IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-000309
[2022] NZHC 2972

BETWEEN	BRYAN DOUGLAS STAPLES First Plaintiff
AND	CLAIMS RESOLUTION SERVICES LIMITED Second Plaintiff
AND	RICHARD LOGAN FREEMAN First Defendant
AND	MEDIAWORKS TV LIMITED Second Defendant
AND	KATE MCCALLUM Third Defendant
AND	TRISTRAM CLAYTON Fourth Defendant

Hearing: On the papers

Counsel: S D Carter for Plaintiffs
B P Henry and S T Patterson for Mr Peters (Non-Party)
P J Gunn and C P C Wrightson for Attorney-General (Non-Party)
B J R Keith as Amicus Curiae (Non-Party)

Judgment: 14 November 2022

JUDGMENT OF DOOGUE J

This judgment was delivered by me on 14 November 2022 at 11.00 am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] Mr Staples obtained (by formal proof) judgment against Mr Freeman in defamation, arising from Facebook posts and the provision by Mr Freeman of allegedly defamatory material to the Rt Hon Winston Peters PC (Mr Peters), who apparently used the material to make a speech in Parliament, which was then reported on by the Campbell Live programme (the substantive judgment).[1]

[2] In the substantive judgment, dated 4 June 2021, Mr Staples was awarded $350,000 in damages, plus interest, costs and disbursements against Mr Freeman.

[3] On application by Mr Peters and the Attorney-General, in a judgment dated 30 November 2021, the Court recalled the substantive judgment, noting certain issues required further argument (the recall judgment).[2] Further submissions were sought on the precise extent of the revision of the substantive judgment.

Issues

[4] The issues which require further examination are:

(a) what is covered by the scope and reach of the prohibition against "questioning" of "proceedings in Parliament";

(b) whether, and to what extent, a defendant who provides material to a Member of Parliament is themselves also within the scope of privilege; and

(c) whether on the facts in this case the provision of information by Mr Freeman to Mr Peters falls within the scope of privilege.

[5] The answer to the questions posed in [4] may require a revision of the declaration of liability, quantum and costs made in the substantive judgment.

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1 *Staples v Freeman* [2021] NZHC 1308 [Substantive judgment].
2 *Staples v Freeman* [2021] NZHC 3237 [Recall judgment].

[6] Costs arising from the application for recall determined in the recall judgment are also in issue.

What is covered by the scope and reach of the prohibition against "questioning" of "proceedings in Parliament"?

What amounts to a proceeding in Parliament?

[7] The starting point is that the meaning of legislation must be ascertained from its text and in light of its purpose and context.[3] Section 10 of the Parliamentary Privilege Act 2014 (the Act) provides a wide and inclusive definition of what amounts to "proceedings in Parliament".

[8] As observed by the Court of Appeal in *Kiwi Party Inc v Attorney-General*:[4]

> [37] The Parliamentary Privilege Act was prompted by concerns about aspects of the Supreme Court's judgment in *Attorney-General v Leigh*. In particular, it was thought the Supreme Court's decision unduly restricted parliamentary privilege. The legislature responded by passing the Parliamentary Privilege Act "to restore" the scope of parliamentary privilege and to align the law of parliamentary privilege in New Zealand with comparable commonwealth jurisdictions.

[9] The principle of freedom of speech that underpins the Act can be traced to art 9 of the Bill of Rights 1688, which states:[5]

> **Freedom of speech**
>
> 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:

[10] The main purposes of the Act are to reaffirm and clarify the nature, scope and extent of the privileges, immunities, and powers exercisable by the House of Representatives, its committees and its members, and to ensure adequate protection from civil and criminal legal liability for communication of, and of documents relating to, proceedings in Parliament.[6]

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3 Legislation Act 2019, s 10(1).

4 *Kiwi Party Inc v Attorney-General* [2020] NZCA 80, [2020] 2 NZLR 224 (footnotes omitted). In *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 [*Leigh*], the Supreme Court held the information contained in the briefing of a Minister by a public servant in preparation for (and used to answer) a parliamentary question was not protected by parliamentary privilege.

5 See *Kiwi Party Inc v Attorney-General*, above n 4, at [38].

6 Parliamentary Privilege Act 2014, s 3(1).

[11] The Act also has several subsidiary purposes, which are to help it achieve these main purposes.[7] The Act reaffirms and clarifies the purpose of parliamentary privilege but is not intended to be a comprehensive codification of parliamentary privilege. The Act also defines "proceedings in Parliament" for the purposes of art 9 of the Bill of Rights 1688 and is, in particular, intended to alter the law in the decision in *Attorney-General v Leigh*.[8] The Act also has the purpose of abolishing and prohibiting evidence being offered or received, questions being asked, or statements, submissions or comments being made concerning proceedings in Parliament, and to inform or support "effective repetition" claims and liabilities in proceedings in a court or tribunal.

[12] Section 4 provides guiding principles for the interpretation of the Act:

> **4 Interpretation of this Act**
>
> (1) This Act must be interpreted in a way that—
>
> (a) promotes its main and subsidiary purposes; and
>
> (b) promotes the principle of comity that requires the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges; and
>
> (c) ensures privileges, immunities, and powers of the House of Representatives, its committees, and its members are exercisable for the purpose stated in section 7.
>
> (2) Subsection (1) does not affect the application of Part 2 of the Legislation Act 2019 to this Act.

[13] Section 7 then outlines the purpose of parliamentary privilege:

> **7 Purpose of parliamentary privilege**
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> The privileges, immunities, and powers exercisable in accordance with the rest of this Act by the House, committees, and members, are exercisable to—
>
> (a) uphold the integrity of the House as a democratic legislative assembly; and

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7 Section 3(2).

8 See *Leigh,* above n 4.

> (b) secure the independence of the House, committees, and members, in the performance of their functions.

[14] Section 10 defines "proceedings in Parliament". The scope of proceedings in Parliament (protected by art 9) is, through s 10, deemed to include the range of matters there set out. In particular, and reversing *Leigh*, the range of matters is deemed to relevantly include:

> (a) "all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee" (s 10(1)); and
>
> (b) "the preparation of a document for purposes of or incidental to the transacting of any business of the House or of a committee" (s 10(2)(c)).

[15] Section 10(3) provides:

> **10 Proceedings in Parliament defined**
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> …
>
> (3) In determining under subsection (1) whether words are spoken or acts are done for purposes of or incidental to the transacting of the business of the House or of a committee, words spoken or acts done for purposes of or incidental to the transacting of reasonably apprehended business of the House or of a committee must be taken to fall within subsection (1).
>
> …

[16] I note that this section is not found in the Parliamentary Privileges Act 1987 (Cth), which contains a broadly comparable definition of proceedings in Parliament. The legislative history records that s 10(3) was added in the course of Select Committee consideration:[9]

> … to make it clear that proceedings include matters which relate to the transacting of any "reasonably apprehended" business …
>
> Our proposed definition recognises that much of the vital business of Parliament is transacted away from the floor of the House, or in reasonable

[9] Parliamentary Privilege Bill 2013 (179-2) (select committee report) at 10.

> anticipation of parliamentary business, and it is critical that privilege apply to such proceedings. Whether or not particular words, actions or documents are covered will require an examination of the particular matter and the occasion.

[17] The provision has not been the subject of judicial comment but is interpreted by the authors of *McGee: Parliamentary Practice in New Zealand* as follows:[10]

> There must be a serious or realistic prospect of the House entertaining the business before a communication to a member will be protected. …
>
> …
>
> The connection between circulating a proposed petition and any future business of the House is too remote to satisfy the statutory test of "transacting the reasonably apprehended business of the House". It has been held that an email exchange between an adviser to a member of Parliament and a departmental official was too remote from the transacting of any likely business of the House to attract parliamentary privilege. Something more must occur than the mere creation of a document for a member of Parliament.

[18] However, s 10(3) is not on its wording directed to whether there is a "serious or realistic prospect of the House entertaining the business" but rather whether there is "reasonably apprehended business". The straightforward interpretation of the effect of s 10(3) is that:

(a) the protection of s 10 is broadened — steps taken for the purposes of or incidental to parliamentary business fall within s 10 even if relevant business is not currently being transacted or even if relevant business does not ever occur; but

(b) in such cases, such business must be "reasonably apprehended", in the sense that it is expected that such business will ensue. In establishing the words spoken or acts done are for the purposes of or incidental to parliamentary business, s 10(3) requires an objective prospect of such

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[10] Mary Harris and David Wilson (eds) *McGee: Parliamentary Practice in New Zealand* (4th ed, Oratia, Auckland, 2017) at 729 and 732 (footnotes omitted). *McGee* cites *Smith v Department of Foreign Affairs and Trade* [2007] AIRC 366, a decision of the Australian Industrial Relations Commission, as the example of an "email exchange" without the "something more" necessary to attract privilege. In turn, *Smith* cites (among others) *Erglis v Buckley* [2005] QSC 25 [*Erglis* QSC] and *Erglis v Buckley* [2005] QCA 404, [2006] 2 Qd R 407 [*Erglis* QCA] but does not address the term "reasonable apprehension", which is not found in the Parliamentary Privileges Act 1987 (Cth).

business and will not be satisfied by, for example, a constituent's expectation that business may ensue.

[19] Further, and in particular, s 10(4) and (5) prohibit the use of a necessity test in interpreting s 10(1) as used in *Leigh*:

> (4) In determining under subsection (1) whether words are spoken or acts are done for purposes of or incidental to the transacting of the business of the House or of a committee, no necessity test is required or permitted to be used.
>
> (5) **Necessity test** includes, but is not limited to, a test based on or involving whether the words or acts are or may be (absolutely, or to any lesser degree or standard) necessary for transaction of the business.

[20] Section 10(7) specifically overturns *Leigh* and any other contrary law:

> (7) This section applies despite any contrary law (including, without limitation, every enactment or other law in the decision in *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 (SC)).

[21] The effect of s 10 for present purposes is therefore that:

(a) steps taken for the purposes of or incidental to parliamentary business and for the preparation of a document for the purpose of or incidental to such business are "proceedings in Parliament"; and

(b) the determination of whether a given step is for that purpose or is incidental is not to turn on whether that step is necessary or by reference to *Leigh.*

[22] The Act does not, to the contrary, define or expressly prescribe the process for determining the meaning of "words spoken and acts done in the course of, or for purposes of or incidental to, transacting of the business of the House or of a committee".

[23] The effect of the Act is to leave the question of whether such information is for the purposes of or incidental to parliamentary business as turning on the closeness of the connection between the provision of information and the parliamentary business.

Mr Peters' speech

[24] Based on the definition contained in s 10, Mr Peters' speech is self-evidently a "proceeding in Parliament".

[25] It is not permissible in terms of ss 11 and 15 of the Act to rely on the speech or reporting of those remarks as a historical fact relevant to the plaintiffs' claim as a form of extended publication and/or as establishing an element of liability. Each of those actions involves some criticism or determination of the remarks as untrue contrary to s 11(a).

[26] Therefore, the reliance by the plaintiffs upon Mr Peters' parliamentary remarks — even though only for the purpose of seeking to reflect the greater publication effected through those remarks for the purpose of liability — amounts to questioning of those remarks.

Mr Freeman's provision of information to Mr Peters

[27] The next issue in this case is whether Mr Freeman's provision of information to Mr Peters also falls within the Act's definition of "proceedings in Parliament". This requires an assessment of the facts against the statutory definition.[11]

[28] If the provision of this information to Mr Peters by Mr Freeman comes within the Act's definition of "proceedings in Parliament", then the provision of the information is subject to parliamentary privilege.

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[11] Harris and David, above n 10, at 729.

[29] The authors of *McGee* describe the position of communications involving Members of Parliament as follows:[12]

> Not all actions of a member of Parliament constitute proceedings in Parliament. Proceedings in Parliament cover a much narrower range of activities than are performed by members generally. Even actions performed by a member in his or her capacity as a member may not qualify for protection.[13] Although actions taken in or in relation to the House are proceedings in Parliament, actions taken in relation to constituents or other persons (and vice versa) are usually not proceedings in Parliament. Communications, for instance, between a member and the public, including even a member's constituents, are not proceedings in Parliament.[14] Such a communication might become a proceeding in Parliament only if the communication were directly connected with some specific business being transacted, or about to be transacted, in the House or a committee. The delivery of a petition to a member for presentation to the House would qualify as a proceeding in Parliament (being proximately connected to business that the House is about to transact), *as would a communication solicited by a member for the express purpose of using it in or for specific business of the House or of a committee*.[15]
>
> The question is whether words are spoken or acts are done for the purposes of, or are incidental to, transacting the business of the House or a committee. The Parliamentary Privilege Act 2014 requires consideration of what is "reasonably apprehended business of the House or a committee".[16] There must be a serious or realistic prospect of the House entertaining the business before a communication to a member will be protected. A communication's status after it has been received by the member depends upon the use the member makes of it. *If the member takes some action in respect of it for the purpose of transacting parliamentary business, it may, at that point, become part of a proceeding (whether or not it is referable to a particular debate before the House)*.[17] Even so, that will not have any retrospective effect so as to afford protection in respect of the original communication to the member.

[30] There have been a number of cases in overseas jurisdictions that have considered whether the communications of "strangers" to Members of Parliament, are protected by parliamentary privilege.

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12 Harris and David, above n 10, at 728-729 (emphasis added).

13 *Attorney-General of Ceylon v De Livera* [1963] AC 103 (PC); *Re Ouellet (No 1)* (1976) 67 DLR (3d) 73 (CS); *Crane v Gething* [2000] FCA 45, (2000) 169 ALR 727; and *Rowley v Armstrong* [2000] QSC 88.

14 *Buchanan v Jennings* [2002] 3 NZLR 145 (CA) at [64]; *Pankiw v Canada (Human Rights Commission)* [2007] 4 FCR 578 (a member's constituency newsletter was not protected by parliamentary privilege); *Rivlin v Bilainkin* [1953] 1 QB 485, [1953] 1 All ER 534; and *R v Ponting* [1985] Crim LR 318 (QB).

15 *Erglis* QSC, above n 10; *Terry v Police* [2004] NZAR 489 (HC); Joint Committee on Parliamentary Privilege (UK) *Parliamentary privilege: report of session 2013-14* [2013] HL Paper 30, HC 100 at [242].

16 Parliamentary Privilege Act, s 10(3).

17 *Erglis* QSC, above n 10.

[31] In *Rivlin v Bilainkin*, a communication of an allegedly defamatory nature repeated to a Member of Parliament contrary to an injunction against repetition, being in no way connected with any proceeding in Parliament, was not protected by parliamentary privilege so as to oust the jurisdiction of the Court.[18]

[32] In another case, *R v Grassby,* a former Member of Parliament was charged with criminal defamation for supplying a defamatory document to a current Member of Parliament, with the intention that it be read out in Parliament.[19] The defendant applied for an order staying the proceedings against him on those charges. The Supreme Court of New South Wales dismissed his application for a stay and held parliamentary privilege did not protect an informant in his position.

[33] The Court found the privilege is that of the Member of Parliament, not that of anyone else, and there was no warrant to give a comparable absolute immunity to any person who seeks to persuade a member to say something in the House. The Court observed that such an application of absolute privilege "would protect any vicious character assassin" in trying to destroy another's reputation by having a Member of Parliament read out "deliberately fabricated untruths" in the House.[20] Instead, the Court determined the appropriate level of protection for such informants was qualified privilege, which is defeasible by malice. The Court considered it "wholly unreal" that parliamentarians would be deterred from reading out information supplied to them for that purpose by informants, or that the sources of information to parliamentarians would dry up, if those informants were protected by qualified rather than absolute privilege.[21]

[34] In *Rowley v O'Chee*, Mr Armstrong made defamatory remarks about Mr Rowley to Senator O'Chee alleging Mr Rowley was engaged in illegal fishing.[22] The remarks were unsolicited by the Senator and Mr Armstrong was acting in his personal capacity. The Senator then raised the issue in the Senate and in a radio broadcast.[23] The plaintiff initially brought an action for defamation against the

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18 *Rivlin v Bilainkin*, above n 14.
19 *R v Grassby* (1991) 55 A Crim R 419 (NSWSC).
20 At 428.
21 At 430.
22 *Rowley v O'Chee* [2000] 1 Qd R 207 (QCA).
23 At 210-211.

Senator. Mr Rowley sought disclosure of documents relevant to the proceeding and Senator O'Chee opposed the order on the basis that his documents were protected by parliamentary privilege.

[35] In deciding whether the Senator's communications with Mr Armstrong or the documents he had received from Mr Armstrong were protected by parliamentary privilege, McPherson JA considered "[i]t is not … possible for an outsider to manufacture Parliamentary privilege for a document by the artifice of planting the document upon a Parliamentarian".[24] The privilege does not attach to a document until at earliest the Member or their agent "does some act with respect to it for purposes of transacting business in the House".[25] He found:[26]

> Generally, it seems to me that if documents like these came into possession of Senator O'Chee and he retained them with a view to using them, or the information they contain, for the purpose of Senate questions or debate on a particular topic, then it can fairly be said that his procuring, obtaining or retaining the possession of them were "acts done … for purposes of or incidental to the transacting of the business" of that House. Although "acts done" is not specially apt to describe what happens when a possibly unsolicited document arrives through the mail or by other forms of communication, a member who becomes aware that the document has arrived and elects to keep it for purposes of transacting business of a House, may properly be said to have done an "act" or "acts" for purposes of, or incidental to, the transacting of that business.

[36] McPherson JA further determined that requiring the Senator to produce the documents for inspection had an obvious potential to deter parliamentarians from preparing or assembling documentary information for future debates and questions in the House.[27] However, he also emphasised the privilege belonged not to the Senator's informants, nor even solely to the Senator himself, but to Parliament, and attaches only when a Member does some act with respect to documents for purposes of, or incidental to, the transacting of House business.[28] The majority found parliamentary privilege applied to the documents in this context and set aside the order for their disclosure.

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24 At 221.
25 At 221.
26 At 221. However, Fitzgerald P, dissenting, found at 214: "If given effect, the primary argument for Senator O'Chee's claim to privilege would expand the boundaries of parliamentary privilege to limits which are, to my mind, unnecessary, excessive and unsupported by authority and not within the statutory language."
27 At 224.
28 At 224-225.

[37] Following the decision in *Rowley v O'Chee* and an unsuccessful application for special leave to appeal that decision in the High Court of Australia, Mr Rowley sought leave in the Queensland Supreme Court to take a fresh step in the proceedings, this time against Mr Armstrong.[29] Mr Armstrong applied for an order striking out the defamation action for want of prosecution or on the ground of its being an abuse of process.[30] Mr Armstrong argued his communications with the Senator were protected by parliamentary privilege.[31] The Court held Mr Armstrong's act of communicating with the Senator did not amount to participating in proceedings in Parliament so that parliamentary privilege did not extend to protect him as such an informant.[32] However, it found that the protections of qualified privilege still applied.[33]

[38] In the *Erglis v Buckley* proceedings, the Leader of the Opposition in the Queensland Legislative Assembly asked questions of the Minister for Health and made a lengthy statement in Parliament criticising the conduct and management of a Queensland hospital ward.[34] The source of the information supplied to the Leader of the Opposition was the plaintiff, Ms Erglis, who had been a nurse on the relevant ward. A number of other nurses sought an opportunity to refute these allegations and, to that end, arranged a meeting with the Minister for Health the next day. At that meeting, the nurses asked the Minister whether, if they prepared a letter containing their side of the matter, she would be prepared to read it in Parliament. The Minister promised to do so. The letter was then composed, written, and signed by the defendants and transmitted to the Minister who read it in Parliament later that day. The letter, which was then reported in the media, included comments that were defamatory of Ms Erglis. She sued the other nurses, the defendants, for defamation.

[39] The defendants originally applied for summary judgment on the basis the action was not maintainable because they were protected by parliamentary privilege.[35]

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29 *Rowley v Armstrong*, above n 13.
30 At [1].
31 At [19].
32 At [33]-[34], citing *Rowley v O'Chee,* above n 22.
33 At [20].
34 *Erglis* QSC, above n 10; *Erglis* QCA, above n 10.
35 *Erglis v Buckley* [2003] QSC 394. I note that in a further interlocutory application in *Erglis v Buckley* [2004] QCA 223, [2004] 2 Qd R 599 at [30], Jerrard JA endorsed the position declared in *R v Grassby,* above n 19, that a communication from the public to a member of the legislature seeking to persuade them to say something in the House was protected by qualified privilege only.

At that stage the precise circumstances of the provision of the letter to the Minister (namely, the Minister's involvement in initiating its drafting) were unclear. It was common ground that merely volunteering information to a member was not sufficient to attract privilege. However, the Court refused the summary judgment application as further evidence was required to determine the applicability of parliamentary privilege.

[40] At trial, the Minister gave evidence about speaking to the nurses and agreeing to their suggestion that she read out the letter they wrote her. The jury held the creation and sending of the letter by the nurses was in the course of, or for the purposes of, or incidental to transacting business of Parliament, as was the bringing of the letter to the attention of other ward staff. The defendants argued parliamentary privilege should extend to confer protection on the acts of strangers to Parliament.

[41] In the Supreme Court of Queensland, the Judge, referring to *Rowley v O'Chee*, considered that in order for privilege to attach to a document, the Member or their agent "must in some way appropriate the document to proceedings in Parliament by doing some act with respect to the document for purposes of, or incidental to, transacting parliamentary business".[36] He considered there was no requirement for there to be debate in progress at the time the document is appropriated for there to be some parliamentary business to which the document is referable.[37] In this case, the Judge found the Minister had appropriated the letter to proceedings in Parliament when she was invited and undertook to read it out in the Assembly. While parliamentary debate on the ward had already been occurring, the Judge considered a "document so appropriated may itself initiate the business in question".[38]

[42] The Judge disagreed with the narrow construction of the legislation (the Parliamentary Privileges Act 1987 (Cth)) in *Rowley v Armstrong* and concluded that the acts of the defendants in composing, typing, printing and sending the letter to the Minister were entitled to the absolute protection of parliamentary privilege, because the Minister had solicited their letter and expressly undertook to read it out in the

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36 *Erglis* QSC, above n 10, at [37], citing *Rowley v O'Chee*, above n 22, at 225-226.
37 At [37].
38 At [37].

Assembly with its specified content.[39] The Judge explained there was no distinction of substance between the defendants preparing a document recording their views at the Minister's invitation when she had made it clear it would be presented to the Assembly in that form, and the Minister herself writing such a document for that purpose, or the Minister having a member of her staff do so at her behest.[40] The Judge observed that privilege would not have attached if the defendants had merely sent an unsolicited letter to the Minister (as in *Grassby*), or if the Minister had merely agreed to consider any letter sent for presentation or submission to the Assembly.[41]

[43] However, the defendants were not protected against a claim over a separate and subsequent publication, where the letter was displayed on the counter at the nurses' station in the ward after having been sent to the Minister.[42] Those acts in publishing defamatory matter were deemed to be no more protected than a defamatory statement by a member made outside Parliament repeating a defamatory statement made in Parliament.[43]

[44] On appeal, the Queensland Court of Appeal assessed whether the defendants were entitled to the protection of parliamentary privilege and confirmed the Supreme Court's findings.[44] McPherson JA, with whom Dutney J agreed, acknowledged the Supreme Court's decision extended parliamentary privilege to persons who are not themselves Members of Parliament but held that "such an extension is, in the circumstances of this case, necessarily implicit in the statutory provisions".[45] He stated this is consistent with the well-settled judicial characterisation of the privilege as belonging to Parliament as a whole rather than to the individual member, and that the protection must be intended to cover those who will be involved in preparing and providing the document for the Member to use in transacting the business of the Assembly, and not merely the Member who prepares the document themselves.[46] The Court also agreed the subsequent publication of the letter in the ward did not fall within

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39 At [40]-[41].
40 At [41].
41 At [41].
42 At [43].
43 At [43], referring to *Buchanan v Jennings* [2004] UKPC 36, [2005] 2 NZLR 577.
44 *Erglis* QCA, above n 10.
45 At [31].
46 At [31].

proceedings in Parliament as it was not "for the purposes of transacting any business of the Assembly".[47]

[45] Jerrard JA agreed. He considered that a focus on whether the documents were "solicited" by the Minister concentrated too much on one matter of fact, and what mattered was that the Minister offered to assist the nurses, who suggested a statement by them be read, and the Minister then agreed to do that on conditions.[48] He found the Minister thereby appropriated the document and its preparation to proceedings in Parliament so that privilege attached.[49]

[46] In *Terry v Police*, the appellant was convicted of criminal offending after sending a fax to a Member of Parliament and later threatening in a telephone call to an employee of the Member that he would come to Parliament with a firearm.[50] The High Court, in a decision prior to the existence of the Act, considered whether the evidence of the fax was inadmissible because it was subject to parliamentary privilege as a proceeding in Parliament. The Court canvassed the point, as follows:

> [39] In this case it is uncertain, on the evidence, whether the appellant's fax was closely related to any current parliamentary business. It is not clear whether this matters. The Clerk of the Australian Senate, Harry Evans, has argued that in appropriate cases parliamentary privilege should cover constituents "who seek to assist the pursuit of the public interest by providing information to the tribunes of the nation": Evans, "Protection of Persons Who Provide Information to Members", 27th Conference of Presiding Officers and Clerks, Hobart, 1996. On the other hand, the authors of Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, 2002) at 402 suggest that a member's constituency work will not usually be protected since it will seldom relate to business before the House. I would prefer to have more facts as to the connection, if any, between the appellant's fax and current parliamentary business before expressing a concluded view as to whether it is subject to parliamentary privilege.

[47] The Judge held the fax was admissible even if subject to parliamentary privilege because the prosecution had relied on it only to identify the appellant (not to question or impeach what was said or done in Parliament).[51]

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47 At [35].
48 At [100].
49 At [100].
50 *Terry v Police*, above n 15.
51 At [41].

[48] In *Carrigan v Cash*, the first respondent, the Minister for Employment in the Australian Government, appointed the second respondent, a retired Judge, to inquire into and report on complaints concerning the Vice President of the Fair Work Commission, including complaints made by the plaintiff to the Minister's predecessor.[52] After the report was tabled in the Senate and circulated, the plaintiff brought judicial review proceedings, seeking a declaration that the report was of no effect. The respondents applied to strike out the pleadings on the basis they would require the Court to receive evidence and make assessments concerning proceedings in Parliament. The Federal Court was therefore required to determine whether a report tabled by a Minister was a proceeding in Parliament.

[49] The Court noted the question of whether words were spoken or acts done for a specified purpose is a question of fact that requires an assessment of the subjective purpose of the actor in question. The ascertainment of that purpose is informed by an objective consideration of the circumstances.[53] The Court noted the tabling in Parliament of a report obtained by the Executive for its purposes does not necessarily mean the report is a "proceeding in Parliament".[54]

[50] The Court considered that what required consideration in assessing whether privilege applied was the purpose of the retired Judge in preparing and presenting the report.[55] In these circumstances, the second respondent's purpose clearly related to the transacting of parliamentary business as it concerned an inquiry into whether complaints against a public officer amounted to grounds to recommend his removal from office by Parliament.[56] He provided the report with the knowledge and intention it would in all probability be used by Parliament for that purpose. It was not prepared simply to provide advice to the Minister for her consideration or for any other purpose.[57] There had also already been discussion in the Senate of the investigation and forthcoming report. Accordingly, the Court concluded the report constituted a proceeding in Parliament.

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52 *Carrigan v Cash* [2016] FCA 1466.
53 At [44].
54 At [45], citing *Stewart v Ronalds* [2009] NSWCA 277, (2009) 76 NSWLR 99 at [121].
55 At [46].
56 At [69].
57 At [70].

[51] In *Law Society Northern Territory v Legal Practitioners Disciplinary Tribunal (NT)*, the Chief of Staff to the Leader of the Opposition in the Northern Territory Legislative Assembly sought advice from that Member's lawyer about how the Member ought to respond to a report to be tabled in the Assembly containing adverse findings about that Member's conduct.[58] The lawyer advised the Member should make a false statement in the Assembly as to the report's findings. The plaintiff sought judicial review of the Disciplinary Tribunal's finding that the evidence of the advice was inadmissible because it was subject to parliamentary privilege.

[52] The Supreme Court of the Northern Territory held that the Disciplinary Tribunal was correct to find that the evidence of the advice was protected by parliamentary privilege. The Court accepted documents prepared by parliamentary staff for use by a Minister or any other parliamentarian in the business of Parliament will ordinarily be privileged, and found there was no reason for this privilege not to extend to a legal practitioner employed to advise a parliamentarian on what to say or do in the Assembly.[59] The Court distinguished *Grassby* on the basis that the lawyer was acting in his professional capacity as an adviser to the Member, providing advice that was sought by the Member's agent, and could not be characterised as an outsider.[60]

Contrary indications in work of parliamentary privilege committees

[53] The status of information provided to Members has also been considered in the work of parliamentary privilege committees in both Australia and the United Kingdom.

[54] In the United Kingdom successive reports of the Joint Committee on Parliamentary Privilege have raised the question of whether constituents' letters are (and, if not, ought to be) subject to parliamentary privilege.

[55] The first report of the Joint Committee, published in 1999, records earlier consideration by the House of Commons of whether Members' own letters written to

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58 *Law Society Northern Territory v Legal Practitioners Disciplinary Tribunal (NT)* [2020] NTSC 79, (2020) 357 FLR 22.

59 At [43].

60 At [28], citing *R v Grassby*, above n 19.

responsible Ministers were or ought to be privileged as proceedings in Parliament, but noted a number of consequent difficulties including whether such protection should extend to letters from constituents.[61] The report concluded against such extension, noting both expert evidence by the prominent constitutional scholar A W B Bradley that "the qualified privilege of common law seems to have enabled members of both Houses to carry out their functions satisfactorily" and the broader concern that:[62]

> Article 9 provides an altogether exceptional degree of protection, as discussed above. In principle this exceptional protection should remain confined to the core activities of Parliament, unless a pressing need is shown for an extension. There is insufficient evidence of difficulty, at least at present, to justify so substantial an increase in the amount of parliamentary material protected by absolute privilege.

[56] *McGee* notes that privilege applies to a "communication solicited by a member for the express purpose of using it in or for specific business of the House or of a committee".[63] The 2013/14 report of the Joint Committee it cites in support of that proposition is principally concerned with whether absolute privilege does or ought to apply to Members' own correspondence rather than correspondence sent to Members.[64] That report observed:[65]

> … whether a Member's letter is a proceeding in Parliament will depend, in the circumstances of the case, on how closely the letter is connected to an occurrence, actual or clearly foreseen, in the House or one of its committees. [The Clerk of the House] pointed out that Article 9 was not the only factor, since "the special position of a person providing information to a Member for the exercise of his parliamentary duties has been regarded by the courts as enjoying qualified privilege at law".[66]

[57] However, and while the 2013/14 report followed a discussion paper that set out the position that parliamentary privilege did not generally apply to correspondence and raised the question of whether it should, the Joint Committee recommended against any extension of protection.[67]

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61 Joint Committee on Parliamentary Privilege (UK) *Parliamentary Privilege: First Report* (HL Paper 43-I/HC Paper 214-I, 1999) [JCPP *First Report*] at [103]-[112].

62 At [108] and [110] (footnote omitted).

63 Harris and Wilson, above n 10, at 729, citing *Erglis* QSC, above n 10.

64 Joint Committee on Parliamentary Privilege (UK) *Parliamentary Privilege: Report of Session 2013-14* (HL Paper 30/HC Paper 100, 2013) [JCPP *2013/14 Report*].

65 At [238].

66 Malcolm Jack (ed) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament* (24th ed, LexisNexis, London, 2011) at 270.

67 Office of the Leader of the House of Commons *Green Paper on Parliamentary Privilege* (Cm 8318, April 2012) at [63]-[76], including the comment at [64] that "it is clear that correspondence

[58] The 2013/14 report also dealt separately with briefs prepared at Members' direction and set out the Joint Committee's view — contrary to *Leigh* — that such briefs are "fundamental" to and so part of the parliamentary proceedings.[68] Similarly, the first (1999) report found privilege accorded to a speech or question must necessarily extend to Members' preparatory notes and drafts, "provided these do not circulate more widely than is reasonable for the member to obtain assistance and advice, for instance from a research assistant".[69]

[59] In Australia, the Supreme Court decision in *Erglis* noted the reasoning in *Rowley v Armstrong* "was the subject of detailed criticism in advice by the Clerk of the Senate and Mr Bret Walker SC to the Senate Committee of Privileges".[70] Contrary to the decision reached by the Supreme Court in *Rowley v Armstrong,* the Clerk was of the opinion that the communication by Mr Armstrong to the Senator "must be treated … as being 'proceedings in Parliament'".[71] The advice was, in particular, critical of the Court's failure to follow a Senate Privileges Committee report and for inconsistency with s 16(2) of the Parliamentary Privileges Act 1987 (Cth), which includes preparatory work within the scope of proceedings in Parliament.[72]

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between MPs and their constituents has never been considered to be a proceeding. Certain correspondence … might be held to be already subject to absolute privilege if closely connected or preparatory to parliamentary proceedings".

68 JCPP *2013/14 Report*, above n 64, at [245]: "Such briefing is necessarily antecedent to a parliamentary proceeding, and should enjoy the same protection as is afforded to the draft of a speech or question, whether prepared by a Member personally or by a researcher acting on the instructions of that Member."

69 JCPP *First Report*, above n 61, at [113].

70 *Erglis* QSC, above n 10, at [40], citing Bret Walker "Rowley v Armstrong – Opinion" in *Advices to the Senate Committee of Privileges from the Clerk of the Senate and Senior Council, March 1988 to April 2002* (Senate of the Commonwealth of Australia, 2002) [*Advice to the Committee of Privileges*].

71 *Advice to the Committee of Privileges*, above n 70, at 130.

72 At [5], citing Senate Committee of Privileges *Possible threats of legal proceedings against a senator and other persons* (67th Report, September 1997) [SCP *67th Report*]; and Parliamentary Privileges Act 1987 (Cth), s 16(1)-(2), which provides:

(1) 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.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, ***proceedings in Parliament*** means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

Section 16(2) is closely followed in ss 10(1) and (2) of the Act.[73] The Senate agreed to brief counsel to intervene, but the case did not proceed.[74]

[60] However, the background to that criticism of *Rowley v Armstrong* in the work of the Australian Senate Privileges Committee gives a more complex and, here, instructive position. The criticism relies upon a 1997 report of the Senate Committee of Privileges, which puts the issue as follows:[75]

> It has always been thought, in the absence of definitive judicial authority, that the immunity of parliamentary proceedings from any impeachment or question before any court or tribunal extends to matters which, while not part of the actual proceedings of the Senate or its committees, are closely connected with those proceedings. …
>
> This extended operation of the immunity is provided for in the *Parliamentary Privileges Act 1987* in the following terms:
>
> > 'proceedings in Parliament' means all words spoken and acts done in the course of, *or for purposes of or incidental to*, the transacting of the business of a House or of a committee [emphasis added].
>
> This provision is regarded as a codification of the pre-existing law, not as an extension of the law …

[61] Further, and consistently with the other commentary above, the Senate Committee stated:[76]

> The answer to this question is likely to be determined by the circumstances of particular cases, and, in particular, by the closeness of the connection between the communication of the information to the senator and potential or actual proceedings in the Senate or a committee. For example, if a person provides information to a senator with an explicit request that the senator initiate some action in the Senate in relation to that information, such as an inquiry by the Senate, there is a much stronger basis for concluding that the communication of that information is protected by parliamentary privilege than if the person provides the information simply as a matter of political intelligence …

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

73 The only substantive difference in s 10(2) of the Parliamentary Privilege Act 2014 is that s 10(2)(e) adds scope for other legislation to deem matters to constitute proceedings in Parliament. However, and as below, the Australian Act does not include provision for "reasonably apprehended" proceedings, as provided in s 10(3) of the Parliamentary Privileges Act 2014.

74 Harry Evans and Rosemary Laing (ed) *Odgers' Australian Senate Practice* (14th ed, Commonwealth Government Printer, Canberra, 2016) at 61.

75 SCP *67th Report*, above n 72, at [2.2], summarising advice of the Clerk of the Senate (original emphasis preserved).

76 SCP *67th Report*, above n 72, at [2.2], summarising advice of the Clerk of the Senate.

> Similarly, if a senator has requested the information for the purpose of using it in the Senate or a committee, there is a stronger basis for applying the immunity than if there is no evidence of any potential relationship between the information and parliamentary proceedings. If a senator has actually used the information in the course of parliamentary proceedings, that also provides a firmer basis for applying the immunity to the provision of the information than if no parliamentary use is made of the information.

[62] The Senate Committee observed that there was a need to weigh both the free flow of information to the Senate and the right to bring proceedings over alleged harm and cautioned against a general protection:[77]

> … the Committee would not contemplate providing protection for a person who had simply sought cover for acts done with malice where this would provide a defence against the operation of the law. … If all information given to senators for the purpose of speeches to the Senate is covered by privilege, there may be some danger that Senate privilege could be used to protect documents and files which may be required in court proceedings.

And concluded that:[78]

> … the Committee does not intend to definitively state principles of general application. The Committee recognises the potential for abuse of the principle that the protection of information conveyed to a senator in connection with proceedings in Parliament should take precedence over a person's available rights under the law … it is not necessary to make a definitive finding as to the scope of privilege, even though [the Committee] has in the present case been prepared to make a finding of contempt …
>
> The Committee does not address the question as to the extent to which protection should be extended to consultations between constituents and senators, and to information held by senators, in the performance of their duties as senators.

[63] It also appears to have been material in the Senate Committee's assessment of the *Rowley v Armstrong* proceeding that, as the Committee understood, the only record of Mr Armstrong's statement was the Senator's own notes and the proceeding had only arisen when Mr Rowley had discovered Mr Armstrong to be the alleged source of the Senator's information.[79] As noted by Professor Enid Campbell, the Committee's finding of potential contempt was based on the obstruction of the Senator's

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77 At [2.13].
78 At [2.46]–[2.47].
79 SCP *67th Report*, above n 72, at [2.23].

parliamentary work and did not require a finding that the records were proceedings in Parliament.[80]

Propositions that emerge from a review of the Act and the case law

[64] The cases referred to by counsel as reviewed above are in some respects difficult to reconcile and need to be treated carefully as they arise in different jurisdictions. In addition, proper effect must be given to the Act. However, reading the Act and the case law together, the following nine propositions are apparent:

(a) The question of whether a communication to a member falls within the scope of proceedings in Parliament is a fact-specific inquiry. A clear understanding of how the information came to be provided to a Member will be required.

(b) If a "stranger" to Parliament provides unsolicited material to a Member, they will likely not be protected by parliamentary privilege. They may, however, have qualified privilege, which is defeasible by malice or, likely, contempt of court.

(c) A step taken that can be demonstrated to be preparatory or incidental work for the Member's contribution to Parliamentary business, including reasonably apprehended business under s 10(3), will fall within the scope of proceedings in Parliament. I note that the reference in s 10(2)(c) to "the preparation of a document for purposes of or incidental to the transacting of any business of the House" is simply a particular example of activity that falls within the more general definition contained in s 10(1). It does not limit the privilege afforded to other activities.

(d) The determination of whether a given step is for the purpose of parliamentary business or is incidental to that business is not to turn on

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80 Enid Campbell *Parliamentary Privilege* (Federation Press, Sydney, 2003) at 48.

whether that step is necessary or by reference to *Attorney General v Leigh.*[81]

(e) The preparation and provision of a parliamentary statement or brief in terms directed by a Member, whether by a Member's staff, an external adviser, or, as in *Erglis*, by aggrieved individuals on terms agreed with the Member,[82] will amount to such preparatory or incidental work and so fall within the definition, as do unreleased drafts.

(f) A communication short of the above may amount to preparatory or incidental work if it is nonetheless closely connected to the Member's contributions to parliamentary proceedings. Relevant, but not determinative, factors in assessing this connection include:

(i) whether the information provided was solicited or its delivery otherwise invited by the Member;

(ii) whether the communication was expressly sought for the purpose of parliamentary business;

(iii) at what point in time there was a serious or realistic prospect of the information becoming part of the business of the House; and

(iv) whether it was actually used.

(g) In keeping with the significant character and consequences of a finding that a given statement or action falls within the scope of proceedings in Parliament, that assessment must be stringent. In particular, the provision of a document to a Member for potential use in parliamentary proceedings is not itself enough to render that document a proceeding in Parliament.

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81 *Leigh,* above n 4.
82 *Erglis* QSC, above n 10.

(h) Issues should be resolved paying proper regard to the purposes of the Act and the privilege. When assessing the matter, the Court should consider whether, if the actions in question did not enjoy privilege, this is "likely to impact adversely on the core or essential business of Parliament".[83]

(i) Finally, the Act must be interpreted in a way that promotes the principle of comity that requires the legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to the important constitutional relationship, the other's proper sphere of influence and privileges.[84]

Was the provision of information by Mr Freeman to Mr Peters for the purposes of or incidental to the transacting of reasonably apprehended business of the House?

[65] To determine whether the provision of information to Mr Peters was for purposes of or incidental to the transacting of reasonably apprehended business of the House, and therefore within the scope of proceedings in Parliament and subject to parliamentary privilege, the Court must determine how the information came to be provided to him.

[66] In particular, the Court must consider whether the information was solicited, or its delivery otherwise invited by Mr Peters, and at what point there was a serious or realistic prospect of the information becoming part of the business of the House.

[67] The substantive judgment sets out the evidence relied on to establish that Mr Freeman was responsible for the provision of information to Mr Peters. That was a different factual question to the one to be answered now, which is in what circumstances Mr Freeman supplied that information to Mr Peters and whether that provision of information falls within the scope of proceedings in Parliament.

[68] The available evidence can only be described as scant. I have carefully reviewed it in light of the principles and considerations expressed at [64].

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83 *R v Chaytor* [2010] UKPC 52, [2011] 1 AC 684 at [47].
84 Parliamentary Privilege Act, s 4(1)(b).

[69] The circumstances as to how the relevant documents came to be in Mr Peters' possession are ultimately unclear. It is also unclear at what point Mr Peters first considered making a speech in Parliament in relation to the material. Importantly, the available evidence does not clearly disclose who initiated contact and when, or precisely why Mr Freeman arranged for the information to be supplied to Mr Peters. Although it appears the documents were not prepared and provided by Mr Freeman on terms agreed with Mr Peters as in *Erglis*, there is at least some evidence that Mr Peters asked for information from Mr Freeman and his associate on an ongoing basis.

[70] The final factor to consider in assessing the connection between the provision of the documents and Mr Peters' contributions to parliamentary business is whether and in what manner the communication was actually used.

[71] The documents provided were used by Mr Peters and formed the basis of the speech he made in the House. The substantive judgment found Mr Peters' parliamentary remarks included "substantially similar allegations" to those contained in the District Court documents.[85] This is a factor in favour of a close connection.

[72] However, the information was used only in part, with Mr Peters appearing to have significantly refined and condensed the information. The evidence is that Mr Peters was provided with a voluminous file that in the substantive judgment was identified as comprising "over 400 pages of emails and affidavits".[86] He was provided with "all those files" and he repeatedly advised Mr Freemen he and/or his staff had been "going through" it and "annotated the parts we can use".[87] Mr Peters also said in the phone conversations with Mr Freeman that "[a]ll the background work by us has been done" and "we've been through the whole thing".[88]

[73] Clearly then, Mr Peters made his own inquiries in relation to the material. This indicates Mr Peters took some independent steps with respect to the documents to prepare them for delivery to Mediaworks and for presentation as a speech to the

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85 Substantive judgment, above n 1, at [81].
86 At [77].
87 At [73].
88 At [73].

House. However, given the lack of clear evidence as to the circumstances of the initial provision of the documents and the intentions of the parties in seeking or providing them, I do not consider these unilateral acts are sufficient for the Court to find a close connection does not exist in the circumstances.

[74] In light of this unresolved evidential uncertainty, the Court is not in a position to determine that the provision of the documents by Mr Freeman to Mr Peters was outside of the preparatory or incidental work for his contribution to parliamentary business. I make this finding having regard to the principle of comity which here supports the Court erring on the side of finding privilege.

Conclusion

[75] On the basis of my review of the evidence, I find the provision of information by Mr Freeman to Mr Peters comprises a proceeding in Parliament as defined in the Act,[89] because there is evidence that Mr Peters sought the information in question and did so for parliamentary purposes. Such provision of information is therefore protected by parliamentary privilege.

How may the Court refer to or rely on evidence of the remarks made in the House?

[76] Having determined the provision of information by Mr Freeman to Mr Peters comes within the definition of proceedings in Parliament, the question is how the Court may refer to or rely on the remarks made in Parliament by Mr Peters, or reporting of those remarks, as an historical fact relevant to the plaintiffs' claim as a form of extended publication and/or as establishing an element of liability.

The law

[77] Section 11 of the Act provides the general effect of the privilege on using evidence of proceedings in Parliament:

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89 Parliamentary Privilege Act, s 10.

> **11 Facts, liability, and judgments or orders**
>
> In proceedings in a court or tribunal, evidence must not be offered or received, and questions must not be asked or statements, submissions, or comments made, concerning proceedings in Parliament, by way of, or for the purpose of, all or any of the following:
>
> (a) questioning or relying on the truth, motive, intention, or good faith of anything forming part of those proceedings in Parliament:
>
> (b) otherwise questioning or establishing the credibility, motive, intention, or good faith of any person:
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament:
>
> (d) proving or disproving, or tending to prove or disprove, any fact necessary for, or incidental to, establishing any liability:
>
> (e) resolving any matter, or supporting or resisting any judgment, order, remedy, or relief, arising or sought in the court or tribunal proceedings.

[78] Using the language of art 9, freedom of speech is "impeached" where civil or criminal liability is sought to be imposed for what a person has said or done in Parliament, whereas it is "questioned" where legal proceedings critically examine what a person has said or done in Parliament.[90]

[79] There are some legitimate uses of evidence of proceedings in Parliament. Section 13 provides that certain documents relating to proceedings in Parliament may be used by a court or tribunal for the purpose of interpreting legislation. Section 15 also allows for the use of proceedings in Parliament to establish historical events or other facts:

> **15 Use of proceedings to establish, without impeaching or questioning, historical events or other facts**
>
> (1) In relation to proceedings in a court or tribunal, neither this subpart nor the Bill of Rights 1688 prevents or restricts evidence being offered or received, questions being asked, or statements, submissions, or comments made, concerning proceedings in Parliament, by way of, or for the purpose of, establishing with no impeaching or questioning of the proceedings in Parliament a relevant historical event or other fact.

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[90] Harris and David, above n 10, at 734, citing the Attorney-General's submission in *Pepper (Her Majesty's Inspector of Taxes) v Hart* [1993] AC 593 (HL) at 638.

> (2) This section is explanatory only, and does not limit or affect the prohibition in Article 9 of the Bill of Rights 1688 (operating as this subpart requires, or independently) on impeaching or questioning proceedings in Parliament.

[80] Examples of permissible historical uses are using parliamentary proceedings to prove material facts, such as that a statement was made in Parliament or made at a particular time, or that it refers to a particular person;[91] using proceedings to prove that a member was present in the House on a particular day;[92] or using proceedings to prove that a report of a speech is fair and accurate and thereby protected by qualified immunity.[93]

[81] Determining how the proceedings in Parliament in this case can be used by this Court involves interpretation of the Act, and in particular ss 11 and 15. In doing so, the Court must be guided by the instruction in s 4(1)(b) that the Act "must be interpreted in a way that … promotes the principle of comity".

Certain comment on proceedings in Parliament permissible

[82] There are two elements to consider when a Court is considering referring to a proceeding in Parliament: first, what comment the Court wishes to make; and second, the purpose of that comment.

[83] Regarding the first element, it is open to the Court to acknowledge that, for example, a speech has been made in Parliament and to quote from that speech. There is no questioning or impeaching of the speech in simply referring to it. The Court may not, however, critically examine the speech, or consider the motives or good faith of the speaker or consider whether the speech is untruthful or unlawful. To do so would be to "question" the speech contrary to s 11.

[84] Regarding the second element, the Court may refer to Hansard to assist in the interpretation of legislation,[94] or to establish that a historical event occurred because a

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91 Harris and David, above n 10, at 739, citing *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC).

92 Harris and David, above n 10, at 739, citing *Forbes v Samuel* [1913] 3 KB 706; and *Tranton v Astor* (1917) 33 TLR 383.

93 Parliamentary Privilege Act, ss 18-21.

94 Section 13.

parliamentarian spoke about it.[95] But it may not rely on that evidence to "resolv[e] any matter" arising in court proceedings.[96] The Court may refer to proceedings in Parliament as contextual or background information in a claim, but not to determine contentious matters in issue.

No civil or criminal liability for exercising privileges of Parliament

[85] Section 11 and art 9 make it plain that there can be no civil or criminal liability for those exercising privileges of Parliament. Parliamentary proceedings may not be "impeached". Thus, a Court may not hold a Member of Parliament liable in defamation for what that Member says in the House.[97]

[86] The question arises as to whether the prohibition in s 11(d) against "establishing any liability" extends to the extent of separately establishing liability. The answer must be yes: the purpose of the privilege is to free Parliament's functioning from judicial control and to respect each branch of government's constitutional role. The use of the word "any" supports a broad reading of s 11(d) — the Act is deliberately expansive in prohibiting the courts' use of evidence of proceedings in Parliament. That the privilege can protect people who are not Members of Parliament themselves is evident in the case law.[98]

[87] Using evidence of a parliamentary proceeding to establish liability would almost certainly call the parliamentary proceeding into question in a way that would contravene s 11. A court cannot use evidence of a speech in Parliament to establish liability against another person if it does so by questioning the propriety of a parliamentary statement, or by drawing inferences or conclusions from anything forming part of parliamentary proceedings.[99]

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95 Section 15.
96 Section 11(e).
97 *Dillon v Balfour* (1887) 20 LR Ir 600.
98 See for example *Erglis* QSC, above n 10; and *Law Society Northern Territory*, above n 58.
99 Harris and Wilson, above n 10, at 735, citing *Rost v Edwards* [1990] 2 QB 460.

Proceedings in Parliament cannot be used to determine damages

[88] A further question arises, namely whether the Court could rely on evidence of proceedings in Parliament for the more limited purpose of determining the quantity of damages to be awarded.

[89] This issue was considered in the *Erglis v Buckley* proceedings. The defendants originally succeeded in striking out a pleading that the Minister's speech meant that the imputations contained in the letter became known to the public at large, which the defendants intended.[100] The plaintiff intended to rely on that republication as relevant to the question of damages. The Queensland Supreme Court held that pleading was impermissible as it sought to question what the Minister said and did and struck it out.

[90] This decision was, however, successfully appealed.[101] The three judges wrote separately. McPherson JA allowed the appeal as he considered the pleading involved no questioning of parliamentary proceedings because the Minister was simply reading out a letter to inform Parliament of what it said, not making her own statement.[102] Jerrard JA disagreed, and would have dismissed the appeal, considering that the pleadings attacked the propriety of the Minister's conduct in the Assembly in breach of the privilege.[103] Fryberg J joined McPherson JA in allowing the appeal, but largely due to his view of procedural issues. He agreed:[104]

> … there is something to be said for the view that a member's freedom of speech might be impaired if there were a risk that by making a speech he or she would cause an informant to become liable for increased damages.

However, he considered that question was better addressed at trial.

[91] This decision was discussed by the New Zealand Court of Appeal in *Leigh v Attorney-General*.[105] The Court of Appeal preferred the dissenting reasoning of Jerrard JA, quoting from his decision at length, including:[106]

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100 *Erglis v Buckley* [2003] QSC 440.
101 *Erglis v Buckley* [2004] QCA 223, [2004] 2 Qd R 599.
102 At [11].
103 At [28]-[34].
104 At [100].
105 *Leigh v Attorney-General* [2010] NZCA 624, [2011] 2 NZLR 148.
106 At [58], citing *Erglis v Buckley*, above n 101.

> [34] One foreseeable consequence of holding to the contrary would be the potential detrimental effect on the willingness of citizens to provide possibly important and possibly defamatory information to members of Parliament. An equally important and likely consequence of so holding would be the effect on proceedings in the Parliament such as those involved in this matter. A Member of Parliament who is exposing a source of information to the risk of increased damages by merely publishing verbatim the information given, thus enabling civil proceedings to occur of the kind brought here in which it is pleaded that republication in Parliament was intended and happened, may be able to avoid that consequence to her or his informants by adding comment and observation from other asserted or actual sources and thus providing a bowdlerized or fragmented version of the information given. If the Member takes the latter steps it will be difficult for any person to tender the relevant Hansard extract without it being held that the plaintiff is requiring the court to examine what the Member said and the extent to which it was a republication. Such an examination would be very open to the complaint that it was questioning the speeches in Parliament and proceedings to determine why various statements were made and upon what they were based.

[92] Of course, the Court of Appeal's decision in *Leigh* was appealed to the Supreme Court, but on the point of whether the public servant who prepared a briefing for a Minister, which the Minister then used to answer parliamentary questions, was protected by parliamentary privilege.[107] The Supreme Court found he was not so protected; a finding which was expressly altered by the Act.[108]

[93] However, the Court of Appeal's support in *Leigh* for Jerrard JA's dissenting opinion in *Erglis* is convincing and consistent with the broad approach to the privilege confirmed by the subsequent enactment of the Act. On that view, using evidence of a speech in Parliament to support a claim for increased damages inevitably involves questioning the speech and is impermissible.

[94] As stated by the Queensland Court of Appeal in *Belbin v McLean*:[109]

> … if the quantum of damages able to be recovered from a publisher of defamatory information to a parliamentarian could be greatly increased by virtue of republication in Parliament, there would be an obvious practical restraint on the parliamentarian's freedom to use the information.

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107 *Leigh,* above n 4.
108 Parliamentary Privilege Act, s 3(2)(c).
109 *Belbin v McLean* [2004] QCA 181 at [39].

Conclusion as to how the Court may deal with Mr Peters' speech

[95] In relation to Mr Peters' speech in Parliament, pursuant to ss 11 and 15 of the Act the Court may record that the speech was made and quote from it. It may not do the following, all of which amount to questioning or impeaching a proceeding in Parliament contrary to ss 11 and 15 of the Act:

(a) call the speech's truthfulness or lawfulness into question, even by way of comment;

(b) question Mr Peters' motives, intentions or good faith;

(c) examine the speech in order to resolve matters in issue or to draw inferences, such as what materials Mr Peters was provided with and relied on in drafting the speech;

(d) use the speech to impose liability on Mr Freeman; or

(e) use the speech to evidence wider publication and quantify damages.

[96] The Court may not rely on the speech as evidence of wider publication of the allegedly defamatory material either for the purpose of establishing liability or for increasing the award of damages. To do so would inherently question the speech, especially where the speech is not a simple republication of material provided to Mr Peters. As Jerrard JA warned in *Erglis*, and the Court of Appeal quoted in *Leigh*, if a Member has added "comment and observation from other asserted or actual sources and thus provid[ed] a bowdlerized or fragmented version of the information given", it is difficult for a plaintiff to "tender the relevant Hansard extract without it being held that the plaintiff is requiring the court to examine what the Member said and the extent to which it was a republication".[110] And an examination of the speech "to determine why various statements were made and upon what they were based" is impermissible.[111]

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110 *Erglis v Buckley*, above n 101, at [34], quoted in *Leigh v Attorney-General*, above n 105, at [58].
111 *Erglis v Buckley*, above n 101, at [34], quoted in *Leigh v Attorney-General*, above n 105, at [58].

How may the Court rely on reports of proceedings in Parliament?

[97] Mr Peters' speech in Parliament was reported on in two Campbell Live programmes. The first programme aired on 23 July 2014, the same day the speech was made. It showed excerpts from the speech and recorded Mr Staples watching and reacting to the speech. The second programme aired on 30 July 2014 and included some clips from Mr Peters' speech, but was largely a result of Campbell Live's own investigation into Mr Staples. The second programme does not raise issues relating to proceedings in Parliament, so this analysis focuses on the first programme.[112]

[98] It is evident the first Campbell Live programme showing Mr Peters' speech on television would have substantially increased public awareness of the allegations against Mr Staples.

[99] Those who republish proceedings in Parliament are protected by the statutory defence of qualified immunity if it is a fair and accurate report of those proceedings, and the defendant in communicating the matter did not abuse the occasion of communication by acting in bad faith or with a predominant motive of ill will.[113] A fair and accurate report of parliamentary proceedings is not treated as a repetition of the allegations themselves.

[100] The first Campbell Live programme aired clips of the speech and put the allegations in it to Mr Staples. It appears, therefore, to be a fair and accurate report of the speech. There is no evidence to suggest that Campbell Live or its journalists acted in bad faith or with a predominant motive of ill will. It appears that Campbell Live would have at least an arguable defence to a claim based on that programme.

[101] In these circumstances it is difficult to see how a court could impose liability for a fair and accurate report of a speech in Parliament on a person who provided information to the Member making the speech, without thereby questioning the speech. This is especially so when the speech is not a simple republication of correspondence as it was in *Erglis*. The same argument applies as regards the

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112 See substantive judgment, above n 1.
113 Parliamentary Privilege Act, ss 18-21.

assessment of damages as well — such an assessment would inevitably call the speech into question.

Effect on, and revision of, the substantive judgment

[102] The result is that no aspect of the claim connected to Mr Peters and his speech in the House can be taken into account in assessing Mr Freeman's liability.

[103] The provision of information to Mr Peters was a proceeding in Parliament, meaning the Court has no jurisdiction to hear that part of the claim.

[104] Parliamentary privilege means the court has no jurisdiction to inquire into or assess damages arising as a consequence of the provision of that information, such as the impact of Mr Peters' speech and the coverage of that speech on Campbell Live.

Quantum

[105] In light of these findings, it is necessary to revisit the issue of the quantum of damages to be awarded to the plaintiffs.

Extent of revision of the substantive judgment

[106] Thus:

(a) the description and finding of defamation in respect of the Facebook posts remain unaffected;

(b) the description of the District Court documents as defamatory does not require revision but the discussion of their provision to Mr Peters requires revision in accordance with my findings in this judgment;

(c) the claim based in Mr Peters' remarks, the reporting of those remarks and the description of those matters requires revision in light of the findings in this judgment;

(d) the declaration of liability and quantum requires revision in accordance with these variations; and

(e) the award of costs requires revision, on the basis that a substantial part of the claim has ultimately been unsuccessful and/or that the failure by the plaintiffs' counsel to raise the application of the Act has caused additional cost under r 14.7(d) and (f) of the High Court Rules 2016.

Costs on the application for recall

[107] Counsel for Mr Peters has sought indemnity or 3C costs as costs against the Court, to be paid by the Crown but perhaps recoverable from the plaintiffs. Counsel for the Attorney-General has in turn opposed such costs in respect of the Court and the Crown.

[108] The starting point is that scale costs for an interlocutory application are conventionally awarded for successful applications for recall, to be paid by the opposing party or parties. For example:

(a) In *Taylor v Roper*,[114] the Court of Appeal recalled and supplemented its judgment to address a further statutory basis for argument that had not been advanced at hearing but that was then raised by the Supreme Court in response to a leave application. The Court issued an addendum to address that statutory basis and awarded scale costs to the party that had sought to pursue the point.

(b) In *Murren v Schaeffer*,[115] the Court of Appeal recalled one part of its judgment in light of new information, setting aside an award of indemnity costs. The successful applicant was awarded scale costs.

[109] On the specific points raised and on the approach above, Mr Peters is entitled to costs as a successful applicant for recall. As to quantum:

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114 *Taylor v Roper* [2021] NZCA 691, [2022] 2 NZLR 671.
115 *Murren v Schaeffer* [2019] NZCA 34.

(a) It is correct, as put for Mr Peters, that counsel for the plaintiffs did not raise the Act.

(b) However, much of the claim to costs for Mr Peters concerns his objection that the Court made adverse findings in breach of natural justice. As the Court noted in the recall judgment:[116]

(i) the remedy for those adverse findings that relate to Mr Peters' parliamentary remarks is that successful recall application; but

(ii) beyond that there are jurisdictional objections to the remaining claims of breach of natural justice — for example, objections to evidence — and to any remedy for that claim.

[110] On the question of indemnity costs under r 14.6(4)(d) on the ground that Mr Peters is not a party to the proceeding but has acted reasonably (in that he was obliged to act):

(a) The premise of such costs is that a non-party ought not to be out of pocket through a necessary intervention.

(b) Indemnity costs, if awarded, are also to reflect reasonable costs. Scale costs, which provide a yardstick for reasonableness, appear to amount to 2.6 days/$6,214 at category 2B or $9,178 at category 3B.[117]

(c) The Court may also award scale costs.[118]

(d) Scale costs could, however, be increased under r 14.6(3)(b)-(c) either on the basis that the plaintiffs' failure to raise the Act increased costs and/or that the matters raised are in the public interest.

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116 Recall judgment, above n 2, at [12]-[20].
117 High Court Rules 2016, sch 3, items 22, 24 and 26.
118 See *Erwood v Maxted* [2010] NZCA 93, (2010) 20 PRNZ 466.

[111] On the question of category 3C costs, it is difficult to see the present proceeding as requiring "a comparatively large amount of time" so as to warrant band C.[119] The Court may, however, consider that between the relative rarity of a successful recall application and the importance of the issue of parliamentary privilege, that category 3B costs and/or some uplift is apt.

[112] On the question of costs effectively against the Court and/or the Crown:

(a) As reflected in the recall awards above, the costs of recall where the party or parties have failed to raise a material issue fall, if at all, to the respondent to the recall application. That is the straightforward outcome in a case of this kind.

(b) As noted for the Attorney-General in opposition, the cases involving costs against the Court involve inferior tribunals, and recovery against the Crown for alleged deficiencies on the part of this Court is contrary to the principle of judicial immunity and in particular to dicta of the Supreme Court in *Chapman*:[120]

> [175] Because the judges of the superior courts have always been immune from suit, there could be no question of the Crown (or the state) being vicariously liable for their actions. Judges of inferior courts, however, did not, until recently, enjoy an immunity as broad as that of superior court judges and, as is apparent from our earlier discussion, there are many cases in which such judges have been exposed to suit. As far as we are aware, however, there is no case in which it has been successfully asserted that the Crown (or state) was vicariously liable for the actions of such judges. …

[113] Scale costs on a 3B basis are awarded against the plaintiffs in favour of Mr Peters.

[114] Costs against the Crown are unwarranted and barred by jurisdictional grounds.

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119 High Court Rules, r 14.5(2)(c).

120 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [175]. Proposals to the contrary included provision for costs: see [168].

[115] The recalled judgment will be issued contemporaneously in light of the findings in this judgment.

Doogue J

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