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IMPLICATIONS OF THE PENALTY PRIVILEGE IN EMPLOYMENT AND OTHER CIVIL LITIGATION

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Implications of the penalty privilege in employment and other civil litigation.

Litigation can be like a high-stakes card game. The privilege against civil penalty may entitle a defendant to conceal their cards and keep the plaintiff guessing. Tactically, the defendant must decide whether to claim the privilege and when to waive it.

Civil litigation ordinarily requires both plaintiff and defendant to reveal their case through pleadings, discovery and the other ordinary processes under the Rules of Court, but a person facing possible civil penalties may be entitled to conceal their case until the close of the plaintiff's case at hearing. A corporation is not entitled to the privilege but may be affected by privilege claims of directors and employees.

Civil penalty provisions are found in some of the more contested areas in employment and industrial law, including numerous provisions of the *Fair Work Act 2009*, where the Fair Work Ombudsman, employers, employees and industrial organisations may be able to bring civil penalty proceedings. They are found also in the *Corporations Act 2001* and in the *Competition and Consumer Act 2010*. It is not necessary that an action should claim a civil penalty for the privilege to be available.

In *Re Australian Property Custodian Holdings Ltd (No 2)* [2012] VSC 576, Robson J identified the following principles relating to penalty privilege:

- The privilege is self-evidently available in penalty proceedings.
- In civil actions where no claim is made for penalty, the defendant must show that providing the information would tend to subject the defendant to a penalty in separate proceedings.
- The privilege is a common law right, availed of as of right, and protected by the court.
- The privilege extends to obligations to plead, make discovery and answer interrogatories.
- The proper course for a defendant wishing to take the privilege is to plead accordingly; if challenged, the defendant must justify that the privilege is taken in good faith and on reasonable grounds.

A person defending civil penalty proceedings may not be compelled to disclose any information that has the tendency to expose them to civil penalty. The defendant should invoke the privilege at the outset, and neither admit nor deny any allegation where a positive pleading would abrogate the privilege. A defence prepared in this manner is known as a “McDonald defence”, after *McDonald v ASIC* (2007) 73 NSWLR 612. The majority in *McDonald* noted that the privilege was a substantive common law right to which, in the absence of statutory authority, procedural rules of court must yield (at [39]). A defendant may plead a *McDonald* defence and reserve the making of any positive defence until the close of the plaintiff’s case, at which time the defendant may decide whether to deliver an amended defence (*McDonald* at [72], per Mason P, Giles JA agreeing; *ASIC v Mining Projects Group Ltd* (2007) 164 FCR 32 at [13] (Finkelstein J)).

Although the privilege is available only to natural persons, a court may relieve a corporation of its obligations under court rules to the extent necessary to enable a person such as a sole director to maintain their privilege. The principle is not that the corporation will not be required to disclose information which tends to show a person to be liable for civil penalty, but that the person cannot be obliged to disclose that information through the corporation. So it may be that a corporation’s obligation to produce documents on subpoena can be met through a clerical or other employee, but a sole director or other person cannot be required to swear an affidavit of discovery or give instructions on admissions or denials in pleading a defence for the corporation which in breach of their own privilege.

If the person entitled to the privilege is a director or other officer, the corporation may be fixed with that person’s knowledge. If pleading instructions are available only through a person who would also be exposed to civil penalty, the corporation may seek an order relieving it of the need to comply with the pleading rules to the extent necessary to preserve that person’s privilege (*APCH* at [163]).

Where the information is held by a person who is not a director, and the corporation is not fixed with their knowledge, the corporation may be able to plead that it does not know, and cannot admit, the allegations: *John Holland Pty Ltd v CFMEU (No 2)* [2014] FCA 1032. It is unclear to what extent a corporate defendant has an obligation

to make inquiries to put itself in a position to make a positive admission or denial:

Director of the Fair Work Building Industry Inspectorate v CFMEU [2014] FCA 652.

The privilege may be significant in non-penalty proceedings. Claims against employees and former employees for breach of competitions restraints or misuse of company information often plead sections 182 and 183 of the *Corporations Act 2001*, respectively prohibiting improper use of position and improper use of company information. An employee may seek discovery against a former employer of employment records, which may not have been kept in compliance with *Fair Work Act* penalty provisions. Even where the penalty provisions are not cited in the statement of claim, information provided in a defence or discovery may show a breach of them. If the defendant does not claim the privilege and decline to plead to the allegations, the privilege may be waived: *Futuretronics.com.au Pty Ltd v Graphix Labels Pty Ltd* [2007] FCA 1621. Once the information has been disclosed, the plaintiff may be allowed to amend and directly allege a breach of the civil penalty provision.

While a defendant may be able to amend their defence after close of the plaintiff's case so as to waive the privilege and raise a positive defence, this may preclude cross-examination on the basis of the defendant's positive case and limit cross-examination of the plaintiff's witnesses to matters in the plaintiff's case. This may result in the plaintiff's case being split.

Plaintiffs and defendants should be aware of the potential for claims of penalty privilege, both in pleading claims and defences, and in providing information generally. Once information has been provided, any privilege surrounding that information has been waived, even if privilege may still be claimed in respect of other information.

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