HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

PRESIDENT OF THE LEGISLATIVE COUNCIL OF NEW SOUTH WALES
Appellant

and

JAMES CULLEN
First Respondent

ATTORNEY GENERAL FOR NEW SOUTH WALES
Second Respondent

SPEAKER OF THE LEGISLATIVE ASSEMBLY OF NEW SOUTH WALES
Third Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. Are ss 7 to 9 of the *Parliamentary Evidence Act 1901* (NSW) (**PE Act**) incompatible with the institutional integrity of the Supreme Court of New South Wales and therefore constitutionally invalid because they require that Court, at the effective direction of a parliamentary officer, to issue a warrant authorising the arrest of a witness and thereafter their indefinite detention by that parliamentary officer?

PART III: NOTICE OF CONSTITUTIONAL MATTER

3. Notice under s 78B of the *Judiciary Act 1903* (Cth) has been filed and served: **CAB 71**. A further notice was filed and served by the President on 6 May 2026. No further notice is required.

PART IV: STATEMENT OF FACTS

4. Mr Cullen agrees with the summary of the relevant facts at **AS [6]-[7]**. Mr Cullen refers below to additional facts set out in the annexures to the agreed statement of facts from the Court below, which are contained in a Book of Further Material (**BFM**).

PART V: ARGUMENT

The Court of Appeal's decision

5. As the President acknowledges (**AS [16.2]**), it was common ground in the Court of Appeal that "it was no part of the Court's role to make any inquiry into the 'validity' of the summons or the certificate, or the facts underpinning the issue of the summons or the certificate" (see also **CAB 11-12 [5]**). The Court of Appeal was thus correct to observe that the function conferred upon the Supreme Court "is not subject to any meaningful evaluative determination by the judge" (**CAB 13 [8]**). The Supreme Court is a "mere functionary" that is obliged to issue a warrant upon presentation of a certificate (**CAB 34 [66]**).

6. The immediate consequence of a warrant is that the witness is to be detained to be brought before a House or a committee to give evidence. The warrant has the further consequence that the witness has to "obey all further orders under the hand of the [President] for his or her remand or for his or her final discharge from custody" (s 9; see also the form of the warrant in Sch 3 to the PE Act). The authority of the Court is lent "to what in substance is the original and subsequent decisions of the President for the indefinite detention of a person" (**CAB 13 [8]**).

7. Sections 7-9 establish a political process for securing the attendance of a witness who has refused to obey a summons "without just cause or reasonable excuse". It is a political process in the sense that political actors decide who is to be detained and for how long and, further, because breach of any condition on the exercise of power to issue a summons or a certificate, or of any condition on the continuing detention of the witness, has at most political consequences: there is no consequence enforceable by a court or even cognisable by the Court at the point of issuing the warrant. Given the avowedly political process that the parties agree is established by ss 7-9 of the PE Act, the question at the centre of this case is: why is a Judge involved ***at all*** in that process?

8. The Court of Appeal correctly held that the involvement of Judges in this scheme violated the *Kable* doctrine. The legal and practical effect of the Judge's involvement was to conscript the Court's reputation for impartiality and imbue a political process with the imprimatur of the Court

of which the Judge is a member. The lack of independent decision-making is "antithetical to [the] Court's constitutionally-mandated role as an independent and impartial body, and in a substantial way" (**CAB 26-27 [42]**). The legislation "exploit[s] the reputation for independence … without the actuality of independence" (**CAB 34 [67]**). That is the very sapping of the Court's institutional integrity to which the *Kable* doctrine responds. The Court of Appeal was correct to observe that "this is not a case at the margins", that the legislation it held invalid "well and truly crosses the line", and that the case was *a fortiori* the decision in *Kable* itself (**CAB 13-14 [8], [9]**).

9. The President's appeal does not dispute the Court of Appeal's characterisation of the role of the Supreme Court in issuing a warrant or the consequences of the issuing of a warrant. Rather, the President submits that, in analysing the features of the scheme summarised at [5]-[6] above, the Court of Appeal "failed to account for various matters of history and authority" (**AS [12]**). For the reasons developed below, none of the matters relied upon by the President casts doubt on the Court of Appeal's judgment.

Applicable constitutional principles

10. ***Enlisting courts to supplement or effectuate political decision is impermissible (Totani)***: Legislation may contravene the *Kable* principle if it "enlists" the relevant court in the performance of a function by the Executive. In *South Australia v Totani* (2010) 242 CLR 1, the Attorney-General of South Australia had power to make a declaration in relation to an organisation if the Attorney-General was satisfied: (a) that members of the organisation associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and (b) that the organisation represented a risk to public safety and order in the State. The legislation went on to provide that "[t]he [Magistrates] Court must, on application by the Commissioner [of Police], make a control order against a person (the 'defendant') if the Court is satisfied that the defendant is a member of a declared organisation".

11. A majority of this Court held that the function conferred on the Magistrates Court was invalid. French CJ said that the law "require[d] the Magistrates Court to make a decision largely pre-ordained by an executive declaration for which no reasons need be given, the merits of which cannot be questioned in that Court and which is based on executive determinations of criminal conduct committed by persons who may not be before the Court" (at [4]). This compromised the decisional independence of the court because it was "a substantial recruitment of the judicial function … to an essentially executive process", which "gives the neutral colour of a judicial

decision to what will be, for the most part in most cases, the result of executive action" (at [82]). This was so even though the executive declaration could be collaterally challenged or judicially reviewed because of the practical limits on such challenges including absence of reasons, materials before the decision maker, and other evidentiary constraints (at [27]).

12. The other Justices in the majority made observations to similar effect. Gummow J said that the legislation "supplements the exercise by the Attorney-General of the politically accountable function conferred by Pt 2 with respect to the declaration of organisations … [b]ut that supplementation involves the conscription of the Magistrates Court to effectuate that political function" (at [142]). Hayne J said that "[i]t is not the business of the courts, acting at the behest of the executive, to create such norms of conduct without inquiring about what the subject of that norm has done, or may do in the future", and that "[t]o be required to do so is repugnant to the institutional integrity of the courts" (at [226]). His Honour also referred to the "forensic difficulties" of seeking judicial review of a declaration, which "would be very large" (at [195]).

13. Crennan and Bell JJ acknowledged that a State court might validly be "required to act on the basis of a factum determined by the Executive" but that *Kable* could be transgressed if the court's adjudicative powers were "confined so as to merely implement an executive or legislative determination" (at [420]). The tipping point is identified by evaluating whether the legislation "draws a court into the implementation of government policy, by confining the court's adjudicative process so that the court is directed or required to implement legislative or executive determinations without following ordinary judicial processes" (at [428]; see also [434]-[436]). Their Honours also agreed with Hayne J in relation to the availability of judicial review (at [415]). Finally, Kiefel J said that the court's order "gives the appearance of its participation in the pursuit of the objects of the Act", but that properly understood "the making of the order serves to disguise an unstated premise" (at [480]).

14. The decision in *Totani* was considered in *Condon v Pompano Pty Ltd* (2013) 252 CLR 38. Hayne, Crennan, Kiefel and Bell JJ said that independence and impartiality convey a sense in which State courts "must be and remain free from external influence" and "cannot be required to act at the dictation of the Executive", footnoting *Totani* (at [125]). This statement makes clear that the constitutional principle for which *Totani* stands is not exhausted by its particular facts. Their Honours explained (at [132]-[133]) that, in *Totani*, the impermissible manner of enlistment arose from the Executive having the authority to decide whether and why an organisation should be declared; the Court determining only whether a person was a member of the declared organisation.

That is, there was a mismatch between the identity of the real decision-maker, the executive, and the perfunctory role given to the Court in consummating the executive decision.

15. ***Inscrutable decision-making is impermissible (Wainohu)***: This Court has also held legislation invalid where the Judge is utilised to support inscrutable decision-making. In *Wainohu v New South Wales* (2011) 243 CLR 181, the legislation created a two-stage process. *First*, Pt 2 of the Act conferred on an "eligible judge" of the Supreme Court power to make a "declaration" in respect of an organisation. *Second*, if that declaration was made, Pt 3 of the Act conferred power on the Supreme Court to make control orders against individual members of the organisation.

16. The function conferred on "eligible judges" by Pt 2 of the Act was conferred on judges acting as persona designata, rather than the Supreme Court as a whole. However, the Court confirmed that the test was relevantly the same as the one applied in *Totani*. French CJ and Kiefel J held that "a State legislature [cannot] confer upon judges of a State court administrative functions which substantially impair its essential and defining characteristics of a court" (at [7]). To similar effect, Gummow, Hayne, Crennan and Bell JJ said that the "incompatibility" tests as developed in the *Kable* context and the persona designata context "share a common foundation in constitutional principle", which "has as its touchstone protection against legislative or executive intrusion upon the institutional integrity of the courts, whether federal or State" (at [105]).

17. A majority of the Court held that the function conferred by Pt 2 was invalid. The essential problem with the legislation was that eligible judges were not required to provide any grounds or reasons for the declaration or decision. This was said by Gummow, Hayne, Crennan and Bell JJ to "utilise confidence in impartial, reasoned and public decision-making of eligible Judges in the daily performance of their offices as members of the Supreme Court to support inscrutable decision-making" (at [109]; see also at [68] (French CJ and Kiefel J)). Again, this was so despite opportunity for collateral attack on or judicial review of the declaration, which the Court perceived to be "more difficult" because of the opacity of the process (at [109]).

18. ***Available alternatives are relevant to the constitutional analysis***: Their Honours also said that the assessment of compatibility "may be assisted by regard to what other course was available to the legislature", which in that case included casting the relevant provisions "in a form which … required as well as permitted the provision of grounds or reasons" (at [108]). The relevance of alternative approaches in the *Kable* analysis was accepted by the Court of Appeal in the present case (**CAB 27 [43]**).

19. ***Kable is engaged by conscription to legislative, not only executive, functions***: As the Court of Appeal accepted in the present case (**CAB 24 [37]**), the enlistment of a court to a legislative function can contravene *Kable*. There is no principled distinction between an "intrusion" that is legislative and one that is executive. The integrity of courts reflects "a great cleavage" between "legislative and executive power on the one hand and judicial power on the other", with the danger of usurpation being perceived from both branches: *Wilson* (1996) 189 CLR 1 at 11.[1] The High Court has, on many occasions, referred to *Kable* as protecting the judiciary from influence either from both the executive and legislative branches or from the "political branches".[2]

20. The difficulty distinguishing executive and legislative intrusions is amplified here. The underlying non-judicial object and function in which the Court is involved is the detention and compulsory interrogation of a subject. The institutional integrity of the Court is no less capable of being compromised because the detention and interrogation is to be carried out by a committee of a House rather than an executive officer. Describing the non-judicial function as "legislative" rather than "executive" is irrelevant to the constitutional norm, which focuses on the court's qualities. The animating concern of the *Kable* principle is the institutional integrity of a court, a fundamental aspect of which is decisional independence. Decisional independence may be compromised not only by external control or influence by the Executive but also by others. There is no reason why external control or influence over a court, wielded by Parliamentary officers exercising powers in aid of the management of the Houses and their proceedings, would not be capable of undermining the decisional independence and therefore institutional integrity of the court. Indeed, the processes of the Houses are (and may properly be) intensely partisan and political, perhaps even more so than many manifestations of the executive branch.

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1 Quoting Harrison Moore, *Commonwealth of Australia* (2nd ed) p 101, also quoted in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 117 (Evatt J); *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 546 (the Board); *Grollo v Palmer* (1995) 184 CLR 348 at 393 (Gummow J).

2 *Grollo v Palmer* (1995) 184 CLR 348 at 366 (Brennan CJ, Deane, Dawson and Toohey JJ), 377 (McHugh J), 392 (Gummow J); *Kable v DPP (NSW)* (1996) 189 CLR 51 at 133 (Gummow J); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 9 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [91] (Gummow J); *Gypsy Jokers Motorcycle Club v Commissioner of Police* (2008) 234 CLR 532 at [51] (Kirby J), [168] (Crennan J); *Lane v Morrison* (2009) 239 CLR 230 at [11] (French CJ and Gummow J); *Totani* (2010) 242 CLR 1 at [62] (French CJ), [420] (Gummow and Bell JJ), [479] (Kiefel J); *Kuczborski v Queensland* (2014) 254 CLR 51 at [105], [110], [117] (Hayne J), [228]-[229] (Crennan, Kiefel, Gageler and Keane JJ); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [145] (Gageler J); *Garlett v Western Australia* (2022) 277 CLR 1 at [57] (Kiefel CJ, Keane and Steward JJ), [174] (Gordon J).

Principles applied: sections 7-9 of the PE Act impair institutional integrity of Supreme Court

21. The function conferred by s 8 of the PE Act substantially impairs the institutional integrity of the Supreme Court of New South Wales and is therefore invalid. The role performed by the Court is akin to that performed by the Magistrates Court under the legislation invalidated in *Totani*. Indeed, the President makes no real attempt to distinguish *Totani*, other than to rely on history, as well as Article 9 being said to provide a "principled explanation" for the role performed by the Supreme Court (see **AS [47]**). The similarity is evident:

(a) The Speaker or the President plays the pre-eminent role in the process that leads to the apprehension of a person. They decide the person has failed to attend and whether there was "just cause or reasonable excuse" for that non-attendance, and they decide whether to issue a certificate certifying those facts and thereby compel their attendance.

(b) Once the decision is made to issue a certificate, consistent with the discussion above, the issue of the warrant is a foregone conclusion. The Judge has no discretion whether or not a warrant should issue. The Judge makes no independent decision whether any particular criteria are satisfied, other than that there is a "certificate". As to this, the President strains to identify three matters that must be "determined" by the Court: **AS [16.1]**. They are all matters that are entirely artefacts of the legislative scheme to interpose the Judge as the issuer of the warrant and not real criteria. It is no more than a question of whether the relevant dictation has been given. As the Court of Appeal recognised, "[t]he remote possibility that there may be a real issue as to forgery, or the affixing of a seal, or as to who holds office as President, verges upon a theoretical construct devised for the sake of argument" (**CAB 34 [66]**).

(c) The basis for the certificate cannot be reviewed by the Court. The certificate is not required to set out reasons for concluding that the person had no just or reasonable excuse for not attending. The language of "certify", and the form of certificate in Sch 2 to the PE Act, tend to support a construction that the facts are for the certifier and not the Court to determine: see *Provide Nominees Pty Ltd v Australian Securities and Investments Commission* (2024) 301 FCR 569 at [43]-[44]; *Gould & Birbeck & Bacon v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 at 531-532. So too, the absence of express modification or abrogation of parliamentary privilege favours a construction denying the Court power to examine the peculiar facts on which a warrant is predicated: *BDR21 v Australian Broadcasting Corporation* (2023) 298 FCR 1 at [80].

(d) The subject of the warrant is not heard on, or even notified of, the application.

(e) The consequence of the Judge's decision is that the person is liable to be detained by any of the persons to whom the warrant is directed, for the purpose of bringing the person before the Assembly, Council or a Committee. The persons to whom the warrant is directed are also required, without any further review by the Court, to obey any further orders of the President or Speaker. The person will be required to answer any "lawful question" before they will be once again at liberty.

(f) Significantly, the execution of the warrant does not involve bringing the person before the issuing Court and there is no apparent means for that Court to exercise continuing control over the apprehension and detention of the person. That control is arrogated by the Assembly, Council or Committee as the case may be.

(g) Detention might continue for so long as the Assembly, Council or Committee maintains its purpose of requiring the person to answer lawful questions and there is no apparent limit enforceable by the Court as to the duration of that purpose, nor to adjudicate whether the purpose is in fact held.

22. In the circumstances set out above, the PE Act is properly characterised as seeking "to cloak … in the neutral colors of judicial action"[3] the work of the Legislature or its constituent bodies: *Mistretta v United States*, 488 US 361 at 407 (1989). In this regard, it is significant that the Legislature and its constituent bodies are inherently political bodies. Their pursuit of law-making and oversight functions is inextricable from their political character as a whole, and from the particular partisan interests of the politicians who comprise them from time to time. Indeed, the summoning of witnesses by the Houses or Committees of Parliament can sometimes be pursued legitimately for political purposes. Whatever may have been the perceived understanding of the judicial role in 1901, today the Court cannot be conscripted to the political function in that way. The Court cannot, consistent with its institutional integrity, be required to issue arrest warrants in this scheme. *Kable* requires that the legitimacy of the judicial branch of government not be

[3] Quoted on many occasions by this Court: see, eg, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 9 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) ("The passages cited from *Mistretta* are equally relevant to the interpretation of Ch III of the Constitution in this country.")

"undermined by the political branches of government": *Kuczborski v Queensland* (2014) 254 CLR 51 at [228] (Crennan, Kiefel, Gageler and Keane JJ).

23. The fact that the issuing of a warrant results in a deprivation of liberty is also significant. In *Totani*, French CJ said that the maintenance of judicial independence is "never more important than when decisions affecting personal liberty and liability to criminal penalties are to be made" (at [1]). In addition, Crennan and Bell JJ quoted Gleeson CJ in *Al-Kateb v Godwin* (2004) 219 CLR 562, where his Honour said "personal liberty is the most basic" human right or freedom (at [423]). In the subsequent decision of *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, Gageler J said that the provision held invalid in *Totani* "might be said to have given too little latitude for judgment in constraining personal liberty" (at [179]).

24. In this regard, not only does the Judge have no "latitude for judgment" whether to issue the warrant upon the certificate, the Judge has no real role in the ongoing control and supervision of the person's detention once apprehended. That subsequent circumstance makes the court's prior involvement in instigating the detention all the more repugnant. Parliamentary privilege means that the Court would be required to order detention in circumstances where there could be no lawful enquiry by the Court into whether the detention was only for the purpose of bringing the person before the relevant House or Committee, or only for the minimum amount of time required to achieve that purpose. This is admitted by the President, who relies on the ***political*** accountability of the President or Speaker to the relevant House for any non-compliance with the purposive limit on the length of the detention (**AS [49]**). That political accountability is masked by the conscription of the politically unaccountable Court. Even if a court could exercise ultimate superintendence over whether the detention continued to be supported by a lawful purpose, the purpose identified by the PE Act is a very broad and politically inflected one.

25. The President emphasises that neither he nor the Speaker "would ***ordinarily*** be involved in the decision to issue a summons", and can "be expected to exercise their own independent judgment in deciding whether to provide a certificate" (**AS [15.3]**). That submission admits the obvious possibility that the President or Speaker may ***not*** be divorced from or uninvolved in the partisan politics. Indeed, that possibility is shown by this very case. The Hon Rod Roberts MLC was a member of the majority of the Committee that, on 30 September 2025, decided in a partisan 4:3 decision to issue a summons if Mr Cullen failed to accept an invitation to appear (**BFM 4-5)**. Mr Roberts was then the Acting President of the Council at the time that a certificate might have

issued. He is the officer who gave the assurance not to seek a warrant pending resolution of this proceeding (**BFM 8**).

26. In any event, nothing in the PE Act allows a Judge to discern that those officers have stepped outside the supposedly "***ordinary***" course, nor to refuse a warrant if they did. The President and the Speaker are still political actors. They can be removed from their positions by a mere vote of the House: ss 22G(3)(b) and 31(2) of the *Constitution Act 1902* (NSW). Whether or not they might be expected to "exercise their own independent judgment in deciding whether to provide a certificate" is beside the point and not a sufficient foundation on which to sanction the conscription of the Judge to the process.

27. ***The decision in Emmerson:*** The scheme held valid in *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 is readily distinguishable (contra **AS [46.1]-[46.2]**). The legislation in that case involved an "application" to the Court, a "hearing of that application", and empowered the court to ***determine*** whether specified criteria were fulfilled. The making of a declaration involved an exercise of ***judicial power*** by the Supreme Court (at [65]). The majority of the High Court observed that the Supreme Court could only make a declaration "on receipt of evidence sufficient to satisfy the civil standard of proof in respect of a person's requisite number of past convictions", and the declaration would be made in open court and in circumstances where the affected person would be afforded procedural fairness. Their Honours then held that, while the Supreme Court's task "may readily be performed, because of the ease of proof of the criteria", it was still properly characterised as judicial.

28. Under the legislation considered in *Emmerson*, Parliament had legislated the consequences attaching to the outcome of a judicial process, but permitted the Court to undertake such a process. The PE Act is fundamentally different:

(a) The issuing of a warrant is an administrative, rather than a judicial function: see **CAB 14 [9]**. Section 8 of the PE Act is relevantly indistinguishable from the legislation considered in *Love v Attorney General (NSW)* (1990) 169 CLR 307, in which the High Court held that a power to issue a warrant authorising the use of a listening device, despite being conferred on the Supreme Court, was "essentially administrative in nature" (at 321), "closely resembl[ing]" functions traditionally classified as non-judicial (at 320) and lacking the character of "an adjudication to determine the rights of parties" (at 321). Similar warrant-issuing powers under Commonwealth law are recognised to be non-judicial, depending for their efficacy on the persona designata doctrine.

(b) There are no criteria "determined" by the Court, even easily.

(c) There is no application of any standard of proof by the Judge, nor even formation of any particular subjective state of mind – there is just a certificate in the form of Sch 2 or something to like effect.

29. To describe the task conferred on the Court as "minimal" was apt in the case of *Emmerson*; it is not apt in the present case. It is one thing to require a judge to make a particular order upon proof of factual preconditions, even minimal ones; it is quite another to require a judge to grant an official the legal authority to detain a citizen, simply because the official made an application in a prescribed form.

30. The PE Act is also readily distinguishable from the registration of a judgment under s 6 of the *Foreign Judgments Act 1991* (Cth), relied upon at **AS [46.1]**. Whether or not the role of the court is properly characterised as "very limited", it is plainly greater than what is required of the court under the PE Act. In particular, s 6(3) provides that the court is to order the judgment to be registered "[s]ubject to this Act and to proof of the matters prescribed by the applicable Rules of Court". Further, s 6(6) provides that a judgment is not to be registered if at the date of the application "it has been wholly satisfied" or "it could not be enforced in the country of the original court". This function is very far from the "rubber stamping" function under the PE Act.

31. ***Availability of alternatives:*** As noted above, the plurality in *Wainohu* had regard to what other course was available to the legislature. As explained by the President (**AS [24]**), the PE Act was preceded by the *Parliamentary Evidence Act 1881* (NSW), which was the response in New South Wales to the Privy Council's decision in *Fenton v Hampton* (1858) 14 ER 727. The response in Tasmania to that decision was the *Parliamentary Privilege Act 1858* (Tas). Under that Act, the President or Speaker has power to issue a warrant for the arrest of any person who is adjudged guilty of contempt upon resolution of the relevant House. There was also another other precedent in New South Wales where the Chairman or Vice-Chairman of a parliamentary committee had power to issue a warrant: see *Public Works Act 1888* (NSW), s 10(f) (**CAB 27 [44]**).

32. The Court correctly relied upon the existence of these alternative models in support of a finding of invalidity (**CAB 27 [44]**). These precedents, or some other variant, was available to the New South Wales Parliament and would not have impaired the institutional integrity of the Supreme Court as the PE Act does. The precedent would have in its favour an alignment of power and responsibility: if parliamentary officers are to determine the arrest and detention of subjects

for parliamentary purposes, and if they are to be subject only to political and electoral responsibility for those decisions, then they should not conscript the neutrality and reputation of the Supreme Court and its Judges to support those decisions. The interposition of a judge, immune from political accountability and not doing anything other than lending their reputation to the decision, can serve only to loosen such political constraints as there are on the power. At the same time, s 8 of the PE Act involves the Court in rubber-stamping a political decision without any of the qualities of decisional independence that are among the Court's constitutionally defining characteristics.

33. The President submits that the "availability of that option is not a consideration that favours invalidity" because "that alternative option involves a ***greater*** departure from the paradigm because it involves the authorisation of detention that does not involve a court at all" (**AS [43]**). The "paradigm" to which the President refers is the "constitutional paradigm" that "courts are ordinarily involved in processes involving the detention of individuals" (**AS [42]**, emphasis omitted). As discussed in more detail below, the "constitutional paradigm" is not concerned solely with ***who*** orders detention – it is also concerned with ***how*** that person is involved in authorising detention. The provisions of the PE Act are an impermissible departure from the "constitutional paradigm" because they give the Court no real work to do. The fact that there are alternative ways that the attendance of witnesses could be secured without such a departure is relevant to the *Kable* analysis.

34. Contrary to **AS fn 91**, the Court of Appeal's references to s 74 of the *Electoral Act 1880* (NSW), s 25 of the *Parliament of Queensland Act 2001* (Qld), s 1 of the *Parliamentary Privilege Act 1858* (Tas) and s 4 of the *Parliamentary Privileges Act 1891* (WA) are not a "distraction". It is true that these provisions "concern arrest following a finding of contempt". However, this is simply an alternative way of "ensuring availability to give evidence". It incentivises attendance by the witness under threat of a finding of contempt and arrest. This was also an alternative model available to the New South Wales Parliament that is relevant to the *Kable* analysis.

35. The absence of any need to involve the Court to secure the attendance of witnesses is also evident from other contexts. Under ss 36, 36A and 36B of the *Independent Commission Against Corruption Act 1988* (NSW), a Commissioner issues warrants and can determine the release of the witness, subject to de novo review by the Court. In addition, under s 16 of the *Royal Commissions Act 1923* (NSW) and s 6B of the *Royal Commissions Act 1902* (Cth), the Commissioners can issue arrest warrants to secure the attendance of witnesses (see also s 22 of the *Special Commissions of Inquiry Act 1983* (NSW)). These examples serve to emphasise that the PE Act is an outlier, with

no analogue in any other context or in any other jurisdiction, which adopts a mechanism for the attendance of witnesses that is unnecessary to achieve that purpose.

The relevance of history

36. ***Gaudron J in Wilson:*** As noted above, the President does not dispute that terms of the PE Act, as well as parliamentary privilege, have the result that the Supreme Court has no meaningful role in authorising and supervising the detention of a witness. The President instead relies on matters of history as establishing the constitutionality of the provisions. More particularly, he relies heavily on a statement made by Gaudron J in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 26, which is said "to provide a complete (or near complete) answer to the *Kable* question in this case" (**AS [23]**). In truth, her Honour's statement provides no answer at all, but rather supports the judgment below.

37. In referring to "the issuing of warrants" which have "historically" been vested in judges, her Honour must be understood as referring to the ordinary form of the function that involved the judge because of their professional capacity to form some requisite state of mind on which their warrant would issue. For example, in *Grollo v Palmer* (1995) 184 CLR 348 – which was one of the examples upon which her Honour relied – the Judge had to be satisfied of various criteria, including that "there are reasonable grounds for suspecting that a particular person is using, or is likely to use, the service".

38. The Judge also had some role to perform under the legislation in each of the other examples relied upon by the President at **AS [21], fns 37-39**. In *CXXXVIII v White* (2020) 274 FCR 170 (**AS fn 37**), the Judge had to be "satisfied by evidence on oath that there are reasonable grounds to believe … that a person has committed an offence under subsection 30(1) or is likely to do so". In *George v Rockett* (1990) 170 CLR 104 (**AS fn 38**), it had to "appear[] to a justice, on complaint made on oath, that there are reasonable grounds for suspecting" certain prescribed matters. In *Love v Attorney-General (NSW)* (1990) 169 CLR 307, the Court had to be satisfied "that there are reasonable grounds for [the prescribed] suspicion or belief" (**AS fn 39**). Finally, in *Coco v The Queen* (1994) 179 CLR 427, the Judge could approve the use of a listening device, after having regard to certain prescribed matters including the gravity of the offence and the extent of any interference with privacy, and could give approval subject to such conditions, limitations and restrictions that were in their opinion necessary in the public interest (**AS fn 39**).

39. The Judge also had a substantive role to perform in all but one of the historical examples cited in **AS fn 44**, including because the ***discretion*** to issue the warrant would facilitate the Judge's assessment of the strength of the grounds for a warrant. Under s 10 of the *Vagrancy Act 1902* (NSW), the Judge could issue a warrant "upon information on oath before him made that an idle and disorderly person, a rogue or vagabond, or an incorrigible rogue is, or is reasonably suspected to be, harboured or concealed in any house kept, or purporting to be kept, for the reception, lodging, or entertainment of travellers or others". Under s 9 of the *Influx of Criminals Prevention Act 1903* (NSW), the Judge "before whom information on oath has been laid that any person is guilty of an offence against this Act and that such person is on board any vessel or is harboured or concealed in any house or other place" could grant a warrant. A similar role can be seen in ss 354-355 and 357 of the *Crimes Act 1900* (NSW). Under s 23 of the *Justices Act 1902* (NSW), the Judge could issue a warrant if an information was laid before them "and the matter thereof substantiated by the oath of the informant or a witness".

40. Section 25(2) of the *Justices Act 1902* (NSW) was slightly different. The Judge was required to issue a warrant if a court Clerk certified that an indictment had been filed. But this exceptional provision can be explained because it was the mechanism by which ***the court itself*** secured the appearance of the accused on the indictment, to be brought ***before a court***. It is an inapt analogy to s 8 of the PE Act.

41. Putting this last example to one side, in each of the examples relied on by the President, the involvement of a judge was plainly protective of the person who may be affected by the warrant. For example, in *Hilton*, the majority said that the legislation "designates the judges as individuals particularly well qualified to fulfil the sensitive role that the section envisages" (at 74). In *Grollo*, the plurality said that "it is precisely because of the intrusive and clandestine nature of interception warrants and the necessity to use them in today's continuing battle against serious crime that some impartial authority, accustomed to the dispassionate assessment of evidence and sensitive to the common law's protection of privacy and property (both real and personal), be authorised to control the official interception of communications" (at 367). Their Honours went on to say that the Judge's independent role "preserves public confidence in the judiciary as an institution".

42. Contrary to **AS [23]**, the warrant power at issue in the present case is ***not*** "of the same nature that has historically been exercised by courts and judges". There is a difference of kind, not just degree, between these other schemes, where the Judge played a substantive role, and the PE Act, where the Judge plays no substantive role. The historical involvement of judicial officers

in issuing warrants of other kinds in fact supports the ***invalidity*** of ss 7-9 of the PE Act, because that history is part of the reputation being conscripted. The PE Act draws on this historical reputation of Judges making independent decisions and fulfilling a protective function while simultaneously denying the Judge any kind of protective capacity.

43. The Court of Appeal did not mention Gaudron J's observation because it was not relevant (cf **AS [23]**). The Court clearly understood that irrelevance because it explained that "[w]hat matters is not the fact that a warrant is to be issued", as "judges and courts have long been involved in issuing warrants", but that "[w]hat matters is that the function purportedly conferred is not subject to any meaningful evaluative determination by the judge" (**CAB 13 [8]**). That was the critical feature that distinguished this warrant-issuing function from the other warrant-issuing functions to which Gaudron J was plainly referring.

44. ***The 1881 Act:*** The President submits that, on the Court of Appeal's logic, the 1881 Act did not confer the warrant issuing power on the Supreme Court of New South Wales because it was subject to a constitutional limitation in the federal Constitution (**AS [25]**). The President then submits that "taken to its natural conclusion, it must mean that the original conferral of the warrant power on the Supreme Court of the Colony of New South Wales – from 1881 until Federation – must have also had the effect of substantially impairing the independence and impartiality of that Court" (**AS [26]**).

45. That does not expose any "fundamental flaw in the logic of the Court of Appeal's reasoning" (**AS [27]**). The argument illogically elides different conceptions of independence and impartiality before and after the adoption of the Federal Constitution. Also, the Constitution does not "assume" that, "at Federation, the Supreme Courts were independent and impartial tribunals" (contra **AS [27]**). It does not assume that every function previously conferred on a Supreme Court of a Colony would be appropriately performed by the Supreme Court of the State consistent with Chapter III. Rather, the Constitution ***required*** the Supreme Courts from 1901 to be, and thereafter to remain, independent and impartial tribunals. The relevant consequence of that requirement was that a function that had previously been conferred on a Supreme Court that substantially interfered with the Court's independence and impartiality became invalid.

46. As Gageler J explained in *Burns v Corbett* (2018) 265 CLR 304, "[o]n federation, everything adjusted"; even established practices would yield to the national, integrated court system established by Ch III: at [112]. "To the extent that colonial legislation could not be worked

conformably with the text and structure of the Constitution, colonial legislation ceased to operate": *Burns* at [112]. The "pre-Federation position" was only "carried forward" to the extent that that position was consistent with the terms and structure of the Constitution (contra **AS [29]**). This point was made by the Court of Appeal in observing that, upon federation, "[t]here arose for the first time a class of functions that could not validly be conferred upon the Court or the judges of the Court" (**CAB 29 [52]**).

47. In addition, no warrant was ever issued under the Act prior to Federation (or indeed since) (see **CAB 18 [19]**). Therefore, there is not available the occasionally deployed (but by no means decisive) mode of originalist reasoning that there was some widely accepted practice which the Constitution should be taken to have accommodated: compare, for example, the ***actual*** practice of appointing acting judges considered in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [26] (Gleeson CJ), [82] (Gummow, Hayne and Crennan JJ), [138] (Callinan J), [256]-[267] (Heydon J); or the "long history" of ***actual*** "recommendations [for or against clemency] by trial judges to the Executive" referred to in *Baker v The Queen* (2004) 223 CLR 513 at [47]–[48] (McHugh, Gummow, Hayne and Heydon JJ).

48. The logic of the President's submission is undermined by a further example. In 1900, criminal juries "were constituted exclusively by males who satisfied some minimum property qualifications": *Cheatle v The Queen* (1993) 177 CLR 541 at 560, referring (for example) to s 1 of the *Jury Act 1847* (NSW). On the President's logic, the Constitution "assumed" that such arrangements were consistent with the institutional integrity of State courts.

Ch III and the power to detain

49. The President submits that "an analysis similar to the analysis for assessing whether a Commonwealth law contravenes the *Lim* principle is at least capable of informing whether a State law contravenes the *Kable* limit" (**AS [35]**). On that basis, the President submits that the detention authorised by the PE Act is reasonably capable of being seen as necessary for a legitimate non-punitive purpose, and therefore falls within an "exceptional case" as recognised in *Lim* (**AS [39]**). It is said that that "strongly support[s] the conclusion that the law does not substantially impair the institutional integrity of the court" (**AS [35]**).

50. This submission is a distraction. Whether detention is reasonably capable of being seen as necessary for a legitimate non-punitive purpose is not exhaustive even of the question whether a Commonwealth law is consistent with Chapter III. It is certainly not exhaustive of the question

whether a State law is consistent with Chapter III. There are many kinds of non-judicial, non-punitive functions which, if conferred on courts, would undermine their institutional integrity. The question of institutional integrity in this case is not whether there is a legitimate purpose for the detention. The question is whether the Supreme Court is the appropriate body to be authorising detention for that purpose where it has no decisional role. The President's submission does not address this question. Thus, even if this Court were to develop the law in the way proposed by the President, such a development would not be dispositive of the appeal.

51. In this regard, as noted above, the Court – even though it is the body that authorises the detention – has no meaningful role in ensuring that the detention of the witness only persists for so long as is necessary for that witness to give evidence. This is admitted by the President, who submits that detention is "unlikely" to be lengthy "because the President or Speaker would be politically accountable to the relevant House of Parliament for any non-compliance with the purposive limitation the length of detention" (**AS [49]**). In other words, the enforcement of the purposive limit is ***not*** a matter for the Supreme Court. By reason of Art 9, an application for a writ of habeas corpus could be sufficiently answered by production of the warrant and any subsequent orders of the President. The constitutional infirmity is not the Court's inability to scrutinise, but the Court's obligation to authorise where it cannot also scrutinise: see **CAB 28-29 [47], [51]-[52]**.

52. The President submits that "the involvement of a court in the detention of individuals is ordinarily considered to be a 'good thing'", which makes it "unsurprising that the 1881 and 1901 Acts adopted a model that involved the Supreme Court in the authorisation of detention" (**AS [42]**). Whether or not the involvement of a court is a "good thing" must depend upon ***how*** the court is involved. As the Court of Appeal recognised, the PE Act "neither requires nor permits the relevant judge to bring any such qualities of independence, impartiality and fair-mindedness to bear on a meaningful decision-making process" (**CAB 34 [67]**). In *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, Gageler J explained that, while there are strong policy reasons to confer powers to constrain liberty on a court, those same policy reasons demand "that the conferral occur through the legislative formulation of 'a judicial process of some refinement'" (at [158]). Judges might be well qualified to perform the warrant-issuing function, "[b]ut those functions might as well be performed by others": *Grollo v Palmer* (1995) 184 CLR 348 at 391 (Gummow J).

Proposed intervention of Mr Tudehope MLC

53. ***Leave to intervene should be refused:*** On 5 May 2026, the Hon Damien Tudehope MLC applied for leave to intervene or alternatively to be heard as amicus curiae. Mr Tudehope was not a member of the Privileges Committee that issued the summons to Mr Cullen that led to the present proceeding. Rather, he is a member of the Select Committee whose draft minutes were disclosed without approval, which disclosure was the subject-matter of the Privileges Committee's inquiry.

54. The application for leave to intervene should be refused because Mr Tudehope does not have a sufficient interest in the proceedings. Only a party whose interests would be "directly affected" by a decision in the proceeding is entitled to intervene" and "[i]ntervention will not ordinarily be supported by an indirect or contingent affection of legal interests following from the extra-curial operation of the principles enunciated in the decision of the Court": *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [2]. The Court may grant leave to intervene "[w]here a person having the ***necessary*** legal interest can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination" (at [3], emphasis added).

55. Mr Tudehope submits that he would be "directly affected by a decision" because he was a member of the Select Committee and in his "capacity" as Leader of the Opposition in the Legislative Council (**TS [1]**). He also submits that there is "utility in hearing from a leading member of the Council and the Shadow Attorney-General in circumstances where the Committee has not been joined and where the President takes a position broader than is necessary to secure attendance at a Committee of the Legislative Council" (**TS [1]**). He expresses concern about the loss of the "threat" of a warrant to secure the attendance of witnesses: Affidavit of Damien Francis Tudehope sworn 5 May 2026 (**Tudehope**) at [16(a)].

56. These factors do not establish the requisite interest, for three reasons. *First*, the validity of the legislation is properly defended by the President and the Speaker as the "Presiding Officer" of the Legislative Council and Legislative Assembly respectively and their "independent and impartial representative[s]": *Constitution Act 1902* (NSW), ss 22G(1), 31. Both the President and the Speaker appeared in the Court of Appeal in defence of the validity of the legislation. The President continues to defend the validity of the legislation in this Court.

57. *Secondly*, the Privileges Committee could have joined the proceedings, but chose not to. In this regard, for the purposes of the application for leave to intervene only, Mr Cullen seeks to rely

on an affidavit of Kathleen Anne Plowman affirmed on 26 May 2026 (**Plowman**). On 22 October 2025, the legal representatives of Mr Cullen notified the Chair of the Privileges Committee of the proceedings in the Court of Appeal and asked him and the Committee whether they agreed that the President was the proper respondent to the proceedings and that neither he nor the Committee sought to be joined as a party to the proceeding (**Plowman [4], Exhibit KAP-01**). On 27 October 2025, the Chair confirmed that he considered that the President was the proper respondent and that neither he nor the Committee sought to be joined (**Plowman [6], Exhibit KAP-02**).

58. *Finally*, Mr Tudehope's membership of the Select Committee, and his leadership position in the Opposition, do not mean his interest in these proceedings is any greater than any other Member of Parliament. His interest is not special, but indeed likely partisan.

59. The application for leave to appear as amicus curiae should also be refused. In *iiNet*, the Court said that, in order to grant leave, it "will need to be satisfied … that it will be significantly assisted by the submissions and that any costs to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the expected assistance" (at [5]). The Court went on to say that "[o]rdinarily … where the parties are large organisations represented by experienced lawyers, applications for leave to intervene or to make submissions as amicus curiae should seldom be necessary or appropriate" (at [6]). That observation must apply with equal force where the parties include two Parliamentary Officers and the New South Wales Attorney-General.

60. In the present case, Mr Tudehope does not seek to offer a different perspective on the issues upon which the parties have joined and which were ventilated in considerable detail in the Court below over a 1½ day hearing. He seeks to raise a wholly new issue. It is not correct to submit that Mr Cullen's "secondary, alternative submissions" advanced in the Court below "deal largely with the matters raised in this application for leave to intervene" (**TS [10]**). Mr Cullen advanced below an alternative submission against the possibility that the legislation was construed to have ***abrogated*** parliamentary privilege so as to allow a court to examine the basis for the issue of a summons and a certificate without contravening that privilege (see Mr Cullen's written submissions at **Tudehope, Exhibit DFT2, p.10 [3]**). Mr Tudehope's wholly different argument is that the issue of a certificate does not attract parliamentary privilege in the first place because it is not part of "proceedings in Parliament" within the meaning of Art 9. The fact that this argument has not previously been raised is not evidence of its strategic inconvenience (cf **TS [6]-[7], [12]**), but rather of its weakness.

61. The raising of this new argument will substantially add to the length of the hearing. It is unlikely that the issues can properly be ventilated in the 20 minutes of oral argument Mr Tudehope requests. The proper construction of "proceedings in Parliament", and the separate issue whether a Court would "impeach" those proceedings by supervising detention, are both very large questions. They also have no bearing on the proper resolution of the appeal.

62. ***Issuing a certificate is part of "proceedings in Parliament":*** Mr Tudehope submits that the issue of a certificate under s 7 is not "proceedings in Parliament" within Art 9 (**TS [25]**). He advances various, inconsistent arguments in support of that submission. None is correct.

63. *First*, he submits that a certificate is not a proceeding because "[t]he act is not one done by the House or any committee in a 'collective capacity' as referred to by Erskine May" (**TS [26]**). The proposition that "proceedings in Parliament" are limited to acts done in a "collective capacity" is unsupported by any case law or authoritative treatise. Erskine May refers to the "***primary*** meaning of proceedings, as a technical Parliament term" … as "some formal action, usually a decision, taken by the House in its collective capacity" (see **TS [19]**, emphasis added). It is implicit in the use of the word "primary" that a "proceeding" is ***not*** limited to such actions. In *R v Chaytor* [2011] 1 AC 684, in the passage quoted in **TS [20]**, the Supreme Court of the United Kingdom said that submitting claims for allowances and expenses "does not form part of, ***nor is it incidental to***, the core or essential business of Parliament, which consists of collective deliberation and decision making" (emphasis added). In that decision, the Court expressly recognised that "proceedings in Parliament" are not limited to deliberations of, and decisions made by, Parliament or a committee.

64. The issue of a certificate is comfortably incidental to the collective action of a House or a committee examining a witness. The issue of a summons under s 4 is the result of a deliberation and then a decision by the House or a committee. The issue of a certificate then follows if the President or Speaker is satisfied that the witness has failed to attend without just cause or reasonable excuse. The purpose of the issue of a certificate is then to secure the attendance of the witness who has failed to obey the summons. There is no "clear contrast" between the decision to issue a summons and the decision to issue a certificate (contra **TS [26]**); they are two stages of a process directed to the same end.

65. It is not clear what Mr Tudehope considers to be the significance of a certificate not needing to be done by the President "*in camera*" (see **TS [27]**). In any event, whether or not the act is done

in camera is irrelevant – either way, it is incidental to the issue of a summons. The fact that the certificate is directed to the Supreme Court is similarly irrelevant.

66. There is no analogy to the decision in *Chaytor* (contra **TS [28]**). In that case, a distinction was drawn between an act that was incidental to "the administration of Parliament" and an act that was incidental to the "collective deliberation and decision making" of Parliament. The act of submitting claims for allowances and expenses fell into the former category. Here, there is a clear connection between the deliberative process of examining a witness, of issuing a summons to further that purpose, and of issuing a certificate to secure the collectively desired attendance of the witness. Mr Tudehope's own submission is that the issue of a certificate is "an administrative act that follows as a consequence of the collective decision" (**TS [28]**).

67. *Secondly*, Mr Tudehope submits that the issue of a certificate is not a "proceeding in Parliament" because it is judicially reviewable, including on the ground of reasonableness (**TS [29]-[30]**). That submission assumes its conclusion. The proper analysis starts with construing the statute to ascertain ***whether*** the satisfaction is reviewable. The fact that a statute uses the word "satisfied" does necessarily mean that the relevant state of satisfaction is judicially reviewable: cf *Eshetu*, cited at **TS fn 19**, see also **TS [33]-[34]**.

68. Here, the certificate is presented ex parte without notice to the witness and the Judge is not required, and probably not authorised, to give notice and hold a hearing. The lack of a mechanism to empower the Judge to review the satisfaction, consistent with the inherent notion of a "certificate", rather suggests that the satisfaction is not reviewable. That is itself consistent with the intention that the certificate form part of proceedings in Parliament.

69. Mr Tudehope submits that the Judge would "naturally … consider the prospect that attendance at the Committee may require questioning for a protracted period", and that "[a]t least to that extent, the Court of Appeal's concern at [7] that the inquiry 'might extend weeks or months or years' ***will*** be accounted for (**TS [30]**, emphasis in original). Any attempt by the Court to estimate how long the questioning will take would be nothing more than speculation. The certificate is not required to identify anything about that matter. It is extremely unlikely that Parliament would intend for a state of satisfaction to be judicially reviewable on that basis. In any event, even if the Court could make a reasonable guess of the length of questioning, and took that into account in deciding whether to issue a warrant, a fundamental problem is that the witness is subject to any further order of the President or Speaker. There is no similar state of satisfaction in respect of those

orders that Mr Tudehope submits could be the subject of judicial review. Accordingly, there would remain the prospect of indefinite detention, which has been instigated by the Court and which cannot then be reviewed by the Court.

70. There is no relevant point of distinction with *Fitzpatrick and Browne* (contra **TS [31]**). In that case, the Court said that "[t]he judgment of the House [as to a contempt] is expressed by its resolution and by the warrant of the Speaker" (at 162). In the present case, the deliberative decision to compel a witness is expressed by the summons of the House or committee, and that decision is enforced by the issue of a certificate by the Speaker or President and the issue of a warrant by the Court. In both cases, detention occurs "without a fair trial" and without "meaningful review".

71. ***Proposed application to set aside warrant:*** Mr Tudehope submits that a witness can challenge a warrant "immediately" on the basis that a condition of its issue, being a valid certificate, did not exist (**TS [35]**). On such an application, Mr Tudehope submits that "the Court ***can*** receive evidence of the witness's actual non-attendance and the reasons given for it (the underlying facts of the President's 'satisfaction' under s 7)" (**TS [36]**, emphasis in original). That assertion is unexplained, in particular, how it is that the Court could be furnished with evidence of the record before the President or Speaker consistent with parliamentary privilege. To the extent that any part of the record forms part of "proceedings in Parliament", the record cannot be "impeached or questioned" in any proceeding. Even on Mr Tudehope's position, that would include at least any document or other information provided to the President or Speaker by the relevant Committee, which bore upon the reasons given by the witness for non-attendance.

72. In any event, the imagined review would not be meaningful given the opacity of the parliamentary process: cf *Wainohu* at [109]; *Totani* at [27] (referred to above). There is no obligation on the President or Speaker to provide reasons for their state of satisfaction. And this would be an application that the witness would bring ***from detention***, which – even on Mr Tudehope's submission – has been ordered by the Court at the direction of the relevant parliamentary officer.

73. The same problem arises in respect of a later application to set aside the warrant or an application for habeas corpus (**TS [35]**). Mr Tudehope submits that, on such an application, "the Court can receive evidence of the fact the witness attended and was questioned, or evidence that the period of detention exceeds what is reasonably necessary to bring the witness before the relevant chamber or committee" (**TS [36]**). Such evidence would plainly be "proceedings in

Parliament", given it would concern what the witness was being questioned about and whether the relevant House or Committee had "finished" its questioning.

74. ***Whether impeaching or questioning:*** Mr Tudehope submits that "[e]vidence of the fact of non-attendance, or the reasons for it, are not matters that 'impeach' conduct which can properly be described as 'proceedings' in Parliament" (**TS [37]**). The problem with this submission that a review would not be limited to such facts. It will be a review of the state of satisfaction of the President or Speaker. There may be many factors that were considered by the President in deciding to issue the certificate. It is a real likelihood that some of those factors would plainly involve "proceedings in Parliament", for example matters that were considered by the committee. As discussed above, Mr Tudehope also submits that the Judge would consider that the prospect of questioning for a protracted period, which would also involve "proceedings in Parliament".

75. Mr Tudehope submits that review by a court would "impeach" proceedings in Parliament only if it would have an "adverse effect on the essential business of Parliament" (**TS [37]**, see also **[18], [38]**). That is a very large, yet undeveloped, submission that Art 9 should be construed as an evaluative standard involving case-by-case assessment of the effect of a proposed use on parliamentary proceedings: cf *Casimaty* (2024) 98 ALJR 1139 at [81] (Edelman J). The better view, consistent with authority, is that the general language of Art 9 is better construed as imposing a broad exclusionary rule reflecting Parliament's own assessment of the means by which its freedoms are to be secured. However, the Court should not decide this issue in circumstances where the proper construction of "impeach" is an important question raised only by a proposed intervener, not adequately exposed, and where responsive submissions cannot fairly be made within the constraints of responding to the proposed intervention.

76. In a recent decision of the Court of Appeal, the parties (including the President, Speaker and Attorney-General) exchanged "careful" and "complex" submissions on the construction of Art 9, which "[i]n large measure … reflected the reality that the Australian decisions on Article 9 do not speak with one voice": *Director of Public Prosecutions (NSW) v President of the Legislative Council of New South Wales* [2026] NSWCA 20 at [78]. The breadth of the phrase "impeached or questioned" was expressly left open: see [105]. Further, the issue should not be resolved where the resolution of the proper construction of "impeach" is unlikely to be determinative. Even if Mr Tudehope's submission were accepted, the availability of judicial review ***would*** have an adverse effect on the essential business of Parliament given the close connection between the decision to issue a summons and the decision to issue a certificate.

77. ***Whether indefinite detention is authorised:*** The Court of Appeal was correct to hold that ss 7-9 authorised indefinite detention (contra **TS [40[-[41]**). None of the "problems" identified by Mr Tudehope undermine that conclusion.

78. *First*, the Court of Appeal was correct to observe that it is "not open … to require … the period of detention to be limited, say, to the period necessary in order for the purpose for which the summons was issued to be performed" (contra **TS [43]**). The Court was making the obvious point that there is nothing in the legislation that permits the Court to impose that limitation. It may be accepted that the purpose of the detention is to bring the person before the Council, Assembly or a committee to give evidence (and there is no need to apply the principle of legality to reach that conclusion: cf **TS [45], [49]**). However, the problem is that the Court can have no meaningful role in ensuring that the detention only persists for so long as is necessary to achieve that purpose.

79. *Secondly*, it may similarly be accepted that orders under s 9 "must be referable to the purpose of the warrant in s 8" (**TS [44]**). However, again, the problem is the unavailability of meaningful review of those orders. The result is "as drastic" as is held at **CA [27]**.

80. *Thirdly*, it may be that the detention could be subject to an application for habeas corpus, and that the President would bear the onus to demonstrate the legality of the detention (**TS [46]**). However, as noted above, the application could be answered merely by the production of the warrant and any further order that had been issued by the President or Speaker.

81. The other limits on detention identified at **TS [48]**, namely suspension of business in the event of an election or the dissolution of committees upon prorogation, do not require supervision by a court for their enforcement. Any witness subject to a warrant at that time would simply be released as a result of business having been suspended or the committee being dissolved.

82. The regime does not "resemble[] the unobjectionable administrative warrant-issuing functions discussed in *Grollo* … and other cases", for the reasons set out in detail above (contra **TS [50]**). It also bears no resemblance to the historical use of a writ of habeas corpus to ensure the defendant's attendance or the writ of *capias ad respondendum*, which are concerned with securing the attendance of a person ***at a court***. It is also distinguishable from the power in s 72 of the *Supreme Court Act 1970* (NSW), which is a discretionary power conferred on a court to make orders for the bringing of a person before "any tribunal or authority".

83. *Finally*, contrary to **TS [51]**, s 9 cannot be severed. Severance cannot be effected where it appears that "the law was intended to operate fully and completely according to its terms, or not at

all": *Pidoto v Victoria* (1943) 68 CLR 87 at 108. It is clear that ss 7-9 were intended to operate together. As the Court of Appeal recognised, "the provisions which now comprise ss 7-9 constituted a single sentence in s 5 of the 1881 Act" (**CAB 14 [10]**). Section 9 sets out what it is that the warrant authorises. It is unthinkable that Parliament would enact a provision conferring power to issue a warrant without then identifying the consequences of the issuing of that warrant.

84. It is also not possible to sever s 9 after its first clause. The form of the warrant in Sch 3 provides that the witness will be detained "for the purpose of being brought before [the Assembly, the Council or a committee] to give evidence and there to be obey all further orders under the hand of the [President or Speaker] for his or her remand or for his or her final discharge from custody". The scheme contemplates that it may be necessary for the President or Speaker to make further orders, for example, as to the time and place of questioning. To sever that mechanism from the Act would make it unworkable. As French CJ said in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, "if Parliament has used clear words to encroach upon the liberty or rights of the subject or to impose procedural or other constraints upon the courts its choice should be respected even if the consequence is constitutional invalidity" (at [42]).

PART VI: NOTICE OF CONTENTION/CROSS-APPEAL

85. Not applicable.

PART VII: ESTIMATE OF TIME

86. Given the President's estimate, Mr Cullen estimates that he will also require 2¼ hours for oral argument, or 3 hours if it is necessary to address the additional issues sought to be raised by Mr Tudehope MLC.

Dated: 26 May 2026

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ANNEXURE TO THE FIRST RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date
1.	*Bill of Rights 1688* (1 W & M sess 2 c 2)	Current	Art 9	Act in force at the date of the Court of Appeal's decision	7 to 17 October 2025
2.	*Constitution Act 1902* (NSW)	Current	ss 22G, 31	Act in force at the date of the Court of Appeal's decision	N/A
3.	*Crimes Act 1900* (NSW)	As made	ss 354-355, 357	Response to Appellant's submission	N/A
4.	*Electoral Act 1880* (NSW)	As made	s 74	Historical comparison	N/A
5.	*Foreign Judgments Act 1991* (Cth)	Current	s 6	Response to Appellant's submission	N/A
6.	*Independent Commission Against Corruption Act 1988* (NSW)	Current	ss 36, 36A, 36B	Provided for illustrative purposes	N/A
7.	*Influx of Criminals Prevention Act 1903* (NSW)	As made	s 9	Historical comparison	N/A
8.	*Jury Act 1847* (NSW)	As made	s 1	Provided for illustrative purposes	N/A
9.	*Justices Act 1902* (NSW)	As made	s 23, 25	Response to Appellant's submission	N/A
10.	*Parliament of Queensland Act 2001* (Qld)	Current	s 25	Provided for illustrative purposes	N/A
11.	*Parliamentary Evidence Act 1881* (NSW)	As made	All	Predecessor to PE Act	N/A

12.	*Parliamentary Evidence Act 1901* (NSW)	Current	ss 4, 7-9, Scheds 2, 3	Act in force at the date of the Court of Appeal's decision and events to which the dispute relates	7 to 17 October 2025 (issue of summons, refusal to comply)
13.	*Parliamentary Privilege Act 1858* (Tas)	As made	s 1	Historical comparison	N/A
14.	*Parliamentary Privileges Act 1891* (WA)	Current	s 4	Provided for illustrative purposes	N/A
15.	*Public Works Act 1888* (NSW)	As made	s 10	Historical comparison	N/A
16.	*Royal Commissions Act 1902* (Cth)	Current	s 6B	Provided for illustrative purposes	N/A
17.	*Royal Commissions Act 1923* (NSW)	Current	s 16	Provided for illustrative purposes	N/A
18.	*Special Commissions of Inquiry Act 1983* (NSW)	Current	s 22	Provided for illustrative purposes	N/A
19.	*Supreme Court Act 1970* (NSW)	Current	s 72	Response to Appellant's submission	N/A
20.	*Vagrancy Act 1902* (NSW)	As made	s 10	Response to Appellant's submission	N/A