PARLIAMENTARY PRIVILEGE AND JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

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Introduction

In the course of parliamentary proceedings ministers may sometimes provide explanations for decisions made by them or their subordinates, in purported exercise of statutory or prerogative powers. They may also make statements concerning the policy which has been applied, or is to be applied, in exercise of a power. Those who contest the validity of administrative action through litigation may seek to tender evidence of such statements to prove that a power has been exercised for an improper purpose or in bad faith; that a power has been exercised without regard to relevant considerations or with reference to irrelevant considerations; that a policy which has been applied, or is proposed to be applied, is not permissible; or that a decision-maker has otherwise acted contrary to law.

The question considered in this article is the extent to which the law of parliamentary privilege restricts the use of evidence of parliamentary proceedings for such purposes. Under English law and the laws of the Australian States, the controlling statutory provision is Article 9 of the English *Bill of Rights 1689*.[1] Under Australian federal law the controlling statutory provision is s16 of the *Parliamentary Privileges Act 1987* (Cth). This provision applies to the Legislative Assembly of the Australian Capital Territory[2] and it is substantially replicated in s6 of the Northern Territory's *Legislative Assembly (Powers and Privileges) Act 1992*.

I shall deal first with the position under Article 9 of the *Bill of Rights 1689* and then with the position under s16 of the federal Act. At appropriate points reference is made to recommendations of the United Kingdom Parliament's Joint Committee on Parliamentary Privilege.[3]

Article 9 of the Bill of Rights

Article 9 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.

At the very least this provision means that participants in parliamentary proceedings cannot be subjected by courts to any liabilities on account of what they have said or done in the course of parliamentary proceedings.[4] But courts have taken the view that Article 9 also imposes restrictions on the admission and use of evidence of parliamentary proceedings,

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1 In most States Article 9 applies by virtue of statutory provisions: see *Imperial Acts Application Act 1969* (NSW), s6 and Sched 1; *Constitution Act 1867* (Qld), s40A; *Imperial Acts Application Act 1984* (Qld), s5; *Constitution Act 1934* (SA), s38; *Constitution Act 1975* (Vic), s19; *Imperial Acts Application Act 1980* (Vic), Part II Divn 3; *Parliamentary Privileges Act 1891* (WA), s1. In Tasmania Article 9 applies as a matter of necessity: *R v Turnbull* [1958] Tas SR 80 at 83-4. See also *Egan v Willis* (1998) 195 CLR 424.

2 *Australian Capital Territory (Self Government) Act 1988* (Cth), s24.

3 Report, HL Paper 43-I; HC Paper 214-I (April 1999).

4 Article 9 does not, however, protect members from the exercise of the disciplinary and punitive powers possessed by the Houses of which they are members.

and does so even in cases in which it is not sought to fix anyone with a liability for what has been said or done in the course of parliamentary proceedings.[5]

In *Prebble v Television New Zealand Ltd*[6] the Judicial Committee of the Privy Council, on appeal from New Zealand, ruled that Article 9 means, inter alia, "that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross examination, inference or submissions) that the action or words [in parliament] were inspired by improper motives or were untrue or misleading".[7] The Judicial Committee and Australian courts have, however, accepted that a court does not act in breach of Article 9 if it receives and makes use of evidence of parliamentary proceedings for non-contentious purposes, for example to prove that certain documents were tabled in a parliament on a certain day.[8]

There are relatively few reported cases in which courts have expressly ruled on the admissibility of evidence of parliamentary proceedings in litigation to contest the validity of administrative acts.

In *R v Secretary of State for Trade; Ex parte Anderson Strathclyde p/l*[9] the party seeking judicial review sought to adduce evidence of what a minister had said in the House of Commons to show that the minister had wrongly divested himself of a statutory power and that in consequence a decision by his deputy to allow a takeover of a company was invalid. A Divisional Court concluded that Article 9 of the *Bill of Rights* precluded admission of this evidence. In the Court's opinion there was:

> no distinction between using a report in Hansard for the purpose of supporting a cause of action arising out of something which occurred outside the House, and using a report for the purpose of supporting a ground for relief in proceedings for judicial review in respect of something which occurred outside the House. In both cases the court would have to do more than take note of the fact that a certain statement was made in the House on a certain date. It would have to consider the statement or statements with a view to determining what was the true meaning of them, and what were the proper inferences to be drawn from them.[10]

The United Kingdom Parliament's Joint Committee on Parliamentary Privilege has, however, noted a number of later cases in which evidence of parliamentary proceedings was received by a court, without objection, either in support of or in opposition to an application for judicial review.[11] The Committee has recommended enactment of legislation along the lines of

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5 See E Campbell, "Parliamentary Privilege and the Admissibility of Evidence" (1999) 27 *Fed L Rev* 367.

6 [1995] 1 AC 321.

7 Ibid, p 337.

8 *R v Turnbull* [1958] Tas SR 80 at 84; *Sankey v Whitlam* (1978) 142 CLR 1 at 35-7; *Finnane v Australian Consolidated Press Ltd* [1978] 2 NSWLR 435 at 438-9; *Uren v John Fairfax and Sons Ltd* [1979] 2 NSWLR 287 at 289; *Mundey v Askin* [1982] 2 NSWLR 374 at 375; *NSW Branch of Australian Medical Association v Minister of Health and Community Services* (1992) 26 NSWLR 116; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 337; *R v Smith; Ex parte Cooper* [1992] 1 Qd R 423 at 429-30. This is also the position under s16(3) of the *Parliamentary Privileges Act 1987* (Cth): *Amman Aviation Pty Ltd v Commonwealth* (1988) 81 ALR 710 at 717-18 (FC). See also *Egan v Willis* (1998) 195 CLR 424 at para 133(1) per Kirby J.

9 [1983] 2 All ER 233.

10 Ibid, p 239 per Dunn J.

11 Report (n 3 above) para 49. In four of the cases cited there was an issue about the legality of ministerial policies regarding release of prisoners on parole: *In re Findlay* [1985] AC 319; *Pierson v Home Secretary* [1997] 3 All ER 577 (HL); *R v Home Secretary; Ex parte Venables* [1998] AC 407; *R v Home Secretary; Ex parte Hindley* [1998] QB 751. In *R v Home Secretary; Ex parte Brind* [1991] 1 AC 696 the issue was the legality of a ministerial directive to broadcasters. What the minister had said in Parliament was used to support the validity of the directive. In *Secretary of State for Foreign Affairs; Ex parte World Development Movement* [1995] 1 WLR 386 (QBD) evidence of statements made before two parliamentary committees was admitted to prove that the grant of aid in support of the construction of a dam in Malaysia was not

s16(3) of the *Parliamentary Privileges Act 1987* (Cth), though not quite as sweeping as the Australian provision. Specifically it has recommended enactment of a statutory provision to the effect that:

> No court or tribunal may receive evidence, or permit questions to be asked or submissions made, concerning proceedings in Parliament by way of, or for the purpose of, questioning or relying on the truth, motive, intention or good faith from anything forming part of those proceedings in Parliament or drawing an inference from anything forming part of those proceedings.[12]

This prohibition should, the Joint Committee has recommended, be coupled with a proviso to the effect that courts may take statements or conduct in Parliament into account "when there is no suggestion that the statement or action was inspired by improper motives or was misleading and there is no question of legal liability", for the statement or conduct.[13]

In addition the Joint Committee has recommended that Article 9 of the *Bill of Rights 1689* "should not be interpreted as precluding the use of proceedings in Parliament in court for the purpose of judicial review of governmental decisions"[14] and "that the exception of judicial review proceedings from the scope of Article 9 should apply also to other proceedings in which a government decision is material".[15] These recommended exceptions to the general exclusionary rule of evidence would not derogate from the well settled principle that participants in parliamentary proceedings are immune from legal liability for what they say or do in the course of those proceedings.

The Joint Committee justified the recommended exceptions to the general exclusionary rule on the basis that "ministerial decisions announced in Parliament would be less readily open to examination" by the courts "than other ministerial decisions".[16] Furthermore were the exceptions not accepted, Article 9 of the *Bill of Rights* "would become a source of protection for the executive from the courts".[17]

Section 16 of the *Parliamentary Privileges Act 1987* (Cth)

Section 16(1) affirms the application of Article 9 of the *Bill of Rights 1689*. Ensuing subsections seek to amplify the meaning and effect of the Article. Section 16(2) contains a non-exhaustive definition of what are to be regarded as proceedings in the federal Parliament. Section 16(3) restricts the uses which may be made of evidence of federal parliamentary proceedings in litigation[18] and proceedings before tribunals.[19] It provides as follows:

> 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—

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authorised under the relevant statute. In *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513 evidence of parliamentary proceedings was adduced for the purpose of determining the legality of a government decision not to issue a statutory instrument to bring a statute into operation.

12 Report (n 3 above), para 86.

13 Ibid.

14 Ibid, para 55.

15 Ibid, para 59.

16 Ibid, para 51.

17 Ibid.

18 The restriction applies to all Australian courts.

19 The term "tribunal" is defined in s3(1) to mean "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".

(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.

There are some exceptions to the general principle[20] in s16(3) but none are relevant for present purposes.

Section 16(3) presents some problems of interpretation. In *Laurance v Katter*[21] Davies JA described the subsection as "at least ambiguous" and suggested that "its literal meeting is also arguably absurd".[22] In his view the subsection must be read in the light of s16(1), that is Article 9 of the *Bill of Rights*. So read, s16(3) does not, in his view, prohibit the reception and use of evidence of federal parliamentary proceedings if the object is not to impeach or question the freedom of speech or debates in parliament.[23] On this reading of s16(3), Davies JA held that the subsection did not prohibit the reception of what a Senator had said in debate to prove the content of a statement made outside the House. (In *Rann v Olsen*[24] a Full Court of the Supreme Court of Australia rejected the proposition that s16(3) must be read down in the way suggested by Davies JA.)

In *Laurance v Katter* Fitzgerald P said he was unsure about "what para (c) [of s16(3)] encompasses which is outside paras (a) and (b)". He went on to say:

> So far as words spoken in parliament are concerned, para (c) forbids generally (subject to statutory exceptions …) any inference or conclusion in a court or tribunal proceeding with respect to the meaning of what was said, whereas paras (a) and (b) effect a similar prohibition which is limited by reference to the relevance or attempted use of the meaning of the words spoken in parliament in the particular proceedings.[25]

Pincus JA expressed concerns about the effect of para (c). He pointed out that it places:

> no limitation on the sort of inferences or conclusions the drawing of which may bring the provision into operation. Legal inferences and conclusions are not excluded, subject to s16(5). Inferences or conclusions wholly favourable to the parliament and its members are not excluded, nor need the inferences have anything to do with the standing or credit of members of parliament, past or present.[26]

There is only one reported case in which the effect of s16(3) in judicial review proceedings has been considered - *Hamsher v Swift*[27] in 1992. This was a case in which review was sought of a refusal to grant permanent resident status to several United States citizens. In support of the application for review (under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)) the pleadings referred to a ministerial statement in Parliament. None of the

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20 Subsections16(5) and (6).

21 (1997) 141 ALR 447 (Qld CA).

22 Ibid, p 489.

23 Ibid, p 490. What is meant by impeaching or questioning proceedings in Parliament was also considered by Queensland's Court of Appeal in *O'Chee v Rowley* (1997) 150 ALR 199.

24 (2000) 172 ALR 395 at paras 114-27, 256 and 284.

25 (1997) 141 ALR 447 at 481.

26 Ibid, p 483.

27 (1992) 33 FCR 545.

respondents referred the Federal Court to s16(3). Nevertheless French J considered that paras 16(3)(b) and (c) prohibited reception and use of the statement. The prohibition could not be waived by an individual.

The applicants in this case had made reference to the ministerial statement as evidence of a decision in 1989 and also in support of a contention that departmental action taken in 1986 did not amount to a disposition of their applications for permanent resident status but rather deferred consideration of the applications. Reference to the ministerial statement was, in the opinion of French J, for the purpose of establishing the minister's intention or otherwise inviting the drawing of inferences from it.[28]

A few years before this case, another judge of the Federal Court, Beaumont J, had ruled that s16(3) precluded reception of the Hansard record of a Senator's question of a minister and part of the minister's answer. The case, *Amann Aviation Pty Ltd v Commonwealth*,[29] was one in which the plaintiff sought damages for breach of contract. It alleged unlawful termination of its coastwatch contract with the Commonwealth. The plaintiff's pleadings claimed that, before the contract was terminated, the Commonwealth had entered into an agreement with Skywest Aviation Pty Ltd that that company would supply the services which the plaintiff had agreed to supply, and that a director of Skywest (Sir Peter Abeles) had suggested to the minister that the Commonwealth should grant the plaintiff no concessions in the performance of its contract. The question asked of the minister in the Senate was whether the minister had had a telephone conversation with Sir Peter Abeles concerning the coastwatch contract, and, if so, the nature and purpose of the conversation. Beaumont J considered that use by the court of the extract from Hansard was prohibited by paras (b) and (c) of s16(3). What was sought to be done was to use Hansard to justify an inference that the minister had been influenced by Sir Peter Abeles in relation to the decision to terminate the plaintiff's contract. The tender of Hansard was, in the opinion of Beaumont J, "by way of or for the purpose of questioning the motive, intention or good faith of the minister" and also "by way of, or for the purpose of, inviting the drawing of inferences or conclusions from what was said in the Senate …".[30]

This was not, of course, a case in which a plaintiff sought to fix liability on a minister in respect of something said or done in the course of parliamentary proceedings. The action alleged to be unlawful was action taken outside Parliament and evidence of what had been said in Parliament was tendered to prove the alleged illegality. The case may be regarded as one of a kind which the United Kingdom Parliament's Joint Committee on Parliamentary Privilege recommended as an exception to the general rule about exclusion of evidence of parliamentary proceedings.[31] For what was in issue was the legality of a government decision—a decision to terminate a contract.

Subject to the exceptions contained in ss16(5) and (6), the prohibitions of s16(3) of the 1987 Act are expressed in terms which apply to proceedings in any court or tribunal, regardless of the nature of the proceedings. Literally construed s16(3) applies to all proceedings for judicial review of administrative action taken outside the course of parliamentary proceedings.

28 Ibid, p 564.

29 (1988) 81 ALR 710.

30 Ibid, p 718.

31 Report (n 3 above), paras 56-59.

I have elsewhere discussed the constitutional issues presented by s16(3) of the 1987 Act.[32] For present purposes it is sufficient to mention but one of the grounds on which the constitutionality of s16(3) might be assailed. It is that, unless read down, it can operate to inhibit the exercise of federal judicial powers, contrary to implications found in Chapter III of the federal Constitution.[33] Federal judicial power is reposed in the High Court by s75 of the Constitution and includes a supervisory jurisdiction.[34] Supervisory jurisdictions are also reposed in the Federal Court by s39B of the *Judiciary Act 1903* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and Part 8 of the *Migration Act 1958* (Cth).

The numbers of cases in which the success of an application for judicial review will depend on whether a party is able to tender evidence of what has been said or done in the federal Parliament is not likely to be great.[35] There could, however be cases in which s16(3) operates to prevent a fair trial and in which the court finds it necessary to order a stay of the proceedings.[36] In such a case s16(3) might serve to "impair the judicial functions of finding the facts, applying the law or exercising any available discretion in making the judgment or order which is the end and purpose of the exercise of judicial power".[37]

The High Court of Australia has not yet had occasion to consider the constitutionality of s16(3) of the 1987 Act. In *Laurance v Katter*[38] Fitzgerald P was of the view that the subsection is a valid enactment in exercise of the federal Parliament's power under s49 of the Constitution. In his opinion the legislative power so conferred is not subject to implied constitutional limitations.[39] In contrast Pincus JA was of the view that s16(3) does not validly operate in relation to the conduct of proceedings for defamation. This was because of the implied constitutional freedom of political communication and the impact of s16(3) on that freedom.[40] Davies JA's narrow interpretation of s16(3) was clearly influenced by the presence of that implied freedom.[41]

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32 See n 5 above. The article was, however, written and published before the decision in *Rann v Olsen* (2000) 172 ALR 395.

33 The chapter entitled "The Judicature".

34 The original and entrenched supervisory jurisdiction of the High Court rests on paras (iii) and (v) of s75.

35 This is mainly because of statutory rights to supply written reasons for administrative decisions, for example under the *Administrative Appeals Tribunal Act 1975* (Cth) and/or the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The United Kingdom Parliament's Joint Committee on Parliamentary Privilege reported that it has received a letter from the Attorney-General for the Commonwealth in which he stated that (in the words of the Committee) s16 of the *Parliamentary Privileges Act 1987* (Cth) had not proved inhibiting to the judicial review of administrative action and that, given the rules and process of administrative decision-making in Australia, it is unlikely that an applicant for judicial review would suffer from being unable to rely on privileged parliamentary material to challenge a minister's decision": *First Report* (n 3 above), n 143.

36 See Campbell (n 5 above) at 374. In *Rann v Olsen* (2000) 172 ALR 395, judges of a Full Court of the Supreme Court of South Australia were clearly divided on the question whether it was appropriate for them to stay an action for defamation in which issues of parliamentary privilege had been raised. The case had come to the Full Court on a case stated by the trial judge. Three of the five judges constituting the Full Court (Doyle CJ and Mullighan and Lander JJ) thought that the question of whether a stay be ordered should be left to the trial judge. The other two judges (Prior and Perry JJ) favoured a stay.

37 *Nicholas v The Queen* (1998) 72 ALJR 456 at para 23 per Brennan CJ.

38 (1996) 141 ALR 447 (Qld CA).

39 Ibid, pp 478-81. In the prior case of *Amann Aviation Pty Ltd v Commonwealth* (1988) 81 ALR 710 at 718 Beaumont J had no doubt about the constitutionality of s16(3). Neither of these judges, however considered the relationship between the legislative powers conferred by s49 and s51(xxxvi) of the Constitution. Section 51 of the Constitution is the principal section which defines the legislative powers of the federal Parliament, but the exercise of those powers is controlled by other provisions in the Constitution and implied limitations on federal legislative powers.

40 (1996) 141 ALR 447 at 483-6.

41 Ibid, pp 490-1.

In *Rann v Olsen*[42] a Full Court constituted by five judges of the Supreme Court of South Australia ruled that s16(3) does not infringe the implied constitutional freedom of political communication.[43] The Court also rejected a submission that s16(3) is invalid because it "requires or authorises a court, exercising the judicial power of the Commonwealth, to exercise that power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power".[44] Doyle CJ thought this submission lacked substance and he dealt with it shortly as follows:

> Relevantly s16(3) … is no different from any other rule of law that operates to exclude certain evidence from consideration by the Court. Plenty of examples come to mind, and they are examples which may involve application of the law in a manner that may have a telling or even decisive effect on the outcome of a case. The law relating to professional legal privilege and public interest immunity is a good example. These rules may result in the Court not receiving evidence which could have a decisive effect on a case.[45]

Were the High Court to hold s16(3) invalid it would still have to consider the effect of Article 9 of the *Bill of Rights 1689* so far as it applies to the federal Parliament. Article 9 applies to that Parliament not merely by force of s16(1) of the federal Act of 1987 but also by force of s49 of the Constitution.[46] At the time the Constitution came into operation there was very little case law on the question of the extent to which Article 9 might inhibit reception and use of evidence of parliamentary proceedings in courts of law. Certainly there was no judicial ruling on the use of evidence of parliamentary proceedings in litigation to contest the validity of administrative action which had taken place outside a parliament.

In *R v Murphy*[47] Hunt J observed that English case law on the impact of Article 9 on curial rules of evidence was relatively modern. The earliest English decision he considered significant was *Church of Scientology v Johnson-Smith*.[48] Many years later the Judicial Committee of the Privy Council expressed the view that s16(3) of the *Parliamentary Privileges Act 1987* (Cth) was an accurate statutory rendition of the effect of Article 9.[49] And it rejected the narrow reading of that provision in *R v Murphy*—a reading which s16(3) of the 1987 Act was designed to combat.[50]

The High Court of Australia has, to date, not had occasion to rule on the effect of Article 9 on the admission and use of evidence of parliamentary proceedings in litigation. In interpreting this provision the High Court is entitled to have regard to its history and purpose. So far as Article 9 applies to the federal parliament the court may have regard to how the provision had been interpreted up to 1901. Neither the terms of the federal Constitution nor judicial precedent obliges the High Court to hold that s16(3) of the *Parliamentary Privileges Act 1987* (Cth) is merely declaratory of any effect of Article 9. Equally the Court is free to interpret Article 9 in a way which is consistent with the exercise of the judicial power of the Commonwealth, as defined in ss 75 and 76 of the federal Constitution. The Constitution

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42 (2000) 172 ALR 395.

43 Ibid, paras 128-189.

44 Ibid, at para 190.

45 Ibid, para 191.

46 Section 49 provides that "the powers, privileges and immunities of the Senate and the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until so declared shall be those of the Commons House of the Parliament of the United Kingdom, its members and committees, at the establishment of the Commonwealth".

47 (1986) 5 NSWLR 18 at 26.

48 [1972] 1 QB 522.

49 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 333. This was also the view of Fitzgerald P in *Laurance v Katter* (1996) 141 ALR 447 at 481; cf Pincus JA at 484.

50 See Sen. Deb. 7 Oct. 1986 at 892, 894-5; HR Deb. 19 April 1987 at 1154-6.

could well be interpreted as precluding an interpretation of Article 9 of the *Bill of Rights 1689* which impairs the ability of courts of federal jurisdiction to perform their functions under the Constitution and federal legislation, among them adjudication of the validity of actions of the executive branch of government.

Arguments in support of the proposition that Article 9 should not be interpreted as precluding admission and use of evidence of parliamentary proceedings when the validity of governmental acts is in issue in litigation before courts must surely be strengthened by the recent recommendations of the United Kingdom's Joint Committee on Parliamentary Privilege.[51] And if Article 9 does not preclude a court from receiving evidence of parliamentary proceedings in order to determine whether a House of a parliament has exceeded its powers,[52] must it not follow that Article 9 does not preclude reception by courts of evidence of parliamentary proceedings when the court has to decide whether an officer or agency of the executive branch of government has exceeded their power?

51 See n 3 above.

52 *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563.