

THE CONSTITUTIONAL VALIDITY OF TERRORISM ORDERS OF CONTROL AND PREVENTATIVE DETENTION

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I INTRODUCTION

History shows that governments seeking to protect the state will often do so by restricting the liberty of those persons who are perceived as a threat. At such times, there is a marked shift in the relationship between the judiciary and the executive. This traditionally involves an expansion of executive power so as to order the detention of individuals with a corresponding contraction in the ability of courts to review the exercise of these powers,¹ but it may also involve the courts being required to exercise powers of detention in an extension of their judicial functions. In both instances, the power to detain or control the movements of persons without charging them with any criminal conduct, presents a stark challenge to the very essence of the rule of law.²

Experience from earlier emergencies has been that altering the balance between the executive and judicial branches in this way, to allow executive

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- 1 In his seminal discussion of emergency powers in the wake of World War II, Clinton Rossiter asserted that, because of its very nature, 'it is always the executive branch in the government which possesses and wields the extraordinary powers of self-preservation of any democratic, constitutional state': Clinton Rossiter, *Constitutional Dictatorship* (1948) 12. More recently, the point was expressly recognised by Lord Hoffmann in *Secretary of State v Rehman* [2003] 1 AC 153, 195 when he said: 'recent events in New York and Washington ... are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities ... constitutes a threat to national security'.
- 2 Of which A V Dicey famously declared, 'Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else': A V Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, 1959) 202. Bernadette McSherry makes this point directly in the context of contemporary Australian laws for preventative detention: Bernadette McSherry, 'Indefinite and Preventative Detention Legislation: From Caution to an Open Door' (2005) 29 *Criminal Law Journal* 94, 107–08.

detention, amounts to a disproportionate response of little benefit to national security.³ But, at least these earlier departures from legal norms were undertaken with a finite end or objective in sight. By contrast, the use of detention without charge in respect of an amorphous and ongoing conflict, such as the ‘war on terror’, presents the potential for a permanent readjustment of the relationship between the arms of government and the freedoms of individuals.⁴ The conditions of the immediate post-9/11 world — in which the threat of unexpected and indiscriminate terrorist attacks hang over us — seem all too amenable to a change of this sort. In both the United Kingdom and the United States of America, the executive was quick to assert strict limits upon the justiciability of its power to detain, without trial, both its own citizens and foreign nationals, in the name of national security. In Australia, the Commonwealth’s *Anti-Terrorism Act (No 2) 2005* introduced into the *Criminal Code* (Cth) two new Divisions which allow control orders (hereafter ‘COs’) and preventative detention orders (hereafter ‘PDOs’) to be issued over individuals for the purpose of preventing terrorist activity.⁵

There are signs, however, that recent attempts at redefining executive and judicial power to enforce new laws restricting individual liberty will not go wholly unchecked by the courts. In a series of 2004 cases, the United States Supreme Court relied upon a combination of constitutional and legislative limits to force the executive to provide some form of process by which those detained might challenge the basis of their detention.⁶ This culminated in the collapse of the military commission system for ‘enemy combatants’ in the decision of *Hamdan v Rumsfeld*.⁷ In the United Kingdom, the House of Lords has considered the extent to which the executive must justify a derogation from the *European Convention of Human Rights* in the name of national security. In *A v Secretary of State for the Home Department*⁸ their Lordships struck down a scheme for the indefinite detention of non-citizens suspected of terrorist activities as incompatible with the

3 Detention of individuals on the basis of ethnicity was practiced during both World Wars. In the United States, the internment of Japanese Americans during WWII was upheld by the United States Supreme Court in *Korematsu* (1944) 323 US 214. In Australia, the local equivalents to that infamous decision are the High Court’s decisions in the cases of *Lloyd v Wallach* (1915) 20 CLR 299; *Ex parte Walsh* [1942] ALR 359; and *Little v Commonwealth* (1947) 75 CLR 94. The significance of these cases today was debated by McHugh and Kirby JJ in *Al-Kateb v Godwin* (2004) 219 CLR 562, 588–89 (McHugh J); 620–22 (Kirby J) (*‘Al-Kateb’*).

4 This point has now been made by many commentators, but for present purposes see particularly, David Dyzenhaus, *The Constitution of Law – Legality in a Time of Emergency* (2006) 2.

5 The control order regime is found in Division 104 of the *Code*, and the scheme for PDOs is in Division 105.

6 *Rumsfeld v Padilla* 542 US 426 (2004); *Hamdi v Rumsfeld* 542 US 507 (2004); *Rasul v Bush* 542 US 466 (2004). Though for a critique of the minimalist approach favoured by the majority judgments in *Hamdi*, see Dyzenhaus, above n 4, 48–50.

7 126 S.Ct. 2749 (2006). The Court found the President’s commission system violated federal law, including the *Uniform Code of Military Justice*, as well as treaty obligations, under the *Geneva Conventions*. In response, however, the United States government devised a modified new military commission system purporting to comply with the procedural requirements demanded by the Supreme Court. This was accepted by the United States Congress in its passage on 28 September 2006 of the *Military Commissions Act of 2006*.

8 [2005] 2 AC 68.

Convention as well as the *Human Rights Act 1998* (UK). The decision has been hailed by some commentators as a confirmation of the court's constitutional function of determining questions of rights.⁹ Others have read the case in more limited terms, and its implications less enthusiastically, but still recognise that the House of Lords was unusually assertive in defining its place in the constitutional order.¹⁰ Importantly, in both jurisdictions, it has been possible to rely upon express guarantees in constitutional and international instruments so as to limit executive powers of detention.¹¹

In contrast the Australian constitutional order lacks the substantive limitations on executive action that exist elsewhere. Instead constraints are provided only by the federal distribution of legislative power and the separation of power across the three arms of government. As to the first, when anti-terror laws were first introduced in 2002, the Federal Attorney-General, Daryl Williams, identified a range of legislative powers which might support the legislation.¹² In addition to the existing Commonwealth legislative power, the Attorney-General stated that 'the Prime Minister and state and territory leaders agreed on the importance of comprehensive, national coverage of terrorism offences' and for this reason, 'they agreed that the states would remove any lingering constitutional uncertainty by means of constitutional 'references' to the Commonwealth Parliament in accordance with s 51(xxxvii) of the *Commonwealth Constitution*'.¹³ The Attorney-General's suggestion that the referral of power over terrorism offences

9 Tom Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' (2005) 68 *Modern Law Review* 655, 668.

10 See, generally, Stephen Tierney, 'Determining the State of Exception: What Role for Parliament and the Courts?' (2005) 68 *Modern Law Review* 668; and David Dyzenhaus 'An Unfortunate Outburst of Anglo-Saxon Parochialism' (2005) 68 *Modern Law Review* 673.

11 For this reason, it is difficult to accept the simplistic assessment offered by Curtin that, in sanctioning indefinite detention of aliens by the executive (see *Al-Kateb* (2004) 219 CLR 562 discussed throughout this paper), 'the High Court has embarked upon a trajectory fundamentally opposed to the course which is being followed by both the US Supreme Court and the British House of Lords': Juliet Curtin, '“Never Say Never”: *Al-Kateb v Godwin*' (2005) 27 *Sydney Law Review* 355, 369.

12 These included 'powers relating directly to criminals (s 51(xxviii), s 119); to Commonwealth places (s 52(i) and territories (s 122); other express powers (including those dealing with foreign, trading or financial corporations — s 51(xx), electronic, postal and other like services — s 51(v), and external affairs — s 51(xxix), in addition to the implied power to protect the Commonwealth and its authorities': Daryl Williams and James Renwick, 'The War Against Terrorism: National Security and the Constitution' (Summer 2002/2003) *Bar News: Journal of the NSW Bar Association* 42, 43. James Renwick has suggested that the more recent initiatives of preventative detention might rely upon the extended aspect of the defence power in s 51(vi) but the extent of judicial deference on this score should not overestimated: James Renwick, 'Detention Without Trial — The Relevance for Australia of the United States Supreme Court Decisions in *Hamdi*, *Rasul* and *Rumsfeld*' (Paper presented at the Ninth Colloquium of the Judicial Conference of Australia, Sunshine Coast, 3 September 2005).

13 Williams and Renwick, above n 12. These references are contained in the *Terrorism (Commonwealth Powers) Act 2002* of each State. In Victoria, the reference is in the *Terrorism (Commonwealth Powers) Act 2003*. The references are in substantially the same terms. They make provision for express amendments to the *Criminal Code* (Cth) in relation to 'the matter of terrorist acts, and actions relating to terrorist acts'.

was necessary only to remove doubt over the extent of Commonwealth power may be understating the case.

The sufficiency of the States referral of legislative power over matters concerning terrorism, as well as that of existing Commonwealth legislative power is currently under challenge in *Thomas v Mowbray & Ors* ('*Thomas*').¹⁴ In *Thomas*, a control order was issued for the first time, restricting Jack Thomas from using various telecommunications devices to contact a number of listed persons.¹⁵ Additionally, he is prohibited from leaving his house between midnight and five am.¹⁶ The order was made after Thomas had been acquitted by a Victorian Supreme Court jury of two counts of providing support to a terrorist organisation on a number of terrorism offences,¹⁷ and later had those of which he was convicted¹⁸ quashed by that State's Court of Appeal.¹⁹ Thomas is now in the process of challenging the constitutionality of the control order made against him. At the time of writing, the matter has been heard by the High Court and awaits decision.

If the Commonwealth has successfully secured adequate legislative power to deal with matters concerning terrorism, the separation of powers implied from the structure of the *Commonwealth Constitution*²⁰ is the only substantial check on the extent of the power of detention. The purpose of this article is to assess whether the forms of detention which the Commonwealth Parliament has introduced into Australian law are valid in light of what that separation demands. The issue is one which arises from the face of the law itself since both types of order are made with the involvement of judicial officers — either sitting as a federal court (for COs) or acting in a purely personal capacity (for PDOs).

The article is structured as follows. In Part II, the fundamentals of the High Court's approach to the separation of power are outlined. Rather than trying to articulate limits on executive power directly, the Court has developed limits through its view of the nature and scope of judicial power.²¹ Authorities in the mid-1990s suggested that the strict separation of judicial power in Chapter III of the *Commonwealth Constitution* provided fairly clear limits on powers of detention so as to invalidate laws which improperly conferred these powers upon the executive²² or courts.²³ However, in more recent cases, a majority of the High

14 High Court of Australia, M119 of 2006 ('*Thomas*').

15 *Jabbour v Thomas* [2006] FMCA 1286 (27 August 2006) sch 1, paras 6–7.

16 *Ibid* para 1.

17 *Criminal Code* (Cth) s 102.7(1).

18 *Criminal Code* (Cth) s 102.6(1) and *Passports Act 1938* (Cth) s 9A: *DPP v Thomas* [2006] VSC 120 (31 March 2006) per Cummins J.

19 *R v Thomas* [2006] VSCA 165 (18 August 2006) per P Maxwell, Buchanan and Vincent JJA.

20 *Re Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*').

21 See Michael Detmold, 'The Nature of Judicial Power' (2001) 12 *Public Law Review* 135, 147. Leslie Zines says, the powers of the other arms are 'more analytically coherent' than 'the disparate powers and functions of the executive at common law': Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *PLR* 279, 279.

22 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 ('*Chu Kheng Lim*'). The power to detain aliens was upheld as a law within s 51(xix) of

Court has cast real doubt on the extent to which the constitutional implication restricts the power to detain outside of normal criminal law processes of trial and punishment,²⁴ leaving the validity of the Commonwealth's terrorism detention orders in Divisions 104 and 105 of the *Criminal Code* (Cth) uncertain.

In Parts III and IV, we describe the schemes in Division 104 and 105 of the *Code* in detail and then consider them against the existing High Court jurisprudence on executive and judicial detention. The state of flux in which this jurisprudence appears to be at present means that this exercise necessarily has a somewhat speculative character. Nevertheless, we approach the analysis with two particular considerations in mind. First, while we have a degree of sympathy with the motivations for using the judiciary to make detention orders, we contend that involving the courts and their personnel in this way risks undermining the ability of the judicial arm of government to check executive power. It is, of course, the perceived independence of courts that makes them particularly useful to the executive as a means of adding legitimacy to coercive executive action.²⁵ There is a paradox here. Courts only have the characteristic of independence as a result of their separation from the executive, and as a result of the particular judicial methods they adopt in the exercise of judicial power. Clearly, the more often the executive uses judicial independence to bolster the legitimacy of its actions, and the more often the judiciary participate in processes that are not judicial in nature, the more eroded judicial independence becomes.²⁶

The second consideration is an insistence upon the values of the rule of law as underlying the conception of the separation of powers. Of course, this is hardly a novel approach but merely reflects adherence to the opinion expressed by Justice Dixon in the *Australian Communist Party v Commonwealth* ('*Communist Party Case*') that the *Commonwealth Constitution* is:

an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think it might fairly be said that the rule of law forms an assumption.²⁷

the *Commonwealth Constitution* but the Court pointed out that the situation with respect to citizens was very different.

23 *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*'). This case concerned New South Wales State legislation which conferred a power of preventative detention upon the State Supreme Court. Nevertheless, the Act was invalidated by virtue of the implications arising from the separation of judicial power under the *Commonwealth Constitution*.

24 *Al-Kateb* (2004) 219 CLR 562; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 ('*Fardon*'); *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 ('*Behrooz*'); and *Re Woolley; Ex parte Applicants M276/2003* (2004) 210 ALR 369 ('*Re Woolley*').

25 *Mistretta v United States* 488 US 361, 407 (1989).

26 See A J Brown, 'The Wig or the Sword: Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 54.

27 (1951) 83 CLR 1, 189 ('*Communist Party Case*').

Invocation of this principle in the immediate context is not a simple assertion of civil liberties to be protected by the *Commonwealth Constitution*.²⁸ While heeding the warning of the Chief Justice that ‘the rule of law is such a powerful rhetorical weapon ... that care is needed in its deployment’,²⁹ we argue that Australia’s constitutional settlement recognises that the law must control power. The formal separation of powers is one clear way in which this is achieved, and it is particularly in this sense that our analysis of existing case law proceeds. However, it is acknowledged that there is more to Dixon J’s remark³⁰ and this may also have a bearing on both types of anti-terrorism orders considered here. In the instance of a power to detain, the focus must be on the nature of the power to detain in itself, before addressing whether it is appropriately designated an exercise of executive or judicial power. This raises the question of whether, regardless of the nominal attribution of power and the process devised for its use, the exercise of power of that type is consistent with what either the judiciary or the executive have the capacity to do within the constitutional system. Importantly, because the inquiry begins with the question of what is the nature of the power being exercised, and not simply whether it is judicial or executive, it leaves open the possibility that a power might be *neither* judicial nor executive, and cannot be conferred on either branch of government.

This obviously presents a direct challenge to the extent of Parliament’s sovereignty, and yet for the separation of powers to be about meaningful restraint upon power, rather than merely its location, we argue it is a possibility that must be taken seriously.³¹ This appeal to public law theory does not produce a perplexing lacuna but supports instead the creation of space for the liberty of the individual through the institutional independence of the judiciary.³² As Detmold posits, judicial power has ‘enormous content. The content is freedom ... that oddly

28 Indeed, as George Winterton warned, ‘the civil liberty aspects of the decision [the *Communist Party Case*] should not be overstated’: George Winterton, ‘The Significance of the *Communist Party Case*’ (1992) 18 *Melbourne University Law Review* 630, 655.

29 Murray Gleeson, ‘Courts and the Rule of Law’ in Cheryl Saunders and Katherin Le Roy (eds), *The Rule of Law* (2003) 181.

30 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 (Gummow and Hayne JJ).

31 An influence here is the work of Professor Eric Barendt: see Eric Barendt, ‘Separation of Powers and Constitutional Government’ [1995] *Public Law* 599, 601–08 cf N W Barber, ‘Prelude to the Separation of Powers’ (2001) 60 *Cambridge Law Journal* 59, 59 in which he states that: ‘the essence, though not the whole, of separation of powers lies in the meeting of form and function; the matching of task to those bodies best suited to execute them. The core of the doctrine is not liberty, as many writers have assumed, but efficiency’.

32 In his discussion of the *Communist Party Case*, Dyzenhaus describes as false the choice only between the Parliament/executive on one hand and the judiciary on the other. There is also ‘the middle ground of legality — the constitutional values of the rule of law’, which, he claims, the majority of the High Court relied upon in that case ‘despite their own pull towards constitutional positivism’: David Dyzenhaus, ‘Constituting the Enemy: A Response to Carl Schmitt’ in Andras Sajó, *Militant Democracy* (2004) 45. Elsewhere, he explains that the ground of legality ‘requires that when Parliament and government make such a determination [of the existence of a state of emergency] they make it in a way that respects the requirements of the rule of law. Hence courts must ask what the legal limits are on the power of Parliament, whatever the nature of the emergency’: Dyzenhaus, above n 4, 79.

substantive thing ... with no content.’³³ Thus we would argue that there is, and must be, an inherent constitutional limit to the type of detention that can ever be sanctioned in a constitutional democracy such as Australia — whether ordered by the executive or by the courts.

II THE CONSTITUTIONAL PROBLEM — OFFENDING THE SEPARATION OF JUDICIAL POWER

A *The Separation of Judicial Power*

The High Court has long recognised that of the three arms of government which the *Commonwealth Constitution* establishes, the judiciary is to be kept strictly separate from the legislature and executive.³⁴ While the latter two will inevitably overlap in accordance with the Westminster tradition of responsible government,³⁵ there is nothing to soften the clear demarcation of judicial power implied from its separate treatment in Chapter III of the *Commonwealth Constitution*.³⁶

As a result, the Court has made it very clear that the exercise of judicial and non-judicial power may not be performed by the same institution without causing constitutional offence. Barring the power to make rules of procedure,³⁷ a federal court created by Chapter III of the *Commonwealth Constitution* cannot exercise anything other than judicial power, and any law which invests a Chapter III court with a non-judicial function will fail.³⁸ However, the simplicity of this double restriction belies the great complexity which has attended the Court’s efforts to pin down a clear operation for the implied separation of power. Undoubtedly the major hindrance remains the elusive character of judicial power itself.³⁹ What is more, this task has been complicated by the facts of several key cases being concerned with the extent to which the separation of judicial power in the

33 Detmold, above n 21, 144.

34 *Boilermakers* (1956) 94 CLR 254.

35 Most expressly recognised by s 64’s requirement that Ministers of the Crown be members of the Commonwealth Parliament, but see also the High Court’s discussion of the issue in *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73 (‘Stevedoring’).

36 *Boilermakers* (1956) 94 CLR 254, 275–76.

37 Suri Ratnapala, *Australian Constitutional Law — Foundations and Theory* (2002) 183–85.

38 *Stevedoring* (1931) 46 CLR 73, 98 (Dixon J); *Boilermakers* (1956) 94 CLR 254, 270–72 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

39 Although Chief Justice Griffith’s formulation in *Huddart Parker & Co Ltd v Moorehead* (1909) 8 CLR 330, 357 tends to be a reliable starting point, it has not proven especially helpful in the context of recent questions addressing the relationship between judicial power and detention.

Commonwealth Constitution inhibits State legislatures, rather than the Commonwealth itself, in their attempt to confer novel functions on their own courts. In that context, it is not surprising that a greater latitude is afforded the States since the non-judicial functions with which their courts may be conferred need only be not '*incompatible* with their role as a repository of federal jurisdiction'.⁴⁰ That is obviously distinct from demanding that the functions be purely judicial in nature and consequently the guidance we may draw from those cases is open to qualification.

The potential for constitutional difficulty with the Commonwealth's new schemes of COs and PDOs lies in the means devised for their issuance. Specifically, investing the Federal Court, the Family Court and the Federal Magistrates Court with the power to issue COs⁴¹ will be invalid unless those orders can be brought within the parameters of judicial power. It is not obvious that this can be achieved insofar as the obligations, prohibitions and restrictions imposed by COs deprive their subject of liberty, despite the individual not having been found guilty of any crime. Certainly, to the extent that persons are subject to an order which so restricts their movement as to amount to their detention, serious doubts as to constitutionality exist on this score. But even when COs effect a significant deprivation of liberty short of detention, it may still be argued that they improperly impose a significant punishment of the individual that occurs outside a process of criminal adjudication, and so risk invalidity on this ground.

Conversely, the question of constitutionality surrounding PDOs is whether the executive has the power to issue orders for detention as an administrative act. Any want of power in the executive to issue PDOs is not remedied by conferring the power on Courts, as the constitutional question simply shifts to the question raised in relation to COs; namely, whether issuing a PDO is a valid exercise of judicial power. A further question arises of whether federal judges, acting in their personal capacity, should be issuing authorities for such orders.⁴² That function must not be incompatible with their role and responsibilities as judicial officers.⁴³ The inclusion of members of State and Territory Supreme Courts as issuing authorities adds another dimension to this question since it invites consideration as to whether a lower standard of incompatibility applies in their case.⁴⁴

The relationship between involuntary detention and judicial power underlies both the control order and PDO regimes. Before considering the two orders individually, then, it is helpful to review the Court's recent discussions on this topic as a preliminary step.

40 *Fardon* (2004) 223 CLR 575, 591 (Gleeson CJ stating the principle from *Kable* (1996) 189 CLR 51, 56).

41 *Criminal Code* (Cth) s 104.4. 'Issuing court' is defined in s 100.1 to refer to these three courts.

42 *Criminal Code* (Cth) s 105.18(2). 'Issuing authority' for continued PDOs are listed at s 105.2.

43 *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348.

44 *Kable* (1996) 189 CLR 51.

B *Involuntary Detention and The Separation of Judicial Power*

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Chu Kheng Lim*'),⁴⁵ the High Court upheld the executive detention of non-citizens under the *Migration Act*. Writing with the majority in that case, Brennan, Deane and Dawson JJ expressed the significance of the separation of judicial power for the liberty of citizens as follows:

[P]utting to one side the exceptional cases to which reference is made below, 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.⁴⁶

The effect of this appears to be twofold: first, involuntary detention is, subject to some exceptions, the domain of the judicial arm of government; and second, its use is bound to punishment of those found guilty of a criminal offence. The idea that a federal court could order the deprivation of a citizen's freedom on some other basis is rejected by their Honour's earlier remark that:

[G]rants of legislative power [do not] extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.⁴⁷

Despite the apparent clarity of these statements, it is in the realm of the exception that the matter assumes greater complexity. The examples which the joint judgment gave as to situations where non-judicial detention would be valid included cases of mental illness or infectious disease — where a punitive purpose was clearly absent.⁴⁸ But the distinction between a punitive purpose and other motivations for detention was one which later members of the Court have found less distinct, leading them to doubt the existence of any general constitutional immunity from imprisonment except by court order. In *Kruger v Commonwealth* ('*Kruger*'),⁴⁹ Justice Gaudron was clear in her rejection of any principle that a law authorising detention by the executive was *prima facie* in breach of Chapter III. Her Honour's opinion in that case, which viewed the matter as one determined by characterisation of the law in question under the grants of power in s 51, has proven to be highly influential. Increasingly the Court has distanced itself from the notion of a general constitutional immunity deriving from the nature of judicial power and its exclusive possession by Chapter III courts. It is open to question, however, whether her Honour would have supported the trend by later majorities to de-emphasise the limits upon the grants of subject matter in s 51 which seemed to be a cornerstone of her approach.

45 (1992) 176 CLR 1.

46 *Ibid* 27.

47 *Ibid*.

48 *Ibid* 28.

49 (1997) 190 CLR 1, 110–111 ('*Kruger*').

This was made clear by the majority judgments in the decision of *Al-Kateb v Godwin* ('*Al-Kateb*').⁵⁰ In that case, the Court was asked to determine the constitutionality of the mandatory detention of unlawful non-citizens in cases where such detention could very well be indefinite. Section 196 of the *Migration Act 1958* (Cth) provides that a non-citizen must remain in detention until they are either granted a visa, removed from Australia or deported. Mr Al-Kateb was taken into detention under the Act but he was denied a visa as his application for refugee status failed. However, as a 'stateless person' it was not presently possible to deport Al-Kateb — a situation that looked likely to continue for the foreseeable future. Attempts by the Commonwealth to remove him to Egypt, Syria, Jordan, Kuwait, and to Palestinian territories had all failed. In light of this impasse, the Court was asked to determine whether the real possibility that Al-Kateb would remain in detention indefinitely changed the character of that detention in a way which rendered it unconstitutional. By a 4:3 majority, the court answered that it did not.⁵¹

The seemingly indefinite nature of the detention was found not to alter its initial non-punitive purpose. The majority doubted the exclusivity with which the joint judgment in *Chu Kheng Lim* had identified the involuntary detention of a citizen as an incident of judicial power, and embraced Gaudron J's view that several grants of legislative power, including the aliens' power, may permit such a result. As Hayne J remarked, the matter 'turns upon the connection between such detention and the relevant head of power, not upon the identification of detention as a step that can *never* be taken except in exercise of judicial power'.⁵² Thus, the purpose of detention is 'gleaned from the content of the heads of power which support the law'.⁵³ In this case, that exercise produced a non-punitive purpose which was open to the Parliament to pursue under its power with respect to aliens in s 51(xix).⁵⁴ Nothing, including the possibly indefinite duration of Al-Kateb's detention, served to engage limitations from Chapter III as a result.⁵⁵

Justice McHugh provided a further elaboration of this reasoning in his judgment in *Re Woolley; Ex parte Applicants M276/2003*.⁵⁶ His Honour again rejected the proposition in *Chu Kheng Lim* that detention by the executive, subject

50 (2004) 219 CLR 562 ('*Al Kateb*').

51 It should be noted that the Chief Justice, based his dissent exclusively upon statutory construction of the Act.

52 *Al-Kateb* (2004) 219 CLR 562, 648; cf 613 (Gummow J).

53 Ibid 651 (Callinan J). See also, 583 (McHugh J); *Re Woolley* (2004) 210 ALR 369, 386.

54 In his minority opinion, Gummow J, while agreeing to some extent with that view, went on to say, at 160: 'However, the purposes are not at large. The continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government ... it cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III.'

55 The same result was held in respect of other variants upon the migration detention scheme, namely the conditions of detention (*Behrooz* (2004) 219 CLR 486) and its application to children (*Re Woolley* (2004) 210 ALR 369). Neither of those features served to render the detention punitive in nature.

56 (2004) 210 ALR 369.

to exceptions, would always be punitive.⁵⁷ Certainly, legislation authorising executive detention, without more, would give rise to an inference of punitive purpose. However, this would be rare and in most cases some clear purpose should be discernible. That would be the ‘yardstick’ for determining whether the law is punitive or not. Justice McHugh went on to say that ‘the most obvious example of a non-punitive law that authorises detention is one enacted solely for a protective purpose’, giving the example of war-time detention as necessary to ‘protect the community’.⁵⁸ In his analysis of this judgment, Glass says, ‘the only relevance of disproportionate aspects of the mandatory detention laws is if they disclose an improper punitive purpose. It is hard to see this test having much bite’.⁵⁹

Simultaneously to its consideration of the legality of executive detention of non-citizens, the High Court has been engaged in developing a jurisprudence with respect to the detention of past offenders who continue to pose a risk to the community. This has arisen in the context of State laws which empower courts to make orders for the continued detention of prisoners beyond their release date. In *Kable v Director of Public Prosecutions (NSW)*,⁶⁰ the Court struck down the *Community Protection Act 1994* (NSW) on the basis that it conferred upon the Supreme Court of that State a function which was incompatible with its holding federal judicial power under s 77(iii) of the Commonwealth Constitution. This was due to the specific features of this Act applied in respect of a named individual and which empowered the Supreme Court to make a detention order if it was satisfied on reasonable grounds:

- (a) that the person is more likely than not to commit a serious act of violence; and
- (b) that it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody.⁶¹

The majority found that this scheme compromised the institutional integrity of the Supreme Court by making it seem an instrument of the executive’s policy to imprison the individual in question without recourse to ordinary legal processes — namely without adjudging the person guilty of any fresh criminal offence. This had ramifications under the Commonwealth Constitution due to the Supreme Court’s occasional exercise of federal judicial power.⁶²

While the use of the separation of judicial power at Commonwealth level in this way to invalidate a State Act was a surprising offshoot of the *Boilermakers* principle,⁶³ it was clear that *Kable* did not simply extend the principle to the State jurisdiction. The majority in *Kable* simply required that the State Court should not

57 Ibid 384.

58 Ibid 385.

59 Arthur Glass, ‘Immigration Detention and the Australian Constitution: *Al-Kateb v Godwin* and *Behrooz v DIMIA*’ Gilbert + Tobin Centre Constitutional Law Conference (Sydney, 18 February 2005).

60 (1996) 189 CLR 51.

61 *Community Protection Act 1994* (NSW) s 5(1).

62 *Kable* (1996) 189 CLR 51, 103 (Gaudron J); 116–19 (McHugh J); and 140 (Gummow J).

63 Ibid 85–86 (Dawson J).

exercise a function *incompatible* with judicial power. Their Honours recognised that it could still hold non-judicial powers⁶⁴ — something which is strictly denied to those courts who owe their jurisdiction exclusively to Chapter III. This distinction is crucial in understanding that a law which confers functions on State Supreme Courts and survives challenge under the reasoning in *Kable* will not necessarily be valid if enacted in exactly the same terms at the federal level. However, if the provisions of a State law would not, if passed at the Commonwealth level and dealing with federal courts, offend the strict separation of judicial power under Chapter III, then it is *ipso facto* immune from challenge under the *Kable* principle.⁶⁵

That helpful framework will, however, only take the Court so far and in the case of *Fardon v Attorney-General (Qld)* ('*Fardon*')⁶⁶ there was a serious disagreement as to whether the State law in question would be compliant with Chapter III if passed by the Commonwealth Parliament. This has muddled the issue of deciding exactly when involuntary detention is an exercise of non-judicial power. In *Fardon*, the court considered the validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), a piece of state legislation attempting to grant the Queensland Supreme Court the power to make interim or continuing detention orders against a prisoner currently serving time for a serious sexual offence. A 6:1 majority of the Court found the law to be valid, assisted by the many features which distinguished the Act from that which was challenged in *Kable* — not the least being that the Queensland legislation was of general application.

Fardon gives no clear answer as to whether the ability to detain on the basis of what a person *might* do rather than what she or he *has* done is judicial in nature.⁶⁷ The Chief Justice confined himself to finding that the legislation in question did 'not confer functions which are incompatible with the proper discharge of judicial responsibilities'⁶⁸ — all that was required in order for the Act to stave off a challenge under the *Kable* principle. Justices Hayne, Callinan and Heydon also effectively reserved their opinion on whether the Act would meet the stricter standard for federal laws,⁶⁹ though they did indicate varying levels of dissatisfaction with the rigidity of the *Chu Kheng Lim* joint judgment — which was entirely consistent with their opinions in *Al-Kateb* some months earlier.⁷⁰ But

⁶⁴ *Kable* (1996) 189 CLR 51, 118–19 (McHugh J).

⁶⁵ *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 562; *Silbert v DPP (WA)* (2004) 205 ALR 43, 45–46; *Baker v The Queen* (2004) 223 CLR 513, 534–35.

⁶⁶ (2004) 223 CLR 575.

⁶⁷ Indeed, the preference of the Court to focus upon the process in the Queensland legislation instead of squarely confronting the principle seemingly established in *Kable* has been a source of criticism. For example, Meagher complained, '[n]otwithstanding the many procedural differences between the *Kable* and *Fardon* laws, to my mind they had a common and defining constitutional characteristic — they imposed punishment for possible rather than proven criminal conduct': Dan Meagher, 'The Status of the *Kable* Principle in Australian Constitutional Law' (2005) 16 *Public Law Review* 182, 185.

⁶⁸ *Fardon* (2004) 223 CLR 575, 592.

⁶⁹ *Ibid* 648 (Hayne J); and 655–56 (Callinan and Heydon JJ).

⁷⁰ *Al-Kateb* (2004) 219 CLR 562.

Justice McHugh was less restrained and said that ‘when determining an application under the Act, the Supreme Court is exercising judicial power’,⁷¹ though he did not ultimately base his conclusion on that finding.⁷² On the other hand, Justices Gummow and Kirby (the latter in dissent) expressly said that had the Act been passed by the Commonwealth it would have offended Chapter III. While accepting the existence of exceptional cases,⁷³ Gummow J insisted that Chapter III stated 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’.⁷⁴

Justice Gummow went on to argue that the value of this particular formulation lay in its avoidance of the indeterminacy inherent in asking whether the detention was ‘penal or punitive in character’.⁷⁵ Instead the concern remains whether a person is deprived ‘of their liberty without adjudication of guilt’.⁷⁶ In taking this approach — consistent with his stance in *Al-Kateb*⁷⁷ — his Honour clearly favoured retention of the principles enunciated in the joint judgment of Brennan, Deane and Dawson JJ in *Chu Kheng Lim* and similarly proceeds from a starting point of the assumption of liberty. This produces a stronger Chapter III protection than generated by the competing approach of first determining a non-punitive protective purpose to the detention as being within legislative competence.⁷⁸

The recent decision of *Vasiljkovic v Commonwealth* (‘*Vasiljkovic*’)⁷⁹ indicates a move by the court favouring the statements of principle outlined by Justice Gummow in *Fardon*. *Vasiljkovic* was concerned with a challenge to the *Extradition Act 1988* (Cth) on the basis that depriving a citizen of liberty for the purpose of extradition was inconsistent with the judicial power of the Commonwealth when the State requesting extradition need not establish a prima facie case against the individual. The Court found no invalidity, with Kirby J dissenting. That result was not surprising given the Commonwealth’s power with respect to external affairs in s 51(xxix) and the longstanding practice of the executive to make extradition arrangements with other countries. The majority found that the power of the Commonwealth Attorney-General to surrender a

71 *Fardon* (2004) 223 CLR 575, 596.

72 *Ibid* 598.

73 *Kruger* (1997) 190 CLR 1, 162.

74 *Fardon* (2004) 223 CLR 575, 612. Dyzenhaus describes ‘this version of the theological doctrine of double effect’ as a ‘form of double speak’ and decries its ability to offer a convincing analytical tool: above n 4, 83.

75 *Ibid*. In *Re Woolley M276/2003* (2004) 210 ALR 369, 385, McHugh J admitted to a degree of difficulty in drawing ‘the dividing line between a law whose purpose is protective and one whose purpose is punitive’ particularly ‘where a protective law has acknowledged consequences that, standing alone, would make the law punitive in nature’. Nevertheless, his Honour attempted to explain how the validity of a law which had a combination of punitive and non-punitive purposes could be determined through use of a proportionality analysis: 389–93. With respect, this reasoning stands in marked contrast to the clarity offered by Gummow J’s approach.

76 *Fardon* (2004) 223 CLR 575, 613.

77 (2004) 219 CLR 562, 609–14.

78 See text accompanying n 51–58.

79 [2006] HCA 40 (3 August 2006) (‘*Vasiljkovic*’).

person for extradition was another exception to the guarantee provided by the separation of judicial power in Chapter III of the *Commonwealth Constitution*.⁸⁰

In their judgments, members of the Court appeared to endorse Justice Gummow's earlier reformulation of the *Chu Kheng Lim* doctrine. Justice Kirby did so most explicitly,⁸¹ while the joint opinion of Gummow and Hayne JJ acknowledged his Honour's statements in *Fardon* but did not expressly adopt those over the passage in *Chu Kheng Lim* since the present facts clearly fell within the exception to either formulation.⁸² The Chief Justice did not make any direct reference to *Fardon* at all, preferring to cite simply the joint judgment from *Chu Kheng Lim*. In so doing, he maintained an emphasis upon the purpose of the detention whilst also stressing the importance of the adjudicative function to determine guilt. On the facts of this case that was clearly lacking, resulting in the view that the power was properly held by the executive.⁸³

Despite this recent indication of some possible consensus emerging from the court, it remains difficult to say with much certainty just what the impact of the separation of judicial power is upon a Commonwealth scheme of involuntary detention. While it is agreed that a number of grants of legislative power enable executive detention where the purpose is non-punitive, the minority judgments of Gummow and Kirby JJ in *Al-Kateb* offer strong appeal in their suggestion that the ability to invoke this classification cannot be without limit. Justice Gummow's insistence that the dichotomy between punishment and protection is fallacious given that the two motives often co-exist points the way to a revitalised use of Chapter III to limit executive detention. At the same time, *Fardon* hardly offers solid support for conferring upon federal courts the ability to order detention absent a finding of guilt but for the purpose of protecting the community. The survival of the State legislation in that case owes much to it having only to satisfy the lower standard of 'incompatibility' from *Kable*. A similar enactment at the federal level appears to offer far less certainty as to a positive outcome.

The inconclusive nature of the case law in this area was a factor pointed to by several persons at the time the Commonwealth proposed introducing its schemes for COs and PDOs. Concerns over the validity of what was being proposed were first raised by the Queensland government after receiving advice from the State Solicitor-General.⁸⁴ *The Australian* newspaper purported to have got hold of a

80 [2006] HCA 40, Gleeson CJ paras 37–38; and Gummow and Hayne JJ paras 113–14 (though note their Honours preferred to view the extradition process as simply standing outside Chapter III).

81 Ibid para 193.

82 Ibid para 108. Heydon J issued an opinion essentially concurring in their Honour's judgment: [2006] HCA 40, para 222.

83 His Honour stated, at [2006] HCA 40, para 34: 'The interference with personal liberty involved in detention during the extradition process (if that occurs), and in involuntary delivery to another country and its justice system is not undertaken as a form of punishment. No doubt, to the person involved, some of its practical consequences may be no different from punishment, but the purpose is not punitive. To repeat, the process involves no adjudication of guilt or innocence. It is undertaken for the purpose of enabling such an adjudication to be made in a foreign place, according to foreign law, in circumstances where Australia has no intention itself of bringing the person to trial for the conduct of which the person is accused.'

84 Queensland, *Parliamentary Debates*, 25 October 2005, 3389 (Peter Beattie).

leaked legal opinion from the Commonwealth's Chief General Counsel, Mr Henry Burmester QC which reportedly made the following assessment on the preventative detention scheme:

No guarantee as to the validity can be given even as to detention for 24 or 48 hours ... This is a very untested area of the law. Recent High Court cases do not encourage an expansive approach to the scope for executive detention under Commonwealth law.⁸⁵

When the Senate Legal and Constitutional Legislation Committee invited submissions on the Bill, it received several submissions which expressed continuing doubt over the use of the federal courts and judges in making the two different types of order.⁸⁶ Most notable was an opinion by Stephen Gageler SC, not submitted to the Committee but made publicly available after having been sought by the Australian Capital Territory Chief Minister.⁸⁷

Despite those warnings, the amendments to the *Criminal Code* (Cth) introduced by the *Anti-Terrorism Act (No 2) 2005* still possessed several features which appear to strain against the authorities in the area. It is now appropriate to address directly the question of just how likely it is that the schemes for COs and PDOs will withstand possible challenges for breaching the constitutional separation of judicial power.

III JUDICIAL POWER AND CONTROL ORDERS

A *Outline of The Scheme for Control Orders*

As with PDOs, COs have a protective purpose.⁸⁸ To procure a control order against an individual, the Australian Federal Police ('AFP') must first seek the consent of the Attorney-General by providing him or her with a detailed brief explaining not just the order sought but the basis upon which it is being sought, the grounds for each requested obligation and the history of any previous COs sought,

85 Samantha Maiden and Dennis Shanahan, 'Terror Laws An Untested Legal Area', *The Australian* (Sydney), 26 October 2005, 10.

86 See, for example, Professor Simon Bronitt, Miriam Gani, Dr Mark Nolan and Dr John Williams, *Submission 210*, 6–10; Dr Greg Carne, *Submission 8*, 26–30; Division of Law, Macquarie University, *Submission 168*, 7–10; Gilbert + Tobin Centre of Public Law *Submission 80*, 7–12; Law Council of Australia, *Submission 140*, 11–14; The Hon Alastair Nicholson, Mr John Tobin, Mr Danny Sandor, Ms Paula Grogan and Ms Carmel Guerra, *Submission 237*, 11–13; Queensland Law Society and Bar Association of Queensland *Submission 222*, 1–7. All submissions are available on the Committee's webpage for the Inquiry: <http://www.apf.gov.au/senate/committee/legcon_ctte/terrorism/submissions/sublist.htm>.

87 Stephen Gageler, 'In the Matter of Constitutional Issues Concerning Preventative Detention in the Australian Capital Territory', opinion provided to Australian Capital Territory Government Solicitor, 26 October 2005.

88 This is expressly stated in respect of the control orders: *Criminal Code* (Cth) s 104.1.

obtained, varied or revoked in respect of the person concerned.⁸⁹ Once the AFP officer has the consent of the Attorney-General, he or she may apply to an issuing court for an interim control order under s 104.4. That order may then be confirmed, varied or revoked at a subsequent hearing⁹⁰ to be held as soon as practicable, but no less than 72 hours after the making of the interim order.⁹¹ The grounds upon which the court makes both the interim and confirmed control order are the same.⁹² The court must be satisfied, on the balance of probabilities, either that:

- ‘making the order would substantially assist in preventing a terrorist act’; or
- ‘that the person subject to the order has provided training to, or received training from, a listed terrorist organisation’.⁹³

The court must also be satisfied, again on the balance of probabilities, that each of the obligations, prohibitions and restrictions to be imposed is both reasonably necessary *and* reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.⁹⁴ Australia’s first control order was issued against Jack Thomas in August 2006. A range of conditions was imposed upon him. After some attracted ridicule (notably the prohibition upon him contacting Osama bin Laden), the issuing Magistrate made statements saying that he thought some of the conditions sought by the AFP were ‘silly’.⁹⁵ There seemed to be little understanding on his part that if that was his opinion then he had failed to exercise his powers under section 104.4 appropriately.

It is worth stating in full the range of possible conditions which may be placed on an individual by the terms of a CO under s 104.5(3):

- (a) a prohibition or restriction on the person being at specified areas or places;
- (b) a prohibition or restriction on the person leaving Australia;
- (c) a requirement that the person remain at specified premises between specified times each day, or on specified days;
- (d) a requirement that the person wear a tracking device;
- (e) a prohibition or restriction on the person communicating or associating with specified individuals;
- (f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the Internet);
- (g) a prohibition or restriction on the person possessing or using specified articles or substances;
- (h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);

89 *Criminal Code* (Cth) s 104.2.

90 *Criminal Code* (Cth) s 104.14.

91 *Criminal Code* (Cth) s 104.5(1A).

92 *Criminal Code* (Cth) s 104.16(1)(a) makes it clear that in confirming the earlier order, it must state its satisfaction of the criteria utilised earlier in respect of the interim version.

93 *Criminal Code* (Cth) s 104.4(1)(c).

94 *Criminal Code* (Cth) s 104.4(1)(d).

95 Ian Munro with Mark Forbes, ‘Magistrate Slams ‘Farcical’ Ban On Bin Laden’, *The Age* (Melbourne), 1 September 2006, 5; Natasha Robinson, ‘Ban On Bin Laden Contacts Just “Silly”’, *The Australian* (Sydney), 1 September 2005, 6.

- (i) a requirement that the person report to specified persons at specified times and places;
- (j) a requirement that the person allow himself or herself to be photographed;
- (k) a requirement that the person allow impressions of his or her fingerprints to be taken;
- (l) a requirement that the person participate in specified counselling or education.

This list presents quite a spectrum of possible orders — from brief, minimally disruptive contact through to real restrictions on livelihood and mobility. Unlike PDOs, COs do not involve incarcerating the subject in a state facility. However, they may involve a form of detention nonetheless, and to that extent, would attract the sort of considerations raised in cases such as *Fardon* and *Al-Kateb*. When the Senate Legal and Constitutional Legislation Committee conducted hearings as part of its inquiry into the *Anti-Terrorism Bill (No 2)*, some government members of the Committee expressed frustration that ‘everybody keeps talking about house arrest’.⁹⁶ It was, however, hardly surprising that this possibility under the new law elicited particular apprehension.

It is clear from the range of conditions which may form the terms of a control order that the deprivation of individual liberty may be severe. In particular, an order incorporating the conditions in s 104.5(3)(a) (a prohibition or restriction on the person being at specified areas or places) and s 104.5(3)(c) (a requirement that the person remain at specified premises between specified times each day, or on specified days) may amount to ‘detention’ in the sense of imposing a significant restriction upon liberty of movement. The possible extent of that deprivation is also relevant in this context, with COs lasting up to 12 months and the option of renewal for the duration of the Schedule’s operation enabling long term house arrest.

The imposition of conditions which fall short of a total deprivation of an individual’s liberty cannot be assumed to be immune from difficulty. These may still be of such a character as to be unconstitutional if ordered except in accordance with the exercise of judicial power. Support for this argument is found in recent decisions from the United Kingdom concerning the incompatibility of COs requiring their subjects to remain in their residence for 18 hours a day with the *European Charter of Human Rights*. In August 2006, the Court of Appeal upheld the decision of a lower court that those obligations amounted to a breach of Article 5 of the *Charter*.⁹⁷ That provision guarantees a right to liberty of the person, subject to certain exceptions. The Secretary of State argued before the

96 Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 14 November, 61 (George Brandis). Gearty has noted, in discussing the United Kingdom’s scheme of control orders created in early 2005 and from which the Australian government drew inspiration, a similar aversion by that country’s legislature to employment of the term ‘house arrest’. As he infers, this must be to soften the unease surrounding introduction of ‘a form of coercion that ...was surely thought incapable of being used in a modern democratic state’: Conor Gearty, *Can Human Rights Survive?* (2006) 103.

97 *Secretary of State for the Home Department v JJ; KK; GG; HH; NN; & LL* [2006] EWCA Civ 1141.

Court that the terms of the orders amounted only to a restriction on the subject's freedom of movement. In rejecting that argument, the Court of Appeal approved Sullivan J's initial finding that 'the length of the curfew period, the extent of the obligations and their intrusive impact on the respondents' ability to lead a normal life'⁹⁸ meant that the orders constituted a deprivation of liberty.⁹⁹

Certainly, given the range of possible conditions under the legislation which may attach to any particular control order, we must acknowledge that those comprised of less draconian prohibitions may well survive constitutional challenge. Even so, the difficulty remains as to where the line is to be drawn between those deprivations of liberty which may comfortably be within the power of the executive, and the more extreme versions which are not. Additionally, this invites the question as to what degree the policy behind the law is frustrated at having to draw this line.

B The Constitutional Issues

Accepting that a control order has the potential to significantly deprive individuals of their freedom, triggers scrutiny as to the role which the Commonwealth has allocated to federal courts in making such orders. As the courts empowered to issue COs all derive their jurisdiction from Chapter III of the *Commonwealth Constitution*,¹⁰⁰ the ability to issue an order must be found squarely within the parameters of judicial power itself. To accept anything less in this context is to flout the constitutional imperatives identified in *Boilermakers*. It is not sufficient, as it was in *Fardon*, for the judicial function of issuing an order to be merely 'not incompatible' with the exercise of judicial power.

A key difficulty lies in identifying the relationship between detention and judicial power. There appears to be two streams of opinion on this issue, as apparent from the brief overview of existing authorities. On one hand, apart from 'exceptional cases' in which executive-ordered detention is permitted for a non-punitive purpose,¹⁰¹ detention of a citizen exists solely as an incident upon adjudication of that individual's criminal guilt. On the other, it is arguable that in clarifying the impact of the *Kable* principle, recent cases have suggested some flexibility as to the basis upon which a court may order detention so that a preventative purpose is within that which is regarded as judicial. Just how far this accommodation may extend remains, of course, open to speculation in light of the reluctance of most of the judges in *Fardon* to declare whether the power central to that case was essentially judicial in character.

98 *Secretary of State for the Home Department v JJ; KK; GG; HH; NN; & LL* [2006] EWHC 1623 (Admin), para 73.

99 *Secretary of State for the Home Department v JJ; KK; GG; HH; NN; & LL* [2006] EWCA Civ 1141, paras 20–23.

100 Being the Federal Court, the Family Court and the Federal Magistrates Court: *Criminal Code* (Cth) s 100.1.

101 Examples of which are the schemes upheld in *Kruger (Stolen Generations Case)* (1997) 190 CLR 1; *Al-Kateb* (2004) 219 CLR 562; *Re Woolley* (2004) 210 ALR 369.

On the formulation preferred by Justice Gummow in *Fardon*, the power granted to federal courts to issue COs under Division 104 is undoubtedly non-judicial in character. It will be recalled that, apart from exceptional cases, his Honour opined 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’.¹⁰² Whatever else may be said of the factors which the court must consider in making a control order, it is clear that they do not turn on questions of guilt and past conduct but rather upon issues of propensity and apprehension. The court’s designated function under the circumstances is to assist in the prevention of a terrorist act rather than to impose punishment for the commission of a terrorist offence.

The *Code* itself actually admits this — in the most express terms possible. Section 104.1 states ‘[t]he object of this Division is to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act.’

Perhaps this is merely a sensible acknowledgment of the obvious tenor of the operative provisions which follow, but it does seem to invite doubt over the role of the courts. It is clear that the basis upon which the deprivations of liberty in cases like *Al-Kateb*, *Woolley* and *Kruger* survived constitutional objection was that they involved only the use of non-judicial power. Those decisions provide clear instances where a power to detain for a *preventative* purpose was considered to be an exercise of non-judicial power. This was a point picked up by Senator Kirk during the inquiry into the *Anti-Terrorism Bill (No 2)*. In her questioning of staff from the Attorney-General’s Department, it seemed that the Commonwealth was either unable to settle upon the true character of the scheme it was introducing or was content to hedge its bets:¹⁰³

Mr McDonald — The advice is that for control orders it is judicial. That is why we have a court doing it. The concern there is that control orders could be regarded by the High Court as being penal in nature. The interesting thing about control orders is that they can be as soft as a feather or quite onerous. At the onerous end of it are quite strong limitations on your geographical movement and who you associate and communicate with. At the other end of it could be quite limited — that is, you cannot go anywhere near Lucas Heights. So it is an area where there is a lot of potential for it to be held to be punitive, where the conditions are quite onerous. Consequently, we have erred in the direction of making it a decision to be made by the courts. There was little bit of debate about that with some of the states, but our Solicitor-General and Chief General Counsel have been around a long time and the advice from both of them is firm on this.

Senator KIRK — I assume that Mr Burmester has given you written advice to that effect—that in his view this is a judicial process.

¹⁰² *Fardon* (2004) 223 CLR 575, 612. This is a reformulation of the joint judgment in *Chu Kheng Lim* (1992) 176 CLR 1, 27.

¹⁰³ In this regard, it is particularly interesting to note that the section had not appeared in the draft bill leaked by the Australian Capital Territory Chief Minister and must therefore be seen as some kind of response to the doubts raised by State officers as to the validity of the control order scheme: see text accompanying n 84–85 above.

Mr McDonald — Both the Solicitor-General and Mr Burmester.

Senator KIRK — Look at the object of the division in section 104.1. It says:

... obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act.

I fail to see how that actually involves the application of judicial standards. It seems protective in nature, rather than punitive. Would that not be said?

Mr McDonald — My simple answer on that is that it is probably true of many criminal law statutes where there is no argument about this.¹⁰⁴

McDonald's attempt to connect a protective function to the role of court orders in the criminal law more generally was a fairly standard response to such concerns. In particular, the Attorney-General had sought to ease concerns over the orders by likening them to apprehended violence orders,¹⁰⁵ an analogy attempted by McDonald later in his exchange with Senator Kirk. But, as the latter noted by way of rejecting that argument, the ability of State courts to issue Apprehended Violence Orders ('AVOs') is not to the point of discerning which functions may be validly exercised by a Chapter III court, subject to a much stricter separation of judicial power.¹⁰⁶

McDonald then sought to draw a parallel between the ability to make a control order and the Family Court's power to make protective orders under s 114 of the *Family Law Act 1975* (Cth).¹⁰⁷ But this is not at all apt. It is clear from the provision cited that what the Family Court is able to order is anticipatory injunctive relief preventing a spouse from various activities relating to the matrimonial home and other property and also the person of the other spouse. The individual seeking the injunction is able to identify a specific legal right in relation to the matrimonial proceedings over which the Court already has jurisdiction which they are asking the court to protect from interference. A control order under Division 104 of the *Criminal Code* (Cth) is eminently distinguishable. It does not depend upon a legal proceeding being already in existence. It is granted at large to protect the entire community, rather than in respect of the specific rights of a particular individual.

Putting aside the inapplicability of those examples, it would seem that in making the issue of COs a judicial process, the Commonwealth is claiming that judicial power may properly be exercised for preventative purposes relying on a substantive reading of *Fardon*. For example, the Chief Justice indicated in *Fardon* that there was nothing 'inherent in the making of an order for preventative, as distinct from punitive, detention that compromises the institutional integrity of a court'.¹⁰⁸

¹⁰⁴ Evidence to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Sydney, 14 November, 17–18.

¹⁰⁵ BBC Radio, 'Counter-terrorism Legislation; Immigration Policy', *HardTalk*, http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Interview_Transcripts_2005_Transcripts_31_October_2005_-_Interview_-_BBC_Hardtalk_London at 31 October 2005.

¹⁰⁶ Above n 104, 18 (Senator Kirk).

¹⁰⁷ Ibid.

¹⁰⁸ (2004) 223 CLR 575, 592.

This stance necessitates a very close reading of the opinions expressed by the majority, other than Gummow J, in *Fardon*. Only Justice McHugh was prepared to say that the power conferred upon the Supreme Court of Queensland by the legislation in question actually *was* judicial, while others contented themselves with saying it was not inconsistent with power of that character — enough to deal with the matter in the context of a State court.¹⁰⁹ But common to both approaches was the need to reach a certain level of satisfaction over the processes contained in the law.¹¹⁰ This was illustrated by the many distinctions drawn between the Queensland Act for preventative detention and the law struck down in *Kable*.

Many of the factors which led to the law in *Fardon* being upheld pertain to the operation of Division 104. The scheme for COs is of general application and confers upon courts a substantial discretion as to whether an order should be made, and if so, the conditions it should contain. The onus of proof is on the senior AFP member requesting the making of an order. Unlike the draft Bill which was leaked to the public, the final version of the scheme provides that confirmatory hearings are to be *inter partes*.¹¹¹ Following a recommendation from the Senate Committee,¹¹² the rule against hearsay applies — although only in respect of confirming an order.¹¹³ The discretion is to be exercised by reference to established legal criteria to a recognised standard — balance of probabilities. Lastly, the individual has the right to seek revocation of any order made against him or her.

However, those features may be offset by others which are problematic to any attempt to frame the powers conferred by Division 104 as judicial. First, there is the restriction upon the subject of the order and his or her legal representative as to knowing the basis upon which it has been issued. In the initial draft this was to be total, but as enacted, the party is now entitled to ‘a summary of the grounds on which the order is made’.¹¹⁴ This is clearly an inadequate provision of information so as to enable the subject to challenge the making of the order. In addition, the law specifically draws attention to the possible operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) to exclude information from the summary which the Attorney-General feels is likely to prejudice national security.¹¹⁵ This legislation may also limit the ability of the subject to hear some or all of the evidence adduced by the AFP in seeking confirmation of the order under s 104.14(1). Indeed, the remarkable nature of the *National Security Information Act* must mean that the ability to take assurance

109 Ibid 592 (Gleeson CJ); 648 (Hayne J); 656 (Callinan & Heydon JJ).

110 See particularly, ibid 596–97, 602 (McHugh J). Consistent with his overall position, Gummow J indicated that these considerations could not be determinative in respect of a federal enactment (2004) 223 CLR 575, 614.

111 The *ex parte* process originally proposed was seen as an aspect of the scheme which particularly weakened its connection to judicial power: Gageler, above n 87, 13.

112 Senate Legal and Constitutional Committee, Commonwealth Parliament, Provisions of the Anti-Terrorism Bill (No 2) 2005, (2005) 71 (Recommendation 22).

113 *Criminal Code* (Cth) s 104.28A.

114 *Criminal Code* (Cth) ss 104.12(1)(a)(ii) and 104.26(1)(a)(ii).

115 *Criminal Code* (Cth) ss 104.12(2) and 104.26(2).

from application of the usual rules of evidence in other contexts (as the Court was able to do in *Fardon*) is out of the question in respect of terrorism matters.

Second, and clearly distinct from the schemes for preventative detention considered in both *Kable* and *Fardon* (and also, for that matter, *Baker v R*),¹¹⁶ a control order may be issued over a person who has not been earlier found guilty of any criminal wrongdoing. The exclusive application of those other laws to ‘prisoners’ may be an important consideration.¹¹⁷ The individuals had by their actions already been brought within the judicial power of the courts. The ability to delay their release into the community upon expiration of their original sentences was effectively seen as a corollary to that power which had been earlier applied. Similarly, legislation enabling the monitoring of persons once they are back in the community after serving a custodial sentence for a sexual offence clearly looks to the individual’s earlier conviction to determine their eligibility.¹¹⁸

The protective order found in Division 104 need have no such precursor. The COs which may be issued against persons as a means of ‘substantially assisting’ in the prevention of a terrorist act have no such requirement — a point which the Attorney-General acknowledged when he said, ‘[i]f you work on the assumption that only those people who could be convicted of an offence are subject to a control order then you wouldn’t have control orders’.¹¹⁹ A control order may be made against someone who has never been charged, let alone convicted, of a terrorism crime. Or, as the events surrounding the making of the control order in respect of Jack Thomas demonstrate,¹²⁰ an order may be made against an individual whose conviction of guilt has been quashed on appeal¹²¹ — even when the Crown is seeking a retrial.¹²²

Thus the power to issue a control order cannot draw upon some antecedent judgment of the subject’s guilt. In this context, it seems worthwhile to draw attention to use of the civil standard in making an order.¹²³ Even in *Fardon*, where

116 (2004) 223 CLR 513.

117 Indeed, the ‘connection between the operation of the Act [in *Fardon*] and anterior conviction by the usual judicial processes’ was a significant factor in Gummow J’s joining in the majority to find that the State Act was not incompatible with the separation of power required by Chapter III: *Fardon* 223 CLR 575, 619. See Anthony Gray, ‘Preventative Detention Laws — High Court Invalidates Queensland’s *Dangerous Prisoners Act 2003*’ (2005) 30 *Alternative Law Journal* 75, 77. This crucial distinction is regularly glossed over by defenders of the control order scheme such as Peter Faris QC: ABC, ‘Lateline speaks to Faris, Williams On Terrorism Control Orders’, *Lateline*, 29 August 2006 <<http://www.abc.net.au/lateline/content/2006/s1727524.htm>>.

118 For example, the *Serious Sex Offenders Monitoring Act 2005* (Vic) s 4.

119 ‘Control order for protection: Ruddock’ 28 August 2006, at <<http://news.nine.msn.com.au/article.aspx?id=125661&print=true>>. The United Kingdom Court of Appeal echoed some agreement with this when it recently pronounced that ‘a control order is only appropriate where the evidence is not sufficient to support a criminal charge’: *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140, [53]. The Court indicated the view that the control orders in its jurisdiction gave rise to civil, not criminal, proceedings.

120 See text accompanying n 14–19.

121 It should be pointed out that this is specifically excluded in respect of persons whose sex convictions are quashed or set aside: *Serious Sex Offenders Monitoring Act 2005* (Vic) s 4(2)(a).

122 *R v Thomas (No 2)* (2006) VSCA 166 (18 August 2006).

123 *Criminal Code* (Cth) ss 104.4(1)(c) and (d).

the law dealt solely with convicted persons, the Court was required to find an ‘unacceptable risk’ of a serious sexual offence ‘to a high standard of probability’.¹²⁴ At the Senate hearings, Senator Brandis attempted to justify the use of a simple ‘balance of probabilities’ test in respect of the COs by saying that ‘the standard to be satisfied here is higher than the standard for a very common existing procedure — namely, a search warrant’.¹²⁵ The obvious answer to this is that the two are not at all comparable and the COs have the potential to much more seriously interfere with a person’s liberty.

Lastly, it is vital to place the scheme for COs in the wider context of Part 5.3 of the *Criminal Code* (Cth) dealing with terrorism offences. The fact that an order can be made if the court is satisfied on the balance of probabilities ‘that the person has provided training to, or received training from, a listed terrorist organisation’¹²⁶ would seem to create a mechanism to directly rival the offences set down in ss 101.2 and 102.5 of the *Criminal Code* (Cth), which obviously employ the criminal standard of proof. The existence of an orthodox judicial process by which the behaviour in question can be addressed must throw further doubt on what kind of treatment it is receiving via the COs. Indeed this must be true of the entirety of the scheme, not simply when training provides the impetus for the order. If the court is satisfied that ‘making the order would substantially assist in preventing a terrorist act’ under s 104.4.1(a)(i), then surely in most cases the same evidence could be used to bring a prosecution under the very wide preparatory offences of the earlier Division? The ability to choose between two alternative procedures, both involving the courts, was not a feature of the legislation discussed in the cases to-date.¹²⁷ It would be surprising if this was of no consequence to any attempt to understand exactly what power the issuing court is employing in making COs under Division 104.

In conclusion, there is considerable doubt over the constitutional validity of the COs. None of the existing authorities support the involvement of Chapter III courts in making orders purely for the protection of the community. Instead, the unclosed category of ‘exceptional cases’ demonstrates that detention for such a purpose may be ordered by the executive without offending the separation of judicial power. Additionally, where a protective function has been validly conferred upon the judiciary it has been at the State level and so a majority of the High Court has been able to refrain from direct consideration of whether such a power is judicial *per se*.

124 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(3)(b).

125 *Hansard* (Senate, Legal and Constitutional Legislation Committee), 14 November 2005, 85 (George Brandis).

126 *Criminal Code* (Cth) ss 104.4(1)(c)(ii). It should be noted that this limb may also give rise to another, related argument. It might be possible to argue that making the eligibility of a person subject to judicial determination of a bare fact of this sort places the court concerned in the position of making an administrative decision to permanently classify an individual as someone against whom an order may be sought by the Australian Federal Police.

127 Again, this tension is readily apparent when one considers the position of Jack Thomas who after being released by the Victorian Court of Appeal then had his freedom constrained by the Federal Magistrates Court on an order made using a lesser standard of proof: see n 14–19.

As demonstrated by *Fardon*, the attempt to discern whether a power conferred is merely *compatible* with judicial power has led to a focussing upon the statutory conditions governing its exercise as a key to validity.¹²⁸ While we have sought to demonstrate that the processes for the making of COs under Division 104 fall short of those upheld in earlier cases, the matter cannot turn on that alone.¹²⁹ At the federal level, process cannot — or should not — rescue orders which are at heart not of a judicial character. Justice Gummow signalled as much by his remark to the Commonwealth as intervener in *Fardon* that:

It is not to the present point, namely, consideration of the Commonwealth's submissions, that federal legislation, drawing its inspiration from the 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 would be in the nature of the outcome, not the means by which it was obtained.¹³⁰

This is an especially important passage for the clear message it sends that the power is not ultimately defined by the process for its exercise. Although Justices Deane and Toohey rightly insisted in *Nationwide News Pty Ltd v Wills* that 'no part of the judicial power of the Commonwealth can be exercised ... in a manner inconsistent with our traditional judicial process',¹³¹ the corollary does not follow that a non-judicial function conferred upon a court which apes that process will pass muster.¹³² Taking our cue from Justice Gummow, we submit that the validity of Division 104 would ideally hinge upon an assessment of the function it confers — court-ordered detention of individuals perceived as dangerous but who need not have committed any criminal offence nor be suffering from illness that may lead them to be a risk to others. Examination of the process set down in the legislation is not an improper part of this determination but it should not obscure the fundamental objection to the purpose of the Division.

Concerns on this score echo the position of Canadian scholar David Dyzenhaus that courts should be wary of deferring to the other arms of government on the basis of national security where to do so results in their endorsement of 'grey law' — where the rule of law is a façade rather than a substantive protection.¹³³ Relevant to his discussion such a law may establish:

128 See, for example, the opinion of Gleeson CJ in that case where his Honour proceeds with such an examination after concluding that statutory regimes and common law sentencing principles have long included protection of the community as a factor in judicial determinations of detention: (2004) 223 CLR 575, 592.

129 Even so, in the High Court challenge to the validity of the control order scheme, Thomas' lawyers have prudently argued in the alternate, that if the power to make such orders is judicial in nature, the processes of Division 104 render its exercise incompatible with Chapter III of the Constitution: Written Submissions of the Plaintiff, *Thomas*, High Court of Australia (Melbourne Registry), M119 of 2006, [53]–[69].

130 (2004) 223 CLR 575, 614.

131 (1992) 1771 CLR 1, 70.

132 For an early recognition of the potential import of Gummow J's judgment in respect of the Commonwealth's anti-terrorism legislation, see Oscar Roos, 'Baker v The Queen & Fardon v Attorney-General for the State of Queensland' (2005) 10 *Deakin Law Review* 271, 281.

133 Dyzenhaus, above n 4, 3.

a grey hole [as opposed to the more familiar black hole of places like Guantanamo Bay] ... a space in which the detainee has some procedural rights but not sufficient for him effectively to contest the executive's case for his detention. It is in substance a legal black hole but worse because the procedural rights available to the detainee cloak the lack of substance.¹³⁴

It may be an overstatement to say that Division 104 amounts to a 'grey law' of this type¹³⁵ — though one should seriously consider the deficiencies of the process it outlines as potentially exacerbated by the provisions of the *National Security Information Act 2004*. Even so the caution is still pertinent. Courts should be extremely reluctant to allow the legislature to embroil them in the implementation of a policy which strikes such a significant challenge to the legal restraints which govern the relationship between individuals and the state.¹³⁶ To do so, on the basis of some level of satisfaction with the process set down in the legislation, is for the courts to put at risk their own independence as safeguarded by a constitutional commitment to a separation of powers. The consequence would be to diminish their role in the maintenance of a substantive conception of the rule of law.

The challenge which Division 104 presents to the separation of powers provides a highly orthodox ground for it to be declared invalid. The Division possesses a number of features which hamper its claim to be a legitimate and appropriate manifestation of judicial power on even the broadest understandings as to what that might involve.

No explicit recourse to the rule of law as a fount of common law constitutionalism is necessary, however persuasive some might find those arguments in this case.¹³⁷ Instead, the separation of powers doctrine provides a clear framework through which that broader assumption may be brought to bear upon this particular legislative initiative.

¹³⁴ Ibid 50 (see also comments at 19).

¹³⁵ Dyzenhaus admits 'it is a delicate matter to decide when the blackness shades through grey into something which provides a detainee with adequate rule-of-law protection, when, that is, on the continuum of legality, the void fills up with rule-of-law content': *ibid*.

¹³⁶ This is not to object to the law merely on the basis that it will diminish public confidence in the courts, reasoning which has now fallen out of favour: *Fardon* (2004) 223 CLR 575, 593 (Gleeson CJ). It is based upon the actual function and responsibilities which are conferred by the Division.

¹³⁷ This would not necessarily provide as strong an outcome since Dyzenhaus has argued that such appeals to the morality of the rule of law cannot be used to defeat clear legislative intention: see David Dyzenhaus, 'The Justice of the Common Law' in Saunders and Le Roy, above n 29, 39 and 43–44.

IV JUDICIAL POWER AND PREVENTATIVE DETENTION ORDERS

A *Outline of the Scheme for Preventative Detention Orders*

PDOs enable the federal police to detain a person for a maximum of 48 hours on the grounds that the detention will aid in preventing the commission of an act of terrorism that is expected to occur within 14 days,¹³⁸ or that the detention will preserve evidence of a terrorist act that has occurred within the last 28 days.¹³⁹ In each case, the detention of the person must be reasonably necessary for these purposes. In relation to preventing a terrorist attack, the police must have reasonable grounds to suspect that the person will be involved in carrying out the attack, or is involved in its preparation.¹⁴⁰

There are two types of order. Initial PDOs of up to 24 hours are issued by senior members of the AFP.¹⁴¹ Continued PDOs and extensions of continued PDOs are issued by judges and Federal Magistrates acting in their personal capacity, members of the Administrative Appeals Tribunal or retired judges.¹⁴² Continued PDOs may last for a further period that is not more than 48 hours from the time the person was first taken into custody.¹⁴³ Although there is provision for the individual to obtain legal advice and representation in seeking a remedy,¹⁴⁴ the application for either order is made *ex parte* by members of the AFP.¹⁴⁵ In relation to continued PDOs, the AFP member making the application must put before the issuing authority ‘any material in relation to the application’ that the person the subject of the order has given the AFP member.¹⁴⁶ The individual has no right to appear personally or through legal representation so as to challenge the issuing of an order.

In addition to the Commonwealth regime, a regime for PDOs exists in all Australian States and mainland Territories.¹⁴⁷ The State and Commonwealth regimes complement each other, with provision being made for cumulative but not concurrent orders. There are, however, significant differences between the various Commonwealth and State regimes. First, all the State regimes make provision for

138 *Criminal Code* (Cth) s 105.4(4).

139 *Criminal Code* (Cth) s 105.4(6).

140 *Criminal Code* (Cth) s 105.4(4).

141 *Criminal Code* (Cth) s 105.8(1).

142 *Criminal Code* (Cth) s 105.12 and 105.18(2).

143 *Criminal Code* (Cth) s 105.14.

144 *Criminal Code* (Cth) s 105.37.

145 *Criminal Code* (Cth) ss 105.7 and 105.11.

146 *Criminal Code* (Cth) s 105.11(5).

147 *Terrorism (Police Powers) Act 2002* (NSW) Part 2A; *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic) Part 2A, s 4; *Terrorism (Preventative Detention) Act 2006* (WA); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Emergency Powers) Act 2003* (NT) Part 2B.

preventative detention for up to 14 days. In New South Wales, Tasmania, Victoria and the Australian Capital Territory, the orders are made by the Supreme Courts of the States and Territories¹⁴⁸ after hearing from the applicants and the person to be detained, unless the court is satisfied that the order is urgent, in which case an application for an interim order may be made by electronic communication,¹⁴⁹ or in the case of Tasmania, if the order is urgent, an application can be made to a senior police officer.¹⁵⁰ The preventative detention laws in Queensland, South Australia, Western Australia and the Northern Territory are similar to the Commonwealth law with the issuing authorities being judges acting in their personal capacity or retired judges.¹⁵¹ In these jurisdictions, the person against whom the order is sought is not given notice of the application and therefore has no opportunity to make representations in relation to it.¹⁵² In Queensland, there is provision for the Public Interest Monitor to witness the application.¹⁵³ The Australian preventative detention laws are similar to laws passed in the United Kingdom and Canada since the terrorist attacks in the United States on 11 September 2001. *The Terrorism Act 2006* (UK) makes provision for a maximum period of detention of 28 days.¹⁵⁴ Under Canada's *Criminal Code*, preventative detention can be ordered for a maximum of 72 hours.¹⁵⁵ In both jurisdictions, the issuing authorities are judges in their personal capacity, and the person against whom the order is sought has an opportunity to be heard in the application process.

To apply for a PDO, the AFP must have reasonable grounds to suspect that the subject either:

- 'will engage in a terrorist act';
- 'possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act'; or
- 'has done an act in preparation for, or planning of, a terrorist act'.¹⁵⁶

These acts are all, in themselves, terrorist offences. The burden of 'reasonable suspicion' under s 105.4(4) in relation to these acts depends on what is construed as 'reasonable'. Presumably, for the grounds to be 'reasonable' there must be at least some credible information to support the suspicion, but not sufficient

148 *Terrorism (Police Powers) Act 2002* (NSW) Part 2A, s 26H; *Terrorism (Community Protection) Act 2003* (Vic) Part 2A, s 5; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 18.

149 *Terrorism (Community Protection) Act 2003* (Vic) Part 2A, ss 7–8; *Terrorism (Police Powers) Act 2002* (NSW) Part 2A, ss 26G–26H; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 20.

150 *Terrorism (Preventative Detention) Act 2005* (Tas) ss 5, 7.

151 *Terrorism (Preventative Detention) Act 2005* (Qld) s 7; *Terrorism (Preventative Detention) Act 2005* (SA) s 4; *Terrorism (Preventative Detention) Act 2006* (WA) s 7; *Terrorism (Emergency Powers) Act 2003* (NT) s 21C.

152 *Terrorism (Preventative Detention) Act 2005* (SA) ss 6–9; *Terrorism (Preventative Detention) Act 2005* (Qld) s 13(2); *Terrorism (Preventative Detention) Act 2006* (WA) ss 11, 12; *Terrorism (Emergency Powers) Act 2003* (NT) s 21F.

153 *Terrorism (Preventative Detention) Act 2005* (Qld) ss 16, 24.

154 *Terrorism Act 2006*, c.11 s 23 (Eng.)

155 Canada *Criminal Code*, R.S.C., ch C-46, s 83.3(7)(b)(ii) (1985).

156 *Criminal Code* (Cth) s 105.4(4).

information to arrest the person. If there were sufficient evidence to arrest a person, from the perspective of crime prevention, this would seem a better option than applying for a PDO. First, under a PDO, the person may not be questioned.¹⁵⁷ Second, upon arrest for a terrorism offence, it is very unlikely that bail would be granted to the person given the nature of terrorism offences, and as such, the person is liable for a longer period of detention than under a PDO.

Clearly, the apparent intent behind the PDO scheme is to detain a person in circumstances where there is insufficient evidence to support a charge for a terrorist offence. This purpose raises two related concerns. First, it provides the executive with a largely arbitrary power to detain, as the question of 'reasonable suspicion' is not linked to particular evidence linking a person to a terrorist attack which might later be the subject of a charge. Reasonable suspicion, in itself, is both the rationale and the justification for detention. Furthermore, abundance of caution in an environment of heightened concern over national security may mean that the 'reasonable suspicion' criterion is easily satisfied.

Second, there is a concern that detention *is* being used to facilitate the criminal investigation process, but in circumstances where the person is being detained as part of a broader criminal investigation that does not necessarily involve them. If the authorities are investigating the actions of another person, this ought only to be furthered through taking action against that person, either by charging them, or seeking a separate warrant for their questioning by ASIO under the *Australian Security Intelligence Organisation Act 1979* (Cth), Division 3.

B The Constitutional Issues

PDOs are established as administrative rather than judicial orders. This raises two issues in relation to their constitutionality. First, can the executive issue a PDO consistently with the separation of powers doctrine? This is the inverse of the question asked in relation to the role of the judiciary in issuing COs. Second, if the executive cannot lawfully make a PDO, could the law be remedied by making the orders part of a judicial process, as is the case in the preventative detention regimes in New South Wales, Tasmania, Victoria and the Australian Capital Territory? In short, as we concluded in relation to COs and the position expressed in *Chu Kheng Lim* that Courts can only order the involuntary detention of a person 'as an incident of the exclusively judicial function of adjudging and punishing criminal guilt', is of equal application in this context. Second, if the executive can lawfully order preventative detention consistent with the constitutional separation of powers, there is a further issue of whether, consistent with the separation of

¹⁵⁷ *Criminal Code* (Cth) s 105.42, though he or she may be subject to an ASIO questioning warrant at the same time: see s 105.25. It should be noted, however, that the government was in favour of providing for questioning persons on a PDO, but could not secure agreement on this issue from the States at the Council of Australian Governments meeting that agreed to the legislation. The issue is due to be reconsidered: Commonwealth, Parliamentary Debates, House of Representatives, 3 November 2005, 102 (Philip Ruddock, Attorney-General).

judicial power in Chapter III, judges acting in their personal capacity, can be issuing authorities for such orders.

1 *Executive Power to Order Involuntary Detention in the Form of PDOs*

In *Kruger*, Gaudron J stated that ‘a law authorising detention in custody divorced from any breach of the law, is not a law on a topic with respect to which s 51 confers power’.¹⁵⁸ Her Honour went on to acknowledge, however, that the power to detain persons who have not breached any law may be wider under the Commonwealth’s legislative powers with respect to defence, quarantine, naturalisation and aliens and the influx of criminals. Most cases challenging the extent of executive detention under Commonwealth laws have arisen in the context of immigration detention under s 51(xix). In discussing those cases, the general principles espoused must be interpreted within the context in which they are raised.

In *Al-Kateb*, the majority emphasised the breadth of the legislative power over aliens in holding valid the executive detention in that case.¹⁵⁹ Justice Hayne highlighted how the detention of aliens under the *Migration Act 1958* (Cth) provides aliens with little or no protection from Chapter III.¹⁶⁰ Detention of aliens under the *Migration Act* is mandatory. The executive officer enforcing the detention has no discretion whether or not to detain:

No judgment is called for There is, therefore, nothing about the decision making that must precede detention which bespeaks an exercise of the judicial power. Nor is there any legislative judgment made against a person otherwise entitled to be at liberty in the Australian community. The premise of the debate is that the non-citizen does not have permission to be at liberty in the community.¹⁶¹

If Hayne J’s premise that aliens require permission to be at liberty in the community is accepted,¹⁶² this provides a basis for the distinction between immigration detention and the detention of citizens under some other source of legislative power, such as a power referred by the States under s 51(xxxvii), or even under an expanded reading of the secondary aspect of the defence power. PDOs alter the rights of citizens to be at liberty through the exercise of an elaborate administrative process which calls for the exercise of judgment in determining such matters as the existence of a ‘reasonable suspicion’ and in determining the necessity of detaining a person to prevent a terrorist attack. As

¹⁵⁸ *Kruger* (1996) 196 CLR 1, 111.

¹⁵⁹ See, eg, *Al-Kateb* (2004) 219 CLR 562, 582-86 (McHugh J); 644-45 (Hayne J). In particular, the ability of the power to support laws not just for the detention awaiting removal of aliens, but also for the purpose of segregating them from the Australian community until such time as removal may occur was crucial to the majority’s reasoning: Dennis Rose, ‘The High Court Decisions in *Al Kateb* and *Al Khafaji* – A Different Perspective’ (2005) 8 *Constitutional Law & Policy Review* 58, 61-62.

¹⁶⁰ *Al-Kateb* (2004) 219 CLR 562, 647-48 (Hayne J).

¹⁶¹ *Ibid* 647 (Hayne J).

¹⁶² Compare Hayne J’s understanding of the place of aliens in the community with the statement of Brennan, Deane and Dawson JJ in *Chu Kheng Lim* (1992) 176 CLR 1, 19 that: ‘an alien who is within this country whether lawfully or unlawfully, is not an outlaw’.

such, there is something in the decision-making process in this instance which suggests the exercise of judicial power.

In *Chu Kheng Lim*, the joint judgment of Brennan, Deane and Dawson JJ with whom Mason CJ and Gaudron J expressly agreed, stated, 'the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority, except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.'¹⁶³ As already noted, the joint judgment identified a number of exceptions to this general proposition.¹⁶⁴ Besides these exceptions, the only qualification to the constitutional immunity was that it applied in times of peace. The joint judgment's reference to times of peace was in the context of a consideration of whether an expansion of the defence power might provide greater scope for executive detention.

In *Chu Kheng Lim*, McHugh J provided a broader scope for detention by the executive. He was prepared to accept that if there was a non-punitive purpose for the executive detention, then it could not be characterised as punitive unless the detention went 'beyond what is reasonably necessary to achieve the non-punitive object'.¹⁶⁵ This formulation of executive detention provides a greater scope for non-judicial detention. For Brennan, Deane and Dawson JJ, whether a detention was punitive was a question of substance and not form, so that it would be 'beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens ... in terms which sought to divorce such detention from both punishment and criminal guilt'.¹⁶⁶

The distinction between McHugh J and Brennan, Deane and Dawson JJ in *Chu Kheng Lim* is important in relation to PDOs. The determination of the constitutionality of a PDO, according to McHugh J's formulation, is a matter of proportionality of the detention relative to purpose. Could it be considered reasonably necessary to detain a person without charge when there is a suspicion that they might be involved in committing a terrorist act within the next 14 days? The problem with making this particular assessment is that the determination of what is reasonably necessary depends on what amounts to a reasonable suspicion under s 105(4). One question of proportionality is dependent on another question of proportionality. As applied to s 105(4), McHugh J's test for the constitutionality of the detention is not an assessment that can easily or even sensibly be made.

In *Al-Kateb*, McHugh J maintained his approach to the characterisation of a law as constitutional on the grounds that it had a non-punitive purpose. In relation

¹⁶³ (1992) 176 CLR 1, 28–29.

¹⁶⁴ These included the arrest and detention in custody of a person accused of crime (though this was still subject to the supervisory jurisdiction of the Courts in relation to bail applications), and detention in cases of mental illness or infectious disease. The joint judgment also acknowledged that aliens enjoyed less protection under the Constitution than citizens, and that the administrative detention of aliens would be valid if it was 'reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered': *Chu Kheng Lim* (1992) 176 CLR 1, 33.

¹⁶⁵ *Chu Kheng Lim* (1992) 176 CLR 1, 71.

¹⁶⁶ *Chu Kheng Lim* (1992) 176 CLR 1, 27.

to immigration detention, the fact that the detained person in that instance, Mr Al Kateb, was held for the non-punitive purpose of preventing him from entering the Australian community was sufficient to satisfy McHugh J that it was within the scope of the aliens' power regardless of the length of the detention.¹⁶⁷ In the case of immigration detention, then, McHugh J was satisfied that the non-punitive purpose in itself was enough for it not to be considered punitive in character.¹⁶⁸

Part of the difficulty of McHugh J's test is, as Gummow J noted in *Al-Kateb* and *Fardon*, that imprisonment commonly has a range of rationales, both punitive and non-punitive.¹⁶⁹ It was for this reason, that Gummow J preferred to construe the question of constitutionality as one of whether the deprivation of liberty was a step in the exercise of judicial power.¹⁷⁰ This takes the purpose of the detention out of the test, and places the focus squarely on the question of whether a particular category of a deprivation of liberty can be ordered by the executive.¹⁷¹ In *Fardon*, Gummow J acknowledged that the list of exceptions to the general principle 'is not closed'.¹⁷² However, he expressly stated that 'regimes imposing upon the court's functions detached from the sentencing process' do not form a new exceptional class.¹⁷³ It is not clear whether Gummow J would include PDOs in the form they appear in s 105(4) of the *Criminal Code* (Cth) in the list of exceptions. However, the basis of his reasoning that detention should only be for the commission of past acts in the adjudication of criminal guilt, would seem entirely applicable in this context.

Evidently, members of the High Court differ in their approach to drawing the limits on the power of the executive to detain under statutory authority. McHugh and Hayne JJ in *Al-Kateb* were satisfied that the scope of legislative power over aliens, among other powers, includes a power to detain without any assessment of criminal guilt, since segregation of non-citizens from the community was a purpose within power. In its very terms, then, such detention might be considered non-punitive, and to be simply a part of the legislative power over the subject matter. Some members of the Court, in particular Gummow and Kirby JJ, despite acknowledging the breadth of the power to make laws with respect to aliens, have held that there must still be a consideration of the constitutional limits of the

167 *Al-Kateb* (2004) 219 CLR 562, 584–85. At various points in his judgment, McHugh J described the non-punitive purpose as 'protective'. McHugh J does not elaborate on the sense in which the detention is 'protective'. Presumably, he means protection of the Australian community from an illegal non-citizen. There is a considerable irony in the use of 'protection' here. Mr Al-Kateb unsuccessfully applied for a protection visa, and as a result found himself lawfully detained, according to McHugh J's test for valid executive detention, to 'protect' the Australian community.

168 See also, McHugh J in *Re Woolley* (2004) 210 ALR 369, discussed above, n 46–49.

169 *Al-Kateb* (2004) 219 CLR 562, 611–12; *Fardon* (2004) 223 CLR 575, 613.

170 It will be recalled that Gummow J in *Fardon*, formulated the principle in the following terms: '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': (2004) 223 CLR 575, 612. See also *Al-Kateb* (2004) 219 CLR 562, 612.

171 *Al-Kateb* (2004) 219 CLR 562, 612.

172 *Fardon* (2004) 223 CLR 575, 613.

173 *Ibid.*

executive power to detain which derives from Chapter III.¹⁷⁴ For these judges, Chapter III limitations will inescapably be of central importance to the constitutionality of any such detention. One factor militating in favour of PDOs being found to be constitutional is the limited duration of the detention. In *Al-Kateb*, it was the potential for indefinite detention that gave particular concern to some members of the Court.¹⁷⁵ It might be that the Court will be less concerned about detention with a maximum duration of 48 hours.

2 *The Constitutionality of Judges Acting as Issuing Authorities for PDOs*

As discussed earlier, in New South Wales, Tasmania, Victoria and the Australian Capital Territory, courts issue PDOs. The Commonwealth scheme, like the PDO regimes in Queensland, South Australia, Western Australia and the Northern Territory, creates the orders as administrative orders, and provides for judges acting in their personal capacity to act as issuing authorities for continued PDOs. This difference between the schemes illustrates just how fine the line is between the orders being judicial or administrative in nature. The Commonwealth scheme makes clear that in the position of an issuing authority, judges are acting in 'a personal capacity and not as a court or a member of a court'.¹⁷⁶ Furthermore, issuing authorities must consent in writing to being appointed as an issuing authority.¹⁷⁷ And yet, as issuing authorities, they are provided with 'the same protection and immunity as a Justice of the High Court' in the performance of their duties, a protection not normally associated with the executive.¹⁷⁸

The High Court has made it clear that judges can act in non-judicial capacities as long as they have consented to do so, and the non-judicial capacity is not incompatible with their judicial functions.¹⁷⁹ This is known as the *persona designata* exception. It is an exception to one limb of the formal separation of powers doctrine in *Boilermakers*; namely, that federal courts can *only* exercise judicial power. There are two related difficulties with such an exception to the separation of powers. First, it might be considered theoretically incoherent to have functional exceptions to a formal separation of powers, since the very existence of overlapping functions points to incompatibility. Second, even if functional exceptions are consistent with a separation of powers doctrine, it is extremely difficult to draw a principled boundary between what is a compatible overlap of functions and what is not. A key reason for this is that in determining functional exceptions to the separation of powers doctrine, courts are in the position where they are reinterpreting the theory of separation upon which the exception is based, and they are doing so in an *ad hoc* way, fashioning the exceptions in response to

174 *Al-Kateb* (2004) 219 CLR 562, 613 (Gummow J); 615–16 (Kirby J).

175 *Al-Kateb* (2004) 219 CLR 562, 576–577 (Gleeson CJ); 609–13 (Gummow J); 615–20 (Kirby J).

176 *Criminal Code* (Cth) s 105.18(2).

177 *Criminal Code* (Cth) s 105.2(2).

178 *Criminal Code* (Cth) s 105.18(1).

179 *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

particular factual circumstances. The two most recent cases on the *persona designata* doctrine, *Grollo v Palmer* ('Grollo')¹⁸⁰ and *Wilson v Minister for Aboriginal Affairs* ('Wilson'),¹⁸¹ are good examples of the difficulties with the incompatibility rule.

In *Grollo*, Brennan CJ, Deane, Dawson and Toohey JJ, with whom Gummow J agreed in a separate judgment, upheld the use of the judiciary to issue interception warrants under Part IV of the *Telecommunications (Interception) Act 1979* (Cth). The warrants were issued *ex parte*, in secret, and without providing reasons for the decision.¹⁸² The identity of the judge issuing the warrant was not disclosed, and no record was kept of the application which would permit judicial review of the judge's decision to issue it.

The majority in *Grollo* held that incompatibility might arise in three circumstances:

- the performance of the non-judicial function prevented the performance of substantial judicial functions;
- the performance of the non-judicial function might compromise or impair the capacity of the judge to exercise judicial functions with integrity; or
- the performance of the non-judicial function might affect the public confidence in the integrity of the judiciary.¹⁸³

The majority was 'troubled' by the perception of bias that might arise from the judiciary's participation in the criminal investigation process, and relied on the Court's own administrative processes and the integrity of individual judges to avoid any prejudice from arising.¹⁸⁴ Ultimately, the majority decided that judges performed an important social function in bringing to bear their impartiality and independence to an 'intrusive and clandestine' executive process, and that performing this function, rather than compromising their independence for the future, 'preserved public confidence in the judiciary as an institution'.¹⁸⁵

In dissent, McHugh J concluded that the function of issuing interception warrants had the opposite effect on judicial independence and public confidence in the judiciary.

When a person who holds judicial office contemporaneously exercises executive power as *persona designata*, members of the public may have great difficulty in seeing any separation of those functions. The greater the association between the judicial status of the *persona designata* and the executive functions that he or she performs, the greater is the likelihood that the judicial and not-judicial functions of that person will seem to be fused.¹⁸⁶

180 (1995) 184 CLR 348.

181 (1996) 189 CLR 1.

182 *Grollo v Palmer* (1995) 184 CLR 348, 366–67.

183 *Ibid* 365.

184 *Ibid* 366.

185 *Ibid* 367.

186 *Ibid* 377 (McHugh J).

The difference in opinion between the majority and minority points to a conundrum at the heart of the incompatibility doctrine. It is the perceived independence of judges that makes them particularly appropriate persons to administer clandestine and secretive executive orders. The more clandestine and secretive the executive action is, the more important it would appear to be to have the judiciary involved in its implementation as a check on the executive. And yet, courts are only independent of the other branches of government as a result of the separation of their functions, and as a result of the particular judicial methods they adopt in the exercise of judicial power. When the judiciary is employed to exercise non-judicial power, its independence is necessarily compromised. The very fact of acting for the executive means the judiciary is not acting independently, though a reputation for independence provides a cloak of legitimacy for the executive action. Clearly, the more often the executive uses judicial independence to bolster the legitimacy of its actions, and the more often the judiciary participate in processes that are not judicial in nature, the weaker judicial independence is for the future.¹⁸⁷

The Court was once again called upon to consider the *persona designata* doctrine in *Wilson*.¹⁸⁸ In this case, a majority of the Court upheld a challenge to the appointment of a judge of the Federal Court to prepare a report under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The report was required as a precondition to the Minister's power to make a declaration in relation to Aboriginal heritage protection. In *Wilson*, the Court elaborated on the criteria for the third type of incompatibility outlined in *Grollo*, namely, the effect on public confidence in the independence and integrity of the judiciary. The criteria focused on the closeness of the function of the judicial officer acting *persona designata* to the functions of the executive as the test for incompatibility. In dissent, Kirby J considered the functions to be performed by the reporter in *Wilson* were considerably less problematic than those to be performed by an eligible judge under the telephone interception legislation in the earlier case of *Grollo*.¹⁸⁹

Since *Wilson* some members of the High Court have dismissed the role of public perception as a factor in determining the constitutionality of a law. In a different context, *Nicholas v The Queen* ('*Nicholas*'),¹⁹⁰ the High Court was called upon to decide the validity of a law that required courts to disregard the illegality of law enforcement officers in the process of gathering evidence for drug offences, when determining the admissibility of that evidence. It was argued that the law was invalid because it directed the court to exercise judicial power in a manner that was inconsistent with the essential character of a court. An important part of the argument was that a law that allowed illegally procured evidence would bring

187 See Brown, above n 26; Martin Redish, 'Separation of Powers, Judicial Authority and the Scope of Article III: The Troubling Cases of Morrison and Mistretta' (1989) 39 *DePaul Law Review* 299.

188 (1996) 189 CLR 1.

189 See, for example, Denise Meyerson, 'Extra-Judicial Service on the Part of Judges: Constitutional Impediments in Australia and South Africa' (2003) 3 *Oxford University Commonwealth Law Journal* 181, 192; Kristen Walker, 'Persona Designata, Incompatibility and the Separation of Powers' (1997) 8 *Public Law Review* 153, 162–63.

190 (1998) 193 CLR 173.

the court into disrepute, and thereby damage its reputation and furthermore, affect its ability to exercise judicial power. In answering this charge, Brennan CJ held that ‘public perception’ of courts was not a criterion of the constitutional validity of a law.¹⁹¹ Hayne J expressed a similar view.¹⁹² Gaudron, McHugh and Kirby JJ all maintained, in different formulations, that public confidence in the judiciary was necessary to preserve the independence of courts required by Chapter III of the *Commonwealth Constitution*. It is difficult to say whether the position of Brennan CJ and Hayne J represents a shift in the Court’s position on the importance of the Court’s reputation to maintaining a separation of powers, and even if it does, whether the shift has any impact on the third ground of incompatibility relied upon in *Wilson*. Certainly, it seems easy enough to distinguish *Nicholas* on the ground that the question of constitutionality in that case was vastly different to the question of incompatibility. The High Court is understandably cautious about limiting the power of the Parliament to prescribe practices and procedures for criminal investigation, whereas particular vigilance is called for when the question is the extent to which members of the judiciary can themselves be involved in the criminal investigation process.

It is difficult to predict whether the current High Court would find the use of federal judges as issuing authorities for PDOs to be incompatible with the exercise of federal judicial power. First, it is not clear whether *Wilson* is a retreat from the *persona designata* exception generally, or is confined to the circumstance of federal judges conducting public inquiries as part of an administrative process. The PDO regime is more analogous to the issuing of telecommunication interception warrants in *Grollo*. But even if *Grollo* is still good law, it might still be possible to distinguish the role of federal court judges issuing warrants for the interception of telecommunications for the purposes of criminal investigation, from their acting as issuing authorities for PDOs.

Taking the first of the three grounds for incompatibility in *Grollo*, the performance of the non-judicial function could not be said to prevent the performance of substantial judicial functions. This ground is aimed at administrative functions which take judges off the bench for substantial periods of time which is clearly not the case with issuing PDOs. Under the second ground, it might be argued that acting as an issuing authority for PDOs ‘compromises or impairs the capacity of judges to exercise their judicial functions with integrity’. The majority in *Grollo* was satisfied that the Federal Court could deal with problems of conflict which judges might face in sitting on cases for which they had earlier been involved in a criminal investigation capacity. In this regard, the same possibility exists in relation to PDOs as arose in relation to interception warrants. Judges may find themselves in a position of having received information about a person in the application for a PDO, and then later being asked to sit in judgment over the same person charged with a terrorism offence in relation to which the person had earlier been the subject of a PDO. The relationship between

191 Ibid 197 (Brennan CJ).

192 Ibid 272–75 (Hayne J)

PDOs and COs adds a further layer of complication that was not present in relation to interception warrants. To maintain their integrity, judges hearing PDOs in their personal capacity would need to ensure that they do not find themselves acting as a judge in an application for a control order over the same person. The PDO application being *ex parte*, there may be information provided to the judge that the person the subject of the order is not privy to and has no opportunity to rebut which is not repeated in the judicial hearing for a control order. According to the majority in *Grollo*, this conflict could be avoided by judges ensuring that they did not sit on related cases involving the same person.¹⁹³ They also stated that for judges who might be more likely to find themselves in a position of conflict, 'it would be prudent ... not to accept an appointment'.

The majority in *Grollo* found the final ground for incompatibility most troubling; that is, that the performance of the non-judicial function might affect the public confidence in the integrity of the judiciary. There is a strong argument that involvement in the issuing of PDOs risks the public confidence in the judiciary. PDOs are, by their very nature, at or beyond, the limits of executive detention under the *Commonwealth Constitution*. Although for the majority in *Grollo*, the clandestine nature of interception warrants was a reason to involve judges, there was a clear shift in *Wilson* towards distancing the judiciary from such executive action. In our view, this shift is to be welcomed — particularly in respect of orders such as these.¹⁹⁴

Wilson established a number of considerations for this final ground of incompatibility. First, is the function to be performed an integral part, or closely connected with, the functions of the legislature or the executive?¹⁹⁵ If not, there is no constitutional incompatibility. There is no question that PDOs are closely connected to functions of the executive, although as we have discussed, there are serious questions whether the executive actually has the power to issue them. PDOs are a part of the national security measures deemed necessary in the current national security environment. The function is closely associated with the work of the Australian Security and Intelligence Organisation and the AFP. Therefore, it is necessary to consider the second condition; namely, that the function must be performed independently of the instruction of the executive.¹⁹⁶ This is arguably satisfied in relation to the function of an issuing authority, given that the executive has to make an application for a PDO, and the authority has the power whether or not to issue the order.¹⁹⁷ Furthermore, under s 105.4(7) an issuing authority 'may refuse to make a PDO unless the AFP member applying for the order gives the issuing authority any further information that the issuing authority requests'. It should also be noted that in *Grollo*, the majority found that the function of issuing telecommunication interception warrants was not incompatible with Chapter III

193 *Grollo v Palmer* (1995) 184 CLR 348, 366.

194 See also Michael McHugh, 'Terrorism Legislation and the Constitution' (2006) *Australian Bar Review* 117, 128.

195 *Wilson v Minister for Aboriginal Affairs* (1996) 189 CLR 1, 17.

196 *Ibid.*

197 *Criminal Code* (Cth) s 105.

even though between 1988 and 1994, only 13 of 2,639 applications were refused, revealing an extraordinary degree of compliance with executive applications.¹⁹⁸

Third, is any discretion in exercising the function to be exercised on political grounds, or in other words, 'on grounds that are not confined by factors expressly or impliedly prescribed by law'?¹⁹⁹ Considerable discretion is conferred upon the issuing authority in making the decision whether or not to issue a PDO. PDOs in themselves are a highly controversial means of responding to a national security threat. The Federal government has argued that it must do what is 'reasonable and humanly possible to provide protection' from terrorism.²⁰⁰ One of the rationales for this is that it will be blamed, and damaged politically, if it does not do so. In this sense, PDOs are highly political. The majority in *Wilson* clarified this requirement, stating that 'it will often be relevant to note whether the function to be performed must be performed judicially, that is, without bias and by a procedure that gives each interested person an opportunity to be heard and to deal with any case presented by those with opposing interests'.²⁰¹ As *ex parte in camera* proceedings, the application process for PDOs clearly falls short on this test of judicial performance.

The establishment of this final requirement by the majority in *Wilson* seems to indicate a change in the Court's position from *Grollo*, as it would seem that the function of issuing telecommunications interception warrants would also fail the test. Another indication that the Court changed its position on the incompatibility doctrine in *Wilson* is the different view the majority took on the relevance to incompatibility of the useful function judges perform in bringing an independent assessment to sensitive and clandestine executive action. In *Grollo*, the majority decided that the impartiality and independence judges brought to the performance of non-judicial functions enhanced the case for upholding conferral of these functions.²⁰² In *Wilson*, the majority stated expressly that constitutional compatibility of function was not 'a question of the desirability of employing judicial skills in order to perform a service for the executive government'.²⁰³ If *Wilson* does represent a change in the criteria for incompatibility, and assuming it still holds sway with the High Court a decade later, the argument can be made that acting as issuing authorities under s 105.2 of the *Criminal Code* (Cth) is incompatible with the exercise of judicial functions of judges on Chapter III courts, and therefore that s 105.2 would need to be read down to exclude federal judges and magistrates.

198 *Grollo v Palmer* (1995) 184 CLR 348, 382 (McHugh J).

199 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 17.

200 ABC Online, 'PM Dismisses Terrorism Protection Concerns' *ABC News Online*, 11 September 2006, <<http://www.abc.net.au/news/newsitems/200609/s1737518.htm>>.

201 (1996) 189 CLR 1, 17.

202 *Grollo v Palmer* (1995) 184 CLR 348, 367.

203 (1996) 189 CLR 1, 9.

V CONCLUSION

It is entirely understandable and appropriate that, in meeting the challenges of national security, governments act to prevent terrorist attacks. There are many strategies that may be adopted to that end such as enhanced border protection or greater security of sites and substances.²⁰⁴ It is also possible, as has occurred in Australia, to attach criminal responsibility to activities which are extremely preliminary to the attempt or commission of a terrorist act.²⁰⁵

But, even to a government with the best of intentions, there are limits to the extent to which the law can be used as a preventative tool. In particular, it cannot be used to pre-emptively deprive individuals of their liberty merely because, absent any relevant criminal history, they are perceived to constitute a threat to the community. Laws of this sort represent a fundamental shift in the conception of judicial power as a power to determine restrictions upon an individual's freedom based upon past wrongdoing. The Commonwealth's new regimes for COs and PDOs are an example of legislative overreach in this regard. The two types of order share a common protective purpose but they also present a direct challenge to the principle of the rule of law.

It is revealing in this regard that the Commonwealth is far from certain about which institutions to empower to issue these new orders. Despite the general similarity between the two schemes, the judicial power of federal courts is used to issue COs, while PDOs are made using executive power conferred upon judges and others in their personal capacity. There was no adequate attempt made by the government to explain this distinction, but it is clear that concern over the impact of the separation of judicial power was significant in the drafting of the two new Divisions of the *Criminal Code* (Cth). That two such different approaches could be employed in respect of orders purporting to exist for the same general preventative purpose is a solid illustration of the uncertainty of the law in the area. The consequences of the constitutional implication of the separation of powers in the context of preventative detention remain elusive.

In this paper, we have argued that there is doubt about the constitutionality of the Commonwealth's terrorism detention orders regardless of whether the power to issue the orders is conferred on the judiciary or the executive. The objection to the orders, then, is not simply an objection as to the correct allocation of the power to detain. The inability to fit the power to issue the orders comfortably within the hands of either the executive or judicial arms of government indicates that they transgress fundamental freedoms protected by the rule of law. The law is not merely a tool of the State for the control of its citizens. Governance under a constitution built upon an adherence to the rule of law ensures that individuals are afforded some protection from measures such as COs and PDOs which encroach on fundamental freedoms.

204 The importance of these kind of measures relative to changes to criminal offences are discussed in Kent Roach, 'Trading Rights for Security' (2006) 27 *Cardozo Law Review* 2151.

205 See *Criminal Code* (Cth) ss 101.4, 101.5, 101.6.