HIGH COURT OF AUSTRALIA

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Details of Filing

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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

and

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

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Part I: CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: OUTLINE OF ORAL SUBMISSIONS

2. South Australia supports the submissions advanced by Tasmania on Grounds 1 and 2.

Ground 1: Compliance with s 16 of the PWC Act is non-justiciable

3. Ground 1 concerns the "wider principle"; there are certain "legislative functions and … established privileges" which although not falling within the terms of Article 9 nevertheless fall within the exclusive cognisance of Parliament and are protected by the doctrine of parliamentary privilege: SA, [18]; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 332 (Lord Browne-Wilkinson) (V8, T69).

4. The constitutional significance of privilege to the business of Parliament serves to emphasise the improbability that legislation intends, in the absence of express words or manifest intention, to derogate from it including by encroaching upon recognised powers and privileges that are within the exclusive cognisance of Parliament: SA, [16]-[17].

5. It is not clear that the Full Court applied the correct test in drawing the implication that the *Public Works Committee Act 1914* (Tas) (PWC Act) "envisages that this public obligation will be subject to the protection and enforcement of the courts": *Casimaty v Hazell Bros Group Pty Ltd* [2022] TASSC 9, [16]-[17], [25] (CAB, 24-25, 27); SA, [20], [22].

6. The First Respondent's submission that a less stringent approach to the question of abrogation of Parliament's composition privilege was adopted by the New Zealand Court of Appeal is wrong: RS, [20]; *Awatere Huata v Prebble* [2004] 3 NZLR 359, [43], [59], [69] (Gendall J) (V6, T39).

7. Although powers and privileges most directly connected to the legislative and deliberative functions of Parliament are likely to enjoy the highest protection, care must be taken before departing from the principle that parliamentary privilege may be eroded other than by express words or necessary intendment. However, it is ultimately unnecessary to determine whether any privileges of the Parliament were impliedly excluded by the PWC Act because the Full Court and the First Respondent have

accepted that the business of the Committee falls within the exclusive control of the Parliament: *Casimaty v Hazell Bros Group Pty Ltd* [2022] TASSC 9, [20] (CAB, 26); RS, [26].

8. The strength of Tasmania's submissions concerning exclusive cognisance is not that the prohibition contained in s 16(1) of the PWC Act is itself a recognised privilege. Rather, it is that the prohibition is so firmly enmeshed with the provisions of the PWC Act that provide for the membership, procedures and deliberative decision-making functions of the Committee, that it too should be understood to fall within the exclusive cognisance of the Tasmanian Parliament.

9. That submission draws considerable support from the tools at the disposal of the Tasmanian Parliament to enforce the prohibition, including: withholding of public funds, censure by House of Assembly, a motion of no confidence in the responsible minister, suspension of the responsible minister and a motion of no confidence in the government: SA, [21]; cf RS, [11].

10. The Full Court was in error to conclude that the "scheme will only have efficacy" if supervised by the Court: *Casimaty v Hazell Bros Group Pty Ltd* [2022] TASSC 9, [25] (CAB, 27); SA, [21].

Ground 2: Use of the Committee's 2017 Report will breach Article 9

11. The notion of "impeached or questioned" should not be narrowly construed: SA, [23]-[26]. The First Respondent's submissions to the contrary (RS, [30]-[40]) should not be accepted for the following reasons:

    a. The manner in which the First Respondent seeks to deploy the statement by Justice Fryberg, that "in construing art 9, the courts have been as much concerned to protect the rights of citizens as to preserve the liberties of Parliament", is inconsistent with the statement of principle in *Prebble*: *Erglis v Buckley* [2004] 2 Qd R 599, [85] (V7, T55); *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 336 (Lord Browne-Wilkinson) (V8, T69).

    b. The First Respondent's attempts to undermine Blackstone's "examined, discussed and adjudged" formulation, by noting the absurdity that would result if there could be no discussion, including by the public, of events in parliament, goes no-where in circumstances where no party or intervener submits otherwise: RS, [35]-[39].

c. The First Respondent's attempt to restrict the notion of "questioning" to challenge, attack, discredit or disparage is inconsistent with authority that establishes that it not permissible to use parliamentary proceedings even for the purpose of establishing the truth of parliamentary statements: RS, [44]. Tasmania's construction of "questioning", as meaning "investigating, judging or debating", should be preferred: Reply, [10].

12. South Australia makes two submissions about the principle that reference to parliamentary proceedings for the purpose of establishing an historical fact does not offend Article 9:

a. The now long recognised usage of parliamentary statements for the purpose of construing statutes is an instance of such a usage that does not offend Article 9: SA, [27].

b. Recognition by United Kingdom courts of the use of ministerial statements for the purpose of challenging administrative decisions is incorrect, and should not be followed: SA, [27].

13. Whilst it may be correct that use of the 2017 Report for the purpose of ascertaining the scope of works recommended by the Committee would not infringe Article 9, determining whether variations to the works are material, such that the works are no longer of the same character, necessarily intrudes into the Committee's assessment of the merits of the works. This process goes beyond merely observing the scope of the recommended works, as an historical fact, and extends to an examination of the Committee's reasons.

Dated: 9 April 2024

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