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Legal professional privilege and parliamentary privilege over drafting instructions

Two recent Federal Court decisions—*State of New South Wales v Betfair* [2009] FCAFC 160 (*Betfair*) (12 November 2009) and *Sportsbet Pty Ltd v New South Wales* [2009] FCA 1283 (*Sportsbet*) (13 November 2009)—have dealt with the issue of privilege claims made in relation to:

- **drafting instructions provided to parliamentary counsel by a government agency**
- **draft legislation provided by parliamentary counsel to a government agency, and**
- **communications with third parties made for the purposes of preparing drafting instructions to parliamentary counsel.**

Summary

Briefly, these types of communications between parliamentary counsel and the executive:

- can attract legal professional privilege (*Betfair*, paras [15], [21]-[24] and [38])
- may also attract public interest immunity if it can be demonstrated that disclosure would or might harm an important aspect of public administration (which may depend, in turn, on whether the legislative process has been completed or not) (*Sportsbet*).

However, communications between parliamentary counsel and the executive do not necessarily attract parliamentary privilege (*Sportsbet*, paras [20]-[21(1)]).

Betfair

In *Betfair*, the Full Court of the Federal Court of Australia (Kenny, Stone and Middleton JJ) noted that the relationship between the state and parliamentary counsel may be one of client and lawyer (citing *Waterford v Commonwealth* (1987) 163 CLR 54 at 60-62 per Mason and Wilson JJ) and that, if advice was sought of and given by parliamentary counsel in relation to the drafting and preparation of draft legislation, this would qualify for legal professional privilege (citing, among other authorities, *Workcover Authority (NSW) v Law Society of NSW* (2006) 65 NSWLR 502 at 521). (See generally AGS *Legal Briefing* 87, 'Legal professional privilege and the government' (15 July 2008)).

The Court noted that the purpose of a government agency providing instructions to parliamentary counsel was to obtain effective and valid draft legislation that is in accordance with the instructions. Further, when parliamentary counsel provide draft legislation in response to those instructions, even without more, they are implicitly advising that the draft legislation provided is effective and valid.

On this basis, communications for the dominant purpose of providing drafting instructions to parliamentary counsel, or for the dominant purpose of parliamentary counsel providing the instructing government agency with draft legislation, will on their face attract legal professional privilege.

Communications with third parties

However, this case demonstrates that the scope of the retainer between a government agency and parliamentary counsel becomes less clear when communications are made between the government agency and a third party before the government gives any drafting instructions to parliamentary counsel—that is, when communications with third parties concern the instructions to be given to parliamentary counsel and drafts of drafting instructions.

The Court held that whether communications to third parties qualify for privilege depends on the application of the principle in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 (*Pratt*). In *Pratt*, the Full Court of the Federal Court held that legal professional privilege extended to a confidential communication prepared by a third party (regardless of the third party's relationship with the client) and provided to the client, but only if the communication was prepared and made for the dominant purpose of it being used by the client to communicate with the client's legal adviser to obtain legal advice.

In *Pratt*, the communication was an accountant's report prepared at the client's direction, and it was held to be privileged if prepared with the dominant purpose of it being, or being part of, the client's communication to its lawyers to obtain legal advice.

In determining whether a communication with a third party has been prepared or made to enable the client to obtain legal advice, a court will consider not only the client's stated purpose in having the communication created but also the client's conduct.

Communications made for the dominant purpose of the seeking and obtaining legal advice attract legal professional privilege

In *Betfair*, on the basis of the evidence before the Court, the Court concluded that the communications with the third parties were made for the dominant purpose of the agency seeking and obtaining legal advice from parliamentary counsel. In this respect, it was significant to the Court that the communications were with members of the working group which worked consensually with the government agency, under a regime of confidentiality, to formulate and finalise the drafting instructions to be provided to parliamentary counsel so that it could create appropriate regulations. This was very different from a situation where the state publishes an exposure draft of proposed legislation and invites public comment.

Waiver of privilege

The Court also gave consideration to the issue of whether the government agency had waived privilege by providing the communications to the third parties. In the particular circumstances of the case, the Court concluded that the government agency did not act inconsistently with the maintenance of the confidentiality, even though the agency did not impose a use restraint beyond that implicit in the confidentiality regime between the agency and the third parties. However, the resolution of this issue in other circumstances will ultimately turn on the particular facts of the case.

Sportsbet

In *Sportsbet*, the Federal Court (Jagot J) relevantly considered the application of the doctrine of parliamentary privilege to documents constituting or recording communications with parliamentary counsel for the purpose of preparing a draft Bill.

The Court held that the doctrine of parliamentary privilege operates in NSW according to the common law and, by operation of s 6 of the *Imperial Acts Application Act 1969*, article 9 of the *Bill of Rights 1688* (Imp), which provides:

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

The submissions

The state submitted that, as draft laws are created or prepared for the purpose of or incidental to the transacting of parliamentary business, the communications with parliamentary counsel should attract parliamentary privilege. It was further submitted that the application of the privilege to those communications would preclude their disclosure under discovery, not just their use as evidence.

Sportsbet submitted that, with the possible exception of one document (notes for a Minister to use in parliament), none of the documents related to the transaction of business by a member of parliament. This is because there was no evidence that any member of parliament had done anything with the documents for the purpose of transacting business in the house of parliament. Also, the discovery of the documents could not involve questioning or impeaching anything done in parliament. Therefore, the objection on the grounds of parliamentary privilege, even if well-founded, was premature.

There is no parliamentary privilege where there is no connection with business of parliament

Jagot J generally accepted Sportsbet's submissions and concluded that the discovery and use of the documents did not in any way involve questioning or impeaching the transaction of business in parliament. The documents were simply communications about the terms of the draft Bill. Jagot J said, in contrast to the case of the documents found to attract the privilege in *Rowley v O'Chee* (1997) 150 ALR 199 (a decision of the Queensland Court of Appeal involving the *Parliamentary Privileges Act 1987*), the connection of each document (with the exception of the two referred to below), with the business of parliament was 'far more distant and tenuous'. On this basis, the claim for parliamentary privilege was rejected.

Jagot J ruled that two documents did attract parliamentary privilege, on account of each being created for the purpose of a Minister conducting business in parliament: see para [21(2)]. So far as these two documents were concerned, consistent with *Rowley v O'Chee*, Jagot J considered that the privilege protects the document from disclosure under discovery and not just mere use as evidence.

Parliamentary privilege may operate differently in the Commonwealth context

It should be noted that s 16 of the *Parliamentary Privileges Act 1987* sets out the circumstances in which parliamentary privilege can be claimed in respect of documents prepared in the context of the Commonwealth Parliament's proceedings. Section 16 provides that the provisions of article 9 of the Bill of Rights apply, sets out what 'proceedings in Parliament' means in this regard, which includes preparation of a document for the purposes of or incidental to the business of a House, and provides that, in proceedings in a court or tribunal, it is not lawful for things to be done concerning such proceedings in parliament.

Accordingly, and depending on the circumstances of the case, in the Commonwealth context s 16 may cover documents constituting or recording communications with parliamentary counsel for the purpose of preparing a draft Bill.

In Sportsbet the claim for public interest immunity was also rejected

Sportsbet also involved a claim for public interest immunity. Having regard to the evidence in the case and weighing up the competing public interests, Jagot J concluded that the interest in the protection of the proper functioning of government was substantially outweighed by the interest in the administration of justice protected by production. On this basis, the claim for public interest immunity was rejected. The fact that the process of legislative amendment was completed weighed against the state. However, Jagot J noted that the position may not have been as clear had the decision-making process been underway at the time the claim for immunity was made.

Implications for clients

While drafting instructions and draft legislation are capable of attracting legal professional privilege, government agencies will need to be aware that communications with third parties will only attract the privilege if they are made for the dominant purpose of the agency seeking and obtaining legal advice from parliamentary counsel.

Government agencies should remain aware that communications with parliamentary counsel about draft legislation will not necessarily attract parliamentary privilege and may not attract public interest immunity. However, it is likely that communications on the preparation of draft legislation for presentation to the Commonwealth Parliament will be protected by s 16 of the *Parliamentary Privileges Act 1987*. That protection only operates to forestall reliance upon these communications before a court or tribunal (as defined in the Act).

However, these principles may be relevant beyond court and tribunal proceedings. Legal professional privilege is picked up as the basis for an exemption under the *Freedom of Information Act 1982* (see s 42) and, under s 46 of that Act, exemption may be claimed where disclosure would be contempt of parliament (note, however, that the mere fact that a document attracts parliamentary privilege in court or tribunal proceedings is not itself a basis for exemption).

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