



## 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 OUTLINE OF ORAL ARGUMENT**

## PART I: CERTIFICATION

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This outline of oral argument is in a form suitable for publication on the internet.

## PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

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### Parliamentary Evidence Act

1. The essential constitutional infirmity lies in giving all the decisional authority to the President (s 7) but all the coercive power, which must be exercised upon the President's certificate, to the Supreme Court (s 8).

(a) Steps 1.1 and 1.2 in the President's outline of oral argument are discretionary political decisions. Even in Step 1.2, the President (and Speaker) are political actors, removable by mere vote of the House: *Constitution Act 1902* (NSW), ss 22G(3)(b) and 31(2). Observance of any expectation of independence is a matter enforceable only politically.

(b) So-called "steps 1.3 and 1.4" are an attempted exaggeration of the meagre statutory precondition, "upon such certificate ...". The Court makes no meaningful decision.

(c) By steps 1.5 and 1.6, the warrant not only effectuates the parliamentary officer's anterior decision to compel a witness who in their determination lacked just cause or reasonable excuse for non-attendance, but also their subsequent orders for further detention, which is not supervised by the court: PE Act, s 9, Sched 3; CA [25] (CAB 20).

2. The PE Act is a unique enactment. The purpose of securing the attendance of witnesses is achieved by other means in other schemes, including in legislative precedents in Tasmania and New South Wales itself: CA [14]-[19] (CAB 16-18).

### Kable principle

3. **Previous decisions of this Court:** The *Kable* principle can be infringed where there is 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: *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [124]-[125], [132]-[133] (Hayne, Crennan, Kiefel and Bell JJ) (JBA Tab 18); *South Australia v Totani* (2010) 242 CLR 1 at [81]-[82] (French CJ), [139]-[140], [142] (Gummow J), [225]-[226], [229] (Hayne J), [434]-[436] (Crennan and Bell JJ), [464], [467]-[468], [480] (Kiefel J) (JBA Tab 36). It does not make a difference that the warrant function is administrative rather than judicial because decisional independence is a defining characteristic of the court as an institution.

4. There is no analogy to *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, which concerned an orthodox judicial process: [24], [27], [56], [60], [62] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (**JBA Tab 19**). The fact of an historical conviction by a court is far removed from a discretionary determination by a parliamentary officer as to what should occur.

5. **Article 9 and exclusive cognisance:** Article 9 and exclusive cognisance are principles of abstention, not conscription; a shield, not a sword. They can explain why a court does not interfere with the intra-mural affairs of Parliament but not why a court may be required to lend its authority to such an intra-mural affair: *Attorney-General (Tas) v Casimaty* (2024) 98 ALJR 1139 at [40] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ) (**JBA Tab 42**).

6. Respect for exclusive cognisance would mean recognising that the limits on the functions of the parliamentary officers are to be enforced politically. The interposition of the Supreme Court undermines that by masking the political accountability of those political decisions.

7. **Historical involvement of judges:** The historical use of judges to issue warrants supports the *invalidity* of the scheme. The practice of authorising judges to issue warrants has virtually without exception involved conferring a power to be exercised upon the judge's satisfaction as to the criteria for issuing the warrant: see **1RS [36]-[43]**. That is a significant part of the very reputation that has been conscripted.

8. **Pre-Federation practices:** Widespread *practices* before Federation may inform the interpretation of Ch III: *Forge v ASIC* (2006) 228 CLR 45 at [26], [82], [138], [256]-[257] (**JBA Tab 25**); *Baker v The Queen* (2004) 223 CLR 513 at [47]-[48] (**JBA Tab 20**); but compare Local Land Boards considered in *Burns v Corbett* (2018) 265 CLR 304. Here, there was no practice: see **1RS [44]-[48]**.

*Lim* principle (**1RS [49]-[52]**)

9. The question whether *Lim* applies in the States does not arise. If it matters, the test would not be satisfied because denying the judge any antecedent decisional authority and any subsequent supervision of the detention is not reasonably appropriate and adapted to the purpose of securing the witness's attendance.

10. Alternatively, even if *Lim* applies and is not transgressed, it is a principle about punishment that is not exhaustive of the *Kable* principle, or indeed the incompatibility doctrine at the federal level from which *Kable* is derived. It says nothing about a whole range of non-judicial, non-punitive functions that might be sought to be conferred on judges or courts.

Mr Tudehope MLC's intervention (1RS [62]-[84])

11. Even if parliamentary privilege were no impediment in theory to the Court collaterally reviewing a certificate, no available construction of the text of s 8 would allow for collateral review. Collateral review would tend to deny the certificate its intended effect of “certifying” the facts and call into question why the procedure would involve a certificate at all.

12. Even if there were such a construction, it would not render the provisions valid. The process is still skewed so that the Court must make the coercive order except in an extremely limited circumstance where the Court could find that the President's satisfaction as to lack of reasonable excuse was not formed reasonably. The judge could not satisfactorily conduct even that limited inquiry, which would be *ex parte* and where the President has no obligation to furnish anything other than the certificate.

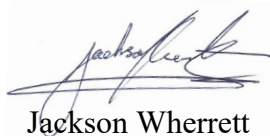
13. Even if a warrant could subsequently be challenged on the ground that the certificate was invalid, that would not render the provisions valid. Detention would already have occurred. The quality of the review available would be little better than in the posited *ex parte* hearing.

14. In any event, contrary to the essential premise of Mr Tudehope's submissions, parliamentary privilege *is* an impediment to collateral review of a certificate. The decision to issue a certificate is a proceeding in Parliament, at least because it is incidental to the deliberative decision of the House or Committee to summon a witness and made in consultation with members of the House or Committee. And even if it were not itself a proceeding, any review of it would still be constrained by the inability to question or impeach (on any view of Art 9) related proceedings in Parliament. That is because the reasonableness of the President's satisfaction could not be examined by reference to, e.g., the deliberations on the summons, or communications from the House or Committee to the President about issuing a certificate, or the House or Committee's purposes, all of which could conceivably be raised by a witness to assert a just cause or reasonable excuse: see AF [46]-[56] (CAB 59-63). That constraint renders the posited review no answer to the constitutional difficulty.

Dated: 10 September 2026



Brendan Lim



Jackson Wherrett