HIGH COURT OF AUSTRALIA

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File Number:	S17/2026
File Title:	President of the Legislative Council of New South Wales v. Cu
Registry:	Sydney
Document filed:	Form 27A - Appellant's Submissions
Filing party:	Appellant
Date filed:	16 Apr 2026

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

PRESIDENT OF THE LEGISLATIVE COUNCIL OF NEW SOUTH WALES

Appellant

and

JAMES CULLEN

First Respondent

ATTORNEY GENERAL FOR NEW SOUTH WALES

Second Respondent

SPEAKER OF THE LEGISLATIVE ASSEMBLY OF NEW SOUTH WALES

Third Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1 These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2 Mr Cullen (the First Respondent and the Chief of Staff to the Premier of New South Wales) was summoned to attend and give evidence before the Privileges Committee of the Legislative Council of New South Wales (**Summons**) under s 4(2) of the *Parliamentary Evidence Act 1901* (NSW) (**PE Act**). The First Respondent did not comply with the Summons. The President (the Appellant and the "independent and impartial representative" of the Council[1]) proposed to certify that the First Respondent had failed to comply with the Summons, without just cause or reasonable excuse (s 7).

3 The First Respondent commenced a proceeding to prevent that occurring, and thereby to prevent him: being the subject of an arrest warrant issued by the Supreme Court of New South Wales (s 8); being arrested, detained and brought before the Privileges Committee for the purpose of giving evidence (s 9); and being compelled to answer any lawful questions (s 11). With the support of the Attorney General for New South Wales (the Second Respondent), the First Respondent was successful: the Court of Appeal of New South Wales found that ss 7 to 9 of the PE Act are invalid because they contravene the limitation on State legislative power identified in ***Kable*** *v Director of Public Prosecutions (NSW)*.[2] The President, with the support of the Speaker of the Legislative Assembly of New South Sales (the Third Respondent), unsuccessfully resisted that conclusion. By his ground of appeal, the President contends the Court of Appeal's conclusion was wrong.

PART III: SECTION 78B NOTICE

4 Notice under s 78B of the *Judiciary Act 1903* (Cth) has been filed and served: **CAB 71**.

PART IV: CITATION

5 The medium neutral citation for the reasons of the Court of Appeal is *Cullen v President of Legislative Council of New South Wales* [2025] NSWCA 278.

PART V: FACTS

6 An agreed statement of facts provided the factual foundation for the Court of Appeal's judgment: see **CAB 46**. Most relevantly, under s 4(2) of the PE Act, on 7 October 2025,

1 *Constitution Act 1902* (NSW), ss 22G(1).
2 (1996) 189 CLR 51.

the Usher of the Black Rod personally served the Summons on the First Respondent. The Summons was signed by the Chair of the Privileges Committee and stated that the First Respondent was required to attend and give evidence before the Privileges Committee at 10:00 am on 8 October 2025. The First Respondent did not attend and give evidence at that time or at all: see **CAB 58-64 [43]-[57], [61]**. However, no certificate was issued under s 7 in light of the First Respondent's challenge: see **CAB 63-65 [58]-[60], [62]**.

7 The First Respondent's challenge was heard and determined, in the first instance, by the Court of Appeal "in light of the evident importance of the issue sought to be raised": **CAB 10 [2]**. In the Court of Appeal, the "main vice to which [the First Respondent] pointed was that the function conferred by s 8 was mandatory and non-evaluative and involved in substance a "rubber stamp" upon the President's decision to detain the person and require him to come before the House or a committee": **CAB 11 [5]**. In essence, the Court of Appeal accepted the First Respondent's arguments, concluding that ss 7 to 9 contravened the *Kable* limit and granted a declaration accordingly.

PART VI: ARGUMENT

A INTRODUCTION

8 Chapter III of the Constitution establishes an "integrated court system".[3] That system contemplates that "any court of a State", including each "Supreme Court" (s 73(ii)), may be invested with federal jurisdiction (s 77(iii)) and exercise the judicial power of the Commonwealth (s 71). The Constitution thereby requires every State "court", once established, to remain an "appropriate recipient" of federal jurisdiction.[4] To remain an appropriate recipient, a State court must maintain its "institutional integrity", which is to say it must maintain the "essential characteristics" of a "court".[5] That requirement provides the foundation for the *Kable* limit: a State law will contravene that limit if it purports to confer upon a State court a power or function that "substantially impairs" the court's "institutional integrity" or, in other words, one or more of its "essential characteristics".[6]

3 *A-G (NT) v* ***Emmerson*** (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
4 ***Forge*** *v ASIC* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ).
5 See *Forge* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ).
6 *Emmerson* (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

9 It is not possible to make a "single all-embracing statement" of the essential characteristics of a "court".[7] However, a "court" is an institution for the "administration of justice".[8] To administer justice, a court must have the "capacity to administer the common law system of adversarial trial" which, in turn, requires a court to be (and appear to be) an "independent and impartial tribunal".[9] It follows that the *Kable* limit will invalidate a State law that confers upon a State court a power or function that "substantially impairs" the court's status as an independent and impartial tribunal. In that way, the *Kable* limit protects "the integrity of courts as institutions established for the administration of justice".[10]

10 10 The circumstances in which legislation will contravene the *Kable* limit cannot be identified in the abstract.[11] The assessment of whether a law substantially impairs the institutional integrity of a court is invariably one that requires a "practical judgment" to be made.[12] The judgment required is one of "substance, and therefore of degree".[13] It "requires an examination not only of the legal operation of the law but also of the practical impact of the law".[14] It is necessary to give "close attention to the detail of [the] impugned legislation".[15] The judgment must be made bearing in mind that the "essential characteristics" require application in the "real world" and "are not and cannot be absolutes".[16] It has been said that "only extreme legislation" will contravene the limit.[17]

11 In making the necessary judgment, the Court of Appeal focused on two features of the
20 statutory scheme (see **CAB 11-12 [5]-[6], 13-14 [8]-[9]**, **22 [31], 34 [66], 34-35 [68]**):

7 *Forge* (2006) 228 CLR 45 at [64] (Gummow, Hayne and Crennan JJ).

8 *Harris v Caladine* (1991) 172 CLR 84 at 92 (Mason CJ and Deane J), cited in *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [120] (Gageler J) (***NAAJA***).

9 *Forge* (2006) 228 CLR 45 at [64]. See also *North Australian Aboriginal Legal Aid Service Inc v* ***Bradley*** (2004) 218 CLR 146 at [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); ***Garlett*** *v Western Australia* (2022) 277 CLR 1 at [117]-[118] (Gageler J).

10 See *NAAJA* (2015) 256 CLR 569 at [120], [127], [134] (Gageler J); *Garlett* (2022) 277 CLR 1 at [115], [135] (Gageler J), [168], [182] (Gordon J).

11 See *Assistant Commissioner Condon v* ***Pompano*** *Pty Ltd* (2013) 252 CLR 38 at [124] (Hayne, Crennan, Kiefel and Bell JJ).

12 See *Vanderstock v Victoria* (2023) 279 CLR 333 at [154] (Kiefel CJ, Gageler and Gleeson JJ). See also ***Wainohu*** *v New South Wales* (2011) 243 CLR 181 at [30] (French CJ and Kiefel J), [107] (Gummow, Hayne, Crennan and Bell JJ).

13 See ***Graham*** *v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

14 See *Graham* (2017) 263 CLR 1 at [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also *South Australia v* ***Totani*** (2010) 242 CLR 1 at [74] (French CJ), [134], [138] (Gummow J), [231] (Hayne J).

15 ***Fardon*** *v A-G (Qld)* (2004) 223 CLR 575 at [104] (Gummow J).

16 *Pompano* (2013) 252 CLR 38 at [68] (French CJ).

17 ***Vella*** *v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [56] (Bell, Keane, Nettle and Edelman JJ).

first, that the function conferred upon the Supreme Court does not involve "any meaningful evaluative determination by the judge" before the Court becomes under an "obligation" to issue a warrant; and *second*, a warrant issued by the Supreme Court "authorises and requires the Sheriff, police and other officers thereafter into the indefinite future to comply with all further written orders from the President". For the Court of Appeal, the presence of those two features was sufficient to conclude that the statutory scheme was "antithetical to the Court's essential attributes of impartiality and independence" and therefore contravened the *Kable* limit: **CAB 13 [8]**.

12 The Court of Appeal's error was that, in analysing the two features, it failed to account for various matters of history and authority. Those matters reveal that the presence of those features (either alone or in combination) does not result in the substantial impairment of the institutional integrity of the Supreme Court. To the contrary, the presence of those features is entirely consistent with the constitutional history of the Supreme Court, its status as an independent and impartial tribunal, and the "traditional view" that courts do not interfere in the "intra-mural activities of the Parliament".[18]

B THE WARRANT POWER

13 It is first necessary to locate the warrant power within the overall process established by the PE Act for requiring a person (other than a Member) to attend before a House or committee of Parliament for the purpose of giving evidence. That process has six steps.

14 The *first step* is the making of an order, by a House of Parliament or one of its committees, to summon any person who is not a Member of Parliament to "attend and give evidence" before the relevant House or committee: s 4. The summons must be signed by the Clerk of the relevant House, or the Chair of the committee, and must be personally served upon the person. The President's position in the Court of Appeal was that the steps in this decision-making process were "proceedings in Parliament" for the purposes of Art 9 of the Bill of Rights.[19] Argument proceeded on that basis: **CAB 18 [21]**.

15 The *second step* is reached if the person "so summoned fails to attend and give evidence".

15.1 In that event, under s 7, the President or the Speaker may consider whether they are "satisfied" that: (1) the person was duly summoned to attend and give evidence;

[18] *A-G (Tas) v* ***Casimaty*** (2024) 98 ALJR 1139 at [42] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ), see also at [103]-[104] (Edelman J).

[19] Article 9 is currently in force in New South Wales by the *Imperial Acts Application Act 1969* (NSW), s 6, Second Schedule, Part 1: see ***Egan*** *v Willis* (1998) 195 CLR 424 at [24] (Gaudron, Gummow and Hayne JJ).

(2) the person failed to appear; and (3) that failure was "without just cause or reasonable excuse". If the President or the Speaker reach that state of satisfaction, they have a discretion to "certify" those facts under their "hand and seal to a Judge of the Supreme Court", in the form set out in Sch 2 (or to like effect).

15.2 Again, the President's position was that this step was a "proceeding in Parliament" for the purpose of Art 9 of the Bill of Rights and argument proceeded on that basis: **CAB 18 [21]**.

15.3 Notably, neither the Speaker nor the President would ordinarily be involved in the decision to issue a summons, that being done by either an order of the relevant House or committee.[20] That lack of involvement at the earlier stage reflects their constitutional status as the "independent and impartial representative" of their respective Houses.[21] They can therefore be expected to exercise their own independent judgment in deciding whether to provide a certificate.[22]

15.4 Further, the significance of the exercise of the power by the President or the Speaker is reinforced by the requirement that the certificate be issued "under the President's or the Speaker's hand and seal" — by being required to take that step, the President or the Speaker is "made aware" that what they are doing is exercising their "own authority, in a matter of moment, doing something [themselves] as a result of the exercise of [their] personal discretion": see **CAB 18-19 [22]**.[23]

16 The *third step* is reached if the President or Speaker provides a certificate to the Supreme Court. Upon receipt of a certificate, the Supreme Court must determine whether, in fact, the certificate meets the requirements of a certificate described in s 7.

16.1 A "piece of paper" alone is not enough: cf **CAB 11-12 [5], 13 [8]**. Rather, the Court must determine whether: (1) the certificate states the three matters the subject of the President's or Speaker's "satisfaction"; (2) the certificate was signed and sealed by

[20] Although extremely rare, the President can participate in debate and discussion in the Council when not presiding, but has a casting vote only when votes are otherwise equal. The Speaker can participate in debate, discussion and vote in the Assembly when not presiding, but if presiding has only a casting vote when votes are otherwise equal: see *Constitution Act 1902* (NSW), ss 22G(6), 22I (President), ss 31(4), 32(2).

[21] *Constitution Act 1902* (NSW), ss 22G(1) (President), 31(1) (Speaker). See also *Emmerson* (2014) 253 CLR 393 at [63] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), discussing the role of the DPP.

[22] That is not merely a theoretical possibility but has in fact occurred in practice: see *New South Wales Legislative Council Practice* (2nd ed, 2021) at 801.

[23] Quoting *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 at 42-43 (Windeyer J).

the President or Speaker; and (3) at the time, the purported President or Speaker in fact held the relevant office: **CAB 33 [65]**.[24]

16.2 It is this third step in the process that the Court of Appeal deprecated as involving no "meaningful evaluative determination". Regardless of whether that is an accurate characterisation of the Court's task, the constitutional argument in the Court of Appeal proceeded on the basis that it was no part of the Court's role to make any inquiry into the "validity" of the summons or the certificate, or the facts underpinning the issue of the summons or the certificate. As the Court of Appeal put it, correctly: "It is not open to contest the issue of the warrant on the basis that the President has the facts wrong, or is acting in bad faith, or to require the warrant to be executed in a particular way, or for the period of detention to be limited, say, to the period necessary in order for the purpose for which the summons was issued to be performed": **CAB 12 [5]**.

16.3 Any such contest would run into the prohibition contained in Art 9 of the Bill of Rights and the "traditional view" that a court "does not interfere" in the "intra-mural activities of the Parliament".[25] Both Art 9 and the traditional view are manifestations of one aspect of the common law principle of "exclusive cognisance" — namely, the "exclusive right" of each House of Parliament "to manage its own affairs without interference … from outside Parliament".[26] The President having an undoubted power to issue a certificate, "it is for the House to judge of the occasion and of the manner of its exercise".[27]

17 The *fourth step* is reached if the Court determines that the certificate provided by the President or the Speaker meets the statutory description in s 7. If so, under s 8, the Court "shall" issue a warrant "for the purpose of bringing the person before the Council, Assembly, or Committee to give evidence".

[24] The Court of Appeal noted the Speaker's submission to this effect and suggested it was different from the position of the President. Any difference was one of emphasis rather than substance: the President always maintained that the certificate must be one that satisfied the statutory description in s 7.

[25] *Casimaty* (2024) 98 ALJR 1139 at [42] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ); see also at [103]-[104] (Edelman J).

[26] *R v Chayton* [2011] 1 AC 684 at [63] (Lord Phillips PSC), quoted in *Alley v Gillespie* (2018) 264 CLR 328 at [108] (Nettle and Gordon JJ). See also *Egan* (1998) 195 CLR 424 at [69] (McHugh J).

[27] *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162 (the Court). See also *Crime and Corruption Commission v Carne* (2023) 280 CLR 555 at [113] (Gordon and Edelman JJ); *Alford v Parliamentary Joint Committee* (2018) 264 CLR 289 at [29] (Gordon J)

17.1 The function conferred by s 8 is properly characterised as administrative — that is, non-judicial. There is not any "adjudication to determine the rights of parties", and "a judge makes no order and nothing that he or she does is enforced as an order of the court".[28] Rather, the effect of a warrant depends on the consequences attached to it by the PE Act itself.[29]

17.2 The Court of Appeal concluded correctly that, in this context, the use of the word "shall" imposes an obligation on the Court to issue a warrant if it determines it has received a certificate meeting the statutory description: **CAB 19-20 [23]-[24]**. Any different conclusion would again involve the Court running into the principle of "exclusive cognisance". If the Court had a discretion to refuse to issue a warrant upon the receipt of a certificate meeting the statutory description in s 7, it is impossible to conceive of criteria that would guide the exercise of that discretion that did not also call into question the basis on which Parliament had acted in issuing the summons or providing the certificate.

18 At the *fifth step*, under the authority of the warrant, the person named in the warrant is to be arrested and detained in custody: s 9(1).

19 At the *sixth step*, once the person is detained under the authority of the warrant, the President or the Speaker may order the person to be produced to give evidence before the relevant House or the committee. Once the person has been produced, the President or Speaker may order that they be remanded (to enable a person to be produced again to give evidence) or released from custody: s 9(1).

C CONSTITUTIONAL HISTORY

C.1 The importance of history

20 The essential characteristics of independence and impartiality were not developed, and do not exist, in a vacuum — they are "not attributes plucked from a platonic universe of ideal forms".[30] Rather, they are characteristics "rooted in the text and structure of the Constitution informed by the common law" and therefore carry with them "historically developed concepts of courts and the judicial function".[31] In examining whether those characteristics have been impaired, it is therefore necessary to "take account of

[28] ***Love*** *v A-G (NSW)* (1990) 169 CLR 307 at 3322 (the Court).
[29] *Love* (1990) 169 CLR 307 at 322 (the Court).
[30] *Pompano* (2013) 252 CLR 38 at [68] (French CJ).
[31] *Pompano* (2013) 252 CLR 38 at [68], see also at [2]-[3] (French CJ).

considerations of history, and of the exigencies of government".[32] That approach is consistent with that applied when determining related questions of whether a power is properly characterised as judicial[33] or as punitive.[34]

21 In ***Wilson*** *v Minister for Aboriginal and Torres Strait Islander Affairs*, Gaudron J observed that there may be functions, which do not satisfy criteria ordinarily associated with an exercise of judicial power "but which, *historically*, have been vested in judges in their capacity as individuals and which, *on that account*, can be performed without risk to public confidence".[35] Her Honour gave as examples the kind of warrants considered in *Hilton v Wells* and ***Grollo*** *v Palmer*[36] (telephone interception). Other examples include warrants: for arrest (pending trial and for other purposes[37]); for search and seizure;[38] and for use of listening devices.[39] The feature common to each of those examples is that the warrants authorise persons (usually members of the Executive) to do things that would otherwise be unlawful, usually involving the infringement of fundamental rights (for example, liberty or privacy).[40]

22 *Wilson* concerned the limit on Commonwealth legislative power that constrains the conferral of certain non-judicial functions on federal judges in their personal capacity. However, Gaudron J's observation was later endorsed by Gummow, Hayne, Crennan and Bell JJ in *Wainohu*,[41] which concerned the limit on State legislative power that constrains the conferral of certain functions on State judges in their personal capacity. That endorsement is reflective of the *Wilson* limit and the *Kable* limit having a "common foundation" in Ch III, both limits being directed to protecting the integrity of courts that may exercise the judicial power of the Commonwealth.[42] Expressed at a higher level of

[32] *Forge* (2006) 228 CLR 45 at [42] (Gleeson CJ). See also *Totani* (2010) 242 CLR 1 at [47], [50]-[51] (French CJ); ***Wainohu*** *v New South Wales* (2011) 243 CLR 181 at [52] (French CJ and Kiefel J).

[33] See, eg, ***Palmer*** *v Ayres* (2017) 259 CLR 478 at [37] (Kiefel, Keane, Nettle and Gordon JJ), [42]-[47], [61]-[74] (Gageler J).

[34] See, eg, ***Jones*** *v Commonwealth* (2023) 280 CLR 62 at [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); ***YBFZ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at [14] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

[35] (1996) 189 CLR 1 at 26 (emphasis added).

[36] (1985) 157 CLR 57; (1995) 184 CLR 348.

[37] See, eg, *CXXXVIII v White* (2020) 274 FCR 170.

[38] See, eg, *George v Rockett* (1990) 170 CLR 104.

[39] See, eg, *Love* (1990) 169 CLR 307; *Coco v The Queen* (1994) 179 CLR 427.

[40] ***Ousley*** *v The Queen* (1997) 192 CLR 69 at 99 (McHugh J).

[41] (2011) 243 CLR 181 at at [94].

[42] See *Wainohu* (2011) 243 CLR 181 at [105] (Gummow, Hayne, Crennan and Bell JJ), see also at [47]-[52] (French CJ and Kiefel J); **CAB 30-33 [56]-[64]**.

generality and in more contemporary language,[43] the point Gaudron J was making was that a law (Commonwealth or State) that confers upon a court (or judge in their personal capacity) a function that might appear, at first glance, to be one that has the effect of substantially impairing the institutional integrity of that court will not, in truth, have that effect if it is a function that has been historically vested in courts (or in judges).

23 Despite being significant and authoritative, Gaudron J's observation was not mentioned by the Court of Appeal. Indeed, her Honour's observation might be thought to provide a complete (or near complete) answer to the *Kable* question in this case. The warrant power here is of the same nature that has historically been exercised by courts and judges.[44] Further, as a matter of historical fact, the warrant power conferred by the PE Act was first conferred upon the Supreme Court in 1881. That suggests that, at the time of Federation, the function was not thought to be incompatible with the independence and impartiality of the Supreme Court. However, as will be seen, in this case the position is even stronger. The Constitution provides a firm textual and structural foundation for that conclusion.

C.2 The 1881 Act

24 The PE Act was preceded by the *Parliamentary Evidence Act 1881* (NSW), being "An Act to provide for the summoning attendance and examination of Witnesses before either House of Parliament or any Committee thereof". The background to the 1881 Act is detailed in *New South Wales Legislative Council Practice*[45] and includes, among other things, the Privy Council's decision in *Fenton v Hampton*.[46] In short, before the enactment of the 1881 Act, the New South Wales Parliament did not have the power to compel witnesses to attend and give evidence, which had caused practical difficulties in the conduct of various inquiries. The 1881 Act was designed to overcome those difficulties.[47] As enacted, the 1881 Act included, in largely identical terms, the same

[43] "Perception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity": *Fardon* (2004) 223 CLR 575 at [102] (Gummow J); see also *NAAJA* (2015) 256 CLR 569 at [40] (French CJ, Kiefel and Bell JJ), [124] (Gageler J).

[44] See, eg, around the time of Federation: *Justices Act 1902* (NSW), ss 23, 25; *Crimes Act 1900* (NSW), s 354-355, 357; *Vagrancy Act 1902* (NSW), s 10; *Influx of Criminals Prevention Act 1903* (NSW), s 9. See generally *Ousley* (1997) 192 CLR 69 at 105-106 (McHugh J); Blackstone, *Commentaries on the Laws of England* (17th ed, 1830), bk 4, ch 21 at 289-292; *Imperial Acts Adoption and Application Act 1850* (NSW), applying 11 & 12 Vict c 42 and c 43; Woods, *A History of Criminal Law in New South Wales, The Colonial Period 1788 – 1900* (2002) at 174.

[45] (2nd ed, 2021) at 77-79.

[46] (1858) 14 ER 727. See also *Egan* (1998) 195 CLR 424 at [44]-[45] (Gaudron, Gummow and Hayne JJ), [75], [84] (McHugh J); **CAB 16-17 [14]-[16]**.

[47] *Hansard*, Legislative Assembly (18 August 1881) at 727 (emphasis added).

provisions that are relevant to this proceeding: see **CAB 11 [4], 16-17 [14]-[16]**. Under that scheme, the warrant power was conferred upon the Supreme Court of the Colony of New South Wales.

C.3 The transition on Federation

25 The 1881 Act remained in force immediately before Federation. Upon Federation, two things of significance occurred. *First*, subject to the Constitution, the laws of the Colony of New South Wales continued in force as laws of the State of New South Wales: by operation of s 108 of the Constitution for those laws "relating to any matter within the powers of the Parliament of the Commonwealth" and otherwise independently of s 108 for all other laws.[48] *Second*, by the operation of s 106 of the Constitution, the Supreme Court of the Colony of New South Wales became the Supreme Court of the State of New South Wales.[49] That "transmutation" was also subject to the Constitution.[50] In that way, the 1881 Act became a law of the of State of New South Wales and — subject to any constitutional limitation[51] — conferred the warrant power upon the Supreme Court of New South Wales. However, on the logic of the Court of Appeal's reasoning, that conferral never occurred because it would have contravened the *Kable* limit: the conferral of the warrant power by the 1881 Act on the Supreme Court of the State of New South Wales would have had the effect of substantially impairing its institutional integrity.

26 On one view, that outcome might be explained as being a consequence flowing from the establishment of a new constitutional structure, bringing with it new constitutional limits. After all, on Federation "everything adjusted": **CAB 35 [70]**.[52] However, the logic of the Court of Appeal's reasoning goes further: taken to its natural conclusion, it must mean that the original conferral of the warrant power on the Supreme Court of the Colony of New South Wales — from 1881 until Federation — must have also had the effect of substantially impairing the independence and impartiality of that Court.

27 That exposes a fundamental flaw in the logic of the Court of Appeal's reasoning, because the Constitution was framed on precisely the opposite assumption. The Constitution assumes that, at Federation, the Supreme Courts were independent and impartial tribunals

48 *R v Phillips* (1970) 125 CLR 93 at 134 (Gibbs J).
49 *Kable* (1996) 189 CLR 51 at 141 (Gummow J). See also *Kotsis v Kotsis* (1970) 122 CLR 69 at 75-76 (Barwick CJ).
50 *Kable* (1996) 189 CLR 51 at 141 (Gummow J). See also *Totani* (2010) 242 CLR 1 at [201] (Hayne J).
51 See ***Burns*** *v Corbett* (2019) 265 CLR 304 at [110]-[118] (Gageler J).
52 See *Burns* (2019) 265 CLR 304 at [72], [112] (Gageler J).

and, as such, would be "appropriate recipient[s] of invested federal jurisdiction".[53] That assumption is given a textual foundation by references to the "Supreme Court of any State" (s 73(ii)) and the "Supreme Court of a State" (s 73), which Courts "must always be within the phrase a 'court of a State' as it appears in s 77(iii)".[54] For a body to meet those constitutional descriptions, the body must possess the essential characteristics of independence and impartiality.[55] That requirement is not only implicit in the terms of Ch III of the Constitution, but is also necessary for the "preservation of that structure".[56]

28 The text and structure of the Constitution thereby establishes that, at Federation, the Supreme Court of New South Wales was, in fact and law, an independent and impartial
10 tribunal. That is so even though, by that time, it had been conferred with the warrant power for nearly 20 years. The Court of Appeal's conclusion — that the warrant power substantially impairs the Supreme Court's independence and impartiality — contradicts the reality of that constitutional history.

29 In truth, the warrant power did not have that effect prior to Federation. Nor did it have that effect upon Federation. That conclusion does not depend only on the existence of a pre-Federation expectation or practice. As in this case, such expectations and practices may be relevant to answering the constitutional question, even if they are not decisive.[57] But in this case, what is decisive is that the pre-Federation position was carried forward by the terms and structure of the Constitution itself.

20 30 Nothing changed when the 1881 Act was re-enacted after Federation in the form of the PE Act. That did not involve any substantive alteration to the provisions of the 1881 Act. Rather, as reflected in its long title, the purpose of the PE Act was "to consolidate the law relating to the summoning, attendance, and examination of witnesses before either House of Parliament or any Committee thereof". Nor did anything change in the intervening 124 years leading up to the Court of Appeal's decision in December 2025.

53 See *Forge* (2006) 228 CLR 45 at [63], see also at [57] (Gummow, Hayne and Crennan JJ).

54 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [152]-[153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), see also at [99] (French CJ); *Forge* (2006) 228 CLR 45 at [41] (Gleeson CJ).

55 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

56 *Bradley* (2004) 218 CLR 146 at [29], see also [27], [35] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

57 See *Palmer v Ayres* (2017) 259 CLR 478 at [37] (Kiefel, Keane, Nettle and Gordon JJ), [42]-[47], [61]-[74] (Gageler J); *Burns* (2019) 265 CLR 304 at [110]-[111] (Gageler J).

D DETENTION WITHIN AN EXCEPTIONAL CASE

31 If further analysis is required to conclude that the warrant power does not contravene the *Kable* limit, it is useful to begin that analysis by recognising that a warrant issued under the PE Act authorises the involuntary detention of a person by officers of the New South Wales Executive. That detention would be unlawful if it were not authorised by statute.[58] That is important because the Court has recently given significant attention to the constitutional limits, deriving from Ch III of the Constitution, that constrain Commonwealth and State legislative power on statutes authorising detention. Locating the analysis of the PE Act within the framework established by those recent authorities assists in explaining why ss 7 to 9 do not contravene the *Kable* limit.

D.1 Authorisation of detention: the constitutional paradigm

32 The "involuntary deprivation of liberty … ordinarily constitutes punishment".[59] Further, under our system of government, the adjudgment and punishment of criminal guilt is an exclusively judicial function.[60] Those two points, in combination, lead to the further point that, under our system of government, the involuntary detention of a person ordinarily exists as an incident of that judicial function.[61] In other words, the detention of a person is ordinarily authorised: (1) by a court; (2) in the exercise of judicial power; and (3) "as a penal consequence prescribed by law for an existing criminal liability determined to have arisen from the operation of positive law on past events or conduct".[62] The same is true of certain other measures, short of detention, that are properly characterised as punitive.[63]

33 There are, however, "exceptional cases" where the detention of an individual may be authorised outside of that paradigm.[64] Whether a law falls within an exceptional case depends on whether it is "reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose".[65] At the Commonwealth level, unless the law meets that requirement, the departure from the paradigm will not be "justified" and the law will be

[58] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528-529 (Deane J); *Chu Kheng* ***Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 19 (Brennan, Deane and Dawson JJ).

[59] ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at [28] (the Court).

[60] *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

[61] *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

[62] *EGH19 v Commonwealth* [2026] HCA 7 at [16]-[17] (Gageler CJ and Gleeson J).

[63] See, eg, *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1; *YBFZ* (2024) 99 ALJR 1.

[64] *EGH19* [2026] HCA 7 at [16]-[19] (Gageler CJ and Gleeson J), [62]-[63], [65], [84] (Gordon J), [285], [292], [313], [318], [329] (Jagot J). See also *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at [17], [27], [36] (Kiefel CJ, Bell, Keane and Steward JJ), [71]-[73] (Gageler J), [134] (Gordon J), [207]-[209] (Edelman J).

[65] *NZYQ* (2023) 280 CLR 137 at [39] (the Court).

incompatible with Ch III.[66] That result follows from the limitation on Commonwealth legislative power identified in *Lim*.

34 The *Lim* limit does not directly restrict the legislative power of the States. However, like the *Kable* limit, it ultimately derives from Ch III's separation of the judicial power of the Commonwealth.[67] Consistent with those limits having a common foundation in Ch III, the Court has often recognised the relationship between them. In terms that foreshadowed the *Kable* limit, *Lim* recognised that the Commonwealth Parliament could not enact a law that required a "court" to exercise judicial power "in a manner inconsistent with the essential character of a court or with the nature of judicial power".[68] Then, in *Kable* itself, central strands of the reasoning in *Lim* were "applied as a step in the reasoning" of Toohey J and Gummow J, and was "reflected" in that of Gaudron J and McHugh J.[69]

35 Accordingly, an analysis similar to the analysis for assessing whether a Commonwealth law contravenes the *Lim* principle is at least capable of informing whether a State law contravenes the *Kable* limit.[70] Adopting that approach is likely to assist in ensuring that the development and application of the *Kable* limit occurs in a "principled, coherent, and systematic way rather than as evaluations of specific instances".[71] On that approach, if a State law imposing a function on a court involves an *unjustified* departure from the constitutional paradigm, that will strongly support, if not require, the conclusion that the law substantially impairs the institutional integrity of that court.[72] Conversely, if a State law imposing a detention function on a court involves a departure from the paradigm that is *justified*, that will strongly support the conclusion that the law does not substantially impair the institutional integrity of the court. This is such a case.

66 See *Jones* (2023) 280 CLR 62 at [42]-[43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *YBFZ* (2024) 99 ALJR 1 at [8], [18], [64] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

67 See *Garlett* (2022) 277 CLR 1 at [111]-[123] (Gageler J); *EGH19* [2026] HCA 7 at [285]-[289] (Jagot J).

68 (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ). See also *Leeth v Commonwealth* (1992) 174 CLR 455 at 487 (Deane and Toohey JJ); *Pompano* (20130 252 CLR 38 at [183]-[184] (Gageler J).

69 See *Fardon* (2004) 223 CLR 575 at [77] (Gummow J), citing *Kable* (1996) 189 CLR 51 at 97-98 (Toohey J), 106-107 (Gaudron J), 121-122 (McHugh J), 131-132 (Gummow J).

70 See *Garlett* (2022) 277 CLR 1 at [40], [45]-[56] (Kiefel CJ, Keane and Steward JJ), [121]-[123], [132]-[137] (Gageler J), [184], [198]-[200] (Gordon J), [248] (Edelman J); *EGH19* [2026] HCA 7 at [24]-[27] (Gageler and Gleeson JJ), [127]-[128] (Gordon J), [289], [319], [323], [330]-[331] (Jagot J). See also *Fardon* (2004) 223 CLR 575 at [126], [150]-[155], [174]-[175] (Kirby J), [214]-[217], [234] (Callinan and Heydon JJ); *Totani* (2010) 242 CLR 1 at [202], [208]-[212] (Hayne J); *NAAJA* (2015) 256 CLR 569 at [125], [128] (Gageler J), *Vella* (2019) 269 CLR 219 at [61], [71]-[72], [74]-[75], [84]-[85] (Bell, Keane, Nettle and Edelman JJ), [173] (Gageler J), [204] (Gordon J).

71 *Vella* (2019) 269 CLR 219 at [56] (Bell, Keane, Nettle and Edelman JJ).

72 See *Garlett* (2022) 277 CLR 1 at [135]-[137] (Gageler J).

36 As noted, whether there is "justification" for a departure from the constitutional paradigm involves asking whether the departure is "reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose". The word "necessary" means "reasonably appropriate and adapted".[73] What is required is an analysis of "means" and "ends", and the relationship between the two.[74] The analysis must account for the different constitutional limits that apply at the State level, the most significant of which is that there is no strict separation of State judicial power.[75] The analysis may be informed by the constitutional values underlying Ch III, and "historical practices and classifications".[76]

37 In seeking to rationalise previous decisions involving the *Kable* principle, there is a "risk of undue abbreviation, and consequent inaccuracy".[77] There can be a tendency for explanations of previous cases to be expressed in conclusory language (often using metaphors such as "enlistment" and "recruitment"), which tends to obscure the underlying reasoning. Bearing that in mind, previous decisions involving *Kable* challenges to State laws concerning court-ordered detention, or serious restrictions on liberty, can be explained by reference to the approach outlined above.[78] For example, the detention authorised by the laws considered in *Fardon* and *Garlett* can be understood as being reasonably capable of being seen as necessary for a legitimate non-punitive purpose (the protection of the community from certain grave and serious harm). So too can the restrictions on liberty that were authorised by the laws in *Wainohu* and *Vella*. Each scheme involved a "judicial process of some refinement".[79]

38 In contrast, the invalidity of the law in *Kable* can be explained on the basis it authorised detention that either lacked a legitimate purpose (because it was "enacted solely for the purpose of ensuring that Mr Kable, alone of all people in New South Wales, would be kept in prison after his term of imprisonment expired")[80] or was not reasonably capable

73 See *YBFZ* (2024) 99 ALJR 1 at [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
74 *NZYQ* (2023) 280 CLR 137 at [44] (the Court).
75 See *Pompano* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ).
76 See *Jones* (2023) 280 CLR 62 at [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).
77 *Forge* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ).
78 See *Vella* (2019) 269 CLR 219 at [174] (Gageler J); *Garlett* (2022) 277 CLR 1 at [138] (Gageler J); *EGH19* [2026] HCA 7 at [27] (Gageler CJ and Gleeson J), [330]-[331] (Jagot J).
79 *EGH19* [2026] HCA 7 at [27] (Gageler CJ and Gleeson J).
80 See *Fardon* (2004) 223 CLR 575 at [43], see also at [33] (McHugh J). See also *NAAJA* (2015) 256 CLR 569 at [125] (Gageler J).

of being seen as necessary for a legitimate non-purpose (because it was not "a *carefully calculated* legislative response to a general social problem").[81] The invalidity of the law in *Totani*, which involved serious restrictions on liberty, can be similarly explained. On the assumption that scheme had a legitimate non-punitive purpose,[82] the law was not reasonably capable of being seen as necessary to that purpose. In contrast to the federal law upheld in *Thomas v Mowbray*,[83] the law involved the court being required to impose significant restrictions on a person's liberty without making *any* inquiry into what that person had done in the past or "may do" in the future,[84] or into the relationship between the restrictions to be imposed and the achievement of the stated purpose of the law.[85]

10 **D.2 The warrant power is within an exceptional case**

39 The detention authorised by ss 7 to 9 of the PE Act falls within an exceptional case. Consistently with the first element of the constitutional paradigm, the detention is authorised by a court. However, in a departure from the second and third elements of the paradigm, the detention is authorised by an exercise of non-judicial power and otherwise than as part of the adjudgment and punishment of criminal guilt. Each of those departures is reasonably capable of being seen as necessary for a legitimate non-punitive purpose.

40 The "purpose" of the law is "what the law is designed to achieve in fact".[86] The purpose of the detention authorised by a warrant is to bring the person before the relevant House of Parliament, or a committee, to give evidence. That purpose emerges not only from the
20 text and structure of the legislative scheme, but also the history summarised in paragraph 24 above. That purpose is "legitimate" and "non-punitive". The power of detention supports the system of responsible government in New South Wales[87] by facilitating the appearance before Parliament of persons with whom the Executive deals (including public servants). And it is not radically different from the detention of a person

81 See *Fardon* (2004) 223 CLR 575 at [16] (Gleeson CJ), [91] (Gummow J) (emphasis added).

82 In light of more recent authorities, that might be doubted, given its generally framed "protective" purpose: see *Totani* (2010) 242 CLR 1 at [92] (Gummow J), [214] (Hayne J), [447]-[448] (Kiefel J).

83 (2007) 233 CLR 307.

84 See *Totani* (2010) 242 CLR 1 at [211], [215], [219], [222]-[224], [225(c)], [226], [228], [230], [235]-[236] (Hayne J), see also [82] (French CJ), [110], [140], [149] (Gummow J) [434]-[436] (Crennan and Bell JJ), [480] (Kiefel J); *Kuczborski v Queensland* (2010) 242 CLR 1 at [224] (Crennan, Kiefel, Gageler and Keane JJ).

85 See *Totani* (2010) 242 CLR 1 at [214]-[215], [228] (Hayne J), [474], [478] (Kiefel J); *Vella* (2019) 269 CLR 219 at [178]-[179] (Gageler J).

86 *NZYQ* (2023) 280 CLR 137 at [40] (the Court).

87 See generally *Egan* (1998) 195 CLR 424 at [36]-[46] (Gaudron, Gummow and McHugh JJ).

"accused of crime to ensure that he or she is available to be dealt with by the courts", which has long been recognised as detention for a legitimate non-punitive purpose.[88]

First element: conferral on a court

41 The Court of Appeal favoured the view that the function in s 8 is conferred on a "court" — that is, it is conferred on the Supreme Court as an institution, rather than upon each of the individual judges of that Court in their personal capacity: see **CAB 32-33 [62]**. That is consistent with the position that was advanced by both the President and the First Respondent (but inconsistent with that advanced by the Speaker). Most significantly for the Court of Appeal, both the warrant and the certificate "refer, repeatedly and unambiguously, to 'the Supreme Court of New South Wales'".[89]

42 The conferral of the warrant power on the Supreme Court is thus consistent with the constitutional paradigm. Indeed, the paradigm provides an explanation for *why* the warrant power was conferred on the Supreme Court. Under that paradigm, courts *are* ordinarily involved in processes involving the detention of individuals. The paradigm is consistent with the notion that the involvement of a court in the detention of individuals is ordinarily considered to be a "good thing": see **CAB 28 [47]**, **34 [67]**.[90] There is therefore nothing surprising about the fact that, in 1881 and then again in 1901, the New South Wales Parliament adopted a legislative model that involved the Supreme Court in the authorisation of detention.

43 It is true that the New South Wales Parliament in 1901 might have instead chosen to confer the warrant power on the Houses of Parliament themselves, as it earlier did in s 10(f) of the *Public Works Act 1888* (NSW).[91] However, contrary to the Court of Appeal's view, the availability of that option is not a consideration that favours invalidity: cf **CAB 11 [4]**. To the contrary, that alternative option involves a *greater* departure from the paradigm because it involves the authorisation of detention that does not involve a court at all. That is not to suggest that alternative would itself be unconstitutional: that

[88] *Lim* (1992) 176 CLR 1 at 28 (Brennan, Deane and Toohey JJ). See also *Civil Procedure Act 2005* (NSW), s 97, pursuant to which the court may issue, or make an order for the issue of, a warrant for the person's arrest for failure to comply with a subpoena *ad testificandum*.

[89] See also *Supreme Court Act 1970* (NSW), ss 24(2) and (4)(b).

[90] See *Fardon* (2004) 223 CLR 575 at [2] (Gleeson CJ); *Thomas* (2007) 233 CLR 307 at [17] (Gleeson CJ); *Vella* (2019) 269 CLR 219 at [90] (Gageler J); *EGH19* [2026] HCA 7 at [26] (Gageler CJ and Gleeson J).

[91] The Court of Appeal's references to *Electoral Act 1880* (NSW), s 74; *Parliament of Queensland Act 2001* (Qld), s 25; *Parliamentary Privilege Act 1858* (Tas), s 1 and *Parliamentary Privileges Act 1891* (WA), s 4 are a distraction: **CAB 11 [4], 27 [44]**. Those provisions are not analogous to ss 7-9 of the PE Act, but rather concern arrest following a finding of contempt, not for the purpose of ensuring availability to give evidence.

greater departure from the paradigm would be justified having regard to the principle of exclusive cognisance: see **CAB 30 [55]**. But the fact that a law involving a departure from the paradigm in a certain respect might be justified does not cast doubt on the validity of a law that accords with that paradigm in that same respect.[92]

Second element: a non-judicial power

44 The departure from the second element of the constitutional paradigm — detention by non-judicial power, rather than judicial power — is reasonably capable of being seen as necessary for the purpose of bringing the person before the relevant House of Parliament, or a committee, to give evidence. In considering the means adopted by the law to pursue that purpose, it is necessary to recognise that there is no prohibition on a State law conferring a non-judicial function on a State court, even if the exercise of that power involves interfering with a person's fundamental rights. So much is illustrated by *Love*, which considered the conferral of a non-judicial warrant power on a State court.[93]

45 It is also necessary to recognise that, at least ordinarily, judicial power is to be exercised "in accordance with the judicial process".[94] In contrast, non-judicial power may fall to be exercised — including by courts and judges — in a manner that does not accord with the ordinary incidents of the judicial process. So much is illustrated by *Grollo*, which involved the power to issue a telephone interception warrant, conferred on federal judges in their personal capacity. That power did not involve "the *judicial method* of deciding questions in controversy",[95] an application for a warrant was made *ex parte*, and the judge was not required to give reasons. More than that, "the very issue of a warrant and the identity of the judge who issued it" was to remain secret; the execution of the warrant might have gone "undetected by the person against whom or against whose interest the warrant was executed"; and there was no return made on the execution of the warrant which would have permitted "a determination of its lawfulness, a review of its due execution and a disposition of the fruit of the execution".[96] Yet none of those features, far removed from the ordinary judicial process, made the conferral of the function incompatible with Ch III.

92 See *EGH19* [2026] HCA 7 at [56] (Gageler CJ and Gleeson JJ).
93 (1990) 169 CLR 307.
94 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Pompano* (2013) 252 CLR 38 at [142] (Hayne, Crennan, Kiefel and Bell JJ).
95 *Grollo* (1995) 184 CLR 348 at 367 (Brennan CJ, Deane, Dawson, Toohey JJ) (emphasis added).
96 *Grollo* (1995) 184 CLR 348 at 367 (Brennan CJ, Deane, Dawson, Toohey JJ).

46 Consistent with the Court of Appeal's reasoning, it is true that, under s 8 of the PE Act, non-judicial power is exercised in a manner that involves some modification of the ordinary judicial process: the exercise of power depends on a straightforward determination (the third step of the statutory process), following which the Court comes under an obligation to issue the warrant (the fourth step). In some cases, that combination of features may present a constitutional problem, as illustrated by the decision in *Totani*. However, contrary to an assumption that appears to have been made by the Court of Appeal (see **CAB 26-27 [42]**), neither of those particular features (alone or in combination) *necessarily* raises such a problem. So much is illustrated by the reasoning and outcome in *Emmerson*, with which the Court of Appeal failed to engage.

46.1 As to the ease of the Court's task, the Court in *Emmerson* confirmed that "the determination of whether the statutory criteria are satisfied may readily be performed, because of the ease of proof of the criteria, does not deprive the process of its judicial character".[97] The Court's task in *Emmerson* involved nothing more than a determination of whether a person had previously been found guilty by a court of specified offences.[98] A very limited determination by a court is also involved where, for example, a person seeks registration of a judgment under s 6 of the *Foreign Judgments Act 1991* (Cth).[99] Thus, as Professor Stellios has put it, the institutional integrity of a court "will not necessarily be threatened when a court is given a *minimal task* to undertake".[100]

46.2 As to the Court's obligation to issue a warrant, the Court in *Emmerson* reiterated that it is "well established that Australian legislatures can empower courts to make specified orders if certain conditions are satisfied, even if satisfaction of such conditions depends on a decision, or application, made by a member of the Executive" and that such "provisions are not, for that reason alone, taken to trespass on the judicial function or to be impermissibly determinative of the outcome of an exercise of jurisdiction".[101] The same can be said here, where satisfaction depends on a decision made by a representative of the Legislature.

[97] (2014) 253 CLR 393 at [65] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[98] See *Emmerson* (2014) 253 CLR 393 at [24]-[26], [60], [65] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). See also *Evidence (National Uniform Legislation) Act 2011* (NT), s 178.
[99] See *PT Bayan Resources v BCBC Singapore* (2015) 258 CLR 1 at [20]-[30] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).
[100] Stellios, *Zines and Stellios's The High Court and the Constitution* (7th ed, 2022) at 301-302.
[101] *Emmerson* (2014) 253 CLR 393 at [57]-[58] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

47 Here, in contrast to *Totani*, there is a principled explanation for why the Supreme Court's task under s 8 is "minimal" and why, if the criteria are satisfied, the Court comes under an obligation to issue a warrant. Consistent with the points made at paragraphs 16 and 17 above, if the Court had been given a more complex evaluative task or had been afforded discretion as to whether to issue a warrant, the scheme would have conflicted with the common law principle of "exclusive cognisance" because it would have exposed the internal workings of Parliament to scrutiny by the Court. The New South Wales Parliament could, of course, enact a statutory scheme that overrode that principle (and Art 9 of the Bill of Rights). However, given the importance of that principle to the system of representative and responsible government in New South Wales, the process attached to the exercise of the warrant power by the Supreme Court is reasonably capable of being seen as appropriate and adapted to the legitimate non-punitive purpose of ensuring the subject of a warrant is available to give evidence to Parliament.

Third element: not part of the adjudgment and punishment of criminal guilt

48 In a departure from the third element of the constitutional paradigm, the warrant power is divorced from the adjudgment and punishment of criminal guilt. But that departure is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose. Where a law authorises detention, the law must "limit the *duration* of that detention to what is reasonably capable of being seen to be necessary to effectuate an identified statutory purpose which is reasonably capable of being achieved".[102]

49 That condition is satisfied here. The duration of the detention is expressly linked to the purpose of producing the person to give evidence from time to time. The person cannot be arbitrarily detained for some other purpose. The detention authorised may be described as "indefinite" (in the sense of "detention without a chronologically fixed endpoint"[103]), because the end-point of the detention is subject to the control of the President or Speaker. In theory, the detention may therefore be lengthy. However, in practice, that is unlikely because the President or Speaker would be politically accountable to the relevant House of Parliament for any non-compliance with the purposive limit on the length of detention.[104] In any event, very lengthy indefinite detention may retain its character as

[102] *NZYQ* (2023) 280 CLR 137 at [41] (the Court) (emphasis added).
[103] *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463 at [132] (Kenny and Mortimer JJ).
[104] See *Casimaty* (2024) 98 ALJR 1139 at [32], [34], [40]-[41] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

non-punitive and legitimate, so long as the purpose of the detention remains capable of being achieved. That is the position here: the purpose of producing the person to give evidence, from time to time, may be achieved right up until the Parliament is prorogued or dissolved, at which point the detention would be required to end: **CAB 30-31 [56]**.

50 Once those temporal and purposive limits on detention are properly recognised, the Court of Appeal's concern about the Supreme Court being involved in a scheme of "indefinite detention" largely fall away. And they fall away entirely once it is also recognised that there is a principled explanation for why a warrant authorises detention in accordance with future orders of the President or Speaker as to the production, remand and discharge of the person detained: see ss 9(1)-(2). Again, that explanation is found in the principle of "exclusive cognisance": consistent with Parliament controlling its internal affairs, once the warrant has been executed and the person is within the control of the Parliament, then it is it appropriate that the Parliament alone determine the person's continuation in custody or release: **CAB 30 [55]**. The substance of the detention is reasonably capable of being seen to be necessary to effectuate an identified statutory purpose which is reasonably capable of being achieved.

E CONCLUSION

51 As explained in Part C, the Court of Appeals' conclusion is inconsistent with the history of the Constitution and the assumptions on which it was framed. If more is necessary, the analysis in Part D reveals why the detention authorised by ss 7 to 9 of the PE Act is detention within an "exceptional case". That analysis puts the features that the Court of Appeal considered constitutionally problematic in their proper constitutional context, demonstrating that ss 7 to 9 do not contravene the *Kable* limit.

PART VII: ORDERS SOUGHT

52 The Appellant seeks orders set out in the Notice of Appeal: **CAB 70**.

PART VIII: ESTIMATE OF TIME

53 It is estimated that 2.25 hours (including reply) will be required for the Appellant's oral argument.

Dated: 16 April 2026

Bret Walker
Fifth Floor St James' Hall
02 8257 2500
caroline.davoren@stjames.net.au

Thomas Wood
Owen Dixon Chambers West
03 9225 6078
twood@vicbar.com.au

Frances Leitch
Fifth Floor St James' Hall
02 8257 2540
frances.leitch@stjames.net.au

ANNEXURE TO THE SUBMISSIONS OF THE APPELLANT

Pursuant to paragraph 1 of Practice Direction No 1 of 2024, this annexure sets out the constitutional provisions, statutes and statutory instruments referred to in the submissions.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	The Constitution	Current	Sections 73, 71, 77(iii), 106 and 108, Ch III	In force at the date of the Court of Appeal's decision and events to which the dispute relates.	All relevant times
New South Wales statutes					
2.	*Bill of Rights 1688* (1 W & M sess 2 c 2)	Current	Article 9	Act in force at the date of the Court of Appeal's decision.	7 to 17 October 2025
3.	*Civil Procedure Act 2005* (NSW)	Current	Section 97	Provided for illustrative purposes.	N/A
4.	*Constitution Act 1902* (NSW)	Current	Sections 22G(1) and (6), 22I, 31(1) and (4), 32(2)	Act in force at the date of the Court of Appeal's decision.	N/A
5.	*Crimes Act 1900* (NSW)	As made	Sections 354-355, 357	Historical comparison.	N/A

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
6.	*Electoral Act 1880* (NSW)	As made	Section 74	Historical comparison.	N/A
7.	*Imperial Acts Adoption and Application Act 1850* (NSW), *applying 11 & 12 Vict c 42 and c 43*	As made	All	Historical comparison.	N/A
8.	*Imperial Acts Application Act 1969* (NSW)	Current	Section 6, Second Schedule, Part 1	Act in force at the date of the Court of Appeal's decision.	N/A
9.	*Influx of Criminals Prevention Act 1903* (NSW)	As made	Section 9	Historical comparison.	N/A
10.	*Justices Act 1902* (NSW)	As made	Sections 23 and 25	Historical comparison.	N/A
11.	*Parliamentary Evidence Act 1881* (NSW)	As made	All	Predecessor to the PE Act.	N/A
12.	*Parliamentary Evidence Act 1901* (NSW)	Current	All	Act in force at the date of the Court of Appeal's decision and events to which the dispute relates.	7 to 17 October 2025 (issue of summons, refusal to comply)

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
13.	*Public Works Act 1888* (NSW)	As made	Section 10(f)	Historical comparison.	N/A
14.	*Supreme Court Act 1970* (NSW)	Current	Sections 24(2) and (4)(b)	Act in force at the date of the Court of Appeal's decision and events to which the dispute relates.	N/A
15.	*Vagrancy Act 1902* (NSW)	As made	Section 10	Historical comparison.	N/A
Statutes from other jurisdictions					
16.	*Evidence (National Uniform Legislation) Act 2011* (NT)	10 April 2014	Section 178	Act relevant to the decision in *Emmerson* as at the date of the High Court's judgment in *Emmerson*.	N/A
17.	*Foreign Judgments Act 1991* (Cth)	Current	Section 6	Provided for illustrative purposes.	N/A
18.	*Parliament of Queensland Act 2001* (Qld)	Current	Section 25	Provided for illustrative purposes.	N/A

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
19.	*Parliamentary Privilege Act 1858* (Tas)	As made	Section 1	Historical comparison.	N/A
20.	*Parliamentary Privileges Act 1891* (WA)	As made	Section 4	Historical comparison.	N/A