HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	C3/2024
File Title:	Commonwealth of Australia v. Mr Stradford (a pseudonym) &
Registry:	Canberra
Document filed:	Form 27D - 1st Respondent's submissions (Stradford)
Filing party:	Defendant
Date filed:	10 May 2024

Important Information

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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 OF THE FIRST RESPONDENT

PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. There are four issues, or groups of issues, in this proceeding:

   (a) ***First***, was Mr Stradford's imprisonment lawful on the basis that the Judge's order authorising that imprisonment did so validly until set aside? (Commonwealth Submissions (**CS**) [2(a)]; Vasta Submissions (**VS**) [2(b)]).

   (b) ***Secondly***, does an inferior court judge enjoy immunity from suit at common law in the circumstances of this case and, if not, should this Court create such an immunity? (CS [2(c)]; VS [2(a)]).

   (c) ***Thirdly***, do officers such as constables and gaolers have a common law defence for torts committed while executing an invalid order of an inferior court, provided it is valid on its face? (CS [2(b)]; Queensland Submissions (**QS**) [2(b)]).

   (d) ***Fourthly***, does s 249 of the *Criminal Code* (Qld) apply to the orders of federal courts so as to afford a statutory defence to Queensland in this case? (QS [2(a)]).

3. For the reasons given by the primary judge (**J**), the answer to each question is "no".

PART III SECTION 78B NOTICE

4. Mr Stradford considers that no further s 78B notices are required in this proceeding.

PART IV FACTS

5. The facts are set out at J[18]–[66], [120]–[129], [588]–[632]. They are not now in controversy. But they should not be ignored or minimised. If the Appellants are correct, Mr Stradford has no right to compensation for the grievous injustice he has suffered.

6. Mr Stradford's detention was ordered following a "gross parody of a court hearing" (J[129]) infected by "fundamental and egregious errors" (J[5]) including a "profound denial of procedural fairness" (J[65]), "prejudgment" amounting to "actual bias" (J[135]), "thinly veiled threat[s]" of imprisonment (J[121]), interrupting, hectoring, berating and bullying (J[118]), "high-handed and unnecessarily demeaning, contemptuous and dismissive" conduct (J[664]) and all in all, "a thoroughly unacceptable abuse of judicial power" displaying "an almost contemptuous disregard for the rule of

law" (J[646]). The three transcripts of 10 August 2018 (**CAB 74–109**), 26 November 2018 (**CAB 129–134**), and most critically, 6 December 2018 (**CAB 137–160**) bear out these descriptions. Read together, it is clear there is no merit in Judge Vasta's barely pressed and undeveloped ground of appeal that he did not prejudge the matter (VS[46]). At any rate, that is but ***one*** of the reasons that his orders were an "affront to justice": J[6].

7. Due to an assumed failure to produce documents (about which Mr Stradford was never heard); without affording Mr Stradford (who was unrepresented) any of the protections mandated by statute for contempt proceedings; without ever making a finding that Mr Stradford had breached any order, let alone that he had committed contempt (cf VS[7]);[1] and without considering whether some sentence less harsh than imprisonment was appropriate, Judge Vasta ordered that Mr Stradford "be sentenced to a period of imprisonment in the Arthur Gorrie Correctional Centre for a period of twelve (12) months, to be served immediately" (J[38]). In words to which Wigney, Strickland, Murphy and Kent JJ have all assented: "It is difficult to envisage a more profound or disturbing example of pre-judgment and denial of procedural fairness to a party on any prospective orders, much less contempt, and much less contempt where a sentence of imprisonment was, apparently, pre-determined as the appropriate remedy": J[64].

8. Immediately after the imprisonment order was made, Mr Stradford was escorted from the courtroom by two MSS guards through one of the public areas in the Harry Gibbs Commonwealth Law Courts Building, in front of his former wife, his best friend and any other members of the public present. He was taken into a goods lift to the basement. He was then frisk searched and made to remove his cufflinks, belt and shoes. He was placed in a holding cell about two by three meters in size: J[403], [592]–[594].

9. Thirty minutes later, Queensland Police collected Mr Stradford from the court. He was handcuffed and transported to the Roma Street Watch House in the back of a paddy wagon. He felt like a "dog in the back of a cage": J[44], [595]–[597]. When he arrived at the Watch House, he was placed in an "interim cell". He was then taken to the counter and "processed". He was questioned by the officers. One confused him, saying "so you

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[1] The suggestion Judge Vasta believed Judge Turner had made such a finding sits uneasily with Judge Vasta's questioning of Mr Stradford on 6 December 2018 (J[131]–[132]). But even if Judge Vasta did so, it was an inexplicable and obviously avoidable error. There was no record of any such finding by Judge Turner. The circles and ticks at **CAB 126–127** were plainly not such a record. The transcript of the hearing before Judge Turner (**CAB 129–134**) made clear her Honour had not made any finding, which transcript she directed be placed on the court file for Judge Vasta's purposes (**CAB 134.20–25**). The order Judge Turner made (**CAB 136**) adjourned the matter "for hearing of the contempt application" to Judge Vasta.

owe money". Another quipped: "you will have a tough time in here". He was told he might be in the Watch House for months: J[599]. It was a bleak place: see the photographs in Mr Stradford's Book of Further Materials **3–21**.

10. Mr Stradford was then strip searched. He had to remove his clothing and was told to lift his legs and spread his buttocks so the police could check whether he had concealed anything in his anus. He felt degraded. He was then given clothes to wear which came from the "women's pile". Because they were denim, rather than green like everyone else's, Mr Stradford was taunted by the other inmates: J[600]–[601].

11. Mr Stradford was taken to a holding cell, about three by one metre in size. There were four other inmates in it. One punched the wall above Mr Stradford's head. He tried to laugh it off but he was panicking. He felt terrified and overwhelmed. He was mocked by the other inmates, who called him "constable" and "copper" because he was well groomed, and "cheeseball" because he talked to the guards: J[602].

12. Mr Stradford was then taken to his first "pod", where he was to spend the night. He shared the pod with five other inmates, though he had his own cell. His bed was a lump of concrete, with a mattress and blanket. He was not given a pillow: J[603]. He felt upset and distressed. He put the blanket over his head but an officer told him to take it off or it would be confiscated. The cell had a bubbler and sink but the bubbler was not working. It had a metal toilet but no toilet paper. He had to ask for tissue paper. There was a shower at the end of the pod where inmates showered in the morning. He was given a towel and toothbrush but the toothbrush was taken away from him after each use. The Watch House was bitterly cold. He asked for but was refused a second blanket. He was not given any shoes or socks: J[603].

13. Inmates were locked in their cells for meals. The meals were passed through a hatch in the door. They were given Red Rooster for lunch and dinner, every day: J[604].

14. After the first night, Mr Stradford was moved to a different pod, shared with an inmate who told him he was "coming off ice and heroin", had been "in and out of mental health wards" and had been homeless at various times. On the first night in this cell, he woke up to find his cellmate's hands around his throat. He felt intimidated having to sleep in that environment. His cellmate had no regard for personal hygiene and did not use toilet paper. The cell was "disgusting": J[607].

15. Mr Stradford witnessed various episodes of violence and aggression between inmates in the Watch House. The guards were not always watching. One time, Mr Stradford was punched in the head. He was told, with the addition of expletives, to "shut up": J[610].

16. He did not sleep well. He worried about his family and about what his children would think of him. He started to struggle mentally. He was allowed a phone call to his then lawyers but was told they could not assist without money. He called Legal Aid but was told they could not assist until he reached his final gaol: J[611]–[612].

17. By this point, Mr Stradford felt hopeless and helpless. He felt he was "spiralling" into a "very bad mental state". He had suicidal thoughts. On one occasion, he took steps towards a suicide attempt. A guard had not closed the food hatch in the door of his cell. Mr Stradford made a noose out of a blanket or towel and hung it on the hatch, thinking he could strangle himself by twisting it around his neck. The only reason he did not take that step was that he heard his daughter's favourite song come on over the radio. Mr Stradford became very emotional while giving this evidence: J[613].

18. After four nights in the Watch House, Mr Stradford was transferred to the Brisbane Correctional Centre (**BCC**). He was handcuffed and taken in a transport van divided into "boxes" and placed in a box with two other inmates. The box was "tiny" and he felt like "a dog in a case on the back of a greyhound trailer". He was "freaking out" and started to bang the side of the van. One of the other inmates told him to shut up. The other put his hands over Mr Stradford's head. The officers in the van did not intervene: J[618].

19. On arrival at the BCC, the officer opening the door of the van asked him whether it was his first time in prison, and said "you're going to love Christmas". Mr Stradford was taken to a psychologist at the BCC and, having told her he was "not doing all that well", was placed under observation, meaning he received fewer privileges: J[620]–[621]. After seeing the psychologist, Mr Stradford was again strip searched. This again required him to part his buttocks to ensure nothing was secreted in his anus: J[623].

20. Mr Stradford's cell at the BCC was approximately two by three metres in size. The shower could only be used for approximately three minutes and was scalding hot. There was a period each day where Mr Stradford was locked down in his cell. He was observed by prison officers every 120 minutes: J[626]– [627].

21. In one incident at the BCC, an inmate grabbed Mr Stradford's backside during a "muster" and told him he would "look a lot sexier" if he shaved his legs. That night, Mr Stradford

used a razor and soap to shave his legs. As the primary judge found, the fact that he did that demonstrates the extraordinary impact that imprisonment was having on his mental state. In another incident, an inmate elbowed Mr Stradford in the side of the head and said "don't fucking touch" while he was lining up for a piece of toast at breakfast: J[628].

22. On his last day at the BCC, Mr Stradford was told he would soon be sent to a maximum security prison. He telephoned his friend so his friend could tell his fiancée. His friend, however, told him that he was going to be released as he had won his appeal: J[630]. On reaching this point of his evidence, Mr Stradford broke down and started sobbing.

23. In sum, Mr Stradford was treated in a "thoroughly humiliating, demeaning and degrading manner" and his experience was "harrowing": J[629], [642]. He has contracted post-traumatic stress disorder and major depressive disorder: J[667].

PART V ARGUMENT

ISSUE 1: WHETHER ORDERS WERE VALID UNTIL SET ASIDE

Inferior court orders at common law

24. The starting point is that, as this Court unanimously stated in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17*,[2] the Federal Circuit Court was an inferior court. One "uncontroversial" (CS[13]) consequence is that, in contrast to the orders of a superior court, any purported order it made that was affected by jurisdictional error would be void *ab initio*. As Gageler J said in *Stanley v DPP (NSW)*,[3] an order of an inferior court affected by jurisdictional error "is and was from the moment of its making lacking in legal authority: … it 'is not an order at all'." Or, as Jagot J put it, such a purported order is "completely void and has no force or effect" from the moment it is purportedly made — it is "void from the outset".[4]

25. The order need not be later set aside for this to be so. As this Court held in *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd*:[5]

> The circumstance that the Land Court has been established as an inferior court, as distinct from a superior court, means that failure to comply with a condition of its jurisdiction to perform a judicial function renders any judicial order it might make in

2 (2021) 272 CLR 329 at 343 [26] (Steward J; Kiefel CJ, Keane, Gordon and Edelman JJ agreeing).

3 (2023) 97 ALJR 107 at 113 [16] (footnotes omitted, emphasis added).

4 (2023) 97 ALJR 107 at 136 [156], [158].

5 (2021) 272 CLR 33 at 48–9 at [48] (Kiefel CJ, Bell, Gageler and Keane JJ).

> the purported performance of that judicial function lacking in legal force. That is so whether or not the judicial order is set aside.

26. One consequence of this, relevant to this proceeding, is that "the purported order can also be impeached collaterally in any proceeding in any court in which it might be sought to be relied upon to support or deny a claim for relief".[6] An example is that failure to obey the order cannot be a contempt of court; and the validity of the order can be impugned in any proceedings for contempt.[7] For the same reason, where the order is relied upon to supply a defence of lawful authority to a claim in tort, the validity of the order can be impugned — and if impugned successfully will not afford a defence.

27. As Gageler J explained in *Stanley*:[8]

> The manifest inconvenience which would arise from the uncertainty of never knowing whether an order made in fact by an inferior court was valid unless and until its validity had been raised in and determined by the same or another court in a subsequent proceeding, in combination with ***the potentially extreme consequences for those who might have acted in the interim on the faith of the order***, has long been thought to provide reason to pause before reaching a conclusion that a perceived error on the part of the court in deciding to make the order is jurisdictional.

28. In the same case, Jagot J also adverted to this consequence, noting that:[9]

> acts done in pursuit of an order made without jurisdiction (eg, imprisonment on an order of conviction and custodial sentence) would be done without authority, ***exposing those acting under the order to liability for their acts*** (eg, in the torts of false imprisonment or trespass to the person).

29. Thus, while it has long been recognised that there are "potentially extreme consequences" for those who engage in tortious conduct and seek to justify their conduct by reference to an invalid order of an inferior court, one way this is ameliorated is by exercising caution before concluding that an inferior court has committed jurisdictional error. As will be seen, another way in which it has been ameliorated is by statute, where parliaments have seen fit to intervene.

30. At common law, then, an inferior court order which is made beyond jurisdiction cannot be relied upon by a defendant to a tort claim as supplying lawful authority, because the lawfulness of that authority is itself susceptible to collateral challenge within the tort

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6 *Stanley v DPP (NSW)* (2023) 97 ALJR 107 at 113 [16] (Gageler J) (footnotes omitted).

7 *New South Wales v Kable* (2013) 252 CLR 118 at 140 [56] (Gageler J).

8 (2023) 97 ALJR 107 at 113 [17] (footnotes omitted, emphasis added).

9 (2023) 97 ALJR 107 at 136 [158] (emphasis added).

claim. His Honour correctly so reasoned at J[177]–[184]. The Appellants' reliance on s 17 of the then *Federal Circuit Court of Australia Act 1999* (Cth) (**FCCA Act**) to overcome this clear conclusion was correctly rejected by the primary judge for the reasons his Honour gave (J[89]–[99], [187], [193]–[195], [349]–[357]). In addition to relying on those reasons, Mr Stradford makes the following submissions.

Section 17 of the FCCA Act

31. Even if Judge Vasta had been exercising power under s 17 of the FCCA Act, that provision does not have the effect for which the Commonwealth and Judge Vasta contend. Section 17(1) of the FCCA Act provided:

> The Federal Circuit Court of Australia has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court.

32. This said nothing about the interim validity of orders that are subsequently set aside for jurisdictional error. It was directed to a different matter. As an inferior court created by statute, absent this provision, the Federal Circuit Court would have only had power to punish contempts in the face of the Court.[10] Section 17(1) ensured that the scope of the Federal Circuit Court's power was broader, extending to punishing any kind of contempt which this Court would have power to punish.[11] It was designed to ensure that the Federal Circuit Court could deal with ***all*** types of contempt, rather than only those with which inferior courts can deal at common law. As this Court said in *Boilermakers* of the similarly worded s 29A of the *Conciliation and Arbitration Act 1904* (Cth), "section 29A gives power to punish for ***contempts of all descriptions***".[12] Indeed, if the Appellants' approach to s 17 is correct, *Boilermakers* was wrongly decided: s 29A would have conferred on the Court of Conciliation and Arbitration the status of a superior court — as distinct from an arbitral tribunal — when making contempt orders, removing the constitutional impediment to the conferral of judicial power upon it.

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[10] Rolph, *Contempt* (Federation Press, 2023) 35; see, eg, *Master Undertakers' Association NSW v Crockett* (1907) 5 CLR 389 at 392–3 (Griffith CJ, Barton J agreeing).

[11] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [129]–[130] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), citing s 48(1) of the *District Court Act 1991* (SA): "The Court has the same power to deal with contempts as the Supreme Court has in respect of contempts of the Supreme Court". The similarity with s 17(1) of the FCCA Act is obvious.

[12] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 287 (Dixon CJ, McTiernan, Fullagar and Kitto JJ; emphasis added).

33. The primary judge was thus right to hold that s 17 did not have the effect "that orders made by the Circuit Court in the exercise of its contempts powers are somehow imbued with the characteristics of orders made by superior courts": J[192]. That s 17 was not directed to granting "superior court legal effect" to Federal Circuit Court orders made in contempt matters is evidenced by the fact that equivalent provision has been made for superior courts, including the Federal Court of Australia in s 31(1) of the *Federal Court of Australia Act 1976* (Cth) and the Family Court of Australia in the former s 35 of *Family Law Act 1975* (Cth), which the Commonwealth accepts "was the model for s 17 of the FCC Act" (CS[27]). There would be no need for those provisions if their purpose were to make those courts into superior courts in contempt cases, for those courts were superior courts already. Likewise, the same form of drafting is found in s 24 of the *Judiciary Act 1903* (Cth), specifying the scope of the power of this Court (a superior court) to punish for contempt by reference to the power of the Supreme Court of Judicature in England.[13]

34. If s 17 of the FCCA Act operated as Appellants contend, it would have had the incongruous effect that, though an order of the Federal Circuit Court which was affected by jurisdictional error could be collaterally challenged, an order of that Court punishing a person for contempt for failing to comply with the first order was valid until set aside. It would have had the practical consequence of turning ***all*** of the Federal Circuit Court's orders into ones capable of being enforced as valid until set aside.

35. The Appellants place great reliance on the words "same power" (CS[18]–[19]; VS[53]). It is said that "if s 17(1) did not confer power to make orders punishing contempt that were valid until set aside, it would not have conferred the "same power" as is possessed by this Court". On that approach, s 17 would also have conferred power to make orders to punish contempt that were unappealable, as this Court's orders are. Plainly, s 17 did not have that effect. The reference to the "same power" concerned the scope of the power to punish for contempt. It said nothing about the quality of an order once made.

36. On the Appellants' approach, s 17(1) of the FCCA Act rendered the Federal Circuit Court a superior court when making orders for contempt. It is true that an Act can render a court a superior court when exercising some jurisdiction but not others. Thus, in *Day v The Queen*,[14] this Court referred to provisions of the *District Court of Western Australia*

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[13] See similarly *Cameron v Cole* (1944) 68 CLR 571 at 606–607 (Williams J).

[14] (1984) 153 CLR 475 at 479 (Gibbs CJ, Mason, Wilson and Dawson JJ). See also *Cameron v Cole* (1944) 68 CLR 571 at 585 (Latham CJ), 606 (Williams J).

Act 1969 (WA) conferring criminal jurisdiction on the District Court of Western Australia and said: "For this purpose the District Court is a superior court". But that was because the provisions in question stated that "the Court has all the jurisdiction and powers that the Supreme Court has in respect of any indictable offence" and that "[i]n all respects … the practice and procedure of the Court as a Court of criminal jurisdiction shall be the same as the practice and procedure of the Supreme Court in like matters". Section 17(1) of the FCCA Act was quite different: it made no reference to "jurisdiction"; it had a much more confined subject matter; it made no reference to "practice and procedure"; and it had an obviously different, more limited, purpose (cf CS[16]).

Parts XIIIA and XIIIB of the *Family Law Act*

37. In any event, as his Honour correctly held at J[83]–[99], Pts XIIIA and XIIIB of the *Family Law Act* were an exhaustive statement of Judge Vasta's power to impose sanctions for failure to comply with orders made under that Act. The Full Court of the Family Court has repeatedly described them as an exhaustive code and in so doing has accepted submissions advanced on behalf of the Commonwealth.[15]

38. That conclusion is hardly surprising. Part XIIIA deals with sanctions for contravention of order made under the *Family Law Act*. Among other things, s 112AD(2)(c) limits the quantum of the fine that may be imposed to 60 penalty units; s 112AD(2)(d) limits the term of imprisonment that may be imposed to 12 months; s 112AD(2A) permits imprisonment only if the court is satisfied the contravention was intentional or fraudulent; and s 112AE(2) permits imprisonment only if the court is satisfied no lesser sanction under s 112AD(2) is appropriate. In this context, the purpose of s 112AP is clear. Sub-section (1) provides that the section applies to a contempt that does not constitute a contravention of an order under the Act or constitutes a contravention of such an order that "involves a flagrant challenge to the authority of the court". Sub-section (2) provides that, in spite of any other law, a court having jurisdiction under the Act may punish a person for contempt of that court. The scheme of the Act is thus that contraventions of orders are to be dealt with in accordance with Part XIIIA unless they involve a flagrant challenge to the authority of the court.

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[15] *In the Marriage of Schwarzkopff* (1992) 106 FLR 274 at 281; *Rutherford v Marshal of Family Court of Australia* (1999) 152 FLR 299 at [83]; *Abduramanoski v Abduramanoska* (2005) 191 FLR 360 at [47], [67].

39. On the Appellants' argument, this detailed scheme may be readily swept away. Section 112AP(1) would be otiose: a contravention of orders could be dealt with by contempt even if it did not involve a flagrant challenge to the authority of the court. The consequence would be that the limitations imposed by Pt XIIIA could be circumvented: the quantum of any fine and the period of any imprisonment would be unlimited. By analogy with the familiar *Anthony Hordern* principle, the general power in s 17 of the FFCA Act should not be construed to allow circumvention of the limitations imposed on the more specific provisions in the *Family Law Act*[16] (cf VS[56]).

40. Section 17 of the FCCA Act made clear that it did not do so. Following sub-s (1), it continued:

> (2) Subsection (1) has effect subject to any other Act.
>
> …
>
> Note: See also section 112AP of the *Family Law Act 1975*, which deals with family law or child support proceedings.

41. The Note recognised that it is s 112AP of the *Family Law Act* (the only provision in Pt XIIIB) that "deals with" contempts in family law proceedings. It was a clear textual recognition that s 17 gives way to the code contained in Pts XIIIA and XIIIB when it comes to family law contempts. That is especially so given that the FCCA Act was enacted in 1999, seven years after the Full Court of the Family Court first held that the provisions in Pts XIIIA and XIIIB of the *Family Law Act* were "a self-contained code".[17] Given s 17 came later, it should be construed as recognising and leaving unaltered the well-established code for family law contempts already contained in the *Family Law Act*. It should not be assumed that s 17 was the dominant provision, leading to a search in Pts XIIA and XIIIB for "any express language that displaced s 17" (cf CS[24]).

42. CS[22] submits that Pts XIIIA and XIIIB operate only to confine the pre-existing power in s 17 of the FCCA Act, not displace it entirely in family law matters. That is inconsistent with the fact that s 112AP(2) expressly confers power to punish for contempt: on the Appellants' approach, that is unnecessary. And it is inconsistent with the fact that s 17 of the FCCA Act was not pre-existing. Pts XIIIA and XIIIB do take the courts which they empower as they find them (cf CS[24], [29]), not because they assume

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[16] See generally *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, 7; *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672, 678.

[17] *In the Marriage of Schwarzkopff* (1992) 106 FLR 274 at 281.

a pre-existing power to punish for contempt but because they assume fundamental matters such as whether the court is a superior or inferior court.

ISSUE 2: JUDICIAL IMMUNITY

43. There is a significant body of authority on the circumstances at common law in which an inferior court judge does not have the protection of judicial immunity. It was summarised by Heydon JA (with whom Davies AJA agreed) in *Wentworth v Wentworth*:[18]

> [J]udges of courts other than superior courts are not immune if they act outside jurisdiction whether or not they did so knowingly (unless the excess of jurisdiction was caused by an error of fact in circumstances where the court had no knowledge of or means of knowing the relevant facts).

That is an accurate summary of the extensive case law on the subject, extending back over 400 years to *The Case of the Marshalsea*.[19]

44. In sum (see also J[342]–[347]), the cases are clear (cf VS[27]) that an inferior court judge may lose immunity in a variety of categories of case, including (relevantly to this case) where there has been:

(a) an error as to a jurisdictional fact of which the judge was,[20] or should have been,[21] aware; and

(b) the making of an order that the judge lacked power to make — not only generally[22] but in the particular circumstances of the case due to the non-satisfaction of a fundamental condition precedent to the exercise of the power, including a gross denial of procedural fairness.[23]

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18 [2000] NSWCA 350 at [195] (not reported in (1999) 46 NSWLR 300).

19 (1613) 10 Co Rep 69a; 77 ER 1027.

20 *Morgan v Hughes* (1788) 2 TR 226; 100 ER 123.

21 *The Case of the Marshalsea* (1613) 10 Co Rep 69a; 77 ER 1027; *Gwinne v Poole*, The Reports and Entries of Sir Edward Lutwyche (1718, Nutt and Gosling), 290; *Calder v Halket* (1840) 111 Moo PC Cas 28; 13 ER 12; *Polley v Fordham (No 2)* (1904) 91 LT 525.

22 *Agnew v Jobson* (1877) 13 Cox CC 625; *M'Creadie v Thomson* 1907 SC 1176; *Gerard v Hope* [1965] Tas SR 15; *Spautz v Butterworth* (1996) 41 NSWLR 1.

23 *Windham v Clere* (1589) Co Eliz 130; 78 ER 387; *Scavage v Tateham* (1600) Cro Eliz 829, 78 ER 1056; *Groome v Forrester* (1816) 5 M & S 314; 105 ER 1066; *Davis v Capper* (1829) 10 B & C 28, 109 ER 362; *Caudle v Seymour* (1841) 1 QB 889; 113 ER 1372; *Lindsay v Leigh* (1848) 11 QB 465 at 551; 116 ER 547 at 551; *Willis v Maclachlan* (1876) 1 Ex D 376; *Ex parte Taylor; Re Butler* (1924) 41 WN (NSW) 81; *O'Connor v Isaacs* [1956] 2 QB 288; *Re McC (A Minor)* [1985] AC 528; *R v Manchester City Magistrates' Court; Ex parte Davies* [1988] 1 WLR 667 (affirmed in *R v Manchester City Magistrates' Court; Ex parte Davies* [1988] 3 WLR 1357); *Clarke v Burton* (1994) 3 Tas R 370.

45. There are ***many*** cases in which liability has been established against inferior court judges. This includes not only the cases that were discussed by the primary judge at length.[24] It includes another nine cases dating from 1589 to 1904 that were the subject of submissions by Mr Stradford below but which his Honour did not find it necessary to canvass in detail,[25] save to note "that they provide further support for the proposition that at common law, an inferior court judge who makes an order, or issues a warrant, in circumstances where they did not have jurisdiction to do so, is not protected from suit by judicial immunity, except where they did not know, or have the means of knowing, the facts which deprived them of their jurisdiction": J[259]. In all of the cases just referred to, liability was in fact established against an inferior court judge. This is a key difference between Mr Stradford's case and the Appellants' cases. Mr Stradford's case involves a simple application of the many cases in which tortious claims against inferior court judges have succeeded. He contends, straightforwardly, that this case falls within the same categories as those in which liability has previously been established. By contrast, the Appellants attempt to sidestep those cases, seeking to construct novel arguments relying on *dicta* from cases in a variety of other contexts.

46. Mr Stradford wholly embraces the primary judge's analysis at J[199]–[373], which reflects an acceptance of his submissions below. In addition, he submits as follows.

The immunity of an inferior court judge

47. Generally, where an inferior court judge does not have the protection of judicial immunity, the authorities express that conclusion in terms of a conclusion that there was an absence, excess or want of "jurisdiction". This is a different concept to jurisdictional

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[24] The cases discussed by the primary judge in which liability was in fact established against an inferior court justice, rather than merely affirmed as a theoretical possibility, are *The Case of the Marshalsea* (1613) 10 Co Rep 69a; 77 ER 1027, *Groome v Forrester* (1816) 5 M & S 314; 105 ER 1066, *Houlden v Smith* (1850) 14 QB 841; 117 ER 323, *Willis v Maclachlan* (1876) 1 Ex D 376, *Wood v Fetherston* (1901) 27 VLR 492, *M'Creadie v Thomson* 1907 SC 1176, *Gerard v Hope* [1965] Tas SR 15, *In re McC (A Minor)* [1985] AC 528, *R v Manchester City Magistrates' Court; Ex parte Davies* [1988] 1 WLR 667 (affirmed in *R v Manchester City Magistrates' Court; Ex parte Davies* [1988] 3 WLR 1357), and *Spautz v Butterworth* (1996) 41 NSWLR 1. That is to say nothing of *O'Connor v Isaacs* [1956] 2 QB 288, where liability would have been established had the case not been time-barred, and *Clarke v Burton* (1994) 3 Tas R 370, where the Full Court held that the plaintiff will be entitled to judgment unless the magistrate makes good his statutory defence on remitter to the trial court; with history failing to record what happened after the remitter.

[25] The cases not discussed by the primary judge in which liability was in fact established against an inferior court justice are *Windham v Clere* (1589) Co Eliz 130; 78 ER 387; *Scavage v Tateham* (1600) Cro Eliz 829, 78 ER 1056; *Lane v Santeloe* (1718) 1 Str 79; 93 ER 396; *Smith v Bouchier* (1734) 2 Str 993; 93 ER 989; *Davis v Capper* (1829) 10 B & C 28; 109 ER 362; *Caudle v Seymour* (1841) 1 QB 889; 113 ER 1372; *Lindsay v Leigh* (1848) 11 QB 465; *Agnew v Jobson* (1877) 13 Cox CC 625; and *Polley v Fordham (No 2)* (1904) 91 LT 525.

error. So much is evident from the exception described by Heydon JA in *Wentworth v Wentworth*. A factual error by an inferior court judge concerning a matter which is a condition of their jurisdiction may well mean that the decision of the judge is affected by jurisdictional error. But if the judge did not know, and had no means of knowing, the true factual position, they will still be protected by judicial immunity. That is a complete answer to the *in terrorem* hypothetical posed by Judge Vasta in the last sentence of VS[40]: unknowable errors of jurisdictional fact do not cause the immunity to be lost. In *Wentworth v Wentworth*, Heydon JA suggested that a mere apprehension of bias — which would be a jurisdictional error — would be insufficient. Likewise, in *Re McC (a minor)*,[26] Lord Bridge deprecated the view of the Court of Appeal below that any jurisdictional error was sufficient, and said that a "safer guide" was the decided cases where inferior court judges had been held liable in damages. That involves no want of principle (cf VS[29]). It is the classic common law method.

48. Each of the cases where liability has been established against an inferior court judge has served to explicate the categories of case in which the immunity will be lost. As the primary judge correctly held, "given the somewhat protean or chameleon-like character of the word 'jurisdiction', the safest guide would appear to be the cases in which inferior court judicial officers have been held liable in damages for consequences flowing from a purported exercise of jurisdiction held to be beyond the relevant limit": J[208]. Of most immediate relevance to the circumstances at hand are the following cases, which are but a subset of the cases cited at footnotes 24 and 25 above.

49. In *Groome v Forrester*[27] in 1816 (see J[215]–[217]), the Court of King's Bench allowed an action in trespass to proceed against two magistrates who, upon the plaintiff refusing to deliver up a particular book to the Court, committed the plaintiff to gaol "until he shall have yielded up ***all and every the books*** concerning his said office of overseer, belonging to the parish". The commitment was invalid as the condition of its discharge was broader than the offence for which the plaintiff was committed. Delivering the judgment of the Court, Lord Ellenborough CJ held:[28]

> Upon these authorities, and the reason of the thing, we are obliged to pronounce that the commitment made in pursuance of the said adjudication in this case, as well as the adjudication itself, in respect to the imprisonment, being, in this particular, ***a clear***

[26] [1985] AC 528 at 542E–544F.

[27] (1816) 5 M & S 314; 105 ER 1066.

[28] (1816) 5 M & S 314 at 320; 105 ER 1066 at 1068 (emphasis added).

> ***excess of jurisdiction, was not warranted by law, and that the imprisonment thereunder was a trespass in the committing magistrates, for which this action is maintainable*** …

There was no suggestion in *Groome v Forrester* that the magistrates lacked jurisdiction over the proceeding as a whole, as in *The Case of the Marshalsea*. Nor was it a case of the magistrates making an order that they never had power to make under any circumstances. Rather, the vice in *Groome v Forrester* was that the magistrates exceeded their jurisdiction in making the particular order of imprisonment that they made, as the order of imprisonment did not correspond to the offence found to have been committed.[29]

50. In *Raven v Burnett*[30] in 1894 (see J[225]–[226]), the law was summarised by Griffith CJ in a decision upheld by the Full Court, as follows:

> In order to establish the jurisdiction of an inferior court it must be shown that the court had cognisance of the subject matter of the action, both as to amount and kind, had authority to call the defendant before it, ***and had authority to make an adjudication of the kind it purported to make.*** … A plaintiff executing the process of an inferior court in a matter beyond its jurisdiction is liable to an action, whether he knew of the defect or not … ***In the case of a judge, the rule is that he is not liable to an action for acting without jurisdiction unless he had knowledge, or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction*** (*Calder v Halkett* 3 Moore PC 28, 58). His liability depends, therefore, upon the facts as they appear to him when the matter comes before him for adjudication, and not as they may afterwards be shown to have existed. ***But an erroneous, though honest, conclusion on a matter of law, on which his jurisdiction over the subject matter, or his authority to make the order which he makes, depends, will not protect him*** (*Houlden v Smith* 14 QB 841; *Agnew v Jobson* 47 LJ MC 67).

As the beginning of this passage makes clear, Griffith CJ did not consider the notion of "jurisdiction" to be limited to the question of subject matter. *Calder v Halkett*[31] (see J[221]–[222]) was a decision of the Privy Council; while on appeal from India, it would undoubtedly have been regarded as binding in Australia (cf VS[17]).

51. In *Wood v Fetherston*[32] in 1901 (see J[227]–[228]), the Full Court of the Supreme Court of Victoria had to consider the personal liability of two justices of the peace sitting as a court of petty sessions. The justices had issued a warrant permitting certain constables to eject the plaintiff from his leased premises and to seize his furniture. The justices'

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29 See also *Caudle v Seymour* (1841) 1 QB 889; 113 ER 1372; *Lindsay v Leigh* (1848) 11 QB 465; 116 ER 547.

30 (1894) 6 QLJ 166 at 168 (emphasis added).

31 (1840) 3 Moo PC Cas 28; 13 ER 12.

32 (1901) 27 VLR 492 (Williams, Hood and Holroyd JJ).

jurisdiction depended on the existence of a valid notice to quit issued by the landlord. However, the notice to quit before the justices was not valid, as it was premature, a matter that would have been apparent to the justices had they correctly appreciated the law. The Full Court held that judicial immunity did not apply, and the judges were liable. Again, the notion of "jurisdiction" was not limited to subject matter jurisdiction.

52. In *M'Creadie v Thomson*[33] in 1907 (see J[230]–[234]), a magistrate who had power to fine and to imprison if the fine were not paid, sentenced the plaintiff to 14 days without giving her the option of a fine. The plaintiff served 12 days in prison and the magistrate was held liable in damages for false imprisonment. While the trial and conviction had been within jurisdiction, the magistrate had no power to impose a sentence of imprisonment.[34] Delivering the judgment of the Court, Lord Kingsburgh accepted that a judge of an inferior court generally enjoys an immunity, but asked:

> Can it be said that a magistrate who has before him a case which he can competently try under an Act of Parliament on which the complaint is founded, and who, instead of dealing with the case as it is before him, and on conviction awarding such punishment as the Act prescribes and allows, ***proceeds knowingly to pronounce a sentence which is not competent under the Act of Parliament, and thereby sends a person to prison contrary to the Act of Parliament,*** — I say, can it be said that he is in any more favourable position than a magistrate trying a case in circumstances where he has no jurisdiction?

Answering that question in the negative, his Honour applied *Groome v Forrester*, for the proposition that "there may be liability in a magistrate, ***not merely for acting without jurisdiction, but for doing an act in excess of the jurisdiction he was called upon to exercise***".[35] The House of Lords in *Re McC* affirmed this passage, ***save*** for the word "knowingly", as they could "not see how ignorance of the terms of the statute regulating their powers of sentence in any particular case could afford justices any defence".[36]

53. In *O'Connor v Isaacs*[37] in 1956 (see J[236]–[239]) the plaintiff was ordered to pay maintenance to his wife, even though such an order could only be made if the court were satisfied that the plaintiff had been guilty of "persistent cruelty" to her. No such finding

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33 1907 SC 1176 (Lords Kingsburgh (Lord Justice Clerk), Stormonth-Darling, Low and Ardwall).

34 *Re McC (A Minor)* [1985] AC 528 at 557 (Lord Templeman).

35 1907 SC 1176 at 1183–1184 (emphasis added).

36 *Re McC (A Minor)* [1985] AC 528 at 548–9.

37 [1956] 2 QB 288.

had been made. He was committed to prison for non-payment, then sued for false imprisonment. At first instance, Diplock J held as follows:[38]

> The law, therefore, appears to me to be clear that ***where a magistrate or any judge of an inferior court assumes jurisdiction where he has no jurisdiction as a result of a mistake of law, he is liable*** in trespass for acts done as a result of that erroneous assumption of jurisdiction, and if his mistake of law appears upon the face of the record itself, the setting aside of the order is not a condition precedent to the action at common law. In the present case it appears upon the face of the record that the magistrates made the order without jurisdiction.

While the plaintiff's claim against the justices was dismissed on the ground that it was statute barred, "[b]ut for being found time barred it would plainly have succeeded",[39] on the basis that the magistrates made the order without jurisdiction. That was so even though they had jurisdiction over the general subject matter of maintenance payment.

54. In *Gerard v Hope*[40] in 1965 (see J[240]–[241]), the principles above were applied by the Supreme Court of Tasmania. A justice issued a warrant of commitment for the plaintiff, which could only be done if the plaintiff had defaulted on his payment obligations to the Taxation Department (which he had not). The plaintiff commenced proceedings against the justice, the constable who took him into custody, the Controller of Prisons and the Attorney-General. He succeeded against all of them. Crisp J held that the warrant was unauthorised by the statute, and that the act complained of was therefore "wholly beyond the jurisdiction of the justice".[41] Importantly, the justice held liable in *Gerard v Hope* did possess two possible statutory sources of power to make the order. But as Crisp J explained,[42] neither of those sources of power were applicable on the facts of the case. This was thus simply another case where an inferior court judge made an order that he lacked power to make in the particular circumstances of the case, due to the non-satisfaction of a condition precedent to the exercise of the power.

55. The House of Lords considered the position in *Re McC* in 1985 (see J[242]–[255]). While the Commonwealth emphasises that the case concerned a statutory provision (see

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38 [1956] 2 QB 288 at 304 (emphasis added).

39 *R v Manchester City Magistrates' Court, Ex parte Davies* [1988] 1 WLR 667 at 671 (Simon Brown J); affirmed on appeal in *R v Manchester City Magistrates' Court, Ex parte Davies* [1988] 3 WLR 1357.

40 [1965] Tas SR 15.

41 [1965] Tas SR 15 at 53.

42 [1965] Tas SR 15 at 36–38.

eg CS[63]–[64]), Lord Bridge (with whom the rest of the House of Lords agreed) expressly held that it did not differ from the common law.[43] His Lordship said:[44]

> Justices would, of course, be acting "without jurisdiction or in excess of jurisdiction" within the meaning of s 15 if, ***in the course of hearing a case within their jurisdiction they were guilty of some gross and obvious irregularity of procedure***, as for example if one justice absented himself for part of the hearing and relied on another to tell him what had happened during his absence, ***or of the rules of natural justice***, as for example if the justices refused to allow the defendant to give evidence.

56. The reason jurisdiction was exceeded in *Re McC*, where the justices had detained the plaintiff without informing him of his right to legal aid, was as follows:[45]

> Can it be said that the appellants' omission to inform the respondent of his right to apply for legal aid was ***a mere procedural irregularity***? I have reached the conclusion that ***it cannot*** … The philosophy underlying the provision must be that no one should be liable to a first sentence of imprisonment, borstal training or detention, unless he has had the opportunity of having his case in mitigation presented to the court in the best possible light. For an inarticulate defendant, as so many are, such presentation may be crucial to his liberty. It is impossible to say in this or any other case that, if the requirements of article 15(1) had been satisfied, it would have made no difference to the result. For these reasons I am of opinion that ***the fulfilment of this statutory condition precedent to the imposition of such a sentence*** as the appellants here passed on the respondent is no less ***essential to support the justices' jurisdiction to pass such a sentence*** than, for example, ***in the case of a sentence of immediate imprisonment, a prior conviction of an offence for which a sentence of imprisonment can lawfully be passed***.

The concluding words have obvious relevance to this case.

57. While VS[18] might be read as suggesting that *Re McC* spoke only to "the position of Magistrates in Northern Ireland", Lord Bridge was deliberate in making sure, where "if essentially the same principles apply both in Northern Ireland on the one hand and in England and Wales on the other, to say so".[46] On all relevant points, his Lordship expressly confirmed that the decision of the House represented the law not only in Northern Ireland, but also more broadly throughout the United Kingdom.[47]

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43 [1985] AC 528 at 541E–G (Lord Bridge; Lords Keith, Elwyn-Jones, Brandon and Templeman agreeing).

44 [1985] AC 528 at 546H–547B (emphasis added).

45 [1985] 1 AC 528 at 552 (emphasis added).

46 [1985] 1 AC 528 at 537.

47 [1985] 1 AC 528 at 547, 548.

58. In *R v Manchester City Magistrates' Court, Ex parte Davies*[48] in 1988 (see J[256]–258]), the High Court of England and Wales summarised the law in orthodox terms, and then held that the two magistrates whose acts were in question were personally liable to the plaintiff, because they had made an order for imprisonment without making a prior finding, as required by the statute, that the plaintiff had failed to pay his rates due to "culpable neglect". Such a finding was an indispensable precondition to the making of an order of imprisonment (just as a finding of contempt was an indispensable precondition to an order of imprisonment in this case). The decision was affirmed on appeal in *R v Manchester City Magistrates' Court, Ex parte Davies*.[49]

59. In *Harvey v Derrick*[50] in 1995, a judge of the New Zealand District Court (an inferior court) committed a litigant to prison on the assumed but erroneous basis that he had failed to pay an outstanding fine, when in fact the litigant had been duly paying off the fine in instalments. The New Zealand Court of Appeal considered whether a false imprisonment claim could proceed against the judge notwithstanding the *Summary Proceedings Act 1957* (NZ), which barred actions against such a judge "unless he has exceeded his jurisdiction or has acted without jurisdiction", thus picking up the language of the common law cases. By majority, the Court of Appeal held that the action could proceed. In reasons with which Cooke P agreed, Richardson J held as follows:[51]

> The proper exercise of judicial responsibility requires that the Judge act with integrity and competence. A cushion of immunity provides appropriate protection against error. Absolute immunity would undermine judicial responsibility and give no weight at all to the public policy goals of tort and public law liability. As the word "excess" indicates ***it is a matter of degree***. In extreme circumstances the Judge's conduct may ***so egregiously overstep the mark as to take the resulting decision beyond any colour of authority***. While purporting to act in a judicial capacity a Judge who acts in bad faith or is ***grossly careless*** or ***indifferent to the performance of responsibilities*** can properly be characterised as acting without jurisdiction or in excess of jurisdiction.

60. Importantly, the Court distinguished between "the first step" of considering whether the judge had jurisdiction generally over the subject matter, and "the second step" of considering whether the judge was "so remiss in exercising that jurisdiction to the detriment of the respondent and accordingly fell so far short of what may fairly and objectively be expected of a judicial officer as to take his decision outside the

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48 [1988] 1 WLR 667 at 671–3 (Simon Brown J).

49 [1988] 3 WLR 1357 (O'Connor and Neill LJJ and Sir Roger Ormrod).

50 [1995] 1 NZLR 314 (Cooke P, Richardson and Fisher JJ).

51 [1995] 1 NZLR 314 at 326 (emphasis added).

jurisdiction".[52] Consistently with the cases already outlined, it was held that an inferior court judge may lose immunity at either of these two steps, not only the first.

61. As his Honour held at J[358]–[372], and as South Australia agrees (SAS[12]–[15]), Judge Vasta's conduct in the contempt proceeding places him squarely within the categories established by the decided cases. Far from finding the contempt proved beyond reasonable doubt,[53] Judge Vasta did not make a finding that Mr Stradford had contravened any order, much less committed a contempt, at all. Far from ensuring that Mr Stradford be given a precisely formulated statement of change, so that "the alleged contemnor knows exactly what is alleged and is able to mount a defence to the charge",[54] Judge Vasta bypassed the procedure in r 19.02 of the *Federal Circuit Court Rules 2001* (Cth) in its totality, replacing it with his own brand of summary justice. Far from dispensing the "common justice that, where individuals are to be charged with contempt and threatened with attachment, they should have the opportunity to be heard",[55] Judge Vasta cut Mr Stradford off in the very first sentence of his attempted explanation, and then proceeded to verbally abuse him. Far from observing the rule, made obligatory by s 112AE of the *Family Law Act*, that the committal of a person to prison for contempt of court is a last resort, and that "[w]here there is a reasonable alternative available instead of committal to prison, that alternative must be taken",[56] Judge Vasta plainly considered no alternatives. Far from approaching the question of conviction and sentence with an open mind, Judge Vasta was from the outset implacably determined to send Mr Stradford to gaol.

The Appellants' invocation of cases from other contexts

62. In this Court, both the Commonwealth and Judge Vasta seek to answer this body of authority by arguments focussed on the meaning of "jurisdiction" in cases concerning superior courts. It would seem that the meaning which the Appellants seek to ascribe to "jurisdiction" is "authority to decide" (CS [58]) or "'subject matter' jurisdiction" (VS [46]). That is contrary to the cases above, where inferior court judges were often liable despite having jurisdiction over the cause. The submissions invite this Court to

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52 [1995] 1 NZLR 314 at 326–7.

53 *Witham v Holloway* (1995) 183 CLR 525 at 534 (Brennan, Deane, Toohey and Gaudron JJ).

54 Rolph, *Contempt* (Federation Press, 2023) 757–8.

55 *R v Ledgard* [1841] 1 QB 616 (Lord Denman CJ); Rolph, *Contempt* (Federation Press, 2023) 761–2.

56 *Danchevsky v Danchevsky* [1975] Fam 17 at 22 (Lord Denning MR).

read general statements from cases where there was no issue as to the immunity of any inferior court judge and treat those statements as though they were decisive of the issue, not argued and not before the court in those cases, of the immunity of inferior court judges (eg CS[62]). That is a fundamentally wrong approach to authority (see also J[328]).

63. The ***first*** — and primary — case invoked by the Appellants is *Sirros v Moore*[57] (CS[53]–[54]; VS[18]). There are at least four reasons why it does not support the Appellants (see also J[263]–[273]). *First*, it concerned a superior court.[58] Everything said about inferior courts was *dicta*. It has never been binding authority, even in England, on the immunity of inferior court judges.

64. *Secondly*, the decision re-affirms, multiple times, that for many centuries there has been recognised and applied a distinction between superior and inferior courts in the context of judicial immunity. Thus, Lord Denning MR said the following of the principle reported by Lord Coke in *The Case of the Marshalsea*:[59]

> That principle has been repeated a thousand times, but it was only applied, so far as I can discover, to the inferior courts. The judges of the superior courts were very strict against the courts below them. They were particularly hard on justices of the peace. ***The reports abound with cases where they were held liable in damages***.

His Lordship later reiterated that there has always been "a sharp distinction between the inferior courts and the superior courts".[60] Likewise, Buckley LJ recognised that while there is no case of a judge of superior court being successfully sued for an act in excess of his jurisdiction, "[t]here are, on the other hand, ***many reported cases in which judges of inferior courts have been sued***".[61] Similarly, Ormrod LJ recognised that in contrast to the position of judges of superior courts: "***Judges of courts of inferior jurisdiction and justices of the peace have, always, it appears, been differently treated***".[62]

65. *Thirdly*, while it is true that Lord Denning MR sought to change the common law so that all judges were placed on an equal footing as regards their immunity, his Lordship did so

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57 [1975] 1 QB 118.

58 [1975] 1 QB 118 at 136F-G (Lord Denning MR), 150E-G (Ormrod LJ).

59 [1975] 1 QB 118 at 133 (emphasis added).

60 [1975] 1 QB 118 at 136.

61 [1975] 1 QB 118 at 141 (emphasis added).

62 [1975] 1 QB 118 at 147 (emphasis added).

largely on the basis that the immunity of superior court judges should in fact be ***limited***. That is made clear by the following example his Lordship gave:[63]

> Some attempt has been made to reconcile the immunity of the judges of the superior courts with that of the inferior courts. It has been said that a judge of a superior court is the arbiter of his own jurisdiction. It is so extensive that he can never be said to have gone outside it. At most he has only exercised – albeit wrongly – a jurisdiction which belongs to him. So he is not to be made liable in damages. I can see no justification for this theory. The Pharisee could say: "God, I thank thee, that I am not as other men are." But a judge of a superior court cannot say it, or at any rate, should not. A judge of the superior court can go outside his jurisdiction just as any other judge can. His jurisdiction is limited by the law, and not by his own whim. Suppose he is trying a case. The jury find the man "Not Guilty." And the judge says: "I do not agree with the verdict. I think you are guilty. I sentence you to six months' imprisonment. Officer, take him away." And the officer takes him away. Such a judge would be going outside his jurisdiction. He would be liable – not merely because he was acting outside his jurisdiction – but because he would be knowingly acting quite unlawfully. He would not be acting judicially. He would, I should think, be liable in damages.

66. Lord Denning MR thus understood the immunity of even a superior court judge to be of no avail where the judge made an order of imprisonment in defiance of a verdict of acquittal. The Appellants must disavow this part of his Lordship's reasons, as it is directly contrary to their argument that there is immunity so long as the judge has jurisdiction over the cause generally. In Lord Denning MR's example, the judge would have precisely the kind of jurisdiction that the Appellants argue is sufficient to support an immunity, yet his Lordship considered that the judge would be liable.

67. *Fourthly*, and in any event, Lord Denning MR's views on this topic were expressly disapproved by the House of Lords in *Re McC*. Lord Bridge (with whom the rest of the House of Lords agreed) explained that the statutory provisions at issue there necessarily reflected the distinction.[64] But importantly, his Lordship continued:[65]

> The narrower question whether other courts of limited jurisdiction can and should be given the same immunity from suit as the superior courts, in which Lord Denning MR was supported in his view by Ormrod LJ, is one on which I express no concluded opinion, though my inclination is to think that ***this distinction is so deeply rooted in our law that it certainly cannot be eradicated by the Court of Appeal and probably not by your Lordships' House***, even in exercise of the power declared in the *Practice*

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63 [1975] 1 QB 118 at 135.

64 [1985] 1 AC 528 at 540–1.

65 [1985] 1 AC 528 at 550 (emphasis added).

> *Statement (Judicial Precedent)* [1966] 1 WLR 1234 made by the House. ***So fundamental a change would, in my present view, require appropriate legislation***.

68. As Heydon JA said in *Wentworth v Wentworth*:[66]

> *Sirros v Moore* was unfavourably viewed in several respects by the House of Lords in *In re McC (A Minor)* [1985] AC 528. The key passage in Lord Denning MR's reasons for judgment at may be thought to waver confusingly between different senses of the expression "jurisdiction". The tests propounded arguably state the immunity more narrowly than in former times.

69. The ***second*** case is *Nakhla v McCarthy*[67] (CS[55]; see J[274]–[282]). It concerned the President of the Court of Appeal of New Zealand, a superior court.[68] The reasons of Woodhouse J make clear in the second paragraph that they are directed to explaining why no "action complaining of the judicial work of a ***superior*** court judge" had succeeded during the past 150 years.[69] Thus, though the reasons contain the broad and general statements on the meaning of "jurisdiction" on which the Appellants place reliance, they must be read in light of the particular question the Court had to answer, which was "whether or not ***a judge sitting as a member of the Court of Appeal*** has acted within or outside the broad jurisdiction given to him in order to hear and determine the matter".[70]

70. The ***third*** case is *Durack v Gassior*[71] (CS[56]). Again, this concerned a judge of the Family Court, a superior court. The statements at CS[56] are applicable to superior courts only. It is contrary to basic principle to take a statement pronounced in a case concerning a superior court and then assert that it applies to inferior courts as well, in circumstances where the point was never argued and did not arise for decision.

71. The ***fourth*** case is *Re East; Ex parte Nguyen*[72] (CS[57]; VS[19]). That case speaks to a different context, for the reason given in the very first sentence of the plurality's reasons. The proceeding was one "seeking orders of certiorari and declaratory relief".[73] The plaintiff was attempting to quash his criminal conviction. He was not seeking damages. As already explained, administrative law cases represent a distinct area of discourse.

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66 [2000] NSWCA 350 at [260].

67 [1978] 1 NZLR 291.

68 [1978] 1 NZLR 291 at 293.

69 [1978] 1 NZLR 291 at 293–4 (emphasis added).

70 [1978] 1 NZLR 291 at 303.

71 (Unreported, High Court of Australia, 13 April 1981 at 538) (Aickin J).

72 (1998) 196 CLR 354.

73 (1998) 196 CLR 354 at 358 [1] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

Further, the passage on which the Commonwealth relies (at CS[57]) is trite. Every party to this case accepts that there is "a well established immunity from suit which protects judicial officers from actions arising out of acts done in the exercise of their judicial function or capacity". No-one denies the existence of the immunity. Questions of how far the it extends, when it may be lost and how it varies at different levels of the court hierarchy, are not addressed by this sentence. No such issues were raised in the case.

72. The ***fifth*** case is *Gallo v Dawson*[74] (CS[58]; VS[19] n 26). It concerned a justice of this Court, a superior court. Justice Wilson expressly noted that the argument with which he was dealing was that "a judge ***of a superior court*** is not liable to be sued in respect of acts done in the performance of his judicial duties".[75] His Honour then said that "***[i]n this context***, 'jurisdiction' means the broad and general authority conferred upon a court to hear and determine a correct".[76] Nowhere was it said that the same applies to inferior courts, as the question did not arise for decision.

73. The ***sixth*** case is *Fingleton v The Queen*[77] (CS[59]; see also J[298]–[310]). It concerned the an immunity conferred by a Queensland statute, not the common law. Chief Justice Gleeson said so expressly: "We are concerned with the application of the Code, ***not the common law***".[78] Although the judge in question was an inferior court judge, the statute granted her, in effect, the immunity of a superior court judge.[79] It is thus misleading to suggest that *Fingleton* did not concern the immunity of superior court judges (CS[62]). As Gleeson CJ explained:[80]

> In dealing generally, and in the same manner, with all "judicial officers", s 30 put aside distinctions between various levels in the judicial hierarchy which existed at common law in relation to judicial immunity.

It was in that context that his Honour went on to affirm the meaning of "jurisdiction" given in *Nakhla v McCarthy* which, though ordinarily applicable only to superior courts, was extended to inferior courts by the Queensland statute.[81]

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74 (1989) 63 ALJR 121.

75 (1989) 63 ALJR 121 at 122 (emphasis added).

76 (1989) 63 ALJR 121 at 122 (emphasis added).

77 (2005) 227 CLR 166.

78 (2005) 227 CLR 166 at 185 [36] (emphasis added).

79 Section 30 of the *Criminal Code* (Qld); see (2005) 227 CLR 166 at 173 [2].

80 (2005) 227 CLR 166 at 184 [34].

81 (2005) 227 CLR 166 at 185 [35].

74. The ***seventh*** case is *Attorney-General (NSW) v Agarsky*[82] (CS[60]). The decision is three pages long. It was a summary disposal of proceedings brought by a self-represented litigant. It does not refer to superior or inferior courts at all, and the distinction between them was not argued. The Court was evidently not taken to the considerable body of authority on the topic. In *Rajski v Powell*,[83] after noting that a distinction has been drawn between the immunity of judges of superior and inferior courts, Kirby P concluded that the principles set out in the cases "require some refinement of what I earlier said on this subject in *Attorney-General for New South Wales v Agarsky*".

75. The ***eighth*** case is *Yeldham v Rajski*[84] (CS[60] n 98; VS[19]). It too concerned a justice of the Supreme Court of New South Wales, a superior court. The Commonwealth's statement to the contrary at CS[62] is wrong. The case neither purported to decide, nor can it be read as deciding, anything about the immunity of inferior court judges.

76. The ***ninth*** case is *Wentworth v Wentworth*[85] (VS[19]). It concerned the derivative judicial immunity of a Taxing Officer of the Supreme Court of New South Wales, a superior court. Against that background, Fitzgerald JA made clear that "[t]here is no present purpose in investigating whether … there is a difference between the immunity afforded at different levels of the judicial hierarchy".[86] It was sufficient to apply the cases concerning superior court immunity, and it was in that context that his Honour affirmed *Nakhla*.[87] Moreover, in the reasons of Heydon JA, with whom Davies AJA agreed, his Honour considered what the position of the Taxation Officer would have been "if that immunity does not correspond with that of judges in superior courts", and summarised the line of authority on which Mr Stradford relies in the quote at [43] above.

77. The ***tenth*** case is *O'Shane v Harbour Radio Pty Ltd*[88] (CS[60]; VS [19] n 26). That case did not concern the liability of an inferior court judge at all. It concerned a magistrate's attempt to rely on judicial immunity within a defamation case in which she was the plaintiff, to preclude the defendant from running a truth defence. The Commonwealth's submission at CS[60] that this case decided that "the same judicial immunity as applies

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82 (1986) 6 NSWLR 38 (Kirby P, Hope and Mahoney JJA agreeing).
83 (1987) 11 NSWLR 522 at 528, 536.
84 (1989) 18 NSWLR 48.
85 (2001) 52 NSWLR 602; [2000] NSWCA 350.
86 (2001) 52 NSWLR 602 at 612 [20].
87 (2001) 52 NSWLR 602 at 612 [80] (Fitzgerald JA).
88 (2013) 85 NSWLR 698.

to superior court judges applies to magistrates in the exercise of their judicial function" is wrong. All it decided was whether judicial immunity could be used "as a sword".[89] Any more general statements were *dicta* on a point not in issue (see J[329]).

78. In sum: not one of the cases relied on by the Appellants decided anything about the common law immunity of inferior court judges. None of them overrule, or even contradict, the much larger body of authority discussed at [43]–[61] above, all of which is directly and squarely concerned with the immunity of inferior court judges and, moreover, affords abundant examples of that immunity being lost.

Abolishing the distinction

79. Next, and alternatively to their position that the distinction does not exist, the Commonwealth and Judge Vasta invite this Court to abolish the distinction between the immunity of superior and inferior court judges that has been recognised at common law for over 400 years. That radical step should not be taken.

80. ***First***, had Parliament wished, it could have chosen to alter the common law position concerning the immunity of judges of the Federal Circuit Court. There are a number of existing legislative models[90] that could have been adopted, including the following:

(a) It could have created an inferior court, while importing the immunity from suit of a superior court, as has been done for judges of various inferior state courts in New South Wales, Victoria, South Australia, Western Australia and Tasmania.[91] As noted above, a provision of that kind was in issue in *Fingleton*. (Parenthetically, as the primary judge said of one such provision, "the enactment of that provision would hardly have been necessary if, at common law, the protection and immunity of an inferior court judge was the same as that of a superior court judge": J[335].)

(b) It could have created a statutory right to damages against inferior court judges, available in only certain prescribed cases, as has been done in s 36 of the *Justices*

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89 (2013) 85 NSWLR 698 at [81]–[82] (Beazley P).

90 Aronson and Whitmore, *Public Torts and Contracts* (Law Book, 1982) 140–1.

91 *Judicial Officers Act 1986* (NSW), s 44B; *Magistrates' Court Act 1989* (Vic), s 14(1); *County Court Act 1958* (Vic) s 9A(1); *Magistrates Court Act 1991* (SA), s 44(1); *District Court Act 1991* (SA) s 46(1); *Magistrates Court Act 2004* (WA) s 37; *Magistrates Court Act 1987* (Tas), s 10A; *Courts and Administrative Tribunals (Immunities) Act 2008* (NT), s 4.

of the Peace and Commissioner for Declarations Act 1991 (Qld),[92] drawing on the model established by the *Justices Protection Act 1848* (UK).

(c) It could have made provision for the indemnification by the State for the acts of judicial officers. The legislation considered in *Harvey v Derrick* followed this model. Similarly, s 54 of the *Justices of the Peace Act 1997* (UK) provides for the indemnification, from local government funds, of justices for damages and costs awarded against them, and also sums paid by them in out-of-court settlement of litigation, where it is determined that the justice against whom the suit was brought had acted reasonably and in good faith.[93] Similarly, as explained by the English Court of Appeal in *LL v Lord Chancellor*,[94] s 9 of the *Human Rights Act 1998* (UK) prohibits claims for damages in respect of judicial acts done in good faith except where they cause a deprivation of liberty contrary to art 5 of the *European Convention on Human Rights*. Such claims are permitted but any award of damages is against the Crown.

81. As the above survey reveals, it is wrong to assert that the "legislative tide is all one way" (cf VS[45]). On the contrary, parliaments around the world have created a variety of schemes seeking to balance, in different ways, the need for some form of judicial immunity with the countervailing need to protect the liberty of individuals and to ensure the availability of redress for those wrongly harmed. It is especially appropriate to leave this field to parliaments given that each parliament creates its own courts and should be able to control the attributes of the bodies so created.

82. Even the step taken by the Commonwealth Parliament (but not by any State or Territory Parliament) in response to the primary judge's decision in this case demonstrates the room for legislative choice. A new s 277A has been inserted into the *Federal Circuit and Family Court of Australia Act 2021* (Cth), conferring on Division 2 judges the "same protection and immunity" as Division 1 judges, but only doing so prospectively, and not retrospectively. Thus, even in its most recent enactment, the Commonwealth Parliament has proceeded on the basis that the existing distinction should be abrogated for post-amendment cases but maintained for pre-amendment cases (cf VS[44]).

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92 Which, by virtue of s 19(1), applies to magistrates, District Court judges and Supreme Court judges alike. See further H P Lee and Enid Campbell, *The Australian Judiciary* (2nd ed, Cambridge, 2013) 222.

93 H P Lee and Enid Campbell, *The Australian Judiciary* (2nd ed, Cambridge, 2013) 227–8.

94 [2017] 4 WLR 162.

83. ***Secondly***, and relatedly, there are competing policy imperatives which may drive the different legislative options. The Appellants place much emphasis on the "invidious" position a judge of an inferior court may be placed in by being exposed to liability and the risk this is said to pose to judicial independence (CS[67]–[68]; VS[20]–[25], [36]–[43]). However, it is not apparent why the prospect of liability in the limited circumstances it is available poses any real threat to judicial independence. For instance, a judge has a duty to afford procedural fairness. It cannot seriously be suggested that the prospect of liability for grossly denying someone procedural fairness before sending them to gaol might deter impartial judicial decision-making. No insoluble threat to judicial independence has been perceived in the United Kingdom and Europe where, as noted above, claims for damages in respect of the conduct of judges (including superior court judges, as in *LL v Lord Chancellor*) can be made for deprivation of liberty contrary to art 5 of the *European Convention*. The European Court of Human Rights has treated the decision in *Re McC* as specifying when such a claim is available.[95]

84. Further, the Appellants' policy arguments pay little attention to the position of a person in the position of Mr Stradford, who was deprived of his liberty for a substantial period and suffered psychiatric injury as a result. The consequence of the Appellants' argument is that, in cases of this kind, victims of even the most egregious torts should have no remedy. The circumstances present an exquisite dilemma: do the potential benefits of an expansive judicial immunity outweigh the potential harm to individuals thus unable to obtain a remedy?

85. The law of the past four centuries has answered that question in relation to inferior courts more favourably to the individual than in relation to superior courts. One justification for that distinction was the very substantial disparity between the qualifications of superior court judges and those of inferior courts, such as justices of the peace, who may well have lacked legal qualifications.[96] Thus, as Ormrod LJ said in *Sirros v Moore*:[97]

> Holdsworth (*A History of English Law*, 3rd ed. (1924), vol. 6, p. 238), however, suggested that exposure to the risk of personal liability for acting in excess of jurisdiction was preserved by the courts ***as a means of safeguarding the liberty of the subject***, especially where justices of the peace were concerned.

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95 See *LL v Lord Chancellor* [2017] 4 WLR 162 at [66]–[89] (Jackson LJ; King and Longmore LJJ agreeing).

96 Saunders, *The Duties, Rights and Liabilities of Justices of the Peace* (1852, John Crockford) 2–4; Blackstone, *Commentaries on the Law of England*, Vol 1 (1765) 340–1.

97 [1975] 1 QB 118 at 148–9.

86. The differences between judges of superior and inferior courts in Australia today are clearly less pronounced than they once were. But it remains the case that, for various reasons, there is in general a greater prospect that an inferior court judge may have less experience, less assistance from able counsel and less time to consider than a superior court judge (cf CS[73]; VS[32]). The risk of error, and consequent harm to an individual, may thus be greater in relation to inferior courts than superior courts. That is one of the reasons why, as this Court said in *Bodruddaza v Minister for Immigration and Multicultural Affairs*,[98] "it has always been the policy of our law as a question of public order to keep inferior Courts strictly within their proper sphere of jurisdiction." That the law prefers this to "finality" in the case of orders of inferior courts (cf CS[69]; VS[38]) is evidenced by the ability to challenge such orders collaterally.

87. Another reason for the distinction in modern times is that the work of superior courts is exposed to a far greater degree of publicity than that of inferior courts (cf CS[72]). The decisions and reasons for judgment of superior courts are generally published online, and important cases are reported by the media and even live-streamed online. By contrast, much of the work of inferior courts happens in relative obscurity, away from the public eye. There is a greater risk that inferior court judges may become mini-tyrants over time, running their courts as their own private fiefdoms. As Judge Vasta said: "that's what I do. If people don't comply with my orders there's only [one] place they go" (J[22]). It is difficult to see how any superior court judge could say such a thing in court without rightly fearing opprobrium. For inferior court judges, the policy of the common law for four centuries has been to promote restraint by conferring a lesser immunity from suit.[99] Importantly, "mass litigation has not resulted."[100] The question for this Court is whether it should now remove an incentive to exercise restraint.

88. As this case shows, the prospect of personal liability may remain a valuable means of safeguarding the liberty of the subject. In *R v Manchester City Magistrates' Court Ex parte Davies*,[101] in concluding that two magistrates were liable to the plaintiff for sending

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98 (2007) 228 CLR 651 at 665 [36] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

99 See *Harvey v Derrick* [1995] 1 NZLR 314 at 325 (Richardson J).

100 Robert J Sadler, "Judicial and Quasi-Judicial Immunities: A Remedy Denied" (1982) 13 *Melbourne University Law Review* 508 (**Sadler**) at 525.

101 [1988] 1 WLR 667 at 676 (emphasis added).

him to gaol for non-payment of rates, without first making the necessary finding of "culpable neglect", Simon Brown J concluded:

> I recognise, of course, the considerations of public policy which underlie [a statutory provision conferring judicial immunity]. But I cannot suppose that this decision will make justices fearful in future of discharging their duties in regard to defaulting ratepayers. And ***if it causes justices hereafter to pause longer before sending ratepayers to prison, that perhaps would be no bad thing***.

Those words have obvious resonance in this case.

89. This Court is not writing on a blank slate. The question is not whether the Court favours the policy reasons justifying a distinction between the immunity of inferior and superior court judges. It is whether this Court should overthrow centuries of precedent in circumstances where there remain justifications for the distinction which that precedent establishes. It is whether this Court should reject entirely the claims of deserving plaintiffs in favour of a blanket immunity, in circumstances where more nuanced legislative choices are available to parliaments.

90. ***Thirdly***, and more generally, parliaments have made deliberate legislative decisions on the basis of the common law as it has been historically declared (cf VS[27]–[28]). That includes decisions to establish superior or inferior courts, as the case may be, on the basis of the existing law that differentiates them, and decisions to alter, diminish, transfer or leave untouched the liability that applies to judges and third parties in connection with the orders of those two kinds of court. By way of example, in the 2021 reconstitution of the Federal Circuit Court as a division of the Federal Circuit and Family Court of Australia, the decision was made to make Division 1 (the continuation of the Family Court of Australia) a superior court but not to do so in relation to Division 2 (the continuation of the Federal Circuit Court of Australia). As to Division 2, the legislative intent is spelled out expressly in a recent Explanatory Statement: "The FCFC (Division 2) continues, like the FCC, as an ***inferior court of record***."[102]

91. Where legislative choices have been made to deploy terms of art with an established legal meaning, courts, including this Court, cannot redefine those same terms with the same latitude with which they might develop the common law more generally. Any such redefinition will immediately and automatically alter the operation of any legislation in

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[102] Federal Circuit and Family Court of Australia Legislation (Consequential Amendments and Other Measures) Regulation 2021 (F2021L01204), Explanatory Statement, item [76], and see item [77] (emphasis added).

which the term has been adopted, in a way that may or may not be consistent with the legislative intent. As Justice Leeming has observed, statutes have a role "in influencing judge-made law and as a critical driver of change ***and restraint*** in the Australian legal system".[103] This was the very point made by Lord Bridge speaking for the House of Lords in *Re McC* in the quote at [67] above, as the reason why the distinction between superior and inferior courts in its application to judicial immunity could not be eradicated even by the United Kingdom's highest court. It ought not be done by this Court either.

ISSUE 3: COMMON LAW DEFENCE FOR EXECUTIVE OFFICERS

The common law

92. The Commonwealth and Queensland both contend that there exists "a common law defence to the tort of false imprisonment, which is available in respect of acts done in executing an apparently valid order of an inferior court even though that order is later held invalid" (CS[33]). That is contrary to a large number of common law authorities. Again, Mr Stradford embraces the primary judge's analysis (J[413]–[524]).

93. The position at common law is that while there is support in some cases for a special 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 (often referred to in the case law as "ministerial officers"), other persons who commit torts in pursuance of such orders (including constables and gaolers) have no such special defence. The position as to the latter was correctly stated by Gageler and Jagot JJ in *Stanley* in the passages in [27]–[28] above.[104]

94. The position was also canvassed by Allsop P and Basten JA in *Kable v New South Wales*.[105] Allsop P said:[106]

> [T]here is every reason to consider that an ***officer of a court*** should be protected by his actions in obedience to an order of the court of which he is either part or an officer. Orders directed to ***police or gaolers*** in the form of a court order, not issued in the course of judicial process, but having the true legal character of an executive warrant, which is wholly lacking authority, ***do not stand as necessarily bringing the same protection to those who obey them as might be thought appropriate to officers of the***

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[103] Mark Leeming, "Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room" (2013) 36(3) *UNSW Law Journal* 1002 at 1002–3 (emphasis added).

[104] See also Aronson and Whitmore, *Public Torts and Contracts* (Law Book, 1982) 147: "The general rule at common law is that a policeman who does something not authorised by law is not entitled (if sued) to any protection by virtue of his office. Taken to its logical conclusion, that means that a policeman has no defence when sued for executing the void or invalid process of a court or justice."

[105] [2012] NSWCA 243.

[106] [2012] NSWCA 243 at [35] (emphasis added).

> ***court itself***, even in such circumstances. It is unnecessary to explore this possible distinction. ***An invalid warrant gives a policeman no protection from the consequences of invasion of common law rights of person or property; it is statute that protects him***: *Feather v Rogers* and *Carroll v Mijovich* (1991) 25 NSWLR 441 at 446-447 and 457.

95. Likewise, Basten JA said:[107]

> [O]nly orders made by a judge of a superior court in the exercise of judicial power are valid until set aside and thus provide immunity to those executing them in good faith … The result of that conclusion may be that, absent statutory protection, ***public officers are exposed to potential liability in damages for obeying what they reasonably believe to be a valid court order***. However, the conclusion means no more than that the order was of the kind which could be made by the Supreme Court under the *Listening Devices Act*, by a District Court judge or by a magistrate: ***to obtain protection, as has long been recognised, statutory protection is required***.
>
> The potential difficulties faced by the police seeking to execute a void warrant have long been recognised, but ***have found their solution, not in the general law, but in statute***. Thus, a constable executing an invalid search warrant has been held to have ***no protection at common law in this State, but to enjoy protection originally available provided in England by the Constables Protection Act 1750*** (Imp) (24 Geo II, c 44), s 6: *Feather v Rogers* (1909) 9 SR (NSW) 192. In fact, as explained by Kirby P in *Carroll v Mijovich* (1991) 25 NSWLR 441 at 447A-C, there has been specific statutory protection for police under New South Wales law since the Police Regulation Act 1899: see also comment as to ***absence of general law protection in the judgment*** of Handley JA, at 457F.

96. This analysis is correct. As discussed at [122]–[126] below, since 1750 it is the *Constables Protection Act*, 24 Geo II, c 44 (and its analogues) that has been the source of protection for constables and gaolers who enforce invalid warrants of inferior courts. The task that the Appellants now claim for the common law is one that for 274 years has in fact been done by statute.

97. The absence of any common law defence of the kind now contended for by the Appellants is made clear not only by the ameliorating enactment of the *Constables Protection Act* but the many cases in which a constable or gaoler was in fact found liable to pay damages notwithstanding that he was executing an apparently valid order of an inferior court. The Appellants' arguments are impossible to reconcile with the actual results in those cases.

98. In *Nichols v Walker and Carter*[108] in 1635, where two persons executed a warrant to distrain the plaintiff's property, and where the warrant was issued by justices of the peace

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[107] [2012] NSWCA 243 at [161]–[162] (emphasis added).

[108] (1635) Cro Car 394; 79 ER 944 (emphasis added).

who did not have jurisdiction over the plaintiff's land, the warrant provided no defence to an action against them personally. The Court held:

> [T]he rate being unduly taxed, the warrant of the justices of peace for the levying thereof will not excuse: and ***it is not like where an officer makes an arrest by warrant out of the King's Court; which if it be error the officer must not contradict, because the Court hath general jurisdiction: but here the justices of the peace have but a particular jurisdiction, to make warrant to relieve rates well assessed***. Whereupon it was adjudged for the plaintiff.

Thus, by as early as 1635, the distinction was drawn in this context between superior courts (eg. the King's Court) and inferior courts (eg. justices of the peace with "but a particular jurisdiction").

99. Likewise, in *Read v Wilmot*[109] in 1672, an officer who enforced an arrest warrant (a capias) erroneously issued by an inferior court (in the absence of a summons commencing proceedings, which was a necessary anterior step) was held liable in false imprisonment. The Court of King's Bench said of the invalid warrant:

> False imprisonment lies upon it, and the officer cannot justify here, as upon process out of the Courts of Westminster. ***For suppose an attachment should go out of the County Court without a plaint, could he that executes it, justify? Yet a sheriff may justify an arrest upon a capias out of the Common Pleas, tho' there were no original***: but ministers to the Courts below must see that things be duly done. Wherefore the plaintiff must have judgment.

Again, the distinction here maintained was between a warrant issued by a superior court (eg. the Common Pleas) and that of an inferior court (eg. the County Court).

100. In *Shergold v Holloway*[110] in 1734, a magistrate had issued a warrant to arrest a recalcitrant employer. The warrant was executed by an officer (a tithingman), whom the plaintiff then sued for false imprisonment. The plaintiff invoked *Read v Wilmot* and *Gwinne v Poole*.[111] The claim succeeded before the Court of King's Bench. It was held that the magistrate had jurisdiction over the general subject matter of unpaid wages but had no power to issue warrants of arrest. On that basis, the officer could not justify under the warrant. As the Chief Justice explained:

> [I]f the justice has a jurisdiction of the subject matter, though he may mistake in his execution of that jurisdiction, yet it shall excuse the constable or tithingman, unless

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[109] (1672) 1 Vent 220; 86 ER 148 (emphasis added).

[110] (1734) Sess Cas KB 154; 93 ER 156 (emphasis added); also reported as *Shergold v Holloway* (1734) 2 Str 1002, 93 ER 995.

[111] Referred to by their citations "1 Vent 220" and "2 Lutw 395, 1560".

> something is discovered in the warrant, which from some express law shews the justice had not a jurisdiction. Now in this case, ***taking this to be a warrant to arrest, that was certainly a process, of which the justice had no sort of jurisdiction***, and then it comes expressly within the case in [*Martin v Marshal and Key*[112]] and [*Smith v Bouchier*[113]] of the last term; in each of which cases there was a general jurisdiction of the cause, but not of the process, which was the distinction, and concluded upon that point, that ***the defendant could not justify under this warrant, for though it might be hard to say that a tithingman should know the law better than the justice, yet it being a general law, every one is obliged to take notice of it***.

The Court of King's Bench thus acknowledged in this case that the common law could be "hard" on officers; but nonetheless affirmed and applied it. The magistrate's lack of power to issue warrants of arrest was fatal to the officers' defence.

101. In *Morse v James*[114] in 1738, it was held by the Court of Common Pleas, in response to an objection that a precept (or warrant) relied upon by a constable had been issued in a cause wherein the Court lacked jurisdiction:

> [I]t has always been holden that a constable may justify under a justice's warrant in a matter wherein the justice had a jurisdiction, though the warrant be never so faulty: but that ***if a justice of peace makes a warrant to a constable to arrest a man in an action of debt, such warrant will not justify the constable, because he was not obliged to obey it, and must take notice at his peril that it was in a matter concerning which the justice had no jurisdiction***.

102. In *Perkin v Proctor and Green*[115] in 1768, the Court of King's Bench once again affirmed the absence of protection afforded by the common law to those who execute process of inferior courts, as compared with that of superior courts:

> ***[W]here Courts of Justice assume a jurisdiction which they have not, an action of trespass lies against the officer who executes process, because the whole proceeding was coram non Judice***, the case of *The Marshalsea*… ***And it is not like where an officer makes an arrest by warrant out of the King's Court, which if it be error the officer must not contradict, because the Court hath general jurisdiction…***

103. In *Morrell v Martin*[116] in 1841 (see J[419]–[423]), these and many previous cases were surveyed by the Court of Common Pleas. A constable seized the plaintiff's property under authority of a warrant issued by two justices of the peace for non-payment of rates. The plaintiff sued the constable in replevin. The constable's pleading did not aver that

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[112] (1615) Hob 63; 80 ER 233.

[113] (1734) 2 Str 993; 93 ER 989.

[114] (1738) Willes 122 at 128; 125 ER 1089 at 1092 (emphasis added).

[115] (1768) 2 Wils KB 382 at 384; 95 ER 874 at 875 (emphasis added).

[116] (1841) 3 Man & G 581; 133 ER 1273.

the justices had been within their jurisdiction in issuing the warrant, nor did it aver that the plaintiff had ever been duly assessed for the rates in the first place, or that the plaintiff was the occupier of any rateable lands.[117] The Court found for the plaintiff:[118]

> Upon these grounds it appears to us, that ***when a limited authority only is given, as in the present case, if the party to whom such authority is given, extends the exercise of his jurisdiction to objects not within it, his warrant will be no protection to the officers who act under it;*** and that, by necessary consequence, where an officer justifies under a warrant so granted by a court of limited jurisdiction, he must shew that the warrant was granted in a case which fell within such limited jurisdiction; and that the present plea containing no sufficient allegation to bring the case within the jurisdiction of the justices, is bad, and that there must be judgment, on such plea, for the plaintiff.

104. In light of the principles and authorities cited above, Simpson ACJ in the Full Court of the Supreme Court of New South Wales clearly stated the law in *Feather v Rogers*[119] in 1909 (see J[424]–[429]):

> I never entertained a doubt from the commencement of this case, and I do not entertain the slightest doubt now, that the Justice acted without jurisdiction in issuing this warrant. It is utterly immaterial whether the form has been in use for years or not. The warrant which was issued, founded upon the information, was issued without jurisdiction. ***If a constable executes a warrant which the Magistrate had no jurisdiction to issue, the warrant affords him no protection at common law***…
>
> ***It is no doubt very hard upon police officers who are bound to execute the warrants of Justices, that they should be made liable for so doing on the ground that the Justice issuing the warrant exceeded his jurisdiction.*** It is very hard on laymen that they should have to take the risk of the warrant being irregular. ***It is more important, however, that the law should be upheld, notwithstanding the liability or constables and other persons***.

105. Similarly, Cohen J said: "I quite agree with [Simpson ACJ] that at common law the defendant would have had no answer to the action".[120] Rogers J held similarly.[121] As the primary judge explained (J[428]), the want of jurisdiction in *Feather v Rogers* was not a want of subject-matter jurisdiction. Consistently with basic principle concerning orders of inferior courts, they afford no defence if they are invalid even if the court in question had subject-matter jurisdiction (cf CS[45]).

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[117] (1841) 3 Man & G 581 at 590, 133 ER 1273 at 1277.

[118] (1841) 3 Man & G 581 at 597, 133 ER 1273 at 1279 (emphasis added).

[119] (1909) 9 SR (NSW) 192 at 196–7 (emphasis added).

[120] (1909) 9 SR (NSW) 192 at 198.

[121] (1909) 9 SR (NSW) 192 at 200.

106. The Commonwealth seeks to distinguish *Feather v Rogers* on a new basis, not advanced below, that because the warrant was a search warrant, it involved no exercise of judicial power and therefore "did not involve the common law defence at all" (CS[42]). This distinction forms no part of the reasoning in any of the cases in this line of authority. None of the cases in this area draw any distinction between acts of judicial officers that amount to an exercise of judicial power as distinct from administrative power. It is a modern distinction sought to be superimposed on the common law by the Commonwealth centuries after the fact. In any event, it is unsustainable, as the cases above in which constables and gaolers have been found liable involve not only search warrants, but also arrest warrants and orders of imprisonment, which the Commonwealth must accept are judicial. The Commonwealth's new argument is a revisionist rereading of an Australian intermediate appellate authority that is directly contrary to its case.

107. In *Spautz v Dempsey*[122] in 1984, the plaintiff sought, among other things, a declaration that his imprisonment by a prison superintendent had been unlawful. He had been committed to prison by a justice of the peace for failure to pay costs in earlier proceedings. Justice Lee of the Supreme Court of New South Wales began by considering the position at common law, noting the difference in this area between superior and inferior courts:[123]

> ***In the absence of statutory authority authorizing commitment to prison after imposition of a penalty or an order for costs neither a magistrate in a Court of Petty Sessions, nor any other justice, has any power to commit to prison***. … There is no "inherent" jurisdiction in an inferior court to provide means for enforcing its orders by imprisonment: *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7. ***This lack of power to commit to prison in terms of the order made is to be contrasted with the position in superior courts where no warrant is necessary for the carrying out of the sentence of the court***. "It has long been established that in criminal matters the sentence of a superior court is itself the authority for the execution of the punishment directed and that no warrant is necessary to render such execution lawful …".

After considering whether any statutory protection applied, and concluding that none did, his Honour made the declarations sought that the issue and execution of the warrant, and the imprisonment of the plaintiff, "was unlawful".[124]

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122 [1984] 1 NSWLR 449.

123 [1984] 1 NSWLR 449 at 451 (emphasis added).

124 [1984] 1 NSWLR 449 at 460–1.

Authorities relied upon by the Appellants

108. The Commonwealth relies on six Australian authorities as supporting the existence of its claimed common law defence (CS[36]). None of them do so.

109. The ***first*** is *Smith v Collis*[125] (CS [36(a)]; see J[468]–[470]). That case concerned a statutory claim for a penalty under s 6 of the *Habeas Corpus Act 1679* for having knowingly imprisoned a person for an offence for which he had been imprisoned before.[126] In this context, the question to which Cullen CJ was directing his remarks was "whether there is evidence in this case that the governor of the gaol ***knowingly*** imprisoned for the same offence a person already delivered or set large on a habeas corpus", that being the statutory question. The plaintiff contended that knowledge of his former release should be imputed to the governor of the gaol in view of particular circumstances of which the governor was aware.[127] Chief Justice Cullen rejected that argument, holding that the kind of "knowledge" to which the statute referred could not be made out on that basis alone. None of that spoke to the position at common law.

110. The ***second*** case relied upon by the Commonwealth is *Commissioner for Railways (NSW) v Cavanough*[128] (CS [36(b)], [41]; see J[472]–[473]). Nothing in that case concerned the liability of an officer of the court, a constable or a gaoler for acts committed in execution of a warrant issued by an inferior court. Both the plurality[129] and Starke J[130] did no more than cite *Dr Drury's Case*[131] in *dicta*. It is thus necessary to consider what *Dr Drury's Case* stands for (see also J[446]–[450]).

111. *Dr Drury's Case* concerned the particular position of the ancient office of sheriffs, who were "ministerial officers of the courts of justice" or court officers and who, by virtue of the office itself, were not liable for acts done by them in the execution of court process.[132]

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125 (1910) SR (NSW) 800.

126 See footnote on page 800 for text of provision.

127 (1910) SR (NSW) 800 at 812–3.

128 (1935) 53 CLR 220.

129 (1935) 53 CLR 220 at 225.

130 (1935) 53 CLR 220 at 227–8.

131 (1610) 8 Co Rep 141; 77 ER 688.

132 Watson, *A Practical Treatise on the Office of Sheriff* (1848, Sweet & Maxwell) 67; Blackstone, *Commentaries on the Law of England*, Vol 1 (1765), 333; Bruce and Churchill, *The Law of the Office and Duties of the Sheriff* (1879, Stevens and Sons) 278; *Owen v Daly* [1955] VLR 442 at 449 (Dean J); *R v Turnbull; Ex parte Taylor* (1968) 123 CLR 28 at 44 (Windeyer J); *Zhou v Kousal* (2012) 35 VR 419 at 437 [102]–[104] (Vickery J).

As the Court of Common Pleas held in *Moravia v Sloper*,[133] while a person who seeks to justify their tortious acts on the basis of the process of an inferior court must show that the process was within jurisdiction, officers of the Court need not. As Lord Chief Justice Willes explained, there was a "plain reason for this", namely that officers of an inferior court are in a unique position because "the inferior officer is punishable as a minister of the Court if he do not obey its commands".[134]

112. But constables, gaolers and other third parties who act upon or even execute the orders of inferior courts are not subject to the court's supervision and direction in the same way as the court's own officers, and so the exception does not apply to them. This distinction between "ministerial officers" of the Court, who are not liable for the execution of a court order unless the defect is apparent on its face, and constables and gaolers on the other hand, who are liable for the execution of an inferior court that is invalid at all, continues to exist, and has generated two parallel streams of authority: the first stream typified by the cases on which the Commonwealth relies, and the second stream typified by the cases outlined at [92]–[107] above. A source of confusion in some of the cases has been the failure to notice both streams, with the result that there are overbroad statements in each, together with the historical view of constables as "subordinate officers to the conservators of the peace" and so, by the seventeenth century, "proper officers of the justices".[135]

113. The ***third*** case relied upon by the Commonwealth is *Posner v Collector for Inter-State Destitute Persons (Vict)*[136] (CS [36(c)], [41]; see J[474]–[478]). That case did not concern the liability of any officer for acts done in the execution of the warrant. *Dicta* in the reasons simply confirm the distinction between ministerial officers of the court and others. Thus, Dixon J quoted[137] with approval from the reasons of Denman CJ in *Andrews v Marris*,[138] a ministerial officer case (see J[452]–[455]). Once again, the position of officers other than court officials, such as constables and gaolers, was not considered. Likewise, Starke J's comments[139] drew on this same line of authority: his

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133 (1737) Willes 30; 125 ER 1039.

134 (1737) Willes 30 at 34; 125 ER 1039 at 1042.

135 *R v Wyat* (1705) 1 Salk 380 at 3811; 91 ER 331. This is the origin of the passage quoted at QS[49].

136 (1946) 74 CLR 461.

137 (1946) 74 CLR 461 at 481–2.

138 (1841) 1 QB 3; 113 ER 1030.

139 (1946) 74 CLR 461 at 476.

Honour cited the very page of *Mayor of London v Cox*[140] that in turn cited *Andrews v Marris* and *Moravia v Sloper*, both ministerial officer cases (see J[451]–[455]).

114. The ***fourth*** case relied upon by the Commonwealth is the 1997 decision of the Full Court of the Supreme Court of Western Australia in *Robertson v The Queen*[141] (CS [36(d)], [42]). The Court held that the superintendent of a prison was not liable for unlawful imprisonment even if the warrant of commitment issued by a magistrate was "a nullity" because it recorded a sentence of imprisonment longer than that which he had actually imposed. The actual decision was correct, because the *Constables Protection Act* remained (and remains) in force in Western Australia.[142] But the reasoning should not be approved by this Court and the primary judge was right not to follow it for the reasons his Honour gave (J[479]–[486]). The Full Court did not mention *Feather v Rogers* — a previous intermediate appellate authority which ought to have been followed unless thought to be plainly wrong — or any of the other authorities referred to above. Instead, the Court relied upon cases concerning ministerial officers, overbroad *dicta* and cases in which the *Constables Protection Act* supported the outcome.[143] Various of the Court's reasons ignore the fundamental distinction between orders of inferior and superior courts, rely on irrelevant statements concerning the tendency to construe legislation so as not to result in a court's orders being void, and mistake a summary of counsel's submissions in a previous case for reasoning approved by the Court.[144]

115. The ***fifth*** case relied upon by the Commonwealth is *von Armin v Federal Republic of Germany (No 2)*[145] (CS [36(e)]; see J[487]–[492]). That case cites cases from the "ministerial officer" stream of authority only, rather than those in the constable and gaoler line of authority, and indeed Finkelstein J candidly accepted that he only "looked at" a "few cases" on the issue.[146] In any event, the paragraph relied upon by the

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140 (1867) LR 2 HL 239 at 263.

141 (1997) 92 A Crim R 115.

142 It formed part of the law of Western Australia from the deemed establishment of the State on 1 June 1829: *Interpretation Act 1984* (WA), s 73; *Quan Yick v Hinds* (1905) 2 CLR 345 at 355–356; *Rogers v Squire* (1978) 23 ALR 111 at 115–116. It was recognised as being in force by the Law Reform Commission of Western Australia, Project No 75, *United Kingdom Statutes in Force in Western Australia* (1994), pp 66–67.

143 (1997) 92 A Crim R 115 at 122.

144 (1997) 92 A Crim R 115 at 123–125.

145 [2005] FCA 662.

146 [2005] FCA 662 at [5].

Commonwealth in *von Arnim* was *dicta*, as his Honour held that the inferior court order at issue in that case was valid.

116. The ***sixth*** case invoked by the Commonwealth is *Kable* (CS [36(f)]; see J[493]–[509]). But as noted above, *Kable* itself recognises the very distinction between the two lines of authority discussed above. In any event, Allsop P's reasons reached no conclusion on the question. His Honour simply left the matter open.

117. Lastly, the Commonwealth asserts that the common law defence recognised for ministerial officers has been held to apply to police and prison officials (CS[39], [43]). With the exception of *Robertson*, which is a flawed outlier for the reasons outlined at [114] above, the cases relied upon do not support the proposition claimed. In both *Henderson v Preston*[147] and *Olliet v Bessey*, the warrant in question was valid, not invalid, and so the warrant itself authorised the acts.[148] *Smith v Collis* concerned a statutory defence, not the common law (see [109] above). *Dr Drury's Case* supports Mr Stradford, as it is the root of the line of the authority recognising the defence for ministerial officers who are "***commanded and compelled***"[149] to obey the warrant (see [111] above). *Moravia v Sloper* is another case that supports Mr Stradford, holding, as the headnote accurately records, that where a litigant "pleads a justification under process of an Inferior Court, he must shew that the cause of action arose within the jurisdiction of the Court: but the ***officers of the Court*** need not".[150] Likewise, *Demer v Cook* supports Mr Stradford, for as the headnote accurately records,[151] the Court held "that the action could not be maintained against the clerk of the peace, as he was ***merely a ministerial officer*** and his act was a ministerial act; but that the action was maintainable against the governor … and that ***the governor was liable in damages to the plaintiff***." In *Higginson v Martin*, the reason the defendant could justify on the warrant was because he was an "***officer of the Court***",[152] and was therefore "to obey and not to examine".[153] Lastly, in

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147 (1888) 21 QBD 362.

148 In *Olliet v Bessey*, this point emerges most clearly not in the Commonwealth's reported version of the case ((1682) T Jones 214; 84 ER 1223), but in the versions reported at (1682) 2 Show KB 148; 89 ER 851 and 2 Show KB 204; 89 ER 892. See also J[470].

149 *Dr Drury's Case* (1610) 8 Co Rep 141 at 143a; 77 ER 688 at 691.

150 *Moravia v Sloper* (1737) Willes 30 at 30; 125 ER 1039 at 1039 (emphasis added).

151 *Demer v Cook* (1903) 88 LT 629 at 629 (emphasis added). See also J[470].

152 Again, this appears not in the Commonwealth's version of the case ((1677) 2 Mod 195; 86 ER 1021) but in a different reported version: (1677) Freem KB 322; 89 ER 239 (emphasis added).

153 (1677) 2 Mod 195 at 196; 86 ER 1021 at 1022.

Hill v Bateman[154] the warrant under which the constable justified was never held to be invalid (as distinct from merely the subject of appellable error). Moreover, this was a report of a jury trial at Westminster, reporting what was "agreed" to be the position and directed. It does not record Lord Raymond ever deciding the point. It was considered by the Court of Common Pleas (*en banc*) in *Morrell v Martin*, in a thorough review of the authorities in which the Court held that "[t]here is a great difficulty … in reconciling the cases which have been brought in review before the Court".[155] After weighing *Hill v Bateman* against the rest, the Court nonetheless concluded that the "***warrant will be no protection to the officers who act under it***" (see [103] above).

118. In short, not one of the cases relied upon by the Commonwealth actually decided that there exists a defence for persons other than ministerial officers of the court when they commit tortious acts under the purported cover of an invalid inferior court order. The availability of a special defence for ministerial officers is coextensive with the personal obligation to obey the order by virtue of their office as an officer of the court. That is the bright line: if a person is personally bound by virtue of their office as an officer of the court to obey a court's orders, and punishable if they do not, they cannot be liable for doing so. On the Appellants' approach however, it is unclear where the line would be drawn: who, if anyone, would fall outside such a defence? Its rationale would seem to apply equally to third-party individuals holding no executive office of any kind, in which case it would entirely swallow up the principle that invalid court orders afford no defence to those who commit tortious acts under them.

119. Contrary to CS[46]–[47], the MSS employees do not fall within the limited common law defence. The primary judge's reasons for rejecting such a contention at J[403]–[408] are plainly correct. They were not appointed under the FCCA Act or any other legislation. They were not employed by the Commonwealth or the Court. They were not officers of the Court. They did not act on the Marshal's instructions when detaining Mr Stradford or report to the Marshal in respect of that detention. They were not subject to any disciplinary action by the court for failure to perform their duties. The implications of a failure to perform their duties lay in their contracts of employment with MSS and its services contract with the Commonwealth.

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[154] (1725) 2 Str 710; 93 ER 800.

[155] (1841) 3 Man & G 581 at 592; 133 ER 1273 at 1278.

120. Queensland takes a rather different tack. Queensland first draws attention to what it says are the inconsistent results in cases of the seventeenth century (QS[45]–[52]). These have largely been addressed above. The two additional cases mentioned by Queensland are *Webb v Batchelor* and *Gwinne v Pool*. The former is a poorly reported and, based on the reports, briefly reasoned decision.[156] The latter is consistent with the preponderance of authority: the officer in question was an officer of the court and was not liable "for he is bound to obey".[157]

121. More significantly, Queensland acknowledges that a correct analysis of the cases in the eighteenth, nineteenth and twentieth centuries does reflect a division at common law between those involving ministerial officers of the court and those involving others (QS[53]–[57]), which was resolved in England by the enactment of the *Constables Protections Act* (QS[59]–[61]). Yet Queensland draws the wrong conclusion from this analysis. It is not that the common law did, or should now, reflect the *Constables Protection Act* (cf QS[68]–[70]). It is that the protection that has existed for police officers and correctional services officers for torts committed in executing invalid inferior court warrants has always been achieved by statute.

Legislative modification

122. The long title of the *Constables Protection Act* was: "An Act for the rendering Justices of the Peace more safe in the Execution of their Office; and for indemnifying Constables and others acting in obedience to their Warrants." Section 6 provided a defence to "any constable, headborough, or other officer … for any thing done in obedience to any warrant under the hand or seal of any justice of the peace … notwithstanding any defect of jurisdiction in such justice or justices". It applied not only to police constables but to a gaoler receiving and detaining a person under the warrant of a magistrate.[158] It did not, as the Commonwealth suggests, "align" or "overlap" with the common law (CS[44]), as its long title makes clear. Unlike today, in 1750 legislation was almost invariably passed only to remedy a distinct mischief. As has often been recognised,[159] including by Queensland in this case (QS[60]), the *Constables Protection Act* counteracted the

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156 (1675) Frem KB 407; 89 ER 302 and 1 Ven 273; 86 ER 182.

157 The Reports and Entries of Sir Edward Lutwyche (1718, Nutt and Gosling), 290.

158 *Butt v Newman* (1819) Gow 97; 171 ER 850.

159 *Entick v Carrington* (1765) 19 State TR 1030 at 1062; see also 95 ER 807; *Kable v New South Wales* [2012] NSWCA 243 at [162] (Basten JA); Aronson and Whitmore, *Public Torts and Contracts* (Law Book, 1982) 140–1.

common law by ameliorating its perceived harshness. As Basten JA pointed out in *Kable*,[160] so much did it become part of the fabric of English law that it is the "suppressed premise" in many cases. That is evidenced by the primary judge's analysis at J[433]–[443] of this Court's reasons in *Corbett v The King*[161] and the cases to which they refer.

123. No such statute applies either to the MSS employees, or the officers of the Queensland Police or Queensland Corrective Services, who effected the detention of Mr Stradford. While it once applied in Queensland, the application of the *Constables Protection Act* was terminated in 1984.[162] There was once a specific Queensland provision conferring an immunity on police.[163] But it was repealed, in favour of the present provisions that applied in this case:[164] instead of simply immunising officers from liability, they take the different approach of transferring liability for their acts to the State. This exemplifies that the remedying of any perceived harshness in the common law — and the choice of model as to how to remedy it, for instance whether by immunity from liability or transfer of liability to the State — is a matter for legislation.

124. Again, the circumstance presents a dilemma (cf CS[37]; QS[44], [68]): in whose favour should the law err — the executing authorities or the individual? To pick up what Lord Slynn of Hadley said in *R v Governor of Brockhill Prison, Ex parte Evans (No 2)*:[165]

> If the claim is looked at from the governor's point of view liability seems unreasonable; what more could he have done? If looked at from the applicant's point of view she was, it is accepted, kept in prison unlawfully for 59 days and she should be compensated. Which is to prevail?
>
> Despite sympathy for the governor's position it seems to me that the result is clear. She never was lawfully detained after 17 September 1996. She was merely thought to be lawfully detained. That is not a sufficient justification for the tort of false imprisonment even if based on rulings of the court. Although in form it is the governor, it is in reality the State which must compensate her for her unlawful detention.

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160 [2012] NSWCA 243 at [48].

161 (1932) 47 CLR 317.

162 *Imperial Acts Application Act 1984* (Qld), s 7. This followed the recommendations of the Queensland Law Reform Commission, Report No 31, *An Examination of the Imperial Statutes in Force in Queensland* (1981), Annexure A.

163 *Police Act 1937* (Qld), s 69(1).

164 Section 10.5 of the *Police Service Administration Act 1990* (Qld) and s 349 of the *Corrective Services Act 2006* (Qld). By virtue of these provisions, Queensland admitted that it is vicariously liable for the conduct and omissions of officers of Queensland Police and Queensland Corrective Services.

165 [2001] 2 AC 19 at 26.

125. Just as in England, so too in Queensland, the balance between these two competing ends has been struck in favour of the liberty of the individual, with the State (rather than any individual officer) liable for the harm suffered. In effect, the scheme adopted in Queensland is akin to a public insurance scheme, with the State as insurer. That is a rational and humane response to the dilemma posed by cases of this kind, in which the interests of two innocent parties — the unlawfully detained prisoner and the officer simply doing his or her job — are otherwise necessarily pitted against each other. By contrast, the consequence of the Commonwealth's submissions would be that Mr Stradford should have no remedy at all for the wrongful deprivation of his liberty.

126. The Appellants' invitation for this Court to rewrite the common law is of a similar kind, and should be rejected for similar reasons, as the step this Court was invited to take in *Pipikos v Trayans*.[166] Just as "it is hardly to be supposed that the enactment of [the Statute of Frauds] left room for judicial development of the law relating to part performance that would upset the balance effected by Lord Selborne's reconciliation",[167] so too here, it is hardly to be supposed that the enactment of the *Constables Protection Act* left room for judicial development of the law relating to tortious liability for wrongs committed pursuant to invalid inferior court orders that would upset the balance effected by that Act and its Australian descendants. Should any reforms now be thought necessary, it is the parliaments that should pursue them.

South Australia's new argument

127. Finally, South Australia seeks leave to argue that the warrant was valid notwithstanding that Judge Vasta's orders were affected by jurisdictional error (SAS [2], [17]–[21]). That leave should be refused. It is not the subject of any of the grounds of appeal before the Court. It was not an argument pleaded or even mentioned by any party below. Had it been raised, Mr Stradford may have sought discovery of documents relating to the issuing of the warrant and may have made different choices in relation to cross-examination of witnesses.

128. In any event, the argument has no merit. If the order of imprisonment was invalid because it was affected by jurisdictional error, then a subsequently issued warrant based on that order must likewise be invalid. Not only that, but it was Judge Vasta who signed

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166 (2018) 265 CLR 522.

167 (2018) 265 CLR 522 at 545 [74] (Kiefel CJ, Bell, Gageler and Keane JJ).

the warrant (J[39]). His decision to do so necessarily involved all the same errors as affected the making of the order of imprisonment itself. Thus, even if the warrant was not automatically invalid for being based on an invalid order, it was independently invalid for being tainted by the same errors as infected the order.

ISSUE 4: THE *CRIMINAL CODE* (QLD)

129. Lastly, Queensland contends that its officers enjoy protection from liability under s 249 of the *Criminal Code* (Qld). This argument was opposed not only by Mr Stradford below but also by the Commonwealth which filed detailed submissions explaining why it was wrong; the Commonwealth does not embrace it in this Court. The primary judge rightly gave Queensland's argument short shrift: J[525]–[548]. It is wholly lacking in merit.

130. Section 249 relevantly provides: "It is lawful for a person who is charged by law with the duty of executing a lawful warrant issued ***by any court***". The primary judge correctly held that, properly construed, this does not apply to warrants issued by federal courts. His Honour did not hold, as Queensland incorrectly asserts, that the provision does not apply to all "courts exercising federal jurisdiction" (cf QS[31]).

131. Section 35(1) of the *Acts Interpretation Act 1954* (Qld) provides as follows:

> **35 References to Queensland to be implied**
>
> (1) In an Act—
>
> (a) reference to an officer, office or entity is a reference to such an officer, office or entity in and for Queensland; and
>
> (b) a reference to a locality, jurisdiction or other thing is a reference to such a locality, jurisdiction or other thing in and of Queensland.

132. A "court" is both an "entity" and a "thing". Section 35(1) requires that, subject to any contrary intention (see s 4), the references to "any court" in s 249 of the *Criminal Code* be read as "any court ***in and for Queensland***" or "any court ***in and of Queensland***". The difference between "for" and "of" in these two formulations is immaterial. They limit the reference to "court" in s 249 not merely to courts in Queensland but of or for Queensland. That is not apt to describe federal courts.

133. The predecessor provision, s 14 of the *Acts Shortening Act 1867* (Qld), was in force at the time the *Criminal Code* was enacted. It was in equivalent terms:

> When any officer or office is referred to in any enactment the same shall be taken to refer to the officer or office of the description designated within and for the Colony of

> Queensland and all references to localities jurisdictions and other matters and things shall be taken to relate to such localities jurisdictions and other matters and things within and of the said colony unless in any such case the contrary shall appear to have been intended by the Legislature.

134. A "court" is one of the "other matters and things" which this provision requires, again subject to any contrary intention, to be construed as a matter or thing "within and of" Queensland.

135. These provisions have long been recognised by this Court to have a particular application to references in State legislation to courts and court process. Thus, in *Solomons v District Court of New South Wales*,[168] in a passage that applies directly to the present case, Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ said:

> There is a "general rule of construction" which would confine the State enactment to State proceedings and officers. In any event, the "Justices" referred to in s 2 of the Costs Act are Justices of the Peace. This follows from the definition in s 21 of the *Interpretation Act 1987* (NSW). The power conferred by s 2 "was clearly intended to be conferred on all New South Wales courts, at whatever level, exercising criminal jurisdiction". ***The "Court[,] Judge [and] Justices" identified in s 2 of the Costs Act, and the phrase therein "any proceedings relating to any offence", do not extend to federal courts created by the Parliament under Ch III of the Constitution or to this Court or to judicial officers of the Commonwealth***, and the offences in question do not include offences under a law of the Commonwealth. This follows as a matter of construction of s 2 of the Costs Act in the light of s 12(1) of the *Interpretation Act*.[169]

136. As authority for the "general rule of construction" to which their Honours referred, their Honours cited the 1932 decision of *Seaegg v The King*.[170] There, this Court said of a reference to "indictments" in the *Criminal Appeal Act 1912* (NSW):

> "Indictment" is defined to include any information presented or filed as provided by law for the prosecution of offenders. We do not think that the State enactment by these general words intends to refer to prosecutions on indictment preferred by the law officers of the Commonwealth for offences against the laws of the Commonwealth. Such prosecutions are governed by the special provisions contained in secs. 69–77 of the *Judiciary Act* 1903–1927, which deal not only with the manner in which they shall be instituted and the jurisdiction in which they shall be tried, but with the nature and extent of the appeal from a conviction and the power of the Court hearing that appeal. Apart from ***the general rule of construction requiring an interpretation which would restrain the general words so that they would not apply to Federal proceedings so regulated and would confine the State enactment to State proceedings***, the State statute contains specific references to the Attorney-General of

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168 (2002) 211 CLR 119 at 130 [9] (emphasis added).

169 Section 12(1) of the *Interpretation Act 1987* (NSW) is the equivalent to s 35(1) of the *Acts Interpretation Act 1954* (Qld).

170 (1932) 48 CLR 251 at 255 (the Court) (emphasis added).

> the State and to the Minister of Justice which place its meaning beyond doubt (see secs. 13, 16, 24 and 17(2)) and show that the right of appeal it confers is limited to convictions upon indictment preferred according to State law.

137. Similarly, in *DRJ v Commissioner of Victims Rights (No 2)*,[171] the New South Wales Court of Appeal considered the operation of the New South Wales analogue of s 35 of the *Acts Interpretation Act* in some detail. As explained by Leeming JA (Bell P and Meagher JA agreeing):[172]

> [T]he words "New South Wales" are used in two different senses. In paragraph (a), they are references to the *polity* within the Australian federation. In paragraph (b), they are references to a *place* within the Australian continent. One paragraph is institutional; the other geographical. "Officer", "office" and "statutory body" all have ***an essential institutional relationship with New South Wales as a polity***, which need not necessarily be geographically confined. ***A New South Wales statute referring, say, to a "judicial officer" would prima facie apply to a judge of the Supreme Court of New South Wales (and might well apply even if he or she was taking evidence on commission in London), but not to a judge of the Supreme Court of Western Australia visiting Sydney on holiday***.

138. The similarly worded s 35(1)(a) of the *Acts Interpretation Act* speaks of a connection not with the place within Australia known as Queensland, but with the polity of Queensland. The question is whether the Federal Circuit Court of Australia is a court "in and for" the polity of Queensland. Courts established by the Queensland Parliament answer that description. Courts established by other Parliaments, whose officers happen to perform functions within the territory of Queensland from time to time, do not. The Federal Circuit Court of Australia does not become a Court "in and for Queensland" merely to the extent that certain of its judicial officers are situated "in" Queensland from time to time. That is because "in" is only the first part of the prepositional phrase: the Court must be both "in ***and for***" Queensland. For this reason, Queensland's argument must be rejected. It erroneously treats the geographical dimension as being the sole and decisive question and ignores the institutional dimension. None of the matters in QS[17]–[35] alter the fact that the Federal Circuit Court is not a court of the polity of Queensland.

139. Nor is there any intention to the contrary manifested by the *Criminal Code* which would displace the statutory and common law presumption that "court" in s 249 does not apply to federal courts.

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171 (2020) 103 NSWLR 692.

172 (2020) 103 NSWLR 692 at [97] (emphasis added).

140. ***First***, the *Criminal Code* was enacted in 1899, before Federation and the creation of any federal courts.[173] Sections 249 and 250 have never been amended: they are in identical form today as the day they were enacted. It is not possible in those circumstances to conclude that any words used in those provisions impliedly convey an intention that "court" shall include federal courts, because at the time that those provisions were enacted there was no such thing as a federal court.

141. ***Secondly***, where there is a desire in the *Criminal Code* to refer to a matter or thing in and of the Commonwealth, that has been done expressly. That is so, for instance, in the definition of "law enforcement agency" in s 1, the definition of "relevant offence" in s 77, the definition of "supervision order" in s 227C(3), the definition of "Act" in s 391(7), the definitions of "sporting contingency" and "sporting event" in s 443, and the definitions of "government entity" and "government functions" in s 469A(5). This approach has been taken in s 359E when there was a desire to refer to courts other than those of Queensland. Section 359E(2) provides a five-year maximum sentence for unlawful stalking. Section 359E(3)(c) increases the maximum sentence to seven years if, relevantly, for any of the acts constituting the unlawful stalking, the person "contravenes or intentionally threatens to contravene an injunction or order imposed or made by a court or tribunal under a law of the Commonwealth or a State".

142. ***Thirdly***, confining "courts" in s 249 to Queensland courts is consistent with other references to "courts" in provisions which have been present in the *Criminal Code* since its enactment (cf QS[34]). Thus, s 200 makes it a criminal offence for a person employed as an officer "of any court" to fail to perform the duties of their employment. As a provision present in the *Criminal Code* since its enactment, before Federation, which has never been subsequently amended, the reference to "any court" plainly cannot encompass federal courts. It would be decidedly odd, to say the least, for a State to seek to impose criminal sanctions upon the officers of federal courts in respect of the exercise of their duties as such. Indeed, it may well be beyond power, as trenching on the exclusively federal subject matter of the exercise of federal jurisdiction.[174] Similarly, s 561(1)

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[173] It was assented to on 28 November 1899. While it was expressed to commence on 1 January 1901 (s 2) — the same day as the Commonwealth Constitution — the significant point is that, at the time of the enactment of the *Criminal Code*, the Commonwealth had yet to be created. The Commonwealth Constitution was not assented to until 9 July 1900.

[174] The entire subject matter of the conferral and exercise of federal jurisdiction is a subject-matter of legislative power that is, by Ch III of the Constitution, exclusively vested in the Parliament of the Commonwealth: *Rizeq v Western Australia* (2017) 262 CLR 1 at [61] (Bell, Gageler, Keane, Nettle and Gordon JJ).

authorises a Crown Law Officer to "sign and present an indictment in any court of criminal jurisdiction". That provision, which, again, has not been substantively amended since 1899, cannot refer to a federal court, because it is constitutionally impossible for a State to confer jurisdiction on a federal court.[175]

143. ***Fourthly***, the general focus of the *Criminal Code* on State, rather than federal, matters is evidenced from the outset by s 5 of the *Criminal Code*. It provides:

> **5 Provisions of Code exclusive with certain exceptions**
>
> From and after the coming into operation of the Code, no person shall be liable to be tried or punished in Queensland as for an indictable offence except under the express provisions of the Code or some other statute law of Queensland, or under the express provisions of some statute of the United Kingdom which is expressly applied to Queensland, or which is in force in all parts of Her Majesty's dominions not expressly excepted from its operation, or which authorises the trial and punishment in Queensland of offenders who have at places not in Queensland committed offences against the laws of the United Kingdom.

144. Again, this provision has been in the *Criminal Code* since it was enacted. Read literally, it would mean that no indictable offence under a federal law could be tried in Queensland, not even by a Queensland court exercising federal jurisdiction. But federal indictable offences are tried every day in Queensland courts, as federal criminal jurisdiction is vested in them by various Commonwealth statutes.[176] That this state of affairs is not precluded by s 5 demonstrates that the *Criminal Code* was not intended to apply to the exercise of federal jurisdiction in Queensland, once again re-affirming a focus upon State, rather than federal, matters.

145. Section 8 even more clearly evidences a focus on State, rather than federal, courts:

> Nothing in this Act or in the Code shall affect the authority of courts of record to punish a person summarily for the offence commonly known as 'contempt of court', but so that a person can not be so punished and also punished under the provisions of the Code for the same act or omission.

146. The *Criminal Code* sets out the criminal law ***of Queensland***. In that context, it is evident that the saving of the contempt jurisdiction of courts of record effected by s 8 could only be concerned with the courts of record of Queensland. An Act directed to the criminal law of Queensland could never be thought to affect the contempt jurisdiction of courts of another polity, especially one that did not exist at the time s 8 was enacted. Indeed, it is

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[175] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

[176] See, eg, s 68(2) of the *Judiciary Act 1901* (Cth).

beyond the legislative competence of the States to affect the contempt jurisdiction of federal courts.[177]

147. Nor is there any anomaly if s 249 of the *Criminal Code* applies only when officers execute orders of Queensland courts. Officers executing orders of federal courts will simply be subject to the common law. It is not possible to attribute to s 249 or the surrounding provisions of the *Criminal Code* a generalised intention to insulate officers from civil liability in all circumstances and at all costs. It strikes a balance. To the extent that that balance chosen by the legislature differs from the balance struck at common law, there is nothing anomalous about the increased protection for officers being limited to officers executing orders of Queensland courts.

148. Unlike the income tax exemption considered in *Birmingham University and Epsom College v Federal Commissioner of Taxation*,[178] there is no "mismatch" between the scope of any liability imposed by the *Criminal Code* and s 249 if it is read as territorially limited (cf QS[32]). In particular, there is no need to construe s 249 as applying to federal courts for the orders of such courts to provide a defence for executing officers to the crimes of assault, common assault and deprivation of liberty (ss 246, 335, 355) (cf QS[30]). Each is engaged only unlawful conduct. None require that the lawful authority for the conduct be provided by a provision of the *Criminal Code*. Indeed, s 3(d) of the *Criminal Code Act* is to the contrary. It provides: "This Act shall not, except as expressly therein declared, affect any principle or rule of law or equity, or established jurisdiction, or form or course of pleading, practice, or procedure". The lawful execution of a valid warrant issued by a federal court would provide the requisite lawful authority by force of the common law concerning the execution of warrants. That is so irrespective of the construction of s 249.

149. Nor would such executing officers be exposed to criminal liability simply because the warrant were invalid (cf QS[30]). That would depend on matters such as the officers' reliance on answers of honest and reasonable mistake of fact (s 24) and compulsion (s 31). The former would supply an answer if the officer had an honest and reasonable,

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[177] The State Parliaments have no power to add to or detract from federal jurisdiction: *Rizeq v Western Australia* (2017) 262 CLR 1 at [60]–[61] (Bell, Gageler, Keane, Nettle and Gordon JJ).

[178] (1938) 60 CLR 572.

but mistaken, belief that the warrant was valid. The latter would supply an answer if the officer was acting in execution of the law[179] or following the orders of a superior.[180]

150. Conversely, if s 249 of the *Criminal Code* applies to officers executing orders of federal courts, real anomalies arise. The process of federal courts, such as the Federal Court and at the relevant time the Federal Circuit Court, run and may be executed throughout Australia.[181] If an officer were sued for false imprisonment or trespass for the execution of a warrant of a federal court, s 249 of the *Criminal Code* could apply only to the extent that the law of the place of the tort were Queensland. Thus, officers executing orders of a single federal court would have greater protection from liability — and plaintiffs would have lesser rights of action — depending on where within Australia the process were executed. Further, to the extent that the process were executed across State lines, for instance if a person the subject of a warrant issued by a federal court were taken from the Gold Coast to Tweed Heads, the extent of the officers' protection and the plaintiff's right of action would differ for different parts of the journey.

PART VII ORAL ADDRESS

151. On the basis of the appellants' 8-hour combined estimate for oral argument, Mr Stradford estimates that 6.5 hours will be required to present oral argument. However, in view of the matter having now been set down for a 2-day hearing, provided that all the appellants and South Australia complete their submissions by the end of the first day, Mr Stradford expects that he will be able to present and complete his submissions over the course of the second day, leaving the appellants a brief period in reply.

Dated: 10 May 2024

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[179] See generally *Mackinlay v Willey* [1971] WAR 3 (FC) at 10 (Virtue SPJ): "This subsection confers on the hangman, the prison authorities, the bailiff and others who are servants of the law and justice and act in accordance with the demands of them that are made by their official position, to escape from ordinary criminal responsibility", quoted in *R v Slade* [1995] 1 Qd R 390 at 394 (Lee J).

[180] See generally *Hunt v Maloney; Ex parte Hunt* [1959] Qd R 164 (FC) at 173 (Stanley J): "it is directed to a subordinate's obedience to orders eg a solider or sailor, a constable, a gaoler".

[181] *Federal Court of Australia Act 1976* (Cth), s 18; *Federal Circuit Court of Australia Act 1999* (Cth) s 10(3).

ANNEXURE TO MR STRADFORD'S SUBMISSIONS

Pursuant to *Practice Direction No 1 of 2019*, Mr Stradford sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No	Description	Version	Provisions
	Commonwealth statutory provisions		
1.	*Conciliation and Arbitration Act (No 2) 1951* (Cth)	As enacted	s 7 (which contains the text of s 29A of the principal Act as thereby amended)
2.	*Family Law Act 1975* (Cth)	As at 24 Jan 1990 (Reprint No. 2, reprinted as at 3 July 1985)	s 35
3.	*Family Law Act 1975* (Cth)	As at 6 Dec 2018 (Compilation No. 87, 22 Nov 2018 – 9 Mar 2019)	Pts XIIIA, XIIIB; ss 112AD, 112AE, 112AP
4.	*Federal Circuit and Family Court of Australia Act 2021* (Cth)	Current	s 277A
5.	*Federal Circuit Court of Australia Act 1999* (Cth)	As at 6 Dec 2018 (Compilation No. 36, 1 Sep 2018 – 31 Dec 2019)	ss 10(3) and 17
6.	*Federal Circuit Court Rules 2001* (Cth)	As at 6 Dec 2018 (Compilation No. 25, 4 Aug 2018 – 25 Sep 2020)	r 19.02
7.	*Federal Court of Australia Act 1976* (Cth)	Current	ss 18 and 31
8.	*Judiciary Act 1903* (Cth)	As enacted	s 24
9.	*Judiciary Act 1903* (Cth)	Current	s 68(2)
	State statutory provisions		
10.	*Acts Interpretation Act 1954* (Qld)	As at 6 Dec 2018 (Reprinted as at 1 Oct 2008)	ss 4 and 35(1)
11.	*Acts Shortening Act 1867* (Qld)	As enacted	s 14
12.	*Corrective Services Act 2006* (Qld)	As at 6 Dec 2018 (Reprinted as at 1 Dec 2018)	s 349
13.	*County Court Act 1958* (Vic)	Current	s 9A(1)
14.	*Courts and Administrative Tribunals (Immunities) Act 2008* (NT)	Current	s 4

15.	*Criminal Code 1899* (Qld)	As enacted	ss 249 and 250
16.	*Criminal Code 1899* (Qld)	As at 18 Sep 2002 (Reprinted as at 19 Jul 2002)	s 30
17.	*Criminal Code 1899* (Qld)	As at 6 Dec 2018 (Reprinted as at 3 Dec 2018)	ss 1, 5, 8, 24, 31, 77, 200, 227C(3), 246, 249, 250, 335, 355, 359E, 391(7), 443, 469A(5), 561(1)
18.	*Criminal Code Act 1899* (Qld)	As at 6 Dec 2018 (Reprinted as at 3 Dec 2018)	s 3(d)
19.	*District Court Act 1991* (SA)	As at 2 Feb 2009 (Reprinted as at 23 Nov 2008)	s 48(1)
20.	*District Court Act 1991* (SA)	Current	s 46(1)
21.	*District Court of Western Australia Act 1969* (WA)	As at 6 Feb 1978 (Reprinted as at 9 April 1973)	ss 42(1) and 44
22.	*Imperial Acts Application Act 1984* (Qld)	As enacted	s 7
23.	*Judicial Officers Act 1986* (NSW)	Current	s 44B
24.	*Justices of the Peace and Commissioner for Declarations Act 1991* (Qld)	Current	ss 19(1), 36
25.	*Magistrates Court Act 1987* (Tas)	Current	s 10A
26.	*Magistrates Court Act 1991* (SA)	Current	s 44(1)
27.	*Magistrates Court Act 2004* (WA)	Current	s 37
28.	*Magistrates' Court Act 1989* (Vic)	Current	s 14(1)
29.	*Police Act 1937* (Qld)	As enacted	s 69(1)
30.	*Police Service Administration Act 1990* (Qld)	As at 6 Dec 2018 (Reprinted as at 1 Dec 2018)	s 10.5
31.	*Interpretation Act 1984* (WA)	As enacted	s 73
32.	*Interpretation Act 1987* (NSW)	Current	s 12(1)
	Foreign statutory provisions		
33.	*Constables Protection Act 1750* (Imp), 24 Geo II, c 44	As enacted	
34.	*Habeas Corpus Act 1679* (UK), 31 Cha 2, c 2	As enacted	s 6

35.	*Human Rights Act 1998* (UK)	Current	s 9
36.	*Justices of the Peace Act 1997* (UK)	Current	s 54
37.	*Justices Protection Act 1848* (UK)	As enacted	
38.	*Summary Proceedings Act 1957* (NZ)	As at 19 April 1990 (Reprinted as at 3 Sep 2007)	s 193(1)