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# Silent Partners? Trade Unions, Corporations and Penalty Privilege in the Federal Court of Australia

**Eugene Schofield-Georgeson***

**Abstract**

'Penalty privilege' is sometimes referred to as 'the right to silence' or more correctly the privilege against self-exposure to civil penalty. It is a procedural rule that applies equally to trade unions and corporations in Australian federal courts. This article critically investigates this equality of this treatment, revealing its historical evolution and arguing that it results in unequal outcomes, relative to the social and historical roles of unions and corporations. But it also discovers distinct incoherence in the application of penalty privilege, along with a host of related legislative interventions that have sought to entrench the equal treatment of trade unions and corporations more broadly. Accordingly, this article proposes a range of reform, with a particular focus on the application of penalty privilege in the federal arena. A more coherent application of penalty privilege, it is proposed, is one that applies in proportion to the social power exercised by persons and entities before the Court.

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## Introduction

Neoliberal regulatory law rarely finds itself in a courtroom. But when it does, the procedural rules that apply to its regulatees might best be described as imposing formal equality with unequal content.[1] Such lopsided treatment coincides with an increasing juridification of Australian labour and corporate law through a regulatory maze of enforcement hierarchy, occasionally culminating in a civil penalty imposed by a court. As commentators Fudge and Glasbeek commented at the beginning of the neoliberal political era in the mid-1970s, 'the legalization of politics' inherent within neoliberal regulatory law 'inevitably leads to a renewed emphasis on due process'.[2] Australian courts have responded to these trends by emphasising fair procedural treatment for its two main categories of defendants — trade unions and corporations — predominantly by treating them in the same way,

1. Geoffrey Kay and James Mott, *Political Order and the Law of Labour* (MacMillan Press, 1982) 111-3; Brett Heino, *Regulation Theory and Australian Capitalism* (Rowman and Littlefield International, 2017) 36.
2. Judy Fudge and Harry Glasbeek, 'The Politics of Rights: A Politics With Little Class' (1992) 1(1) *Social & Legal Studies* 45, 54.

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particularly with respect to the 'right to silence' (or to resist interrogation). Far removed from the investigation of union corruption and mafia-style scandals, compulsory interrogation of trade union officials is permitted and frequently occurs in relation to routine industrial matters such as unprotected industrial action[3] and 'coercion' (the extent of union pressure applied most commonly to employers during disputation).[4] Indeed, it is difficult to contemplate why union officials would undertake such acts were it not to improve the livelihood and conditions of union members. Meanwhile, courts extend the same form of compulsory interrogation to company directors, most commonly accused of dishonesty offences — deceiving stakeholders such as the general public, consumers, business partners, creditors and workers by misappropriating corporate funds to their own ends.

This article takes issue with the procedural legal treatment of corporations and trade unions as 'equals'. Indeed, just as different as the offences of which union officials and company directors are accused, are the fundamentally different social roles performed by trade unions and corporations — large, publicly listed corporations, in particular. Where corporations exist to privately accumulate socially produced wealth,[5] trade unions exist to ensure the fair treatment of the society that produces it. Accordingly, it is the central platform of this paper that their formal equalitarian treatment by Australian procedural law produces unequal results.

Formally treating trade unions, corporations, their officers and officials as equals is a problem that can be analysed on many socio-legal levels in Australia. For instance, industrial law may be conceived of as operating across three key dimensions of Australian socio-legal power involving: first, the *type* of industrial capitalism or constitutional legal game being played; second, the *rules* of the game or legislative and rule-making capacities of the state, primarily within its parliaments and courts; and third, the *moves* within the game which take place at both court and tribunal levels.[6] Consideration of the *type* of game being played raises constitutional legal issues which are ultimately beyond the scope of this article. Accordingly, this article explores the problem of equal treatment of trade unions and corporations within second and third dimensions of Australian legal power: the *rules* of the game; and *moves* within it. It is within the rules of the game, since the mid-2000s, that consecutive legislatures have equated trade unions with corporations in a raft of legislation concerning trade union elections, auditing, duties of officials and general trade union governance. These issues have been well-traversed by academic literature since the 1980s and are only broadly touched upon here.[7] The *moves* in the game, on the other hand, take place at a base or situational level, predominantly in courts and tribunals.

3. See, for example, *Australian Building and Construction Commission v Construction Forestry Mining Maritime and Energy Union* [2019] FCA 998 (*'ABCC v CFMMEU'*); *Director of the Fair Work Building Industry Inspectorate v Construction Forestry Mining Maritime and Energy Union* [2014] FCA 652 (*'DFWBII v CFMMEU'*).
4. See, for example, *Construction Forestry Mining Maritime and Energy Union v Australian Building and Construction Commission* (2018) 259 FCR 20.
5. Harry Glasbeek, *Capitalism: A Crime Story* (Between the Lines, 2018) 4.
6. The 'rules of the game' analogy is derived from Robert Alford and Roger Friedland, *The Powers of Theory: Capitalism, State and Democracy* (Cambridge University Press, 1985) 6-11.
7. See, for example, Michael Christie, 'Legal Duties and Liabilities of Federal Union Officials' (1986) 15(4) *Melbourne University Law Review* 591; Anthony Forsyth, 'Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model' (2000) 13(1) *Australian Journal of Labour Law* 1, 11-12 ('Trade Union Regulation'); Joel Silver, 'For the Union Makes Us … Rich?: Preventing Trade Union Corruption in Law After The Health Services Union Saga' (2013) 18(1) *Deakin Law Review* 127; Ian Ramsay and Miranda Webster, 'The Origins and Evolution of the Statutory Duties of Trade Union Officers' (2019) 47(1) *Australian Business Law Review* 23.

This is a realm to which comparatively scarce little scholarship has been devoted.[8] It is on this plane that the Federal Court began to treat trade unions and corporations in a similar way from the late 1970s. This is a key level at which the effects of the paradigm shift towards the treatment of trade unions as corporations have been felt and at which legal change is most achievable.

Accordingly, this situational level is a primary focus of this article as well as the level of suggested redress. Ultimately, however, holistic redress of this issue must be directed towards all socio-legal levels, attending to their interconnections.[9]

The specific vehicle for initial discussion is a set of procedural rules surrounding the privilege against self-exposure to civil penalty in the Federal Court, or 'penalty privilege'. This rule is similar and related to the privilege against self-incrimination, or the 'right to silence',[10] within the general criminal law. Penalty privilege provides a defendant to a civil claim or action (including those in civil penalty matters) immunity from giving evidence both in court and in the course of official questioning.[11] Self-incriminating or 'confessional' evidence is, in turn, the simplest way to prove a prosecution. But the rule against self-exposure to penalty is subject to a range of contextual limitations that open the rule to normative scrutiny and differential application. Foremost among these limitations is that corporations are not entitled to penalty privilege.[12] This means that officers of corporations can be compelled to provide evidence during compulsory interrogation both in court and during official investigations. Subsection 19(2) of the *Australian Securities and Investments Commission Act 2001* (Cth) provides a legislative example of compulsory interrogation, under which ASIC may require corporate officers to attend a recorded interview, answer questions under oath and produce documents (under Part 3-3). Failure to do so is punishable by a fine or 2 years imprisonment.[13]

Indeed, such a rule is a regulatory breakthrough, slashing through centuries of corporate veils and legal fictions that were engineered to protect the powerful owners and directors of corporate wealth from legal subjecthood and submission to the law of the land. As some libertarian commentators

8. See generally RRS Tracey, 'The Conduct of Union Disciplinary Hearings' (1982) 24(2) *Journal of Industrial Relations* 204; Caroline Kelly, 'Regulatory Approaches to the Internal Affairs of Trade Unions in Australia: From Democratic Control to Corporate Accountability' in Caroline Kelly and Joo-Cheong Tham (eds), *Democracy, Social Justice and the Role of Trade Unions: We the Working People* (Anthem Press, 2021) 49.
9. Erik Olin Wright, *Understanding Class* (Verso, 2015) 125.
10. See *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 202 [1] (French CJ); *Evidence Act 1995* (Cth) ss 89(1)(a), 122(1)(a)-(d).
11. *Griffin v Pantzer* (2004) 137 FCR 209, 227 [37], 228 [44] (Allsop J).
12. *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Evidence Act 1995* (Cth) s 187.
13. *Australian Securities and Investments Commission Act 2001 (Cth)*, s 63(1)(a) ('*ASIC Act*'). Suspects are permitted limited access to the privilege against self-incrimination in this context (s 68(2)-(3)). They are permitted to utter the word 'privilege' in respect to answers that may tend to incriminate them in criminal and civil penalty proceedings (although not necessarily civil proceedings): Eugene Schofield-Georgeson, 'Coercive Investigation of Corporate Crime: What Investigators Say' (2020) 43(4) *University of New South Wales Law Journal* 1405, 1411-1412 ('What Investigators Say'). Despite asserting 'privilege', their compelled evidence may nevertheless be used to prosecute others (including a corporation) in civil, civil penalty and criminal proceedings: s 68(1). See also *Attorney-General (Vic) v Riach* [1978] VR 301, 310–11 (Kaye J); *Smith v The Queen* (2007) 35 WAR 201, 226 [75] (Buss JA). This practice is known as 'derivative use', which is permitted by common law: Schofield-Georgeson 'What Investigators Say' (n 13) 1411-1412.

have argued, doing away with this privilege is an exercise in compulsion that departs from the libertarian premise of evidence law — that it is for the State (or an accuser) to prove its allegation against a defendant, unaided by the defendant.[14] These lawyers, politicians and commentators have argued against legislative powers to gather evidence from corporations by compulsion,[15] which they see as 'watering-down' silence rights.[16] Contrary to such a position, however, I have argued elsewhere that there is no 'one-size-fits-all' approach to silence rights.[17] Rather, the law ought to, and does, alter silence rights to reflect the relative social power of particular categories and classes of defendants (corporate defendants are a prime example).[18] Permitting corporate defendants to exercise silence rights merely enhances their existing power to evade regulation through complex corporate structures, lengthy trails of documentary evidence and abundant resources to defend prosecution. In the case of corporate crime, compulsory powers (although seldom used) have proven extremely effective in prosecuting 'the crimes of the powerful.'[19]

Despite baring few of the hallmarks of corporate power and sharing few of the purposes of incorporation, trade unions are subject to equivalent legal treatment as corporations. This includes being subject to an increasing and disproportionate volume of civil prosecutions compared to corporations, while being held to an equivalent level of legal procedural scrutiny. The *Fair Work (Registered Organisations) Act 2009* (Cth), for instance, subjects trade union officials to compulsory interview and production of documents without the privilege against self-incrimination while punishing non-compliance with fines and imprisonment for 2 years.[20] The provisions are replicated by legislation specifically relating to the operation of trade unions in the building and construction industry.[21] In the case of penalty privilege, trade unions have none.

In taking issue with the way in which formal 'equality' is extended to trade unions and corporations through silence rights or penalty privilege, the starting point for analysis is a collection of Federal Court case law. This case law dates back to 1910 but has predominantly developed since the 1980s.[22] It is

14. These powers have been strongly contested: see Jeremy Gans, Submission No 77 to Australian Law Reform Commission, *Freedoms Inquiry* (2015); Dissenting Report Prepared by Senator Barney Cooney and Mr Frank Ford MP, Joint Statutory Committee on Corporations and Securities, Parliament of Australia, *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (November 1991) 31; Joseph P Longo, '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) 10(4) *Company and Securities Law Journal* 237, 251; John Cotton, 'Australia: Self-Incrimination in Company Legislation' (1998) 19(6) *Company Lawyer* 182, 184.
15. See, for example, powers to compel witnesses and suspects to produce both written and oral evidence, maintained by the corporate watchdog, ASIC, pursuant to *ASIC Act* (n 13) ss 19, 61.
16. See above n 14 and accompanying text.
17. See Schofield-Georgeson, 'What Investigators Say' (n 13); Eugene Schofield-Georgeson, 'Silence Matters: A Survey of the Right To Silence In the Summary Jurisdiction of New South Wales' (2020) 24(2) *International Journal of Evidence and Proof* 121 ('Silence Matters'); Eugene Schofield-Georgeson and Torrington Callan, 'Comparing Silence Rights in the Northern Territory and New South Wales' (2020) 44(2) *Criminal Law Journal* 110.
18. Schofield-Georgeson, 'What Investigators Say' (n 13).
19. Frank Pearce, *The Crimes of the Powerful: Marxism, Crime and Deviance* (Pluto Press, 1976).
20. *Fair Work (Registered Organisations) Act 2009* (Cth) ss 335, 335D, 33P, 337, 337AD ('*Fair Work (Registered Organisations) Act*'). The powers are subject to the same limitations as those in respect to corporate investigations: see above n 13.
21. See, for example, *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) ss 61F, 62, 102 ('*Building and Construction Industry (Improving Productivity) Act*').
22. *R v Associated Northern Collieries* (1910) 11 CLR 738, 742 (Isaacs J) ('*Associated Northern Collieries*'); *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 ('*Pyneboard*').

increasingly supported by a raft of legislation echoing Federal Court practice.[23] The following section of the article (Penalty Privilege in the Federal Court) explores the operation of this 'equal' treatment of corporations and trade unions in penalty privilege cases, in order to justify a more rational and transparent application of the privilege. In the section Justifications for Differential Treatment of Trade Unions and Corporations, it will be argued that coherent and transparent application of the privilege requires different legal treatment of unions and corporations — primarily owing to the different historical roles and social purposes of both institutions. The final section of the paper (Possibilities for Legal Change: The Rules and Moves of the Game) suggests possibilities for legal change that reflect this distinction across two socio-legal planes identified at the outset of the paper: the rules and moves of the game.

## Penalty Privilege in the Federal Court

Returning to the metaphor of the moves in the game, Federal Court treatment of penalty privilege has been haphazard and inconsistent. Commencing with an historical analysis, the cases analysed in this section of the paper show that from the 1980s, trade unions and corporations, their officers and officials, have both been subject to similarly chaotic procedural treatment. Notwithstanding this incoherence, the cases also illustrate the development of a spectrum or sliding scale on which penalty privilege is applied.

Throughout most of the twentieth century, the Federal Court shielded corporations from comprehensive regulation and investigation by permitting them to assert penalty privilege.[24] So long as the spectre of a fine loomed, the privilege could be claimed by corporations against both civil plaintiffs and Federal regulatory authorities.[25] It could be claimed by companies and their officials in response to pre-trial investigation requests, demands and orders for discovery of company documents.[26] And as formal 'penalty privilege', it could be asserted by company officers and officials in Court.[27] However, as numerous regulatory bodies,[28] commentators[29] and Royal Commissions[30]

23. See, for example, *ASIC Act* (n 13), ss 19(2), 33, 61, 68(1)(a); *Fair Work (Registered Organisations) Act* (n 20), ss 335, 335D, 33P, 337, 337AD; *Building and Construction Industry (Improving Productivity) Act* (n 21), ss 61F, 62, 102.
24. *Associated Northern Collieries* (n 22); *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat and Livestock Corporation* (1979) 42 FLR 204.
25. Ibid.
26. *Associated Northern Collieries* (n 23); in *Pyneboard* (n 22) Mason CJ, Wilson and Dawson JJ distinguished between the privilege against self-incrimination, which they found could be asserted by defendants (including corporate defendants) at the investigation stage of proceedings, and penalty privilege, which they said could be asserted at the hearing or trial stage of proceedings. This distinction between both types of privilege has, in recent Federal Court case law, been blurred and treated as the same thing see, for example, *Australian Building and Construction Commissioner v O'Halloran* [2020] FCA 1291 ('*ABCC v O'Halloran'*).
27. Ibid.
28. See, for example, the National Companies and Securities Commission, the Australian Securities Commission and Commonwealth Director of Public Prosecutions (in Paul Sofronoff, 'Derivative Use Immunity and the Investigation of Corporate Wrongdoing' (1994) 10 *Queensland University of Technology Law Journal* 122, 128-9).
29. Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (Columbia University Press, 1939); Edwin Sutherland, 'White-Collar Criminality' (1940) 5(1) *American Sociological Review* 1; Edwin H Sutherland, *White Collar Crime* (Holt Reinhart and Winston, 1949); Frank Pearce and Steve Tombs, *Toxic Capitalism: Corporate Crime and the Chemical Industry* (Dartmouth Publishing, 1998); Steve Tombs and Dave Whyte, *Safety Crimes* (Willan Publishing, 2007); Glasbeek (n 5).
30. See, for example, the 'Runciman Commission' or Royal Commission on Criminal Justice (UK) 1992 which made mention of the issue; along with more focussed and local Government inquiries such as that chaired by ME Beahan: Joint Statutory Committee on Corporations and Securities, *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law*, Parliament of Australia (Parliamentary Paper No 483, November 1991).

complained since the early 20th century, these rules hindered investigation and prosecution of often complex corporate fraud and criminality committed by corporations. Without access to a paper trail, investigation of corporate crime was mostly thwarted from the outset.[31]

In 1974, the Whitlam Government's *Trade Practices Act* codified compulsory investigation powers for its federal regulatory agency, the Trade Practices Commission. When these powers were first challenged, the High Court in a unanimous decision, found that penalty privilege could be modified by statute such that corporations and their agents could be compelled to produce documentary evidence and answer questions.[32] In 1993, Justice Stein of the NSW Land and Environment Court made a bold finding that corporations were not legal persons and therefore not entitled to the privilege against self-incrimination.[33] After this decision was overturned in the NSW Court of Appeal, the High Court confirmed Stein J's first instance decision and privilege against self-incrimination along with penalty privilege were all but extinguished for corporations.[34] Both forms of privilege nevertheless continued to apply to individual company officers for their own personal (and not corporate) wrongdoing.[35]

The pretext for the decision in *EPA v Caltex Refining Co Pty Ltd* ('*Caltex*') was a matter of technocratic legal reasoning: that the privilege against self-incrimination is predicated upon distinctly *human* rights that cannot rationally be extended to artificial legal entities like corporations.[36] A closer reading of the judicial policy behind the decision, however, shows that the privilege can be a more malleable instrument — 'nor … so fundamental' — when applied to corporations.[37] Effectively, in *Caltex,* the High Court adapted the privilege to specifically account for the social power of large trading corporations as defendants. In abolishing privilege for corporations, Chief Justice Mason and Justice Toohey reasoned that corporations '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.'[38] They found that '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.'[39] Accordingly, the judges confirmed that '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.'[40] A year later, the Federal Court expressly applied this decision to corporate penalty privilege.[41]

Since this time, a range of more intricate and incoherent distinctions have been drawn by federal and state supreme courts in the application of penalty privilege to corporations, including trade

31. Ibid.
32. *Pyneboard* (n 22).
33. *State Pollution Control Commission v Caltex Refining Co Pty Ltd* (1991) 72 LGRA 212.
34. *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 ('*Caltex*').
35. Ibid.
36. Ibid 498 (Mason CJ and Toohey J).
37. Ibid.
38. Ibid.
39. Ibid.
40. Ibid 500.
41. *Trade Practices Commission v Abbco Ice Works Pty Limited and Others* [1994] FCA 953 (Burchett J, Black CJ and Davies J agreeing) ('*Abbco'*).

unions (the complex history of the legal treatment of unions as corporations is discussed in the next section of the paper) and their officials. The Federal Court decisions demonstrate that penalty privilege operates across a spectrum or sliding scale of four interchangeable options. First, and at one end of the spectrum, are cases in which corporate officers and officials are permitted to exercise complete penalty privilege on the basis that they are 'natural' persons as opposed to legally fictitious corporations (vis-à-vis the treatment of corporations in *Caltex* — 'option 1').[42] Next along the spectrum are cases in which penalty privilege is permitted but limited by not requiring pre-trial disclosure from corporate defendants ('option 2').[43] In effect, this allows a defendant to run a 'negative case', testing the prosecution case against them but nevertheless requiring the defendant to eventually file a defence, often at the close of the prosecution case, halfway through the trial. Judges who permit penalty privilege on this basis, reason that silence rights are 'fundamental', sacrosanct or simply permitted.[44] The third option along the spectrum involves a collection of cases in which penalty privilege is further limited by requiring corporate defendants to run a positive case ('option 3').[45] This means that a defendant must file some (but not all) defence evidence before the commencement of hearing or trial proceedings, including an outline of contested issues. The defence must specifically address each prosecution allegation, stating whether it is admitted, denied or not admitted, as well as referencing the relevant law and some evidence to justify its case. This is sometimes required on the basis of 'expediency', sound case management or that corporate defendants are simply able to comply with such requirements.[46] The fourth and final option along the spectrum of Federal Court penalty privilege simply denies penalty privilege to corporate officers and union officials, compelling them to give evidence on the basis that they are emanations of a legally fictitious corporation ('option 4').[47]

42. *Caltex* (n 34); *Rich v Australian Securities and Investments Commission* 220 CLR 129 (Bergin J at first instance in NSW permitted the defendant's claim of penalty privilege where the director's evidence in the immediate proceedings would have been used against him in secondary proceedings in which criminal charges had already been laid); *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union [No 2]* [2014] FCA 1032.
43. *ABCC v O'Halloran* (n 26); *Australian Securities and Investments Commission v Mining Projects Group Ltd* (2007) 164 FCR 32 ('*ASIC v Mining Projects*'); *Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liquidation) [No 2]* [2020] FCA 348, [16] (Katzmann J); *Singh v Fair Work Ombudsman* [2019] FCA 664, [7] (Lee J); *Sadie Ville Pty Ltd v Deloitte Touche Tohmatsu (A Firm) [No 3]* [2018] FCA 1107 (Moshinsky J); *Fair Work Ombudsman v Hu* [2017] FCA 1081(Rangaih J); *Frugtniet v Migration Agents Registration Authority* [2017] FCA 537 (Kenny J); *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union [No 2]* [2014] FCA 1032.
44. See, for example, *ASIC v Mining Projects* (n 43); *ABCC v O'Halloran* (n 26).
45. *MacDonald v ASIC* (2007) 73 NSWLR 612 (Mason P) ('*MacDonald'*); *Bridal Fashions Pty Ltd v Comptroller-General of Customs* (1996) 17 WAR 499 ('*Bridal Fashions'*); *In the Matter of Water Wheel Mills Pty Ltd* (Victorian Supreme Court, Mandie J, 22 June 2001, Unreported); *Adams v Director FWBII* (2017) 258 FCR 257 (where this view on the relevant rule in respect to penalty privilege was provided by a Full Court of the Federal Court as a non-binding opinion or *obiter dicta*); *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* (2005) 226 ALR 247; *ABCC v CFMMEU* (n 3); *Australian Building and Construction Commissioner v McDermott* [2017] FCA 504 (an extraordinary decision, permitting the prosecution to reopen its case after the closing of both parties' cases after it discovered a fatal error in its pleadings, thereby requiring the defence to reopen and change its case.); *QC Resource Investments Pty Ltd v (In Liq) v Mulligan* [2016] FCA 813 ('*Mulligan*'); *DFWBII v CFMMEU* (n 3).
46. *MacDonald* (n 45); *DFWBII v CFMMEU* (n 3); *Bridal Fashions* (n 45).
47. *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd [No 6]* [2020] FCA 64; *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd [No 3]* [2019] FCA 285; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 550 ('*ABCC v CFMEU*') (upheld on appeal in *Construction, Forestry, Mining and Energy Union and Another v Australian Building and Construction Commissioner (2018) 259 FCR 20* ('*CFMEU v ABCC*')); *Futuretronics.com.au Pty Limited v Graphix Labels Pty Ltd* [2007] FCA 1621; *Abbco* (n 41); *Rodney Birrell v Australian National Airlines Commission* [1984] FCA 22 (privilege claimed but considered waived where an employer corporation had already produced the evidence in a document).

As a body of rules, these common law distinctions are logical enough. However, their application is incoherent and fails to reflect underlying power dynamics at play within corporations and trade unions.[48] Instead, the rules provide a moveable feast — along with significant discretion to Federal Court trial judges. Nevertheless, the existence of this spectrum presents intriguing possibilities for a more proportionate system of procedural justice (such as that proposed in the section Justifications for Differential Treatment of Trade Unions and Corporations). Applied in proportion to the relative social power and purpose of a corporate or trade union defendant, for instance, this spectrum could be used by trial courts to enhance procedural equality.

Federal procedural legislation offers little assistance to aid the coherent common law application of penalty privilege. The *Federal Court Act 1976* (Cth), for instance, states that court rules are simply a matter for 'judges of the Court'.[49] By contrast, comparable NSW legislation — the *Uniform Civil Procedure Rules 2005* — require defendants (including company officers) to 'plead specifically' any fact that might surprise the prosecution, thwart their case, or that does not arise in the prosecution pleadings.[50] Indeed, the leading NSW penalty privilege case, *MacDonald*,[51] goes further, limiting the privilege by requiring defendants to run a positive case, in turn by filing a defence prior to commencement of proceedings.[52] This aids the prosecution case by dispensing with the need for the prosecution to prove particular allegations at trial.

The NSW rules provide guidance for mostly small to medium-sized corporate defendants who comprise a majority of the subjects of civil prosecution in NSW.[53] As onerous as these rules are, they are nevertheless fair and proportionate to the purpose for which corporations exist (discussed in the following section of this paper) as well as the access to material resources maintained by medium-sized and some small business defendants.[54] However, the rules are not suited to large, publicly listed corporations, whose wealth, power and access to resources frequently enable them to elude prosecution, meaning that they should be completely stripped of penalty privilege, as determined by the High Court in *Caltex* (discussed above).[55] Neither are the NSW rules appropriate in respect to

48. For instance, in 2015, the High Court lent weight to the view that unions and their officials should be treated like corporations in respect to foregoing penalty privilege: *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482. Civil penalty matters, said the bench, necessarily involved a 'denial of most of the procedural protections of an accused in criminal proceedings' at [53]. Nevertheless, the lack of specificity inherent within this statement was used in the most recent Federal Court proceedings involving penalty privilege to extend the privilege to trade union officials. In 2020, Berna Collier J found that the High Court's pronouncement did not displace the claim of fundamental privilege against self-exposure in civil proceedings, as per Burchett J in *Abbco* (n 41): *ABCC v O'Halloran* (n 26), 22-23 [72]. And while this particular decision is to be welcomed as one that affords fairness to trade union officials, the overall Federal Court position on the privilege remains incoherent.
49. *Federal Court Act 1976* (Cth) s 59(1). It is supplemented by Part VB of the *Federal Court Rules 2011*, which 'set out … practice and procedure requirements' to 'strengthen', 'clarify', 'streamline' and 'ensure more efficient civil litigation': Explanatory Memorandum to the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth). The most recent Court ruling on the issue has found, 'cannot be said … to abrogate such a long-standing rule as the privilege against self-exposure': *ABCC v O'Halloran* (n 26) 24 [78].
50. Rule 14.14(2).
51. *MacDonald* (n 45).
52. The defence must: i) plead the relevant law; ii) identify specific prosecution allegations that are denied; and iii) specify issues in contest: *ABCC v O'Halloran* (n 26) 22-23 [72]–[74].
53. Schofield-Georgeson, 'What Investigators Say' (n 13) 1410.
54. It is hardly fair to impose such a rule on small non-GST remitting incorporated businesses, which necessarily earn less than $75,000 per annum and therefore do not have requisite access to adequate material resources and social power to fairly defend themselves without access to penalty privilege. As suggested below, owners of small businesses such as these should be treated as 'natural persons'.
55. *Caltex* (n 34); Schofield-Georgeson, 'What Investigators Say' (n 13).

trade unions and their officials (for reasons outlined in the following section of this paper — Penalty Privilege in the Federal Court).

Federal industrial legislation further prescribes the procedural treatment of trade union officials in respect to discrete 'general protections' matters such as 'coercion'. In these matters, a court is required to reverse the onus of proof (placing it upon the defendant), compelling union officials to give evidence in their defence.[56] It was on this basis that in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union*[57] (and in the same matter on appeal[58]), the Federal Court refused to provide an evidentiary certificate to a trade union witness that would have exempted him from giving incriminating evidence. In effect, section 361 of the *Fair Work Act 2009* (Cth) ('*Fair Work Act*') compelled him to give evidence. Similarly, sections 363 and 793 of that Act further provide that a trade union has the same state of mind as its officials (much like Federal corporations legislation).

A corollary of this incoherent treatment of trade unions, corporations and their officials through penalty privilege doctrine and accompanying legislation is that the regulation of corporations and trade unions is elided. Cases of complex corporate fraud, in which directors are accused of swindling hundreds of millions of dollars,[59] are subject to the same array of incoherent protections as trade union officials accused of taking industrial action outside of a bargaining period or who temporarily obstructed non-union members from entering a building site.[60] Given the fundamental political disparities in purpose and relative degrees of social power between the two key institutions that are subject to penalty privilege — corporations and trade unions — it is disproportionate to subject both to equal procedural regulation. It is also unfair to permit such arbitrariness in its application. As the foregoing section of this paper argues, relative differences in social and economic power between trade unions and corporations create a cogent reason to distinguish between situations in which silence rights should be applied. That the law does in fact already distinguish between particular types of crime and its social origins[61] is already apparent in the differentiated application of procedural rights.[62]

## Justifications for Differential Treatment of Trade Unions and Corporations

In justifying why corporations and trade unions should be afforded different legal treatment in respect to penalty privilege, this section critically appraises the historical and practical legal reasons why they are treated similarly. Where these reasons involve broader issues of trade union governance and regulation, analysis in this section must necessarily move beyond the situational level ('moves in the game') or mere penalty privilege. Analysed alongside common law penalty privilege here are the rules of the game: trade union governance legislation and the comparative treatment of trade unions by Australian legislative industrial regimes.

Shortly after Australian Federation, in 1908, corporations and trade unions were both characterised by the Australian High Court as maintaining a separate legal personality from their

56. *Fair Work Act 2009* (Cth) s 348 ('*Fair Work Act*').
57. *ABCC v CFMEU* (n 47).
58. *CFMEU v ABCC* (n 47).
59. See, for example, *Mulligan* (n 45).
60. See, for example, *ABCC v CFMMEU* (n 45); *DFWBII v CFMMEU* (n 3).
61. Rusche and Kirchheimer (n 29); Sutherland (1940), (1949) (n 29); Pearce and Tombs (n 29); Tombs and Whyte (n 29).
62. Schofield-Georgeson, 'What Investigators Say' (n 13).

members[63] — an observation repeated by the Court in 1959.[64] As such, in this pre-*Caltex* era, both entities and their officers were availed of penalty privilege. Nevertheless, prior to the late 1970s, corporations and trade unions were regulated differently within the Federal arena. From 1904, the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) held unions to account through a tribunal process overseen by the Federal Court, applying administrative law principles of 'natural justice'.[65] This system required that union officials abide by a series of internal union rules and conditions under the Act, breach of which resulted in a fine.[66] Such regulation grew in complexity, mostly under conservative governments such as the Bruce-Page and Menzies Governments during the late 1920s and early 1950s.[67] Meanwhile, despite a significantly smaller volume of matters for which unions could be prosecuted,[68] along with an 'under-resourced and largely ineffectual' regulator,[69] the types of matters for which unions were held to account did not differ markedly to those for which trade unions are frequently prosecuted today. Similar to 'coercion' or 'unlawful industrial action' in today's industrial parlance, before the late 1970s, union militancy was prosecuted via breach of 'bans clauses' (anti-strike provisions, built into industrial awards), along with 'contempt of court' proceedings (for ignoring court orders relating to strikes or arbitration), punishable by large fines against the union.[70] But unlike the treatment afforded to unions by the Federal Court in the penalty privilege cases discussed above, until the late 1970s, unions and their officials were afforded an opportunity to present a defence, or remain silent.[71]

From the late 1970s, however, the Federal Court began to hear an increasing volume of industrial matters. Accordingly, in the case of *Allen v Townsend*,[72] the Federal Court began to treat union officials as corporate officers. The Court pointed to a raft of technical legal characteristics which it insisted meant that trade unions should be treated as corporations.[73] These characteristics are that trade unions and corporations are both

(i) regulated by statute;
(ii) have a separate legal personality to their members;
(iii) maintain perpetual succession;
(iv) own property independently from their members;
(v) directed and managed by individuals (natural persons) whose powers are in turn regulated by internal and external rules and

63. *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 360–1 (O'Connor J) ('*Jumbunna*').
64. *Williams v Hursey* (1959) 103 CLR 30, 68 (Fullager J) ('*Hursey*').
65. Kelly (n 8) 55.
66. See, for example, *Commonwealth Conciliation and Arbitration Act 1904* (Cth) ss 140–1.
67. Eugene Schofield-Georgeson, 'The Emergence of Coercive Federal Australian Labour Law, 1901–2020' (2021) *Journal of Industrial Relations* ('Australian Labour Law').
68. Ibid.
69. Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22(3) *Australian Journal of Labour Law* 306–36.
70. Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (The Law Book Company, 1994) 74-96.
71. *Walter Annamunthodo v Oilfield Workers' Trade Union* [1961] AC 945; *Clark v Printing and Kindred Industries Union* (1976) 9 ALR 621 ('*Clark*'). Other rules even excluded outcomes arrived at through tribunal hearings in which tribunal members exhibited 'invincible bias': *Cains v Jenkins* (1979) 42 FLR 188; Kelly (n 8) 55-59; or that occurred in an 'emotionally charged atmosphere': *Clark* (n 71) 525.
72. (1977) 31 FLR 431 ('*Allen v Townsend*').
73. Ibid 349; Christie (n 7) 598.

(vi) confer theoretical control over the organisation upon members while ensuring that a managing group of individuals have substantial control over their affairs.[74]

These characteristics are explored in more detail, below. As Ramsay and Webster have recently discovered, the treatment of unions as corporations (and union officials as corporate officers) by the Courts from the late 1970s coincided with heated political debate in Australian legislatures.[75] These debates saw conservative state and federal governments successfully mobilise conservative members of the legal profession to conduct a range of 'independent' inquiries recommending the regulation of unions as corporations, subject to judicial, rather than tribunal jurisdiction.[76]

These inquiries culminated in a broad national shift towards enterprise level labour regulation since the 1990s. In 2002, the conservative Howard Government introduced the first legislation officially subjecting trade unions to the same legal treatment as corporations in a Schedule to its *Workplace Relations Act 1996*. The legislation regulated internal trade union affairs.[77] It also imposed exceedingly more onerous financial accounting and reporting requirements than previous Australian industrial regulatory systems, as well statutory fiduciary duties between officials and members, echoing the *Corporations Act 2001* (Cth).[78]

The Howard Government legislation was mostly replicated by the Rudd and Gillard Labor Governments under the *Fair Work (Registered Organisations) Act 2009*. Its regulatory regime for trade unions has since been amended by consecutive conservative governments, in the wake of a Royal Commission into Trade Union Governance and Corruption that concluded in 2015. The Royal Commission was initiated by conservative Prime Minister Tony Abbott and presided over by conservative former High Court Justice, Dyson Heydon. It found instances of corruption within several unions (leading to a series of prosecutions under existing civil and criminal laws) while alleging corruption against others.[79] On this basis, Commissioner Heydon emphatically recommended that union regulation and governance closely replicate strict corporate governance procedures.[80]

As labour law commentator, Joellen Riley commented at around this time, the existing framework of the *Fair Work (Registered Organisations) Act 2009* (Cth) already mirrored corporate governance legislation.[81] At 250 pages in length, it contains rules on union establishment,

74. *Allen v Townsend* (n 72) 349; see also Kelly (n 8).
75. Ian Ramsay and Miranda Webster, 'The Origins and Evolution of the Statutory Duties of Trade Union Officers' (2019) 47(1) *Australian Business Law Review* 23, 25–8.
76. Ibid. The first laws imposing onerous financial reporting obligations upon unions occurred following a Fraser-era Royal Commission into Western Australian union corruption. Later legislation in 1996 and 2002 (as well as the recently failed Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019) built upon these efforts.
77. Revised Explanatory Memorandum, *Workplace Relations Amendment (Registration and Accountability of Organisations) Bill 2002;* Second Reading Speech, *Workplace Relations (Registration and Accountability of Organisations) Bill 2002,* (House of Representatives, March 21, 2002), 1837.
78. Ibid.
79. *Royal Commission into Trade Union Governance and Corruption Final Report* (Final Report, December 2015) vol 1 ('TURC Vol 1'); *Royal Commission into Trade Union Governance and Corruption Final Report* (Final Report, December 2015) vol 2 ('TURC Vol 2'); *Royal Commission into Trade Union Governance and Corruption Final Report* (Final Report, December 2015) vol 5 ('TURC Vol 5'). Successful criminal prosecutions occurred in respect to three officials from the Health Services Union, while successful civil penalty prosecutions occurred in respect to one official from the Australian Workers' Union and two from the Western Australian branch of the Transport Workers' Union: Anthony Forsyth, 'Law, Politics and Ideology: The Regulatory Response to Trade Union Corruption in Australia' (2017) 40(4) *University of New South Wales Law Journal* 1336, 1354-1355.
80. TURC Vol 1 (n 79); TURC Vol 2 (n 79) 12 [9]; TURC Vol 5 (n 79) 166 [27] and more generally, 155-171.
81. Joellen Riley, 'Should Unions Be Subject to the Same Rules as Corporations?', *Sydney Morning Herald* (Sydney, 16 June 2012).

amalgamations, record-keeping, financial reporting, auditing and duties of office bearers. Just like corporate directors, union officials are required to act in good faith for proper purposes and in the interests of members.[82]

They owe a duty of care and due diligence[83] and must not abuse their position,[84] nor misuse company information,[85] for personal benefit or favour. Mirroring corporate governance legislation, trade union governance provisions expose trade unions to civil penalty provisions, assessed by a Federal Court subject to the civil standard of proof or balance of probabilities. Trade unions and officials continue to be subject to the regular criminal law and other 'laws of the land', in the same manner as corporate directors.[86]

This mirroring of corporate and trade union accountability was expressly recognised by the High Court in relation to the application of penalty privilege in 2015.[87] These findings have, in turn, contributed to the way in which the Federal Court has treated trade unions when claiming penalty privilege: denying it to them and, in some cases, their officials.[88] In *Australian Building and Construction Commission v Construction Forestry Mining Maritime and Energy Union*, for instance, Rares J went so far as to say that, 'the union is a private person, not acting in the public interest, but exercising its private rights to enforce the law'.[89]

This current common law doctrine requires critique. Given the democratic achievements of trade unions since at least the late eighteenth century, as well as their enormous contribution to public life (from universal manhood suffrage to the very existence of labour regulation),[90] the suggestion that unions do not act in the public interest, is simply at odds with reality. As such, it perpetuates a new legal fiction: that trade unions should act like, and in turn be treated as, private trading corporations. Indeed, the Australian High Court recently distinguished between 'public' and 'private' action in the *Banerji Case*,[91] summarised neatly by Justice Keane who said, 'it is a contradiction in terms to claim to be speaking in the public square about the public interest while at the same time insisting that one is engaged in a private activity'.[92] In other words, speaking of the public interest in public, as unions regularly do in the media, at rallies, pickets, through industrial action, during bargaining, in Parliamentary inquiries, tribunals and courts, constitutes public action. But the public aspect of trade unions alone does not justify their differential treatment to corporations.

Rather, what of the 'interests' that trade unions represent? Unlike corporations, the specific public interests represented by trade unions are predominantly democratic: the interests of private members alongside, and in tandem with, those of a particular social class or group.[93] Put differently,

82. *Fair Work (Registered Organisations) Act* (n 20) s 286.
83. Ibid s 285.
84. Ibid s 287.
85. Ibid s 288.
86. Ibid s 291; Riley (n 81).
87. *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375, 380 [2] (French CJ, Kiefel, Bell, Gageler and Keane JJ), citing *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 559 [31] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
88. See, for example, *ABCC v CFMMEU* (n 3).
89. Ibid 8 [18].
90. Michael Quinlan, *The Origins of Worker Mobilisation* (Routledge, 2019); Eugene Schofield-Georgeson, *By What Authority? Criminal Law in Colonial New South Wales* (Australian Scholarly Publishing, 2018).
91. *Comcare v Banerji* (2019) 267 CLR 373, 402 [36], 406-7 [46] (Kiefel CJ, Bell, Keane and Nettle JJ).
92. Patrick Keane, 'Too Much Information: Civilisation and the Problems of Privacy', (Speech, Whincop Memorial Lecture 2020, 27 August 2020).
93. Joo-Cheong Tham and Caroline Kelly, 'Introduction: Democracy and Social Justice as Organising Principles', in Kelly and Tham (eds) (n 8) 5-9.

where corporations exist to privately accumulate socially produced wealth,[94] trade unions exist to ensure the fair treatment of the society that produces it. Within workplaces this involves the immediate interests of workers, organising them to bargain for improved wages and conditions, as well as providing particular social services. More broadly, however, trade unions educate workers and organise social movements to ensure the fair treatment of marginalised people and the wider society by the State and capital.

Within living memory, these campaigns have involved improving health and safety at work, increasing the social wage as well as fighting for (and winning) social justice causes involving the environment, Aboriginal people, prison reform, social welfare and many others. It is noted however that unions cannot represent the interests of *all* union members at all times. For instance, the democratic majoritarian decision-making processes deployed within unions sometimes elevate the interests of dominant majorities within unions — full-time male employees — over and above those of minorities, comprised of part-time and casual workers, many of whom are women. It is further noted that there exists a critique of union democracy premised upon the notion of 'proprietary interest' — that unions are members-only organisations, existing for their exclusive benefit (like companies).[95] This was an argument mounted by opponents of the labour movement at a time when compulsory unionism and closed-shop workplaces were still permitted under Australian law. Since the passage of legislation abolishing these practices and enshrining the notion of voluntary union membership, labour lawyer Anthony Forsyth has argued that the 'proprietary interest' critique 'is no longer sustainable (if it ever was)'.[96]

Finally, while it is true that a small number of trade unions have access to large pools of financial resources like corporations, these resources are provided by the working-class members of trade unions, for the benefit and legal protection of themselves, other union members as well as the union as an institution. Such protection necessarily results from the exploitative nature of working relationships and contractual employment in a liberal labour market, predominantly organised in the interests of trading corporations.[97] Furthermore, the pools of resources possessed by the largest Australian trade unions nevertheless pale in comparison to the private asset wealth of publicly listed trading corporations.[98] Indeed, the Federal Government has just passed legislation to more readily facilitate demergers between unions within some of the country's strongest unions, with the objective of diluting union power and resources.[99] At the time of writing, a split is now underway within Australia's largest and wealthiest union — the CFMMEU — involving the disamalgamation of the wealthy 'mining' division from the body of that organisation.[100]

94. Glasbeek (n 5) 4.
95. Christie (n 7) 592-594.
96. Forsyth, 'Trade Union Regulation' (n 7) 12.
97. Indeed, this is the 'protective view' of labour law, pioneered by Kahn-Freund in Davies and Freedland, *Kahn-Freund's Labour and the Law* (Stevens, 1983) 18. See also Hugh Collins, *Employment Law* (Clarendon Oxford, 2003) Ch. 1.
98. The combined asset wealth of Australia's top 16 wealthiest unions was recently calculated to be $1.6 billion (AUD): Michael Bailey, 'Menzies Research Centre Study Reveals How Rich Unions Are', *Australian Financial Review* (online, 9 September 2018) <https://www.afr.com/policy/economy/menzies-research-centre-study-reveals-how-rich-unions-are-20180909-h154mm>. In the same year, the combined asset wealth of Australia's top 16 wealthiest ASX-listed corporations was worth over $1 trillion (AUD): <https://www.marketindex.com.au/asx-listed-companies>.
99. *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020* (Cth), s 94A.
100. *Workplace Express,* 'Executive ruling on coverage would breach CFMMEU rules: Judge' (online, 26 February 2021) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=1&selkey=59834&hlc=2&hlw=disamalgamation&s_keyword=disamalgamation&s_searchfrom_date=631112400&s_searchto_date=1631662364&s_pagesize=20&s_word_match=2&s_articles=1>; *Workplace Express,* 'Newsflash: FWC Throws out CFMMEU demerger case' (online, 14 September 2021) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=2&selkey=60462&hlc=2&hlw=>. As this article notes, 'this ruling is unlikely to be the end of the matter'.

In dismantling the similar legal treatment of trade unions and corporations, it is also crucial to address the seemingly arbitrary legal justification for this treatment, provided by the Federal Court in *Allen v Townsend*.[101] Starting with the first characteristic ((i) 'regulation'), it is not difficult to suggest that most, if not all, forms of collective human organisation are regulated in some way by statute and that they might involve characteristic (iv), the pooling of common assets or property. Neither is it a stretch to suggest that most, if not all, collectivities have leaders who are required to comply with particular rules (characteristic (v)), or that they might plan for succession (characteristic (iii)).[102] Indeed, other private organisations such as partnerships, charitable trusts, and voluntary non-profit associations exhibit similar characteristics but are afforded different regulatory treatment to corporations.

It is undeniable that both unions and corporations share the second characteristic ((ii) separate legal personality) — a legal fiction attributed to them over the course of a century by various High Courts.[103] Nevertheless, unions have not shared the same advantages of corporate personality as corporations. On the one hand, separate legal personality has provided corporate shareholders, whose wealth is contingent upon the fulfilment of contractual relationships, with 'limited liability' from claims by stakeholders: consumers and creditors like workers and trade unions, while shielding them from criminal liability.[104] Unions, on the other hand, are prohibited from registering for limited liability under the *Corporations Act 2001* (Cth).[105] It is nonetheless true that separate legal personality protects trade unions from a small and diminishing number[106] of common law prosecutions (in tort and contract) in respect to the discrete area of unlawful industrial action. But separate legal personality does not protect union officials and members from individual prosecution for more common unlawful industrial action claims under the *Fair Work Act.*[107] Accordingly, it is more accurate to say that possessing a separate legal personality means different things for trade unions and corporations and is perhaps reflective of the different social role and purpose fulfilled by each organisation.

In respect to the final common characteristic — control over the organisation (vi) — trade unions and corporate governance could not be more different. The democratic purposes for the existence of trade unions, discussed above, lend themselves to fundamental internal legal differences to corporations. At the core of these legal differences are the laws and processes regulating governance of each organisation. Where corporations are governed, and in most cases, controlled, by disparities in ownership, trade unions are subject to governance processes more akin to those expected from a liberal democratic polis. In practice, this means that often wealthy and powerful majority shareholders maintain a 'controlling share' within corporations,[108] while union elections entitle each member to a vote.[109] Corporate

101. *Allen v Townsend* (n 74).
102. Partnerships and charitable trusts, for instance, exhibit all of these features.
103. *Hursey* (n 64); *Jumbunna* (n 63).
104. *Corporations Act 2001* (Cth), s516 ('*Corporations Act*').
105. Ibid s 116; Forsyth, 'Trade Union Regulation' (n 7), 13.
106. Andrew Stewart et al., *Creighton and Stewart's Labour Law 6th Edition* (The Federation Press, 2016) 920-925.
107. *Fair Work Act* (n 57) s 539(2) item 2 and s 13, which provides the definition of a 'national system employee'. One Federal Court judge has recently resolved to fine union officials within the CFMMEU personally for future breaches of industrial law: *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Botany Cranes Case) [No 4]* (2021) 306 IR 110.
108. Enshrined pursuant to the *Corporations Act* (n 104) s 250E(1). Each member of a corporation has one vote per share owned.
109. See definition of 'direct voting system', outlined in the *Fair Work (Registered Organisations) Act* (n 20), s 6, together with s 143(1)(a). This is sometimes qualified by systems of proportional representation in particular unions where delegates exercise a number of votes in proportion to the size of their branch membership: see, for example, *McLeish v Kane* (1978) 22 ALR 547.

elections, meanwhile, may be held and conducted by the corporation (in the terms established by the *Corporations Act*), whereas union elections are conducted by the Australian Electoral Commission (AEC).[110]

The arguments raised in this section of the paper regarding the history, purpose and legal characteristics of unions and corporations demonstrate fundamental differences between these two organisations. Importantly, these arguments should not be taken in isolation but should be read together, to better comprehend the complex and different historical and social reality in which these organisations exist. The following section of the paper addresses possibilities for regulatory change that more fairly account for these differences, particularly in respect to the application of penalty privilege.

## Possibilities for Legal Change: The Rules and Moves of the Game

This paper has so far established that the rules of the game treat unions and corporations similarly and that in turn, this has shaped the moves in the game by subjecting both entities to a similarly incoherent array of procedures surrounding penalty privilege. It has also critiqued this similar treatment of unions and corporations as well as the apparent incoherent application of penalty privilege. This section of the paper addresses possible solutions.

In this respect, the rules in the game might be altered in a number of ways. First, unions, corporations and their respective officials and officers might be afforded penalty privilege directly in proportion to their relative social power. The four existing common law options on the penalty privilege spectrum (outlined above in the Introduction section) might prove useful to such an assessment. For instance, rather than being treated as corporations or their emanations, trade union officials might be consistently treated as natural persons for the purposes of penalty privilege by the Federal Court (as per 'option 1'). Meanwhile, trade unions, as artificial legal entities, might be afforded the opportunity to file a negative defence ('option 2'), a limited version of penalty privilege. This option affords a degree of immunity from interrogation to trade unions in recognition of their social role and purpose. But by nevertheless requiring a defence of some description, Option 2 acknowledges over a century of Australian High Court jurisprudence that has labelled trade unions as 'artificial' legal entities, which, since *Caltex*, have not been fully entitled to penalty privilege.[111]

A corollary of this proposal is that the officers of most small to medium-sized trading corporations might consistently be treated as they are in the state jurisdiction of NSW where rules of strict pleading apply ('option 3').[112] Under these rules, corporations and their officers are required to file a defence in which they must plead the relevant law, identifying specific prosecution allegations that are denied, and specifying issues in contest (in accordance with the UCPR, r. 14.14(2) and *MacDonald*[113]). Meanwhile, corporations themselves might continue to be denied penalty privilege much like the large and powerful defendant-corporation in *Caltex*.[114] So too might the officers of large publicly listed corporations, who could be treated as emanations of corporations (as per 'option 4'). Restricting the operation of this rule to company officers from large publicly listed corporations is proportionate to the social and legal power commanded by these individuals and their organisations.

110. *Fair Work (Registered Organisations) Act* (n 20) s 182.
111. *Caltex* (n 34).
112. See above n 72: this group should be taken to exclude non-GST remitting incorporated businesses (which necessarily earn less than $75,000 per annum) who should be treated as 'natural persons' (as per Option 1).
113. See above n 45.
114. *Caltex* (n 34).

These solutions would be easiest to achieve by legislative amendment to either the *Federal Court Rules* or *Evidence Act 1995* (Cth) or, less likely, by way of a Full Federal Court decision.

A further change would be to reinstate the Fair Work Commission's control over some matters of trade union governance and to require the Federal Court to observe rules of 'natural justice' in respect to internal trade union disputes.[115] Before the mid-1970s, such rules routinely involved the application of penalty privilege and silence rights to all union officials within internal disputes, despite the High Court's restrictive decision in respect to tribunals (such as the Fair Work Commission) in the *Boilermakers' Case* some 24 years earlier.[116] Returning to a similar system would clearly require a legislative solution. A final addendum to these amendments surrounding penalty privilege is the repeal of reverse onus provisions against trade union officials within the *Fair Work Act* (eg 'coercion').

Applying silence rights in proportion to the social power of individual and corporate defendants is to challenge a basic utilitarian premise of liberal law: formal equality with unequal content.[117] And as the preceding argument has explained, procedural 'silence rights' have rarely had universal application. Over time, courts and legislatures have applied interrogation rules differently in respect to different social groups and categories of defendants.[118] Where powerful and often large corporate entities, for instance, are subject to compulsory powers of interrogation, these laws have been effective in diminishing the prospect of law evasion through complex corporate structures, paper trails and a superior command over financial resources.[119] Equally, where socially vulnerable defendants, including Aboriginal people and Legal Aid NSW clients have been availed of strong silence rights, courts have arrived at more socially appropriate outcomes for these defendants.[120] In this respect, existing procedural law does, to some extent, recognise that formally equal treatment does not result in substantively equal outcomes. Accordingly, changing the rules on penalty privilege between unions and corporations is likely to afford more equal outcomes between both entities.

Changing the rules of the game to provide for equal outcomes between corporate and trade union defendants involves changing substantive regulation of trade unions. Rather than regulating unions as corporations by imposing corporate-style fiduciary duties on officials, as well as financial and reporting obligations, unions should be regulated in the democratic interests of members.[121] As British labour law commentators Elias and Ewing put it,

> A proper assessment of the role which the law ought to play in the regulation of groups in society must depend largely on the public significance of the functions of these groups, and the methods they employ

115. Kelly (n 8). Such matters might include disputes with respect to union rules, including elections.
116. Such a system might be rejected by the High Court for constitutional invalidity on the basis that enhancing tribunal power over trade unions interferes with the Ch III judicial power of the Court, as per *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 269 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers*'); see also *South Australia v Totani* (2010) 242 CLR 1, 48 [70] (French CJ). Legislative strategies that avoid a *Boilermakers'* issue (by permitting tribunals decisional power), include tribunal schemes where either: parties elect to be bound by a tribunal decision or its 'arbitral power' (see *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83); where a tribunal merely 'administers' statutory criteria, as opposed to determining substantive rights and liberties (see, *Luton v Lessels* (2002) 210 CLR 333); or where a tribunal regulates an activity — rather than determining its legality (see, *Attorney-General (Cth) v Alinta Limited* (2008) 233 CLR 542).
117. Kay and Mott (n 1); Heino (n 1).
118. Schofield-Georgeson, 'What Investigators Say' (n 13) 131-152.
119. Ibid.
120. Schofield-Georgeson, 'Silence Matters' (n 18).
121. Forsyth, 'Trade Union Regulation' (n 7) 11-12.

> to pursue them… Both Parliament and the courts should consider the particular needs and objectives of an organization before deciding what, if any, controls should be exercised over it.[122]

Comparing the respective roles and purposes of trade union officials and company directors, in the way suggested by Elias and Ewing, illustrates that corporate-style duties are ill-suited to holding trade union officials to account. The operation of such duties is unclear, particularly in respect to officials' day-to-day decisions surrounding industrial disputation or enterprise bargaining.[123] For instance, are the interests of fiduciaries or union members best served by officials pursuing goals that are at odds with managerial prerogative of the employer — whose interests might also be supported by common law, thereby requiring a legal challenge — or are they best served by compliance with employer demands and existing law? Duties owed by corporate directors to their shareholders, by contrast, are far clearer: make profit within legal constraints.

It is undeniable that the democratic interests of union members are served by ensuring that their organisation is solvent and officials are acting with propriety. In the era before union corporatisation, these needs were adequately catered-for pursuant to the previous and original sections of the *Conciliation and Arbitration Act 1904* (Cth),[124] as well as the respective criminal laws of the States and Commonwealth.[125] Indeed, recent empirical research demonstrates that the number of coercive regulatory laws, predominantly against trade unions, more than tripled in number during the Howard-era, when compared with the conciliation and arbitration system.[126] But that there has been some sort of 'explosion' in union malfeasance, justifying a crackdown on union officials that treats union governance in a 'tit-for-tat' manner to corporations has simply not been proven by the recent Royal Commission into union corruption — unlike the recent findings of Royal Commissions into Banking, Superannuation and Financial Services Industry.[127] In this context, there is clearly a place for a Registered Organisations Commission[128] (as there has always been a place for union registration and subjection to an industrial umpire under Australian industrial relations systems since 1904). But the legislation that it oversees must be brought into line with the democratic purpose of trade unions, shifting oversight and scrutiny from a corporate compliance model, back towards a registration scheme combined with an external complaints process for union members, requiring investigation by the Commission. Such a process might also jettison labyrinthine auditing and electoral scrutineering processes, currently overseen by the ROC and the Australian Electoral Commission, that require unions to devote crucial resources to corporate compliance, rather than better defending their members in democratic workplace struggle. Instead, complaints regarding union rules, elections and governance might be referred to the Commission, with judicial oversight provided by the Federal Court.

122. Patrick Elias and Keith Ewing, *Trade Union Democracy: Members' Rights and the Law* (Mansell Publishing, 1987) 260.
123. Forsyth, 'Trade Union Regulation' (n 7) 15-16.
124. See, for example, *Conciliation and Arbitration Act 1904* (Cth) s 72 (from the original 1904 Act).
125. Currently, set out under the *Crimes Act 1900* (NSW) Pt 4AA (Fraud and related offences); as well as extensive provisions relating to organisational crime contained under Chapter 7 of the *Criminal Code Act 1995* (Cth).
126. Schofield-Georgeson, 'Australian Labour Law' (n 67) 14-15, 16-20.
127. See, for example, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 127-129, 136–138, 164-165, 225-226, 239, 247.
128. Forsyth, 'Trade Union Regulation' (n 7) 102.

## Conclusion

At present, the treatment of trade unions as corporations in the Australian Federal legal realm is procedurally convenient, particularly where the law in respect to penalty privilege is complex. But in light of the purposes and activities of trade unions, such treatment is unfair when compared to those of trading corporations. It has the effect of relegating trade unions to an inferior position to corporations in the face of interrogation and official questioning. As demonstrated, the incoherent application of penalty privilege also results in uncertain legal outcomes.

Instead, coherence, fairness and arguably less complexity might be found through applying the existing spectrum of penalty privilege rights in accordance with the social power of corporate defendants. Addressing this discrete problem, however, raises broader issues regarding the regulation of trade unions involving the amount of tribunal control over such matters, statutory duties of union officials as well as industrial provisions that reverse the onus of proof for union officials. As canvassed here, these problems can be viewed and treated on a range of legal and political levels. Each level differs in its level of pragmatism or difficulty in implementation. Given the breadth of neoliberal change to industrial regulatory law over the past few decades, however, it may be wise to start small. Hence, the primary focus of this paper is upon the application of penalty privilege in the Federal Court — a topic that offers one of the clearest insights into the equality of treatment (with differential outcomes) between unions and corporations.

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