

Australia: The Ultimate Dilemma – put at risk immunity for cartel conduct, or waive privilege?

In Brief

In *Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Ltd* [2021] FCA 511, the Federal Court has handed down an important decision which highlights the dilemma that may be faced by an immunity applicant in complying with its duty to provide full, frank and truthful disclosure and to co-operate under the ACCC's Immunity and Cooperation Policy for Cartel Conduct (**ACCC Policy**) and maintaining legal professional privilege over witness accounts provided to solicitors at an early stage in an investigation. The Federal Court's judgment is [here](#).

The decision is a reminder that careful consideration should be given at each stage of an internal investigation, and in communications with regulators, in relation to the purpose for which a document is being created, and on what basis any privileged document, or part of a privileged document, might be provided to any third party, including the regulator or prosecutor.

In more detail

Brief facts

The judgment relates to the criminal prosecution by the Commonwealth Director of Public Prosecutions (CDPP) of allegations of cartel conduct in relation to an institutional share placement.

In August 2015, JP Morgan Chase & Co Group's (**the Immunity Applicant**) in-house and external lawyers commenced an internal review of the Immunity Applicant's conduct in relation to the Share Placement (**Internal Review**). Following the grant of a "first in" marker by the ACCC, internal and external lawyers conducted interviews with the Immunity Applicant's employees during which interview notes were created and outlines of evidence were prepared (**Interview Notes and Evidence Outlines**). The Immunity Applicant subsequently submitted an oral "proffer" to the ACCC and applied for and obtained conditional immunity from the ACCC and the CDPP.

During committal proceedings in 2020, the accuseds pressed the CDPP to produce documents generated during the Internal Review. The CDPP then requested the Immunity Applicant to produce the Evidence Outlines by reference to the conditions to the grant of conditional immunity which required it to "provide full, frank and truthful disclosure and co-operation to the ACCC (including by withholding nothing of relevance) throughout the course of the ACCC's investigation and any subsequent legal proceedings commenced by the ACCC and/or the CDPP in respect of the disclosed cartel conduct".

The Immunity Applicant was concerned to maintain legal professional privilege but ultimately agreed, over two meetings with the CDPP, to read aloud selected passages from the Evidence Outlines. In each case the partial accounts were provided by reference to 12 identified topics

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and the Immunity Applicant's advisors said words to the effect of "this is the evidence [the Immunity Applicant] expects will be given in respect of [the topic] by [the named employee] based on their first account".

In January 2021, the CDPP served subpoenas on three members of the Immunity Applicant group for production of the Interview Notes and Evidence Outlines, among other things. The Immunity Applicant objected to inspection on the basis of legal professional privilege. No access was sought to parts of documents containing legal advice, or comments in the nature of legal advice.

The Federal Court's decision

The Federal Court was asked to consider firstly, whether the Interview Notes and Evidence Outlines were privileged and secondly, whether the Immunity Applicant had by its conduct waived that privilege.

In summary, the Federal Court held that:

- The dominant purpose of the Internal Review was to provide confidential legal advice to the Immunity Applicant, in respect of any actual or potential risk, exposure or other concern arising from its conduct during the share placement and how any such legal risk, exposure or concern might be managed and/or mitigated, including by applying to the ACCC for immunity under the Immunity Policy. Although it was challenged whether this was the dominant purpose of the Internal Review, or whether the purpose was to obtain sufficient factual material to proceed to the proffer stage, the Court accepted that the documents were privileged.
- The Immunity Applicant's partial disclosure of the content of the documents to the CDPP was inconsistent with the maintenance of confidentiality over the remainder of the content and it thereby waived privilege in the whole of the documents (save for any legal advice). In particular:
 - The Immunity Applicant made a conscious and voluntary decision to disclose portions of its confidential documents, and it did so in the pursuit (or perhaps defence) of its commercial and strategic interests.
 - When the disclosures were made, the Immunity Applicant knew the CDPP's position was that it required *the whole* of the "*factual material*" in the Evidence Outlines.
 - The Immunity Applicant made assertions to the CDPP about the extent and character of what it was disclosing and what it was not disclosing which was inconsistent with its maintenance of confidentiality over the undisclosed balance of the documents. An assertion that what was disclosed would be sufficient to enable consistency between accounts to be assessed, was also inconsistent with the maintenance of the confidentiality of the documents.
 - The CDPP was precluded from making its own assessment of those matters and would have an "inaccurate perception" or "incomplete understanding" of the matters disclosed - for example the partial disclosures included references to phone calls without the participants or the date/time of the calls being identified.
 - The Immunity Applicant chose the topics which provided the framework for the partial disclosures.



- It could not be said that the Immunity Applicant made the partial disclosures for a limited specific purpose and it did not do so on the basis that the CDPP would keep confidential the disclosed material.

The Court however found that the following conduct did not constitute waiver:

- The fact that an investigation was undertaken by the Immunity Applicant, or that it obtained legal advice on the basis of the results of that investigation or sought and obtained grants of immunity, particularly as neither the ACCC nor the CDPP required the disclosure of privileged material as a condition of the grant of immunity.
- The imposition of the condition by the ACCC and the CDPP, and the Immunity Applicant's acceptance of the condition, that it provide "full, frank and truthful disclosure and cooperation ... including by withholding nothing of relevance" was not of itself inconsistent with the maintenance of the confidentiality of the communications.

What does this mean for immunity applicants or others considering self-reporting to a regulator?

The decision whether to apply for immunity (under the ACCC Policy or the new ASIC policy), or whether to approach a regulator to self-report conduct, is always a decision which must be made following consideration of all the benefits and risks. The risk of waiving privilege is an important risk to include in that consideration.

Although it may not be possible to completely remove the risk of being forced to decide between two conflicting interests – maintaining confidentiality and privilege in documents on the one hand and not jeopardising the grant of conditional immunity on the other – steps taken during an internal investigation can minimise that risk. These steps include:

- Considering and documenting the purpose for which any interviews are being conducted.
- Considering the attendees of any interviews, including whether external counsel should attend.
- Considering the form in which any interviews will be recorded.
- Being mindful of the creation of documents, including whether it is preferable for factual recollections to be documented separately to legal advice or conclusions.
- Being aware that any disclosure to third parties, including oral disclosure, risks an assertion of waiver, and considering whether any limits should be placed on the use of the documents by the recipients. It is particularly important to understand whether the person to whom any privileged material is being provided is agreeing to maintain the confidentiality of the information disclosed. Where the recipient is a regulator this will not always be possible.

In this matter neither the CDPP nor the ACCC required disclosure of the privileged material earlier in the investigation, prior to those accused of cartel conduct pressing for it to be produced during the committal. Whether this decision will lead to regulators and/or the CDPP making a deliberate decision not to seek privileged documents during the course of investigations, or whether it leads to the reverse, will remain to be seen. The Court noted that the ACCC respected the existence of the privilege, indicating in its evidence that it appreciated that doing so facilitated the reporting to it of cartel conduct. Regulators and the CDPP will no doubt need to carefully weigh up the benefits and risks of requiring immunity applicants to produce privileged material either as a condition of immunity or in compliance with the obligations attaching to conditional immunity.



It is further relevant that the protected cartel information regime in the *Competition and Consumer Act 2010* (Cth) was introduced so as to encourage informants to approach the ACCC with information. If information which is requested by a regulator in the course of an immunity application will be disclosed to third parties, it is clear that this will have an impact on the integrity, certainty and effectiveness of the immunity regime.

Parties that are undertaking investigations and considering an application for immunity, whether under the ACCC Policy or new ASIC policy, should now assume a risk that they may be put to an election to either disclose privileged material or jeopardise immunity, and should consider carefully their options and seek appropriate advice.

For any assistance on the ACCC's or the ASIC's immunity policies, please feel free to contact our team.

You can read more about the ACCC's immunity policy [here](#) and the ASIC's immunity policy [here](#).
