IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M18 of 2015

B E T W E E N :

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
Appellant

- A N D -

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

ALSAFE PREMIX CONCRETE PTY LTD (ACN 003 290 999)
Second respondent

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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

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FIRST TO SIXTH RESPONDENTS' SUBMISSIONS

PART I: PUBLICATION

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

PART II: ISSUES

2.1 The primary issue in the appeal is whether a corporate defendant in contempt proceedings can be compelled by court processes to produce specific or identified documents that might assist in proving the contempt alleged against it.

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2.2 There may be a secondary issue advanced by the seventh respondent: namely whether the Court of Appeal erred in concluding that the appellant ("**the CFMEU**") would not suffer substantial injustice if leave to appeal in that case were refused (as it was).

PART III: *JUDICIARY ACT* 1903 (CTH), S 78B

3.1 The Boral Respondents are of the view that notices under s 78B of the *Judiciary Act* 1903 (Cth) are not required.

PART IV: FACTS

4.1 The Boral Respondents adopt the summary of relevant facts set out at Part V of the CFMEU's submission[1] and add only the following, namely:

(a) the summons of 22 August 2013 there referred to charges the CFMEU with contempts constituted, in part, by a blockade of a construction site at Footscray, Victoria, on 16 May 2013;

(b) it is alleged that that blockade was organised by an official of the CFMEU, Mr Joseph Myles, and that, by his doing so, Mr Myles acted with the authority of the CFMEU;

(c) the plaintiffs will lead evidence that:[2]

(i) whilst in attendance at the blockade, Mr Myles made a number of telephone calls, including in response to being asked by police officers to permit passage through the blockade of persons wholly disconnected from the industrial disputation or issues in respect of which it was imposed;

(ii) Mr Myles told police at the blockade that he was "following directions" and, at one stage, referred to needing instructions from his "union boss";[3] and

(iii) at or around the time of the blockade, calls were placed between telephone numbers that the Boral respondents understand were used by Mr Myles (on the one hand) and various members of the executive of the Victorian branch of the CFMEU's Construction and General division (on the other); and

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[1] Dated Tuesday, 10 March 2015 ("**CFMEU Submission**").

[2] *CFMEU v Boral Resources (Vic) Pty Ltd* [2014] VSCA 261 ("**the Decision Below**"), [80].

[3] The reference to Mr Myles's "union boss" is summarised in paragraph 5 of an affidavit dated 8 May 2014 of Paul Jason O'Halloran, relied upon by the Boral Respondents in the Court below.

(d) the order of the Honourable Justice Digby ("**the Discovery Order**") compels the CFMEU to discover and produce specific documents, namely:

(i) business cards of named officials as at the date of the alleged contempts;

(ii) alternatively, documents recording the mobile telephone numbers of those officials as at the date of the alleged contempts; and

(iii) documents recording the terms by which the CFMEU employed or engaged Mr Myles as at the date of the alleged contempts.

PART V: APPLICABLE LEGISLATIVE PROVISIONS

5.1 The Boral Respondents accept the CFMEU's statement of applicable constitutional provisions, statutes and regulations but contend that it is incomplete. Also relevant are the following additional statutory provisions, which are still in force:

(a) *Evidence Act* 2008 (Vic) ss 17, 20, 140, 141, 187, and definitions of "civil proceeding" and "criminal proceeding" in the glossary.

PART VI: ARGUMENT

6. SUMMARY

6.1 The Boral Respondents' position on the appeal can be summarised as follows:

(a) proceedings commenced under O 75 of the *Supreme Court (General Civil Procedure) Rules* 2005 ("**the Civil Rules**") are not criminal proceedings; at least some of the protections afforded to defendants in criminal proceedings have no application to contempt;

(b) even if that is wrong, and the full array of protections normally available to an accused in criminal proceedings applies in contempt, none of those protections serves as a mechanism by which a corporate accused can resist being compelled, by court process, to produce specific documents; and

(c) the Victorian Court of Appeal did not err in refusing leave to appeal.[4]

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[4] Decision Below, [508].

7. THE FLAWS IN THE CFMEU'S ANALYSIS AND THE CORRECT ANALYTICAL FRAMEWORK

7.1 The Discovery Order was made under r 29.07(2) of the Civil Rules. That rule gives the Supreme Court of Victoria discretion to order discovery in proceedings commenced otherwise than by writ. The Court will order discovery under r 29.07(2) only in "special circumstances".[5] The CFMEU does not now[6] contend that the discretion conferred by the rule miscarried in some way. Rather, it challenges the applicability of the rule itself. It contends that the rule does not apply to proceedings for contempt commenced pursuant to O 75 of the Civil Rules. It contends that:

(a) the standard of proof that applies in contempt proceedings is proof beyond reasonable doubt;[7]

(b) a corollary of that standard is that a moving party cannot compel a respondent party to produce documents;

(c) this corollary principle arises in two ways, namely:

(i) the beyond-reasonable-doubt standard of proof "entails" a "companion" principle, namely that a moving party cannot compel a respondent to "assist" in discharging its onus of proof,[8] and that principle would be offended were the respondent party compelled to produce documents to the moving party;[9] and

(ii) further or alternatively, proceedings where the criminal standard of proof applies must be characterised as "accusatorial",[10] and compelling a respondent party to produce documents to a moving party in such a proceeding would be "inconsistent" with its "accusatorial" nature;[11]

(d) this corollary principle is distinct from the privileges against self-incrimination and self-exposure to penalty, hence it continues to apply in respect of corporate defendants despite the non-availability of those privileges to corporations;[12] and

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[5] *Creswick Resources N/L v Mining Warden of State of Victoria* [2000] VSC 134, [37] (Gillard J).

[6] In earlier stages of the proceeding, it contended that discovery ought not to be ordered as a matter of discretion—see *Boral Resources (Vic) Pty Ltd v CFMEU* [2014] VSC 120, [131] (Digby J).

[7] CFMEU Submission [15].

[8] CFMEU Submission [16].

[9] CFMEU Submission [19], [27] and [31].

[10] CFMEU Submission [18].

[11] CFMEU Submission [31].

[12] CFMEU Submission [45].

(e) the Civil Rules do not, either expressly or by necessary intendment, abrogate this corollary principle.[13]

7.2 This chain of reasoning is, with respect, analytically flawed in two respects.

7.3 First, the criminal standard of proof is one of many protections that apply in favour of an accused in criminal proceedings. But it is not a *source* of those other protections. Consider, for example, the prohibitions against an accused giving evidence for the prosecution[14] and against in-trial commentary about an accused's silence being such as to suggest guilt:[15] these are free-standing rules of criminal process; they do not arise from the criminal standard.

10 7.4 Second, the CFMEU's argument is built upon impermissible top-down reasoning.[16] It seeks to classify contempt proceedings as "accusatorial" and then to rely upon that classification to dictate an outcome. This is not a sound process of reasoning. "Accusatorial" is a label; a convenient, shorthand reference to a series of specific common law rules by which criminal proceedings assume that complexion.[17] It is wrong to treat the conceptual proposition as some free-standing common law rule distinct from those by which it is constituted. The same applies to the proposition that a criminal accused cannot be compelled to "assist" the prosecution.[18]

7.5 It is for the CFMEU to show that r 29.07(2) should, according to the principle
20 of legality, be read down so as not to authorise the Discovery Order. To invoke the principle of legality, the CFMEU has to show that there is (or should be) a common law rule[19] against compelling a corporate defendant in a contempt proceeding to produce specific documents to the plaintiff.[20] If the CFMEU can demonstrate that such a rule exists, it is accepted that the principle of legality would require that r 29.07(2) be read down, and that the appeal should succeed.

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[13] CFMEU Submission [46]–[55].

[14] *Evidence Act* 2008 (Vic), s 17(2).

[15] *Evidence Act* 2008 (Vic), s 20.

[16] See, in the context of restitution, *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544–545 (Gummow J).

[17] Amongst which are included the presumption of innocence, proof beyond reasonable doubt, the right to a fair trial (and the constituent elements thereof recognised in cases such as *Jago v District Court NSW* (1989) 168 CLR 23, 29, and *Dietrich v The Queen* (1992) 177 CLR 292, 299–300), an accused's privileges against self-incrimination and self-exposure to penalty (where available), the non-compellability of an accused to give evidence for the prosecution, the prohibition against the drawing of adverse inferences as to guilt from an accused's silence, the duties of prosecutors to act fairly, and the rules of duplicity. See also in this regard, the opening passage of French CJ in *Lee v NSW Crime Commission* (2013) 251 CLR 196, 202.

[18] As to which, see paragraph 9.3 below.

[19] The word "rule" is used a shorthand for a common law right, fundamental principle or a rule forming part of the general system of law—see: *X7 v Australian Crime Commission* (2013) 248 CLR 92, 131-132 (Hayne and Bell JJ).

[20] See, eg, *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

7.6 In the absence of authority on point, the CFMEU's task will inevitably involve two steps: first, demonstrating that such a rule applies generally in criminal proceedings; and, second, that it is appropriate to import it into proceedings for contempt.

7.7 For the reasons that follow, it is submitted that:

(a) there is no common law rule that prohibits the compelling of a corporate accused in "true" criminal proceedings to produce specific documents to the prosecutor; and

(b) even if there is such a rule, it does not apply to—and should not be transplanted into—proceedings for contempt under O 75 of the Civil Rules.

8. APPLICATION OF RULE 29.07

8.1 In the Court of Appeal, the CFMEU argued that the Civil Rules (other than O 75 itself) did not, of their own force, apply to contempt proceedings commenced under O 75. Rather, it submitted that, in such proceedings, the Supreme Court had a discretion to create ad hoc rules on a case-by-case basis; and that, in doing so, it could choose to model such ad hoc rules on the Civil Rules. In this Court, the CFMEU probably doesn't persist with that argument.[21]

8.2 To avoid any doubt, the Boral Respondents submit that all of the Civil Rules apply, of their own force, to contempt proceedings commenced under O 75[22] (subject always to their being individually construed in light of the principles of legality). The sole issue about the application of r 29.07(2) is whether it ought to be read down so as not to authorise the Discovery Order.

9. SCOPE AND APPLICATION OF THE SO-CALLED "COMPANION PRINCIPLE"

9.1 The CFMEU argues that two "fundamental" principles inhere in the criminal standard of proof: that the prosecution bears the onus proving an accused's guilt; and that it must do so without any assistance from the accused.[23] It is the latter—referred to as "the companion principle"—that is cited as a source of the alleged prohibition against the Discovery Order.

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[21] That can't be said with certainty. The CFMEU does submit that O 75 is "self-contained": CFMEU Submission [53]–[54]. It is not clear whether the CFMEU is submitting that, as a matter of construction, O 29 does not apply in contempt proceedings *even if*, contrary to its earlier submissions, there is no common law rule against compelling a corporate contempt defendant to produce specific documents. But given that the submissions about the construction of the Civil Rules appear under the heading "Properly construed, the Rules do not otherwise provide", it seems more likely that those submissions are limited to contending that the Civil Rules do not override the common law rule that the CFMEU posits.

[22] See r 1.05 of the Civil Rules.

[23] CFMEU submission [16].

9.2 The companion principle has been the subject of consideration in this Court over several decades (both before and after this Court's decision in *Environmental Protection Authority v Caltex Refining Co. Pty Ltd*[24] ("**Caltex**")). Its precise scope has not been definitively or consistently stated. Although it has been recited in the wide terms that the CFMEU employs,[25] it has also been assigned a narrower purview; for example, as the source of an accused's immunity from having to:

(a) "testify";[26]

(b) "testify or admit guilt [or] give evidence in defence of his or her plea of not guilty";[27]

(c) "admit the offence with which he or she is charged";[28] and

(d) "confess his guilt".[29]

9.3 In reality, the so-called "companion principle" is a convenient, short-hand summation of the combined effect visited by various intertwined common law protections, such as the privileges against self-incrimination and self-exposure to penalty,[30] the non-compellability of an accused to give evidence for the prosecution,[31] and the prohibition against drawing adverse inferences of guilt from an accused's silence.[32] In *Lee No. 1*, Gageler and Keane JJ held to a similar effect in respect of the so-called "right to silence":[33]

> The fundamental principle in respect of which the principle of construction is sought to be invoked in the present case—that no accused person can be compelled by process of law to admit the offence with which he or she is charged—is not monolithic: it is neither singular nor immutable… What is often referred to as a 'right to silence' is rather 'a convenient description of a collection of principles and rules: some substantive, and some procedural; some of long standing, and some of recent origin', which differ in 'incidence and importance…'

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[24] (1993) 178 CLR 477.

[25] See, eg, *Lee v The Queen* (2014) 308 ALR 252 ("**Lee No. 2**"), 260; *Caltex*, 527 (Deane, Dawson and Gaudron JJ), 550 (McHugh J); *Lee v NSW Crime Commission* (2013) 251 CLR 196 ("**Lee No. 1**"), 265–266 (Kiefel J).

[26] See, eg, *Lee No. 2*, 260; *Caltex*, 503 (Mason CJ and Toohey J).

[27] *X7 v Australian Crime Commission* (2013) 248 CLR 92 ("**X7**"),120 (French CJ and Crennan J). See also *Caltex*, 501 (Mason CJ and Toohey J).

[28] *Caltex*, 501 (Mason CJ and Toohey J). See also *Lee No. 1*, 313 (Gageler and Keane JJ).

[29] *Sorby v The Commonwealth* (1983) 152 CLR 281 ("**Sorby**"), 294 (Gibbs CJ).

[30] See, eg, *Paxton v Douglas* (1812) 34 ER 502, 503; *Sorby*, 294 and 308; J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 9th ed, 2013), [25065]–[25070].

[31] See, eg, *Evidence Act* 2008 (Vic), s 17; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

[32] See, eg, *Evidence Act* 2008 (Vic), s 20; *Dyers v The Queen* (2002) 210 CLR 285, 292-293 (Gaudron and Hayne JJ); *RPS v The Queen* (2000) 199 CLR 620, 633. This principle has been applied in proceedings alleging contempt of court: *Jones v ACCC* (2010) 189 FCR 390, 409 (Keane CJ, Dowsett and Reeves JJ).

[33] *Lee No. 1*, 313 (citing *Azzopardi v The Queen* (2001) 205 CLR 50, 57 (Gleeson CJ)).

9.4 To ascertain whether, in any given case, a particular process should be constrained by principles of legality, it is necessary to look not at the over-arching, short-hand summary concept, but at the discrete protections by which it is constituted.

9.5 The question may then be posed: what is the discrete common law protection that is offended by the Discovery Order in the present case? Were the defendant a natural person, the answer to that question would be obvious: it would offend his or her privilege against self-incrimination; a privilege long understood to protect against not merely the answering of questions, but also against the compulsory extraction of documents.[34]

9.6 In truth, there is no principle afforded by the common law that furnishes corporate defendants in criminal proceedings with a means of resisting compulsion to produce specific documents under generally-framed legal processes (including rules of court). The only principle of the common law that confers that species of protection is the privilege against self-incrimination,[35] a protection that, since *Caltex*, is not available to bodies corporate. Cross on Evidence puts the position thus:[36]

> In Australia the privilege against self-incrimination is not available to corporations. Nor is the privilege against self-exposure to a penalty. In this respect Australia no longer follows the English authorities. **There is no rule that a court's processes to compel the production of a corporation's documents are unavailable in criminal proceedings**. (emphasis added)

9.7 In any event, even if there is a common law rule—distinct from the privileges against self-incrimination and self-exposure to penalty—against compelling a criminal accused to produce documents to the prosecutor, that rule does not and should not apply to a corporate accused. That conclusion follows from *Caltex* and is not altered by the subsequent decisions in *X7*, Lee *No. 1* and *Lee No. 2*.

10. WHAT *CALTEX* DECIDED

10.1 The significance of *Caltex* can briefly be stated—it involved:

(a) a generally-worded statutory power to require production of specified documents (or specified classes of documents);[37]

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[34] *Caltex*, 501 (Mason CJ and Toohey J, citing *R v Cornelius* (1744) 93 ER 1133). See also *Sorby*, 292 (Gibbs CJ, referring to *King v McLellan* [1974] VR 773, 777-778).

[35] *Caltex*, 501–502 (Mason CJ and Toohey J), 517 (Brennan J).

[36] Heydon, above n 30, [25080].

[37] *Caltex*, 489.

(b) the use of that power during (and for the purposes of securing a conviction in) existing criminal proceedings; and

(c) a corporate defendant that, ultimately, was required to produce the documents sought.

10.2 For the reasons that follow, the rationes decidendi of *Caltex* include the following, namely that:

(a) the common law privilege against self-incrimination does not extend to bodies corporate; and

(b) leaving aside the privilege against self-exposure to penalty, there is no common law rule, whether deriving from the accusatorial nature of criminal proceedings or otherwise, that prohibits a corporate accused being compelled to produce specific documents to a prosecutor.

10.3 In *Caltex*, the corporate accused was served with two notices requiring that it produce potentially incriminating documents to the prosecutor: one issued pursuant to a power conferred by statute and one issued pursuant to court rules.

10.4 Before the matter reached this Court, the NSW Court of Criminal Appeal held that both notices were invalid because the corporate accused was entitled to claim privilege against self-incrimination. In reaching that conclusion, the Court of Criminal Appeal specifically relied on the need to maintain the integrity of the "accusatorial system of criminal justice".[38] Hence, when the matter reached this Court, one of the issues to be considered was whether the "accusatorial system of criminal justice" warranted recognition of a rule against compelling a corporate accused to produce documents to a prosecutor. Indeed, in seeking to uphold the decision of the Court of Criminal Appeal, the respondent (Caltex) made the very same argument that the CFMEU now makes:[39]

> The right to remain mute when called upon to produce documents that might incriminate one is one of the due process of law. Due process encapsulates **all an accused's rights which are designed to require the prosecution to prove its case without the assistance of the accused**. (emphasis added)

10.5 In upholding the validity of the statutory notice, a majority of this Court concluded that there is no common law rule[40]—arising from the accusatorial nature of criminal proceedings or otherwise—that protects against the compelling of a corporate accused to produce documents to a prosecutor.

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[38] *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118, 127 (Gleeson CJ, Mahoney JA and McLelland J agreeing).

[39] *Caltex*, 483.

[40] Leaving aside the privilege against self-exposure to a penalty, which is discussed later in these submissions.

10.6 Mason CJ and Toohey J held:[41]

> 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 testify to the commission of the offence charged.

10.7 McHugh J held:[42]

> 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.

10.8 Brennan J, after concluding that corporations had no privilege against self-incrimination, concluded that there was also no "other fundamental bulwark of liberty which qualifies in any material way a statutory grant of an investigative power".[43] In the context of the issues in the case and reasons of the Court of Criminal Appeal, his Honour's reference to "any other fundamental bulwark of liberty" must cover any other putative common law immunity borne of the accusatorial nature of criminal proceedings.

10.9 Brennan's J conclusions are part of the ratio of his Honour's judgment.[44] His Honour upheld the statutory notice to produce on two separate bases, namely that:

(a) the statute in question abrogated any privilege against self-incrimination;[45] and, in any event

(b) there was no common law rule (such as privilege against self-incrimination or some other "fundamental bulwark of liberty") against compelling a corporate accused to produce documents.[46]

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[41] *Caltex*, 503. See also *Caltex*, 504, 508.

[42] *Caltex*, 556. It is apparent that his Honour used the expression "adversary system of criminal justice" as synonymous with "accusatory system of criminal justice".

[43] *Caltex*, 517.

[44] Cf CFMEU Submission [36].

[45] *Caltex*, 512 (Brennan J).

10.10 Each basis was "independent and free standing" and "[e]ach thus constituted a separate ratio decidendi".[47]

10.11 Brennan J joined Deane, Dawson and Gaudron JJ in holding the rules-based notice to be invalid. Deane, Dawson and Gaudron JJ reached that conclusion on the basis of their minority view that corporations were entitled to the privilege against self-incrimination. Brennan J reached the conclusion on the basis of his view that corporations were entitled to the privilege against self-exposure to penalty.[48] Neither basis remains good law. Contrary to the view of Deane, Dawson and Gaudron JJ, the Court concluded that corporations have no privilege against-incrimination. Subsequent authority has made clear that, contrary to Brennan's J judgment, they also have no privilege against self-exposure to penalty.[49] The position has been made clearer still by statute.[50] It follows that if *Caltex* was decided today, the rules-based notice to produce would have been upheld. That notice is on all fours with the Discovery Order in this case.

Caltex remains good law and should be followed

10.12 Nothing said in *X7*, *Lee No. 1* and *Lee No. 2* qualifies *Caltex*. That they "place reliance on the joint judgment of Dawson, Deane and Gaudron JJ [in *Caltex*]"[51] may be accepted. Equally, they are replete with approving references to the other judgments of Mason CJ and Toohey J,[52] Brennan J,[53] and McHugh J.[54]

10.13 In any event, there are obvious differences separating those cases from the present.

10.14 *X7* concerned the power of the NSW Crime Commission to examine a natural defendant about matters in respect of which criminal charges had been laid but not determined. The Commission's statutory examination power abrogated the

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[46] *Caltex*, 517 (Brennan J).

[47] *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 361 (Heydon JA).

[48] *Caltex*, 522–523.

[49] See, eg, *Daniels v ACCC* (2002) 213 CLR 543, 559; *Trade Practices Commission v Abbco Iceworks* (1994) 52 FCR 96, 99, 129–130, 132 and 146. The privilege against self-exposure to penalty remains available to natural defendants: *Rich v ASIC* (2004) 220 CLR 129.

[50] *Evidence Act* 2008 (Vic), s 187.

[51] CFMEU Submission [45].

[52] *X7*, 120 (French CJ and Crennan J), 153 (Kiefel J); *Lee No. 1*, 215 (French CJ), 248, 252 (Crennan J), 265 (Kiefel J), 307 (Gageler and Keane JJ).

[53] *Lee No. 1*, 249 (Crennan J), 316–317 (Gageler and Keane JJ).

[54] *X7*, 120 (French CJ and Crennan J), 153 (Kiefel J); *Lee No. 1*, 213 (French CJ), 259 (Crennan J), 265, 267–268, 276 (Kiefel J).

examinee's privilege against self-incrimination.[55] Nonetheless, this Court held (by majority) that the accused was not required to answer incriminating questions because doing so would undermine his right to stand mute at his trial, and the Commission's power to examine did not, expressly or by necessary intendment, abrogate that protection inherent in the accusatorial nature of Australian criminal justice.[56] Other than at the level of general principle—already discussed[57]—*X7* provides little if any assistance to the CFMEU. More to the point, it offers nothing in the way of qualification upon *Caltex*. Given the dramatically different circumstances of the two cases, that is hardly surprising.

10.15 In *Lee No. 1*, this Court considered whether a defendant facing criminal charges could, by a process of examination that was separate from his pending criminal trial, be required to answer questions concerning the recovery of assets said to have come about from the activities in respect of which the charges were laid. Again, the examination power expressly abrogated the examinee's privilege against self-incrimination.[58] A majority of this Court[59] held that the power authorised the examination in question. Again, the circumstances there bear almost no resemblance to those of the present case, nor to those in *Caltex*.

10.16 *Lee No. 2* concerned the propriety of a criminal trial conducted by a prosecutor that had been unlawfully provided a transcript of a NSW Crime Commission examination. The accused had been examined in the Commission about matters common to those in respect of which he had been charged. This Court unanimously held that the prosecutor's possession of the transcript constituted a miscarriage of justice.[60] So described, it is clear that *Lee No. 2* is similarly disconnected from the circumstances presented by this case (and by *Caltex*).

10.17 There is nothing about any of those decisions—and no authority in this Court—that calls into question the correctness of *Caltex*. There is nothing that compels the Court to conclude that corporate defendants in criminal proceedings ought to be able to resist the compulsory production of specific documents pursuant to generally-worded legal processes. *Caltex* continues to stand as an "insuperable obstacle"[61] to that conclusion.

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[55] *X7*, 104 (French CJ and Crennan J).

[56] *X7*, 142–143 (Hayne and Bell JJ), 153–154 (Kiefel J).

[57] At section 9 above.

[58] *Lee No. 1*, 208 [13] (French CJ).

[59] French CJ, and Crennan, Gageler and Keane JJ, Hayne, Kiefel and Bell JJ dissenting.

[60] *Lee No. 2*, 263.

[61] Decision Below, [495].

10.18 While this Court can depart from its previous decisions,[62] it is important that any such departure be "infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law".[63] Here, the CFMEU does not seek to reopen *Caltex*, nor ask that the Court overturn it. The Court should therefore conclude, consistently with *Caltex*, that there is no common law rule against compelling a corporate accused to produce documents.

The policy analysis in Caltex *should prevail in any event*

10.19 Even if *Caltex* does not positively establish the non-existence of a common law rule against compelling a corporate accused to produce documents, the policy analysis in *Caltex* militates against the recognition of such a rule. The rule would overlap with privilege against self-incrimination. The same reasons that prompted this Court, in *Caltex*, to limit self-incrimination privilege and require the corporate accused to produce specific documents would warrant the equivalent limitation of any other rule (if one exists) that would otherwise stand as an impediment to that outcome.

11. IN ANY EVENT, CRIMINAL PROCEDURE IS NOT CONTEMPT PROCEDURE

11.1 Even assuming, for the sake of argument, that there *is* a common law rule that protects a corporate accused in a criminal proceeding from compulsion to produce specific documents, that rule does not apply—and should not be made to apply—to contempt proceedings commenced under O 75 of the Civil Rules. This is so for four reasons, addressed below.

First: lack of authority

11.2 The CFMEU cannot point to any authority for a rule against compelling a corporate contempt defendant to produce documents. As far as the Boral Respondents are aware, the only other Australian decision that has considered the question is *Woods v Skyride Enterprises Pty Ltd*,[64] where discovery was ordered.

11.3 This paucity of authority may appear surprising given that contempt is "as old as the law itself".[65] Save for being codified nearly 30 years ago, contempt procedure in Victoria has remained substantially unchanged for well over a century.[66]

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[62] *Nguyen v Nguyen* (1990) 169 CLR 245, 269 (Dawson, Toohey and McHugh JJ). See also *Lee No. 1*, 231 (Hayne J).

[63] *Nguyen v Nguyen* (1990) 169 CLR 245, 269 (Dawson, Toohey and McHugh JJ, citing *Queensland v The Commonwealth* (1977) 139 CLR 585, 620 (Aickin J)). See also *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237, 243–244 (Dixon J); *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1949) 77 CLR 493, 496 (Latham CJ, and Rich, Dixon, McTiernan and Webb JJ).

[64] [2012] WASC 4 (Heenan J).

[65] Sir John Fox, "Practice in Contempt of Court Cases" (1922) 38 *Law Quarterly Review* 185, 185.

11.4 In 19th century England, an alleged contemnor—even an individual—could be interrogated on oath about alleged contempts.[67] By the early 20th century, the interrogation procedure fell into disuse in England[68] but it remains available to this day in Tasmania.[69] Obviously, at a time when even interrogatories were available, there could be no question of a common law rule against compelling a contempt defendant—still less a corporate contempt defendant—to produce documents. In more modern times (but before *Caltex*), privilege against self-incrimination was available to corporations to resist compulsory production of documents.[70] It may be surmised that, since the emergence of privilege and until *Caltex* (when its availability was restricted to natural litigants), it was pointless to attempt to compel a corporate contempt defendant to produce documents.

11.5 In any event, the absence of authority—particularly post-*Caltex* authority—upon which the appellant might rely is unsurprising, given that there is no post-*Caltex* authority for the proposition that the rule exists in "true" criminal proceedings.[71]

Second: the policy underpinnings are radically different

11.6 There are fundamental differences between contempt proceedings and criminal proceedings. The similarities between them upon which the CFMEU relies fall short of requiring that there should be imported into proceedings for contempt a criminal law protection against compelling the production of specific documents by corporate defendants (assuming that such a criminal law protection exists).

11.7 The CFMEU relies on two similarities. The first is the criminal standard of proof. The second is the observation of this Court in *Witham v Holloway*[72] that contempt proceedings "must realistically be seen as criminal in nature".[73]

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[66] At least since the beginning of the 20th century, the Supreme Court's power to punish for contempt has been exercised through a summary procedure under the civil rules of court. Until the introduction of O 75 in 1986, the procedure was to apply to the Court by a notice of motion supported by affidavits: see *BHP Pty Ltd v Dagi* (1996) 2 VR 117, 126 (Winneke P, dissenting).

[67] Fox, above n 65, 192.

[68] Ibid.

[69] *Supreme Court Rules* 2000 (Tas), r 942.

[70] See, eg, *Re Trade Practices Commission v Arnotts Ltd* [1989] FCA 256, where the Federal Court upheld a corporation's objection to production of documents on the basis that the documents could incriminate the corporation in a contempt of court (the case within which those documents were sought was not itself a contempt proceeding).

[71] There is one decision of the NSW Court of Appeal—namely *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456—in which it was held that a generally-worded rule of Court was insufficient to permit orders compelling a corporate accused in criminal proceedings to answer interrogatories and provide documents. That case was decided on the basis of the arguments advanced, which "...focused on the requirement in the notices [issued pursuant to relevant instruments] to answer questions" and which did not contend "...that the Court should consider the issue of production of documents separately" (*Nutricia*, 468). There are at least two authorities—both decisions at first instance—that are the other way: *Calderwood v SCI Operations Pty Ltd* (1995) 63 IR 49; and *WorkCover Authority of NSW v Police Service of NSW* (2000) 50 NSWLR 333.

[72] (1995) 183 CLR 525 ("***Witham***").

11.8 That the common law might be set against sanctioning the punishment of a person where there exists reasonable doubt about his or her guilt is unsurprising. But it doesn't follow that other features of criminal procedure must also be imported into contempt proceedings. As much is clear from the very same judgment in *Witham*: "...to say that proceedings for contempt are essentially criminal in nature is not to equate them with the trial of a criminal charge".[74]

11.9 The differences between contempt proceedings and criminal proceedings are many and significant. Perhaps the most significant difference lies in the different policy underpinnings. One of the fundamental policy considerations upon which criminal procedure is founded is the power imbalance between the individual and the state, and the consequent need to protect the liberty of the individual against intrusions by the state.[75]

11.10 This consideration has little relevance to a proceeding for contempt constituted by a breach of a civil order. Contempt proceedings alleging breach of court orders are commenced by private parties,[76] who don't enjoy the resources, or access to the resources, of the state. They do not have a standing police force, or investigations and prosecutions departments of the kind that modern prosecuting agencies typically do. They do not have an equivalent of the Office of Public Prosecutions or Crown prosecutors—no large, permanent team of full-time lawyers whose sole job is to prosecute. They do not typically have their own forensic laboratories, or standing teams of forensic scientists, accountants and other experts. Most importantly, they do not have access to the powerful armoury of legal processes available to law enforcement bodies to gather evidence—powers such as warrantless search powers,[77] search warrants,[78] surveillance powers,[79] compulsory forensic procedures,[80] and statutory examination and document production powers. Even where the plaintiff is a large commercial entity with substantial financial resources, it remains a private

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[73] CFMEU Submission [15]–[16].

[74] *Witham*, 534 (Brennan, Deane, Toohey and Gaudron JJ). See also *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 ("***Hinch***"), 89.

[75] See, eg, R *v Carroll* (2002) 213 CLR 635, 643 (Gleeson CJ and Hayne J).

[76] In this case, it so happens that, after the Boral Respondents had commenced the contempt proceeding, the Attorney-General for the State of Victoria successfully applied to be joined as a plaintiff. This does not change the proper characterisation of contempt proceedings generally as involving private parties. The joinder of the Attorney-General to a proceeding for contempt constituted by a breach of a civil order is highly unusual—as far as the Boral Respondents are aware, it has only ever happened twice in Victoria. In any event, the Discovery Order was sought by summons filed by the Boral Respondents, not by the Attorney-General (indeed, it pre-dates his joinder). The CFMEU does not submit that anything turns on the joinder of the Attorney-General.

[77] See, eg, warrantless access to metadata under: the *Telecommunications Act 1997* (Cth), ss 313(3) and 313(7); and the *Telecommunications (Interception and Access) Act 1979* (Cth), pt 4-1, div 4.

[78] See, eg, *Crimes Act* 1958 (Vic), s 465.

[79] See, eg, *Surveillance Devices Act* 1999 (Vic), s 15.

[80] See, eg, *Crimes Act* 1958 (Vic), ss 464K, 464SA and 464T.

entity and operates on the same level as the contempt defendant. All the more is that so in circumstances involving personal litigants: far from being a powerful emanation of the Crown, a contempt plaintiff will, in some cases, be no more powerful or better resourced than an average citizen.

11.11 In contrast, contempt procedure has its own, quite distinct policy objectives. Civil justice relies on private parties to ensure compliance with court orders through privately instituted contempt proceedings. The principal objective of contempt procedure is to vindicate judicial authority[81] by enabling private parties who are granted the benefit of court orders to take action against those who breach them.

11.12 This fundamental difference militates against the wholesale importation of the onerous rules of criminal procedure into contempt procedure. Contempt procedure must be practically accessible to private litigants. If it is not, court orders risk becoming mere pieces of paper.

Third: there are accepted procedural differences

11.13 There are also significant, accepted procedural differences between contempt proceedings and criminal proceedings. For example:

(a) contempt proceedings are brought in the court's civil jurisdiction;[82]

(b) contempt is an indictable offence,[83] yet for over a century it has always been prosecuted summarily in Victoria,[84] with no means by which the defendant might elect to have a charge tried by jury;[85]

(c) private contempt plaintiffs are not subject to prosecutorial duties;[86]

(d) pleading rules are more relaxed in contempt proceedings;[87]

(e) unlike in a criminal proceeding, costs can be (and routinely are) ordered against an unsuccessful party to a contempt proceeding;[88] and

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[81] *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 112–113 (Gibbs CJ, and Mason, Wilson and Deane JJ).

[82] *Hinch*, 89.

[83] *BHP Pty Ltd v Dagi* (1996) 2 VR 117, 126 (Winneke P, dissenting).

[84] Ibid.

[85] Cf *Criminal Procedure Act* 2009 (Vic), s 29(1)(b), which provides that the Magistrates' Court may determine that an indictable offence be made triable summarily only with the accused's consent.

[86] See, eg, *K v J* (2004) 184 FLR 1, 20–21; *Jones v ACCC* (2010) 189 FCR 390, 409. This conclusion, it is submitted, is unsurprising: to impose upon a private contempt plaintiff all of the duties of a criminal prosecutor would be to make contempt proceedings unworkable.

[87] See, in relation to duplicity, Decision Below, [223]–[230] and the cases there cited.

[88] See, eg, *Slaveski v The Queen (on the application of the Prothonotary of the Supreme Court of Victoria)* [2012] VSCA 48, [91] (Warren CJ, Nettle and Redlich JJA agreeing).

(f) there are differences between the punishments available for contempt and the punishments available in criminal proceedings—for example, one form of punishment available in contempt but not in crime is continuous imprisonment until the contempt is purged.[89]

11.14 These differences warrant extreme caution in importing elements of criminal procedure into contempt proceedings. It cannot be assumed that merely because a particular rule exists in criminal procedure, it should automatically be imported into contempt procedure.

11.15 Here, even assuming that there is a common law rule against requiring a corporate accused to produce specific documents in a criminal proceeding,[90] it is for the CFMEU to show why that rule should be imported into contempt proceedings. It has not done so.

Fourth: policy considerations

11.16 There are sound policy reasons why a rule (assuming that one exists) that a corporate accused in criminal proceedings should not be compelled to produce specific documents should not be imported into contempt procedure. In *Caltex*, this Court identified strong policy reasons for refusing to extend self-incrimination privilege to corporations. They included that:

(a) "[i]n general, a corporation is usually in a stronger position vis-à-vis the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons";[91]

(b) corporate conduct is often complex and difficult to prove;[92] and

(c) corporate offending is often provable (or even detectable) only through corporate documents.[93]

11.17 Moreover in criminal proceedings, there is little need to compel the accused to produce documents under rules of court. Prosecuting authorities can use search warrants and, often, other statutory production powers to obtain documents in the accused's possession—mechanisms unavailable to a contempt plaintiff. If compulsory production provisions of the rules of court are also unavailable, the contempt plaintiff is left in a uniquely *dis*advantaged position vis-à-vis both an

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[89] Ibid [93].

[90] Which, of course, is denied for the reasons advanced in section 9 above.

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

[92] *Caltex*, 500 (Mason CJ and Toohey J, 533 (Deane, Dawson and Gaudron JJ), 554 (McHugh J).

[93] *Caltex*, 500 (Mason CJ and Toohey J), 515 (Brennan J), 554 (McHugh J).

ordinary criminal prosecutor and an ordinary civil plaintiff. That would be a peculiar outcome; one not easily reconciled with the notion that contempt proceedings serve as privately-resourced means of vindicating court authority.

11.18 These considerations militate against granting to corporations a common law immunity from being compelled to produce specific documents in contempt proceedings. For at least the same reasons that prompted this Court, in *Caltex*, to constrain the privilege against self-incrimination and require the production of specific documents, so too, with respect, should it constrain any *other* immunity (if one exists) that might otherwise protect against that consequence in proceedings for contempt.

12. SUBSTANTIAL INJUSTICE

12.1 By its decision below, the Victorian Court of Appeal declined to grant the CFMEU leave to appeal against the Discovery Order. A significant—perhaps primary—reason for its doing so was that "[t]he documents in question could have been obtained by the simple device of issuing one or more subpoenas for production" and that, that being the case, the CFMEU would "suffer no real injustice whatever" by the order being allowed to stand.[94]

12.2 The Boral Respondents did not advance arguments on this point separate from or additional to those developed and advanced by the seventh respondent. In the present appeal—as at the date of these submissions—the seventh respondent has refused to cooperate with the Boral Respondents as to the contentions that might be pressed on this (or any) point. Nonetheless, the Boral Respondents anticipate that the seventh respondent will, as he did below, develop the submission on this point in his written and oral submissions herein.

13. DISPOSITION

13.1 The appeal should be dismissed with costs. So determined, the stay granted by the Court on 20 November 2014 will automatically dissolve, and the timetable for the discovery and inspection of documents, and for the hearing of the substantive matter, may proceed with all due haste.

PART VII: NOTICE OF CONTENTION OR CROSS APPEAL

14.1 Not applicable.

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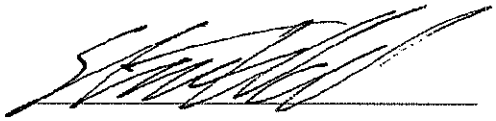
[94] Decision Below, [479].

PART VIII: ESTIMATE OF TIME

15.1 The Boral Respondents will require 1.5 hours for the presentation of their oral arguments.

Dated: Tuesday, 24 March 2015



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