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THE COOPERATION DILEMMA – LEGAL PRIVILEGE IN THE "WHY NOT LITIGATE" ERA

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Legal Briefings – By **Merryn Quayle and Mark Smyth**

The Financial Services Royal Commission has had a significant impact on regulators' appetites to obtain documents subject to claims of legal professional privilege and shifted strategic considerations that companies will weigh in deciding whether or not to provide privileged documents to regulators.

The impact of the more aggressive approach to regulatory investigations and enforcement in Australia in the wake of the Financial Services Royal Commission has been widespread.

Although Australian regulators cannot compel production of privileged materials, waiving privilege – while not compulsory – can be an attractive but risky proposition for companies seeking to strike the right balance between cooperation and protecting their legal advice and communications.

As has been well publicised, in the wake of Commissioner Hayne's "why not litigate" question, regulators have been deploying their compulsory information-gathering powers with ever increasing frequency.

The current climate of unprecedented regulatory and public scrutiny has increased the pressure on companies to take a cooperative and transparent approach to regulator and law enforcement interactions.

Absent clear legislative intent to the contrary, in this jurisdiction privilege is a protective 'shield' that can be, and commonly is, relied on as an immunity to prevent production of documents that would otherwise be required to be handed over.

However, regulators and law enforcement agencies across the globe are increasingly applying pressure on companies to disclose documents subject to claims of privilege – either through close scrutiny of such claims or by requiring disclosure as a necessary condition for cooperative arrangements or deferred prosecution agreements. There can also be other benefits for companies who elect, for a variety of reasons, to not rely on the privilege immunity.

BENEFITS FROM 'COOPERATING'?

A company might make a strategic decision to waive privilege for a range of reasons:

- Privileged material can help establish a due diligence defence, or otherwise demonstrate that persons within a company have acted honestly and in accordance with (often independent) legal advice.
- A privileged document can often usefully "tell the story" and correct a regulator's otherwise incomplete narrative.
- Reliance on privilege can be portrayed as a company being "secretive" – disclosure of privileged material can be seen as a way of demonstrating transparency and avoiding potential criticisms of impeding the work of the regulator or standing in the way of the search for "truth".
- Disclosure may seek to change any perception that a company has not responded adequately to initial allegations of misconduct and needs to take steps to address that in a more open and frank manner.

A corporation under investigation may of course gain substantial benefits from cooperating with the regulator or law enforcement agency – such as a more favourable resolution or reduced fines or penalties.[1] Some regulators have suggested – albeit controversially – that waiving privilege will be a strong indicator of cooperation.[2] ASIC has encouraged voluntary confidential disclosure of privileged information, noting that it may "*assist the parties to identify efficiently, and with precision, the critical issues to be addressed in an investigation*" and that it "*will often be in the public interest for ASIC, in seeking to perform its regulatory functions, to have access to LPP material and it will often not be detrimental to the privilege holder for this to occur.*"[3]

However, a decision to disclose privileged material is not without its complexities and should always be approached with the big picture in mind.

IMPLICATIONS OF DISCLOSURE – A SLIPPERY SLOPE

Under Australian law, privilege is waived if the privilege holder engages in conduct that is inconsistent with the maintenance of confidentiality.[4]

Waiver of privilege does not inevitably follow from disclosure to a third party and courts continue to recognise that disclosure to a regulator pursuant to a limited waiver agreement will not necessarily give rise to a more general waiver.[5] Nevertheless, disclosure of privileged documents to a third party certainly increases the risk of a loss of privilege. Once the confidentiality is lost, it can't be regained and can have far-reaching consequences.[6]

Authorities and civil litigants (especially class action law firms) will seek access to these materials to build a related case. Even though disclosure of privileged documents may have achieved the desired purpose in reaching a satisfactory outcome in a regulatory investigation context, those same documents may provide unnecessary ammunition in a civil litigation setting.

Disclosure of privileged documents or parts of privileged documents also runs the risk of unintended waiver. Regulators and courts will be sceptical of any selective disclosure which could be regarded as "cherry picking". Waiver of privilege in one document also risks waiving privilege over related communications, such as emails about it or other documents that it refers to.

Disclosure of privileged material can also cause the regulator to heavily scrutinise disclosed advice (and related communications). This can lead to unexpected attention directed towards in-house and external lawyers involved in the provision of the advice – they may find themselves under examination in circumstances where the focus would otherwise tend to be on management and non-legal business members.

Disclosure of privileged documents to one regulator may lead to disclosure to other regulators. For example, following recommendations in the Financial Services Royal Commission, ASIC and APRA have committed to engaging on investigations or enforcement actions and sharing appropriate, relevant information wherever possible.[7]

Investigations that involve multiple jurisdictions necessarily also involve the consideration of complex issues arising from different legal systems, varied privilege rules and differing regulator expectations. For example, many countries do not recognise the concept of privilege, instead acknowledging a duty of confidentiality from lawyer to client in certain circumstances. In light of the increased cooperation and information-sharing between different regulators here and overseas, a company cooperating with one body should expect to share the same information with investigative bodies in other jurisdictions.

In this context, it is important that any decisions regarding asserting or waiving privilege not be taken lightly and without due consideration to potential implications.

ENDNOTES

1. ASIC and APRA, have emphasised that a cooperative approach may benefit a company in many ways, and will be relevant to ASIC's consideration of which type of action to pursue and what remedy or combination of remedies to seek. See "ASIC's approach to enforcement after the Royal Commission", Sean Hughes, ASIC Commissioner, speaking at the 36th Annual Conference of the Banking and Financial Services Law Association in Queensland on 30 August 2019 https://asic.gov.au/about-asic/news-centre/speeches/asic-s-approach-to-enforcement-after-the-royal-commission/

2. "Waiving privilege over that initial investigative material will be a strong indicator of cooperation and an important factor that I will take into account when considering whether to invite a company to enter into DPA negotiations": Lisa Osofsky, Director, Serious Fraud Office, speaking at the Royal United Services Institute in London on 3 April 2019 https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/.

3. ASIC, "Claims of legal professional privilege" (Info 165), https://asic.gov.au/about-asic/asic-investigations-and-enforcement/claims-of-legal-professional-privilege/ .

4. *Mann v Carnell* (1999) 201 CLR 1.

5. *Cantor v Audi Australia Pty Ltd* [2016] FCA 1391.

6. See *Glencore International AG v Federal Commissioner of Taxation* (2019) 93 ALJR 967, in which the High Court confirmed that privilege is only an immunity from the exercise of compulsory powers of disclosure and does not provide an actionable legal right beyond ensuring that privileged documents need not be produced. Once privileged documents are publicly available or in the hands of third parties, the only relief to seek to prevent further use would be in equity for any breach of confidentiality.

7. Memorandum of Understanding between APRA and ASIC, November 2019.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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