Form 27D *Rule 44.03.3*

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S352 of 2012**

BETWEEN: **STATE OF NSW**
Appellant

and

GREGORY WAYNE KABLE
Respondent

RESPONDENT'S SUBMISSIONS [ANNOTATED]

Filed on behalf of the respondent by
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PART I: CERTIFICATION FOR PUBLICATION ON THE INTERNET

1. The respondent certifies that the submission is in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF THE ISSUES THAT THE APPEAL PRESENTS

2. *As to the Notice of Appeal issues (at AB2:588-591)*:

(a) What was the nature of the purported jurisdiction or function exercised by the Supreme Court of NSW when Levine J purported to make the disputed detention order of 23 February 1995? Whether, as Kable asserts, the Court and Levine J were exercising a purely executive function that was foreign to, and not properly incidental to, the exercise of judicial power of a superior court of record?

(b) Whether, as Kable asserts, Levine J's disputed detention order of 23 February 1995 was not a *"judicial order"?*

(c) Whether, as Kable asserts, the findings, holdings and judgment that were made in *Kable v DPP (NSW)* [1996] HCA 24, 189 CLR 51 ***("Kable 1996")***, went beyond being merely public law findings (as to limits of State legislative power), and also bind Kable and the State of NSW in their private law litigation in tort in the present litigation?

(d) Whether, as Kable asserts, the *"set[ting] aside"*, on 12 September 2006 (in *Kable 1996* at p 143 order 2) of Levine J's disputed detention order of 23 February 1995 (reproduced at AB1:426-428), retrospectively removed any constitutional, statutory, administrative law or common law impediments to Kable's right and entitlement to have, and to maintain, a vested private law cause of action in tort against the State of NSW for false imprisonment for Kable's detention in prison for six months, from 23 February 1995 to 22 August 1995?

(e) Whether, as Kable asserts, the State of NSW has no defence of common law justification to Kable's false imprisonment?

3. *As to the Respondent's Notice of Contention issues (at AB2:597-601)*

(a) AB2:598[1] Whether, as Kable asserts, the Executive Government, being the 'State of NSW' (within the meaning of the *Crown Proceedings Act* 1988) is liable to Kable directly (for acting in concert to achieve a common end), as well as vicariously (pursuant to the *Law Reform (Vicarious*

Liability) Act 1983 (NSW)) for false imprisonment?

(b) AB2:598[2(a)] Whether, as Kable asserts, the Executive Government had an improper purpose, aptly described as 'institutional malice', which constituted the tortious mental state for the respective torts of (i) malicious prosecution, and (ii) collateral abuse of process?

(c) AB2:599[2(b)(b)], [5], [6] Whether, as Kable asserts, the elements of the cause of action for the tort of malicious prosecution were established against the Executive Government, without impugning the sovereignty of parliament or the separation of powers?

(d) AB2:599[2(b)(a)], [3], [4] Whether, as Kable asserts, the elements of the cause of action for the tort of collateral abuse of process were established against the Executive Government, although the Executive Government was not a party to *Kable 1996*, and without impugning either the sovereignty of parliament or the separation of powers?

PART III: CERTIFICATION OF NOTICE IN COMPLIANCE WITH SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. The appellant filed and served notices in compliance with the s 78B of the *Judiciary Act 1903* on 19 December 2012.

5. The respondent filed and served a Notice of Contention together with notices in compliance with section 78B of the *Judiciary Act 1903* on 2 January 2013.

PART IV: STATEMENT OF ANY MATERIAL FACTS SET OUT IN THE APPELLANT'S NARRATIVE OF FACTS OR CHRONOLOGY THAT ARE CONTESTED

6. The respondent adopts the following abbreviations in these submissions:
"AS" – appellant's submissions filed 25.1.13
"AC" – appellant's chronology filled 25.1.13
"AB1" or **"AB2"** – High Court Appeal Books vol 1 (pp 1-433) and vol 2 (pp 434-609) respectively
"CI" – Commonwealth's Intervener submissions filed 1.2.13
"QI" – State of Queensland's Intervener submissions filed 8.2.13
"VI" – State of Victoria's Intervener Submissions filed 1.2.13
"W1" – State of Western Australia's Intervener Submissions filed 31.1.13
Kable 1995 (main) – *DPP v Kable,* main reasons for judgment of 23 February 1995 (Levine J, unreported), at AB1:225-425
Kable 1995 (terms) – *DPP v Kable,* short judgment as to terms of order of 23

February 1995 (Levine J, unreported), at AB1:429-433
Kable 1996 – *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24, 189 CLR 51
Kable 2010 – *Kable v State of NSW* [2010] NSWSC 811, (2010) 203 A Crim R 66 (Hoeben J), reproduced at AB2:451-488
Kable 2012 – *Kable v State of NSW* [2012] NSWCA 243 (Allsop P; Basten, Campbell & Meagher JJA; McClellan CJ at CL, unreported), as varied on 9 November 2012, reproduced at AB2:500-584.

7. *As to the Notice of Appeal issues (at AB2:588-591):*

(a) *AS[7] & [12] & also AC:* On 23 February 1995, Levine J, in addition to making the disputed preventative detention order, granted bail *instanter* to Kable on all criminal charges then pending against Kable under s 85S of the *Crimes Act 1914* (Cth) for which Kable was, already, remanded in custody until 7 March 1995. The granting of bail on the pending criminal charges, with effect 23.2.1995, permitted the disputed detention order made under the *Community Protection Act 1994* (NSW), ss 9 & 20 to have putative immediate effect as from 23 February 1995. See ***Kable 1995 (terms)*** at AB1:432(20-55)). Bail had previously been refused by various magistrates (see AB1:220(55), 222(58), 224(60)).

(b) *AS[8] & [14]*: Whilst it is true that the maximum duration of a detention order was six months *(CPA s 5(2)),* there was no limit to the number of further 'renewals' of detention orders that could be sought for up to six months each *(CPA s5(4));* and although Grove J had declined, on 21 August 1995, to renew the detention order on that occasion, the *CPA* permitted further or fresh applications by the DPP for Kable's detention under the *CPA* at any time thereafter *(CPA* ss 5(3) & 5(4)).

(c) *AS[16]:* On 16 September 2005, the appellant and respondent agreed to consent judgment (set out at AB1:79) dismissing the Director of Public Prosecutions for NSW **(hereinafter "DPP")** (as second defendant) from the proceedings, on the basis that the appellant agreed with the respondent, that the appellant accepted liability for the acts and defaults of the DPP in accordance with the terms set out in an earlier letter from the appellant to the respondent dated 18 October 1999 (at AB1:77).

(d) *AC:* On 8 December 1997, the Amended Statement of Claim (at AB1:6-26) not only added claims by joining the DPP as second defendant, but also added additional causes of action in tort (for malicious prosecution and for collateral abuse of process) against the State of NSW. The initial Statement of Claim, filed on 20 November 1996 (at AB1:1-5) instituted proceedings against the State of NSW for false imprisonment only.

8. *As to the Notice of Contention issues (at AB2:597-601):*

(a) On 25 October 1994, the NSW Attorney-General (who was also the Minister for Justice) issued a public media release (at AB1:116) stating that Cabinet and the Fahey Government had, that same day, approved a package of legislation for the preventative detention of persons including, inter alia, specifically, *"Mr K"* (namely the respondent, Kable) who were *"...likely to commit an offence involving physical harm to another person and cannot otherwise be detained."* (AB1:116(21-22)).

(b) The Executive Government produced the *Community Protection Bill 1994* (agreed fact at AB1:182[1]).

(c) On 27 October 1994, the NSW Attorney-General on behalf of the Executive Government introduced the *Community Protection Bill 1994* into the Upper House, the Legislative Council (agreed fact at AB1:182[2]). Under that Bill (clause 8), the Attorney-General was the only person who could apply to the Supreme Court of NSW for a detention order.

(d) On 27 October 1994, the *Community Protection Bill 1994* was read for the 1st time in the Legislative Council (agreed fact at AB1:182[3]).

(e) On 27 October 1994, the NSW Attorney-General on behalf of the Executive Government moved that the *Community Protection Bill 1994* be read a second time in the Legislative Council (agreed fact at AB1:182[4]).

(f) On 27 October 1994, the NSW Attorney-General on behalf of the Executive Government commended the *Community Protection Bill 1994* to the Legislative Council (agreed fact at AB1:183[7]).

(g) On 9 November 1994, the Crown Solicitor's Office wrote to the respondent's then solicitors (at AB1:86-87), informing them that, if the proposed *Community Protection Bill* became law, the NSW Attorney General proposed, subject to medical advice, to apply to the Supreme Court [of NSW] for an order that the respondent be detained; and asking the respondent to make himself available for medico-legal examination by forensic psychiatrists nominated by the Attorney-General.

(h) On 11 November 1994, the NSW Attorney-General wrote to the respondent's then solicitors (at AB1:95), noting inter alia that the respondent had been charged with offences under the *Crimes Act* (Cth) s 85S, and also noting inter alia that the *Community Protection Bill* envisaged a civil procedure to allow the Supreme Court to order that a person be held in preventative detention if satisfied that it is necessary to protect the community. The Attorney-General's letter also said that if the *Community Protection Bill* were passed, the Attorney-General would give serious consideration to whether there was sufficient evidence to enable the Attorney-General to apply to the Supreme Court for such an order against the respondent.

(i) The Director-General of the NSW Government's Cabinet Office wrote a

number of letters between 11 November 1994 to 9 December 1994 (at AB1:157, 161, 163, 165, 174, 178), acknowledging that the Attorney-General and the Premier had received specific submissions, concerns and representations in opposition to the *Community Protection Bill 1994* that would be considered by the Government.

(j) On 16 November 1994, the NSW Attorney-General on behalf of the Executive Government agreed to amendments to the *Community Protection Bill 1994* in the Legislative Council to provide that the said Bill would only apply to the respondent (agreed fact at AB1:183[8]). Under those amendments, in the second print of the Bill (clause 8), the DPP NSW, instead of the NSW Attorney-General, was the only person who could apply to the Supreme Court of NSW for a detention order.

(k) On 23 November 1994, the NSW Minister for Police and Emergency Services introduced the *Community Protection Bill 1994* into the Lower House, the Legislative Assembly and moved that the said Bill be read a second time (agreed fact at AB1:183[9]).

(l) On 2 December 1994, the *Community Protection Act 1994* **(hereinafter *"CPA"*)** passed through the Parliament (agreed fact at AB1:183[10]).

(m) On or about 6 December 1994, the *CPA* was presented to the Governor by the Executive Government (agreed fact at AB1:183[11]).

(n) On 6 December 1994, the *CPA* received Royal Assent (agreed fact at AB1:183[12]).

(o) On 9 December 1994, the *CPA* was proclaimed. (agreed fact at AB1:183[13]).

(p) On 13 December 1994, the DPP commenced proceedings against the respondent, seeking orders against the respondent pursuant to the *CPA* (agreed fact at AB1:183[14]).

(q) All of the evidence that was tendered and read by the DPP, as prosecutor, in the application and proceedings before Levine J against the respondent under the *CPA* was obtained for the DPP, for use in such prosecution, by the Crown Solicitor's Office (NSW), both before (see AB1:86(50)-87(15) & 95(30-40)), and also after (see the long list of "not reproduced" evidence listed in the index at AB1 at pages v-xvi, at items #75- #500, #502- #508) the enactment of the *CPA*.

(r) The new NSW Attorney-General informed the DPP by letter dated 16 August 1995 (at AB1:99-100) of the Attorney-General's opposition to any inter-parties settlement with the respondent of proceedings under the *CPA*.

(s) The DPP informed the NSW Attorney-General by letter dated 16 August 1995 (at AB1:102-103) that the DPP had instructed counsel representing the DPP not to settle with the respondent on an inter-parties basis in proceedings under the *CPA*. In the same letter, the DPP informed the NSW Attorney-General of his own criticism of the *CPA*.

Part V: STATEMENT THAT THE APPELLANT'S STATEMENT OF APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS IS ACCEPTED OR, IF NOT, A STATEMENT IDENTIFYING THE RESPECT OR RESPECTS IN WHICH IT IS ALLEGED TO BE WRONG OR INCOMPLETE

9. The respondent agrees with the legislation identified at AS[40] & [41].

10. In addition, the respondent relies on:

(a) *Community Protection Bill 1994*, 1st print, 27 October 1994 (in its entirety, from the Law Courts Library catalogue, 1st May 2000) – to be reproduced in full in the respondent's' bundle of authorities and materials for the appeal hearing.

(b) *Community Protection Bill 1994*, 2nd print, 1994 (in its entirety, from the Law Courts Library catalogue, 1st May 2000) – to be reproduced in full in the respondent's' bundle of authorities and materials for the appeal hearing.

(c) *Community Protection Bill 1994*, 3rd print, 1994 (in its entirety, from the Law Courts Library catalogue, 1st May 2000) – to be reproduced in full in the respondent's' bundle of authorities and materials for the appeal hearing.

(d) *Crown Proceedings Act 1988* (NSW), ss 1, 2, 3, 4, 5, 6, 7 – reproduced below in the Annexure to the present submissions.

(e) *Law Reform (Vicarious Liability) Act 1983* (NSW), ss 1, 2, 3, 4, 5, 7, 8, 10 reproduced below in the Annexure to the present submissions.

PART VI: STATEMENT OF ARGUMENT IN ANSWER TO THE ARGUMENT OF THE APPELLANT AND ANY INTERVENER SUPPORTING THE APPELLANT

11. The appellant and interveners engage, under the licence of advocacy, in a revisionist interpretation that seeks to portray the process of the NSW Supreme Court that culminated in Levine J's detention order of 23 February 1995 as a regular judicial process. That was not so. The *CPA* proceedings in the Supreme Court of NSW at first instance *"do not in any way partake in the way of legal proceedings" (Kable 1996* per Gaudron J at p 106.3) but were *"the antithesis of judicial process"* (ibid at p 106.9) and *"attempts to dress up as proceedings as involving the judicial process. In doing so they were a mockery of that process"* (ibid at p 108.3). It was *"repugnant to the judicial process in a fundamental degree"* (ibid per Gummow J at pp 132.2 & 134.2). That was so, despite the personal *"independence and impartiality"* of Levine J (ibid, per McHugh at p 183.7).

12. The appellant (AS[19], [31]) and interveners (CI[16.2], [17.2], [28], [40]; QI[15]-[16]; VI[21]-[22]; WI[34]-[36]) seek to limit the findings and determinations of this Court in *Kable 1996* to public law findings that do not flow across to the respondent Kable's private law rights against the State of NSW. The respondent disputes that, and will, in these submissions, demonstrate that the Court of Appeal correctly applied settled principles, in *Kable 2012,* to the findings made in *Kable 1996* to reach the decision, in *Kable 2012,* that the appellant was liable to the respondent in the private tort of false imprisonment. The respondent relies in this Court on the way he opened his case in the Court of Appeal (where he was the successful appellant) (27.10.11 at Tpp 1-2):

> "BATES: Your Honours, Mr Kable is both the most important and perhaps also in some ways the most unimportant person in this case. He is the most important because it's his case and he is claiming compensation for the wrongs that were done to him. He's also important, because the reason why what happened to him was so wrong was that it concerns values which our legal system should protect for everybody. And that's been the paradox of this case - that the importance arises in some ways out of the unimportance of him personally, individually, because he was the one really who suffered because of the departure from important values that our legal system should protect.
>
> What happened to Mr Kable ... arises out of fundamental breaches of the rule of law which has both a public law aspect and a private law aspect. The public law aspect found its result in the decision of the High Court of Australia in 1996 in Kable v Director of Public Prosecutions and the current proceedings which follow on from that and deal with the private law aspect in his compensation claim.
>
> The two aspects of the rule of law, the public law aspect and the private aspect are both related and also to some extent distinct. The appellant [Kable] accepts the long-established principle which is that the findings of unconstitutional[it]y do not of themselves give rise to civil wrongs which goes back to the well known line of cases from James v Commonwealth in the 1930s onwards and we accept that. The appellant [Kable] accepted, both before Justice Hoeben the trial judge and here, that Mr Kable has to bring his claim within the principles of private law.
>
> But the appellant [Kable]'s submission however is that the find[ing]s that were made by the High Court in relation to the public law aspects do flow across and have implications for this private law claim and one of the main underlying thematic challenges that's reflected in the various grounds of appeal is that the trial judge did not properly take account of and apply it to the extent that he should have in our submission. The implications of the public law findings and the constitutional decision in 1996 for his private law rights.
>
> The broad submission which I'll be developing more fully in relation to particular grounds of appeal and particular causes of action in dealing with the trial judge's

judgment is that ... the findings that were made by the High Court as part of its finding that the legislation was unconstitutional ... and in its decision to set aside the orders that were made on 23 February 1995 by Justice Levine at first instance, are findings that should have been given full effect equally in the private law proceedings and flowing on from that the appellant's broad submission is this. That properly understood and applied the effect of the findings made by the High Court in the 19[9]6 decision was that there was in the relevant sense an improper purpose shown that can be sheeted home to the executive government which is relevantly the State of New South Wales for the purpose of the definition of the State of New South Wales and the Crown Proceedings Act of 1988."

13. **The public law findings in *Kable 1996* flow across to the respondent Kable's private law rights against the appellant State of NSW.** This is so for the following reasons:

(a) The *CPA* applied to only one person in the whole world – Kable himself *(CPA* s 3(3)). Public and private law coalesced.

(b) The essential steps in the reasoning that formed the *ratio (Blair v Curran* [1939] HCA 23, 62 CLR 464 per Dixon J at pp 531-532) of the majority in *Kable 1996* for holding the *CPA* invalid, *ab initio,* from date of assent included both: (a) the *ad hominem* features of the *CPA*, being legislation directed solely against Kable (see *Kable 1996* per Toohey J at p 98.4; Gaudron J at pp 103.7, 106.8-107.2; McHugh J at pp 120.5, 121.3, 122.2; Gummow J at pp 130.9-131.3, 133.8, 144.2); and (b) the finding in *Kable 1996* that the Supreme Court, in conducting the earlier substantive proceedings against Kable under the *CPA,* and in making the putative detention order on 23 February 1995, was exercising a purely executive power that was repugnant to, and neither part of, nor properly ancillary or incidental to, the exercise of judicial power (see *Kable 1996* per Toohey J at p 98.7; Gaudron J at p 107.2; McHugh J at pp 122.2-122.6; Gummow J at pp 127.5, 128.2). Those findings in *Kable 1996* were correctly relied on by Allsop P (at AB2:513[3]-[4]) in the majority opinion, and by Basten JA concurring (at AB2:572[153]), *in Kable 2012.* The *ad hominem* character of the *CPA,* directed against Kable only, was an essential step in the *in rem* public law finding that the *CPA* was unconstitutional (being in breach of the implied prohibition of Chapter III), flowed across to and binds the State of NSW in the *in personam* private law causes of action brought by Kable against the State. In this situation, the *in rem* constitutional facts (comprising the "1st category" of facts explained by in *Thomas v Mowbray* [2007] HCA 33, 233 CLR 307 at 512[613]-522[639] per Heydon J) and the inter-parties *in personam* facts (ibid, comprising the "2nd category" of facts) are in a number of respects identical. This was expressed concisely by Allsop P (at AB2:513[4]) and Basten JA (at AB2:153) and underlies Allsop

P's conclusions at AB2:518[17]-519[18].

(c) The DPP was a party to *Kable 1995 (main)*, *Kable 1995 (terms)* and *Kable 1996.* The Solicitor General for the State of NSW appeared for the DPP in *Kable 1996.* The State of NSW has accepted liability for the DPP in *Kable 2010 & Kable 2012.* Accordingly, the State is bound in Kable's private litigation by the public law findings made against the DPP in *Kable 1996.*

(d) The *Crown Proceedings Act 1988 (NSW)* provides that the "State of NSW" means the Crown in right of NSW (s 5(1)) and includes *"the Government of NSW"* (s 5(a)) and *"a Minister of the Crown in right of NSW"* (s 5(b)), and provides that *"Civil proceedings against the Crown shall be commenced in the same way,* ***and the rights of the parties in the case shall as nearly as possible be the same****, and judgment and costs shall follow and may be awarded on either side, and shall bear interest,* ***as in the ordinary case between subject and subject"*** (our emphasis).

14. It follows that the Court of Appeal in *Kable 2012* (at AB2:513[4] & 518[17] per Allsop P (with whom Campbell JA [173], Meagher JA [174] & McClellan CJ at CL [176] concurred on false imprisonment), and at AB2:572[153] per Basten JA (separately concurring), rightly applied the public law findings in *Kable 1996* to the private law litigation for false imprisonment by Kable against the State of NSW.

15. **The Court of Appeal rightly applied the ratio of *Love v Attorney-General (NSW)* [1990] HCA 24, 169 CLR 307 *("Love")* to find that Levine J's detention order was not a "judicial order".** The analysis by Allsop P (at AB2:515[9]-519[18], 535[58]) and by Basten JA (at AB2:573[155]-575[160])) rightly applied the *rationes* of *Love* to find that: (a) the detention order of 23 February 1995 was not a *"judicial order"*, but was an administrative order only, and so had no greater validity than the Act that purported to authorise it, viz, the *CPA;* and (b) that as the *CPA* was wholly invalid *ab initio,* there was no basis of validity for the detention order, which was not valid at any time, but was a nullity. It was not valid at any time from the time it was purportedly 'made' on 23 February 1995, throughout Kable's detention (for six months, from 23 February 1995 until 22 August 1995); nor was it valid until it was formally set aside on 12 September 1996 (in *Kable 1996).*

16. The appellant (at AS[26]) and interveners (CI[23]-[24], [35]; QI[13], [22]; VI[8], [15]-[17]) seek to distinguish or limit the application of *Love* on the basis that the order in *Love* was an *ex parte* application by the law enforcement officers, as a step in criminal investigation, without a contradicter for a listening devices warrant. The *ratio* of *Love* cannot be so confined. The distinction drawn in *Love* between a duty to act judicially, in the sense of fairly and impartially (which is not sufficient to

make the act of issuing an order as being a *"judicial order")* and the act of issuing a *"judicial order"* was reaffirmed in *Coco v The Queen* [1994] HCA 15, 179 CLR 427 at p 444.3 (plurality of Mason CJ, Brennan, Gaudron & McHugh JJ); *Grollo v Palmer & Ors* [1995] HCA 26, 184 CLR 348 at pp 359-360 (plurality of Brennan CJ, Deane, Dawson & Toohey JJ) & 389.2 (Gummow J); *Ousley v The Queen* [1997] HCA 49, 192 CLR 69 at pp 80.5, 85.2 (Toohey J), 87.1-87.5 (Gaudron J), 99.3-104.2, 109.3 (McHugh J), 121.4, 122.9, 127.6, 130.6, 131.5 (Gummow J), 140.6, 145.2-146.3 (Kirby J), Furthermore, *Minister for Immigration & Multicultural Affairs v Bharjwaj* [2002] HCA 11, 209 CLR 597 ***("Bharjwaj")*** applied the same reasoning process as the *rationes* of *Love* (without expressly citing *Love* for that principle) to inter-parties litigation. *Bharjwaj* concerned an unsuccessful appeal by the Minister to this Court, which was dismissed, against a decision of the Federal Court, that had upheld the decision of the Immigration Review Tribunal to overrule the decision of the Minister's delegate under the *Migration Act 1958 (Cth)* who had cancelled Bharjwaj's student visa. Gaudron & Gummow J in a joint judgment held that an administrative decision *"involving jurisdictional error"* (at pp 614[51] & 618[61]) is not binding until set aside and *"is properly regarded, in law, as no decision at all"* (at p 615[51]), and that is so *"[a] fortiori in a case in which the decision in question exceeds constitutional power or infringes a constitutional prohibition"* (at pp 614[51]-615; 616[53]). McHugh J agreed that *"jurisdictional error"* made the September 1998 administrative decision *"of no force or effect"* (at pp 618[63] & 619[67]). Hayne J held that that while administrative decisions are *"presumed"* to be correct, if the decision is set aside for *"jurisdictional error"*, the statutory power has not been exercised (at pp 645[151]-646[152]) and *"...there is no useful analogy to be drawn with the decisions of the Court concerning the effect of judgments and orders of the Federal Court of Australia made in proceedings in which the Court had no constitutionally valid jurisdiction"* (at p 646[151]). *"Once it is recognised that a court could set it aside for jurisdictional error, the decision can be seen to have no relevant legal consequences"* (at p 647[153], emphasis in the original). Callinan J agreed that whether the decision was valid depended on whether the September 1998 decision was *"bad in a jurisdictional sense"* (at p 648[162]). Gleeson CJ (at p 605[13]) and Kirby J (at p 634[10]) held that jurisdictional error of an administrative order does not necessarily invalidate the decision *ab initio* if, as a matter of proper construction of a valid Act, the legislature had intended to give the disputed legislation legislation (viz, the *Migration Act 1958* (Cth)) some effect despite jurisdictional error (at p 605[13]).

17. The *CPA* was wholly invalid *ab initio* from date of assent *(Kable 1996* per Toohey J at p 98.9, Gaudron J at p 108.3, McHugh J at p 124.1-124.3, Gummow J at p 144.3). Even the provision of the *CPA*, s 28, that purported to grant immunity to the DPP and other servants and agents of the present appellant (State of NSW) was invalid and could not be severed (see Allsop P at AB2:538[65] citing Toohey J at p

99, Gaudron J at p 108, McHugh J at 124 Gummow J at p 144). There was no residual legislative authority at all in any provision of the *CPA* to give any effect whatsoever to the detention order of 23 February 1995. The Court of Appeal in *Kable 2012* was correct to hold that the detention order of 23 February 1995 was not a judicial order, but was as a purported administrative order only, involving jurisdictional error, and wholly void and a nullity, which did not authorise lawful detention of the respondent at any time from when it was purportedly made (on 23 February 1995) until it was set aside, in *Kable 1996* (on 12 September 1996).

10 18. The appellant (AS[26]-[27]) and interveners (CI[16.2]; QI[11]-[14]; VI[5.4], [18], [23]) misconstrue the reliance placed in *Kable 2012* by Allsop P for the majority (at AB2:512[3]-514, 518[17]-519[18]), & by Basten JA in his separate concurring reasons (at AB2:570[150]-571, 572[153]), on the findings made by this Court in *Kable 1996.* The Court of Appeal in *Kable 2012* did not characterise Levine J's order as administrative *"only"* (AS[26]) or *"solely"* (QI[13]) by reference to the inseverable invalidity of the *CPA,* and did not regard *Kable 1996* to be a *"complete answer"* (AS[27]) to the characterisation of Levine J's order. Allsop P's statement that *"The High Court in Kable [1996] has decided these questions"* (AB2:518[17]) was, when read in proper context, not a statement that *Kable 1996* had itself
20 *decided* the characterisation of Levine J's order for private law rights, but was a short-hand way of summarising the process of reasoning set out at AB2:512[2]-521[21], 535[58] including the *Love* line of reasoning. Allsop P (at AB2:512[3]-513[4], 518[17]), and Basten JA (at AB2:572[153]) correctly recognised the interrelationship between the public law findings in *Kable 1996* and the private law causes of action in *Kable 2012*, and correctly applied settled processes of reasoning from *Love* to find that the detention order of 23 February 1995 did not issue by a *"judicial act"*, in the strict sense required by the *Love* reasoning, and was not a *"judicial order"*.

30 19. **Although Levine J was, under conventional doctrine, exercising federal jurisdiction in finding (erroneously) that the *CPA* was constitutionally valid, his detention order of 23 February 1995 was, nonetheless, not a judicial order.** Levine J found (erroneously) in his reasons that the *CPA* was constitutionally valid (at AB1:386(60)-387(10), 392(40), 394(49-53)).

20. The appellant (at appeal ground 2 at AB2:589[2]) and interveners contend that the respondent's constitutional challenge that was raised in the proceedings before Levine J (and which engaged federal jurisdiction to the *"matter"* pursuant to the *Judiciary Act 1903* (Cth) s 39(2) & Cth *Constitution* s 76(i)) precludes the finding made in *Kable 2012* that the detention order of 23 February 1995 was itself a purely executive order and was not a judicial order. The appellant and interveners contend that the making of the detention order was a *"judicial order"* as it was part of the same *"matter"* as the constitutional challenge (AS[20], [24]-[25]; CI[25], [35]; QI[19]-[20]; VI[24]-[25], [36]; WI[14]-[15], [27]-[29]), or was sufficiently incidental to the constitutional challenge (AS[29]).

21. Allsop P (at AB2:515[8]-[9], 517[16]-518) and Basten JA (at AB2:540[72], 567[141]-[142], 568[144], 570[149], 571[150]-572[153]) rightly reasoned and held that not every purported 'order' made by a primary judge in a matter in which federal jurisdiction was triggered in by a threshold constitutional challenge is itself a 'judicial act'. Their Honours rightly applied the distinction explained in *Love,* supra between the 'character of the power', in a bare or general sense (which does not make an order judicial, see *Love,* supra, per Mason CJ, Brennan, Dawson, Toohey & Gummow JJ at pp 320.5-321.3, 321.8-322.2), and the nature of the actual act of issuing the order (which makes the order judicial if the strict criteria for judicial power are satisfied, see *Love,* supra, at p 321.4).

22. A duty to act judicially (in the sense of fairly and impartially) does not make the act of making the order itself judicial *(Love,* supra, at p 319.1-319.3). The findings of the majority in *Kable 1996* conclusively established that the jurisdiction exercised by Levine J in making the detention order was a purely executive jurisdiction (see citations earlier in these submissions at par 13(b) above), and was not properly ancillary or incidental to judicial power – irrespective of whether the order was made by a state court exercising federal jurisdiction or *quaere* by a state court (the Supreme Court of NSW) purporting to exercise a residual state jurisdiction after federal jurisdiction is exhausted *(Momcilovic v The Queen* [2100] HCA 34, 245 CLR 1 at 70[101] per French CJ *(obiter)).*

23. The finding that Levine J was exercising a purely executive jurisdiction was made in *Kable 1996,* notwithstanding the federal aspect of the constitutional challenge that picked up the State law viz the *CPA*. The finding in *Kable 1996* that Levine J was exercising a purely executive jurisdiction was not merely a public law finding *in rem* between Kable and the DPP. *Kable 2012* correctly applied that finding to the private law *in personam* cause of action for false imprisonment between Kable and the State of NSW. Levine J, when he made the detention order of 23 February 1995, was not exercising *"the defining or essential features"* of a Chapter III superior court (see *Wainohu v NSW* [2011] HCA 24, 243 CLR 1 at 208[44] per

French CJ & Kiefel J; see also *South Australia v Totani* [2010] HCA 39, 242 CLR 1 per French CJ at 48[70]). Basten JA rightly pointed out the *"logical conundrum"* (AB2:568[145], 570[149]) that would arise if a constitutional challenge to State legislation *(CPA)* of itself rendered an order valid that otherwise would (if it had not been constitutionally challenged) have been wholly invalid. Allsop P rightly pointed out (at AB2:512[2], 535[60]-537[63]) that the common law should be developed in conformity with respecting constitutional boundaries that protect the rule of law under the Constitution. The *"autochthonous expedient" (R v Kirby; Ex Parte Boilermakers Society of Australia* [1956] HCA 10, 94 CLR 254 per Dixon CJ, McTiernan, Fullagar & Kitto JJ at p 268.7) of using state courts to exercise federal jurisdiction, should be developed within the constitutional boundaries of Chapter III of the Constitution: *Lange v Australian Broadcasting Corporation* [1997] HCA 25, 189 CLR 520 (per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow & Kirby JJ at p 566.2: *"Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives (Theophanous's Case (1994) 182 CLR 104 at 136). The common law and the requirements of the Constitution cannot be at odds."*

24. The Court of Appeal's approach in *Kable 2012* reflects and correctly applies the settled distinction made in federal jurisdiction between *"...separate sources of authority to decide different kinds of questions"* (per Hayne & Callinan JJ in *Re Macks & Ors; Ex parte Saint* [2000] HCA 62, 204 CLR 158 ***("Re Macks")*** at 275[331] citing *Residual Assco Group Limited v Spalvins* [2000] HCA 33, 202 CLR 629 ***("Residual Assco")*** at 638[8, 639[12]-[13] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ). Although the constitutional challenge to the *CPA* engaged federal jurisdiction, *"...orders which dealt with proceedings on their merits were said to be invalidly made if the jurisdiction to make them depended on invalid legislation"* (per Hayne & Callinan JJ in *Macks* at 276[31] citing *Residual Assco* at 639[13], 640-41[17]). The terms of the order made by Levine J in *Kable 1995 (terms)* (at AB1:429-433) and the purported detention order itself (at AB1:426-428), in the proceedings on the merits of the order, were invalidly made, as the purported *'order'* relied on the authority of the *CPA,* which was no authority at all, as it was wholly invalid *ab initio.*

25. It follows that the detention order of 23 February 1995 was void *ab initio* and was not valid until set aside.

26. **The respondent's alternative contention is that even if (contrary to the holding of *Kable 2012)* the detention order of 23 February 1995 was valid until it was set aside, it was then retrospectively nullified (on 12 September 1996) *ab initio* as from 23 February 1995, as it was an order made in breach of Chapter III of the Commonwealth Constitution.** The respondent's alternative contention is that, at most, an order made in breach of Chapter III of the Constitution has a

'provisional' validity, only; and that even if a 'judicial order' that breaches Chapter III has to be obeyed until it is set aside (on 'appeal') or quashed (in the exercise of original supervisory jurisdiction), when it is set aside, it is a nullity *ab initio;* or alternatively, the Court has a discretion to nullify it *ab initio* which should be exercised in favour of the respondent where, as here:

(a) no third parties (other than the appellant's own servants or agents for whom the appellant is vicariously liable) have taken any steps in reliance on the order: *Commissioner for Railways (NSW) v Cavanough* [1935] HCA 45, 53 CLR 220, and see Allsop P at AB2:522[24]-523[27], 525[35], Basten JA at AB2:564-565[135]; *Re Macks,* supra, per Gleeson CJ at 179[33], Gaudron J at 193-194[83], McHugh J at 221[173], Gummow J at 241[235]-232[236], Kirby J at 269[311]-[312], Hayne & Callinan JJ at 286[369]-287[373]);

(b) there has been no merger of the cause of action in an un-appealed conviction or un-appealed judgment *(Victoria Stevedoring and General Contracting Co Pyt Ltd v Dignan* [1931] HCA 34, 46 CLR 73 and see Allsop P at AB2:522[25], Basten JA at AB2:565[136]); and

(c) the order was not a consent order: *International Finance Trust Company Limited v NSW Crime Commission (No. 2)* [2010] NSWCA 46 at [56], [62]-[64], [83], [87] per Basten JA with whom Allsop P [1] & McClellan CJ at CL [91] concurred; *Newcrest Mining Limited v Thornton* [2012] HCA 60 per French CJ at [17], Heydon J at [48], Bell J at[113], [125] ; Crennan & Kiefel JJ dissenting at [100]).

This contention was advanced for Kable in the Court of Appeal (see Basten JA at AB2:539-540[72], 543[78(vi)], 544-545[81], 560[121], [123]) but that Court found it unnecessary to determine as the Court accepted the putative detention order of 23 February 1995 was not a judicial order at all.

27. However, the respondent presses this contention in the alternative. This is necessary to *"...vindicate a constitutional boundary, or to guarantee a constitutional right"* (C L Pannam, "Unconstitutional Statutes and De Facto Officers", (1966) 2 Federal Law Review 37 at 61-62, quoted with approval both by Kirby P in *Residual Assco,* supra, at 655[64] and by Allsop P at AB2:536[60]. See also the passage from *Commissioner for Motor Transport v Antill Ranger & Co Pty Ltd* [1956] UKPCHCA 3, 94 CLR 177 (PC) at 181.3 quoted by Basten JA at AB2:565[138] to similar effect.

28. As stated in *Re Macks,* supra, per Hayne & Callinan JJ at 274[329]: *"There can, however, be no unthinking transplantation to Australia of the learning that has built up about superior courts of record in England. The constitutional context is wholly different. Due regard must be had to those differences."*

29. Bankruptcy law provides a well-known example of a judicial order of a superior court, viz, a sequestration order, which is wholly annulled *ab initio* when it is set aside: *Union Club v Lord Battenberg* [2006] NSWCA 72, 66 NSWLR 1 per Giles JA at 19[80]-[81], Santow JA at 28[128]-[129], Bryson JA at 40-41[180]); special leave refused *Battenberg v Union Club* [2006] HCATrans 621 (Gummow & Callinan JJ).

30. The purported detention order of 23 February 1995 was one that was *"...so vicious as to violate some fundamental principle of justice": Martin v Mackonochie* (1878) 3 QBD 730 at 739 per Lush J; *Martin v Mackonochie* (1879) 4 QBD 697 at 732 per Thesiger LJ; *R v North* (1927) 1 KB at 504 per Scrutton LJ; *Munday v Gill* [1930] HCA 20, 44 CLR 38 at p 44.3 per Isaacs CJ; *Posner v Collector for Inter-State Destitute Persons (Victoria)* [1946] HCA , 74 CLR 461 at 476.3 per Starke J. In the last-mentioned case, *Posner,* Starke J opined, in *obiter,* that such orders should *"perhaps"* be a *"void"* category, and have *"no effect or operation in law"* (at p 476.2). In the same case, Williams J said, after reviewing the English decisions, that although the order of a superior court is voidable, nonetheless: *"An order of a superior court which is made in the absence of a person who has not been served, has often being described in judgments of the highest authority as being null and void and so lacking in efficacy that it can be disregarded. The latest of these authorities appear to be Craig v Kanssen (1943) KB256; Marsh v Marsh (1945) AC 271. I take the expression 'null and void' where it occurs in these judgments in reference to a superior court to mean that the person against whom the order is made may disregard it in the sense that it is so fundamentally impeachable that he is entitled to have it set aside in the inherent jurisdiction of the court which made it ex debito justitiae if at any time it is sought to be enforced against him" (Posner* at 489.8-490.1). The respondent submits that these epithets characterise the objective quality that should deprive the putative detention order of 23 February 1995 of being a 'judicial order' in required strict sense. This should enliven the possible *"exception or qualification"* reserved for consideration in an appropriate case in *Haskins v Commonwealth* [2011] HCA 28, 244 CLR 22 at 42[46] per French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ.

31. Kable suffered a wrong which deserves a remedy for false imprisonment. Damages is the only practical private law remedy for the respondent against the appellant. The remedy of restitution *(Production Spray Painting & Panel Beating Pty Ltd v Newham [No 2]* (1992) 27 NSWLR 659 (CA); *Macintosh v Lobel* (1993) 30 NSWLR 441 (CA) per Mahoney JA at 474B) is not feasible in the situation between the appellant and respondent.

32. **The appellant has no common law defence of justification to false imprisonment of the respondent from 23 February 1995 to 22 August 1995 (six months).** False imprisonment is a tort of strict liability at common law: *R v*

Governor of Brockhill Prison, Ex Parte Evans (no 2) [2001] 2 AC 19 (HL) ***("Brockhill")*** at 26B-C (Lord Slynn), 27D-E (Lord Browne), 28B-C (Lord Steyn), 32D (Lord Hope), 42B-D (Lord Hobhouse).

33. It is no defence or justification at common law that a gaoler detained the respondent based on the gaoler's bona fide belief that the order was a valid judicial order in accordance with an erroneous interpretation of the law: *Marshall v Watson* [1972] HCA 27, 124 CLR 641; *Brockhill,* supra, at 25G-H, 26D-H (per Lord Slynn), 28H-29C (per Lord Steyn, approving *Cowell v Corrective Services Commission of NSW* (1988) 13 NSWLR 714 (CA)), 32H-33B, 35D-F (per Lord Hope), 40H, 42E-F, 43C-D, 45H-46A, 47F (per Lord Hobhouse).

34. It is no defence that the appellant or its servants or agents believed that the detention order of 23 February 1995 was a valid judicial order if it was only, as the respondent submits, and as was rightly held in *Kable 2012,* a purported administrative order only. The principle stated by *Coleridge J in R v Drury* (1849) 3 Car & K 190 ***("Drury")*** at 199, 175 ER 516 at 520 that *"acts done in the execution of justice, which are compulsive"* gives immunity against suit only if (a) the order is a valid judicial order (which the detention order of 23 February 1995 was not), or (b) if the *CPA* authorised the detention (which it did not as it was wholly invalid): *Marshall v Watson* [1972] HCA 27, 124 CLR 641. As s 28 of the *CPA* (the immunity provision) was not severable and was invalid with the whole *CPA,* there was no defence of honest and mistaken belief: *Hazelton v Potter* [1907] HCA 63, 5 CLR 445; *Little v Commonwealth* [1947] HCA 24, 75 CLR 94; *Trobridge v Hardy* [1955] HCA 68, 94 CLR 147

35. Even if this Court held, against the respondent, that the detention order were a judicial order when it was made (on 23 February 1995), it was nonetheless annulled or nullified *ab initio* when it was set aside (on 12 September 1996), for the reasons set out above in the alternative contention (pars 26-31 above).

36. Furthermore, even if (contrary to the respondent's submission) the *Drury* principle is applicable, it only gives immunity to the gaolers (ie to the appellants servants and agents), not to the principal, viz, the appellant, which cannot rely on the immunity in vicarious liability: *Law Reform (Vicarious Liability) Act 1983 (NSW)* s 10(1) & (2). As s 28 of the *CPA* was invalid with the rest of the *CPA,* the appellant cannot engage s 10(3) of the *Law Reform (Vicarious Liability) Act 1983*. The intervener submissions by WA (WI) do not address this legislation. The Court of Appeal was correct (Allsop P at AB2:534[56]; Basten JA at AB2:[167], 578-579[171]).

PART VII: STATEMENT OF THE RESPONDENT'S ARGUMENT ON THE RESPONDENT'S NOTICE OF CONTENTION

37. The executive government **("EG")** has a juristic status as an entity recognised by law that can be sued in either a responsible minister or collective sense: see the legislative provisions identified at pars 10(d) & (e), and 13(d) of these submissions above, and annexed below. The EG is the controlling mind of the State of NSW(the appellant). The legislation recognises that the executive government has an existence independent of the legislature. Implicit in the said legislation is the notion that the convention of cabinet solidarity informs the juristic entity that can be sued. To that extent the convention of cabinet solidarity is not a shield against the appellant's liability

38. The mere fact that aspects of the EG's conduct impacts on the legislature does not shield the EG from juristic liability where the EG's conduct can be disentangled. This much is established by *The Queen v Toohey; Ex Parte Northern Land Council* [1981] HCA 74, 151 CLR 170; *FAI Insurances Ltd v Winneke* [1982] HCA 26, 151 CLR 342.

39. The facts relied on at par 8 above of these submissions establish a course of conduct by the EG before, during and after the legislature enacted the *CPA*. The conduct of the EG establishes a common purpose by members of the EG (having regard to cabinet solidarity) to detain the respondent by an improper means that can be disentangled from the legislature's role. The means was a violation of the respondent's rule of law protections. The EG's sole or predominant purpose was to formulate, engage in, and carry out (as it did) a plan of concerted action to detain the respondent in prison by conduct of the EG (and its servants or agents, including the EG for whom the appellant has accepted liability) which *"...cloaked their work in the neutral colors of judicial action" (Kable 1996* per Gummow J at p 133 quoting with approval *Mistretta v United States* (1989) 488 US 361). The members of the EG were joint tortfeasors with each other, as they engaged in in *Thompson v Australian Capital Television Pty Ltd & Ors* [1996] HCA 38, 186 CLR 575,

40. **False imprisonment.** In addition to *vicarious* liability of the appellant for the respondent's false imprisonment, on which the respondent succeeded in the Court of Appeal, the respondent presses ground 1 of his Notice of Contention (AB2:598[1]) that the appellant was personally or directly liable for false imprisonment. The holding in *Kable 2012* rejecting *direct* liability of the appellant in false imprisonment (at AB2:538[64], 562[129], 564[134]) should be overruled in the respondent's favour . The respondent relies on the factual matters summarised earlier in these submissions (at par 8 above) as enlivening the principle that the appellant (ie the Executive Government and Ministers, see par 13(d) above) engaged in concerted action with one another to carry out that purpose *(Thompson*

v Australian Capital Television Pty Ltd & Ors [1996] HCA 38, 186 CLR 575 ***("Thompson")*** per Brennan CJ, Dawson & Toohey JJ at pp 580.8-581.3). The EG's conduct (by itself and its servants and agents including the DPP) was carried out "in furtherance of a common design" in which the EG's aided, counselled, directed and joined in the furtherance of that design *(Thompson,* per Gummow J at p 600.3 adopting the language used in *The Koursk* [1924] P 140 at 155, 159-160). The respondent contends that the passage in *Haskins v Commonwealth* [2011] HCA 28, 244 CLR 22 ***("Haskins")*** at 41[43] that is quoted by Basten JA at AB2:564[133]-[134] does not exclude direct liability in the present appeal. *Haskins* did not involve the application of the principle of joint liability in *Thompson* to the EG as a juristic entity under the *Crown Proceedings Act 1988* (NSW).

41. **Malicious prosecution and collateral abuse of process.** The trial judge and the Court of Appeal erred in finding that the conduct of the EG could not be disentangled from the legislature or the motives of parliamentarians *(Kable 2010* at AB2:469[57]-471[62]; *Kable 2012* per Basten JA at AB2:553-554[104], 557[114] with whom Allsop P at AB2:512[1], Campbell JA at AB2:579[173], Meagher JA at AB2:580[174], McClellan CJ at CL at AB2:580[176] concurred as to malicious prosecution and collateral abuse of process). The respondent was not suing for the *"very act of initiating and proclaiming the invalidated legislation" (Kable 2010* at AB2:470[61]). The respondent was suing the EG as joint tortfeasors for carrying out a tortious plan and common design.

42. The respondent contends that the EG's joint purpose set out above (at par 39) was a sufficient improper purpose for each of the respective torts of malicious prosecution and collateral abuse of process. The respondent describes this as *'institutional malice'*. The trial judge and the Court of Appeal wrongly refused to accept this as a cognisable form of malice *(Kable 2010* at AB2:472[70]-474[74]; *Kable 2012* at AB2:556[113]-557[114]). The respondent contends that malice has acquired an extended meaning in 'rule of law' torts, being enlivened by an improper purpose by the EG to instigate or set the law in motion (malicious prosecution) and/or to use, in the sense of misuse, the court system (abuse of process) to infringe the respondent's rule of law freedoms in the manner that occurred – it was a purpose *"other than a proper purpose": A v New South Wales* [2007] HCA , 230 CLR 500 at 531[91]-[92] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon & Crennan JJ. Predominant purpose is the criterion *(Williams v Spautz* [1992] HCA 34, 174 CLR 509 ***("Spautz")*** per Mason CJ, Dawson, Toohey & McHugh JJ at p 529.5).

43. **Malicious prosecution:** There was absence of reasonable and probable cause for the EG's conduct. Kable was already remanded on bail on pending criminal charges so it was untrue that he could *"...not otherwise be detained"*

(AB1:116(25)). The EG knowingly (subjectively) and objectively (in the *Mistretta,* supra, sense) promoted a totally unfair 'prosecution' of Kable under unfair procedures which used the judiciary to bring about the EG's pre-determined *ad hominem* goal of detaining the respondent *(A v NSW,* supra, at 525[70]).

44. **Abuse of process:** Unlike an ordinary litigant, who cannot *'mould'* the court rules and prosecution procedures, the appellant's conduct (by itself and by its servants and agents including the DPP) controlled the prosecution evidence and process adopted by the Supreme Court in the *CPA* proceedings. The EG was the 'real' party, even though the DPP was the formal plaintiff *(CPA* ss 3(1), 8). The categories of abuse of process are not closed *(Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd & Ors* [2009] HCA 43, 239 CLR 75 per French CJ, Gummow, Hayne & Crennan JJ at 93[28]). The CPA proceedings were *"seriously and unfairly burdensome, prejudicial or damaging"* and *"productive of serious and unjustified trouble and harassment"* of the respondent (ibid at 94[28] reaffirming *Batistatos v RTA (NSW)* [2006] HCA 27, 226 CLR 256 per Gleeson CJ, Gummow, Hayne & Crennan JJ at 267[14]). The *CPA* proceedings were (as has been established by Kable 1996) an abuse of process in the sense explained by Brennan J, namely, *"the process of the law is put in motion for a purpose which...the process is incapable or serving the purpose it is intended to serve...When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process...which is not capable of serving its true purpose" (Jago v Disrict Court of NSW & Ors* [1989] HCA, 168 CLR 23 at pp 47.7- 48.3; reaffirmed by Brennan J in *Williams,* supra, at p 531.5) viz, was incapable of achieving detention of the respondent Kable according to law.

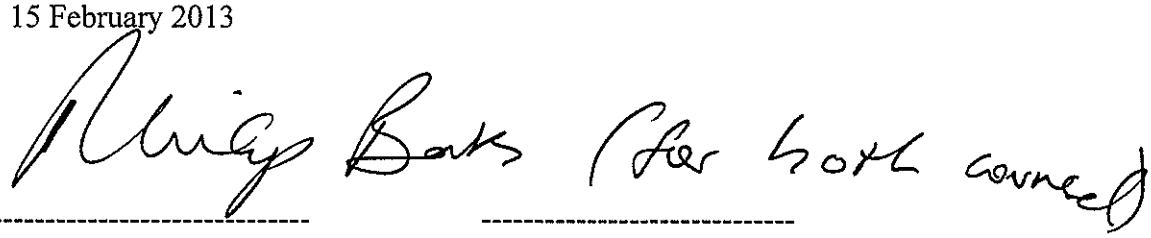
45. This Court should overrule intermediate appellate courts which have held that the tort of collateral abuse of process cannot be committed by the 'real' prosecutor who is not an actual party on the record: See *Leerdam v Noori* [2009] NSWCA 90, 255 ALR 553 ***("Leerdam I"),*** special leave refused [2009] HCATrans 288 ***("Leerdam II")*** and *Emanuele v Hedley* [1998] FCA 709 ***("Emanuele"),*** which was mentioned but not decided in *Kable 2012* by Basten JA at AB2:540-541[73]. *Emanuele* noted however the argument that abuse of process may not be limited to the actual party but may extend to a 'real' party such as the Commonwealth. *Leerdam I* can be explained on the narrow basis that a party's solicitor on the record cannot be sued for collateral abuse of process where the solicitor has acted in accordance with the established professional and regulatory norms of conduct of admitted practitioners.

PART VIII: ESTIMATE OF THE NUMBER OF HOURS REQUIRED FOR THE PRESENTATION OF THE RESPONDENT'S ORAL ARGUMENT

46. The respondent estimates he will require two to three hours to present his oral argument.

10

Dated: 15 February 2013



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COUNSEL FOR THE RESPONDENT

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S352 of 2012

STATE OF NSW

Appellant

AND

GREGORY WAYNE KABLE

Respondent

ANNEXURE A TO THE RESPONDENT'S SUBMISSIONS

1. This Annexure sets out the terms of sections 1 2, 3, 4, 5, 6 and 7 of the *Crown Proceedings Act 1988* (NSW) as well as sections 1, 2, 3, 4, 5, 7, 8 and 10 of the *Law Reform (Vicarious Liability) Act 1983* (NSW), as they were in force as at 23 February 1995 to 22 August 1995, and also sets out any amendments since then.

2. Firstly, the *Crown Proceedings Act 1988* (NSW) sections 1 2, 3, 4, 5, 6 and 7:

1 Name of Act

This Act may be cited as the *Crown Proceedings Act 1988*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

In this Act:

> ***civil proceedings*** includes civil proceedings at law or in equity, and also includes proceedings by way of preliminary discovery, cross-claim, counterclaim, cross-action, set-off, third-party claim and interpleader.

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Crown means the Crown in right of New South Wales, and includes:

(a) the Government of New South Wales, and

(b) a Minister of the Crown in right of New South Wales, and

(c) a statutory corporation, or other body, representing the Crown in right of New South Wales.

judgment includes every species of relief which a court can grant, whether interlocutory or final, and whether by way of order that anything be done or not done or otherwise, and also includes a declaration.

4 Crown may sue

The Crown may bring civil proceedings under the title "State of New South Wales" against any person in any competent court.

3. Section 5 was in the following form since it came into force on 1 February 1989, and was subsequently amended.

5 Crown may be sued

(1) Any person, having or deeming himself, herself or itself to have any just claim or demand whatever (not being a claim or demand against a statutory corporation representing the Crown) may bring civil proceedings against the Crown under the title "State of New South Wales" in any competent court.

(2) Civil proceedings against the Crown shall be commenced in the same way, and the proceedings and rights of the parties in the case shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side, and shall bear interest, as in an ordinary case between subject and subject.

4. Section 5 was amended by the Courts Legislation Amendment Act 1998 (No. 49 of 1998), schedule 9 with effect from 3 August 1998.

5 Crown may be sued

Insert "against the Crown" after "whatever" in section 5 (1).

6 Service of documents on the Crown

(1) In connection with civil proceedings by or against the Crown under the title "State of New South Wales" a document required to be served on the Crown shall be served (subject to any other Act or law) on the Crown Solicitor.

(2) Rules of court may be made with respect to the mode of service of documents on the Crown Solicitor for the purposes of this section, including rules that personal service may be duly effected by leaving a document at the office of the Crown Solicitor.

7 Satisfaction of judgment

(1) The Treasurer shall pay (out of any money legally available) all money payable by the Crown under any judgment, including any interest, except to the extent that the money is paid by some person other than the Treasurer.

(2) Execution, attachment or similar process shall not be issued out of any court against the Crown or any property of the Crown.

5. Secondly, the *Law Reform (Vicarious Liability) Act 1983* (NSW) sections 1, 2, 3, 4, 5, 7, 8 and 10:

1 Name of Act

This Act may be cited as the *Law Reform (Vicarious Liability) Act 1983*.

2 Commencement

(1) Sections 1 and 2 shall commence on the date of assent of this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

3 Application of Act

This Act does not apply to or in respect of a tort committed by a person or arising out of a wrongful act or omission occurring before the day appointed and notified under section 2 (2).

4 Act to bind Crown

This Act binds the Crown.

6. Section 5 was in the following form since it came into force on 28 October 1983, and was subsequently amended.

5 Definitions

(1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

Crown means the Crown in right of New South Wales.

independent function, in relation to a servant or a person in the service of the Crown, means a function conferred or imposed upon the servant or person, whether or not as the holder of an office, by the common law or statute independently of the will of the servant's master or the Crown, as the case may require.

office includes the office of special constable within the meaning of Part 4 of the *Police Offences Act 1901*.

person in the service of the Crown does not include a servant of the Crown.

(2) In this Act, a reference to:

(a) a function, includes a reference to a power, authority and duty, and

(b) the performance of a function includes a reference to the exercise of the function and the failure to perform or exercise the function.

4. Section 5 was amended by Police Legislation Amendment (Civil Liability) Act 2003 (No. 74 of 2003) Schedule 2 with effect from 1 January 2004.

[2] Section 5 Definitions

Insert in alphabetical order in section 5(1):

court includes a tribunal, and in relation to a claim for damages means any court or tribunal by or before which the claim falls to be determined.

legal proceedings means proceedings in a court.

originating process means any statement of claim, summons, application or other process by means of which legal proceedings are commenced.

police tort claim – see section 9B (1).

7 Vicarious liability of masters

Notwithstanding any law to the contrary, a master is vicariously liable in respect of a tort committed by the master's servant in the performance or purported performance by the servant of an independent function where the performance or purported performance of the function:

(a) is in the course of the servant's service for his or master or is an incident of the servant's service (whether or not it was a term of his or her contract of service that the servant perform the function), or

(b) is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the servant's master.

8 Further vicarious liability of the Crown

(1) Notwithstanding any law to the contrary, the Crown is vicariously liable in respect of the tort committed by a person in the service of the Crown in the performance or purported performance by the person of a function (including an independent function) where the performance or purported performance of the function:

(a) is in the course of the person's service with the Crown or is an incident of the person's service (whether or not it was a term of the person's appointment to the service of the Crown that the person perform the function), or

(b) is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the Crown.

(2) Subsection (1) does not apply to or in respect of a tort committed by a person in the conduct of any business, enterprise, undertaking or activity which is:

(a) carried on by the person on the person's own account, or

(b) carried on by any partnership, of which the person is a member, on account of the partnership.

10 Effect of statutory exemptions

(1) In this section:

person includes the Crown.

statutory exemption means a provision made by or under an Act which excludes or limits the liability of a person.

(2) For the purposes of determining whether or not a person is vicariously liable in respect of a tort committed by another person, any statutory exemption conferred on that other person is to be disregarded.

(3) Except as provided by this section, nothing in this Act affects a statutory exemption conferred on a person.

4. This Act was also amended by Police Legislation Amendment (Civil Liability) Act 2003 (No. 74 of 2003) Schedule 2 with effect from 1 January 2004, in relation to the insertion of headings as follows:

[1] Part 1, heading

Insert before section 1:

Part 1 Preliminary

[3] Part 2, heading

Insert before section 7:

Part 2 Vicarious liability of masters for independent functions

[4] Part 3, heading

Insert before section 8:

Part 3 Vicarious liability of Crown for persons in its service

[6] Part 5, heading

Insert before section 10:

Part 5 Miscellaneous