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REGULATOR POWERS, CLIENT PRIVILEGES AND RESPONSES:

LEGAL PROFESSIONAL PRIVILEGE AND PRIVILEGE AGAINST SELF INCRIMINATION

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ABOUT THE AUTHOR

Dominique Hogan-Doran was called to the New South Wales Bar in November 1995.

Ms Hogan-Doran graduated from the University of Sydney with a Bachelor of Economics (Social Sciences) and Bachelor of Laws with First Class Honours. Awarded the Sir Robert Gordon Menzies Scholarship in Law, she studied postgraduate law at Balliol College, Oxford, obtaining a Bachelor of Civil Laws with First Class Honours. Ms Hogan-Doran also obtained a Master of Laws Degree from the University of Sydney, majoring in Consumer Protection Law and Insolvency Law.

Ms Hogan-Doran has advised and appeared on behalf of the Australian Securities and Investments Commission in the Supreme Court of New South Wales, Federal Court and High Court of Australia, including in relation to enforcement proceedings against directors of the James Hardie Group of companies.

She has acted for numerous companies, trustees, directors and officers in relation to investigations by the Australian Prudential Regulation Authority, the Australian Competition and Consumer Commission, Australian Taxation Office, Australian Securities and Investments Commission, the NSW Department of Fair Trading, the NSW Independent Commission Against Corruption, and the HIH Royal Commission.

Before her call to the Bar, Ms Hogan-Doran was Research Director to then Chief Justice of the NSW Supreme Court, the Hon A.M. Gleeson QC and a graduate lawyer at Malleson Stephen Jacques, Solicitors.

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REGULATOR POWERS, CLIENT PRIVILEGES AND RESPONSES:

LEGAL PROFESSIONAL PRIVILEGE AND PRIVILEGE AGAINST SELF INCRIMINATION

1. The range of coercive investigatory powers available to our national regulators are broad.[1] This paper canvasses the limits on those powers to the extent persons and corporations may claim privilege to resist compulsory production of documents or information during the course of investigations and if subsequently defending enforcement proceedings, in particular legal professional privilege (and its statutory equivalent, client legal privilege)[2] and privilege against self-incrimination (and its particular variant, penalty privilege).[3]

PART I:
LEGAL PROFESSIONAL PRIVILEGE

General principles

2. In Australia, legal professional privilege attaches to:
   (a) confidential communications passing between a client and the client's legal advisor, for the dominant purpose of obtaining or giving legal advice (the "legal advice" privilege); and
   (b) confidential communications passing between a client, the client's legal advisor and third parties, for the dominant purpose of use in or in relation to litigation, which is either pending or in contemplation ((the "litigation" privilege).

3. The rationale for the privilege is that it exists "*to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers*".[4]

4. A "dominant" purpose[5] is one that predominates over other purposes; it is the prevailing or paramount purpose.[6]

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[1] See further Chapter 2 "Coercive Investigatory Powers of ASIC, ACCC and ATO" in Legg, *Regulation, Litigation and Enforcement* (2011).

[2] See further Chapter 7, Section 4 in Heydon, *Cross on Evidence* (9th Aust edn, 2013) [25210]-[25304].

[3] See further Chapter 7, Section 2 in Heydon, *Cross on Evidence* (9th Aust edn, 2013) [25065]-[25185].

[4] *Esso Australian Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 48 at [35]; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 508.

[5] In *Esso Australian Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 48, the High Court reformulated the common law test for legal professional privilege, changing it from the sole purpose test favoured by the majority in *Grant v Downs* (1976) 135 CLR 674.

5. Legal professional privilege is capable of attaching to communications between a salaried legal advisor (ie an in house lawyer) and his/her employer provided that the legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are in confidence and arise from the relationship of lawyer/client.[7]

6. The privilege only applies to communications: it does not prevent the disclosure of facts observed by either party in the course of their relationship as client and legal adviser.

7. The communication must be a confidential one. Thus, it not available where:
   (a) discussion takes place in presence of third party or an adverse witness; or
   (b) where document made available to the other party by order of the court.

8. Legal professional privilege is not available if a client seeks legal advice in order to facilitate the commission of a crime or fraud or civil offence. It matters not whether the advisor knows or does not know of the unlawful purpose.[8] Information passed on to a practitioner in furtherance of a crime is not protected by the duty of confidence, and it will not be privileged.[9]

9. An important distinction between legal advice privilege and litigation privilege is that, generally, if one of the parties to a communication is a third party to the client/lawyer relationship, a valid claim to privilege cannot be made unless legal proceedings are either anticipated or actually on foot. Where litigation is not in prospect, a claim for advice privilege in respect of a communication with an agent of the client can only be sustainable if the agent is an agent for the purpose of communication with the client's legal advisor.

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[6] See *AWB Ltd v Cole* [2006] FCA 571 at [105]-[106]; *FCT v Pratt Holdings* (2005) 225 ALR 226 at 279-280 [30] per Kenny J.

[7] *Waterford v Commonwealth* (1987) 163 CLR 54 at 96 (Dawson J) and 79-82 (Deane J). An in-house lawyer must be a lawyer admitted to practice, and must have been acting independently of the employer and in a position to provide impartial legal advice. The fact the lawyer holds a practicing certificate may be an indication of this level of independence, but is not alone determinative. See further *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 at 44; *Dye v Commonwealth Securities Ltd* (No 5) [2010] FCA 950.

[8] *Baker v Campbell* (1983) 153 CLR 52 at 86; *Attorney-General (NT) v Kearney & Northern Land Council* (1985) 158 CLR 500 at 511.

[9] *R v Cox and Railton* (1884) 14 QBD 182; *Re Bell; ex parte Lees* (1980) 146 CLR 141.

10. Litigation privilege is not available to protect documents brought into existence in contemplation of Royal Commissions or Commissions of Inquiry.[10]

11. If an original document is privileged, a copy made by a lawyer is also privileged,[11] even if the copy is brought into existence for a non-privilege purpose.[12]

12. If an original document is not privileged, but a copy is made for the dominant purpose of obtaining advice or further litigation, the copy is privileged.[13]

13. The principles which apply to copy documents apply equally to translated documents.[14]

14. At common law, legal professional privilege may be lost by:
    (a) waiver (express or imputed[15]); or
    (b) by the content of the communication ceasing to be confidential.[16]

15. Privilege is that of the client (or those with a common interest in litigation), not the legal practitioner. Therefore it is only the client who may waive the privilege or claim it.[17] Thus, for a legal practitioner to waive privilege without instructions will be a breach of professional duty and expose the practitioner to an action for breach of contract or negligence.

16. Documents prepared for one action will continue to be privileged in subsequent litigation, even if the subject matter of or the parties to the subsequent litigation are different.[18] But evidence served in other proceedings is no longer confidential (having been disclosed to one's opponent) and so not

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[10] *AWB Ltd v Cole* [2006] FCA 571 at [146]-[164] per Young J.

[11] *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1951] 1 KB 134 at 146-7 (CA).

[12] *Brambles Holdings Ltd v Trade Practices Commission (No 3)* (1981) 58 FLR 452 at 458.

[13] *Australian Federal Police Cmr v Propend Finance Pty Ltd* (1997) 188 CLR 501.

[14] *Sumitomo Corp v Credit Lyonnais Rouse Ltd* [2002] 4 All ER 68 at [44] and [46]-[47] (CA).

[15] Imputed or implied waiver is determined by asking whether the relevant conduct was inconsistent with the maintenance of confidentiality of the privileged communication, rather than a test of unfairness: *Mann v Carnell* (1999) 201 CLR 1 at 13 [29]. The expression "imputed" rather than "implied" waiver is preferable since it signifies that waiver has been imputed by law not implied by conduct: see *AWB v Cole (No 5)* (2006) 155 FCR 30 per Young J at [128].

[16] *Baker v Campbell* (1983) 153 CLR 52 at 112.

[17] *Baker v Evans* (1987) 77 ALR 565.

[18] See *Pearce v Foster* (1885) 15 QBD 114 at 119 (CA); *The Aegis Blaze* [1986] 1 Lloyd's Rep 203 (CA).

of a character capable of attracting litigation privilege.[19] On the other hand, earlier drafts and affidavits retained but not served on the opposing party are still covered by legal professional privilege.

Statutory Client Legal Privilege

17. The *Evidence Act* 1995 (Cth) and the *Evidence Act* 1995 (NSW) (and commensurate legislation in the ACT, Tasmania and Victoria) introduce a different concept, that of client legal privilege. [20] This applies to communications and documents as long as their dominant purpose was the provision of legal advice or the provision of services related to proceedings and where it is sought to adduce such documents or communications in legal proceedings: see ss 118-120.

18. The relevant purpose is that which led to the making of the communication or the creation of a document, not the purpose "sought to be achieved in, or by means of" the communication or document.[21]

19. "Adducing" refers both to:
    (a) when evidence is led in examination-in-chief; and
    (b) when evidence is obtained during cross-examination
    either at trial or in the course of interlocutory hearings.

20. There are enumerated legislative exceptions to client legal privilege: see ss 121-126.

21. In 1999, the High Court determined that the statutory test of client legal privilege does not apply outside the context of adducing evidence in court and does not result in any alteration of the common law. [22]

22. However, subsequent statutory and rule amendments have modified the position in relation to pre-trial procedures: see eg section 131A of the Evidence Act 1996 (NSW) which extends the application of client legal privilege to pre-trial processes (including discovery). There is legislation to similar effect in the Tasmanian, Victorian and ACT Acts.

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[19] *ACCC v Cadbury Schweppes Pty Ltd* [2009] FCAFC 32 (common law privilege); *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2009] NSWSC 225 (statutory privilege).

[20] See further Heydon, *Cross on Evidence* (9th Aust edn, 2013) at [25300]-[25304].

[21] *Carnell v Mann* (1998) 89 FCR 247 at 253 (Full Court).

[22] *Northern Territory v GPAO* (1999) 196 CLR 553; *Mann v Carnell* (1999) 201 CLR 1.

Regulatory Investigations

23. Because the common law applies to material sought pursuant to investigatory powers (*Baker v Campbell* (1983) 153 CLR 52 at 115-116), legal professional privilege is prima facie available even when a regulator exercises one of its investigative powers, although it is necessary to consider whether the empowering statute has expressly or impliedly abrogated the privilege.

ASIC Investigations

24. Arguably, the better view is that the *Australian Securities and Investments Commission Act* 1991 (Cth) (**ASIC Act**) does not abrogate legal professional privilege.[23] This is so, notwithstanding that there is no express provision in the ASIC Act abrogating legal professional privilege, and there is nothing supporting the contention that the abrogation of legal professional privilege is a necessary implication: see eg s 1(1), 1(2), 1(3), Pt 3 and in particular ss 68 and 69. The only express canvassing of the issue is found in s 76, which provides that a statement made by a person at a compulsory examination by ASIC pursuant to s 19 of the ASIC Act is not admissible in evidence against that person in subsequent proceedings if the statement discloses matters in respect of which the person could claim legal professional privilege in the proceedings and the person objects to the admission of evidence of the statement: s 76(1)(d).

25. In practice, ASIC does not require an examinee in a section 19 examination to disclose any communication that might properly be the subject of a claim for legal professional privilege. ASIC has in recent years always included in its s 19 examination notices and ss 30-34 notices for production of documents a statement that legal professional privilege may be claimed.

26. However, those notices go on to indicate that ASIC will test any claim for privilege by requiring the provision of information for each document or part of it over which privilege is claimed:[24]
    (a) the date, type, author, recipient and subject matter of that document or part of it, and whether it is an original or copy;

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[23] As a result of the approach taken by the High Court in *Daniels v ACCC* (2002) 213 CLR 543 and subsequent decisions of lower courts in particular the Victorian Court of Appeal in *ASIC v Lindberg* (2009) 261 ALR 207; contra *CAC (NSW) v Yuill* (1991) 172 CLR 319 which was decided under the former companies legislation. There the High Court held that the legislation contained the necessary implied exclusion and that a client could not claim the privilege to refuse to produce books or answer questions at a compulsory examination. In *Daniels* at [35] it was noted that *Yuills* case “may well be decided differently” today.

[24] See Legg, *Regulation, Litigation and Enforcement* (2011), at [3.30] p 57.

(b) if the original or copy of the document or part of it has been provided to any person who is not the privilege holder or a legal representative of the privilege holder, the identify of the persons to whom the original or a copy of the document or part of it has been provided and the basis on which it was provided to those persons;

(c) the grounds on which legal professional privilege is claimed;

(d) the facts that are relied upon as giving rise to the claim, including the details of the dominant and any other purpose for which the document was brought into existence;

(e) the identity of the holder of the legal professional privilege;

(f) whether an in-house legal counsel was involved in the preparation of the document or part and to provide sufficient details about that person's independence and the capacity in which they acted in relation to the preparation of the document or part.

27. In *Australian Securities and Investments Commission v Lindberg* (2009) 25 VR 398, the Victorian Court of Appeal concluded that if draft witness statements and transcripts of s19 examinations contained or referred to communications that were the subject of legal professional privilege, that privilege was lost once the statements of evidence were recorded in them and the transcripts were supplied to ASIC. The Court of Appeal accepted that the doctrine of legal professional privilege required an authority exercising compulsive powers to obtain documents to give the recipient a practical and realistic opportunity to make claims for legal professional privilege but determined it had no application in a situation where ASIC had already obtained possession of the documents from third parties and the doctrine could not extend to creating a right to such a practical and realistic opportunity to claim privilege by some other person: at [54].

28. The *ASIC Act* does include a specific entitlement for a legal practitioner to make a claim for legal professional privilege but makes no express provision for any one other than a legal advisor to make any claim for legal professional privilege. A legal practitioner may decline to provide information or produce a document if the provision of the information or the disclosure of the document would disclose a privileged communication made by, or on behalf of or to the lawyer in his or her capacity as a lawyer: s 69(1). A lawyer who refuses to disclose information or documents on that basis, must as soon as practicable, provide ASIC with a notice setting out the name and address of the person to whom, or by on behalf of whom, the communication was made together with sufficient information, if the information provided was in writing to enable the document containing the information to be identified and otherwise sufficient particulars of that document or the part of the document contained in the communication: see s 69(3).

29. A noteworthy example of an extreme express abrogation of legal professional privilege, with no restrictions left on the use of privileged information obtained by coercion, is the legislation enacted after the conclusion of the NSW Special Commission of Inquiry into the Medical Research & Compensation Fund (the James Hardie Inquiry) in 2004. Pursuant to *James Hardie (Investigations and Proceedings) Act 2004* (Cth), legal professional privilege was abrogated in relation to James Hardie material[25] for the purposes of, or in connection with:
   (a) a James Hardie investigation; or
   (b) a James Hardie proceeding.

30. The policy behind that specific enactment was explained as follows:[26]

> The community must have confidence in the regulation of corporate conduct, financial markets and services. This confidence would be undermined if ASIC was unduly inhibited in its ability to obtain and use material necessary to conduct investigations and take enforcement action where appropriate in relation to matters arising from the James Hardie Special Commission of Inquiry and any subsequent investigations and prosecutions instigated by the regulator.

31. Material acquired by ASIC in this way was used during its civil penalty proceeding against the former directors and officers and entities of the James Hardie group: see eg *Australian Securities and Investments Commission v Macdonald (No 9)* [2009] NSWSC 13; 223 FLR 37 (objection to documents subpoenaed to former solicitors of JHINV dismissed on basis privilege abrogated by statute).

ACCC Investigations

32. Section 155(7B) of the *Competition and Consumer Act* 2010 (Cth) (introduced in 2006 into the predecessor *Trade Practices Act* 1974 (Cth)) provides that the section does not require a person to produce a document that would disclose information that is the subject of legal professional privilege.[27]

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[25] James Hardie material included records that had been made, kept, or received by the James Hardie Special Commission of Inquiry, books and information that, after the commencement of the Act, ASIC or the DPP requests or requires the production of in relation to a James Hardie Investigation or a James Hardie Proceeding: see s 3.

[26] Explanatory Memorandum to the James Hardie (Investigations and Proceedings) Bill 2004 (Cth), [4.24].

[27] As to the interaction between s 155 and legal professional privilege prior to the introduction of s 155(7B) in 2006 see *Daniels Corporation International Ltd v ACCC* (2002) 213 CLR 543. As to the operation of s 155 generally, see the judgment of the Full Federal Court in *Seven Network Limited v ACCC* (2004) 140 FCR 170 at 182-183; *Singapore Airlines Ltd v ACCC* (2009) 260 ALR 244 at [35]-[38] and [61]-[62].

33. During ACCC compulsory examinations, a person may claim privilege. Since, like in ASIC examinations, a lawyer may be present subject to reasonably conditions, the ability to preserve privilege is enhanced.

ATO Investigations

34. Sections 263 and 264 of the *Income Tax Assessment Act* 1936 (Cth) gives wide powers to the Commissioner to obtain information relating to income tax liability. However, in *FCT v Citibank Ltd* (1989) 20 FCR 403, the Full Federal Court concluded that s 263 does not override legal professional privilege.

35. As former High Court Justice Dyson Heydon has observed,[28] the application of compulsory seizure powers has given rise to particular difficulties as to what stage of the process and in what way are questions of privilege to be asserted and determined? The authorities are mixed as to whether privilege should be considered at the stage of the issue of the warrant. Certainly, at the stage of its execution, the recipient of the warrant (including its officers and employees where the recipient is a corporation) must be afforded an opportunity to make the claim, or risk any seizure being held beyond power.[29]

36. Practitioners should be aware of the Guidelines agreed between the ATO and the Law Council of Australia in September 1991, which is included in the ATO's Access and Information Gathering Manual:

> 6.2.1 LPP is a privilege that can be claimed by a person in relation to certain communications with their lawyer. The privilege belongs to the client, not the lawyer. If it is properly claimed it is a complete answer to any form of compulsory disclosure, including the access and notice powers. If it is not claimed, the compulsion on disclosure is effective. Once privilege is claimed the question can arise as ot whether the claim is correct or not. It may be immediately obvious whether it is correct, or not, see 6.6.8.
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> 6.6.8 The court adopted what Brooking J in *Alitt v Sullivan* [1988] VR 621 called 'lawful violation' of the privilege and gave examples of occasions when a tax officer may look at a privilege communication. These include when there is no on present to make a claim, there is a blanket claim for privilege, or it is reasonably apparent that the claim is not sustainable.

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[28] Heydon, *Cross on Evidence* (9th Aust edn, 2013) at p 843 [25250].

[29] *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403 (although see *Australian Securities and Investments Commission v Lindberg* (2009) 25 VR 398 at [51] (where the documents had already got into the hands of the relevant authority). The recent extension of search warrant powers to ASIC (see *Corporations Amendment (No 1) Act* 2010 (Cth) and *ASIC Act* s 3N and 3Q) suggests that these issues may be litigated further in the near future:.

ALRC Reform Recommendations

37. The Australian Law Reform Commission, in its 2007 Report 107 *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, observed that there was continuing uncertainty as to the availability of privilege in response to federal investigations, although the problems were mainly ones of practice and procedure (such as persons not always being given an opportunity to make a claim, and concerns about inconsistency and blanket claims).

38. It proceeded to recommend[30] that:
    (a) legislation should be enacted of general application to cover various aspects of the law and procedure governing client legal privilege claims in federal investigations in accordance with recommendations in the Report (Recommendation 5-1); and
    (b) such federal client privilege legislation should provide that, in the absence of any clear, express statutory statement to the contrary, client legal privilege applies to the coercive information-gathering powers of federal bodies (Recommendation 5-2).

39. Needless to say, these recommendations have not (yet) been adopted.

PART II:
PRIVILEGE AGAINST SELF-INCRIMINATION
& PENALTY PRIVILEGE

General Principles

40. The privilege against self-incrimination is also deeply ingrained in the common law, the principle having been recognised since at least the 17th century in the face of the Court of Star Chamber and the Court of High Commission, which had obliged people to confess their wrongdoing and be exposed to public sanction.

41. In *Brownsword v Edwards* (1751) 28 ER 157 at 158, Lord Hardwicke LC described the privilege thus:

> "The general rule is, that no one is bound to answer so as to subject himself to punishment, whether that punishment arises by the ecclesiastical law or the law of the land … nor is it material what the nature of the punishment is. It is a punishment which must be performed or got rid of by commutation, which is like a fine".

[30] See http://www.austlii.edu.au/au/other/alrc/publications/reports/107/_4.html.

42. The High Court of Australia acknowledged the privilege as a "bulwark of liberty" in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 (per Mason ACJ, Wilson and Dawson JJ at 340) and in *Sorby v The Commonwealth of Australia* (1983) 152 CLR 281 at 294, Chief Justice Gibbs identified the principle thus:

> A person may refuse to answer any question, or to produce any document or thing, if to do so "*may tend to bring him into the peril and possibility of being convicted as a criminal*": *Lamb v. Munster* (1882) 10 QBD 110, at p 111. The mere fact that the witness swears that he believes that the answer will incriminate him is not sufficient; "*to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer*": *Reg. v. Boyes* (1861) 1 B & S 311, at pp 329-330; [1861] Eng R 626 (121 ER 730, at p 738).

43. The danger to be apprehended must be "*real and appreciable with reference to the ordinary operation of law in the ordinary course of things*",[31] and not insubstantial or remote.

44. The privilege applies not only in judicial proceedings, but non-judicial inquiries and investigations (subject to statutory abrogation).[32]

45. The privilege is assumed to be unqualified unless:
    (a) excluded by statute, by express words or necessary implication: *Sorby v Commonwealth* (1983) 152 CLR 281 at 288-289, or
    (b) waived by the person entitled to claim it: *Reid v Howard* (1995) 184 CLR 1 at 12.

46. The privilege protects against the risks of incrimination: by
    (a) direct evidence (eg evidence of the fact of disclosure and of the material disclosed); and
    (b) indirect or derivative evidence (evidence obtained by using the disclosed material as a basis of investigation, ie where provision or disclosure may set in train a process which may lead to incrimination or discovery of real evidence of an incriminating character[33]).

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[31] *Reg. v. Boyes* (1861) 1 B & S 311, at pp 329-330 (121 ER 730, at p 738).

[32] *Pyneboard* at 341, 347; *Sorby* at 309.

[33] *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 443 per Lord Wilberforce; see also *Sorby* at 294-295 and 310; *Reid v Howard*, at 6-7.

47. The privilege can be asserted by natural persons, but not by corporations.[34] But as the ALRC acknowledged in its report (at [9.13]):

> Clearly, the artificiality of the distinction between company officers and the corporate legal entity is problematic. Company officers compelled to incriminate the corporation may furnish information that results in subsequent actions against them personally, yet they may not be able to claim privilege personally while acting in their capacity as company officers.

Penalty Privilege

48. A privilege conceptually distinct[35] from the privilege against self-incrimination is the so-called "penalty" privilege. Penalty privilege arises where a person may refuse to answer questions or provide information on the basis that to do might expose her or him to the imposition of a civil penalty.

49. A civil penalty is a penalty designed to punish or discipline a person, rather than to compensate an aggrieved party: *Rich v ASIC* (2004) 220 CLR 129 at 143-144 at [26]-[28]. Civil penalties are a product of regulatory law, where the focus is on compliance through an enforcement pyramid of graduated sanctions and remedies.[36] Civil penalties are a remedial hybrid incorporating elements of deterrence and thus necessarily involve a balancing of civil and criminal procedure. They are increasingly prevalent as a regulatory tool.[37]

50. There are many types of actions that involve their imposition[38] and thus will raise the question of the application of penalty privilege, for example:
    (a) proceedings to ban or disqualify a person from acting as a company director or as a member of a profession;
    (b) liability to statutory disciplinary proceedings;[39]

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[34] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Daniels v ACCC* (2002) 213 CLR 543 at 559. According to Mason CJ and Toohey J, "*the historical reasons for the creation and recognition of the privilege do not support its extension to corporations*'": at 500. The modern rationale for the privilege is equally inapplicable: "*modern international treatment of the privilege as a human right which protects personal freedom, privacy and human dignity is a less than convincing argument that corporations should enjoy the privilege*": ibid, at 500. See also *Evidence Act*, 1995 (Cth), s 187 and *Corporations Act*, 2001 (Cth) s 1316A.

[35] *Daniels* at 559, citing *Pyneboard* at 345 and 350.

[36] See further Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993); Australian Law Reform Commission, *Securing Compliance*, Discussion Paper 65 (2002).

[37] See ALRC, *Principled Regulation: Federal Civil and Administrative Penalties*, Report No 95 (2002).

[38] It may be obvious, but a claim for damages in a civil proceeding is not an action to impose a civil penalty.

[39] *Police Services Board v Morris* (1985) 156 CLR 397 at 403, 408.

(c) proceedings to recover a civil penalty under the *Competition and Consumer Act* 2010 (Cth);
(d) proceedings to recover a civil penalty, unpaid duty and reparations under the *Customs Act* and *Excise Act*[40];
(e) removal from public office (as employee, executive officer appointed under statute or elected official);[41]
(f) demotion, reprimand, deferral of salary increment or other punishments of public sector employees;
(g) loss of civil status from being declared a bankrupt; and
(h) disqualification from holding or obtaining a driving licence.

51. Of these, it is useful to recall that two classes of civil penalties are particularly notable, because of their parallel criminal offences for almost identical conduct, namely:
    (a) civil penalties under the *Corporations Act*, among the 30 categories of civil penalty provisions listed in s 1317E, there are parallel criminal offences concerning directors duties (in respect of breaches of s 181-184); and
    (b) civil penalties under the *CCA* concerning cartel conduct, something which the former ACCC Chairman Graham Samuel described as "*in reality, a form of theft*".[42]

52. The High Court has declined to say that penalty privilege is a substantive rule of law which has application beyond judicial proceedings.[43] The ALRC[44] has recommended that the protections under penalty privilege be the same as those afforded in respect of self-incrimination in criminal matters, and the Queensland Law Reform Commission[45] has gone further and recommended that the penalty privilege, in the absence of express provision to the contrary, should be available in non-judicial proceedings and investigations.

Regulatory Investigations

53. Despite their significance, the privilege against self-incrimination and penalty privilege have been largely abrogated in relation to the coercive investigatory

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[40] *CEO of Customs v Camille Trading Pty Ltd* [2004] NSWSC 1256; *Commissioner of Taxation v Price* [2006] QCA 108.

[41] *Taylor v Carmichael* [1984] 1 NSWLR 421.

[42] Opening Comments to the ACCC's Regulatory Conference, *Cracking Cartels: International and Australian Developments*, Sydney, 24 November 2006.

[43] See *Rich v ASIC* at 142, citing *Daniels* at 554.

[44] ALRC Report No. 95, Recommendation 18-1.

[45] QLRC Report No. 59 (2004), para. 5.1.

powers of Australian regulators.

54. The principles to be applied have been enunciated in a series of decisions in the High Court commencing with *Mortimer v Brown* (1971) 122 CLR 493 and concluding with *Hamilton v Oades* (1989) 166 CLR 486. In the last of those cases Mason CJ (at 495) said:

> "The privilege against self-incrimination can only be abrogated by the manifestation of a clear legislative intention. The intention may none the less be demonstrated by reference to express words or necessary implication. ... But the privilege is not lightly abrogated, and the phrase 'necessary implication' imports a high degree of certainty as to legislative intention."

55. Although in *Hamilton v Oades* Deane and Gaudron JJ dissented in the result, their dissent was not a dissent from the statement of principle as expressed by Mason CJ in that case. Their Honours, in their joint judgment (at 500-501), express the principle in the following terms:

> "The rules of statutory construction require a clear expression of legislative intent before a provision will be held effective to abrogate or limit a privilege as fundamental as the privilege against self-incrimination... In the present case that intent is made manifest by the words of s.541(12) [of the Companies (New South Wales) Code]. ... An intent to abrogate or limit the privilege may also be made manifest by the purpose of the provision in question and the public interest which it is intended to serve ...".

56. The ALRC has noted[46] that the courts have implied a statutory intention to remove the privilege in provisions which:
    (a) impose an unqualified obligation to answer;[47]
    (b) enable an agency to determine if an offence has been committed or a legislative provision contravened;[48]
    (c) provide for the answering of questions, the provision of information and the production of documents;[49]
    (d) provide for grounds for failing to comply, such as reasonable excuse provisions;[50]

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[46] at [9.43].

[47] *Sorby at* 311; *Pyneboard* at 341 and 343; *National Companies and Securities Commission v Sim* [1987] 2 VR 421, 425. In *Sorby*, the High Court held that the privilege was removed when testifying to a Royal Commission under the *Royal Commissions Act 1902* (Cth). Section 3 provides that a person summoned before a Royal Commission is required to answer all questions put to them; s 6 provides that self-incrimination is not a ground on which to refuse to answer a question.

[48] *Pyneboard* at 341.

[49] Ibid. at 341.

[50] *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385, 392 and 396; *Pyneboard* at 343.

(e) establish a general or limited use immunity;[51] and

(f) relate to investigations leading to the imposition of penalties or forfeiture.[52]

57. The vast majority of statutory information-gathering powers would meet one or more of these criteria.

58. Sometimes statutes remove the privilege but limit the subsequent use of information. There are three types of immunity potentially available:

(a) *personal immunity*: a total personal immunity from any further prosecution;

(b) *use immunity*: claimed by a person before answering questions which would tend to incriminate and preventing the answers given from being admitted into evidence against that person in subsequent proceedings (usually excepting perjury); and

(c) *derivative use immunity*: extends use immunity to prevent any other evidence obtained through further inquiries based on the compulsorily disclosed material from being admissible.[53]

ASIC Investigations

59. Subsection 68(1) of the ASIC Act abrogates the privilege against self-incrimination and penalty privilege in certain circumstances, in that it is not a reasonable excuse for a person to refuse or fail:

(a) to give information; or

(b) to sign a record; or

(c) to produce a book;

in accordance with a requirement made of the person, that the information, signing the record or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty.

60. The word '*might*', in the context of '*might tend to incriminate*', within s 68(2)(a), and '*might in fact tend to incriminate*', within s 68(2)(b), connotes that, at least, a real possibility exists, based on objective facts and circumstances, that:

(a) the statement which the person is to make, for the purposes of par (a); and

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[51] *Sorby* at 300 and 311; *Price v McCabe; Ex parte McCabe* (1984) 55 ALR 397, 37.

[52] *Price v McCabe* at 34.

[53] An example of an express derivative use immunity is s 243SC(1)(d) of the *Customs Act* (introduced by the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (Cth), which provides that a person may refuse to answer a question or produce a document if to do so would '*result in further attempts to obtain evidence that would tend to incriminate the person*'.

(b) the statement which the person has in fact made, for the purposes of par (b),

may tend to incriminate the person.[54]

61. The privilege does not provide a blanket ban on giving evidence, but must be exercised on a question-by-question basis.[55] This has led to the development of a time consuming practice in ASIC compulsory examinations of requiring an examinee to claim "privilege" before practically every answer.

62. A use immunity is provided to a person in relation to:
   (a) giving information where it is given by oral statement and
   (b) signing a record

   but *not* producing a book: see s 68(3).

63. The use immunity applies to:
   (a) a criminal proceeding; and
   (b) a civil penalty proceeding;

64. Importantly, the use immunity does not apply to:
   (a) proceedings in relation to a false statement: see s 63(3)(c), (d);
   (b) civil proceedings (eg, a class action for compensation orders);
   (c) disqualification or administrative proceedings (eg, disqualification from providing financial services): see s 1349 *Corporations Act*.

ACCC Investigations

65. To similar effect as s 68 of the ASIC Act is section 155(7) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).[56] A person served by the ACCC with a s 155 Notice will not be excused from producing a document or answering a question on the ground that it might incriminate them or expose them to a penalty: see s 154R(4), s 155(7) and s 159 (2). Similarly, see s 154R(3), 155(7) and 159(1) in relation to the ACCC's power in relation to search warrants and compulsory examinations.

66. A person will only have a use immunity in relation to the information given by them – ie, it is not admissible against them in criminal proceedings except for

[54] *Smith v The Queen* [2007] QASCA 163; (2007) 175 A Crim R 528; (2007) 63 ACSR 445 at [69].

[55] See *Warman International Ltd v Environtech (Aust)* (1986) 67 ALR 253 at 265.

[56] Section 155 CCA is broadly equivalent to s 155 of the former *Trade Practices Act* 1974 (Cth). As to the relationship between these two acts – which are in fact the same act – see *Australian Competition and Consumer Commission v MSY Technology Pty Ltd (No 2)* (2011) 279 ALR 609 at [5]-[6] (Perram J).

specific purposes (eg non-compliance, obstruction or giving false or misleading information: see s 154R(4), s 155(7) and s 159(2)).

ATO Investigations

67. Australian taxation laws are silent on the privilege but the regulator is given broad information-gathering powers. The penalties for failing to comply with requests made under these powers has been held to impliedly remove the privilege. Thus, in respect of investigations by the ATO, s 264 of the *Income Tax Assessment Act* and ss 8C and 8D of the *Taxation Administration Act* 1953 (Cth) abrogate the privilege against self incrimination in respect of s 264 ITAA.[57]

68. However, unlike with ASIC and ACCC investigations, there is no statutory evidential immunity in exchange for the abrogation of the privilege in relation to ATO Investigations.

Enforcement Proceedings

69. In the absence of legislative intervention[58] or creation of court rules providing a uniform civil code for civil penalty proceedings (especially proceedings under the *Corporations Act*[59] and the *ASIC Act*), it has been left to the courts to develop a hybrid procedure on an ad-hoc basis through case law and Court rules when faced with claims for privilege against self-incrimination and penalty privilege.

70. That hybrid procedure has been obliged to balance two conflicting policies:
    (a) prevention of surprise ("trial by ambush") embedded in civil procedure;
    (b) the accused's right to silence and its central role in criminal procedure.

71. Striking the balance has led to a mixed interpretation of civil penalty procedure which at times has seemed to privilege criminal process values to the detriment of the overarching regulatory rationale of the provisions.[60]

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[57] See the decision of the Full Federal Court in *DFCT v De Vonk* (1995) 31 ATR 481 per Hill and Lindgren JJ at [32]; Foster J at [1]-[2], approving *Stergis v FCT* (1989) 20 ATR 592; (1989) 89 ATC 4442 (Hill J); *Donovan v DFCT* (1992) 23 ATR 129; (1992) 92 ATC 4114 (Wilcox J).

[58] The 2002 ALRC Report recommended the enactment of a "Regulatory Contraventions Statute" to clarify uncertainty as to the nature of, and procedure applicable to civil penalties: pp 25, 263, Recommendation 6-7.

[59] Section 1317J of the *Corporations Act* is a directive provision which simply states that the court "must apply the rules of evidence and procedure for civil matters when hearing proceedings for (a) a declaration of contravention or (b) a pecuniary penalty order".

[60] Such a result was most recently disavowed by the High Court in *ASIC v Hellicar* (2012) 86 ALJR 522 when it rejected the NSW Court of Appeals' conclusion that, by failing to call a particular witness,

72. There is every likelihood that a defendant's compliance with pleading rules[61] would be likely to either directly or derivatively assist the regulator to establish part of its case.[62] In multi-respondent litigation, this presents real risks for the individual defendant, since what is pleaded on behalf of the corporation (which cannot claim penalty privilege, and so cannot avoid pleading in the normal way[63]) could destroy the utility of the privilege for its individual directors or officers.

73. There are now numerous examples of cases where all or part of the standard civil procedure rules have been dispensed with or modified to account for a privilege claim.[64] A defendant can also be excused from filing witness statements ahead of trial,[65] indeed until the regulator closes its case. In *Rich v ASIC*, the Commission conceded that if (as the High Court concluded) no discovery should be ordered against a defendant to disqualification suit,[66] the person was also not required to file evidence before trial (see 220 CLR 129 at 136), and that has been the position adopted in subsequent enforcement cases.

ASIC had breached a duty of fairness and thus undermined the cogency of its case and failed to discharge its burden of proof.

[61] For example, in NSW the *Uniform Civil Procedure Rules* require a party to:

(a) specifically plead to matters that will take the other party by surprise: r 14.14(2)(a);

(b) specifically plead to matters that will render a claim or defence by the other side not maintainable: r 14.14(2)(b);

(c) raise matters not arising out of the pleading: r 14.14(2)(c));

(d) provide particulars sufficient to enable the other party to identify the case that the pleading requires it to meet: r 15.1(1).

[62] See *Macdonald v ASIC* [2007] NSWCA 304 at [10].

[63] *Bridal Fashions Pty Ltd v Comptroller-General of Customs* (1996) 140 ALR 681 (Malcolm CJ, Ipp and Owen JJ) at 696.

[64] See eg *Macdonald v ASIC* [2007] NSWCA 304 (requiring the defendants to file defences invoking any statutory and other "positive" defences": at [59]); *Anderson & Ors v Australian Securities and Investments Commission* [2012] QCA 301 (requiring defendants to give notice of any intention to rely upon any relevant statutory defence or ground of dispensation and to state which allegation of fact is admitted, not admitted or denied, but otherwise dispensing with compliance with rules).

[65] See eg *ACCC v Amcor Printing Papers Group Ltd* (1999) 163 ALR 465*; ACCC v J McPhee & Son (Australia) Pty Ltd (No 2)* (1997) 77 FCR 217; *ASIC v Plymin* (2002) 4 VR 168; *ACCC v FFE Building Services Ltd* (2003) 130 FCR 37 (FC) contra *Sidebottom v Commissioner of Taxation* (2003) 6 VR 302 (CA).

[66] It is well settled that a defendant to a civil penalty proceeding may refuse a request for discovery. This principle has a deep history. A common informer was precluded from seeking discovery or interrogatories in civil actions for a penalty in *Mexborough v Whitwood Urban District Council* [1897] 2 QBD 111. In 1910, Isaacs J refused to order discovery in a case involving alleged cartel conduct by colliery owners: see *R v Associated Northern Collieries* (1910) 11 CLR 738.