IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S352 OF 2012**

On appeal from the NSW Court of Appeal

BETWEEN: **STATE OF NSW**
Appellant

AND: **GREGORY WAYNE KABLE**
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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Date of this document:1 February 2013

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

PART III LEGISLATIVE PROVISIONS

3. The Commonwealth adopts the Appellant's statement of applicable legislative provisions.

PART IV ISSUES PRESENTED BY THE APPEAL

4. The issues are accurately stated by the Appellant. The Commonwealth intervenes to support the Appellant on issues (a) and (b). Accordingly, these submissions address the proper characterisation of the order of Levine J made in relation to Mr Kable on 23 February 1995 pursuant to the *Community Protection Act 1994* (NSW) (**CP Act**).

PART VI STATEMENT OF THE ARGUMENT

Summary statement of the correct legal analysis

5. The Supreme Court is a superior court of record. In any particular matter, the Court may derive its jurisdiction from various sources, including s 23 of the *Supreme Court Act 1970* (NSW) (**Supreme Court Act**), s 39 of the Judiciary Act and its inherent jurisdiction. In some proceedings, more than one source of jurisdiction may be engaged and during the course of the proceedings the nature of the jurisdiction may change.

6. In the particular matter the subject of the present proceedings, in asking the Supreme Court to make an order against the liberty of Mr Kable, the Director of Public Prosecutions (**DPP**) engaged the jurisdiction of the Court to adjudicate the dispute in reliance upon a power conferred by a duly passed Act of the NSW Parliament.

7. This was an invocation of the Court's jurisdiction to act as a court, and specifically as a superior court of record. The Court was being asked to apply the law to the facts as found, to hear both sides, and to reach a conclusion on whether the DPP had established an entitlement to the order as sought, and to embody its conclusion in an appropriate order.

8. Sections 22 and 23 of the Supreme Court Act (both alone and read with s 5 of the CP Act) gave the Court jurisdiction to hear the dispute as a court. At least once Mr Kable raised as a defence that the CP Act was invalid by reason of provisions of the Constitution, the Court was exercising federal jurisdiction.

9. Once the matter came within federal jurisdiction, the whole of the matter came within that federal jurisdiction. The matter could be described at that point as the disputed entitlement of the DPP to the order sought, the dispute extending to whether the Constitution, as the higher law (see covering cl 5 and s 106), rendered invalid the very Act on which the application depended.

10. The Court had the authority, and a duty, to decide the question of validity raised within the matter. Equally, if it formed the conclusion that the CP Act was valid, it had both the authority and duty to decide the further question of whether the conditions for the making of an order were satisfied.

11. Everything the Court did in its subsequent conduct of the matter – the conduct of the hearing in open court, receipt of evidence and submissions, delivery of reasons and the making of orders – was done pursuant to its duty to exercise its jurisdiction and hear and determine the matter, and in its capacity as a superior court of record.

12. The Court was entitled to determine the timing at which the various questions within the matter would be decided. While it could have ordered a separate hearing on the validity of the CP Act, it was not bound to do so. It was certainly entitled, consistently with its character as a superior court of record, to take the fairly conventional course and hear all issues together and then reserve and give a single judgment dealing so far as possible with all issues.

13. Had the Court reached the decision later shown to be the law – that the CP Act was invalid – it would have recorded this in a judgment and order dismissing the application. Instead, reaching a conclusion later shown to be wrong on the question of validity, the Court proceeded to deal with the question which then necessarily arose, whether the criteria for an order under the CP Act were satisfied; finding that they were, it proceeded to make the order.

14. Whichever way the reasoning and order turned out, the Court was acting in its capacity as a superior court of record and fulfilling its duty to exercise its duly invoked jurisdiction conferred on it by the laws of the Commonwealth and State Parliaments. The character of its order follows from the character of the exercise in which it was engaging. As the Court was acting throughout in a *judicial* capacity, so too was the order a *judicial* order. This is so whether the order was to grant or dismiss the application and whether the order later turned out to be right or wrong. The same can be said for the amenability of the order to appeal – to the Court of Appeal, or to this Court under s 73 of the Constitution.

15. The critical conclusion is that the Court was acting in the discharge of its duties as a superior court of record. This case focusses on one aspect which flows from that conclusion – that the order made in the capacity of a superior court of record is valid until set aside. But other, like consequences may also flow from the conclusion. The imputations against Mr Kable necessarily contained in the DPP's originating process and submissions, and in the Court's expression of reasons and orders (and subsequent legitimate republications of them), are subject to a defence of privilege because they were made or uttered in the course of a superior court sitting as a court.

The Court of Appeal's analysis

16. The analysis of Allsop P (with which three other members of the Court of Appeal agreed) turned critically on his Honour's reading of three High Court cases – *Love v Attorney-General (NSW)* (***Love***)[1], *Kable v Director of Public Prosecutions (NSW)* (***Kable***)[2] itself and *Re Macks; Ex Parte Saint* (***Re Macks***):[3]

16.1. His Honour posed a question at [9]: does the binding effect of an order of a superior court of record as valid until set aside necessarily depend on the order being an exercise of power that is judicial in character, or ancillary or incidental to the exercise of judicial power? His Honour answered that question at [18] in the affirmative, based on the reasoning in *Love*. It followed, according to his Honour, that once it is found that an act of the Court is administrative in character, rather than judicial or ancillary to judicial, then the act is of no effect in law unless the statute which purports to justify it is valid: also at [18].

16.2. His Honour read the reasons of the majority in this Court in *Kable* as conclusively determining on these facts the question just posed. That is, his Honour read the majority in *Kable*, in finding that the CP Act contravened the legislative powers of the NSW Parliament by reason of a restriction arising from Ch III of the Constitution, as necessarily further holding that the act of the trial judge in making the order under the CP Act was beyond anything which could properly be characterised as judicial or ancillary to judicial: at [3], [4] and [17].

16.3. His Honour then sought to explain the apparently contrary decision of this Court in *Re Macks* as one where the opposite conclusion could properly be reached about the outcome of the question posed in [16.1] above. His Honour considered that the Court in *Re Macks* was

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1 (1990) 169 CLR 307.

2 (1996) 189 CLR 51.

3 (2000) 204 CLR 158.

concerned to analyse the earlier exercise of power by the Federal Court which was held to be judicial in nature (specifically it concerned the making of orders for the winding up of corporations and consequential matters); the defect in the exercise, namely that the Constitution did not permit a State Parliament to confer such a power on a federal court, did not convert the resulting order of the Federal Court into an executive or administrative act: [6]-[8].

17. In summary, the Commonwealth submits as follows in relation to these three propositions:

17.1. The proposition at [16.1] may be taken as following from *Love* and as correct. In addition, however, *Love* provides guidance as to *how* one draws the line between exercises of power by a court that are judicial or ancillary to judicial, and those which are purely administrative. In doing so, *Love* distinguishes between the nature of a power, viewed as a bare matter, and the character of the act involved in the exercise of the power. It is the latter which is relevant for present purposes. On a full *Love* analysis, every indication in the present case points to the character of the act being judicial.

17.2. The approach in [16.2] involves, with respect, a misreading of *Kable*. The Court was not there called on to decide and did not decide the question posed in [16.1]. It was dealing with a different and anterior matter: did Ch III impose a restriction on the legislative power of the NSW Parliament such that it could not confer on the Supreme Court the jurisdiction and powers which it purported to confer in the CP Act? The reading in [16.2], with respect, confuses the *reasons* which some members of the Court gave for answering that question in the affirmative – reasons which hinged on what it would mean for the character of the Supreme Court and its role under Ch III were it to be conferred with such a power – with the very different question posed above of the character of the steps engaged in by the trial judge in the determination of the whole matter (including the question whether the CP Act was valid).

17.3. The basis for distinguishing *Re Macks* is, with respect, not satisfactory. In each of *Re Macks* and the present case:

17.3.1. a superior court of record was asked to proceed, as a court, to exercise a jurisdiction conferred on it by a duly passed Act of Parliament and, if the conditions were established factually and legally under the statute, to proceed to the grant of relief;

17.3.2. the court was expressly or impliedly called upon to make a judgment whether the governing statute was valid and empowered the court to exercise the jurisdiction in question

and proceed to the consideration of the substantive question in accordance with the ordinary judicial process;

17.3.3. as a superior court of record, the court had power to conclusively determine its own jurisdiction (subject to appeal). The proposition that a superior court of record has power to determine its own jurisdiction has a well-established history;[4]

17.3.4. the court erred, it was later established, in the express or implied decision on jurisdiction because the Act of Parliament turned out to be invalid;

17.3.5. it was Ch III of the Constitution which rendered the Act invalid, albeit for different reasons;

17.3.6. the error as to jurisdiction infected what followed: the court was acting in excess of its lawful jurisdiction in proceeding to deal with the substantive issues and to make *any* order on the substantive application. What the court should have done, with perfect knowledge, was to rule on the jurisdictional question, in the negative, to make an appropriate order embodying that ruling and then regard its judicial task in the matter as complete. But in each case, the court lacked that perfect knowledge. The character of what it proceeded to do, after making the erroneous assumption as to its jurisdiction, is not altered by the precise reason why the Ch III argument was ultimately upheld.

18. These three responses will now be developed.

The nature of power conferred and the capacity in which it is conferred

19. In *Love*,[5] this Court recognised that the characterisation of an instrument issued by a judge of the Supreme Court as a judicial order depends upon whether the instrument 'issues as a result of a determination made by the judge in his or her judicial capacity'.[6] If the act of issuing the instrument is judicial in nature, the instrument takes on the attributes of a judicial order. By contrast, if the act is administrative, its ambit is determined in light of the scope of the power conferred on the court by the statute.[7]

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4 See, for example, *Scott v Bennett* (1871) LR 5 HL 234 at 245 (Martin B).

5 (1990) 169 CLR 307.

6 (1990) 169 CLR 307 at 319. The instrument in question in *Love* was a warrant issued under s 16 of the *Listening Devices Act 1984* (NSW) (**Listening Devices Act**).

7 (1990) 169 CLR 307 at 318.

20. The question of whether a power conferred by statute on a court or a judge is conferred in a judicial capacity is one of construction.[8] Where a statute confers power on a court, there is ordinarily a strong presumption that the court as such is intended.[9] In determining whether the presumption is rebutted in any given case, the nature of the power to be exercised is 'one of the important factors' to consider.[10] However, the fact that a power is not judicial is not decisive of the question whether the act of exercising the power is judicial.[11]

21. Allsop P acknowledged this distinction as emanating from the Court's decision in *Love* (at [9]), but ultimately did not carry out the full analysis necessary to apply it to this case. This was because he read this Court's reasons in *Kable* as determinative of the issues before him: [17]; as to which, see the next section below. The reasons of Basten JA do not address the distinction between the nature of the power and the character in which it is exercised (see [149]-[153]).

22. If the characterisation of an act as judicial or administrative stood or fell with the nature of the power being exercised, the Court in *Love*, having determined that the power in question was not judicial, would have had no cause to analyse whether the act of issuing a warrant was a judicial act. That the Court proceeded to consider that question[12] indicates that even the exercise of a non-judicial power, which is conferred on a superior court in its capacity as a court, may result in a 'judicial order';[13] that is, an order of the court which is valid until set aside. That result is consistent with the authority and obligation of a superior court, acting in that capacity, to exercise the jurisdiction which is conferred on it by a duly passed Act of Parliament and which is engaged by a party moving the court for relief thereunder.

23. In eliding the distinctions upon which the Court's analysis in *Love* proceeded, and considering themselves otherwise constrained by the Court's reasons in *Kable*, the Court of Appeal erred in not examining fully the process involved in the court hearing and determining the application for an order under s 5 of the CP Act with a view to ascertaining whether the Supreme Court was acting in its judicial capacity, and whether the making of the order was a judicial act. This Court's conclusion in *Love* that the act of issuing a warrant under s 16 of the Listening Devices Act was essentially administrative in nature was attributable to the absence of features which were indicative of a

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8 *Hilton v Wells* (1985) 157 CLR 57 at 72 (Gibbs CJ, Wilson and Dawson JJ).

9 *Hilton v Wells* (1985) 157 CLR 57 at 72 (Gibbs CJ, Wilson and Dawson JJ).

10 *Hilton v Wells* (1985) 157 CLR 57 at 73 (Gibbs CJ, Wilson and Dawson JJ); *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 319.

11 *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 321.

12 *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 321.5–322.

13 *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 322.

judicial act 'in the same sense as in an adjudication to determine the rights of parties':[14]

23.1. The warrant was 'not an order inter partes from which a party whose conversations may be overheard has a right of appeal'.

23.2. The judge issuing the warrant 'makes no order and nothing that he or she does is enforced as an order of the court'.

23.3. If the warrant was granted, its effect depended entirely on the State Act.

23.4. It was also possible that, on its true construction, the statute did not impose an obligation on a judge to perform the function of issuing warrants, but gave him or her the option of consenting to do so or not.

24. The process leading to the making of an order under s 5 of the CP Act displayed a number of the features consistent with those which this Court identified in *Love* as being indications of the Court making a determination in its capacity as a court:

24.1. Proceedings for an order were to be commenced by summons in accordance with the rules of court: s 16(1).

24.2. The power to make a preventive detention order under s 5 of the CP Act was conferred on the Court, with the jurisdiction to be exercised by a single judge: ss 24, 26.

24.3. Proceedings under the CP Act were civil proceedings and, to the extent the Act did not provide for their conduct, were to be conducted 'in accordance with the law (including the rules of evidence) relating to civil proceedings': s 14.

24.4. Rules of Court could be made under the Supreme Court Act for regulating the practice and procedure of the Court in respect of proceedings under the CP Act: s 30(1).

24.5. Whilst the Court could hear and determine an application for a preventive detention order in the absence of the defendant, it had to be satisfied that the summons had been duly served on the defendant, or the summons had not been duly served but that all reasonable steps to do so had been taken: s 16(2).

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[14] (1990) 169 CLR 307 at 321-322; the quote was extracted by the Court from the judgment of Windeyer J in *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 at 39.

24.6. In any proceedings under the CP Act, the Court was bound by the rules of evidence (s 17(1)(a)), although the Court had to receive into evidence documents or reports of the kind referred to in s 17(1) that were tendered to it in proceedings under the Act: s 17(3).

24.7. The CP Act did not affect the right of any party to proceedings under the Act to appear, call witnesses and give evidence, cross-examine witnesses or make submissions to the Court on any matter connected with the proceedings: s 17(2).

24.8. By reason of [24.1]–[24.7], the State Parliament required the Court to proceed in the usual character of the Court resolving an inter partes dispute.

24.9. Further, in the course of carrying out that mandate and hearing that inter partes dispute, it was part of the function of the Court, qua court, to hear and determine any challenge to whether the CP Act itself was valid. As a constitutional point was raised, s 39 of the Judiciary Act operated to bring the matter within federal jurisdiction and required the Court to determine the challenge. (The precise form of that challenge, as made at first instance, did not rely on any proposition that the procedure in [24.1]-[24.8] did not in truth reflect the usual judicial process. The fact that such arguments concerning validity were later raised, and succeeded by majority in this Court – as to which see the next section – did not deprive the actions of Levine J of their judicial character in hearing and determining the points raised before him.)

24.10. Provided that the Court came to the conclusion that the CP Act was valid, it was the Court's task, qua court, to go on and apply the law stated in the Act to the facts to reach a conclusion on whether to make an order.

24.11. The Court could order that a specified person be detained only if it was satisfied, on reasonable grounds, that the person was more likely than not to commit a serious act of violence, and that it was appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody: s 5(1). And the Court could not make an order against a person unless it was satisfied that the DPP's case had been proved on the balance of probabilities: s 15.

24.12. If satisfied a case was made out for an order, the Court could make an order subject to such conditions as it determined in its discretion: s 9(1).

24.13. The order, if made, could be enforced as an order of the Court. Thus, the order constituted sufficient authority for the person against

whom it is made to be held in custody for the duration of an order: s 19.

24.14. Finally, the order had appeal rights attached, thus an appeal to the Court of Appeal was available from any determination of the Court to make or refuse to make a preventive detention order, which could be on a question of law, a question of fact or a question of mixed law and fact: s 25.

25. Notwithstanding the subsequent determination by the majority of this Court in *Kable* that the CP Act invalidly sought to confer on the Supreme Court a power which was incompatible with that Court being a repository of federal judicial power, the making of an order under s 5 constituted the final step in what was clearly intended to be a judicial process, with attendant rights of representation, participation and appeal. It constituted a judicial act which involved an inquiry and determination as to the Court's jurisdiction; it was the necessary means of embodying the Court's conclusions on jurisdiction and it constituted an order of the Court, as a superior court of record, which was valid until set aside.

This Court's decision in *Kable*

26. The issue before this Court in *Kable* was the validity of the CP Act. Mr Kable argued that the Act constituted an exercise of judicial power by the Parliament of NSW or, alternatively, that it invested in the Supreme Court a non-judicial power that was incompatible with Ch III of the Constitution.[15] The question of what implications might flow from a conclusion that the CP Act was invalid, in terms of the legal effect of Levine J's order, was not raised for the Court's consideration, and no member of the Court addressed it.

27. Evaluation of Mr Kable's argument in *Kable* entailed analysing the nature of the power that s 5(1) of the CP Act conferred on the Supreme Court. Of those in the majority:

27.1. Toohey J concluded that s 5 of the CP Act (which could not be severed from the rest of the Act) required the Supreme Court to exercise what, in light of the issues raised in the case, was the judicial power of the Commonwealth in a manner that was inconsistent with traditional judicial process. The function in question - ordering detention of a person by reference to what he or she might do - was non-judicial and further, incompatible with public confidence in the integrity of the judiciary as an institution.[16]

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15 (1996) 189 CLR 51 at 90 (the argument as summarised by Toohey J).

16 (1996) 189 CLR 51 at 96-98.

27.2. Gaudron J also characterised the power as being not 'properly characterised as a judicial function' and one which compromised the integrity of the Supreme Court. The power purportedly conferred on the Supreme Court by s 5(1) was so described, and thus incompatible with the exercise of the judicial power of the Commonwealth, because it required the making of an order depriving an individual of his liberty, not because he has breached any law but because an opinion was formed on the basis of material which did not necessarily constitute admissible evidence, that he was more likely than not to breach a law by committing a serious act of violence as defined.[17]

27.3. McHugh J described the CP Act as seeking to ensure, so far as legislation could do it, that the appellant would be imprisoned by the Supreme Court when his sentence expired, thus making the Court the instrument of a legislative plan, initiated by the executive government, to imprison Mr Kable by a process that was 'far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person'. The CP Act invested the Supreme Court with a jurisdiction that was 'purely executive in nature'.[18]

27.4. Gummow J described the CP Act as purporting to confer an authority that was 'non-judicial in nature'. His Honour then reached the conclusion of incompatibility on the basis that the CP Act required the Supreme Court 'to inflict punishment without any anterior finding of criminal guilt by application of the law to past events, being the facts as found'. It was this activity which his Honour considered to be repugnant to judicial process, making the Court apt to be seen as 'but an arm of the executive which implements the will of the legislature'.[19]

28. Although the majority were critical of the process in which the CP Act involved the Court, their Honours' examination of that process was not directed at, still less determinative of, the proper characterisation of Levine J's conduct of and determination of the proceedings before him and his resultant order. The Court was solely concerned with the nature of the power sought to be conferred on the Supreme Court and with the consequences for the Court system if such a law were valid; not with whether Levine J was acting in the capacity of the Supreme Court when he heard and determined the matter before him or with the character of his order made in the exercise of the power.

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17 (1996) 189 CLR 51 at 106-108.

18 (1996) 189 CLR 51 at 121-122, 124.

19 (1996) 189 CLR 51 at 132-134.

29. In this regard, Allsop P's description of the reasons of the majority in *Kable*, as relying upon the proposition that the Supreme Court was not acting, institutionally, as a superior court in making an order under s 5 of the CP Act, can only be an extrapolation from the reasons of the majority which were not directed to that issue. Whilst by no means determinative, the form of orders in *Kable* is, at the least, inconsistent with Allsop P's understanding of what the case decided. The setting aside of Levine J's order, and substituting an order that the application be dismissed with costs, supports the proposition that, notwithstanding the power that the CP Act conferred on the Supreme Court was invalid, the order was valid until set aside as a judicial act which was the product of a process conferred on the Court as a court, and involving a necessary determination as to its jurisdiction in that regard.

Re Macks is not relevantly distinguishable

30. *Re Macks* involved a challenge to the validity of State remedial legislation that sought to save winding up and consequential orders that the Federal Court had made under State legislation purporting to give it power to make such orders. In the earlier case of *Re Wakim; Ex parte McNally*, this Court held that State legislation of that nature was invalid under Ch III of the Constitution.[20]

31. The effect of the remedial legislation was to declare the rights and liabilities of those affected by an 'ineffective judgment' to be the same as if the ineffective judgment had been a valid judgment of the Supreme Court. The arguments in this Court required consideration of whether the orders of the federal courts under the State legislation were nullities.

32. In concluding that the Federal Court orders were binding and determinative unless and until they were set aside on appeal or pursuant to s 75 of the Constitution, a majority emphasised the character of the Federal Court as a superior court of record.[21] In that capacity it had the power to make a binding decision on whether it had jurisdiction in a matter (pursuant to s 5(2) of the *Federal Court of Australia Act 1976* (Cth) alone, or in combination with s 19 of the *Federal Court of Australia Act* and s 39B(1A)(c) of the Judiciary Act). Upon finding (albeit wrongly) that it had jurisdiction, the Court was obliged to exercise that jurisdiction and determine the rights and liabilities in issue.[22] It was 'not to the point to say that the particular subject matter of the controversy was not in fact a subject matter which fell within jurisdiction validly conferred on the Court'.[23]

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20 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

21 (2000) 204 CLR 158 at [22]-[23] (Gleeson CJ), [53], [57] (Gaudron J), [216] (Gummow J), [337], [340], [343] (Hayne and Callinan JJ).

22 (2000) 204 CLR 158 at [57] (Gaudron J).

23 (2000) 204 CLR 158 at [343] (Hayne and Callinan JJ).

33. Allsop P sought to distinguish the circumstances in *Re Macks* from those of the present case on the basis that the orders at issue in *Re Macks* were the product of the Federal Court 'exercising judicial power, in the general sense' (at [8]); the fact that the States could not validly confer on the Court the power it was purporting to exercise did not alter the character of the order as one of a superior court. On a proper characterisation the situation here is not relevantly different.

34. The duly passed CP Act created on its face a right in the DPP to apply to the Court for an order under s 5 of the Act in defined circumstances. The NSW Parliament conferred the power to determine whether to make such an order on the Supreme Court, to be exercised by a single judge. That power was, on its face, validly conferred on the Court in its capacity as a superior court of record, with the authority and duty to determine its jurisdiction. The DPP then commenced proceedings under the Act by filing a summons seeking an order under s 5 for the detention of Mr Kable. Provided his Honour was satisfied that the summons validly engaged the Court's jurisdiction – a step which was expressly addressed in the present case by reason of Mr Kable's constitutional challenge – Levine J had a duty to hear the DPP's application in accordance with the procedures set out in the CP Act, and determine whether he was satisfied on reasonable grounds as to the criteria in s 5 and whether to exercise the discretion to make the order.[24]

35. The conclusion of Allsop P, that in *Re Macks* the defect in the Federal Court's exercise of judicial power 'in the general sense' did not convert the resulting order into a mere executive or administrative act, applies equally to the order of Levine J. All of the steps which his Honour took in reaching the conclusion that an order under the CP Act should be made were taken in discharging a judicial function conferred on the Court as a superior court of record. The differing bases on which the legislation at issue in *Re Macks* and the CP Act were held to exceed State legislative power do not constitute a relevant distinction which leaves one order as a judicial act and demands retrospective re-characterisation of the later as an administrative act.

Wider considerations

36. The characterisation of Levine J's order for which the Commonwealth contends is consistent with the integrated system of courts established by the Constitution, with the High Court at its pinnacle.[25] The order made by his Honour constituted an order of the Supreme Court in a matter, and was on

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24 *Re Macks* (2000) 204 CLR 158 at [52]-[53] (Gaudron J).

25 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [110] (Gummow and Hayne JJ); *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531 at [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), [121] (Heydon J).

that basis appealable to the High Court under s 73 of the Constitution.[26] By contrast, the integrity of the judicial system which lay at the core of the reasons of the majority in *Kable* would be undermined if, notwithstanding the existence of orders of a superior court which are the product of a process vested in a court in its judicial capacity, those orders can subsequently be held never to have had any binding effect.

37. Indeed, on the Court of Appeal's view, it is difficult to see how this Court's role at the apex of the system, or its hearing of *Kable* itself, is to be justified or explained. If the act of making the 'order' and the 'order' itself are in truth administrative in character, how does the order fall within s 73? How can this Court correct erroneous findings about the requirements of Ch III that result from courts engaging in administrative acts but not a judicial order? How is it that the 'matter' in which Levine J was undoubtedly exercising federal jurisdiction produces an order, which if it goes one way (application dismissed) would be classified as properly judicial, yet the other way (application allowed) is classified as merely administrative?

38. Consequences of this nature tell against the correctness of the Court of Appeal's analysis. In circumstances where, in issuing the order, Levine J acted pursuant to powers which the Parliament vested in the Court in its judicial capacity, with the attendant necessity to determine the question of jurisdiction, it constituted a valid order of the Supreme Court until it was set aside.

39. These submissions are not at odds with the various observations in *Momcilovic v The Queen*.[27] That was a different case where the exercise of the judicial power of the Commonwealth could be brought to a conclusion with a set of appropriate orders leaving as a discrete matter the question whether a separate power or function should be exercised which is non-judicial in nature. If it is lawful for a State court to exercise that separate function or power, that will occur in State jurisdiction and not be appealable under s 73.[28] By contrast, in the present case, the order of Levine J, whichever way it went, was the necessary and indispensible conclusion to the determination made in a judicial capacity of the various questions raised. It was the necessary expression of the conclusion on inter alia the question of jurisdiction which the superior court of record was called on to decide. As such, it was a judicial order made in the exercise of federal jurisdiction and appealable under s 73.

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26 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 312 (Brennan J), referred to with approval in *Kable* at 142-143 (Gummow J), together with a passage in the majority judgment in *Mellifont* at 300.

27 (2011) 245 CLR 1.

28 There might be, or need to be, a separate capacity for a purely administrative order of a State Court to be reviewed by a Court of Appeal for jurisdictional error and for that appeal decision to produce an order appealable under s 73, but that is not the present case.

40. Further, the broader interests of justice include the entitlement of citizens to rely upon orders made by courts as courts – particularly superior courts of record – without having to conduct an inquiry into whether the legislation underpinning the orders is valid, or, if invalid, the precise ground of invalidity. Once a court pronounces against validity, things may be different. And this Court can speak finally, where its jurisdiction is properly engaged in a matter. But short of this, the citizen should be able to rely safely on the decision of a court – particularly a superior court of record which can conclusively determine the limits of its own jurisdiction.

41. This point was well made in *Revell v Blake*,[29] where some members of the Court, expressed concern about the consequences of finding the bankruptcy proceedings of an inferior court (acting, for the purposes of those proceedings, as a superior court) were a nullity. In making such a finding, Martin B held that 'the trustee and all the parties concerned would be liable to an action as trespassers, and the consequences would be such as to render it impossible to carry the Act into execution ... [I]t must follow that the parties proceeding in the bankruptcy are all trespassers. If that be so, no one would dare to proceed under the Act at all'.[30]

PART VII ESTIMATED HOURS

42. It is estimated that 45 minutes will be required for the presentation of the Commonwealth's oral argument.

Date of filing: 1 February 2013

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[29] (1873) LR 8 CP 533.

[30] At 541-542.