HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

MINISTER FOR HOME AFFAIRS
Applicant

and

ABDUL NACER BENBRIKA
Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Intervener

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

PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth intervened in the proceeding under s 78A of the *Judiciary Act 1903* (Cth) (the **Judiciary Act**) in support of the applicant (the **Minister**) before the cause pending in the Court of Appeal was removed into this Court.

PART III ARGUMENT

A. INTRODUCTION AND SUMMARY

3. On 4 September 2020, the Minister applied to the Supreme Court of Victoria under s 105A.5 of the *Criminal Code* (Cth) (the **Code**) for a continuing detention order (**CDO**) in relation to the Respondent (QRB 3-5).

4. Under s 105A.7 of the Code, on an application under s 105A.5, the Supreme Court may make a CDO in relation to a terrorist offender if it is satisfied: (i) to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious offence against Pt 5.3 of the Code if the offender is released into the community; and (ii) that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.

5. If the CDO is made, s 105A.3(2) of the Code provides that it will authorise the detention of the respondent in a prison for the period the order is in force.

6. On 8 October 2020, Tinney J reserved the following question for the consideration of the Court of Appeal under s 17B(2) of the *Supreme Court Act 1986* (Vic) (QRB 77-78):

> Is all or any part of Division 105A of [the Code] (and, if so, which part) invalid because the power to make a [CDO] under s 105A.7 of the Code is not within the judicial power of the Commonwealth and has been conferred, inter alia, on the Supreme Court of Victoria contrary to Chapter III of the Commonwealth Constitution?

7. On 27 October 2020, Tinney J made an interim detention order under s 105A.9 of the Code in relation to the respondent (QRB 79-80).

8. On 2 November 2020, on the application of the Attorney-General of the Commonwealth under s 40(1) of the Judiciary Act, the question reserved for the consideration of the Court of Appeal was removed into this Court (QRB 92-93).

9. The Commonwealth submits that the question reserved should be answered "No". In summary, the Commonwealth makes that submission for the following reasons.

9.1. Although the power to impose detention as an incident of adjudging and punishing criminal guilt is exclusively judicial, the power to impose detention other than as punishment for a breach of the law is neither exclusively judicial nor exclusively executive. Whether such a power is properly characterised as judicial power will depend on the application of the ordinary principles governing the separation of powers.

9.2. It follows that a power to impose detention other than as punishment for a breach of the law can be conferred by the Commonwealth Parliament on a court under Ch III of the Constitution, provided that: (i) the features of the power, and the process by which it is exercised, are such that the power is properly characterised as judicial power; and (ii) the power is to be exercised in a matter of the kind described in ss 75 or 76 of the Constitution.

9.3. The power conferred on the Supreme Court by s 105A.7 of the Code is a power to impose detention other than as punishment for a breach of the law. The features of that power, and the process by which it is exercised, are such that the power is properly characterised as judicial power. Further, that power is to be exercised in a matter arising under a law made by the Commonwealth Parliament. It is therefore within the judicial power of the Commonwealth.

B. APPLICABLE PRINCIPLES

(a) The judicial power of the Commonwealth

10. The issue raised by the question reserved is whether the power conferred on the Supreme Court by s 105A.7 of the Code is within the judicial power of the Commonwealth. If the power is not properly characterised in that way, the Commonwealth accepts that the Commonwealth Parliament could not confer it on the Supreme Court.[1] (That is, the Commonwealth does not contend that the power is incidental to the execution of the judicial power of the Commonwealth.)

11. The concept of judicial power has been said to "defy … purely abstract conceptual

[1] See *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152 (the Court); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (***Boilermakers***) at 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *R v Murphy* (1985) 158 CLR 596 at 614-615 (the Court).

analysis".[2] Whether a particular power is judicial power may depend not only on the nature of the power, but also on the nature of the body by which it is exercised, as well as historical considerations.[3] At its core, though, judicial power is the power of a polity "to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property".[4]

12. The judicial power of the Commonwealth is that judicial power which has as its source Ch III of the Constitution, or a law of the Commonwealth Parliament made under Ch III.[5] It is the judicial power that is exercised whenever a court exercises judicial power in federal jurisdiction[6] — that is, pursuant to the authority conferred by the Constitution or Commonwealth law to adjudicate a matter of the kind described in ss 75 and 76 of the Constitution, or the authority to hear and determine an appeal under s 73 of the Constitution.[7]

13. The judicial power of the States is that judicial power which has as its source a State constitution, or another law of a State Parliament.[8] It is the judicial power that is exercised whenever a court exercises judicial power in State jurisdiction — that is, pursuant to the authority to adjudicate which State courts (and other bodies) possess under laws made by State Parliaments.[9]

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2 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 (***Tasmanian Breweries***) at 394 (Windeyer J).

3 *R v Davison* (1954) 90 CLR 353 (***Davison***) at 368-370 (Dixon CJ and McTiernan J); *Tasmanian Breweries* (1970) 123 CLR 361 at 373 (Kitto J), 387 (Menzies J), 394 (Windeyer J).

4 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ). See also *Rizeq v Western Australia* (2017) 262 CLR 1 (***Rizeq***) at [52] (Bell, Gageler, Keane, Nettle and Gordon JJ).

5 Constitution, ss 71, 73, 75, 76 and 77. See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264-265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Boilermakers* (1956) 94 CLR 254 at 269-270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (***Re Wakim***) at [51] (McHugh J), [111] (Gummow and Hayne JJ). The Commonwealth Parliament may confer a power to quell disputes other than under Ch III — for example, under s 51(vi) or s 122 — but that power, although it may be "judicial power", is not the "judicial power of the Commonwealth": see *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 600 (Barwick CJ), 602 (McTiernan J), 612 (Windeyer J), 623 (Walsh J); *Private R v Cowen* (2020) 94 ALJR 849 at [60] (Kiefel CJ, Bell and Keane JJ), [121] (Nettle J), [133] (Gordon J).

6 *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ); *Gould v Brown* (1998) 193 CLR 346 at [15] (Brennan CJ and Toohey J), [212] (Gummow J); *Rizeq* (2017) 262 CLR 1 at [51] (Bell, Gageler, Keane, Nettle and Gordon JJ).

7 As to s 73, see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable [No 1]***) at 142 (Gummow J).

8 *Gould v Brown* (1998) 193 CLR 346 at [18] (Brennan CJ and Toohey J); *Re Wakim* (1999) 198 CLR 511 at [51] (McHugh J), [119] (Gummow and Hayne JJ).

9 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 (***Edensor***) at [3] (Gleeson CJ, Gaudron and Gummow JJ); *Rizeq* (2017) 262 CLR 1 at [8] (Kiefel CJ), [50] (Bell, Gageler, Keane, Nettle and Gordon JJ), both quoting *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 (Isaacs J).

14. The judicial power of the Commonwealth is subject to some limits that the judicial power of the States is not, because the judicial power of the Commonwealth can be conferred only through or in conformity with Ch III.[10] For that reason, the judicial power of the Commonwealth may be exercised only in a "matter".[11] But, contrary to the Respondent's submissions (RS [42], [63]), the only differences between the judicial power of the Commonwealth and the judicial power of the States are those that arise from the different sources of the authority to adjudicate.[12] The character of Commonwealth and State judicial power is the same, regardless of its source.[13] That is why the many judgments of this Court describing judicial power do not differentiate between the character of Commonwealth and State judicial power.

15. The Respondent does not identify any basis for this Court now, for the first time, to differentiate between the judicial power of the Commonwealth and that of the States on a basis unrelated to the different sources of authority to adjudicate.[14] In particular, he does not identify any aspect of Ch III which might warrant the conclusion that power of the kind conferred on the Supreme Court by s 105A.7 of the Code could be conferred as part of the judicial power of the States (RS [54]), but cannot be conferred as part of the judicial power of the Commonwealth.

16. Rather than attempt that task, the Respondent seeks to rely on *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[15] for the proposition that a power to order the detention of a person can only be within the judicial power of the Commonwealth if it is an incident of the function of adjudging and punishing criminal guilt (RS [19]). He goes so far as to contend that the power to detain for other purposes is an exclusively executive power that cannot be conferred on a court (RS [16]-[17]). For the reasons given below, that proposition is not part of Australian law.

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10 *Boilermakers* (1956) 94 CLR 254 at 269-270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Rizeq* (2017) 262 CLR 1 at [15] (Kiefel CJ), [58]-[59] (Bell, Gageler, Keane, Nettle and Gordon JJ).

11 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ). See also *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at [24]-[26] (French CJ, Kiefel, Bell and Keane JJ); *Gould v Brown* (1998) 193 CLR 346 at [118] (McHugh J); *Re Wakim* (1999) 198 CLR 511 at [111] (Gummow and Hayne JJ); *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at [82]-[83] (French CJ).

12 Stellios, "State/Territory human rights legislation in a federal judicial system" (2008) 19 *Public Law Review* 52 at 60.

13 *Rizeq* (2017) 262 CLR 1 at [53] (Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Gould v Brown* (1998) 193 CLR 346 at [29] (Brennan CJ and Toohey J).

14 See paragraph 42 below.

15 (1992) 176 CLR 1 (***Lim***).

17. Notwithstanding its central place in the Respondent's argument, *Lim* did not concern detention as a result of an order by a court. Further, the Court in fact upheld the validity of legislation that required detention in custody in circumstances that had nothing to do with adjudging and punishing criminal guilt, because the power in question was "neither punitive in nature nor part of the judicial power of the Commonwealth".[16] It is therefore necessary to give some attention to what *Lim* actually decided.

(b) The principle to be derived from Lim

18. At issue in *Lim* was the validity of a statutory scheme that required the executive to detain certain non-citizens. One argument advanced against the validity of the scheme was that, by requiring the executive to detain the non-citizens, the Commonwealth Parliament had impermissibly conferred judicial power on the executive. In dealing with that argument, Brennan, Deane and Dawson JJ began from two premises.[17] The first premise was that the function of adjudging and punishing criminal guilt is exclusively part of judicial power. The second premise was that, in conferring that function exclusively on courts, the Constitution is concerned with substance rather than form.

19. From those premises, their Honours reasoned to the conclusion that the Commonwealth Parliament could not confer on the executive an arbitrary power to detain citizens in custody, even if that power were conferred in terms divorced from punishment and guilt (given the focus on substance over form). One reason given in support of that conclusion was that, subject to certain exceptions, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[18] That statement was not a conclusion,[19] but a step in the reasoning to the conclusion that:[20]

> [As a] general proposition … the power to order that a citizen be involuntarily confined in custody is, under the doctrine of the separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth[.]

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16 (1992) 176 CLR 1 at 32; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 (***Falzon***) at [82] (Gageler and Gordon JJ), [96] (Nettle J).

17 *Lim* (1992) 176 CLR 1 at 27. See also *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497 (Gaudron J); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258 (Mason CJ, Brennan and Toohey JJ).

18 *Lim* (1992) 176 CLR 1 at 27.

19 Cf *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (***Fardon***) at [77] (Gummow J).

20 *Lim* (1992) 176 CLR 1 at 28; see also at 28-29.

20. The above conclusion, and the reasoning that underpins it, lend no support to the notion that involuntary detention by the executive may be permissible even where such detention could not be ordered by a court (cf RS [16]-[19]).[21] To the contrary, the proposition identified by Brennan, Deane and Dawson JJ was that detention in custody cannot be imposed at all (that is, by anyone) except by a court as an incident of adjudging and punishing criminal guilt. That is, unless an exception to the general proposition applies, detention can validly be imposed: (i) only by a court in the exercise of judicial power; and (ii) even then, only as an incident of adjudging and punishing criminal guilt.

21. While the "general proposition"[22] identified in *Lim* may be accepted, the exceptions to it are so numerous that it "cannot be said that the power to authorise detention in custody is exclusively judicial except for clear exceptions".[23] In an attempt to account for the many exceptions, the Respondent upends the analysis in *Lim* (and the argument to which it responded) by submitting that, far from being exclusively judicial, non-punitive detention is an exclusively executive power. That is, he contends that such detention by order of the executive is permissible, even though such detention by order of a court is not (RS [16]-[19]). That submission derives no support from *Lim*. It is also contrary to this Court's recognition of the good reasons why the power to detain for non-punitive purposes should be exercised by courts.[24]

22. Cases since *Lim* have confirmed that the feature that explains the "exceptions" to the general proposition stated in *Lim* is whether detention is imposed as punishment for a breach of the law.[25] If a power to detain is properly characterised as having a purpose of

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21 The penultimate sentence of RS [19] seeks to re-cast the principle from *Lim* as a limit on detention "by reason of a court order", but that language has no foundation in the case.

22 See *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 (***NAAJA***) at [37] (French CJ, Kiefel and Bell JJ); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (***Plaintiff M68***) at [40] (French CJ, Kiefel and Nettle JJ). See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 (***Re Woolley***) at [17] (Gleeson CJ).

23 *Kruger v Commonwealth* (1997) 190 CLR 1 (***Kruger***) at 109-110 (Gaudron J) (emphasis added). See also *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 (***Behrooz***) at [20] (Gleeson CJ); *Al-Kateb v Godwin* (2004) 219 CLR 562 (***Al-Kateb***) at [257]-[258] (Hayne J; Heydon J agreeing).

24 See *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 (***Vella***) at [90] (Bell, Keane, Nettle and Edelman JJ), [158] (Gageler J). See also *Fardon* (2004) 223 CLR 575 at [2] (Gleeson CJ), [44] (McHugh J); *Thomas v Mowbray* (2007) 233 CLR 307 (***Thomas***) at [17] (Gleeson CJ) (this passage being approved in *Vella* (2019) 93 ALJR 1236 at [90] and [158]).

25 *Al-Kateb* (2004) 219 CLR 562 at [44]-[45], [49] (McHugh J), [255]-[256] and [263] (Hayne J; Heydon J agreeing), [289] (Callinan J); *Behrooz* (2004) 219 CLR 486 at [21] (Gleeson CJ), [218] (Callinan J); *Re Woolley* (2004) 225 CLR 1 at [17], [19] (Gleeson CJ), [53]-[62] (McHugh J), [222], [227] (Hayne J), [261] (Callinan J); *NAAJA* (2015) 256 CLR 569 at [36]-[37] (French CJ, Kiefel and Bell JJ), [94]-[103] (Gageler J); *Plaintiff M68* (2016) 257 CLR 42 at [40] (French CJ, Kiefel and Nettle JJ), [98], [100] (Bell J),

effecting such punishment, it will be exclusively judicial, and can be validly conferred by the Commonwealth Parliament only on a court. If, however, a power to detain can be "shown to be directed to a purpose other than to punish",[26] the power will be neither exclusively judicial nor exclusively executive.[27] In such cases, the character of the power depends on the application of the ordinary principles governing the separation of powers.

23. Contrary to the Respondent's submissions (RS [23]), to understand *Lim* in this way is not to assert that all of the exceptions identified in *Lim* fall within clearly defined categories.[28] Nor is it to elevate a distinction between punitive and protective detention.[29] Rather, it is to recognise that, if a power to detain is directed to a purpose other than to punish for a breach of the law, the power will not intersect with the "general proposition" from *Lim*.

24. Thus, *Lim* provides no support to the Respondent's contention that a power to order the involuntary detention of a person can only be within the judicial power of the Commonwealth if it is an incident of the function of adjudging and punishing criminal guilt. Instead, if the Commonwealth Parliament confers on a court a power to detain other than as an incident of adjudging and punishing criminal guilt, the question is whether the power is directed to a purpose other than to punish for a breach of the law. If it is, the conferral of that power will be valid provided the power is properly characterised as judicial power having regard to ordinary principles governing the separation of powers.

(c) Judicial power and preventive detention

25. There is no intrinsic reason why a power to detain other than as an incident of adjudging and punishing criminal guilt cannot be judicial power. Indeed, in *Re Woolley*, McHugh J identified several examples of circumstances in which courts may order the detention of persons in custody other than as an incident of adjudging and punishing criminal guilt, stating that:[30]

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[183]-[185] (Gageler J), [238]-[241] (Keane J); *Falzon* (2018) 262 CLR 333 at [17], [27], [29], [33] (Kiefel CJ, Bell, Keane and Edelman JJ), [96] (Nettle J).

26 *Falzon* (2018) 262 CLR 333 at [33] (Kiefel CJ, Bell, Keane and Edelman JJ).

27 Contrary to RS [24], the fact that the power is protective does not stamp it as executive in nature. Courts commonly make orders for a protective purpose: see *Thomas* (2007) 233 CLR 307 at [15] (Gleeson CJ); *Vella* (2019) 93 ALJR 1236 at [83] (Bell, Keane, Nettle and Edelman JJ).

28 In *Kruger* (1997) 190 CLR 1 at 109-110, Gaudron J referred to the absence of positive features that unify the exceptions, but did not exclude the existence of a negative characteristic of the kind identified above.

29 As both the decision in *Lim* and the exceptions identified by Brennan, Deane and Dawson JJ in that case demonstrate, there are forms of detention which are neither "punitive" nor "protective".

30 *Re Woolley* (2004) 225 CLR 1 at [58] (citations omitted).

> An order committing a person to an institution after acquittal of a criminal charge on the ground of insanity or mental illness is a notable example. Another example is an order committing a person to be detained without bail pending trial. At different times, courts have also been given power to order the detention of persons who were adjudged mentally ill or who were debtors.

26. A further example is detention under a statutory scheme providing for the preventive detention of a person previously convicted of a criminal offence after the expiry of that person's sentence. In *New South Wales v Kable*,[31] every member of this Court held that an order made by the Supreme Court of New South Wales under a scheme of that kind had involved the exercise of judicial power.

27. The legislation at issue in *Kable [No 2]* was the *Community Protection Act 1994* (NSW) (**CP Act**). Section 5(1) of that Act purported to confer on the Supreme Court the authority and power to order the continuing detention of Gregory Kable in prison after the expiry of his sentence, if the Court was satisfied on reasonable grounds that Mr Kable 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. The Director of Public Prosecutions (**Director**) applied for an order under the CP Act in relation to Mr Kable. As part of his defence to the Director's application,[32] Mr Kable raised the question whether the CP Act was invalid by reason of Ch III of the Constitution. In 1995, Levine J made an order under the CP Act requiring that Mr Kable be detained in custody for a period of six months.[33] At the expiry of that six month period, Mr Kable was released. Subsequently, in *Kable [No 1]*, a majority of the High Court held that the CP Act was invalid.

28. Following *Kable [No 1]*, Mr Kable sought damages for false imprisonment, alleging that his detention under the order made by Levine J had been unlawful. In *Kable [No 2]*, the High Court rejected that allegation, holding that the detention under that order was not unlawful, because Levine J's order was effective until it was set aside in *Kable [No 1]*. Central to that conclusion was the High Court's acceptance that, in ordering that Mr Kable be detained in custody after the expiry of his sentence, Levine J was exercising judicial power.[34] The plurality in *Kable [No 2]* explained that:[35]

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31 (2013) 252 CLR 118 (***Kable [No 2]***).
32 See *Kable [No 1]* (1996) 189 CLR 51 at 136 (Gummow J).
33 *Kable [No 2]* (2013) 252 CLR 118 at [2] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
34 *Kable [No 2]* (2013) 252 CLR 118 at [17]-[19], [33], [38]-[39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [69]-[70], [74], [77] (Gageler J).
35 *Kable [No 2]* (2013) 252 CLR 118 at [17] (emphasis added, citation omitted); see also at [74] (Gageler J).

> It is … to misstate the effect of the decision in *Kable [No 1]* to hold … that in exercising power under the CP Act, "the Supreme Court was not exercising judicial power or authority and was not acting, institutionally, as a superior court". The majority in *Kable [No 1]* held that the CP Act was invalid because it required the Supreme Court to exercise judicial power and act institutionally as a court, but to perform a task that was inconsistent with the maintenance … of the Supreme Court's institutional integrity.

29. This Court's decision in *Kable [No 2]* therefore establishes that legislation that empowers a court to order the detention of a person after the expiry of his or her sentence, based on an assessment of the risk of future offending by that person, may properly be characterised as a conferral of judicial power.[36]

30. The Respondent's contention that the Court in *Kable [No 2]* held only that Levine J made a judicial order should not be accepted (RS [52]-[53]), because the entire Court held that the order made by Levine J was properly characterised as a judicial order because it was made in the exercise of judicial power.[37] Thus, not only did both the plurality and Gageler J expressly identify the power exercised by Levine J as judicial power,[38] but both judgments also explained that the fact that orders of a superior court of record are made in the exercise of judicial power is central to the justification for giving effect to such orders until they are set aside.[39]

31. Confronted with the above reasoning, the Respondent concedes that the power exercised in *Kable [No 1]* was "judicial power" (RS [54]). That concession is rightly made. However, the concession cannot stand with his argument that preventive detention can be imposed only in the exercise of exclusively executive power, or with his argument that *Kable [No 2]* held only that Levine J made a judicial order.

32. The Respondent falls back to an attempt to distinguish *Kable [No 2]*. He submits both: (i) that Levine J was not exercising the judicial power of the Commonwealth; and (ii) that there is a relevant distinction between State judicial power and the judicial power of the Commonwealth. For the reasons that follow, both arguments should be rejected. Specifically, and again consistently with *Kable [No 2]*, the Court should hold that, in

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36 See also *Fardon* (2004) 223 CLR 575 at [34] (McHugh J); *Thomas* (2007) 233 CLR 307 at [15], [18] (Gleeson CJ); *Vella* (2019) 93 ALJR 1236 at [149], [159] (Gageler J).

37 See *Kable [No 2]* (2013) 252 CLR 118 at [27], [38] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); see also at [50], [67] (Gageler J).

38 *Kable [No 2]* (2013) 252 CLR 118 at [17]-[18] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [74]-[77] (Gageler J). It was for this reason that the plurality did not find it necessary to consider the issue identified in the second sentence of [35] of the plurality's reasons.

39 *Kable [No 2]* (2013) 252 CLR 118 at [33]-[34], [38] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [59]-[60], (Gageler J).

exercising power under the CP Act, Levine J was exercising the judicial power of the Commonwealth (cf RS [54], [56]-[58]). Further, it should also hold that, even if Levine J had been exercising State judicial power, there is no principled reason why a power to order the detention in custody of a person after the expiry of his or her sentence, based on an assessment of the risk of future offending by that person, is within State judicial power but not within the judicial power of the Commonwealth (cf RS [55], [59]-[64]).

(i) Levine J was exercising the judicial power of the Commonwealth

33. In *Kable [No 2]*, the plurality recorded that in the courts below the proceeding had been conducted on the premise that it "engaged the judicial power of the Commonwealth", before observing that it was "not open to doubt" that those proceedings "engaged federal jurisdiction (at least to the extent the proceedings were a matter arising under the Constitution or involving its interpretation)".[40] As Gageler J explained, drawing on the reasons of Gummow J in *Kable [No 1]*, the raising of a question as to the validity of the CP Act in the proceeding before Levine J had the effect of bringing the whole of the matter in issue in that proceeding within the federal jurisdiction of the Supreme Court conferred by s 39(2) of the *Judiciary Act*.[41] Once a question about the constitutional validity of the CP Act was raised by Mr Kable as part of his defence to the application for an order under s 5(1) of the CP Act, the matter became one "arising under the Constitution" within the meaning of s 76(i) of the Constitution. That having occurred, the State jurisdiction that would otherwise have allowed the Supreme Court to determine that matter was removed by s 39(1) of the *Judiciary Act*, and replaced by federal jurisdiction invested by s 39(2) of the *Judiciary Act*,[42] leaving "no room for the exercise of a State jurisdiction which apart from any operation of the *Judiciary Act* the State court would have had".[43]

40 [40] *Kable [No 2]* (2013) 252 CLR 118 at [18] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[41] *Kable [No 2]* (2013) 252 CLR 118 at [76] (Gageler J), citing *Kable [No 1]* (1996) 189 CLR 51 at 136 (Gummow J). See also *Kable [No 2]* (2013) 252 CLR 118 at [37] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Kable [No 1]* (1996) 189 CLR 51 at 96 (Toohey J), 114 (McHugh J), both of whom likewise referred to Levine J having exercised federal jurisdiction.

[42] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 (***MZXOT***) at [180] (Heydon, Crennan and Kiefel JJ). The respondent's reliance on *Re Wakim* (1999) 198 CLR 511 at [71] is inapt (RS [56]), for McHugh J clearly explained in that passage that the vice in the State laws was the "attempt to confer State jurisdiction in respect of controversies that fall outside the realm of federal jurisdiction".

[43] *Felton v Mulligan* (1971) 124 CLR 367 at 373 (Barwick CJ), 412 (Walsh J), endorsed in *MZXOT* (2008) 233 CLR 601 at [180] (Heydon, Crennan and Kiefel JJ).

34. The Respondent's submissions that – notwithstanding the analysis in *Kable [No 2]* – this Court should now find that *Kable [No 1]* did not involve the judicial power of the Commonwealth should be rejected.

35. *First*, the respondent contends that Levine J must have been exercising State judicial power because the CP Act was a State law (RS [54], [56]). That contention fails to take account of s 79 of the *Judiciary Act*. More specifically, because Levine J was exercising federal jurisdiction, the CP Act, as a State law, was not capable of applying of its own force to determine the powers of the Supreme Court.[44] However, had s 5(1) of the CP Act not been invalid for other reasons, s 79 of the *Judiciary Act* would have operated to apply that provision as Commonwealth law in the exercise of that jurisdiction.[45] Thus, the power purportedly exercised by Levine J in making the detention order with respect to Mr Kable was power purportedly conferred by Commonwealth law, not State law.

36. *Second*, the Respondent contends that it is open to analyse *Kable [No 1]* as having involved two matters, only one of which was in federal jurisdiction (RS [57]). That submission is contrary to Gummow J's description in *Kable [No 1]* of the jurisdiction exercised by Levine J as having been "wholly federal".[46] It is also contrary to the "better view" identified by Gageler J in *Kable [No 2]*,[47] who explained that the "single matter" encompassed not only whether the CP Act was invalid because it was incompatible with Ch III of the Constitution, but also whether the order sought in relation to Mr Kable should be made.[48] Those conclusions involved a conventional application of settled principle. What is part of the one matter "depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships".[49] Once Mr Kable sought to defend the Director's application by contending that the CP Act was invalid,[50] in order for Levine J to

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44 *Rizeq* (2017) 262 CLR 1 at [63], [103] (Bell, Gageler, Keane, Nettle and Gordon JJ).
45 *Rizeq* (2017) 262 CLR 1 at [103]-[104] (Bell, Gageler, Keane, Nettle and Gordon JJ).
46 *Kable [No 1]* (1996) 189 CLR 51 at 136 (Gummow J). See also *Edensor* (2001) 204 CLR 559 at [7] (Gleeson CJ, Gaudron and Gummow JJ).
47 *Kable [No 2]* (2013) 252 CLR 118 at [76] (Gageler J).
48 *Kable [No 2]* (2013) 252 CLR 118 at [77] (Gageler J).
49 *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ); *Palmer v Ayres* (2017) 259 CLR 478 at [26] (Kiefel, Keane, Nettle and Gordon JJ).
50 See *Kable [No 1]* (1996) 189 CLR 51 at 136 (Gummow J). In *Fencott v Muller* (1983) 152 CLR 570 at 608, Mason, Murphy, Brennan and Deane JJ noted that "[t]he scope of a controversy which constitutes a matter is not ascertained merely by reference to the proceedings which a party may institute, but may be illuminated by the conduct of those proceedings and especially by the pleadings in which the issues in controversy are defined and the claims for relief are set out".

determine whether he should make an order under s 5(1) of the CP Act, it was necessary for his Honour first to determine whether he could do so. Those questions were bound up in the one controversy about whether an order under the CP Act should be made in relation to Mr Kable. They did not involve "completely disparate claim[s]"[51] of the kind that would support the conclusion that there were two separate matters.

37. This Court should not readily accept the Respondent's invitation to identify multiple matters, for that may have significant ramifications for the jurisdiction of federal courts, including by promoting "arid jurisdictional dispute[s]".[52] To the extent that disputes arising from a common substratum of facts are characterised as involving multiple matters, the Federal Court, Family Court and Federal Circuit Court will be unable to quell the entirety of the controversies that come before them, to the extent that parts of those controversies involve State law.[53] That is plainly undesirable, for "nothing is so apt to promote confusion and difficulty as an attempt to dissect out of an entire legal question one of the component issues it involves and to submit it for decision in artificial isolation".[54]

38. *Third*, the Respondent contends that, even if *Kable [No 1]* involved one matter, Levine J might have exercised both the judicial power of the Commonwealth and State judicial power "within the same matter" (RS [58]). That submission must be rejected, for it is well settled that a court cannot have both federal jurisdiction and State jurisdiction to adjudicate a single matter.[55] The comments of French CJ in *Momcilovic* cited by the Respondent (RS [58]) related to the exercise of a "distinct non-judicial power".[56] Such a power could not have been exercised in federal jurisdiction,[57] and thus could conceivably have been exercised after a court had exhausted its functions in federal jurisdiction. But the power exercised by Levine J was judicial power, which was to be exercised in order to adjudicate the matter before his Honour.[58] The exercise of that power was part of

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51 *Fencott v Muller* (1983) 152 CLR 570 at 607 (Mason, Murphy Brennan and Deane JJ).
52 *Fencott v Muller* (1983) 152 CLR 570 at 609 (Mason, Murphy Brennan and Deane JJ).
53 See *Fencott v Muller* (1983) 152 CLR 570 at 608-609 (Mason, Murphy Brennan and Deane JJ). See also *Rizeq* (2017) 262 CLR 1 at [55] (Bell, Gageler, Keane, Nettle and Gordon JJ).
54 *Felton v Mulligan* (1971) 124 CLR 367 at 410 (Walsh J), quoting *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545 at 571 (Dixon J).
55 *Felton v Mulligan* (1971) 124 CLR 367 at 373 (Barwick CJ), 411-412 (Walsh J); *Fencott v Muller* (1983) 152 CLR 570 at 608-609 (Mason, Murphy, Brennan and Deane JJ); *MZXOT* (2008) 233 CLR 601 at [23]-[24] (Gleeson CJ, Gummow and Hayne JJ).
56 *Momcilovic* (2011) 245 CLR 1 at [101] (French CJ) (emphasis added).
57 See *Edensor* (2001) 204 CLR 559 at [72]-[73] (Gleeson CJ, Gaudron and Gummow JJ); *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [24], [28] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).
58 *Kable [No 2]* at [27] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [77] (Gageler J).

Levine J's functions in federal jurisdiction, as opposed to a function to be exercised after those functions had been exhausted.

(ii) There is no relevant distinction between State and Commonwealth judicial power

39. Alternatively, even if Levine J was exercising State judicial power in making the order under the CP Act, there is no relevant distinction between that power and the judicial power of the Commonwealth which might provide a basis to distinguish *Kable [No 2]*. That is not to equate Commonwealth and State judicial power. As is explained in paragraphs 12 to 14 above, there is a distinction between the judicial power of the States and the judicial power of the Commonwealth. However, that distinction is referable to the source of the authority to exercise the power, and not to its character. So much is confirmed by *Rizeq*, where the plurality observed that "[t]he character of judicial power, as distinct from the source of the authority of a particular court to adjudicate a particular justifiable controversy, is unaffected by the source of the law that is to be applied".[59]

40. The Respondent has identified no basis for his submission that the judicial power of the Commonwealth is a "special species of judicial power" (RS [63]). Not only does that submission lack a basis in the text of the Constitution, or in any decisions of this Court that have explained the concept of "judicial power", it is contrary to the established proposition that the Constitution does not permit of "different grades or qualities of justice".[60] Once that is recognised, it follows that, if a State court could make an order for preventive detention under a State statute in the exercise of State judicial power, then if the same court, following relevantly the same judicial process, makes the same order under a relevantly identically Commonwealth statute, that should involve an exercise of Commonwealth judicial power. There is no principled basis for any different conclusion.

41. The Respondent has not identified any aspect of Ch III that might warrant the conclusion that a power to order the detention of a person after the expiry of his or her sentence, based on an assessment of the risk of future offending by that person, is capable of being within the judicial power of the States, but not the judicial power of the Commonwealth. The only aspect tentatively identified by the Respondent is the separation of powers (RS [42], [63]). However, while the fact that there is no separation of powers at the State level

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59 *Rizeq* (2017) 262 CLR 1 at [53] (Bell, Gageler, Keane, Nettle and Gordon JJ) (emphasis added).

60 *Kable [No 1]* (1996) 189 CLR 51 at 103 (Gaudron J); *Wainohu v New South Wales* (2011) 243 CLR 181 at [105] (Gummow, Hayne, Crennan and Bell JJ); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [123] (Hayne, Crennan, Kiefel and Bell JJ).

explains why State courts can exercise power that is not judicial, it does not mean that there is some power properly described as "judicial power" when conferred by State law that is not "judicial power" when conferred by Commonwealth law. Accordingly, once it is accepted that the power conferred by Div 105A is judicial power, the separation of powers presents no obstacle to the validity of that Division.

(e) The observations of Gummow J

42. Given the emphasis that the Respondent places on various *dicta* by Gummow J, it is desirable to say something further about his Honour's observations in *Fardon*.[61] There are several reasons why this Court should not follow Gummow J's reasoning in that case.

43. *First*, Gummow J's reasoning turned on the proposition that, exceptional cases aside, the "involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts".[62] Preventive detention plainly cannot satisfy that requirement.[63] In formulating that proposition, Gummow J necessarily rejected the proposition that a power to impose involuntary detention in custody is permissible provided that it serves a non-punitive purpose.[64] In doing so, his Honour drew directly on his dissenting reasons in *Al-Kateb*,[65] which had been handed down only two months earlier. His Honour's reasoning therefore critically depended on his rejection of the distinction between detention for punitive and non-punitive purposes, that being a distinction that has been repeatedly endorsed by this Court (including by the majority in *Al-Kateb*, and in many cases in the 16 years since *Fardon* was decided).[66]

44. *Second*, although Gummow J acknowledged that the list of exceptions to which reference was made in *Lim* is not closed,[67] his Honour did not identify any criteria to explain the exceptions, or give any reason for his Honour's statement that preventive detention by courts did not fall within the exceptions.[68] With the exception of Gummow, Kirby and

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61 (2004) 223 CLR 575 at [68]-[89]; see also at [145] (Kirby J); *Thomas* (2007) 233 CLR 307 at [115] (Gummow and Crennan JJ), [353] (Kirby J).
62 (2004) 223 CLR 575 at [80]. That is how the basis for Gummow J's judgment is characterised in RS [44].
63 *Fardon* (2004) 223 CLR 575 at [84].
64 *Fardon* (2004) 223 CLR 575 at [81]-[82].
65 *Fardon* (2004) 223 CLR 575 at [81] footnote 146, citing *Al-Kateb* (2004) 219 CLR 562 at [137]-[139].
66 See the cases cited in footnote 25 above.
67 *Fardon* (2004) 223 CLR 575 at [83].
68 *Fardon* (2004) 223 CLR 575 at [83].

Crennan JJ in *Thomas*,[69] no other member of this Court has subsequently endorsed Gummow J's exclusion of preventive detention by courts from the list of exceptions. In particular, in *South Australia v Totani*,[70] on which the Respondent places some emphasis (RS [51]), neither Hayne J nor Kiefel J endorsed that aspect of Gummow J's reasoning in *Fardon*.[71]

45. *Third*, Gummow J's reasoning did not command the support of a majority of the High Court in *Fardon*. Most clearly, McHugh J held that, when determining an application to hold a person in preventive detention, the Supreme Court was exercising judicial power of a kind that could have been conferred by the Commonwealth.[72] Both Gleeson CJ and Hayne J expressly reserved their position on that point.[73] However, Gleeson CJ subsequently endorsed McHugh J's view,[74] while Hayne J's reasons are irreconcilable with acceptance of Gummow J's approach, because his Honour said that:[75]

> [in deciding] whether legislation requiring a federal court to determine whether a person previously found guilty of an offence should be detained beyond the expiration of the sentence imposed … would purport to confer a non-judicial function on that court … much may turn on the particular terms and operation of the legislation in question.

46. That reasoning is fundamentally at odds with Gummow J's view that such legislation could never be valid because the vice was in "the nature of the outcome".[76] Finally, while Callinan and Heydon JJ did not directly address whether the Commonwealth could itself enact a preventive detention regime, their Honours did hold that "it is valid to confer powers on both non-judicial and judicial bodies to authorise detention" for non-punitive purposes.[77] Their Honours' reasoning therefore turned on the very dichotomy between punitive and non-punitive detention that Gummow J had rejected.

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69 *Thomas* (2007) 233 CLR 307 at [115] (Gummow and Crennan JJ), [353] (Kirby J).
70 (2010) 242 CLR 1 (***Totani***).
71 See *Totani* (2010) 242 CLR 1 at [208]-[210] (Hayne J), [472] (Kiefel J).
72 *Fardon* (2004) 223 CLR 575 at [34]. It is not clear on what basis the Respondent submits that McHugh J "was only addressing the sufficiency of the statutory standards to be applied in the exercise of judicial power" (RS [51]). His Honour held in [34] that "when determining an application under the Act, the Supreme Court is exercising judicial power", and that the question whether an order should be made under the Act would "constitute a 'matter' that could be conferred on or invested in a court exercising federal jurisdiction".
73 *Fardon* (2004) 223 CLR 575 at [18] (Gleeson CJ), [196]-[197] (Hayne J).
74 *Thomas* (2007) 233 CLR 307 at [15].
75 *Fardon* (2004) 223 CLR 575 at [197]. The quote in RS [46] from Hayne J's judgment in *Al-Kateb* does not assist the respondent, because in that passage Hayne J was concerned with the infliction of "punishment". The passage says nothing about detention for a non-punitive purpose. Further, Hayne J's reasons in *Totani* do not assist the respondent, because those reasons did not endorse (or address) Gummow J's statement that preventive detention by courts did not fall within the exceptions (cf RS [51]).
76 *Fardon* (2004) 223 CLR 575 at [85]; see also at [106].
77 *Fardon* (2004) 223 CLR 575 at [214]-[217].

47. *Fourth*, the reasons given by Gummow J erroneously convert a statement made by Brennan, Deane and Dawson JJ in *Lim* as a reason why the executive could not detain for a punitive purpose into a broader proposition that would preclude any detention for non-punitive purposes under Commonwealth law, whether imposed by the executive or the courts (subject only to exceptions of the kind identified in *Lim*).[78] In that way, separation of powers principles are recast to deny to all three arms of government the power to detain for non-punitive purposes.

C. APPLICATION TO DIVISION 105A OF THE CODE

48. The features of the scheme in Div 105A of the Code support the conclusion that the power conferred on the Supreme Court by s 105A.7 is within the judicial power of the Commonwealth. That is so because, as noted in paragraph 24 above, the relevant questions are: (i) whether the power can be shown to be directed to a purpose other than to punish for a breach of the law; and, if so (ii) whether, having regard to ordinary principles governing the separation of powers, the power is properly characterised as judicial power.

(a) Division 105A has a non-punitive purpose

49. The fact that a law involves the infliction of involuntary hardship or detriment by the state — including by requiring detention in custody — does not necessarily mean that the purpose of that law is to punish.[79] While the detention of a person in custody by the state will ordinarily permit an inference to be drawn that the purpose of the detention is punitive in the absence of some other justification,[80] that inference will not be available where the legislature provides a reason for detention that is "consonant with a non-punitive purpose".[81] Such a purpose must be identified as a matter of construction.[82]

50. The determination whether detention is imposed for a punitive purpose is a task that has been performed by this Court on many occasions,[83] including in relation to powers to

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78 *Fardon* (2004) 223 CLR 575 at [83].
79 See *Fardon* (2004) 223 CLR 575 at [34] (McHugh J); *Re Woolley* (2004) 225 CLR 1 at [17] (Gleeson CJ); *Minogue v Victoria* (2019) 93 ALJR 1031 at [31] (Gageler J).
80 *Falzon* (2018) 262 CLR 333 at [24] (Kiefel CJ, Bell, Keane and Edelman JJ).
81 *Falzon* (2018) 262 CLR 333 at [24] (Kiefel CJ, Bell, Keane and Edelman JJ).
82 See *Re Woolley* (2004) 225 CLR 1 at [57]-[61] (McHugh J); *Falzon* (2018) 262 CLR 333 at [33] (Kiefel CJ, Bell, Keane and Edelman JJ).
83 See *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ); *Behrooz* (2004) 219 CLR 486 at [21] (Gleeson CJ); *Al-Kateb* (2004) 219 CLR 562 at [45] (McHugh J), [266]-[268] (Hayne J; Heydon J agreeing), [291] (Callinan J); *Falzon* (2018) 262 CLR 333 at [33] (Kiefel CJ, Bell, Keane and Edelman JJ).

order the detention of a person after the expiry of his or her sentence on the basis of an assessment of the risk of future offending by that person.[84] The following features of Div 105A demonstrate a purpose for the detention that results from a CDO that is sufficient to displace any inference that the purpose of that detention is punitive (cf RS [25]).

51. *First*, the object of Div 105A, as stated in s 105A.1, is "to ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders who pose an unacceptable risk of committing serious Part 5.3 offences if released into the community". That object is plainly directed to the protection of the community.

52. *Second*, under s 105A.7(1), the Supreme Court may only make a CDO in relation to a terrorist offender if it is "satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community" and that "there is no other less restrictive measure that would be effective in preventing the unacceptable risk". Thus, a CDO can only be made where there is both an unacceptable risk to the community[85] and no effective means of preventing that unacceptable risk which is less restrictive than an order for detention in custody. The criteria for the making of a CDO are therefore tailored to the non-punitive object identified in s 105A.1.

53. *Third*, in determining whether it is satisfied of the criterion in s 105A.7(1)(b), the Supreme Court must have regard to the matters identified in s 105A.8(1), which include the safety and protection of the community (s 105A.8(1)(a)), reports about the risk of the offender committing a serious Pt 5.3 offence if released into the community (s 105A.8(1)(b) and (c)), any report about the extent to which the offender can be managed in the community (s 105A.8(1)(d)), and any treatment or rehabilitation programs in which the offender has had an opportunity to participate (s 105A.8(1)(e)). All of those matters reinforce that the task to be undertaken by the Court is one of assessing future risk, and is not directed to imposing punishment for past acts.

54. *Fourth*, the Minister must apply for review of a CDO at least annually (s 105A.10). A CDO may also be reviewed at other times if, on the application of the offender, the Court

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84 See *Fardon* (2004) 223 CLR 575 at [34] (McHugh J), [219] (Callinan and Heydon JJ).

85 The connection between the prevention of serious terrorism offences and the protection of the community was recognised by this Court in *Thomas* (2007) 233 CLR 307 at [145] (Gummow and Crennan JJ; Gleeson CJ agreeing), [438]-[439] (Hayne J), [647] (Heydon J).

is satisfied that there are new facts or circumstances that would justify reviewing the order, or that it would otherwise be in the interests of justice to do so (s 105A.11). On an application for review of a CDO, the Court must revoke the CDO unless it is once again satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Pt 5.3 offence if released into the community, and that there is no other less restrictive measure that would be effective in preventing the unacceptable risk (s 105A.12(4) and (5)). The Minister again bears the onus of satisfying the Court of those matters (s 105A.12(6)).

55. The conclusion that the power in s 105A.7 is conferred for a non-punitive purpose is not undermined by the fact that an application for a CDO may only be made in relation to a person who has in the past been convicted of particular types of serious offence, and who is detained in custody at the time the application is made (s 105A.3(1)) (cf RS [31]). Indeed, that connection with an "anterior conviction by the usual judicial process" was treated as a matter that supported validity in *Fardon*.[86] Given that this factor significantly limits the circumstances in which preventive detention can occur, it would be surprising if it did otherwise.

56. Nor is that conclusion undermined by the fact that the detention is in a prison (cf RS [31]). Under s 105A.4(1), a person who is detained in prison under a CDO must, as far as reasonably possible, be treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment. And, under s 105A.4(2), such a person must not be accommodated or detained in the same area of the prison as persons who are serving sentences of imprisonment unless that is necessary, or the person elects to be so accommodated or detained.

57. The Respondent's submission that part of the purpose of imposing punishment is often to protect the community (RS [28]-[29]) does not assist him. It is true that one of the purposes of imposing punishment will often be to protect the community.[87] But it does not follow from the premise that punishment may have a protective purpose that the

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86 *Fardon* (2004) 223 CLR 575 at [108] (Gummow J); see also *Vella* (2019) 93 ALJR 1236 at [176] (Gageler J). Nor does the selection of a past conviction as the factum upon which legislation operates support the conclusion that the legislation increases the punishment for the past offence that led to that conviction: see *Falzon* (2018) 262 CLR 333 at [48] (Kiefel CJ, Bell, Keane and Edelman JJ), [89] (Gageler and Gordon JJ), [93]-[94] (Nettle J).

87 See *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476 (Mason CJ, Brennan, Dawson and Toohey JJ); *Fardon* (2004) 223 CLR 575 at [69]-[70] (Gummow J); *Pollentine v Bliejie* (2014) 253 CLR 629 at [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

reverse is true, such that detention for a protective purpose necessarily involves punishment. That evidently is not the case, as mandatory quarantine to prevent the spread of an infectious disease illustrates.

(b) Division 105A is properly characterised as conferring judicial power

58. For the following reasons, the power conferred on the Supreme Court by s 105A.7 of the Code is properly characterised as judicial power. It is not relevantly distinguishable from the scheme held in *Kable [No 2]* to confer judicial power,[88] and it also shares the features relied on in *Thomas* when characterising the power at issue in that case as judicial power (being a power to issue control orders with respect to terrorist offenders).[89]

59. *First*, the power to make a CDO is conferred on a court (s 105A.7(1)). It has long been recognised that the character of a power may be affected by the character of the repository of the power.[90]

60. *Second*, the criteria of which the Court must be satisfied before making a CDO (s 105A.7(1)) are sufficiently certain to be capable of judicial application.[91]

61. *Third*, in determining whether to exercise the power to make a CDO, the Court will act judicially and afford the offender procedural fairness.[92] A CDO can only be made following an *inter partes* hearing, in which the rules of evidence and procedure apply (s 105A.13), and in which the offender has the opportunity to examine and cross-examine witnesses and make submissions (s 105A.14). The Court may make orders ensuring that the offender has a legal representative (s 105A.15A), as occurred in this case. The

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88 *Kable [No 2]* (2013) 252 CLR 118 at [27] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [63], [73] (Gageler J).

89 *Thomas* (2007) 233 CLR 307 at [30] (Gleeson CJ; Heydon J agreeing), [598]-[599] (Callinan J; Heydon J agreeing); see also *Vella* (2019) 93 ALJR 1236 at [62] (Bell, Keane, Nettle and Edelman JJ), [159] (Gageler J). With one exception, it also shares the features relied on by McHugh J in *Fardon* when characterising the power at issue there as judicial power: see *Fardon* (2004) 223 CLR 575 at [34]; see also at [19] (Gleeson CJ). The one exception is that the scheme in *Fardon* allowed the court to make a "supervision order" as an alternative to making a continuing detention order or no order.

90 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 6 (Gibbs J), 9-10 (Jacobs J), 18 (Aickin J); *R v Hegarty; Ex parte Salisbury City Corporation* (1981) 147 CLR 617 at 628 (Mason J; Gibbs CJ, Stephen and Wilson JJ agreeing), 631-632 (Murphy J); *Pasini v United Mexican States* (2002) 209 CLR 246 at [12]-[13] (Gleeson CJ, Gaudron, McHugh and Gummow JJ), [51]-[52] (Kirby J).

91 See *Fardon* (2004) 223 CLR 575 at [22] (Gleeson CJ), [34] (McHugh J), [225] (Callinan and Heydon JJ); *Vella* (2019) 93 ALJR 1236 at [62]-[63], [86]-[89] (Bell, Keane, Nettle and Edelman JJ).

92 See *Fardon* (2004) 223 CLR 575 at [19] (Gleeson CJ), [34] (McHugh J), [93]-[98], [115] (Gummow J), [220]-[224] (Callinan and Heydon JJ); *Vella* (2019) 93 ALJR 1236 at [62], [83] (Bell, Keane, Nettle and Edelman JJ).

Minister bears the onus of satisfying the Court that the conditions for making a CDO have been met (s 105A.7(3)).

62. *Fourth*, the Court must give reasons for its decision (s 105A.16), and its decision is subject to an appeal by way of rehearing (s 105A.17).[93]

63. Aside from his reliance on *Lim*, the respondent advances only two arguments as to why the power conferred on the Court by s 105A.7 is not properly characterised as judicial power (RS [20]). Both of those arguments must be rejected. First, he argues that s 105A.7(1) does not involve judicial power because it creates new rights and obligations. That submission is irreconcilable with both *Kable [No 2]*[94] and *Thomas*.[95] Second, the Respondent argues that the power to make a CDO lacks conclusiveness, because of the operation of s 105A.10(4). However, it is in the nature of a CDO that it will cease to be in force at the end of the period referred to in s 105A.10(1B), unless an application for review is made and the Court determines on that application that it is once again satisfied of the matters identified in s 105A.7(1)(b) and (c) (which are re-stated in s 105A.12(4)). That feature of a CDO is not sufficient for the power to make the order to be characterised as an exercise of non-judicial power.[96]

D. SEVERANCE

64. If, contrary to the submissions above, the Court concludes that s 105A.7 is invalid, the Commonwealth accepts that the balance of Div 105A is likewise invalid.

PART IV ESTIMATED HOURS

65. It is estimated that 2 hours will be required for the presentation of the oral argument of the Commonwealth.

Dated: 23 November 2020

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93 See *Fardon* (2004) 223 CLR 575 at [99] (Gummow J), [230]-[232] (Callinan and Heydon JJ).
94 (2013) 252 CLR 118 at [77] (Gageler J); see also at [27] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
95 *Thomas* (2007) 233 CLR 307 at [15]-[17] (Gleeson CJ), [71]-[79] (Gummow and Crennan JJ), [599] (Callinan J).
96 Even when the Executive ultimately determines the duration of detention, this does not necessarily render the power to impose that detention non-judicial power, as the parole cases demonstrate. See also *R v Moffatt* [1998] 2 VR 229 at 238 (Winneke P); *Pollentine v Bleijie* (2014) 253 CLR 629 at [45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).