



## HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

BETWEEN:

**PRESIDENT OF THE LEGISLATIVE COUNCIL OF NEW SOUTH WALES**

Appellant

and

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**JAMES CULLEN**

First Respondent

**ATTORNEY GENERAL FOR NEW SOUTH WALES**

Second Respondent

**SPEAKER OF THE LEGISLATIVE ASSEMBLY OF NEW SOUTH WALES**

Third Respondent

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**APPELLANT'S REPLY**

## PART I: CERTIFICATION

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

## PART II: REPLY

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- 2 **History:** The opposing parties fail to commit to whether: (1) they suggest that ss 7 to 9 of the PE Act were validly enacted in 1901 but became invalid at some later unidentified point in time between 1901 and 2025; or (2) whether they accept that, on the logic of their argument, the 1881 Act became invalid on Federation and ss 7 to 9 of the PE Act were never validly enacted at all. New South Wales appears to prefer the first option, placing emphasis on the significance of “changing circumstances” relating to the “characteristics and functions” of State Supreme Courts: **NSW [39]-[40]**. However, it is not clear how any of those generally described changes could have had the effect of invalidating ss 7 to 9. More importantly, judges continue to be involved in issuing warrants, and the foundations of “parliamentary privilege” (the principle of “exclusive cognisance” and Art 9 of the Bill of Rights) have remained stable.
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- 3 Mr Cullen appears to prefer the second option, even though it would have the “embarrassing” result that the institutional integrity of the Supreme Court “has been impaired since Federation”.<sup>1</sup> His primary response is that the President “illogically elides different conceptions of independence and impartiality before and after the adoption of the Federal Constitution”: **IRS [45]**. He thereby posits that, on Federation, a new conception of “independence and impartiality” was “plucked from a platonic universe of ideal forms”,<sup>2</sup> with some free-standing content that differed from characteristics that then attached to the State Supreme Courts: cf **AS [20]**. But the State Supreme Courts were of “very high and uniform calibre”.<sup>3</sup> By their entrenchment in the Constitution, they were recognised as possessing the characteristics of “independence and impartiality” necessary to be “considered fit receptacles for the investing of federal jurisdiction”: **AS [27]-[28]**.<sup>4</sup> Subject to s 72 of the Constitution, it was those same characteristics that were carried forward on Federation — there was no other source from which some new and more strict conception of “independence and impartiality” might have been drawn.
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<sup>1</sup> See *Forge* (2006) 228 CLR 45 at [17], [36], [40] (Gleeson CJ).

<sup>2</sup> *Pompano* (2013) 252 CLR 38 at [68] (French CJ).

<sup>3</sup> See *Totani* (2010) 242 CLR 1 at [61] (French CJ), quoting Sawyer, *Australian Federalism in the Courts* (1967) at 20-21.

<sup>4</sup> *Forge* (2006) 228 CLR 45 at [82] (Gummow, Hayne and Crennan JJ), see also [41] (Gleeson CJ).

- 4 Mr Cullen also suggests that the President’s historical argument must be wrong because it would mean that the Constitution “assumed” that pre-Federation laws, imposing jury qualification requirements offensive to modern standards, were consistent with the institutional integrity of State Supreme Courts: **1RS [48]**. On the assumption that *Kable* may constrain modifications to State jury requirements, the Constitution *did* assume that such laws were consistent with the “institutional integrity” of the State Supreme Courts (not to mention s 80 of the Constitution). If the Constitution made any other assumption, a great number of jury trials would have miscarried, given “criminal juries in 1900 were constituted exclusively by males who satisfied some minimum property qualification”.<sup>5</sup>
- 10 5 Finally, nothing follows from the fact that “no warrant was ever issued under the Act prior to Federation (or indeed since)”: **1RS [47]; Cth [20]**. Of course, it may be that no warrant was ever required to be issued because the threat of the issue of a warrant was sufficient to incentivise persons to comply with a summons. In any event, what is significant is that the power to issue a warrant was conferred by statute as at Federation. That is consistent with *Forge*, which accepted that historical *legislative* practice may inform whether contemporary legislation contravenes the *Kable* limit.<sup>6</sup>
- 6 ***Totani***: At the heart of much of Mr Cullen’s case is the proposition that ss 7 to 9 “enlist” or “conscript” the Supreme Court, such that they are properly characterised as provisions that seek “to cloak ... in the neutral colors of judicial action” the work of the Legislature or its constituent bodies: **1RS [8], [10]-[14], [19], [21], [22], [24], [26], [32], [42]**. That submission draws heavily from various statements taken from the five separate majority judgments in *Totani*, without grappling with the fundamentally different law held invalid in that case and the significance of the “constitutional paradigm” to that conclusion. That approach risks severing the principles from their constitutional roots: **AS [37]; Cth [10]**.<sup>7</sup>
- 20 7 Two points about the “constitutional paradigm”. *First*, the “constitutional paradigm” underpinning the *Lim* limitation has significance beyond Commonwealth laws, being grounded in “ancient principles of the common law” that pre-date the federal structure established by the Constitution.<sup>8</sup> *Second*, the paradigm has significance beyond ensuring

<sup>5</sup> *Cheatle* (1993) 177 CLR 541 at 560 (the Court).

<sup>6</sup> See *Forge* (2006) 228 CLR 45 at [17], [36], [40], [42] (Gleeson CJ), [53] (Gummow, Hayne and Crennan JJ), [267], [277] (Heydon J).

<sup>7</sup> *Pompano* (2013) 252 CLR 38 at [137] (Hayne, Crennan, Kiefel and Bell JJ).

<sup>8</sup> *YBFZ* (2024) 99 ALJR 1 at [6] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *EGH19* [2026] HCA 7 at [67]-[69] (Gordon J).

that only “courts” may exercise the judicial power of the Commonwealth: cf **Cth [25]-[27]**; **NT [22], [29]**; **SA [22]**. The concern of the paradigm extends to both *who* is authorised to exercise a power (a “court”?), as well as *how* the power may be exercised (if by a “court”, consistently with its “institutional integrity”<sup>9</sup>): **1RS [33]**; **NSW [67]**. Those points explain the Court’s careful scrutiny of “preventative justice” schemes in *Kable, Fardon, Vella* and *Garlett* (at the State level) and *Thomas and Benbrika [No 1]* (at the Commonwealth level). In each scheme, a “court” was empowered to impose “preventive restrictions on liberty outside the constitutional paradigm”.<sup>10</sup> The schemes that were held to be valid can be understood as schemes where the departures from the paradigm were “justified”, such that they did not require the “court” to exercise power in a manner inconsistent with its “institutional integrity”: **AS [35]-[38]**.<sup>11</sup>

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8 The law considered in *Totani* falls within this constitutional framework.<sup>12</sup> The more complete explanation of the “vice” of that law is that it required the Magistrates Court to “create new norms of conduct the content of which was determined by the executive and legislature, and which restricted the liberty of the subject (over and above the norms binding the public under the general law), *without any inquiry by the Court into past or threatened contraventions by the individual of any existing legal norm*”.<sup>13</sup> On that explanation, the lack of any “meaningful evaluative determination” by the Magistrates Court was not, of itself, constitutionally problematic.<sup>14</sup> It was, however, problematic in a context where the Court was required to impose significant restrictions on a person’s liberty outside of the constitutional paradigm. Because the Court was required to impose those restrictions without any inquiry into the person’s past or threatened conduct, the restrictions on liberty were imposed by “default”, “even where” it could not be and had not been established that the imposition of the restrictions on that person were “reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose”.<sup>15</sup> That lack of

<sup>9</sup> See *Lim* (1992) 176 CLR 1 at 27 (Brennan, Dawson and Deane JJ) (“essential character of a court or with the nature of judicial power”); *EGH19* [2026] HCA 7 at [282], [288]-[289], [291]-[292], [314] (Jagot J); **SA [15]-[17]**; cf **Cth [27]**.

<sup>10</sup> See *EGH19* [2026] HCA 7 at [24] (Gageler CJ and Gleeson J).

<sup>11</sup> See *EGH19* [2026] HCA 7 at [24]-[27] (Gageler CJ and Gleeson J), [63] (Gordon J), [329]-[330] (Jagot J); *Garlett* (2022) 277 CLR 1 at [166], [185]-[189] (Gordon J).

<sup>12</sup> See *Totani* (2010) 242 CLR 1 at [76], [82] (French CJ), [131] (Gummow J), [211]-[212] (Hayne J), [423]-[424] (Crennan and Bell JJ), [471]-[478] (Kiefel J).

<sup>13</sup> *Kuczborski* (2010) 242 CLR 1 at [224] (Crennan, Kiefel, Gageler and Keane JJ) (emphasis added); **Cth [12]**.

<sup>14</sup> That is consistent with the outcome in *Emmerson* (2014) 253 CLR 393: see **AS [46]**.

<sup>15</sup> See *YBFZ* (2024) 99 ALJR 1 at [85] (Gageler CJ, Gordon, Gleeson and Jagot JJ); **AS [38] n 82, 84-85**.

justification meant that the law was inconsistent with the “institutional integrity” of the Magistrates Court.<sup>16</sup>

9 The role played by the Supreme Court under ss 7 to 9 of the PE Act is not “akin” to that performed by the Magistrates Court in *Totani*: cf **1RS [21]**; **Cth [12]-[13]**.

9.1 The issue of a warrant by the Supreme Court authorises the restriction of a person’s liberty, but it does not “create new norms of conduct”. The purpose of that restriction of liberty is both non-punitive and legitimate: **AS [40]**; **NSW [65]**. That purpose has nothing to do with “preventive justice”. It is instead directed to ensuring a person is available to give evidence before Parliament: **AS [40]**, **[47]**.

10 9.2 The power to issue a warrant is administrative: **AS [17.1]**; **1RS [28(a)]**; **NSW [24]**. It is therefore not necessary for the exercise of the power to be accompanied by the ordinary incidents of the judicial process for the power to be validly conferred on a State court. Consistent with history and authority, warrants are often authorised to be issued without requiring reasons, procedural fairness or open court: **AS [45]**. The law in *Totani* had no analogue in history or authority.<sup>17</sup>

20 9.3 By the time the Supreme Court comes to issue a warrant, a House of Parliament, or a committee, must have determined that a person is required to attend to give evidence before Parliament (s 4); and the President or Speaker must have determined that the person failed to comply with that requirement without just cause or reasonable excuse (s 7). Both of those determinations are directed to precisely the same legitimate non-punitive purpose as the issue of a warrant by the Supreme Court. In contrast, in *Totani*, there was a disconnect between the criteria governing the Magistrates Court’s decision and the criteria governing the Attorney-General’s anterior decision.<sup>18</sup>

9.4 In those circumstances, the issue of a warrant by the Supreme Court (and the consequent restriction on liberty) is reasonably capable of being seen as necessary to ensure the person is available to give evidence before Parliament. Based on the

<sup>16</sup> See *Emmerson* (2014) 253 CLR 393 at [46] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>17</sup> See *Totani* (2010) 242 CLR 1 at [140] (Gummow J), [223]-[224] (Hayne J), [429]-[431], [434] (Crennan and Bell JJ), [473]-[476] (Kiefel J), distinguishing *Thomas* (2007) 233 CLR 307.

<sup>18</sup> The Attorney-General’s declaration was made by reference to members of the organisation generally, who may or may not have included the person the subject of a control order application. Thus, it was possible for the liberty of a person to “be restricted where neither the executive nor the judicial branch [had] made any determination about what he or she has done, intends to do, or is likely to do in connection with ‘serious criminal activity’”: *Totani* (2010) 242 CLR 1 at [215], see also [197] (Hayne J), [478] (Kiefel J).

determinations made under ss 4 and 7, there is a need for the issue of a warrant to achieve that purpose. So long as there has been compliance with the conditions on the exercise of those powers, the issue of a warrant by the Supreme Court will invariably assist in the achievement of that purpose. Further, once a warrant is issued, the detention of the person is authorised for only so long as is necessary to ensure the purpose is achieved: **AS [48]-[49]**. Again, this contrasts with *Totani*, where a control order may or may not have assisted in the achievement of the purpose of that law in any given case.<sup>19</sup>

10 9.5 Before issuing a warrant under s 8, it is not the role of the Supreme Court to enforce any of the conditions on the exercise of the powers under ss 4 and 7, nor is it the role of the Court to make its own assessment of whether the circumstances warranted the issue of a summons, whether a person failed to comply with a summons, or whether they did so without just cause or reasonable excuse. The Supreme Court does not have the role of inquiring into any of those matters because of the principle of “exclusive cognisance” and Art 9 of the Bill of Rights: **AS [47], [50]**. Those matters of “parliamentary privilege” are grounded in history and reflective of deeper “systemic values”, both of which have a role to play in assessing whether a law is reasonably capable of being seen as necessary to the achievement of a legitimate non-punitive purpose: **NSW [28]-[29]**. No historical matters or systemic values supported the law in *Totani*.

20 9.6 In undertaking the “means and ends” assessment, there is room to consider the availability of alternative measures that might be adopted to achieve that same purpose: **1RS [33]**. Apart from one example of similar antiquity as the PE Act (**AS [43]**), none of the proposed alternative measures achieve the same purpose (or do not achieve it to the same extent). The detention authorised by the PE Act is forward-looking and non-punitive: it is directed to ensuring the attendance of a person for the purpose of giving evidence in the future. The other examples are backward-looking and punitive: they are directed to ensuring the attendance of the person for the purpose of punishing a failure to attend to give evidence in the past: **NSW [70]; Cth [16]**. That threat of punishment *may* incentivise the attendance of witnesses to give evidence (**1RS [34]**); but unlike the PE Act, it does not guarantee that outcome.

30 <sup>19</sup> See *Totani* (2010) 242 CLR 1 at [197], [215] (Hayne J), [478] (Kiefel J).

- 10 **Mr Tudehope:** The President neither consents nor opposes the application of the Hon Damien Tudehope MLC for leave to intervene or to appear as amicus curiae. If leave is granted, the President makes the following points in response to Mr Tudehope’s submissions concerning “parliamentary privilege” — the principle of “exclusive cognisance” and Art 9 of the Bill of Rights — and its relationship with s 7.
- 11 *First*, an action of a member of Parliament need not be done in a “collective capacity” to be within the scope of parliamentary privilege: **1RS [63]; NSW [78]; cf TS [19]-[20]**. In any event, “[t]he issue of a certificate is comfortably incidental to the collective action of a House or a committee examining a witness”: **1RS [64]; see also NSW [78]-[80];**
- 10 **cf TS [26], [28]**.
- 12 *Second*, an action of a member of Parliament need not be directed to other members to be within the scope of parliamentary privilege: cf **TS [27]**. It is therefore beside the point that a certificate under s 7 is provided to the Supreme Court: **1RS [65]**. So much is illustrated by Mr Tudehope’s acceptance that a summons issued under s 4 is within the scope of parliamentary privilege (**TS [32]**), being a summons necessarily directed to a “person *not* being a Member of the Council or Assembly” (emphasis added).
- 13 *Third*, the power conferred by s 7 is conditioned on the President’s (or the Speaker’s) “satisfaction” of: (a) the failure of the summoned witness to attend as required by the summons; and (b) that the witness’s non-attendance is “without just cause or reasonable
- 20 **excuse”: 1RS [67]**. The use of the word “satisfaction” does no more than establish the existence of a statutory condition on the exercise of the power: cf **TS [34]**. But not every statutory condition on the exercise of a power is enforceable by a court: “the statutory consequence of non-compliance with a statutory condition of an exercise of power” is a question of statutory construction.<sup>20</sup> On the proper construction of a statute, non-compliance with a condition: (i) “might result in an exercise of power that is invalid”; or (ii) “might give rise only to political, administrative or other non-legal consequences”.<sup>21</sup>
- 14 On its proper construction, any non-compliance with a condition on the exercise of the power under s 7 has only political consequences. Any other construction would be inconsistent with parliamentary privilege, including because it would invite the
- 30 “questioning” or “impeaching” of matters that Mr Tudehope accepts are within the scope of parliamentary privilege: see **1RS [71], [74]; NSW [81]; Cth [15]; cf TS [32], [37]**. That

<sup>20</sup> *Casimaty* (2024) 98 ALJR 1139 at [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

<sup>21</sup> *Casimaty* (2024) 98 ALJR 1139 at [32] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

privilege can, of course, be abrogated by Parliament. But that would involve a departure from “the general system of law”,<sup>22</sup> and it should not be concluded that Parliament intended such a departure in the absence of express words or any necessary implication. Section 7 does not include express words abrogating parliamentary privilege and provides no foundation for drawing any necessary implication: cf **TS [33]**.

15 *Fourth*, to the extent that Mr Tudehope seeks to raise questions about the scope of parliamentary privilege more generally — including as to the meaning of the expression “impeached or questioned” in Art 9, and the observations of Edelman J in *Casimaty*<sup>23</sup> —  
 10 the Court should refrain from expressing a view on those questions unless it is necessary to resolve the constitutional validity of ss 7 to 9 of the PE Act: see **1RS [75]-[76]**.

**Dated:** 9 June 2026



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<sup>22</sup> See *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [86]-[87], [117] (Hayne and Bell JJ); *BDR21 v Australian Broadcasting Corporation* (2023) 98 FCR 1 at [76]-[80] (the Court).

<sup>23</sup> (2024) 98 ALJR 1139 at [81] (Edelman J).