HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY **NO M 112 OF 2020**

BETWEEN: **MINISTER FOR HOME AFFAIRS**

Applicant

AND: **ABDUL NACER BENBRIKA**

Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH

Intervener

SUBMISSIONS OF THE RESPONDENT

PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. On 4 September 2020, the applicant commenced proceedings in the Supreme Court of Victoria for a continuing detention order (**CDO**) in respect of the respondent under s 105A.7(1) of the *Criminal Code* (Cth) [**CRB 1**]. On 8 October 2020, Tinney J reserved a question in the proceeding for the consideration of the Court of Appeal pursuant to s 17B(2) of the *Supreme Court Act 1986* (Vic) [**CRB 81**]. On the application of the Attorney-General of the Commonwealth under s 40(1) of the *Judiciary Act 1903* (Cth), that question was removed into this Court on 2 November 2020 [**CRB 95**].

3. The question reserved is as follows [**CRB 96**]:

> Is all or any part of Division 105A of the *Criminal Code* (Cth) and, if so, which part, invalid because the power to make a continuing detention order under section 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?

PART III SECTION 78B NOTICE

4. The Attorney-General is to serve a notice by 4pm on 10 November 2020 [**CRB 96**].

PART IV JUDGMENT BELOW

5. There is no judgment below.

PART V FACTS

6. On 15 September 2008, the respondent, an Australian citizen born on 17 February 1960, was convicted of having committed two offences between July 2004 and November 2005,[1] namely, intentionally being a member of a terrorist organisation and intentionally directing the activities of a terrorist organisation, in both cases knowing that it was a terrorist organisation, contrary to ss 102.3(1) and 102.2(1) of the *Criminal Code* respectively. Each is a "serious Part 5.3 offence" within s 105A.2 of the *Criminal Code*.

7. The respondent was sentenced to a total effective sentence of 15 years' imprisonment,

[1] A conviction for a third offence was quashed: *Benbrika v The Queen* (2010) 29 VR 593.

with a non-parole period of 12 years. Parole was never granted. The respondent's sentence was due to expire on 5 November 2020. Tinney J made an interim detention order pursuant to s 105A.9 on 27 October 2020 for a period of 28 days, with the result that the respondent is due to be released on 2 December 2020 unless a further order is made.

PART VI ARGUMENT

A. The scheme of Division 105A

8. Division 105A of the *Criminal Code* establishes a scheme for the continuing detention of terrorist offenders. A CDO commits the offender to detention in prison while the order is in force: s 105A.3(2). The Minister for Home Affairs may apply to the Supreme Court of a State or Territory for a CDO pursuant to s 105A.5.

9. Section 105A.3(1) provides that a person may only be subject to a CDO if he or she: (a) has been convicted of one of the offences set out in s 105A.3(1)(a), being, generally, terrorism related offences committed in Australia or elsewhere; (b) is detained in custody and serving a sentence for such an offence, has been continuously in custody since being convicted of such an offence, or is subject to a continuing or interim detention order; and (c) if in custody serving a sentence, will be at least 18 years old upon its expiry.

10. The Supreme Court may make a CDO under s 105A.7(1) if it is satisfied: (a) 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 in Australia or elsewhere if released into the community; and (b) that there is no less restrictive measure that would be effective in preventing the unacceptable risk. In determining whether there is an unacceptable risk, the Court is to have regard to the matters in s 105A.8(1), including: the safety and protection of the community; any report received from a relevant expert under s 105A.6; any report relating to how the offender might be managed in the community; any treatment or rehabilitation programs in which the offender has participated; and the offender's history of committing any of the offences referred to in s 105A.3(1)(a).

11. A CDO may not be made for a period longer than 3 years and the Court must be satisfied that the period during which the order is in force is reasonably necessary to prevent the unacceptable risk: s 105A.7(5). Multiple consecutive orders of up to 3 years each may be made in relation to the same offender: s 105A.7(6).

12. There is an appeal, as of right within 28 days or with leave thereafter, from a decision to

make a CDO: s 105A.17. Further, a CDO must be reviewed by the Court annually on application of the Minister: s 105A.10. If no application is made, the order ceases to be in force at the end of the relevant 12 month period. The Court may also review a CDO on application by the offender in limited circumstances: s 105A.11.

B. The judicial power of the Commonwealth

13. The Supreme Court of Victoria is a "court of a State" capable of being invested with federal jurisdiction under s 77(iii) of the Constitution. The Commonwealth Parliament can confer upon it authority to exercise the judicial power of the Commonwealth, and non-judicial power incidental to the grant of such judicial power.[2] Save for such incidental powers, the Commonwealth Parliament cannot confer power on the Supreme Court that is not the judicial power of the Commonwealth.

14. This directs attention to the content of the judicial power of the Commonwealth. While it is a concept which cannot be exhaustively defined, no decision of this Court has held that the judicial power of the Commonwealth includes a power to imprison a person pre-emptively for what he or she is likely to do in the future. The Court should not so hold in this case.[3]

15. What this Court clearly held in *Lim* is 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".[4] This Court has reaffirmed that principle on numerous occasions.[5]

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2 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (***Boilermakers***) at 269-270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *R v Murphy* (1985) 158 CLR 596 at 614 (the Court).

3 Later in these submissions at [52]-[64] we explain why the Commonwealth's reliance in its submissions filed in the Court of Appeal (**the Commonwealth's Submissions**) on *New South Wales v Kable* (2013) 252 CLR 118 (***Kable [No 2]***) for a contrary view should be rejected.

4 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Lim***) at 27 (Brennan, Deane and Dawson JJ). See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (***Plaintiff M68***) at [401] (Gordon J).

5 See *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 (***Behrooz***) at [20] (Gleeson CJ), [121] (Kirby J); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 (***Re Woolley***) at [14], [16]-[17] (Gleeson CJ), [182] per Kirby J; *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 (***Vasiljkovic***) at [37] (Gleeson CJ), [84] (Gummow and Hayne JJ), [193] (Kirby J); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 (***NAAJA***) at [37] (French CJ, Kiefel and Bell JJ), [94] (Gageler J), [236] (Nettle and Gordon JJ); *Plaintiff*

16. Since *Lim*, this Court has made clear that there are a number of situations in which the **executive** can permissibly detain a person (including a citizen) against his or her will. In charting the boundaries of permissible executive detention, this Court has considered it critical to identify the purpose for which the person is detained. That is because generally speaking, detention by the executive will not involve an exercise of the judicial power of the Commonwealth, and will not be invalid on this account, if the detention is shown to be for a legitimate non-punitive purpose.[6]

17. This line of authority is concerned, however, with the power of the **executive** to detain consistently with the separation of powers. These cases do not directly bear upon the question when the Commonwealth Parliament can empower a **Ch III court** to order the imprisonment of a person.

18. In fact, **none** of this Court's cases about Commonwealth legislation has concerned whether the Commonwealth may empower a Ch III court to order the imprisonment of a person otherwise than as a consequence of a finding of criminal guilt. The Court has addressed preventative powers of that kind: (a) in the context of State laws;[7] and (b) in the context of Commonwealth legislation authorising restraints on liberty less than imprisonment,[8] and we will come to each of these contexts below.

19. But so far as Ch III courts are concerned, the position remains as stated in *Lim*: detention in the custody of the State by reason of a court order "exists **only** as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[9] To uphold the validity of s 105A.7 of the *Criminal Code*, this Court must clearly hold, for the first time, that detention in prison in the custody of the State exists as a part of the judicial power of the Commonwealth not only as an incident of adjudging and punishing criminal guilt for acts done, but also for acts that have not yet been done and may never be done. For the

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M68 (2016) 257 CLR 42 at [40] (French CJ, Kiefel and Nettle JJ); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 (***Falzon***) at [16] (Kiefel CJ, Bell, Keane and Edelman JJ); *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 (***Vella***) at [152] (Gageler J; Gordon J agreeing).

6 See *Re Woolley* (2004) 225 CLR 1 at [60], [62] (McHugh J); *Vasiljkovic* (2006) 227 CLR 614 at [34] (Gleeson CJ); *NAAJA* (2015) 256 CLR 569 at [36]-[38] (French CJ, Kiefel and Bell JJ), [53], [98]-[103], [128]-[129] (Gageler J), [145] (Keane J), [235]-[237] (Nettle and Gordon JJ); *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 at [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *Falzon* (2018) 262 CLR 333 at [19], [24]-[31] (Kiefel CJ, Bell, Keane and Edelman JJ), [96] (Nettle J).

7 For example, *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 (***Fardon***).

8 For example, *Thomas v Mowbray* (2007) 233 CLR 307 (***Thomas***).

9 *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ) (emphasis added).

following reasons, the Court should not reach that conclusion, and should instead adhere to what was stated in *Lim*.

B.1 Principle

20. The power to make a CDO is removed from the traditional conception of the judicial power of the Commonwealth in three respects. *First*, a CDO involves a determination not of existing rights and obligations having regard to past events, but the determination of new rights and obligations. While not determinative, this is an indication that the power does not comprise the judicial power of the Commonwealth.[10] *Second*, as *Lim* recognised, detention by court order, generally and traditionally, depends upon and is imposed for an anterior finding of criminal guilt. Thus, while preventative interferences with or conditions on liberty may not be powers that are intrinsically non-judicial,[11] the power to continue to imprison a person after the person's sentence has expired is in a different category. *Third*, by reason of s 105A.10(4), a CDO lacks the conclusiveness that attends an exercise of the judicial power of the Commonwealth.[12] Whether a CDO remains binding depends in part on action, or inaction, by the executive: see s 105A.10(4).[13]

21. The respondent submits that there is no warrant — no "special and compelling feature"[14] of the power — to justify the inclusion of this power in the judicial power of the Commonwealth.

22. ***Protective vs punitive.*** The Commonwealth's Submissions before removal into this Court argued, presumably in reliance on s 105A.1, that the power to make a CDO is "protective", rather than "punitive", and that *Lim* does not prevent a Ch III court ordering the imprisonment of a person for a non-punitive purpose.[15] The Court should not accept such a submission as a proper basis for concluding that s 105A.7 confers the judicial

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10 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189 (the Court).

11 *Thomas* (2007) 233 CLR 307 at [15]-[17] (Gleeson CJ); *Vella* (2019) 93 ALJR 1236 at [149]-[150], [159] (Gageler J).

12 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374.

13 While there was periodic review of the orders in *Fardon*, there was no equivalent to s 105A.10(4).

14 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374-375 (Kitto J); *South Australia v Totani* (2010) 242 CLR 1 at [227] (Hayne); *Vella* (2019) 93 ALJR 1236 at [171] (Gageler J); *Palmer v Ayres* (2017) 259 CLR 478 at [72] (Gageler J).

15 We observe that the "protective" purpose contended for is to be understood in the context of the width and extra-territoriality of serious Part 5.3 offences, which are offences that may or may not be committed in Australia and concern harm that likewise may or may not occur in Australia.

power of the Commonwealth.

23. *First*, the "exceptional cases" identified in *Lim* and acknowledged in subsequent cases should not be understood as constituting one global qualification in respect of any detention by court order with a non-penal or non-punitive purpose. Such an understanding could not be reconciled with observations that the exceptions in *Lim* do not fall within clearly defined categories.[16] It would overlook the fact that the acceptance of those exceptions has often turned on analysis of particular historical analogies or precedents,[17] and it would serve ultimately to elevate the distinction between punitive and protective action that has rightly been considered unsatisfactory,[18] as to which see [28] below.

24. *Second*, assuming for argument's sake that the power conferred by s 105A.7 is "protective", at the federal level, that would usually stamp the power as executive and non-judicial in nature.[19]

25. *Third*, if the distinction between punishment and protection is thought useful, then s 105A.7 should be regarded as having a penal or punitive character. That is because (a) the fact of detention in prison is *prima facie* penal or punitive, and (b) there is no feature of the statutory regime to displace or nullify that characterisation. We draw attention to particular features of the statutory regime that **reinforce** that characterisation at [31] below.

26. The first proposition — that detention is *prima facie* penal or punitive — is reflected in *Lim*. It explains why the joint judgment acknowledged that, as a "general proposition",[20] the involuntary detention of a person in custody by the State is penal or punitive in character. That is correct as a general proposition because, absent cogent reasons to stamp the detention with some other character, the very fact of detention will establish that it is penal or punitive. As Gleeson CJ said in *Behrooz*, "[i]n the case of a citizen, what is punitive in nature about involuntary detention (subject to a number of exceptions) is the

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16 *Kruger v Commonwealth* (1997) 190 CLR 1 at 109-111 (Gaudron J); *Vasiljkovic* (2006) 227 CLR 514 at [37] (Gleeson CJ).

17 See, eg, *Vasiljkovic* (2006) 227 CLR 614 at [108]-[109] (Gummow and Hayne JJ).

18 See *Al-Kateb v Godwin* (2004) 219 CLR 555 (***Al-Kateb***) at [135]-[137] (Gummow J); *Fardon* (2004) 223 CLR 575 at [20] (Geelson CJ), [196]-[197] (Hayne J); *Totani* (2010) 242 CLR 1 at [472] (Kiefel J).

19 See *Thomas* (2007) 233 CLR 307 at [504] (Hayne J); *Vella* (2019) 93 ALJR 1236 at [203] (Gordon J).

20 *Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ); *NAAJA* (2015) 256 CLR 569 at [37] (French CJ, Kiefel and Bell JJ); *Plaintiff M68* (2016) 257 CLR 42 at [40] (French CJ, Kiefel and Nettle JJ).

deprivation of liberty involved",[21] and as Gageler J said in *NAAJA*, "any form of detention is penal or punitive unless justified as otherwise": its "default characterisation" is penal or punitive.[22]

27. Approaching the question of characterisation on the basis that detention is *prima facie* penal or punitive is correct as a matter of principle. It is appropriately calibrated to the viewpoint of the individual whose liberty has been infringed. As Edelman J noted in *Minogue v Victoria*:[23]

> [H L A] Hart once observed that a prisoner who was told that his sentence was extended as a measure of social protection rather than punishment "might think he was being tormented by a barren piece of conceptualism – though he might not express himself in that way".

10 To proceed in this manner is not at all to propound an individual right to liberty that is entitled to constitutional protection. Rather, it acknowledges and reflects that a rationale of the separation of powers was to appropriately safeguard individual liberty.[24] It is consistent with that rationale, and with a substance over form approach, to recognise that detention in prison is *prima facie* penal or punitive whatever the reason for imposing it.

28. Additionally, this approach acknowledges that the prevention of future harm is itself an aspect of punishment.[25] That is why the distinction between punishment and protection is — as five Justices recognised in *Rich v Australian Securities and Investments Commission* a month after *Al-Kateb* and a month before *Fardon* — "[a]t best, … elusive".[26] As Edelman J explained in *Minogue*, "[o]nce it is recognised that punishment

20 embraces a number of purposes, including prevention, 'the claim that a measure is

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21 (2004) 219 CLR 486 at [20]-[21] (Gleeson CJ).

22 (2015) 256 CLR 569 at [98].

23 (2019) 93 ALJR 1031 (***Minogue***) at [47].

24 See *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 11 (Jacobs J); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Magaming v The Queen* (2013) 252 CLR 381 at [63]-[67] (Gageler J); *NAAJA* (2015) 256 CLR 569 at [94] (Gageler J); *Plaintiff M68* (2016) 257 CLR 42 at [97] (Bell J); *Vella* (2019) 93 ALJR 1236 at [140]-[142], [190] (Gageler J).

25 See *Fardon* (2004) 223 CLR 575 at [81]-[88] (Gummow J), [196] (Hayne J); *Al-Kateb* (2004) 219 CLR 61 at [137]-[138] (Gummow J); *Totani* (2010) 242 CLR 1 at [208]-[210] (Hayne J), [472] (Kiefel J); *Minogue* (2019) 93 ALJR 1031 at [47] (Edelman J).

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26 (2004) 220 CLR 129 at [32] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); see also at [41]-[42] (McHugh J); *Behrooz* (2004) 219 CLR 486 at [171] (Hayne J); *Re Woolley* (2004) 225 CLR 1 at [227] (Hayne J).

primarily preventive does not necessarily take it outside the realm of punishment'".[27] And as Brennan, Deane, Toohey and Gaudron JJ observed in *Witham v Holloway*:[28]

> nothing is achieved by describing some proceedings as "punitive" and others as "remedial or coercive". Punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes. And there can be no doubt that imprisonment and the imposition of fines, the usual sanctions for contempt, constitute punishment.

29. This approach is in keeping with this Court's openness to dual characterisation whenever questions of characterisation arise in federal constitutional law. To conclude that the detention is protective should not preclude its punitive nature.

30. Finally, in the present context, the distinction between punishment and protection is a false dichotomy, because an underlying purpose of Pt 5.3 of the *Criminal Code*, and the offence provisions set out in that Part, is both punishment and protection.

31. In light of the above, the power conferred by s 105A.7 cannot avoid characterisation as penal or punitive. *First*, a CDO results in detention which, for the reasons given, is *prima facie* penal or punitive. Continuing imprisonment is the substantive purpose and effect of the power.[29] *Second*, the place of that detention is in prison. That is no less the case even though the offender's treatment might, depending on the exigencies of the prison, be different from that of a person serving a custodial sentence therein: s 105A.4. *Third*, Div 105A operates to continue the duration of a person's existing period of detention under a sentence, that being a precondition for the exercise of the power to make a CDO. That sentence was imposed as punishment, and the continuation of that sentence cannot be detached from that purpose. If Div 105A had an overriding protective purpose free from **any** penal or punitive feature, one would expect the Parliament to permit a CDO to be made against a person who was not necessarily presently in detention. The comparison to preventative detention orders that may be made under Div 105 in relation to a person not in custody is telling in that regard: those powers are markedly more limited. *Fourth*, Div 105A makes no provision for ongoing treatment or care of the terrorist offender so as to bespeak an overwhelming concern with rehabilitation and ultimately protection. *Fifth*, the duration of the continuing detention may prove to be indefinite because

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27 (2019) 93 ALJR 1031 at [47].

28 (1995) 183 CLR 525 at 534.

29 *Lim* (1992) 176 CLR 1 at 27; *Re Woolley* (2004) 225 CLR 1 at [55] (McHugh J), [184] (Kirby J).

successive CDOs may be made.

32. ***Desirability***. The Commonwealth's Submissions below stated that there is good reason to empower courts to exercise the power to imprison citizens on a prospective or preventative basis, if such a power is to exist at all.[30] The respondent submits that such considerations do not properly inform Ch III analysis and, more particularly, do not justify characterisation of the power to make a CDO as the judicial power of the Commonwealth as whether the Commonwealth Parliament can authorise a Ch III court to do something does not depend on whether or not it is thought desirable that that should occur. *Re Wakim; Ex parte McNally* illustrates this,[31] as does the reasoning of Gummow J in *Fardon* set out at [43]-[45] below.

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33. Further, to judicialise a process that otherwise departs from fundamental principle because it is thought preferable for the judiciary to wield the power is self-defeating. It blurs the boundaries of the separation of powers to the ultimate detriment of the individual liberty which that separation was designed to secure.[32] Callinan and Heydon JJ characterised the detention power in *Fardon* as "protective", but correctly cautioned that "[t]his is not to say however that this Court should not be vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes".[33] To adapt and adopt an observation of Kennedy J in *Clinton v City of New York*, the fact that an accretion of power is voluntary, because it is thought desirable, does not make it innocuous.[34]

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B.2 History

34. The fact that a power was consistently exercised by courts prior to federation can contribute to its characterisation as part of the judicial power of the Commonwealth.[35] It is partly on the basis of historical practice that: (a) a court order for the detention for treatment of the mentally ill and those suffering from infectious disease; (b) committal

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30 See *Thomas* (2007) 233 CLR 307 at [17] (Gleeson CJ); cf [476] (Hayne J); *Vella* (2019) 93 ALJR 1246 at [90] (Bell, Keane, Nettle and Edelman JJ), [158] (Gageler J).

31 (1999) 198 CLR 511 (***Re Wakim***); see, eg, at [2] (Gleeson CJ), [34] (McHugh J).

32 See fn 24 above.

33 (2004) 223 CLR 575 at [217].

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34 524 US 417 at 452 (1998)

35 See *R v Davison* (1954) 90 CLR 353 at 382 (Kitto J); *Vasiljkovic* (2006) 227 CLR 614 at [113] (Gummow and Hayne JJ); *Palmer v Ayres* (2017) 259 CLR 478 at [37] (Kiefel, Keane, Nettle and Gordon JJ), [69], [73] (Gageler J); *Vella* (2019) 93 ALJR 1236 at [83] (Bell, Keane, Nettle and Edelman JJ).

pending trial; (c) binding over orders; and (d) apprehension for extradition can be justified as part of the judicial power of the Commonwealth.[36] Such court orders have a substantial historical foundation, and it can readily be inferred that the framers of the Constitution intended them to fall within the judicial power of the Commonwealth.

35. By contrast, there is no pre-federation historical precedent for an order committing a person to prison, for a significant period, for conduct he or she is likely to engage in divorced from any finding of criminal guilt or mental impairment of any kind whatsoever. Thus, in so far as the exceptional cases identified in *Lim* have historical practice as a common thread, the power to make a CDO is a break from tradition and history, rather than steeped in it.

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B.3 Authority

36. While the issue raised in this case — whether the Commonwealth can invest a Ch III court with the power to order that a person be detained otherwise than for a finding of criminal guilt — has never been clearly determined by this Court members of the Court have considered it. Importantly, on four occasions, Gummow J said that a power like that conferred by s 105A.7 would be beyond the Commonwealth Parliament's legislative capacity to enact by reason of Ch III of the Constitution.

37. ***Kable***. Section 5(1) of the *Community Protection Act 1994* (NSW) (***CP Act***) empowered the Supreme Court of New South Wales to make an order for the detention of Mr Kable

20 in prison for a specified period if, among other things, it was satisfied on reasonable grounds that he was more likely than not to commit a serious act of violence. Gummow J said emphatically that "the most significant" feature of the power to make an order under the *CP Act* was that:[37]

> … whilst imprisonment pursuant to Supreme Court order is punitive in nature, it is not consequent upon any adjudgment by the Court of criminal guilt. Plainly, in my view, such an authority could not be conferred by a law of the Commonwealth upon this Court, any other federal court, or a State court exercising federal jurisdiction. Moreover, not only is such an authority non-judicial in nature, it is repugnant to the judicial process in a fundamental degree.

38. The result was that the power under the *CP Act* could not be validly conferred on the

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[36] *Fardon* (2004) 223 CLR 575 at [83] (Gummow J); *Vasiljkovic* (2006) 227 CLR 614 at [107]-[109] (Gummow and Hayne JJ; Heydon J agreeing), [182]-[183] (Kirby J).

[37] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***) at 132.

Supreme Court. Gaudron J reasoned to the same conclusion albeit without specific reference to the judicial power of the Commonwealth. Her Honour said that to imprison a person based not on a breach of the law, but on an opinion as to his or her likelihood to breach the law is "the antithesis of the judicial process" and, critically, "not a power that is properly characterised as a judicial function, notwithstanding that it is purportedly conferred on a court and its exercise is conditioned in terms usually associated with the judicial process".[38] We return to *Kable* in greater detail below.

39. ***Nicholas***. At issue in *Nicholas v The Queen* was a federal provision that affected the rules of evidence in prosecutions for a federal offence.[39] The central issue was whether the provision was an attempt by the Parliament to usurp or impermissibly interefere with the judicial power of the Commonwealth, and in that context Gummow J said:[40]

> The legislative powers of the Commonwealth do not extend to the making of a law which authorises or requires a court exercising the judicial power to do so in a manner which is inconsistent with its nature. Thus, a legislative direction requiring a court not to release a person held in unlawful custody is a direction as to the manner (and outcome) of the exercise of its jurisdiction and is an impermisble intrusion into the exercise of the judicial power. Nor would a legislative direction be valid if it required a court in exercise of the judicial power of the Commonwealth to order imprisonment, not on the basis that the persons in question had breached any criminal law, but upon an opinion formed by reference to material, not necessarily admissible in legal proceedings, that, on the balance of probabilities, they might breach such a law.

40. ***Fardon***. *Fardon* concerned the validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (***Dangerous Prisoners Act***), which authorised the continuing detention of a person convicted of a serious sexual offence where he or she was considered "a serious danger to the community" because there was an "unacceptable risk" the person would commit a serious sexual offence if released. The issue was whether this conferred a power on the Supreme Court of Queensland that was incompatible with its institutional integrity as a State court capable of being invested with federal jurisdiction contrary to the principle in *Kable*.

41. The issue was not whether it conferred the judicial power of the Commonwealth, because the power in question was conferred under a State Act. Critical to the majority's

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38 (1996) 189 CLR 51 at 106-107. See also *NAAJA* (2015) 256 CLR 569 at [125] (Gageler J).

39 (1998) 193 CLR 173 (***Nicholas***).

40 *Nicholas* (1998) 193 CLR 173 at [146].

conclusion that the law was valid was that the States are not as inhibited as the Commonwealth in the powers they can validly confer upon courts. That was because State constitutions, unlike the Commonwealth Constitution, do not impose a separation of powers.[41] Not everything denied to a judge exercising a power under federal law is denied to a judge exercising State jurisdiction under State law.[42]

42. It follows that State regimes for the continuing detention of offenders do not determine the issue before this Court. The limitation imposed on the States by *Kable* is "not at all comparable" to the limitation Ch III imposes on the Commonwealth.[43] It does not follow from the fact that the States can validly enact such regimes that the Commonwealth can do so too. What does follow is the opposite: what the Commonwealth can do the States can too, because the latter have fewer constitutional limits on legislation in respect of courts than the former. Taking up this approach, the Attorney-General of the Commonwealth intervened in *Fardon* in support of the validity of the *Dangerous Prisoners Act* to argue that it would have been open to the Commonwealth to confer such a power on a Ch III court. It followed, the Attorney-General said, that Queensland could do so too. Gummow J, with whom Kirby J agreed,[44] expressly rejected that submission.

43. Gummow J began with the observation that the power to determine whether a person has engaged unlawful conduct and, as a consequence, to impose punishment for such conduct lies "at the heart of exclusive judicial power".[45] That kind of judicial power was to be contrasted with the power to order continuing detention under the *Dangerous Prisoners Act*, which was "conditioned upon a finding, not that the person has engaged in conduct which is forbidden by law, but that there is an unacceptable risk that the person will

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41 See *Kable* (1996) 189 CLR 51 at 65 (Brennan CJ), 77-80 (Dawson J), 92-94 (Toohey J), 109 (McHugh J); *Fardon* (2004) 223 CLR 575 at [37] (McHugh J); *Totani* (2010) 242 CLR 1 at [66] (French CJ), [144]-[145] (Gummow J), [201], [221] (Hayne J); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 (***Pompano***) at [22] (French CJ), [124] (Hayne, Crennan, Kiefel and Bell JJ); *NAAJA* (2015) 256 CLR 569 at [168] (Keane J).

42 *Fardon* (2004) 223 CLR 575 at [219] (Callinan and Heydon JJ); see also at [37] (McHugh J), [86] (Gummow J), [144(4)] (Kirby J); *Pompano* (2013) 252 CLR 38 at [125]-[126] (Hayne, Crennan, Kiefel and Bell JJ).

43 *Kable* (1996) 189 CLR 51 at 103 (Gaudron J). See also *NAAJA* (2015) 256 CLR 569 at [187] (Keane J).

44 *Fardon* (2004) 223 CLR 575 at [68]-[69] (Gummow J), [145] (Kirby J).

45 *Fardon* (2004) 223 CLR 575 at [76], referring to *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497 (Gaudron J). See also *Magaming v The Queen* (2013) 252 CLR 381 at [61] (Gageler J); *Duncan v New South Wales* (2015) 255 CLR 388 at [41] (the Court); *Vella* (2019) 93 ALJR 1236 at [152] (Gageler J).

commit a serious sexual offence."[46]

44. Referring to *Lim*, Gummow J suggested that "the 'exceptional cases'" aside, the principle derived from Ch III is that "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."[47] Those exceptional cases included committal to custody pending trial and civil commitment in cases of mental illness or infectious disease.[48] Detention "by reason of apprehended conduct, even by judicial determination on a quia timet basis, is of a different character".[49]

45. Gummow J next said that the detention authorised by the *Dangerous Prisoners Act* was not a consequential step in the adjudication of criminal guilt for past acts. That was so even though an order could only be made in respect of a person previously convicted of an offence.[50] Thus, although it was a power which a State parliament not subject to a separation of powers could confer on a court, the same power, if conferred by the federal Parliament, would not be valid because it would not be within the judicial power of the Commonwealth. Gummow J concluded:[51]

> It is not to the present point … that federal legislation, drawing its inspiration from the [Dangerous Prisoners] Act, may provide for detention without adjudication of criminal guilt but by a judicial process of some refinement. The vice for a Ch III court and for the federal laws postulated in submissions [by the Commonwealth] would be in the nature of the outcome, not the means by which it was obtained.

46. Gleeson CJ and Hayne J expressly reserved the issue raised by the Commonwealth's submission, although Hayne J noted that there was "evident force in the proposition that to confine a person for what he or she might do, rather than what he or she has done, is at odds with identifying the central constitutional concept of detention as a consequence of judicial determination of engagement in past conduct".[52] This is consistent with what his Honour had earlier said in *Al-Kateb*: "punishment is not to be inflicted in exercise of the

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46 *Fardon* (2004) 223 CLR 575 at [76] (Gummow J).

47 *Fardon* (2004) 223 CLR 575 at [80].

48 See *Lim* (1992) 176 CLR 1 at 28-29 (Brennan, Deane and Dawson JJ).

49 *Fardon* (2004) 223 CLR 575 at [84] (Gummow J).

50 See *Fardon* (2004) 223 CLR 575 at [73]-[74].

51 *Fardon* (2004) 223 CLR 575 at [85]. See also at [106].

52 *Fardon* (2004) 223 CLR 575 at [18] (Gleeson CJ), [196]-[197] (Hayne J).

judicial power except upon proof of commission of an offence".[53] The other members of the Court in *Fardon* did not address the Commonwealth's submission.

47. ***Thomas.*** In *Thomas*, this Court upheld the validity of control orders under the *Criminal Code*.[54] The provisions were found not to confer non-judicial power on a Ch III court. Gummow and Crennan JJ expressly adhered to Gummow J's analysis in *Fardon* in relation to detention, but distinguished control orders on the basis that the degree or nature of the impairment of a person's liberty was different.[55] Further, the "matters of legal history" relied upon to support the validity of control orders were said to "support a notion of protection of public peace by preventative measures imposed by court order, **but falling short of detention in the custody of the State**".[56]

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48. To similar effect, Gleeson CJ made clear that *Thomas* was not concerned with detention in custody.[57] His Honour did remark that "[i]t is not correct to say, as an absolute proposition, that, under our system of government, restraints on liberty, **whether or not involving detention in custody**, exist only as an incident of adjudging and punishing criminal guilt".[58] But the question of actual detention in custody did not arise for determination, and such detention ought not viewed as simply on a continuum with other restrictions on liberty.[59]

49. ***Persuasiveness of Gummow J's reasoning***. This Court should regard Gummow J's reasoning in the cases discussed above as highly persuasive. It was proffered in *Fardon* following full argument squarely raising the issue. These were no mere passing remarks.[60]

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50. Gummow J's views attracted the agreement of Kirby J in *Fardon*[61] and Crennan J in *Thomas*;[62] Gaudron J reasoned similarly in *Kable*;[63] Hayne J recognised the force of his

53 (2004) 219 CLR 555 at [265].

54 (2007) 233 CLR 307.

55 *Thomas* (2007) 233 CLR 307 at [114]-[116].

56 *Thomas* (2007) 233 CLR 307 at [121] (emphasis added).

57 See *Thomas* (2007) 233 CLR 307 at [18] (Gleeson CJ). See also at [444] (Hayne J).

58 (2007) 233 CLR 307 at [18] (emphasis added).

59 See *Plaintiff M68* (2016) 257 CLR 42 at [91] (Bell J).

30 60 See *Brunner v Greenslade* [1971] Ch 993 at 1002-1003 (Megarry J).

61 (2004) 223 CLR 575 at [145].

62 (2007) 233 CLR 307 at [115].

63 (1996) 189 CLR 51 at 106-107.

Honour's reasoning in *Fardon*;[64] and Hayne J and Kiefel J referred to relevant passages with some apparent approval in *Totani*.[65]

51. The Commonwealth's Submissions below were to the effect that passages in the judgments of McHugh and Hayne JJ in *Fardon* were contrary to Gummow J's reasoning, but that submission overreaches. McHugh J held that the statutory criteria in the *Dangerous Prisoners Act* were "sufficiently precise to engage the exercise of State judicial power" and "would seem sufficiently precise to constitute a 'matter' that could be conferred on or invested in a court exercising federal jurisdiction".[66] But his Honour was only addressing the sufficiency of the statutory standards to be applied in the exercise of judicial power, being a well-known issue in Ch III jurisprudence, not the issue analysed by Gummow J. Equally, Hayne J's comment that "much may turn on the particular terms and operation of the legislation in question" did not involve a conclusion that a power to order a CDO would be within the power of the Commonwealth to confer provided the legislative scheme were appropriately tailored.[67] It is wrong to treat that remark as having said something definitive on the subject when his Honour was careful not to do so. The Commonwealth's submission also pays insufficient attention to Hayne J's reasons for judgment in *Totani*, which referred to several steps in Gummow J's reasons in *Fardon* with some apparent approval; certainly, without a hint of disapproval.[68]

C. KABLE [NO 2]

52. The Commonwealth's Submissions below relied on *Kable [No 2]*[69] as establishing that a court order requiring preventative detention in prison can be made in the exercise of the judicial power of the Commonwealth. What this Court held in *Kable [No 2]* is not, with respect, so clear,[70] and the respondent submits that the Court did not so hold. What the plurality concluded was that such an order is a judicial order by a superior court, attracting the principle that it is valid unless and until set aside. While there are statements about

64 (2004) 223 CLR 575 at [197].

65 (2010) 242 CLR 1 at [208]-[210] (Hayne J), [472] (Kiefel J).

66 (2004) 223 CLR 575 at [34].

67 (2004) 223 CLR 575 at [197].

68 (2010) 242 CLR 1 at [208]-[210].

69 (2013) 252 CLR 118.

70 See generally J Stellios, "*Kable*, preventative detention and the dilemmas of Chapter III" (2014) 88 *Australian Law Journal* 52 (**Stellios**).

judicial power in the plurality judgment, they are not part of the *ratio* of the case. Whether or not Levine J had exercised the judicial power of the Commonwealth in *Kable* was not argued in *Kable [No 2]*, and the case is not, therefore, authority on it. Our explanation of the *Kable* cases is as follows.

53. In 1995, the Supreme Court of New South Wales (Levine J) made an order under the *CP Act* requiring Mr Kable to be detained in custody for a period of six months, after which he was released. In 1996, a majority of this Court held that the *CP Act* was invalid.[71] At issue in *Kable [No 2]* in 2013 was whether Mr Kable had been falsely imprisoned pursuant to the order of Levine J. He submitted that the principle requiring that effect be given to an order of a superior court until it is set aside was not engaged because Levine J had not made a judicial order. This Court rejected that submission; and that his Honour had made a judicial order was the key holding of the case.[72]

54. That Levine J made a judicial order does not say much, if anything, about the source or nature of the judicial power exercised in making it. The respondent submits that the power which Levine J exercised in making the detention order against Mr Kable was **State** judicial power conferred under the *CP Act*, **not** the judicial power of the **Commonwealth**. That must be so, because Levine J was exercising power pursuant to s 5(1) of the *CP Act*, which was a State statute and which "[o]n its face … [was] directed to the exercise of State, not federal, jurisdiction".[73] It is settled doctrine that "when an exercise of legislative powers is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chap III".[74] It follows that "[t]he Parliament of the Commonwealth alone has power to vest federal jurisdiction".[75] The Parliament of New South Wales could never vest the judicial power of the Commonwealth under the *CP Act*.[76]

55. Characterising Levine J as having exercised State judicial power goes some way to reconciling the perceived tension between statements in *Kable* that the power in the *CP*

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71 (1996) 189 CLR 51.

72 *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).

73 *Kable* (1996) 189 CLR 51 at 116 (McHugh J).

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

75 *Rizeq v Western Australia* (2017) 262 CLR 1 at [59] (Bell, Gageler, Keane, Nettle and Gordon JJ).

76 See *NAAJA* (2015) 256 CLR 569 at [176], [179] (Keane J).

Act was non-judicial[77] and statements in *Kable [No 2]* to the contrary.[78] The power was non-judicial in the sense that it was not only different from, but also incompatible with, the judicial power of the Commonwealth. But not all that is denied to the Commonwealth (and to Commonwealth judicial power) is denied to the States (and State judicial power).

56. The argument by the Comnmonwealth that this Court in *Kable [No 2]* held that Levine J permissibly exercised the judicial power of the Commonwealth appears to reach that conclusion solely on the basis that Levine J was exercising federal jurisdiction as a consequence of Mr Kable raising a constitutional objection to the making of the detention order.[79] Accepting that premise for the moment, it does not lead to the Commonwealth's conclusion about power. The Commonwealth does not conscript State conferrals of State judicial power and hand them back dressed now as federal judicial power. Thus, in *Re Wakim*, the vice in the State Acts was that they purported to confer State judicial power on the Federal Court. The power did not transmogrify into the "judicial power of the Commonwealth" merely because the matter was in federal jurisdiction (for example, because there were proceedings against the trustee in bankruptcy).[80]

57. Just as fundamentally, it does not follow from the constitutional objection having been raised that the order made by Levine J was made in the exercise of federal jurisdiction. It is open to analyse *Kable* as having involved two matters (one being the constitutional question and the other being the question whether to make a detention order under the *CP Act*). That analysis was left open by the plurality in *Kable [No 2]*. We acknowledge it was rejected by Gageler J having regard to what was said in *Kable* about the matter being wholly in federal jurisdiction,[81] but respectfully, it should be noted that the point was not argued in *Kable*. In fact, it was "common ground" that the order of Levine J was made in the exercise of federal jurisdiction.[82] The point not having been argued, *Kable* should not be regarded as authority for the proposition that Levine J's order was made in the exercise of federal jurisdiction, rather than in the exercise of the power conferred upon the

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77 *Kable* (1996) 189 CLR 51 at 98 (Toohey J), 107 (Gaudron J), 132 (Gummow J), 122 (McHugh J).

78 Stellios at 57-60.

79 See *Kable v New South Wales* (2012) 268 FLR 1 at [142] (Basten JA); *Kable [No 2]* (2013) 252 CLR 118 at [12] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

80 (1999) 198 CLR 511 at [71] (McHugh J); cf at [7] (Gleeson CJ).

81 *Kable [No 2]* (2013) 252 CLR 118 at [37] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [76]-[77] (Gageler J)

82 *Kable* (1996) 189 CLR 51 at 114 (McHugh J).

Supreme Court under the *CP Act*.[83]

58. The same result that Levine J's order was made in the exercise of State judicial power can be reached via a different analytical route. The respondent also submits that not all power exercised when a State Supreme Court is determining a proceeding in the exercise of federal jurisdiction is the judicial power of the Commonwealth. So much is apparent from the fact that a court in federal jurisdiction may exercise incidental non-judicial powers; it cannot then be said that federal jurisdiction only involves the exercise of the judicial power of the Commonwealth. But more fundamentally, after exhausting functions in the exercise of federal jurisdiction, there is no reason why, within the same matter, the Supreme Court could not then turn to exercise a distinct State judicial power vested in it. Reasoning similarly, French CJ (Bell J agreeing) said in *Momcilovic v The Queen*:[84]

> Accepting the validity of s 36, there is no reason in principle why the Court of Appeal, having exhausted its functions in the exercise of its federal jurisdiction in this case, could not proceed to exercise the distinct non-judicial power, conferred upon it by s 36, to make a declaration of inconsistent interpretation.

59. Because it is inconsistent with basic principle to treat Levine J as having exercised the judicial power of the Commonwealth under s 5(1) of the *CP Act*, the respondent submits that one or other of the above analyses in [57] and [58] should be accepted. If that means that members of this Court erred in *Kable* by regarding the entire proceedings as being within federal jurisdiction (in circumstances where the point was not argued),[85] this Court should now so hold. Consistently with this submission, in *Fardon*, there was no doubt that the Supreme Court of Queensland was exercising State judicial power, and that was so even though Mr Fardon had raised a constitutional objection to the order. Further, the anomaly inherent in the Commonwealth's argument is apparent; it contends the principle as stated in *Lim* has no application in the present context because of the decision in *Kable [No 2]*, which neither considered that principle nor the observations of the members of this Court set out at [37]-[48] in relation to it.

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83 See *CSR Ltd v Eddy* (2005) 226 CLR 1 at [13] (Gleeson CJ, Gummow and Heydon JJ); *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007 at [28] (Kiefel CJ, Bell, Keane and Gordon JJ); *Private R v Cowen* (2020) 94 ALJR 849 at [173] (Edelman J).

84 (2011) 245 CLR 1 at [101] (French CJ), [661] (Bell J).

85 See *Kable* (1996) 189 CLR 51 at 96 (Toohey J), 114 (McHugh J), 136 (Gummow J); cf at 87 (Dawson J).

60. Once it is accepted that Levine J exercised State judicial power, it then follows that the Commonwealth can draw no assistance from *Kable [No 2]* in this case, which concerns whether or not Commonwealth legislation validly vests the judicial power of the Commonwealth. That is because this Court should accept that State judicial power is not the same as (nor co-extensive with) the judicial power of the Commonwealth. It is broader.

61. *First*, while French CJ in *Pompano*[86] and Brennan CJ and Toohey J in *Gould v Brown* left that question open,[87] Callinan and Heydon JJ in *Fardon* expressly said that "[f]ederal judicial power is not identical with state judicial power".[88] McHugh J implicitly differentiated between them in *Fardon* and *Re Wakim*,[89] as did Gummow and Hayne JJ in *Re Wakim* in saying that "the subject of the judicial power of the Commonwealth is dealt with in the Constitution as a subject that is different and distinct from the judicial power of the States".[90]

62. *Second*, it would not be unusual to hold that the judicial power of the Commonwealth is narrower than what might otherwise be regarded generally as "judicial power".[91] In at least one respect, it plainly is narrower: the judicial power of the Commonwealth with which Ch III is concerned must only be exercised with respect to a "matter".[92]

63. *Third*, the fact that State judicial power is broader than the judicial power of the Commonwealth is coherent with their different sources. The latter is established by Ch III of the Constitution and moulded by the separation of powers inherent in the Constitution. As Dawson J said in *Kable*, "[t]he nature of that judicial power is … very much determined by the separation of powers which the Constitution requires to be observed in relation to such a court".[93] By contrast, State judicial power is found in State constitutions,

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86 (2013) 252 CLR 38 at [22].

87 (1998) 193 CLR 346 at [15].

88 (2004) 223 CLR 575 at [219].

89 See *Re Wakim* (1998) 198 CLR 511 at [63]; *Fardon* (2004) 223 CLR 575 at [34].

90 (1998) 198 CLR 511 at [110].

91 See *Nguyen v The Queen* (2016) 311 FLR 289 at [195] (Tate JA). See also *Commonewalth v Queensland* (1975) 134 CLR 298 at 327-328 (Jacobs J).

92 See *Kable* (1996) 189 CLR 51 at 136-137 (Gummow J); *Commonwealth v Queensland* (1975) 134 CLR 298 at 325 (Jacobs J); *Gould v Brown* (1998) 193 CLR 346 at [118] (McHugh J), [178] (Gummow J); *Burns v Corbett* (2018) 265 CLR 304 at [104] (Gageler J).

93 (1996) 189 CLR 51 at 85.

which are provided for in Ch V of the Constitution and are not bound by a separation of powers. One consequence is that State courts can permissibly exercise non-judicial powers. But another consequence is that their conception of judicial power need not be the same as, and is not the same as, that special species of judicial power established by Ch III of the Constitution.

64. The content of State judicial power does not otherwise fall for determination in this case. Division 105A is Commonwealth legislation, and it purports to confer the judicial power of the Commonwealth. Reliance on *Kable [No 2]* in that context is misplaced.

D. SEVERANCE

65. If s 105A.7 is invalid, then Div 105A is invalid in its entirety.

PART VII ORDERS SOUGHT

66. The reserved question should be answered: Div 105A of the *Criminal Code* is invalid in its entirety. The respondent seeks an order for his costs whatever the event (which, the respondent submits, can be a matter for a single Justice if the respondent's argument on invalidity is unsuccessful).

PART VIII ESTIMATED HOURS

67. The respondent seeks 2.5 hours to present oral argument (including reply).

Dated: 9 November 2020

……..…..	…….	…….
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ANNEXURE

Legislative provisions referred to in written submissions (Practice Direction No 1/2019)

1. Constitution (Cth), Chs III, V (current)
2. *Judiciary Act 1903* (Cth), s 40(1) (current)
3. *Criminal Code* (Cth), Pt 5.3 (as at 4 September 2020)
4. *Supreme Court Act 1986* (Vic), s 17B(2) (current)
5. *Community Protection Act 1994* (NSW) (as made)
6. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (as made)