IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S352 of 2012

BETWEEN:

HIGH COURT OF AUSTRALIA
FILED
25 JAN 2013
THE REGISTRY SYDNEY

STATE OF NSW
Appellant

and

GREGORY WAYNE KABLE
Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet publication

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

Part II: Concise statement of issues

2. This appeal raises the following (related) questions:

   (a) Are the orders of a State Supreme Court valid until set aside in circumstances where that Court makes orders pursuant to a State Act subsequently held to be invalid by reason of its contravention of an implied restriction on State legislative power derived from Ch III of the Constitution?

   (b) Are the orders of a State Supreme Court exercising federal jurisdiction pursuant to s 39(2) of the Judiciary Act 1903 (Cth) ("Judiciary Act") in resolving the constitutionality of a State Act and exercising powers pursuant to that Act deprived of the character of judicial orders by reason of the invalidity of the State Act?

   (c) Do officers acting to obey orders of a State Supreme Court which were valid on their face have a defence of lawful authority to tortious liability for false imprisonment at common law?

Filed for the State of NSW on 25 January 2013
I V KNIGHT, Crown Solicitor
Level 5, 60-70 Elizabeth Street
SYDNEY NSW 2000
DX 19 SYDNEY

Ref: AGD01002816
Contact: Jane Graham

Ph: (02) 9224 5101
Fax: (02) 9224 5122

Part III: Section 78B of the Judiciary Act

3. The appellant filed and served notices in compliance with s 78B of the Judiciary Act on 19 December 2012.

4. The appellant notes that the respondent has filed a notice of contention and that a notice under s 78B of the Judiciary Act has been filed and served in relation to the notice of contention.

Part IV: Citation of reasons for judgment

5. The reasons for judgment of Hoeben J in the Supreme Court of NSW have been reported as Kable v New South Wales (2010) 203 A Crim R 66. The reasons for judgment of the NSW Court of Appeal ([2012] NSWCA 243) have not been reported.

Part V: Facts

6. The respondent pleaded guilty to the manslaughter of his wife, which took place on 5 September 1989. He was charged with murder but the prosecution accepted a plea of guilty to manslaughter on the basis of diminished responsibility. On 1 August 1990 the respondent was sentenced to total terms of imprisonment of five years and four months. The terms expired on 4 January 1995.

7. While in prison the respondent wrote a series of threatening letters. As a result of the threats made in the letters, the respondent was charged before Magistrate Kok on 29 December 1994 with 14 contraventions of s 85S of the Crimes Act 1914 (Cth) ("Crimes Act"). The chronology provided by the parties to the Court of Appeal in 1995 indicated that these 14 charges were additional to three prior charges under s 85S: Kable v Director of Public Prosecutions (1995) 36 NSWLR 374 at 391-392. Warrants issued in December, January and February 1995 required the respondent to be kept in remand. The final warrant expired on 7 March 1995.

8. The Community Protection Act 1994 (NSW) ("CP Act") was proclaimed on 9 December 1994. In the form ultimately enacted, it applied to the respondent only. It purported to authorise applications by the Director of Public Prosecutions ("DPP") to the Supreme Court for a preventative detention order, for a maximum of six months, if the Court were satisfied that the respondent 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 the community

generally that he be held in custody: s 5. It also purported to authorise applications for interim detention orders: s 7.

9. On 13 December 1994 the DPP commenced proceedings in the Supreme Court of NSW seeking an interim order that the respondent be detained for three months pursuant to s 7 of the CP Act, an order that he be medically examined and an order that he be detained in prison for six months pursuant to s 5 of the CP Act.

10. A constitutional challenge to the CP Act, based on the infringement by the CP Act of fundamental human rights, was rejected by Spender AJ on 19 December 1994. His Honour declined to stay the proceedings: Director of Public Prosecutions v Kable (1994) 75 A Crim R 428.

11. The DPP's application for an interim detention order pursuant to s 7 of the CP Act was heard by Hunter J on 22 and 23 December 1994. On 30 December 1994 his Honour rejected constitutional challenges based on s 109 inconsistency, a constitutional right to equality and a constitutional prohibition on detention other than subsequent to conviction. Justice Hunter made an interim order for the respondent's detention. His order was not the subject of appeal.

12. Justice Levine heard the DPP's application for an order under s 5 of the CP Act over 13 days between 9 January and 7 February 1995. The same constitutional challenges as had been rejected by Hunter J were brought. There was also extensive lay and expert evidence. On 23 February 1995 Levine J rejected those challenges and made an order for preventative detention of the respondent for six months pursuant to the CP Act. The order sealed by the Supreme Court of NSW at the time was erroneously dated "23 February 1994", but the actual date of the order is plain from the face of order 1. Justice Levine's order was appealed. The NSW Court of Appeal dismissed the appeal on 9 May 1995: Kable v Director of Public Prosecutions (1995) 36 NSWLR 374.

13. On 12 April 1995, as a result of the pending proceedings under the CP Act, Magistrate Heagney permanently stayed the respondent's prosecution for 15 alleged contraventions of s 85S of the Crimes Act.

14. On 21 August 1995 Grove J declined to revoke Levine J's order but dismissed an application by the DPP for a further order for detention. The respondent was released on the expiration of Levine J's order on 22 August 1995.

15. On 18 August 1995 the respondent was granted special leave to appeal to this Court. The appeal, which was confined to Levine J's order, was allowed, by majority, on 12 September 1996: Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 ("Kable"). Justice Levine's order was set aside.

16. On 20 November 1996 the respondent commenced proceedings against the appellant, seeking damages for false imprisonment. On 8 December 1997, the respondent filed an Amended Statement of Claim, maintaining his claim of false imprisonment against the appellant and advancing claims for malicious prosecution and abuse of process against the appellant and the DPP. Proceedings against the DPP were dismissed by consent on 16 September 2005.

17. On 9 November 2009, the first day of the trial before Hoeben J, his Honour granted leave for the respondent to file a Second Further Amended Statement of Claim. Justice Hoeben entered judgment for the appellant on 30 July 2010, holding that the respondent's claims for malicious prosecution, collateral abuse of process and false imprisonment could not be made out. The respondent's appeal was heard before a bench of five (Allsop P, Basten, Campbell and Meagher JJA and McClellan CJ at CL) on 27 and 28 October and 29 November 2011. On 8 August 2012 the Court of Appeal allowed the appeal in part, set aside Hoeben J's orders dismissing the proceedings against the applicant and in lieu thereof gave judgment for the respondent on his claim for false imprisonment, holding the appellant vicariously liable for the actions of its officers. The Court remitted the matter for assessment of damages.

Part VI: Argument

Legal effect of orders of a superior court of record

18. The order of Levine J, rather than the CP Act itself, deprived the respondent of his liberty. That order was made by the Supreme Court, a superior court of record continued in existence by s 22 of the Supreme Court Act 1970 (NSW) ("Supreme Court Act"). Although the Supreme Court is, like all Australian courts, a court of limited jurisdiction

(Re McJannet; ex parte Minister for Employment, Training and Industrial Relations (Qld) (1995) 184 CLR 620 at 652-653; PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission (2012) 86 ALJR 1071 at 1075 [16]) the existence of limitations on its jurisdiction flowing from its constitutional competence does not render orders made by the Supreme Court in the purported exercise of jurisdiction which it in fact does not have nullities (although they are liable to be set aside).

19. It is well established that the Kable principle speaks to legislative power: see eg Wainohu v New South Wales (2011) 243 CLR 181 at 208-210 [44]-[47] per French CJ and Kiefel J and South Australia v Totani (2010) 242 CLR 1 at 47-48 [69] per French CJ; 81 [201] per Hayne J; 156 [425] per Crennan and Bell JJ. The passages from this Court's reasons in Kable that Allsop P (Campbell and Meagher JJ and McClellan CJ at CL agreeing) found decisive ([2012] NSWCA 243 at [3]-[4], [17], see also Basten JA at [153]) in holding that Levine J did not perform a judicial act or make a judicial order were directed to the restriction imposed on the legislative power of State parliaments. Justice Toohey's reference (Kable at 98) to the "extraordinary character" of the CP Act was in the course of classifying the legislation and considering its compatibility with the performance of judicial functions or the judiciary's discharge of functions in the exercise of judicial power (see also Gummow J at 132). Justice Gaudron's analysis (at 106-107) was concerned with the effect of s 5 of the CP Act on the institutional integrity of the Supreme Court and (at 108) on public confidence in the judicial process. Justices McHugh (at 122) and Gummow (at 134) each considered the effect of the CP Act on the independence, or perceived independence, of the Supreme Court from the legislature. Their Honours' reasoning in those passages was not directed to the quality of Levine J's order made on 23 February 1995, but to the different question of whether the CP Act exceeded the legislative power of the NSW parliament. The order made by the High Court in Kable itself presupposed the existence in law and binding nature of Levine J's order.

20. The Supreme Court (a) had jurisdiction – necessarily federal jurisdiction invested pursuant to s 39(2) of the Judiciary Act (see Kable at 136 per Gummow J; see also at 87 per Dawson J, 96 per Toohey J) – to determine whether the CP Act was valid, and (b)

jurisdiction to determine the applications brought by the DPP pursuant to the CP Act. At all times, there was a single "matter": see Re Wakim; ex parte McNally (1999) 198 CLR 511 at 585-586 [140] per Gummow and Hayne JJ (Gleeson CJ and Gaudron J agreeing at 546 [25] and [26]).

21. An appeal lies to this Court pursuant to s 73 of the Constitution from orders made by the Supreme Court beyond jurisdiction: see Ah Yick v Lehmert (1905) 2 CLR 593 at 601. Ordinarily, such orders will be set aside. There may, however, be discretionary reasons for refusing leave to appeal or declining to grant appellate relief from the order of a superior court. Even where such an order made in excess of jurisdiction is liable to be set aside for reasons arising under the Constitution or involving its interpretation, it is not inevitable that relief will be granted, despite the powerful reasons for this Court setting aside judgments or orders of this type: cf Bond v The Queen (2000) 201 CLR 213 at 224-225 [32]-[34]. For example, in Re Wakim, this Court declined to quash the Federal Court's order winding up Amann Aviation, although the order was made pursuant to a statute that contravened an implied prohibition in Ch III of the Constitution: see at 565 [81] per McHugh J, 592 [164]-[165] per Gummow and Hayne JJ (Gleeson CJ and Gaudron J agreeing). The Court's decision in relation to the winding up order "cannot be reconciled with a doctrine of absolute nullification": Residual Assco Group Ltd v Spalvins (2000) 202 CLR 629 at 660 [78] per Kirby J.

22. Those principles were central to this Court's decision in Re Macks; ex parte Saint (2000) 204 CLR 158. The argument on behalf of Victoria, South Australia and Western Australia that orders made by the Federal Court pursuant to the cross-vesting legislation in contravention of the same implied prohibition arising from Ch III of the Constitution identified in Re Wakim (and hence beyond jurisdiction) were nullities was rejected. Chief Justice Gleeson (at 177 [20]) quoted Rich J (Latham CJ agreeing) in Cameron v Cole (1944) 68 CLR 571 at 590 for the proposition that "[i]t 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 it is valid unless and until it is set aside." See also Re Macks at 178 [23] per Gleeson CJ, 183-187 [48]-[57] per Gaudron J, 215-216 [152] per McHugh J, 236-237 [217]-[220] per Gummow J, 274-279 [328]-[345] per Hayne and Callinan JJ; Matthews v Australian Securities and Investments Commission (2000) 97 FCR 396 at

401-402 [20]-[25] (upholding a judgment of contempt of orders made by the Federal Court under the cross-vesting legislation, despite the court's want of jurisdiction to make the orders). Five members of the court in Berowra Holdings Pty Ltd v Gordon (2006) 225 CLR 364 at 369-370 [10]-[11] cautioned of the "[d]angers" – identified in the context of administrative decisions in Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597 at 613 [46], 643 [144]-[145] – involved in the use of the terms "invalid" or "nullity" in the context of "proceedings in, and acts and orders of, courts", including that those concepts "tend to obscure the distinction between superior courts of record of general jurisdiction and courts of limited jurisdiction".

10 23. The proposition that the Supreme Court's orders pursuant to the CP Act in contravention of the Kable doctrine were nullities should similarly be rejected. The Supreme Court's orders, though made pursuant to an Act which contravened an implied prohibition arising from Ch III, were not nullities. They carried with them an implied determination that they were within jurisdiction, made pursuant to the authority conferred by s 39(2) of the Judiciary Act and ss 22 and 23 of the Supreme Court Act: see Re Macks at 187 [56]-[57] per Gaudron J, 215 [151] per McHugh J, 278 [341], 279 [344] per Hayne and Callinan JJ. They amounted to a determination that the CP Act was valid. Although that turned out to be erroneous, the Supreme Court had authority (and was under an obligation) to decide the question of validity.

20 24. For when the jurisdiction of the Supreme Court is purportedly invoked, it is the "first duty" of the court to satisfy itself that it has jurisdiction: Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd (1911) 12 CLR 398 at 415. If the Supreme Court determines that it has jurisdiction then it is, subject to limited exceptions, obliged to exercise that jurisdiction to determine the controversy before it: see Re Macks at 185-186 [53] per Gaudron J. In the absence of an express order concerning jurisdiction, a superior court's orders made in the proceedings embody a decision that it has jurisdiction: Re Macks at 187 [56] per Gaudron J, 215 [150] per McHugh J. Inherent in Levine J's order in this case – made after rejecting a constitutional challenge – was, therefore, a determination that his Honour had
30 jurisdiction to make the order under the CP Act, his Honour (mistakenly) believing that that Act did not contravene any constitutional restriction. Having made that

determination, it is "the nature of judicial power" (Re Macks at 186 [53] per Gaudron J) for a judge of a superior court to proceed to determine rights and liabilities in issue, as Levine J did here.

25. Justice Levine's order was the only thing that resolved the constitutional argument between the parties. It was "an integral part of the process of determining the rights and obligations of the parties which [were] at stake in the proceedings": Mellifont v Attorney-General (Qld) (1991) 173 CLR 289 at 303. To the extent that order contained a determination on the question of whether or not Levine J had jurisdiction, it was consistent with the exercise of a judicial function. His Honour's determination of the constitutionality of the Act and thus of the validity of his own jurisdiction to make the order he did was certainly not antithetical to the judicial process, as Allsop P (Campbell and Meagher JJA and McClellan CJ at CL agreeing) recognised in the Court of Appeal at [57], nor did the judgments in Kable suggest that it was. This determination was inherent in the order made, despite this Court's subsequent description of proceedings under the CP Act as antithetical or repugnant to the judicial process: Kable at 106 and 108 per Gaudron J, 122 per McHugh J, 132 per Gummow J. The challenge to the continuing effect of the order necessarily involved a challenge to the inherent finding of jurisdiction. Yet the reasoning of the Court of Appeal holds that Levine J's order was not made in the exercise of judicial power. Were that to be correct, no appeal could have been raised to this Court pursuant to s 73 of the Constitution from Levine J's order (upheld by the Court of Appeal), because an appeal does not lie from a decision made otherwise than in the exercise of judicial power: Mellifont v Attorney-General (Qld) at 299-300, 305. There was no suggestion in the judgments in Kable that the appeal was outside the appellate jurisdiction of this Court.

26. As a result, Levine J's order cannot be analysed only by reference to the authority conferred by CP Act, as Allsop P suggested at [18] and as in the case of a purely administrative act such as was considered in Love v Attorney-General (NSW) (1990) 169 CLR 307. The issuance of a listening device warrant under the NSW statute in issue in Love was "a step in the administrative process and ... thus an administrative function"; it did not involve the making of any order inter partes and was not enforced as a court order: at 322.

27. The Court of Appeal erroneously considered Kable to be a complete answer to the question of the character of the orders made by Levine J. That the CP Act was invalid does not address the question of the authority of Levine J's preventative detention order at the time of the respondent's detention. The well-settled proposition that the orders of a superior court of record are to be treated as valid until set aside should be applied to that order.

28. As noted above, the application of that proposition is also consistent with the orders ultimately made in Kable. The authoritative decision of this Court was required in order to set Levine J's order aside, as an aspect of quelling the controversy between the parties. The order was not ignored as if it was of no effect in the resolution of the proceedings. Nor was it declared void by the orders of this Court.

29. Alternatively, if the Court were not to accept the characterisation of Levine J's order as judicial, it is submitted that in the circumstances of this case where the constitutional validity of the CP Act was raised, the function Levine J performed under the CP Act had such a close connection with the exercise of judicial power (in his Honour's jurisdictional finding) or with the making of a judicial order (resolving the constitutional argument) that it should be regarded as incidental to the judicial function when performed in association with it, though it would cease to be an incidental function when performed on its own: see The Queen v Murphy (1985) 158 CLR 596 at 614-616; cf Kable at 106. It is appropriate to give close consideration to how the relevant court operates in determining whether such a function may be regarded as incidental, as was done in The Queen v Murphy at 616. The hearing before Levine J "on the merits" (no differently from the determination of validity) had all the procedural characteristics of a trial, taking place in open court, with legal representation of parties, cross-examination and addresses.

30. If the later success of a Kable-based challenge deprives the orders of a State Supreme Court of their judicial character, this will create a category of Supreme Court orders that despite being valid on their face will not command obedience. Since the implied limitation on State legislative power identified in Kable concerns the capacity of State parliaments to confer functions on a "court of a State" capable of being invested with federal jurisdiction for the purposes of s 77(iii) of the Constitution, it is inevitable that in

many instances a constitutional challenge relying on the Kable doctrine will be upheld only after a State court has made orders pursuant to the statute the subject of the successful constitutional challenge, as in this case and International Finance Trust Co Ltd v NSW Crime Commission (2009) 240 CLR 319 ("IFTC"). The effect of court orders under the invalid s 10 of the Criminal Assets Recovery Act 1990 (NSW) was addressed by NSW legislation following IFTC: see International Finance Trust Co Ltd v NSW Crime Commission (No. 2) [2010] NSWCA 46 at [42]-[43]. Absent such legislative intervention, the existence of such a category of Supreme Court orders would sit uncomfortably with the constitutional protection of the institutional integrity of State Supreme Courts flowing from their role in the integrated Australian judicial system (as to which see Wainohu at 208 [44] per French CJ, 228-229 [105] per Gummow, Hayne, Crennan and Bell JJ).

Defence of lawful justification to tortious liability

31. Whether or not Levine J's order should be treated as valid until set aside, the common law principle providing protection from tortious liability to those acting in accordance with a court order should prevent the imposition of liability on the applicant via the Law Reform (Vicarious Liability) Act 1983 (NSW) in this case. As Professor Enid Campbell has pointed out, there is "no necessary connection between the principles applied in determining whether governmental acts are ultra vires and the principles to be applied in determining civil liabilities to pay compensation": "The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts" (2003) 29(1) Monash University Law Review 49 at 84.

32. The invidious consequences for the administration of justice if those acting pursuant to court orders could not rely upon a defence of lawful justification have long been recognised: see eg Olliet v Bessey (1729) Jones T 214; 84 ER 1223; Andrews v Marris (1841) 1 QB 3 at 16-17; 113 ER 1030 at 1036; Ward v Murphy (1937) 38 SR(NSW) 85 at 99; Hadkinson v Hadkinson [1952] P 285 at 288; Robertson (1997) 92 A Crim R 115 at 124-125; see also Little v Lewis [1987] VR 798 at 804-805, Clifford L. Pannam, "Tortious Liability for Acts Performed Under an Unconstitutional Statute" (1966) 5 Melbourne University Law Review 113 at 156. As Stephen ACJ explained in the false imprisonment case of Mok Sing v Dat (1902) 2 SR(NSW) 333 at 336, "no one

would dare to act under the order until he first satisfied himself that the order was correct", a result his Honour described as "monstrous" (at 338, 339, see also Owen J at 340-341, describing the result as a "ridiculous position" and "a perfect farce").

33. The common law provides a defence of lawful justification to an officer executing a court's order or process that is valid on its face, in accordance with the protection conferred on "acts done in the execution of justice, which are compulsive": Dr Drury's Case (1610) 8 Co Rep 141b at 143a, 77 ER 688 at 691, cited in Commissioner for Railways (NSW) v Cavanough (1935) 53 CLR 220 at 225; see also Olliet v Bessey and the cases cited by Allsop P at [43]. The defence is available in respect of an officer executing an inferior court's order made beyond its jurisdiction as well as the order of a superior court: Posner v Collector for Inter-State Destitute Persons (Vic) (1946) 74 CLR 461 at 476 per Starke J, 481-482 per Dixon J. The defence was afforded to police who had taken the plaintiff into custody following the instructions of a Crown Court judge to stop him leaving the court, although the judge had no jurisdiction to detain the plaintiff, in Sirros v Moore [1975] 1 QB 118 at 137 per Lord Denning MR, see also at 144 per Buckley LJ. It was extended to a gaoler who kept a person in custody beyond the sentence imposed by a magistrate by reason of an error in the warrant of commitment signed by the magistrate (not apparent on its face) in Robertson (1997) 92 A Crim R 115 at 125 per Steytler J (Malcolm CJ and Franklyn J agreeing); see also R v Governor of Brockhill Prison; ex parte Evans (No. 2) [2001] 2 AC 19 at 35, 43-44, 46.

34. There is no sound reason for those well-established principles not to apply to the present case of an order, valid on its face, pursuant to an Act whose validity had been upheld by three judges of the Supreme Court.

35. The officers who detained the respondent had no discretion to release him. Before this Court's decision in Kable, to release the respondent without authority – which could only have been conferred by the expiry of a detention order under Pt 2 of the CP Act or a further order of the Supreme Court (eg under s 13 of the CP Act) – would have contravened s 23(2) of the CP Act and risked prosecution for contempt. During the currency of the detention order, the respondent was taken to be a person required by law to be in custody in prison for the purposes of s 352AA of the Crimes Act 1900 (NSW)

(now repealed), enabling him to be apprehended and recommitted to prison if reasonably suspected to be unlawfully at large: see s 22(2) of the CP Act. To hold that the defence of lawful justification is not available would mean that an officer must either question and disobey the Supreme Court's order, with the consequences set out above, or risk his or her employer incurring liability in tort for the relevant conduct.

36. Allsop P was prepared to assume that the common law "provides that, as a general rule, an officer (such as a sheriff or gaoler) obeying a judicial order of a competent court and executing it is protected, even if the order be at that time invalid" (at [48]) but was unwilling to extend the protection to an order arising from a purported exercise of power pursuant to the CP Act: at [63]. Justice Basten's reasoning on this issue relied on the statutory protection conferred on a gaoler by s 46 of the Prisons Act 1952 (NSW), countenancing the possibility of "residual common law protection" but refusing to extend it to novel forms of statutory order: at [165]. Their Honours inaccurately characterised Levine J's order, for the reasons stated above. Even if their Honours' characterisation of the order were correct, however, where a State Supreme Court order is valid on its face and is relied upon by a gaoler in good faith, it is appropriate to apply the common law principle whose existence was assumed by the Court of Appeal. To do otherwise would generate inconsistency between the common law and the institutional role of the Supreme Court underpinning the implied constitutional restriction in Kable by generating a category of completely ineffective documents dressed up as Supreme Court orders (cf Kable at 106 per Gaudron J), further undermining the integrity of the Supreme Court. Their Honours erred in failing to apply a common law defence of lawful justification.

37. Though the majority in Haskins v Commonwealth (2011) 244 CLR 22 regarded the Australian Military Court ("AMC")'s orders as "not validly made" (at 46-47 [63], cf at 42 [46]), the Court nevertheless held that an action for false imprisonment would not lie against a member of the armed forces – and thus against the Commonwealth bearing vicarious liability for the officer's acts – who detained the plaintiff in obedience to a warrant, regular on its face but issued after the plaintiff was sentenced by the AMC: at 47-48 [67]. As the majority stated, it is not "appropriate to ... seek to frame a rule based only on a distinction between acts done within or without jurisdiction. ... If it is

accepted that what was done in execution of [the AMC's] orders was done 'without jurisdiction', the question remains whether an action for false imprisonment *should* be found to lie in those circumstances": at 46-47 [63], emphasis in original.

38. If compliance with a Supreme Court order does not provide a defence of lawful authority at common law, the necessary consequence is that it need not be obeyed and that it would not found a contempt if disregarded: cf Matthews v Australian Securities and Investments Commission (2000) 97 FCR 396. This presents significant problems for the stability of the judicial system. It is problematic not only for police and other officers charged with executing court orders, who at the very least will be slow to act in their execution pending resolution of the constitutional status of legislation pursuant to which the orders are made, but also for those obeying Supreme Court orders in other contexts where court officers do not act judicially, such as examinations pursuant to criminal assets confiscation legislation.

Notice of Contention

39. The respondent has filed a notice of contention, seeking to reagitate the causes of action in malicious prosecution and abuse of process in respect of which he failed at first instance and on appeal. The appellant relies on the reasons in the courts below, including the conspicuous absence of any factual finding of malice, and of any evidence capable of supporting such a finding, and will make further submissions as appropriate following receipt of the respondent's submissions.

Part VII: Applicable legislative provisions

40. The applicable statutes and regulations as they existed at the relevant time are reproduced in the attached Annexure A to these submissions. The provisions that are reproduced are as follows:

    (a) Judiciary Act 1903 (Cth) s 39;

    (b) Supreme Court Act 1970 (NSW) ss 22, 23, 88; and

    (c) Community Protection Act 1994 (NSW) (in its entirety).

41. The above provisions of the Judiciary Act and Supreme Court Act 1970 (NSW) remain in force, with the exception of s 88 of the Supreme Court Act, which was repealed by the

Courts Legislation Amendment (Civil Juries) Act 2001 (NSW), s 4 and Sch 2, cl 1, reproduced along with the relevant savings provision in Sch 2, cl 3 (now Sch 4, cl 19 of the Supreme Court Act 1970 (NSW)). Section 39 of the Judiciary Act was amended by the Judiciary Legislation Amendment Act 2006 (Cth), s 3 and Sch 1, cl 1, also reproduced. While the CP Act was held to be invalid in Kable, it has not been repealed.

Part VIII: Orders

42. The appellant seeks the following orders:

1. The appeal be allowed.

2. The orders of the Court of Appeal, dated 8 August 2012, are set aside and lieu thereof, order that the appeal be dismissed with costs.

3. In accordance with the terms on which special leave to appeal was granted, order that the appellant pay the costs of the appeal to this Court, including the costs of the application for special leave.

Part IX: Oral argument

43. The appellant estimates that 2.5 hours will be required for the presentation of its oral argument.

Dated: 25 January 2013

M G Sexton SC SG
Tel: (02) 9231 9440
Fax: (02) 9231 9444
Email: Michael_Sexton@agd.nsw.gov.au

M J Leeming SC
Tel: (02) 9223 7395
Fax: (02) 9232 7740
Email: mleeming@selbornechambers.com.au

J E Davidson
Tel: (02) 9231 9445
Fax: (02) 9231 9444
Email: joanna_davidson@agd.nsw.gov.au

Counsel for the Applicant

ANNEXURE A TO APPELLANT'S SUBMISSIONS

Part VII: Applicable legislative provisions

Judiciary Act 1903 (Cth), s 39 (as in force 23 February 1995)

39. Federal jurisdiction of State Courts in other matters

(1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.

(2) The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38, and subject to the following conditions and restrictions:

(a) A decision of a Court of a State, whether in original or in appellate jurisdiction, shall not be subject to appeal to Her Majesty in Council, whether by special leave or otherwise.

Special leave to appeal from decisions of State Courts though State law prohibits appeal

(c) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.

Exercise of federal jurisdiction by State Courts of summary jurisdiction

(d) The federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction, or an arbitrator on whom the jurisdiction, or part of the jurisdiction, of that Court is conferred by a prescribed law of the State, within the limits of the jurisdiction so conferred.

Section 39 of the Judiciary Act 1903 (Cth) was subsequently amended by the Judiciary Legislation Amendment Act 2006 (Cth), s 3 and Sch 1.

Judiciary Legislation Amendment Act 2006 (Cth), s 3 and Sch 1, cl 1
(commenced 7 December 2006)

3. Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Orders of non-judicial officers of State courts of summary jurisdiction

Part 1—Amendments

Division 1—Main amendments

Judiciary Act 1903

1 Paragraph 39(2)(d)

Repeal the paragraph.

Note: The heading to paragraph 39(2)(d) is deleted.

Supreme Court Act 1970 (NSW), ss 22, 23, 88(b) (as in force 23 February 1995)

22. Continuance

The Supreme Court of New South Wales as formerly established as the superior court of record in New South Wales is hereby continued.

23. Jurisdiction generally

The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

88. Common law claim—fraud, defamation etc

Proceedings on a common law claim in which there are issues of fact:
(a) on a charge of fraud against a party, or
(b) on a claim in respect of defamation, malicious prosecution, false imprisonment, seduction or breach of promise of marriage,
shall be tried with a jury.

Section 88 of the Supreme Court Act 1970 was repealed by the Courts Legislation Amendment (Civil Juries) Act 2001 (NSW), s 4 and Sch 2, cl 1. The relevant savings provision is Sch 2, cl 3 (now in force as Sch 4, cl 19 of the Supreme Court Act 1970).

Courts Legislation Amendment (Civil Juries) Act 2001 (NSW), s 4 and Sch 2, cls 1 and 3
(commenced 18 January 2002)

4. Amendment of Supreme Court Act 1970 No 52

The *Supreme Court Act 1970* is amended as set out in Schedule 2.

Schedule 2 Amendment of Supreme Court Act 1970

[1] Sections 85–89

Omit the sections. Insert instead:

85 Trial without jury unless jury required in interests of justice

(1) Proceedings in any Division are to be tried without a jury, unless the Court orders otherwise.

(2) The Court may make an order under subsection (1) that proceedings are to be tried with a jury if:

(a) any party to the proceedings:

(i) files a requisition for trial with a jury, and

(ii) pays the fee prescribed by the regulations made under section 130, and

(b) the Court is satisfied that the interests of justice require a trial by jury in the proceedings.

(3) The rules may prescribe the time within which a requisition must be filed for the purposes of subsection (2) (a).

(4) A fee paid under this section is to be treated as costs in the proceedings, unless the Court orders otherwise.

(5) In any proceedings in which the Court has ordered a trial by jury, the following questions of fact must be tried without the jury:

(a) questions of fact on a defence arising under section 63 (5) or 64 (1) (c) of the *Workers' Compensation Act 1926* or section 151Z (1) (e) of the *Workers Compensation Act 1987*,

(b) any other question of fact ordered by the Court.

(6) This section does not apply to proceedings referred to in section 86.

86 Common law claim—defamation

(1) Proceedings on a common law claim in which there are issues of fact on a claim in respect of defamation are to be tried with a jury.

(2) Despite subsection (1), the Court may order that all or any issue of fact be tried without a jury if:

(a) any prolonged examination of documents or scientific or local investigation is required and cannot conveniently be made with a jury, or

(b) all parties consent to the order.

87 Questions of fact

The Court may order that any question of fact in proceedings (whether the proceedings are to be tried with or without a jury) be tried before any other question of fact in the proceedings.

[3] Fourth Schedule

Insert after Part 11:

Part 12 Provision consequent on enactment of *Courts Legislation Amendment (Civil Juries) Act 2001*

19 Application of amendment

Section 85, 86, 87, 88 or 89, as in force immediately before its amendment by the *Courts Legislation Amendment (Civil Juries) Act 2001*, continues to apply in relation to proceedings commenced but not finally determined before the commencement of that amendment as if the section had not been amended.

Community Protection Act 1994 (NSW) (in its entirety, as in force 23 February 1995)

(printed copy of authorised version follows)

AA

Community Protection Act 1994 No 77

Status Information

Currency of version
Current version for 6 December 1994 to date (accessed 25 January 2013 at 12:13).
Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force
The provisions displayed in this version of the legislation have all commenced. See Historical notes

Note:
As to the status of this Act, see Kable v Director of Public Prosecutions (NSW) [1996] HCA 24; (1996) 189 CLR 51.

Responsible Minister
Attorney General

Authorisation
This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the Interpretation Act 1987.

File last modified 12 September 1996.

Contents

New South Wales

An Act to protect the community by providing for the preventive detention of persons who are, in the opinion of the Supreme Court, more likely than not to commit serious acts of violence.

Part 1Preliminary

1 Name of Act

This Act may be cited as the *Community Protection Act 1994*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Objects and application of Act

(1) The object of this Act is to protect the community by providing for the preventive detention (by order of the Supreme Court made on the application of the Director of Public Prosecutions) of Gregory Wayne Kable.

(2) In the construction of this Act, the need to protect the community is to be given paramount consideration.

(3) This Act authorises the making of a detention order against Gregory Wayne Kable and does not authorise the making of a detention order against any other person.

(4) For the purposes of this section, Gregory Wayne Kable is the person of that name who was convicted in New South Wales on 1 August 1990 of the manslaughter of his wife, Hilary Kable.

4 Definitions

In this Act:

assessor means an assessor appointed by the Court under section 11.

Court means the Supreme Court of New South Wales.

defendant means a person against whom proceedings under this Act are being taken.

detainee means a person who is subject to a detention order.

detention order means a preventive detention order or an interim detention order.

interim detention order means an order referred to in section 7.

preventive detention order means an order referred to in section 5.

prison means a prison within the meaning of the *Prisons Act 1952*.

serious act of violence means an act of violence, committed by one person against another, that has a real likelihood of causing death or serious injury to the other person or that involves sexual assault in the nature of an offence referred to in section 61I, 61J, 61K, 66A, 66B, 66C, 66D, 66F, 78H, 78I, 78K, 78L or 80A of the *Crimes Act 1900*.

Part 2Detention orders

Division 1Detention orders

5 Preventive detention orders

(1) On an application made in accordance with this Act, the Court may order that a specified person be detained in prison for a specified period if it is satisfied, on reasonable grounds:

(a) that the person is more likely than not to commit a serious act of violence, and

(b) that it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody.

(2) The maximum period to be specified in an order under this section is 6 months.

(3) An order under this section may be made against a person:

(a) whether or not the person is in lawful custody, as a detainee or otherwise, and

(b) whether or not there are grounds on which the person may be held in lawful custody otherwise than as a detainee.

(4) More than one application under this section may be made in relation to the same person.

6 Arrest warrants

(1) On an application made in accordance with this Act, the Court may issue a warrant for the arrest of the person against whom proceedings on an

application for a preventive detention order are pending if it is satisfied, on the basis of the information given to the Court in connection with the application, that there are reasonable grounds on which a preventive detention order may be made.

(2) A warrant may be transmitted to the person to whom it is addressed by facsimile transmission, in which case the copy produced by the transmission is taken to be the original document.

(3) A person who is arrested under the authority conferred by a warrant under this section must be brought before the Court as soon as practicable and, in any case, within 72 hours of arrest.

7 Interim detention orders

(1) On an application made in accordance with this Act, the Court may order that the defendant in any proceedings on an application for a preventive detention order be detained in prison for such period (not exceeding 3 months) as the Court determines.

(2) In particular, such an order (an ***interim detention order***) may be made so as to enable:

(a) the defendant to be examined as referred to in section 17 (1) (c), or

(b) reports on the defendant to be prepared as referred to in section 17 (1) (d), or

(c) other proceedings to be brought for the purpose of committing the defendant to custody or other involuntary detention,

before the Court determines the application.

(3) On an application made in accordance with this Act or on its own motion, the Court may extend the period of an interim detention order for such further period (not exceeding 3 months) as the Court determines if it appears that the proceedings on the application for a preventive detention order will not be determined during the period currently specified in the interim detention order.

(4) An interim detention order ceases to have effect, regardless of its terms, when the proceedings on the application for a preventive detention order are determined.

(5) An interim detention order may be made, and its period extended, in the absence of the defendant.

8 Director of Public Prosecutions to make certain applications

Only the Director of Public Prosecutions may make an application referred to in section 5, 6 or 7.

9 Detention orders generally

(1) A detention order may be made subject to such conditions (including a condition specifying the particular prison in which the detainee is to be detained) as the Court may determine.

(2) A detention order takes effect on the date on which it is made or such later date as is specified in the order.

10 Detention orders may not be made against persons under 16

A detention order may not be made against a person who is under the age of 16 years.

11 Orders appointing assessors

On or as soon as practicable after making a preventive detention order, the Court must make a further order appointing one or more duly qualified medical practitioners, psychiatrists or psychologists as assessors to observe and report on the detainee during the period for which the order is in force.

12 Orders for medical, psychiatric or psychological treatment

On making a detention order, or at any time while a detention order is in force, the Court may make a further order directing the Commissioner of Corrective Services to make specified medical, psychiatric or psychological treatment available to the detainee.

13 Amendment and revocation of preventive detention orders

(1) On the application of the Director of Public Prosecutions or a detainee, the Court:

(a) may amend a preventive detention order by reducing the period for which it is in force, or

(b) may revoke a preventive detention order.

(2) In determining an application under this section, the Court must have regard to the most recent reports prepared under section 21.

(3) More than one application under this section may be made in relation to the same preventive detention order.

Division 2Procedure before the Court

14 Nature of proceedings

Proceedings under this Act are civil proceedings and, to the extent to which this Act does not provide for their conduct, they are to be conducted in accordance with the law (including the rules of evidence) relating to civil proceedings.

15 Standard of proof

The Court must not make a detention order against a person unless it is satisfied that the Director of Public Prosecutions' case has been proved on the balance of probabilities.

16 Conduct of proceedings generally

(1) Proceedings on an application for a preventive detention order are to be commenced by summons in accordance with rules of court.

(2) The Court may hear and determine an application for a preventive detention order in the absence of the defendant if it is satisfied:

(a) that the summons has been duly served on the defendant, or

(b) that the summons has not been duly served on the defendant but that all reasonable steps to do so have been taken.

17 Hearings

(1) In any proceedings under this Act, the Court:

(a) is bound by the rules of evidence, and

(b) may order the production of documents of the following kind in relation to the defendant:

(i) medical records and reports,

(ii) records and reports of any psychiatric in-patient service or prison,

(iii) reports made to, or by, the Offenders Review Board,

(iv) reports, records or other documents prepared or kept by any police officer,

(v) the transcript of any proceedings before, and any evidence tendered to, the Mental Health Review Tribunal, and

(c) may order an examination of the defendant to be carried out by one or more duly qualified medical practitioners, psychiatrists or psychologists, and

(d) may require the preparation of reports as to the defendant's condition and progress by such persons as it considers appropriate, and

(e) must have regard to any report made available to it under paragraph (d), and

(f) may, if the interests of justice so demand, exclude any person (other than a party to the proceedings or the party's legal representative) from the whole or any part of the proceedings.

(2) This Act does not affect the right of any party to proceedings under this Act:

(a) to appear, either personally or by the party's legal representative, or

(b) to call witnesses and give evidence, or

(c) to cross-examine witnesses, or

(d) to make submissions to the Court on any matter connected with the proceedings.

(3) Despite any Act or law to the contrary, the Court must receive in evidence any document or report of a kind referred to in subsection (1), or any copy of any such document or report, that is tendered to it in proceedings under this Act.

18 Orders prohibiting publication of material that may identify persons

(1) The Court may, in or in connection with any proceedings under this Act, make an order prohibiting persons generally, or any named person or persons, from publishing or broadcasting the name of any person:

(a) who is a defendant or witness in the proceedings, or

(b) to whom the proceedings relate, or

(c) who is mentioned or otherwise involved in the proceedings.

(2) Such an order has effect both during the proceedings and after the proceedings are disposed of.

(3) For the purposes of this section, a reference to the name of a person includes a reference to any information, photograph, drawing or other material that identifies the person or is likely to lead to the identification of the person.

Division 3Administration of preventive detention orders

19 Detention orders sufficient authority for detainees to be held in custody

A detention order is sufficient authority for the person against whom it is made to be held in custody in accordance with the terms of the order.

20 Detention orders ineffective while detainees are otherwise in custody

A detention order does not have effect while the person against whom it is made is lawfully in custody otherwise than under the order.

21 Reports to be prepared

(1) While a preventive detention order is in force:

(a) the assessor or assessors appointed for the detainee, and

(b) the Commissioner of Corrective Services,

are to make reports to the Director of Public Prosecutions on the detainee's condition and progress.

(2) Reports under this section must be prepared:

(a) at least once during the period for which the preventive detention order is in force, and

(b) whenever else the Director of Public Prosecutions so requires.

(3) A report prepared by an assessor or by the Commissioner of Corrective Services must contain particulars with respect to the following matters:

(a) a description of the general behaviour of the detainee during the period to which the report relates,

(b) an opinion as to whether or not the detainee is still more likely than not to commit a serious act of violence,

(c) an opinion as to whether or not it is still appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody,

(d) an opinion as to whether the detainee should remain in the prison in which the detainee is currently detained or be transferred to another prison.

(4) A report prepared by an assessor must also contain particulars with respect to the following matters:

(a) a description of the current state of the detainee's medical, psychiatric and psychological condition,

(b) a description of any medical, psychiatric or psychological treatment made available to the detainee during the period to which the report relates,

(c) a description of any medical, psychiatric or psychological treatment undergone by the detainee during the period to which the report relates,

(d) an opinion as to whether any medical, psychiatric or psychological treatment (whether of the same kind as that made available during the period to which the report relates or of another kind) should be made available to the detainee during the remainder of the period for which the detention order is in force.

(5) Particulars of an opinion must include particulars of the grounds on which the opinion is formed.

22 Detainees taken to be prisoners for certain purposes

(1) A detainee is taken to be a prisoner within the meaning of the*Prisons Act 1952*.

(2) A detainee is taken to be required by law to be in custody in prison for the purposes of section 352AA of the *Crimes Act 1900*.

(3) In any other Act (other than the *Sentencing Act 1989*) or any instrument under any such Act:

(a) a reference to a sentence of imprisonment includes a reference to a detention order, and

(b) a reference to a term of imprisonment includes a reference to the period for which a detention order is in force.

(4) The *Sentencing Act 1989* does not apply to or in respect of a detention order or a detainee.

23 Discharge of detainees from prison

(1) A detainee must be discharged from prison at the expiry of the detention order to which the detainee is subject unless there is lawful reason for continuing to hold the detainee in custody.

(2) A detainee must not be discharged from prison, or allowed leave of absence from prison, otherwise than:

(a) at the expiry of the detention order to which the detainee is subject, or

(b) in accordance with an order made by the Court.

(3) This section applies despite any other Act or law to the contrary.

Division 4General

24 Exercise of jurisdiction by single Judge

The jurisdiction of the Court under this Act is exercisable by a single Judge.

25 Right of appeal

(1) An appeal to the Court of Appeal lies from any determination of the Court to make, or to refuse to make, a preventive detention order.

(2) An appeal may be on a question of law, a question of fact or a question of mixed law and fact.

(3) The making of an appeal does not stay the operation of a detention order.

26 Jurisdiction of Court apart from Act not limited

Nothing in this Act limits the jurisdiction of the Court apart from this Act.

Part 3Miscellaneous

27 Costs

(1) A person is entitled to legal aid within the meaning of the*Legal Aid Commission Act 1979* for the costs incurred by or on behalf of the person for or in connection with:

(a) proceedings brought against the person under this Act, or

(b) proceedings by way of appeal from any decision of the Court in proceedings brought against the person under this Act.

(2) The nature and extent of legal aid to which a person is entitled under this section, and the terms and conditions on which it is to be provided, are to be determined by the Legal Aid Commission in accordance with the *Legal Aid Commission Act 1979*.

28 Protection of certain persons from liability

No action lies against any person (including the State) for or in respect of any act or omission done or omitted by the person so long as it was done or omitted in good faith for the purposes of, or in connection with the administration or execution of, this Act.

29 Bail Act 1978 not to apply

The *Bail Act 1978* does not apply to or in respect of a person who is a defendant in proceedings under this Act.

30 Rules of court

(1) Rules of court may be made under the *Supreme Court Act 1970* for regulating the practice and procedure of the Court in respect of proceedings under this Act.

(2) This section does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.

31 Functions of Director of Public Prosecutions

(1) The Director of Public Prosecutions has the powers, authorities duties and functions conferred or imposed on the Director of Public Prosecutions by this Act.

(2) This section does not limit the powers, authorities duties and functions conferred or imposed on the Director of Public prosecutions by or under any other Act.

Historical notes

The following abbreviations are used in the Historical notes:

Am	amended	LW	legislation website	Sch	Schedule
Cl	clause	No	number	Schs	Schedules
Cll	clauses	p	page	Sec	section
Div	Division	pp	pages	Secs	sections
Divs	Divisions	Reg	Regulation	Subdiv	Subdivision
GG	Government Gazette	Regs	Regulations	Subdivs	Subdivisions
Ins	inserted	Rep	repealed	Subst	substituted

Table of amending instruments

Community Protection Act 1994 No 77. Assented to 6.12.1994. Date of commencement, 9.12.1994, sec 2 and GG No 167 of 9.12.1994, p 7206.

Top of page