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Parliamentary privilege

In the course of proceedings before courts and tribunals, references are sometimes made to some event in, or related to, Parliament. However, subject to some very limited exceptions, parliamentary privilege makes any such reference unlawful.

Summary of key principles

Parliamentary privilege:

- is provided for by s 16 of the *Parliamentary Privileges Act 1987*
- covers *all words spoken and acts done in the course of, or for the purposes of, or incidental to* parliamentary business, including Hansard, hearings and reports of parliamentary committees, documents prepared for parliamentary use (such as question time briefs and answers to questions on notice) and drafting and preparatory steps in such processes
- applies to this information regardless of whether it is widely known and publicly available or sensitive and confidential
- operates only in the context of proceedings in courts and tribunals – it does not prevent the disclosure or use of parliamentary information in other contexts
- protects against the use of parliamentary information for a very wide range of prohibited purposes including *drawing, or inviting the drawing of, inferences or conclusions wholly or partly* from parliamentary information
- prevents parties, courts and tribunals from tendering or receiving evidence, asking questions and making statements, submissions or comments concerning parliamentary information
- does not prevent the use of extrinsic materials (such explanatory memoranda and second reading speeches) in interpreting legislation but is otherwise subject only to very limited and uncertain possible exceptions

This issue

— probably cannot be waived by Parliament as a matter of law (and in practice never is)
— if breached can lead to serious consequences, including a punishment by the Parliament.

Introduction

Parliamentary privilege is usually understood as the protection that enables parliamentarians to speak freely in Parliament without fear of being sued (usually for defamation). This protection of members of Parliament is well recognised as a fundamental purpose of the privilege.[1]

What is less commonly appreciated is that this is but one part of a much broader principle of 'non-intervention', by which the courts and Parliament are 'astute to recognise their respective constitutional roles'.[2] Parliamentary privilege helps to give effect to this broader principle by preventing courts and tribunals from inquiring into, or even referring to, anything that happens in Parliament.[3]

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Relationship to Bill of Rights

The privilege originally found written form in Art 9 of the Bill of Rights 1688 (UK), which stated:

> That the freedom of speech and debates on proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.

This had long been treated by courts as offering a wide range of protections against the use of parliamentary information in legal proceedings. However, 2 decisions in the NSW Supreme Court were made which held that Art 9 had a far narrower construction than had previously been accepted. The result was that witnesses and the accused in those cases were rigorously cross-examined, and their credibility attacked, by reference to evidence that they had given to Senate committees.[4] The dramatic weakening of the privilege suggested by those decisions led to the introduction of the *Parliamentary Privileges Act 1987* (Cth) (the Act).[5]

It is because of this history that s 16 is drafted using language which declares the application and effect of Art 9 rather than creating a new and separate privilege. Section 16(1) 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.

The proper approach to the construction of section 16

The somewhat unusual drafting device of restating the privilege as it was considered to exist under Art 9 of the Bill of Rights has occasionally led to uncertainty as to whether s 16 should be understood:

— as providing no different protection than that originally available under Art 9 or
— according to its natural and ordinary language, which states the privilege in broader terms than Art 9.

The former view was taken by Davies JA in *Laurance v Katter* (1996) 141 ALR 447. His Honour held (at 489–90) that s 16(3), which sets out the protections afforded to parliamentary information, should be read as applying only if an actual impeachment of the parliamentary freedom would arise (leaving it for the court in each case to decide whether that consequence would ensue).

However, the latter view is now established as correct. Courts have emphasised that s 16(3) should be construed in accordance with its ordinary language and is not to be 'read down' or given a restricted meaning. As a result, the construction adopted by Davies JA has been expressly rejected as impermissibly reading into s 16(3) a judicial proviso that is simply not present in the section itself.[6]

'Proceedings in Parliament'

The parliamentary information that is protected by the privilege is the information that comes within the meaning of 'proceedings in Parliament'. This is defined broadly in s 16(2) of the Act:

> (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
>
> (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.

A number of aspects of this provision bear particular attention.

The privilege applies to 'all words spoken and acts done in the course of, or for the purposes of, or incidental to' the business of Parliament.

(i) The definition is broad

The definition is plainly a broad one. For example, it is not just the activities of the Houses of Parliament that attract the privilege; it also applies to parliamentary committees.[7] Experience has shown that, being a step removed from the business of the Houses, committee business is sometimes (and mistakenly) not identified as attracting the privilege.

Further, the examples set out in paragraphs (a) to (d) of s 16(2) are themselves broad ones. The most commonly used parliamentary information is often captured directly by the language of one or more of those paragraphs. However, even where information is not picked up by those paragraphs, it is important to remember that these are but specific examples of an even broader concept, namely *'all words spoken and acts done in the course of, or for the purposes of, or incidental to'* the Parliamentary business.

As a result, 'proceedings in Parliament' captures a large field of activity and information that is regularly used and prepared by government officers and lawyers, such as:

- reports of speeches, statements and answers of members in the course of parliamentary sittings
- submissions and evidence to parliamentary committees and the reports of those committees

— the preparation of documents for a committee hearing (for example, drafts and final briefs prepared for senior executives attending before a Senate estimates committee)

— the preparation of material to assist ministers in relation to parliamentary business, such as answers to questions on notice and question time briefs.

(ii) Parliamentary privilege does not require that the information be sensitive or confidential

Unlike most other privileges (such as legal professional privilege, public interest immunity and the privilege against self-incrimination), parliamentary privilege is not limited to protecting sensitive, prejudicial or confidential information. The privilege operates equally in relation to highly public parliamentary information.

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For example, a minister may make a number of statements about government policy in Parliament that are widely reported in national media. Those statements are nonetheless 'proceedings in Parliament', attracting the privilege in just the same way as would confidential parliamentary information.

Indeed, in practice the majority of attempts to use 'proceedings in Parliament' in court relate to information that is not confidential at all, such as Hansard and committee information. For example, in *Amann Aviation Pty Ltd v Commonwealth*, Beaumont J held that s 16(3) was infringed by the tender of both an extract from Hansard and an article in the *Sydney Morning Herald* that reported on proceedings in the Senate.[8]

(iii) 'Proceedings in Parliament' are not limited to 'documents'

Paragraphs (b), (c) and (d) of s 16(2) outline how various documents can fall within 'proceedings in Parliament'.[9] However, the concept of 'proceedings in Parliament', and thus the privilege itself, is not limited to documents. Again, the operative expression is 'words spoken or acts done'.

Accordingly, while documents are, in practice, commonly the subject of the privilege, it is often not because of their character as documents per se but usually because they are:

— a *record* of words spoken or acts done in the course of parliamentary business (for example, Hansard or a transcript of evidence before a committee)

— a *result* of acts done in the course of parliamentary business (for example, the creation of a written submission for a committee).

... information that is provided by third parties, unsolicited, to parliamentarians does not automatically fall within 'proceedings in Parliament'.

(iv) Information will not be protected outside of its parliamentary context

In order to be 'proceedings in Parliament' it is necessary that acts or information arise 'in the course of, or for purposes of or incidental to' parliamentary business. For this reason, information that is provided by third parties, unsolicited, to parliamentarians does not automatically fall within 'proceedings in Parliament'. Rather, it is usually necessary that some act have been done to procure or use the information for the purpose of transacting parliamentary business.[10]

Likewise, even though exactly the same information may have been used and disclosed for both administrative and parliamentary purposes, it is only the parliamentary use that will attract the operation of s 16. For example, information prepared purely for administrative purposes may later come to be disclosed in Parliament. The original, non-parliamentary, use of the information will not be protected by parliamentary privilege notwithstanding its subsequent parliamentary use.[11] Conversely, the use of the information in Parliament will attract the privilege notwithstanding that precisely the same information in the administrative context is unprotected.

Even subtler distinctions can apply to different copies of the same document, depending upon the purpose for which the copy was made. As noted, a document prepared for a purely administrative purpose will not attract the privilege. However, if a copy of that same document is made at the request of a parliamentarian who intends to use it in Parliament, the copy so made will attract the privilege even though the original document did not.[12]

These distinctions were well illustrated in the decision of the Full Federal Court in *British American Tobacco Australia Ltd v Secretary, Department of Health and Ageing* (2011) 195 FCR 123. In that case the respondent claimed legal professional privilege over a legal advice that was captured by a freedom of information request. The government had previously referred to aspects of that advice in a response paper that it had prepared for a Senate committee hearing. The appellant argued that the privilege had been waived by:

— the tabling of the response paper in the Senate and its incorporation in full into the Senate Hansard

— the subsequent publication on a government website of the same response paper.

... the use of information in Parliament will attract the privilege notwithstanding that precisely the same information in the administrative context is unprotected.

The Full Court held that the first of these (the publication through tabling in the Senate) fell within 'proceedings in Parliament' and thus attracted the privilege. However, it held that the subsequent publication of the same document on the government website was not 'incidental to' the parliamentary business (within s 16(2)(c)) and was not a report 'pursuant to an order of a House or a committee' (within s 16(2)(d)). As such, the act of publishing the government response on the website was not 'proceedings in Parliament' and could be relied upon without breaching parliamentary privilege.[13]

(v) Whether something is 'proceedings in Parliament' is a question of fact

Determining whether a particular act was done for a parliamentary purpose requires an assessment of that purpose as it stood at the time when the act was done.[14] This is a question of fact.

Commonly the purpose for which a document was prepared will be apparent from the nature and content of the document itself. So, for example, it may readily be inferred that a document titled 'Question Time Brief' was connected with parliamentary business. (It is accepted that courts are permitted to receive parliamentary material for the limited purpose of

considering whether it attracts the protection of s 16(3).[15] Accordingly, the consideration of proceedings in Parliament for this limited purpose is not, itself, a breach of the privilege.)

In other cases the question whether a document has a parliamentary purpose may not be evident from the document itself. For example, documents prepared for the purpose of developing an answer to a question on notice may not be so marked. In such cases it will be necessary for careful enquiry to be made as to the provenance and purpose of the document.

In less obvious cases it will be necessary to obtain and present cogent and specific evidence to establish that particular information formed 'proceedings in Parliament'.[16] This could include affidavits from the persons involved in the activity in question. It is also possible to prove a range of matters using an evidentiary certificate signed by the President of Senate, the Speaker of the House of Representatives or a chairperson of a committee under s 17 of the Act.

Proceedings in courts and tribunals – how does the privilege apply?

The protection afforded to proceedings in Parliament is set out in s 16(3) of the Act:

> (3) 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 privilege only applies in the limited sphere of 'proceedings in any court or tribunal'.

Again, there are a number of aspects of this provision that bear consideration.

(i) Privilege applies only in proceedings in a court or tribunal

The privilege only applies in the limited sphere of 'proceedings in any court or tribunal'. Outside of that context people can consider, discuss, comment upon, attack, criticise or support parliamentary acts and words without infringing s 16. Thus the privilege does not provide a limitation on the activities of institutions such as the executive and the media (save to the extent of their involvement in court or tribunal proceedings).

'Court' and 'tribunal' are defined in s 3(1) as follows:

> *court* means a federal court or a court of a State or Territory.
>
> *tribunal* means any person or body (other than a House, a committee or a court) having power to examine witnesses on oath, including a royal commission or other commission of inquiry of the Commonwealth or of a State or Territory having that power.

The question whether or not proceedings are before a 'court' will usually be tolerably clear. The consideration of what is a 'tribunal' may, however, be more complicated. The definition clearly captures:

— Royal Commissions and commissions of inquiry
— the Administrative Appeals Tribunal and like tribunals of States and Territories.

It also would appear to capture a range of 'proceedings' in which executive bodies or office holders exercise compulsory powers to require a person to attend and be examined on oath. Thus care should be taken when there is any prospect of parliamentary information being referred to in such a process.

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There is also scope for a broader construction by which a 'tribunal' could include any person who is *authorised* to administer an oath to a witness but lacks power to compel their attendance. This would markedly expand the operation of the privilege, as it would include, for example, persons with authority to administer an oath and examine witnesses simply by the consent of parties.[17]

It is unlikely that 'tribunal' is intended to be understood in this way because:

— a consideration of s 16 as a whole shows that the repeated words 'court or tribunal' are used in way that highlights characteristics that those 2 types of bodies commonly share (for example, the power to compel the production of documents and the ability to conduct hearings in which evidence is tendered and received and submissions are made)
— s 16(3) applies only in 'proceedings' in a tribunal. Ordinarily, 'proceedings' would describe the entirety of a particular legal action or process before that body and would involve such things as the consideration and determination of factual and/or legal questions; the presentation of evidence by tendering documents or exhibits, reading affidavits and/or asking questions of witnesses; one or more parties (often represented by lawyers) seeking to advance or protect a particular interest; and the presentation of argument, the making of submissions and the like
— the only examples given in the definition of 'tribunal' (Royal Commissions and commissions of inquiry) are bodies that undertake processes of those kinds and that have the power to compel witnesses to attend and answer questions
— if 'tribunal' were to be construed broadly as meaning any body or person with the lawful authority to administer an oath and examine witnesses, it would have the result that parliamentary privilege applied to many processes which, by their very nature, would not involve legal scrutiny and adjudication. This would not appear to further either of the fundamental purposes of the privilege (the protection of members from legal proceedings and the principle of 'non-intervention' by courts).

(ii) The connection with proceedings in Parliament is broad

In order to attract the privilege the use need only be one 'concerning' proceedings in Parliament. This describes a broad range of connections between the proposed use and the information. Again, this reinforces that it is the parliamentary aspect of the information which is important. For this reason, tendering a newspaper report about proceedings in the Senate is just as impermissible as tendering the Hansard itself – both would involve the tender of a document 'concerning' proceedings in Parliament.

(iii) The prohibited types of use are very broad

As with the definition of 'proceedings in Parliament', the *uses* of such information are proscribed in the broadest of terms. The prohibition applies to most, if not all, of the ways in which information could conceivably be used in a court or tribunal proceedings by prohibiting:

- tendering or receipt of evidence
- asking of questions
- the making of statements, submissions and comments.

(iv) The prohibited purposes are very broad

Similarly, the prohibition operates in relation to a very broad range of *purposes* as described in paragraphs (a) to (c). Given the rationale for the privilege, it is not surprising that the prohibited purposes include questioning the truth, motive, intention or good faith of any person or anything forming part of the proceedings in Parliament.

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Just as importantly, though, the prohibited purposes include 'relying on' or 'establishing' such motive, intention, good faith and so on. This is sometimes considered surprising because it is hard to see how a positive reinforcement of some parliamentary event could compromise parliamentary processes. The explanation is that:

- were such matters in contest between the parties, it would require the court to either adjudicate upon the parliamentary event or else leave one party with an unfair inability to contest that issue
- the broader principle of non-intervention is not concerned solely with courts potentially making findings that compromise parliamentary processes but with courts entering that parliamentary sphere at all.

While ss 16(3)(a) and (b) cover many situations and are the ones most commonly discussed in the authorities, they are in fact simply more explicit examples of the broader prohibition in s 16(3)(c). In other words, if proceedings in Parliament are to be used in any way in a court proceeding, it is axiomatic that this must involve 'drawing, or inviting the drawing of, inferences or conclusions'. Evidence, questions, statements, comments and so on that do not do this are, almost by definition, irrelevant to the proceedings and therefore impermissible or at best otiose. Accordingly, any use of 'proceedings in Parliament' in a court or tribunal (other than by way of *non sequitur*) is liable to fall foul of s 16(3)(c) when that provision is given its direct literal meaning.[18]

Exceptions to the privilege

(i) Extrinsic materials – the major exception

The most significant and commonly used exception to the privilege is that proceedings in Parliament can be used as aids to statutory construction. This is specifically provided for in s 16(5) of the Act:

> (5) In relation to proceedings in a court or tribunal so far as they relate to:
>
> (a) a question arising under section 57 of the Constitution; or
>
> (b) the interpretation of an Act;
>
> neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

It is only this exception that permits the use of explanatory memoranda, second reading speeches and so on to be relied upon in a court or tribunal.

However, it remains important to recognise that, even here, the exception only applies if the extrinsic materials are used in a particular way (that is, as aids to construction). The use of extrinsic materials in court proceedings will still be prohibited if done for a different purpose.

For example, the explanatory memorandum relating to a statute creating criminal offences may describe the social evils at which the offence provisions are targeted. Under s 16(5) it could be relied upon when ascertaining the meaning of the offence provision (for example, ascertaining what the mental element for the offence must have been intended to be). However, it cannot be relied upon to prove that there is, in fact, a major social problem of the kind described.

The most significant and commonly used exception to the privilege is that proceedings in Parliament can be used as aids to statutory construction.

(ii) Other exceptions are strictly limited

Beyond using proceedings in Parliament as aids to statutory construction, there is only a small category of somewhat uncertain exceptions that may be available. These 'exceptions' are unusual because they appear to be accepted as matter of practice and parliamentary intention, notwithstanding that the literal words of s 16(3), particularly paragraph (c), would prohibit the use of the information in question.

It is beyond the scope of this briefing to consider this difficult issue in detail. However, the following points can be noted:

— The Explanatory Memorandum states of s 16(3)(c) that it 'would not prevent the proving of a material fact by reference to a record of proceedings in Parliament which establishes the fact, eg, the tendering of the *Journals of the Senate* to prove that a Senator was present in the Senate on a particular day'.

— Exceptions of these kinds were recognised before the introduction of the Act.[19]

— Since the introduction of the Act, the authorities have treated a range of uses as being permissible, but these exceptions have covered a wide and conflicting range and do not yet appear to be guided by any unifying principle.[20]

The safest starting point is to assume that the privilege will operate according to its terms. To the extent that any of these exceptions may be available, they should in practical terms be treated as being confined to:

— use of parliamentary records to prove that a parliamentarian was present on a particular day, that they spoke (without disclosing the words spoken) and that they acted within a particular capacity

— similar or related 'formal' uses of parliamentary material if what is involved is simply not capable of being contentious.

Any such exception should only be relied upon after appropriate legal advice and consultation with the Attorney-General's Department (discussed further below).

Subpoenas and notices to produce

A question that frequently arises for Commonwealth agencies is whether parliamentary privilege applies to subpoenas to produce documents (and like court processes requiring production of information). It is well recognised that *production* and *inspection* of information in response to a subpoena are steps which are separate from, and occur before, any actual *use* of the information in the proceeding itself. Accordingly, the issue is whether s 16(3) operates as a bar to production and inspection.

A question that frequently arises for Commonwealth agencies is whether parliamentary privilege applies to subpoenas to produce documents.

The conclusions of the Queensland Court of Appeal in *O'Chee v Rowley* (1997) 150 ALR 199 lend some support to the proposition that the privilege does operate as a bar to production for inspection, even before any attempted use of the material in the proceedings. However, an unqualified proposition to that effect raises a number of difficulties:

— The types of use proscribed by s 16(3) are set out at some length, but they do not include any prohibition on 'production', 'disclosure' or 'inspection' as would arise in the subpoena context. If Parliament had considered that the privilege should operate as a bar to production, disclosure or inspection, it could simply have provided as much.[21] The fact that it did not suggests that Parliament did not intend the privilege to necessarily operate in that way (at least not at all times).

— Both the Second Reading Speech and Explanatory Memorandum reinforce the view that Parliament's concern in enacting s 16(3) was to prevent any such future *use* of parliamentary material (as opposed to suggesting any concern in relation to the mere production or inspection of such material).

— In *O'Chee v Rowley*, McPherson JA makes no reference to s 16(3) in any part of his Honour's consideration of whether the privilege operates as a bar to production. Rather, the focus was on s 16(2) of the Act and Art 9 of the Bill of Rights. Reliance upon these other rules, rather than the ordinary language of s 16(3), sits uncomfortably with the authorities which require that s 16(3) is to be construed according to its plain and ordinary language (discussed above).

— McPherson JA's reasoning that the requirement for production would *in fact* tend to interfere with the provision of material to Parliament does not have regard to:
  – the fact that the privilege is not predominantly concerned with protecting confidential material
  – the fact that, in cases where there is a need to protect confidential information, this can be achieved by making a claim for public interest immunity in any event.
— It seems to have been accepted that Mr Rowley sought the documents for the sole (prohibited) purpose of using them to demonstrate the basis for statements made by Senator O'Chee. Accordingly, the case may be understood as an example of the privilege operating to deprive the production and inspection of the documents of any legitimate forensic purpose.

For these reasons, there is much to be said for the view that s 16(3) does *not* operate, in each and every case, as an automatic bar to production, disclosure or inspection in the context of a subpoena to produce documents (or equivalent process).[22] Rather, the lawfulness of a subpoena should be understood to turn upon the purpose for which it has been issued. Consider, for example, a subpoena that requires the production of documents that fall within the meaning of 'proceedings in Parliament':

The privilege is not an automatic bar to production in response to a subpoena.

— It may have the sole purpose of obtaining documents so that they can be tendered or referred to in cross-examination or submissions. Such uses would be plainly prohibited by s 16(3) and would not be permitted. While the subpoena itself would not infringe s 16(3) directly, its sole purpose would inevitably be frustrated by that provision at the point when the subpoenaed information came to be used in the proceedings. The subpoena would therefore be liable to be set aside because it lacks a 'legitimate forensic purpose'.[23]
— Alternatively, if the purpose of the subpoena is to seek the production of material that is relevant to legitimate lines of inquiry which that party may be able to pursue, the subpoena may well have a legitimate forensic purpose (it being well recognised that subpoenas may be used for broader purposes than merely seeking material that is to be directly tendered or used in trial).[24] While documents within the rubric of 'proceedings in Parliament' may therefore be required to be *produced* for that purpose, s 16(3) may continue to fully apply to that material so that it could still not be used in court in any of the ways prohibited.

The privilege is an 'absolute prohibition'.

Waiver or ouster of the privilege

Section 16(3) provides that the specified uses of proceedings in Parliament are 'not lawful'. This is not qualified by circumstances or conditions and involves no exercise of a discretion by the court or tribunal. It is, in short, an 'absolute prohibition'.[25]

Further, as the privilege belongs to the Parliament, it cannot be waived by an individual member of Parliament. Before the introduction of the Act, it was considered that the privilege could be waived by a motion passed by the relevant House(s) of Parliament. It is doubtful that such an approach remains open since the introduction of the Act.[26]

Managing the effect of s 16(3)

The application of the privilege can sometimes lead to results that may appear unfortunate or unfair in the context of the particular proceedings in which it arises. However, there are a number of ways in which such consequences can be ameliorated in practice. In particular, equivalent information may be able to be relied upon in court without reference to the parliamentary context that would attract the operation of s 16(3).

For example, rather than tendering the evidence of a witness before a parliamentary committee (which would be prohibited), the witness could be summonsed by the court and asked questions in the ordinary way. This would enable a party to elicit the same information but without any reference to the committee proceedings.

To take another example, a party may seek to rely upon Hansard solely for the purpose of proving that certain information was no longer confidential. While this would be prohibited by s 16(3), the same result could be achieved by the parties putting as an 'agreed fact' that the information was publicly available. Provided this was done without reference to the Hansard or the business of Parliament, the agreed fact would not infringe s 16(3). Indeed, in a case where the Commonwealth was a party and knew that the information was publicly available in Hansard, the model litigant obligation may require that the Commonwealth make a concession of this kind rather than leave the other party in a position of being unable to establish a matter that the Commonwealth knew to be true, simply because of the application of the privilege.

Courts will be careful to ameliorate anything that they consider may involve a technical and unfair reliance upon parliamentary privilege, so it is important to properly consider the scope for such practical 'workarounds'. However, if a court ultimately considers that the operation of the privilege will lead to a serious injustice that is incurable by any other means, it may order a permanent stay of the proceedings.[27]

... as it is unlawful for a court or tribunal to have regard to parliamentary information, any breach may undermine the legal proceedings in which the information is used.

Consequences of breach

There are a number of potential consequences associated with a breach of parliamentary privilege. Firstly, it may involve a breach of the model litigant obligation for the Commonwealth to participate in a breach of the privilege. As such, issues of this kind should be notified to the Office of Legal Services Coordination within the Attorney-General's Department, which may take action on a breach.

Secondly, as it is unlawful for a court or tribunal to have regard to parliamentary information, any breach may undermine the legal proceedings in which the information is used. This could lead, for example, to a successful appeal against a decision that was made in favour of a party in consequence of some (unlawful) reliance upon parliamentary information at first instance.[28]

Finally, a breach of parliamentary privilege can be a contempt of Parliament. This could potentially lead to action being taken by Parliament to have individuals punished for that contempt. In the worst kind of case this could potentially include a term of imprisonment.

... a breach of parliamentary privilege can be a contempt of Parliament.

Consultation with the Attorney-General's Department

The Act is administered by the Attorney-General's Department. Accordingly, issues as to the interpretation or application of the Act should be the subject of consultation with the Constitutional Policy Unit within the Department (in accordance with para 10 of the Legal Services Directions 2005). The Constitutional Policy Unit should also be consulted for guidance on any dealings with Parliament that may need to be undertaken in relation to privilege issues.

Additionally, as parliamentary privilege questions may also involve sensitive legal, political and policy issues, consideration should be given to the need to report to the Office of Legal Services Coordination under para 3 of the Legal Services Directions 2005.

Notes

1 *Sankey v Whitlam* (1978) 142 CLR 1 at 35; *O'Chee v Rowley* (1997) 150 ALR 199 at 212; *Rann v Olsen* (2000) 76 SASR 450 per Doyle CJ at [116].

2 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 332–4 per Lord Browne-Wilkinson, delivering the judgment of the Privy Council.

3 *Rann v Olsen* (2000) 76 SASR 450 per Doyle CJ at [116]–[124], [177]–[179] and Perry J at [242]–[246].

4 *R v Murphy* (1986) 5 NSWLR 18.

5 A helpful analysis of the history of the privilege and the introduction of the Act can be found in *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223 at 224–30.

6 *Rann v Olsen* (2000) 76 SASR 450 per Doyle CJ (with whom Mullighan J agreed) at [51]–[54], [94]–[101], [106]–[108], [113] and [124]–[125]; Perry J at [241]–[245], [250]–[251] and [255]–[256] and Lander J at [393]. *Rann* was followed in this respect by the Full Court of the Supreme Court of Victoria in *R v Theophanous* (2003) 141 A Crim R 216 at [69].

7 'Committee' is defined in s 3(1) as follows:

> ***committee*** means:
>
> (a) a committee of a House or of both Houses, including a committee of a whole House and a committee established by an Act; or
>
> (b) a sub-committee of a committee referred to in paragraph (a).

8 *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223.

9 'Document' is defined in s 3(1) to include 'part of a document'.

10 *O'Chee v Rowley* (1997) 150 ALR 199 at 209 and 215. As McPherson JA there colourfully put it, 'Junk mail does not, merely by its being delivered, attract privilege of parliament'.

11 For a discussion of this basic principle see *Stewart v Ronalds* (2009) 76 NSWLR 99 per Hodgson JA at [115]-[125], with whose tentative views Allsop P (at [76]) and Handley AJA (at [129]) agreed.

12 *Swarcboard v Gallop* (2002) 167 FLR 262 at [21]-[22].

13 *British American Tobacco Australia Ltd v Secretary, Department of Health and Ageing* (2011) 195 FCR 123 at [48]–[54].

14 *O'Chee v Rowley* (1997) 150 ALR 199 per Fitzgerald P at 201 and per McPherson JA at 208–9.

15 *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223 at 232.

16 *O'Chee v Rowley* (1997) 150 ALR 199 per Fitzgerald P at 201.

17 Such authority could be conferred by s 34 of the *Acts Interpretation Act 1901*.

18 This problem was well described in *Coleman v Sellars* (2000) 181 ALR 120, where Pincus JA stated (at [12]):

> Since any evidence, question, submission or comment in a court or tribunal would ordinarily have the purpose of leading to *some* conclusion – otherwise it would presumably be irrelevant – s 16(3) goes, as a practical matter, close to saying that parliamentary proceedings may not be discussed in any court or tribunal.

19 *Sankey v Whitlam* (1978) 142 CLR 1; *Uren v John Fairfax & Sons Ltd* [1979] 2 NSWLR 287; *Mundey v Askin* [1982] 2 NSWLR 369; *Henning v Australian Consolidated Press Ltd* [1982] 2 NSWLR 374; and *Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1 (all of which are noted by Beaumont J in *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223 at 226 in his Honour's thorough review of the case law preceding the introduction of the Parliamentary Privileges Act).

20 *Coleman v Sellars* (2000) 181 ALR 210; *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223; *Hamsher v Swift* (1992) 33 FCR 545; *Mees v Roads Corporation* (2003) 128 FCR 418; *Laurance v Katter* (1996) 141 ALR 447; *Rann v Olsen* (2000) 76 SASR 450; and *R v Theophanous* (2003) 141 A Crim R 216. The approach taken by Davies JA in *Laurance v Katter* was explicitly rejected in both *Rann v Olsen* and *R v Theophanous*.

21 Indeed, in the following subsection, the drafters did include a specific prohibition on courts and tribunals requiring 'in camera' documents 'to be produced'.

22 There may still be circumstances where these processes also involve a proscribed use of the parliamentary material. For example, using an affidavit listing documents in the discovery process could well involve tendering evidence and making submissions etc in relation to parliamentary material detailed in the affidavit.

23 As to which, see, for example, *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667.

24 See, for example, *R v Saleam* (1989) 16 NSWLR 14 at 22.

25 *Hamsher v Swift* (1992) 33 FCR 545 at 563-564.

26 *Hamsher v Swift* (1992) 33 FCR 545 at 563-564.

27 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321; *Rann v Olsen* (2000) 76 SASR 450 per Doyle CJ at [205]–[212], Prior J at [232]–[233], Perry J at [271]–[281] and Lander J at [445]–[460].

28 See, for example, *Cornwall v Rowan* (2004) 90 SASR 269; and *R v Theophanous* (2003) 141 A Crim R 216.

About the author

Tim Begbie *has a busy counsel practice specialising in national security matters, regulatory and enforcement work and the protection of confidential government information. As part of that practice he regularly advises and appears in relation to difficult information-handling issues (including parliamentary privilege, obligations of confidence, statutory secrecy provisions and the* Harman *obligation).*

AGS contacts

Robert Orr PSM QC *Chief General Counsel*	02 6253 7129
Tom Howe QC *Chief Counsel Dispute Resolution*	02 6253 7415
Simon Daley *Chief Solicitor Dispute Resolution*	02 9581 7404
Guy Aitken *Deputy General Counsel*	02 6253 7084
Tim Begbie *Senior General Counsel*	02 6253 7521
Tara McNeilly *Senior General Counsel*	02 6253 7374
Irene Sekler *Senior Executive Lawyer*	02 6253 7155
Peter Melican *Senior Lawyer*	02 9581 7404

Offices

Canberra	*50 Blackall Street, Barton ACT 2600*
Sydney	*Level 42, 19 Martin Place, Sydney NSW 2000*
Melbourne	*Level 21, 200 Queen Street, Melbourne VIC 3000*
Brisbane	*Level 12, 340 Adelaide Street, Brisbane QLD 4000*
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