HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No H3 of 2023

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

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The issues arising in this appeal are:

   (a) Whether the condition precedent in s 16(1) of the *Public Works Committee Act 1914* (Tas) (**PWC Act**) is a public obligation which is enforceable under the general law by the courts; and

   (b) Regardless of the answer to (a), whether the adjudication by a court upon whether there is a difference between public works referred to and reported upon by the Parliamentary Standing Committee on Public Works (**Committee**) and the public works to be undertaken by a general government sector body infringe parliamentary privilege.

PART III: SECTION 78B NOTICE

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

PART IV: CITATIONS

4. The citations for the decisions below are:

(a) in the Full Court of the Supreme Court of Tasmania – *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2;

(b) at first instance in the Supreme Court of Tasmania - *Casimaty v Hazell Bros Group Pty Ltd (No 2)* [2022] TASSC 9.

PART V: FACTS

5. These proceedings concern road works at a junction on the Tasman Highway near the Hobart Airport. Holyman Avenue and Cranston Parade meet the highway at that junction. The first respondent claims to hold an interest in land at Cranston Parade.[1] A proposal by the Department of State Growth to upgrade the intersection was considered and reported upon by the Committee in 2017 (**2017 report**).[2] The second respondent was engaged to construct the new interchange. The first respondent claims that the works that the second respondent was to perform are not the same as the public works considered and reported upon by the Committee.[3] Declaratory relief and an injunction were sought to restrain the second respondent from commencing the works until the Committee had considered and reported upon those works in accordance with s 15 and s 16 of the PWC Act.[4]

6. Upon being joined as a second defendant in the proceedings,[5] the Attorney-General filed an interlocutory application for "the action to be dismissed on account of the statement of claim not disclosing any reasonable cause of action in that there was no justiciable issue for the Court" and, in the alternative, to strike out parts of the statement of claim as offending parliamentary privilege.[6] The second respondent did not wish to be heard in relation to the interlocutory application.

7. The Primary Judge was inclined to think that the first respondent would have an arguable cause of action "if no question of parliamentary privilege arose", and was further inclined to think that, "if the statutory provisions on which the plaintiff's claim is based were unrelated to the proceedings of Parliament", that the first respondent would arguably have a sufficient interest for his action not to be dismissed.[7] In any event, the

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1 ASOC [1] (ABFM 4).
2 ASOC [3] (ABFM 5).
3 ASOC [14] (ABFM 8-9).
4 ASOC (ABFM 9).
5 Court order endorsed on the Attorney-General's application, and Notice of Appearance, (ABFM 24, 25).
6 Interlocutory application filed on 24 May 2021 (ABFM 28).
7 Primary Judge at [4], [13], [16] (CAB 6, 8, 9).

Primary Judge found that the cause of action could not proceed without the Court adjudicating upon the 2017 report of the Committee and the response of the Governor and the Committee to the obligations imposed upon them by the PWC Act.[8] His Honour found that "[a]djudicating upon those matters would contravene Article 9 of the Bill of Rights and is therefore not permitted" and concluded that the action therefore had no hope of success.[9] The amended statement of claim was struck out and the action dismissed.[10]

8. On appeal, the Full Court (Pearce and Brett JJ; Geason J dissenting) found that the Attorney-General's interlocutory application was misconceived, set aside the order of the Primary Judge and dismissed the interlocutory application.[11]

9. In any event, the road works did commence and are now complete.[12]

PART VI: ARGUMENT

A. Summary

10. The first issue relates to the proper construction of the PWC Act. Section 16 imposes a condition that certain public works shall not commence unless first referred to and reported upon by the Committee. Contrary to the conclusion of the Full Court,[13] that condition does not create a public obligation which is enforceable by the courts. Instead, it is concerned with the duty of the Executive to Parliament, underpinned by principles of responsible government. Construing s 16 as creating a public obligation which is enforceable by the courts not only disregards the "wider principle" of parliamentary privilege but is contrary to the principle that diminishing the privileges of Parliament should only occur by express or unmistakable language.[14]

11. The second issue concerns the ability of a court to consider a report of a parliamentary committee. Comparing the works which were referred to and reported upon by the

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8 Primary Judge at [32] (CAB 11).
9 Primary Judge at [32] (CAB 11).
10 Primary Judge at [33] (CAB 11); Order of the Primary Judge dated 21 February 2022 (CAB 12).
11 Full Court at [1], [35] (CAB 20, 31).
12 Whilst there is no evidence before the Court as to the completion of the works, it is not anticipated to be a contentious point.
13 Full Court at [1], [24] (CAB 20, 27).
14 *BDR21 v Australian Broadcasting Corporation* [2023] FCAFC 101; (2023) 298 FCR 1 at 20-21 [78] – [79] (the Court); *Hammond* v *The Commonwealth* (1982) 152 CLR 188 at 200 (Murphy J).

Committee in accordance with the PWC Act against the works to be performed under a construction contract entered into by a general government sector body infringes that part of parliamentary privilege enshrined in Article 9 of the *Bill of Rights 1688*.[15]

B. Legislative Scheme

12. The PWC Act provides for the establishment of a Parliamentary Standing Committee on Public Works.[16] A Joint Committee of Members of the Legislative Council and House of Assembly is to be appointed at the commencement of the first session of every Parliament.[17] Ministers of the Crown are excluded from membership.[18]

13. The functions of the Committee are set out in s 15. According to s 15(1), the Committee is to "consider and report upon every public work that is proposed to be undertaken by a general government sector body, except any public work which hereafter may be withdrawn from the operation of this Act by a resolution withdrawing the same adopted by each House of Parliament…where the estimated cost of completing the work exceeds the relevant monetary threshold in relation to the work".[19] Section 2 defines "public work" to mean: "building or construction works"; and "road or bridges works".[20]

14. In considering and reporting on any work, the Committee shall have regard to: the stated purpose of the work; the necessity or advisability of carrying it out (and where the work purports to be of a "reproductive" or "revenue producing" character, the amount of revenue which it may reasonably be expected to produce); and the present and prospective public value of the work; and in all cases shall take such measures and procure such information as may enable it to inform or satisfy Parliament as to the expedience of carrying out any proposed work.[21] The PWC Act affords the Committee certain powers, including to enter land, summon witnesses and take evidence.[22]

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15 1 W & M Sess 2 c 2.
16 PWC Act, Long Title.
17 PWC Act s 3(1).
18 PWC Act s 3(3).
19 PWC Act s 15(1). The relevant monetary threshold is defined in s 3 to mean $8 000 000 in relation to building and construction works and $15 000 000 in relation to road or bridges works.
20 PWC Act s 2.
21 PWC Act s 15(2).
22 PWC Act s 13, 14, 22.

15. According to s 16(1), no public work to which s 15 applies (except those authorised by Parliament or withdrawn from the operation of the PWC Act), the estimated completion cost of which exceeds the relevant monetary threshold, shall be commenced unless it has first been referred to and reported upon by the Committee in accordance with s 16. Section 16(2) requires the Governor to refer every proposed public work that exceeds the relevant monetary threshold to the Committee. With such reference, there shall be furnished an estimate of the cost of the work, plans, specifications, descriptions and reports on probable costs and revenue, if any.[23] The Committee reports the results of their inquiries to the House of Assembly if in session or to the Governor if not in session.[24] If the Committee does not recommend the carrying out of the relevant public work, that work cannot be commenced unless and until it is authorised by an Act.[25]

16. The Houses of Parliament may extend the operation of the PWC Act by directing that any public work the estimated cost of which does not exceed the relevant monetary threshold shall be referred to the Committee, in which case all the powers and provisions of the PWC Act apply to such work.[26]

C. The First Issue – is the condition precedent in s 16(1) a public obligation which is enforceable by the courts?

17. The first issue raises a question of justiciability. It involves consideration of the following interrelated matters:

(a) whether a failure to comply with s 16(1) is capable of giving rise to a legal controversy involving a legal right or legal obligation;

(b) whether the condition precedent in s 16(1) is an obligation owed to the public at large or, instead, to the Parliament; and

(c) whether the courts are able to resolve any such controversy, having regard to the principle of "exclusive cognisance".

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23 PWC Act s 16(3).
24 PWC Act s 16(4).
25 PWC Act s 16(5).
26 PWC Act s 17.

Justiciability – the need for a legal right or legal obligation

18. For a justiciable controversy to arise, the relevant controversy must be one which relates to a legal right or legal obligation and is capable of being resolved by a court.[27] That concept is central to the notion of judicial power. As this Court explained in *Rizeq v Western Australia*:[28]

> The essential character of judicial power … stems from the unique and essential function that judicial power performs by quelling controversies about legal rights and legal obligations through the ascertainment of facts, application of law and exercise, where appropriate, of judicial discretion.

19. Borrowing from the description of a constitutional "matter", the identification of a controversy as justiciable was recently expressed by this Court in the following terms:[29]

> The central conception of a matter is of a justiciable controversy between defined persons or classes of persons about an existing legal right or legal obligation. The controversy is justiciable if it is capable of being resolved in the exercise of judicial power by an order of a court which, if made, would operate to put an end to the question in controversy through the creation of a "new charter by reference to which that question is in future to be decided as between those persons or classes of persons". Conversely, a controversy between defined persons or classes of persons about an existing legal right or legal obligation which is not capable of being resolved in the exercise of judicial power by an order of a court is not justiciable.

20. Although there are exceptional cases in which justiciable controversies might arise in the absence of any real dispute regarding rights, duties or liabilities,[30] the circumstances of this case do not fit within any of those recognised exceptions.

21. As the first respondent has not pleaded any private rights in these proceedings but is seeking equitable relief to enforce a public right,[31] the relevant enquiry is whether the proceedings involves a public right or obligation.

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27 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 (Kitto J).

28 *Rizeq v Western Australia* (2017) 262 CLR 1 at 23 [52] (Bell, Gageler, Keane, Nettle and Gordon JJ).

29 *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5; (2022) 96 ALJR 234 at 249 [47] (Gageler and Gleeson JJ) (footnotes omitted); see also at 245 [29] (Kiefel CJ, Keane and Gordon JJ). See further, *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 26 at [32], [35] (Kiefel CJ, Gordon and Steward JJ).

30 For example, "the long-standing power of courts to give directions to trustees, administrators and executors and to determine questions arising in the course of company winding up processes or the traditional powers of courts to make orders relating to the maintenance and guardianship of infants" as outlined in *R v Davison* [1954] HCA 46; (1954) 90 CLR 353 at 368 (Dixon CJ and McTiernan J); *CGU Insurance Ltd v Blakeley* [2016] HCA 2; (2016) 259 CLR 339 at [29] (French CJ, Kiefel, Bell and Keane JJ); *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 26 at [77] (Edelman J).

31 Primary judge at [10], [12] (CAB 8).

22. Public rights are generally understood to mean rights owed to the public at large.[32] They commonly encompass rights associated with municipal planning laws and are often directed towards "public health and comfort and the orderly arrangement of municipal areas".[33] Further examples include:[34] whether a mining company was in breach of a statutory prohibition;[35] whether the conduct of business by bodies corporate was permitted by statute having regard to their statutory powers;[36] and the lawfulness of executive action in regulating shop trading hours.[37] To that list might be added public rights of navigation [38] and common law fishing rights.[39] 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.

The PWC Act does not create legal rights or legal obligations

23. Sections 15 and 16 of the PWC Act do not create enforceable legal rights or obligations which are owed to the public at large.

24. The PWC Act fundamentally relates to Parliament's supervision of the Executive in regards to the carrying out of certain public works and the associated expenditure of public monies. It is essentially concerned with the internal proceedings of Parliament (specifically in relation to the proceedings of its Committee to which it has designated responsibility to consider and to report upon proposed public works). Any public interest in relation to the carrying out of works to which the Act applies is secured through the parliamentary process and the principles of responsible government. As this Court said in *Egan v Willis*:[40]

> A system of responsible government traditionally has been considered to encompass "the means by which Parliament brings the Executive to account" so that "the Executive's primary responsibility in its prosecution of government is owed to

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32 *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5; (2022) 96 ALJR 234 at 249 [87]-[88] (Edelman and Steward JJ).

33 *Cooney v Ku-ring-gai Corporation* (1963) 114 CLR 582 at 604-605 (Menzies J).

34 *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5; (2022) 96 ALJR 234 at 253 [63] (Gageler and Gleeson JJ).

35 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

36 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247;

37 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552.

38 *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, [2008] HCA 29 at 61, 66 [40], [60] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

39 *Harper v Minister for Sea Fisheries*; *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 at 57 [22] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

40 *Egan v Willis* (1998) 195 CLR 424 at 451 (Gaudron, Gummow and Hayne JJ).

> Parliament"…It has been said of the contemporary position in Australia that, whilst "the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people" and that "to secure accountability of government activity is the very essence of responsible government".

25. Thus, the only relevant responsibility in terms of s 16 is that which the Executive owes to Parliament. In that sense, the rights and obligations under s 16 are political, or parliamentary, in nature (rather than legal) and are owed to Parliament as an aspect of responsible government. The fact that the duty is imposed by statute does not itself take the matter outside of internal parliamentary procedures.[41]

26. It is possible to draw a parallel with the obligation placed on the Attorney-General under s 7 of the *New Zealand Bill of Rights Act 1990* to bring to the attention of the House of Representatives any provision in a Bill that appeared to be inconsistent with the Bill of Rights. The High Court of New Zealand in *Mangawaro Enterprises Ltd v Attorney-General*[42] found that the obligation (and the response, or lack of it, to that obligation) was not properly described as a right of the citizen at all, but a safeguard designed to enable members to debate proposals, thereby bringing it within the ambit of parliamentary proceedings.[43] A similar situation applied in *Boscawen v Attorney-General*[44] in which New Zealand's Court of Appeal held that the Attorney-General's duty to report under the same provision was non-justiciable.

27. There is little difference between those decisions and the present circumstances. Section 16 of the PWC Act operates as a safeguard designed to ensure that Parliament is able consider and report on proposed public works. The purpose of the provision considered in *Mangawaro* and *Boscawen* was legislative, whereas the purpose of s 16 serves a different parliamentary function of facilitating the supervision and accountability of the Executive. However, in each case the purposes are inherently parliamentary and therefore non-justiciable.

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41 *Awatere Huata v Prebble* [2004] NZCA 147; [2004] 3 NZLR 359 at 396 [55] (McGrath, Glazebrook and O'Regan JJ. That decision was reversed by the Supreme Court but without revisiting that issue: see *Boscawen v Attorney-General* [2009] 2 NZLR 229 at 236 [25] (O'Regan J delivering the judgment of the Court).

42 *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451.

43 *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451 at 456, 457 (Gallen J).

44 *Boscawen v Attorney-General* [2009] 2 NZLR 229.

Exclusive cognisance

28. In any event, a controversy regarding compliance with s 16 may not be capable of being resolved in the exercise of judicial power. As suggested by the Primary Judge (but discounted by the Full Court),[45] whatever conclusion the Court reaches, "the Committee could subsequently consider the same question and reach the opposite conclusion".[46] That finding is supported by the broader notion of parliamentary privilege, encompassed by the common law principle of "exclusive cognisance", that each House of Parliament has "the exclusive right … to manage its own affairs without interference from the other or from outside Parliament".[47]

29. In that regard, the freedom of speech protected by Article 9 is often described as part of a "wider principle" of parliamentary privilege. Lord Browne-Wilkinson, delivering the judgment of the Privy Council in *Prebble v Television New Zealand Ltd* said: [48]

> 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: *Burdett v Abbot* (1811) 14 East 1; *Stockdale v Hansard* (1839) 9 Ad. & El. 1; *Bradlaugh v Gossett* (1884) 12 QBD 271; *Pickin v British Railways Board* [1974] AC 765; *Pepper v Hart* [1993] AC 593. As Blackstone said in his *Commentaries on the Laws of England*, 17th ed (1830), vol. 1, p. 163:
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> > "the whole of the law and custom of Parliament has its original from this one maxim, '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.'"

30. As noted by the Victorian Court of Appeal,[49] their Lordships identified this principle as the "principle of non-intervention". In *Boscawen v Attorney-General*, it was said that the "comity principle" (as it is also described) was engaged and the Attorney-General's reporting role was covered by that principle.[50]

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45 Full Court at [1], [34], (CAB 20 and 30).

46 Primary judge at [30], (CAB 11).

47 *Alley v Gillespie* (2018) 264 CLR 328 at 357 [107] – [108] (Nettle and Gordon JJ); *R v Chaytor* [2011] 1 AC 684 at 712 [63]; *President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]* [2021] WASC 223 [138], [156] – [175] (Hall J).

48 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 332.

49 *R v Theophanous* 141 A Crim R 216 at 244 [66] (The Court).

50 *Boscawen v Attorney-General* [2009] 2 NZLR 229 at 237 [32]-[33] (O'Regan J delivering the judgment of the Court).

31. The Full Court of the Western Australian Supreme Court said in *Halden v Marks*,[51] "it is settled principle that the courts will not intrude on the role of Parliament and will endeavour to regulate their own proceedings so as to avoid doing so". The reluctance of the courts is said to be based on mutual respect and the desire to avoid conflicting decisions.[52] The Primary Judge recognised this when he concluded, correctly, that:[53]

> In asserting that obligations imposed by the PWC Act on the Governor and the Committee have not been complied with, the plaintiff is seeking to impugn Parliament's supervision and control of the Executive through the Committee, and that infringes parliamentary privilege.

32. Having regard to those matters of principle, the proceedings instituted by the first respondent are "so closely connected with proceedings in Parliament so as to make it either appropriate or necessary for the court to decline to exercise jurisdiction".[54] In finding that the prohibition on the commencement of public works in s 16 was intended to be a public obligation enforceable by the courts,[55] the Full Court failed, with respect, to have proper regard to those underlying principles.

33. The Full Court relied upon the decision of the High Court of New Zealand in *Awatere Huata v Prebble*[56] to support its approach 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".[57]

34. In undertaking that exercise, the Full Court correctly found that there was no real question that the Committee is engaged in parliamentary work and that parliamentary privilege will apply to it.[58] However, it somewhat inexplicably found that the provisions of s 16(1) and (2) create public obligations which fall outside the scope of the parliamentary process and hence the ambit of parliamentary privilege.[59] It found that it was clear from the legislative scheme and the legislative text that the enforcement of the

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51 *Halden v Marks* (1995) 17 WAR 447 at 462 (Rowland, Murray and Anderson JJ).
52 *President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]* [2021] WASC 223 [175] (Hall J).
53 Primary judge at [31] (CAB 11).
54 *Obeid v R* (2017) 96 NSWLR 155 at 192 [146] (Bathurst CJ, Leeming and RA Hulme JJ agreeing).
55 Full Court at [1], [24] (CAB 20, 27).
56 *Awatere Huata v Prebble* [2004] NZCA 147; [2004] 3 NZLR 359; Full Court at [15] (CAB 24). The Full Court's quote from that case is in fact from *Ah Chong v Legislative Assembly of Western Samoa* [2001] NZAR 418 at 426-427 (Lord Cooke of Thorndon).
57 Full Court at [1], [17] (CAB 24-25).
58 Full Court at [1], [20] (CAB 26), citing *Cornwall v Rowan* (2004) 90 SASR 269; [2004] SASC 384.
59 Full Court at [1], [24] (CAB 27).

prohibition (in s 16(1)) on the commencement of work without the prescribed parliamentary scrutiny is not a matter that falls within the parliamentary process but rather is intended to be a public obligation enforceable under the general law by the courts.[60] The finding that the Act envisages that the obligation would be subject to the protection and enforcement of the courts because "it is inconceivable that if 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"[61] is flawed. In light of the principles discussed above, such an implication, apparently based on silence, is unsafe. As Murphy J made clear in *Hammond, v The Commonwealth*,[62] the privileges of Parliament are jealously preserved and Parliament will not be held to have diminished any of its privileges unless it has done so by unmistakable language. That Parliament did not do so here[63] suggests an intention that enforcing compliance with s 16(1) should remain fully within the domain of Parliament as an aspect of responsible government and subject to the usual considerations of parliamentary privilege.

35. Further, the view that the scheme would only have efficacy if it can be lawfully enforced on persons outside Parliament as a basis for drawing the implication,[64] does not take account of the function of Parliament in holding the Executive to account under the concept of responsible government. Nor does it pay regard to the ability of Parliament to rely upon its own procedures to ensure such accountability, without any need to include provisions in the PWC Act to achieve that end. The manner in which the Full Court tested its construction of the provisions by pointing out that there is nothing prescribed in the legislation which would empower the Parliament to identify or require the referral (by the Governor) of work to the Committee under s 16(2),[65] also failed to adequately consider that the obligation under s 16(1) rests on the Executive which is directly answerable to the Parliament.

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60 Full Court at [1], [24] (CAB 27).
61 Full Court at [1], [25] (CAB 27).
62 *Hammond* v *The Commonwealth* (1982) 152 CLR 188 at 200 (Murphy J); *BDR21 v Australian Broadcasting Corporation* [2023] FCAFC 101 at [78] – [80] (the Court); *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* [2002] 2 Qd R 8, [26] (McPherson JA).
63 Cf. the offence provisions contained in the PWC Act, s 20, s 21, s 23, s 26.
64 Full Court at [1], [25] (CAB 27).
65 Full Court at [1], [25] (CAB 27).

36. On the other hand, the Court found that the question of whether or not the Governor refers a proposed work to the Committee under s 16(2) is not a matter which can be reviewed or enforced by the courts.[66] However, there is no relevant distinction in the PWC Act between the condition precedent in s 16(1) and that in s 16(2) which would justify one being subject to enforcement by the courts whilst the other remains immune. In both cases, the Executive is ultimately accountable to Parliament given that, as another aspect of responsible government, the Governor acts on advice of the Executive Council and the Ministers are accountable to Parliament for the Governor's acts or omissions.[67] The Full Court said that "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" seemingly on the basis that the power and responsibility of reviewing and reporting on all relevant public work in s 15 is said not to be limited to works which have been referred to it by the Governor.[68] How that can be so is not clear. Properly construed, that is not what the PWC Act provides. By s 15(1), the Committee's scrutiny of public work is clearly expressed to be "subject to the provisions of the Act" and concerns "every public work that is proposed to be undertaken by a general government sector body". The public work in s 15(1) is plainly coextensive with the public work in s 16(1) as s 16(1) expressly applies to public work to which s 15 applies. The public work in s 16(2) is similarly coextensive with the public work in s 15(1) and s 16(1). The Full Court's construction of the provisions does not provide a rationale for finding that s 16(1) creates a public obligation enforceable in the courts.[69]

37. In summary, courts cannot enforce s 16. It is a matter for the Parliament. The PWC Act concerns the business of the Parliament in holding the Executive to account. The remedy is political, not legal. That is effectively illustrated in the Full Court's own conclusion that, should the first respondent be successful in his action, and a further referral is made, the Committee may conclude that there is no significant difference in the works, and reiterate its earlier recommendation.[70] Apart from the assumption that the Committee would be willing to entertain a further referral, and that it would properly fall within its

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66 Full Court at [1], [22] (CAB 26).
67 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 366 (Mason J).
68 Full Court at [1], [23] (CAB 27).
69 Cf the several factors set out in *Awatere Huata v Prebble* [2004] NZCA 147; [2004] 3 NZLR 359 at 397 supporting the conclusion that Parliament did not wish to make the process in that case an internal one protected from judicial review.
70 Full Court at [1], [34] (CAB 20, 30-31).

functions to do so, the Full Court's conclusion serves to demonstrate not only its error, but also the point that whether any given works have been referred to and reported upon by the Committee is ultimately a matter for Parliament to assess in the conduct of its own internal proceedings.

D. The Second Issue – does considering the 2017 report infringe Article 9?

The error of the Full Court

38. The Primary Judge correctly concluded that the first respondent's action would require the court to adjudicate upon the 2017 Report for the purpose of determining whether the second respondent's works are so different from those contemplated in the Committee's Report that the process of referral and reporting under s 16 of the PWC Act would need to be repeated.[71] He found that would contravene Article 9[72] and that it was conceivable that the Committee might subsequently consider the matter and reach the opposite conclusion.[73]

39. The Full Court agreed with the Primary Judge that the proceedings would inevitably require consideration of the 2017 report[74] and said there was no question that comparison between "the work now proposed and that which was the subject of the 2017 report will arise".[75] However, in contrast to the Primary Judge, the Full Court erred in its view that proof of the report and underlying documents for the purposes of that comparison does not infringe parliamentary privilege.[76] Whilst the Full Court correctly considered that admitting evidence of parliamentary proceedings for the purpose of establishing the fact and content of what is said in parliament is permissible, it fell into error in deciding that "[i]t must also be permissible to admit the documents referred to in the report for the purpose of establishing the scope of the work which is the subject of the report".[77] Examining the Committee's report for the purpose of establishing the scope of the works that were reported on would be to question and impeach a parliamentary proceeding, contrary to Article 9.

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71 Primary Judge at [30] (CAB, 11).
72 Primary Judge at [32] (CAB 11).
73 Primary Judge at [30] (CAB 11).
74 Full Court at [1], [28] (CAB 20, 28).
75 Full Court at [1], [28] (CAB 20, 28).
76 Full Court at [1], [33] (CAB 20, 30).
77 Full Court at [1], [33] (CAB 20, 30).

Article 9

40. Article 9 provides as follows:

> "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."

41. It applies in Tasmania by virtue of s 24 of the *Australian Courts Act 1828 (Imp).*[78]

42. In Article 9, the word: "impeached" is understood to mean "impeded, hindered, or prevented" or "detrimentally or prejudicially affected, or impaired";[79] and "questioned" is interpreted to mean "examined, discussed, and adjudged", in court.[80]

43. As already noted, Article 9 is a manifestation of a wider principle of comity or reciprocal restraint and respect which operates between the courts and Parliament.[81] It is central to the understanding of the history of the relationship between courts and the Westminster Parliament, which, prior to the *Bill of Rights*, was marked by conflict and controversy.[82] The concept underlying Article 9 was recently described by this Court as follows: [83]

> Parliamentary privilege is a "bulwark of representative government". It has long antecedents. It allows Parliament to perform its functions without obstruction. Parliamentary privilege shields certain areas of legislative activity from judicial or executive review, thereby giving "the legislative branch of government the autonomy it requires to perform its constitutional functions". Parliamentary privilege operates to ensure that a person who participates in parliamentary proceedings can do so knowing, at the time of that participation, that what they say cannot "later be held against them in the courts", thereby ensuring that such a person is not inhibited in providing information to the Parliament or in otherwise participating in parliamentary proceedings. This is the "basic concept underlying article 9" of the *Bill of Rights 1688*.

44. The *Parliamentary Privileges Act 1858*, s 12, provides that its provisions do not affect any power or privilege possessed by either House before the passing of the Act. The privileges of the Tasmanian Parliament, to the extent that they are not defined or extended

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78 9 Geo IV c 83; *R v Turnbull* (1958) Tas SR 80, 84 (Gibson J); (CAB 9), Primary Judge, [18] (CAB 9); Full Court, [1], [9]-[10] and [42] (Geason J) (CAB 20, 23, 34).

79 *Rowley v O'Chee* [2000] 1 Qd R 207, 222 – 223 (MacPherson JA, Moynihan J agreeing at 227).

80 *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522, 530 (Browne J).

81 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 332 (Lord Browne-Wilkinson).

82 *Egan v Willis* (1998) 195 CLR 424, 444 [22] (Gaudron, Gummow and Hayne JJ).

83 *Crime and Corruption Commission v Carne* [2023] HCA 28, [106] (Gordon and Edelman JJ) (footnotes omitted).

by statute,[84] are those reasonably necessary to their existence and proper exercise of their functions and duties.[85]

45. It is well accepted that what constitutes a proceeding in Parliament is a matter for the courts.[86] And, as this Court acknowledged: "it is for the courts to judge 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".[87]

46. The authorities establish that parliamentary privilege exists in relation to the proceedings of parliamentary committees and encompasses a report of a parliamentary committee for the purposes of Article 9.[88] It follows that the Committee's reports cannot be "impeached" or "questioned" in any court.

Examining the Committee's report to establish the scope of the works is to question the report

47. The first respondent claims that the scope of the work reported on does not include the works which were to be conducted by the second respondent.[89] The second respondent's filed defence admits that there are differences in the works to be conducted, but denies that the works to be conducted fall outside the scope reported on by the Committee.[90]

48. However, it is not possible to establish the scope of work reported on by the Committee, in order to determine whether the second respondent's works have been referred to and reported upon in accordance with s 16, without questioning what it was the Committee inquired into and reported upon. To do so infringes Article 9.

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84 Enid Campbell, 'The Penal Jurisdiction of the Australian Houses of Parliament' (1963) 4(2) *Sydney Law Review*, 212, 214.

85 *R v Turnbull* [1958] Tas SR 80, 83-4 (Gibson J); *Egan v Willis* (1998) 195 CLR 424, 445 [24], [30]-[34] (Gaudron, Gummow and Hayne JJ), [138]-[141] (Kirby J), [189] (Callinan J); *Obeid v R* (2017) 96 NSWLR 155, [120] (Bathurst CJ), [291], [295], [470], [474] (Leeming JA, RA Hulme J, Hamil and Adams JJ agreeing); Enid Campbell, *Parliamentary Privilege*, Federation Press, 2003, 10.

86 *R v Chaytor* [2011] 1 AC 684 at [14]-[16] (Lord Phillips); *President of the Legislative Council of Western Australia v Corruption and Crime Commission (No 2)* [2021] WASC 223 [157] (Hall J).

87 *R v Richards; Ex parte Fitzpatrick and Browne* [1955] 92 CLR 157, 162; See also *Egan v Willis* [1998] HCA 71; (1998) 195 CLR 424, 446 (Gaudron, Gummow and Hayne JJ).

88 *NSW AMA v Minister for Health and Community Services* (1992) 26 NSWLR 116 at 120-121; *Cornwall v Rowan* (2004) 90 SASR 269, 361- 364 [384], [386], [397] (Bleby, Besanko and Sulan JJ) citing *Dingle v Associated Newspapers Ltd* [1960] 2 QB 405, 410 (Pearson J).

89 ASOC [14] (ABFM 8).

90 Defence to ASOC [14] (ABFM 13).

49. Although there is no doubt that it is permissible to receive evidence of parliamentary proceedings to prove the occurrence of those proceedings or the content of those proceedings as a matter of historic fact,[91] ascertaining the scope of the work considered and reported on by the Committee's report goes beyond that. The Committee's report would need to be examined to allow the Court to determine the true scope of the reported work. A similar claim was considered in *Bates v Attorney-General of Tasmania*[92] where the court made the relevant comparison, determining that the works were not so different as to require a fresh referral and report. As the Full Court correctly identified,[93] that case did not consider parliamentary privilege and so it is not authority for the issues in this appeal. However, a similar comparative exercise would be required in the first respondent's action and that would involve questioning a proceeding of Parliament.

50. The task that the first respondent would have the trial court undertake is akin to admitting the content of a parliamentary statement to establish the truth of the statement, which Grey J found unacceptable in *Mees v Roads Corporation and Ors*[94]:

> The unacceptability of the proposition is demonstrated by postulating the existence of more than one statement to Parliament, when there is a conflict between the statements. Plainly, a court could not be placed in the situation in which opposing parties tender the conflicting statements and the court is obliged to accept the truth of each of them. There are therefore many sound reasons for taking the view that it is not open to a party to tender a statement made to Parliament as evidence of the truth of the facts stated.

51. It is evident from the pleadings[95] that the scope of the work reported on is a contentious issue in the proceedings. It is by adjudicating upon a disputed issue that a court invites the danger of contest with the view of Parliament on the same issue. As demonstrated by the authorities below, this is the type of activity which Article 9 requires the court to avoid.

52. In *Prebble v Television New Zealand Limited* the Privy Council agreed that pleadings referring to statements made and things done in the House of Representatives should be struck out by reason of Article 9 on the basis that the defendant intended to rely on

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91 *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.

92 [1995] TASSC 28.

93 Full Court at [1], [29] (CAB 20, 29).

94 *Mees v Roads Corporation and Ors* [2003] FCR 418 [85] (Gray J).

95 See for example, Amended State of Claim, [14] (ABFM 8); and, Defence to Amended Statement of Claim, [14] (ABFM 13).

matters relating to a parliamentary proceeding "not purely as a matter of history but as part of the alleged conspiracy or it implementation".[96]

53. In *Mees v Roads Corporation*, as part of concluding that admitting statements made in Parliament in order to establish the truth of those statements was not permitted by Article 9, and after discussion of an exception which is not immediately relevant, it was said "[w]ith this exception, it seems that any form of critical examination of the content of what has been said to Parliament will not be undertaken by a court."[97]

54. In *Church of Scientology of California v Johnson-Smith*,[98] in order to refute a plea of fair comment in a libel action concerning a libel alleged to have been published in a television interview, the plaintiffs sought to rely on extracts from Hansard of what had taken place in Parliament to prove malice. Browne J ruled that evidence inadmissible, stating that:

> I accept the Attorney-General's argument that the scope of parliamentary privilege extends beyond excluding any cause of action in respect of what is said or done in the House itself. And I accept his proposition which I have already tried to quote, that is, that what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House. In my view this conclusion is supported both by principle and authority.[99]

55. Browne J emphasised, in this regard, the word "questioned" in Article 9, and the basis upon which Blackstone put it, that "anything arising concerning the House ought to be examined, discussed and adjudged in that House and not elsewhere. The House must have complete control over its own proceedings and its own members".[100]

56. In *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services*[101], Hungerford J, after concluding that the authorities settled that Hansard may be admitted into evidence "to prove certain things were said in a proceeding in Parliament",[102] refused to admit a report of a parliamentary committee into evidence to establish the facts and opinions contained in that report, because so doing:[103]

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96 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 337 (Lord Browne-Wilkinson for the Privy Council).
97 *Mees v Roads Corporation* [2003] FCR 418, [80] (Gray J).
98 [1972] 1 QB 522.
99 *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522, 529.
100 *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522, 530.
101 *NSW AMA v Minister for Health and Community Services* (1992) 26 NSWLR 116.
102 *NSW AMA v Minister for Health and Community Services* (1992) 26 NSWLR 116 at 124.
103 *NSW AMA v Minister for Health and Community Services* (1992) 26 NSWLR 116, 128-129.

> …would inevitably result in direct and critical challenge to the material contained in it as finalised by the committee. That would represent a challenge to the functions of the committee and the way in which it has performed those functions. Such a process would strike, in my view, at the whole basis for Parliamentary privilege as it has evolved, and would result in the PAC Report being impeached and questioned contrary to art 9 of the *Bill of Rights 1688 (Imp)*. Whilst one may have some sympathy for the result that a party to proceedings is thus limited in the presentation of a case, the state of the law as I have found it makes that result inevitable.

57. Other authorities have similarly found that Article 9 prevents the use of parliamentary material to consider and determine contested matters.[104]

58. The Full Court noted the need to avoid confusion between the right to prove the occurrence of parliamentary events and the prohibition on questioning those events,[105] yet it fall into the very trap it had identified and misapplied *Prebble v Television New Zealand Limited* and *Mees v Roads Corporation*:[106]

> In this case, the application of these authorities and the principles discussed in them must lead to the conclusion that there is no prohibition against admission of the 2017 report, or the statements and evidence relating to that report, in order to establish the fact and content of the report. It must also be permissible to admit the documents referred to in the report for the purpose of establishing the scope of the work which is the subject of the report. 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).

59. Examining the report to establish the scope of the works reported on does not fall within the allowable uses of parliamentary proceedings to establish the occurrence of a parliamentary event or the content of what was said. Nor does such examination fall within other allowable uses of such material such as: as an aid to the construction of legislation;[107] or, on judicial review, to explain the motives of the Minister making the decision under review.[108]

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104 *Mundey v Askin* [1982] 2 NSWLR 369, 373 (Moffitt P, Reynolds and Samuels JJA); *Finnane v Australian Consolidated Press Ltd* [1978] 2 NSWLR 435, 438 (Needham J) refusing a request to cross examine the plaintiff concerning statements made in Parliament; *Victorian Taxi Families Inc and Anor v Taxi Services Commission* (2018) 61 VR 91, [97] (Derham AsJ); *Cornwall v Rowan* 90 SASR 269, [384]-[397] (Bleby, Besanko and Sulan JJ).

105 Full Court at [1], [30] (CAB 20, 29).

106 Full Court at [1], [33] (CAB 20, 30).

107 *Pepper v Hart* [1993] AC 593, 634 (Lord Browne-Wilkinson), 616 (Lord Keith of Kinkel, agreeing), 617 (Lord Bridge of Harwich agreeing), 617 (Lord Griffiths, agreeing), 619 (Lord Ackner, agreeing), 619 (Lord Oliver of Aylmerton, agreeing); a use of parliamentary material which is enshrined in legislation *Acts Interpretation Act 1931* (Tas) ss 8A, 8B.

108 *Toussaint v Attorney-General of Saint Vincent and the Grenadines* [2007] WLR 2852. See also reference to this use of parliamentary material in *Mees v Roads Corporation* [2003] FCR 418, [80] (Gray J).

Impeaching the Committee's proceedings

60. Examining the 2017 report for the purposes of establishing the scope of works is to impeach a parliamentary proceeding by causing the proceedings of the Committee to be "impeded, hindered, or prevented", or because such activity detrimentally or prejudicially affects or impairs the work of the Committee.[109]

61. The concept that lies behind Article 9 of allowing Parliament to perform its function without obstruction is evident in the interpretation of "questioning" or "impeaching" in the authorities. For example, in *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services*, in refusing to consider a report of a parliamentary committee, the peril to be averted was "a challenge to the functions" of a parliamentary committee which would strike at the whole basis of the privilege.[110] In *Bradlaugh v Gossett*,[111] a case concerning an application for an injunction restraining the Serjeant-at-Arms from carrying out a resolution of the House of Commons to exclude a member until he engaged not to disturb it further, Stephen J said:[112]

> I think the House of Commons is not subject to the control of Her Majesty's courts in its administration of that part of the statute law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable.

62. The decision of a court as to the scope of works reported on by the Committee affects and impairs the work of a parliamentary committee because of the potential for the Court's determination about the scope of the works reported on to be different to the Committee's view on the matter. As earlier submitted, the activity of examining the 2017 Report to make a judgment about the scope of the works reported on intrudes upon Parliament's supervision and control of the Executive in respect of the expenditure of public money.

63. In *Comalco v Australian Broadcasting Corporation*,[113] Blackburn CJ allowed Hansard to be tendered to prove the fact that the Minister made statements, but in so doing said:[114]

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109 *Rowley v O'Chee* [2000] 1 Qd R 207, 222 – 223 (MacPherson JA, Moynihan J agreeing at 227).
110 *NSW AMA v Minister for Health and Community Services* (1992) 26 NSWLR 116, 128.
111 (1884) 12 QBD 271.
112 *Bradlaugh v Gossett* (1884) 12 QBD 271, 278 (Stephen J), 273 (Lord Coleridge CJ agreeing, but writing additional reasons), 277 (Mathew J agreeing).
113 *Comalco Ltd v Australian Broadcasting Corporation* (1983) 78 FLR 449.
114 *Comalco Ltd v Australian Broadcasting Corporation* (1983) 78 FLR 449, 453 (Blackburn CJ).

> … the way in which the court complies with Art 9 … and with the law of the privileges of Parliament, is not by refusing to admit evidence of what was said in Parliament, but by refusing to allow the substance of what was said in Parliament to be the subject of any submission or inference. The court upholds the privileges of Parliament, not by a rule as to the admissibility of evidence, but by its control over the pleadings and the proceedings in court.

64. In contrast to the Full Court, the Primary Judge, in line with the authorities discussed above, correctly controlled the pleadings and the proceedings by striking out the statement of claim and dismissing the action.

PART VII: ORDERS SOUGHT

65. The Appellant seeks the following orders:

(a) appeal allowed;

(b) set aside the order of the Full Court made on 4 May 2023 and reinstate the orders of the Primary Judge made on 21 February 2022; and

(c) the first Respondent pay the appellant's costs of the appeal to this Court and of the Application for Special Leave to Appeal.

PART:VIII: ESTIMATE OF TIME

66. It is estimated that the appellant will require 2 hours for the presentation of oral argument.

Dated 1 December 2023

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ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the appellant sets out a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions, identifying the version of the legislation relevant to the case.

Tasmanian Legislation		**Provision(s)**	**Version**
1.	*Public Works Committee Act 1914*	all	as at 12.12.2019 until 26.11.2023
2.	*Parliamentary Privileges Act 1858*	12	current
United Kingdom			
3.	*Bill of Rights 1688 (UK)*	art 9	current
4.	*Australian Courts Act 1828 (Imp)*	s 24	current