CASE NOTE

ENVIRONMENT PROTECTION AUTHORITY v CALTEX REFINING CO PTY LTD CORPORATIONS AND THE PRIVILEGE AGAINST SELF INCRIMINATION*

In discussing the entitlement of corporations to the privilege against self-incrimination in a previous issue of this journal,[1] Ramsay concluded "it is likely that the question whether the privilege against self-incrimination extends to corporations will persist and be the cause of serious uncertainty until determined by the High Court of Australia".[2] The High Court has recently determined the matter. In *Environment Protection Authority v Caltex Refining Co Pty Ltd*,[3] ("*EPA v Caltex*")a majority of the Court concluded that the privilege against self-incrimination does not extend to corporations. Despite this, as will be seen, there remains some uncertainty as to the rights of corporations when required to produce evidence in court.

I. THE FACTS

The case arose from charges laid by the State Pollution Control Commission (now the Environment Protection Authority) against Caltex Refining Co Pty Ltd in

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1 "Corporations and the Privilege Against Self-incrimination" (1992) 15 *UNSWLJ* 297.

2 *Ibid* at 312.

3 (1993) 178 CLR 477.

1990. In relation to these charges Caltex was served with a notice pursuant to s 29(2)(a) of the *Clean Waters Act* 1970 (NSW) and a notice to produce in accordance with the rules of the Land and Environment Court. Both notices required the production of documents.

Caltex applied to the Land and Environment Court for a ruling that it was not obliged to produce these documents on several grounds, including its right to the privilege against self-incrimination. Justice Stein held that corporations were not entitled to the privilege self-incrimination and then stated several questions of law to be determined by the Court of Appeal. The first of these questions was: Whether an incorporated company is entitled to a privilege commonly known as privilege against self-incrimination. The Court of Appeal overturned his Honour's decision, concluding that a corporation is entitled to the privilege against self-incrimination.[4]

II. THE DECISION OF THE HIGH COURT

A majority of the High Court (Mason CJ, Brennan, Toohey and McHugh JJ) in three separate judgments, concluded that corporations are not entitled to the privilege against self-incrimination.

A. The Judgments of Mason CJ and Toohey J and the Judgment of McHugh J

Chief Justice Mason and Toohey J delivered a joint judgment in which they held that corporations are not entitled to the privilege against self-incrimination. The judgment of McHugh J, though different in detail, is substantially the same. It is therefore convenient to deal with these judgments together.

In both judgments, their Honours began by a consideration of existing common law authority. Each recognised that, given the uncertain state of this authority, it provides little guidance for the High Court. Whilst courts in England, New Zealand and Canada (before the enactment of the Canadian Charter of Rights and Freedoms) have held that the privilege extended to corporations,[5] the position has recently been doubted by the House of Lords.[6] Further, courts in the United States have long held that a corporation is not entitled to the privilege.[7] In the light of this, their Honours considered that the matter was to be determined by consideration of the history and policy of the privilege. Their Honours considered that there were essentially three bases upon which the privilege could be justified.

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4 *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118.

5 *Triplex Safety Glass Co v Lancegaye Safety Glass Ltd* [1939] 2 KB 395; *Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation* [1978] AC 547; *Webster v Solloway Mills & Co* [1931] 1 DLR 831; *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191.

6 *Istel Ltd v Tully* [1993] AC 45, at 53, 58, 63-4.

7 *Hale v Henkel* 201 US 43 (1906).

(i) Protection of the Individual from Abuse of Power and Loss of Freedom and Dignity

The protection of the individual from abuse of power and loss of dignity and freedom is a central purpose of the privilege. According to their Honours, the privilege against self-incrimination emerged as a reaction to the draconian use of the ex-officio oath by ecclesiastical courts and the Court of Star Chamber. It was subsequently recognised in common law courts as a privilege against answering any incriminating question.[8] Thus the privilege developed "to protect individual human persons from being compelled to testify, on pain of excommunication or physical punishment, to their own guilt".[9] However, their Honours recognised that the historical justification for the privilege is distinct from its modern rationales. In modern times the privilege is justified on grounds which reflect, but are not solely determined by, the history of privilege. The protection it provides individuals has been much more widely construed. The privilege has come to be regarded not only as a protection against abuse of power but as a "human right" based on the desire to protect personal freedom and human dignity.[10]

Their Honours agreed that this aspect of the privilege in no way justified its application to corporations. It is inherent in the nature of corporations that they have no need for protection from abuse of power and loss of dignity.[11] They have "no body to be kicked or soul to damned".[12]

Justice McHugh went on to consider an argument often put against this conclusion: that although the privilege is not necessary to protect corporations themselves it is necessary to protect individual members of corporations against the consequences of punishing the corporation. This argument has most force in relation to small corporations where the consequences of the conviction and punishment of the corporation for its members are likely to be most serious. It impressed both Gleeson CJ in the Court of Appeal[13] and du Parcq LJ in *Triplex Safety Glass Co v Lancegaye Safety Glass Limited.*[14] However, McHugh J argued:[15]

> There is a strong doctrinal argument against it. The privilege cannot be claimed because third parties are to be incriminated.[16] Further an individual witness is not entitled to the benefit of the privilege against self-incrimination if the only ground for the claim is that he or she will be adversely affected by the production of the

8 *Wigmore on Evidence*, Vol 8, McNaughton Rev 1961 at [2250].

9 Note 3 *supra* at 498, per Mason CJ and Toohey J.

10 *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 150 per Murphy J. See also *Pyneboard v Trade Practices Commission* (1982) 152 CLR 328 and *Controlled Consultants v Commissioner for Corporate Affairs* (1985) 156 CLR 385 where his Honour expressed his view that the privilege against all self-incrimination was not available to corporations. In these cases the other members of the High Court did not consider it necessary to decide the issue.

11 Note 3 *supra* at 498.

12 *British Steel v Granada Television* [1981] AC 1096 at 1127 per Lord Denning.

13 Note 4 *supra* at 128.

14 Note 5 *supra* at 409.

15 Note 3 *supra* at 549.

16 *Rochfort*, note 10 *supra* at 145; *Rio Tinto Zinc* note 5 *supra* at 637-8.

> evidence ... members of a corporation may be adversely affected by the conviction of a corporation, but they are not convicted. It is difficult to see why any adverse effect on the members should entitle the corporation to refuse to produce the evidence.

(ii) Maintenance of Balance Between the Individual and the State

The modern rationales for the privilege against self-incrimination are not confined to the protection of the individual. There are two further bases upon which the privilege is justified. The first of these is that the privilege "assists to hold a proper balance between the powers of the State and the rights and interest of citizens".[17] Chief Justice Mason and Toohey J were quick to dismiss this as a basis upon which the privilege could be extended to a corporation. They held:[18]

> [W]e reject without hesitation the suggestion that the availability of the privilege to corporations achieves or would achieve a correct balance between state and corporation. In general, a corporation is usually in a stronger position vis-a-vis the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons ... Accordingly, in maintaining a 'fair' or 'correct' balance between state and corporation, the operation of the privilege should be confined to natural persons.

Justice McHugh also rejected this opinion and went on to say that, even assuming that an artificial entity such as a corporation can be regarded as a citizen, this argument provides no basis for the extension of the privilege to corporations. In his Honour's view the "qualitative" difference between artificial entities and real persons means they cannot be equated with individuals for the purpose of determining their rights and obligations. The separation of its legal personality from the personality of the individual corporations, accords the corporation benefits and therefore justifies greater interference.[19]

(iii) The Preservation of the Accusatorial System

There remains one justification for the privilege against self-incrimination. Chief Justice Gleeson held that:[20]

> the privilege is a significant element maintaining the integrity of our accusatorial system of criminal justice, which obliges the Crown to make out a case before the accused must answer.

Their Honours considered that this is the most compelling reason in favour of the extension of the privilege against self-incrimination to corporations. However, they did not consider it sufficient. The argument of Mason CJ and Toohey J is twofold. Firstly, their Honours argue that the denial of the privilege against self-

17 Note 4 *supra* at 127.
18 Note 3 *supra* at 500.
19 *Ibid* at 550.
20 Note 4 *supra* at 127.

incrimination to corporations would not fundamentally impair the accusatorial system of justice since:[21]

> The fundamental principle that the onus of proof beyond reasonable doubt rests upon the Crown would remain unimpaired as would the companion rule that an accused person cannot be required to testify to the commission of the offence charged.

Secondly, their Honours referred to the unique difficulties which the privilege against self-incrimination imposes in the regulation of corporate crime. Since corporate crime is not usually detectable without access to the documents of a corporation, the availability of the privilege to corporations disproportionately hinders the prosecution of corporations for a criminal offence.[22]

Their Honours concluded that, whilst some of the rationales for the privilege against self-incrimination militate in favour of its application to corporations, "when all the considerations are taken into account they compel the conclusion that the privilege against self-incrimination in its entirety is not available to corporations".[23]

Justice McHugh accorded similar weight to this argument in favour of the extension of the privilege to corporations. Indeed, his Honour commented:[24]

> If the only rationale of the privilege was the need to maintain the integrity of the adversary system, it might be difficult to deny its application to a corporation or granting it to an individual even though a corporation itself cannot give evidence.

However this justification must be weighed against the harm to the administration of justice which would result from allowing corporations to claim the privilege.[25] Like Mason CJ and Toohey J, McHugh J referred to the particular difficulties the privilege against self-incrimination imposes for the detection and punishment of corporate crime which, in his opinion, "has enormous social impact".[26] His Honour considered that requiring the production of pre-existing documents, as would be the case if corporations were denied the protection of the privilege against self-incrimination, is different from requiring a witness to answer questions:[27]

> In producing such documents, the corporation is not creating evidence against itself as would occur if an individual should be compelled to give incriminating answers. The documents already exist. In light of the extensive inroads made by legislatures into the privilege by requiring the production of corporate documents, it is difficult to maintain that the adversary system and civil proceedings would be impaired if the privilege is held not to apply to corporations.

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21 Note 3 *supra* at 503.
22 *Ibid* at 503-4.
23 *Ibid.*
24 *Ibid* at 551.
25 *Ibid* at 553.
26 *Ibid* at 555.
27 *Ibid.*

This is particularly so since the documents can be obtained by search warrant and, assuming that they are relevant to the offence could not be altered or destroyed without committing the offence of attempting to pervert the course of justice.[28]

B. The Judgment of Brennan J

Justice Brennan, the fourth member of the majority, approached the case quite differently, considering each of the two notices served on Caltex separately.

(i) The Section 29 Notice

In his Honour's opinion, Caltex could not resist production of documents under this notice. The primary reason for his Honour's conclusion was that he construed s 29 to exclude the privilege against self-incrimination. On this analysis Caltex would not be entitled to the privilege against self-incrimination, regardless of whether as a general rule corporations are entitled to the benefit of the privilege. However, his Honour did consider the general question. His Honour held that, as the privilege against self-incrimination is primarily intended to protect an individual from the suffering which conviction inflicts on a real individual, it has no application to artificial entities.[29]

(ii) The Notice to Produce

Contrary to Mason CJ, Toohey and McHugh JJ, Brennan J concluded that Caltex was not obliged to produce documents in response to the notice to produce. In his Honour's opinion, whilst the privilege against self-incrimination has no application in these circumstances, a corporation is entitled to the privilege against self-exposure to a civil penalty.

This privilege, according to his Honour, is separate from the privilege against self-incrimination and is moreover different in nature. The privilege against self-exposure to a penalty operates not as a protection of human dignity but as a limitation on the power of the courts. Its concern is to prevent a court lending its process to aid the production of evidence upon which the plaintiff can establish that the defendant is liable to a penalty. His Honour cited the judgment of Lord Esher MR in *Martin v Treacher*:[30]

> It would be monstrous that the plaintiff should be allowed to bring [an action the object of which is to subject the defendant to a penalty] on speculation, and then, admitting that he not enough evidence to support it, to ask the defendant to supply such evidence out of his own mouth and so to incriminate himself.

Because of the different nature of this privilege, his Honour held that it is available to corporations. Given that the rationale of the privilege is to prevent a particular use of the court's process rather than to protect the defendant, the identity of the

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28 *Ibid* at 555-6.

29 *Ibid* at 516.

30 (1886) 16 QBD 507.

defendant is not relevant. There is therefore no basis for the distinction between corporations and individuals. His Honour concluded:[31]

> Although I must accept that the privilege against self-incrimination can be applied outside judicial and quasi-judicial proceedings as a fundamental bulwark of liberty for the individual, there is no reason why the penalty should be applied outside the area in which its rationale - the limitation placed by the court on the exercise of its powers to obtain evidence - warrants its application."

Furthermore, this privilege operates whether the corporation is exposed to a penalty in criminal or civil proceedings since:[32]

> it would surely be incongruous for a court to allow discovery against a corporation in proceedings for conviction of the corporation while refusing discovery in proceedings for a civil penalty.

In summary, Brennan J would not allow a corporation to resist a statutory requirement to provide information by claiming the privilege against self-incrimination. However, a corporation required by some power of a court to produce information it is entitled to resist production of information in reliance upon the privilege against self-exposure to a penalty irrespective of whether the penalty is civil or criminal.

C. The Judgment of the Minority

The minority, Deane, Dawson and Gaudron JJ, held that a corporation is entitled to the privilege against self-incrimination. In doing so, their Honours placed great emphasis on the role the privilege plays in requiring the prosecution to prove its case against an accused. Their Honours did not deny that the privilege is partially justified by the protection it affords individuals facing prosecution.[33] However, in their view, having regard to the other bases upon which the privilege is justified, it is not a sufficient reason to deny corporations the privilege against self-incrimination. They held:[34]

> The privilege against self-incrimination ... is based upon the deep seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself.

Further, their Honours were not oblivious to the difficulties the privilege against self-incrimination poses for the regulation of corporate crime. They recognised that "the complex corporate structure which the corporate investigator nowadays so often faces makes detecting and prosecuting corporate crime increasingly difficult, and sometimes well-nigh impossible, without access to more effective procedures than the traditional methods such as search and seizure."[35] However, they considered that legislative action is the appropriate method for ensuring the effective regulation of corporations in their view the legislature is "capable of

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31 Note 3 *supra* at 522.
32 *Ibid* at 520.
33 *Ibid* at 526-7.
34 *Ibid* at 532.
35 *Ibid* at 533.

confining [exceptions] to the requirements of a particular situation".[36] Indeed their Honours supported the application of the privilege to corporations because the legislature has already in numerous circumstances exercised its power to modify the privilege.[37] In their view, the legislative assumption that the privilege against self-incrimination extends to corporations, and therefore requires abrogation if it is not to apply, is an important consideration in determining the extent of the operation of the privilege.[38]

Their Honours last point was that the privilege against self-incrimination in any event is only available to corporations in limited circumstances. It will only apply where the corporation itself objects to the production of evidence, through its proper officer or counsel. In particular, it does not protect the corporation from the production of secondary evidence of the contents of its documents nor does it provide a ground upon which another person can resist the production of documents.[39]

III. COMMENT

Despite a majority of the justices of the High Court concluding that a corporation is not entitled to the privilege against self-incrimination, some doubt remains as to the rights of a corporation which is faced with the requirement of a court to produce documents. Whilst four justices would allow the corporation to refuse to produce the evidence, the finding of Brennan J that corporations are entitled in such circumstances to the privilege against self-exposure to a penalty has an entirely different basis from the same conclusion of Deane, Dawson and Gaudron JJ. Indeed the reasons which prompted Brennan J to conclude that corporations are not entitled to the privilege against self incrimination are inconsistent with those which lead Deane Dawson and Gaudron JJ to allow resistance to the notice. On the other hand Mason CJ, Toohey and McHugh JJ are of the opinion that neither the privilege against self-incrimination nor the privilege against self-exposure to a penalty are available to a corporation. There is therefore no clearly defined majority.

This uncertainty should be resolved in accordance with the views of Mason CJ, Toohey J and McHugh J. A clear majority of the Court has held that the privilege against self-incrimination is not available to a corporation. The availability of the

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36 *Ibid.*

37 *Ibid* at 534. Their Honours refer to the exclusion of the privilege against self-incrimination for some purposes by the *Corporations Law* (ss 597(12) and 1316A(1)).

38 This argument is addressed by Mason CJ and Toohey J who argued:
[t]he circumstance that Parliament (or a drafter) assumed that the antecedent law differed from the law as the Court finds it to be is not a reason for the Court refusing to give effect to its view of the law ..." Parliament does not change the law "simply by betraying a mistaken view of it".
Note 3 *supra* at 505-6.

39 *Ibid* at 534.

privilege against self-exposure to a penalty to a corporation is not consistent with this view.

The origin of Justice Brennan's view that the privilege against self-incrimination operated only in a judicial or quasi-judicial context can be found in his judgment in *Pyneboard Pty Ltd v Trade Practices Commission*[40] and *Sorby v The* Commonwealth.[41] His Honour argued this is evident from its origin as a reaction to the practices of the Court of Star Chamber and the Court of High Commission[42] and from the practical operation of the privilege. In *Sorby*, his Honour said:[43]

> The common law had no occasion to extend the protection to a witness in non-judicial proceedings, and it has no procedure appropriate to the control of a claim of privilege in such proceedings. The claim of privilege, which is made by or on behalf of a witness when the examiner asks him a particular question, is necessarily submitted to the judge for his ruling.

Thus his Honour's opinion was that the privilege against self incrimination limited only the exercise of curial or quasi-curial power. He did not accept the view of the majority in *Pyneboard* that the privilege against self-incrimination is "too fundamental a bulwark of liberty to be characterised simply as a rule of evidence applicable to judicial and quasi-judicial proceedings"[44] and therefore applies whenever an individual is required to produce information which may be incriminating.

In this case Brennan J deferred (as he did in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs*)[45] to the view of the majority *Pyneboard* and *Sorby* as it relates to the privilege against self-incrimination.[46] However, it is evident from this case that his Honour does not accept that this analysis can be extended to the privilege against self-exposure to a penalty. In finding that this privilege operates only to limit curial or quasi-curial power, his Honour has applied the argument he previously made in relation to the privilege against self-incrimination to the privilege against self-exposure to a penalty.

It is this analysis which, with respect, is open to criticism. Having accepted that the privilege against self-incrimination does not simply limit curial power but provides a general protection of the rights of the individual which extends beyond judicial or quasi-judicial proceedings, it cannot be maintained that the privilege against self-exposure to a penalty operates only as a limitation on curial power. As Mason CJ, Toohey and McHugh JJ held, the privilege against self-exposure to a penalty developed by analogy with and to serve the same purposes as the privilege against self-incrimination. The abrogation of corporations' right to the latter privilege necessarily requires the abrogation of corporations' right to the former.[47]

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40 (1983) 152 CLR 281.
41 (1983) 152 CLR 328.
42 *Ibid* at 317.
43 *Ibid* at 320.
44 Note 40 *supra* at 340.
45 (1985) 156 CLR 385.
46 Note 3 *supra* at 510.
47 *Ibid* at 504-5. See also McHugh J, note 3 *supra* at 547-8.

These privileges share an essential quality, the protection of the individual. It is true that the privilege against self-incrimination and the privilege against self-exposure to a penalty have often been spoken of as separate,[48] but it should not be understood from this that the privilege against self-exposure to a penalty is fundamentally different from the privilege against self-incrimination. The privileges are separate in that they protect the individual from different dangers: the danger of a criminal conviction on the one hand and the danger of exposure to a penalty on the other. However the privilege against self-exposure to a penalty is concerned, like the privilege against self-incrimination, with the protection of the individual. This is evident from its very nature. The privilege against self-exposure to a penalty only applies if the defendant is liable to be exposed to the imposition of a civil penalty rather than a mere obligation to provide redress for a civil wrong.[49] Such a limitation is not consistent with the privilege being only concerned to ensure that a party making such a claim is required to prove that claim through the admission of independent evidence. Where the defendant is facing an obligation to provide redress for a civil wrong there is still an interest in ensuring that the plaintiff satisfies the onus of proof upon independent evidence. What distinguishes the case of a defendant facing a penalty is the severity of the consequences. This indicates the privilege is directed to the protection of the individual.

Further, authorities indicate that the privileges have long been regarded as closely related. The strongest statement in support of this is that of Lord Harwicke in *Smith v Read*:[50]

> [T]here is no rule more established in equity, than that a person shall not be obliged to discover what will subject him to a penalty, or anything in the nature of a penalty. Under the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself.

Other judicial statements are also consistent with this. In *Martin v Treacher*,[51] Lord Esher justified the privilege by explaining "although the penalty is not strictly in law a criminal penalty, yet the action is in the nature of a criminal charge against the defendant". Further, in *Redfern v Redfern*[52] Bowen LJ apparently saw no need, in discussing the privilege against self-exposure to a penalty, to elucidate its separate policy when he said:

> It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered would tend to expose him to any punishment, penalty, forfeiture or ecclesiastical censure.

Lastly, Brennan J referred to authority which revealed a concern at the use of the court process to force from a person who is alleged to have committed a wrong

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48 In *Pyneboard*, note 40 *supra* at 335, Mason ACJ, Wilson and Dawson JJ referred to them as "different aspects or grounds of privilege".

49 *R v Associated Northern Collieries* (1910) 11 CLR 378 at 511-12.

50 (1736) Atk 527; 26 ER 332.

51 Note 30, *supra*.

52 [1890] P 130 at 147.

doing, the evidence which supports that allegation.[53] This is not, however, a basis for distinguishing the privilege against self-exposure to a penalty from the privilege against self-incrimination. As six members of the High Court (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) made clear, the privilege against self-incrimination itself is partly justified on the role it plays in ensuring that independently obtained evidence is required.[54] If anything therefore it is further evidence of the close relationship between the privileges.

IV. CONCLUSION

The decision in *EPA v Caltex* clarified a long uncertain issue: the application of the privilege against self-incrimination to corporations. As it answered one question however, it raised another: the application of the privilege against self-exposure to a penalty to corporations. As has been argued, however, once it is realised that the privilege against self-exposure to penalty has essentially the same origins and policy as the privilege against self-incrimination, it is clear both that it should apply outside the realm of judicial or quasi-judicial proceedings and that it should not be available to corporations.

V. POSTSCRIPT

The application of the privilege against self-exposure to a penalty has recently been considered by the Full Court of the Federal Court in *Trade Practices Commission v Abbco Ice Works Pty Limited*.[55] On 19 August 1994 a majority of the Court (Black CJ, Davies, Burchett and Gummow JJ, Sheppard J dissenting) held that a corporation is not entitled to the privilege against self-exposure to a penalty.

A. Facts

This case arose out of proceedings brought by the Trade Practices Commission against Abbco Ice Works Pty Limited for injunctive relief and pecuniary penalties under s 76 of the *Trade Practices Act* 1974 (Cth) ("the Act"). It was alleged that Abbco had committed offences under ss 45 and 45A of the Act. A special case was stated for consideration by the Full Court of the Federal Court pursuant to s 25(6) of the *Federal Court of Australia Act* 1976 (Cth). The issue raised was

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53 This concern is evident for example in the passage from *Martin v Treacher* cited by Brennan J; see text accompanying note 30 *supra*.

54 Note 3 *supra* at 501, 532, 550. Indeed, as discussed above, it was because the role the privilege against self incrimination paid in requiring the prosecution to produce independent evidence that Deane, Dawson and Gaudron JJ refused to abrogate the application of the privilege to corporations.

55 Unreported, Federal Court of Australia, Full Court, 19 August 1994.

whether a corporation is entitled to rely upon the privilege against self-exposure to a penalty.

B. The Judgment of Burchett J

The principal judgment is that of Burchett J, with whom Black CJ and Davies J agreed.

(i) Precedential Value of EPA v Caltex

The first finding by his Honour is *EPA v Caltex* does not decide the issue. In his view, the judgments in *EPA v Caltex* cannot be construed to create a binding rule as to the application of the privilege against self-exposure to a penalty to corporations.[56] His Honour referred to the last of the questions stated for consideration by the High Court and the Court's answer thereto. These were as follows:

> 7. Whether the privilege against self-incrimination extends to [the respondent] in respect of the said notice to produce.
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> Answer: The respondent is entitled to either the privilege against self-incrimination or the privilege against self-exposure to a penalty in respect of the said notice to produce.[57]

First, his Honour held that the very terms of the answer "make it clear that it cannot provide a precedent binding on this court to hold, in the case where self-incrimination is *not* in issue, a corporation can rely on the privilege against self-exposure to a penalty in respect of a notice to produce."[58] More fundamentally, his Honour goes on to state that where no clear ratio decidendi emerges from the reasons for a decision, a court which is bound by that decision is only bound to apply it where the circumstances of the case are not reasonably distinguishable from those which gave rise to the decision. In such cases, no proposition of law emerges that can be applied in different circumstances.[59]

His Honour concluded:[60]

> Thus if a minority of a court would decide in a party's favour on one point, and a differently constituted minority would do so on a different point, the two minorities may add up to a majority in support of the particular result each favours. The case would then be authority for its actual position, yet cannot be said to have decided any proposition of law.

EPA v Caltex is clearly such a case. Although a majority of five judges favour the view that Caltex could resist the notice to produce, this majority was made of two separate minorities. On the one hand, Brennan J held that Caltex could resist the notice on the basis of the privilege against self-exposure to a penalty. On the other

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56 As we will see, Sheppard J dissented on this point.

57 Note 3 *supra* at 168. As will be seen, this answer formed the basis for the dissent of Sheppard J.

58 Note 55 *supra* at 4.

59 *Great Western Railway Company v Owners SS Mostyn* [1928] AC 57 at 58; *Dickenson's Arcade Pty Limited v The State of Tasmania* (1974) 130 CLR 177 at 183; *Federation Insurance Limited v Wasson* (1987) 163 CLR 303 at 314.

60 Note 55 *supra* at 7. See also *Re Tyler; Ex parte Foley* (1994) 121 ALR 153.

hand, Deane, Dawson and Gaudron JJ held that Caltex could resist the notice to produce on the basis of the privilege against self-incrimination.

As a result of this analysis, his Honour considered it necessary that the Federal Court consider for itself the availability of the privilege against self-exposure to a penalty to a corporation.

(ii) The Privilege Against Self-Exposure to a Penalty and the Privilege Against Self-Incrimination

His Honour's conclusion that the privilege against self-exposure to a penalty does not extend to corporations was the result of an extensive review of the historical treatment of both privileges by the courts and academic writers. However, his Honour did not regard the history of the privilege alone to be determinative of the issue. He was concerned also with the development of the privilege into its present form. Referring to submissions of counsel that the privilege against self-exposure to a penalty was a privilege invented by the Courts of Chancery, his Honour said:[61]

> I do not think the issue should be approached as if this Court were composed of historians delving into the distant sources at common law and in equity ... what is more important is to understand the nature, scope and justification of the principles which ... became accepted as settled law.

His Honour canvassed authority from as far back as the decision in *Attorney-General v Mico.*[62] Whilst his Honour referred to the "common rule of Chancery" allowing a party to resist discovery which was cited to the Court in argument, the following statement of Widdrington CJ should also be noted:[63]

> If a man will prefer a bill to compel me to answer what trespasses I have committed upon his land, or what other injury I have done him, I shall not be compelled to answer such a bill, as the common rule in all courts is, because it is a matter of crime and tort, for which I am finable and punishable in another court over and above what damages the party is to recover against me.

In addition to the authority cited above, his Honour also referred to the decision in *Orme v Crockford* in which a demurrer by the defendant to a bill for discovery was allowed on the basis that:[64]

> It is a most important right of which this bill seeks to deprive the Defendant - no less than that of protecting himself from the consequences of answering questions which might tend to charge him with a crime or subject him to penalties or forfeiture of an estate.

Indeed his Honour refers to authority which appears to abandon even the distinction drawn in *Pyneboard*, that is that the rules are "different aspects or

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61 Note 55 *supra* at 24.

62 (1658) Hardres 137; 145 ER 419.

63 *Ibid* at 139; ER at 420.

64 (1824) 13 Price 376; 147 ER 1022.

grounds of privilege".[65] In particular, his Honour refers to the decision of Lopes J in *Martin v Treacher* that:[66]

> When an action is brought the sole object of which is to enforce penalties: interrogatories cannot be administered, because the action is in the nature of a criminal proceeding, and in such a proceeding it will be monstrous and contrary to the policy of the law to compel the defendant before the trial to make admissions which would incriminate himself.

His Honour's historical survey is completed with reference to early statute law[67] and nineteenth century academic texts.[68]

Interestingly, his Honour goes on to consider more recent American authority. The privilege enshrined in the Fifth Amendment to the Constitution of the United States by which "no person ... shall be compelled in any criminal case to be a witness against himself" has been held to extend to actions for penalties and forfeitures which are of a "quasi-criminal" nature.[69] His Honour noted that the American position is "profoundly influenced"[70] by the constitutional context of the privilege, nevertheless he considered that the decisions of the Supreme Court shed some light on the history and policy of the privilege. Of particular importance is the decision in *Counselmen v Hitchcock* where it was held:[71]

> It is an ancient principle of law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures.

Thus, the Supreme Court took the view that, regardless of the constitutional context of the privileges, a single principle underlies both the privilege against self-incrimination and the privilege against self-exposure to a penalty.

(iii) The Judgment of Lord Esher MR in Earl of Mexborough[72]

His Honour regarded the judgment of Lord Esher in the above case as the principal obstacle to the conclusion that the privilege against self-exposure to a penalty is analagous to the privilege against self-incrimination. In that case, Lord Esher outlined two rules:[73]

> The first is that, where a common informer sues for a penalty, the courts will not assist him by their procedure in any way; and I think a similar rule has been laid down and acted upon from earliest times, in respect of actions to enforce a forfeiture of an estate in land.

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65 Note 46 *supra* at 335.

66 Note 55 *supra* at 415. His Honour also refers to statements by Deane J in *Refrigerated Express Lines Pty Limited v Australian Meat and Livestock Corporation* (1979) 42 FLR 402 and Lord Langdale in *Glynn v Houston* (1836) 1 Keen 329 at 337; 48 ER 333 at 336.

67 His Honour refers to the *Statute of Long Parliament* (16 Car 1, 1 Cap XD of 1640).

68 *Daniell's Chancery Practice* (1871); Hare, *A Treatise on the Discovery of Evidence* (1836); Bray, *The Principles and Practice of Discovery* (1885); note 55 *supra* at 26-7.

69 *Boyd v United States* 116 US 616 (1885).

70 Note 55 *supra* at 35.

71 142 US 547 (1892).

72 *Earl of Mexborough v Whitwood Urban District Coiuncil* [1897] 2 QB 111.

73 *Ibid* at 115.

The passage which concerned his Honour was as follows:[74]

> The rule by which a witness is protected from being called upon to answer questions which may tend to incriminate ... has really nothing to do with the two rules to which I have just referred.

However, his Honour concluded that this passage could not justify the distinction drawn by Brennan J between the privilege against self-incrimination and the privilege against self-exposure to a penalty for two reasons. First, in the light of the authorities canvassed, he took the view that Lord Esher was "simply wrong".[75] In addition, his Honour took the view that this passage is not in fact directed to the broad equitable principles upon which Brennan J relied in his judgment but to the circumstances in which a penalty is brought by a common informer.[76]

That Lord Esher was concerned with common informers is evident from the first passage cited above. In addition, Lord Esher also said:[77]

> The [rules] are no doubt rules of procedure, but they were much more than that: *they are rules made for the protection of people in respect of their property, and against common informers.* (emphasis added)

This passage was relied upon by counsel in *R v Associated Northern Collieries*[78] in support of a distinction between actions at the suit of the Crown and those at the suit of a common informer. It was argued that in that case the former was a suit which a court would regard with favour in view of the fact that it is in the public interest. In the latter case however, since a common informer pursued only personal advantage, a court would decline to assist. However, this distinction was rejected by the High Court. Justice Issacs said:[79]

> I do not believe the judgments in that case to be taken as a whole as pointing to any such distinction, but as differentiating between civil actions for penalties and ordinary civil actions not for penalties. The suggested distinction ... besides being irrelevant it would have been inconsistent with admitted rules and quite opposed to a vast current of authority and precedent.

Therefore his Honour concluded that the privileges against self-crimination and self-exposure to a penalty "are both reflections of the one fundamental principle".[80]

C. The Judgment of Gummow J

Justice Gummow agreed in a separate judgment with the conclusion of Burchett J. However, his reasons are significantly different.

His Honour's central argument is that the privilege against self-incrimination and privilege against self-exposure to a penalty never had any application to a corporation. His Honour begins with the premise that at least until the nineteenth

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74 *Ibid.*

75 Note 55 *supra* at 20.

76 *Ibid* at 21.

77 Note 55 *supra* 115.

78 Note 49 *supra.*

79 *Ibid* at 743. His Honour referred in particular to *Smith v Read*, note 50 *supra.*

80 Note 55 *supra* at 42.

century, parties to an action (whether civil or criminal) could not be witnesses.[81] Therefore, in his view, the true rule established by the privilege was that *witnesses* were not obliged to answer any questions which exposed them to a criminal charge or to an action for a penalty.[82] Since a corporation cannot be a witness, the privileges, at least in their original form, were inherently unsuitable for application to corporations. Further, in relation to the privilege against self-incrimination it must be remembered that corporations were not, until comparatively recently, subject to the criminal law.[83]

His Honour's conclusion in respect of this matter is best expressed at the end of his judgment. His Honour said that whilst it might be accurate "in a broad sense" to say that both the privilege against self-incrimination and the privilege against self-exposure to a penalty are "deep rooted in English law", "there is no such deep root in respect of the assertion of either privilege by or on behalf of corporations".[84]

As is evident, Gummow J relied extensively on the historical analysis. He justified this approach by reference to the particular importance to the common law of its history.[85] However, his Honour, like the other members of the majority, did not regard the historical analysis as entirely determinative. First, he considered it would be wrong to accord much weight to the origin of the privileges, particularly to the debate as to whether the privileges were rules of equity or of the common law. Australian courts are creatures of statute, governed ultimately by the Constitution, and their procedure is determined primarily by rules of court.[86] More significantly, his Honour pointed out that even if the privilege against self-exposure to a penalty originated as a special rule of equity, it has since developed into a general privilege available at law and in equity and, like the privilege against self-incrimination, extending to quasi-judicial proceedings.[87] He concluded that the evolution of the privilege against self-exposure to a penalty is "another illustration of the development of the law, over time, where what originally were procedural rights mature into independent substantive doctrines".[88] Thirdly, his Honour was persuaded by the need for consistency in the application of the privileges to corporations, holding:[89]

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81 *Ibid* at 15, 18.

82 Note 4 *supra* at 15-16.

83 Note 4 *supra* at 122; *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 169.

84 Note 55 *supra* at 37.

85 *Ibid* at 4.

86 *Ibid* at 5-6.

87 *Ibid* at 7; *Pyneboard*, note 40 *supra* at 337; *EPA v Caltex*, note 3 *supra* at 547-8; *Comptroller-General of Customs v Disciplinary Appeal Committee* (1992) 35 FCR 446 at 474-81. However his Honour does conclude that the privileges do have different origins and initially reflect separate principles, note 55 *supra* at 27-8.

88 Note 55 *supra* at 7. His Honour drew an analogy with the development of the rule against penalties. See *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170.

89 Note 55 *supra* at 6, 38.

> It would be an odd result if an order might be properly made for production of documents which exposed a corporation to a criminal liability, but no order would be made if it might result in the imposition of a civil penalty.

His Honour pursued this a little further in the conclusion of his judgment. As pointed out by members of the High Court in *EPA v Caltex*, the denial of the right to the privilege against self-incrimination to corporations will only affect the requirement that a corporation produce documents or other material in the nature of real evidence.[90] Amongst the reasons given by McHugh J for his conclusion that corporations are not entitled to the privilege against self-incrimination, was that the forced production of real evidence was less objectionable than forced production of testimony.[91] Justice Gummow took the view that the denial of the privilege against self-exposure to a penalty to corporations is also less objectionable than forced exposure to incrimination. In his view, this is another reason for denying the privilege against self-exposure to a penalty to corporations. He said:[92]

> If the corporation, even as a party, is denied the privilege against self-incrimination by the compulsion to produce books or documents, what additional rationale preserves, in respect of corporations, the cognate penalty privilege? If the balance between state and corporation, now as we must accept, favours denial of the privilege in the first category of case, why should a different balance be struck in the second category?
>
> If the one privilege extends to corporations, then no doubt the other must also do so.

D. The Judgment of Sheppard J

Justice Sheppard was the sole dissenting judge in the Federal Court. His Honour began from the premise that until the decision in *EPA v Caltex* the privilege against self-exposure to a penalty was available to corporations. His Honour referred to cases in which the availability of the privilege to corporations was assumed though not specifically argued.[93] These cases were assumed in *Pyneboard*.[94]

His Honour's first argument was that the High Court's decision did not disturb this settled position. He took the view that the High Court's answer to question 7 of the question stated for consideration in *EPA v Caltex* indicated that the High Court considered that the matter had been determined.[95] He took the view that the High Court's statement in answer to that question, that Caltex "is entitled to either the privilege against self-incrimination or the privilege against self-exposure to a

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90 Note 3 *supra* at 535, 555-6.

91 *Ibid* at 555-6.

92 Note 55 *supra* at 38. Presumably his Honour does so on the basis that the consequences of the denial of the privilege against self-exposure to a penalty are less serious.

93 *R v Associated Northern Collieries*, note 49 *supra*; *Refrigerated Express Lines Pty LImited v Australian Meat and Livestock Corporation*, note 68 *supra*.

94 Note 40 *supra*.

95 Cited above. See text accompanying note 57.

penalty" can only be explained on the basis that "the judges of the Court in formulating their answer to question 7 put what Brennan J had said in that passage together with the views of Deane, Dawson and Gaudron JJ".[96] That is, the answer reveals that Deane, Dawson and Gaudron JJ took the view that corporations are entitled to the privilege against self-exposure to a penalty and, in conjunction with Brennan J, form a majority on this point.

However, his Honour went on to say that even if this issue was not determined by the answer to question 7, he would still consider that corporations are entitled to the privilege against self-exposure to a penalty. He considered that if the majority were correct in their analysis that the decision in *EPA v Caltex* created no binding authority, the appropriate response of the Federal Court is to uphold the existing law. He gives two reasons for this conclusion. First, in his Honour's view the uncertainty in the law should be decided by the High Court alone. He referred in particular to the fact that there are nine intermediate appellate courts which may consider this problem and to the consequent uncertainty which may arise if each court took it upon itself to decide the law.[97] Secondly, his Honour considered that it was inappropriate for the Federal Court to consider denying the privilege to the corporation since "the very denial of the privileges to corporations will tend if not to destroy them to substantially devalue them so far as they extend to natural persons as distinct from corporations."[98] This, in his Honour's view, is contrary to the decision of the High Court in *EPA v Caltex*.

E. Comment

The issue has therefore been substantially clarified. The dissent of Sheppard J moreover, does not detract from the force of the judgments of the majority. His Honour did not purport to challenge the rationale of the majority judgments. Instead he took the view that it is not an appropriate question for the Full Federal Court to consider in the particular circumstances. Further his Honour's decision is, with respect, open to criticism.

First, the basis upon which Sheppard J concluded that the matter was determined by the High Court is unsatisfactory. Decisions of high appellate courts, such as the High Court of Australia, carry great weight. They are customarily expressed in reasons of substantial length. It can hardly be desirable to attribute views to members of the High Court on the basis of the wording of a formal order, particularly in the face of a lengthy judgment which does not consider the issue. Moreover, this approach neglects the important role which intermediate appellate courts have in the development of the law. It is increasingly recognised that intermediate appellate courts should be prepared to effect significant change to the established law, if judicial law making is appropriate in the circumstances. Chief Justice Mason of the High Court recently stated that the task of judicial law

96 Note 55 *supra* at 15.
97 *Ibid* at 18.
98 *Ibid.*

making on significant issues of principle should not be confined to the High Court since:[99]

> The volume of work now coming to the High Court by means of applications for special leave to appeal and constitutional cases is so great that the court may not be able to discharge adequately its responsibility for formulating and refining the principles of judge-made law unless intermediate courts of appeal play a greater part in that process.

Reluctance on the part of an intermediate appellate court to determine issues of principle unduly inhibit the development of the law. Justice McHugh, when his Honour was a member of the Court of Appeal of New South Wales, commented that because of the increasing workload of the High Court and its obligation to give preference to constitutional cases, intermediate appellate courts should not restrict their law making roles to cases in which there is a clear error. The result would be that "the law would be the subject of outdated rules and principles for lengthy periods".[100] If, as Sheppard J appears to suggest, the rule-making function of intermediate appellate courts should also be restricted in cases in which there is existing uncertainty which may be exacerbated by conflicting intermediate appellate court decisions, the law would be subject to continuing and lengthy uncertainty.

The second criticism to be made of Justice Sheppard's dissent is that his Honour supported the decision not to disturb the established law with reasons which are contrary to the judgments of the majority in *EPA v Caltex*. His Honour's concern was that by denying the privilege against self-exposure to a penalty to corporations, persons associated with the corporation may be exposed to penal actions as a result of evidence produced by the corporation. In his Honour's view, this is contrary to the majority judgments in *EPA v Caltex* which make it clear that "an individual's entitlement to rely on the two privileges was unaffected by the decision".[101]

With respect, this conclusion is not supported by the majority in *EPA v Caltex*. It is true that there is no indication that the existing right of individuals to the privilege against self-incrimination and to the privilege against self-exposure to a penalty is to be limited. However this is no basis for finding that corporations are entitled to the privilege. It is fundamental that the privileges are privileges against *self*-incrimination and *self*-exposure. Neither corporations nor individuals are entitled to refuse to produce evidence on the grounds that a third party, however closely related to them, will be incriminated. Therefore the maintenance of the privilege against self-incrimination in favour of individuals provides no basis upon which it could be said that corporations are entitled to either the privilege against

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99 The Hon Justice Mason AC KBE, "The Role of the Courts at the Turn of the Century" (1993) 3 *Journal of Judicial Administration* 156.

100 The Hon Mr Justice McHugh, "Law Making in an Intermediate Appellate Court: The New South Wales Court of Appeal" (1987) 11 *Sydney Law Review* 183 at 188.

101 Note 15 *supra* at 18.

self-incrimination or the privilege against self-exposure to a penalty. This point was made explicitly by McHugh J.[102]

F. Conclusion

As the availability of the privilege against self-incrimination to corporations was not fully argued before the High Court and as three members of the Court did not consider the issue in *EPA v Caltex*, it remained uncertain. Fortunately, the issue has been clarified by the Full Federal Court which, with the benefit of extensive argument, reached a conclusion similar to that reached by Mason CJ, Toohey and McHugh JJ in *EPA v Caltex*.

The recent decision is to be welcomed for the clarity and consistency it gives the law regulating the requirement of corporations to produce evidence. It will also be welcomed by those who consider that appropriate regulation of corporate activity requires access by courts to their documents and records.

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102 See text accompanying note 15 *supra*.