HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 24 May 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	C3/2024
File Title:	Commonwealth of Australia v. Mr Stradford (a pseudonym) &
Registry:	Canberra
Document filed:	Form 27E - Reply
Filing party:	Applicant
Date filed:	24 May 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY **NO C3 OF 2024**

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

AND: **MR STRADFORD (A PSEUDONYM)**
First Respondent

HIS HONOUR JUDGE SALVATORE PAUL VASTA
Second Respondent

STATE OF QUEENSLAND
Third Respondent

NO C4 OF 2024

BETWEEN: **HIS HONOUR JUDGE SALVATORE PAUL VASTA**
Appellant

AND: **MR STRADFORD (A PSEUDONYM)**
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

STATE OF QUEENSLAND
Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S24 OF 2024**

BETWEEN: **STATE OF QUEENSLAND**
Appellant

AND: **MR STRADFORD (A PSEUDONYM)**
First Respondent

HIS HONOUR JUDGE SALVATORE PAUL VASTA
Second Respondent

COMMONWEALTH OF AUSTRALIA
Third Respondent

SUBMISSIONS IN REPLY OF THE COMMONWEALTH OF AUSTRALIA

PART I FORM OF SUBMISSIONS

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

PART II REPLY

ISSUE 1: THE CONTEMPT ORDERS WERE VALID UNTIL SET ASIDE

2. ***Section 17***: The FCC not having been created as a "superior court", it is common ground that the starting presumption is that its orders are not valid until set aside. However, "it is within the competence of Parliament to bestow upon a federal court the attributes of a superior court to the extent that the Constitution permits", with those attributes including "the protection of officers of the Court in the execution of void orders".[1] Whether this has been done in the relevant respect is a question of statutory construction. None of the cases relied on by Mr Stradford suggest otherwise: cf RS [24]-[30].

3. Mr Stradford's case is that the *sole* function of s 17 of the FCC Act was to ensure that the FCC could deal with all types of contempt, including those not ordinarily within the competence of an inferior court: RS [32]. No doubt it does serve that function. But that does not demonstrate that s 17 has no *further* function. Indeed, as Mr Stradford recognises at RS [33], analogues of s 17 appear in the constituting statutes of *superior* courts, including the Federal Court.[2] If their *sole* function was as Mr Stradford asserts, such a provision would be otiose in relation to superior courts. That strongly implies that the function of s 17 was to do precisely what it said: to ensure that the FCC had the "same power" to punish contempts as is possessed by this Court. It would not have had the "same power" if its orders provided less protection to those who execute them than is provided by orders made by this Court, given the ramifications that would be apt to have for the enforcement of those orders:[3] cf RS [35].

4. Mr Stradford's submission at RS [32] that the Commonwealth's case is inconsistent with *Boilermakers* is wrong. The vice in *Boilermakers* was that the Arbitration Court was *not* a Ch III court, but was purportedly given Commonwealth judicial power.[4] The Commonwealth's argument does not entail that s 17 impermissibly vested judicial power on a non-judicial body; plainly, the FCC always was a court. Contrary to RS [32],

---

1 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 392-393 (Dawson J); *Re Macks; ex parte Saint* (2000) 204 CLR 158 at [141] (McHugh J).
2 As discussed in *Re Colina; ex parte Torney* (1999) 200 CLR 386 at [15] (Gleeson CJ and Gummow J).
3 *Kable* (2013) 252 CLR 118 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
4 (1956) 94 CLR 254 at 288-289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

its submission therefore does not imply that this was an effect of s 29A of the *Conciliation and Arbitration Act 1904* (Cth). Section 17 simply conferred power to make particular orders that would have the same effect as identical orders made by this Court. That is within Parliament's power.[5]

5. There is nothing "incongruous" in the proposition that an order of the FCC may be invalid, while an order *enforcing* that first order is valid until set aside: cf RS [34]. The distinction reflects the fact that the purpose of the contempt jurisdiction is to protect the integrity of the Court, and to ensure the efficacy of the exercise of judicial power. Contrary to RS [34], this does not render *all* invalid orders of the FCC valid until set aside. Nothing prevents a collateral challenge to the first order (as envisaged in RS [26]).

6. As RS [36] notes, s 17 does not use "jurisdiction" or "practice and procedure", which were used in the provision discussed in *Day*.[6] But the Court in *Day* did not attribute any particular significance to those terms. In particular, the absence of "jurisdiction" in s 17 is immaterial, because the FCC did not need s 17 to obtain jurisdiction; it had jurisdiction under s 10(1) of the FCC Act and s 39(1A) of the Family Law Act.

7. ***Pts XIIIA and XIIIB***: The submissions at RS [37]-[38] do not make good the claim that Pts XIIIA and XIIIB are an "exhaustive code". That is not the effect of the Full Family Court decisions cited, as explained at CS [31]. Nor is it the effect of the text of those Parts: see CS [20]-[30]. The Commonwealth's argument does not mean that Pts XIIIA and XIIIB are "swept away" or "circumvented" (cf RS [39]). They prevail within their sphere of operation, such that if a court makes contempt orders without complying with Pts XIIIA and XIIIB then those orders may be set aside on appeal *for that reason*. But their sphere of operation does not touch whether contempt orders are valid *until* set aside (see CS [22]). So much can be seen from the fact that the Family Law Act created the Family Court as a superior court of record (s 21(2)) and also provided for matrimonial causes to be commenced in at least the Supreme Court of the Northern Territory (s 39(1)).[7] That Act thereby contemplated that superior courts might make contempt orders, being orders that plainly *would* be valid until set aside even if *not* made in compliance with Pts XIIIA and XIIIB. As Pts XIIIA and XIIIB do not prevent superior

---

5 See, eg, *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 290 (Deane, Gaudron and McHugh JJ).
6 (1984) 153 CLR 475 at 479 (Gibbs CJ, Mason, Wilson and Dawson JJ).
7 See Commonwealth, Gazette No S86 (27 May 1976), made pursuant to s 40(3) of the *Family Law Act*.

courts from making such an order, there is no basis to find that they prevent the FCC from doing so in the exercise of its power under s 17(1). That is why the *Anthony Hordern* principle does not assist Mr Stradford. There can be no "legislative intent to cover the field"[8] in circumstances where Pts XIIIA and XIIIB do not concern the relevant field (the effect of contempt orders until they are set aside) at all, as is evidenced by the conspicuous absence of *any* provision addressing that topic.

8. For the same reason, s 17(2) of the FCC Act does not assist Mr Stradford (cf RS [41]). It manifests an intention that s 17(1) gives way to other provisions if, *but only if*, on the proper construction of s 17(1) and some other law, there is inconsistency. For the reason just given, there is no inconsistency between s 17(1) and Pts XIIIA and XIIIB.

9. Section 112AP(2) is not superfluous (cf RS [42]). The fact that it confers power provides no basis to confine s 17, for it is well settled that provisions that confer powers on courts are not to be read down by making implications or imposing limitations not found in express words (eg to avoid overlap with other powers).[9]

ISSUE 2: JUDICIAL IMMUNITY

Judge Vasta acted within subject-matter jurisdiction, and was therefore immune

10. Mr Stradford makes his judicial immunity argument by pointing to a line of historical cases in which inferior court judges have been held liable in damages, despite acting within subject matter jurisdiction (cf RS [47]-[60]). Like the primary judge, he says it is enough to show that the present case falls within "categories" which can be discerned from the facts of those cases (RS [44]-[46]). It can be accepted that there are old cases, particularly in England, where inferior court judges were held not to have immunity despite having subject-matter jurisdiction. There are likewise old cases to the contrary. This body of authority defies neat categorisation, particularly given the radical changes in the legal context (including the role and independence of the judiciary) over the 400 year period to which those cases relate. For that reason, "categories" discerned piecemeal from the historical authorities should not determine this case. In stating the common law of Australia, the proper approach calls for "judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle".[10]

---

8 *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at [158] (Nettle, Gordon and Edelman JJ).
9 See, eg, *DCT v Huang* (2021) 273 CLR 429 at [23]-[24] (Gageler, Keane, Gordon and Gleeson JJ).
10 *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at [81] (Gageler J); *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at [3] (Kiefel CJ, Bell, Keane and Gordon JJ), [63] (Gageler J).

Further, to focus on the old cases is to ignore both the weight of recent Australian authority (which includes authoritative *dicta*) and the Australian constitutional context.

11. ***Australian authority***: Mr Stradford takes as his starting point (RS [43]) a statement of Heydon JA in *Wentworth v Wentworth*, which he describes as "an accurate summary of the extensive case law on the subject". This is the high point of Mr Stradford's case on the Australian authorities. But, tellingly, Mr Stradford omits Heydon JA's introductory words: "There is authority *before Sirros v Moore* [1975] QB 118 that …".[11] Heydon JA distinctly did *not* go on to say that such authority reflected the law, or that *Sirros* was wrong. Indeed, he accepted (at [260]) that the High Court's general approval of *Rajski* limited the capacity of an intermediate court to reconsider the correctness of *Sirros* (his Honour's hesitation relating to whether *Sirros* stated the immunity too *narrowly*).

12. From this unstable platform, Mr Stradford considers (RS [70]-[77]) each of the Australian authorities identified by the Commonwealth and comes to the surprising conclusion (RS [78]) that *not one* of those cases decided *anything* about the common law immunity of inferior court judges. He supports that submission by taking each of those authorities in turn, searching for the narrowest basis upon which it *could* have been decided, and ignoring anything in the court's actual reasoning that goes beyond the narrowest basis on which the case could have been decided. That is not the correct approach, for the authority of a case depends on the reasoning actually adopted.[12]

13. The tide of Australian authority, including persuasive and considered *obiter*, has moved towards recognising that an inferior court judge enjoys judicial immunity so long as they act with subject-matter jurisdiction. To the extent that Australian courts refer to immunity arising when a judge has "jurisdiction", such statements are made in relation to both superior and inferior court judges (cf RS [69]),[13] and they consistently approve the statement in *Nakhla* that "jurisdiction" in this context simply means "[a]uthority to decide".[14] Further, the Australian cases do not doubt, but positively approve, Lord Denning MR's conclusion in *Sirros* that the same immunity attaches to judges of

---

11 *Wentworth v Wentworth* [2000] NSWCA 350 at [195] (emphasis added).
12 See, eg, *Deakin v Webb* (1904) 1 CLR 585 at 604-605 (Griffith CJ); Sir Rupert Cross and J W Harris, *Precedent in English Law* (4th ed, 1991) at 58-59.
13 See *Gallo* (1988) 63 ALJR 121 at 122 (Wilson J); *Fingleton* (2005) 227 CLR 166 at [35] (Gleeson CJ); *Rajski* (1987) 11 NSWLR 522 at 528G-529A, 532E, 534C (Kirby P) and 538F-539B (Priestley JA, Hope JA agreeing); *Yeldham* (1989) 18 NSWLR 48 at 58 (Kirby P), 70 (Hope AJA, Priestley JA agreeing).
14 [1978] 1 NZLR 291 at 301 (Woodhouse J).

superior and inferior courts.[15] In an Australian court, it is irrelevant that this remark was *dicta* (cf RS [63]). What matters is the persuasive force of his Lordship's reasoning on this point, which has already been accepted in Australia (including in this Court). The Australian cases cannot be answered (or disregarded) because an attack is made on *Sirros*, or by pointing to cases decided before *Sirros* that reflected a different view as to the appropriate common law rule.

14. What stands against this in the body of Australian case law? Mr Stradford mostly relies on cases that pre-date (and sometime long pre-date) *Sirros* and the cases that have approved it. These cases provide no answer to the more recent and authoritative statements set out at CS [56]-[60]. To the limited extent that Mr Stradford relies on post-*Sirros* Australian cases, they are cases that turned on limited statutory immunities.[16] The same is true of the more recent English or New Zealand authorities which, on analysis, turn on statutes that entrenched outdated distinctions (cf RS [55]-[60]).[17]

15. ***Australian legal context***: Mr Stradford's argument ignores fundamental aspects of the Australian legal context. In particular, it ignores the significance of judicial immunity for judicial independence, which Ch III makes a necessary attribute of both superior and inferior courts.[18] It ignores the fact that all Australian courts are courts of limited jurisdiction,[19] meaning one major rationale for distinguishing between the immunity of judges of superior or inferior courts can have no relevance in Australia. It ignores that the old English cases were decided without attention to the nature of the power being exercised, contrary to the requirements of the Australian constitutional context. And it transplants into the modern Australian context inapt English history[20] relating to the

---

15 See, eg, *Durack v Gassior* (Unreported, High Court of Australia, 13 April 1981); *Gallo* (1988) 63 ALJR 121 at 122 (Wilson J); *Gallo* (1990) 64 ALJR 458 at 460 (McHugh J); *Fingleton* (2005) 227 CLR 166 at [40] (Gleeson CJ), [137] (Kirby J); *Agarsky* (1986) 6 NSWLR 38 at 40 (Kirby P); *O'Shane* (2013) 85 NSWLR 698 at [85]-[91] (Beazley P, McColl JA and Tobias AJA agreeing).

16 *Clarke v Burton* (1994) 3 Tas R 370 was concerned only with the availability of a statutory defence to a damages claim; *Spautz v Butterworth* (1996) 41 NSWLR 1 concerned the construction of a statutory immunity which was unavailable where a judge "exceeded [their] jurisdiction".

17 *In Re McC* and *Ex Parte Davies* are addressed at CS [63]-[64]. *Harvey v Derrick* [1995] 1 NZLR 314 is irrelevant for the same reasons.

18 See *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [24]-[29], [35], [44] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

19 See, eg, *Kirk* (2010) 239 CLR 531 at [107] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Katoa v Minister for Immigration* (2022) 96 ALJR 819 at [44] (Gordon, Edelman and Steward JJ).

20 See, eg, *Kirk* (2010) 239 CLR 531 at [66] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

discipline of justices of the peace.[21]

No distinction between the immunity of superior and inferior court judges

16. Recognising the immunity of judges of both superior and inferior courts for acts done while exercising subject-matter jurisdiction is far from "radical" (cf RS [79]). To the contrary, it coheres with what has already been recognised in Australian law. In the United Kingdom, it found reflection in the reasoning in *Sirros*.[22] United States courts have likewise done away with the distinction, holding that all judges will be immune while acting within subject matter jurisdiction.[23] The same is true in South Africa for all judges (irrespective of court), unless they act with malice.[24]

17. ***The power to legislate***: It is a distraction to point to statutory provisions which clarify the immunity enjoyed by certain judicial officers (cf RS [80]-[82]). Of course, had there been such a provision in the FCC Act at the relevant time, the present issue would not have arisen. But the absence of such a provision is of no assistance in ascertaining the state of the common law, because sometimes legislation *confirms* the common law, sometimes it *alters* it, and sometimes it simply leaves the common law to operate (cf RS [80(a)]). The absence of an express immunity in the FCC Act may have reflected the view that, by 1999, it was thought unnecessary because the common law no longer recognised a distinction between judges of different courts. That would be consistent with the Australian authorities, as already discussed. The observation in *In re McC* that any change to the distinction in England should be left to Parliament is beside the point here (cf RS [67]), as no such distinction has ever been "deeply rooted" in Australia.

18. ***Judicial independence***: Mr Stradford doubts that personal liability "poses any real threat" to judicial independence (RS [83]). But those doubts cannot be accepted in the face of the authoritative statements, including in this Court, about the importance of

---

21 As to the extensive and diverse roles of justices of the peace in England, who were thought to act variously "judicially" and "ministerially", see Maitland, *Justice and Police* (1885) at 80; see also Block, "*Stump v Sparkman* and the history of judicial immunity" [1980] *Duke Law Journal* 879 at 887-891.

22 The force of that reasoning (or equivalent reasoning) has been recognised in other cases: see *Everett v Griffiths* [1921] 1 AC 631 at 665-666 (Viscount Finlay); *In Re McC* [1985] 1 AC 528 at 541 (Lord Bridge); *Anderson v Gorrie* [1895] 1 QB 668 at 671 (Lord Esher MR), 672 (Kay LJ), 672 (AL Smith LJ).

23 See *Alzua v Johnson,* 231 US 106 (1913) at 111; *Stump v Sparkman*, 435 US 349 (1978). See also, eg, *Lange v Benedict* (1878) 73 NY 12; *Austin v Vrooman*, 128 NY 229, 28 NE 477 (1891); *Waugh v Dibbens*, 61 Okl 221, 160 P 589 (1916).

24 See, eg, *Telematrix Pty Ltd v Advertising Standards Authority* [2005] ZASCA 73 at [17]-[19] (Harms JA, Cameron, Van Heerden, Mlambo JJA and Cachalia AJA agreeing); *Congress of Traditional Leaders v Speaker of the National Assembly* [2016] ZAWCHC 206 at [62]-[68] (Hlophe JP).

judicial immunity in foreclosing the risks of bias or an appearance of bias.[25] The doubts are particularly unpersuasive given Mr Stradford's submission that an inferior court with subject-matter jurisdiction may nevertheless lack "jurisdiction" in the sense relevant to judicial immunity, which denies his submission that inferior court judges may be liable only in "limited circumstances" (cf RS [83]). The inappropriateness of drawing a distinction between the immunity of superior and inferior court judges is further underlined by the recogition that the judicial independence rationale of judicial immunity also underpins the non-compellability of judges, as well as absolute privilege in defamation (rules that apply equally to judges of superior and inferior courts).[26]

19. ***Competing "policy imperatives"***: Mr Stradford identifies three "policy imperatives" that he says support the distinction. None withstands scrutiny. *First*, Mr Stradford says that an inferior court judge will more likely "have less experience, less assistance from able counsel and less time to consider than a superior court judge" (RS [86]). In large part that is to invoke an anachronistic view of inferior court judges.[27] In any case, such differences could only sound in the need for greater protection of judicial officers who, through no fault of their own, are placed in a position where they are less supported to avoid the risk of suit.[28] The proper answer for errors which may flow from such "differences" lies in prerogative or appellate relief, not in personal liability.

20. *Second*, Mr Stradford says that "the work of superior courts is exposed to a far greater degree of publicity than that of inferior courts" (RS [87]). This very matter shows the fallacy in that generalisation. In any event, to the extent that judges of all courts need "incentives" to exercise restraint, that is achieved already: by the process of judicial and appellate review (as operated here); by the powers of the Chief Judge or Chief Justice in addressing complaints about judicial officers; and at the federal level by the removal

---

25 See at CS [67]-[68]. See also Holdsworth, "Immunity for Judicial Acts" (1924) *Journal of the Society of Public Teachers of Law* 17; Holdsworth, *A History of English Law* (1924) vol 6 at 234-240.

26 See, eg, *Evidence Act 1995* (Cth) s 16, which does not distinguish between judges of superior and inferior courts. In *Herijanto v Refugee Review Tribunal* (2000) 74 ALJR 698 at [13]-[15], Gaudron J explained that judicial independence is a rationale underpinning both the non-compellability rule and judicial immunity (citing *Sirros*), without distinguishing between judges of superior and inferior courts. As to absolute privilege, see, eg, *Scott v Stansfield* (1868) LR 3 Ex 220 at 223 (Kelly CB), 224 (Martin B).

27 That view has been roundly criticised in England where, unlike Australia, it had some genesis in the historical role of justices of the peace: *Sirros* [1975] QB 118 at 136; *In Re McC* [1985] 1 AC 528 at 541.

28 See, eg, *Brooks v Mangan*, 86 Mich 576, 49 NW 633 (1891) at 634: "Circuit judges are usually men of experience and education in the law, while justices of the peace seldom have any legal education or training. Upon what reason should the former be held exempt from liability for their errors, while the latter must be severely punished for honest errors of judgment? I can find no reason in such a distinction."

mechanism in s 72(ii). These mechanisms achieve oversight and incentivise restraint in individual cases, without the systemic risks involved in the imposition of personal liability on inferior court judges (see CS [67]-[70]).

21. *Third*, Mr Stradford emphasises the prospect of personal liability as a "valuable means of safeguarding the liberty of the subject" (RS [84], [88]). However, he accepts that there would be no legally enforceable right to compensation if a contempt order were wrongly made by a superior court (RS [85]). A person wrongfully detained on the order of a superior court must rely upon the executive for compensation for injustice for which there is no legally enforceable remedy.[29] The same mechanism is available with respect to equivalent orders of inferior courts. While imperfect, this represents the legal policy compromise between safeguarding the integrity of the judicial system as a whole and the private interests of affected individuals. The compromise should be consistent.

22. ***Legislative reliance on the distinction***: Finally, Mr Stradford suggests that parliaments have made "deliberate legislative decisions" on the basis of the historical distinction (RS [90]-[91]). But the only form of decision to which he points is the decision to designate a court as an inferior or superior court. It is implausible to suggest that, in making that choice, parliaments have been swayed by a finely-honed view about the implications of the choice for the common law immunity of judges. Indeed, the speed with which Parliament responded to the decision now under appeal belies any suggestion that it had relied upon the view of the common law Mr Stradford advances.[30]

ISSUE 3: THE COMMON LAW DEFENCE

23. Mr Stradford accepts that authority supports a common law defence for "officers of an inferior court who are bound, by virtue of their office, to give effect to any order made by the court" (RS [93]). The Commonwealth agrees. But Mr Stradford says that this common law defence excludes "other persons who commit torts in pursuance of such orders (including constables and gaolers)". The rationale for such an arbitrary distinction is unclear. The argument in support of it is unpersuasive. It encounters three

---

29 So much was recognised in *Robertson* (1997) 92 A Crim R 115 at 116 (Malcolm CJ). See, eg, the practice of the making of ex gratia or act of grace payments to victims of wrongful convictions. See also *Kaplan v State of Victoria (No 8)* [2023] FCA 1092 at [15], [1650], [1667] (Mortimer CJ).

30 See the *Federal Courts Legislation Amendment (Judicial Immunity) Act 2023* (Cth), which inserted s 277A into the *Federal Circuit and Family Court of Australia Act 2021* (Cth).

fundamental problems, in addition to specific issues with the analysis of the authorities.

24. ***First, as to method***. Mr Stradford appears to demand a degree of uniformity, clarity and consistency – a kind of tidiness – which has never been a hallmark of the common law.[31] He persuaded the primary judge to adopt that approach, which caused his Honour to reject the common law defence for want of "a clear or unequivocal line of authority" (CAB 384 [516]). But that is to set the bar too high, particularly when seeking a common law rule on an issue that is litigated rarely. Mr Stradford again goes so far as to say that *none* of the cases upon which the Commonwealth relies actually supports its position (RS [108], [118]). That submission suffers the same vices discussed in para 12 above in relation to his equivalent submission about judicial immunity. Indeed, the methodology is not even applied consistently (eg RS [93], relying on observations in dissenting reasons in *Stanley* on a matter that was plainly not in issue in that case).

25. ***Second, as to the distinction between judicial and executive acts***. Mr Stradford dismisses this as a "modern distinction sought to be superimposed on the common law by the Commonwealth centuries after the fact" (RS [106]). The corollary of that must be the (rather surprising) submission that the common law of Australia should be stated by this Court without regard to that distinction. Apparently on that basis, Mr Stradford treats cases concerning executive acts and warrants as if they inform the position of persons giving effect to orders made by an inferior court when exercising the judicial power of the Commonwealth (see RS [94]-[96], [98]-[102], [105]-[106]). That ignores the fact that the common law of Australia exists in a constitutional setting that demands recognition of the distinction between judicial and executive power.[32] The Commonwealth's argument is not a gratuitous superimposition which obscures the "true" position revealed by 17th century English cases. It is an argument that recognises the constitutional framework within which the common law of Australia is applied.

26. Mr Stradford goes so far as to say that the distinction forms *no* part of the reasoning in *any* of the cases in this line of authority and that *none* of the cases in this area draw *any* distinction of this kind (RS [106]). That is wrong. Indeed, the distinction is critical in *Kable*, the very case he takes as his starting point. When passages quoted at RS [94]-[96] are read in full (and giving weight to the words Mr Stradford chose *not* to

---

31 *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at [84] (Gageler J).

32 See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 141-142 (Brennan J) ("The Constitution and the common law are bound in a symbiotic relationship"); *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 566 (the Court).

emphasise), it is clear that Allsop P and Basten JA were primarily concerned to draw out the different protections that arise when executing an invalid executive warrant as opposed to an invalid judicial order. That is the prism through which Allsop P conducted his analysis of the authorities, including those relied upon by the Commonwealth.[33] That is not surprising, given that the distinction was recognised in England more than two centuries ago,[34] and has long been understood in Australia.[35]

27. Mr Stradford would be on firmer ground in submitting that the earliest English authorities recognised a clear distinction between superior and inferior courts (eg RS [98]), but did not at that stage draw a clear distinction between judicial and executive acts (cf RS [106]). But that does not assist Mr Stradford, for justices of the peace made a wide range of decisions, some of which would later come to be recognised as judicial in character (such as imposing punishment) and some of which were administrative (such as search warrants). At the time the *Justices of the Peace Act 1361* was enacted, "and indeed until the eighteenth century, there was no distinction drawn between judicial and administrative functions, and a large share of both was entrusted to the justices of the peace".[36] Given that, the fact that the earliest authorities do not distinguish between executive and ministerial power provides no warrant for asserting that the common law closed its eyes to that distinction once it had been recognised.

28. ***Third*, *as to the distinction between "ministerial officers" and others***. Mr Stradford seeks to identify a limit on the common law defence which cannot be sustained. There is no "bright line" category of officers who may rely on the common law defence, since even constables were recognised early on as proper officers of the justices and bound to execute their warrants (see QS [49]; RS [112]). While it can be accepted that some early English authority emphasised the need to protect ministerial officers, the cases were far from consistent. Of those that emphasised the position of "ministerial officers", many simply recorded that situation in point of fact, or explained it by reference to the need to protect the integrity of the institution, or emphasised it as being among a number of reasons why the person was not liable in that particular case. Those cases, considered

---

33 See CS [25]-[48] discussing, inter alia, *Cavanough* (1935) 53 CLR 220; *Cox* (1867) LR 2 HL 239; *Posner* (1946) 74 CLR 461; *Roberston* (1997) 92 A Crim R 115.

34 See, eg, *Cox v Coleridge* (1822) 107 ER 15 at 19-20 (Abbott CJ), 20 (Bayley J, Holroyd J), 21 (Best J).

35 See, eg, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 335 (Griffith CJ), 378 (O'Connor J), 383 (Isaacs J).

36 c 1, 34 Edw 3, discussed in Maudsley and Davies, "The Justice of the Peace in England" (1964) 18 *University of Miami Law Review* 517 at 519. See also *Wise v Withers* (1806) 7 US 331 at 336, holding that the powers of a justice of the peace are "partly judicial and partly executive".

as a whole, did not establish a common law defence which specifically excluded a subset of officers and officials charged by the court with enforcing orders made in the exercise of judicial power (see CS [39] [44(a)]; QS [46]-[56]). Much less was any such exclusion frozen in time by the *Constables Protection Act*, such that the common law could not develop consistently with that legislation (cf RS [126]).

29. With those three problems in mind, Mr Stradford's analysis of the Australian authorities at RS [108]-[118] can be seen to be flawed. In particular:

(a) In *Smith v Collis*, the Court recognised that the protection extended to a gaoler. It may be accepted that this case concerned a statutory claim. But, contrary to RS [109], the relevant statements, while *obiter*, directly addressed the common law position that would apply in an action for false imprisonment (see CS [36(a)]).

(b) While *Cavanough* was not a false imprisonment case, the common law position was described by the plurality as follows: "Acts 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'". Their Honours cited *Dr Drury's Case* (which preceded the *Constables Protection Act*) in support of this proposition. To the same effect, Starke J said "anyone who acts in execution of a judgement may justify under it". Thus, this Court framed the principle as one applicable to "judicial orders", with no distinction between ministerial officers and others (cf RS [110]-[111]). Mr Stradford simply ignores these statements. They cannot be answered by discussing the facts of an English case from 1610 (cf RS [111]).

(c) In *Posner*, which again was not a false imprisonment case, this Court relied on English cases which attached the protection of the common law defence to constables and garnishees,[37] suggesting it is not limited to "ministerial officers".

(d) In *Robertson*, the position of a gaoler could not have been made clearer. Mr Stradford's arguments at RS [114] for distinguishing or not following that case are weak. The *Constables Protection Act* was not considered or applied at all, and so does not explain the result. There was no occasion to consider *Feather v Rogers*

[37] For example, Starke J at 476 cited *Cox* (1867) LR 2 HL 239, which held that the protection applied to a garnishee. Likewise, Dixon J at 482 cited *Moravia v Sloper* (1737) 125 ER 1039, which concerned a constable. RS [113] emphasises the reference to *Andrews v Marris* (1841) 1 QB 3, but that case says nothing about excluding a non-ministerial officer (the gaoler was not even sued). To the contrary, this Court has cited it as supporting the broader proposition that an action will not lie "against an executive officer": see *Mooney v Commissioner of Taxation (NSW)* (1905) 3 CLR 221 at 241-242 (Griffith CJ).

because it concerned the *executive* act of issuing a search warrant, not the *judicial* act of making a warrant of commitment upon conviction and sentence. Mr Stradford's more general complaints as to the reasoning are misplaced, for the Court correctly applied *Sirros*, *Cox* and *Posner*.

(e) In *Kable*, the Court did not find that there was an exclusion for persons other than "ministerial officers" acting in obedience to a *judicial* order (cf RS [116]). In the introductory words excluded from the passage quoted at RS [94], Allsop P said that, in cases involving a judicial order, "the courts are protecting third parties such as court officers or garnishees from the consequences of an invalid order (not being limited to the order of a superior court)". His Honour went on to equate the position of police officers with officers of the court where they were "acting under the immediate orders of a judicial officer after the exercise of judicial process" (at [38]). It was only in relation to orders that had "the true legal character of an executive warrant" that Allsop P contemplated, without deciding, that officers of the court might stand in a stronger position than police or gaolers.

30. It is no answer to these authorities to maintain that older English authority can be found which suggests a narrower defence. Nor does the *Constables Protection Act* point against the Commonwealth's submission (cf RS [96], [122]). Instead, it demonstrates that the policy need to protect those executing orders of inferior courts has long been uncontroversial. Over a period of more than 250 years, that Act would need to have exerted but a weak "gravitational pull" to have caused the common law defence to extend to align with the Act (not to "upset the balance effected by that Act": cf RS [126]).[38] That is a more persuasive analysis than to treat that Act as having dictated the result in cases where it is not even mentioned.

Dated: 24 May 2024

Stephen Donaghue
Solicitor-General of the Commonwealth

Tim Begbie
T: (02) 6253 7521
tim.begbie@ags.gov.au

David Hume
T: (02) 8915 2695
dhume@sixthfloor.com.au

Olivia Ronan
T: (02) 6141 4147
olivia.ronan@ag.gov.au

[38] See, eg, M Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (2023) p 124; *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 at [19]-[20] (Gleeson CJ, Gaudron and Gummow JJ), noting that "[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"; *PGA v The Queen* (2012) 245 CLR 355 at [61]-[65] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also CS [44(b)] and [112].