HWL Ebsworths CPD

Civil Penalty Applications and the Privilege against Penalty

1. In most cases involving small employers, the regulator (being the Fair Work Ombudsman[1]) will seek civil penalties against individuals. The individuals are not told that they have a right not to disclose their defence or their evidence before the close of the regulator's case. They are not told that they have a right to resist subpoenae. Quite often, their lawyers do not know that they have those rights. Those rights are a bundle of rights called the privilege against penalty.
2. The privilege against penalty is one of a number of related but conceptually distinct privileges such as the privilege against self-incrimination; privilege against forfeiture and ecclesiastical censure.
3. The privilege of self incrimination at common law is of obscure origin and uncertain breadth. At its narrowest however, it prevents a natural person[2] being compelled to to answer any question, or to produce any document or thing that may tend to incriminate the person[3]. There is no exception except for statute. It may be abrogated by express words or necessary implication[4]. There is a presumption that the parliament will not do so[5]. The privilege can be waived by the person[6].
4. The privilege against self-exposure to penalty affords similar protection to the privilege against self-incrimination, but it developed in Chancery from the equitable precept that it would be "monstrous " for a common informer to be

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[1] The Ombudsman has an average staffing level of 702 and an annual budget of 181 Million. As at 30 June 2018, it had 85 matters before the Courts. The issue also rises in cases brought by the ROC, ASIC, APRA and the ATO.

[2] *Sorby v The Commonwealth* (1982) 152 CLR 281 at 288.

[3] *Sorby v The Commonwealth* 152 CLR 281 at 288

[4] *Pyneboard v TPC* (1983) 152 CLR 328 at 341

[5] *Sorby* 152 CLR 281 at 289

[6] *Reid v Howard* 184 CLR 1 at 5

able to bring a civil action for penalty without evidence to support it and then require the defendant to supply the evidence out of his own mouth.[7] Applications for civil penalty are historically intertwined with common informer processes. As more recently described[8]

> Blackstone's suspicion of the latter was heightened by what he described as the actions of Henry VII in hunting out prosecution upon old and forgotten penal laws, in order to extort money from the subject … the distinguishing character of this reign was that of amassing treasure in the kings coffers, by every means that could be devised.[9]
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> His concerns were not reduced by the choice of jurisdiction; the now notorious Star Chamber. As Finkelstein J has noted;
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> > By the time of Henry VIII, the number of statutes conferring upon informers the right of action to recover penalties had become very large. In fact they gave rise to a ruthless group of persons aiming to make easy profits. The statutes became very unpopular. The courts of equity reacted against them by refusing to order discovery or require the defendants to give evidence. Eventually the number of actions by informers became so numerous it was necessary to place some restraint upon them. First, time limitations were fixed for the bringing of certain classes of action under penal statutes. Then the *Common Informers Act 1951* abolished most common informer actions in England.[10]

5. A respondent to a civil penalty application may also refuse to answer any question. The admission of allegations made in a statement of claim constitutes a waiver of privilege against self-exposure to a penalty[11]. That privilege may be waived by entering the box or agreeing to orders[12]. However, a respondent who admits a particular fact in his or her defence does not thereby waive the right to claim privilege for all other facts[13]. Privilege may be waived by the actions of a lawyer acting with the ostensible authority of the person entitled

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[7] *Construction, Forestry, Mining and Energy Union (CFMEU) v Boral Resources (Vic) Pty Ltd* (2015) 147 ALD 492; (2015) 320 ALR 448; [2015] HCA 21 at [55].

[8] Latham, Enforcement of the Workplace Relations Act: The use of civil penalties Employment Law Bulletin July 2004

[9] Above note 7 at Book IV Ch 23 p 428.

[10] *CPSU v Telstra Corp* (2001) 108 IR 228 at 233.

[11] *Fair Work Ombudsman v Hu* [2017] FCA 1081 at [21]

[12] *Birrell v Australian National Airlines Commission* (1984) 1 FCR 526 at 531–2

[13] *Fair Work Ombudsman v Hu* [2017] FCA 1081 at [21]

to claim privilege[14]. The pleading of a positive defence prior to the closure of the applicant's case does not waive the privilege.[15]

6. Like the privilege against self-incrimination, penalty privilege is based upon the deep seated belief that those who allege the commission of a crime [or in this case a contravention of the Act] to prove it themselves and should not be able to compel the accused to provide proof against himself.[16] As Dean J held in *Reid v Howard*[17];

> The privilege against self-incrimination is deeply ingrained in the common law". It reflects "a cardinal principle" which lies at the heart of the administration of the criminal law in this country. It can be, and has increasingly been. overridden or modified by the legislature. It can be waived by the person entitled to claim it. Otherwise, it is unqualified. In particular. It should not be modified by judicially devised exceptions or qualifications. Unless it appears that the assertion of potential incrimination is unsustainable, a claim to the benefit of the privilege cannot, in the absence of statutory warrant, properly be disregarded or overridden by the courts.

<u>When does the penalty arise?</u>

7. In *Alfred v Walter Construction Group Ltd* [2003] FCA 993, Gyles J rejected a proposition that a party could not plead a defence because of the possibility of future civil penalty proceedings. His Honour adopted the reasoning in *Intercontinental Development Corporation and* held that:

> *"It is for the court to consider from the circumstances of the case, and the nature of the evidence the witness is called upon to give, whether there is reasonable ground to apprehend danger of prosecution or forfeiture if the witness is compelled to answer. The danger must be real and appreciable, and not of an imaginary or insubstantial character. If there is a risk, the court does not generally go into the question of whether it is probable or not that proceedings will, in fact, be taken."*

[14] *Fair Work Ombudsman v Hu* [2017] FCA 1081 at [27]

[15] *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* [2011] FCA 368 at [14] and [24] although compare with *Coyle v Doctors of Northcote (Trustee)* [2016] FCCA 555 at [22].

[16] See *Caltex* 178 CLR 5477 at 532

[17] 184 CLR 1 at 5

8. A person may take advantage of the privilege to resist coercive processes.[18] such as discovery[19] or subpoena[20]

9. The giving of an undertaking not to use the material cannot be used to narrow the privilege[21].

<u>The filing of defences and evidence</u>

10. The Federal Court has become increasingly vigilant upon the proper pleading and conduct of civil penalty cases. As the Full Federal Court has held *Australian Building and Construction Commissioner v Hall* [2018] FCAFC 83, 227 IR 75 at [50]:

> *"[T]he respondents were entitled to be told clearly and precisely in the Commissioner's ASOC what case it was they had to meet and, unless they deliberately chose to allow the case to be conducted on a different basis, to direct their evidence and arguments to that case and that case alone. Plainly, this latter exception did not permit the Commissioner to make a significant addition to, or departure from, the pleaded case, in counsel's opening or closing submissions and then seek to justify that course by pointing to the respondents' failure to object as evidence of their acquiescence in that course."*

11. A personal respondent is required to file a defence. As Gyles J held in *A & L Silvestri Pty Ltd (ACN 052 514 799) v Construction, Forestry, Mining and Energy Union* [2005] FCA 1658 at [17]:

> *"such a respondent can decline to admit matters alleged against it. To the extent that the rules of pleading require to be modified to enable this to take place, that will be done. There is no occasion, however, for relieving respondents of a duty to plead. Even in a criminal trial, a defendant pleads guilty or not guilty."*

12. The question as to when a respondent is required to file their amended defence was dealt with in *Australian Securities and Investments Commission (ASIC) v Mining Projects Group Ltd* (2007) 164 FCR 32; at [13]:

> There is a potential problem if, as in this case, a defendant wishes to run a positive case. Ordinarily a positive case must be raised in the defence.

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[18] *Hadgkiss v Blevin* [2003] FCA 1083

[19] *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129; 50 ACSR 242; 209 ALR 271; 78 ALJR 1354; 22 ACLC 1198; [2004] HCA 42 at [39]

[20] *Trade Practices Commission v TNT Management Pty Ltd* (1984) 53 ALR 214; 15 A Crim R 172 at 176

[21] *Hadgkiss v Blevin* [2003] FCA 1083 at [12]

> Whether it must be raised in a defence in a civil action to recover a penalty is by no means clear. The view I favour is that there can be no such requirement as it would be inconsistent with the privilege. On the other hand, if a defendant who wishes to run a positive case is required to plead his case that can be accommodated while maintaining the privilege. What should occur is that the defendant should be entitled to rely on the privilege until the plaintiff's case is concluded. If at that point the defendant decides to run a positive case he can deliver an amended defence that will outline his case. In an exceptional case the judge may grant a short adjournment to allow the plaintiff time to prepare, if he is otherwise taken by surprise. In most cases that will not be necessary. By the time the plaintiff has closed his case the nature of the defence will usually be apparent. That is the experience of those who prosecute criminal cases. The advocate who runs a civil penalty proceeding should be equally adept at dealing with the defendant and his witnesses without knowing in advance every word they are about to say.

13. The contrary conclusion was reached by the NSW Court of Appeal in *MacDonald v Australian Securities and Investments Commission (ASIC)* (2007) 73 NSWLR 612 [2007] NSWCA 304. In that case, Mason P at [74], with Giles JA agreeing at [77], held that a respondent to a claim for penalty was required to invoke from the outset any relevant defence or statutory ground of dispensation.
14. It does not seem that the Court was referred to the decision in *Mining Projects Group* (although the court cannot be criticised for this given the closeness of the judgments in time). The reasoning in *MacDonald* is based upon a different regime of court rules.
15. There is also a somewhat contrary decision of FCCJ Street in *Fair Work Ombudsman v Sinpek Pty Ltd & Ors (No.2)* [2019] FCCA 630. In that case, the personal respondents sought to file their evidence only at the close of the applicant's case. The Court made orders that the personal respondents were required to file their amended defence and affidavit material prior to the hearing of the case subject to any claim based on a privilege against exposure to civil penalty. Those orders were justified in part by the reasoning at [11] that the filing of evidence after the close of the applicant's case would lead to an adjournment and bifurcated hearing and had the potential to the potential to substantially delay the determination of proceedings.
16. Leave to appeal was refused by the Federal Court on the basis of prematurity in *Singh v Fair Work Ombudsman* [2019] FCA 664. The Court did however hold

that it was likely that:

> Mr and Mrs Singh will choose (or, to use his Honour's word, "elect") not to file affidavit evidence, a substantive amended defence nor submissions. At the close of the FWO's case in chief at the hearing, an application can then be made by Mr and Mrs Singh to the primary judge for leave for such documents which are then proposed to be relied upon to be filed. Given the existence of the privilege (and notwithstanding his Honour's orders), it could not be suggested that Mr and Mrs Singh were required to have filed and served these materials in a civil penalty case any earlier: see *Australian Securities and Investments Commission v Mining Projects Group Ltd* [2007] FCA 1620; (2007) 164 FCR 32 at 37-38 [13].

Inferences

17. Inferences may be drawn against a party who fail to call relevant evidence[22] and may be drawn against a person who has claimed the privilege[23]. On the other hand, the existence of statutory coercive powers may mean that the applicant was in a position to secure the cooperation of potential witnesses, and therefore (absent evidence to the contrary) the court should infer that it was able to bring to court those witness.[24]

No cases

18. The court has a broad discretion not to put the moving party to its election (or, alternatively, to refuse to hear the no case submission at all).[25] There is ample authority for the proposition that as a general rule a defendant will not be permitted to advance a submission at the close of the plaintiff's case that there is no case to answer unless an election is first made to call no evidence.[26] The

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[22] *Blatch v Archer* (1774) 1 Cowp 63; (1774) 98 ER 969.

[23] *Adams v Director, Fair Work Building Industry Inspectorate* [2017] FCAFC 228, (2017) 258 FCR 257 (2017) 277 IR 161 at [147] see also above n 8, at [652]-[661] per Giles JA, with whom Mason P and Beazley JA agreed; *Australian Securities and Investments Commission (ASIC) v Rich* (2009) 236 FLR 1; (2009) 75 ACSR 1; [2009] NSWSC 1229 at [461] cf *Dolan v the Australian and Overseas Telecommunications Corporation* [1993] FCA 202; (1993) 114 ALR 231 (1993) 17 AAR 355 (1993), 42 FCR 206 (30 April 1993); *Fair Work Ombudsman v A to Z Catering Solution Pty Limited & Anor (No.2)* [2018] FCCA 2299 (24 August 2018) at [287].

[24] *Australian Securities and Investments Commission (ASIC) v Rich* (2009) 236 FLR 1; (2009) 75 ACSR 1; [2009] NSWSC 1229 at [465].

[25] *Australian Securities and Investments Commission (ASIC) v Healey* (2011) 278 ALR 618; (2011) 83 ACSR 484; [2011] FCA 717 at [538].

[26] *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA) (No 2)* (1992) 38 FCR 458 at 460.

seriousness of the allegations may be grounds for the Court not to require a respondent to elect.

19. The situation is more complicated with multiple respondents. The cases seem to show that the court should hear all the evidence of the respondents before it makes a finding of no case against any of the individual respondents.[27]

Evidnece in reply

20. In *ASIC v Rich* [2006] NSWSC 826, the Supreme Court of NSW held at [15] - [17] that:

> The court treats an ASIC civil penalty case in which a declaration of contravention is sought as a proceeding subject to the civil rules of evidence and procedure, but when exercising its discretion in evidentiary and procedural matters, the court has regard to the nature of the proceeding as a civil penalty proceeding and the seriousness of the consequences of granting the relief sought (including disqualification orders that have a penal effect).
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> I doubt whether this approach is substantively different from the criminal procedure, in terms of principles or application. The following principles emerge from the criminal cases:
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> · the general principle is that the prosecution must present its case completely before the accused is called upon for his defence, and therefore, although the trial judge has a discretion to allow the prosecution to call further evidence after evidence has been given for the defence, the prosecution should be permitted to call evidence at that stage only if the circumstances are very special exceptional and, generally speaking, not if the occasion for calling the further evidence ought reasonably to have been foreseen...;
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> Generally, the same principles govern the exercise of the court's discretion in civil cases. It is said that the court applies the principles about splitting the prosecutor's case "less strictly" to a plaintiff in a civil case, to use the language of the learned editor of Cross on Evidence at [17720], citing Shaw's case at 85 CLR 383 per Fullagar J, or "more liberally", to use the language of Santow J in Adler at [9]. But in a civil penalty case in which disqualification orders are sought, once one has regard to the nature of the proceeding and the seriousness of the consequences attaching to the relief sought, and all of the considerations affecting the particular evidence sought to be adduced, it is unlikely that the injunction to be "more liberal" will have any effect on the exercise of the discretion."

Corporations

21. It is necessary to note however that the privilege does not apply to a

[27] *Lakshmanan v Janarthanan (No 2)* [2006] FCA 832 (8 March 2006) at [15], *James v ANZ Banking Group Ltd (No 2)* (1985) 9 FCR 448.

corporation.[28] That means that a corporation may be subject to coercive processes even if those processes expose an individual to a penalty. In a simple example, a subpoena for production may be resisted by an individual who exercises the privilege even though the same documents may be sought from the corporate employer and then used against the individual. The exercise of the privilege may be used to prevent the corporate employer from quizzing its officers and employees.[29]

22. A corporation cannot however avoid pleading as to the facts by relying on the privilege against self exposure to a penalty of its officials or members, who are individuals if it has alternate ways of determining the factual situation: *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCA 998 at [7] – [8]; see also *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 652 at [6].

Threats to the privilege

23. Given the importance now placed upon notions of case management; there is a certain seductive quality to a proposition that privileges such as this should be read narrowly. The privilege can be criticised as an unnecessary impediment to the proving of contraventions and as an obstacle to the judicial ascertainment of the truth[30].

24. The Full Federal Court has expressed concern about the application of the doctrine. In the case of *Adams v Director, Fair Work Building Industry Inspectorate* [2017] FCAFC 228, (2017) 277 IR 161 at [102], the Full Court held that:

> *"Following the adoption of Pt VB of the Federal Court Act, one might well argue that facilitation of the just resolution of disputes may necessitate a rule which compels the advance identification of any defence, to that extent abrogating the right to decline to expose oneself to a penalty."*

[28] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; (1993) 118 ALR 392; BC9303552.

[29] *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* [2014] FCA 1032 at [51]–[52].

[30] *Caltex* at 533

25. To do so however is to deny the importance of the privilege in the development of the common-law and in the protection of the individual, particularly against the state and its various regulatory bodies. It would be a disturbing development were Courts to modify the privilege by judicially devised exceptions or qualifications.
26. While the privilege continues, it does provide some significant protections for the personal respondent.

Some questions

When does the privilege arise?

Who can you represent?

How do you get instructions from a company?

What occurs if SOC amended to include individuals?

Ian Latham

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