

PREVENTATIVE DETENTION ORDERS AND THE SEPARATION OF JUDICIAL POWER

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I INTRODUCTION

Preventive detention extends traditional legal frameworks into new territory. Not only may preventive detention orders act to imprison citizens outside criminal justice frameworks, they may also challenge fundamental constitutional values such as equality, openness and, crucially, the independence of judges who may be appointed to issue such orders. This is demonstrated in the preventative detention order ('PDO') provisions of the *Criminal Code Act 1995* (Cth) schedule 1 ('*Criminal Code*'). These provisions empower serving federal, state and territory judges to personally order the brief incarceration of citizens to protect the community from terrorism.¹ These orders are issued in secretive, *ex parte* proceedings that lack ordinary judicial process.

This article argues that the PDO provisions of the *Criminal Code* infringe Chapter III of the *Constitution* by involving serving judges in detention proceedings that lack the basic features of fair process. This central claim is constructed in three parts. First, in Part II, I outline the relevant constitutional principles governing the separation of judicial power, and argue that a single constitutional limit restricts the permissible extra-judicial functions of federal, state and territory judges. This allows for the rationalisation of two streams of case law described in Part II: the '*Kable* cases' dealing with the powers of state and territory courts, and the '*Grollo* cases' dealing with the powers of federal judges in their personal capacities (said to be appointed as designated persons or *personae designatae*). This argument is relatively uncontentious, following the 2011 case of *Wainohu v New South Wales*.² However, as PDOs may be issued by

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1 *Criminal Code* ss 100.1(1), 105.2.

2 (2011) 243 CLR 181 ('*Wainohu*').

serving judges from federal, state and territory courts, this argument is crucial in arriving at a clear assessment of constitutional validity. An overview of this case law reveals that fair process is central to constitutional validity, but that major compromises to fair process may be tolerated under Chapter III.

My second argument is more controversial. In Part III, I focus on cases concerning extra-judicial powers to order preventive incarceration to argue that, in this context, Chapter III mandates compliance with the basic tenets of fair process. In Parts IV and V, I develop these arguments through an analysis of the constitutional validity of the PDO provisions. This analysis also demonstrates some of the strengths and weaknesses of the incompatibility test arising from the *Kable* and *Grollo* streams of authority, to which I briefly turn in Part VI.

Though enacted in 2005, PDOs were used for the first time in September 2014, thus raising the spectre of a potential constitutional challenge to these provisions. Shortly after this, the provisions were subject to a series of amendments, including an extension of their sunset clause from December 2015 to September 2018.³ Moreover, relatively recent developments in Chapter III jurisprudence have strengthened restrictions on the scope of functions that may be conferred on judges *personae designatae*. These developments call for a fresh consideration of whether the involvement of judges in issuing continued PDOs is constitutionally valid.

The arguments advanced in this article lead to a conclusion that the PDO provisions of the *Criminal Code* violate Chapter III of the *Constitution*, insofar as they confer the power to issue PDOs on serving judges. In conclusion, I argue that the provisions should be significantly redesigned, or simply repealed.

II THE INCOMPATIBILITY LIMIT ON EXTRA-JUDICIAL FUNCTIONS

In accordance with the rule of law and the basic separation of governmental powers, courts, and only courts, may order the incarceration of citizens as a punishment for criminal wrongdoing.⁴ Courts also determine bail applications, ordering the imprisonment of persons awaiting trial, and are responsible for placing a host of other restrictions on individual liberty, ranging from apprehended violence orders, to injunctions, to bankruptcy orders. But can a judge order that a person be imprisoned in a state facility when he or she has not been charged with a criminal offence? And what if that judge is acting in his or her personal capacity? In order to understand the constitutional limits on judges'

3 *Criminal Code* s 105.53, as inserted by *Counter-Terrorism Legislation (Foreign Fighters) Act 2014* (Cth).

4 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Chu Kheng Lim*'), discussed below in Part III.

powers to order non-punitive incarceration, it is first necessary to understand the separation of judicial power under the *Constitution*.

Chapter III of the *Constitution* has been interpreted to give rise to a strict separation of judicial power for federal courts. The judicial power of the Commonwealth may only be vested in properly constituted courts, and federal courts are restricted to the exercise of judicial powers and ancillary non-judicial powers.⁵

This strict, formalist separation of powers does not apply to judges in their personal capacities, appointed *personae designatae*. By the 1980s, the principle that federal judges may undertake non-judicial functions *personae designatae* was supported by extensive practice which had, sometimes controversially, seen serving judges appointed to positions such as Ambassador and Royal Commissioner.⁶

The distinction between a judge as-a-judge and a judge as-a-qualified-individual is therefore of supreme importance. A federal *court* may only be vested with judicial powers and ancillary non-judicial powers. A federal judge *persona designata* may be vested with non-judicial powers, but may not be vested with judicial powers (because he or she is not a court as such). This distinction is inescapably superficial. Simply by conferring a role on a federal judge rather than on a court, the strict separation rules are avoided and non-judicial tasks may be vested in a judge.⁷ That judge may even exercise those powers in chambers or in proceedings resembling a hearing.⁸ The apparent superficiality of the *persona designata* doctrine has been acknowledged in the string of constitutional challenges to *persona designata* appointments, most famously by Mason and Deane JJ in *Hilton v Wells*, who warned against the device becoming an ‘elaborate charade’.⁹

5 *Constitution s 71; R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

6 For an insightful history of this practice and its controversy, see, eg, A J Brown, ‘The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge’ (1992) 21 *Federal Law Review* 48; Fiona Wheeler, ‘“Anomalous Occurrences in Unusual Circumstances”? Extra-judicial Activity by High Court Justices: 1903 to 1945’ (2013) 24 *Public Law Review* 125.

7 To this end, Denise Meyerson has described the *persona designata* device as a ‘back door’: 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, 188.

8 See, eg, *Hilton v Wells* (1985) 157 CLR 57, 84 (Mason and Deane JJ) (‘*Hilton*’); *Grollo v Palmer* (1995) 184 CLR 348, 377 (McHugh J) (‘*Grollo*’); *Wainohu* (2011) 243 CLR 181.

9 *Hilton* (1985) 157 CLR 57, 84 (Mason and Deane JJ), citing *Medical Board (Vic) v Meyer* (1937) 58 CLR 62, 97 (Dixon J). See also *Wainohu* (2011) 243 CLR 181, 205 [37]–[38] (French CJ and Kiefel J), 229 [106] (Gummow, Hayne, Crennan and Bell JJ); *Hilton* (1985) 157 CLR 57, 69 (Gibbs CJ, Wilson and Dawson JJ) where their Honours said the question of whether judges are appointed *persona designata* ‘involves fine distinctions, which some may regard as unsatisfactory’. And in *Grollo*, McHugh J (in dissent) observed that ‘[w]hen a person who holds judicial office contemporaneously exercises executive power as a *persona designata*, members of the public may have great difficulty in seeing any separation of those functions’: *Grollo* (1995) 184 CLR 348, 377.

A *Grollo* Incompatibility

The *persona designata* doctrine has the potential to seriously undermine the strict federal separation of judicial power.¹⁰ Acknowledging this, in the 1995 case of *Grollo v Palmer* the High Court gave authority to an important limit on the scope of functions capable of being vested in judges *personae designatae*. A majority of the Court held that: ‘no function can be conferred [on a judge *persona designata*] that is *incompatible* either with the judge’s performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power’.¹¹

Grollo concerned an unsuccessful challenge to provisions enabling telephone-tapping warrants to be issued by federal judges *personae designatae*.¹² The warrants were issued in secret, on application by the Australian Federal Police (‘AFP’) to an ‘eligible judge’ in chambers. A majority of the High Court acknowledged that this function involved an ‘in camera exercise of executive power to authorise a future clandestine gathering of information’.¹³ However, their Honours determined that the function was nonetheless compatible with judicial independence and integrity as the judge retained his or her fundamental independence throughout the proceedings.¹⁴

In 1996, the incompatibility test was applied to invalidate a federal statute for the first time. *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*¹⁵ concerned the appointment of Justice Jane Mathews as reporter to the Minister on whether certain areas should be classified as Aboriginal heritage sites. The role was fulfilled in accordance with basic principles of openness and fairness. However, Justice Mathews’ appointment was held to be invalid on the basis that it involved functions so entwined with the executive as to diminish public confidence in the judicial institution as a whole.¹⁶ Since *Wilson*, the

10 See *Grollo* (1995) 184 CLR 348, 376 (McHugh J), quoted in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 13 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) (‘*Wilson*’); *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241, 261 (Weinberg, Bennett and Edmonds JJ) (‘*Hussain*’); Meyerson, ‘Extra-judicial Service’, above n 7, 187–8.

11 *Grollo* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ) (emphasis added).

12 *Telecommunications (Interception) Act 1979* (Cth) ss 6D, 6H.

13 *Grollo* (1995) 184 CLR 348, 367 (Brennan CJ, Deane, Dawson and Toohey JJ).

14 *Ibid.*

15 (1996) 189 CLR 1.

16 *Ibid* 28–9 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 18–19 (Gaudron J). Some commentators have critiqued *Wilson* as being inconsistent with the findings in *Grollo*: see, eg, Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 266–7; Kristen Walker, ‘*Persona Designata*, Incompatibility and the Separation of Powers’ (1997) 8 *Public Law Review* 153, 192; Meyerson, ‘Extra-judicial Service’, above n 7, 196. See also Justice Kirby’s dissenting opinion in *Wilson* (1996) 189 CLR 1, 47–50.

incompatibility test has not been applied to invalidate a *persona designata* appointment of a federal judge, despite its invocation on a number of occasions.¹⁷

B *Kable* Incompatibility

Less than a week after *Wilson* was handed down, the High Court introduced a second field of application for the incompatibility test, giving rise to the ‘second stream’ of incompatibility case law. In *Kable v Director of Public Prosecutions (NSW)*,¹⁸ the High Court held that Chapter III of the *Constitution* prohibits state courts from being vested with powers that are incompatible with judicial independence or institutional integrity. Chief Justice Gleeson summarised the basis for the *Kable* principle as follows:

since the *Constitution* established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.¹⁹

Kable concerned state legislation providing for the New South Wales Supreme Court to order the preventive incarceration of a named individual at the completion of his sentence for serious offences.²⁰ This scheme was held to be incompatible with the independence and impartiality of the Supreme Court on the bases that the Act was ad hominem and departed significantly from fair process.²¹

The *Kable* incompatibility test was argued on numerous occasions, but was not applied again until 2009.²² The 2004 case of *Fardon v Attorney-General (Qld)*²³ is of particular relevance to this article as it concerned preventive detention orders issued by the judiciary.²⁴ In *Fardon*, the High Court upheld the capacity of the Queensland Supreme Court to issue preventive detention orders almost identical to those considered in *Kable*.²⁵ The Queensland preventive detention orders were upheld on the bases that they were of general application

17 See, eg, *Hussain* (2008) 169 FCR 241, and the valuable discussion of the evolution of the incompatibility condition, in particular the ‘later cases’ concerning the doctrine: at 266–71 (Weinberg, Bennett and Edmonds JJ). The test has been applied to invalidate a conferral of functions on serving state judges in *Wainohu* (2011) 243 CLR 181, discussed below.

18 (1996) 189 CLR 51 (*Kable*).

19 *Fardon v A-G (Qld)* (2004) 223 CLR 575, 591 [15] (Gleeson CJ) (*Fardon*).

20 *Community Protection Act 1994* (NSW) (*CPA*).

21 *Kable* (1996) 189 CLR 51, 98 (Toohey J), 106–8 (Gaudron J), 122–3 (McHugh J), 131–2 (Gummow J); *Fardon* (2004) 223 CLR 575, 655 [219] (Callinan and Heydon JJ); *New South Wales v Kable* (2013) 252 CLR 118, 128 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (*Kable [No 2]*).

22 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 (*International Finance Trust*).

23 (2004) 223 CLR 575.

24 I note that in 2013 the High Court confirmed that the act of power that was the subject of the Court’s decision in *Kable* was an act of judicial rather than administrative power: see *Kable [No 2]* (2013) 252 CLR 118.

25 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (*DPSOA*).

and adhered more closely to ordinary judicial process. The Acts considered in *Kable* and *Fardon* bear important similarities to PDOs and I return to these cases in Part III.

C A Single Incompatibility Standard: *Wainohu*

Until 2011, the relationship between the *Grollo* ruling concerning federal judges, and the *Kable* ruling concerning state courts, was unresolved.²⁶ It was clear that a similar incompatibility limit applied to the permissible functions of federal judges *personae designatae* and state courts – but what of the permissible powers of state judges *personae designatae*? It was possible that the restrictions on the extra-judicial powers of state judges were outside the reach of both the *Grollo* and *Kable* principles. Some suggested that any limits on the permissible powers of state judges *personae designatae* were weak, almost to the point of non-existence.²⁷

In the 2011 case of *Wainohu*, the High Court resolved this issue by confirming that the *Kable* incompatibility limit also applies to judges of state courts *personae designatae*.²⁸ *Wainohu* concerned the declaration of certain bodies to be ‘criminal organisations’ by a Supreme Court judge acting *persona designata*. Declaration proceedings had an appearance of open court, involved important determinations of fact, and enlivened the Supreme Court’s jurisdiction to issue control orders in relation to individuals associated with the declared criminal organisation.²⁹ The High Court struck down the scheme on the basis that it compromised the institutional integrity of the Supreme Court. Incompatibility was based solely on the removal of the judge’s obligation to give reasons for

26 *Wainohu* (2011) 243 CLR 181, 202 [32] (French CJ and Kiefel J), [77]–[78] 221 (Gummow, Hayne, Crennan and Bell JJ).

27 This was argued by Victoria, intervening: *ibid* 212 (French CJ and Kiefel J). Support for this could be found in Justice McHugh’s equivocal statement in *Kable* indicating that incompatibility may invalidate the *persona designata* appointment of a state judge, but that this would be very rare (his Honour suggested the radical example of the appointment of a Chief Justice to Cabinet): see *Kable* (1996) 189 CLR 51, 118 (McHugh J). This belief may also be reflected in some of the drafting techniques employed by state and federal legislatures, employing state judges in their personal capacity alongside retired judges and independent persons in controversial regimes. See, eg, the conferral of functions on state judges *personae designatae* by the Commonwealth in *Australian Security Intelligence Organisation Act 1979* (Cth) pt 3 div 3. For further discussion of these topics, see, eg, Rebecca Welsh, ‘A Question of Integrity: The Role of Judges in Counter-Terrorism Questioning and Detention by the Australian Security Intelligence Organisation’ (2011) 22 *Public Law Review* 138, 146–9; Rebecca Welsh, ‘“Incompatibility” Rising? Some Potential Consequences of *Wainohu v New South Wales*’ (2011) 22 *Public Law Review* 259, 262.

28 *Wainohu* (2011) 243 CLR 181, 211–12 [49]–[51] (French CJ and Kiefel J), 228–9 [105] (Gummow, Hayne, Crennan and Bell JJ).

29 *Ibid* 192 [7], 215 [57]–[59], 218–20 [66]–[72] (French CJ and Kiefel J). It was on this basis that the Court concluded s 13(2) effectively rendered the entire *Crimes (Criminal Organisations Control) Act 2009* (NSW) invalid: at 220 [70] (French CJ and Kiefel J), 231 [118]–[112] (Gummow, Hayne, Crennan and Bell JJ).

declaring an organisation a criminal organisation. The judge maintained a residual discretion to give reasons. However, for a majority of the High Court, the giving of reasons was so fundamental to the judge's actual and perceived independence and integrity that the mere removal of the obligation impermissibly compromised the integrity of both the judge and the Supreme Court issuing control orders over associates of the declared organisation.³⁰

For French CJ, Kiefel, Gummow, Hayne, Crennan and Bell JJ, the fact that the declaration was made by a judge rather than a court was simply a factor to weigh into the *Kable* incompatibility analysis.³¹ These Justices also harnessed *Grollo* and *Wilson* to determine whether the power was incompatible with judicial independence. In this way, their Honours combined the two distinct streams of *Grollo* and *Kable* incompatibility case law to assess whether a power conferred on state judges *personae designatae* infringed Chapter III of the *Constitution*. The majority Justices in *Wainohu* ultimately grounded their decision in a general discussion of how a power may be incompatible with judicial independence.³² This indicates that incompatibility is a single constitutional notion that can be invoked to limit the powers of state and territory courts as well as all Australian judges *personae designatae*.

Wainohu indicates that *Kable* incompatibility aligns with that introduced in *Grollo*, as the rulings 'share a common foundation in constitutional principle' which 'has as its touchstone protection against legislative or executive intrusion upon the institutional integrity of the courts, whether federal or State'.³³ However, some cases – such as the 2013 case of *Assistant Commissioner Condon v Pompano Pty Ltd*³⁴ – reflect an alternate approach to the incompatibility test. In *Condon*, the High Court unanimously rejected arguments that Queensland's organised-crime control-order regime was invalid insofar as it allowed for the control order application to be based on evidence withheld from the respondent ('secret evidence').³⁵ In this case, the Court considered arguments for *Kable* incompatibility without reference to the *Grollo* cases. Chief Justice French and Gageler J justified the protection of judicial independence and impartiality on the basis that state courts must qualify as courts, rather than by reference to a broader constitutional notion of compatibility. The essential characteristics of courts are arguably irrelevant to determining incompatibility in *persona designata* cases.

30 *Wainohu* (2011) 243 CLR 181, 192 [7], 213 [53]–[54], 215 [57]–[59], 219–20 [69] (French CJ and Kiefel J). Cf Heydon J in dissent: at 238–9.

31 Ibid 212 [51]–[52] (French CJ and Kiefel J), 228–9 [105] (Gummow, Hayne, Crennan and Bell JJ). On the balancing exercise, or 'evaluative process', see *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 530 [90] (French CJ) ('*K-Generation*').

32 *Wainohu* (2011) 243 CLR 181, 225–6 [94] (Gummow, Hayne, Crennan and Bell JJ), 205–6 [38] (French CJ and Kiefel J).

33 Ibid 228 [104] (Gummow, Hayne, Crennan and Bell JJ).

34 (2013) 252 CLR 38 ('*Condon*').

35 See Rebecca Ananian-Welsh, 'Secrecy, Procedural Fairness and State Courts' in Miiko Kumar, Greg Martin and Rebecca Scott-Bray (eds), *Secrecy, Law and Society* (Routledge, 2015).

This suggests that the incompatibility test may be applied differently, or at least have markedly different emphases, in its separate contexts. It certainly reflects that incompatibility is a flexible standard, and the approaches that judges adopt in interpreting *Grollo* and *Kable* incompatibility may vary widely.³⁶

D What Is Incompatible?

Incompatibility with judicial independence and integrity provides a constitutional limit on the permissible functions of federal, state and territory judges – but what makes a power incompatible? How is one to determine whether the issuing of PDOs by serving federal, state or territory judges is compatible or incompatible with judicial independence and integrity? In the remainder of this Part I highlight that both the *Kable* and *Grollo* streams of incompatibility case law emphasise the centrality of fair process to compatibility. However, the weight of authority also indicates that the usurpation or control of a feature of a judge’s decisional independence is required to establish incompatibility, and the maintenance of the certain essential characteristics and the judge’s overarching discretions appears to ensure constitutional validity.

Incompatibility is an inherently flexible concept. The High Court has described determining incompatibility as an evaluative process,³⁷ and has acknowledged that exhaustive definition of incompatibility is neither possible nor desirable.³⁸ Nonetheless, the Court has gone to some lengths to give meaning to the concept of incompatibility, particularly in the earliest cases. This guidance has proved influential in the development of the incompatibility tests.³⁹

In *Grollo*, the Court described three ways in which incompatibility may arise. First, incompatibility exists when the actual performance of the judge’s judicial functions is significantly compromised as a result of a non-judicial function. Secondly, the personal integrity of the judge may be compromised or impaired

36 A number of commentators have argued that the incompatibility test authorities are inconsistent, or at least difficult to reconcile: see Kristen Walker, above n 16, 159; Meyerson, ‘Extra-judicial Service’, above n 7, 196; Patrick Keyzer, ‘Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?’ (2008) 30 *Sydney Law Review* 100, 106; Gabrielle Appleby, ‘State Law and Order Regimes and the High Court: A Study in Federalism and Rights Protection’ (Paper presented to the Australian Association of Constitutional Law, Sydney, 23 October 2013) 18–27.

37 *K-Generation* (2009) 237 CLR 501, 530 (French CJ).

38 See, eg, *Nicholas v The Queen* (1998) 193 CLR 173, 256 (Kirby J) (‘*Nicholas*’); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Fardon* (2004) 223 CLR 575, 618–19 [104]–[105] (Gummow J); *K-Generation* (2009) 237 CLR 501, 530 [90] (French CJ).

39 See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1, 95–6 (Gummow J); *Wainohu* (2011) 243 CLR 811, [94] 225–6 (Gummow, Hayne, Crennan and Bell JJ), 206 (French CJ and Kiefel J); *Hussain* (2008) 169 FCR 241, 261–6 (Weinberg, Bennett and Edmonds JJ).

by the non-judicial function.⁴⁰ These first two bases of incompatibility have not been applied in the cases to date, despite arguable grounds for personal integrity incompatibility existing in *Grollo* (the judge in question was compelled to excuse himself from the trial of Mr Grollo without providing reasons to the parties, on the basis of his pre-trial functions *persona designata*).⁴¹ Thus, *Grollo* indicates that practical and personal incompatibility may only be established in circumstances where they could not have been avoided by an, albeit hypothetical, ‘appropriate practice’ – such as ensuring that conflicts of interest were avoided through the assignment of judges to particular cases.⁴² Subsequent case law does nothing to contest this interpretation.

The third way in which incompatibility may arise is where the judicial exercise of the non-judicial function would diminish public confidence in the judiciary as a whole (‘public confidence incompatibility’).⁴³ It is this form of incompatibility that has arisen in the key challenges and is echoed in the *Kable* cases, including in *Wainohu*.

In *Wilson*, a majority of the High Court said that incompatible functions will be ‘an integral part of, or closely connected with, the functions of the legislative or executive government’.⁴⁴ If this first condition is met, incompatibility will exist if the judge is reliant upon non-judicial instruction, advice or wish, or if his or her discretion is exercised on political grounds.⁴⁵

The focus on public confidence adopted in *Wilson* must be considered in light of the High Court’s later judgments, including in *Nicholas v The Queen*,⁴⁶ in which the Court upheld provisions allowing for the admission of evidence in prosecutions for narcotics offences resulting from the illegal conduct of law enforcement officers. In *Nicholas*, Brennan CJ strongly warned against the ‘court’s opinion about its own repute’ becoming a test of constitutional validity.⁴⁷ Wendy Lacey has cogently argued that developments in *Nicholas* indicate that public confidence incompatibility does not look to actual public perception, but for an inappropriate overlap in the functions of the judicial and non-judicial arms

40 *Grollo* (1995) 184 CLR 348, 364–5 (Brennan CJ, Deane, Dawson and Toohey JJ).

41 Kristen Walker, above n 16, 161; *ibid* 366 (Brennan CJ, Deane, Dawson and Toohey JJ).

42 *Grollo* (1995) 184 CLR 348, 366 (Brennan CJ, Deane, Dawson and Toohey JJ).

43 *Ibid* 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

44 *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

45 *Ibid*.

46 (1998) 193 CLR 173.

47 *Nicholas* (1998) 193 CLR 173, 197 (Brennan CJ), 275 (Hayne J). See also Justice Heydon’s strong criticism of the use of the term ‘public confidence’ in *Wainohu* (2011) 243 CLR 1, 248–9. His Honour posed the question:

Or is it the case that to say of a provision that ‘it will damage public confidence in the courts’ is merely a veiled way of saying ‘I dislike it’, and that it must therefore be constitutionally invalid? Does ‘public confidence’ have any more meaning than expressions like ‘social justice’ or ‘value to society’?

See also *Nicholas* (1998) 193 CLR 173, 209 (Gaudron J), 224, 226 (McHugh J), 258 (Kirby J).

of government or the compromise of judicial processes.⁴⁸ This view was affirmed by most of the majority Justices in *Fardon*, who said the criterion may be framed as actual and *perceived* institutional integrity, rather than public confidence.⁴⁹

Since *Wilson*, the incompatibility test has been argued on numerous occasions but has never resulted in a finding of incompatibility in respect of a federal judge appointed *persona designata*.⁵⁰ These cases affirmed the suggestion arising from *Grollo* and *Wilson* that a relatively formal sense of independence – by which the judge is not forced into an unavoidable conflict, integrated into the political branches or instructed to make a political decision – will avoid incompatibility.

Kable incompatibility has also been interpreted narrowly. Between the High Court decisions in *Kable* in 1996 and *International Finance Trust v New South Wales Crime Commission*⁵¹ in 2009, the incompatibility test had been argued but never applied.⁵² In 2004, Kirby J suggested the *Kable* rule may be ‘a constitutional guard dog that would bark but once’⁵³ and in 2006, Gageler J, then Senior Counsel representing the Australian Securities and Investments Commission, argued that any furtherance of the *Kable* rule was like asking the dog ‘to turn on the family’.⁵⁴ These comments reflect the general view of the time that incompatibility was a very narrow standard, easily avoided except in the most rare and extreme cases.⁵⁵ It was in this context that the PDO provisions were enacted.

A number of subsequent decisions support this narrow view of the *Kable* incompatibility test. For instance, in *K-Generation Pty Ltd v Liquor Licensing Court*⁵⁶ and *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*⁵⁷ the High Court upheld the use of secret evidence in judicial proceedings on the basis that the court was capable of independently reviewing the secret classification of

48 Wendy Lacey, ‘Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution’ (2003) 31 *Federal Law Review* 57, 76. See also *Mistretta v United States*, 488 US 361, 407 (1989), quoted in *Grollo* (1995) 184 CLR 348, 364–5 (Brennan CJ, Deane, Dawson and Toohey JJ).

49 *Fardon* (2004) 223 CLR 575, 593 [23] (Gleeson CJ), 629–30 [144] (Kirby J), 617–18 [102] (Gummow J), where Gummow J said: ‘Perception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity’. See also Zines, above n 16, 278.

50 See *Hussain* (2008) 169 FCR 241, 266–71. The conferral of non-judicial functions on state judges has resulted in a finding of incompatibility: *Wainohu* (2011) 243 CLR 181.

51 (2009) 240 CLR 319.

52 See *Hussain* (2008) 169 FCR 241, 266–71 (Weinberg, Bennett and Edmonds JJ).

53 *Baker v The Queen* (2004) 233 CLR 513, 535 (Kirby J).

54 Transcript of Proceedings, *Forge v Australian Securities and Investments Commission* [2006] HCATrans 25 (8 February 2006).

55 See also *Fardon* (2004) 223 CLR 575, 601 [42] (McHugh J).

56 (2009) 237 CLR 501.

57 (2008) 234 CLR 532 (‘*Gypsy Jokers*’).

the information. The preservation of the courts' residual discretions enabled the judge to overcome potential incompatibility in each case.⁵⁸

Even the findings of incompatibility in *International Finance Trust* and *South Australia v Totani*⁵⁹ support a narrow interpretation of *Kable* incompatibility. These decisions turned upon provisions purporting to direct the court as to the manner and outcome of the exercise of its powers. The Supreme Court was unable to remedy these directions by an exercise of its usual discretions. For the High Court this indicated a usurpation of the court's decisional independence and, thus, incompatibility with Chapter III.⁶⁰

In the 2013 case of *Condon*, the High Court unanimously upheld Queensland's organised-crime control-order scheme. Validity was maintained on the basis that the Supreme Court retained sufficient discretion to remedy unfairness arising from secret evidence relied on to support a control order application.⁶¹ In *Attorney-General (NT) v Emmerson*,⁶² asset forfeiture provisions survived constitutional challenge on the basis that the Northern Territory Supreme Court was able to conduct proceedings with 'ordinary judicial process', exercising its usual control and discretion. The High Court reached this finding despite the severe and arguably disproportionate impact on rights effected by the legislation, and the fact that the provisions obliged the Supreme Court to issue a forfeiture notice on application of the Director of Public Prosecutions, provided that three drug-related prosecutions in 10 years were proved. A similar emphasis on the preservation of ordinary judicial process underpinned the High Court's decision in *Kuczborski v Queensland*,⁶³ in which Queensland's onerous anti-organised crime laws withstood challenge on *Kable* grounds. Once again, the Justices of the High Court emphasised that the severity, even disproportionate harshness, of the laws in question did not necessarily impact their validity, provided that the laws were administered in an ordinary criminal trial.⁶⁴

This selection of cases indicates that an unavoidable usurpation of a judge's decisional independence is required to establish invalidity. They also indicate that severe intrusions on liberty and infringements on fairness will be tolerated, provided that the judge maintains complete independent control of the conduct of the proceedings.

58 See *Gypsy Jokers* (2008) 234 CLR 532, 560 (Gummow, Hayne, Heydon and Kiefel JJ); *K-Generation* (2009) 237 CLR 501, 542–3 [147]–[149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

59 (2010) 242 CLR 1 ('*Totani*').

60 *International Finance Trust* (2009) 240 CLR 319, 355 (French CJ), 364 (Gummow and Bell JJ), 385 (Heydon J); *Totani* (2010) 242 CLR 1, 21 (French CJ), 56, 67 (Gummow J), 153, 159–60 (Crennan and Bell JJ), 171–2 (Kiefel J), 88–9 (Hayne J).

61 (2013) 252 CLR 38.

62 (2014) 88 ALJR 522 ('*Emmerson*').

63 (2014) 89 ALJR 59 ('*Kuczborski*').

64 *Ibid* 98 [217] (Crennan, Kiefel, Gageler and Keane JJ).

Wainohu is something of an anomaly in the context of these cases. In *Wainohu*, the High Court made a 6:1 finding of incompatibility despite the maintenance of the judge's overarching discretions. The fact that the proceedings had the appearance of an open court weighed against the validity of the law. This appearance, paired with the removal of the obligation to give reasons for the declaration, compromised an essential aspect of judicial process and thereby impermissibly undermined the perceived independence of the judiciary.⁶⁵ Perhaps removing the appearance of an open court from the declaration process, and allowing the judge to issue the declaration behind closed doors as in *Grollo*, would have avoided incompatibility.⁶⁶

Wainohu reinforced the incompatibility test's focus on the perceived impartiality of the judge or court performing the function. However, like other *Kable* incompatibility cases, *Wainohu* also demonstrates that various compromises to fair process will not necessarily cause incompatibility. For instance, an organisation could be declared on the basis of undisclosed information in proceedings not governed by the rules of evidence.⁶⁷ Ultimately, *Wainohu* demonstrates that the compromise of an 'essential' aspect of judicial independence (such as the giving of reasons for a decision) may give rise to incompatibility, regardless of the judge's residual discretion to remedy that compromise.

In summary, *Grollo* and *Wilson* suggest that maintaining a relatively formal sense of independence by which the judge is not forced into an unavoidable conflict, integrated into the political branches or instructed to make political decisions will avoid incompatibility. The *Kable* cases also reflect a narrow conception of incompatibility by which invalidity is only established where the court's decisional independence is entirely usurped or controlled. Finally, *Wainohu* indicates that the compromise of an essential feature of judicial independence or impartiality may cause incompatibility regardless of the maintenance of overarching judicial discretions.

It remains that across the breadth of authorities, the impact of the order on the individual and compromises to fair process effected by *ex parte* proceedings,⁶⁸ secret evidence,⁶⁹ and decisions based on information not governed by the rules of evidence,⁷⁰ have proved largely irrelevant to the incompatibility analysis. The

65 *Wainohu* (2011) 243 CLR 181, 219–20 [67]–[69] (French CJ and Kiefel J). It was on this basis that the Court concluded s 13(2) effectively rendered the entire *Crimes (Criminal Organisations Control) Act 2009* (NSW) invalid: 220 [70]–[71] (French CJ and Kiefel J), 231 [115]–[116] (Gummow, Hayne, Crennan and Bell JJ).

66 Welsh, “‘Incompatibility’ Rising?”, above n 27, 264. The lack of any common law requirement that reasons be given for administrative decisions was instrumental in Justice Heydon's dissenting opinion: *Wainohu* (2011) 243 CLR 181, 241 [153], 244 [164].

67 *Crimes (Criminal Organisations Control) Act 2009* (NSW) ss 8, 13(1), 28, 29.

68 *Grollo* (1995) 184 CLR 348; *International Finance Trust* (2009) 240 CLR 319.

69 *K-Generation* (2009) 237 CLR 501; *Gypsy Jokers* (2008) 234 CLR 532; *Condon* (2013) 252 CLR 38.

70 *Grollo* (1995) 184 CLR 348; *Wainohu* (2011) 243 CLR 181.

focus has tended to rest squarely on the independence with which the power is exercised, that is, the maintenance of the judge's decisional independence and his or her capacity to ensure that a basic appearance of ordinary judicial process is maintained.⁷¹

III INCOMPATIBILITY IN THE PREVENTIVE DETENTION CONTEXT

There are strong normative as well as doctrinal reasons to suggest that the incompatibility test would be applied more strictly to a power that involved incarceration outside the criminal process. In this Part, I argue that Chapter III requires that any power, vested in a serving judge, to order the incarceration of a citizen must accord with the basic tenets of fair process. Fair process is difficult to define. However, in *Re Nolan; Ex parte Young*, Gaudron J provided a definition which has informed many subsequent decisions of the High Court. Her Honour defined fair process as:

Open and public inquiry (subject to limited exceptions), the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts.⁷²

It is apparent that fair process requires, in the least, a degree of openness, equality, objectivity, and the capacity for a party to know and answer the case against them.

My argument acknowledges a spectrum of scrutiny under the *Grollo* and *Kable* incompatibility tests. The cases discussed above indicate that incompatibility will usually only be established where the judge is unable to remedy procedural unfairness by an exercise of discretion. I argue that, in the preventive detention context, procedural fairness is *required* to preserve the validity of the legislation, and it is insufficient to say that the judge may exercise his or her discretion to stay proceedings or remedy unfairness. This argument is built upon a recognition of the particular attention afforded to incarceration powers under the constitutional order, and a close reading of the cases of *Kable* and *Fardon*, each of which concerned the validity of judicially authorised preventive detention.

71 *Emmerson* (2014) 88 ALJR 522 provides a key example of a decision emphasising the importance of ordinary judicial process. Though this should be read in light of *Condon*, in which Gageler J held that even the residual capacity to stay proceedings for want of fairness would save provisions from invalidity: *Condon* (2013) 252 CLR 38, 115.

72 (1991) 172 CLR 460, 496 (Gaudron J), quoted in *Fardon* (2004) 223 CLR 575, 615 [92] (Gummow J); *Condon* (2013) 252 CLR 38, 95 (Hayne, Crennan, Kiefel and Bell JJ).

A Detention and the *Constitution*

The detention of citizens in state custody has the capacity to challenge basic constitutional values such as liberty, equality, and the rule of law. The fundamental aversion of the constitutional order to *arbitrary* detention is undoubted. As Sir William Blackstone observed:

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest ... to imprison arbitrarily whomever he or his officers thought proper ... there would soon be an end of all other rights and immunities.⁷³

More recently, Gummow J drew upon a passage from the American case *Hamdi v Rumsfeld*,⁷⁴ ‘made with reference to Blackstone and Alexander Hamilton’,⁷⁵ to express the constitutional aversion to indefinite and arbitrary executive detention, saying that: ‘The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the executive’.⁷⁶

As Justice Gummow’s statement reflects, under the Australian constitutional system, adherence to liberty and freedom from improper detention has found protection through the doctrine of the separation of powers. In respect of punitive detention, the *Constitution* will not tolerate its application outside the judicial process of a criminal trial. This was recognised by Brennan CJ, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*:

putting to one side the exceptional cases ... 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. Every citizen is ‘ruled by the law, and by the law alone’ and ‘may with us be punished for a breach of law, but he can be punished for nothing else’.⁷⁷

Punitive detention therefore falls exclusively within the judicial power of the Commonwealth and may not be ordered by the executive or legislature. That is, punitive detention requires full curial process.⁷⁸ However, detention proportionate

73 Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, first published 1765, 1966 ed) vol 1, 131.

74 542 US 507 (2004).

75 *Al-Kateb v Godwin* (2004) 219 CLR 562, 127 (Gummow J), citing Alexander Hamilton, ‘The Federalist No 84’ in Benjamin F Wright (ed), *The Federalist: The Famous Papers on the Principles of American Government* (Barnes & Noble Books, 1996) 533.

76 *Al-Kateb v Godwin* (2004) 219 CLR 562, 127 (Gummow J).

77 (1992) 176 CLR 1, 27 (Brennan CJ, Deane and Dawson JJ), quoting AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 202.

78 See Justice Gummow’s reformulation of the *Chu Kheng Lim* immunity in *Fardon* (2004) 223 CLR 575, 612 [78].

to a legitimate non-punitive end (such as quarantine and mental health-related detention) may be the subject of a civil or administrative order.⁷⁹

Thus, the simplest distinction is between punitive detention that requires full curial process, and non-punitive detention which may result from an administrative or civil process. This is not to say that the legislature may ‘dress up’ punitive measures as non-punitive.⁸⁰ And it must also be acknowledged that distinguishing punitive and non-punitive detention is not necessarily an easy task. The High Court has tended not to question the preventive or punitive purpose of a scheme as stated by the legislature, but it has not been blind to the indeterminacy of the word ‘punishment’.⁸¹

While recognising that non-punitive detention may be the subject of an administrative or civil order, in *Kable Toohey*, Gaudron and Gummow JJ suggested that this kind of scheme would rarely be constitutionally permissible.⁸² Justice Gaudron’s particularly strong views on this topic were also iterated in *Chu Kheng Lim*, when her Honour said that detention in the absence of a breach of criminal law and outside the well-accepted categories of exceptions ‘is offensive to ordinary notions of what is involved in a just society’.⁸³ Her Honour later repeated these sentiments, observing that:

depriving an individual of his liberty, not because he has breached any law, whether civil or criminal, but because an opinion is formed, on the basis of material which does not necessarily constitute evidence admissible in legal proceedings, that he ‘is more likely than not’ to breach a law by committing a serious act of violence ... That is the antithesis of judicial process one of the central purposes of which is ... to protect ‘the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights are not interfered with other than in consequence of the fair

79 James Renwick, ‘The Constitutional Validity of Preventative Detention’ in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) 127, 133, citing *Chu Kheng Lim* (1992) 176 CLR 1, 71 (McHugh J). This preceded a valuable discussion on the evolution (and devolution) of the rule in that case: at 132–3. See also Zines, above n 16, 288–9.

For an argument in favour of developing constitutional principles, see Jeffrey Steven Gordon, ‘Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-criminal Detention’ (2012) 36 *Melbourne University Law Review* 41. Gordon offers a sophisticated analysis of this principle, acknowledging that ‘no dominant methodology for evaluating non-criminal imprisonment has emerged’: at 43.

80 This term was used in respect of the legislation in *Kable* (1996) 189 CLR 51, 108 (Gaudron J).

81 See, eg, *Fardon* (2004) 223 CLR 575, 613 [82] (Gummow J). As Gummow J identifies, the distinction between preventive and punitive detention raises a host of issues, the exploration of which is beyond the scope of this article. See also Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013); Patrick Keyzer and Sam Blay, ‘Double Punishment? Preventive Detention Schemes under Australian Legislation and their Consistency with International Law: The *Fardon* Communication’ (2006) 7 *Melbourne Journal of International Law* 407.

82 *Kable* (1996) 189 CLR 51, 96–8 (Toohey J), 106–7 (Gaudron J), 132, 134 (Gummow J).

83 *Chu Kheng Lim* (1992) 176 CLR 1, 55, quoted in *ibid* 131 (Gummow J).

and impartial application of the relevant law to the facts which have been properly ascertained'.⁸⁴

In *Al-Kateb v Godwin*,⁸⁵ Hayne J harnessed Justice Gaudron's views to arguably undermine the *Chu Kheng Lim* principle. His Honour, like Gaudron J in *Kruger v Commonwealth*,⁸⁶ pointed to the raft of valid instances of executive detention; he then argued that the existence of a general rule against executive detention, subject to limited exceptions, was 'doubtful'.⁸⁷

The circumstances in which executive detention may be valid or invalid remains a disputed and uncertain area of constitutional law.⁸⁸ This article focuses only on non-punitive detention orders issued by serving judges *personae designatae*. Recognising the particular challenge that incarceration orders pose to constitutional values, when might preventive detention be incompatible with judicial independence and institutional integrity?

B *Kable* and *Fardon*: Judicially Authorised Preventive Detention

In the 1996 case of *Kable* and the 2004 case of *Fardon*, the High Court was called upon to determine whether powers to issue preventive detention orders were compatible with judicial independence and integrity. Read in a certain light, these cases demonstrate that the *Constitution* requires that powers to order preventive detention must comply with the basic tenets of natural justice and fair process when those powers are vested in judges.

Kable concerned New South Wales legislation, the *Community Protection Act 1994* (NSW). This Act empowered the Supreme Court to order the continued imprisonment of a person named in the Act, on community protection grounds, at the completion of his sentence for serious offences. In *New South Wales v Kable*,⁸⁹ the High Court confirmed that the power exercised by the Supreme Court was an aspect of its judicial (rather than its administrative) functions.⁹⁰ The CPA named only one person to whom it applied, Gregory Wayne Kable. *Fardon* concerned similar Queensland legislation, the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), which provided for the Queensland Supreme Court to order the continued preventive detention of prisoners at the completion of their sentences for serious offences. The *DPSOA* was of general rather than ad hominem application.

84 *Kable* (1996) 189 CLR 51, 106–7 (Gaudron J), quoting *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 497 (Gaudron J).

85 (2004) 219 CLR 562.

86 (1997) 190 CLR 1, 109–10 (Gaudron J).

87 *Al-Kateb v Godwin* (2004) 219 CLR 562, 648 (Hayne J).

88 For a recent case discussing the *Chu Kheng Lim* immunity, see *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 88 ALJR 847, and more generally, see Gordon, above n 79.

89 (2013) 252 CLR 118.

90 This finding was necessary to the Court's resolution of Mr Kable's claim for compensation for false imprisonment: *ibid*.

Both the *CPA* and the *DPSOA* carried the potential for indefinite detention, provided a full right of appeal to the Court of Appeal,⁹¹ and had a purely preventive object.⁹² Both Acts also provided for preventive detention to be ordered following a hearing in open court at which submissions and arguments were heard from both sides.⁹³ In *Kable*, the *CPA* was struck down as incompatible with the institutional independence and integrity of the New South Wales Supreme Court. In *Fardon*, the *DPSOA* withstood the test of incompatibility.

Neither the *CPA* nor the *DPSOA* exhibited the kind of incompatibility described in *Wilson*.⁹⁴ The Court was not integrated into another branch of government, reliant to an acute degree on executive instruction, nor compelled to exercise its discretion on political grounds. That said, a primary ground of invalidity in *Kable* was the usurpation of a key aspect of the Court's decisional independence, as the Act named the single individual to whom it applied. This repugnant feature was absent from the *DPSOA*. However, this was not the sole reason for invalidity. In *Kable*, the Court also based its finding of incompatibility on the fact that the detention was ordered in circumstances 'far removed' from,⁹⁵ or merely 'dressed up' as,⁹⁶ ordinary judicial process.

In *Kable*, the majority Justices were careful to stipulate that the procedural deficiencies of the *CPA*, in addition to its ad hominem nature, rendered the function of issuing preventive detention orders incompatible with the Supreme Court's independence and integrity. As summarised later (in *Fardon*) by Callinan and Heydon JJ:

Despite the differing formulations of the Justices in the majority [in *Kable*], the primary issue remained whether the process which the legislation required the Supreme Court of New South Wales to undertake, was *so far removed from a truly judicial process* that the Court, by undertaking it, would be so tainted or polluted that it would no longer be a suitable receptacle for the exercise of federal judicial power under Ch III of the Constitution.⁹⁷

Incompatibility was established in *Kable* not only because the *CPA* was ad hominem, but also because it: removed the need to prove guilt beyond reasonable doubt (or at all), replaced this burden with a predictive balance of probabilities standard,⁹⁸ provided for proof by materials that may not satisfy the rules of

91 See *Fardon* (2004) 223 CLR 575, 592 [19]–[20] (Gleeson CJ), 617 [99]–[102] (Gummow J), 658 [229]–[233] (Callinan and Heydon JJ).

92 Ibid 597 [34] (McHugh J), 658 [234] (Callinan and Heydon JJ).

93 Ibid 592 [19]–[20] (Gleeson CJ), 615 [95] (Gummow J), who emphasised that the respondent could appear at the proceeding.

94 *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

95 *Kable* (1996) 189 CLR 51, 122 (McHugh J).

96 Ibid 108 (Gaudron J). The phrase 'dressed up' was used by McHugh J to describe the legislation in *Kable: Fardon* (2004) 223 CLR 575, 596 [33].

97 *Fardon* (2004) 223 CLR 575, 655 [219] (Callinan and Heydon JJ) (emphasis added).

98 *Kable* (1996) 189 CLR 51, 98 (Toohey J), 106–7 (Gaudron J), 122–3 (McHugh J), 131, 132 (Gummow J).

evidence,⁹⁹ and declared that the proceedings were civil proceedings although the Court was not asked to determine the existing rights and liabilities of any party or parties.¹⁰⁰ As to this final feature, the High Court in *Kable [No 2]* said that the judge applying the *CPA* was adjudicating the rights of the potential detainee,¹⁰¹ though it seems clear that this adjudication related to a creation of new rights rather than a determination of existing rights. It is notable that these offending features of the *CPA* were not requirements or usurpations as such – the Act preserved the residual discretions of the court, including its capacity to stay proceedings for want of fairness.¹⁰²

In *Fardon*, a similar preventive detention scheme withstood the incompatibility test. The legislation considered in that case was designed in light of the High Court’s decision in *Kable*. Not only was the Act of general application, but it remedied some of the procedural deficiencies identified in *Kable*.

First, the standard of proof in the *DPSOA* was substantially higher than the invalid *CPA*, being a high degree of probability as opposed to the balance of probabilities.¹⁰³ Secondly, the *DPSOA* vested a substantial discretion with the Court as to what form the order should take, unlike the more limited choice of simply whether or not to order detention under the *CPA*. This discretion was also subject to more precise standards under the *DPSOA*, including ‘serious danger to the community’ and ‘unacceptable risk’,¹⁰⁴ compared to the broader standards of ‘more likely than not’ and appropriateness guiding decisions under the *CPA*.¹⁰⁵

Thirdly, each Act rested the onus of proof with the Attorney-General, but only the *DPSOA* imposed a duty to disclose on that party.¹⁰⁶ Fourthly, the rules of evidence applied under both Acts, but could not be avoided by the Court under

99 Ibid 106 (Gaudron J), 122 (McHugh J). The *CPA* s 17(1)(a) provided that the Court was bound by the rules of evidence, but as McHugh J observed, s 17(3) went ‘a long way to negating that protection’: at 120. Section 17(3) provided that: ‘Despite any Act or law to the contrary, the Court must receive in evidence any document or report of a kind referred to in subsection (1)’, referring to a range of medical and other professional reports, ‘that is tendered to it under the Act’.

100 *Kable* (1996) 189 CLR 51, 106 (Gaudron J), 122 (McHugh J). Justice McHugh concluded that the legislation rendered ‘the Supreme Court the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person’: at 122.

101 *Kable [No 2]* (2013) 252 CLR 118, 132 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

102 For Gageler J, the Supreme Court’s capacity to stay proceedings saved Queensland’s organised-crime control-order legislation from potential invalidity: *Condon* (2013) 252 CLR 38, 115.

103 *Fardon* (2004) 223 CLR 575, 597 [34] (McHugh J), 616 [96]–[98] (Gummow J), 656 [220]–[224] (Callinan and Heydon JJ).

104 Ibid 592, 593 [22] (Gleeson CJ), 597 [34] (McHugh J), 657 [225] (Callinan and Heydon JJ), citing *M v M* (1988) 166 CLR 69, 78 in which that same magnitude of risk was found to be an acceptable justification for a court denying a parent access to a child.

105 *CPA* s 5(1).

106 *Fardon* (2004) 223 CLR 575, 592 [19] (Gleeson CJ), 615–16 [95] (Gummow J), 656 [220]–[221] (Callinan and Heydon JJ).

the *DPSOA*.¹⁰⁷ Lastly, only the *DPSOA* obliged the Supreme Court to provide detailed reasons for its decision.¹⁰⁸ The High Court in *Fardon* concluded that, unlike orders made under the *CPA*, *DPSOA* orders were issued in accordance with ‘ordinary judicial process’.¹⁰⁹

The lines of distinction drawn by the Justices in *Fardon* may appear fine.¹¹⁰ There were substantial commonalities between the Acts, even with respect to the processes by which the orders were issued. The broader procedural frameworks, aims and outcomes of these preventive detention schemes were all-but-identical. Yet the High Court in *Fardon* was careful to emphasise the points of distinction listed above, as viewed in all the circumstances, as carrying determinative weight.¹¹¹ Together, the cases of *Kable* and *Fardon* indicate that the constitutional validity of a preventive detention scheme involving courts hinges not only on whether a key aspect of decisional independence has been usurped (through ad hominem legislation), but also on the compliance of the scheme with basic aspects of fair and ordinary judicial process.

C A Fair Process Requirement for Judicially Authorised Preventive Detention

Neither *Kable* nor *Grollo* incompatibility has been applied to test a preventive detention scheme since *Fardon*. That said, the High Court has faced a string of challenges to preventive restraints on liberty falling just short of incarceration.

In *Thomas v Mowbray*, the High Court upheld the capacity of federal courts to order anti-terrorism control orders.¹¹² *Totani*, *Wainohu* and *Condon* each concerned state control-order schemes, similarly empowering courts to order potentially severe and prolonged restrictions on liberty for the purpose of preventing future serious crime. In the first two Chapter III challenges to control order schemes – *Thomas* and *Totani* – members of the Court were careful to distinguish the valid restraints under a control order from the more questionable instance of preventive incarceration.¹¹³

107 Ibid 592 [19] (Gleeson CJ), 596 [33] (McHugh J), 615–16 [95] (Gummow J), 656 [220]–[224] (Callinan and Heydon JJ).

108 Ibid 617 (Gummow J), 658 (Callinan and Heydon JJ).

109 Ibid 592 (Gleeson CJ), 658 (Callinan and Heydon JJ), who used the similar phrase ‘full and proper legal process’.

110 Anthony Gray, ‘Standard of Proof, Unpredictable Behaviour and the High Court of Australia’s Verdict on Preventive Detention Laws’ (2005) 10 *Deakin Law Review* 177, 185. *Fardon* has been critiqued as implicitly overturning *Kable*: see Keyzer, above n 36, ‘To What End the Separation of Judicial Power?’, 106–12.

111 *Fardon* (2004) 223 CLR 575, 592 [19]–[21] (Gleeson CJ), 615–17 [92]–[99] (Gummow J), 656 [220], 658 [230] (Callinan and Heydon JJ).

112 (2007) 233 CLR 307 (*Thomas*).

113 *Thomas* (2007) 233 CLR 307, 330 (Gleeson CJ), 459 (Hayne J), 356 (Gummow and Crennan JJ); *Totani* (2010) 242 CLR 1, 83 (Hayne J), 171 (Kiefel J).

Two observations arise from these cases. First, the High Court continues to suggest that incarceration may present something of a special case, deserving of particular scrutiny, distinguished even from severe prolonged restraints such as wearing a tracking device, being subject to curfews, or even the potential for house arrest.¹¹⁴ Secondly, and perhaps conversely, these cases demonstrate the negligible weight that may be placed on the extent to which a power impacts on rights and liberties in assessing constitutional validity under Chapter III.

In *Condon*, Gageler J expressed the clear view that procedural fairness is a defining characteristic of courts.¹¹⁵ This approach may support an argument (albeit couched in hindsight) that the focus on procedural fairness in *Kable* and *Fardon* arose from the fact that those proceedings occurred in *courts*, not because they resulted in preventive incarceration. If this is the case, then the reasoning in *Kable* and *Fardon* may not apply to the PDO provisions considered below as they are not issued by courts, and more recent incompatibility cases may affirm that the preservation of the judge's basic discretions is sufficient to avoid incompatibility.¹¹⁶

The clearest point to arise from *Kable* and *Fardon* is that ad hominem legislation is constitutionally offensive. But, when applying *Kable*, the High Court in *Fardon* emphasised the importance of compliance with a range of aspects of procedural fairness, not simply the preservation of the judge's ultimate control of proceedings. These aspects include, but are not limited to, an open hearing at which both sides are heard, and the determination of a clear question according to precise standards and involving a real exercise of independent discretion. Moreover, a right of appeal ought to exist and reasons ought to be given.

IV ANTI-TERRORISM PREVENTIVE DETENTION ORDERS

The interpretation of the *Kable* and *Grollo* incompatibility tests argued above has a direct impact on the constitutional validity of the PDO provisions of the Commonwealth *Criminal Code*. Before addressing the constitutional validity of PDOs, it is helpful to consider the detail of the provisions and their role in Australia's counterterrorism framework.

PDOs were introduced into division 105 of the *Criminal Code*, along with control orders and updated sedition offences, in the months following the 2005 London bombings.¹¹⁷ Like control orders, PDOs are civil orders aimed at the

114 For a description of the range of terms available under a control order, see *Criminal Code* s 104.5(3), discussed in Part IV.

115 *Condon* (2013) 252 CLR 38, 105 (Gageler J). See also *Wainohu* (2011) 243 CLR 181, 208 (French CJ).

116 *Ibid* 81 [92] (French CJ), 101 [162] (Hayne, Crennan, Kiefel and Bell JJ), *contra* 115 [210] (Gageler J).

117 *Anti-Terrorism Act (No 2) 2005* (Cth).

prevention of future wrongs. The PDO provisions enable the detention of individuals aged 16 years or over, for up to 48 hours by the AFP, in order to prevent an imminent terrorist act, or to protect evidence of a recent terrorist act.¹¹⁸

Division 105 creates two kinds of PDOs. The first, an initial PDO, is initiated and administered entirely within the ranks of the AFP.¹¹⁹ Initial PDOs may authorise detention for a period of up to 24 hours.¹²⁰ The second kind of order is a continued PDO. Continued PDOs are issued on application by the AFP to an Issuing Authority and may extend the period of detention to up to 48 hours from the point the detainee was first taken into custody.¹²¹

In the case of continued PDOs, the Issuing Authority is a consenting qualified person appointed to the position by the Attorney-General.¹²² The Attorney-General may appoint to this role a serving or retired judge of the Federal Court, the Family Court or a state or territory Supreme Court. The Attorney-General may also appoint a Federal Magistrate or a President or Deputy President of the Administrative Appeals Tribunal.¹²³ When issuing a continued PDO the Issuing Authority is acting *persona designata*.¹²⁴

The application to a senior AFP officer for an initial PDO, or to an Issuing Authority for a continued PDO, will include a summary of the grounds on which the applying officer considers the order should be made, as well as the outcomes of any previous orders sought against the detainee, including applications for control orders under division 104 of the *Criminal Code*.¹²⁵ The summary provided by the AFP officer will not contain any information, the disclosure of which is likely to prejudice national security, within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('*NSIA*').¹²⁶

118 *Criminal Code* s 105.4.

119 *Criminal Code* s 105.8.

120 *Criminal Code* s 105.9.

121 *Criminal Code* s 105.12.

122 *Criminal Code* s 105.2(1).

123 *Criminal Code* ss 100.1(1), 105.2. The President will necessarily also be a Judge of the Federal Court: *Administrative Appeals Tribunal Act 1975* (Cth) s 7(1). The President and Deputy-President must have been enrolled as a legal practitioner for at least five years: *Administrative Appeals Tribunal Act 1975* (Cth) s 7(1AA); *Criminal Code* s 105.2.

124 *Criminal Code* s 105.19.

125 *Criminal Code* ss 105.7(2), 105.11(2).

126 *Criminal Code* s 105.11(3A). '[L]ikely to prejudice national security' is defined as 'a real, and not merely a remote, possibility that the disclosure will prejudice national security', and 'national security' is broadly defined as 'Australia's defence, security, international relations or law enforcement interests': *NSIA* ss 8, 17. For discussion of the direct and indirect consequences of the *NSIA* on control order proceedings, including the impact of withholding materials on the basis that they are 'likely to' fall within the *NSIA*, see Andrew Lynch, Tamara Tulich and Rebecca Welsh, 'Secrecy and Control Orders: The Role and Vulnerability of Constitutional Values in Australia and the United Kingdom' in David Cole, Federico Fabrini and Arianna Vidaschi (eds), *Secrecy, National Security, and the Vindication of Constitutional Law* (Edward Elgar, 2013) 154, 162–8.

An application for a continued PDO must include any information given to the officer by the detainee.¹²⁷ This is the only opportunity that the detainee has to communicate with the Issuing Authority. The detainee must be informed of his or her right to provide information in this way.¹²⁸

There are four possible grounds on which a PDO may be issued. The first three grounds focus on the prevention of an imminent act of terrorism – and acts expected to occur ‘in any event’ within 14 days of the application.¹²⁹ Under these grounds the Issuing Authority must be satisfied that the person will engage in a terrorist act, possesses a thing connected with preparing for a terrorist act, or has done an act in preparation for a terrorist act.¹³⁰ The fourth ground on which a PDO may be issued is that it is reasonably necessary to detain the person in order to preserve evidence of, or relating to, a ‘recent’ terrorist act that has occurred in the previous 28 days.¹³¹

The notion of a terrorist act is central to the grounds on which PDOs may be issued. Section 100.1 of the *Criminal Code* defines a ‘terrorist act’ as ‘an action or threat of action’ with the intention of advancing a political, religious or ideological cause *and* coercing, or influencing by intimidation, a domestic or foreign government *or* intimidating the public or a section of the public. The definition of a terrorist act has been criticised as being so broad its meaning is unclear.¹³² Notwithstanding these criticisms, the definition has underpinned a significant number of prosecutions for terrorism offences.¹³³

A detainee under a PDO is subject to significant restrictions on his or her contact with third parties, including legal representatives.¹³⁴ Moreover, the detainee may be subject to prohibited contact orders restricting his or her contact more broadly.¹³⁵ Breaches of these disclosure restrictions may incur criminal

127 *Criminal Code* s 105.11(5).

128 *Criminal Code* s 105.10A(b).

129 *Criminal Code* s 105.4(5).

130 *Criminal Code* s 105.4(4).

131 *Criminal Code* s 104.4(6).

132 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter-Terrorism Legislation* (2006) xvii recommendation 10; Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (2006) 10 recommendations 6–8; Council of Australian Governments, *Council of Australian Governments Review of Counter-Terrorism Legislation* (Report, 14 May 2013) x; Bret Walker, *Independent National Security Monitor Declassified Annual Report 20th December 2012* (Report, 14 May 2013) 128. See also Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006) [10]; Nicola McGarrity, ‘“Testing” Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia’ (2010) 34 *Criminal Law Journal* 92, 113–14.

133 For a summary of some of these prosecutions, see McGarrity, above n 132; Council of Australian Governments, above n 132 attachment D.

134 *Criminal Code* ss 105.34–105.39.

135 *Criminal Code* s 105.14A.

prosecution and up to five years' imprisonment.¹³⁶ Officers are not permitted to question a detainee under a PDO except to confirm his or her identity, ensure his or her wellbeing or to fulfil the terms of the PDO.¹³⁷

It is important to consider PDOs within the broader context of anti-terrorism measures.¹³⁸ While a person may be detained under a PDO for up to 48 hours and may not be interrogated, a person charged with a terrorism offence may be interrogated and is highly unlikely to be granted bail, making the period of potential incarceration for that person substantially longer than 48 hours.¹³⁹

Even if the AFP is unable to charge a person, the Australian Security Intelligence Organisation ('ASIO') may invoke the Special Powers Relating to Terrorism Offences provisions of the *Australian Security Intelligence Organisation Act 1979* (Cth).¹⁴⁰ If it can be demonstrated that questioning the person will 'substantially assist the collection of intelligence that is important in relation to a terrorism offence', he or she may be subject to an ASIO questioning warrant, allowing ASIO to interrogate the person in secret for up to a total of 24 hours over the course of 28 days.¹⁴¹ A person subject to an ASIO questioning warrant has no right to silence, no privilege against self-incrimination, and may be subject to body and strip searches.¹⁴² The person's rights to contact third parties, including legal representatives, are severely circumscribed,¹⁴³ and a number of disclosure and non-compliance offences punishable by imprisonment attach to the provisions.¹⁴⁴

If, additionally, reasonable grounds exist to believe the person: may alert someone involved in a terrorism offence that the offence is being investigated, may not appear for questioning, or may destroy or damage evidence (this last criterion notably resembling the second ground for issuing a PDO), then the person may be subject to an ASIO questioning and detention warrant.

136 *Criminal Code* s 105.41.

137 *Criminal Code* s 105.42.

138 For general discussion on this topic, see Bret Walker, above n 132, 53–9.

139 Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105, 132; McGarrity, above n 132, 121–4.

140 *Australian Security Intelligence Organisation Act 1979* (Cth) pt 3 div 3.

141 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34E(5)(b).

142 Jude McCulloch and Joo Cheong Tham, 'Secret State, Transparent Subject: The Australian Security Intelligence Organisation in the Age of Terror' (2005) 38 *Australian and New Zealand Journal of Criminology* 400, 402.

143 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34C(3B), 34CU, 34D(4A), 34E(3), 34G(5)–(6), 34J(1)(e), 34K(1), (9)–(11), 34TA, 34U, 34ZO. See also Andrew Palmer, 'Investigating and Prosecuting Terrorism: The Counter-Terrorism Legislation and the Law of Evidence' (2004) 27 *University of New South Wales Law Journal* 373, 381.

144 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34L, 34ZS. For further discussion on the non-disclosure aspects of the 'special powers' provisions, see, Joo Cheong Tham, 'Critique and Comment Casualties of the Domestic "War on Terror": A Review of Recent Counter-Terrorism Laws' (2004) 28 *Melbourne University Law Review* 512; McCulloch and Tham, above n 142.

Questioning and detention warrants not only permit the secret compulsory interrogation of the person, as described above, but also enable his or her detention for up to seven days.¹⁴⁵ Like PDOs and questioning warrants, ASIO questioning and detention warrants attract a high level of secrecy and onerous contact restrictions. Clearly, arrest or obtaining an ASIO warrant present preferable options in the furtherance of a terrorism investigation, as compared to the comparatively limited powers available under a PDO.¹⁴⁶

The first ground on which a PDO may be issued also bears strong similarity to the basis for obtaining a control order under division 104 of the *Criminal Code*.¹⁴⁷ Control orders are issued on the basis of a balance of probabilities determination that the order will substantially assist in preventing a terrorist act, or that the person has been involved in training with a listed terrorist organisation, engaged in a hostile activity in a foreign country, or been convicted of a terrorism offence in Australia or a foreign country.¹⁴⁸ Each term of the requested order must be reasonably necessary, appropriate and adapted for the purpose of protecting the public from a terrorist act.¹⁴⁹ The terms of a control order may include far-reaching restrictions or obligations including, for example, restrictions on the person's: presence at certain places, contact with certain people, use of telecommunication or technology, possession of things or substances, and activities.¹⁵⁰ Although the restrictions and obligations available under a control order fall short of imprisonment in a state facility, it is clear that control orders have the potential to severely inhibit a person's liberty even to the point of house arrest.

If the AFP determines that restricting the person's liberty will substantially assist, and is proportionate to, the aim of preventing an imminent terrorist act, the organisation could conceivably elect whether to seek a PDO or a control order. The terms of a control order are far more flexible, potentially far-reaching and durable than the brief period of detention available under a PDO.¹⁵¹ A control order may extend for up to 12 months and has the possibility of renewal beyond that period.

Against this backdrop it can be seen that PDOs fill a slight gap in the anti-terrorism legislative arsenal. Their role is to permit up to two days' detention in response to an imminent or recent terrorist act, in the absence of sufficient evidence to support an arrest, and when questioning would not substantially

145 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34F.

146 For the author's analysis of the Chapter III validity of ASIO questioning and detention warrants, see Welsh, 'A Question of Integrity', above n 27.

147 *Criminal Code* s 104.4.

148 *Criminal Code* s 104.4(1). These grounds were expanded upon by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

149 *Criminal Code* s 104.4(1)(d).

150 *Criminal Code* s 104.5(3).

151 *Criminal Code* s 104.5(3).

assist a terrorism investigation. On this basis, Andrew Lynch and Alexander Reilly assert that:

detention [under a PDO] 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.¹⁵²

It is perhaps little wonder that, despite urgent enactment in 2005,¹⁵³ the PDO provisions were not used until September 2014 when three orders were imposed on individuals in the course of large-scale anti-terrorism raids in Sydney.¹⁵⁴ The New South Wales Supreme Court issued a sweeping suppression order with respect to those PDOs.¹⁵⁵

Prior to this, in 2013, the Independent National Security Legislation Monitor ('INSLM') Bret Walker SC reported that no agency had 'seriously considered seeking a PDO' and that extensive consultation revealed 'no enthusiastic support for the provisions'.¹⁵⁶ On the other hand, ASIO questioning warrants have been issued a total of 16 times,¹⁵⁷ the terrorism offence provisions have resulted in at least 35 prosecutions and 23 convictions,¹⁵⁸ and even control orders have been used twice and considered by agencies on a number of other occasions.¹⁵⁹

In separate reports tabled on 14 May 2013, both the INSLM and the Council of Australian Governments ('COAG') recommended the repeal of division 105.¹⁶⁰ A number of reasons were cited in support of these recommendations, including the need for additional safeguards that would diminish the potential effectiveness of PDOs,¹⁶¹ and the lack of demonstrated necessity or utility for the scheme.¹⁶² To this end, the INSLM described PDOs as being 'at odds with our

152 Lynch and Reilly, above n 139, 132.

153 For discussion and critique of this enactment process, see Greg Carne, 'Prevent, Detain, Control and Order? Legislative Process and Executive Outcomes in Enacting the *Anti-Terrorism Act (No 2) 2005* (Cth)' (2007) 10 *Flinders Journal of Law Reform* 17.

154 Jason Om, 'Counter-Terrorism Raids: AFP Used Extraordinary Powers for First Time To Detain People without Charge' *ABC News* (online), 20 September 2014 <<http://www.abc.net.au/news/2014-09-19/afp-used-extraordinary-powers-to-detain-people-without-charge/5757546>>.

155 Paul Farrell, 'Indefinite Ban on Reporting of Counter-Terrorism Preventive Detention Order' *The Guardian* (online), 23 September 2014 <<http://www.theguardian.com/world/2014/sep/23/indefinite-ban-reporting-counter-terrorism-preventative-detention-order>>.

156 Bret Walker, above n 132, 45.

157 *Ibid* 154 app G.

158 Council of Australian Governments, above n 132, 101 attachment D.

159 Bret Walker, above n 132, 13.

160 *Ibid* 67, 130 recommendation III/4; Council of Australian Governments, above n 132, 68 recommendation 39.

161 Council of Australian Governments, above n 132, 70.

162 Bret Walker, above n 132, 67.

normal approach to even the most reprehensible crimes',¹⁶³ and COAG said the orders 'might be thought to be unacceptable in a liberal democracy'.¹⁶⁴

The utilisation of the PDO provisions in 2014 was followed by legislative amendments that broadened their scope and extended their sunset clause.¹⁶⁵ These factors highlight that, despite their odd place in the landscape of anti-terrorism legislation, PDOs remain a key feature of Australian law. The close relationship, but distinct differences, between PDOs, ASIO warrants, control orders and terrorism offences suggests that – despite stipulating a crime prevention and prosecution purpose¹⁶⁶ – PDOs are uniquely designed to enable the detention of individuals outside the usual criminal, or even intelligence gathering, processes and paradigms.

The involvement of serving judges in this unique detention scheme raises important constitutional questions. The role of the Issuing Authority is to determine whether the bases for the PDO are met. That role is fulfilled in secretive proceedings in which the person subject to the PDO has limited capacity to contest the application or to access information or counsel. By involving judges in proceedings for the secret, short-term incarceration of citizens outside criminal or civil justice contexts, the PDO provisions present an opportunity to assess whether existing constitutional principles are capable of protecting judicial independence from legislative infringement in the preventive detention context. As PDOs were not used until late 2014, the opportunity has only recently arisen for the validity of these orders to be tested in court.

V IS THE POWER TO ISSUE CONTINUED PDOS CONSTITUTIONALLY VALID?

The PDO provisions confer the role of Issuing Authority on serving judges of state, territory and federal courts *personae designatae*. This role involves determining whether an initial PDO may be continued to permit up to 48 hours of detention on the bases that: the person will engage in a terrorist act, possesses a thing that is connected with a terrorist act, has done an act preparing or planning terrorist act,¹⁶⁷ or that the detention is necessary to preserve evidence of a terrorist act.¹⁶⁸

The power to issue PDOs may be conferred on judges *personae designatae* if it is compatible with judicial independence and institutional integrity. The fusion of the *Grollo* and *Kable* streams of incompatibility discussed above, allows us to

163 Ibid 47.

164 Council of Australian Governments, above n 132, 68.

165 *Counter-Terrorism Legislation (Foreign Fighters) Act 2014* (Cth).

166 *Criminal Code* s 105.1.

167 *Criminal Code* s 105.4(4).

168 *Criminal Code* s 105.4(6).

draw on the full-spectrum of incompatibility cases in order to assess whether serving judges from federal, state and territory courts may be vested with this power. There is no need to separately assess the validity of the conferral of power on federal judges under the *Grollo* incompatibility test, and state or territory judges under the *Kable* incompatibility test.

Drawing first upon the guidance from *Grollo*, the issuing of PDOs could not conceivably result in ‘so permanent and complete a commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable’.¹⁶⁹ Moreover, any practical conflict between the judge’s judicial and non-judicial roles could be avoided by the adoption of ‘appropriate practices’.¹⁷⁰ Thus, the power to issue PDOs would not meet the thresholds for either practical or personal incompatibility. The relevant branch of incompatibility is thus public confidence incompatibility, elaborated in *Wilson* and the *Kable* stream of cases.

Under the *Wilson* test, public confidence incompatibility is established when a function is ‘an integral part of, or closely connected with, the functions of the legislative or executive government’.¹⁷¹ The function must also be either reliant upon non-judicial instruction, advice or wish, or involve the exercise of discretion on political grounds for incompatibility to exist.¹⁷²

Despite the administrative nature of the Issuing Authority’s role, he or she is not integrated into the investigation of the terrorist act in question, but is independent from it. Moreover, the Issuing Authority’s consideration of the AFP’s request is performed without interference. The Issuing Authority may be reliant on executive instruction, but he or she also has access to information from the detainee and performs an independent review of the information presented for the purpose of reaching a determination.¹⁷³ The Issuing Authority retains considerable discretion in exercising his or her role, including the ultimate power to independently determine whether or not to issue the PDO.¹⁷⁴

The third factor that *Wilson* proposes for consideration is the basis on which the Issuing Authority exercises that discretion. The Issuing Authority’s decision is reached on the objective criteria of reasonableness: there must be *reasonable grounds* to suspect the person will engage in a terrorist act, possesses a thing that is connected with a terrorist act, or has done an act preparing or planning a terrorist act,¹⁷⁵ or it must be *reasonably necessary* to detain the person to preserve evidence of a terrorist act.¹⁷⁶ Reasonable necessity is a familiar legal

169 *Grollo* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

170 *Ibid* 366 (Brennan CJ, Deane, Dawson and Toohey JJ).

171 *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

172 *Ibid*.

173 *Criminal Code* s 105.11(5).

174 *Criminal Code* s 105.4.

175 *Criminal Code* s 105.4(4).

176 *Criminal Code* s 105.4(6).

standard.¹⁷⁷ Reasonable belief that a person has engaged in the conduct described forms the basis upon which a person may be charged with certain terrorism offences.¹⁷⁸ Reasonable suspicion is a significantly lower standard, but it remains one that the courts have significant experience with, for example in assessing whether stop and search powers have been lawfully invoked.¹⁷⁹ Thus, there are legal standards guiding the Issuing Authority's exercise of power. In other words, the Issuing Authority is not compelled to exercise his or her discretion based on political considerations while fulfilling his or her role under division 105.

Whether the order will 'substantially assist' in preventing a terrorist act is not the kind of question that would usually face judges. However, in *Grollo* the inclusion of similar standards in the judge's decisional role was found to be compatible with the exercise of administrative functions by the judge *persona designata*.¹⁸⁰ Moreover, the control order cases, in particular *Thomas* – in which the issuing of anti-terrorism control orders was upheld as a valid exercise of judicial power by a Chapter III court – positively endorsed this kind of predictive reasoning by courts.¹⁸¹

In all, the Issuing Authority retains significant decisional independence: analogous to the independence of the eligible judge issuing telephone-tapping warrants in *Grollo*, as opposed to the more integrated, advisory role of the reporter in *Wilson*. There is no indication that the legislation compels the Issuing Authority to follow executive instruction or to draw conclusions based on political considerations or criteria, as was the case in *Wilson*.¹⁸² Therefore, the decisional independence of the Issuing Authority is maintained and it is likely that the PDO scheme would survive this test of incompatibility.

The *Kable* incompatibility cases reflect that incompatibility may also be established by the usurpation or control of an essential feature of a court's (or a judge's) decisional independence. As discussed above, the Issuing Authority in PDO proceedings retains overarching discretions, formal independence, and fundamental control of the proceedings. There are no obligations placed on him

177 Reasonable necessity was considered in *Thomas* (2007) 233 CLR 307, 352–3 (Gummow and Crennan JJ), 330–3 (Gleeson CJ).

178 *Crimes Act 1914* (Cth) s 3W(1).

179 Reasonable suspicion forms the basis of certain police actions which are commonly reviewed by the courts, such as the issuing of warrants under the *Crimes Act 1914* (Cth) s 3E and searches under s 3T; it is also the common law standard for arrest, though this is lower than the statutory standard of 'reasonable belief' in the *Crimes Act 1914* (Cth) s 3W(1). Reasonable suspicion is also a standard applied in other contexts, such as in assessing bias on the part of a judge (where the 'reasonable apprehension' test looks to 'reasonable suspicion'): *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 364–5 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

180 The *Telecommunications (Interception) Act 1979* (Cth) ss 45 and 46(2) invited the judge to have regard to whether the warrant would be 'likely to assist' the criminal investigation, among a list of other factors.

181 See *Thomas* (2007) 233 CLR 307, 333–4 (Gleeson CJ), 347–8 (Gummow and Crennan JJ), discussed above in Part III(C). See also *Condon* (2013) 252 CLR 38, 58–9 (Hayne, Crennan, Kiefel and Bell JJ); *Thomas* (2007) 233 CLR 307, 334 (Gleeson CJ), 417 (Kirby J).

182 *Wilson* (1996) 189 CLR 1, 19 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

or her as in *Totani* or *International Finance Trust*. These factors are sufficient to support a finding that the Issuing Authority's decisional independence remains intact under division 105.

Moreover, unlike the power considered in *Wainohu*, PDOs are issued in secret and are not a precursor to court proceedings. Applications for a continued PDO take place behind closed doors (similar to applications for telephone-intercept warrants upheld in *Grollo*), and PDOs are clearly administrative in nature and their impact is constrained to the administrative sphere.

The authorities indicate that the characteristics of the warrant regime that give the provisions a 'non-judicial flavour',¹⁸³ such as the warrant's severe interference with the liberty of an innocent citizen, are not determinative of incompatibility. In *Totani*, *Condon* and *Wainohu*, the control order schemes in question resulted in potentially severe and prolonged restrictions on liberty in the absence of criminal charge. In *Grollo*, *Gypsy Jokers*, *K-Generation*, *Emmerson*, and *Kuczborski* too, the orders severely impacted the rights of individuals. In none of these cases did the impact of the order on individual play a weighty role in the incompatibility analysis. In fact, in *Kuczborski*, Crennan, Kiefel, Gageler and Keane JJ said that 'to demonstrate that a law may lead to harsh outcomes, even disproportionately harsh outcomes, is not, of itself, to demonstrate constitutional invalidity [under the *Kable* test]'.¹⁸⁴ Moreover, the majority in *Grollo* encouraged the involvement of judges in particularly rights-intrusive schemes, observing in a lengthy but valuable passage that:

The decision to issue a warrant is, for all practical purposes, an unreviewable in camera exercise of executive power to authorise a future clandestine gathering of information. Understandably a view might be taken that this is no business for a Judge to be involved in, much less the large majority of the Judges of the Federal Court.

Yet it is precisely because of the intrusive and clandestine nature of interception warrants and the necessity to use them in today's continuing battle against serious crime that some impartial authority, accustomed to the dispassionate assessment of evidence and sensitive to the common law's protection of privacy and property (both real and personal), be authorised to control the official interception of communications. ... It is an eligible Judge's function of deciding independently of the applicant agency whether an interception warrant should issue that separates the eligible Judge from the executive function of law enforcement. It is the recognition of that independent role that preserves public confidence in the judiciary as an institution.¹⁸⁵

As this passage suggests – and subsequent cases have affirmed¹⁸⁶ – it seems that extra-judicial involvement in orders that severely impact rights and liberties

183 *Hussain* (2008) 169 FCR 241, 268 (Weinberg, Bennett and Edmonds JJ).

184 *Kuczborski* (2014) 89 ALJR 59, 98 [217].

185 *Grollo* (1995) 184 CLR 348, 367 (Brennan CJ, Deane, Dawson and Toohey JJ) (citations omitted).

186 See, eg, *Condon* (2013) 252 CLR 38; *Emmerson* (2014) 88 ALJR 522; *Thomas* (2007) 233 CLR 307, 329 (Gleeson CJ).

may be valid, so long as the fundamental independence of the judge is maintained.

The Issuing Authority in PDO proceedings retains an ultimate discretion whether to issue the warrant and exercises his or her functions to an objective standard free from interference. Therefore, it is likely that the provisions would survive a Chapter III challenge based on the basic incompatibility standard arising from the *Grollo* and *Kable* cases. However, there are two important factors that together indicate that PDOs may violate Chapter III of the *Constitution*. First, the orders effect the incarceration of citizens and, secondly, the orders are issued in proceedings entirely lacking the key aspects of fair process.

To revisit Justice Gaudron's influential description of fair process, it involves:

open and public inquiry (subject to limited exceptions), the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts.¹⁸⁷

PDOs are issued in proceedings divorced entirely from fair or ordinary judicial process. The proceedings are not open. The decision is reached on the basis of information not governed by the rules of evidence. The only information the Issuing Authority sees from the detainee is provided through the detaining officer.¹⁸⁸ The Issuing Authority does not hear directly from the detainee, nor is the detainee in a position to hear the case against him or her, or to challenge the matter before the Issuing Authority. The detainee's right of appeal is limited to merits review in the Administrative Appeals Tribunal only once the order is no longer in force.¹⁸⁹ Full reasons are not given for the Issuing Authority's decision.

This could not be considered satisfactory according to minimum standards of natural justice, or to be in keeping with the hallmarks of fair process, such as openness, equality, or the capacity for a person to know and answer the case against them. Unlike proceedings for preventative detention orders under the *CPA* or the *DPSOA*, at no stage of the PDO process is the detainee able to contest the detention in a hearing, with legal representation and sufficient notice or information to enable him or her to build and put forward a case. All these features of division 105 place the procedural protections in the PDO scheme considerably short of those provided for in the *DPSOA* upheld in *Fardon* and even well short of those held invalid in *Kable*.

Some factors weigh in favour of the validity of the power to issue PDOs. Like the *DPSOA* preventive detention scheme, PDOs are not ad hominem. Issuing Authorities retain overarching discretions whether to issue PDOs and as

187 *R v Young* (1991) 172 CLR 460, 496 (Gaudron J).

188 *Criminal Code* s 105.11(5).

189 *Criminal Code* s 105.51.

to the appropriate period of detention. The scheme does not have a punitive object, and the Issuing Authority's constraints of 'reasonableness' are instrumental in ensuring that any period of detention will be proportionate to a legitimate non-punitive end, being the prevention of terrorism. The onus of proof is on the applicant, but the standard of proof is the balance of probabilities – features that align with the *CPA* struck down in *Kable* but fall short of the standards in the *DPSOA* upheld in *Fardon*. Each of these factors goes some way to ameliorating the fundamental unfairness and inequality of the proceedings, but could not be seen to overcome the gross infringements to fair process listed above.

The power to issue continued PDOs may be constitutionally valid when assessed against the basic incompatibility standard, which tends to allow a judge's decisional independence to overcome compromises to fair process. In many ways the power exercised by the Issuing Authority resembles the in camera, ex parte power to issue telephone intercept warrants upheld in *Grollo*. However, *Fardon* and *Kable* suggest that a higher standard of fair process is required in proceedings for judicially authorised incarceration. If this is the case, the PDO provisions do not pass constitutional muster. This interpretation recognises the particular constitutional scrutiny to which detention powers are traditionally subject. Division 105 provides for serving judges to issue detention orders in circumstances lacking the basic hallmarks of fair process. The process could not even be said to be dressed up as ordinary judicial proceedings. The provisions may be of general application rather than ad hominem, but beyond that characteristic they do even greater damage to the integrity of the issuing judge than the powers conferred under the *CPA* and struck down in *Kable*. There are, therefore, strong reasons to suggest that the appointment of serving judges as Issuing Authorities for continued PDOs violates Chapter III of the *Constitution*.

VI THE STRENGTHS AND WEAKNESSES OF THE INCOMPATIBILITY TEST

The foregoing analysis demonstrates some of the key strengths and weaknesses of the *Grollo* and *Kable* incompatibility tests. The issuing of continued PDOs by serving judges threatens judicial independence and integrity in a number of ways. The clearest threat arises from the fact that the proceedings lack the basic hallmarks of fairness or equality, yet involve incarceration – one of the most severe impositions on liberty available under Australian law.

Detailed consideration of how the incompatibility test may apply to the PDO scheme reveals, first, that the incompatibility test is hard to follow. Gabrielle Appleby has observed that the 'inherent uncertainty of the [incompatibility]

principle, together with its almost constant reformulation and re-explanation' has led to confusion and other consequences for state executive and legislative branches of government.¹⁹⁰ Similarly, in 2008 the Federal Court observed that 'while the idea of incompatibility is familiar, its application to different factual situations is not'.¹⁹¹ Writing in 2011, Chris Steytler and Iain Field addressed some 'unanswered questions' concerning the meaning of incompatibility. These questions touched upon the test's capacity to protect fair process, the role of public confidence in the analysis, and how the test intersected with the essential features of courts.¹⁹² More recent cases, such as *Condon*, have done little to give clarity to these issues.¹⁹³ It is difficult to grasp how interpretations of the incompatibility test in the *Grollo persona designata* cases intersect with interpretations in the *Kable* cases. The High Court's renewed emphasis on the defining and essential characteristics of courts muddies these waters even further.

In applying the test to the power conferred on serving judges under the PDO provisions, it is not clear whether the *Grollo* stream of authority carried weight, or whether this guidance is outdated and secondary to interpretations that focus on usurpations of decisional independence. Then again, perhaps the *Kable* cases, or some aspects of these authorities, simply do not apply in *persona designata* contexts. Likewise, procedural fairness and the related concern of perceived impartiality is emphasised in some cases but given short shrift in others. It is difficult to grasp and apply a central notion of incompatibility or to come to confident conclusions as to Chapter III validity under the test.

The incompatibility test continues to evolve, but the directions it takes and the bases for those developments are uncertain and unpredictable. In less than 20 years the test has been heralded as containing valuable potential for limiting government power and protecting judicial independence and impartiality,¹⁹⁴ and has been effectively disregarded as a 'dog that barked but once'.¹⁹⁵ In all, the test is difficult to predict, difficult to follow and difficult to apply. Even faced with an arguably clear challenge to liberty and judicial independence in the PDO provisions, the analysis is unavoidably complex, clouded and uncertain.¹⁹⁶

Secondly, the principles that emerge from the authorities suggest an essentially narrow conception of incompatibility. Present interpretations of the

190 Appleby, 'State Law and Order Regimes and the High Court', above n 36, 2.

191 *Hussain* (2008) 169 FCR 241, 261 (Weinberg, Bennett and Edmonds JJ).

192 Chris Steytler and Iain Field, 'The "Institutional Integrity" Principle: Where Are We Now, and Where Are We Headed?' (2011) 35 *University of Western Australia Law Review* 227, 251–64.

193 Appleby, 'State Law and Order Regimes and the High Court', above n 36, 18–27.

194 Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1, 8; Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31 *Sydney Law Review* 411, 440–1; Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205, 220–4.

195 *Baker v The Queen* (2004) 233 CLR 513, 535 (Kirby J).

196 For similar criticisms made of the incompatibility standard, see Appleby, 'State Law and Order Regimes and the High Court', above n 36, 2.

test provide little scope for considering the most troubling aspects of PDOs. The fact that the orders involve serving judges in a secretive, rights-offensive instance of administrative incarceration, entirely divorced from any semblance of fair process, may carry negligible weight in the *Grollo* or *Kable* incompatibility analyses. Ex parte proceedings,¹⁹⁷ secret evidence,¹⁹⁸ and decisions based on information not governed by the rules of evidence,¹⁹⁹ have not resulted in findings of incompatibility, even where the power resulted in severe incursions on rights. A relatively formal sense of independence by which the judge has not been forced into an unavoidable conflict, integrated into the political branches or instructed to make political decisions has regularly been affirmed as avoiding incompatibility. The retention of overarching discretions and the capacity for the judge to remedy any potential unfairness also seems to avoid incompatibility. Ultimately, the *Grollo* and *Kable* incompatibility tests appear to provide only the scantest protection for the fairness, openness or equality of the process in which the judge is involved, despite the centrality of these qualities to judicial independence and impartiality.

The High Court's apparent renewed emphasis on ordinary judicial process in *Wainohu*, *Condon*, *Emmerson* and *Kuczborski* may reflect an overall improvement in the capacity of the incompatibility test to protect fairness in judicial proceedings and achieve judicial independence and impartiality. However, the *Kable* and *Grollo* incompatibility tests are clearly not an implied Bill of Rights, and are unlikely to amount to a kind of implied due process principle.

The purposes underlying the separation of judicial power relate to the rule of law, the protection of rights and liberties, and the restraint of governmental power.²⁰⁰ The issuing of PDOs by serving judges challenges these core constitutional notions. In practice, however, the incompatibility test focuses primarily on the overarching independent discretions of the judge, rather than on these other, more subtle, affronts to the independence or integrity of the judicial institution. In this way, incompatibility arguably provides a minimal and ultimately insubstantial mechanism for achieving the purposes of the separation of judicial power. The notion of incompatibility truly has considerable potential

197 *Grollo* (1995) 184 CLR 348; *International Finance Trust* (2009) 240 CLR 319.

198 *K-Generation* (2009) 237 CLR 501; *Gypsy Jokers* (2008) 234 CLR 532; *Condon* (2013) 252 CLR 38.

199 *Grollo* (1995) 184 CLR 348; *Wainohu* (2011) 243 CLR 181.

200 Mason, above n 194, 2; Peter Gerangelos, 'Interpretational Methodology in Separation of Powers Jurisprudence: The Formalist/Functionalist Debate' (2005) 8 *Constitutional Law and Policy Review* 1, 3; James Stellios, 'Reconceiving the Separation of Judicial Power' (2010) 22 *Public Law Review* 113; New Zealand Law Commission, 'Towards a New Courts Act – A Register of Judges' Pecuniary Interests?' (Issues Paper No 1, 2011) 4; Ralf Dahrendorf, 'A Confusion of Powers: Politics and the Rule of Law' (1977) 40 *Modern Law Review* 1, 9; Denise Meyerson, 'The Rule of Law and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 1, 3.

in the achievement of judicial independence and integrity, but that potential has not been borne out in the case law to date.

The *Grollo* and *Kable* incompatibility tests thus risk the incremental erosion of the separation of judicial power by failing to prevent compromises to independence and integrity falling short of immersion, usurpation or control. It is insufficient that the incompatibility tests only prevent complete usurpations of judicial independence and allow other affronts to fair or ordinary judicial process. The incompatibility standard would be improved by evolving to better recognise that perceived judicial independence and impartiality are placed at risk by the mere involvement of judges in clearly unfair or biased proceedings.

This article has presented an interpretation of *Grollo* and *Kable* incompatibility that would better achieve judicial independence and integrity in the preventive detention context. This discussion highlights both the clear challenge to judicial independence posed by PDOs, and the potential strengths of the incompatibility test. There is clear potential in *Grollo* and *Kable* incompatibility to better protect fair process in judicial proceedings and, thereby, to more effectively preserve judicial independence and integrity. If *Kable* and *Fardon* support the existence of a higher standard of scrutiny for preventive detention powers, this would be a significant advancement in the capacity of the incompatibility standard to achieve judicial independence and integrity. However, this advancement would be strictly confined to the context of non-punitive incarceration. Not even prolonged, severe restrictions on liberty (such as may arise under a control order) would attract a similarly substantive notion of incompatibility.

The strength of the incompatibility test lies in its potential to achieve judicial independence and integrity by directly engaging these notions as determinative of constitutional validity. The weaknesses of the test lie in its unpredictable interpretation, in its unclear and dynamic relationship to other principles (such as the essential features of courts), in its steady narrowing, and in its failure to effectively prevent the erosion of judicial independence and impartiality. Some authors have suggested that there is room for the High Court to develop a stronger, clearer, more predictable approach to better achieve the aims of the separation of judicial power and avoid the incremental erosion of independence and impartiality. Ideally, such an approach could also harness the direct, principled engagement that gives the incompatibility test such strong potential to achieve judicial independence and integrity.²⁰¹

201 For analysis of varying approaches and the suggestion of a new test, see, eg, Rebecca Welsh, 'A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39 *Monash University Law Review* 66; Gabrielle Appleby, 'Imperfection and Inconvenience: *Boilermakers*' and the Separation of Judicial Power in Australia' (2012) 31 *University of Queensland Law Journal* 265.

VII CONCLUSION

This article has considered the limits that the *Constitution* places on judicially authorised preventive detention. It has argued that the involvement of serving judges in the PDO provisions violates Chapter III of the *Constitution*. The PDO provisions challenge the separation of judicial power and present an opportunity to critically assess the *Kable* and *Grollo* streams of incompatibility case law, by involving judges in proceedings that allow for the secret, short-term incarceration of citizens outside usual judicial processes.

An initial review of the *Kable* cases dealing with the powers of state and territory courts, and the *Grollo* cases dealing with the powers of federal judges *personae designatae*, reveals that these two streams of incompatibility authorities may be rationalised into one. A single constitutional notion of ‘compatibility with judicial independence and integrity’ determines the scope of powers that may be conferred on state and territory courts, as well as on all Australian judges *personae designatae*.

So what renders a power incompatible with judicial independence or institutional integrity? The incompatibility standard that arises from the authorities is narrow. Incompatibility appears to be established only by the complete immersion of a judge in the executive, the unavoidable control or usurpation of a key aspect of the judge’s decisional independence, or the compromise of a defining feature of court proceedings. Based on these observations, it appears that the appointment of serving judges as Issuing Authorities for continued PDOs is likely to pass constitutional muster, as the provisions preserve the judge’s control of proceedings and his or her capacity to independently determine whether to issue the order. This analysis reveals that the *Grollo* and *Kable* incompatibility tests have significant weaknesses in their capacity to protect some fundamental constitutional values. In particular, the jurisprudence is highly complex and fails to respond to the most troubling aspects of the preventive detention scheme – such as its gross infringements on liberty in an absence of fair, open or equal proceedings.

This article has advanced an interpretation of the incompatibility test that requires judicially authorised, non-punitive incarceration to comply with the basic tenets of fair process. On this interpretation, parliaments would be restrained from appointing judges to order the preventive detention of citizens in proceedings that lack basic aspects of natural justice, fairness and equality. As PDOs are issued in secretive, *ex parte* proceedings, in which the person has no opportunity to put his or her case or make submissions to the Issuing Authority (except through the detaining officer before proceedings for a continued PDO have commenced), the provisions do not meet this standard. Therefore, the provisions violate Chapter III of the *Constitution*. This interpretation of the incompatibility test has the potential to more effectively protect judicial independence and integrity by preserving basic aspects of procedural fairness, at least in proceedings involving the incarceration of citizens by judges.

The constitutional constraints arising from Chapter III may be avoided by simply removing judges from the preventive detention scheme and designing

provisions that are administered entirely within the executive government – for instance, by allowing senior police officers to issue all PDOs. This would present no advancement in terms of liberty or fair process, and may raise other constitutional issues.²⁰²

Two further observations may be made. First, the involvement of judges in such schemes may play a key role in securing their passage through Parliament. Without the in-built safeguard presented by the judge, the scheme may prove to be too controversial to pass through both Houses of Parliament.

Secondly, the independence of the judiciary ought not be compromised lightly. It is by isolation from, not fusion into, administrative regimes that the judicial arm of government maintains its independence and integrity.²⁰³ These qualities have been described as ‘a keystone in the democratic arch ... If it crumbles, democracy falls with it’.²⁰⁴ On this basis the High Court has recognised that judicial independence ‘may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action’.²⁰⁵ And, as Denise Meyerson observes: ‘In the long run, the use of the courts to restrict the liberty of individuals for the purpose of protecting the public may therefore kill the goose that lays the golden egg’.²⁰⁶

Thus, in order to maintain the independence and integrity of the Australian judiciary, future preventive detention schemes ought to appropriately involve judges where their skills of independent oversight are required, but should be designed in a manner that adheres to the core aspects of fair process. In this way, the *Constitution* may permit non-punitive detention, but only in circumstances that appropriately adhere to core rule of law values. If anti-terrorism PDOs cannot exist *and* safeguard judicial independence, or the fairness, objectivity and equality of law, then – as recommended by both the INSLM and COAG – that scheme risks constitutional invalidity and should be repealed.²⁰⁷

202 The scope of non-judicial detention received attention in *Chu Kheng Lim* (1992) 176 CLR 1; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 88 ALJR 847, but remains unresolved in many respects.

203 Denise Meyerson, ‘Using Judges To Manage Risk: The Case of *Thomas v Mowbray*’ (2008) 36 *Federal Law Review* 209, 228.

204 Australian Bar Association, ‘The Independence of the Judiciary’ [1991] (Winter) *Victorian Bar News* 17, 18.

205 *Mistretta v United States*, 488 US 361, 407 (Blackmun J) (1989), quoted in *Grollo* (1995) 184 CLR 348, 366 (Brennan CJ, Deane, Dawson and Toohey JJ).

206 Meyerson, ‘Using Judges To Manage Risk’, above n 203, 228.

207 Council of Australian Governments, above n 132; Bret Walker, above n 132.