



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

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and

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

**SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE
AUSTRALIAN CAPITAL TERRITORY (INTERVENING)**

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Part I: CERTIFICATION OF SUITABILITY FOR PUBLICATION

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

Part II: BASIS OF INTERVENTION

- 2. The Attorney-General for the Australian Capital Territory (**ACT**) seeks leave to intervene pursuant to rules 42.08A and 44.04 of the *High Court Rules 2004* in order to advance submissions that are generally in support of the Attorney-General for the State of Tasmania (**Tasmania**).

Part III: WHY LEAVE SHOULD BE GRANTED

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- 3. The ACT has an interest in the way in which the present proceedings are resolved arising from the proper application of the principles of statutory interpretation to legislation regulating the work of Parliament, in light of the principles of parliamentary privilege applicable in all Australian jurisdictions. In the ACT, the principles of parliamentary privilege having their source in Article 9 of the *Bill of*

Rights Act 1688 1 Will & Mar Sess 2 c 2 (Eng) (**Bill of Rights**), as reflected in the *Parliamentary Privileges Act 1987* (Cth) (**Privileges Act**) which, applies in the ACT by virtue of s 24(3) *Australian Capital Territory (Self-Government) Act 1988* (Cth) (**Self-Government Act**).

4. While the ACT does not have legislation in similar terms to the *Public Works Committee Act 1914* (Tas) (**PWC Act**), it does have legislation that stipulates a role for committees of the Legislative Assembly as necessary steps in informing or scrutinising the Executive in its government functions.
- 10 5. In the case of the *Planning Act 2023* (ACT), for example, proposed major amendments to the Territory Plan must be referred to the relevant Assembly committee for consideration and an opportunity to report on it and the Minister is restrained from taking further action in relation to the draft amendment, unless the committee has decided not to report, until the Assembly committee reports or a prescribed period has passed since the referral.¹
6. In the case of the *Nature Conservation Act 2014* (ACT), a draft reserve management plan must be referred to the relevant Assembly committee for consideration and an opportunity to report and the Minister is restrained from taking further action in relation to the draft plan until the Assembly committee reports or a prescribed period has passed since the referral.²
- 20 7. Determining as a matter of statutory construction the justiciability of those parliamentary activities, in the sense of being enforceable in the courts as public obligations, is of importance to the operation of parliamentary privilege in the ACT and indeed in other jurisdictions that have legislated for similar parliamentary committee functions to oversee Executive action. As such, the issues in this appeal extend beyond the question of oversight of public works in Tasmania.
8. For these reasons, the ACT seeks leave to intervene in the proceedings.

¹ Sections 70-77.

² Sections 181-183.

Part IV: ARGUMENT

Issues

9. Subsection 16(1) of the PWC Act makes referral to, and a report by, the Parliamentary Standing Committee on Public Works (**Committee**) under s 16(2) a condition precedent to the commencement of public works to which s 15 applies.
10. The First Respondent's claim in the present proceedings is for declaratory and injunctive relief to restrain Hazell Bros from undertaking public works on the basis that those works are works to which s 15 applies but which have not been the subject of referral to and report by the Committee, contrary to s 16(1).
- 10 11. This issues in this appeal are stated to be:³
 - (a) Whether the condition precedent in s 16(1) of the PWC Act is a public obligation which is enforceable under the general law by the courts (**First Issue**).
 - (b) Whether the adjudication by a court upon whether there is a difference between public works referred to and reported upon by the under the PWC Act and the public works to be undertaken by a general government sector body infringes parliamentary privilege (**Second Issue**).⁴

First Issue

Parliamentary privilege understood in its widest sense

- 20 12. The First Issue arises by reason of the principles governing the separate constitutional roles of parliament, the executive and the courts applicable in Tasmania and indeed all Australian jurisdictions.
13. These principles are sometimes referred to under the rubric of "parliamentary privilege". When used in that way, the term should be understood in a broad sense

³ Tasmania's Submissions at [2]. See also First Respondent's Submissions at Pt II [A] although worded slightly differently.

⁴ Although Tasmania has prefaced the Second Issue with the qualifier "regardless of the answer to the first question", the ACT submits that the two issues are necessarily interrelated. In particular, if the answer to the First Issue is that the obligation in s 16(1) of the PWC Act is not enforceable in the courts, then the Second Issue does not arise because no occasion arises for a court to adjudicate on whether the public works considered and reported on by the Committee are the same as the public works undertaken by a general government sector body. Conversely, if the answer to the First Issue is that s 16(1) is enforceable by the courts, then it must necessarily entail the abrogation of that aspect of parliamentary privilege enshrined in the Bill of Rights to the extent necessary for the court to conduct the requisite comparative analysis to adjudicate the issue.

as encompassing more than the principle in Article 9 of the Bill of Rights (although that principle certainly falls within it).⁵ As Lord Browne-Wilkinson observed in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 332:

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.

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(citations omitted, emphasis added)

14. Part of the courts' recognition of their constitutional roles, is the exercise of restraint from interference in parliamentary proceedings. It is this element of parliamentary privilege that gives rise to the First Issue because the PWC Act concerns parliamentary proceedings but the First Respondent seeks to have the courts enforce the provision in s 16(1).

A question of statutory construction

15. The First Issue is therefore a question of whether the terms of the PWC Act displace that element of parliamentary privilege and permit the court's interference in parliamentary proceedings in the way the First Respondent contends. The answer to that question depends on the proper construction of s 16(1).

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16. The proper approach to statutory construction has been articulated by this Court on many occasions. A convenient summary of the principles is contained in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14] where Kiefel CJ, Nettle and Gordon JJ stated:

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if

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⁵ Tasmania refers to this as the "wider principle of comity or reciprocal restraint and respect which operates between the courts and Parliament": Tasmania's Submissions at [43]. The Attorney-General for South Australia (**South Australia**) employs parliamentary privilege as "a conveniently succinct term for the sum of the powers, privileges and immunities held by Parliament and enjoyed by its constituent Houses, committees, and members, without which they could not discharge their functions": South Australia's Submissions at [7]. The ACT endorses South Australia's discussion of the various authorities articulating the significance of this principle: South Australia's Submissions at [11]-[15].

its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

(footnotes omitted)

17. These common law principles are reflected in the statutory principles contained in ss 8A and 8B of the *Acts Interpretation Act 1931* (Tas) (**Acts Interpretation Act**) which direct that:

- (a) an interpretation of a provision that promotes the purpose or object of an Act is to be preferred to an interpretation that does not promote the purpose or object;
- 10 (b) in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation;⁶ and
- (c) the “ordinary meaning” of a provision means the ordinary meaning conveyed having regard to its context in the Act and the purpose or object of the Act.

Full Court’s analysis of the First Issue

18. The Full Court of the Supreme Court of Tasmania (**Full Court**)⁷ correctly acknowledged that the question of whether the court was precluded from enforcing s 16(1) of the PWC Act as a matter of parliamentary privilege was a question of statutory construction.⁸ However, having correctly diagnosed the task, the Full Court failed to apply the correct principles.

20 19. The Full Court’s reasoning on the First Issue may be distilled into the following key elements:

- (a) Various provisions of the PWC Act indicate that its purpose was to establish the Committee, the exclusive function of which is to examine public works

⁶ Section 8B(1) of the Acts Interpretation Act permits recourse to extrinsic material to *provide* an interpretation of a provision only if the provision is “ambiguous or obscure” or the “ordinary meaning leads to a result that is manifestly absurd or is unreasonable” and in any other case only to *confirm* the interpretation conveyed by the ordinary meaning. However, this Court has held that independently of the equivalent provision of the *Acts Interpretation Act 1901* (Cth), the modern approach to statutory interpretation permits recourse to the extrinsic material in that a court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context. See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Limited* (1997) 191 CLR 85 at 99, 112-113.

⁷ *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 (Brett J, Pearce J agreeing, Geason J dissenting).

⁸ Full Court at [17].

of the defined value and provide Parliament with sufficient information to enable it to determine the expedience of carrying out the work, thereby facilitating parliamentary oversight of public works by government.⁹

- (b) Notwithstanding that general purpose, s 16(1) takes the PWC Act a step further than merely facilitating parliamentary oversight by prohibiting the commencement of public works of the defined value until there has been a referral and consequent report by the Committee.¹⁰
- (c) That prohibition does not fall upon Parliament, but rather binds those who would perform the public work, namely the Executive and those who contract with it.¹¹ The scheme will only have efficacy if it can be lawfully enforced on applicable persons outside Parliament.¹²
- (d) There is nothing in the terms of the legislation to indicate that enforcement of the prohibition is a matter for Parliament.¹³
- (e) As such, it must necessarily be implied that 16(1) is intended to be a public obligation enforceable under the general law by the courts.¹⁴

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Proper construction of s 16(1)

20. The elements of the Full Court’s reasoning described at [19(b)] – [19(d)] above involve several errors of construction which infect the Full Court’s conclusion in [19(e)] that it is necessary to imply in s 16(1) a power of enforcement in the courts.

20 21. **First**, beginning with the text of s 16(1), there is nothing to support the notion that s 16(1) purports to bind third parties outside the Parliament and beyond the Executive. The provision is not expressed, for example, in terms such as “*no person engaged to undertake* public work to which s 15 applies may commence those works unless the condition precedent in s 16(2) has been satisfied” or similar. The text is directed solely at steps the Executive and the Committee must take, with no textual indicators that the provision casts a wider obligation.

⁹ Full Court at [19]-[20].
¹⁰ Full Court at [23].
¹¹ Full Court at [23].
¹² Full Court at [25].
¹³ Full Court at [24].
¹⁴ Full Court at [24].

22. *Secondly*, having regard to the context of s 16(1) necessarily means having regard to its surrounding provisions and the PWC Act as a whole. Relevantly, this context includes:

- (a) the long title which refers to “An Act to provide for the establishment of a Parliamentary Standing Committee on Public Works”;
- (b) Part II (ss 3 – 12) which sets out how the Committee is to be constituted and affairs of procedure, including that it is to be comprised wholly of Members of the Legislative Council and Members of the House of Assembly, vacancies, quorum, appointment of a Chairman, Vice-Chairman and Secretary, voting, sitting arrangements, reports and minutes; and
- (c) Part III (ss 13 – 31) which prescribes the Committee’s functions, including centrally its role to consider and report to Parliament upon every public work that is proposed to be undertaken by a general government sector body that exceeds a prescribed monetary threshold so as to inform or satisfy Parliament as to the expedience of carrying out the work, as well as the associated powers required for the Committee to obtain the information necessary to discharge that function and the ability of Parliament to extend the Committee’s functions to encompass public works below the prescribed monetary threshold.

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23. It is clear from these surrounding provisions that the PWC Act is concerned with regulating the affairs of the Committee, including its relationship with Parliament and the Executive, in order that it may fulfil its function of facilitating Parliament’s supervision over public works conducted by the Executive: There is nothing in any of this surrounding context to support a construction of s 16(1) that casts its obligation beyond the Executive so as to bind third parties. Rather, seen in the context of its surrounding provisions, the requirement in s 16(1) that public works are not to commence until the Committee process has occurred is plainly a direction from Parliament to the Executive, not an obligation cast on third parties.

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24. Oddly, the Full Court did in fact refer to a number of these surrounding provisions (including the long title, the “detailed provisions concerning the constitution of the

Committee and its procedures”, and the Committee’s functions specified in s 15 and correctly observed that:¹⁵

It is apparent from these provisions that the exclusive function of the Committee is to examine public works of the defined value, and provide Parliament with sufficient information to enable it to determine "the expedience of carrying out the work". This is clearly intended to facilitate and ensure parliamentary oversight of the conduct of such work by government.

10 Yet, having made that apt observation from the surrounding provisions, the Full Court went on to construe s 16(1) as though it were divorced from that context. In doing so, the Full Court’s construction also ignored another important consideration of context, as Tasmania and South Australia have pointed out, namely the principle that diminishing the privileges of Parliament should only occur by express or unmistakable language.¹⁶ The corollary of this is that if it was Parliament’s intention that the court were to be able to adjudicate on the compatibility of works proposed or undertaken with the works endorsed by the Committee’s report, then the PWC Act ought to so provide expressly. Otherwise, as noted below, compliance with the Committee’s report is exclusively a matter for the Parliament, using the mechanisms available to it.

20 25. **Thirdly**, construing s 16(1) in context in its widest sense includes having regard to the principle of responsible government inherent in the Westminster system in place in Tasmania and other Australian jurisdictions. That principle has various facets but relevantly includes that “Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government”.¹⁷ Such scrutiny occurs in various ways including, in modern times, through oral questioning of Ministers present in the chamber¹⁸ but also more generally through the requirement that the Parliament meet at least annually, the provision for control of supply by the legislature, the requirement that

¹⁵ Full Court at [20].

¹⁶ Tasmania’s Submissions at [10]; South Australia’s Submissions at [9] and [16]-[19].

¹⁷ *Egan v Willis* (1998) 195 CLR 424 at 453 [45] (Gaudron, Gummow and Hayne JJ).

¹⁸ *Egan v Willis* (1998) 195 CLR 424 at 477 [105] (McHugh J); 502 [154] (Kirby J). See *House of Assembly Standing & Sessional Orders and Rules* Chapter 10 (Questions Seeking Information), cll 331-333 (attendance of Members desired to be examined); *Legislative Council Standing Orders* Chapter 6 (Attendance of Members); Chapter 9 (Questions Seeking Information); cll 243-244 (attendance of Members desired to be examined).

Ministers be members of the legislature, the privilege of freedom of speech in debate, and the power to coerce the provision of information.¹⁹

26. As this Court explained in *Egan v Willis* (1998) 195 CLR 424 at 451, in a system of responsible government, the Executive's primary responsibility in its prosecution of government is owed to Parliament. The Executive through its Ministers is not outside Parliament but rather members of it and answerable to it. That being so, no express provisions providing for Parliament to enforce the Executive's obligation under s 16(1) of the PWC Act are necessary because such powers already exist as an ordinary incident of the principle of responsible government. The Full Court's reasoning that the absence of any express provisions empowering Parliament to enforce the obligation in s 16(1) requires such a power be impliedly bestowed on the courts ignores the principle of responsible government which is a fundamental part of the statutory context.
27. **Fourthly**, having proper regard to the purpose of the PWC Act also militates against an extension of the obligation under s 16(1) to third parties. It is clear from the long title and the tenor of the provisions noted above that the purpose of the PWC Act is to facilitate Parliament's oversight and supervision over the Executive's expenditure of money on public works through the creation of the Committee to investigate and report on such works.
28. This is supported by the mischief which the PWC Act was introduced to remedy, as gleaned from extrinsic materials and legislative history. On the Second Reading of the Public Works Committee Bill, Mr Fullerton who introduced the Bill described that the object of the legislation was to set up a committee to deal with public works proposals because "members of the House often lacked information". The point of establishing the Committee was not to give it a "right of veto" but for the purpose of

¹⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559 (The Court). See *Constitution Act 1934* (Tas) s 8B (Ministers must be a member of either the Legislative Council or the Legislative Assembly); s 10 (Parliament is constituted by the Governor, the Legislative Council and the House of Assembly); s 11 (there shall be a session of Parliament at least once in every year); s 17 (the Houses to make standing orders for the orderly conduct of all business and proceedings of the House and of both Houses collectively);

obtaining information that members of the House ought to have about public works proposals.²⁰

29. It is also apparent, both from the Second Reading debates and the clause notes that appeared in the PWC Act as originally enacted, that the genesis of the PWC Act was influenced by the passage of similar legislation in the Commonwealth Parliament around 12 months earlier, as well as similar legislation in existence in New South Wales and Victoria.²¹ Indeed, the terms of the PWC Act borrow heavily from the Commonwealth iteration.

10 30. It is similarly clear from the Second Reading Speech of Prime Minister Cook who introduced the Bill into the Commonwealth Parliament that the mischief it sought to remedy was the fact that Parliament “knows very little of the actual details of the expenditure of large sums of public money”.²² The creation of the Parliamentary committee was intended to “remedy that defect, as well as to ensure a more efficient spending of the money, and the wiser disposition of our public works policy”.²³ Importantly, however, that was not to entail any diversion of responsibility from Parliament. As the Prime Minister stated:²⁴

20 I say that in connexion with public works and public undertakings, the responsibility of this Parliament should be preserved inviolate. That is the point, I think, which ought to decide this matter. No outside body should have to do with projects in a responsible way which relate to the initiation of the spending of the public funds of the country. The determination of what, where, to what extent, and in what shape our public functions shall be initiated and utilized must always, it seems to me, rest with those who have charge of the purse of the country, and have the responsibility, finally, for the spending of the money. In other words, I think that this proposal preserves the power of Parliament over the whole province of public expenditure.

31. Extending the obligation in s 16(1) to third parties who have nothing to do with supervising the Executive’s expenditure on public works does not promote the legislative purpose of the PWC Act. Parliament is responsible for appropriating the

²⁰ *The Mercury* Thursday 26 November 1914 p 8. At this time the debates of the Tasmanian Parliament were reported in *The Mercury*. Tasmania does not produce explanatory memoranda to Bills, although it produces fact sheets and clause notes. No fact sheet is available for the Public Works Committee Bill 1914.

²¹ *Commonwealth Public Works Committee Act 1913* (Cth) (Repealed); *Public Works and Procurement Act 1912 No 45* (NSW); *The Public Works Statute 1865* (Vic) (Repealed).

²² *Hansard*, House of Representatives, Friday 12 December 1913, p 4244.

²³ *Hansard*, House of Representatives, Friday 12 December 1913, p 4244.

²⁴ *Hansard*, House of Representatives, Friday 12 December 1913, p 4245.

funds to pay for public works²⁵ and the Executive is responsible for executing and carrying out arrangements necessary for public works to be undertaken.²⁶ Parliament supervises the Executive's activities through the Committee. The Executive is responsible to Parliament in its obligation to ensure the referrals are made.²⁷ The Executive and the Parliament are in the position to know when the condition precedent has been met through the public works being referred to and reported on by the Committee. Whether or not the Executive has acted compatibly with the works reported on by the Committee is a matter for the Parliament. For example, by resolution, one of the Houses could refer the compatibility of the works undertaken to the works reported on to the Committee for further report. In this way, the scheme of supervision is achieved.

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32. Third parties, on the other hand, have none of those responsibilities nor are they in an equivalent position of knowledge. They also have no power to bring about satisfaction of the condition precedent through effecting referrals to the Committee. As such, it is quite incorrect to say, as the Full Court did, that such a scheme will “only have efficacy if it can be lawfully enforced on applicable persons outside Parliament”.²⁸ On the contrary, the efficacy of the scheme is independent of persons outside Parliament. As South Australia has pointed out, the fact that third parties outside Parliament may be impacted by Parliamentary proceedings in significant ways does not warrant an implication that parliamentary privilege has been abridged.²⁹

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²⁵ *Constitution Act 1934* (Tas) Part IV including s 36 (*Appropriation Act* means an Act which authorizes the issue and application of any money from the Consolidated Fund to meet (a) the cost of the ordinary annual services of the Government; (b) expenditure on public works or any property required for public purposes; (c) the making of a loan authorised by law).

²⁶ *Public Works Construction Act 1880* (Tas) and orders made by the Governor under s 4 of the *Administrative Arrangements Act 1990* (Tas) by which the Governor may provide for (a) the assignment to a Minister of the administration of a department or an enactment and (b) the specification of the department responsible to a Minister in relation to the administration of an enactment.

²⁷ Pursuant to the *Administrative Arrangements Order 2023* (Tas) sch 1, part 27, the Treasurer is responsible for the PWC Act in so far as it relates to the conditions precedent to commencing public works.

²⁸ Full Court at [25].

²⁹ South Australia's Submissions at [20].

33. For these reasons, there was no proper basis in either the text, context or purpose of the PWC Act for the Full Court to draw any implication – let alone a necessary one – that s 16(1) imposes a public obligation enforceable by the courts.

Second Issue

- 10 34. The answer to the First Issue entails the consequence that the Second Issue does not arise. That is, if the obligation under s 16(1) of the PWC Act is not enforceable by the courts, there is no occasion for the courts to conduct a comparison of public works that have been the subject of a referral to and report by the Committee against any public works undertaken by a general government sector body in issue in a proceeding.

35. Nonetheless, the Second Issue is considered below because it serves to illustrate the correctness of the conclusion reached above on the First Issue. It does so by demonstrating that in carrying out the inquiry required to enforce s 16(1) of the PWC Act, a court would necessarily infringe that aspect of parliamentary privilege enshrined in Article 9 of the Bill of Rights. This is essentially the analysis that the Primary Judge at first instance in the Supreme Court of Tasmania (**Primary Judge**)³⁰ invoked in order to arrive at his conclusion on the First Issue that:³¹

20 ... the plaintiff would have an arguable cause of action if no question of parliamentary privilege arose. However ... **evidence as to the proceedings and omissions of the Committee would not be admissible** for reasons associated with parliamentary privilege, and ... the plaintiffs action **cannot possibly succeed** without that evidence.

(emphasis added)

Article 9 of the Bill of Rights

36. Article 9 prevents proceedings in Parliament from being “impeached” or “questioned” in any court or place outside Parliament. The ACT endorses the elaboration on the meaning of those words drawn from the authorities articulated by Tasmania and South Australia.³²

³⁰ *Casimaty v Hazell Bros Group Pty Ltd (No 2)* [2022] TASSC 9 (Blow CJ).

³¹ Primary Judge at [4].

³² Tasmania’s Submissions at [42]-[43], [52]-[57] and [61]-[63]; South Australia’s Submissions at [23] ff 32; [24]-[26].

37. Additional guidance on the meaning of Article 9 may be gleaned from the more recent expression of that principle now contained in s 16 of the Privileges Act (which also applies in the ACT by virtue of s 24(3) of the Self-Government Act).

38. Section 16(1) of the Privileges Act provides:

For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

10 39. It is clear from that provision that s 16 was enacted not to declare a new principle of parliamentary privilege but rather to codify the content of Article 9 (or at least a minimum content).

40. Additionally, s 5 of the Privileges Act provides:

Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of this Act, continue in force.

Under the Constitution the powers, privileges, and immunities are those of the House of Commons, and of its members and committees, at the establishment of the Commonwealth.

20 41. The explanatory memorandum to the Parliamentary Privileges Bill 1987 reveals that the measure was perceived as necessary to restore a broad scope to Article 9 in the wake of narrow approaches that had been taken in two decisions of the Supreme Court of New South Wales.³³

42. The key provision for present purposes is s 16(3) of the Privileges Act which provides:

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

- 30 (a) questioning or **relying on the truth**, motive, intention or good faith of anything forming part of those proceedings in Parliament;
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

³³ Parliamentary Privileges Bill 1987 Explanatory Memorandum p 3. See also the discussion in *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223 at 228-229 (Beaumont J). The ACT therefore agrees with South Australia's submission that Article 9 should not be given a confined interpretation but rather the full meaning the words are capable of bearing: South Australia's submissions at [23]-[24].

- (c) **drawing, or inviting the drawing of, inferences or conclusions** wholly or partly from anything forming part of those proceedings in Parliament.

(emphasis added)

Full Court's analysis of the Second Issue

43. The Full Court's reasoning on the Second Issue comprises the following key elements:

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(a) It followed from the Full Court's conclusion on the First Issue that it is within the authority of the courts to determine the facts necessary to establish whether the condition precedent contained in s 16(1) of the PWC Act is applicable and has been met in a particular case.³⁴

(b) There is no question that determining those facts required a comparison to be undertaken between the public works the subject of the Committee's report and the public works undertaken or proposed to be undertaken and in issue in the proceeding.³⁵

(c) That comparative exercise will inevitably require consideration of the Committee's report.³⁶

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(d) Although consideration of the Committee's report was necessary, it simply required a "direct comparison" between the relevant works and did not require the Court to examine, discuss or adjudicate upon the Committee's report nor to use the report or the documents referred to in it to establish the truth of any facts asserted in them.³⁷

(e) As such, no infringement of Article 9 would arise from the court conducting the comparative exercise required to enforce s 16(1) of the PWC Act.

Proper application of Article 9 of the Bill of Rights

44. Assuming the correctness of the elements in the Full Court's reasoning described at [43(a)] – [43(c)], they do not lead to the proposition described at [43(d)] on which the Full Court relies to reach the conclusion in [43(e)].

45. The Full Court's reasoning that conducting the comparative analysis does not entail any "questioning" of the Committee's report appears to be based on an assumption

³⁴ Full Court at [26].

³⁵ Full Court at [28].

³⁶ Full Court at [28].

³⁷ Full Court at [33].

that the task is as “mechanical” as checking a parliamentary record to confirm the occurrence of an historic objective event.³⁸ That assumption is unfounded. In this regard, the ACT endorses Tasmania’s submission that while the Full Court recognised the need to avoid confusion between the right to prove the occurrence of parliamentary events and the prohibition on questioning those events, it fell into the very trap it had identified.³⁹

46. Conducting the comparative analysis will involve a court traversing three basic steps:
- (a) reviewing the contents of the Committee’s report and determining from that review the nature and scope of the public works considered and reported on by the Committee;
 - (b) reviewing the contents of the material available concerning the relevant public works undertaken or proposed to be undertaken by a government sector body that are in issue in the proceeding and determining from that review the nature and scope of those public works;
 - (c) comparing (a) to (b) and drawing a conclusion as to whether they are relevantly the same or different.
47. Steps (a) and (c) plainly involve questioning the contents of the Committee’s report. Put in terms of the expression of Article 9 articulated in s 16(3) of the Privileges Act:
- (a) step (a) involves both:
 - i. drawing an *inference* from the contents of the Committee’s report, namely as to the nature and scope of the public works considered; and
 - ii. *asserting the truth* of the contents of the report (or aspects of it), namely the accuracy of the descriptions in the report relied on to draw the inference referred to above; and
 - (b) step (c) involves drawing a *conclusion* from the Committee’s report, namely that the public works considered and reported on are relevantly the same or different from the public works in issue in the proceeding.

³⁸ As Tasmania has stated, 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: Tasmania’s Submissions at [49].

³⁹ Tasmania’s Submissions at [58].

48. The comparative analysis therefore involves the essence of what Article 9 prevents a court from doing.

49. It may be that, in a given case, the inference may be so straightforward, the truth of the descriptions so uncontroversial or the conclusion so obvious that the task *appears* to be as ‘mechanical’ as confirming a historical fact from the parliamentary record, such as whether a particular member was present in Parliament on a particular day. Nonetheless, the task remains qualitatively different from the latter scenario, however straightforward it may appear to be in a given case. This is implicit in the Full Court’s acknowledgement that it is conceivable that the Governor and the Committee may reach a different view on the question than the view that a court may reach.⁴⁰

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50. For these reasons, the Full Court erred in concluding on the Second Issue that the comparative analysis required for a court to determine the issue under s 16(1) does not infringe that aspect of parliamentary privilege enshrined in Article 9 of the Bill of Rights.

Part V: ESTIMATE OF TIME

51. It is estimated that up to 15 minutes will be required for the presentation of the ACT’s oral argument.

Dated 7 February 2024

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⁴⁰ Full Court at [34]. It is also reflected in the fact that First Respondent and Second Respondent reached different views on the question as apparent from their respective pleadings: see Tasmania’s Submissions at [47] and [51].

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

**ANNEXURE TO THE ATTORNEY-GENERAL FOR THE
AUSTRALIAN CAPITAL TERRITORY'S SUBMISSIONS**

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, the Australian Capital Territory sets out below a list of the particular constitutional provisions, statutes, and statutory instruments referred to in submissions.

No.	Description	Provisions	Version
Australian Capital Territory			
1.	<i>Planning Act 2023</i> (ACT)	70-77	Current
2.	<i>Nature Conservation Act 2014</i> (ACT)	181-183	Current
Commonwealth			
3.	<i>Australian Capital Territory (Self-Government) Act 1988</i> (Cth)	24	Current
4.	<i>Commonwealth Constitution</i>	49	Current

5.	<i>Commonwealth Public Works Committee Act 1913</i> (Cth) (Repealed)	All	As at 19.12.1913 until 20.12.1914
6.	<i>Parliamentary Privileges Act 1987</i> (Cth)	5, 16	Current
Tasmania			
7.	<i>Acts Interpretation Act 1931</i> (Tas)	8A-8B	As at 05.11.2021 until 23.10.2022
8.	<i>Administrative Arrangements Act 1990</i> (Tas)	4	Current
9.	<i>Administrative Arrangements Order 2023</i> (Tas)	Sch 1, part 27	Current
10.	<i>Constitution Act 1934</i> (Tas)	8B, 10, 11, 17, Part IV (36-45)	As at 01.07.2019 until 17.03.2022
11.	<i>Public Works Committee Act 1914</i> (Tas)	All	As at 06.02.1915 until 18.07.1915 and As at 12.12.2019 until 26.11.2023
12.	<i>Public Works Construction Act 1880</i> (Tas)	All	Current
New South Wales			
13.	<i>Public Works and Procurement Act 1912</i> No 45 (NSW)	All	Current
Victoria			
14.	<i>The Public Works Statute 1865</i> (Vic) (Repealed)	All	As at 12.10.1865
United Kingdom			
15.	<i>Bill of Rights 1688</i> 1 Will & Mar Sess 2 c 2 (Eng)	Article 9	Current