HIGH COURT OF AUSTRALIA

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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

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PART I — CERTIFICATION

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

PARTS II & III — INTERVENTION

2. The Attorney-General of the Commonwealth intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) generally in support of the first respondent, Mr Cullen, and the second respondent, the Attorney General for New South Wales.

PART IV — ARGUMENT

A. INTRODUCTION & SUMMARY

3. The ***Parliamentary Evidence Act*** *1901* (NSW), "uniquely in this country",[1] enlists a State Supreme Court in the process of issuing a warrant for the apprehension of a person who does not comply with a summons to attend Parliament. All States in Australia have regimes for the issuance of warrants for the apprehension of persons who fail to comply with a summons to appear before Parliament.[2] However, only in New South Wales is a court interposed in that process.

4. The power purportedly conferred on the Supreme Court by s 8 of the *Parliamentary Evidence Act* is inconsistent with the principle that State legislation cannot validly "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".[3] That principle, which is founded upon the constitutionally mandated position of State Supreme Courts in the integrated federal judicial system, was identified in ***Kable*** *v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and has been affirmed on many occasions.[4]

5. The institutional integrity of the Supreme Court is substantially impaired by the distinctive scheme enacted by the legislature of New South Wales under which:

   (a) the power to issue a summons to attend Parliament is reposed in the Clerk of a House of Parliament (s 4(1)) or, relevantly for present purposes, the Chair of a parliamentary committee (s 4(2));

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1 *Cullen v President of the Legislative Council of New South Wales* [2025] NSWCA 278 at [4] (**CA**).

2 Cf *Parliamentary Privilege Act 1858* (Tas), s 5; *Parliamentary Privileges Act 1891* (WA), s 9; *Constitution Act 1934* (SA), s 38; *Constitution Act 1975* (Vic), s 19(1); *Parliament of Queensland Act 2001* (Qld), ss 39 and 41.

3 *Garlett v Western Australia* (2022) 277 CLR 1 at [7] (Kiefel CJ, Keane and Steward JJ).

4 *Kable* (1996) 189 CLR 51 at 103 (Gaudron J). See also *Kable* at 114-115 (McHugh J); ***Baker*** *v The Queen* (2004) 233 CLR 513 at [51] (McHugh, Gummow, Hayne and Heydon JJ); ***Fardon*** *v Attorney-General (Qld)* (2004) 223 CLR 575 at [15], [23] (Gleeson CJ), [37] (McHugh J), [100]-[103] (Gummow J), [198] (Hayne J) and [219] (Callinan and Heydon JJ); *Assistant Commissioner Condon v* ***Pompano*** *Pty Ltd* (2013) 252 CLR 38 at [123] (Hayne, Crennan, Kiefel and Bell JJ); *Attorney-General (NT) v* ***Emmerson*** (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); ***Kuczborski*** *v Queensland* (2014) 254 CLR 51 at [139] (Crennan, Kiefel, Gageler and Keane JJ); ***Vella*** *v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [55] (Bell, Keane, Nettle and Edelman JJ).

(b) the power to certify that a person has failed to attend Parliament without just cause or reasonable excuse is also reposed in an officer of the Parliament, being the President of the Legislative Council or the Speaker of the Legislative Assembly (s 7);

(c) "[u]pon such certificate" being issued, the Supreme Court is obliged to issue a warrant for the apprehension of the person named in the certificate (s 8). Section 8 leaves no room for the determination or adjudication of any question by the Court, apart from the threshold *de minimus* requirement that there be a certificate in which the relevant person is named. As was common ground below, once a certificate which complies with s 7 has been received, the Court has "no independent discretion to exercise": CAB 11 [5] (see also CAB 19 [23]); and

(d) the warrant, once issued, authorises the detention of the person named so that they may "from time to time be produced for the purpose of giving evidence … pursuant to any order under the hand and seal of the President or Speaker" (s 9(1)). In that way, the warrant authorises detaining officers "to obey *all future written orders* made by the President" or the Speaker: CAB 12 [6] (emphasis in original). The President does not dispute that the warrant has this effect: AS [50].

6. In those particular circumstances, the Court of Appeal was correct to conclude that the legislation infringed the *Kable* limit. The peculiar features of the regime meant that the issue of the warrant: (i) involved no "meaningful evaluative determination" by the Court and (ii) on the Court of Appeal's construction, purported to lend the authority of the Supreme Court to subsequent orders of the President or Speaker which would have the effect of continuing a person's detention into the indefinite future: CAB 13 [8].

B. THE KABLE PRINCIPLE

B1. Repugnancy or incompatibility with institutional integrity

7. The principle in *Kable* was summarised as follows by the plurality in ***Garlett*** *v Western Australia* (2022) 277 CLR 1 at [7] (footnotes omitted):

> The decision in *Kable* established that, 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.

8. As that description reflects, the "essential notion" underlying the *Kable* principle "is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system".[5] State Supreme Courts are integrated into that system as potential repositories of federal jurisdiction (Constitution, ss 71 and 77(iii)) and as courts from which appeals may be available to the High Court (s 73).[6] The principle also applies to other State courts which
10 are invested with federal jurisdiction and therefore form part of the federal judicial hierarchy.[7]

9. In determining whether the institutional integrity of a State court is substantially impaired, regard is had to the "defining characteristics" of such courts, being characteristics that set State courts apart from other decision-making entities.[8] Among those defining characteristics is the requirement that a court be independent and impartial, both in reality and in appearance.[9] That requires "judicial decisional independence": a court cannot simply give effect to a decision of the executive or the legislature "as if it were a judicial decision of the court".[10] It requires a State court to

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5 *Fardon* (2004) 223 CLR 575 at [101] (Gummow J); see also at [36] (McHugh J), [198] (Hayne J), [219] (Callinan and Heydon JJ).

6 *Kable* (1996) 189 CLR 51 at 102-103 (Gaudron J), 113-115 (McHugh J), 137-139 (Gummow J). See also *Baker* (2004) 223 CLR 513 at [51] (McHugh, Gummow, Hayne and Heydon JJ).

7 *South Australia v* ***Totani*** (2010) 242 CLR 1 at [58] (French CJ); ***Forge*** *v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ); ***K-Generation*** *Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [131] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Vella* (2019) 269 CLR 219 at [23] (Bell, Keane, Nettle and Edelman JJ). See also *Kable* (1996) 189 CLR 51 at 139 (Gummow J).

8 *Forge* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ); *K-Generation* (2009) 237 CLR 501 at [89] (French CJ); *Totani* (2010) 242 CLR 1 at [62] (French CJ), [443] (Kiefel J); *Pompano* (2013) 252 CLR 38 at [67] (French CJ), [125] (Hayne, Crennan, Kiefel and Bell JJ); ***Wainohu*** *v New South Wales* (2011) 243 CLR 181 at [44] (French CJ and Kiefel J); *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569 at [39] (French CJ, Kiefel and Bell JJ), [119]-[121] (Gageler J).

9 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Forge* (2006) 228 CLR 45 at [41] (Gleeson CJ), [64], [66] (Gummow, Hayne and Crennan JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [10] (Gummow, Hayne, Heydon and Kiefel JJ); *Totani* (2010) 242 CLR 1 at [72] (French CJ), [427]-[428] (Crennan and Bell JJ), [443] (Kiefel J); *Pompano* (2013) 252 CLR 38 at [125] (Hayne, Crennan, Kiefel and Bell JJ); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

10 *Totani* (2010) 242 CLR 1 at [70] (French CJ).

"be and remain free from external influence" by "the other branches of government", in the sense that it "cannot be required to act at the dictation" of those other branches.[11]

10. The need for the reality and appearance of judicial decisional independence is often expressed by reference to metaphors that convey the obverse, such as "enlistment",[12] "recruitment",[13] or "conscription",[14] or which refer to the court being made an "instrument"[15] or "arm"[16] of the executive or legislature. Those metaphors must be applied with caution, "bearing in mind that all legislation reflects political decisions and government policy as a source of laws … and that it is the essential role of the judiciary to enforce those laws".[17] Only "extreme legislation" will be incompatible with or repugnant to the institutional integrity of a State Supreme Court.[18] The *Kable* principle is concerned to avoid a *substantial* impairment of the institutional integrity of State courts. It is infringed by the "substantial recruitment of the judicial function … to an essentially executive process",[19] or by a State court being required to act at the behest of the executive (or the legislature) "to an impermissible degree".[20]

11. By contrast, laws which confer a "substantial judicial discretion" will not infringe the *Kable* principle on this basis.[21] A law that "confers upon a court a power with a duty to exercise it if the court decides that the conditions attached to the power are met, on that ground alone is not to be classified as a legislative attempt to direct the outcome of the exercise of jurisdiction".[22] That is so even where "the determination of whether the statutory criteria are satisfied may readily be performed" because the criteria are easily

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11 *Pompano* (2013) 252 CLR 38 at [125] (Hayne, Crennan, Kiefel and Bell JJ).

12 *Totani* (2010) 242 CLR 1 at [149] (Gummow J), [226], [236] (Hayne J), [481] (Kiefel J); *Wainohu* (2011) 243 CLR 181 at [6], [46] (French CJ and Kiefel J); *Kuczborksi* (2014) 254 CLR 51 at [224] (Crennan, Kiefel, Gageler and Keane JJ); *Garlett* (2022) 277 CLR 1 at [60] (Kiefel CJ, Keane and Steward JJ).

13 *Totani* (2010) 242 CLR 1 at [82] (French CJ), [342] (Heydon J).

14 ***International Finance*** *Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [97] (Gummow and Bell JJ); *Totani* (2010) 242 CLR 1 at [342] (Heydon J); *Emmerson* (2014) 253 CLR 393 at [45] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

15 *Kable* (1996) 189 CLR 51 at 122, 124 (McHugh J); *Totani* (2010) 242 CLR 1 at [436] (Crennan and Bell JJ).

16 *Kable* (1996) 189 CLR 51 at 134 (Gummow J).

17 *Garlett* (2022) 277 CLR 1 at [60] (Kiefel CJ, Keane and Steward JJ).

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

19 *Totani* (2010) 242 CLR 1 at [82] (French CJ).

20 *Totani* (2010) 242 CLR 1 at [149] (Gummow J).

21 As in *Vella* (2019) 269 CLR 219 at [79] (Bell, Keane, Nettle and Edelman JJ).

22 *Totani* (2010) 242 CLR 1 at [133] (Gummow J).

proved.[23] Nor is a court's institutional integrity undermined merely because an anterior step in the judicial determination involves the exercise of a discretion by the executive,[24] or because the executive exercises control over the information that is made available to the court.[25]

B2. Application to s 8 of the *Parliamentary Evidence Act*

12. The peculiar features of ss 7 to 9 of the *Parliamentary Evidence Act* mean that the Court of Appeal was correct to conclude that the function reposed in the Supreme Court by s 8 was incompatible with, or repugnant to, its institutional integrity. The scheme is analogous to that which was held by this Court to be invalid in *South Australia v* ***Totani*** (2010) 242 CLR 1. There, the impugned law sought to give the "neutral colour of a judicial decision"[26] to, and the "appearance of [judicial] participation"[27] in, findings of the executive about factual matters which were not disclosed to, and could not be tested by, the Magistrates Court. The vice of the law was that it required the Magistrates Court to "create new norms of conduct the content of which was determined by the executive and legislature", over and above the norms binding at general law, "without any inquiry by the Court into past or threatened contraventions by the individual of any existing legal norm".[28] The "vital circumstance and essential foundation" for the control order made by the Court was a declaration by the executive,[29] unaccompanied by any judicial determination that the defendant "has engaged, or will or may engage, in criminal conduct".[30]

13. The function assigned to the Supreme Court by s 8 is even more constrained than the power conferred on the Magistrates Court in *Totani*. The duty to issue a warrant is enlivened "[u]pon" the Court being presented with a certificate issued by the President or the Speaker under s 7. It is accepted by all parties that:

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[23] *Emmerson* (2014) 253 CLR 393 at [65] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[24] *Emmerson* (2014) 253 CLR 393 at [61], [64] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[25] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[26] *Totani* (2010) 242 CLR 1 at [82] (French CJ).

[27] *Totani* (2010) 242 CLR 1 at [480] (Kiefel J). See also at [149] (Gummow J) and [236] (Hayne J).

[28] *Kuczborski* (2014) 254 CLR 51 at [224] (Crennan, Kiefel, Gageler and Keane JJ).

[29] *Totani* (2010) 242 CLR 1 at [142] (Gummow J).

[30] *Totani* (2010) 242 CLR 1 at [225] (Hayne J).

(a) the Supreme Court has no discretion to decline to issue a warrant: AS [16.2] (see also CAB 11 [5], 28 [47]); 1RS [21(b)]; 2RS [18];

(b) on any application for judicial review of the decision to issue the warrant, a Court could not examine the basis for the certification: AS [16.2], [17.2]; 1RS [69]; 2RS [76], [81]; and

(c) a warrant would authorise the detention of a person for the purpose of their being produced to give evidence not only pursuant to the existing summons, but also pursuant to any further order of the President or Speaker: AS [50]; 1RS [6], [21(e)]; 2RS [22].

10 14. The Court of Appeal correctly apprehended that these features of the legislative scheme impermissibly impair the institutional integrity of the Supreme Court. The impugned legislation requires the Supreme Court to issue a warrant "without undertaking any independent curial determination, or adjudication" of the premise on which the warrant is sought.[31] The role assigned to the Court is, in substance, to implement a parliamentary judgment under the "guise of judicial determination".[32] Further, the Court is called upon to authorise a warrant of uncertain ambit and duration. The Court would be, and be seen to be, endorsing future decisions of the Speaker or the President, "whatever they be", which would inform the operative scope of the warrant: CAB 21 [27]. The substantial impairment of the Court's institutional integrity arises irrespective of whether the
20 function is conferred upon the Supreme Court, or on a judge *persona designata*: in either case, the function purportedly conferred is inconsistent with the requisite independence and impartiality.[33]

15. None of these difficulties would be capable of being cured by a judicial review of the decision to issue the warrant, because any interrogation of those matters on a judicial review application would involve the impeachment or questioning of proceedings in Parliament: see 1RS [74]-[76]; 2RS [81]. That being so, the powers of the court on review would remain impermissibly constrained by an anterior decision of the

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31 *Totani* (2010) 242 CLR 1 at [436] (Crennan and Bell JJ).

32 *Kuczborski* (2014) 254 CLR 51 at [224] (Crennan, Kiefel, Gageler and Keane JJ).

33 The concept of *persona designata* is not determinative of the *Kable* analysis, since Chapter III does not prevent State Parliaments from conferring non-judicial functions on State courts: *Wainohu* (2011) 243 CLR 181 at [49]-[50] (French CJ and Kiefel J), citing *Love v Attorney-General (NSW)* (1990) 169 CLR 307. See also CAB 31-32 [57]-[61].

legislature.[34] As to the ability to review whether the purpose of the detention had been exhausted or was otherwise not complied with, that is a question of some complexity which is not raised by the parties and has not been ventilated in the proceedings to date: see 1RS [75]-[76]. It is not difficult to conceive of cases where consideration of whether a person was being detained "for the purpose of giving evidence" would call for an impermissible inquiry into the conduct of parliamentary proceedings, for example, whether committee inquiries were being conducted with the necessary expedition.[35] Accordingly, this Court could not safely proceed on the basis that s 9 would permit a Court to review, on any application for habeas corpus, whether detention was for a purpose authorised by the warrant.

16. The scheme established by ss 7 to 9 of the *Parliamentary Evidence Act* stands in contrast to the position in all other jurisdictions in Australia. While the availability of these alternative legislative models does not of itself demonstrate invalidity, their existence serves to underscore the correctness of the Court of Appeal's description of the New South Wales model as an "outlier": CAB 27 [44]. In all other States, the power to issue a warrant is reposed in Parliament itself.[36] The New South Wales model also stands in contrast to the *Parliamentary Privileges Act 1987* (Cth), which likewise confers on a House of Parliament a power to impose penalties of imprisonment for offences against that House: s 7(1).[37] As to the internal Territories: the Legislative Assembly of the Australian Capital Territory does not have a power to imprison or fine a person.[38] The position in the Northern Territory is different, but again not analogous to that in New South Wales. The Legislative Assembly may impose a penalty of imprisonment

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[34] See, albeit in the context of an anterior executive decision, *International Finance* (2009) 240 CLR 319 at [56]-[58] (French CJ), [93]-[97] (Gummow and Bell JJ) and [161] (Heydon J).

[35] In such a case, "functional analysis" of the kind referred to at 2RS [81] (by reference to TS [37]) would not readily shed light on the question. The limits to judicial review would be founded upon the principle of non-intervention generally, rather than by reference to any "chilling effect" upon the functioning of Parliament and its members: cf *Attorney-General (Tas) v* ***Casimaty*** (2024) 98 ALJR 1139 at [81]. Edelman J's reasons in *Casimaty* at [81] should not be read as endorsing, for all purposes, a case-by-case assessment of the effect of a proposed use of materials on parliamentary proceedings: 1RS [75].

[36] See fn 2 above. The Victorian and South Australian legislation declares the privileges of the Houses of Parliament to be the same as those of the House of Commons in the United Kingdom. Those relevantly included powers to determine whether a person was in contempt of Parliament and, if so, to commit them for contempt by issuing a warrant: *Speaker of the Legislative Assembly of Victoria v Glass* (1871) LR 3 PC 560 at 572.

[37] The power to discharge such an order may, by a resolution of a House, be reposed in the President or Speaker: s 7(4).

[38] *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 24(4).

equivalent to that which may be imposed under s 7(1) of the *Parliamentary Privileges Act 1987* (Cth).[39] The resolution imposing such a penalty and the warrant committing a person to custody is to set out particulars of the offence, and a person so convicted may apply to the Full Court of the Supreme Court for a declaration that the matters stated in the resolution and warrant are not capable of constituting a breach of privilege or a contempt.[40] That task, on review, is a counterpoint to the much more limited role assigned to the Supreme Court under the *Parliamentary Evidence Act*.

17. The principle of exclusive cognisance neither justifies nor requires the legislative design reflected in s 8 of the *Parliamentary Evidence Act*: cf AS [47]. It is axiomatic that each House of Parliament has "the exclusive right … to manage its own affairs without interference from the other or from outside Parliament".[41] A corollary of that principle is that the courts will not determine matters which are exclusively in Parliament's domain. In *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, this Court refused applications for writs of habeas corpus on the basis that warrants issued by the Speaker of the House of Representatives pursuant to resolutions of that House were conclusive evidence of a breach of privilege. In reasoning to that conclusion, the Court explained: "it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise" (at 162).[42] The seminal importance of that principle is reflected in s 49 of the Constitution, which confers a legislative power to declare the powers, privileges and immunities of the Houses of Parliament and of the members and committees of each House.[43] However, the undoubted importance of exclusive cognisance is not a reason to involve the Supreme Court in the process of issuing a

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[39] *Legislative Assembly (Powers and Privileges) Act 1992* (NT), s 25(1).

[40] *Legislative Assembly (Powers and Privileges) Act 1992* (NT), s 26.

[41] *Alley v Gillespie* (2018) 264 CLR 328 at [108] (Nettle and Gordon JJ), quoting *R v Chaytor* [2011] 1 AC 684 at [63].

[42] See, to similar effect, *Egan v Willis* (1998) 195 CLR 424 at [27] (Gaudron, Gummow and Hayne JJ), [66], [78]-[79] (McHugh J), [133(3)] (Kirby J) and [179] (Callinan J).

[43] At the Commonwealth level, s 49 of the Constitution gives Art 9 of the Bill of Rights a constitutional character in that it provides that, until declared by Parliament, the powers, privileges and immunities of the Houses of Parliament (and their members and committees) shall be those of the House of Commons in the United Kingdom: see *Sankey v Whitlam* (1978) 142 CLR 1 at 35 (Gibbs ACJ); *Rann v Olsen* (2000) 76 SASR 450 at [134] (Doyle CJ). Section 5 of the *Parliamentary Privileges Act 1987* (Cth) provides that except to the extent the *Parliamentary Privileges Act* expressly provides otherwise, the powers, privileges and immunities of the Houses of Parliament (and their members and committees) are as in force under s 49 immediately before the commencement of that Act.

warrant for the apprehension of a person who has failed to comply with a summons issued at Parliament. To the contrary, it is a reason *not* to interpose the Court in a process in which its decisional capabilities will necessarily be limited.

B3. Relevance of historical antecedents

18. It may be accepted that the references to "courts" in ss 71 and 77(iii) import certain pre-federation assumptions about the defining characteristics of courts. In *Totani*, French CJ identified three "overlapping assumptions" which arise from matters of history as well as the text and structure of Chapter III: (i) that the rule of law shall apply throughout the Commonwealth; (ii) that State courts are competent to be entrusted with the exercise of federal jurisdiction; and (iii) that the courts of the States had, and continued to have, the characteristics of independence, impartiality, fairness and adherence to the principle of open justice.[44] When the assumptions are identified at this level of generality, the President's proposition that the *Kable* analysis is informed by "considerations of history" is uncontroversial.[45]

19. Certainly, a widespread historical practice may point against a conclusion that a function is incompatible with the institutional integrity of a Supreme Court. That mode of reasoning was applied in *Forge* (2006) 228 CLR 45. There, it was held that the practice of appointing acting judges was not contrary to the *Kable* principle, having regard to the practice in six of the colonies of appointing to courts of summary jurisdiction Justices of the Peace or stipendiary magistrates who did not have tenure.[46] Similarly, in identifying the minimum supervisory jurisdiction secured in State Supreme Courts by Chapter III, the plurality in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 had regard to the supervisory jurisdiction of each of the Supreme Courts at federation.[47]

20. However, that does not mean that *every* function that was conferred on a State Supreme Court at federation, in *any* jurisdiction, was incapable of impairing the institutional integrity of a Supreme Court. The President's position is overbroad: cf AS [22]. It is one thing to treat as relevant to the constitutional conception of a State Supreme Court

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[44] (2010) 242 CLR 1 at [61]-[62] (French CJ).

[45] AS [20], quoting *Forge* (2006) 228 CLR 45 at [42] (Gleeson CJ).

[46] *Forge* (2006) 228 CLR 45 at [82] (Gummow, Hayne and Crennan JJ) and [256] (Heydon J).

[47] *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [97]-[98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

the fact that a power was widely exercised by Supreme Courts in the colonies at the time of federation. It is another, however, to set a constitutional boundary only by reference to one entry in the statute books, absent any explication of whether and how frequently the power was exercised and how widely its existence was known.[48] That the antecedent to the *Parliamentary Evidence Act* was in force in New South Wales since 1881 does not, of itself, mean that every element of that legislative design was compatible with the *Kable* requirements. To limit the meaning of "Supreme Court" in s 73 in this way would be to deny the constitutional nature of the expression.[49]

21. None of the powers conferred on the Supreme Court by the legislation cited at AS fn 44 is comparable to s 8 of the *Parliamentary Evidence Act*. To the contrary, each of the provisions cited serves as a counterpoint. The provisions cited from the *Crimes Act 1900* (NSW), *Vagrancy Act 1902* (NSW) and *Influx of Criminals Prevention Act 1903* (NSW), and s 23 of the *Justices Act 1902* (NSW), did not oblige the Court or a Justice to issue a warrant; rather, they conferred a discretion.[50] As for s 25(2) of the *Justices Act 1902* (NSW), the power conferred by that provision was a conventional incident of criminal procedure. Section 25(2) empowered a Justice, upon the filing of an indictment by or on behalf of the Attorney-General, to authorise: (a) the continuing detention of a person already in custody for another offence, until trial or removal or discharge from custody "by due course of law"; or (b) the apprehension of a person for the purpose of committing the person to trial or admitting them to bail. That in no way resembles a provision that requires a court to give effect to Parliament's determination that a person should be apprehended, without any capacity to consider or review the appropriateness or length of that detention or to supervise the ongoing operation of the custodial order.[51]

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[48] It may be noted, in this context, that the power in s 8 of the *Parliamentary Evidence Act* has never in fact been exercised: CAB 18 [19].

[49] *Kable* (1996) 189 CLR 51 at 141 (Gummow J).

[50] *Justices Act 1902* (NSW), s 23; *Crimes Act 1900* (NSW), ss 354-355, 357; *Vagrancy Act 1902* (NSW), s 10; and *Influx of Criminals Prevention Act 1903* (NSW), s 9.

[51] Cf *Chu Kheng **Lim** v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28 (Brennan, Deane and Dawson JJ).

B4. *Lim* does not constrain the validity of a State law

22. The foregoing submissions are a complete answer to the questions raised by the appeal. The unique scheme effected by ss 7 to 9 of the *Parliamentary Evidence Act* contravenes the limitation on State legislative power identified in *Kable*.

23. The second s 78B notice issued by the President poses a question as to the applicability of the constitutional limit identified in *Chu Kheng* ***Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.[52] However, the question does not arise. No party contends that any provisions of the *Parliamentary Evidence Act* are invalid by reason of *Lim*. Consistently with established prudential principles, the Court should go no further than is necessary to resolve a constitutional question.[53]

24. However, if against that submission the Court were minded to consider the issue raised by the notice, the Court should conclude that the principles in *Lim* do not inform the analysis of whether a law is invalid by reason of the *Kable* principle.

25. It is well established that the principle identified in *Lim* is a limit on Commonwealth power, and does not condition the validity of State laws. The principle articulated in the joint reasons in *Lim* is that, "exceptional cases" aside, "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".[54] The principle is grounded firmly in the separation of powers. It limits Commonwealth legislative and executive power by "exclusively entrusting" to courts the function of "the adjudgment and punishment of criminal guilt under a law of the Commonwealth".[55]

26. In contrast, *Kable* is not directed to ensuring that the power to detain is exercised only by courts. Rather, its purpose is to ensure that such courts are appropriate repositories for federal jurisdiction. *Kable* did not disturb the well-established proposition that the doctrine of the separation of powers, reflected in the structural separation of Chapters I,

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[52] Notice issued pursuant to s 78B of the *Judiciary Act 1903* (Cth) on 6 May 2026, [4].

[53] *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

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

[55] *Lim* (1992) 176 CLR 1 at 26-27 (Brennan, Deane and Dawson JJ). See also *EGH19 v Commonwealth* [2026] HCA 7 at [75] (Gordon J), [160], [189] (Edelman J) and [285] (Jagot J).

II and III of the Constitution, does not apply to the States.[56] It is "fundamental for an understanding of *Kable*" to appreciate that the "repugnancy doctrine … does not imply into the Constitutions of the States the separation of judicial power mandated for the Commonwealth".[57] In *Kable*, Gaudron J observed that the limit on State legislative power which derives from Chapter III is "not at all comparable" with the separation of powers embodied in the *Boilermakers'* principle.[58]

27. To apply *Lim* as a test of State legislative power would erode the carefully worked through distinction between the *Kable* principle and the limits on Commonwealth legislative power that are derived from the separation of powers. Where a Commonwealth law confers power on a court, the test for its validity is whether that power is judicial power (or incidental to the exercise of judicial power) and, if so, whether the law requires the court to exercise the power in a manner that is inconsistent with the essential character of a court or with the nature of judicial power.[59] The focus of the *Kable* principle is more confined. The question is whether a State Parliament has purported to confer on a court a function or power which is repugnant to or incompatible with its institutional integrity. Consistently with that distinction, a State law may be valid even though, if it were a law of the Commonwealth, it would infringe Chapter III.[60]

28. That the principle in *Lim* does not limit the legislative power of a State is confirmed by the reasoning of the majority in *Garlett*. In *Garlett*, the appellant argued that the conferral of particular powers on the Supreme Court of Western Australia under the *High Risk Serious Offenders Act 2020* (WA) was inconsistent with that Court's role as a repository of federal jurisdiction, because the powers conferred were non-judicial.[61] That argument

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[56] *Fardon* (2004) 223 CLR 575 at [36]-[37] (McHugh J), [86] (Gummow J), [198] (Hayne J), [219] (Callinan and Heydon JJ); *K-Generation* (2009) 237 CLR 501 at [84] (French CJ); *Totani* (2010) 242 CLR 1 at [201] (Hayne J); *Wainohu* (2011) 243 CLR 181 at [45] (French CJ and Kiefel J); *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).

[57] *Fardon* (2004) 223 CLR 575 at [86] (Gummow J), cited in *Garlett* (2022) 277 CLR 1 at [247] (Edelman J).

[58] *Kable* (1996) 189 CLR 51 at 103 (Gaudron J), referring to *R v Kirby; Ex parte* ***Boilermakers'*** *Society of Australia* (1956) 94 CLR 254. See at 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

[59] *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152 (the Court); *Boilermakers'* (1956) 94 CLR 254 at 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 607 (Deane J), 689 (Toohey J), 703-704 (Gaudron J); *Lim* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

[60] *Fardon* (2004) 223 CLR 575 at [219] (Callinan and Heydon JJ); *Pompano* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ).

[61] *Garlett* (2022) 277 CLR 1 at [40] (Kiefel CJ, Keane and Steward JJ).

was rejected. The plurality considered that the appellant's challenge based on *Lim* "conflated the *Kable* issue" with a contention that the power exercisable under the impugned legislation "was not judicial power such as might be conferred upon a court exercising federal jurisdiction consistently with Ch III".[62] The plurality rejected the challenge as inconsistent with ***Fardon*** *v Attorney-General (Qld)* (2004) 223 CLR 575 and because, in any event, the law would have been valid even if it had been a Commonwealth law.[63] Similarly, Gleeson J observed that "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".[64]

29. The importance of that distinction is not diminished by the fact that this Court has, on occasion, reasoned that a State law will not infringe the *Kable* principle if an equivalent Commonwealth law would not be prohibited by Chapter III.[65] The logic of that methodology is that Chapter III cannot be more demanding of State courts than it is of federal courts. To that limited extent, *Lim* may in appropriate cases be "capable of informing" the application of *Kable*: cf AS [35].

30. However, to suggest that there should be incorporated into the *Kable* analysis some freestanding inquiry into whether detention under a State law effects an "*unjustified* departure from the constitutional paradigm" (AS [35]) is to distract from the well-established inquiry into whether a function is incompatible with or repugnant to a court's institutional integrity. It also risks confusing the *Lim* analysis, which is relevantly focused on ensuring that the power to detain is not inappropriately reposed in the executive or the legislature, rather than on whether detention by a *court* will substantially undermine its institutional integrity. That difference informed the reasoning of a number of Justices in *Fardon*, who expressly did not test the State law by reference to whether an equivalent Commonwealth law would have survived the *Lim* analysis.[66] As Gleeson CJ observed at [18], the challenge to the State law was "based upon the

62 *Garlett* (2022) 277 CLR 1 at [39] (Kiefel CJ, Keane and Steward JJ).

63 *Garlett* (2022) 277 CLR 1 at [40] (Kiefel CJ, Keane and Steward JJ).

64 *Garlett* (2022) 277 CLR 1 at [294] (footnote omitted).

65 See, for e.g., *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at [14] (the Court); *Baker* (2004) 223 CLR 513 at [22]-[24] (McHugh, Gummow, Hayne and Heydon JJ); *Pompano* (2013) 252 CLR 38 at [126] (Hayne, Crennan, Kiefel and Bell JJ).

66 *Fardon* (2004) 223 CLR 575 at [18] (Gleeson CJ), [85]-[86] (Gummow J) and [219] (Callinan and Heydon JJ).

involvement of the Supreme Court in the decision-making process as to detention", which would fall away if the function were reposed in some other entity (e.g. a board of psychiatrists or a retired judge). Similarly, in *Pollentine v Bleijie* (2014) 253 CLR 629 the plurality described as "wholly inapplicable" the metaphor of "cloaking" derived from *Mistretta v United States*,[67] because the relevant decision was made by the executive and was "not, in any way, made to appear as if it were made by a court".[68] That approach is consistent with *Kable*'s focus on the "defining characteristics" of a Supreme Court, being a focus on characteristics that "mark a court apart from other decision-making bodies".[69]

31. The President implicitly accepts this foundational difference between the *Kable* and *Lim* principles, acknowledging that the application of *Lim* in the State context "must account for the different constitutional limits that apply", most notably, that there is no separation of powers at the State level: AS [36]. Once that basal distinction is accepted, however, the aptness of the *Lim* analysis falls away, for the separation of powers is the very justification for *Lim*. The inaptness of *Lim* as a measure of the validity of a State law that confers power on a State court is exemplified by the present case, in which it is not contended by any party that it would be impermissible to repose the power to issue a warrant in the legislature.

PART V — ESTIMATE OF TIME

32. It is estimated that up to 30 minutes will be required to present the oral argument of the Attorney-General of the Commonwealth.

Dated 2 June 2026

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[67] (1989) 488 US 361 at 407.

[68] *Pollentine* (2014) 253 CLR 629 at [47], [49] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[69] *Forge* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ).

ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

No.	Description	Version	Provision(s)	Reasons for providing this version	Applicable date(s)
Commonwealth					
1.	*Commonwealth Constitution*	Compilation No 6 (29 July 1997 to present)	ss 49, 71, 73, 77	In force at all relevant times	N/A
2.	*Australian Capital Territory (Self-Government) Act 1988* (Cth)	Compilation No 26 (11 December 2024 to present)	s 24	Comparison	N/A
3.	*Parliamentary Privileges Act 1987* (Cth)	Compilation No 4 (21 October 2016 to present)	ss 5, 7	Comparison	N/A
States and Territories					
4.	*Constitution Act 1934* (SA)	Current (18 April 2024 to present)	s 38	Comparison	N/A
5.	*Constitution Act 1975* (Vic)	Current (20 August 2025 to present)	s 19	Comparison	N/A
6.	*Crimes Act 1900* (NSW)	As made (31 October 1900)	ss 354-355, 357	Historical comparison	N/A
7.	*High Risk Serious Offenders Act 2020* (WA)	Current (26 August 2020 to 23 April 2023)	All	Version in force on date of decision in *Garlett* (2022) 277 CLR 1	7 September 2022
8.	*Influx of Criminals Prevention Act 1903* (NSW)	As made (3 October 1903)	s 9	Historical comparison	N/A
9.	*Justices Act 1902* (NSW)	As made (14 August 1902)	ss 23, 25	Historical comparison	N/A
10.	*Legislative Assembly (Powers and Privileges) Act 1992* (NT)	Current (31 July 2024 to present)	ss 25, 26	Comparison	N/A
11.	*Parliamentary Evidence Act 1901* (NSW)	Current (17 July 2009 to present)	ss 4, 7-9	Act in force at all relevant times	All relevant times

No.	Description	Version	Provision(s)	Reasons for providing this version	Applicable date(s)
12.	*Parliament of Queensland Act 2001* (Qld)	Current (30 June 2025 to present)	ss 39, 41	Comparison	N/A
13.	*Parliamentary Privilege Act 1858* (Tas)	Current (15 December 2005 to present)	s 5	Comparison	N/A
14.	*Parliamentary Privileges Act 1891* (WA)	Current (12 September 2014 to present)	s 9	Comparison	N/A
15.	*Vagrancy Act 1902* (NSW)	As made (11 September 2002)	s 10	Historical comparison	N/A
Other jurisdictions					
16.	*Bill of Rights 1688* (1 W & M Sess 2 c 2)	Current	Art 9	Act in force at all relevant times	All relevant times