IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M18 of 2015

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

APPELLANT'S SUBMISSIONS

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Part I: Publication

1. The Appellant certifies that these submissions are in a form suitable for publication on the internet.

Part II: Issue on the Appeal

2. Did the Court of Appeal of the Supreme Court of Victoria err in deciding that the coercive processes for discovery (and for the production of documents by subpoena) may be engaged where punishment is sought for contempt of court orders?

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

3. The Appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and submits that no such notice should be given.

Part IV: Judgments below

4. The decision of the Court of Appeal is not reported. The medium neutral citation is *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd & Ors* [2014] VSCA 261.

5. The decision of Digby J on appeal in the Supreme Court is not reported. The medium neutral citation is *Boral Resources (Vic) Pty Ltd & Ors v Construction, Forestry, Mining and Energy Union & Anor* [2014] VSC 120.

6. The first instance decision of Daly AsJ in the Supreme Court is not reported or published on the internet. It is provided in the Appeal Book.

Part V: Factual matters

7. The First to Sixth Respondents ("the Boral parties"), by summons dated 22 August 2013 and issued pursuant to Rule 75.06 of Chapter I of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) ("the Rules"), sought orders in the Supreme Court of Victoria that the Appellant be punished for contempt of court constituted by alleged disobedience in relation to orders made by the Supreme Court on 5 April 2013.

8. By summons dated 2 October 2013, the Boral parties sought orders requiring the Appellant to make discovery of documents in accordance with Rule 29.07 for the purpose of proving the Appellant's liability for the actions of Mr Joe Myles, who is alleged to have performed the relevant disobedient acts.

9. On 23 October 2013, the summons for discovery was dismissed by Daly AsJ.

10. The Boral parties appealed the decision of Daly AsJ.

11. On 25 March 2014, Digby J delivered judgment in the appeal brought by the Boral

parties.[1] Justice Digby decided that the Rules applied to a contempt proceeding under O 75, subject to the appropriate exercise of discretion,[2] and ordered that the Appellant make discovery of the documents sought in the Boral parties' discovery summons.[3]

12. The Appellant sought leave to appeal the decision of Digby J to the Court of Appeal.

13. On 24 October 2014, the Court of Appeal refused the Appellant leave to appeal on the basis that no substantial injustice would be occasioned by the order for discovery because the documents sought to be discovered could be sought by a subpoena to produce.[4] The Court of Appeal also said it would have dismissed the appeal on the implicit basis that *Environmental Protection Authority v Caltex Refining Company Pty Ltd*[5] (***Caltex***) had abolished the privilege against self-incrimination for corporations, and that no other bar to discovery existed.[6]

Part VI: Argument

14. The Court of Appeal erred in deciding as it did because:

    a. discovery is a process that is inconsistent with accusatorial proceedings;

    b. *Caltex* does not alter that proposition;

    c. the Rules, properly construed, do not otherwise provide; and

    d. the Court of Appeal was wrong to dispose of the matter by reference to the hypothetical availability of subpoenas.

a) Discovery is a process that is inconsistent with accusatorial proceedings

i) Proceedings brought to punish an alleged contemnor for breach of court orders are accusatorial proceedings

15. In Australia, all charges of contempt must be proven beyond reasonable doubt. This was decided in *Witham v Holloway*[7] (***Witham***). In a joint judgment, Brennan, Deane, Toohey and Gaudron JJ stated that because "'all proceedings for contempt must realistically be seen as criminal in nature'... [t]he consequence is that all charges of contempt must be proved beyond reasonable doubt."[8] Writing separately, McHugh J similarly held that all contempts must be "proved according to the criminal standard of proof".[9]

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[1] *Boral Resources (Vic) Pty Ltd & Ors v CFMEU & Anor (Ruling)* [2014] VSC 120 (**Digby J decision**).
[2] Digby J decision at [34].
[3] Digby J decision at [167].
[4] *Construction Forestry Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd & Ors; Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd & Ors* [2014] VSCA 261 (**Court of Appeal decision**) at [477]-[479].
[5] (1993) 178 CLR 447 (***Caltex***).
[6] Court of Appeal decision at [502]-[505].
[7] (1995) 183 CLR 525 (***Witham***).
[8] *Witham* at 534.
[9] *Witham* at 545.

16. Proof beyond reasonable doubt is a common law concept[10] that entails two fundamental principles. The first is that the prosecution is required to prove the guilt of the accused person.[11] The second, or companion, principle is that the prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.[12]

17. In the application of the companion principle, a distinction has, on occasion, and not without criticism,[13] been drawn between testimonial evidence and documentary evidence. This distinction has been drawn on the basis that it is only the privilege against self-incrimination that protects an accused in criminal proceedings, and that this privilege only applies to testimonial evidence.[14] This reasoning, however, fails to recognise that it is the standard of proof beyond reasonable doubt, and the principles that inhere within that standard, that give rise to the requirement that the prosecution must prove its case without the assistance of the accused. The drawing of a distinction between testimonial and documentary evidence is inconsistent with, and undermines the integrity of, the standard of proof beyond reasonable doubt.[15]

18. Because proof beyond reasonable doubt requires the prosecution to meet that standard without any assistance from the accused, proceedings based on that standard of proof are characterised as "accusatorial" proceedings.[16] As Gaudron, Gummow, Kirby and Hayne JJ stated in *Azzopardi v The Queen*[17], "[t]he fundamental proposition from which consideration of the present matters must begin is that a criminal trial is an accusatorial process, in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt".[18] Although those statements were made in the context of a criminal trial, the two fundamental principles acknowledged above, and therefore the accusatorial nature of the proceedings, stem from the standard of proof rather than the classification of proceedings as criminal or civil.[19] Contempt proceedings, including those brought to punish an alleged contemnor for breach of court orders, require proof beyond reasonable doubt; they are accusatorial proceedings.[20]

ii) Discovery is a process that is inconsistent with accusatorial proceedings

1. Discovery and its origins

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[10] *Woolmington v DPP* [1935] AC 462.
[11] *Lee v The Queen* (2014) 308 ALR 252 (*Lee 2*) at 260 [32].
[12] *Lee 2* at 260 [33].
[13] *Caltex* at 528 per Deane, Gaudron and Dawson JJ.
[14] *Caltex* at 502 per Mason CJ and Toohey J.
[15] *Caltex* at 528 per Deane, Dawson and Gaudron; at 550-551 per McHugh J.
[16] *RPS v The Queen* (2000) 199 CLR 620 at 630 [22]; *Azzopardi v The Queen* (2001) 205 CLR 50 (*Azzopardi*) at 64 [34] per Gaudron, Gummow, Kirby and Hayne JJ.
[17] (2001) 205 CLR 50.
[18] *Azzopardi* at 64 [34] per Gaudron, Gummow, Kirby and Hayne JJ.
[19] Indeed, the distinction between civil and criminal proceedings, as a means for determining appropriate procedure, has been recognised as, "at best, unstable": *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 200 [121] per Hayne J.
[20] Contempt proceedings were expressly characterised as such in *Jones v ACCC* (2010) 189 FCR 390 at 409 [34].

19. Discovery is, at its heart, a court order in civil proceedings requiring a respondent to assist a plaintiff with the discharge of the burden of proof. To so understand discovery, it is necessary to examine its origins.

20. The concept of discovery first arose in the English Courts of Equity. Prior to 1854, English common law courts had no power to enforce discovery.[21] There was a concern that:[22]

> [f]rom the mode of proceeding at common law, a man with the full knowledge of facts which would show the truth and justice of the case, may, by concealing those facts within his own breast, and merely for want of disclosure or evidence, succeed in recovering a demand which he knows to be satisfied, or in resisting a demand which he knows to be just.

21. The Courts of Equity considered this to be "against conscience".[23] A party to a civil action at common law could therefore file a bill for discovery in the Court of Chancery and equity would intervene to require an opposing party to provide information, admissions and documents.[24] A number of 18th and 19th century cases confirm this understanding of discovery. In *Montague v Dudman*[25], the Lord Chancellor stated the general principle:

> A bill of discovery lies here in aid of some proceedings in this court in order to deliver the party from the necessity of procuring evidence, or to aid the proceedings in some suit relating to a civil right at common law, as an action; but not to aid the prosecution of an indictment or information, or to aid the defence of it.

22. In *Attorney-General v Duplessis*[26], the Attorney-General brought proceedings to assert the King's title to lands in the possession of Mrs Duplessis and her infant daughter, on the basis that they were aliens who could not assert title to the lands.[27] The Attorney-General had sought an order for discovery to compel Mrs Duplessis to discover whether she was alien or not.[28] The Lord Chancellor, affirming the order on appeal, declared that:[29]

> the Crown had a right to discovery ... the same right that every subject had to discovery; either to supply evidence, or to prevent expense and delay in procuring evidence, which would be infinite in the present case, if commissions were to be sent abroad, to examine witnesses relating to her birth.

23. In *Flight v Robinson*[30] (*Flight*), the defendants had sought specific performance of a contract by which the plaintiff, Flight, had agreed to purchase a property in which they

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[21] *Melbourne Steamship Company Limited v Moorehead* (1912) 15 CLR 333 at 349 per Isaacs J; Edward Bray, *The Principles and Practice of Discovery* (1885) (**Bray**) at 4.
[22] *Storey v Lord George Lennox* (1836) 1 Keen 341 at 350 (***Storey***).
[23] *Storey* at 350.
[24] Bray at 4.
[25] (1751) 2 Ves. Sen. 397 at 398.
[26] (1752) Parker 144 (***Duplessis***).
[27] *Duplessis* at 144.
[28] *Duplessis* at 156.
[29] *Duplessis* at 164.

had an interest. Flight brought a cross-bill of discovery against the defendants for the purpose of procuring documents tending to affect the validity of the contract.[31] The defendants admitted that they had relevant papers in their possession, but said that those papers were confidential and that they ought not be required to produce them.[32] In deciding the matter, Lord Langdale MR observed that an order for discovery required a defendant to provide all information and evidence in his or her possession material to the plaintiff's case:[33]

> every Defendant is bound to discover all the facts within his knowledge, and to produce all documents in his possession which are material to the case of the Plaintiff. However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes, or thinks in relation to the matters in question.

24. The purpose that discovery was said to serve was:[34]

> The greatest security which the nature of the case is supposed to admit of is afforded, for the discovery of all relevant truth, and by means of such discovery, this Court, notwithstanding its imperfect mode of examining witnesses, has, at all times, proved to be of transcendent utility in the administration of justice. It need not be observed, what risks must attend all attempts to administer justice, in cases where relevant truth is concealed, and how important it must be to diminish those risks.

25. Lord Langdale MR accepted, however, that an exception to these general principles was that professional advice and confidential communications should not be disclosed. Documents falling within that exception were not required to be discovered.

26. In 1885, Edward Bray, in *The Principles and Practice of Discovery*, defined discovery as:[35]

> the right by which a party to some proceedings (actually commenced or contemplated) before a civil court is enabled, before the determination of any matter in question in those proceedings, to extort on oath from another party to those proceedings – (1) all his knowledge, remembrance, information and belief ... concerning the matter so in question; (2) the production of documents in his possession or power relating to such matter.

27. An originating purpose of discovery can therefore be seen to be diminishing or relieving the burden of proof borne by a plaintiff, by way of court-ordered assistance from the respondent.

2. Power of the Supreme Court of Victoria to order discovery derived from the power possessed by the English Courts of Equity

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[30] (1844) 8 Beav 22 (***Flight***).
[31] *Flight* at 22.
[32] *Flight* at 33.
[33] *Flight* at 34.
[34] *Flight* at 34.
[35] Bray at 1.

28. The Supreme Court of the Colony of Victoria was established in 1852. The Court was granted: the same common law jurisdiction over civil pleas as the Courts of Queen's Bench, Common Pleas and Exchequer of Pleas at Westminster had in England; the same criminal law jurisdiction as the Court of Queen's Bench and the Central Criminal Court in London; and the same equitable jurisdiction as the Chancery Court of England, which included the same power to order discovery.[36] In 1883, the common law and equitable jurisdictions of the Court were fused by the *Judicature Act 1883* (Vic) such that legal and equitable jurisdictions could be exercised in "every civil cause or matter".[37] Schedule 2 of the *Judicature Act 1883* provided for "Rules of Court", including, in O 31, rules relating to discovery and interrogatories. The Supreme Court of the Colony of Victoria became the Supreme Court of Victoria in the *Supreme Court Act 1890*,[38] at which time its jurisdiction and powers were continued under its constituting Act.[39]

29. The rules around discovery have since been adapted to suit modern litigation. Discovery in Victoria is now regulated by O 29 of the Rules. However, the general nature and purpose of modern discovery remain unchanged: to diminish or relieve a moving party in civil proceedings from its onus of proof. In a passage recently endorsed by the High Court of Australia, Lord Diplock described the contemporary practice of discovery as:[40]

> [t]he practice of compelling litigating parties in the course of preparing for trial of a civil action to produce to one another, for inspection and copying, all documents in their possession and control which may contain information that may, either directly or indirectly, enable that other party either to advance his own cause or to damage the case of his adversary or which may fairly lead to a chain of inquiry which may have either of these two consequences.

30. The Court further endorsed Lord Diplock's comment that "[t]he use of discovery involves an inroad, in the interests of achieving justice, upon the right of the individual to keep his own documents to himself".[41] These words reflect those of Lord Langdale MR in *Flight*, where his Lordship accepted that however disagreeable discovery may be to a respondent, its ultimate purpose is to elicit the truth in order to serve the administration of justice.

3. An order for discovery is inconsistent with the concept of proof beyond reasonable doubt

31. A practice that requires a respondent to assist a plaintiff to discharge its burden of proof is inconsistent with an accusatorial proceeding applying the criminal standard: proof

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[36] *An Act to make provision for the better Administration of Justice in the Colony of Victoria* (1852) 15 Vict No 10, ss 10, 11 and 14.
[37] *The Judicature Act* (1883) 47 Vict No 761, s 8 where "cause" was defined as "any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown", and "matter" as "every proceeding in the Court not in a cause".
[38] *An Act to Consolidate the Law Relating to the Supreme Court* (1890) 54 Vict. No 1142 (***Supreme Court Act 1890***).
[39] *Supreme Court Act 1890*, Part II Constitution, Jurisdiction, Powers and Duties of Court and Judges.
[40] *Home Office v Harman* [1983] 1 AC 280 at 299 per Diplock LJ, paraphrased in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 (***Expense Reduction***) at 319 [44].
[41] *Expense Reduction* at 319 [44].

beyond reasonable doubt.

b) *Caltex* did not decide that discovery is permissible in accusatorial proceedings

i) What was decided, and what was obiter, in Caltex?

32. *Caltex* does not stand for the proposition that the Supreme Court of Victoria may order discovery in a contempt proceeding. Nor does it support this proposition by analogy.

33. The relevant facts in *Caltex* are as follows. Caltex Refining Co Pty Ltd had been charged in the Land and Environment Court of New South Wales with offences under the *State Pollution Control Commission Act 1970* (NSW) and the *Clean Waters Act 1970* (NSW). The prosecutor served on Caltex two notices requiring the production of identical documents: a notice pursuant to s 29(2)(a) of the *Clean Waters Act 1970* (NSW) (**the statutory notice**) and a notice to produce under the rules of the Land and Environment Court (**the rules-based notice**). The key issue before the High Court was whether Caltex could rely on the privilege against self-incrimination to resist the notices to produce.

34. Four members of the Court (Mason CJ, Toohey, Brennan and McHugh JJ) held that Caltex could not resist the statutory notice. However a different majority (Brennan, Deane, Dawson and Gaudron JJ) held that Caltex could resist the rules-based notice. The reasons need to be broken down in order to understand precisely what was decided in *Caltex*, and how the decision relates to the issue in this case.

35. In *Caltex*, Mason CJ and Toohey J held that the privilege against self-incrimination was not available to corporations.[42] This was on the basis that neither of the two rationales underpinning the privilege — (1) the protection of individuals from being compelled to testify, on pain of excommunication or physical punishment, to their own guilt, and (2) the striking of a fair balance between an individual and a well-resourced State — required the privilege be available to corporations.[43] Chief Justice Mason and Toohey J specifically rejected the argument that the privilege was necessary to maintain the integrity of the accusatorial system of criminal justice.[44] Their Honours considered that the companion principle was "primarily directed against a requirement to testify or admit guilt"[45] and that although that protection had, over time, been extended to documentary evidence, that extended operation was not "an essential element in the accusatorial system of justice".[46] Their Honours also considered that the passage of a number of statutes interfering with the availability of the privilege to corporations indicated that "the privilege, at least in so far as it relates to production of corporate documents, is not a fundamental aspect of the accusatorial criminal justice system".[47] Because the privilege

[42] *Caltex* at 504, 507-508.
[43] *Caltex* at 499-500.
[44] *Caltex* at 500-502
[45] *Caltex* at 501.
[46] *Caltex* at 503.
[47] *Caltex* at 504.

was not available to corporations, their Honours held that Caltex could not resist either notice.

36. Justice Brennan, writing alone, took a different approach. In respect of the statutory notice, his Honour construed s 29(2)(a) as excluding the privilege against self-incrimination.[48] His Honour held that the purpose of the power to require documents be produced under s 29(2)(a), namely to enable authorised officers to check the discharge of pollutants from premises, would be frustrated if the privilege were available.[49] Having construed s 29(2)(a) in this manner, Brennan J stated that it was not necessary to decide whether corporations could claim the privilege against self-incrimination.[50] However, his Honour went on to say that "as that was the chief issue addressed in argument, I should express an opinion on it".[51] His Honour reasoned that because the privilege was designed to confer an immunity from an obligation to testify to one's own guilt, and to protect human dignity, it was irrelevant to a corporation.[52] Justice Brennan further reasoned that, in practice, the availability of the privilege would frustrate the prosecution of corporations.[53] His Honour therefore observed that the privilege should not be available to corporations, and that Caltex was bound to comply with the statutory notice.[54] However, given that s 29(2)(a) was held to exclude the privilege, his Honour's observations on the availability of the privilege to corporations were obiter.

37. In respect of the rules-based notice, Brennan J held that it could not issue because a court could not exercise its powers to compel discovery in a criminal or civil proceeding in which a penalty was sought.[55] His Honour observed that courts had traditionally "embodied under the rubrics of privilege the circumstances in which they will refuse to exercise their powers to order discovery, the production of documents, and the giving of testimony".[56] His Honour considered that although the privilege against self-incrimination would not operate to protect a corporation, there was another privilege that would; the privilege against self-exposure to a penalty. This was because that the penalty privilege was not concerned with the protection of human dignity, but with the equitable concern that a defendant in penalty proceedings should not be compelled to provide the evidence necessary to establish one's own liability.[57] Because it would be incongruous to allow discovery against a corporation in a criminal but not civil proceeding, and because penalties could be imposed on a corporation in either criminal or civil proceedings, his Honour held "corporations exempt from an obligation to give discovery in any proceedings brought to enforce a liability to a penalty, whether criminal or civil, unless a

[48] *Caltex* at 511-512.
[49] *Caltex* at 511.
[50] *Caltex* at 512.
[51] *Caltex* at 512.
[52] *Caltex* at 512, 514
[53] *Caltex* at 516.
[54] *Caltex* at 516.
[55] *Caltex* at 509, 518.
[56] *Caltex* at 518.
[57] *Caltex* at 519.

statute or a rule of court otherwise provides expressly or by necessary intendment".[58]

38. Contrary to the reasons of Mason CJ, Toohey and Brennan JJ, in a joint judgment Deane, Dawson and Gaudron JJ held that the privilege against self-incrimination was available to corporations. Their Honours held that the basic adversarial procedure of the criminal law could not be explained solely by reference to specific immunities such as the privilege against self-incrimination.[59] Rather, it was:[60]

> to be explained by the principle, fundamental in our criminal law, that the onus of proving a criminal offence lies upon the prosecution and that in discharging that onus it cannot compel the accused to assist it in any way.

10 39. Because this was the foundation of their Honours' reasoning, they rejected the proposition that any distinction could be drawn between testimonial and documentary evidence for the purposes of the privilege against self-incrimination. [61] Their Honours also held that the privilege should not be denied to corporations on the basis that it "may trouble the conscience less because a corporation 'has no body to be kicked or soul to be damned'".[62] Instead it was said to be necessary to have regard to the principles underpinning the privilege and the purpose the privilege serves, namely 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".[63] Their Honours also emphasised that the denial of the privilege to corporations under statute should not be taken to
20 undermine corporate possession of the privilege at common law, but rather as recognition of it. Finally, their Honours concluded that, to the extent that pragmatism required that the privilege be abrogated to facilitate prosecution, this was better carried out by the legislature. Their Honours thus held that Caltex should be able to invoke the privilege against self-incrimination to resist the rules-based notice.[64] In respect of the statutory notice, for reasons of statutory construction, their Honours held that it was invalidly issued and should be dismissed.[65]

40. Justice McHugh, in the final set of reasons, approached the matter on the basis of "what 'ought to be' the common law of this country".[66] His Honour acknowledged that the privilege first arose to "protect the dignity and privacy of an accused person" in the
30 nature of a human right,[67] but also observed that the privilege served to maintain the integrity of the accusatorial system.[68] His Honour stated that:[69]

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[58] *Caltex* at 520-521.
[59] *Caltex* at 527.
[60] *Caltex* at 527, 532.
[61] *Caltex* at 528.
[62] *Caltex* at 532.
[63] *Caltex* at 532-533.
[64] *Caltex* at 534, 535.
[65] *Caltex* at 537.
[66] *Caltex* at 543.
[67] *Caltex* at 545, 548.
[68] *Caltex* at 546.
[69] *Caltex* at 550-551.

> [i]f the prosecution could compel the answering of questions in the course of the trial and the answering of interrogatories and the production of documents for the purposes of the trial, the burden of proof on the prosecution would be immeasurably lightened and, in the case of the guilty, frequently discharged.

41. However, McHugh J held that the "public interest in the adduction of relevant evidence in civil and criminal proceedings outweighs the detriments associated with refusing to allow corporations to claim the privilege".[70] His Honour therefore held that the Court "*should* hold, therefore, that a corporation cannot claim the privilege against self incrimination".[71]

10 *ii) Caltex did not resolve the issue of whether discovery can be granted in contempt proceedings*

42. *Caltex* has been interpreted as holding, by majority, that the privilege against self-incrimination is not available to corporate defendants.[72] That majority is said to be composed of Mason CJ and Toohey J, Brennan J and McHugh JJ – though, as noted above, the reasons of Brennan J on this point were obiter.

43. At the time that it was decided, *Caltex* also stood for the proposition that a court rules-based notice to produce documents could not issue against a corporation in criminal proceedings. The majority in support of that proposition was Brennan J together with Deane, Dawson and Gaudron JJ. Following the decision of *Trade Practices Commission*
20 *v Abbco IceWorks Pty Ltd*[73], in which a majority of the Full Court of the Federal Court of Australia held that corporations do not enjoy the penalty privilege, a controversy has arisen over whether *Caltex* should now also stand for the proposition that a corporation cannot resist a rules-based notice to produce.[74] This appears to flow from Brennan J's observations that the penalty privilege was available to a corporation.

44. However, no combination of reasons in *Caltex* can form a majority in support of the proposition that, in the absence of the penalty privilege, discovery may be ordered against a corporate defendant in accusatorial proceedings. While Mason CJ, Toohey and McHugh JJ may be attributed with this position, Brennan J expressly concluded that a court *could not* order discovery in civil or criminal proceedings where a penalty was

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[70] *Caltex* at 556.
[71] *Caltex* at 556 (emphasis added).
[72] *Daniels Corporation International Ltd v ACCC* (2002) 213 CLR 543 at 559 [31] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[73] (1994) 52 FCR 96 (*Abbco*).
[74] See, for example, *Calderwood v SCI Operations* (1995) 63 IR 49 at 58 per Gray J and *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 at 474 [63]-[66] per Spigelman CJ, Hidden J agreeing at 497 [201], Latham J agreeing at 497 [202]. This controversy is not settled by reference to decisions dealing with civil penalty proceedings: (see, for example, *Abbco* at 129-130 per Burchett J: "once given that a corporation cannot claim the benefit of the privilege against self-incrimination, there is no sound reason why a proper authority, suing a corporation for a civil penalty, should not have the assistance ordinarily given to a litigant in the Court with respect to discovery and production of documents", Black CJ agreeing at 99, Davies J agreeing at 99. The nature of civil penalty proceedings, in any event, differs in key respects from contempt including because in the former allegations are not required to be proven beyond reasonable doubt and no criminal conviction can be imposed.

sought. How Brennan J would have ruled on the validity of the rules-based notice absent the penalty privilege is unknown. His Honour did not decide that absent the penalty privilege, a corporation could not resist the rules-based notice; his Honour simply observed that the penalty privilege would stand in the way of discovery. It was not necessary for Brennan J to consider whether any other principles would also stand in the way of discovery. *Caltex* provides no support, by way of a majority, for the proposition that discovery may be ordered against a corporation in criminal proceedings or in proceedings where a penalty is sought. There is, on this point, simply no clear High Court ratio.

45. The proposition that *Caltex* should not be interpreted as allowing for an order for discovery against a corporate accused in an accusatorial system is supported by *X7 v Australian Crime Commission*[75] (***X7***), *Lee v New South Wales Crime Commission*[76] (***Lee 1***) and *Lee v The Queen*[77] (***Lee 2***). These decisions place reliance on the joint judgment of Dawson, Deane and Gaudron JJ, who formed a majority with Brennan J in relation to the rules-based notice. Furthermore, as stated by Kiefel J in *Lee 1* and as unanimously affirmed by the Court in *Lee 2*, while the privilege against self-incrimination may be lost, the principle that the prosecution is to prove the guilt of an accused person remains.[78] Corporations may have lost the privilege against self-incrimination, but the prosecuting party must still prove the guilt of an alleged contemnor beyond reasonable doubt. This standard of proof prohibits the prosecution from requiring an alleged contemnor to assist with establishing liability. Discovery, therefore, cannot be ordered against a corporate defendant in contempt proceedings.

c) Properly construed, the Rules do not otherwise provide

46. As set out above, the common law principles that inhere in the standard of proof beyond reasonable doubt are inconsistent with an order for discovery and the equitable principles that underlie such an order. *Caltex* does not affect those principles.

47. Common law principles may, however, be altered by legislation (and valid rules made under that legislation) that so provides either expressly or by necessary implication. The principle of legality requires that where such a law or rule seeks to depart from a fundamental principle, that intention must be "expressed with irresistible clearness … It will usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to so abrogate or restrict and has determined to do so".[79] The question in this case is whether the Rules clearly provide for

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[75] (2013) 248 CLR 92 (*X7*).
[76] (2013) 251 CLR 196 (*Lee 1*).
[77] (2014) 308 ALR 252 (*Lee 2*).
[78] *Lee 2* at 260 [32].
[79] *X7* at 153 [158] per Kiefel J. See on a related point, *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 at 487-488 [136] per Spigelman CJ, Hidden J agreeing at 497 [201], Latham J agreeing at 497 [202]: "It is sufficient for present purposes to conclude that the administration of detailed interrogatories for the purpose of proving elements of the offence the subject of extant charges, is such a significant impingement upon

discovery in proceedings under O 75, being accusatorial proceedings leading to punishment, where the systemic requirement would ordinarily be, at least, to prove the case without resort to the accused. This requires an examination of the terms of O 75.

48. Rule 75.01 provides that, "[i]n this order, unless the context or subject matter otherwise requires, "respondent" means a person guilty or alleged to be guilty of contempt of court".

49. Rules 75.02 – 75.04 provide for procedures to be adopted specifically in respect of contempt in the face of Court.

50. Rule 75.06 provides for the procedure to be adopted in respect of all forms of contempt, including the contempt alleged against the Appellant in the present case. In particular:

a. sub-rule 75.06(1) provides that an "application for punishment for the contempt shall be by summons or originating motion in accordance with this Rule";

b. sub-rule 75.06(2) provides that where the contempt is committed by a party in relation to a proceeding in the Court, the application shall be made by summons in the proceeding;

c. sub-rule 75.06(3) provides that where sub-rule (2) does not apply, the application shall be made by originating motion which shall be entitled "The Queen v" the respondent, "on the application of" the applicant, and shall require the respondent to attend before a Judge of the Court;

d. sub-rule 75.06(4) provides that the summons must "specify the contempt with which the alleged contemnor is charged"; and

e. sub-rule 75.06(5) provides that the summons or originating motion, and a copy of every supporting affidavit, must be served personally on the alleged contemnor.

51. Rule 75.10 provides that where "the Court finds that a respondent is guilty of contempt of court", Rule 75.11 applies.

52. Rule 75.11 provides for the following punishments for contempt:

a. under sub-rule 75.11(1), the Court may punish a natural person for contempt by committal to prison or fine or both;

b. under sub-rule 75.11(2), the Court may punish a corporation for contempt by sequestration or fine or both;

c. under sub-rule 75.11(3), the Court may commit a natural person to prison until a fine imposed under sub-rule 75.11(1) is paid; and

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the integrity of the courts that Parliament should not be understood to intend that a statutory power can be so

d. under sub-rule 75.11(4), the Court may make an order for punishment on terms, including a suspension of punishment.

53. Order 75 may fairly be described as a self-contained order. It specifies that contempt proceedings must be conducted according to specific rules within that order. It creates a special definition of "respondent", and uses language that is not found elsewhere in the Rules: "guilty", "punish", "charged". It sets out a process unique to that order by which the prosecution is required to specify the nature of the allegation, to support that allegation by affidavit evidence, and to serve the documents personally on the accused. It makes no express provision for discovery or coercive processes to be exercised under O 75. It cannot be implied that discovery orders may be imported from elsewhere in the Rules. The specific terms of O 75, and the carefully prescribed nature of the scheme that it creates, do not permit the implication of inconsistent orders that would subvert that scheme.[80] Order 75 clearly places the burden of proof on the prosecuting party, consistently with the common law requirement that such charges be proven beyond reasonable doubt. The Rules are consistent with the relevant common law principles.

54. That O 75 should be construed as a self-contained order is consistent with the nature of the inherent power that it regulates.[81] The power of the Supreme Court to punish for contempt of court is a power that is inherent in a superior court,[82] implied from its status as a court of record,[83] and inherited from the English Courts at Westminster Hall.[84] It is a power that exists independently of the Rules and of either the civil or criminal jurisdiction. As an inherent power of the Supreme Court, it was not necessary to specify that contempt was an independent power in the statute that created the Supreme Court of the Colony of Victoria.[85] This point is, however, well illustrated in the statute that established the Courts of General Sessions in the Colony of Victoria in 1852, in which s 7 provided for the Courts' power to punish for contempt of court; s 8 for the Courts' civil jurisdiction; and s 9 for the Courts' criminal jurisdiction.[86] Order 75 should be seen as regulating the exercise of the Supreme Court's contempt power in the civil jurisdiction, in a similarly self-contained manner.

55. To so construe O 75 is also consistent with the procedure that has been historically adopted in contempt proceedings. It was the English courts that first embraced summary

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deployed in the absence of a clear statement to that effect."

[80] *Anthony Hordern & Sons v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 per Gavan Duffy CJ and Dixon J.

[81] *Batistatos v Roads & Traffic Authority of New South Wales* (2006) 226 CLR 256 at 268 [19] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

[82] *Porter v the King; Ex parte Yee* (1926) 37 CLR 432 at 443 per Isaacs J; *Re Colina; Ex parte Torney* (1999) 200 CLR 386 (***Re Colina***) at 395 [16] per Gleeson CJ and Gummow J.

[83] *Constitution Act* 1975 (Vic), s 76; *Hawkins Pleas of the Crown*, 8th edition, (1824), Book 2, Ch xxii, p 206, cited in *Balogh v St Albans Crown Court* (1974) 1 QB 73 at 92 per Lawton LJ; *R v Metal Trades Employers' Federation; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 254 per Dixon J; *Re O'Callaghan* (1899) 24 VLR 957 at 963.

[84] *Constitution Act* 1975 (Vic), s 2(3); *Supreme Court Act 1958* (Vic), s 15.

[85] *An Act to make provision for the better Administration of Justice in the Colony of Victoria* (1852) 15 Vict 10.

[86] *An Act to make provision for the better Administration of Justice in Courts of General Sessions in the Colony of Victoria* (1852) 16 Vict 3, ss 7-9.

procedure in place of jury trial on indictment.[87] That procedure was adopted by Australian courts.[88] In contempt proceedings with a criminal aspect (prior to *Witham*), it has been consistently stated that the summary procedure must be "exercised with great caution"[89] and only where the "case is clear and beyond reasonable doubt".[90] No case can be clear and beyond reasonable doubt where discovery or subpoenas to produce are required to prove the contempt charged. Order 75 therefore frames a procedure that is consistent with this historical practice. This further supports the conclusion that O 75 does not "otherwise provide".

d) The Court of Appeal was wrong to dispose of the matter by reference to the hypothetical availability of subpoenas

56. The real issue in these proceedings is whether discovery may be ordered in contempt proceedings. That is the order that was sought by the respondents, made by Digby J in the Supreme Court, and appealed from to the High Court.

57. That issue should not be obscured by the Court of Appeal's refusal of leave to appeal on the basis that ordering discovery caused no substantial injustice to the Appellant because the same information could be sought by subpoena.[91] The Court purported to apply the test in *Niemann v Electronic Industries Ltd*[92] (***Niemann***), which provides that leave to appeal from an interlocutory order should only be granted where: (a) the decision was wrong, or at least attended by sufficient doubt; and (b) substantial injustice would be done by leaving the decision unreversed.[93] The manner in which the Court of Appeal applied *Niemann* was, however, wrong.

58. In *Niemann*, whether a substantial injustice arose was to be determined by reference to whether that injustice would arise if the interlocutory order in dispute was wrong, and was left undisturbed. The point of this 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.[94] However, if that order was wrong, or attended by sufficient doubt, and would cause substantial injustice if left in place, leave would be granted immediately to correct any error of law, and prevent any substantial injustice. *Niemann* does not suggest that whether a substantial injustice arises can be measured by reference to other

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[87] *John Fairfax & Sons Pty Ltd v MacCrae* (1954-1955) 93 CLR 351 (***John Fairfax***) at 370 per Dixon, Fullagar, Kitto and Taylor JJ; *Re Colina* at 394 [14] per Gleeson CJ and Gummow J.

[88] This procedure originally developed in English Courts: *Re Colina* at 396 [20] per Gleeson CJ and Gummow J.

[89] *John Fairfax* at 370 per Dixon, Fullagar, Kitto and Taylor JJ.

[90] [1900] 2 QB 36 at 41. The High Court and Victorian Supreme Court have adopted this statement on a number of occasions: see, for example, *Maslen v The Official Receiver* (1947) 74 CLR 602 at 610 per Latham CJ, Rich, Dixon and McTiernan JJ; *R v Arrowsmith; R v Miller; R v Little* (1950) VLR 78 at 84; *R v Brett* (1950) VLR 226 at 228.

[91] Court of Appeal decision at [477]-[481].

[92] [1978] VR 431 (***Niemann***).

[93] *Niemann v Electronic Industries Ltd* [1978] VR 431 at 433 per McInerney J, at 438 per Murphy J.

[94] This may be contrasted with the discretionary principle that a court will not act in vain to reconsider a decision that could not have had a different result: see *Re Refugee Tribunal; Ex Parte Aala* (2000) 204 CLR 82 at 109 [58] per Gaudron and Gummow JJ.

hypothetical exercises of power that are not in issue in the proceeding. Indeed, if that were allowed, it would have the result that the interlocutory order in dispute would remain unexamined and be permitted to stand, by reference to hypothetical exercises of power.

59. It follows that in the present case, whether there is a substantial injustice must be determined by reference to whether substantial injustice would arise if the order for discovery were wrong, not by reference to whether the same information could hypothetically be sought by subpoena. The answer to whether a substantial injustice would arise in this context must be yes. If the order for discovery was allowed it would irrevocably compromise the Appellant's right to an accusatorial proceeding. Leave should have been granted to determine whether an order for discovery was permissible in contempt proceedings. Whether subpoenas would elicit the same information is not relevant to that analysis.

60. Even if the Court of Appeal did not err in its application of *Niemann*, the Court erred in determining that no substantive injustice flowed because the relevant documents could be obtained by subpoena. There was no evidence to support the Court of Appeal's conclusion. No subpoena has been sought in these proceedings and there is no evidence that it would be sought or that it would elicit the relevant information. There was no basis to suppose that any other person could or would have produced the documents sought by subpoena.[95] Nor is there a principled basis upon which to conclude that subpoenas would be so available. The theoretical proposition that subpoenas could be ordered in accusatorial proceedings was raised by the Court in argument and was scarcely addressed by the parties. The Appellant did not concede that subpoenas are available against respondents in accusatorial contempt proceedings, and submits that they are not. It was not open to the Court of Appeal to conclude that no substantial injustice would occur in these circumstances.

Part VII: Legislation and Rules

An Act to make provision for the better Administration of Justice in Courts of General Sessions in the Colony of Victoria (1852) 16 Vict 3
Supreme Court Act 1958 (Vic)
Constitution Act 1975 (Vic)
Supreme Court (General Civil Procedure) Rules 2005 (Vic)
Civil Procedure Act 2010 (Vic)

Part VIII: Orders sought

61. Appeal allowed with costs.

62. Set aside the Order of the Court of Appeal of the Supreme Court of Victoria made on 24 October 2014, and in lieu thereof, order that:

[95] *R v Ronen & Ors* (2004) 62 NSWLR 77.

a. The application for leave to appeal to the Court of Appeal be allowed;
b. The appeal to the Court of Appeal be allowed;
c. Paragraphs 1-3 of the Order of Digby J of the Supreme Court of Victoria made on 25 March 2014 (as amended by further order of Digby J made on 30 October 2014) be set aside.

Part IX: Estimate of time

63. The Appellant estimates that it requires 2 hours to present its oral argument.

Dated 10 March 2015

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