



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

PRESIDENT OF THE LEGISLATIVE COUNCIL OF NEW SOUTH WALES

Appellant

and

JAMES CULLEN & ORS

First Respondent

OUTLINE OF ORAL ARGUMENT OF AMICUS CURIAE

Part I: CERTIFICATION

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

Part II: Propositions to be advanced in oral argument

Certificate is not a *conclusive* determination of compliance with the statutory conditions

1. The President's certificate is not "conclusive". Section 7 imposes two subjective jurisdictional facts. The President must certify "such facts". The s 7 satisfaction is a precondition to the power in s 8: TS [29], [34] cf 1RS[67]. Section 7 is directed to "*a Judge of the Supreme Court*". Non-compliance has legal, not merely political, consequences (*Eshetu* [130]-[133]; *George v Rockett* (1990) 170 CLR 104, 110–111 (JBA4 27/924–925); cf Reply [14]; cf *Casimaty* (2024) 98 ALJR 1139 [37]- [42], [52] (JBA8 42/2103, 2105)
2. Section 8 has an enforceable purposive limit "*for the purpose of bringing the person before the Council... to give evidence*". Section s 9 must be construed by reference to the purpose in s 8: TS[43]. NSW acknowledge that reading: NSW [83]: *NAAJA* (2015) 256 CLR 569, [11], [23];
3. *Fitzpatrick and Browne* (1955) 92 CLR 157, 162 (JBA5 35/1388) must be distinguished: TS[31]-[34]; cf 1RS[70]. *First*, it concerned powers supplied by s 49 of the Constitution.
4. *Second*, this case concerns express statutory limits on power. No House can conclusively assert the existence of a power: *Egan* (1998) 195 CLR 424 [26] [53] (cf [79] McHugh J) JBA4 23/542,551,562; *Stockdale* (1832) 112 ER 1112, 1154 (Denman CJ), 1188 'not conclusive' (Patterson J), 1198 ('*usurpation*') (Coleridge J) JBA9 53/2548, 2582, 2592.
5. Third, the warrant in *Fitzpatrick* was "in general terms, and not in particular terms" (92 CLR, 164). If the warrant "*specifies the ground of the commitment the court may ...*

determine whether it is sufficient in law” (92 CLR, 162). Schedules 2 states the particular ground (JBA 3/20). Cf s10 *Parliamentary Privilege Act 1858 (Tas)* (JBA2 14/132); see s9 *Parliamentary Privileges Act 1987 (Cth)* JBA2 5/50, EM *Parliamentary Privileges Bill 1987 (Cth)* “a court may review...to determine whether the person’s conduct was capable of constituting an offence as defined”, see also *Burdett v Abbot* (1811) 14 East 1, 150–151 104 ER 501 at 558; *Middlesex* (1840) 113 ER 419,427

6. The implications for institutional integrity are significant. Either before the warrant issues (eg by declaration) or after (eg by *habeas*) (cf 1RS[80]) the Court can adjudicate upon (in addition to the matters at CA[65]) (a) whether the protection in s 5 (read purposively) applies to the staff of another Member: CA [3], [72]; (b) whether the s8 purpose of attending “to give evidence” subsists eg, in the event the Parliament or committee has been prorogued or dissolved: *Stockdale*, 112 ER 1156 (Denman CJ) (JBA 53/2550) (on the limits with respect to prorogation), approved in *Chaytor*, [61]; Constitution Act 1902 (NSW), s 22F; cf RS1 [81]; (c) whether the President could be reasonably satisfied that there was no ‘just cause or reasonable excuse’ for non-attendance.

Superintending the warrant after its issue would not impeach proceedings in the Council

7. Evidence of faulty service, of whether the person failed to appear, or that a committee has had a reasonable time to question, does no more than establish the existence or non-existence of facts: *Mundey v Askin* [1982] 2 NSWLR 369, 373 (JBA8 47/2322).
8. The fact that an adverse inference *could* incidentally be drawn from judicial review does not shut off the inquiry altogether: *DPP (NSW)*[2026] NSWCA 20 [102]-[105] (obiter) (JBA8 45/2315–2316); *Casimaty* (2024) 98 ALJR 1139 [81] (JBA8 42/2111); cf 1RS , [74]; NSW [81].

Alternatively, the certification is not a proceeding in Parliament

9. The mechanism of ss 7–8 — an independent officer being “satisfied” of certain matters and certifying them to a judge — is not a “proceeding in Parliament”. The Court of Appeal assumed, and did not decide, the contrary: CA [21]; AS [14], [15.2]; NSW [74].
10. The test is functional: whether inquiry “*is likely to impact adversely on the core or essential business of Parliament*”: *R v Chaytor* [2011] 1 AC 684, [47] (JBA9 51/2441); *R (Miller) v Prime Minister* [2020] AC 373, [66] (JBA9 52/2504); cf 1RS [63].

11. Statute has *expanded* privilege beyond Art 9 to an incidental matters: *Rowley* [2000]1 Qd R 207, 219-220 (JBA8 49/2378); *Sportsbet v NSW* (2009) 262 ALR 27 [19] (Jagot J)
12. Exclusive cognisance is a distinct concept. Both it and Art 9 may be relinquished: “*it is, of course, always open to Parliament by legislation to provide for the courts to encroach on matters falling within its exclusive cognisance, or even on article 9 privilege*”: *Chaytor*, [67] (JBA 51/2447); *Casimaty* (2024) 98 ALJR 1139, [51] (JBA 42/2105). The novel NSW scheme interposing certification to a Supreme Court Judge indicates this is not an intramural matter: TS [27]-[29]. The Attorney General accepts that s 13 of the same Act abrogates Art 9 “to some extent”: NSW [44] fn 49; cf President’s Reply [14].

The function is not of itself improper for a court to exercise

13. Warrant powers of this kind have historically been exercised “without risk to public confidence”: *Wilson* (1996) 189 CLR 1, 26 (Gaudron J) (JBA7 41/2057). The Act formalises the process of *habeas corpus ad testificandum* by which a prisoner was brought before Parliament it being “one of the functions of the Supreme Court to assist other tribunals in any judicial inquiry”: *In re Kelly; ex parte The Sheriff* (1860) 2 Legge 1275 (JBA8 46/2319–2321).

Section 9 can be severed

14. If necessary, either the whole of s 9 may be severed, along the words in the warrant in Schedule 3 “*and there to obey all further orders under the hand of...*” until the end of the sentence Section 8 is sufficient to give force to the warrant (cf RS1 [83]–[84]), and it would be a gratuitous assumption that Parliament intended indefinite detention or nothing.

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