# Federal Court of Australia



# Trade Practices Commission v Abbco Ice Works Pty Limited and Others [1994] FCA 1279; (1994) 123 ALR 503, (1994) 14 ACSR 359, (1994) Atpr 41-342 (1994) 52 FCR 96 (19 August 1994)

## FEDERAL COURT OF AUSTRALIA

TRADE PRACTICES COMMISSION v. **ABBCO ICE WORKS** PTY LIMITED and OTHERS
No. NG953 of 1993
FED No. 543/94
Number of pages - 54
Practice And Procedure - Privilege - Stare Decisis
[1994] FCA 1279; (1994) 123 ALR 503, (1994) 14 ACSR 359, (1994) ATPR 41-342 (1994) 52 FCR 96

**COURT**

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
BLACK CJ(1), DAVIES(2), SHEPPARD(3), BURCHETT(4) AND GUMMOW(5) JJ

**CATCHWORDS**

Practice And Procedure
Privilege - notice to produce documents in action by Trade Practices Commission in which pecuniary penalties are sought to be recovered - privilege against self-exposure to a penalty - whether privilege applies to a corporation - discussion of the relationship between the privilege against self-incrimination and the privilege against self-exposure to a penalty.

Stare Decisis - effect of a High Court ruling where no ratio decidendi commanded the assent of a majority of the High Court.

Federal Court Rules, Order 33 rule 12

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

> The King v. The Associated Northern Collieries [1910] HCA 61; (1910) 11 CLR 738
> Pyneboard Proprietary Limited v. Trade Practices Commission [1983] HCA 9; (1983) 152 CLR

328
Hepples v. The Commissioner of Taxation of the Commonwealth of Australia [1992] HCA 3; (1992) 173 CLR 492

Re Tyler; Ex parte Foley [1994] HCA 25; (1994) 121 ALR 153
Martin v. Treacher (1886) 16 QBD 507
Mexborough (Earl of) v. Whitwood Urban District Council (1897) 2 QB 111
United States of America v. McRae (1867) LR 4 Eq 327
Refrigerated Express Lines (A/asia) Pty Ltd v. Australian Meat and Livestock

Corporation (1979) 42 FLR 204
Smith v. Read [1736] EngR 59; (1736) 1 Atk 527; 26 ER 332

**HEARING**

SYDNEY, 3 July 1994
19:8:1994

Counsel for the Applicant: Mr D.F. Jackson QC with
Mr D.J. Hammerschlag

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the Respondent Mr J.D. Heydon QC with
**Abbco Ice Works** Pty Limited: Mr A.A. Ransom

Solicitors for the Respondent Ledlin Partners
**Abbco Ice Works** Pty Limited:

Counsel for The Gillette Mr J.C. Campbell QC
Company, who was given leave
to appear as amicus curiae:

Solicitors for The Gillette Allen Allen and Hemsley
Company:

Counsel for TNT Australia Pty Mr A.J. Sullivan QC with
Limited, who were given leave Mr M.R. Speakman
to appear as amici curiae:

Counsel for Mayne Nickless Mr R.J. Wright
Limited, who was given leave
to appear as amicus curiae:

Solicitors for TNT Australia Blake Dawson Waldron
Pty Limited and Mayne
Nickless Limited:

**ORDER**

THE COURT ORDERS THAT the questions referred be answered as follows:

(1) Whether the notices to produce served on the company ought to be set aside?

Answer: No.
(2) Whether the Court ought to order otherwise under Order 33 rule 12?

Answer: No.

AND THE COURT FURTHER ORDERS THAT the costs of the applicant be paid by the respondent **Abbco Ice Works** Pty Limited AND THAT there be no order as to the costs of the amici curiae.
NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**DECISION**

BLACK CJ I agree with Burchett J, for the reasons he gives, that both questions referred for the determination of the Full Court should be answered "No" and that the sixth respondent, Abbco Iceworks Pty Ltd, should pay the costs of the special case.

DAVIES J I have had an opportunity to read the reasons for judgment prepared by Burchett J. I agree with them and with the orders which his Honour proposes.

SHEPPARD J In this matter I have had the advantage of reading the judgment of Burchett J. I acknowledge my indebtedness to him for the comprehensive analysis of the law in this area which it contains. What follows is my own attempt to analyse the position as it has developed in Australia this century. I have done this in a summary form rather than in any elaborate way.

2. For me the starting point is R v Associated Northern Collieries [1910] HCA 61; (1910) 11 CLR 738 where the defendant was sued by the Crown for penalties provided for in the Australian Industries Preservation Act 1906. There Isaacs J said (at 742-3):-

> "There is an inherent distinction between a civil action to prevent or redress a civil injury on the one hand, and a civil action to recover a penalty on the other. In the latter case the whole and avowed object of the proceedings is the infliction of the penalty, and the discovery sought of documents relevant to the claim can therefore have no other intended consequence. It does not require in such a case the oath of the defendant to establish the fact that the production of the documents would tend to penalize him. The Court can see the effect of discovery from the nature of the proceeding. In the former case there is no such necessary consequence, and whether the objectionable tendency exists or not has to be otherwise ascertained, and claiming immunity upon oath in the course of making discovery is the most usual, but not the only other means of establishing it."

3. After discussing some authorities, his Honour referred (at 747) to Halsbury's Laws of England, 1st edition, Volume 11 at 41 where it is said that, in civil proceedings where the action is brought merely to establish a forfeiture or enforce a penalty, discovery will not be allowed and, if allowed, may be resisted. Isaacs J then said (at 747-8):-

> "In view of these clear and undeviating authorities I am bound to refuse the application to compel the defendants to

> give discovery. Two or three references are apposite to the suggestion that the defendants would in fact be sufficiently protected by the subsequent refusal to order production. There is the observation of Lord Lindley in Martin v Treacher (1886) 16 QBD, 507, at p.513 and the similar statement of Chitty LJ in Mexborough's Case (Mexborough v Whitwood Urban District Council) (1897) 2 QB, 111, at p.121, that in such a case the proper course is to stop the matter in limine; and the other reference is to that of Lord Coleridge CJ in Jones v Jones (1889) 22 QBD, 425, at p.428, that if the suggested course were taken the very mischief sought to be prevented would ensue. Said the learned Lord Chief Justice:- 'The whole case for the plaintiff may depend upon his power to trace a particular document into the possession of the defendant, and, upon its non-production, to prove its contents by secondary evidence.' Nothing short of distinct legislative provision to the contrary can overcome a principle so deeply rooted and consistently enforced, and as there is no such relevant provision, I must take the law as I find it."

4. It is next appropriate to refer to the decision of Deane J (when a judge of this Court) in Refrigerated Express Lines (Australasia) Pty. Limited v Australian Meat and Live-stock Corporation (1979) 42 FLR 204. The action was an ordinary civil action in which the applicant for relief alleged breaches of certain of the provisions of Part IV of the Trade Practices Act 1974. The sections provided for the imposition of a penalty in the event of their infringement but the plaintiff's action was for injunctive relief and damages.

5. Deane J said (at 207-8):-

> "It is a well-established principle that a defendant in proceedings which are solely for the recovery of a pecuniary penalty should not be ordered to disclose information or produce documents which may assist in establishing his liability to the penalty (see, generally, per Isaacs J in R v Associated Northern Collieries [1910] HCA 61; (1910) 11 CLR 738, at pp 741-748; Naismith v McGovern [1953] HCA 59; (1953) 90 CLR 336, at pp 341-342 and Martin v Treacher (1886) 16 QBD 507). Even where, as in the present case, the proceedings are not for recovery of a penalty but to prevent and redress civil injury, a party to litigation ought not to be compelled to provide information or produce documents for inspection by the other party if the result thereof will be to provide evidence against him which may be used to establish his liability to a penalty in other proceedings (Mayor of the County Borough of Derby v Derbyshire County Council (1897) AC 550, at p.552).
> In the former case, that is to say in a mere action for a penalty, a court should, in the absence of statutory provision to the contrary, refuse to make any order at all against the defendant for discovery or production of documents or provision of information for the reason that the whole and avowed object of the proceedings being the imposition and the recovery of a penalty, an order for the production of documents or provision of information against

> the defendant can, so far as the prosecutor of the action is concerned, properly have no other intended consequence (see R v Associated Northern Collieries (1910) 11 CLR, at p.742. This is a broad and unqualified rule whose origins are apparently to be found in a reluctance on the part of the Court of Chancery to lend the aid of its discovery proceedings to the common informer (see Mexborough (Earl of) v Whitwood Urban District Council (1897) 2 QB 111, at p 115 and Heimann v Commonwealth [1935] HCA 73; (1935) 54 CLR 126, at p 130."

6. His Honour referred to further authorities and said that they plainly established the general rule that a party to proceedings which are for civil restraints and not for a penalty ought not ordinarily be excused in limine from giving discovery or answering interrogatories but should be left to object to producing particular documents or answering particular questions on the grond that such production or answer might tend to expose him to liability to a penalty.

7. Before the decision in Refrigerated Express Lines, the matter had been the subject of further consideration in the High Court in Naismith v McGovern [1953] HCA 59; (1953) 90 CLR 336 referred to by Deane J in the course of his judgment. The case did not cast any doubt on Isaac J's decision in the Northern Collieries case. But it should be said that the judges assumed, rather than decided, that it was correct; see the discussion at 340-342. Naismith raised a different problem from that which arises here. The Northern Collieries case was not of direct relevance to the matter to be decided there.

8. The Northern Collieries and the Refrigerated Express Lines cases have been followed and applied in many judgments of this Court. They have also been approved by the High Court in Pyneboard Pty. Limited v Trade Practices Commission [1983] HCA 9; (1983) 152 CLR 328. In their joint judgment the present Chief Justice and Wilson and Dawson JJ said (at 335-6):-

> "It is well settled that 'a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure' to use the words of Bowen LJ in Redfern v Redfern (1891) P 139, at p 147. See also Martin v Treacher (1886) 16 QBD 507; Earl of Mexborough v Whitwood Urban District Council (1897) 2 QB 111; R v Associated Northern Collieries [1910] HCA 61; (1910) 11 CLR 738. Indeed, in a civil action brought merely to establish a forfeiture or enforce a penalty the rule is that neither discovery nor interrogatories will be allowed (In re A Debtor (1910) 2 KB 59, at p 66; Associated Northern Collieries (1910) 11 CLR, at p 747). See generally the discussion by Deane J in Refrigerated Express Lines (A/asia) Pty. Ltd. v Australian Meat and Live-stock Corp. (1979) 42 FLR 204. There his Honour drew a distinction between discovery in a mere action for a penalty and discovery in an action which was not for a penalty the result of which might be used to establish a party's liability to a penalty in other proceedings (1979) 42 FLR, at pp. 207-208. In the first situation, the court should, in the absence of statutory provision to the contrary, refuse to make any order for discovery, production of documents or the provision of information for the reason that an intended consequence of the discovery, production of documents or provision of information is the imposition of the penalty,

> this being the object of the action. His Honour described this as 'a broad and unqualified rule whose origins are apparently to be found in a reluctance on the part of the Court of Chancery to lend the aid of its discovery proceedings to the common informer (see (Mexborough) and Heimann v Commonwealth [1935] HCA 73; (1935) 54 CLR 126, at p.130).'"

9. It follows that until, the recent decision of the High Court in Environment Protection Authority v Caltex Refinery Co. Pty. Limited [1993] HCA 74; (1993) 178 CLR 477, the law on this topic was regarded as settled. What has unsettled it is the Caltex case. It was a case, however, concerned not with the privilege against self-exposure to a penalty not imposed by the criminal law but with the privilege against self-incrimination. Four judges of the Court, Mason CJ, Brennan J, Toohey and McHugh JJ held that corporations are no longer entitled to rely on the privilege against self-incrimination. The three remaining members of the Court, Deane, Dawson and Gaudron JJ were of a different view. In obiter dicta two of the majority, Mason and Toohey JJ, expressed the view that, by analogy the privilege against self-exposure to a civil penalty should also be denied to corporations. McHugh J expressed a similar view.

10. In their joint judgment Mason CJ and Toohey J said (at 500) that, in the final analysis, the principal bases for making the privilege against self-incrimination available to corporations were that it assists in maintaining the fair state-individual balance and that it is a significant element in maintaining the integrity of our accusatorial system of criminal justice which requires the Crown to prove its case before the accused is called upon to answer. The second basis related to the right to silence and constituted a part of what is known as "due process."

11. Mason CJ and Toohey J rejected these bases for the rule so far as applied to corporations. Amongst other things they said (at 500):-

> "... we reject without hesitation the suggestion that the availability of the privilege to corporations achieves or would achieve a correct balance between State and corporation. In general, a corporation is usually in a stronger position vis-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. The doctrine of the corporation as a separate legal entity and the complexity of many corporate structures and arrangements have made corporate crime and complex fraud one of the most difficult areas for the State to regulate effectively."

12. Later they said (at 501-3):-

> "That principle, which was primarily directed against a requirement to testify or admit guilt, was extended by means of privilege against self-incrimination, so as to protect an accused person from compliance with an obligation arising by process of law to produce incriminating documents. It had been settled as early as the eighteenth century that the courts would not make an order requiring an accused person to produce documents which would or might tend to incriminate him or her of the offence charged. In R v Cornelius (1744) 2 Strange 1210; 93 ER 1133, the Court of

King's Bench refused the prosecutor a rule to inspect the books of the defendants who were charged with the offence of taking money for granting licences to alehouse-keepers. The rule was denied on the ground that it was tantamount to requiring 'a defendant indicted for a misdemeanour, to furnish evidence against himself'...

In conformity with that principle, the privilege against self-incrimination protects an accused person who is required by process of law to produce documents which tend to implicate that person in the commission of the offence charged. The privilege likewise protects a person from producing in other proceedings, including civil proceedings, documents which might tend to incriminate that person. In its application to the production of documents, the operation of the privilege is more far reaching in the protection which it gives than in its application to oral evidence. It is one thing to protect a person from testifying to guilt; it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt, especially documents which are in the nature of real evidence. Indeed, the protection afforded by the privilege is now so far reaching that it has been described as protection against being compelled to say anything which 'may tend to bring him into the peril and possibility of being convicted as a criminal' (Lamb v Munster (1882) 10 QBD 110, per Field J at 111) or as protection 'against exposure to conviction for a crime', (Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR, per Mason ACJ, Wilson and Dawson JJ at 336. That is because the privilege protects a person from discovering or revealing information which may lead to the discovery of admissible evidence of guilt not in his or her possession or power (Hamilton v Oades [1989] HCA 21; (1989) 166 CLR 486, at 503, 508; [1989] HCA 21; 85 ALR 1).

In this respect the protection now conferred by the privilege extends well beyond the objects originally sought to be achieved by way of protecting natural persons from the abuses which necessitated the introduction of the privilege. True it is that the production of documents pursuant to process of law, such as a subpoena duces tecum, involves some testimonial aspects. Thus, by producing the documents described, the person producing them admits that the documents existed, were in his or her possession or power and that they are authentic in the sense that they match the description which they have been given (Braswell (1988) 487 US, at 104). But the privilege inhibits the production of books which might be used in evidence and are in the nature of real evidence which speak for themselves as distinct from testimonial oral evidence which is brought into existence in response to an exercise of investigative power or in the course of legal proceedings (Controlled Consultants Pty Ltd (1985) 156 CLR, per Gibbs CJ, Mason and Dawson JJ at 392; Corporate Affairs Commission (NSW) v Yuill [1991] HCA 28; (1991) 172 CLR 319, per Brennan J at 326; [1991] HCA 28; 100 ALR 609). Plainly enough

> 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.
> Accepting that, notwithstanding this difference, the privilege does protect the individual from being compelled to produce incriminating books and documents, it does not follow that the protection is an essential element in the accusatorial system of justice or that its unavailability in this respect, at least in relation to corporations, would compromise that system. The fundamental principle that the onus of proof beyond reasonable doubt rests on the Crown would remain unimpaired, as would the companion rule that an accused person cannot be required to testify to the commission of the offence charged. To speak in this context of a violation of the 'right to silence' serves, in our view, only to confuse the issue."

13. Against that background, I come to the passage in the judgment which is of direct relevance to the present problem. Their Honours said (at 504-5):-

> "Although the point was not fully argued in this case, the reasons for denying the privilege against self-incrimination to corporations apply with equal force to the privilege against exposure to a penalty. The privilege against exposure to a civil penalty is a different aspect or ground of privilege from the privilege against self-incrimination (see Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR, per Mason ACJ, Wilson and Dawson JJ at 336-7). The former privilege has been treated as being applicable to corporations in a civil action for penalties (R v Associated Northern Collieries [1910] HCA 61; (1910) 11 CLR 738, at 747). But that privilege has developed by analogy from the privilege against self-incrimination so that the reasons given for denying the availability of the latter privilege to corporations also deny the availability of the penalty privilege. That said, this is not a case in which that privilege could have any application, as the proceedings here are not civil proceedings for a penalty."

14. Their Honours concluded by saying (at 507-8):-

> "Ultimately, it is clear that the rationales for the availability of the privilege against self-incrimination to natural persons, both historical and modern, do not support the extension of the privilege to artificial legal entities such as corporations. The privilege in its modern form is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them. In respect of natural persons, a fair state-individual balance requires such protection; however, in respect of corporations, the privilege is not required to maintain an appropriate state-individual balance. Nor is the privilege so

> fundamental that the denial of its availability to corporations in relation to the production of documents would undermine the foundations of our accusatorial system of criminal justice."

15. McHugh J said (at 555):-

> "In civil actions, the case for requiring corporations to disclose all relevant documentary evidence is overpowering. To permit a corporation to claim the privilege in civil proceedings is to deprive the opposite party of evidence which will assist that party's case. Sometimes, that evidence will completely destroy the corporation's case. In Istel (AT and T Istel Limited v Tully (1993) AC 45 at 53) Lord Templeman said that it was 'difficult to see any reason why in civil proceedings the privilege against self-incrimination should be exercisable so as to enable a litigant to refuse relevant and even vital documents which are in his possession or power and which speak for themselves'. In producing such documents, the corporation is not creating evidence against itself, as would occur if an individual could be compelled to give incriminating answers. The documents already exist. In the 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 in civil proceedings will be imperilled if the privilege is held not to apply to corporations. Istel (1993) AC, at 62. Indeed, it is difficult to contend that a corporation, which is the creature of the law, suffers injustice if it is obliged to produce all relevant evidence in civil proceedings even though it proves or tends to prove that it has breached the law. Because that is so, no distinction ought to be drawn for the purpose of civil proceedings between the production of documents and other forms of evidence such as answers to interrogatories which tend to incriminate a corporation. If criminal proceedings are pending or threatened, it is open to a civil court, by appropriate orders, to make orders to prevent any oppression of a corporation as the result of ordering discovery or interrogatories in its proceedings (See for example, the orders made in Istel (1993) AC 45.)"

16. The orders in Istel required the defendants to disclose information relating to dealings with certain assets and to produce documents in respect of such dealings. The orders prohibited the use of the material so disclosed in the prosecution of either defendant. In relation to this form of order, I refer generally to the discussion in Re New World Alliance Pty Limited; Sycotex Pty Limited v Baseler (1993) 118 ALR 699 at 713-7.

17. McHugh J discussed (at 547 - 548) the privilege against exposure to a civil penalty. He concluded his discussion by saying (at 548):-

> "The decision in Pyneboard establishes that the privilege (against exposure to a civil penalty) is a general privilege not limited to curial proceedings. Consequently, if the privilege against self-incrimination is not available to a

> corporation, the privilege against exposure to a civil action for a penalty is not available to a corporation, notwithstanding that in Associated Northern Collieries, Isaacs J refused to order the corporate defendants to make discovery of documents in a civil action for a penalty."

18. In the course of his judgment Brennan J said (at 512-513) that the particular immunity which the privilege against self-incrimination was designed to confer was an immunity from an obligation to testify to one's own guilt. He said that that was an immunity which was irrelevant to a corporation because it could not be a witness. Eventually he concluded (at 516) that the rationale of the privilege against self-incrimination had no application to corporations. He also said (at 517):-

> "The significance of denying the availability of the privilege against self-incrimination to a corporation lies in the inability of the corporation to resist the exercise of a statutory power from which a natural person is immune. The implication which is made in construing a statute conferring an investigative power is that the exercise of the power will not compel a person to incriminate himself unless the statute otherwise prescribes expressly or by necessary intendment. That implication does not protect corporations. Nor is there any other fundamental bulwark of liberty which qualifies in any material way a statutory grant of an investigative power. As we shall see, the privilege against self-exposure to a penalty affords no such qualification."

19. His Honour later referred (at 519) to the fact that the penalty privilege owed its existence not to the law's historical protection of human dignity, but to the limitation which the courts placed on the exercise of their powers to compel a defendant in an action for the recovery of a penalty to furnish against himself the evidence needed to establish his liability. He referred to what Lord Esher MR said in Martin v Treacher (1886) 16 QBD 507 (at 511-512) namely:-

> "The reasons given seem substantially to amount to this: although the penalty is not in strict law a criminal penalty, yet the action is in the nature of a criminal charge against the defendant ... and, the object of the action being to subject the defendant to a penalty in the nature of a criminal penalty, it would be monstrous that the plaintiff should be allowed to bring such an action on speculation, and then, admitting that he had not evidence to support it, to ask the defendant to supply such evidence out of his own mouth and so to criminate himself. It is on this principle, as it seems to me, that a court of equity would not grant its aid to such an action."

20. Brennan J continued (at 520-521):-

> "In refusing to lend its process to compel discovery in actions to recover a civil penalty, the court has made no distinction between corporations and natural persons. The policy which denies discovery in actions for a penalty is concerned more with the purpose for which discovery is sought than with the privilege of individual litigants.

> Moreover, until the present case, the significance of the distinction between the privilege against self-incrimination and the penalty privilege has not been considered. But once it is seen that the privilege against self-incrimination can be claimed only by natural persons, the distinction between exposure to a civil penalty and exposure to a criminal penalty cannot be regarded as a relevant distinction for the purpose of determining whether discovery should be ordered. So long as it was thought that corporations, no less than natural persons, could claim a privilege against self-incrimination, the distinction did not matter. But it would surely be incongruous for a court to allow didscovery against a corporation in proceedings for the conviction of the corporation while refusing discovery in proceedings for a civil penalty. It would be no less incongruous to allow discovery against a corporation in proceedings for a civil penalty and deny discovery against a natural person in similar, or even the same, proceedings.
> As penalties may be imposed on a corporation either in criminal or in civil proceedings and as the polilcy of the law leads the court to refuse to exercise its powers to compel discovery designed to procure evidence of liability to penalties, I would hold corporations exempt from an obligation to give discovery in any proceedings brought to enforce a liability to a penalty, whether criminal or civil, unless a statute or rule of court otherwise provides expressly or by necessary intendment."

21. The essential reason why Deane, Dawson and Gaudron JJ reached the conclusion they did is to be found in the following passage from their joint judgment (at 534-535):-

> "If, as it seems to us, the desire to deny the privilege against self-incrimination, whether to natural persons or corporations or both, tends to be dictated by pragmatism rather than principle, then the extent of any denial is more appropriately a matter for the legislature than the courts. We can find no sufficient reason in principle for saying that the doctrine, as it has developed in our law, has no application to corporations. Thus in the present case, which is a criminal prosecution against the respondent, there is no reason why the respondent may not successfully invoke the privilege against the notice to produce documents given pursuant to the rules of the court. Whether the refusal to produce the documents should be upheld on that basis or upon the broader basis that the prosecution cannot compel a defendant in criminal proceedings to assist it in the proof of its case is a matter which it is unnecessary to determine."

22. Their Honours decided that the existing authorities should be followed and applied. If there were to be any change, it should be brought about by the legislature, not the courts.

23. Finally, in relation to Caltex, it is pertinent to note the Court's answer to question 7 of the questions raised for the Court's determination. The question and the answer are as follows (178 CLR

at 560):-

> "7. Whether the privilege against self-incrimination extends to (the respondent) in respect of the said notice to produce.
> 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."

24. At first sight, the answer may be thought to be confusing because the question of the privilege against exposure to a civil penalty did not arise for determination in the case. I think, however, that the answer to the question is explained by the passage earlier cited from Brennan J's judgment in which he said (at 521) that, as penalties may be imposed on a corporation either in criminal or in civil proceedings and as the policy of the law leads the Court to refuse to exercise its powers to compel discovery designed to procure evidence of liability to penalties, he would hold corporations exempt from an obligation to give discovery in any proceedings brought to enforce a liability to a penalty, whether criminal or civil. It may, I think, be inferred, 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. In this way there was a majority of judges in favour of the view that, both in cases involving a civil penalty and those involving a criminal one, the Court would not allow its procedures to be used to compel the defendant to discover documents, to answer interrogatories or to produce documents pursuant to a subpoena or a notice to produce which had the force of a subpoena. That is the only explanation for the formal answer to the question. In saying what I have, I have not overlooked Brennan J's proposed answer to the question (at 523) which was, "No, but the privilege against self-exposure to a penalty extends to Caltex." With respect, the answer to question 7 given by the Court as a whole more clearly accords with what Brennan J said in the passage from his judgment at 521.

25. If I am correct in my understanding of the significance of the High Court's answer to question 7 in the Caltex case, this matter, at least in this Court, is concluded against the Trade Practices Commission. The Court's formal order discloses that one of the matters decided in the case was that a party sued for the recovery of a penalty, civil or criminal, is not bound to discover documents, answer interrogatories or respond to a subpoena to produce documents or a notice to produce which has the force of a subpoena. That was the law which the High Court applied in Pyneboard; the judgments of Brennan, Deane, Dawson and Gaudron JJ, who comprised the majority of the Court on this point, have reaffirmed it. This Court is bound by the decision in Pyneboard and, in my respectful opinion, by the majority opinion on this point in Caltex.

26. If, for the reasons given by Burchett J in his judgment, my conclusion that Caltex binds us to find against the Trade Practices Commission be incorrect, the position is, in my respectful opinion, no different. On that basis, Caltex is not an authority which binds us to decide the point in favour of either party. The statements of Mason CJ and Toohey J on the point are clearly obiter. Furthermore, the two judges say (at 504) that the point was not fully argued.

27. It is not clear to me whether McHugh J's treatment of the matter should be regarded as obiter; the better view may be that it forms part of the rationale for his decision. In the circumstances, it is unnecessary to form a view on that question. Deane, Dawson and Gaudron JJ do not deal with the point expressly. Their view that the privilege against exposure to a penalty remains is to be discerned from their general approach to the problem of privilege against self-incrimination and from the circumstance that they must be taken to have concurred in the answer to question 7 of the questions posed for the determination of the Court. Caltex, on this basis, is of no more than persuasive authority. Its persuasiveness pulls one evenly in opposite directions, three judges having one view and three the opposite view. The seventh judge, Brennan J, deals with the matter directly. On his

approach the matter is one of substance. It provides an independent ground of his decision in a case involving privilege against self-incrimination for he would not distinguish between actions for a criminal penalty and actions for a civil penalty any more than do Deane, Dawson and Gaudron JJ.

28. If one looks at the matter in this way, the case is not an authority on the point in question here. But this area of the law is not devoid of authority. There is binding authority upon this Court because of the decision in Pyneboard and the cases which it followed and applied. Pyneboard continues to bind this Court. We should follow it.

29. There are at least two sound reasons why, if the correct view be that Caltex is of persuasive authority only, we should not disturb the existing law. The first is this. The problem we have is not unlikely to arise in numbers of other contexts in other courts of equivalent jurisdiction. The Full Court of the Federal Court is only one of nine full courts or courts of appeal to which this problem may come. It is important that the law not be rendered any more uncertain than it now is. In my opinion this problem, if it has not already been decided - in my opinion it has been - ought to be left to the further decision of the High Court or to the legislature.

30. The second matter to which I refer stems from the care taken by all the judges of the High Court in Caltex to make it clear that an individual's entitlement to rely on the two privileges was unaffected by the decision. There is no suggestion that they should be curtailed or modified in any way. Yet the very denial of the privileges to corporations will tend, if not to destroy them, then substantially to devalue them so far as they extend to natural persons as distinct from corporations.

31. It is common for legislatures concerned with the conduct (really misconduct) of corporations to provide for a variety of offences against statutory provisions. Sanctions are imposed for infringements of the legislation. Sometimes these are criminal and sometimes they are civil. Often the sanctions apply, not only in relation to corporations, but also to the individuals (eg. directors or other officers of corporations) who have participated in breaches of the law. This case provides an example. The corporate respondents were sued for infringements of Part IV of the Trade Practices Act 1974 ("the Act") pursuant to para.76(1)(a) of the Act. Numbers of the personal respondents who have been sued, are being sued pursuant to other paragraphs of subsec.76(1); for example, pursuant to para.(c) because they are said to have aided, abetted, counselled or procured a person (the corporation) to contravene the Act, and pursuant to para.(e) because they are said to have been, directly or indirectly, knowingly concerned in, or party to, the contravention.

32. If the corporate respondents are bound to produce documents pursuant to an order for discovery or a subpoena, it is not unlikely that the corporation may produce documents which will also implicate the personal respondents. That will almost certainly happen. The documents will be available, not only against the corporate respondents; in many cases they will be available against the personal respondents.

33. I recognise that many of the community would think this a good thing. But, if that be so, it will be because there is a view that the privilege against self-incrimination and the privilege against exposure to a penalty have been taken too far. Individuals as well as corporations should be denied it. In this respect, some of the considerations mentioned in the judgments of Mason CJ and Toohey J, Brennan J and McHugh J are as apposite, with respect, for individuals as they are for corporations. In saying what I have, I recognise that by no means all the matters upon which they relied fall into this category and that there are to be found in the judgments reasons and grounds which do apply to corporations but not to individuals.

34. Of course, documents of the kind I have mentioned could well be obtained pursuant to notices served under s.155 of the Act. But the assumption upon which this discussion proceeds is that nothing in Caltex nor in any of the earlier authorities discloses an intention to affect or cut down an individual's entitlement to the privilege. The existence of the privilege is regarded as fundamental

both in relation to the enforcement of the criminal law and of the law dealing with the recovery of penalties in civil proceedings. My opinion is that the denial of the privilege to a corporation will, for practical purposes, operate to deny it also to individuals alleged to be implicated in the corporation's wrong doing. These various considerations suggest to me that, if there is to be a change in the law, it ought to be made by the legislature, not the courts. That is especially so when one considers that the Act already contains its own provisions to overcome the problem. I refer again to s.155 of the Act which was discussed in Pyneboard.

35. I recognise that there are some matters which tend to persuade one against the views which I have expressed. Firstly, until Caltex, the authorities drew no distinction between the entitlement of corporations to rely on the privilege and the entitlement of individuals to do so. I think I am correct in saying that there is no discussion in any of the authorities to which I have referred, except Caltex, which raises the question whether any different approach should be adopted in relation to corporations from that adopted in relation to individuals.

36. Secondly, there is obviously an incongruity in denying one privilege, the privilege against self-incrimination, and maintaining another, the privilege against exposure to a civil penalty. It must be conceded that, if corporations are denied privilege against self-incrimination, it follows logically that they should be denied privilege against exposure to a civil penalty. But Brennan J perceived this incongruity and dealt with it. His way of rationalising the position, reflected in the Court's answer to question 7, was to deny to prosecutors and plaintiffs suing corporations for penalties, whether criminal or civil, access to the Court's powers to require corporations to provide discovery of documents and answers to interrogatories, and to require compliance with subpoenas to produce documents or notices to produce documents having the force of subpoenas. This, as I understand his Honour's judgment, was the one qualification he made to his conclusion that privilege against self-incrimination should be denied to corporations. In this way he avoided the apparent inconsistency or incongruity which would otherwise have existed.

37. There is one further matter which has caused me to pause before reaching the conclusion I have. It was not a matter relied on in any of the submissions made to us. Most of the dicta in the various authorities to which I have referred contain language which, in fairly categorical terms, states that the privilege against exposure to a penalty will only be available in cases where the action is solely or merely for a penalty. The present action is an action for penalties, but it began as an action in which, not only penalties, but also injunctions, were sought. It was not an action solely for penalties. The fact, however, is that most, if not all, of the respondents have now consented to final injunctive relief or have given undertakings to the Court by way of final relief. In some cases this has been done without admissions. So the action has become one which is in reality one solely for penalties and not any other relief. I think that it is safe enough to proceed to decide the matter now on the basis that the action is one solely for penalties and not for other relief as well. If it be thought that the action is not one solely for penalties, then the Trade Practices Commission was clearly entitled to discovery or to serve a notice to produce which had the force of a subpoena. But subject to the decision in Caltex, persons served with such a notice, although bound to comply with it, would be entitled to claim privilege from inspection of particular documents which tended to expose them to a penalty.

38. In the result, for the reasons I have given, I would answer the questions which have been asked in the special case as follows:-

(a) Yes.
(b) Does not arise.

BURCHETT J Pursuant to s. 25(6) of the Federal Court of Australia Act 1976, there came before the Full Court, at the instance of the sixth respondent, **Abbco Ice Works** Pty Limited ("the company"), a special case in which questions were reserved for the Court's determination. The case showed that the Trade Practices Commission had instituted proceedings by application, against (inter

alios) the company, for injunctive relief and for the recovery of pecuniary penalties under s. 76 of the Trade Practices Act 1974. Contraventions were alleged of ss. 45 and 45A of that Act, contraventions of which do not constitute crimes but do give rise to liability to pecuniary penalties: Pyneboard Proprietary Limited v. Trade Practices Commission [1983] HCA 9; (1983) 152 CLR 328 at 332. By notices to produce served in reliance upon Order 33 rule 12 of the Rules of Court, the applicant Commission has sought production of various documents from the company. The company's response to the notices to produce has been an application to set them aside on the ground that compliance might expose it to the imposition of a civil penalty. The questions reserved are the following:

> (a) Whether the notices to produce served on the company ought to be set aside; or
> (b) Whether the Court ought to order otherwise under Order 33 rule 12.

In substance, the issue raised is whether, as a corporation, the company is entitled to rely on the privilege, which is certainly available to individuals, against self-exposure to a penalty.

2. In The King v. The Associated Northern Collieries [1910] HCA 61; (1910) 11 CLR 738, although the question whether a corporate defendant to a civil action for penalties was in any different position from individual defendants does not seem to have been argued, Isaacs J, on the ground that the proceeding was penal, declined to require the defendants, who included companies, to make discovery of documents. But the whole question has recently been thrown open by the decision of the High Court in Environment Protection Authority v. Caltex Refining Co Pty Limited [1993] HCA 74; (1993) 178 CLR 477. There it was held by a bare majority (Mason CJ, Brennan, Toohey and McHugh JJ, with Deane, Dawson and Gaudron JJ dissenting) that the privilege against self-incrimination is not available to a corporation. The decision, though by a bare majority, is of course binding on this Court, and indeed, unless the High Court on some later occasion feels "compelled to the conclusion that (it) is wrong", on the members of the High Court itself: Nguyen v. Nguyen [1990] HCA 9; (1990) 169 CLR 245 at 269, per Dawson, Toohey and McHugh JJ.

3. However, the problem with which we are concerned is not solved by Caltex. Despite the close affinity between the privilege against self-incrimination and the privilege against self-exposure to a penalty (many statements of principle in the books assimilate the two privileges into one rule), there is a distinction. Caltex did not involve a civil action for a penalty, but a prosecution for offences. The close affinity to which I have referred is illustrated by the fact that a criminal prosecution is plainly penal (see Huntington v. Attrill (1893) AC 150 at 156), but the converse will not always hold; a civil action for a penalty is not a criminal proceeding: Naismith v. McGovern [1953] HCA 59; (1953) 90 CLR 336 at 340-341; Associated Northern Collieries (supra) at 742. Accordingly, the decision itself in Caltex cannot create a binding precedent for the present case. Nor is there a ratio decidendi common to the majority in Caltex which provides a binding rule by the application of which this case could be decided. Three of the majority (Mason CJ, Toohey and McHugh JJ) gave utterance to obiter dicta affirming that the privilege against self-exposure to a penalty was no more available to a corporation than (as the majority of the Court held) was the privilege against self-incrimination. But the fourth member of the majority (Brennan J) took the contrary view, and in his case, his view cannot be seen as an obiter dictum because it formed the basis of his judgment on one of the substantial issues in the case. However, he was alone in expressing that view, although it enabled him to join with the minority on the principal question (Deane, Dawson and Gaudron JJ) in answering (but not directly) the further question "(w)hether the privilege against self-incrimination extends to (the respondent) in respect of the said notice to produce". Their answer held the Caltex company "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". But the very terms of this answer make it clear that it cannot provide a precedent binding this Court to hold, in a case where self-incrimination is not in issue, that a corporation can rely upon the privilege against self-exposure to a

penalty in respect of a notice to produce. Even if that were not so, the quite different reasons given by Brennan J, on the one hand, and Deane, Dawson and Gaudron JJ on the other, would require the conclusion that the decision on the point in question lacks a ratio decidendi. Only the decision itself would be binding, in indistinguishable circumstances.

4. The common law, like the Droit Administratif (though not the general law) of France, has been developed by the method of building upon the precedents provided by previous decisions. But it is necessary to understand the nature of a binding precedent, and to what it extends. In Great Western Railway Company v. Owners S.S. Mostyn (1928) AC 57 at 73, Viscount Dunedin said:

> "Now, when any tribunal is bound by the judgment of another Court, either superior or co-ordinate, it is, of course, bound by the judgment itself. And if from the opinions delivered it is clear - as is the case in most instances - what the ratio decidendi was which led to the judgment, then that ratio decidendi is also binding. But if it is not clear, then I do not think it is part of the tribunal's duty to spell out with great difficulty a ratio decidendi in order to be bound by it."

This passage was referred to by Barwick CJ in Dickenson's Arcade Pty Limited v. The State of Tasmania [1974] HCA 9; (1974) 130 CLR 177 at 188, and by Mason CJ, Wilson, Dawson and Toohey JJ in Federation Insurance Limited v. Wasson [1987] HCA 34; (1987) 163 CLR 303 at 314. In the former case (ubi cit.) Barwick CJ said, with reference to an earlier decision of the High Court:

> "There was, however, no reason for that decision common to the members of the Court who formed the majority in favour of the conclusion. An attempt was made by counsel for the plaintiff in the argument of this demurrer to construct a reason for decision in the sense of the minority by aggregating views expressed by those Justices with a view argumentatively attributed to one of the Justices included in the majority. Such a course, however, is inadmissible, just as a common reason for decision could not be constructed by adding views of single Justices to form a conglomerate. ... A composite reason so constructed does not furnish a reason for decision in the sense of that expression in relation to judicial precedent. There being no reason for decision common to the majority of the Justices, the Court's decision ... , in my opinion, is authority only in relation to the statutory and factual situation it resolved and in relation to a case which has, if not precisely, at least substantially and indistinguishably the same statutory and factual situation. ... I do not consider myself bound by any of the several reasons given by the individual Justices for the conclusion to which they came: and, in particular, I do not regard myself as bound to use any of those reasons as a base on which to construct some further or other conclusion."

In Federation Insurance Limited v. Wasson, the High Court affirmed the decision of the Court of Appeal of New South Wales in Wasson v. Commercial and General Acceptance Ltd (1985) 2 NSWLR 206 and, in particular, the view of McHugh JA (as he then was), who said (at 228):

> "The reasons for a dissenting judgment can never constitute a binding precedent: Dickenson's Arcade Pty Ltd v. Tasmania [1974] HCA 9; (1974) 130 CLR 177 at 188. Only the reasons for the decision in a case are binding. This is so even though no judge in the majority expresses a view on the particular point." (Emphasis original.)

5. The passage I have cited from the judgment of Barwick CJ in Dickenson's Arcade was also cited by Mason CJ and Deane J in their joint judgment in Philip Morris Limited v. The Commissioner of Business Franchises (Victoria) [1989] HCA 38; (1989) 167 CLR 399 at 439. In that case (at 440), Mason CJ and Deane J referred to "disparity of reasoning" as producing a "resulting absence of any compelling general principle" emerging from a decision. Toohey and Gaudron JJ (at 481) made a similar statement, and McHugh J (at 496) said:

> "Since the reasons for decision of Fullagar J (in the earlier case there under examination) were different from those of the other judges in the majority, the case is an authority only for what it decided in respect of the legislation there under examination."

(The other members of the majority in the case his Honour was discussing did not themselves form a majority of the Court.)

6. 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 will then be authority for its actual decision, yet cannot be said to have decided any proposition of law. But it must follow that where the same position arises with respect to the answer to a question of law in a special case (as it may if the question be a double one), the court should not simply give an answer in the same way. For if the answer to the question is a proposition of law, it cannot be true only for the instant matter. In order, therefore, to avoid an absurdity, the court should generally divide the double question into its parts, and answer each as a majority determines. This is the situation that arose in Hepples v. The Commissioner of Taxation of the Commonwealth of Australia [1992] HCA 3; (1992) 173 CLR 492 at 550-553.

7. Very recently, the High Court returned to the same subject. In Re Tyler; Ex parte Foley [1994] HCA 25; (1994) 121 ALR 153, the Court was referred to two earlier decisions based upon reasoning in which, as Brennan and Toohey JJ said (at 158), "no clear majority view prevailed". McHugh J said (at 165):

> "The divergent reasoning of the majority judges in (the two earlier cases) means that neither of those cases has a ratio decidendi. But that does not mean that the doctrine of stare decisis has no relevance or that the decisions in those cases have no authority as precedents. Because it is impossible to extract a ratio decidendi from either of the two cases, each decision is authority only for what it decided. (Dickenson's Arcade Pty Ltd v. Tasmania (supra) at 188; Philip Morris Ltd v. Commissioner of Business Franchises (Vic.) (supra) at 496). But what is meant by saying that a case, whose ratio decidendi cannot be discerned, is authority for what it decided? It cannot mean that a court bound by that decision is bound only by the precise facts of the case. Stare decisis and res judicata

> are different concepts.
> In my opinion, the true rule is that a court, bound by a previous decision whose ratio decidendi is not discernible, is bound to apply that decision when the circumstances of the instant case 'are not reasonably distinguishable from those which gave rise to the decision' (Scruttons Ltd v. Midland Silicones Ltd [1961] UKHL 4; (1962) AC 446 at 479 per Lord Reid)."

8. It should need no emphasis that the lack of a ratio decidendi, accepted by a majority, in respect of one point in a decision, does not affect the authority of the decision in respect of another point which was plainly decided by a majority. Indeed, even a decision lacking a discernible ratio decidendi should be followed where the facts are not readily distinguishable. In Re Tyler, McHugh J said (at 166-167):

> "Although I remain convinced that the reasoning of the majority justices (in the two earlier decisions) is erroneous, I do not regard that as a sufficient reason to refuse to give effect to the decisions in those cases. They are recent decisions of the court where, after full argument on each occasion, the court upheld the validity of the Act in circumstances where the facts are not readily distinguishable from the present case ... .
> ... Like cases should be decided alike. Uniformity of judicial decision is a matter of great importance. Without it, confidence in the administration of justice would soon dissolve."

Cf. Goryl v. Greyhound Australia Pty Ltd [1994] HCA 18; (1994) 68 ALJR 432 at 433, per Mason CJ. (Of course, cases involving the interpretation of the Constitution have repeatedly been treated as in a special category, as McHugh J pointed out in Re Tyler at 165-166.)

9. The actual decision in Caltex concerned the answers required to be given to seven questions raising issues of law in a case stated by the Land and Environment Court of New South Wales in the prosecution of the Caltex company for offences involving the pollution of the Pacific Ocean and the contravention of conditions of a licence to discharge pollutants from the Kurnell refinery. The prosecution relied both upon a notice, under a specific statutory power to require the production of documents conferred by s. 29(2)(a) of the Clean Waters Act 1970 (NSW), and also upon a notice to produce served under the Rules of Court, which gave it the effect of a subpoena. As I have said, the High Court held, by majority (Mason CJ, Brennan, Toohey and McHugh JJ), that the Caltex company was not entitled to rely upon the privilege against self-incrimination, being a corporation. In answer to one of the seven questions stated for determination, namely, "(w)hether an incorporated company is entitled to a privilege commonly known as the privilege against self-incrimination", the Court therefore answered "No". The Court also, by the same majority, upheld the validity of the notice given under s. 29(2)(a). With only Brennan J dissenting, it refused to hold that the notice to produce under the Rules of Court should be set aside as an abuse of the process of the Court. But by a different majority (Brennan, Deane, Dawson and Gaudron JJ), the Court gave the equivocal answer, concerning the privilege claimed by the Caltex company in respect of that notice to produce, to which I have already made reference.

10. While only Brennan J relied, as a ground of decision, upon a view as to whether the privilege against self-exposure to a penalty is available to a corporation, Mason CJ, Toohey and McHugh JJ also stated their views on that matter, which are in conflict with the view of Brennan J. Deane, Dawson and Gaudron JJ did not advert to this conflict, although the answer of the Court to the

question whether the notice to produce should be set aside as an abuse of the process of the Court makes it plain they were not prepared to join with Brennan J in holding (as he did at 523) that "service of the notice to produce should be set aside". However, their Honours' reference (at 535) to Morgan v. Babcock and Wilcox Ltd [1929] HCA 25; (1929) 43 CLR 163 may explain their refusal to agree with Brennan J on this point. For that case shows that a notice to produce is an accepted procedure, in a criminal as in a civil case, in order to lay the foundation for proof of documents by secondary evidence. Service of the notice could accordingly not have been set aside in advance of the hearing, unless perhaps on the view that there could have been no possible purpose in the adducing of secondary evidence of any of the documents, if the claim of privilege should have been upheld upon any attempt to enforce compliance with its terms. Cf. the remarks of Lord Eldon LC in Parkhurst v. Lowten (1819) 2 Swans 194 at 213; 36 ER 589 at 595.

11. It is convenient, before coming to the question of privilege against self-exposure to a penalty, to outline the way in which the High Court dealt, in Caltex, with the question whether a corporation may avail itself of the privilege against self-incrimination. The joint judgment of Mason CJ and Toohey J refers to the paucity of previous Australian authority on the point; to the established doctrine in the United States (the weight of which must be qualified by the nature of the question there as a constitutional one) that a corporation may not claim the privilege; to the English authorities which do not distinguish between the position of a corporation and an individual, but in the recent decision of the House of Lords in A. T. and T. Istel Ltd v. Tully (1993) AC 45 at 53 have turned to attack the justification of the privilege in civil proceedings in relation to relevant documents, Lord Templeman describing the privilege as "an archaic and unjustifiable survival from the past" (with this might, perhaps, be compared the more restrained remark of Cardozo J in Palko v. Connecticut 302 US 319 (1937) at 326 that justice "would not perish if the accused were subject to a duty to respond to orderly inquiry", and see also IBM United Kingdom Ltd v. Prima Data International Ltd (1994) 1 WLR 719 at 728); to Canadian authorities which are complicated by the Canadian Charter of Rights and Freedoms; and to recent New Zealand authority which firmly supports the right of a company to claim the privilege. Their Honours next examined the historical basis of the privilege, as it became established during the 17th century. They pointed out that it was in large measure a reaction against unjust methods of interrogation, and that the abuses with which it was concerned in those days of its inception did not relate to corporations. One may add that, as late as the year 1850, Sir Lancelot Shadwell V-C was able to say, in The King of the Two Sicilies v. Willcox [1851] EngR 134; (1850) 1 Sim (NS) 301 at 335 [1851] EngR 134; (61 ER 116 at 130) that, although "a corporation might be liable to be indicted" for not repairing a bridge or not complying with an order of justices, "those cases were exceptional; and the general law of England was that a corporation could not be indicted for crime".

12. Mason CJ and Toohey J then turn (at 498-505) to a discussion of the place of the privilege against self-incrimination in the modern law, and of whether the considerations which support it apply to a corporation. They refer to Lord Templeman's view in Istel that "the only present-day justification for the privilege (is) the discouragement of ill-treatment of suspects and the extraction of dubious confessions", pointing out that this cannot apply to the compulsory production of documents by process of law. They also refer to the view that the privilege is "a human right which protects personal freedom, privacy and human dignity", suggesting this too is "less than convincing" in relation to a corporation. They discuss whether the principle is justifiable as "maintaining the fair state-individual balance" and "the integrity of our accusatorial system of criminal justice", but conclude that grounds so stated should not require the law to grant a company the privilege of withholding its documents, which are "in the nature of real evidence which speak for themselves". Then their Honours refer to "the effect of the privilege (as being) to shield corporate criminal activity", and continue (at 504):

> "In this respect, the availability of the privilege to corporations has a disproportionate and adverse impact in restricting the documentary evidence which may be produced to the court in a prosecution of a corporation for a

> criminal offence. In the case of corporations, their books and documents constitute the best evidence of their business transactions and activities. It makes no sense at all to make the privilege available to a corporation in respect of these books and documents when officers of the corporation are bound to testify against the corporation unless they are able to claim the privilege personally. Oral evidence given by an officer of a corporation is that of the witness, not that of the corporation".

Their Honours find that "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". This conclusion is repeated at the end of the judgment, where they say (at 507-508):

> "Ultimately, it is clear that the rationales for the availability of the privilege against self-incrimination to natural persons, both historical and modern, do not support the extension of the privilege to artificial legal entities such as corporations. The privilege in its modern form is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them. In respect of natural persons, a fair state-individual balance requires such protection; however, in respect of corporations, the privilege is not required to maintain an appropriate state-individual balance. Nor is the privilege so fundamental that the denial of its availability to corporations in relation to the production of documents would undermine the foundations of our accusatorial system of criminal justice.
> ... (I)f it ever was the common law in Australia that corporations could claim the privilege against self-incrimination in relation to the production of documents, it is no longer the common law."

13. It has been argued that this conclusion indirectly diminishes the value of the privilege for individuals. Where both a corporation and its officers are at risk of prosecution, to require discovery of the corporation is to make available documents which may accuse its officers. But their privilege has never been, nor should it be, a shield against the use of incriminating evidence - only a right to decline to be themselves the authors of their own destruction by producing the evidence. If evidence produced by the corporation condemns them, the relevant law is vindicated without any breach of the principle against self-incrimination.

14. Against the background of their opinion that the privilege relating to self-incrimination is not available to a corporation, their Honours made (at 504-505) a short statement on the subject of the cognate privilege relating to self-exposure to a penalty, as follows:

> "Although the point was not fully argued in this case, the reasons for denying the privilege against self-incrimination to corporations apply with equal force to the privilege against exposure to a penalty. The privilege against exposure to a civil penalty is a different aspect or ground of privilege from the privilege against self-incrimination ... . The former privilege has been treated as being

> applicable to corporations in a civil action for penalties. But that privilege has developed by analogy from the privilege against self-incrimination so that the reasons given for denying the availability of the latter privilege to corporations also deny the availability of the penalty privilege. That said, this is not a case in which that privilege could have any application, as the proceedings here are not civil proceedings for a penalty."

15. It is convenient to refer next to the views of McHugh J, because they are closely similar to those of Mason CJ and Toohey J. His Honour also took, as his starting point for discussion of the principle, the conflicts of the 17th century, and later examined the justifications by which the principle is supported today. In his Honour's view (expressed at 550), "the most powerful reason for allowing a corporation to claim the privilege is that the privilege against self-incrimination is a natural, although not a necessary, consequence of the adversary system". This was insufficient, having regard to the public interest in the availability of the documents of a corporation to assist in the just determination of court proceedings. His Honour held (at 556):

> "In my opinion, the public interest in the adduction of relevant evidence in civil and criminal proceedings outweighs the detriments associated with refusing to allow corporations to claim the privilege. This Court should hold, therefore, that a corporation cannot claim the privilege against self-incrimination."

16. Like Mason CJ and Toohey J, McHugh J made reference, in the course of his judgment, to the question whether a corporation was entitled to claim the privilege against self-exposure to a civil penalty. He said (at 547-548) of the latter privilege:

> "It is a general privilege which, absent a contrary legislative indication, may be invoked outside the course of judicial proceedings whenever a person is asked to answer questions or provide information which may tend to expose that person to a penalty.
> Once it is accepted that the origin of the privilege was the common law, that it was not invented by the Court of Chancery, and that it is a general privilege which applies outside judicial proceedings, it is difficult, if not impossible, to distinguish the rationale of this privilege from the rationale of the privilege against self-incrimination. First, in Smith v. Read ((1736) 1 Atk, at p 527 (26 ER, at p 332)), Lord Hardwicke made it clear that the privilege against exposure to a penalty or forfeiture was implied from the rule that 'a man is not obliged to accuse himself'. Secondly, the majority decision of this Court in Pyneboard (supra) is inconsistent with the proposition that the penalty privilege derives from the limitations which the Court of Chancery, or for that matter the courts of law, placed on their power to compel a person to provide information against him or herself. The decision in Pyneboard establishes that the privilege is a general privilege not limited to curial proceedings. Consequently, if the privilege against self-incrimination is not available to a corporation, the privilege against exposure to a civil

> action for a penalty is not available to a corporation, notwithstanding that in Associated Northern Collieries (supra), Isaacs J refused to order the corporate defendants to make discovery of documents in a civil action for a penalty."

17. The accuracy, as a matter of history, of the view accepted by McHugh J that the privilege against self-exposure to a penalty "was not invented by the Court of Chancery", its origin being in the common law, was strongly attacked at the hearing before us, with a wealth of citation of ancient authority. However, the point does not seem to me to be significant. Even if the privilege was in fact invented by the Court of Chancery, or if its origin is uncertain, it is plain from the citation which McHugh J makes from a judgment of Lord Hardwicke, and other judgments of that eminent Lord Chancellor are to like effect, that the development of the privilege into its mature form proceeded upon precisely the same principles as the development of the privilege against self-incrimination. The two marched in step and, as I shall show, were often, perhaps usually, treated as one. To the extent that an aversion to actions by common informers may have contributed to the growth of the equitable doctrine, leading Courts of Chancery to restrict discovery proceedings, it should be said that this is hardly a basis upon which a modern court would ground a refusal to countenance assisting an action brought to recover a penalty imposed by the Parliament in the pursuit of national economic policies of high importance - particularly where such an action may only be maintained by the Minister or the Trade Practices Commission.

18. The final member of the majority on the principal issue in Caltex, as I have said, was Brennan J. He also traced the history of the privilege back to the 17th century, and pointed out that the criminal liability of corporations had not then been developed. Further, in his opinion, the present day grounds supporting the availability of the privilege against self-incrimination are inapplicable to corporations. He referred (at 515) to the "pragmatic consideration" of the centrality of its documents to the proof of a criminal case against a corporation, where many crimes are concerned, and concluded (at 516):

> "The rationale of the privilege against self-incrimination has no application to corporations. In practice, if investigative powers were qualified by a privilege against self-incrimination enuring for the protection of corporations, the liability of corporations to criminal sanctions would frequently be unenforceable. Thus neither principle nor practice supports the proposition that corporations are entitled to claim the privilege against self-incrimination."

He repeated the conclusion in definite terms (at 518): "Caltex, being a corporation, cannot claim the privilege against self incrimination."

19. But (at 518-521) Brennan J examined the question whether the Court should exercise its powers in relation to the discovery and production of documents in a case where the result would be to expose a corporation to a penalty. Having denied that a corporation could rely on the privilege against self-incrimination in answer to a requirement to discover documents, he proceeded:

> "There is another privilege, akin to the privilege against self-incrimination, to which corporations have a better claim, namely, a privilege against self-exposure to a civil penalty. The burden of a pecuniary (or other non-corporal) penalty on a corporation is the same, whether the penalty be classified as criminal or civil. The privilege against

> self-exposure to a penalty (hereafter 'the penalty privilege') was developed by analogy with the privilege against self-incrimination, the rule that 'a man is not obliged to accuse himself' being held to imply 'that he is not to discover a disability in himself': Smith v. Read ((1737) [1736] EngR 59; 1 Atk 526, at p 527 [1736] EngR 59; (26 ER 332, at p 332)). As Lord Hardwicke said in Harrison v. Southcote ((1751) [1751] EngR 108; 2 Ves Sen 389, at 394; [1751] EngR 108; (28 ER 249, at 252)):
> '... (t)he general rule established with great justice and tenderness in the law of England (is) that none shall be obliged to discover what may tend to subject him to a penalty, or that which is in nature of a penalty.'
> The penalty privilege, however, is a different privilege from the privilege against self-incrimination, as was pointed out in Pyneboard ((1983) 152 CLR, at pp. 336, 350). In Mexborough (Earl of) v. Whitwood Urban District Council ((1897) 2 QB 111, at p 115), Lord Esher said:
> 'It has been argued that the reason why the Courts will not assist the plaintiff in an action for a penalty is that it is a criminal action. But it is not. There is no such thing as a criminal action. An action for a penalty is a civil action just as much as an action for a forfeiture. The rule by which a witness is protected from being called on to answer questions which may tend to criminate himself is often referred to in connexion with this subject, but it has really nothing to do with the two rules to which I have referred. In an action for a penalty there can be no question of the defendant's being called on to criminate himself.'"

20. Brennan J takes the view that the privilege against discovery or production of documents on the ground of self-exposure to a penalty is a quite separate privilege, peculiarly concerned (in a way that the other is not) with the Court's pursuit of its own procedures. He states (at 520):

> "Thus the court refuses to lend its process to compel discovery on the application of a plaintiff whose action is brought merely to recover a penalty ... . Discovery is denied because the policy of the law requires that the court should not give discovery at all in such an action".

But why should that be the policy of the law? Lord Hardwicke treated it as in substance the same policy which underlay the privilege against self-incrimination. If that were so, it would be difficult to see why the one privilege should be available to a corporation when the other is not. However, Lord Esher, in the passage cited by Brennan J, says the rule against self-incrimination "has really nothing to do with" the rules relating to penalties and forfeitures. Later in these reasons, I shall endeavour to show that Lord Esher is simply wrong. Indeed, in a passage in his judgment in Martin v. Treacher (1886) 16 QBD 507 at 511-12 which is cited by Brennan J in Caltex at 519-520, Lord Esher himself uses the expression "to supply such evidence out of his own mouth and so to criminate himself" (emphasis added), in relation to the suggestion that a defendant might be required to answer interrogatories in a proceeding for a penalty. In the same judgment, Lord Esher said an action for a penalty was "in the nature of a criminal charge". On the basis of those passages, it would be

extraordinary if the rules in fact had "nothing to do with" each other; and, of course, the great authority of Lord Hardwicke is to the contrary. But there is a more fundamental reason why little assistance is to be obtained from the judgment of Lord Esher in Earl of Mexborough. His Lordship (who, as Brett LJ, had said in Allhusen v. Labouchere (1878) 3 QBD 654 at 662:

> "I was one of the common law judges who thought that there would be very great danger in introducing into litigation arising from the daily occurrences of life the equity principle (allowing incriminatory interrogatories to be put, subject to a right to refuse to answer) which might have been perfectly harmless in almost all equity proceedings")

was not speaking of the broad equitable rule as to penalties on which the reasoning of Brennan J relies. Lord Esher's remarks (at 111-117, that is, throughout his consideration of the matter) were confined, so far as penalties are concerned, to the case where "a common informer sues for a penalty", and, so far as forfeitures are concerned, to cases of "actions brought to enforce a forfeiture of an estate in land". So conceiving of the rules (I shall later discuss whether he was correct in doing so), his Lordship said "they are rules made for the protection of people in respect of their property, and against common informers". The rule applied, in United States of America v. McRae (1867) LR 4 Eq 327 at 337, to penalization by the United States of an adherent of the Confederacy, was of a different order. It related to any penalty, whether or not sued for by an informer, and was grounded by Sir W. Page Wood V-C (ubi cit.) on "the maxim 'nemo tenetur seipsum prodere'". That is the rule upon the true scope of which this case must turn, and it does not necessarily involve a common informer. (As to common informers see Blackstone's Commentaries on the Laws of England, vol. II ch. 29 section VII(1).)

21. At 520, Brennan J said:

> "The rationale behind restrictions on discovery in actions of forfeiture and penalties was suggested by Lord James in National Association of Operative Plasterers v. Smithies ((1906) AC 434, at p 438) to be 'that the Courts of Equity were so averse to actions of that nature being brought at all that they would not assist them, and therefore they did not allow discovery to be obtained'."

Brennan J concluded his discussion of this point (at 520-521) with the statement that

> "it would surely be incongruous for a court to allow discovery against a corporation in proceedings for the conviction of the corporation while refusing discovery in proceedings for a civil penalty. It would be no less incongruous to allow discovery against a corporation in proceedings for a civil penalty and deny discovery against a natural person in similar, or even the same, proceedings."

His Honour therefore decided (at 521) that he would

> "hold corporations exempt from an obligation to give discovery in any proceedings brought to enforce a liability to a penalty, whether criminal or civil, unless a statute or rule of court otherwise provides expressly or by necessary intendment".

22. One corollary of this view, of course, is that the whole problem can simply be cured by the adoption of a rule of court.

23. Deane, Dawson and Gaudron JJ dissented on the question of the availability to a corporation of the privilege against self-incrimination. As their Honours saw it, the immunity or privilege is not to be traced to a single source. It is related to the development of the adversary system itself, and to the fundamental principle that the Crown must prove its case. For their Honours, the privilege represented "at all events so far as the criminal law is concerned, an unequivocal rejection of an inquisitorial approach" (532). "In the end, it 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" (ibid). On that basis, they considered the justification of the privilege was entirely applicable to corporations. They said nothing of the privilege against self-exposure to a penalty. If it is right, contrary to their view of the high principle involved, to jettison, so far as corporations are concerned, the privilege against self-incrimination, it can hardly be appropriate to retain a related privilege for cases merely of a civil penalty - certainly not on the ground of an historical aversion of Courts of Equity (or Courts of Law, according to Lord Esher) for actions brought by a common informer. That, on their Honours' approach, would be to strain at a gnat while swallowing a camel. Accordingly, it is easy to understand why there is no mention of "penalty privilege" in the joint judgment of Deane, Dawson and Gaudron JJ. Indeed, in a judgment which was not committed to so exalted a view of the place of the privilege against self-incrimination in the law, Mason ACJ, Wilson and Dawson JJ, in Pyneboard at 344-345, described as "bizarre" and "irrational" an argued intention of the legislature to abrogate the privilege against self-incrimination, but at the same time preserve the privilege against self-exposure to a penalty.

24. In my opinion, the task of choosing between the obiter dicta of Mason CJ, Toohey and McHugh JJ, on the one hand, and the view of Brennan J, on the other hand, requires some examination of the extent to which it is true that the two privileges in question are separate and distinct. But I do not think that issue should be approached as if this Court were composed of historians delving into the distant sources at common law and in equity of the then almost embryonic rules which appeared in the course of the 17th century in England. Undoubtedly they did not appear from nowhere. But what is more important is to understand the nature, scope and justification of the principles which, having passed through the hands of Lord Hardwicke LC in the 18th century, became accepted as settled law by the time of Lord Eldon LC and through the 19th and 20th centuries.

25. Although it was held in Pyneboard (at 336) that the privilege against self-incrimination and "the privilege against exposure to penalties or forfeiture or ecclesiastical censure" are "four different aspects or grounds of privilege", that does not mean that each developed into its present form in the law in isolation from the others. Whatever the origins of the equitable rules about forfeiture and penalty in relation to suits for discovery, at least from the time of Lord Hardwicke LC, "equity", to use the words of Mason ACJ, Wilson and Dawson JJ in Pyneboard at 337, "looked to the existing model of the common law and applied the rule which it had established". Inevitably, therefore, the principles governing privilege against self-incrimination and self-exposure to a penalty underwent a joint development. The privileges were "analogous", as Brennan J put it in Pyneboard at 350. Even well before the time of Lord Hardwicke, as appears from section IV of the statute of 1640 of the Long Parliament (16 Car. 1 Cap. XI) by which the hated procedure of the ex officio oath, formerly employed by the Court of Star Chamber and the Court of High Commission, was expressly forbidden, self-incrimination and self-exposure to a penalty were seen to be so alike as to be appropriately provided for by the one rule. The statute, some details of which will be conveniently found set out in the judgment of Brennan J in Sorby v. The Commonwealth of Australia [1983] HCA 10; (1983) 152 CLR 281 at 317, expressly proscribed the administration of an ex officio oath whereby a person might be obliged "to confess or to accuse himself or herself of any crime, offence, delinquency or misdemeanour, or any neglect, matter or thing, whereby or by reason whereof he or she shall or may be liable or exposed to any censure, pain, penalty, or punishment whatsoever". Although the less liberal Parliament of Charles II chose narrower language when it re-enacted this provision (see section IV of the 1661 statute, 13 Car. II Cap XII), both aspects of the privilege were,

as has been indicated, affirmed by Lord Hardwicke, and the subsequent development of the law which occurred during the 19th century continued to keep together the concepts of self-incrimination and self-exposure to a penalty. Indeed, there are signs that the principles applied in Chancery and at law were seen to be closely related as early as the case of The Attorney General v. Mico (1658) Hardres 137; 145 ER 419, where (at 139;420) the Court of Exchequer had cited to it the "common rule in Chancery" with respect to discovery, in addition to numerous cases at law referred to in the argument, as establishing that a party should not be forced, either "directly" or "oblique(ly)" to "accuse himself". Perhaps the rule in Chancery came the more easily into the debate because the case in the Court of Exchequer was brought upon a bill of discovery.

26. In Daniell's Chancery Practice 5th ed. (1871) vol. 1 at 481, the grounds of demurrer to discovery are set out. The first ground, stated in a single sentence, as one ground, is:

> "That the discovery may subject the defendant to pains and penalties, or to some forfeiture, or something in the nature of forfeiture."

Under this heading, Daniell proceeds to discuss both self-incrimination and self-exposure to a penalty. He says (at 482):

> "(I)t is a general rule that no one is bound to answer so as to subject himself to punishment, in whatever manner that punishment may arise, or whatever may be the nature of that punishment: whether it arises by the Ecclesiastical Law, or by the law of the land, or the laws of a foreign country. ... If, therefore, a bill alleges anything which, if confessed by the answer, may subject the defendant to a criminal prosecution, or to any particular penalties, as maintenance, champerty, simony, or subornation of perjury, the defendant may object to the discovery."

This is to treat the grounds of self-incrimination and self-exposure to a penalty as but aspects of a single "general rule".

27. Perhaps the two most celebrated works, dealing specifically with the topic of discovery of documents, to come out of the 19th century are Hare: A Treatise on the Discovery of Evidence, the first edition of which was published in 1836, and Bray: The Principles and Practice of Discovery, published in 1885. In Hare, 2nd ed. (1877), a specific chapter (at 100-135) is devoted to the topic of "DISCOVERY OF EVIDENCE WHICH MAY TEND TO SUBJECT THE PARTY TO PENALTY OR FORFEITURE". Under this heading, the learned author commences with the general rule, as follows:

> "IF the answer of the party might be evidence tending to subject him to punishment by any judicial or competent authority, or to any penalty or forfeiture, or disability in the nature of a penalty, he will not be compelled to make the discovery.
> 'It is,' said Lord Hardwicke, 'a general rule, established with great justice and tenderness by the law of England, that none shall be obliged to discover what may tend to subject him to a penalty, or to that which is in the nature of a penalty' (Harrison v. Southcote, 2 Ves 389, 394; Parkhurst v. Lowten, 2 Swans 194, 214, per Lord Eldon; Mitford, Plead. 193, 284)".

(The first paragraph of this passage, as it appeared in substantially the same terms in the first edition of the work, was quoted with approval by Isaacs J in Associated Northern Collieries (supra) at 744.) In the ensuing discussion, reference is made to cases where criminal prosecution was contemplated and to cases where ecclesiastical or other penalties might be apprehended. At 103-104, there is an examination of the decision in The King of the Two Sicilies v. Willcox (supra) where (at 330-331; 128) Lord Cranworth held that the penalty, to which regard is to be had, must be a penalty by English law, and rejected an argument based on liability to punishment under the law of Sicily. In the later case, United States of America v. McRae (1867) LR 3 Ch App 79, Lord Chelmsford LC found privilege available where forfeiture was in question under the law of the United States of America. Hare comments (at 104):

> "The properties in dispute were, in the one case, a ship which had been purchased by a revolutionary party in Sicily; and in the other, monies raised upon bonds of the Confederate States of America. In one case the penalty was the alleged punishment for rebellion; in the other, forfeiture by an ex post facto Act of Congress. It seems impossible to sustain the former case since the last decision. Punishment for rebellion in Sicily must have been a very real ground for claiming protection at the time it was brought forward - much more so than a mere forfeiture of property."

Anyone who has read the notable Sicilian work by Leonardo Sciascia, The Council of Egypt, would have no difficulty in accepting Hare's comment about the punishment for rebellion in the Kingdom of the Two Sicilies, but the real point of the passage for present purposes is its complete assimilation of the principles governing the two privileges, while at the same time it underlines the greater importance of the privilege against self-incrimination. Hare's assimilation of the principles is fully in accord with the language of Lord Chelmsford in the case cited (United States v. McRae) at 83, where he referred to "the well known rule, applying both to the examination of witnesses and to interrogatories of Defendants in equity, that no person is compellable to answer any question which has a tendency to expose him to a criminal charge, penalty, or forfeiture".

28. Bray (at 309-310) also sets out exceptions or limitations on the right to discovery, of which he distinguishes five, the first being that:

> "A party is not compelled to give discovery which will expose him to the risk of any kind of punishment whether it be by way of pains or penalties or forfeiture".

Under this statement of an exception or limitation on the right to discovery, Bray groups together self-incrimination and self-exposure to a penalty. He says (at 314):

> "It is a well known rule applying both to the examination of witnesses ... and to interrogatories of defendants in equity, that no person is compellable to answer any question which has a tendency to expose him to a criminal charge, penalty or forfeiture".

In a footnote at 345-346, Bray insists that there is one ground on which the cases dealing with self-exposure to a penalty or forfeiture have invariably proceeded:

> "In every case the ground on which discovery is refused is that based on the maxim 'Nemo tenetur seipsum prodere.'"

This, of course, with the occasional substitution of "accusare" for "prodere", is the ground on which cases dealing with self-incrimination proceed. Bray's note contrasts the ground expressed in the Latin maxim with the suggested ground, on which he did not think the decisions had been put, of some "peculiar reluctance of equity to assist penalties or forfeitures". At the same time, he concedes that probably "equity would not have granted discovery in aid of the prosecution (of actions for penalties or forfeitures), partly perhaps on the ground that it was the business of equity to relieve against and not to assist forfeitures".

29. In the Commentaries on Equity Jurisprudence of Story J, first English edition (1884), at 1,021, a separation is made between the grounds of privilege, but they are nevertheless treated together in the one section, s. 1494, as follows:

> "In the next place, the courts of equity will not allow discovery to aid the promotion or defence of any suit which is not purely of a civil nature. Thus, for example, they will not compel a discovery in aid of a criminal prosecution; or of a penal action; or of a suit in its nature partaking of such a character; or in a case involving moral turpitude; for it is against the genius of the common law to compel a party to accuse himself; and it is against the general principles of equity to aid in the enforcement of penalties or forfeitures."

30. The extent to which the two privileges, though separate, are assimilated in these 19th century texts is reflected in the judgments of Lindley LJ and Lopes J (as they then were) in Martin v. Treacher (supra, at 513-514). That was an action by a common informer for penalties, in which interrogatories were sought to be administered to the defendant. Lindley LJ said that Courts of Equity proceeded

> "on the ground that the party against whom discovery was sought was not bound to criminate himself or to expose himself to penalties; and it is clear from the cases that this principle extends to statutory penalties such as those now sued for."

It will be noted that in this passage "the ground" and "this principle" are expressed in the singular, although both privileges are referred to. Lopes J said:

> "I believe the true principle is that, 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 would be monstrous and contrary to the policy of the law to compel the defendant before the trial to make admissions which would criminate himself and practically decide the action against him."

That statement may perhaps be thought to go too far in the light of the modern decision in Pyneboard, but it certainly indicates the extent to which the two privileges were put upon the same footing. In that respect, it is consistent with what Deane J said in Refrigerated Express Lines (A/asia) Pty Ltd v. Australian Meat and Livestock Corporation (1979) 42 FLR 204 at 211 when he referred, in the singular, to "the right against self-incrimination and self-penalization", and with the inclusive language used by Lord Langdale MR in Glynn v. Houston [1836] EngR 1168; (1836) 1 Keen 329 at 337; [1836] EngR 1168; 48 ER 333 at 336: "It is sufficient that he would be subject to penal

consequences". It is also consistent with the often-cited judgment of Alexander CB in Orme v. Crockford (1824) 13 Price 376; 147 ER 1022, who referred (at 388-389; 1026) to the "most important right (of a person) ... of protecting himself by refusing to answer, from the consequences of answering questions which might tend to charge him with a crime, or subject him to penalties, or forfeiture of estate contrary to the humane policy of the law". This formulation ascribes the same justification of humanity to all three aspects of the privilege.

31. The association of the privilege in respect of evidence tending to convict of a crime with that in respect of evidence tending to expose to a penalty has also been continued in the late 20th century in Halsbury's Laws of England, 4th ed. vol. 13 para. 92, which is headed "Privilege against incrimination of self or spouse", and proceeds:

> "There is a general rule of evidence that a person should not be compelled to say anything which might tend to bring him into the peril and possibility of being convicted as a criminal. Hence in any civil proceeding, any person, whether a party or not, cannot be compelled to produce any document or thing or to answer any question, if to do so would tend to expose that person, or his or her spouse, to proceedings for an offence or for the recovery of a penalty ... ."

32. In the United States, as has been mentioned, the privilege is a constitutional one. It was conferred by the Fifth Amendment, by which "no person ... shall be compelled in any criminal case to be a witness against himself ... ." In Wigmore on Evidence McNaughton revision (1961) vol. 8 para. 2,254 it is stated: "The facts protected from disclosure are distinctly facts involving a criminal liability or its equivalent." And in para. 2,256 it is stated:

> "Wherever, by way of forfeiture, a right of property is divested or a liability to pay money to another person is created, by way of a retribution for misconduct done or of a deterrent from misconduct apprehended, the effect is in spirit penal. The disclosure of such facts should therefore be protected by the privilege."

And in para. 2,257 it is stated:

> "The distinction between a penalty and a forfeiture is a shadowy one, though both are in essence contrasted with a civil liability. A penalty may be defined as a liability to pay money or to yield up a public privilege by way of punishment imposed by law. ...
> In any case, the form of the proceeding is not decisive, for a proceeding essentially civil is sometimes conducted in the name of the state. Conversely, a specific penalty for wrongdoing is sometimes made recoverable at the suit of an informer or other person by way of encouraging detection and prosecution." (Emphases original.)

33. Wigmore's broad view of the effect of the Fifth Amendment's proscription of self-incriminatory questions may be supported by reference to the decision of the Supreme Court of the United States in Boyd v. United States 116 US (1885) 616, where Bradley J, delivering the opinion of the Court, said (at 634):

> "As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes ... of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution ... ."

In one of the fundamental decisions in this area, Counselman v. Hitchcock [1892] USSC 17; 142 US 547 (1892) Blatchford J, delivering the opinion of the Court, said (at 563-564):

> "It is an ancient principle of the 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."

In McCarthy, United States Marshal for the Southern District of New York v. Arndstein [1924] USSC 161; 266 US 34 (1924) the opinion of the Supreme Court was delivered by Brandeis J, who said (at 40):

> "The privilege ... applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. ... It protects, likewise, the owner of goods which may be forfeited in a penal proceeding."

The opinion of the Court, delivered by Rehnquist J (as he then was) in United States v. Ward [1980] USSC 167; 448 US 242 (1980), accepts (at 248-251) that a penalty imposed as a civil penalty may be "punitive in either purpose or effect", so as to trigger the operation of the Fifth Amendment, though "the 'clearest proof'" would be required, and in the particular case Boyd was distinguished.

34. The position in the United States, it needs no emphasis, must be regarded as profoundly influenced by the status of the Fifth Amendment as a constitutional guarantee. However, it is clear that the aspect of the ancient privilege which relates to penalties and forfeitures is recognized, in the United States also, and despite the fairly precise language of the Fifth Amendment itself, as closely associated with self-incrimination.

35. At the forefront of the argument in favour of the application to a corporation of the rule against self-exposure to a penalty, notwithstanding that the rule against self-incrimination has been held not to apply, stands the judgment of Lord Esher MR in Earl of Mexborough (supra). For the proposition is that the rule in relation to penalties is a different rule which, if it be admitted that Lord Esher went too far when he said that the rule against self-incrimination "has really nothing to do with" the rules relating to penalties and forfeitures, may nevertheless truly be said to have a force of its own. I think there is no doubt that Lord Esher did indeed think there were relevant rules positivi juris, which related to particular kinds of action. In Earl of Mexborough (at 114-115), he stated "two rules of law which have always existed as part of the common law of England, and have been recognised as such by all courts whether of law or equity". He said:

> "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 the earliest times, in respect of actions brought to enforce a forfeiture of an estate in land. ... (T)hey are rules made for the protection of people in respect of their property, and against common informers."

His Lordship referred again (at 117) to "these two fundamental rules of law for the protection of people in respect of their title to property and against common informers", adding that "where in any action an issue is raised solely for the purpose of obtaining judgment for a forfeiture of land, the Court will not with regard to that issue make any order either for the discovery of documents or for the administration of interrogatories". With these comments may be compared the same judge's statement in Adams v. Batley (1887) 18 QBD 625 at 630:

> "Martin v. Treacher (supra) only establishes that there is no rule of law or ethical principle to prevent interrogatories being administered in this class of cases, except the rule which is founded on the old doctrine of Courts of Equity that they would not assist a common informer to obtain discovery. I do not say that the decisions of the Courts of Equity have not gone further, but that was the foundation of the doctrine."

Reliance has also been placed on what Lord James said in National Association of Operative Plasterers v. Smithies (1906) AC 434 at 437-438:

> "In the instances given the reason why Courts of Equity would not relieve in actions of forfeiture and penalties was not made very clear at the Bar, but I should suppose it was this, that the Courts of Equity were so averse to actions of that nature being brought at all that they would not assist them, and therefore they did not allow discovery to be obtained."

36. But as Isaacs J made clear in Associated Northern Collieries (supra, at 743), a distinction dependent upon the party bringing an action for a penalty being a common informer is "quite opposed to a vast current of authority and precedent". See also Jones v. Jones (1889) 22 QBD 425, where (at 427) Lord Coleridge CJ expressly rejected the proposition, and In re a Debtor (1910) 2 KB 59 at 66, per Fletcher Moulton LJ. Isaacs J spent a number of pages (742-748) of his judgment in Associated Northern Collieries demonstrating that Lord Esher's view was erroneous. He pointed out (at 743) that when the judgments in Earl of Mexborough are "taken as a whole" they do not point to "any such distinction", the reason, of course, being that the judgments of A.L. Smith LJ and Chitty LJ do not support it. Of less importance for present purposes, but still relevant in order to show the breadth of the true equitable principle, is the fact that Lord Esher also stated the principle as it applies to forfeitures too narrowly. It has never been limited to forfeitures of title to land: Monnins v. Dom' Monnins (1673) 2 Ch Rep 68; [1672] EngR 1; 21 ER 618; Honeywood v. Selwin [1744] EngR 1790; (1744) 3 Atk 276; 26 ER 961; Taylor v. Carmichael (1984) 1 NSWLR 421 at 426. In Chauncey v. Tahourden [1742] EngR 103; (1742) 2 Atk 392; 26 ER 637, which concerned a legacy of pounds 1,500, Lord Hardwicke LC said the bill for discovery was "a harsh demand in a court of equity", since it related to a marriage that would have worked a forfeiture of the legacy, and he allowed the demurrer.

37. The true rule is not based on a categorization of the action as an action brought by a common

informer, or even as an action brought solely to recover a penalty, although it does apply in such cases. It is a false syllogism to see the rule as therefore restricted to these cases. In Naismith v. McGovern (supra), which was an action to recover a penalty, Williams, Webb, Kitto and Taylor JJ, in their joint judgment, said (at 341-342):

> "But the Court of Equity would not make 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 any other person where the proceeding was of such a nature that it might result in a penalty or forfeiture: 'nemo tenetur seipsum prodere'."

That was not to put the matter on the basis of some narrow rule applicable to actions for penalties or forfeitures, but on the broad principle of equity which Lord Hardwicke applied in Smith v. Read (supra) when he said "there 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 any thing in the nature of a penalty", and "(u)nder the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself". It is "the rule" stated by Goddard LJ in Blunt v. Park Lane Hotel, Limited (1942) 2 KB 253 at 257

> "that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for".

38. The point was put very clearly by Lindley LJ in Martin v. Treacher (supra, at 512-514), where his judgment proceeds, not on the basis of a rule peculiar to actions for penalties, but upon a consideration of how "the well established principles of law with regard to discovery" apply to such a case. Having pointed out that there were many actions in relation to which equity did not allow a bill for discovery, including actions like Orme v. Crockford (supra), a case of a common informer's suit for a penalty, Lindley LJ said:

> "But the Courts of Equity in refusing discovery in such cases as Orme v. Crockford did not proceed on the ground that the action was one of that sort, but on the ground that the party against whom discovery was sought was not bound to criminate himself or to expose himself to penalties; and it is clear from the cases that this principle extends to statutory penalties such as those now sued for."

It would be hard to imagine a clearer statement that the allowance of a demurrer to a bill for discovery in aid of an action for penalties was no more than an example of the application by a Court of Equity of the broad principle stated by Lord Hardwicke in Smith v. Read.

39. In Associated Northern Collieries (supra, at 742-743) Isaacs J, having dismissed National Association of Operative Plasterers v. Smithies (supra) from consideration as a suit for injury to a civil right and not for a penalty, said:

> "The test whether an order for discovery can be made is whether the Court can see that the discovery may expose the party to a penalty or not. Very often that depends upon whether the action itself is a penal proceeding. It does not rest upon the fact that it is a civil action. An action

> is nonetheless civil because it is penal ...
> There is an inherent distinction between a civil action to prevent or redress a civil injury on the one hand, and a civil action to recover a penalty on the other. In the latter case the whole and avowed object of the proceedings is the infliction of the penalty, and the discovery sought of documents relevant to the claim can therefore have no other intended consequence. It does not require in such a case the oath of the defendant to establish the fact that the production of the documents would tend to penalize him. The Court can see the effect of discovery from the nature of the proceeding. In the former case there is no such necessary consequence, and whether the objectionable tendency exists or not has to be otherwise ascertained, and claiming immunity upon oath in the course of making discovery is the most usual, but not the only other means of establishing it."

In this passage, Isaacs J assumes there is a single principle by virtue of which discovery of documents having the tendency to criminate or penalize can be described as discovery that has an "objectionable tendency", the distinction between an action to recover a penalty and some other action incidentally involving facts giving rise to a liability to a penalty being, so far as discovery is concerned, that in the one case the tendency the objecting party would be required to prove is admitted upon the statement of claim, and in the other it has to be established aliunde. There is no suggestion here, nor is there elsewhere in the detailed judgment delivered by Isaacs J, that the exclusion of discovery in actions for a penalty rests upon some principle peculiar to such actions, and not upon the general principle applicable to any discovery that has a tendency to self-incrimination or self-exposure to a penalty. In Refrigerated Express Lines (supra) at 207-208, although in that case there is a guarded acceptance (at 208) that "apparently" the rule concerning penalty actions originated "in a reluctance on the part of the Court of Chancery to lend the aid of its discovery proceedings to the common informer", the principles are set out conformably with the judgment of Isaacs J in Associated Northern Collieries.

40. My conclusion from the survey made in these reasons of texts and authorities since the 18th century is that the privilege against self-incrimination, and that against self-exposure to a penalty, are both reflections of the one fundamental principle. It has been stated in various ways, and with differing emphases. But, with respect, it cannot be better expressed than by the words which Deane, Dawson and Gaudron JJ used in Caltex (at 532) with reference to self-incrimination:

> "In the end, (the privilege) 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".

Substituting "the incurring of a penalty" for "the commission of a crime" and "the defendant" for "the accused", I think this statement applies to the privilege against self-exposure to a penalty. So applied, the principle may evoke less feeling, but it remains the same principle. It is therefore wrong to regard the two grounds or aspects of privilege as depending on unrelated or different considerations. They should not be seen as separate props in the structure of justice, but rather as interlocking parts of a single column. The foundation of this column is that "great justice and tenderness in the law of England", that "humane policy of the law", which Lord Hardwicke and Alexander CB expounded, and the High Court has so recently examined. In the Supreme Court of the United States, it has been said to be a matter of "protecting individual civil liberties": United States v. White [1944] USSC 109; 322 US 694 (1944) at 700.

41. If that foundation will not support the allowance of the privilege in respect of self-incrimination to a body corporate, it will not support the allowance to the same body of the privilege against self-exposure to a penalty. Even when actions by common informers were significant features of the legal landscape, the authorities do not suggest that an aversion to them was the true basis of the rule. The ghost of an almost forgotten procedure should not be allowed to warp the fabric of the modern law, in which an action for a civil penalty (particularly against a corporation) is most likely to be maintained by a Minister or an authority constituted under an Act of the Parliament. To see the policy of the law as contrary to the maintenance of an action for a civil penalty under the Trade Practices Act, or under other legislation, is to see the law as a house divided against itself - for such penalties are imposed by the law framed by Parliament in order to enforce policies of the law. Once given that a corporation cannot claim the benefit of the privilege against self-incrimination, there is no sound reason why a proper authority, suing a corporation for a civil penalty, should not have the assistance ordinarily given to a litigant in the Court with respect to discovery and production of documents - assistance generally thought to be in the interests of justice. Adapting the words of Mason CJ and Toohey J (in Caltex at 505), the reasons given by the majority of the High Court for denying the one privilege to corporations also deny them the other. Indeed the "pragmatic" reason, as Brennan J called it (at 515), of the difficulty of enforcement of the law against a corporation, if its documents were not subject to discovery, would apply more strongly in the case of a contravention of a law enforceable only by an action for a penalty, because there would be no reserve power to resort to a search warrant. Reference was repeatedly made in Caltex (at 517, 533, 535, 551) to the availability of a search warrant to obtain access to documents privileged from discovery. Even so, McHugh J (at 551) thought the limitations upon search warrants provided a reason for withholding the privilege against self-incrimination from corporations. But there is no search warrant which can be issued to obtain evidence that a civil penalty has been incurred. Except in a case where a special provision such as s. 155 of the Trade Practices Act might apply (and, in practice, provisions of that kind have been shown to have the disadvantage of too often turning one proceeding into two, with great loss of time and at considerable cost), if a corporation were to have the benefit of the privilege against self-exposure to a penalty, its office would be like an ancient Hebrew City of Refuge for its documents, and the proof of its liability might in some cases be impossible.

42. In my opinion, this Court should hold that, now that the common law of Australia has been held by the High Court not to extend to corporations a privilege against self-incrimination, the common law of Australia does not extend to them any privilege against self-exposure to a civil penalty either. Accordingly, the questions reserved should be answered in the negative. The costs of the special case should be borne by the sixth respondent, **Abbco Ice Works** Pty Limited.

GUMMOW J I agree that the questions reserved should be answered, and costs awarded, in the manner set out in the last paragraph of the reasons for judgment of Burchett J.

2. I agree also with what is said in that judgment on the issues that have arisen before us concerning the doctrines of stare decisis and ratio decidendi, particularly where the earlier decision involves answers to questions posed by a case stated or like procedure.

3. This special case is a sequel to Environment Protection Authority v Caltex Refining Co. Pty Ltd [1993] HCA 74; (1991) 25 NSWLR 118, (1993) 178 CLR 477. Writing of that decision, Professor Tapper has said (Note, (1994) 110 LQR 350 at 351):

> "While the privilege against self-incrimination
> can be seen as a technical procedural ground for
> resistance to discovery and notices to produce,
> it is possible to take a much broader view, and
> to see it as a fundamental human right."

4. However, I prefer to see the dispute before us as concerned with the existence of rights (or, more

accurately immunities) which are better identified as individual or personal rather than as "human rights". The latter expression, at least when it has not been given a particular statutory content, is narrower. This is because "human rights" focuses attention upon the human actor and away from the artificial legal entity even though it may stand in front of the human actor or beside that person as a co-defendant. The term "human rights" may also operate more widely. This is because, at least without specific statutory foundation, it evokes deep concerns of natural law which are not necessarily those of civil law. Finally, the expression "human rights" may encourage circularity of reasoning, by posing a question, in relation to corporations, in terms which answer it.

5. The issue in Caltex, as Professor Tapper puts it (supra p. 352), narrowed in the majority judgments in the High Court to a choice between an analysis which concentrated on the damage which abridgment of the privilege against self-incrimination would do to the adversarial principle, and one which concentrated more on the difficulty of enforcing the law if corporate defendants "were to remain free to invoke the privilege".

6. However, if due regard is had to the evolution of the doctrines, practices and procedures of those English courts which have supplied a basis for the Australian legal system, the perspective changes. The issue in this and recent litigation becomes not so much whether the privilege against self-incrimination and what I shall call the penalty privilege should be withdrawn from corporations. Rather, it is whether, properly considered, these privileges as they grew out of common law and equitable doctrine and practice, ever extended to corporations.

7. Why is it useful and indeed important to appreciate this evolutionary process? One reason is the Holmesian axiom that in order to know what the law is we must first know what it has been. Another is that, statute law apart, a significant element in the "legitimacy" of case law based principle is that it embodies a measure of practical experience over time and varying circumstance. A third, of particular importance in any issue in the common law of evidence, is found in the following from the opening passage of Holmes's "The Common Law":

> "The substance of the law at any given time
> pretty nearly corresponds, so far as it goes,
> with what is then understood to be convenient;
> but its form and machinery, and the degree to
> which it is able to work out desired results,
> depend very much upon its past."

The contemporary significance of this opening passage is analysed in detail by Professor G. Edward White in "Justice Oliver Wendell Holmes", 1993, pp. 149-182.

8. One must begin by turning to Caltex itself.

Caltex

9. Three points should be noted as to the nature of the dispute before the New South Wales Court of Appeal and the High Court in Caltex. The first is that the proceeding in the Land and Environment Court was a prosecution, not a civil proceeding for a penalty; see 178 CLR at 505, per Mason CJ, Toohey J. Hence the immediate issue before us could not have arisen there in the same way.

10. The second is that the more significant element of the dispute in Caltex at the appellate level concerned a notice to produce documents in accordance with the rules of the Land and Environment Court, the sole purpose thereof being to obtain evidence and information for use against Caltex in the prosecution against it, in that court, for contravention of provisions of certain State legislation. No issue arose as to privilege in respect of testimonial evidence.

11. Thirdly, it was significant in Caltex, as it is here, that the procedures of many courts give to a

notice to produce the efficacy of a subpoena. Thus, as Gleeson CJ pointed out in Caltex (25 NSWLR at 123-124), the effect of the notice at issue in that litigation was to require the party served to produce the documents, unless the court otherwise ordered, without the need for any subpoena for production. And in Caltex Deane, Dawson and Gaudron JJ emphasised (178 CLR at 528) that the subpoena duces tecum was originally a Chancery writ, and that when the common law courts were given the power to use the subpoena, they did so consistently with Chancery practice. So it was that the particular procedure which gave rise to the Caltex litigation had its roots in Chancery practice rather than common law.

12. The written submissions before us rightly emphasise the importance of the way in which the law has developed over a long period. But I emphasise the above points to indicate that the history of these matters is sufficiently complicated to make it difficult to put on one side of the line a so-called common law privilege against self-incrimination enjoyed by corporations and, on the other, comparable protections which corporations may have enjoyed from equitable procedures and remedies. The further significance of this point is three-fold.

13. First, despite the considerable recourse to history in the written submissions presented to us, in truth English legal history makes it difficult now to say that the one privilege is to be classified as a creature of equity and the other of common law, or that one is a personal right and the other a restraint on curial power. Nor, as will become apparent, in my view is it correct to do so. Further, whatever the roots of the Australian legal system, the importance of that history is to be weighed against the fundamental consideration that all courts in Australia exercising federal jurisdiction derive their authority ultimately from the Constitution, and all courts here are sustained by statute: Parsons v Martin (1984) 5 FCR 235 at 240-241. At issue in this case is the operation of Rules of Court made under the Federal Court of Australia Act 1976.

14. Secondly, and as is emphasised by Burchett J in his reasons for judgment, the same rationale should determine the application to corporations of that aspect of the law of privilege concerning self-incrimination and the attitude in equity to the use of its procedures in aid of civil actions to recover penalties which might be described as quasi-criminal in nature. It would be an odd result if an order might properly be made for production of documents which expose a corporation to a criminal liability, but no order would be made if it might result in the imposition of a civil penalty. Such a result would, as Burchett J points out, be particularly curious in that whilst the criminal process may be assisted by the availability of a search warrant, no such alternative would, in the absence of special statutory provision, be available in aid of the recovery of the civil penalty.

15. Thirdly, whatever the strength of the several historical origins involved, in Australia the position has been reached that though distinct from the privilege against exposure to conviction for a crime, the privilege of refusing to answer questions or provide information on the ground that the answers or the information might tend to expose the party to the imposition of a civil penalty, is not confined in its application to discovery and interrogatories and, further, is available at common law as well as in equity: Pyneboard Pty Ltd v Trade Practices Commission [1983] HCA 9; (1983) 152 CLR 328 at 337, per Mason ACJ, Wilson, Dawson JJ. That authority, as McHugh J pointed out in Caltex (at 547-548), also establishes that both privileges have a general operation, that is to say are not limited to curial proceedings; see, for example, Comptroller-General of Customs v Disciplinary Appeal Committee (1992) 35 FCR 466 at 474-481.

16. Thus there is here another illustration of the development of the law, over time, whereby what originally were procedural rights mature into independent substantive doctrines. For example, despite its procedural origins, the jurisdiction of equity courts to relieve against contractual penalties has hardened into a substantive doctrine, as is illustrated, at least in the majority judgments, by AMEV-UDC Finance Ltd v Austin [1986] HCA 63; (1986) 162 CLR 170. See also the discussion of a comparable situation by Kearney J in Burns Philp Trustee Co. Ltd v Viney (1981) 2 NSWLR 216.

The present proceeding
17. The claims in the proceeding in which the case has been stated before us include the recovery, pursuant to s. 76 of the Trade Practices Act 1974 ("the T.P. Act"), of pecuniary penalties. The contraventions of the T.P. Act relied upon are breaches of the "price fixing" provisions of ss. 45 and 45A. Those sections are contained in Part IV of the T.P. Act. The action is described as a civil action for the recovery of pecuniary penalties; criminal proceedings do not lie for contravention of Part IV (s. 78). However, the action is brought, as ss. 76 and 77 indicate, for the recovery of the pecuniary penalties on behalf of the Commonwealth, and the order this Court would make is for payment to the Commonwealth of the penalties.

18. By notices to produce served pursuant to O. 33 r. 12, the applicant seeks production of various documents by the 6th respondent. The sixth respondent seeks an order setting aside those notices on the ground that compliance with them may expose it to the imposition of a civil penalty. Order 33 r. 12 has the effect, in substance, of a subpoena and, to some extent, operates as an order for particular discovery. Rule 12 obliges the party served to produce the documents in accordance with the notice, without the need of a subpoena. However, this obligation is conditioned by the words "unless the Court otherwise orders".

19. The present action thus stands in contrast to Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Livestock Corporation (1979) 42 FLR 204. There the proceedings were purely to prevent and redress alleged civil injury by reason of contravention of Part IV of the T.P. Act and no claim was made for recovery of a pecuniary penalty.

20. This case falls within the first category described by Deane J (42 FLR at 208). That includes actions for a penalty in which the Court should, in the absence of a statutory provision to the contrary, refuse to make any order at all against the defendant for discovery or production of documents, or the provision of information, the whole and avowed object of the proceeding being the imposition and recovery of the penalty. The second category identified by Deane J includes proceedings not brought for the recovery of a penalty; the party against whom an order for discovery or interrogatories or like relief is made may object on the ground that compliance may tend to expose him to a penalty. Here there is no general rule precluding the making of such an order in the first place. Rather, it is for the party against whom the order is made to make good the objection.

21. As will become apparent, the first category has its historical root in the demurrer to a bill for discovery, asserting the general want of an equity in the particular description of case. The second category reflects those cases in which the party was left to advance a sufficient ground for refusing to answer a particular interrogatory or to produce certain documents.

22. Some Rules of Court in current operation make specific provision, in relation to discovery, for the immunity in question here. For example, in England, RSC, O. 24 r. 2 (1) makes a general provision which is then subject to para. (3). This states:

> "Paragraph (1) shall not be taken as requiring a defendant to an action for the recovery of any penalty recoverable by virtue of any enactment to make discovery of any documents."

A claim for conversion damages in respect of copyright infringement is not a penalty recoverable by virtue of an enactment within the meaning of this rule: Richmark Camera Services Inc. v Neilson-Hordel Limited (1981) FSR 413.

23. In New South Wales, provision is made in the Supreme Court Rules, Part 23, rule 2 (4) along the lines of the English provision, but with a wider effect. In New South Wales, a party required to give discovery need not include in the list of documents any document relating only to a matter in

question on a claim for any penalty recoverable by virtue of any New South Wales or federal statute or "for the enforcement of a forfeiture". The rule does not deal with the situation where the documents would provide evidence which might be used to establish liability to a penalty or forfeiture in other proceedings.

24. The immediate issue here is whether the circumstance that the sixth respondent is a corporation renders inapplicable to it a principle, explained by Deane J in the passage in Refrigerated Express discussed above. The principle is that this being a civil action for a penalty, the Court should in the absence of a statutory provision to the contrary, refuse to make any order at all for production of documents. Should the Court "otherwise order" within the meaning of O. 33 r. 12?

Privilege and Discovery
25. It was said by a learned American scholar that in making orders for discovery and like remedies, equity acted only in aid of some object which it could regard with approval, or at least without disapproval, "some subject which is not opposed to good morals or to the principles of public policy embodied in the law": Pomeroy, "Equity Jurisprudence", 2nd ed., 1892, s202. (Professor White has pointed out that the writings of Pomeroy were influential in the development of Holmes's legal theory; "Justice Oliver Wendell Holmes", supra p. 524.) In Pyneboard 152 CLR at 336, Mason ACJ, Wilson and Dawson JJ made the point that the privileges against exposure to penalties, or forfeiture, or ecclesiastical censure were different aspects or grounds of privilege. As will be seen, this distinction reflected the classes of case in which equity regarded discovery and like remedies as sought in aid of objects which it did not regard with approval. But equity did not proceed simply upon any narrow principle concerned with actions for penalties brought by informers. I therefore agree with the analysis by Burchett J in his judgment of what was said to the contrary effect by Lord Esher MR in Earl of Mexborough v Whitwood Urban District Council (1897) 2 QB 111 at 115.

26. On the present special case it is necessary to determine if the reasoning of the High Court in Caltex against extending to corporations the so-called privilege against self-incrimination has a particular consequence. This is whether the privilege, developed in equity, whereby the Court should in the absence of a statutory provision to the contrary, refuse to make any order against a defendant for discovery, or production of documents, or provision of information, where the object of the proceeding is the imposition and recovery of a penalty, likewise does not apply to corporations.

27. The answer that neither privilege extended to corporations would not necessarily bring with it the result that corporations were denied the equity-based privileges in their other aspects concerned, for example, with matters of forfeiture or ecclesiastical censure. The principle, described as "deeply ingrained", that production for inspection would not be ordered in an action brought to enforce a forfeiture of an estate in land, there a lease, was applied by the Queensland Full Court in William Collin and Sons Pty Ltd v T. and T. Mining Corporation Pty Ltd (1971) Qd R 427 at 438. In that case the party successfully resisting production was a stranger to the action for forfeiture itself.

28. The narrower issue before us is, do the reasons given for denying to corporations the privilege against self-incrimination also deny the availability of what one might call the penalty privilege?

Self-Incrimination
29. It is best to begin with the privilege against self-incrimination. In their joint judgment in Caltex (178 CLR at 501-503), Mason CJ and Toohey J analysed the development of the subject by pointing out the following:

> (i) The "elementary principle" that "an accused person is not bound to incriminate himself", primarily was directed "against a requirement to testify or admit guilt".
> (ii) The principle was "extended" so as to protect the

> accused from compliance with obligations to produce documents and, in particular, (a) the court would not make an order requiring the accused to produce documents which would or might tend to incriminate that person of the offence charged, and (b) the accused might not be required by process of law to produce documents which would tend to implicate the accused in the commission of the offence charged.
> (iii) The privilege also protected a person from producing documents in other proceedings, including civil proceedings, being documents which might tend to incriminate that person.
> (iv) In its application to the production of documents, the operation of the privilege was more far reaching than in its application to oral evidence; it was one thing to protect a person from testifying as to guilt, and another to protect a person from production of documents already in existence which constituted evidence of guilt, especially documents in the nature of real evidence. These spoke for themselves, as distinct from testimonial oral evidence brought into existence in the course of legal proceedings.
> (v) Accordingly, the case for protecting a person against compulsion to make admissions of guilt is much stronger than that for protecting a person from compulsion to produce books or documents, in the nature of real evidence of guilt, which are not testimonial in character.

Corporations

30. In consideration of the application of these concerns to corporations and to what one might call the penalty privilege, it is best to begin with what their Honours described as the "elementary principle" from which the other principles outlined above developed, namely that no accused person can be compelled by process of law to admit the offence with which that person is charged.

31. However, it is important to bear in mind that in criminal trials in England, as distinct from civil actions (where change came sooner), the accused only became a competent witness as the result of a series of statutes commencing in 1872 and culminating in the Criminal Evidence Act 1898 (UK); see Maxwell v D.P.P. (1935) AC 309 at 316-317, Sir Harry Poland QC "Changes in Criminal Law and Procedure Since 1800" in A Century of Law Reform, 1901, p. 54. Under the British statute, the accused was to be called only upon his application but then might be asked any question in cross-examination notwithstanding it would tend to incriminate him as to the offence charged (para. 1 (e)); but the witness was not required to answer any question tending to show he had committed another offence, subject to the qualifications in para. 1 (f).

32. Accordingly, the starting point perhaps might be better expressed by saying that, at a criminal trial, witnesses were not bound to answer any question "whereby they charge themselves with any crime, or by answering may subject themselves to any penalty". The unlikely author of that formulation is Sir George Jeffreys CJ in The Trial of Thomas Rosewell (1684) 10 St Tr 147 at 169; see also The Trial of Titus Oates (1685) 10 St Tr 1079 at 1099, 1123 and The Trial of Sir John Freind (1696) 13 St Tr 1 at 16, 17. In the latter passage, Sir John Holt CJ ruled:

> "No man is bound to answer any question that tends to make him accuse himself or subject him

> to any penalties."

Oates was tried for perjury. The other reports are of trials at bar for high treason. The accused, as was then the requirement, appeared for himself. (In treason trials it was only by virtue of the Treason Act 1695 (7 and 8 Will III, c. 3, s. 1) that the accused had any right to engage counsel. Counsel was not allowed prisoners on charges of felony until as late as the Trials For Felony Act 1836 (6 and 7 Will IV, c. 114, s. 1) (UK).) At each of the above trials the accused unsuccessfully sought to discredit the witnesses for the prosecution by asking questions as to their religious practices, as Papists or Nonconformists. The answers might have imperilled the witnesses under the then current statute laws as to recusancy and the like.

33. Obviously enough, corporations cannot be witnesses. Further, the amenability of corporations to the criminal law (a matter discussed by Gleeson CJ in Caltex, 25 NSWLR at 122) is a fairly recent development. The common law requirement of mens rea was an inhibition to the application both of the common law and statutory offences. Various forms of punishment specified for statutory offences were incapable of imposition on corporations. Burchett J has set out the pertinent observations by Shadwell V-C in The King of the Two Sicilies v Willcox [1851] EngR 134; (1851) 1 Sim. (NS) 301 at 335; [1851] EngR 134; 61 ER 116 at 130. That case determined that a corporation could not be indicted under the Foreign Enlistment Act (1819), 59 Geo III, c. 69, s. 7 (UK), a precursor of the Foreign Enlistment Act 1870 (Imp.). Lord Blackburn, when dealing with a statutory offence in The Pharmaceutical Society v The London and Provincial Supply Association Ltd (1880) 5 App Cas 857 at 870, put it as follows:

> "A corporation may in one sense, for all
> substantial purposes of protecting the public,
> possess a competent knowledge of its business,
> if it employs competent directors, managers, and
> so forth. But it cannot possibly have a
> competent knowledge in itself. The metaphysical
> entity, the legal 'person', the corporation,
> cannot possibly have a competent knowledge."

Thus, as Lord Reid later explained in Tesco Supermarkets Ltd v Nattrass [1971] UKHL 1; (1972) AC 153 at 169, there had been difficulties with the accepted doctrines of the common law, in "the invention" of absolute offences by statute and the courts. This 19th century process is further discussed in Cornish and Clark, "Law and Society in England, 1750-1950", 1989, pp. 605-607.

34. Further, the common law itself took an adverse view of the competence of individuals, let alone corporations, as sources of testimonial evidence, even in civil actions. In Best, "A Treatise on the Principles of the Law of Evidence", 3rd ed., 1860, para. 126, the learned author indicated that there were various matters which were privileged from disclosure in evidence on general grounds of public policy. He later (para. 145 ff) went on to consider three grounds of incompetency of witnesses which then existed, namely:

> (i) incompetency from want of reason and understanding by reason of deficiency or immaturity of intellect,
> (ii) incompetency for want of religious belief such that witnesses cannot be sworn in a form they consider binding on their consciences, and
> (iii) incompetency from interest, in particular as parties to the proceeding or as spouse to a party.

The learned author continued (in para. 126) as follows:

> "But besides these, the law extends a personal privilege to witnesses of declining to answer particular questions: a privilege based on the principle of encouraging all persons to come forward with evidence in courts of justice, by protecting them as far as possible from injury or needless annoyance in consequence of so doing. It is therefore a settled rule that a witness is not to be compelled to answer any question, the answering of which has a tendency to expose him to a criminal prosecution, or proceedings for a penalty, or a forfeiture, even of an estate or interest."

35. Best pointed out that this practice was recognised by the Witness Act 1806, 46 Geo III, c. 37 (UK). He said (para. 131):

> "It was formerly a disputed point whether witnesses were compellable to answer questions, the answers to which would subject them to civil proceedings. To set this matter at rest the statute 46 George III, c. 37, was passed, which, after reciting the existing doubts on the subject, proceeded to declare and enact, that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit."

In the United States the view was taken that this statute did no more than represent what was, in any event, the position at common law: Taylor "A Treatise on the Law of Evidence", 1848, Vol. II, para. 1077.

36. There was, at the time Taylor wrote his celebrated work, a debate as to whether this personal privilege of witnesses of declining to answer particular questions extended to questions having a tendency to disgrace the witness by, for example, revealing that he had been convicted of an offence, or suffered some infamous punishment, or had been imprisoned on a criminal charge. Matters were somewhat clarified by the Common Law Procedure Act 1854 (17 and 18 Vict., c. 125) (UK), ss. 25 and 103. These sections provided that a witness in a civil case might be questioned as to whether he had been convicted of any felony or misdemeanour and if he denied the fact, or refused to answer, the opposite party might prove the conviction.

37. It is important to appreciate that until the mid-nineteenth century the case law, which extended to witnesses what Best described as the personal privilege of declining to answer particular questions, developed in a system of civil trials where the witnesses would not be parties to the action. As

already indicated, and as was famously exemplified by the trial of Bardell v Pickwick (recounted in 1837), the common law rule was that parties to the action were not competent witnesses. The rule, according to what Best (para. 168) describes as the best authorities, was founded solely on the interest which the parties to the suit were supposed to have in its outcome. Such was the horror of the common law at the temptations of perjury that a party might not ask anything of the other party or tell his or her own tale. The authorities to which Best referred included the 4th edition of Gilbert on Evidence, p. 130, and Pipe v Steele [1842] EngR 49; (1842) 2 QB 733, 114 ER 286.

38. Where the interest of the party had been removed by, for example, one of several defendants suffering a judgment by default under circumstances which rendered him indifferent to the result of the contest between his companions and the plaintiff, the evidence of a party might be received. Further, the prosecutor of an indictment or information was in general a competent witness against the accused (para. 169). Special rules also existed concerning the taking of evidence from accomplices.

39. In addition, when an issue of fact was directed from the Court of Chancery to be tried at law before a jury, Chancery frequently made it part of the order that the plaintiff or defendant should be examined as a witness; likewise when a cause was referred to arbitration from a court of common law, it was usually part of a rule that the arbitrator should be at liberty to examine the parties: Best, para. 172, Weir, review of Oldham, "The Mansfield Manuscripts and the Growth of English Law of the Eighteenth Century", (1993) CLJ 319 at 320. The latter practice dated at least from the time of Lord Mansfield.

40. Various statutory exceptions to the position in civil actions in the common law courts were made in the 1840s (Best, para. 173). Statutory reform included Lord Denman's Act 1843 (6 and 7 Vict. c. 85) and culminated in the Law of Evidence Amendment Act 1851 (14 and 15 Vict. c. 99), a proponent of which had been Lord Brougham. Section 2 of the latter statute was a general provision rendering the parties and the persons on whose behalf any action might be brought or defended, competent and compellable to give evidence either viva voce or by deposition on behalf of either or any of the parties to the action. The question then arose as to the application to the new situation of the previous common law whereby witnesses had the privilege of declining to answer particular questions. The matter was resolved by specific statutory provision. Section 3 stated:

> "But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to incriminate himself or herself and etc."
> (Emphasis supplied).

These provisions were adopted in New South Wales by Act No. 14 of 1852, ss. 2 and 3.

41. Corporations could not have been witnesses but they are and were parties. Hence, the need arose to consider what, if any, foundation in principle or policy there was to treat a corporate party as not compellable to answer any question tending to incriminate itself. Given the comparatively late date of these statutory developments, both in civil and criminal law, concerning the competence and compellability of parties, it is not surprising that the English courts did not deal authoritatively with the application to corporations of the privilege until well into this century: Triplex Safety Glass Co Ltd. v Lancegaye Safety Glass (1934) Limited (1939) 2 KB 395 at 408-9.

42. To speak of the privilege against self-incrimination as if at common law it ever had extended to corporations is, in my view, to misstate the position. Any such extension of the privilege to corporations was, at best, a by-product of extensive changes in civil and criminal procedure made in England by statute in the course of the 19th century. Those changes reflected the strong influence of the teachings of Bentham upon the significant law reforms enacted in the decades commencing with Brougham's tenure as Lord Chancellor (1830-35). Many aspects of criminal and civil procedure which would now loosely be considered as based in "the common law" (and on occasion exalted as such) are, in truth, the legacy of "Benthamite" influence upon statutory reform.

The United States

43. The course of development in the United States of the relevant constitutional guarantee had taken a not dissimilar course. The Fifth Amendment to the United States Constitution (part of the Bill of Rights of 1791) provides that "No person . . . shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law". Writing in 1833 in his "Commentaries on the Constitution of the United States", vol. 3, para. 1782, Story said of this provision:

> "This also is but an affirmance of a common law privilege. But it is of inestimable value. It is well known, that in some countries, not only are criminals compelled to give evidence against themselves, but are subjected to the rack or torture in order to procure a confession of guilt."

44. In Hale v Henkel [1906] USSC 55; 201 US 43 (1906) the Supreme Court decided, not surprisingly, given this background, that the benefits of the Fifth Amendment are exclusively for a witness compelled to testify against himself in a criminal case and cannot be set up by a witness on behalf of a corporation of which the witness is an officer or employee. In argument it had been submitted (at 58) with reference to various authors writing on evidence, including Best and Taylor, that:

> "The privilege embodied in the Amendment is upheld on grounds which vary to some extent; but the privilege is personal and is based upon the consideration of the law for the individual in his capacity as a witness."

45. The Supreme Court was concerned with a subpoena issued to the Secretary and Treasurer of a corporation which was defendant in an action against it by the United States under the Sherman Act. The officer of the corporation appeared before the grand jury investigating the matter, in obedience to the subpoena, but refused to answer questions and declined to produce the papers and documents called for in the subpoena. The issue was whether the Fifth Amendment was an answer to the alleged contempt. In the judgment of the Supreme Court it was said (at 66) that the object of the Fifth Amendment was to establish in express language and upon a firm basis "the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime". The Court later (at 74-75) said:

> "Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them

> subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorised by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how those franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defence amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."

46. In Caltex at 490-493, these and later authorities were referred to by Mason CJ and Toohey J as indicating that the privilege is limited to its historic foundation of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.

Discovery

47. It is appropriate now to turn to consider the position as regards discovery. Section 6 of the Law of Evidence Amendment Act 1851 (14 and 15 Vict., c. 99) (UK) provided for discovery of documents in actions at common law in all cases in which previously a discovery might have been obtained by filing a bill or by other proceeding in a court of equity. This legislation was copied in New South Wales by s. 5 of Act No. 14 of 1852. Other developments followed, leading 25 years later in England to the modern fused system of administration where rules of court provide generally for discovery and interrogatories.

48. In noticing the different procedures which previously existed at common law and in equity, it should be borne in mind that the mode of trial differed. Actions at law were tried by judge and jury, so that the fact finder did not rule on admissibility. In Chancery, the only evidence (except the proof in certain cases of written documents) admitted on the hearing of a cause consisted of depositions taken upon interrogatories by officers of the court, and the right of cross-examination was theoretical. Trial upon affidavit, popularly seen as the typical equity method of decision, was not introduced until the Chancery Procedure Act 1852 (15 and 16 Vict., c. 86) (UK), ss. 28, 29. See the account given by a near contemporary, Birrell QC "Changes in Equity, Procedure and Principles" in A Century of Law Reform, 1901, pp. 187-191.

49. In the common law courts litigants generally had been allowed to conceal from each other up to the time of trial the evidence on which they meant to rely and neither was compelled to supply the other with any evidence, parol or otherwise, to assist the other party in the conduct of the cause. As Best put it (para. 726), this defect in some degree was remedied by the procedure for filing a bill in equity for the discovery of evidence; however, that process was "alike circuitous and expensive". See also Professor Enid Campbell "Rules of Court", 1985, pp. 116-118. As Professor Campbell points out, a common law litigant, generally speaking, could not seek discovery in Chancery except against a party and then only to discover material relevant to the proof of his own case.

50. In Chancery then, the question was not whether any witness had the personal privilege of declining to answer particular questions, with the rationale being the encouragement of persons to come forward with evidence by protecting them from injury or needless annoyance in consequence of so doing. Thus, in my view, it is not entirely accurate to attribute to equity the same foundation for its development in this field as that of the common law courts, or to treat the grounds of self-incrimination and self exposure to a penalty as but aspects of a single general rule.

51. In referring to the Court of Chancery it should not be overlooked that until the 1840s the Court of Exchequer also had an equitable jurisdiction, particularly in revenue matters: "Potter's Historical Introduction to English Law and Its Institutions", 4th ed., 1958, pp. 117-120, Worrell v Power and Power [1993] FCA 551; (1993) 46 FCR 214 at 219. In the exercise of this equitable jurisdiction a bill for discovery lay in the Exchequer. An example is the elaborately argued case, The Attorney-General v Mico (1658) Hardres 137; 145 ER 419. Hence the relevance in that argument of references to Chancery practice.

52. The question in courts of equity was whether (a) the bill, as a whole, was demurrable for want of an equity, or (b) an answer might properly be refused to a particular question or production denied of a particular document or class of documents. As to the first ground of objection, a general demurrer lay, for example, on the basis that (i) the defendant, as a mere witness, was not a party to the record in the action in aid of which the bill of discovery was sought or (ii) the action related not to a civil right in a court of common law, but to the prosecution of an indictment or an information or the defence to an indictment or information: Hare, "A Treatise on Discovery of Evidence", 1836, Part II, Ch. V, s. 4, p. 116; Bray "The Principles and Practice of Discovery", 1885, pp. 40.

53. In Wigram, "Points in the Law of Discovery", 2nd ed., 1840, p. 5, it is said that the courts of equity compelled discovery in aid of civil rights only, and not in aid of the prosecution of an indictment or information or to aid the defence of it. Further, as the learned author continues (at 79, 80):

> "But it may happen, that, in proceedings for a merely civil purpose, material facts constituting evidence of the "plaintiff's case" may be alleged in a bill, and inquiries may be founded upon such alleged facts, the answers to which would subject the party alleging them to criminal proceedings. Will a court of equity compel the defendant to answer an interrogatory to which such an observation applies?"

54. The learned author continues by giving the principal cases expressly "for the purpose of illustration only". These show that Lord Esher MR was somewhat wide of the mark in what he said in Lord Mexborough's Case supra. Wigram's illustrations are set out as follows, with citation of authority, in paras. 130-134 (pp. 80-81):

"130 If a question involves a criminal charge, the plaintiff is not entitled to an answer to such question, however material it may be to the "plaintiff's case". This was carried to its extent in Maccallum v Turton 2 Y and J 183 [1828] EngR 357; (148 ER 883). In the application of this principle, it has been held, that a married woman will not be compelled to answer a bill which would subject her husband to a charge of felony.
131 So, - if the answer of the defendant to a given question would subject him to pains or penalties, the plaintiff is not entitled to an answer to such question, however material the answer might be to the "plaintiff's case".
132 So, - if the answer would subject the defendant to ecclesiastical censure.
133 So, - if the answer would prove the defendant guilty of great moral turpitude, subjecting him to penal consequences.
134 So, - of a forfeiture of interest, strictly so called. But, the objection does not apply to the mere determination of an interest by force of a limitation.
135 So, - formerly if the defendant were a purchaser, without notice of the plaintiff's claim. But later decisions seem to consider a purchaser for value without notice, as not entitled to any greater privilege than the party having any other ground of defence.
136 So, - if the matter to which the question applies be within the privilege allowed to communications between a client and his attorney; - a privilege which, it seems, applies to the attorney himself in all cases.
The late case of Desborough v Rawlins (1838) 3 Myl and Cr 515 [1838] EngR 440; (40 ER 1025), contains much valuable criticism upon the subject of professional privilege.
137 The above privileges extend, it has been said, to the representatives of the party.
138 With respect to these excepted cases, it must be further observed, that the defendant's privilege extends, not merely to the particular question to which the objection applies, but to every question in the bill, the answer to which would form a link in a chain of evidence, which, if perfect, would lead to the consequences against which the privilege is intended to guard."

55. It is significant that Bray said (supra at 345-346) that he had been unable to find any case in which discovery had been sought in equity for the express purpose of aiding the prosecution of an action to recover penalties or to enforce a forfeiture, and in which it was refused on that express ground. The distinction had to be drawn between the rule that a party was not bound to answer so as to expose himself to pains, penalties or forfeitures, and the principle that equity only assumed jurisdiction to compel discovery in a civil action. The true principle was that, as to individual questions put, a party was not bound to answer so as to expose himself to pains, penalties or forfeitures or to a disability in the nature of a penalty or forfeiture.

56. Nevertheless, as I have indicated, in the Australian decisions the position has been reached that there is what Deane J called "a broad and unqualified rule" that an order for discovery or production of documents or provision of information will not be made against a defendant in an action for a penalty of the nature of that with which the present case is concerned. The result is, with respect, readily supportable. Criminal proceedings do not lie by reason only of contravention of Part IV of the T.P. Act, which is at issue in this case. Section 78 so states. But to the civil action to recover pecuniary penalties under ss. 76 and 77, Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 applies at the evidentiary level, and there is authority that to certain terms in s. 76 there should be given the meaning they carry in the criminal law: Yorke v Lucas [1985] HCA 65; (1985) 158 CLR 661 at 673 per Brennan J.

57. The term "penalty" was not used in courts of equity merely in the sense of an exaction pursuant to statute as a punishment for contravention thereof. It embraced the wider concept of penalty as understood in the law of relief in equity against the exaction of penal payments in contractual disputes and the forfeiture of property interests. Thus, it was said by Hare (p. 144) that if the liability of the defendant (for example, under a lease) was in the nature of stipulated damages rather than a penalty, the principle against a discovery would not apply. He gave as examples, Jones v Green (1829) 3 Y and J 298 at 304; [1829] EngR 508; 148 ER 1193 at 1195 and East India Co. v Neave [1800] EngR 46; (1800) 5 Ves Jun 173 at 185; [1800] EngR 46; 31 ER 530 at 536-537.

58. With the fused system of administration following upon the introduction of the Judicature legislation, it might have been thought that procedures for discovery were now at large, in the sense of no longer being controlled by the preceding body of law. However, the House of Lords held that this was not so. In Lyell v Kennedy (1883) 8 App Cas 217, the Earl of Selborne LC quoted at length from the works of Hare and Wigram and said that the Court of Appeal had held correctly that the right of discovery under the new rules of the Supreme Court was not in principle more extensive than formerly was the case in the Court of Chancery. The High Court expressed the same view in Naismith v McGovern [1953] HCA 59; (1953) 90 CLR 336 at 341-342, when dealing with O. 32 of the High Court Rules.

59. But it should be noted that in Lyell v Kennedy Lord FitzGerald indicated that in some respects the new system certainly expanded the availability of discovery. His Lordship noted that, for example, whilst in its auxiliary jurisdiction equity would not lend its aid to enforce discovery for an action in tort, this was now available. He then said (8 App Cas at 234):

> "It seems to me also not to be very clear that an increased power to exhibit interrogatories to the defendant, and enforce discovery as to the plaintiff's title, or vice versa, is an interference with the right of the party interrogated, or is more than alteration of procedure. Since the passing of the Evidence Amendment Acts, making all parties competent witnesses, it is difficult to see that there can be a 'right' in any litigant to refuse to answer proper interrogatories where he is liable to be called as a witness and examined viva voce to the same matters."

60. In Chancery it was considered to be against public policy to assist the plaintiff in an ejectment action at law to succeed not by the strength of his own title but by the assistance of Chancery in searching into the evidence as to the title of the defendant. Later, in O'Rourke v Darbishire (1920) AC 581, the House of Lords treated as still subsisting the rule that a party might insist upon a claim of privilege from discovery on the ground that the documents in question related exclusively to his

own case and not the case of the opposing party. That privilege is now removed in the rules of various courts, for example in this Court, O. 15, r. 7.

Discovery and Corporations

61. An officer or member of a corporation might be made a defendant to a bill of discovery even though, in a sense, a mere witness; this was an expedient procedure because a corporation could answer only under its common seal so that there was no indictment for perjury in respect of false affidavits sworn on discovery: Dummer v Corporation of Chippenham [1807] EngR 451; (1807) 14 Ves Jun 245; 33 ER 515, Gibbons v Waterloo Bridge Company (1818) 5 Price 491; 146 ER 673. See also McLean v Burns Philp Trustee Co. Pty Ltd (1985) 2 NSWLR 623 at 644, per Young J.

62. Gibbons is a significant case. It is a decision of the Court of Exchequer which, as I have indicated, at the relevant time had an equity jurisdiction. The plaintiff was an annuitant who sued on behalf of himself and other annuitants and creditors of the corporation which by private statute, (1816) 56 Geo III c. lxiii, ss. 16-18, had the right to levy rates and take tolls upon the newly opened Waterloo Bridge. Maladministration and misappropriation were alleged against the company. The Chief Clerk of the company, Bayley, was joined as a defendant to the bill. The Exchequer Court overruled a demurrer to the bill. All the defendants had demurred, whereas the Chief Clerk had no ground for doing so. He had no ground because he was not liable to any penalty or forfeiture in respect of misappropriation by the company. That meant that the whole demurrer was bad. Sir Richard Richards CB said (146 ER at 673-674):

> "I never knew an instance of a clerk demurring to a bill of this sort. Some of the questions put do not lead to a liability to penalties. I have no difficulty in saying, that the demurrer cannot be maintained, for it is clear that a clerk to the defendants cannot demur on the ground that his principals are liable to penalties, and his answer could not be read against them. It has been said, that the clerk ought not to have been made a party, as he has no interest, and might be examined as a witness. But this is a case of a corporation, and therefore from necessity it has been allowed, as an exception to the general rule that one who may be a witness cannot be a defendant to a bill for discovery."
> (Emphasis supplied)

63. Earlier, in Fenton v Hughes [1802] EngR 274; (1802) 7 Ves Jun 287, 32 ER 117, Lord Eldon LC had explained that there was an exception to the rule that a bill for discovery might not be sought against a mere witness. His Lordship said:

> "The cases of secretaries and book-keepers to corporations proceed upon another ground, now sanctioned by practice, so that it is impossible to unsettle it. But the principle is very singular. It originated with Lord Talbot (Wych v Meal, 3 P Will 310 [1734] EngR 88; (24 ER 1078)); who reasoned thus upon it; that you cannot have a satisfactory answer from a corporation; therefore you make the secretary a party; and get from him the discovery you cannot be sure of

> having from them; and it is added, that the answer of the secretary may enable you to get better information. The first of those principles is extremely questionable; if it were now to be considered for the first time; and, as to the latter, it is very singular to make a person a Defendant, in order to enable yourself to deal better and with more success with those, whom you have a right to put upon the record. But this practice has so universally obtained without objection, that it must be considered established."

See also the discussion by Shadwell V-C in Glasscott v The Governor and Company of the Copper-Miners of England [1840] EngR 1031; (1840) 11 Sim. 305 at 312-315; [1840] EngR 1031; 59 ER 892 at 894-895.

64. The point is that it had not been resolved whether under the old equity practice the answer of a clerk or member of a corporation, elicited by the above procedures, might be read at all against the corporation. Its utility may have been merely, as Lord Eldon put it, to "enable you to get better information" towards obtaining fuller discovery from an amenable party; see Bray at pp. 83-84. Thus, what was decided in Gibbons was that it was no objection for the clerk to show that the corporation was liable to penalties, because his answer could not be read against it in any event.

65. Under the Judicature system there is no separate procedure of joining an officer or servant of the corporate party as a defendant against whom discovery is sought. The court nevertheless has a discretion to direct an answer to interrogatories for the company by a particular officer: Smith Kline and French Laboratories Ltd v Inter-Continental Pharmaceuticals (Australia) Pty Ltd [1969] HCA 34; (1969) 123 CLR 514.

66. What follows from the above consideration of the previous equity practice is that here too the position of corporations in respect of what I have called the penalty provision still awaited development, alongside the statutory changes in common law procedures, when the modern fused system of procedure was adopted.

Conclusions

67. It may be accurate in a broad sense to say that both the privilege against self-incrimination (in its various branches) and the penalty privilege of refusing to answer questions or provide information or documents where the whole object of the proceeding is the imposition and recovery of a civil penalty, are "deep rooted in English law"; cf Lam Chi-ming v The Queen (1991) 2 AC 212 at 222. However, there is no such deep root in respect of the assertion of either privilege by or on behalf of corporations.

68. Further, the privilege against discovery or production of documents or provision of information in a proceeding for the imposition and recovery of a civil penalty, shares with that branch of the privilege against self-incrimination concerned with protection from compulsion to produce books or documents in the nature of real evidence of guilt, a significant characteristic. This is that both rest upon weaker ground than that which supports the privilege against self-incrimination by compulsion to make an admission of guilt which is testimonial in character. If the corporation, even as a party, is denied the privilege against self-incrimination by 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?

69. If the one privilege extends to corporations, then no doubt the other also should do so; cf New Zealand Apple and Pear Marketing Board v Master and Sons Ltd (1986) 1 NZLR 191 at 197. But if corporations are not within the reach of one protection, why should they be within the reach of the other? Further, as I have endeavoured to show, the development of the law which has produced what one must accept are the two privileges, does not provide real support for drawing corporations within the ambit of either privilege.

70. For these reasons I would dispose of the special case in the manner indicated by Burchett J.

---