IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M97 of 2016

BETWEEN:

Aaron Joe Thomas Graham
Plaintiff

and

Minister for Immigration and Border Protection
Defendant

PLAINTIFF'S ANNOTATED REPLY

Part I: Certification

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

Part II: Submissions

2. The Minister's submissions convert the Applicant's arguments into absolute propositions.[1] These straw men are then toppled by reference to cases in which the courts have upheld statutory schemes erecting forensic difficulties, preferring one public interest over another, or modifying practice and procedure. It is concluded that the statutory scheme, which does these things, must also be valid. But such "domino" reasoning is no more available to the Minister than it is to applicants.[2] Indeed, when French CJ remarked that 'Parliament is competent to qualify attributes of the judicial process in recognition of "public interest considerations such as the protection of sensitive information"',[3] his Honour's point was actually that there are "limits" upon such qualifications. These, as his Honour noted, are "informed by the common law" and require "application in the real world". The Minister does not attempt to apply these limits.[4]

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1 E.g. that "Ch III require[s] that a court must have access to" all relevant material: Minister's submission (**MS**), [8]; that supervisory jurisdiction is denied if "invoking judicial review is not made easy": MS, [22]; that "to accept the Applicant's argument would be to hold that Parliament is not constitutionally competent to strike that balance": MS, [29]; that judicial "balancing" is a "defining characteristic of a Ch III court": MS, [40]; or that s 75(v) requires courts "to have access to all of the information on which an administrative decision was based": MS, [57].

2 Cf. *Pompano*, 94 [137] (Hayne, Crennan, Kiefel and Bell JJ).

3 *Pompano*, 72 [68], cited at MS, [20].

4 Likewise the interveners. South Australia does, however, recognise them at [23]-[24].

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3. ***Limits "informed by the common law"***. Instead of taking it as the relevant baseline, the Minister and NSW would set at nought the common law of public interest immunity. According to NSW: '[i]f the legislature is entitled to strike its own balance and define the procedure to be applied by a court in resolving any claim for immunity, there is no meaningful sense in which the common law relating to public interest immunity "provides the essential baseline"'.[5] This simply fails to appreciate the nature of the relationship, viz, that the defining characteristics of courts are *informed by* the common law.[6] There is no requirement, in this context, that each aspect of the common law so considered should itself *be* a defining characteristic, still less one that is absolute. Thus the Plaintiff argues not that public interest immunity is constitutionally entrenched,[7] but that, as an important common law principle that is displaced by the statutory scheme, regard should be had to it when considering the limits posed by certain defining characteristics.[8]

4. The Minister places particular emphasis on the fact that the statutory scheme in *Gypsy Jokers* did not provide for balancing against "any countervailing public interest in the administration of justice".[9] But that case does not suggest that public interest immunity procedure is constitutionally irrelevant, nor that Parliament is unconstrained in selecting a factum by which to circumvent it. To the contrary, the court in *Gypsy Jokers* carefully analysed the statutory scheme *against* the common law baseline.[10]

5. It would also be wrong simply to transpose the *result* in *Gypsy Jokers*. The case concerned decisions relating not to liberty,[11] so much as "a certain kind of property right, involving the erection and maintenance of heavy fortifications".[12] The statutory scheme aimed to facilitate judicial review in circumstances where public interest immunity claims might otherwise tend to

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5 Submissions of NSW, [16].
6 *Pompano*, 72 [68] (French CJ).
7 Plaintiff's submissions (**PS**), [23]; cf. MS, [30]; submissions of NSW, [10].
8 Namely those referred to at PS, [31].
9 MS, [35], [39].
10 At 551-52 [4] (Gleeson CJ), 556-57 [22]-[25] (Gummow, Hayne, Heydon and Kiefel JJ), 574-75, [90]-[94] (Kirby J), 595-96 [178]-[183] (Crennan J). Cf. MS, [18].
11 A point made by Crennan J, at 591 [163], by contrast to *Kable*.
12 *Gypsy Jokers*, 550 [3] (Gleeson CJ).

hinder it.[13] And confidentiality depended on a familiar evaluative criterion (prejudice to the operations of the Commissioner). In this context, the Appellant complained that the evaluation was vested in the Commissioner, thereby permitting the Executive to "dictate" to the Court.[14] The Commissioner, supported by the Commonwealth Attorney-General, argued that as a matter of statutory construction there was no such dictation because the exercise was actually vested in the Court.[15] The Court agreed, and so decided the case on the minor premise.[16] None of the judgements suggested that the alleged "dictation" was, in any event, constitutionally unproblematic.[17]

10 6. The Minister and NSW present an historical argument to this effect. But it is untenable to suggest that *Conway* "changed the common law position that had until then, including at the time of the Constitution's enactment, been regarded as settled",[18] or that the "restrictive historical position", exemplified by *Griffin* and *Duncan*, was that courts treated public interest immunity claims as "conclusive".[19] The former submission is belied in *Conway* itself, where Lord Morris surveyed the old authorities at length[20] and concluded that they were inconsistent, there being "much authority which would have warranted an entirely different statement of principle in *Duncan's* case".[21] The latter submission is ahistorical, for *Griffin* was disapproved in *Robinson* not merely
20 on a niggardly evidentiary point,[22] but also as to whether Ministerial certificates were binding.[23] Indeed, it is for this very reason that *Robinson*

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[13] So argued the Commissioner (see at 538) and the Commonwealth Attorney-General (see at 542). These arguments were accepted by Gleeson CJ, at 551 [5].

[14] *Gypsy Jokers*, 536.

[15] See the arguments at 538 (Commissioner), 540 (Commonwealth Attorney-General), discussed at 551 [6]-[7] (Gleeson CJ), 558 [31] (Gummow, Hayne, Heydon and Kiefel JJ), 593 [170].

[16] *Gypsy Jokers*, 551-52 [7] (Gleeson CJ), 558 [33] (Gummow, Hayne, Heydon and Kiefel JJ), 594 [174] (Crennan J).

[17] To the contrary, the judgements suggest that "dictation" would, at the very least, raise constitutional issues. See, in addition to the dissent of Kirby J, the plurality judgement at 559 [34] and [36] and that of Crennan J (with whom Gleeson CJ agreed) at 594 [174].

[18] MS, [45].

[19] MS, [40]-[41].

[20] At 961C-970G.

[21] At 970F. See also at 961C and 968A (Lord Morris), 978C (Lord Hodson), 980F, 983D (Lord Pearce) and 992F (Lord Upjohn). See also *Re Grosvenor Hotel, London (No 2)* [1965] Ch 1210 (***Grosvenor Hotel***), 1261E-F (Salmon LJ).

[22] Cf. MS, [40] (f.n. 48). This very argument was rejected by the Supreme Court of Victoria (Lowe, Smith and Gowans JJ) in *Bruce v Waldron* [1963] VR 3 (***Bruce***), 7 (see from line 41).

[23] The Minister's discussion of *Marconi* (MS, [42]-[43]) also ignores what was said in *Robinson*: see at 716. See also *Queensland Pine Co Ltd v Commonwealth* [1920] SR (Qld) 121, in which

and *Duncan* came to be viewed as high authorities in "direct conflict".[24] This conflict was well-recognised in the UK,[25] in Australia (where, *Robinson*, as a binding decision of the Privy Council, was followed over *Duncan*)[26] and elsewhere in the British Commonwealth (where *Robinson* was simply preferred).[27]

7. The historically presented argument should therefore be rejected. Public interest immunity is an important common law doctrine that was still evolving at Federation. That it settled where it did is unsurprising because, as Salmon LJ remarked in *Grosvenor Hotel*, it would be contrary to the "whole spirit" of the common law if "the judges had abdicated their power to control the intervention of the executive in the administration of justice".[28]

8. ***Limits requiring "application in the real world".*** The Plaintiff has not argued that the statutory scheme is invalid "merely because" it is possible to imagine other laws that go some way to achieving what Parliament intended.[29] He has merely observed that the High Court, in its Chapter III and *Kable* jurisprudence, has often had "regard to what other course was available to the legislature" in resolving "practical" issues of repugnancy or incompatibility.[30] Whilst this sort of analysis (being one aspect of what is sometimes called "proportionality")[31] is not essential to the Plaintiff's

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the Defence minister's claim of public interest immunity over documents was unobjectionable in form. The plaintiff relied on *Marconi*. The court ordered production of the documents and, upon inspecting them, overruled the Defence minister's claim.

[24] *Bruce*, 8 (line 30). See also the other authorities referred to at footnotes 25 to 27 below.

[25] See *Grosvenor Hotel*, 1245D (Lord Denning MR), 1248C (Harman LJ); *Conway*, 951A-B (Lord Reid), 970B (Lord Morris), 978G-79C (Lord Hodson), 982C-83E (Lord Pearce).

[26] See e.g. *Hubbard v Hubbard* [1948] VLR 480 (Gavan Duffy J); *Christie v Ford* (1957) 2 FLR 202, 208-09 (NTSC: Kriewaldt J); *Bruce*, 8-10; *Re Tunstall; Ex Parte Brown* [1966] 1 NSWR 770 (where, at 776-77, the NSW Court of Appeal noted the conflict between *Robinson* and *Duncan*, observed that the High Court's own jurisprudence was equivocal, noted that *Robinson* was binding and disapproved an earlier decision in which *Duncan* had been followed). As such, Gibbs ACJ's reference in *Sankey* to affidavits being "no longer conclusive", which occurred in his Honour's discussion of *Conway*, must be understood as a reference to the English position being brought into line with the rest of the common law world; cf. MS, [41].

[27] *R v Snider* [1953] 2 DLR 9; *Corbett v Social Security Commission* [1962] NZLR 878.

[28] At 1262C.

[29] Cf. MS, [47].

[30] PS, [29], citing inter alia the plurality in *Wainohu*.

[31] *Monis v R* (2013) 249 CLR 92, 213-14 [345]-[347] (Crennan, Kiefel and Bell JJ). See also Jeremy Kirk, "Constitutional Guarantees, Characterisation and the concept of Proportionality" (1997) 21 *Melbourne University Law Review* 1, 7-9.

argument, it may be a useful tool in considering "limits ... rooted in the text and structure of the *Constitution*" that are not absolute.[32]

9. The Minister nonetheless argues that any "form of proportionality analysis" is "impermissible" because McHugh J once remarked that "questions of proportionality do not arise in the Ch III context".[33] But his Honour's point was simply that "[a] law that confers judicial power on a person or body that is not authorised by or otherwise infringes Ch III cannot be saved by asserting that its operation is proportionate to an object that is compatible with Ch III".[34] That is a straightforward *Boilermaker's* point.[35] His Honour did not attempt to lay down any general rule, let alone constrain other (non-absolute) limitations derived from Chapter III.[36] Indeed, his Honour did not even regard the case as involving a limitation derived from Chapter III.[37]

10. As regards the protection afforded by s 75(v), issue has been joined as to whether (to use the Minister's language) the principle in *Bodrudazza* is limited to statutory schemes imposing a "hard-edged condition precedent" at the jurisdictional threshold.[38] There is no need to "reopen" *Totani*,[39] in which it was held, applying *Kirk*, that the Supreme Court of South Australia was wrong to find that a privative clause rendered certain findings "unreviewable".[40]

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[32] PS, [16], citing French CJ in *Pompano*.
[33] MS, [47], citing *Re Woolley* (2004) 225 CLR 1 (***Re Woolley***), 33 [78].
[34] *Re Woolley*, 34 [80].
[35] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; referred to by his Honour in *Re Woolley* at 21-22 [48]-[50].
[36] Neither did the plurality in *Magaming*, which decided the point on the minor premise by noting that the appellant had failed to explain when or how proportionality reasoning should could apply to constitutionalise common law principles of proportionality in sentencing: see at 397-98 [51]-[52] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). Cf. MS, [40].
[37] *Re Woolley*, 27 [63], citing Gaudron J in *Kruger v Commonwealth* (1997) 190 CLR 1, 111.
[38] Cf. MS, [52].
[39] Cf. MS, [23].
[40] See at 62 [128] (Gummow J), 77-79 [191]-[195] (Hayne J), 131 [345] (Heydon J). No judges purported to limit the principle in *Bodrudazza*, which was not even argued.