



**ASIC**

Australian Securities & Investments Commission

# **Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms: Interim Report 127**

## **Submission by the Australian Securities and Investments Commission**

September 2015

## Introduction

- 1 The Australian Securities and Investments Commission (**ASIC**) previously made a submission to the Australian Law Reform Commission (**ALRC**) in relation to its inquiry into *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws* (**Freedoms Inquiry**) in response to ALRC Issues Paper 46 (**Submission 74**). ASIC welcomes the opportunity to further contribute to the Freedoms Inquiry by this submission in response to ALRC Interim Report 127 (**Interim Report**).
- 2 The terms of reference for the Freedoms Inquiry require the ALRC to undertake:
  - the identification of Commonwealth laws that encroach upon traditional rights, freedoms and privileges; and
  - a critical examination of those laws to determine whether the encroachment upon those traditional rights, freedoms and privileges is appropriately justified.
- 3 The Terms of Reference further provide that: “In conducting this inquiry, the ALRC should also have regard to other inquiries and reviews that it considers relevant”.
- 4 The principal focus of this submission is the privilege against self-incrimination, which is addressed in chapter 12 of the Interim Report.
- 5 This submission also briefly addresses a discrete issue in relation to each of the following topics addressed in the Interim Report:
  - client legal privilege (chapter 13 of the Interim Report);
  - strict and absolute liability (chapter 14 of the Interim Report); and
  - procedural fairness (chapter 15 of the Interim Report).
- 6 ASIC would be happy to provide further information in relation to these or other topics if the ALRC considers that it would be of assistance to its inquiry.

## The Privilege Against Self-Incrimination (chap 12, Interim Report)

7 In its previous submission (Submission 74 at pp.6-40) ASIC addressed a range of issues relating to the privilege against self-incrimination. ASIC continues to adhere to and rely upon all aspects of that submission. This submission elaborates upon one particular aspect, namely, statutory protection provided in compensation for abrogation of the privilege (see Submission 74 at pp.23-29 & 34-39). At paragraph 93 of its previous submission ASIC expressed the following views on this topic:

- the extent to which exclusion of the privilege against self-incrimination is accompanied by compensatory protection in relation to the subsequent permissible use or admissibility of the compulsorily acquired information (except pre-existing documents) is a relevant criteria in determining whether exclusion is justified;
- the provision of “use immunity” affords adequate compensatory protection;
- the provision of “derivative use immunity” is undesirable and contrary to the public interest; and
- the provision of no immunity for pre-existing documents is justifiable ...

8 The privilege against self-incrimination is addressed in chapter 12 of the Interim Report, which concludes with the following comments about use and derivative use immunity:

12.104 In nearly all cases identified by this Inquiry to date, the abrogation of the privilege has been accompanied by a use or derivative use immunity, as recommended by the Guide to Framing Commonwealth Offences. Use immunities prohibit the use of the information revealed in subsequent proceedings against the person. Derivative use immunities render inadmissible information obtained as a result of the person having revealed information.

12.105 There have been several reviews of the privilege against self-incrimination and the availability of use immunities to protect witnesses who are compelled to produce evidence or attend examinations. *These reviews largely concluded that use and derivative use immunities are an appropriate safeguard of individual rights and may, therefore, appropriately justify laws that exclude the privilege against self- incrimination.*

12.106 Concerns have been raised regarding statutes that provide use immunity only, and not derivative use immunity. The ALRC is interested in comment as to whether further review of the use and derivative use immunities is necessary.

9 ASIC considers that the sentence italicised above, stating that previous reviews have largely concluded that “use and derivative use immunities” are an appropriate statutory safeguard, may be misread as suggesting that use immunity without derivative use immunity is an inadequate statutory safeguard. ASIC submits that previous reviews on this topic in Australia, including three recent reviews conducted by the ALRC itself, have concluded that use immunity without derivative use immunity is an adequate and appropriate statutory safeguard.

10 ASIC further considers that such previous reviews, in addition to relevant authorities and experiences from overseas, persuasively establish that use immunity without derivative use immunity is often the most appropriate statutory safeguard and that further review of this particular topic may not be required.

11 This part of ASIC’s submission addresses the following six matters:

- (a) the nature of statutory use immunity and derivative use immunity;

- (b) judicial discretions relating to the use of “derivative evidence”;
- (c) overseas approaches to derivative use immunity;
- (d) the decision in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381;
- (e) previous reviews in Australia relating to derivative use immunity; and
- (f) the absence of a need for further review.

12 There is significant duplication between this part of ASIC's submission and its previous submission because a number of the matters addressed below were referred to in ASIC's previous submission. However, such matters are either expanded upon in this submission or repeated to provide relevant context or for the reader's convenience.

**(a) The nature of statutory use immunity and derivative use immunity**

13 When the legislature compels a person to disclose information and abrogates the privilege against self-incrimination it may, but need not, provide compensatory protection by limiting the extent to which the information can subsequently be used against the person.<sup>1</sup> The High Court of Australia has observed that this is a policy question for the legislature:

[T]he legislature *may*, whilst compelling the production of incriminating material, provide protection against its use in the prosecution of the person producing it ... Questions arise as to the extent of the protection necessary - whether it should prevent only direct use or whether it should extend to derivative use – but *that is something which is properly a matter for the legislature to consider*.<sup>2</sup>

14 In those cases where Australian legislatures have abrogated the privilege against self-incrimination and chosen to provide compensatory protection, it usually takes one of two forms: (i) use immunity; or (ii) use and derivative use immunity.

15 Affording *use immunity* to a person compelled to disclose information renders *the particular information disclosed* (e.g. the actual answers to questions asked during an examination) inadmissible as evidence against that person in subsequent proceedings. However, the information can be used as a lead to progress an investigation and if it results in the discovery of further relevant material that material can be used in evidence against the person if it passes the ordinary rules and discretions relating to admissibility.

16 Affording *use and derivative use immunity* to a person compelled to disclose information not only renders the particular information disclosed inadmissible as evidence against him or her, but also renders inadmissible *any further material subsequently derived, directly or indirectly, as a consequence of the particular information disclosed by the person*. Accordingly, if the particular information disclosed is used in an investigation and it leads, directly or indirectly, to the discovery of further relevant material that "derivative evidence" will also be inadmissible against the person, even if it would or could have been discovered without the particular information disclosed by the person.

<sup>1</sup> McNicol, *Law of Privilege* (LBC, 1992), 243.

<sup>2</sup> *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 534 (Deane, Dawson and Gaudron JJ) (emphasis added). Also see *Sorby v The Commonwealth* (1983) 152 CLR 281, 310-311 (Mason, Wilson & Dawson JJ) & 316 (Brennan J).

- 17 It appears that most statutes in Australia abrogating the privilege against self-incrimination provide use immunity and not derivative use immunity.<sup>3</sup> In *Hamilton v Oades*, a case involving a compulsory examination power in a predecessor to the *Corporations Act 2001* (Cth), Mason CJ considered that such a provision was justifiable on public policy grounds:

Of course the section gives no protection to the witness against the use in criminal proceedings of derivative evidence, that is, evidence which is obtained from other sources in consequence of answers given by the witness in his examination ... Parliament has made its legislative judgment that such action is not required and has limited specific protection to the possible consequences of direct use in evidence of the answers of the witness, *thereby guarding against the possibility that the witness will convict himself out of his own mouth - the principal matter to which the privilege is directed*. Thus the legislative resolution of the competition between public and private interest is to provide for a compulsory examination and to give specific protection in relation to *the principal matter covered by the privilege* but not otherwise.<sup>4</sup>

- 18 As recognised by the Supreme Court of Canada, derivative use immunity "is an American invention, required to deal with the unique language of their Fifth Amendment".<sup>5</sup> Unlike the situation in Australia, US legislatures are not free to abrogate the privilege against self-incrimination without providing both use and derivative use immunity, even if they consider it to be in the best interests of society to do so. The following is a prominent example of a statutory provision in the US providing use and derivative use immunity:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but *no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case*, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.<sup>6</sup>

- 19 On many occasions in the past, but less so recently, Australian legislators have copied the American approach by providing both use and derivative use immunity as compensation for abrogation of the privilege against self-incrimination. A prominent example is s.128(7) of the uniform evidence law, which reads as follows:

In any proceeding in an Australian court:

- (a) *evidence given by a person* in respect of which a certificate under this section [overriding the privilege against self-incrimination] has been given; *and*
- (b) *evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence;*

<sup>3</sup> See, eg, McNicol, *Law of Privilege* (LBC, 1992), 201-202; Ligertwood, *Australian Evidence* (Butterworths, 3<sup>rd</sup> ed, 1998), 252-253: "the bulk of ... provisions only afford protection in relation to incrimination of a direct rather than of a derivative kind. ... [R]ecent amendments indicate the legislature's general dislike of derivative use-immunity provisions"; *R v Hood* (NSW Court of Criminal Appeal, 13 February 1997, No. 60326/96) per Smart J: "Protection against derivative use of the answers is sometimes but not usually accorded".

<sup>4</sup> *Hamilton v Oades* (1989) 166 CLR 486, 496. Also see p.508 (Dawson J).

<sup>5</sup> *R v S (RJ)* [1995] 1 SCR 451, [246].

<sup>6</sup> 18 U.S.C.A. § 6002.

*cannot be used against the person.* However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.<sup>7</sup>

- 20 As illustrated by these examples (which are fairly typical), statutory provisions affording derivative use immunity in America and Australia generally provide what might be described as mandatory “blanket” immunity in relation to derivative use. In particular, there are no exceptions or qualifications that would permit the use of “derivative evidence” under circumstances where it might otherwise be thought fair or desirable to do so, such as where the particular evidence in question could or would have been obtained without the compelled information or where a judge considers that it is interests of justice to do so.
- 21 The potentially drastic practical effect of derivative use immunity is well illustrated by the following examples contained in a submission from the National Crime Authority (now the Australian Crime Commission) to the Senate Legal and Constitutional Legislation Committee in relation to the *Proceeds of Crime Bill 2001* (**NCA Submission**):

(a) *Example 1*

Following a drug seizure a suspect is arrested and a restraining order is obtained over his property. At the time of making the restraining order the court also makes an order for the examination of the suspect to identify his full asset holdings. During the examination the witness states that he had resided at an address not yet known to police. Enquiries are undertaken, which confirm that the suspect resided at the address, and police gather enough evidence to obtain a search warrant for the property. When the warrant is executed a firearm is found with the suspect’s fingerprints on it. Forensic analysis of the firearm reveals that it was used in an unsolved murder. Police re-investigate the murder and uncover evidence proving beyond reasonable doubt that the suspect committed it (eg. DNA samples found on the victim match the suspect and eyewitnesses to the murder identify the suspect).

If the suspect had been conferred *use* immunity his statement that he resided at the property would be inadmissible in proceedings against him. However, if the police could prove by other means that he resided at the property they would be permitted to do so. Evidence that the firearm was found on the property, that it was covered with the suspect’s fingerprints and that it was used to shoot the victim would all be admissible against the suspect. Any further evidence against the suspect obtained as a result of the re-investigation into the murder would also be admissible against him, such as the DNA and eyewitness evidence.

If the suspect had been conferred *derivative use* immunity in relation to the examination all of the evidence referred to above (eg. the gun, fingerprints, DNA and eyewitness evidence) would be inadmissible against him because it was all derived as a direct or indirect consequence of the initial disclosure of his address (even though the address and the derivative evidence would or could have been discovered by police without the disclosure from the witness). Without such evidence, the suspect would effectively be rendered “conviction-proof” in relation to the murder.

(b) *Example 2*

Police investigating a drug syndicate obtain a production order in relation to the accountant of one of the suspects requiring him to produce documents relating to the suspect’s financial affairs. Prior to the issue of the production order the accountant was not a suspect. The accountant produces documents showing that he engaged in transactions, on behalf of his client, involving large amounts of cash. This raises the suspicions of investigators and they undertake an investigation into the transactions, including the involvement of the accountant. The investigation reveals that the accountant has been actively involved in the activities of the drug syndicate - planning and financing drug importations, laundering the proceeds of drug sales and reaping a large financial benefit. The police put the accountant under surveillance and subsequently catch him “red-handed” in relation to a new drug importation.

<sup>7</sup> See, eg. s.128(7) of the *Evidence Act 1995* (Cth).

If *use* immunity had been conferred in relation to the production order the particular documents produced by the accountant would be inadmissible in criminal proceedings against him, but the further evidence obtained as a result of the police investigation into the relevant transactions would be admissible. If *derivative use* immunity was conferred all evidence derived from the police investigation into his activities, including him being caught red-handed in relation to the subsequent drug importation, would be inadmissible against the accountant even though that evidence would or could have been uncovered by investigators in any event. Any evidence obtained by police from future investigations into the accountant would also be rendered inadmissible on the basis that the initial decision to ‘target’ him was a direct or indirect consequence of the material produced pursuant to the production order.<sup>8</sup>

- 22 As these abovementioned examples illustrate, a major problem with the conferral of statutory derivative use immunity in relation to information gathering powers is that the full scope of the immunity cannot be accurately predicted in advance because there will always be uncertainty about exactly what information the person might disclose and what past, present or future criminal activities might be uncovered as a direct or indirect consequence of that information. Any grant of derivative use immunity has the *potential* to render a person conviction-proof for an unforeseeable range of offences. For example, the NCA Submission states (at p.24): “The grant of derivative use immunity to the accountant in the above example could be tantamount to conferring upon him a lifetime ‘get out of jail free’ card, without any conscious decision ever having been made to take such a drastic step”.
- 23 A further difficulty with derivative use immunity, which is exacerbated when compulsory information-gathering powers are exercised at an early stage of an investigation (which is usually when they are most necessary and effective), is that at the completion of an investigation it can become extremely difficult and time-consuming to adequately identify what evidence has been directly or indirectly “derived” from the immunised information. A grant of derivative use immunity can “taint” an entire investigation, especially a lengthy and complex one, and preclude successful prosecution because of a practical inability to positively prove that evidence was not indirectly derived from information compelled from the accused, including in cases where the evidence was not so derived.
- 24 In light of these dangers and difficulties, responsible law enforcement agencies will generally not exercise compulsory information gathering powers that confer derivative use immunity as often or as early as otherwise desired, even though such omissions are likely to undermine the public purpose for providing such powers and abrogating the privilege against self-incrimination in the first place.

## **(b) Judicial discretions relating to the use of “derivative evidence”**

- 25 A significant consideration in assessing the appropriateness of, and need for, statutory derivative use immunity is the fact that the absence of such statutory protection does not mean that “derivative evidence” will necessarily be admissible in a subsequent prosecution against the person from whom the relevant information was compelled. This point was emphasised in the NCA Submission over 13 years ago:

Such [derivative] evidence could only be used against the person if it satisfied the ordinary rules of admissibility - a requirement that will often be difficult to meet. This is because the actual information that the person was compelled to disclose will not be admissible against the

---

<sup>8</sup> National Crime Authority, *Submission to the Legal and Constitutional Legislation Committee For the Committee’s Inquiry into The Provisions of the Proceeds of Crime Bill 2001* (18 January 2002), pp.23-24.



person and often such information will be the only link connecting him or her to the derivative evidence. Furthermore, *in any criminal proceedings the trial court has a wide range of discretions it can exercise to exclude otherwise admissible evidence, which could be invoked if the court was of the opinion that the admission of derivative evidence in a particular case would be “unfair” or “prejudicial” to the accused.* Such discretions are readily available to courts throughout Australia [See ss.135, 137 & 138 of the *Evidence Act 1995 (Cth, ACT & NSW)* and their common law counterparts].<sup>9</sup>

26 In recent years Australian courts have confirmed that the existence of wide and flexible judicial discretions to exclude the admission of derivative evidence, and further restrict the use of both information compelled from a person and derivative evidence, in order to prevent unfair prejudice to an accused or fundamental departures from ordinary criminal trial processes.<sup>10</sup> For example, French CJ and Crennan J have observed that:

[T]he trial judge has a discretion in relation to the admissibility of [derivative] evidence, and the court has a power to control any use of derivative evidence which amounts to an abuse of process.<sup>11</sup>

27 In addition, a court may restrain the exercise of compulsory information gathering powers in order to prevent prejudice to the fair trial of the person<sup>12</sup> or quash a conviction if the use or admission of compulsorily acquired information or derivative evidence rendered the trial unfair or resulted in a fundamental departure from ordinary criminal processes.<sup>13</sup>

28 Trial judges in Australia have relevant discretions to prevent or remedy any potential unfairness that may arise from the exercise of statutory powers that abrogate the privilege against self-incrimination and provide use but not derivative use immunity and the exercise of those discretions will largely focus upon the specific nature of the derivative use or derivative evidence and its likely effect in the particular circumstances of a case.

### (c) Overseas approaches to derivative use immunity

29 While derivative use immunity is mandatory in the United States because of the particular requirements of the Fifth Amendment to the US Constitution, courts and legislatures in Canada, South Africa, Hong Kong and the United Kingdom have declined to follow the US approach and have expressed a preference for statutory provisions that afford use immunity only, while recognising that courts also have a flexible discretion (like that in Australia) to exclude certain forms of “derivative evidence” in appropriate cases. A review of overseas authorities in this field is highly instructive.

<sup>9</sup> NCA Submission, above n8, p.34 (italics added, citations omitted).

<sup>10</sup> See, eg, *X7 v Australian Crime Commission* (2013) 248 CLR 92, [38], [58]-[65]; *Lee v NSW Crime Commission* (2013) 251 CLR 196, [137]; *R v Seller & McCarthy* [2013] NSWCCA 42 at [99]-[106], [115], [119], [126]-[127] & [134]-[137]; *Lee v R* (2004) 308 ALR 254; *R v Seller & McCarthy* [2015] NSWCCA 76; *R v Independent Broad-Based Anti-Corruption Commission* [2015] VSC 374 at [84].

<sup>11</sup> *X7 v Australian Crime Commission* (2013) 248 CLR 92, [58].

<sup>12</sup> See, eg, *Hammond v The Commonwealth* (1982) 152 CLR 188; *Commissioner of Australian Federal Police v Zhao* [2015] HCA 5. Indeed, it is well established in Australia that, in accordance with the principle of legality, “a statutory power to require a person to answer questions ... should be read down so as not to be able to be used, after criminal proceedings have been commenced against an accused, to require the accused to answer questions in relation to matters the subject of the pending criminal proceedings”: *Zhang v Woodgate and Lane Cove Council* [2015] NSWLEC 10 at [73]. See generally *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v NSW Crime Commission* (2013) 251 CLR 196.

<sup>13</sup> See, eg, *Lee v R* (2004) 308 ALR 254; *R v Seller & McCarthy* [2015] NSWCCA 76.



## United States

30 The approach taken in relation to derivative use immunity in the US was summarised in the NCA Submission (pp.30-31), in terms considered accurate by ASIC, as follows:

The Fifth Amendment to the US Constitution provides in absolute terms that: “No person ... shall be compelled in any criminal case to be a witness against himself”. Accordingly, unlike the situation in Australia, US legislatures are not free to override the privilege against self-incrimination, even if they consider it to be in the best interests of society to do so.

The first type of immunity statute passed in the US was enacted in 1857.<sup>14</sup> It provided witnesses who were compelled to disclose self-incriminating information with full immunity from prosecution in relation to all matters referred to or touched upon in the information disclosed. This is known as “transactional immunity”. However, from the very outset, transactional immunity was widely abused. As one commentator remarked, “[w]itnesses granted transactional immunity were given an incentive to give wide-ranging but shallow testimony, which would provide absolution for every offence touched upon, while failing to encourage complete candor, specificity and detail”.<sup>15</sup> In 1862, Congress responded to the abuses by enacting a statute that afforded use, but not derivative use, immunity.<sup>16</sup>

In 1892, the US Supreme Court held in *Counselman v Hitchcock*<sup>17</sup> that use immunity was insufficient to satisfy the Fifth Amendment. “Congress was alarmed by the *Counselman* decision”.<sup>18</sup> Sixteen days later it enacted a new immunity statute providing a compelled witness with full transactional immunity from prosecution in relation to “any transaction, matter or thing, concerning which he may testify”<sup>19</sup> (ie. transactional immunity). However, “despite the constitutional acceptability of transactional immunity, its practical consequences apparently caused prosecutors to use it infrequently. The ‘immunity bath’ it provided seemed to constitute too high a price for the testimony received”.<sup>20</sup> Ghio has observed that:

As transactional immunity statutes continued to bar the prosecution of criminals who testified, [they] grew increasingly unpopular. ... Congress was well aware of the mounting public criticism of the inability to prosecute under transactional immunity.<sup>21</sup>

In 1970 Congress passed the *Organized Crime Control Act*, which provided use and derivative use immunity instead of transactional immunity.<sup>22</sup> These provisions were held to comply with the Fifth Amendment in *Kastigar v United States*.<sup>23</sup> In this case, the Supreme Court also explained the full implications of derivative use immunity. It declared that once a person has been compelled to disclose information and has been afforded derivative use immunity, in any subsequent criminal prosecution against that person the prosecution has:

... the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source *wholly independent of the compelled testimony*. ... One raising a claim ... need only show that he testified under a grant of immunity in order to shift to the government the *heavy burden* of proving that *all of the evidence* it proposes to use was derived from legitimate independent sources.<sup>24</sup>

<sup>14</sup> See generally Berger, M *Taking the Fifth* (Lexington Books, 1980) at 67-72; Murphy, J “The Aftermath of the Iran-Contra Trials: The Uncertain Status of Derivative Use Immunity” (1992) 51 *Maryland Law Review* 1011; Ghio, RS “The Iran-Contra Prosecutions and the Failure of Use Immunity” (1992) 45 *Stanford Law Review* 229.

<sup>15</sup> Murphy, above n24, 1015 (quotations omitted). Also see Ghio, above n24, at 236.

<sup>16</sup> See Berger, above n24, 67-68 (italics added).

<sup>17</sup> *Counselman v Hitchcock* (1892) 142 US 547.

<sup>18</sup> Murphy, above n24, 1016.

<sup>19</sup> Act of 11 February 1893, ch. 83, 27 Stat.443. The constitutionality of this statute was upheld by the Supreme Court in *Brown v Walker* 161 US 591 (1896), and reaffirmed in *Ullmann v United States* 350 US 422 (1956).

<sup>20</sup> Berger, above n24, 70.

<sup>21</sup> Ghio, above n24, 238-239.

<sup>22</sup> 84 Stat. at 927, codified at 18 U.S.C. § 6002 (italics added).

<sup>23</sup> 406 US 441 (1972).

<sup>24</sup> 406 US 441 at 460-461 (italics added).

The Supreme Court stated that derivative use immunity “bar[s] the use of compelled testimony as an ‘investigatory lead’, and also bar[s] the use of any evidence obtained by focussing investigation on a witness as a result of his compelled disclosures”.<sup>25</sup>

For the prosecution to prove that it has made no direct or derivative use of compelled information in a prosecution against the immunised witness, a full evidentiary hearing must be held (generally termed a “*Kastigar* hearing”) and the prosecution must prove that every item of evidence it seeks to introduce was derived wholly independently of the compelled information.<sup>26</sup> It appears that the *Kastigar* hearing must be adversarial in nature and give the defendant an opportunity to cross-examine each prosecution witnesses.<sup>27</sup>

This “heavy burden” has proven extremely difficult to satisfy and has resulted in many prosecutions being dropped or dismissed in the United States.<sup>28</sup> High profile cases that collapsed because of a failure to disprove derivative use of immunised information include the prosecution of Gordon Strachan arising from the Watergate scandal<sup>29</sup> and the prosecutions of Oliver North and John Poindexter arising from the Iran-Contra scandal.<sup>30</sup>

In light of the practical difficulties associated with “derivative use” immunity, a number of US commentators have remarked that it is essentially the same as transactional immunity. For example, Ghio has stated that derivative use immunity is “the functional equivalent of transactional immunity”.<sup>31</sup> Berger has stated that derivative use immunity may “in practice be much akin to full transactional immunity”.<sup>32</sup> Murphy has stated that derivative use immunity is “essentially a grant of transactional immunity”.<sup>33</sup>

It has also been pointed out that affording use and derivative use immunity “provides more protection than that mandated by the Fifth Amendment”, creating “a virtually insurmountable hurdle for criminal prosecution of immunized witnesses”.<sup>34</sup> Ghio has stated that:

[T]he system in practice has proven burdensome and unworkable. ... Since the implementation of “use and derivative use” statute ... the investigation and prosecution of alleged criminals has become much more burdensome and costly.<sup>35</sup>

31 The commentaries and authorities referred to in the above passage illustrate the substantial problems encountered with statutory derivative use immunity in the US. They are further evidenced by the following observations from legal practitioners:

- Recently ... *Kastigar* has come under attack. Pressure is growing for efficient law enforcement. When an immunized witness is later prosecuted, *Kastigar* places the burden on the government “to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony”. *At times this burden can be staggering*.<sup>36</sup>
- Testimonial or statutory immunity ... bars any direct or indirect use of the immunized testimony. Technically, though, a prosecutor remains free to indict so long as he can demonstrate that his proof is wholly independent of the immunized testimony. Because “taint”

<sup>25</sup> 406 US 441 at 460.

<sup>26</sup> See eg. *US v Romano* 583 F.2d 1 at 7 (1<sup>st</sup> Cir. 1978); *US v DeDiego* 511 F.2d 818 at 824 (D.C. Cir. 1975); *US v Smith* 580 F.Supp 1418 at 1422 (D.N.J. 1984); *US v Garrett* 797 F.2d 656 at 664 (8<sup>th</sup> Cir. 1986); *US v Riveccio* 919 F.2d 812 at 814 (2d Cir. 1990), *cert. denied*, 11 S.Ct. 2852 (1991).

<sup>27</sup> See *US v Rinaldi* 808 F.2d 1579 at 1582 (D.C. Cir. 1987); *US v DeDiego* 511 F.2d 818 at 822 (1975).

<sup>28</sup> See eg. *US v McDaniel* 482 F.2d 305 (8<sup>th</sup> Cir. 1973); *US v Semkiw* 712 F.2d 891 (3<sup>rd</sup> Cir. 1983); *US v Dornau* 359 F.Supp 684 (S.D.N.Y. 1973), *cert. denied* 419 US 872 (1974).

<sup>29</sup> Strachan, K “Self-Incrimination, Immunity, and Watergate” (1978) 56 *Texas Law Review* 791.

<sup>30</sup> See eg Ghio, above n24, 247-251; Murphy, above n24, 1035-1050.

<sup>31</sup> See eg. Ghio, above n24, 247.

<sup>32</sup> Berger, above n24, 72.

<sup>33</sup> Murphy, above n24, 1052.

<sup>34</sup> Murphy, above n24, 1012 & 1052-1053.

<sup>35</sup> Ghio, above n24, 230.

<sup>36</sup> Akhil Amar, *The Constitution and Criminal Procedure: First Principles* (Yale University Press, 1997), 59 (italics added, citations omitted).

or *Kastigar* hearings are so burdensome and because they require pretrial disclosure of the government's entire case, *as a practical matter testimonial immunity ordinarily precludes prosecution of your client.*<sup>37</sup>

- The substantial burden [of disproving “derivative use” at a *Kastigar* hearing] will often discourage the Government from even seeking an indictment and, if it does obtain an indictment, the court may dismiss the indictment after a *Kastigar* hearing. The burdens imposed by the *Kastigar* hearing are the principal reason that prosecutors resist conferring derivative use immunity by agreement and are loath to seek statutory immunity ... *obtaining derivative use immunity can effectively prevent the Government from attempting a prosecution where it anticipates that it will have significant Kastigar problems. A practitioner who stands his or her ground and obtains derivative use immunity may thus have insulated the witness from prosecution.*<sup>38</sup>

32 The dangers and difficulties experienced with statutory derivative use immunity in the US are so well known and accepted that they have deterred courts and legislators in Canada, South Africa, Hong Kong and the United Kingdom from following the US approach, even though the privilege against self-incrimination is protected to varying degrees by a constitutional or legislated Bill of Rights in each of those jurisdictions (unlike the position in relation to the Commonwealth of Australia).

## Canada

33 The Canadian Charter of Rights and Freedoms (**the Charter**)<sup>39</sup> limits the extent to which legislatures can abrogate the privilege against self-incrimination, yet the Supreme Court of Canada has held that statutes abrogating the privilege are not required to provide derivative use immunity. In particular, the Supreme Court has rejected the US approach in recognition of the problems associated with a blanket statutory rule of derivative use immunity, but held that judges have a flexible discretion to exclude a narrow category of derivative evidence, namely, “derivative evidence that could not have been found or appreciated except as a result of the compelled testimony”.<sup>40</sup>

34 The seminal judgment in this field is that of La Forest J in *Thomson Newspapers Ltd v Canada* [1990] 1 SCR 425 (*Thompson*). As this judgment has proven to be highly influential, it is worth quoting at length. The case involved a statutory information-gathering power that abrogated the privilege against self-incrimination while providing use but not derivative use immunity and one of the issues was whether the absence of statutory derivative use immunity contravened the requirements of the Charter. His Honour commenced his consideration of this topic by identifying the significant differences between information compelled from a person (compelled testimony itself) and evidence derived from compelled testimony (derivative evidence):

There are serious grounds on which objection can be raised to an absolute rule that testimonial immunity must always extend to evidence derived from compelled testimony. While allowing the Crown to use such evidence in criminal proceedings may in a formal sense be equivalent to permitting direct reliance on the compelled testimony itself, there is an important difference

<sup>37</sup> John Koeltl & John Kiernan (eds), *The Litigation Manual: Special Problems and Appeals* (3<sup>rd</sup> ed, 1999), 428 (italics added, citations omitted).

<sup>38</sup> John Townsend, *Tax Crimes* (LexisNexis, 2008), 428 (italics added, citations omitted).

<sup>39</sup> Section 13 of the Charter provides “A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence”.

<sup>40</sup> *Thomson Newspapers Ltd v Canada (Thompson)* [1990] 1 SCR 425, [221]. Also see *R v S (RJ)* [1995] 1 SCR 451, [196]-[205].

between the type of prejudice that will be suffered in the two cases. It is only when the testimony itself has to be relied on that the accused can be said to have been forced to actually *create* self-incriminatory evidence in his or her own trial. The compelled testimony is evidence that simply would not have existed independently of the exercise of the power to compel it; it is in this sense evidence that could have been obtained *only* from the accused.

By contrast, evidence derived from compelled testimony is, *by definition*, evidence that existed independently of the compelled testimony. This follows logically from the fact that it was evidence which was found, identified or understood as a result of the "clues" provided by the compelled testimony. Although such evidence may have gone undetected or unappreciated in the absence of the compelled clues, going undetected or unappreciated is not the same thing as non-existence. The mere fact that the derivative evidence existed independently of the compelled testimony means that it *could* have been found by some other means, however low the probability of such discovery may have been ...

The fact that derivative evidence exists independently of the compelled testimony means, as I have explained, that it could also have been discovered independently of any reliance on the compelled testimony. It also means that its quality as evidence does not depend on its past connection with the compelled testimony. Its relevance to the issues with which the subsequent trial is concerned, as well as the weight it is accorded by the trier of fact, are matters that can be determined independently of any consideration of its connection with the testimony of the accused. If it were otherwise, it would not in fact be derivative evidence at all, but part of the actual testimony itself. Taken together, these aspects of derivative evidence indicate that it is self-sufficient, in the sense that its status and quality as evidence is not dependent on its relation to the testimony used to find it. In this regard, the very phrase "derivative evidence" is somewhat misleading.

Seen from this light, it becomes apparent that those parts of derivative evidence which are incriminatory are only *self*-incriminatory by virtue of the circumstances of their discovery in a particular case. They differ in this respect from incriminatory portions of the compelled testimony itself, which are by definition *self*-incriminatory, since testimony is a form of evidence necessarily unique to the party who gives it.

I would think that this, without more, raises doubts as to whether we should be as wary of prosecutorial use of derivative evidence as we undoubtedly must be of such use of pre-trial testimonial evidence. What prejudice can an accused be said to suffer from being forced to confront evidence "derived" from his or her compelled testimony, if that accused would have had to confront it even if the power to compel testimony had not been used against him or her? I do not think it can be said that the use of such evidence would be equivalent to forcing the accused to speak against himself or herself; once the derivative evidence is found or identified, its relevance and probative weight speak for themselves. The fact that such evidence was found through the evidence of the accused in no way strengthens the bearing that it, taken by itself, can have upon the questions before the trier of fact ...

The one qualification that must be made to the above has to do with the difference between independently existing evidence that *could* have been found without compelled testimony, and independently existing evidence that *would* have been found without compelled testimony ... [T]here will be situations where derivative evidence is so concealed or inaccessible as to be virtually undiscoverable without the assistance of the wrongdoer. For practical purposes, the subsequent use of such evidence would be indistinguishable from the subsequent use of the pre-trial compelled testimony. In both cases, it can be said that the accused is being forced to answer a case that he or she was forced to make stronger than it would otherwise have been.<sup>41</sup>

35 Justice La Forest then proceeded to identify and discuss the competing public interests associated with derivative use immunity, including criticising the approach to derivative use immunity in the US, as follows:

---

<sup>41</sup> *Thomson Newspapers Ltd v Canada (Thompson)* [1990] 1 SCR 425 at [199]-[211].

We must remember that in defining the scope of the immunity required by the Charter, we are called upon to balance the individual's right against self-incrimination against the state's legitimate need for information about the commission of an offence.

Even in cases in which the state's need for information could be satisfied without a power to compel testimony, the exercise of such a power can be an important investigative technique. By compelling testimony from those it has reason to believe possess information about known or suspected wrongdoing, the state can focus its investigative efforts much more quickly and more precisely than may otherwise be possible. The community as a whole benefits as a result. Wrongdoers are identified and apprehended more swiftly, and the perceived effectiveness of law enforcement is thereby enhanced. This in turn increases the law's effectiveness as a deterrent to other possible wrongdoers. In addition, the ability of authorities to quickly focus their investigations means that the lives and activities of fewer people will be disrupted as a result of any particular investigation. Finally, the limited resources that society has to spend on law enforcement activity in general will be utilized in a more cost-effective manner. This will mean the effective investigation of a greater proportion of offences which, again, can only enhance the law's potency as a deterrent to potential wrongdoers ...

*All of these benefits of a power to compel testimony would either be lost or severely limited if the ... legislative grant of any such power must be accompanied by a grant of full use and derivative use immunity. This is confirmed by the experience of the United States ...*

*[A]s some commentators have pointed out, the practical effect of conferring derivative use immunity is in many cases virtually indistinguishable from the conferral of immunity from prosecution. That is because it is in many cases extremely difficult for the prosecution to prove that the evidence it seeks to introduce against an accused who has been compelled to testify is not in fact derived from that testimony. It must be remembered that it would not be enough for the Crown to prove simply that the evidence could have been obtained independently of their testimony ... Instead, it must be proved that the evidence was in fact found independently of the compelled testimony. In the wake of an even relatively complex investigation where many different and reinforcing leads and mere hunches have played a part in guiding the investigators, what could possibly constitute such proof? ...*

*In short, a general requirement of derivative use immunity would mean that in many cases the use of the power to compel testimony would furnish wrongdoers with the type of "immunity baths" that were characteristic of the transaction immunity formerly available in the United States. Law enforcement authorities would be faced with the choice of either securing information quickly at the risk of jeopardizing subsequent prosecutions, or conducting more protracted and widely cast investigations. Either way, the advantages to the community currently enjoys from the power to compel testimony would be severely restricted ... I note that the absolutist position the courts in the United States have adopted in this area is undoubtedly rooted in the explicit and seemingly absolute right against self-incrimination found in that country's Constitution.<sup>42</sup>*

- 36 Justice La Forest concluded that the best way to address the complex issues relating to derivative evidence, and satisfy the requirements of the Charter, was to afford judges a flexible discretion to exclude such evidence when its admission would be unfair:

Simply because Parliament has provided for the inadmissibility of [compelled testimony] does not mean that it thereby intended that [derivative evidence] should be admitted, even when either at common law or under the Charter, such evidence would be rejected on the ground that admitting it would be unfair. It is quite reasonable for Parliament to have dealt with the obvious case of unfairness resulting from the use of self-incriminating testimony, leaving more subtle situations to be dealt with in the application of general principles. ... [D]erivative evidence raises very subtle questions requiring contextual balancing ...

<sup>42</sup> *Thomson Newspapers Ltd v Canada (Thompson)* [1990] 1 SCR 425 at [212]-[216] (italics added, citations omitted).



[T]he issues relating to derivative evidence are complex and obscure and do not easily lend themselves to global solutions. Accordingly, there may well be wisdom in Parliament's not dealing expressly with derivative evidence ...

Since the proper admission or rejection of derivative evidence does not admit of a general rule, a flexible mechanism must be found to deal with the issue contextually. That can only be done by the trial judge ...

It may, of course, be argued that the matter should be left for Parliament to deal with. I do not agree. I suspect that the best course Parliament could adopt in achieving a proper balance between the rights of the accused and the public in this area would be to accord the trial judge a discretion ... I see no reason why a court charged with the duty of ensuring a fair trial consistently with the principles of fundamental justice should have need to await the enactment of a statute to discharge this responsibility, especially when the bulk of the law of evidence was judicially created in the first place.<sup>43</sup>

- 37 Justice La Forest expressed the following views as to the circumstances under which the discretionary exclusion of derivative evidence may be warranted:

In my view, derivative evidence that could not have been found or appreciated except as a result of the compelled testimony under the Act should in the exercise of the trial judge's discretion be excluded since its admission would violate the principles of fundamental justice. As will be evident from what I have stated earlier, I do not think such exclusion should take place if the evidence would otherwise have been found and its relevance understood. There is nothing unfair in admitting relevant evidence of this kind ... The touchstone for the exercise of the discretion is the fairness of the trial process ...

The precise balance that should apply is one, of course, that will require development over time.

It is neither necessary nor advisable in this appeal to attempt a more extensive elaboration of the more flexible approach to derivative evidence I have suggested ...

I conclude, then, that the use of derivative evidence derived from the use of [compelled testimony] does not automatically affect the fairness of those trials. It follows that complete immunity against such use is not required by the principles of fundamental justice. The immunity against use of actual testimony provided by [statute] together with the judge's power to exclude derivative evidence where appropriate is all that is necessary to satisfy the requirements of the Charter.<sup>44</sup>

- 38 Another significant judgment on point in the same case was delivered by L'Heureux-Dube J. Her Honour concluded that dictates of fairness and requirements of the Charter did not necessitate the exclusion of any category of derivative evidence:

Fundamental justice in our Canadian legal tradition and in the context of investigative practices is primarily designed to ensure that a fair balance be struck between the interests of society and those of its citizens. In this regard, I fail to see why 'fundamental justice' would require an inflexible immunity in respect of derivative evidence ...

In my view, "fundamental justice" requires protection coextensive with the individual's testimonial participation in the investigation, that is, use immunity. Such protection serves the end of preventing the state from using incriminating evidence which was obtained from the individual himself, while at the same time tailoring the protection to what our system considers to be the appropriate boundary of fairness in the judicial process. Once it is established that our legal tradition recognizes the usefulness of commissions of inquiry and other investigative agencies such as the Commission, the question of the correct amount of protection to be given to witnesses must leave some room for the purpose of proper law enforcement to be served ...

<sup>43</sup> *Thomson Newspapers Ltd v Canada (Thompson)* [1990] 1 SCR 425 at [195]-[224].

<sup>44</sup> *Thomson Newspapers Ltd v Canada (Thompson)* [1990] 1 SCR 425 at [221]-[223].



Derivative evidence, which consists mainly of real evidence, cannot be assimilated to self-incriminating evidence and does not go to the fairness of the judicial process which is what, in the end, fundamental justice is all about.<sup>45</sup>

39 The issue of derivative evidence was further considered by the Supreme Court of Canada in *R v S (RJ)* [1995] 1 SCR 451, which also involved a statutory power that abrogated the privilege against self-incrimination while providing use but not derivative use immunity. All nine members of the court rejected the American rule of mandatory derivative use immunity, while five members endorsed recognition of the flexible judicial discretion to exclude a narrow category of derivative evidence previously proposed by La Forest J in *Thomson* and the other four members rejected any form of derivative use immunity.

40 The leading judgment in *R v S (RJ)* was delivered by Iacobucci J (La Forest, Cory and Major JJ concurring), with whom Lamer CJC also relevantly agreed. Justice Iacobucci commenced his consideration of the issue at hand by noting that the absence of statutory derivative use immunity did not mean that derivative evidence was "necessarily admissible at a subsequent proceeding".<sup>46</sup> He then rejected the mandatory rule of full derivative use immunity in US, agreeing with the criticisms of the American experience made by La Forest J in *Thomson*,<sup>47</sup> and variously stated:

[T]he Charter does not demand absolute derivative use immunity ... [T]here are significant problems inherent in the idea of full derivative use immunity ...

[T]he effect of a complete derivative use immunity may be to afford the compelled witness an "immunity bath", or a complete transactional immunity in respect of matters touching upon the compelled testimony ...

[N]ot all derivative evidence is worthy of the protection afforded to self-incriminatory testimony ...

[T]here is no requirement for derivative evidence to be excluded in toto under the Charter.<sup>48</sup>

41 Justice Iacobucci, like La Forest J in *Thomson*, concluded that "only a particular category of derivative evidence" warranted protection under the Charter and that the protection should take the form of a "flexible" judicial discretion.<sup>49</sup> His Honour stated:

I think that *derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness, ought generally to be excluded* under s.7 of the Charter in the interests of trial fairness ...

Since this test for exclusion can only arise in the context of proceedings subsequent to a witness's testimony, I am hesitant to elaborate further upon the test I propose here. Its form will become known, as it should, in the context of concrete factual situations.<sup>50</sup>

42 Justice Iacobucci observed that the exercise of the discretion to exclude derivative evidence "will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission" and stated:

[T]here should be no automatic rule of exclusion in respect of any derivative evidence.

<sup>45</sup> *Thomson Newspapers Ltd v Canada (Thompson)* [1990] 1 SCR 425 at [267]-[270].

<sup>46</sup> *R v S (RJ)* [1995] 1 SCR 451, [165]-[166].

<sup>47</sup> *R v S (RJ)* [1995] 1 SCR 451, [167]-[174].

<sup>48</sup> *R v S (RJ)* [1995] 1 SCR 451, [172]-[183].

<sup>49</sup> *R v S (RJ)* [1995] 1 SCR 451, [205].

<sup>50</sup> *R v S (RJ)* [1995] 1 SCR 451, [196]-[197]. Also see [209].

However, ... in the majority of cases the trial judge's discretion will likely be exercised in favour of exclusion with regards to derivative evidence which could not have been obtained but for a witness's testimony. I do not believe that La Forest J meant to express anything different in *Thomson Newspapers* ...

I will not try to imagine today the factual circumstances in which [such] derivative-use immunity might not be protected. When, if ever, that might occur, is an issue I leave for another day.<sup>51</sup>

- 43 On the other hand, Sopinka J (McLachlin J concurring) rejected any form of derivative use immunity, stating:

I can find no support for the principle of derivative use immunity in the common law ... Indeed, derivative use immunity appears to have been an invention of the United States in order to deal with the unique problem posed by the Fifth Amendment, a constitutional guarantee that is quite different from ours ...

Derivative use immunity based on any test requires that the evidence which is adduced against the party who was compelled be screened. I cannot see how in virtually every case a *voir dire* of the whole of the evidence can be avoided. Iacobucci J refers to the criticisms levied against derivative use immunity by La Forest J in *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425. This criticism is of complete derivative use immunity which excludes all evidence causally connected to the compelled testimony. I question the theory that the difficulties encountered in applying derivative use immunity in the United States will be appreciably reduced by adopting the "but for" test ...

I expect that difficulties experienced with derivative use immunity in the United States will be repeated here leading to interminable admissibility proceedings and resulting in virtual transactional immunity.<sup>52</sup>

- 44 In a similar vein, L'Heureux-Dube J (Gonthier J concurring) maintained the views about derivative evidence she had previously expressed in *Thomson* and declared:

There is ... no rule or principle at common law that prohibits use by the state of derivative evidence *per se*. As such, I can find no support for a derivative use immunity principle in the common law. I agree with Sopinka J that the derivative use immunity approach is an American invention, required to deal with the unique language of their Fifth Amendment. In light of the very different language and historical context of our Charter ..., this approach has neither place nor support in Canadian jurisprudence.<sup>53</sup>

- 45 It is now settled that trial judges in Canada have a discretion, which is to be applied in a "flexible and practical manner",<sup>54</sup> to exclude a narrow category of derivative evidence, namely, "derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the [compelled] testimony" of the accused.<sup>55</sup>

- 46 The key feature of Canadian jurisprudence in this field is that, even though the privilege against self-incrimination is protected by a constitutionally entrenched Bill of Rights, the Supreme Court has categorically rejected the need for statutory derivative use immunity, especially the blanket type provided in America (and in many Australian statutes), and concluded that use immunity plus a flexible judicial discretion to exclude a narrow category of derivative evidence is adequate and optimal compensation for abrogation of the privilege.

<sup>51</sup> *R v S (RJ)* [1995] 1 SCR 451, [202]-[205].

<sup>52</sup> *R v S (RJ)* [1995] 1 SCR 451, [328]-[335].

<sup>53</sup> *R v S (RJ)* [1995] 1 SCR 451, [246].

<sup>54</sup> *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* [1995] 2 SCR 97, [93].

<sup>55</sup> See, eg, *British Columbia Securities Commission v Branch* [1995] 2 SCR 3.

## South Africa

47 The position in South Africa is essentially the same as that in Canada. In particular, South Africa has a constitutionally entrenched Bill of Rights that limits the extent to which legislation can abrogate the privilege against self-incrimination, but the Constitutional Court has rejected the US approach in relation to derivative use immunity.

48 In *Ferreira v Levin*<sup>56</sup> the Constitutional Court was called upon to consider whether the right to a fair trial required a company officer examined in winding-up proceedings under s.417 of the *Companies Act 1973* (SA), which expressly abrogated the privilege against self-incrimination, to be afforded "blanket" derivative use immunity in addition to use immunity. The Court held that it did not. The leading judgment on this particular point was delivered by Ackerman J, with whom all other members of the Court agreed.

49 Justice Ackerman expressly endorsed the judgments of La Forest J in *Thompson* and Iacobucci J in *R v S (RJ)*, referring to the latter as follows:

Iacobucci J [concluded] that

"derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness, ought generally to be excluded under s. 7 of the Charter in the interests of trial fairness."

*The qualification "ought generally" was introduced because the learned judge advocated ... that the exercise of the discretion "will depend on the probative effect of the evidence balanced against the prejudice caused to the accused by its admission." In other words, there is no automatic rule of exclusion ...*

There is, in my judgment, no reason why this approach cannot and ought not to be adopted in regard to the enquiry concerning the admissibility of derivative evidence in the context of section 417(2)(b) of the Companies Act.<sup>57</sup>

50 Justice Ackerman identified the policy and practical arguments in favour of adopting a flexible discretionary approach to the admission of derivative evidence as follows:

*In my view an approach whereby a blanket exclusion of derivative evidence is not applied but where instead it is dealt with on the flexible basis of discretionary admissibility, as outlined above, passes [Constitutional] muster. We are not obliged to follow the absolutist United States approach which, as pointed out in Thomson Newspapers in a passage already referred to*

"is undoubtedly rooted in the explicit and seemingly absolute right against self-incrimination found in that country's Constitution."

The holding of a section 417 enquiry is lawful and serves an important public purpose. Evidence obtained as a result of such an enquiry cannot be equated with evidence obtained as a result of unlawful conduct. Where, for example, derivative evidence is obtained as a result of torture there might be compelling reasons of public policy for holding such evidence to be inadmissible even if it can be proved independently of the accused. Otherwise, the ends might be allowed to justify the means. The admission of evidence in such circumstances could easily bring the administration of justice into disrepute and undermine the sanctity of the constitutional right which has been trampled upon. The same considerations do not apply to derivative evidence obtained as a result of the [abrogation of the privilege against self-incrimination] at a section 417 enquiry.

<sup>56</sup> 1996 (1) SA 984.

<sup>57</sup> *Ferreira v Levin* 1996 (1) SA 984, [145]-[146] (italics added, citations omitted).

Companies are used to raise money from the public and to conduct business on the basis of limited liability. There are obvious advantages to doing so. But there are responsibilities which go with it. Part of the responsibility is to account to shareholders for the way in which the company conducts its affairs and, if the company goes insolvent, to account to shareholders and creditors for the failure of the business. These responsibilities are well known to all who participate in the running of public companies. Giving evidence at a section 417 enquiry is part of the responsibility to account. *It cannot simply be said that the administration of justice would necessarily be brought into disrepute by the subsequent use, even in criminal proceedings against the examinee, of derivative evidence obtained as a result of the [abrogation of the privilege against self-incrimination]. Indeed, the public, and especially the victims of the crime, might find a denial of the right to use such evidence inexplicable ...*

Although no statistical or other material was placed before us, it is quite apparent that the United States has vastly greater resources, in all respects and at all levels, than this country when it comes to the investigation and prosecution of crime, more particularly when regard is had to the particularly high crime rate, which one can take judicial notice of, currently prevalent in South Africa. This in my view gives added weight to the considerations of efficiency, economy of time and the most prudent use of scarce resources, highlighted by La Forest J in *Thomson Newspapers* and to which I have already referred, and supporting the adoption of a flexible approach in dealing with the admissibility of derivative evidence. *The flexible approach is narrowly tailored to meet important state objectives flowing from the collapse and liquidation of companies and the resulting duties of liquidators to protect the interests of creditors and the public at large, while at the same time interfering as little as possible with the examinee's right against self-incrimination. It is balanced and proportional and, in my view, fully justifiable in an open and democratic society based on freedom and equality ...*

A compulsion to give self-incriminating evidence, coupled with only a direct use immunity along the lines indicated above, and subject to a judicial discretion to exclude derivative evidence at the criminal trial, would not negate the essential content of the section 11(1) right to freedom or the section 25(3) right to a fair trial ... As far as section 25(3) is concerned, *the trial judge is obliged to ensure a "fair trial", if necessary by his or her discretion to exclude, in the appropriate case, derivative evidence. Ultimately this is a question of fairness to the accused and is an issue which has to be decided on the facts of each case. The trial judge is the person best placed to take that decision.*<sup>58</sup>

## Hong Kong

- 51 In Hong Kong the privilege against self-incrimination exists at common law and is also protected under the Hong Kong Bill of Rights Ordinance, but the Court of Final Appeal has held that there is no requirement to provide derivative use immunity to persons who are compelled to provide self-incriminating information.
- 52 In *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133 (*Tee*) a trial judge ordered a permanent stay of a prosecution against company directors who had been examined pursuant to statutory provisions that abrogated the privilege against self-incrimination and provided use but not derivative use immunity because prosecutors had received derivative evidence and proposed to use it against them at trial. Hong Kong's Court of Final Appeal set aside the order for the stay, holding that the use of derivative evidence is not "inimical to the concept of a fair trial and/or the presumption of innocence".<sup>59</sup> In reaching this conclusion Ribeiro PJ (with whom all other members of the Court agreed) relied upon authorities from Australia and the United Kingdom, while distinguishing those from Canada, and stated:

<sup>58</sup> *Ferreira v Levin* 1996 (1) SA 984, [150]-[153] (italics added, citations omitted).

<sup>59</sup> (2001) 4 HKCFAR 133, 176. Also see *Kennedy v Cheng* (2009) 12 HKCFAR 601 at [37].

Corporate fraud is to-day a matter of major concern which calls for strong regulation ... Moreover, those who hold corporate office and are engaged in corporate activities, especially activities which impinge upon the public, are well aware of the existence of the legislative regulatory regime and that compliance with its provisions is a necessary condition of participation in those activities.

No one could seriously argue that it is wrong or unfair for the legislature to empower an inspector to investigate the facts where circumstances suggest that a company's affairs may be conducted with intent to defraud others ... [W]here the investigation confirms such fears, the public interest in protecting the public from fraud strongly suggests in principle that the product of the investigation should be made available to the appropriate public authorities. *Balancing against that public interest the important countervailing public interest in an accused being assured of a fair trial, the solution adopted by [the legislation] appears to be entirely acceptable and consistent with [the right to a fair trial and presumption of innocence in Hong Kong's Bill of Rights Ordinance]. The Legislature has struck a balance which allows the Inspector to abrogate the privilege but subjects the elicited evidence to a direct use prohibition, inferentially permitting derivative use.*

In evaluating this balance, it is important to bear in mind that the purpose of the privilege is to respect the will of the accused to remain silent, thereby ensuring that the accused is not compelled to provide proof of his or her guilt. The privilege has no application to evidence which exists independently of the will of the accused. This proposition was expressly recognised in *Saunders v United Kingdom* (1996) 23 EHRR 313 at para 69. Indeed, in my judgment, there is much to be said for the general proposition that there is no inherent unfairness in establishing a person's guilt by the use of reliable objective evidence obtained from an independent source, even if the acquisition of that evidence was facilitated by clues contained in the excluded admissions. This view accords with common law doctrine based on *Rex v Warickshall* (1783) 1 Leach 263 and the cases approving it, cited above.

Taken in the foregoing context and also in the context of our trial procedures as a whole (including the court's residual discretion to exclude evidence to secure the fairness of the trial), *the absence of a derivative use immunity does not mean that an accused will not receive a fair trial. Nor does it undermine the presumption of innocence.*<sup>60</sup>

- 53 As mentioned in the last paragraph of the above-mentioned quote Ribeiro PJ recognised that, notwithstanding the absence of any general derivative use immunity, the trial judge would retain a "residual discretion to exclude evidence to secure the fairness of the trial". His Honour has previously observed that:

[I]n cases where the ground on which a stay is sought concerns alleged unfairness in the use of particular classes or items of evidence, the courts, for procedural reasons, are extremely reluctant to determine the evidential questions on a stay application. This is because the fairness of using the evidence may be incapable of evaluation prior to the trial itself. The impact of such evidence on the fairness of the trial may need to be considered in the context of the evidence as a whole so that the question may best be dealt with as a question of admissibility to be determined by the trial judge and possibly made subject to his residual discretion to exclude the same.<sup>61</sup>

- 54 Accordingly, the only form of potential derivative use immunity recognised in Hong Kong is a general residual judicial discretion to exclude derivative evidence if necessary to ensure the fairness of the trial.

### **United Kingdom**

- 55 Pursuant to the *Human Rights Act 1998* (UK), legislation in jurisdictions in the United Kingdom must, so far as it is possible to do so, be read and given effect in a way which is

<sup>60</sup> (2001) 4 HKCFAR 133, 176-177 (emphasis added). Also see *Kennedy v Cheng* (2009) 12 HKCFAR 601 at [37].

<sup>61</sup> (2001) 4 HKCFAR 133, 151.



compatible with the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (**European Convention**), which recognises the privilege against self-incrimination as part of the right to a fair trial in article 6(1).<sup>62</sup> However, neither the European Court of Human Rights (**ECHR**) nor UK courts have held that this obligation requires the provision of derivative use immunity to persons compelled to disclose incriminating information. In *Saunders v United Kingdom*, the European Court ruled that such persons should *generally* be provided with use immunity, but did not suggest that derivative use immunity was also required.<sup>63</sup> Indeed, the Privy Council and European Court have held that in some situations not even use immunity is required and that the admission of compulsorily obtained information will not infringe the right to a fair trial in art.6(1) of the European Convention.<sup>64</sup>

56 Following the decision in *Saunders*, UK Parliament amended many statutory information gathering powers by introducing provisions providing use but not derivative use immunity.<sup>65</sup>

57 In *R v Hertfordshire County Council* [2000] 2 AC 412, a case involving a compulsory information gathering power that abrogated the privilege against self-incrimination, Lord Hoffman condoned the use of "derivative evidence" in the following terms:

No doubt this information [compelled from the appellants] could have been used to assist the council in gathering evidence for a prosecution against the appellants, but English law does not regard the use of evidence obtained in consequence of an involuntary statement in the same light as the admission of the statement itself: see *Lam Chi-ming v The Queen* [1991] 2 AC 212 ... [S]ubject to the trial judge's discretion under section 78 [of the *Police and Criminal Evidence Act 1984*<sup>66</sup>], evidence was not inadmissible merely because it had been discovered in consequence of an involuntary confession: see *Rex v Warickshall* (1783) 1 Leach 263. *The appellants cannot therefore say that the possible use of evidence obtained in consequence of the information [compelled] under [statute] would offend any policy of English law.*<sup>67</sup>

58 However, in the same case Lord Cooke left open the possibility that the use of such derivative evidence might be inconsistent with the European Convention:

[I]f it had been necessary for the disposal of this appeal to determine whether article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms would rule out the admission in a prosecution of evidence obtained in consequence of the answers (sometimes called "derivative" evidence), it might well be that a reference to the European Court of Justice would have been appropriate. Such issues are the subject of much and difficult case law in various jurisdictions, and at the present stage the jurisprudence of the European Courts may leave the matter unclear. But this appeal does not require your Lordships to make a determination of the "derivative" evidence question.<sup>68</sup>

<sup>62</sup> See, eg, *Saunders v United Kingdom* (1996) 23 EHRR 313, [68]-[76]; *Heaney and McGuinness v Ireland* (2001) 33 EHRR 264, [40].

<sup>63</sup> (1996) 23 EHRR 313, [68]-[76].

<sup>64</sup> *Brown v Stott* [2003] 1 AC 681; *O'Halloran and Francis v United Kingdom* (2007) 46 EHRR 21.

<sup>65</sup> *Youth Justice and Criminal Evidence Act 1999* (UK), s.59 & schedule 3.

<sup>66</sup> Section 78(1) states: "In any proceedings the court may refuse to allow evidence on which the prosecution proposed to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

<sup>67</sup> *R v Hertfordshire County Council* [2000] 2 AC 412, 421-422 (italics added). Also see *R v Director of Serious Fraud Office* [1993] AC 1, 40-41; *Shierson v Rastogi* [2002] EWCA Civ 1624 at [47].

<sup>68</sup> *R v Hertfordshire County Council* [2000] 2 AC 412, 426.



59 The position in the UK in relation to derivative use immunity was recently summarised as follows:

It is now common for statutes that compel the provision of information to go on to provide that the information may not generally be used as evidence in a subsequent prosecution of the respondent ...

It would appear ... that a possible further protection, derivative-use immunity, is unlikely to be routinely available in England and Wales ...

It seems likely that, where compelled information is inadmissible in evidence in England and Wales by virtue of *Saunders v UK*, the law would stop short of going further and recognising an absolute rule of derivative-use immunity. Rather, the view would be taken that whether any derivative evidence should be admitted is to be determined on a case-by-case basis, starting from the premise that such evidence is admissible but may be excluded under section 78(1) of the Police and Criminal Evidence Act 1984 if its admission would impinge unduly on the fairness of the trial ...

Given the case-by-case determinations on which this approach is dependent, it potentially offers less protection than would a more robust approach of recognising a rule of derivative-use immunity. Not recognising such a rule would, however, be consistent with the approach taken in England and Wales to the admissibility of any evidence obtained in consequence of a confession that is inadmissible in evidence under section 76(2) of the Police and Criminal Evidence Act 1984. Section 76(4) of the 1984 Act provides that the fact that a confession is excluded from evidence pursuant to section 76(2) 'shall not affect the admissibility in evidence of any facts discovered as a result of the confession'.<sup>69</sup>

60 Accordingly, on the current state of authority it appears that the only potential restriction on the use of derivative evidence in the United Kingdom is the general judicial discretion to exclude evidence in order to secure the fairness of a trial.

61 In light of the foregoing review of comparative authorities and commentaries it appears that jurisprudence in Canada, South Africa, Hong Kong and the United Kingdom does not provide support for a blanket adoption of derivative use immunity. On the contrary, there appears to be a growing consensus that issues relating to the use of derivative evidence are best handled by trial judges on a flexible discretionary basis rather than through the legislative imposition of rigid rules.

**(d) The decision in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381**

62 In *Re an Application under the Major Crimes (Investigation Powers) Act 2004* (2009) 24 VR 415 (*Re MCIP Act*) Warren CJ held that the compulsory examination power in s.39 of the MCIP Act, which abrogated the privilege against self-incrimination and provided use but not derivative use immunity, was inconsistent with the Victorian *Charter of Human Rights and Responsibilities* (**Victorian Charter**) and concluded that a *mandatory* form of the *discretionary* derivative use immunity recognised in Canada had to be "read into" the Act:

In interpreting s 39 of the [MCIP Act], *derivative use immunity must be extended* to a witness interrogated pursuant to the terms of the Act where the evidence elicited from the interrogation could not have been obtained, or the significance of which could not have been appreciated, but for the evidence of the witness. *Derivative use of the evidence obtained pursuant to*

<sup>69</sup> Choo, *The Privilege Against Self-Incrimination and Criminal Justice* (Hart Publishing, 2013) at 34-38 (& Appendix 2). Also see *HM Advocate v P* [2011] UKSC 44 at [27].

*compelled testimony must not be admissible* against any person affected by s 39 of the Act unless the evidence is discoverable through alternative means.<sup>70</sup>

63 ASIC makes the following comments in relation to the decision in *Re MCIP Act*:

- (1) The decision concerns the specific requirements of the Victorian Charter, which does apply to, or have any counterpart in relation to, Commonwealth laws.
- (2) A key foundation in the reasoning of Warren CJ was her conclusion, partly based on the apparent absence of reported cases on point, that trial judges did not possess sufficient residual discretions to exclude derivative evidence in appropriate cases.<sup>71</sup> As referred to in paragraphs 25 to 28 above, it is now clear, including from reported cases decided since the decision in *Re MCIP Act*, that trial judges do possess such discretions.
- (3) Chief Justice Warren relied on the aforementioned leading judgments in the Canadian cases of *Thomson* and *R v S (RJ)* for the purpose of recognising derivative use immunity relating to evidence that “could not have been obtained, or the significance of which could not have been appreciated, but for” the compelled testimony,<sup>72</sup> but did not address the strong views expressed in those judgments to the effect that such immunity should be applied on a discretionary flexible case-by-case basis by trial judges (with “no automatic rule of exclusion”) rather than mandated by legislation.<sup>73</sup>
- (4) The decision in *Re MCIP Act* was reversed by Parliament<sup>74</sup> and the amending bill was accompanied by the following statement of compatibility with the Victorian Charter:

**Removal of derivative use immunity**

The bill amends the Major Crime (Investigative Powers) Act to provide that section 39 does not prevent evidence obtained as a direct or indirect consequence of an answer given in an examination or document or other thing produced at an examination or in answer to a witness summons being admitted in a criminal proceeding or other proceeding for the imposition of a penalty. Any such evidence will be admissible in the proceeding in accordance with the applicable rules of evidence.

As the second-reading speech introducing the Major Crime (Investigative Powers) Act made clear, the legislative intention at the time of enactment was that the immunity set out in section 39 of the act would not extend to information obtained, or evidence derived, as a result of answers provided at an examination. However, a derivative use immunity was subsequently ‘read’ into the act by the Supreme Court in *In the matter of Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, applying section 32 of the charter act. In that case, the court found that the right to fair hearing and the right to protection against self-incrimination in the charter act included a right to protection against the derivative use of compelled testimony.

The amendments authorising the admission of evidence obtained as a consequence of an answer given in an examination therefore limit the right of a person not to be compelled to testify against himself or herself or to confess guilt (section 25(2)(k) of the charter act) as interpreted at first instance by the Supreme Court, and potentially interferes with the right to a fair hearing (section 24(1)). Nevertheless, for the reasons that follow I consider that the ability to use evidence derived from compulsory

<sup>70</sup> (2009) 24 VR 415, [177].

<sup>71</sup> See, eg, (2009) 24 VR 415 at [57]-[78].

<sup>72</sup> See, eg, (2009) 24 VR 415 at [129]-[138], [159]-[160] & [177].

<sup>73</sup> See paragraphs 42 to 56 of this Submission.

<sup>74</sup> *Criminal Organisations Control and Other Acts Amendment Act 2014* (Vic), s.162(2), inserting s.39(4) in MCIP Act.

questioning under the act is a reasonable and justified limit on the privilege against self-incrimination and is therefore compatible with the right to a fair hearing.

The central aspect of the privilege against self-incrimination is protected by the direct use immunity provided in section 39 of the act and is not affected by the bill. Further, in *In the matter of Major Crimes (Investigative Powers) Act 2004*, the Supreme Court also recognised that the derivative use of answers given in an examination could be justified under the charter act.

There are significant difficulties in detecting and prosecuting organised crime offences. Criminal organisations are well known to engage in serious violence against persons who provide information to police. They use that reputation to ensure that even persons who are not involved in the offences do not assist police with their investigation. This code of silence can operate both within the criminal organisation and outside it. The Major Crime (Investigative Powers) Act aims to assist in the detection and prosecution of such offences and thereby prevent further offences.

The inability to use any evidence derived from answers, against the person who gave them, significantly undermines the effectiveness of the coercive powers scheme in achieving that aim. Because of the code of silence and culture of fear, the chief examiner may examine a person without being aware of the level of criminal activity in which that person is involved or which the person knows about. By providing answers that lead to the discovery of evidence against them, that person can be effectively immunised from prosecution. This undermines the ability to prosecute persons responsible for serious organised criminal offences, which is an important purpose of the act. In addition, the risk of a person immunising themselves from prosecution adversely affects the way in which Victoria Police and the chief examiner use the powers under the act, reducing the scope and value of the chief examiner's powers.

One of the concerns that the privilege against self-incrimination protects against is the risk of unreliable testimony obtained through improper questioning techniques, including torture. These concerns do not arise from the use of evidence derived from compulsory questioning by the chief examiner.

I consider that ensuring that derivative evidence is able to be used is necessary to enable serious organised crime to be investigated and prosecuted. While it may limit the privilege against self-incrimination, the reading in of a derivative use immunity significantly undermines the important purposes of the act and there are no other less restrictive means reasonably available.

I also consider that the admission of derivative evidence obtained as a consequence of answers given under the act would not result in an unfair trial. The law has long recognised that the privilege against self-incrimination may be limited by statute and the admission of such evidence does not render a trial unfair.<sup>75</sup>

## **(e) Previous reviews in Australia relating to derivative use immunity**

64 The Terms of Reference for this Inquiry require the ALRC to “have regard to other inquiries and reviews that it considers relevant”. ASIC is aware of six previous inquiries or reviews in Australia relating to derivative use immunity and each of them concluded that statutory provisions affording use but not derivative use immunity provided an adequate and appropriate safeguard for abrogation of the privilege against self-incrimination.

65 The six previous inquiries or reviews are listed below.

<sup>75</sup> Hon G.K. Rich-Phillips, Legislative Council, Parliament of Victoria, *Criminal Organisations Control and Other Acts Amendment Bill, Statement of Compatibility*, 7 August 2014, Legislative Council, pp.2430-2433.

### **1991: Parliamentary Joint Committee on Corporations and Securities (PJCCS)**

66 In 1991, as referred to in Submission 74 at [125] and [139], the PJCCS conducted an extensive review of derivative use immunity provisions in corporations legislation and recommended the removal of such provisions, providing detailed reasons for its conclusions.

67 In 1992, as referred to in Submission 74 at [140]-[141], Parliament accepted the recommendations of the PJCCS, for reasons explained in detail, and enacted reforms removing derivative use immunity from corporations.

### **1997: The Kluver review**

68 In 1997, as referred to in Submission 74 at [142]-[143], an extensive review of the abovementioned reforms was conducted by John Kluver, who strongly endorsed the removal of statutory derivative use immunity.

### **2002-2003: ALRC Principled Regulation Inquiry**

69 Between 2002 and 2003 the ALRC considered the issue of derivative use immunity in its *Principled Regulation* inquiry and recommended a statutory provision affording use but not derivative use immunity to accompany abrogation of the privilege against self-incrimination.<sup>76</sup>

### **2004: QLRC**

70 In 2004, as referred to in Submission 74 at [114], the Queensland Law Reform Commission, after conducting an extensive review of *Abrogation of the Privilege Against Self-Incrimination*, recommended that statutory provisions should afford use but not derivative use immunity.

### **2007: ALRC**

71 In 2007 the ALRC considered the issue of derivative use immunity in relation to its review of *Client Legal Privilege in Federal Investigations* (ALRC Report 107). The ALRC, among other things, considered the PJCCS review, the Kluver Review and submissions from ASIC and the CDPP and expressed its agreement with them as follows (emphasis added):

7.144 The ALRC is mindful of the criticisms made of derivative use immunity by the then ASC, the CDPP and the JSCCS in the context of its application to the privilege against self-incrimination in ASC investigations. *The ALRC tends to agree that derivative use immunity can operate as a 'poisoned chalice', present genuine practical obstacles to enforcement action, and render virtually worthless the effect of abrogation of privilege.*

7.145 Consequently, the ALRC supports use immunity as a more appropriate default safeguard than derivative use immunity. ALRC95 recommended that, where legislation abrogated or modified [the privilege against self-incrimination], a default use immunity provision should apply in the absence of any clear express statutory statement to the contrary.

---

<sup>76</sup> ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC Report 95, March 2003), [18.40]-[18.49] & recommendation 18-3.

## 2009: ALRC

72 In 2009, as referred to in Submission 74 at [115], the ALRC, similarly concluded that existing provisions in the *Royal Commissions Act 1902* (Cth) which abrogated the privilege against self-incrimination and provided use but not derivative use immunity were desirable and justifiable:

[The] Act provides for a direct use immunity rather than a derivative or transactional use immunity. That is, evidence given by a witness in a Royal Commission cannot be used as evidence in subsequent legal proceedings, but may be used to obtain further evidence. A derivative use immunity would not allow the evidence to be used to obtain further evidence. This would make it much more difficult to prosecute a person for offences that are disclosed during an inquiry. The primary argument against a derivative use immunity, therefore, is that it would shield witnesses from the proper consequences of their wrongdoing ...

*The present abrogation of the privilege, coupled with a use immunity, strikes the right balance in relation to Royal Commissions. The function of Royal Commissions is to discover the truth, without the evidential or procedural limitations that apply to courts ...*

Further, a derivative use immunity would render enforcement impracticable and negate the purpose of the abrogation of the privilege. Royal Commissions should not be used as an obstacle to proper enforcement action, particularly given the serious subject-matter of most Royal Commissions.<sup>77</sup>

73 ASIC submits that the ALRC should have regard to each of the abovementioned reviews or inquiries in conducting its present Inquiry.

---

<sup>77</sup> ALRC, note 72 above, [17.38] & [17.53]-[17.55] (emphasis added).

## Client Legal Privilege (chap 13, Interim Report)

- 74 In chapter 13 of the Interim Report at [13.50]-[13.60] and [13.99] concerns are raised about whether telecommunications data retention laws “encroach upon” client legal privilege.
- 75 The terms of reference for the Freedoms Inquiry state: “For the purpose of the inquiry ‘laws that encroach upon traditional rights, freedoms and privileges’ are to be understood as laws that: ... **abrogate** client legal privilege” (emphasis added).
- 76 ASIC agrees the views expressed by the ALRC at [13.60] and [13.99] to the effect that the telecommunications data retention laws do not abrogate client legal privilege.<sup>78</sup>

---

<sup>78</sup> See, eg, *Commissioner of Taxation v Coombes* [1999] FCA 842.



## Strict & Absolute Liability (chap 14, Interim Report)

77 Chapter 14 of the Interim Report addresses Strict and Absolute Liability. In relation to this topic the terms of reference provide: “For the purpose of the inquiry ‘laws that encroach upon traditional rights, freedoms and privileges’ are to be understood as laws that: ... apply strict or absolute liability to **all** physical elements of a criminal offence” (emphasis added).

78 At paragraphs [14.22]-[14.25] and [14.91] of the Interim Report concerns are raised about strict liability provisions relating to the offence of insolvent trading in s.588G(3) of the *Corporations Act 2001* (Cth). ASIC submits that such concerns are unwarranted for the following reasons:

- Neither strict nor absolute liability applies to “all” physical elements of the offence, within the meaning of the terms of reference. In particular, neither applies to the elements specified in s.588G(3)(c) and (d), which are the most important elements of the offence.
- While s.588G(3B) provides that strict liability applies to paragraph (3)(b), namely, the circumstance (i.e. physical element) that “the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt”, it is apparent that the matter stated in paragraph (3)(c) (“the person suspected at the time when the company incurred the debt that the company was insolvent or would become insolvent as a result of incurring that debt or other debts”) is effectively the fault element for paragraph (3)(b). The section contains what ASIC considers to be a drafting error; ASIC submits that s.588G should be amended to: (i) delete the reference to paragraph (3)(b) in paragraph (3B); and (ii) specify that the fault element for the physical element in (3)(b) is the matter stated in (3)(c). Such a reform would clarify the elements of the offence without expanding the scope of the offence or making it any easier to prove.
- Most significantly, paragraph (3)(d), which is the gravamen of the offence, requires proof (beyond reasonable doubt) that the accused’s conduct was “dishonest”. Dishonesty is a highly onerous and culpable fault element.<sup>79</sup>
- In requiring proof of the matters referred to in paragraphs (3)(c) and (d) – both of which are subjective and onerous fault elements – the offence of insolvent trading in s.588G(3) does not criminalise conduct that is not highly culpable or otherwise encroach upon any traditional right, privilege or freedom.

---

<sup>79</sup> See, eg, Law Commission for England & Wales, *A Criminal Code for England and Wales* (Report No. 177, April 1989), vol 2, [8.1]; Review of Commonwealth Criminal Law, *Principles of Criminal Responsibility and Other Matters* (July 1990), [5.2]; Model Criminal Code Officers Committee, *Model Criminal Code: Chapter 3 – Theft Fraud, Bribery and Related Offences* (Report, December 1995) 9, 11, 85, 91, 173, 193, 203, 217-283; Minister for Home Affairs, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (December 2007), [4.4]; Ashworth, n 5, 137, 190, 393 & 397; Odgers S, *Principles of Federal Criminal Law* (Thompson Reuters, Sydney, 2<sup>nd</sup> ed, 2010) at [5.1.170]; *Sayed v R* [2012] WASCA 17 at [43].

## Procedural Fairness (chap 15, Interim Report)

79 In chapter 15 of the Interim Report at [15.40]-[15.41] potential concerns are raised about whether ss.915B and 915C of the *Corporations Act 2001* (Cth) may unjustifiably deprive affected persons of procedural fairness. It appears that the effect of these provisions may have been misconstrued.

80 As identified in Submission 74 at [161]-[162]:

- s.915B is a narrow provision that enables ASIC to suspend or cancel an Australian financial services license without first providing procedural fairness under specified exceptional circumstances, such as: where the licensee becomes insolvent, is convicted of serious fraud, loses their legal/mental capacity; or, in the case of responsible entities of managed investment schemes, where the scheme members have or are likely to suffer loss because of a breach of the Corporations Act; and
- in all other circumstances s.915C applies and, pursuant to s.915C(4), ASIC is expressly required to afford procedural fairness before seeking to suspend or cancel a license.

## Further information

- 81 ASIC recognises the importance of traditional rights and freedoms and supports the Freedoms Inquiry. ASIC would be happy to provide any further information that may be of assistance to the ALRC, including in relation to any of the matters referred to in this submission or any other submissions received the ALRC.