

Reception issues? Check your regional settings.

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The orthodox statement of parliamentary privilege in the Australian context typically begins with a reverential recitation of Article 9 of the Bill of Rights 1689 (UK). According to the orthodox view, this establishes the core parliamentary privileges of free speech, exclusive cognizance and institutional comity for relevant purposes. Based on this argument from authority, Article 9 can be pleaded in judicial proceedings because of its certain reception into Australian law on the settlement of each of the colonies.

This position may be contrasted with the position in New Zealand, where, since Prebble,² parliamentary privilege arises by necessary implication while Article 9 is referenced as an exemplar of the wider principles undergirding parliamentary privilege. Eschewing the 'orthodox' view of Article 9 in Australian scholarship, this provocation argues for the development of an alternative, constitutionally grounded, Australian parliamentary privilege jurisprudence.

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² *Prebble v Television New Zealand Ltd* (PC) [1995] 1 AC 321, 332 (Lord Browne-Wilkinson for the Judicial Committee).

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When these ghosts of the past stand in the path of justice, clanking their mediaeval chains, the proper course for the judge is to pass through them undisturbed.

(United Australia Ltd v Barclays Bank Ltd [1941] AC 1 at 29, per Lord Atkin)

It is the nature of a federal polity that it constantly renders the organs of government, federal and State, accountable to a constitutional standard. State Parliaments in Australia, whatever their historical provenance, are not colonial legislatures. They are provided for in the Australian Constitution. To this extent, at least, they are rendered accountable to the constitutional text. Notions of unreviewable parliamentary privilege and unaccountable determination of the boundaries of that privilege which may have been apt for the sovereign British Parliament must, in the Australian context, be adapted to the entitlement to constitutional review. Federation cultivates the habit of mind which accompanies constitutional superintendence by the courts.

(Egan v Willis (1998) 195 CLR 424, at [133] per Kirby J)

Introduction

1. In the Anglo-Australian legal context, the orthodox treatment of parliamentary privilege begins with Article 9 of the *Bill of Rights 1689* (UK) (*Bill of Rights*),³ which states as follows:

That the Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament.

2. Put another way, for many scholars and practitioners, Article 9 of the *Bill of Rights* (Article 9) represents the ‘end of history’ regarding parliamentary privilege. This argument from authority has the dual advantage of the shroud of tradition and the delicious aura of antique learning. As

³ No view is expressed by the author on the 1688 vs 1689 controversy (Cf: *Commissioner of Stamps v Telegraph Investment Company Pty Ltd* (1995) 184 CLR 453, 466 (McHugh and Gummow JJ (n 43)). This is a question for further research and commentary.

reassuringly soporific as this may seem, the unquestioned acceptance of the end of history orthodoxy in an Australian context belies a significant misconception with the potential for incalculable harm. Specifically, continued fascination with a single clause of an institutional bargain, struck against the European dynastic politics of the late seventeenth century, risks failing to engage meaningfully with important implications of modern Australian constitutional sovereignty.⁴

3. Parliamentary privilege as it developed within the English common law is much richer and more dynamic than what might be termed Article 9 'reductionism'. Likewise, the *Bill of Rights* represented considerably more than a safeguard against executive retaliation towards parliamentary critics. Further, even when it was adopted, the *Bill of Rights* did not have universal Imperial application. It did not, for example, extend as a matter of course to Scotland.⁵ Nor was the re-stated post-Convention Parliament *Bill of Rights* plucked from the heavens. Indeed, modern canons of construction would require that each article of the statute (other articles also having direct relevance to parliament), be interpreted by reference to its legislative text, context and its full constitutional framework.⁶
4. Interestingly, the question of whether – and, if so, to what extent – the *Bill of Rights* (including Article 9) was inherited or received in British colonial possessions across the seas is also not settled. Colonies did not always have the same legal foundation. Some were established as naval penal settlements, some as free 'settlements', some were taken by conquest, some granted by cession. Although the process of colonial administrative development leading to responsible and representative self-government in each case followed broadly similar patterns, at the same time the process exhibited considerable variability depending on 'local conditions'.

⁴ In the specific context of the New South Wales parliament, see *Egan v Willis* (1998) 195 CLR 424, 496 (Kirby J).

⁵ While the *Claim of Right Act 1689* (Scot) is the primary instrument under which the Scottish crown was settled jointly on William and Mary, it was drafted and passed in its own legal and political context (note the Preamble that expressly objects that James II and VII had attempted to 'invade the fundamental constitution of this kingdom and altered it from a legal limited monarchy, to an arbitrary despotic power'). The equivalent provision to Article 9 states:

That for redress of all grievances and for the amending, strengthening and preserving of the laws, parliaments ought to be frequently called and allowed to sit, and the freedom of speech and debate secured to the members.

<https://www.legislation.gov.uk/aosp/1689/28/contents>. See also The Right Hon. Sir D Edward, 'Scotland's Magna Carta: The Claim of Right and the Common Law', *The UK Supreme Court Yearbook, Vol 9: 2017-2018 Legal Year*, Daniel Clarry (ed) pp. 7-12.

⁶ A point not lost on the plurality in *Egan v Willis* (1998) CLR 424, 445 (Gaudron, Gummow and Hayne JJ).

5. What is not open to doubt, however, is that colonial legislatures in the Westminster tradition were established with, and have been held to occupy, a particular constitutional role and function as a separate arm of government. In Australia's constitutional framework, this means that the legislature will be internally self-governing and directly answerable to the repositories of the sovereign power of the jurisdiction. As recently as 1986 in Australia, it was not entirely settled that this 'sovereign power' resided exclusively with the electorate⁷ Did sovereignty pass exclusively to the electorate piecemeal when each of the separate former colonies achieved responsible government? At self-government? At Federation? With the passing of the *Statute of Westminster 1931 (Imp)*? The *Statute of Westminster Adoption Act 1942 (Cth)*? Or did the passage of the *Australia Acts* in 1986 mark the terminus of an imperceptible drift towards domestic electoral sovereignty?
6. This paper argues for an Australian jurisprudence of parliamentary privilege that is both grounded in its core historic common law principles and buttressed by the Australian constitutional framework within which it operates.⁸ If constitutional sovereignty is the *grundnorm* of Australia's post-colonial settlement, any consideration of parliamentary privilege that fails to account for both its origins *and* its constitutional safeguards and guarantees is deficient at best; corrosive to the democratic legitimacy of the parliamentary institution at worst.
7. From a legal perspective, the implications that flow from locating the source of parliamentary privilege in the *Constitution* are relatively uncontroversial. From a practical and cultural perspective, however, they do present some undeniable challenges for the institution of Parliament in the Australian context, given the degree to which that institution and its stakeholders choose to define parliamentary privilege by reference to Article 9.
8. If the underlying premise of this provocation is misconceived, then the orthodox Article 9 '*reductionist*' view remains undisturbed. If, however, the alternate view-that Article 9 was not

⁷ Cf: George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26(1) Federal Law Review 1.

⁸ *Egan v Willis* (1998) 195 CLR 424, 496 (Kirby J, referencing *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319):

There are doubtless further consequences for the State Parliaments and their respective Houses, which flow from the references to them in the Australian Constitution. The elucidation of these implications must await future cases. For the present, it is enough to insist that the [New South Wales Legislative] Council should be seen as a constituent House of Parliament of a State of Australia which bears a significantly different relationship to the people governed by it than that which existed in colonial times.

received into Australian Law prior to Federation (a view advanced by Professor Enid Campbell in 1966)⁹, then consideration of parliamentary privilege in the Australian context should, as a matter of course, properly account for the *Constitution*.

9. Such a proposition is perhaps least controversial with respect to the Commonwealth parliament. As an arm of government created by the *Constitution*, it is trite to observe that parliamentary privilege at a Commonwealth level must be conformable to the requirements of that instrument. But what of parliamentary privilege at the level of State parliaments? The extract of the decision of Kirby J in *Egan v Willis* highlighted at the opening of this paper, invites the inference that the *Constitution* (and its amenability to interpretation and enforcement by Chapter III courts) has some unspecified work to do in that sphere also.
10. This is not to say that the institution of parliament is (or should be) 'accountable' to the courts. The rationale in *Prebble*¹⁰ referred to in Part I is sufficient to underscore the importance of the overriding non-interventionist ethic of mutual respect and deference (sometimes referred to as 'comity') on which the rule of law in a democratic society is based. Nevertheless, in a constitutional system of government, each arm of government must comport itself in a way that respects the relevant constitutional freedoms and limitations. Given that Chapter III courts in the Australian system of government have the peculiar responsibility of interpreting and applying the *Constitution*, any constitutionally invalid action of a State parliamentary chamber is, necessarily, subject to judicial review and remedy.
11. This paper does not attempt an exhaustive treatment of the jurisdiction of Chapter III courts to review and remedy all manner of circumstances (actual and potential) where the exercise of parliamentary privilege in a State parliamentary proceeding might fail to observe protections or limitations that arise under the *Constitution*. Rather, it suggests that State parliamentary

⁹ Enid Campbell, *Parliamentary Privilege in Australia* (Melbourne University Press, 1966) 2:

Opinions delivered by the Judicial Committee of the Privy Council during the 19th century established that English laws about parliamentary privileges were not automatically transplanted in those of Great Britain's colonies in which legislative institutions had been established. ...

It was, nonetheless, acknowledged that, by statute, houses of colonial legislatures and their members could be endowed with privileges co-extensive with those of houses of the Westminster parliament and its members, or else with privileges they would not possess at common law – notably punitive powers.

¹⁰ *Prebble v Television New Zealand Ltd* (PC) [1995] 1 AC 321, 332 (*Prebble*) (Lord Browne-Wilkinson for the Judicial Committee) '**there is a long line of authority which supports a wider principle, of which Article 9 is merely one manifestation, viz, that the courts and Parliament are both astute to recognise their respective constitutional roles.**'

proceedings may be required to conform with the *Constitution* in any relevant respect (even regarding the exercise of parliamentary privilege). Consider, for example, where the proceedings of a parliamentary committee touch on (or even compromise) the personal interests or legal rights of a witness, or institution. In such a case, if a proceeding in a State parliamentary chamber (or a committee of such a chamber) were to be conducted in a manner that was not consistent with relevant federal constitutional requirements, such conduct would be amenable to review and remedy within the jurisdiction of Chapter III courts.

12. It is not the purpose of this paper to consider in any detail what remedy (or remedies) might best be suited to such a juridical task beyond raising the necessary inference that such jurisdiction would appear to reside exclusively with Chapter III courts. This work seeks principally to stimulate greater scholarly and professional debate in an important area of jurisprudence.

Part I: Parliamentary Privilege – Sasquatch to Statute

13. The practice and theory of English common law in the 21st century still has dark, musty corners; places of obscurity and arcane knowledge, that seem impervious to the fashions and trends of law reform. Among these are various forms of legally recognised privilege, one of which is parliamentary privilege. Apart from those who are charged with exercising and defending particular types of privilege, few understand what the term means – let alone its technical import in particular areas of law.¹¹
14. The free articulation of the will of the people is neither necessary nor inevitable in any system of government. Those wielding the executive power of a sovereign state do not always take a benign view of political pluralism. Viewed from this perspective, the existence of a legally privileged space within a representative legislature is an essential (and unique) democratic counterpoint to overweening executive power. The same can of course be said about the importance of the freedom of political communication, including a free press.¹²
15. So much is relatively uncontroversial. Especially (although not always), when one refers blandly to the ‘privilege of freedom of speech and debates in Parliament’. However, when one considers the broader questions of ‘parliamentary proceedings’ referenced in Article 9 of the *Bill of Rights*, is it really the case that parliamentary ‘proceedings’ are legally privileged (i.e.:

¹¹ Gerrard Carney, ‘The power of privilege.’ (2004) 21(June) *About the House* 28.

¹² *McCloy v New South Wales* (2015) 325 ALR 15, [99]-[124] (Gageler J)

‘non-justiciable’) and beyond the scrutiny of the courts, tribunals or other ‘places out of parliament’?¹³

Privilege (and parliamentary privilege)

16. Etymologically, ‘privilege’ is an amalgam of two Latin words which, taken together, literally mean ‘private law’. The idea stems from a relatively simple proposition; ‘Your house, your rules’. Brought even closer to home, as many of us heard in youth; ‘Under my roof, I am the relevant authority’. In the context of parliament, the body of law that is referred to as ‘parliamentary law’ has a place of its own within the wider general law. It relates to matters internal to the proceedings of parliament and (where applicable) its constituent chambers. In a very real sense, this intra-mural, ‘domestic’ or customary law constitutes parliamentary privilege. As Professor Campbell observed, the term ‘parliamentary privilege’ is an omnibus label:¹⁴

... commonly used to refer to the special rights and powers possessed by individual houses of a parliament and the various protections accorded by law to members of a parliament and other participants in parliamentary proceedings. ...

The special rights, powers and immunities collectively known as parliamentary privileges, serve one essential purpose, that being to enable houses of parliament and their members to carry out their functions effectively.

17. Other legally recognised occasions or relationships of privilege are recognised in our system of law, such as in judicial proceedings,¹⁵ between a doctor and a patient, between spouses and the privilege against self-incrimination etc. There are also legally recognised classes of privileged communications including, for example those occurring in the context of a private, formally convened meeting or certain professional correspondence. In a sense, therefore, privilege involves a legally recognised right to act according to private or customary rules, separate to the general law and ordinary directions of the court.

Parliamentary privilege: An origin story.

18. As already noted, modern recitation of parliamentary privilege typically starts with Article 9. Indeed, it is often referred to as enshrining the ‘single most important parliamentary privilege’.¹⁶ And here, one cannot help but note the ambiguity, given that Article 9 clearly has

¹³ Carren Walker, ‘Parliamentary Privilege and the common law of parliament: can MP’s say what they want and get away with it?’ Conference paper, ASPG Annual Conference (27-29 September 2017).

¹⁴ Enid Campbell, *Parliamentary Privilege* (2003, Federation Press) 1.

¹⁵ Being occasions of absolute privilege (*Mann v O’Neill* (1997) 191 CLR 204, 212 (Brennan CJ, Dawson, Toohey and Gaudron JJ); 243 (Gummow J).

¹⁶ Joint Committee on Parliamentary Privilege, *Parliamentary Privilege First Report* (1999) (House of Lords Paper No 43-I, House of Commons Paper 214-I) [36].

three objects in the active tense, namely freedom in each of parliament's; 'Speech'; 'Debates'; and, 'Proceedings', and the prohibitive verbs ('questioned' or 'impeached') are applied to indefinite subject courts or places out of parliament.

19. The preamble to the *Bill of Rights* as passed by the Lords and Commons and assented to by the newly (and jointly) crowned King William III and Queen Mary II stated that it was necessary 'for the vindicating and asserting their ancient rights and liberties'. How one interprets the claim to 'ancient rights and liberties' depends to some extent on one's reading of modern European history.
20. The origins of the *Bill of Rights* are either to be found in the principled struggle for primacy between divine-right British monarchs (primarily the Stuarts) and a self-assured representative Parliament, or a soldiers' bargain (struck against the background of the Spanish Wars of Succession) between a determined military invader with an eye to the main chance and a canny political elite, more interested in international trade and religious settlement than dynastic politics.¹⁷ It was only when William and Mary threatened to leave the negotiating table (but not-one can't help but notice-leave the country) that the horse-trading and institutional posturing stopped and the resident political elite put its final written terms on the table.¹⁸
21. The history of the concept of parliamentary privilege generally neither begins nor ends with the *Bill of Rights*.¹⁹ Actions impeaching or abrogating the actual proceedings of parliament enforced by the English judiciary were, prior to the settlement of the *Bill of Rights*, relatively

¹⁷ The ambiguity of this point has been long acknowledged. For example, consider Blackstone's obfuscatory remarks in his commentaries:

It is likewise true, that at the time of the revolution, ad 1688, the lords and commons, by their own authority, and upon the summons of the Prince of Orange, (afterwards king William,) met in a convention, and therein disposed of the crown and kingdom. But it must be remembered, that this assembling was upon a like principle of necessity as at the restoration; that is, upon a full conviction that king James the Second had abdicated the government, and that the throne was thereby vacant: which supposition of the individual members was confirmed by their concurrent resolution, when they actually came together. And, in such a case as the palpable vacancy of a throne, it follows ex necessitate rei, that the form of the royal writs must be laid aside, otherwise no parliament can ever meet again.

William Blackstone, *Blackstone's Commentaries*, (1753) 1 Bl Comm 152 (1893 Ed)
https://oll.libertyfund.org/titles/2140#Blackstone_1387-01_1330.

¹⁸ Howard A Nenner, 'The convention of 1689: A Triumph of Constitutional Form' (1966) 10(4) *American Journal of Legal History* 282.

¹⁹ See Gretchen Kewley, *Report on the Imperial Acts Application Act 1922* (Report, prepared for the Legislative Assembly of Victoria, June 1975) 50.
[https://www.parliament.wa.gov.au/Parliament/commit.nsf/\(\\$lookupRelatedDocsByID\)/78480A99B1BE725D48257E670030F98B/\\$file/Report+on+The+Imperial+Acts+Application+Act+1922.pdf](https://www.parliament.wa.gov.au/Parliament/commit.nsf/($lookupRelatedDocsByID)/78480A99B1BE725D48257E670030F98B/$file/Report+on+The+Imperial+Acts+Application+Act+1922.pdf).

uncommon. This can be demonstrated by reference to the scandal and disapprobation that such actions invariably occasioned. Institutional memory of such outrages was both sharp and clear to the drafters of the *Bill of Rights*. But the possibility of such ‘impeachment’ (legal or otherwise), was nevertheless an ever-present anxiety for members of the legislature.

22. In addition to highly publicised arbitrary instances of notorious thuggery by a number of peeved monarchs and one Lord Protector, the institution of parliament was placed under peculiar institutional stress by the egregious Court of Star Chamber, leading to its eventual abolition by Charles I’s ‘Long Parliament’ in 1641.²⁰ Grudges nursed by the ruling classes about this ‘Court’ stretched back to the loathed ‘Council Learned’ which operated during the reign of Henry VII.²¹ The arcane history of the British constitution is beyond the scope of this paper, but suffice it to say that the parliamentarians who settled the text of the *Bill of Rights* generally (and Article 9 in particular), wished to enshrine their institutional powers of veto to prevent excesses of executive power and shield the intramural affairs of the parliamentary chambers from the direct scrutiny and disapprobation of the Crown and its executive agencies (including the courts).²² The *Bill of Rights* referenced aspects of parliamentary privilege to be sure, but the document cast its aspirational net rather wider than the freedom of speech.
23. In the system of government bequeathed to its Australian possessions, the Crown somewhat anomalously forms a constituent part of the larger institution of parliament.²³ Indeed, in some respects, this is the distinguishing feature of ‘Westminster’ style ‘responsible’ government. There is also the further complication that, until relatively recently, the House of Lords also served as the ultimate court of appeal (for both the courts of law and with respect to the intramural proceedings of the Lords and Commons). The final relic of the royal prerogative origins of the colonies can be seen with the continued existence of the Judicial Committee of the Privy Council (drawn from the Law Lords), which sat at the pinnacle of the Colonial Judiciary. This body still serves such a function for 32 overseas jurisdictions, just as it did for the Australian state Supreme Courts until 1986.²⁴ Clearly, the *Bill of Rights* (and Article 9 of that instrument),

²⁰ Jeremy Elkins, ‘Declarations of Rights’ (1996) 3(1) University of Chicago Law School *Roundtable* 243, 266. Cf: Thomas G. Barnes, ‘Star Chamber Mythology’ (1961) 5(1) *American Journal of Legal History* 1.

²¹ R Somerville, ‘Henry VII’s ‘Council Learned in the Law’ (1939) 54 (215) *The English Historical Review*, 427–42.

²² An aspiration that was evidently shared by their legislative contemporaries north of the Tweed.

²³ Except Victoria (*Constitution Act 1934* (Vic) s.4). *Constitution* (Cth) s.1; *Constitution Act 1902* (NSW) s.3; *Constitution Act 1867* (Qld) s.2A(1); *Constitution Act 1934* (Tas) s.10; *Constitution Act 1889* (WA) s.2(2).

²⁴ Australia Acts s11.

must be read in context. As with any such totemic artefact, unpacking the origin story requires some care.

Origins of the origin story

24. The claim or assertion of an inherent ‘privilege’²⁵ of free speech made by the Lords and Commons in the *Bill of Rights* was not novel in either 1689 or 1621. Indeed, the precise origins of this claim are difficult to discern even for the expert editorial team behind Erskine May.²⁶ The obscurity of the origins of the claim is particularly marked with respect to its assertion by the Commons House.²⁷
25. Some sources fix the origin of the privilege of free speech in the late 14th century. The acknowledged authorities most commonly cited in this respect are:
 - a) Haxey’s Case (1397);
 - b) The petition of Sir Thomas Yonge (1455);
 - c) Strode’s Case (1512);
 - d) The prayer of Sir Thomas More (1523);
 - e) The prayer of Sir Edward Coke (1593);
 - f) The notorious ‘Protestation of December 1621’; and,
 - g) *R v Eliot, Holles and Valentine* (1629) 3 St Tr 294 (*R v Eliot et al*).
26. As might be expected, the arguments made by counsel for the defence in the last (and most infamous) of these named authorities, *R v Eliot et al*, relied upon those that preceded it.²⁸

²⁵ As per the *Bill of Rights*: ‘freedom’; ‘liberty’; ‘matters and causes cognizable only in Parliament’.

²⁶ Thomas Erskine May, *Erskine May’s treatise on the law, privileges, proceedings and usage of Parliament* (Sir David Natzler KCB and Mark Hutton eds, 25th edn, online 2019) para 12.4 <https://erskinemay.parliament.uk/section/4573/freedom-of-speech/#footnote-item-1>.

²⁷ Harold Hulme, ‘The Winning of Freedom of Speech by the House of Commons’ (1956) 61(4) *The American Historical Review* Vol. 61, 825–53.

²⁸ Peter Johnston, ‘The ‘Glorious Revolution’ Down Under: Parliamentary Privilege and the Bill of Rights 1689 (UK)—Its Application in Criminal Proceedings Against Members of Parliament: England and Australia Compared’ (Research Paper No. 2013-29, Faculty of Law, University of Western Australia, September 2013) 2–4.

27. The historical basis on which the privileges that are now associated with Article 9 were traced by the *R v Eliot et al* defence counsel through the reigns of Edward III and Richard II,²⁹ Henry IV,³⁰ Henry VI,³¹ Henry VIII and Elizabeth I. A close reading of the historical authorities recited

²⁹ In the case of Richard II, more in the breach than the observance. (Cf: *Haxey's case*. A Commons petition of 1397, critical of the administration of government under Richard II drew the ire of the King. Notably, one of the clauses of this wide-ranging petition referred to the illegal, private retention of liveried soldiers by certain 'Lords' contrary to law. Presumably this was a none-too-subtle reference to the ever-present 'White Hart' emblem emblazoned on the vestments of Richard's many armed thugs apparently located in the precincts of the Royal Court. Richard demanded that Lords' discover the identity of the author of the petition. Richard's compliant House of Lords and Judges declared the petition to be treasonous and its author a traitor. Initially, the Commons refused to divulge the identity of the petition's author. The egregious Speaker of the Commons, Sir John Bussy (one of the King's 'minions' according to Henry Elsynge), acting without the approval of the Commons, informed the King that one Thomas Haxey, a clerk within the court (and who may not himself have been a member of the Commons) had authored the petition. Haxey was brought before the Lords and condemned to the death of a traitor. This sentence was commuted to imprisonment and forfeiture. See Henry Elsynge, *The Manner of Holding Parliaments in England* (Samuel Speed, 1663) 140.

³⁰ In 1399, at his first parliament, Henry IV granted Haxey's petition seeking a full and unconditional pardon and restored Haxey's forfeited property, doing so in full statutory form. Haxey's petition claimed that he had suffered '*encontre droit et la curse quel avoit este devant en parlement*' (contrary to right and to the procedure that had previously been followed in parliament). This personal petition was also supported by a second, reinforcing, petition by the Commons in similar terms but with the important distinction in the claim of right made to the relief sought, expressed as '*en contre droit et la course quel avoit este use devant en parlement, en anientiment des custumes de lez communes*' (against right and the procedure which had previously been in use in parliament, to the ruin of the customs of the commons).

Due, in part, to the different wording (and evidence of editing) on the Roll, the technical import of the quashing of Haxey's previous sentence is contentious, but it was subsequently relied upon as some authority for the proposition that freedom of speech in debates of the Commons was an ancient privilege of that House. See 'Henry IV: October 1399, Part 1' in Chris Given-Wilson, Paul Brand, Seymour Phillips, Mark Ormrod, Geoffrey Martin, Anne Curry and Rosemary Horrox (eds) *Parliament Rolls of Medieval England* ('*Parliament Rolls*') (originally published by Woodbridge, 2005) [p. iii-430], item 90, 104 British History Online <http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/october-1399-pt-1> [accessed 3 February 2021]. See also Henry IV: January 1401' in Given-Wilson et al, '*Parliament Rolls*' [p. iii-456] item 11 British History Online <http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/january-1401> [accessed 4 February 2021]. See also 'Henry IV: October 1407' in Given-Wilson et al, '*Parliament Rolls*' [p. iii-608] item 22 British History Online <http://www.british-history.ac.uk/no-series/parliament-rolls-medieval/october-1407> [accessed 4 February 2021].

³¹ Consider the petition of Sir Thomas Yonge, about whom the 1455 Appendix to the Parliamentary Rolls record:

Petition of Thomas Young, knight of the shire for Bristol in various parliaments, for recompense for his imprisonment in the Tower for things said by him in the house of commons, notwithstanding the commons' old liberty to say what they wish without challenge, charge or punishment.

Address: To the right wise and discreet commons in this present parlement assembled

Answer: The kyng wolle that the lordes of his counseill do and provyde in this partie for the seid suppliant as by there discrecions shal be thought conveyent and reasonable

See 'Henry VI: July 1455' in Given-Wilson et al, '*Parliament Rolls*' [p. v-337] appendix item 14 British History Online <http://www.british-history.ac.uk/no-series/parliament-rolls->

in *R v Eliot et al* demonstrates that parliamentary freedom of speech (both real and as asserted) during the medieval period in England was something of a moving feast. This is no small matter, given that the word 'parliament' itself suggests that it is a place (or occasion) of speech (or debate). Either parliament was a place or occasion of free speech, or it was little more than an autocratic kabuki. The desirability of either manifestation necessarily depended on whether one was wearing the crown or serving it.

28. The contextually interesting 1663 edition of *Elsynge* (first Clerk of the Restoration parliament under Charles II) provides the following terse (albeit not entirely accurate, but nevertheless insightful) summary of the emergence of the parliamentary privilege of free speech prior to the Glorious Revolution and the *Bill of Rights*:³²

That the Commons ever enjoyed those privileges, which the Speaker now petitions for, though never desired by any of the Ancient Speakers, until after the 7th year of King H[enry]. 8.

The petitions are now three, touching their Privileges, (viz.)

First, For access unto his Majesty.

Secondly, For freedom of speech.

Tirdly (sic), For freedom from Arrests. ...

The Speakers Petition for freedom of speech is not recorded, before 33 H[enry] 8 [1523] made by Thomas Moyle Speaker.

Neither was it ever denied them, for the Commons would never suffer any uncomley speeches to pass of private men in their House, much lesse of the King, or of any of the Lords.

They did oftentimes under E[dward] 3 discuss and debate amongst themselves many things concerning the Kings Prerogative. And agreed upon Petitions for Laws to be made directly against his Prerogative, As may appear by divers of the said Petitions, yet they were never interrupted in their consultations, nor received Check for the same, as may appear also by the answers of the said Petitions.

29. A sometimes-forgotten development in the story of parliamentary privilege occurred in the early years of the reign of Henry VIII in *Strode's Case*. This concerned a Cornish member of the House of Commons, one Richard Strode. In 1512 Strode proposed a Bill to address the damage done by the unscrupulous Tin barons in his constituency. After Strode tabled his remedial Bill in Westminster, Tin mine owners in his constituency prosecuted Strode in the Cornish Stannary

[medieval/october-1407](#) [accessed 8 February 2021]. In many respects, a slight textual reference made more significant by its matter-of-fact recitation.

³² *Elsynge* (n 35) 138.

Court for breaching a 'Charter of Pardon', previously issued by Henry VII to the Cornish Tin barons in 1508.³³ A Stannary Court subsequently fined Strode for his contempt of the Stannary law. When Strode refused to pay, he was imprisoned by the local magistrates 'in a dounge and a depe pytt under grounde in the Castell of Lidford'.³⁴ It will be appreciated that this disobliging accommodation had the effect of preventing Strode from attending the Commons to move the passage of his Bill.

30. Outraged, the Commons and subsequently the Lords, passed *Strode's Act* (later known as the *Privilege of Parliament Act 1512* (4 Hen 8, c.8). This Act provided that:

... *sutes accusementes condempnacions execucions fynes amerciamentes punysshmentes correccions greviances charges and impositions putte or had or here after to be put or hadde unto or uppon the said Richard **and to every other of the person or persons afore specified**, that nowe be of this present parliament **or that of any Parliament hereafter** shalbe for any bill spekyng reasonyng or declaryng of any mater or maters concernyng the parliament to be commened and treated of, **be utterly voyd and of none effecte**.*³⁵

(Emphasis added and original old English spelling retained).

31. Lest there be any doubt as to the continued relevance of this Act, it still appears on the current statute book for England and Wales in its original terms.³⁶ The status of this Act as being one of general application was also settled by the House of Lords when posthumously reversing the judgment of the Court of King's Bench in *R v Eliot et al* on 11 December 1667.³⁷
32. Claims to freedom of speech in parliamentary proceedings, being one of the core privileges of parliament, as an 'ancient right, privilege and necessity' of the Commons do appear in the records as having been asserted at the commencement of a parliament, at least as early as the reign of Elizabeth I. However, even that observation requires some context. It is certainly the case that, when presented to the Queen and Lords in February 1593 as nominee for the Speakership of the Commons, then Solicitor General Sir Edward Coke made such a claim. That

³³ Note that this was itself, in a sense, an exercise of Stannary privilege.

³⁴ As per the preamble to the eponymous *Strode's Act*.

³⁵ Emphasis added.

³⁶ *Privilege of Parliament Act 1512* (4 Hen 8, c.8) www.legislation.gov.uk/aep/Hen8/4/8/section/wrapper1 (accessed 30 March 2021).

³⁷ House of Lords Journal Volume 12: 11 December 1667 in *Journal of the House of Lords: Vol 12 1666-1675* (London, 1767-1830) 164-166 <https://www.british-history.ac.uk/lords-jrnl/vol12/pp164-166> (accessed 30 March 2021).

being said, when the Queen responded through her loyal Lord Keeper, Sir John Puckering, her Majesty replied in the following terms:³⁸

*Privilege of speech is granted, but you must know what privilege you have; not to speak every one what he listeth, or whatcometh in his brain to utter that; but your privilege is, aye or no. Wherefore, mr. Speaker, her maj.'s pleasure is, That if you perceive any idle heads, which will not stick to hazard their own estates; which will meddle with reforming the Church, and transforming the Common-wealth; and do exhibit any bills to such purpose, that you receive them not, until they be viewed and considered by those, who it is fitter should consider of such things, and can better judge of them. To your Persons **all privileges is granted, with this caveat, that under colour of this privilege, no man's ill-doings, or not performing of duties, be covered and protected.***

(Emphasis added, original old English spelling retained).

33. However one might interpret such an exchange, it hardly constitutes unequivocal recognition of an 'undoubted' institutional privilege of absolute freedom of speech (or anything else). Indeed, it is difficult to characterise the Sovereign's response as anything more than a warning. Nevertheless, it does demonstrate that, at least by the end of the 16th century there was something of a contest of ideas concerning parliamentary privilege.³⁹
34. Almost thirty years later, a remarkably similar assertion of the ancient 'privilege' was drafted for the Commons' committee by a considerably older and more experienced Sir Edward Coke. On this occasion, Coke's words were adopted by the House in an effort at asserting parliamentary privilege against claims of the divine-right monarch James I in the '*Protestation of December 1621*'.⁴⁰ This was notoriously torn from the journals of the Commons by the then Clerk of the House at the direction of James I himself.⁴¹ The Protestation stated:⁴²

³⁸ Sir Edward Coke, 'February 22, 1593' in Steve Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke* (Indianapolis: Liberty Fund, 2003) Vol. 3, 1190 https://oll.libertyfund.org/title/shepherd-selected-writings-of-sir-edward-coke-vol-iii#lf0462-03_head_006 (accessed 13 August 2020).

³⁹ Elkins (n 26). Fast-forward four hundred years of constitutional history (and the small matter of two Australian vice-regal dismissals of elected governments aside), and it is interesting to note how comprehensively the respective roles played in by Gloriana and her 'parlyament' in the theatre of 1593 have been reversed.

⁴⁰ Nicholas Handler, 'Rediscovering the Journal Clause: The Lost History of Legislative Constitutional Interpretation' (2019) 21 *University of Pennsylvania Journal of Constitutional Law* 1219, 1248.

⁴¹ James I made it clear to all in both word and deed that he had no compunction in punishing any member of parliament for speech and conduct in parliament.

⁴² Henry Hallam, *The Constitutional History of England from the Accession of Henry VII. to the Death of George II.* (London: Ward, Lock, & Co.), p. 262.

That the liberties, franchises, privileges, and jurisdictions of parliament are the ancient and undoubted birthright and inheritance of the subjects of England; and that the arduous and urgent affairs concerning the king, state, and the defence of the realm, and of the church of England, and the making and maintenance of laws, and redress of mischiefs, and grievances which daily happen within this realm, are proper subjects and matter of counsel and debate in parliament; and that in the handling and proceeding of those businesses, every member of the house hath, and of right ought to have, freedom of speech to propound, treat, reason, and bring to conclusion the same: that the commons in parliament have like liberty and freedom to treat of those matters, in such order as in their judgments shall seem fittest: and that every such member of the said house hath like freedom from all impeachment, imprisonment, and molestation (other than, by the censure of the house itself), for or concerning any bill, speaking, reasoning, or declaring of any matter or matters, touching the parliament or parliament business; and that, if any of the said members be complained of, and questioned for any thing said or done in parliament, the same is to be showed to the king, by the advice and assent of all the commons assembled in parliament, before the king give credence to any private information.

35. In many respects, the assertion that the ‘*subjects of England*’ possessed a ‘*birthright and inheritance*’, reposing in their parliament and requiring that its members should have freedom of speech, deliberation and determination in the discharge of their duty betrays a self-conscious anxiety. This is an anxiety shared by representative legislators throughout history, particularly where the coercive power of the state reposes in the hands of one or a few individuals of high rank and fragile ego.⁴³
36. Those familiar with the natural and built geography of London will appreciate that that the delights of the Tower were within view (and a short boat trip) from the Palace of Westminster when Sir Edward drafted the ‘Protestation’ for the Commons’ drafting committee.⁴⁴ Indeed, Senators of ancient Rome would recognise the same sentiments expressed (and unspoken) in the Protestation as though written by one of their own.⁴⁵ To no-one’s surprise, least of all Sir Edward himself, he was soon taking up lodgings in the Tower at His Majesty’s displeasure.

⁴³ Edward Watts, ‘Introduction: Freedom of Speech and Self-Censorship in the Roman Empire’ (2014) 92 *Revue Belge de Philologie et d’Histoire* (Belgian Review of Philosophy and History) 1, 157-166.

⁴⁴ This observation is underscored by the fact that Coke was aged 75 when, for this drafting work on the Protestation, Coke was confined in the Tower for more than six months by James I. Even this pales in comparison to the later treatment of Eliot and his co-accused. Eliot was imprisoned on three occasions between 1626 and 1632 as royal retribution for his parliamentary contributions. Ultimately, Eliot spent his three final years of life in the same Tower for his parliamentary opposition to Charles I. These outrages were not prevented by the *Privilege of Parliament Act 1603* (UK), which had been passed in the early years of James I and purported to grant a limited immunity from arrest to Members (Cf: *Re: Anglo-French Co-Operative Society* (1880) 14 ChD 533).

⁴⁵ For example, Thræsea Paetus, in Watts (n 43) 160-61.

37. In any event, the wrath of the Stuarts did not diminish with the effluxion of time. Charles I may have been less subtle than his wily father in his dealings with Parliament, but he was no less convinced of his divine right to rule the kingdom as he thought fit. The case of *R v Eliot et al* is arguably the most celebrated of the presaging controversies prior to the adoption of the *Bill of Rights* and its Article 9. As Professor Twomey explains, in this case:⁴⁶

... three Members of Parliament were prosecuted during the Reign of King Charles I for allegedly seditious statements they made in Parliament. These statements concerned complaints of illegal taxation. The Members were imprisoned in the Tower of London, where Sir John Eliot died in 1632 and the other two were detained for 11 years. In 1668 Eliot's conviction was reversed by the House of Lords, which regarded it as illegal and against the freedom and privilege of Parliament. This was reinforced in 1689 with the assertion of freedom of speech and debate in article 9 of the Bill of Rights.

38. The absolutist Lord Protector was no more enamoured of the institution of parliament and its ancient and undoubted '*liberties, franchises, privileges, and jurisdictions*' than the divine-right monarchs he fought to overthrow. Eschewing the Commons in which he once sat as a regular member, he preferred the autocratic despotism of his hand-picked divine-right commanders and a compliant Council of State.⁴⁷ Two years after Cromwell's death, the Stuarts were once again in an uneasy partnership with the ruling classes.
39. Shortly following the restoration of Charles II, the *Sedition Act 1661* (UK) (13 Car 2, c.1), at s.6 provided as follows:

... this Act or any thing therein contained shall not extend to deprive either of the Houses of Parliament or any of their Members of their just ancient Freedome and priviledge of debating any matters or busines which shall be propounded or debated in either of the said Houses or att any Conferences or Committees of both or either of the said Houses of Parliament or touching the repeal or alterac[i]on of any old or p[re]paring any new Lawes or the redressing any publique grievance but that the said Members of either of the said Houses and the Assistants of the House of Peers and every of them shall have the same freedome of speech and all other Priviledges whatsoever as they had before the making of this Act.

(Original old English spelling retained).

Origins and the Oranges

40. The realpolitik (and obvious threat of armed conquest) that underpinned the air-brushed 'Glorious Revolution' of 1688/89, does not delegitimise the subsequent characterisation of the

⁴⁶ Anne Twomey, 'Article 9 of the Bill of Rights 1688 and Its Application to Prorogation', U.K. Const. L. Blog (4th Oct. 2019) <https://ukconstitutionalaw.org/> (accessed 4 March 2021).

⁴⁷ C H Firth, 'The Court of Cromwell' (1897) 3 *The Cornhill Magazine* (15) (Sep 1897), 349.

outcome as ‘crown by contract’. Rather more literally than Locke perhaps envisaged,⁴⁸ a compact between prospective rulers and the accepted representatives of ‘consenting’ subjects was clearly hammered out between the Commons, the Lords and the non-Conquerors between November 1688 and February 1689. Tense and self-interested horse-trading that was subsequently sanitised by the set-piece ‘Convention Parliament’ of December 1689, the pre-Convention Parliament negotiations were conducted as Prince William and Princess Mary of Orange toured their ‘Glorious Revolution’ caravan around Britain to win (or at least subdue) the hearts and minds of the locals. Examination of the Lords’ copy of the Declaration of Rights on which the final *Bill of Rights* was based, reveals the unmistakable signs of drafting (and re-drafting) in the text and margins, each mark, scratch and blot bearing witness to the brokering of a deal.⁴⁹ The consequences of the invasion may not have been cheap, but it was in the relevant sense, a bargain. For the Dutch Stadtholder William in particular, a pacified (Protestant) and economically productive England was the cornerstone of his grander European policies. His joint-Sovereign, the Princess Royal Mary Stuart offered the promise of continuity together with sufficient patina of dynastic legitimacy to avoid the complete appearance of the invasion or revolution that it undoubtedly represented.⁵⁰

41. Displacing his Catholic father-in-law, James II, on the throne of England had the combined advantage of shifting the European balance of power in William’s favour in addition to settling an old score with a belligerent Louis XIV of France. The Glorious Revolution/Dutch invasion of England came at the beginning of the War of the Grand Alliance, but in many respects, it assured the ultimate demise of Louis XIV’s foreign and military policy in Europe. To be sure, the *Bill of Rights* was a big deal in every sense of the term, but a swift political settlement was definitely expedient for a commanding general with bigger fish to fry and finite military resources to ration between disparate theatres of war. The genuine legal and practical partnership of William III and Mary II in this enterprise ensured that there was a relatively durable settlement – an outcome obviously in the interests of all concerned. Except, of course, James II (and VII).
42. The Declaration and the pre-Convention Parliament ‘*Bill of Rights*’ were the acceptable terms of a negotiated settlement between a well-provisioned invader and a self-interested political

⁴⁸ John Locke, *Two Treatises of Government*, ed. Thomas Hollis (London: A. Millar et al., 1764).
<https://oll.libertyfund.org/title/hollis-the-two-treatises-of-civil-government-hollis-ed>.

⁴⁹ <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections1/collections-glorious-revolution/draftdeclaration/>

⁵⁰ Nenner (n 24) 282.

elite.⁵¹ At least in the context of England and Wales, the *Bill of Rights* generally (and perhaps Article 9 in particular), gave unequivocal legal recognition to and institutional acceptance of parliamentary privilege. This moment of acceptance and agreement was significant, not because of the pageantry of the Convention Parliament, or in bringing parliamentary privilege into being, but because of the long prior history of institutional tension and conflict between (and among) the various arms of government that had been effectively acknowledged, if not positively resolved.⁵²

43. Professor Campbell eloquently observed in her seminal Australian work on parliamentary privilege that it is impossible to disambiguate the historical development of parliamentary privilege in Westminster on the one hand from the gradual emergence, institutionalisation and eventual pre-eminence of the Commons within the English royal court on the other. What Coke described as ‘prescription’ in this context serves as shorthand for a long slow process begun prior to the Norman Conquest whereby representatives of the shires, hundreds and boroughs were summoned by the crown to great assemblies to make and advertise decisions requiring common consent which gradually transformed into a self-governing and integral institution capable of granting or withholding legislative legitimacy to the Crown itself.⁵³

Parliamentary Privilege in Westminster and beyond

44. Responsible legislatures, modelled on Westminster, as established in the Australian colonies were brought into existence relatively fully formed and with none of the obscurity surrounding the origins of the Imperial parliament. Invariably, there were founding instruments – usually constitutions owing their provenance, if not their actual terms, to an Imperial statute. As for specific privileges (including those associated with Article 9), according to Professor Campbell:⁵⁴

Members of Colonial legislatures, even in those colonies in which the laws of England applied ipso vigore, were not, as we have seen, entitled as of right to the privileges

⁵¹ Steve Pincus, *1688: The First Modern Revolution* (Yale University Press, 2009), 221-302.

⁵² As with all legislative measures, at subsequent points of institutional tension it was left to the courts to resolve outstanding questions relating to the terms and effect of the settled text.

⁵³ Enid Campbell, *Parliamentary Privilege in Australia* (Melbourne University Press, 1966) 3-6.

⁵⁴ *Ibid* 29. Cf Campbell (n 11) 2:

Opinions delivered by the Judicial Committee of the Privy Council during the 19th century established that English laws about parliamentary privileges were not automatically transplanted in those of Great Britain’s colonies in which legislative institutions had been established. ...

It was, nonetheless, acknowledged that, by statute, houses of colonial legislatures and their members could be endowed with privileges co-extensive with those of houses of the Westminster parliament and its members, or else with privileges they would not possess at common law – notably punitive powers.

enjoyed by members of the British Parliament. In England, freedom of speech and debate in parliament was guaranteed by statute, but the relevant statutes were of purely local application and as such were not applicable to newly settled colonies. Nevertheless, freedom of speech usually was permitted to members of colonial assemblies, and in modern times it has been held to be one of the privileges which they should enjoy on the general principle of reasonable necessity.

45. Notwithstanding Professor Campbell's scholarly circumscription, in an Australian context, Article 9 is often emphatically referenced as an axiomatic, absolute, self-regarding and legally binding Imperial statute having full force and effect.⁵⁵ On closer inspection, however, this is not the universal juridical treatment of Article 9.⁵⁶ In a number of former colonial common law jurisdictions, the status of the *Bill of Rights*, including Article 9 has been more enigmatic, given the 'subordinate'⁵⁷ nature of the former colonial legislatures.⁵⁸ The approach adopted by some authorities has been to focus on the connotation of parliamentary privilege as a species of customary law within the common law and refer where necessary to Article 9 in terms of the institutional settlement it represents.⁵⁹
46. Accordingly, with respect to parliamentary privilege in an Australian (federal) context, some care is required in laying down a domestic jurisprudence of the privilege. It may be that Article 9 is a sacred keystone of Westminster-based parliamentary privilege, somehow received into Australian colonial or post-federation law. Alternatively, Article 9 might be an arcane shorthand for core elements of common law parliamentary privilege as an essential and integral

⁵⁵ See for example Law Reform Committee of South Australia, '*Relating to the Inherited Imperial Law and Constitutional Statutes*' (Report No 96, 1985) [25] '[T]his is the most famous Bill of Rights, which is certainly in force in South Australia' <https://law.adelaide.edu.au/system/files/2019-02/96-Inherited-Imperial-Law-and-Constitutional-Statutes.pdf>.

⁵⁶ Jeremy Finn, 'The Imperial Laws Application Act 1988' (1989) 4 *Canterbury Law Review* 93, 93-95.

⁵⁷ *Attorney General (WA) v Marquet* (2003) 217 CLR 545, 569 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁵⁸ *Case 15 – Anonymous* (1722) 2 P Wms 75; 24 ER 646 (PC); *Kielley v Carson* (1842) 4 Moo PC 63; *Fenton v Hampton* (1858) 11 Moo PC 347; 14 ER 727; *Doyle v Falconer* (1866) 16 ER 293; *Barton v Taylor* (1886) 11 App Cas 197; *Fielding v Thomas* [1896] AC 600; (cf *Cooper v Stuart* (1889) 14 App Cas 286; *Quan Yick v Hinds* (1905) 2 CLR 345). See also *Landers v Woodworth* (1878) 2 SCR 158; *New Brunswick Broadcasting Corp v Nova Scotia (Speaker of House of Assembly)* (1993) 100 DLR (4th) 212. See also Christopher English, 'Newfoundland's Early Laws and Legal Institutions: From Fishing Admirals to the Supreme Court of Judicature in 1791-92' (1995) 23 *Manitoba Law Journal* 55, 71-74; Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stephens & Sons, 1966) 544-547; Hon. Mr Justice BH McPherson, 'The Mystery of Anonymous (1722)' 75 *Australian Law Journal* 169.

⁵⁹ *Egan v Willis* (1998) 195 CLR 424, 462 (per McHugh J). Cf 445 (Gaudron, Gummow and Hayne JJ), 488-493 (Kirby J), 509 (Callinan J).

component of our constitutional democracy.⁶⁰ While both readings are possible, some clarity and certainty is, surely, warranted regarding one of the central principles of the federal constitutional democratic settlement.⁶¹

47. It is settled that, for the judicial system and the institution of parliament to operate in a constitutionally compatible manner, each should respect the constitutional role and function of the other and, as far as possible, mind its own constitutional business. This point was made more directly by Sir Gerard Brennan⁶² when considering the question of Constitutional amendment as follows:⁶³

Although in recent times most attention has been given to the control of executive power, the Parliament remains the organ of government which is constitutionally central to our form of government. The Constitution made the Houses of Parliament the masters of their own powers, privileges and immunities and of the mode in which those powers, privileges and immunities might be exercised and upheld. No change in these provisions would be consistent with the maintenance of the Westminster system. The powers, privileges and immunities of the Houses of Parliament are the constitutional underpinning of the system of responsible government for they ensure that the manner in which the people's forum exercises its constitutional functions is immune from interference by either the executive or the judicial branch of government.

48. This principle of institutional 'comity' between the branches of government is occasionally put to extreme tests, but the importance (and resilience) of the general principle over time should not be underestimated. The most often quoted expression of how the general principle operates in practice in our system of law is that adopted by the High Court (itself repeating the formula expressed in the *Sheriff of Middlesex Case*)⁶⁴ as affirmed in *Stockdale v Hansard* (***Stockdale***)⁶⁵ and approved in *Bradlaugh v Grossett* (***Bradlaugh***):⁶⁶

⁶⁰ Johnston (n 34) 2; New South Wales Legislative Council Practice, Parliament of New South Wales, *Parliamentary Privilege: Immunities and Powers of the House* (Chapter 3).

⁶¹ Insightful Australian writers find forms of words calculated to elide past this issue in a manner that causes least offence to adherents of either view. See Tim Begbie, *Parliamentary Privilege* (Australian Government Solicitor, Legal Briefing No 95, 26 June 2012) 2.

⁶² AC, KBE, former Chief Justice of Australia.

⁶³ Sir Gerard Brennan, 'The Parliament, the Executive and the Courts: Roles and Immunities' (1997) 9(2) *Bond Law Review* 136, 145.

⁶⁴ [1840] EngR 360; (1840) 11 Ad & E 273 [113 ER 419].

⁶⁵ (1839) 9 Ad & El 1.

⁶⁶ (1884) 12 QBD 271.

*it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.*⁶⁷

49. This formula is held to govern the two relevant constitutional principles underpinning parliamentary privilege; namely, freedom of speech and ‘exclusive’ cognisance. It is worth noting here that this formula was itself adapted from earlier cases touching on the Royal prerogative. Early seventeenth-century cases established that while the courts could determine the existence and extent of a prerogative power they could not question or review the manner in which a prerogative power had been exercised.⁶⁸ It is no coincidence that this parallel jurisprudence also bears the hallmarks of one Sir Edward Coke, in that context, sitting as Chief Justice.⁶⁹ No one knew how to turn a personal grudge into a fine question of law like Sir Edward.⁷⁰

Part II: Colonial (and Federal) Reception of Parliamentary Privilege

50. The conflation of parliamentary privilege and Article 9 is so commonplace as to appear axiomatic. After referencing Article 9, it is thereafter orthodox to present a sequence of logical constitutional imperatives that necessarily arise from its terms.⁷¹ For such a proposition to hold true, it must of course be accepted that the *Bill of Rights* generally (or Article 9 in particular) is indeed the touchstone of parliamentary privilege *and* that the *Bill of Rights* was received into the Australian colonies either at the point of settlement, or some ascertainable date thereafter.
51. As explained above, there is significant uncertainty about either premise. This uncertainty revolves around the question of reception of English law in Australia.

⁶⁷ *R v Richards; Ex Parte Fitzpatrick & Browne* (1955) 92 CLR 157, 162 (Dixon CJ for the court).

⁶⁸ Thomas Poole ‘United Kingdom: The royal prerogative’ (2010) 8(1) *International Journal of Constitutional Law*, 146; *Prohibitions del Roy* (1607) 12 Co. Rep. 63; *Case of Proclamations* [1611] 12 Co Rep 74, 76 (‘The King hath no prerogative, but that which the law of the land allows him.’).

⁶⁹ R.A. MacKay, ‘Coke – Parliamentary Sovereignty or the Supremacy of the Law’ (1924) 22(3) *Michigan Law Review* 215.

⁷⁰ Jesse Norman ‘The Winding Stair’ (2023) Biteback Publishing, UK.

⁷¹ E.g. the Constitution. In conjunction with cl 49 of the Constitution, see Parliament of Australia, ‘Chapter 2’, *Oggers’ Australian Senate Practice* (14th ed); Parliament of Australia, ‘Chapter 2’, *House of Representatives Practice* (7th ed); Queensland Government, *Queensland Parliamentary Procedures Handbook* (Chapter 18); New South Wales Legislative Council, Parliament of New South Wales *Parliamentary Privilege in New South Wales* (Part Two, 1.4); New South Wales Legislative Council Practice, Parliament of New South Wales, *Parliamentary Privilege: Immunities and Powers of the House* (Chapter 3).

52. At the time of the settlement of New South Wales, the accepted view as to the reception of English law into a new colony was that put by Blackstone as follows:⁷²

For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; ... What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother-country.

53. It will be readily appreciated that Blackstone's test for 'reception' of English law in a colony articulated in the foregoing passage is deviously flexible.⁷³
54. The legal systems applicable to the colonies of Australia and New Zealand (as was the case previously in the British North American possessions) were established in reliance on the prerogative right of the British crown articulated by Blackstone above, with or without the sanction of Parliament.⁷⁴ Given that Blackstone's settlement rationale was subsequently relied upon as a legal justification for the dispossession of first nations people in many of the places in which the principle was put into practice by the British navy on behalf of the Crown, it is not uncontroversial.⁷⁵ However, such considerations are beyond the scope of a paper exploring the origins of parliamentary privilege in Australia.
55. The prerogative power of the Crown to legislate for a colony was explained in the High Court *Seas and Submerged Lands Case*, by Stephen J as follows:⁷⁶

The effect of self government upon the prerogative in the case of the prerogative to legislate is instanced in the case of Malta. There the grant of responsible government,

⁷² William Blackstone, *Blackstone's Commentaries*, (1753) 1 Bl Comm 107 (1893 Ed) https://oll.libertyfund.org/titles/2140#Blackstone_1387-01_1330; Alex C. Castles, 'The Reception and Status of English Law in Australia' (1963) 2(1) *Adelaide Law Review* 1

⁷³ Gerrard Carney, *The Constitutional Systems of the Australian States and Territories* (2006, Cambridge University Press) 136-147; J.E. Cote, 'The Reception of English Law' (1977) 15 *Alberta Law Review* 29; Peter M McDermott, 'Imperial Statutes in Australia and New Zealand' (1990) 2(2) *Bond Law Review* 162.

⁷⁴ English (n 64) 71-74.

⁷⁵ *Case 15 – Anonymous* (1722) 2 P Wms 75; 24 ER 646 (PC); Ulla Secher 'The Mabo Decision - Preserving the Distinction between Settled and Conquered or Ceded Territories' (2005) 24(1) *University of Queensland Law Journal* 35.

⁷⁶ *NSW v Commonwealth* (1975) 135 CLR 337, 440.

flowing from the grant to a local legislature of the power to legislate, with the Governor's assent, concerning most of the internal affairs of that island, had the effect of suspending, pro tanto, the exercise of the Imperial royal prerogative to legislate (Sammut v. Strickland (1938) AC 678). So too in the case of the Australian colonies; to the extent of the powers conferred upon the new responsible governments, the corresponding royal prerogatives residing in the Imperial Crown were suspended, never in fact to be revived. They were replaced by corresponding royal prerogatives of the Crown in right of the colony in question, exercisable by the Governor upon the advice of his colonial Ministers. The creation of the several Australian colonies did not abrogate that which the settlers had brought with them, namely 'all the common law relating to the rights and prerogatives of the Sovereign in his capacity as head of the Realm...' Instead it 'continued in force as law of the respective Colonies applicable to the Sovereign as their head' (R v Kidman (1915) 20 CLR 425, 435-36 (Griffith J) (Kidman's Case)). So it is that prerogatives in the nature of proprietary rights which arose 'by virtue of the King being the supreme executive authority of a particular territorial unit possessed of self government are also held by the Crown in right of that particular territorial unit or political entity' (the Butterworth Case, per Long Innes C.J. in Eq. (1938) 38 SR (NSW) 244, 440).

56. Prior to the establishment of a representative legislature in any colony, there is little to suggest that the *Bill of Rights* either generally or specifically with reference to Article 9 would in any sense, be 'applicable to their own situation and the condition of an infant colony'.⁷⁷ Further, even after the establishment of self-government in a colony, as Blackstone noted:

What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother-country.

57. This is no point of arcane 18th century legal theory, given that the same legislative constraints were enshrined in the *Colonial Laws Validity Act 1865* (Imp),⁷⁸ an Act which was not repealed with respect to the former Australian Colonies until the passing of the *Australia Acts* of 1986.
58. It is clear that, having been established firstly as penal or crown colonies, using Blackstone's contemporaneous taxonomy, the only laws of direct application, including for the Australian

⁷⁷ *Kielley v Carson* (1842) 4 Moo PC 63 at 84-85. Cf Carney (n 78) 140:

'Fundamental statutes such as the *Magna Carta*, the *Bill of Rights 1689*, and the *Act of Settlement 1701* are also regarded as being inherited as at 1828.' (relying on *Smith v the Queen* (1991) 25 NSWLR 1, 13 (Kirby P)).

However, His Honour there relied on the 'preservation' of the *Bill of Rights* declared by *Imperial Acts Application Act 1969* (NSW) s 6. Little turns on this point for present purposes, however, as Kirby P may be understood to infer (by reference to the discussion of Article 11 of the *Bill of Rights*), the *Bill of Rights* in a number of respects declared 'the ancient common law of England' (at 14).

⁷⁸ Section 24.

colonies, were those that *'were applicable to their own situation and the condition of an infant colony'*. At settlement, there was initially no local legislature to which the *Bill of Rights* could be *'applicable'* in the relevant sense. It is not apparent how the settlement of the date of reception by statute to a date on which there was no parliamentary institution in the relevant colony raises a necessary implication that the *Bill of Rights* was thereby received into the relevant colony.⁷⁹

59. Even if it was the case that Article 9 had somehow been *'received'* into the colony, it is difficult to square the prohibitions of its text with such expressly binding Imperial limitations to the effect that any subsequently established colonial legislature was *'subject to the revision and control of the king [or queen] in council'*. Always with the overriding contingency that, *'the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of Westminster'*. The Crown in council and the superintending power of Westminster were clearly the ultimate (and a constitutionally) regular *'place out of'* the colonial legislatures with the power to question, impeach, *'new-model'* or *'reform'* all matters touching on their speeches, debates and proceedings.
60. By way of one much referenced illustration, note that by the *'Instructions'* to the Governor of Newfoundland executed on 26 July 1832, William IV advised:⁸⁰

You are to permit the members of our said Council to have and enjoy freedom of debate and vote in all affairs of public concern that may be submitted to their consideration in Council.

61. While the convocation in Newfoundland of a Legislative Assembly was provided for in the Letters Patent, Instructions and Advice to Governor Cochrane (and in the subsequent *Newfoundland Act 1832 (Imp)*),⁸¹ no equivalent regal indulgence was expressly extended to that body. For clarity, it should be noted that the Instructions do envisage that the local legislature comprising *'the Governor, Council and Assembly'*⁸² so the distinction does not appear to have been accidental.

⁷⁹ Campbell (n 59) 1; Kewley (n 25) 51; The Law Reform Commission of Western Australia, *United Kingdom Statutes in Force in Western Australia* (Project No 75, October 1994) 92 <https://www.lrc.justice.wa.gov.au/files/P75-R.pdf>.

⁸⁰ At [5]. The author acknowledges the generous assistance of the professional staff of the Parliamentary Information and Research Service in the Library of Parliament, Canada for the reference material on which this analysis was based.

⁸¹ As enacted 7 August 1832.

⁸² *Newfoundland Act 1832 (Imp)* [12].

62. By 1842 a controversy in the Newfoundland Assembly had arisen from an alleged breach of parliamentary privilege and related contempt proceedings. This involved allegations of mismanagement against the colony's surgeon (Kielley) during Assembly proceedings by an Assembly Member (Kent). The subsequent acrimony resulted in the exchange of threats, a privileges inquiry, summons, admonition, imprisonment by order of the Assembly, a successful habeas corpus writ and an appeal for redress against the Speaker of the Assembly (Carson) to the Privy Council.⁸³ It was in this context that the Privy Council was asked to pronounce on the status, powers and privileges of colonial legislatures. Baron Parke, for the Privy Council observed:⁸⁴

*It is said, however, that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the Common Law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one.*

63. In finding that subordinate legislatures do not derive their privileges from the same sources His Lordship further stated:⁸⁵

... we decide according to the principle of the Common Law, that the House of Assembly have not the power contended for. They are a local Legislature, with every power reasonably necessary for the proper exercise of their functions and duties, but they have not what they have erroneously supposed themselves to possess – the same exclusive privileges which the ancient Law of England has annexed to the House of Parliament.

64. It is worth recalling that in an Australian context, a similarly acrimonious colonial dispute arose from the proceedings of the Legislative Council of Van Diemen's Land relatively soon after the judgment in *Kielley v Carson*. In a series of unanimous decisions, the Judicial Committee of the Privy Council hearing the appeal case of *Fenton v Hampton*⁸⁶ upheld and confirmed the general application of the principles articulated in *Kielley v Carson* to British dominions across the seas.⁸⁷

⁸³ *Kielley v Carson* [1842] 4 Moo PC 63; (1842) 12 ER 225.

⁸⁴ *Ibid* (235).

⁸⁵ At 92 (236). See also *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 569 [64]-[65] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁸⁶ (1858) 11 Moo PC 347; 14 ER 727.

⁸⁷ See also *Chenard v Arissol* [1949] AC 127 at 133-134.

65. Clearly, then, the dates of reception (established in either the *Australian Courts Act 1828* (Imp),⁸⁸ or by colonial or State legislation)⁸⁹ provide a weak basis to claim the reception of either English common law relevant to parliamentary privilege,⁹⁰ or the historical English statutory provisions⁹¹ referred to above that bear on parliamentary privilege, including the *Bill of Rights*.⁹² This is because, even where a date of reception is settled by statute, these dates anticipated the introduction of representative legislatures within the relevant colony by years-or in some cases, decades.
66. Reception of English enacted law into the colonies has been the subject of extensive scholarship. The weight of this body of authority suggests that English law in a sense ‘flowed’ into the colonies as far as it was reasonably necessary and adapted to the particular circumstances of the colony. Scholarship is less clear about the notion of a ‘lock-in’ date for the reception of unenacted common law. This leaves open the possibility (if not the likelihood), that a correct view is that the reception of unenacted law into a colony was not static.⁹³
67. On the other hand, it appears that the reception of enacted law (including the *Bill of Rights*), depended very much on the intersection of the applicable circumstances of the relevant colony at the date of reception and the content of the statute book relevant to those applicable circumstances at that date.⁹⁴ What Griffith CJ referred to in *Quan Yick v Hinds* (1905), as the ‘condition of the laws and institutions of the Colony pertaining on the relevant date of reception’.⁹⁵ At the relevant reception dates established for each of the Australian colonies, there was no comparable representative legislature to which parliamentary privilege might require adapting to ‘*the particular circumstances of the colony*’.⁹⁶

⁸⁸ For New South Wales and Tasmania, s 24 (as enacted 25 July 1828); for Victoria the *Victorian Constitution Act 1855* (Vic) s 40; for Queensland the *Queensland Supreme Court Act 1867* (Qld) s 20.

⁸⁹ For Western Australia (founded 1 June 1829) the *Interpretation Act 1918* (WA) s 43 (now the *Interpretation Act 1984* (WA) s 73); for South Australia (founded 28 December 1836) *Acts Interpretation Act 1915* (SA) s 48.

⁹⁰ Castles (n 77) 5-13.

⁹¹ Ibid, 13-31.

⁹² Campbell (n 59) 1; Kewley (n 25), 51; The Law Reform Commission of Western Australia, *United Kingdom Statutes in Force in Western Australia* (Project No 75, October 1994) 92 <https://www.lrc.justice.wa.gov.au/files/P75-R.pdf>.

⁹³ Castles (n 77) 5-11; Cote (n 71) 55-57; McDermott (n 71).

⁹⁴ McDermott (n 71); Cote (n 71) 53-55.

⁹⁵ *Quan Yick v Hinds* (1905) 2 CLR 345, 356 (emphasis added).

⁹⁶ Kewley (n 25), 51:

68. After the date of reception, only those statutes that were expressed by the Imperial parliament to apply to the colony '*proprio vigore*' (or were explicitly adopted into the law of the colony by the local legislature had force in the colony).⁹⁷ While this point has been the subject of some judicial commentary in the context of the reception of the *Bill of Rights* into Australian law, the only such commentary suggesting that reception was effectuated relates directly to Article 4 and the taxation power.⁹⁸ While the taxation power appears to have been exercised in the various colonies from the earliest days of colonisation, given that the principles on which the relevant case turned were constitutional in nature, this provides weak support for the proposition that the *Bill of Rights* generally was received at the point of colonisation.
69. The least equivocal scholarly pronouncement on this question remains that of Professor Campbell, writing in 1966:⁹⁹

When the Australian colonies were settled, they received so much of the law of England then in force as was reasonably capable of being applied under local conditions. But the laws so received did not include any part of the British domestic law relating to parliamentary privilege ... Although the privileges of the legislatures of the overseas dominions resemble the privileges of the British Houses of Parliament,

Only if Acts could be applied in New South Wales in 1828, can they be said to have become part of the law of the new colony by virtue of s.24 of [the *Australian Courts Act 1828* (Imp)]. The New South Wales Law Reform Commission expressed doubt whether the Acts of 1512, 1603, 1737 and 1770 were ever applicable in that State.

Cf: In *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* [2002] 2 QdR 8, per McPherson JA at [21]:

There is no doubt that art.9 of the Bill of Rights has always formed part of the law of Queensland. Unlike some other Australian States, Queensland came into existence as a separate entity in 1859 with a representative form of Parliamentary government of which the Bill of Rights was immediately capable of being attracted.

This observation is problematic, given that Queensland was separated from the pre-existing colony of New South Wales by letters patent rather than having been '*settled*'. Accordingly, the relevant reception date for the new colony had already passed prior to the passing of the *Constitution Act 1867*. The comment of McPherson JA above does not reference a source of authority as a basis upon which the proposition is made. Importantly, these comments predate both *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 and *Kirk v Industrial Relations Commission* (2010) 239 CLR 531. Despite this lack of authority, McPherson JA's comments appear to have received some endorsement by the majority in *Crime and Corruption Commission v Carne* [2023] HCA 28 (13 September 2023) (Kiefel CJ, Gageler and Jagot JJ) at [30].

⁹⁷ Castles, (n 77) 26-31; Cote (n 91) 31-37. See *Imperial Acts Adopting Ordinance 1867* (WA) at s 1.

⁹⁸ *Egan v Willis* (1998) 195 CLR 424 [129] '*the Bill of Rights is part of the constitutional heritage of Australia. It came with those who established the colonies. It applied in the colonies by medium of imperial law, except so far as later altered or repealed by valid local statute.*' (Kirby J, referring to *Commissioner of Stamps v Telegraph Investment Company Pty Ltd* (1995) 184 CLR 453, 466 (McHugh and Gummow JJ)).

⁹⁹ Campbell (n 59) 22-23.

especially those of the House of Commons, in no case do they depend upon the inheritance of English [enacted] law.

70. It is significant also that, when colonial Australian legislatures finally legislated for the privileges of their parliamentary chambers, the formula adopted was in similar terms:

Victoria

*It shall be lawful for the Legislature of Victoria by any Act or Acts to define the privileges immunities and powers to be held enjoyed and exercised by the Council and Assembly and by the members thereof respectively Provided that no such privileges immunities or powers shall exceed those now held enjoyed and exercised by the Commons House of Parliament or the Members thereof.*¹⁰⁰

Western Australia

The Legislative Council and Legislative Assembly of Western Australia, and their members and committees, have and may exercise —

- (a) *the privileges, immunities and powers set out in this Act; and*
- (b) *to the extent that they are not inconsistent with this Act, the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989.*¹⁰¹

Commonwealth:

*The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.*¹⁰²

71. The significance of these, and similar, recitations has been the subject of judicial commentary over the years. While the respective legislative formulae give the appearance of declaring the reception and applicability of the common law relating to parliamentary privilege (and to give a degree of codification to such common law privileges), it is not clear that they were either intended to, or have the effect of adopting or importing any statutory provision (including the *Bill of Rights*) into the domestic law of the relevant jurisdictions.¹⁰³ As indicated above, with

¹⁰⁰ *Victorian Constitution Act 1855* (UK), later repealed by the *Constitution Act 1975* (Vic) s 19, in similar terms.

¹⁰¹ *Parliamentary Privileges Act 1891* (WA).

¹⁰² Constitution s 49.

¹⁰³ Cf *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 466 (McHugh and Gummow JJ) in the context of Article 4 and taxation:

respect to Victoria, despite the foregoing constitutional provision, the 1975 Kewley Report to the Legislative Assembly of Victoria (building on the 1922 Cussen Report) expressed doubts about the reception into that State of English parliamentary privilege statutes predating 1828.¹⁰⁴ In 1994, the Western Australian Law Reform Commission having specific regard to provision reproduced above, nevertheless observed that:¹⁰⁵

This provision incorporates such of the privileges, immunities and powers conferred by the following statutes that are in force in the United Kingdom, that is, the statutes of [various privilege related statutes] and Article 9 of the Bill of Rights 1688. Repealing them in Western Australia would not affect this incorporation. In any case, the statutes might not have been inherited when the colony of Western Australia was founded because they were not reasonably capable of being applied under local conditions, there being no local legislature.

(Emphasis added).

72. In the context of Western Australia, this reasonable scholarly circumspection about the question of common law versus statutory reception of parliamentary privilege has not, subsequently been judicially settled. The full court of the Western Australian Supreme Court decision in *Aboriginal Legal Service of Western Australia Inc v State of Western Australia*¹⁰⁶ held that the Western Australian legislation, read in light of the State Constitutional provision authorising its passage, was the relevant source of the privilege.¹⁰⁷ The judgement of

In the eastern colonies of Australia where s 24 of the Australian Courts Act 1828 (Imp) applied, the Bill of Rights was a statute in force 'within the realm of England' in 1828, and, as such, applied except so far as later altered by local statute. In 1828, what became the colonies of Victoria and Queensland formed part of New South Wales and the Australian Courts Act applied directly to what was then Van Diemen's Land. On the other hand, in South Australia and Western Australia, it appears simply to have been regarded as axiomatic from the beginnings of European occupation that a statute such as the *Bill of Rights* would apply under the common law principles on the reception of law in settled colonies.

¹⁰⁴ Kewley (n 25) 51.

¹⁰⁵ The Law Reform Commission of Western Australia, *United Kingdom Statutes in Force in Western Australia* (Project No 75, October 1994) 92 <https://www.lrc.justice.wa.gov.au/_files/P75-R.pdf>.

¹⁰⁶ (1993) 9 WAR 297 (Rowland, Nicholson and Walsh JJ).

¹⁰⁷ *Ibid* 305 (Rowland J):

The extent of the powers, privileges and immunities enjoyed by the House of Commons from time to time are founded on usage, custom and statute. To the extent that they are said to arise by statute, the courts will exercise jurisdiction to decide whether the statute authorises the privilege claimed. In Western Australia the grant of privilege is wholly by statute. The *Parliamentary Privileges Act 1891* (WA), whereby those powers and privileges are given to the Houses in this State, contain those powers and privileges. They include the powers and privileges enjoyed by the Commons, except to the extent limited by the proviso to s 1. This Court has jurisdiction, in my opinion, to construe the Act so as to ascertain the extent of such powers and privileges, and their manner of exercise if it be governed by the statute.

Nicholson J in this case provides an exemplar of a constitutionally grounded approach to State parliamentary privilege controversies deserving of greater currency.¹⁰⁸

73. In *Halden & Anor v Marks & Ors*,¹⁰⁹ the issue of the proper connotation of *Parliamentary Privileges Act 1891* (WA) s.1 was pressed on Steytler J, sitting alone, hearing an interim injunction application, by intervening counsel for the President of the Legislative Council of Western Australia (appearing by leave). Referenced in His Honour's judgement are submissions made to the court on behalf of the President of the Legislative Council.¹¹⁰ The Court's transcript of proceedings demonstrates that this matter was well ventilated in oral argument by counsel on all sides.¹¹¹ On appeal to the full court of the Western Australian Supreme Court, an outline of submissions on behalf of the President of the Legislative Council relevantly stated:¹¹²

Article 9 of the Bill of Rights 1688 confers privileges which are applicable to the Legislative Council and its members by virtue of s.1 of the Parliamentary Privileges Act 1891 (WA) and which are privileges of the Parliament as a whole

74. It can be appreciated that this submission was not that the *Bill of Rights* was received into Western Australian law in statutory form, but rather, that the privileges *represented* in the English statute were made applicable in Western Australia by virtue of the relevant Western Australian constitutional and statutory provisions.
75. Consistent with this submission, Steytler J noted that, as between the parties:

It is not in dispute that one of the privileges or immunities enjoyed by the bodies and persons referred to is that provided by Article 9 of the Bill of Rights.

76. His Honour's choice of language was clearly deliberate. The agreed contention of the parties was that the privileges referred to in the Western Australian statute are inclusive of that expressed in Article 9. While this is consistent with the reception of parliamentary privilege at common law, it is not declaratory of the reception of the *Bill of Rights*.¹¹³ The Full Court of the

¹⁰⁸ Ibid 310-15 (Nicholson J).

¹⁰⁹ [1995] WASC 346 (10 July 1995) at 14.

¹¹⁰ Ibid 20.

¹¹¹ Transcript of Proceedings, *Halden & Anor v Marks & Ors* (Supreme Court of Western Australia, Steytler J 5 July 1995).

¹¹² Respondent, 'Outline of Submissions', Submission in *Halden & Anor v Marks & Ors*, 26 July 1995, [11] referencing *Sankey v Whitlam* (1978) 142 CLR 1, 36-37 and *Prebble v Television New Zealand Ltd* (PC) [1995] 1 AC 321, 335.

¹¹³ Further, as has been explained above, the *Bill of Rights* is a statute of the English parliament. As noted by Steytler J, at 14, the original text of the *Parliamentary Privileges Act 1891* (WA) s1 refers to '*the Commons House of parliament of Great Britain and Ireland*'.

Western Australian Supreme Court, on appeal from Steytler J, ultimately found that the question of privilege did not arise for determination. The court did, however, essentially echo the indirect formula adopted above by both Steytler J and as articulated in the submission to which His Honour referred extracted above in the following obiter remarks:¹¹⁴

For present purposes, it is accepted that the privilege with which this case is concerned is that defined in Art 9 of the Bill of Rights, made applicable in Western Australia by the Parliamentary Privileges Act 1891 (WA) s1.

77. This very particular expressive formula has been adopted with remarkable uniformity by the Western Australian Supreme Court. For example, both Malcolm CJ for the court in *R v Parry, Saxon & Smith*¹¹⁵ and (as recently as July 2021) Hall J sitting alone in *President of the Legislative Council of WA v CCC [No 2]*¹¹⁶ have all essentially adopted the same descriptive formula relating to parliamentary privilege in Western Australia.
78. With respect to the Commonwealth provision at s.49 of the *Constitution*, as noted above, while there is universal agreement regarding the antecedents of s.16 of the *Parliamentary Privileges Act 1987* (Cth)¹¹⁷ the effect of s.16 of the Act is yet to be settled.¹¹⁸

¹¹⁴ *Halden v Marks* (1995) 17 WAR 447,461 (Rowland, Murray and Anderson JJ) is referred to favourably by Malcolm CJ for the court in *R v Parry, Saxon & Smith* [1997] 92 A Crim R 295 [66].

¹¹⁵ (1997) 92 A Crim R 295 [66] (Malcolm CJ) with direct reference to:

The relevant privilege is that defined in Article 9 of the Bill of Rights 1689, which is applicable in Western Australia by virtue of s1 of the Parliamentary Privileges Act 1891.

¹¹⁶ [2021] WASC 223 [94]-[95] (Hall J):

The *Parliamentary Privileges Act* does not otherwise provide for privilege in respect of the proceedings of Parliament. Accordingly, it is necessary to consider the privileges, immunities and powers of the Commons House of Parliament of the United Kingdom and its members and committees, held by custom, statute or otherwise, as at 1 January 1989.

As at the relevant date, the privileges, immunities and powers of the House of Commons of the UK included those set out in article 9 of the *Bill of Rights* of 1688. It is common ground that those privileges form part of the law of Western Australia by virtue of s 1(b) of the *Parliamentary Privileges Act* and that they are not inconsistent with that Act.

¹¹⁷ See *Amann Aviation Pty Ltd v Commonwealth* (1988) 81 ALR 710, 718-19.

¹¹⁸ Contra: Per Beaumont J. *'The provisions of s 16(3), in my view, are, in substance, declaratory of the position both in England and in Australia before the enactment of the Act.'* (Referenced with approval by Fitzgerald P in *Laurance v Katter* (1996) 141 ALR 447 at 481; *Rann v Olsen* (2000) SASR 450, 472 [117], 481 [173] (Doyle CJ), 493 [243]-[245] (Perry J), 501 [294] (Lander J expressly not joining issue on the point); *Carrigan v Cash* [2016] FCA 1466 [12] (White J) at [12]; *Leyonhjelm v Hanson-Young* [2021] FCAFC 22 [358] (Abraham J); see also *McCloy v The Honourable Megan Latham* [2015] NSWSC 1782 at [14]-[22] (McDougall J). See also Daniel Morgan, 'Parliamentary Privilege in Queensland' (2008) 59 AIAL Forum 9. The preferred view naturally depends on the correctness of the conclusions about the reception of the *Bill of Rights* into Australian law suggested in this paper.

79. As already discussed, the common law recognises and respects parliamentary privilege as a part of the general law. The 2013 United Kingdom Joint Select Committee on Parliamentary Privilege expressed the implications flowing from this proposition in the following terms (notably without direct reliance upon Article 9):¹¹⁹

Privilege refers to the range of freedoms and protections each House needs to function effectively: in brief, it comprises the right of each House to control its own proceedings and precincts, and the right of those participating in parliamentary proceedings, whether or not they are Members, to speak freely without fear of legal liability or other reprisal.

80. The Committee made the following cautionary observation:¹²⁰

*Parliamentary privilege is a living concept, and still serves to protect Parliament, each House, their committees, and all those involved in proceedings. **Much has changed since the publication of the report of the 1999 Joint Committee: privilege evolves as Parliament evolves, and as the law evolves.***

(Emphasis added)

Towards an Australian jurisprudence of parliamentary privilege

81. Australian courts have had no difficulty in acknowledging parliamentary privilege as forming part of the common law in reliance on the venerable legal doctrine of reasonable necessity. In doing so, the central principles of parliamentary privilege, namely, freedom of speech in parliamentary debates and proceedings on the one hand, and what has been referred to as the ethic of mutual respect (or deference or comity) between parliament and the judiciary on the other, have been readily accepted and applied.¹²¹ While the question of reception of Article 9 into the founding colonies has not been authoritatively determined by any court,¹²² there has been no judicial uncertainty in recognising and upholding parliamentary privilege as part of our common law. Indeed, all relevant decisions appear to have proceeded on the basis that the common law principles of parliamentary privilege were received into each Australian

¹¹⁹ United Kingdom Parliament Joint Committee on Parliamentary Privilege, *Parliamentary Privilege Report* (2013–14, HL Paper 30, HC 100) [3].

¹²⁰ United Kingdom Parliament Joint Committee on Parliamentary Privilege, *Parliamentary Privilege Report* (2013–14, HL Paper 30, HC 100) [13].

¹²¹ The Hon Wayne Martin AC, Chief Justice of Western Australia, 'Parliament and the Courts: A Contemporary Assessment of the Ethic of Mutual Respect' (2015) 30(2) *Australasian Parliamentary Review* 80-98.

¹²² Cf: McPherson JA Qld. But note that the declaratory statement of his Honour in that place cited no authority for the proposition there expressed.

jurisdiction to meet the circumstances ‘applicable to their own situation and the condition’ of that jurisdiction.

82. Consider the leading Commonwealth case of *R v Richards*.¹²³ No resort was made in this judgment to the *Bill of Rights*. Rather, Dixon CJ, for the court, surveyed the ‘powers, privileges and immunities’ of the House of Commons as far as they were relevant to the House of Representatives and the Senate by virtue of s.49 of the *Constitution*. The common law relevant to parliamentary privilege was recited and applied in this judgement without express reliance upon or reference to the *Bill of Rights*.¹²⁴ As discussed, some authorities have suggested that the subsequent enactment of the *Parliamentary Privileges Act 1987* (Cth) (especially s.16) declares the position applicable at federation on 1 January 1901. At s.16(1) this Act provides:

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

83. As to whether or not this provision can and does clarify the effect of s.49 of the *Constitution* beyond its actual terms, compared with the choir of judicial and scholarly circumspection surveyed above, the dread opening clause of the provision strikes a disquieting note.¹²⁵
84. The High Court in the NSW case of *Egan v Willis*¹²⁶ delivered a more diverse expression of views than that in *R v Richards* on the relevant basis for parliamentary privilege. In *Egan*, the plurality of Gaudron, Gummow and Hayne JJ observed that the issue of reception of the *Bill of Rights* into NSW presented significant problems of legal reasoning, before observing that these problems were not before the court in that case.¹²⁷ Their honours were content to determine the appeal by reference to the doctrine of reasonable necessity referred to above.¹²⁸

¹²³ *R v Richards; Ex Parte Fitzpatrick & Browne* (1955) 92 CLR 157.

¹²⁴ Cf Gordon J, in an application for an injunction staying the proceedings of a parliamentary committee, in *Alford v Parliamentary Joint Committee on Corporations and Financial Services* [2018] HCA 57. Her Honour considered the question of jurisdiction (although not making a clear jurisdictional finding) and observed that the decision in *R v Richards; Ex Parte Fitzpatrick & Browne* (1955) 92 CLR 157 at para 162 was reflective of the Article 9 prohibition. Nevertheless, the Commonwealth Parliament did not expressly reference its privileges to Article 9 of the *Bill of Rights* until the passage of the *Parliamentary Privileges Act 1987* (Cth) at s 16 of that Act.

¹²⁵ Cf William Shakespeare, *Hamlet*, Act III, Scene II, Line 179.

¹²⁶ *Egan v Willis* (1998) 195 CLR 424.

¹²⁷ *Egan v Willis* (1998) 195 CLR 424, 445.

¹²⁸ *Ibid* 447, 454.

85. McHugh J was content to determine the '*powers and privileges*' of the NSW houses of parliament by analogy with those of the UK House of Commons.¹²⁹ While acknowledging the express adoption of the *Bill of Rights* by the NSW legislature in 1969, his honour went out of his way to point out that he believed it was the common law and not any statutory provision which determined the dispute on which he was delivering his judgment:¹³⁰

In neither Stockdale nor Bradlaugh did the judges suggest that it was Art 9 of the Bill of Rights that precluded them from exercising jurisdiction. Rather, their reasoning indicates that by parliamentary law – which as customary law is part of the common law – matters affecting the internal administration of the House of Commons are outside the jurisdiction of the common law courts. The Bill of Rights which is in force in New South Wales merely confirms the common law.

86. McHugh J also highlighted the difficulty in placing too much strain on the analogy between colonial legislatures and the parliament at Westminster as a common law proposition.¹³¹ Two further observations of McHugh J are particularly striking for present purposes. Firstly, '*I cannot see any ground for thinking that federation or the passing of the Australia Acts has given the [NSW Legislative] Council a power that it did not have before 1900.*'¹³² Second, '*Of course, the provisions of the Commonwealth of Australia Constitution Act 1900 (Imp) affect the Constitutions of the States*'.¹³³

87. Kirby J expressed the view that the '*Bill of Rights is part of the constitutional heritage of Australia. It came with those who established the colonies.*' By reference to the *Australian Courts Act 1828*, his Honour held that the *Bill of Rights* '*applied in the colonies by the medium of imperial law,*

¹²⁹ Ibid, 458-59.

¹³⁰ Ibid, 462.

¹³¹ *Egan v Willis* (1998) 195 CLR 424, 463 (McHugh J) citing Professor Berriedale Keith, *Responsible Government in the Dominions* (1929, 2nd ed) Vol 1, 366:

The legal position of Colonial Legislatures as regards privilege has long been made clear by judgements of the Privy Council. These assert in effect that the privileges of Parliament are essentially peculiar to itself, being the product of long usage, that they are not carried over to any Legislature by its mere performance of similar functions in legislative matters - the Parliament having had more complex origin than mere legislation - and that a Legislature has merely, perhaps in a marked form, the right of any Assembly to secure order in its own proceedings.

The reasoning adopted by His Honour echoes that in the judgment of Nicholson J in *Aboriginal Legal Service of Western Australia Inc v State of Western Australia* [1993] WASC 55 (8 February 1993) at 5-7 (Walsh J concurring).

¹³² *Egan v Willis* (1998) 195 CLR 424, 469.

¹³³ Ibid, 469.

*except so far as later altered or repealed by valid local statute.*¹³⁴ Regardless of the proper view of the reception of the *Bill of Rights* generally, or Article 9 more particularly, his honour referred to the observation in *Prebble*¹³⁵ that *'there is a long line of authority which supports a wider principle, of which Article 9 is merely one manifestation, viz, that the courts and Parliament are both astute to recognise their respective constitutional roles.'*

Did someone mention the Constitution?

88. While it is indeed the case that a number of Australian jurisdictions have clarified this distinction by express legislation,¹³⁶ none of the available authorities appear to have explicitly considered the implications of a specific Imperial statute passed with express application (i.e.: *proprio vigore*) to all Australian jurisdictions in the last year of the nineteenth century, namely, the *Commonwealth of Australia Constitution Act 1900 (Imp)* (the Imperial Act). The significance of this frame of reference in the context of legislative functions was alluded to by the plurality in *Attorney General (WA) v Marquet*:¹³⁷

Now, however, it is essential to begin by recognising that constitutional arrangements in this country have changed in fundamental respects from those that applied in 1889. It is not necessary to attempt to give a list of all of those changes. Their consequences find reflection in decisions like Sue v Hill. Two interrelated considerations are central to a proper understanding of the changes that have happened in constitutional structure. First, constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources. Secondly, unlike Britain in the nineteenth century, the constitutional norms which apply in this country are more complex than an unadorned Diceyan precept of parliamentary sovereignty. Those constitutional norms accord an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements.

89. This delineation between local constitutional factors and assumed imperial continuity from within the High Court suggests that some of the longstanding operating assumptions relating to

¹³⁴ Relying on *Commissioner of Stamps v Telegraph Investment Company Pty Ltd* (1995) 184 CLR 453,466 (McHugh and Gummow JJ). In that case, finding that Article 4 of the *Bill of Rights* was received into the Australian colonies by virtue of s.24 of 9 Geo IV c83 (Imp). Note that Prior J draws this inference more emphatically in *Rann v Olson* (2000) 76 SASR 450, 490-91.

¹³⁵ *Prebble v Television New Zealand Ltd* (PC) [1995] 1 AC 321, 332 (Lord Browne-Wilkinson for the Judicial Committee).

¹³⁶ *Parliamentary Privileges Act 1987* (Cth) s 16(1); *Imperial Acts Application Act 1969* (NSW) s 6, Sch.2; *Parliament of Queensland Act 2001* (Qld) s 8(2); *Imperial Acts Application Act 1984* (Qld) s 5, Sch.1; *Imperial Acts Application Act 1980* (Vic) ss 3, 8, Sch ; *Australian Capital Territory (Self Government) Act 1988* (Cth) s 24; *Legislation Act 2001* (ACT) s 17, Sch.1; *Legislative Assembly (Powers and Privileges Act 1992* (NT) s 6 (repeating the text of the Commonwealth provision).

¹³⁷ *Attorney General (WA) v Marquet* (2003) 217 CLR 545 at 570, per Gleeson CJ, Gummow, Hayne and Heydon JJ.

parliamentary law and procedure that have long been relied upon at both a Commonwealth and State level may be misconceived.

Part III: Constitutional sovereignty and parliamentary privilege in Australia

90. It is trite to note that the *Constitution* contained in the schedule to the *Commonwealth of Australia Constitution Act 1900 (Imp) (Imperial Act)*¹³⁸ was adopted by a majority of electors in all the original colonies via separate referendum processes. At the second round of referendum votes, all six colonies recorded majority acceptance by the eligible voters of the federal constitutional proposals.¹³⁹ Petitions were then made on behalf each of the colonial legislatures to the Crown and British Parliament. When passed, the Imperial Act applied to all the former colonies by paramount force (i.e.: *proprio vigore*)¹⁴⁰ from the date stipulated in the proclamation provided for at s 3 of the *Imperial Act*.¹⁴¹
91. Under the machinery of the Federation so established, a single common law for the Commonwealth (administered by the High Court and other courts of Chapter III) a Commonwealth constitutional jurisdiction was created, incorporating the previously disconnected judicial systems of the former colonies in a unified legal system with differential application.¹⁴² As a result, from 1 January 1901, all of the prior Australian common law that had developed out of that which was inherited or received from England became subject to the *Constitution*, including—presumably—the common law relating to parliamentary privilege.
92. Given the paramount force of the *Constitution*, any statutory provisions applicable within the Federation newly established, including the constitutions of the former colonies (which continued after Federation as states), became subject to the *Constitution*. This much is provided for in both the *Imperial Act* and the relevant portions of the text of the *Constitution* itself.¹⁴³

106 Saving of Constitutions

*The constitution of each State of the Commonwealth shall, **subject to this Constitution**, continue as at the establishment of the Commonwealth, or as at the admission or*

¹³⁸ *Commonwealth of Australia Constitution Act 1900 (Imp)*.

¹³⁹ A total of 422,788 in favour, 161,077 against. See Gerrard Carney, *The Constitutional Systems of the Australian States and Territories* (2006, Cambridge University Press) 63.

¹⁴⁰ *Commonwealth of Australia Constitution Act 1900 (Imp)* s 5.

¹⁴¹ Proclamation of 17 September 1900, Australian Government *Gazette* 1901, p. 1.

¹⁴² *Lipohar v R* (1999) 200 CLR 485 at 505 [43]; Leslie Zines AO 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32 FLR 337.

¹⁴³ *Australian Constitution* ss 106–108 (emphasis added).

establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107 Saving of Power of State Parliaments

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

108 Saving of State laws

*Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, **subject to this Constitution**, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.*

(Emphasis added)

Reception and Paramount Force

93. As discussed above, it is open to find that the *Bill of Rights* was not received into Australian law either in general terms, or with respect to Article 9 in particular. Recall that the colonial organs of government were established in each of the various colonies within the framework of an imperial legal system created by virtue of the imperial prerogative powers of the Crown or by statute. These measures were subsequently made subordinate to the ultimate veto of the imperial executive government and the fiat of the imperial parliament by the passage of particular statutes.¹⁴⁴
94. Further, prior to Federation no Australian colonial legislature passed legislation that expressly adopted the *Bill of Rights* (a statutory provision with undoubted application to the supervising legislature in Westminster). Rather, prior to Federation, the privileges of the Australian colonial legislatures as established were either based on the doctrine of reasonable necessity or, in a

¹⁴⁴ *Colonial Laws Validity Act 1865* (Imp) s 24. Cf William Blackstone, *Blackstone's Commentaries*, (1753) 1 BI Comm 107 (1893 Ed) https://oll.libertyfund.org/titles/2140#Blackstone_1387-01_1330 and Chief Justice Sir Owen Dixon 'Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240.

few instances, by reference to the established privileges of the House of Commons at Westminster, with due allowance for the wider Imperial constitutional settlement.¹⁴⁵

95. In addition to the different forms utilised in their establishment, each of the Australian colonies achieved responsible self-government at different times. In each case, this development was an expression of the will of the majority of qualified electors and in the manner and form stipulated and legislated for by the imperial parliament in Westminster. This same model was adopted by the other self-governing dominions.¹⁴⁶
96. Reference to the *Colonial Laws Validity Act 1865 (Imp)* demonstrates that the British Parliament and the British Colonial Office (via the office of Colonial Governors) retained a 'general superintending power' with respect to the colonial administrations and legislatures.¹⁴⁷ As for the '*speeches, debates and proceedings*' not being questioned or impeached in '*any court or place out of*' the relevant parliament, recall that the '*general superintending power*' of the imperial British Parliament at Westminster was in evidence with respect to the States and Commonwealth of Australia as recently as 1986.¹⁴⁸ Notably, the 'Australia Act' constitutional amendments occurred without reference to the s.128 referendum requirements of the *Constitution*.¹⁴⁹
97. Given all of this, any claim that Article 9 was 'received' into Australian law prior to federation on 1 January 1901, while arguable, appears at the very least to be contestable. It is the case that, following federation, a number of Australian legislatures (Commonwealth and State) subsequently sought to 'clarify' the status of the *Bill of Rights* with respect to their jurisdictions, even in some cases by means of formally adopting the text (NSW, ACT and NT). However, before any of those measures were adopted, the former Australian colonies had become unified under

¹⁴⁵ (See Part I: 'Article 9 and parliamentary privilege in an Australian context').

¹⁴⁶ Eg: *British North America Act 1867 (Imp)* c3 30&31 Vic (see now *Constitution Act, 1982 (Can)*).

¹⁴⁷ Consider, for example, the 1933 Western Australian Secession Referendum and subsequent petition to the Westminster parliament by the Western Australian legislature. In that instance, the Westminster parliament's supervisory jurisdiction was not exercised in accordance with the express wishes of the majority of electors and the relevant sub-national colonial legislature. This suggests both the existence of the supervising jurisdiction of Westminster with respect to the Australian dominions, and a determination to exercise it independently of the express wishes of the relevant colonial legislature. Note that, at this time, the *Statute of Westminster 1931 (Imp)* had not been adopted with respect to the Australian dominions (Cf: *Statute of Westminster Adoption Act 1942 (Cth)*, s.3)

¹⁴⁸ With the passage of the *Australia Act 1986 (Imp)*-a statute of the British Parliament which effected a multilateral alteration of the *Constitution*.

¹⁴⁹ Pungently critiqued by Kirby J in *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 (*A-G v Marquet*) [202]-[213].

a single *Constitution*, passed by a majority of electors in all former colonies and enacted (by paramount force) by the superintending British Parliament.

98. From the perspective of legal reasoning, the proposition in *Prebble* that Article 9 is merely a particular manifestation of the wider principle, namely; that common law parliamentary privilege was received at a time and in a manner commensurate with the relevant 'local conditions' appears to be the least problematic of the two available alternative propositions. Against this background, the particular significance of the highlighted text at s.106 of the *Constitution* above ('subject to this Constitution') comes into clearer focus.
99. Similarly, once the enacted paramount force of the *Constitution* is acknowledged with respect to parliamentary privilege, it may be allowed that s 107 of the Constitution could have some, as yet unspecified work to do in the development of an Australian jurisprudence of parliamentary privilege at a State level.
100. In addition, given the post-Federation unified common law system in Australia and the lack of express pre-Federation legislative adoption of Article 9 on the part of any of the former Australian colonies, a plain reading of the *Constitution* at s.108 suggests that any subsequent legislative action on the part of the various states (or indeed, the Commonwealth) designed to amend the common law relating to parliamentary privilege after Federation, would in any event be '*subject to this constitution*'.
101. The High Court sits as the ultimate court of appeal and as the definitive authority on all matters relating to the common law within Australia. As discussed already, this includes that part of the common law relating to parliamentary privilege. Accordingly, constitutional sovereignty requires a reading and application of common law parliamentary privilege that is altogether different from that which follows from the perspective of Diceyan parliamentary sovereignty.¹⁵⁰ Under the former characterisation of sovereignty, all governmental power is conformable to the *Constitution*, under the latter, parliamentary power is reflective of an institutional pre-eminence, characterised by a degree of constitutional immunity from scrutiny reposing in the legislature.
102. If the analysis proposed here is correct, the plenary legislative powers of the state parliaments do not immunise parliamentary privilege at common law from the operation (and application)

¹⁵⁰ A constitutional perspective propounded with conviction in J Goldsworthy, *The Sovereignty of Parliament*, Clarendon Press 1999. See also Goldsworthy, J. (2022). '*Parliamentary Sovereignty and Popular Sovereignty in the UK Constitution.*' *The Cambridge Law Journal* 1.

of relevant constitutional freedoms, limitations and guarantees.¹⁵¹ The implications that necessarily follow are clear enough; namely, while parliamentary privilege at common law appears to have been received into the Australian possessions prior to 1901; from 1 January 1901 the constitutions of the states continued 'subject to this Constitution' (as it were, 'proprio vigore').¹⁵² After 1901, fundamental concepts of parliamentary privilege are subsequently grounded more in terms of constitutional, rather than parliamentary, sovereignty as a cornerstone principle.¹⁵³

103. Based on this reasoning, any exercise of parliamentary privilege in a state parliamentary proceeding that may be inconsistent with a requirement of the *Constitution* would not appear to be immune from review by a relevant Chapter III court. To find otherwise would mean accepting the existence, within the federal system of government, of 'islands of power immune from supervision and restraint.'¹⁵⁴

Comity, Ouster and Contemporary Australian Constitutionalism

104. As discussed above, comity and deference has ensured that the institutional separations, especially between the judiciary and the legislature, have been scrupulously respected. However, it is suggested that this is better understood by reference to ordinary legal principles surrounding recognised privileges under the general law, than by strained resort to the *Bill of Rights* as though this was a domestically applicable statute with general application. An Australian jurisprudence of parliamentary privilege that is too rigidly based on a totemic United Kingdom statute obscures rather than clarifies, its proper constitutional significance and limitations.
105. Regardless anything else, as discussed above, the *Constitution* was passed by a majority of electors in each of the former colonies (Western Australia last of all). It was adopted by referring legislation in each of the colonial legislatures and was enacted as a Schedule to an Act

¹⁵¹ 'Upon what had been the judicial structures of the Australian colonies and, upon federation, became the judicial structures of the States, the Constitution, by its own force imposed significant changes. Section 77(ii) authorises the Federal Parliament to conscript the courts of the States for the exercise of Federal jurisdiction without imposing any requirement of State consent thereto.' *Gould v Brown* (1998) 193 CLR 346 at 444 [186]. per Gummow J.

¹⁵² Alex C. Castles, 'The Reception and Status of English Law in Australia' (1963) 2(1) *Adelaide Law Review* 1 at 14.

¹⁵³ Nicholas Aroney and Benjamin Saunders 'On Judicial Rascals and Self-Appointed Monarchs: "The Rise of Judicial Power in Australia"' (2017) 36(2) *University of Queensland Law Journal* 221 at 242.

¹⁵⁴ *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (*Kirk*).

of the Imperial Legislature, having paramount force and effect (*'proprio vigore'*) with respect to the relevant dominions. This procedure simultaneously transformed the former disparate colonies into constituent states of a new indissoluble political entity—the Commonwealth of Australia—with the pre-existing colonial constitutions continuing *'subject to this constitution'*, as declared by the Imperial parliament.

Judicial deference, jurisdictional error and the ambulatory Constitution

106. Comity, or what has alternatively been described as *'judicial deference'*, was explored with specific reference to Article 9 extra-curially by the then Chief Justice for Western Australia, Wayne Martin QC AC.¹⁵⁵ Despite his Honour noting a number of well-documented occasions where the ethic of mutual respect has been put to the test, he suggested that:

In summary, although questions do arise from time to time with respect to the capacity of the Parliament and the courts to interfere with the proceedings of the other, those occasions are rare. When such occasions do arise, the relevant entity generally proceeds with great care to avoid any interference with the workings of the other, consistently with the ethic of mutual respect.

107. At the heart of this approach is the position put in *Prebble*, discussed above, that:¹⁵⁶

In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz, that the courts and Parliament are both astute to recognise their respective constitutional roles.

108. The distinction between describing parliamentary privilege in terms of institutional comity borne of civilised (dare one say aristocratic?) deference on the one hand or as a required constitutional demarcation on the other may, at first appear to be trivial or arcane. However, the potential existence of a bright line delimiting the judicial powers of the state on the one hand and the privileged powers of a parliamentary chamber on the other, is something about which the ordinary citizen should, perhaps, have a degree of clarity or certainty.
109. Either Article 9 (or indeed the wider principle that it manifests) is a non-justiciable ouster clause, or it is purely emblematic of the centrality of the freedom of speech in parliamentary proceedings, within the broader context of the specific constitutional compact within which it operates.

¹⁵⁵ The Hon Wayne Martin AC, Chief Justice of Western Australia, 'Parliament and the Courts: A Contemporary Assessment of the Ethic of Mutual Respect' (2015) 30(2) *Australasian Parliamentary Review* 80-98.

¹⁵⁶ At 332 (Lord Browne-Wilkinson for the Judicial Committee).

110. Characterisation of parliamentary privilege, grounded in a non-justiciable ouster clause devolves down to requiring a form of institutional civility that is well documented (if poorly articulated), particularly in the United Kingdom. If, however, the ‘*wider principle*’ of the freedom of speech and debates in parliamentary proceedings which describes the core elements of parliamentary privilege as *constitutionally* grounded, then it must be accounted for by reference to the wider constitutional context within which it is located.
111. In the Australian constitutional settlement, there is only one forum with the constitutional authority to determine the extent to which a given controversy arising out of a particular parliamentary proceeding is both jurisdictionally and constitutionally regular. Under our constitutional arrangements, that authority is not susceptible to ouster, however it might be described.¹⁵⁷
112. In passing, it should be acknowledged that the judicial treatment of statutory ouster and privative clauses in Australia has been the subject of extensive scholarship, judicial and extra-curial commentary by academics and judicial officers over time. For those without the expansive legal mind of former Chief Justice Sir Anthony Mason,¹⁵⁸ the treatment of such clauses appears to have been in transition from the previously authoritative decision of Dixon CJ in *R v Hickman*¹⁵⁹ to the endlessly fascinating (if somewhat polarising) decision in *Kirk*.¹⁶⁰ For present purposes, it is sufficient to repeat the principal finding in *Kirk* that s.75 of the

¹⁵⁷ The most common context within which this grundnorm is analysed is in the relationship between the executive and the judiciary, see; Rebecca Ananian-Welsh and George Williams ‘Judaical independence from the Executive: A first-Principles review of Australian cases (2015) 40(3) *Monash University Law Review* 593. As to the enduring conundrum of the adjudicative organ of the *Constitution* being solely responsible for its interpretation, see; Justice Ronald Sackville ‘*The 2003 Term: The Inaccessible Constitution*’, *FedJSchol* at 1 (2004 Constitutional Law Conference, University of New South Wales, 20 February 2004); and, Charles Noonan ‘Section 75(v), No-Invalidity Clauses and the Rule of Law’ (2013) 36(2) *UNSW Law Journal* 437.

¹⁵⁸ Sir Anthony Mason (2001) ‘The Foundations and Limitations of Judicial Review’ 31 *AIAL Forum*.

¹⁵⁹ *R v Hickman; Ex parte Fox* (1945) 70 CLR 598.

¹⁶⁰ Cf: Jeremy Kirk ‘The entrenched minimum provision of judicial review’ (2004) 12 *Australian Journal of Administrative Law* 64; AJA Ronald Sackville ‘*The Constitutionalisation of State Administrative Law*’, (2011 Whitmore Lecture Council of Australasian Tribunals (NSW Chapter) 14 September 2011); Will Bateman ‘The Constitution and the substantive principles of judicial review: The full scope of the entrenched minimum provision of judicial review’ (2011) 39 *Federal Law Review* 463; Justice John Basten, ‘Jurisdictional Error after Kirk: Has it a Future?’ (2012) 23 *Public Law Review* 94; Ronald Sackville ‘An Age of Judicial Hegemony’ (2013) 87 *ALJ* 105; Oscar Roos ‘Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*’ (2013) 35 *Sydney Law Review* 781 Goldsworthy, J (2014) ‘*Kable, Kirk and judicial statesmanship*’ (2014) 40(1) *Monash University Law Review* 75; Nicholas Aroney and Benjamin Saunders ‘On Judicial Rascals and Self-Appointed Monarchs: “The Rise of Judicial Power in Australia”’ (2017) 36(2) *University of Queensland Law Journal* 221; Justice John Griffiths ‘Judicial Review of Administrative Action in Australia’ (2017) 88 *AIAL Forum* 9.

Constitution implies a minimum entrenched constitutional standard of judicial review available to parties affected by the potentially unconstitutional action of the organs of government, at both federal and state levels. Chapter III courts, including State Supreme Courts, cannot be deprived of this jurisdiction.¹⁶¹

Parliamentary privilege as governmental power

113. This paper suggests that as an expression of necessary governmental power, there is nothing remarkable about parliamentary privilege (either at common law or in statutory form). As Allsop CJ has stated extra-curially, in the context of Administrative Law:¹⁶²

Administrative law is better conceptualised as part of the law that controls and shapes public power ...

This is so because the subject is power, which is relational, human, and societal, sourced in authority, compulsion, and consent. Recognition of this indefinability and uncertainty, in a definitional sense, at the heart of power and its control permits one to conceptualise and express principles and rules for its control in their political, societal and human contexts, and, most importantly, at the appropriate levels of generality.

114. The authorities referred to in this provocation are entirely consistent with the proposition that the exercise of parliamentary privilege at both a federal and state level is (and properly should be) amenable to judicial review for jurisdictional error.¹⁶³ Indeed, as Allsop CJ observed in the foregoing article:¹⁶⁴

In Australia, the foundation of the control of public power is s 75(v), containing the related notions of jurisdictional authority and jurisdictional error, mandating an irreducible minimum standard of the lawfulness of all public power through Marbury v Maddison, Quin, Plaintiff S157, Graham, Te Puia, Kable and Kirk. Such a central and fundamental Constitutional conception lives in the common law, in statutes construed by reference to the common law, and by a judicial technique in the exercise of the

¹⁶¹ Per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [91]-[100]. Cf James Stellios 'Exploring the purposes of section 75(v) of the *Constitution*' (2011) 34(1) *UNSW Law Journal* 70; and Lisa Burton Crawford 'The entrenched minimum provision of judicial review and the limits of "Law"' (2017) 45 *Federal Law Review* 569. Cf: Oscar Roos 'The Kirk Structural Constitutional Implication' [2020] *Melbourne University Law Review* 27; (2020) 44(1) *Melbourne University Law Review* 345

¹⁶² Chief Justice James Allsop 'The Foundations of Administrative Law', *FedJSchol* 5 at 1 (12th Annual Whitmore Lecture Council of Australasian Tribunals (NSW Chapter) 4 April 2019).

¹⁶³ *Navoto v Minister for Home Affairs* [2019] FCA 295 [39] (Allsop CJ) and following; Leighton McDonald, 'Jurisdictional Error as Conceptual Totem' (2019) 42(3) *UNSWLJ* 1. Cf: Anne Twomey 'The defining characteristics of constitutional expressions and the nationalisation of the State court system.' (2013) 11 *The Judicial Review* 233 generally and especially from 242.

¹⁶⁴ Chief Justice James Allsop 'The Foundations of Administrative Law', (12th Annual Whitmore Lecture Council of Australasian Tribunals (NSW Chapter) 4 April 2019) 9.

protective judicial power looking to the substance of the exercise of power, not its form, by analogy with the techniques of equity.

Towards an Australian jurisprudence of parliamentary privilege

115. The preferable statements of parliamentary privilege in an Australian context that adequately account for the available authorities discussed throughout this provocation appear to be as follows:

- a. Common law parliamentary privilege was received into all Australian colonial jurisdictions by means of the 'reasonable necessity' of self-governing domestic legislatures;
- b. Parliamentary privilege, as part of the common law, forms part of the 'constitution, powers or procedure' of state parliaments;¹⁶⁵
- c. With due allowance for the statutory adoption of the powers and privileges of the House of Commons in Westminster at s 49 of the *Constitution*, the proposition at b) holds with respect to the parliament of the Commonwealth from 1 January 1901;¹⁶⁶
- d. Prior to Federation, a number of the Australian colonial legislatures legislated to modify the common law position in their jurisdictions along the lines subsequently adopted at s 49 of the *Constitution* regarding the Commonwealth parliament;¹⁶⁷
- e. From Federation parliamentary privilege at common law (and as previously validly modified by the various pre-existing colonial legislatures) became 'subject to' the *Constitution*;¹⁶⁸ and
- f. Since Federation, parliamentary privilege as subsequently validly modified by the various state and territory legislatures¹⁶⁹ continues, nevertheless, to be 'subject to' the *Constitution*.¹⁷⁰

¹⁶⁵ See *AG v Marquet* (2003) at [74] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

¹⁶⁶ See *R v Richards* at [12] per Dixon CJ for the court '*The language [of s.49] is such as to be apt to transfer to the House the full powers, privileges and immunities of the House of Commons.*'

¹⁶⁷ *Victorian Constitution Act 1855* (UK), later repealed by the *Constitution Act 1975* (Vic) s 19, in similar terms; and *Parliamentary Privileges Act 1891* (WA). (See Part I at [67]).

¹⁶⁸ *Australian Constitution* s 106.

¹⁶⁹ *Parliamentary Privileges Act 1987* (Cth) s 16(1); *Imperial Acts Application Act 1969* (NSW) s 6, Sch.2; *Parliament of Queensland Act 2001* (Qld) s 8(2); *Imperial Acts Application Act 1984* (Qld) s 5, Sch.1; *Imperial Acts Application Act 1980* (Vic) ss 3, 8, Sch ; *Australian Capital Territory (Self Government) Act 1988* (Cth) s 24; *Legislation Act 2001* (ACT) s 17, Sch.1; *Legislative Assembly (Powers and Privileges Act 1992* (NT) s 6 (repeating the text of the Commonwealth provision).

¹⁷⁰ *Australian Constitution* s 108.

116. On this analysis, it appears that, in an Australian context, since Federation, parliamentary privilege is grounded on the common law, viewed through the prism of the *Constitution* and is not, in any meaningful sense, based on the adoption or reception of the *Bill of Rights*.
117. This presents a relatively familiar decisional rubric. In determining a given legal controversy involving a claim of parliamentary privilege, a court might firstly consider if the relevant parliamentary privilege being asserted was one of reasonable necessity directed towards a genuine legislative function. If not, the enquiry would turn to any statutory basis that might be relied upon. This would involve applying the relevant established principles of statutory and/or constitutional interpretation.
118. Thereafter, consideration would need to be given, among other matters, to the effect of any relevant constitutional freedoms or limitations. Such interpretive and adjudicative functions are exclusively (and properly) matters for courts exercising Chapter III jurisdiction.¹⁷¹
119. As will be seen, the foregoing approach appears to have been adopted in each of the High Court decisions to which one might reasonably look for insight and elucidation, including for example, *Attorney-General for New South Wales v Trethowan*;¹⁷² *R v Richards*; *Ex Parte Fitzpatrick & Browne*;¹⁷³ *Egan v Willis*;¹⁷⁴ *Attorney-General (WA) v Marquet*.¹⁷⁵

Trethowan

120. In the first of these, *Trethowan*, injunctions were sought preventing the presentation of Bills for Royal Assent which would have the effect of abolishing the New South Wales Legislative Council. This intervention of the Courts was sought before the legislative procedures of the New South Wales Parliament in passing a Bill into law could be completed. The High Court in this judgement simply proceeded on the assumption (shared by all members of the Court) that the Court had jurisdiction to resolve the dispute and did so by granting the requested relief.

R v Richards

121. *R v Richards* concerned the powers of the Commonwealth House of Representatives to punish for contempt, by reference to s 49 of the *Constitution*. Arguably, this is the exercise of

¹⁷¹ At a state level, while the constitution facts here articulated no longer appear to be controversial (see; Luke Beck 'What is a 'Supreme Court of a State' (2012) 34 *Sydney Law Review* 295), the implications have yet to be fully articulated in the context of parliamentary privilege at the state level.

¹⁷² *Attorney-General for New South Wales v Trethowan* (1931) 44 CLR 394 (*Trethowan*).

¹⁷³ *R v Richards*; *Ex Parte Fitzpatrick & Browne* (1955) 92 CLR 157 (*R v Richards*).

¹⁷⁴ *Egan v Willis*.

¹⁷⁵ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 (*A-G v Marquet*).

parliamentary privilege most apt to infringe the individual rights of the citizen. Consider the following extract from the judgment of Dixon CJ, for the court, in *R v Richards* regarding the effect of s 49 of the *Constitution*:¹⁷⁶

*For s.49 says that, until the powers, privileges and immunities of the House are declared by Act of Parliament, the powers, privileges and immunities of the House shall be those of the Commons House of Parliament of the United Kingdom at the establishment of the Commonwealth. **The language is such as to be apt to transfer to the House the full powers, privileges and immunities of the House of Commons.** As Lord Cairns has said, an essential ingredient, not a mere accident, in those powers, is the protection from the examination of the conclusion of the House expressed by the warrant. There are, however, other considerations in this Constitution which have been availed of by counsel for the two men concerned as grounds upon which to urge that a restrictive construction should be given to those words, giving them less operation than their terms seem to require, and we shall now express our view upon those arguments.*

It is convenient, first, to go to the important argument that this Constitution of Australia is a rigid federal Constitution under which it is the duty of the courts of the Commonwealth, and, indeed, the courts of law generally, to consider whether any act done in pursuance of the powers given by the Constitution, whether by the legislature or by the executive, is beyond the power which the Constitution assigns to that body.

*As a general proposition, **the truth of that consideration admits of no denial. It is a Constitution which deals with the demarcation of powers, leaves to the courts of law the question of whether there has been any excess of power, and requires them to pronounce as void any act which is ultra vires.** In the everyday work of this Court, we are accustomed to examining the validity of Acts of Parliament. Less often does the validity of an executive act come to be considered, but it stands upon the same footing. It is urged for that reason that we should refuse to adopt as applicable under our Constitution the view of the Court of Queen's Bench pronounced in 1840 and adopted as for the Colony of Victoria by the Privy Council in 1871, and that we should construe s.49 as not transferring to Australia that element in the law governing the privileges and powers of the House of Commons.*

*The answer, in our opinion, lies in the very plain words of s.49 itself. **The words are incapable of a restricted meaning, unless that restricted meaning be imperatively demanded as something to be placed artificially upon them by the more general considerations which the Constitution supplies.** ...*

(Emphasis added)

122. There is no need to take an implication from such clear and concise reasoning. The adoption at s 49 of the *Constitution* of 'the full powers, privileges and immunities of the House of Commons' for the constituent chambers of the Federal parliament was quite holistic. Further, these

¹⁷⁶ *R v Richards* at (164) (emphasis added).

'powers, privileges and immunities' are self-evidently subject to anything *'imperatively demanded'* by other constitutional requirements, including the Court's supervisory jurisdiction.

Egan v Willis

123. *Egan v Willis* was heard on appeal from the Full Court of the New South Wales Court of Appeal and addressed questions of parliamentary privilege arising from a political dispute within the Legislative Council of New South Wales. The dispute quite literally reached beyond the Legislative Council chamber to the footpath in front of the State parliament. The plurality of Gaudron, Gummow and Hayne JJ in this case endorsed the reasoning of Dixon CJ above, when approving Canadian obiter dicta allowing for a jurisdictional review role for the superior courts.¹⁷⁷ Similarly, their honours noted in obiter that:

It was not suggested that to take account of the Commonwealth Constitution or Australia Act would lead to any diminution in the powers and privileges of the State Parliaments when those powers and privileges are identified according to what hitherto have been accepted principles.

124. In the same case, McHugh J relevantly stated:¹⁷⁸

No doubt there are cases – those arising under the federal Constitution for example – where a court is compelled to make a formal declaration concerning the internal affairs of a legislative chamber. But as a general rule, courts should eschew making such declarations even when the validity of the resolution is incidental to the determination of a plaintiff's legal rights. ...

Respect for the procedures of the Council requires that a court should make declarations or entertain claims arising out of the business of the Council only when it is essential to declaring the existing rights of the parties.

(Emphasis added)

125. As noted in Part I (and extracted in the opening quotation above), the most detailed consideration of the implications of constitutional sovereignty as the interpretive grundnorm of an Australian doctrine of parliamentary privilege in *Egan v Willis* was that of Kirby J, as follows:¹⁷⁹

133. ***...There is a further reason, in Australia, for dismissing the argument of non-justiciability. Courts in this country, at least in the scrutiny of the requirements of the Australian Constitution, have generally rejected the notion that they are forbidden by considerations of parliamentary privilege, or of the ancient common law of Parliament, from adjudging the validity of***

¹⁷⁷ *Egan v Willis* [27].

¹⁷⁸ *Egan v Willis* [111]-[112].

¹⁷⁹ *Egan v Willis* [133]-[135] (emphasis added and footnotes removed).

parliamentary conduct where this must be measured against the requirements of the Constitution. Whilst it is true that Australian courts will ordinarily permit parliamentary procedures to be completed before they intervene, the power of intervention by the courts cannot be seriously doubted. It is the nature of a federal polity that it constantly renders the organs of government, [F]ederal and State, accountable to a constitutional standard. State Parliaments in Australia, whatever their historical provenance, are not colonial legislatures. They are provided for in the Australian Constitution. To this extent, at least, they are rendered accountable to the constitutional text. Notions of unreviewable parliamentary privilege and unaccountable determination of the boundaries of that privilege which may have been apt for the sovereign British Parliament must, in the Australian context, be adapted to the entitlement to constitutional review. Federation cultivates the habit of mind which accompanies constitutional superintendence by the courts. Courts recognise a large measure of power in, say, the chamber of a State Parliament, to define and enforce its notions of its own privileges. **But the Australian constitutional context does not accord to such a body a completely unreviewable entitlement, in law, to define and enforce its own powers.** Any such powers can only be exercised in conformity with the political and judicial system which the Constitution creates. **Decisions of other countries and from other times therefore need to be adapted in the modern Australian context when it is suggested that they apply to the privileges of a House of Parliament of an Australian State.** I would acknowledge no lesser scrutiny by the Court of the lawfulness of a claim of privilege by a chamber of the New South Wales Parliament than that accepted in *R v Richards: Ex parte Fitzpatrick and Browne* in relation to the Federal Parliament which arguably enjoys larger powers and broader immunities by virtue of the text of the Constitution.

- 134 It is therefore lawful to proceed to consider the ambit of the privilege relied upon in this case whilst avoiding the evaluative judgments inherent in deciding whether the appellant's conduct merited the action which occurred. This is the approach which has been taken in New South Wales in the past to the delineation of the respective functions of the Houses of Parliament and the courts. Nothing in Art 9 of the Bill of Rights or the common law of Parliament as applied in this country forbids that approach. Although the line drawn may not always be bright, it will be found by courts limiting their functions in this area to the elucidation of legal questions and the avoidance of purely political ones. **The controversy tendered here as to the existence and scope of the privilege relied upon is susceptible of judicial resolution. It is justiciable.** The submission to the contrary is rejected.

The constitutional point

135. In the course of argument, questions were raised by the Court concerning the broader implications for the issues for decision of the language and structure of the Australian Constitution. Two aspects of potential importance were mentioned. The first is the reference in the Constitution to State Parliaments, to the Executive Government of the States and to the State Governors who are

*advised by such governments. Clearly, the Constitution envisages that State Parliaments will exist, comprised of a single House or Houses which can be properly described as such, be capable, as such, of exercising the functions envisaged for them in the Constitution and **having a character which is not inconsistent with the basic norms of government which the Constitution establishes.***

(Emphasis added)

126. It will be appreciated that the propositions outlined in this provocation are almost entirely on all fours with the foregoing highlighted (and representative) passages of his Honour's decision in *Egan v Willis*.
127. Callinan J held that justiciability did not arise (largely because it was not contested by the parties), but also by specific (and narrow) reference to the demarcation elucidated in those cases commencing with the *Sherriff of Middlesex*,¹⁸⁰ through *Stockdale v Hansard*,¹⁸¹ *Bradlaugh v Gossford*¹⁸² and then to *R v Richards*.¹⁸³

180. ... Section 6 of the Imperial Acts Application Act 1969 (NSW) does however apply the Bill of Rights to the State Houses of New South Wales but that legislation has nothing to say about the powers of the Houses with respect to the production of documents and any coercive measures which might be adopted in default of their production. Nonetheless it serves (**with necessary adaptations to accommodate differences between the Houses of Westminster and of a State legislature**) as a clear indication that the proceedings of the Houses in New South Wales should not **in general** be subject to check or questioning in the Courts.

(Emphasis added)

128. His Honour's views here may, perhaps, be thought to align more closely with the approach characterised in this paper as Article 9 reductionism. The ambiguity of his honour's passing reference to the wider Australian context then, after touching so lightly on the jurisdictional question is, nevertheless, both curious and tentative.

A-G v Marquet

129. *A-G v Marquet* concerned a Bill that had been passed in both houses of the Western Australian legislature, but which had not been presented by the Clerk of the Parliaments for Royal assent.

¹⁸⁰ [1840] EngR 360; (1840) 11 Ad & E 273 [113 ER 419].

¹⁸¹ (1839) 9 Ad & El 1.

¹⁸² (1884) 12 QBD 271.

¹⁸³ *Egan v Willis* [180] (emphasis added). As to the historical approach which appears to have been favoured by Callinan J.

On appeal from the Full Court of the Western Australian Supreme Court, the High Court was invited to determine whether it was lawful to present the Bill to the Governor-in-Council, where the internal proceedings of the Legislative Council in passing the Bill had not been fully compliant with relevant state constitutional requirements, which stipulated an absolute majority in each chamber to effect a change to the 'constitution' of the State parliament.¹⁸⁴

130. The *Constitution Act 1889* (WA) provides that the parliament comprises the Legislative Assembly, the Legislative Council and the Crown.¹⁸⁵ Despite (or perhaps because of) the intense scrutiny given by the Full Court of the Western Australian Supreme Court¹⁸⁶ to the question of whether it had jurisdiction to review parliamentary proceedings relating to the passage of legislation between (and within) the various branches of the Parliament, the plurality of Gleeson CJ, Gummow, Hayne and Heydon JJ¹⁸⁷ and Callinan J¹⁸⁸ chose to simply proceed on the basis that it had jurisdiction to determine the controversy.
131. In *A-G v Marquet*, Kirby J directly addressed the question of jurisdiction, noting that 'as between the branches of government in Australia - notably the legislatures of the nation and the courts - there remain constitutional principles of mutual respect and deference.'¹⁸⁹ Nevertheless, his honour had no difficulty in concurring with the Western Australian Supreme Court's prior findings relating to both jurisdiction and justiciability, consistent with his Honour's own previous findings in the earlier cases of *Egan v Willis* and *Eastgate v Rozzoli* (1990) 20 NSWLR 188.¹⁹⁰
132. Accordingly, it now appears settled that, where the powers and privileges of the relevant parliamentary chamber have been legislatively adopted by direct reference to those possessed by the House of Commons in Westminster (such as applies in jurisdictions including the Commonwealth and Western Australia), Chapter III courts have the power (indeed the constitutional duty), to 'question or impeach' 'proceedings' in Parliament in relevant cases.

¹⁸⁴ *Australia Act 1986* (Cth) s 6; *Constitution Act 1889* (WA) ss 2(3), 73(2); and *Electoral Distribution Act 1947* (WA) s 13.

¹⁸⁵ *Constitution Act 1889* (WA) s 2(2)

¹⁸⁶ *Marquet v Attorney General of Western Australia* (2002) 26 WAR 201 at 209-210 [17]- [23] per Malcolm CJ, 223-224 per Anderson J, 230-244 per Steytler and Parker JJ, 270 per Wheeler J.

¹⁸⁷ *A-G v Marquet* [8].

¹⁸⁸ *A-G v Marquet* [255] expressly approving the reasons and findings on justiciability made by Steytler and Parker JJ.

¹⁸⁹ *A-G v Marquet* [106].

¹⁹⁰ *A-G v Marquet* [106]-[110].

Importantly, the basis of this power in an Australian context is located in uniquely Australian constitutional sources.

Does it matter?

133. It may be objected that the seminal cases of *Sherriff of Middlesex, Stockdale v Hansard* and *Bradlaugh v Gossford* equally established that it was for the Courts to determine if a ‘privilege’ existed and, if so, it was for the House in question to determine ‘*the occasion and of the manner of its exercise*’.¹⁹¹ As may be appreciated this formulation was little more than a particular application of the general law relating to privilege. The role of the Court in such cases is to settle questions of jurisdiction, not to make administrative, legislative or political decisions. However, in response, to use the modern language of Australian constitutional jurisprudence, the existence and the manner of the exercise of a particular privilege (or the conduct of a parliamentary proceeding itself) may equally involve the determination of jurisdictional facts. This could relate to the jurisdictional facts which condition the relevant statutory power or the jurisdictional facts relevant to the exercise of that statutory power. Depending on the particular circumstances, wrongly determined jurisdictional facts might give rise to jurisdictional error of the type that are amenable to remedies in the form of declarations, injunctions¹⁹² or even, in rare cases, the high constitutional writs.

134. In this respect, more recently the High Court has held that jurisdictional error can arise in a number of ways, such as where the relevant authority:¹⁹³

- asks the wrong question;
- fails to ask the right question;
- takes account of irrelevant considerations;
- fails to take account of relevant considerations;
- exceeds the source of the power under which they purport to act;
- does not adequately consider the merits of a case; or

¹⁹¹ *R v Richards; Ex Parte Fitzpatrick & Browne* (1955) 92 CLR 157 at [7] per Dixon CJ for the Court.

¹⁹² Edward Sykes ‘The Injunction in Public Law’ [1953] *University of Queensland Law Journal* 114.

¹⁹³ Eg: *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at [11]-[12]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17 at [54]; 97 ALJR 488; 409 ALR 234.

- fails to afford procedural fairness.
135. In each case, particularly where the rights of an individual are affected, a remedy may be available by means of an application for review by a Chapter III Court. Such constitutionally enshrined avenues of judicial review cannot be breezily thwarted by blanket claims of non-justiciability.¹⁹⁴
136. It will no doubt be asserted, contra, that parliamentary privilege, regardless of its manner of adoption or reception nevertheless constitutes an ‘ouster’ or privative clause *par excellence* (if not the ultimate progenitor of such a phenomenon). To do so brings the discussion back to the principal premise upon which this paper is based; namely, the different implications flowing from a theoretical commitment to parliamentary sovereignty on the one hand and constitutional sovereignty on the other.¹⁹⁵
137. If the preferable view of the state (as opposed to colonial) constitutional settlement post-1901 is one of *parliamentary* sovereignty, then it follows that parliamentary privilege (even in the form advanced in *Prebble*) requires that the proceedings in parliament at a state level effectively be ‘islands of power immune from supervision and restraint.’¹⁹⁶ On the other hand, if the preferable view of state (as opposed to colonial) constitutional settlement post-1901 is constitutional sovereignty, then it follows that parliamentary privilege must be understood and administered in a manner that is conformable with the relevant minimum standards, freedoms and limitations enshrined in the *Constitution*.¹⁹⁷
138. One such minimum standard is the requirement of natural justice, or procedural fairness as it is now termed. More latterly, *materiality* has become a further requirement¹⁹⁸ when applying

¹⁹⁴ *Craig v South Australia* (1995) 184 CLR 163; *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332; and, *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123. Mark Aronson, ‘The Growth of Substantive Review: the Changes, their Causes and their Consequences’ (2016), in Bell J; Elliott M; Varuhas J (ed.), *Public Law Adjudication in Common Law Systems: Process and Substance*, pp. 113 – 143; and, Mark Aronson ‘Between form and substance: Minimising judicial scrutiny of executive action’ (2017) 45 *Federal Law Review* 519.

¹⁹⁵ See: Justice Nye Perram ‘Project Blue Sky: invalidity and the evolution of consequences for unlawful administrative action’ (FCA) [2012] *FedJSchol* 35.

¹⁹⁶ *Kirk* [99].

¹⁹⁷ The modern juridical treatment of parliamentary privilege in Canada adopts the constitutional sovereignty approach: Warren Newman ‘Parliamentary Privilege, the Canadian Constitution and the Courts’ (2007) 39(3) *Ottawa Law Review* 573.

¹⁹⁸ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134–135 per Kiefel CJ, Gageler and Keane JJ.

this minimum standard.¹⁹⁹ Regardless of its precise technical expression, the minimum constitutional standard represented by procedural fairness has specific implications for state parliamentary proceedings. Consider that such proceedings (in particular, committee proceedings) may be established by statutory provisions or have an inquisitorial character, including the requirement to provide evidence on oath, or under pain of penalty for false or misleading testimony or punishment for contempt.

139. It is not uncommon in such proceedings for questions of parliamentary privilege to arise with respect to members of the relevant chambers (or, for that matter non-member witnesses) or regarding specific institutions. Consider, for example, the circumstances giving rise to Report 16 of the Western Australian Joint Parliamentary Committee on the Corruption and Crime Commission relating to the process for appointing a Commissioner for that State's independent public sector Corruption Commissioner.²⁰⁰ Other such examples can be identified across most Australian jurisdictions. Where the constitutional rights, liberties and freedoms of the relevant citizen, or the constitutional character of the institution in question are, or are likely to be affected, any material failure to afford procedural fairness to such an affected party would, on this analysis, be amenable to jurisdictional review.

Crime and Corruption Commission (Qld) v Carne

140. Indeed, the precise issue came before the High Court earlier this year in the matter of *Crime and Corruption Commission v Carne* [2023] HCA 28.²⁰¹

Trial at first instance (Carne v Crime and Corruption Commission)

141. The background facts can be summarised quite shortly. Adverse findings were made by the Queensland *Crime and Corruption Commission (CCC)* against the former Public Trustee of Queensland, Mr Carne. These findings were contained in a report given to the Parliamentary Corruption and Crime Committee (**PCCC**) by the CCC relying on s 69 of the *Corruption and Crime Commission Act 2001* (Qld). Mr Carne sought judicial relief on the basis of a material denial of procedural fairness by the CCC.²⁰² At first instance Davis J (relying on the comments of

¹⁹⁹ Jeremy Kirk 'The entrenched minimum provision of judicial review' (2004) 12 *Australian Journal of Administrative Law* 64; Justice Steven Rares 'Judicial Review of Administrative Decisions - Should There be a 21st Century Rethink?' (FCA) [2014] *FedJSchol* 18.

²⁰⁰ Parliament of Western Australia (2020) Report 16 'Annual Report 2019-2020', *Joint Standing Committee on the Corruption and Crime Commission* (November 2020) 6.

²⁰¹ On appeal from *Carne v Crime and Corruption Commission (Qld)* [2022] QCA 141; (2022) 11 QR 334.

²⁰² *Carne v Crime and Corruption Commission* [2022] QCA 141.

McPherson JA in *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner*,²⁰³ held that Mr Carne's suit offended parliamentary privilege as articulated in Article 9 of the Bill of Rights.²⁰⁴ Specifically, the contest between the requirements of constitutional sovereignty on the one hand and parliamentary sovereignty on the other comes into sharp focus in the following extract of the decision of Davis J:²⁰⁵

... an attack on the report on the basis that it was prepared contrary to the rules of procedural fairness, is to question or impeach the report.

As the report is part of the proceedings of the Assembly, Mr Carne's added ground is not justiciable.

142. Plainly put, this represents judicial acceptance of the argument from authority that Article 9 of the *Bill of Rights*, and its statutory form in Queensland, operate as a self-executing ouster clause.

[Queensland Court of Appeal \(*Carne v Crime and Corruption Commission*\)](#)

143. On appeal to the Queensland Court of Appeal, the majority of McMurdo and Mullins JJA found that the CCC's report had been prepared in a manner that did not conform with the relevant statutory framework governing the CCC. In a nod to the Australian constitutional principle of legality that is commonplace in administrative law, the plurality found that jurisdictional error in the preparation and transmission of the CCC report rendered that report a nullity and, on that basis, the question of privilege did not arise.²⁰⁶

144. Freeburn JA dissented, finding both that the report was validly prepared and, on transmission to the PCCC, became clothed with parliamentary privilege. Echoing the stark delineation and preferred conclusion of Davis J in the first instance extracted above, his Honour stated:²⁰⁷

As the report is protected by parliamentary privilege, the applicant's claims about procedural fairness are not justiciable. The issues of procedural fairness and the publication of the report are properly within the borders of the business of parliament. ...

In my view, orders to that effect would be contrary to the principle that parliamentary proceedings are immune from outside examination by other organs of the state and would be to trespass inadvertently into the legislature's province.

²⁰³ [2002] 2 QdR 8, [21] (see discussion at [67] above).

²⁰⁴ *Carne v Crime and Corruption Commission* [2021] QSC 228 at [119] and [141].

²⁰⁵ *Ibid* at [157]-[158].

²⁰⁶ *Carne v Crime and Corruption Commission* [2022] QCA 141; (2022) 11 QR 334; at [81].

²⁰⁷ *Ibid* at [196] and [200].

145. His honour’s reliance on the argument from authority based on an orthodox reading of Article 9 could not be more clear.

Before the High Court of Australia (*Crime and Corruption Commission v Carne*)

146. The CCC applied for leave to appeal to the High Court, which was granted on 16 December 2022.²⁰⁸ The subsequent appeal was heard by the full court comprising Kiefel CJ, Gageler, Gordon, Edelman and Jagot JJ on 6-7 June 2023.²⁰⁹

147. Both the Speaker of the Queensland Legislative Assembly and the Commonwealth Attorney General intervened in the appeal. Using the argument from authority, the Appellant CCC for Queensland and each of the interveners relied on Article 9 of the *Bill of Rights 1689* (UK), claiming that the matter was not justiciable, and that, therefore, it was beyond the jurisdiction of the court to determine.²¹⁰ Before the Court, Peter Dunning KC, for the appellant grounded much of the appeal on the question of privilege and justiciability.²¹¹ Bret Walker SC, for the Speaker of the Legislative Assembly of Queensland pressed the proposition identified above at [67] that Article 9 has ‘*always formed part of the law of Queensland*’ and that this forms a prohibition on any form of remedy on the basis of justiciability.²¹² Tim Begbie KC, for the Attorney-General of the Commonwealth, traversed the continent of caselaw dealing with how Anglo-Australian jurists have construed and applied Article 9 of the Bill of rights since 1689.²¹³

148. Johnathan Horton KC for the Respondent was the only party before the Court rely directly on the framework of the *Constitution* in argument by reference to the inherent jurisdiction of Chapter III courts:²¹⁴

... this Court has jurisdiction, expressly preserved, in effect, by [the relevant statutory] test, in concert with Parliament in keeping this body supervised. This part of the duty we say of the Courts, articulated by Justice Brennan in Ainsworth; the essential nature

²⁰⁸ *Crime and Corruption Commission v Carne* [2023] HCATrans 225.

²⁰⁹ *Ibid*; and, [2023] HCATrans 75.

²¹⁰ *Crime and Corruption Commission v Carne*, HCA B66/2022: Appellant’s Written submissions and Outline of Oral submissions; Attorney-General of the Commonwealth (2 February 2023 and 6 June 2023 respectively); Intervener’s Written Submissions and Outline of Oral submissions; Attorney-General of the Commonwealth (24 February 2023 and 6 June 2023 respectively); Speaker of the Legislative Assembly of Queensland (23 February 2023 and 5 June respectively);

²¹¹ *Crime and Corruption Commission v Carne* [2023] HCATrans 74 (6 June 2023) at (59)-(70).

²¹² *Ibid* from (73) to HCATrans 75 (7 June 2023) at (96).

²¹³ *Crime and Corruption Commission v Carne* [2023] HCATrans 75 (7 June 2023) from (96)-(124).

²¹⁴ *Ibid* at (132).

of judicial review – uniquely essential in this regard in maintaining compliance with the Statute.

149. In a constitutional democracy where almost all of the relevant powers and privileges of the legislatures of the federation are statutory in nature, and in which the principle of legality is a cornerstone, the natural foundation on which to ground a jurisprudence of parliamentary privilege surely must be the foundational constitutional instrument. Historical developments prior to federation are, in many respects, little more than a dancing shadow, illuminated by the light of a comforting fire.
150. It was striking to note which questions appeared to exercise the minds of the members of the Court on 6 June 2023 (particularly Kiefel CJ, Gageler J, Edelman J and Gordon J) when turning to the parliamentary privilege arguments. Much of the questioning coincided with the tenets of *Prebble's* wider concept of parliamentary privilege and also suggested that the members of the Court were thinking deeply about how the argument from authority interacted with jurisdictional error. (see: High Court Audiovisual Recording AV-2023-06-06 at 3:13:00 to 3:26:20).²¹⁵

Decision (13 September 2023)

151. On 13 September 2023, the High Court dismissed the CCC appeal unanimously. Two judgements were delivered: a senior plurality comprising Kiefel CJ, Gageler and Jagot JJ, with a junior plurality comprising Gordon and Edelman JJ. Both judgements apply standard principles of statutory construction and an application of principles of jurisdictional error.
152. The majority decision briefly traverses the submissions put before the Court on the parliamentary privilege issues.²¹⁶ Given the extent to which the argument from authority was relied upon by the Appellant and both interveners in their written and oral submissions it would be courageous to read this portion of judgment in more declarative terms than this.
153. Notably, the senior plurality exercised its judicial function in terms of statutory construction. Both the Speaker and the Chairperson of the PCCC committee gave evidence that the relevant report was relied upon in the proceedings of the Queensland Legislative Assembly. It is against this background that the senior plurality determined the appeal in favour of Mr Carne. Their honours took the view that the connection between the relevant CCC report and the PCCC required under the statute was what mattered in the circumstances, and this had to be

²¹⁵ At <https://www.hcourt.gov.au/cases/cases-av/av-2023-06-06> (accessed 9 September 2023). See also *Crime and Corruption Commission v Carne* [2023] HCATrans 74 (6 June 2023) at (63) to (70).

²¹⁶ *Crime and Corruption Commission v Carne* [2023] HCA 28 (13 September 2023) at [30]-31].

established by reference to the text and context of the relevant legislation. As their honours stated:²¹⁷

*The requisite connection is not established on the facts of this case. If established, **the large question** of the preclusive effect of s 8 [of the Parliament of Queensland Act, adopting the text of Article 9], which does not arise on the facts of this case, would have to be determined.*

(Emphasis added)

154. The junior plurality comprising Edelman and Gordon JJ approached the factual matrix and applied the same rules of statutory construction and jurisdictional error as did the senior plurality. Their honours ultimately determined the appeal by reference to the same underlying principle of legality. The substantive point of distinction between the senior plurality and the junior plurality is that the junior plurality took the opportunity to engage with the argument from authority relied upon in submissions. Their honours stated:²¹⁸

*If the October draft is subject to parliamentary privilege then **a large question** arises as to whether the declaration made by the Court of Appeal infringes that privilege.*

(Emphasis added)

155. While acknowledging that; ‘Parliamentary privilege is a “bulwark of representative government”, the junior plurality deliberately characterised parliamentary privilege by reference to *Prebble’s* ‘wider concept’.²¹⁹ Rather than accepting the argument from authority, their honours turned their minds to the judicial task before them purely by reference to the relevant Australian constitutional norms. In this respect, attention is drawn to the following passage of judgment of the junior plurality:²²⁰

It is for the courts to decide whether a claimed privilege is necessary for the legislature to function. The court has no power to review the rightness or wrongness of a decision made pursuant to the privilege. As Dixon CJ said in R v Richards; Ex parte Fitzpatrick and Browne, ‘it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise’. Put differently, the intervention by the courts is only ‘at the initial jurisdictional level’. The court will

²¹⁷ *Crime and Corruption Commission v Carne* [2023] HCA 28 (13 September 2023) at [39].

²¹⁸ *Ibid*, [105].

²¹⁹ *Ibid*, [106].

²²⁰ *Ibid*, [113].

not interfere with proceedings and procedures of Parliament. Thus, once it is accepted that the privilege exists, and that the Parliament has determined the occasion of its exercise, nothing further falls to be determined.

It is unnecessary and inappropriate to determine the metes and bounds of parliamentary privilege in this case. *In assessing the existence of the privilege in this matter, it cannot be said that the October Draft was brought into existence ‘in the course of, or for the purposes of or incidental to, transacting business of the [PCCC]’.*

(Emphasis added)

156. Putting the foregoing judicial commentary as charitably as possible, *CCC v Carne* offered the High Court with two very different jurisprudential worldviews in stark relief. These competing views are constitutional sovereignty on the one hand and parliamentary sovereignty on the other. By determining the appeal using the ordinary canons of Australian statutory construction and by reference to the fundamental principles of legality and jurisdictional error, the High Court has unanimously demonstrated a clear preference for one over the other.

Implications for Practice

157. The disruptive potential of the foregoing principles will not be lost on Presiding Officers and former colleagues serving at the Tables of parliamentary chambers at the State and Commonwealth levels. There are many instances where procedures are followed in the context of parliamentary business are governed by statutory provisions, or where the rights and freedoms of individuals are implicated, not the least of which being procedures and privileges committee inquiries.
158. In addition, as suggested, there is an ever-expanding range of statutory provisions across all jurisdictions which grant ‘*Parliamentary Officer*’ status to independent scrutiny agencies. There are also parliamentary committees, brought into existence by, or imbued with functions in statutory provisions, directed towards various special purposes in all state jurisdictions.²²¹

²²¹ Eg (indicative only): **NSW**: *Advocate for Children and Young People Act 2014*, Pt 7; *Government Sector Audit Act 1983*, Pt 4; *Health Care Complaints Act 1993*, Pt 4; *Independent Commission Against Corruption Act 1988*, Pt 7; *Legislation Review Act 1987*; and, *Public Works and Procurement Act 1912*. **Qld**: *Crime and Corruption Act 2001*, ss 9, 228, Pt 3 and Pt 4; *Information Privacy Act 2009*, s 145 and Sch 5; *Integrity Act 2009*; *Parliament of Queensland Act 2001*; and, *Parliamentary Service Act 1988*. **SA**: *Aboriginal Lands Parliamentary Standing Committee Act 2003*; *Independent Commission Against Corruption Act 2012*, ss 6 and 8; *Parliament (Joint Services) Act 1985*; and, *Parliamentary Committees Act 1991*. **Tas**: *Public Accounts Committee Act 1970*; *Public Works Committee Act 1914*; and, *Parliamentary (Disclosure of Interests) Act 1996*, s 24. **Vic**: *Audit Act 1994*, ss 74 and 76; *Independent Broad-Based Anti-Corruption Commission Act 2011* ss 19, 162 and 162A; *Parliamentary Administration Act 2005*; *Parliamentary Committees Act 2003*; and, *Public Interest Disclosures Act 2012*. **WA**: *Auditor General Act 2006*, ss 7, 26, 43 and 44; *Corruption, Crime and Misconduct Act 2003*, ss 9, Pt 5, Pt 13, Pt 13A; *Financial Management Act 2006*, ss 82, 83 and 85; and, *Parliamentary Commissioner Act 1971*.)

159. It does not take a particularly close reading of such provisions to uncover the principal rationale behind them, being that *'such matters fall for the exclusive cognisance of the Parliament and are beyond the review of the Courts'*. If such a rationale was ever well-founded, it appears to have its basis in a reading of parliamentary privilege jurisprudence that does not adequately account for the Australian constitutional settlement.²²²
160. Experience suggests that in the main, the actual procedures adopted in most parliamentary proceedings across Australia reflect a lawyerly concern for the fundamental principles of procedural fairness. This is so despite the occasional inelegance in drafting exhibited in relevant Standing Orders and Orders of Reference. The flexibility of parliamentary procedure and the inherent professional caution of Presiding Officers and parliamentary clerks can usually be relied upon to maintain public confidence in the institutional machinery. Nevertheless, as demonstrated by the actions of former Clerk Marquet of the Western Australian Legislative Council, the citizen should be entitled to have resort to the courts to provide assurance that fundamental constitutional norms (such as the rule of law) are both adopted and enforced.

Conclusion

161. Given the *'ambulatory'* nature of constitutional interpretation,²²³ it is unsurprising that our understanding of what our constitutional norms require in any given context continues to develop.²²⁴ Few areas of constitutional jurisprudence have been more ambulatory in recent times than that of jurisdictional error. Given the widespread use of statutory provisions that cast particular parliamentary processes and functions in legislative form, there is surprisingly little scholarly treatment of how the developing jurisprudence of jurisdictional error applies (or is ousted) with respect to parliamentary statutory offices, procedures or duties. It is, at the very

²²² *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332 at 348 per French CJ **'Every statutory discretion, however broad, is constrained by law.'**; at 362 per Hayne, Kiefel and Bell JJ *'The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably.'*; and at 370 per Gageler J *'Implication of reasonableness as a condition of the exercise of a discretionary power conferred by statute is no different from implication of reasonableness as a condition of an opinion or state of satisfaction required by statute as a prerequisite to an exercise of a statutory power or performance of a statutory duty.'*

²²³ *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 per Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ. at [9], approving *Jumbunna Coal Mine v Victorian Coal Miners' Association (No 2)* (1908) 6 CLR 309, at pp 367, 368 per O'Connor J.

²²⁴ *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087. Cf: David Hume 'The Rule of law in reading down: Good law for the 'bad man' (2014) 37(3) *Melbourne University Law Review* 620; J Goldsworthy 'The Constitution and its Common Law Background' (2014) 25(4) *Public Law Review* 265; Michael Kirby 'Reviving the Memory of Andrew Inglis Clark: An Unfinished Federal Project' 34(2) *University of Tasmania Law Review* 14; G Taylor 'The Constitution and the Common Law Again' (2019) 40(2) *Adelaide Law Review* 573.

least, doubtful that such statutory manifestations of parliamentary activity fall beyond the ordinary constitutional mechanisms for determining and addressing jurisdictional error.

162. Further, noting that, in an Australian post-Federation context, all Australian parliaments and state Constitutions continue ‘subject to’ the *Constitution*, the distinction between parliamentary privilege being either enacted or unenacted may have ceased to be a distinction with any practical utility.
163. Parliament in a representative democracy has the unique (and necessary) constitutional power to legislatively vary and otherwise impact upon the rights, liberties, and freedoms of the citizen within the constitutional framework in which they exist. Having also the absolute freedom of speech inhering to their proceedings and possessing the power to summons and punish for contempt, Parliaments (and, to a large degree, their committees) and members of parliamentary chambers also have a unique capacity to impact upon the reputations and livelihood of individuals, entities, and institutions.
164. In the ordinary course of parliamentary proceedings, the classes of individuals who may be thus affected (apart from elected members) include, for example: ordinary citizens and corporate entities, witnesses, public servants, strangers observing proceedings, members of the press and officers of the parliament. It is not the purpose of this paper to deal specifically or exhaustively with these classes. However, the breadth of persons and entities liable to be impacted by privileged parliamentary proceedings is worth highlighting.
165. The entrenched nature of Chapter III judicial review was confirmed in the same year that the High Court determined the dispute in *A-G v Marquet*. In the matter of *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, the High Court affirmed its view that it was for the courts to define the nature and scope of jurisdictional error in government action.²²⁵ Further, the High Court confirmed that, given that the courts’ capacity to correct for such error is articulated in the text of the *Constitution* at Chapter III, this power of judicial review is entrenched and is not subject to legislative exclusion.²²⁶
166. As discussed above, the 2010 High Court decision in *Kirk* has not been without its critics. That decision determined that the Chapter III characteristics entrenched in the *Constitution* and

²²⁵ Per Gleeson CJ at [5]-[6]; Per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [102]-[104]; Callinan J at [161].

²²⁶ The question of whether, and if so to what extent, express parliamentary language can have the practical effect of denying a particular class of persons access to the courts is a matter for case-by-case determination (Cf: *Leghaei v Director-General of Security* (2007) 97 ALD 516).

applicable to State Supreme Courts were also not subject to legislative exclusion. *Kirk* raises for consideration the underlying premise of this paper; namely, whether the exercise of parliamentary privilege (at common law, or as provided by statute) is required to meet the minimum standard articulated in that case, wherever such exercise might affect the rights, liberties and freedoms of individuals or entities. If so, can (or should) the affected party be entitled to access courts of Chapter III jurisdiction to obtain judicial review and remedy?

167. From the Australian perspective, as far as the import and significance of Article 9 of the *Bill of Rights* is concerned, in our legal and political tradition the omnibus concept we term '*parliamentary privilege*' can be traced to repeated assertions stretching back well before 1688. It is a short-hand term, in the same way as other legally recognised occasions and relationships of privilege are short-hand descriptors for omnibus concepts. In terms of parliamentary sovereignty, parliamentary privilege elevates and sanctifies a range of conduct (including freedom of speech) occurring in the legal and political spheres in limited circumstances by excluding it from the reach of the courts. Viewed from the perspective of constitutional sovereignty, parliamentary privilege (including freedom of speech) must conform to the bedrock principle of legality, something that demands the active and transparent engagement of the courts in a constitutionally regular manner.
168. The provocation undergirding this paper is that legally recognised occasions and relationships of privilege are subject to the inherent jurisdiction of Chapter III Courts (including State Supreme Courts), within the unified Commonwealth judicial hierarchy of our common law system. Arguably, in *CCC v Carne*, the High Court has precisely demonstrated this. The nature and extent of that inherent jurisdiction is, indeed, a '*large question*' worthy of scholarly analysis beyond the scope of this paper, noting that, in many cases it would likely amount to little more than declaratory relief. However, the premise underlying this paper is that such jurisdiction is an inherent feature of our constitutional framework and that it exists to ensure that, particularly with respect to agencies and organs of the state, there are no '*islands of power immune from supervision and restraint*.'²²⁷

²²⁷ *Kirk* [99].