HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

BETWEEN: **MINISTER FOR HOME AFFAIRS**

Applicant

AND: **ABDUL NACER BENBRIKA**

Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH

Intervener

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. The principle for which *Lim* stands

2. *Lim* is not authority for the proposition that power to order the detention of a person can only be within the judicial power of the Commonwealth if it is an incident of the function of adjudging and punishing criminal guilt. Although detention for a punitive purpose is exclusively judicial, detention for a non-punitive purpose is neither exclusively judicial nor exclusively non-judicial: CS [16], [22], [24].

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- *Lim* (1992) 176 CLR 1 at 27-28, 32 **(JBA 3, tab 9)**
- *Falzon* (2018) 262 CLR 333 at [17], [19], [24], [81]-[82], [96] **(JBA 3, tab 10)**

B. Gummow J's reasoning in *Fardon*

3. Gummow J's reasoning at [68]-[88] of *Fardon* should not be followed. His Honour's conclusion that the Commonwealth Parliament cannot enact a law for preventive detention was based on a reformulation of *Lim* that treats the separation of powers as abstracting power from all three branches of government, rather than simply as dividing power between those branches. Further, that reformulation resulted from his Honour's rejection of the distinction between detention for punitive and non-punitive purposes, that being a distinction that has been repeatedly endorsed in Ch III cases: CS [43].

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- *Fardon* (2004) 223 CLR 575 at [80]-[81], [85] **(JBA 4, tab 11)**
- *Al-Kateb* (2004) 219 CLR 555 at [137]-[139]; cf [44]-[45], [263], [287], [303] **(JBA 3, tab 6)**

4. Gummow J did not identify any principle to explain the exceptions referred to in *Lim*, or any reason why preventive detention of the kind at issue in *Fardon* did not fall within such an exception: CS [44].

- *Fardon* (2004) 223 CLR 575 at [83] **(JBA 4, tab 11)**

5. Gummow J's reasoning did not command the support of a majority in *Fardon*, or in any case since: CS [45]-[46].

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- *Fardon* (2004) 223 CLR 575 at [18], [34], [196]-[197], [214]-[215] **(JBA 4, tab 11)**
- *Thomas* (2007) 233 CLR 307 at [15] **(JBA 8, tab 26)**

C. The decision in *Kable [No 2]*

6. *Kable [No 2]* establishes that the order for the preventive detention of Mr Kable under the *Community Protection Act 1994* (NSW) (**CP Act**) was made in the exercise of judicial power: CS [26], [29]-[30].

   - *Kable [No 2]* (2013) 252 CLR 118 at [17], [33], [74] **(JBA 6, tab 19)**

7. This Court should find that that order was made in the exercise of the judicial power of the Commonwealth: CS [33]. None of the reasons the Respondent has advanced against that contention should be accepted.

   - *Kable [No 2]* (2013) 252 CLR 118 at [18], [36]-[37], [76]-[77] **(JBA 6, tab 19)**

10 8. ***First***, while the CP Act was a State law, the source of the power purportedly exercised by Levine J in making the order to detain Mr Kable was Commonwealth law. Once Mr Kable resisted the making of an order by challenging the validity of the CP Act, Levine J was exercising federal jurisdiction. As a "double function" provision, s 5 of the CP Act was a law that purported to "confer or govern" the powers of a court, and therefore could not apply of its own force in federal jurisdiction. Instead, it applied as Commonwealth law by reason of s 79 of the *Judiciary Act 1903* (Cth) (or, rather, would have done so if the CP Act had not been invalid): CS [35].

   - *Rizeq* (2017) 262 CLR 1 at [83], [87], [100] and [103] **(JBA 7, tab 24)**

9. ***Second***, *Kable [No 1]* did not involve two matters. The challenge to the validity of the
20 CP Act was integral to the resolution of the controversy about whether an order should be made under s 5(1) of that Act: CS [36]-[37].

   - *Kable [No 2]* (2013) 252 CLR 118 at [76] **(JBA 6, tab 19)**
   - *Kable [No 1]* (1996) 189 CLR 51 at 96, 114, 136 **(JBA 5, tab 15)**
   - *Fencott v Muller* (1983) 152 CLR 570 at 607-609 **(JBA 4, tab 13)**

10. ***Third***, a single matter before Levine J could not have involved the exercise of both federal jurisdiction and State jurisdiction: CS [38].

    - *MZXOT* (2008) 233 CLR 601 at [23] and [180] **(JBA 6, tab 18)**

30 11. Alternatively, even if Levine J was exercising State judicial power in ordering that Mr Kable be detained, that provides no basis to distinguish *Kable [No 2]*. There is no difference between the character of Commonwealth and State judicial power. The only

relevant difference is referable to the source of authority to decide (specifically, that Commonwealth judicial power can be exercised only in a "matter").

- *Rizeq* (2017) 262 CLR 1 at [52]-[53] **(JBA 7, tab 24)**

12. The Respondent identifies no constitutional principle that can explain why the power to order preventive detention can form part of State judicial power, but an identical power cannot form part of the judicial power of the Commonwealth. The separation of powers doctrine cannot do that work, for it imposes no limit on the conferral of judicial power on a court. In truth, there is no such constitutional principle, for the Constitution does not admit two qualities or grades of judicial power: CS [12]-[14], [39]-[41].

- *Kable [No 1]* (1996) 189 CLR 51 at 103 **(JBA 5, tab 15)**

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D. Division 105A of the Criminal Code confers judicial power

13. As a matter of statutory construction, the power to make a continuing detention order under s 105A.7 of the Criminal Code does not have a punitive purpose: CS [49]-[57].

- Criminal Code, ss 105A.1, 105A.4, 105A.7, 105A.8 **(JBA 1, tab 2)**

14. The power conferred on the Supreme Court by s 105A.7 is properly characterised as judicial power, having regard to: CS [58]-[63]

(a) the fact that the power conferred by s 105A.7 of the Criminal Code is conferred on a court: *Thomas* (2007) 233 CLR 307 at [59], [95] (**JBA 8, tab 26**);

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(b) the fact that the power is governed by ascertainable tests or standards: *Vella* (2019) 93 ALJR 1236 at [57]-[68], [82], [84], [89]-[90], [158]-[159] **(JBA 9, tab 29)**; and

(c) the judicial process required to be followed in exercising that power:

- *Kable [No 2]* (2013) 252 CLR 118 at [27] **(JBA 6, tab 19)**
- *Thomas* (2007) 233 CLR 307 at [30], [598]-[599], [651] **(JBA 8, tab 26)**
- Criminal Code, ss 105A.13, 105A.14, 105A.15A, 105A.16, 105A.17 **(JBA 1, tab 2)**.

Stephen Donaghue Mark Hosking

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10 December 2020