HIGH COURT OF AUSTRALIA

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Details of Filing

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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

SECOND RESPONDENT'S SUBMISSIONS

PART I CERTIFICATION

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

PART II ISSUES

2. The President correctly identifies the issue in this proceeding as being whether ss 7-9 of the *Parliamentary Evidence Act 1901* (NSW) (**PE Act**) are invalid because they contravene the limitation on State legislative power identified in ***Kable*** *v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51: President's submissions (**AS**) at [3].

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The President issued a notice under s 78B of the *Judiciary Act 1903* (Cth) in respect of this appeal on 23 March 2026 and a further notice on 6 May 2026. The Second Respondent (**NSWAG**) does not consider that any further notice is required.

PART IV FACTS

4. The President summarises the factual background to this appeal at **AS [6]-[7]**. See, also *Cullen v President of the Legislative Council of NSW* [2025] NSWCA 278 (**J**) at [1]-[2] (**CAB 10**). The NSWAG does not seek to supplement that summary.

PART V ARGUMENT

A INTRODUCTION

5. The Court of Appeal held that ss 7-9 of the PE Act substantially impair the institutional integrity of the Supreme Court and thus infringe the *Kable* principle. The essential features of the Court's reasoning were encapsulated at J [8] (**CAB 13**):

> … the function purportedly conferred is not subject to any meaningful evaluative determination by the judge, and instead imposes an obligation to issue a warrant that not only requires the immediate arrest and detention of a person, but also authorises and requires the Sheriff, police and other officers thereafter into the indefinite future to comply with all further written orders from the President. The lending of the authority of the Court, or of a judge of the Court, to what in substance is the original and subsequent decisions of the President for the indefinite detention of a person, is antithetical to the Court's essential attributes of impartiality and independence which the Kable doctrine is directed to securing.

6. This reasoning is correct. There is no basis for this Court to disturb the Court of Appeal's conclusion that ss 7-9 of the PE Act are invalid. In support of that contention, the NSWAG advances submissions below in respect of the following matters:

7. ***First***, the background to and key provisions of the PE Act (see [11]-[24] below).

8. ***Secondly***, an explanation of: (i) the basic principles that govern the *Kable* limit; (ii) why the President's contention that the Court of Appeal failed properly to deal with matters of history is mistaken; and (iii) the relevance of alternative legislative regimes and why, contrary to the President's submissions, exclusive cognisance does not provide a rationale for the limited role for the Judge under s 8 of the PE Act (see [25]-[49] below).

9. ***Thirdly***, a response to the new argument that consideration of the framework developed by this Court for applying the principle in *Chu Kheng* ***Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs*[1] supports the validity of the PE Act (see [50]-[72] below). In summary, the NSWAG submits that consideration of the *Lim* principle is not of assistance in this case. The question whether there should be any alignment between *Kable* and *Lim* should be addressed in a case where it could actually be determinative of the outcome. Any suggested alignment is, in any event, unsound as a matter of constitutional principle and, even if the *Lim* principle were applied here, the Court would conclude that ss 7-9 are invalid.

10. ***Fourthly***, a response to the submissions advanced by the Hon Damien Tudehope MLC (**TS**) on his intervention application (see [73]-[84] below).

B OVERVIEW OF THE *PARLIAMENTARY EVIDENCE ACT 1901* (NSW)

(i) Background to the PE Act

11. The PE Act was enacted in 1901 "as part of a systemic consolidation of the statute book following federation".[2] The substance of the provisions in the PE Act concerning the summoning, attendance and examination of witnesses remained unchanged from the statute it replaced: the *Parliamentary Evidence Act 1881* (NSW) (**1881 Act**).[3]

12. As explained at J [14] (**CAB 16**), the 1881 Act was a "belated response" to ***Fenton*** *v Hampton* in which the Privy Council held that the Legislative Council of Van Dieman's Land "did not possess the power of arrest with a view to adjudication, on a complaint of contempt committed out of its doors".[4] In response, the Tasmanian Parliament enacted the *Parliamentary Privileges Act 1858* (Tas). As is summarised at J [14] (**CAB 16**), that Act

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1 (1992) 176 CLR 1.

2 S Frappell and D Blunt (eds), *New South Wales Legislative Council Practice* (2nd ed, The Federation Press, 2021) at 79. See, also, the Long Title of the Act and the statement of the Premier on the Second Reading of the Parliamentary Evidence Bill 1901 (Legislative Assembly, *Parliamentary Debates*, 2 October 1901 at 1914-1915) which both confirm that this was a consolidation Act.

3 Frappell and Blunt, *NSW Legislative Council Practice* at 79; G Appleby, "Inquiry into provisions of the *Parliamentary Evidence Act 1901*: 'Fit for Purpose and Modernised'" (1 March 2024) at [1.9].

4 (1858) 11 Moo PC 347 at 396; 14 ER 727 at 745.

authorised the presiding officers of the Tasmanian Houses of Parliament "to issue a warrant which by its own force authorised Sheriffs, constables and others to arrest and detain" a person that had been summoned to give evidence but refused to do so. Other Australian jurisdictions have enacted comparable legislation, "which either confers power directly on the chamber or one of its members to compel attendance": J [4] (**CAB 11**).[5]

13. In New South Wales, unsuccessful attempts were made at passing comprehensive privileges legislation in 1856, 1878 and 1879: J [15] (**CAB 16**).[6] Finally, in 1881 the "Milburn Creek affair" (which concerned alleged bribery of MPs and government officers) served as the catalyst for the passage of the 1881 Act to enable Parliament to compel witnesses to attend and give evidence under oath about those matters.[7] The preamble to the 1881 Act stated that the purpose of the Act was to confer on the Houses and their committees "the power of compelling the attendance of Witnesses and of examining them on oath".[8]

14. As noted at J [17]-[18] (**CAB 17**),[9] the mechanism adopted by the 1881 Act for enforcing attendance of witnesses (which is replicated in ss 4-9 of the PE Act) departed from the precedent found in the *Electoral Act 1880* (NSW) and later enacted in the *Public Works Act 1888* (NSW). Those statutes authorised certain parliamentary committees to issue a warrant for the arrest of a witness who, having been summoned to appear, failed to do so.

(ii) Key provisions of the PE Act

15. Sections 4 and 5 of the PE Act set out the procedure for summoning or procuring the attendance of witnesses to give evidence before the Legislative Assembly, the Legislative Council, or a committee of either House: J [11] (**CAB 14-15**). Sections 7-9 provide for what is to occur if a witness summoned under s 4 does not attend to give evidence. Seven observations may be made in respect of these provisions:

16. ***First***, s 7 confers a discretion on the President or the Speaker to issue a certificate where she or he is satisfied that: (i) a person has failed to comply with the summons; and (ii) that failure is without just cause or reasonable excuse: J [21] (**CAB 18**).

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5 *Parliament of Queensland Act 2001* (Qld), s 25; *Parliamentary Privileges Act 1891* (WA), s 4. See, also, *Parliamentary Privileges Act 1987* (Cth), ss 4, 7 and 9.

6 See Frappell and Blunt, *New South Wales Legislative Council Practice* at 75-77.

7 See Frappell and Blunt, *New South Wales Legislative Council Practice* at 78-79.

8 See, also, the second reading speech of the Attorney General: Legislative Assembly, *Parliamentary Debates*, 18 August 1881 at 727 (Hon Sir Robert Wisdom); the comments of the Hon George Reid at 730; and the comments of the Hon Joseph George Innes (Legislative Council, *Parliamentary Debates*, 14 September 1881 at 1104).

9 See also Mr Cullen's submissions (**RS1**) at [31].

17. ***Secondly***, under s 7 the certificate is to be "according to the form in Schedule 2, or to the like effect". The terms of Schedule 2 indicate that a certificate may provide limited information to the judge that receives it.

18. ***Thirdly***, as was found at J [23]-[24], [31] (**CAB 19-20, 22**), s 8 of the PE Act *requires* a Judge that receives a certificate made by the President or Speaker under s 7 to issue a warrant. Upon presentation with a certificate that, on its face, complies with the requirements of s 7 of the PE Act, the Judge has no discretion to determine whether a warrant should issue. That position is confirmed by the matters identified at J [23]:

(a) the words of s 8 — "[u]pon such certificate any Judge of the said Court shall issue a warrant …" — by including "shall issue" in contrast to the discretionary power conferred on the President and Speaker in s 7 (which uses the words "may certify");

(b) the use of the word "shall" invokes the rule of construction, which can now be found in s 9(2) of the *Interpretation Act 1987* (NSW), that the power in question "must be exercised on demand";[10]

(c) the use of the word "upon" confirms that the Judge is not authorised to engage in any separate consideration into the underlying veracity of the facts set out in the certificate;

(d) the template warrant in Sch 3 to the PE Act commences "WHEREAS it hath *this day* been certified …" (emphasis added) which assumes that the Judge will issue the warrant on the same day that the President or Speaker issues the certificate.

19. Two other features of the statutory language confirm the limited role for the Judge:

(a) the use of the words "certify", "certificate" and "certified" in ss 7-8 and in the template warrant suggest that the facts are for the certifier to determine and not the Judge (see **RS1 [21(c)]**);

(b) the absence of any express abrogation of parliamentary privilege is consistent with it being impermissible for the Judge to undertake a wide-ranging inquiry into the facts underlying the certificate (see **AS [16.3]**, **[17.2]**).

20. Indeed, even if all of these features did not point in the direction of the Judge having no independent discretion under s 8 of the PE Act to determine whether a warrant should issue, given the limited nature of the information presented to the Judge it is quite unclear how she or he could go about inquiring into the underlying facts. Further, given the limitations on

[10] *Ward v Williams* (1955) 92 CLR 496 at 506.

the material available to the Judge, it is unclear what considerations could inform any discretionary refusal of a warrant.

21. ***Fourthly***, there is no indication in the terms of ss 7-8 of the PE Act that the Judge issuing the warrant: (i) must do so in open court; or (ii) should only do so after giving the potential subject of the warrant an opportunity to be heard. The provisions appear to contemplate that the warrant may be issued, in effect, *ex parte* following a review of the certificate.

22. ***Fifthly***, pursuant to s 9(1), when a warrant is issued under s 8 of the PE Act it authorises the apprehension and then detention of the named person: J [27] (**CAB 20**). The person named in the warrant is not delivered into the custody of the Court so as to be given an opportunity to be heard.[11] Section 9(1) also contemplates that there may be further orders under the hand and seal of the President or Speaker: (i) for the production of the person from time to time to give evidence; (ii) for the person to be remanded; or (iii) finally for the person to be discharged from custody. The Judge that issued the warrant is not involved in the making of such orders and the PE Act does not provide expressly for any oversight function.

23. ***Sixthly***, the template certificate and warrant in Schs 2-3 of the PE Act are both titled "In the matter of the '*Parliamentary Evidence Act 1901*' and [the person]" in a manner that suggests a curial proceeding. Further, the template warrant in Sch 3 is headed "In the Supreme Court of New South Wales" and the Judge's signature and seal are to be followed by the words "A Judge of the Supreme Court of New South Wales". These features appear designed to lend the appearance of judicial authority to the process pursuant to which warrants are issued.

24. ***Seventhly***, the Court of Appeal held (at J [9], [62] (**CAB 14, 33**)) and the President accepts (at **AS [17.1]**, **[41]**) that the function conferred on the Supreme Court by s 8 of the PE Act involves the exercise of administrative rather than judicial power. A judge issuing a warrant under s 8 is not engaged in an "adjudication to determine the rights of parties" and the warrant is not enforced as a Court order.[12] Further, the issuance of a warrant under s 8 is not undertaken as part of, or ancillary to, a traditional exercise of judicial power[13] because the warrant is issued for the purpose of the witness being brought *before Parliament* to give evidence. Finally, the conclusion that the Judge's function under s 8 is administrative in character is supported by the authorities in which it has been accepted that the issuance by

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11 cf *Civil Procedure Act 2005* (NSW), s 97(4).

12 cf ***Love*** *v Attorney General (NSW)* (1990) 169 CLR 307 at 321-322 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

13 cf ***Ousley*** *v The Queen* (1997) 192 CLR 69 at 99 (McHugh J).

judges of search warrants;[14] warrants authorising the use of listening devices;[15] interception warrants;[16] and warrants authorising detention[17] is, in each case, an administrative function.

C *KABLE*: PRINCIPLES AND APPLICATION

(i) Kable: basic principles

25. The principle established by the decision in *Kable* was described by three members of this Court in ***Garlett*** *v Western Australia* in the following terms:[18]

> … by reason of the integrated system of courts postulated by the provisions of Ch III of the *Constitution*, State legislation which purports to confer upon a State Supreme Court a function which substantially impairs the institutional integrity of such a court in its role as a repository of federal jurisdiction is "repugnant to or incompatible with" that role and is, therefore, invalid.

26. The NSWAG does not take issue with the basic outline of the *Kable* principle set out at **AS [8]-[10]**. It is a somewhat protean constitutional limit: "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate further outcomes".[19] It is also true that a law will only breach the *Kable* limit where it trenches on a Court's independence and impartiality to such an extent that "it is repugnant to the judicial process in a fundamental degree"[20] and that this is a "very high" threshold.[21] Assessing whether this threshold has been transgressed requires careful consideration of the "core constitutional values underpinning and protected by Ch III"[22] and earlier authorities in which the validity of legislation has been tested against the *Kable* limit.

(ii) Proper role for historical analysis when applying the Kable principle

27. In this case, the President's main complaint is that the Court of Appeal failed properly to take into account considerations of history when determining whether the provisions of the PE Act infringed the *Kable* limit: **AS [20]**. In particular, the President contends that the Court of Appeal: (i) ought to have applied certain observations of Gaudron J in ***Wilson*** *v*

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14 ***Grollo*** *v Palmer* (1995) 184 CLR 348 at 359-360 (Brennan CJ, Deane, Dawson and Toohey JJ).
15 *Love* (1990) 169 CLR 307 at 315 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *Grollo* (1995) 184 CLR 348 at 359-360; *Ousley* (1997) 192 CLR 69 at 80, 84-85, 87, 100, 121-122, 130, 145-146.
16 *Grollo* (1995) 184 CLR 348 at 359-360, 362.
17 *CXXXVIII v* ***White*** (2020) 274 FCR 170 at [73] (Wigney, Bromwich and Abraham JJ).
18 (2022) 277 CLR 1 at [7] (Kiefel CJ, Keane and Steward JJ). See, also, *Attorney-General (NT) v* ***Emmerson*** (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
19 ***Fardon*** *v Attorney-General (Qld)* (2004) 223 CLR 575 at [104] (Gummow J).
20 *Kable* (1996) 189 CLR 51 at 132 (Gummow J). See, also, *Garlett* (2022) 277 CLR 1 at [242] (Edelman J).
21 *Garlett* (2022) 277 CLR 1 at [242] (Edelman J).
22 *Garlett* (2022) 277 CLR 1 at [199] (Gordon J).

Minister for Aboriginal and Torres Strait Islander Affairs purportedly to the effect that judges may exercise warrant-issuing powers of the kind found in s 8 of the PE Act;[23] and (ii) failed properly to grapple with the fact that the Supreme Court had identical powers to those impugned in this case for twenty years prior to Federation.

28. As a general proposition, when this Court is considering whether legislation infringes a limitation that arises by reason of Ch III, the "historical or traditional classification of a function" under the law "can be relevant to, although not determinative of" the law's validity.[24] "[H]istorical practice is no substitute for an assessment of compatibility with modern conceptions of courts and judicial power".[25] Caution must be exercised to ensure that historical analysis is not deployed in a simplistic manner or pitched at the wrong level of generality.[26] The correct approach was articulated by Gageler J in *Palmer v Ayres*:[27]

> The primary question in each case is not as to how the function might have been exercised in practice at or around 1900. The answer to that narrow temporal question will be relevant, but it cannot be determinative. The aim is not simply to take a snap-shot of the historical position at a moment in time. The fundamental question is as to how the particular function is now to be characterised having regard to the systemic values on which the framers can be taken to have drawn in isolating the judicial power of the Commonwealth and in vesting that power only in courts. The aim is to be faithful to those values.

29. Justice Gageler was here addressing how the Court should go about determining whether a function is inherently non-judicial (such that it cannot be conferred on a federal court) or exclusively judicial (such that, under federal law, it can only be conferred on a federal court). However, a similar methodology is applicable for the *Kable* principle. The President appears to accept as much (see **AS [20] (n 33)**) but both of his historical arguments are superficial and do not engage properly with the history of warrant powers and what that history says about the relevant systemic values.

(iii) History of warrant powers

30. As noted at [27] above, at **AS [21]** the President relies on the observation of Gaudron J in *Wilson* — a case that concerned whether a function conferred on a Federal Court judge as *persona designata* infringed Ch III — to the effect that there may be functions, which do not

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23 (1996) 189 CLR 1 at 26.

24 *Benbrika v Minister for Home Affairs [No 2]* (2023) 280 CLR 1 (***Benbrika [No 2]***) at [44] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

25 J Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 2022) at 290.

26 *Benbrika [No 2]* (2023) 280 CLR 1 at [45] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

27 (2017) 259 CLR 478 at [69].

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".[28] The President notes (at **AS [21]**) that Gaudron J went on to give the example of telephone interception warrants, which were considered in each of *Hilton v Wells*[29] and *Grollo*. At **AS [23]**, the President goes on to suggest that Gaudron J's observation should have provided "a complete (or near complete) answer to the *Kable* question in this case" because "[t]he warrant power here is of the same nature that has historically been exercised by courts and judges".

31. It may be accepted that, as is stated at **AS [22]**, the observation of Gaudron J in *Wilson* relied on by the President was endorsed by Gummow, Hayne, Crennan and Bell JJ in ***Wainohu** v New South Wales*.[30] It is also the case that the principle applied in *Wilson* and the *Kable* limit "share a common foundation in constitutional principle" that "has as its touchstone protection against legislative or executive intrusion upon the institutional integrity of the courts, whether federal or State".[31]

32. However, all of these points in fact undermine the President's argument because, contrary to **AS [23]**, the Judge's function under s 8 of the PE Act is fundamentally different to warrant powers that have been vested in courts and judges historically. Consideration of *Grollo*, in which it was held that warrant-issuing functions can be exercised by Federal Court judges as personae designatae, only serves to highlight the problematic features of the PE Act.

33. *Grollo* concerned a law with the features described at **AS [45]** that provided for the issuance of interception warrants upon the making of an application to an eligible Federal Court judge.[32] Brennan CJ, Deane, Dawson and Toohey JJ acknowledged that issuing a warrant:[33]

> … is, for all practical purposes, an unreviewable in camera exercise of executive power to authorise a future clandestine gathering of information. Understandably a view might be taken that this is no business for a judge to be involved in, much

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28 *Wilson* (1996) 189 CLR 1 at 26.

29 (1985) 157 CLR 57.

30 (2011) 243 CLR 181 at [94]. Note that immediately before the passage relied on by the President, the joint judgment in *Wainohu* also endorsed Gaudron J's statement in *Wilson* (1996) 189 CLR 1 at 25-26 that "In general terms, a function which is carried out in public, save and to the extent that general considerations of justice otherwise require, [and which is] manifestly free of outside influence and which results in a report or other outcome which can be assessed according to its own terms, will not be one that gives the appearance of an unacceptable relationship between the judiciary and other branches of government". None of these criteria are satisfied for the warrant-issuing function under the PE Act.

31 *Wainohu* (2011) 243 CLR 181 at [105] (Gummow, Hayne, Crennan and Bell JJ).

32 (1995) 184 CLR 348 at 354-357.

33 (1995) 184 CLR 348 at 367 (footnote omitted).

less the large majority of the judges of the Federal Court.

34. However, their Honours went on to say that it was "precisely because of the intrusive and clandestine nature of interception warrants" that it was desirable for judges to be involved in deciding whether they should be issued.[34] This was because:[35]

> … the professional experience and cast of mind of a judge is a desirable guarantee that the appropriate balance will be kept between the law enforcement agencies on the one hand and criminal suspects or suspected sources of information about crime on the other. It is an eligible judge's function of deciding independently of the applicant agency whether an interception warrant should issue that separates the eligible judge from the executive function of law enforcement. It is the recognition of that independent role that preserves public confidence in the judiciary as an institution.

35. *Grollo* demonstrates that the reason that judges are permitted to engage in the function of issuing warrants that "authorise conduct which would otherwise be tortious" (J [25] (**CAB 20**)) is not an aberration explicable by history alone.[36] Judges can only exercise that kind of function where they are extended some measure of decisional independence to consider evidence and determine whether a warrant should issue: that is the critical factor that has been understood to separate a judge from the other arms of government and so preserve institutional integrity: see J [8] (**CAB 13**).[37] That is the case for the legislation considered in all of the examples relied on at **AS [21] (n 37-39)**: see **RS1 [38]**.

36. Similarly, other than s 25(2) of the *Justices Act 1902* (NSW),[38] none of the historical statutes relied on at **AS [23] (n 44)** required a Judge to issue a warrant authorising detention upon presentation of a certificate in circumstances where the Judge was not permitted to inquire into the underlying facts. That is precisely what occurs under the warrant regime in the PE Act: the Judge has no meaningful decision-making role so as to separate her or him from the functions exercised by the President or the Speaker: see [18]-[19] above. The certificate issued under s 7 of the PE Act is the "vital circumstance and essential foundation" for the issuing of a warrant.[39] Once the certificate issues, effectively, the Judge is required to

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34 *Grollo* (1995) 184 CLR 348 at 367.

35 *Grollo* (1995) 184 CLR 348 at 367 (emphasis added). See, also *Love* (1990) 169 CLR 307 at 321 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

36 See, also, *White* (2020) 274 FCR 170 at [113], [120]-[121] (Wigney, Bromwich and Abraham JJ).

37 See again *Grollo* (1995) 184 CLR 348 at 367.

38 As pointed out at **RS1 [40]**, this provision authorises the issuance of a warrant ancillary to a traditional exercise of judicial power: see [24] above. Persons subject to such a warrant may be brought before the Court at which point they may dispute that they are the person named in the relevant indictment or be granted bail: see s 25(2) in particular.

39 *South Australia v* ***Totani*** (2010) 242 CLR 1 at [142] (Gummow J). See, also, [75], [82], [149], [436], [480].

implement the decisions made by the Parliamentary officers.

37. Having regard to these matters, far from supporting the President's argument, the warrant cases highlight the vice in ss 7-9 of the PE Act. Namely, the regime vests power in a Judge to authorise detention for precisely the same reason as other warrant regimes — the judiciary has a reputation for independence and impartiality — however, it requires the Judge to issue a warrant in circumstances where the Judge cannot make a decision that is impartial and independent of the decision already taken by the presiding officer: cf **AS [42]**: **RS1 [42]**. As the Court of Appeal explained at J [67] (**CAB 34**):

> … the *Parliamentary Evidence Act* neither requires nor permits the relevant judge to bring any such qualities of independence, impartiality and fair-mindedness to bear on a meaningful decision-making process. Instead the regime draws upon the perception of those qualities so as to lend an appearance of judicial authority to a decision which has in substance already been made by the President. To exploit the reputation for independence in this way, without the actuality of independence, is to impair the institutional integrity of the Court substantially.

(iv) Significance of the 1881 Act and the transition at Federation

38. At **AS [24]-[30]**, the President develops an argument that proceeds as follows: (i) ss 7-9 of the PE Act re-enacted provisions of the 1881 Act that were in force for twenty years prior to 1901 such that the warrant power at issue was vested in the Supreme Court at the time of Federation; (ii) the *Constitution* was framed on the assumption that the Supreme Court possessed the essential characteristics of independence and impartiality to be a "Supreme Court of any State" (s 73(ii)) and the "Supreme Court of a State" (s 73) and thus a "court of a State" (s 77(iii)); and (iii) therefore, the fact that the Supreme Court was vested with this power cannot have substantially impaired the Court's independence and impartiality prior to or at Federation (and cannot be found to have that effect now). That argument impermissibly takes a snap-shot of the historical position at 1901 and fails to engage with the systemic values that underpin Ch III as they are understood today.

39. The correct starting point, as acknowledged at J [70] (**CAB 35**), is that at 1901 "everything adjusted".[40] From that point onwards, Ch III of the *Constitution* required that the Supreme Court of New South Wales exhibit "the defining characteristics which mark a court apart from other decision-making bodies".[41] It is those characteristics which are constitutionally

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40 *Burns v Corbett* (2018) 265 CLR 304 at [72], [112] (Gageler J).

41 *Assistant Commissioner Condon v* ***Pompano*** *Pty Ltd* (2013) 252 CLR 38 at [67] (French CJ). See, also, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ); *Garlett* (2022) 277 CLR 1 at [115]-[117] (Gageler J), [242]-[243] (Edelman J).

entrenched, notwithstanding that their incidents, or what is required for a Court to possess them, are not "frozen in time".[42] In other words, whether a function conferred on a Judge or a mode of constituting or organising a Court undermines "the reality and appearance of decisional independence and impartiality"[43] such as to present a Ch III problem "may vary and develop in response to changing circumstances".[44] For example, it has been suggested that — notwithstanding that Sir John Latham and Sir Owen Dixon both acted as diplomatic representatives during World War II — "there would be no doubts" in the present day that appointment of a federal judge to an ambassadorial role would be incompatible with the continued exercise by that judge of the judicial power of the Commonwealth.[45]

10 40. The characteristics and functions of the Supreme Courts of the States and the manner in which they were constituted underwent significant changes in the late 19th century and continued to evolve in the 20th century.[46] Very significant alterations to the manner in which the Supreme Court of New South Wales exercised judicial power occurred after 1901.[47]

41. The outworking of the President's argument is that any characteristic of, or function that happened to be vested in, the Supreme Court as at Federation — even if there was no well-established historical practice of that function being exercised (see **RS1 [47]**) — could never infringe the *Kable* doctrine. That is incompatible with the true position that, on and from 1901, the Constitution required the Supreme Courts to exhibit characteristics of independence and impartiality necessary to be an appropriate repository of federal
20 jurisdiction. Functions which were at that time vested in Supreme Courts were not assumed

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42 ***Vella*** *v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [141] (Gageler J), See, also, *Trust Company of Australia Ltd (t/as Stockland Property Management) v Skiwing Pty Ltd (t/as Café Tiffany's)* (2006) 66 NSWLR 77 at [53]-[54] (Spigelman CJ; Hodgson and Bryson JJA agreeing), citing *Ng v The Queen* (2003) 217 CLR 521 at [9].

43 *Pompano* (2013) 252 CLR 38 at [67].

44 *Victoria v Commonwealth* (1971) 122 CLR 353 at 397 (Windeyer J).

45 HP Lee and E Campbell, *The Australian Judiciary* (2nd ed, Cambridge University Press, 2013) at 188. See, also, R French, "Essential and Defining Characteristics of Courts in an Age of Institutional Change" (Address delivered at the Supreme and Federal Court Judges Conference in Adelaide on 21 January 2013) at 10, quoting Sir Owen Dixon commenting on JD Holmes "Royal Commissions" (Paper presented at the Ninth Legal Convention of the Law Council of Australia, Brisbane, 22 July 1955) reproduced in (1955) 29 *Australian Law Journal* 253 at 272.

46 See the discussion of Dawson J in *Kable* (1996) 189 CLR 51 at 81 concerning appeals to the Governor in Executive Council in South Australia (accommodated by s 73(ii) of the *Constitution*) and the insertion in 1992 of Pt 9 into the *Constitution Act 1902* (NSW). See, also, the discussion of the membership of the Legislative Council of sitting judges of the Supreme Court of New South Wales in JM Bennett, *Colonial Law Lords* (The Federation Press, 2006).

47 See, eg, the introduction of appeals against fact or sentence in criminal proceedings by the *Criminal Appeal Act 1912* (NSW).

to be valid and would be rendered invalid if they substantially interfered with the Courts' independence and impartiality.

(v) Additional considerations relevant to the Kable analysis

42. There are two further considerations that support the conclusion that ss 7-9 of the PE Act infringe the *Kable* doctrine: the availability of alternative legislative schemes and the fact that, contrary to the President's submissions, exclusive cognisance does not provide a rationale for the limited role for the Judge under s 8 of the PE Act.

43. ***Alternative legislative schemes:*** As outlined at J [4] (**CAB 11**), there are alternative mechanisms available to secure the attendance of witnesses to give evidence before Parliament. Those alternatives fall into two broad categories.

44. First, a genuinely independent warrant-issuing function could be conferred on the Supreme Court if Parliament were willing to override the allied principles: (i) referred to as "exclusive cognisance";[48] and (ii) given expression in Art 9 of the Bill of Rights. Contrary to **AS [47]**, this option should not be treated as unavailable by reason of the special importance of exclusive cognisance and parliamentary privilege.[49] To reason in that way is to fall into the error identified by the Court of Appeal at J [51]-[52] (**CAB 28-29**) of treating Art 9 as if it took precedence over the *Constitution* (rather than being "a provision that could be amended or repealed or … waived").[50]

45. Second, as pointed out at J [44] (**CAB 27**) New South Wales could follow other Australian jurisdictions by enacting legislation including that does one or both of: (i) making it an offence to fail to comply with a summons issued under s 4 of the PE Act to be adjudged and punished by Parliament; and (ii) authorising parliamentary officers to issue warrants for apprehension to compel attendance to give evidence: see [12] above. In this regard, it is notable that s 11 of the PE Act does both these things in respect of persons who refuse to answer lawful questions when giving evidence to Parliament.

46. As explained at J [43] (**CAB 27**), the existence of these alternative mechanisms for securing

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48 See *Attorney-General (Tas) v* ***Casimaty*** [2024] HCA 31; 419 ALR 183; 98 ALJR 1139 at [51] (Edelman J)

49 Section 13 of the PE Act provides an example of a provision that confers jurisdiction on a Court in a manner that abrogates, to some extent, Art 9 of the Bill of Rights and exclusive cognisance.

50 See, also, *Director of Public Prosecutions (NSW) v President of the Legislative Council of New South Wales* [2026] NSWCA 20 (***DPP (NSW)***) at [89] (Leeming and Stern JJA; Griffiths A-JA) where it is explained that even though Art 9 is "'a provision of the highest constitutional importance and should not be narrowly construed' … that does not mean that its scope is unlimited".

the attendance of witnesses to give evidence before Parliament is a relevant consideration for the *Kable* analysis. The fact that at least one "other course was available to the legislature" weighs in favour of invalidity.[51]

47. ***Exclusive cognisance***: At **AS [47], [50]** the President relies on principles of exclusive cognisance and Art 9 of the Bill of Rights to explain a number of features of the PE Act including the limited scope of the Judge's function under s 8. It may be accepted that the limited capacity of the Judge to inquire into the facts that underlie the President or Speaker's certificate bears some resemblance to the well-established limitations on the extent to which courts will examine what occurred in a House of Parliament in ordinary curial proceedings.[52] However, in truth this resemblance is skin-deep.

48. In an ordinary curial proceeding "where a question of parliamentary privilege is raised in a case already before the court" or even "where the courts have been asked to review action by Parliament to enforce its proceedings"[53] then if the Court declines to review the manner of a House's exercise of its privileges and powers, it defers to Parliament's judgment as to matters that appropriately fall within its exclusive purview and responsibility. In doing so, the Court: (i) avoids "becom[ing] embroiled in the political controversies which such questions typically involve";[54] and (ii) conforms to the "bilateral principle that the courts and Parliament are both astute to recognise their respective constitutional roles".[55]

49. By contrast, when a warrant issues under the PE Act, the limited inquiry that the Judge may undertake deprives her or him from having any independent role: see [35]-[37] above. Consequently, under this unique legislative scheme (see [14] above; J [44] (**CAB 27**)), the Judge is in fact drawn into closer association with, and indeed subordinated to, Parliament because — rather than answering a legal question whether a parliamentary privilege or power exists — she or he is required to *implement* judgments made by parliamentary officers. That state of affairs is liable to: (i) undermine the judiciary's "reputation for impartiality and nonpartisanship" on which its legitimacy depends;[56] and (ii) impair the

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51 *Wainohu* (2011) 243 CLR 181 at [107] (Gummow, Hayne, Crennan and Bell JJ).

52 *R v Richards; Ex parte* ***Fitzpatrick and Browne*** (1955) 92 CLR 157 at 162 (Dixon CJ, delivering the judgment of the Court); *Egan v Willis* (1998) 195 CLR 424 at [27] (Gaudron, Gummow and Hayne JJ).

53 *Halden v Marks* (1995) 17 WAR 447 at 462 (The Court).

54 *Egan v Willis* (1998) 195 CLR 424 at [131] (Kirby J). See, also [122].

55 *DPP (NSW)* [2026] NSWCA 20 at [97] (Leeming and Stern JJA; Griffiths A-JA). See, also, *Egan v Willis* (1998) 195 CLR 424 at [22] (Gaudron, Gummow and Hayne JJ); *Casimaty* [2024] HCA 31; 419 ALR 183; 98 ALJR 113 at [104]; W Martin, "Parliament and the Courts: A Contemporary Assessment of the Ethic of Mutual Respect" (2015) 30(2) *Australasian Parliamentary Review* 80.

56 *Kuczborski v Queensland* (2014) 254 CLR 51 at [228] (Crennan, Kiefel, Gageler and Keane JJ), citing

Supreme Court's institutional integrity. Understood in this way, the effect of ss 7-9 of the PE Act is thus to undercut rather than promote one of the key rationales for exclusive cognisance. It follows that exclusive cognisance cannot justify the limited function for the Judge under s 8 of the PE Act. Indeed, this aspect of "the nature of the relationship that the legislation establishes between the two branches of government"[57] is properly regarded as supporting a finding of invalidity.

D PRESIDENT'S ARGUMENTS BASED ON THE *LIM* PRINCIPLE

50. At **AS [31]-[50]** the President contends that the application to ss 7-9 of the PE Act of the framework established by recent authorities of this Court for assessing whether a Commonwealth law infringes the principle stated in *Lim* — i.e. that, putting to one side exceptional cases, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"[58] — provides further support for the conclusion that those provisions are valid. This argument was not advanced before the Court of Appeal or in the President's application for special leave.

51. The NSWAG's position is that: (i) invocation of the *Lim* principle does not assist the resolution of this appeal such that, in accordance with the prudential approach, any consideration of whether there should be closer alignment between *Lim* and *Kable* should await a case where it would be determinative of the outcome (see [52]-[55] below); (ii) if the Court were minded to decide the point, there should be no closer alignment of the *Kable* limit with the *Lim* principle (see [56]-[64] below); and (iii) even if the Court were to apply the *Lim* framework to ss 7-9 of the PE Act that exercise would only confirm that the Court of Appeal was correct to invalidate these provisions: see [65]-[72] below.

(i) The Court should not determine whether there should be closer alignment between the Kable principle and Lim principle

52. Recent authorities of this Court have stated that, when determining whether a Commonwealth law that authorises detention contravenes the *Lim* principle, the starting point is to consider whether the detention conforms with the "constitutional paradigm which posits the imposition of a penal or punitive detriment only: (1) by a court; (2) in the exercise

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Kable (1996) 189 CLR 51 at 133 and *Mistretta v United States* (1989) 488 US 361 at 407.

57 *Totani* (2010) 242 CLR 1 at [200] (Hayne J) (concerning the executive and judicial branches).

58 (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

of judicial power; and (3) in the performance of the exclusively judicial function of adjudging and punishing criminal guilt".[59] A Commonwealth law that authorises detention but does not conform with this paradigm will only be valid in "exceptional cases" (that is where it is "reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose").[60] This approach may be referred to as the "*Lim* framework".

53. The President contends that an analysis similar to this framework for assessing whether a Commonwealth law contravenes the *Lim* principle is at least "capable of informing" whether a State law contravenes the *Kable* limit: **AS [35]**. It is said that if a State law imposing a detention function on a court is a "justified" departure from the *Lim* principle, that will "strongly support" the conclusion that the law does not impair the institutional integrity of the court, and, if the State law involves an "unjustified" departure, that will "strongly support, if not require" the conclusion that the law does impair its institutional integrity.

54. Even if it were constitutionally sound to invoke the *Lim* principle in this way (as to which see further below at [56]-[64]), it would not assist in the resolution of this appeal. That is because, even if it were held that the non-judicial power conferred on the Supreme Court by ss 7-9 is reasonably capable of being seen as necessary for a legitimate non-punitive purpose (which the President identifies as bringing the person before Parliament to give evidence), ss 7-9 would still impair the institutional integrity of the Court because of: (i) the absence of any evaluative role before the Court comes under an obligation to issue the warrant; and (ii) the way in which curial authority has been lent to the original and potentially subsequent decisions of the President. In other words, the *Lim* principle cannot exhaust the operation of the doctrine in *Kable*: **RS1 [50]**.

55. The Court can resolve the present appeal by recourse to the ordinary application of the *Kable* principle. In accordance with the prudential approach,[61] consideration of whether there should be closer alignment between those two principles should await a case where the resolution of that question may be determinative. A case which may present a better vehicle

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59 ***EGH19*** *v Commonwealth* [2026] HCA 7 at [16] (Gageler CJ and Gleeson J). See, also, ***NZYQ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at [28], [39] (The Court); ***YBFZ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 at [8] (Gageler CJ, Gordon, Gleeson and Jagot JJ); ***CZA19*** *v Commonwealth of Australia* (2025) 99 ALJR 650 at [63] (Gordon J).

60 *NZYQ* (2023) 280 CLR 137 at [39]; *YBFZ* (2024) 99 ALJR 1 at [8]; *CZA19* (2025) 99 ALJR 650 at [63]; *EGH19* [2026] HCA 7 at [287] (Jagot J).

61 *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *YBFZ* (2024) 99 ALJR 1 at [47] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

is already before the Court: see North Australian Aboriginal Justice Agency Ltd v Northern Territory of Australia (D15/2025), where the plaintiff contends that s 7A(2AB) of the *Bail Act 1982* (NT) is invalid for being an unjustified departure from the *Lim* principle.

(ii) In any event, there should be no further alignment of the two principles

56. If, contrary to the submissions above, the Court considers it appropriate to address the relationship between these principles, the NSWAG makes the following submissions.

57. It may be accepted that, as noted at **AS [34]**, both the *Kable* limit and the *Lim* principle ultimately derive from the separation of federal judicial power mandated by Ch III.[62] However, as Gleeson J explained in *Garlett*, the claim at **AS [34]** that "central strands of the reasoning in *Lim*" were woven into the judgments of each of Toohey J, Gaudron J, McHugh J and Gummow J in *Kable* is open to serious doubt.[63]

58. It is uncontroversial that if a State law "would not offend Ch III had it been enacted by the Commonwealth Parliament for a Ch III court" then there can be no *Kable* problem.[64] This is because if a power could be conferred as part of the judicial power of the Commonwealth then the exercise by a State court of that power could not be incompatible with the exercise by that court of federal jurisdiction. These observations serve to highlight that the *Kable* principle is directed at ensuring that State courts remain appropriate repositories for federal judicial power. By contrast, as Gleeson J observed in *Garlett*:[65]

> … the *Lim* principle was articulated as a constitutive part of the doctrine of the separation of Commonwealth judicial power, not as a doctrine about the nature of Ch III courts or the characteristics of Ch III courts that are essential to the institutional integrity of those courts …

59. Fundamentally, the *Kable* principle "does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth by Ch III".[66] The States also

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62 *Garlett* (2022) 277 CLR 1 at [119] (Gageler J); *EGH19* [2026] HCA 7 at [288] (Jagot J).

63 (2022) 277 CLR 1 at [306]-[309].

64 *Pompano* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ); *Vella* (2019) 269 CLR 219 at [147] (Gageler J); *Garlett* (2022) 277 CLR 1 at [121] (Gageler J); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 (***Benbrika [No 1]***) at [82] (Gageler J), [158] (Gordon J).

65 (2022) 277 CLR 1 at [294]. See, also, *EGH19* [2026] HCA 7 at [153], [160] (Edelman J).

66 *Fardon* (2004) 223 CLR 575 at [86] (Gummow J). See, also, at [36] (McHugh J), [198] (Hayne J), [219] (Callinan and Heydon JJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [84] (French CJ); *Pompano* (2013) 252 CLR 38 at [22] (French CJ), [124]-[126] (Hayne, Crennan, Kiefel and Bell JJ); *Pollentine v Bleijie* (2014) 253 CLR 629 at [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Benbrika [No 1]* (2021) 272 CLR 68 at [137], [155] (Gordon J); *Garlett* (2022) 277 CLR 1 at [40] (Kiefel CJ, Keane and Steward JJ), [184] (Gordon J), [247] (Edelman J).

enjoy plenary legislative power.[67] It follows from these propositions that there is no constitutional impediment to a State law authorising a person or entity *other than a Court* to impose a punitive detriment.[68] In other words, the relationship between individuals and the bodies politic of the States is not governed by the same constitutional paradigm referred to at [52] above.[69] Three observations may be made in this respect.

60. ***First***, there can be no direct application of the *Lim* principle at the State level. That proposition finds support in the reasoning of a majority of this Court in *Garlett*.[70]

61. ***Secondly***, the *Kable* limit has traditionally been recognised as "mak[ing] ample allowance for diversity in the constitution and organisation of [State] courts".[71]

10 62. ***Thirdly***, if the effect of the *Kable* limit were that State courts cannot impose punitive detriments other than as part of the adjudgment and punishment of criminal guilt then the net result is that, exceptional cases aside, only a State legislature or executive could impose such a detriment without a criminal trial. To adopt the observations of Gleeson CJ in *Thomas v Mowbray*, "[t]he advantages, in terms of protecting human rights, of such a conclusion are not self-evident" because "the exercise of powers, independently, impartially and judicially, especially when such powers affect the liberty of the individual, would ordinarily be regarded as a good thing, not something to be avoided".[72] In other words, closer alignment of the *Kable* limit with the *Lim* principle at the State level would not produce the same results in terms of the protection of liberty that is sometimes referred to at the federal level[73] as the
20 rationale for the *Lim* principle as a limitation on the functions that can be conferred on courts.

63. It is presumably because of points like these that the President makes the more limited contention that the *Lim* principle is "capable of informing" the *Kable* analysis: **AS [35].** The NSWAG accepts that considerations relevant to whether detention is justified under the *Lim* framework may be relevant to the question of whether the institutional integrity of a State court has been compromised for the purposes of *Kable*.[74] However, that does not mean that:

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67 *Fardon* (2004) 223 CLR 575 at [40] (McHugh J).
68 *Fardon* (2004) 223 CLR 575 at [40]; *YBFZ* (2024) 99 ALJR 1 at [93], [142]-[161] (Edelman J); *EGH19* [2026] HCA 7 at [175]-[177], [210] (Edelman J).
69 cf *EGH19* [2026] HCA 7 at [16] (Gageler CJ and Gleeson J).
70 (2022) 277 CLR 1 at [40] (Kiefel CJ, Keane and Steward JJ), [247] (Edelman J), [293]-[309] (Gleeson J).
71 *Totani* (2010) 242 CLR 1 at [68] (French CJ). See, also, *Wainohu* (2011) 243 CLR 181 at [52] (French CJ and Kiefel J).
72 (2007) 233 CLR 307 at [17].
73 See, eg, *Garlett* (2022) 277 CLR 1 at [125] (Gageler J).
74 cf *Totani* (2010) 242 CLR 1 at [1] (French CJ).

(i) State courts can never impose a punitive detriment that would fall foul of the *Lim* principle if imposed by a federal court but which nonetheless involve "a judicial process of some refinement";[75] or (ii) the outcomes of previous decisions can be rationalised by application of the *Lim* framework alone.

64. The first proposition fails to grapple with the fact that State courts exist within a different constitutional paradigm to which different normative considerations apply such that their institutional integrity is not necessarily imperilled by a function that could not be exercised by a federal court due to the *Lim* principle: see [59]-[62] above. The problems with the second proposition are demonstrated by **AS [37]-[38]** which seek to explain the outcomes of previous *Kable* decisions by reference to the *Lim* framework and, in doing so, demonstrate its limited explanatory power. For example, the suggestion at **AS [37]** that the detention or other restrictions on liberty authorised by the laws in *Fardon*, *Garlett*, *Wainohu* and *Vella* was in each case "reasonably capable of being seen as necessary for a legitimate non-punitive purpose" is pitched at such a high level of generality as to be of no real assistance in understanding those decisions. Similarly, the explanations as to why the laws in *Kable* and *Totani* were held invalid at **AS [38]** are simplistic and omit aspects of the reasoning in those decisions that went beyond the limited question of whether the detention in each case could be justified (see the more complete summary of the reasoning in *Totani* at **RS1 [10]-[14]**).

(iii) Analysis under the Lim framework does not support the validity of the PE Act

65. As against the possibility that the Court considers there to be utility in applying the *Lim* framework to assess the validity of the PE Act, the NSWAG submits that the President has mis-applied that framework at **AS [39]-[50]**. The NSWAG agrees with the President that: (i) the purpose of the detention authorised by a warrant issued under the PE Act is to bring the relevant person before a House of Parliament or parliamentary committee to give evidence (**AS [40]**); (ii) that purpose is "legitimate" and "non-punitive"; (iii) the function in s 8 is conferred on the Supreme Court as an institution (**AS [41]**); and (iv) as noted at [24] above, the warrant-issuing power is administrative rather than judicial in nature (**AS [44]**).

66. It follows from these four points of agreement that, if the *Lim* framework were to be applied, justification is required for the departure from the second and third elements of the constitutional paradigm referred to at [52] above (i.e. the detention at issue results from the exercise of *non-judicial power* and is *not part of the adjudgment and punishment of criminal*

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[75] *Vella* (2019) 269 CLR 219 at [158] (Gageler J), citing *Fardon* (2004) 223 CLR 575 at [85] (Gummow J).

guilt). These departures are not "reasonably capable of being seen to be necessary (in the relevant sense of 'reasonably appropriate and adapted' rather than essential or indispensable)"[76] for the legitimate purpose identified at **AS [40]**.

67. In order to appreciate why that is so, it is important that, under the *Lim* framework, the "inquiry is not simply as to what is authorised to be done but as to by whom and *how it is authorised to be done*".[77] That point takes on special significance if the *Lim* framework is to be used to inform the operation of the *Kable* limit for the reason given at [54] above: namely, in such a case, the Court is not just asking whether *detention* is justified, it is determining whether the detention is effected by a process that, when considered as a whole, trenches on the institutional integrity of the State Court. Here, there are four key points.

68. ***First***, the scheme established by the PE Act authorises the detention of persons pursuant to a warrant issued by a Judge: (i) acting at the direction of the President or Speaker; (ii) without any capacity to assess the underlying facts independently; (iii) without any of the ordinary incidents of the judicial process (e.g. proceedings in open court; the consideration of evidence or statutory criteria; or a requirement to give reasons); and (iv) where features of the warrant seem designed to give the appearance of a more traditional exercise of judicial power: see [20] and [23] above. Having regard to those features of the PE Act, and contrary to the submissions at **AS [46]**, the warrant power under s 8 is far removed from cases like *Emmerson* for the reasons given at **RS1 [27]-[29]**.

69. ***Secondly***, as the President acknowledges at **AS [49]**, the detention authorised by a warrant issued under the PE Act — whatever the precise scope of that authority (see [82]-[83] below) — can properly be described as "indefinite" (in the sense that it has no chronologically fixed end-point when the warrant is issued). The President emphasises that the detention must be for the purpose of producing the person to give evidence from time to time. However, by reason of the principles of exclusive cognisance, it would be very difficult to enforce that purposive limit by way of a *habeas* application. That the President or Speaker may be *politically accountable* to the relevant House of Parliament for any non-compliance with the purposive limit on detention (see **AS [49]**) would provide limited comfort to the Court that is required to lend its authority to that detention for reasons given at **RS1 [24]-[25].**

70. ***Thirdly***, as explained at [43]-[46] above, there are available alternatives for achieving the

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76 *YBFZ* (2024) 99 ALJR 1 at [18] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

77 *EGH19* [2026] HCA 7 at [21] (Gageler CJ and Gleeson J) (emphasis added).

purpose of securing the attendance of persons to give evidence before Parliament, which is a relevant consideration when applying the *Lim* framework.[78] The President suggests that the second of these alternatives — conferring power directly on parliamentary officers to compel attendance — would involve a *greater* departure from the constitutional paradigm because there would be no involvement of a court at all: **AS [43]**. That submission overlooks that, in the absence of a strict separation of powers at the State level, there is no obvious basis on which it could be said that the vesting of the power under s 8 of the PE Act in a non-judicial body would involve a *greater* departure from the applicable constitutional paradigm: see [59] above. It is unclear why it is necessarily preferrable, as a matter of constitutional principle, for a State Court that is neither required nor permitted to bring any "qualities of independence, impartiality and fair-mindedness to bear on a meaningful decision-making process" (J [67] **CAB 34**) to authorise detention rather than the Parliament itself. That is especially so when there is a long history of the Parliament at Westminster having power to order persons to be brought into custody to answer charges of contempt,[79] which power was initially conferred on the Commonwealth Parliament by s 49 of the *Constitution.*

71. ***Fourthly***, as outlined at [47]-[49] above, the Judge's limited function under s 8 of the PE Act is not explicable by reason of exclusive cognisance or Art 9 of the Bill of Rights, but rather serves to undermine those allied principles. Thus, contrary to **AS [50]**, these principles cannot be used to justify the imposition of punishment other than by way of an exercise of judicial power as part of the adjudgment and punishment of criminal guilt.

72. Having regard to these four matters, if consideration of the *Lim* framework is relevant (which the NSWAG denies), that exercise only confirms that the *manner* in which the PE Act effects detention represents an unjustified departure from the constitutional paradigm. It may be observed that each of these matters is also relevant to the *Kable* analysis and is thus referred to in the earlier section above. That highlights that recourse to the *Lim* principle is unnecessary in this case, which should be resolved by the ordinary *Kable* analysis.

E RESPONSE TO THE INTERVENTION APPLICATION OF THE HON DAMIEN TUDEHOPE MLC

73. The NSWAG takes no position on the question of whether Mr Tudehope should be granted leave to intervene in this appeal as a person directly affected by the decision or as *amicus*

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78 *EGH19* [2026] HCA 7 at [56] (Gageler CJ and Gleeson J).

79 *Erskine May: Parliamentary Practice* (25th ed, 2019) at [11.20], [38.57]. See, also, J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) at 501–2; H Evans, "Fitzpatrick and Browne: Imprisonment by a House of Parliament" in HP Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) at 145-147.

curiae. For the reasons that follow, the submissions advanced by Mr Tudehope on exclusive cognisance and s 9 of the PE Act are misconceived and should not be accepted by this Court.

(i) Exclusive cognisance

74. At **TS [11]**, Mr Tudehope correctly identifies that argument in the Court of Appeal proceeded on the basis that the decision-making processes contemplated by the PE Act up to and including the issuance of a certificate under s 7 were "proceedings in Parliament" for the purposes of Art 9 of the Bill of Rights: J [21] (**CAB 18**). Mr Tudehope goes on to challenge that common assumption on the basis that the issuance of a certificate under s 7 of the PE Act is not an act done by a House of Parliament or a committee in a "collective capacity": **TS [25]-[29]**. It is said to follow that the reasonableness of the President's state of satisfaction that a witness has failed to attend "without just cause or reasonable excuse" is justiciable: **TS [30]**. Mr Tudehope's submissions cannot be accepted for five reasons.

75. ***Implausible statutory construction***: Although Mr Tudehope's submissions focus on the meaning of the phrase "proceedings in Parliament" in Article 9 of the Bill of Rights, it bears emphasising that the key questions for the Court are: what is the correct construction of the PE Act and how does that bear on the *Kable* analysis? Mr Tudehope appears to contend either that: (i) a Judge issuing a warrant under s 8 has a discretion to inquire into the underlying facts stated in the certificate issued under s 7; or (ii) the reference to the President's "satisfaction" in s 7 means that the Supreme Court can review those underlying facts albeit only after one of its Judges has been *required* to issue the warrant without being permitted to undertake that exercise: **TS [14]**. The former construction of the impugned provisions is irreconcilable with the textual features of s 8 in particular outlined at [18]-[20] above, which the Court of Appeal relied on and to which Mr Tudehope does not refer.

76. The second construction emerges most clearly at **TS [35], [39]** where Mr Tudehope: (i) accepts that the issuance of the warrant by the Judge is an administrative act; but (ii) then says that the warrant may be challenged "immediately on the basis that the statutory conditions for its issue had not been strictly complied with, or there may be a later application to set … it aside or for *habeas corpus* on the basis that the purpose of the warrant is spent": **TS [35]**. Leaving aside the practical question of whether a person named in a warrant would ever be in a position to bring an immediate application for judicial review, it is implausible that, if the legislature intended the Supreme Court to be able to scrutinise the veracity of the matters certified by the President, it would have enacted such a convoluted process whereby a Judge of that Court is first required to issue a warrant upon presentation of a certificate

(even if the certificate is not in fact "legally effective": see **TS [34]**).

77. ***Failure to cure the vice in the regime***: As Mr Tudehope accepts at **TS [39]**, the primary vice identified by the Court of Appeal was the absence of a meaningful evaluative function for the Judge under s 8 of the PE Act. At least in the case of his second construction (see [76] above), Mr Tudehope's approach does not fix that problem. It merely enables greater superintendence by the Court after the warrant issues. That the Supreme Court might be able to declare, after the fact, that one of its Judges was involved in authorising wrongful detention would not reverse the damage to the Court's institutional integrity arising from that circumstance. Indeed, it may compound it.

10 78. ***Unduly narrow conception of exclusive cognisance***: The major premise of Mr Tudehope's argument is that exclusive cognisance and the principle in *Fitzpatrick and Browne* that in cases of undoubted privileges, "it is for the House to judge of the occasion and of the manner of its exercise"[80] only extend to purely collegiate or collective activities of a House of Parliament or committee. That premise should not be accepted. Actions which "consist[] of collective deliberation and decision making" may constitute the "core or essential business of Parliament"[81] (and thus the primary manifestation of proceedings in Parliament) but, as the authorities relied on by Mr Tudehope at **TS [19]-[20]** acknowledge, collective deliberation and decision-making require individual actions (for example, in the form of voting, speaking, and submitting written questions by members of parliament). It follows
20 that any notion that the limitations on curial review of parliamentary powers and privileges referred to above should be confined narrowly to collective decisions taken by a House or committee relies on an unsustainable distinction between individual and collective actions. Such an approach is particularly unsound in relation to a formal action taken by one of the presiding officers, each of whom is the "representative" of their respective House.[82] In this regard, it is notable that in *Yemini v Elasmar* it was held that the exercise by the presiding officers of the Victorian Parliament of the power to exclude strangers and control access to Parliament was "within the exclusive cognisance or jurisdiction of Parliament".[83]

79. ***Issuance of certificate is not an individual administrative act***: Even if, contrary to [78] above, the determinative question for whether some act amounts to proceedings in

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80 (1955) 92 CLR 157 at 162 (Dixon CJ).

81 *R v Chaytor* [2011] 1 AC 684 at [62] (Lord Phillips of Worth Matravers PSC).

82 *Constitution Act 1902* (NSW), ss 22G(1) and 31(1).

83 [2022] VSC 788 at [82] (Ginnane J). See, also, *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319 at 386 (McLachlin J).

Parliament is whether it is sufficiently connected to a collective deliberation or decision, the President's issuance of a certificate is so connected. A certificate can only issue if the President has been informed of the failure of a person to comply with a summons by a committee or member of the Legislative Council. The provision of that information is likely to be accompanied by a request that a certificate should issue. Notably, in this case correspondence from the Chair of the Privileges Committee to the Acting President of the Legislative Council dated 9 October 2025 left open the possibility that the committee might "request[] the President to take … further action under sections 7-9 of the [PE Act] to secure Mr Cullen's attendance": Agreed Statement of Facts at [62] (**CAB 65**). That evidence only confirms the obvious point that the President is both a representative and member of the Legislative Council and can be expected to decide whether a certificate should issue following consultation with other members of the House. That being so, the notion that the decision to issue a certificate is the administrative act of an individual divorced from the collective decision-making of Parliament (see **TS [28]-[29]**) cannot be accepted.

80. In practice, the issuance of a certificate by the President is a formal action incidental to a collective decision taken by a House or parliamentary committee, not unlike that which led to the issuance of the warrants by the Speaker of the House of Representatives in *Fitzpatrick and Browne* or the ejection of Mr Egan from the parliamentary precinct by the Usher of the Black Rod in *Egan v Willis*. The suggestion at **TS [31]-[32]** that the present case is different because, unlike those cases, the PE Act does not require a resolution of a House elevates substance over form in a manner liable to undermine the efficacy of parliamentary privilege.

81. ***Judicial review would impeach proceedings in Parliament***: Assuming for the sake of argument that the issuance of a certificate by the President is not itself a proceeding in Parliament, applications for judicial review of the kind contemplated at **TS [35]** would nonetheless involve the impeaching or questioning of proceedings in Parliament. Undoubtedly, a core parliamentary function is the "superintendence of the conduct of the executive government".[84] Frequently, that function is exercised by parliamentary committees asking questions of witnesses. Plainly, as Mr Tudehope accepts at **TS [28]**, the deliberations that proceed, and result in, the issuance of a summons under s 4 of the PE Act are proceedings in Parliament (as would be any documents that recorded or informed those

[84] *Egan v Willis* (1998) 195 CLR 424 at [46] (Gaudron, Gummow and Hayne JJ). See, also, *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 665; *Casimaty* [2024] HCA 31; 419; ALR 183; 98 ALJR 1139 at [77].

deliberations). A challenge in respect of the reasonableness of the President's state of satisfaction that a witness's non-attendance "is without just cause or reasonable excuse" would not be limited to the narrow factual questions identified at **TS [37]**; it would require the traversal of the circumstances in which the witness was summoned to appear and refused to do so (including, potentially, the motivations of the various persons involved and documents recording their deliberations). Contrary to **TS [37]**, judicial review proceedings of that nature would involve impeaching or questioning proceedings in Parliament and may draw the Court into political controversies (see the authorities cited at [48] above). That is so regardless of whether Mr Tudehope's "functional"[85] analysis, or a more expansive approach to Art 9, is adopted (which is a large question that ought not be resolved in this case in circumstances where it could not be determinative of the result).

(ii) Proper construction of s 9 of the PE Act

82. At J [27] (**CAB 20-21**), the Court of Appeal construed s 9(1) of the PE Act to mean that the warrant issued by the Judge provides authority not just for actions taken under the warrant but also under any "subsequent orders by the President extending the detention in custody of the person for an unknown period of time". At J [6]-[7] (**CAB 12-13**), some emphasis was placed on this matter in relation to the *Kable* analysis. Mr Tudehope contends that that construction of s 9(1) is wrong: see **TS [50]**. The NSWAG's primary position is that the Court of Appeal arrived at the correct construction for the reasons that their Honours gave.

83. Having said that, the drafting of the PE Act is not pellucid and, to the extent that Mr Tudehope submits that under s 9(1) of the PE Act the Judge's warrant authorises detention of a person for the purpose of securing their attendance to give evidence and only up to the point when the President or Speaker makes a further order for their release or further detention (whereupon the subsequent order provides the authority for the person's detention), the NSWAG acknowledges that that approach finds some support in s 9(2) which, as noted at J [28] (**CAB 21**), provides that a subsequent order by the President or Speaker shall "be a sufficient warrant for all persons acting thereunder". However, even on that narrower construction of s 9:

(a) the issuance of a warrant under s 8 precipitates and authorises the detention of the named person for a duration of time that will not be known when the warrant issues

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85 *Casimaty* [2024] HCA 31; 419 ALR 183; 98 ALJR 1139 at [81] (Edelman J). See, also, *DPP (NSW)* [2026] NSWCA 20 at [78].

(and is indefinite in that sense) and may involve detention pursuant to an order of the President or Speaker (cf J [31] (**CAB 22**));

(b) in practical terms, the period of detention pursuant to the warrant may vary, and could be substantial, depending on when the relevant House[86] or committee[87] is next sitting (in the case of committees, a quorum will be required,[88] which means that whether a committee can sit will depend upon the availability of multiple members of Parliament some of whom may need to travel from regional electorates); and

(c) on any *habeas* application to enforce the purposive limit, the nature of the review undertaken by the Court would be constrained as described at [69] and [81] above and the application could be answered by the production of the warrant and any further order issued by the President or Speaker (see also J [7] (**CAB 13**); cf **TS [46]**).

84. In light of these matters, similar considerations to those that exercised the Court of Appeal at J [7] (**CAB 12-13**) on their broader construction of s 9 arise under a narrower interpretation. Those considerations, when assessed together with the other matters outlined above, necessitate a finding of invalidity even on this narrower approach. As this alternative construction would not save ss 7-9 of the PE Act from invalidity (contrary to **TS [50], [52]**), s 31 of the *Interpretation Act 1987* (NSW) does not require its acceptance.[89] Finally, the proposals for severance at **TS [51]** cannot be accepted for the reasons given at **RS1 [83]-[84]** and, in any event, would produce similar results to the construction outlined at [83] and so likewise fail as a means of preserving the validity of part of the PE Act.

PART VII ESTIMATE

85. The NSWAG estimates that he will require up to 1 hour to present his oral argument or 1 hour and 20 minutes if it is necessary to address Mr Tudehope's submissions.

Dated 26 May 2026

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86 See, eg, Frappell and Blunt, *New South Wales Legislative Council Practice* at 329.

87 See NSW Legislative Assembly, *Consolidated Standing and Sessional Orders* (25 March 2026), SO 287; NSW Legislative Council, *Standing Rules and Orders* (February 2023), SOs 214-215.

88 See NSW Legislative Assembly, *Consolidated Standing and Sessional Orders* (25 March 2026), SO 286; NSW Legislative Council, *Standing Rules and Orders* (February 2023), SOs 221-222.

89 *NAAJA v Northern Territory* (2015) 256 CLR 569 at [76] (Gageler J).

ANNEXURE TO SECOND RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date
1.	*Constitution* (Cth)	Version 6 (29 July 1977 to present)	Sections 49, 73, 77; Chapter III	In force at all relevant times	All relevant times
New South Wales statutes					
2.	*Civil Procedure Act 2005* (NSW)	28 March 2026 to present	Section 97(4)	Comparison	N/A
3.	*Constitution Act 1902* (NSW)	28 March 2026 to present	Sections 22G(1) and 31(1); Part 9	Illustrations	N/A
4.	*Criminal Appeal Act 1912* (NSW)	28 March 2026 to present	All	Illustration	N/A
5.	*Electoral Act 1880* (NSW)	As made	Section 74	Historical comparison	N/A
6.	*Interpretation Act 1987* (NSW)	28 March 2026 to present	Sections 9(2), 31	Inform interpretation of impugned Act	N/A
7.	*Justices Act 1902* (NSW)	As made	Section 25(2)	Historical comparison	N/A
8.	*Parliamentary Evidence Act 1881* (NSW)	As made	All	Predecessor to the PE Act.	N/A
9.	*Parliamentary Evidence Act 1901* (NSW)	17 July 2009 to present	All	Act in force at all relevant times	All relevant times
10.	*Public Works Act 1888* (NSW)	As made	Section 10	Historical comparison	N/A

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date
Statutes from other jurisdictions					
11.	*Bail Act 1982* (NT)	1 April 2026 to present	Section 7A(2AB)	Illustration	N/A
12.	*Bill of Rights 1688*	Current	Article 9	In force	N/A
13.	*Parliamentary Privileges Act 1987* (Cth)	Version 4 (21 October 2016 to present)	Sections 4, 7 and 9	Illustration	N/A
14.	*Parliamentary Privileges Act 1858* (Tas)	As made	All	Historical comparison	N/A
15.	*Parliament of Queensland Act 2001* (Qld)	30 June 2025 to present	Section 25	Illustration	N/A
16.	*Parliamentary Privileges Act 1891* (WA)	12 September 2014 to present	Section 4	Illustration	N/A