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

SECOND RESPONDENT'S
OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

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

Part II: OUTLINE OF ARGUMENT

2. The key vice identified by the Court of Appeal in the *Parliamentary Evidence Act 1901* (NSW) (**PE Act**) (**JBA Vol 1, Tab 3**) is that, when presented with a certificate issued by the **President** of the Legislative Council or the **Speaker** of the Legislative Assembly, a judge of the Supreme Court is required to issue a warrant that will precipitate detention without any "meaningful evaluative determination by the judge": J [8] (**CAB 13**).

3. ***President's reliance on parliamentary privilege to justify the judge's limited function***: Contrary to the President's submission at **AS [47]**, the allied principles that are: (i) referred to as "exclusive cognisance"; and (ii) given expression in Art 9 of the Bill of Rights, do not provide a "principled explanation" for the "minimal" task undertaken by the judge under s 8 of the PE Act. The contention that these principles can be relied upon to justify a regime that "neither requires nor permits the relevant judge to bring any … qualities of independence, impartiality and fair-mindedness to bear on a meaningful decision-making process" (J [67] (**CAB 34**)) misunderstands the nature of these principles and their role within the broader constitutional framework in two ways.

4. ***First***, as explained at J [51]-[52] (**CAB 29**) and **RS2 [44]**, the "starting point" is Ch III of the *Constitution*, not Art 9 of the Bill of Rights or exclusive cognisance. It follows that New South Wales could enact, as one of the many alternative regimes available (see **RS2 [43]-[46]**), a statutory scheme that involved the Supreme Court in the process of ensuring the attendance of witnesses before Parliament and its committees. Such a scheme would require some degree of abrogation of Art 9 and exclusive cognisance; however, there is no impediment to the legislature achieving that result.

5. ***Secondly***, the President's argument wrongly assumes that the limited function exercised by the judge under s 8 of the PE Act gives effect to exclusive cognisance or Art 9. When those principles are engaged – for example, in a case where a party seeks to have the Court review the manner of a House's exercise of its privileges and powers – the Court declines to exercise its powers in respect of matters that are properly within the exclusive purview and responsibility of Parliament. In so doing, the Court conforms to the "<u>bilateral</u> principle that the courts and Parliament are both astute to recognise their respective constitutional roles": *Director of Public Prosecutions (NSW) v President of the Legislative Council of New South Wales* (2026) 119 NSWLR 80 (**JBA Vol 8, Tab 45**) at

[97] (Leeming and Stern JJA and Griffiths A-JA). In this way, exclusive cognisance and Art 9 protect <u>both</u> the Parliament and the Courts by ensuring that the latter avoid "becom[ing] embroiled in the political controversies which such questions typically involve": *Egan v Willis* (1998) 195 CLR 424 (**JBA Vol 4, Tab 23**) at [131] (Kirby J).

6. The difficulty with the impugned provisions of the PE Act is not so much that they do not permit the judge to investigate the underlying facts when presented with a certificate issued by the President or the Speaker. That limited function could be regarded as consistent with Art 9 and exclusive cognisance. The real problem arises because, notwithstanding these limitations on the judge's capacity to scrutinise the matter, she or he is required to issue a warrant that gives effect to the parliamentary officer's decision.

7. In this way, the operation of ss 7-9 of the PE Act cannot be equated with Art 9 or exclusive cognisance in an ordinary case. The effect of the statutory provisions is not to ensure that the Supreme Court and Parliament are confined to their proper functions but rather to: (i) draw a judge into closer association with proceedings in Parliament; and (ii) require the judge to subordinate their judgment to that of the President or the Speaker. Understood in this way, the effect of the impugned provisions is actually to undermine the object and operation of exclusive cognisance and Art 9: see **RS2 [47]-[49]**.

8. ***Mr Tudehope's arguments based on parliamentary privilege***: Mr Tudehope contends that, contrary to the position adopted by all of the parties and at J [21] (**CAB 18**), the issuance of a certificate by the President is <u>not</u> a proceeding in Parliament. It is said to follow that a court can review the reasonableness of the President's state of satisfaction that a witness has failed to attend "without just cause or reasonable excuse". That submission should be rejected for four reasons (the first, second and fourth of which obtain regardless of whether issuance of a certificate is a proceeding in Parliament).

9. ***First***, as explained at **RS2 [75]**, even if the issuance of a certificate is not a proceeding in Parliament, that would not cure the key vice identified by the Court of Appeal (see [2] above) because the absence of a meaningful evaluative function for the judge under the PE Act flows necessarily from the text of the statute itself (see J [23] (**CAB 19**)).

10. ***Secondly***, the potential for judicial review <u>after</u> a warrant has issued cannot save the impugned provisions from invalidity: **RS2 [76]-[77]**. An immediate challenge to the issuance of a warrant would be practically impossible. As for the possibility of a challenge at some later stage, that would not overcome the basic problems that: (i) the Supreme Court would have been required to issue a warrant at the direction of the

President or the Speaker; and (ii) a person would be detained for a not insubstantial period pursuant to that warrant.

11. ***Thirdly***, on any view, the issuance of a certificate by the President or Speaker under s 7 of the PE Act does constitute a proceeding in Parliament because, contrary to Mr Tudehope's submissions, it is not an individual administrative act but rather a formal action taken as part of a collective process in which members of a House or committee will be involved: **RS2 [79]-[80]**.

12. ***Fourthly***, even on Mr Tudehope's approach, any challenge to a warrant brought after the issuance of a warrant would likely be significantly constrained in practice by the limited extent to which deliberations and documents prior to, or post-dating, the issuance of the certificate under s 7 of the PE Act could be relied on by reason of Art 9: **RS2 [81]**.

13. ***President's reliance on the Lim principle***: No party contends that the provisions of the PE Act are invalid by application of the principle articulated in *Chu Kheng **Lim** v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (**JBA Vol 3, Tab 22**). Further, on no view is the *Lim* principle exhaustive of the scope of the *Kable* doctrine (i.e. just because a law falls into an "exceptional case" for the purposes of the *Lim* principle, that does not mean there could not be other features of the law that undermine the institutional integrity of a State court). Having regard to these matters, it is unnecessary for the Court to determine the extent to which the *Lim* principle informs the *Kable* principle and, in accordance with the precautionary approach to deciding constitutional questions, the Court should not do so: **RS2 [54]**.

14. If, contrary to that submission, the question of the relationship between *Lim* and *Kable* is reached, the NSWAG submits (see **RS2 [56]-[64]**) that the mere fact that a law authorises a court to impose detention in a manner that would infringe the *Lim* principle if it were enacted by the Commonwealth is not determinative, or even highly suggestive, of the proper conclusion on a *Kable* analysis: see *Lim* (1992) 176 CLR 1 at 26-28, 32 (Brennan, Deane and Dawson JJ); *Garlett v WA* (2022) 277 CLR 1 (**JBA Vol 4, Tab 26**) at [7], [39]-[40] (Kiefel CJ, Keane and Steward JJ), [184] (Gordon J), [241]-[248] (Edelman J), [292]-[298], [301], [305] (Gleeson J).

Dated: 10 September 2026

Zelie Heger SC **Luca Moretti**