



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S17/2026
File Title: President of the Legislative Council of New South Wales v. Cu
Registry: Sydney
Document filed: (A-G of SA) Form 27C - Intervener's submissions
Filing party: Interveners
Date filed: 02 Jun 2026

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S17/2026

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

**SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
STATE OF SOUTH AUSTRALIA (INTERVENING)**

Part I: PUBLICATION OF SUBMISSIONS

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

Part II: INTERVENTION

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) to advance submissions that are not generally in support of any party.

Part III: LEAVE TO INTERVENE

3. Not applicable.

Part IV: SUBMISSIONS

4. On 6 May 2026, the Appellant issued a second notice in these proceedings pursuant to s 78B of the *Judiciary Act* that identified the following constitutional question: “in assessing whether a State law that authorises detention contravenes the *Kable* limit, to what extent is it relevant or determinative that the detention is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose?”¹
5. South Australia’s submissions are limited to addressing that question. South Australia makes no submission about the ultimate issue raised in these proceedings concerning the validity of ss 7-9 of the *Parliamentary Evidence Act 1901* (NSW) (**Parliamentary Evidence Act**). No equivalent provisions have ever been enacted in South Australia.²
6. As Justice Gleeson recently noted in *Garlett v Western Australia*, “[i]t would be a significant step to conclude that the *Lim* principle operates as an additional constraint on State (and Territory) legislative power, over and above the *Kable* principle.”³ In the event that the Court agrees with the essential reasoning of the Court of Appeal in this matter,⁴ then it will be unnecessary for the Court to address the question identified in the second 78B notice and, in accordance with the usual prudential approach, the Court should refrain from doing so.⁵

¹ *Appellants’ Further Notice of a Constitutional Matter*, 6 May 2026, [4].

² *Cullen v President of the Legislative Council of New South Wales* (2025) 400 FLR 74, 76-77 [4] (Bell CJ, Leeming, Free JJA) (**Cullen**).

³ (2022) 277 CLR 1, 106 [293] (Gleeson J) (**Garlett**).

⁴ *Cullen* (2025) 400 FLR 74, 88-93 [51]-[71] (Bell CJ, Leeming, Free JJA).

⁵ *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, 248-249 [57]-[60] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), 259-262 [98]-[107] (Edelman J).

7. If, however, it is necessary for the Court to address this issue, then South Australia submits, for the reasons that follow, that in assessing whether a State law that authorises detention contravenes the *Kable* limit,⁶ it is not directly relevant or determinative that the detention is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose. That is because the *Lim* principle⁷ does not operate as an additional constraint on State legislative power, over and above the *Kable* principle.

The separation of powers doctrine

8. The separation of powers doctrine advances two constitutional objectives.⁸ The first is to ensure the institutional integrity of those courts that exercise federal jurisdiction within the integrated Australian judicial system (the institutional integrity principle). The second is to safeguard the liberty of the subject against incursions by the legislative and executive branches antithetical to the notion of exclusively judicial power (the liberty principle).
9. Whilst the separation of powers doctrine supports each of these principles, the textual foundation, constitutional purpose and operation of each is different. South Australia contends that while the *Kable* doctrine can be seen as the logical outworking of the institutional integrity principle, the *Lim* principle is directed to marking the limits of exclusive federal judicial power in a manner that is protective of liberty.

Chapter III courts: the institutional integrity principle

10. The textual foundation of the institutional integrity principle is the consistent use of the term “court” in Chapter III of the *Constitution* to describe those institutions upon which the federal judicial power may be vested:⁹ “in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.”¹⁰

⁶ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***).

⁷ *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (***Lim***).

⁸ *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) (***Wilson***); *South Australia v Totani* (2010) 242 CLR 1, 156 [423] (Crennan and Bell JJ) (***Totani***); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 131-134 [136]-[142] (Gordon J) (***Benbrika No 1***); *Garlett* (2022) 277 CLR 1, 57 [163] (Gordon J); *EGH19 v Commonwealth* [2026] HCA 7, [71] (Gordon J), [279] (Jagot J) (***EGH19***); Andrew Lynch, ‘Is Judicial Dissent Constitutionally Protected’ (2004) 4 *Macquarie Law Journal* 81, 83; Fiona Wheeler, ‘Due Process, Judicial Power and Chapter III in the New High Court’ (2004) 32(2) *Federal Law Review* 205; Michael Baker, ‘On Being a Chapter III Judge’ (2010) 35(1) *University of Western Australia Law Review* 1, 9-10; Susan Crennan, ‘*Magna Carta*, Common Law Values and the Constitution’ (2015) 39(1) *Melbourne University Law Review* 331, 344.

⁹ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 67-68 [41] (Gleeson CJ), 73-76 [57]-[63] (Gummow, Hayne and Crennan JJ), 136 [237]-[238] (Callinan J agreeing) (***Forge***); *Totani* (2010) 242 CLR 1, 157 [427] (Crennan and Bell JJ); *EGH19* [2026] HCA 7, [288] (Jagot J).

¹⁰ *Constitution*, s 71. See also, ss 73, 75, 76 and 77(iii).

11. The institutional integrity principle serves a basal federal purpose. It ensures that those courts that are, or may be, conferred with federal jurisdiction possess the requisite degree of independence and impartiality to perform that constitutional function. The doctrine was necessary, as a matter of constitutional design, to ensure that the people and polities of the new federation could be confident that federal disputes would not become beholden to parochial interests. That purpose was reflected in the following contribution of Sir Edmund Barton at the Adelaide Convention:¹¹

It seems to me that if we are to have Federation in all its strength and power we are forced to the conclusion that the power which will best hold the Federation together, and will best preserve the honor of the Constitution, is the peaceful arbitrament of a Federal Court ... One of the strongest guarantees for the continuance and indestructibility of the Federation is that there should be some body of this kind constituted which, instead of allowing the States to fly to secession because they cannot get justice in any other way, will enable them to settle their differences in a calm judicial atmosphere.

12. This federal purpose remains vital. As Justice Kirby explained in *Forge*:¹²

It is the federal character of the Australian Constitution that necessitates, more than in nations differently organised, a judiciary that can decide federal contests in a way that is accepted by all participants in the polity. Given the necessity of drawing lines that mark off the governmental powers respectively of the Commonwealth, the States and the Territories, it is essential that there be an independent and impartial constitutional umpire for the disputes that inevitably occur. This is why federalism is legalism. It is why judicial review is an essential feature of governmental arrangements in a federal nation. The judges who perform the task of judicial review in such a polity must be, and be seen to be, legally competent, independent and impartial in the discharge of such functions.

13. Consistent with this constitutional purpose, the authorities concerning institutional integrity have recognised a series of “essential characteristics”¹³ applicable to all “courts”¹⁴ that do,

¹¹ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 23 March 1897, 25 (Edmund Barton). See also, *Totani* (2010) 242 CLR 1, 38-39 [51] (French CJ), quoting J Quick and R Garran, *The Annotated Constitution of the Commonwealth of Australia* (1901), 804.

¹² *Forge* (2006) 228 CLR 45, 119 [185] (Kirby J in dissent, but not on this point), citing *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (*Boilermakers*). See also, *Boilermakers* (1956) 94 CLR 254, 267-268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *EGH19* [2026] HCA 7, [281] (Jagot J).

¹³ The terminology of “essential characteristic” is to be preferred to “defining characteristic” because the latter phrase may erroneously suggest that the any departure from a rigidly defined standard will necessarily undermine the institutional integrity of a court. As Justice Edelman observed in *Garlett*, “[t]hese characteristics cannot always be treated as absolute requirements”: *Garlett* (2022) 277 CLR 1, 88-89 [243] (Edelman J). See also, *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 48 [5], 71-74 [67]-[72], 79-80 [88]-[89] (French CJ), 99-100 [156]-[157] (Hayne, Crennan, Kiefel and Bell JJ) (*Pompano*).

¹⁴ *Wilson* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Garlett* (2022) 277 CLR 1, 88 [242] (Edelman J); *SDCV v Director-General of Security* (2022) 277 CLR 241, 281 [91] (Kiefel CJ, Keane and Gleeson JJ), 285 [106] (Gageler J), 303-304 [172], 305-306 [174] (Gordon J), 323-324 [225], 337 [267] (Edelman J) (*SDCV*).

or may, exercise federal jurisdiction which sustain their institutional independence and impartiality:

13.1. The rule against bias, including the apprehended bias principle, recognises that the integrity of the judicial system is affected by the fact of, or the appearance of, a departure from the court's independence and impartiality.¹⁵

13.2. The hearing rule promotes sound decision-making and ensures that a court must afford a hearing to all interested parties in a manner that promotes judicial legitimacy.¹⁶

13.3. The duty to give reasons promotes good decision-making and judicial accountability in a manner that promotes judicial legitimacy.¹⁷

13.4. The open court principle subjects court proceedings to public and professional scrutiny, and thereby maintains public confidence in the integrity and independence of courts.¹⁸

13.5. Tenure and remuneration requirements for judges ensure judicial independence from the executive and other sources of influence.¹⁹

13.6. The rule against enlistment (and cloaking) also protects courts from the reality, or appearance, of executive influence.²⁰

14. The essential characteristics of a court are not exhausted by these categories.²¹ New characteristics that sustain a court's actual and perceived independence and impartiality

¹⁵ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) (**Bradley**); *Forge* (2006) 228 CLR 45, 77 [66] (Gummow, Hayne and Crennan JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 210 [44] (French CJ and Kiefel J) (**Wainohu**); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 594 [39] (French CJ, Kiefel and Bell JJ) (**North Australian Aboriginal Justice Agency Ltd**).

¹⁶ *Pompano* (2013) 252 CLR 38, 71 [67] (French CJ), 105 [169] (Hayne, Crennan, Kiefel and Bell JJ), 105 [177] (Gageler J).

¹⁷ *Wainohu* (2011) 243 CLR 181, 214-215 [56], 216 [58]-[59] (French CJ and Kiefel J); *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 278-279 (McHugh JA).

¹⁸ *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ); *Wainohu* (2011) 243 CLR 181, 209 [44] (French CJ and Kiefel J); *Pompano* (2013) 252 CLR 38, 72 [67] (French CJ); *North Australian Aboriginal Justice Agency Ltd* (2015) 256 CLR 569, 594 [39] (French CJ, Kiefel and Bell JJ).

¹⁹ *Forge* (2006) 228 CLR 45, 79-80 [74] (Gummow, Hayne and Crennan JJ), 123 [197], 127 [209], 135 [231] (Kirby J).

²⁰ *Kable* (1996) 189 CLR 51, 133 (Gummow J), quoting *Mistretta v United States*, 488 US 361, 407 (1989); *Totani* (2010) 242 CLR 1, 172 [479] (Kiefel J); *Wainohu* (2011) 243 CLR 181, 209 [44] (French CJ and Kiefel J); *Pompano* (2013) 252 CLR 38, 89 [125] (Hayne, Crennan, Kiefel and Bell JJ).

²¹ *Bradley* (2004) 218 CLR 146, 163 [30] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Pompano* (2013) 252 CLR 38, 72 [67] (French CJ).

may emerge as judicial processes evolve to meet new challenges.²² It is the touchstone of “independence and impartiality”²³ that orients this Court’s jurisprudence concerning institutional integrity “in a principled, coherent, and systematic way”.²⁴

15. Given its textual foundation and constitutional purpose, the institutional integrity principle operates as a restriction upon Commonwealth legislative power. The Commonwealth Parliament may not legislate in a manner that impairs the institutional integrity of Chapter III courts, whether they be federal or state courts.²⁵
16. In *Kable*, this Court held that the institutional integrity principle applied to State courts, as a matter of “practical, if not logical necessity”,²⁶ because of the autochthonous expedient provided for by s 77(iii) of the *Constitution*.²⁷ Therefore, the institutional integrity principle also operates as a restriction on State legislative power.
17. Consistent with the constitutional text of Chapter III and its constitutional purpose, the institutional integrity principle must be understood to apply in the same way to all courts within the integrated judicial structure. It does not operate in a less stringent fashion with respect to State courts.²⁸ It is in this sense that it has been repeatedly, and correctly, observed that the *Constitution* does not allow for different grades of justice.²⁹

²² *Bradley* (2004) 218 CLR 146, 152-154 [3]-[5] (Gleeson CJ); *Forge* (2006) 228 CLR 45, 76 [64] (Gummow, Hayne and Crennan JJ); M Gordon, “The Integrity of Courts: Political Culture and A Culture of Politics” (2021) 44 *Melbourne University Law Review* 863, 868. See also, *Dietrich v The Queen* (1992) 177 CLR 292, 328 (Deane J).

²³ *Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Forge* (2006) 228 CLR 45, 63 [28] (Gleeson CJ), 76 [64] (Gummow, Hayne and Crennan JJ); *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532, 591 [161]-[162] (Crennan J).
²⁴ *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 246 [56] (Bell, Keane, Nettle and Edelman JJ) (*Vella*).

²⁵ *Wilson* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Garlett* (2022) 277 CLR 1, 88 [242] (Edelman J); *SDCV* (2022) 277 CLR 241, 281 [91] (Kiefel CJ, Keane and Gleeson JJ), 285 [106] (Gageler J), 303-304 [172], 305-306 [174] (Gordon J), 323-324 [225], 337 [267] (Edelman J).

²⁶ *Pompano* (2013) 252 CLR 38, 106 [183] (Gageler J).

²⁷ *Kable* (1996) 189 CLR 51, 94-95 (Toohey J), 102-4 (Gaudron J), 110-111, 114-116 (McHugh J), 139-140 (Gummow J); *Pompano* (2013) 252 CLR 38, 105-106 [180]-[183] (Gageler J)

²⁸ Statements to the effect that the *Kable* doctrine is less strict (see, for example, *Kable* (1996) 189 CLR 51, 103-104 (Gaudron J); *Garlett* (2022) 277 CLR 1, 67 [184] (Gordon J)) are directed to the absence of a separation of powers applicable to State courts.

²⁹ *Kable* (1996) 189 CLR 51, 103 (Gaudron J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 617 [101] (Gummow J) (*Fardon*); *Wainohu* (2011) 243 CLR 181, 209-210 [45] (French CJ and Kiefel J), 228-229 [105] (Gummow, Hayne, Crennan and Bell JJ), 247 [171] (Heydon J); *Pompano* (2013) 252 CLR 38, 89 [123] (Hayne, Crennan, Kiefel and Bell JJ); *Vella* (2019) 269 CLR 219, 278 [147] (Gageler J); *Benbrika No 1* (2021) 272 CLR 68, 92 [20] (Kiefel CJ, Bell, Keane and Steward JJ); *Garlett* (2022) 277 CLR 1, 44 [115] (Gageler J), 66 [181], 74 [199] (Gordon J); *SDCV* (2022) 277 CLR 241, 269 [58] (Kiefel CJ, Keane and Gleeson JJ), 323 [222] (Edelman J); *CZA19 v Commonwealth* (2025) 99 ALJR 650, 668 [76] (Gordon J).

Exclusive federal judicial power: the liberty principle

18. The separation of powers doctrine not only ensures an integrated Australian court system with institutional integrity, it also safeguards liberty.³⁰ Chapter III of the *Constitution* does not achieve this by expanding the essential characteristic of “courts” beyond that which is necessary to maintain their institutional integrity, but by adopting a principled and historical notion of the exclusive “judicial power” of the Commonwealth vested in courts by s 71 of the *Constitution*. The nature of that power is contrasted to the legislative power vested in the Commonwealth Parliament by s 1, and the executive power of the Commonwealth vested by s 61 of the *Constitution*.
19. An historical conception of exclusive “judicial power” informs the constitutional purpose of the separation of powers to secure liberty: “the life, liberty, and property of the subject [is not] in the hands of arbitrary judges, whose decisions [are] then regulated only by their own opinions, and not by any fundamental principles of law”.³¹ And, in *Lim*, Justices Brennan, Deane and Dawson (with Chief Justice Mason agreeing) held that “the most important” of the functions that is “exclusively judicial in character” is the “adjudgment and punishment of criminal guilt”.³²
20. The “bulwark of liberty”³³ secured by Chapter III is accomplished by the combined operation of the institutional integrity principle (which mandates a suitable forum) and the liberty principle (which mandates an exclusive judicial power). These two principles are reflected in the first two elements of the “constitutional paradigm” which demands that detention of a person is ordinarily authorised: “(1) by a court; (2) in the exercise of judicial power; (3) as a penal consequence prescribed by law for an existing criminal liability determined to have arisen from the operation of positive law on past events or conduct.”³⁴
21. The liberty principle operates as a limitation on Commonwealth legislative power to confer federal judicial power upon federal or state courts.³⁵ This is apparent from the language and

³⁰ *R v Davison* (1954) 90 CLR 353, 381 (Kitto J); *Wilson* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Benbrika No 1* (2021) 272 CLR 68, 92 [20] (Kiefel CJ, Bell, Keane and Steward JJ), 132 [138] (Gordon J).

³¹ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 606 (Deane J), quoting Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), vol I, 269; quoted in *EGH19* [2026] HCA 7, [279] (Jagot J).

³² *Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ, Mason CJ agreeing at 10).

³³ *Benbrika No 1* (2021) 272 CLR 68, 92 [20] (Kiefel CJ, Bell, Keane and Steward JJ).

³⁴ *EGH19* [2026] HCA 7, [16] (Gageler CJ and Gleeson J).

³⁵ *Garlett* (2022) 277 CLR 1, 105-106 [292] (Gleeson J).

logic of the plurality judgment in *Lim*, which addressed itself to “adjudgment and punishment of criminal guilt under a law of the Commonwealth” and explained:³⁶

That function appertains exclusively to and ‘could not be excluded from’ the judicial power of the Commonwealth. That being so, Ch III of the Constitution precludes the enactment, in purported pursuance of any of the sub-sections of s 51 of the Constitution, of any law purporting to vest any part of that function in the Commonwealth Executive.

22. Given that State Parliaments have no legislative authority to confer federal judicial power,³⁷ the liberty principle does not operate as a limitation on State legislative power. It is in this sense that it has been repeatedly, and correctly, observed that the State constitutions do not themselves incorporate a separation of powers,³⁸ and more relevantly for present purposes do not have a separation of powers imposed upon them by Chapter III.³⁹
23. It follows that the constitutional paradigm recognised in *Lim* operates “under our system of government” as (i) a constitutional limitation upon Commonwealth legislative power to be supervised by this Court and, (ii) as an important legal convention, or “norm”,⁴⁰ in the States to be supervised in the familiar way by the processes of representative and responsible government.

Relevance of the *Lim* doctrine in applying the *Kable* doctrine

24. As demonstrated above, the textual foundation, constitutional purpose and operation of the institutional integrity principle and the liberty principle are different. Accordingly, it would be erroneous to draw directly upon principles that have been developed for the purpose of ascertaining the boundary of the exclusive “judicial power” of the Commonwealth (namely,

³⁶ *Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) (emphasis added).

³⁷ *Rizeq v Western Australia* (2017) 262 CLR 1, 25 [60] (Bell, Gageler, Keane, Nettle and Gordon JJ).

³⁸ *Clyne v East (No 1)* (1967) 68 SR (NSW) 385, 395 (Herron CJ), 396-397, 400-401 (Sugerman JA), 403 (Asprey JA); *Gilbertson v South Australia* [1978] AC 772, 783 (Lord Diplock for the Court); *Building Construction Employees & Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372, 401-402 (Kirby P), 418-419 (Priestley JA); *Kable* (1996) 189 CLR 51, 67 (Brennan CJ), 77-81 (Dawson J), 93-94 (Toohey J), 109-110 (McHugh J); *Burns v Corbett* (2018) 265 CLR 304, 393-394 [207] (Edelman J).

³⁹ *Kable* (1996) 189 CLR 51, 65 (Brennan CJ), 81, 85-86 (Dawson J), 93 (Toohey J), 103-104 (Gaudron J), 109, 118 (McHugh J); *Fardon* (2004) 223 CLR 575, 598 [37] (Gleeson CJ), 614 [86] (Gummow J), 655-656 [219] (Callinan and Heydon JJ); *Totani* (2010) 242 CLR 1, 45 (French CJ); *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, 573 [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Wainohu* (2011) 243 CLR 181, 212 [52] (French CJ and Kiefel J); *North Australian Aboriginal Justice Agency Ltd* (2015) 256 CLR 569, 625 [146] (Keane J); *The Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343, 368 [57] (Hayne, Crennan, Kiefel and Bell JJ); *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398, 430 (Heydon J); *Pompano* (2013) 252 CLR 38., 53 [22] (French CJ), 89 [124] (Hayne, Crennan, Kiefel and Bell JJ); *Pollentine v Bleijie* (2014) 253 CLR 629, 648-649 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Benbrika No 1* (2021) 272 CLR 68, 92 [20] (Kiefel CJ, Bell, Keane and Steward JJ).

⁴⁰ *Garlett* (2022) 277 CLR 1, 106 [294] (Gleeson J).

the *Lim* principle) in considering the application of the institutional integrity principle to State courts (the *Kable* doctrine). There are three further reasons why South Australia submits that the Appellant’s contention should be rejected.

25. First, neither *Kable* itself nor subsequent decisions of the Court applying it have proceeded on the basis that application of the *Lim* principle directly answered the question of invalidity of a State law or formed a necessary step in the analysis required under the *Kable* doctrine. It is true that in several cases the nature of the alleged invalidity was such that the challenges could be readily resolved by a conclusion that a federal law imposing the same functions would be valid.⁴¹ On that basis the question of federal validity or invalidity was seen as potentially useful, but it was never accepted as an “exclusive test of invalidity”.⁴² Indeed, the utility of considering the validity of a State law through the lens of an equivalent law enacted by the Federal Parliament is limited: it could only be determinative if the answer is that the federal law would be valid.
26. That approach is demonstrated in *Fardon*. There, the appellant submitted that the Queensland laws providing for continuing detention were invalid and could not be conferred on the Supreme Court, relying on *Lim* and *Kable* reasoning. The Commonwealth intervening had submitted that the State law’s validity could be upheld on the basis that federal law could validly confer the same functions. No member of the Court adopted that approach. Chief Justice Gleeson, in upholding the State law on a *Kable* analysis, expressly held it was unnecessary to decide if a comparable federal law would be valid. Justice McHugh rejected as “a serious constitutional mistake” any assumption that *Kable* or the *Constitution* assimilated the positions of federal and State courts.⁴³ Justice Gummow considered the question of federal validity and, despite concluding it would be invalid, held that the State law was valid under *Kable*.⁴⁴ Justice Kirby was the sole member of the Court to conclude that the State law was invalid,⁴⁵ and to agree with Justice Gummow that a comparable federal law would not be valid,⁴⁶ but rejected the direct application to State laws of a test of federal validity.⁴⁷ Justice Hayne agreed with

⁴¹ *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561-562 [13]-[14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Baker v The Queen* (2004) 223 CLR 513, 526-527 [22]-[24] 534 [51] (McHugh, Gummow, Hayne and Heydon JJ), cf 544-545 [85]-[86] (Kirby J) (*Baker*).

⁴² *Fardon* (2004) 223 CLR 575, 630 [144](4) (Kirby J), 655-656 [219] (Callinan and Heydon JJ), see also, 614 [87] (Gummow J).

⁴³ *Fardon* (2004) 223 CLR 575, 591 [18] (Gleeson CJ), 598-600 [36]-[40] (McHugh J).

⁴⁴ *Fardon* (2004) 223 CLR 575, 608-609 [68]-[69], 614 [86]-[87], 621 [117] (Gummow J).

⁴⁵ *Fardon* (2004) 223 CLR 575, 647 [194] (Kirby J).

⁴⁶ *Fardon* (2004) 223 CLR 575, 631 [145] (Kirby J).

⁴⁷ *Fardon* (2004) 223 CLR 575, 630 [144](4) (Kirby J, agreeing with Callinan and Heydon JJ at 655-656 [219]). However, Justice Kirby did view the question of federal invalidity on the basis of repugnancy to the

Justice Gummow that the impugned State law was valid, but reserved opinion on whether an equivalent federal law would be valid.⁴⁸ Justices Callinan and Heydon accepted the potential usefulness of a test based on whether a comparable federal law would be invalid, but rejected that as an “exclusive test of invalidity”, acknowledging that State laws might be valid in circumstances where a federal law would infringe Chapter III. Their Honours expressed the test in the familiar terms of genuine adjudicative process and integrity and independence.⁴⁹

27. It is clear from *Fardon* that the Court did not accept an application of the *Lim* principle as the relevant test for whether a State law would be invalid as determinative of the question of institutional integrity under the *Kable* doctrine.
28. So much was recognised also in *Garlett*, where Chief Justice Kiefel and Justices Keane and Steward cited the relevant passages from *Fardon* rejecting such a test, in support of their finding that “the *Lim* principle has no application to establish the invalidity of the HRSO Act”, and that the submission to the contrary could not stand with the Court’s decision in *Fardon*.⁵⁰
29. Second, the incorporation of the *Lim* principle as an essential characteristic of State courts, uncoupled from the correlative limb of the separation of powers doctrine that tribunals may not exercise judicial power,⁵¹ would give rise to an incongruous result in the States. Restricting the capacity of State legislatures to confer preventative jurisdictions on State courts may incentivise the conferral of such jurisdictions on State tribunals.⁵² This would sit in tension with “the emergence of a conventional understanding that ... a power to constrain liberty by reference to what a person might do in the future, if it is to be conferred at all, is best conferred on a court.”⁵³
30. Third, to extend the *Kable* doctrine beyond the touchstone of independence and impartiality, as a means of preventing the conferral of jurisdiction on State courts that are

ordinary judicial role as an indicator that a State law would be invalid also: *Fardon* (2004) 223 CLR 575, 630-631 [144](5)-[146] (Kirby J).

⁴⁸ *Fardon* (2004) 223 CLR 575, 647-648 [196], [198] (Hayne J).

⁴⁹ *Fardon* (2004) 223 CLR 575, 630 [144](4) (Kirby J), 655-656 [219] (Callinan and Heydon JJ), see also, 614 [87] (Gummow J).

⁵⁰ *Garlett* (2022) 277 CLR 1, 23 [40] (Kiefel CJ, Keane and Steward JJ), see also, 106-110 [293]-[306] (Gleeson J).

⁵¹ *Waterside Workers' Federation (Aust) v JW Alexander Ltd* (1918) 25 CLR 434, 441 (Griffith CJ); *Boilermakers* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

⁵² Justice McHugh recognised this possibility in *Fardon* (2004) 223 CLR 575, 600 [40] (McHugh J) (“no process of legal or logical reasoning leads to the conclusion that, because the federal Parliament may invest State courts with federal jurisdiction, the States cannot legislate for the determination of issues of criminal guilt or sentencing by non-judicial tribunals.”)

⁵³ *EGH19* [2026] HCA 7, [26] (Gageler CJ and Gleeson J), quoting *Vella* (2019) 269 CLR 219, 260-261 [90] (Bell, Keane, Nettle and Edelman JJ), quoting *Thomas v Mowbray* (2007) 233 CLR 307, 508 [599] (Callinan J). See also, *Benbrika No 1* (2021) 272 CLR 68; *Garlett* (2022) 277 CLR 1.

deemed to be unfair, would draw this Court into controversies which do not find their answer in the text and structure of the *Constitution*. As members of this Court have repeatedly cautioned, the resolution of such controversies may themselves undermine judicial integrity.⁵⁴

Part V: TIME ESTIMATE

31. It is estimated that up to 15 minutes will be required for the presentation of South Australia's oral argument.

Dated: 2 June 2026



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⁵⁴ *Baker* (2004) 223 CLR 513, 519-520 [6] (Gleeson CJ), quoting *Nicholas v The Queen* (1998) 193 CLR 173, 197 [37] (Brennan CJ), 542-543 (Kirby J); *Fardon* (2004) 223 CLR 575, 586 [2], 593 [23] (Gleeson CJ), 601 [41] (McHugh J); *Vella* (2019) 269 CLR 219, 235 [24], 256 [80] (Bell, Keane, Nettle and Edelman JJ), quoting *Fardon* (2004) 223 CLR 575, 586 [2], 593 [23] (Gleeson CJ) and *Nicholas* (1998) 193 CLR 173, 197 [37] (Brennan CJ).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S17/2026

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

ANNEXURE

**PROVISIONS REFERRED TO IN THE SUBMISSIONS OF THE
ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
(INTERVENING)**

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
1.	<i>Constitution</i>	Current	ss 71, ss 73, 75, 76, 77(iii); Ch III	In force at all relevant times	All relevant times
2.	<i>Parliamentary Evidence Act 1901 (NSW)</i>	Current	ss 7-9	In force at all relevant times	All relevant times