IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S352 of 2012

ON APPEAL FROM THE NEW SOUTH WALES COURT OF APPEAL
SUPREME COURT OF NEW SOUTH WALES

BETWEEN:

STATE OF NEW SOUTH WALES

Appellant

and

GREGORY WAYNE KABLE

Respondent

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SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

PART II: BASIS OF INTERVENTION

2. The Attorney-General for Victoria intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the appellant.

20 **PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED**

3. Not applicable.

PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. It is not necessary to add to the statement of applicable statutory provisions referred to in the appellant's submissions.

PART V: ARGUMENT

5. In summary, the Attorney-General for Victoria submits:

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5.1 The Court of Appeal erred in finding that the principle that an order of a superior court of record is valid and binding until set aside did not apply to the order made by Levine J, pursuant to s 5 of the *Community Protection Act 1994* (NSW) (the **CP Act**), for the preventative detention of the respondent for a period of six months.

5.2 As a matter of principle, all orders of the Supreme Court of New South Wales, whether judicial or non-judicial, are presumed to be validly made. In the case of judicial orders, they have the further quality of being valid and binding when made, notwithstanding that they may subsequently be set aside. This quality carries with it substantive legal consequences, beyond that of a mere evidentiary presumption.

5.3 The order made by Levine J was a judicial order.

5.4 The Court of Appeal incorrectly regarded itself as bound to find that the order made by Levine J was a non-judicial order by reason of observations made by members of this Court in *Kable v Director of Public Prosecutions (NSW)*[1] (***Kable No 1***). When viewed in the context of the relevant enquiry in that case, and in light of subsequent decisions of this Court, those observations did not (and could not) mandate such a conclusion.

5.5 The decision in *Re Macks; Ex parte Saint*[2] shows that the order of Levine J was, by reason of the status of the Supreme Court as a superior court of record, valid when made and until set aside and was not properly regarded as a "nullity", even though the CP Act was invalid for constitutional reasons.

5.6 Given that the order made by Levine J was judicial in nature and valid when acted upon to detain the respondent, officers who acted to enforce the order have a defence of lawful authority to any claim in tort for false imprisonment notwithstanding that the order was later set aside.

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1 (1996) 189 CLR 51.

2 (2000) 204 CLR 158.

6. The Attorney-General for Victoria makes no submissions in relation to the notice of contention.

The principle that an order made by a superior court of record is valid until set aside

7. The Court of Appeal correctly acknowledged the principle that an order of a superior court of record, such as the Supreme Court of New South Wales, has effect until set aside.[3] Reference was made to the decision of this Court in *Cameron v Cole*,[4] in which it was said to be a "well-established rule" that, if in the course of a purported trial a fundamental irregularity has occurred that prevents it from being a trial at all, the decision of a superior court is not void, because it is "settled by the highest authority that the decision of a superior court, even if in excess of jurisdiction, is at the worst voidable, and is valid unless and until it is set aside".

8. The Court of Appeal went on to confine the principle by reference to the character of the act of making the order. Allsop P (with whom, on this issue, Campbell and Meagher JJA and McClellan CJ at CL agreed) said that "the conception of an order of a superior court carrying with it the presumptions of jurisdictional authority and validity *has within it the further assumption* of the judicial character of the act of making the order".[5] Whilst accepting that the concept of judicial power was not susceptible of comprehensive definition, his Honour held that *Love v Attorney-General (NSW)*[6] was authority for the proposition that an act of a court that was not of a judicial character, nor properly ancillary to the exercise of judicial power, falls to be analysed not by reference to the attributes of a judicial order but by reference to the authority conferred by the underlying Act.[7]

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3 *Kable v State of New South Wales* [2012] NSWCA 243 (***Kable No 2***) at [6] (Allsop P), [139]-[141] (Basten JA).

4 (1944) 68 CLR 571 at 590-591 (Rich J), see also 605-606 (Williams J).

5 *Kable No 2* at [18] (emphasis added).

6 (1990) 169 CLR 307.

7 *Kable No 2* at [18]. Basten JA described the principle as being *dependent* on the order being made in the exercise of judicial power: see at [141], [160]. His Honour at [139] relied on the statement in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 645 [151] that "[i]n general, judicial orders of superior courts of record are valid until they are set aside on appeal, even if they are made in excess of jurisdiction".

9. The Supreme Court of New South Wales is a superior court of record. That is confirmed by s 22 of the *Supreme Court Act 1970* (NSW). As such, the Supreme Court has authority conclusively to determine its own jurisdiction, subject to correction on appeal.[8] Moreover, the rule of law on which the Constitution is premised demands that it is the courts that determine legal controversies, including as to constitutional issues. In that context, the ability of a Supreme Court, as a superior court of record, to determine its own jurisdiction necessarily extends to determining the constitutional limits of that jurisdiction.

10. An order of the Supreme Court—either expressly or, most commonly, implicitly—carries with it an assertion of the Court's jurisdiction. The Court's authority to make such an assertion, and to do so conclusively, carries with it the consequence that the order is valid for all purposes unless and until later set aside. The setting aside of the order does not mean that it was never of any legal effect. To the contrary, so long as the order remained on foot, it stood as the conclusive assertion of jurisdiction of a superior court.

11. The principle that orders of a superior court are valid until the contrary is shown extends to non-judicial orders;[9] however, since by their nature such orders involve no conclusive determination of jurisdiction, the consequences of establishing invalidity are different. Unlike judicial orders, non-judicial orders might be found never to have had any valid operation. In that respect, they stand in the same position as administrative acts of non-judicial bodies.[10]

12. It has therefore been said that judicial orders of superior courts are never nullities.[11] Even if there may be exceptions to that proposition,[12] the present is not such a case.

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8 *Cameron v Cole* (1944) 68 CLR 571 at 598 (McTiernan J); *Ousley v The Queen* (1997) 192 CLR 69 at 107 (McHugh J), 129-130 (Gummow J); *DMW v CGW* (1982) 151 CLR 491 at 507 (Mason, Murphy, Wilson, Brennan and Deane JJ); *Ex parte Williams* (1934) 51 CLR 545 at 550 (Dixon J).

9 *Ousley v The Queen* (1997) 192 CLR 69 at 88-89, 108-109, 130-131; cf at 152.

10 See especially *Ousley v The Queen* (1997) 192 CLR 69 at 130-131 (Gummow J).

11 *Cameron v Cole* (1944) 68 CLR 571 at 590 (Rich J), 598 (McTiernan J), 605-606 (Williams J); *Ousley v The Queen* (1997) 192 CLR 69 at 99; *Sanders v Sanders* (1967) 116 CLR 366 at 376.

12 As suggested, without elaboration, in *Ex parte Williams* (1934) 51 CLR 545 at 550 and *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 645 [151].

This is apparent from the decision in *Re Macks; Ex parte Saint,*[13] referred to at paragraphs 35 to 36 below.

13. In *Ex parte Williams*, the Court of Criminal Appeal of New South Wales increased a prisoner's sentence on an appeal by the Commonwealth Attorney-General. The High Court was subsequently evenly divided as to whether the Attorney-General had had the right to bring the appeal.[14] The prisoner's subsequent application for habeas corpus in the High Court was refused on grounds including the effect of s 23(2)(a) of the *Judiciary Act 1903* (Cth) in the circumstances of the earlier court's equal division. However, Dixon J relied also on the status of the order of the Court of Criminal Appeal. His Honour said:[15]

> I am of the opinion that it is not possible to challenge upon habeas corpus proceedings the validity of such an order of the Supreme Court as that which increased the prisoner's sentence. That writ cannot be granted when the prisoner is held under an actual order or sentence, unless the Court making the order exceeded its jurisdiction so that the order is a nullity. But the Supreme Court is a superior Court of record having general jurisdiction. It may not be true that such a court has in all cases an authority to determine its own jurisdiction, which makes it impossible ever to treat its orders as nullities, but it is in this particular instance true that it had authority conclusively to determine the existence of its own jurisdiction, and so, whether it correctly determined it or not, to make an order which was a valid judicial order, and not a mere nullity operating to give no authority to hold the prisoner.[16]

14. The critical issue in this appeal is, therefore, not whether the order of Levine J was to be presumed valid unless set aside—it was, whether as a judicial order of a superior court or as a non-judicial administrative act. The question is whether the order was judicial in character such that it was valid and binding when made, notwithstanding that it was subsequently set aside.

Application of indicia for identifying a judicial order

15. In assessing whether orders and instruments of a court are judicial or non-judicial in nature, the indicia considered in the decision of *Love v Attorney-General (NSW)*[17]

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13 (2000) 204 CLR 158.

14 *Williams v The King [No. 2]* (1934) 50 CLR 551.

15 (1934) 51 CLR 545 at 549-550.

16 See also at 548 (Rich J) and paragraphs 35 to 36 below.

17 (1990) 169 CLR 307.

should be examined. The question in that case was whether a listening device warrant issued under a State Act was a judicial order.[18] In a unanimous judgment, the Court considered the character of the power to issue the warrant in light of the following attributes: that the power was conferred not on a judge but on the Supreme Court itself (tending towards a characterisation as judicial),[19] that notice of an application for a warrant was required to be served on the Attorney-General but not upon the person in relation to whom the warrant was sought (tending towards a characterisation as administrative),[20] that there was no adjudication to determine the rights of parties (administrative),[21] that the warrant was not an instrument *inter partes* (administrative),[22] that the issuing of the warrant gave the person in relation to whom it was issued no right of appeal (administrative),[23] and that there might be no obligation on a judge to perform the function of issuing warrants, the judge having the option of consenting to do so or not (administrative).[24]

16. Applying these indicia, it is clear that the process that led to the order made by Levine J had many of the characteristics that have been identified as supporting a characterisation of a court's order as judicial in nature.

16.1 The function conferred by the CP Act was conferred on the Supreme Court and not its judges *personae designatae*.[25]

16.2 The proceedings before Levine J were *inter partes*[26] and conducted in the manner of a trial. The proceedings ran for 13 days, during which a number of lay and expert witnesses were examined and cross-examined and legal submissions were made.[27] The rules of evidence applied (with, by

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18 (1990) 169 CLR 307 at 318-319.

19 (1990) 169 CLR 307 at 320.

20 (1990) 169 CLR 307 at 320-321.

21 (1990) 169 CLR 307 at 321.

22 (1990) 169 CLR 307 at 322.

23 (1990) 169 CLR 307 at 322.

24 (1990) 169 CLR 307 at 322.

25 CP Act, ss 5(1), 24; *Kable No 1* at 104 (Gaudron J).

26 CP Act, s 16; *Kable No 1* at 108 (Gaudron J), 119 (McHugh J).

27 *Director of Public Prosecutions v Kable* (Unreported, Levine J, 23 February 1995) at 1, 6-134, 144-159.

implication, some exceptions in respect of the reception of medical records and other documentary evidence).[28] The proceedings were characterised by the CP Act as "civil proceedings"[29] and findings of fact were to be made "on the balance of probabilities" (a familiar judicial standard).[30] The respondent was represented by counsel throughout the proceedings.[31]

16.3 The CP Act provided a broad right of appeal[32] (which was invoked by the respondent in the Court of Appeal and ultimately led to the appeal in this Court).

17. Accordingly, the order of Levine J was a "judicial act in the same sense as is an adjudication to determine the rights of parties".[33]

***The decision in* Kable No 1**

18. The Court of Appeal erred in finding that this Court had conclusively determined the character of the order made by Levine J in its decision in *Kable No 1*.[34] On a proper reading of *Kable No 1*, there was no such determination.

19. In *Kable No 1*, the current respondent advanced three principal bases for the alleged invalidity of the CP Act.[35]

19.1 First, he argued that the CP Act was not a "law" (primarily because of its application to a specific individual) and therefore fell outside the power of the New South Wales Parliament to make "laws" for the peace, welfare and good government of the State.

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28 CP Act, ss 14, 17; *Kable No 1* at 90 (Toohey J), 105 (Gaudron J).

29 CP Act, s 14; *Kable No 1* at 90 (Toohey J).

30 CP Act, s 15; *Kable No 1* at 90 (Toohey J), 130 (Gummow J).

31 As permitted by the CP Act, s 17(2)(a); see also *Kable No 1* at 119 (McHugh J).

32 CP Act, s 25; *Kable No 1* at 90 (Toohey J).

33 *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 at 39 (Windeyer J), quoted by the Court in *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 321-322.

34 See *Kable No 2* at [17] (Allsop P); see also [150], [153] (Basten JA).

35 *Kable No 1* at 53-55 *arguendo*; see also, e.g., the headings in the reasons of Brennan CJ at 64-66 and Dawson J at 71.

19.2 Second, he argued that the New South Wales Constitution established a strict separation of judicial power that was infringed by the CP Act because it involved an exercise of judicial power by the legislature or an interference with the judicial process.

19.3 Third, he argued that, as Ch III of the Constitution authorised the investing of the judicial power of the Commonwealth in State courts, those courts must be capable of accepting and exercising such federal jurisdiction and could not, therefore, be vested by a State law with other functions and powers incompatible with the exercise of federal judicial power.

10 20. The Court rejected the first two arguments and (by majority) accepted the third. The Court's reasons for rejecting the separation of powers argument did not require it to characterise the making of the order of Levine J as a judicial act or otherwise. That argument was not premised on any characterisation of the Supreme Court's functions under the CP Act, but on the allegation that the CP Act itself was in substance an exercise of judicial power by the legislature.[36]

21. Nor did the Court's acceptance of the third argument, which gave rise to the "*Kable* principle", require or depend on any characterisation of the order of Levine J as judicial or otherwise.[37] That principle does not, contrary to statements of the Court of Appeal, involve a "guarantee of a constitutional right".[38] It is a limitation on
20 legislative power which has as its exclusive concern the maintenance of the institutional integrity of the Supreme Courts and other State courts and the maintenance of their defining or essential characteristics.[39] The enquiry begins and

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36 *Kable No 1* at 64-65 (Brennan CJ), 77 (Dawson J).

37 *Kable No 1* at 96, where Toohey J said: "the issue as presented by the appellant was not one of judicial versus legislative or executive power but of incompatibility with the essence of judicial power"). Gaudron J said at 103: "The prohibition on State legislative power which derives from Ch III is not at all comparable with the limitation on the legislative power of the Commonwealth enunciated in *R v Kirby; Ex parte Boilermakers' Society of Australia*". At 121-122 McHugh J stated: "the Act and its procedures compromise the institutional impartiality of the Supreme Court. ... It is not merely that the [CP] Act involves the Supreme Court in the exercise of non-judicial functions". At 132 Gummow J said: "[Mr Kable] submits, the jurisdiction conferred by the [CP] Act upon the Supreme Court is of such an extraordinary nature as to be incompatible with the exercise by that institution of federal jurisdiction conferred pursuant to s 77(iii) of the Constitution".

38 *Kable No 2* at [60] and [61] (Allsop P).

39 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15] (Gleeson CJ); 617-618 [101]-[102] (Gummow J). *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76

ends with an analysis of the compatibility of the State law with the relevant court's institutional integrity.

22. Thus, in *Wainohu v New South Wales*,[40] French CJ and Kiefel J described the *Kable* principle as preventing State legislatures from validly enacting a law that "would confer upon any court a function (*judicial or otherwise*) incompatible with the role of that court as a repository of federal jurisdiction". Consistent with this analysis, the principle can operate in a setting that is not concerned with the conferral of new functions on a court at all.[41]

23. The "essential reasoning" of the majority Justices in *Kable No 1* as to the constitutional invalidity of the CP Act therefore did not, as the Court of Appeal held,[42] involve reliance upon the characterisation of the function conferred by the CP Act as non-judicial. The Court's analysis of the manner in which the CP Act required the Supreme Court to proceed was directed instead to the question whether the CP Act was incompatible with that Court's institutional integrity. The argument, and the constitutional principle the case identified, turned on the scope of legislative power and therefore upon the terms of the legislation rather than the character of the order made by Levine J in the particular case.

24. The citations and quotations from four members of this Court in *Kable No 1* that were relied on by the Court of Appeal must also be viewed in light of the fact that three of those four Justices regarded Levine J, in making the order detaining the respondent, as exercising federal jurisdiction. This conclusion must have involved acceptance of the proposition that the making of the detention order by Levine J was an exercise of the judicial power of the Commonwealth.

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[63] (Gummow, Hayne and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1 at 48 [70] (French CJ); 82 [205] (Hayne J); 162 [443] (Kiefel J); *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 [44] (French CJ and Kiefel J).

40 (2011) 243 CLR 181 at 210 [46] (emphasis added). See also Doyle CJ (with whom Perry and White JJ agreed) in *R v England* (2004) 89 SASR 316 at 328: "The principle of *Kable* is intended to ensure that State Supreme Courts are not required to exercise their powers (judicial or non-judicial), or to act, in a manner that would render them unsuitable as courts to exercise Commonwealth judicial power."

41 So, in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, it was invoked, unsuccessfully, to challenge the practice of appointing acting judges; see, e.g., 79 [73] (Gummow, Hayne and Crennan JJ).

42 See *Kable No 2* at [3] (Allsop P); see also [153] (Basten JA).

24.1 Toohey J observed that the Director of Public Prosecutions had conceded that Levine J had been exercising federal jurisdiction vested in the Supreme Court by s 39 of the *Judiciary Act 1903* (Cth) because he had been required to determine constitutional submissions made by Mr Kable.[43] He regarded this concession as properly made, finding that "[b]y reason of the issues raised in the case, the Supreme Court exercised federal jurisdiction".[44] That Toohey J regarded the *order* (in addition to any determination of the constitutional questions) as having been made in the exercise of federal jurisdiction is clear—his Honour said that in the present case (one in which constitutional issues had been raised and determined) the CP Act required the Supreme Court "to exercise the judicial power of the Commonwealth".[45] The judicial power of the Commonwealth was "involved, in circumstances where the Act is expressed to operate in relation to one person only, the appellant, and has led to his detention without a determination of his guilt for any offence".[46]

24.2 McHugh J said that it was "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 appellant contended that the Act was in breach of the Constitution".[47]

24.3 Gummow J said that Levine J had exercised federal jurisdiction in a matter arising under or involving the interpretation of the Constitution. This

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43 *Kable No 1* at 94.

44 *Kable No 1* at 96.

45 *Kable No 1* at 98.

46 *Kable No 1* at 99. The attribution by Allsop P to Toohey J of the statement that the acts performed by Levine J were "non-judicial functions" (*Kable No 2* at [3]) is not supported by a proper reading of the judgment of Toohey J. Although the words "non-judicial functions" appear at the page cited (*Kable No 1* at 98), they take their place within a quotation from *Grollo v Palmer* (1995) 184 CLR 348 at 365 which addressed the limits of functions that could be conferred on federal judges as *personae designatae*. Given the express finding by Toohey J that Levine J was exercising the judicial power of the Commonwealth when making the order detaining Mr Kable, it is likely that his Honour was making use of the *Grollo v Palmer* quotation for its reference to "public confidence in the integrity of the judiciary as an institution ... [being] diminished" as a criterion of invalidity, a criterion more relevant to the operation of the *Kable* principle (*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617-618 [102] (Gummow J)) than questions of taxonomy. The judgment of Toohey J must be read as containing a characterisation of both the function of Levine J in making the order for the detention of Mr Kable, and the order itself, as judicial in nature.

47 *Kable No 1* at 114.

> followed from the nature of the defences presented to the application to the Supreme Court for Mr Kable's detention under the CP Act. There was thereafter 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".[48]

The conclusion that Levine J was exercising federal jurisdiction when making his order tells against the conclusion that his Honour's order was not a judicial act.

25. Of the four judgments in *Kable No 1* on which the Court of Appeal relied as authority for the proposition that this Court had conclusively determined that the order of Levine J was non-judicial in nature, only the judgment of Toohey J contains an analysis of the nature of the power exercised under the CP Act *in the present case*, namely in circumstances in which the constitutional validity of the CP Act had been challenged and accepted. Whilst the judgments of Gaudron, McHugh and Gummow JJ contain observations about the nature of the functions conferred by the CP Act in the abstract, none of their Honours assessed those functions by reference to the constitutional challenge or the particular order made by Levine J. As set out above, Toohey J regarded Levine J's order as an exercise of the judicial power of the Commonwealth (albeit one liable to be set aside). The Court of Appeal misconstrued the observations of the other members of the majority as an authoritative determination of the character of that order.[49]

Subsequent characterisation of preventative detention orders

26. Further, to the extent that the majority Justices in *Kable No 1* embarked upon any characterisation of the function conferred by the CP Act, such characterisation reflected an assumption about the making of preventative detention orders, which must be viewed in light of subsequent analysis on this subject by this Court.

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48 *Kable No 1* at 136.

49 At the very least, given the conclusion of Toohey J, there was no majority support for the proposition that the order of Levine J was not judicial in nature.

27. The relevant assumption was that orders confining the respondent to custody would not be judicial[50] if:

27.1 a determination of guilt was not required as a condition of the order made against the respondent;[51] or

27.2 it did "not involve the resolution of a dispute between contesting parties as to their respective legal rights and obligations".[52]

28. The nature of a power to make preventative detention (and cognate) orders has been the subject of subsequent consideration by this Court in *Fardon v Attorney-General (Qld)*[53] and *Thomas v Mowbray*[54].

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50 Or at least would be foreign to the judicial process.

51 See *Kable No 1* at 97, where Toohey J said: "If the power to detain were the consequence of the actual commission of a serious act of violence, it might be little different from the power to impose an indeterminate sentence to be found in various statutes. In those cases, however, some prior conduct in the form of the commission of an offence of a prescribed nature is the basis upon which an indeterminate sentence may be ordered. ... But the Act required no determination of his guilt for any of those offences as a condition of the order made against him." See also at 98: "[Preventative detention] is not an incident of the exclusively judicial function of adjudging and punishing criminal guilt". At 106-107, Gaudron J said: "The power purportedly conferred ... requires the making of an order ... depriving an individual of his liberty, not because he has breached any law, whether civil or criminal, but because an opinion is formed ... that he "is more likely than not" (s 5(1)(a)) to breach a law by committing a serious act of violence ... That is the antithesis of the judicial process ... It is not a power that is properly characterised as a judicial function ...". At 122-123, McHugh J said: "Instead of a trial where the Crown is required to prove beyond reasonable doubt that the accused is guilty of a crime ... the Supreme Court is asked to speculate whether, on the balance of probabilities, it is more likely than not the appellant will commit a serious act of violence." At 132, Gummow J said: "[W]hilst imprisonment pursuant to Supreme Court order is punitive in nature, it is not consequent upon any adjudgment by the Court of criminal guilt", and at 134: "The Act requires 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."

52 See *Kable No 1* at 106 (Gaudron J); see also at 122 (McHugh J): "[The proceedings under the CP Act] do not involve any contest as to whether the appellant has breached any law or any legal obligation. They 'are not directed to any determination or order which resolves an actual or potential controversy as to existing rights or obligations' which is the benchmark of an exercise of judicial power."

53 (2004) 223 CLR 575.

54 (2007) 233 CLR 307. *Fardon* and *Thomas v Mowbray* bear on the status of an order made under the CP Act (as a statute involving preventative detention orders) as a matter of precedent. There can be no issue estoppel in this matter, as there is no identity of issues (the issue of the status of the order made by Levine J not having been, nor needing to be, decided in *Kable No 1*) nor of parties (the contradictor in *Kable No 1* being the Director of Public Prosecutions—not there exercising functions on behalf of the Queen in right of New South Wales—and not the State of New South Wales): *Brewer v Brewer* (1953) 88 CLR 1 at 14 (Fullagar J); *Blair v Curran* (1939) 62 CLR 464 at 510 (Starke J) 531-532 (Dixon J), 541 (McTiernan J); *Ramsay v Pigram* (1968) 118 CLR 271 at 276 (Barwick CJ).

29. In *Fardon*, the Court examined a Queensland law of general application with a central object the making of provision for the continued detention in custody[55] of a particular class of prisoner "to ensure adequate protection of the community".[56] McHugh J held that, although the Queensland Supreme Court was not called upon to determine "an actual or potential controversy as to existing rights or obligations",[57] it was required to make a determination in accordance with the rules of evidence by a standard that was sufficiently precise to engage the exercise of judicial power.[58] Gummow J also identified the regime for preventative detention orders as having the character of judicial process.[59]

10 30. In *Thomas v Mowbray*, the Court considered a Commonwealth legislative regime directed at protecting the public from terrorist acts. Pursuant to the regime, federal courts could make control orders (which imposed constraints on the liberty of the subject of the control order), in part, on the basis of a prediction about the likelihood that the order would assist in preventing a terrorist attack.[60] Because of the strict separation of powers at the federal level,[61] the Court was required to consider whether the power to make control orders was judicial or otherwise in order to determine the regime's validity.[62]

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55 Or supervised release.

56 Section 3(a) of the relevant Act as extracted in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 603.

57 Quoting *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 375 (Kitto J).

58 (2004) 223 CLR 575 at 596-597 [34].

59 (2004) 223 CLR 575 at 621 [115] (notwithstanding suggestions that an identical regime which operated upon persons other than "prisoners" would have been invalid: at 619 [108]).

60 Commonwealth Criminal Code, s 104.4(1)(c)(i).

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

62 See also *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 319 (the Court): "The characterization of a power as judicial or non-judicial in nature arises most frequently in connexion with the rule that Ch. III of the Constitution does not allow the judicial power of the Commonwealth to be exercised 'by a body established for purposes foreign to the judicial power' and does not allow 'a combination with judicial power of functions which are not ancillary or incidental to its exercise but are foreign to it'".

31. Gleeson CJ said:[63]

> The power to restrict or interfere with a person's liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what the person has done, which involves interfering with legal rights, and creating new legal obligations, rather than resolving a dispute about existing rights and obligations, is in truth a power that has been, and is, exercised by courts in a variety of circumstances. It is not intrinsically a power that may be exercised only legislatively, or only administratively.

His Honour added:[64]

> Two familiar examples of the judicial exercise of power to create new rights and obligations which may restrict a person's liberty are bail, and apprehended violence orders. ... Apprehended violence orders have many of the characteristics of control orders, including the fact they may restrain conduct that is not in itself unlawful. ...
>
> To decide that such powers are exclusively within the province of the executive branch of government would be contrary to our legal history ...

32. Gummow and Crennan JJ made similar observations,[65] including:[66]

> [T]he jurisdiction [of justices of the peace] to bind over did not depend on a conviction and it could be exercised in respect of a risk or threat of criminal conduct against the public at large.

33. Callinan J referred to similar historical and analogical considerations.[67] Heydon J agreed with the majority on these points.[68] No such detailed consideration was given to the characterisation of the preventative detention order in *Kable No 1*;[69] nor, in light of the enquiry demanded by the *Kable* principle, did it need to be.

34. When called upon to decide questions of characterisation in respect of preventative detention order (and similar) regimes, this Court has therefore held that they may involve the exercise of judicial power. To the extent that there are suggestions in *Kable No 1* to the contrary,[70] they must be viewed in light of the subsequent authority

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63 (2007) 233 CLR 307 at 328 [15].

64 (2007) 233 CLR 307 at 328-329 [16]-[17].

65 (2007) 233 CLR 307 at 356-357 [116]-[121].

66 (2007) 233 CLR 307 at 357 [120] (citation omitted).

67 (2007) 233 CLR 307 at 507-509 [595]-[599].

68 (2007) 233 CLR 307 at 526 [651]. Kirby J dissented, as did Hayne J.

69 There was some limited analogical consideration by Gummow J of *quia timet* injunctive relief: *Kable No 1* at 130-131.

70 See above nn 51 and 52 and accompanying text, and *Kable No 2* at [3] (Allsop P), [153] (Basten JA).

of this Court—*Fardon* and *Thomas v Mowbray* are authority for the proposition that a power vested in a court to order "preventative justice", not depending upon a criminal conviction, will not (without more) require the exercise of non-judicial power.

The* Re Macks *decision: the principle that orders of a superior court of record are valid until set aside applies to orders made pursuant to an unconstitutional law

35. The decision of the Court of Appeal is also inconsistent with this Court's decision in *Re Macks; Ex parte Saint*[71] that orders of the Federal Court (as a superior court of record) that were made beyond jurisdiction, because the legislation enabling them to be made was invalid for constitutional reasons, were nonetheless valid when made and until set aside and were not properly regarded as "nullities".

35.1 Gleeson CJ referred to *Cameron v Cole* and stated that it may be accepted that orders made by the Federal Court pursuant to invalid legislation were not nullities, and that the status of the Federal Court as a superior court of record (by virtue of s 5(2) of the *Federal Court of Australia Act 1976* (Cth)) meant that they were valid until set aside.[72]

35.2 Gaudron J held that orders of the Federal Court made without jurisdiction were not nullities, as the Court's authority under s 5(2) of the *Federal Court of Australia Act 1976* (Cth) to make a binding decision that it has jurisdiction in a matter meant that its orders were final and binding unless and until set aside on appeal or pursuant to s 75(v) of the Constitution.[73]

35.3 McHugh J, while differing from Gleeson CJ and Gaudron J as to the power of Parliament to provide that orders of a federal court are binding until set aside, held that the orders in question were not "nullities" because the court had impliedly determined that it had jurisdiction to make the orders.[74]

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71 (2000) 204 CLR 158.

72 (2000) 204 CLR 158 at 177-178 [20]-[23].

73 (2000) 204 CLR 158 at 185-187 [53]-[57].

74 (2000) 204 CLR 158 at 213 [143]-[144], 215-217 [150]-[156].

35.4 Gummow J held that the creation of the Federal Court as a superior court of record had the effect that it had the characteristics of a superior court of record at common law (to the extent that these characteristics are consistent with the Constitution), including the treatment of orders made in excess of jurisdiction on constitutional or other grounds as effective until they are quashed or their enforcement is enjoined by the High Court or they are set aside on appeal.[75]

35.5 Kirby J, although in dissent, likewise held that, in the case of courts established on the model of the English courts, there are sound reasons of legal history, principle and policy for accepting that the Constitution sustains, as valid until set aside, the "judgments, decrees, orders and sentences" of such courts, at least where these courts are superior courts of record. A statutory provision to such effect represents nothing else than clarification of the character of "courts" that are provided for in the Constitution.[76]

35.6 Hayne and Callinan JJ took an approach similar to that of McHugh J, denying the power of Parliament to give binding effect to all orders of a federal court until set aside, regardless of whether they had constitutional support, but accepting that orders made to quell a controversy could validly be made binding until set aside (including in cases where the court determined its own jurisdiction).[77]

36. In the decision below, the Court of Appeal sought to distinguish *Re Macks* on the basis that the order under consideration in that case was a judicial act, made without constitutionally founded jurisdiction.[78] This distinction is misconceived for the reasons given above. Moreover, the decision in *Re Macks* shows that orders of a superior court are not "nullities" even when those orders are made under legislation that is subsequently determined to be constitutionally invalid. Applying that decision

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75 (2000) 204 CLR 158 at 235-236 [216].

76 (2000) 204 CLR 158 at 248 [255], see also 248-250 [256]-[258]. Cf McHugh J at 214-216 [148]-[152] and Hayne and Callinan JJ at 275-279 [330]-[344].

77 (2000) 204 CLR 158 at 276 [334], 278 [340]-[341].

78 *Kable No 2* at [8] (Allsop P), [143]-[153] (Basten JA).

to the present case indicates that the order of Levine J was not a "nullity" but was valid and binding when made and until it was set aside on appeal by this Court.

No tortious liability for acts done pursuant to the order of Levine J

37. The Court of Appeal held that the principle that an order made by a superior court of record is valid until set aside did not apply to protect those who had acted in reliance on the order of Levine J from tortious liability. Central to this finding was the characterisation of that order as non-judicial in nature.

38. Once it is accepted that the Court of Appeal erred in characterising the order as non-judicial in nature, that order was valid and officers who acted to enforce it have a defence of lawful authority to any claim in tort for false imprisonment.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

39. Approximately 20 minutes will be needed for the presentation of oral submissions.

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