



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: P56/2021  
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IN THE HIGH COURT OF AUSTRALIA  
PERTH REGISTRY

P56/2021

BETWEEN:

PETER ROBERT GARLETT

Appellant

and

THE STATE OF WESTERN AUSTRALIA

First Respondent

THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA

Second Respondent

### OUTLINE OF ORAL SUBMISSIONS

#### ATTORNEY-GENERAL FOR THE STATE OF TASMANIA (INTERVENING)

##### Part I: Certification

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

##### Part II: Outline of Oral Submissions

2. The proper question is whether the *High Risk Serious Offenders Act 2020* (WA) (HRSO Act) interferes with the institutional integrity of the Supreme Court so as to infringe the principle expressed in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (**JBA 4 Tab 24**). The appellant's submission that it does ought to be rejected.
3. The appellant's contentions made by reference to whether the power in the HRSO Act could be validly exercised if conferred by the Commonwealth Parliament and whether the power conferred is judicial are a distraction from that proper question.

##### *Judicial Power – Separation of Powers*

4. State Parliaments are not prevented from conferring non-judicial power on courts of a State as there is no strict separation of powers at the State level.

*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598 [37], 600 [40], 614 [86] (**JBA 4 Tab 20, 861, 863, 877**);

*Condon v Pompano* (2013) 252 CLR 38, 89 [124]-[125] (**JBA 3 Tab 14, 446-447**)

5. Focussing upon whether or not a power is judicial does not resolve the question as to the constitutional validity of a power conferred by a State Parliament upon a Ch III court.
6. The conferral of non-judicial power upon a court does not alone constitute an interference with the court's institutional integrity.
7. The nature of the power may, in some cases, be relevant in considering whether a provision constitutes an interference with the institutional integrity of a Chapter III court. It will not always or necessarily be significant as the appellant suggests (**AR [3]**). An assessment as to whether non-judicial power is relevant in any significant sense will depend upon an analysis of the particular power in the context of the statutory scheme.
8. However, that issue does not arise for determination in this case as the power to make preventative detention orders under the HRSO Act is undoubtedly judicial in nature. The appellant's submissions that the power is not judicial cannot be sustained in light of the findings of this Court in *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 (**JBA 8 Tab 43**).
9. Whether or not the power is judicial, the constitutional issue is whether its conferral on the Supreme Court is repugnant to or inconsistent with the institutional integrity of that court as a Chapter III court.
10. The answer to that question, with regard to the HRSO Act, is found in *Fardon*. The legislative schemes are relevantly indistinguishable. They both have the object of protecting the community from harm and engage orthodox court processes.

***Protective purpose – Lim exception***

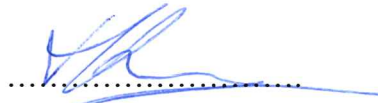
11. Assuming that the power of the court to make a restriction order under the HRSO is correctly characterised as judicial, the “*Lim principle*” (*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 **JBA 3 Tab 19**) has no direct relevance. It concerns the separation of Commonwealth powers.

12. However, if the *Lim* principle is nevertheless considered relevant, it recognises that there are exceptions (unconfined by history) which allow involuntary detention under preventative detention orders the object of which is the protection of the community from harm (*Benbrika* at [28], [36] **JBA 8 Tab 43, 2581 -2582**). Orders under HRSO fall within such an exception. The Appellant's suggested test: that schemes for post sentence detention to protect the community can only be valid if "exceptional" (AR [13]) has no constitutional basis and is not supported by precedent. *Fardon* and *Benbrika* do not establish such a test.

Dated: 10 March 2022



Sarah K Kay SC  
Solicitor-General



Jenny Rudolf