



Express law fast track information for clients

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Federal Court rules on parliamentary privilege and waiver of legal professional privilege

In [*British American Tobacco Australia v Secretary, Department of Health and Ageing* \[2011\] FCAFC 107](#) the Full Federal Court has ruled that parliamentary privilege prevents a court or tribunal from having regard to a document tabled in the Senate in order to determine whether legal professional privilege has been waived. However, it does not prevent a subsequent publication of the same document from being considered by the executive government or a stranger.

Background

This case concerned a request by British American Tobacco Australia (BATA) for access under s 15 of the *Freedom of Information Act 1982* (FOI Act) to a copy of a legal advice provided by the Attorney-General's Department on 14 December 1995 to the then Department of Human Services and Health (Health). The legal advice concerned legal and constitutional issues relating to the plain packaging of cigarettes.

Health refused to disclose the legal advice on the basis that it was exempt under s 42 of the FOI Act on the grounds of legal professional privilege (LPP). This decision was affirmed by the Administrative Appeals Tribunal (the Tribunal).

The fundamental issue on appeal to the Full Federal Court was whether LPP in the legal advice had been waived by disclosure by Health. The relevant acts of disclosure were:

- a document was tabled in the Senate which referenced aspects of the legal advice (referred to as the 'Government Response')
- the Government Response was subsequently published on a government website

- a summary of the legal advice was provided to the Tobacco Working Group (TWG) or the Ministerial Tobacco Advisory Group (MTAG) or the Tribunal and BATA (in the course of proceedings before the Tribunal).

The Court had to consider whether s 16(3) of the *Parliamentary Privileges Act 1987* (PP Act) prevented the Tribunal (or the Court) from having regard to the tabling of the Government Response in the Senate or its subsequent publication on Health's website.

Decision of the Full Court

The Full Court (constituted by Keane CJ, Downes and Besanko JJ) dismissed the appeal and held that LPP in the legal advice had not been waived.

Tabling in the Senate

The Court held that s 16(3) of the PP Act prevented the Tribunal and the Court from having regard to the tabling of the Government Response in the Senate when determining whether LPP in the legal advice was waived. The Court followed High Court authorities on the question of waiver as set out in *Mann v Carnell* (1999) 201 CLR 1 and *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 to the effect that LPP is waived if the conduct of the person seeking to rely on the privilege is inconsistent with the maintenance of the privilege. The court found that, in considering whether tabling the Government Response in the Senate amounted to waiver, an inference must be drawn that there is an inconsistency in the respondent now seeking to maintain LPP. The Court held this was not permitted by s 16(3).

However, the Court found that s 16(3) of the PP Act does not apply to the publication by the executive government (or anyone else) of statements made in the Parliament. The subsequent publication by the executive government is not an act which is 'incidental' to the transacting of the business of the House or a committee and s 16(2) is concerned with what is incidental to the activities of the legislature.

The Court held it would give an 'unduly expansive operation' to s 16(2)(d) of the PP Act and Senate Standing Order 167 to regard them 'as clothing with parliamentary privilege any re-publication by any stranger of any document tabled in the Senate' (at [55]).

Subsequent web publication

The Court found that the publication of the Government Response on the internet did not effect a waiver of LPP in the legal advice. The Court found the Government Response was not used for the purpose of achieving some advantage for itself or disadvantage for another person and there was no reason to apprehend that this would occur.

The Court held that the disclosure of a summary of the legal advice to TWG, the MTAG or in the course of the Tribunal proceedings were not acts inconsistent with the maintenance of LPP in the legal advice.

Implications for agencies

The Attorney-General's Department is responsible for the administration of the PP Act and is considering the effect of this decision. Queries about its implications should be made to the Constitutional Policy Unit on 02 6141 3650 or at cpu@ag.gov.au.

Kirsty Windeyer and Louise McConnell of the Australian Government Solicitor were instructed as solicitors in this matter.

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