HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S24/2024

BETWEEN:

STATE OF QUEENSLAND
Appellant

and

MR STRADFORD (A PSEUDONYM)
First Respondent

and

JUDGE SALVATORE PAUL VASTA
Section Respondent

and

COMMONWEALTH OF AUSTRALIA
Third Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Filed on behalf of the appellant

14 August 2024

PART I: Internet publication

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

PART II: Propositions to be advanced in oral argument

A. Section 249 of the *Criminal Code*

2. The judge construed s 249 as being inapplicable to warrants issued by federal courts and even State courts exercising federal jurisdiction: PJ [544], [546] [**CAB 391-2**].
3. That construction fails to give due regard to the purpose and context of s 249 and also misapplies s 35(1)(a) and (1)(b) of the *Acts Interpretation Act 1954* (Qld) and the related common law presumptions: QS [26]-[39].
4. ***Statutory context***: Section 249 (read with s 250) is one of a set of provisions dealing with justifications and excuses for assaults and violence to the person generally. The section:
   (a) is expressed in very broad language;
   (b) applies even when the warrant is invalid;
   (c) where it applies, protects a person against civil liability (s 6(1), *Criminal Code*);
   (d) does not regulate any activity of a court or confer any power on a court.
5. Section 249 protects against criminal and civil liability for arrest or detention, eg, the offences of common assault (s 335) and deprivation of liberty (s 355). The territorial reach of those is dealt with expressly in s 12: QS [28]-[30].
6. ***Misapplication of s 35(1)(b) and like common law presumption***: The common law presumption against extraterritoriality and s 35(1)(b) require identification of the 'hinge' or 'central subject matter' of the statute: ***BHP*** *Group Ltd v Impiombato* (2022) 96 ALJR 956, [59], [62], [63] (Gordon, Edelman and Steward JJ) [**C3 Tab 19, 393-395**]; cf [22], [37] (Kiefel CJ and Gageler J) [**C3 Tab 19, 385, 388**].
7. The judge did not attempt to identify the 'hinge'. Further, his Honour required a territorial link for every element of s 249. The authorities correctly describe this approach as a 'fallacy': *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692, [116] (Leeming JA) [**D6 Tab 52, 1697**].
8. ***Section 35(1)(b) and the common law presumption are displaced by contrary intention***: The context and purpose of s 249 show that it is intended to protect against criminal and civil liability. The judge's construction would lead to absurd consequences: officers would be exposed to criminal and tortious liability for enforcing an invalid warrant of a federal court, or an invalid warrant of a State court exercising federal jurisdiction.

9. The justification provided by ss 249-250 is commensurate with the liability provisions: *Birmingham University and Epsom College v Federal Commissioner of Taxation* (1938) 60 CLR 572, 580 (Dixon J) [**C3 Tab 20, 407**]. See also: 576; 578-9; 581-2.
10. Assuming s 35(1)(a) has a separate application, it is displaced for the same reasons.
11. ***Seaegg rule*:** The rule has been described as a particular operation of the presumption against extraterritoriality: Herzfeld & Prince, *Interpretation* at 218 [9.270] [**E9 Tab 113, 2898**]. The underlying rationale for that presumption is unclear, being described as:
    a) comity: *BHP* at [23]-[32] (Kiefel CJ and Gageler J) [**C3 Tab 19, 385-7**]; cf [71] (Gordon, Edelman and Steward JJ) [**C3 Tab 19, 396**]; or
    b) the need to confine general words to matters within territorial limits: *BHP* at [27] (Kiefel CJ and Gageler J) [**C3 Tab 19, 386**].
12. If comity is the rationale, s 249 would not engage the presumption. Contrast:
    a) *Seaegg v The King* (1932) 48 CLR 251, 255 [**C5 Tab 40, 1479**];
    b) *Solomons v District Court (NSW)* (2002) 211 CLR 119, [9] [**C5 Tab 41, 1493**].
13. Likewise, any need to confine words within territorial limits would not engage the rule.
14. In any event, the rule is displaced for the reasons given at [8]-[9] above.
15. ***Stradford's submissions to the contrary should be rejected*:** Statutes are 'always speaking': *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333, 363-4 [83] (Edelman J) [**C3 Tab 18, 372-3**]. Context and purpose of ss 249-250 require that they apply to all courts, whether in existence in 1899 or not: QS [fn 35], QR [10].
16. Other provisions which expressly refer to things 'in and of' the Commonwealth serve vastly different purposes, eg, s 359E.
17. The presumption that terms bear the same meaning throughout a statute is not a strong one: *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1, 10 (Gibbs CJ); 15 (Mason J) [**C3 Tab 21, 419, 424**]. Context here suggests 'any court' includes federal courts: QS [13].
18. The primary judge's construction gives rise to anomalies. The legislature could not have intended to compel officers to rely on ss 24 and 31(1)(a) and (b): QR [16]-[19].
19. Qld's construction of ss 249 and 250 does not give rise to 'real anomalies': QR [20].

B. The common law

20. ***No 'ministerial' exception***: The common law did not distinguish between ministerial officers, police officers and gaolers: QR [21]. Constables were ministerial officers: *Hawkins Pleas of the Crown* [**E9 Tab 110, 2692**]. The 'well known distinction' was

between those bound to enforce and parties: *Mooney v Commission of Taxation* (1905) 3 CLR 221, 241-2 [**C4, Tab 32, 1061-2**]; *Moravia v Sloper* (1737) 125 ER 1039, 1041 [**D6 Tab 71, 2007**].

21. There were two related rationales for this distinction:
    a) Impossible for constables and other officers to know if the order was lawful.
    b) It was not their role to second-guess the legality of orders of the court: see *Webb v Batchelor* (1826) 89 ER 294 (A); (1826) 89 ER 302 (B) [**D7 Tab 102, 2513-4**]; *Oliet v Bessey* (1682) 84 ER 1223, 1223-4 [**D7 Tab 76, 2060-61**].
22. ***Narrower view adopted by some later cases***: Officers could escape liability by relying on warrant, but only if the court had 'general jurisdiction of the cause'.
    a) This line of authority was not limited to court officers.
        - *Morse v James* (1738) 125 ER 1089, 1092 [**D6 Tab 73, 2025**]
        - *Smith v Bouchier* (1795) 93 ER 989, 989 [**D7 Tab 95, 2366**]
        - *Andrews v Marris* (1841) 113 ER 1030, 1036 [**D6 Tab 44, 1605**]
    b) 'General jurisdiction of the cause' did not equate to the modern concept of jurisdictional error. See, eg, *Morrell v Martin* (1841) 133 ER 1293, 1279 [**D6 Tab 72, 2020**]; *Hill v Bateman* (1726) 117 ER 323 [**D6 Tab 62, 1827**]; *Painter v The Liverpool Gas Light Co* (1836) 111 ER 478, 482, 483 [**D7 Tab 81, 2212, 2213**].
23. The *Constables Protection Act 1750* removed the need to rely on these doctrines. It was no longer necessary to show that the court had 'jurisdiction of the cause': QR [26].
24. Mr Stradford's contention about the *Constables Protection Act* should be rejected because he does not show a principled basis to distinguish ministerial officers from others bound to obey; he does not contend, and cannot contend, that officers should have a duty to inquire whether warrants are valid; and he does not suggest the common law should revert to 'general subject matter jurisdiction'.
25. Qld cannot be fixed with liability on the basis that the scheme adopted is 'akin to a public insurance scheme': QR [28]-[33].

Dated: 14 August 2024.

Gim Del Villar KC SG **Jonathan Horton KC** **Daniel Favell** **Felicity Nagorcka**