HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No H3 of 2023

BETWEEN:

Attorney-General for the State of Tasmania
Appellant

and

Gregory John Casimaty
First Respondent

and

Hazell Bros Group Pty Ltd
(ACN 088 345 804)
Second Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

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

PART II: REPLY SUBMISSIONS

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

2. This appeal does not relate to standing. The Primary Judge's suggestion that the first respondent arguably had a special interest in the subject matter of the proceedings (**RS [5]**) is therefore of no immediate relevance.

3. In relation to the criticism made by the first respondent at **RS [6]**, by his own submission the first respondent accepts that the PWC Act is intended to facilitate and ensure parliamentary oversight of public works (**RS [4(a)]**). To therefore suggest that the appellant's argument is circular by relying upon that "assumption" is difficult to understand.

4. Contrary to the first respondent's suggestion (**RS [8]**), the appellant does challenge the finding of the Full Court[1] that the prohibition in s 16(1) binds those who contract with the Executive. Having regard to the text, context and purpose[2] of the PWC Act,

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1 Full Court [1], [23]; (CAB, 27).
2 **RS [2]** and **ACT [16]-[17]**.

including its broader context of facilitating parliamentary supervision of the Executive in its conduct of public works, there is no reason to suppose that it binds third parties.[3] Rather, it is clear that it is concerned with public work that is proposed to be undertaken by a general government sector body[4] such that the relevant obligation rests with that body and its responsible Minister rather than its contractors or other third parties (who are neither accountable to Parliament nor under its supervision).

5. The assertions that no powers and procedures for the enforcement of s 16(1) are identified in the appellant's submissions (**RS [10]-[12]**) and that the Executive's accountability to Parliament is insufficient or inadequate (**RS [15]**) overlook the appellant's submissions which identify enforcement powers and procedures as parliamentary processes and the principles of responsible government (**AS [24]-[25], [34]-[37]**).[5] By way of example, questions may be raised and explanations sought during hearings of Budget Estimates Committees[6] or through question time or other parliamentary inquiry processes. Further, Parliament might decline to authorise expenditure on public works in an appropriation bill. In that regard, it is well understood that money cannot be taken out of Consolidated Revenue without the authority of Parliament.[7] Relevantly, in the Tasmanian context, s 11(2) of the *Financial Management Act 2016* provides that money must not be drawn from the Public Account except under the authority of that or another Act. To suggest that such mechanisms are inadequate ignores the doctrine of responsible government and denies the supremacy of Parliament.

6. The appellant refutes the first respondent's assertion (**RS [13]**) that the appellant has not explained why the Full Court's construction of s 16(1) cannot "supplement" the operation of responsible government**.** The explanation is found in the appellant's submissions regarding exclusive cognisance (**AS [28]ff**). The notion that court

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3 See also **ACT [23], [27], [28]**.

4 See s 15(1), s 15(3) and s 16(1) of the PWC Act.

5 See also **ACT [25], [31]; SA [21].**

6 As Gleeson CJ remarked in the context of considering an appropriation in the Commonwealth context, "appropriations are made in a context that includes public scrutiny and political debate concerning budget estimates and expenditure review" *Combet and ors v Commonwealth of Australia and ors* (2005) 224 CLR 494, 523 [7].

7 *Auckland Harbour Board v R* [1924] AC 318, 326 (Viscount Haldane); and, in the Commonwealth context, *Combet and ors v Commonwealth of Australia and ors* (2005) 224 CLR 494, 522 [5] (Gleeson CJ); 535, [44] (McHugh J); 595-598 [227]-[236] (Kirby J).

enforcement might supplement responsible government in the present context involves the very contradiction which the principle of exclusive cognisance seeks to avoid.

7. The first respondent relies upon remarks made in *Awatere Huata v Prebble*[8] and *R v Chaytor*[9] in support of its assertion that unmistakable language is not needed to displace the privileges of Parliament (**RS [17]-[21]**). However, the remarks quoted from those cases were made in circumstances that are significantly different to this matter and in which, it is submitted, "unmistakable language" was found to give rise to a necessary implication displacing Article 9 (not least of all the provisions by which Parliament placed the relevant process into the hands of the political party).[10] To be clear, the appellant does not suggest that express words are necessary. Rather, the appellant asserts that there are no sufficient indications in the text of the PWC Act to ground the implication found by the Full Court at [24][11] that "it is clear from the legislative scheme and the legislative text, that the enforcement of this prohibition is not a matter that falls within the parliamentary process".

8. In response to **RS [28]**, the appellant accepts that s 15 of the PWC Act may have an expanded operation in circumstances in which Parliament makes a direct referral to the Committee under s 17 so as to trigger the deeming device in that provision.[12] However, that does not explain why the condition precedent in s 16(1) would be subject to curial enforcement as distinct from s 16(2).

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8 *Awatere Huata v Prebble* [2004] 3 NZLR 359.

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

10 *Awatere Huata v Prebble* [2004] 3 NZLR 359 related to circumstances where the legislature had expressly, by an amending Act, given the task of determining whether a member's seat was vacant to the party. It is clear and long understood that Caucus and party meetings are not proceedings of Parliament (*R v Turnbull* [1958] Tas SR 80). Thus a clear intention to remove such a decision from the province of Parliament was discerned such that the determinations were amenable to judicial review. See in particular 397-398 [60]-[67] (McGrath, Glazebrook and O'Reagan JJ); 415-416 [144], [149] (Hammond J). The quoted remark from *R v Chaytor* [2011] 1 AC 684, 716 [78] relates to ss 2-6 of the *Mental Health Act 1983* (UK) which concern general processes for compulsory hospital admission for mental disorder. A statute dealing with mental disorder is very different from a statute dealing with the creation of a parliamentary committee such as the PWC Act.

11 (CAB [27]).

12 Section 17 provides that: "The House of Assembly or Legislative Council may by resolution, with respect to any public work the estimated cost of which does not exceed the relevant monetary threshold in relation to such work, direct that the same shall be referred to the Committee, in which case all the powers and provisions of this Act shall be applicable to such work".

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

9. The submission that "Blackstone's statement" should not be relied upon to construe Article 9 (**RS [35]-[40]**) ought to be rejected. Blackstone's statement has long been relied upon in considering the construction of Article 9 and the related concept of exclusive cognisance, particularly with respect to their origins.[13] Blackstone's statement supports the view that "the general principle is quite clear … that… extracts from Hansard … must not be used in any way which might involve questioning, in a wide sense, what was said in the House of Commons".[14]

10. The comments relating to Blackstone's statement in *Buchanan v Jennings*[15] (**RS [35]-[36]**) and in *Erglis v Buckley*[16] (**RS [37]- [38]**) need to be understood in their context. When this is done, it is clear that they, and the quotes within them,[17] are made as part of a line of reasoning establishing that the law and practices relating to Parliament have developed since Blackstone's statement and that, in particular, it is now permissible to admit evidence of parliamentary proceedings to prove what was said or done in Parliament as a matter of historical record as opposed to proving a contentious issue.[18] The appellant does not dispute that this is now possible, or indeed that there are other limited circumstances[19] where use of parliamentary proceedings in court is permitted. This does not mean that Blackstone's statement should be disregarded when construing Article 9. The appellant uses the word "discuss" in the sense of investigating, judging or debating such that adjudication by a court is required but does not submit that any use, mention or reference to parliamentary proceedings at all should be excluded. In that

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13 For example: *Victorian Taxi Families Inc and anor v Taxi Services Commission* (2018) 61 VR 91, 124 [93(a)] (Derham As J); *R v Chaytor* [2011] 1 AC 684, 712 [64] (Lord Phillips); *Cornwall v Rowan* (2004) 90 SASR 269, 364 [396] (the Court); *Awatere Huata v Prebble* [2004] 3 NZLR 359, 394 [48] (McGrath, Glazebrook and O'Reagan JJ); *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 332 (Lord Browne Wilkinson); *NSW AMA v Minister for Health and Community Services* (1992) 26 NSWLR 114, 118, 125 (Hungerford J); *Bradlaugh v Gossett* (1884) 12 QBD 271, 278-279 (Stephen J).

14 *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522, 530-531 (Browne J).

15 (2002) 3 NZLR 145.

16 [2004] 2 Qd R 599.

17 The remark about "repugnancy to the spirit of the constitution" is critical of the now historical practice whereby the practice and methods of Parliament were not defined or ascertained in stated laws (fn 18, [163] of both the 1803 (14th ed) and the 1830 (17th) editions of Sir William Blackstone, *Commentaries on the Laws of England in Four Books*). The comments from the UK Joint Committee relate to changes to enable parliamentary proceedings to be used without seeking the prior leave of Parliament and for such purposes as assisting in the construction of statutes (Joint Committee on Parliamentary Privilege, *First Report*, House of Lords and House of Commons, 30 March 1999, [42]).

18 *Buchanan v Jennings* (2002) 3 NZLR 145, 168-169 [64] (Richardson P, Gault, Keith and Blanchard JJ); *Erglis v Buckley* [2004] 2 Qd R 599, 605, 609 [8], [19] (McPherson JA); 625, 632 [67], [87] (Fryberg J).

19 The circumstances are usefully referred to in South Australia's submissions (**SA [27]).** The appellant agrees with what is noted by South Australia in fn 37.

regard, the Commonwealth has misconstrued the appellant's submissions (**Cth [12]-[14]**).

11. In any event, the appeal must succeed whether or not the definitions of "question" and "impeach" posited by the first respondent (**RS [31]-[32]**) are preferred to those stated for the appellant (**AS [42]**). As has been explained (**AS [47]-[59]**) and also clearly articulated by the ACT (**ACT [44]-[49]**), the first respondent's claim requires the court to go further than admitting the report for the purposes of proving what was said and done in Parliament as an historic fact. Rather, it calls the 2017 Report into question and requires it to be examined judicially contrary to Article 9 for the purpose of determining its meaning and scope. The authorities referred to by the first respondent (**RS [43]**) do not support such a course.[20] Similarly, the suggestion by the Commonwealth (**Cth [28]-[40]**) that comparing the works reported on by the Committee to those proposed can be achieved without doing more than accepting the proceedings of the Committee as an historical fact is disputed. Such comparison requires the examination of the 2017 report for a contentious purpose and in circumstances where it will be the subject of submission and inference, which is not permissible.[21] The assumption that the Committee's report will "simply provide a baseline for comparison" (**Cth [34]**) mischaracterises the relevant inquiry in the context of these proceedings. The matters in dispute necessarily require consideration of the report in order to ascertain and identify that baseline by a process of analysing the proceedings and report of the Committee.

Dated 19 February 2024

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20 *Mees v Road Corporation* (2003) 128 FCR 418, 443 [80] (Grey J); *Comalco Ltd v Australian Broadcasting Corporation* (1983) 78 FLR 449, 454 (Blackburn CJ) where Hansard was admitted only to prove the Minister made the statements and whether inferences could be drawn was not ruled on; *R v Chaytor* [2011] 1 AC 684, 701 [27] (Lord Phillips) concerned the reach of the phrase "proceedings in Parliament" and not whether parliamentary material was admitted to prove historical events; *Leyonhjelm v Hanson-Young* (2021) 282 FCR 341 and *Commissioner for Fair Trading v Bowes Street Developments Pty Ltd (No 2)* [2023] ACTSC 168 relate to the application of s 16(3)(c) of the *Parliamentary Privileges Act 1987* (Cth) and only allowed the parliamentary material to be admitted to prove historical events.

21 *Victorian Taxi Families Inc and anor v Taxi Services Commission* (2018) 61 VR 91, 121, 125 [86], [93(g)] (Derham AsJ).