



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: H3/2023
File Title: Attorney-General for the State of Tasmania v. Casimaty & Anc
Registry: Hobart
Document filed: Form 27F - 1st Respondent's Outline of oral argument
Filing party: Respondents
Date filed: 09 Apr 2024

Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

H3/2023

IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

BETWEEN:

ATTORNEY-GENERAL FOR THE STATE OF TASMANIA
Applicant

and

GREGORY JOHN CASIMATY
First Respondent

and

HAZELL BROS GROUP PTY LTD
(ACN 088 345 804)
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: This outline is in a form suitable for publication on the internet.

Part II: OUTLINE OF ORAL SUBMISSIONS

Issues

1. The appeal raises two issues namely:
 - (A) Whether the prohibition on the commencement of public works in s.16(1) of the *Public Works Committee Act 1914 (PWC Act)* gives rise to a public right or obligation which can be protected or enforced by the court; and
 - (B) Is Art. 9 of the Bill of Rights necessarily infringed if the court compares the Hazell Bros Works to the public works referred to and reported by the Committee in 2017 for the purposes of determining whether the Hazell Bros Works ought not to have been commenced by virtue of 16(1) of the PWC Act?

Issue A – the PWC Act

2. The first issue is one of statutory construction of the PWC Act.¹

¹ First Respondent's Submissions at [1]

3. The starting point is the text of the statute whilst, at the same time, regard is to be had to its context and purpose.²
4. There is no requirement for express words or unmistakable language. The relevant inquiry is whether the claimed exclusive cognisance of parliamentary exists in relation to the enforcement of compliance with the s.16(1) prohibition and not whether an established privilege is abrogated by statute.³
5. The majority rejected the appellant's argument "that all aspects of the process prescribed by the PWC Act are related to the proceedings of Parliament and, accordingly, excluded from intervention by the Court", and correctly construed s.16(1) of the PWC Act such that it creates public obligations binding those who perform the work, falling outside parliamentary processes and hence parliamentary privilege.⁴ The prohibition is not confined to "general government sector" bodies and is directed to the commencement of the work.⁵
6. The consideration of public works by the Committee as required by s.16(4) of the PWC Act does not commence until after referral is made by the Governor under s.16(2). Prior to that time the relevant proposed public works are prohibited from commencement by s.16(1). The prohibition in s.16(1) applies prior to and independently of the commencement of the parliamentary process of the consideration of and reporting on the proposed public works. As such the court's enforcement of the prohibition does not require the court to enter the parliamentary process and thereby infringe parliament's exclusive cognisance. The decision of the Governor to refer work to the Committee pursuant to s.16(2) is the commencement of and part of that parliamentary process and therefore within the exclusive cognisance of the parliament.⁶

² First Respondent's Submissions at [2]-[3]

³ First Respondent's Submissions at [16-22 and 26-27]

⁴ First Respondent's Submissions [4]

⁵ Contrary to the submission of the ACT at [21].

⁶ First Respondent's Submissions at [28]

7. The statutory purpose of the PWC Act is to ensure proper scrutiny of public works proposed to be constructed by government for the benefit of and use by the public, using significant sums of public money. The statutory purpose is not only facilitated by enforcement by the courts of the express prohibition in s.16(1) of the PWC Act,⁷ but is necessitated by the absence of any efficacious enforcement of that prohibition by parliament under principles of responsible government.⁸

Issue B - Article 9 of the Bill of Rights

8. Article 9 is to be construed using the same principles of statutory construction as used for the PWC Act, including by resort to dictionary definitions applicable at the time the Bill of Rights was enacted in 1688.⁹ The parties appear to be in agreement that resort to the dictionary definition of "impeach" is permissible, but are not in agreement in relation to "question".
9. In *Erglis v Buckley* [2004] 2 Qd R 599 (**Erglis**) at [6] McPherson JA relied upon his previous reasoning in *Rowley v O'Chee* [2000] 1 Qd R 207 (**Rowley**) at 222, which applied the dictionary definition of "impeach" in existence at the time the Bill of Rights was enacted. It is therefore logical to assume McPherson JA would have adopted the same approach in relation to "question", as Fryberg J did in *Erglis* at [84]. Jerrard JA in dissent in *Erglis* appeared to adopt the same approach at [32], and applied the first dictionary definition to "question" at [34] rather than the obsolete second definition: "to ask or inquire about, to investigate (a thing) Obs. rare".
10. Blackstone's statement that "*whatever matter arises concerning either house of parliament, ought to be examined, discussed and adjudged in that house to which it relates, and not elsewhere*", was first published in 1765 and is a purported quote of Sir Edward Coke published in 1644. Article 9 is more confined - in particular, his word "discussed" is to be compared with the narrower "impeached or questioned" in art 9. The ordinary meaning of the text of art 9 at the time it was enacted ought to

⁷ First Respondent's Submissions at [25]

⁸ First Respondent's Submissions [8]-[15]

⁹ First Respondent's Submissions [29]-[34]

guide its statutory construction rather than Blackstone's statement which distracts attention.¹⁰

11. The authorities referred to by the Cth at [21]-[23] are consistent with an orthodox application of the ordinary meaning of the words "impeached" or "questioned" used in art.9 at the time it was enacted. For example, using parliamentary proceedings to establish the truth of facts, correctness of opinions or to support the drawing of an inference favourable to one's case cause those facts, opinions and submissions to be necessarily impeached by the opposing party if the truth of the fact or correctness of opinion or submission is reasonably in issue in the proceedings. If not reasonably in issue, then art. 9 is not breached. When using proceedings in parliament to assist Courts to ascertain the meaning of legislation issues of truthfulness or correctness do not arise, and thereby do not engage art. 9.
12. The majority correctly applied common law principles relevant to Article 9 to the facts and correctly found that a consideration by the Court of the 2017 Report in this case would not be prohibited by parliamentary privilege and would merely involve establishing the fact and content of that report.¹¹

Dated: 8 April 2024



Bruce McTaggart SC

¹⁰ First Respondent's Submissions [35]-[40]

¹¹ First Respondent's Submissions [41]-[46]