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Parliamentary Privilege Act(s) Tas

Power to call on documents &
evidence from the Crown.

6 September 2019

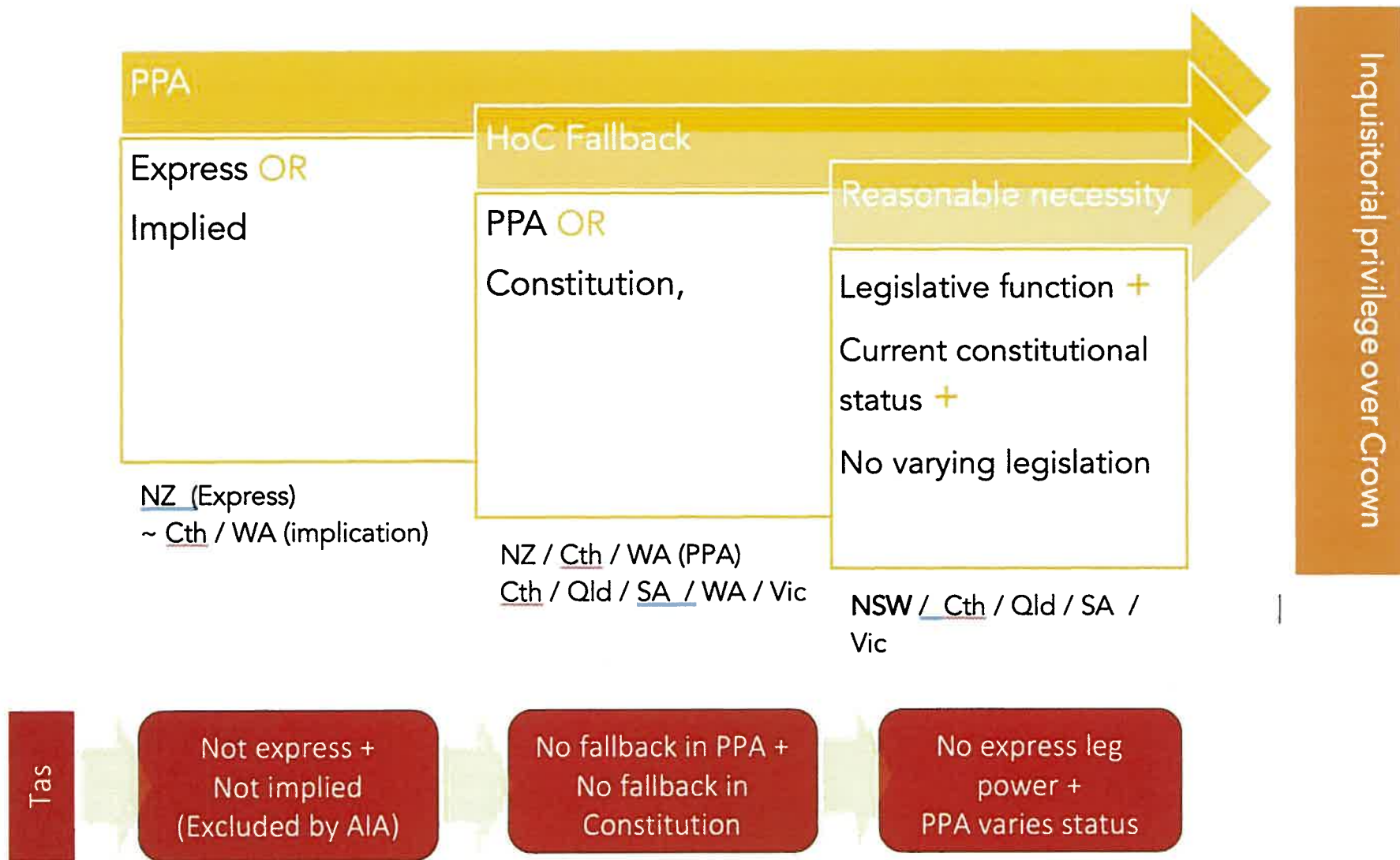


Key points

- Tasmania has the oldest *Parliamentary Privileges Act* (PPA) in Au / NZ.
- Tasmania' has (mostly) unique statutory and constitutional limitations which,
 - Suggest the PPA does not apply to 'the Crown'.
 - Limit the ability to imply the Crown would be otherwise subject to Parliamentary Privilege by the doctrine of 'reasonable necessity' .
- On a bare reading of the PPA it,
 - *At least*, does not apply to Government Ministers in the exercise of their executive functions;
 - Could be argued not to apply to the entire public service.



The (uncertain) privileges over Government Ministers / Docs



Fenton v Hampton (1858)



- Legislative Council of Van Diemen's Land (Tasmania) summonsed John Hampton, the Comptroller-General of Convicts;
- Non-attendance before the council ordered his arrest and imprisonment for contempt of the house.

- SC (VDL) / Privy Council – orders unlawful
- Leg Co subordinate creature of Imperial Statute
- Imperial statute provided no punitive/coercive powers to colonial houses
- Leg Co could only do what was reasonably necessary to carry out functions described in Imperial statute.

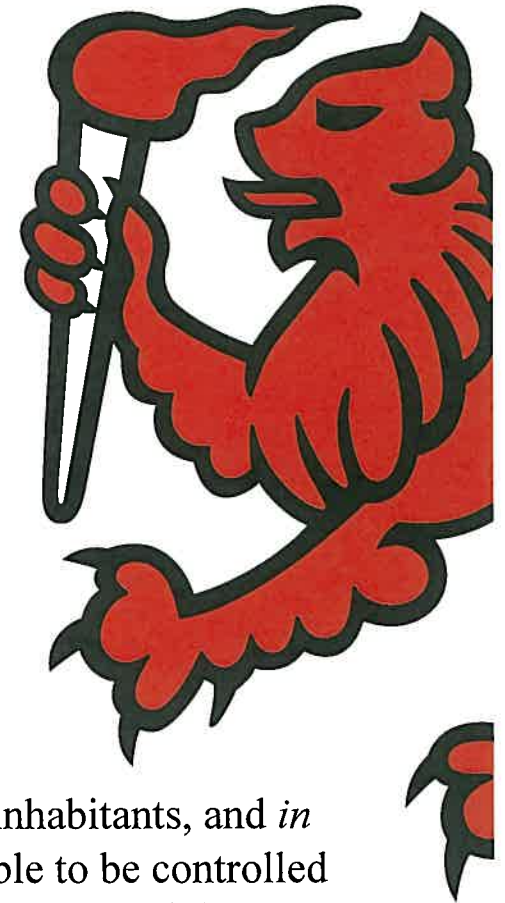
the origin of the [Tasmanian Parliament] and of the powers conferred upon it ... [arise] solely from statutory authority, clothed thereby with certain delegated and defined powers and functions, subject thereby in the exercise of those powers and functions to restrictions and limitations subordinate to [the UK] Parliament, *and in important particulars to the control and direction of the [Crown]*.



- 1858 PPA enacted by VDL Parliament
- Arguably could not have bound the Crown at all (if not practically impossible);



- Regardless Colonial PPA:
 - Would have to have been express to bind Crown
 - **Was not expressed to bind the Crown.**
 - Was not (re) tested against Hampton.



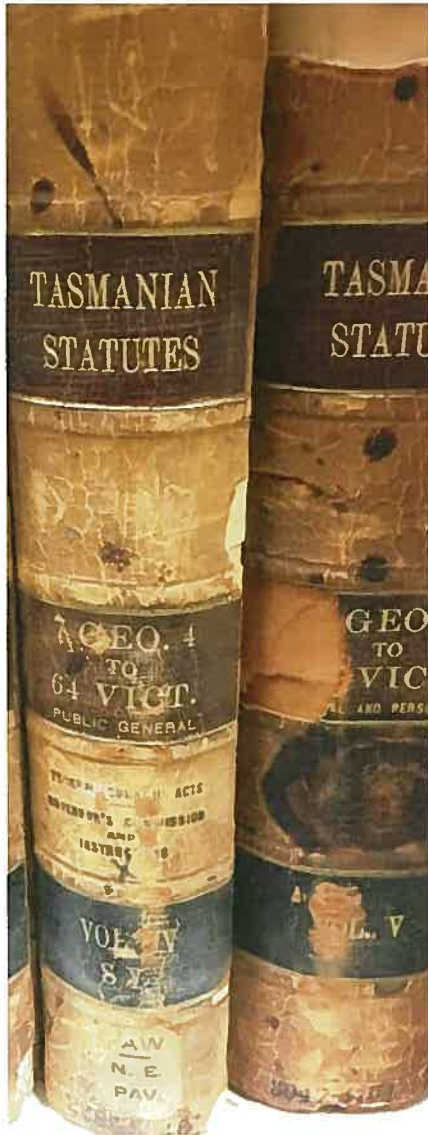
[Tas PLT] a new Legislative body, consisting of members, in part elected by the inhabitants, and *in part appointed by the Crown* ... The Governor's assent or dissent [to Bills] is liable to be controlled by instructions from the Queen, to which he is bound to conform, and even measures which have passed the Council and received that assent are liable to be disallowed by Her Majesty. ...



- Section 6(6)

"No Act shall be binding on the Crown ... unless express words are included therein for that purpose."

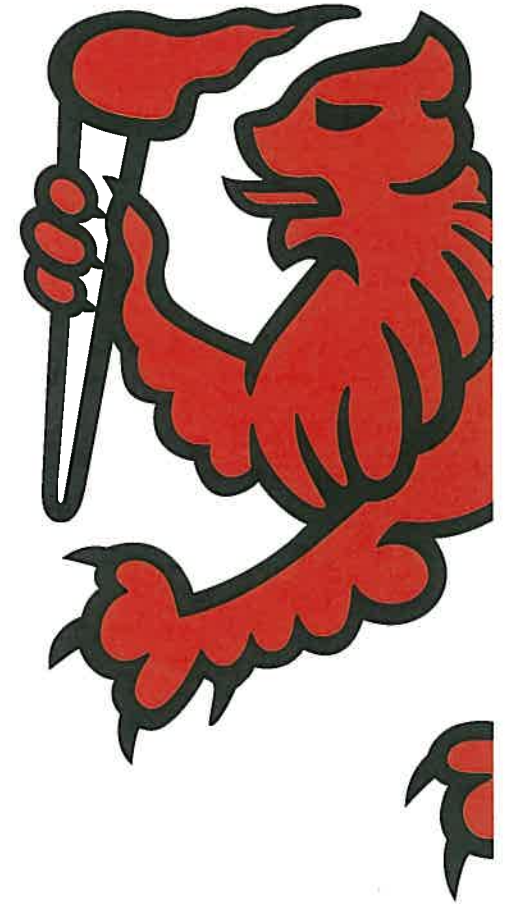


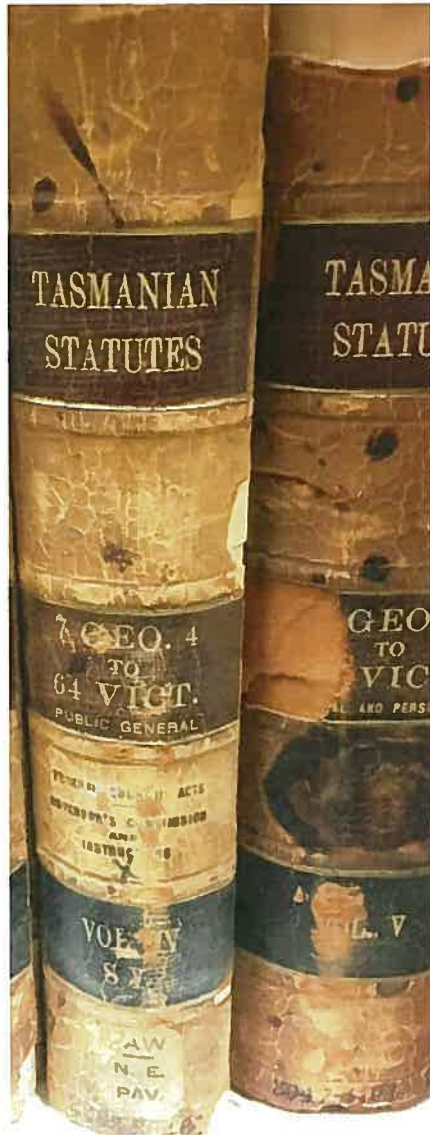


- Section 6(6)

"No Act shall be binding on the Crown
... unless express words are included
therein for that purpose."

- No express words in PLP (Tas)
- Compare -> *Parliamentary Privileges Act 2014 (NZ)*, s 6 "This Act binds the Crown."



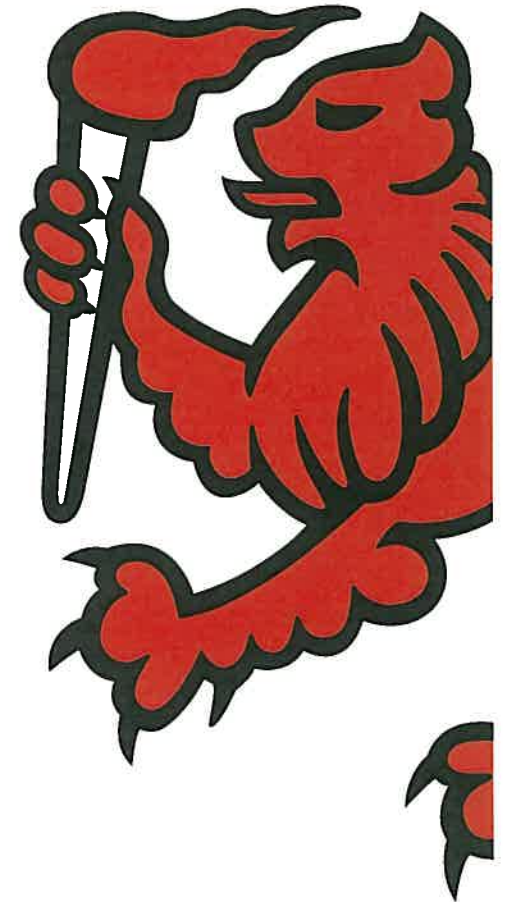


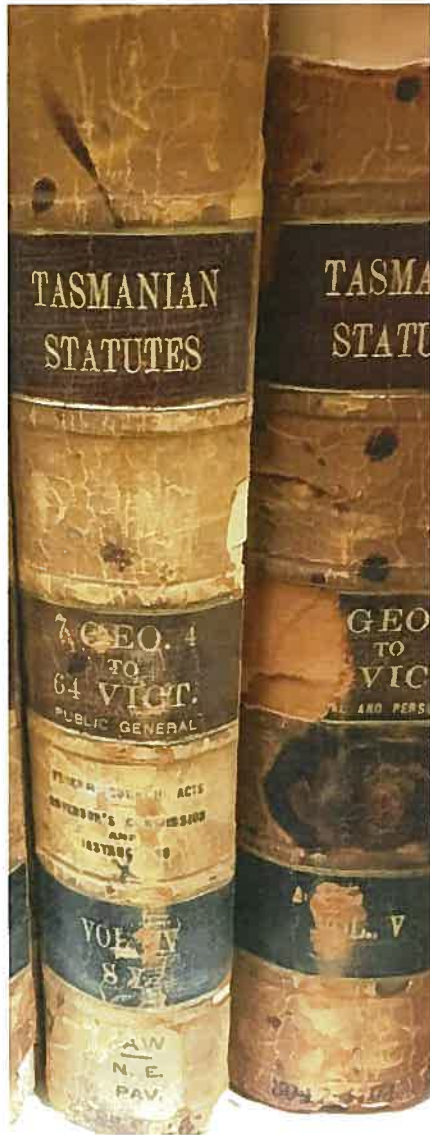
- Section 6(6)

"No Act shall be binding on the Crown ... unless express words are included therein for that purpose."

- Section 41(1)

*"In any Act the expressions **person** and party respectively shall include any body of persons, corporate or unincorporate, **other than the Crown.**"*





- Section 6(6)

"No Act shall be binding on the Crown ... unless express words are included therein for that purpose."

- Section 41(1)

*"In any Act the expressions **person** and party respectively shall include any body of persons, corporate or unincorporate, **other than the Crown.**"*

- Compare to AIA (Cth), s 2C(1) "in any Act a person includes a body politic or corporate as well as an individual".



What is the Crown (in the Right of Tasmania)?

"Crown" not defined in *Interpretation / Constitution Acts*.

- *Crown Proceedings Act 1993 (Tas)*, s 4 "Crown includes a Minister, an instrumentality or agency of the Crown and a prescribed person"



At common law:

- Narrowest - executive power "exercised by or on behalf of the Governor on the advice of [Government] **Ministers**".
- Broadest entirety of executive government, including the "**public instrumentalities**, employees and agents".



Common law privileges?

- ANZ jurisdictions (other than NSW) use legislative 'fall-back' date to UK HoC at set date.
- Other than WA this is within *Constitution Act*
- At all times since colonisation UK HoC was able to exercise its privileges with respect to Crown ministers / public service.
- **Tasmania has no such fall-back.**



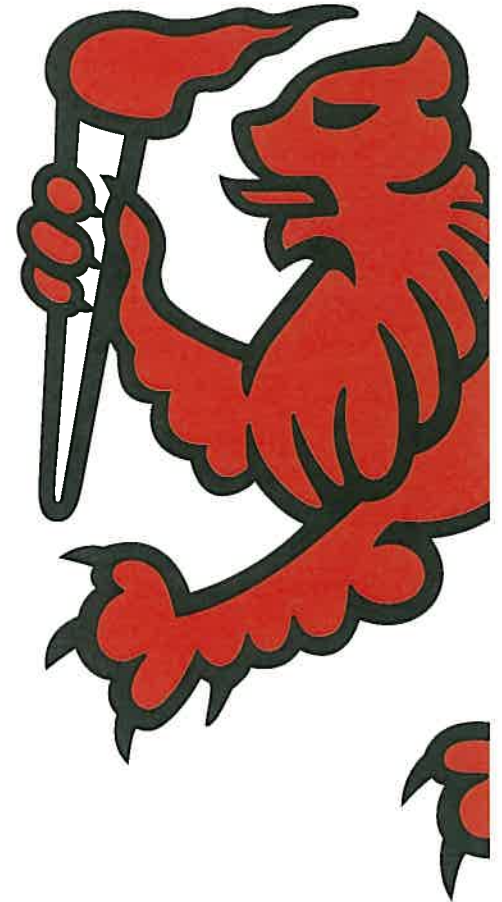
- *Common law privileges?*
- All jurisdictions (other than NSW) use legislative 'fall-back' date to UK HoC at set date.
- i.e. Cth Constitution, s 49

"The powers, privileges, and immunities of the [Plt/committees] ... shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at [1901].



Other sources of privilege over Crown ministers

- *Common law privileges?*
- All jurisdictions (other than NSW) use legislative 'fall-back' date to UK HoC at set date.
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- *Common law privileges?*
- Privileges Act 1858, s 12

"Nothing in this Act contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect any power or privilege possessed by ***either House of Parliament*** **before** the passing of this Act in any manner whatsoever."



Reasonable necessity?

- All jurisdictions (**other than NSW**) use legislative 'fall-back' date to UK HoC at set date.
- NSW has no privileges legislation
- NSWSC / HC determined NSW Leg Co possessed powers that are 'reasonably necessary' to carry out its constitutional functions.



Reasonable necessity?

- *Egan v Willis / Egan v Chadwick*
- NSW Leg Co possesses power to demand documents from Minister (but not punish) because:
 - s 5 Constitution Act (NSW) which provides PLT “power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever”.
 - A system of responsible government which had evolved over time in NSW which had not been “varied or abrogated by [privileges] legislation”.



Reasonable necessity?

- *Egan v Willis (HCA)*

"What is "reasonably necessary" at any time for the "proper exercise" of the "functions" of the Legislative Council [of NSW] is to be understood by reference to what, *at the time in question*, have come to be conventional practices established and maintained by the Legislative Council. *Such a position might be varied or abrogated by legislation.*

There has been no such legislation ...



- *Reasonable necessity?*
- *Unlike NSW, Tasmania*
- Confers no express power to legislate on its Parliament in its Constitution Act.
- Has modified its privileges by legislation.
- Implicitly time-locks the privileges to the colonial houses at or before 1858.

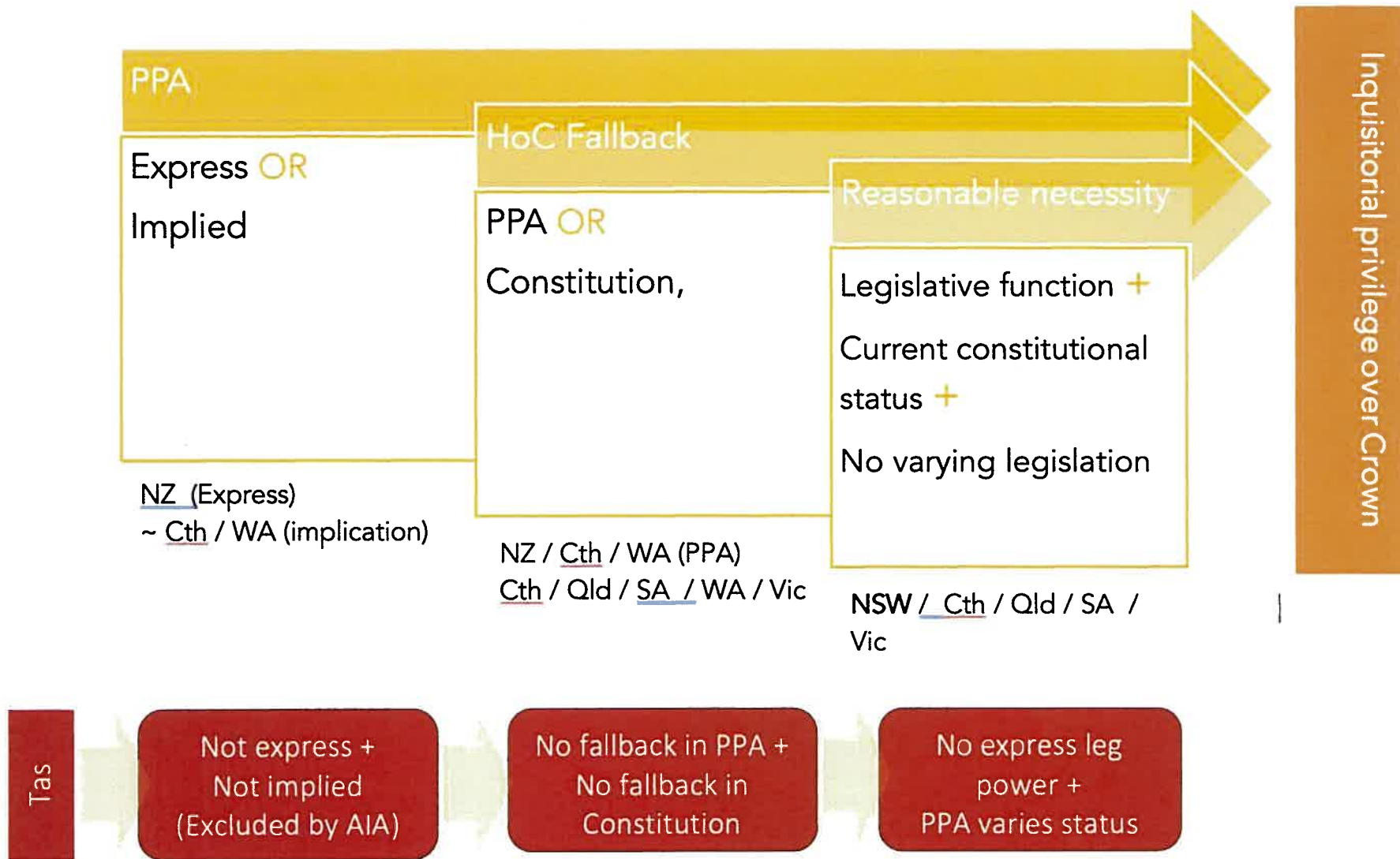
= significant degree of uncertainty about how far the doctrine of reasonable necessity extends in Tasmania.



- Tasmanian law generates a significant amount of legal uncertainty visa vis Government Ministers.
- This uncertainty extends as far as the public service.
- The uncertainty has not translated into direct resistance to parliamentary scrutiny.
- However, it might serve to embolden refusals and if pressed would have to be resolved in the Courts (delaying/undermining any Committee).



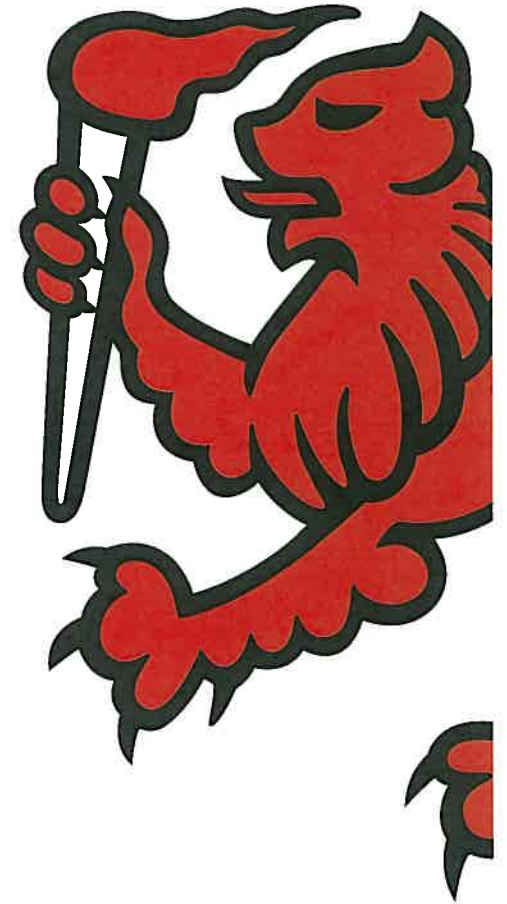
The (uncertain) privileges over Government Ministers / Docs



The (uncertain) privileges over Government Ministers / Docs

	PPA	PPA expressly binds Crown	AIA impliedly binds Crown	HoC fallback	Constitutional legislative power
Cth	✓	X	✓	✓	✓
NSW	X	n/a	n/a	X	✓
NZ	✓	✓	X	✓	✓
Qld	X	n/a	n/a	✓	✓
SA	X	n/a	n/a	✓	✓
VIC	X	n/a	n/a	✓	✓
WA	✓	X	✓	✓	✓
TAS	✓	X	X	X	X

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Resolving the uncertainty

- Doubts removal / amendment to:
 - Include the Crown in the PPA
 - Provide legislative fallback in PPA
- Amend Constitution Act.
- Repeal PPA.

