Corporations and the Privilege Against Self Incrimination

Environment Protection Authority v Caltex Refining Co Pty Limited,
unreported, High Court, Full Court, 24 December 1993.

A pollution prosecution produces an important decision for all Australian companies.

In considering the NSW Environment Protection Authority's (EPA) prosecution of Caltex Refining Co Pty Limited (Caltex) for pollution offences under the Clean Waters Act 1970, the High Court has made an important decision on the privilege against self-incrimination which is likely to have wide ranging implications for all companies.

After commencement of the pollution prosecution, the EPA issued notices which required Caltex to produce documents relating to pollutant discharges. The EPA conceded that these notices were issued solely for the purpose of gathering evidence and information for use against Caltex in the prosecution.

The notices, in essentially identical terms, were issued under two statutory heads of power:

- Section 29 of the Clean Waters Act 1970 - which empowers authorised officers of the EPA to require the occupier of premises to produce any documents relating to the discharge of pollutants into any waters.
- Rules of the Land & Environment Court - which empower the Court to compel the production of documents.

Caltex refuses to deliver the required records of pollutant discharges

Caltex resisted production of the requested documents on two main grounds. Firstly, Caltex asserted that a corporation is entitled to rely on the privilege against self-incrimination to avoid production of the documents requested under either of the notices.

Secondly, Caltex argued that the Section 29 notice cannot be issued for the sole purpose of marshalling evidence in proceedings which are currently on foot.

High Court majority (4/3) decides the privilege against self-incrimination is not available to corporations

The conclusion reached by the majority (Mason CJ, Toohey Brennan and McHugh JJ) was that Caltex was not entitled to rely on the privilege against self-incrimination to avoid production of the documents requested by the EPA.

According to the majority the privilege against self-incrimination cannot be invoked by corporations to avoid production of documents where production is required either under rules of court or under a statutory power.

In reaching this conclusion, the majority judges examined the historic rationale for the emergence of the privilege. As a response to the excesses of the Star Chamber and High Commission, the privilege represented an attempt to curb the Crown's power to use extraordinary measures of extraction to obtain confessions which were often of dubious merit.

In its scrutiny of the application of the privilege in the contemporary context, the majority considered that it is a personal privilege which is exclusively the preserve of natural persons. While the privilege usefully preserves the state/individual balance, a corporation is sufficiently well-placed to defend itself against prosecution. Also, regulation of corporate conduct would become too onerous if the privilege applied.

Privilege against self-exposure to penalties: revisited by a single judge of the majority

Like the other judges of the majority, Brennan J held that the privilege against self-incrimination has no application to corporations, irrespective of whether demands for production of documents are made under rules of court or under statutory powers.

However, Brennan J decided that corporations may avail themselves of a different privilege, the privilege against self-exposure to penalties in the context of judicial and quasi-judicial proceedings. According to Brennan J, this privilege exempts a corporation from the obligation in any court proceedings (whether civil or criminal) to produce documents which may expose it to a penalty where those proceedings are for the purpose of imposing a penalty.

Although the views of Brennan J are not of themselves legally binding, it is useful to consider them alongside the opinions of the minority of judges.

While the three minority judges (Gaudron, Deane and Dawson JJ) concluded that corporations may avail of the privilege against self-incrimination to resist production of documents ordered under rules of court, they did not actually discuss the privilege against self-exposure to a penalty.

In combination, the views of the minority and of Brennan J suggest that a corporate defendant may, in some circumstances, resist the production of documents where an order is made under rules of court. It is arguable that a corporation could resist production of documents in the context of judicial and quasi-judicial proceedings by claim-

ing the privilege against self-exposure to a penalty.

There is no practical effect upon the outcome of the case flowing from Brennan J's singular views. Theoretically, Caltex could possibly have refused to produce the documents requested under the notice issued under the Rules of the Land and Environment Court. However, because the majority held that Caltex could not resist production under the Section 29 notice, this other notice is largely irrelevant.

Clearly, however, there are other contexts in which government regulatory authorities will not have access to statutory powers to authorise the issue of notices to produce documents and will be limited to the powers available under rules of court.

EPA v Caltex: The implications for directors and managers

The decision provides considerable guidance from the High Court on the limits of the obligations on corporations to produce incriminating evidence. However, the implications of the decision are far broader than a question of the increased risk of corporate exposure to liability.

Although the majority placed considerable emphasis on the origins and personal nature of the privilege against self-incrimination, very little attention was given to the radical ways in which our legislators now choose to incriminate company directors.

Under an increasing number of statutes, including environmental and pollution control legislation, managers and directors are automatically deemed guilty of offences committed by the company solely by reason of the office or position of employment occupied within the corporation.

There is no suggestion in the decision of the High Court majority that the use of incriminating evidence obtained from corporations is limited in use to prosecution of the corporation itself. Consequently, the logical extension of *EPA v Caltex* is that a company may be compelled to produce incriminating documents which could in turn be used to bring or be in support of proceedings against directors or managers in the company (whether or not prosecution proceedings are launched against the company itself).

It remains to be seen whether our legislators will respond to the High Court's ruling by quarantining directors from prosecution based solely on documents compulsorily produced by corporations in those cases where directors are automatically deemed to have committed the same offence as the company.

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