HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION — APPELLANT

AND

BORAL RESOURCES (VIC) PTY LTD & ORS — RESPONDENTS

Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd
[2015] HCA 21
17 June 2015
M18/2015

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation

P J Morrissey SC with R B Shann and J D Watson for the appellant (instructed by Slater and Gordon)

S J Wood QC with J L Snaden and D Ternovski for the first to sixth respondents (instructed by Fisher Cartwright Berriman)

J B Davis with B W Jellis for the seventh respondent (instructed by Victorian Government Solicitor)

CATCHWORDS

Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd

Practice and procedure – Contempt of court – Discovery – Where proceeding brought under r 75.06(2) of Supreme Court (General Civil Procedure) Rules 2005 (Vic) ("Rules") to punish appellant for contempt of court – Where appellant is a corporation – Whether a corporation may be ordered to make discovery under r 29.07(2) of Rules in a contempt proceeding – Whether a contempt proceeding is a criminal proceeding or a civil proceeding.

Words and phrases – "accusatorial proceeding", "civil proceeding", "companion principle", "criminal proceeding".

Civil Procedure Act 2010 (Vic), s 3, Pt 4.3.
Evidence Act 2008 (Vic), s 187.
Supreme Court (General Civil Procedure) Rules 2005 (Vic), r 29.07(2), O 75.

1 FRENCH CJ, KIEFEL, BELL, GAGELER AND KEANE JJ. At issue in this appeal is whether the appellant, a corporation, is amenable to an order under r 29.07(2) of the Supreme Court (General Civil Procedure) Rules 2005 (Vic) ("the Rules") to make discovery of particular documents in proceedings brought to punish it for contempt of court.

2 Rule 29.07(2) expressly authorises the making of an order for discovery. If the appellant were a natural person, production of documents pursuant to such an order might be resisted as offending the privilege against self-incrimination (which would not be displaced by the general language of the rule) with the result that an order for discovery would be refused[1]. But because the appellant is a corporation, it is unable at common law to invoke this privilege[2] or the privilege against self-exposure to a penalty[3], and so compliance with an order under r 29.07(2) cannot be excused on these grounds. The position at common law is now reinforced by s 187 of the *Evidence Act* 2008 (Vic), which provides:

> "(1) This section applies if, under a law of the State or in a proceeding, a body corporate is required to—
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> (a) answer a question or give information; or
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> (b) produce a document or any other thing; or
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> (c) do any other act whatever.
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> (2) The body corporate is not entitled to refuse or fail to comply with the requirement on the ground that answering the question, giving the information, producing the document or other thing or doing that other act, as the case may be, might tend to incriminate the body or make the body liable to a penalty."

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1 *R v Associated Northern Collieries* (1910) 11 CLR 738 at 748; [1910] HCA 61; *Woods v Skyride Enterprises Pty Ltd* [2012] WASC 4 at [13]-[14]; *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2013] VSCA 378 at [10].

2 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; [1993] HCA 74.

3 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 559 [31]; [2002] HCA 49.

3 In *Environment Protection Authority v Caltex Refining Co Pty Ltd*[4], this Court held that a corporation charged with an offence may not resist a lawful command to produce documents to a prosecuting authority. That was so even though the corporation had been charged with criminal offences. In this case the appellant has argued that the terms of r 29.07(2) are not sufficiently clear to oblige it to disadvantage itself as a defendant in proceedings which are either criminal or quasi-criminal. For the reasons which follow, this argument should be rejected. Whether or not the appellant's argument can stand with this Court's decision in *Caltex*, the appellant's argument fails because the contempt proceeding against the appellant is a civil proceeding to which r 29.07(2) applies according to its tenor.

The Rules

4 Rule 1.05(1) of the Rules provides, relevantly, that "these Rules apply to every civil proceeding commenced in the Court". The term "civil proceeding" is not defined in the Rules. It may be noted that s 3 of the *Civil Procedure Act* 2010 (Vic) ("the Act") defines the term "civil proceeding" for the purposes of the Act to mean "any proceeding in a court other than a criminal proceeding or quasi-criminal proceeding"; but the Act does not purport to define the term as it is used in the Rules. Something more will need to be said in due course about this provision and the relationship between the Rules and the Act.

5 Order 29 of the Rules sets out the rules that apply to discovery. Rule 29.07(2) provides that in a proceeding not commenced by writ "the Court may at any stage order any party to make discovery of documents." Rule 29.07(3) provides that an order made pursuant to r 29.07(2) "may be limited to such documents or classes of document ... as the Court thinks fit."

6 Order 75 of the Rules is concerned with proceedings for contempt of court. Rule 75.06 provides as follows:

> "(1) Application for punishment for the contempt shall be by summons or originating motion in accordance with this Rule.
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> (2) 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.

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4 (1993) 178 CLR 477.

(3) Where paragraph (2) does not apply, the application shall be made by originating motion which—

(a) shall be entitled 'The Queen v' the respondent, 'on the application of' the applicant; and

(b) shall require the respondent to attend before a Judge of the Court.

(4) The summons or originating motion shall specify the contempt with which the respondent is charged.

(5) The summons or originating motion and a copy of every affidavit shall be served personally on the respondent, unless the Court otherwise orders."

7 In this case, the contempt proceeding was commenced by summons in accordance with r 75.06(2).

8 Part 4 of O 75 sets out the rules that apply "where the Court finds that a respondent is guilty of contempt of court." Rule 75.11 sets out the types of punishment that may be imposed. Pursuant to r 75.11(2), a corporation may be punished for contempt by sequestration of property or fine or both.

The history of the proceedings

9 On 22 August 2013, the first to sixth respondents ("the Boral parties") filed a summons seeking orders in the Supreme Court of Victoria that the appellant be punished for contempt of court. The Attorney-General for the State of Victoria was subsequently granted leave to intervene in this proceeding pursuant to r 9.06(b)(ii).

10 The Boral parties alleged that the appellant had disobeyed orders made by Hollingworth J on 5 April 2013 by establishing a blockade of a construction site to which the first respondent supplied concrete. The blockade was alleged to have been organised and implemented by an employee of the appellant, Mr Joseph Myles, between 12.00 pm and 2.00 pm on 16 May 2013.

11 On 2 October 2013, the Boral parties filed a summons seeking an order pursuant to r 29.07(2) directing the appellant to make discovery of specific documents going to the question of whether the appellant authorised Mr Myles to establish the blockade. Other than documents containing the terms of Mr Myles' employment, the documents sought were business cards and other documents

recording the mobile telephone numbers of officers of the CFMEU Construction and General Division, Victorian branch. The Boral parties seek to prove they communicated with Mr Myles at the relevant time.

12 On 23 October 2013, the Boral parties' summons for discovery was dismissed by Daly AsJ. Daly AsJ held that the contempt proceeding was "properly characterised as a criminal proceeding, and as such, the rules of civil procedure do not apply."[5] On that footing, her Honour concluded that an order for discovery pursuant to r 29.07(2) was not available, and that, even if it were, such an order was not appropriate because the contempt proceeding was "criminal in nature".

13 The Boral parties appealed the decision of Daly AsJ to a judge of the Trial Division of the Supreme Court of Victoria (Digby J) pursuant to r 77.06 of the Rules. The Boral parties contended that Daly AsJ erred: (a) in holding that the Rules did not apply to the contempt proceeding; and (b) in holding that, even if they did, discovery under r 29.07(2) was inappropriate as a matter of discretion. Digby J upheld both of these contentions.

14 In relation to the Boral parties' first contention, his Honour held[6], relying on this Court's decision in *Hinch v Attorney-General (Vict)*[7], that the contempt proceeding was a civil proceeding to which the Rules, including r 29.07(2), applied. This was said to be the case even though the contempt proceeding could be described as criminal in nature[8].

15 In relation to the second contention, Digby J held[9] that an order for discovery was appropriate in the circumstances because the documents the Boral parties sought were relevant to the contempt proceedings and were peculiarly within the knowledge of the appellant; and because an order for discovery would not infringe any right or interest of the appellant. As to this latter point, Digby J

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5 See also *Australian Securities and Investments Commission v Sigalla (No 4)* (2011) 80 NSWLR 113.

6 *Boral Resources (Vic) Pty Ltd v CFMEU* [2014] VSC 120 at [34].

7 (1987) 164 CLR 15 at 89; [1987] HCA 56.

8 *Boral Resources (Vic) Pty Ltd v CFMEU* [2014] VSC 120 at [68].

9 *Boral Resources (Vic) Pty Ltd v CFMEU* [2014] VSC 120 at [149].

noted[10] that the privileges against self-incrimination and self-exposure to a penalty were not available to the appellant as a corporation.

16 In the upshot, Digby J set aside the decision of Daly AsJ and, pursuant to r 29.07(2), made an order directing the appellant to make discovery of the documents sought by the Boral parties.

17 Pursuant to O 64 of the Rules, the appellant applied for leave to appeal to the Court of Appeal of the Supreme Court of Victoria. In a joint judgment, Ashley, Redlich and Weinberg JJA refused[11] the appellant leave to appeal because: (a) there was insufficient reason to doubt the decision of Digby J; and (b) the appellant would suffer no substantial injustice if Digby J's order for specific discovery were permitted to stand.

18 As to the latter point, the Court of Appeal held[12] that the relevant question was whether it would be unjust to allow the Boral parties to gain access to the documents they sought, and that this would not be unjust because the "documents in question could have been obtained by the simple device of issuing one or more subpoenas for production." The Court of Appeal said this conclusion was sufficient to dispose of the appellant's application for leave to appeal, but nonetheless proceeded to express its view as to the merits of the appellant's arguments.

19 The appellant's first argument was that r 29.07(2) did not apply to the contempt proceeding because it was a "criminal proceeding". The Court of Appeal rejected[13] the premise on which this argument proceeded, namely, that a contempt proceeding may be characterised, "for all purposes, as a criminal proceeding." The Court of Appeal held[14] that a contempt proceeding takes its

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10 *Boral Resources (Vic) Pty Ltd v CFMEU* [2014] VSC 120 at [111].

11 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2014] VSCA 261 at [477]-[480].

12 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2014] VSCA 261 at [479].

13 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2014] VSCA 261 at [497].

14 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2014] VSCA 261 at [498]-[500].

"character from [its] surrounding circumstances, and the context within which the analysis proceeds." It held that the contempt proceeding in the present case is "governed by the civil jurisdiction, and the rules ordinarily applicable in that jurisdiction."

20 The appellant's second argument was that the contempt proceeding was an "accusatorial proceeding", which meant that the Boral parties were required to prove the charge of contempt without any assistance from the appellant (including by way of discovery under the Rules), and that the Rules should be construed so as to conform with this fundamental principle. In this regard, the appellant relied on observations made by members of this Court in *X7 v Australian Crime Commission*[15] and *Lee v The Queen*[16]. The Court of Appeal rejected[17] this argument on the basis that it was foreclosed against the appellant by the decision of this Court in *Caltex*.

The appeal to this Court

21 The appellant appealed to this Court pursuant to special leave granted by Hayne and Kiefel JJ on 13 February 2015.

The appellant's arguments

22 In relation to the basis on which the Court of Appeal formally refused leave to appeal, the appellant argued that the Court of Appeal erred in proceeding on the footing that the possibility that the relevant documents could be obtained by subpoena meant the appellant would not suffer substantial injustice if the discovery order were sustained. Given that the appellant's principal argument should be rejected and the appeal dismissed for that reason, it is not necessary to resolve this argument.

23 The appellant's principal argument began with the contention that it must now be taken to be established that in all proceedings for contempt of court the applicable standard of proof is proof beyond reasonable doubt. It was said that inherent in this standard of proof is a requirement that the moving party cannot

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15 (2013) 248 CLR 92; [2013] HCA 29.

16 (2014) 88 ALJR 656; 308 ALR 252; [2014] HCA 20.

17 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2014] VSCA 261 at [446], [495].

compel the party charged with contempt to testify or produce documents to assist it in making its case. This requirement was referred to as "the companion principle".

24 The companion principle was said to be distinct from the privileges against self-incrimination and self-exposure to a penalty so that even where, as here, these privileges are not available, the companion principle continues to operate in favour of the party charged. The appellant then argued that the application of the companion principle meant that r 29.07(2) must be construed so as not to apply to undermine the appellant's position as the party charged.

25 The appellant argued that this Court's decision in *Caltex*, properly understood, was not inconsistent with this argument. The appellant did not seek to argue that *Caltex* was wrongly decided; rather, it sought to confine the authority of *Caltex* so as to leave room for it to invoke the companion principle.

26 The appellant also argued that the references in O 75 to "guilt", "punishment" and "charge" indicated that proceedings for contempt of court under O 75 are quarantined from the application of r 29.07(2) of the Rules. The appellant argued further that the Act affected the operation of the Rules in a way which meant that the rules relating to discovery do not apply to proceedings for contempt. It was said that the Act, while not seeking generally to override the Rules, had the effect that the Rules do not operate in relation to quasi-criminal proceedings such as contempt proceedings. In this regard, it was said that the Act makes provision in relation to discovery in Pt 4.3; and that this provision is so comprehensive as to indicate that discovery is available only in "civil proceedings" as defined in the Act.

27 It is convenient to consider the arguments relating to the Rules and the Act before turning to the appellant's principal argument.

The Rules and the Act

28 The provisions of O 75 are not quarantined from the other provisions of the Rules. In the first place, a proceeding under r 75.06(2) is within the literal scope of r 29.07(2) because it is a proceeding not commenced by writ. Secondly, the provisions of O 75 are not self-contained: they expressly assume the application of other rules, including those related to summonses (O 46) and affidavits (O 43).

29 It is not the case that r 29.07(2) has no application to proceedings under O 75 because r 29.07(2) is confined to proceedings in which each party is

required by the Rules to deliver a pleading setting out its case whereas O 75 contemplates that a respondent has no such obligation. Rule 29.07(2) is not confined to proceedings involving the delivery of pleadings. The language of r 29.07(2) makes no such qualification. In truth, it proceeds on the express footing that it applies to proceedings that do not involve the delivery of pleadings, namely, proceedings not commenced by writ[18].

30 The circumstances, in O 75, that the term "respondent" means a "person guilty or alleged to be guilty of contempt of court"[19], and that the summons by which the application is to be made "shall specify the contempt with which the respondent is charged"[20], do not warrant the conclusion that O 75 is intended to stand outside the Rules. In this regard, r 4.03(2) expressly acknowledges that proceedings against a "respondent" are within the ordinary application of the Rules. It provides:

> "A person who commences a proceeding under Rule 32.03, 32.05, 37.02 or 75.06(3) shall be called an applicant and the person against whom the proceeding is commenced shall be called a respondent."

31 Further, while r 75.06(5) requires that "[t]he summons … and a copy of every affidavit" be served personally on the respondent, this cannot be taken to preclude an applicant from supplementing affidavit evidence relied on at the outset of the contempt proceeding with further evidence. That is because r 75.06(5) is not an exhaustive statement of the procedure applicable to an application for contempt: it is expressly directed at the requirements for the initiation of an application.

32 It is important to appreciate that the respondent can be protected from oppressive conduct by the applicant by the exercise of the judicial discretion conferred by r 29.07(2).

33 The appellant's argument that the Act so confines the operation of the Rules, insofar as they facilitate discovery, that they do not apply to contempt proceedings must also be rejected. The Act does not purport to define civil proceedings for the purposes of the Rules. More importantly, the Act expressly

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18 Rules, O 14.

19 Rules, r 75.01.

20 Rules, r 75.06(4).

contemplates the untrammelled operation of the Rules in relation to discovery. Thus, s 59 of the Act, which appears in Pt 4.3, provides that the powers conferred under Pt 4.3 "are in addition to, and do not derogate from, any powers a court has under rules of court in relation to discovery or disclosure of documents."

34 If r 29.07(2) is given its literal operation, its terms are sufficiently clear to authorise the order for discovery that was made in this case. The effect of an order under r 29.07(2) is plainly to override the right of the party against whom it is made to keep its papers private, as well as any entitlement that party might otherwise have to refrain from assisting the other party in the proceedings against it.

The companion principle

35 The appellant's principal argument regarding the companion principle must be rejected because the companion principle is an adjunct to criminal proceedings; and the contempt proceeding is not a criminal proceeding.

36 It is well established that the accusatorial nature of a criminal trial means that, under the common law, the onus of proof is upon the prosecution to prove its case[21]. As a corollary, under the common law, the prosecution cannot compel the accused to assist it to discharge its onus[22]. In *Lee v The Queen*[23], this Court said:

> "Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in *X7*. The principle is so fundamental that 'no attempt to whittle it down can be entertained' albeit its application may be affected by a statute expressed clearly or in words of necessary intendment. The privilege against self-incrimination may be lost, but the principle remains.

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21 *Caltex* (1993) 178 CLR 477 at 503.

22 *Sorby v The Commonwealth* (1983) 152 CLR 281 at 294; [1983] HCA 10; *Caltex* (1993) 178 CLR 477 at 527; *X7* (2013) 248 CLR 92 at 118 [42], 136 [101]-[102], 153 [159].

23 (2014) 88 ALJR 656 at 662 [32]-[33]; 308 ALR 252 at 260.

> The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.
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> The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof. Recognising this, statute provides that an accused person is not competent to give evidence as a witness for the prosecution, a protection which cannot be waived." (footnotes omitted)

37 Two points may be made here. First, the companion principle described in *Lee v The Queen* is not, as the appellant argued, a corollary of the criminal standard of proof. Rather, it is an "aspect of the accusatorial nature of a criminal trial in our system of criminal justice" whereby an accused person cannot be compelled to assist the prosecution to make its case[24]. The companion principle is a "companion" of criminal *trials*, not of the standard of proof ordinarily applicable in such trials[25].

38 Secondly, no question arises under r 29.07(2) of the Rules as to the appellant being required to give evidence against itself as a witness for the prosecution. The documents required to be discovered speak for themselves. In the nature of things, such documents have been brought into existence in the course of the conduct of the corporation's affairs by or through other (natural) persons acting in the service of the corporation. In such a case, the concerns that testimonial admissions may be extracted by oppressive conduct and that confessions of dubious reliability will be adduced[26] do not arise. If such concerns were to arise in different circumstances, they would fall to be considered as part of the discretion conferred by the rule.

39 There is no issue on this appeal as to the correctness of the exercise of the discretion by Digby J to order discovery. This is not surprising, given the nature and content of the documents sought.

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24 *Caltex* (1993) 178 CLR 477 at 528.

25 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 313 [318]; [2013] HCA 39.

26 *A T & T Istel Ltd v Tully* [1993] AC 45 at 53.

The companion principle and the contempt of court proceeding

40 To describe the contempt proceeding as "accusatory", in the sense that it charged the appellant with conduct warranting punishment, is not to take the proceedings out of the civil jurisdiction and the purview of the Rules. As Hayne J observed in *Re Colina; Ex parte Torney*[27], in *Hinch*[28] Mason CJ, Wilson, Deane, Toohey and Gaudron JJ said:

> "Notwithstanding that a contempt may be described as a criminal offence, the proceedings do not attract the criminal jurisdiction of the court to which the application is made. On the contrary, they proceed in the civil jurisdiction".

41 In *Re Colina; Ex parte Torney*[29], Hayne J described "the cardinal feature of the power to punish for contempt" as being that it "is an exercise of judicial power *by the courts*, to protect the due administration of justice." In this case, the contempt proceeding arose in the course of the civil proceeding between the Boral parties and the appellant.

42 The contempt proceeding was commenced and pursued under the Rules, which apply according to their tenor in relation to proceedings in the civil jurisdiction. In *Witham v Holloway*[30], Brennan, Deane, Toohey and Gaudron JJ considered the distinction made in the authorities between civil and criminal contempt, and concluded that the punitive effect of the usual sanctions for contempt meant the "differences upon which the distinction between civil and criminal contempt is based are, in significant respects, illusory", and an insufficient justification for the allocation of different standards of proof for civil and criminal contempt. Their Honours went on to say[31]:

> "[T]he illusory nature of those differences and the fact that the usual outcome of successful proceedings is punishment, no matter whether

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27 (1999) 200 CLR 386 at 428 [109]; [1999] HCA 57.

28 (1987) 164 CLR 15 at 89.

29 (1999) 200 CLR 386 at 429 [112] (emphasis in original).

30 (1995) 183 CLR 525 at 534; [1995] HCA 3.

31 (1995) 183 CLR 525 at 534.

> primarily for the vindication of judicial authority or primarily for the purpose of coercing obedience in the interest of the individual, make it clear as Deane J said in *Hinch*, that all proceedings for contempt 'must realistically be seen as criminal in nature'[32]. The consequence is that all charges of contempt must be proved beyond reasonable doubt."

43 Their Honours were at pains to make it clear that this statement did not include the proposition that proceedings on a charge of contempt are, or are to be regarded as the equivalent of, a criminal trial. As their Honours said[33]:

> "[T]o say that proceedings for contempt are essentially criminal in nature is not to equate them with the trial of a criminal charge. There are clear procedural differences, the most obvious being that criminal charges ordinarily involve trial by jury, whereas charges of contempt do not."

44 There are other differences in addition to those referred to by their Honours, not the least important of which is that contempt proceedings are initiated, not by the executive government, but by private parties to an indisputably civil proceeding. A party to a civil proceeding who wishes to complain that the other party has breached an order of the court is not in the same position as a prosecuting authority, which can gather evidence by compulsory processes of search and seizure before making a decision to charge the defaulting party with contempt. Further, in the contempt proceeding, the spectre of oppression by the executive government in requiring the accused to assist it in the prosecution of a criminal charge against the accused, especially one launched without adequate investigation by the agents of the state, does not arise. In any case, where an application for discovery in contempt proceedings did give rise to such a concern, the more fundamental concern for the liberty of the subject would be a powerful consideration in the exercise of the discretion whether or not to make an order for discovery.

45 In *Witham v Holloway*[34], the plurality expressly noted that the process whereby a contempt proceeding is resolved is a civil "hearing" not a criminal

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32 *Hinch* (1987) 164 CLR 15 at 49.

33 *Witham v Holloway* (1995) 183 CLR 525 at 534. See also *Doyle v The Commonwealth* (1985) 156 CLR 510 at 516; [1985] HCA 46; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 453 [58]; [1999] HCA 19.

34 (1995) 183 CLR 525 at 534.

"trial". McHugh J also expressed the view[35] that proceedings for contempt of court to punish a respondent are "civil and not criminal proceedings".

46 These observations point to a significant deficit in the arguments advanced for the appellant: those arguments do not explain how the contempt proceeding has proceeded as a criminal proceeding without the engagement of any rules of criminal procedure. The progression of the matter through the various levels in the hierarchy of courts was at all times regulated by the laws relating to the civil jurisdiction including the Rules. The companion principle cannot be applied to usurp the authority of the Rules in this regard[36].

47 In summary then, it may be accepted that the companion principle is a fundamental aspect of a criminal trial, which is not to be "whittled down" by an expansive interpretation of legislation that is not clear in its intention. But no criminal trial is in prospect here, and so there is no reason why the language of r 29.07(2) should not be applied according to its tenor in the contempt proceeding.

Conclusion and orders

48 The appeal should be dismissed with costs.

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35 *Witham v Holloway* (1995) 183 CLR 525 at 549.

36 *McGinty v Western Australia* (1996) 186 CLR 140 at 232; [1996] HCA 48; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544 [73]; [2001] HCA 68.

49 NETTLE J. The issue for determination in this appeal is whether, in a civil proceeding for punishment of a corporation for criminal contempt, it is competent for a judge of the Supreme Court of Victoria to order that the corporation make particular discovery. For the reasons which follow, it is.

CFMEU's contentions

50 The factual background and applicable provisions of the Supreme Court (General Civil Procedure) Rules 2005 (Vic) ("the Rules") are set out in the joint judgment.

51 In brief substance, the appellant ("CFMEU") contends that, despite the decision of this Court in *Environment Protection Authority v Caltex Refining Co Pty Ltd*[37] that the privilege against self-incrimination is not available to a corporation, and the view later taken in the Full Court of the Federal Court of Australia in *Trade Practices Commission v Abbco Iceworks Pty Ltd*[38] and by members of this Court in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[39] that the privilege against self-exposure to penalty is similarly not available to a corporation, the court below was wrong to order particular discovery in view of the accusatorial nature of a contempt proceeding.

52 The gist of the argument is that, because the proceeding to punish CFMEU for contempt is an accusatorial proceeding in which it is incumbent upon the first to sixth respondents ("Boral") to prove the alleged contempt beyond reasonable doubt, it would be inconsistent with the accusatorial nature of the proceeding to require CFMEU to assist in proof of the alleged contempt by discovery of particular documents.

53 CFMEU relies in particular on the fundamental principle of the criminal justice system that the onus of proof beyond reasonable doubt rests on the Crown, and the companion rule that an accused cannot be required to assist in proof of the offence charged. It bases its resistance to the order for particular discovery on the limits on compulsory production which it says are imposed by the companion rule. It contends that, although the privileges against self-incrimination and self-exposure to penalty may no longer be available to corporations, the fundamental principle and the companion rule continue to limit the way in which a prosecutor is permitted to prove the prosecution case against

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37 (1993) 178 CLR 477; [1993] HCA 74.

38 (1994) 52 FCR 96.

39 (2002) 213 CLR 543; [2002] HCA 49.

an accused and thus to limit the powers of courts to compel production of documents in aid of the prosecution.

The privileges against self-incrimination and self-exposure to penalty

54 It is as well to start with the privilege against self-incrimination and the privilege against self-exposure to penalty. The privilege against self-incrimination had its beginnings in the same aversion to inquisitorial proceedings as spawned the fundamental principle and, in its application to the criminal justice system, it provides support for the fundamental principle[40]. But it has features which set it apart. Importantly for present purposes, it is capable of applying to all proceedings, criminal and civil[41].

55 The privilege against self-exposure to penalty affords similar protection to the privilege against self-incrimination, but it developed in Chancery from the equitable precept that it would be "monstrous" for a common informer to be able to bring a civil action for penalty without evidence to support it and then require the defendant to supply the evidence out of his own mouth[42].

56 In *Caltex* the majority held that the privilege against self-incrimination is not available to a corporation as a basis for resisting a statutory requirement for the production of documents[43]. Subsequently, in *Abbco*, the majority of the Full Court of the Federal Court held that, as the result of denying the privilege against self-incrimination to corporations, it should be accepted that corporations are also denied the benefit of the privilege against self-exposure to penalty[44]. More recently, in *Daniels*, Gleeson CJ, Gaudron, Gummow and Hayne JJ stated that, consistently with what was said in *Abbco*, it should now be recognised that

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40 *Caltex* (1993) 178 CLR 477 at 527-528 per Deane, Dawson and Gaudron JJ. See below at [61]-[64].

41 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 268 [184] per Kiefel J; [2013] HCA 39.

42 *Orme v Crockford* (1824) 13 Price 376 at 391 per Garrow B [147 ER 1022 at 1026-1027]; see also *Martin v Treacher* (1886) 16 QBD 507 at 511 per Lord Esher MR; *Mexborough (Earl of) v Whitwood Urban District Council* [1897] 2 QB 111 at 115 per Lord Esher MR; *Caltex* (1993) 178 CLR 477 at 519-520 per Brennan J; *Abbco* (1994) 52 FCR 96 at 129-130 per Burchett J.

43 (1993) 178 CLR 477 at 507 per Mason CJ and Toohey J, 517 per Brennan J, 557-558 per McHugh J.

44 (1994) 52 FCR 96 at 130 per Burchett J, 146 per Gummow J.

neither the privilege against self-incrimination nor the privilege against self-exposure to penalty any longer applies to corporations[45].

57 Nothing that has occurred since *Daniels* suggests that there is any need to revisit the availability to corporations of either privilege. To the contrary, the extent of corporate crime and misfeasance in contemporary society is such that the considerations which informed the result in *Caltex* are at least as compelling today as they were then or when *Daniels* was decided.

The adversarial nature of contempt proceedings

58 CFMEU does not suggest that *Caltex* was wrongly decided or that what was said in *Daniels* about the privilege against self-exposure to penalty should not be followed. Rather, as has been stated, it bases its resistance to the order for particular discovery on what it describes as the essentially adversarial nature of the contempt proceeding and what it contends are limits imposed on compulsory production of documents by the fundamental principle and companion rule of the criminal justice system. The argument as finally propounded in the course of oral submissions proceeded thus:

(1) The proceeding in which the appeal arises is a proceeding to punish CFMEU for contempt and is, therefore, essentially criminal in nature.

(2) Because the proceeding is essentially criminal in nature, it engages the operation of the fundamental principle of the criminal justice system and, therefore, it is incumbent on Boral to prove the alleged contempt beyond reasonable doubt.

(3) Because the proceeding is essentially criminal in nature it also engages the operation of the companion rule of the criminal justice system and, therefore, it is incumbent on Boral to prove the alleged contempt without the assistance of CFMEU.

(4) Save to the extent that the fundamental principle and the companion rule may be restricted by legislation, it would run counter to the fundamental principle and the companion rule if a defendant to a contempt proceeding could be ordered to make discovery of documents or otherwise to produce documents which might assist in proof of the contempt.

(5) Construed in the light of the principles asserted in points (3) and (4), O 75 and r 29.07(2) do not expressly or impliedly restrict the fundamental principle or the companion rule and, therefore, do not permit an order for

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45 (2002) 213 CLR 543 at 559 [31].

particular discovery to be made against a defendant in a contempt proceeding.

(6) Consequently, notwithstanding the abolition of the corporate privileges against self-incrimination and self-exposure to penalty, CFMEU should not have been ordered to make discovery of documents or to produce documents in this proceeding.

59 The first two steps in that argument are uncontentious. A contempt proceeding is "essentially criminal in nature" and, therefore, it is incumbent on Boral to prove the contempt beyond reasonable doubt[46]. But the third and following steps of the argument do not logically follow from the first and second. Although the requirement that contempt be proved beyond reasonable doubt is the consequence of contempt proceedings being "essentially criminal in nature"[47], it does not mean that a contempt proceeding attracts all of the features of the criminal justice system. As was remarked in *Witham v Holloway*[48]:

> "to say that proceedings for contempt are essentially criminal in nature is not to equate them with the trial of a criminal charge. There are clear procedural differences".

60 Determining whether Boral must prove the alleged contempt without the assistance of CFMEU requires closer consideration of the fundamental principle and companion rule, and of the nature of contempt proceedings.

The fundamental principle and the companion rule

61 The fundamental principle of the criminal justice system that the onus of proof beyond reasonable doubt rests on the Crown, and its companion rule that the accused cannot be required to assist in proof of the offence charged, are now conceived of as expressions of the basic accusatorial nature of the criminal justice system[49].

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46 *Witham v Holloway* (1995) 183 CLR 525 at 534 per Brennan, Deane, Toohey and Gaudron JJ; [1995] HCA 3.

47 *Hinch v Attorney-General (Vict)* (1987) 164 CLR 15 at 49 per Deane J; [1987] HCA 56.

48 (1995) 183 CLR 525 at 534 per Brennan, Deane, Toohey and Gaudron JJ.

49 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 134-135 [95]-[100] per Hayne and Bell JJ; [2013] HCA 29.

62 As such, as Mason CJ and Toohey J observed in *Caltex*, they are grounded in 17th century reaction to the excesses of the ecclesiastical courts and Star Chamber and embody the notion that the liberty of the individual will be weakened if power exists to compel a suspected person to confess to his or her guilt[50]. In essence, they represent a balance struck between the power of the state to prosecute an individual for an offence and the position of the individual who stands charged[51].

63 Recently, in *X7 v Australian Crime Commission*, Hayne and Bell JJ spoke of the interrelation of the accusatorial system and the fundamental principle as follows[52]:

> "These features of the accusatorial system of criminal justice can be described as an accused having a 'right to silence'. And discussion of the 'right to silence' must often proceed in conjunction with a discussion of the privilege against self-incrimination. But, as this Court's decision in *Environment Protection Authority v Caltex Refining Co Pty Ltd* shows, the privilege against self-incrimination is distinct from what was there described as '[t]he fundamental principle that the onus of proof beyond reasonable doubt rests on the Crown' and its 'companion rule that an accused person cannot be required to testify to the commission of the offence charged'."

64 More recently, in *Lee v The Queen*, the Court in a unanimous judgment stated that[53]:

> "Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in *X7*. The principle is so fundamental that 'no attempt to whittle it down can be entertained' albeit its application may be affected by a statute expressed clearly or in words of necessary intendment. The privilege against self-incrimination may be lost, but the principle remains.

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50 (1993) 178 CLR 477 at 497-498; see also *Sorby v The Commonwealth* (1983) 152 CLR 281 at 294 per Gibbs CJ; [1983] HCA 10.

51 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 234 [74] per Hayne J.

52 (2013) 248 CLR 92 at 136 [102] (footnotes omitted).

53 (2014) 88 ALJR 656 at 662 [32]-[33] per French CJ, Crennan, Kiefel, Bell and Keane JJ; 308 ALR 252 at 260; [2014] HCA 20 (footnotes omitted).

> The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.
>
> The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof. Recognising this, statute provides that an accused person is not competent to give evidence as a witness for the prosecution, a protection which cannot be waived."

The nature of contempt proceedings

65 A proceeding for punishment for contempt constituted by disobedience of an injunction granted in a civil proceeding is not part of the criminal justice system in the sense essayed in *Caltex*, *X7* or *Lee v The Queen*. Although "all proceedings for contempt 'must [now] realistically be seen as criminal in nature'"[54], not all contempts are criminal[55]. Failure to obey an injunction is not a criminal offence[56] unless the failure to comply is defiant or contumacious[57]. A proceeding for contempt is not a proceeding for criminal contempt if the proceeding appears clearly to be remedial or coercive in nature as opposed to punitive[58]. A criminal contempt is a common law offence, albeit not part of the

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54 *Witham v Holloway* (1995) 183 CLR 525 at 534 per Brennan, Deane, Toohey and Gaudron JJ, quoting *Hinch v Attorney-General (Vict)* (1987) 164 CLR 15 at 49 per Deane J.

55 *Hearne v Street* (2008) 235 CLR 125 at 168 [132] per Hayne, Heydon and Crennan JJ; [2008] HCA 36; *Australian Securities and Investments Commission v Sigalla (No 4)* (2011) 80 NSWLR 113 at 118 [11] per White J.

56 *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 498-499 per Windeyer J; [1965] HCA 21.

57 *Doyle v The Commonwealth* (1985) 156 CLR 510 at 516 per Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ; [1985] HCA 46.

58 *Hearne v Street* (2008) 235 CLR 125 at 168 [133] per Hayne, Heydon and Crennan JJ.

ordinary common law[59]. But even a proceeding for criminal contempt is not a criminal proceeding[60].

66 The contempt alleged in this case is a criminal contempt. It is alleged that CFMEU is guilty of wilful and contumacious disobedience of an injunction. The relief which is sought is thus punitive, not coercive or remedial; and, therefore, the proceeding is a penal proceeding. Even so, it is a civil proceeding. It is tried by judge alone and, subject to the qualification explained below, the applicable rules of procedure are the rules of procedure which apply to other civil proceedings.

67 The qualification is that some of the safeguards applicable to criminal proceedings also apply to a civil proceeding for criminal contempt[61]; including, in the case of a defendant who is a natural person, the privilege against self-incrimination and the privilege against self-exposure to penalty[62]. Their application rests on "accepted notions of elementary justice"[63] and reflects the fact that a proceeding for committal may result in "very serious interference with

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59 *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 115 per Gibbs CJ, Mason, Wilson and Deane JJ; [1986] HCA 46; *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 at 306.

60 *Hinch v Attorney-General (Vict)* (1987) 164 CLR 15 at 89 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ; see also *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 428 [109] per Hayne J; [1999] HCA 57; cf, in another context, *Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* (2014) 225 FCR 210 at 220 [39] per Buchanan, Gordon and Wigney JJ.

61 *Doyle v The Commonwealth* (1985) 156 CLR 510 at 516; see also *Amalgamated Television Services Pty Ltd v Marsden* (2001) 122 A Crim R 166; *Australian Securities and Investments Commission v Sigalla (No 4)* (2011) 80 NSWLR 113 at 130 [69] per White J.

62 See *R v Associated Northern Collieries* (1910) 11 CLR 738 at 744-745 per Isaacs J; [1910] HCA 61; *Clarkson v Director of Public Prosecutions* [1990] VR 745 at 759 per Murphy J; see also *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 142 [24] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; [2004] HCA 42.

63 See *Coward v Stapleton* (1953) 90 CLR 573 at 580 per Williams ACJ, Kitto and Taylor JJ; [1953] HCA 48.

the liberty of the subject"[64]. But they do not prevent CFMEU being ordered to make discovery and give production of particular documents.

The fundamental principle and companion rule do not apply

68 There are several reasons why that is so. First, where a contempt proceeding is brought by a private litigant, as it is here, there is no contest between the state and an individual. Hence, there is not the need, which there is in criminal proceedings, to strike a balance between the power of the state and the position of the individual who stands accused of an offence. If CFMEU were found guilty of contempt, it would face the prospect of punishment. To that extent, the proceeding is analogous to a criminal proceeding or, in other words, it is "essentially criminal in nature". But it does not involve the forces of the state being arrayed against the individual in the way that occurs in ordinary criminal proceedings.

69 Secondly, although such a proceeding is a proceeding to punish the corporate defendant for criminal contempt, and so is "essentially criminal in nature", it remains a civil proceeding. Civil proceedings directed against corporations ought not to be conceived of as so much trenching on the liberty of the subject that they call for the untrammelled application of the fundamental principle and the companion rule. It might be different if the defendant were a natural person. The prospect of punishment would mean that the liberty of the subject would be at stake. But it is not sensible to speak of depriving a corporation of liberty. The kinds of punishments which can be inflicted on a corporation are essentially no different from the kinds of remedies and processes of execution available to a plaintiff in ordinary civil proceedings.

70 Thirdly, in *Caltex*, Mason CJ and Toohey J concluded the privilege against self-incrimination is not available to a corporation in a prosecution for a criminal offence because it would have[65]:

> "a disproportionate and adverse impact in restricting the documentary evidence which may be produced to the court in a prosecution of a corporation for a criminal offence."

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64 *Doyle v The Commonwealth* (1985) 156 CLR 510 at 516.

65 (1993) 178 CLR 477 at 504.

71 To same effect, Brennan J stated that[66]:

> "if investigative powers were qualified by a privilege against self-incrimination enuring for the protection of corporations, the liability of corporations to criminal sanctions would frequently be unenforceable."

72 Further, as has been noticed, it was later held in *Abbco* and confirmed in *Daniels* that co-ordinate considerations dictate that corporations are, for similar reasons, not entitled to the privilege against self-exposure to penalty.

73 The privilege against self-incrimination and the privilege against self-exposure to penalty are thus denied to corporations because of the disproportionate and adverse impact which those privileges would have in restricting the documentary evidence that may be produced in court in the prosecution of a corporation for a criminal offence. To afford the fundamental principle and companion rule an operation which deprives courts of the capacity to compel corporate defendants to make discovery and production of documents in contempt proceedings would have an equally disproportionate and adverse impact in restricting the documentary evidence which may be produced to the court in the prosecution of contempt proceedings.

74 Fourthly, Mason CJ and Toohey J's conclusion in *Caltex*, that the privilege against self-incrimination is not available to corporate defendants, was expressly premised on recognition that the fundamental principle and the companion rule do not require that corporate defendants be spared from being required to produce incriminating documents. Their Honours' reasoning included the following express rejection of Gleeson CJ's conclusion in *Caltex Refining Co Pty Ltd v State Pollution Control Commission*[67] that the fundamental principle and companion rule supported the availability to corporations of the privilege against self-incrimination[68]:

> "With respect to the first basis, we reject without hesitation the suggestion that the availability of the privilege to corporations achieves or would achieve a correct balance between state and corporation. In general, a corporation is usually in a stronger position vis-à-vis the state than is an individual ...

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66 (1993) 178 CLR 477 at 516, see also at 554-556 per McHugh J.

67 (1991) 25 NSWLR 118 at 127.

68 (1993) 178 CLR 477 at 500-504 (footnote omitted).

> Accordingly, in maintaining a 'fair' or 'correct' balance between state and corporation, the operation of the privilege should be confined to natural persons. ...
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> [I]t is necessary to look rather more closely at ... Gleeson CJ's second justification, the maintenance of the accusatorial system of justice.
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> ...
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> 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. ...
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> ...
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> Indeed, the extent to which statute has interfered with the privilege in relation to corporations indicates 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."

75 To adopt and adapt their Honours' reasoning, since the fundamental principle and companion rule do not require that corporations be spared from a requirement to produce incriminating documents in a criminal proceeding, it follows *a fortiori* that the fundamental principle and companion rule do not require that corporations be spared from a requirement to make particular discovery in civil penal proceedings.

76 In other words, although "the accusatory system is not co-extensive with the privilege[s] against self-incrimination"[69] and self-exposure to penalty, it is apparent that within the "relatively confined area of the production of documents"[70] the common law's denial of the privileges to corporations leaves no room for another basis upon which corporations may resist production.

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69 *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 at 490 [155] per Spigelman CJ.

70 *Caltex* (1993) 178 CLR 477 at 535 per Deane, Dawson and Gaudron JJ.

77 CFMEU contended to the contrary on the basis of the holdings in *X7* and *Lee v The Queen* that, despite statutory abrogation of the privileges against self-incrimination and self-exposure to penalty in the context of inquisitorial hearings, the fundamental principle and companion rule were not displaced for the purposes of subsequent criminal trials. CFMEU argued that parity of reasoning dictates that, despite the common law's denial to corporations of the privileges, the fundamental principle and companion rule protect a corporation against compulsory production of documents in relation to a contempt with which it is charged.

78 That argument must be rejected. *X7* and *Lee v The Queen* were not concerned with discovery or production of documents, still less with discovery and production of documents by corporate defendants. They were concerned with compulsory interrogation of natural persons. And, as Mason CJ and Toohey J and Brennan J recognised in *Caltex*, and Spigelman CJ later reiterated in *NSW Food Authority v Nutricia Australia Pty Ltd*[71], compulsory interrogation concerning an offence with which a person stands charged is a "qualitatively more significant impingement upon the accusatory system" than compulsory production of documents. It raises different considerations.

79 *X7* held that, despite the statutory abrogation of the privilege against self-incrimination, a natural person charged with a serious criminal offence could not be compelled to answer questions in the course of a compulsory interrogation about the charged offence. The legislation in question did not manifest a sufficiently clear intention to displace the fundamental principle[72]. *Lee v The Queen* held that it would undermine the accusatorial nature of a criminal trial if evidence elicited in the compulsory interrogation of a natural person concerning an offence with which he was charged were later made available to the prosecution[73]. Neither case said anything about corporations or the production of documents or otherwise cast any doubt on the determination in *Caltex* that, in the case of a corporate defendant, it is not a fundamental aspect of the accusatorial criminal justice system that the corporation should be entitled to resist a requirement for compulsory production of documents.

80 So to say is not to foreclose the argument that *X7* and *Lee v The Queen* imply that it remains a fundamental aspect of the accusatorial nature of the criminal justice system that a natural person shall not be required to assist in proof of a charge of contempt by means of the compulsory production of

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71 (2008) 72 NSWLR 456 at 490-491 [156].

72 (2013) 248 CLR 92 at 150 [147] per Hayne and Bell JJ, 153 [159]-[160] per Kiefel J.

73 (2014) 88 ALJR 656 at 662-663 [32]-[34]; 308 ALR 252 at 260.

documents. Nor is it to foreclose the possibility that what was said in *X7* and *Lee v The Queen* about compulsory interrogation of a natural person concerning an offence with which he or she has been charged extends to the compulsory interrogation of a corporation about an offence with which it has been charged. Some of the reasoning of the New South Wales Court of Criminal Appeal in *Nutricia* is consistent with that being so[74]. But neither of those questions needs to be decided for the purposes of this appeal. There is no suggestion here of a natural person being compelled to produce documents (otherwise than as agent of a corporation) or of the compulsory interrogation of a corporation.

81 For the purposes of what is in issue in this matter, it is sufficient to say that *Caltex* shows that it is not a fundamental aspect of the accusatorial criminal justice system that a corporation should be entitled to resist a requirement for compulsory production of documents. That is why the common law does not afford corporations a privilege against self-incrimination or against self-exposure to penalty. It follows that, in the case of a corporate defendant, there is no need for any specific statutory abrogation of the fundamental principle or companion rule in order to render the corporate defendant susceptible to an order compelling the production of documents. In particular, there is nothing in principle or otherwise about the integrity of the criminal justice system which warrants that a corporate defendant to a civil proceeding for contempt, whether civil or criminal, should not be ordered to make particular discovery of documents or to produce them. The rules of civil procedure in relation to contempt proceedings brought under O 75, including r 29.07(2), operate accordingly.

Section 187 of the *Evidence Act* 2008 (Vic)

82 The Attorney-General for the State of Victoria argued that s 187 of the *Evidence Act* 2008 (Vic) lends support to that conclusion. That submission should be accepted. Section 187 provides inter alia that, where in a proceeding a body corporate is required to produce a document or any other thing or to do any other act whatever, it is not entitled to refuse or fail to comply with the requirement on the ground that producing the document or other thing or doing the other act might tend to incriminate it or make it liable to a penalty.

83 CFMEU has been ordered to make particular discovery. Hence, it has been ordered to do an act in a proceeding within the meaning of the section. For the reasons already stated, CFMEU has no privilege against self-incrimination or self-exposure to penalty which would enable it to resist an order for discovery and neither the fundamental principle of the criminal justice system nor the companion rule requires that CFMEU be spared from an order requiring it to give

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74 (2008) 72 NSWLR 456 at 490 [155] per Spigelman CJ; see also *Exagym Pty Ltd v Professional Gymnasium Equipment Company Pty Ltd* [1994] 2 Qd R 6.

particular discovery. The words of the section are clear. The effect of the section is that CFMEU may not refuse to make the discovery ordered on the ground that it might incriminate it or expose it to a penalty or because of the fundamental principle or the companion rule.

Order 75 is not self-contained

84 At an earlier stage of the proceeding, CFMEU contended that O 75 was a self-contained code which excluded other parts of the Rules, including O 29. In the course of argument, that contention was abandoned. Counsel for CFMEU conceded that O 75 operates as part of the Rules and thus incorporates other parts of the Rules according to its and their terms.

85 The concession was properly made. Order 75 is plainly not an exclusive code. It provides for a procedure which necessarily imports processes provided for in several other parts of the Rules; subject, in the case of a natural person, to the privilege against self-incrimination and the privilege against self-exposure to penalty and, in the case of a corporation, to other qualifications which are not here in issue.

Substantial injustice

86 It was accepted that, if the fundamental principle and companion rule are not opposed to CFMEU being ordered to provide particular discovery pursuant to r 29.07(2), the appeal must fail. Accordingly, it is unnecessary to consider whether, if there had not been power to order that CFMEU make particular discovery, the order would have been productive of substantial injustice.

Conclusion

87 For these reasons, the appeal should be dismissed with costs.