SQUIRE PATTON BOGGS

"Waiving" Privilege Goodbye?

Limited Waiver and Voluntary Disclosure Agreements

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Introduction

A voluntary disclosure agreement (VDA) was previously understood to enable companies to voluntarily disclose documents that are subject to legal professional privilege to regulators like the Australian Securities and Investment Commission (ASIC) to assist with an investigation without a total waiver of privilege. The primary purpose of a VDA was to create a "limited waiver" given that the disclosed information can only be used by the regulator for the purpose of informing its consideration of (i) the subject matter of the investigation; and (ii) any resulting proceedings in connection with the subject matter.

However, the Federal Court's recent decision in *Australia Securities and Investments Commission (ASIC) v Noumi Ltd* [2024] FCA 349 ruled that voluntary disclosure of information to ASIC pursuant to a VDA was inconsistent with the maintenance of any privilege. In some respects, the decision turns on the particular facts and circumstances of the case; however, the decision casts doubt on how effective VDAs actually are, particularly in the context of ASIC's voluntary disclosure regime.

Background

Noumi Ltd (Noumi) is an Australian publicly listed company that manufactures and sells dairy and plant-based beverage and nutritional products. ASIC brought proceedings against Noumi's predecessor, Freedom Food Group Ltd, and its former officers (including its former CEO, Rory Macleod) for alleged contraventions of the *Corporations Act 2001* (Cth) (Proceedings). According to ASIC, these contraventions arose from Noumi's failure to have adequate accounting policies for writing down the carrying values of large amounts of obsolete and out-of-date inventory as part of its financial reporting obligations (Inventory Issue).

ASIC's decision to bring the Proceedings was based on a report prepared by PwC entitled the "Freedom Foods Group Limited – Investigation Report" (PwC Report). PwC had been engaged by Noumi's legal adviser, Rani John, to investigate Noumi's accounting and financial reporting practices after the Inventory Issue had been escalated to Noumi's board. Noumi subsequently disclosed the finalised PwC Report to ASIC pursuant to a VDA, and ASIC subsequently commenced the Proceedings. Importantly, these Proceedings included allegations against Mr. Macleod, however, he was not provided a copy of the PwC Report on the basis it was privileged. During the Proceedings, Noumi asserted privilege over the PwC Report, while Mr. Macleod contended that Noumi had waived any attaching privilege by way of, among other things, its voluntary disclosure to ASIC.

Judgment

Justice Shariff was satisfied that the PwC Report attracted privilege given that its creation had been for the dominant purpose of the provision or receipt of legal advice. However, His Honour also found that Noumi waived privilege by voluntarily disclosing the PwC Report to ASIC as part of the VDA. Justice Shariff arrived at this conclusion by undertaking a predominantly factual inquiry, "informed by consideration of fairness",[1] into whether there would be inconsistency between the preservation of privilege over the PwC Report and Noumi's voluntary disclosure to ASIC.

Upon proper construction of the VDA, Justice Shariff held that Noumi permitted ASIC to use information from the PwC Report "derivatively". That is, even if the VDA prevented ASIC from tendering the PwC Report as admissible evidence, ASIC was still allowed to consider not only PwC's findings, but also the underlying evidence leading to those findings, to obtain further evidence in an admissible form against Mr. Macleod. This included, for example, in identifying witnesses based on the interviewed Noumi personnel, the relevant documents to show these witnesses and the evidence they are likely to provide. In this sense, Noumi's voluntary disclosure of the PwC Report was inconsistent with the maintenance of privilege.

As for the consideration of fairness, Justice Shariff also regarded that there had been "specific unfairness" against Mr. Macleod (as opposed to general unfairness). According to His Honour, it would be unfair to sanction Noumi's disclosure of information to ASIC for its consideration of regulatory investigations and proceedings against Mr. Macleod while allowing Noumi to assert privilege and confidentiality over that same information against Mr. Macleod.

Finally, Justice Shariff considered ASIC's and Noumi's public policy argument that ASIC's "voluntary disclosure regime" facilitated the administration of justice by enabling ASIC to accept candid and voluntary disclosure of confidential information, which, in turn, leads to time and cost savings when conducting investigations into alleged statutory contraventions. As the voluntary disclosure regime is not grounded in statute, however, Parliament has not abrogated legal professional privilege so as to guarantee that voluntary disclosure of privileged information to regulators would always amount to a limited waiver.

1 *Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66 at [29].

Takeaways

Whilst Justice Shariff indicated that the inquiry into whether privilege has been waived by way of voluntary disclosure of information must be determined on a case-by-case basis, companies who make disclosures to ASIC (or other regulatory bodies) under a nonstatutory VDA regime now potentially risk a total waiver of privilege. To avoid lengthy and expensive litigation, it is critical to obtain independent legal advice before entering into VDAs.

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