IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

NO M45 OF 2015

BETWEEN: NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED (ACN 118 017 842)
First Plaintiff

MIRANDA MARIA BOWDEN
Second Plaintiff

AND: NORTHERN TERRITORY OF AUSTRALIA
Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

Australian Government Solicitor
4 National Circuit, Barton, ACT 2600
DX 5678 Canberra

Date of this document: 13 August 2015

File ref: 15057201
Simon Thornton | Gavin Loughton
Telephone: 02 6253 7287 | 026253 7203
Lawyer's E-mail: Simon.Thornton@ags.gov.au | Gavin.Loughton@ags.gov.au
Facsimile: 02 6253 7303

PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

PART IV CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

3. The applicable legislative provisions are those contained in Annexure A to the Plaintiffs' Submissions (**PS**), as supplemented by Annexure A to the Defendant's Submissions.

PART V ARGUMENT

1. SUMMARY OF ARGUMENT

4. These submissions address the three main contentions advanced by the plaintiffs:

   4.1. That s 122 is limited by the separation of judicial power effected by Ch III;

   4.2. That the impugned provisions are invalid on the basis of *Kable v Director of Public Prosecutions (NSW)* (***Kable***)[1] (as applied in *Kirk v Industrial Court of New South Wales* (***Kirk***))[2]; and

   4.3. That the impugned provisions confer judicial power on the Northern Territory Executive.

5. The Commonwealth also makes submissions in response to the proposed submissions of the Australian Human Rights Commission (**the Commission**).

6. In summary, the Commonwealth submits that:

   6.1. The Court should reject the plaintiffs' primary contention that, as a general proposition, s 122 is limited by the separation of judicial from executive and legislative powers effected by Ch III. To the contrary, s 122 is a broad grant of power that authorises the establishment of territory courts, and territory judicial power, and there is nothing in Ch III that prevents such a choice under s 122.

   6.2. The Court should reject the plaintiffs' secondary submission that territory courts always and only exercise federal jurisdiction and all judicial power in the territories is judicial power of the Commonwealth. To the contrary, at least in the case where territory courts on which jurisdiction has been

1 (1996) 189 CLR 51.

2 (2010) 239 CLR 531.

conferred by a law enacted by a legislative assembly are resolving a dispute about rights and duties sourced in laws enacted by legislative assemblies established under s 122, territory courts are not on that basis exercising federal jurisdiction. The jurisdiction to resolve such disputes is sourced in s 122: not Ch III of the Constitution.

6.3. The impugned provisions do not remove or limit the jurisdiction of territory courts to exercise judicial review. Thus, even if the plaintiffs were able to establish that the decision in *Kirk* is applicable to the Supreme Court of a Territory (a step which is not undertaken in the plaintiffs' submissions), there can be no contravention of *Kable* or *Kirk* as contended.

6.4. If it is necessary to reach questions of judicial power, in determining whether detention of a person requires an exercise of judicial power, the *purpose* of the law is the determinative criterion. It is only when the purpose is *punitive* in character that the detention must result from an exercise of judicial power.

6.5. The Commission's contentions that international human rights standards, including the proportionality test, can inform the requirements of the separation of Commonwealth judicial power should be rejected. That is particularly the case where such standards are derived from jurisdictions which are not reflective of Australia's constitutional arrangements.

2. THE RELATIONSHIP BETWEEN S 122 AND CH III OF THE CONSTITUTION

The plaintiffs' contentions

7. The plaintiffs present their contentions at two levels:

7.1. Their **primary contention** is that '[t]his Court should now hold that the exercise of power under s 122 is limited by the separation of judicial from executive and legislative powers effected by Ch III' (see PS, [22]).

7.2. Their **secondary contention** relies upon, what is said to be, 'the better view' that 'territory courts always and only exercise federal jurisdiction' and 'all judicial power in the territories falls within the judicial power of the Commonwealth' (see PS, [29]).

8. As will be explained, neither contention should be accepted.

The primary contention

9. The plaintiffs' primary contention is that, as a broad proposition, the power in s 122 to establish a system of government in the territories must when exercised conform to the separation of judicial power limitations deriving from the High Court's decision in *R v Kirby; Ex parte Boilermakers' Society of Australia* (***Boilermakers***).[3] This contention is advanced notwithstanding that the reasoning in *Boilermakers* expressly disavowed such a result.[4] The primary contention rests on the slender foundations that the Constitution 'must be read

[3] (1956) 94 CLR 254.

[4] (1956) 94 CLR 254, 289–92 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

as a whole'; the prescription in s 111 of the Constitution that territories 'shall become subject to the exclusive jurisdiction of the Commonwealth'; and the heading to Chapter III, 'The Judicature' (PS, [23]). Reading the Constitution as a whole is not disputed, but merely begs the question. Furthermore, mere appeal to s 111 and the heading to Ch III does not advance the inquiry. The inquiry is advanced by asking, first, what is the scope of s 122 and, secondly, whether that scope is affected by any limitations arising from Ch III.[5]

The scope of s 122

10. The inquiry must commence with the scope of s 122 to 'make laws for the government of any territory ...'. The legislative power conferred upon the Commonwealth Parliament by s 122 of the Constitution:

> is a plenary power capable of exercise in relation to Territories of varying size and importance which are at different stages of political and economic development. It is sufficiently wide to enable the passing of laws providing for the direct administration of a Territory by the Australian Government without separate territorial administrative institutions ... yet on the other hand it is wide enough to enable Parliament to endow a Territory with separate political, representative and administrative institutions ... [6]

11. The power is 'non-federal in character in the sense that the total legislative power to make laws to operate in and for a territory is not shared in any wise with the States',[7] so that the Commonwealth Parliament is, with respect to the territories, 'a completely sovereign legislature'.[8] The terms in which power is granted are not only plenary, but are unlimited by reference to specific subject matter,[9] are without express qualification,[10] and have been held to confer 'as large and universal a power of legislation as can be granted'.[11]

---

5 This sequencing of the steps in the inquiry was emphasised by Gaudron J in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 334–5 [19] (***Eastman***).

6 *Berwick Ltd v Gray* (1976) 133 CLR 603, 607 (Mason J). See also *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 272 (Brennan, Deane and Toohey JJ) (***Capital Duplicators***).

7 *Spratt v Hermes* (1965) 114 CLR 226, 242 (Barwick CJ) (***Spratt***).

8 *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591, 611 (Windeyer J) (***Falconer***). See also *Porter v The King; Ex parte Chin Man Yee* (1926) 37 CLR 432, 448 (Starke J) (***Porter***); *Newcrest Mining (WA) Ltd v Commonwealth [No 2]* (1993) 46 FCR 342, 406–7 (French J).

9 *Spratt* (1965) 114 CLR 226, 241–2 (Barwick CJ) ('Section 122 gives to the Parliament legislative power of a different order to those given by s 51. That power is not only plenary but is unlimited by reference to subject matter.'), 250–1 (Kitto J); *Teori Tau v Commonwealth* (1969) 119 CLR 564, 570 (Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ) ('The grant of legislative power by s 122 is plenary in quality and unlimited and unqualified in point of subject matter').

10 Cf ss 51 and 52 which are conditioned by the words 'subject to this Constitution': see *Eastman* (1999) 200 CLR 322, 334–5 [14] (Gleeson CJ, McHugh and Callinan JJ) contrasting s 122 and the power in s 52(i).

11 *Spratt* (1965) 114 CLR 226, 242 (Barwick CJ). See also *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 62 (Latham CJ); *Lamshed v Lake* (1957) 99 CLR 132, 142, 148 (Dixon CJ, with whom Webb and Taylor JJ agreed); *Berwick Ltd v Gray* (1976) 133 CLR 603, 607 (Mason J, with whose reasons Barwick CJ, McTiernan and Murphy JJ agreed), 611 (Jacobs J); *Kruger v Commonwealth* (1997) 190 CLR 1, 41 (Brennan CJ), 54 (Dawson J), 141 (McHugh J) (***Kruger***).

12. Subject to any qualifications as may be found elsewhere in the Constitution, the legislative power conferred on the Parliament by s 122 for the government of a territory is no less expansive than the legislative powers of the Parliaments of the Australian States,[12] or of the United States Congress to make laws respecting the territories belonging to the United States.[13] It has been accepted that s 122 authorises the establishment of government institutions, including 'courts having authority within the territories'.[14] Those courts are not 'created by the Parliament' for the purposes of s 72 of the Constitution and, accordingly, the appointment of judges to territory courts need not comply with the appointment process or requirements set out in that provision.[15] Section 122 is also the source of authority for the conferral of appellate jurisdiction on the High Court from the judgments of territory courts.[16]

13. In sum, s 122 of the Constitution is a source of legislative power, for the government of a territory, to create rights and duties; to create courts (and appoint judges to them); and to confer jurisdiction and power on those courts to resolve disputes about such rights and duties. To that extent, the judicial system of a territory finds its constitutional source in s 122 and operates in parallel with, rather than as an aspect of, the judicial system created by Ch III.

14. Subject to qualification elsewhere, Parliament may choose to establish a system of government for a territory that replicates the system of government established by the Constitution for the federal government. However, it need not. The power is broad and flexible enough to allow Parliament to design systems of government for the territories to have different and varying arrangements for the exercise of government power.

Limitation from Ch III?

15. Since there is no relevant constraint arising from s 122 itself, the existence of any limitation separating 'judicial from executive and legislative powers' must derive from Ch III. However, analysis of the text and structure of Ch III leads to the conclusion that no such limitation on s 122 may be derived as a broad proposition.

    15.1. The limitations from *Boilermakers* pivot on the vesting, by s 71, of the 'judicial power of the Commonwealth'. With respect to original jurisdiction, judicial power of that kind is defined by reference to the matters of federal jurisdiction set out in ss 75 and 76, and is vested by s 71 in the High

---

12 See *Kruger* (1997) 190 CLR 1, 54 (Dawson J). See also *Capital Duplicators* (1992) 177 CLR 248, 271 (Brennan, Deane and Toohey JJ) ('no less than the power which would have been conferred if the "peace, order and good government" formula had been used').

13 *American Insurance Co v Canter,* 26 US 511, 546 (1828); *McAllister v United States,* 141 US 174 (1891); *Clinton v Englebrecht,* 80 (13 Wall) US 434 (1872); *Northern Pipeline Construction Co v Marathon Pipe Line Co,* 458 US 50, 64–5 (1981). See also *Glidden Company v Zdanok* 370 US 530 (1961) 544–7 (Harlan J).

14 *Spratt* (1965) 114 CLR 226, 264 (Taylor J). See also *Spratt* (1965) 114 CLR 226; *Falconer* (1971) 125 CLR 591; *Eastman* (1999) 200 CLR 322, 346 [57] (Gummow and Hayne JJ).

15 *Eastman* (1999) 200 CLR 322; *Falconer* (1971) 125 CLR 591.

16 *Porter* (1926) 37 CLR 432, 441 (Isaacs J), 446–7 (Higgins J), 449 (Starke J); *Boilermakers* (1956) 94 CLR 254, 290 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *A-G (Cth) v The Queen* (1957) 95 CLR 529, 545 (Privy Council).

Court, federal courts created by Parliament, and 'such other courts as it invests with federal jurisdiction'.

15.2. The language of s 71 ('such other courts as it invests with federal jurisdiction') includes State courts invested with federal jurisdiction under s 77(iii). The continuing existence of State courts is thereby recognised, and s 77(ii) contemplates that those State courts have jurisdiction which 'belongs to' them.[17] Thus, the text and scheme of Ch III anticipates that Commonwealth judicial power is capable of exercise by at least one species of courts that already exercise judicial power from another source.

15.3. Chapter III makes no express mention of territory courts. However, the language of s 71 anticipates that there may be courts vested with federal jurisdiction that are neither federal nor State courts, and it has been accepted that territory courts, which emanate from s 122, fall within that expression.[18] However, the language does not require, either expressly or by necessary implication, that territory courts are to be created as empty vessels which must await, and can only ever have, vestings of jurisdiction under Ch III.

15.4. Nor does the language 'the judicial power of the Commonwealth' in s 71 itself necessitate the conclusion that any grant of judicial power made directly or indirectly by a law of the Parliament, *including any judicial power granted under s 122*, must *always* be subject to the *Boilermakers* principles. Whilst the plaintiffs (PS, [26]) uncritically equate 'judicial power' with 'the judicial power of the Commonwealth', there is a clear textual difference. That difference grounds the view taken by numerous judges of this Court that Ch III governs the exercise of 'that part of the totality of judicial power which the Commonwealth may exert which can be called "federal judicial power"';[19] it does not apply to 'the exercise of that judicial power which exists as a function of government of a territory'.[20]

16. Consequently, close examination of the relationship between s 122 and Ch III requires the plaintiffs to establish their secondary contention in order to make good their primary contention and to be successful in their challenge. The question raised by the plaintiffs' proceeding is whether a territory statutory power, asserted to be judicial, must be exercised by a territory court. The rights and duties in dispute, the court, and the jurisdiction and power to resolve the dispute have their immediate or ultimate source in s 122 of the Constitution. In those circumstances, the plaintiffs can only succeed if 'territory courts always and only exercise federal jurisdiction' and 'all judicial power in the territories falls within the judicial power of the Commonwealth'.

---

17 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 619 [23] (Gleeson CJ, Gummow and Hayne JJ).

18 *Northern Territory v GPAO* (1999) 196 CLR 553, 605 [131] (Gaudron J) (***GPAO***); *Eastman* (1999) 200 CLR 322, 338–40 [28]–[35] (Gaudron J), 348 [63] (Gummow and Hayne JJ); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [28] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) (***Bradley***).

19 *Falconer* (1971) 125 CLR 591, 599 (Barwick CJ).

20 *Spratt* (1965) 114 CLR 226, 253 (Kitto J).

The secondary contention

17. To support their secondary contention, the plaintiffs rely (see PS, n 39) on the judgments of Gaudron J in *Eastman*,[21] Dixon J in *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd*,[22] and Gummow J in *Kruger*.[23] The Commonwealth makes the following submissions in response to these references:

    17.1. Dixon J's comments in *Laristan* were directed to a dispute arising under a law enacted pursuant to s 52(i), not s 122.[24] His Honour later accepted in *Lamshed v Lake*[25] that 'laws made mediately or immediately under s 122 are primarily not within the operation of [Ch III]'.

    17.2. Gummow J's contemplated response to his Honour's unease with the existing jurisprudence on the relationship between s 122 and Ch III was to integrate entirely territory courts and jurisdiction into Ch III;[26] not, as the plaintiffs' propose, to maintain territory courts under s 122, but consider all the jurisdiction to be federal. In any event, that step has not been taken by the Court.

    17.3. It is only the judgment of Gaudron J that lends direct support for the secondary contention. However, as will be explained (see below at [38]–[42]), her Honour's view should not be accepted.

18. The Commonwealth responds in four ways to the plaintiff's secondary contention. *First*, at a level of interpretive coherence, it is unpersuasive. *Secondly*, it does not follow as a necessary consequence from any of the principles established by this Court which have enhanced the flexibility permitted to the Parliament for the design of judicial (or other governmental) systems for the territories. *Thirdly*, it is not supported by *GPAO*. *Fourthly*, it is not required by constitutional purpose or design.

Interpretive coherence

19. As already indicated, this Court has accepted that s 122 is a source of legislative power to create courts (and appoint judges to them), and to confer jurisdiction and power on those courts to resolve disputes about rights and duties. As this Court has recognised, each of these matters *might* have been accommodated within the scheme of Ch III.[27] Territory courts *might* have been considered to be federal courts subject to the requirements of s 72, and all jurisdiction exercised by such courts *might* have been regarded as federal jurisdiction arising under s 76(ii). In other words, Ch III *might* have been seen

---

21 (1999) 200 CLR 322, 341.

22 (1929) 42 CLR 582, 585.

23 (1997) 190 CLR 1, 168–9.

24 (1929) 42 CLR 582, 585.

25 (1958) 99 CLR 132, 142.

26 (1997) 170 CLR 1, 170.

27 *Boilermakers* (1956) 94 CLR 254, 290 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Gould v Brown* (1998) 193 CLR 346, 402 (Gaudron J); *Kruger* (1997) 190 CLR 1, 109 (Gaudron J), 168 (Gummow J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 594–5 [173] (Gummow and Hayne JJ); *GPAO* (1999) 196 CLR 553, 603 [126] (Gaudron J).

as displacing the authority, otherwise available under the expansive terms of s 122, to establish a judicial system for the government of a territory. However, that position has not been taken.

20. As a matter of interpretive coherence, it is unappealing to view s 122 as the source of power for the creation of non-federal territory courts and the appointment of judges to them, but to view Ch III as displacing *entirely* the authority, otherwise available under s 122, to define the jurisdiction and power to be exercised by those courts and judges. Once it is accepted that Ch III allows room for s 122 to create a territory court system, s 122 should be allowed the breadth its language conveys to authorise the vesting of territory jurisdiction or power in such courts. There is nothing in the text or structure that necessitates a different conclusion.

Flexibility permitted to the Parliament

21. In addition to the exercise of territory jurisdiction sourced in s 122, it has been accepted that territory courts can be vested with and exercise federal jurisdiction.[28] In those circumstances, the vesting of jurisdiction occurs under s 122,[29] while the subject matter of the vesting is the judicial power of the Commonwealth identified in Ch III. For example, territory courts can be vested with and exercise federal jurisdiction when determining a matter 'arising under [the] Constitution, or involving its interpretation' (s 76(i)). Territory courts must be, and remain, suitable receptacles for the exercise of federal jurisdiction and, consequently, in conferring powers and functions on territory courts, the Parliament, and legislative assemblies created by Parliament, are subject to the limitations that derive from the Court's decision in *Kable*.[30]

22. Furthermore, this Court has accepted that rights and duties that are exclusively sourced in Commonwealth legislation enacted under s 122, can (i) create a matter of federal jurisdiction under s 76(ii) of the Constitution which (ii) can be resolved by the High Court[31] or a lower federal court[32] with appropriately vested jurisdiction. For example, in *GPAO*,[33] a majority of the Court accepted that the Family Court was exercising federal jurisdiction when determining a dispute about rights and duties arising from Commonwealth legislation having its exclusive source in s 122. The matter was said to arise under s 76(ii).

23. In establishing these principles, this Court has recognised that the operation of judicial systems within territories cannot be wholly quarantined within s 122. In some circumstances, jurisdiction to resolve disputes about rights and duties

---

28 *Bradley* (2004) 218 CLR 146,162–3 [27]–[28] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 518–19 [18]–[19]; *Blunden v Commonwealth* (2003) 218 CLR 330, 336 [9] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Eastman* (1999) 200 CLR 322, 339–40 [32]–[33] (Gaudron J), 348 [63] (Gummow and Hayne JJ).

29 *Eastman* (1999) 200 CLR 322, 348 [63] (Gummow and Hayne JJ); *Bradley* (2004) 218 CLR 146,162 [27] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

30 (1996) 189 CLR 51. See *Bradley* (2004) 218 CLR 146; *A-G (NT) v Emmerson* (2014) 307 ALR 174.

31 *GPAO* (1999) 196 CLR 553, 590–1 [88]–[89] (Gleeson CJ and Gummow J); *Falconer* (1971) 125 CLR 591, 606 (Menzies J).

32 *GPAO* (1999) 196 CLR 553, 591 [91] (Gleeson CJ and Gummow J), 605 [132] (Gaudron J), 650–1 [256] (Hayne J).

33 (1999) 196 CLR 553.

sourced in s 51 laws may be exercised by territory courts; in other circumstances, jurisdiction to resolve a dispute about rights and duties sourced exclusively in s 122 may be exercised by the courts established under Ch III. To that end, this Court has accommodated (and, where necessary, adjusted) the established principles to facilitate that need for flexibility in designing the judicial systems to operate in the territories.

24. None of those principles, however, require the acceptance of the plaintiffs' secondary contention. In particular, *GPAO*, which the plaintiffs refer to only in passing, does not require such result as will now be elaborated.

10 ***The decision in* GPAO**

25. The submission accepted by the majority in *GPAO* can be summarised in the following passage from the judgment of Gleeson CJ and Gummow J:

> The submission, essential for this case, is that s 76(ii), in conjunction with s 77(i) of the Constitution, operates in accordance with its terms and permits the conferral of jurisdiction on federal courts in matters arising under laws made under s 122 of the Constitution. In such cases the constitutional source of the jurisdiction is ss 76(ii) and 77(i) and the jurisdiction is federal.[34]

26. *GPAO* (and likewise *Spinks v Prentice*)[35] concerned the deployment, by
20 Parliament, of federal courts to exercise jurisdiction to resolve a dispute about rights and duties sourced exclusively in s 122. Rather than selecting courts that were creatures of s 122 to exercise jurisdiction for the government of a territory, in the legislation considered in *GPAO*, Parliament instead used the institutional machinery in Ch III. Section 76(ii) was seen by the Court as the Ch III pathway to allow Parliament to use federal courts for the exercise of Commonwealth judicial power for the government of a territory.

27. *GPAO* illustrates that s 76(ii) operates as a *head* of federal jurisdiction which may be conferred, within the outline of Ch III, on the High Court and on lower federal courts created by Parliament. Consistently with this constitutional plan,
30 if Parliament chooses to confer jurisdiction on a federal court, it must do so within the confines of the Ch III requirements. In short, as a head of jurisdiction, s 76(ii) is facultative, enabling Parliament to use the institutional machinery in Ch III to apply and enforce laws for the government of a territory.

28. However, this understanding of *GPAO* says nothing about the applicability of s 76(ii) to *territory courts* resolving disputes about rights and duties that have their exclusive source in s 122. In particular, it does not operate as a limitation to displace territory jurisdiction exercised by territory courts where the dispute involves rights and duties having their immediate or ultimate source in s 122.

---

34 (1999) 196 CLR 553, 591 [91] (emphasis added). Hayne J (at 650 [254]) agreed with those reasons. Gaudron J's conclusion (at 605 [132]) that s 122 laws enlivened s 76(ii) was similarly confined to the provisions in question.

35 *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511, 596 [175] (Gummow and Hayne JJ), with Gleeson CJ (at 540 [3]), Gaudron J (at 546 [27]) and McHugh J (at 565 [82]) agreeing. Gummow and Hayne JJ addressed the question of jurisdiction on the assumption that s 122 was the sole source of power to enact the relevant rights (at 594 [172]). Callinan J (at 636 [312]) applied the passage from Gleeson CJ and Gummow J in *GPAO* to conclude that the Federal Court had jurisdiction.

To repeat the point already made, s 76(ii) is a *head* of federal jurisdiction: it is not a limitation on the exercise of jurisdiction that otherwise exists. Without more, s 76(ii) cannot operate to require that all matters meeting the description of its subject matter be resolved with an exercise of federal jurisdiction. Once it is accepted that territory courts can exercise territory jurisdiction, there is nothing in s 76(ii) to prevent Commonwealth laws sourced exclusively in s 122 from being applied and enforced in territory jurisdiction.

29. Thus, while s 76(ii) is capable of being triggered if the Parliament chooses to use the Ch III machinery for the exercise of Commonwealth judicial power for a territory, it has no limiting effect when territory courts are exercising their existing jurisdiction to resolve disputes about rights and duties that have their immediate or ultimate source in s 122.

Constitutional purpose and design

30. This established position is supported by the underlying federal purpose and structural design of the constitutional system. As the Privy Council said in *Attorney-General (Cth) v The Queen*,[36] Ch III exhaustively describes 'the federal judicature and its functions in reference only *to the federal system of which the Territories do not form part.*' The primary object of the Constitution was to create a federal system of government and, as Brennan CJ said in *Kruger*:

> The federal compact was expressed in the distribution of legislative, executive and judicial power to be exercised throughout the federating States by the Commonwealth on the one hand and the respective States on the other.[37]

31. It is well accepted that the structural separation of Commonwealth judicial power effected by Ch III is required and informed by this central *federal* conception. As Dixon CJ, McTiernan, Fullagar and Kitto JJ said in *Boilermakers*:

> The position and constitution of the judicature could not be considered accidental to the institution of federalism; for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed.[38]

32. These federal considerations do not require that all judicial power in a territory be federal. To the extent that s 122 authorises the conferral of territory jurisdiction and judicial power on territory courts to resolve disputes arising from laws sourced exclusively in s 122, those federal considerations are in no way implicated. To the extent that territory courts are recognised as capable of exercising federal jurisdiction, all that is required by those federal considerations is for territory judicial systems to satisfy minimum standards of institutional integrity.[39] That requirement is achieved with the recognition that

---

36 (1957) 95 CLR 529, 545 (emphasis added).

37 (1997) 190 CLR 1, 42.

38 (1956) 94 CLR 254, 276.

39 See, eg, *Forge v ASIC* (2006) 228 CLR 45, 73 [56] (Gummow, Hayne and Crennan JJ).

the *Kable* limitations apply to territory courts because of their potential role within the integrated federal judicial system.[40]

33. This position is consistent with, and supported by, the principles governing the operation of s 80 of the Constitution. An offence 'against any law of the Commonwealth', that is necessary to enliven the operation of s 80, does not include an offence created by a law sourced exclusively in s 122, whether that offence is enacted by the Parliament or a legislative assembly.[41] That interpretation of s 80 is informed by the same federal considerations that produce the established position on the wider relationship between s 122 and Ch III. As Griffith CJ said in *R v Bernasconi*, 'Chapter III is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to the territories'.[42] Of course, his Honour spoke too loosely if he intended to dismiss any interrelation between s 122 and Ch III. However, the underlying rationale retains its explanatory force, supporting both the interpretation of s 80 and the established position on the relationship between s 122 and Ch III.[43] The plaintiffs do not seek to reopen *Bernasconi*.

34. This also takes account of the varying contexts for which s 122 was intended to operate. The power conferred by s 122 was designed to cover both internal and external territories at various levels of development, the circumstances of some of which may have been wholly inconsistent with the separation of judicial power model entrenched at the federal level. As Gleeson CJ, McHugh and Callinan JJ said in *Eastman*, '[t]he territories have been, still are, and will probably continue to be, greatly different in size, population and development'.[44] They have in the past, and may in the future, include territories with pre-existing legal systems that are fundamentally different in character to the system of government entrenched in the Constitution at the federal level. The practical context to which s 122 is directed militates against the view that s 122 should be, as a broad and general proposition, subject to the separation of judicial power effected by Ch III.

35. It also places Australian citizens resident in a territory in no different position from Australian citizens resident in the States, as the separation of judicial power was not an established feature of the constitutional position of the Australian colonies before federation nor of the Australian States after federation.[45] The established position is also broadly consistent with the

---

40 *Bradley* (2004) 218 CLR 146; *A-G (NT) v Emmerson* (2014) 307 ALR 174.

41 *R v Bernasconi* (1915) 19 CLR 629, 635 (Griffith CJ, with whom Gavan Duffy and Rich JJ agreed)).

42 *R v Bernasconi* (1915) 19 CLR 629, 635. See also Isaacs J at 637.

43 As Isaacs J emphasised, that view of s 80 was reached after construing ss 80 and 122 'in relation to the rest of the instrument as well as to each other': (1915) 19 CLR 629, 637. The same interpretive coherence is required of the broader relationship between s 122 and Ch III.

44 (1999) 200 CLR 322, 331 [7].

45 *Kable* (1996) 189 CLR 51, 67 (Brennan J), 78 (Dawson J), 92–4 (Toohey J), 103–4 (Gaudron J), 109 (McHugh J), 132 (Gummow J); *Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38, 89–90 [125]; *Pollentine v Bleijie* (2014) 311 ALR 332, 341–2 [42].

interpretation of Art IV, § 3(2) of the United States Constitution, upon which s 122 was broadly modelled.[46]

36. Finally, the position that the Commonwealth can choose whether or not to legislate to engage Ch III machinery for the resolution of disputes in a territory is entirely consistent with the flexibility the Commonwealth enjoys in determining the legislative and executive structures of government for a territory.

Conclusion

37. Once it is accepted that *GPAO* has nothing to say about territory courts when they are exercising territory jurisdiction, it cannot support the secondary contention. It is possible, as was the case in *GPAO,* for a law sourced in s 122 to give rise to a matter under s 76(ii) where Parliament has chosen to use the institutional machinery in Ch III to enforce Commonwealth laws made for the government of a territory. To that extent it can be said that s 122 will be limited by the separation of judicial power effected by Ch III. Thus, *GPAO* has nothing to say about the issue raised by this case: that is, the jurisdiction of territory courts conferred by a law of the legislative assembly to resolve a dispute about rights and duties having their source in the laws of a legislative assembly. The jurisdiction is, invariably, territory jurisdiction.

The view of Gaudron J in *Eastman*

38. As already indicated, the plaintiffs support their secondary contention by relying on the view of Gaudron J in *Eastman*. Her Honour said the following of the jurisdiction exercised by the Supreme Court of the ACT:

> Although it is not necessary to decide whether the Supreme Court is now the creature of the body politic known as the Australian Capital Territory, it may be observed that its existence is ultimately sustained by a law under s 122 of the Constitution and the rights and duties in issue in matters before it must ultimately depend for enforcement on the law by which that Court is sustained. Thus, in my view, those matters are matters arising under a law of the Commonwealth for the purposes of s 76(ii) of the Constitution ... [47]

39. Her Honour's analysis for when s 76(ii) is enlivened drew from the well established test of Latham CJ in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*,[48] that a matter arises under a law made by Parliament 'if the right or duty in question in the matter owes its existence to the Federal law or depends upon Federal law for its enforcement'.[49]

40. Gaudron J's approach to the jurisdiction of territory courts under s 76(ii) should not be accepted. The *enforcement* identified by Latham CJ refers to

---

46 See the cases in n 13 above. See also the observations of Higgins J in *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 476.

47 (1999) 200 CLR 322, 341 [40].

48 (1945) 70 CLR 141, 154.

49 Gaudron J's judgment in *Eastman* at 341 [39] referred to her Honour's approach in *GPAO* (1999) 196 CLR 553, 605 [133] where *Barrett* was quoted and applied.

Commonwealth legislative schemes that provide an enforcement mechanism for rights and duties deriving from another source. Thus, in *Barrett* itself, the impugned provisions sought to confer power on the Commonwealth Court of Conciliation and Arbitration to give directions for the performance of the rules of industrial organisations registered under the *Commonwealth Conciliation and Arbitration Act 1904* (Cth). In response to an argument that the rights and duties derived from the common law agreement of the members of the organisation and not from the Commonwealth Act, Latham CJ held that, even if that were so (a matter that was not shown on the evidence), the rights and duties were binding and enforceable because the organisations had been registered under the Commonwealth Act.[50]

41. The same is true of the registration and enforcement mechanism for arbitral awards under the *International Arbitration Act 1974* (Cth), upheld in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*.[51] While the arbitral award is the product of the private agreement of the parties, the registration and enforcement of those rights and duties was a matter arising under the Commonwealth Act.[52] And the same, again, is true of s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), which empowers the Federal Court or the Family Court to exercise jurisdiction conferred on it by (inter alia) a law of the ACT or Northern Territory. In *Crosby v Kelly*, a Full Court of the Federal Court held that the effect of this provision was both to confer jurisdiction and create rights that have the force of the law of the Commonwealth.[53] Whilst the content of the rights is derived from the law of the ACT or the NT,[54] by this mechanism such rights are enforceable as rights under *Commonwealth* law.[55]

42. Thus, when Latham CJ spoke of *enforcement*, his Honour referred to specific rights of enforcement conferred explicitly and specifically by a Commonwealth Act, not the source of power to create a court; nor the source of a court's authority to enforce a law. The 'matter' under s 76(ii) must involve rights and duties created by the Commonwealth Act, whether they are rights and duties conferred directly by the Act or rights under the Act to enforce rights and duties deriving from another source.

Section 73 does not require acceptance of the secondary contention

43. Insofar as s 73 of the Constitution might be said to require the conclusion that territory courts invariably exercise federal jurisdiction,[56] the Commonwealth makes the following submissions. *First*, rejection of the secondary contention 'does not set any limit to the operation which s 75 or s 76 have according to

---

50 (1945) 70 CLR 141, 151–2.

51 (2013) 251 CLR 533,

52 (2013) 251 CLR 533, 543–4 [2] (French CJ and Gageler J), 561 [52] (Hayne, Crennan, Kiefel and Bell JJ).

53 (2012) 203 FCR 451, 459 [39] (Bennett, Perram and Robertson JJ).

54 (2012) 203 FCR 451, 459 [37].

55 Special leave to this Court was denied, with the reasoning of the Full Court considered to be correct: *Kelly v Crosby* [2013] HCATrans 17. See also *Ruhani v Director of Police* (2005) 222 CLR 489.

56 Cf *Kruger* (1997) 190 CLR 1, 175 (Gummow J).

their terms.'[57] Thus, litigants resident in territories have access to this Court and the Federal Court to ventilate a federal matter where there is appropriate jurisdiction to do so. *Secondly*, with the acceptance that territory courts are available in appropriate cases to exercise federal jurisdiction, the appellate pathway to the High Court from territory courts is considerable, including where the matter arises under the Constitution. *Thirdly*, s 73 on any view falls short of a constitutionally guaranteed pathway to the High Court for all purposes. For example, errors of law by lower State courts, which are not jurisdictional in nature,[58] may be insulated from State Supreme Court review and, subsequently, High Court appeal. Likewise, at least at State level, judicial power can be given to non-judicial bodies in ways which prevent all questions of fact from being available for review on a full rehearing by the Supreme Court and ultimately the High Court; and much of the common law is made, or developed, in the finding of fact. *Fourthly*, pursuant to s 73, Parliament may prescribe exceptions to, and regulations of, the Court's appellate jurisdiction. The express recognition of a legislative power to exclude matters from the Court's appellate jurisdiction weakens the force of any proposition that the secondary contention is required to maintain the role of the Court at the apex of the federal judicial system.

Alternative Commonwealth submission

44. If, instead, it were accepted that a Commonwealth law invariably enlivens federal jurisdiction in s 76(ii) (whether it is exercised by a federal court or territory court), that conclusion should not apply to the laws of a territory legislative assembly.

45. Legislative assemblies created by Parliament do not exercise legislative power as delegates of the Parliament.[59] Consequently, it cannot be said that disputes about rights and duties sourced in the laws enacted by legislative assemblies are matters capable of enlivening jurisdiction in s 76(ii). It would be a strange reading of s 76(ii) if it could it be said that the laws of legislative assemblies give rise to matters 'arising under any laws made by the Parliament' for the purposes of that provision.

46. The plaintiffs call in aid the principle that the 'stream cannot rise above its source' (PS, [28]). However, that contention has, as its premise, the proposition that territory systems of government created under s 122 *must* replicate the arrangement established in the Constitution for the federal government. But that is the very matter to be established. Section 122 provides a pathway to Statehood.[60] It would be incongruent to read s 122 in a way that imposes limits on a territory system of government more restrictive than those which apply to existing States. Indeed, the majority decision in *Capital Duplicators* subjected s 122 to the limits in s 90 in order to place the territories in the shoes of the States. It would be inconsistent with the reasoning in the majority judgments in

---

57 *Spratt* (1965) 114 CLR 226, 253 (Kitto J).

58 Cf the position of jurisdictional errors in *Kirk* (2010) 239 CLR 531, 566 [55].

59 *Capital Duplicators* (1992) 177 CLR 248.

60 See, eg, *Capital Duplicators* (1992) 177 CLR 248, 266 (Mason CJ, Dawson and McHugh JJ), 271–2 (Brennan, Deane and Toohey JJ); 288–9 (Gaudron J).

Capital Duplicators for s 122 to be read as subject to a limitation on government power not applicable to the States.

47. In short, in the alternative, even if a law enacted by the Commonwealth Parliament under s 122 necessarily and invariably triggers s 76(ii) when the matter is determined by a territory court, the Court should conclude that a law of a legislative assembly is not capable of enlivening that head of federal jurisdiction where jurisdiction to resolve the matter is conferred by a law of the assembly.

Leave should not be granted to re-open *Spratt* and *Falconer*

48. In so far as it is necessary, the plaintiffs seek leave to re-open *Spratt* and *Falconer* (PS, [30]). Such leave is necessary as each of the plaintiffs' primary and secondary contentions cannot sit with the ratio of those cases.[61]

49. The Commonwealth submits that, in accordance with the criteria set out in *John v Federal Commissioner of Taxation,*[62] leave should not be granted to re-open those decisions:

49.1. The decisions in *Spratt* and *Falconer* rest on a principle carefully worked out in a significant succession of cases in this Court[63] and in the United States.[64] Of course, *Spratt* and *Falconer* have been qualified by subsequent decisions of the Court in the recognition that territory courts are capable of exercising federal jurisdiction sourced in Ch III. However, those subsequent decisions do not undercut the general principle that territory courts exercise territory jurisdiction.

49.2. For almost 50 years, *Spratt* and *Falconer* have been relied upon by the Commonwealth Parliament as the basis for designing the systems of government in the territories. In particular, the establishment of self-government in the Northern Territory and the Australian Capital Territory proceeded on the assumption that territory courts exercised territory jurisdiction sourced in s 122. Acceptance of the plaintiffs' contentions would have far-reaching and dislocating consequences for the way in which justice has been administered in the territories.[65]

---

61 As Gummow J recognised in *Kruger* (1997) 190 CLR 1, 169-70.

62 (1989) 166 CLR 417, 438-9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

63 *Porter* (1926) 37 CLR 432; *A-G v The Queen* (1957) 95 CLR 529, 545 (Privy Council); *Spratt* (1965) 114 CLR 226; *Falconer* (1970) 125 CLR 591.

64 See the cases in n 13 above.

65 For example, the ACT Civil and Administrative Tribunal (ACAT), which is not established as a court, has received 9877 'civil dispute applications' since June 2009: ACAT Annual Report 2013–14, p 8. In FY2009–10, the number of civil dispute applications lodged with ACAT was 1770 (1756 of which were civil applications; ie not common boundaries, unit titles or retirement villages applications), in FY2010–11 it was 1885 (1826), in FY2011-12 it was 2306 (2231), in FY2012–13 it was 2019 (1963) and in 2013–14 it was 1897 (1835): ACAT Annual Report 2013-2014, p 8. A civil dispute application is defined in s 16 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) (ACAT Act) to include, among others, a contract application (an application in relation to a contract, including an application for damages for breach of contract), a damages application (an application for damages for negligence or for any other tort except nuisance or trespass), a debt application, a nuisance application or a trespass application (see s 15 of the ACAT Act for definitions). In dealing with a civil dispute application ACAT has the same jurisdiction and powers as the Magistrates Court has under Pt 4.2 (Civil jurisdiction) of the *Magistrates Court Act 1930* (ACT) (s 22(1)). Under s 71, a money

49.3. Furthermore, the decisions in *Spratt* and *Falconer*: (i) were unanimous, with no disagreement on the question of the character of jurisdiction exercised by territory courts; (ii) produce a result which is reasonable and workable and in keeping with the need for s 122 to apply to a territory through its various stages of economic and social development; and (iii) place Australian citizens resident in a territory in no different position from Australian citizens resident in a State where there is similarly no separation of power.

3. THE *KABLE* ARGUMENT

50. The plaintiffs also contend that the impugned provisions are invalid on the basis of *Kable*.[66] As developed in [52]–[59] of the plaintiffs' submissions, the plaintiffs' *Kable* submission seeks to draw strength from the Court's decision in *Kirk*.[67] As ultimately presented, the plaintiffs' argument is that '[t]he failure to provide for judicial oversight of the period of detention deprives [Northern Territory] courts of an essential characteristic and thereby impairs their institutional integrity' (PS, [58]).

51. The Commonwealth makes the following submissions in response to the *Kable/Kirk* argument:

51.1. The Court's decision in *Kirk* rested on the essential constitutional characteristics of a State 'Supreme Court' as that expression appears in the text of Ch III. The plaintiffs do not identify in their submissions how the *Kirk* reasoning is to be extended to the Supreme Court of a territory.

51.2. In *Kirk*, the impugned provision, s 179 of the *Industrial Relations Act 1996* (NSW), provided that a decision of the NSW Industrial Court was to be 'final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal'. The provision extended to proceedings for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, injunctions, declaration or otherwise. There is no similar provision in the impugned provisions. The jurisdiction of the courts in the Northern Territory, and the entitlement of a person to seek appropriate relief in those courts, are entirely unaffected by the impugned provisions.

---

order or non-money order made by ACAT is taken to have been filed in the ACT Magistrates Court for enforcement under the *Court Procedures Rules 2006*, part 2.18 (Enforcement) on the day the order is made. On this basis, it is clear that when determining at least the vast majority of civil dispute applications ACAT is exercising judicial power. Accordingly, if the plaintiffs' primary contention were accepted, the validity of most of the civil dispute applications resolved by an ACAT determination would be brought into doubt. Conversely to the situation regarding ACAT, s 32 of the *Human Rights Act 2004* (ACT) empowers the ACT Supreme Court to declare that a Territory law is not consistent with a human right. In *Momcilovic v The Queen* (2011) 245 CLR 1 a power to make such a declaration of incompatibility was held to be non-judicial. Were the plaintiffs' arguments to be accepted, the conferral of such a power on the ACT Supreme Court would be invalid (although to date it appears that only one declaration of incompatibility has been made: *Re application for bail by Islam* (2010) 4 ACTLR 235).

66 (1996) 189 CLR 51.

67 (2010) 239 CLR 531.

51.3. The plaintiffs' *Kable* submission ultimately rests on an asserted limited opportunity and scope for judicial review because of (i) the short duration of detention; and (ii) the fact that the review would be limited to the legislative preconditions authorising detention (PS, [56]). Neither argument removes the jurisdiction of the courts nor limits the opportunity for judicial review.[68] They are necessary incidents of a legislative scheme that authorises detention for a limited period on the establishment of certain preconditions. If the plaintiffs' contentions are correct, then general powers of arrest could be impugned on the same basis where a person is held in detention for a short period and then released without charge. Equally, longer periods of detention might be constitutionally valid whereas shorter periods would not – an intuitively unappealing proposition. Neither the duration of detention, nor the character of (otherwise valid) statutory criteria, should be seen as inconsistent with the decision in *Kirk*.

51.4. To extend the application of *Kable* to the impugned provisions would effect a radical and far-reaching transformation of the principle. It is well accepted that, subject to the *Kable* limitation, State Parliaments are not subject to separation of judicial power limitations.[69] The *Kable* principle prevents State and territory legislatures from conferring powers or functions on courts or judges which are incompatible with the exercise of Commonwealth judicial power. The limitation is derived from, and justified by, the inclusion of State and territory courts in the federal judicial system as vehicles for the exercise of federal jurisdiction. Further extensions of *Kable* to apply to functions conferred by State Parliaments on the executive arm of government would take the principle beyond its constitutional foundations and unsettle well-established constitutional principles applicable to State Parliaments.

4. CONFERRAL OF JUDICIAL POWER ON THE NORTHERN TERRITORY EXECUTIVE

52. The Commonwealth makes the following submissions, at a level of principle, on the approach to be applied for determining when detention pursuant to a law of the Commonwealth requires an exclusive exercise of judicial power.

53. The detention of a person requires an exercise of judicial power where the law authorising the detention has a *punitive purpose*. As accepted by members of this Court, the purpose of the law is the 'yardstick' of validity.[70]

---

68 This is not a case like *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 where the prescription of a fixed time limit for seeking judicial review operated, in substance, to limit impermissibly the right or ability of applicants to seek judicial review. Any practical difficulty for the second plaintiff in seeking judicial review of her detention arose from the limited duration of detention: not from the regulation of the second plaintiffs' right or ability to seek judicial review.

69 *Kable* (1996) 189 CLR 51, 67 (Brennan J), 78 (Dawson J), 92–4 (Toohey J), 103–4 (Gaudron J), 109 (McHugh J), 132 (Gummow J); *Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38, 89–90 [125]; *Pollentine v Bleijie* (2014) 311 ALR 332, 341–2 [42].

70 *Al-Kateb v Godwin* (2004) 219 CLR 562, 660 [294] (Callinan J). See also at 648–52 [257]–[269] (Hayne J), 662–3 [303]–[304] (Heydon J); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 25–6 [60] (McHugh J) (***Re Woolley***); *Fardon v A-G* (Qld) (2004) 223 CLR 575, 653 [215]

54. Contrary to statements in the plaintiffs' submissions (cf [32]), it is incorrect to assert 'a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth'.[71] While the formulation of the principle in that way found favour with the majority in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (***Lim***),[72] it has not been accepted by a majority of the Court in subsequent cases.[73]

55. As subsequently understood by a majority of the Court, the demarcation of judicial power identified in *Lim* rests on a *punitive* versus *non-punitive* distinction, with the character of the detention to be determined by the *purpose* of the law.[74] What is offensive to the requirements of Ch III is a legislative *purpose* to detain a person as punishment for wrongdoing.[75]

56. In order for a statutory power of executive detention to be characterised as truly being for a non-punitive purpose, it must not confer an *arbitrary* power of detention: the non-punitive purpose of the statute must be sufficiently identified, defined and confined, so that there are criteria that make it possible for a court to ascertain whether any given detention was lawful.

57. As the plaintiffs accept (PS, [38]), the purpose of the provisions is to be ascertained, as a matter of statutory construction, from the legislation when read as a whole and against its statutory background. Of course, as Kiefel and Keane JJ said in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (***Plaintiff M76***):

> It may readily be accepted that the common law right of every Australian citizen to be at liberty means that, generally speaking, any involuntary detention of a citizen would be characterised as penal and punitive.[76]

58. However, that is a presumption informing the interpretive exercise: a presumption that can be displaced by a manifest *non-punitive* statutory purpose. It is not a presumption that can be elevated to the status of a 'constitutional immunity' subject to a limited set of exceptions.[77]

59. It is appropriate to describe the test, as the plaintiffs have (PS, [39]), in terms of what is 'reasonably capable of being seen as necessary for' a non-punitive

---

(Callinan and Heydon J); *Pollentine v Bleijie* (2014) 311 ALR 332, 342 [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), 347–8 [70]–[73] (Gageler J).

71 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28–9 (Brennan, Deane and Dawson JJ).

72 (1992) 176 CLR 1.

73 See also the doubts expressed in *Lim* (1992) 176 CLR 1, 55 (Gaudron J); *Kruger* (1997) 190 CLR 1, 110 (Gaudron J).

74 Cf *Re Woolley* (2004) 225 CLR 1, 66 [184] (Kirby J); *Fardon v A-G* (Qld) (2004) 223 CLR 575, 640–1 [173]–[174] (Kirby J).

75 See *Pollentine v Bleijie* (2014) 311 ALR 332, 342 [44]–[45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), 347 [69] (Gageler J); *Re Woolley* (2004) 225 CLR 1, 32 [76] (McHugh J), 85 [263] (Callinan J); *Plaintiff M76* (2013) 251 CLR 322, 385 [206].

76 (2013) 251 CLR 322, 385 [206].

77 Gummow J's reinforcement and refinement of the constitutional immunity proposition in *Fardon v A-G* (Qld) (2004) 223 CLR 575, 613 [84] (adopted by Gummow and Crennan JJ in *Thomas v Mowbray* (1997) 233 CLR 307, 356 [114]–[115]) has not been accepted by a majority of the Court.

purpose.[78] The expression of the test in that way merely emphasises (i) the need for a non-punitive purpose; (ii) that the non-punitive purpose must be discernible as a matter of statutory construction; and (iii) that detention is a means of achieving that non-punitive purpose.

60. However, contrary to the plaintiffs' further contentions (PS, [39]–[40]), the expression of the test in that way does not involve a proportionality analysis beyond the scope of that limited inquiry.[79] In particular, it does not involve an assessment of (i) the merits of the non-punitive purpose; (ii) the extent to which that non-punitive purpose might be achieved by other means; or (iii) the extent of the impact of the detention on the person detained.

5. RESPONSES TO THE SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

61. The Commissioner's submissions should be rejected. On the one hand, as stated at [11] of the Commission's submissions, the 'Commission does not contend that the [International Covenant on Civil and Political Rights] or other international human rights principles concerning the right to liberty are binding in domestic law, or that the Constitution must be read to conform to, or so far as possible with, the rules of international law' (see also Commission's submissions (**CS**), [37]). Yet on the other hand, the Commission seeks to contend that the views of the United Nations Human Rights Committee and jurisprudence of the European Court of Human Rights 'is relevant at least insofar as it is consistent with the common law which, in turn, informs the concepts of judicial power, the judicial process and the institutional integrity of courts for the purposes of Ch III' (CS, [11]). Seeking to draw upon the statement of Brennan J in *Mabo v Queensland [No 2]*,[80] the Commission further contends that 'international law is a "legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights"'.

62. The Commission thereby seeks to achieve indirectly what cannot be achieved directly, that is, to use international human rights standards to inform the interpretation of the Constitution. That approach to discerning the meaning of constitutional text or implications should be rejected. *First*, it is not supported by any decision of this Court. *Secondly*, it is inconsistent with accepted interpretive methods. As McHugh J correctly observed in *Al-Kateb v Godwin*,[81] it is 'difficult to accept that the Constitution's meaning is affected by rules created by the agreement and practices of other countries.' That is no less the case where rules of international law are said to influence the development of common law principles that inform constitutional meaning. *Thirdly*, and most decisively in the context of the operation of Ch III, there is no relevant comparison. International

---

78 See *Re Woolley* (2004) 225 CLR 1, 14 [25] (Gleeson CJ); *Kruger* (1997) 190 CLR 1, 162 (Gummow J); *Plaintiff M76* (2013) 251 CLR 322, 369–70 [138]–[140] (Crennan, Bell and Gageler JJ). In this respect, McHugh J's rejection of this form of words does not appear to have been accepted by the Court (see *Re Woolley* (2004) 225 CLR 1, 32 [77] (McHugh J)).

79 See *Re Woolley* (2004) 225 CLR 1, 33 [79] (McHugh J), *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 137 [349] (Heydon J).

80 (1992) 175 CLR 1, 42.

81 (2004) 219 CLR 562, 595 [73].

instruments that place limits on the exercise of government power in order to protect the rights of the individual necessarily require a different analytical framework to that which is applied when considering the structural separation of judicial power implied from the Constitution.[82]

63. To the extent that common law principles inform the separation of judicial power requirements, they are principles historically understood in the common law tradition: not principles that have been filtered through inapplicable international standards. In particular, tests of 'proportionality' from different traditions (cf: CS, [33]–[40]) should not be used in this context. They have been disavowed by this Court in the context of Ch III analysis and that position should not change.[83]

64. The separation of judicial power principles may well give 'practical effect to the rule of law on which the Constitution depends' (CS, [14]), but the operation of those principles cannot be determined by reference to a free-standing conception of the requirements of the 'rule of law' (cf: CS, [14]).

65. It exaggerates the historical record to say that the framers of the Constitution considered it 'necessary for the protection of the individual liberty of the citizen that the functions of the three branches of government should be dispersed' (CS, [15]). There is very little, if anything, in the historical record that would support such a proposition.[84] As was recognised by French CJ in *South Australia v Totani*, '[t]he historical record does not indicate that the members of the Convention expressly adverted to the broader concept of the separation of judicial power in their debates'.[85]

66. This Court has accepted that '[t]he separation of the judicial function from other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges'.[86] However, such statements must be understood in the context of the Australian constitutional tradition of separating judicial power. It is a tradition that protects the *independence* of the judiciary to determine disputes involving the individual and the state. As Hayne, Crennan, Kiefel and Bell JJ emphasised in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*:

> The doctrine of the separation of powers is directed to ensuring an independent and impartial judicial branch of government to enforce lawful limits on the exercise of public power.[87]

67. It is not a tradition that places limits on the exercise of legislative power in order to protect the liberty interests of the individual; nor is it a tradition that protects the individual by disbursing government power. The statements by Kitto J in *R v*

---

82 Indeed, the Commission accepts the international standards in this area 'appear to exceed the limits of the common law's concern' (Commission's submission, [37]), thereby destroying the relevance of any comparison.

83 *Magaming v The Queen* (2013) 252 CLR 381, 397–8 [52], 413–14 [101]–[104].

84 See, eg, Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 152; J M Finnis, 'Separation of Powers in the Australian Constitution' (1968) 3 *Adelaide Law Review* 159.

85 (2010) 242 CLR 1, 44 [63].

86 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11.

87 (2013) 251 CLR 533, 574 [104].

Davison[88] and Jacobs J in *R v Quinn; Ex parte Consolidated Foods Corporation*,[89] relied on by the Commission at [15] of its submissions, do no more than establish the accepted tradition of separating judicial power to protect judicial independence. Indeed, Kitto J expressly disavows any reliance on 'fundamental functional differences between powers'.[90]

PART VI ESTIMATED HOURS

It is estimated that 45 minutes will be required for the presentation of the oral argument of the intervener.

Dated: 13 August 2015

10

.....
Justin Gleeson SC
Solicitor-General of the Commonwealth
Telephone: 02 6141 4145
Facsimile: 02 6141 4149
Email: justin.gleeson@ag.gov.au

.....
James Stellios
Telephone: 02 9236 8600
Facsimile: 02 9221 8686
Email: james.stellios@stjames.net.au

Counsel for the Attorney-General of the Commonwealth (Intervening)

88 (1954) 90 CLR 353, 380–1.

89 (1977) 138 CLR 1, 11.

90 (1954) 90 CLR 353, 382.