Bond Law Review

Volume 5 | Issue 2 Article 3

12-1-1993

'No Body to be Kicked or Soul to be Damned': Corporate Claims to the Privilege Against Self-Incrimination

Jan McDonald
Bond University

'No Body to be Kicked or Soul to be Damned': Corporate Claims to the Privilege Against Self-Incrimination

Abstract
The most obvious way for a corporation to resist compulsory production of documents that contain evidence of potential misconduct is to claim that production may tend to incriminate the company. Until recently, it was assumed that corporations were entitled to claim the privilege against self-incrimination; the High Court never having expressed a conclusive opinion on the question. In EPA v Caltex, however, a narrow majority of the Court held that the focus of the privilege is to prevent abuses of personal freedoms and individual human rights, and therefore, that the privilege has no application to corporate entities. It also endorsed a wide interpretation of statutory powers to compel production. This note examines the Caltex decision and assesses its implications for white-collar crime investigation and enforcement.

Keywords
self-incrimination, corporate law, EPA v Caltex

Comments and Notes

'NO BODY TO BE KICKED OR SOUL TO BE DAMNED': CORPORATE CLAIMS TO THE PRIVILEGE AGAINST SELF-INCRIMINATION

By
Jan McDonald
Assistant Professor of Law
Bond University

No murderer wants to hand her accuser the warm and smoking gun or the blood-stained knife. Sensible people begrudge providing the prosecution with damning evidence and generally, the law is sympathetic. The privilege against self-incrimination protects individuals from facing the '"cruel trilemma" of punishment for refusal to testify, punishment for truthful testimony or perjury'.[1] The privilege is most commonly associated with the right to silence at trial, but extends to the production of incriminating documentary evidence. This is critical in a business environment where corporations and their directors face heavy criminal penalties for non-compliance; and where State and Federal pollution control, occupational health and safety, corporations, and taxation legislation provides government authorities with wide powers to compel production of documents.

The most obvious way for a corporation to resist compulsory production of documents that contain evidence of potential misconduct is to claim that production may tend to incriminate the company. Until recently, it was assumed that corporations were entitled to claim the privilege against self-incrimination; the High Court never having expressed a conclusive opinion on the question[2]. In *EPA v Caltex*,[3] however, a narrow majority of the Court

1 *Environment Protection Authority of New South Wales v Caltex*, High Court of Australia, 24 December 93, per Mason CJ and Toohey J, at p 27.

2 The question has been entertained by the High Court twice, but both cases were decided on other grounds. In *Pyneboard Pty Lty v Trade Practices Commission* (1983) 152 CLR 328, the High Court did not decide the matter, but was 'content to assume' that the privilege was also available to corporations in Australia. In *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1984) 156 CLR 385, a High Court majority determined that the facts before it rendered it unnecessary to consider the question at all.

3 High Court of Australia, 24 December 93.

held that the focus of the privilege is to prevent abuses of personal freedoms and individual human rights, and therefore, that the privilege has no application to corporate entities. It also endorsed a wide interpretation of statutory powers to compel production. This note examines the *Caltex* decision and assesses its implications for white-collar crime investigation and enforcement.

The background to *EPA v Caltex*

The *Caltex* litigation started when the New South Wales Environment Protection Authority's predecessor[4] served two notices on Caltex Refining Pty Ltd, requiring it to produce documents relating to an alleged breach of a permit condition. Caltex refused, and sought a direction from the Land and Environment Court that it did not have to comply with the notices. The two notices were identical; one was authorised by section 29(2)(a) *Clean Waters Act* 1970 (NSW), the other issued under the Rules of the Land and Environment Court.[5] The notices required Caltex to provide the State Pollution Control Commission with documents relating to alleged breaches of the water pollution discharge permit for Caltex' oil refinery at Kurnell. The sole purpose of the notices was to obtain evidence against Caltex for use in criminal proceedings that had already commenced.[6] The alleged breaches had occurred over a year before the State Pollution Control Commission served Caltex with the notices.

Section 29(2)(a) of the *Clean Waters Act* 1970 permits an authorised officer to require -

> the occupier of any premises from which pollutants are being or are usually discharged into any waters to produce to that authorised officer any reports, books, plans, maps or documents relating to the discharge from the premises of pollutants into the waters or relating to any manufacturing, industrial or trade process carried on those premises.

Justice Stein in the Land and Environment Court held that Caltex was required to comply with the notices,[7] but he submitted a number of questions of law to the Court of Criminal Appeal regarding the validity of the notices,

4 The State Pollution Control Commission was replaced by the Environment Protection Authority by the *Protection of the Environment Administration Act* 1991 (NSW).

5 The *Land and Environment Court Rules* 1980, Pt 6, r 2 incorporate the provisions of the *Supreme Court Rules* 1970 relating to summary prosecutions, which incorporate the rules regarding notices to produce. Supreme Court Rule 16 of Pt 36 provides that where a party to proceedings serves on another party a notice requiring the party to produce any document ... the party served shall, unless the court otherwise orders, produce the document without the need for any subppoena for production. The court would relieve the party of the obligation to produce where the document is subject to privilege. Supreme Court Rules 1970, Pt 36, r 13 discussed in *Caltex Refining Pty Ltd v SPCC* (1991) 25 NSWLR 118, at 123-4.

6 Ibid at 121.

7 *SPCC v Caltex Refining Pty Ltd* (1991) 72 LGRA 212.

and in particular the availability of the privilege against self-incrimination to corporations.

The decision in the Court of Criminal Appeal

The Court of Criminal Appeal had to decide three questions:

(i) was the privilege against self-incrimination available to corporate entities?

(ii) had the *Clean Waters Act* excluded the privilege by necessary implication? and

(iii) was the notice issued pursuant to section 29(2)(a) valid?

The Court Of Criminal Justice held that corporations could avail themselves of the privilege against self-incrimination. It reasoned that:

(i) a corporation that bears the duties of citizenship should also be entitled to the rights thereof;

(ii) the privilege struck a balance between the powers of the State and the rights of individual citizens; and

(iii) the privilege helped to maintain the integrity of the accusatorial system of criminal justice by requiring the Crown to make out a case before the accused is obliged to answer.[8]

Although it decided that the privilege extended to corporations, the Court held that the broad wording of section 29(2) suggested that the privilege against self-incrimination had been excluded by necessary implication. The intent of the section was to enable authorities to ascertain whether an offence had been committed and to respond promptly to emergencies, which meant that the authority had to have access to all relevant monitoring data etc.[9] Moreover, another section of the *Clean Waters Act* specifically preserved the privilege, but no equivalent saving had been applied to section 29.[10]

The Court Of Criminal Justice went on, however, to hold that even if the privilege against self-incrimination had been excluded, Caltex was not required to comply with the section 29(2)(a) notice because it had been

8 Ibid at 127 per Gleeson CJ, Mahoney JA and McLelland J.

9 Ibid at 131-2, citing *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 152 CLR 333, at 241-342, per Mason A-CJ, Wilson J and Dawson J. The privilege against self-incrimination will only be excluded by necessary implication where the object of the statute giving the broad discovery powers is to ensure full investigation of possible offences where relevant information is known by persons who could not be expected to provide such information except under a statutory obligation.

10 Ibid at 131.

issued for an improper purpose.[11] The Court held that the scope of section 29(2) should be understood in the context of the objects of the Clean Waters legislation as a whole.[12] Thus, the Court concluded that the provision was designed to empower officers to investigate on-going activities, not to assist the authority in gathering evidence of a breach that had occurred over a year earlier.[13] To permit section 29(2) to be used for this purpose, the Court Of Criminal Justice held, would be to extend the evidence-gathering powers of the Environmental Protection Authority beyond those conferred in the procedures of the Land and Environment Court and remove the protections conferred on an accused by those procedures.[14]

The decision of the High Court

(i) Privilege against self-incrimination not available to corporations

On appeal the High Court reversed the decision of the New South Wales Court Of Criminal Justice on the question of privilege. The Court reviewed authorities in the United Kingdom,[15] New Zealand,[16] Canada,[17] and the United States[18] and held by a 4:3 majority that corporations were not entitled to the privilege against self incrimination. In three separate judgments, the majority[19] traced the historical foundation for the privilege and examined its modern justification, concluding that the privilege was aimed at protecting individual rights and freedoms, and that such a concern had no application to corporate entities.[20] A corporation has 'no body to be kicked or soul to be damned',[21] and therefore does not require the common law protection that the privilege affords to individuals. In taking this view, the majority adopted the position that had been taken by Murphy J in three earlier High court

11 Ibid at 132.

12 Ibid.

13 Ibid at 130-1.

14 Ibid at 130-2.

15 *In re Westinghouse Uranium Contract* [1978] AC 547 following *Triplex Safety Glass Co v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395, but see criticisms of the privilege in *British Steel v Granada Television* [1981] AC 1096, at 1127 and *Istel Ltd v Tully* [1993] AC 45 at 53.

16 *New Zealand Apple and Pear Marketing Board v Master and Sons Ltd* [1986] 1 NZLR 191.

17 *Reg v Amway Corp* (1989) 56 DLR (4th) 309, although Mason CJ and Toohey J's interpretation of this case differs from Brennan J's. Neither judgment refers to the later decision in *R v Bata Industries* [No. 1] 70 CCC (3d) 391 which held that the protection afforded by s7 of the Canadian Charter of Rights and Freedoms applied to corporations only in situations where the privilege is necessary in order to protect the life, liberty or security of an individual.

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

19 Mason CJ, Toohey, Brennan and McHugh JJ.

20 Brennan J, at 10-4 of his judgment.

21 Per Lord Denning MR, in *British Steel v Granada Television* [1981] AC 1096 at 1127 quoted by Mason CJ & Toohey J at 18 of their judgment and McHugh J at 6 of his judgment, in *Caltex*.

decisions.[22] In *Pyneboard Pty Ltd v Trade Practices Commission* Murphy J identified the privilege against self-incrimination as part of the common law of human rights that was based on a desire to protect personal freedom and human dignity.[23] This meant that it could not be used by one person to protect another and could not be claimed by an individual on behalf of a corporate entity.[24] Adopting the dicta of Denning in *Caltex*, the majority also argued pragmatically that allowing a corporate privilege against self-incrimination would frustrate a legislative intention to control corporate conduct, since proof of corporate crime usually depended upon proof of documents in the corporation's possession or power.[25] Quoting Wigmore[26], the majority in *Caltex* held that the state-individual balance would be tipped unfairly in favour of corporations were the privilege to be extended to them, because:

> Groups frequently are powerful and their illegal doings frequently are provable only by their records; and ... economic crimes (as contrasted with common law crimes) are usually not even discoverable without access to business records.

In dissent, Deane, Dawson and Gaudron JJ endorsed the view of the Court of Criminal Appeal that the privilege against self-incrimination was available to corporations. While the privilege had its origins in the Star Chamber's inquisitorial procedures, the minority believed that in modern society it was an extension of the Crown's burden of proving the guilt of the accused beyond reasonable doubt[27] - 'an unequivocal rejection of an inquisitorial approach'.[28] In order to maintain an appropriate balance between the people and the State, the minority held that the privilege should be available to corporate entities as well as individuals. The pragmatic desire to ensure that legislative controls on corporate conduct were not frustrated should be irrelevant to the Court's formulation of the common law position. If there were to be any erosion of common law principles, the minority considered that this was best done by the legislature.

Deane, Dawson an Gaudron JJ also considered the significance of statutory attempts to either preserve or exclude the privilege. Referring to provisions of the *Corporations Law* and the *Australian Securities*

22 *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 150 per Murphy J; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 346-7 per Murphy J; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 395 per Murphy J.

23 *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 152 CLR 333 at 346 per Murphy J.

24 Ibid.

25 Brennan J at 14-5 of his judgment citing *Wigmore on Evidence* (McNaughton rev. 1961) Vol 8 par 2259b.

26 Ibid *Wigmore on Evidence* at 360-1.

27 At 11-12 and 21 of their judgment.

28 At 19 of their judgment.

Commission Act 1989 (Cth), the minority held that the fact that the legislature has modified the privilege in some cases whilst preserving it in others reflected an assumption by Parliament that the privilege currently extends to corporations.[29] On this point, Mason CJ and Toohey J countered that Parliament's mistaken view of a common law rule did not automatically change that rule;[30] legislation should only be understood to change a common law rule by implication if the continued operation of the rule made the legislative provisions unworkable, and this was not the case with the *Clean Waters Act*.

(ii) Privilege against self-exposure to a civil penalty

The four Justices who held that the privilege against self-incrimination did not apply to corporations also considered the application of the little-used privilege against self-exposure to a civil penalty. Mason CJ, Toohey and McHugh JJ held that the same considerations apply to the so-called 'penalty privilege' as to the privilege against self-incrimination: the focus on individual freedoms precluded its extension to corporate entities.[31] Brennan J, however, held that the fine that could be imposed following a successful prosecution was akin to a civil monetary penalty - the financial burden was the same, regardless of whether the penalty is classified as civil or criminal[32] - and the rationale underlying the 'penalty-privilege' permitted its extension to corporations.

Brennan J distinguished between the privilege against self-incrimination, which protected individuals' freedom, and the privilege against self-exposure, which was based on the courts' limitation of their own powers to compel a defendant to furnish the evidence needed to establish its liability for a penalty.[33] The exercise of the Court's powers did not depend on whether the defendant was a corporation or a private individual.[34] In *Pyneboard*, the majority held that a statutory provision requiring a person to provide information could be qualified by the penalty privilege, but Brennan J in *Caltex* took the view that the penalty privilege should be limited to the court-issued notice to produce. This was because the justification for the privilege was limited to the scope of a court's powers. Brennan J noted that the majority in *Pyneboard* had extended the penalty privilege to statutory orders to provide information for the same reason that they had extended the privilege against self-incrimination - as a 'bulwark of liberty'.[35] Now that the majority had held that a corporation could not claim the privilege against self-incrimination, Brennan J reasoned that the penalty privilege should be

29 At 26 of their judgment.
30 Mason CJ and Toohey J at 45 of their judgment.
31 Mason CJ and Toohey J at 42 of their judgment, McHugh at 23 of his judgment.
32 At 21 of his judgment.
33 At 23 of his judgment citing *Monnins v Dom' Monnins* (1973) 2 CLR 68 (21 ER 618).
34 See 23-6 of Brennan J's judgment.
35 Brennan J at 28 of his judgment, citing *Pyneboard* (1983) 152 CLR at 340-1.

similarly limited.[36]

Deane, Dawson and Gaudron JJ did not discuss the penalty privilege specifically. It may be inferred, however, that they would support its extension to corporations for the following reasons:

(i) they recognised that the privilege against self-incrimination had developed from the equitable principle that the Court of Chancery would not order production of documents 'if to do so would have exposed the party against whom discovery was sought to a penalty or forfeiture';[37]

(ii) the case they cited as authority for this principle was the same case that Brennan J cited in support of the penalty privilege; and

(iii) the minority held that the privilege against self-incrimination did extend to corporations.

If this inference is correct, it would appear that a 4:3 majority of the High Court considered that Caltex would have been entitled to claim the privilege against self-exposure to a civil penalty in relation to the notice to produce issued under the Rules of the Land and Environment Court.

The final order from the *Caltex* appeal states that in respect of the notice issued under the Rules of the Land and Environment Court:

> Caltex is entitled to either the privilege against self-incrimination or the privilege against self-exposure to a penalty in respect of the said notice.

This order conflicts with the ratio of the case - that the privilege against self-incrimination does not enure for the benefit of corporations. Still, four justices concluded that Caltex did not have to comply with the notice, and without any comment from the minority on the privilege against self-exposure, it is difficult to rationalise this outcome with the majority's decision on self-incrimination.

(iii) Legislative exclusion of the privilege by necessary implication

Having taken the view that corporate entities were entitled to the privilege against self-incrimination, the minority found that, when read in context, there was a clear legislative intention to exclude the privilege in section 29(2)(a) of the *Clean Waters Act*.[38] This legislative intention was based on the express

36 Ibid.

37 Deane, Dawson and Gaudron JJ, at 12 of their judgment.

38 Brennan J also held that s29(2)(a) excluded the privilege, although he went on to conclude that the privilege would not have been available to corporations anyway.

inclusion of the privilege in another section and the creation of an offence for failing to comply with a notice to produce. The minority therefore held that Caltex would have to comply with the statutory notice provided it had been validly issued. The majority's conclusion that the privilege against self-incrimination was not available for corporations meant that it did not have to consider whether the privilege had been excluded by the statute.

(iv) Validity of the section 29(2)(a) notice to produce

The majority that precluded Caltex from claiming the privilege against self-incrimination held that the company should be required to comply with the notice issued under section 29(2)(a). In its view, that notice was issued for a valid purpose despite being for the sole purpose of gathering adverse evidence. The majority reasoned that when the Court of Criminal Appeal held that the notice was invalid, it had assumed that the privilege against self-incrimination was available to corporations. Mason CJ and Toohey J held that, once it was accepted that a corporation could not claim the privilege in response to a court-issued notice to produce, so that the documents would have to be supplied pursuant to that notice, there was no reason to limit the scope of the section 29(2)(a) notice to purely investigative proceedings: why should the powers of the Environment Protection Authority's to compel production be more limited under statute than pursuant to the Rules of Court? Mason CJ and Toohey J also held that a broad interpretation of the Environment Protection Authority's powers under section 29(2)(a) was more consistent with the purpose that the provision sought to achieve, that is, effective pollution control.[39]

Brennan J held that while a statutory power to compel a person to give testimony of facts relating to an offence with which the person stands charged is inconsistent with a right to silence at the trial, and would ordinarily be construed narrowly for this reason, section 29(2)(a) of the *Clean Waters Act* related only to the production of documents which were already in existence and which spoke for themselves.[40] As with Mason CJ and Toohey J, Brennan J held that these documents could be searched for and seized under a warrant if the statutory power were exhausted, so there was no reason to restrict the statutory power.

Deane, Dawson and Gaudron JJ interpreted section 29(2)(a) narrowly. The minority held that the powers conferred on the Environment Protection Authority should be limited to the administrative function of controlling pollution.[41] Section 29(2)(a) extended to requiring a person to clean up polluted waters, ensuring compliance with the Act, detecting offences, and even gathering evidence for the purpose of commencing a prosecution, but it

39 At 48 of their judgment.

40 Brennan J at 18-9.

41 Deane, Dawson and Gaudron JJ at 31 citing *Huddart Parker & Co v Moorehead* (1909) 8 CLR 330.

did not extend to collecting evidence to use against Caltex in a prosecution that had already been launched. In the minority's view, the language of section 29(2)(a) referring to premises 'from which pollutants are being or are usually discharged' did not contemplate the use of that section to obtain documents relating to a discharge that occurred twelve months previously.[42]

(v) Availability of the privilege against self incrimination for corporate officers

Most of the judgments in *Caltex* make only passing reference to the question of whether individual corporate officers could claim a personal entitlement to the privilege against self-incrimination when required to produce documents on behalf of the company, and thereby stop the company from producing the documents.[43] This is obviously of enormous relevance in the context of corporate crime generally because most statutes extend personal liability to company officers for the acts of the company. It is particularly important in respect of environmental crimes because so many State Acts *deem* individual directors and managers to be liable for offences committed by their company, subject only to a due diligence defence.[44] McHugh J examined the question of individual incrimination in detail and concluded that while members of a corporation (and by extension its officers and directors) may be adversely affected by the conviction of a corporation, they themselves are not convicted.[45]

It is true that company directors and managers are not automatically prosecuted once the guilt of the company has been established, because the decision to prosecute is still at the discretion of the regulatory authority. Where, however, there are provisions like section 10 of the *Environmental Offences and Penalties Act* 1989 (NSW), which state that it is not necessary that the company actually be convicted in order to prosecute a corporate officer on the basis of a statutory deeming provision, McHugh J's reasoning is less persuasive. There is clearly the possibility that a company officer acting as the company's representative could be compelled to provide documents that incriminate the company and which incriminate her as well. In such cases, the officer is not actually convicted when the company's

42 Deane, Dawson and Gaudron JJ at 30.

43 Mason CJ, Toohey J and Deane at 14-6 of their judgment and Dawson and Gaudron JJ (in dissent) at 15-6 refer to it only when discussing the position in the United States, Brennan does not discuss the issue directly, but see 16 of his judgment.

44 See eg *Environmental Offences and Penalties Act* 1989 (as amended)(NSW) s10; *Environment Protection Act* 1978 (as amended)(Victoria); *Environment Protection Act* 1993 (South Australia) s129; *Environmental Management and Pollution Control Bill* 1993 (Tasmania) s59; *Environment Protection Bill* 1993 (Qld) s136. Similar deeming provisions appear in other regulatory regimes, such as occupational health and safety (See, eg s50 *Occupational Health and Safety Act* 1983 (NSW)) and taxation (See s8Y *Taxation Administration Act* 1953).

45 McHugh J at 26 of his judgment citing *Rochfort* (1982) 153 CLR at 145.

documents are produced, but could be quite easily. This, surely, would violate their fundamental human rights and freedoms, which would offend the majority's reasoning in *Caltex* and the view taken in other recent affirmations of the privilege against self-incrimination.[46]

In Canada, the privilege against self-incrimination contained in section 11(c) of the *Charter of Rights and Freedoms* has been held not to apply to corporations because it refers to accused persons not being required to appear as witnesses and corporations can never be witnesses. Section 7 of the Charter provides that 'Everyone has the right to life, liberty and security of person and the right not to be deprived of that except in accordance with the principles of fundamental justice'. This section has also been interpreted to provide protection against compulsory production of self-incriminating evidence, in circumstances in which section 11(c) does not apply. In *R v Bata Industries*,[47] the Provincial Court of Ontario applied the position taken in earlier cases and held that section 7 does not protect corporations from self-incrimination, unless it is necessary to protect the life, liberty or security of a human being.[48] That is, the privilege will extend to corporations if denying it to them would effectively deny it to individual corporate officers.[49] In future, such an approach might be adopted in Australia if it is considered that the denial of corporate privilege is working a grave injustice on individuals.

Comment

The *Caltex* decision is important in several respects. Most obviously, it confirms that corporations can not claim the privilege against self-incrimination. The views of both the majority and minority on this issue are appealing, but given the High Court's apparent desire to limit the general availability of other common law privileges,[50] it is not surprising that a restrictive interpretation prevailed. The majority's historical view of the privilege certainly supports its confinement to individuals. However, their comments on the pragmatic need to assist legislative efforts at corporate control do not sit well with the fact that they were seeking merely to declare the common law position: it is curious that the common law has been interpreted in order to accommodate prevailing government policy. On the other hand, the minority's focus on the burden of proof in our accusatorial system of justice overlooks the economic, political and legal strength of

46 See *Petty v The Queen* (1991) 102 ALR 129.

47 *R v Bata Industries Ltd* [No1] 70 CCC (3d) 391.

48 Ibid at 392.

49 In *Bata* the Managing Director of the Bata Shoe Company, who was charged jointly with the company under Ontario environmental protection legislation, successfully challenged the admissibility of a report in the company's trial on the ground that that incriminated him as well.

50 For example, the Court has remarked on numerous occasions on the need to confine the bounds of legal professional privilege to ensure that it is not abused by corporations seeking to use it as a shield: *Grant v Downs* (1976) 135 CLR 674; *Baker v Campbell* (1983) 57 ALJR 749; *Waterford v Commonwealth* (1986-87) 163 CLR 54.

corporations relative to individual citizens and indeed, government authorities.

The disturbing question left unanswered by the judgment is the fate of individual corporate officers who are compelled to produce documents as representatives of the company. Acting *as* the company, they are unable to claim the privilege against self-incrimination for themselves as individuals because the privilege relates to *self*-incrimination. Now, they cannot resist compulsory production in order to protect the company either. In spite of the majority's affirmation of the paramountcy of individual rights and freedoms, the implications of their decision for corporate officers and directors are likely to be extremely far-reaching.

The second significant aspect of the case may dilute the impact of the ruling on the availability of the privilege against self-incrimination to corporations. If the comments of the minority can be read to accord with Brennan J's views, the case entrenches the availability of the privilege against self-exposure to a civil penalty to corporations, at least in respect of orders for discovery. It is hard to see why the privilege against self-exposure to a civil penalty should be treated any differently from self-incrimination, especially where the 'penalty' results from a criminal prosecution. Indeed, Brennan J's conclusion that criminal fines are in fact civil penalties for the purpose of the privilege seems to beg the question over the differences between the two privileges. Brennan J thought that the penalty privilege originated from the Court of Chancery's traditional refusal to compel production solely to assist one party in recovering a penalty or forfeiture from the other rested. But this practice was presumably founded on notions of fairness and, as the majority in *Pyneboard* acknowledged, as a 'fundamental bulwark of liberty' - considerations that may not be relevant to corporate conduct.

The decision also supports the High Court's trend towards expansive interpretation of statutory powers of investigation and production in respect of white-collar crime, and their exclusion of common law privileges by necessary implication.[51] According to the majority, the Environment Protection Authority could compel production of documents for any purpose relating to enforcement of the *Clean Waters Act*, even once a prosecution had been commenced. State and Commonwealth statutes in a range of areas - trade practices, taxation, corporations law - arm the relevant regulatory authorities with powers at least as wide as those conferred on the New South Wales Environment Protection Authority.[52] Even the minority who would

51 See especially *Corporate Affairs Commission (NSW) v Yuill* (1991) 4 ASCR 624.

52 See Andrews N, Dirkis M, and Bondfield B, 'The Diminishing Role of the Privilege Against Self-Incrimination in Commonwealth Legislation, or, Has the Phantom Federal 'Fifth' Finally Faded?' (1993) 3 *Aust J of Corporate Law* 54, and Longo J 'The Powers of Investigation of the Australian Securities Commission: Balancing the Interests of Persons and Companies Under Investigation with the Interests of the State' (1992) *Companies & Securities LJ* 237.

have upheld the privilege in respect of corporations took the view that the privilege had been excluded by implication in the *Clean Waters Act*.

The decision is likely to have repercussions well beyond questions of pollution control because it supports government law enforcement efforts in most areas of corporate regulation without any appraisal of the utility or fairness of that regulation or its implications for individuals. It leaves the corporate community with an unenviable choice between lobbying for the enactment of statutory protection, implementing rigorous record retention policies, and ensuring that in the event of documents being seized, the company's activities are proved to be beyond reproach.