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Penalty privilege is not available in a federal administrative context unless it is applied by statute: apparent tension in High Court authority resolved

***Migration Agents Registration Authority v Frugtniet* [2018] FCAFC 5 (30 January 2018)**

Background

Mr Frugtniet's registration as a migration agent was cancelled by the Migration Agents Registration Authority (MARA). He appealed to the Administrative Appeals Tribunal (AAT). The AAT made conventional directions requiring Mr Frugtniet to provide any witness statements or documents prior to the hearing. Mr Frugtniet argued that this was contrary to his privilege against exposure to a penalty (penalty privilege). The AAT rejected that argument on the basis that penalty privilege could not be seen as a substantive common law right applying outside of judicial proceedings in light of *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 and *Rich v ASIC* (2004) 220 CLR 129.

Mr Frugtniet appealed to the Federal Court. His appeal was allowed on the basis that:

- The statements in *Daniels* and *Rich*, being obiter, were not binding.
- In contrast, the binding ratio of earlier High Court decisions was that penalty privilege, like the privilege against self-incrimination, was a fundamental common law right with extra-curial application (*Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 and *Police Service Board v Morris* (1985) 156 CLR 397).
- Intermediate appellate court authority in Victoria, NSW and the Federal Court supported this view of the High Court authority.
- As penalty privilege was a fundamental common law right, the principle of legality meant that it could only be abrogated by clear statutory language or necessary implication. As the *Migration Act 1958* and the *Administrative Appeals Tribunal Act 1975* (AAT Act) did not have this effect, the privilege was available.

Appeal to the Full Court

MARA appealed to the Full Federal Court. Its principal argument was that the primary judge had erred as to the precedential effect of the High Court decisions, such that *Daniels* and *Rich* had to be applied, not the earlier decisions in *Pyneboard* and *Morris*. As *Daniels* and *Rich* denied that penalty privilege was a fundamental common law right of general application there was no question of needing to find a statutory abrogation. As nothing in the Migration Act and the AAT Act indicated that the privilege *was* available, it was not.

MARA also advanced additional grounds, including that penalty privilege did not apply at all outside judicial proceedings, that the AAT directions lacked the necessary compulsion and that the outcome could not have been different. However, having accepted MARA's principal

argument, the Full Court found it unnecessary and undesirable to make final rulings upon those grounds (although it did make important observations concerning them).

Full Court decision

The Full Court (Siopis, Robertson and Bromwich JJ) upheld the appeal in a joint judgment. Key aspects of the decision are as follows.

***Daniels* must be followed:** Although *Pyneboard* and *Morris* dealt on the facts with penalty privilege, they did not establish that it was a fundamental common law right applying outside judicial proceedings. This was at most an assumed, and therefore non-binding, aspect of the reasoning in each case: [13]–[15], [23]–[30], [78].

In contrast, the observations in *Daniels* to the effect that penalty privilege was not a substantive rule of law applicable outside of judicial proceedings *were* binding. They followed a considered rejection of the reasoning in *Pyneboard* and an express statement that there was no High Court decision which said otherwise: [33]–[39]. The effect of these observations was reiterated in *Rich*: [40], [44]. As a result:

> [52] …*Daniels* must be regarded as a seminal decision of the High Court, the correctness of which has never been doubted. Its clear terms are "*seriously considered dicta*" which are therefore binding on this Court. Even if regarded as no more than comments made, they cannot lightly be put to one side. This Court must endeavour to give effect to them.

Intermediate appellate authority did not dictate otherwise: Insofar as the primary judge had drawn support from a Full Federal Court decision, it had been misunderstood and could not prevail over *Daniels* and *Rich* in any case. Intermediate appellate authority dealing with State tribunals did not safely translate to the federal context making it undesirable to comment on the correctness of those decisions: [67]–[71].

Legislation may not be readily seen to apply penalty privilege: Applying *Daniels*, it is not a question of whether penalty privilege has been *abrogated* in a non-curial setting; the question is whether, as a matter of statutory construction, it has been *applied* in the first place: [53], [82]. A number of factors are likely to guide this construction exercise:

- A conclusion that the privilege applies in a non-curial setting 'must be found in the face of the view of a majority of the High Court in *Daniels* doubting that penalty privilege ordinarily applies in a non-curial setting at all': [52].
- While the task of implying that the privilege *does* apply may not be so burdensome as that imposed by the principle of legality, some basis must be found in the statute: [54]. This may require 'reasonably clear language to that effect or a strong basis for an implication, akin to clear language, that penalty privilege applies': [81].
- It is inherently less likely that the privilege will apply unless (i) it is claimed in curial proceedings; (ii) the proceedings expose the claimant to penalties; and (iii) the claim is made to protect against a compulsory disclosure of information which would assist in proving the imposition of a penalty against the person: [79]–[81].

The privilege did not apply to the AAT proceedings: Nothing in the context of the Migration Act or AAT Act meant that penalty privilege applied to the AAT proceeding.

> [82] …Adhering to the position expressed in *Daniels* and *Rich*, there must have been a statutory basis for penalty privilege to apply to the AAT proceedings; there simply can be no question of its abrogation where it is not applicable. It follows that in the absence of a statutory basis, penalty privilege did not apply to those proceedings.

The AAT's directions did not engage the privilege anyway: The procedural orders made by the AAT were not amendable to a claim of privilege in any case as they did not compel

him to give or call any evidence. They only required him to provide a copy of any such evidence he might seek to rely upon prior to the hearing, to assist in the efficient administration of a non-adversarial, non-curial tribunal: [80], [83]–[84].

Implications

The judgment is significant for a number of reasons. As penalty privilege will only apply in a non-judicial setting if there is a statutory basis for it, it is unlikely to apply to proceedings in federal tribunals (most obviously the AAT). Significant disruption to the procedures of those tribunals may otherwise have followed upon claims for penalty privilege.

The decision may also be important in relation to administrative action such as (i) the exercise of compulsory powers when investigating non-criminal breaches of the law; (ii) the making of administrative decisions which involve outcomes in the nature of a penalty; and (iii) obtaining information in the context of employment disciplinary processes.

Even in the context of judicial proceedings for a penalty, the decision may invite consideration of whether certain procedural orders against individuals carry the necessary element of compulsion to engage the privilege. Finally, and more broadly, the decision reinforces the need for proper consideration of the rules of precedent; it illustrates how this may require considerably more than drawing a simple distinction between ratio and dicta.

The decision is available at: www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2018/5.html

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