HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

P56/2021

BETWEEN: **PETER GARLETT**
Applicant

THE STATE OF WESTERN AUSTRALIA
Respondent

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and

THE ATTORNEY-GENERAL FOR
THE STATE OF WESTERN AUSTRALIA
Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I: CERTIFICATION

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

Part II: OUTLINE OF ORAL SUBMISSIONS

The Act does not infringe the separation of powers doctrine

2. In *Benbrika*, this Court rejected a separation of powers challenge to a preventative detention regime which shared many features in common with the scheme established by the *High Risk Serious Offender Act 2020* (WA) (the Act).[1]

3. Chief Justice Kiefel and Justices Bell, Keane and Steward, and Justice Edelman writing separately, held that in assessing whether the risk of an offender committing an offence was 'unacceptable' for the purposes of Div 105A of the *Criminal Code* (Cth), it was necessary to have regard to whether the threat of harm to the community was sufficiently serious to warrant the making of an order.[2]

4. Similarly, s 7 of the Act requires both a probability assessment of the likelihood of the commission of a serious offence as well as a qualitative assessment of the harm; bare satisfaction about the likelihood of the commission of a serious offence would be insufficient to enliven the Supreme Court's power to make a restriction order.[3] Construed in this manner, s 7 of the Act maintains a 'close correspondence' with the non-punitive purpose of the Act such that the impugned provisions of the Act should be understood to have, as a matter of substance, the object of protecting the community from harm.[4]

The Act does not infringe the *Kable* doctrine

5. In *Fardon*, this Court rejected a *Kable* challenge to a preventative detention regime which shared many features in common with the scheme established by the Act.[5]

6. The Appellant seeks to distinguish *Fardon* on the basis that it concerned crimes of the 'utmost seriousness'.[6] Yet, the reasoning of the judges comprising the majority in *Fardon* did not turn upon the extent of the seriousness of the offending to which the

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1 *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 (*Benbrika*) (**JBA 8, tab 43**).
2 *Benbrika*, 184 [47]; 214 [193] (**JBA 8, tab 43**).
3 *Benbrika*, 183 [43] (Kiefel CJ, Bell, Keane & Steward JJ) (**JBA 8, tab 43**).
4 *Benbrika*, 183 [36] (Kiefel CJ, Bell, Keane & Steward JJ). The conclusion reached by members of the minority, was informed by the contrary construction: 193-194 [92]-[93] (Gageler J); 209 [170] (Gordon J) (**JBA 8, tab 43**).
5 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (*Fardon*) (**JBA 4, tab 20**).
6 Appellant's Submissions, [56], [72].

scheme was directed. Rather, the features of the scheme that supported validity were found to be: substantial discretions; ascertainable judicial standard; onus borne by the State; procedural fairness; rules of evidence; public hearings; reasons; appeals; and, annual reviews.[7] In large measure, these features have been replicated by the Act.[8] In any event, in this context, 'sharp distinctions should not … be drawn'.[9]

7. Even if the Court considers that the present case can be distinguished from *Fardon*, the Court should nonetheless reject the Appellant's submissions regarding the application of the *Kable* doctrine on the basis that those submissions concerning the relevance of history, traditional procedure and public confidence are flawed in the following respects.

10 *History*

8. In the context of his submissions concerning the separation of powers, the Appellant adopts a 'historicist mode of reasoning' that focuses on antecedents and analogues.[10] In the context of his submissions concerning the *Kable* doctrine, the Appellant submits that the 'focus is not dissimilar' and that 'requiring Courts to do things that Courts have not historically done … affects such Courts' institutional integrity.'[11] The Appellant's submissions invite the Court to erroneously conflate the relevance of history to the identification of judicial power with the relevance that history may hold in undertaking *Kable* analysis.

9. History may be relevant, although not decisive in undertaking a separation of powers analysis.[12] Where history is relevant in this context, its use tends to be prohibitory in the
20 sense that it assists in the maintenance of a boundary.

10. History is also relevant in applying the *Kable* doctrine; the concepts of 'independence', 'impartiality' and 'institutional integrity' are not developed in a vacuum.[13] Accordingly, where a sufficiently similar function has historically been conferred upon a court, this will tend towards the conclusion that an impugned function does not infringe the *Kable*

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7 *Fardon*, 592 [19] (Gleeson CJ), 596 [34], 602 [44] (McHugh J), 615-616 [93]-[95], 617 [99], 619-621 [109]-[113] (Gummow J), 656 [221], 657 [225]-[227], 658 [230]-[232] (Callinan & Heydon JJ) (**JBA 4, tab 20**).

8 The Act, ss 7(1), 48(1) (ascertainable judicial standard), 7(2), 29(2) (onus of proof), 28 (reasons), 39 (disclosure), 64-65 (review), 69 (appeals) and 84(4) (rules of evidence) (JBA 4, tab 20).

9 *Vella v Commissioner of Police (NSW)* (2019) CLR 219 (*Vella*), 258 [84] (Bell, Keane, Nettle & Edelman JJ) (**JBA 7, tab 37**).

10 Appellant's Submissions, [35]-[36].

11 Appellant's Submissions, [62] and [66].

12 *Benbrika*, 204 [147] (Gordon J), quoting *Palmer v Ayres* (2017) 259 CLR 478, 494 [37] (**JBA 8, tab 43**); cf *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 67 (McHugh J) (**JBA 3, tab 19**).

13 *Forge v Australian Securities & Investments Commission* (2006) 228 CLR 45, 58 [42] (Gummow, Hayne & Crennan JJ) (**JBA 4, tab 21**).

doctrine.[14] However, the attempt by the Appellant to deploy history in the converse fashion is erroneous. The bare fact that a function conferred on a state court departs from what has historically been considered 'judicial power' will not undermine a state court's institutional integrity.[15]

Traditional procedure

11. Pointing to various features of the Act, the Appellant submits that the procedure it prescribes 'depart[s] fundamentally' from the ordinary judicial process.[16] South Australia respectfully adopts the submission of the Western Australia that those features pointed to by the Appellant are not departures from traditional judicial procedure.[17]

10 12. In any event, even if the Appellant could demonstrate that the Act required a departure from traditional procedure, that would be insufficient to establish invalidity.[18] Adherence to the requirements to afford procedural fairness (including the rule against bias),[19] the open court principle,[20] and the duty to give reasons[21] may be seen to sustain judicial independence and impartiality. By contrast, the Appellant has failed to articulate how the supposed departures compromise the institutional integrity of the Court.

Public confidence

13. In effect, the Appellant submits that a loss of public confidence would be occasioned by the Court implementing the scheme of the Act as envisaged by Parliament because the legislative policy that informed its passage is defective. Again, however, with respect, the
20 Appellant's submission fails to tie the alleged defect to any constitutional foundation. The public confidence with which the *Kable* doctrine is concerned is not public confidence in state courts in some unconstrained sense, but rather public confidence that state courts are independent and impartial tribunals.

Dated: 10 March 2022 MJ Wait SC ST O'Flaherty

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14 *Vella*, 257 [83] (Bell, Keane, Nettle & Edelman JJ) (**JBA 7, tab 37**).
15 *Fardon*, 600–601 [41] (McHugh J) (**JBA 4, tab 20**).
16 Appellant's Submissions, [76].
17 Second Respondent's Submissions, [75]-[83].
18 *Fardon*, 600–601 [41] (McHugh J) (**JBA 4, tab 20**).
19 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 594 [39] (French CJ, Kiefel & Bell JJ) (**JBA 6, tab 31**); *Wainohu v New South Wales* (2011) 243 CLR 181 (**JBA 6, tab 31**) (*Wainohu*), 208-209 [44] (French CJ & Kiefel J) (**JBA 7, tab 38**); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 71-72 [67]-[68] (French CJ), 105 [177], 110 [194] (Gageler J) (**JBA 3, tab 14**).
20 Ibid.
21 *Wainohu*, 215 [58]-[59], 219 [68] (French CJ & Kiefel J); 228 [104] (Gummow, Hayne, Crennan & Bell JJ) (**JBA 7, tab 38**).