Disclosing Privileged Documents to Regulators

Alex Cuthbertson, Partner, Monisha Sequeira, Senior Associate, and Alex Lee, Lawyer, report on the Cantor v Audi decision.

In *Cantor v Audi Australia Pty Limited* [2016] FCA 1391, the Federal Court denied Australian class action plaintiffs access to documents exchanged between Volkswagen AG and a foreign regulator. The case provides insights into what you should consider before providing privileged documents to a regulator. This is critical in an era of increasing regulatory action and class actions in which plaintiffs seek to piggy back off global regulatory investigations and proceedings.

How does this decision affect you?

Regulators have broad investigative and information-gathering power. However, in Australia, regulators cannot compel the production of privileged communications.[1] Nevertheless, sometimes it is advantageous to disclose such documents. Before doing so you should consider the following:

- Are there proceedings on foot or likely to arise in which third parties will seek to obtain those documents? This is increasingly taking place across jurisdictions.
- Before providing any documents to a regulator, obtain appropriate legal advice to determine the legal framework under which the materials are provided, particularly the level of confidentiality that applies to dealings with the regulator. This may require obtaining foreign law advice.
- If there is any concern about the level of confidentiality that applies to dealings with the regulator, consider with your legal advisers whether the benefits of providing the regulator with privileged communications outweigh the risks.
- Ensure that in correspondence with the regulator it is made clear that all material is provided on a confidential basis. If any privileged material is provided, consider making it clear that the limited disclosure of that material is made solely for the purpose of the regulator performing its regulatory functions and no broader waiver of privilege is intended. All privileged materials should be clearly marked confidential and privileged.
- Prior to the provision of any privileged documents, if practicable, consider whether it is appropriate and would be effective to reach agreement with the regulator that your communications are to remain confidential and that the privileged material will not be provided or disclosed, in whole or in part, to third parties.

Background

The German regulator for motor transport, the KBA, investigated whether Volkswagen AG and its related group companies (***VW Group Companies***) had implemented 'defeat devices'[2] in their diesel cars and whether any technical changes to those cars were necessary to bring the cars into conformity with applicable regulations and original KBA 'type approvals'. In response to a request for information in that investigation, Volkswagen AG provided the KBA with legal advice that it had obtained from its German lawyers (the ***advice***) along with a covering letter referring to that advice. The KBA subsequently reproduced parts of the advice in 'ordinances' sent to certain VW Group Companies, specifying necessary remedial action.

Purchasers and lessees of VW Group Companies' cars brought five parallel class action proceedings against companies within the Volkswagen group who manufactured, imported, sold and/or distributed the relevant cars in Australia. The judgment involved an application brought by the class action plaintiffs to access the advice and the parts of redacted documents referring to the advice. Specifically, the class action plaintiffs sought discovery of the advice, the cover letter and the ordinances exchanged in the KBA investigation. Volkswagen AG claimed that the advice was privileged and redacted parts of the other communications on the grounds of privilege.

The privilege dispute focused on three issues:

- Did privilege attach to the communications of the advice, cover letter and ordinances?
- Was there an implied waiver of the privilege when the advice was provided to the KBA or when parts of the advice were reproduced in the cover letter and ordinances?
- Was there a waiver of the privilege when, as the plaintiffs contended, the VW Group Companies relied on communications with the KBA in their pleadings?

The decision

Justice Bromwich upheld the claims of privilege in relation to each of the communications, and further held that there was no waiver of privilege either as a result of the initial communication of the advice and cover letter to the KBA, or the subsequent reproduction of parts of the advice in the KBA ordinances.[3]

His Honour considered the relevant German legal framework with respect

1 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543. Absent clear legislative intent to the contrary, in Australia there is no obligation to provide regulators with privileged communications because legal professional privilege is a fundamental common law immunity.

2 A 'defeat device' is software which can detect when a car is under testing conditions and can alter car performance to effect emissions.

to confidentiality as important context for both the privilege and waiver claims.[4]

Privilege issue

His Honour outlined the conditions for the test for privilege under Australian common law:[5]

- the communications passed between the client and their lawyer;
- the relevant communications were confidential; and
- the communications were for the 'dominant purpose' of giving or receiving legal advice.

Justice Bromwich held that legal professional privilege attached to the communication of the advice based on the form, context and contents of the advice. The advice was not a submission in disguise. The cover letter referring to and attaching the advice 'came under the umbrella of privilege' of the advice. The parts of the ordinances referring to the advice were privileged communications because they were not 'fresh communications' and had occurred in circumstances protecting the confidence of those communications, including that they were not sent beyond the VW Group Companies.

The waiver issue

The more interesting part of the judgment concerned waiver and whether the limited disclosure of the advice to the KBA (and the other communications referring to the advice exchanged between the parties) resulted in an implied waiver as against the rest of the world.

His Honour applied the test for waiver of privilege under Australian law, according to which privilege is waived if the privilege-holder engages in conduct 'inconsistent' with the maintenance of the confidentiality which the privilege protects.[6] Whether limited disclosure of advice will amount to a waiver will turn on the facts and circumstances of a case. Justice Bromwich noted that,

> in any third party communication, [it is important to take] steps to maintain confidentiality to preserve privilege, which may be achieved by the face of the document constituting the communication, the means and circumstances in which it occurs, and the factual and legal context.[7]

Justice Bromwich held that the disclosure of the advice to the KBA resulted in only a limited waiver of privilege. Specifically, and having regard to the relevant German law, his Honour found that, since the advice was provided to the KBA in circumstances of confidentiality,[8] Volkswagen AG's conduct in handing over the advice resulted in a limited waiver in favour of the KBA only, and only for the purposes of the KBA performing its regulatory functions. Therefore, although there was limited waiver of privilege by Volkswagen AG's conduct, that waiver did not apply to the whole world (and, in particular, did not apply to the class action plaintiffs). He found that the communications between Volkswagen AG and the KBA occurred in a legal context which placed the public interest in candid disclosure to the KBA above any other general public interest in further disclosure.

Justice Bromwich also noted that while the KBA's request was not in the nature of a compulsory process with civil penalty or criminal sanctions, it was 'less than truly voluntary' given the practical and commercial consequences of non-compliance. However, he did not treat the presence or absence of compulsion as having a 'determinative role' in the privilege dispute.

His Honour held there was no implied waiver by providing the advice to the KBA because the mere fact of disclosure by Volkswagen AG to the German regulator (given the applicable statutory confidentiality regime) was not inconsistent with it seeking to maintain confidentiality of the advice as against the Australian class action plaintiffs. Demonstrating inconsistency in the relevant sense required pointing to specific aspects of Volkswagen AG's conduct of the Australian proceedings which were inconsistent with the maintenance of confidentiality rather than pointing to the mere fact of disclosure to a third party, without more.[9]

The Court further held that Volkswagen AG had not impliedly waived the privilege by referring to its correspondence with the KBA in the Australian proceedings because the respondents' pleadings in those proceedings (including Volkswagen AG's pleadings) merely relied on the technical solutions it had proposed to the KBA and not on any legal advice received by Volkswagen AG from its German law firm as to whether the devices were properly characterised as 'defeat devices'. His Honour did note, however, that waiver could have been found if Volkswagen AG sought to selectively deploy its correspondence with the KBA on a key substantive matter in the class action proceedings and a 'fresh question of waiver' could arise if Volkswagen AG seeks to do so in the future.

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3 *Cantor v Audi* [2016] FCA 1391 (22 November 2016) (***Cantor***).

4 In considering the German confidentiality regime that applied to the KBA investigation, his Honour took into account German statutory provisions concerning the KBA's role and third party access rights, German legislation and case law and a KBA administrative decision denying an environmental NGO access to the VW investigation materials.

5 As the privilege dispute concerned pre-trial discovery proceedings, the court applied common law, not the *Evidence Act 1995* (Cth). *Esso Australia Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49 at 59.

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

7 *Cantor* [74].

8 There was no indication in the judgment that Volkswagen AG and the KBA had reached an express agreement to keep all communications between them confidential. However, the absence of an express agreement was not fatal. Volkswagen AG relied on affidavit evidence that the documents were given to the KBA on the basis that they were being provided, 'within the bounds of a confidential German administrative procedure.' [46(5)(c)(iii)].

9 In reaching this conclusion, Justice Bromwich noted that the facts of *Goldberg v Ng* (1995) 185 CLR 83, were limited and unique and were not to be read more expansively. The central notion is that disclosure to a third party for a limited and specific purpose does not of itself result in a loss of privilege as against another party in litigation.