HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 11 Mar 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	P56/2021
File Title:	Garlett v. The State of Western Australia & Anor
Registry:	Perth
Document filed:	Form 27F - Outline of oral argument (Vic)
Filing party:	Defendant
Date filed:	11 Mar 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

PETER ROBERT GARLETT
Appellant

and

THE STATE OF WESTERN AUSTRALIA
First Respondent

THE ATTORNEY-GENERAL FOR WESTERN AUSTRALIA
Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I: CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

PART II: OUTLINE

2. The specification of robbery as a "serious offence" in the *High Risk Serious Offenders Act 2020* (WA) (the **Act**) does not make the Act "extreme" legislation that substantially impairs the institutional integrity of the Supreme Court of Western Australia.

3. "Categories" of legislation that will infringe the *Kable* principle have been developed, as have categories of legislation that will not infringe the *Kable* principle, based on "principled, coherent and systematic" development of the law rather than "as evaluations of specific instances": *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [56] (**JBA v7 Tab 37**).

4. One category of legislation that has been held not to infringe the *Kable* principle is preventative order schemes that have a protective purpose, confer powers on a Court that require evaluative judgements to be made and require those powers to be exercised in accordance with the ordinary incidents of judicial power: *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (**JBA v4 Tab 20**), *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 (**JBA v7 Tab 37**), *Minister for Home Affairs v Benbrika* (2021)

95 ALJR 166 (**JBA v8 Tab 43**) and *Thomas v Mowbray* (2007) 233 CLR 307 (**JBA v7 Tab 36**).

5. The Act has each of these features. The power to make a restriction order has a protective purpose; it is conditioned on the court making evaluative judgements by reference to criteria that are readily capable of judicial application; and the power is to be exercised in accordance with the ordinary incidents of the exercise of judicial power: **VS [5]**.

6. The protective purpose of the power to make a restriction order is apparent from the objects provision (s 8), the criteria for the making of a restriction order (s 7) and the paramount consideration specified in s 48(2): **VS [21]**. It does not depend on the particular offences specified by the legislature: see *Vella* at [2]-[3].

7. The protective purpose of the power is reinforced by the legislature's specification of only certain offences as being "serious offences". The Parliament has selected those offences which it has judged may cause "harm" of a kind that the community may need to be protected against by the making of a restriction order, including robbery.

8. The judgment as to which offences are capable of causing that kind of harm is a matter for the Parliament.

   8.1 Keane J in *Magaming v The Queen* (2013) 252 CLR 381 at [105] (**JBA v5 Tab 28**);

   8.2 Edelman J in *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at [228]-[230] (**JBA v8 Tab 43**).

9. Conversely, the Act does not have any features that place it within any of the categories of cases recognised to infringe the *Kable* principle:

   9.1 There is no "enlistment" of the Court, of the kind considered in *Totani v South Australia* (2010) 242 CLR 1 (**JBA v6 Tab 34**): **VS [35]-[36]**, because the Act preserves the independence of the Court.

   9.2 There is no impermissible effect on the Court's processes. Unlike in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 (**JBA v4 Tab 23**), the respondent to an application for a restriction order has the opportunity to participate in the court process:

VS [37.5]. And the Court must provide reasons: cf *Wainohu v New South Wales* (2011) 243 CLR 181 (**JBA v 7 Tab 38**): **VS [37.4]**.

Dated: 11 March 2022

.....	.....	.....
Rowena Orr	**Frances Gordon**	**Thomas Wood**
Solicitor-General of Victoria		