HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

ATTORNEY-GENERAL FOR THE STATE OF TASMANIA APPELLANT

AND

GREGORY JOHN CASIMATY & ANOR RESPONDENTS

Attorney-General (Tas) v Casimaty
[2024] HCA 31
Date of Hearing: 9 April 2024
Date of Judgment: 11 September 2024
H3/2023

ORDER

1. *Appeal allowed.*

2. *Set aside the orders made by the Full Court of the Supreme Court of Tasmania on 4 May 2023 and, in their place, order that the appeal from the orders made by the Supreme Court of Tasmania on 21 February 2022 be dismissed with costs.*

3. *The first respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of Tasmania

Representation

S K Kay SC, Solicitor-General for the State of Tasmania, with E A Warner for the appellant (instructed by Office of the Solicitor-General (Tas))

B R McTaggart SC with G M O'Rafferty for the first respondent (instructed by Leonard Fernandez Barristers & Solicitors)

S P Donaghue KC, Solicitor-General of the Commonwealth, with E H I Smith and M-Q T Nguyen for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M J Wait SC, Solicitor-General for the State of South Australia, with J F Metzer for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

A P Berger KC with P M Bindon for the Attorney-General for the Australian Capital Territory, intervening (instructed by ACT Government Solicitor)

Submitting appearance for the second respondent

CATCHWORDS

Attorney-General (Tas) v Casimaty

Statutes – Construction – Statutory consequence of non-compliance with statutory condition of exercise of power – Where s 16(1) of *Public Works Committee Act 1914* (Tas) ("Act") stipulates conditions precedent to commencement of public work proposed to be undertaken by Tasmanian Government department or State authority – Conditions precedent that public work referred to and reported upon by Parliamentary Standing Committee on Public Works ("Committee") – Where Tasmanian Government Department of State Growth proposed new interchange be constructed – Where proposal referred to and reported upon by Committee – Where person with claimed interest in adjacent land brought proceeding against construction company in Supreme Court of Tasmania alleging commencement of road work contravened s 16(1) of Act as different from proposal referred to and reported upon by Committee – Where Attorney-General for Tasmania joined as defendant to proceeding – Where Attorney-General sought order that statement of claim be struck out or proceeding be dismissed because statement of claim failed to disclose cause of action in that no justiciable issue before Court or because adjudication by Court would contravene privilege of Tasmanian Parliament – Whether observance of conditions precedent to commencement of public work stipulated by s 16(1) of Act an obligation enforceable by a court.

Words and phrases – "conditions precedent", "duty", "exclusive cognisance of Parliament", "impeached or questioned", "intra-mural", "justiciable controversy", "non-compliance", "non-justiciable", "parliamentary privilege", "political accountability", "public obligation", "public work", "public works committee", "referred to and reported upon by", "responsible government".

Bill of Rights 1688 (1 W & M sess 2 c 2), Art 9.
Public Works Committee Act 1914 (Tas), ss 15, 16, 17.

1 GAGELER CJ, GORDON, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. Section 16(1) of the *Public Works Committee Act 1914* (Tas) ("the Act") stipulates conditions precedent to the commencement of a public work proposed to be undertaken by a Tasmanian Government department or State authority. The conditions precedent are that the public work has been referred to and reported upon by a Joint Committee of Members of the Legislative Council and House of Assembly known as the "Parliamentary Standing Committee on Public Works" ("the Committee").

2 The dispositive question in this appeal is whether observance of those conditions precedent to the commencement of a public work is an obligation that is enforceable by a court. The answer is that it is not.

Facts and procedural history

3 The Tasmanian Government Department of State Growth ("the Department") proposed that a new interchange be constructed at a road junction near Hobart Airport where Holyman Avenue and Cranston Parade meet the Tasman Highway. The proposal was referred to and reported upon by the Committee in 2017. The Department subsequently engaged Hazell Bros Group Pty Ltd ("Hazell Bros") to construct a new interchange at the junction.

4 Mr Casimaty claims to have an interest in land adjacent to Cranston Parade. By writ and statement of claim filed in the Supreme Court of Tasmania in 2020, apparently at a time before Hazell Bros commenced the construction, Mr Casimaty brought a proceeding against Hazell Bros in which he sought a declaration that construction of the new interchange was a public work and an injunction restraining Hazell Bros from commencing construction until a proposal for that public work had been referred to and reported upon by the Committee. The essence of Mr Casimaty's pleaded case was that commencement of the road work that Hazell Bros had been engaged to undertake contravened s 16(1) of the Act in that the road work was different from the proposed road work that had been referred to and reported upon by the Committee in 2017. The pleaded differences were that the interchange Hazell Bros had been engaged to construct: was to cost $46.4 million rather than between $28.08 million and $29.99 million; was not to have connections from the westbound on-ramp to Cranston Parade that would allow only left turn movements; and was to have two roundabouts providing access to Holyman Avenue and Kennedy Drive.

5 By order under s 58(1)(j) of the *Supreme Court Civil Procedure Act 1932* (Tas), the Attorney-General for Tasmania was joined as a defendant to the

proceeding. Upon being joined as a defendant, the Attorney-General filed an interlocutory application seeking an order that the statement of claim be struck out or that the proceeding be dismissed either because the statement of claim as then amended failed to disclose a cause of action in that there was "no justiciable issue before the Court" or because adjudication by the Supreme Court of issues of fact raised on the pleadings would "offend the principle that parliamentary proceedings are absolutely privileged".

6 The interlocutory application was heard and determined at first instance by Blow CJ.[1] His Honour was persuaded that for the Supreme Court to adjudicate on the existence and significance of the pleaded differences between the road work that Hazell Bros had been engaged to undertake and the proposed road work that had been referred to and reported upon by the Committee in 2017 would necessarily contravene the privilege of the Tasmanian Parliament.[2] His Honour for that reason struck out the statement of claim and dismissed the proceeding.

7 Mr Casimaty appealed to the Full Court of the Supreme Court. By majority, the Full Court allowed the appeal, set aside the order of the primary judge and in its place ordered dismissal of the Attorney-General's interlocutory application.[3] Brett J, with whom Pearce J agreed, construed s 16(1) of the Act as creating "a public obligation enforceable under the general law".[4] His Honour accepted that adjudication of Mr Casimaty's pleaded case for the enforcement of that public obligation by injunction would require the Supreme Court to compare the road work that Hazell Bros had been engaged to undertake with the proposed road work that had been referred to and reported upon by the Committee in 2017.[5] Differing from the primary judge, however, his Honour found that making that comparison would not necessarily contravene any privilege of the Tasmanian Parliament.[6] Geason J dissented.

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1 *Casimaty v Hazell Bros Group Pty Ltd [No 2]* [2022] TASSC 9.

2 [2022] TASSC 9 at [32].

3 *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [1], [35].

4 [2023] TASFC 2 at [24].

5 [2023] TASFC 2 at [28].

6 [2023] TASFC 2 at [33]-[34].

8 The Tasmanian Attorney-General sought and was granted special leave to appeal from the order of the Full Court. This Court was informed on the hearing of the appeal that construction of the interchange had been completed. On the basis that the effect of the order of the Full Court was to leave the proceeding in the Supreme Court on foot and that it was open to Mr Casimaty to apply to further amend his statement of claim to vary the relief he sought in the proceeding, it was not suggested that completion of the interchange rendered the appeal moot.

The appeal

9 Reflecting the terms of the interlocutory application filed in the Supreme Court, the Tasmanian Attorney-General's appeal raises two grounds. The first ground is to the effect that the Full Court was wrong to construe s 16(1) of the Act as creating "a public obligation" enforceable by a court. The second ground is to the effect that the Full Court ought to have concluded that the primary judge was correct to consider that adjudication of the pleaded case would contravene the privilege of proceedings in the Tasmanian Parliament.

10 Mr Casimaty contested both grounds of appeal. Consistently with its stance before the primary judge and the Full Court, Hazell Bros played no active role in the appeal.

11 The Attorney-General of the Commonwealth was granted leave to intervene on the hearing of the appeal, as were the Attorneys-General for South Australia and the Australian Capital Territory. The Attorneys-General for South Australia and the Australian Capital Territory each supported the Tasmanian Attorney-General on both grounds of appeal. The Attorney-General of the Commonwealth contested the second ground. In the result, it is unnecessary to address any of the competing arguments on parliamentary privilege.

12 The appeal can and should be resolved by upholding the first ground, concerning the construction of s 16(1) of the Act, with the consequence that the second ground does not arise for determination.

The origin and scheme of the Act

13 The Act has its origin in the *Public Works Act of 1888* (NSW). In the vision of Sir Henry Parkes who introduced it, the object of the *Public Works Act of 1888* was to strengthen parliamentary oversight of executive expenditure on public works by providing a standing parliamentary mechanism for investigating and

advising on Ministerial proposals for expenditure on public works.[7] Through the operation of a public works committee, Parkes' *Public Works Act of 1888* was "to preserve the power of [the] Parliament as unimpaired as possible over the whole province of the public expenditure ... and at the same time to throw around the expenditure of the public revenues the strongest security [Parkes] could invent to prevent extravagance or misdirection in the expenditure of public money".[8]

14 The scheme of the *Public Works Act of 1888* was reproduced in the *Public Works Act 1900* (NSW) and in turn in the *Public Works Act 1912* (NSW). Its central provisions regarding the public works committee were substantially replicated in the *Railways Standing Committee Act 1890* (Vic) and in the *Commonwealth Public Works Committee Act 1913* (Cth). Echoing the earlier language of Parkes, Prime Minister Joseph Cook recorded that the *Commonwealth Public Works Committee Act* "preserves the power of [the] Parliament over the whole province of public expenditure" and emphasised that the legislative scheme was for Ministerial responsibility to be "preserved at every stage".[9]

15 The Act as originally enacted by the Tasmanian Parliament in 1915 replicated the scheme of those Commonwealth, New South Wales, and Victorian legislative precedents. The Act is reported to have been explained in the Tasmanian House of Assembly at the time of its enactment as intended "to ensure that members should have needful information on public works proposals".[10] Its long title was and remains "[a]n Act to provide for the Establishment of a Parliamentary Standing Committee on Public Works".

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7 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 February 1888 at 2418-2423. See generally Beauchamp, *Parliament, Politics and Public Works: A History of the New South Wales Public Works Committee 1888-1930* (2006) at 9-12.

8 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 February 1888 at 2419.

9 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 12 December 1913 at 4245.

10 *The Mercury* (Hobart), 26 November 1914 at 8.

16 The current scheme of the Act maintains in essential respects the scheme of the Act as originally enacted.

17 Part II of the Act deals with the constitution and composition of the Committee. Under it, the Committee is to be re-established at the commencement of the first session of every Parliament,[11] is to comprise specified numbers of Members both of the Legislative Council and the House of Assembly,[12] and is to exclude Ministers as well as the President of the Legislative Council and the Speaker of the House of Assembly.[13] Though any three members of the Committee are sufficient to form a quorum for the exercise of its powers, any report or recommendation to Parliament is to be approved by a majority of the whole Committee.[14]

18 Part III of the Act deals with the powers of the Committee. Those powers include powers to enter land,[15] to summon witnesses[16] and to examine witnesses on their solemn declaration.[17]

19 Pivotal provisions within Pt III of the Act are ss 15, 16 and 17. Each refers to a "public work" and to the "relevant monetary threshold". For the purpose of the Act, a "public work" is either "building or construction works" (in relation to which the "relevant monetary threshold" is $8 million) or "road or bridges works" (in relation to which the "relevant monetary threshold" is $15 million).[18]

20 Section 15 of the Act is headed "Functions of Committee". Section 15(1) provides that "[t]he Committee shall, subject to the provisions of [the] Act,

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11 Section 3(1) of the Act.

12 Section 3(2) of the Act.

13 Section 3(3) of the Act.

14 Section 5 of the Act.

15 Section 13 of the Act.

16 Section 14 of the Act.

17 Section 22 of the Act.

18 Section 2 of the Act.

consider and report upon every public work that is proposed to be undertaken by a general government sector body ... in all cases where the estimated cost of completing the work exceeds the relevant monetary threshold in relation to the work". There is an exception for a public work that is withdrawn from the operation of the Act by a resolution adopted by each House of Parliament. For the purpose of the section, a "general government sector body" is a "Government department" within the meaning of the *State Service Act 2000* (Tas) or any "State authority" classified as an entity within the general government sector in the annual financial report prepared by the Treasurer under the *Financial Management Act 2016* (Tas) and a "State authority" is "a body or authority", not including a Government department, being "a body or authority, whether incorporated or not, that is established or constituted under a written law or under the royal prerogative ... which, or of which the governing authority, wholly or partly comprises a person or persons appointed by the Governor, a Minister or another State authority".[19]

21 Section 15(2) sets out considerations to which the Committee is to have regard in performing the function under s 15(1). They include "the stated purpose" of the work, "the necessity or advisability of carrying it out", and "the present and prospective public value of the work". Section 15(2) further requires the Committee to "take such measures and procure such information as may enable them to inform or satisfy Parliament as to the expedience of carrying out the work". Section 15(1) and (2) make clear that the Committee is limited in its function and focus. It is to "consider and report" upon the relevant works. It is not necessarily required, for example, to furnish any recommendations or provide any advisory opinions. Further, it is to inform or satisfy the Parliament "as to the expedience" of carrying out the work only; not anything more general.

22 Section 16 of the Act is headed "Conditions precedent to commencing public works". It provides in full:

> "(1) No public work to which section fifteen applies (except such works as have already been authorized by Parliament or hereafter may be withdrawn from the operation of this Act by a resolution withdrawing same adopted by each House of Parliament), the estimated cost of completing which exceeds the relevant monetary threshold in relation to such work, and whether such work is a continuation, completion, repair, reconstruction, extension, or new

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19 Section 15(3) of the Act.

work, shall be commenced unless it has first been referred to and reported upon by the Committee in accordance with this section.

(2) The Governor shall by writing under his hand addressed to the Committee refer every proposed public work that exceeds the relevant monetary threshold in relation to such work to the Committee for their report thereon.

(3) With every such reference to the Committee there shall be furnished to the Committee an estimate of the cost of such work when completed, together with such plans and specifications or other descriptions as the Minister administering the *Public Works Construction Act 1880* for the time being deems proper, together with the prescribed reports on the probable cost of construction and maintenance, and an estimate of the probable revenue, if any, to be derived therefrom. Such estimates, plans, specifications, descriptions, and reports to be authenticated or verified in the prescribed manner.

(4) The Committee shall, with all convenient dispatch, deal with the matter and shall as soon as conveniently practicable, regard being had to the nature and importance of the proposed work, report to the House of Assembly, if the House of Assembly is then in session, and, if not, to the Governor, the result of their inquiries.

(5) If in a report under subsection (4) of this section, the Committee does not recommend the carrying out of the work to which the report relates, that work shall not be commenced unless and until it has been authorized by an Act."

23 Though sub-ss (2), (3) and (4) of s 16 are substantially unchanged from sub-ss (2), (3) and (4) as originally enacted in 1915, sub-ss (1) and (5) differ in material respects from sub-ss (1) and (5) as originally enacted. The material amendments to sub-ss (1) and (5) were in 1962[20] and 1964.[21]

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20 *Public Works Committee Act (No 2) 1962* (Tas).

21 *Public Works Committee Act 1964* (Tas).

24 As originally enacted, s 16(1) provided that "[n]o public work of any kind whatever ... the estimated cost of completing which exceeds [the then relevant monetary threshold] ... shall be commenced unless sanctioned as in this section provided", and s 16(5) provided that "[a]fter the receipt of [the report of the Committee under s 16(4)] the House of Assembly shall by resolution declare either that it is expedient to carry out the proposed work, or that it is not expedient to carry it out". Thus, s 16(1) as originally enacted made it a condition precedent to the commencement of any public work that the proposed work had been sanctioned by a resolution of the House of Assembly under s 16(5) which had declared it expedient to carry out the work after the House had received a report of the Committee under s 16(4) following referral of the proposed work to the Committee by the Governor under s 16(2).

25 What occurred in 1962 was that the words "sanctioned as in this section provided" were omitted from s 16(1) and replaced with the words "it has first been referred to and reported upon by the Committee in accordance with this section" and s 16(5) in its original form was omitted in its entirety.[22] The effect was to make the condition precedent to the commencement of a public work referred to in s 16(1) that the Committee had reported to the House of Assembly on the proposed work under s 16(4) following referral of the proposed work to the Committee by the Governor under s 16(2). A resolution of the House of Assembly sanctioning the proposed work was no longer necessary and any recommendation of the Committee in the report was irrelevant.

26 What then occurred in 1964 was that the words "of any kind whatever" were omitted from s 16(1) and replaced with the words "to which section fifteen applies" and s 16(5) was inserted in its current form.[23] The effect of the amendment to s 16(1) was to make the presentation to the House of Assembly of a report on a proposed work by the Committee under s 16(4) following referral of the proposed work to the Committee by the Governor under s 16(2) a condition precedent to the commencement of a public work only if that public work was within the scope of s 15(1). The effect of the insertion of s 16(5) was to add to the conditions precedent in s 16(1) a further condition precedent that the Committee had recommended in the report under s 16(4) that the proposed work be carried out.

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22 Section 2 of the *Public Works Committee Act (No 2) 1962* (Tas).

23 Section 3 of the *Public Works Committee Act 1964* (Tas).

27 Notwithstanding those amendments to s 16(1) and (5), the substantive operation of s 16(1) in its current form differs only slightly from the substantive operation of s 16(1) as originally enacted. To recapitulate, s 16(1) as originally enacted stipulated as conditions precedent to the commencement of any public work that the proposed work had been: referred to the Committee by the Governor under s 16(2); reported on to the House of Assembly by the Committee under s 16(4); and sanctioned by a resolution of the House of Assembly under s 16(5) as originally enacted declaring it expedient to carry out the work. Section 16(1) in its current form now stipulates as conditions precedent to the commencement of a public work within the scope of s 15(1) that the proposed work has been referred to the Committee by the Governor under s 16(2) and reported on to the House of Assembly by the Committee under s 16(4). To s 16(1) in its current form is added s 16(5) in its current form, stipulating as a further condition precedent to the commencement of a public work within the scope of s 15(1) that the Committee has recommended in the report under s 16(4) that the proposed work be carried out. The only difference of substance in the combined operation of the provisions of s 16(1) and (5) is that the original need for a public work to be sanctioned by a resolution of the House of Assembly under s 16(5) as originally enacted, in order to meet a condition precedent set out in s 16(1), has been replaced by a need for the carrying out of the public work to be recommended by the Committee in a report to the House under s 16(4), in order to meet the condition precedent set out in s 16(5).

28 Section 17 of the Act is headed "Power of House of Assembly or Legislative Council to extend Act". It provides for the House of Assembly or Legislative Council, by resolution, to direct that a public work the estimated cost of which does not exceed the relevant monetary threshold "shall be referred to the Committee, in which case all the powers and provisions of [the] Act shall be applicable to such work".

29 Though the headings to ss 15, 16 and 17 of the Act do not form part of the Act,[24] they form part of the context within which the text of those provisions is to be construed.[25] The headings are substantially the same as the marginal notes to ss 15, 16 and 17 of the Act as originally enacted, which were substantially the same

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24 Section 6(4)(a) of the *Acts Interpretation Act 1931* (Tas).

25 See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

as the marginal notes to the relevant sections of the Commonwealth,[26] New South Wales,[27] and Victorian[28] legislation in force at that time, and are traceable to the marginal notes which first appeared in Parkes' *Public Works Act of 1888*.[29]

30 Turning next to consider the proper construction of s 16(1) of the Act, it is therefore relevant to observe at the outset that, in common with its predecessors, s 16 of the Act has been consistently described in headings and marginal notes not as creating an offence or as imposing a prohibition against the carrying out of an unauthorised public work but as setting out "conditions precedent to commencing public works".

The proper construction of s 16(1) of the Act

31 The Solicitor-General of Tasmania commenced her submissions on the hearing of the appeal with the proposition that compliance with s 16(1) of the Act does not give rise to a justiciable controversy. That proposition can be accepted, but not as a point of principle. Rather, it is made good as a consequence of reaching the conclusion that s 16(1) of the Act does not on its proper construction create an obligation enforceable by a court. If s 16(1) of the Act does not create an obligation enforceable by a court, then a claim to enforce compliance with it cannot be justiciable.[30] The underlying question is the proper construction of s 16(1).

32 *Project Blue Sky Inc v Australian Broadcasting Authority*[31] demonstrates that the statutory consequence of non-compliance with a statutory condition of an exercise of power is as much a question of statutory construction as is the content of the condition. On the proper construction of a statute prescribing such a condition, non-compliance with the condition might result in an exercise of power that is invalid, might result in an exercise of power that is not invalid but that is

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26 Sections 14 and 15 of the *Commonwealth Public Works Committee Act 1913* (Cth).

27 Sections 24 and 34 of the *Public Works Act 1912* (NSW).

28 Sections 12 and 13 of the *Railways Standing Committee Act 1890* (Vic).

29 Sections 12, 13 and 18 of the *Public Works Act of 1888* (NSW).

30 See *Thomas v Mowbray* (2007) 233 CLR 307 at 354 [106].

31 (1998) 194 CLR 355.

nevertheless an unlawful act capable of being restrained by injunction, or might give rise only to political, administrative or other non-legal consequences.[32]

33 *Australian Broadcasting Corporation v Redmore Pty Ltd*[33] furnishes a pertinent example. There, a statutory condition precedent to an exercise by a statutory corporation of powers to enter into contracts for the performance of its functions was expressed in terms that the corporation "shall not, without the approval of the Minister" enter into a contract under which it was to pay more than a specified amount of money.[34] The condition was construed to be "not concerned to confine the actual content of those powers or to invalidate or render unenforceable contracts with innocent outsiders made in the exercise of them" but neither was it construed to have no more than "the status of a pious admonition".[35] Rather, it was observed that non-compliance with the condition "could, depending upon the circumstances, constitute misconduct for the purposes of disciplinary proceedings ... and would, at the least, call for a report by the Auditor-General to the responsible Minister whose approval to the relevant contract had not been obtained".[36]

34 Section 16(1) and (5) of the Act prescribe conditions precedent to commencing public works within the scope of s 15(1) of the Act. Depending on the nature of the public work involved, the power to carry it out might be a power conferred on a Government department or a State authority by a Tasmanian statute or might be an aspect of the executive power of the Executive Government of Tasmania formally vested in the Crown and exercisable by the Governor. Whether the source of power to carry out a given public work is statutory or executive, the exercise of power is in every case one for which, in accordance with the

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32 *Clayton v Heffron* (1960) 105 CLR 214 at 246-247; *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 98 ALJR 623 at 628 [25].

33 (1989) 166 CLR 454.

34 (1989) 166 CLR 454 at 457.

35 (1989) 166 CLR 454 at 459.

36 (1989) 166 CLR 454 at 459-460.

conventions of responsible government, Ministers of the Crown are politically accountable to the House of Assembly and to the Legislative Council.[37]

35 "A system of responsible government", as was said in *Egan v Willis*,[38] "has been considered to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'". The explanation in *Egan v Willis* relevantly continued:[39]

> "One aspect of responsible government is 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. Another aspect of responsible government, perhaps the best known, is that the ministry must command the support of the lower House of a bicameral legislature upon confidence motions. The circumstance that Ministers are not members of a chamber in which the fate of administration is determined in this way does not have the consequence that the first aspect of responsible government mentioned above does not apply to them. Nor is it a determinative consideration that the political party or parties, from members of which the administration has been formed, 'controls' the lower but not the upper chamber."

36 Members of a State Parliament were accordingly said by Isaacs J in *Horne v Barber*[40] to owe "high public duties". He explained:

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37 See Selway, "The 'Vision Splendid' of Ministerial Responsibility Versus the 'Round Eternal' of Government Administration", in Macintyre and Williams (eds), *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* (2003) 164 at 166-167.

38 (1998) 195 CLR 424 at 451 [42], quoting Kinley, "Governmental Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices" (1995) 18 *University of New South Wales Law Journal* 409 at 411.

39 (1998) 195 CLR 424 at 453 [45]. See also *Egan v Chadwick* (1999) 46 NSWLR 563 at 568-573 [15]-[47].

40 (1920) 27 CLR 494 at 500.

> "One of the duties is that of watching on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account in the constitutional way by censure ... in Parliament – censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses."

37 The design of the Act was and remains, like that of its forebears, not to displace that mechanism of political accountability of the Executive Government to the Parliament but to strengthen it.

38 From beginning to end, the application of s 16 of the Act to a public work is within the control of the House of Assembly and the Legislative Council. Any public work within the scope of s 15(1) of the Act can be withdrawn from the operation of the Act by resolution adopted by each of the House of Assembly and the Legislative Council. That is the effect of the exception in s 15(1) as reinforced by the bracketed words in s 16(1). And any public work that might be engaged in by a Government department or a State authority but that might not meet the relevant monetary threshold so as to be within the scope of s 15(1) of the Act can be brought within the operation of the Act by resolution of either the House of Assembly or the Legislative Council. That is the effect of s 17.

39 Furthermore, the steps which need to have been taken to meet the conditions precedent to the commencement of a public work by a Government department or a State authority prescribed by s 16(1) and (5) of the Act are steps which are wholly intra-mural. That is, they are activities undertaken exclusively by Members of the Parliament. They involve the Committee, comprised as it is of Members of the House of Assembly and the Legislative Council, considering a proposal for the carrying out of the public work referred to it by the Governor (acting by convention on the advice of the responsible Minister) and reporting on that proposal to the House of Assembly.

40 Consonant with the Act being designed to strengthen political accountability in accordance with the conventions of responsible government, the statutory consequence of non-compliance with a condition precedent to the commencement of a public work by a Government department or a State authority prescribed by s 16(1) or (5) of the Act is best seen to lie exclusively within the province of that mechanism of political accountability. The consequence of non-compliance is political, such that compliance is to be enforceable by the House

of Assembly and the Legislative Council, not legal, such that compliance is to be enforceable by a court.

41 The capacity of the House of Assembly and the Legislative Council to enforce compliance with such a condition precedent politically inheres not only in the capacity of each for public scrutiny, political debate and censure.[41] Their capacity to enforce compliance inheres also in their specific capacity to decline to authorise expenditure on any public work by refusing to enact the appropriation required to enable funding for the public work to be drawn from the Public Account.[42]

42 The conclusion that the statutory consequence of non-compliance with a condition precedent prescribed by s 16(1) or (5) of the Act is not to be seen as lying in the availability of curial relief is buttressed by two further considerations. The more general of those considerations is the "traditional view" that a court "does not interfere" in "the intra-mural activities of the Parliament".[43] The more specific consideration, which is well illustrated by the circumstances of the present case, is the inconvenience to private contractors engaged by Government departments or State authorities to carry out public works, and to the public for whose benefit those works are carried out, of the carrying out of those works being subjected to legal challenge in the Supreme Court at the instigation of any and all whose interests might be sufficiently affected to have standing to seek curial relief.

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41 For example, questions may be put to and explanations sought from the Executive during budget estimates hearings, through question time or other parliamentary inquiry processes: *Egan v Willis* (1998) 195 CLR 424 at 451 [42], 477 [105], 502 [154]. See also *Combet v The Commonwealth* (2005) 224 CLR 494 at 523 [7].

42 See s 11(2) of the *Financial Management Act 2016* (Tas). See generally *Auckland Harbour Board v The King* [1924] AC 318 at 326-327.

43 *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 482, citing *Cormack v Cope* (1974) 131 CLR 432 at 454 and *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 184. See also *Clayton v Heffron* (1960) 105 CLR 214 at 234-235.

Disposition

43 The appeal is to be allowed with costs. The orders of the Full Court are to be set aside. In their place, the appeal from the orders of the primary judge is to be dismissed with costs.

EDELMAN J.

Introduction: Simple facts, three important questions, and a centuries-old problem

44 Section 16(1) of the *Public Works Committee Act 1914* (Tas) imposes a duty prohibiting certain public work (to which s 15 applies) from being commenced unless it has first been referred to and reported on by the Parliamentary Standing Committee on Public Works ("the Committee") in accordance with s 16. Mr Casimaty commenced proceedings seeking declaratory relief concerning proposed public works and an injunction to restrain Hazell Bros Group Pty Ltd ("Hazell Bros") from commencing the works which Mr Casimaty alleged would be in breach of the duty in s 16(1). Mr Casimaty alleged that the road works being performed by Hazell Bros did not correspond in cost and in some other details with the works that had been referred to and reported on by the Committee.

45 The Attorney-General for Tasmania, who was joined as a party to the proceedings, sought interlocutory orders in the Supreme Court of Tasmania including to dismiss Mr Casimaty's claim on the basis that it did not disclose any reasonable cause of action. The primary judge (Blow CJ) dismissed Mr Casimaty's claim because the claim, being based upon assertion of breach of s 16(1), could not succeed without assessment of matters covered by the parliamentary privilege of the Tasmanian Parliament contained in Art 9 of the *Bill of Rights 1688*,[44] namely whether the road works performed by Hazell Bros corresponded in cost and in detail with the works that had been referred to and reported on by the Committee.[45]

46 A majority of the Full Court of the Supreme Court (Brett J, Pearce J agreeing) upheld an appeal on the basis that s 16(1) created "public obligations which fall outside the scope of the parliamentary process, and hence the ambit of parliamentary privilege"; the public obligations were intended to be enforced by the courts and not by Parliament.[46] In dissent, Geason J would have upheld the approach of the primary judge.[47]

47 The works have now been completed. As the Solicitor-General for South Australia said in oral submissions, it is not apparent what substantive relief would be available to Mr Casimaty even if this appeal by the Attorney-General were to be dismissed. An injunction to prevent the works from proceeding is now obviously hopeless. And there now appears little or no utility in the declaration

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44 1 W & M sess 2 c 2.

45 *Casimaty v Hazell Bros Group Pty Ltd [No 2]* [2022] TASSC 9 at [31]-[32].

46 *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [24].

47 *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 at [51]-[52].

sought by Mr Casimaty. But the Attorney-General for Tasmania did not rely upon any formal or informal notice of contention, or any new submission,[48] in the Full Court, nor any ground of appeal in this Court, that asserted that Mr Casimaty's claim should have been dismissed on the basis that any relief that he sought, or might seek, would be inutile.

48 The Attorney-General's two grounds of appeal are interrelated. Both concern the centuries-old puzzle of the extent of the exclusive cognisance of Parliament. The first ground asserts that the majority of the Full Court erred in concluding that ss 15 and 16 of the *Public Works Committee Act* created a public obligation that was subject to the protection and enforcement of the courts and "outside the parliamentary process and hence the ambit of parliamentary privilege". The second ground asserted that the Full Court should have concluded that the "parliamentary privilege" in Art 9 of the *Bill of Rights* would be infringed by an adjudication by a court of Mr Casimaty's claim of infringement of s 16(1).

49 The Attorney-General's first ground is not merely an assertion that essential aspects of the subject matter of a claim of breach of s 16(1) would fall within the "parliamentary privilege" of the Tasmanian Parliament covered by Art 9 of the *Bill of Rights*. Rather, the first ground involves an assertion that any adjudication at all concerning a breach of s 16(1) is within the broader exclusive cognisance of the Tasmanian Parliament. The first ground, therefore, effectively subsumes the second ground in its focus upon whether Mr Casimaty's assertion of a breach of s 16(1) is entirely beyond the scope of the courts' power to adjudicate. Nevertheless, a consideration of the second ground is a necessary incident to determining the scope of the relative spheres of competence of the courts and Parliament.

50 The road works which Mr Casimaty alleged to be in breach of s 16(1) were required to be undertaken by the Executive Government (in particular, "a general government sector body") and were performed by Hazell Bros as agents for an Executive body. It is unusual for an alleged breach of a duty imposed by State legislation upon an Executive body to be a matter that is wholly excluded from the adjudicative authority of the Supreme Court of that State. This Court has held that no Parliament can "deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive ... power".[49] And even when a dispute does not raise any real issue of the limits of Executive power, courts have traditionally taken a very restrictive approach to interpretation of provisions that,

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48 See *Supreme Court Civil Procedure Act 1932* (Tas), s 47(3); *Attorney-General (Tas) v Cameron* (2007) 152 LGERA 45 at 66 [74]; *Krulow v Glamorgan Spring Bay Council* (2013) 23 Tas R 264 at 288 [86]-[87].

49 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99]. See also at 585 [113].

on one reading of their terms, might be thought to exclude judicial authority to adjudicate upon an alleged breach of duty by the Executive.[50]

51 Nevertheless, there are instances, with powerful justifications and strong historical antecedents, where courts have declined to recognise an authority to adjudicate upon a dispute. One relevant instance is where the courts treat the dispute as falling within the exclusive cognisance of another branch of government. The expression "exclusive cognisance" has been used in different ways, but it is used in these reasons to describe a principle that wholly encompasses, and extends beyond, Art 9 of the *Bill of Rights*.[51] The courts have declined to recognise authority over any matter that is properly considered to fall within the scope of the exclusive cognisance of Parliament.

52 Three anterior questions should be answered in order to determine whether the dispute concerning s 16(1) of the *Public Works Committee Act* properly falls within the exclusive cognisance of the Tasmanian Parliament so that a court should not adjudicate upon the alleged contravention by Hazell Bros of s 16(1) as agent of an Executive body. First, who owes the duty that is imposed by s 16(1) of the *Public Works Committee Act*? In particular, is that duty imposed only on the Executive Government or on all persons? Secondly, what is the content of the duty? In particular, to what extent does the duty concern questioning matters involving the internal proceedings of Parliament, with the effect that judicial adjudication of a breach of the duty in s 16(1) could infringe Art 9 of the *Bill of Rights*? Thirdly, to whom is the duty in s 16(1) owed? In particular, is the duty owed to Parliament or to the public generally?

53 The answer to each question is as follows: (i) the Executive Government ("general government sector bod[ies]") owes the duty that is imposed by s 16(1) of the *Public Works Committee Act*; (ii) in some circumstances, hearing evidence or adjudicating upon submissions concerning a claim alleging breach of the duty in s 16(1) might infringe Art 9 of the *Bill of Rights* because the duty relates to the Committee which is comprised of Members of Parliament; and (iii) the duty is owed by general government sector bodies to Parliament.

54 The consequence of these answers is that the duty in s 16(1) is created by Parliament, owed to Parliament, and related to the activities of Members of Parliament. The entirety of Mr Casimaty's claim of contravention of s 16(1) is within the exclusive cognisance of the Parliament of Tasmania. The Supreme Court of Tasmania should not adjudicate upon the alleged contravention of s 16(1).

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50 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at 33-35 [85]-[87], 36-38 [91]-[94].

51 See *R v Chaytor* [2011] 1 AC 684 at 697 [13], 722-723 [102]-[104].

(1) Who owes the duty in s 16(1) of the *Public Works Committee Act*?

55 In its present terms, s 16(1) of the *Public Works Committee Act* imposes a duty not to commence public work (which is estimated to exceed a monetary threshold[52]) until the public work has been referred to and reported on by the Committee in accordance with s 16. Section 16(5) provides that if the Committee does not recommend the carrying out of the work then the work "shall not be commenced unless and until it has been authorized by an Act". Section 2 defines "public work" to mean building or construction works and road or bridges works.

56 The Tasmanian Parliament has identified the persons who owe the duty in s 16(1) with increasing precision in various amendments to the *Public Works Committee Act*. Prior to 2009, the persons to whom s 16(1) was directed were not expressed with clarity. As originally enacted in 1915, the *Public Works Committee Act* provided in s 16(1) that, subject to a monetary threshold or prior authorisation by Parliament, "[n]o public work of any kind whatever ... shall be commenced unless sanctioned as in this section provided". The section set out a process for parliamentary approval of the public work. The previous section, s 15, obliged the Committee to consider and report on all such proposed public works for which parliamentary approval was required. On its face, s 16 was apparently directed at every person who commences public work. In substance, however, public work would only be commenced by persons acting for or on behalf of public bodies. This was clarified by amendments beginning in 1964.

57 In 1964, amendments to s 16(1) altered the terms of that provision from referring to public work "of any kind whatever" to refer to public work "to which section fifteen applies".[53] The 1964 amendments also amended the application of s 15 from any public work "for which Parliamentary authority is required" to works "the cost of which is to be defrayed out of the Loan Fund".[54] The "Loan Fund" was not defined in the 1964 amendments.

58 By amendments to the *Public Works Committee Act* in 2009,[55] the duty upon any person not to engage in public work without compliance with the "conditions precedent" in s 16 was expressed as a duty upon general government sector bodies. Since 2009, the prohibitive words in s 16 ("[n]o public work to

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52 The relevant monetary threshold is $8,000,000 in relation to building or construction works and $15,000,000 in relation to road or bridges works: *Public Works Committee Act 1914* (Tas), s 2.

53 *Public Works Committee Act 1964* (Tas), s 3(a).

54 *Public Works Committee Act 1964* (Tas), s 2(a).

55 *Public Works Committee Amendment Act 2009* (Tas), s 4.

which section fifteen applies ... shall be commenced") reveal the content of s 16(1) to depend upon the terms of s 15 which, subject to a resolution of Parliament, require the consideration of and reporting on by the Committee of "every public work that is proposed to be undertaken by a general government sector body" where the estimated cost exceeds the relevant monetary threshold.[56]

59 When s 16(1) is read with s 15, therefore, and consistently with the concern of those sections only with "public work", the duty in s 16(1) is imposed upon "a general government sector body". The duty in s 16(1) is therefore concerned only with ensuring that a general government sector body does not commence public work without a reference to the Committee and a report of the Committee recommending the work.

60 A "general government sector body" is defined in s 15(3) as "a Government department within the meaning of the *State Service Act 2000*" and "any State authority classified as an entity within the general government sector in the Treasurer's annual report". This definition, combined with the definition of a "State authority" in s 15(3), has the effect that a general government sector body might be a legal person (such as an incorporated State authority), but also might not be a legal person (such as an unincorporated government department or a State authority established under a written law or royal prerogative that is not incorporated). If the "general government sector body" is not a legal person then the duty in s 16(1) is owed by the body politic of the State of Tasmania, performing the work through its Executive.[57] It is convenient in these reasons to refer to the relevant duty holder simply as a "general government sector body".

61 A general government sector body will usually perform work through contractors, including the natural persons engaged by Hazell Bros. Hence, if an injunction could issue against a general government sector body to restrain breach of s 16(1), the injunction could also extend to named agents of the general government sector body. But, by s 15, the legal person who undertakes the work, and therefore the only legal person subject to the duty in s 16(1), is the "general government sector body".

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56 Subject to extension of the operation of ss 15 and 16 by s 17.

57 See *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 98 ALJR 655 at 684-685 [142]-[143].

(2) What is the scope and content of the duty in s 16(1) of the *Public Works Committee Act*?

No question of either federal jurisdiction or the jurisdiction of a general government sector body

62 The action that Mr Casimaty sought to bring concerned a State highway near Hobart Airport. It was common ground that, as pleaded in Hazell Bros' defence, there were State appropriations that related to the road works. The action did not engage federal jurisdiction. Had it done so, an analysis of whether adjudication upon the scope and content of the duty would extend "the court's true function into a domain that does not belong to it" could intersect with an examination of whether there was a "matter".[58]

63 A more difficult issue is whether the action alleging breach of s 16(1) concerns the jurisdiction, or legal authority, of a general government sector body to engage in the public work. On one view, this is suggested by the words "[c]onditions precedent to commencing public works" in the heading to s 16 of the *Public Works Committee Act*. The heading is not part of the Act but is extrinsic material which can be used in the interpretation of the Act.[59] The heading immediately invites the question: "Precedent to what?"[60] Is the reference to "commencing public works" a reference to the *authority* to commence public works? Or is it a reference to the *action* of commencing public works?

64 In public law, the usual answer is that a condition precedent means a condition precedent to the *authority* of the Executive to act.[61] However, the expression "condition precedent" is sometimes used more colloquially to mean some event prior to ("precedent to") the *action* involving the exercise of a statutory power. In this latter colloquial sense, the expression has been described as "regulating the exercise of a statutory power" by imposing a duty upon the person before the *action* involved in exercise of the power, but not invalidating the exercise of power if the duty is breached.[62] That is how the expression "[c]onditions precedent" is used in the heading to s 16.

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58 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 370.

59 *Acts Interpretation Act 1931* (Tas), ss 6, 8B.

60 *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 541.

61 *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510 at 534 [82]-[84].

62 *Miller v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 98 ALJR 623 at 628 [25]-[26].

65 By s 16(1), a general government sector body that proposes to undertake public work has an obligation not to commence the work until the occurrence of the "conditions precedent" culminating in a report by the Committee. By s 16(5), the general government sector body has an obligation not to commence the work until the condition precedent occurs of the Committee recommending the carrying out of the work (or until the work is otherwise authorised by an Act). The action of performing the work by a general government sector body is not invalid, and the work is not legally lacking in authority, in the absence of any of the precedent events (referring of the public work to the Committee, reporting on the work by the Committee and a recommendation by the Committee that the work be carried out).

66 The authority of a general government sector body to commence public work without compliance with the "conditions precedent" is an example of the colloquial use of the phrase "conditions precedent". There are several matters that support this conclusion that s 16 uses the phrase "conditions precedent" in a colloquial sense: (i) the variety of different, and separate, statutory and non-statutory powers the exercise of which might be affected by s 16(1), given the expansive definition of "public work"; (ii) the variety of ways in which s 16(1) could be breached; and (iii) the potential difficulty in identifying a breach in some cases.[63] In this case, the works were undertaken under statutory powers concerning public highways in Pt II of the *Roads and Jetties Act 1935* (Tas).

Matters protected by parliamentary privilege in any adjudication of s 16(1)

(a) The application of Art 9 of the *Bill of Rights*

67 The focus of the second ground of this appeal was upon the "general constitutional principle"[64] embodied in Art 9 of the *Bill of Rights* and not upon any "wider principle, of which article 9 is merely one manifestation".[65] Nevertheless, an assessment of the wider principle of exclusive cognisance that is raised by the first ground of appeal is informed by the extent to which an adjudication of s 16(1) could engage the principles contained in Art 9 of the *Bill of Rights*.

68 The *Bill of Rights* recites that King James II had endeavoured to subvert the "Law[]s and Liberties of this Kingdom[]" in various ways including by

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63 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391 [93]-[95].

64 *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 258; *Egan v Willis* (1998) 195 CLR 424 at 445 [24]; see also at 462 [69].

65 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 332. See Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 2 at 159-160.

prosecutions of matters and causes "cognizable on[]ly in Parl[i]ament". In that context, Art 9 of the *Bill of Rights* provides:

> "That the Freedom[] of Speech and Debates or Proceedings in Parl[i]ament ought not to be impeached or questioned in any Court or Place out of Parl[i]ament".

69 In *Stockdale v Hansard*,[66] one of the "two great cases which exhaust the learning on the subject",[67] it was held that the courts had power to enquire into the existence of the powers, privileges and immunities of the Commons, but that once the courts had determined the existence of a privilege then "the members of each House of Parliament are the sole Judges whether their privileges have been violated".[68] That principle has been reaffirmed in this Court.[69]

70 Although there was once a "shadow of doubt" about this,[70] Art 9 of the *Bill of Rights* applies in its terms to the Parliament of (what is now) Tasmania, not merely as part of the received common law which Art 9 reflects,[71] but also by s 24 of the *Australian Courts Act 1828* (Imp).[72] The *Australian Courts Act* is an Imperial statute which, by requiring English laws and statutes in force at that time to "be applied" in New South Wales and Tasmania "so far as [they] can be applied", was intended to be "always speaking" in the modern sense that it would apply to new circumstances and would extend to new Parliaments.[73] The reason for s 24 picking up the written laws of England, and not merely the common law, was that "[t]he Imperial Legislature evidently intended and had in view to legislate for the

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66 (1839) 9 Ad & E 1 [112 ER 1112].

67 *Pickin v British Railways Board* [1974] AC 765 at 799, quoting *Bradlaugh v Gossett* (1884) 12 QBD 271 at 275.

68 *Stockdale v Hansard* (1839) 9 Ad & E 1 at 194-195 [112 ER 1112 at 1185-1186].

69 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162; *Egan v Willis* (1998) 195 CLR 424 at 446 [27], 460 [66].

70 *Rowley v O'Chee* [2000] 1 Qd R 207 at 219.

71 *R v Turnbull* [1958] Tas SR 80 at 83-84; *Egan v Willis* (1998) 195 CLR 424 at 445 [24]. See also *Sankey v Whitlam* (1978) 142 CLR 1 at 35.

72 9 Geo IV c 83. See Campbell, "Comment—Ministerial Privileges" (1959) 1 *Tasmanian University Law Review* 263 at 265.

73 See *Aubrey v The Queen* (2017) 260 CLR 305 at 322 [30], 325-326 [39]-[40]; *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* [2024] AC 89 at 118-122 [84]-[95]. See especially *Egan v Willis* (1998) 195 CLR 424 at 445 [23].

growing wants and ever-changing circumstances and condition of a new Colony just entrusted with legislative powers and functions".[74]

(b) The nature of Art 9 of the *Bill of Rights*

71 Article 9 of the *Bill of Rights* is sometimes referred to as a "parliamentary privilege", although it is broader than just a privilege (in the strict sense) of Parliament and its Members. A privilege is "a peculiar benefit or advantage, of a special exemption from a burden falling upon others".[75] Article 9 includes a privilege of Members of Parliament, so that, for example, Members of Parliament have no legal duty not to defame others, in circumstances where allegedly defamatory action occurs during the official conduct of proceedings in Parliament. Article 9 also extends the privilege to Parliament itself,[76] so that the privilege of a single Member cannot be waived by that single Member.[77] But Art 9 extends beyond merely declaring a privilege of Parliament or its Members.

72 Article 9 applies in cases where no Member of Parliament is a party to the proceeding and no question arises of exempting Parliament or its Members from a general legal duty. In such cases, Art 9 has been recognised, in what is effectively a duty on courts, as preventing consideration of anything that would impeach or question any speech, debate or parliamentary proceeding.[78] In such cases, the privilege "cannot be waived by either House" because it is also a protective "statutory duty" upon courts.[79] Nevertheless, as will be seen below, Art 9 is less

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74 *Fenton v Hampton* (1858) 11 Moore PC 347 at 382 [14 ER 727 at 740]. See also at 397 [14 ER 727 at 745].

75 See *Western Australia v Manado* (2020) 270 CLR 81 at 115 [84], quoting *Humphrey v Pegues* (1872) 83 US 244 at 248. See also Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16 at 36.

76 *Sankey v Whitlam* (1978) 142 CLR 1 at 36-37.

77 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 335; *R v Chaytor* [2011] 1 AC 684 at 729 [130].

78 *Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1; *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114; *Mees v Roads Corporation* (2003) 128 FCR 418; *Cornwall v Rowan* (2004) 90 SASR 269; *Victorian Taxi Families Inc v Taxi Services Commission* (2018) 61 VR 91.

79 Natzler and Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 25th ed (2019) at 240 [12.1]. See also

likely to apply in cases which do not have a direct effect upon Parliament or its Members.

(c) The meaning and application of "questioned" in Art 9 of the *Bill of Rights*

73 At the extremes there are two possible meanings of "questioned" in Art 9 of the *Bill of Rights*. Neither can now be accepted as correct. At one extreme, there is no longer any doubt that an allegation of improper motive by a Member of Parliament is not necessary for proceedings in Parliament to be "questioned", rather than "impeached", within Art 9.[80] At the other extreme, modern courts have not adopted the broad view of "questioned", which would take remarks by Blackstone disjunctively to suggest that the content of proceedings in Parliament can never be "examined, discussed, and adjudged" other than in Parliament.[81] For instance, the mere discussion, whether in court or any other place, of the facts of proceedings in Parliament is extremely unlikely, without more, to contravene Art 9. In this sense, it has been said that the provision "cannot be read entirely literally".[82]

74 In a line of cases, exemplified by reasoning in the Privy Council,[83] it has been held that proceedings in Parliament are not "questioned" if the content of the proceedings is relied upon merely as fact rather than for the truth of the contents of the proceedings.[84] This reasoning cannot be applied as a strict or rigid test. For instance, there are simple cases where facts concerning proceedings in Parliament, such as the presence of a Member, can be relied upon in a proceeding for their truth.[85] Equally, there may be cases where the content of proceedings in Parliament cannot be relied upon in court even though that content is relied upon only for the

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Joseph, "Parliament's Attenuated Privilege of Freedom of Speech" (2010) 126 *Law Quarterly Review* 568 at 574-575.

80 *Rost v Edwards* [1990] 2 QB 460 at 470, 474-475.

81 Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 2 at 158.

82 *Buchanan v Jennings (Attorney General of New Zealand intervening)* [2005] 1 AC 115 at 123 [9].

83 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 337.

84 *Uren v John Fairfax & Sons Ltd* [1979] 2 NSWLR 287 at 289; *Mundey v Askin* [1982] 2 NSWLR 369 at 373; *Mees v Roads Corporation* (2003) 128 FCR 418 at 445 [86]; *Victorian Taxi Families Inc v Taxi Services Commission* (2018) 61 VR 91 at 125 [93(f)]. See also *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 at 531.

85 *Constitution*, s 38.

mere facts of the proceedings, rather than their truth. For instance, the mere fact of words spoken in Parliament cannot be used as the basis for a defamation proceeding against a Member of Parliament even if, in the absence of any defence of justification, the only dispute concerns the effect of the Member's words on the plaintiff's reputation. The mere prospect of an action for defamation is sufficient to require the privilege, even if the action concerns only whether the words were spoken and their effect on reputation with no dispute about truth: Members of Parliament "can not satisfactorily discharge [their] duties, if they are liable to defamation actions at every turn".[86]

75 In this appeal, the Solicitor-General of the Commonwealth sought to adopt and adapt this approach, submitting that a line should be drawn between the valid use of proceedings in Parliament "simply to establish what occurred as a fact" and the invalid use of proceedings for the purpose of examining "the propriety or validity of what occurred in Parliament".[87] This distinction may be more useful than the distinction between fact and truth, but it introduces concepts divorced from the text of Art 9 (for example, issues about the meaning of "propriety" or "validity" of proceedings in Parliament) and is potentially inconsistent with central authorities concerning Art 9. For instance, in the famous decision in *Stockdale v Hansard*,[88] which led to the enactment of the *Parliamentary Papers Act 1840* (UK),[89] the Court permitted defamation proceedings to be maintained against a publisher of a report made to Parliament. The defamation proceedings arguably involved indirectly questioning the propriety of the report.

76 A distinction between fact and truth or between fact and propriety or validity is also unhelpful where the dispute between the parties concerns the *effect* of proceedings in Parliament. The fact of words spoken in Parliament can be used if there is dispute about the effect of those words, such as in identifying the objective purpose of Parliament or the consequences of the law.[90] Difficult cases at the margins are also unlikely to be resolved by verbal distinctions between whether proceedings in Parliament are sought to be used to examine truth or "the propriety or validity of what occurred in Parliament" rather than "to establish what occurred as a fact". For instance, in one decision, described as controversial,[91] it

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86 *Gipps v McElhone* (1881) 2 NSWR 18 at 22.

87 See *Buchanan v Jennings (Attorney General of New Zealand intervening)* [2005] 1 AC 115 at 132 [18].

88 *Stockdale v Hansard* (1839) 9 Ad & E 1 [112 ER 1112].

89 3 Vict c 9.

90 *Pepper v Hart* [1993] AC 593 at 638.

91 See *Cornwall v Rowan* (2004) 90 SASR 269 at 362 [389].

was held that a witness in a criminal trial could be cross-examined about whether evidence that he had given before Senate Select Committees was a previous inconsistent statement because "[i]t is the fact that the previous inconsistent statement was made, not the truth of the matters stated in it, which is relevant to the attack upon his credit".[92] But that controversial decision led to legislative change,[93] for the purpose, explained in the Explanatory Memorandum, of "restor[ing] the interpretation of article 9 contained in ... earlier judgments".[94]

77 In light of the more pragmatic approach that courts have taken to Art 9, the best presently existing test for whether the freedom of speech and debates or proceedings in Parliament would be "impeached or questioned" by a legal proceeding is a functional and pragmatic test. As six judges of the Supreme Court of Canada said in *Chagnon v Syndicat de la fonction publique et parapublique du Québec*:[95]

> "the scope of parliamentary privilege is delimited by the purposes it serves ... It inheres to the nature and functions of legislative assemblies as a separate branch of government. The reach of inherent privilege extends only so far as is 'necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business'".

78 As to individual Members of Parliament, the function of Art 9, including the privilege contained in it, includes protecting Members of Parliament "not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown".[96] Beyond protection of the individual Members of Parliament, Art 9 also ensures the efficient and effective discharge of parliamentary business, without a real or substantial prospect of a chilling effect arising from, or by, legal challenge. Therefore, courts "will not allow any challenge to be made to what is said or done within the walls of Parliament in performance

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92 *R v Murphy* (1986) 5 NSWLR 18 at 27. See also Campbell, "Parliamentary Privilege and Admissibility of Evidence" (1999) 27 *Federal Law Review* 367 at 372-373.

93 *Parliamentary Privileges Act 1987* (Cth).

94 Australia, House of Representatives, *Parliamentary Privileges Bill 1987*, Explanatory Memorandum at 11. See also Natzler and Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 25th ed, (2019) at 338 [16.13].

95 [2018] 2 SCR 687 at 708 [27].

96 Blackstone, *Commentaries on the Laws of England* (1765), bk 1, ch 2 at 159.

of its legislative functions".[97] In this way, the privileges of Parliament "are vouchsafed so that Parliament can fulfil its key function in our system of democratic government".[98]

79 In this respect, Art 9 may reflect the principle which determines the limit of the common law powers of the Houses of Parliament, being those powers that "are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute".[99] As Herron CJ explained this common law constitutional principle, it arises where a House of Parliament considers that a power is "necessary to its existence or to the orderly exercise of its important legislative functions".[100] These "requirements of necessity" limit the common law powers of the Houses of Parliament in a manner "measured by the need to protect the high standing of Parliament and to ensure that it may discharge, with the confidence of the community and the members in each other, the great responsibilities which it bears".[101]

80 On the other hand, the purpose of Art 9 does not require the protection of Parliament and its Members at any price. For instance, separate from considerations of the boundary between courts and Parliament, public or media discussion and commentary upon proceedings in Parliament might occur in a place outside Parliament and might be in critical terms. But, in that context, the intention of Art 9 was never to "have effect so as to stifle the freedom of all to comment on what is said in Parliament, even though such comment may influence Members in what they say".[102]

81 The functional and pragmatic approach to balancing these competing considerations invites courts to ask whether consideration of, or admission of evidence of, parliamentary proceedings could give rise to a real or substantial prospect of a chilling effect upon the functioning of Parliament and its Members: "[i]f what is involved in a tender of evidence ... is simply not capable of being

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

98 *Pickin v British Railways Board* [1974] AC 765 at 798.

99 *Kielley v Carson* (1843) 4 Moore PC 63 at 88 [13 ER 225 at 234].

100 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 395.

101 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 397.

102 *Pepper v Hart* [1993] AC 593 at 638. But see *Finnane v Australian Consolidated Press Ltd* [1978] 2 NSWLR 435, rejected in *Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1 at 4-5.

contentious, it is difficult to see how the right of free speech could be affected".[103] In that respect, there is merit in the focus, in the authorities mentioned above,[104] upon whether anything said in any proceedings in Parliament is relevant in the legal proceeding only for the uncontentious fact of what was said. But attention should remain focused upon whether any use of speech, debates or proceedings in Parliament could give rise to a real or substantial prospect of chilling or restraining the free engagement of those involved in the Parliament and its processes.

82 A similar approach has been taken in some decisions in the United States concerning the constitutional prohibition against Members of Congress being "questioned" outside Congress for any speech or debate in either House.[105] This "Speech or Debate Clause" was derived from Art 9 of the *Bill of Rights*.[106] The Speech or Debate Clause has generally been treated as a privilege only of Members of Congress.[107] But in a decision with powerful echoes of *Stockdale v Hansard*,[108] in which it might have been said that speech of Members of Congress was indirectly questioned, White J explained that the clause was not infringed by proceedings seeking relief for an invasion of privacy by persons performing non-legislative functions resulting from the distribution outside Congress of a congressional report, because the action was not inconsistent with the function and purpose of the clause:[109]

> "We cannot believe that the purpose of the Clause—'to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary,' ...—will suffer in the slightest if it is held that those who, at the direction of Congress or otherwise, distribute actionable material to the public at large have no automatic immunity under the Speech or Debate Clause but must respond to private suits to the extent that others must respond in light of the Constitution and applicable laws. ... We are unwilling to sanction such a result, at least absent more substantial evidence that, in order to perform its legislative function, Congress must not only inform the

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103 *Amann Aviation Pty Ltd v Commonwealth of Australia* (1988) 19 FCR 223 at 231.

104 Above at fn 84.

105 *Constitution of the United States*, Art I, s 6, cl 1.

106 *United States v Johnson* (1966) 383 US 169 at 177-178.

107 *Powell v McCormack* (1969) 395 US 486 at 504, approving *Kilbourn v Thompson* (1880) 103 US 168 and *Dombrowski v Eastland* (1967) 387 US 82.

108 (1839) 9 Ad & E 1 [112 ER 1112].

109 *Doe v McMillan* (1973) 412 US 306 at 316-317.

public about the fundamentals of its business but also must distribute to the public generally materials otherwise actionable under local law."

83 In the application of Art 9 in this functional way, Art 9 should not be seen as only a rule of evidence. Article 9 should extend also to the court receiving, or considering, submissions that would give rise to a real or substantial prospect of a chilling effect upon the functioning of Parliament and its Members.[110] There will be cases where the relevance of proceedings in Parliament is not clear until after the admission of the proposed evidence or after receipt of submissions. In such cases, the court complies with Art 9 "not by refusing to admit evidence of what was said in Parliament, but by refusing to allow the substance of what was said in Parliament to be the subject of any submission or inference"[111] where receipt, or consideration, of the submission or inference would give rise to a real or substantial prospect of chilling or restraining the free engagement of those involved in the processes of Parliament.

(d) The application of Art 9 of the *Bill of Rights* to the present proceedings

84 In light of the principles set out above, it is not possible to determine conclusively whether, or to what extent, a proceeding for infringement of s 16(1) of the *Public Works Committee Act* would involve the questioning of proceedings in Parliament, namely the report of the Committee on the proposed public works. Much may depend upon any submissions that are made about the alleged breach of s 16(1).

85 For instance, it would be very difficult to see how there could be any infringement of Art 9 if Mr Casimaty's only evidence and submissions were to establish that: (i) the reference in s 16(1) to the commencement of the "public work" required the public work strictly to correspond with the work referred to and reported on by the Committee; and (ii) there was a failure of that strict correspondence, such as by the expenditure of $46.4 million rather than the reported estimate of between $28.08 million and $29.99 million. To take this issue of financial expenditure as an example, there is no real or substantial prospect of chilling or restraining any person engaged in the processes of Parliament by a submission, reasoning, or a conclusion that the amount of $29.99 million to which the report refers is not the same amount as $46.4 million.

86 On the other hand, Mr Casimaty might make an alternative submission that the reference in s 16(1) to the commencement of the "public work" required only that the public work substantially correspond with the work referred to and

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110 *Cornwall v Rowan* (2004) 90 SASR 269 at 363 [395], quoting *Rann v Olsen* (2000) 76 SASR 450 at 486 [204].

111 *Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1 at 5.

reported on by the Committee. Apart from the issue of financial expenditure, other complaints by Mr Casimaty concerned the failure to provide connections from the westbound on-ramp to Cranston Parade that would allow left turn in and left turn out movements only, and the provision of two roundabouts providing access to Holyman Avenue and Kennedy Drive. A comparison of those works as completed with the detail of the Committee's report could involve submissions that infringe Art 9 of the *Bill of Rights*. An obvious example where Art 9 could be infringed would be if the question of substantial correspondence were (perhaps ambitiously) said by Mr Casimaty to require consideration of the subjective motives of the members of the Committee.

87 Ultimately, for the purposes of this appeal, it suffices to say that although I do not accept that the entirety of the proceeding would necessarily be contrary to Art 9 of the *Bill of Rights*, there are circumstances in which adjudication upon the scope and content of the duty in s 16(1) of the *Public Works Committee Act* could engage Art 9 of the *Bill of Rights*. In those circumstances, that part of the evidence or submissions concerning the alleged breach of duty in s 16(1) of the *Public Works Committee Act* could not be entertained by a court.

(3) To whom is the duty in s 16(1) of the *Public Works Committee Act* owed?

88 The next question is: to whom is the duty in s 16(1) of the *Public Works Committee Act* owed by a general government sector body? There are three possibilities. First, the majority of the Full Court concluded that the duty was one that was owed to the public. Secondly, the Attorney-General for Tasmania submitted that the duty was owed only to the Parliament of Tasmania. The answers to the first two questions provide significant support to that submission. A third possibility is that the duty in s 16(1) is owed to both the Parliament and to the public.[112]

89 Public duties are duties that are generally "owed to the public at large".[113] They might arise from statute, such as statutory duties owed to the public by people generally,[114] or statutory duties owed to the public by public bodies in the exercise of their powers.[115] The category of public duties is not mutually exclusive of the category of duties to Parliament. For instance, the duty of the Executive not to

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112 Compare *R v Chaytor* [2011] 1 AC 684 at 716 [81], 724 [108].

113 *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519 at 558 [87].

114 For instance, *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

115 See *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257 [24]-[25].

withdraw money from Consolidated Revenue without the authority of Parliament is a duty that is owed both to Parliament (as part of responsible government) and to the public (as part of representative government).[116] Those duties are given effect at the Commonwealth level by ss 81 and 83 of the *Constitution*.[117]

90 Although Pt III of the *Public Works Committee Act* is entitled "Powers of the Committee", Pt III contains some duties which are plainly public duties. For instance, the offence against the Act provided in s 21, of knowingly dissuading or preventing any witness from obeying a summons under the Act, is a public duty enforceable by, or at the direction of, the Attorney-General in the courts.[118] And even provisions in Pt III which contain no express sanction can engage public duties. For instance, as Beech-Jones J observed in oral argument in this appeal, a claim for trespass might be brought by a member of the public upon whose land the Committee entered without justification by compliance with the requirements for notice in s 13.

91 The s 16(1) duty stands apart from these other duties. The s 16(1) duty is similar to the form in which it existed in the legislation from which it originated.[119] In the Second Reading Speech of the progenitor legislation, the *Public Works Act 1888* (NSW), Sir Henry Parkes spoke of the goal of the legislation being "to preserve the full and unfettered power of Parliament" as well as "to throw around the expenditure of the public revenues the strongest security I could invent to prevent extravagance or misdirection in the expenditure of public money".[120]

92 When the *Public Works Committee Bill* was introduced to Parliament in 1914, in the Second Reading Speech Mr Fullerton explained that the object of the Bill was to set up a parliamentary committee similar to that in other States "to ensure that members should have needful information on public works

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116 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 449, 451; *The Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 224-225; *Combet v The Commonwealth* (2005) 224 CLR 494 at 597-598 [234]-[235]. See also *Auckland Harbour Board v The King* [1924] AC 318 at 326-327.

117 *Brown v West* (1990) 169 CLR 195 at 205; *Wilkie v The Commonwealth* (2017) 263 CLR 487 at 523 [61].

118 *Public Works Committee Act 1914* (Tas), s 29. See also *R v Chaytor* [2011] 1 AC 684 at 716-717 [82].

119 *Public Works Act 1888* (NSW), s 13.

120 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 February 1888 at 2419.

proposals".[121] The original form of s 16(1) imposed a prohibition upon public work of any kind, estimated to cost more than £5,000,[122] without compliance with the condition precedent of authorisation from Parliament by a particular process. That process of authorisation required the Governor to have referred the proposed work to the Committee,[123] the Committee to have reported on the work to the House of Assembly (or the Governor if the House of Assembly was not in session),[124] and the House of Assembly to have resolved that it was expedient to carry out the work.[125]

93 The "conditions precedent" in the original form of the legislation, concerning the process resulting in parliamentary authorisation by resolution, were altered by amendments in 1962 and 1964.[126] The process, as amended, still required the Governor to refer proposed public work to the Committee and the Committee to report to the House of Assembly (or the Governor if the House of Assembly was not in session). But the works were required to be approved by the Committee, not by a resolution of the House of Assembly. Nevertheless, any public work could be withdrawn from the operation of the Act by a resolution of each House of Parliament.[127]

94 As this legislative background and the discussion of the first two questions above shows, there are important aspects of this statutory scheme that point strongly to the duty in s 16(1) being owed exclusively to Parliament. First, the purpose of the scheme faces inwards towards Parliament: it is to ensure control by Parliament or the Committee (which is comprised of Members of the Legislative Council and House of Assembly[128]) of substantial public works and to ensure that Members of the House of Assembly were informed about those works. Secondly, as explained in relation to the first question above, and as the amendments to the

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121 *The Mercury* (Hobart), 26 November 1914 at 8.

122 Or less, in accordance with a resolution of the House of Assembly under the *Public Works Committee Act 1914* (Tas), s 17.

123 *Public Works Committee Act 1914* (Tas), s 16(2).

124 *Public Works Committee Act 1914* (Tas), s 16(4).

125 *Public Works Committee Act 1914* (Tas), s 16(5).

126 *Public Works Committee Act (No 2) 1962* (Tas), s 2; *Public Works Committee Act 1964* (Tas), s 3.

127 *Public Works Committee Act 1914* (Tas), s 15(1), read with s 16(1). This power was introduced by the *Public Works Committee Act 1919* (Tas).

128 *Public Works Committee Act 1914* (Tas), s 3(2).

Public Works Committee Act make express, the duty is owed by general government sector bodies who undertake public works. Thirdly, as explained in relation to the second question above, the duty in s 16(1) is closely related to the processes of Parliament. That close relation is reinforced by the close association of the "conditions precedent" in s 16 with the processes of Parliament.

95 These three matters are further supported by a fourth matter, which is that, unlike other provisions of the *Public Works Committee Act* which create offences and provide for the imposition of criminal penalties,[129] no express sanctions are provided by the *Public Works Committee Act* for breach of the duty in s 16(1). The powers following a breach lie with the Tasmanian Parliament and its committees. It is also arguable—and it is unnecessary to express this point any higher than one that is arguable—that the powers of the Committee in relation to a proposed public work do not always terminate after provision of a report to the House of Assembly or Governor under s 16(4). It is arguable that the duty of the Committee to report to the Governor on its proceedings before the commencement of each session of Parliament[130] might permit the Committee to exercise its substantial powers to assess whether there has been compliance with the terms of its previous report. If such power to assess compliance exists then, in producing a report under s 10, the Committee could exercise powers including: entering land (s 13), summoning witnesses (s 14), taking evidence (s 22), and engaging assessors (s 31).

96 Ultimately, the combination of the four matters above has the effect that the duty upon general government sector bodies in s 16(1) not to undertake public works unless the "conditions precedent" are satisfied is a duty owed only to Parliament. Any issues concerning breach of the duty in s 16(1) are matters that might be raised in Parliament, referred to a Parliamentary Committee or, as explained above, form the subject of further consideration by the Committee.

97 The consequences of a breach of the s 16(1) duty to Parliament might include the denial of funding for a government department or government body, including for any public work that a general government sector body has already commenced. The definition of "general government sector body" in s 15(3) includes a "State authority classified as an entity within the general government sector in the Treasurer's annual report" prepared under s 40 of the *Financial Management Act 2016* (Tas). Section 11(2) of the *Financial Management Act* denies power to any officer to draw money from the Public Account without statutory authority.

98 Although the implication to be drawn from the *Public Works Committee Act* is that the duty in s 16(1) is owed by general government sector bodies only to

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129 *Public Works Committee Act 1914* (Tas), ss 20, 21, 23, 26, 30.

130 *Public Works Committee Act 1914* (Tas), s 10.

Parliament, this does not necessarily mean that the duty is non-justiciable. That is the ultimate question raised by this appeal.

Should a court adjudicate upon an allegation of breach of s 16(1) in the present case?

99 In oral submissions in this appeal, this ultimate question posed by the first ground of appeal was repeatedly expressed as concerned with whether an allegation of breach of s 16(1) was "non-justiciable". The phrase "non-justiciable" is used in a variety of ways and in a variety of contexts. Its meaning "is far from settled, black-letter law".[131] In the present context, the expression is not used in its common sense, which is to describe a dispute that cannot "be determined on some recognized principle of law".[132] Rather, it is used to describe a matter in which a court should decline to exercise judicial power because the dispute falls within "a domain that does not belong to" the courts.[133] The issue is whether the domain of this entire dispute should be recognised as falling within the common law principle of "exclusive cognisance" of Parliament[134] so that adjudication of the dispute by a court would "assume a function that is necessarily committed to another branch of government".[135]

100 An assessment of whether the entirety of a dispute falls within the exclusive cognisance of Parliament requires answers to the three questions of statutory interpretation addressed above: (i) by whom is the duty owed; (ii) what is the nature and content of the duty; and (iii) to whom is the duty owed? The answers to these questions inform the ultimate question of whether a duty can be adjudicated upon by a court or whether that adjudication falls within the exclusive cognisance of Parliament. That ultimate question is not merely a matter of statutory interpretation. The question falls within a category described, in a related context, as one of "general constitutional principle".[136] It is therefore of no moment that the *Public Works Committee Act* does not purport, expressly or impliedly, to deprive the courts of the ability to adjudicate upon a breach of s 16(1).

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131 *Hicks v Ruddock* (2007) 156 FCR 574 at 600 [93].

132 *South Australia v Victoria* (1911) 12 CLR 667 at 708.

133 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 141; *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 370.

134 *Alley v Gillespie* (2018) 264 CLR 328 at 357-358 [108].

135 *Gerhardy v Brown* (1985) 159 CLR 70 at 139.

136 *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 258.

101 It has been observed in the Supreme Court of the United Kingdom that there have been "extensive inroads" made into areas that had traditionally been regarded as part of the "exclusive cognisance of Parliament".[137] A large step in the same direction has recently been taken in the Supreme Court of Canada.[138] In broad terms, these inroads have been made following the adoption by courts of an approach which has narrowed each of (i) the functions protected by Art 9 of the *Bill of Rights*; and (ii) the domain of Parliament protected by the broader principle of exclusive cognisance. Some commentators have argued that courts have gone too far in narrowing the domain of the exclusive cognisance of Parliament.[139] Others have urged the courts to narrow the domain further.[140]

102 In some cases it may be difficult to determine whether the matters arising for adjudication fall within the exclusive cognisance of Parliament, raising difficult questions concerning where the boundary of the exclusive domain of Parliament should be drawn. The answers to the three questions of statutory interpretation above mean that this not one of those difficult cases. As explained above: (i) the duty in s 16(1) is owed by a "general government sector body" which is an Executive body or the body politic of the State of Tasmania; (ii) the duty is one that is closely related to the processes of Parliament and, in its consideration by a court, Art 9 of the *Bill of Rights* might be infringed; and (iii) the duty is owed only to Parliament.

103 As a duty that is closely associated with the processes of Parliament, thereby raising questions concerning the application of Art 9 of the *Bill of Rights*, and also as a duty that is owed by the Executive only to Parliament, the duty in s 16(1) can comfortably be characterised as a rare case involving the "internal affairs" of Parliament.[141] The "traditional view"[142] is that Parliament's adjudication of those affairs "is not subject to review by a Court of law".[143] While it can be accepted that descriptions such as the "internal affairs" or "intra-mural activities" of Parliament

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137 *R v Chaytor* [2011] 1 AC 684 at 716 [78]; *R (Miller) v Prime Minister* [2020] AC 373 at 411 [66].

138 *Canada (Attorney General) v Power* [2024] SCC 26.

139 See, eg, Joseph, "Parliament's Attenuated Privilege of Freedom of Speech" (2010) 126 *Law Quarterly Review* 568.

140 See, eg, Lui, "Piercing the Parliamentary Veil against Judicial Review: The Case against Parliamentary Privilege" (2022) 42 *Oxford Journal of Legal Studies* 918.

141 *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 394.

142 *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 482.

143 *Osborne v The Commonwealth* (1911) 12 CLR 321 at 336. See also at 355.

involve loose language capable of including "the provision of basic supplies and services such as stationery and cleaning", and therefore capable of extending to disputes about supply of paper or employment of cleaners, the expression in the circumstances of this case invokes those activities that concern "Parliament's sovereignty as a legislative and deliberative assembly".[144]

104 There are strong justifications for the traditional view in circumstances such as these, where the duty in question is predominantly concerned with the internal affairs of Parliament and where Parliament or a committee of Parliament may have chosen to take, or not to take, action. One justification for the traditional view is the avoidance of conflict, such as by different decisions between the courts and Parliament.[145] Another is inefficiency.[146] But in some circumstances of potential concurrent institutional authority, the risk of conflicting decisions or inefficiency might be tolerated. The strongest justification for the traditional view is the corrosive effect of one branch of government assuming authority over core institutional aspects of another branch of government.[147] In such circumstances, references to "comity", "mutual restraint", "mutuality of respect", and "separation of powers"[148] describe the need for the separation, and segregation, of the exercise of power that falls within the cognisance of Parliament from the authority of the courts to exercise judicial power. As a matter concerning the internal affairs of the Tasmanian Parliament and involving a duty owed to the Parliament, this strongest justification applies to the adjudication of an allegation of breach of s 16(1) of the *Public Works Committee Act*. Mr Casimaty's claim thus falls within the exclusive cognisance of the Parliament of Tasmania.

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144 *R v Chaytor* [2011] 1 AC 684 at 713-714 [72]-[73], quoting the United Kingdom, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege—First Report* (1999) at [241], [246]-[247].

145 *Pickin v British Railways Board* [1974] AC 765 at 788; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 334; *Halden v Marks* (1995) 17 WAR 447 at 463.

146 *Leung Kwok Hung v President of the Legislative Council [No 1]* (2014) 17 HKCFAR 689 at 702-703 [30].

147 See Lock, "Parliamentary Privilege and the Courts: The Avoidance of Conflict" [1985] *Public Law* 64 at 65-66.

148 *R v Parliamentary Commissioner for Standards; Ex parte Al Fayed* [1998] 1 WLR 669 at 670; *Wilson v First County Trust Ltd [No 2]* [2004] 1 AC 816 at 840 [55]; *Buchanan v Jennings (Attorney General of New Zealand intervening)* [2005] 1 AC 115 at 117; Burnett, "Parliamentary Privilege—Liberty and Due Limitation" (2019) 24 *Judicial Review* 107 at 114 [22].

Conclusion

105 The appeal should be allowed with the first respondent to pay the appellant's costs. Orders should also be made setting aside the orders of the Full Court and, in place of those orders, ordering that the appeal from the orders of the primary judge be dismissed with costs.