IN THE MATTER OF CONSTITUTIONAL ISSUES CONCERNING PREVENTATIVE DETENTION IN THE AUSTRALIAN CAPITAL TERRITORY

OPINION

Introduction

1. On 27 September 2005 the Council of Australian Governments (COAG) issued a communiqué in the following terms:

> COAG agreed to the Commonwealth Criminal Code being amended to enable Australia better to deter and prevent potential acts of terrorism and prosecute where these occur. This includes amendments to provide for control orders and preventative detention for up to 48 hours to restrict the movement of those who pose a terrorist risk to the community.
>
> ...

State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days and stop, question and search powers in areas such as transport hubs and places of mass gatherings.

2. The Commonwealth has since circulated a draft of the *Anti-Terrorism Bill 2005* (Cth) which includes provisions to amend the *Criminal Code* to provide in Div 104 for the making of "control orders" and in Div 105 for the making of "preventative detention orders".

3. The scheme of the proposed Div 104 is to allow an "issuing Court" (the Federal Court, the Family Court or the Federal Magistrates Court) to make a control order the effect of which is to impose obligations, prohibitions and restrictions on a named person. The issuing Court has a discretion to make such an order if, on the application ex parte of a senior member of the Australian Federal Police acting with the consent of the Commonwealth Attorney-General, the issuing Court is satisfied on the balance of probabilities either that the making of the order would substantially assist in preventing a terrorist act or that the person to whom the order relates has provided training to or received training from a listed terrorist organization and that each of the obligations, prohibitions and restrictions to be imposed by the order is reasonably necessary for the purpose of protecting the public from a terrorist act. The obligations, prohibitions and restrictions that an issuing Court may impose on a person by a control order include a requirement that the person remain at specified premises between specified times each day or on specified days, a requirement that

the person wear a tracking device and a prohibition or restriction on the person communicating with specified individuals. A control order is to remain in force for the period specified in the order which may be up to 12 months unless sooner revoked, varied or declared to be void on the application of either the person to whom the order relates or the Commissioner of the Australian Federal Police.

4. The scheme of the proposed Div 105 is to allow an "issuing authority" (a person who is a Federal Magistrate or a Judge of a federal court) to make a preventative detention order the effect of which is to allow any member of the Australian Federal Police to take into custody and detain a named person for a specified period of up to 48 hours, to use force for the purpose of doing so, to search the person and to hold the person in secret and substantially incommunicado. The "issuing authority" has a discretion to make such an order if satisfied that there are reasonable grounds to suspect that the person will or is preparing to engage in a terrorist act, that the making of the order would substantially assist in preventing a terrorist act occurring and that detaining the person for the period specified in the order is reasonably necessary for that purpose.

Questions

5. I am instructed by its Chief Solicitor to advise the Australian Capital Territory Executive as to:

   (1) the constitutional validity of the amendments to the *Criminal Code* proposed by the Commonwealth; and

   (2) the constitutional constraints, if any, on the ability of the Legislative Assembly of the Territory to provide for preventative detention for up to 14 days.

Short Answers

6. For the reasons which follow, I consider that:

   (1) there is a substantial prospect that each of the proposed Div 104 and the proposed Div 105 of the *Criminal Code* would be held to be invalid by the High Court;

   (2) although the Legislative Assembly of the Territory would have the ability to provide for preventative detention for up to 14 days, it could only safely do so by conferring the power to order such detention on an executive officer of the Territory; for the Legislative Assembly to attempt to confer such power on a court or on a person who is a judicial officer of the Territory would also

encounter a substantial prospect of being held to be invalid by the High Court.

Reasons

7. It is convenient to deal first with the constitutional validity of the amendments to the *Criminal Code* proposed by the Commonwealth.

8. It appears that, in enacting the proposed provisions, the Commonwealth Parliament would be relying in part upon the legislative power conferred by s 51(xxxvii) of the Constitution to make laws with respect to matters referred to the Commonwealth Parliament by State Parliaments but only extending to the States concerned and in part on the legislative power conferred by s 122 of the Constitution to make laws for the government of a Territory.

9. Notwithstanding the reliance to be placed upon s 122 of the Constitution, the proposed provisions are drafted so as to confer power on federal courts, in the case of Div 104, or on judges of federal courts, in the case of Div 105. Insofar as Div 104 would purport to confer power on a federal court, *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 establishes that that is something which must occur, if at all, pursuant to and in compliance with Ch III of the Constitution. Insofar as Div 105 would purport to confer power on a judge of a federal court, that is something which must occur, if at all, in a manner which is compatible with Ch III of the Constitution.

10. The fundamental difficulty with each of the proposed Div 104 and the proposed Div 105 stems from the separation by Ch III of the Constitution of the "judicial power of the Commonwealth" from the "legislative power of the Commonwealth" and the "executive power of the Commonwealth" conferred respectively by Ch I of the Constitution (which includes s 51(xxxvii)) and Ch II of the Constitution and to a lesser, but not insignificant extent, also from the power conferred by s 122 of the Constitution (which is within Ch IV) which in allowing for the Commonwealth Parliament to make laws for the government of a Territory allows it to make provision for the conferral on organs of government of "the judicial power of the Territory".

11. The relevant effect of that separation of powers is that the Commonwealth Parliament cannot:

    (1) confer any part of the "judicial power of the Commonwealth" on any person or body that is not a Ch III "court";

    (2) require or authorize a Ch III court to:

        (a) exercise something other than "the judicial power of the Commonwealth"; or

        (b) exercise the "judicial power of the Commonwealth" in a manner which is not consistent with the essential character of a court or with the nature of judicial power; or

(3) require or authorize any judge of a Ch III court to perform a non-judicial function of such a nature or in such a manner as to undermine the institutional integrity of the court of which he or she is a member.

12. The proposed Div 104 and the proposed Div 105 in various ways call into question each of those constitutional limitations.

13. The starting point is that Div 104 in its substantive effect and Div 105 in its terms each purport to authorize involuntary detention.

14. The general proposition recognized in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28-29 is that the power to order the involuntary detention of a citizen is part of the "judicial power of the Commonwealth" capable of being exercised only by a Ch III court and only "as an incident of the exclusively judicial function of adjudging and punishing criminal guilt". A number of exceptions to that general proposition were recognized in *Lim* at 28. They included cases of mental illness or infectious diseases and cases in which there is detention "of a person accused of a crime to ensure that he or she is available to be dealt with by the courts". Subject to those and the possibility of other exceptions, the view expressed in *Lim* at 28-29 was that citizens enjoy a "constitutional immunity" from involuntary detention otherwise than pursuant to an order made by a court in the exercise of the "judicial power of the Commonwealth".

15. Although Commonwealth legislation empowering preventative detention by order of an officer of the Commonwealth was enacted and upheld during both World Wars

(see the references in *Al-Kateb v Godwin* (2004) 208 ALR 124 at [55]-[60]), there is a very real issue as to whether any form of preventative detention would now be accepted by a majority of the High Court as compatible with Ch III of the Constitution.

16. In *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50, while other members of the majority refrained from expressing an opinion (Hayne J expressly so at [196]), Gummow J went out of his way to reject a contention of the Commonwealth Solicitor-General that the Commonwealth Parliament could confer on a Ch III court a power to detain that is preventative and not punitive in nature. Justice Gummow referred at [84] to "detention by reason of apprehended conduct, even by judicial determination on a quia timet basis" as being "at odds with the central constitutional conception" of detention occurring only as a consequence of judicial determination of criminal guilt. He added at [85]:

> It is not to the present point ... that federal legislation ... 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.

17. This was a reiteration and reinforcement of views Gummow J had expressed two months earlier in *Al-Kateb v Godwin* at [135]-[140] concerning the inability of the Commonwealth Parliament to authorize the executive detention of an alien except as

an incident of the powers either to deport or to receive and process claims for entry permits.

18. Although in dissent in *Al-Kateb v Godwin*, together with Gleeson CJ and Kirby J, Gummow J formed part of the majority in *Fardon*. His view on this point was consistent with that expressed by Kirby J in dissent both in *Fardon* and *Al-Kateb v Godwin*. He is rarely in dissent. Were his view to be accepted by a majority of the High Court, it would almost inevitably spell the invalidity of each of the proposed Div 104 and the proposed Div 105. The invalidity would stem simply from the nature of the power conferred.

19. The alternative view, expressed by Hayne J in *Al-Kateb v Godwin* at [248]-[263] with the concurrence of Heydon J at [303], and touched upon again by Hayne J in *Fardon* at [196], is one that refuses to draw from *Lim* any sharp distinction either between proceedings that are civil and proceedings that are criminal or between detention that is punitive and that which is not. It appears to recognize that (subject always to there being a sufficient connection with a relevant head of legislative power) involuntary detention may be a consequence of a valid exercise of judicial power in other than criminal proceedings just as it may be a consequence of a valid exercise of a non-judicial power conferred by legislation of an executive officer or body. The approach taken in the joint judgment of Callinan and Heydon JJ in *Fardon* at [219]-[233] can be seen as implicitly proceeding upon the same foundation.

20. Were that alternative view to be accepted by a majority of the High Court, the focus in considering the validity of the amendments to the *Criminal Code* proposed by the

Commonwealth would be shifted from a consideration of the nature of the power conferred to a more broad consideration of the terms in which it was conferred and, in particular, on the circumstances in which it was required or authorized to be exercised.

21. In respect of the proposed Div 104, the essential question would be whether the terms upon which an "issuing Court" (the Federal Court, the Family Court or the Federal Magistrates Court) was authorized to make, revoke, vary or declare void a control order could be said to involve it in the exercise of the "judicial power of the Commonwealth" in a manner consistent with the essential character of a court or with the nature of judicial power. The principles informing the answer to that question are analogous to, but stricter than, those articulated in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 and its progeny. Adopting the language of Callinan and Heydon JJ in *Fardon* at [219], as an absolute minimum, what would be required to obtain a positive answer to that question is that the issuing court be required "to undertake a genuinely adjudicative process" in circumstances where its "integrity and independence as a court are not compromised" and where it is not "called upon to act ... effectively as the alter ego of the legislature or the executive".

22. It was pointed out by Brennan CJ in *Nicholas v Queen* (1998) 193 CLR 173 at [19]:

> To exercise judicial power, a court is bound to take the essential steps identified by Mason, Murphy, Brennan and Deane JJ in *Fencott v Muller* (1983) 152 CLR 570 at 608. Referring to [*Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357] their Honours said:

> 'The unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion'.

As the rights and liabilities prescribed by a court's judgment (including a liability to undergo punishment in accordance with a sentence imposed by a criminal court) declare or are founded on the antecedent rights and liabilities of the parties (including a right or liability to the exercise of a judicial discretion), the court must find the facts and apply the law which, at the relevant time, prescribe those antecedent rights and liabilities.

23. In the same case, Gaudron J said at [74] that:

> ... consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means,

> moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.

24. It is, of course, "no objection that [a] function entrusted to [a court] is novel": *R v Joske; Ex parte Shop Distributive & Allied Employees Association* (1976) 135 CLR 194 at 216. And as was pointed out in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191:

> Leaving aside problems that might arise because of the subject-matter involved or because of some prescribed procedure not in keeping with the judicial process, where a discretionary authority is conferred upon a court and the discretionary authority is to be exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature, it will be possible to conclude that the determination by the court gives effect to rights and obligations for which the statute provides and that the determination constitutes and exercise of judicial power.

See also *Director of Public Prosecutions (Cth) v Toro-Martinez* (1993) 333 NSWLR 82 at 91, 99; *King v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* (2001) 109 FCR 447 at 462 – 464.

25. The difficulty here is that there are problems that arise not only because of the subject-matter involved but also because of the prescribed procedure. Although it is impossible to state a position with any real degree of certainty, there is, in my opinion, a substantial prospect that, in view of the potentially draconian consequences of a control order being made, the process envisaged by the proposed Div 104 for the making of such an order would be found to be inconsistent with the essential character of a court and with the nature of judicial power. In proceeding to make a control order on the application of officers of the Commonwealth Executive, the issuing court would be required to assess the evidence presented and to make a determination as to whether it was satisfied on the balance of probabilities that the pre-conditions for the making of such an order were met. In that sense it would be required to undergo a process of ascertaining facts and applying legally prescribed criteria to the facts as ascertained. Yet it would be required to do so not only in the absence of a party but also in the absence of any real and existing controversy as to antecedent rights or liabilities. The legally prescribed criteria to be applied by the court, albeit by reference to its own satisfaction on the balance of probabilities, confine it essentially to making a choice as to what it considers to be is necessary or appropriate for protecting the public in the future. Unlike the position in *Fardon*, there would not even be a requirement for the existence of some antecedent determination of criminal liability. Moreover, the court would act ex parte on the application of officers of the Commonwealth Executive to make an order that substantially and immediately affects the liberty of a person. The making of the order would then leave to that person the burden of challenging the order that was made by reference to the same criteria.

26. In respect of the proposed Div 105, the essential question would be whether the conferral on an "issuing authority" (a person who is a Federal Magistrate or a Judge of a federal court) of the power to make a preventative detention order would have the effect of authorizing a judge of a Ch III court to perform a non-judicial function of such a nature or in such a manner as to undermine the institutional integrity of the court of which he or she is a member. The answer to that question is informed, although not dictated, by a consideration of the extent to which there may be a tendency to undermine public confidence in the administration of justice. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 16, four members of the High Court following *Grollo v Palmer* (1995) 184 CLR 348 at 365, stated:

> The capacity of Ch III judges to perform their judicial duties throughout the terms of their appointment independently of the political branches of government cannot be prejudiced by their appointment to non-judicial office or to perform non-judicial functions. If an appointment to non-judicial office or performance of non-judicial functions prejudices that capacity it is incompatible with the office and function of a Ch III judge. And that is inconsistent with s 72 of the Constitution.

27. Their Honours went on to set out a useful approach to assessing the compatibility of a non-judicial function with the office and function of a judge of a Ch III court. It said at 17:

The statute or the measures taken pursuant to the statute must be examined in order to determine, first, whether the function is an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government. If the function is not closely connected with the Legislature or the Executive Government, no constitutional incompatibility appears. Next, an answer must be given to the question whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the Executive Government, other than a law or an instrument made under a law (hereafter 'any non-judicial instruction, advice or wish'). If an affirmative answer does not appear, it is clear that the separation has been breached. The breach is not capable of repair by the Ch III judge on whom the function is purportedly conferred, for the breach invalidates the conferral of the function. If the function is one which must be performed independently of any non-judicial instruction, advice or wish, a further question arises: Is any discretion purportedly possessed by the Ch III judge to be exercised on political grounds – that is, on grounds that are not confined by factors expressly or impliedly prescribed by law? In considering these questions, 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. An obligation to observe the requirements or procedural fairness is not necessarily indicative of compatibility

with the holding of judicial office under Ch III, for many persons at various levels in the executive branch of government are obliged to observe those requirements. But, conversely, if a judicial manner of performance is not required, it is unlikely that the performance of the function will be performed free of political influence or without the prospect of exercising a political discretion.

28. Applying this approach, and acknowledging again that it is impossible to state a position with any real degree of certainty, there is in my opinion, a substantial prospect that the proposed Div 105 would be found to be wanting in authorizing the making of a control order by a judge of a Ch III court. The function of making a control order is one that is closely connected to the functioning of the Australian Federal Police, the issuing authority will in practice be wholly dependent upon the information provided by the Australian Federal Police and natural justice is wholly wanting. The making of a control order results in the immediate deprivation of liberty.

29. Turning next to the constitutional constraints on the ability of the Legislative Assembly of the Territory to provide for preventative detention, I note that I have previously advised that neither the doctrine of separation of powers effected by Ch III of the Constitution nor anything contained in the *Australian Capital Territory (Self-Government) Act 1988* (Cth) prevents the Legislative Assembly from:

(1) conferring judicial power ("the judicial power of the Territory") on a body that is not a Territory court;

(2) subject to the principle in *Kable v Director of Public Prosecutions (NSW)* as recognized as applicable to Territory courts in *Northern Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at [27]-[29], conferring non-judicial powers or functions on a Territory court.

30. I do not propose to repeat that advice or the reasons for it other than to point out two things. The first is that *Kruger v Commonwealth* (1997) 190 CLR 1 is direct and relatively recent authority for the proposition that the conferral of judicial power (involving the power to order detention) on a non-judicial officer in a Territory under a law made pursuant to s 122 of the Constitution does not offend Ch III of the Constitution. The second is that the result is to place the Territory for present purposes in a position substantially identical to that of a State.

31. It follows that I see no constitutional impediment to the Legislative Assembly conferring an executive officer of the Territory the power to make an order for preventative detention for up to 14 days.

32. If, on the other hand, the Legislative Assembly were to follow the model of the proposed Div 104 or the proposed Div 105 of the *Crimes* Act, so as to attempt to confer such power on a Territory court or on a person who is a judge of a Territory court, essentially the same problems as have already been addressed in relation to the validity of the proposed Div 105 of *Crimes Act* would arise albeit under the rubric of the principle in *Kable v Director of Public Prosecutions (NSW)* adequately discussed in my earlier advice.

33. Finally, I have been asked two subsidiary questions concerning the ability of the Legislative Assembly to confer power to make preventative detention orders on the Australian Federal Police.

34. The first is whether s 23(1)(c) of the *Australian Capital Territory (Self-Government) Act*, which excludes from the legislative power otherwise conferred on the Legislative Assembly by s 22 of that Act the power to make laws "with respect to ... the provision by the Australian Federal Police of police services in relation to the Territory", presents an impediment. I do not think that it does. Although the expression "police services" is not defined in the *Australian Capital Territory (Self-Government) Act*, its ordinary meaning can be no narrower than the definition appearing in s 4 of the *Australian Federal Police Act 1979* (Cth): "police services" includes "services by way of the prevention of crime and the protection of persons from injury or death, and property from damage, whether arising from criminal acts or otherwise". Section 9(1)(b) of the *Australian Federal Police Act* goes on to authorize a member of the Australian Federal Police when performing functions in the Territory to have "the powers and duties conferred or imposed on a constable or an officer of police by or under any law ... of the Territory". Particularly when read in the light of those provisions, the subject matter of the area of legislative power excluded by s 23(1)(c) of the *Australian Capital Territory (Self-Government) Act* is, I think, quite clearly limited to what can be properly described as the provision of "services". It does not restrict the Legislative Assembly from conferring substantive or procedural powers on officers of the Australian Federal Police.

35. The second question is whether the Legislative Assembly could confer power to make preventative detention orders on members of the Australian Federal Police in circumstances where equivalent powers could not be conferred by the Commonwealth Parliament on members of the Australian Federal Police. My answer is that it cannot. The child has no greater powers than its parent. However, with respect of persons within the Australian Capital Territory there is no reason why the Commonwealth Parliament could not in reliance solely on s 122 of the Constitution legislate to confer power to make preventative detention orders on the Australian Federal Police. It would be otherwise if the Commonwealth Parliament sought to rely on legislative powers other than s 122 of the Constitution.

Dated: 26 October, 2005

STEPHEN GAGELER
SELBORNE CHAMBERS

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ACT Government Solicitor
Level 5, 12 Moore Street
CANBERRA CITY ACT 2601

Attn: Mr Peter Garrisson
Tel: (02) 6207 0654
Fax: (02) 6207 0650