IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S 352 of 2012

BETWEEN:

STATE OF NSW
Appellant

and

GREGORY WAYNE KABLE
Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the Appellant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part VII of the Appellant's Submissions.

Date of Document: 31 January 2013

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PART V: SUBMISSIONS

5. Western Australia intervenes to make submissions in respect of the dismissal by the Court of Appeal of the defence pleaded at [8] of the Defence[1]. This is the matter addressed by Allsop P commencing at [29][2].

6. Western Australia submits that a defendant to an action for false imprisonment who acts by reason of, and pursuant to, an instrument which appears on its face to be an order of a superior court, where the defendant in good faith believes that the instrument is an order of a superior court, has an immunity from suit at common law.

10 7. The reasoning leading to this conclusion is as follows. *First,* a judge of a superior court who makes an order of the Court is immune to any action in tort in respect of, or arising from, such order. This is so whether or not the Court has jurisdiction or power to make such order, and whether such order is later determined to be void.

8. *Second,* a like immunity exists for witnesses who appear in any proceeding in which such an order is made.

9. *Third*, the existence of such immunity for judges and witnesses compels the existence and availability of a like immunity in an action for false imprisonment brought against public officers who, in good faith, act by reason of and pursuant to any such purported order.

20 10. A link between judicial immunity and immunity for others acting pursuant to a purported court order was alluded to, though not fully considered, by Allsop P[3]. Basten JA did not consider this issue directly[4].

11. Before considering the principle of judicial immunity, and its contended corollary, it is necessary to address an aspect of the decision of Levine J in *DPP v Kable* (*Kable I*)[5] and the appeal from it.

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[1] This defence is outlined by Basten JA; *Kable v New South Wales* [2012] NSWCA 243 at [119].
[2] *Kable v New South Wales* [2012] NSWCA 243.
[3] *Kable v New South Wales* [2012] NSWCA 243 at [35].
[4] *Kable v New South Wales* [2012] NSWCA 243 at [165]. Likewise, McLellan CJ at CL concluded that liability of the defendant flowed "inevitably" from the decision of this Court in *Kable v DPP* (1997) 189 CLR 51; see *Kable v New South Wales* [2012] NSWCA 243 at [177].

The decision in *Kable I*

12. It was contended on behalf of Mr Kable before Levine J[6], and was a ground of appeal before the Court of Appeal[7], that the *CP Act* was inconsistent with implications drawn from the *Constitution* and thereby invalid[8]. Invalidity was seemingly not put, either before Levine J or the Court of Appeal, as matter of incompatibility or power, and the ground upon which Mr Kable ultimately succeeded was not put until the appeal reached the High Court.

13. Levine J decided the contention as to the validity of Act[9], as did the Court of Appeal. The Supreme Court of New South Wales, exercising federal jurisdiction, had power to determine this issue of validity of the Act, and, in exercise of that power, did so. The order which Levine J made[10] did not, in terms, dismiss the challenge to the validity of the Act, but this was likely because no separate proceeding was commenced by Mr Kable seeking relief.

14. The matter went to the High Court as an appeal. As explained by Gummow J[11], before Levine J and the Court of Appeal, Mr Kable did not seek a declaration that the Act was invalid, but contended it. Before the High Court, although there is reference in the judgment of Gummow J to Mr Kable seeking a declaration that the Act was invalid[12], it would seem that the contentions as to invalidity were put as grounds of appeal, which is reflected in the order finally made by the Court[13].

15. It is instructive to consider the hypothetical that, before Levine J and the Court of Appeal, Mr Kable advanced the contention as to judicial power which succeeded in the High Court. Had he done, patently, Levine J and the Court of Appeal would have had power to consider whether the court was properly exercising judicial power. Indeed, it can only be in an exercise of judicial, as opposed to legislative and executive power, that this *could* be determined under the *Constitution.*

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[5] *DPP v Kable* (New South Wales Supreme Court, 23 February 1995; BC9504976).
[6] *DPP v Kable* (New South Wales Supreme Court, 23 February 1995; BC9504976) at 152-160.
[7] *Kable v DPP* (1995) 36 NSWLR 374 at 384.
[8] The contention is expressed by Mahoney JA, *Kable v DPP* (1995) 36 NSWLR 374 at 384.6.
[9] *DPP v Kable* (New South Wales Supreme Court, 23 February 1995; BC9504976) at 152-160.
[10] It is set out at *Kable v New South Wales* [2012] NSWCA 243 at [75].
[11] *Kable v DPP* (1997) 189 CLR 51 at 125.
[12] *Kable v DPP* (1997) 189 CLR 51 at 126 (per Gummow J).
[13] *Kable v DPP* (1997) 189 CLR 51 at 144-145.

The common law basis of the principle of judicial immunity

16. As Gaudron J observed in *Herijanto v Refugee Review Tribunal*[14]:

> The protection and immunity enjoyed by a Justice of this Court is not the subject of legislative provision. Rather, he or she has such protection and immunity as is conferred by the common law and, perhaps, such as is to be derived by implication from Ch III of the Constitution.

17. The immunity of judges of the Supreme Courts and superior Federal Courts is likewise a matter of common law. This common law immunity is, no doubt, entrenched as a necessary and essential aspect of judicial power under the *Constitution.* This is particularly so as it is courts, exercising judicial power, that, under the *Constitution,* determine the scope of judicial power.

The principle of judicial immunity

18. A recent *obiter dictum* statement by this Court of the immunity, is to be seen in the judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ in *D'Orta-Ekenaike v Victoria Legal Aid*[15]:

> The development of judicial immunity was more complex. It was bound up with the development of the law relating to excess of jurisdiction, and thus with the development of the principles governing when a judicial decision was open to collateral attack. Its history has been traced by Holdsworth. It is not necessary to examine that history in any detail, beyond noticing that the decisions of courts of record were conclusive, but those of inferior courts were open to collateral attack alleging excess of jurisdiction. Hence, while action might lie at common law for acts done in an inferior court in excess of jurisdiction, the decisions of supreme courts were final. And there was an immunity from suit for any judicial act done within jurisdiction *[citation considered below]*. What is important to notice for present purposes is not the history of development of this immunity, but that both judicial immunity and the immunity of witnesses were, and are, ultimately, although not solely, founded in considerations of the finality of judgments.

19. The reference to Sir William Holdsworth was to a paper in the JSPTL[16]. This paper was re-produced in Volume VI of *A History of English Law* pp.234-240. The

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[14] *Herijanto v Refugee Review Tribunal* [2000] HCA 16; (2000) 74 ALJR 698 at [3].
[15] *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1 at 19([40]).
[16] As will be discussed, it is of interest that Sir William Holdsworth's paper is entitled "Immunity of Judicial Acts", giving rise immediately to the question of what is a "judicial act".

citation for the proposition that "... there was an immunity from suit for any judicial act done within jurisdiction", is to *Sirros v Moore*[17] and *Rajski v Powell*[18].

20. To the observations of Sir William Holdsworth in respect of the English common law can be added that of Sadler[19], Stengel[20], and most importantly, the work of Block[21]. In addition, the historical development of the principle in American law, and in particular in federal jurisdiction, is discussed by Nagel[22], Romagnoli[23] and Feinman and Cohen[24].

21. Without traversing this history in detail, there is a consensus that, in English decisions of the Year Books period[25] and of the 16th and 17th centuries, the notion of "jurisdiction" of superior courts was relevant, though, imprecise. As Ormrod LJ observed in *Sirros v Moore*[26], this imprecision was not greatly assisted by use of the term *corum non judice* and this imprecision resulted in uncertainty as to the doctrinal basis and practical extent of the immunity[27].

22. In respect of the notion of "jurisdiction" in this context, the insight of Sir William Holdsworth is important; that in English common law from the earliest times, because a superior court determined conclusively[28] its own "jurisdiction", an error as to jurisdiction was not an error beyond jurisdiction resulting in the loss of immunity[29]. In effect, the immunity of judges of superior courts was total, even though theoretically a judge might act *corum non judice* (whatever that might mean)[30]. This is consistent with the reasoning of Lord Denning MR and Ormrod LJ

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[17] *Sirros v Moore* [1975] QB 118.
[18] *Rajski v Powell* (1987) 11 NSWLR 522.
[19] Robert Sadler "Judicial and Quasi-Judicial Immunities: A Remedy Denied" (1982) 13 MULR 508 at 510-518.
[20] Timothy Stengel "Absolute Judicial Immunity Makes Absolutely No Sense: An Argument for an Exception to Judicial Immunity" (2012)84 Temple Law Review 1071.
[21] Randolph Block "Stump v Sparkman and the History of Judicial Immunity" [1980] Duke Law Journal 879 – in particular 881-897.
[22] Robert Nagel "Judicial Immunity and Sovereignty" (1978) 6 Hastings Constitutional Law Quarterly 236.
[23] Joseph Romagnoli "What Constitutes Judicial Act for the Purposes of Judicial Immunity?" (1985) 53 Fordham Law Review 1503.
[24] Feinman and Cohen "Suing Judges: History and Theory" 31 S.C.L. Rev. 201 (1980).
[25] Sir William Holdsworth *A History of English Law* Volume VI p.236.
[26] *Sirros v Moore* [1975] QB 118 at 150.
[27] See the helpful discussion of Professor Block in "Stump v Sparkman and the History of Judicial Immunity" [1980] Duke Law Journal 879 at 894-896.
[28] Subject to modern notions of appeal.
[29] Sir William Holdsworth *A History of English Law* Volume VI p.239. See also *Sirros v Moore* [1975] QB 118 at 137-138 (Buckley LJ).
[30] See Ormrod LJ in *Sirros v Moore* [1975] QB 118 at 150.

in *Sirros v Moore*[31], where the issue was whether to extend the common law immunity to equate what was thought to be the limited immunity of judges of non-superior courts to the complete immunity of judges of superior courts.

23. Although the term "jurisdiction" is often invoked in this context[32], what Professor Block refers to as "the jurisdictional limit on judicial immunity"[33] is, it is submitted, no longer exhaustive or entirely complete.

24. Although in decisions of the United States Supreme Court, the term jurisdiction is often referred to, its imprecision in this context is evident. For instance, Justice Field speaking for the United States Supreme Court in *Randall v Brigham*[34] stated the proposition as follows:

> Now, it is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly.

25. *Randall v Brigham* dealt with the issue in the context of an order of the Superior Court of Massachusetts which, although "a court of general jurisdiction"[35], was not, in 1868, a court of unlimited jurisdiction as jurisdiction over certain matters vested exclusively in federal courts.

26. As noted above, Gleeson CJ, Gummow, Hayne and Heydon JJ in *D'Orta-Ekenaike v Victoria Legal Aid* [36] cited, as authority for the proposition that "... there was an

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[31] *Sirros v Moore* [1975] QB 118.
[32] The term is also used in United States cases dealing with the principle; see *Bradley v Fisher* 80 US 335 (1871) at 347 (Field J for the Court), stating the immunity in terms of "the exercise of their judicial functions". In other decisions the United States Supreme Court has resorted to the term "jurisdiction"; see *Pierson v Ray* 386 US 547 (1967) at 553-554 (per Warren CJ for the majority), *Stump v Sparkman* 435 US 349 (1978) at 355-357 (per White J for the Court). At p.356 in *Stump v Sparkman* White J makes the point that a decision by a judge about the Court's jurisdiction is a judicial act. See also *Forrester v White* 484 US 219 (1988) at 227-229 (O'Connor J for the Court).
[33] Randolph Block "Stump v Sparkman and the History of Judicial Immunity" [1980] Duke Law Journal 879 at 896.
[34] *Randall v Brigham* 74 US 523 (1868) at 535-536.
[35] *Randall v Brigham* 74 US 523 (1868) at 535.
[36] *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1 at 19 ([40]).

immunity from suit for any judicial act done within jurisdiction"[37], *Sirros v Moore*[38] and *Rajski v Powell*[39]. The reference to *Sirros v Moore*[40] to support this proposition is not conclusive. It is evident enough that for Lord Denning MR[41] and Ormrod LJ[42], the immunity for judges of superior courts was total. Buckley LJ's judgment was different[43]. Kirby P's judgment in *Rajski v Powell* is, with respect, unclear as to the precise meaning which his Honour accorded to the term "jurisdiction" in this context[44] while Priestly JA (with whom Hope JA agreed) expressly refers to the imprecision of the term in this context[45].

27. The contemporary salience of the insight of Sir William Holdsworth - that because a superior court determines conclusively it own "jurisdiction", an error as to jurisdiction was not an error outside of its jurisdiction - is irresistible. This is particularly so in Australia where questions of the jurisdiction of superior courts do arise, and where they can only be determined by the exercise of judicial power.

28. If it is the case that there are courts in Australia the members of which do not enjoy the immunity[46], what characterises a court, the judges of which enjoy the immunity, is the power to determine, by final judgment, that courts' own jurisdiction[47]. This is certainly the case with the Supreme Court of New South Wales.

An observation arising from *Kable I*

29. As noted above, it is instructive to consider the scope of judicial immunity on an assumption that before Levine J, the contention as to judicial power which succeeded in the High Court, was put. Clearly, Levine J and the Court of Appeal had power to consider whether they were properly exercising judicial power. Implicitly, this decision was made.

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[37] It is probably not relevant that their Honours do not state that "... there was [not] an immunity from suit for any judicial act done [beyond] jurisdiction".
[38] *Sirros v Moore* [1975] QB 118.
[39] *Rajski v Powell* (1987) 11 NSWLR 522.
[40] *Sirros v Moore* [1975] QB 118.
[41] *Sirros v Moore* [1975] QB 118 at 136.
[42] *Sirros v Moore* [1975] QB 118 at 150.
[43] See *Sirros v Moore* [1975] QB 118 at 137, 139.
[44] *Rajski v Powell* (1987) 11 NSWLR 522, in particular at 534-535.
[45] *Rajski v Powell* (1987) 11 NSWLR 522, in particular at 539.
[46] This was the point determined for English law in *Sirros v Moore* [1975] QB 118; whether the immunity extended to courts of more limited jurisdiction than the High Court.
[47] In the analysis of Sir William Holdsworth, this was a superior court or record, contrasted with a court (or tribunal) which if it exceeded its jurisdiction would be subject to prerogative review as opposed to appeal.

30. On this understanding, there is no sensible basis for a common law immunity to apply where a court wrongly determines its own jurisdiction, but not where it wrongly finds that it is exercising judicial power. The invalid exercise of power (whether void or not) arises from the erroneous decision that power exists. Even though making an erroneous decision as to power, having made it, the judge is required to go on and exercise the power, even if invalidly.

Whether there is a rationale for limiting the principle of judicial immunity to all errors except errors as to the limits of judicial power

31. Clearly judicial immunity does not apply to all acts of judges. The decision of the United States Supreme Court that considered the immunity in the context of the dismissal by a judge of a court employee[48] illustrates this uncontroversially. Likewise, a judge exercising executive power *persona designata* would not have immunity, at common law[49]. The difference between these circumstances and this matter is that, here, the Court purported to exercise judicial power. The order made by Levine J[50] was in a document headed "In the Supreme Court of New South Wales, Sydney Registry, Common Law Division" and was expressed as an order of the Supreme Court. All people reading it would have understood it to be an order of the Supreme Court acting as a court. Of course the form of expression of an "order", or the formatting of a document, does not convert an exercise of executive power into an exercise of judicial power, but it can, and here does, make plain that the exercise of power was a purported exercise of judicial power.

32. Whether judicial immunity extends to an erroneous purported exercise of judicial power is best considered by having regard to the "policy considerations" identified by Allsop P[51]. His Honour does not approach the question by considering judicial immunity, but in respect of a postulated immunity of a gaoler[52]:

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[48] *Forrester v White* 484 US 219 (1988).

[49] See *Rajski v Powell* (1987) 11 NSWLR 522, in particular at 533 (per Kirby P). This is also the proper understanding of references in *Sirros v Moore* [1975] QB 118 to notions such as "acting as a judge" (*Sirros v Moore* [1975] QB 118 at 135 (Lord Denning MR)), "doing a judicial act" (*Sirros v Moore* [1975] QB 118 at 135 (Lord Denning MR)), "acting judicially" (*Sirros v Moore* [1975] QB 118 at 135 (Lord Denning MR)), "performing a judicial function" (*Sirros v Moore* [1975] QB 118 at 139 (Buckley LJ)), acts done "in the exercise of judicial office" (*Anderson v Gorrie* [1895] 1 QB 668 at 671 (Lord Esher MR)) and "acting in a judicial capacity" (*Sirros v Moore* [1975] QB 118 at 148 (Ormond LJ)).

[50] Re-produced at *Kable v New South Wales* [2012] NSWCA 243 at [75].

[51] *Kable v New South Wales* [2012] NSWCA 243 at [58]-[63].

[52] *Kable v New South Wales* [2012] NSWCA 243 at [57].

> As an order arising from the purported exercise of invalid executive power antithetical to the judicial process and undermining of the Court's institutional place in the administration of justice under the Constitution, subject to one matter, there appears no reason, sourced in the constitutional considerations that led to invalidity, for extending protection at common law to a gaoler acting on the order in good faith, in circumstances where statutory protection exists[53]. That one matter is an underlying policy consideration. The policy would rest on stability and confidence in the judicial system and in the orders issued by courts. It might be thought that, even in the circumstances attending the decision in *Kable* and the "extraordinary" legislation, the principle (in so far as it exists) should be extended to orders that were not judicial acts and were not the product of judicial process but of process that was antithetical to judicial process and judicial power, in order that confidence in orders issued by the Supreme Court not be undermined.[54]

33. To this "policy consideration" in respect of a gaoler or police officer would be added, in respect of judicial immunity, the need to avoid intimidating and harassing litigation against judicial officers.

34. Allsop P considered this identified policy consideration as being outweighed, ultimately, by the following[55]:

> A refusal to extend the assumed common law principle may be seen as a vindication of a constitutional boundary or guaranteed right. Here, the vice of the *CP Act* was described by the majority of the High Court in uncompromising terms. The Act threatened basal concepts of governmental and constitutional organisation, in particular, the confidence in the judicial branch of government and the protection of the public under the rule of law. To put the matter thus reveals the vice of the statute in co-opting the Court for purposes inimical to its structure and integrity and to its constitutional function.

35. His Honour's reasoning can be distilled into the contention that because the "vice of the *CP Act*" was so egregious, this outweighed the consideration earlier identified as to the public policy of promoting confidence in the judicial system and in the orders issued by courts. His Honour appears to introduce a qualitative element; it is only where the "vice" of conferral of incompatible executive power is particularly

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[53] Consideration of this matter ought not to be obscured by the existence of possible general statutory defences or immunities. As the decision in *Kable v DPP* (1997) 189 CLR 51 exemplifies, statutory protections often go along with the Act declared to be invalid; see *Kable v DPP* (1997) 189 CLR 51 at 144 (per Gummow J) in respect of s.28 of the Act.

[54] *Kable v New South Wales* [2012] NSWCA 243 at [58].

[55] *Kable v New South Wales* [2012] NSWCA 243 at [60].

egregious that the immunity does not arise; at least for gaolers (and presumably police officers).

36. Expressed in the context of judicial immunity, his Honour's reasoning would result in uncertainty. The judicial immunity would exist except where the exercise of incompatible executive power was not sufficiently egregious; that is where it did not "threaten basal concepts of governmental and constitutional organisation, in particular, the confidence in the judicial branch of government and the protection of the public under the rule of law". That reasonable people can sensibly disagree on this is exemplified by the fact that in *Kable I* two justices of this court dissented.

10 **Conclusion as to judicial immunity**

37. It is contended that the common law of Australia is, that judges of superior courts, in determining the jurisdiction of the court in which they sit, enjoy an immunity from suit in tort for the consequences of error. Judges of superior courts are required, as an incident of judicial power, to determine whether in the proceeding before them they are exercising judicial power or power incompatible with it.

38. Having regard to these two matters, it follows that the immunity extends to the erroneous exercise of judicial power.[56]

The relevance of the "voidness" of an incorrect exercise of judicial power

39. Gaudron and Gummow JJ and Hayne J in *Minister for Immigration and*
20 *Multicultural Affairs v Bhardwaj*, observed that the ascription of terms such as "invalid", "void", "voidable" and "nullity" invariably obscures rather than clarifies analysis of the consequences of administrative error[57]. This obscurity has also been

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[56] It is not proposed here to address some difficult issues that would obviously arise as to causation and the like. In *Ruddock v Taylor* [2005] HCA 48; (2005) 222 CLR 612 at 642-644 ([112]-[115]) McHugh J, though dissenting in the result, considered the liability of a Minister for false imprisonment following imprisonment as a result to an invalid administrative deportation order under the *Migration Act*. His Honour included, in the class of defendants, the Minister whose erroneous decision enlivened the subsequent steps resulting in imprisonment. His Honour described the class of defendants to include those who took an "active [step] in promoting and causing the imprisonment" ([112]). There can be little doubt, in the present case, that if judicial immunity were not available, and but for limitation, a judge who made an order under the Act would have been a person who took an "active [step] in promoting and causing [Mr Kable's] imprisonment" under the Act.

[57] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 612-613 ([45]-[46]) per Gaudron and Gummow JJ, at 643 ([144]) per Hayne J. See also *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 369-370 ([10]) per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; *Swansson v R* (2007) 69 NSWLR 406 at 415 ([60]-[69]) per Spigelman CJ and *Mandurah Enterprises Pty*

recognised by the Court of Appeal in New Zealand, by making reference, as did Hayne J in *Bhardwaj*, to the seminal work of Sir William Wade[58]. These observations, in respect of administrative error, apply equally to consideration of the consequences of a court acting beyond power, by impermissibly exercising executive power.

40. It would be erroneous to reason that, because an "order" made by a court beyond power is void, judicial immunity is, *ipso facto,* unavailable. The common law is replete with examples of words having different meanings and consequences in different contexts[59]. This is particularly so in respect of common law notions which are underlain, as is judicial immunity, by considerations of public policy.

41. The meaning of "voidness" in this context is avoided, if the immunity, in the terms contended, is found to exist at common law.

The consequence of the postulated test for judicial immunity upon the immunity of others

42. As contended above, the common law doctrine of judicial immunity would operate (and at all times would have operated) in this matter in response to any action brought.

43. If this is so, it would be a perverse outcome if public officers, such as police officers and prison authorities, who acted in good faith to execute the order, even though such order was made without power and even if it is void, were not likewise immune. In addition to the policy consideration identified by Allsop P, that extending the immunity to public officers who execute the order would enhance

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Ltd v Western Australian Planning Commission (2010) 240 CLR 409 at 429 ([61]) per Hayne J. See generally, Hutley "The Cult of Nullification in English Law" (1978) 52 ALJ 8. Similar type issues occur in cases involving civil claims arising from unlawful detention after administratively erroneous surrender; *Ruddock v Taylor* [2005] HCA 48; (2005) 222 CLR 612. Similar again are the consequences of various emanations of "illegality"; most recently see *Equuscorp Pty Ltd v Haxton* [2012] HCA 7.

[58] *Reid v Rowley* [1977] 2 NZLR 472 at 478; Wade, "Unlawful Administrative Action: Void or Voidable?" (1967) 83 LQR 499 (Part 1), and (1968) 84 LQR 95 (Part 2). In festschrift (respectively) for Sir William Wade and Professor Campbell (whose paper "Unconstitutionality and its Consequences" in Lindell (Editor) *Future Direction in Australian Constitutional Law* (1994) at 90 is important in this respect) these themes were re-visited. In respect of Sir William Wade, see Forsyth, "'The Metaphysic of Nullity' – Invalidity, Conceptual Reasoning and the Rule of Law" in Forsyth and Hare (Editors) *The Golden Metwand and the Crooked Cord: Essays in Public Law in Honour of Sir William Wade* (1998) at 141; in respect of Professor Campbell, see Aronson, "Nullity" in Groves (Editor) *Law and Government in Australia* (2005) at 139.

[59] Perhaps the best known is Professor Walter Wheeler Cook's observations as to the different meanings of "domicile" in *the Logical and Legal Bases of the Conflict of Laws* (1942) chapter VII.

"stability and confidence in the judicial system and in the orders issued by courts"[60], it would be manifestly unjust for public officers acting in good faith to execute orders of court, regular on their face, to face liability in tort, where the judge who had erroneously determined that he/she has power to make such order, is immune.

44. It would be even more perverse if, in addition to the immunity which (it is contended) applies to judicial officers in this circumstance witnesses[61] who appeared at a hearing under the Act were also immune, yet public officers acting in good faith to execute orders of court were not.

45. In *D'Orta-Ekenaike v Victoria Legal Aid*[62] the consideration found to underlay both judicial and witness immunity was the finality of judgments. This consideration applies less starkly where a court has been found not to have been exercising judicial power. In *Giannarelli v Wraith*[63] Mason CJ cited an additional consideration:

> The need for that protection arises from "the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty", to repeat the words of Fry L.J. in Munster, at p 607.

46. Pursuant to s.17 of the *CP Act,* the court could require medical practitioners to prepare reports, receive them in evidence and order that the person be available for cross examination at a hearing. In this sense, giving evidence was a mere discharge of duty of a witness required to attend.

47. An analogy is the defence of absolute privilege to an action for libel or slander brought against a witness in quasi-judicial proceedings. Although the identification of bodies the proceedings of which attract the privilege is evaluative[64], here the

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[60] *Kable v New South Wales* [2012] NSWCA 243 at [58].

[61] It is to be noted that Mr Kable brought proceedings against an expert witness who gave evidence before Levine J. The action was summarily dismissed, *inter alia,* on the basis of the existence of witness immunity; *Kable v Dr Westmore Matter No 20033/97* [1997] NSWSC 653.

[62] *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1 at 19-20 ([40]-[41]).

[63] *Giannarelli v Wraith* [1988] HCA 52; (1988) 165 CLR 543 at 558.

[64] See *Mann v O'Neill* (1997) 191 CLR 204 at 212-213 (Brennan CJ, Dawson, Toohey and Gaudron JJ), *Trapp v Mackie* [1979] 1 WLR 377 at 379 (Lord Diplock).

body was the Supreme Court of New South Wales and inevitably the privilege would apply, at common law.[65]

48. It would be impossible to contend that such a witness, compelled to have appeared before Levine J, and discharging this duty, would not be immune.

PART VI: LENGTH OF ORAL ARGUMENT

49. It is estimated that the oral argument for the Attorney General for Western Australia will take 10 minutes.

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Dated: 31 January 2013

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[65] It is interesting to note that Professor Fleming in the last edition of his text which he authored, expressly noted that "constitutional decisions" as to the limits of judicial power were not "helpful" in this context; meaning that characterisation of a body as one exercising judicial power or non-judicial power was of little or no assistance; see Fleming *The Law of Torts* (Ninth Edition) (1998) p.617, fn.327.