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 REPLY

Date of document: 31 March 2015
Filed on behalf of the Applicant
Prepared by:
Slater and Gordon Lawyers
485 La Trobe Street
Melbourne Vic 3000

Contact: Bradley Annson
Solicitor Code: 339
DX: 229 Melbourne
Tel: 03 9949 6959
Fax: 03 9600 0290
Ref: M415913

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Argument

2. The Respondents' contentions can be grouped into eight categories, which are addressed under the headings set out below.

The existence and scope of the companion rule

3. The Boral parties submit that the companion rule is no more than the privilege against self-incrimination, the penalty privilege, the non-compellability of an accused to give evidence for the prosecution, and the prohibition on drawing adverse inferences from an accused's silence.[1] Because corporations cannot claim the privilege against self-incrimination, there is said to be no common law principle that will prevent a discovery against a corporate defendant in contempt proceedings.[2] This submission is wrong. The companion rule is a fundamental common law principle, allied to the burden of proof beyond reasonable doubt, which applies in respect of an accused, limits the process by which criminal guilt is established, and exists as part of the "wider dimension of the accusatorial system of criminal justice"[3]. It is relevant at the initial stage of assessing whether legislation requires an accused to assist a prosecuting party, and in the absence of clear intent, will not be displaced. The companion rule is distinct from the privilege against self-incrimination, which is "a personal right ... which applies in courts, tribunals and inquiries", may be asserted by a person who is not subject to any accusatorial process,[4] and is only asserted after legislation has been construed so as to require a person to assist a prosecuting party.[5]

Abrogation of the companion rule in respect of corporate defendants

4. The Attorney-General submits that the denial of the privilege against self-incrimination and the penalty privilege to corporations in *Environmental Protection Authority v Caltex Refining Company Pty Ltd*[6] (***Caltex***), *Daniels Corporation International Pty Ltd v ACCC*[7] (***Daniels***) and s 187 of the *Evidence Act* 2008 (Vic) (**the Evidence Act**) evinces an intention to abrogate the companion rule in respect of corporate defendants.[8] Any intention to abrogate a fundamental common law principle, however, or to depart from a general system of law, must be expressed with "irresistible clearness"[9] and requires direct attention to that abrogation.[10] The authorities cited by the Attorney-General evince no such intention. In *Caltex*, the question that arose for determination was whether a corporation could rely on the privilege against self-incrimination.[11] Even if Mason CJ, Toohey J and McHugh J may be

---

[1] First to Sixth Respondents' submissions (**Boral Submissions**) [9.3].
[2] Boral Submissions [9.6].
[3] *Lee v NSW Crime Commission* (2013) 251 CLR 196 (***Lee 1***) at 212-213 [20] per French CJ, 248-249 [125] per Crennan J, 261 [159], 265-6 [175], 268 [182] per Kiefel J; *Lee v The Queen* (2014) 308 ALR 252 (***Lee 2***) at 260 [32]-[33].
[4] *Lee 1* at 268 [182] per Kiefel J.
[5] See, for example: s 187 of the *Evidence Act 2008* (Vic); Rule 29.04(1)(d) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (**Rules**).
[6] (1993) 178 CLR 447 (***Caltex***).
[7] (2002) 213 CLR 543 (***Daniels***).
[8] Seventh Respondent's submissions (**AG Submissions**) [13(b)(ii)], [15]-[21], [50]-[53].
[9] *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; *X7 v Australian Crime Commission* (2013) 248 CLR 92 (***X7***) at 153 [158] per Kiefel J.
[10] *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 153 [158] per Kiefel J.
[11] *Caltex* at 489 per Mason CJ and Toohey J; 526 per Deane, Dawson and Gaudron JJ, 543 per McHugh J. For Brennan J this question was not required to be resolved: see at 512.

said to have implicitly decided that the companion rule should fall with the privilege against self-incrimination, that does not constitute a majority. Brennan J, in denying corporations the privilege against self-incrimination because it would allow a corporation to frustrate "legislative intention to control corporate conduct",[12] was referring to the shield of privilege, not to the underlying accusatorial system. Deane, Dawson and Gaudron JJ, who would not have denied corporations the privilege against self-incrimination, evidenced no intention to abrogate the companion rule.[13] In *Daniels*, the majority only briefly referred to the abrogation of the privileges in respect of corporations, and did not refer to the accusatorial system.[14] Section 187 of the Evidence Act, when introduced in 2008, was solely directed to the removal of the privilege of self-incrimination.[15] Even if, by virtue of the text, s 187 also removed the penalty privilege, this section would still only remove privileges, which only operate once legislation has been construed to abrogate the companion principle.

5. The Boral parties similarly submit, that if there is a common law rule, distinct from the privilege against self-incrimination, that protects a criminal accused from producing documents to a prosecutor, *Caltex* provides that such a rule does not apply to corporate defendants.[16] However, as set out in the Appellant's primary submissions, *Caltex* does not provide an answer to the question of whether discovery may be sought against a corporate accused in contempt proceedings.[17] The Boral parties mistake the factual outcome in *Caltex* for legal principle. The Boral parties then submit that nothing said in *X7 v Australian Crime Commission*[18] (***X7***), *Lee v New South Wales Crime Commission*[19] (***Lee 1***) *and Lee v The Queen*[20] (***Lee 2***) qualifies *Caltex*.[21]. This cannot be correct. *Caltex* has been interpreted as denying corporations the privilege against self-incrimination. *Lee 2* held that even where that privilege is lost, the accusatorial system remains, so that the prosecution must prove its case without the assistance of the accused. *Lee 2* must have the result that, in the absence of an express intention, prosecuting parties cannot require a corporate accused to assist with the discharge of the onus of proof, despite the loss of the privilege against self-incrimination.

Distinguishing X7, Lee 1 *and* Lee 2 *from the present matter*

6. The Boral parties distinguish *X7*, *Lee 1* and *Lee 2* from the present matter on the basis that those matters concerned testimonial evidence, human defendants, and criminal proceedings. The distinctions between testimonial and documentary evidence, and between natural persons and corporate persons, however, are only relevant to the privilege against self-incrimination,[22] and not to principles derived from the accusatorial system, where the onus on the prosecution requires them to prove their case without (testimonial or documentary) assistance from the (human or corporate) defendant.[23] The distinction between criminal and contempt proceedings is, for the reasons outlined in the Appellant's primary submissions,

---

[12] *Caltex* at 515.
[13] *Caltex* at 528, 537.
[14] *Daniels* at 559 [31] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[15] Explanatory Memorandum, Evidence Bill 2008 (Vic) p 62. See also the heading to s 187, which may be used in aid of construction: see *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 601 per Mason, Deane, Dawson and Gaudron JJ.
[16] Boral Submissions [9.7]-[10.18].
[17] Appellant's primary submissions [32]-[45].
[18] (2013) 248 CLR 92.
[19] (2013) 251 CLR 196.
[20] (2014) 308 ALR 252.
[21] Boral Submissions [9.7]-[10.18].
[22] See, for example, *Caltex* at 502 per Mason CJ and Toohey J.
[23] *Caltex* at 528 per Deane, Dawson and Gaudron JJ; *NSW Food Authority v Nutricia Australia Ltd* (2008) 72 NSWLR 456.

and the reasons discussed at [7]-[12] below, not relevantly significant.

Submission that contempt procedure is relevantly different from criminal procedure

7. The Boral parties submit that the companion principle should not apply in contempt proceedings,[24] and provide five justifications in support, none of which withstand scrutiny.

8. First, the Boral parties submit that there is no specific authority for a rule against discovery against a corporate defendant in contempt proceedings. However the absence of such authority is hardly surprising given that until *Caltex*, corporations could claim a privilege against self-incrimination. Furthermore, this absence of authority is matched by the absence of authority in favour of discovery in contempt proceedings.[25] Although, as the Boral parties submit, in 19th century England an alleged contemnor could be interrogated on oath about alleged contempt,[26] this practice was recognised to be "certainly contrary to the genius of the common law, and there seems little doubt that the Court of equity from which this form of trial was derived was the Star Chamber".[27] This practice, if once part of the common law, can no longer be said to be part of the common law relating to contempt proceedings after the intertwined development of the criminal standard of proof and the prosecutorial onus in *Woolmington v DPP*[28], and the requirement that the criminal standard of proof apply in contempt proceedings in *Witham v Holloway*[29].

9. Second, the Boral parties submit that the criminal standard of proof does not justify importing all criminal procedure into contempt proceedings.[30] The Appellant makes no such submission, but only that the companion rule presumptively applies in contempt proceedings.

10. Third, the Boral parties submit that criminal procedural protections arise because of the imbalance between the individual and the state, and that such protections must be reduced in private contempt prosecutions in order to facilitate the prosecution.[31] This cannot be correct. On that logic, where a private criminal prosecution is brought,[32] procedural protections must also be reduced. An important reason for such procedural protections is that the accused is exposed to criminal punishment. This was the basis on which the High Court determined in *Witham* that the criminal standard of proof was necessary in contempt proceedings.[33]

11. Fourth, the Boral parties submit that "contempt procedure must be practically accessible to private litigants" in order to vindicate the authority of the Court.[34] The Appellant categorically rejects that a fundamental common law principle that attaches to the criminal standard of proof should be removed in order to make it easier for private individuals to seek the criminal punishment of other private individuals. Far from protecting the authority and integrity of the Court, the imposition of criminal convictions, by a process that required the accused to assist the prosecuting party with the onus of proof, would undermine it.

12. Fifth, the Boral parties submit that companion rule should not apply in contempt proceedings

---

[24] Boral Submissions [11.1]. The Attorney-General also submits that accusatorial notions should not attach to contempt proceedings "with the same rigour as in a criminal trial": AG Submissions [13(e)].
[25] A decision of a single judge in the Supreme Court of Western Australia is not significant for present purposes.
[26] John Fox, 'The Practice in Contempt of Court Cases' (1922) 38 *Law Quarterly Review* 185, 192 (**Fox**).
[27] Fox, 193.
[28] *Woolmington v DPP* [1935] 1 AC 462 at 481 per Viscount Sankey LC.
[29] (1995) 183 CLR 525 (***Witham***).
[30] Boral Submissions [11.8].
[31] Boral Submissions [11.9]-[11.10]
[32] For example, see ss 9(5) and 10 of the *Director of Public Prosecutions Act 1994* (Cth); ss 22(1)(b)(ii) and 25 of the *Public Prosecutions Act 1994* (Vic) and *Stefanovski v Magistrates' Court of Victoria* [2004] VSC 313.
[33] *Witham* at 534 per Brennan, Deane, Toohey and Gaudron JJ.
[34] Boral Submissions [11.11]-[11.12].

because of procedural differences between contempt and criminal proceedings.[35] The differences identified do not support that submission. Contempt is an indictable offence that is prosecuted summarily, but so are many other indictable offences.[36] Costs may be ordered in contempt proceedings, but similarly may be ordered in summary criminal proceedings.[37] Parties who allege contempt are not subject to the full range of prosecutorial duties, but the Full Federal Court held in *Jones v ACCC*[38] that contempt proceedings were still fundamentally accusatorial. Coercive remedies may be available in contempt proceedings, but this does not affect the criminal standard of proof, or the exposure to criminal punishment, in contempt proceedings. Although pleading the "gist" of a contempt[39] may seem more relaxed, flexibility is required because the relevant contempts are breaches of court orders, rather standard criminal offences.[40] The alleged contemnor must nevertheless be left in no doubt about the accusation being made against them.[41] In this sense, there is no difference between contempt charges and charges for other criminal offences.

Policy rationales said to justify the abrogation of the companion rule for corporate defendants

13. The Appellant does not concede the Respondent's policy arguments[42] and will address them if invited, but submits such considerations are appropriately the province of Parliament.[43]

Discovery no longer antithetical to accusatorial proceeding now that penalty privilege removed

14. The Attorney-General submits that "the significance of the denial of the privileges, ... is that assumptions about what procedures, such as discovery, were for, are no longer valid".[44] This submission is too broad. The penalty privilege, a personal right, may be removed, but the doctrines that inform discovery and govern the scope of its exercise remain.

Construction of Supreme Court (General Civil Procedure) Rules 2005 (Vic), *including O29*

15. The Respondents submit that all of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) (**the Rules**) apply to contempt proceedings under O75.[45] This construction of the Rules is too blunt. It is not a question of whether *all* or *none* of the rules apply to O75 proceedings. It is always a question of construction, which is governed first and foremost by the text and structure of the Rules.[46] In its primary submissions, the Appellant contends that the Rules, properly construed, and independently of the companion rule, do not allow for discovery in proceedings under O75. The Appellant further submits that O29, properly construed, does not apply in proceedings under O75. This requires examination of a number of interlocking rules. Rule 4.01 provides that proceedings may be commenced by writ or originating motion. Rule 29.01 provides that O29 only applies to proceedings commenced by writ, except where the Rules otherwise provide. The Rules otherwise provide in Rule 29.07, which states that in

---

[35] Boral Submissions [11.13].
[36] *Criminal Procedure Act 2009* (Vic), Schedule 2.
[37] See generally *Latoudis v Casey* (1990) 170 CLR 534.
[38] (2010) 189 FCR 390 at 409 [33]-[34].
[39] *Coward v Stapleton* (1953) 90 CLR 573 at 579-580 per Williams ACJ, Kitto and Taylor JJ; *Doyle v The Commonwealth* (1985) 156 CLR 510 at 516; *MacGroaty v Clauson* (1989) 167 CLR 251 at 255.
[40] *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 110 [428] per Hayne J.
[41] *Mason v MWREDC Ltd* [2012] FCA 1083; *Harmsworth v Harmsworth* [1987] 3 All ER 816 at 821.
[42] Boral Submissions [10.19], [11.16]-[11.18]; AG Submissions [58]-[65].
[43] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 157-158 [1]-[2] per French CJ.
[44] AG Submissions [66].
[45] Boral Submissions [8.2], AG Submissions [13(d)],[68]. The Boral parties state that this is subject to being "read down" by reference to the principle of legality. This fundamentally misunderstands the principle of legality, which turns upon clear intention, and does not cut across intention to "read down" legislation or rules.
[46] See, for example, *Thiess v Collector of Customs* [2014] HCA 12 at [22]-[34].

a proceeding not within Rule 29.01, the Court may at any stage order any party to make discovery of documents. Such other proceedings must include, for example, proceedings commenced by originating motion. Rule 29.07 may appear to be broad enough to include contempt proceedings, however, that possibility is foreclosed by Rule 29.12.1(3), which provides for the consequences of a party failing to make discovery within time. A Court may order "(a) if the party required to make discovery is the plaintiff, that the proceeding is dismissed; (b) if the party required to make discovery is a defendant, that the defendant's defence, if any, be struck out". In a contempt proceeding under O75, however, there is no defendant (a person alleged to be guilty of contempt is a "respondent"), and there is no obligation on the respondent to file a defence.[47] Rule 29.12.1(3) thus reveals that O29 does not contemplate discovery orders in contempt proceedings under O75.

16. That this is the intention of the Rules is confirmed by the *Civil Procedure Act 2010* (Vic) (**Civil Procedure Act**), which extensively regulates discovery,[48] but only applies to "civil proceedings", which, by statutory definition, do not include criminal proceedings or quasi-criminal proceedings.[49] Although quasi-criminal proceedings are not defined, contempt proceedings under O75, which are "criminal in nature", allege "guilt", expose the alleged contemnor to criminal punishment, and require proof beyond reasonable doubt, must constitute quasi-criminal proceedings. If discovery were permissible in proceedings under O75 there would be two kinds of discovery under the Rules: discovery regulated by the Civil Procedure Act, and discovery not so regulated under O75. That result cannot have been intended, and a construction of the Rules that produces that result should be rejected.[50] Furthermore, even if it could be said that there was ambiguity in the Rules, the Civil Procedure Act resolves that ambiguity in favour of the Appellant.[51]

No substantial injustice because same documents could have been sought by subpoena

17. The Attorney-General relies on *BHP Petroleum Pty Ltd v Oil Basins Ltd*[52] to argue that "substantial injustice" should not be given the construction for which the Appellant contends.[53] However the passage relied upon omits the italic emphasis on the word "substantial": the passage is about whether an injustice is *substantial*, rather than the composite phrase "substantial injustice". The Attorney-General further submits that the Court of Appeal did not engage in a hypothetical reasoning process and that this is demonstrated by *Brereton v Sinclair*[54]. In that case, the prosecutor conceded that the common law assault charges could be brought.[55] In this matter, the Appellant submits that a subpoena could not be issued against it, and that a subpoena issued against third parties would not necessarily produce the documents sought in the discovery order. A substantial injustice arises because the decision rests on hypothetical legal and factual conclusions.

Dated: 31 March 2015

Peter Morrissey SC Ruth Shann Gideon Boas Julia Watson
T: 9225 6564 F: 9225 8686 E: petermorrissey@pjmsc.com

---

[47] Rules, rules 4.03(2), 75.01.
[48] See for example, Part 4.3 of the *Civil Procedure Act 2010* (Vic).
[49] *Civil Procedure Act 2010* (Vic) ss 3, 4.
[50] *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 254-255 per Dawson J.
[51] *Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625-626 per Dixon, Evatt and McTiernan JJ.
[52] [1985] VR 756 at 759 per Fullagar J.
[53] AG Submissions [13(f)-(g)].
[54] (2000) 2 VR 424 (***Brereton***).
[55] *Brereton* at 434 [31].