HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **NZYQ**
Plaintiff

and

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

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REPLY SUBMISSIONS OF THE PLAINTIFF

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PART I: CERTIFICATION

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

PART II: REPLY

2 **The facts:** Gleeson CJ considered that removal will be "incapable of fulfilment" in a situation where "removal is not possible in the circumstances which prevail at the time and which are likely to prevail in the foreseeable future".[1] That is how his Honour treated the factual situation in *Al-Kateb* (**PS [5]**), notwithstanding his observation that "[i]t cannot be said that it will never be reasonably practicable to remove" Mr Al-Kateb (cf **CS [8]**).[2] That highlights the insignificance of the Commonwealth's speculation that it might, in theory, be possible to remove the Plaintiff at some unspecified point in the future and that the Minister's discretion could, in theory, be exercised in the Plaintiff's favour: cf **CS [9]**.

3 The Commonwealth otherwise rejects the contention that the facts are "indistinguishable" from *Al-Kateb*, on the basis that there was no finding that Mr Al-Kateb was "a danger to the Australian community": **CS [7]**.[3] That difference is irrelevant because ss 189 and 196 of the Act, in their terms and practical effect, operate in relation to a person "regardless of personal circumstances, regardless of whether he or she is a danger to the community, and regardless of whether he or she might abscond".[4] That being so, this case does not concern the validity of an "appropriately tailored scheme for the protection of the community from the harm that particular forms of criminal activity may pose".[5]

4 ***Al-Kateb* and *AJL20*:** The Plaintiff accepts that he requires leave to reopen those propositions for which *Al-Kateb* is authority,[6] namely that: (i) ss 189 and 196 authorise the detention of a person even if there is no real likelihood or prospect of the person being removed in the reasonably foreseeable future; and (ii) in that operation, the provisions do not infringe Ch III. But, beyond those propositions, there is no *ratio decidendi* that "can be extracted from the *reasoning*" because "the reasoning of none of the majority Justices had the support of four of the seven Justices".[7] That follows from the different reasoning

1 *Al-Kateb* (2004) 219 CLR 562 at [1], see also at [13] (Gleeson CJ). The notion is the inverse of "capable of fulfilment", which may be differently expressed as "reasonably capable of being achieved": see **PS [34] n 98**.
2 *Al-Kateb* (2004) 219 CLR 562 at [18] (Gleeson CJ).
3 See also *Plaintiff M47/2012* (2012) 251 CLR 1 at [345] (Heydon J).
4 *Al-Kateb* (2004) 219 CLR 562 at [21] (Gleeson CJ). See also *Woolley* (2004) 225 CLR 1 at [30] (Gleeson CJ).
5 Cf *Benbrika* (2012) 272 CLR 68 at [32] (Kiefel CJ, Bell, Keane and Steward JJ). Nothing in the Plaintiff's submissions precludes the possibility that the Parliament could, consistently with Ch III, establish such a "protective" scheme: see **PS [49] nn 151, 154**; *Tajjour v NSW* (2014) 254 CLR 508 at [163] (Gageler J).
6 *Vanderstock v Victoria* [2023] HCA 30 at [10], [133] (Kiefel CJ, Gageler and Gleeson JJ), [432] (Gordon J), [653] (Edelman J), [782] (Steward J), [893] (Jagot J).
7 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at [86] (McHugh J) (emphasis in original), see also at [19] (Gleeson CJ), [136] (Gummow J), [211] (Hayne J); *Lange* (1997) 189 CLR 520 at 554-556 (the Court).

adopted by Callinan J in relation to both propositions: **PS [22.2], [51]**. The Commonwealth seeks to avoid that conclusion by emphasising Callinan J's statement that the text is "clear and unambiguous": **CS [15]**. But the Commonwealth overlooks his Honour's qualification that detention can continue "[s]o long as the purpose of detention has not been abandoned".[8] That entails a recognition that the Act may cease to authorise the detention of an "unlawful non-citizen" in some circumstances: cf **CS [23]**. In other words, although his Honour thought the text was clear and unambiguous, his Honour gave that text a different meaning to that of the other members of the majority.[9] His Honour then considered the validity of the law on that different basis.

5 Those matters must be kept in mind in considering *AJL20*. That case did not decide either the construction issue (**CS [28]-[29]**) or the constitutional issue (**CS [44]-[47]**). Instead, the case proceeded on the assumption that the two propositions for which *Al-Kateb* is authority were correct: **PS [39]**.[10] To the extent those propositions have been incorporated into the reasoning in *AJL20* on the basis of that assumption, it does not become another authority to be reopened.[11]

6 **Right to remain / detention:** The Commonwealth's submissions conflate two different propositions: (i) a non-citizen in Australia without a visa has no right to remain in Australia; and (ii) such a person has only a qualified right to personal liberty: **CS [35]**. At common law, and under the Constitution, the second proposition does not follow from the first. The vulnerability of non-citizens to deportation (when compared to citizens) does not deprive non-citizens of the protection of the common law or of the Constitution in so far as their liberty is concerned. Separating the two propositions answers the Commonwealth's submissions relying on the "basal features" of the scheme of the Act and the "binary classification of non-citizens as lawful or unlawful": **CS [20]-[23]**.[12]

7 "Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law'".[13] In this context, "everybody" means any person who is within the territory of Australia such that the common law applies. Thus, an "alien" in Australia — whether lawfully or unlawfully — obtains the benefits of the common law,

8 *Al-Kateb* (2004) 219 CLR 562 at [298], see also at [291], [295], [301].
9 That difference of opinion amongst the majority reinforces the point that other constructions of the text are "reasonably open": see further paragraph 10 below.
10 Understandably given the position of the respondent in *AJL20* (2021) 273 CLR 43: see at [106] (Edelman J), referring specifically to the construction issue: cf **CS [29]**.
11 See *Vanderstock* [2023] HCA 30 at [484] (Edelman J) and the cases there cited.
12 See further *AJL20* (2021) 273 CLR 43 at [116] (Edelman J).
13 *Lange* (1997) 189 CLR 520 at 564 (the Court).

including the benefit of being unable to be detained by a *lettre de cachet* or "other executive warrant authorizing arbitrary arrest or detention": **PS [30]**.[14] It is in that sense that an alien does have a common law "right" to "personal liberty" — or, put another way, a "freedom" or "immunity" from being detained by "mere administrative decision or action".[15]

8 Within that context, it is established that an officer of the Executive cannot take away that freedom without judicial mandate, except to the extent authorised by "valid statutory provision".[16] That limitation on Executive power is both a statement about the content of the common law and about "our system of government" under the Constitution.[17] Under that system, the Executive has an "inherent constitutional incapacity" to authorise a deprivation of liberty.[18] That incapacity can only be overcome by Parliament conferring statutory authority to detain on the Executive, which "must pass muster under Ch III".[19] It follows that the correct premise for considering both the construction and constitutional issues is that, absent statutory authority or judicial mandate, all persons in Australia have a freedom from being detained by the Executive: see **PS [50]**; **AHRC [33], [49]**.

9 **Constructional choice:** Aside from the question of leave to reopen, the central point in dispute on the construction issue appears to be whether a constructional choice arises: **CS [20], [34]**. To accept the Commonwealth's submission that there is no such choice, the Court must conclude that Gleeson CJ, Gummow J, Kirby J and Bell J each preferred a construction that was not "reasonably open". That is not a conclusion that should lightly be reached, particularly where the Commonwealth's argument is that the provisions authorise the detention of a person potentially for life, in circumstances where the provisions do not expressly say that: cf **PS [18]**. The legislative history does not compel that conclusion: see **AHRC [12]-[21]; HRLC [27]-[29]**; cf **CS [30]-[31]**.

10 Nor does the scheme of the Act, once it is recognised that the "right" to be present within the territory is distinct from a person's freedom from administrative detention. To the contrary, the text of the Act recognises the distinction between the concepts of "entering"

[14] *Re Bolton; Ex Parte Beane* (1987) 162 CLR 514 at 528 (Deane J); *Lim* (1992) 176 CLR 1 at 19 (Brennan, Deane and Dawson JJ); *Plaintiff M76* (2013) 251 CLR 322 at [139] (Crennan, Bell and Gageler JJ); *Plaintiff S4* (2014) 253 CLR 219 at [24] (the Court).

[15] *Beane* (1987) 162 CLR 514 at 528-529 (Deane J); *Lim* (1992) 176 CLR 1 at 28-29 (Brennan, Deane and Dawson JJ); *Garlett* (2022) 96 ALJR 888 at [113], [134] (Gageler J); Gordon (2012) 36 *MULR* 41 at 70; *Glencore International AG v Federal Commissioner of Taxation* (2019) 265 CLR 646 at [22] (the Court).

[16] *Lim* (1992) 176 CLR 1 at 19 (Brennan, Deane and Dawson JJ).

[17] See *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ); *Plaintiff M68* (2016) 257 CLR 42 at [97] (Bell J), [151]-[155] (Gageler J); *Garlett* at [129], [133], [144], [152] (Gageler J), [179] (Gordon J).

[18] *Plaintiff M68* (2016) 257 CLR 42 at [159], [162], [164] (Gageler J). See also *CPCF* (2015) 255 CLR 514 at [147]-[150] (Hayne and Bell JJ); *AJL20* (2021) 255 CLR 514 at [80] (Gordon and Gleeson JJ).

[19] *Plaintiff M68* (2016) 257 CLR 42 at [163] (Gageler J).

and "remaining" in Australia (on the one hand) and being subject to administrative detention (on the other). The former concepts concern the "right" of a person to be located within the territory of Australia.[20] Absent a visa, a person is an "unlawful non-citizen" and therefore does not have that "right". In that sense, an "unlawful non-citizen" is not "entitled to live in the Australian community": cf **CS [23]**.[21] But the provisions governing a person's status as an unlawful non-citizen and physical presence in Australian territory (see Divs 1-5 and 8, 9 of Pt 2) do not address a person's freedom from administrative detention. That is addressed by ss 189 and 196 (Div 7 of Pt 2), but in terms that are silent about the intended operation of the Act in relation to a person's freedom where removal has become "incapable of fulfilment": cf **CS [21]**. That is what gives rise to the constructional choice: **PS [7]-[8]**; **AHRC [27]**.

11 **Chapter III:** Aside from the question of leave to reopen, the central point of dispute on the constitutional issue appears to be the identification of the relevant "legitimate" non-punitive purpose of the detention. The Plaintiff identifies that purpose as being "removal from Australia" — the purpose of "facilitating" or "effectuating" or "providing for" a person's removal from Australia.[22] The Commonwealth identifies that purpose as: (i) "exclusion from entry into the Australian community" (by reference to *Lim*); and/or (ii) "segregation pending removal" (by reference to *AJL20*): **CS [46], [48]**.

12 The *first* of the Commonwealth's purposes is merely a recasting of the suggestion that segregation per se is a legitimate non-punitive purpose. That suggestion is addressed at **PS [49]**. The Commonwealth's reliance on the word "exclusion" in the *Lim* formulation of "exclude, admit, deport" does not meet that argument: **CS [46]**. Consistent with its long usage in domestic, comparative and international law, Brennan, Deane and Dawson JJ were evidently using the word "exclude" as the "complement" of the power to "expel" (ie, "deport").[23] The point their Honours were making was that, as an "incident of sovereignty over territory", a State may: prevent an alien from physically entering the

[20] Specifically, that part of the territory designed as the "migration zone": see ss 5 (definitions of "enter Australia", "leave Australia', "remain in Australia", "remove"), 4(2), (4), 6, 82(8). See further *Acts Interpretation Act 1901* (Cth), ss 2B (definition of "Australia"), 15B.

[21] Leaving aside the difficulties attending the concept of the "Australian community" in this context: see *Woolley* (2004) 225 CLR 1 at [135]-[151] (Gummow J).

[22] See, eg, *Lim* (1992) 176 CLR 1 at 30-31 (Brennan, Deane and Dawson JJ), 57-58 (Gaudron J); *Al-Kateb* (2004) 219 CLR 562 at [17] (Gleeson CJ), [121]-[122], [124], [130], [135] (Gummow J); *Plaintiff M76* (2013) 251 CLR 322 at [139] (Crennan, Bell and Gageler JJ); *Plaintiff S4* (2014) 253 CLR 219 at [26]-[27] (the Court); *Falzon* (2018) 262 CLR 333 at [24], [29], [39], [63] (Kiefel CJ, Bell, Keane and Edelman JJ); **HRLC [16] n 27**.

[23] *Lim* (1992) 176 CLR 1 at 26, 29-31.

Australian territory ("exclude");[24] decide whether to grant an alien permission to physically remain in the territory ("admit");[25] or if the alien has physically entered the territory, remove an alien from the territory ("deport").[26] The Commonwealth's approach collapses those distinctions and is not supported by *Al-Kateb*: Callinan J did not decide whether "preventing aliens from entering the general community" was a legitimate purpose.[27]

13 The *second* of the Commonwealth's suggested purposes must be viewed in that light. The majority in *AJL20* were summarising existing authority; they were not purporting to identify a new and previously unrecognised legitimate purpose. To that end, their Honours identified two distinct purposes: (i) detention for the purpose of "segregation pending receipt, investigation and determination of any visa application" ("admission"); and (ii) detention for the purpose of "removal" ("deportation").[28] Properly understood, that formulation of the removal purpose is no different from the Plaintiff's, being detention "to facilitate" removal of unlawful non-citizens.[29] The Commonwealth, mistakenly, seeks to add the consequence of that detention — physical segregation from the general population within the territory[30] — to its purpose.[31] However, even if their Honours were identifying a new and broader legitimate purpose of "segregation pending removal" (as the Commonwealth contends), that would not assist the Commonwealth. The notion that removal is "pending" still implies that removal is an outcome reasonably capable of being achieved: **PS [34]**; see also **AHRC [50]**. In the Plaintiff's circumstances, it is not: **PS [41]**. *AJL20* did not concern those circumstances, and thus does not preclude the Plaintiff's success on the constitutional issue.

Dated: 24 October 2023

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[24] See, eg, *CPCF* (2015) 255 CLR 514 at [149]-[150] (Hayne and Bell JJ); *Plaintiff M68* (2016) 257 CLR 42 at [382] (Gordon J). See also cases where persons have entered territorial waters, but have been prevented from disembarking: *Toy v Musgrove* (1888) 14 VLR 349 at 378 (Higginbottom CJ), 423, 425 (Holroyd J); *Ex parte Lo Pak* (1888) 9 LR (NSW) 221 at 237 (Darley CJ); *CPCF* (2015) 255 CLR 514 at [264], [267]-[268] (Kiefel J); *Ruddock v Vadarlis* (2001) 110 FCR 491 at [4], [7], [10], [16] (Black CJ), [188], [193] (French J); Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (1987) at 91.

[25] See, eg, *Plaintiff M76* (2013) 251 CLR 322 at [141] (Crennan, Bell and Gageler JJ).

[26] See, eg, *A-G (Canada) v Cain* [1906] AC 542 at 546-547; *Robtelmes v Brenan* (1906) 4 CLR 395 at 400-4 (Griffith CJ), 415 (Barton J), 420-422 (O'Connor J); *Koon Wing Lau* (1949) 80 CLR 533 at 555-6 (Latham CJ).

[27] *Al-Kateb* (2004) 219 CLR 562 at [289].

[28] If the words "segregation pending" also attached to "removal", the reference in *AJL20* at [25] to the "connection between the detention and segregation or removal" would not make grammatical sense.

[29] See *AJL20* (2021) 273 CLR 43 at [61], see also at [21], [50]; *WAIS* [2002] FCA 1625 at [56] (French J).

[30] See *Woolley* (2004) 225 CLR 1 at [139] (Gummow J); *Unions NSW (No 1)* (2013) 252 CLR 530 at [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[31] See *AJL20* (2021) 273 CLR 43 at [134] (Edelman J) and the cases there cited.