

# PERSONA DESIGNATA, PUNITIVE PURPOSES AND THE ISSUE OF PREVENTATIVE DETENTION ORDERS: ALL ROADS LEAD TO INFRINGEMENT OF THE SEPARATION OF JUDICIAL POWER

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*The doctrine of separation of judicial power set out in the Australian Constitution is an important mechanism for ensuring the protection of human rights. The doctrine encompasses two elements: (1) that ch III courts have the exclusive authority to exercise judicial power; and (2) that ch III courts may only exercise judicial power. There is a strong argument that the preventative detention regime contained in the anti-terrorism legislation breaches these elements, and is therefore unconstitutional, on two bases. On the one hand, a judge who issues an order, which is done on a persona designata or personal capacity basis, is undertaking a non-judicial function that is inconsistent with the institutional integrity of the judiciary; thereby infringing the second element. On the other hand, even if it is not inconsistent with the institutional integrity of the judiciary, detention could be for punitive purposes and therefore constitutes an exercise of judicial power which cannot be undertaken persona designata; thereby infringing the first element. With the rising terror threat and recent world events, it is only a matter of time before the executive seeks to rely on the powers to issue an order. The 2015 decision of North Australian Aboriginal Justice Agency Ltd v Northern Territory, where the issue of executive detention was recently considered by the High Court, leaves open the possibility that the regime may not withstand judicial challenge.*

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## I INTRODUCTION

Australia's preventative detention order ('PDO') regime was a controversial addition to the terrorism provisions of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') and the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') following the terrorist attacks in the United States on 11 September 2001.<sup>1</sup> The regime is a form of executive detention which allows an individual to be held in custody for up to 168 hours without being charged with a crime (or even suspected of committing a crime) where holding the individual would assist the Australian Federal Police ('AFP') or the Australian Security Intelligence Organisation ('ASIO') in a terrorist investigation. While to date no one has been detained under the regime, and therefore its validity has not been judicially tested, its future use is becoming more and more likely as fear grows of attacks on home soil following events such as the Martin Place Siege in December 2014, the Paris attacks in November 2015 and the Nice attacks in July 2016. Given the significance of the regime, and the interest in the anti-terrorism legislation from academics and practitioners alike, any future detention will inevitably result in a judicial challenge. As with the control order regime, which falls short of detention but nevertheless results in restrictions on liberty, questions as to the compatibility of the PDO regime with the separation of judicial power will be considered. The recent decision of *North Australian Aboriginal Justice Agency Ltd v Northern Territory*,<sup>2</sup> which addressed the validity of an executive detention regime whereby individuals can be held for up to four hours without charge, leaves open the possibility that the PDO regime may not withstand judicial challenge.

<sup>1</sup> Although the term 'preventative detention order' ('PDO') is only used in the *Criminal Code Act 1995* (Cth), the author proceeds on the basis that both the *Criminal Code Act 1995* (Cth) and *Australian Security Intelligence Organisation Act 1979* (Cth) regimes are substantively similar. Therefore, the author uses 'PDO regime' to refer to the regimes of executive detention under both Acts.

<sup>2</sup> (2015) 326 ALR 16.

Chapter III of the *Constitution* separates judicial power from the legislative and executive powers of the Commonwealth so as to ensure that disputes concerning 'legal rights and obligations ... are determined by independent judges, free from control or influence.'<sup>3</sup> The separation of judicial power championed in *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers' Case*')<sup>4</sup> and *A-G (Cth) v The Queen* ('*Boilermakers' Appeal*')<sup>5</sup> encompasses two elements: (1) that ch III courts have the exclusive authority to exercise judicial power;<sup>6</sup> and (2) that ch III courts may only exercise judicial power and so must not discharge non-judicial functions.<sup>7</sup> These two elements seek to reach a balance between maintaining the independence of the judiciary and ensuring that the executive is protected from judicial interference in relation to particular administrative decisions which are properly made by the executive. In the absence of a comprehensive set of constitutionally protected rights, the separation of judicial power is significant in terms of the role of the judiciary as guardian of the rights and liberties of individuals.

A recognised exception to the second element of the separation of judicial power is the concept of judges acting in a *persona designata* capacity. The term '*persona designata*' means a 'person designated individually or by name, rather than as a member of a class'.<sup>8</sup> In this legal context, it refers to judges exercising powers or performing functions in a personal, rather than a judicial, capacity. This controversial construct has been incorporated into the PDO regime through the legislation stipulating that judicial officers can be appointed by Ministers as 'issuing authorities' and 'prescribed authorities' to issue orders and, in some cases, conduct the questioning of detainees, *persona designata*. Through stipulating that judges perform such functions *persona designata*, and therefore as non-judicial functions, the Parliament sought to avoid infringement of the first element of the separation of judicial power. Nevertheless, there is a strong argument that the PDO regime breaches both

<sup>3</sup> George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 185, 188.

<sup>4</sup> (1956) 94 CLR 254.

<sup>5</sup> (1957) 95 CLR 529. In this appeal judgment, the Privy Council affirmed the *Boilermakers' Case*.

<sup>6</sup> (1956) 94 CLR 254, 268–71 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

<sup>7</sup> *Ibid* 271–2, 278.

<sup>8</sup> Peter E Nygh and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 1998) 334.

elements and is therefore unconstitutional on two bases. On the one hand, a judge who issues an order *persona designata* is undertaking a non-judicial function which is inconsistent with the institutional integrity of the judiciary; thereby infringing the first element. On the other hand, even if it is not inconsistent, detention could be for punitive purposes and therefore constitutes an exercise of judicial power which cannot be undertaken *persona designata*; thereby infringing the second element. Thus these alternative arguments reach the same conclusion: that the scheme infringes the separation of power and is therefore constitutionally invalid.

Part II contains a short discussion of the rationale for judicial independence and the important role that the separation of judicial power plays in protecting human rights, particularly the right to liberty of the person which is significant in the context of any form of detention. This will provide a human rights context to Parts III and IV which discuss the development of the two elements of the separation of judicial power championed in the *Boilermakers' Case*<sup>9</sup> and how the courts have approached these elements in key cases. It will focus on the *persona designata* construct in relation to the second element, followed by the immunity from detention for punitive purposes in relation to the first element. This includes a critique of the concept of *persona designata* more generally. Part V will apply the principles set out in the key cases to the PDO regime to reach the conclusion that the regime, if challenged, is likely to be found to infringe one of the two elements of the separation of power and would therefore be held invalid.

## II JUDICIAL INDEPENDENCE FOR THE PROTECTION OF RIGHTS

'Since the law is for all, the question of whether it has been broken must be objectively and impartially inquired into.'<sup>10</sup> The role of the judiciary, as the branch of the Commonwealth vested with the judicial power, is to undertake that inquiry. The decision in *New South Wales v Commonwealth* ('*Wheat Case*') in 1915 was the first significant decision to address the separation of judicial power.<sup>11</sup> Here, the High Court recognised the importance of judicial impartiality, and that the object of the constitutional

<sup>9</sup> (1956) 94 CLR 254.

<sup>10</sup> R G Hammond, 'The Judiciary and the Executive' (1991) 1 *Journal of Judicial Administration* 88, 89.

<sup>11</sup> (1915) 20 CLR 54.

separation of powers would be frustrated through control or interference by the Parliament.<sup>12</sup> In the *Boilermakers' Appeal* to the Privy Council in 1957, Viscount Simonds acknowledged the importance of the judiciary being free from influence, stating, 'in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive.'<sup>13</sup> Following these seminal cases, the High Court has been firm in defending the independence of the judiciary and its function in scrutinising legislative and executive actions to ensure that powers exercised are *intra vires*. From a human rights perspective, it is what Deane J describes as 'the *Constitution's* only general guarantee of due process.'<sup>14</sup> It is this separation that gives rise to the protection against arbitrary detention.

The core meaning of 'judicial power' has been said to involve 'a decision settling for the future ... a question [between identified parties] as to the existence of a right or obligation'.<sup>15</sup> It is concerned with ascertaining, declaring and enforcing existing 'rights and liabilities'.<sup>16</sup> In 1909 in *Huddart, Parker & Co Pty Ltd v Moorehead*,<sup>17</sup> Griffith CJ described judicial power as being:

the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.<sup>18</sup>

Judicial power has often included settling a controversy which relates to human rights. Thus, while on some levels separation between the legislature and executive does not strictly exist in Australia due to the doctrine of responsible government, as famously stated in Montesquieu's *The Spirit of Laws*, 'there is no liberty, if the judiciary power be not separated from the

<sup>12</sup> Ibid 93, 89–90 (Isaacs J).

<sup>13</sup> (1957) 95 CLR 529, 540 (Viscount Simonds for Viscounts Simonds and Kilmuir LC, Lords Morton, Tucker, Cohen, Keith and Somervell).

<sup>14</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580.

<sup>15</sup> *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J).

<sup>16</sup> *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 463 (Isaacs and Rich JJ).

<sup>17</sup> (1909) 8 CLR 330.

<sup>18</sup> Ibid 357.

legislative and executive.<sup>19</sup> The judiciary must therefore be granted complete liberty to determine cases, and not be subject to interference from the Parliament or the executive. It is for this reason that the High Court has insisted on the maintenance of its independence and struck down legislation which purported to infringe on its role.

The significance of the doctrine of separation of judicial power in protecting human rights is no more apparent than in the context of the anti-terrorism legislation. In the aftermath of the 11 September 2001 terrorist attacks, the Australian Parliament introduced anti-terrorism legislation which contained a raft of measures,<sup>20</sup> including the *ASIO Act's* regime for the issue of questioning and detention warrants which allows individuals to be detained for up to 168 hours without being charged with a criminal offence.<sup>21</sup> This regime complements the *Criminal Code's* PDO regime.<sup>22</sup> Unlike the better-known control orders which merely restrict an individual's movements and activities,<sup>23</sup> a PDO results in an individual being taken into custody for reasons such as to preserve evidence or prevent a suspected terrorist act.<sup>24</sup> PDOs therefore place a much greater burden on the right to liberty compared to control orders. The measures sought to address the perceived inadequacies of the existing law to deal with the threat of terrorism through not only punishing terrorists but also preventing the commission of terrorist attacks by allowing the liberty of individuals to be restricted and monitored.<sup>25</sup> As explained by former Attorney-General Philip Ruddock, '[t]he law should operate as both a sword and a shield — the means by which offenders are punished but also the mechanism by which crime is prevented.'<sup>26</sup> There is of course a need to strike a balance between protecting the community and

<sup>19</sup> Baron de Montesquieu, *The Spirit of Laws* (Thomas Nugent trans, Colonial Press, revised ed, 1899) vol 1, 152 [trans of: *De L'Esprit des Loix* (first published 1748)].

<sup>20</sup> *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) sch 1 item 24, inserting *ASIO Act* pt III div 3; *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4 item 24, inserting *Criminal Code* ch 5 pt 5.3 divs 104–5.

<sup>21</sup> *ASIO Act* pt III div 3; see especially at ss 34F, 34G(4), 34S.

<sup>22</sup> *Criminal Code* div 105.

<sup>23</sup> *Ibid* div 104; see at s 104.5(3).

<sup>24</sup> *Ibid* ss 105.4(4)–(6).

<sup>25</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (Philip Ruddock, Attorney-General).

<sup>26</sup> Philip Ruddock, 'Legal Framework and Assistance to Regions' (Speech presented at the Regional Ministerial Counter-Terrorism Conference, Bali, February 2004).

protecting individual rights. In the absence of a constitutionally entrenched bill of rights, the role and independence of the judiciary is vital in maintaining an appropriate balance. This includes protecting its exclusive mandate to exercise the judicial power of the Commonwealth, which includes ordering detention for punitive purposes. As argued in Part V, to the extent that the PDO regime could result in individuals being detained for punitive purposes, as a form of executive detention it will be constitutionally invalid.

However, just as the Parliament must not infringe on the judiciary's exclusive mandate to exercise judicial power, so too must the judiciary not transgress its constitutional functions. Key to the vesting of the judicial power of the Commonwealth in the judiciary is that the judiciary is restricted to only exercising judicial power. That said, in some instances, including in relation to the issue of PDOs, members of the judiciary have been permitted to act in a *persona designata* capacity to perform executive or administrative functions. This is a problematic concept and does raise concerns that the independent role of members of the judiciary, which ch III strives to protect, could be compromised. Parts III and IV of this article discuss each of the two elements of the separation of judicial power, and set out the principles derived from key cases which are then applied to the PDO regime in Part V.

### III RESTRICTIONS ON COURTS EXERCISING NON-JUDICIAL FUNCTIONS

Given that the only powers the Commonwealth Parliament may vest in the judiciary are those functions that form part of, or are incidental to, the judicial power of the Commonwealth,<sup>27</sup> the judiciary must not discharge non-judicial functions (such as giving advisory opinions).<sup>28</sup> According to Winterton, the purpose of this principle is:

to protect the independence of federal judges, who must determine the legality of action by the political branches, by freeing them from the supposedly contaminating influence of involvement with government policy and other non-judicial issues.<sup>29</sup>

<sup>27</sup> *Boilermakers' Case* (1956) 94 CLR 254, 271–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

<sup>28</sup> See, eg, *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 ('*Advisory Opinions Case*').

<sup>29</sup> Winterton, above n 3, 188.

However, it has been accepted that while courts cannot perform non-judicial functions, it is possible to confer such functions on individual judges in their personal capacity.

Adherence to this second element of the separation of judicial power is quite obviously necessary if the judiciary is to fulfil its role as independent decision-maker regarding the rights and obligations of individuals. It follows that an attempt to vest non-judicial functions in courts will be constitutionally invalid. The key case in this regard is *Kable v Director of Public Prosecutions (NSW)* ('*Kable*').<sup>30</sup> Here, s 5(1) of the *Community Protection Act 1994* (NSW) conferred on the Supreme Court of New South Wales the power to order the detention of an individual in prison if satisfied on reasonable grounds that the individual posed a significant danger to the public. The appellant challenged the validity of the Act after he was detained. The High Court held that the Act was invalid because the function of issuing such an order without adjudication of criminal guilt was incompatible with the judicial power of the Commonwealth set out in ch III, which the Supreme Court of New South Wales exercises from time to time.<sup>31</sup> Thus, the power vested in the Court by the Act to issue detention orders was a non-judicial function that was inconsistent with ch III.

There is one recognised exception to this general rule that courts cannot exercise non-judicial functions; specifically where judges are acting *persona designata*, or in a personal capacity. While this is not a new concept, and was discussed in Australia as early as 1906 in the context of the Supreme Court of Western Australia determining disputed elections,<sup>32</sup> it has gained more attention in recent decades as the Parliament has attempted to circumvent the strict rules imposed by the separation of judicial power. In some instances, the functions performed by judicial members pose little risk to the rights of individuals, and therefore the effect that this could have on the role of the judiciary in determining existing rights and functions is immaterial. In other instances, including in relation to the issue of PDOs, the split between the functions of the different arms of government, which the separation of powers strives to maintain, is blurred. Given the subject matter being dealt with — the right to freedom from deprivation of liberty without being

<sup>30</sup> (1996) 189 CLR 51.

<sup>31</sup> *Ibid* 98 (Toohey J), 107 (Gaudron J), 109 (McHugh J), 127–8 (Gummow J).

<sup>32</sup> *Holmes v Angwin* (1906) 4 CLR 297, 304–7 (Griffith CJ).



afforded due process of the law — the risks and consequences for individuals are significantly higher. The *persona designata* construct is being used as a deliberate attempt to circumvent the restrictions imposed on the judiciary from exercising non-judicial functions.

The 1979 case of *Drake v Minister for Immigration and Ethnic Affairs* (*'Drake'*)<sup>33</sup> gave rise to one of the first significant decisions on the *persona designata* construct following the *Boilermakers' Case*. Here, an argument was put forward that a member of the Administrative Appeals Tribunal ('AAT'), who was a Federal Court judge, infringed the separation of powers on the basis that he could not act in an administrative capacity by sitting on the AAT.<sup>34</sup> The Federal Court held that there was nothing in the *Constitution* that precluded a ch III judge from acting in another role in their personal capacity. In a joint judgment, Bowen CJ and Deane J stated:

There is nothing in the *Constitution* which precludes a justice [of a ch III court] from, in his personal capacity, being appointed to an office involving the performance of administrative or executive functions including functions which are quasi-judicial in their nature. Such an appointment does not involve any impermissible attempt to confer upon a [c]h III court functions which are antithetical to the exercise of judicial power. Indeed, it does not involve the conferring of any functions at all on such a court.<sup>35</sup>

This principle was applied in 1985 in *Hilton v Wells* in relation to phone tapping warrants.<sup>36</sup> Here, the *Telecommunications (Interception) Act 1979* (Cth) conferred upon 'a Judge of the Federal Court of Australia'<sup>37</sup> the power to issue warrants authorising the interception of telecommunications on behalf of the executive.<sup>38</sup> It was alleged that the arrangement infringed the *Boilermakers'* principle due to the issue of warrants being an administrative rather than judicial function.<sup>39</sup> In a joint judgment, Gibbs CJ, Wilson and Dawson JJ confirmed that conferral of such an administrative function on the Federal Court itself (or indeed state Supreme Courts) would have been an

<sup>33</sup> (1979) 24 ALR 577.

<sup>34</sup> Ibid 583–4 (Bowen CJ and Deane J).

<sup>35</sup> Ibid 584.

<sup>36</sup> (1985) 157 CLR 57.

<sup>37</sup> *Telecommunications (Interception) Act 1979* (Cth) s 18, as repealed by *Telecommunications (Interception) Amendment Act 1987* (Cth) s 14.

<sup>38</sup> *Telecommunications (Interception) Act 1979* (Cth) s 20(1), as repealed by *Telecommunications (Interception) Amendment Act 1987* (Cth) s 14.

<sup>39</sup> See *Hilton v Wells* (1985) 157 CLR 57, 67.

infringement on the separation of powers given that it was not ancillary or incidental to a judicial function.<sup>40</sup> However, their Honours determined that (unlike in *Kable*,<sup>41</sup> where conferral was on the Supreme Court) individual judges were undertaking the administrative function in a personal capacity.<sup>42</sup> The High Court confirmed the validity of such arrangements and endorsed the above statement of Bowen CJ and Deane J in *Drake*.<sup>43</sup> Indeed, the *Telecommunications (Interception) Act 1979* (Cth), was subsequently amended to make it clear that the function was in fact conferred on a *persona designata* basis,<sup>44</sup> although of course this did little but to confirm as a matter of statutory construction the capacity with which judges were acting in issuing warrants.

The artificiality of the construct was highlighted by Mason and Deane JJ:

To the intelligent observer ... it would come as a surprise to learn that a judge, who is appointed to carry out a function by reference to his judicial office and who carries it out in his court with the assistance of its staff, services and facilities, is not acting as a judge at all, but as a private individual. Such an observer might well think, with some degree of justification, that it is all an elaborate charade.<sup>45</sup>

Their Honours rejected the ‘metaphysical notion’ that a judge acting in their capacity as a judge could nevertheless be ‘detached from the court of which [they are] a member’; asserting that such a notion could not ‘be supported as a matter of legal theory.’<sup>46</sup> Their Honours clearly recognised the potential of such constructs to undermine the principle in *Boilermakers*.<sup>47</sup>

These sentiments have been repeated in more recent cases concerning the issue of warrants. A decade later in *Grollo v Palmer*,<sup>48</sup> the High Court

<sup>40</sup> Ibid.

<sup>41</sup> (1996) 189 CLR 51.

<sup>42</sup> *Hilton v Wells* (1985) 157 CLR 57, 73.

<sup>43</sup> Ibid 69, citing (1979) 24 ALR 577, 584.

<sup>44</sup> Explanatory Memorandum, *Telecommunications (Interception) Amendment Bill 1987* (Cth) 12 [15]; *Telecommunications (Interception) Amendment Act 1987* (Cth) s 8, inserting *Telecommunications (Interception) Act 1979* (Cth) s 6D. Note that this Act is now called the *Telecommunications (Interception and Access) Act 1979* (Cth).

<sup>45</sup> *Hilton v Wells* (1985) 157 CLR 57, 84.

<sup>46</sup> Ibid 81.

<sup>47</sup> Ibid 81–2.

<sup>48</sup> (1995) 184 CLR 348.

considered the amendments to the *Telecommunications (Interception) Act 1979* (Cth). It affirmed the *persona designata* arrangements in the legislation, but drew on *Hilton v Wells* to set limits to a judge's ability to act in a personal capacity.<sup>49</sup> This included that 'no function can be conferred 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'.<sup>50</sup> Brennan CJ, Deane, Dawson and Toohey JJ provided three circumstances where incompatibility will arise where:

[1] [there is] so permanent and complete a commitment to the performance of non-judicial functions ... that the further performance of substantial judicial functions by that judge is not practicable. ... [2] [T]he performance of non-judicial functions [is] of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is compromised or impaired. [3] Or ... the performance of non-judicial functions [is] of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished.<sup>51</sup>

For example, it was held in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* that the appointment of a Federal Court judge as a reporter was incompatible with the Federal Court's responsibility to exercise the judicial power of the Commonwealth given that it was essentially a political position.<sup>52</sup>

One of the significant conclusions reached by the majority in *Grollo v Palmer*<sup>53</sup> did not relate to the general principle of judges exercising administrative functions *persona designata*, but more specifically the issue of judges exercising administrative functions as part of criminal investigations. Here it was argued that judges undertaking functions in the process of a criminal investigation, including by issuing telephonic interception warrants which could result in the collection of evidence, was incompatible with judicial office.<sup>54</sup> Brennan CJ, Deane, Dawson and Toohey JJ rejected this argument. Their Honours accepted that:

<sup>49</sup> Ibid 364–5 (Brennan CJ, Deane, Dawson and Toohey JJ), citing *Hilton v Wells* (1985) 157 CLR 57, 83 (Mason and Deane JJ), 73–4 (Gibbs CJ, Wilson and Dawson JJ).

<sup>50</sup> *Grollo v Palmer* (1995) 184 CLR 348, 365.

<sup>51</sup> Ibid.

<sup>52</sup> (1996) 189 CLR 1, 16–20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

<sup>53</sup> (1995) 184 CLR 348.

<sup>54</sup> Ibid 358–9 (Brennan CJ, Deane, Dawson and Toohey JJ).

If the issuing of interception warrants were reasonably to be regarded as a judicial participation in criminal investigation, it would be a function which could not be conferred on a judge without compromising the judiciary's essential separation from the executive government.<sup>55</sup>

Their Honours considered that '[t]he judicial method of deciding questions in controversy has no application in exercising the power to issue an interception warrant.'<sup>56</sup> For instance, '[u]nlike a warrant to enter, search and seize, [an interception warrant's] execution may go undetected' and so there would be no potential for 'judicial review of a judge's decision to issue a warrant'.<sup>57</sup> It was further held that:

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. In other words, the professional experience and cast of mind of a judge is a desirable guarantee that the appropriate balance will be kept between the law enforcement agencies on the one hand and criminal suspects or suspected sources of information about crime on the other. 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.<sup>58</sup>

The references to the 'battle against serious crime' is a similar argument to that put forward by the Parliament to justify the PDO regime,<sup>59</sup> as discussed in Part V of this article.

By contrast, in finding that the grant of the power to issue warrants was contrary to the *Constitution* and therefore invalid, McHugh J delivered a

<sup>55</sup> Ibid 366–7.

<sup>56</sup> Ibid 367.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 2005, 81 (Nicola Roxon).

passionate dissent. His Honour affirmed the need for ‘the incompatibility qualification on the *persona designata* doctrine’ if ‘the separation of powers doctrine is to continue effectively as one of the bulwarks of liberty enacted by the *Constitution*’.<sup>60</sup> In applying the qualification, his Honour concluded that in this instance:

the functions undertaken by ... judges acting as *persona designata* ... [were] of such a nature and [were] exercised in such a manner that public confidence in the ability of the judges to perform their judicial functions in an independent and impartial manner [was] likely to be jeopardised.<sup>61</sup>

His Honour reached this conclusion with reference to both ‘the nature of the power and the manner in which it is exercised’ — the nature of the power approves or authorises the police to invade ‘the privacy of ordinary citizens for the purposes of a criminal investigation’, while the manner of the exercise provides judges with a broad ‘discretion to approve or disapprove’, thereby essentially putting themselves ‘in the uniform of the constable.’<sup>62</sup> McHugh J continued:

The result is that, whenever the issue of the warrant is approved, the *persona designata* becomes open to the criticism that he or she has preferred the interests of the investigative agency to the privacy and interests of the persons whose communications are to be intercepted — the ordinary citizens whose liberty and interests the separation of powers is designed to protect.<sup>63</sup>

On this basis, his Honour concluded that the power to authorise the issue of intercept warrants was incompatible with the exercise of the ordinary judicial functions of a judge of a federal court.<sup>64</sup> The High Court has since held on multiple occasions that while ‘[p]erception as to the undermining of public confidence is an indicator’, it is ‘not the touchstone, of invalidity’.<sup>65</sup> The touchstone of invalidity concerns institutional integrity, and ‘[t]hat touchstone extends to maintaining the appearance as well as the realities of impartiality

<sup>60</sup> *Grollo v Palmer* (1995) 184 CLR 348, 376.

<sup>61</sup> *Ibid* 378.

<sup>62</sup> *Ibid* 378–9.

<sup>63</sup> *Ibid* 379.

<sup>64</sup> *Ibid* 384.

<sup>65</sup> *Fardon v A-G (Qld)* (2004) 223 CLR 575, 618 [102] (Gummow J). See also *South Australia v Totani* (2010) 242 CLR 1, 82 [206] (Hayne J).

and independence of the courts from the executive.<sup>66</sup> Nevertheless, the concerns raised by McHugh J certainly resonate today when considering these issues.

The incompatibility qualification to the *persona designata* arrangements and the issue of public perception arose in the 2011 motorcycle gang case of *Wainohu v New South Wales*.<sup>67</sup> This case concerned the capacity of Supreme Court of New South Wales judges who had been designated ‘eligible judges’ by the Attorney-General to declare an organisation a ‘declared organisation’ for the purposes of the *Crimes (Criminal Organisations Control) Act 2009* (NSW).<sup>68</sup> Section 13(2) of the Act provided that an eligible judge was not required to provide any grounds or reasons for a declaration or decision. The Supreme Court was then empowered, on application by the Commissioner of Police, to make interim control orders against individual members of declared organisations,<sup>69</sup> while certain activities of those ‘controlled members’ were made offences.<sup>70</sup> The appellant was a member of the Hells Angels Motorcycle Club and challenged the validity of the legislation after the Acting Police Commissioner applied for a declaration in relation to the Club.<sup>71</sup>

In a 6:1 majority, the High Court held that the legislation was invalid on the basis that the performance of roles by state judges personally was incompatible with or repugnant to the institutional integrity of the court.<sup>72</sup> In particular, exempting judges from the requirement to give reasons for a declaration, which would otherwise be ‘a defining characteristic of a court’, was incompatible with the institutional integrity of the Supreme Court.<sup>73</sup> Gummow, Hayne, Crennan and Bell JJ, quoting Gaudron J in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*, noted that judges performing such roles in a personal capacity could ‘diminish public

<sup>66</sup> *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 326 ALR 16, 31 [40] (French CJ, Kiefel and Bell JJ).

<sup>67</sup> (2011) 243 CLR 181.

<sup>68</sup> See generally *ibid* 191–6 [1]–[20] (French CJ and Kiefel J).

<sup>69</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 14(1); see also at ss 16, 19.

<sup>70</sup> *Ibid* ss 26, 27.

<sup>71</sup> *Wainohu v New South Wales* (2011) 243 CLR 181, 191 [1]–[3] (French CJ and Kiefel J), 220–1 [74]–[75] (Gummow, Hayne, Crennan and Bell JJ).

<sup>72</sup> *Ibid* 192 [6], 216–20 [63]–[73] (French CJ and Kiefel J), 228–30 [104]–[109], 231 [115]–[116] (Gummow, Hayne, Crennan and Bell JJ).

<sup>73</sup> *Ibid* 209 [44] (French CJ and Kiefel J).

confidence in the particular judges concerned or in the judiciary generally.<sup>74</sup> This case was significant as it extended the *Kable* principle, which concerned a state court undertaking a non-judicial function, to state judges undertaking non-judicial functions in a personal capacity.

While the High Court has imposed limits on the *persona designata* concept, the general principle has continued to be criticised judicially and in academia as being no more than a charade, given that a judge is requested to undertake that function because he or she is in fact a judge. Sir Anthony Mason extra-judicially criticised the artificiality of the concept:

The concept of *persona designata* has a distinctly artificial flavour about it. The concept, which would have appealed to mediaeval schoolmen, has been criticised on the ground that it contemplates the judge acting in his character at large, detached from the court of which he is a member. The concept has little to commend it. Rationality would be advanced if the concept were jettisoned and replaced by the incompatibility test.<sup>75</sup>

Such arrangements also put at risk the separation of powers through blurring the lines between the roles of those that create, administer and interpret the laws. Decisions such as *Hilton v Wells*<sup>76</sup> have missed the major point from the *Boilermakers' Case*<sup>77</sup> about 'the danger to the standing, independence and impartiality of the courts arising from the mixture of judicial and non-judicial powers in the same persons.'<sup>78</sup> As Shapiro argues:

To the extent that courts make law [or, it might be interpolated, assert fundamental rights], judges will be incorporated into the governing coalition, the ruling elite, the responsible representatives of the people, or however else the political regime may be expressed. In most societies this presents no problem at all because judging is only one of the many tasks of the governing cadre. In societies that seek to create independent judiciaries, however, this

<sup>74</sup> Ibid 226 [94], quoting *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 26.

<sup>75</sup> Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1, 5, quoted in *Wainohu v New South Wales* (2011) 243 CLR 181, 211 [49] (French CJ and Kiefel J).

<sup>76</sup> (1985) 157 CLR 57.

<sup>77</sup> (1956) 94 CLR 254.

<sup>78</sup> Leslie Zines, *The High Court and the Constitution* (Butterworths, 4<sup>th</sup> ed, 1997) 216.

reintegration will nonetheless occur, even at substantial costs to the proclaimed goal of judicial independence.<sup>79</sup>

Lynch and Reilly correctly point out that while there may be a positive motivation for using the judiciary to make orders:

the more often the executive uses judicial independence to bolster the legitimacy of its actions, and the more often the judiciary participate[s] in processes that are not judicial in nature, the more eroded judicial independence becomes.<sup>80</sup>

Further, while there is a need for an appropriate level of scrutiny to be applied to the issue of a warrant or other order, other individuals who are not currently serving members of the judiciary (such as former judges or senior lawyers) may equally be capable of applying a robust and defensible decision-making process, albeit without the same security of tenure. These issues are particularly relevant in relation to the PDO regime, which requires judges to participate alongside the executive in intelligence gathering processes.

#### IV THE JUDICIARY'S EXCLUSIVE POWER TO EXERCISE JUDICIAL FUNCTIONS

The second element of the separation of judicial power dictates that any attempt by the Parliament to vest judicial power or functions in a body other than a ch III court is invalid.<sup>81</sup> This includes a prohibition on the Parliament itself exercising judicial power. This is because '[t]o vest in the same body executive and judicial power is to remove a vital constitutional safeguard.'<sup>82</sup> To this end, ch III courts enjoy the exclusive authority to exercise the judicial power of the Commonwealth. There have been many instances where the

<sup>79</sup> Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981) 34. See also Edward D Bayda, 'The Processes of Dispute Resolution' in Rosalie S Abella and Melvin L Rothman (eds), *Justice Beyond Orwell* (Éditions Yvon Blais, 1985) 439, 449.

<sup>80</sup> Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105, 109.

<sup>81</sup> See, eg, *Wheat Case* (1915) 20 CLR 54, 90 (Isaacs J); *Boilermakers' Case* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

<sup>82</sup> *Boilermakers' Appeal* (1957) 95 CLR 529, 540-1 (Viscount Simonds for Viscounts Simonds and Kilmuir LC, Lords Morton, Tucker, Cohen, Keith and Somervell).



High Court has held attempts by the Parliament to vest judicial power in non-judicial bodies or to limit the judiciary's exercise of judicial power to be unconstitutional. Some of the most controversial cases have related to where penalties have been imposed or individuals have been detained, which is highly relevant in the context of the PDO regime.

On a number of occasions, the High Court has held legislation invalid which created bodies that purported to exercise the judicial power of the Commonwealth, but which were not established under *Constitution* ch III. In the *Wheat Case*,<sup>83</sup> the *Inter-State Commission Act 1912* (Cth) conferred power on the Inter-State Commission to determine complaints,<sup>84</sup> declare state regulations invalid,<sup>85</sup> impose penalties,<sup>86</sup> award damages<sup>87</sup> and grant injunctions.<sup>88</sup> While the High Court accepted that adjudicating was not the exclusive domain of ch III courts,<sup>89</sup> having regard to the nature of the Commission and its powers, the Commission did purport to exercise judicial power.<sup>90</sup> Since the Commission was not a court established under *Constitution* s 71,<sup>91</sup> pt V of the Act, which conferred judicial powers on the Commission, was held to be invalid by four of the six judges: Griffith CJ, Isaacs, Powers and Rich JJ.<sup>92</sup> In the 2009 case of *Lane v Morrison*,<sup>93</sup> the High Court held the Australian Military Court to be unconstitutional on similar grounds. The Court was established under the *Defence Force Discipline Act 1982* (Cth)<sup>94</sup> 'to make binding and authoritative decisions of guilt or innocence independently from the chain of command of the defence forces.'<sup>95</sup> However, by purporting to exist outside the command structure, when the s 51(vi) defence power requires that connection in order for the Act to be *intra vires*, the jurisdiction

<sup>83</sup> (1915) 20 CLR 54.

<sup>84</sup> *Inter-State Commission Act 1912* (NSW) s 24.

<sup>85</sup> *Ibid* s 32.

<sup>86</sup> *Ibid* s 34(1).

<sup>87</sup> *Ibid* s 30(1).

<sup>88</sup> *Ibid* s 31.

<sup>89</sup> *Wheat Case* (1915) 20 CLR 54, 87 (Isaacs J).

<sup>90</sup> See, eg, *ibid* 60–2 (Griffith CJ).

<sup>91</sup> *Ibid* 62 (Griffith CJ), 93–4 (Isaacs J), 106 (Powers J), 109 (Rich J).

<sup>92</sup> See *ibid* 65 (Griffith CJ), 95 (Isaacs J), 107 (Powers J), 109–11 (Rich J).

<sup>93</sup> (2009) 239 CLR 230.

<sup>94</sup> *Defence Force Discipline Act 1982* (Cth) s 114, as repealed by *Military Justice (Interim Measures) Act (No 1) 2009* (Cth) sch 1 item 72.

<sup>95</sup> *Lane v Morrison* (2009) 239 CLR 230, 266–7 [115] (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

conferred on the Court consequently involved the exercise of judicial power otherwise than in accordance with ch III.<sup>96</sup> Just as the judiciary must remain independent, so too must it retain exclusive control over matters for judicial determination.

The High Court has similarly invalidated legislation which purported to limit the judiciary's power. This issue most commonly arises in the context of 'privative' or 'ouster' clauses which are attempts by the Parliament to limit the scope of judicial review of administrative decisions made under legislation. Historically, the leading case in this regard was the 1945 decision of *R v Hickman; Ex parte Fox* ('*Hickman*').<sup>97</sup> Here, a Tribunal was empowered under regulations to make certain decisions regarding employers and employees in the coal mining industry.<sup>98</sup> A privative clause stated that the Tribunal's decision 'shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any [c]ourt on any account whatever.'<sup>99</sup> With reference to *Constitution* s 75(v), the High Court concluded that legislation could not 'affect the jurisdiction of this Court to grant a writ of prohibition against officers of the Commonwealth when the legal situation requires that remedy.'<sup>100</sup> In concluding that the privative clause did not exclude it from reviewing the Tribunal's decision, and finding that the Tribunal had attempted to decide a matter outside its authority, Dixon J stated:

no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.<sup>101</sup>

<sup>96</sup> Ibid 266–7 [114]–[116].

<sup>97</sup> (1945) 70 CLR 598.

<sup>98</sup> *National Security (Coal Mining Industry Employment) Regulations 1941* (Cth).

<sup>99</sup> Ibid reg 17.

<sup>100</sup> *Hickman* (1945) 70 CLR 598, 614 (Dixon J).

<sup>101</sup> Ibid 615.

The application of the *Hickman* principle was considered in 2003 in *Plaintiff S157/2002 v Commonwealth*.<sup>102</sup> This case concerned a privative clause in the *Migration Act 1958* (Cth) that purported to restrict the judiciary from reviewing migration and visa decisions.<sup>103</sup> The High Court held that the *Hickman* principle was simply a rule of construction which allowed apparently incompatible statutory provisions to be reconciled.<sup>104</sup> Their Honours identified that there can be no general rule as to the meaning or effect of privative clauses, but rather the meaning of a privative clause must be ascertained from its terms.<sup>105</sup> While the High Court upheld the validity of the privative clause, it determined that it had limited effect in that it did not prevent it from examining the decision for jurisdictional error and granting relief if it did.<sup>106</sup> Thus, the High Court limited the effectiveness of the clause. More recently, in 2010 in *Kirk v Industrial Court of New South Wales* the High Court confirmed that a privative clause in New South Wales legislation could not have effect in respect of decisions affected by jurisdictional error.<sup>107</sup> That is, enacting a privative clause purporting to prevent judicial review of a decision infected by jurisdictional error is beyond the legislative power of the State Parliament.<sup>108</sup> With reference to the separation of powers, these cases confirm that the High Court is the ultimate decision-maker where there is a contest and therefore 'this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review'.<sup>109</sup>

The exclusive power of the judiciary to exercise judicial functions and limitations on the use of privative clauses also means that only the judiciary has the power to adjudicate guilt and determine punishment. This principle is important from a human rights perspective, particularly in the context of the PDO regime. In 1967 in *Liyanage v The Queen*,<sup>110</sup> hearing an appeal from Ceylon (now Sri Lanka), the Privy Council held that emergency legislation which provided for the special trials of individuals involved in an attempted

<sup>102</sup> (2003) 211 CLR 476.

<sup>103</sup> *Migration Act 1958* (Cth) s 474.

<sup>104</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 501 [60] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid* 507–8 [79]–[83].

<sup>107</sup> (2010) 239 CLR 531.

<sup>108</sup> *Ibid* 566–7 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>109</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 514 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>110</sup> [1967] 1 AC 259.

coup d'état was invalid.<sup>111</sup> It was held that the process of the appointment of the judges, the rules of evidence governing the trials and the intent of the legislation to ensure convictions, infringed the separation of judicial power.<sup>112</sup> Similarly, in 1991 in *Polyukhovich v Commonwealth* ('*Polyukhovich*'),<sup>113</sup> the High Court noted that a bill of attainder, or a bill of pains and penalties, which declares a person guilty of a crime and imposes a penalty without them having been convicted, would amount to an exercise of judicial power and therefore infringe the separation of powers.<sup>114</sup> Thus, there is a prohibition on the legislative branch imposing a penalty without conviction.

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Chu Kheng Lim*'),<sup>115</sup> Brennan, Deane and Dawson JJ made it clear that:

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.<sup>116</sup>

In this case, the plaintiffs were Cambodian nationals who were detained as 'designated person[s]' for not having valid entry permits.<sup>117</sup> The plaintiffs contested inter alia that *Migration Act 1958* (Cth) s 54R, which provided that '[a] court is not to order the release from custody of a designated person', was invalid. The majority concluded that s 54R was invalid as a direction by the Parliament to the Court as to the manner in which it was to exercise its jurisdiction.<sup>118</sup> In a joint judgment, Brennan, Deane and Dawson JJ stated:

A law of the [P]arliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires

<sup>111</sup> Ibid 291–2 (Lord Pearce for Lords Pearce, Macdermott, Morris, Guest and Pearson).

<sup>112</sup> Ibid 277, 291–2.

<sup>113</sup> (1991) 172 CLR 501.

<sup>114</sup> Ibid 536 (Mason CJ), 612 (Deane J), 647 (Dawson J), 685–6 (Toohey J), 721 (McHugh J).

<sup>115</sup> (1992) 176 CLR 1.

<sup>116</sup> Ibid 27.

<sup>117</sup> Ibid 15–16.

<sup>118</sup> Ibid 36–7; see also Gaudron J's concurring judgment at 53–8.

acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid.<sup>119</sup>

It followed in this context that a law cannot allow detention by the executive that is ‘not appropriate and adapted to regulating entry or facilitating departure as and when required’.<sup>120</sup> Thus, if detention by the executive is punitive in nature, in that it goes beyond what is reasonably necessary to achieve a non-punitive objective, it will be unconstitutional.

The issue of punitive detention was recently considered by the High Court in November 2015 in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*.<sup>121</sup> Here, the relatively new High Court composition considered the validity of *Police Administration Act 1978* (NT) div 4AA, which establishes the Northern Territory’s ‘paperless detention’ regime. Section 133AB confers on police the power to arrest a person without a warrant and detain them for up to four hours (or longer if they are intoxicated) if they reasonably believe the individual has committed, is committing, or is about to commit an ‘infringement notice offence’. This includes minor (and arguably trivial) offences such as undue noise,<sup>122</sup> failing to keep a front yard clean,<sup>123</sup> or playing a musical instrument so as to annoy.<sup>124</sup> The police may then release the person unconditionally, on bail or with an infringement notice, or may bring them before a court.<sup>125</sup> The Explanatory Statement describes the purpose of the scheme as being to provide police with an ‘alternative post-arrest option’, so that individuals could be brought into custody but released with an infringement notice.<sup>126</sup> The plaintiffs argued that s 133AB is beyond the powers of the Northern Territory Legislative Assembly because it confers on the Northern Territory executive a power of detention for punitive purposes in contravention of the separation of judicial power in ch III and/or the *Kable* principle.<sup>127</sup> They also expressed concern regarding abuse of power, given that the offences for which individuals can be charged

<sup>119</sup> Ibid 36.

<sup>120</sup> Ibid 57 (Gaudron J).

<sup>121</sup> (2015) 326 ALR 16.

<sup>122</sup> *Summary Offences Act 1978* (NT) s 53B.

<sup>123</sup> Ibid s 78.

<sup>124</sup> Ibid s 76. See *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 326 ALR 16, 22 [18] (French CJ, Kiefel and Bell JJ), 34 [58] (Gageler J).

<sup>125</sup> *Police Administration Act 1978* (NT) s 133AB(3).

<sup>126</sup> Explanatory Statement, *Police Administration Amendment Bill 2014* (NT).

<sup>127</sup> *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 326 ALR 16, 19 [9]–[10] (French CJ, Kiefel and Bell JJ).

would have ordinarily been dealt with simply through the issue of an infringement notice without custody.<sup>128</sup>

Through a variety of different arguments, a 6:1 majority of the High Court (Gageler J dissenting) held that the amendments were valid, but did so on the construction of the provisions rather than the substantive constitutional issues. French CJ, Kiefel and Bell JJ held that, on its proper construction, div 4AA does not contain a punitive power to detain.<sup>129</sup> The discretion of police to detain was not unfettered since exercise of the power had to occur on *reasonable grounds* that the individual had committed or was committing an offence.<sup>130</sup> Separately, Nettle and Gordon JJ determined that, upon its proper construction s 133AB fell within the arrest and detention in custody exception outlined in *Chu Kheng Lim*,<sup>131</sup> because it does not permit detention for longer than is reasonably necessary to bring the individual before a court.<sup>132</sup> Keane J held that regardless of whether the detention was punitive, div 4AA was within the power of the Northern Territory Parliament and was not an exercise of the judicial power of the Commonwealth.<sup>133</sup>

Notably in the context of this article, the four hour maximum did play a significant role in the finding by French CJ, Kiefel and Bell JJ that detention is not punitive. Their Honours determined that detention for such a short period in these circumstances would allow for little more than preventing the individual from committing or continuing to commit the offence, and establishing his or her identity as required by the Act, and therefore could not be punitive.<sup>134</sup> Significantly, however, their Honours left open the possibility that a longer period of detention may not be valid:

If the maximum period for which a person could be held in detention in respect of an infringement notice offence were significantly greater than that specified under s 133AB, then a question might arise as to whether such an extended detention could be justified under any circumstances ... and whether,

<sup>128</sup> See *ibid* 74 [240] (Nettle and Gordon JJ).

<sup>129</sup> *Ibid* 32 [45]–[46] (French CJ, Kiefel and Bell JJ).

<sup>130</sup> *Ibid* 27–8 [34]–[36]; *Police Administration Act 1978* (NT) s 133AB(1).

<sup>131</sup> (1992) 176 CLR 1.

<sup>132</sup> *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 326 ALR 16, 74 [237].

<sup>133</sup> *Ibid* 62 [179].

<sup>134</sup> *Ibid* 28 [36].

beyond a certain point, it could still be characterised as administrative rather than punitive.<sup>135</sup>

Through this obiter dictum, their Honours left open the possibility that detention in such circumstances for a period of time beyond four hours, even for the purposes described, could constitute detention for punitive purposes.

Gageler J, who delivered the only dissenting judgment, also addressed the duration of detention but came to a different conclusion. His Honour noted that the duration of detention must meet at least two conditions: (1) that it is 'reasonably necessary to effectuate [the] purpose which is identified in the statute'; and (2) that it is 'capable of objective determination by a court at any time and from time to time'.<sup>136</sup> His Honour concluded that s 133AB did not meet either of these requirements because the duration was 'not limited by reference to the time needed to effectuate any identified statutory purpose',<sup>137</sup> and the duration was left to the police rather than the courts.<sup>138</sup> His Honour also noted that given that detention was on the basis of the police member *believing* that the person had or was about to commit an offence, s 133AB purported to authorise a form of detention which resulted in the police 'acting not as an accuser but as a judge'.<sup>139</sup> In such circumstances detention was punitive, although his Honour ultimately concluded that the Northern Territory Parliament was not constrained by the strict separation of judicial power and so the provisions were not invalid on this basis.<sup>140</sup> Nevertheless, Gageler J concluded that the regime was invalid for impairing the Court's institutional integrity.<sup>141</sup>

The core principle that can be derived from the above cases (and applied to the PDO regime) is that any attempt by the Parliament to authorise detention for punitive purposes where such is not dependent on an adjudgment of criminal guilt by a court will be invalid. From a human rights perspective, it can be said that, when peace prevails, individuals enjoy constitutional immunity from being imprisoned except where a ch III court has granted

<sup>135</sup> Ibid 29 [38].

<sup>136</sup> Ibid 43 [99].

<sup>137</sup> Ibid 43 [101].

<sup>138</sup> Ibid 43–4 [101].

<sup>139</sup> Ibid 44 [102].

<sup>140</sup> Ibid 47 [118].

<sup>141</sup> Ibid 49–50 [129]–[134].

such an order in the exercise of judicial power.<sup>142</sup> This conclusion is significant in terms of the constitutional validity of the PDO regime. If the detention of individuals under the PDO regime is found to be for punitive purposes, the function of issuing an order would constitute an exercise of judicial power. A judge performing this function *persona designata*, rather than in a judicial capacity, would therefore be at risk of infringing ch III of the *Constitution*. Whether detention is punitive will depend on factors such as the purpose, circumstances and duration of the detention. These factors are applied to the PDO regime in the following Part in assessing whether detention under the regime is for punitive purposes.

#### V THE TWO ELEMENTS AND PREVENTATIVE DETENTION ORDERS

The two elements of the separation of judicial power cannot be understated in terms of their importance and significance for the protection of one of the most fundamental human rights — the right to liberty of the person. Australia's PDO regime threatens this fundamental right. The PDO regime is contained in *Criminal Code* div 105 and *ASIO Act* pt III div 3. These provisions allow a judge acting *persona designata* to order individuals to be detained (and in some instances to question them) where there are reasonable grounds to suspect that they are either involved in a terrorist act or otherwise have information regarding a terrorist act. The regime therefore permits individuals to be detained without charge by order of a judge. The Parliament would argue that the function performed by judges under the PDO regime is a non-judicial function which is consistent with the incompatibility qualification, and that detention in these circumstances is for non-punitive purposes for the protection of the community. After setting out the relevant provisions of the PDO legislation, the following section rebuts these arguments. It will conclude that the PDO regime breaches the two elements of the doctrine of separation of power discussed above on two bases: first, that the issue of such orders *persona designata* by federal judges is a non-judicial function which does not satisfy the incompatibility qualification; and secondly, even if it does satisfy the incompatibility qualification, orders may amount to a punitive penalty which must only be imposed by a judge

<sup>142</sup> Michael McHugh, 'Terrorism Legislation and the *Constitution*' (2006) 28 *Australian Bar Review* 117, 121.



exercising judicial power, not a judge acting *persona designata*. Both arguments result in the same outcome: that the regime is constitutionally invalid and therefore unlikely to withstand judicial challenge.

#### A Relevant Provisions

Section 105.4 of the *Criminal Code* provides that an AFP member may apply for, and an issuing authority may make, a PDO if satisfied of a number of matters listed in that section. These matters include that there are reasonable grounds to suspect that the subject will engage in a terrorist act and that making the order is reasonably necessary to substantially assist in preventing a terrorist act occurring, or that a terrorist act has occurred and it is reasonably necessary to detain the subject to preserve evidence.<sup>143</sup> The order must contain a summary of the grounds on which the order is made,<sup>144</sup> although there are exceptions in relation to national security information.<sup>145</sup> A person can be detained for up to 48 hours if subject to an initial PDO, followed by a continued PDO,<sup>146</sup> although at the expiration of that period, a person may be detained for up to an additional 14 days under corresponding State or Territory legislation.<sup>147</sup> There are restrictions on the issue of multiple PDOs in relation to the same situation, which purport to limit to some extent persons from being subject to consecutive orders.<sup>148</sup> Although, the effectiveness of such a restriction is limited given that a person may be the subject of an order before, during and after a terrorist act occurs, even though they relate to the same alleged terrorist act.<sup>149</sup>

<sup>143</sup> *Criminal Code* ss 105.4(4), (6).

<sup>144</sup> *Ibid* s 105.12(6).

<sup>145</sup> *Ibid* s 105.12(6A).

<sup>146</sup> An initial PDO allows an individual to be held for 24 hours and a confirmed PDO allows them to be held for a further 24 hours: *ibid* ss 105.8(5), 105.12(5).

<sup>147</sup> See, eg, *Terrorism (Police Powers) Act 2002* (NSW) s 11(3)(a); *Terrorism (Preventative Detention) Act 2005* (Qld) s 12(2). This process is how Dr Mohamed Haneef was detained for 12 days without being charged with a criminal offence. Dr Haneef was detained at Brisbane Airport in July 2007 on suspicion of aiding terrorists following the terrorist attacks at the Glasgow International Airport in June 2007: see generally Amnesty International Australia, *Dr Mohamed Haneef's Case* (11 September 2007) <[http://www.amnesty.org.au/hrs/comments/dr\\_mohamed\\_haneef](http://www.amnesty.org.au/hrs/comments/dr_mohamed_haneef)>.

<sup>148</sup> See, eg, *Criminal Code* s 105.6(3) which provides that another initial PDO cannot be made in relation to the same person on the basis of assisting in preventing the same terrorist act occurring within that period.

<sup>149</sup> For a discussion of the legislative regime see Claire Macken, 'The Counter-Terrorism Purposes of an Australian Preventative Detention Order' in Nicola McGarrity, Andrew Lynch

A senior AFP member may act as an issuing authority for an initial PDO.<sup>150</sup> However, for a continued PDO, s 105.2(1) provides that the Minister may appoint as an issuing authority a person who is a federal judge, a judge of a State or Territory Supreme Court, a person who has served as a judge in one or more superior courts for a period of five years but no longer holds that commission, or the President or a Deputy President of the AAT who has been enrolled as a legal practitioner for five years.<sup>151</sup> Thus, both currently serving and former judicial officers may act as issuing authorities. Section 105.18(1) provides that an issuing authority has, in the performance of his or her duties, the same protection and immunity as a Justice of the High Court. Additionally, s 105.18(2) provides that the function of making, revoking or extending a continued PDO that is conferred on a judge or member of the AAT is conferred in a *personal* capacity and not as a court or a member of a court.

Similarly, *ASIO Act* pt III div 3 sets out the functions and powers of ASIO to obtain questioning and detention warrants. The Director-General of ASIO must first seek the Minister's consent,<sup>152</sup> and in doing so must give the Minister a draft request that includes, inter alia, a statement of the facts and other grounds on which the Director-General considers it necessary to issue the warrant.<sup>153</sup> After receiving consent, the Director-General may request that an issuing authority issue a warrant.<sup>154</sup> Section 34G(1) provides that an issuing authority may issue the warrant if, among other procedural requirements, he or she is satisfied that there are reasonable grounds for believing that it will substantially assist the collection of intelligence that is important in relation to a terrorism offence. This approach appears to be wider than that of similar intelligence agencies in the United States and the United Kingdom because ASIO has the power to obtain a warrant for the detention of a person who is not suspected of a terrorism offence.<sup>155</sup> The warrant authorises the person to be taken into custody immediately by a

and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 30, 32–3.

<sup>150</sup> *Criminal Code* s 100.1(1) (definition of 'issuing authority', para (a)).

<sup>151</sup> See also *ibid* s 100.1(1) (definition of 'issuing authority', para (b)).

<sup>152</sup> *ASIO Act* s 34F.

<sup>153</sup> *Ibid* s 34F(3).

<sup>154</sup> *Ibid* s 34F(7).

<sup>155</sup> See McHugh, above n 142, 125.

police officer, brought before a prescribed authority for questioning, and detained for 168 hours.<sup>156</sup> While there are no restrictions on issuing multiple warrants, and therefore imposing subsequent detentions, s 34G(2) provides that if a person has already been detained under earlier warrants, the issuing authority may only issue the new warrant if it is justified by additional or materially different information than that known at the time consent was sought for the earlier warrants. Again, this offers limited protection against the issue of successive warrants.

Section 34AB provides that the Minister may appoint as an issuing authority a judge, or a person of a specified class declared in the regulations. Section 34B(1) provides that the default position for the prescribed authority role is former serving judges. However, there is scope for the Minister to appoint currently serving judges to perform such functions on a *persona designata* basis if the Minister is of the view that there is an insufficient number of former judges available.<sup>157</sup> Like s 105.18 of the *Criminal Code*, s 34ZM of the *ASIO Act* provides that in performing functions under the div, an issuing authority or prescribed authority has the same protection and immunity as a Justice of the High Court and clarifies that the person is acting in a personal capacity and not as a court or a member of a court.

### B Persona Designata and the Incompatibility Qualification

Judicial power under ch III of the *Constitution* traditionally includes 'ordering detention and [other forms of] punishment after a person has been found guilty of a crime.'<sup>158</sup> Thus, consistent with the principles established in the *Boilermakers' Case*<sup>159</sup> and *Kable*,<sup>160</sup> ordering that an individual be detained in circumstances where their guilt has not been established is not an exercise of judicial power. It follows that detaining an individual pursuant to a PDO where its issue is not dependent on guilt (or even suspicion of a crime) is an administrative function and does not involve an exercise of judicial power. It is for this reason that the *Criminal Code* and *ASIO Act* provide that judges perform the non-judicial functions of issuing PDOs on a *persona designata*

<sup>156</sup> *ASIO Act* ss 34G(3)–(4).

<sup>157</sup> *Ibid* s 34B(2); see also at s 34B(3).

<sup>158</sup> Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (UNSW Press, 2006) 48.

<sup>159</sup> (1956) 94 CLR 254.

<sup>160</sup> (1996) 189 CLR 51.

basis. Through this arrangement, the Parliament sought to avoid offending the principles in the *Boilermakers' Case* and *Kable*.

Regardless of how artificial the construct is, as has already been established in this article, judges are permitted to undertake non-judicial functions on a *persona designata* basis. This is an established exception to the separation of powers. Therefore, the PDO regime is not invalid for simply conferring on judges the power to issue detention orders. However, as clarified in *Grollo v Palmer*, conferring a non-judicial function on a judge is only permitted where that function is not 'incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities',<sup>161</sup> and where the judge consents to the conferral.<sup>162</sup> The three circumstances in which incompatibility arises, as identified by Brennan CJ, Deane, Dawson and Toohey JJ in that case,<sup>163</sup> can be applied to the PDO regime to analyse whether incompatibility arises.

First, there must be no practical impediments faced by judges appointed as issuing authorities by the Minister.<sup>164</sup> For judges designated 'issuing authorities' under the PDO regime, their commitment to the performance of this non-judicial function is not so permanent and complete that further performance is not practicable. This is particularly given that no judge has yet been asked to issue a PDO and it is unlikely that the volume of orders in the future will be significant. It is therefore the second and third circumstances which are most relevant here — the second being that the non-judicial function of issuing PDOs is of such a nature that the capacity of an issuing judge to perform his or her judicial functions with integrity is compromised or impaired; and the third being that the function otherwise diminishes public confidence in the integrity of the judiciary or in the capacity of the judge to perform those functions with integrity.<sup>165</sup> There is a real risk that the institutional integrity of the judiciary would be diminished if a judge were to issue a PDO *persona designata*. There are various factors which are relevant to this argument, including the application of specified criteria prior to issuing

<sup>161</sup> (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

<sup>162</sup> *Ibid* 364–5.

<sup>163</sup> *Ibid* 365.

<sup>164</sup> *Ibid*.

<sup>165</sup> *Ibid*.

an order, the provision of reasons for issuing an order, and the involvement of judges in a criminal process.

Gummow J in *Grollo v Palmer* described ‘an essential attribute’ of Commonwealth judicial power as the resolution of ‘justiciable controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.’<sup>166</sup> Part of this involves the application of specific criteria prior to a decision. The criteria imposed for the issue of PDOs require satisfaction of certain matters on reasonable grounds,<sup>167</sup> and so this complies with the ‘essential and defining characteristics’ requirement for compatibility with institutional integrity.<sup>168</sup> However, the practical effect of these criteria (and, therefore, their capacity to protect against arbitrary detention) is severely limited given that they are linked to the incredibly wide definition of ‘terrorist act’.<sup>169</sup> For example, it would not be difficult to satisfy the criteria in s 105.4 which could apply to matters as broad as the instruction in the use of office equipment to a member of a terrorist organisation.<sup>170</sup> The criteria could therefore be applied to countless innocent or naive activities. Conversely, they could also easily be applied in circumstances where police have a suspicion that an individual is guilty of a criminal offence, but do not have the requisite evidence for the individual to be charged as per the usual criminal process.

In *Thomas v Mowbray*, Gummow and Crennan JJ confirmed the constitutional validity of the issue of control orders — another controversial addition to the *Criminal Code* following September 11<sup>171</sup> — on the basis that such orders involve an independent determination of ‘adequate legal standards or criteria.’<sup>172</sup> While it is arguable that the High Court would adopt the same approach in relation to PDOs as it did in *Thomas v Mowbray*,<sup>173</sup>

<sup>166</sup> Ibid 394.

<sup>167</sup> *Criminal Code* ss 105.4(4)–(6).

<sup>168</sup> *Wainohu v New South Wales* (2011) 243 CLR 181, 192 [7] (French CJ and Kiefel J).

<sup>169</sup> *Criminal Code* s 100.1 contains a broad definition of ‘terrorist act’ which includes, inter alia, an action or threat of action which causes serious physical harm to a person or damage to property, endangers a person’s life, creates a risk to the health or safety of the public, or seriously interferes with an electronic system. There are offences associated with terrorist acts, as well as financing, or providing training to, terrorist organisations: at divs 101, 103.

<sup>170</sup> Lynch and Williams, above n 158, 24.

<sup>171</sup> *Criminal Code* div 104, as inserted by *Anti-Terrorism Act 2005 (No 2)* (Cth) sch 4 item 24. See generally Lisa Burton and George Williams, ‘What Future for Australia’s Control Order Regime’ (2013) 24 *Public Law Review* 182.

<sup>172</sup> (2007) 233 CLR 307, 345 [72].

<sup>173</sup> Ibid.

given that the general processes for issuing orders are similar, it must be remembered that the power to issue control orders is exercised by the court and not individual judges *persona designata*. The function of issuing a PDO *persona designata* undermines the institutional integrity of the judiciary because the judge is required to apply a process of judicial reasoning but in a *personal*, rather than a *judicial*, capacity — noting of course that the outcome of that process is deprivation of liberty rather than merely a clandestine phone tap or imposition of a curfew. The Hon Michael McHugh has expressed doubt as to whether the High Court will continue to endorse this fiction,<sup>174</sup> explaining that the non-judicial power of the kind invested in an issuing judge is different from the power to issue warrants which was held constitutionally valid in *Hilton v Wells*,<sup>175</sup> and *Grollo v Palmer*.<sup>176</sup> This comparison can be extended to include control orders, so that while that regime was held constitutionally valid, the same reasoning cannot be applied to the PDO regime.

The centrality to the judicial function of a public explanation of reasons for final decisions has long been recognised. The requirement to give reasons is ‘an incident of the judicial process’.<sup>177</sup> It was included by Gummow J as part of the abovementioned description of the essential attributes of the judicial power of the Commonwealth — resolutions of justiciable controversies ‘which are delivered in public after a public hearing, and, where a judge is the tribunal of fact as well as law, are preceded by grounds for decision which are animated by reasoning’.<sup>178</sup> Unlike in *Wainohu v New South Wales*,<sup>179</sup> the PDO legislation requires individuals to be provided a summary of the grounds on which an order is made.<sup>180</sup> However, the subject may not be provided with these grounds if disclosure is likely to prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings)*

<sup>174</sup> McHugh, above n 142, 128.

<sup>175</sup> (1985) 157 CLR 57.

<sup>176</sup> (1995) 184 CLR 348.

<sup>177</sup> *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 667 (Gibbs CJ), quoting *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 386 (Mahoney JA).

<sup>178</sup> *Grollo v Palmer* (1995) 184 CLR 348, 394.

<sup>179</sup> (2011) 243 CLR 181.

<sup>180</sup> See *Criminal Code* ss 105.8(6)(e), 105.12(6)(d). Cf *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 13(2).

*Act 2004* (Cth) ('*NSI Act*').<sup>181</sup> 'National security' is broadly defined in s 8 of the *NSI Act* as 'Australia's defence, security, international relations or law enforcement interests.' Given that the purpose of detention includes detecting and preventing terrorist acts before they occur, it is likely that the grounds for issuing an order would not be based on evidence which would withstand scrutiny in accordance with the rules of evidence at that point (because if sufficient evidence of terrorist or other criminal activities were collected, the person would be able to be charged with criminal offences). Instead, an order would be issued based on *intelligence*, and it is foreseeable that the disclosure of such intelligence during the investigation process would naturally prejudice national security. Indeed, the *NSI Act* has been invoked in countless criminal trials,<sup>182</sup> as well as civil proceedings relating to the making of a control order,<sup>183</sup> so it is certainly predictable that disclosure of such information during the investigation process could raise the same concerns. Consistent with *Wainohu v New South Wales*,<sup>184</sup> this amounts to an exemption from the requirement to give reasons for a declaration, which would otherwise be an essential and defining characteristic of a court, and is therefore incompatible with the institutional integrity of the court.

This issue is directly related to the next matter of concern, being the involvement of judges in a criminal investigation process. While this function was not sufficient to render the issue of telephonic interception warrants an invalid function in *Grollo v Palmer*,<sup>185</sup> the very nature of the outcomes are different. In that case, the majority noted a number of unique issues, including that:

The judicial method of deciding questions in controversy has no application in exercising the power to issue ... [a] warrant. ... [T]he very issue of a warrant and the identity of the judge who issued it are not disclosed. ... [I]ts execution may go undetected by the [subject] ... [and] there is no return made on the execution of the warrant which permits a determination of its lawfulness ...

<sup>181</sup> *Criminal Code* ss 105.8(6A), 105.12(6A).

<sup>182</sup> In a June 2008 report, it was stated that the Act had 'been invoked in federal criminal cases involving 28 defendants': Attorney-General's Department (Cth), *National Security Information (Criminal and Civil Proceedings) Act 2004: Practitioners' Guide* (2008) 5.

<sup>183</sup> See, eg, *Thomas v Mowbray* (2007) 233 CLR 307.

<sup>184</sup> (2011) 243 CLR 181.

<sup>185</sup> (1995) 184 CLR 348.

[and] no records are kept which would permit judicial review of a judge's decision to issue a warrant.<sup>186</sup>

The PDO regime does not tick these same boxes, and through issuing these orders there is far greater involvement of judges in the criminal investigation process. The issuing judge will have applied specific criteria prior to exercising the power. The subject of the order naturally will be aware of the issue of the order since they will be detained and possibly questioned and, subject to national security redactions, can be provided with a summary of the grounds on which the order is made. There is scope for the subject to seek judicial review of the lawfulness of their detention under *Constitution* s 75(v). In practical terms, this could amount to the seeking of a writ of habeas corpus, and would certainly involve a review of the records (subject to pt 3 div 3 of the *NSI Act* which can be used to impose restrictions on the disclosure of records). All of these features lead to the conclusion that judges would be participating in the criminal investigation process which, as identified in *Grollo v Palmer*, would breach the doctrine of separation of power.

The regime also provides for judges to play a far more active role in the investigation process than simply issuing orders. While the default position in the *ASIO Act* is for only former serving judges to be appointed as prescribed authorities,<sup>187</sup> there is scope for the Minister to appoint currently serving judges to perform such functions on a *persona designata* basis.<sup>188</sup> In such circumstances, a judge would undertake the actual questioning of a detainee.<sup>189</sup> This inquisitorial questioning function would certainly constitute participation in the criminal investigation process and therefore be a function 'incompatible ... with the judge's performance of his or her judicial functions'.<sup>190</sup> While there are limitations on how any evidence collected as part of this questioning process can be used in future criminal proceedings, institutional integrity would surely be compromised if, for example, the subject sought judicial review of their detention under *Constitution* s 75(v) or through the intelligence they collect being used to inform further police investigation, which results in criminal charges being laid. Such intimate

<sup>186</sup> Ibid 367 (Brennan CJ, Deane, Dawson and Toohey JJ).

<sup>187</sup> *ASIO Act* s 34B(1).

<sup>188</sup> Ibid s 34B(2); see also at s 34B(3).

<sup>189</sup> Ibid ss 34G(3)–(4).

<sup>190</sup> *Grollo v Palmer* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).



involvement in the criminal investigation process on an administrative level is repugnant to the separation of powers.

Given the above issues, there is a real risk that undertaking the administrative functions required of judges under the PDO regime is incompatible with judicial office because '[p]art of what sets courts apart from other institutions within our system of government is that they do not participate in a punitive deprivation of liberty by another arm of government.'<sup>191</sup> Such a function, even on a *persona designata* basis, is simply inconsistent with the institutional integrity of a court. At the very least, as identified by Williams, 'involving judges in an investigative process by which Australian citizens are detained in secret for unprecedented periods could undermine public confidence in the judicial system.'<sup>192</sup> This is particularly given the extent of the intrusion on individual rights. Judicial officers appointed as issuing authorities in a personal capacity are required to fulfil legislative obligations on the one hand, but in their judicial capacity are responsible for protecting human rights by virtue of the doctrine of separation of powers. This includes ensuring that individuals are afforded due process and are not detained for punitive purposes otherwise than by a court order. It is therefore difficult to deny that there is at least a perceived conflict or inconsistency between these dual roles. Gageler J commented in the 'paperless arrest' case that:

A law which gives to a court a role in a legislative scheme designed to facilitate punitive executive detention must surely be within the same category. The role is antithetical to the existence of the court as an institution for the administration of justice; repugnant in a fundamental degree to the judicial status.<sup>193</sup>

The nature of the power authorises the police to detain individuals without affording them the due process of the law, while the manner of its exercise provides judges with an equally broad discretion to approve an order as criticised by McHugh J in *Grollo v Palmer*.<sup>194</sup> Noting that the composition of

<sup>191</sup> *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 326 ALR 16, 49 [129] (Gageler J).

<sup>192</sup> George Williams, Submission to Senate Legal and Constitutional References Committee, *Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, 4 November 2002.

<sup>193</sup> *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 326 ALR 16, 49 [128].

<sup>194</sup> (1995) 184 CLR 348, 379.

the High Court is very different to that which decided *Thomas v Mowbray*,<sup>195</sup> and we have already seen changes in the approach to executive detention, there is a real possibility that their Honours will not accept the validity of the regime if it were judicially challenged.

Commentators have similarly questioned the continuing validity of the *persona designata* construct in the context of the PDO regime. Extra-curially, the Hon Michael McHugh criticises the legislation on the basis that it assumes that a judge has two '*persona[e]*' — one as a judge and one as a private citizen — and that functions can be conferred on the different persona even though the legislation uses the judicial persona to identify the private persona.<sup>196</sup> According to Lynch and Reilly, '[w]hen the judiciary is employed to exercise non-judicial power, its independence is necessarily compromised.'<sup>197</sup> Indeed, speaking extra-curially Sir Gerard Brennan described *Criminal Code* div 105 as conferring power on issuing authorities as species of executive rather than judicial power.<sup>198</sup> Lynch and Williams refer to the *persona designata* doctrine as a 'precarious fiction' in that '[u]sing judicial office as a means of identifying potential issuing authorities and then claiming the power is conferred on them as private individuals has an air of artificiality.'<sup>199</sup> Given that one of the primary rationales for the separation of judicial power is the protection of human rights, assisting the executive to detain an individual without charge is a function which is incompatible with the judiciary's function.

### C *Punitive Detention as a Judicial Function*

The above leads to the second argument that the function of issuing PDOs involves the exercise of judicial power and is therefore invalid for infringing the second element of the separation of judicial power. As discussed, the Parliament would seek to rely on the argument that preventative detention is non-punitive for protective purposes. However, there is a strong argument that in some circumstances detention would be for punitive purposes and, as

<sup>195</sup> (2007) 233 CLR 307.

<sup>196</sup> McHugh, above n 142, 128.

<sup>197</sup> Lynch and Reilly, above n 80, 138.

<sup>198</sup> See Sir Gerard Brennan, 'Law for All; Justice for Each' (Speech delivered at the 2007 Justice Awards, Parliament House, Sydney, 31 October 2007) <<http://www.lawfoundation.net.au/ljf/app/35B368B724DB0A72CA2573860001CBC9.html>>.

<sup>199</sup> Lynch and Williams, above n 158, 48.

orders are granted on a *persona designata* basis as an administrative function, their issue is inconsistent with the principles established in *Chu Kheng Lim*.<sup>200</sup> Indeed, in 2012 the *Council of Australian Governments Review of Counter-Terrorism Legislation* identified that, among other factors, the use of judges might result in the detention being ‘considered punitive in nature’ and therefore unconstitutional.<sup>201</sup>

Part IV outlined how the features of the PDO regime, including the application of specified criteria and the provision of a summary of the grounds on which an order is made, are features typical of the exercise of judicial power. In *Thomas v Mowbray*, the constitutional validity of the issue of control orders was confirmed as a *judicial* function on the basis that it involved an independent determination of adequate legal standards or criteria.<sup>202</sup> It is arguable that the same conclusion could be adopted in relation to the PDO regime, given that the general processes for issuing orders (including the application of specified criteria) are similar. However, a judge acting *persona designata* is not permitted to exercise judicial power, and thus this function breaches the separation of powers.

That said, the more significant issue in relation to the issue of judicial power is the fact that the consequence of the decision reached by a judge acting *persona designata* is deprivation of liberty. Cases such as *Chu Kheng Lim* make it abundantly clear that the detention of an individual for punitive purposes is an exercise of judicial power.<sup>203</sup> It follows that if a constitutional immunity from being imprisoned for punitive purposes exists, then ‘federal legislation purporting to authorise detention outside the excepted [non-punitive] categories would be invalid as an attempted exercise of the judicial power of the Commonwealth.’<sup>204</sup> Legislation conferring the power on judges to issue PDOs *persona designata* in an administrative capacity will therefore be unconstitutional if such is for punitive purposes. As discussed above, whether detention is punitive will depend on factors such as the

<sup>200</sup> (1992) 176 CLR 1, 27–8 (Brennan, Deane and Dawson JJ).

<sup>201</sup> Council of Australian Governments, *Council of Australian Governments Review of Counter-Terrorism Legislation* (2013) 66 [261].

<sup>202</sup> See (2007) 233 CLR 307, 344–8 [71]–[79] (Gummow and Crennan JJ).

<sup>203</sup> (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ). For a discussion of the limitations on the legislature’s power to declare guilt and impose punishment see *Polyukhovich* (1991) 172 CLR 501, 536 (Mason CJ), 612 (Deane J), 647 (Dawson J), 685–6 (Toohey J), 721 (McHugh J).

<sup>204</sup> McHugh, above n 142, 121.

purpose, circumstances and duration of the detention. The PDO regime can be analysed according to these factors.

In relation to the purpose of detention, there are various grounds for AFP members and ASIO officials to apply for, and issuing judges to grant, PDOs. On the one hand, it is foreseeable that in some circumstances an order may be used as part of a broader criminal process in investigating offences and establishing guilt. An order is therefore just one step in that process before a criminal trial proceeds and would not infringe the separation of power. For example, an order might be granted following a terrorist act in order to preserve evidence — the subject of the order will later be charged with committing a terrorist act and detained on that basis, but the issue of an order is intended to serve an important function in the interim in ensuring that the evidence is not destroyed. The purpose of detaining the subject to protect evidence would be a non-punitive purpose, and the duration of the detention would be no more than was reasonably necessary to achieving that non-punitive purpose of securing the evidence. Similarly, an order could be granted to interrupt a terrorist act, similar to the function of the Northern Territory's paperless arrest scheme (with respect to an infringement notice offence),<sup>205</sup> and so detention could allow for little more than preventing the individual from continuing to commit that suspected act. Detention in these circumstances would be for community protection purposes and therefore fall within the recognised exception to the immunity against detention without charge.

On the other hand, it is also foreseeable that the regime will not always be used as a purely administrative function for non-punitive purposes. While the enabling legislation is not so obvious as to indicate that detention can be to punish an individual due to their criminal guilt, the grounds on which an order can be issued are so broad that there may be circumstances where a subject is detained due to a suspicion of guilt but where sufficient evidence is not available. For example, an order might be sought and granted on the basis that the police have intelligence to suggest that the subject has had involvement in or knowledge of a terrorist act, but that intelligence cannot be used as evidence proven according to the standard rules of evidence. If that individual is detained, it is difficult to deny that detention without charge would amount to detention for punitive purposes, particularly if they are not

<sup>205</sup> *Police Administration Act 1978* (NT) s 133AB(1).

questioned as part of the criminal investigation process or no investigative process follows the detention.

In relation to the period for detention, in the paperless arrest case, French CJ, Kiefel and Bell JJ left open the possibility that administrative detention, based on reasonable grounds that the individual had or was committing an offence, for a period exceeding four hours could be characterised as punitive rather than administrative.<sup>206</sup> Conversely, Gageler J was satisfied that detention of only four hours in these circumstances was indeed punitive.<sup>207</sup> Comparisons can be drawn between the PDO regime and the paperless arrest regime, with both providing for individuals to be detained without charge on a reasonable suspicion that they have or intend to commit an offence. Under the *Criminal Code*, just like the paperless arrest regime, the individual can be detained and released without charges being laid. The duration of detention is determined in both regimes by an individual acting in an administrative capacity — not a judge acting in a judicial capacity — and therefore the administrative decision-maker is acting as accuser and judge.<sup>208</sup> An issuing judge would be performing a judicial function as an administrative decision-maker.

Based on the obiter in the paperless arrest case, there is a real possibility that four currently serving High Court justices may not consider that detention for up to 168 hours constitutes non-punitive detention. Indeed, if an administrative body were performing the role of issuing authority in this instance, it is predictable that the fate of that body would be similar to that of the Industrial Relations Commission or the Australian Military Court. Gageler J referred to the role of the Northern Territory courts being made a support player in a scheme the purpose of which is to facilitate punitive executive detention. His Honour's comments can easily be applied to the PDO regime:

They are made to stand in the wings during a period when arbitrary executive detention is being played out. They are then ushered onstage to act out the next scene. That role is antithetical to their status as institutions established for the administration of justice.<sup>209</sup>

<sup>206</sup> *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 326 ALR 16, 29 [38].

<sup>207</sup> *Ibid* 43–4 [101]–[103].

<sup>208</sup> See *ibid* 44 [102] (Gageler J).

<sup>209</sup> *Ibid* 50 [134].

With reference to the nature of the entities and functions they performed, the High Court has invalidated schemes where complaint or review bodies purported to exercise judicial power.<sup>210</sup> Similarly, in a series of cases the High Court has, as a matter of statutory construction, read down ouster or privative clauses to limit their effectiveness in restricting judicial review of administrative decisions.<sup>211</sup> The principles outlined in these decisions clearly set out the veracity at which the judiciary approaches any attempts to either exercise or limit its power. Contrast this to circumstances where Parliament has attempted to create a bipolar structure whereby judges undertake functions which have the look and feel of a judicial function, but in an effort to avoid infringement of the separation of powers are performed with an 'administrative hat' on. It is only a matter of time before the High Court puts an end to such arrangements, and if the executive attempts to trigger the powers in the PDO regime and detain an individual without charge, the outcome is unlikely to be favourable.

## VI CONCLUSION

In the absence of a comprehensive set of constitutionally entrenched rights, the doctrine of separation of judicial power in ch III of the *Constitution* is an essential feature in ensuring due process and protecting human rights. The two elements of the doctrine — that ch III courts have the exclusive authority to exercise judicial power and that ch III courts may only exercise judicial power and so must not discharge non-judicial functions — are key to ensuring that a strict separation is maintained. According to Winterton, '[t]he vital constitutional role of the judiciary as an independent, co-equal branch of government would be compromised if the judicial process were interfered with by legislative or executive action'.<sup>212</sup> It is clear that the issue of PDOs by judges acting *persona designata* has the potential to compromise this strict separation. There is a real question as to whether such a non-judicial function is inconsistent with, or repugnant to, the institutional integrity of the judiciary. Alternatively, even if it is not inconsistent, detention could be for punitive purposes and would therefore constitute a judicial function which

<sup>210</sup> See, eg, *Wheat Case* (1915) 20 CLR 54.

<sup>211</sup> See, eg, *Hickman* (1945) 70 CLR 598; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

<sup>212</sup> Winterton, above n 3, 193.

cannot be undertaken *persona designata*. Either way, the PDO regime infringes the doctrine of separation of judicial power.

While attention during the past decade has been on control orders, given that this regime has been used on two occasions, with the increasing terror threat on home soil it may not be long before a PDO is issued and the High Court is also provided the opportunity to consider the validity of these arrangements. Kirby J stated that the ‘loss of liberty ... is ordinarily one of the hallmarks reserved to criminal proceedings conducted in the courts, with the protections and assurances that criminal proceedings provide.’<sup>213</sup> The ability of the judiciary to fulfil such a role is compromised through the *persona designata* arrangements and it is unlikely to withstand judicial challenge.

<sup>213</sup> *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, 179 [56].