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7 JULY 2015

## High Court upholds power to order a corporation facing contempt proceedings to discover documents that may tend to implicate it in the contempt alleged

***Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd [2015] HCA 21 (17 June 2015)***

### ***Background***

The appellant trade union was a corporation. It had allegedly disobeyed orders made by a judge of the Supreme Court of Victoria on 5 April 2013 by blockading a construction site to which the first respondent, Boral Resources (Vic) Pty Ltd, supplied concrete.

Rule 29.07(2) of the [Supreme Court \(General Civil Procedure\) Rules 2005](#) (Vic) confers power to make an order for discovery.

An order was sought under this rule for discovery of documents going to the question of whether the CFMEU authorised an employee to establish the blockade. A decision of an Associate Justice of the Supreme Court refusing the discovery order was overturned by a Judge of the Court who imposed the order.

The Victorian Court of Appeal refused leave to appeal from the judge's decision (see [2014] VSCA 261). Special leave was granted to appeal to the High Court.

### ***High Court decision***

The High Court unanimously dismissed the CFMEU's appeal (with a plurality judgment and Nettle J agreeing separately).

### **Submissions**

The CFMEU argued that the contempt proceeding was an 'accusatorial proceeding' in which those alleging contempt were required to prove it without the CFMEU's assistance. The argument ran that the standard of proof of beyond reasonable doubt applies in all proceedings for contempt of court. Inherent in that standard of proof is a requirement that the party charged with contempt cannot be compelled to testify or produce documents to assist the moving party in making its case. This requirement was called 'the companion principle'.

The CFMEU relied on observations of the High Court in recent cases decided in favour of persons who had undergone compulsory questioning about offences with which they were charged. Those cases considered the companion principle to be distinct from the privilege against self-incrimination and as enduring even if the privilege were lost: *X7 v ACC* (2013) 248 CLR 92 at 136 and *Lee v The Queen* (2014) 308 ALR 252 at 260. The distinction was important because, under common law, a corporation cannot claim the privilege against self-incrimination: *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, a position reinforced in Victoria by s 187 of the *Evidence Act 2008* (Vic).

### **Reasoning**

The High Court rejected the submission that, on the basis of *X7 v ACC* and *Lee v The Queen*, the companion principle should save the CFMEU from discovering documents in the contempt proceedings. The High Court distinguished those cases which concerned the compulsory interrogation of persons who were then or later charged with criminal offences rather than the discovery of pre-existing documents in contempt proceedings (at [38]).

The companion principle is an adjunct to criminal proceedings. It did not extend to the contempt proceedings against the CFMEU because they were civil proceedings. The High Court rejected the suggestion that the companion principle was inherent in the standard of proof. The plurality said (at [37] – references omitted, emphasis in original):

[The companion principle] is an ‘aspect of the accusatorial nature of a criminal trial in our system of criminal justice’ whereby an accused person cannot be compelled to assist the prosecution to make its case. The companion principle is a ‘companion’ of criminal *trials*, not of the standard of proof ordinarily applicable in such trials.

The plurality observed that, while contempt proceedings ‘are essentially criminal in nature’, there are procedural differences to a criminal trial such as the absence of a jury (see [40]–[43]). The plurality pointed out (at [44]):

There are other differences ... contempt proceedings are initiated, not by the executive government, but by private parties to an indisputably civil proceeding. A party to a civil proceeding who wishes to complain that the other party has breached an order of the court is not in the same position as a prosecuting authority, which can gather evidence by compulsory processes of search and seizure before making a decision to charge the defaulting party with contempt. Further, in the contempt proceeding, the spectre of oppression by the executive government in requiring the accused to assist it in the prosecution of a criminal charge against the accused, especially one launched without adequate investigation by the agents of the state, does not arise.

### ***Implications and significance of the decision***

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A corporation charged with contempt cannot resist a discovery order by relying on the companion principle that an accused cannot be compelled to assist in the proof of the offence charged. That principle does not apply in contempt proceedings, because contempt proceedings are civil.

The court could still use its discretion not to order discovery, for example where it considers the discovery order would be oppressive.

The High Court excluded the reasoning in *X7 v ACC* and *Lee v The Queen* about the companion principle from application to contempt proceedings.

Text of the decision is available at: <http://www.austlii.edu.au/au/cases/cth/HCA/2015/21.html>

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