



Express law fast track information for clients

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Full Federal Court judgment important to decision makers claiming privilege over advice

In [*Assistant Treasurer and Minister for Competition and Consumer Affairs v Cathay Pacific Airways Limited* \[2009\] FCAFC 105](#) (31 August 2009), the Full Federal Court has made findings that have significant ramifications for decision makers and their use of information that is privileged.

Key points

The Full Court has confirmed that decision makers can take into account legal advice in making a decision and do not risk waiving privilege by that step alone.

As long as there is no disclosure of the contents of legal advice in a statement of reasons, providing a statement of reasons which discloses that legal advice was taken into account will not waive privilege, even when the statement of reasons is volunteered rather than required by statute.

Also, it is appropriate to mask privileged material and disclose non-privileged material within a document during a discovery process.

In handing down its decision, the Full Federal Court has clearly endorsed the ability of a decision maker to rely on legal advice in making a decision while retaining the right to claim privilege over that advice in subsequent judicial review proceedings.

Background

The Full Court's decision followed an appeal by the Assistant Treasurer and Minister for Competition and Consumer Affairs (Assistant Treasurer) against an interlocutory decision of Middleton J in which his Honour found that the filing by the Assistant Treasurer of a Statement of Reasons in judicial review proceedings was an act inconsistent with the maintenance of privilege in legal advice which had been considered by the Assistant Treasurer at the time that he made the decision under review.

The Assistant Treasurer voluntarily filed a statement of reasons in the AD(JR) proceedings challenging a particular decision made by him. The Assistant Treasurer, prior to filing his statement of reasons, gave discovery and claimed privilege over references to legal advice obtained from the AGS and summarised in an Executive Minute prepared by staff of the Treasury. In this statement of reasons, the Assistant Treasurer noted the fact that the Treasury Executive Minute was before him at the time that he made the decisions in relation to which review had been sought.

Full Court decision

Justice Flick (with whom Justices Spender and Lander agreed) found that:

(a) whether or not the mere reference in a statement of reasons to legal advice having been obtained and forming part of the decision making process is sufficient to constitute waiver is 'a matter of general application which supported the grant of leave to appeal';

(b) the mere reference in a statement of reasons to legal advice having been received and the fact that such advice played a part in the decision-making process is not sufficient to constitute a waiver of privilege;

(c) the statement of reasons filed by the Assistant Treasurer did no more than expose the decision-making process pursued by Assistant Treasurer in forming his opinion, in a manner consistent with the preservation of privilege. The statement of reasons did not refer to legal advice in such a way that its contents (rather than the fact of it having been given) became relevant, in an evidential sense, to the ability of the other party to challenge the decision;

(d) no significance can be attached to the Assistant Minister's decision to file the statement of reasons as the filing of the statement did no more than to make available to the parties and the Court a copy of the Assistant Treasurer's reasons and findings which statement might be used by Court in the management of the proceedings before it;

(e) the giving of reasons voluntarily is to be encouraged as it:

- avoids unnecessary disputes as to whether there is a statutorily enforceable entitlement to reasons;
- increases public confidence in, and the legitimacy of, the administrative process;
- encourages a careful examination of the relevant issues, the elimination of extraneous considerations and consistency in decision-making,

and the trend of '...voluntarily providing reasons should not be discouraged by exposing decision-makers to the prospect of having to expose legal advice received merely by reason of voluntarily providing reasons...'

The Court was also satisfied that the references made by the Assistant Treasurer in his statement of reasons to the Treasury Executive Minute did not disclose the content or effect of the legal advice over which privilege had been claimed. Moreover, the Court rejected a contention by Cathay that the approach taken by the Assistant Treasurer in redacting only those portions of the Treasury Executive Minute that referred to the AGS legal advice was unfair in that the approach rendered the document incomplete. The Court was satisfied that the withholding of legal advice received from the AGS had not occasioned any "ambiguity" or "unfairness". The Court reiterated that:

... where legal advice can be severed from the balance of a document, and where that which is disclosed meaningfully informs a reader as to those matters taken into account by a decision-maker, no implied waiver of privileged material occurs.

Justice Flick, citing *Waterford v the Commonwealth of Australia* 163 CLR 54, further observed that:

It would be invidious to place the Assistant Treasurer in a position which denies him the ability to obtain and rely upon legal advice except upon terms that the advice be disclosed. It is of importance that those who have the responsibility of making decisions have access to legal advice.

His Honour went on to note that:

It would be equally an invidious result should it be concluded that Cathay Pacific was to be denied the benefit of gaining access to so much of the materials as was considered by the Assistant Treasurer not to be privileged merely by reason of the presence of some privileged material.

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