HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF TASMANIA

BETWEEN:

ATTORNEY-GENERAL FOR THE STATE OF TASMANIA
Appellant

and

GREGORY JOHN CASIMATY
First Respondent

and

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

FIRST RESPONDENT'S SUBMISSIONS

Part I: These submissions are in a form suitable for publication on the internet.

Part II: It is contended that the appeal presents the following issues for determination:

A. Whether the prohibition on the commencement of public works in s.16(1) of the *Public Works Committee Act* 1914 (Tas) (**PWC Act**) can be enforced by the Supreme Court of Tasmania (**the Court**).

B. Whether it would be contrary to Article 9 of the Bill of Rights (**Art. 9**) if the Court undertook a comparison of the works within the 2017 report of the Public Works Committee (**the Committee**) with the relevant (Hazell Bros) works.

Part III: No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: The appellant's narrative of facts and chronology are not contested.

Part V: The first respondent's argument in answer to the argument of the appellant is as follows:

Issue A

A question of statutory construction

1. Consistent with the finding of the majority of the Full Court (**the majority**), that *"it is a question of construction whether it is within the jurisdiction of the Court to ensure that the requirements of legislation are observed, or alternatively whether such a role is precluded as a matter of parliamentary privilege*"[1], both parties contend that the first issue is one of statutory construction.[2]

2. The starting point to ascertain the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is to be had to its context and purpose.[3]

3. An interpretation that promotes the purpose or object of the Act is to be preferred to one that does not, whether or not the purpose or object is expressly stated in the Act.[4]

Construing the PWC Act

4. Consistent with the statute and the following reasons of the majority, the prohibition on the commencement of public works in s.16(1) of the PWC Act can be enforced by the Court.

(a) Sections 15 and 16 of the PWC Act are intended to facilitate and ensure parliamentary oversight of the conduct of public works of the defined value by government, and to provide Parliament with sufficient information to enable it to determine *"the expedience of carrying out the work*".[5]

(b) The statutory purpose and significance of a referral by the Governor under the PWC Act extends beyond the facilitation of review of public works by the Committee.

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[1] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [17] per Brett J (Pearce J agreeing) applying the approach of the NZ Court of Appeal in *Huata v Prebble* [2004] NZCA 147; [2004] 3 NZLR 359; Core Appeal Book (**CAB**), pp.24-25

[2] Appellant's submissions at [10].

[3] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] per Kiefel CJ, Nettle and Gordon JJ; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381–382 [69]–[71]; [1998] HCA 28 ; *Alcan (NT) Alumina Pty Ltd v Cmr of Territory Revenue* (2009) 239 CLR 27 at 46–47 [47]; [2009] HCA 41.

[4] *Acts Interpretation Act* 1931 (Tas), s.8A.

[5] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [20] per Brett J (Pearce J agreeing); CAB, p.26

Under s.15, the Committee is charged with reviewing and reporting on all relevant public work. There is no requirement in that section limiting that power and responsibility to works that have been referred to it by the Governor under s.16 (2). It is important that the mandatory requirement of referral by the Governor is not contained in s.15, but rather in s.16, the provision dealing with the condition precedent for the commencement of public works.[6]

(c) Section 16(1) takes the PWC legislation a step further than merely facilitating parliamentary review of public work. It prohibits the commencement of public work unless and until there has been scrutiny, that is there has been a referral under s.16 (2) and consequent report by the Committee. This prohibition does not fall upon parliament, but rather binds those who perform the public work, the executive government and those who contract with it.[7]

(d) The prohibition on commencement of work without the prescribed parliamentary scrutiny is intended to apply to persons and organisations outside parliament. This prohibition is a critical aspect of the legislative scheme. [8]

(e) There is nothing in the legislation which suggests that enforcement of the prohibition is a matter for Parliament.[9]

(f) In a situation where there had been no prior referral of relevant work to the Committee, there is nothing prescribed in the legislation which would empower the Parliament to identify or require referral of the work to it under s.16 (2).[10]

(g) The scheme will only have efficacy if it can be lawfully enforced on applicable persons outside parliament.[11]

(h) Having regard to the extensive prescription and regulation of the powers and procedure of the Committee once referral is made, it is inconceivable that if

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[6] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [23] per Brett J (Pearce J agreeing); CAB, p.27

[7] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [23] per Brett J (Pearce J agreeing); CAB, p.27

[8] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [24] per Brett J (Pearce J agreeing); CAB, p.27

[9] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [24] per Brett J (Pearce J agreeing); CAB, p.27

[10] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [25] per Brett J (Pearce J agreeing); CAB, pp.27-28

[11] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [25] per Brett J (Pearce J agreeing); CAB, pp.27-28

Parliament had intended that it be part of the legislative scheme that it be solely responsible for enforcing compliance with the condition precedent on the performance of public works, that it would not have included in that scheme powers and procedures for such enforcement and it has not done so.[12]

Justiciability

5. As the primary judge found[13]the first respondent has arguably a special interest in the subject matter of the proceedings, in that he claims to have an interest in a piece of land in Cranston Parade, and appears to contend that an interchange constructed in accordance with the revised plans will result in less convenient access to and from that property than an interchange constructed in accordance with the plans considered by the Committee. This finding was not challenged by the appellant in the Full Court who confined the challenge to the justiciability of the first respondent's action to the exclusive cognisance of Parliament.[14]

6. The appellant's submission that the authorities do not support the notion that prohibitions which are designed to secure the rights of Parliament to supervise and control the executive are owed to the public at large[15] is circular. The submission assumes that the relevant prohibition in s.16(1) of the PWC Act is designed to secure the rights of Parliament to supervise and control the executive, which is the issue which this appeal raises. In any event, the existence or non-existence of public rights enforceable in the courts requires statutory construction of the PWC Act.

7. There is authority on s.16 of the PWC Act. In *Bates v Attorney-General of Tasmania*[16] Cox J (as he then was) refused declaratory relief and injunctions in respect of public work, the commencement of which was said to be unlawful having regard to the provisions of s.16(1) of the PWC Act. The factual issue was identical to that arising in this case i.e., whether the public work in question had been the subject of an earlier referral and report. Cox J considered the claim on its merits, made the

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[12] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [25] per Brett J (Pearce J agreeing); CAB, pp.27-28

[13] *Casimaty v Hazell Bros Group Pty Ltd* [2022] TASSC 9 at [13] per Blow CJ; CAB, p.8

[14] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [8] per Brett J (Pearce J agreeing); CAB, pp.22-23

[15] Appellant's submissions at [22].

[16] [1995] TASSC 28.

relevant comparison, and determined that the work was not so different in character as to require a fresh referral and report. The question of parliamentary privilege does not appear to have been raised and considered by the judge.

Responsible Government

8. The majority's finding that the s.16(1) *"prohibition does not fall upon Parliament, but rather binds those who would perform the public work, which clearly must be executive government and those who contract with it*"[17] is not challenged by the appellant. Rather, the appellant suggests that the as the "*executive is ultimately accountable to Parliament"* as an aspect of the principle of responsible government then the enforcement of the prohibition is a matter for Parliament.[18]

9. The appellant does not suggest there is anything in the text of the legislation which suggests that enforcement of the prohibition is a matter solely for Parliament.

10. The appellant does not suggest how in a situation where there has been no prior referral of relevant work to the Committee the Parliament would be empowered to identify or require referral of the work to it under s.16 (2).

11. The appellant does not suggest how, in practice, the prohibition could lawfully be enforced on applicable persons outside parliament nor effectively on an executive government acting unlawfully.

12. The appellant does identify any powers and procedures for enforcement of the prohibition by Parliament.

13. Nor does the appellant explain why the majority's construction of s.16(1) of the PWC Act cannot supplement the operation of responsible government. To secure the responsibility of government activity is the very essence of responsible government.[19]

14. The majority of the Full Court distinguished *Mangawaro Enterprises Ltd v Attorney General.*[20] Brett J (with whom Pearce J agreed) found that if the legislative

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[17] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [23] per Brett J (Pearce J agreeing); CAB, p.27

[18] Appellant's submissions at [36].

[19] *Egan v Willis* (1998) 195 CLR 424 at [42] per Gaudron, Gummow and Hayne JJ.

[20] [1994] 2 NZLR 451.

requirement in s.16 included only that contain in subs (2) and omitted subs (1) the legislative scheme would be comparable to that applicable in the *Mangawaro Enterprises* case, and the question of compliance of the executive with the obligation of referral contained in s.16 (2) would be a matter falling within the parliamentary process. However, Brett J found that s.16 (1) extends the application and operation of the legislation in a critical way. The existence of the prohibition in that section supports the conclusion that the legislative scheme extends beyond parliamentary process and review by imposing a restraint on the conduct of persons outside parliament, where that review has not taken place. In other words, if the appropriate referral has not been made, and the work is being commenced, then not only is the relevant member of the executive in breach of its obligations to Parliament, but it is also in breach of the public duty owed by statute. In practical terms, it will be carrying out work in circumstances which are prohibited by the legislation, because the appropriate parliamentary scrutiny has not taken place.[21]

15. Therefore, the executive's accountability to parliament is insufficient and inadequate to ensure practical compliance with the prohibition on the commencement of unscrutinised public works in s.16(1) of the PWC Act by the executive and those who contract with it so as to meet the relevant objects and purpose of the PWC Act. In the absence of any parliamentary power to enforce that prohibition, Parliament must by implication have intended the prohibition to be subject to the "*protection and enforcement of courts*".[22]

Exclusive cognisance

16. General statements about wider principles of mutual restraint and non-intervention are unhelpful in the task of construing the PWC Act. As the majority of the Court of Appeal in NZ observed, when considering whether a Member of Parliament may be held liable in defamation if the Member makes a defamatory statement in the House of Representatives – a statement which is protected by absolute privilege under art 9 of the Bill of Rights 1688 – and later affirms the statement (but without repeating it) on an occasion which is not protected by privilege :

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[21] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [25] per Brett J (Pearce J agreeing); CAB, pp.27-28

[22] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [25] per Brett J (Pearce J agreeing); CAB, pp.27-28

"We do not see more general statements about wider principle, mutual restraint and non-intervention as being helpful in resolving this case. This appears to be a situation in which Oliver Wendell Holmes is right : "You can never decide a case by general propositions". Plainly the courts must be respectful of Parliament's fundamental privileges, privileges required by its essential functions. They must as well, when the issue arises for decision, determine what they understand to be the limits of those privileges, as they have in many cases in many jurisdictions over the centuries."[23]

17. The first respondent takes issue with the appellant's submission to the effect that Parliament will not be held to have dismissed any of its privileges unless it has done so by "*unmistakable language*".[24]

18. In *Huata v Prebble*[25] the Court of Appeal of NZ considered the application of internal parliamentary proceedings privilege to the *Electoral Act* 1993 (NZ) in proceedings for judicial review of whether a member's seat had become vacant. The majority found that this aspect of parliamentary privilege could apply notwithstanding that the procedure pursuant to which the seat had become vacant was prescribed by statute.[26] The majority concluded that the court *"can and should consider and determine the scope of this privilege and thus the limits of the area that concerns the internal procedures of the House and is the subject of privilege."*[27]

19. The majority in *Huata v Prebble*[28] concluded that the relevant statute had "*sufficient indications*" that Parliament did not intend that the procedures were subject to internal proceedings privilege.[29]

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[23] *Jennings v Buchanan* [2002] NZCA 363; [2002] 3 NZLR 145 at [54]; an appeal to the Privy Council was dismissed in *Buchanan v Jennings* [2005] 1 AC 115.

[24] Appellant's submissions at [10 and 34].

[25] [2004] NZCA 147; [2004] 3 NZLR 359.

[26] At [55].

[27] At [59]. In *The Queen v Richards; exparte Fitzgerald and Browne* [1955] HCA 36; (1955) 92 CLR 157 Dixon CJ at 162 said that "*it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and manner of its exercise."*

[28] Comprising McGrath, Glazebrook and O'Reagan JJ with whom Hammond agreed at [144], William Young J expressing reservations at [159].

[29] At [59-67].

20. The majority in *Huata v Prebble* went on to consider Art 9 and said that "*it is well recognized*" that Parliament has the power to override Art 9 "*expressly or by implication*" and that *"it may be that in cases not involving the attribution of legal liability on the basis of statements in the House (historically the most important aspect of the rule), if there are other important constitutional principles involved, the Court will take a less stringent approach to questions of implication."*[30] The majority found that Art 9 had been overridden by implication.[31]

21. In *R v Chaytor* Lord Phillips (with whose reasons the other Lords agreed) said that any presumption that express language was required (to "*waive or relinquish*" exclusive cognisance[32]) was "*open to question*".[33]

22. In *President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]* Hall J refers to some examples of exclusive cognisance being the right to suspend or expel a member and the right to determine who will be presiding officer. Unlike the carrying out of public works outside of Parliament by the executive and those who contract with it, these examples clearly relate to the internal working of Parliament.[34] Hall J also noted that the scope of the matters covered by exclusive cognisance has changed over time, in part due to inroads made by legislation. Furthermore, the dividing line between the privileged and non-privileged activities of each House of Parliament is not easy to define and there are also some areas where Parliament and the courts have overlapping jurisdiction.[35]

23. The appellant submits that this proceeding is so closely connected with proceedings in Parliament so as to make it either appropriate or necessary for the court to decline

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[30] At [69].

[31] At [69]. The Supreme Court of NZ upheld an appeal from the majority of the Court of Appeal's construction of the relevant statute but not in relation to parliamentary privilege in *Prebble v Huata* [2004] NZSC 29.

[32] The words used by Nettle and Gordon JJ in *Alley v Gillespie* (2018) 264 CLR 328 at [108] and also by Hall J in *President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]* [2021] WASC 223 at [138].

[33] *R v Chaytor* [2011] 1 AC 684 at [78].

[34] *President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]* [2021] WASC 223 at [138].

[35] *President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]* [2021] WASC 223 at [139].

to exercise jurisdiction.[36] The appellant relies upon the suggestion by the primary judge that the first respondent is asserting that obligations imposed by the PWC Act on the Governor and the Committee have not been complied with and therefore he is seeking to impugn Parliament's supervision and control of the executive through the Committee in breach of parliamentary privilege. This reasoning was implicitly rejected by the majority of the Full Court. Brett J held the fact that the Governor and the Committee may have a different view does not detract from the jurisdiction of the Court to grant injunctive relief to enforce s.16(1).[37]

24. In any event, the first respondent need only establish that the relevant work has not been referred to and reported by the Committee. He does not seek to impugn Parliament's supervision and control of the executive through the Committee.

25. Further, the finding of the majority of the Full Court, that the courts can enforce the prohibition on commencing public work in s.16(1), advances the objects of the PWC Act by enhancing the capacity of Parliament to supervise and control the executive in relation to unscrutinised public works which reach the relevant monetary threshold. If those unscrutinised public works are prohibited by the courts, then a referral to and report thereon by the Committee is the likely response of the executive.

26. The appellant relies upon cases including *BDR21 v ABC*[38] as suggesting that waiver or relinquishment of exclusive cognisance by implication by silence is unsafe.[39] In *BDR21 v ABC* it was unsuccessfully argued that the *Public Interest Disclosure Act* 2013 (Cth) had excluded the operation of s.16(3) of the *Parliamentary Privileges Act* 1987. The Full Court of the Federal Court found that a declaration in substance, supported by s.49 of the Constitution, is required to change the operation of s.16(3) of the *Parliamentary Privileges Act* via another statute. The Full Court referred to the need for *"express words in an unmistakable way so as to meet the constitutional mandate*".[40] The Full Court referred to decisions dealing with claimed abrogation of

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[36] Appellant's submissions at [32].

[37] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [34] per Brett J (Pearce J agreeing); CAB, pp.30-31

[38] [2023] FCAFC 101 (referred to at [34 fn62] of the Appellant's submissions).

[39] Appellant's submissions at [34].

[40] [2023] FCAFC 101 at [80].

established privileges by statute[41] including *Hammond v Commonwealth*[42], *Criminal Justice Commission v Parliamentary Criminal Justice Commission*[43] and *Aboriginal Legal Service of Western Australia v Western Australia.*[44] The present case involves a different issue to those cases namely whether Parliament has by statute waived or relinquished exclusive cognisance to the courts to enforce a statutory prohibition on the commencement of public works. In the present case it is not suggested that in the courts' enforcement of the prohibition in s.16(1) they would not be bound by Art 9.

27. The majority did not rely solely on silence as giving rise to the implication that enforcement of the prohibition in s.16(1) of the PWC Act was enforceable by the courts as suggested by the appellant[45], but rather on the reasons outlined at [4] hereof.

28. Contrary to the appellant's submission[46] there is a relevant distinction in the PWC Act between the condition precedent to the lawful commencement of certain public works in s.16(1) and the obligation on the Governor to refer certain public works to the Committee in s.16(2). The prohibition in s.16(1) is intended to apply to persons and organisations outside parliament. Further, the works on which the Committee must report under s.15 are wider and not necessarily coextensive with the works referred to it by the Governor pursuant to s.16(2). Pursuant to s.17 of the PWC Act the House of Assembly or Legislative Council may by resolution direct referral to the Committee of public works not exceeding the defined monetary threshold.

Issue B: Article 9 of the Bill of Rights

29. This issue also involves statutory construction, but of Art. 9 which applies in Tasmania by virtue of s. 24 of the *Australian Courts Act 1828* (Imp).[47]

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[41] [2023] FCAFC 101 at [92].

[42] [1982] HCA 42;152 CLR 188 at 200 per Murphy J

[43] [2001] QCA 218; [2002] 2 Qd R 8 at [26] per McPherson JA (with whom Williams JA agreed),

[44] (1993) 9 WAR 297 at 304.

[45] Appellant's submissions at [34].

[46] Appellant's submissions at [36].

[47] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [10] per Brett J (Pearce J agreeing); CAB, p.23

Impeach or Question

30. In *Erglis v Buckley & Ors*[48]the Queensland Court of Appeal considered the meaning of the words "impeach" and "question" taken from Art 9 and appearing in s.8(1) of the *Parliament of Queensland Act* 2001.

31. "Impeach" was found by the Queensland Court of Appeal to mean:[49]

(a) to impede, hinder, prevent;

(b) to hinder the action, progress, or well-being of; to affect detrimentally or prejudicially; to hurt, harm, injure, endamage, impair; and

(c) to challenge, call in question, cast an imputation upon, attack; to discredit, disparage.

32. "Question' was found by the Queensland Court of Appeal to mean:[50]

(a) to examine judicially; hence, to call to account, challenge, accuse *(of);* and

(b) to call in question, dispute, oppose.

33. The Queensland Court of Appeal identified the above definitions as applicable at the time the *Bill of Rights* was enacted.

34. In the process of considering the purposive construction of the words,[51] Fryberg J explained the origins of Art. 9 [52] as being to prevent intimidation of the houses of parliament by the executive and accountability before a possibly hostile judiciary. Fryberg J then said that "*[i]n construing art 9, the courts have been as much*

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[48] [2004] 2 Qd R 599; [2004] QCA 223.

[49] *Erglis v Buckley & Ors* [2004] 2 Qd R 599 per McPherson JA at [6], Jerrard JA at [32], and Fryberg J at [83 and 89]. See also *Rowley v O'Chee* [2000] 1 Qd R 207, 222; *Laurence v Katter* [2000] 1 Qd R 147, 204. But also see *President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]* [2021] WASC 223 at [146-149].

[50] *Erglis v Buckley & Ors* [2004] 2 Qd R 599, McPherson JA at [6], Jerrard JA at [32], and Fryberg J at [84 and 89].

[51] Under the Queensland equivalent of the *Acts Interpretation Act* 1931 (Tas), s.8A.

[52] [2004] 2 Qd R 599 at [85]; see also McPherson JA at [18]; see also *Jennings v Buchanan* (2002) 3 NZLR 145 at [18]-[24].

concerned to protect the rights of citizens as to preserve the liberties of Parliament."[53]

35. In *Jennings v Buchanan,*[54] the majority of the NZ Court of Appeal detailed the origins of Blackstone's often quoted statement quoted by the Privy Council in *Prebble v Television New Zealand,*[55] 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*." (**Blackstone's statement**)[56] to Sir Edward Coke in 1644, and that *"[i]n particular, his word "discussed" is to be compared with the narrower "impeached or questioned*" in Art 9. The majority noted at least one of Blackstone's editors also criticised the passage (in its briefer form) as implying a power which "surely is repugnant to the spirit of our constitution" (Edward Christian, 15th ed 1809, 163 n18; see also 164 n19)".[57] The majority went on to say[58]:

"Much more significant than that criticism is that made in 1999 by the Joint Committee on Parliamentary Privilege of the United Kingdom Parliament: the "oft quoted [Blackstone/Coke] statement ... is now accepted as being too wide and sweeping" (Session 1998-99 HL 43-I, HC 214-I para 42). The Committee, chaired by Lord Nicholls of Birkenhead, a Law Lord, also said this:

This legal immunity [guaranteed in art 9] is comprehensive and absolute. Article 9 should therefore be confined to activities justifying such a high degree of protection, and its boundaries should be clear. (Executive Summary p1)."

36. That criticism made in1999 by the Joint Committee on Parliamentary Privilege of the United Kingdom Parliament was cited with apparent approval by the Privy Council in *Buchannan v Jennings.*[59]

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[53] *Erglis v Buckley & Ors* [2004] 2 Qd R 599 at [85] per Fryberg J. See also *Jennings v Buchanan* (2002) 3 NZLR 145 at [18]-[24].

[54] (2002) 3 NZLR 145 at [18]-[24].

[55] [1995] 1 AC 321 at 332.

[56] *Jennings v Buchanan* (2002) 3 NZLR 145 at [21].

[57] *Jennings v Buchanan* (2002) 3 NZLR 145 at [22].

[58] *Jennings v Buchanan* (2002) 3 NZLR 145 at [23].

[59] [2005] 1 AC 115 at [16].

37. In *Erglis v Buckley* McPherson JA[60] refers to the following passage from Lord Browne-Wilkinson in *Prebble v Television New Zealand Ltd*[61] (which then goes on to refer to Blackstone's statement).

"In addition to article 9 itself there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any ***challenge*** *to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges …"* [bold emphasis added]

As to this passage McPherson JA says;

"If the test to be applied in determining whether s 8(1) of the Act or art 9 is being contravened is whether, in Blackstone's phrase, something said in the course of a speech or debate in Parliament is being examined, discussed or adjudged elsewhere, it would quickly put paid to a large segment of political discourse and comment throughout the State and, indeed, in the broader frame throughout the nation. That is no doubt why his Lordship was careful to confine his remarks to any "challenge" in the courts to what is said or done in Parliament."

38. McPherson JA traced the statement in *Prebble v Television New Zealand* to the judgment of Browne J in *Church of Scientology v Johnson-Smith.*[62] His Honour found that there are several reasons[63] for doubting the continuing relevance today of much of the extract from Blackstone's *Commentaries* if it is to be understood as meaning literally that a matter arising in Parliament ought not to be discussed in court or elsewhere.

39. The High Court has frequently referred to the particular caution which must be taken to ensure that the use of expressions in other cases does not obscure the words of an Act and warned about the dangers of ignoring the words of a statute in favour of

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[60] [2004] 2 Qd R 599 at [12].

[61] [1995] 1 AC 321,332.

[62] [1972] 1 QB 522, 530.

[63] [2004] 2 Qd R 599 at [13-18].

judicial comment. For example, in *Shi v Migration Agents Registration Authority* Hayne and Heydon JJ said:[64]

"*As this Court has so often emphasised in recent years, questions presented by the application of legislation can be answered only by first giving close attention to the relevant provisions. Reference to decided cases or other secondary material must not be permitted to distract attention from the language of the applicable statute or statutes. Expressions used in decided cases to explain the operation of commonly encountered statutory provisions and their application to the facts and circumstances of a particular case may serve only to mask the nature of the task that is presented when those provisions must be applied in another case. That masking effect occurs because attention is focused upon the expression used in the decided cases, not upon the relevant statutory provisions.*"

40. Therefore, the ordinary meaning of the text of Art 9 at the time it was enacted ought to guide its statutory construction rather than Blackstone's statement which distracts attention from the language of Art 9.

The application of Art 9 by the courts

41. Parliamentary privilege will not prevent proof of parliamentary proceedings, where the fact of the occurrence of those proceedings is relevant in the litigation and it is permissible to prove evidence of the words spoken [and it is submitted written] rather than simply describing the effect of what was done.[65]

42. In *Jennings v Buchannan* the majority of the NZ Court of Appeal referred to the difficulty, if not impossibility, for the courts to state, in a consistent way, generally applicable rules for the application of Art 9 and suggested that critical assistance is to be found in the words of Art 9, its purpose and related principle (even if the particular understanding of both may shift over the centuries), and the actual rulings in, and facts of, the leading cases, as well as the facts of the case before the court.[66] The purpose of the privilege and the important public interest reflected in it was as

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[64] (2008) 235 CLR 286 at [92].

[65] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [30-32] per Brett J (Pearce J agreeing) citing *Egan v Willis* (1998) 195 CLR 424 per Kirby J at [133], *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 per Lord Browne Wilkinson at 337, and *Mees v Roads Corporation* [2003] FCA 306 per Gray J at [80]; CAB, pp.29-30

[66] (2002) 3 NZLR 145 at [50].

identified by Lord Browne-Wilkinson in *Prebble* as *"to ensure so far as possible that a member of the legislature and witnesses before Committees of the House can speak freely without fear that what they say will later be held against then in the Courts. The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say."*[67]

43. The appellant's submissions acknowledge[68] that parliamentary privilege will not prevent proof of parliamentary proceedings to prove the occurrence of those proceedings or the content of those proceedings as an historical fact. [69] Case examples of the tender/receipt of evidence of parliamentary proceedings for that purpose include the following:

(a) the tender of Hansard as evidence of the words spoken in the Victorian Parliament, which words were relevant to whether misleading information had been provided to the Commonwealth Minister for the Environment relating to construction of the Scoresby Freeway;[70]

(b) the tender of Hansard to prove that a minister of the Queensland government made certain statements in parliamentary proceedings to prove the fact that the statements were made in support of the ABC's defence of fair comment in defamation proceedings[71];

(c) the receipt of evidence as to the existence or non-existence of a statement made in the course of in parliamentary debate in the Senate relevant to the defence of justification in defamation proceedings[72];

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[67] (2002) 3 NZLR 145 at [53].

[68] Appellant's submissions at [49].

[69] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [30] per Brett J (Pearce J agreeing); CAB, p.29

[70] *Mees v Roads Corporation* (2003) 128 FCR 418 at [86] per Gray J.

[71] *Comalco Ltd v Australian Broadcasting Corporation* (1983) 78 FLR 449 at 454 per Blackburn CJ.

[72] *Leyonhjelm v Hanson-Young* (2021) 282 FCR 341 at [47], [53], [55] per Rares J (Rares J was in dissent but not regarding parliamentary privileges on which his Honour, in substance, took the same view as Wigney and Abraham JJ).

(d) the tender of Hansard to prove, as a fact, that certain things had been said in the course of debate in the Legislative assembly of New South Wales[73];

(e) in *R v Chaytor* the UK Supreme Court held that the submission by members of Parliament of claim forms for allowances and expenses could not qualify for the protection of privilege. Scrutiny of such claims by the courts in the course of criminal proceedings would not adversely impact on the core or essential business of Parliament and would not inhibit debate or freedom of speech. The only thing it was said to inhibit was the making of dishonest claims[74];

(f) a report of a committee of the Victorian Parliament as evidence on the making of that report[75]; and

(g) the tender of parliamentary material including a report of a Commonwealth Joint Standing Committee and various submissions made to the Joint Standing Committee for the purposes of preparing the report. These documents were admitted for the purpose of establishing misleading representations which were relevant to whether there were reasonable grounds for making representations as to future matters under the *Australian Consumer Law* regarding the future availability of light rail and as to travel times on it relating to the sale of residential units.[76]

The application of Art 9 to this case

44. Art 9 would not be infringed if the Court undertook a direct comparison of the relevant works and those works within the 2017 report of Committee made pursuant to the PWC Act.[77] To do so would not involve going further than establishing historic fact.[78] It would not impeach or question the report for the purposes of Art 9 within the meaning of those words as discussed in *Erglis v Buckley* as set out above. It will

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[73] *Mundey v Askin* [1982] 2 NSWLR 369 at 373D–F, Moffit P, Reynolds and Samuels JJA.

[74] *R v Chaytor* [2011] 1 AC 684.

[75] *Victorian Taxi Families Inc and Anor v Taxi Services Commission* (2018) 61 VR 91.

[76] *Commissioner for Fair Trading v Bowes Street Developments Pty Ltd (No 2)* [2023] ACTSC 168 per Curtin AJ (ex tempore).

[77] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [33] per Brett J (Pearce J agreeing); CAB, p.30

[78] see *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 337 (Lord Browne-Wilkinson for the Privy Council); *Mees v Roads Corporation* [2003] FCR 418; *Leyonhjelm v Hanson-Young* (2021) 282 FCR 341; *NSW AMA v Minister for Health and Community Services* (1992) 26 NSWLR 116 at 124.

not, for example, involve a *challenge* to or *attack* upon the Committee's report. It will not involve *discrediting* or *disparaging* the report. It will not call into *question* the report. It will not *hinder* or *impair* the Committee in its statutory functions. It will simply involve considering by way of historic fact the public works upon which the Committee reported and specifically whether those works included the Cranston Parade Connection.

45. The appellant contends[79] that there is a danger of a contest with the [later] view of Parliament if the Court undertakes this exercise. This was considered and rejected as irrelevant by the majority.[80] As Brett J points out, the practical consequences would be that if there was a referral to the Committee, irrespective of the view reached by the Court in granting relief, one of the possible outcomes is that the Committee concludes that there was little significant difference in respect of the relevant work and so reports to Parliament, presumably reiterating its earlier recommendation. Such a conclusion and report would not be open to challenge before the courts and any attempt at such a challenge would be appropriately met by a claim of parliamentary privilege. In any event, as Hall J observed in *President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2], "Article 9 is concerned with the impeaching of proceedings, not with other conduct that may only have an indirect impact on those proceedings."*[81]

46. As the majority of the Full Court correctly found there is no prohibition against the admission of the 2017 report, or the statements and evidence relevant to that report, or the documents referred to in that report for the purpose of establishing the fact, content and scope of the report and these facts are sufficient to enable the Court to determine whether the work now proposed has been the subject of a referral and report sufficient to satisfy the condition precedent to the commencement of work contained in s.16 (1). This does not even involve the court *"examining, discussing and adjudicating*" upon the report. Nor does it involve using the report or documents referred to in it to establish the truth of any facts asserted in them. The comparison does not involve impugning the validity of the report or questioning its accuracy. The

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[79] Appellant's submissions at [51].

[80] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [34] per Brett J (Pearce J agreeing); CAB, pp.30-31

[81] [2021] WASC 223 at [149].

Court will not need to consider whether the statements made to the Committee are true or accurate, nor make any judgement about the correctness or validity of the Committee's recommendations.[82]

Part VI: Not applicable.

Part VII: It is estimated that the first respondent will require 2 hours for the presentation of oral argument.

Dated 21 December 2023

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[82] *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [33] per Brett J (Pearce J agreeing); CAB, p.30

ANNEXURE TO THE FIRST RESPONDENT'S SUBMISSIONS

In accordance with *Practice Direction 1 of 2019*, the following is a list of the particular constitutional provisions, statutes and statutory instruments referred to in the First Respondent's submissions, identifying the correct version of the legislation as at the date or dates relevant to the case.

Item	Legislation	Provision(s)	Version
1	*Public Works Committee Act 1914* (Tas)	ss.15, 16, 17	As at 12.12.2019 to 26.11.2023
2	*Acts Interpretation Act 1931* (Tas)	s.8A	Current
3	*Bill of Rights 1688* (UK)	Art 9	Current
4	*Australian Courts Act 1828* (Imp)	s.24	Current