

# LEGISLATIVE PURPOSE, FACT-FINDING AND PREVENTATIVE DETENTION FOLLOWING

## *LIM-NZYQ*

Ashleigh Barnes

*The purpose of the law of preventative detention is two-fold: it aims to strike a balance between the protection of the community and individual liberty. To achieve this, a doctrinal framework that allows for the appropriate balancing of these dual objects is needed. In Australia, this balancing exercise is struck by Parliament and supervised by the judiciary. The judiciary requires a workable framework and set of standards against which to measure the constitutional validity of a preventative detention regime. This framework must be capable of being applied in a coherent and consistent manner. This essay argues that the problem with the Lim-NZYQ framework, as applied to the law of preventative detention in Australia, is that it rests on a fiction around constitutional facts. It should be clarified and reformed by reference to the cardinal principles of coherence and transparency in judicial reasoning.*

### I INTRODUCTION

In 1992, the High Court of Australia (the ‘Court’ or the ‘HCA’) formulated a broad constitutional immunity from detention by the state other than by order of a court following a judicial finding of criminal guilt (the ‘Lim principle’).<sup>1</sup> Detention absent adjudgment and punishment of criminal guilt by the judiciary was *exceptional*,<sup>2</sup> consisting of a narrow category

---

<sup>1</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, [28] (Brennan, Deane and Dawson JJ) (*‘Lim’*).

<sup>2</sup> *Ibid* [27].

of *protective* detention, such as pre-trial detention following arrest and involuntary detention in cases of mental illness or infectious disease.<sup>3</sup> The subsequent three decades have seen the gradual but certain expansion of such ‘exceptional’ cases through federal and state *preventative* detention regimes that have withstood the *Lim* immunity. In 2004, the Court upheld State legislation that authorised courts to preventatively detain a ‘prisoner’ if the court was satisfied that the person would constitute a serious danger to the community in the form of an ‘unacceptable risk that the prisoner will commit a *serious sexual offence*.’<sup>4</sup> In 2021, the Court upheld federal legislation that authorised courts to preventatively detain ‘terrorist offenders who pose an unacceptable risk of committing serious’ *terrorism-related offences* if released into the community.<sup>5</sup> In 2022, the Court upheld State legislation that authorised courts to preventatively detain ‘high risk offenders’ if the court is ‘satisfied... that it is necessary to make a restriction order ... to ensure adequate protection of the community against an unacceptable

---

<sup>3</sup> Ibid [28].

<sup>4</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (emphasis added) (*Fardon*). The validity of preventative detention legislation in the States and Territories is measured by compliance with the weaker *Kable* principle, not the *Lim* principle: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*). Examples of State preventative detention regimes are included in this overview of preventative detention in Australia because: i) they contribute to a fuller understanding of the law of preventative detention in Australia; ii) in certain *Kable* challenges to detention the Court has considered whether the State law would offend the *Lim* principle, thereby casting further light on the scope and application of *Lim* and iii) the two principles may converge, ‘for instance, where incompatibly with institutional integrity [the *Kable* principle] would also render a power ‘non-judicial’ [thereby breaching the *Boilermakers* principle, which forms the basis of the *Lim* principle]’: Rebecca Ananian-Walsh et al, *Blackshield and Williams Australian Constitutional Law and Theory* (The Federation Press, 8th ed, 2024) [16.11].

<sup>5</sup> *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 (*Benbrika (No 1)*).

risk that the offender will commit a *serious offence*.<sup>6</sup> The ‘serious offences’ in the Act were defined broadly to include personal property offences such as ‘*robbery*.’ These regimes involved the continuing detention of prisoners who had been tried in Australian courts and served their time.

In December 2023, the Commonwealth Government introduced a novel and more expansive preventative detention regime that applies to non-citizens.<sup>7</sup> This was in response to *NZYQ*, a landmark case that unanimously invalidated the indefinite executive detention of a certain class of non-citizens (those that had no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future) on the grounds that such detention violated the *Lim* principle.<sup>8</sup> The novel scheme authorises the preventative detention of non-citizens in the community (as opposed to persons currently in detention in Australia) for whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future; who were convicted of certain ‘violent or sexual offences’ (either overseas or in Australia); and who pose an ‘unacceptable risk’ of committing another such offence in the future.

---

<sup>6</sup> *Garlett v Western Australia* (2022) 404 ALR 182 (emphasis added) (*‘Garlett’*).

<sup>7</sup> *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) (‘2023 Amendments’).

<sup>8</sup> *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 997 ALJR 1005.

This essay critically analyses the application of *Lim-NZYQ* to future preventative detention challenges and takes stock of whether the law of preventative detention in Australia is fit for purpose. In Part II, this essay identifies novel doctrinal developments in *NZYQ*, namely, the Court's embrace of the factual underpinnings of several aspects of the *Lim-NZYQ* test. This includes the requirement that the legislative purpose of the law authorising detention 'must be *capable of being achieved in fact.*'<sup>9</sup> In Part III, this essay analyses whether the law as it currently stands is fit for purpose. The purpose of the law of preventative detention is two-fold: it aims to strike a balance between the protection of the community and individual liberty. To achieve this, a doctrinal framework that allows for appropriate balancing of these dual objects is needed. In Australia, this balancing exercise is struck by Parliament and supervised by the judiciary. It follows that the judiciary requires a workable framework and set of standards against which to measure the constitutional validity of a preventative detention regime. This framework must be capable of being applied in a coherent and consistent manner. This essay argues that the problem with the *Lim-NZYQ* framework, as applied to the law of preventative detention, is that it rests on a fiction around constitutional facts. It should be clarified and reformed by reference to the cardinal principles of coherence and transparency in judicial reasoning.

---

<sup>9</sup> Ibid [40] (my emphasis).

Part III explains the significance of the judicial embrace of the empirical dimensions of an assessment of validity in challenges to laws authorising preventative detention. First, it illustrates that the *Lim-NZYQ* test requires the Court to ‘proceed on the basis of certain factual claims or assumptions about the world, and these often concern complex and contested social, political or economic issues.’<sup>10</sup> Second, it illustrates *how* the Court has made factual assessments of this kind in other Chapter III jurisprudence. Inconsistent practices across members of the Court emerge, including i) non-recognition of the factual underpinnings of their findings; ii) intuitive assessments; and iii) the consideration of evidentiary material to establish the relevant constitutional facts.<sup>11</sup> It concludes that if the application of the *NZYQ-Lim* inquiry is to be empirically grounded, it is imperative that attention is given to the role of judicial fact-finding.<sup>12</sup> This essay responds to and addresses gaps in the limited literature in this field. It is the first consideration of constitutional fact-finding and the law of preventative detention.

## II WHAT DOES *NZYQ* MEAN FOR PREVENTATIVE DETENTION?

### A *The Lim principle*

The starting point for the law of preventative detention at the federal level in Australia is *Lim*. In *Lim*, Brennan, Deane and Dawson JJ articulated the constitutional limits concerning judicial

---

<sup>10</sup> Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2021) 1.

<sup>11</sup> These patterns are consistent with judicial fact-finding in other areas of constitutional law. See *ibid*.

<sup>12</sup> *Ibid* 1.

and administrative constraints on liberty. Their Honours derived from Chapter III a broad constitutional principle, binding the Commonwealth, that (subject to certain well-established exceptions) ‘the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.’<sup>13</sup> In *Lim*, in the course of determining the validity of a legislative scheme that provided for Executive immigration detention, the joint judgment articulated the following test: the impugned laws would be ‘valid laws if the detention which they require and authorise is limited to what is *reasonably capable of being seen as necessary*’ for the purposes of deportation or to enable an application for an entry permit to be made and considered.<sup>14</sup> In 2023, the Court in *NZYQ* unanimously endorsed the *Lim* principle and applied it to overturn 2004 precedent that had permitted indefinite executive immigration detention.<sup>15</sup>

#### B *The Lim-NZYQ principle?*

*NZYQ* made several contributions to the *Lim* principle. The focus of this essay is the clarification and refinement of the criterion of validity for laws authorising detention in Australia that occurs outside of the adjudgment and punishment of criminal guilt by the

---

<sup>13</sup> *Lim* (n 1). The *Boilermakers* principle – that federal laws confer only judicial powers on courts and that non-courts are limited to non-judicial powers – also applies: *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (*Boilermakers*).

<sup>14</sup> *Lim* (n 1) [32].

<sup>15</sup> *NZYQ* (n 9); *Al-Kateb v Godwin* (2004) 219 CLR 562 (*Al-Kateb*).

judiciary and the requirements this test imposes on legislative purpose. In *NZYQ*, the Court endorsed the *Lim* principle as the test for validity of laws authorising such detention in the following terms:

... [A] law enacted by the Commonwealth Parliament which authorises the detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the Constitution unless the law *is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose*.<sup>16</sup>

The full Court's adoption of a singular test for determining the validity of exceptions to the *Lim* principle – that the law is '*reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose*' – is a significant and important contribution. This is the first time the Court has unanimously agreed on this articulation of the test to laws authorising detention.<sup>17</sup>

---

<sup>16</sup> *NZYQ* (n 9) ('the *Lim-NZYQ* principle') (emphasis added) (citations omitted).

<sup>17</sup> Previously the formulation '*reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose*' had been relied on by Gummow J writing alone in *Kruger v the Commonwealth* (1997) 190 CLR 1, 162 ('*Kruger*'); by Callinan and Heydon JJ in *Fardon* [215]; by Gageler J writing alone in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 [374] ('*CPCF*'); by Gageler and Gordon JJ each writing separately in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 [184], [392] ('*Plaintiff M68/2015*'); by Gageler J dissenting in *Garlett* [143], by Gageler J dissenting in *Benbrika (no 1)* [95]; and by Edelman J writing separately in *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 [236] ('*Alexander*'). It was only on 1 November 2023, four weeks prior to the publication of the reasons in *NZYQ*, that all members of the Court agreed on this formulation to determine whether statute had conferred part of the judicial power of the Commonwealth on a Minister in the context of citizenship-stripping laws: *Jones v Commonwealth* (2023) 97 ALJR 936 [43], [78], [153] ('*Jones*'). However, in a case handed down on the same day and also concerning the constitutional validity of citizenship-stripping laws, only Edelman and Gordon JJ, each writing separately, invoked the test: *Benbrika v Minister for Home Affairs* (2023) 87 ALJR 899 [35], [63] ('*Benbrika (No 2)*'). Of these, the Court in *NZYQ* only cited *Benbrika (No 2)* and *Jones* as authority for the test. In addition, the Court cited Justice Gageler's dissent in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*

The Court also expanded on the operation of the *Lim* principle:

The purpose of the law in this context, as elsewhere in constitutional discourse, must be identified at an appropriate level of generality. So identified at the appropriate level of generality, the purpose is that which the law is *designed to achieve in fact*. For an identified legislative objective to amount to a legitimate and non-punitive purpose, the legislative objective *must be capable of being achieved in fact*. The purpose must also be both legitimate and non-punitive.<sup>18</sup>

Thus, the *Lim-NZYQ* formulation includes several requirements as to legislative purpose. First, the legislative purpose of an impugned law that authorises preventative detention must be the purpose which the law is *designed to achieve in fact*. This is not a novel refinement of the *Lim* principle. This same inquiry was undertaken in *Lim* itself and as noted by the Court is also consistent with other areas of constitutional discourse. This was, however, the first time the Court *expressly* identified the factual underpinnings of an application of the *Lim* principle.

Second, the test imported the novel requirement that the legislative purpose ‘must be *capable of being achieved in fact*.’<sup>19</sup> Indeed, this is *the* doctrinal development that operated in *NZYQ* to

---

(2015) 256 CLR 569 (*NAAJA*) and the joint judgment in *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 (*Falzon*).

<sup>18</sup> *NZYQ* (n 8) [40] (emphasis added) (citations omitted).

<sup>19</sup> *Ibid* (emphasis added). No member of the Court considered whether the identified legislative purpose was *capable of being achieved in fact* in the cases identified by the Court as applications of the *Lim* principle: *Alexander* (n 16), *Benbrika (No 2)* (n 17) or *Jones* (n 17). Nor was it identified in the other applications of the *Lim* principle identified in above n 17: *Benbrika (No 1)* (n 5); *Kruger* (n 7); *Fardon* (n 4). But see the judgments of Crennan and Gageler JJ in *CPCF* (n 17) and Gordon and Gageler JJ in *Plaintiff M68/2015* (n 17).

invalidate the detention of the plaintiff,<sup>20</sup> and in the order of 150 other non-citizens being held in indefinite executive immigration detention in Australia.

*C Lim-NZYQ and the States and Territories*

Before turning to assess the implications of the recognition of fact-finding requirements in *Lim-NZYQ*, this essay briefly considers whether the *Lim-NZYQ* principle applies to the States and Territories. It is well-established that there is an implied prohibition on State action that is ‘incompatible’ with a State court’s exercise of federal jurisdiction.<sup>21</sup> There is a substantive difference between the strict *Boilermakers* and *Lim* principles, which safeguard the separation of federal judicial power, and the more flexible *Kable* principle, which imposes weaker requirements on State courts.

In 2022, in *Garlett*, the Court split 4:3 on the application of the *Lim* principle to the States.<sup>22</sup> The majority, consisting of Kiefel CJ, Keane, Steward and Gleeson JJ, held that *Lim* has no application to the States.<sup>23</sup> In dissent, Gageler J held that the *Lim* principle applied to the States.<sup>24</sup> This was on the basis that ‘conferral on a court of a function that involves the creation

---

<sup>20</sup> *NZYQ* (n 8) [41] (citations omitted).

<sup>21</sup> *Kable* (n 4); *Fardon* (n 4).

<sup>22</sup> *Garlett* (n 6).

<sup>23</sup> *Ibid* 192-193 (Kiefel CJ, Keane and Steward JJ); 255-256 (Gleeson J).

<sup>24</sup> *Ibid* 212-213.

of a liability to detention in custody through an act of adjudication’ in ‘[o]ther than what is truly an exceptional case, and other than as an incident of the adjudgment and punishment of criminal guilt’ is ‘antithetical to the character of the court as an institution for the administration of justice’ *and* ‘antithetical to the very conception of justice which it is the responsibility of courts to administer.’<sup>25</sup> It thus would infringe both the *Lim* and *Boilermakers*’ principles *and* the *Kable* principle.

Justice Edelman, who joined the majority, explained that while *Lim* does not apply directly:

The reasoning in *Lim* about the nature and character of punishment, expressed in relation to the separation of powers, can inform the answer to this different question, namely: when is power that is of a nature that is generally exclusively judicial so unjust in its operation that it cannot even be exercised by the judiciary?<sup>26</sup>

In a similar vein, Gordon J reasoned that:

The *Lim* principle is not irrelevant to the assessment of whether State legislation is compatible with Ch III of the Constitution... the fact that the *Kable* principle has its roots in Ch III of the Constitution remains of fundamental importance.<sup>27</sup>

Thus, for a majority of the Court in *Garlett*, the refinements to *Lim* in *NZYQ* would not alter the narrower and distinct *Kable* inquiry undertaken at the State and Territory level.<sup>28</sup>

---

<sup>25</sup> Ibid.

<sup>26</sup> Ibid 244 (Edelman J).

<sup>27</sup> Ibid 226 (Gordon J).

<sup>28</sup> It is notable that there are two new members of the Court since *Garlett* – Jagot and Beech-Jones JJ.

### III NOVEL FACT-FINDING REQUIREMENTS?

Having identified the jurisprudential developments effected by *NZYQ*, this Part analyses whether the current law of preventative detention in Australia is fit for purpose. The law of preventative detention must strike a balance between its dual purposes: the protection of the community and individual liberty. Part II explained that this balancing exercise is struck by Parliament and supervised by the judiciary applying the *Lim-NZYQ* framework. It follows that for the *Lim-NZYQ* framework to be fit for purpose, it must provide a workable process and set of standards against which the judiciary may measure the constitutional validity of a preventative detention regime. Part II illustrated that *NZYQ* clarified several aspects of the operation of the *Lim* principle, thereby purportedly clarifying the operation of the law of preventative detention in Australia (at least at the Commonwealth level). However, this Part argues that it did so without resolving a key coal-face issue that will confront litigants and courts in the application of the revised test. This Part is concerned with the workability of the requirements that: i) laws authorising preventative detention must be ‘reasonably capable of being seen as *necessary* for a legitimate and non-punitive purpose’; and ii) that the legislative purpose ‘*must be capable of being achieved in fact*’. These novel requirements have not been subject to academic scrutiny, particularly in the context of preventative detention. It investigates what types of decisions courts are required to make applying the *Lim-NZYQ* principle; whether these are best characterised as questions of law or questions of fact; and the

types of fact that underpin these inquiries.<sup>29</sup> This relates in turn to what sources of evidence and burdens of proof will be required in respect of these inquiries in the context of the law of preventative detention.<sup>30</sup> This Part will illustrate the concerns identified as to workability with regards to the 2023 Amendments introduced in response to *NZYQ*. It argues that further guidance is needed as to how litigants should apply the *Lim-NZYQ* test before this jurisprudence could be considered fit for purpose.

This work is important. First, ‘a rational and accurate method of fact-finding ensures that decisions will, as far as possible, reflect the real world.’<sup>31</sup> Moreover, ‘understanding the role of facts ... can elucidate the process of legal reasoning itself.’<sup>32</sup> Relatedly, ‘identifying more precisely the use that is being made of evidentiary material will help to illuminate the extent to

---

<sup>29</sup> In doing so, it also illustrates that several of the requirements of the *Lim-NZYQ* test are comparable (or possibly even equivalent to) steps undertaken in other areas of Australian constitutional law that have embraced structured proportionality analysis. A full consideration of whether Chapter III jurisprudence *should* expressly adopt a proportionality analysis (either by adopting the two-step process proposed by Edelman J, or by more expressly recognising the ‘single characterisation’ inquiry as including several proportionality-like aspects of reasoning) is beyond the scope of this essay. For the purposes of this essay, one does not need to accept that the test in *Lim-NZYQ* is equivalent or similar to proportionality testing or should more explicitly adopt proportionality testing to accept my arguments that factual propositions are relevant and necessary to courts undertaking the *Lim-NZYQ* inquiry.

<sup>30</sup> Carter undertook a similar inquiry with respect to implied freedom of political communication jurisprudence in Australia: Carter (n 10).

<sup>31</sup> Carter (n 10) 6.

<sup>32</sup> *Ibid.*

which particular propositions are supported, or justified, by relevant empirical material.<sup>33</sup> In short, the nature and extent of judicial fact-finding, and the extent to which that process is rational, accurate and transparent, has important democratic and rule of law implications. This essay argues that the *Lim-NZYQ* framework should be clarified and reformed by reference to the cardinal principles of coherence and transparency in judicial reasoning. Ensuring that the judicial fact-finding required to apply *Lim-NZYQ* to the law of preventative detention in Australia is rational, accurate and transparent will render the framework fit for purpose.

The evaluative elements of the *Lim-NZYQ* framework persist, but the focus of this essay is on whether and how the Court will inform these value judgments by reference to underlying empirical claims about the world, and whether this practice is workable in the context of the law of preventative detention. It concludes that the law cannot be considered fit for purpose without clarity on the factual and evaluative components of the *Lim-NZYQ* test as applied to the law of preventative detention.

#### *A Introduction to facts in the constitutional setting*

Before analysing the place of facts in the *Lim-NZYQ* principle, it is necessary to understand the distinction between ‘ordinary’ or ‘adjudicative’ facts and other ‘non-adjudicative facts’, including ‘constitutional’ facts.<sup>34</sup> Historically, the constitutional law-fact nexus attracted

---

<sup>33</sup> Ibid 62.

<sup>34</sup> Ibid 44.

limited attention.<sup>35</sup> Recent scholarship has offered helpful insights into the field.<sup>36</sup> However, that attention has been largely confined to analysis of the constitutional law-fact nexus in section 92 case law (the guarantee of interstate trade jurisprudence), the defence power and the implied freedom of political communication case law. Now, *NZYQ* expressly invites similar engagement with facts in Chapter III jurisprudence.

By way of brief overview, ‘ordinary’ or ‘adjudicative’ facts are ‘the facts that concern the immediate parties to the dispute and relate to the litigants, their properties and their businesses: ‘who did what, where, when, how, and with what motive or intent.’<sup>37</sup> These facts are typically required to be supported by evidence.<sup>38</sup> ‘Non-adjudicative facts’ are general and do not concern the immediate parties. They concern the operation of a law in practice and its likely effects or

---

<sup>35</sup> See J D Holmes, 'Evidence in Constitutional Cases' (1970) 23 *Australian Law Journal* 235; P Brazil, 'The Ascertainment of Facts in Australian Constitutional Cases' (1970) 4 *Federal Law Review* 64; S Kenny, 'Constitutional Fact Ascertainment' (1990) 1 *Public Law Review* 134; A S Bell, 'Section 92, Factual Discrimination and the High Court' (1991) 20 *Federal Law Review* 240; J Lennan, 'How to Find Facts in Constitutional Cases' (2011) 30 *Civil Justice Quarterly* 304.

<sup>36</sup> See Rosalind Dixon, 'The Functional Constitution: Re-reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455; Gabrielle Appleby, 'Functionalism in constitutional interpretation: Factual and participatory challenges: Commentary on Dixon' (2015) 43(3) *Federal Law Review* 492; Brendan Lim, 'The Convergence of form and Function: Commentary on Dixon' (2015) 43(3) *Federal Law Review* 505; Gabrielle Appleby and Anne Carter, 'Parliaments, proportionality and facts' (2021) 43(3) *Sydney Law Review* 259; Carter (n 10).

<sup>37</sup> Carter (n 10) 45 citing K C Davis, 'Judicial Notice' (1955) 55 *Columbia Law Review* 945, 952.

<sup>38</sup> *Ibid* 47.

consequences.<sup>39</sup> They may not be referable to external events. They are not always required to be supported by evidence and may not always be able to be verified to the same degree of certainty as adjudicative facts.<sup>40</sup>

The HCA has recognised ‘constitutional facts’, a category of ‘non-adjudicative’ facts, since at least the 1940s.<sup>41</sup> These are ‘the facts relevant to the constitutional validity of enactments.’<sup>42</sup> The High Court acknowledged that, ‘[h]ighly inconvenient as it might be’, questions of constitutional validity will ‘sometimes depend on facts, facts which somehow must be ascertained by the court responsible for deciding the validity of the law.’<sup>43</sup>

However, in 1990, Susan Kenny, now a judge of the Federal Court of Australia, observed that the Court had not developed a coherent body of practicable principles to control “‘constitutional fact” ascertainment.’<sup>44</sup> This meant Counsel ‘lacked practical judicial guidance

---

<sup>39</sup> Ibid 40.

<sup>40</sup> Ibid 45.

<sup>41</sup> See, eg, *Stenhouse v Coleman* (1944) 69 CLR 457, 469. See also *Thomas v Mowbray* (2007) 233 CLR 307, 511–22 [612]–[639] (Heydon J) (*‘Thomas’*).

<sup>42</sup> Kenny (n 35); Appleby (n 36) 495.

<sup>43</sup> *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 292 (Dixon CJ). See also *Thomas* (n 40) 512 [614], 518–19 [632] (Heydon J).

<sup>44</sup> Kenny (n 35) 149.

as to appropriate fact presentation.<sup>45</sup> In 2015, Gabrielle Appleby observed that this body of principles was still in need of development.<sup>46</sup> The embrace of constitutional fact-finding in Chapter III jurisprudence renews the need for this practical guidance.

B *A question of law and fact: whether the law is ‘reasonably capable of being seen as necessary to achieve a legitimate and non-punitive purpose’*  
For six members of the Court, the *Lim-NZYQ* test is broken down into two *conceptually distinct* questions: i) the identification of the legislative purpose as what legislation is designed to achieve in fact and ii) the question of whether the law is ‘reasonably capable of being seen as necessary to achieve a legitimate and non-punitive purpose.’<sup>47</sup> The identification of what legislative purpose is designed to achieve in fact is not a novel requirement. But maintaining this inquiry as a separate and anterior step has not consistently been the approach taken across the bench. The majority approach to the ‘reasonably capable of being seen as necessary to achieve a legitimate and non-punitive purpose’ inquiry as ‘a single question of characterisation (whether the power is properly characterised as punitive)’ can have the effect of conflating the empirical inquiry as to the identification of purpose with the evaluative inquiries as to purpose. In some cases, this can conceal the facts relied on by the Court to make evaluative assessments,

---

<sup>45</sup> Ibid 156.

<sup>46</sup> Appleby (n 36) 495.

<sup>47</sup> Cf Edelman J who expressly embraces proportionality analysis, see *NZYQ* (n 8) [51]-[54].

which in turn impacts the coherence of the framework and whether it can be considered fit for purpose.

In *Alexander*, for example, the majority concluded that the citizenship-stripping power conferred on the Minister by the impugned provision infringed the *Lim* principal having regard to two key considerations: ‘One concerned the nature and severity of the consequences of a purported exercise of the power. The other concerned the purpose of the power as identified in s 36A.’<sup>48</sup> The former is an empirical inquiry – it is based on implicit factual premises about the practical operation of a citizenship-stripping power. The members of the majority ‘equated cessation of citizenship with exile or banishment, which they noted had historically been regarded as punishment.’<sup>49</sup> While this empirical conclusion about the ‘nature and severity of the consequences’ of citizenship-stripping was described by the Court as one of ‘two principal considerations’ anterior to ‘the purpose of the power as identified’ in the impugned provision, it clearly shaped the conclusion that the purpose of the power was punitive. This example illustrates that the question as to whether a purpose is legitimate *and* non-punitive is a mixed question of fact *and* law.

---

<sup>48</sup> *Benbrika (No 2)* (n 17) [21] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

<sup>49</sup> *Ibid* [22].

The same issues will be relevant to a challenge to the 2023 Amendments. In raising ‘immediate concerns’, advocates have queried whether the 2023 Amendments can be ‘reasonably capable of being seen as necessary’ for the purpose of community safety.<sup>50</sup> One issue is the risk assessment that the judiciary is required to undertake. In making a ‘community safety order,’ a court must consider an expert report and, separately, the ‘treatment or rehabilitation programs’ engaged in by the person. However, the Human Rights Law Centre explains that:

Because of their visa status, non-citizens are routinely denied access to rehabilitation and treatment programs available to others in prison. Non-citizens are often denied parole and access to post-release treatment programs, on account of their visa status. Solely because of their visa status, non-citizens will be prevented from providing the forms of evidence that would weigh against the making of a ‘community safety order.’<sup>51</sup>

The likely operation of the Act will inform the Court’s mixed factual and evaluative assessment as to whether the preventative regime is ‘reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.’

If it is correct that certain Chapter III questions cannot be resolved by *fact* alone, it may be preferable that the Court more clearly separate out and explain where it is guided by *fact* and where it is making a legal *evaluation* (in part informed by fact). A starting point is to first separately identify the objective legislative purpose, before evaluating whether that purpose is

---

<sup>50</sup> ‘Explainer: Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023’, *Human Rights Law Centre* (Web Page, 12 December 2023) <<https://www.hrlc.org.au/reports-news-commentary/preventative-detention>>.

<sup>51</sup> *Ibid.*

legitimate and non-punitive. This would improve the coherence of the framework, rendering it fit for the purpose of judicial supervision of preventative detention schemes.

The range of sources of evidence the Court will look to in making such mixed empirical and evaluative determinations is also in need of clarification. The Court has previously had regard to historical facts and to its own understanding of the subject matter. In *Benbrika (No 2)*, for example, recourse to ‘historical considerations’ was tempered by the Court’s understanding of contemporary society.<sup>52</sup> In discussing the nature of judicial power, the plurality observed that:

There is no doubt that "the historical or traditional classification of a function is a significant factor to be taken into account in deciding whether there is an exercise of judicial power involved". The historical or traditional classification of a function, if any, can be relevant to, although not determinative of, the question of "how the particular function is now to be characterised having regard to the systemic values on which the framers can be taken to have drawn in isolating the judicial power of the Commonwealth and in vesting that power only in courts".<sup>53</sup>

This reasoning demonstrates that Chapter III is an area in which the Court is willing to have regard to its own knowledge or understanding of the subject matter. Carter has observed a similar preparedness to make factual assessments in this way in implied freedom of political communication jurisprudence, which often requires judicial assessment about how a given law

---

<sup>52</sup> *Benbrika (No 2)* (n 17) [44] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). The plurality was also assisted by ‘the paucity and inconstancy of the precedents for the legislative empowerment of executive deprivation of citizenship or nationality consequence upon a finding of criminal guilt by a court’ and the lack of ‘legislative precedents for a person’s citizenship or nationality being automatically terminated by operation of law upon the person engaging in conduct constituting an offence’: *ibid* [46]-[47]. This is consistent with the Court’s ‘routine’ consideration of “evidence” as to legislation in other jurisdictions in Australia, as well as in some cases internationally’: Dixon (n 36) 470.

<sup>53</sup> *Benbrika (No 2)* (n 17) [44].

affects political speech or the capacity to vote. In these cases, the Court has tended to make factual findings by reference to its own understanding of these topics (such as the nature of speech, the political landscape in Australia and the electoral system) as opposed to by consulting technical evidence. This sits in tension with the Court's identification of the facts that inform an assessment of s 92 and whether a measure is discriminatory and protectionist in its effect. In such cases, the Court has indicated more willingness to consult economic or technical evidence.<sup>54</sup>

This discrepancy could mean, as Carter suggests,<sup>55</sup> that the Court is more comfortable with its own knowledge or understanding of the area at hand. In *Benbrika (No 2)*, all members of the Court had a view on the significance of membership of the Australian polity and what that membership may consist of.

However, this may also expose the unique nature of the questions that Chapter III cases pose. Despite the practice of relying on members of the Court's own understanding in implied freedom of political communication jurisprudence, several sub-questions that the Court must answer would arguably benefit from social science evidence. One example is the inquiry into the extent to which a given law affects political speech 'as a whole.' Conversely, the question

---

<sup>54</sup> Carter (n 10) 142-143.

<sup>55</sup> *Ibid.*

as to whether citizenship-stripping or a particular preventative detention scheme is a punishment may not be concretely or conclusively answered by evidence. This was acknowledged expressly by Edelman J, who lamented the ‘fine line’ between:

(i) punitive laws, which have as one of their purposes sanctioning proscribed conduct by making it subject to harsh consequences, and (ii) laws which use certain conduct merely as a factum which informs a decision to impose harsh consequences for separate purposes concerning the public interest.<sup>56</sup>

Thus, the component factual and evaluative parts of an answer to such questions in the Chapter III may be too mixed or too fine-grained, to separate out. If this is the case, further clarity on the range of sources of evidence the Court will be willing to consult in making such determinations *and* the appropriate procedures for bringing such evidence in apex courts would improve the fit between the jurisprudence as it stands and its purpose.

*C A question of fact: the legislative purpose must be capable of being achieved in fact*  
Additional questions as to how the *Lim-NZYQ* test is to operate in practice also suggest the framework requires clarification before it can be considered capable of coherent application and fit for purpose. As above, the identification of legislative purpose is conceptually distinct from the assessment of whether the impugned law is capable of achieving that purpose. This latter inquiry, often referred to as the suitability inquiry in proportionality jurisprudence and

---

<sup>56</sup> *Alexander* (n 17) [241]. See also *Benbrika (No 2)* (n 17) [92]-[94].

literature, is also dependent on facts: '[i]t asks an empirical question regarding the ability of the means used by the limiting law to advance or realize the proper purpose.'<sup>57</sup>

Following *NZYQ*, the question that arises is whether the HCA in adopting the requirement that 'the legislative purpose must be *capable of being achieved in fact*' proposes to undertake an inquiry that is equivalent or different to the application of suitability testing in other areas of Australian constitutional law. In recognition of the problem of factual uncertainty, Barak suggests a 'middle-ground framing' of 'suitability' tests:

A test cannot demand complete certainty (or governments could never legislate), yet at the same time courts should not simply accept the government's statements of purpose at face value. ... [The suitability test] can be fulfilled on the basis of 'logic and common sense' ... at times the text of the law will be insufficient to make this evaluation and evidence will be needed.<sup>58</sup>

Carter considers the 'suitability' inquiry to be easily satisfied.<sup>59</sup> For Carter, the test is akin to 'ordinary tasks of statutory construction.'<sup>60</sup> This means 'a court may need further information about the policy objectives pursued by the law, the regulatory context in which it operates and the mechanics of how the law itself works.'<sup>61</sup> However, ordinarily courts are only satisfying

---

<sup>57</sup> Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge, Cambridge University Press, 2012) 307.

<sup>58</sup> Carter (n 10) 33 citing Barak (n 57) 310.

<sup>59</sup> Carter (n 10) 34.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.* 24.

themselves that ‘the law is *capable* of achieving that purpose, not whether it will actually achieve that purpose.’<sup>62</sup> Justice Edelman has observed that *the* suitability test is ‘almost always satisfied since the construct of legislative purpose is based upon a legislature that is assumed to act rationally’.<sup>63</sup>

However, in *NZYQ* the Court adds the phrase ‘*in fact*’ to the purportedly lower standard of ‘whether the law is capable of achieving that purpose.’ Following *NZYQ*, litigants might ask whether the addition of the phrase ‘*in fact*’ converts the *Lim-NZYQ* test into a standard that is different to that used in suitability testing elsewhere by the Court?

It is notable that in *NZYQ* the application of the requirement that the legislative purpose is capable of being achieved *in fact* was not undertaken as part of the exercise of statutory construction. Instead, it required the identification and assessment of ‘ordinary’ or ‘adjudicative’ facts (*not* ‘constitutional facts’). This means the Court considered the facts that concern the immediate parties to the dispute: ‘who did what, where, when, how, and with what

---

<sup>62</sup> Ibid 58.

<sup>63</sup> *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171 [472].

motive or intent.’<sup>64</sup> These are the sorts of facts that are typically required to be, and capable of being, supported by evidence to a greater degree of certainty than constitutional facts.<sup>65</sup>

At first blush, it is difficult to see how the requirement that the legislative purpose must be capable of being achieved in fact could be supported by adjudicative facts in the context of preventative detention schemes. If it is to be supported by adjudicative facts, the Court would be required to verify whether the detention of an individual plaintiff or class of plaintiffs would *in fact* protect communities. However, the legislative schemes that have been upheld as constitutional do not give judges this (impossible) task. Instead, the constitutionally valid preventative detention schemes have required courts to, for example, determine whether it is satisfied ‘to a high degree of probability, on the basis of admissible evidence,’ that if the offender is released, they ‘pose...an unacceptable risk’ of committing a certain offence.<sup>66</sup> And the 2023 Amendments involve asking a court to impose a three-year detention order or supervision order in respect of a person who has been convicted of certain violent or sexual offences (either in Australia or overseas) and who poses an ‘unacceptable risk’ of committing another such offence in the future.

---

<sup>64</sup> Carter (n 10) 47.

<sup>65</sup> Ibid.

<sup>66</sup> See, eg, *Criminal Code Act 1995* (Cth) s 105A.7(1)(b)-(c) upheld in *Fardon*.

If the requirement that the legislative purpose must be capable of being achieved in fact is to be supported by constitutional facts, under the current framing, the Court would be required to verify whether preventative detention schemes are *in fact* capable of operating to protect communities from crime. Yet there is a striking distinction between this purported requirement and the deference that has historically been shown by majorities of the Court toward legislative purpose and design choices in preventative detention cases. The preventative detention jurisprudence pre-*NZYQ* demonstrates a reticence to ‘second-guess’ Parliament’s legislative objectives. In the case of *Fardon*, the then Chief Justice Gleeson observed that ‘[m]any laws that are enacted by parliaments and administered by courts are the outcome of political controversy, and reflect controversial political opinions.’<sup>67</sup> His Honour continued:

[N]othing would be more likely to damage public confidence in the integrity and impartiality of courts than judicial refusal to implement the provisions of a statute upon the ground of an objection to legislative policy. If courts were to set out to defeat the intention of Parliament because of disagreement with the wisdom of the law, then the judiciary’s collective reputation for impartiality would quickly disappear.<sup>68</sup>

Likewise, Justice Edelman observed in *Benbrika (No 1)* that:

[T]he very integrity and impartiality of the courts ... would be seriously impaired if the judiciary could generally refuse to implement statutory provisions on the grounds of an objection to legislative policy.<sup>69</sup>

---

<sup>67</sup> *Fardon* (n 4) 592-592.

<sup>68</sup> *Ibid* 593. See also 601 (McHugh J).

<sup>69</sup> *Benbrika (No 1)* (n 5) [226].

It followed, for Edelman J, that Parliament was entitled to find that all the terrorist-related offences to which Division 105A applied were serious enough to necessitate preventative detention, without reviewing any evidence or probing the Parliament's justification for that conclusion.<sup>70</sup>

There is much to be said for permitting a lower standard at the suitability stage of the inquiry in the context of preventative detention. First, this approach would be consistent with the legalist conception of judicial power in Australia. Carter explains that the 'Court has long expressed the view that factual questions relating to social, political or economic matters are beyond the proper limits of its role.'<sup>71</sup> Second, this approach enables Parliament to act 'prophylactically' and in relation to 'inferred legislative imperatives', without the need for evidentiary support.<sup>72</sup> Third, and perhaps most importantly, adjudication in these fields often involves 'circumstances of radical uncertainty' and 'massively complex social facts.'<sup>73</sup> As already noted, in the context of preventative detention (as opposed to Executive immigration detention) these may not be questions that can be verified by fact. Fourth, even if the facts were

---

<sup>70</sup> Ibid 73 [237]. See also [46]-[47] (Kiefel CJ, Bell, Keane and Steward JJ).

<sup>71</sup> Carter (n 10) 115.

<sup>72</sup> *McCloy v New South Wales* (2015) 257 CLR 178, [233] (Nettle J).

<sup>73</sup> T Endicott, 'Proportionality and Incommensurability' in G Huscroft, BW Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York, Cambridge University Press, 2014) 336-337.

verifiable, issues of institutional competence (including the resourcing and expertise of courts, and their procedures) affect the capacity of courts to make such findings.<sup>74</sup>

These factors, and the earlier jurisprudence of the Court, suggest that it is more likely, and indeed preferable, that the *NZYQ-Lim* requirement that the legislative purpose is capable of being achieved in fact will be applied in the context of preventative detention as an ordinary suitability test. Instead of seeking predictive certainty, it will ask only if the law is *capable* of achieving the objective (*not* as a matter of ‘fact’). However, the requirement that the legislative purpose is capable of being achieved *in fact* will continue to apply in the context of Executive immigration detention.

This does not turn the requirement into one of total deference. An inquiry into whether a law providing for preventative detention with the object of protecting the community from certain criminal offences is capable of achieving that aim could still involve probing the justification process engaged in by the State.<sup>75</sup> The Court could consider how the legislature arrived at its findings: ‘the nature of the evidence before the legislature, and whether the legislature relied on consultations, investigations or studies.’<sup>76</sup>

---

<sup>74</sup> Carter (n 10) 47.

<sup>75</sup> Ibid 38, 164.

<sup>76</sup> Ibid 85. See further Appleby and Carter (n 36).

The precise nature of this requirement is relevant to the validity of the 2023 Amendments. Is the capacity of the 2023 Amendments to achieve their legislative objective to be assessed by reference to predictive certainty or some other standard, including one of justification? The orders in *NZYQ* were published on 8 November 2023. The reasons in *NZYQ* were published on 28 November. The 2023 Amendments were introduced to Parliament on 27 November 2023, the day *before* the reasons in *NZYQ* were published. This suggests inadequate time for consultation and scrutiny,<sup>77</sup> and indeed that the laws were drafted *without* insight into the Court's updated jurisprudence. Notwithstanding this, the 2023 Amendments were passed on 6 December. Clarity regarding the operation of this aspect of the *Lim-NZYQ* test is needed to render it workable and fit for purpose.

#### IV CONCLUSION

This essay has made several contributions. In Part II this essay offered doctrinal clarification by explaining the jurisprudential developments in *NZYQ* and the way they may translate from the law of Executive immigration detention to the law of preventative detention. It highlighted in particular, the express embrace of the factual underpinnings required to apply the *Lim-NZYQ* principle. In Part III, this essay inquired into the impact of these developments on the workability of the framework and whether it is fit for purpose. It considered if, how and why

---

<sup>77</sup> 'Extraordinary step of preventative detention requires further reflection', *Law Council of Australia* (Media Release, 7 December 2023) <<https://lawcouncil.au/media/media-releases/extraordinary-step-of-preventative-detention-requires-further-reflection>>.

facts matter in the law of preventative detention following *Lim-NZYQ*. It offered critical analysis into the nature and role of judicial fact-finding in Chapter III jurisprudence following *NZYQ*. Specifically, it demonstrated that there may be practical and conceptual difficulties in terms of the availability of relevant evidentiary material at different stages of the *Lim-NZYQ* inquiry and in different contexts, such as in the law of preventative detention as opposed to the law of executive immigration detention, and that this may in turn affect the level of satisfaction required.<sup>78</sup> It is thus queried whether the emphasis on facts by the Court in *NZYQ* will signal a renewed and deeper scrutiny of legislative purpose in Chapter III cases generally, and the suitability and necessity of the legislative measures taken in pursuit of that purpose in future preventative detention cases, or whether the inquiry will (at least in the context of preventative detention) be a relatively weak standard.<sup>79</sup> For either path, this essay emphasised the need for clarity before the jurisprudence can be considered fit for purpose.

It also remains to be seen whether this express emphasis on the factual underpinnings of these evaluative inquiries will result in consistent practices across members of the Court, an increased reliance on external evidentiary sources over intuitive assessments or any other procedural developments to assist constitutional fact-finding. Does the burden lie with the State

---

<sup>78</sup> This is consistent with the findings of other scholars in their analysis of factual inquiries in other areas of constitutional law. See Carter (n 10).

<sup>79</sup> In the context of the implied freedom jurisprudence, Carter observes that the adoption of similar tests has not been accompanied by more transparent or consistent reasoning about or reliance on facts: *ibid*.

party seeking to defend the impugned law? If so, what rules govern this process of fact-finding? Should social science play a role? It was beyond the scope of this essay to consider the refinement of existing procedural mechanisms, or indeed adoption of novel mechanisms, through which the Court may ascertain constitutional facts. Instead, it limited its investigation to ascertain the breadth of facts required for the Court to apply the *Lim-NZYQ* principle. It is hoped that this work prompts conversation as to how to develop a coherent approach to fact-finding, and whether and what procedural adjustments may be needed.

## BIBLIOGRAPHY

### A *Articles/Books*

Ananian-Walsh, Rebecca et al, *Blackshield and Williams Australian Constitutional Law and Theory* (The Federation Press, 8th ed, 2024)

Appleby, Gabrielle, 'Functionalism in constitutional interpretation: Factual and participatory challenges: Commentary on Dixon' (2015) 43(3) *Federal Law Review* 492

Appleby, Gabrielle and Anne Carter, 'Parliaments, proportionality and facts' (2021) 43(3) *Sydney Law Review* 259

Barak, A, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge, Cambridge University Press, 2012)

Bell, A S, 'Section 92, Factual Discrimination and the High Court' (1991) 20 *Federal Law Review* 240

Brazil, P, 'The Ascertainment of Facts in Australian Constitutional Cases' (1970) 4 *Federal Law Review* 64

Carter, Anne, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2021)

Davis, K C, 'Judicial Notice' (1955) 55 *Columbia Law Review* 945

Dixon, Rosalind, 'The Functional Constitution: Re-reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455

Endicott T, 'Proportionality and Incommensurability' in G Huscroft, BW Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification and Reasoning* (New York, Cambridge University Press, 2014)

Holmes, J D, 'Evidence in Constitutional Cases' (1970) 23 *Australian Law Journal* 235

Kenny, S, 'Constitutional Fact Ascertainment' (1990) 1 *Public Law Review* 134

Lennan, J, 'How to Find Facts in Constitutional Cases' (2011) 30 *Civil Justice Quarterly* 304

Lim, Brendan, 'The Convergence of form and Function: Commentary on Dixon' (2015) 43(3) *Federal Law Review* 505

## B Cases

*Alexander v Minister for Home Affairs* (2022) 276 CLR 336

*Al-Kateb v Godwin* (2004) 219 CLR 562

*Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899

*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1

*Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171

*Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280

*CPCF v Minister for Immigration and Border Protection* (2015) CLR 514

*Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333

*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575

*Garlett v Western Australia* (2022) 404 ALR 182

*Jones v Commonwealth* (2023) 97 ALJR 936

*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51

*Kruger v the Commonwealth* (1997) 190 CLR 1

*McCloy v New South Wales* (2015) 257 CLR 178

*Minister for Home Affairs v Benbrika* (2021) 272 CLR 68

*North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569

*NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 997 ALJR 1005

*Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 336

*R v Kirby; Ex parte Boilermarkers' Society of Australia* (1956) 94 CLR 254

*Stenhouse v Coleman* (1944) 69 CLR 457

*Thomas v Mowbray* (2007) 233 CLR 307

## C Legislation

*Criminal Code Act 1995 (Cth)*

*Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023 (Cth)*

## D Other

‘Explainer: Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023’, *Human Rights Law Centre* (Web Page, 12 December 2023) <<https://www.hrlc.org.au/reports-news-commentary/preventative-detention>>

‘Extraordinary step of preventative detention requires further reflection’, *Law Council of Australia* (Media Release, 7 December 2023) <<https://lawcouncil.au/media/media-releases/extraordinary-step-of-preventative-detention-requires-further-reflection>>