

A RECENT CASE – APPLICATION OF THE PARLIAMENTARY PRIVILEGES ACT

The committee may be interested in a recent case decided in the Federal Court which involved an application of provisions of the Parliamentary Privileges Act, particularly subsection 16(3) which deals with the meaning of "questioned or impeached" in Article 9 of the Bill of Rights 1688 (*British American Tobacco Australia Limited v Secretary, Department of Health and Ageing* [2011] FCAFC 107 (23 August 2011)).

Subsection 16 (3) provides:

In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

- (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; or
- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

The case was an appeal by British American Tobacco Australia Ltd under the *Freedom of Information Act 1982* against a decision of the Department of Health and Ageing to deny access to a copy of legal advice provided by the Attorney-General's Department in 1995 to the then Department of Human Services and Health concerning constitutional or other legal impediments to the introduction of generic packaging for tobacco products. The document was claimed to be exempt on the basis of legal professional privilege, a decision affirmed by the Administrative Appeals Tribunal.

The appellant argued that various disclosures of a summary of the advice constituted a waiver of that privilege. The Federal Court rejected the appeal.

The issue of parliamentary privilege arose because two of the acts of disclosure involved the tabling of a government response to a report of the Senate Community Affairs References Committee on the tobacco industry and the cost of tobacco-related illness, and the publication of the government response on a government website. The question was whether these disclosures were proceedings in parliament and therefore precluded from being considered for the purpose of determining waiver of legal professional privilege.

The Court reached its decision by applying the standard tests for whether the disclosures it was able to examine had amounted to a waiver of the privilege. First,

however, it considered whether section 16 of the Parliamentary Privileges Act precluded it and the AAT from examining the disclosures in the two publications of the government response. The appellant argued that it was permissible to refer to the tabled government response because it sought only to prove the fact that the words were used in the tabled document, not to invite any inference from the use of those words or to raise any question of the truth of, or motives behind, the response. The respondent argued that the tabled response could not be used to found a contention that legal professional privilege had been waived, because it was necessary to form a judgment on the basis of inferences or conclusions regarding the content of the original advice referred to in the response, in order to decide whether publication of the response was inconsistent with the maintenance of the privilege. The Court agreed with the respondent:

48. ... To avoid the threat presented by s 16(3) of the PP Act, the appellant is driven to say that it seeks to refer to the tabling of the Government Response in the Senate only to show that the words were published. However, if one does not go further and invite the inference that the reference reveals an inconsistency in the position of the respondent in now seeking to maintain legal professional privilege, then there can be no basis to the conclusion that the privilege has been waived. If the appellant seeks to show the inconsistency necessary to make good its waiver argument, it must be gored by s 16(3) of the PP Act.

49. In our opinion, it is not possible to avoid the conclusion that the appellant does indeed seek to make use of the tabling of the Government Response to permit the drawing of an inference adverse to the government. Since inconsistency in maintaining the privilege is the point on which waiver turns, for the appellant to succeed it must persuade the court that the conduct of the respondent in insisting upon the privilege is inconsistent with the publication of the Government Response by tabling it in the Senate. That is precisely the kind of reflection which may not be made upon the conduct of those whose published statements are within the protection of s 16(3) of the PP Act.

The Court concluded that the AAT did not err in law in concluding that subsection 16(3) of the Parliamentary Privileges Act precluded it from deciding whether the tabling of the government response in the Senate was inconsistent with the maintenance of legal professional privilege in the original advice.

In relation to the disclosure of the response on a government website, the Court concluded that this publication was not covered by parliamentary privilege. The respondent argued that the publication was covered by that aspect of "proceedings in parliament" represented by paragraph 16(2)(c):

the preparation of a document for purposes of or incidental to the transacting of any such business.

The Court rejected this claim, as well as the respondent's contention that Senate standing order 167 (which authorises the publication of any tabled document) in combination with paragraph 16(2)(d) of the Parliamentary Privileges Act¹ somehow transformed the publication of the document by a government agency on a government website into a "proceeding in Parliament". The Court had no difficulty in dismissing such an extravagant claim, based on a complete misunderstanding of standing order 167:

51. ... The respondent's argument fails to acknowledge that s 16(2) of the PP Act is concerned with what is incidental to the activities of the legislative arm of government and that the publication by the executive government was, on the face of things, unrelated to the business of either house of the legislative branch.

...

55. The courts should not be astute to confine the scope of parliamentary privilege, but neither should they give effect to exorbitant claims which are apt to interfere with the rights of subjects without any corresponding benefits in terms of freedom of debate in Parliament and the protection of Parliamentarians. See *Buchanan v Jennings* at [6] - [10]. It would, we think, give an unduly expansive operation to the provisions of Senate standing order 167 to regard it as clothing with parliamentary privilege any re-publication by any stranger of any document tabled in the Senate. And for present purposes, the offices of the executive government who published the Government Response on its website were strangers to the Senate.

On this website publication, the Court found that the AAT had erred in law in failing to consider and deal with the appellant's contention that disclosure of the government response on the website effected a waiver of legal professional privilege. In the end, however, this did not affect the final outcome (that the privilege had not been waived by the publication of references to the original advice).

On both counts, the judgment represents a sound application of the principles of parliamentary privilege as expressed in the Parliamentary Privileges Act.

¹ 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:
... (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 do formulated, made or published.