HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

BETWEEN:

ATTORNEY-GENERAL FOR THE STATE OF TASMANIA
Appellant

and

GREGORY JOHN CASIMATY
First Respondent

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

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (SEEKING LEAVE TO INTERVENE)

PART I — CERTIFICATION

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

PARTS II AND III — INTERVENTION

2. The Attorney-General of the Commonwealth (the **Commonwealth**) applies for leave to intervene to make submissions with respect to the second ground of appeal.[1]

3. Leave should be granted because the Commonwealth's interests are likely to be substantially affected by the Court's resolution of that ground, if it is reached.[2] Parliamentary privilege in relation to proceedings of the Commonwealth Parliament is relevantly governed by s 16 of the *Parliamentary Privileges Act 1987* (Cth) (the **Commonwealth Act**). While s 16 of the Commonwealth Act does not replicate the language of Art 9 of the *Bill of Rights 1688*,[3] s 16(1) declares and enacts that Art 9 applies in relation to the Parliament of the Commonwealth in addition to any other operation that s 16 may have.[4] Section 16(2) defines "proceedings in Parliament" for the purposes of

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1 *High Court Rules 2004* (Cth), r 42.08A. The Commonwealth does not seek to be heard on the first ground of appeal.

2 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 (***Roadshow Films***) at [2] (the Court).

3 1 W & M Sess 2 c 2. This Act applies in Tasmania by virtue of the *Australian Courts Act 1828* (Imp) s 24.

4 There is unresolved debate as to whether s 16(3) of the Commonwealth Act is merely a codification of Art 9, or whether it extends its operation. For the former view, see *Prebble v Television New Zealand Ltd*

both Art 9 and s 16 itself. As a result, any ruling on the operation of Art 9 will have direct implications for the privileges of the Commonwealth Parliament. Further, when considering questions about the meaning and application of s 16 of the Commonwealth Act — and specifically its application to the use of evidence of parliamentary proceedings in litigation — courts have routinely drawn on case law concerning Art 9.[5] This means that any judgment concerning the operation of Art 9 is likely to have indirect implications for the operation of s 16 of the Commonwealth Act.

4. The submissions set out below, which the Commonwealth seeks to supplement succinctly at the hearing of the appeal, will "assist [the Court] to reach a correct determination" of the second ground, and will not result in undue cost or delay.[6]

PART IV — ARGUMENT

A SUMMARY

5. Like the judgments below,[7] the second ground of appeal proceeds on the basis that the determination of the first respondent's claim in the Supreme Court of Tasmania will require the Court to compare (1) the work that was referred to the Parliamentary Standing Committee on Public Works (the **Committee**) under s 16(2) of the *Public Works Committee Act 1914* (Tas) (the **PWC Act**), and (2) the work that the second respondent was contracted to undertake. This comparison is required in order for the Court to determine whether the contracted work fell within the scope of the work on which the Committee reported under s 16(4) of the PWC Act, and therefore whether the condition precedent in s 16(1) of the PWC Act was satisfied. The issue raised by the second ground is whether the majority in the Full Court was correct to conclude that "proof of the report and underlying documents for the purpose of the comparison does not infringe

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[1995] 1 AC 321 (***Prebble***) at 333 (Lord Browne-Wilkinson, for the Privy Council); Explanatory Memorandum, *Parliamentary Privilege Bill 1987*, p 9, 12-14. For the latter, see, eg, *Mees v Road Corporation* (2003) 128 FCR 418 (***Mees***) at [82]-[84] (Gray J), citing Enid Campbell, "Parliamentary Privilege and the Admissibility of Evidence" (1999) 27 *Federal Law Review* 367 at 381.

5 See, eg, *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223 (***Amann Aviation***) at 224-231 (Beaumont J); *Rowley v O'Chee* [2000] 1 Qd R 207 (***Rowley***) at 218-221 (McPherson JA); *Leyonhjelm v Hanson-Young* (2021) 282 FCR 341 (***Leyonhjelm***) at [30]-[52] (Rares J), [248] (Wigney J), [364]-[365] (Abraham J).

6 *Roadshow Films* (2011) 248 CLR 37 at [4], [6] (the Court).

7 PJ [30] (CAB 11); FC [33] (CAB 30).

parliamentary privilege" (**CAB 30 [33]**) because it would not "impeach" or "question" the proceedings of the Tasmanian Parliament.[8]

6. In summary, the Commonwealth submits:

(a) The notion of "question[ing]" in Art 9 is not confined to challenging or attacking what is said in parliamentary proceedings. It includes relying upon statements made in Parliament for the purpose of establishing the truth of the thing stated. However, "question[ing]" in Art 9 does not prevent parliamentary proceedings from being relied on for the non-contentious purpose of establishing what occurred in Parliament as a matter of historical fact.

10 (b) It is impossible to determine the likelihood of an infringement of Art 9 without first considering the construction of s 16(1) of the PWC Act. That is because the legal standard to be applied when determining whether proposed public work falls within "the scope" of, or is "the same as" the work that was considered and reported on by the Committee is relevant to whether the use of parliamentary proceedings to establish breach of that standard will infringe Art 9. As the Commonwealth has no interest in how s 16(1) of the PWC Act is interpreted, it does not make any submission on that point.

(c) If s 16(1) of the PWC Act is interpreted as requiring strict or literal correspondence between the work referred to and reported on by the Committee and the work that
20 is in fact undertaken, then it would ordinarily be possible for a court to determine whether such correspondence exists without infringing Art 9. That follows because all that would be necessary to apply s 16(1) would be to identify whether the work approved by the Committee (as a matter of historical fact) differs in any way from the work that was performed, is being performed or is proposed to be performed.

(d) If s 16(1) of the PWC Act is interpreted as permitting some variation between the work referred to and reported on by the Committee and the work that is in fact undertaken, then a dispute may concern the significance of any objectively identifiable differences. In that event, it would be necessary on a case by case basis to consider the purpose for which evidence of proceedings in Parliament is sought
30 to be tendered, in order to determine whether that purpose goes beyond proof of a

[8] On a fair reading of its reasons, the Full Court did not conclude that ss 15 or 16 of the PWC Act abrogated or modified parliamentary privilege in the report, or proceedings of the Committee generally. Accordingly, the principles that govern statutory modification of parliamentary privilege are not in issue on this appeal.

matter of historical fact. If it does (because, for example, a party seeks to show that a variation is significant because it pertains to a matter that the Committee considered important in approving the work), that is likely to infringe Art 9.

B INTERPRETATION OF ARTICLE 9

7. The meaning of the words "impeached or questioned" in Art 9 has defied precise exposition.[9] That reflects the "very general language"[10] of the provision and the difficulties in discerning an all-embracing criterion which can be applied to the different circumstances in which evidence of proceedings in Parliament may arise for consideration outside Parliament.

Impeached

8. It was held in *Rowley v O'Chee* that the meaning of "impeached" for the purposes of Art 9 includes "impeded, hindered or prevented" or "detrimentally or prejudicially affected, or impaired".[11] That construction was informed by the *Oxford Dictionary* definition of "impeached"; in particular, senses that were in use in 1688 (when the Bill of Rights was enacted).[12] There is no dispute between the parties to this proceeding and South Australia (seeking leave to intervene) that this is the meaning of "impeached" in Art 9.[13]

9. It was suggested by the House of Lords in *Pepper v Hart* that "impeached", unlike "questioned", may apply only to circumstances in which a person is sought to be made liable in a criminal or civil proceeding for what they said in Parliament.[14] Whether or not that is so, the practical significance is limited given that the words form a compendious phrase. There is no doubt that "questioning", at least, extends beyond situations in which a person is sought to be held liable for their words or actions in a proceeding of Parliament.

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9 See Enid Campbell, *Parliamentary Privilege* (2nd ed, 2003) at 11.

10 *Television New Zealand v Prebble* [1993] 3 NZLR 513 at 518 (Cooke P).

11 [2000] 1 Qd R 207 at 222 (McPherson JA); followed in, eg, *Victorian Taxi Families Inc v Taxi Services Commission* (2018) 61 VR 91 at [93] (Derham AsJ). See also *Erglis v Buckley* [2004] 2 Qd R 599 (***Erglis***) at [6] (McPherson JA).

12 *Rowley* [2000] 1 Qd R 207 at 222 (McPherson JA).

13 Appellant's submissions (**AS**) at [42]; First Respondent's submissions (**RS**) at [31] and [44]; Submissions of the Attorney-General of South Australia (seeking leave to intervene) (**SA**) at fn 32.

14 [1993] AC 593 (***Pepper***) at 638 (Lord Browne-Wilkinson, with Lord Keith, Lord Bridge, Lord Griffiths, Lord Ackner and Lord Oliver agreeing).

Questioned

10. Consistently with the approach adopted by the primary judge (Blow CJ), the appellant's submissions on the scope of "questioned" rely on the "maxim" stated in the 17th edition of Blackstone's *Commentaries* 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".[15] That passage was invoked in *Church of Scientology of California v Johnson-Smith*[16] and by the Privy Council in *Prebble v Television New Zealand Ltd*,[17] and is reflected in Blow CJ's conclusion that the first respondent's claim would result in the Committee's 2017 report being "examined, discussed, and adjudicated upon" contrary to Art 9.[18]

11. The first respondent's preferred construction of "questioned" is narrower. Embracing the critique that Blackstone's maxim is "too wide and sweeping"[19] and has "lost most of its current relevance",[20] the first respondent relies on the conclusion of Fryberg J in *Erglis v Buckley* that "questioned" in Art 9 means "[t]o examine judicially; hence, to call to account, challenge, accuse (of)" and "[t]o call in question, dispute, oppose".[21] On that interpretation, it is said that a use of parliamentary proceedings is permitted provided that use does not "challenge", "attack", "discredit" or "disparage" what was said.[22]

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15 Blackstone, *Commentaries on the Laws of England* (17th ed, 1830), book 1 at 163. See AS [42].

16 [1972] 1 QB 522 (***Church of Scientology***) at 530 (Browne J).

17 [1995] 1 AC 321 at 332 (Lord Browne-Wilkinson, for the Privy Council). See also *Hamilton v Al-Fayed* [2001] 1 AC 395 at 402 (Lord Browne-Wilkinson, with Lord Steyn, Lord Cooke, Lord Hope and Lord Clyde agreeing).

18 PJ [30] (CAB 11).

19 *Buchanan v Jennings* [2002] 3 NZLR 145 at [23] (Richardson P, Gault, Keith and Blanchard JJ); see also *Buchanan v Jennings* [2005] 1 AC 115 (Lord Bingham, for the Privy Council) at [16], quoting from United Kingdom, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege – First Report* (30 March 1999) at [42].

20 *Erglis* [2004] 2 Qd R 599 at [13]-[16] (McPherson JA), pointing out that the maxim appeared in the same form in the first edition of *Commentaries*, which was published in 1765, and that it was originally a quotation from Coke's *Fourth Institutes* which were written in the early part of the 17th century, and that it therefore "reflects a state of affairs which had probably ceased to prevail even at the time that [the 17th] edition was published in 1830". It also reflected a time when "both Houses of Parliament in Britain insisted that 'no one was entitled to publish reports of their proceedings, and [they] committed to prison those who broke the rule" (quoting Maitland, *Constitutional History of England* (1908) 376.

21 [2004] 2 Qd R 599 at [84]. The first respondent attributes that approach to the Court of Appeal as a whole: RS [32]-[33]. However, neither McPherson JA (in the majority) nor Jerrard JA (in dissent) adopted that understanding of Art 9.

22 RS [44].

12. The Commonwealth submits that the position taken by the appellant is too broad (in equating "questioning" with discussion), while that taken by the first respondent is too narrow (in equating "questioning" with attack or disparagement).

13. *First*, as to overbreadth, the word "questioned" in Art 9 should not be interpreted so as to prohibit any parliamentary event from being "discussed" in courts or tribunals. In *Prebble*, Lord Browne-Wilkinson referred to Blackstone's maxim in the context of stating that the courts "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".[23] His Lordship said further that the effect of parliamentary privilege is that the courts do not "allow what is said in Parliament to be the subject matter of investigation or submission";[24] and that courts are prevented "from adjudicating on issues arising in or concerning the House".[25]

14. Given these statements, Lord Browne-Wilkinson was invoking Blackstone's maxim not to articulate a comprehensive or prescriptive test, but to explain the underlying "principle" of which Art 9 was a "manifestation". Taken literally, the words "examined" and "discussed" in Blackstone's maxim would prevent any reference at all to proceedings in Parliament. On one view, that would prevent public discussion in the media, which is plainly absurd.[26] Further, it is clear that Lord Browne-Wilkinson accepted, as is discussed below at paragraph 24, that evidence of parliamentary proceedings can be referred to in court proceedings (ie "examined" and "discussed") to prove what "was done and said in Parliament as a matter of history".[27] That was also recognised in his Lordship's speech in *Pepper*, where he said that "[f]ar from questioning the independence of Parliament and its debates", to permit reference to parliamentary material as an aid to

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23 [1995] 1 AC 321 at 332 (Lord Browne-Wilkinson, for the Privy Council) (emphasis added). See also *Erglis* [2004] 2 Qd R 599 at [12] (McPherson JA), pointing out that the word "challenge" (read as "challenge in the courts") was "no doubt" intended to narrow the width that the maxim would otherwise convey.

24 *Prebble* [1995] 1 AC 321 at 333 (Lord Browne-Wilkinson, for the Privy Council) (emphasis added), citing *Church of Scientology* [1972] 1 QB 522 at 531 (Browne J) and *Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1 (***Comalco***) at 3 (Blackburn CJ).

25 *Prebble* [1995] 1 AC 321 at 335 (Lord Browne-Wilkinson, for the Privy Council) (emphasis added).

26 That point was made by Lord Browne-Wilkinson in *Pepper* [1993] AC 593 at 638. However, the better view is that this scenario is avoided by construing "place out of Parliament" as being limited to courts, tribunals or other bodies with compulsive or disciplinary powers: see United Kingdom, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege – First Report* (30 March 1999) at [91]-[96]; Enid Campbell, *Parliamentary Privilege* (2nd ed, 2003) at 21; Philip A Joseph, "Parliament's Attenuated Privilege of Freedom of Speech" (2010) 126 *Law Quarterly Review* 568 at 572-573.

27 *Prebble* [1995] 1 AC 321 at 337 (Lord Browne-Wilkinson, for the Privy Council).

statutory construction "[gives] effect to what is said and done there".[28] That underscores the need for caution in relying on Blackstone's maxim to articulate the effect of Art 9.

15. *Second*, and by contrast, to construe "questioning" as limited to challenging, attacking or disparaging proceedings in Parliament would be underinclusive. The meaning of "questioned" in Art 9 has not historically been regarded as limited in this way. While Fryberg J did adopt that interpretation in *Erglis*, it was not adopted by either McPherson JA (who did not set out a view about the meaning of "questioned"[29]) or Jerrard JA in dissent (who, unlike Fryberg J, considered that "questioned" included "to ask or inquire about, to investigate (a thing)" and extended to the "examination" of parliamentary proceedings[30]). In addition, to limit Art 9 in this way is at odds with the recognition in *Prebble* that "the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information" must prevail over "the interests of justice in ensuring that all relevant evidence is available to the courts", when these interests are in conflict.[31]

16. The "basic concept" underlying Art 9 is "the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts".[32] However, the prohibition on using evidence of parliamentary proceedings is not confined to circumstances where a person is sought to be made liable for their statements or actions in Parliament.[33] That is because freedom of speech in Parliament, and the free flow of information to Parliament, may be interfered with by measures that stop short of seeking to impose liability of that kind – for example by public judicial findings about the accuracy, truthfulness or *bona fides* of statements made in or to the Parliament. For that

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28 [1993] AC 593 at 638 (Lord Browne-Wilkinson, with Lord Keith, Lord Bridge, Lord Griffiths, Lord Ackner and Lord Oliver agreeing).

29 The first respondent cites McPherson JA in *Erglis* [2004] 2 Qd R 599 at [6], but his Honour did not purport there to define "questioned" in Art 9.

30 *Erglis* [2004] 2 Qd R 599 at [32] (Jerrard JA).

31 *Prebble* [1995] 1 AC 321 at 336 (Lord Browne-Wilkinson, for the Privy Council). The court must nonetheless consider the interests of justice; for example, by considering whether to stay proceedings where the effect of parliamentary privilege is that it is "impossible fairly to determine the issue between the parties": at 338.

32 *Prebble* [1995] 1 AC 321 at 334, 336, quoted in *Crime and Corruption Commission v Carne* (2023) 97 ALJR 737 at [106] (Gordon and Edelman JJ). See also *Sankey v Whitlam* (1978) 142 CLR 1 (***Sankey***) at 35 (Gibbs ACJ).

33 *Prebble* [1995] 1 AC 321 at 334 (Lord Browne-Wilkinson, for the Privy Council); cf *R v Murphy* (1986) 5 NSWLR 18.

reason, Art 9, and in particular the concept of "questioning", has long been construed in a "wide" manner.[34]

17. The meaning of Art 9 cannot be safely ascertained by resort to dictionary definitions.[35] Instead, consistently with the common law method of legal reasoning, the question of when a use of evidence of parliamentary proceedings in a court will amount to "impeach[ing] or question[ing]" such proceedings has been approached by the courts on a case-by-case basis, having regard to the purpose and rationale of Art 9 and the development of the law through judicial exegesis.[36]

18. Approaching the interpretation of Art 9 in that way, it is apparent that possible uses that parties may attempt to make of proceedings in Parliament fall upon a spectrum, from uses that are plainly contrary to Art 9, to those that are plainly consistent with it.

19. At the former end of the spectrum, there is no doubt that the prohibition on "impeach[ing]" or "question[ing]" proceedings of Parliament prevents "bring[ing] into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading".[37] In the same vein, "it is not permissible to challenge by cross-examination in a later action the veracity of evidence given to a parliamentary committee".[38]

20. Similarly, it is impermissible to impugn the validity of a report of a parliamentary committee (eg on the ground of bias, failure to take relevant considerations into account,

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34 *Church of Scientology* [1972] 1 QB 522 at 531 (Browne J); *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 at 518 (Cooke P).

35 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [27] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), quoting *Cabell v Markham* 148 F 2d 737 at 739 (Judge Hand) (1945).

36 See, eg, *Thomas v Mowbray* (2007) 233 CLR 307 at [91] (Gummow and Crennan JJ), referring to Zines, *The High Court and the Constitution*, 4th ed (1997) at 195: "Given a broad standard, the technique of judicial interpretation is to give it content and more detailed meaning on a case to case basis. Rules and principles emerge which guide or direct courts in the application of the standard."

37 *Prebble* [1995] 1 AC 321 at 337 (Lord Browne-Wilkinson, for the Privy Council). See also *Mees* (2003) 128 FCR 418 at [80] (Gray J); *R v Jackson* (1987) 8 NSWLR 116 at 120 (Carruthers J); *Amann Aviation* (1988) 19 FCR 223 at 226-227 (Beaumont J). In the context of s 16 of the Commonwealth Act, see also *R v Theophanous* (2003) 141 A Crim R 216 at [70] (Winneke ACJ, Vincent JA and Eames JJA).

38 *Hamilton v Al-Fayed* [2001] 1 AC 395 at 407 (Lord Browne-Wilkinson, with Lord Steyn, Lord Cooke, Lord Hope and Lord Clyde agreeing). The holding to the contrary in *R v Murphy* (1986) 5 NSWLR 18 is widely regarded as incorrect. As Gray J observed in *Mees* (2003) 128 FCR 418 at [74], "[t]he Commonwealth Parliament was apparently so dissatisfied with the narrow ambit given to parliamentary privilege in *R v Murphy* … that it enacted the [Commonwealth Act]".

denial of procedural fairness),[39] or to tender evidence or make submissions "critical of the report including the reasoning, opinions, findings and conclusions in the report".[40]

21. While notions of challenging, attacking or disparaging what is said in Parliament constitute the central case of what is comprehended by the notion of "questioning" (or "impeaching"), the limitation on the use of proceedings in Parliament in litigation is not confined to such cases. For example, authority establishes that statements made in Parliament may not be used as evidence of the truth of facts that are asserted or the correctness of opinions that are expressed.[41] Such a use of proceedings in Parliament plainly would not itself involve challenging, attacking or disparaging what was said. It would, however, impermissibly skew court proceedings if one party could rely upon proceedings in Parliament (such as a report of a parliamentary committee) to establish the truth of what was said, but the opposing party was not permitted to test or contradict that evidence (a testing or contradiction that Art 9 would prevent).[42]

22. It has also been held that the use of what is said or done in Parliament for the purpose of drawing an inference that is favourable to one's case would also constitute "questioning" within the meaning of Art 9. That may be so even if it involves positive reliance on the words spoken, rather than questioning the truth or accuracy of anything said.[43]

23. Further along the spectrum, some uses of proceedings in Parliament have been permitted. Perhaps the best known example is that it has been held that Art 9 does not prevent the use of clear statements made in Parliament by a Minister or other promoter of a Bill for

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39 See, eg, *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* [2002] 2 Qd R 8 at [23] (McPherson JA), [33] (Williams JA), [47] (Chesterman J); *Kiwi Party Inc v Attorney-General (NZ)* [2020] 2 NZLR 224 at [37]-[45] (Collins, Simon France and Lang JJ), leave to appeal refused. See also *Dingle v Associated Newspapers Ltd* [1960] 2 QB 405 at 409-410 (Pearson J).

40 *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114 (***NSW AMA***) at 129 (Hungerford J). See also *Mees* (2003) 128 FCR 418 at [80] (Gray J), stating that "any form of critical examination of the content of what has been said to Parliament will not be undertaken by a court".

41 *NSW AMA* (1992) 26 NSWLR 114 at 117, 129 (Hungerford J); *Mees* (2003) 128 FCR 418 at [85] (Gray J).

42 See, eg, *British Railways Board v Pickin* [1974] AC 765 at 799 (Lord Simon); *Rann v Olsen* (2000) 76 SASR 450 at [85]-[86] (Doyle CJ); *NSW AMA* (1992) 26 NSWLR 114 at 128-129 (Hungerford J); *Mees* (2003) 128 FCR 418 at [81] (Gray J). Note also the example in [85], where Gray J posited a situation where more than one statement was made in Parliament, and there was conflict between them, and then both were tendered.

43 See *Church of Scientology* [1972] 1 QB 522 at 529-530 (Browne J). The plaintiffs' pleadings relied on parliamentary statements as evidencing malice. His Lordship stated the applicable principle more broadly as being 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" (emphasis added). See also *Mees* (2003) 128 FCR 418 at [85] (Gray J); *NSW AMA* (1992) 26 NSWLR 114 at 126-129 (Hungerford J).

the purpose of assisting the courts to ascertain the meaning of legislation that is ambiguous or obscure. Thus, in *Pepper*,[44] the House of Lords rejected an argument that to permit reference to proceedings in Parliament for this purpose would infringe Art 9 because it would constitute a "questioning" of the freedom of speech or debate in Parliament. Lord Browne-Wilkinson, speaking for the House of Lords, said that "[f]ar from questioning the independence of Parliament", to permit reference to parliamentary material as an aid to statutory construction "[gives] effect to what is said and done there".[45] That reasoning appears to confine the notion of "questioning" by reference to the meaning of "impeachment", and may be open to criticism on that basis.[46] Logically,
10 the process of ascertaining the purpose of legislation by reference to statements in Parliament must depend on relying upon the truth of what was said,[47] thereby prima facie engaging Art 9.[48] Consistently with that submission, s 16(5) of the Commonwealth Act implicitly recognises the possibility that the use of proceedings in Parliament to assist in the interpretation of an Act might amount to "questioning" proceedings in Parliament, and expressly provides that "neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence of a record of proceedings in Parliament" for that purpose.[49]

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44 [1993] AC 593 at 640 (Lord Browne-Wilkinson, with Lord Keith, Lord Bridge, Lord Griffiths, Lord Ackner and Lord Oliver agreeing).

45 [1993] AC 593 at 638 (Lord Browne-Wilkinson, with Lord Keith, Lord Bridge, Lord Griffiths, Lord Ackner and Lord Oliver agreeing). In *Buchanan v Jennings* [2005] 1 AC 115 at 131 [16], Lord Bingham (for the Privy Council) said that "it cannot now be said, as it once perhaps could, that mere reference to or production of a record of what was said in Parliament infringes article 9".

46 Philip A Joseph, "Parliament's Attenuated Privilege of Freedom of Speech" (2010) 126 *Law Quarterly Review* 568 at 572-574, criticising Lord Browne-Wilkinson's reasoning in *Pepper* and positing that it was inconsistent with his Lordship's later approach in *Prebble*.

47 Cf SA [27].

48 The use of Hansard for the purposes of statutory interpretation has often been characterised as an exception to, rather than a straightforward application of, the pre-existing understanding of Art 9: see United Kingdom, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege – First Report* (30 March 1999) at [45]; Philip A Joseph, "Parliament's Attenuated Privilege of Freedom of Speech" (2010) 126 *Law Quarterly Review* 568 at 572, 574. A seemingly contrary view was taken extra-curially by Lord Steyn: see Johan Steyn, "*Pepper v Hart*; A Re-examination" (2001) 21 *Oxford Journal of Legal Studies* 59 at 62-63 (asserting that it was "transparently weak" to argue that Art 9 was engaged by the use of parliamentary materials in statutory interpretation).

49 See also *BDR21 v Australian Broadcasting Corporation* (2023) 298 FCR 1 at [70] (Rangiah, Bromwich and Cheeseman JJ). The Explanatory Memorandum to the *Parliamentary Privileges Bill 1987* recognised, in discussing s 16(5), that the *Acts Interpretation Act 1901* (Cth) already allowed reference to second reading speeches, reports of committees and amendments moved and determined for the purpose of assisting in statutory interpretation. It then asserted that "Nothing in the sub-clause makes admissible anything which would otherwise not be admissible" (p 14). However, the admissibility of that material may have been the result of s 15AB of the *Acts Interpretation Act 1901* (Cth) having already displaced Art 9. That said, that possibility is not mentioned in the Explanatory Memorandum accompanying the *Acts*

24. Finally, and at the other end of the spectrum, it is well established that the use of evidence of parliamentary proceedings to prove "what was done and said in Parliament as a matter of history"[50] does not infringe Art 9. Examples include where evidence is sought to be used to establish that a statute was passed;[51] that a document was tabled in Parliament;[52] that a member was present on a particular day;[53] that a report was in fact made on a particular date;[54] or that certain things were said in the course of a debate in Parliament.[55] The use of evidence of parliamentary proceedings to establish what occurred as a matter of history has been regarded as consistent with Art 9 on the basis that it involves no "examination of the circumstances in which the debate had taken place or the motives of the participants, or of anything else which might infringe the privilege of Parliament".[56] The use of such evidence must be confined to the "non-contentious purpose"[57] of establishing the historical fact of what occurred in the parliamentary proceedings, and does not extend to permitting inferences to be drawn from that historical fact.

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25. In light of the above, the majority in the Full Court below put the point too broadly when it said that "the privilege will not prevent proof of parliamentary proceedings, where the fact of the occurrence of those proceedings is relevant in the litigation".[58] The touchstone is not whether proceedings in Parliament are relevant in the litigation, but the purpose for which those proceedings are sought to be used.[59]

Interpretation Act Amendment Act 1984 (Cth), s 7 of which introduced s 15AB. It is likely the enactment of s 15AB that explains the reference in *Pepper* [1993] AC 593 at 637 to Australia having "relaxed the rule" to approximately the extent favoured in that case. See also *Acts Interpretation Act 1931* (Tas), s 8B.

50 *Prebble* [1995] 1 AC 321 at 337 (Lord Browne-Wilkinson, for the Privy Council). See also *Mees* (2003) 128 FCR 418 at [80] (Gray J); *Erglis* [2004] 2 Qd R 599 at [8] (McPherson JA); *Leyonhjelm* (2021) 282 FCR 341 at [44], [52] (Rares J), [248] (Wigney J).

51 See, eg, *Prebble* [1995] 1 AC 321 at 337 (Lord Browne-Wilkinson, for the Privy Council).

52 See, eg, *Sankey* (1978) 142 CLR 1 at 35 (Gibbs ACJ).

53 See, eg, *Amann Aviation* (1988) 19 FCR 223 at 230 (Beaumont J).

54 See, eg, *Victorian Taxi Families Inc v Taxi Services Commission* (2018) 61 VR 91 at [101] (Derham AsJ), but not for the purpose of drawing inferences from it.

55 See, eg, *Mundey v Askin* [1982] 2 NSWLR 369 (***Mundey***) at 373 (Moffitt P, Reynolds and Samuels JJA) (the report of the judgment does not identify the nature of this information or the purpose for which it was adduced, although the Court observed that "[t]here was no question of any further examination of the circumstances in which the debate had taken place or the motives of the participants, or of anything else which might infringe the privilege"); *Comalco* (1983) 50 ACTR 1 at 3 (Blackburn CJ); *Leyonhjelm* (2021) 282 FCR 341 at [35], [52] (Rares J), [248] (Wigney J), [364]-[365], [375] (Abraham J).

56 *Mundey* [1982] 2 NSWLR 369 at 373 (Moffitt P, Reynolds and Samuels JJA).

57 *Amann Aviation* (1988) 19 FCR 223 at 230-231 (Beaumont J).

58 FC [30] (CAB 29) (emphasis added).

59 See, eg, *Rann v Olsen* (2000) 76 SASR 450 at [73]-[76] (Doyle CJ); *Leyonhjelm* (2021) 282 FCR 341 at [366], [371] (Abraham J); Enid Campbell, *Parliamentary Privilege* (2nd ed, 2003) at 17, 89.

26. For that reason, it is necessary to distinguish a case where a party seeks to use evidence of proceedings in Parliament only for the purpose of establishing historical facts (ie what was said, or who was present), from that where the party's purpose is either to attack, or to extract some additional inference or benefit from, those proceedings. That point was made by Browne J in *Church of Scientology*, in responding to the Attorney-General's submission that Hansard "could be read simply as evidence of fact, what was in fact said in the House, on a particular day by a particular person" but that "the use of Hansard must stop there and that counsel was not entitled to comment upon what had been said in Hansard or to ask the jury to draw any inferences from it".[60] His Honour said "the general principle is quite clear … and that is that these extracts from Hansard which have already been read must not be used in any way which might involve questioning, in a wide sense, what was said in the House of Commons as recorded in Hansard".[61]

27. Similarly, in *Comalco Ltd v Australian Broadcasting Corporation*, Blackburn CJ referred with approval to the observations in *Church of Scientology* and other authorities supporting the view that mere proof of the fact that something was said or done in Parliament would not infringe parliamentary privilege, but added that where evidence was admitted on that basis, a court should "refus[e] to allow the substance of what was said in Parliament to be the subject of any submission or inference".[62] That approach is also consistent with the subsequent decision in *Prebble*, where the Privy Council said that proof of parliamentary historical facts must not be used to support an allegation of "impropriety or any other questioning".[63]

C ARTICLE 9 AND SECTION 16(1) OF THE PUBLIC WORKS ACT

28. If it is alleged that the condition precedent in s 16(1) of the PWC Act has not been satisfied, the logical starting point is to ascertain – through a process of statutory construction – the legal standard to be applied when determining whether proposed work has been "referred to and reported upon by the Committee" for the purposes of that sub-section. That will require the Court to decide how much, if any, variation is permissible between the work described in a report of the Committee and the work that a person has

60 [1972] 1 QB 522 at 531 (emphasis added).

61 [1972] 1 QB 522 at 531. This passage was quoted with apparent approval in *Amann Aviation* (1988) 19 FCR 223 at 225 (Beaumont J).

62 (1983) 50 ACTR 1 at 5.

63 [1995] 1 AC 321 at 337 (Lord Browne-Wilkinson, for the Privy Council) (emphasis added). See also *Leyonhjelm* (2021) 282 FCR 341 at [47]-[50] (Rares J), [148], [228] (Wigney J).

performed (or is contracted to perform) before the condition precedent will not be satisfied. The Commonwealth does not have any interest in the correct interpretation of s 16(1) of the PWC Act, and therefore does not make any submissions on that point. However, the construction adopted will have implications for whether a case alleging non-compliance with s 16(1) of the PWC Act can be advanced without infringing Art 9.

29. There are some straightforward instances in which the proof or determination of a claim of non-satisfaction of the condition precedent in s 16(1) of the PWC Act either would, or would not, involve parliamentary proceedings being used in a manner that infringes Art 9 on any plausible interpretation of s 16(1):

(a) One situation would be where a plaintiff alleged that no work, or no conceivably relevant work, had been referred to the Committee. In such a case, recourse to the proceedings of the Committee may not be required, at least if the allegation were admitted. But even if the allegation were denied, the evidence might realistically be confined to so much as was necessary to identify whether the work appeared in the business of the Committee and was the subject of a report. Reference to the proceedings would merely be for the purpose of establishing the historical facts as to what the Committee said or did. There would be no challenge to what was said by or to the Committee, and no inference would be drawn from anything said or done. Such a challenge could be determined without infringing Art 9.

(b) Another uncontentious situation (or a particular instance of the first situation) would be where a claim is defended on the basis that the work had been the subject of a resolution of each House withdrawing it from the operation of the PWC Act.[64] In such a case, a defendant may have recourse to the proceedings of each House to show, as a historical fact, that the Parliament had passed a resolution relating to the work in question. Such a use, which is not materially different from using Hansard to prove the passage of a statute,[65] would clearly not infringe Art 9.

(c) Conversely, an action might be brought on the admitted basis that the Committee had reported on the very work that was to be undertaken, but it might be alleged that nevertheless the condition precedent in s 16(1) of the PWC was not satisfied because the report of the Committee was invalid and should be treated as a nullity.

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64 See PWC Act, ss 15(1) and 16(1).

65 See *Prebble* [1995] 1 AC 321 at 337 (Lord Browne-Wilkinson, for the Privy Council).

If a plaintiff sought to make good a case of that kind (arguing, for example, that the report was invalid because the Committee had carried out its functions in bad faith, or that there had been some defect in its procedures), then that would be a clear attempt to impugn or question proceedings in Parliament contrary to Art 9.

30. In between these extremes there are cases such as the present, where it is accepted that a claim will involve some kind of "comparison" between the proposed work that was referred to and reported on by the Committee and the work that has been (or is to be) undertaken. In cases of that kind, the interpretation of s 16(1) of the PWC Act will determine what needs to be established in order to demonstrate non-satisfaction of the condition precedent, which may in turn have implications for the relevance of Art 9. That can be illustrated by two possible constructions of s 16(1).

31. *First*, it might be held that s 16(1) of the PWC Act demands strict or literal correspondence between the work referred to and reported on by the Committee and the work that is in fact undertaken. If that were so, the analytical exercise to establish non-satisfaction of the condition precedent in s 16(1) would require:

(a) identifying the content of the work approved by the Committee, by reference to the report of the Committee under s 16(4) of the PWC Act (and the documents accompanying the referral of the proposed works to the Committee under s 16(3));

(b) identifying the work that was actually carried out, or that is actually being carried out or is proposed to be carried out (including by reference to content of the contractual and planning documents, but also by reference to any other relevant evidence); and

(c) comparing (a) and (b) to ascertain whether there is any difference between them.

32. In the Commonwealth's submission, such a process of "comparison" would <u>not</u> result in the proceedings of the Committee being "questioned" within the meaning of Art 9. That follows because the first step does not go beyond identifying, as a historical fact, the proposed work that the Committee considered and approved in its report. The second step likewise does not go beyond identifying, as a fact, the work that was performed or that is being performed. While the third step does involve a process of inferential reasoning, insofar as it involves drawing a conclusion from observations, that reasoning is directed to whether something done <u>outside</u> Parliament (ie the second step) is different from the proposed work reported upon by the Committee. If anything is being

"questioned", it is not the work of the Committee, but the work that has been done to implement the proposed work that the Committee approved. To treat that step as "questioning" proceedings in Parliament would be to extend Art 9 beyond its rationale.[66] That is because there would be no dispute over the interpretation of the report of the Committee, or what the Committee intended that report to mean, or the reason why the Committee decided to approve the work (such as whether it attached importance to particular features of the proposed work in deciding to approve that work).[67] The only use of parliamentary proceedings would be to identify, as a historical fact, the works actually referred to the Committee and the subject of its report. To use that fact as the basis for a comparison with, for example, the scope of the contracted works, neither questions nor impeaches proceedings in Parliament. It simply takes them as a given – a baseline for the comparison that s 16(1) of the PWC Act requires.

33. *Second*, it might be held that s 16(1) of the PWC Act permits minor variations between the work referred to and approved by the Committee and the work that is in fact undertaken. If interpreted in that way, that would allow scope for disputes to arise concerning the legal significance of any objectively identifiable differences. This case is an example of a dispute of that kind, as is *Bates v Attorney-General (Tas)*,[68] being an earlier decision of the Supreme Court of Tasmania in which the plaintiff sought to enjoin the continuation or completion of public work in reliance on s 16(1) of the PWC Act. In dismissing that challenge, Cox J concluded that the identified differences between the work reported on by the Committee and the work to be undertaken were "at most minor" and amounted to "slight alteration[s]", and that these differences did not result in an outcome which was "essentially different" from the work reported on by the Committee.[69]

34. If s 16(1) of the PWC Act is interpreted as leaving room for an evaluative judgment of the kind posited above, it is by no means clear that the resolution of a dispute about the application of s 16(1) would necessarily require any party to deploy parliamentary proceedings in a way that infringes Art 9. In such a case, the judge may proceed (as on the strict construction approach) by first identifying any objectively ascertainable

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66 See, eg, *Prebble* [1995] 1 AC 321 at 337 (Lord Browne-Wilkinson, for the Privy Council). Cf Philip A Joseph, "Parliament's Attenuated Privilege of Freedom of Speech" (2010) 126 *Law Quarterly Review* 568 at 577-578, 589 (arguing that any drawing of inferences or conclusions ought to be regarded as "questioning", but contending that *Prebble* and other cases are not consistent with that view).

67 Compare *Leyonhjelm* (2021) 282 FCR 341 at [376] (Abraham J).

68 (1995) 87 LGERA 106. The Commonwealth makes no submission about the correctness of *Bates*.

69 *Bates* (1995) 87 LGERA 106 at 114-115.

differences between the proposed works that were reported on by the Committee and the proposed works in fact performed or being performed. If the judge then proceeds to evaluate whether those differences are "minor" or "slight" (as occurred in *Bates*), that would involve determining the legal significance of the differences between what the Committee approved as a matter of historical fact, and the work in fact being performed, for the purpose of determining whether the condition precedent created by s 16(1) of the PWC Act was satisfied. That evaluation would not involve any questioning of proceedings in Parliament contrary to Art 9. Instead, as with the first example, the Committee's report would simply provide a baseline for the comparison that s 16(1) of the PWC Act requires.

35. Importantly, however, there are ways in which a party might seek to advance a claim for non-compliance with s 16(1) of the PWC Act that would infringe Art 9. For example, a party may wish to contend that the views or intentions of the individual members of the Committee (or other participants in the Committee's proceedings) are relevant to the evaluative exercise required by s 16(1). Such a party might, for example, seek to argue that a variation or departure from the proposed work that was approved by the Committee should not be characterised as "minor", because the variation concerns an aspect of the proposal that some members of the Committee indicated they considered important to their decision to approve the work. If a party sought to rely on evidence of proceedings in Parliament for that purpose, that would go beyond the proof of historical facts. It would involve positive reliance on the truth of what was said in Parliament, or the drawing of inferences about the state of mind of the Committee (or witnesses before the Committee) as to why it decided to support the proposed works (and perhaps as to how it would have addressed a modified proposal). Those uses of proceedings in Parliament are not permitted by Art 9, for they would inevitably involve reliance upon the truth of those proceedings, or impugning the quality of those proceedings, or making competing submissions about the inferences that should be drawn from what occurred in Parliament.

D APPLICATION OF PRINCIPLES TO THE FACTS

36. The issue raised by ground 2 arose in the context of an interlocutory application for summary judgment or strike-out, rather than at the point at which a party sought to tender or rely on evidence of parliamentary proceedings for an identified purpose. As the majority in the Full Court observed, the premise of that interlocutory application was that the resolution of the first respondent's claim would inevitably require the proceedings of

the Committee to be used in a manner that infringes Art 9.[70] That had the consequence that neither the 2017 report, nor the documents on which it is based, were placed before the Supreme Court, and they likewise are not before this Court.

37. What is presently known is that:

(a) *First*, it is common ground that there are differences between the work as described in the relevant planning permits (being the work which the second respondent was engaged to undertake) and the work considered and reported on in the 2017 report.

(b) *Second*, the second respondent has joined issue with the first respondent on the significance of those differences: ie, whether any differences mean that the contracted work was not "the same as",[71] or was "outside of the scope" of,[72] the referred work.

(c) *Third*, the boundaries of that dispute have not fully crystallised. As to the facts, the particulars to the relevant paragraph of the first respondent's statement of claim list three differences but state that "[f]urther particulars [are] to be provided";[73] and the defence, while admitting that there are differences, does not address the particulars identifying those differences, save for identifying "the contracted cost of completing the work".[74] As to the law, the question of how any objective factual differences between the works are to be evaluated for the purpose of determining whether the condition precedent in s 16(1) of the PWC Act was satisfied remains to be ventilated at trial.

38. For the above reasons, whether a claim alleging non-compliance with s 16(1) of the PWC Act will infringe Art 9 does not have an "all or nothing" answer. Some arguments alleging non-compliance with s 16(1) will infringe Art 9, but others will not. It follows that, unless ground 1 succeeds, the orders made by Blow CJ striking out the statement of claim and dismissing the action[75] ought not to be restored. The matter should proceed to trial.

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70 FC [6] (CAB 22).

71 Amended statement of claim at [14] (AFM 8).

72 Defence to the amended statement of claim at [14(c)] (AFM 13).

73 Amended statement of claim at [14] (AFM 8-9).

74 Defence to the amended statement of claim at [14] (AFM 13).

75 Order dated 21 February 2022 (CAB 12).

39. For the reasons addressed above, that does not mean that the parties may make unfettered use of the 2017 report or the documents that underlie it. To the contrary, the trial judge must exercise "control over the pleadings and the proceedings" to prevent an infringement of parliamentary privilege.[76] If necessary, the 2017 report could be admitted "on a de bene esse basis, that is to say, … provisionally for the purpose of a temporary and conditional examination in order to enable the court to inquire whether the reception of the extract into evidence is, or is not, prohibited"[77] by Art 9.

40. Whether or not it is admitted provisionally, if any party seeks to use the 2017 report for a prohibited purpose, the Court "will refuse to allow that course to be followed".[78] However, to the extent that any party deploys the 2017 report only to identify, as a historical fact, the proposed work that was "referred to and reported on by the Committee", as a step in the argument that the work actually performed differed from the work approved to an extent not permitted on the proper construction of s 16(1) of the PWC Act (whatever that may be), then Art 9 would not be infringed.

PART V — ESTIMATE OF TIME

41. The Commonwealth seeks up to 30 minutes to present oral argument.

Dated: 6 February 2024

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76 *Comalco* (1983) 50 ACTR 1 at 5 (Blackburn CJ).

77 *Amann Aviation* (1988) 19 FCR at 232 (Beaumont J), cited with approval in *Carrigan v Cash* [2017] FCAFC 86 at [42] (Dowsett, Besanko and Robertson JJ); *Leyonhjelm* (2021) 282 FCR 341 at [234] (Wigney J), [364] (Abraham J).

78 *Rann v Olsen* (2000) 76 SASR 450 at [74]-[75] (Doyle CJ); *Leyonhjelm* (2021) 282 FCR 341 at [237] (Wigney J), [376] (Abraham J).

IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

H3 of 2023

BETWEEN:

ATTORNEY-GENERAL FOR THE STATE OF TASMANIA
Appellant

and

GREGORY JOHN CASIMATY
First Respondent

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

ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Pursuant to Practice Direction No 1 of 2019, the Commonwealth sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provision(s)
Commonwealth			
1.	*Acts Interpretation Act 1901* (Cth)	Current	s 15AB
2.	*Acts Interpretation Act Amendment Act 1984* (Cth)	15 May 1984 – 11 June 1984	s 7
3.	*Parliamentary Privileges Act 1987* (Cth)	Current	s 16
State and Territory			
4.	*Acts Interpretation Act 1931* (Tas)	Current	s 8B
5.	*Public Works Committee Act 1914* (Tas)	12 December 2019 — 26 November 2023	ss 15 and 16
United Kingdom			
6.	*Australian Courts Act 1828* (Imp)	Current	s 24
7.	*Bill of Rights 1988*, 1 W & M Sess 2 c 2	Current	Art 9