IN THE HIGH COURT OF AUSTRALIA **No. M18 of 2015**

MELBOURNE REGISTRY

BETWEEN:

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

Appellant

AND

BORAL RESOURCES (VIC) PTY LTD (ACN 004 620 731)

First Respondent

ALSAFE PREMIX CONCRETE PTY LTD (ACN 003 290 999)

Second Respondent

BORAL BRICKS PTY LTD (ACN 082 448 342)

Third Respondent

BORAL MASONRY LTD (ACN 000 223 718)

Fourth Respondent

BORAL AUSTRALIAN GYPSUM LTD (ACN 004 231 976)

Fifth Respondent

BORAL WINDOW SYSTEMS LTD (ACN 004 069 523)

Sixth Respondent

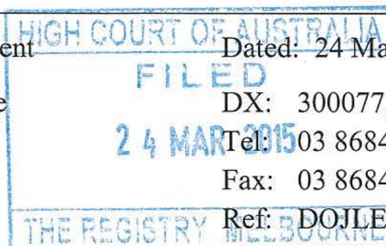
ATTORNEY-GENERAL FOR THE STATE OF VICTORIA

Seventh Respondent

SUBMISSIONS OF THE SEVENTH RESPONDENT

Filed on behalf of the Seventh Respondent
Victorian Government Solicitor's Office
Level 25, 121 Exhibition Street
Melbourne VIC 3000
Contact: Patricia Athanasiadis

Dated: 24 March 2015
DX: 300077, Melbourne
Tel: 03 8684 0444
Fax: 03 8684 0449
Ref: DOJLEO 1367267



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Part I. Publication

1. This document is in a form suitable for publication on the internet.

Part II. Issues

2. The issue is whether the Court of Appeal erred in refusing the appellant's application for leave to appeal the order of a Judge of the Trial Division for particular discovery[1] against the appellant, being a corporate defendant, under r. 29.07 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) **(Rules)** in a proceeding brought against it under Order 75 of the Rules seeking its punishment for contempt.

3. This raises the following three questions:

10 (a) was the Court of Appeal correct to find that the Judge of the Trial Division had power to order particular discovery under r. 29.07 of the Rules against the appellant, being a corporate defendant, in a proceeding brought against it under Order 75 of the Rules seeking its punishment for contempt;

(b) if not, was the Court of Appeal in any event correct to refuse leave to appeal the order for particular discovery on the basis that it entailed no substantial injustice because:

(i) it was open to the first to sixth respondents to issue a subpoena under Order 42 of the Rules against the appellant, being a corporate defendant, in that proceeding which required the appellant to produce
20 the same documents as those which are the subject of the particular discovery order; and/or

(ii) it was open to the first to sixth respondents to issue a subpoena under Order 42 of the Rules against officers of the appellant, being a corporate defendant, in that proceeding which required those officers to produce the same documents as those which were the subject of the discovery order?

Part III. *Judiciary Act 1903*, s 78B

4. The seventh respondent, the Attorney-General for the State of Victoria, is of the view that s 78B notices are not required.

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Part IV. Facts

5. By summons filed 22 August 2013, pursuant to r. 75.06 of the Rules, the first to sixth respondents **(Boral Parties)** sought orders in the Supreme Court of Victoria that the appellant be punished for contempt constituted by disobedience of civil orders made by the Supreme Court on 5 April 2013. On 28 October 2013, the Attorney-General was granted leave to be joined as the seventh plaintiff to that summons pursuant to r. 9.06(2) of the Rules.

[1] The order was for discovery of particular documents and classes of documents. It was not an order for general discovery. See the order of Digby J made 25 March 2014.

6. The pertinent charges in the contempt summons alleged that the appellant, by the conduct of a named employee: organised, implemented, participated in, constituted and maintained a blockade of a construction site at Joseph Road, Footscray on 16 May 2013.

7. By summons filed 2 October 2013, the Boral Parties applied for an order for particular discovery against the appellant under r. 29.07 of the Rules. The discovery sought was limited to specific categories of documents. The Boral Parties submitted that the documents were relevant to attributing corporate responsibility to the appellant. Their purpose was to establish the authority of the employee to do as he did at the blockade
10 on behalf of the appellant.

8. In support of the discovery application, the Boral Parties relied on affidavit material demonstrating that the employee was receiving directions by telephone as to the conduct and maintenance of the blockade.

9. The Boral Parties submitted that the discovered documents could be used in conjunction with telephone call records, produced under subpoenas to telecommunications carriers, to identify the person or persons from whom the employee apparently sought and obtained directions. Documents containing the terms of employee's employment were also said to be relevant to the scope of his authority.

10. The history of the disposition of the application for particular discovery is as follows:

20 (a) on 23 October 2013, an Associate Judge (Daly AsJ) dismissed the summons for discovery;

(b) the Boral Parties appealed that order pursuant to r. 77.06 of the Rules. On 25 March 2014, a Judge of the Trial Division (Digby J) allowed the appeal and ordered that the appellant make discovery of the documents sought in the discovery summons;

(c) the appellant sought leave to appeal the decision to the Court of Appeal. On 24 October 2014, the Court of Appeal (Ashley, Redlich and Weinberg JJA) refused the application for leave to appeal.[2]

11. In essence, the application for leave to appeal was refused for two reasons:

30 (a) the decision of the High Court in *Environmental Protection Authority v Caltex Refining Co Pty Ltd*[3] (***Caltex***) represented a major if not insuperable obstacle to the appellant's contention that discovery could not be given under the Rules;[4] and

(b) the appellant would suffer no substantial injustice if the order for specific discovery were permitted to stand. This is because the documents in question

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2 *CFMEU v Boral Resources (Vic) Pty Ltd* [2014] VSCA 261 (**COA Decision**).
3 (1993) 178 CLR 477.
4 COA Decision, [495].

could have been obtained by the simple device of issuing one or more subpoenas for production.[5]

PART V. Applicable legislative provisions and rules

12. In addition to the statement of applicable statutory provisions set out in in Part VII of the appellant's amended submissions dated 24 March 2015 (**AS**), the Attorney-General refers to: s 187 of the *Evidence Act 2008* (Vic), s 187 of the *Evidence Act 1995* (Cth) and orders 7, 30, 42, 43 and 46 of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic).*

Part VI. Argument

10 **A. Overview of contentions by the Attorney-General**

13. The Attorney-General contends that:

 (a) the law has developed to recognise that the privilege against self-incrimination and the penalty privilege are not available to a corporate defendant.[6] Therefore the protections which the law offers to natural persons, by reason of the privileges, are not co-extensive with those afforded to corporations;

 (b) the appellant's contention that clear words or necessary intendment must be found within the Rules before they may be construed as permitting discovery under r. 29.07 would return the law to its position prior to the decisions to deny the privileges to corporations in proceedings against them by the legislature
20 (under s 187 of the *Evidence Act 2008* (Vic)) and this Court;[7]

 (c) the appellant contends that the nature of the accusatorial system (including the principle that the prosecution cannot compel the accused to assist it with the discharge of the onus of proof) provides a residual basis to protect a corporation from the Court's general powers to compel it to produce documents in a proceeding against it in which the standard of proof is beyond reasonable doubt.[8] This contention proceeds on one of two of the following false assumptions:

  (i) the first false assumption is that it is an essential part of the accusatorial system to protect a corporate defendant from the Court's processes to
30 compel that defendant to produce incriminating documents in such a proceeding;[9]

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5 COA Decision, [477] - [479]: "there is no answer to the respondents' submission that leave to appeal should be refused, at least on the basis that the [appellant] will suffer no substantial injustice if the order for specific discovery is permitted to stand".

6 See *Caltex*; *Daniels Corp International Pty Ltd v ACCC* (2012) 213 CLR 543, [31] (***Daniels***); *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96 (***Abbco***); *Evidence Act* 2008 (Vic) s 187.

7 *Daniels*, 559 [31]. Cf *Caltex*, 521 (Brennan J).

8 AS: 15 - 18.

9 *Caltex*, 503 (Mason CJ and Toohey J, who observe that the case for protecting a person from compulsion to make a testamentary admission of guilt is much stronger than the case for protecting a person from the

(ii) alternatively, if the assumption that such a protection was an essential part of the accusatorial system were correct, the second false assumption is that the purpose and function of the decisions to deny the privileges to corporations did not entail the modification of the accusatorial system with the result that the Court's general processes may be used to compel a corporate defendant to produce documents in such a proceeding .[10]

Either way the appellant's argument that there is a residual basis to relevantly protect a corporation is invalid;

10 (d) given the removal of any impediment to the Court's power to compel the production of documents from a corporate defendant, r. 29.07 should be construed as permitting an order for specific discovery to be made against that corporate defendant. The Court of Appeal was correct to so hold;[11]

(e) moreover, the appellant's contention concerning the relevant residual protection from production afforded to corporations by the accusatorial system equates a proceeding for contempt with a criminal trial for this purpose. Although post *Witham v Holloway*,[12] all proceedings for contempt must essentially be seen as criminal in nature[13] for the purpose of ascertaining the standard of proof, "to say that proceedings for contempt are essentially
20 criminal in nature is not to equate them with the trial of a criminal charge".[14] To the extent that any accusatorial notions attach to a contempt proceeding they should not do so with the same rigour as in a criminal trial;

(f) in any event, as the Court of Appeal also held, under Order 42 of the Rules a subpoena may be issued to a party in a proceeding.[15] Where a privilege applies, an objection may be made to production so as to preserve that privilege.[16] But the denial of the privileges means that the appellant, as a body corporate, cannot refuse or fail to comply with a requirement to produce documents on the ground that it might tend to incriminate that body or make

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production of books or documents which are in the nature of real evidence of guilt and are not testimonial in character), 550 - 556 (McHugh J).

[10] For example: *Caltex*, 500 - 504, 507, 508 (Mason CJ and Toohey J), 551 - 557 (McHugh J). *Daniels*, [31]; *Evidence Act* 2008 (Vic) s 187; *Evidence Act 1995* (Cth) s 187.

[11] COA Decision, [481], [495].

[12] *Witham v Holloway* (1995) 183 CLR 525.

[13] Ibid 534 (Brennan, Deane, Toohey and Gaudron JJ).

[14] Ibid. See also *CFMEU v Boral Resources (Vic) Pty Ltd* [2013] VSCA 378, [10] (Beach JA with whom Osborn JA agreed) referring to *Hinch v Attorney-General for the State of Victoria* (1987) 164 CLR 25. There are significant differences between the powers that are set in train against an alleged contemnor and those set in train under the criminal law; *Re Colina & Anor; Ex Parte Torney* (1999) 200 CLR 386, [109] (Hayne J).

[15] Below, the appellant properly conceded that in a proceeding under Order 75.06, Order 42 may appropriately found an order for subpoenas. (Written submissions of the appellant in the Court of Appeal dated 1 July 2014, [5.1]). The appellant submitted, however, that this power may not be available against the accused itself (see transcript 28/07/14 at T.276.14-T.280.27).

[16] See in particular *Evidence Act* 2008 (Vic) s 187.

that body liable to a penalty.[17] Alternatively, a subpoena may be issued against officers of the appellant for the same documents;[18]

(g) therefore, on either basis, there is no substantial injustice in this case, even if the order for specific discovery ought otherwise be set aside;

(h) the availability of powers to compel the production of documents from corporate defendants for use in proceedings against them to which accusatorial notions attach is supported by powerful policy considerations, which have been recognised by this Court.[19]

B. The appellant's primary argument is inapposite to a corporate defendant

10 14. In substance, the primary argument made by the appellant proceeds by the following propositions:

(a) proceedings brought to punish a contemnor for breach of court orders are accusatorial in nature;[20]

(b) an accusatorial proceeding entails two fundamental principles of common law. The first is that the prosecution is required to prove the guilt of the accused person. The second is the companion principle, that the prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof;[21]

(c) such fundamental principles may be abrogated or curtailed by legislation (or
20 valid rules made under legislation). But this must be done expressly or by necessary implication (**the Interpretive Principle**);[22]

(d) discovery under the Rules against a defendant in a proceeding that is accusatorial in nature, would be a departure from the companion principle, because it would require the defendant to assist in the discharge of the onus of proof by the production of (potentially inculpatory) documents;[23]

(e) applying the Interpretive Principle, the Rules do not expressly, or by necessary intendment, provide that discovery is available against a defendant in an accusatorial proceeding;[24]

(f) therefore, the Court of Appeal should have held that the Judge of the Trial
30 Division erred by making an order for discovery in this case.

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[17] *Caltex*, 551 (McHugh J); cf the position prior to the denial of the privileges: *Master Builders Association (NSW) v Plumbers and Gasfitters Employees' Union (Aust)* (1987) 14 FCR 479. See also *Caltex*, 507 (Mason CJ and Toohey J), 557 (McHugh J); *Abbco*; *Evidence Act* 2008 (Vic) s 187.

[18] COA Decision, [479].

[19] Addressed in detail below in part C.4.

[20] AS: [15] - [18].

[21] AS: [16].

[22] AS: [47].

[23] AS: [47].

[24] AS: [47] - [55].

15. It is convenient to commence with proposition (b), because if the companion principle has been relevantly abrogated or modified in its application to accusatorial proceedings against a corporate defendant, then the appellant's argument falls away. This is because the foundation for the Interpretive Principle in (c) would then be lost.

16. The Attorney-General submits that to apply the Interpretive Principle to the Rules in this case, would be inconsistent with the combined effect of the denial of the privilege against self-incrimination and the penalty privilege for corporations.

17. The appellant looks to draw support from statements of principle made by this Court in a trio of recent cases: *X7 v Australian Crime Commission* (***X7***),[25] *Lee v New South* 10 *Wales Crime Commission* (***Lee 1***)[26] and *Lee v The Queen* (***Lee 2***).[27]

18. In particular, the appellant relies on statements by Kiefel J in *Lee 1*, and the Court in *Lee 2*, referring to the principle of the common law that it is for the prosecution to prove the guilt of an accused person. In *Lee 2* the Court said:

> The privilege against self-incrimination may be lost, but the principle remains. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice. The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.[28] (citations omitted)

19. These statements of general principle are relied upon by the appellant as applying, 20 without qualification, to the circumstances of the present case. But that approach begs the threshold question: can the proposition be stated - without qualification - that the prosecution cannot compel a corporate defendant to assist with the discharge of its onus of proof?

20. The privileges and the companion principle are not the same, but they are closely linked in their historical and conceptual basis. The denial of one may have the effect that the other does not apply or at least is modified. It was recognised in *Lee 2* that the specific legislative abrogation of the privilege against self-incrimination to assist the New South Wales Crime Commission to gather evidence, did not abrogate the companion principle. This was because the legislative regime established under the 30 *New South Wales Crime Commission Act 1985* (NSW) was about the coercive attainment of testimonial evidence for a purpose extraneous to any criminal proceeding against the accused.[29] This regime was designed to quarantine evidence given by a person that might be charged from those involved in the prosecution of those charges.[30] Thus the Court, there, was able to recognise that despite the removal of the privilege the companion principle remained.[31]

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[25] *X7 v Australian Crime Commission* (2013) 248 CLR 92.
[26] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.
[27] *Lee v The Queen* (2014) 308 ALR 252.
[28] *Lee 2*, [32] - [33].
[29] *Lee 2*, [34]. *Lee 1* and *X7* also concerned legislation providing for the attainment of evidence for a purpose extraneous to a proceeding against the person; *X7*, [26] - [27]; *Lee 1*, [285].
[30] *Lee 2*, [33].
[31] *Lee 2*, [32].

21. The equivalent argument is not available to the appellant in the present case because the very issue confronted and resolved by the total denial of the privileges for corporations was whether a moving party may compel a corporate defendant to provide documents that might be used in a proceeding against that defendant.

22. Moreover, each of *X7, Lee 1 and Lee 2* are distinguishable because they concerned the criminal trial of natural persons.

C. Development of Attorney-General's argument

C.1 The Court considered the impact on the accusatorial system, including the companion principle, in *Caltex*

10 23. In *Caltex*, it was recognised by all members of the Court that the primary argument in support of the maintenance of the privilege against self-incrimination for corporations, was the protection of the integrity of the accusatorial system, including the maintenance of the burden of proof on the prosecuting party. That argument relied for its force on recognition that the denial of the privilege to corporations entailed a modification to the operation of the accusatorial system in its application to a corporate accused. Despite that argument, the majority decided that the privilege was not available to corporations. It follows that it is not now open for the appellant to contend that the denial of the privilege has no consequence for the accusatorial system or the companion principle.

20 24. As was recognised by Professor Colin Tapper in the *Law Quarterly Review*, the divergence between the majority and minority judges in that case:

> ... narrowed to a choice between an analysis which concentrated on the damage which abridgement would do to the adversarial principle and one which concentrated more on the difficulty of enforcing the law if corporate defendants were to remain free to invoke the privilege.[32]

25. Andrew Ligertwood in *Australian Evidence* recognised, to similar effect, that:

> ... it was strenuously argued that the privilege could be independently justified on the accusatorial (adversarial) ground that the system of justice demands that the prosecution establish its case without relying on the defendant to produce evidence
> 30 against itself. This argument was decisive of the minority decision, but the majority, whist recognising its force in principle, rejected on pragmatic grounds its application to the disclosure of documents by corporations. It argued that, first, to demand production of documents made little inroad into the privilege, particularly as the privilege can be (and has been) simply avoided by legislation empowering direct seizure of documentary material; and that, second, abuses by powerful corporations demand that they not be entitled to the privilege, even if this results in some modification of accusatory principles in their case.[33]

26. The facts of *Caltex* may be briefly stated. The respondent, Caltex, had been charged with criminal offences under the *Clean Waters Act 1970* (NSW) and the *State*

[32] C Tapper, 'Corporations and the Privilege Against Self-Incrimination' (1994) 110 LQR 350, 352: "The principal argument of policy for retention of the privilege in relation to corporate defendants was that it was fundamentally inconsistent with the adversarial system to compel any defendant to provide any evidence against itself".

[33] A Ligertwood, *Australian Evidence* (4th ed), 2004, 5.154.

Pollution Control Commission Act 1970 (NSW). Following the commencement of the prosecution, the prosecutor served on Caltex two notices, each requiring production by Caltex of identical documents in relation to the offences. The first was a notice pursuant to s 29(2)(a) of the Act (**Statutory Notice**) and the second was a notice to produce pursuant to the *Rules of the Land and Environment Court 1980* (NSW) (**Rules Based Notice**).

27. The appellant (**EPA**) appealed to the High Court from an order of the New South Wales Court of Criminal Appeal[34] answering questions of law stated to that Court by Stein J, a judge of the Land and Environment Court of New South Wales.[35] Questions 4 and 5 of the questions stated by Stein J in substance respectively asked whether the Statutory Notice and the Rules Based Notice should be set aside as an abuse of process.

28. The appeal was allowed. Four members of the Court (Mason CJ, Toohey, Brennan and McHugh JJ) held that Caltex could not resist the Statutory Notice. By a different majority (Brennan, Deane, Dawson and Gaudron JJ) it was held that Caltex was not obliged to produce the documents pursuant to the Rules Based Notice.

29. The impact of the denial of the privilege against self-incrimination for the accusatorial system, including the companion principle, considered by the New South Wales Court of Criminal Appeal and the various judges of the High Court is set out below.

30. In the Court of Criminal Appeal, Gleeson CJ (with whom Mahoney and McLelland JJ agreed), identified that a purpose of the privilege was "maintaining the integrity of our accusatorial system of criminal justice, which obliges the Crown to make out a case before an accused must answer".[36] That purpose formed part of his Honour's reasoning in upholding the claim to the privilege made by Caltex.[37]

31. In the High Court, Caltex argued that the right to remain mute when called upon to produce incriminating documents is part of the due process of the law. And that due process encapsulates all of an accused's rights which are designed to require the prosecution to prove its case without the assistance of the accused.[38]

32. Mason CJ and Toohey J delivered a joint judgment. Their Honours reviewed a number of posited justifications for extending the privilege against self-incrimination to corporations. They closely considered the argument based on the "maintenance of the accusatorial system of justice".[39] Their Honours recognised that it was based on the principle, expressed in *Woolmington v DPP*:[40] "that the prosecution must prove the guilt of the prisoner is part of the common law ... and no attempt to whittle it down

34 *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 (***Caltex CCA***).
35 The questions stated by Stein J are set out in in *Caltex*, 487 (Mason CJ and Toohey J).
36 *Caltex CCA*, 127 (Gleeson CJ).
37 Ibid 128 (Gleeson CJ).
38 *Caltex*, 483 (summary of argument).
39 See *Caltex*, 500, 501 (Mason CJ and Toohey J).
40 [1935] AC 462.

can be entertained".[41] For policy reasons their Honours decided that this principle did not justify the extension of the privilege to corporations.[42]

33. Brennan J upheld the Statutory Notice and recognised that the privilege against self-incrimination did not extend to a corporate accused.[43] His Honour did not directly address the accusatorial system, although in considering the Statutory Notice he recognised that, when construing a statute conferring an investigative power, the interpretive implication that "the exercise of the power will not compel a person to incriminate himself unless the statute otherwise prescribes expressly or by necessary intendment" is one that "does not protect corporations".[44] Nor, his Honour said, does "any other fundamental bulwark of liberty".[45] Brennan J set aside the Rules Based Notice on the basis of the penalty privilege.[46] We deal with this below.

34. McHugh J recognised that the maintenance of the "adversary system" (used synonymously with the accusatorial system) provided a justification for the privilege to be extended to corporations.[47] Indeed, his Honour recognised that the most powerful reason in support of the privilege is that it is "a natural, although not necessary consequence of the adversary system".[48] His Honour went on to conclude, however, that if the integrity of the adversary system requires that a corporation can refuse to produce documents: "[t]his is much too high a price to pay for allowing corporations to claim the privilege".[49]

35. Deane, Dawson and Gaudron JJ held that the privilege against self-incrimination was available to a corporate accused. Importantly, their Honours also recognised the burden of proof, and therefore the accusatorial system, as a major justification for the maintenance of the privilege.[50] Their Honours observed that the privilege represented "at all events so far as the criminal law is concerned, an unequivocal rejection of an inquisitorial approach".[51] Their Honours further identified that the basis for the immunity of an accused person from being compelled to produce documents in criminal proceedings: "now appears to rest more upon the principle that the prosecution bears the onus of proof than upon the privilege against self-incrimination".[52] Their Honours did not go on to consider the penalty privilege. This was unnecessary because they held that the privilege against self-incrimination provided an answer to the Rules Based Notice as well as the Statutory Notice.

C.2 The abolition of the penalty privilege post *Caltex*

41 *Caltex*, 501 (Mason CJ and Toohey J); *Woolmington v DPP* [1935] AC 462, 481 - 482: relied on by the appellant AS: [16]; also referred to in *Lee 2*, [32].
42 *Caltex*, 504 (Mason CJ and Toohey J).
43 *Caltex*, 516 (Brennan J). Brennan J answered question 4 of the questions posed by Stein J "No", 523.
44 *Caltex*, 517 (Brennan J).
45 *Caltex*, 510 (Brennan J).
46 *Caltex*, 518 - 523 (Brennan J).
47 See, for example, *Caltex*, 550 (McHugh J).
48 Ibid.
49 Ibid, 556.
50 *Caltex*, 532 (Deane, Dawson and Gaudron JJ).
51 Ibid.
52 *Caltex*, 528 (Deane, Dawson and Gaudron JJ).

36. Although among the majority, Brennan J held that a corporation may rely on the penalty privilege as a protection against the compulsory production of documents under the rules of court notwithstanding the denial of the privilege against self-incrimination. On this basis, his Honour set aside the Rules Based Notice.

37. The critical development, post-*Caltex*, is that (contrary to the holding of Brennan J) the penalty privilege is no longer available: s 187 *Evidence Act 2008* (Vic) and *Daniels*. In *Daniels,* Gleeson CJ, Gaudron, Gummow and Hayne JJ held: "it should now be accepted that, as the privilege against self-incrimination is not available to corporations, the privilege against self-exposure to penalties is, similarly, not available to them".[53]

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38. Recognising this, one could assemble a majority among Mason CJ, Toohey, McHugh and Brennan JJ in support of production under a rules based procedure. That would be based on the inference that, absent the penalty privilege, Brennan J would have joined the majority on this point. However, that alone is not determinative of the answer in this case.

39. What is of greater significance is that the appellant's approach to the construction of the Rules in the present case, is inconsistent with the logic of the subsequent denial of the penalty privilege for corporations. To develop this argument, it is necessary to briefly explore the nature of the penalty privilege.

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40. The penalty privilege embraces the principle that the Court should, in the absence of a statutory provision to the contrary, refuse to make an order against a defendant for discovery, production of documents, or the provision of information, where the object of the proceeding is the imposition and recovery of a penalty.[54] By reason of the penalty privilege, discovery or the production of documents would be refused *in limine* where the object of the proceeding was the infliction of a penalty.[55] In *Caltex,* Brennan J held that the penalty privilege extended to criminal proceedings for the reason that it would be odd to afford a greater protection in a penalty proceeding than in a criminal proceeding.[56]

41. Brennan J observed that the "penalty privilege ... is a different privilege from the privilege against self-incrimination".[57] His Honour further observed that

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> The penalty privilege owes its existence not to the law's historical protection of human dignity but to the limitation which the courts placed on the exercise of their powers to compel a defendant in an action for the recovery of a penalty to furnish against himself the evidence needed to establish his liability.[58] (emphasis added)

[53] *Daniels*, 559: referring to *Abbco*.

[54] See *Abbco*, 135 (Gummow J).

[55] S McNicol, '*Law of Privilege*' 1992 LawBook Co, 189; *R v Associated Northern Collieries* (1910) 11 CLR 738, 742 (Isaacs J); *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat & Livestock Corp* (1979) 42 FLR 204, 207 - 8 (Deane J); *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335 - 356 (Mason ACJ, Wilson and Dawson JJ).

[56] *Caltex*, 520 (Brennan J).

[57] *Caltex*, 519 (Brennan J).

[58] Ibid.

42. Given that a fundamental (although not sole)[59] function of the penalty privilege is to impede the Court's exercise of its powers to compel discovery from a defendant to a criminal or penalty proceeding for use against it in that proceeding, the denial of that privilege for corporations entails the removal of that impediment. This underlines the importance, for the issues raised on this appeal, of the recognition by this Court and the legislature of the unavailability of the penalty privilege to corporations.

43. That the Court's general powers to compel documents are now relevantly available against corporations, is supported by the approach taken by the Full Federal Court in: *Abbco* (particularly per Burchett and Gummow JJ) and the decision of the Federal
10 Court (Gray J) in *Calderwood v SCI Operations Pty Ltd* (***Calderwood***).[60]

44. *Abbco* concerned a proceeding to recover civil penalties pursuant to ss 45 and 45A of the *Trade Practices Act 1974* (Cth). The central issue was whether the rules of the Federal Court of Australia permitted the service by the applicant of notices to produce documents directed to the respondent corporation. This raised the question whether the penalty privilege remained available to a corporate defendant. By a majority of four to one, the Court held that the notices were valid. This followed from its holding that the privilege against self-exposure to a privilege (the penalty privilege) was not available to a corporation.

45. Justice Burchett (with whom Black CJ and Davies J concurred) delivered the principal
20 judgment. His Honour observed that:

> It has been stated in various ways, and with differing emphases. But, with respect, it cannot be better expressed than by the words which Deane, Dawson and Gaudron JJ used in Caltex with reference to self-incrimination:
>
> > 'In the end, [the privilege] is based upon the deep-seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself'.[61] (citations omitted)

46. His Honour reasoned, however, that if that foundation could not support the privilege in respect of self-incrimination, it could not provide a justification for the maintenance of the penalty privilege for corporations.[62] Gummow J, writing separately, agreed that
30 the denial of the privilege against self-incrimination meant that the justification for the penalty privilege fell away.[63]

47. *Calderwood* concerned three sets of proceedings, in which two defendants were charged with criminal offences pursuant to the *Industrial Relations Act 1988* (Cth). Each defendant was a body corporate. The prosecutor required the defendants to give discovery and to produce documents on subpoenas pursuant to the *Industrial Relations Court Rules*. The defendants objected to each notice and sought that the subpoenas be set aside. The prosecutor relied on s 187(2) of the *Evidence Act 1995* (Cth) which

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[59] For example, the penalty privilege may also be invoked outside the course of judicial proceedings whenever a person is asked to answer questions or provide information which may expose that person to a penalty. See *Caltex*, 547 (McHugh J).

[60] (1995) 130 ALR 456.

[61] *Abbco*, 129 - C (Burchett J).

[62] Ibid. This is consistent with the view taken by McHugh J in *Caltex*, 547.

[63] *Abbco*, 146 - B (Gummow J).

provided that a body corporate was not entitled to refuse or to fail to comply with a requirement to answer a question or give information on the grounds that it might incriminate the body corporate or make the body corporate liable to a penalty. The defendants contended that s 187(2) was subject to an overriding principle that a defendant in a criminal proceeding cannot be required to produce evidence against itself.

48. The defendants' argument was rejected by the Court. His Honour held that in the absence of a privilege protecting a party, provisions in the rules of a court under which the production of a document can be compelled are applicable and must be obeyed. Since the denial of the privileges there is no surviving rule that a court's processes to compel the production of documents are unavailable to a prosecutor in a criminal proceeding.[64]

49. Another relevant example of a court ordering a corporate defendant to give discovery is found in the decision of Heenan J in the Supreme Court of Western Australia in *Woods v Skyride*.[65] That order was made in the context of a proceeding for contempt of court.

C.3 Statutory abrogation of the privileges

50. The denial of the privileges has been given statutory force in the *Evidence Act* 2008 (Vic). Section 187 provides:

> **No privilege against self-incrimination for bodies corporate**
>
> (1) This section applies if, under a law of the State or in a proceeding, a body corporate is required to—
>
> (a) answer a question or give information; or
>
> (b) produce a document or any other thing; or
>
> (c) do any other act whatever.
>
> (2) The body corporate is not entitled to refuse or fail to comply with the requirement on the ground that answering the question, giving the information, producing the document or other thing or doing that other act, as the case may be, might tend to incriminate the body or make the body liable to a penalty

51. The appellant does not address s 187 in the AS. If, as the appellant contends, clear legislative words or necessary intendment are required before the Rules may be construed to permit discovery,[66] such words or intendment are the very thing provided by s 187; relevantly, to provide for the compulsory production of documents by a corporation "in a proceeding". To construe the Rules without reference to s 187 would be to undo the purpose and function of that section.

[64] *Calderwood*, 466.
[65] [2012] WASC 4.
[66] AS: [47].

52. In considering the effect of s 187, it is relevant to refer to the common law position prior to the abolition of the privileges.[67] The purpose of s 187 is to remove the privilege against self-incrimination and the penalty privilege for corporations. At common law, those privileges provided the basis on which a person could in a proceeding resist discovery or seek to have a subpoena set aside. A ready example is provided by *Caltex*, itself. Caltex sought to set aside the Rules Based Notice on the ground of the privilege against self-incrimination.[68]

53. Importantly, s 187 applies to a requirement to "produce a document" not only "under a law of the State" but also "in a proceeding". The reference to a requirement "in a proceeding", read disjunctively from "a law of the State", must be a reference to those requirements that arise by the compulsory processes of a Court, such as a subpoena or discovery. The appellant's Interpretive Principle would have the practical effect of returning to corporations an equivalent protection as that given by the privileges under the common law. This is because a corporation would remain protected from the production of documents in a proceeding, absent some further statutory provision to the contrary. This is inconsistent with a pivotal assumption of s 187, that a corporation may be required to produce incriminating documents in a proceeding. Section 187 is unqualified. It has, to the extent required, by necessary intendment modified the companion principle in its application to proceedings that involve a body corporate.

C.4 Real evidence

54. The arguments above have focused on the proposition that the denial of the privileges to corporations at common law and under s 187 entail the availability of the Court's coercive powers to compel a corporation to produce incriminating documents in a criminal or penalty proceeding against it. The only issue squarely raised by this case is whether the denial of the privileges at common law and under s 187 entails the Court's ability to order discovery of certain specified documents or categories of documents rather than general discovery.[69]

55. The broader submission, that the denial of the privileges and s 187, permits the Court to avail itself of all of its powers to coerce the provision of information (for example the administration of interrogatories) has not been made. The issue does not squarely arise here.

56. In *Caltex*, Mason CJ and Toohey J acknowledged that: "[p]lainly enough the case for protecting a person from compulsion to make an admission of guilt is much stronger than the case for protecting a person from compulsion to produce books or documents which are in the nature of real evidence of guilt and are not testimonial in character."[70] Their Honours reasoned:

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67 See for example *Habib v Nationwide News Pty Ltd* (2010) 76 NSWLR 299[180].

68 *Caltex*, 534: The claim to the privilege was upheld by Deane, Dawson and Gaudron JJ.

69 Unlike a subpoena, rule 29.07 makes an order for discovery in a contempt proceeding subject to a judicial leave filter. An application to interrogate would also be filtered at the leave stage (see Order 30 of the Rules).

70 *Caltex*, 503 (Mason CJ and Toohey J). See also their Honour's observations, 502. Cf 528 (Deane, Dawson and Gaudron JJ). Cf also 553 (McHugh J) where his Honour expressed the view that the denial of the

> Accepting that ... the privilege does protect the individual from being compelled to produce incriminating books and documents, it does not follow that the protection is an essential element in the accusatorial system of justice or that its unavailability in this respect, at least in relation to corporations, would compromise that system. The fundamental principle that the onus of proof beyond reasonable doubt rests on the Crown would remain unimpaired, as would the companion rule that an accused person cannot be required to speak to testify to the commission of the offence charged.[71]

57. A subpoena seeking the documents which are the subject of the discovery order in this case, would plainly not compel any testimonial evidence. The same is true for the discovery order itself. Consistently with the observations of Mason CJ and Toohey J, neither such a subpoena or the discovery order would compromise the accusatorial system. This may be contrasted with the issues raised in *X7* and *Lee 2*, which concerned a departure from the accusatorial nature of the criminal justice system in a fundamental respect.[72]

C.5 Policy justifications for the denial of the privileges

58. As is set out above, in the process of considering whether the privilege against self-incrimination would be denied to corporations at common law, the High Court recognised the impact of this on the maintenance of the accusatorial system. It was recognised that powerful policy reasons, which transcended any impact on the accusatorial system, supported the denial of this privilege. This was particularly so in the case of the compulsory production of real evidence by corporations. The appellant's primary argument in this case, would run counter to those policy considerations identified in *Caltex* which are set out below.

59. **First,** crimes for which corporations are usually prosecuted involve complex documentary material. The impediments to law enforcement are greater when the conduct is that of a corporation.[73] The suggestion that the availability of the privilege to corporations (as a shield to the production of documents) achieves the correct balance between the individual and the state should be rejected out of hand.[74]

60. **Secondly**, such observations have particular force in a case, like the present, that concerns the attribution of corporate responsibility. As was recognised by Brennan J in *Caltex*, the imposition of criminal liability on a corporation depends upon demonstrating that the relevant act or omission was within the scope of authority

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privileges would entail the power to interrogate in a proceeding against a corporation for a penalty. See also *Abbco*, 145-G-146-A (Gummow J).

[71] *Caltex*, 503, 504 (Mason CJ and Toohey J). See also 516 - 517, (Brennan J). Cf *NSW Food Authority v Nutricia* (2008) 72 NSWLR 456. This case concerned an application by the accused to set aside six notices seeking information and/or documents in relation to extant summary criminal proceedings against it. The notices were accurately described as interrogatories: 461 [6]. Spigelman CJ (with whom Hidden and Latham JJ agreed), in holding that the notices should be set aside, recognised the distinction between real evidence and testamentary evidence. However, his Honour observed that no point arising from this distinction was argued in the case: "There was no contention that the Court should consider the issue of the production of documents separately": 468 [32]. See also, 484 - 5 [118].

[72] See *Lee* 2, [31].

[73] *Caltex*, 491, 500 (Mason CJ and Toohey J, 515 (Brennan J), 554 (McHugh J); Ramsay, 'Corporations and Privilege Against Self-Incrimination' (1992) 15 *University of New South Wales Law Journal* 297, 306 - 7; *United States v White* (1944) 322 US 694, 700.

[74] *Caltex*, 500 (Mason CJ and Toohey J).

conferred by the corporation upon the person or persons whose act, omission the corporations liability is said to depend.[75] Importantly, "[p]roof of those additional issues, linking the artificial entity with the relevant elements of the offence, often depends entirely or substantially on proof of documents in the corporation's possession or power".[76]

61. **Thirdly**, incorporation is a benefit conferred by the State, presumably for the benefit of the public. This imports correlative obligations to obey the law and discover documents as a form of accountability.[77]

62. **Fourthly**, corporate documents constitute the best evidence of their business transactions and activities. It makes no sense for a privilege to be available to a corporation in respect of those books and documents when officers of the corporation are bound to testify against the corporation unless they are able to claim the privilege personally.[78]

63. **Fifthly**, corporate documents tend to speak for themselves and are less fallible than oral testimony. If the availability of such documents is restricted, this will force regulatory authorities to place greater emphasis on the testimony of company officers and employees. In turn, this will force the officer or employee into the trilemma of contempt, truthful evidence to the detriment of his employer, or perjury. This in circumstances where the required evidence may be more accurately revealed in the corporation's documents.[79]

64. **Sixthly,** there is a "public interest in the administration of justice that requires that the parties be given a fair trial on all the relevant and material evidence".[80] As was recognised by McHugh J in *Caltex*: "To deprive the corporation's opponent – whether the Crown or a private litigant – of evidence which will assist that party's case is a high price for the administration of justice to pay in return for securing the integrity of the adversary system of justice".[81] This led his Honour to conclude:

> … a strong case can be made in favour of the conclusion that the privilege should not be exercisable by a corporation so as to prevent the prosecution obtaining, by subpoena, documents which are relevant to the issues in criminal proceedings. The documents exist. They can be obtained by search warrant … Why then should this evidence be allowed to remain hidden in the files of the corporation when it is relevant to an issue to be tried in criminal proceedings? It is difficult to see how the administration of justice, even under the adversary system of criminal justice can be advanced by allowing a corporation to refuse to produce documents on subpoena simply because the documents tend to incriminate the corporation. If a corporation can refuse to produce documents, the public interest in detecting and punishing crime is diminished so that the integrity of the adversary system can be maintained for the benefit of an artificial entity. This is much too high a price to pay for allowing corporations to claim the privilege.[82]

[75] *Caltex*, 514 - 515 (Brennan J).
[76] *Caltex*, 515 (Brennan J).
[77] *Caltex*, 490 - 491 (Mason CJ and Toohey J); *Hale v Henkel* (1906) 201 US 43, 69 - 70.
[78] *Caltex*, 504 (Mason CJ and Toohey J); *Reg v Anway Corp* [1989] 1 SCR 21, 41.
[79] *Caltex*, 504 (Mason CJ and Toohey J).
[80] *Sankey v Whitlam* (1978) 142 CLR 1, 95-96 (Mason J), referred to in *Caltex*, 553 (McHugh J).
[81] *Caltex*, 555 - 556 (McHugh J).
[82] *Caltex*, 556 (McHugh J).

65. Moreover, a number of these considerations carry particular weight in a contempt proceeding, where the moving party is unlikely to be able to have recourse to any coercive powers of investigation, such as a search warrant. This may support the relaxation of any accusatorial notions that attend such a proceeding. As this Court held in *Witham v Holloway* although proceedings for contempt are essentially criminal in nature that is not to equate them with the trial of a criminal charge.[83]

D The appellant's other arguments

66. The appellant contends at AS: [21]-[31] that discovery is a process that is antithetical to an accusatorial proceeding. However, this reflects the now historical principle, embodied in the penalty privilege, that "none shall be obliged to discover what may tend to subject him to a penalty, or to that which is in the nature of a penalty".[84]

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67. The significance of the denial of the privileges, particularly the penalty privilege, is that assumptions about what procedures, such as discovery, were for, are no longer valid. As the Court of Appeal observed: "[i]t has long been a truism that discovery is not available against an accused in a criminal proceeding. *Caltex*, did, after all, represent a radical shift in the law as it had long been understood".[85]

68. The appellant contends[86] that the Rules do not, expressly or by necessary intendment, provide for discovery in proceedings under Order 75. This rests on its further contention that the Interpretive Principle applies. This is addressed in Part C above. To the extent that the appellant advances any separate argument as to the construction of the Rules, the Attorney-General submits:

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(a) the proceeding was commenced under Order 75 of the Rules. This is consistent with the longstanding principle that contempt proceedings operate in the civil jurisdiction of the Court;

(b) contrary to the submission of the appellant, Order 75 is not a "self contained order".[87] It is not a code. It must operate in conjunction with other rules outside that order. For example, r. 75.06 refers to an affidavit, but Order 43 supplies the formal requirements for an affidavit.[88] Moreover, the appellant properly concedes that the subpoena procedure under the Rules attaches to a contempt proceeding brought under r. 75.06 (however the appellant contends that such a regime is confined to third party subpoenas);

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(c) the Court of Appeal has held, correctly, that the entirety of the Rules apply prima facie to proceedings brought under Order 75 in relation to alleged contempts of court.[89]

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[83] *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ).
[84] *Abbco*, 118-G (Burchett J).
[85] COA Decision, [305].
[86] AS: [46]-[50].
[87] AS: [53].
[88] See also, for example, Order 7 (service), Order 46 (applications on summons).
[89] *CFMEU v Boral Resources (Vic) Pty Ltd & Ors* [2013] VSC 378) [10] (Beach JA with Osborn JA agreeing).

E. Substantial Injustice

69. The application before the Court of Appeal was for leave to appeal an interlocutory order, pursuant to ss 10 and 17A(4)(b) of the *Supreme Court Act* 1986 (Vic). Consistent with the principle described in *Niemann v Electronic Industries Ltd* (***Niemann***),[90] this required consideration of two questions: is the decision below attended with sufficient doubt to warrant the grant of leave and would substantial injustice be caused if the decision was allowed to stand.

70. Applying *Niemann*, the Court of Appeal held that there was "no answer" to the respondents' submission that leave to appeal should be refused, "at least on the basis that the [appellant] will suffer no substantial injustice if the order for discovery is permitted to stand".[91] This was because the documents in question could otherwise have been obtained by the simple device of issuing one or more subpoenas for production.

71. The appellant submits that the Court of Appeal wrongly applied the principle in *Niemann*.[92] In developing this argument, the appellant seeks limit the scope of the concept "substantial injustice". It submits that the purpose of the requirement of leave was "that leave would not be granted to appeal an interlocutory order, and so fracture and delay the proceeding, if the question of whether that order was wrong could be dealt with at a subsequent stage without causing substantial injustice".[93] From this platform, the appellant submits that "*Niemann* does not suggest that whether a substantial injustice arises can be measured by some other hypothetical exercises of power that are not in issue in the proceeding".[94]

72. This argument is misconceived. The concept of "substantial injustice" is not so confined. The object of the requirement that an appeal lies only from an interlocutory order only by leave is to reduce appeals from these orders as much as possible.[95] As was explained by Fullagar J in *BHP Petroleum Pty Ltd v Oil Basins Ltd*:

> It must not be forgotten that the general requirement of showing substantial injustice is an expression of Judges, not of a statute, and that it was expressed simply as a guideline for the exercise of what must necessarily be and remain a broad discretion to grant or withhold leave to appeal.[96]

73. The test of substantial injustice focuses attention on the practical consequences if the impugned order stands. To do so is not to engage in an impermissible 'hypothetical'. This is demonstrated by the decision of the Court of Appeal (Tadgell, Chernov and Charles JJA) in *Brereton v Sinclair*.[97] In that case, a police informant charged an accused with statutory assault. An interlocutory order was made, the effect of which was that the charge alleging statutory assault was time-barred. In refusing the

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90 *Niemann v Electronic Industries Ltd* [1978] VR 431.
91 COA Decision, [447].
92 AS: [57].
93 AS: [58].
94 Ibid.
95 *Perry v Smith* (1901) 27 VLR 66; *Darrell Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd* [1969] VR 401, 408; Cf AS: [58].
96 *BHP Petroleum Pty Ltd v Oil Basis Ltd* [1985] VR 756, 759 (Fullagar J).
97 *Brereton v Sinclair* (2000) 2 VR 424, [31] (Chernov JA).

informant's application for leave to appeal from that order, the Court reasoned that there would be no substantial injustice because even if the statutory assault charge was time-barred, it would have been open for a charge of common law assault to be laid.

74. A subpoena directed to the appellant under Order 42 would require the appellant to produce the specified documents specified in the discovery order. As a consequence of the denial of the privileges, it is not open to the appellant to refuse or fail to comply with the requirement on the grounds of the privileges.[98] As to a subpoena addressed to an officer of the appellant, that officer could also not object or seek to set aside the subpoena.[99] Such a subpoena invokes no accusatorial notions.

10 75. As the Court of Appeal held, in light of the availability of subpoenas against the appellant or its officers, no substantial injustice flows from the discovery order.[100]

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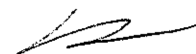
JONATHAN B DAVIS
Aickin Chambers
T 9225 7999
20 F 9225 7728
davisj@vicbar.com.au



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BENJAMIN W JELLIS
Joan Rosanove Chambers
T 9225 6592
F 9225 7728
jellis@vicbar.com.au

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98 See *Caltex*, 551; *Workcover Authority of NSW v Crown in Right of NSW* [2000] NSWIRComm 234.

99 See fn 15 above. It is implicit that the Court of Appeal inferred that subpoenas issued to such officers would result in production of the same documents as those which are the subject of the discovery order.

100 COA Decision, [477] - [479].