

## 1. Jurisdiction to challenge the Declaration

A Declaration of Suspicion ‘cannot be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction in any court’. Such ‘privative clauses’ are read so that they do not attempt to exclude the HCA’s constitutional jurisdiction under s 75(v) where mandamus, prohibition or an injunction are sought against an ‘officer of the Commonwealth’.<sup>1</sup> This expression has a ‘broad meaning’,<sup>2</sup> including both judicial and executive officers,<sup>3</sup> and would include a Military Police officer acting in their official capacity as a Commonwealth employee. Jack will need to seek mandamus, prohibition or an injunction as these are the remedies that are entrenched in s 75(v). In this case, he would probably seek mandamus (why?) with ancillary certiorari. 75(iii)?

### The effect of the privative clause

*Plaintiff S157/2002* establishes that to gain the protection a privative clause ‘purports’ to confer, a decision must be a bona fide attempt to exercise power, be related to the subject matter of the legislation, and be reasonably capable of reference to the power conferred.<sup>4</sup> In Jack’s case, there is no indication that these are not met. – But – that is not enough – S157.

If it operates, a privative clause does not actually exclude review. It reconciles the tension between criteria under which decisions are made and the attempt to exclude review, expanding the decision-maker’s powers rather than denying jurisdiction.<sup>5</sup> In *Plaintiff S157/2002*, ‘privative clause decisions’ were protected by a clause very similar to the Act s 23. Since decisions afflicted by jurisdictional error were void *ab initio*, they were not

---

<sup>1</sup> *Plaintiff S157/2002*.

<sup>2</sup> *Aala* (2000) 204 CLR 82, 141 (Hayne J).

<sup>3</sup> *Ex parte Whybrow* (1910).

<sup>4</sup> *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 615 (Dixon J).

<sup>5</sup> *Plaintiff S157/2002*.

protected 'decisions' 'under the Act'. Section 23 prevents effective review of a declaration, but one made in jurisdictional error is not legally a 'Declaration of Suspicion' as referred to in the Act, and thus not protected since no the legislation does not give void decisions any effect.<sup>6</sup> ✓

### **Is there a 'matter'?**

Chapter III confers jurisdiction with respect to 'matters', which require an 'immediate right, duty or liability to be established by the determination of the Court'.<sup>7</sup> Of itself, a Declaration of Suspicion has no effect on Jack's rights. **The challenge to the declaration clearly gives rise to a matter. It involves a question of validity and J would have sufficient interest.** Its validity is a hypothetical question, much in the same way as it was hypothetical for a court to advise on the validity of legislation in the absence of a controversy in *Re Judiciary*. While the issue of the Declaration will affect future controversies, the same could be said about the enactment of the *Navigation Act*.

The HCA has interpreted the 'matter' requirement broadly where, for example, a criminal law will not be enforced but the possibility of prosecution still exists.<sup>8</sup> In *Croome*, however, there was still the legal possibility of prosecution until the legislation's validity was decided. Here, the Declaration alone does nothing. In a sense, this is not particularly important. ✓ A Declaration of Suspicion is required to reverse the onus of proof in the hearing on the home detention order. Invalidating the declaration would invalidate the order, so the Declaration could be challenged in this forum (see Q4).

---

<sup>6</sup> As in *Commissioner of Taxation v Futuris Corp* (2008)

<sup>7</sup> *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 264 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

<sup>8</sup> *Croome v Tasmania* (1997).

## The grounds

The privative clause requires Jack to demonstrate jurisdictional error. ✓ Several grounds of review give rise to jurisdictional error. On the limited facts available, Jack's best argument is that the scheme contains no 'plain words of necessary intendment' as required to exclude a requirement of procedural fairness.<sup>9</sup> ✓ Thus, by not giving Jack an opportunity to 'put his case', the officer of the Military Police made their decision in jurisdictional error.<sup>10</sup>

## 2. Jurisdiction to challenge the warrant

*Section 75(iii)*: this gives the HCA jurisdiction where 'the Commonwealth, or a party being suing or being sued on behalf of the Commonwealth, is a party'. This includes 'officers and agencies of the Government sued... in their official or governmental capacity'.<sup>11</sup> However, if 'the Commonwealth' refers to the executive government, certainly federal judges<sup>12</sup> and possibly other officers of courts may not be 'the Commonwealth'. ✓

*Section 75(v)*: Military Registrars are 'officers of the Commonwealth' (see above), and so *s* 75(v) gives jurisdiction to seek mandamus, prohibition or injunction against the Registrar. ✓

*Section 76(i)*: This allows Parliament to confer jurisdiction to hear 'matters arising under the Constitution or involving its interpretation', and it has done so for the HCA.<sup>13</sup> Arguing that a law is constitutionally invalid is necessarily such a matter.<sup>14</sup> ✓ good

## Separation of Powers

---

<sup>9</sup> *Annetts v McCann* (1990) 170 CLR 596, 598.

<sup>10</sup> *Aala* (2000); *Bodruddaza* (2007).

<sup>11</sup> *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 367 (Dixon J).

<sup>12</sup> James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) 331.

<sup>13</sup> *Judiciary Act 1903* (Cth) s 30(a).

<sup>14</sup> Stellios, above n 12, 318.

Military Registrars are officers of the CMC. If the CMC is a Chapter III court, non-judicial powers cannot be conferred on it unless they are incidental to the exercise of judicial power.<sup>15</sup>

### **Is the CMC a Chapter III court?**

In *Lane v Morrison*, the Australian Military Court was unanimously held to be neither a military tribunal nor a Ch III court. It was not a tribunal because it fell outside the chain of command, thus exercising judicial rather than purely disciplinary powers or because it fell outside of an historical exception to Ch III. The missing qualities of a Ch III court were ‘the manner of appointment and tenure of its members’.<sup>16</sup> ✓

The CMC is not a tribunal, but it addresses these Ch III issues. As required by the *Constitution* s 72, CMC judges are tenured. There is nothing to suggest that their appointments are not also governed by s 72. The Act creates an inferior federal court, a power implied from ss 71, 77(ii). ✓

### **Has non-judicial power been conferred on the CMC?**

*Grollo* unanimously decided that issuing warrants does not fall within Commonwealth judicial power.<sup>17</sup> The leading judgment discussed search warrants as well as the telecommunications interception warrant at issue, finding that although they were historically issued by judges, they were administrative in nature. ✓ Every judge endorsed Mason and Deane JJ’s finding in *Hilton v Wells* that issuing warrants is not ancillary to judicial power. ✓

---

<sup>15</sup> *Boilermakers’ Case*.

<sup>16</sup> *Lane v Morrison* [2009] HCA 29, [32] (French CJ and Gummow J).

<sup>17</sup> *Grollo v Palmer* (1995) 184 CLR 348, 359-60 (Brennan CJ, Deane, Dawson and Toohey JJ), 375 (McHugh J), 386 (Gummow J).

Military Registrars are not federal court judges. Nonetheless, the power to issue a warrant may not be valid if in fact the Parliament has conferred the power on the CMC itself. In this respect *persona designata* cases are instructive, though the doctrine applies (so far) only to judges. To avoid the implication that they are conferred on a court, powers must be explicitly conferred on a judge in their personal capacity and accepted voluntarily.<sup>18</sup> ✓

The power to issue warrants is conferred indiscriminately on all Registrars by virtue of their position, which involves hearing a significant caseload. Power has been conferred not on Military Registrars individually as officers of the CMC. Conferring this non-judicial power on a Ch III court is unconstitutional. There is not much difference b/w this and Hilton. You might have considered the other *persona designata* in case it is conferred in personal capacity.

### 3. Jurisdiction to hear the claim against the military police

Common law claims are ordinarily heard in state jurisdiction, which federal courts cannot exercise.<sup>19</sup> However, as noted above, the Constitution s 75(iii) gives the HCA jurisdiction in matters where ‘the Commonwealth’ or its representatives, including the Military Police, is a party. This allows the claim against them to be heard in federal jurisdiction in the HCA, even though it arises from state law. ✓ s 80 JA?

#### **Jurisdiction to hear the claim against the NSW Police**

The HCA has no jurisdiction to hear the claim against the NSW Police. However, s 75(iii) confers jurisdictions with respect to entire ‘matters’. If the claim against the NSW Police is part of the same ‘matter’ as the case against the Military Police, it can be heard in accrued

---

<sup>18</sup> *Grollo v Palmer* (1995).

<sup>19</sup> *Re Wakim; Ex parte McNally* (‘Cross-vesting Case’).

jurisdiction. 'Matters' includes entire justiciable controversies giving rise to proceedings.<sup>20</sup> ✓

If claims proceed from the same 'substratum of facts', they are part of the same matter and therefore heard together in federal jurisdiction,<sup>21</sup> so long as the federal claim 'is a substantial ✓ aspect of [the] controversy'.<sup>22</sup> Claims arise from the same substratum of facts when it is necessary to one to resolve the other, or when they depend on 'common transactions and facts'.<sup>23</sup> Whether claims share a substratum of facts is ultimately 'a matter of practical judgment'.<sup>24</sup>

Exactly the same facts give rise to Jack's claims. They are against separate defendants, but in *Fencott* the majority held that the content of a matter 'is not ascertained merely by reference to the proceedings...',<sup>25</sup> and in the *Cross-vesting Case* it was said that a 'matter' may ✓ occasionally even proceed through more than one court, referring explicitly to the case of a third party claim when determining one claim will necessitate the determination of the ✓ other.<sup>26</sup> The Military and NSW Police acted together to gain entry to Jack's home; it will probably be impossible to determine what damage was which officers. Thus, a determination of one claim will substantially determine the other. Using the language of 'severability', it is impossible to separate the cases.<sup>27</sup> ✓ good

#### 4. Jurisdiction to challenge the home detention order.

As noted above, federal courts are not 'the Commonwealth' for the purposes of s 75(iii), but

---

<sup>20</sup> *Pirrie v McFarlane* (1925) (Isaacs J).

<sup>21</sup> *Philip Morris Incorporated v Adam P Brown Male Fashions Pty Ltd*.

<sup>22</sup> *Fencott v Muller* (1983) 152 CLR 570, 609 (Mason, Murphy, Brennan and Deane JJ).

<sup>23</sup> *Philip Morris Incorporated v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 512 (Mason J).

<sup>24</sup> *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ).

<sup>25</sup> *Ibid*.

<sup>26</sup> (1999) 198 CLR 511, 585 (Gummow and Hayne JJ, with Gleeson CJ and Gaudron JJ generally agreeing on jurisdictional issues).

<sup>27</sup> See e.g. *Carter v Egg & Egg Pulp Marketing Board* (1942); *Philip Morris v Adam P Brown* (1981).

their members are officers are ‘officer[s] of the Commonwealth’ for s 75(v). To attract ✓ jurisdiction, Jack will seek an injunction or prohibition to prevent enforcement of the order, and mandamus to compel its correct exercise. Whatever remedy he seeks, he will need to demonstrate invalidity, i.e. generally jurisdictional error, which occurs where a decision-maker acts under invalid provisions.<sup>28</sup> Ideally, he would want the court to issue *habeas corpus*, as in *Kisch*.<sup>29</sup> ✓

Challenging validity would also attract the Court’s jurisdiction to hear cases under the Constitution (see above).<sup>30</sup> ✓ That the Act s 40 is invalid could be argued in several ways.

While Jack’s detention does not arise from an ascertainment of criminal guilt, which would normally be required to deprive a ‘citizen’ of liberty,<sup>31</sup> some non-punitive restriction of liberty is permitted both as judicial and executive power.<sup>32</sup> Separation of powers arguments are stronger. ✓

### **Section 40 confers non-judicial power on the CMC**

Non-judicial power cannot be conferred on a Chapter III court unless it is incidental to the exercise of judicial power.<sup>33</sup> On its face, issuing a s 40 order for pre-trial detention is not ✓ judicial power as it creates liability to imprisonment rather than determining a pre-existing right. Pre-trial detention could be seen as necessary ‘to ensure that [the accused] is available

---

<sup>28</sup> *Aala* (2000).

<sup>29</sup> *R v Carter; Ex parte Kisch* (1934) 52 CLR 211. The power is in the *Judiciary Act 1903* (Cth) s 33.

<sup>30</sup> *Constitution* s 76(i), conferred by the *Judiciary Act 1903* (Cth) s 30(a).

<sup>31</sup> *Lim* (1992) (Brennan, Deane and Dawson JJ, Mason CJ agreeing).

<sup>32</sup> See e.g. *Lim* (1992), *Vasiljkovic* (2006), *Thomas v Mowbray* (2007).

<sup>33</sup> *Boilermakers’ Case*.

to be dealt with by the courts<sup>34</sup> and thus incidental to an exercise of judicial power, but s 40 allows the CMC to detain a person who has not been and may not be charged. ✓

In *Thomas* the Court regarded a power to make control orders as judicial although it created rights, noting that ‘matters of legal history... support a notion of protection of public peace by preventative measures imposed by court order, but falling short of detention in the custody of the State’.<sup>35</sup> ✓

Section 40 can be distinguished on two grounds. First, a home detention order is akin to ‘custody of the State’. It compels the subject to remain in one place at all times rather than imposing restrictions on how they may live an otherwise normal life, as does a control order. The only real difference is the venue. If Gummow and Crennan JJ’s distinction between ‘custody of the state’ and other restrictions is significant (no other judges referred to it), authorising protective/preventative house arrest is not judicial power. ✓

### **The test in issuing a detention order is insusceptible of judicial exercise**

The second difference is that in *Thomas* the criteria for issuing an order were directed toward preventing a ‘terrorist act’. Gleeson CJ stressed this protective rationale and the detailed legal definition of ‘terrorist acts’. The CMC, however, must be satisfied that its orders would also be ‘in the interests of maintaining military values and morale’. **Although there is a broader protective policy for which the Act was enacted.** This attempts to achieve a policy objective rather than the preventative/protective rationale that justified the ‘binding over’ orders and apprehended violence orders referred to in *Thomas*. ✓

---

<sup>34</sup> *Lim* (1992) 176 CLR 1, 28 (Brenna, Deane and Dawson JJ).

<sup>35</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 357 (Gummow and Crennan JJ). Gleeson CJ made a similar point without distinguishing between control orders and detention. Callinan and Heydon JJ agreed that the power was judicial.

The criterion that the CMC must be satisfied that a home detention order be ‘in the interests of maintaining military values and morale that the order be made’ may not be capable of judicial resolution, i.e. application of law to decided facts.<sup>36</sup> A wide discretion will not necessarily render a power insusceptible of judicial exercise. However, cases have tended to stress the notion that courts are ‘familiar’ with certain expressions<sup>37</sup> (e.g. ‘just and equitable’, ‘oppressive, unreasonable or unjust’, ‘reasonable’), which, despite their vague nature, are ‘not so indefinite as to be insusceptible of strictly judicial application’.<sup>38</sup> So – s 40(ii) would be ok by analogy to Thomas?

The first two matters of which the CMC must satisfy itself – that the accused is suspected of having been involved with an offence and that the making of the order is ‘reasonably necessary and reasonably appropriate and adapted for the purpose of protecting other ✓ members of the military’ – fall within this category. The first is a finding of fact and the second is a test familiar from other areas of constitutional law.

However, whether an order is ‘in the interests of maintaining military values and morale’ is not a test that has been judicially applied in the past. Courts have had no opportunity to become familiar with these considerations, as military discipline is an historical exception to the separation of powers principle, traditionally exercised by tribunals convened under s 51(vi). ✓

---

<sup>36</sup> See e.g. *Polyukhovic* (1991) 172 CLR 501, 703-4 (Gaudron J).

<sup>37</sup> *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151 (Fullagar J).

<sup>38</sup> *Amalgamated Engineering Union Case* (1960) 103 CLR 368, 383 (Kitto J, with Dixon CJ agreeing).

What is in the interests of maintaining ‘military values’ and morale involves the weighing up of potentially competing policy considerations. First, the court must decide what these undefined ‘military values’ are. Second, in deciding whether an order will further them and morale, they must weigh up hypothetical policy factors. One member of the military might be heartened by the detention of a suspected offender, but another might be afraid that they could be confined to their home without being charged with an offence. A discretion is not necessarily invalid because some weighing up of policy might be involved, but this factor invites little else. This discretion is not capable of judicial exercise. ✓

Even if the power to make home detention orders is held to be judicial, there are other arguments that Jack could make:

### **Due Process**

There is no usurpation of judicial power here as reversing the onus of proof ‘affects the manner in which a court approaches the finding of facts but is not open to constitutional objection provided it prescribes a reasonable approach to the assessment of the kind of ✓ evidence to which it relates’.<sup>39</sup> **This might be problematic** The better argument is that the process for making detention orders is incompatible with the ‘judicial process’.

‘The judicial process’ is understood to include certain protected characteristics. Chiefly, it ‘requires that the parties be given an opportunity to present their evidence and to challenge the evidence against them’,<sup>40</sup> a guarantee of natural justice. ✓

---

<sup>39</sup> (1998) 193 CLR 173, 189.

<sup>40</sup> *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

This argument was raised in *Thomas*. The AFP was required to disclose the details required for a subject to respond to the case for confirmation of their interim control order, but information relevant to national security was exempted. Thomas argued that this omission breached the guarantee of procedural fairness.

Though they did not decide it, the majority were unimpressed with the argument. In this case, however, there are important differences. The *Thomas* judges stated that the impugned section referred to a narrow definition of ‘national security’. The subject of the interim order was otherwise absolutely free to know the evidence against them and respond to it. ✓

Section 44 allowed Jack to challenge the order before the CMC. However, the issue of a Declaration of Suspicion and the application for a home detention order reversed the onus of proof. Jack was not permitted to know the contents of the Declaration of Suspicion or see supporting evidence, so it was impossible for him to prove that he has not been involved in an offence. In these circumstances, the right to be heard before the CMC is meaningless since Jack cannot confront the evidence against him and, because of this, the reversed onus of proof guarantees that he will not succeed. The process thus breaches the guarantee of procedural fairness. ✓ **very good analysis here**

## 5. **CMC jurisdiction to hear the offence**

The parliament can confer jurisdiction on inferior federal courts to hear matters under a law of the parliament.<sup>41</sup> Since the Act creates the offences, parliament can confer jurisdiction to hear them on a Ch III court (see above). ✓

---

<sup>41</sup> *Constitution* ss 76(ii), 77(i).

## **Must Jack be tried by jury?**

The *Constitution* s 80 requires ‘trial on indictment of any offence against any law of the Commonwealth’ to be by jury. An offence is under a Commonwealth law if it is ‘made under the legislative powers of the Commonwealth’;<sup>42</sup> this unproblematically includes offences under the CMC Act. ✓

It is Parliament that ‘determines whether any particular offence shall be tried on indictment or summarily’.<sup>43</sup> Despite dissent,<sup>44</sup> the majority view is that ‘trial on indictment’ has no independent content – there is no requirement that some offences *must* be tried on indictment.

✓

‘Less serious military offences’ are those not punishable by two or more years imprisonment, and unlike s 5, s 6 does not provide for their trial on indictment. This means there is no requirement that Jack’s be tried by jury. ✓

## **Can a Military Registrar conduct the trial?**

Military Registrars are not judges. Federal judges must be tenured, while they are appointed for five year terms.<sup>45</sup> In *Harris v Caladine* the HCA decided that non-judicial officers of federal courts could exercise some Commonwealth judicial power. Mason CJ and Deane J held that judicial power could be delegated if it was *not*:

---

<sup>42</sup> *Re Colina* (1999) 200 CLR 386, 397 (Gleeson CJ and Gummow J, Hayne J agreeing). McHugh J made a similar point at 401.

<sup>43</sup> *Kingswell v The Queen* (1985) 159 CLR 264, 277 (Gibbs CJ, Wilson and Dawson JJ).

<sup>44</sup> Beginning with Dixon and Evatt JJ in *Lowenstein’s Case* (1938) and followed in recent years by Murphy J in *Rankin* (1978), Deane J in *Kingswell* (1985) and Kirby J in *Re Colina* (1999).

<sup>45</sup> *Constitution* s 72.

- (a) ‘to an extent where it can no longer properly be said that, as a practical as well as a theoretical matter, the judges constitute the court’; or ✓
- (b) ‘inconsistent with the obligation of a court to act judicially and that the decisions of the officers of the court in the exercise of their delegated jurisdiction, powers and functions must be subject to review or appeal by a judge or judges of the court’.<sup>46</sup>

McHugh, Dawson and Gaudron JJ also stressed the requirement of supervision.

The effect of the Act ss 3, 6 is that Registrars hear all offences with a maximum penalty of less than two years’ imprisonment. This is likely to include the majority of offences tried – indeed, the reason for a system is to expedite more frequent hearings of minor offences. The ✓ effect is that the majority of the CMC’s work is done by Registrars rather than judges. For this reason, the court is no longer really constituted by judges.

There is no mechanism in the Act for judges to supervise or overturn decisions of Registrars. Registrars’ decisions are final determinations of rights as are judges’ decisions in other courts. Nor is there any provision to appeal a Magistrate’s decision to a judge or the full bench of the CMC as there is, e.g. in the *Family Law Act* (which *Harris* concerned). ✓

For this reason, the Act s 6 is invalid.

## 6. Can the NSW bail provisions apply?

---

<sup>46</sup> *Harris v Caladine* (1991) 172 CLR 84, 95 (Mason CJ and Deane J).

State laws cannot operate of their own force in federal jurisdiction.<sup>47</sup> For this reason, the *Judiciary Act* ss 68(1) s 79(1) here ‘picks up’ state and territory provisions, including those ‘for holding accused persons to bail’, and applies them as surrogate Commonwealth laws.

These sections cannot pick up state provisions that are insusceptible of exercise as part of exercise in federal jurisdiction, as this would violate the *Boilermakers*’ prohibition. In *Thomas v Mowbray*, however, bail was considered a judicial power based on historical grounds. ✓

Section 68(1) may pick up a law that ‘on its own terms... identifies the courts of the enacting states’,<sup>48</sup> so as not to ‘stultify’ the operation of federal jurisdiction.<sup>49</sup> Mason J identified this as an exception to the requirement that the section requires provisions to be picked up with their meaning unchanged.<sup>50</sup> Cases have not so far dealt with a provision which specifically authorises one named court to exercise a power, so – do you mean an Owen problem here? but this may be a ‘bridge too far’ as Parliaments may intend to confer a power very specifically on one court. ✓

Section 68(1) does not state that laws are picked up ‘except as otherwise provided by a law of the Commonwealth’, as s 79(1) does. However, it is read as though it did,<sup>51</sup> both because it picks up laws ‘so far as they are applicable’ and because otherwise two contradictory provisions would have to be reconciled. The test of this is whether ‘the operation of the

---

<sup>47</sup> *Bass v Permanent Trustee* (1999).

<sup>48</sup> *ASIC v Edensor Nominees* (2001) 204 CLR 559, 591 (Gleeson CJ, Gaudron and Gummow JJ).

<sup>49</sup> *John Robertson v Ferguson Transformers* (1973) 129 CLR 65, 88 (Gibbs J).

<sup>50</sup> *John Robertson v Ferguson Transformers* (1973) 129 CLR 65, 95 (Mason J).

<sup>51</sup> *Putland v The Queen* [2004] HCA 8, [41] (Gummow and Heydon JJ, Callinan J agreeing). See also [7] (Gleeson CJ), [80] (Kirby J).

Commonwealth law so reduces the ambit of the state law being picked up that they are irreconcilable'.<sup>52</sup>

In *Macleod v ASIC*, a WA provision allowing parties before a single judge to appeal to the full bench was irreconcilable with ASIC's enumerated powers as it would expand them.

Section 68(1) cannot pick up the NSW bail provision for a similar reason. The *CMC Act* s 42 'requires a member of the military to remain in a designated home' until they are charged, convicted or acquitted, with no provision for bail. It differs from *Putland*, where a rejected argument that two laws were irreconcilable rested on a negative implication in the Commonwealth Act. Here, the listed circumstances that end the detention are exhaustive, and a court does not have the power to release them for any other reason. ✓ Moreover, the Court itself does not release a subject, but rather an order ends when one of the circumstances occurs. ✓

Further, bail provisions apply to persons 'awaiting trial', but Jack has not yet been charged. Arguably his detention is different from detention following committal to trial, ✓ as it has a protective rationale (see above). The Registrar cannot apply the bail provision.

**A very impressive paper. Congratulations.**

**82**

---

<sup>52</sup> *Northern Territory of Australia v GPAO* (1999) 196 CLR 553, 588 (Gleeson CJ and Gummow J).