SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2014 0072

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION — Applicant

v

GROCON CONSTRUCTORS (VICTORIA) PTY LTD (ABN 98 148 006 624) and OTHERS (according to the Schedule attached) — Respondents

-and –

S APCI 2014 0040

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION and OTHERS (according to the Schedule attached) — Appellants

v

GROCON CONSTRUCTORS (VICTORIA) PTY LTD (ABN 98 148 006 624) and OTHERS (according to the Schedule attached) — Respondents

-and –

S APCI 2014 0038

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION — Applicant

v

BORAL RESOURCES (VIC) PTY LTD (ACN 004 620 731) and OTHERS (according to the Schedule attached) — Respondents

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JUDGES:	ASHLEY, REDLICH and WEINBERG JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	25 and 28 July 2014
DATE OF JUDGMENT:	24 October 2014
MEDIUM NEUTRAL CITATION:	[2014] VSCA 261
JUDGMENTS APPEALED FROM:	*Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors* (No 2) [2014] VSC 134 (Cavanough J) *Boral Resources (Vic) Pty Ltd & Ors v CFMEU & Anor* [2014] VSC 120 (Digby J)

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Construction Forestry Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd & Ors (S APCR 2014 0072) and (S APCI 2014 0038)

CONTEMPT OF COURT – Industrial dispute – Preventing access to building sites – Restraining orders made – Alleged breaches of restraining orders – Proceeding alleging contempt of court initiated under *Supreme Court (General Civil Procedure) Rules* 2005 (r 75.06(2)) – Whether civil or criminal proceeding in circumstances of case.

CONTEMPT OF COURT – Finding made of breaches of restraining orders – Finding of criminal contempt – Criminal convictions recorded and fines imposed – Whether finding of criminal contempt available when charges did not plead contumacious conduct – Whether contumacy an element of criminal contempt or an aggravating circumstance – Nature of contempt – Effect of *X7 v Australian Crime Commission* (2013) 248 CLR 92 and *Lee v The Queen* (2014) 88 ALJR 656 – Whether contumacy must be pleaded in order that contempt for breach of Court orders be treated as criminal – Contumacy need not be pleaded – Sufficient that alleged contemnor put on notice that allegation of contumacy is made.

CRIMINAL LAW – Alleged breaches of restraining orders – Whether trial judge erred in finding applicant had breached restraining orders – Terms of orders – Whether particulars of charges satisfied – Significance of redeployment of workers before relevant blockading conduct commenced – Not reasonably arguable that trial judge erred in findings of contempt.

CRIMINAL LAW – Alleged breaches of restraining orders – Whether evidence to support findings of breaches to criminal standard – Not reasonably arguable that trial judge erred in so finding.

CRIMINAL LAW – Breaches of restraining orders – Finding of criminal contempt – Fine imposed – Whether fine in respect of breach disproportionate to fines imposed for other breaches – Not reasonably arguable that fine disproportionate.

Construction Forestry Mining and Energy Union v Boral Resources (Vic) Pty Ltd (S APCI 2014 0040)

PRACTICE AND PROCEDURE – Discovery – Whether procedure under r 29.07 available against alleged contemnor in contempt proceedings brought under *Supreme Court General Civil Procedure) Rules* 2005 (r 75.06)(2)) – Proceeding alleging breaches of court orders – Nature of contempt alleged – Relevant evidentiary/procedural regime – Corporate defendant – Whether discovery unavailable by reason of contempt proceeding 'criminal' and 'accusatorial' – Leave to appeal against order for discovery refused.

APPEARANCES:	Counsel	Solicitors
Grocon (S APCR 2014 0072)		
For the Applicants	Mr P J Morrissey SC with Ms R Shann and Mr G Boas	Slater & Gordon Limited
For the Respondents	Mr M P McDonald SC with Mr P J Wheelahan	Herbert Smith Freehills
For the Attorney-General	Mr S J Wood QC with Mr E Gisonda and Mr B Jellis	Victorian Government Solicitor
Grocon (S APCI 2014 0040)		
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For the Attorney-General	Mr S J Wood QC with Mr E Gisonda and Mr B Jellis	Victorian Government Solicitor
Boral (S APCI 2014 0038)		
For the Applicant	Mr P J Morrissey SC with Ms R Shann and Mr G Boas	Slater & Gordon Limited
For the Respondents	Mr S J Wood QC with Mr J L Snaden and Mr D Ternovski	FCB Workplace Lawyers And Consultants
For the Attorney-General	Mr J B Davis with Ms R W Sweet	Victorian Government Solicitor

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ASHLEY JA
REDLICH JA
WEINBERG JA:

1 Contempt of court has been described as 'the Proteus of the legal world, assuming an almost infinite diversity of forms'.[1] Before the Court are three appellate proceedings (to use a neutral description) which illustrate the truth of that aphorism. They arise out of two matters heard and determined by judges in the Trial Division.

2 In *Construction Forestry Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* ('the CFMEU' or 'the Union', 'Grocon', and 'the Grocon matter'), there are –

(1) A notice of appeal against judgment entered by a judge of the Trial Division on 31 March 2014. This appeal is brought in reliance upon s 10 of the *Supreme Court Act* and O 64 of ch 1 of the *Supreme Court (General Civil Procedure) Rules 2005* ('ch 1' or 'the Rules'); and

(2) Notices of application for leave to appeal against conviction and sentence against the judgment entered on 31 March 2014, brought in reliance upon, respectively, ss 274 and 278 of the *Criminal Procedure Act 2009* ('*Criminal Procedure Act*').

3 The Union seeks to agitate four grounds. Two of them relate to it being adjudged guilty of particular contempts of court for breaches of court orders. Two relate to sentences imposed for those breaches and for other breaches of those orders. Under cover of sentence ground 3, the Union contends that the trial judge could not have found it guilty of criminal contempt for breaches of court orders, and could not have entered convictions for such breaches, unless the charges had pleaded – which they did not – that the breaches were contumacious. That was the principal issue argued on the appeal, which is not to say that the other grounds were not pressed with greater or lesser vigour, as the case may be.

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1 Joseph Moskowitz, 'Contempt of Injunctions, Civil and Criminal' (1943) 43 *Columbia Law Review* 780, cited in C J Miller, *Contempt of Court* (Clarendon Press, 2nd ed, 1989) 1.

4 In *CFMEU v Boral Resources (Vic) Pty Ltd* ('Boral' and 'the Boral matter'), there is an application for leave to appeal (and, if leave is granted, an appeal) against an interlocutory order made by a judge in the Trial Division on 25 March 2014. This application is brought in reliance upon ss 10 and 17A(4)(b) of the *Supreme Court Act 1986* ('*Supreme Court Act*'), and O 64 of ch 1.

5 The Union seeks to challenge the order that it give specific discovery in a proceeding brought against it for contempt of court constituted by alleged breaches of court orders. The Union contends, principally, that the nature of contempt of court is that such an order could not have been made against it.

6 The appellate proceedings in the Grocon matter were initiated in the alternative. At the hearing, all parties — that is, the Union, Grocon and the Attorney-General for Victoria ('the A-G') — agreed that the correct vehicles for prosecuting the matter were the notices of application for leave to appeal against conviction and sentence ('the conviction application' and 'the sentence application'). It was accepted that the Union was 'a person convicted of an offence by an originating court' within the meaning of s 274 of the *Criminal Procedure Act*, and 'a person sentenced for an offence by an originating court' within s 278, which called into play so much of divs 1 and 2 of pt 6.3 of that Act as could be applied. For the reasons explained by Priest JA in *Allen v The Queen*,[2] the commonly agreed position was correct.

7 The consequence of what we have just said is that the appeal which was commenced under O 64 was incompetent. It must be dismissed.

8 The application in the Boral matter is, as we have said, brought under O 64 of ch 1. The Union's position is that, although the matter in which the judge's order was made is to be characterised as a criminal proceeding, the Rules referable to applications for leave to appeal against interlocutory orders in civil proceedings have

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2 (2013) 36 VR 565, 569 [15]-[17] (*'Allen'*). It matters not that *Allen* was a case in which there was summary adjudication of contempt.

to be applied. That is because div 4 of pt 6.3 of the *Criminal Procedure Act*, which permits interlocutory appeals, is confined by s 295(1) of that Act to proceedings 'for the prosecution of an indictable offence'. According to the CFMEU's argument, s 10(1)(a) of the *Supreme Court Act* provides that the Court of Appeal has jurisdiction to hear and determine all appeals from a judge of the Trial Division. The consequence is that a vehicle for the appeal must be found. Absent the operation of the *Criminal Procedure Act*, ch 1 must be pressed into play. The possible alternative, that the logical extension of the Union's position might dictate that there is simply no appeal from an interlocutory decision in a contempt matter, was comprehensively ignored.

9 It is convenient to mention here the position adopted by Boral and the A-G with respect to the procedure taken by the Union in the Boral matter. In short, they do not cavil with that procedure because in their submission the Rules, necessarily including O 64, prima facie apply in contempt matters.

The Grocon matter

10 It is now necessary to describe the proceedings which have given rise to the applications, and the grounds of application in each instance, in the Grocon matter.

The restraining orders

11 As at August 2012, there was what Cavanough J, the trial judge in the Grocon matter, accurately described as 'a bitter, longstanding and highly prominent industrial dispute' between the CFMEU and companies in the Grocon Group.[3] The parties had very different perceptions as to what the dispute was about. Those perceptions are presently immaterial.

12 At this time, Grocon was undertaking construction work at two sites of present relevance.

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3 *Grocon Constructors (Vic) Pty Ltd v CFMEU (No 2)* [2014] VSC 134 [136] ('Penalty Reasons').

13 The first was the Emporium site in Lonsdale Street, Melbourne. This site occupied much of the block between Swanston and Elizabeth Streets. It was bounded to the north by Lonsdale Street and to the south by Little Bourke Street.

14 The second was the McNab site in McNab Avenue, Footscray. This avenue is a no-thoroughfare. It can be approached from Napier Street or Nicholson Street, in each instance by passing through a roundabout.

15 On 21 August 2012, on the application of Grocon, Warren CJ made orders that:

> 2. Until the trial of this proceeding or further order, the Construction, Forestry, Mining and Energy Union (whether by itself, its officers, servants, agents or howsoever [or] otherwise) is restrained from:
>
> (a) preventing, hindering or interfering with free access to, and free egress from, the building site occupied by each of the First Plaintiff or Second Plaintiff located at McNab Avenue, Footscray in the State of Victoria (**McNab site**) by any person or vehicle;
>
> (b) …
>
> (c) causing, inducing, procuring or inciting any person to do or attempt to do any of the things restrained by subparagraphs 2(a)-(b) of this order.

16 The CFMEU was on notice of the application for these orders, but did not attend court.

17 On 22 August 2012, Warren CJ, on the application of Grocon, made further orders. Relevantly, they were as follows:

> 3. Until 4.15 pm on 28 August 2012, the Construction, Forestry, Mining and Energy Union (whether by itself, its officers, servants, agents or howsoever or otherwise) and all persons who were on 22 August 2012 or are now, or have at any time since 22 August 2012 been present at the picket line at the Emporium site, are restrained from;
>
> (a) preventing, hindering or interfering with free access to, and free egress from, the Emporium site by any person or vehicle; and
>
> (b) …

(c) …; and

(d) causing, inducing, procuring or inciting any person to do or attempt to do any of the things restrained by subparagraphs 3(a)-(c) of this order.

18 The CFMEU was also on notice of the application for these orders. It did not attend court.

19 In each instance, the orders made by Warren CJ, as authenticated, contained a penal notice addressed to the CFMEU.

20 On 28 August 2012, Cavanough J made these orders:

3. Until the trial of this proceeding or further order, the CFMEU (whether by itself, its officers, servants, agents or howsoever or otherwise) is restrained from:

(a) preventing, hindering or interfering with free access to, and free egress from, the building site known as the "Emporium" site occupied by the third plaintiff at 269-321 Lonsdale St and located between Little Bourke Street and Lonsdale Street in the State of Victoria ("**the Emporium Site"**) by any person or vehicle;

(b) …

(c) …; and from

(d) causing, inducing, procuring or inciting any person to do or attempt to do any of the things restrained by subparagraphs 3(a)-(c) of this order.

21 This was another occasion upon which, although put on notice by Grocon, the CFMEU did not attend court.

The contempt applications

22 On 24 August 2012, Grocon filed and served an application by summons that the CFMEU be punished for contempt. As amended on 30 August 2012, then on 3 September 2012, the statement of charges read as follows:

10. In breach of paragraph 3(a) of the Order, prior to 4.15pm on 28 August 2012, the Defendant prevented free access to the Emporium Site by persons.

PARTICULARS

On 28 August 2012, during the period of approximately 6.30am to 11.00am, the Defendant by its officers Ralph Edwards, John Setka, Bill Oliver, Elias Spernovasilis, Derek Christopher, Shaun Reardon, Gareth Stephenson together with persons present outside Gate 1 of the Emporium Site prevented free access to the Emporium Site by persons engaged to work on the Emporium Site on that day.

11. In breach of paragraph 3(a) of the Order, prior to 4.15pm on 28 August 2012, the Defendant hindered free access to the Emporium Site by persons.

PARTICULARS

On 28 August 2012, during the period of approximately 6.30am to 11.00am the Defendant by its officers Ralph Edwards, John Setka, Bill Oliver, Elias Spernovasilis, Derek Christopher, Shaun Reardon, Gareth Stephenson together with persons present outside Gate 1 of the Emporium Site hindered free access to the Emporium Site by persons engaged to work on the Emporium Site on that day.

12. In breach of paragraph 3(a) of the Order, prior to 4.15pm on 28 August 2012, the Defendant interfered with free access to the Emporium Site by persons.

PARTICULARS

On 28 August 2012, during the period of approximately 6.30am to 11.00am the Defendant by its officers Ralph Edwards, John Setka, Bill Oliver, Elias Spernovasilis, Derek Christopher, Shaun Reardon, Gareth Stephenson together with persons present outside Gate 1 of the Emporium Site interfered with free access to the Emporium Site by persons engaged to work on the Emporium Site on that day.

13. In breach of paragraph 3(d) of the Order, after the Order was made but prior to 4.15pm on 28 August 2012, the Defendant caused persons to prevent free access to the Emporium Site by persons.

PARTICULARS

The Defendant caused persons to gather outside Gate 1 to the Emporium Site on 28 August 2012 during the period of approximately 6.30am to 11.00am and prevent free access to the Emporium Site by persons engaged to work on the Emporium Site on that day.

14. In breach of paragraph 3(d) of the Order, after the Order was made but prior to 4.15pm on 28 August 2012, the Defendant procured persons to prevent free access to the Emporium Site by persons.

PARTICULARS

The Defendant procured persons to gather outside Gate 1 to the Emporium Site on 28 August 2012 during the period of

approximately 6.30am to 11.00am and prevent free access to the Emporium Site by persons engaged to work on the Emporium Site on that day.

15. In breach of paragraph 3(d) of the Order, prior to 4.15pm on 28 August 2012, the Defendant incited persons to prevent free access to the Emporium Site.

PARTICULARS

On 28 August 2012, at approximately 7.36am, the Defendant by its officer, Ralph Edwards, using a loudspeaker said words to the effect of "Back here again tomorrow boys for more fun" and did thereby incite persons to return to attend at Gate 1 of the Emporium Site on 29 August 2012 for the purpose of preventing access to the Emporium Site by persons engaged to work on the Emporium Site.

23 The application that the CFMEU be punished for contempt was heard by Cavanough J in the period 3 to 5 September 2012. The Union did not appear. His Honour reserved his decision.

24 On 7 September 2012, Grocon filed a further summons seeking that the CFMEU be punished for contempt. The summons contained 27 new charges, covering alleged conduct of the Union at the Emporium site on 29, 30 and 31 August 2012, and at the McNab site on 5 September 2012. We pause to note that the alleged breaching conduct at the McNab site on 5 September 2012 coincided with the final day of the hearing of the first contempt summons, a hearing not attended by the CFMEU.

25 The charges set out in both the first and second summonses followed a pattern with respect to the Emporium site. It is illustrated by the charges referable to 29 August 2012. Thus:

1. In breach of paragraphs 3(a) of the Order, on 29 August 2012 the Defendant **prevented** free access to the Emporium Site by persons.

PARTICULARS

On 29 August 2012, during the period of approximately 6.30am to 1.00pm, the Defendants by its officers Bill Oliver, John Setka, Shaun Reardon, Gareth Stephenson and Elias Spernovasilis together with persons proximate to the Emporium Site prevented free access to the Emporium Site by persons engaged to work on the Emporium site on that day.

2. In breach of paragraph 3(a) of the Order, on 29 August 2012 the Defendant **hindered** free access to the Emporium site by persons.

PARTICULARS

On 29 August 2012, during the period of approximately 6.30am to 1.00pm, the Defendant by its officers Bill Oliver, John Setka, Shaun Reardon, Gareth Stephenson and Elias Spernovasilis together with persons proximate to the Emporium Site hindered free access to the Emporium Site by persons engaged to work on the Emporium Site on that day.

3. In breach of paragraph 3(a) of the Order, on 29 August 2012 the Defendant **interfered with** free access to the Emporium Site by persons.

PARTICULARS

On 29 August 2012, during the period of approximately 6.30am to 1.00pm, the Defendant by its officers Bill Oliver, John Setka, Shaun Reardon, Gareth Stephenson and Elias Spernovasilis together with persons proximate to the Emporium Site interfered with free access to the Emporium Site by persons engaged to work on the Emporium Site on that day.

4. In breach of paragraph 3(d) of the Order, on 29 August 2012 the Defendant **caused** persons to prevent free access to the Emporium Site by persons.

PARTICULARS

The Defendant caused persons to gather proximate to the Emporium Site on 29 August 2012 during the period of approximately 6.30am to 1.00pm and prevent free access to the Emporium Site by persons engaged to work on the Emporium Site on that day.

5. In breach of paragraph 3(d) of the Order, on 29 August 2012 the Defendant **procured** persons to prevent free access to the Emporium Site by persons.

PARTICULARS

The Defendant procured persons to gather proximate to the Emporium Site on 29 August 2012 during the period of approximately 6.30am to 1.00pm and prevent free access to the Emporium Site by persons engaged to work on the Emporium Site on that day.

6. In breach of paragraph 3(d) of the Order, on 29 August 2012 the Defendant **incited** persons to prevent free access to the Emporium Site by persons.

PARTICULARS

The Defendant incited persons to gather proximate to the Emporium Site on 29 August 2012 during the period of approximately 6.30am

> to 1.00pm and prevent free access to the Emporium Site by persons engaged to work on the Emporium Site on that day.[4]

26 It can thus be seen that the charges mirrored the language of 'preventing, hindering or interfering with' free access to the site by persons set out in [3(a)] of the restraining order made on 28 August 2012; and also mirrored the language of 'causing … procuring or inciting' breaching conduct set out in [3(d)]. There was one charge per verb.

27 It may further be noted that the applications by which the charges were preferred were initiated by summonses in accordance with r 75.06(2) of ch 1 — that is, by a procedure under the civil rules. It has never been contended by the CFMEU that the charges were for that reason incompetent.

28 Of importance to the conviction application, pertaining to events at the Emporium site on 29 and 30 August 2012 (see ground 1 at [69] below), is the language of the particulars of obstruction of access. The issue sought to be relied upon is illustrated by the particulars of charge 1(a), the key parts of which we now highlight:

> On 29 August 2012, **during the period of approximately 6.30am to 1.00pm**, the Defendants by its officers Bill Oliver, John Setka, Shaun Reardon, Gareth Stephenson and Elias Spernovasilis together with persons proximate to the Emporium Site prevented free access to the Emporium Site **by persons engaged to work on the Emporium site on that day**.

29 With respect to the McNab site, having regard to the way in which the matter proceeded, it is only necessary to refer to charges 22 to 27, which read as follows:

> 22. In breach of paragraph 2(a) of the McNab Site Order, on 5 September 2012 the Defendant prevented free access to the McNab Site by a vehicle.
>
> **PARTICULARS**
>
> On 5 September 2012, during the period of approximately 6.30am to 7.00am, the Defendant by its officers John Setka and Shaun Reardon together with persons proximate to the McNab Site prevented free

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4 (Emphasis added).

access to the McNab Site by a semi-trailer that was attempting to enter the McNab Site.

23. In breach of paragraph 2(a) of the McNab Site Order, on 5 September 2012 the Defendant hindered free access to the McNab Site by a vehicle.

PARTICULARS

On 5 September 2012, during the period of approximately 6.30am to 7.00am, the Defendant by its officers John Setka and Shaun Reardon together with persons proximate to the McNab Site hindered free access to the McNab Site by a semi-trailer that was attempting to enter the McNab Site.

24. In breach of paragraph 2(a) of the McNab Site Order, on 5 September 2012 the Defendant interfered with free access to the McNab Site by a vehicle.

PARTICULARS

On 5 September 2012, during the period of approximately 6.30am to 7.00am, the Defendant by its officers John Setka and Shaun Reardon together with persons proximate to the McNab Site interfered free [sic] access to the McNab Site by a semi-trailer that was attempting to enter the McNab Site.

25. In breach of paragraph 2(a) of the McNab Site Order, on 5 September 2012 the Defendant prevented free access to the McNab Site by a vehicle.

PARTICULARS

On 5 September 2012, at approximately 8.04am, the Defendant by its officers John Setka and Shaun Reardon together with persons proximate to the McNab Site prevented free access to the McNab Site by a semi-trailer that was attempting to enter the McNab Site.

26. In breach of paragraph 2(a) of the McNab Site Order, on 5 September 2012 the Defendant hindered free access to the McNab Site by a vehicle.

PARTICULARS

On 5 September 2012, at approximately 8.04am, the Defendant by its officers John Setka and Shaun Reardon together with persons proximate to the McNab Site hindered free access to the McNab Site by a semi-trailer that was attempting to enter the McNab Site.

27. In breach of paragraph 2(a) of the McNab Site Order, on 5 September 2012 the Defendant interfered with free access to the McNab Site by a vehicle.

PARTICULARS

On 5 September 2012, at approximately 8.04am, the Defendant by its officers John Setka and Shaun Reardon together with persons

> proximate to the McNab Site interfered with free access to the McNab Site by a semi-trailer that was attempting to enter the McNab Site.

30 Again, the charges mirrored the verbs listed in [3(a)] of the restraining order made on 28 August 2012; but here the alleged interference was not with persons, but (on two separate occasions) with the passage of a vehicle.

Circumstances — the Emporium site

31 No challenge is raised by the conviction application to the facts found by Cavanough J with respect to what happened at the Emporium site. Ground 1, as will be seen, contends that his Honour's findings of fact could not sustain a conclusion that the Union had committed contempts on 29 and 30 August 2012. But that ground turns only upon the language of the relevant charges.

32 What happened at the Emporium site can be briefly described. His Honour found that the Union, principally through the conduct of senior officials in the Victoria-Tasmania branch of its Construction and General Division, gathered together large numbers of men — many of them apparently connected with the Union — and located them in and around the Emporium site so as to prevent, hinder and interfere with free access by persons to the site for a period of hours on each of 28, 29, 30 and 31 August 2012. The officials involved were Ralph Edwards ('Edwards'), John Setka ('Setka'), Bill Oliver ('Oliver'), Elias Spernovasilis ('Spernovasilis'), Derek Christopher ('Christopher'), Shaun Reardon ('Reardon'), Frank O'Grady ('O'Grady') and Gareth Stephenson ('Stephenson'). Others involved were David Noonan ('Noonan'), Danny Baradi ('Baradi') and Craig Johnston ('Johnston').

33 At the pertinent time, Noonan was Divisional Secretary of the Construction and General Division. Edwards was Divisional Branch President. Oliver was Divisional Branch Secretary. Setka was Divisional Branch Assistant Secretary. Reardon and Spernovasilis were Divisional Branch Vice-Presidents. Christopher,

Stephenson and Baradi were Divisional Branch Management Committee Members. Johnston was a Branch Council Member.

34 It was incontrovertible that the Union was in law responsible for the conduct of the officials mainly involved in the events which transpired.

35 The Emporium site covered a substantial area. It had a number of possible entry points. It is unnecessary to describe them, for the judge found that the conduct for which the Union was responsible interfered with free access to the site, and various arguments to the contrary advanced at trial can be put to one side.

36 What may be described as the main offending conduct took place in Lonsdale Street, which provided two access points to the site.

37 On the morning of 28 August 2012, a crowd which swelled to about 1,000 gathered in Lonsdale Street. The crowd completely blocked access to the site from the east, preventing entry by a group of some 115 Grocon workers. They never got beyond the intersection of Lonsdale and Swanston Streets. Police on horseback and foot were driven back into Swanston Street. Setka then approached the Grocon workers. He called them 'rats', 'dogs' and 'fucking dogs'. When one of the workers said that they just wanted to go to work, he again called them 'fucking dogs'.

38 Later that day, each of Edwards, Christopher and Oliver made it clear, by public statements, that the same activity would be repeated on the following day. So did the Union, by an article published on its website.

39 Late on the afternoon of 28 August, out of concern for the safety and welfare of its Emporium site workers, Grocon decided to deploy them, where possible, to other sites. The permanent workforce at the Emporium site, we interpolate, numbered some 85 to 90 persons. There were also about 25 management and staff.

40 The evidence did not reveal whether any, and if so how many workers were in fact re-deployed on 29 August.

41 On the morning of 29 August, a large crowd again assembled in Lonsdale Street. Even before the time when workers would normally have sought access to the site, the roadway was blocked, and there was no path through to the entry point at the north eastern part of the site.

42 Between 5.00pm and 5.30pm on 29 August, the Grocon workers who would otherwise have been working at the Emporium site the next day were instructed by telephone not to attend that site, but rather to attend other sites that next day. That instruction was given out of concern for the safety of the workers had they attempted to enter the site to work on the following day.

43 On 30 August, well before the time when workers would normally have arrived for their day's work, a crowd of more than 1,000 persons had assembled in the vicinity of the north eastern entry point of the site. There was not, by reason of the crowd, a clear path to that entry point. Police were in attendance both to the east and west of the site in Lonsdale Street.

44 On 31 August, a group of about 30 Grocon workers was able to access the site, but only with the assistance of police. That was achieved despite the presence of some 800 to 1,000 protesters. A little after midday, the workers were escorted out. It was decided that no attempt would be made by Grocon workers to re-enter the site that day.

45 What we have said is sufficient to explain the broad character of what went on in the vicinity of the site on the days upon which the judge found that there had been a breach of the restraining orders. Because there is no occasion to do so, we need not detail the duration of the offending conduct on each day, or the repeated presence and prominent role assumed by of some the CFMEU officials — Setka, Reardon, Spernovasilis, Edwards and Oliver.

Circumstances — the McNab site

46 By ground 2 of the conviction application, as will be seen, the Union

challenges his Honour's finding that on 5 September 2012 it twice prevented, interfered with or hindered a truck from gaining free access to the McNab site.

47 At about 6.40am on 5 September 2012, a white semi-trailer approached the roundabout to which we referred at [14] above. To enter McNab Avenue, it had to negotiate that roundabout.

48 Grocon was expecting delivery of a load of reinforcing steel to the site by 7.00am that day.

49 At the time when the semi-trailer arrived at the roundabout, there were some 30 to 40 men in the vicinity, together with Setka and Reardon. There were also police officers present.

50 There was not enough room for the semi-trailer to enter McNab Avenue because of the presence of the men on the roadway.

51 The truck stopped. Reardon and Setka stood at the driver's side door. What they said is unknown. In the event, the truck remained stationary for a period. Then it was driven away.

52 Whilst the truck was stopped, a utility vehicle entered the roundabout. Men stood in front of it, causing the driver to stop. They spoke to the driver. They then moved aside, and allowed it to pass. The evidence showed that it was travelling to a different site. A motorcycle travelling to another site was also permitted passage after the rider had been spoken to by the men.

53 Grocon's site manager gave instructions for one of his foremen to arrange for the truck driver to 'make a second attempt at delivering the reinforcing steel to the McNab site'. Whilst there was no evidence that such a call was made, the judge concluded that the same truck arrived back at the roundabout at a few minutes after 8.00am.

54 By that time, Setka and Reardon had departed. Before they did so, Reardon

was seen to address the 30 to 40 men to whom we have referred.

55 When the truck arrived for the second time, its passage was blocked by a man standing in front of it. Some 15 men stood around and in front of it. A number of men approached the driver's side door and apparently spoke to the driver. What any of them said is not known.

56 The driver got out of the truck. He was surrounded by some of the men.

57 Police officers approached the group, and separated the driver and the other men.

58 The men continued to block the truck's access to the site. In time, the driver got back into the truck, and drove away.

59 Much of what we have described was demonstrated by CCTV footage which was before the judge, and which we have also viewed.

Finding of contempts

60 In all, as pressed by Grocon, 30 charges fell for consideration by the judge. Having regard to the fact that the CFMEU appeared to answer the charges raised by the second summons, his Honour decided, of his own motion, to re-open the first application. He decided also to hear the two applications together and that the evidence in one should be evidence in the other.

61 There followed a 10 day trial.[5] It concluded on 19 October 2012. Grocon adduced a great deal of evidence of different kinds — oral, electronic and documentary. The CFMEU called no witnesses. But it tendered three documents through Grocon witnesses, cross-examined two Grocon managers, and cross-examined two police witnesses whose roles had been referred to in affidavits filed for Grocon.

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5 The 10 days include 3, 4 and 5 September 2012.

62 His Honour concluded, to the criminal standard, that each of the 30 charges was made out. But he determined to record only five findings of contempt — one with respect to each of the four days at the Emporium site, and one with respect to the McNab site. He published reasons his Liability Reasons on 24 May 2013.[6]

63 Then, in the period 7 August 2013 to 25 February 2014, the judge dealt with two further contempts alleged against the Union — referable to activity at other sites at a later time, with the question of what penalties should be imposed for the various contempts, and with costs.

64 On 31 March 2014, his Honour published his Penalty Reasons. In consequence, he made, inter alia, the following orders:

> (2) The first defendant (the CFMEU) is adjudged in criminal contempt of this Court in that, contrary to the order made by the Honourable Chief Justice Warren on 22 August 2012, the CFMEU did on 28 August 2012 prevent, hinder and interfere with free access to the building construction site located at 269-321 Lonsdale Street, Melbourne referred to in the order ("the Emporium site") and did on that day incite persons to prevent access to the Emporium site, and the CFMEU is convicted and fined $250,000 for that criminal contempt.
>
> (3) The CFMEU is adjudged in criminal contempt of this Court in that, contrary to the order made by the Honourable Justice Cavanough on 28 August 2012, the CFMEU did on 29 August 2012 prevent, hinder and interfere with free access to the Emporium site, and the CFMEU is convicted and fined $250,000 for that criminal contempt.
>
> (4) The CFMEU is adjudged in criminal contempt of this Court in that, contrary to the order made by the Honourable Justice Cavanough on 28 August 2012, the CFMEU did on 30 August 2012 prevent, hinder and interfere with free access to the Emporium site by persons, and the CFMEU is convicted and fined $250,000 for that criminal contempt.
>
> (5) The CFMEU is adjudged in criminal contempt of this Court in that, contrary to the order made by the Honourable Justice Cavanough on 28 August 2012, the CFMEU did on 31 August 2012 hinder and interfere with free access to the Emporium site by persons and did cause and procure persons to prevent free access to the Emporium site, and the CFMEU is convicted and fined $250,000 for that criminal contempt.
>
> (6) The CFMEU is adjudged in criminal contempt of this Court in that,

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6 *Grocon Constructors (Vic) Pty Ltd v CFMEU* [2013] VSC 275 ('Liability Reasons').

> contrary to the order made by the Honourable Chief Justice Warren on 21 August 2012, the CFMEU did on 5 September 2012 prevent, hinder and interfere with, on two occasions, free access by a vehicle to the site located at McNab Avenue, Footscray referred to in the order, and the CFMEU is convicted and fined $150,000 for that criminal contempt.[7]

65 We pause to note, in a preliminary way, these matters. They bear upon ground 3 of the sentence application.

66 First, the charges, as articulated, sought that the Union be punished for contempt, but did not allege that its conduct had been contumacious.

67 Second, the judge found in his Penalty Reasons that the Union's conduct with respect to all five contempts of present relevance had been of that character.[8]

68 Third, his Honour proceeded, in those circumstances, to impose convictions as well as fines. In his formal orders, in each instance he adjudged the Union 'in criminal contempt of this Court' and 'convicted and fined [the Union] for that criminal contempt'. He explained why he imposed convictions as well as fines (the Union had accepted that substantial fines were appropriate having regard to the contempts found by his Honour) this way:

> I regard these contempts as exceptionally serious. So much so that they warrant explicit classification as criminal contempts, perhaps for the first time in the Australian industrial context. I have already explained why I consider these contempts to be so serious. In short, they were highly contumacious. They were also highly visible and highly memorable. The Court must visit the defiance of the CFMEU with a penalty which will not only adequately respond to the scale of the defiance but also act as a general and specific deterrent. No fines of the level previously imposed could do that.
>
> …
>
> I can see absolutely no reason why my findings that the relevant contempts represent criminal contempts should not be translated into formal criminal

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7 [2014] VSC 134 [223].

8 In so finding, the judge applied the criminal standard of proof: Penalty Reasons [86]. The Union does not challenge the meaning of the word 'contumacious' which the judge gave it: Penalty Reasons [96]–[115]. Nor does the Union challenge his Honour's conclusion (Penalty Reasons [130], [134], [147], [150]) that, so assessed, its conduct on the occasion of each contempt was contumacious (although, as will be seen, it challenges his Honour's finding that - with respect to three of the five instances — contempt was made out).

convictions. I will order accordingly.[9]

Conviction application — grounds

69 The Union relies upon these grounds in its conviction application:

> Liability for 29 & 30 August 2012
>
> Ground 1 – His Honour erred in finding, as the Charges alleged, that the obstructive conduct, which occurred during the time-period pleaded, prevented (etc) free access to the site by "persons engaged to work on the Emporium site on that day".
>
> …
>
> Liability for 5 September
>
> Ground 2 – His Honour erred in finding that free access of the vehicle in question was prevented, hindered or interfered with by the CFMEU.

70 Ground 1 is directed to the contempts found against the Union relating to the Emporium site on 29 and 30 August 2012. The contention raised is that the particulars of the charges referable to those days were not satisfied because, in short, the Emporium site workers had been redeployed to other sites on those days, the redeployment being directed before the time at which the offending conduct on those days began.

71 Ground 2 relates to the contempts found against the Union relating to the McNab site on 5 September 2012. The gist of the contention is that the evidence was incapable of justifying a conclusion to the criminal standard that action by the Union prevented, interfered with or hindered free access of the vehicle to the site on either occasion. That was said to be the situation particularly on the second occasion — by which time, it will be recalled, Setka and Reardon had left the area.

72 The grounds show that there is no challenge to the findings of contempt on 28 and 31 August 2012 relating to the Emporium site. Neither — it flows from the grounds on the sentence application to which we refer hereafter — is there any

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[9] Penalty Reasons [201], [203].

challenge to the fines which the judge imposed for those contempts.

Sentence application — grounds

73 Two grounds were pursued on the sentence application:

> Ground 3 – His Honour erred in finding that it was open to find the Contempts were criminal in circumstances where the Statement of Charges did not make such an allegation.
>
> …
>
> Ground 5 – His Honour erred by imposing penalties for the Fifth Contempts which were disproportionate to those imposed for the earlier contempts.

74 Ground 3 was much agitated. It was the centrepiece of the sentence application, and was indeed the principal issue raised overall in the Grocon matter. The gist of the Union's contention was that, if Grocon had wished to have the Union punished for contumacious breach of the restraining orders, contumacy must have been alleged by the charges. The judge had not been entitled to find contumacy at the penalty stage, and then use that finding to hold that the Union had committed criminal contempts and so should be convicted as well as fined.

75 The consequence of the success of ground 3 would be, it was submitted, that the convictions should be set aside. It would have no bearing upon the fines which were imposed.

76 Ground 5, referable to the fine imposed for the contempts found against the Union relating to the McNab site, was scarcely pursued. As will be seen, it was faintly submitted that the ground would have some currency if the Court concluded that the first but not the second incident of interference with the passage of the truck had been sufficiently established.

The Boral matter

Restraining orders

77 Justice Hollingworth, in the Trial Division, made restraining orders relevant

to this matter on 7 March and 5 April 2013. Paragraphs 4, 5 and 6 of Boral's summons dated 22 August 2013, seeking that the Union be punished for contempt, referred to the March Order. But that order and those paragraphs are irrelevant for present purposes. It is only necessary to set out [2] and [3] of the April Order. They are as follows:

> 2. Until the trial of this proceeding or further order, the defendant (whether by itself, its officers, employees, agents or howsoever otherwise) be restrained from procuring, advising, persuading, encouraging, inciting or counselling – or threatening to so procure, advice, persuade, encourage or counsel – any person who is employed or engaged to perform work, at any location in Victoria, that involves, or would normally involve, working with products or services supplied by the plaintiffs (or any of them), to fail or refuse to perform that work, or to perform it otherwise than in the manner in which it would customarily be performed.
>
> 3. Until the trial of this proceeding or further order, the defendant (whether by itself, its officers, employees, agents or howsoever otherwise) be restrained from preventing, hindering or interfering with, or attempting to prevent, hinder or interfere with, the supply or possible supply of goods or services by the plaintiffs (or any of them) at any building or construction site in Victoria.

The contempt application

78 The application by summons, in accordance with r 75.06(2) of ch 1, was filed on 22 August 2013, seeking that the Union be punished for contempt of court. The pertinent charges were as follows:

> 1. In breach of paragraph 2 of the April Order, the defendant, between the approximate times of 12:00pm and 2:00pm on Thursday, 16 May 2013 at the Regional Rail Link construction site at Joseph Street, Footscray, Victoria (**RRL Site**), procured the failure, by a person or persons engaged or employed to deliver concrete supplied by the first plaintiff to that site at or during that time, to perform that delivery work.
>
> **PARTICULARS**
>
> At the time and place alleged, the defendant – by its employee, Mr Joseph Myles – organised, implemented, participated in, constituted and maintained a blockade of the entry to the RRL Site, which blockade was effected by means of the parking or positioning of motor vehicles across the corner of Joseph Road and Maribyrnong Street, Footscray so as to prevent, hinder or obstruct

access to that site by concrete delivery vehicles; and, by so organising, implementing, participating in, constituting and maintaining, prevented persons who were engaged to deliver concrete supplied by the plaintiff to that site at the time or times over which that blockade remained in place (namely Mr Joe Faraci, Mr Nick Bouranis, Mr Cameron Powell and Mr Adam Farfalla) from performing that work, or otherwise caused them not to perform it.

2. In breach of paragraph 3 of the April Order, the defendant, between the approximate times of 12:00pm and 2:00pm on Thursday, 16 May 2013 at the RRL Site, prevented the supply of concrete by the first plaintiff to that site.

PARTICULARS

At the time and place alleged, the defendant – by its employee, Mr Joseph Myles – organised, implemented, participated in, constituted and maintained a blockade of the entry to the RRL Site, which blockade was effected by means of the parking or positioning of motor vehicles across the corner of Joseph Road and Maribyrnong Street, Footscray so as to render access to that site by concrete delivery vehicles impossible.

3. Alternatively to paragraph 2 above: in breach of paragraph 3 of the April Order, the defendant, between the approximate times of 12:00pm and 2:00pm on Thursday, 16 May 2013 at the RRL Site, interfered with the supply of concrete by the first plaintiff to that site.

PARTICULARS

At the time and place alleged, the defendant — by its employee, Mr Joseph Myles — organised, implemented, participated in, constituted and maintained a blockade of the entry to the RRL Site, which blockade was effected by means of the parking or positioning of motor vehicles across the corner of Joseph Road and Maribyrnong Street, Footscray so as to render free access to that site by concrete delivery vehicles impossible.

79 Each of the charges, referable to activity said to have been engaged in by the Union on 16 May 2013, alleged that it was activity 'by its employee, Mr Joseph Myles'.

Circumstances

80 Justice Digby recorded the circumstances which gave rise to the discovery application this way (references to 'the appellants' are to Boral, to 'the first respondent 'are to the CFMEU, and to 'the second respondent' are to the A-G):

The [following] summary identifies the essence of the appellants' case in this proceeding, as follows:

> *2.2 The Contempt Summons is filed pursuant to r 75.06 of the Rules. By it, the Appellants allege (as now does the Second Respondent), amongst other things, that the First Respondent, acting via its official, Mr Joseph Myles, contravened an injunction issued by Hollingworth J on 5 April 2013. It is alleged that Mr Myles established and maintained a blockade (comprised of vehicles and men) of a construction site at Joseph Road, Footscray, on 16 May 2013, thereby preventing the supply of concrete to that site by the first plaintiff. That construction site was for a project known as the Regional Rail Link project.*
>
> *2.3 Mr Myles is an official of the CFMEU. He is also a 'specialist' 'organiser' apparently assigned by the First Respondent to work in connection with the Regional Rail Link project.*
>
> *2.4 In order to succeed on the charges, the Appellants will need to establish either that the First Respondent authorised Mr Myles to engage in the conduct in which it is alleged that he engaged, or that it failed to take appropriate steps to prevent it — see: Evenco Pty Ltd v. Australian Building Construction Employees and Builders Labourers Federation (Qld Branch); and Grocon Constructors (Vic) Pty Ltd v. CFMEU.*
>
> *2.5 The Appellants seek discovery of specific categories of documents that go to the question of Mr Myles's authority to do as he did, on behalf of the First Respondent, on 16 May 2013. To understand how the documents are relevant, it is necessary to consider the affidavit material that the Appellants have filed in support of the contempt summons, particularly the affidavits of Acting Inspector Damien Jones and Sergeant Mark Anderson.*
>
> *2.6 Acting Inspector Jones and Sergeant Anderson are police officers who attended at the Joseph Road site on 16 May 2013. They both spoke to Mr Myles about the blockade that was in place when they arrived. Sergeant Anderson, having been introduced to Mr Myles, asked whether he (Mr Myles) was 'the main man' in charge of the blockade, to which Mr Myles is said to have responded, '…I am just doing what I am told and following directions…I will be here until I am told otherwise. When we are told we can go home, we go home'.*
>
> *2.7 Acting Inspector Jones and Sergeant Anderson depose that Acting Inspector Jones asked Mr Myles to permit worshippers from a nearby temple (who bore no apparent connection with the blockade or the reason for it) to pass through the blockade. Both depose that Mr Myles then walked away and spoke to somebody on his mobile telephone. He then returned and said that he would permit the worshippers to pass. Both Acting Inspector Jones and Sergeant Anderson then observed the blockading vehicles moving aside to permit the worshippers' vehicles to pass.*
>
> *2.8 The Appellants, then, seek orders requiring that the First Respondent discover contact details for members of the executive of the Victoria/Tasmania branch of its Construction and General division (the executive is, for all intents and purposes, the management body that runs that divisional branch). Documents so discovered will then be used, in conjunction with call record subpoenas to telecommunication carriers, to identify the person from*

> *whom Mr Myles apparently sought and obtained directions to permit worshippers to pass through the blockade.*
>
> *2.9 The Appellants also seek orders requiring the First Respondent to discover documents containing the terms of Mr Myles's employment. Those documents are also relevant to the scope of Mr Myles's authority.*
>
> *2.10 Both categories of documents are peculiarly within the knowledge of the First Respondent.*[10]

The A-G's application to be joined

81 Boral's contempt application has been before this Court on an earlier occasion. What was said by the Court is of relevance to, but not determinative of,[11] the present application.

82 The A-G sought to be joined as a party to Boral's application under r 9.06(b)(ii) of ch 1, or else to be granted leave to intervene. The Union resisted the joinder or the grant of leave to intervene. Justice Digby made an order for joinder under r 9.06 of ch 1.

83 In the course of his reasons, his Honour made observations as to the nature of the contempts alleged. They cast some light upon his characterisation of the contempts as 'criminal contempts' in the later discovery application. Thus:

> I consider that because the contempt proceedings appear to be directed to a solely punitive purpose, given that the alleged blockade to which they principally relate has not apparently continued to affect the RRL project for many months, those alleged contempts are likely to be characterised as alleged criminal contempts being prosecuted by Boral to punish the CFMEU for past breaches.
>
> However, it is not necessary for me to come to a final conclusion or make any finding as to the character of the alleged breaches given my reasons set out below for concluding that the Attorney-General should, in the special circumstances of this application, be joined to this proceeding, whether it be in the nature of a criminal or a civil contempt. Furthermore, I consider that, at all events, it is inappropriate that I do so at this stage of the proceedings informed by very limited evidentiary material as to the alleged contempts

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10 *Boral Resources (Vic) Pty Ltd v CFMEU* [2014] VSC 120 [8] (citations omitted) (emphasis in original).

11 It was not contended by any party that the Court's earlier refusal of leave to appeal should be treated as authority upon a particular issue from which we would only depart if plainly satisfied that it was erroneous.

> and also as to the purpose of the proceeding and indeed no evidence on those topics from the plaintiff Boral which is the party complaining of the contempts and also the party seeking to prosecute them. This is an interlocutory application for joinder. Accordingly, I do not intend at this stage to make any conclusive finding as to the nature of the alleged contempts.[12]

84 The CFMEU sought leave to appeal against the order for joinder. There was a single proposed ground of appeal:

> His Honour erred in finding that r 9.06(b)(ii) of the *Supreme Court (General Civil Procedure) Rules 2005*, which provides for the addition of persons to proceedings for claims, permits a person to be joined to a proceeding for a charge of contempt pursuant to Order 75.[13]

85 As revealed by the reasons of this Court, the Union advanced two arguments in support of the application:

> [T]he applicant contends that r 9.06(b)(ii) does not permit a person to be joined to a proceeding for a charge of contempt pursuant to Order 75 of the Rules. The applicant advances two arguments in support of this submission. First, the applicant contends that the contempts with which it is charged are criminal contempts, and then says that 'civil procedure does not apply to criminal contempts'. Secondly, the applicant submits that regardless of whether the contempt is classified as civil or criminal, even if some rules of civil procedure apply, r 9.06(b)(ii) does not apply to contempt proceedings because r 9.06(b)(ii) only applies to proceedings for 'claims', as distinct from 'a proceeding for a charge'.[14]

86 The application for leave to appeal was refused. We will later refer to the reasons for that refusal in some detail. For the present, it suffices to say that the Court concluded that, prima facie, the civil rules apply to contempt applications, though it might be that not all of those rules are applicable. The Court refused the application on the basis that the judge's decision was not attended by sufficient doubt to justify a grant of leave. The Court would also have refused leave on the ground of want of any relevant significant prejudice being demonstrated.

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12 *Boral Resources (Vic) Pty Ltd v CFMEU* [2013] VSC 572 [29]–[30].

13 *CFMEU v Boral Resources (Vic) Pty Ltd* [2013] VSCA 378 [6].

14 Ibid [8].

The application for discovery

87 By summons filed on 2 October 2013, Boral sought an order for specific discovery against the Union under r 29.07 of ch 1. The documents sought by way of discovery can be briefly summarised as follows:

(1) one copy of any business card issued by the Union for use by Joseph Myles; or alternatively, a copy of any one document recording the mobile telephone number of Myles as at 16 May 2013 or the present time;[15]

(2) the same with respect to each of Setka, Spernovasilis, Reardon, Edwards, Washington and Christopher; and

(3) documents confirming the basis or terms pursuant to which the Union employed Myles on 16 May 2013.

88 On 23 October 2013, Daly AsJ dismissed the application. At the heart of her Honour's decision was this reasoning:

> (a) proceedings for punishment for contempt are criminal in nature, and the appropriate safeguards should apply;
>
> (b) discovery is not available or appropriate in criminal proceedings;
>
> (c) if there is any debate about whether a particular action for contempt is civil or criminal in nature, for the purposes of determining which evidentiary and/or procedural regimes apply, the current case is an action for criminal contempt, as the purpose of bringing the application is to punish the CFMEU for breaching the Orders, not to coerce CFMEU to obey the Orders, and there is no breach capable of remedy; and
>
> (d) while *EPA v Caltex* is authority for the proposition that a corporation is not entitled to rely upon the privilege against self-incrimination in circumstances where compulsory disclosure of documents is authorised by a statutory provision, it is arguably not authority for the proposition that the court's own rules and procedures can be utilised for the purpose of compelling a party, whether a corporation or otherwise, to disclose evidence which would expose that person to a penalty. Further, to the extent that *Abbco Iceworks* has determined that the privilege against self-exposure to a penalty does not extend to corporations, this decision is arguably limited to cases concerning civil actions for civil penalties.[16]

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15 That is, 2 October 2013.

16 *Boral Resources (Vic) Pty Ltd Trading as Boral Concrete v CFMEU* (Ruling, unreported, Supreme Court of Victoria, Daly AsJ, 23 October 2013) [26].

89 Boral appealed against that decision pursuant to r 77.06 of ch 1. It appears to have been uncontroversial that such a right of appeal existed — although, obviously enough, it involved recourse to the Rules.

90 Justice Digby set aside pertinent orders made by Daly AsJ, and in lieu thereof ordered specific discovery, as sought.

91 The Union's ultimate position with respect to the application of the Rules was described by his Honour as follows:

> During oral submissions Mr Morrissey SC clarified that the First Respondent's contention was that although rule 1.05 is to the effect that all the Rules apply to every civil proceeding commenced in the Court (subject to the exceptions in Rule 1.05(2) which are not presently relevant), not all of the Rules are of appropriate application to criminal contempt proceedings instigated pursuant to Order 75. Rules which are not appropriate include the Rules which establish coercive mechanisms such as Orders 29, 30 and 31.
>
> Senior Counsel for the First Respondent also advanced alternative arguments. First, that at its highest Order 29 was not available in respect of an Order 75 criminal or quasi-criminal contempt proceeding. Second, that in the circumstances, and in the exercise of the Court's discretion, Order 29 should not be invoked in relation to a contempt proceeding such as this.[17]

92 Upon the general question whether the Rules applied to a proceeding brought under O 75, the judge concluded that:

> In my view on the proper construction of the Rules, in particular given the terms of r 1.05 of the Rules and the location of Order 75 within the body of the Rules, a contempt proceeding initiated under Order 75 of the Rules is a proceeding in the civil jurisdiction of the Supreme Court and is governed by Chapter I of the Rules. Chapter I governs civil proceedings. This position is, however, subject to the exercise of the Court's discretion in relation to the application of those rules in the particular circumstances of a proceeding. This interpretation of the Rules and this characterisation of the nature of the subject proceeding are supported by the High Court's statements in *Hinch* and the Court of Appeal's observations in *Boral Resources*.
>
> A party charged with criminal contempt may be granted dispensation from some parts of the Rules to ensure there is no loss of relevant privileges and protections. Examples of such parts of the rules include rr 29.07(2), 30.02(3) and 31.12 (Order 31 is in any event also conditioned by the requirement for consent), which deal with discovery, interrogatories and oral examination, respectively. The application of each of these rules is subject to the Court's discretionary power and the Court may decide not to apply such rules in an

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17 *Boral Resources (Vic) Pty Ltd v CFMEU* [2014] VSC 120 [31]–[32] (citations omitted).

> Order 75 contempt proceeding. For example, as observed by the Court of Appeal in *Boral Resources*, the Court's powers to coerce discovery pursuant to Order 29 may not apply in a way which requires an individual to incriminate himself or herself in a contempt proceeding where the contempt alleged is of a criminal character.[18]

93 His Honour then considered whether r 29.07 applied to a contempt proceeding involving a corporate defendant; and whether discovery was otherwise unavailable by reason of the privilege against self-incrimination or against self-exposure to a penalty. He held that:

> Although the learned Associate Judge was correct in characterising this proceeding as a 'criminal contempt', her Honour was not correct in her characterisation of this proceeding as 'a criminal proceeding'. This error then led her Honour to wrongly conclude that the rules of procedure (and evidence) governing criminal proceedings apply and that the rules of civil procedure do not apply to this proceeding, save by clear implication for Order 75 which expressly founded the summons initiating the Contempt Proceeding.[19]

94 The judge then adverted to s 187 of the *Evidence Act 2008* ('*Evidence Act*'), and to authorities including *Clarkson v Director of Public Prosecutions (Vic)*,[20] *Environment Protection Authority v Caltex Refinery Company Pty Ltd*,[21] *Trade Practices Commission v Abbco Iceworks Pty Ltd*,[22] *Calderwood v SCI Operations Pty Ltd*,[23] *Bridal Fashions Pty Ltd v Comptroller - General of Customs*,[24] *Re Australian Property Custodian Holdings Ltd*,[25] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[26] and *WorkCover Authority of New South Wales v Crown in Right of New South Wales*.[27] We mention the authorities to which his Honour referred because almost all of them were relied upon by one party or the other before us.

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18 Ibid [34]–[35] (citations omitted).

19 Ibid [74].

20 [1990] VR 745 ('*Clarkson*').

21 (1993) 178 CLR 477 ('*Caltex*').

22 (1994) 52 FCR 96 ('*Abbco Iceworks*').

23 (1995) 130 ALR 456 ('*Calderwood*').

24 (1996) 17 WAR 499.

25 (2012) 93 ACSR 130.

26 (2002) 213 CLR 543 ('*Daniels*').

27 (2000) 50 NSWLR 333.

95 After consideration of the legislation and the authorities, his Honour concluded that the r 29.07 procedure was not an inappropriate one in the present case. His final reasoning on that point is exposed at [111] of his judgment.[28]

96 His Honour then considered whether, as a matter of discretion, he should make an order for specific discovery under r 29.07.

97 He concluded that the documents which were sought were relevant. There was no challenge in this Court to that conclusion.

98 His Honour further, and correctly, observed that 'special circumstances' must be established by the moving party before an order can be made under r 29.07. He then concluded, after very carefully identifying and weighing competing discretionary considerations, that not only had special circumstances been demonstrated, but also that it was appropriate and desirable that he exercise his discretion in favour of making the orders sought. This is what he said:

> I consider that the following factors favour the exercise of discretion to order limited discovery in this proceeding:
>
> (a) The extent of discovery sought is narrow and cannot be said to be in any way oppressive. The documents sought by [Boral] are copies of business cards issued by the CFMEU to any of seven persons, current as at 16 May 2013, alternatively a copy of one document that records the mobile telephone numbers of the same seven persons at either 16 May 2013 or the present time, and documents which confirm the basis or terms pursuant to which the CFMEU employed Mr Joseph Myles as at 16 May 2013;
>
> (b) There is no real contest as to the learned Associate Judge's finding that the discovery sought in the Discovery Summons is not "fishing";
>
> (d) [sic] It is accepted that the documents sought are relevant to the Contempt Proceeding;
>
> (d) [Boral] argue, and the [CFMEU] does not contradict, that the documents sought are peculiarly within the knowledge of the CFMEU;
>
> (e) As noted by the learned Associate Judge the Contempt Proceeding is not a proceeding where Boral elected to bring its claim other than by

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

Writ, thereby putting itself in a position where it was not entitled to discovery, but rather is a proceeding brought appropriately under Order 75 as required by the Rules;

(f) For the reasons set out in (a)-(e) above, both individually and cumulatively, I support the learned Associate Judge's conclusion that special circumstances exist which warrant an order for discovery under r 29.07 (2);

(g) The nature and extent of the apparent evidentiary issues is a factor which both supports the finding I have made that there are relevant "special circumstances" for the purposes of r 29.07(2) and is also a weighty factor militating in favour of the exercise of discretion to require the limited discovery sought. These evidentiary issues, described in the paragraphs below, arise in the case sought to be established by [Boral] against the [CFMEU]; and

(h) Relevant features of the case sought to be established by [Boral] against the [CFMEU] on the Contempt Summons:

(i) It is sufficiently clear in relation to the Contempt Summons that [Boral] acknowledge that in order to succeed in relation to those charges they pursue [Boral] will need to establish either that the CFMEU authorised Mr Myles to engage in the conduct in which it is alleged he engaged, or that the CFMEU failed to take appropriate steps to prevent such conduct.

(ii) Accordingly, the documents which [Boral] seek by way of limited discovery are documents going to the question of Mr Myles's authority to do as he did, on behalf of the CFMEU, on 16 May 2013. On the above bases it is reasonable to conclude that [Boral] are likely to rely heavily on inferences to establish that Mr Myles acted with the authority of the [CFMEU], and to establish the content of the alleged telephone call on 16 May 2013 involving Mr Myles, and with whom [Mr] Myles spoke on that occasion.

(iii) [Boral] state in their submissions that they have issued subpoenas to various telecommunication companies in order to recover records that may assist in confirming aspects of the key mobile telephone call made by Mr Myles on 16 May 2013. [Boral] note that the subpoenas which they have issued are based on what [Boral] understand are the correct contact details for Mr Myles and executive members of the Victorian/Tasmanian branch of the CFMEU's Construction and General Division. [Boral] further state that the information sought on discovery will in their view either confirm the accuracy of [Boral's] information and serve as a basis for the admission into evidence of the records produced on subpoena. Alternatively, the information sought on discovery may confirm the inaccuracy of [Boral's] information and allow

[Boral] the opportunity to recover accurate, or relevant, records.

(iv) The [CFMEU] has made submissions in relation to possible difficulties concerning the admissibility and probative value of the documents which [Boral] seek to discover. In my view however the admissibility and probative value of the documents sought are potentially impacted by a number of factors which will not be clear until the point at which [Boral] seek to adduce and tender the relevant evidence in trial. The [CFMEU's] submission on this aspect is therefore at the moment speculative, and should be given very little weight.

(v) The [CFMEU] also submits that the documents sought could not prove, or tend to prove, that the CFMEU, via any official, actually spoke to Mr Myles at the time in question; nor, the [CFMEU] submits, can the content of any such conversation be proved. However, at this stage of the proceeding I do not consider that I should ignore the prospect that [Boral] may be able to materially advance their case at trial by deploying the sorts of documents they press to be discovered. Indeed access to the documents sought may be the only way Boral can construct its case.

(vi) The nature of [Boral's] case in the Contempt Proceeding renders the documents sought on the Discovery Summons of great potential significance because they may be pivotal to establishing that in the early afternoon of 16 May 2013 Mr Myles communicated by mobile phone with a person or persons of authority in the CFMEU. This, in turn, may also be of significance in relation to the inferences [Boral] may ask the Court to draw.

(vii) The evidence referred to discloses that Mr Myles, was described in the [CFMEU's] own publications as a specialist organiser with responsibilities covering the subject construction site, was "following directions" from some person or persons and that he made at least one telephone call whilst at the alleged blockade. [Boral] assert that Mr Myles made the telephone call for the purposes of receiving instructions.

(viii) Accordingly, there can be little doubt that the documents [Boral] seek go to a live issue in the substantive proceeding, namely whether Mr Myles's actions and conduct on 16 May 2013 were authorised by his employer, the [CFMEU]. For these reasons the discovery sought is potentially very important to the key issue to which I have referred. I ascribe great weight to this fact a factor militating in favour of exercising the Court's discretion to order limited discovery.

(ix) I do not accept as weighty [Boral's] submission that the

> absence of ancillary statutory powers of compulsion in relation to potentially relevant documents of the type which would be available to the police force and most regulatory authorities prosecuting an offence, is a factor militating in favour of the exercise of discretion to order discovery in this matter. If such a circumstance did justify the conclusion that special circumstances thereby existed, it could be anticipated that all normal applicants for discovery would make out such a special circumstance. Further, it would be an odd and unpredictable position if a party could contend that special circumstances existed because it did not have available to it powers or rights or entitlements which the law did not afford to them. Such a circumstance does not appear to be special but indeed the status quo and normal in that sense. At best I consider this factor, as such, adds very little to the force of [Boral's] discovery application.

In my view, in this proceeding, the strongest argument in favour of discovery is that it is likely to promote the interests of justice, and in particular facilitate the ability of a party to call in aid processes which will assist the Court in identifying the true factual situation.

….

Further, I do not consider that discovery should not be ordered because the process of pre-trial discovery ordinarily entitles the parties involved to mutual discovery, and this feature of *mutuality* is not ordinarily able to be accommodated in quasi-criminal and criminal proceedings. Here the relevant framework is one which does not proceed on an assumption of "mutuality" because r 29.07(2) provides for the Court, in its discretion, to order a specific party to make discovery of documents. The rule itself does not, in terms, provide for mutual discovery by all parties.

….

I consider that the overarching public interest in the administration of justice, which requires that parties be given a fair trial on all the relevant and material evidence, heavily favours the exercise of the Court's discretion to order discovery. In my view the likely prejudice to the fair and just determination of the matters at issue would be unacceptably high if the specific and limited discovery sought was denied to [Boral] in this proceeding. This is because of the nature of [Boral's] case in this proceeding and the potential importance of the evidence sought by [Boral's] application for discovery. I have detailed these considerations above.[29]

The application for leave to appeal

99 A summons seeking leave to appeal from the discovery orders was filed on

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[29] Ibid [149]–[163] (citations omitted).

8 April 2014. A proposed notice of appeal is an exhibit to the affidavit of Bradley Colin Annson affirmed that day. There are three proposed grounds:

> 1. His Honour erred in finding that proceedings brought under Order 75 of the Rules, though constituting a criminal offence, are civil proceedings to which the rules of civil procedure apply, subject to the judge's discretion not to apply an inappropriate procedure.
>
> 2. His Honour erred in finding that discovery pursuant to Order 29 of the Rules can be ordered against the defendant in a contempt proceeding commenced under Order 75 of the Rules, properly characterised as criminal in nature.
>
> 3. His Honour erred in finding that discovery pursuant to Order 29 of the Rules should be ordered in the current proceeding.

100 Although the Grocon and Boral matters involve quite separate breaches — in the case of the Boral matter, alleged breaches of court orders — and raise a number of different factual and legal questions, there are some features of each matter that give rise to common questions of law and principle. We refer, in particular, to the questions raised by ground 3 of the Grocon sentence application, and those that underlie grounds 1 and 2 of the Boral application.

101 We turn next to the principal issue raised in the Grocon sentence application which we briefly referred to at [74] above. We will deal with that matter first, before addressing the Grocon conviction application, because the grounds in support of that application were only faintly pressed in argument.

Grocon sentence application — ground 3

102 In the Grocon matter, with respect to ground 3, the gist of the CFMEU's submission was that, because contempt proceedings arising out of a breach of court orders are today recognised as both criminal in nature and accusatorial, certain safeguards had to be followed. In particular, the Union submitted that it could not be exposed to the possibility of a conviction for criminal contempt without contumacy having been expressly pleaded in the charges brought by Grocon against it. It submitted that contumacy should be regarded as an element of the 'offence',

and one that had to be specifically pleaded as such. As none of the charges brought against it had alleged contumacy, or by their terms otherwise made it clear that the contempt alleged was a criminal contempt, it had not been open to the Court to enter a 'conviction' for such contempt.

103 In the Boral matter, by way of anticipation, and to expose the common theme of the Union's submissions, it was contended that because contempt proceedings arising out of breach of court orders are today recognised as both criminal in nature and accusatorial, the Union could not be required to give discovery of documents as might be required of it in a civil proceeding.

104 Counsel relied upon the same authorities to advance the submissions noted in the two preceding paragraphs. We must later say more about the detail of the Union's submissions. But with respect to ground 3 of the Grocon sentence application, it can be said that they give rise to at least the following questions in the context of a contempt constituted by breach of court orders:

(i) Is contumacy an element of such a contempt in a case in which the circumstances would permit a finding of criminal contempt, or merely an aggravating circumstance?

(ii) Must contumacy be expressly pleaded in order that the contempt may be treated as criminal?

(iii) Can the purpose for which the plaintiff brings the contempt proceeding give the alleged contempt the character of a criminal contempt in the absence of contumacy?

(iv) May the court convict the contemnor of criminal contempt if it is not clear from the terms of the charge that a criminal contempt is alleged?

(v) Must it be made clear at the commencement of the hearing of a charge of contempt that the contempt alleged may be found to be a criminal contempt, or that the proceedings may be found to be only for the purpose of punishing the contemnor or that a finding of contumacious conduct may be made?

105 For the reasons set out below, we would answer those questions as follows.

(i) Although the authorities seem to suggest, on balance, that contumacy is not an element of a criminal contempt, it is unnecessary to express a concluded view regarding this matter.

(ii) No.

(iii) Yes.

(iv) Yes.

(v) In order to satisfy the requirements of procedural fairness, adequate notice of these potential consequences must be given.

The course of the proceedings at trial

106 Every appeal must have regard to the course of events at trial. In the present case, such regard shows very plainly that, from the time when the Union first appeared to answer the charges — (1) its legal advisers were absolutely clear that what was being alleged against it was a criminal contempt by reason of the circumstances in which the alleged breaches of the orders had been committed; (2) the judge and all counsel were alive to the fact that, in accordance with established practice, the question whether the Union's conduct had been contumacious was a matter for determination only if and when the charges were found to be proven; (3) the Union contended that any allegation of contumacy had to be pleaded in the charge; and, as a corollary, that a finding of criminal contempt could not be made because contumacy had not been so pleaded. But it acknowledged that those submissions must fail on the weight of the then state of authority. What follows expands upon those propositions.

107 At the commencement of the hearing of the contempt proceedings before Cavanough J, and before the CFMEU had elected to appear, Grocon accepted as correct his Honour's view that these were proceedings for 'an offence' within the meaning of the *Evidence Act*. His Honour expressed the view that as the Act distinguished between civil and criminal proceedings, the present application to have the CFMEU dealt with for contempt should be treated as a criminal proceeding.

108 Justice Cavanough also observed that in neither summons was there an express allegation of deliberateness, wilfulness, contumaciousness or defiance. However, his Honour indicated that he considered that allegation to be implicit, in part because the A-G was joining in the application. Grocon then said that such a finding would be relevant to the issue of penalty. His Honour observed that the Court ought to know, and the Union 'may be entitled to be told' at the commencement of the hearing, whether Grocon alleged this to be a case of criminal contempt, or one of civil contempt only. His Honour said that, in his opinion, the authorities indicated that this was a matter that was relevant generally and not merely as to penalty.

109 At the first hearing at which the CFMEU appeared, Grocon submitted that the correct approach was that contumacy did not have to be pleaded, and that any such finding need only be made at the penalty phase of the proceeding. The CFMEU submitted that this was wrong in principle. However, it accepted that his Honour was bound to approach the matter in that way in accordance with prevailing authority. Counsel for the CFMEU, in support of a successful application for an adjournment, emphasised the criminal nature of the proceeding and the possibility that there might be a conviction. He expressly stated that the Union was 'facing criminal charges'.

110 In the event, the summonses were not amended to include any allegation of contumacy. However, each summons stated that Grocon was seeking that the CFMEU be 'punished' for the alleged contempts. The matter proceeded on the common understanding that Grocon was seeking findings of criminal contempt.

111 In opening its case, counsel for Grocon sought to deal with the matters his Honour had previously raised with the parties:

> The first proposition we advance is that this is an application to punish the Union for a civil contempt. The proceedings are criminal in nature, and the charge must be proved beyond reasonable doubt. But although the proceedings are criminal in nature, it doesn't equate them to the trial and criminal charge. *Witham v. Holloway* is the relevant authority … As a general rule, failure to comply with an injunction in a civil proceeding is a civil

> contempt, however it may be converted into a criminal contempt where the disobedience or breach amounts to deliberate (indistinct) or [contumacious] conduct. If the court in due course makes a finding that the CFMEU was in contempt of the court's orders, and also finds there's a deliberate defiance of the court's orders, it can in those instances treat the matter as a criminal contempt.

112 At the conclusion of the evidence the CFMEU was found to have breached the orders. However, no finding was made at that stage as to the nature of the contempt. A later penalty hearing then commenced, the legal character of the contempt still being unresolved. The CFMEU argued that as it was a quasi-criminal case, particular criminal protections attached to the proceeding, regardless of whether it was a criminal or civil contempt. The CFMEU then argued that the breaches that had been proved were not contumacious, and that therefore no conviction should be recorded.

113 The primary point which the Union took was that Grocon and the A-G had elected not to proceed with any criminal charge of contempt. Whilst counsel conceded that there was no bar in principle to considering the matter at the penalty stage, he submitted that it was not in the interests of justice to do so in this particular case. He submitted that deferral of characterisation of the contempt was inconvenient, and would generate two trials on criminal liability, thereby exposing the Union to two quite differently structured sentencing submissions.

114 Counsel further submitted that it was too late at the penalty stage to consider whether the Union's disobedience involved contumacy, or amounted to criminal contempt and warranted criminal conviction. Such a process was said to be inconsistent with the fundamental requirements of the accusatorial system. Counsel submitted that, in the absence of a pleading of contumacy, no such finding could be made. Counsel again acknowledged that there was a substantial body of authority against that submission, and he accepted that there were a number of cases in which findings of criminal contempt had been made where contumacy had not been alleged from the outset. He acknowledged that the trial judge would be obliged to reject his submission that contumacy needed to be pleaded, and explained that he

had advanced that contention solely for the purposes of consistency. We interpolate that we understand that submission to have been made so that the Union could, if necessary, challenge the correctness of that line of authority on appeal.

115 The judge then observed:

> In any event, if I were to allow the Attorney in and if I were to then consider whether I ought to find contumacy or whether I ought to impose conviction, you're not in a position to say I can't do that because it wasn't pleaded and nor are you in a position I gather to say, well, I can't do that because it would be a breach of natural justice. In other words, you had enough notice of the proposition that the Attorney would seek to put forward.

116 Grocon and the A-G contended that the Union's disobedience of the Court's orders had involved 'deliberate defiance' and was 'contumacious', amounting therefore to criminal contempt. The CFMEU submitted that none of the contempts found should be classified as criminal contempts as none of the acts of disobedience had been 'contumacious'. This submission assumed, contrary to the Union's primary position, that the judge would find that it had been unnecessary for Grocon to plead contumacy.

117 The Union further submitted that, in any event, criminal convictions should not be recorded.[30] It relied, in that regard, upon the fact that no case could be cited to the trial judge of any finding of criminal contempt against an organisation or an individual for breach of a court order in an industrial context.

118 Grocon and the A-G submitted that the judge should break new ground and impose criminal convictions in relation to at least some of the contempt findings.[31]

119 His Honour accepted the Union's submission that he had power to decline to record a conviction even if satisfied that the contempt was a criminal contempt.[32] But ultimately, as we have said, he convicted and fined the Union on a number of the charges.

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30 Penalty Reasons [4].

31 Ibid [6].

32 Ibid [77].

Submissions on appeal

120 Grocon and the A-G maintained on appeal the arguments which they had advanced at trial. They submitted that the proceeding against the Union had been a civil proceeding, albeit one to which certain criminal characteristics attached. They distinguished a finding of criminal contempt from a criminal proceeding. They submitted that the trial judge had correctly characterised the proceeding as a civil proceeding, and that a finding of contumacy leading to conviction for criminal contempt was properly made at the penalty stage.

121 The arguments advanced on behalf of the Union differed in certain key respects from those that had been put forward below. Whereas counsel had previously conceded that the weight of authority — although it was not conceded to be correct in principle — meant that contumacy could be established, and a conviction recorded, without having been expressly pleaded in the charges brought, it was submitted before this Court that the law, in this regard, had very plainly changed.

122 The basis for that submission lay in two recent decisions of the High Court, *X7 v Australian Crime Commission*[33] and *Lee v The Queen*.[34] Judgment in *X7* was delivered on 26 June 2013, and the Penalty Reasons were not delivered until 31 March 2014. Accordingly, counsel for the CFMEU could have drawn his Honour's attention to what the High Court had said in *X7* in support of his argument that a conviction should not be recorded. But he did not do so. *Lee* was not decided until 21 May 2014, and for that reason could not have formed the basis for any of the Union's submissions before his Honour.

123 Before this Court, counsel for the CFMEU submitted that the combined effect of these two decisions had been to change the landscape, so far as the rights of alleged contemnors were concerned. He submitted that when what they held was

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[33] (2013) 248 CLR 92 ('*X7*').

[34] (2014) 88 ALJR 656 ('*Lee*').

combined with what was decided in *Witham v Holloway*[35] the law was now clear. Despite the weight of past practice, any person or entity said to have committed a contempt of court by breach of a court order was entitled to all of the protections normally afforded to a defendant in a criminal proceeding. This meant that the charge itself had to allege contumacy if a conviction was to be recorded. The lax practice of allowing a judge to find an unpleaded contumacy, and then record a conviction, should no longer be tolerated.

The state of the law before X7 and Lee

124 Viewed simply, ground 3 raises a point of pleading. It might be thought, particularly in light of the Union's reliance upon *X7* and *Lee*, that we should begin our resolution of the issue raised by an analysis of those decisions. But despite the Union's acknowledgment that, before *X7* and *Lee,* the weight of authority was against its submissions on the pleading point, we consider it necessary to begin our consideration of this ground by focussing upon the relevant law as it stood before those decisions; and then to consider whether they 'changed the landscape'. The Union, it must be remembered, argued (although it was subsidiary to its principal submission) that the law as it stood even before *X7* and *Lee,* properly understood, led to the conclusions for which it contended, and that the weight of authority to the contrary was wrong.

125 It is important, before going further, to emphasise that the Union did not contend that civil contempt no longer exists as a species of contempt. Rather it submitted that, if Grocon had wished to contend that what would otherwise be a contempt of that kind should be treated as a criminal contempt, and so open up the prospect of conviction, then Grocon must have pleaded in the charges that the Union's conduct was contumacious (conduct of that kind being at least one circumstance in which what would otherwise be a civil contempt becomes converted (if established) into a criminal contempt). The need for Grocon to plead contumacy

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35 (1995) 183 CLR 525 ('*Witham*').

was said to flow from authorities (even before *X7* and *Lee*), which stated, in effect, that all contempts are to be regarded as 'quasi-criminal' or 'realistically … criminal in nature'. The Union, accepting that contumacy of breach is a circumstance with the capacity to transform what would otherwise be a civil contempt into a criminal contempt, submitted that so much must be pleaded in a charge because of the 'quasi-criminal' or 'realistically ... criminal' character of contempt.

126 The Union also called in aid other language used in relevant discourse — 'offence', 'offence of a criminal character', 'criminal proceeding', 'criminal prosecution', 'criminal proceedings for an offence' and 'prosecution of an offence' — in order to emphasise the character of contempt proceedings for breach of court orders.

127 In our opinion, the authorities to which we will now refer show — at least before the decisions in *X7* and *Lee* — that whilst civil contempt was assimilated to some extent with criminal contempt, the distinction between the two kinds of contempt was maintained.[36] They show also, despite the relevant discourse making use of language of the kind which we mentioned in the preceding paragraph — some of which, it might be said, has the potential to confuse if read uncritically — that the full panoply of the criminal law was never imported into the law of civil contempt. In particular, it was not necessary to plead contumacy in order that a civil contempt might be converted into a criminal contempt. Rather, the circumstances — not confined to contumacious conduct — which might give rise to such a conversion were consistently dealt with at the penalty phase.

128 The first of those two propositions, we note immediately, was not put into dispute by the Union. Rather, it was said not to be decisive against it.

General observations

129 The circumstances which can give rise to the generic term 'contempt of court'

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[36] Eliahu Harnon, 'Civil and Criminal Contempts of Court' (1962) 25 *Modern Law Review* 179.

are many and varied. They share a common characteristic in that they all involve an interference with the due administration of justice. They include both interference with court processes and disobedience of court orders.

130 Procedurally, a distinction is often drawn between contempt in the face of the court and other forms of contempt. Contempt in the face of the court may include conduct such as threatening persons in court, disruptive or disrespectful conduct, a refusal to give evidence, an unwillingness to serve on a jury and taking photographs or making an audio or visual recording in court. Conduct of that kind is often dealt with immediately, and of course summarily, by the trial judge before whom it occurs.[37]

131 Other forms of contempt are usually dealt with in accordance with pt 3 of O 75. Often, though not invariably, the judge will refer such conduct to court officials or the Attorney-General in order that action can be taken. In relation to breaches of court orders arising out of criminal proceedings, the practice in Victoria has been for a law officer to initiate contempt proceedings to protect the administration of the criminal justice system. In relation to such breaches arising out of civil proceedings, it has generally been left to the parties, or to the court, to protect the administration of the civil justice system.[38]

132 Almost all forms of contempt, whether in the face of the court, or not, are classified as criminal in nature. Indeed, they are described as criminal contempts. Traditionally breaches of court orders have been characterised differently. They are usually described as civil contempts.

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37 It will not always be appropriate for a judge to proceed summarily in relation to a contempt in the face of the court. It may be preferable, in some instances, to invoke the procedures contained within O 75 of ch 1 rather than dealing with the matter summarily. See generally, *Kift v The Queen* (1993) 1 VR 703 and *Allen* (2013) 36 VR 565, 575-8 [65]–[75]. It should be noted, however, that the facts in *Allen* were somewhat unusual, and the case does not stand for any general proposition to the effect that the use of summary procedures should, if possible, be avoided.

38 *Broken Hill Pty Co Ltd v Dagi* [1996] 2 VR 117, 125 (Winneke P); *Home Office v Harman* [1983] 1 AC 280, 310 (Lord Scarman).

133 It has been said that the various forms of criminal contempt are not easily categorised.[39] In addition to contempt in the face of the court, they include, for example, publishing or broadcasting material likely to prejudice a pending trial;[40] misconduct by counsel;[41] an employer telling an employee who is a prospective juror not to attend court;[42] lies, prevarication, or feigned inability to remember by a witness;[43] intimidating or otherwise victimising witnesses before, during or after proceedings;[44] and divulging the confidences of the jury room.[45]

134 Contempt of court, in all its forms, was historically a common law misdemeanour capable of being punished upon indictment or presentment.[46] However, in Victoria as well as in other jurisdictions, the custom has been to invoke the court's power to punish contempts by use of the summary civil procedure, without a jury.[47] There has been no instance in modern times of an indictment being brought for such contempt. For practical purposes, the summary procedure has wholly superseded trial by jury which should therefore be regarded as obsolete.[48]

135 Disobedience of a court order constitutes a quite separate form of contempt. We also note, for the sake of completeness, that so too does the wilful breach of an undertaking given to a court, whether expressly or impliedly. As we have already said, conduct of this nature has traditionally been described as 'civil contempt', and

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39 *Australian Securities Investments Commission v Sigalla (No 4)* (2011) 80 NSWLR 113, 118 [8].

40 *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15.

41 *Lloyd v Biggin* [1962] VR 593; *Lewis v Ogden* (1984) 153 CLR 682.

42 *Kift v The Queen* (1993) 1 VR 703.

43 *Keeley v Brooking* (1979) 143 CLR 162.

44 *R v Wright (No 1)* [1968] VR 164.

45 *R v Matthews and Ford* [1973] VR 199.

46 *R v Castro* (1873) LR 9 QB 219, 230, 232 (Blackburn J).

47 William Hawkins and John Curwood, *A Treatise of Pleas of the Crown* (S Sweet, 8th ed, 1824) vol 1, 63; William Hawkins and John Curwood, *A Treatise of Pleas of the Crown* (S Sweet, 8th ed, 1824) vol 2, 289; Samuel Prentice, *A Treatise on Crimes and Misdemeanours* (5th ed, 1877) vol 1, 188; *Earl of Thanet's Case* XXVII State Trials 822; *Re Perkins; Mesto v Galpin* (1998) 4 VR 505, 511 (Brooking JA).

48 *Attorney-General (NSW) v John Fairfax & Sons Ltd & Bacon* (1985) 6 NSWLR 695 (McHugh JA); *Registrar of the Court of Appeal v Willesee* [1984] 2 NSWLR 378, 379 (Hutley AP); *R v Tibbits* [1902] 1 KB 77.

modern texts continue to use that description.[49]

136 If contempt proceedings are brought in respect of breach of a court order, their object is most often to coerce the recalcitrant party into compliance, and not to punish the party for that breach. Notwithstanding the fact that such conduct is usually described as 'civil contempt', the offending party may be imprisoned or fined as an incentive to comply with court orders. If that party happens to be a corporate entity, its assets may be sequestrated.

137 Fines can, in that sense, be coercive, and accrue until the breach is remedied. If the defendant is imprisoned for having disobeyed a court order, he or she will ordinarily be released as soon as the contempt has been purged.

138 It is not in doubt that, in relation to breach of a court order, a finding of contempt can be made whether the breach was technical, wilful or contumacious.[50] It is sufficient to establish that the acts of an alleged contemnor were intentional and were calculated (in the sense of 'likely') to interfere with the course of justice. It is unnecessary to establish a specific intention to breach the order of the court or to interfere with the proper administration of justice.[51]

139 In order to prove a civil contempt involving the breach of an undertaking or

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49 See, eg, Borrie and Lowe, *The Law of Contempt* (LexisNexis 4th ed, 2010) ch 6; Sir David Eady and A T H Smith, *Arlidge, Eady and Smith On Contempt* (Sweet & Maxwell, 4th ed, 2011) ch 3; CJ Miller, *Contempt of Court* (Clarendon Press, 2nd ed, 1989) chs 1 and 2. Even so, the distinction between civil and criminal contempt has not always been maintained. Some breaches of court orders have traditionally been regarded as criminal contempts, irrespective of whether there was proof of actual contumaciousness or defiance. For example, a failure to deliver up a child in response to a court order has always been treated as a criminal contempt. The same is true of a breach of a non-molestation order. Breach of a court order by a solicitor or a liquidator is regarded as a criminal contempt in every case: *Witham* (1995) 183 CLR 525, 530.

50 *Anderson v Hassett* [2007] NSWSC 1310; *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 111; *Matthews v Australian Securities and Investments Commission* [2009] NSWCA 155 [16] (Tobias JA), citing *Metcash Trading Ltd v Bunn (No 5)* [2009] FCA 16 [9] (Finn J).

51 *Lane v Registrar of the Supreme Court of New South Wales* (1981) 148 CLR 245, 258 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ); *Meissner v The Queen* (1995) 184 CLR 132, 144; *R v Rogerson, Nowytager and Paltos* (1992) 174 CLR 268, 278; *Anderson v Hassett* [2007] NSWSC 1310 [5].

order it must be established that the order is clear and capable of compliance, that the alleged contemnor has knowledge of the terms of the order and has by his act or omission breached the terms of the order. In order that he is able to defend himself, the particulars must state what it is that the defendant did or omitted to do which constitutes the contempt.[52]

140 The public interest requires that any disobedience more than casual, accidental or unintentional must at least be regarded as wilful.[53] Thus, a deliberate act or omission which is in breach of an injunctive order or an undertaking, will ordinarily constitute wilful disobedience unless the alleged contemnor is able to show, by way of exculpation, that the default was casual, accidental or unintentional.[54]

141 The intention with which the act was done will, of course, be highly relevant in determining what penalty (if any) is to be imposed by the court. However, liability for contempt is 'strict' in the sense that all that needs to be proved is knowledge of the order, and the subsequent conduct of the party bound by that order which is prohibited.[55]

142 There is a discretionary character to the jurisdiction which enables a court to decline to exercise the contempt jurisdiction at all even though the court may be satisfied that the contempt has been established.[56] Such a discretionary outcome is more likely where the court concludes the contempt to be of a technical nature, as for example where the act or omission may be described as casual, accidental or unintentional.[57] The authorities have rarely regarded such contempts as deserving

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52 *Chiltern District Council v Kean* [1985] 1 WLR 619, 622 (Sir John Donaldson MR).

53 *Steiner Products Ltd v W Steiner Ltd* [1966] 1 WLR 986, 991; *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 111.

54 *Anderson v Hassett* [2007] NSWSC 1310 [6]; *Primelife Corporation Ltd v Newpark Pty Ltd* [2003] VSC 106 (Nettle J).

55 *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191, 217–8 (Lord Oliver).

56 *Re Perkins; Mesto v Galpin* (1998) 4 VR 505 (Brooking JA).

57 *Fairclough & Sons v The Manchester Ship Canal Co* (1897) 41 SJ 225.

of punishment by fine or committal.[58]

143 In these general observations, we have not adverted to the circumstances — in the present case, contumacy was in point — in which it has been held that what would otherwise be a civil contempt for breach of a court's orders will be treated as a criminal contempt. To that question, and to the extent of assimilation of civil contempt with criminal contempt, we now turn.

Distinguishing between civil and criminal contempt

144 The common law has for centuries recognised a distinction between civil and criminal contempt in the context of breach of court orders.[59] Circumstances have been identified which have led to what would otherwise be a civil contempt being treated as a criminal contempt. Initially, focus was placed upon the circumstances of the breach. If it was both deliberate and contumacious, it would be a criminal contempt. More recently, though not without criticism, a second circumstance has been identified — that is, where the purpose or object of the contempt charge is to punish the alleged contemnor, rather than being to achieve compliance with the court's order.

145 We pause to note what is comprehended by the notion of contumacious conduct.

146 The cases suggest that there is a difference between a wilful act, and one that is contumacious.

147 In *Australian Consolidated Press v Morgan,*[60] the contemnor had acted deliberately and after a clear warning from the respondent that to do so would constitute a breach of an undertaking. However, in disregarding that warning, he

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58 *Scott v Evia Pty Ltd* [2007] VSC 15 [41] (Dodds-Streeton J).

59 In *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 106, the plurality traced the distinction back to the 17th century, and noted that it had been repeatedly recognised in judgments of the High Court.

60 (1965) 112 CLR 483 ('*Morgan*').

had acted upon a misconstruction of the meaning of the undertaking. Thus, Windeyer J observed that the conduct, whilst wilful, was not contumacious.[61]

148 In *In the Marriage of Kitchener*,[62] it was said that an act becomes contumacious if the person knows that it is prohibited and has no reasonable belief that it can be excused.

149 In the Full Federal Court, in *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd*,[63] Smithers and Northrop JJ said:

> It is appropriate for the contempt before the Chief Judge to be regarded as involving an element of contumacious conduct. Contumacy is perverse obstinate resistance to authority; see the *Shorter Oxford Dictionary*. Deliberate determination to defy the court for reasons founded upon Union policy in which it is sought to establish immunity from the law would seem to be within this concept of contumacy.[64]

150 The High Court, in *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd*,[65] said that wilful disobedience of a court order which amounted to 'public defiance' could convert what would otherwise be a civil contempt into a criminal contempt.

151 In *Seymour v Migration Agents Registration Authority*, Rares J said that 'a "civil" contempt could become "criminal" where the act charged is contumacious in the sense that in doing it there was a direct intention to disobey the order'.[66]

152 Similarly in *Mosman Municipal Council v Kelly (No 3)*, Biscoe J distinguished wilful from contumacious contempt, the latter involving a specific intention to disobey a court order, thereby evidencing 'a conscious defiance of the court's

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61 Ibid 503.

62 (1978) 20 ALR 535.

63 (1985) 9 FCR 194 ('*Mudginberri (FFC)*').

64 Ibid 207.

65 (1986) 161 CLR 98, 108 ('*Mudginberri (HC)*').

66 (2006) 215 FCR 168 [104] ('*Seymour*').

authority'.[67] So also in *W, NJ v Police* Sulan J defined 'contumacious' as exhibiting 'an attitude of defiance'.[68]

153 Before Cavanough J in the Grocon proceeding, the CFMEU wrongly sought to equate the archaic noun 'contumely' (meaning, 'insolent or insulting language or treatment') with 'contumacy' (meaning, 'perverse and obstinate resistance to authority'). As his Honour found, a contemnor's disobedience of a court order may be both contumacious and contumelious, but it need not be contumelious to be criminal.[69] His Honour concluded that there had been conduct of the part of the Union which constituted 'public defiance' on the Court's orders, although he also concluded that such 'public defiance' was not a necessary condition for a finding of contumacy.[70] None of these findings were challenged on appeal.

154 Despite the conceptual divide between breaches which are contumacious and those which are not, some earlier authorities did not clearly recognise the significance of the distinction. In *Scott v Scott,*[71] for example, Lord Atkinson observed that a person who deliberately contravened an injunction was not, as a result, guilty of a crime but only of a civil contempt of court. His Lordship went on to say that he recognised the possibility that a given contempt might be capable of being viewed in either of two aspects 'the one criminal and the other simply tortious'.[72]

155 In *Keogh v Australian Workers' Union,*[73] Walker J rejected the contention that an application for the sequestration of the property of a trade union that had disobeyed an injunction involved an exercise of the Court's criminal jurisdiction. Rather, his

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67 (2009) 167 LGERA 91, 110 [72] ('*Mosman*').

68 (2009) 197 A Crim R 143, 146–8 [17]–[23].

69 Penalty Reasons [115].

70 Ibid [112], [114].

71 [1913] AC 417.

72 Ibid 464.

73 (1902) 2 SR (NSW) Eq 265.

Honour considered 'it is a step in the suit by which the plaintiff endeavours, by the only means open to him, to enforce against the Union the injunction of the court'.[74]

156 Then, in *Morgan,* Windeyer J, although of the view that sequestration for civil contempt was coercive and compensatory rather than punitive, recognised that the line between civil and criminal contempt could not always be sharply drawn. Conduct by a party could amount to both if the party not only disobeyed a court's order, but did so in a *deliberately defiant way*. Mere breach of an injunction, however, was not criminal. His Honour drew upon United States authority for the proposition that the *character and purpose of the punishment* reflected the distinction between civil and criminal contempt.[75] For a purely civil contempt, a fine, so called, could be imposed but it was made payable to the party injured by the contempt to make good that party's actual loss. That corresponded to English doctrine in which a contemnor, in order to purge his contempt, must make reparation to the party injured by it. The purpose of such an order was primarily compensatory.[76]

157 There, Windeyer J identified two bases for discrimination between civil and criminal contempt — that is, deliberate defiance of a court's order, and the character and purpose of the punishment. The former was a description of contumacious conduct. The latter stands apart from the quality of the contemnor's conduct.

158 *Mudginberri (HC),* represents a distinct development in the law of contempt by the High Court. Before the Court was an appeal by the Union from the decision of the Full Federal Court in *Mudginberri (FFC).*

159 The Union had been the subject of both a series of fines and a sequestration order after it had been found to have contravened the terms of an injunction

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74 Ibid 282.

75 (1965) 112 CLR 483, 502.

76 In *Gompers v Bucks Stove and Range* Co 221 US 418, 441 (1910) to which Windeyer J referred, the United States Supreme Court said that in the absence of 'special elements of contumacy' imprisonment for civil contempt is not inflicted as a punishment to vindicate the authority of the law but is remedial and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant.

restraining it from maintaining a picket line at the Mudginberri abattoir in the Northern Territory. On appeal to the Full Court of the Federal Court, Smithers and Northrop JJ, in a joint judgment, said that at the time of the making of the sequestration order the Court had been dealing with a contempt in its 'dual nature', namely as a contempt already committed and worthy of punishment, and as a contempt accompanied by a threat to continue it indefinitely. Their Honours concluded that the court, 'faced with a contumacious contempt' could make an order 'designed to deal with that contempt according to its nature'. The punishment was referable to both the past and continuing nature of the 'offence'.[77]

160 On the Union's unsuccessful appeal to the High Court, it was specifically held that the Federal Court had power to impose a fine in respect of a contempt consisting of wilful disobedience to an injunction and future acts of disobedience. In so holding, the plurality[78] rejected the Union's submission that the Federal Court had no power to impose a fine for a civil contempt, and no power to impose an anticipatory punishment for future default.

161 The plurality recognised that the distinction between civil and criminal contempt had, in the past, been attended by some practical consequences connected with procedure, onus of proof, right of appeal, mode of punishment, privilege from arrest, pardon and power to release an offender.[79] Their Honours noted that differences in approach in these matters had largely disappeared in more recent times. According to some authorities, criminal, but not civil, contempt could be punished by the imposition of a fine, but more recent decisions had indicated that a fine could be imposed for civil contempt as well as long as it consisted of wilful disobedience to a court order — that is, was not casual, accidental or unintentional.

162 The plurality referred to the 'unsatisfactory nature' of the distinction between

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77 (1985) 9 FCR 194, 208.

78 (Gibbs CJ, Mason, Wilson and Deane JJ).

79 *Mudginberri (HC)* (1986) 161 CLR 98, 106. See also Eliahu Harnon, 'Civil and Criminal Contempts of Court' (1962) 25 *Modern Law* Review 179.

civil and criminal contempt which was attested by the arbitrary classification of some instances of disobedience to an order as examples of criminal contempts.[80] Their Honours added that there was much to be said for the view 'that all contempts should be punished as if they are quasi-criminal in character'.[81]

163 *Mudginberri (HC)* had the effect of blurring any bright line of distinction between civil and criminal contempt constituted by breach of court orders. It did so by its observation which we have set out in the last sentence of the preceding paragraph. It did so also by referring to the artificiality and complexity of the concept that a contempt became criminal when the primary purpose of exercising the power changed from vindication of the rights of the plaintiff to vindication of the authority of the court, given that those objects were so intermixed.[82] That had been the second basis for distinction to which Windeyer J had referred in *Morgan*. Much earlier, in *United States Ex rel Marcus v Hess,* Frankfurter J had made the same point when he said that '[p]unitive ends may be pursued in civil proceedings, and, conversely, the criminal processes frequently employed to attain remedial rather than punitive ends'.[83]

164 The first thread of the matters mentioned in the preceding paragraph was taken up by the High Court in later decisions.

165 In *Hinch v Attorney-General (Vic),*[84] Deane J was emphatic that it should no longer be accepted in this country that a finding of civil or criminal contempt could be justified otherwise than as a punishment for a past or continuing breach of law.

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80 *Mudginberri (HC)* (1986) 161 CLR 98, 107.

81 Ibid 109.

82 Ibid 108–9. The earlier decisions of the High Court appear to be *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union (Australian Section)* (1951) 82 CLR 208; *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351; *Morgan* (1965) 112 CLR 483.

83 317 US 537, 554 (1943).

84 (1987) 164 CLR 15, 49 ('*Hinch*').

166 In *Witham,*[85] one party to civil proceedings in the Supreme Court of New South Wales brought contempt proceedings against another. The judge at first instance found the contempt proved, but made it clear, in arriving at that conclusion, that he had applied the civil standard of proof only. The New South Wales Court of Appeal accepted that, the form of contempt being civil, it was sufficient that there be proof on the balance of probabilities only.

167 The High Court reversed that decision. It held that all proceedings for contempt, whether civil or criminal, 'must realistically be seen as criminal in nature'. Accordingly, even what had traditionally been described as civil contempt had to be proved beyond reasonable doubt.[86]

168 In arriving at that conclusion, the plurality noted that the common law had long recognised a distinction between civil and criminal contempt. It said that this distinction could be traced back at least as far as the early part of the 19th century.[87] However, it noted that in *Mudginberri (HC),* the distinction had been criticised. It noted further that, in *Hinch* Deane J had raised doubts as to its continuing validity.

169 In a separate judgment in *Witham*, McHugh J observed that the 'case for abolishing the distinction between civil and criminal contempts is a strong one'.[88]

170 The observations made by the plurality of the High Court in *Mudginberri (HC),* about the purpose of punishment as a basis for distinguishing between a civil and a criminal contempt, draw attention to the punishments which are available in such a case. Irrespective of the extent to which the distinction between civil and criminal contempt constituted by a breach of court orders remains alive, it is now tolerably clear that the types of punishment available for civil and criminal contempts are broadly the same. Certainly, imprisonment can be ordered for civil

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85 (1995) 183 CLR 525.

86 Ibid 534.

87 In its earlier decision in *Mudginberri (HC)* (1986) 161 CLR 98, it was said that the distinction went back even further, as far as the 17th century.

88 (1995) 183 CLR 525, 549.

contempt, albeit, so it is said, not as a punishment, but remedially, by coercing the defendant to do what he or she has refused to do.[89] As has been seen, *Mudginberri (HC)* held that a civil contempt involving conduct that is wilful, albeit not contumacious, can be visited with a fine, as well as sequestration. In that sense, contempt of court, both civil and criminal, is a 'distinctive offence attracting remedies which are sui generis …'.[90]

171 Punishment by way of fine or imprisonment as a remedy for a proven civil contempt — that is, a case of breach of court orders where the disobedience is more than casual, accidental or unintentional but falls short of being contumacious or defiant[91] — is reflected in the terms of pt 4 of O 75 of the Rules. Rule 75.11, headed 'Punishment for contempt', provides:

> (i) Where the respondent is a natural person the Court may punish for contempt by committal to prison or fine or both.
>
> (ii) Where the respondent is a corporation, the Court may punish for contempt by sequestration or fine or both.
>
> (iii) When the Court imposes a fine, it may commit, or further commit, the respondent to prison until the fine is paid.
>
> (iv) The Court may make an order for punishment on terms, including the suspension of punishment.

172 However, r 66.10 of the Rules provides that a judgment shall not be enforced by committal or sequestration unless a copy of the judgment is served personally on the person bound and:

> 3 A copy of a judgment served under this Rule shall be endorsed with a notice naming the person served, that the person served is liable to imprisonment or to sequestration of property if –

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89 *Morgan* (1964) 112 CLR 483, 499–500 (Windeyer J).

90 *Mudginberri (HC)* (1986) 161 CLR 98, 115, citing *Morris v Crown Office* [1970] 2 QB 114, 129.

91 *Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531, 551 [65] (Keane JA). It should be noted that wilful breach, giving rise to a civil contempt, is a standard which McHugh J in *Witham* recognised falls short of the requirement in criminal contempt of contumacy or defiance on the part of the person in breach: *Witham* (1995) 183 CLR 525, 542. See also, *Heatons Transport (St Helens) Ltd v Transport and General Workers Union* [1973] AC 15, 108 (Wilberforce LJ).

(a) where the judgment requires the person bound to do an act within a fixed time, the person bound refuses or neglects to do the act within that time; or

(b) where the judgment requires the person bound to abstain from doing an act, the person disobeys the judgment.[92]

173 Although those modes of potential punishment for civil and criminal contempts are the same, two points must be made. First, and importantly, conviction has consistently been held to be available in the case of criminal — but not civil — contempts. That shows a persisting difference in the treatment of civil and criminal contempts constituted by breach of court orders. Second, a finding of criminal contempt is more likely to attract imprisonment and highly likely to result in more severe punishment.[93]

174 A little more may be said about the first of those points. A conviction has usually followed as a necessary incident of a finding of criminal contempt.[94] Indeed, a finding of guilt of criminal contempt has itself been regarded as the equivalent to a conviction.[95]

175 In *Attorney General (NSW) v Whiley*,[96] the New South Wales Court of Appeal, drew upon the observations of Kirby P in *Registrar of the Court of Appeal v*

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92 It is now settled that an order for committal will generally not be made if it is not proved that the copy of the order was served on the contemnor endorsed in accordance with r 66.10(3): *Primelife Corporation Ltd v New Park Pty Ltd and Andrejic* [2003] VSC 106 [31] (Nettle J). The purpose of the notice is to warn the party of the consequences which might befall that party should he or she fail to perform the act directed. It has long been recognised that a party will not be attached for disobedience of a mandatory order unless that party has been served with a copy of the order containing the required endorsement. That is because attachment proceedings, being penal and affecting the liberty of the subject, are of a criminal character so that the utmost strictness in procedure and proof is demanded: *Clifford v Middleton* [1974] VR 722, 739 (Kaye J); *Re Bramblevale Ltd* [1970] Ch 128; *Chan v Chen (No 3)* [2007] VSC 52 [25] (Kaye J). We note in passing that the orders of Warren CJ made 21 August 2012 and Cavanough J made 28 August 2012 which were the subject of Grocon's statement of charge were each endorsed with the notice required by r 66.10(3).

93 *Morgan* (1965) 112 CLR 483; *Vaysman v Deckers Outdoor Corporation Inc* (2011) 276 ALR 596, 640 [177]; *Jones v Australian Competition and Consumer Commission* (2010) 189 FCR 390.

94 See, eg, *Deputy Commissioner of Taxation v Gashi* [2011] VSC 448 [5].

95 *Izuora v The Queen* [1953] AC 327, 334–5; *Australian Building Construction and Builders Labourers Federation v David Syme & Co* Ltd (1982) 40 ALR 518, 522 (Bowen CJ, Evatt and Deane JJ).

96 (1993) 31 NSWLR 314 ('*Whiley*').

Maniam (No 2) that a 'conviction of contempt of court is a conviction of an offence, criminal in nature'.[97] The Court added that punishment of the 'convicted contemnor must therefore take into account considerations normally applicable to the punishment of crime in general and this crime in particular'.[98]

176 In *CFMEU v Director of Fair Work Building Industry Inspectorate*[99] the Full Federal Court, after referring to the observation in *Witham* that 'punishment is punishment whether it is imposed in vindication or for remedial or coercive purposes',[100] noted that 'the punishment is consequent upon entry of a conviction,' and that 'conviction for contempt is a conviction of an offence which is criminal in nature'.[101]

177 If a contemnor is adjudged guilty of a civil contempt, Biscoe J observed in *Waverley Council v Tovir Investments Pty Ltd and Rappaport (No 3),*[102] no conviction should be recorded. In *ASIC v Sigalla (No 5),*[103] the contempts proved were held to be civil in nature. Justice White said that the appropriate language was 'that of declaration of [the contemnor's] guilt, rather than conviction of an offence'[104] and adopted the course followed in *Registrar of the Court of Appeal v Maniam (No 1),*[105] where the Court of Appeal made a declaration that the opponent was guilty of contempt of court.[106]

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97 (1992) 26 NSWLR 309, 314 ('*Maniam (No 2)*').

98 *Whiley* (1993) 31 NSWLR 314, 320.

99 [2014] FCAFC 101 ('*Fair Work Inspectorate*').

100 Ibid [37], citing *Witham* (1995) 183 CLR 525, 534.

101 Ibid [38].

102 [2013] NSWLEC 35 [23] ('*Tovir Investments*').

103 [2012] NSWSC 82.

104 Ibid [84].

105 (1991) 25 NSWLR 459.

106 Ibid 461 (Kirby P), 472 (Mahoney JA), 491 (Hope AJA).

The purpose of the proceeding — remedial/coercive in the private interest or punitive in the public interest

178 The fact that a court (subject to imposition of a conviction) may have recourse to the same modes of punishment for both civil and criminal contempt — this enabling a punitive order to be made even absent contumacious conduct — reduces the need, or justification, for distinguishing between those species of contempts in the context of breach of court orders.[107] Tending in a similar direction, the observations of the High Court in *Mudginberri (HC)* referable to the purpose of punishment were later reiterated by the plurality in *Witham*, where their Honours said:

> Given the purpose or object cannot readily be disentangled from effect and given, also, that a penal or disciplinary jurisdiction may be called into play in proceedings alleging breach of an order or undertaking, it is necessary to acknowledge, as it was in *Mudginberri,* that punitive and remedial objects are, in the words of Salmon LJ, 'inextricably intermixed'.[108]

179 But notwithstanding those dicta, courts (including the High Court) have continued to draw the elusive distinction between 'punitive' and 'protective' proceedings.[109] The purpose for which a proceeding has been brought has continued to be employed as one way in which to characterise the legal nature of the contempt.[110] This has a significance for the Union's argument that for a contempt charge to be characterised as criminal, it must allege contumacious conduct. We refer to some of those decisions in chronological order.

180 In *Microsoft Corporation v Marks (No 1)*[111] a decision of the Full Federal Court, the question was whether an appeal lay where an order dismissing proceedings for

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107 *Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531 (Keane JA).

108 (1995) 183 CLR 525, 533–4.

109 *Rich v Australian Securities & Investments Commission* (2004) 220 CLR 129, 145 [32], [33], 148 [41].

110 *Microsoft Corporation v Marks (No 1)* (1996) 69 FCR 117; *Bhagat v Global Custodians Ltd* [2002] NSWCA 160 [33]; *Markisic v Commonwealth of Australia* (2007) 69 NSWLR 737; *Hearne v Street* (2008) 235 CLR 125, 134–41; *Mosman* (2009) 167 LGERA 91, 108 [60]. See also the discussion by Digby J in *Boral Resources (Vic) Pty Ltd v CFMEU* [2014] VSC 572 [46]–[58] and by Cavanough J in the Penalty Reasons [94]–[115].

111 (1996) 69 FCR 117 ('*Microsoft*').

attachment in a motion for contempt had been made. It became necessary to determine the character of the contempt. Justice Beaumont, with whom Lindgren and Lehane JJ agreed, concluded that the appropriate test, as part of the characterisation exercise, was one of 'substance' or 'object'. Accordingly, if the proceedings at first instance were criminal in the sense that their 'object' was to punish, no appeal could lie.[112] Applying that test as at the time of commencement of the proceeding, his Honour concluded that, notwithstanding that some of the charges contained allegations of wilful and contumacious breach, the plaintiff's substantial object should be viewed as remedial rather than punitive.[113]

181 In *Markisic v Commonwealth of Australia*,[114] a decision of the New South Wales Court of Appeal, a question arose whether an appeal lay from a finding of no contempt at first instance. Provisions of the *Supreme Court Act 1970* (NSW) were to the effect that an appeal was available in a case of acquittal of civil contempt, but not in a case of acquittal of criminal contempt. As it turned out, the appeal was dismissed without the need to consider the application of those provisions in the particular circumstances. But in the course of his reasons Campbell JA, with whom Handley JA and Bell J agreed, rejected the contention that all forms of contempt that traditionally would have been classified as civil were now to be viewed as, in reality, criminal in nature. His Honour concluded that, to the contrary, both *Mudginberri (HC)* and *Witham* had preserved the distinction between these two types of contempt.[115] Justice Campbell was inclined to the view that the contempt proceedings with which he was concerned were criminal in nature because they were not remedial or coercive, in the interests of a private individual, but rather related to past breaches for which punishment was sought.[116] That reasoning did not rest upon any finding as to the nature of the contemnor's misconduct.

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112 Ibid 136.

113 Ibid 137.

114 (2007) 69 NSWLR 737 ('*Markisic*').

115 Ibid 746 [49].

116 Ibid 748 [57].

182 Another case in which the New South Wales Court of Appeal was required to consider the distinction between civil and criminal contempt when deciding whether an appeal lay from the dismissal of a charge of contempt was *Street v Hearne*.[117]

183 The charge in that case recited an implied undertaking said to have been given to the court by the contemnors, and particularised its breach. The form of relief sought in the notice of motion was a finding of contempt and 'such further or other orders as the court thought fit'.[118] It was not pleaded in the charge, or in the relief sought, that the conduct was contumacious. Nor was it sought that the contemnors be punished. The appellants unsuccessfully contended in the Court of Appeal, and again in the High Court, that the contempt alleged was a 'criminal contempt' and that, accordingly, the *Supreme Court Act 1970* (NSW) precluded an appeal from the dismissal of the contempt proceeding.

184 Significantly, the appellant was permitted on the appeal to the Court of Appeal to tender additional evidentiary material relating solely to the history of the proceedings between the parties that predated the commencement of the contempt proceedings. This was admitted in order to demonstrate the purpose for which the plaintiffs had initiated those proceedings.[119]

185 Upon a review of that evidence, the majority in the Court of Appeal (Ipp and Basten JJA) concluded that the plaintiff's purpose was essentially remedial or coercive, so that the contempt was to be classified as civil.

186 On appeal to the High Court, the plurality in *Hearne v Street,*[120] said this:

> [The distinction between that which is remedial or coercive and that with is punitive] … is a distinction to be applied, as the parties agreed, bearing in mind the need to approach the application of the person seeking the remedies

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117 (2007) 70 NSWLR 231 ('*Hearne (NSWCA)*').

118 *Hearne v Street* (2008) 235 CLR 125, 168 fn 155.

119 *Hearne (NSWCA)* (2007) 70 NSWLR 231, 236 [18].

120 (2008) 235 CLR 125 ('*Hearne (HC)*').

> for contempt by reference to its substantial character, not to merely formal or incidental features.[121]

187 Importantly, in a footnote to the passage set out above, the plurality noted:

> In the latter category may be placed the form of relief sought in the notices of motion — an adjudication that each appellant was in contempt, such further or other order as the court felt fit, and costs. On the one hand, that leaves open the possibility of very serious sanctions like imprisonment; on the other hand, the orders were in a form common in civil proceedings, and included the possibility of injunctions against future breaches. *The question of whether claims for relief in contempt proceedings should normally be more specific is an important one,* but it can be put on one side in the present case.[122]

188 In *Pang v Bydand Holdings Pty Ltd*[123] the question again arose whether the appeal under the *Supreme Court Act 1970* (NSW) was from a proceeding relating to a civil or criminal contempt. The New South Wales Court of Appeal once again approached the matter by posing the question whether the proceedings were remedial or coercive in nature, or whether they should be viewed as punitive.[124]

189 In the Boral matter, which of course concerned the availability of discovery against the Union, Digby J approached the question of characterisation in much the same way. His Honour focussed upon the substance or purpose of the proceeding as the basis for determining whether it should be viewed as essentially civil or criminal. Associate Justice Daly, who heard the initial application, had characterised the alleged contempt as criminal because, to her mind, the proceeding had a punitive, rather than coercive or remedial purpose. On appeal, Digby J accepted that characterisation on the basis that those proceedings appeared to be directed to a solely punitive purpose.[125]

190 Justice Digby undertook a comprehensive review of authority in order to ascertain whether there remained any meaningful distinction between criminal and

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121 Ibid 168 [133] (Hayne, Heydon and Crennan JJ).

122 Ibid fn 155 (emphasis added).

123 [2011] NSWCA 69 (*'Pang'*).

124 Ibid [82]–[85] (Beazley JA), [171]–[173] (Lindgren AJA). See also *Mosman* (2009) 167 LGERA 91.

125 *Boral Resources (Vic) Pty Ltd v CFMEU* [2013] VSC 572 [29].

civil contempt. He concluded that relevant authority showed that there was 'almost no practical impact of defining a contempt as either civil or criminal'.[126] He was influenced significantly by the fact that both forms of contempt require proof to the criminal standard, that the legal consequences for a party do not differ greatly as the contemnor may be punished by fines or even imprisonment, whether the contempt be civil or criminal,[127] and that even where the proceeding is brought for a remedial or coercive purpose, there remains a public interest aspect to the proceeding and the potential punishment.[128]

Procedural safeguards

191 Although contempt of court, or at least criminal contempt, is a common law offence, it is sui generis in that it is punishable upon a summary procedure provided for by the rules governing civil proceedings.[129]

192 The criminal nature of the proceeding is reflected in the fact that r 75.06(5) of ch 1 requires personal service of the initiating process and of every affidavit.

193 The contemnor cannot be compelled to give evidence.[130]

194 Proof of the contemnor's guilt must be established beyond reasonable doubt.[131]

195 Notwithstanding these procedural safeguards, at least before *X7* and *Lee,* it could not be sweepingly said that proceedings for contempt attracted the criminal jurisdiction of the court to which the application was made.[132] In *Mudginberri (HC)*

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126 Ibid [52](a).

127 Ibid [52](b).

128 Ibid [52].

129 *Rich v The Attorney-General for the State of Victoria* (1999) 103 A Crim R 261.

130 *Comets Products (UK) Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67, 73; *Kift v The Queen* (1993) 1 VR 703, 708.

131 *Keeley v Brooking* (1979) 143 CLR 162.

132 *Re Colina; Ex parte Torney* (1999) 200 CLR 386 (Hayne J); *Hinch* (1987) 164 CLR 15, 89.

the Court cautioned against treating the criminal nature of contempt as equating the proceedings for that offence with those of a trial of a criminal charge. The Court recognised that there were clear procedural differences between the two types of proceedings.[133] In truth, neither civil nor criminal contempt can simply be described as part of the criminal law.[134] And so, at least before *X7* and *Lee*, it could not be sweepingly asserted that all procedures applicable to criminal proceedings were to be imported into proceedings for contempt.

196 As authorities to which we will now refer show, in particular statutory contexts contempt proceedings have had to be forced into a straightjacket admitting only of 'civil' and 'criminal' proceedings. A question which arises in considering Grocon sentence ground 3 is whether any of those cases have anything relevant to say about the extent to which the procedures referable to a case of criminal contempt are informed by the procedures of the criminal law.

197 Each of *Microsoft*, *Markisic*, *Hearne (HC)* and *Pang* raised the question of whether an appeal was available against an acquittal of contempt (or a related order, in the case of *Microsoft*). It was necessary to characterise the nature of the contempt alleged in order to fit it within a statutory regime in which appeal was available in the case of acquittal of civil, but not criminal, contempt.

198 Those cases said nothing themselves about procedural safeguards. They were, however, decided in the context that particular legislation assimilated the consequences of acquittal on a charge of criminal contempt with the common law position that the Crown cannot appeal against a verdict of acquittal.

199 The CFMEU placed considerable reliance, in both the Grocon and Boral matters, upon *Australian Securities Investments Commission v Sigalla (No 4)*[135] a

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133 (1986) 161 CLR 98, 115. In *Witham* (1995) 183 CLR 525, 534, the plurality again emphasised that the proceedings, though 'essentially criminal in nature is not to equate them with a trial of a criminal charge'.

134 *Ahnee v DPP* [1999] 2 AC 294, 306. See also *Doyle v The Commonwealth* (1985) 156 CLR 510, 516.

135 (2011) 80 NSWLR 113 ('*Sigalla*').

decision of White J of the New South Wales Supreme Court.

200 The main issue for decision in *Sigalla* was whether the defendant was entitled to make a no case submission at the conclusion of the plaintiff's case without being required to elect. That gave rise to the question whether the proceeding was, for the purposes of the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005 (*NSW), 'civil proceedings' or 'criminal proceedings', the latter being defined to mean 'proceedings against a person for an offence (whether summary or indictable)'. A second issue was whether the plaintiff could rely upon inferences of the *Jones v Dunkel*[136] kind, as may be drawn in civil proceedings.

201 It was not really necessary for the judge to determine the question raised by the main issue. Before he delivered reasons, he had already informed the parties that, if he concluded that the matter was a civil proceeding, he would grant the defendant leave to adduce evidence if a no case submission was made and rejected.

202 Nonetheless, the judge did answer that question. He decided that the *Uniform Civil Procedure Rules 2005* (NSW) did not apply because the contempt proceeding constituted 'proceedings for an offence'. That was because it was a case of alleged criminal contempt, and because criminal contempt (but not civil contempt) was a common law offence. For that reason it was an 'offence' as defined by the *Evidence Act 1995* (NSW), and thus a 'criminal proceeding' for the purposes of that Act. His Honour summarised his conclusions this way:

> I have concluded that the application to punish Mr Sigalla for contempt is a separate proceeding from the proceeding in which the orders allegedly breached were made, and its character is not determined by the character of the principal proceedings. I have concluded that proceedings to punish for a civil contempt are civil proceedings, but proceedings to punish for criminal contempt are not. I have concluded that these are criminal proceedings within the meaning of the *Civil Procedure Act*, the *Uniform Civil Procedure Rules* and the *Evidence Act* because some of the alleged contempts are criminal contempts. It follows that I have concluded that r 29.10 of the *Uniform Civil Procedure Rules* did not apply.[137]

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136 (1959) 101 CLR 298.

137 (2011) 80 NSWLR 113, 121 [23] (emphasis in original).

203 As corollaries of that chain of reasoning, his Honour concluded that — (1) because the rules did not apply, costs could not be awarded against a defendant found guilty of a criminal contempt for breach of court orders; and (2) the *Evidence Act 1995* (NSW) had 'displaced' *Witham*, with the consequence that the criminal standard of proof would not apply in cases of civil contempt.

204 Justice White cited an array of authority to support his conclusion that where punishment for contempt was sought, the matter before the court should be viewed as one involving a common law offence, necessarily criminal in nature.[138]

205 In arriving at that conclusion, White J was fully aware that, in ordering costs against the applicant in *Hinch,* the High Court had 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 …[139]

206 His Honour also recognised that in *Re Colina; Ex parte Torney*[140] Hayne J, although having characterised contempt as an 'offence', observed that the power to punish for contempt was an inherent power to be invoked in a wide variety of circumstances. Justice Hayne had said:

> There are, in that sense, many forms of contempt; there is no single 'offence' of the kind that the criminal law knows.[141]

207 Justice White further had regard to the decision of the New South Wales Court of Appeal in *Matthews v Australian Securities and Investments Commission*[142]

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138 *Re Colina Ex parte Torney* (1999) 200 CLR 386, where contempt by scandalising the court was described by the majority as a common law offence triable summarily. See also, *Maniam (No 2)* (1992) 26 NSWLR 309, 314; *Whiley* (1993) 31 NSWLR 314, 320; *Principal Registrar of the Supreme Court of New South Wales v Jando* (2001) 53 NSWLR 527; *Ryan v Wright (No 2)* [2004] NSWSC 1019 [21]; *Australian Securities and Investments Commission v Michalik* (2004) 62 NSWLR 335, 340 [26]; *Circuit Finance Australia Ltd v Sobbi* [2010] NSWSC 912 [6].

139 (2011) 80 NSWLR 113, 128, quoting *Hinch* (1987) 164 CLR 15, 89–90.

140 (1999) 200 CLR 386 ('*Re Colina*').

141 Ibid 428 [109].

142 [2009] NSWCA 155 ('*Matthews v ASIC*').

where Tobias JA (with whom Basten and Campbell JJA agreed) had said:

> As is pointed out in *Arlidge, Eadie* [sic] *& Smith on Contempt*, 3rd Ed (2005) Sweet & Maxwell at paragraph 3–74, with regard to civil contempt, given that the liberty of the subject is at stake, although the courts have in certain respects insisted upon the greater safeguards normally associated with the criminal trial process, such as in relation to the standard of proof required to establish a charge of contempt, they have also been careful to resist the full assimilation of civil contempt into the framework of criminal safeguards: *Arlidge* op cit at 3–75 …
>
> A similar view was expressed by Wall J in *Re B (A Minor) (Contempt of Court: Affidavit Evidence)* [1996] 1 WLR 627 where, at 639A, his Lordship observed:
>
> > 'I respectfully agree … that the analogy with criminal proceedings can be taken too far and that in civil proceedings for contempt the Court will introduce those safeguards which are necessary for the protection of the alleged contemnors but will not import criminal procedure wholesale or indiscriminately.'[143]

208 Those decisions may be said to emphasise the difficulty of fitting contempt proceedings into a dichotomy which consists only of 'civil' and 'criminal' proceedings. It is a difficulty which Hayne J underlined in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*,[144] to which we refer later in these reasons.

209 Ultimately, it is not necessary to examine the chain of reasoning which led White J to decide the main question as he did in the context of New South Wales legislation, although it should be noted that his answer did not depend only upon the provisions of the *Evidence Act 1995* (NSW), relevant provisions of which are also to be found in the *Evidence Act 2008*. What can be said is that — (1) even assuming that the judge's answer was transposable to Victorian legislation and ch 1 of the Rules, it would not answer the question whether contumacy is an element of a criminal contempt constituted by breach of court orders, or whether, if it is, the further question whether it must be pleaded in a charge; and (2) *Sigalla* illustrates the extreme and unpredictable consequences of reasoning dictated by the need to characterise a contempt proceeding, in its entirety, as a 'criminal proceeding' or a

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143 Ibid [38]–[39].

144 (2003) 216 CLR 161, 198–9 [114]–[115] ('*Labrador*').

'civil proceeding'. In particular, it seems improbable that, in effect as a side-wind, the civil standard of proof has been restored in the case of civil contempts. The same may be said of what the judge held would be the consequences for costs in a contempt proceeding which might well be privately instituted. We note, in passing, that an order for costs was made against the Union in the present case; and that there is no appeal against that order. Ironically, if the Union succeeded in its appeal on Grocon sentence ground 3, the reasoning in *Sigalla* would mean that it was rightly ordered to pay costs.

210 In the earlier decision of the High Court in *Pelechowski v Registrar, Court of Appeal (NSW)*, Gaudron, Gummow and Callinan JJ, having observed that the particular contempt proceeding, whilst 'criminal in nature', was not 'a criminal prosecution', ordered the unsuccessful respondent to pay the costs of the alleged contemnor.[145] *Pelechowski* was not cited by White J in *Sigalla*.

211 Recently, in *Fair Work Inspectorate*[146] the Full Federal Court had to determine whether the Grocon matter now before this Court constituted 'criminal proceedings' for the purposes of a particular provision of the *Fair Work Act 2009* (Cth) ('*FWA*'). Again, the issue for the Full Federal Court was one of statutory construction.

212 Section 553 of the *FWA* provides as follows:

> (1) Proceedings for a pecuniary penalty order against a person for a contravention of a civil remedy provision are stayed if:
>
> (a) criminal proceedings are commenced or have already commenced against the person for an offence; and
>
> (b) the offence is constituted by conduct that is substantially the same as the conduct in relation to which the order would be made.
>
> (2) The proceedings for the order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the order are dismissed.

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145 (1999) 198 CLR 435, 453 [58] ('*Pelechowski*').

146 [2014] FCAFC 101.

213 The Director of the Fair Work Building Industry Inspectorate made an application for pecuniary penalties against the CFMEU and eight individual respondents under ss 545 and 546 of the *FWA* in relation to conduct at both the Emporium and the McNab sites.

214 The substantive proceeding was set down for hearing on 6 August 2014 with an estimated duration of three weeks. The respondents sought to vacate that hearing date.

215 Justice Tracey rejected the Union's claim that the proceedings against it stood stayed or dismissed by reason of s 553(2) of the *FWA*. His Honour considered that the Grocon matter should not be viewed as a 'criminal proceeding' in the relevant sense.[147]

216 The draft notice of appeal filed in support of the Union's application for leave to appeal against Tracey J's refusal to stay the proceedings asserted that his Honour had erred in holding that the term 'criminal proceeding', within the meaning of s 553(2) of the *FWA*, should be construed as not applying to the offence of contempt, that offence being 'sui generis'.

217 The Full Court[148] ultimately held that his Honour had so erred. The Union submitted before this Court that the reasoning of the Full Court supported its primary contention as to the nature of the contempt proceedings brought against it, not just in the Grocon matter, but also in the Boral proceeding.

218 The Full Court, contrary to the decision of Tracey J, characterised the contempt proceeding in the Grocon matter as 'criminal proceedings for offences in respect of which the CFMEU ha[d] been convicted'.[149] In arriving at that conclusion, the Full Court noted that the CFMEU had been adjudged to be 'in criminal contempt'

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147 *Director of Fair Work Industry Inspectorate v CFMEU* [2014] FCA 770 [38]–[39].

148 *Fair Work Inspectorate* [2014] FCAFC 101 (Buchanan, Gordon and Wigney JJ).

149 Ibid [7].

in relation to each of the five charges of contempt that had been made out.

219 The Full Court noted that it was not disputed that the conduct which had been the subject of the Grocon proceeding was 'substantially the same' as that for which the pecuniary penalty orders were sought under the *FWA*.

220 The Full Court further noted that the phrase 'criminal proceedings … for an offence' in s 553(1) was not defined in the *FWA*. It explained why that might be so, saying:

> That is not surprising. The range of crimes and punishments for crime has expanded so that a single series of events can give rise to several different offences to which different penalties can attach: *Pearce v The Queen* (1998) 194 CLR 610 at 614-615. Moreover, the FWA is a Commonwealth act. Potential criminal proceedings would include offences in contravention of one or more of numerous State and Commonwealth laws and further or alternatively, the common law. The manner in which those proceedings are filed, prosecuted and disposed of varies between the Commonwealth and the States and between the States. In understanding what is meant by 'criminal proceedings … for an offence' in s 553, it cannot and does not matter what process starts the proceedings: *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 [72]. Those matters are not exhaustive but are indications of the wider proposition made by the High Court that there is no bright line between civil and criminal: *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at [112]-[114] (per Hayne J) (Gleeson CJ at [1] and McHugh J at [3] concurring).[150]

221 After referring to what the High Court had said in *Witham* regarding the illusory nature of the distinction between civil and criminal contempt, and noting that what mattered was that punishment would be imposed, the Full Court said:

> Next the *punishment* is consequent upon entry of a *conviction*: see, for example, *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 49. That conviction for contempt is a conviction of an offence which is criminal in nature: see, by way of example, *Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd* [2001] FCA 1758 at [29] (per Lee and Finn JJ); *Attorney-General (NSW) v Whiley* (1993) 31 NSWLR 314 at 320 and *Australian Securities and Investments Commission v Sigalla (No 4)* [2011] NSWSC 62 at [33]-[41]. As was stated in *In Re Bramblevale Ltd* [1970] 1 Ch 128 at 137, '[a] contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved'.
>
> Consistent with what the High Court said in *Witham v Holloway*, the CFMEU was charged with contempt in the SCV … The Attorney-General was joined

150 Ibid [31].

> as a plaintiff. At least from the time of the joinder of the Attorney-General, the 'proceedings [were] in the public interest to vindicate judicial authority or maintain the integrity of the judicial process': *Witham v Holloway* at 531. The proceedings were instituted to punish the CFMEU for failing to obey Court orders. The relief sought was that the CFMEU 'be punished for contempt' … Under the *Evidence Act 2008* (Vic), proceedings are civil or criminal. A criminal proceeding is defined in that Act relevantly to mean the prosecution for an offence: sch 2 to the *Evidence Act 2008* (Vic). In the SCV, the CFMEU was prosecuted for an offence (that of contempt) and the SCV proceedings were conducted to the criminal standard: see … s 141 of the *Evidence Act 2008* (Vic). The CFMEU was convicted of five criminal contempts and was punished for that disobedience by the imposition of fines … The fact that contempt proceedings are, for reasons explained in the authorities, tried summarily and not before a jury is immaterial. So too is the fact that the proceedings were commenced in the civil jurisdiction of the SCV. The fact that different procedures have been adopted for trying contempt charges does not alter the essential characteristic of the proceedings as criminal proceedings. The Director's submission that the contempt proceedings were civil proceedings when commenced because the charge did not plead that the conduct of the CFMEU was deliberate or contumacious should also be rejected. The proceedings were criminal because Grocon and the Attorney-General were seeking convictions and punishment for offences.
>
> What then was the effect of the contempt proceedings in the SCV on the proceedings before the Federal Court? From the outset, it is at least arguable that the proceedings issued by the Director in the Federal Court were stayed against the CFMEU to the extent that they sought pecuniary penalty orders: s 553(1). The SCV proceedings were criminal proceedings for an offence. Although it is strictly unnecessary to decide that the SCV proceedings were from commencement criminal proceedings for the purposes of s 553 of the FWA, the fact that five criminal convictions have been entered against the CFMEU in relation to substantially the same conduct cannot be ignored. Upon the entry of those convictions in the SCV in relation to substantially the same conduct, the proceedings in this Court against the CFMEU, to the extent that they sought pecuniary penalty orders in relation to that conduct, stood dismissed: s 553(2).[151]

222 As we have said, the issue before the Full Court was one of construction. As the judgment illustrates, by its reference to authority, the discourse with respect to contempt is littered with language — we have set out some of it at [126] above — which is imprecise and potentially confusing. No doubt that reflects the peculiar nature of contempt. The application of that language to a particular statutory context is, we consider, a fraught task. It is made more difficult still where the available statutory choice is between 'civil proceedings' and 'criminal proceedings … for an offence'. There is, in our opinion, every reason not to use a conclusion specific

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151 Ibid [38]–[40] (emphasis in original).

to one statutory context to answer a quite different question as to the law of contempt which arises as a matter of general principle. Thus, accepting the correctness of the Full Court's decision, in our opinion it neither resolves nor casts much light on the very different issues before this Court in either the Grocon or Boral matters. The case before the Full Court did not concern procedural safeguards within a contempt proceeding at all. The judgment provides no solution to the question whether contumacy must be pleaded in a charge seeking punishment for contempt, or whether discovery against the alleged contemnor should be ordered in such a case.

223 In addition to the procedural safeguards mentioned at [192]-[194] above, the assimilation of a verdict of acquittal with a finding of 'no contempt' for appeal purposes mentioned at [198] above, and such application as *Sigalla* might have, there is some authority dealing with the procedural requirements which must be met when dealing with a charge of criminal contempt. The high point of that authority appears to be *Rich v The Attorney-General for the State of Victoria*.[152] That was a case of contempt in the face of the court. The contemnor argued on appeal that the charge had been bad for duplicity. President Winneke (with whom Buchanan and Callaway JJA agreed) said this:

> Although contempt of court is, at least in this State, a common law offence, it is sui generis in the sense that it is punishable upon a summary procedure provided for by the rules governing civil proceedings. Thus the concept of duplicity, which is designed to ensure that an accused person should only be charged with one offence in one count on a presentment, does not strictly apply to the summary procedure alleging contempt of court. None the less, contempt of court is a criminal offence and the summary nature of the proceedings cannot be permitted to subvert principles of fairness or to become an instrument of oppression to an alleged contemnor. Thus the courts over the years have required strict compliance with the rules, particularly those which are designed to protect the interests of the contemnor (see *Re B (An Infant)* [1965] Ch 1112 at 1117-1118, per Cross JA; *Coward v Stapleton* (1953) 90 CLR 573 at 579-580). He is entitled to know what is being alleged against him and to be given every chance to meet the allegations. He is entitled to strict compliance with the rules as to personal service of the motion (*Re Pollard* (1868) LR 2 PC 106 at 120).[153]

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152 (1999) 103 A Crim R 261 ('*Rich v A-G*').

153 Ibid 279 [39].

224 In *Varnavides v VCAT and the Dental Practice Board of Victoria,*[154] Vincent and Nettle JJA and Harper AJA said that the approach to be taken to the serious offence of contempt should as far as possible be consistent with that adopted when dealing with criminal conduct generally. Even so, up to the time of the decisions in *X7* and *Lee*, there were features of the practice in summary hearing of contempt charges, routinely followed, which were inconsistent with the strict procedural protections which apply in criminal prosecutions. They gave life to the observation of the plurality in *Witham* that proceedings for contempt, though essentially criminal in nature, are not to be equated with those regarded as indispensable to a fair criminal trial.[155] Courts resisted the full assimilation of the framework of criminal safeguards into civil contempt.[156]

225 In our opinion, it was impossible, before *X7* and *Lee*, to lay down in blanket terms an exhaustive test by which it could be determined which of the traditional safeguards available to an accused facing a serious criminal charge could also be invoked by an alleged contemnor. Much depended, we think, upon the purpose underlying the safeguard, its general importance in ensuring a fair trial, and the particular circumstances of the case.[157]

226 For instance, in *Rich v A-G* itself this Court held that the concept of duplicity 'did not strictly apply to the summary procedure alleging contempt of court'.[158] Other authorities reached the same conclusion. We mention them in generally chronological order.

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154 (2005) 12 VR 1.

155 (1995) 183 CLR 525, 534.

156 Sir David Eady and A T H Smith, *Arlidge Eady and Smith On Contempt* (Sweet & Maxwell, 4th ed, 2005) [3–74]; *Re B (a minor)* [1996] 1 WLR 627, 639 (Wall J).

157 In *CFMEU v Boral Resources (Vic) Pty Ltd* [2013] VSCA 378 [10], Beach JA held (Osborn JA agreeing) that not all of the rules of civil procedure would necessarily be applicable, citing discovery as a possible example of one that might not.

158 (1999) 103 A Crim R 261, 279 [39].

227 In Federal Court decisions, it has been said that the rule against duplicitous pleading has no place in the law of contempt.[159]

228 In *Harmsworth v Harmsworth,* Woolf LJ (as his Lordship then was) expressed the view that the rules of duplicity and other rules designed to ensure the fairness of a trial before a jury did not apply to proceedings brought in respect of an alleged contempt.[160]

229 Similarly, in *National Australia Bank Ltd v Juric,* Gillard J concluded that the rules relating to duplicity found in the criminal law did not apply to a charge of contempt.[161] His Honour observed that the Rules, which governed the conduct of contempt proceedings, required that the summons or originating motion alleging contempt 'shall specify the contempt with which the respondent is charged'[162] but did not require the rules of the criminal law relating to duplicity to be introduced into an application for civil contempt.[163] He cited *Witham*[164] and *In Re B (A Minor) (Contempt of Court: Affidavit Evidence)*[165] in support of the proposition that not all safeguards associated with criminal proceedings are to be imported into proceedings for contempt.

230 In *Matthews v ASIC,*[166] Basten JA, although recognising that the rule against duplicity did not apply to contempt proceedings, indicated that other principles of criminal pleadings might, by analogy, be relevant:

> Pleadings can involve what is sometimes described as 'latent duplicity' which may give rise to uncertainty as to the charge to be met and which should be corrected if the defendant is to have a fair trial: see *S v The Queen* [1989] HCA

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159 *Lazar v Taito (Australia) Pty Ltd* (1985) 5 FCR 395, 398 (Fox J); *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union (No 2)* (1987) 15 FCR 64, 74 (Wilcox J).

160 [1987] 1 WLR 1676, 1686.

161 [2001] VSC 375 [97] ('*Juric*').

162 The Rules r 75.06(4).

163 *Juric* [2001] VSC 375 [102].

164 (1995) 183 CLR 525, 534.

165 [1996] 1 WLR 627, 639 (Wall J).

166 [2009] NSWCA 155.

66; 168 CLR 266 at 274 (Dawson J) and 280-281 (Toohey J) and other authorities discussed in *Hannes v Director of Public Prosecutions (Cth) (No 2)* [2006] NSWCCA 373...[167]

231 Then there is the principle in *Jones v Dunkel*. Here, a safeguard which applies in the case of criminal prosecutions was afforded to alleged contemnors. In *Jones v Australian Competition and Consumer Commission*[168] the Full Federal Court (Keane CJ, Dowsett and Reeves JJ) held that the ACCC was not entitled to rely upon the principle in *Jones v Dunkel* in seeking to establish a charge of civil contempt. The charge, as formulated, had not alleged that the breach of court orders had been wilful or contumacious. Nonetheless, once it was clear that the ACCC was seeking to have the alleged contemnor punished, the entire proceeding took on an accusatorial character which, in accordance with High Court authority,[169] put paid to any expectation of the kind that provided the basis for a *Jones v Dunkel* inference.

Safeguards: what must be pleaded?

232 Thus far, in considering the extent to which, before the decisions in *X7* and *Lee*, criminal law procedures were applied to criminal contempt of court orders, we have (1) addressed general principles and (2), noted some instances of procedural safeguards which were held applicable, and another which was not. None of those examples addressed the Union's pleading argument. Put at its highest, the Union submitted that contumacy is an element of a criminal contempt constituted by breach of court orders, and so must be pleaded. At one remove, the Union contended that it had been necessary for Grocon to make clear 'the gist of [its] accusation', this meaning also that contumacy must have been pleaded.

233 Neither aspect of that broad submission was the precise subject of any decision cited to the Court; and we have not found any such decision. On the other

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167 Ibid [167].

168 (2010) 189 FCR 390 ('*Jones v ACCC*'). See also, *Tovir Investments* [2013] NSWLEC 35 [24] (Biscoe J); *Aram v The Owners Strata Plan No 20175* [2012] NSWSC 1220.

169 *RPS v The Queen* (2000) 199 CLR 620, 632–3.

hand, as will be seen, there were general statements, before the decisions in *X7* and *Lee*, about what must be alleged in a charge of contempt. There were a few instances where contumacy was pleaded in the charge. Further, there was a long-established practice that no such pleading was necessary, contumacy being a matter for proof at the penalty phase.

234 The Union's reference to 'the gist of the accusation' appears to have been taken from the joint judgment of Williams ACJ, Kitto and Taylor JJ in *Coward v Stapleton*,[170] but the context in which it was used should be noted:

> [I]t is a well-recognized principle of law that no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him. The gist of the accusation must be made clear to the person charged, though it is not always necessary to formulate the charge in a series of specific allegations. The charge having been made sufficiently explicit, the person accused must then be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law, which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment.
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> Resting as it does upon accepted notions of elementary justice, this principle must be rigorously insisted upon.[171]

235 The principle was necessary, the Court said, because

> the charge place[s] the liberty of the individual in jeopardy in proceedings of a summary character which do not surround him with all the safeguards of a jury trial.[172]

236 The Court stated that the statement of charge must sufficiently specify the alleged breach constituting the contempt in order that the requirements of procedural fairness be satisfied.[173]

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170 (1953) 90 CLR 573, 580.

171 Ibid 579–80 (citations omitted).

172 Ibid 580.

173 Ibid 579–80; *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union (No 2)* (1987) 15 FCR 64, 73.

237 In *Doyle v The Commonwealth*, the High Court said:

> Speaking generally, the notice of motion for committal must be served personally on the person sought to be committed, the charge must be distinctly stated in the notice of motion or other application and the person sought to be committed must be given a proper opportunity to answer the charge.[174]

238 Particulars to the charge may inform the defendant of the substance of the case sought to be made against him, though not the evidence that will be relied upon to establish that case.[175] In *MacGroarty v Clauson* the High Court said:

> It has long been settled that 'no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him' … When what is involved is a charge of common law contempt, it may, depending on the circumstances, not be necessary to formulate the charge in a series of specific allegations, provided that the 'gist of the accusation' is made clear to the person charged.[176]

239 In *Inghams Enterprises Pty Ltd v Timania Pty Ltd,* the Full Court of the Federal Court, after referring to the contemnor's entitlement to know the gist or substance of the charge, observed that 'the concept of the gist of the charge is one that should be approached with some caution in the area of contempt, where precision in formulation is critical'.[177] The Court set aside a finding of guilt of contempt of court because the charges had been amended after the hearing had concluded, and in a way that did not accord with the substance of the 'defective original statement of charge'.[178]

240 The requirement that the 'gist of the accusation' be made clear to an alleged contemnor encompasses the common law requirement that such a person is entitled to know what is alleged against him so that he is given every chance to meet the allegation. It is an important aspect of procedural fairness. As Dixon J stated in

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174 (1985) 156 CLR 510, 516 ('*Doyle*').

175 *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union (No 2)* (1987) 15 FCR 64, 73.

176 (1989) 167 CLR 251, 255.

177 (2005) 221 ALR 823, 835 [34] (Tamberlin, North and Dowsett JJ).

178 Ibid.

Johnson v Miller, a defendant is entitled to be apprised of the 'legal nature of the offence with which he is charged', as well as the 'particular act, matter or thing alleged as the foundation of the charge'.[179] In the same case, McTiernan J described the requirement as the provision of 'fair information and reasonable particularity as to the nature of the offence charged'.[180]

241 The general principle to which we have been referring means that an alleged contemnor must be apprised of the case to be made against him or her. He or she must be apprised of the legal character of the allegation so that the defendant can appreciate the potential consequences of an adverse finding. Anything less will not provide the defendant with the opportunity to respond in a reasonably informed way to the allegation.[181] The alleged contemnor must be able to conduct his or her case on the basis that the charge specifies the contempt which the defendant is required to meet.[182] Precision is necessary if the accused is to be able to defend himself or herself effectively.[183] A failure to properly particularise the charge may amount to a denial of natural justice.[184]

242 But does that general principle mean that contumacy must be pleaded in a charge where such a quality of conduct is alleged against the defendant? Or is it necessary, if not required to be pleaded, that it is unequivocally made clear to the defendant from the outset that such an allegation is made?

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179 (1937) 59 CLR 467, 489. See also *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 557 [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

180 Ibid 501.

181 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) [8.150].

182 *CFMEU v BHP Steel (AIS) Pty Ltd* [2001] FCA 1758 [29]-[32] (Lee and Finn JJ); *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union (No 2)* (1987) 15 FCR 64, 73; *Australian Building Construction Employees' and Builders Labourers' Federation v Minister of State for Industrial Relations* (1982) 43 ALR 189, 206–7 (Evatt and Deane JJ)

183 *Cotroni v Quebec Police Commission* [1978] 1 SCR 1048, 1049.

184 *Magistrates' Court at Prahran v Murphy* [1997] 2 VR 186, 197 (Charles JA); *Matthews v ASIC* [2009] NSWCA 155 [40]; *DPP (Vic) v Green* [2013] VSCA 78 [84].

243 There is comparatively little authority bearing directly upon the formal requirements of a validly worded charge of contempt. It all precedes the decisions in *X7* and *Lee*.

244 In *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section*,[185] the relevant employers' body had obtained orders from the Commonwealth Court of Conciliation and Arbitration, including an order fining the union £100 for contempt of court. Justice Dixon noted that the order was made 'by way of punishment for a contempt in not fulfilling or observing' previous orders made by the court.[186] The summons upon which the order had been made called upon the union and other organisations to answer a charge

> that they had been guilty of contempt of the Arbitration Court and to show cause why they should not be punished for that they did commit contempt of the Arbitration Court by wilfully disobeying an order of such court.[187]

245 The summons went on to identify the order wilfully disobeyed. Justice Dixon observed:

> It will be seen that proceedings, although commenced by a party entitled to the benefit of the order on 5 June 1950, amount to much more than a recourse to civil process to enforce the execution of the order. The contempt charged is treated as a special or criminal contempt and not as a contempt in procedure. The distinction between civil and criminal contempts is well recognised, although when orders restraining or commanding the doing of specific things are defined or disobeyed the remedy by contempt may have a double aspect. This is not an occasion calling for discussion of the two classes of contempt and of the middle ground upon which they overlap or of the purposes for which the distinction is important …
>
> It is enough for present purposes to say that the imposition of the fine, as well as the nature of the summons, shows that the order is of a punitive or disciplinary nature.[188]

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185 (1951) 82 CLR 208.

186 Ibid 253.

187 Ibid.

188 Ibid 253–4.

246 In that case, Latham CJ described 'wilful disobedience' as a contempt of a 'criminal nature'.[189] His Honour did so on the basis that the use of the contempt power, in the particular circumstances of the case, was 'not merely a means of enforcing a civil right of a litigant'.[190] Later authority, however, has distinguished between 'wilful disobedience', which is sufficient for civil contempt, and 'contumacious disobedience', which alters the character of the offence, and renders it one of criminal contempt.

247 A good illustration of the shift in terminology that has plagued this field of discourse may be found in *Morgan*,[191] to which we referred at [147] above. In that case, the respondents had moved the New South Wales Supreme Court for an order that they be at liberty to issue a writ of sequestration against the property of Australian Consolidated Press Ltd for its contempt 'in wilfully disregarding and committing a breach of its undertaking given to the Court' that it would not publish certain material said to have infringed copyright. The respondents asked that the sequestration of the appellant's property operate until the appellant had cleared its contempt, or the court made some other order. The Court ordered the appellant to pay a fine of £1,500 for contempt of court. It was clear from the reasons of the trial judge that the fine was not imposed to compensate the respondents for any loss they may have suffered, or as a coercive measure to obtain compliance for the future. Rather, it was imposed to mark the Court's disapproval of conduct of the appellant, and to reflect the gravity of the breach.

248 Chief Justice Barwick nonetheless held that the respondents' motion was in substance brought for the enforcement for their own benefit of the undertaking given to the Court for their protection attending hearing of the suit. His Honour said:

> [t]he notice of motion was grounded upon a wilful breach of the undertaking and not upon a contumacious or defiant contempt of the court. No evidence tending to establish contumacy in the appellant was led by the respondents.

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189 Ibid 243.

190 Ibid.

191 (1965) 112 CLR 483.

> The proceedings were taken in and formed part of the original suit and were civil in their nature; the contempt alleged was a contempt in procedure, and no more.[192]

249 In *Mudginberri (HC)*,[193] one of the Union's arguments was that the notice of motion seeking the issue of a sequestration order against it did not relate to the payment of the fines which had already been imposed, and was therefore irregular. The motion sought orders that the union and four named officers show cause 'why they should not be punished for contempt of court'. It further called on those persons to 'show cause why fines or imprisonment or other penalties should not be imposed upon each or all of them as a punishment for contempt and as a deterrent of future conduct'.[194]

250 The High Court rejected the appellant's submission that fines or imprisonment could only be imposed 'in respect of conduct which has been charged as and proved to be criminal'.[195] The plurality said:

> Furthermore, it should be said that, contrary to the submission advanced for the Union, the original notice of motion showed on its face that the conduct alleged against the appellants went beyond a matter of mere civil contempt, thereby opening up on any view a jurisdiction in the Federal Court to adopt such measures in its discretion, whether punitive or coercive, which would best deal with the contempt. This was a case where the actions of the Union justified the Chief Judge in resorting to both punitive and coercive measures and indeed the fine of $10,000 may partake of the characteristics of both.[196]

251 The plurality further rejected the contention that the motion for a writ of sequestration was one for the imposition of monetary penalties. Their Honours said:

> Certainly, we would not minimize the importance of the observance of the rules of court with a view to giving to an alleged contemnor the fullest notice of the conduct that is alleged against him and of the relief that is sought. … But contrary to the submission of the appellant, it was not necessary for a further charge to accompany the motion for the issue of a writ of sequestration. There was at all times only one charge, that of actively

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192 Ibid 489.

193 (1986) 161 CLR 98.

194 The form of the notice of motion is set out in Appendix IV to the judgment of the Full Court at (1985) 9 FCR 194, 231.

195 *Mudginberri (HC)* (1986) 161 CLR 98, 100.

196 Ibid 113.

> maintaining a picket line contrary to the order of Beaumont J. That charge was duly laid and formed the basis of the first hearing before Bowen CJ which resulted in the imposition of the fines.[197]

252 It appears tolerably clear, by reason of the 'gist of the accusation' line of authority, and from the passages which we have just cited from *Morgan* and *Mudginberri (HC)* that, applying ordinary principles associated with the criminal law, a charge of criminal contempt ought to contain, by its terms, enough to make its character unmistakeably clear. But that begs the question: what is enough?

253 Some authority has touched upon the question whether contumacy, as an aspect of the contemnor's *state of mind* at the time of breach, should be pleaded as the *mens rea* of the charge of criminal contempt.

254 In *Re Colina,* Hayne J, stated that what must be proved before a court punishes for contempt will vary from case to case, including 'what must be shown about the alleged contemnor's intention'.[198] Further, 'the elements to be established to prove an alleged contempt differ according to the nature of the allegation'.[199] Other members of the Court did not address this issue.

255 In *Construction, Forestry, Mining & Energy Union v BHP Steel (AIS) Pty Ltd,*[200] the Full Federal Court made passing reference to the requisite mental state for a criminal contempt.

256 In *Tweed Shire Council v Mannix,*[201] Cripps J of the New South Wales Land and Environment Court was not satisfied that the respondent was guilty of 'criminal' contempt as his conduct, though wilful, did not have the element of contumacy necessary to constitute such a contempt. His Honour went on to say, in obiter dicta, that if a criminal contempt is to be alleged, the statement of charge should specify the

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197 Ibid 116.

198 (1999) 200 CLR 386, 428 [110].

199 Ibid 429 [110].

200 [2001] FCA 1758 [28] ('*BHP Steel*') (Lee, Finn and Merkel JJ).

201 (1983) 50 LGRA 369 ('*Mannix*').

contumacious conduct rendering the respondent's breach of a court order criminal, beyond merely disobedience of that order.[202]

257 In *Vaysman v Deckers Outdoor Corporation Inc*,[203] the Full Federal Court dealt with an appeal, on the ground of manifest excess, against various sentences of imprisonment imposed by a single judge of the Court in respect of 10 separate charges of contempt of court. The appeal was allowed, and lesser sentences were substituted. In describing the offending, Gray J observed:

> It should be noted that the statements of charge do not allege against the appellant contumacy. An allegation of contumacy, if made and proved, would have rendered the appellant liable to be sentenced for what has been regarded traditionally as criminal contempt of court. Nor do the statements of charge allege against the appellant that he acted wilfully. In charges 36, 37, 4, 5 and 12, the formulation 'deliberately and voluntarily' has been chosen. Charge 52 alleges only a failure to comply, with no allegation of any element of intent. Similarly, charges 55, 57, 61 and 67 allege failure to cause each of the corporations concerned to take some action, again without any allegation of intent.[204]

258 What his Honour said there, of course, was merely by way of observation. It was not a conclusion, upon a contested issue, that contumacy must be pleaded in a charge if it is to be claimed that a breach of court orders constituted a criminal contempt.

259 In that case, Bromberg J, in concluding that the sentences were manifestly excessive, adverted to the fact that the charges did not allege contumacy. But he also adverted to the fact that the judge had made no express finding of contumacy; and he concluded, having examined the findings made at first instance, that they did not 'clearly warrant' a finding of contumacy.[205] If a pleading of contumacy had been required in order that the contempt be a criminal contempt, the two latter steps in his Honour's reasoning would have been superfluous.

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202 Ibid 375.

203 (2011) 276 ALR 596 ('*Vaysman*').

204 Ibid 604 [14].

205 Ibid 640–2 [178]–[187].

260 In *Lade & Co Pty Ltd v Black,* Keane JA (as his Honour then was) said that under the general law relating to contempt, 'punishment was regarded as a consequence solely appropriate to a defiant breach of the court's order'.[206] Significantly, for present purposes, his Honour described this as a 'mental element' which, at common law, was necessary to authorise imposition by the court of a fine by way of punishment for criminal contempt. Justice Keane added that this mental element was never thought necessary to establish a civil contempt sufficient to enliven the power of the court to impose non-punitive orders.[207]

261 The statements made in *Re Colina*, *BHP Steel*, *Mannix*, *Vaysman* and *Lade*, for the most part obiter dicta, are compatible with the common law principle, in the context of the criminal law, that if a particular *state of mind* must be established in order to prove the commission of an offence, that state of mind is an element of the offence. But is contumacy to be so characterised? If it is to be alleged, must it be pleaded?

262 As with so much of the law in this area, there are cases that point in different directions, in the sense that they disclose variations in practice. But variations in practice do not demonstrate what is *required*.

263 As to practice, there are a small number of instances of the motion or summons specifying that the contempt alleged was criminal, or alleging that the contemnor had committed the relevant conduct in a 'contumacious disregard of the orders and as a deliberate breach thereof'. The motion in *Microsoft*[208] is an example.

264 Other cases, however, have explicitly concluded that it is not obligatory, in order to establish criminal contempt constituted by breach of court orders, to allege contumacious conduct in the charge. In those cases, a finding of contumacious conduct has been treated as relevant only to penalty, and not as a matter that must

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206 [2006] 2 Qd R 531, 548 [57] ('*Lade*').

207 Ibid.

208 (1996) 69 FCR 117.

be pleaded. Contumacy has been regarded, it seems, as an aggravating circumstance of the contempt, thereby converting it from a civil into a criminal contempt.

265 A useful illustration of how allegations of criminal contempt are normally dealt with in this country, which provides a rationale why contumacy need not be pleaded, can be found in *Mosman*.[209] There, Biscoe J of the New South Wales Land and Environment Court found the respondent prima facie in contempt of court on a notice of motion for contempt and statement of charge pursuant to the relevant provisions of the *Supreme Court Rules 1970* (NSW). The respondent submitted, as the CFMEU has done before this Court, that the proceedings were for a criminal contempt, and that the statement of charge was defective because it failed to allege that the breach of the court order had been contumacious.

266 In support of those submissions, the respondent relied upon language in the notice of motion which spoke of 'punishment' and 'fine'. The respondent further drew attention to the fact that the applicant's submissions had made it clear that the purpose of the proceeding was punitive, and not remedial or coercive.

267 The applicant, on the other hand, disavowed any intent on its part to have had the respondent dealt with for criminal, rather than civil contempt. In resolving that issue, Biscoe J referred to the need for the statement of charge to set out 'the gist' or substance of the allegation brought. As contempt itself was, in effect, an offence of strict liability, the intention that lay behind the breach was irrelevant. The offence was established by proving disobedience of a court order. The question whether the disobedience was contumacious was irrelevant to whether there had been a contempt.[210] Contumaciousness went only to penalty.[211] His Honour concluded

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209 (2009) 167 LGERA 91.

210 Ibid [71].

211 *Attorney-General (NSW) v John Fairfax & Sons Ltd & Bacon* (1980) 1 NSWLR 362, 367 (Street CJ, Hope and Reynolds JJA); *Ainsworth v Hanrahan* (1991) 25 NSWLR 155, 168 (Kirby P, Samuels and Handley JJA agreeing); *M v Home Office* (1994) 1 AC 377, 426–7 (Lord Woolf); *Mudginberri (HC)* (1986) 161 CLR 98, 113 (Gibbs CJ, Mason, Wilson and Deane JJ), 541 (McHugh J); *Lade* (2006) 2 Qd R 531, 548 [57] (Keane JA); *Markisic* (2007) 69 NSWLR 737, 749 [64] (Campbell JA and Handley AJA, Bell J concurring).

therefore that the statement of charge need only identify the relevant order, and the act or omission said to constitute the breach.

268 Justice Biscoe expressed disagreement with the dictum of Cripps J in *Mannix* to the effect that, where a criminal contempt was alleged, the statement of charge should specify the 'contumacious conduct amounting to the commission of a crime committed by the respondent beyond disobedience of the court's order'.[212] His Honour stated his reasons as follows. First, because the finding of contumacious conduct may be a matter of inference from the response to the contempt charge, as assessed at trial. Second, because the weight of authority indicated that contumacy was relevant only to penalty. Self-evidently, it was difficult to construe the rules governing the form that a statement of charge should take as requiring the specific allegation of matters going only to penalty.[213]

269 His Honour added:

> However, if it is necessary to state in a statement of charge that the disobedience was contumacious at peril of that being excluded from consideration at trial notwithstanding that it emerges at trial that it was contumacious, the consequence is not that the statement of charge is defective, but that any contumacious disobedience cannot be considered on penalty, unless leave is granted to amend the statement of charge at trial. It is irrelevant to whether the respondent is in contempt by breaching the order, as the applicant alleges.[214]

270 It can be seen that one reason why his Honour concluded that the circumstances which would convert a civil to a criminal contempt need not be pleaded was that such circumstances might only be disclosed in the course of the trial. That is perhaps particularly so in a case in which the purpose of a proceeding is revealed, in the course of a trial, to be punishment rather than to ensure compliance with a court's orders. Decisions such as *Hearne (HC)*, *Microsoft*, *Mosman*, and *Sigalla* all illustrate that where the substance of the proceeding is assessed to be

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212 *Mosman* (2009) 167 LGERA 91, 113 [84] referring to *Mannix* (1983) 50 LGRA 369, 375.

213 *Mosman* (2009) 167 LGERA 91, 113 [84].

214 Ibid 114 [85].

for the purpose of punishing past breaches, the contempt may be characterised as criminal. The 'substance test' may result in a finding of criminal contempt even where the plaintiff does not seek committal of the defendant for criminal contempt, or allege that the breach of the court's order was contumacious. The court may nonetheless find that the contemnor's conduct had a tendency to interfere with the course of justice, and would thus merit punishment as a criminal contempt.[215]

271 The passages from the judgment of the plurality in *Hearne (HC),*[216] which we have set out at [186]-[187], proceeded on the basis that the contempt may be found to be criminal by reference to its substantial character, informed by the objectives of the proceeding. Their Honours did not find it necessary to determine whether the relevant time for assessing the character of the proceeding was at the time of its commencement (as the members of the New South Wales Court of Appeal had concluded) or whether subsequent findings of fact by the primary judge were also relevant.[217]

272 In *Sigalla,*[218] White J referred to the obvious difficulty, in some cases, in determining whether a breach is likely to have been contumacious without having heard all of the evidence. He referred to Biscoe J's conclusion in *Mosman,* that contumacy did not have to be alleged as a separate element of the charge of contempt because the contemnor's state of mind was irrelevant when considering whether a contempt had been established. But because the sanction sought by ASIC in *Sigalla* was imprisonment, White J was prepared to infer that its purpose was to have the alleged contemnor dealt with for criminal contempt. His Honour regarded as a telling factor what he described as 'the nature of the proceedings', noting that all of the charges brought were for breaches which were incapable of remedy, and were not coercive of future conduct. It was for these reasons that White J characterised the

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215 *Legal Services Board v Forster* [2012] VSC 633.

216 (2008) 235 CLR 125, 168 [133].

217 Ibid 168–9 fn 156.

218 (2011) 80 NSWLR 113.

alleged contempts as criminal.[219]

273 In the Boral matter, Digby J referred to a number of cases where findings of criminal contempt had been made notwithstanding that the relevant 'statement of charge' had not contained any express allegation of wilful or contumacious conduct.[220]

274 In both *Morgan* and *Witham* it was recognised that a proceeding for what appeared to be civil contempt could commence with a remedial or coercive objective, but be converted into a punitive proceeding in which a criminal contempt was established.[221]

275 In *Mosman,* Biscoe J, after referring to *Witham* and *Hearne (HC)* summarised the position as follows:

> Thus, disobedience to a court order in civil proceedings is a civil contempt, but, it seems, amounts to a criminal contempt if:
>
> (a) the disobedience was contumacious: *Witham v Holloway*; or
>
> (b) punishment serves no remedial, coercive or deterrent purpose, but only a punitive purpose of punishing a past breach: *Hearne v Street.*
>
> The former focuses on the nature of the contempt. The latter focuses on the purpose of the contempt proceedings.[222]

276 In effect, his Honour concluded that disobedience to a court order in civil proceedings could be converted into a criminal contempt provided either condition (a) or (b) was met.[223]

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219 Ibid 132 [80]. To the same effect, is the reasoning of the Full Federal Court in its recent decision, *Fair Work Inspectorate* [2014] FCAFC 101 [39]. There, the Court found the proceedings were criminal 'because Grocon and the Attorney-General were seeking convictions and punishment for offences'.

220 *Boral Resources (Vic) Pty Ltd* v *CFMEU* [2013] VSC 572 [52]–[53].

221 *Morgan* (1965) 112 CLR 483, 489 (Barwick CJ) and *Witham* (1995) 183 CLR 525, 545 (McHugh J).

222 (2009) 167 LGERA 91, 108 [58]–[59].

223 In *Tovir Investments* [2013] NSWLEC 35, Biscoe J reiterated this analysis of how what begins as a proceeding for civil contempt can become a proceeding for criminal contempt if one or other of the conditions specified above are met.

277 Whether or not the rationale which has been offered as to why contumacy need not be pleaded is entirely persuasive, one thing is clear — for a long time in Australia there has been a general practice of dealing with an allegation of contumacy at the penalty phase of a contempt proceeding, that is, after a finding of contempt has been made.

278 It seems that it was the existence of this practice that led counsel for the CFMEU, before Cavanough J, to concede, as he did, that having regard to authority, his Honour was bound to conclude that contumacy need not have been pleaded.

279 The practice, pursuant to which what begins as a possible civil contempt may be converted into a criminal contempt by a finding, at the penalty stage, that the conduct was contumacious, profoundly informs the question whether contumacy must itself be pleaded. The practice provides the courts with a flexible means of protecting the administration of justice which is, after all, the primary rationale for the existence of the offence of criminal contempt.

280 We give but a few examples of the practice, beginning with decisions of the Victorian Supreme Court.

281 In *Juric,*[224] Gillard J, following a finding that various charges of contempt had been proved, invited submissions as to whether the circumstances warranted the recording of a conviction for contempt. The plaintiff submitted, at the penalty hearing, that the charges brought should be treated as having established criminal contempts. His Honour concluded, on the basis of the evidence he had heard, that the contemnor had acted in 'contumelious disregard of the [court] order' and that convictions for contempt should be recorded.[225]

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224 [2001] VSC 375.

225 Ibid [158]. The adjective 'contumacious' would have been more appropriately used.

282 Justice Gillard's decision in *Peko Holdings Inc v Voss*,[226] also illustrates the practice. The breach was ultimately held to be a criminal contempt requiring the recording of a conviction and the imposition of a fine. His Honour ordered the contemnor to be committed to prison pursuant to r 75.11(3) until the fine was paid.[227]

283 In *Chan v Chen (No 3)*,[228] Kaye J, having found the alleged contempts proven, adjourned the proceedings to provide the contemnors with an opportunity to address the Court on whether there should be a conviction, and also on the question of penalty. Because the orders the subject of the finding of contempt had not contained the endorsement required by r 66.10 of the Rules, the plaintiffs did not seek orders for committal of the contemnors. His Honour found the contemnor's conduct to be a 'deliberate and flagrant disobedience' of the relevant orders undertaken with the fundamental purpose of subverting their effect and purpose.[229]

284 Before Cavanough J in the Grocon matter, the CFMEU drew his Honour's attention to his previous decision in *Livingspring Pty Ltd v Ng*,[230] which the CFMEU accepted would govern his Honour's approach to the present issues.[231] In that case, Cavanough J was required to determine whether there had been a breach of undertakings by the alleged contemnor and, if so, whether any such breaches had been wilful or contumacious. One breach was conceded by the contemnor. Justice Cavanough approached the question on the basis that it was necessary for the plaintiffs to prove beyond reasonable doubt not only each element of the charge, but also the aggravating features relevant to penalty. These, of course, included the question whether the conduct had been 'contumacious'.[232] His Honour answered that question affirmatively, but acknowledged that there could be different kinds

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226 [2002] VSC 319.

227 Ibid [55], [70], [81]–[84].

228 [2007] VSC 52.

229 Ibid [9].

230 [2007] VSC 9.

231 Counsel foreshadowed a challenge to that approach on appeal.

232 [2007] VSC 9 [74].

and degrees of contumacy. He raised but did not answer the question whether any breach should be 'determined or declared to amount to a criminal contempt, i.e. a criminal offence, as distinct from a civil contempt'[233] until the 'penalty' hearing.[234]

285 *Deputy Commissioner of Taxation v Gashi* is another case in which the usual practice was applied of deferring any finding of criminal contempt until after a penalty hearing had been conducted.[235]

286 We turn to instances of the application of the practice in other jurisdictions.

287 In *Lade*,[236] in the Queensland Court of Appeal, the appellant complained that he had been denied procedural fairness in that he was not given an opportunity to be heard in relation to penalty after the finding in relation to contempt had been made. Justice Keane observed that there was no authority to support the proposition that, as a matter of law, the primary judge could not deal with the issue of penalty at the same time as he or she determined whether the appellant was guilty of contempt. His Honour considered there was no basis for the general statement that had been made by Atkinson JA in *Bakir v Doueihi*[237] that it was not appropriate, or in accordance with usual procedure, that submissions be made as to penalty in advance of the findings of fact.[238]

288 *Metcash Trading Ltd v Bunn (No 5)* is an example of the deferral of questions concerning the character of the contempt and penalty until after a determination had been made that the contemnor had breached the relevant orders.[239]

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233 Ibid [84].

234 Ibid.

235 [2011] VSC 448 [11], [16], [18].

236 [2006] 2 Qd R 531.

237 [2002] QSC 19.

238 [2006] 2 Qd R 531 [95].

239 [2009] FCA 16 [34].

289 In *ASIC v Matthews*,[240] when heard at first instance, Barrett J ordered the contemnor to be imprisoned for six months for breach of orders prohibiting him from providing advice about securities and the publication of securities reports. This followed a hearing at which his Honour found the contemnor to be in breach of the relevant orders. In reaching that conclusion, his Honour identified the applicable legal principles as being those stated by Finn J in *Metcash Trading Ltd v Bunn (No 6)*.[241]

290 At the penalty hearing in *ASIC v Matthews*, Barrett J referred to the observation in the joint judgment in *Mudginberri (HC)* that 'the underlying rationale of every exercise of the contempt power' is 'to uphold and protect the effective administration of justice'.[242] His Honour found that the orders in question had been made to protect the public, and not for the vindication of some private right of the plaintiff. That added to the question of penalty a dimension that was unusual since, in most cases, court orders were made essentially to protect some private interest of a litigant.[243] In sentencing the contemnor, Barrett J did not seek to characterise the contempt as being either civil or criminal; but he did advert to matters which bear upon a contempt being accounted as criminal, and the sentence which he imposed reflected those matters.

291 In *Pang*,[244] the New South Wales Court of Appeal (Beazley and McColl JJA and Lindgren AJA) dealt with a conviction for contempt in which neither the notice of motion nor the statement of charge gave any indication as to whether the charge was a civil or criminal contempt. The notice of motion sought that the contemnor be 'punished for contempt by committal to prison or fine or both'. This formulation

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240 (2009) 69 ACSR 559, which was to become, of course, *Matthews v ASIC* [2009] NSWCA 155, to which we have earlier referred. The judgment is not to be confused with Barrett J's related penalty judgment in *ASIC v Matthews* (2009) 71 ACSR 279.

241 (2009) 71 ACSR 279 [26], citing *Metcash Trading Ltd v Bunn (No 6)* [2009] FCA 266.

242 Ibid [23], citing *Mudginberri (HC)* (1986) 161 CLR 98, 107.

243 Ibid [24]–[25].

244 [2011] NSWCA 69.

reflected the terms of pt 55 r 13(1) of the *Supreme Court Rules 1970* (NSW) which provided that the court could punish contempt by committal or fine, the rule not confining those punishments to cases of criminal contempt. As Lindgren AJA explained, the most that could be said was that the motion put the contemnor on notice of the fact that the charge was serious, and did not exclude the possibility of a finding of criminal contempt.[245]

292 The trial judge had found the contempt to be proved, and concluded that the breach had been deliberate and contumacious. He had relied in part upon the fact that the contemnor had been an 'extraordinarily unsatisfactory witness'.[246] The contemnor's evidence was, as Beazley JA explained, 'conduct that was properly characterised as contumacious'.[247]

293 The appellant submitted that his evidence had only been led at trial at the penalty stage. He submitted that as the trial judge had made no finding of any criminal contempt before embarking upon that hearing, his evidence, however unsatisfactory it may have been, could not elevate what was a civil contempt into a criminal contempt. He submitted that there had, accordingly, been a 'procedural irregularity of a significant kind'.[248]

294 The Court rejected those contentions. Justice Beazley observed that the rules of court did not distinguish between civil and criminal contempt. The rules governing civil procedure did not necessitate any strict division between the hearing of the contempt charge and the determination of matters relevant to sentence. Nonetheless, her Honour noted 'that the division usually occurs in practice'.[249] Accordingly, it had not been necessary for the trial judge to make a finding as to the nature of the contempt before proceeding with the balance of the hearing.

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245 Ibid [144].

246 Ibid [64].

247 Ibid [129].

248 Ibid [87], [90], [96], [97] (Beazley JA).

249 Ibid [99].

295 The fairness of the practice to which we have been referring has not altogether escaped criticism. In *Seymour*,[250] the applicant had been convicted of contempt in the Supreme Court of New South Wales in 2004, and sentenced to a wholly suspended period of imprisonment. His later application for renewal of registration as a migration agent was refused. Via the Administrative Appeals Tribunal, the matter eventually found its way to Rares J in the Federal Court. In the course of his judgment, Rares J commented adversely upon the practice by saying:

> Was the contempt with which the applicant was charged civil when the charge was preferred? Did it remain so or did it transmute, as the seriousness of and contumaciousness of, his conduct was proved in evidence or found by Buddin J when giving judgment? The very notion that an allegation of contempt can have such a chameleon-like character demonstrated, in [*Mudginberri*] and in [*Witham*] that all such cases had to be decided on the criminal standard of proof.[251]

296 Justice Rares was concerned that

> a person charged with contempt should never be exposed to the duplicitous, almost schizophrenic nature of a charge of 'civil' contempt which during the course of the hearing may change into a 'criminal' charge. No other court proceedings allow of such an intolerable situation. It is unfair to the point of being unjust that a person defending proceedings does not know at the outset of the hearing the full nature of the case against him or her where liberty may be in jeopardy.[252]

297 That said, his Honour felt bound by the observations of the High Court in *Mudginberri (HC)*[253] and in *Doyle*[254] that if he were to find that the contemnor had acted contumaciously the civil contempt could become criminal, as the hallmark of 'criminal' contempt was contumacy or defiance.[255] Justice Rares was satisfied that the contemnor had recognised his guilt at an early stage, and was aware of all the material facts. He must be taken to have been aware that he had been charged with

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250 (2006) 215 FCR 168.

251 Ibid 189 [75] (citations omitted).

252 Ibid 194 [102].

253 (1986) 161 CLR 98.

254 (1985) 156 CLR 510.

255 (2006) 215 FCR 168, 195 [104], citing *Witham* (1995) 183 CLR 525, 541; *Mudginberri (HC)* (1986) 161 CLR 98, 111–2; *Morgan* (1965) 112 CLR 483, 489, 501–2; *Doyle* (1985) 156 CLR 510, 516.

a criminal offence.[256]

298 In a similar vein, White J in *Sigalla* made reference to the safeguard of criminal procedure that an accused

> should not face the jeopardy that if he gives evidence in defence of one charge, he may be convicted by admissions obtained in the course of cross-examination on other charges for which the prosecution did not have sufficient evidence to establish guilt beyond reasonable doubt.[257]

Conclusion regarding the law before X7 and Lee

299 Having analysed the various strands of the law of contempt to which we have referred, we consider the better view to be that, before *X7* and *Lee*, contumacy was not an 'element' of the offence of criminal contempt constituted by breach of court orders. The preponderance of authority treated contumacious conduct in defiance of a court order as essentially a circumstance of aggravation, relevant only to penalty, and not as an element of the offence to be separately pleaded, and proved as a condition of liability.[258] Treated as a circumstance of aggravation, and not an element of the offence, it was not necessary that it be pleaded within the statement of charge.

300 But if we are wrong about that, and contumacy should be viewed as an element of the offence, rather than an aggravating factor, that would not, of itself, avail the Union in this appeal. It has never been regarded as necessary, in order to formulate a valid criminal charge, that it specifically allege each and every element of the offence that is the subject of that charge.[259]

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256 Ibid 195 [109].

257 [2011] 80 NSWLR 113, 133 [87].

258 There is nothing particularly unusual about treating a matter such as contumaciousness as a circumstance of aggravation, rather than as an element of the offence of contempt. The law recognises a distinction between those kinds of aggravation that form part of the facts constituting the offence alleged, and those which are independent of those facts and relevant only to penalty. See, eg, *Sabapathee v The State* [1999] 1 WLR 1836, 1847; *R v Pantorno* [1988] VR 195; *R v Satalich* (2001) 3 VR 231.

259 A charge of murder, at common law, is validly expressed even though it never addresses the mental state required for the commission of that offence. The charge merely avers that on a particular date, at a particular place, the accused did murder the deceased.

301 The necessary content of a criminal charge is that explained in *Johnson v Miller*.[260] In the context of a charge of contempt, whether civil or criminal, it is the 'gist of the accusation'. There is no obligation to plead the contemnor's alleged state of mind.

302 It is one thing to conclude that, before *X7* and *Lee*, the state of the law was that contumacy need not be pleaded in a charge, and that it was a matter for determination if a contempt was established. It is another thing altogether to say, if contumacious conduct was to be asserted, that the moving party was under no obligation to put the alleged contemnor on notice of that matter at the outset. In our opinion, it should be concluded, in order to ensure that an alleged contemnor was accorded procedural fairness, that there was such an obligation. At least that was so where the moving party intended at the outset to press for such a finding at the penalty phase, if the contempt was found proved.

303 The allegation that the breach was contumacious exposes the contemnor to a finding that he or she has committed an offence for which there may be a conviction recorded and greater punishment imposed than would be warranted for a civil contempt.

304 The practice of allowing a civil contempt to be converted into a criminal contempt in the penalty phase was well entrenched in the law in this country before the decisions in *X7* and *Lee*. At the same time, that practice was not easily reconcilable with the need for proper safeguards to apply when dealing with an allegation that may have such serious consequences.

305 There was an element of unfairness in the fact that an alleged contemnor may unwittingly furnish evidence against himself or herself in seeking to meet what, at the liability stage, may be regarded as nothing more than a civil contempt. Thus, where it was not plain from the outset that the contempt charged was criminal in nature, the contemnor should not have been put in jeopardy of the charge being

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260 (1937) 59 CLR 467.

converted to one of criminal contempt by providing evidence that his or her conduct was, in fact, contumacious.

306 Of course it is for the prosecution to prove the guilt of an accused person. The companion rule is that a person facing a charge with the possibility of serious sanctions as a consequence of it being proved, should not be compelled to assist in the discharge of the prosecution's onus of proof.[261] In *Aram v The Owners Strata Plan No 20175*[262] this fundamental safeguard of criminal procedure was invoked so that the alleged contemnor was not compelled to answer the charge by serving witness statements.[263] Absent some allegation in the pleading or charge, or in the opening of the case that the contempt alleged is asserted to be criminal in nature, for which punishment, fine or sequestration is sought, it may not be until the contemnor gives evidence, or perhaps even later in the proceedings, at the penalty stage, that the full nature of the offence relied upon by the moving party becomes apparent. By then the contemnor may unwittingly have furnished the evidence, without which no criminal contempt could have been established.

307 The notice required by O 66 of the Rules, when the notice of motion or summons is initially served, provides the prospective contemnor with a warning of the consequences which might befall him or her should the order of the court continue to be ignored. It has long been recognised that a party will not be attached for disobedience of a mandatory order unless that party has been served with a copy containing the required endorsement. That is because attachment proceedings, being penal and affecting the liberty of the subject, are of a criminal character. Accordingly, the utmost strictness in procedure and proof is demanded.[264]

308 Procedural fairness dictates that the contemnor at the very least be made aware that the charge is for a criminal offence, or that it may be converted into a

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261 *Lee* (2014) 88 ALJR 656, 662 [32]–[33] (French CJ, Crennan, Kiefel, Bell and Keane JJ).

262 [2012] NSWSC 1220.

263 Ibid [11].

264 *Clifford v Middleton* [1974] VR 737, 739 (Kaye J); *Re Bramblevale Ltd* [1970] Ch 128.

criminal offence if the conduct alleged is found to have been contumacious.

309 If there had been any doubt that the Union was aware, from the time when it began to take part in the Grocon matter, that what it faced was an allegation of criminal contempt, for which conviction and other punishment would be sought, we would be prepared to hold, even without regard to the decisions in *X7* and *Lee,* that it should not have been convicted of criminal contempt. But that is not the situation.

310 Justice Cavanough correctly stated that the case before him had been conducted throughout upon the basis that it could be determined, at the penalty stage, whether the contempt, if established, was criminal in nature, and might therefore warrant conviction. As we have earlier said, counsel for the CFMEU made it clear from the outset that he fully understood that the charges brought against his client were for criminal contempt. He also appreciated that Grocon would seek both the recording of convictions and other punishment. There can be no doubt that the Union was aware from the commencement of the hearing that it was exposed to that risk, and understood the potential consequence of a finding of criminal contempt and conviction. It was to allay any concern in that regard that his Honour stated at the beginning of the proceedings, and without demur, that the Union was on notice of the legal character of the contempt alleged. In these circumstances, the CFMEU cannot assert any denial of procedural fairness.

311 As the law stood before *X7* and *Lee*, therefore, there was no requirement to plead contumacy in a statement of charge alleging contempt by breach of court orders in order that a contemnor can be convicted of criminal contempt. Further, the CFMEU, in the particular circumstances of this case, could not point to any denial of procedural fairness. Grocon sentence ground 3 could not be sustained.

X7 v Australian Crime Commission and Lee v The Queen

312 We must now consider *X7*[265] and *Lee*,[266] upon which the Union placed such reliance. We begin by analysing what those cases specifically decided.

X7 v Australian Crime Commission

313 The plaintiff brought proceedings in the original jurisdiction of the High Court. He sought a declaration that, to the extent that div 2 of pt II of the *Australian Crime Commission Act 2002* (Cth) ('*ACC Act*') permitted the compulsory examination of a person charged with an indictable offence against a law of the Commonwealth, the relevant provisions were beyond the power of the Commonwealth Parliament. Alternatively, he sought a declaration to the effect that any such examination would constitute an impermissible interference with what was said to be his constitutional right to a fair trial under ch III of the Constitution. He also sought injunctive relief against the Australian Crime Commission ('ACC') and its officers restraining further compulsory examination in relation to the matters in question.

314 The facts giving rise to the plaintiff's challenge in *X7* are not of any present relevance. It is sufficient to note that in November 2010, he was arrested by officers of the Australian Federal Police and charged with three separate conspiracies, each involving drugs. All charges were brought under the provisions of the *Criminal Code Act 1995* (Cth).

315 While still in custody, and awaiting trial, the plaintiff was served with a summons to appear and give evidence before the ACC. As the High Court noted, that body has functions which include the collection of criminal information and intelligence and the investigation of federally relevant criminal activity in relation to 'serious and organised crime'.[267]

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265 (2013) 248 CLR 92.

266 (2014) 88 ALJR 656.

267 Serious and organised crime covers offences involving two or more offenders, substantial planning and organisation, and the use of sophisticated methods and techniques: *ACC Act* s 4.

316 In response to the summons, the plaintiff attended a compulsory examination before an ACC examiner. During the course of that examination he was asked, and answered under compulsion, questions relating to the very matters which gave rise to the charges brought against him. When the examination resumed the following day, he declined to answer any further questions of that nature. He was told that he would, in due course, be charged with failing to answer questions.

317 The High Court was divided as to whether the plaintiff should succeed. In a joint judgment, Hayne and Bell JJ who, together with Kiefel J, made up the majority, found in the plaintiff's favour. Chief Justice French and Crennan J dissented.

318 By way of overview, Hayne and Bell JJ said:

> Could the examiner lawfully require the plaintiff to answer questions about the subject matter of the offences with which he had been charged but for which he had not then been tried? Could the examiner, for example, lawfully require the plaintiff to answer whether he had committed the offences charged?
>
> These reasons will show that both the general and the more particular question should be answered 'No'. The relevant provisions of the ACC Act should not be construed as authorising the compulsory examination of a person charged with, but not yet tried for, an indictable Commonwealth offence about the subject matter of the pending charge. Permitting the Executive to ask, and requiring an accused person to answer, questions about the subject matter of a pending charge would alter the process of criminal justice to a marked degree, whether or not the answers given by the accused are admissible at trial or kept secret from those investigating or prosecuting the pending charge.
>
> Requiring the accused to answer questions about the subject matter of a pending charge prejudices the accused in his or her defence of the pending charge (whatever answer is given). Even if the answer cannot be used in *any* way at the trial, any admission made in the examination will hinder, even prevent, the accused from challenging at trial that aspect of the prosecution case. And what would otherwise be a wholly accusatorial process, in which the accused may choose to offer no account of events, but simply test the sufficiency of the prosecution evidence, is radically altered. An alteration of that kind is not made by a statute cast in general terms. If an alteration of that kind is to be made, it must be made by express words or necessary intendment.[268]

319 Their Honours then embarked upon a careful analysis of the meaning of the

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[268] (2013) 248 CLR 92, 127 [69]–[71] (emphasis in original).

term 'accusatorial system'. They concluded that that expression was far broader than simply a statement as to who bore the onus of proof. It included reference to the history of the privilege against self-incrimination, and the so called 'right to silence'.

320 In their Honours' words:

> In this case, it is necessary to unpack the content of both the privilege against self-incrimination and the so-called 'right to silence' to identify whether compulsory examination of a person charged with an offence about the subject matter of the offence charged would be an impermissible interference with the due administration of criminal justice.
>
> As four members of this court said in *Reid v Howard*, '[t]he privilege [against self-incrimination], which has been described as a "fundamental … bulwark of liberty", is not simply a rule of evidence, but a basic and substantive common law right'. The evolution of and rationale for the privilege against self-incrimination have been described in various ways. No single explanation has achieved universal acceptance, whether in judicial decisions or academic writings. But neither the existence nor the content of those controversies can be understood as denying that the privilege is now regarded as being 'a basic and substantive common law right', and not just a rule of evidence. That is, it is not a privilege which is concerned only with the *use* to which answers given may be put at, or in connection with, a trial. It is a privilege which permits the refusal to make an answer regardless of whether the answer is admissible as testimonial evidence. The accusatorial process of criminal justice and the privilege against self-incrimination both reflect and assume the proposition that an accused person need never make any answer to any allegation of wrong-doing.
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> The notion of an accused person's 'right to silence' encompasses more than the rights that the accused has at trial. It includes the rights (more accurately described as privileges) of a person suspected of, but not charged with, an offence, and the rights and privileges which that person has between the laying of charges and the commencement of the trial.[269]

321 Their Honours eventually continued:

> The preceding description of the investigation, prosecution and trial of an indictable Commonwealth offence demonstrates that, at every stage, the process of criminal justice is accusatorial. It is against this background that the provisions of the ACC Act, particularly s 28(1), must be construed. If these provisions were to permit the compulsory examination of a person charged with an offence about the subject matter of the pending charge, they would effect a fundamental alteration to the process of criminal justice.[270]

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269 Ibid 136–7 [103]–[105] (citations omitted) (emphasis in original).

270 Ibid 140 [118].

322 They added that:

> This is not to decide that statute can never effect fundamental alterations to the process of criminal justice. As explained earlier, it is not necessary to decide whether there is any relevant constitutional limitation to legislative power that would preclude such an alteration. But such an alteration can only be made if it is made clearly by express words or necessary intendment.
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> …
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> From time to time, legislation has been enacted which has qualified the generally accusatorial nature of the process of criminal justice. Some of the earliest of those modifications are to be found in legislation providing for the examination of bankrupts, and of persons who have 'taken part or been concerned in the promotion, formation, management, administration or winding up' of a corporation and who have been, or may have been, 'guilty of fraud … or other misconduct in relation to that corporation'. Legislation provided for the examination of bankrupts, and those thought to have defrauded companies, before the accused became a competent witness at trial.
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> …
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> These changes to the accusatorial process of criminal justice have been made directly and expressly. Neither the changes that have been made more recently, nor the existence of historical qualifications and exceptions of the kind exemplified by bankruptcy and companies examination procedures, deny that the existing process for the administration of criminal justice is properly described as an accusatorial process. The qualifications and exceptions stand as particular features of the process of criminal justice that have been separately created (in important respects before the emergence of organised police forces and the modern criminal justice system). Their existence shows no more than that the modern criminal justice system is the product of growth over time and is not the product of a decision to implement some single organising theory about the administration of criminal justice.[271]

323 In dealing with the impact of coercive questioning upon the rights of an accused pending trial, their Honours summed up the position as follows:

> Even if the answers given at a compulsory examination are kept secret, and therefore cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom. No longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according *only* to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused

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271 Ibid 140–2 [119], [121], [123] (citations omitted).

> person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge.
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> As has been explained, if an alteration of that kind is to be made to the criminal justice system by statute, it must be made clearly by express words or by necessary intendment. If the relevant statute does not provide clearly for an alteration of that kind, compelling answers to questions about the subject matter of the pending charge would be a contempt.[272]

324 Chief Justice French and Crennan J jointly dissented. Their Honours concluded that the *ACC Act*, upon its proper construction, raised the public interest in the continuing investigation of serious and organised crime above the private interest in claiming the privilege against self-incrimination. They said that the interest in a person subject to examination under the *ACC Act* being tried openly and fairly was protected by the prohibition on the direct use of answers given, or documents or things produced, and by the provisions safeguarding the fair trial of that person.

325 Their Honours were critical of the majority's having elevated the 'right to silence' to an adjunct of the accusatorial system. They noted that this 'right'[273] was not 'a constitutional or legal principle of immutable content'.[274] Nor, of course, was the closely related, but not co-extensive, common law privilege against self-incrimination.[275]

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272 Ibid 142–3 [124]–[125] (emphasis in original).

273 See *R v Director of Serious Fraud Office; Ex Parte Smith* [1993] AC 1, 30–1, where the 'right to silence' was described by Mustill LJ as referring to 'a disparate group of immunities, which differ in nature, origin, incidence and importance'. His Lordship identified no less than six different variations of that right.

274 (2013) 248 CLR 92, 117 [39], citing *Azzopardi v The Queen* (2001) 205 CLR 50, 57 [7] (Gleeson CJ). For what seems to us to be a somewhat strained consideration of whether an infringement of the 'right to silence' is contrary to the requirements of the Australian Constitution, see Anthony Gray, 'Constitutionally Heeding the Right to Silence in Australia' (2013) 39(1) *Monash University Law Review* 156.

275 (2013) 248 CLR 92, 117 [39], citing *Sorby v The Commonwealth* (1983) 152 CLR 281, 298 (Gibbs CJ), 308–9 (Mason, Wilson and Dawson JJ).

326 The effect of *X7* was to reinforce the line of authority, long accepted in this country, that an investigative process, exercising coercive powers, is likely to constitute an interference with the administration of justice, and therefore to constitute a contempt of court, if criminal proceedings in relation to the matter under investigation are already on foot.

327 In that regard, an investigation of that kind would not, under this line of authority, give rise to a contempt if criminal proceedings were merely in prospect, but had yet to be commenced. In particular, it would not be sufficient that such proceedings be 'imminent' or 'on the cards'.[276]

328 Self-evidently, *X7* had nothing whatever to do with criminal pleadings, or for that matter, discovery in criminal matters. Nonetheless, counsel for the Union relied upon the broader statements of principle contained in the majority judgments in support of his invocation of the full panoply of rights — in the Grocon matter, the need to plead contumacy, in the Boral matter, freedom from giving discovery — in accordance with the 'accusatorial system', for anyone facing contempt proceedings.

329 For the sake of completeness, it should be noted that only some three months or so after *X7* was decided, the High Court, in *Lee v New South Wales Crime Commission*[277] held, this time by a 4:3 majority, that it was permissible to engage in coercive questioning, under the provisions of the *Criminal Assets Recovery Act 1990* (NSW), notwithstanding the fact that criminal charges had been laid against the appellants, and a trial was imminent.

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276 *Sorby v The Commonwealth* (1983) 152 CLR 281, 306–7 (Mason, Wilson and Dawson JJ); *Edelsten v Richmond* (1987) 11 NSWLR 51, 58 (Hope JA, Priestly and Clarke JJA agreeing); *A v Boulton* (2004) 204 ALR 598, 620–3 [127]–[145] (Weinberg J); *Re Application Under The Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 431 [64] (Warren CJ); *Today FM (Sydney) Pty Ltd v Australian Communications and Media Authority* (2013) 307 ALR 130, 142 [55]–[56] (Edmonds J).

277 (2013) 87 ALJR 1082 ('*Lee v NSWCC*').

330 The unsuccessful appellants in *Lee v NSWCC* eventually stood trial on the various drug and firearm offences with which they had been charged. The first appellant had previously been required to give evidence before the New South Wales Crime Commission ('NSWCC') in 2009, but had not, at that stage, been charged with any of those offences. Section 13(9) of the *New South Wales Crime Commission Act 1985* (NSW) ('*NSWCC Act*') (since repealed) required the NSWCC to make a direction prohibiting the publication of evidence given before it where publication 'might prejudice … the fair trial of a person who has been or may be charged with an offence'. A direction in those terms had been given.

331 A week or so after the first appellant was questioned, members of the New South Wales police force executed a search warrant at premises in Sydney and a number of incriminating items (including a quantity of powder) were found. It was strongly suspected that the powder seized was drugs, but no drug charges could be laid until the tests of the powder had been completed.

332 The second appellant, who was the first appellant's son, was present at the premises when the search warrant was executed. He was charged with firearms offences. He was examined on 16 September 2009. At that time, charges against both appellants relating to the supply of prohibited drugs were imminent, but had not yet been laid.

333 Pseudoephedrine was subsequently detected in some of the powder. In May 2010 the appellants were charged with supply of the drugs. The transcripts of their evidence before the NSWCC were published by the Commission to the police and provided to the New South Wales Director of Public Prosecutions ('DPP'). Documents which the first appellant had produced under coercion were also made available to the police, and to the DPP.

334 The communication of the transcripts to the DPP, and the use made by the DPP of those transcripts in preparation for the trial, formed the basis of a ground of

appeal to the New South Wales Court of Criminal Appeal. That Court[278] dismissed the appeals.

335 The High Court held that, by virtue of the transcripts having found their way into the possession of the prosecutor, and his having read them, the trial had miscarried in a 'fundamental respect'.[279] A retrial was ordered.

336 The Court, on this occasion, delivered a unanimous judgment. It referred to *X7*, noting in particular the views of the majority in that case. It held that powers of compulsory examinations given to the ACC were not to be construed as applying to persons already charged with offences the subject of the examination. To do so would be to

> depart from the accusatorial nature of the criminal justice system in a fundamental respect. Clear words or those of necessary intendment were therefore necessary and neither were present in the legislation in question. As such, it was not necessary for the majority in *X7* to consider the protective purpose of a provision similar to s 13(9). However, French CJ and Crennan J, who were in dissent, did so. It was a matter of some significance to their Honours' reasoning that the legislation, in providing for a direction regarding non-publication, did so in order to safeguard the examined person's trial as fair.[280]

337 The Court continued:

> 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. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.[281]

338 The Court noted that the purpose of s 13(9) of the *NSWCC Act* was to ensure the fair trial of anyone charged with an offence. In that sense, it 'supported the

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278 *Lee v The Queen* [2013] NSWCCA 68 (Basten JA; Hall and Beech-Jones JJ).

279 *Lee* (2014) 88 ALJR 656, 660 [19].

280 Ibid 662 [31] (citations omitted).

281 Ibid 662 [32] (citations omitted).

maintenance of the system of criminal justice referred to in *X7* and the trial for which that system provides'.[282] The protective purpose of the section would normally require the NSWCC to 'quarantine' evidence provided by a person to be charged from persons involved in prosecuting those charges.[283] That purpose had clearly not been met.

339 The question for determination was not whether the publication of the transcripts to the DPP had been unlawful or wrongful, but whether, as a result of the prosecution having obtained those transcripts, there had been a miscarriage of justice. In that regard, the Crown's 'possession of the appellants' evidence before the Commission put at risk the prospect of a fair trial, which s 13(9) sought to protect'.[284] In that respect, there was a 'fundamental departure' from the criminal trial 'comprehended by our system of criminal justice'.[285] The provision of the transcripts to the Crown 'altered the position of the prosecution vis-à-vis the accused'.[286]

340 As in the case of *X7*, it is obvious that *Lee* had nothing whatever to say upon the subject of pleading requirements in criminal matters, or the possibility of obtaining discovery against an accused in a criminal case. Nonetheless, counsel for the Union sought to draw upon the general statements contained within the judgment regarding the nature of the accusatorial system in order to ground his submissions in support of the Grocon application, as well as those advanced in the Boral matter.

Have X7 and Lee 'altered the landscape' as the Union contends?

341 We have already commented upon the fact that neither *X7* nor *Lee* involved any question of contempt, still less any issue regarding the necessary requirements

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282 Ibid 662 [34].

283 Ibid 663 [34].

284 Ibid 664 [44].

285 Ibid 664 [46].

286 Ibid 666 [51].

for pleading criminal contempt (Grocon), or any issue as to discovery in a proceeding for such contempt (Boral).

342 Nonetheless, counsel for the Union sought to argue, before this Court, that the statements of general principle in these two cases regarding the nature of the accusatorial system had profoundly affected the law, as it applied in these two areas. Henceforth, there would be a tightening of the requirements for pleading criminal contempt, as well as a reinforcement of the long-standing tradition that an alleged contemnor was not required to give discovery in proceedings brought against him or her.

343 The first thing to say about that submission is that it requires something of a leap of faith. In the context of the Grocon matter, as has been seen, there is a substantial body of authority to the effect that it is unnecessary, in order to procure a conviction for contempt, to allege contumacy or its equivalent in the statement of charge. That body of authority includes High Court pronouncements on the subject. To suggest that all of that authority has been swept aside by the equivalent of a side-wind is a somewhat bold submission.

344 However, there are other reasons for rejecting the Union's submission. Both *X7* and *Lee* concerned the right of those accused of serious criminal offences to a fair trial. In both cases, the actions taken by the Executive had the potential to interfere with a fair trial.

345 It was in that context that the Court made the comments that it did about basic values with which the criminal justice system is imbued. There was never any question, in either case, about the adequacy, or otherwise, of the information provided to the defendant regarding the charges faced.

346 The Grocon matter bears no relationship to the issues that engaged the attention of the High Court in the two cases in question.

347 Moreover, it is not as though there is anything particularly new, still less

revolutionary, regarding the accusatorial system in either judgment. Dicta, such as those expressed in these two cases, have formed part of our common law tradition for a very long time. The rules governing the burden and standard of proof, the non-compellability of the accused, the privilege against self-incrimination and the right to silence, as well as the special protections available under the rules of evidence to accused persons in criminal trials have been part of that tradition, in some cases, for centuries. In other words, neither *X7* nor *Lee* should be taken as having created any new law.

348 In reality, as we have said, Grocon sentence ground 3 involves nothing more than a pleading point, albeit one of some importance. We think it would come as something of a surprise to the members of the High Court who decided the two cases upon which the Union relies if they were to be told that the dicta contained in those decisions had, *sub silentio,* overturned a century or more of developed legal doctrine in this country.

349 For reasons that we will develop in relation to the Boral matter, the same conclusion follows in answer to the Union's attempt to rely upon these two cases as the basis for its application for leave to appeal against the discovery order.

350 In that event, the law as it stood before *X7* and *Lee* remains unchanged. In consequence, Grocon sentence ground 3 fails.

Grocon conviction application — ground 1

351 We turn to the other grounds pursued by the Union in the Grocon matter. The first of them was conviction ground 1.

352 As we have noted at [70] above, it was submitted for the Union that the evidence of deployment of the Grocon workers to other sites on 29 and 30 August 2012 meant that the contempts could not be established. In its extended argument, the Union contended that this was because:

(1) the charges must be strictly construed;

(2) the charges were unambiguous, and necessitated proof that those workers who were engaged to work at the Emporium site on those days continued to be engaged at least up to the time when the offending activity began as alleged by the charges; or

(3) if the charges were not unambiguous, they must be read favourably to the Union, which faced punishment for breach of the restraining orders; and so read, they had the meaning described in (1);

(4) in either event, the charges failed because:

(a) the workers were not engaged to work at the Emporium site on those days; and

(b) any engagement had ended before the time at which the offending activity began on those days;

(5) it was wrong for the judge to have treated the charges as constituted by 'continuing and related conduct' by the Union.[287]

353 Counsel for the Union commended the approach of Tracey J in *Bovis Lendlease Pty Ltd v Construction Forestry Mining and Engineering Union*.[288]

354 We asked counsel for the Union what would have been the situation had the workers simply been told to stay at home on the two days. Counsel's response was that the charges would not have been established, in respect of either day, unless the direction had been given after the time at which the offending activities were alleged to have begun. Timing, not distance, would preclude the charges being established.

355 For Grocon, it was submitted that:

(1) the pertinent particulars of charge were unambiguous;

(2) the Union's contention that the Grocon workers were not 'engaged to work' on the Emporium site on the two days flew in the face of the concept of

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287 Liability Reasons [312].

288 (2009) 254 ALR 306 ('*Bovis*').

engagement to work, which relevantly meant 'binding by a contract or a promise as a hiring or an employment'. The workers were engaged to work at the Emporium site on the two days because that is where they would have been working in the ordinary course of their employment with Grocon. The judge was correct to conclude that:

> This charge does not fail because of the redeployments that occurred at 5.00 pm on the previous days. I accept [counsel's] submission that the notion of redeployment is in fact consistent with the workers doing something other than what they would be doing in the ordinary course of business. These workers remained workers who were engaged by Grocon to work on the Emporium site on 29 and 30 August 2012 because that is what they would have been doing in the ordinary course of business.[289]

356 Much the same submission was advanced for the A-G. In written submissions, it was contended that:

> Contrary to the submission of the CFMEU, it is consistent with the plain meaning of the charge that it related to persons who, in the ordinary course of business, would have been working at the Emporium site on 29 and 30 August 2012 but who did not perform work on the site on those days because the CFMEU's conduct put in doubt their safety and welfare. What those workers did instead was irrelevant.

357 It was not in debate in this Court that the charges must be strictly construed. This does not mean, however, that a court must strain to give charges a meaning which they will not sensibly bear in order to facilitate the defence of an alleged contemnor. We agree with the judge below that 'persons engaged to work on the Emporium site on that day' had the clear meaning of persons who would in the ordinary course of their employment have worked on that site on that day.

358 Further, it did not follow from the fact that the members of the permanent workforce were (or, in the case of 29 August 2012, where possible, were) redeployed to work on other sites that their engagements to work at the Emporium site were not in force on 29 and 30 August 2012. The Union's contention to that effect was no more than bare assertion. Whether, in respect of those days, the Union argued that

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289 Liability Reasons [357].

the engagements were terminated, suspended, temporarily replaced by some other engagements, or whether it was said that some other contractual principle was to be applied, was never made clear. The Grocon manager who gave evidence, inter alia, about the redeployments, and the reason for them, was not relevantly cross-examined. Of course it was not for the Union to make out the contempts alleged if there was a gap in the evidence; but on the face of the evidence as it stood, there was no such gap.

359 Criticism by the Union of his Honour's reference to 'continuing and related conduct' is, in our opinion, misplaced. His Honour's reasons make it quite clear that he understood that continuing or 'between dates' offences were not charged. All he was saying, in the passage impugned by the Union,[290] was that the conduct of the Union on 28 August 2012, and the threatened continuation of that conduct on succeeding days to which we have earlier referred, sensibly permitted Grocon management to infer that the workers would face the same problem of attempting to gain access on 29 and 30 August as they had faced on 28 August. This explained the direction that they were given, and permitted the inference — we would say the irresistible inference — that the crowds present on 29 and 30 August would have refused to give free access to the workers had they attempted entry. In fact, as the judge found, free access was obstructed.

360 We do not consider that *Bovis* assists the Union's argument beyond our acceptance of the proposition that a charge which is open to alternative meanings should be strictly construed. In the passage cited for the Union,[291] Tracey J held that where a charge was open to the construction that it applied to both actual or potential interference with a person's passage, or alternatively only to actual interference with passage, the latter, narrower, meaning should be given to it. That does not touch upon the question in the present case whether the engagements of the permanent Emporium site workforce to work at that site were not in existence after

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290 Ibid [355], [356].

291 *Bovis* (2009) 254 ALR 306, 326 [90].

6.30am on each of 29 and 30 August 2012 because that workforce was (or in the case of 29 August, might have been), deployed to other work sites.

361 In our opinion, it is not reasonably arguable that the judge's conclusion respecting contempts on 29 and 30 August was erroneous. In so concluding, we have given consideration to so much of s 276 of the *Criminal Procedure Act* as could be relevant to an application for leave to appeal from 'conviction' (which by s 3 of that Act includes a finding of guilt) on a charge of contempt.

Grocon conviction application — ground 2

362 It was submitted in writing for the Union that, for the reasons which follow, the evidence was insufficient to support the judge's finding of obstruction of the truck by the Union on the occasion of either of the two incidents on 5 September 2012 in the vicinity of the McNab site. Thus:

(1) as to the first incident, there was no evidence that the men deliberately obstructed the truck;

(2) nor was there evidence that the men were controlled by the Union;

(3) what passed between Reardon and the driver was unknown;

(4) at the time of the second incident, Setka and Reardon were no longer present;

(5) there was no evidence of what Reardon said to the men before he left;

(6) there was no evidence that the man who stood in front of the truck either deliberately obstructed the vehicle, or that he did so on behalf of the Union;

(7) the men, on the second occasion as on the first, were not shown to have acted at the Union's behest.

363 Orally, counsel:

(1) correctly noted that the judge had found only one contempt in respect of the events of 5 September. So, to succeed on this ground, it was

necessary for the Union to establish that neither incident constituted breaching conduct;

(2) submitted that there was no evidence as to why the driver drove his truck away on the first occasion. The 'sympathetic truck driver hypothesis' was not excluded. The actions depicted on the video footage rose no higher than 'creating a suspicion';

(3) submitted that there was no evidence of what passed between the men and the driver on the second occasion.

364 Counsel for Grocon submitted in writing that:

(1) each of the primary facts found by the judge was unchallenged. The video evidence supported those findings;

(2) it had been agreed below that no *Jones v Dunkel* inference was to be drawn from the failure of one or other of the parties to call the truck driver or his employer.

365 Orally, counsel submitted that:

(1) the judge's ultimate conclusions respecting the McNab site incidents[292] were unimpeachable;

(2) it was neither here nor there that the truck driver might have departed on the first occasion because he was sympathetic to the Union's cause. Before that time, free access to the McNab site had been obstructed by the Union;

(3) the judge found that the attendance of the 30 to 40 men had been procured by the Union.[293] They had prevented free access of the vehicle on the second occasion. Reardon had addressed them before he left. The fact that Setka and Reardon were not present at the time of the second incident was beside the point. At very least, the inference was

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292 Liability Reasons [357].

293 Ibid [345].

available that Reardon had not taken any steps to prevent the obstruction on the second occasion.

366 For the A-G, it was submitted in writing that:

(1) as the judge had observed, '[t]he video evidence really does speak for itself';[294]

(2) it was not now disputed that the truck was en route to the McNab site. It was interrupted on the first occasion by a crowd including Setka and Reardon, others in the crowd wearing CFMEU-branded clothing;

(3) whatever Setka and Reardon said to the driver was beside the point. There had already been obstruction of free access by the truck to the site;

(4) it was open to the judge to conclude beyond reasonable doubt, with respect to the second incident, that it was the Union which had obstructed free access. Reardon had addressed the crowd before leaving. Some of the men who remained were wearing CFMEU-branded clothing. The outcome which followed the truck's arrival was the same as on the first occasion.

367 In our opinion, this ground of appeal is without merit. It is not reasonably arguable.

368 It was an inevitable conclusion that the crowd's attendance was procured by the Union. To argue that there was no evidence that the men were controlled by the Union at the time of each of the two incidents flew in the face of the initial presence of Setka and Reardon, their leading role in approaching the truck driver on the first occasion, the address which Reardon gave to the men in the crowd before he left, and the observed conduct of the crowd at the time of the second incident.

369 On the first occasion, as shown on the video footage, free access of the truck, which was on its way to the McNab site, was obstructed by the crowd. About that,

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294 Ibid [361].

there could be no room for doubt. It is fanciful to suggest that an inference was available that the obstruction was other than deliberate. It is significant that two other vehicles, whose destination was not the McNab site, were permitted, after discussion, to pass by the crowd.

370 The obstruction of the truck on the first occasion took place before the Union officials spoke to its driver. It is irrelevant what was said between them.

371 On the second occasion, free access of the truck was obviously obstructed, and deliberately so. The observed fact of a man moving into a position directly in front of an approaching semi-trailer admitted of no other conclusion. The actions of members of the crowd in surrounding the driver when he alighted from the truck was further evidence of obstruction — not that it was required in order to make out the breaching conduct. Again, it is irrelevant what passed between members of the crowd and the driver. The fact of deliberate obstruction was patent on the evidence.

Grocon sentence application — ground 5

372 In oral submissions, counsel for the Union stated that:

> [This ground] only survives in this respect, after some thought, we would adjust and downplay that ground in this respect, that ground 5 complained of the penalty that was visited … at the end of the day we couldn't finally submit that that was outside of the range. If the full panoply were to be established, but what we are submitting is that if the court found that the second incident was not correctly characterised as a contempt by the CFMEU then there might be some reduction of the penalty on that ground, even if you found the first incident made out. So that deal with ground 5 because it's a residual penalty ground if the court took the view that the second incident should not prevail.

373 We have concluded that ground 2, by which the Union contended, in part, that the second incident on 5 September 2012 was not proved to be breaching conduct, is not reasonably arguable. It follows, without there being any need to analyse the precise character of ground 5, that in light of counsel's frank statement of the position the ground must fail. It is not reasonably arguable.

The Boral matter — grounds 1–3

374 As noted in [78] of these reasons, Boral's contempt summons dated 22 August 2013 stated in terms that an order would be sought pursuant to r 75.06 that the defendant 'be punished for contempt of Court'. As was the case in the Grocon matter, there is not now, and never has been, the slightest doubt that Boral is seeking to have the Union punished for a contempt constituted by past events. Nor is there any suggestion that the Union has ever, at any relevant time, been unaware of that fact.

375 In our opinion, there can be no doubt that the CFMEU knew full well, right from the very outset of proceedings against it, that Boral was seeking to have the Union dealt with for criminal contempt.

The Union's submissions before this Court

376 The Union, in challenging the order for specific discovery made below, relied essentially upon the same arguments as it had put forward at first instance. However, as in the Grocon matter, it added a new dimension to those arguments. It relied upon both *X7* and *Lee* (to neither of which Digby J had been referred)[295] as having established definitively what had always been thought to be the law, namely that an alleged contemnor was not obliged to give discovery in proceedings brought against him or her. These two cases were said to have laid down an overarching principle to that effect, based upon the accusatorial system governing such proceedings.

377 Counsel for the Union began his argument by noting that discovery has never been available in *favour* of the Crown against an accused person facing criminal charges.[296]

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295 The former having been decided well before Digby J delivered his judgment, the latter not until after his Honour had ordered specific discovery.

296 The position may be otherwise in other jurisdictions, including parts of the United States. However, there is no general doctrine of criminal discovery in this country.

378 Of course, there is no need for any doctrine of formal discovery to be available *against* the Crown. The prosecution is always under an obligation to make available to the defence any material that might conceivably be relevant to the charges brought, whether that material is inculpatory, or possibly exculpatory. In practical terms, this means that anyone accused of a crime is entitled to see all of the material in the possession, or custody, of the Crown that might bear upon the case against that person. There is no need for a formal request to issue, still less to make use of a subpoena. Typically, all such material is supplied with the prosecution brief, or elicited at committal. The obligation to make available to the defence any unused material of this kind is, of course, a continuing one.

379 In Australia, the prosecution has never had the reciprocal right to gain access to documents, or other evidence, in the possession of the defence.[297] Speaking generally, an accused was entitled to keep such material 'up his sleeve' to be produced at trial, without the Crown having been given any intimation of its existence.

380 Over time, legislation has been introduced to recalibrate the scales in this regard. One of the earlier developments was the requirement that the accused give notice to the prosecution of any alibi upon which that accused might seek to rely. Other changes involved giving notice of expert reports, flagging an intent to rely upon hearsay, and giving tendency and coincidence notices when, somewhat unusually, the defence wished to rely upon evidence of that kind.

381 Of course, the prosecution can obtain allegedly incriminating documents by the exercise of statutory powers, coercive in nature. This may take the form of compulsory examinations conducted by regulatory bodies. Both *X7* and *Lee* concerned the exercise of powers of that kind.

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[297] Of course, this is subject to the availability of a search warrant, or common law powers of search incidental to arrest, which might result in the seizure by the police of relevant, and possibly incriminating documents. Legal professional privilege (now known as client legal privilege under the *Uniform Evidence Acts*) can be claimed in relation to such seizure, but not the privilege against self-incrimination.

382 According to counsel for the Union, any suggested diminution in the protection traditionally afforded to an accused by, for example, the abrogation of the privilege against self-incrimination in relation to corporate entities,[298] has been ameliorated by what the High Court said in *X7* and *Lee*. According to this submission, the High Court has reiterated, and underscored, the right of any person charged with an offence to refuse to say or do anything to assist in the proof of the charges brought against him or her. Merely because a corporate entity can no longer claim the privilege against self-incrimination does not mean that it forfeits all other rights associated with the defence of, what is in effect, a criminal charge.

383 Counsel for the Union further submitted that, although neither *X7* nor *Lee* involved any question of discovery, the broad-ranging statements of principle by the High Court regarding the nature of the accusatorial system meant that the Boral proceeding, which was undoubtedly criminal in nature, should not be conducted as though it were nothing more than an ordinary piece of civil litigation. More specifically, counsel submitted that Boral, as the 'prosecutor', should not have available to it any of the interlocutory processes ordinarily associated with civil proceedings, including, in particular, any form of discovery.

384 In developing that submission, counsel for the Union relied upon a series of cases, most of which predated *X7* and *Lee,* which, counsel submitted, strongly suggested that discovery should not have been ordered in this case.

385 Once again, because of the way in which the Union developed its argument, it may be useful to set out briefly the main points in each of the cases upon which it relied.

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298 *Caltex* (1993) 178 CLR 477; *Daniels* (2002) 213 CLR 543.

Authorities relied upon by the Union

Australian Securities Investments Commission v Sigalla (No 4)

386 The first of these was *Sigalla,*[299] which we discussed at some length at [199]-[209] in relation to the Grocon proceeding. The importance of *Sigalla* to the Union's argument in the Boral matter is self-evident. The difficulties with that decision, as discussed earlier in these reasons, are also apparent.

NSW Food Authority v Nutricia Australia Pty Ltd

387 The next case relied upon by the Union, *NSW Food Authority v Nutricia Australia Pty Ltd,*[300] was not mentioned in written submissions filed on behalf of any of the parties, or in oral argument. It was the Court itself, after the hearing of the application, that drew the case to the attention of the parties. Submissions in writing were then made by the Union and Boral. Unsurprisingly, the Union sought comfort in the decision. Not surprisingly, also, Boral submitted that the case had nothing to say about the present matter.

388 In *Nutricia,* the New South Wales Food Authority had issued the respondent with six separate notices, each requiring it to provide information and certain documents. It did so at a time when criminal proceedings had already been instituted, and further criminal proceedings were contemplated. Each notice contained a detailed set of questions, properly characterised as interrogatories. The respondent sought to have the notices set aside.

389 The notices in question were issued pursuant to certain provisions of the *Food Act 2003* (NSW) ('*Food Act*'). That Act conferred upon the New South Wales Food Authority power to make any enquiries necessary to ascertain whether an offence under the *Food Act* had been, or was being, committed.

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299 (2011) 80 NSWLR 113.

300 (2008) 72 NSWLR 456 ('*Nutricia*').

390 The Court of Criminal Appeal held that the provisions of the *Supreme Court Rules 1970* (NSW) empowering a judge to make orders, and to give directions for the just and efficient disposal of the proceedings, did not grant a judge the power to require a corporate defendant, in summary criminal proceedings in the Supreme Court, to answer interrogatories administered by the prosecutor. Nor did the provisions of the *Food Act.*

391 The reasoning behind this decision was essentially as follows. The administration of detailed interrogatories for the purpose of proving elements of an offence, the subject of extant criminal charges, represented a significant intrusion into the integrity of the courts. Parliament should not be understood, in the absence of a clear statement to that effect, to have intended that a statutory power could be so deployed.

392 The judgment of Spigelman CJ (with whom Hidden and Latham JJ agreed) warrants careful consideration. The Chief Justice was, of course, fully cognisant of the fact that, as a result of the High Court's decision in *Caltex,*[301] and the operation of s 187 of the *Evidence Act 1995* (NSW), a corporation could no longer claim the privilege against self-incrimination. Nor for that matter, could it claim the allied privilege against self-exposure to a penalty.[302] However, the abrogation of these privileges did not dissuade the Court from upholding the challenge to the validity of the notices.

393 *Nutricia* must, of course, be understood in context. It came to the Court of Criminal Appeal by way of a case stated. One of the questions posed for determination involved an assumption as to what lay behind the issuing of the notices. It was assumed that the primary aim was to gain an advantage for the prosecutor in the conduct of the criminal proceedings which would not normally be available in accordance with the ordinary rules of criminal procedure. The question

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301 (1993) 178 CLR 477.

302 *Daniels* (2002) 213 CLR 543.

went on to ask whether there would be any bar to interrogatories if, in fact, the notices had not been issued for either the sole or dominant purpose of obtaining evidence for use in those proceedings.

394 Chief Justice Spigelman noted that there was no High Court authority directly on point. There were, however, a series of apparently conflicting dicta that bore upon the subject.

395 The Chief Justice referred first to the observations of Mason J in *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission,*[303] a case concerned with the power to serve a notice requiring the provision of information pursuant to s 155 of the then *Trade Practices Act 1974* (Cth). Justice Mason stated unequivocally that the section, cast as it was in general terms, did not address itself to the question of contempt of court, and should therefore not be read as authorising any action on the part of the Trade Practices Commission which would amount to such a contempt.[304]

396 Chief Justice Spigelman continued by referring to the observations of Gibbs CJ in *Pioneer Concrete,* that it had not been 'shown that the person who gave the notice had any intention to interfere with the course of justice'. Nor had it been shown that 'there was a real risk that the exercise of the powers under s 155 would, in the circumstances, have that effect'. Chief Justice Gibbs had observed, however, that the power to compel the provision of information was a drastic power, capable of abuse, and to be exercised with care.[305]

397 Having referred at some length to *Pioneer Concrete,* Spigelman CJ went on to cite *Hammond v The Commonwealth,*[306] at that stage, and until *X7* and *Lee v NSWCC,* the leading case on the use of coercive powers of examination bearing upon possible contempt.

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303 (1982) 152 CLR 460 ('*Pioneer Concrete*').

304 *Nutricia* (2008) 72 NSWLR 456 [50], quoting *Pioneer Concrete* (1982) 152 CLR 460, 473.

305 *Nutricia* (2008) 72 NSWLR 456 [52], quoting *Pioneer Concrete* (1982) 152 CLR 460, 467–8.

306 (1982) 152 CLR 188.

398 Chief Justice Spigelman also referred to *Caltex.* His Honour noted that although the High Court had definitively held, in that case, that a corporation could not claim the privilege against self-incrimination, the judgment itself did not have a clear ratio. That was because the documents that had been sought had been the subject of both a notice under a statutory power, and a notice to produce issued pursuant to the rules of court. There were different majorities in relation to the two sources of power. Whereas the statutory power was upheld by a 4:3 majority, the decision had gone against the notice to produce under the rules by that same bare majority. Justice Brennan had exercised the decisive vote. His Honour upheld the validity of the notice issued under the statute, but set aside the notice issued under the rules of court.[307]

399 Importantly for present purposes, Spigelman CJ noted that in *Caltex,* Mason CJ and Toohey J (both of whom favoured denying the privilege against self-incrimination to corporations) distinguished between a power to compel documents, and a power to compel answers to interrogatories. Their Honours observed:

> Plainly enough the case for protecting a person from compulsion to make an admission of guilt is much stronger than the case for protecting a person from compulsion to produce books or documents which are in the nature of real evidence of guilt and are not testimonial in character.[308]

400 Chief Justice Spigelman also referred to *Commissioner of Taxation v De Vonk*[309] as perhaps the authority most closely analogous to *Nutricia.* In *De Vonk,* the Commissioner of Taxation had issued a notice under s 264 of the *Income Tax Assessment Act 1936* (Cth) requiring the respondent to give evidence at a time when criminal proceedings were pending against him. It was held that the privilege against self-incrimination had been abrogated in relation to such notices, thereby putting the respondent in the same position, in that respect, as a corporation.

401 That did not prevent the Full Federal Court in *De Vonk* from holding that the

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307 *Caltex* (1993) 178 CLR 477, 522-3.

308 Ibid 503.

309 (1995) 61 FCR 564 ('*De Vonk*').

particular notice should be set aside. That was because the Court considered that there was a real risk, in the particular circumstances of that case, that requiring the provision of information in response to the s 264 notice would result in interference with the administration of justice.

402 Chief Justice Spigelman observed that a similar analysis had been conducted by Austin J in *Australian Securities and Investments Commission v Elm Financial Services Pty Ltd.*[310] There, his Honour had been concerned with notices under various provisions of the *Australian Securities and Investments Commission Act 2001* (Cth). The notices in that case required persons to attend for examination and/or to produce documents. They were served at a time when there were proceedings on foot in which orders were sought for disqualification of directors because of breaches of duty under the *Corporations Act 2001* (Cth) ('*Corporations Act*'). Justice Austin had held, in the particular circumstances of that case, that unlike the finding in *De Vonk,* there was no real risk to the administration of justice such as might give rise to a contempt.[311]

403 Having considered an extensive body of authority (to only some of which we have referred), Spigelman CJ went on to determine whether the notices in *Nutricia* should be set aside. His Honour distinguished between the 'effect' which answering the notices might have upon extant proceedings, and the 'purpose' for which such notices had been issued. He concluded that if a statutory power, conferred in general terms, was sought to be exercised for the sole or dominant purpose of obtaining evidence to be used in pending proceedings in such a way as to obtain an advantage not otherwise legitimately available, there would be a contempt of court. However, that principle was confined to the exercise of that statutory power for that impermissible purpose. It would not apply where the issuing of the notice merely had the 'effect' of securing such an advantage.

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310 (2004) 186 FLR 295.

311 Ibid 312 [80].

404 In arriving at that conclusion, Spigelman CJ, in language remarkably similar to that later used by the High Court in both *X7* and *Lee,* presciently referred to our system of criminal justice as 'accusatory' in nature. His Honour noted that this term had, in fact, been used on a number of occasions in High Court jurisprudence, and gave a series of examples. He then said:

> The self-incrimination immunity should now be regarded as one manifestation of a broader principle and the broader principle may have other manifestations which are available to corporations. The process of historical development was identified in the dissenting judgment of Deane J, Dawson J and Gaudron J in [*Caltex*], in a manner which is not affected by their Honour's [sic] conclusion that the self-incrimination immunity is available to a corporation.[312]

405 After citing a passage from the dissenting judgment in *Caltex*, Spigelman CJ went on to say:

> The accusatory system is, in my opinion, a fundamental element of our traditional method of determining criminal guilt. A public authority which formally alleges criminal conduct by a person must prove it. As recognised in the reasons of Mason CJ and Toohey J set out at 474 [67]–[68] supra and the observations of Deane J, Dawson J and Gaudron J set out at 490 [153] supra, the accusatory system is not co-extensive with the privilege against self-incrimination. It is derived, as many other aspects of our criminal procedure are derived, from the recognition of the imbalance of power between the State and its citizens. That imbalance extends to corporations.[313]

406 His Honour continued:

> For the reasons I have given above when dealing with question (c), absent a clear statement that the accusatory system is to be abrogated, a statutory power should be read as not authorising steps to compel an accused, the subject of extant charges, to provide information for purposes of those proceedings.
>
> Indeed, the Authority acknowledged the force of such considerations by conceding that it could not issue such a notice once a trial, in the sense of a hearing, had commenced. It propounded the relevant restriction in terms of a fair trial. But that principle is not limited in its application to the actual hearing. It extends to many pre-trial procedures, for example, provision of particulars, presentation of the Crown brief etc. The formal presentation of a charge is a critical step in the criminal justice process. As I have indicated above, a prosecuting authority must be taken to assert that, at that point, it is able to establish guilt beyond reasonable doubt. From that point the

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312 *Nutricia* (2008) 72 NSWLR 456, 490 [152].

313 Ibid [155].

> accusatory nature of our criminal process should be given full effect and, in that regard, would lead to the same conclusion as the application of the doctrine of contempt.
>
> Accordingly, Parliament should be taken not to have intended to impinge upon the accusatory nature of our system of criminal justice, after charges are lain, in the absence of express words or necessary intendment.[314]

407 Chief Justice Spigelman concluded, as had the judge at first instance, that two of the six notices issued by the New South Wales Food Authority were invalid, whereas the remaining four were not. The distinction between those notices that were valid, and those that were not, lay in the fact that the two notices that had been set aside had plainly been issued for the purpose, sole or dominant, of obtaining evidence to be used in the pending criminal proceedings. That had been done in such a way as to gain an advantage which could not be obtained under the procedural rules of the court hearing the criminal matter. Accordingly, the issuing of those notices constituted a contempt of court.

408 That principle did not apply to the exercise of the statutory power in relation to the remaining notices where, on the primary judge's finding, there was no such purpose disclosed.

409 *Nutricia* may be viewed as providing support for the Union's submission that the application for discovery in the Boral matter was a tactic which should not be permitted to succeed.

Jones v Australian Competition and Consumer Commission

410 There are other cases which arguably support the Union's position. One such case is *Jones v ACCC*[315] to which we have previously referred. There, the appellant was found to have breached several orders restraining him from promoting what were alleged to be 'quack' treatments for cancer and other diseases. As a result, he

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314 Ibid 491 [159]–[161].

315 [2010] FCAFC 136.

was declared guilty of a number of charges of contempt, and sentenced to a term of imprisonment.

411 On appeal, it was submitted that the judge at first instance had erred by ruling that the appellant's failure to call two key witnesses brought into play the rule in *Jones v Dunkel* to the effect that an unexplained refusal by a party to give evidence, or to call particular witnesses, could in appropriate circumstances entitle the tribunal of fact to draw an inference that the uncalled evidence would not have assisted that party's case.

412 In concluding that there was no scope for the application of that rule, the Full Federal Court essentially equated a proceeding for contempt, even a 'civil' contempt, with a criminal proceeding, perhaps even akin to a criminal trial.[316]

CFMEU v Director of Fair Work Building Industry Inspectorate

413 The CFMEU also called in aid, in the Boral matter, *Fair Work Inspectorate*[317] to which we have previously referred.

414 The Full Court's characterisation of the Grocon matter as a 'criminal proceeding' for the purposes of the relevant provision of the *FWA* there under consideration, is obviously relevant to both the Grocon and Boral proceedings. At the same time, for reasons which we have explained earlier, the case is not directly in point, and could scarcely be regarded as dispositive.

The submissions on behalf of Boral and the A-G

415 Both Boral and the A-G rejected outright the CFMEU's contention that the Boral proceeding should properly be characterised as 'criminal'.

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316 The Full Court referred to *RPS v The Queen* (2000) 199 CLR 620, 632–3 [26]–]29] and *Dyers v The Queen* (2002) 210 CLR 285, in both of which the High Court had explained why a *Jones v Dunkel* direction should not ordinarily be given to a jury in a criminal trial.

317 [2014] FCAFC 101.

416 These parties submitted that nothing in the wide-ranging dicta regarding the 'accusatorial system' in *X7* or *Lee,* had any bearing upon the legal issues to be resolved in the Boral matter. They further submitted that *Sigalla* and *Nutricia* were distinguishable, as were *Jones v ACCC* and *Fair Work Inspectorate.*

417 Counsel for Boral noted that neither *X7* nor *Lee* had anything at all to do with discovery. Generalised statements as to the importance of the accusatorial process as a feature of our criminal justice system had nothing whatever to do with the obligation that might rest upon a party to discover documents that were potentially relevant to the issues in the Boral matter. Counsel further submitted that it was important to remember that none of the documents sought by Boral contained any information of a confidential, or otherwise sensitive nature. In addition, giving discovery of that mere handful of documents would not require the CFMEU to incriminate itself in any direct manner. The documents were real evidence, just as would be any documents seized pursuant to a search warrant. As both Mason CJ and Toohey J had observed in *Pioneer Concrete,* there was a clear distinction between the production of real evidence, and being forced to answer questions.

418 In addition, counsel for Boral noted that neither *X7* nor *Lee* concerned corporate defendants. In that regard, the fact that the CFMEU, as a corporate entity, was not entitled to claim the privilege against self-incrimination (or the allied privilege against self-exposure to a penalty), meant that some of the more sweeping comments in those cases regarding the accusatorial process carried less weight than they might otherwise have done.

419 Counsel for Boral submitted that the reasoning in *Sigalla* could readily be distinguished from the facts that gave rise to the Boral matter. Counsel noted that Digby J had given careful consideration to that case because it had so clearly formed an important part of Daly AsJ's reasoning in rejecting the application for discovery. Justice Digby had accepted Boral's submission that the proceedings for criminal contempt which, had been pursued in *Sigalla,* ought to be viewed 'within a

framework of certain specific legislation, none of which contained language equivalent to that used in the Rules'.[318]

420 Self-evidently, Digby J did not comment upon or consider either *Nutricia* or *Jones v ACCC* as neither of those cases had been cited to him. However, it was submitted that neither decision, nor for that matter, the recent decision of the Full Federal Court in *Fair Work Inspectorate,* was in point.

421 Counsel for Boral submitted that *Nutricia* was to be distinguished on the basis that Boral had never sought to obtain an advantage to which it was not entitled under the rules governing the conduct of a trial for contempt. Indeed, the documents that Boral sought could just as easily have been obtained from the Union by issuing a subpoena to the relevant CFMEU official.[319] That official would then have had to produce those documents to the court, and Boral would inevitably have been granted access to them. The fact that Boral chose to proceed by way of specific discovery, rather than making use of a subpoena, should be regarded as of no particular significance. Boral's use of specific discovery as its preferred means for obtaining the documents to which it would, in any event, be entitled, was a matter of form and not substance.

422 *Jones v ACCC* was distinguished on the basis that it concerned nothing more than the operation of the rule in *Jones v Dunkel*. In that sense, the reasoning of the Full Federal Court was essentially analogous to that which had been adopted in *Witham* in relation to the standard of proof applicable in such cases.

423 As regards *Fair Work Inspectorate,* counsel submitted that it turned upon the construction of a particular provision of the *FWA* and had no application beyond that.

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318 *Boral Resources (Vic) Pty Ltd v CFMEU* [2014] VSC 120 [18].

319 Boral's argument implicitly adopted the distinction drawn by Mason CJ and Toohey J in *Pioneer Concrete* (1982) 152 CLR 460 between real evidence, on the one hand, and being compelled to answer questions, on the other.

Authorities relied upon by Boral

Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd

424 We turn then to consider the cases upon which Boral specifically relied. The first was *Labrador*.[320] It concerned proceedings in the Supreme Court of Queensland against a corporation and its directors alleging the commission of offences against both the *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth). A preliminary issue arose as to whether the prosecutions were 'criminal proceedings' for the purposes of the *Evidence Act 1977* (Qld).

425 The trial judge held, in relation to both sets of proceedings, that they were civil in nature and that the standard of proof was, accordingly, the civil standard. The Court of Appeal, by majority, reversed that decision.

426 The High Court, in turn, allowed the appeal in part. It held that the elements of each offence charged had to be established beyond reasonable doubt. However, the Court also held that those provisions of the *Evidence Act 1977* (Qld) which would ordinarily be applied in civil cases, and in particular, s 92 dealing with the admissibility of documentary evidence, would also apply to the prosecution of those offences.

427 Justice Hayne said:

> Arguments founded on classification of the proceedings as 'civil' or 'criminal' as determinative of the standard of proof, must fail. As reference to the historical matters mentioned earlier reveals, the classification proposed is, at best, unstable. It seeks to divide the litigious world into only two parts when, in truth, that world is more complex and varied than such a classification acknowledges. There are proceedings with both civil and criminal characteristics: for example, proceedings for a civil penalty under companies and trade practices legislation. The purposes of those proceedings include purposes of deterrence, and the consequences can be large and punishing.
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> In any event, this chain of reasoning, from an a priori classification to a conclusion about standard of proof, treats the relevant Acts as providing no more than background information when, in truth, it is with the terms of the Acts that the inquiry must begin. …

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320 (2003) 216 CLR 161.

> Sections 247 of the *Customs Act* and 136 of the *Excise Act* deal with how Customs prosecutions and Excise prosecutions 'may be commenced prosecuted and proceeded with'. Those three aspects of the matter are to be governed by rules of practice, established by the court in which the proceeding is brought, for Crown suits in revenue matters, or 'in accordance with the usual practice and procedure of [that] Court in civil cases', or in accordance with the directions of the court or a judge.[321]

428 Counsel for Boral submitted that, as with customs and excise prosecutions, which he characterised as a form of 'hybrid' to which features of both civil and criminal procedure attached, so too with prosecutions for criminal contempt. While some of the safeguards traditionally associated with the conduct of criminal trials might well be applicable to such prosecutions (e.g., the criminal standard of proof, the right to make a 'no case' submission without penalty, and the inapplicability of *Jones v Dunkel*), it did not follow that each and every one of those safeguards was applicable to such proceedings.

429 Counsel submitted that it should not be forgotten that contempt, in all its forms, was triable summarily. There was no right, on the part of an alleged contemnor to trial by jury. And although some of the provisions of the *Criminal Procedure Act,* particularly those dealing with rights of appeal, were, of necessity, applicable to proceedings for contempt, it did not follow that such proceedings were in all respects subject to the ordinary rules of criminal procedure.[322]

430 Paraphrasing, and to some extent, echoing what Hayne J had said in *Labrador,* counsel for Boral submitted that the contempt proceedings brought against the Union had 'both civil and criminal characteristics'. That was reflected in the fact that the CFMEU had invoked s 17(2) of the *Supreme Court Act*, as well as O 64 of the Rules, as the basis for its challenge to Digby J's order for discovery. Whereas the Grocon matter fell within the ambit of the *Criminal Procedure Act* when it came to the

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321 Ibid 198–9 [114]–[115] (citations omitted).

322 Self-evidently, many of those rules could not have any application to a summary contempt proceeding. The *Jury Directions Act 2013* provides just one example. There would also be a serious question as to whether the ordinary rules of criminal pleading, including those rules governing joinder and duplicity, and the notice requirements specifically applicable to criminal proceedings under the *Evidence Act* were at all relevant to a trial for contempt. We have already commented upon the matter of duplicity in the context of contempt charges.

Union's appeal against conviction, that Act had no application whatever to the Boral matter.

CFMEU v Boral Resources (Vic) Pty Ltd

431 Counsel for Boral placed considerable reliance upon the decision of this Court in *CFMEU v Boral Resources (Vic) Pty Ltd*.[323] That case, to which we referred at [84]-[86] above, involved an application by the Union for leave to appeal against the addition of the A-G as a party to the Boral proceeding. Leave to appeal was refused. Justice Beach, with whom Osborn JA agreed, said this:

> It may be accepted for present purposes that not all of the rules of civil procedure apply to a proceeding seeking to have a party adjudged guilty of contempt of court. A prime example of a rule which may not apply is a rule requiring an individual party to incriminate himself or herself by giving discovery. However, the mere fact that some rules of civil procedure may not apply in proceedings for contempt does not mean that none of the rules governing civil proceedings apply in such cases. Prima facie, the rules in Ch 1 of the *Supreme Court (General Civil Procedure) Rules 2005* apply to proceedings brought under Order 75 in relation to alleged contempts of court. There is nothing in those rules that make them inapplicable to such proceedings. In this respect, the position under Order 75 may be contrasted with the position in New South Wales where different statutory provisions and rules apply.[324]

432 His Honour then cited the passage in *Hinch*[325] which we have set out at [205] above, and continued:

> While the operation of any rule of court that cuts across protections or privileges given to an accused facing criminal charges might need to be mediated so as to ensure a fair trial of those charges without the loss of relevant privileges and protections, r 9.06 is not a rule that comes within that potential class of rules. The Attorney-General has standing to bring a proceeding alleging the same contempts as are currently alleged in the contempt summons. The applicant accepts, and accepted below, that the Attorney-General has power to protect civil proceedings by applying for the punishment of contempts affecting those proceedings. The only caveat the applicant placed on that proposition below was that this concession was only made in relation to criminal contempts. That caveat is no longer relevant — the applicant contending that the present contempts are criminal contempts. In any event, had it been necessary to determine, I would have determined

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323 [2013] VSCA 378.

324 Ibid [10] (citations omitted).

325 (1987) 164 CLR 15, 89-90.

> that it is at least seriously arguable that the Attorney-General has similar standing to bring proceedings for civil contempts as he has to bring proceedings for criminal contempts. At the very least in my view, the question is sufficiently arguable to justify permitting the Attorney-General to intervene in a proceeding where a point in issue might be whether the contempt alleged is civil or criminal.[326]

433 Counsel for Boral submitted that his Honour had expressed himself in language that was carefully chosen and, in effect, prescient. Justice Beach's qualification regarding discovery was confined, in its terms, to individuals, and centred upon the privilege against self-incrimination. His Honour said nothing whatever about the position of a corporate entity which, of course, could not claim any such privilege.

Hinch v Attorney-General (Vic)

434 Counsel for Boral next drew attention to the key passage in *Hinch*,[327] to which we have already referred on several occasions. He submitted that the effect of that passage was to make it clear that although contempt could be described as a criminal offence, proceedings for contempt did not attract the criminal jurisdiction of the court to which the application was made. In fact, the very opposite was true. Such proceedings attracted the civil jurisdiction only of the court. Accordingly, they could not properly be described as criminal proceedings.

Rich v Attorney-General (Vic)

435 Counsel then drew attention to *Rich v A-G*,[328] once again a case to which we have previously referred, and to which we shall shortly return.

436 In *Rich v A-G*, Winneke P referred, in the course of his reasons, to *Broken Hill Pty Co Ltd v Dagi*.[329] That case concerned a finding against BHP that it had

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326 *CFMEU v Boral Resources (Vic) Pty Ltd* [2013] VSCA 378 [11].

327 (1987) 164 CLR 15, 89.

328 (1999) 103 A Crim R 261.

329 [1996] 2 VR 117 ('*Dagi*').

committed various contempts of court. The proceedings had been commenced under r 75.06 and the orders sought were that the appellant be punished for contempt.

437 A specially constituted Court of five held, by majority, that the appeal should be allowed. This was on the basis that a particular provision of the *Public Prosecutions Act 1994* had stipulated that the Attorney-General alone could apply to a court for punishment of a person for a contempt of court that involved an interference with the due administration of justice. The majority (Brooking, Tadgell and Phillips JJA) concluded that the relevant provision applied to all forms of contempt, civil and criminal, and in respect of both civil and criminal proceedings. The dissentients (Winneke P and Hayne JA) disagreed, holding that the provision was confined to contempts in respect of criminal proceedings.

438 Although in dissent, Winneke P made the following observations regarding the offence of contempt as traditionally understood in this State:

> Notwithstanding that contempt of court is, in theory, an offence punishable on indictment, the exercise of the court's power to punish for contempt has, at least for the whole of this century, been exercised through a summary procedure whether the conduct said to constitute the contempt has interfered with the due administration of criminal justice or civil justice. To that end the court has been moved generally by notice of motion supported by affidavits. That practice was further refined in 1986, by the introduction of specific rules relating to contempt procedure: O 75 of the General Rules of Procedure in Civil Proceedings 1986.
>
> The purpose of these rules was, as their name implies, to regulate procedure in civil proceedings, not criminal proceedings: see Supreme Court (Rules of Procedure) Act 1986. None the less, the summary procedure provided by O 75 has been used to move the court for contempts of criminal process: see *R. v. Kift* [1993] 1 V R 703. The rules are, however, particularly adapted to apply to contempts of civil proceedings and contemplate that the court will exercise its powers on the application of individual applicants. Part 2 of the Order provides a procedure for circumstances where it is alleged that the contemnor has committed a contempt in the face of the court. This Part is entitled 'Summary Proceedings for Contempt'. Part 3 of the Order is entitled 'Other Procedure for Contempt' and is stated to apply to contempts in the face of the court, any other contempt of the court and (in the case of the Supreme Court) contempts of an inferior court. The procedure set out provides for the use of a summons or originating motion: r. 75.06. The procedure by summons is stipulated to be the appropriate procedure where it is alleged that the contempt has been committed by 'a party in relation to a

> proceeding in the Court'. In such a case the summons is to be issued 'in the proceeding': r. 75.06(2). In this rule a proceeding' can only be a civil proceeding: see s 3 of the Supreme Court Act 1986; see also r. 1.04 and r. 1.05 of the rules). Rule 75.06 further provides that where the procedure by way of summons does not apply, the application is to be made by originating motion which is to be entitled 'The Queen' v. the respondent, 'on the application of' the 'applicant'. The summons or the originating motion, as the case may be, is required to specify the contempt alleged to have been committed and to be supported by affidavit material. (These rules would appear to be an adaptation of O. 56 of the High Court rules.)
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> Rule 75.07 provides that 'The Court may, by order, direct the Prothonotary to apply by summons or originating motion for punishment of the contempt'. (This appears to provide a similar procedure to that followed in New South Wales where a judge can refer a matter to the registrar: see Ch. 55.)
>
> This procedure provided by the Rules of Court has, for many years now, provided a flexible and readily adaptable procedure for expeditiously dealing with all manner of contempts constituted by conduct which has arisen unexpectedly and in a wide variety of circumstances. In particular the rules have been drawn to provide a speedy resolution of contempts alleged to have been committed in civil proceedings. To that end r. 75.06 provides for the court to be moved by 'summons in the proceeding' in circumstances where it is alleged that a party to those proceedings is the person guilty of the contempt.[330]

439 Counsel for Boral relied upon both *Rich v A-G* and *Dagi* in support of his submission that the use of the O 75 procedure, in both cases, meant that proceedings for contempt, irrespective of whether the particular contempt alleged be civil or criminal, should be viewed as civil in character. They were, therefore, civil proceedings. Counsel submitted that it was particularly noteworthy that in *Rich v A-G* the contempt in question was undoubtedly criminal, yet was dealt with in the civil jurisdiction of the court, effectively as a civil proceeding.

Environment Protection Authority v Caltex Refining Co Pty Ltd

440 Both Boral, and the A-G relied greatly, in support of the order for discovery made by Digby J, upon the decision of the High Court in *Caltex*.[331] That case of course established that a corporate entity could not claim the privilege against self-incrimination. The principle that lay behind that decision was subsequently applied

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330 Ibid 126–7.

331 (1993) 178 CLR 477.

as well in *Daniels*[332] in relation to the privilege against self-exposure to a penalty. It was also given statutory effect by s 187 of the *Evidence Act.*

441 Counsel for Boral submitted that whatever may have been the position before *Caltex* was decided, the situation regarding discovery by corporate entities facing criminal charges was now radically different.

442 We have previously discussed *Caltex,* albeit primarily through the prism of Spigelman CJ's reasoning in *Nutricia.* The case itself involved a criminal proceeding conducted in the New South Wales Land and Environment Court. As we have indicated, various notices to produce were issued against the company, some of them pursuant to statute, and others under the relevant New South Wales rules. It was held at first instance that the corporate defendant could not claim the privilege against self-incrimination in answer to these notices.

443 The Court of Criminal Appeal reversed that decision. Chief Justice Gleeson, in particular, held that Caltex, despite its corporate status, was entitled to claim the privilege.

444 There were several strands to his Honour's reasoning. One was that it was inherent in the criminal justice system that the prosecution, having brought the charges, should be required to prove its case without the defendant being expected to assist it in any way.

445 Counsel for Boral submitted that the reasoning that had commended itself to Gleeson CJ in the Court of Criminal Appeal was very similar to that which the Union was seeking to employ in basing its case before this Court upon *X7* and *Lee*.

446 However, the difficulty from the Union's point of view was that Gleeson CJ's reasoning had been rejected by the High Court. In other words, that Court at least implicitly held that it was in no way inconsistent with the accusatorial nature of a

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332 (2002) 213 CLR 543.

criminal proceeding for a corporation facing criminal trial to be required to give discovery.

447 It was submitted that neither *X7* nor *Lee* had any effect whatsoever upon the reasoning in *Caltex.* Not only were those cases concerned with individual, rather than corporate defendants, but they had nothing to do with discovery, or other production of documents. *Caltex,* on the other hand, dealt with that very issue, and was, in that sense, directly in point so far as the Boral proceeding was concerned.

The limits of Boral's submission

448 The Court questioned counsel for Boral closely as to the scope of his argument. He was asked whether his client acknowledged any limitations upon discovery against a defendant in a contempt proceeding. In particular, he was asked whether Boral could have obtained general discovery against the Union. It is fair to say that he vacillated somewhat in answering that question. However, ultimately he submitted that general discovery could have been ordered. Indeed, he went so far as to submit that subject to the exercise of the Court's discretion, it was conceivable that Boral would have been permitted to administer interrogatories to the Union.

449 Counsel then reminded the Court that all that Boral had sought in this case was a very targeted order for specific discovery. When asked, on a number of occasions, why Boral had not simply subpoenaed the documents concerned, he responded that it could most certainly have done so. However, it had chosen instead, and for whatever reason, to proceed by way of specific discovery. That was a course legitimately available under the Rules, as the judge below had held.

450 As we have indicated, counsel for Boral submitted that his client's proceeding for contempt should be viewed as a civil proceeding. However, he accepted that a contempt proceeding did not fall within the definition of 'civil proceeding' in s 3 of the *Civil Procedure Act 2010 ('Civil Procedure Act'*). Having regard to the terms in which s 3 is drafted, that concession was plainly correct.

451 Counsel for Boral argued, however, that nothing of any relevance turned upon that fact. A matter could be a civil proceeding for the purpose of the Rules, while at the same time falling outside the definition of civil proceeding in s 3. The only consequence would be that the various overarching obligations contained in the *Civil Procedure Act* would not apply to contempt proceedings.

452 In that regard, it was noted that s 70 of the *Civil Procedure Act* began with the words 'without limiting any other power to make rules of court'. It was further noted that the *Supreme Court Act* itself, in s 25(1)(a), conferred power upon the judges of the court to make rules of the kind contained in ch 1.

453 Counsel for Boral next submitted that there was nothing to suggest that a contempt proceeding, whether brought for civil or criminal contempt, should be viewed as a 'criminal proceeding', still less a criminal trial. Counsel submitted that even if such a proceeding was not to be viewed as 'civil', it could nonetheless properly be regarded as a hybrid, neither wholly civil nor wholly criminal.

454 That last submission prompted a series of questions from the Bench as to which, if any, of the ordinary features of a criminal trial might be applicable to a trial for contempt of court. Plainly, it had been determined that the onus of proof rested throughout upon the prosecution. It was also clear that the standard of proof was beyond reasonable doubt. In the New South Wales statutory context, it had been determined that the ordinary rules governing no-case submissions in civil proceedings were not applicable. Nor, had it been held, was the rule in *Jones v Dunkel.*

455 Nonetheless, as the Court observed, there remained a number of unanswered questions. Some of these related to the possible application of the provisions of the *Evidence Act* to a trial for contempt.

456 In that regard, it should be noted that the term 'criminal proceeding' is defined in the dictionary to the *Evidence Act* as meaning, inter alia, 'a prosecution for an offence'.

457 In *Fitz-Gibbon v Wily*,[333] the Full Federal Court held that a bankruptcy proceeding did not constitute a 'prosecution for an offence' notwithstanding that it would be open to the respondent to seek an order for committal if an order for delivery up was not ultimately obeyed.

458 In *Wong v Kelly*[334] the New South Wales Court of Appeal held that a 'customs prosecution' was not a 'criminal proceeding' for the purposes of the *Evidence Act 1995* (NSW). That decision is consistent with *Labrador*[335] where, as we have indicated, the High Court held that a prosecution in Queensland for an offence under the *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth) was not a criminal proceeding to which the *Evidence Act 1995* (Cth) was applicable.

459 On the other hand, as we have previously noted, proceedings for contempt involving breach of court orders have been held to constitute 'prosecution[s] for an offence', and therefore to be 'criminal proceedings' for the purposes of the *Uniform Evidence Acts*.[336]

460 If that be so, it would seem that a number of the provisions contained in the *Evidence Act* that are specifically applicable only to criminal proceedings might well apply to proceedings for contempt. These include, for example, the provisions governing the competence and compellability of defendants in criminal proceedings,[337] compellability of spouses and others in certain criminal

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333 (1998) 87 FCR 104.

334 (1999) 154 FLR 200.

335 (2003) 216 CLR 161.

336 *Sigalla* (2011) 80 NSWLR 113; *Fair Work Inspectorate* [2014] FCAFC 101 [38]. See also, *Tate v Tate* (2002) 169 FLR 190, which depended in part upon particular provisions of the *Family Court Act 1975* (Cth) and the relevant rules of court.

337 *Evidence Act* s 17.

proceedings,[338] the hearsay exception in criminal proceedings,[339] the reliability of admissions made to or in the presence of investigating officials,[340] silence in the face of questioning,[341] the discretion to exclude admissions on the ground of unfairness,[342] further restrictions on tendency and coincidence evidence in criminal proceedings,[343] further protections applicable to cross-examination of the defendant in criminal proceedings,[344] the exclusion of evidence in criminal proceedings,[345] and the standard of proof in criminal proceedings.[346] It is less certain whether the prosecutor on a charge of contempt would be entitled to comment to the judge upon the failure of the defendant to give evidence.[347]

461 Understandably, counsel for Boral submitted that none of these questions had to be resolved in the present case. All that had to be determined was whether a relatively junior CFMEU official, who had allegedly conducted himself in a particular way, had done so with the authority and approval of the Union. In order to establish such authority and approval, discovery of a handful of documents was sought from the Union, a corporate entity that could not claim the privilege against self-incrimination. That scarcely warranted the invocation of the most far-reaching, and sweeping assertions of human rights.

462 Finally, both counsel for Boral and counsel for the A-G submitted that, contrary to what the CFMEU had submitted, the orders Boral had obtained were not unprecedented. In fact, there were at least two cases in which orders for discovery

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338 Ibid s 19.

339 Ibid s 65.

340 Ibid s 85.

341 Ibid s 89.

342 Ibid s 90.

343 Ibid s 101.

344 Ibid s 104.

345 Ibid s 137.

346 Ibid s 141.

347 Section 20 of the *Evidence Act* prohibits such comment by a prosecutor, but this section applies only in a 'criminal proceeding for an indictable offence'. Although, in theory, contempt of court is an indictable offence, the fact is that it is invariably prosecuted summarily.

had been made, in this country, against defendants in what were unquestionably criminal proceedings.

Calderwood v SCI Operations Pty Ltd

463 The first of these was *Calderwood*,[348] a decision of Gray J in the Industrial Relations Court of Australia. In that case, three informations had been laid against each of two defendants alleging the commission of offences under a particular provision of the *Industrial Relations Act 1988* (Cth). In each proceeding a summons had been served on the defendant. The procedure of information and summons was stipulated under the relevant Industrial Relations Court rules.

464 Justice Gray understood that in each case the defendant had been charged with a criminal offence. Each defendant was a corporation. In each proceeding the prosecutor had served upon the defendant a notice requiring the defendant to give discovery of documents. In addition, the prosecutor had served upon each defendant a subpoena requiring specific documents to be produced in answer thereto. The defendants objected to each discovery notice and also sought an order that they not be obliged to comply with it. Each defendant also sought to have the subpoena served upon it set aside.

465 Justice Gray dismissed both sets of complaints. His Honour held that there was nothing on the face of the relevant rule to show that the word 'party' in that rule was to be construed as meaning only a party to a civil proceeding. Nor was there anything in the relevant rules that excluded a defendant in a criminal proceeding from being a proper subject of a subpoena for production. The fact that a corporation could not claim the privilege against self-incrimination, whether at common law, as a result of *Caltex*, or as a result of s 187 of the *Evidence Act 1995* (Cth), provided support for the proposition that both discovery, and the subpoena for production, could be invoked to obtain the documents sought.

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348 (1995) 130 ALR 456.

466 In arriving at that conclusion, Gray J was significantly influenced by the decision of the Full Court of the Federal Court in *Abbco Iceworks,*[349] to which the judge at first instance referred, and to which we have briefly adverted. His Honour specifically distinguished *Noack v General Motors-Holdens Ltd,*[350] where Forster J had held that discovery was not available *against* a prosecutor in criminal proceedings. In the course of doing so, Forster J referred to a long line of authority to the effect that discovery could never be invoked in any such proceedings.[351]

467 Justice Gray noted that in *Sobh v Police Force of Victoria,* Brooking J had carefully examined the various authorities dealing with discovery in criminal proceedings, and had said:

> Neither the Crown nor the accused has the right to obtain production by the other for inspection of all documents relevant to the issues arising on a criminal trial. The exemption of the accused from any process of discovery is absolute. *It flows from the privilege against self-incrimination*…[352]

468 Justice Gray, focussing upon the precise language used in that passage, noted that, having regard to the fact that the privilege was no longer available to corporations, Brooking J's observation in *Sobh* might need to be reconsidered. His Honour concluded that corporate defendants had available to them sufficient safeguards under the accusatorial system, primarily through the fact that the onus of proof rested upon the prosecution in criminal cases. In relation to a corporation, from which the privileges against self-incrimination and self-exposure to a penalty had been removed, there was no particular reason why a prosecutor should not be able to use evidence supplied directly, albeit unwillingly, by the corporate defendant in order to discharge that onus of proof.

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349 (1994) 52 FCR 96.

350 (1985) 11 FCR 122.

351 The 'long line of authority' to which his Honour referred consisted of *Lord Montague v Dudman* (1751) 2 Ves Sen 396; *Naismith v McGovern* (1953) 90 CLR 336; *Maddison v Goldrick* [1975] 1 NSWLR 557, in all of which the point made was by way of dicta.

352 *Calderwood* (1995) 130 ALR 456, 465, quoting *Sobh v Police Force of Victoria* [1994] 1 VR 41, 41 ('*Sobh*') (emphasis added).

469 A second case in which it had been held that discovery was available against a corporate defendant facing criminal charges was *Woods v Skyride Enterprises Pty Ltd*.[353] There E M Heenan J held that, as the corporate defendant could not claim either the privilege against self-incrimination, or the privilege against self-exposure to penalty, there was no reason why it should not be ordered to give, at least, specific discovery.

Submissions on behalf of the A-G

470 Counsel for the A-G supported Boral's submissions regarding discovery, but also added to them. He relied primarily upon a close textual analysis of the Rules. He argued that the starting point, when considering Boral's application for specific discovery, was r 1.05. He submitted that a proceeding for contempt, of the kind instituted by Boral, should be regarded as a 'civil proceeding' for the purposes of the Rules. Accordingly, ch 1 of the Rules, in its entirety, governed all procedural aspects associated with the conduct of that proceeding.

471 It was readily conceded, on behalf of the A-G, that a contempt proceeding could not be viewed as a 'civil proceeding' for all purposes. It was plainly to be regarded as a criminal proceeding for the purposes of the appeal provisions contained in the *Criminal Procedure Act*.

472 Counsel accepted that a contempt proceeding did not fall within the definition of 'civil proceeding' in s 3 of the *Civil Procedure Act*. He accepted that for the purposes of that definition, a contempt proceeding should be viewed as being criminal in nature, or at the very least, 'quasi-criminal' within the meaning of that expression. It did not follow that a contempt proceeding was not to be regarded as a 'civil proceeding', at least for the purpose of the Rules.

473 Counsel for the A-G submitted that it was of some significance that the

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353 [2012] WASC 4 ('*Woods*').

CFMEU had itself invoked the Rules, rather than any form of criminal procedure, in seeking leave to challenge the order for discovery made below.

474 Counsel next submitted, in response to questions from the Bench, that although the Boral matter was only concerned with the correctness or otherwise of an order for specific discovery, Digby J would have been entitled, had his Honour been asked to do so, to order general discovery.[354] He joined with counsel for Boral in submitting that his Honour would also have been entitled to permit Boral to administer interrogatories, and to require the Union to answer them.[355] He accepted, however, that a judge might, as a matter of discretion, be somewhat circumspect about permitting interrogatories, in particular, to be served.

475 Finally, counsel reminded the Court that the Boral matter involved an application for leave to appeal against an interlocutory decision, and not an appeal as of right. In accordance with established principle, leave to appeal should only be granted where the decision under challenge was wrong (or at least attended with sufficient doubt to justify granting leave) and substantial injustice would be done by permitting the decision to stand.[356] Moreover, the Union had to overcome at least one additional, and significant, hurdle. In so far as it sought to attack the exercise of the trial judge's discretion in ordering specific discovery, it was obliged to bring its challenge within the principles laid down in *House v The King*.[357]

476 In that regard, it was submitted that Digby J's decision was plainly correct. At the very least, it was not attended with sufficient doubt to justify granting leave. However, even if the Union overcame that hurdle, it would inevitably fall at the next. On no view could it be said that it would suffer substantial injustice if the order for specific discovery were permitted to stand. That was because the very documents that Boral sought could have been obtained by subpoena. Even if the

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354 The Rules, r 29.11.

355 The Rules, O 30.

356 *Niemann v Electronic Industries Ltd* [1978] VR 431, 433.

357 (1936) 55 CLR 499.

Union succeeded in this appeal, Boral could still obtain those documents by the simple device of using that alterative mechanism.[358]

Conclusion re Boral matter

477 In our view, there is no answer to the respondents' submission that leave to appeal should be refused, at least on the basis that the Union will suffer no substantial injustice if the order for specific discovery is permitted to stand. The documents that Boral seeks include those recording the telephone numbers of certain CFMEU executives, and documents evincing the terms and conditions of employment of Mr Myles. There is no doubt that these documents are highly relevant. Of course, they are also potentially damaging to the Union's defence.

478 However, it does not follow that permitting the order for specific discovery to stand will give rise to 'substantial injustice' to the Union. The question is not whether these documents may damage its case, but whether it would be unjust to allow Boral to gain access to them. It is at that point, at the very least, that the Union's case falls away.

479 The documents in question could have been obtained by the simple device of issuing one or more subpoenas for production. That course remains open. Plainly, if there are no documents meeting the relevant description, there will be nothing for the Union to discover. The same will be true in answer to any subpoena. The fact that Boral chose, for whatever reason, to invoke one mechanism for discovery, rather than another, when both were equally available, does not entitle the Union to say, on an application for leave to appeal against an interlocutory order, that it will suffer substantial injustice unless the decision below is set aside. In truth, it will suffer no real injustice whatever.

480 Justice Digby was satisfied that there existed 'special circumstances' within the meaning of r 29.07 justifying the exercise of the Court's discretion in favour of

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358 *Niemann v Electronic Industries Ltd* [1978] VR 431.

Boral. Certainly, that finding is not attended with sufficient doubt to justify granting leave to appeal. His Honour engaged in a meticulous analysis of the principles governing the exercise of the discretion, and his decision was, in that respect, unimpeachable.

481 That would be sufficient to dispose of this application. In deference to the extraordinarily detailed arguments put forward by all parties, however, and because of the importance of some of the issues raised, we consider it appropriate to set out our views on the merits of the case.

482 There can be no doubt that the law regarding what is still described as civil contempt is in an unsettled, and uncertain, state. Each side was able to call in aid a significant body of authority in support of its contention.

483 On behalf of the CFMEU, the cases relied upon included *Witham, X7, Lee, Sigalla, Nutricia,* and *Fair Work Inspectorate*. On the other hand, Boral and the A-G relied upon, *Labrador, Hinch, Caltex, Daniels, Calderwood, Woods, Rich v A-G, Abbco Iceworks, Clarkson* and *CFMEU v Boral Resources (Vic) Pty Ltd.*

484 In addition to the authorities upon which the parties specifically relied, there are other cases that bear upon the matters in dispute.

485 In *Rich v Australian Securities and Investments Commission,*[359] ASIC applied to the Supreme Court of New South Wales for declarations under the relevant provisions of the *Corporations Act* that two directors of a company, then in liquidation, had contravened s 180(1) of that Act. ASIC sought orders that the directors pay compensation to the company, and also that the directors be disqualified from managing a corporation for such period as the Court considered appropriate.

486 Section 1317L of the *Corporations Act* required the Court to apply the rules of evidence and procedure for civil matters when hearing proceedings of this kind. The

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[359] (2004) 220 CLR 129 ('*Rich v ASIC*').

directors were ordered by a judge at first instance to make discovery of documents by verified list. The Court of Appeal upheld that decision, characterising the power to disqualify a director as 'purely protective' and not 'punitive'. The High Court, by majority, reversed that decision. It held that the distinction between punitive and protective purposes was a false dichotomy, and that disqualification proceedings were, relevantly, to be classed as punitive. Accordingly, each director was entitled to invoke the privilege against penalty or forfeiture in order to avoid discovery. It would not have been sufficient, in order to give full effect to the privilege, to require them to make discovery and then object to the production of any given listed document. To approach the matter in that way might lead to the very mischief the privilege was designed to prevent.

487 The joint judgment of the majority had this to say:

> Although the privilege against exposure to penalties had its origins in the rules of equity relating to discovery, when discovery and interrogatories were provided for under the rules made under the *Judicature Act*, the Court of Equity's principle (that an order for discovery or for the administration of interrogatories in favour of the prosecutor, whether the prosecutor was the Crown or a common informer or some other person, should not be made where the proceeding was of such nature that it might result in a penalty or forfeiture) was applied more generally. As was further pointed out in the joint reasons in *Daniels Corporation*, the privilege against exposure to penalty now serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it. That is not to say that the privileges against exposure to penalties or exposure to forfeitures are substantive rules of law, like legal professional privilege, having application beyond judicial proceedings. In the present matter, however, the only issue is about the application of these privileges to discovery in judicial proceedings. No wider question arises.[360]

488 Perhaps surprisingly, none of the judgments delivered in *Rich v ASIC* made any reference at all to *Caltex*. It is impossible, in those circumstances, to see the reasoning in *Rich v ASIC* as being in any way inconsistent or incompatible with *Caltex*.

489 It could, of course, be argued that *Rich v ASIC* lends some support to the

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360 Ibid 142 [24] (citations omitted).

Union's opposition to having been required to give specific discovery to Boral. However, it must be remembered that that case concerned two individuals, each of whom was fully entitled to claim the privilege against self-incrimination. That stands in stark contrast to the Union's position.

490 We should also refer to *Re Application by Commissioner of the Australian Federal Police,*[361] a judgment of Ginnane J. The question that arose was whether the Commissioner could obtain an order for discovery against an individual who was bound by a restraining order issued under the *Proceeds of Crime Act 2002* (Cth) ('*Proceeds of Crime Act*'), and who was seeking to have that order revoked. The property alleged to be the proceeds of crime was the sum of $4.3 million. That sum was contained in two bank accounts that the respondent, a Buddhist nun and president of a Buddhist temple in Malaysia, claimed to be her property.

491 The Commissioner applied under r 6.093 of the *Supreme Court (Criminal Procedure) Rules 2008* for orders for discovery. Justice Ginnane rejected that application. His Honour accepted that although the rules in question were designated as criminal procedure rules, proceedings concerning restraining orders were to be characterised as civil in nature. He noted that despite that characterisation, the provisions of the *Civil Procedure Act* had no application to the matter before him.[362]

492 Justice Ginnane referred to *Director of Public Prosecutions (Vic) v Thomas*,[363] where Morris J had held that the court could require persons seeking to have their interest in a property excluded from a forfeiture order under the *Confiscation Act 1997* to make discovery. Justice Ginnane accepted that he had the power to make an order for discovery in proceedings under the *Proceeds of Crime Act*, despite their quasi-criminal nature. However, his Honour observed that there were important

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361 [2013] VSC 686.

362 *Civil Procedure Act*, s 4(2)(d).

363 [2005] VSC 421.

qualifications to that statement. In exercising the power to give directions, the court might well decline to make an order for discovery, for instance, where the relevant legislation under which the proceeding was brought contained its own provisions enabling the Commissioner or an authorised officer to obtain documents compulsorily, by other means.

493 Justice Ginnane's reasoning is, to some extent, analogous to our own in so far as we have concluded that Boral's ability, by other means, to obtain the specific documents sought, means that the Union will not suffer substantial injustice if the decision below is permitted to stand.

494 In summary, there is not a single case, among the vast array to which we were referred, and to which we ourselves have had regard, that is dispositive of the detailed arguments advanced by the parties. Indeed, it might also be said that none of those authorities are directly in point.

495 In our view, however, the respondents are correct in saying that *Caltex* presents a major, if not insuperable, obstacle to acceptance of the Union's submissions.

496 Essentially, the Union relies upon the long-standing proposition that the civil rules for discovery have no application to criminal trials. It then moves from that proposition to a separate submission that those particular rules have no application to 'criminal proceedings'. From there, it characterises contempt proceedings, where punishment is sought, as criminal proceedings. It relies in particular upon *Witham,* and its characterisation of civil contempt as effectively criminal in nature. The syllogism is then said to be complete.

497 The problem with all this is that a contempt proceeding cannot simply be characterised, for all purposes, as a criminal proceeding. Plainly, a description of that kind may be apt for some purposes, but that is not inevitably the case.

498 Putting authority to one side, it is clear that contempt proceedings are brought

within the civil jurisdiction of the Court. At the very least, a number of the rules contained within ch 1 apply to such proceedings. Justice Hayne's observations in *Labrador* are particularly apposite in this regard. Contempt proceedings, like those for pecuniary penalties in *Customs Act* matters, have a certain chameleon-like quality. They take their character from their surrounding circumstances, and the context within which the analysis proceeds.

499 We acknowledge that due weight should be accorded to *Sigalla,* where White J found that contempt proceedings were properly to be characterised not merely as 'criminal in nature', but also to be governed, wherever possible, by the rules that governed criminal procedure, and evidence in criminal proceedings. We note, however, that the issue in *Sigalla* was simply whether the consequence of making an unsuccessful no-case submission was loss of an automatic right to adduce evidence. As we have said, the case had nothing whatever to do with discovery, or any more substantive right than that.

500 As a matter of *stare decisis,* although not strictly bound by the decision of this Court in *CFMEU v Boral Resources (Vic) Pty Ltd,*[364] we should, of course, as a matter of comity, accord appropriate weight to the reasoning in that case. There, as we have said, the Court concluded that the Boral proceedings, though capable of being described as 'criminal' in relation to the contempt alleged, did not attract the criminal jurisdiction of the Court. Rather, they were governed by the civil jurisdiction, and the rules ordinarily applicable in that jurisdiction.

501 Justice Digby accepted that a party charged with criminal contempt might properly be granted dispensation from some parts of the Rules to ensure that that party's rights were adequately protected. In his Honour's view, the appropriate mechanism for safeguarding those rights was the sound exercise of judicial discretion.

502 It must be remembered, however, that the Boral matter does not concern the

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364 [2013] VSCA 378.

rights of an individual. It concerns, instead, allegations of contempt against a legal entity that cannot, in law, claim any privilege in answer to an order for discovery. It is not for this Court to question what the High Court has said in that regard, still less, what the Legislature has, as a matter of policy, chosen to enact.

503 It does not follow that companies, and other like entities charged with having committed criminal offences are to be treated less fairly, in other respects, than individual accused. Nor does it follow, however, that such bodies have the same entitlement to immunity from discovery that individuals traditionally have had, that entitlement being in part at least based upon the right to invoke the privilege against self-incrimination. In the end, the most potent safeguard against abuse in such cases may well lie in the sound exercise of judicial discretion.

504 We see no error in Digby J's conclusion that the Associate Justice against whose decision the appeal was brought, was wrong to refuse specific discovery simply on the basis that this was a criminal proceeding, and therefore the Rules had no application. The Boral matter should not have been so characterised. Its actual status was more complex than that. Once her Honour had characterised the matter as she did, it was not at all surprising that she did not go on to consider whether, in the proper exercise of discretion, specific discovery should be ordered. Nonetheless, her failure to have done so meant that the discretion had to be exercised afresh, whether by Digby J, or on remitter.

505 Plainly, a number of the issues raised in this application involve matters as to which reasonable minds may differ. It has long been a truism that discovery is not available against an accused in a criminal proceeding.[365] *Caltex*, did, after all, represent a radical shift in the law as it had long been understood. Some of the implications of that decision are still to be fully grasped.

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365 Indeed, the CFMEU submitted that the converse was true. It cited *R v Naramatsu Hamiguchi* [1908] St R Qd 224 as well as *Clarkson* [1990] VR 745 for the proposition that discovery cannot be compelled in criminal proceedings.

506 It follows for the reasons set out above that the Union's application for leave to appeal should be refused.

Orders

507 In the Grocon matter, we dismiss the notice of appeal commenced under O 64 of ch 1 of the Rules. In respect of the notices of application for leave against conviction and sentence brought in reliance upon ss 274 and 278 of the *Criminal Procedure Act*, we grant leave to the applicant to appeal on sentence ground 3, but dismiss the appeal. We refuse leave to appeal against conviction on grounds 1 and 2 and on sentence ground 5.

508 In the Boral matter, we refuse the application for leave to appeal.

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SCHEDULE

Grocon (S APCR 2014 0072):

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION	Applicant
- and -	
GROCON CONSTRUCTORS (VICTORIA) PTY LTD (ABN 98 148 006 624)	First Respondent
GROCON (FCAD) PTY LTD (ACN 143 621 514)	Second Respondent
GROCON CONSTRUCTORS (VIC) PTY LTD (ABN 88 127 996 436)	Third Respondent
ATTORNEY-GENERAL FOR THE STATE OF VICTORIA	Fourth Respondent

Grocon (S APCI 2014 0040):

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (which is sued on its own behalf and pursuant to Order 18 of the *Supreme Court (General Civil Procedure) Rules 2005* as representing: a) all persons who were on 17 August 2012 or are now, or have at any time since 17 August 2012 been present at the picket lines at the premises of McNab Avenue, Footscray, in the State of Victoria; b) all persons who were on 22 August 2012 or are now, or have at any time since 22 August 2012 been present at the picket lines at the premises of the Emporium construction site between Little Bourke St and Lonsdale Street, Melbourne, in the State of Victoria)	First Appellant
SHAUN REARDON	Second Appellant
DEREK CHRISTOPHER	Third Appellant
ELIAS SPERNOVASILIS	Fourth Appellant
NOEL WASHINGTON	Fifth Appellant
JOHN SETKA	Sixth Appellant
BILL OLIVER	Seventh Appellant
RALPH EDWARDS	Eight Appellant

GARETH STEPHENSON — Ninth Appellant

- and –

GROCON CONSTRUCTORS (VICTORIA) PTY LTD (ABN 98 148 006 624) — First Respondent

GROCON (FCAD) PTY LTD (ACN 143 621 514) — Second Respondent

GROCON CONSTRUCTORS (VIC) PTY LTD (ABN 88 127 996 436) — Third Respondent

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA — Fourth Respondent

Boral (S APCI 2014 0038):

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION — Applicant

- and -

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

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

BORAL BRICKS PTY LTD (ACN 082 448 342) — Third Respondent

BORAL MASONRY PTY LTD (ACN 000 223 718) — Fourth Respondent

BORAL AUSTRALIAN GYPSUM LTD (ACN 004 231 976) — Fifth Respondent

BORAL WINDON SYSTEMS LTD (ACN 004 069 523) — Sixth Respondent

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA — Seventh Respondent