IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S352
No. ~~S178~~ of 2012

BETWEEN: **STATE OF NEW SOUTH WALES**
Appellant

AND: **GREGORY WAYNE KABLE**
Respondent

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# SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

## I. CERTIFICATION

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

## II. BASIS OF INTERVENTION

2. The Attorney-General for Queensland intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

## III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

20 ## IV. APPLICABLE LEGISLATION

4. The applicable legislation is identified in the submissions of the appellant.

## V. ARGUMENT

5. The Attorney-General for the State of Queensland intervenes in support of the appellant. In summary, the Attorney-General submits that:

   (a) the New South Wales Supreme Court is, and always has been, a superior court of record;

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(b) an order of a superior court of record is valid until set aside, regardless of whether the order was made pursuant to legislation that is later held to be unconstitutional;

(c) the order of Levine J for the detention of the respondent under the *Community Protection Act 1994* (NSW) ('the CP Act') was such an order; and

(d) accordingly, the appeal should be allowed.

***(a) Orders of a superior court***

6. In *Cameron v Cole*, Rich J described the effect of an order of a superior court of record as follows:[1]

> It is settled by the highest authority that the decision of a superior court, even if in excess of jurisdiction, is at worst voidable, and is valid unless and until it is set aside.

7. That principle applies even if a superior court exceeds its jurisdiction on constitutional grounds. In *DMW v CGW*, for example, the Family Court had ordered that a husband should have care and control of a child, KJW. The Family Court's jurisdiction was limited to the custody of children of a marriage. The High Court held that, so long as the order stood, the *Family Law Act 1975* (Cth) operated to deny New South Wales Supreme Court jurisdiction to determine that KJW was not the child of the marriage. As Mason, Murphy, Wilson, Brennan and Deane JJ explained:[2]

> The jurisdiction of the Family Court is limited, in relation to matters dealing with the custody of children, to children of a marriage. Nevertheless the grant of jurisdiction must carry with it the power to determine the existence or otherwise of facts upon which its jurisdiction depends. If the Court wrongly decides such a question then that decision will be subject to the prerogative writs or the decision will be subject to appeal. It cannot simply be ignored. So long as the order stands, the effect of the provisions of the *Family Law Act 1975* (Cth), as amended, conferring exclusive jurisdiction will deny the existence of jurisdiction in another Court to adjudicate on KJW's status or custody. The reason for this is that there is implicit in the order of the Family Court a finding that KJW is a child of the W marriage and a challenge to that finding would constitute a matrimonial cause within pars. (c) or (f) of the definition of that term in s. 4 of the Family Law Act. Under s. 8 such proceedings may be instituted only under that Act.

8. In *Re Macks; Ex parte Saint* ('*Re Macks*'),[3] moreover, this Court applied the principle to orders made by the Federal Court in the purported exercise of State jurisdiction. Although the conferral of such jurisdiction was prohibited by Chapter III of the Constitution,[4] the orders of the Federal Court in the exercise

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1 (1944) 68 CLR 571 at 590.
2 (1982) 151 CLR 491 at 507.
3 (2000) 204 CLR 158.
4 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

of that jurisdiction were not nullities. Chief Justice Gleeson put the matter in this way:[5]

> The powers given to the Parliament, and in particular, the power given by s 77 to define the jurisdiction of any federal court other than the High Court, extend to a power to confer the authority implicit in the legislative characterisation of the Federal Court as a superior court of record.
>
> It may be accepted, therefore,...that the order made by the Federal Court were not nullities, and that s 5(2) of the Federal Court Act meant that they were binding until set aside.

9. The other members of the Court reached similar conclusions about the binding nature of the Federal Court's orders.[6]

10. In terms of the principle outlined in paragraph 6, no distinction can be drawn between the effect of orders made by federal courts and the effect of orders made by State courts. This Court has made it clear that Chapter III of the Constitution does not permit of different grades or qualities of justice.[7] As that is so, the orders of a State Supreme Court made under unconstitutional legislation have the same effect as orders of the Federal Court made under unconstitutional legislation. They will therefore be binding until set aside.

***(b) Justice Levine's order was that of the Supreme Court***

11. The New South Wales Court of Appeal accepted that the Supreme Court was a superior court of record when Levine J made his order for the detention of the respondent.[8] It also accepted the principle that the orders of a superior court were valid until set aside.[9] The Court of Appeal, however, distinguished *Re Macks* on the basis that the orders made by the Federal Court in that case were made in the exercise of judicial power, 'in a general sense',[10] whereas the order for the detention of Mr Kable was not.[11] President Allsop, with whose reasons Campbell JA, Meagher JA and McClellan CJ at CL agreed, said:[12]

> The essential reasoning of the four justices [in *Kable*] for [the] conclusion of unconstitutionality included reliance upon the proposition that the Supreme Court was not exercising judicial power or authority and was not acting, institutionally, as a superior court but was acting, effectively, in an executive function (beyond that which is permissibly ancillary to the exercise of judicial power), as an instrument of the Executive.

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5 (2000) 204 CLR 158 at 177-178 [22]-[23].

6 (2000) 204 CLR 158 at 185 [5]-[53] (Gaudron J), 214-215 [149] (McHugh J), 235-237 [216]-[219], 239 [227] (Gummow J), 277-279 [37]-[344] (Hayne and Callinan JJ).

7 *Wainohu v New South Wales* (2011) 243 CLR 181 at 228-229 [105] (Gummow, Hayne, Crennan and Bell JJ). See also *Kable* (1996) 189 CLR 51 at 103 (Gaudron J), 115 (McHugh J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [101] (Gummow J).

8 See *Supreme Court Act 1970* (NSW), ss 22 and 23.

9 [2012] NSWCA 243 at [6] (Allsop P).

10 [2012] NSWCA 243 at [8] (Allsop P).

11 [2012] NSWCA 243 at [17] (Allsop P), [153] (Basten JA).

12 [2012] NSWCA 243 at [3].

12. Justice Basten's reasoning was to the same effect.[13]

13. Because the power conferred by the CP Act was non-judicial, the Court of Appeal stated that the validity of the order depended solely on the statute that authorised it.[14] Since the CP Act was invalid in its entirety, the Court of Appeal found that the order was a nullity.[15] It therefore could not justify the respondent's imprisonment.

14. It is respectfully submitted that the Court of Appeal was mistaken about the nature of Levine J's order.

15. First, the majority in *Kable* did not determine that the order was non-judicial. It is true, as Allsop P and Basten JA pointed out, that members of the majority in *Kable* described the function conferred on the Supreme Court by s 5 of the CP Act as 'the antithesis of the judicial process',[16] 'non-judicial in nature' and 'repugnant to the judicial process in a fundamental degree'.[17] But those observations need to be understood in context of the argument that was ultimately accepted. Sir Maurice Byers had submitted as follows:[18]

> Chapter III of the *Constitution* applied to State courts from 1 January 1901; they were impressed with the characteristics necessary for the possession and exercise of Commonwealth judicial power. No legislature, State or federal, might impose on them jurisdiction incompatible with the exercise of that judicial power. Nor could it control the manner of the exercise of judicial power whether conferred by the Commonwealth or States. Since Ch III envisages State courts as being capable of investiture with and exercise of the judicial power of the Commonwealth, it grants to them or prevents their deprivation of those characteristics required of recipients of that power. A State law which controlled the State court in the exercise of jurisdiction granted by the State is invalid if it is inconsistent with the court's possession of the constitutional characteristics.

16. Consistent with the argument's emphasis on 'constitutional characteristics', the majority found the CP Act to be invalid because, in essence, it compromised the Supreme Court's independence and impartiality.[19] The 'essential reasoning' of the majority did not turn on characterising the orders made under the CP Act as judicial or non-judicial. The majority did not directly address that issue; instead, they addressed the effect of the function upon the institutional integrity

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13 [2012] NSWCA 243 at [152]-[153].

14 President Allsop and Basten JA relied upon *Love v Attorney-General (NSW)* (1990) 169 CLR 307.

15 [2012] NSWCA 243 at [18]-[21], [57] (Allsop P), [154]-[160] (Basten JA).

16 (1996) 189 CLR 51 at 106 (Gaudron J).

17 (1996) 189 CLR 51 at 132 (Gummow J).

18 (1996) 189 CLR 51 at 54-55 (in argument).

19 See, for example, (1996) 189 CLR 51 at 121, 124 (McHugh J), 133-134 (Gummow J). See also *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ).

of the Supreme Court.[20] The Court of Appeal was therefore wrong to treat these observations as determinative of whether the order was always a nullity.

17. Secondly, the Court of Appeal's reasoning is difficult to reconcile with the acceptance in *Kable* that Levine J exercised federal jurisdiction when he made the order. There was no dispute in *Kable* that once the constitutional challenge was raised, Levine J exercised federal jurisdiction.[21] For Toohey J, that fact was critical to the invalidity of the CP Act. His Honour explained:[22]

> In the present case the Act requires the Supreme Court to exercise the judicial power of the Commonwealth in a manner which is inconsistent with traditional judicial process.

This statement is explicable only on the basis that the making of orders under the CP Act amounted to an exercise of judicial power.[23]

18. Justice McHugh[24] and Gummow J also referred to the exercise of the order being made in federal jurisdiction. The latter said:[25]

> The Supreme Court, both at first instance and on appeal, was exercising federal jurisdiction (pursuant to s 76(i) and s 77(ii) of the Constitution and s 39 of the *Judiciary Act 1903* (Cth) ("the Judiciary Act")) in a matter arising under or involving the interpretation of the Constitution. This followed from the nature of the defences presented by the present appellant to the application to the Supreme Court for his detention under the Act. There was no room for the exercise of a State jurisdiction which the Supreme Court otherwise would have had; the jurisdiction exercised by the Supreme Court was wholly federal.

19. The 'matter' in relation to which Levine J exercised federal jurisdiction was the entitlement of the DPP to the order under the CP Act. That was the subject of the proceeding in the Supreme Court.[26] Because the Supreme Court exercised federal jurisdiction in relation to that matter, it could only exercise judicial power and any incidental non-judicial power.[27] That suggests that Levine J's making of the order under the CP Act—the only relevant order that he made—was judicial.

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20 The Court of Appeal assumed that because the function of making orders under the CP Act was repugnant to the judicial process, any order made by Levine J was necessarily non-judicial. But this fails to appreciate that a State law can undermine the institutional integrity of a State court whether or not it confers a non-judicial function on the court and whether or not it involves an adjudicative process: *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 [46]; *South Australia v Totani* (2010) 242 CLR 1 at [78].

21 (1996) 189 CLR 51 at 95 (Toohey J).

22 (1996) 189 CLR 51 at 98.

23 See also (1996) 189 CLR 51 at 99 (referring to the judicial power of the Commonwealth being involved).

24 (1996) 189 CLR 51 at 114: 'It is common ground...that in this very case Levine J made his order in the exercise of federal jurisdiction because he became seized of federal jurisdiction when the [Mr Kable] contended that the Act was in breach of the Constitution.'

25 (1996) 189 CLR 51 at 136 (citations omitted).

26 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264.

27 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152.

20. That conclusion is reinforced by considering the consequences of the alternative view. The High Court only has jurisdiction to hear and determine appeals from 'judgments, decrees, orders, and sentences' that are made in the exercise of judicial power.[28] In *Kable*, Gummow J pointed out if there had been no exercise of federal jurisdiction in relation the CP Act, there would have been no judicial power at the State level to found an appeal to the High Court under s 73 of the Constitution.[29] Acceptance of the views of the Court of Appeal would thus conflict with the basis upon which the High Court exercised its appellate jurisdiction.

21. Justice Basten's suggestion in the Court of Appeal that the order for detention was not incorporated into a single exercise of federal jurisdiction is, with respect, mistaken.[30] Justice Levine determined the constitutional challenge, and implicitly found that he had jurisdiction to make the detention order, as an essential step in resolving whether the DPP was entitled to the order under the CP Act. In other words, the making of the detention order was not a distinct non-judicial function that the Supreme Court undertook after it had exhausted the exercise of its federal jurisdiction.[31] On the contrary, the making of the order and the determination of the constitutional point were inseparable. There was only one matter.

22. Thirdly, disregarding constitutional invalidity, there is no basis for treating Levine J's order as non-judicial in nature. The CP Act conferred power to make preventative detention orders on the Supreme Court, not on a judge as *persona designata*.[32] Proceedings for an order were civil proceedings[33] and were to be commenced by summons in accordance with the rules of court.[34] The Supreme Court was bound by the rules of evidence (subject to exceptions for medical records and reports and certain other documents).[35] Proof was on the balance of probabilities.[36] A party had a right to appear, call witnesses and give evidence, cross-examine witnesses and make submissions on matters connected with the proceedings.[37] An appeal to the Court of Appeal lay from a decision to make, or refuse to make, a preventative detention order.[38] In addition, a preventative detention order was an order of the Court and could be enforced as such. These

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28 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ), 312 (Brennan J); *Kable* (1996) 189 CLR 51 at 142-143 (Gummow J). The word 'judgments' in s 73 refers to operative judicial acts, not the reasons for judgment: see *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 64 (Barwick CJ and Kitto J), 69 (McTiernan and Menzies JJ).

29 (1996) 189 CLR 51 at 142.

30 [2012] NSWCA 243 at [151]-[152] (Basten JA).

31 Compare *Momcilovic v The Queen* (2011) 245 CLR 1 at [101] (French CJ). See also *Felton v Mulligan* (1971) 124 CLR 367 at 373 (Barwick CJ).

32 CP Act, ss 5, 24; *Kable* (1996) 189 CLR 51 at 104 (Gaudron J).

33 CP Act, s 14.

34 CP Act, s 16(1).

35 CP Act, s 17(1) and (3).

36 CP Act, s 15.

37 CP Act, s 17(2).

38 CP Act, s 25.

features distinguish an order under the CP Act from instruments such as warrants for listening devices. Such instruments are not court orders, cannot be enforced as court orders, and confer no right of appeal.[39]

23. The fact that the Supreme Court had to be satisfied that a person would be more likely than not to commit a serious act of violence[40] before it could make a preventative detention order did not render any order non-judicial. Authority postdating *Kable* demonstrates this. In *Fardon v Attorney-General (Qld)*, the High Court dismissed a challenge to the validity of Queensland legislation that provided for the making of detention orders if the Supreme Court was satisfied that there was 'an unacceptable risk that the prisoner [would] commit a serious sexual offence'. Justice McHugh said:[41]

> The exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists. It does so, for example, in the cases of matrimonial causes, bankruptcy, probate and the winding up of companies. The powers exercised and orders made by the Court under this Act are of the same jurisprudential character as in those cases. The Court must first determine whether there is "an unacceptable risk that the prisoner will commit a serious sexual offence". That is a standard sufficiently precise to engage the exercise of State judicial power. Indeed, it would seem sufficiently precise to constitute a "matter" that could be conferred on or invested in a court exercising federal jurisdiction.

24. Justice Gummow[42] and Callinan and Heydon JJ[43] also regarded the legislation as bearing the hallmarks of the judicial process. *Fardon* is therefore inconsistent with any claim that the criteria under s 5(1) of the CP Act necessarily characterise that power as non-judicial.

25. The relief granted by the High Court in *Kable*,[44] moreover, suggested that the order was judicial. The Court did not quash Levine J's order or declare it void *ab initio*; instead, it set the order aside. The form of relief was consistent with the order having the validity of an order made by a superior court of record.

26. Finally, if the reasoning of the Court of Appeal were correct, the consequences would be significant. Parties aggrieved by an order of a superior court could, in many instances, treat it as a nullity and disregard it pending a final determination about its status on an appeal. Because State courts can be vested with non-judicial functions, moreover, it might be difficult to determine whether an order was or was not a judicial act. This would mean that officials who had to act on the faith of what appeared to be a valid order of a court would be uncertain of its status. Such consequences militate against the approach of the Court of Appeal.

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39 *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 322.
40 CP Act, s 5(1).
41 (2004) 223 CLR 575 at [34].
42 (2004) 223 CLR 575 at [115].
43 (2004) 223 CLR 575 at [219]-[232].
44 (1996) 189 CLR 51 at 144-145.

27. For these reasons, the Court of Appeal erred in finding that the order of Levine J was non-judicial in nature. That order, like other orders of the New South Wales Supreme Court, was valid until set aside.

28. The appeal should therefore be allowed.

## VI. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

29. The Attorney-General estimates that 20 minutes should be sufficient to present his oral argument.

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