HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

and

ATTORNEY GENERAL FOR NEW SOUTH WALES
Second Respondent

and

SPEAKER OF THE LEGISLATIVE ASSEMBLY OF NEW SOUTH WALES
Third Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY (INTERVENING)

PART I: CERTIFICATION

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

PART II: BASIS FOR INTERVENTION

2. The Attorney-General for the Northern **Territory** intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth). The Territory intervenes to respond to the submissions of the Appellant (**AS**) concerning the relationship between the principles associated with *Chu Kheng* ***Lim*** *v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 and ***Kable*** *v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51: AS [32]-[38].

PART III: ARGUMENT

A. Summary of submissions

3. The Appellant says that, in assessing the validity of a State law under *Kable*, the Court may compare it to a "constitutional paradigm", derived from *Lim*, that detention is ordinarily authorised (1) by a court; (2) in the exercise of judicial power; and (3) after the adjudgment of criminal guilt: AS [32]. While accepting that the *Lim* principle exists at the Commonwealth level, and that it does not directly restrict the legislative power of the States, the Appellant nevertheless says that non-conformity with that paradigm "will strongly support, *if not require*" the conclusion that the law is invalid by reason of the *Kable* principle: AS [35]. The Territory submits that the question whether *Lim* and *Kable* should be aligned in this manner need not be decided in this case (see **Part B**) but, if it is decided, the Court should conclude they are not so aligned: see **Part C**.

B. The alignment of *Lim* and *Kable* need not be considered

4. The alignment of the *Kable* principle with the *Lim* principle would, for the reasons in Part C below, be a "significant step"[1] and should await a case where it is truly necessary to decide.

5. The Court of Appeal's reasoning does not make that question necessary to decide. That reasoning turned on what Edelman J has described as a "formal"[2] dimension

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1 ***Garlett*** *v Western Australia* (2022) 277 CLR 1, [293] (Gleeson J).
2 Ibid, [246] (Edelman J), and compare the distinct inquiries at [310]-[315] (Gleeson J).

of *Kable* analysis: whether the Supreme Court's institutional integrity would be impaired by it being required to act on the application of a member of the legislature without any decisional role. The Court described the constitutional "vice" (J [67] **CAB 34**) of the impugned law as a lack of judicial independence, and expressly not as the effect of the law on a person's liberty (J [8] **CAB 13**) (emphasis added):

> What matters is not the fact that a warrant is to be issued which will have a serious effect on a person's liberty; judges and courts have long been involved in issuing warrants, including for the arrest of a person. What matters is that 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…. [That is] antithetical to the Court's essential attributes of impartiality and independence which the *Kable* doctrine is directed to securing.

6. Consistent with that, when identifying the relevant principles, the Court said it was sufficient for "present purposes… to refer to what is regularly described as [Ch III] courts satisfying 'minimum requirements of independence and impartiality'": J [34], [37] **CAB 23-24**. After noting a submission that vesting such powers in Judges was a "good thing" because of this institutional independence, the Court said that the Act was invalid because it "neither requires nor permits the relevant judge to bring any such qualities of independence, impartiality and fair-mindedness to bear… [but instead] 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": J [67] **CAB 34**.

7. The relationship between *Lim* and *Kable* was thus not essential to (or even a part of) the Court's reasoning. It is also not essential to the principal arguments advanced by the parties on appeal. The Appellant challenges the Court's conclusion primarily on the basis that it did not take into account the historic roots of the impugned law coupled with the operation of the Constitution upon the status of the State Supreme Courts in the transition to federation: AS [12], [20]-[30]. The Court of Appeal did not accept the Appellant's submissions that the matters of history determined the outcome of the case. The Appellant's primary case provides a narrower path to the resolution of this case: 2R [54]. It is only in the alternative

that the Appellant seeks to invoke the *Lim* principle: AS [31]. Even then, the proposition that a conclusion that a State law which departs from the *Lim* principle "require[s]" a further conclusion that it offends *Kable* is not essential to the Appellant's case: AS [35]. He contends for the opposite result. The Respondents (correctly) say that this issue is a distraction and disavow that mode of analysis: 1R [49]-[50]; 2R [51]-[55].

8. Further, this Court in *Garlett* (2022) 277 CLR 1 considered whether *Lim* and *Kable* should be aligned in a manner similar to that suggested by the Appellant. The Appellant's submissions do not meaningfully engage with the correctness or otherwise of the majority reasons in that case (see [13] below). The Appellant relies heavily on the approach of Gageler J (as his Honour then was) in *Garlett* without explaining why this dissenting approach should be preferred.

9. In those circumstances, the Court's usual "prudential"[3] approach should be applied. The Court does not investigate and decide constitutional questions where that is not necessary to resolve the dispute before it.[4] In particular, it will ordinarily not answer a question where the controversy can be determined on a narrower basis[5] and it avoids the formulation of rules of constitutional law broader than required to determine the controversy before it.[6] There is a hesitance against resolving "non-determinative issues"[7] because "curial exposition of legal principle proceeds best when it proceeds if, and no further than is, warranted to determine" a controversy.[8]

10. In this case, the reasons of the Court of Appeal, and the basis upon which it found invalidity, do not make it necessary to re-consider the relationship between *Lim*

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3 ***Deripaska*** *v Minister for Foreign Affairs* [2026] HCA 14, [39]-[40] (Gageler CJ, Gleeson and Jagot JJ), [94]-[97] (Gordon and Steward JJ) and [195] (Beech-Jones J); ***Mineralogy*** *Pty Ltd v Western Australia* (2021) 274 CLR 219, [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

4 *Farshchi v The King* (2025) 100 ALJR 6, [18] (Gageler CJ, Gordon, Gleeson and Beech-Jones JJ).

5 *Mineralogy* (2021) 274 CLR 219, [60] (Kiefel CJ, Gageler, Keane, Gordon, Steward, Gleeson JJ).

6 Ibid, [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ);

7 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, [47] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

8 *Clubb v Edwards* (2019) 267 CLR 171, [137] (Gageler J), quoted in *Mineralogy* (2021) 274 CLR 219, [58] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Deripaska* [2026] HCA 14, [96] (Gordon and Steward JJ). *Vunilagi v The Queen* (2023) 279 CLR 259, [55] (Kiefel CJ, Gleeson and Jagot JJ), [62] (Gageler J), [98] (Gordon and Steward JJ) and *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1, [7]-[8] (Kiefel CJ, Gageler and Gleeson JJ) are recent examples of this approach.

and *Kable*, which would be complex, subject to potentially differing views[9], and constitutionally significant. That should await a matter where that re-consideration is necessary and where the Court is assisted by argument being joined and fully developed.[10]

C. The *Lim* principle and the *Kable* principle should not be conflated

11. If, contrary to the above, the Court decides to consider the issue, the *Lim* and *Kable* principles should not be conflated in the manner suggested in AS [35].

Preliminary points

12. It is useful to make four preliminary observations concerning the Appellant's proposed method for testing validity against the *Kable* principle.

13. First, the Appellant plainly seeks to advance the mode of analysis proposed by Gageler J in *Garlett*.[11] That was a dissenting view and the majority rejected an invitation similar to that made by the Appellant here. Kiefel CJ, Keane and Steward JJ said that "the *Lim* principle has no application" to establish the invalidity of State laws.[12] Gleeson J (who generally agreed with the plurality) gave additional reasons explaining that there was a "well-established separation between the *Kable* principle… and the doctrine of the separation of Commonwealth judicial power" on which *Lim* depends.[13] Gordon J said no more than that the *Lim* principle "is not irrelevant" to the assessment of whether State legislation is compatible with Ch III of the Constitution.[14] Edelman J held that it was "fundamental for an understanding of *Kable*" to appreciate that it is distinct from the principles in *Lim*.[15]

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9 For example, compare the reasons in *Garlett* (2022) 277 CLR 1, [111]-[139] (Gageler J) and [292]-[309] (Gleeson J).

10 See similarly *Elisha v Vision Australia Ltd* (2024) 99 ALJR 171, [74]-[78] (Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ).

11 *Garlett* (2022) 277 CLR 1, [111]-[139] (Gageler J). AS [35] cites *Garlett* [135]-[137] and says that non-compliance with the *Lim* principle may "require" a finding that the institutional integrity of the State court is substantially impaired. The attempt in AS [37]-[38] to accommodate past *Kable* cases within this reasoning underscores the significant step the Appellant is inviting the Court to take.

12 *Garlett* (2022) 277 CLR 1, [40] (Kiefel CJ, Keane and Steward JJ). See also the explanation of that reasoning in ***EGH19*** *v Commonwealth* [2026] HCA 7, [128] (Gordon J).

13 *Garlett* (2022) 277 CLR 1, [291] and [296] (Gleeson J), citing *Condon v* ***Pompano*** *Pty Ltd* (2013) 252 CLR 38, [22] (French CJ) and [125] (Hayne, Crennan, Kiefel and Bell JJ), ***K-Generation*** *Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, [84] (French CJ), and ***Fardon*** *v Attorney-General (Qld)* (2004) 223 CLR 575, [36] (McHugh J), [86] (Gummow J) and [219] (Callinan and Heydon JJ).

14 *Garlett* (2022) 277 CLR 1, [184] (Gordon J).

15 Ibid, [247] (Edelman J) citing *Fardon* (2004) 223 CLR 575, [86] (Gummow J).

14. The second point is that the Appellant suggests that the four majority judgments in *Kable* were informed by central strands of reasoning in *Lim*, as postulated by Gummow J in *Fardon* (2004) 223 CLR 575 at [77]: AS [34]. As Gleeson J has explained, only Toohey and Gummow JJ referred to *Lim* and none of the other Judges "can be taken to have expressed any general view" that the *Lim* principle informed *Kable*.[16] That is consistent with the subsequent application of the *Kable* principle in *Fardon*.[17] The observations by Gummow J at [77] of *Fardon* were part of a broader proposition that the Commonwealth Parliament cannot confer a power on a court to order imprisonment other than following a finding of guilt as it would be repugnant to the judicial process to a fundamental degree. That broader proposition is inconsistent with the current understanding of the scope of Commonwealth judicial power.[18] In any event, neither that proposition, nor the statement at [77], were necessary to the ultimate conclusion reached by his Honour in that case.[19]

15. Thirdly, the Appellant's invitation is contrary to well-established modes of constitutional analysis. A conclusion that a State law could be validly enacted by the Commonwealth will also dictate that the State law does not offend *Kable*[20], but the reverse is not true.[21] It is not the accepted doctrine of this Court that whether an equivalent Commonwealth law would contravene the *Lim* principle will necessarily inform whether a State law would contravene the *Kable* limit:

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16 Ibid, [306]-[309] (Gleeson J).

17 Ibid, [295]-[305] (Gleeson J).

18 *Minister for Home Affairs v* ***Benbrika*** (2021) 272 CLR 68, [36], [47] and [53] (Kiefel CJ, Bell, Keane and Steward JJ).

19 *Garlett* (2022) 277 CLR 1, [303] (Gleeson J).

20 *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, [14] (the Court); *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181, [10] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); ***Baker*** *v The Queen* (2004) 223 CLR 513, [51] (Kirby J); *Fardon* (2004) 223 CLR 575, [144(5)] (Kirby J) and [219] (Callinan and Heydon JJ); ***Forge*** *v Australian Securities and Investments Commission* (2006) 228 CLR 45, [194] (Kirby J); *South Australia v* ***Totani*** (2010) 242 CLR 1, [339] (Heydon J); *Wainohu v New South Wales* (2011) 243 CLR 181, [43] (French CJ and Kiefel J); *Pompano* (2013) 252 CLR 38, [126] (Hayne, Crennan, Kiefel and Bell JJ); *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83, [17] (French CJ, Kiefel, Bell and Keane JJ); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, [147] (Gageler J); *Benbrika* (2021) 272 CLR 68, [158] (Gordon J).

21 *Fardon* (2004) 223 CLR 575, [18] (Gleeson CJ); *Pompano* (2013) 252 CLR 38, [126] (Hayne, Crennan, Kiefel and Bell JJ).

cf AS [35].[22] As pointed out below, the two tests are different because they have different foundations.

16. Fourthly, the test for validity proposed by the Appellant suffers from notable shortcomings which indicate the absence of an underlying principle. It is expressed as being "similar" (not identical) to the test for the validity of Commonwealth laws, which is said to be "capable" of informing the *Kable* analysis. On its face, that does not explain how the tests are "similar" or may be "capable" of informing one another. The only answer to those questions is that a common answer may be "require[d]" in some cases and in other cases the conclusion under *Lim* might merely "strongly support" a conclusion under *Kable.* How those two categories of case are to be distinguished, and the criteria on which they are to be distinguished, is unexplained. If a common conclusion is not "require[d]" but is merely "strongly supported", what are the factors that might nevertheless lead the State detention law to be valid where an equivalent Commonwealth law would not be? The Appellant proposes no stable answer to those fundamental questions.

The Lim and Kable principles have different bases and different functions

17. Those preliminary matters aside, the majority conclusion in *Garlett* should be preferred because it coheres with the different bases and functions of the two principles.

18. The *Lim* principle is derived from the doctrine of separation of judicial powers from executive and legislative powers, reflected in the division between Chs I, II and III of the Constitution.[23] The plurality reasons in *Lim* must be read in that light.

19. The question in *Lim* was whether the detention of foreign nationals by the Commonwealth executive was authorised. Justices Brennan, Deane and Dawson observed that an alien could not (outside of wartime) be detained without legal authority[24], that the Commonwealth legislation in issue purported to provide that authority[25], and that the legislation was *prima facie* supported by s 51(xix) of the

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22 The passages cited in AS [35] at fn 70 do not identify any majority of this Court having accepted such an approach.

23 *Lim* (1992) 176 CLR 1, 26 (Brennan, Deane and Dawson JJ); *Garlett* (2022) 277 CLR 1, [247] (Edelman J), [286], [294] (Gleeson J).

24 *Lim* (1992) 176 CLR 1, 19-20 (Brennan, Deane and Dawson JJ).

25 Ibid, 20-25 (Brennan, Deane and Dawson JJ).

Constitution.[26] Their Honours then asked whether the provisions were nevertheless "not authorised by that grant of legislative power by reason of some express or implied restriction or limitation" and noted that the plaintiffs relied upon a restriction "implicit in Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates" (emphasis added).[27]

20. In identifying the limits of that restriction, their Honours noted that, as a consequence of the Constitution's separation of the judicial power, Ch III was an "exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested", so that none of the powers in s 51 permitted "the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth."[28] Next, they noted that some functions are exclusively judicial and that one such function is "the adjudgment and punishment of criminal guilt under a law of the Commonwealth", so that no Commonwealth law could "vest any part of that function in the Commonwealth Executive".[29]

21. Their Honours then considered whether that implication could be avoided by the Parliament divorcing the power to detain from the administration of the criminal law and held that it could not.[30] It was in that context, and for that purpose, that they said:

> … putting to one side the exceptional cases to which reference is made below, 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.

22. Three points should be made about that passage. The first is that it was directed to the characterisation and validity of laws made by the Commonwealth Parliament, not to the laws of the States. Secondly, it expressed the principle "as a constitutive part of the doctrine of the separation of Commonwealth judicial power" [31], which

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26 Ibid, 25-26 (Brennan, Deane and Dawson JJ).
27 Ibid, 26 (Brennan, Deane and Dawson JJ).
28 Ibid, 26-27 (Brennan, Deane and Dawson JJ).
29 Ibid, 27 (Brennan, Deane and Dawson JJ).
30 Ibid, 27 (Brennan, Deane and Dawson JJ).
31 *Garlett* (2022) 277 CLR 1, [294] (Gleeson J). See also [111]-[113] (Gageler J), [175],[184] (Gordon J), [247] (Edelman J) and [286] (Gleeson J); *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1, [39], [41] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *EGH19* [2026] HCA 7, [62], [75]-[77] (Gordon J), [160] (Edelman J), [283]-[285] (Jagot J).

only applies at that level. Thirdly, within that framework, the passage was concerned with the functions which could be characterised as exclusively judicial, not with the distinct concept of what functions might be incompatible with the exercise of judicial power. As Gleeson J has explained, *Lim* did not expound 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".[32]

23. These three points do not apply to the *Kable* principle. *Kable* is directed to State (not Commonwealth) courts. There is no strict separation of judicial power at the State level[33], and *Kable* does not mandate such a separation.[34] It may be accepted that both *Lim* and *Kable* ultimately derive from Ch III (cf AS [34], 2R [57]), but *Kable* is concerned with compatibility, not with the scope of exclusively judicial power.

24. The principle for which *Kable* stands, and the sole basis for its implication, is that:

> … because the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.[35]

25. The principle is necessarily limited because it is a constitutional implication. It is limited to that which is strictly necessary to give effect to the textual and structural features which underpin it[36] and its scope cannot depend upon any *a priori*

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32 *Garlett* (2022) 277 CLR 1, [294] (Gleeson J).

33 *Kable* (1996) 189 CLR 51, 65 (Brennan CJ), 78-80 (Dawson J), 92-94 (Toohey J), 109 (McHugh J); *Fardon* (2004) 223 CLR 575, [37]-[42] (McHugh J); *Forge* (2006) 228 CLR 45, [36] (Gleeson CJ), [82]-[85] (Gummow , Hayne and Crennan JJ); *K-Generation* (2009) 237 CLR 501, [84] (French CJ); *Totani* (2010) 242 CLR 1, [66] (French CJ); *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343, [57] (Hayne, Crennan, Kiefel and Bell JJ); *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Benbrika* (2021) 272 CLR 68, [137] (Gordon J).

34 *Pompano* (2013) 252 CLR 38, [122]-[125] (Hayne, Crennan, Kiefel, Bell JJ). See also *Garlett* (2022) 277 CLR 1, [296] (Gleeson J) and the authorities cited therein.

35 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

36 *Gerner v Victoria* (2020) 270 CLR 412, [14] (the Court) and the authorities therein. See also *Re Gallagher* (2018) 263 CLR 460, [24] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) and the authorities therein; *McGinty v Western Australia* (1996) 186 CLR 140, 168-169 (Brennan CJ), 182-183 (Dawson J) and 231 (McHugh J).

assumptions of what would be a desirable state of constitutional affairs.[37] As Edelman J explained in *Benbrika*, from a "libertarian perspective", the creation of more expansive constitutional restraints upon power to detain a person might be laudable, but, "[h]owever desirable such implications might be thought to be, they cannot be superimposed without constitutional foundation".[38]

26. The textual and structural foundations of *Kable* require no more than that State courts remain suitable repositories of federal judicial power, which has at least principally been seen to be directed to whether or not those courts are, and can be seen to be, capable of impartially and independently applying federal law.[39] As Gleeson J explained in *Garlett*, the appellant and Commonwealth Attorney-General made arguments in *Fardon* which invoked *Lim* considerations, but the majority focused on whether the legislation impaired the independence and impartiality of the Supreme Court.[40] In particular, McHugh J said that mere investiture of powers which are "repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of [a] court".[41] Invalidity would only result where the departure "compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law", which would in turn occur where the departure indicates "that the State court might not be an impartial tribunal that is independent of the legislative and executive arms of government".[42] To similar effect, Callinan and Heydon JJ said at [219]:

> Not everything by way of decision-making denied to a federal judge is denied to a judge of a State. So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised, then the legislation in question will not infringe Ch III of the Constitution.

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37 *Burns v Corbett* (2018) 265 CLR 304, [47] (Kiefel CJ, Bell and Keane JJ), [94] (Gageler J), [127] (Nettle J) and [175] (Gordon J); *Spence v Queensland* (2019) 268 CLR 355, [298] (Edelman J) and the authorities therein.

38 *Benbrika* (2021) 272 CLR 68, [217] (Edelman J). See also *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1, [86] (Edelman J).

39 Leaving authority aside, no broader libertarian concerns appear in the Convention Debates. The approach of the Framers was generally to the opposite effect: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135-136 (Mason CJ).

40 *Garlett* (2022) 277 CLR 1, [295]-[296], and also [298]-[305] (Gleeson J).

41 *Fardon* (2004) 223 CLR 575, [41] (McHugh J).

42 Ibid, [42] (McHugh J).

27. More recently, in *Benbrika*, the majority said that there was no reason why a law of the Commonwealth could not confer a function on a State court concerning detention, provided it did not "trench on the Court's independence and impartiality".[43]

28. For those reasons, it is well-accepted that the *Kable* principle is of far more limited scope than the Commonwealth separation of judicial power and what it implies[44] and it is "a serious constitutional mistake to think that either *Kable* or the Constitution assimilates State courts or their judges and officers with federal courts and their judges and officers."[45] There may be "parallels" that can be drawn between the implication of the *Kable* doctrine and the Commonwealth separation of powers, but "the notions of repugnancy to and incompatibility with the continued institutional integrity of the State courts are not to be treated as if they simply reflect what Ch III requires in relation to the exercise of the judicial power of the Commonwealth".[46]

Reliance on the constitutional paradigm

29. Applying those matters to the Appellant's argument, the invocation of the "constitutional paradigm" in this sphere is inapt: AS [32]-[33], [36]. That paradigm was referred to in *EGH19* concerning Commonwealth legislation[47] and conforms to the strict separation of judicial power at the Commonwealth level, but it cannot be coherently applied in the States. The first element of the paradigm makes that plain.

30. The legislative powers of the States to make laws "for the peace, welfare and good government" of their jurisdiction are "as plenary as that of the Imperial Parliament".[48] The acceptance of the Appellant's approach creates tension with the

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43 *Benbrika* (2021) 272 CLR 68, [20] (Kiefel CJ, Bell, Keane and Steward JJ).

44 *Pompano* (2013) 252 CLR 38, [22] (French CJ), [124]-[125] (Hayne, Crennan, Kiefel and Bell JJ).

45 *Fardon* (2004) 223 CLR 575, [36] (McHugh J).

46 *Pompano* (2013) 252 CLR 38, [125] (Hayne, Crennan, Kiefel and Bell JJ), quoted with approval in *Pollentine v Bleijie* (2014) 253 CLR 629, [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). See also *Kable* (1996) 189 CLR 51, 103-104 (Gaudron J); *Baker* (2004) 223 CLR 513, [51] (Kirby J); *Benbrika* (2021) 272 CLR 68, [137] (Gordon J); *Kuczborski v Queensland* (2014) 254 CLR 51, [104] (Hayne J).

47 *EGH19* [2026] HCA 7, [16]-[24] (Gageler CJ and Gleeson J). Note that each of the cases where the paradigm "sets the constitutional baseline" concerned Commonwealth judicial power: at [19] fn 34.

48 *Fardon* (2004) 223 CLR 575, [40] (McHugh J); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (the Court).

legislative capacity of the States to make laws which provide for "breaches of the criminal law to be determined by non-judicial tribunals"[49] or to authorise a panel of psychiatrists to order detention.[50] None of those matters would infringe the *Kable* principle because they would not affect the institutional integrity of State courts. Their existence is inconsistent with the notion that the constitutional paradigm, or *Lim*, has any controlling effect at the State level.[51]

Part IV: Estimate of time

31. The Attorney-General estimates that no more than 15 minutes would be required for the presentation of oral argument.

Dated: 2 June 2026

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49 *Fardon* (2004) 223 CLR 575, [40] (McHugh J).
50 Ibid, [18] (Gleeson CJ) and [40] (McHugh J).
51 *Garlett* (2022) 277 CLR 1, [301] (Gleeson J).

ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date
Commonwealth statutes					
1.	*Constitution*	Current	Ch I, II, III	In force at all relevant times	All relevant times
2.	*Judiciary Act 1903*	Current	78A	In force at all relevant times	25 May 2026: Date of Attorney-General for the Northern Territory's intervention