In *Re Macks; Ex parte Saint*,<sup>460</sup> in a passage endorsed by six members of this Court in *New South Wales v Kable*,<sup>461</sup> Hayne and Callinan JJ noted the different constitutional contexts in England and Australia and cautioned against the "unthinking transplantation to Australia of the learning that has built up about superior courts of record in England". This prescient observation, applicable equally to English learning about courts of "unlimited" and "limited" jurisdiction, directs attention to five consequences that have been said to arise in Australia, based on English learning, from the irrational distinction between "superior courts" and "inferior courts" or between courts of "unlimited" and "limited" jurisdiction.

242 Each of the five asserted consequences discussed below is directly or indirectly relevant to the issues in these appeals. Those asserted consequences are: (i) that superior courts are supervisory courts and are immune from prerogative writs; (ii) based in part on that notion of immunity from prerogative writs, that only an order of a superior court could, by itself, provide justification as a defence to an action against a judge alleging wrongful conduct arising from the order if the judge

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<sup>458</sup> *Hazeldell Ltd v The Commonwealth* (1924) 34 CLR 442 at 446 (emphasis added). See also *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 415; *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274 at 290 [51]; *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 477 [132]. See also Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 37-38.

<sup>459</sup> *Federal Circuit Court of Australia Act 1999* (Cth), s 8(3); *Federal Circuit and Family Court of Australia Act 2021* (Cth), ss 8(2), 10(1)(a).

<sup>460</sup> (2000) 204 CLR 158 at 275 [329].

<sup>461</sup> (2013) 252 CLR 118 at 132 [29].

made orders affected by jurisdictional error; (iii) that only an order of a superior court could, by itself, provide legal justification as a defence to an action asserting wrongful conduct against officers executing the order of a judge made with jurisdictional error; (iv) that only orders of superior courts are immune from collateral challenge on the basis of jurisdictional error; and (v) that only an order of a superior court can support a finding of contempt of that order if the order was made with jurisdictional error.

243 Each of these five asserted consequences that are said to follow from the distinction between superior courts and inferior courts is inconsistent with basic principle and most are inconsistent with the vast body of modern authority. Perhaps the most fundamental error underlying each asserted consequence is the confused notion that orders of a superior court made with jurisdictional error are voidable (or something similar), whilst orders of an inferior court made with jurisdictional error are void. The best-known exposition of this view was by Rich J in *Cameron v Cole*,<sup>462</sup> who reasoned that a decision of an inferior court that was beyond jurisdiction (or made with jurisdictional error) would be void yet a decision of a superior court that was beyond jurisdiction (or made with jurisdictional error) would be "at worst voidable".

244 The assertion of a distinction between voidness and voidability, based on whether a court is inferior rather than superior, was exploded by Dixon J in *Posner v Collector for Inter-State Destitute Persons (Vict)*.<sup>463</sup> His Honour observed that the misuse "of the word 'void' in relation to contracts is even more true of its use in connection with orders and judgments". Dixon J added that a court order could only be treated as a nullity where it was bad or unlawful "upon its face" or if a statute required it to be treated that way (although his Honour noted that the "tendency" was not to construe statutes as having that effect).

245 A related point was made by Lord Diplock in giving the decision of the Privy Council in *Isaacs v Robertson*.<sup>464</sup> Although his Lordship continued to speak of courts of "unlimited jurisdiction", his Lordship explained, in relation to those courts, that the "legal concepts of voidness and voidability form part of the English law of contract" but do not apply to court orders, which, if irregular, can be set aside upon application to the court that made the order but, if regular, can only be set aside on appeal.<sup>465</sup>

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**462** (1944) 68 CLR 571 at 590.

**463** (1946) 74 CLR 461 at 483.

**464** [1985] AC 97.

**465** *Isaacs v Robertson* [1985] AC 97 at 103.

246 Again, in *New South Wales v Kable*,<sup>466</sup> six members of this Court endorsed comments by H W R Wade<sup>467</sup> concerning administrative decisions. Their Honours found "some reflection [in those comments] in connection with the acts of courts and judges" so that:

"[T]here is no such thing as voidness in an absolute sense, for the whole question is, void against whom? It makes no sense to speak of an act being void unless there is some person to whom the law gives a remedy. If and when that remedy is taken away, what was void must be treated as valid, being now by law unchallengeable. It is fallacious to suppose that an act can be effective in law only if it has always had some element of validity from the beginning. However destitute of legitimacy at its birth, it is legitimated when the law refuses to assist anyone who wants to bastardise it. What cannot be disputed has to be accepted."

247 In short, to say that orders of a court are void is merely to express a conclusion which is contingent upon a process of reasoning that is usually opaque and often concerned only with the particular purpose for which the orders are being held to have no legal effect. In reasoning that applies with at least the same force to the orders of all courts as it does to administrative decisions, it has therefore been emphasised that a distinction between decisions that are "void" and those that are "voidable" is "neither necessary nor helpful".<sup>468</sup> As Professor Aronson has cogently and correctly concluded, cases in this Court "unequivocally endorsing the contingency of terms such as validity or nullity stretch back for at least two decades".<sup>469</sup> As explained later in these reasons, this point was made explicit in the recent explanation given by the Supreme Court of the United Kingdom that it has been the law for more than 170 years that no orders of *any* court are void—in the sense that they can be disobeyed—until quashed, set aside, or altered by legislation.<sup>470</sup>

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**466** (2013) 252 CLR 118 at 129-130 [22].

**467** Wade, "Unlawful Administrative Action: Void or Voidable?" (1967) 83 *Law Quarterly Review* 499 at 512.

**468** *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 613 [46].

**469** Aronson, "Reforming Certiorari and Messing with Nullity" (2022) 29 *Australian Journal of Administrative Law* 110 at 115.

**470** *R (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department* [2022] AC 461 at 480-484 [44]-[56], discussing *Chuck v Cremer* (1846) 1 Coop temp Cott 338 at 342 [47 ER 884 at 885].

(ii) *The first asserted consequence: immunity from prerogative writs*

248 At common law, a central consequence of the difference between a superior court and an inferior court was sometimes thought to be that only inferior courts were amenable to writs of certiorari, mandamus, and prohibition. With "unlimited" jurisdiction, it was sometimes said that the position at common law was that the supervisory "superior" courts were not subject to any of those writs<sup>471</sup> or were not subject to certiorari and were not usually subject to the other writs.<sup>472</sup> The historical accuracy of any suggestion of an absolute position at common law is doubtful. It is a position that is inconsistent with the origins of the writ of certiorari in the writ of error.<sup>473</sup> And it is inconsistent with the issue of writs of certiorari and prohibition against the ecclesiastical and admiralty courts.<sup>474</sup>

249 To whatever extent the suggested historical position might have survived the judicature reforms in the United Kingdom, the suggested historical position did not survive Federation in Australia.<sup>475</sup> Section 33(1) of the *Judiciary Act 1903* (Cth) empowers the High Court of Australia to issue writs of mandamus and prohibition against any court, without constraining that power on the basis of whether a court is superior or inferior.<sup>476</sup> And writs of prohibition have always been available against Justices of any federal court as officers of the

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471 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 437 [165]; Campbell, "Inferior and Superior Courts and Courts of Record" (1997) 6 *Journal of Judicial Administration* 249 at 250. See also Blackstone, *Commentaries on the Laws of England* (1768), bk 3, ch 7 at 110, cf 112; Shortt, *Informations (Criminal and Quo Warranto), Mandamus and Prohibition* (1887) at 294, cf 426-429.

472 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 241; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 386-387.

473 Gordon, "Certiorari and the Revival of Error in Fact" (1926) 42 *Law Quarterly Review* 521 at 524, cited in *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 463 [257]. See also Story, *Commentaries on the Constitution of the United States* (1833), vol 3 at 627-628, §1756.

474 Shortt, *Informations (Criminal and Quo Warranto), Mandamus and Prohibition* (1887) at 437 and *Anonymous* (1704) 6 Mod 308 [87 ER 1047], both discussed in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 95 [30].

475 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 393-394.

476 See, for instance, *HBSY Pty Ltd v Lewis* (2024) 98 ALJR 1211; 419 ALR 280.

Commonwealth under s 75(v) of the *Constitution*.<sup>477</sup> There is no rational foundation for the position that only an inferior court is amenable to the constitutional writs, other than a distinction, which on examination is nonsensical, between courts of unlimited jurisdiction and courts of limited jurisdiction. As Leeming observes, "[t]here can be no scope for those propositions [that certiorari, prohibition, and mandamus do not go to a superior court] in the Australian legal system where *all* courts are courts of limited jurisdiction".<sup>478</sup> In *Attorney-General of Queensland v Wilkinson*,<sup>479</sup> Fullagar J said of the argument that a writ of prohibition could not issue to the Industrial Court because it was a "superior Court of Record".<sup>480</sup>

"Whatever may be its status, and whatever its dignity, it is a court of limited jurisdiction, and it follows *prima facie* that it may be restrained by prohibition from exceeding its jurisdiction."

(iii) *The second asserted consequence: inability to justify the acts of judicial officers of "inferior courts" affected by jurisdictional error*

250 The authorities concerning this asserted consequence have developed into a mess.

251 On the one hand, there were many cases which did not distinguish between superior courts and inferior courts when considering whether a judicial officer would have a justification for a claim of false imprisonment or assault based on an order made with jurisdictional error. Some of these cases held that a judicial act which was beyond jurisdiction could not have any legal effect and thus could not provide a defence of justification in any tortious action against the judicial officer. These cases did not distinguish between a lack of jurisdiction based on subject matter, person, or place in finding that the order or judicial act was without legal effect.<sup>481</sup> Other cases, however, held that if the judicial officer was unaware of the

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**477** *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 399.

**478** Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 33 (emphasis in original). See also *New South Wales v Kable* (2013) 252 CLR 118 at 133 [31].

**479** (1958) 100 CLR 422 at 431.

**480** See *The Industrial Conciliation and Arbitration Act 1932* (Qld), s 6(7).

**481** *Scavage v Tateham* (1601) Cro Eliz 829 at 830 [78 ER 1056 at 1056-1057]; *Groome v Forrester* (1816) 5 M & S 314 at 320-321 [105 ER 1066 at 1068]; *Davis v Capper* (1829) 10 B & C 28 at 38 [109 ER 362 at 365]; *Caudle v Seymour* (1841) 1 QB 889

lack of jurisdiction and did not have means of knowing of the lack of jurisdiction then the tortious act was justified.<sup>482</sup> Nevertheless, as Holdsworth observed, with a little exaggeration, "neither the Year Books nor sixteenth and early seventeenth century cases draw any distinction between judges of the superior courts of record and the judges of any other courts of record";<sup>483</sup> and, as Holdsworth also noted, "[a]s late as 1840", Parke B<sup>484</sup> had held, in terms that applied to superior court and inferior court judicial officers, that there was "no privilege" for a judicial officer of *any* court of record who acted "without jurisdiction".<sup>485</sup>

252 On the other hand, there was sometimes held to be a difference between the justification arising from a judicial act in a superior court and the justification arising from a judicial act in an inferior court. In *Miller v Seare*,<sup>486</sup> De Grey CJ said that "[t]he protection, in regard to the Superior Courts, is absolute and universal; with respect to the Inferior, it is only while they act within their jurisdiction". In the advice given by Willes J to the House of Lords in *Mayor and Aldermen of the City of London v Cox*,<sup>487</sup> he explained that a person who, as a plaintiff, obtained and executed a process of an inferior court was liable if the process was beyond the jurisdiction of the inferior court and the "[j]udge and [executing] officer [were] liable to a civil action if they knew of the defect of jurisdiction". In the first case

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at 892-894 [113 ER 1372 at 1373-1374]; *Lindsay v Leigh* (1848) 11 QB 455 at 465-466 [116 ER 547 at 551]; *Houlden v Smith* (1850) 14 QB 841 at 852-853 [117 ER 323 at 327-328]; *Willis v Maclachlan* (1876) 1 Ex D 376 at 384-385; *Agnew v Jobson* (1877) 13 Cox CC 625 at 629-630; *O'Connor v Isaacs* [1956] 2 QB 288 at 363; *Gerard v Hope* [1965] Tas SR 15 at 53-54.

**482** *Windham v Clere* (1589) Cro Eliz 130 [78 ER 387]; *The Case of the Marshalsea* (1612) 10 Co Rep 68b at 76a [77 ER 1027 at 1038-1039]; *Gwinne v Poole* (1692) 2 Lutwyche, App 1560 at 1566 [125 ER 858 at 861]; *Calder v Halket* (1840) 3 Moo PC 28 at 77 [13 ER 12 at 36]; *Wood v Fetherston* (1901) 27 VLR 492 at 501-502; *Polley v Fordham [No 2]* (1904) 91 LT 525 at 529.

**483** Holdsworth, "Immunity for Judicial Acts" [1924] *Journal of the Society of Public Teachers of Law* 17 at 19-20.

**484** The later Lord Wensleydale.

**485** Holdsworth, "Immunity for Judicial Acts" [1924] *Journal of the Society of Public Teachers of Law* 17 at 20, quoting *Calder v Halket* (1840) 3 Moo PC 28 at 74-75 [13 ER 12 at 35].

**486** (1777) 2 Black W 1141 at 1145 [96 ER 673 at 675].

**487** (1867) LR 2 HL 239 at 263, citing *Moravia v Sloper* (1737) Willes 30 [125 ER 1039], *Andrews v Marris* (1841) 1 QB 3 [113 ER 1030], *Carratt v Morley* (1841) 1 QB 18 [113 ER 1036] and *Houlden v Smith* (1850) 14 QB 841 [117 ER 323].

in the line of cases cited by Willes J, *Moravia v Sloper*,<sup>488</sup> the Lord Chief Justice drew a distinction between the superior courts of Westminster Hall and inferior courts with respect to the liability of the plaintiff: "a plaintiff may sue if [they] please in the Courts of Westminster-Hall and then [they] will be safe, but if [they] will sue in an Inferior Court [they are] bound at [their] peril to take notice of the bounds and limits of [its] jurisdiction". Other cases maintained this distinction, for the purposes of a justification defence, between superior courts and inferior courts.<sup>489</sup>

253 The justification defence relied upon by judges for judicial acts in superior courts was said by Holdsworth to have arisen from twin premises, dealt with in reverse order, that replicate two of the erroneous assertions of distinction between superior courts and inferior courts: (i) unlike the inferior courts, which could be "controlled by the prerogative writs", "the judges of the superior courts are answerable only to God and the king"; and (ii) "a superior court has jurisdiction to determine its own jurisdiction ... [but] an inferior court cannot determine its own jurisdiction".<sup>490</sup>

254 As explained above,<sup>491</sup> whatever its doubtful historical basis, there was no foundation left after Federation in Australia for either of these two suggested rationales for different treatment of the justifications for judicial officers or those executing judicial process. There has, therefore, for a long time been no remaining rationale for any different treatment of justification defences for judicial officers and those executing judicial process based upon whether the officer is an officer of a superior court or an inferior court. Unsurprisingly then, when the issue of a defence of justification for judicial acts arose in 1974 in *Sirros v Moore*,<sup>492</sup> a majority of the Court of Appeal (on this issue) rejected the asserted "sharp distinction between the inferior courts and the superior courts". The question remaining was whether: (i) consistently with some of the older cases, the test for *all* courts should be one by which no justification was recognised for judicial orders that were made with jurisdictional error such that "[t]he only difference between judges of the Superior Courts and other judges consists in the extent of

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**488** (1737) Willes 30 at 34 [125 ER 1039 at 1042].

**489** *Willis v Maclachlan* (1876) 1 Ex D 376 at 381-382; *M'Creadie v Thomson* 1907 SC 1176 at 1182-1183; *O'Connor v Isaacs* [1956] 2 QB 288 at 304, 351-352.

**490** Holdsworth, "Immunity for Judicial Acts" [1924] *Journal of the Society of Public Teachers of Law* 17 at 20.

**491** See above at [249].

**492** [1975] QB 118 at 136, 149.



their respective jurisdiction";<sup>493</sup> or (ii) consistently with the older cases that treated judicial acts in superior courts as justified, an inferior court order made with jurisdictional error could still have legal effect to justify an otherwise tortious act (and, if so, what the test for justification should be for judges of all courts).

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The decision in *Sirros v Moore* concerned the liability of a judge of the Crown Court who had ordered the detention of Mr Sirros and where the order was allegedly made with jurisdictional error, the liability of the police officer who had executed the judge's order, and the liability of the Commissioner of Police of the Metropolis. Although the Crown Court was constituted as "a superior court of record",<sup>494</sup> the absurdity of the barren nomenclature of "inferior courts" and "superior courts" was illustrated by the submissions of Lord Gifford, who focused upon the nature of the Crown Court as a superior court of record yet one of "limited jurisdiction" which was "expressly subject to supervision and correction on a case stated or by the prerogative writs".<sup>495</sup> In his florid but penetratingly accurate prose, Lord Denning MR said:<sup>496</sup>

"In the old days ... there was a sharp distinction between the inferior courts and the superior courts. Whatever may have been the reason for this distinction, it is no longer valid. ... In this new age I would take my stand on this: as a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land—from the highest to the lowest—should be protected to the same degree, and liable to the same degree."

Likewise, Ormrod LJ held that "[t]here is no ground today for drawing a distinction between judges of different status or between judges and magistrates".<sup>497</sup> Only Buckley LJ, with either the hesitancy of one of Lord Denning MR's "timorous souls"<sup>498</sup> or the *töricht* mut of a captain standing alone on the deck of a sinking ship, was left clinging to the moribund distinction between superior courts and

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<sup>493</sup> *Anderson v Gorrie* [1895] 1 QB 668 at 671.

<sup>494</sup> *Courts Act 1971* (UK), s 4(1).

<sup>495</sup> *Sirros v Moore* [1975] QB 118 at 128.

<sup>496</sup> *Sirros v Moore* [1975] QB 118 at 136.

<sup>497</sup> *Sirros v Moore* [1975] QB 118 at 149.

<sup>498</sup> *Candler v Crane, Christmas & Co* [1951] 2 KB 164 at 178; *Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA* [1979] AC 210 at 236.

inferior courts. Buckley LJ characterised the Crown Court as "a hybrid", a superior court operating as an inferior court.<sup>499</sup>

256 The test for a defence of justification in *Sirros v Moore* for both the judge and the police officers was expressed in different ways at different points in the reasoning of Lord Denning MR and Ormrod LJ. But the dispositive test applied by Lord Denning MR at the conclusion of his Lordship's reasons was that the judge had "acted judicially"<sup>500</sup> or, in the words of Ormrod LJ, that the judge had "act[ed] in his capacity as a judge, in good faith".<sup>501</sup> That test corresponded with older authorities which had held that there was a justification "for acts done judicially".<sup>502</sup> This test for a defence of justification effectively treated the liability for false imprisonment of the judge and police officers, as participants in a joint enterprise and therefore joint tortfeasors, as justified based upon the judicial act of the court order. Even if the court order had been made with jurisdictional error, it was not "void" in the misleading sense in which that term is sometimes used as meaning devoid of legal consequence.<sup>503</sup> It was capable of providing a justification for the actions of imprisoning Mr Sirros.

257 The test for the defence of justification in *Sirros v Moore* has a strong and principled rationale. As Lord Denning MR said, echoing words of Fox J of the Court of Common Pleas in Ireland more than 150 years earlier,<sup>504</sup> "it applies to every judge, whatever [their] rank. Each should be protected from liability to damages when ... acting judicially. Each should be able to do [their] work in complete independence and free from fear", and "should not have to turn the pages of [their] books with trembling fingers, asking [themselves]: 'If I do this, shall I be liable in damages?'"<sup>505</sup> Or, as O'Connor J of the Supreme Court of the United States expressed the rationale in words later quoted by Gleeson CJ, "the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have ... [i]f judges were personally liable for erroneous decisions, the resulting avalanche of suits ... would

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499 *Sirros v Moore* [1975] QB 118 at 143.

500 *Sirros v Moore* [1975] QB 118 at 137.

501 *Sirros v Moore* [1975] QB 118 at 150.

502 *Taaffe v Downes (note)* (1813) 3 Moo PC 36 at 52 [13 ER 15 at 23].

503 Above at [242]-[247].

504 *Taaffe v Downes (note)* (1813) 3 Moo PC 36 at 51-52 [13 ER 15 at 23].

505 *Sirros v Moore* [1975] QB 118 at 136.

provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits".<sup>506</sup>

258 The test proposed by Lord Denning MR and Ormrod LJ in *Sirros v Moore* was not rejected by the House of Lords in *In re McC (A Minor)*.<sup>507</sup> That case concerned the availability of a statutory defence provided by s 15 of the *Magistrates' Courts Act (Northern Ireland) 1964* ("the 1964 Act"), in respect of an action for damages against three Justices of the Belfast Juvenile Court who acted "without jurisdiction". The statutory defence failed because it did not apply where a Justice had acted "without jurisdiction or in excess of jurisdiction". In a speech with which Lord Keith, Lord Elwyn-Jones and Lord Brandon agreed, Lord Bridge explained that the issue before the House of Lords concerned only the interpretation of s 15 of the 1964 Act, albeit in light of the understanding of the common law in 1849 (the date of passage of the *Justices Protection (Ireland) Act 1849* (UK)),<sup>508</sup> which Lord Bridge considered had been "declaratory of the common law" as at 1849, and which the 1964 Act had sought to consolidate).<sup>509</sup> As to the common law issue in *Sirros v Moore* concerning whether the same immunity should apply to judicial officers of both superior courts and inferior courts, Lord Bridge said that it was a question upon which he "express[ed] no concluded opinion", although he inclined to the view that the distinct treatment of judicial officers of superior courts and judicial officers of inferior courts in respect of what he described as "immunity from suit" was "so deeply rooted in our law that it certainly cannot be eradicated by the Court of Appeal and probably not by your Lordships' House".<sup>510</sup> Indeed, not only had Lord Bridge expressed no concluded opinion on the question, but his Lordship had not heard argument concerning any justification for maintaining what he thought to be a well-established common law rule.

259 In this Court, *Sirros v Moore* has been applied in cases involving so-called "superior court" judges without any suggestion that a different principle would apply to judges or other judicial officers of "inferior courts". The decision in *Sirros v Moore* was applied in 1981 by Aickin J with reference to the page at which the

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**506** *Fingleton v The Queen* (2005) 227 CLR 166 at 186 [38], quoting *Forrester v White* (1988) 484 US 219 at 226-227.

**507** [1985] AC 528.

**508** 12 & 13 Vict c 16, s 2.

**509** *In re McC (A Minor)* [1985] AC 528 at 541-542.

**510** *In re McC (A Minor)* [1985] AC 528 at 550.

quotation above<sup>511</sup> from Lord Denning MR appears.<sup>512</sup> His Honour expressed the conclusion in general terms, not limited to superior courts, that "it is established by law that a judge cannot be sued in respect of anything that [they do] in court".<sup>513</sup> The decision in *Sirros v Moore* was also applied in this Court in 1988 by Wilson J, who, after quoting a passage from Lord Denning MR expressed in general terms which did not distinguish between judicial officers of superior courts and inferior courts, said that "[t]here is little more that can be said".<sup>514</sup> An extension of time for leave to appeal from that decision was refused on the basis that the decision was "unquestionably correct"<sup>515</sup> and a further appeal from that refusal was dismissed on the basis that the decision of Wilson J was "clearly correct".<sup>516</sup>

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The principle in *Sirros v Moore* was also applied in 1998 by this Court in *Re East; Ex parte Nguyen*<sup>517</sup> in the context of judges and other judicial officers of so-called "inferior courts". The case concerned what was loosely described as the "immunity" of a magistrate of the Magistrates' Court of Victoria and the Chief Judge of the County Court of Victoria. A joint judgment of six members of this Court said that "there is a well established immunity from suit which protects judicial officers from actions arising out of acts done in the exercise of their judicial function or capacity". Although their Honours did not cite *Sirros v Moore*, they did refer to a decision of the Court of Appeal of the Supreme Court of New South Wales where *Sirros v Moore* had been cited for the point that the basis for a distinction between the so-called "immunity enjoyed" by judicial officers of superior courts and inferior courts had been criticised.<sup>518</sup> There was no suggestion that the reasoning in *Re East; Ex parte Nguyen* was based on any particular statutory immunity.<sup>519</sup>

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<sup>511</sup> At [255].

<sup>512</sup> *Durack v Gassior* (unreported, High Court of Australia, 13 April 1981) at 15.

<sup>513</sup> *Durack v Gassior* (unreported, High Court of Australia, 13 April 1981) at 17.

<sup>514</sup> *Gallo v Dawson* (1988) 63 ALJR 121 at 122; 82 ALR 401 at 402-403.

<sup>515</sup> *Gallo v Dawson* (1990) 64 ALJR 458 at 460; 93 ALR 479 at 482.

<sup>516</sup> *Gallo v Dawson* (1992) 66 ALJR 859 at 859; 109 ALR 319 at 320.

<sup>517</sup> (1998) 196 CLR 354.

<sup>518</sup> *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 365-366 [30], referring to *Rajski v Powell* (1987) 11 NSWLR 522, see at 528-529.

<sup>519</sup> See *County Court Act 1958* (Vic), s 9A; *Magistrates' Court Act 1989* (Vic), s 14.

261 In *Fingleton v The Queen*,<sup>520</sup> Kirby J referred to "rules, now overtaken by statute and the common law, that formerly drew artificial distinctions ... between judicial officers at different ranks in the hierarchy". As his Honour rightly assumed, the second historical consequence of a purported distinction between superior courts and inferior courts, being the supposed lack of justification for acts of inferior court judicial officers affected by jurisdictional error, no longer existed. The same principle of justification applies to all judicial officers and, by extension, to all persons authorised and required to execute a judicial order.

262 The principle applicable across all courts, to all judicial officers, is that an order, even if made with jurisdictional error, will justify acts that are required by the order, so long as the order is a judicial act. In other words, the justification is based upon a judicial act in the purported exercise of the authority of the court. It is likely that only in extreme cases would an order by a judicial officer be able to be characterised as not even purporting to exercise the authority of the court. Not only would the order have to be perverse or irrational but the judicial officer would need to be "shown to have acted so perversely or so irrationally that what [they] did should not be treated as a judicial act at all".<sup>521</sup>

(iv) *The third asserted consequence: inability to justify acts required in execution of judgments of "inferior courts"*

263 Although Australian law has adopted the principle enunciated by Lord Denning MR in *Sirros v Moore* in relation to judges, there remains doubt about whether that same principle extends not merely to all judicial officers but, as in *Sirros v Moore*, to any other officer executing a court process who would potentially be jointly liable for a tort such as false imprisonment.

264 As a matter of principle, the defence of justification based on judicial authority should be the same. If a judicial order, made with jurisdictional error, nevertheless has sufficient authority to provide a defence of justification for the judicial officer who made the order then, a fortiori, it ought to have sufficient authority to provide the same defence of justification for any person who is bound to take action in accordance with the order. The matter of principle is even more compelling in the case of other persons who have a lesser ability to discover any jurisdictional error. There 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

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**520** (2005) 227 CLR 166 at 214 [137]. See also at 184 [34] per Gleeson CJ, referring to the "strong criticism" of "distinctions between various levels in the judicial hierarchy" in this area; *Rajski v Powell* (1987) 11 NSWLR 522 at 528-529.

**521** *Sirros v Moore* [1975] QB 118 at 141.

fulfil their duty based upon a statutory role following a legal direction from the court.

265 As will be explained below, this was the dominant position at common law. Subject to one exception, in each instance, the (albeit limited) legal authority of a judicial order made with jurisdictional error, whether made by a superior court or an inferior court, is sufficient to provide a defence of justification for the acts of any person where the person is obliged to act in execution of the order. The only exception, consistent with the exception for the judicial officer who is not justified by an order that is made with so blatant a jurisdictional error that it cannot be regarded as even purporting to exercise the authority of the court, is that of a person who does not purport to perform their duty to act as directed by the court because they act in accordance with a warrant or order that "on its face ... is such as no law authorizes".<sup>522</sup> Historical examples of this exception included: (i) the issue of a warrant by a justice of the peace who, notoriously, had jurisdiction only to deprive a person of liberty for particular offences;<sup>523</sup> (ii) the detention by one person of another for non-payment of a debt;<sup>524</sup> or (iii) the detention by one person of another without any warrant at all.<sup>525</sup> The scope and modern instances of this exception are not relevant to this case, save to say that without more it is not sufficient merely to know of facts from which a lack of jurisdiction might be inferred from the face of a warrant.<sup>526</sup>

266 There are many authorities that historically permitted a defence of justification for those obliged to execute a court order, and who did so in the course of their duties, even where the order was made with jurisdictional error and irrespective of whether the court order was from a superior court or an inferior court. In his report of *Dr Drury's Case*,<sup>527</sup> Sir Edward Coke recorded that a sheriff was justified when he seized the plaintiff under a writ of *capias utlagatum*, even though the writ was later reversed by a writ of error. The same was true if the writ were "absolutely void", such as where the court "had no jurisdiction over the

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522 *Corbett v The King* (1932) 47 CLR 317 at 339. See also *Ward v Murphy* (1937) 38 SR (NSW) 85 at 95.

523 Burn, *The Justice of the Peace, and Parish Officer*, 21st ed (1810), vol 5 at 751, referring to offences including "treason, felony, or praemunire, or any other offence against the peace".

524 *Moravia v Sloper* (1737) Willes 30 at 38 [125 ER 1039 at 1044].

525 *Demer v Cook* (1903) 88 LT 629 at 631.

526 cf *Ward v Murphy* (1937) 38 SR (NSW) 85 at 97.

527 (1610) 8 Co Rep 141b at 143a [77 ER 688 at 691].

cause".<sup>528</sup> Coke's description in *Dr Drury's Case* of the difference between "acts done in the execution of justice, which are compulsive", and "acts which are voluntary"<sup>529</sup> was relied upon by four members of this Court in *Commissioner for Railways (NSW) v Cavanough*<sup>530</sup> for the proposition that acts "done according to the exigency of a judicial order afterwards reversed are protected",<sup>531</sup> although a "judgment reversed is the same as no judgment".<sup>532</sup> In the same case, Starke J said that "anyone who acts in execution of a judgment may justify under it".<sup>533</sup>

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In *Andrews v Marris*,<sup>534</sup> the Court of Queen's Bench sat en banc to consider the liability of a clerk and serjeant of an "inferior court",<sup>535</sup> the Caistor Court of Requests, in an action for trespass for assault and false imprisonment. The clerk had issued, and the serjeant had executed, a warrant which was found to be "a nullity".<sup>536</sup> The judgment of the Court was given by Lord Denman CJ, who held that the clerk had no defence of justification by following "the practice of the Court" without any valid order, but that the serjeant had a defence of justification because he was "the ministerial officer of the commissioners [of the Court of Requests], bound to execute their warrants, and having no means whatever of

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**528** Watson, *A Practical Treatise on the Law Relating to the Office and Duty of Sheriff* (1834) at 100-101.

**529** *Dr Drury's Case* (1610) 8 Co Rep 141b at 143a [77 ER 688 at 691]. See also the plaintiff who executes a warrant, not being required to do so, and is later the subject of a suit for damages: Archbold, *The Justice of the Peace, and Parish Officer* (1840), vol 1 at 115.

**530** (1935) 53 CLR 220.

**531** *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225.

**532** *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225, quoting *R v Drury* (1849) 3 Car & K 193 at 199 [175 ER 517 at 520].

**533** *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 227.

**534** (1841) 1 QB 3 [113 ER 1030].

**535** Winder, "The Courts of Requests" (1936) 52 *Law Quarterly Review* 369 at 381.

**536** *Andrews v Marris* (1841) 1 QB 3 at 16 [113 ER 1030 at 1036].

ascertaining whether they issue upon valid judgments or are otherwise sustainable or not".<sup>537</sup> In that respect, the serjeant's situation was:<sup>538</sup>

"exactly analogous to that of the sheriff in respect of process from a Superior Court".

268 This passage was quoted with approval by Dixon J in *Posner v Collector for Inter-State Destitute Persons (Vict)*.<sup>539</sup> In the same case, Starke J referred to the line of authority of which *Andrews v Marris* formed a part and explained that although a *party* (who acts voluntarily) has no defence of justification for "executing the process of an inferior court in a matter beyond its jurisdiction", the same was not true of "an officer executing and obeying such process", who is "protected".<sup>540</sup>

269 The same approach was taken in *Moravia v Sloper*.<sup>541</sup> In that case, although the Lord Chief Justice drew a distinction between the superior courts of Westminster Hall and inferior courts in respect of the liability of a plaintiff who executed a court process but did not prove the existence of jurisdiction, he held that an officer of an inferior court could plead justification "[f]or the inferior officer is punishable as a minister of the Court" for failure to obey the command of the court. It would be unjust for the inferior officer to be punished if that person "does not do a thing", but also to be "liable to an action" if they do.<sup>542</sup> This rationale was repeated by Davidson J in the Supreme Court of New South Wales in *Ward v Murphy*.<sup>543</sup>

270 The defence of justification to a tortious claim for false imprisonment was not limited to officers of courts, superior or inferior. Consistently with the rationale of the Lord Chief Justice in *Moravia v Sloper*, the defence applied to all persons who executed a court order directed to them, whether from a superior court or an inferior court, in the course of their duties (as a matter of obligation). An early

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537 *Andrews v Marris* (1841) 1 QB 3 at 16 [113 ER 1030 at 1035-1036].

538 *Andrews v Marris* (1841) 1 QB 3 at 16-17 [113 ER 1030 at 1036].

539 (1946) 74 CLR 461 at 481-482. See also *Mooney v Commissioners of Taxation, New South Wales* (1905) 3 CLR 221 at 241-242.

540 *Posner v Collector for Inter-State Destitute Persons (Vict)* (1946) 74 CLR 461 at 476.

541 (1737) Willes 30 at 34 [125 ER 1039 at 1041].

542 *Moravia v Sloper* (1737) Willes 30 at 34 [125 ER 1039 at 1042].

543 (1937) 38 SR (NSW) 85 at 95.



example is the decision in *Olliet v Bessey*,<sup>544</sup> which concerned the liability in tort of a jailer who imprisoned Mr Bessey pursuant to an apparently valid writ and warrant. The Court of Common Pleas gave reasons that covered circumstances where a warrant was issued lawfully as well as where the issue of the warrant was affected by jurisdictional error. There are multiple reports of this case to which reference was made during these appeals but the most accurate version (relied upon by the Commonwealth and Queensland) is that reported by Sir Thomas Jones, later Chief Justice of the Court of Common Pleas.<sup>545</sup> The reports relied upon by Mr Stradford<sup>546</sup> were the English Report reprints of the "much criticized" edition of the reports of Sir Bartholomew Shower, which were not even prepared for publication by Shower.<sup>547</sup> In Sir Thomas Jones' report of *Olliet v Bessey*, he describes the following as "said by the Lord Chief Justice" which "the Court agreed to".<sup>548</sup>

"[I]f one be arrested by a process out of an Inferior Court for a cause of action which did not arise within their jurisdiction, the party arrested may well maintain an action against the plaintiff who had levied the plaint, and should be intended to know where the cause of action arose, but not against the Judge or officer who had ent[e]red the plaint, or the officer who had executed it, for when the King had granted such a particular jurisdiction (as he may do by law) it shall be intended that it may be exercised without unavoidable danger or prejudice of the necessary officers thereof. And then it being impossible for them to know whether the cause of action did arise within their jurisdiction, it is not agreeable to any rules of justice, to make them liable to the action of the defendant, if it did not arise there."

271 The decision in *Olliet v Bessey*, as reported in Sir Thomas Jones' more accurate report, was followed in later cases, some involving valid warrants and some involving invalid warrants.<sup>549</sup> A number of those cases, and others, were cited

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544 (1682) T Jones 214 [84 ER 1223].

545 See Yale, "Jones, Sir Thomas (1614-1692)", in Matthew and Harrison (eds), *Oxford Dictionary of National Biography* (2004), vol 30, 638 at 638.

546 *Olliet v Bessey* (1681) 2 Show KB 148 [89 ER 851]; (1682) 2 Show KB 204 [89 ER 892].

547 See Frankle, "Shower, Sir Bartholomew (1658-1701)", in Matthew and Harrison (eds), *Oxford Dictionary of National Biography* (2004), vol 50, 446 at 447.

548 (1682) T Jones 214 at 214-215 [84 ER 1223 at 1223-1224].

549 See, eg, *Gwinne v Poole* (1692) 2 Lutwyche, App 1560 at 1568 [125 ER 858 at 862]; *Henderson v Preston* (1888) 21 QBD 362 at 366, 367; *Demer v Cook* (1903) 88 LT 629 at 631.

with approval by the Chief Justice of New South Wales in *Smith v Collis*<sup>550</sup> in relation to the governor of a jail who executed a warrant that was invalid, but not on its face: "where a gaoler receives a prisoner under a warrant which is correct in form, no action will lie against [them] if it should turn out that the warrant was improperly issued, or that the Court had no jurisdiction to issue it".<sup>551</sup> In the same case, Pring J, when considering whether warrants issued by a magistrate should afford the jailer the same protection as warrants issued by a superior court, said that it is "hard to discover any logical reason why the gaoler should be protected by the warrant of the Superior Court, and not by that of an inferior tribunal such as a magistrate. Protection would seem to be more necessary in the latter case than in the former."<sup>552</sup> Again, in *Robertson*,<sup>553</sup> Steytler J (with whom Malcolm CJ and Franklyn J agreed) recognised that a prison superintendent was justified in relying upon an invalid warrant from an inferior court, noting the view that had prevailed in England since 1846<sup>554</sup> that "[a] party who knows of an order, whether null or void, regular or irregular, cannot be permitted to disobey it".<sup>555</sup>

272 That principled common law position was not, however, uniform. There were numerous cases historically in which it was held, or suggested, that no justification would lie for any person in the execution of an order of an inferior court made with jurisdictional error; a position that was contrasted with the justification afforded to officers executing an order of a superior court made with jurisdictional error.<sup>556</sup> But the problem with these cases, which drew a distinction between inferior courts and superior courts, is that they were based upon the

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**550** (1910) 10 SR (NSW) 800.

**551** *Smith v Collis* (1910) 10 SR (NSW) 800 at 813, quoting *Demer v Cook* (1903) 20 Cox CC 444 at 448 (see also *Demer v Cook* (1903) 88 LT 629 at 631).

**552** *Smith v Collis* (1910) 10 SR (NSW) 800 at 817.

**553** (1997) 92 A Crim R 115.

**554** See *Chuck v Cremer* (1846) 1 Coop temp Cott 338 [47 ER 884].

**555** *Robertson* (1997) 92 A Crim R 115 at 124, quoting *Hadkinson v Hadkinson* [1952] P 285 at 288, which in turn quoted *Chuck v Cremer* (1846) 1 Coop temp Cott 338 at 342-343 [47 ER 884 at 885]. See also at [286]-[290] below.

**556** *Nichols v Walker* (1635) Cro Car 394 at 395 [79 ER 944 at 945]; *Read v Wilmot* (1672) 1 Vent 220 at 220 [86 ER 148 at 148]; *Shergold v Holloway* (1735) Sess Cas 154 at 155 [93 ER 156 at 157]; *Morse v James* (1738) Willes 122 at 128 [125 ER 1089 at 1092]; *Perkin v Proctor* (1768) 2 Wils KB 382 at 384 [95 ER 874 at 875-876]; *Morrell v Martin* (1841) 3 Man & G 581 at 597 [133 ER 1273 at 1279].

problematic distinctions, discussed above,<sup>557</sup> between "void" court processes and "voidable" court processes, and between inferior courts of limited jurisdiction and superior courts of unlimited jurisdiction.<sup>558</sup> In 1841, Tindal CJ stated that "[t]here is a great difficulty, at first sight, in reconciling the cases".<sup>559</sup> Certainly, the decision of the Full Court of the Supreme Court of New South Wales in *Feather v Rogers*<sup>560</sup> in 1909 did not resolve this issue. Although no point was taken about the nature of the warrant—the plaintiff referring interchangeably to authorities concerning executive warrants<sup>561</sup> and judicial warrants<sup>562</sup>—the case concerned a search warrant issued as a matter of executive rather than judicial power. In denying a common law defence of justification to the defendant, no member of the Court mentioned even a single case from the conflicting lines of authority.

273 The common law cases which denied a defence of justification to officers or other persons who were obliged to execute orders of an inferior court were both inconsistent with the principle enunciated in *Moravia v Sloper*, and based upon a distinction between inferior courts and superior courts that cannot be supported by any of its historically asserted rationales. Those cases should not be followed. I also do not consider that the dissenting reasons of Gageler J and Jagot J in *Stanley v Director of Public Prosecutions (NSW)*<sup>563</sup> can be read, as Mr Stradford argued, as supporting the unprincipled view that a person who performs a legal duty has no defence of justification to a claim in tort for their acts, in circumstances where the person owed a legal duty to comply with an order of an inferior court that was directed to them. Properly understood, the statements by their Honours referring to "the potentially extreme consequences for those who might have acted ... on the faith of the order [made with jurisdictional error]" and the exposure of "those

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557 See above at [237]-[239], [242]-[247].

558 *Nichols v Walker* (1635) Cro Car 394 at 395 [79 ER 944 at 945]; *Read v Wilmot* (1672) 1 Vent 220 at 220 [86 ER 148 at 148]; *Shergold v Holloway* (1735) Sess Cas 154 at 155 [93 ER 156 at 157]; *Morse v James* (1738) Willes 122 at 125, 128 [125 ER 1089 at 1091, 1092]; *Perkin v Proctor* (1768) 2 Wils KB 382 at 385-386 [95 ER 874 at 876-877]; *Morrell v Martin* (1841) 3 Man & G 581 at 597 [133 ER 1273 at 1279].

559 *Morrell v Martin* (1841) 3 Man & G 581 at 592 [133 ER 1273 at 1278].

560 (1909) 9 SR (NSW) 192.

561 *Smith v Barton* (1848) 1 Legge 445; *Hope v Evered* (1886) 17 QBD 338.

562 *Caudle v Seymour* (1841) 1 QB 889 [113 ER 1372]; *Lindsay v Leigh* (1848) 11 QB 455 [116 ER 547]; *Arnold v Johnson* (1876) 14 SCR (NSW) 429.

563 (2023) 278 CLR 1 at 8-9 [16], 49 [156], 50 [158]. cf *Spautz v Dempsey* [1984] 1 NSWLR 449 at 451.

acting under the order [made with jurisdictional error] to liability for their acts" cannot be taken to bear upon the possibility, or scope, of a defence of justification in either superior courts or inferior courts.<sup>564</sup>

274 Contrary to the submissions of Mr Stradford, the development of the common law was not frozen in time in 1750 by the passage of the *Constables Protection Act 1750*.<sup>565</sup> That Act was enacted amidst the confusion already present in the authorities in 1750: if the authorities had consistently recognised a justification for a constable executing any court process (whether of an inferior court or a superior court) then "there would surely have been no necessity for the enactment contained in the sixth section".<sup>566</sup> No provision of the *Constables Protection Act* suggested that the common law had been codified and rendered immune from further development. No subsequent case made such a suggestion. And, as the common law continued to be developed in the cases after 1750, no commentator made such a suggestion. The continued development of the common law concerning the defence of justification after the enactment of the *Constables Protection Act* is one of many examples of such development occurring concurrently and consistently with statute in a legal system in which "[s]ignificant elements of what now is regarded as 'common law' had their origin in statute or as glosses on statute or as responses to statute".<sup>567</sup>

275 There is a further, and even more basic, reason that s 6 of the *Constables Protection Act*, correctly, was not, cannot be, and should not be treated as having stultified the common law development of the defence of justification. Section 6 was not concerned with a defence, by plea of justification, at all. Like a limitation provision,<sup>568</sup> or s 4 of the *Statute of Frauds*,<sup>569</sup> words such as "no action shall be brought" do not create a defence by way of justification but instead provide a

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**564** *Stanley v Director of Public Prosecutions (NSW)* (2023) 278 CLR 1 at 9 [17], 50 [158].

**565** 24 Geo II c 44.

**566** *Morrell v Martin* (1841) 3 Man & G 581 at 594 [133 ER 1273 at 1278].

**567** *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 60 [19]. See, further, Gordon, "Analogical Reasoning by Reference to Statute: What is the Judicial Function?" (2019) 42 *University of New South Wales Law Journal* 4.

**568** *Courtenay v Williams* (1844) 3 Hare 539 at 551-552 [67 ER 494 at 500]. See also *Brisbane City Council v Amos* (2019) 266 CLR 593 at 599 [7].

**569** 29 Car 2 c 3. See *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 60 [19]; Williams, *The Statute of Frauds Section Four in the Light of its Judicial Interpretation* (1932) at 194.

defence by way of a bar to enforcement of a right and place only an evidentiary onus on the defendant to raise that defence. There is a fundamental difference between enforceability of an action and justification of the conduct the subject of the action.<sup>570</sup> The *Constables Protection Act* created a defence that operated upon the enforceability of an action, to be pleaded by a defendant with the onus of proof then shifting to the plaintiff.<sup>571</sup> The *Constables Protection Act* did not extinguish the wrongdoing that gave rise to a right "against any constable, headborough or other officer, or against any person or persons acting by [their] order and in [their] aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace ... notwithstanding any defect of jurisdiction in such justice or justices".<sup>572</sup> With this different operation for the defence provided by s 6 of the *Constables Protection Act*, there is no basis for Mr Stradford's submission that the *Constables Protection Act* somehow froze, in 1750, the development of the common law rules as to the defence of justification for the acts of judicial officers and others required to enforce judicial orders or consequential warrants.

276 The importance of a clear common law defence of justification is further emphasised by the criminal law of Queensland, which was the subject of submissions on these appeals. Under Queensland criminal law, officers who execute invalid warrants or judicial orders are protected by statutory defences, including a justification, which mimics the common law justification, of "obedience to the order of a competent authority which he or she is bound by law to obey, unless the order is manifestly unlawful".<sup>573</sup> Where police officers, correctional officers, or contracted guards are bound by law to obey court orders or warrants, whether made or issued by superior courts or inferior courts, and whether the orders or warrants involve jurisdictional error or not, a defence of justification, whether arising under the statute or at common law, should be available unless the orders or warrants cannot be regarded as judicial acts (an expression which might be little different from the description of an order as "manifestly unlawful"). To reiterate,<sup>574</sup> the common law defence of justification should be understood without the confusion that has arisen from descriptions of orders made with jurisdictional error as "void" or "nullities"—descriptions that fail to recognise that judicial orders, and any consequential warrants, involving jurisdictional error are capable of having legal consequences for some purposes.

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570 See *R v Rowan (a pseudonym)* (2024) 278 CLR 470 at 497-498 [75]-[78].

571 *Feather v Rogers* (1909) 9 SR (NSW) 192 at 197-198, 198-199, 200.

572 24 Geo II c 44, s 6.

573 *Criminal Code* (Qld), s 31(1)(b). See also s 249 in relation to civil liability.

574 See above at [242]-[247].

(v) *The fourth asserted consequence: collateral challenge to "inferior court" decisions made with jurisdictional error*

277 The fourth asserted consequence, involving collateral challenges (that is, challenges by one of the parties in a different but "collateral" proceeding) to inferior court orders (more accurately, "judgments" or final orders), was not directly in issue in these appeals. It should nonetheless be referred to because the development of principles relating to collateral challenges "was bound up with the development of the law" discussed above concerning the defence of justification for conduct based on judicial orders.<sup>575</sup> The fourth asserted consequence may also have originated in a difference between courts of record and courts that were not of record. Where a "conviction were alleged in a pleading, it would be a good answer that there was no such record" of the conviction.<sup>576</sup> Nevertheless, the same purported rationale as that supporting the absence of a defence of justification for conduct based on judicial orders of an inferior court made with jurisdictional error was said to support collateral challenge of a decision made with jurisdictional error in an inferior court. As Hale CB said in *Terry v Huntington*,<sup>577</sup> although the "King's courts at Westminster" were courts of "universal jurisdiction", an action would lie for acts "not within the[] jurisdiction" of inferior courts "against the officers of such inferior courts ... for the judgment there is no estoppel in collateral actions".

278 Unsurprisingly, in many of the older cases the same approach was taken to collateral challenge as was taken to judicial "immunity": a distinction was drawn between superior courts and inferior courts on the basis that only the former were presumed to have jurisdiction (or said to have "unlimited" jurisdiction) and were capable of making orders affected by jurisdictional error which were not void.<sup>578</sup> As Blackburn J said, describing the argument of counsel, in *Revell v Blake*,<sup>579</sup> a general rule was thought to exist that if jurisdiction were exceeded by "inferior courts with a limited jurisdiction" then "the proceedings are void, and may be shewn to be so in any collateral proceeding". Hence, unlike in a superior court,<sup>580</sup>

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<sup>575</sup> *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 19 [40]. See also *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 80 [75]. See above at [250]-[262].

<sup>576</sup> *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225, citing *Dr Drury's Case* (1610) 8 Co Rep 141b at 142b [77 ER 688 at 691].

<sup>577</sup> (1669) Hardres 480 at 484 [145 ER 557 at 559].

<sup>578</sup> See Handley, *Spencer Bower and Handley: Res Judicata*, 6th ed (2024) at 68 [4.03].

<sup>579</sup> (1873) LR 8 CP 533 at 544.

<sup>580</sup> *Scott v Bennett* (1871) LR 5 HL 234 at 245-246.

no res judicata would arise from void orders of an inferior court and those orders could be the subject of a collateral challenge.

279 Apart from the conclusory (and now deprecated<sup>581</sup>) description of the nature of orders made by an inferior court with jurisdictional error as "void", this asserted consequence of a difference between superior courts and inferior courts in respect of collateral challenge rested upon the same false premises as those (now rejected) premises concerning justifications for conduct based on judicial orders and the purported immunity of superior courts from prerogative writs. In *In re Racal Communications Ltd*,<sup>582</sup> Lord Diplock thought that the difference was based on the "obvious distinction between jurisdiction conferred by a statute on a court of law of limited jurisdiction" and the jurisdiction of a court which was "not a court of limited jurisdiction". His Lordship added:<sup>583</sup>

"[t]here is simply no room for error going to ... jurisdiction, nor ... is there any room for judicial review. Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only."

280 Other cases attempted to justify the ability to bring a collateral challenge to a decision made by an inferior court, but not a superior court, by the softer but equally problematic assertion that the latter were courts of presumed jurisdiction and the former were courts where jurisdiction was not presumed. For instance, in *Ex parte Amalgamated Engineering Union (Australian Section)*; *Re Jackson*,<sup>584</sup> Jordan CJ said that a collateral challenge to the orders of an inferior court was possible because "nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so" yet "nothing shall be intended to be within the jurisdiction of an inferior Court, but that which is so expressly alleged".

281 Another rationale that was sometimes given for permitting collateral challenge to an inferior court order was a rationale that is both circular and equally applicable to superior court orders: "to hold that judgment to operate as an estoppel would be, in effect, to give jurisdiction".<sup>585</sup> The circularity of that rationale is that the very question is whether the judgment has sufficient authority to operate as an estoppel. In any event, it is a rationale that does not depend upon the status of a

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581 See above at [242]-[247].

582 [1981] AC 374 at 384.

583 *In re Racal Communications Ltd* [1981] AC 374 at 384.

584 (1937) 38 SR (NSW) 13 at 19, 20, quoting *Peacock v Bell* (1667) 1 Wms Saund 73 at 74 [85 ER 84 at 87-88].

585 *Godwin v Cashion* (1878) 1 SCR (NSW) 165 at 169.

court as superior or inferior. Whether or not "the considerations of policy or expediency" aimed at discouraging "a multitude of suits for the same cause of action" should extend to judgments made with jurisdictional error ought therefore to be expressed as a principle without reference to whether the court is described as "superior" or "inferior",<sup>586</sup> just as the principle with which it was historically "bound up"<sup>587</sup>—justifications for conduct based on judicial orders—was expressed.

282 The treatment of orders of an inferior court as subject to collateral attack if infected by jurisdictional error also has serious consequences for that aspect of the rule of law which is concerned with the ability of people to rely upon legal orders. The rationale of the "importance of the authority of court orders to the maintenance of the rule of law",<sup>588</sup> discussed below, applies not only to the need to obey orders of an inferior court that are not invalid on their face, but also to the ability to rely upon such orders.

283 Consider a declaration of a so-called inferior court, made after hearing from a person and a State, that a person commits no criminal offence against a law of the State by engaging in particular conduct. Suppose that the declaration were affected by jurisdictional error and that, years later, a different court, in separate proceedings, reached a different conclusion as to the criminality of conduct that was the subject of the declaration. If the declaration of the earlier inferior court were treated as having no legal effect and capable of being subject to any collateral challenge, then the person who obtained the declaration might arguably be liable to criminal prosecution and conviction for conduct taken in reliance upon an apparently valid declaration by a court.

(vi) *The fifth asserted consequence: an inability to be in contempt of an order of an "inferior court" made with jurisdictional error*

284 The fifth asserted consequence is the one that has the least support in historical authority, although it has been taken to represent Australian law since the reasoning of McHugh JA in *Attorney-General (NSW) v Mayas Pty Ltd*.<sup>589</sup> In that case, his Honour said that "[i]f an inferior tribunal exercising judicial power has no authority to make an order of the kind in question, the failure to obey it

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**586** *Maharajah of Jeypore v Gunapuram Deenabandhu Patnaick* (1904) 32 LR Ind App 45 at 51-52.

**587** *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 19 [40].

**588** *R (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department* [2022] AC 461 at 482 [49].

**589** (1988) 14 NSWLR 342 at 357.



cannot be a contempt. Such an order is a nullity." McHugh JA cited no authority for that proposition. If the proposition were correct, it would be inconsistent with all of the cases concerning judicial "immunity" following *Sirros v Moore* where it was assumed or decided that legal effect could be given to an order of an inferior court sufficient to justify otherwise wrongful action by a judicial officer. Further, as will be explained, the proposition of McHugh JA was also inconsistent with the authority of the previous century and a half. But, unfortunately, the decision of McHugh JA was followed by the New South Wales Court of Appeal in *United Telecasters Sydney Ltd v Hardy*<sup>590</sup> and, without argument being pursued on the point, by members of this Court in *Pelechowski v Registrar, Court of Appeal (NSW)* ("*Pelechowski*").<sup>591</sup>

285 In *Pelechowski*, a majority of three members of this Court held that an asset preservation order made by the District Court of New South Wales had been attended by jurisdictional error. Their Honours then held that since the District Court was an inferior court with no jurisdiction to make the asset preservation order, the appellant could not have been in contempt of that order. A sentence of imprisonment for contempt, imposed by the Court of Appeal, was set aside.<sup>592</sup> The issue in dispute before this Court in *Pelechowski* concerned only the authority of the District Court to make the asset preservation order. The argument that, absent such authority, the order of the District Court remained capable of supporting a conviction for contempt until the order had been set aside was not pursued. Instead, it was conceded by the respondent, after prompting from McHugh J, that if the District Court had no power to make the asset preservation order, the appellant would be "home and hosed".<sup>593</sup> Without any pursued argument on this point, the decision in *Pelechowski* is not authority for the fifth of the asserted consequences, which, following the decisions in *Attorney-General (NSW) v Mayas Pty Ltd* and *United Telecasters Sydney Ltd v Hardy*, this Court assumed to be correct.<sup>594</sup> No decision is authority for an assertion made without argument.<sup>595</sup>

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**590** (1991) 23 NSWLR 323 at 335.

**591** (1999) 198 CLR 435.

**592** *Pelechowski* (1999) 198 CLR 435 at 453 [55].

**593** *Pelechowski v The Registrar, Court of Appeal* [1998] HCATrans 406 at 2/14-16. See also *Pelechowski v The Registrar, Court of Appeal* [1998] HCATrans 405 at 32/3-7.

**594** *Pelechowski* (1999) 198 CLR 435 at 445-446 [27]-[29].

**595** *R v Warner* (1661) 1 Keb 66 at 67 [83 ER 814 at 815]; *Felton v Mulligan* (1971) 124 CLR 367 at 413; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13]; *Bell Lawyers*

286 This issue was, however, argued before the Supreme Court of the United Kingdom in *R (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department*.<sup>596</sup> In that case, Lord Reed, with whom the other members of the Supreme Court of the United Kingdom agreed, cogently explained that since the decision of *Chuck v Cremer*<sup>597</sup> in 1846 it had been an authoritative principle of English law "that a court order must be obeyed unless and until it has been set aside or varied".<sup>598</sup> In *Chuck v Cremer*, the Lord Chancellor had expressed the principle as one that applied to orders known to a party, "whether null or valid, regular or irregular".<sup>599</sup> In other words, even in the ambiguous and deprecated language of the so-called "nullity" of orders of so-called "inferior" courts, such orders had to be obeyed.

287 The point is not merely one arising as a matter of more than 150 years of precedent following *Chuck v Cremer*, to which Lord Reed meticulously referred. As Lord Reed explained in reaching this incontrovertible conclusion of reason in *R (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department*, the consistent treatment of orders of all courts as binding until set aside.<sup>600</sup>

"is consistent with the rationale of the rule ... [I]t is based on the importance of the authority of court orders to the maintenance of the rule of law: a consideration which applies to orders made by courts of limited jurisdiction as well as to those made by courts possessing unlimited jurisdiction."

In other words, whether or not one uses the language of "superior court" or "inferior court" or "limited jurisdiction" or "unlimited jurisdiction", the authority

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*Pty Ltd v Pentelow* (2019) 269 CLR 333 at 346 [28]; *Private R v Cowen* (2020) 271 CLR 316 at 383 [173]. See also Cross and Harris, *Precedent in English Law*, 4th ed (1991) at 158-161.

<sup>596</sup> [2022] AC 461.

<sup>597</sup> (1846) 1 Coop temp Cott 338 [47 ER 884].

<sup>598</sup> *R (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department* [2022] AC 461 at 480 [44].

<sup>599</sup> *Chuck v Cremer* (1846) 1 Coop temp Cott 338 at 342 [47 ER 884 at 885].

<sup>600</sup> *R (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department* [2022] AC 461 at 482 [49].

of a legal order arises from the order itself, the existence of which is accepted by the community "as a protected reason for conformity".<sup>601</sup>

288 This reasoning is consistent with the judgment of six members of this Court in *New South Wales v Kable*,<sup>602</sup> which explained the "roots of the doctrine, that the orders of a superior court of record are valid until set aside even if made in excess of jurisdiction". Although that explanation was given by reference to a "superior court", the explanation applies equally to all courts, whether described as "superior" or "inferior". The roots of the doctrine were said to "lie in the nature of judicial power", the ability of "any court" to "decide whether it has authority to decide the claim that is made to it", and "the distinction between the exercise of judicial power ... and the exercise of executive power".

289 Ultimately, although the proposition in *Pelechowski* is neither authoritative nor justifiable, it is not necessary in these appeals to consider the correctness of the result in that case. Whether the result can be justified may depend upon the extent of the exception to the rule that the orders of *any* court have binding effect of their own force, whether or not the court is classified as a "superior court" or "court of unlimited jurisdiction". In 1834, Chitty described that exception, with reference to substantial authority,<sup>603</sup> in the following terms: "[i]f a Superior Court of Common Law, or a Court of Equity, or a Criminal Court, or an Ecclesiastical Court, assume a jurisdiction which it *clearly* has not, the proceeding will in general be wholly void".<sup>604</sup>

290 In other words, and shorn of the language of "superiority" and "voidness", the orders of *any* court might not have any legal effect if the court is not even purporting to exercise the authority vested in the court. As the Solicitor-General of the Commonwealth expressed the point colourfully in oral submissions, "if a judge of the [Federal] Circuit Court were to purport to conduct a murder trial ... [the

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601 Raz, *The Authority of Law*, 2nd ed (2009) at 29.

602 (2013) 252 CLR 118 at 133-134 [33]-[34].

603 *Weaver v Clifford* (1613) 2 Bulstrode 62 at 64 [80 ER 960 at 962]; *The Case of the Marshalsea* (1612) 10 Co Rep 68b at 76a [77 ER 1027 at 1038-1039]; *Beaurain v Scott* (1813) 3 Camp 388 at 390 [170 ER 1420 at 1421]; *Ackerley v Parkinson* (1815) 3 M & S 411 at 424-425 [105 ER 665 at 670]; *Ex parte Jenkins* (1823) 1 B & C 655 at 655 [107 ER 241 at 241]; *R v Haynes* (1825) Ry & Mood 298 at 299 [171 ER 1027 at 1027]; *Attorney-General v Lord Hotham* (1827) 3 Russ 415 at 415 [38 ER 631 at 632].

604 Chitty, *The Practice of the Law in all its Departments* (1834), vol 2, pt 4 at 307 (emphasis added, footnotes omitted).

judge would not] be purporting to exercise jurisdiction that the court of which they are a member has".

#### IV. The *Federal Circuit Court of Australia Act 1999* (Cth), s 17

291 Part of the first ground of appeal of each of Judge Vasta and the Commonwealth was that s 17 of the *Federal Circuit Court of Australia Act 1999* (Cth) was a source of power for the declaration of contempt and imprisonment order made by Judge Vasta, rendering the declaration and order, and the warrant issued in support of the order, valid until set aside. This ground was treated as a ground of appeal that was anterior to other grounds concerning defences of justification relied on by Judge Vasta, the correctional officers, the police officers, and the MSS Guards. But it is the common law defences of justification that are the anterior issues; those defences also inform the content of s 17.

292 In *The Case of the Marshalsea*,<sup>605</sup> Sir Edward Coke said that although a person might read the words in a statute, that person "will never know the true reason of the interpretation of them" unless they know "what the law was before the making of them". It is essential to an understanding of s 17 of the *Federal Circuit Court of Australia Act* to appreciate, from the development of the common law defences of justification for judicial officers and those executing judicial orders, that terms such as "void" and "nullity" can be dangerously misleading when used to describe the effect of court orders.

293 The effect of s 17 was not to reinstate the historical anachronism by which the orders of inferior courts were sometimes said to be void, nullities, or of no legal effect. Nor was it to reverse a century and a half of authority, with the exception of the limited authority which was referred to but not the subject of any pursued argument in *Pelechowski*, that orders of all courts are binding until set aside. And, most fundamentally for these appeals, it did not reverse the now established and principled position that the order of *any* court, which purports to be an exercise of the authority of the court, is sufficient to justify conduct which would otherwise amount to a tort if the order had no legal effect, with the justification extending to the judicial officer who made the order and any other officer whose duty it was to enforce the order and who was required by the court to do so.

##### (i) *The history of s 17 and equivalent provisions*

294 In 1903, the *Judiciary Act* provided in s 24 that the "High Court shall have the same power to punish contempts of its power and authority as is possessed at the commencement of this Act by the Supreme Court of Judicature in England".

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<sup>605</sup> (1612) 10 Co Rep 68b at 73a [77 ER 1027 at 1033].

295 The text of s 24, and the power that it conferred on this Court, was used as a model for the Commonwealth Court of Conciliation and Arbitration. In 1951,<sup>606</sup> s 29A was added to the *Conciliation and Arbitration Act 1904-1950* (Cth) to give the Court of Conciliation and Arbitration "the same power to punish contempts of its power and authority, whether in relation to its judicial powers and functions or otherwise, as is possessed by the High Court in respect of contempts of the High Court".

296 A bill seeking to enact s 29A was first introduced into the House of Representatives in March 1951, but lapsed as it was not passed by the Commonwealth Parliament prior to the federal election in April 1951. A second bill, which was relevantly identical to the first bill, was then introduced into the House of Representatives in June 1951, and passed by both Houses of Parliament in September 1951. In the second reading speech for each of these two bills, the Minister for Labour and National Service and Minister for Immigration, Mr Holt, explained the history behind the introduction of s 29A.<sup>607</sup> That history was as follows. In 1947, the Commonwealth had legislated to make the Court of Conciliation and Arbitration a "Superior Court of Record" for the first time.<sup>608</sup> The constitution of the Court of Conciliation and Arbitration as a "Superior Court of Record" occurred because this Court had held in *John Fairfax & Sons Pty Ltd v Morrison*<sup>609</sup> that the Court of Conciliation and Arbitration, not being a "superior court of record", had only the "particular power" to punish for contempt that had been conferred on it by statute, being "the power of a superior court of record to punish by attachment and committal any person whom it finds to have been guilty of contempt of the court", but not the power to punish by fine.<sup>610</sup> Specific statutory provisions dealing with the power of the Court of Conciliation and Arbitration to punish for contempt were necessary because of an earlier decision of this Court, which held that the Court of Industrial Arbitration of New South Wales, being an "inferior ... Court of record", had only the power to respond to contempts that

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606 *Conciliation and Arbitration Act (No 2) 1951* (Cth), s 7.

607 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 March 1951 at 66-67; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 29 June 1951 at 729-730.

608 *Commonwealth Conciliation and Arbitration Act 1947* (Cth), s 8.

609 [1945] ALR 297 at 298.

610 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 March 1951 at 66-67; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 29 June 1951 at 730; *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 243.

occurred "in the face of the Court" and not to contempts that occurred outside the Court.<sup>611</sup> But, despite the creation of the Court of Conciliation and Arbitration as a "Superior Court of Record" by the *Commonwealth Conciliation and Arbitration Act 1904-1947* (Cth) ("the 1947 Act") as amended, in 1951 a majority of this Court held that the specific provisions concerning contempt that had been included in the 1947 Act (which had replaced the contempt provision considered by this Court in *John Fairfax & Sons Pty Ltd v Morrison*) had effectively codified the rules concerning contempt and had therefore excluded what was thought to be the common law jurisdiction of a superior court of record concerning contempt.<sup>612</sup>

297 Section 29A was therefore a response to this Court's decision in 1951. In introducing the first iteration of the bill which sought to introduce s 29A of the *Conciliation and Arbitration Act*, Mr Holt explained that despite this Court's decision to the contrary, when the 1947 Act had created the Court of Conciliation and Arbitration as a superior court of record, "[c]learly, the underlying idea ... was that the court should have all the inherent powers to punish for contempt that flowed at common law from its declared status as a superior court of record".<sup>613</sup> Since a majority of this Court had held that such powers had not been conferred by the 1947 Act, the powers were then granted by the new s 29A, which was described as providing "that the Arbitration Court shall be clearly vested with all the inherent powers of a superior court of record notwithstanding the existence of other means of enforcement of its orders and awards".<sup>614</sup> In short, s 29A, in materially the same terms as s 17 of the *Federal Circuit Court of Australia Act*, was inserted for exactly the same reason that s 17 was inserted: to avoid other specific contempt provisions being treated as a code and to ensure that the Court functioned in every respect, in relation to contempt, in accordance with the prevailing understanding of the powers of a superior court of record.

298 In *R v Kirby; Ex parte Boilermakers' Society of Australia*,<sup>615</sup> a majority of this Court held that the legislation that constituted the Commonwealth Court of

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**611** *Master Undertakers' Association of New South Wales v Crockett* (1907) 5 CLR 389 at 392.

**612** *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 256, 259, 265-266.

**613** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 March 1951 at 67. See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 293.

**614** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 March 1951 at 67.

**615** (1956) 94 CLR 254.

Conciliation and Arbitration was invalid because it combined administrative and judicial power in that Court. Nevertheless, the form of s 29A from 1951 provided the model for ensuring that other courts obtained the same contempt powers as a "superior court of record" such as the High Court. For instance, in 1975 the *Family Law Act 1975* (Cth) provided in s 35 that the Family Court (constituted also as a "superior court of record"<sup>616</sup>) "has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court". And in 1976, the *Federal Court of Australia Act 1976* (Cth) provided in s 31(1) that the Federal Court (also described as a "superior court of record"<sup>617</sup>) had "the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court", with additional provision being made to permit the Court as constituted at the time of the contempt to punish a contempt of the Court committed in the face or hearing of the Court.<sup>618</sup>

299 In *Re Colina; Ex parte Torney*,<sup>619</sup> Gleeson CJ and Gummow J described provisions such as s 24 of the *Judiciary Act* and s 35 of the *Family Law Act* "as declaratory of an attribute of the judicial power of the Commonwealth which is vested in those Courts by s 71 of the Constitution". In other words, the statutory provisions concerning contempt merely declared the pre-existing power of those Courts, which is "a power of self-protection or a power incidental to the function of superintending the administration of justice".<sup>620</sup> The expression "self-protection" was that of Parke B in *Beaumont v Barrett*,<sup>621</sup> who described the contempt powers of the Houses of Parliament in that way, adding that the "right of self-protection implies, as a consequence, a right to use the necessary means for rendering such self-protection effectual ... [which requires] a competent authority to enforce the free and independent exercise of its own proper functions, whatever these functions might be".

300 The same reasoning must apply to s 31(1) of the *Federal Court of Australia Act* despite the Federal Court being a statutory court of limited jurisdiction, and although this Court has supervisory jurisdiction over the Federal Court. The Federal Court was created under s 73 of the *Constitution* and exercises the judicial

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**616** *Family Law Act 1975* (Cth), s 21(2).

**617** *Federal Court of Australia Act 1976* (Cth), s 5(2).

**618** *Federal Court of Australia Act 1976* (Cth), s 31(2).

**619** (1999) 200 CLR 386 at 395 [16]. See also at 429 [113].

**620** *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 395 [16], quoting *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 443.

**621** (1836) 1 Moo PC 59 at 77 [12 ER 733 at 740]. See *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 443-444.

power of the Commonwealth under s 71 of the *Constitution*. It is true that the jurisdiction to punish criminal contempt has been described in this Court as an "inherent jurisdiction" of a "superior court".<sup>622</sup> But that reasoning, quoting from Lord Halsbury (who saw "superior courts" as courts of universal jurisdiction<sup>623</sup>), uses the misleading language of "inherent jurisdiction", a concept which, when used in relation to the powers of a court, means "such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred".<sup>624</sup>

301 This conclusion about the power of the Federal Court to punish for contempt, notwithstanding this Court's ability to issue constitutional writs to the Federal Court, can be reached without assessing the correctness of the proposition that this Court's "power to issue *mandamus* and *certiorari*" means that this Court could also punish contempts of lower courts on the assumption that these powers are "in truth but different aspects of the same function—the traditional general supervisory function of the King's Bench, the function of seeing that justice was administered and not impeded in lower tribunals".<sup>625</sup>

302 The same reasoning should also apply to any other federal court created to exercise the judicial power of the Commonwealth under s 71 of the *Constitution*. Nothing in s 71 or s 77 of the *Constitution* provides any basis for a submission that there can be two systems of justice in federal courts, with an "inferior" system of federal courts which do not have the same power of self-protection, or power incidental to the function of superintending the administration of justice, as that held by "superior courts".

(ii) *The terms of s 17 and related provisions*

303 In 1999, at the establishment of the Federal Magistrates Court<sup>626</sup> (which later became the Federal Circuit Court of Australia, with a corresponding change

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<sup>622</sup> *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 241.

<sup>623</sup> Above at [237].

<sup>624</sup> *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 263-264 [5], quoting *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590 [64], which in turn quotes *Harris v Caladine* (1991) 172 CLR 84 at 136, which in turn quotes *Parsons v Martin* (1984) 5 FCR 235 at 241.

<sup>625</sup> *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 363. See also at 365. cf *R v Fletcher; Ex parte Kisch* (1935) 52 CLR 248 at 256-257 in relation to "inferior Courts of a State".

<sup>626</sup> *Federal Magistrates Act 1999* (Cth), s 8(1).



to the title of the *Federal Magistrates Act 1999* (Cth)<sup>627</sup>, and at all relevant times since, s 17 of the *Federal Circuit Court of Australia Act* provided as follows, in terms nearly identical to those of s 31(1) of the *Federal Court of Australia Act*:

**"Contempt of court**

- (1) The Federal Circuit Court of Australia has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court.
- (2) Subsection (1) has effect subject to any other Act.
- (3) The jurisdiction of the Federal Circuit Court of Australia to punish a contempt of the Federal Circuit Court of Australia committed in the face or hearing of the Federal Circuit Court of Australia may be exercised by the Federal Circuit Court of Australia as constituted at the time of the contempt.

Note: See also section 112AP of the *Family Law Act 1975*, which deals with family law or child support proceedings."

304 Section 112AP, to which s 17 refers, is the only provision of Pt XIII B of the *Family Law Act*. That Part is entitled "Contempt of court". Section 112AP concerns contempt of "a court having jurisdiction under this Act", and it applies "[i]n spite of any other law".<sup>628</sup> The sanctions for contempt by a natural person, pursuant to s 112AP, include "committal to prison or fine or both".<sup>629</sup>

305 As the Federal Circuit Court of Australia was a court having jurisdiction under the *Family Law Act*,<sup>630</sup> s 112AP applied to the Federal Circuit Court. However, s 112AP only extends to a contempt that is not "a contravention of an order under [the *Family Law Act*]" or which "constitutes a contravention of an order under [the *Family Law Act*] and involves a flagrant challenge to the authority of the court".<sup>631</sup>

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<sup>627</sup> See *Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth), Sch 1, items 1 and 90.

<sup>628</sup> *Family Law Act 1975* (Cth), s 112AP(2).

<sup>629</sup> *Family Law Act 1975* (Cth), s 112AP(4).

<sup>630</sup> *Family Law Act 1975* (Cth), s 39(1A).

<sup>631</sup> *Family Law Act 1975* (Cth), s 112AP(1).

306 Part XIII A of the *Family Law Act* provides for other "[s]anctions for failure to comply with orders, and other obligations, that do not affect children". Within Pt XIII A, s 112AD(1) provides power for "a court having jurisdiction under [the *Family Law Act*]", which included the Federal Circuit Court, to impose various sanctions<sup>632</sup> if the court "is satisfied that a person has, without reasonable excuse, contravened an order under [the *Family Law Act*]". Some of those sanctions are subject to jurisdictional conditions. For instance, a sentence of imprisonment cannot be imposed "unless the court is satisfied that the contravention was intentional or fraudulent"<sup>633</sup> and that "in all the circumstances of the case, it would not be appropriate for the court to deal with the contravention" by any other available sanction.<sup>634</sup> Further, the period of imprisonment cannot exceed 12 months.<sup>635</sup>

(iii) *The operation of s 17*

307 The starting point for consideration of the operation of s 17 is Mr Stradford's argument that s 17 was inapplicable to the exercise of power by Judge Vasta because Pts XIII A and XIII B of the *Family Law Act* were an "exhaustive code". Mr Stradford went so far as to assert that such a conclusion was "hardly surprising" and that otherwise the "detailed scheme" of those Parts of the *Family Law Act* would "be readily swept away", and, specifically, s 112AP(1) would be "otiose". Those submissions should not be accepted.

308 The scheme of Pts XIII A and XIII B of the *Family Law Act* differs from the exhaustive provisions concerning contempt in the *Commonwealth Conciliation and Arbitration Act 1904-1949* (Cth) which a majority of this Court held, in 1951, to have left no room for the operation of the general powers of contempt of a "superior court".<sup>636</sup> There is no conflict between s 17 of the *Federal Circuit Court of Australia Act* and Pts XIII A and XIII B of the *Family Law Act* that requires s 17 to be made subject to Pts XIII A and XIII B.<sup>637</sup> This is so for three reasons.

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632 See *Family Law Act 1975* (Cth), ss 112AD(2), 112AE, 112AF, 112AG.

633 *Family Law Act 1975* (Cth), s 112AD(2A).

634 *Family Law Act 1975* (Cth), s 112AE(2).

635 *Family Law Act 1975* (Cth), s 112AE(1).

636 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 256, 259, 265-266.

637 See *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 580, fn 195.

309 First, s 17 of the *Federal Circuit Court of Australia Act* was not contained in the *Family Law Act*. There is nothing in any provision in Pt XIII A or Pt XIII B from which any inference could be drawn that Parliament intended to exclude other contempt powers of a court exercising jurisdiction under the *Family Law Act*. Indeed, when those Parts were introduced, the general contempt power of the Family Court, in s 35 of the *Family Law Act*, was deliberately retained.<sup>638</sup> Secondly, the subject matter of s 17 of the *Federal Circuit Court of Australia Act* was different from that of Pts XIII A and XIII B of the *Family Law Act*. Section 17 was concerned with the powers of the Federal Circuit Court when exercising any of "its power and authority". Section 17 was unconstrained by any *express* jurisdictional pre-conditions and did not make available a range of statutory orders. By contrast, Pts XIII A and XIII B are concerned with the power and authority of any court exercising jurisdiction under the *Family Law Act*. Those Parts provide for a range of statutory orders that can be made following a finding of contempt, with various jurisdictional conditions. It is unnecessary to determine on these appeals the extent to which any of the jurisdictional pre-conditions for an order of imprisonment for contempt were established. Thirdly, and most fundamentally, as explained below, s 17 was a declaration of existing power rather than a conferral of power.

310 The issue then is the relevant operation of s 17. The Commonwealth submitted that s 17(1) was "an express statutory indication that, for the purpose of punishing contempts, the orders of the [Federal] Circuit Court were to be treated in the same way as those of this Court". By contrast, Mr Stradford submitted that s 17 operated only to ensure that the Federal Circuit Court had the power to deal with all types of contempt, not merely contempt in the face of the court to which it had been thought that inferior courts were confined.<sup>639</sup>

311 The submission of the Commonwealth should be accepted and that of Mr Stradford rejected. Section 17 of the *Federal Circuit Court of Australia Act*, like the substantively identical s 35 of the *Family Law Act* and s 31(1) of the *Federal Court of Australia Act*, was, as Gleeson CJ and Gummow J described in *Re Colina; Ex parte Torney*,<sup>640</sup> "declaratory of an attribute of the judicial power of the Commonwealth which is vested in those Courts by s 71 of the Constitution". As explained in Part II and Part III of these reasons, to the extent that any historical English distinction between "superior courts" and "inferior courts" survived Federation, that distinction no longer existed, and could not have been part of a declaration of judicial power in 1999 when s 17 was enacted. English courts had

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<sup>638</sup> cf Australian Law Reform Commission, *Contempt*, Report No 35 (1987) at 366-368 [630]-[632].

<sup>639</sup> Above at [296].

<sup>640</sup> (1999) 200 CLR 386 at 395 [16]. See also at 429 [113].

recognised for more than 150 years that orders of any court made with jurisdictional error could have legal effect, regardless of whether the court was a superior court or an inferior court. But, even if the historical English distinction between superior courts and inferior courts were transplanted to Australia, it could not exist at the level of the judicial power of the Commonwealth, which does not distinguish between different types of justice. In that sense, Judge Vasta was correct in his submission that an implication in s 17 was that the "immunities" of judicial officers of the Federal Circuit Court and the Family Court (courts with the same process of judicial appointment, the same judicial tenure, and even the prospect of dual appointment of a judge) were identical.

312 Section 17 was thus declaratory of the fact that any remaining anachronism of a different effect of orders for contempt between superior courts and inferior courts had been consigned to the dustbin of history. Since that effect would have occurred even without s 17, there is no merit in attempts to draw fine distinctions between provisions such as s 17 and other provisions that use the expression "the Court has all the jurisdiction and powers that the Supreme Court has in respect of any indictable offence".<sup>641</sup> The effect is that an order of an inferior court (even one made with jurisdictional error) is usually sufficient authority for its own execution.

## V. Application of the principles to these appeals

313 None of the facts underlying these appeals were in dispute in this Court. On 6 December 2018, Mr Stradford and Mrs Stradford appeared at a hearing in the Federal Circuit Court of Australia concerning their matrimonial dispute. The judge presiding at the hearing, Judge Vasta, informed Mr Stradford that Judge Turner had determined that Mr Stradford was in contempt of disclosure orders that Judge Vasta had previously made. Judge Vasta did not invite Mr Stradford to admit or deny the allegation of contempt. Judge Vasta did not invite Mr Stradford to state his defence to the allegation of contempt. Judge Vasta heard no evidence in relation to the allegation. Judge Vasta did not give Mr Stradford the opportunity to make submissions in defence of the allegation. Indeed, a note recorded that the police had been summoned during an adjournment of Judge Vasta's hearing, prior to any submissions from Mr Stradford that might have been invited at the resumed hearing. And Judge Vasta made no finding that the allegation had been established.

314 Judge Vasta made a declaration that Mr Stradford was in contempt of various orders by Mr Stradford's failure to make full and frank disclosure. His Honour ordered that Mr Stradford "be sentenced to a period of imprisonment ... of twelve (12) months, to be served immediately with [Mr Stradford] to be released

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<sup>641</sup> *District Court of Western Australia Act 1969* (WA), s 42(1), considered in *Day v The Queen* (1984) 153 CLR 475 at 479.

from prison on 6 May 2019, with the balance of the sentence to be suspended for a period of two (2) years". Judge Vasta concluded by saying:

"I will sign the warrant that will commit Mr [Stradford] to prison and the [Queensland Police Service] officers will arrive soon to take him to prison. In the meantime, security, you will have to escort Mr [Stradford] to the cell downstairs to await the officers to come and take him to prison."

315 Two of the MSS Guards present in the courtroom complied with Judge Vasta's direction by escorting Mr Stradford to a holding cell in the court complex and supervising Mr Stradford while he was detained there. Also on 6 December 2018, Judge Vasta signed a warrant of commitment, attaching the order, directing persons including federal and State police officers to deliver Mr Stradford to the Commissioner of the Queensland Corrective Services, and directing the Commissioner of the Queensland Corrective Services to receive Mr Stradford into custody. Officers of the Queensland Police Service subsequently took Mr Stradford, in handcuffs, to the Roma Street Watchhouse from where he was later transferred to the Brisbane Correctional Centre and detained by officers of the Queensland Corrective Services.

316 On 12 December 2018, following an application by Mr Stradford (who had obtained legal representation), Judge Vasta stayed the imprisonment order that he had made on 6 December 2018, pending appeal. He ordered that Mr Stradford be forthwith released from custody pending the outcome of an appeal from his judgment. On 15 February 2019, judgment was given on the appeal, unanimously allowing the appeal and setting aside Judge Vasta's declaration and order for imprisonment.

317 There was no dispute on these appeals that the order for imprisonment made by Judge Vasta, and the consequential warrant that his Honour issued, were the result of a number of jurisdictional errors. It suffices to say that the jurisdictional errors found by the primary judge, and which were properly not disputed in this Court in light of the circumstances described above, included the following. First, Judge Vasta lacked power to make the imprisonment order because he had not made any necessary anterior finding as to conduct that enlivened a power to punish for contempt, such as a finding of a breach of a court order by Mr Stradford.<sup>642</sup> Secondly, Judge Vasta denied Mr Stradford procedural fairness by "act[ing] in a thoroughly unsatisfactory and unjudicial manner".<sup>643</sup> Thirdly, Judge Vasta was affected by actual bias since "nothing that Mr Stradford could have said or done

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<sup>642</sup> *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [81].

<sup>643</sup> *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [118].

could have diverted the Judge from imprisoning him for the contempt that the Judge had either assumed or believed he had committed".<sup>644</sup>

318        There was no dispute before the primary judge, and none on these appeals, that Mr Stradford was involuntarily detained pursuant to the order made and warrant issued by Judge Vasta, and by the acts of the MSS Guards, the officers of the Queensland Police Service, and the officers of the Queensland Corrective Services. The officers of the Queensland Police Service and the officers of the Queensland Corrective Services were required to comply with the imprisonment order, being named in the warrant and commanded to take custody of Mr Stradford. The MSS Guards were also required to comply with the instruction by Judge Vasta to "escort Mr [Stradford] to the cell downstairs to await the officers to come and take him to prison". The terms of the agreement between MSS Security Pty Ltd and the Commonwealth required MSS Guards to perform duties including "[i]n court guarding as directed". Subject to any justification, the primary judge was correct to conclude that each of Judge Vasta, the MSS Guards, the officers of the Queensland Police Service, and the officers of the Queensland Corrective Services were liable for the tort of false imprisonment.

319        The entirety of these appeals therefore reduces to the simple point of whether the imprisonment order made by Judge Vasta was capable of providing that justification. Although the imprisonment order was the result of jurisdictional errors, for the reasons explained in Parts I to III of these reasons, and contrary to the language of some earlier authority, a judicial order that is made with jurisdictional error is not generally a nullity and is not generally devoid of any legal effect. In the integrated Australian legal system, a judicial order made by any court (whether or not the court is described by the historically problematic labels of "superior" or "inferior") cannot generally be ignored by the parties before the court or by those who are required to comply with the order. The order can justify the actions of those who are required to comply with it. As explained in Part IV of these reasons, s 17 of the *Federal Circuit Court of Australia Act* was declaratory of that legal position. Contrary to the submission of the Attorney-General for South Australia, the warrant issued by Judge Vasta could not be a separate source of justification in circumstances where the warrant had no statutory basis, or other legal source of validity, independent of the order of the Federal Circuit Court.

320        On these appeals, Mr Stradford did not submit that, given the circumstances in which they were created, the imprisonment order made, and the consequential warrant issued, by Judge Vasta did not even purport to be exercises of the authority of the Federal Circuit Court. Mr Stradford did not deny that each of the MSS Guards, the officers of the Queensland Police Service, and the officers of the Queensland Corrective Services were acting as required by the Court and in the course of their duties in detaining Mr Stradford. Since it is irrelevant that the order

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<sup>644</sup> *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020 at [134]-[135].

was made, and the consequential warrant was issued, by an inferior court, and since the order had not been set aside during the period of Mr Stradford's detention, the order justified the detention of Mr Stradford, and therefore justified the actions of the MSS Guards, the officers of the Queensland Police Service, and the officers of the Queensland Corrective Services in executing the warrant. The order precluded a finding that they or Judge Vasta had committed the tort of false imprisonment.

## VI. Conclusion

321 *Iudex qui litem suam fecit.* Two millennia ago, this was the mysterious quasi-delict in Roman law of "the judge who made the case their own". The *Institutes* of Gaius and Justinian are "surprisingly silent as to the conduct which amounted to or resulted in a judge 'making the case [their] own'".<sup>645</sup> That quasi-delict, and its equivalent in English and Australian law, has been a puzzle for two millennia. When is a judicial officer liable for the consequences of their actions?

322 The modern answer is that a judicial officer owes the same duties as all other members of society. However, the authority of a judicial officer can provide them, and those who are required by the court to enforce a judicial order, with a defence of justification for acts that would otherwise be wrongful. Provided that the order purports to be an exercise of judicial authority, even if the order is later set aside on the basis of jurisdictional error, that order was not a nullity at the time it was made. The order must be obeyed by the parties until it is set aside and it can provide a defence of justification for those who are required by the court to give effect to the order such as police officers, correctional officers, and contracted guards. Centrally to these appeals, this conclusion does not change merely because the court is described by old English labels, which should have been abolished long ago in Australia, of "inferior court" or "superior court".

323 In each matter, orders should be made as proposed by Gageler CJ, Gleeson, Jagot and Beech-Jones JJ.

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<sup>645</sup> Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (2009) at 81.

324 STEWARD J. I respectfully and gratefully agree with the reasons of Gordon J that s 17 of the *Federal Circuit Court of Australia Act 1999* (Cth) applied here to ensure the validity of the orders made by Judge Vasta until they were set aside. I do so for the reasons expressed by her Honour. I also agree, for the reasons given by Gordon J, that Pts XIII A and XIII B of the *Family Law Act 1975* (Cth) did not create a code that excluded here the application of s 17. Finally, and again for the reasons given by Gordon J, I also agree that Judge Vasta enjoyed common law immunity in relation to the orders made in respect of Mr Stradford. Those conclusions are sufficient to dispose of these appeals.

325 If it were necessary to do so, I would also have agreed with the conclusion of Edelman J that Australian law no longer recognises any distinction between so-called "superior courts" and "inferior courts". Edelman J is correct to conclude that such a distinction is an historical anachronism. The reasons given by his Honour are scholarly and compelling.

326 One further observation should be made which bears out the conclusion reached by Edelman J. Anyone familiar with the work of what was formerly the Federal Circuit Court of Australia, and what is now Division 2 of the Federal Circuit and Family Court of Australia, should acknowledge that the judges of that Court decide cases of great complexity; indeed, usually the complexity is equal to that faced by the judges of the Federal Court of Australia and of what was formerly the Family Court of Australia, traversing the same subject matters, such as family law, industrial law, migration and bankruptcy. Those cases are resolved at a standard of judicial skill which is expected to be equivalent to that displayed by the judges of the Federal Court and the former Family Court. Anyone reviewing the judgments of the Federal Circuit Court would see that this standard is ordinarily met. That is not to say that the judgments are never affected by error. But no judge ever attains such an immaculate standard. Given the foregoing, it simply makes no sense to describe the Federal Circuit Court as an "inferior court".

327 In each appeal I otherwise agree with the orders proposed by Gageler CJ, Gleeson, Jagot and Beech-Jones JJ.



