



ASIC

Australian Securities & Investments Commission

Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms: Issues Paper 46

Submission by the Australian Securities and Investments Commission

March 2015

Introduction

1 The Australian Securities and Investments Commission (**ASIC**) welcomes the opportunity to contribute to the inquiry by the Australian Law Reform Commission (**ALRC**) into *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws* by making a submission in response to ALRC Issues Paper 46 (**Issues Paper**).

2 The Issues Paper invites submissions in relation to two questions asked in relation to a range of specifically identified traditional rights and freedoms:

What general principles or criteria should be applied to help determine whether a law that encroaches upon traditional rights or freedoms is justified?

Which Commonwealth laws unjustifiably encroach upon traditional rights or freedoms?

3 Chapter 10 of the Issues Paper addresses the privilege against self-incrimination and invites submissions in relation to the following two specific questions:

What general principles or criteria should be applied to help determine whether a law that excludes the privilege against self-incrimination is justified?

Which Commonwealth laws unjustifiably exclude the privilege against self-incrimination, and why are these laws unjustified?

4 ASIC has a broad range of important public functions. Many of the laws it is responsible for administering and enforcing necessarily encroach upon traditional rights and freedoms to some extent, but ASIC does not consider that any of them do so unjustifiably.

5 This submission primarily focuses on ASIC's main compulsory investigation powers and the two questions asked in chapter 10 of the Issues Paper as ASIC recognises that these powers involve very significant encroachments upon the privilege against self-incrimination.

6 This submission also briefly addresses the following topics raised in the Issues Paper:

- Client Legal Privilege;
- Procedural Fairness;
- Delegating Legislative Power; and
- Judicial Review.

7 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.

ASIC's regulatory role and responsibilities

- 8 ASIC is Australia's corporate, markets, financial services and consumer credit regulator. Its responsibilities include administration and enforcement of the *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)*, *Corporations Act 2001 (Cth) (Corporations Act)* and *National Consumer Credit Protection Act 2009 (Cth) (NCCP Act)*.
- 9 As Australia's *corporate regulator*, ASIC is required to ensure that companies, managed investment schemes and associated individuals and entities fulfil their obligations under the Corporations Act. ASIC's responsibilities in this field include:
- registering companies, managed investment schemes, auditors and liquidators;
 - assessing companies' compliance with their record keeping obligations, such as keeping financial records that correctly record all transactions and accurately explain the company's financial position and performance;
 - ensuring that company directors, officers and employees comply with their legal duties, including acting in the best interests of the company; and
 - monitoring and reviewing public companies' financial reporting, disclosure and fundraising activities, such as selling shares to the public.
- 10 As Australia's *markets regulator*, ASIC is required to supervise Australia's domestic licensed equity, derivatives and futures markets and those who participate in them. ASIC's responsibilities in this field include:
- assessing how effectively market operators are complying with their legal obligations to operate fair, orderly and transparent markets;
 - making rules aimed at ensuring the integrity of financial markets;
 - supervising market operators' and participants' compliance with the Market Integrity Rules and the Corporations Act; and
 - advising the responsible Minister about authorising new markets or changing market licensees' operating rules.
- 11 As Australia's *financial services regulator*, ASIC is required to protect investors and consumers in the financial system. ASIC's responsibilities in this field include:
- regulating corporations, managed investment schemes and participants in the financial services industry;
 - assessing applications for, and granting or revoking, Australian financial services (AFS) licenses to individuals and corporations seeking to provide financial services, which typically involve dealing in superannuation, managed funds, deposit and payment products, shares and company securities, derivatives and insurance;
 - assessing AFS licensees' compliance with their licence obligations relating to giving financial advice, training advisers, disclosure and dispute resolution; and
 - assessing AFS licensees' compliance with their regulatory reporting obligations, such as notifying ASIC of significant breaches of financial services laws.

12 As Australia's *consumer credit regulator*, ASIC is required to ensure that individuals and entities engaging in credit activities fulfil their obligations under the NCCP Act. ASIC's responsibilities in this field include:

- assessing applications for, and granting or revoking, Australian credit licenses to individuals and corporations seeking to engage in credit activities (including banks, credit unions, finance companies, and mortgage and finance brokers); and
- ensuring that Australian credit licensees and their representatives comply with their obligations under their licences and the NCCP Act, including responsible lending, training, disclosure and general conduct requirements.

ASIC's principal objectives

13 ASIC's principal objectives are set out in s.1(2) of the ASIC Act, which states:

In performing its functions and exercising its powers, ASIC must strive to:

- (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
- (b) promote the confident and informed participation of investors and consumers in the financial system; and
- (d) administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and
- (e) receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and
- (f) ensure that information is available as soon as practicable for access by the public; and
- (g) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.

ASIC's law enforcement functions

14 In order to enforce and give effect to the laws it is responsible for administering ASIC engages in the following types of activities:

- undertaking *investigations* into suspected contraventions of relevant laws, including through the exercise of compulsory powers (referred to in para 17 below);
- taking various forms of *administrative action* against regulated individuals and entities, such as disqualifying or banning persons from engaging in regulated activities, cancelling or suspending licences, accepting enforceable undertakings or issuing infringement notices;
- commencing and conducting various types of *civil proceedings*, such as proceedings to protect or compensate victims or impose civil penalties upon wrongdoers;
- conducting *criminal prosecutions for regulatory offences*; and
- commencing, and assisting the Commonwealth Director of Public Prosecutions (“DPP”) to conduct, *criminal prosecutions for more serious criminal offences*.

- 15 The manner in which ASIC approaches its enforcement functions, including deciding which enforcement tools to utilise in particular cases, is set out in *ASIC Information Sheet 151*.¹
- 16 Table 1 below identifies some of ASIC's enforcement activities and outcomes over the two year period from 1 June 2012 to 30 June 2014.

Table 1 – Enforcement Statistics (2012-2014)

Compulsory Investigation Powers	
Notices requiring the production of books	5,510
Notices requiring appearance for examination	1,107
Enforcement Outcomes	
Administrative outcomes	392
Banning and disqualification orders	233
Australian Financial Services & Australian Credit Licences cancelled or suspended	83
Enforceable Undertakings accepted	46
ASIC Infringement Notices issued	6
Market Disciplinary Panel Infringement Notices issued	24
Civil outcomes	44
No. of persons against whom civil penalty orders were made	16
No. of other civil proceedings completed (excl. civil penalty proceedings)	28
Criminal Outcomes	893
No. of persons convicted of serious offences ²	51
No. of persons convicted of regulatory offences ³	842

¹ Available at <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/>.

² These offences include corporate fraud, financial services fraud (including ponzi schemes), insider trading and market manipulation. Some examples of recent sentences include: *R v Johnson* [2014] VSC 175 (imprisonment for 6.5 years, with a non-parole period of 3.5 years); *R v Veitch*, NSW District Ct, 26 June 2014 (imprisonment for 6 years and 2 months, with a non-parole period of 4 years); *Banovec v R* [2012] NSWCCA 137 (imprisonment for 7 years, with a non-parole period of 4 years and 9 months); *R v Hoy* [2011] VSC 95 (imprisonment for 13 years and 9 months, with a non-parole period of 9 years); *Koch v R* [2011] VSCA 435 (imprisonment for 9 years and 10 months, with a non-parole period of 7.5 years); *R v Finnigan*, NSW District Ct, 18 December 2011 (imprisonment for 10 years, with a non-parole period of 6 years); *R v Dale* [2012] QCA 303 (imprisonment for 7.5 years, with a non-parole period of 3 years and 2 months); *R v Jovicic*, QLD District Ct, 1 September 2011 (imprisonment for 7 years, with a non-parole period of 2 years and 4 months); *R v Bangaru*, NSW District Ct, 17 December 2010 (imprisonment for 8 years and 6 months, with a non-parole period of 6 years and 4 months).

³ These are summary offences involving strict liability that are usually punished by the imposition of minor fines.

The Privilege Against Self-Incrimination

17 For the purpose of investigating suspected contraventions of the laws it administers ASIC has been provided with crucial information-gathering powers. The two main powers enable ASIC to compel relevant persons, including potential witnesses or suspects, to:

- produce specified "books" (the definition of which covers any kind of document⁴) relating to regulated entities or activities (**production powers**);⁵ and
- attend examinations and answer relevant questions on oath (**examination powers**).⁶

18 A significant feature of ASIC's examination and production powers is that they exclude the privilege against self-incrimination (including privilege against self-exposure to a penalty)⁷ and provide only limited compensation for the loss of that privilege.

19 This part of ASIC's submission addresses the following matters raised in chapter 10 of the Issues Paper:

- (a) issues relating to the nature and scope of the privilege against self-incrimination that influence the extent to which its exclusion is justified;
- (b) principles or criteria that should be applied to help determine whether a law that excludes the privilege is justified; and
- (c) justifications for excluding the privilege in relation to ASIC's compulsory information-gathering powers.

(a) Nature and scope of the privilege against self-incrimination

20 In paragraph 10.4 of the Issues Paper the privilege against self-incrimination is described as entitling a "natural person to refuse to answer any question *or produce any document* if it would tend to incriminate them" (emphasis added) and in paragraph 10.5 it is identified as encompassing "three distinct privileges: a privilege against self-incrimination ...; a privilege against self-exposure to a civil or administrative penalty ...; and a privilege against self-exposure to the forfeiture of an existing right (which is less commonly invoked)". Thereafter the privilege is referred to in the Issues Paper in a 'general' sense without differentiation of the various components previously identified.

21 ASIC considers that it is desirable to distinguish between different components of the general privilege against self-incrimination for the same reasons identified by Lord Mustill (speaking on behalf of the House of Lords) when referring to the "right to silence":

I turn ... to "the right of silence". This expression arouses strong but unfocussed feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute ...

Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those

⁴ ASIC Act: s.5(1); NCCP Act: s.5(1). Also see Corporations Act: s.9.

⁵ ASIC Act: ss.30, 31, 32, 33 & 34; NCCP Act: ss.267 & 268. Also see Corporations Act: ss.596A-597B.

⁶ ASIC Act: ss.19-24; NCCP Act: ss.253-258. Also see Corporations Act: ss.596A-597B

⁷ Section s.68 of the ASIC Act, s.295 of the NCCP Act. Also see Corporations Act: ss.597(12) & (12A).

investigating crimes makes it easy to assume that they are all different ways of expressing the same principle, whereas in fact that they are not. In particular, it is necessary to keep distinct the motives which have caused them to become embedded in English law; otherwise objections to the curtailment of one immunity may draw spurious reinforcement from association with the other, and different, immunities commonly grouped under the title of a “right to silence”.⁸

- 22 In particular, not all components of the 'general' privilege against self-incrimination identified in the Issues Paper are of equal nature, origin, incidence and importance. Indeed, not only are some more important than others, but some may no longer be recognised as part of, or protected by, the privilege against self-incrimination, at least in certain jurisdictions.

Only the privilege against *self-incrimination* is a “substantive rule of law”

- 23 As identified in paragraph 10.1 of the Issues Paper, the privilege against self-incrimination is “a basic and substantive common law right, and not just a rule of evidence”, which means that it applies in both judicial and non-judicial contexts. However, this statement is confined to the specific privilege against *self-incrimination*. It has not been recognised as applying to the privilege against self-exposure to a penalty (**penalty privilege**), much less the rarely invoked and often criticised⁹ privilege against self-exposure to forfeiture (**forfeiture privilege**). In particular, the High Court of Australia has intimated that neither of the latter privileges (which are usually discussed together¹⁰) are “substantive rules of law ... having broader application beyond judicial proceedings”.¹¹
- 24 The significant difference in recognised status and importance between the privilege against self-incrimination, on the one hand, and penalty and forfeiture privileges, on the other, was highlighted by Murphy J in *Pyneboard Pty Ltd v Trade Practices Commission*:

Privilege against self-exposure to forfeiture. In England, this probably arose out of the special regard for land rights originally secured by feudal tenures and later by entailing and other devices. The privilege against forfeiture seems to have been confined to forfeitures of realty, particularly leases. The recognition of such a privilege in modern Australia is, in my opinion, not justified.

Privilege against self-exposure to penalties. The origin of this privilege seems to have been judicial hostility to common informers' suits for penalties; the courts would not assist any informer in any way by their procedures. Any general privilege against self-exposure to civil actions for penalties, especially a privilege available outside judicial proceedings, is difficult to justify.

It is an absurd state of the law if a witness, in a civil or criminal trial, can lawfully refuse to answer because the answer may tend to expose him ... to forfeiture of a lease, or to a civil action for penalties, but may not refuse if the exposure is to some other civil loss, such as an

⁸ *R v Director of Serious Fraud Office* [1993] AC 1, 30-31.

⁹ See, eg, *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 345 (Murphy J); McNicol, *Law of Privilege* (LBC, 1992), 201-202; Ligertwood, *Australian Evidence* (Butterworths, 3rd ed, 1998), [5.75]; Heydon, *Cross on Evidence* (Australian ed, 2015, LexisNexus) at [25130]. All of these sources identify this privilege as being narrowly confined to forfeiture of interests in land, rather than “existing rights” (as suggested in para 10.5 of the Issues Paper).

¹⁰ See, eg, *Rich v ASIC* (2004) 220 CLR 129.

¹¹ See, eg, *Rich v ASIC* (2004) 220 CLR 129 at [24] per Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ (“That is not to say that the privileges against exposure to penalties or exposure to forfeitures are substantive rules of law, like legal professional privilege, having broader application beyond judicial proceedings”); *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at [31] per Gleeson CJ, Gaudron, Gummow and Hayne JJ (“[T]here seems little, if any, reason why [the privilege against exposure to penalties] should be recognised outside judicial proceedings. Certainly, no decision of this Court says it should be so recognised, much less that it is a substantive rule of law”).

action for damages, even punitive damages. In so far as such absurdity has been introduced or maintained by judicial decision it can and should be erased by judicial decision. Whatever their standing in judicial proceedings, I see no reason for recognizing such privileges outside judicial proceedings.

Privilege against self-incrimination. The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation.¹²

25 In *Rich v Australian Securities and Investments Commission* Kirby J similarly stated:

[T]he privileges involved in *Daniels* were those against self-incrimination and suggested derogations of legal professional privilege. Those privileges are different from the penalty privilege invoked in this case. Compared to the penalty privilege, each of those privileges has a longer history in the law. Each is more fundamental to its operation. Each is reflected in universal principles of human rights. The penalty privilege is not. The penalty privilege is of a lower order of priority. It has a more recent and specialised origin and purpose in our law. It should not be blown into an importance that contradicts or diminishes the operation of the [Corporations] Act and the achievement of its purposes.¹³

26 As identified in paragraphs 88 to 92 below, the lesser status and importance of the privileges against self-exposure to penalties and forfeiture is a ground upon which their exclusion may be more readily justified than exclusion of the specific privilege against *self-incrimination*.

The privilege against self-incrimination is testimonial in nature

27 As explained by Professor Wigmore, the privilege against self-incrimination is, both in origin and principle, testimonial in nature:

The history of the privilege ... suggests that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to extract from the person's own lips an admission of guilt which would thus take the place of other evidence ... In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion.¹⁴

28 This defining feature of the privilege against self-incrimination has been recognised by the High Court of Australia, which has observed that the privilege seeks to prevent persons from convicting themselves out of their "own mouth",¹⁵ including French CJ, who recently remarked that the privilege reflects "the long-standing antipathy of the common law to compulsory interrogations about criminal conduct".¹⁶ In a similar vein, the Privy Council has declared that "the chief strand of reasoning discernible in the common law rule is the undesirability of the state compelling a person to convict himself out of his own mouth".¹⁷

29 In accordance with this characterisation it is well established that the privilege against self-incrimination does not prevent persons from being compelled to incriminate themselves

¹² (1983) 152 CLR 328, 345-346 (citations omitted).

¹³ See, eg, *Rich v ASIC* (2004) 220 CLR 129 at [129] (citations omitted).

¹⁴ See, eg, Wigmore, *Evidence* (McNaughton revision, Little Brown & Co, 1961), vol 8, [2263].

¹⁵ *Hamilton v Oades* (1989) 166 CLR 486, 496; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 326; *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 544; *R v Swaffield* (1998) 192 CLR 159 at [12]; *Australian Crime Commission v Stoddart* (2011) at [200]; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [50]; *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [136], [181] & [187]. Also see *Sorby v The Commonwealth* (1983) 152 CLR 281, 316.

¹⁶ *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [1]

¹⁷ *Brammigan v Davison* [1997] AC 238, 249. Also see *R v Director of Serious Fraud Office* [1993] AC 1, 32.

through the performance of non-testimonial acts or the provision of evidence that is non-testimonial in nature.¹⁸ As Gibbs CJ stated in *Sorby v The Commonwealth*:

The privilege prohibits the compulsion of the witness to give testimony, but it does not prohibit the giving of evidence, against the will of a witness, as to the condition of his body. For example, the witness may be required to provide a fingerprint, or to show his face or some other part of his body so that he may be identified, or to speak or to write so that the jury or another witness may hear his voice or compare his handwriting. That this was the significance of the distinction between "testimonial" and other disclosures was recognized in *King v McLellan*, where it was held that the protection afforded by the rule against self-incrimination did not extend to entitle a person who had been arrested to refuse to furnish a sample of his breath for analysis when required to do so under s. 80F(6) of the *Motor Car Act 1958* (Vict.). There are decisions to the same effect in Canada (*Curr v. The Queen*) and the United States (*Schmerber v. California* (1966) 384 US 757 - the case of a blood test).¹⁹

30 The rationale for the Victorian Court of Appeal holding in *King v McLellan* that oral statements were protected by privilege against self-incrimination but that physical characteristics of a person were not, was explained as follows:

But there is also a distinction to be maintained between a statement made by a prisoner and a fingerprint or facial or other physical characteristics of a person. *The making of an incriminating statement brings into being adverse evidence which previously did not exist. If forced from a prisoner it requires him to create evidence against himself, possibly in circumstances where he makes a statement not in accordance with facts.* On the other hand, a fingerprint or some physical feature *is already in existence; it exists as a physical fact, and is not susceptible of misrepresentation in any relevant sense.*²⁰

31 In a similar vein, the European Court of Human Rights has stated:

*The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the contracting parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.*²¹

32 It is settled that the privilege against self-incrimination has no application in relation to the seizure of material, including documents, pursuant to a search warrant or similar power.²²

33 The distinction between the compelled *creation of testimonial evidence* (with the attendant risks of ill-treatment and inaccuracy), on the one hand, and the compelled *production of pre-existing evidence*, on the other, has been applied in determining the extent to which the privilege against self-incrimination applies to pre-existing documents (discussed immediately below) and whether "derivative use immunity" should be provided by the legislature as compensation for exclusion of the privilege (see paras 107 to 113 below).

¹⁸ See, eg, Ligertwood, *Australian Evidence* (Butterworths, 3rd ed, 1998), [5.72]; Donaghue, *Royal Commission and Permanent Commissions of Inquiry* (Butterworths, 2001) [4.11].

¹⁹ *Sorby v The Commonwealth* (1983) 152 CLR 281, 292 (citations omitted).

²⁰ *King v McLellan* [1974] VR 733, 777 (emphasis added).

²¹ *Saunders v United Kingdom* (1997) 23 EHHR 313 at [69] (emphasis added).

²² See, eg, *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1984) 156 CLR 385, 392-393 ("[T]he privilege ... has no application to the seizure of documents or their use for the purpose of incrimination provided they can be proved by some independent means"); *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 517-518 & 556; *Central Queensland Speleological Society v Central Queensland Cement Pty Ltd (No 2)* [1989] 2 Qd R 537; *Rank Film Ltd v Video Information Centre* [1982] AC 380; *Tate Access Floors Inc v Boswell* [1991] Ch 512, 529.

Compulsory production of pre-existing incriminating documents

34 In the past it has been accepted by the High Court of Australia that the common law privilege against self-incrimination enables a person to resist a requirement to produce documents that incriminate the person.²³ However, it now appears to be firmly established that the privilege does not generally provide such protection in the United States or United Kingdom and it is very doubtful that it continues to do so in Australia.

United States

35 In the United States the privilege against self-incrimination is entrenched in the Fifth Amendment to the US Constitution, meaning that *in those situations where it applies* it cannot be excluded by the legislature without the provision of immunity that is fully coextensive with the scope of the privilege.²⁴ This ordinarily requires the provision of both *use immunity*, which renders the particular information compelled from a person inadmissible in subsequent proceedings brought against him or her, and *derivative use immunity*, which renders material subsequently derived (directly or indirectly) from that information inadmissible in such proceedings.²⁵

36 In 1886 the Supreme Court ruled that the privilege against self-incrimination entitled a person to refuse to produce incriminating documents.²⁶ However, since that time the Court has restricted (or "clarified") the scope of the privilege to such an extent that it generally no longer affords any protection in relation to the contents of pre-existing documents. This has been achieved through three separate lines of authority referred to below.

37 *Entity exception:* The Supreme Court has held that incorporated and unincorporated entities (e.g. companies,²⁷ unions,²⁸ trusts²⁹ and partnerships³⁰), and natural persons acting on their behalf, cannot invoke the privilege against self-incrimination to resist an obligation to produce documents or records of the entity. The Court has concluded that the privilege should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records", stating:

The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.³¹

²³ See, eg, *Sorby v The Commonwealth* (1983) 152 CLR 281, 288 & 310; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1984) 156 CLR 385, 391-396; *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 502 & 527-528.

²⁴ See, eg, *Counselman v Hitchcock* (1892) 142 US 547.

²⁵ See, eg, *Kastigar v United States* 406 US 441 (1972).

²⁶ *Boyd v United States* 116 US 616 (1886).

²⁷ See, eg, *Hale v Henkel* 201 US 43 (1906); *Wilson v United States* 221 US 361 (1911); *Dreier v United States* 221 US 394 (1911); *Braswell v US* 487 US 99, 105 (1988).

²⁸ See, eg, *United States v White* 322 US 694 (1944).

²⁹ See, eg, *In re Grand Jury Proceedings* 633 F.2d 754 (1980); *In re Grand Jury Subpoena* 973 F.2d 34 (1992).

³⁰ See, eg, *Bellis v United States* 417 US 85 (1974); *US v Hankins* 581 F.2d 431 (1978).

³¹ *United States v White* 322 US 694, 700-701 (1944) (citations omitted).

38 In *Braswell v United States* the Supreme Court, in rejecting an argument that a company officer (and custodian of the company's records) could refuse to produce company records on the ground that the act of production would incriminate himself personally, stated:

We note further that recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime', one of the most serious problems confronting law enforcement authorities ... If custodians could assert a privilege, authorities would be stymied not only in their enforcement efforts against those individuals but also in their prosecutions of organizations.³²

39 *Required records doctrine*: The Supreme Court has held that persons cannot invoke the privilege against self-incrimination to resist lawful demands for "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established".³³

40 *Voluntarily created pre-existing documents*: In recent decades it has become "settled" law in the United States that a person cannot invoke the privilege against self-incrimination to refuse to produce documents that were voluntarily created (e.g. a personal diary) even if their contents incriminate the person.³⁴ The Supreme Court has held that "the privilege protects a person only against being incriminated by his own compelled testimonial communications", as opposed to being compelled to produce pre-existing documents that are incriminating.³⁵

41 A qualification to the abovementioned rule is that if the compelled production of pre-existing documents involves some form of compelled testimonial self-incrimination by the person producing them (such as a requirement "to restate, repeat, or affirm the truth of their contents"³⁶), the act of production itself (but not the content of the documents) will be protected by the privilege against self-incrimination.³⁷ In such (relatively infrequent) situations the government would ordinarily be required to grant evidential immunity to the person in relation to the fact that he or she produced the documents, but could still use the documents against the person if their authenticity and admissibility can be established through independent means.³⁸

42 The overall position in the United States is that the privilege against self-incrimination provides very little protection, and in regulated corporate and commercial environments virtually no protection, in relation to incriminating documents.³⁹

³² *Braswell v United States* 487 US 99, 115-116 (1944) (citations omitted).

³³ *Wilson v United States* 221 US, 380 (1911); *Davis v United States* 328 US 582, 590 (1946); *Shapiro v United States* 335 US 1, 33 (1948). Also see *Baltimore City Department of Social Services v Bouknight* 493 US 549 (1990).

³⁴ See, eg, *United States v Hubbell* 530 US 27, 35-36 (2000): "More relevant to this case is the settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the privilege".

³⁵ *Fisher v United States* 425 US 391, 409 (1976). Also see p.408 ("It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating").

³⁶ *Fisher v United States* 425 US 391, 409 (1976).

³⁷ See, eg, *United States v Hubbell* 530 US 27, 36- (2000)

³⁸ See, eg, *Doe v United States* 487 US 201 (1988); *United States v Hubbell* 530 US 27, 35-36 (2000).

³⁹ See, eg, Berger, "American Perspectives on Self-Incrimination and the Compelled Production of Evidence" (2002) 6 *International Journal of Evidence & Proof* 218.

United Kingdom

43 Until relatively recently, it appeared to be settled in the United Kingdom that the common law privilege against self-incrimination protected a person from being compelled to produce any document if to do so would tend to incriminate him or her.⁴⁰ However, this perceived state of law also attracted significant criticism and calls for reform from the highest levels of the judiciary.⁴¹ For example, in *AT&T Istel v Tully*, which involved a civil action for damages for fraud and breach of trust, Lord Templeman stated:

[I]n my opinion, the privilege [against self-incrimination] can only be justified on two grounds, first that it discourages the ill-treatment of a suspect and secondly that it discourages the production of dubious confessions. Neither of these considerations applies to the present appeal. It is difficult to see any reason why in civil proceedings the privilege against self-incrimination should be exercisable so as to enable a litigant to refuse relevant and even vital documents which are in his possession or power and which speak for themselves ... I regard the privilege against self-incrimination exercisable in civil proceedings as an archaic and unjustifiable survival from the past when the court directs the production of relevant documents and requires the defendant to specify his dealings with the plaintiff's property or money.⁴²

44 In the same case Lord Griffiths expressly endorsed these views and added:

My Lords, the privilege against self-incrimination is in need of radical reappraisal ... I can for myself see no argument in favour of the privilege against producing a document the contents of which may go to show that the holder has committed a criminal offence. The contents of the document will speak for itself and there is no risk of the false confession which underlies the privilege against having to answer questions that may incriminate the speaker. The rule may once have been justified by the fear that without it an accused might be tortured into production of documents but those days are surely past and this consideration cannot apply in the context of a civil action.⁴³

45 Lord Griffiths also expressed his strong disapproval of an undertaking that had been offered in that case that would have restricted the use that prosecutors could have made of any incriminating documents produced by the defendants in the civil proceedings. In particular, he considered that such an undertaking could preclude a successful prosecution against the defendants for criminal fraud, which he noted was "notoriously difficult to establish", and referred to the deleterious consequences of such a result:

Criminal financial fraud on a vast scale has emerged as threat to the financial health of the community. Those who commit these crimes must be pursued most vigorously under the criminal law; if they are allowed to get away with it others will take encouragement to follow their example ...⁴⁴

46 In *Attorney General's Reference (No. 7 of 2000)* the English Court of Appeal (Criminal Division) was called upon to determine whether incriminating documents compelled from the defendant were inadmissible in a subsequent criminal prosecution against him on the ground that their admission would violate the right to a fair trial under the European Convention on Human Rights.⁴⁵ After reviewing leading authorities in this field from the

⁴⁰ See, eg, *Rank Film Ltd v Video Information Centre* [1982] AC 380, 418-419.

⁴¹ See, eg, Zuckerman, "Rolling Back the Privilege Against Self-Incrimination from Documentary Disclosure" (2006) *Civil Justice Quarterly* 427, 428; *Rank Film Ltd v Video Information Centre* [1982] AC 380, 448.

⁴² *AT&T Istel v Tully* [1993] AC 45, 53.

⁴³ *AT&T Istel v Tully* [1993] AC 45, 57-58. Also see 64 (Lord Goff) & 69 (Lord Lowry)

⁴⁴ *AT&T Istel v Tully* [1993] AC 45, 57-58.

⁴⁵ [2001] 2 Cr App R 19.

House of Lords, Privy Council, European Court of Human Rights, Supreme Court of Canada and Constitutional Court of South Africa, the Court of Appeal held that they were not inadmissible and would certainly be regarded as admissible under English law.⁴⁶ In justifying this conclusion the court adopted (and regarded as "jurisprudentially sound"⁴⁷) the distinction, drawn in many of the authorities it reviewed, between a person being compelled to *create testimonial evidence* that is incriminating (which ordinarily violates the privilege against self-incrimination) and being compelled to *produce pre-existing documents* that are incriminating (which does not violate the privilege against self-incrimination).

47 The decision and principles in *Attorney General's Reference (No. 7 of 2000)* have been approved and applied in many cases, some of which are referred to below.

48 In *R v Kearns* the Court of Appeal (Criminal Division), after scrutinising English and European authorities in this field, declared that the following "is clear":

There is a distinction between the compulsory production of documents or other material which have an existence independent of the will of the suspect or accused person and statements that he has had to make under compulsion. In the former case there is no infringement of the right to silence and the right not to incriminate oneself. In the latter case there could be, depending on the circumstances.⁴⁸

49 In *C Plc v P* the Court of Appeal (Civil Division), after conducting a wide review of leading authorities in this field, concluded that the principles identified in the two aforementioned cases applied with equal, if not greater, force in civil proceedings.⁴⁹

50 In *R v S(F)* the Court of Appeal (Criminal Division) referred to the three aforementioned cases with approval and Lord Judge CJ declared on behalf of the Court:

The principle that evidence existing independent of the will of the suspect does not normally engage the privilege against self-incrimination is clearly established in domestic law.⁵⁰

51 Very recently Popplewell J reaffirmed the following conclusion he had reached two years earlier after undertaking an extensive review of leading jurisprudence:

In my view, it has been established by the authorities that the privilege against self-incrimination does not extend to provide a person with protection against the risk of incriminating himself by the provision of a document or documents which come into existence independently of any order, statute or other instrument of law which compelled their production. It does not normally cover documents other than those which come into existence by an exercise of will pursuant to a testimonial obligation imposed upon the party.⁵¹

52 In light of the foregoing it appears to be well settled that in the United Kingdom, like the United States, the privilege against self-incrimination does not protect a person from compulsion to produce pre-existing incriminating documents.

⁴⁶ [2001] 2 Cr App R 19 at [57].

⁴⁷ [2001] 2 Cr App R 19 at [59].

⁴⁸ *R v Kearns* [2002] 1 W.L.R. 2815, 2830, approved in *R v Hundal & Dhaliwal* [2004] 2 Cr App R 19 at [18]-[19].

⁴⁹ *C Plc v P* [2007] 3 W.L.R. 437 (Longmore LJ, Sir Martin Nourse agreeing, Lawrence Collins LJ declining to decide).

⁵⁰ *R v S(F)* [2009] 1 W.L.R. 1489 at [18], followed in *Milson v Ablyazov* [2011] EWHC 1846 (Ch) at [19] ("[T]here is now clear authority in England that the protection [against self-incrimination] under [the European Convention on Human Rights] does not extend to pre-existing documents ... The same position applies as regards the privilege under English domestic law").

⁵¹ *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 at [115].

Australia

53 Whether the privilege against self-incrimination protects a person from being compelled to produce pre-existing incriminating documents has not recently been the subject of detailed judicial exposition in Australia. While (as referred to in para 34 above) the High Court has previously accepted that the privilege would provide such protection, there are at least four interrelated reasons for concluding that the Court would no longer adhere to this position:

- (i) The aforementioned US and UK authorities in this field appear to be persuasive and former High Court Judge, the Hon J D Heydon AC QC, has recently referred to some of the UK authorities with approval in the Australian edition of *Cross on Evidence*.⁵²
- (ii) In New Zealand and Australia law reform commissions have recently concluded that the privilege should not extend to pre-existing documents and legislatures, acting upon their recommendations, have abrogated any privilege in this respect in important contexts (see paras 79 to 86 below).
- (iii) As identified in paragraphs 28 to 29 above, many members of the High Court have recognised that the privilege against self-incrimination is primarily testimonial in character. For example, Mason CJ described "the principal matter to which the privilege is directed" as "the possibility that the witness will convict himself out of his own mouth"⁵³ and Brennan J stated: "In principle, the privilege can have no obligation except as a qualification upon a testimonial obligation".⁵⁴
- (iv) In the three cases referred to below various members of the High Court have acknowledged the significant distinction (upon which the US and UK authorities in this field are founded) between the compelled *creation of testimonial evidence* and the compelled *production of pre-existing documents* and/or recognised that the latter is less worthy of protection by privilege against self-incrimination.

54 In *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* ("*Controlled Consultants*") the High Court held that the power to require the production of books in the *Securities Industry (Victoria) Code* (a predecessor to the ASIC Act) excluded the privilege against self-incrimination, with the plurality (Gibbs CJ, Mason & Dawson JJ) observing that the power "is central to the administration of the Code" and would be "valueless if the obligation to comply were subject to privilege".⁵⁵ In the course of its judgment the plurality referred to s.10(5) of the Code, which did not limit the admissibility of books a person was required to produce but rendered inadmissible any incriminating "explanations" about those books a person was required to make, and stated:

Section 10(5) is, we think, to be explained by the fact that the legislature regarded quite differently an explanation relating to books on the one hand and their production on the other ... [T]here is a significant distinction, because an explanation may be testimonial in character and the books themselves are in the nature of real evidence which speaks for itself.⁵⁶

⁵² Heydon, *Cross on Evidence* (Australian ed, 2015, LexisNexus) at [25090].

⁵³ *Hamilton v Oades* (1989) 166 CLR 486, 496.

⁵⁴ *Sorby v The Commonwealth* (1983) 152 CLR 281, 316.

⁵⁵ (1985) 156 CLR 385, 391 & 394.

⁵⁶ (1985) 156 CLR 385, 392 (emphasis added). The plurality nevertheless indicated that it regarded the privilege against self-incrimination as extending to the production of books, but this point was not contested in the case.

55 In *Corporate Affairs Commission (NSW) v Yuill* a majority of the High Court, including Brennan J, held that the power to require the production of books in the *Companies (New South Wales) Code* (a predecessor to the Corporations Act) was not subject to legal professional privilege (LPP).⁵⁷ In the course of his judgment Brennan J referred to the fact that under the Code books compelled from a person could be used in evidence against him whereas compelled oral statements that were incriminating (or subject to LPP) could not and, citing the aforementioned statement of the plurality in *Controlled Consultants*, stated:

The protection accorded to oral evidence ... is probably to be explained by the legislature's unwillingness to compel a person to furnish out of his own mouth evidence which might be used against him on a criminal trial even though the compulsory disclosure of privileged communications might lead to the discovery of other admissible evidence. *That consideration does not inhibit the compulsory production of books which might be used in evidence, for books are real evidence which speak for themselves unlike oral evidence which comes into existence only in response to an exercise of investigative power.*⁵⁸

56 In *Environment Protection Authority v Caltex Refining Co Pty Ltd* (“Caltex”), a case involving a notice to produce documents served on a corporation, a majority of the High Court (including Mason CJ, Toohey and McHugh JJ) held that the privilege against self-incrimination did not apply to corporations.⁵⁹ In the course of their joint judgment Mason CJ and Toohey J declared that the “modern justification [for the privilege] cannot apply to the compulsion by process of law to produce documents”⁶⁰ before elaborating as follows:

The privilege likewise protects a person from producing in other proceedings, including civil proceedings, documents which might tend to incriminate that person. In its application to the production of documents, the operation of the privilege is more far reaching in the protection which it gives than in its application to oral evidence. *It is one thing to protect a person from testifying to guilt; it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt, especially documents which are in the nature of real evidence ...*

In this respect the protection now conferred by the privilege extends well beyond the objects originally sought to be achieved by way of protecting natural persons from the abuses which necessitated the introduction of the privilege ... [T]he privilege inhibits the production of books which might be used in evidence and are in the nature of real evidence which speak for themselves as distinct from testimonial oral evidence which is brought into existence in response to an exercise of investigative power or in the course of legal proceedings. Plainly enough the case for protecting a person from compulsion to make an admission of guilt is much stronger than the case for protecting a person from compulsion to produce books or documents which are in the nature of real evidence of guilt and are not testimonial in character.

Accepting that, notwithstanding this difference, the privilege does protect the individual from being compelled to produce incriminating books and documents, it does not follow that the protection is an essential element in the accusatorial system of justice or that its unavailability in this respect, at least in relation to corporations, would compromise that system. The fundamental principle that the onus of proof beyond reasonable doubt rests on the Crown would remain unimpaired, as would the companion rule that an accused person cannot be required to testify to the commission of the offence charged.⁶¹

⁵⁷ (1991) 172 CLR 319. Cf. *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543.

⁵⁸ (1991) 172 CLR 319, 326 (citations omitted). Also see p.335 (Dawson J).

⁵⁹ *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

⁶⁰ *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499.

⁶¹ *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 502-503. Also see 527-528 (Dean, Dawson & Gaudron JJ).

57 In the same case McHugh J expressed similar views and also identified the analogy between existing powers to obtain documents by search warrants, which are not limited by the privilege against self-incrimination, as a “strong” reason for not allowing a company to resist production of documents on the grounds of self-incrimination:

In producing such documents, the corporation is not creating evidence against itself, as would occur if an individual could be compelled to give incriminating answers. The documents already exist ...

They can be obtained by search warrant. If they are relevant to an offence, they cannot be altered or destroyed because to alter or destroy them would constitute the offence of attempting to pervert the course of justice.⁶²

58 Sixteen years ago Ligertwood observed that “[this] argument extends by analogy to individuals. Cracks in the sanctity of the privilege in so far as it applies to the production of documents are showing”.⁶³

59 In light of the foregoing there is substantial reason to doubt that the High Court of Australia would currently be prepared to conclude that the privilege against self-incrimination extends to the production of pre-existing documents.

60 In any event, the aforementioned authorities from the United States, United Kingdom and Australia establish that any privilege against self-incrimination in relation to the production of documents is of a lower order of importance than the privilege relating to compelled testimony. As identified in paragraphs 77 to 87 below, this is a highly relevant principle that should be applied in considering whether a law that excludes the privilege is justified.

(b) Exclusion of the privilege against self-incrimination

61 As Gibbs CJ declared in *Sorby v The Commonwealth* (“*Sorby*”): “The privilege against self-incrimination is not protected by the Constitution, and like other rights and privileges of equal importance it may be taken away by legislative action”.⁶⁴

62 Indeed, the Privy Council has observed that:

[S]tatutory interference with the right [to silence] is almost as old as the right itself. Since the 16th century legislation has established an inquisitorial form of investigation into the dealings and assets of bankrupts which is calculated to yield potentially incriminating material, and in more recent times there have been many other examples, in widely separated fields, which are probably more numerous than is generally appreciated. ...

[T]he legislature has not shrunk, where it has seemed appropriate, from interfering in a greater or lesser degree with ... the right to silence.⁶⁵

63 In a similar vein, Mason CJ and Toohey J have commented:

Although the privilege has been described as “deep rooted in English law”, the legislatures have from time to time in different fields abrogated or interfered with the privilege in many of its aspects, including its application to the production of documents. The legislatures have

⁶² *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 555-556.

⁶³ Ligertwood, *Australian Evidence* (Butterworths, 3rd ed, 1998), [5.72].

⁶⁴ *Sorby v The Commonwealth* (1983) 152 CLR 281, 298. Also see, eg, *Sorby v Commonwealth* (1983) 152 CLR 281, 299 & 308-309; *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 490 & 533-534; *Grollo v Bates* (1994) 125 ALR 492, 518; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [39] & [64].

⁶⁵ *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1, 40.

taken this course when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained. The statutory provisions regulating examinations and inquiries into the affairs of corporations, whether undertaken by liquidators, inspectors or other investigators, are illustrations which are germane to the issue arising in the present case. That is because the necessity for these provisions demonstrates beyond any doubt that the shield of privilege as applied to corporations is a formidable obstacle to the ascertainment of the true facts in the realm of corporate activities.

Indeed, the extent to which statute has interfered with the privilege in relation to corporations indicates that the privilege, at least in so far as it relates to production of corporate documents, is not a fundamental aspect of the accusatorial criminal justice system. The extent of abrogation also illustrates ... that the effect of the privilege is to shield corporate criminal activity.⁶⁶

64 More recently, French CJ and Crennan J have remarked:

Legislatures have, in different settings, abrogated or modified the privilege when public interest considerations have been elevated over, or balanced against, the interests of the individual so as to enable true facts to be ascertained. Longstanding examples such as the compulsory public examination of a bankrupt, or of a company officer (when fraud is suspected), serve a public interest in disclosure of the facts on behalf of creditors and shareholders which overcomes some of the common law's traditional consideration for the individual.⁶⁷

65 As these statements suggest, Australian courts have long recognised the supremacy of Parliament in deciding whether and to what extent to modify or exclude the privilege against self-incrimination. This approach is epitomised in the following oft-quoted statement of Windeyer J in *Rees v Kratzmann*:

The honest conduct of the affairs of companies is a matter of great public concern. If the legislature thinks that in this field the public interest overcomes some of the common law's traditional consideration for the individual, then effect must be given to the statute which embodies this policy.⁶⁸

66 A further example is *Mortimer v Brown*,⁶⁹ in which the High Court held that the privilege against self-incrimination had been excluded in relation to public examinations under Queensland's *Companies Acts 1961-1964* (predecessors to the Corporations Act), s.7(c) of which provided that the notes of a person's examination "may thereafter be used in evidence in any legal proceedings against him". Chief Justice Barwick declared:

The Parliament has made it abundantly clear that the so-called right to be silent which the common law sought to protect was not to be available to the examinee: and, as both my brother Kitto and my brother Walsh observe, *the very purpose of the inquiry makes such a course inevitable if that purpose is not frustrated and the inquiry rendered nugatory*. The common law cannot maintain a right in the citizen to refuse to make incriminating answers in the face of a statute which by its expression clearly intends, as does the present, that all questions allowed to be put shall be answered.⁷⁰

67 In the same case Kitto J stated:

⁶⁶ *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503-504 (citations omitted).

⁶⁷ *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [28] (citations omitted). Also see [121] & [139]-[140].

⁶⁸ *Rees v Kratzman* (1965) 114 CLR 63, 80. Also see *Hamilton v Oades* (1989) 166 CLR 486, 494, 497-498 & 507-508; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 326-327; *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 534R v *Director of Serious Fraud Office, ex parte Smith* [1993] AC 1, 44.

⁶⁹ *Mortimer v Brown* (1969) 122 CLR 493.

⁷⁰ *Mortimer v Brown* (1969) 122 CLR 493, 495 (emphasis added). Also see

[T]he circumstance which I find compelling is that the evident purpose of the section, primarily even if not wholly, is to enable a suggestion of fraud or concealment of a material fact to be fully investigated by means of the public examination of certain classes of persons. Such a question in its nature must frequently involve consideration of evidence tending to incriminate individuals. *To read down the wide terms of the section so as to allow a danger of self-incrimination as a valid ground for refusing to answer a question would render the provision relatively valueless in the very cases which call most loudly for investigation.* By providing in sub-s. (7) (c) that notes of a person's examination may thereafter be used in evidence in any legal proceedings against him, the section shows that the possibility of self-incrimination is contemplated as being inherent in the kind of examination that is authorized.⁷¹

Principles or criteria guiding exclusion of the privilege

68 A review of the authorities referred to in this submission, and relevant reports,⁷² reveals that there are six main principles or criteria that should be applied to help determine whether a law that excludes the privilege against self-incrimination is justified:

- (i) the importance of the public interest sought to be advanced by the exclusion;
- (ii) the extent to which the exclusion is reasonably expected to benefit that public interest;
- (iii) whether the exclusion mainly affects participants in a regulatory scheme;
- (iv) the particular nature of the exclusion;
- (v) the extent of any compensatory protection provided; and
- (vi) the adequacy of procedural safeguards.

69 Each of these principles or criteria is addressed in greater detail below.

(i) Importance of the public interest sought to be advanced by exclusion

70 Any decision about excluding the privilege against self-incrimination will require a balance to be struck between competing public interests. In 2004 the Queensland Law Reform Commission (QLRC) issued a report entitled *The Abrogation of the Privilege Against Self-Incrimination (QLRC Report)* in which it described this balancing exercise as follows:

In relation to the privilege against self-incrimination there is, on the one hand, the public interest in upholding the policies that underlie what has come to be judicially recognised as an important individual human right. On the other hand, *there is a public interest in ensuring that relevant authorities have adequate powers to inquire into and monitor activities that give rise to issues of significant public concern:*

The courts have clearly expressed the view that the privilege against self-incrimination is an important human right. Yet the legislature must balance other public interest considerations against the protection of individual human rights. *In the field of regulation, one crucial public interest is securing effective compliance or prosecutions.* The policy question for the legislature is to decide in what circumstances public interest

⁷¹ *Mortimer v Brown* (1969) 122 CLR 493, 496 (emphasis added); also see 501 (Walsh J). This reasoning has been endorsed and applied by the High Court on many occasions: see, eg, *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, at 342-343 & 356-357; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1984) 156 CLR 385, esp at 394; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 332.

⁷² See, eg, Queensland Law Reform Commission (QLRC), *The Abrogation of the Privilege Against Self-Incrimination* (Report No 59, December 2004); New Zealand Law Commission (NZLC), *The Privilege Against Self-Incrimination* (Preliminary Paper 25, September 1996); NZLC, *Evidence* (Report 55 – vol 1, August 1999); ALRC, NSW Law Reform Commission (NSWLRC) & Victorian Law Reform Commission (VLRC), *Uniform Evidence Law* (Report 102, December 2005); ALRC, *Making Inquiries: A New Statutory Framework* (Report 111, October 2009).

considerations should overrule human rights protection, and whether the regulation of particular activities mandates different considerations.⁷³

71 The QLRC concluded that abrogation of the privilege against self-incrimination "depends for its justification on ... the importance of the public interest sought to be protected or advanced by the abrogation"⁷⁴ and also observed that it may be justified where the information sought "concerns an issue of major public importance that has a significant impact on the community in general".⁷⁵

72 ASIC agrees with this conclusion and observation.

(ii) *Extent to which exclusion is expected to benefit the public interest*

73 The QLRC further concluded that abrogation of the privilege against self-incrimination "depends for its justification on ... the extent to which information obtained as a result of the abrogation could reasonably be expected to benefit the relevant public interest"⁷⁶ and stated:

[C]onsideration should be given to the extent to which abrogation of [the privilege] could reasonably be expected to benefit that public interest. If it cannot be demonstrated that information obtained as a result of the exercise of coercive powers is likely to significantly protect or advance the relevant public interest, it is unlikely that the abrogation would be justified. Conversely, if it is clear that the abrogation is likely to substantially promote the public interest, it is more likely that the abrogation can be justified.⁷⁷

74 ASIC agrees with this conclusion and statement.

(iii) *Whether the exclusion mainly affects participants in a regulatory scheme*

75 The QLRC recognised that there may be a persuasive case for abrogation of the privilege against self-incrimination in relation to regulatory schemes:

Abrogation of [the privilege] may also be justified in a situation where an individual is required to co-operate with a legislative regulatory system to which the individual has voluntarily subjected himself or herself.

For example, some regulated activities require government authorisation in the form of a licence or permit in order to engage lawfully in that activity. There is a persuasive argument that society is entitled to insist on the provision of certain information from those who voluntarily submit themselves to such a regulatory scheme. The basis of the argument is that participation in the scheme is a matter of choice and, if undertaken, necessarily involves acceptance of submission to the requirements of the scheme, including compulsion to provide information. In other words, in some situations, participation in a regulated activity may be considered to amount to a waiver of privilege. This may be particularly so in the context of records that are required to be kept as part of a mechanism for ensuring compliance within a regulatory framework.

A regulatory authority's need to secure compliance with the requirements of a legislative scheme is likely to be of particular relevance in relation to the abrogation of the penalty privilege.⁷⁸

⁷³ QLRC, above n72, [6.3] (emphasis added).

⁷⁴ QLRC, above n72, [recommendation 6-1(a)(i)].

⁷⁵ QLRC, above n72, [6.50].

⁷⁶ QLRC, above n72, [recommendation 6-1(a)(ii)].

⁷⁷ QLRC, above n72, [6.52].

⁷⁸ QLRC, above n72, [6.53]-[6.55].

76 ASIC agrees with these comments, but considers that the rationale for abrogating the privilege in relation to regulatory schemes is not entirely confined to the notion of "waiver" by specific persons who voluntarily subject themselves to regulation (such as licensees or permit holders). Abrogation may be justified by broader considerations, such as where it is necessary to obtain information from others who interact with such persons (e.g. contractors, investors and consumers) or otherwise participate within the field of regulation in order to ensure the overall effectiveness of a regulatory scheme of significant public concern.⁷⁹

(iv) Particular nature of the exclusion

77 As referred to at paragraphs 20 to 26 above, not all components of the 'general' privilege against self-incrimination identified in the Issues Paper are of equal nature, origin, incidence and importance. Some are less important than others and, accordingly, their abrogation may be more readily justified.

Pre-existing documents

78 In light of the matters referred to in paragraphs 34 to 60 above and 79 to 87 below, ASIC submits that the privilege against self-incrimination in Australia either is not or should not be available to resist a lawful requirement for the production of pre-existing documents.

79 In 1996 the New Zealand Law Commission (NZLC), after reviewing US (but not UK) authorities in this field, issued a preliminary paper in which it stated:

The Commission is of the preliminary view that the privilege [against self-incrimination] should not apply to pre-existing documents or real evidence in existence at the time their possessor is asked to produce them, for a number of reasons:

- [T]he fact that there is no compulsion at the point when the information is created means that the likelihood of the compulsion causing the evidence to be unreliable, or for the information to be created from abuses of power, is minimal.
- Innocent people need not fear that they will speak rashly or ill-advisedly, as the document containing, or thing comprising, the relevant information is already in existence.
- Although testing and analysis methods may on occasion be called into question, pre-existing evidence is generally less likely to be unreliable than, for example, confession evidence. Therefore, the rationale behind the privilege of preventing the compelled disclosure of unreliable evidence does not so readily apply.
- While privacy concerns are relevant to pre-existing evidence, particularly personal diaries, we suggest that they should not prevail over the concern to obtain all relevant evidence. They do not currently prevail in relation to such evidence seized pursuant to a search warrant.
- In relation to pre-existing evidence, the concern behind the privilege of maintaining a fair State-individual balance may be adequately addressed by the prohibition on unreasonable search and seizure in s 21 of the New Zealand Bill of Rights Act 1990.⁸⁰

⁷⁹ See, eg, the text accompanying footnotes 31 and 68 above. Also see Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011 edition), [9.5.3] ("It may be appropriate to override the privilege [against self-incrimination] where its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence"): <http://www.ag.gov.au/Publications>.

⁸⁰ NZLC, *The Privilege Against Self-Incrimination* (Preliminary Paper 25, September 1996), [203].

80 The NZLC invited submissions in relation to these preliminary views and the further issue of whether the privilege against self-incrimination should apply "to a communicative aspect in the act of producing documents".⁸¹

81 In 1999 the NZLC issued a final report, accompanied by a proposed Evidence Code, in which it stated:

The bulk of submissions agreed with the Law Commission's proposal to remove the privilege for pre-existing documents. There was also support for removing testimonial disclosures implied from producing an object from the scope of the privilege. One commentator pointed out that it was illogical to remove the privilege from pre-existing documents and then to allow them to be protected on the grounds that the act of producing the document was a testimonial disclosure coming within the scope of the privilege. The Commission accepts the force of this argument. Accordingly, the definition of "information" in [the Code] is limited to statements made orally or in a document created after and in response to a request for the information (but not for the principal purpose of avoiding criminal prosecution under New Zealand law). This restores the privilege to its original form as a privilege against compelled testimony.⁸²

82 This recommendation was accepted by Parliament and is now reflected in ss.51(3) and 60-63 of the *Evidence Act 2006* (NZ), which codifies and defines the privilege (in judicial and non-judicial contexts) in a way that affords no protection in relation to the compelled production of pre-existing documents.

83 The 2004 the QLRC addressed pre-existing documents as follows:

In the view of the Commission, a distinction can be drawn between [pre-existing documents], and documents that an individual is required to bring into existence as a result of the abrogation of the privilege against self-incrimination or the penalty privilege.

In the case of the former, since the document already exists, the individual is not compelled to communicate the information for the purpose of the investigation or inquiry. Although the individual may be forced to produce the document, there may be less cause in such a situation for the application of the rationales for either of the privileges.

The Commission is therefore of the view that, with respect to information in documentary form, whether the document is already in existence at the time when the requirement to provide information is imposed is a factor relevant to the appropriateness of the abrogation of either or both of the privileges. This may be particularly so if the document is one that is required to be kept in compliance with a legislative regulatory scheme.⁸³

84 The QLRC's recommendation, which was reached without reviewing UK or US authorities in this field (apart from briefly mentioning the US *required records doctrine*) or referring to the NZLC preliminary paper, falls short of the conclusion reached in New Zealand that the privilege against self-incrimination should not extend to pre-existing documents.

85 In 2004 the ALRC, NSW Law Reform Commission and Victorian Law Reform Commission (**the Commissions**) jointly commenced an inquiry into the operation of Australia's *Uniform Evidence Law*, which resulted in the release of a final report in 2005.⁸⁴ One of the issues considered by the Commissions was the extent to which the privilege against self-incrimination and penalty privilege should apply in relation to court orders made in civil proceedings for the production, disclosure, search or inspection of pre-existing documents.

⁸¹ NZLC, *The Privilege Against Self-Incrimination* (Preliminary Paper 25, September 1996), [203]. At [206] the NZLC

⁸² NZLC, *Evidence* (Report 55 – vol 1, August 1999) [281].

⁸³ QLRC, above n72, [6.72]-[6.74].

⁸⁴ ALRC, NSWLRC & VLRC, above n 72.

The Commissions received a submission from the *Committee of Chief Justices of Australia and New Zealand* to the effect that neither privilege should apply to pre-existing documents and no immunity should be provided in relation to the subsequent use of such documents.⁸⁵ The Commissions agreed and recommended that the Uniform Evidence Laws be amended accordingly.⁸⁶ Amendments reflecting this recommendation have since been introduced in five Australian jurisdictions.⁸⁷

86 In 2009 the ALRC conducted an inquiry into Royal Commissions, which, among other things, considered existing legislative provisions which abrogated the privilege against self-incrimination in relation to production and examination powers and provided compensatory protection that was limited to "use immunity".⁸⁸ The ALRC endorsed these provisions but recommended that no immunity be provided in relation to pre-existing documents:

The scope of the use immunity in relation to documents also should be clarified. The scope of the use immunity should not extend further than the purpose of the privilege against self-incrimination warrants—that is, it should extend only to protect a person from being compelled to testify against him or herself. An extension of the use immunity to all documents or information is likely to hamper the effectiveness of any subsequent legal proceedings, without protecting the interests served by the privilege. Rather, only documents that may be considered a testimonial disclosure—for example, a written statement, or a statutory declaration, prepared in response to a question—should be protected. It follows that the use immunity should not extend to pre-existing documents.⁸⁹

87 In light of the matters referred to in paragraphs 34 to 60 and 79 to 86 above, ASIC submits that abrogation of the privilege against self-incrimination in relation to the production of pre-existing documents (assuming that it applies, which is doubtful), without the provision of any immunity in relation to the subsequent use of such documents, is generally justifiable.

The penalty and forfeiture privileges

88 As identified in paragraphs 23 to 25 above, the penalty and forfeiture privileges are less important than the specific privilege against *self-incrimination* and it appears that the former privileges are not "substantive rules of law" and do not apply in non-judicial contexts.

89 In addition, the forfeiture privilege (which is very narrowly confined) appears to have been abolished in most Australian jurisdictions.⁹⁰

90 In 1999 the NZLC issued a report, accompanied by a proposed Evidence Code, in which it recommended that (in both judicial and non-judicial contexts) the penalty and forfeiture privileges be abolished:

⁸⁵ ALRC, NSWLRC & VLRC, above n 72, [15.142]. The Committee drafted a proposed provision, entitled "**No Privilege Against Self-Incrimination for Pre-Existing Documents**", which read as follows: "At no stage of any proceeding is any person entitled to refuse or fail to comply with an order for production of a pre-existing document or thing that was not created pursuant to a court order, or to object to the inspection or admissibility of evidence of such a document or thing, on the ground that to do so might tend to incriminate the person or make the person liable to a civil penalty". It also drafted a proposed provision (s.187B(3)) expressly excluding use and derivative use immunity in relation to pre-existing documents.

⁸⁶ ALRC, NSWLRC & VLRC, above n 72, [15.143]-[15.150] & Recommendation 15-10.

⁸⁷ *Evidence Act 1995* (Cth): s.128(9)(b); *Evidence Act 1995* (NSW): s.128(9)(b); *Evidence Act 2008* (Vic): s.128(9)(b); *Evidence Act 2011* (ACT): s.128(10)(b); *Evidence Act 2001* (Tas): s.128(9)(b).

⁸⁸ ALRC, note 72 above, chap 17.

⁸⁹ ALRC, note 72 above, [17.76]-[17.86] and Recommendation 17-2(d). The recommendations in this report have not yet been implemented.

⁹⁰ Heydon, *Cross on Evidence* (Australian ed, 2015, LexisNexus) at [25130].

The privilege against self-incrimination arose in a time when the consequences of incrimination were harsh. Many current applications of the privilege have moved far from the historical roots of the privilege. In the Commission's view, there is a strained artificiality in modern applications of the privilege in which the potential detrimental effect of the incrimination involved is minimal.

The Commission originally proposed retaining the privilege for liability to a civil penalty. However, a number of commentators questioned this. One commentator pointed out the difficulties of determining whether some of the existing legislative sanctions amounted to a penalty in law. The existence of the privilege is also difficult to justify when no protection exists for serious forms of civil liability, such as loss of custody of a child, injunctive orders or substantial damages. The Commission was persuaded by these arguments. The definitions of "incriminate" and "self-incriminate" in s 4 refer solely to criminal prosecutions.⁹¹

91 These recommendations were accepted by Parliament and are now reflected in ss.4(1), 51(3) and 60-63 of the *Evidence Act 2006* (NZ), which codify and define the privilege (in judicial and non-judicial contexts) in a way that excludes the penalty and forfeiture privileges.

92 In light of the matters referred to in paragraphs 23 to 25 and 88 to 91 above, ASIC submits that abrogation of the penalty and forfeiture privileges (especially the latter) is more readily justifiable than abrogation of the specific privilege against *self-incrimination*.

(v) *Extent of compensatory protection*

93 For the reasons identified in paragraphs 94 to 116 below, ASIC submits that:

- 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 (for the reasons previously identified in paragraphs 34 to 60 and 79 to 87 above, which need not be repeated in this section of the submission).

No automatic compensatory protection

94 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.⁹² 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

⁹¹ NZLC, *Evidence* (Report 55 – vol 1, August 1999) [277]-[278].

⁹² McNicol, *Law of Privilege* (LBC, 1992), 243.

should extend to derivative use – but *that is something which is properly a matter for the legislature to consider*.⁹³

95 The House of Lords has observed that statutes differ widely on this point:

The statute occasionally provides in so many terms that information may be used in evidence; sometimes that it may not be used for certain purposes, *inferentially permitting its use for others*; or it may be expressly prescribed that the evidence is not to be admitted; or again, the statute may be silent.⁹⁴

96 In *Commissioners of Customs and Excise v Harz and Power* Lord Reid (with whom all other members of the House of Lords agreed) considered that the statute in question permitted incriminating statements compelled from a person to be used against him in a subsequent prosecution and saw no reason why this should not be so:

If a demand for information is made in the proper manner, the trader is bound to answer the demand ..., whether or not the answer may tend to incriminate him, and, if he fails to comply with the demand, he can be prosecuted. If he answers falsely he can be prosecuted for that and if he answers in such a manner as to incriminate himself *I can see no reason why his answer should not be used against him. Some statutes expressly provide that incriminating answers may be used against the person who gives them and some statutes expressly provide that they may not. Where, as here, there is no such express provision the question whether such answers are admissible evidence must depend on the proper construction of the particular statute. Although I need not decide the point, it seems to me to be reasonably clear that incriminating answers to a proper demand under this section must be admissible if the statutory provision is to achieve its obvious purpose*.⁹⁵

97 Similar views have been expressed by the High Court of Australia.⁹⁶ For example, in *Pyneboard Pty Ltd v Trade Practices Commission*, four members of the High Court quoted Lord Reid's comments with approval and Mason CJ, Wilson and Dawson JJ also stated:

The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation. *In such cases it will be so, notwithstanding that the answers given may be used in subsequent legal proceedings*.⁹⁷

98 In *HKSAR v Lee Ming Tee* Hong Kong's Court of Final Appeal (including former Chief Justice of Australia, Sir Anthony Mason NPJ) similarly declared:

Where the privilege against self-incrimination is overridden, in the absence of any binding restriction on use (whether statutory, by judicial order, by undertaking or otherwise), *self-incriminating answers thereby obtained are subject to unrestricted use*. Where the use prohibition or restriction conferred in place of an abrogated privilege is limited, *other use is inferentially permitted*.⁹⁸

⁹³ *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).

⁹⁴ *R v Director of Serious Fraud Office* [1993] AC 1, 35 (emphasis added).

⁹⁵ [1967] 1 AC 760, 816.

⁹⁶ See, eg, *Mortimer v Brown* (1969) 122 CLR 493, 496 & 501; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 339-340, 351-352 & 357-358; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1984) 156 CLR 385, 394; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 325-326 & 332.

⁹⁷ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 339-340 (also see 351-352 & 357-358).

⁹⁸ (2001) 4 HKCFAR 133, 170 (emphasis added).

99 Indeed, there is a long line of English and Australian authority to the effect that incriminating statements lawfully compelled from persons are, in the absence of any statutory provision to the contrary, generally admissible against them in subsequent criminal proceedings.⁹⁹

Use immunity & derivative use immunity

100 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.

101 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 the investigation results in the discovery of further material incriminating the person that material can be used in evidence against the person if it passes the ordinary rules of admissibility.

102 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 it 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 material incriminating the person that material will be inadmissible against the person, even if it would or could have been discovered without the particular information disclosed by the person

103 A major problem with the conferral 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.

104 A further difficulty with derivative use immunity is that, especially when the compulsory information-gathering powers are exercised at an early stage of an investigation (which is usually when they are most necessary and effective), 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 effectively “taint” an entire investigation, especially a lengthy and complex investigation.

105 In light of these risks and difficulties the conferral of derivative use immunity is generally likely to result in the relevant agency not exercising its compulsory information gathering

⁹⁹ See, eg, *R v Goldshede & Sidney* (1844) 1 Carr & K 657; 174 ER 979; *R v Scott* (1856) Dears & BCC 47; 169 ER 909; *R v Coote* (1873) LR4PC 599 (Privy Council), 607-608; 17 ER 587, 592; *Kempley v R* [1944] Arg LR 249 (High Court); *R v Owen* [1951] VLR 393; *R v Travers* (1958) SR (NSW) 85 at 92; *R v Clyne* (1985) 2 NSWLR 740, 746-747; *R v Zion* [1986] VR 609; *Hooper v R* [1995] HCA Trans 283; *DPP (NSW) v Alderman* (1998) 45 NSWLR 526; 104 A Crim R 116 at 123-125; *DPP (NSW) v Attallah* [2001] NSWCA 171 at [27]; *Tofilau v R* (2007) 231 CLR 396 at [7] & [359]; *DPP (NSW) v Majok* [2009] NSWSC 192 at [11]-[12].

powers as often or as early as desired and undermine the public purpose for providing those powers and abrogating the privilege against self-incrimination in the first place.

The overseas approach to derivative use immunity

106 The Supreme Court of Canada has observed that “the derivative use immunity approach is an American invention, required to deal with the unique language of their Fifth Amendment”.¹⁰⁰ Unlike the situation in Australia, legislatures in the United States are constitutionally obliged to afford both use and derivative use immunity to persons who are compelled to furnish potentially self-incriminating information.¹⁰¹ However, this has frequently afforded criminals “immunity baths” in relation to serious criminal activities, leading to public outcry and disuse of compulsory information gathering powers.¹⁰²

107 In light of these difficulties, courts and legislatures in Canada,¹⁰³ South Africa,¹⁰⁴ Hong Kong¹⁰⁵ and the United Kingdom¹⁰⁶ have generally declined to follow the US approach and expressed a preference for statutory provisions that afford use immunity only.

108 The leading judgment on this issue in Canada is that of La Forest J in *Thomson Newspapers Ltd v Canada* (“*Thompson*”), which contains the following instructive passage:

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

¹⁰⁰ *R v S (RJ)* (1995) 96 CCC (3d) 1, 101.

¹⁰¹ See, eg, *Kastigar v United States* 406 US 441 (1972).

¹⁰² 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.

¹⁰³ See, eg, *Thomson Newspaper Ltd v Canada* (1990) 54 CCC (3d) 417; *R v S (RJ)* (1995) 96 CCC (3d) 1.

¹⁰⁴ See, eg, *Ferreira v Levin* 1996 (1) SA 984. Also see *Berstein & Ors v Bester & Ors* 1996 (2) SA 751.

¹⁰⁵ See, eg, *HKSAR v Lee Ming Tee* (2001) HKCFAR 133.

¹⁰⁶ See, eg, *R v Hertfordshire County Council, Ex Parte Green Environmental Industries Ltd* [2000] 2 AC 412 at 421-422; *HM Advocate v P* [2011] UKSC 44. Also see *R v Sang* [1980] AC 402, 453-354; *Lam Chi-Ming v R* [1991] 2 AC 212.

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.¹⁰⁷

109 The judgment of La Forest J in *Thomson* was cited with approval by all nine members of the Supreme Court of Canada in *R v S (RJ)*,¹⁰⁸ in which Iacobucci J (delivering the leading judgment) declared that “there are significant problems inherent in the idea of full derivative-use immunity” and agreed that “the effect of a complete derivative-use immunity may be to afford the compelled witness an ‘immunity bath’”.¹⁰⁹

110 The judgment of La Forest J in *Thomson* was also approved by the Constitutional Court of South Africa in *Ferreira v Levin*,¹¹⁰ in which Ackermann J (with whom all of the other members of the Court agreed):

- referred to “the advantages to the community as a whole (including the fact that investigation and detection is speeded up and the law’s effectiveness as a deterrent enhanced) if there was not a blanket exclusion of derivative evidence”;
- declared that “[w]e are not obliged to follow the absolutist United States approach which ... is undoubtedly rooted in the explicit and seemingly absolute right against self-incrimination found in that country’s Constitution”;¹¹¹ and
- stated that it was not necessarily unfair to use “derivative evidence” against a person compelled to disclose self-incriminating information, adding that “the public, and especially victims of crime, might find a denial of the right to use such evidence inexplicable”.¹¹²

¹⁰⁷ 54 CCC (3d) 417 at 515-516 (citations omitted). L’Heureux-Dube, at 536, also stated: “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”.

¹⁰⁸ (1995) 96 CCC (3d) 1.

¹⁰⁹ (1995) 96 CCC (3d) 1, 71 & 73-74. L’Heureux-Dube and Gonthier JJ, also in the majority, delivered a similar joint judgment, in which they stated (at 101): “There is ... no rule or principle at common law that prohibits use by the state of derivative evidence *per se*. ... 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 ... [T]his approach has neither place nor support in Canadian jurisprudence”. Sopinka and McLachlin JJ similarly stated (at 130): “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”.

¹¹⁰ 1996 (1) SA 984.

¹¹¹ 1996 (1) SA 984 at 1076 (citations omitted).

¹¹² 1996 (1) SA 984 at 1076. Also see *Berstein & Ors v Bester & Ors* 1996 (2) SA 751.

The approach to use and derivative use immunity in Australia

111 It appears that most legislative provisions in Australia abrogating the privilege against self-incrimination and providing compensatory protection do not provide derivative use immunity.¹¹³

112 In *Hamilton v Oades*, a case involving a compulsory examination power in the *Companies (NSW) Code* (a predecessor to the Corporations Act) that required the witness to provide potentially self-incriminating information and afforded use immunity but no derivative use immunity, 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.¹¹⁴

113 This passage was expressly endorsed by Hong Kong's Court of Final Appeal in *HKSAR v Lee Ming Tee*, a case concerning a comparable examination power, in which Ribeiro PJ (with whom all other members of the Court agreed) stated:

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]. 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

¹¹³ See, eg, McNicol, *Law of Privilege* (LBC, 1992), 201-202; Ligertwood, *Australian Evidence* (Butterworths, 3rd 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".

¹¹⁴ *Hamilton v Oades* (1989) 166 CLR 486, 496. Also see p.508 (Dawson J).

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.*¹¹⁵

114 The 2004 the QLRC reached the following conclusions about derivative use immunity:

The Commission considers that, where an immunity is provided, it should generally be in the form of a use, rather than a derivative use, immunity.

In the view of the Commission, the potential effect of a derivative use immunity is wider than the scope of the protection that would have been available if the privilege [against self-incrimination] had not been abrogated. *The Commission therefore considers that a derivative use immunity, because of its capacity to effectively quarantine from use additional material that proves the guilt of an individual who has provided self-incriminating information, should not be granted unless there are exceptional circumstances to justify the extent of its impact.*¹¹⁶

115 In 2009 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.¹¹⁷

116 ASIC considers that the matters referred to in paragraphs 106 to 115 above persuasively establish that the provision of derivative use immunity is undesirable and contrary to the public interest. Use immunity affords adequate compensatory protection.

(vi) Adequacy of procedural safeguards

117 In 2004 the QLRC reported:

[P]rotections about the way in which a requirement to provide information must be made and the conditions that must apply when the information is provided may be highly relevant to the appropriateness of a proposed provision that would abrogate either or both of the privileges.

The Commission is therefore of the view that, in determining whether the abrogation of the privilege against self-incrimination and/or the penalty privilege is appropriate, consideration

¹¹⁵ (2001) 4 HKCFAR 133, 176-177 (emphasis added). Also see *Kennedy v Cheng* (2009) 12 HKCFAR 601 at [37].

¹¹⁶ QLRC, above n72, [9.88]-[9.89] (emphasis added).

¹¹⁷ ALRC, note 72 above, [17.38] & [17.53]-[17.55] (emphasis added).

must be given to the adequacy of the procedural safeguards that will apply when the requirement to provide the information is imposed, and when the individual provides the information.¹¹⁸

118 ASIC agrees with this conclusion.

(c) Exclusion of the privilege in relation to ASIC's powers

119 As identified in paragraphs 17 and 18 above, ASIC has two main types of compulsory investigation powers, each of which excludes the privilege against self-incrimination (and any privilege against self-exposure to a civil penalty):

- powers to compel persons to produce "specified books" relating to regulated entities or activities (**production powers**); and
- powers to compel persons to attend examinations and answer relevant questions on oath (**examination powers**).

120 Compulsory examination and production powers have existed in corporations legislation in Australia and the United Kingdom for over 150 years.¹¹⁹

121 Prior to the 1960s Australian legislation in this field generally did not expressly address the privilege against self-incrimination and either expressly permitted, or did not expressly prohibit, the use of compulsorily acquired information in subsequent civil and criminal court proceedings. The High Court generally interpreted such, including subsequent, legislation as impliedly excluding the privilege against self-incrimination and permitting both direct and derivative use of compulsorily acquired information (oral statements and documents) in civil and criminal proceedings, in the absence of any statutory provision to the contrary.¹²⁰

122 Since the 1960s Australian legislation in this field has increasingly expressly excluded the privilege against self-incrimination and provided some compensatory protection by limiting the admissibility of compulsorily acquired information in certain proceedings brought against the person from whom it was obtained (with the exception of pre-existing documents, which have remained fully admissible in civil and criminal proceedings).¹²¹

Justifications for exclusion of the privilege

123 It is submitted that exclusion of the privilege against self-incrimination in relation to ASIC's examination and production powers is demonstrably justified having regard to the six aforementioned principles or criteria that should be applied in determining this issue, each of which is addressed below. Most are interrelated.

¹¹⁸ QLRC, above n72, [6.69]-[6.70].

¹¹⁹ See, eg, *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [28], [121] & [139]-[140]; *Companies Act 1862* (UK): ss.127 and 156; *Companies Statute 1864* (Vic): s.LVI; *Companies Act 1974* (NSW): ss.88 & 90.

¹²⁰ See, eg, *Rees v Kratzman* (1965) 114 CLR 63; *Mortimer v Brown* (1969) 122 CLR 493; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1984) 156 CLR 385; *Hamilton v Oades* (1989) 166 CLR 486. Also see *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.

¹²¹ See, eg, *Companies Act 1961* (Vic): ss.173 & 174(3); *Companies Act 1961* (NSW): ss.171(5) & 173(5); *Companies Act 1971* (Vic): s.174(4); *Securities Industry Act 1975* (Vic & NSW): ss.8(1), 18(5), 19(4) & 21(6); *Securities Industry Act 1980* (Cth): ss.8(5), 19(9), 21(1), 23(2) & 30(7); *Companies Act 1981* (Cth): ss.12, 296 & 298(5); *Australian Securities Commission Act 1989* (Cth): s.68; *Corporations Legislation (Evidence) Amendment Act 1992* (Cth): ASIC Act: ss.68(2) & 68(3); *Corporations Act*: ss.597(12) & (12A); *NCCP Act*: s.295. Also see the references at note 129 below.

(i) Importance of the public interest sought to be advanced by exclusion

124 As Australia's corporate, markets, financial services and consumer credit regulator (see paras 8 to 16 above), ASIC has highly important responsibilities for safeguarding Australia's financial system and protecting the financial wellbeing of millions of consumers and investors. There is a strong public interest in ensuring that ASIC has sufficient powers to effectively discharge its demanding responsibilities. For over 150 years it has been recognised that such powers include the ability to compel persons to provide or produce information that may be incriminating (see, eg, paragraphs 37, 38 45, 54, 63-67, 113 & 120-122 above).

125 In 1991 the Parliamentary Joint Committee on Corporations and Securities (**PJCCS**) expressed the following conclusions in relation to ASIC's predecessor, the Australian Securities Commission (ASC), which apply with equal force to ASIC:

The Parliament in establishing the ASC intended to restore, and maintain at a high level, business and community confidence in the operation of the securities market and the management of companies. It was clearly envisaged that the ASC would seek civil remedies where appropriate but would also initiate, through the DPP, criminal prosecutions for breaches of the Corporations Law.

If the constraints placed on the ASC's power to investigate and prosecute (or seek civil remedies) are such as to frustrate the achievement of Parliament's objectives, then there is clearly a need for reform. Providing the ASC with the necessary legal powers is not difficult once the policy objective has been clarified ...

The Committee is aware of the historic development and importance of the right of an individual to remain silent. It would not lightly recommend any erosion of that right. However, the nature and complexity of some types of crime occurring today were unknown over the period that this right was evolving in the common law. This is particularly true of corporate crime.

It has been argued earlier in this report that corporate crime is distinctive as a result of both the legal position of the corporation and the nature of the crime itself. Companies are artificial legal entities occupying a privileged position in that all companies are protected by limited liability and public companies may seek investment from the public. They are creations of the Parliament and the conditions under which they are created and the rules governing their operations are determined by the Parliament. The Committee believes that this privileged position carries with it obligations of accountability which may require the restriction of the rights of those participating in the corporate sector, including the right to remain silent ...

The nature of corporate crime also distinguishes it from 'ordinary' crime. The perpetrators of corporate crimes are generally exploiting the privileged position they occupy; they may be the only people with actual knowledge of the crime; there is no clear victim (in the sense that a victim of theft or assault has some direct knowledge of the crime) and much of the evidence will be in the form of records kept by the perpetrators.

The Committee therefore supports the view that the effective regulation of the corporate sector may include legislative provisions which vary the established common law rights available to the ordinary citizen.¹²²

¹²² Parliament of the Commonwealth of Australia, Parliamentary Joint Committee on Corporations and Securities (**PJCCS**), *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (November 1991), [4.1]-[4.9]. Also see *R v SFO* [1993] AC 1, 35 ("Faced with the myriad opportunities for the concealment of fraudulent activities which companies and trusts provide, Parliament has given the Serious Fraud Office the power to call upon a suspected person to come into the open, and to disclose information which may incriminate him").

126 As this passage illustrates, legislative decision-making in relation to ASIC's information-gathering powers has taken place on a considered basis in full recognition of the competing public interests. It is well established that there is a sufficiently important public interest in the effective performance of ASIC's regulatory and law enforcement responsibilities to warrant exclusion of the privilege against self-incrimination (see paras 139 to 143 below).

(ii) *Extent to which exclusion is expected to benefit the public interest*

127 As acknowledged by the PJCCS (para 125 above), ASIC is responsible for the regulation of highly complex commercial activity that generally takes place behind closed doors and out of sight of independent witnesses or individual victims. The great difficulty in investigating such matters, and crucial need for compulsory information-gathering powers that override the privilege against self-incrimination, has been well recognised for a long time, including by members of the judiciary (see, eg, paras 37, 38 45, 54, 63, 66-67, 113 & 121 above), parliamentarians (see, eg, 139 to 141 below) and experts (see, eg, paras 142 to 143 below).

128 Over 20 years ago a plurality of the High Court (Deane, Dawson & Gaudron JJ) commented that: "The complex corporate structure which the corporate investigator nowadays so often faces makes detecting and prosecuting corporate crime increasingly difficult, and sometimes well-nigh impossible, without access to more effective procedures than the traditional methods such as search and seizure".¹²³ In the same case McHugh J stated:

Corporate conduct is often complex. Assessment of a corporation's conduct may only be possible through an examination of its documents. This is particularly so in cases where the alleged wrong is committed as a result of the failure of a system set up by a corporation. A true understanding of the corporation's procedures is likely to be gained only through evidence from the corporation itself, particularly from its records. The difficulty in obtaining independent evidence against corporations is sometimes exacerbated by the inability to identify a victim of corporate behaviour who can testify. Often, the victim is an "amorphous entity such as a market". Furthermore, corporations are often well equipped to cover up their activities and to fund their defences.¹²⁴

129 Over the past two decades since these comments were made the task of investigating and prosecuting white collar crime has become even more difficult, time-consuming and costly as a result of globalisation and advancements in technology, and the need for powers to compel those with relevant information to provide or produce it has correspondingly increased. The substantial public benefits arising from the utilisation of such powers were identified by La Forest J in *Thompson* (at para 108 above). However, as the High Court has often observed (see paras 54, 63 & 66-67 above), such powers would be rendered relatively valueless or nugatory if they were subject to the privilege against self-incrimination.

(iii) *Whether exclusion mainly affects participants in a regulatory scheme*

130 Persons operating in the corporate, markets, financial services or consumer credit sectors generally enjoy significant privileges as a consequence of being licensed, authorised or registered with ASIC and submitting to the relevant regulatory regime. These persons often occupy positions of great trust in which they engage in dealings and make decisions for or on behalf of others, including vulnerable members of the public. Such positions provide

¹²³ *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 533.

¹²⁴ *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 554 (citations omitted).

extensive opportunities for the commission and concealment of serious wrongdoing, especially fraud, which can cause immense harm to the integrity of Australia's financial system and devastation to individual victims.

- 131 The need to effectively regulate such persons and their activities, along with the justification for excluding the privilege against self-incrimination, has been widely recognised (see, eg, paras 37, 39, 70, 75-76, 83, 113 & 125 above). In *Spedley Securities Ltd v Bond Brewing Investments Pty Ltd* this need and justification were explained by Cole J as follows:

In my opinion, the legislature should give consideration to reform of the law so that persons who are directors, executives or senior employees of companies which either receive money from the public or are public companies in which members of the public are invited to become shareholders by initial subscription or subsequent purchase of shares, should not be permitted to decline to answer questions or claim privilege from incrimination when transactions involving such companies are the subject of investigation by statutory investigatory bodies, or are the subject of civil or criminal proceedings.

The law regarding the right to silence and the right to freedom from self-incrimination evolved long before and was unrelated to the evolution of corporations, or concepts of deposit moneys with or investment by the public in the capital of such companies.

Modern commercial activity now depends to a significant extent upon the willingness of members of the public, including public and private companies, to place funds on deposit with financial institutions which hold licences of various types permitting them to receive moneys from the public. Similarly, people are encouraged to invest in the capital of public companies as a means of achieving an agglomeration of capital which facilitates economic activity which otherwise would not be possible.

The complexities of corporations and their activities, by their nature, mean that the public so investing, cannot know in any detail of the use or destination of their funds, or of the detail of transactions in which companies engage. Normally they do not need to. Management of those funds and of the businesses in which the investment is made, is properly left to the directors, executives and employees of those companies.

However, in circumstances where investigative authorities regard the activities of those companies, or its directors, executives or senior employees, as worthy of investigation because of possible breach of statutory law or proper standards of commercial conduct, it is, in my view, contrary to public interest that such persons, being those with the responsibility for the care of the funds invested by the public or the businesses in which such funds are invested, and being normally the only persons who know or ought to know the circumstances surrounding the application of such funds, or the manner in which businesses in which the public have invested have been conducted and managed, should be able to decline to provide such information either upon the ground that they are not obliged to do so because of a right of silence, or alternatively, upon the ground that to do so may incriminate that person.

In my view, persons who receive moneys of the public, by accepting funds or conducting public companies in which by definition the public are invited to invest, are and should be recognised by the law to be in the nature of fiduciaries who, if called upon, must explain their stewardship ...

In my view, the public interest requires that those receiving moneys of the public, or administering companies in which the public invest, should be obliged to explain transactions and conduct related to such moneys and business transactions. I see no public interest in such persons being able to escape either civil or criminal responsibility, if such exists, because parties injured by the conduct of such persons, or prosecuting authorities on behalf of the community, are unable to establish factual matters which because of the nature of companies, or the conduct of such persons, is known only to such persons. The law, at present, protects the interests of the civil and criminal wrong-doers. It should protect the interests of the investing public.

If there be conflict between the private rights of individuals in the conduct of companies in which the public invest, and the rights of members of the investing public, in my view that

conflict should be resolved in favour of the members of the public. A person who is responsible for the direction or administration of a company in which the public invest can have little cause for complaint if he be obliged to tell the truth regarding the application of funds received from the public, or management of a business on behalf of shareholders.¹²⁵

132 It is submitted that the nature, extent and importance of ASIC's regulatory responsibilities provide a compelling justification for its existing compulsory investigation powers and exclusion of the privilege against self-incrimination (see paras 139 to 143 below).

(iv) Particular nature of the exclusion

133 ASIC's production powers are limited to pre-existing documents relating to regulated entities or activities. Accordingly, in light of the matters referred to in paragraphs 34 to 60 and 75 to 92 above coupled with the nature and importance of ASIC's regulatory responsibilities (including the matters referred to in paras 124 to 132 above), it is submitted that the exclusion of any privilege against self-incrimination or self-exposure to a penalty that might otherwise apply to the production powers involves relatively little encroachment upon traditional rights or freedoms and is readily justified. In addition, this longstanding aspect of ASIC's powers has been specifically reviewed and approved in the past.¹²⁶

134 ASIC acknowledges that the exclusion of the privilege against self-incrimination in relation to its examination powers, and to a lesser extent (in light of the matters referred to in paragraphs 23 to 25 and 88 to 92 above) any privilege against self-exposure to a penalty, involves more significant encroachments upon traditional rights or freedoms that require greater justification. ASIC submits that these exclusions are justified in light of the matters referred to in paragraphs 124 to 132 above and 135 to 146 below.

(v) Extent of compensatory protection

135 Legislatures in Australia have generally not provided either use or derivative use immunity in relation to the contents of "books" (i.e. pre-existing documents relating to regulated entities or activities) compelled from persons pursuant to ASIC's, and its predecessors', production powers.¹²⁷ In light of the matters referred to in paragraphs 34 to 60, 75 to 92 and 124 to 133 above, it is submitted that this longstanding absence of compensatory protection is justified because the privilege against self-incrimination either does not or should not extend to pre-existing documents, especially those relating to regulated entities or activities. In addition, this aspect of ASIC's powers has been specifically reviewed and approved in the past.¹²⁸

136 Australian legislatures have provided some compensatory protection in relation to the following aspects of ASIC's (or its predecessors') compulsory powers:

- statements made by persons at examinations or explanations required to be made by similar powers (**compelled statements**); and
- the fact that a person produced a book in response to a production notice (**act of production**), as opposed to the actual content of the book produced.

¹²⁵ (1991) 4 ACSR 229, 246-247.

¹²⁶ Kluver, *Report on the Review of the Derivative Use Immunity Reforms* (May 1997), 10-14 & 36-37.

¹²⁷ See, eg, the references in paras 54-55, 65-67, 112 & 122 of this submission; Kluver, above n126, 10-14.

¹²⁸ Kluver, above n126, 10-14 & 36-37.

137 The compensatory protection afforded by corporations legislation in relation to these two matters has varied over time and may be generally summarised as follows:

- (a) prior to 1991 use immunity was provided in relation to compelled statements and no immunity was provided in relation to acts of production;¹²⁹
- (b) between 1 January 1991 and 13 May 1992 (inclusive) use and *derivative use immunity* was provided in relation to compelled statements and use immunity was provided in relation to acts of production;¹³⁰
- (c) since 14 May 1992 (when the law was effectively restored to the same state as it was prior to 1 January 1991) use immunity has been provided in relation to compelled statements and no immunity has been provided in relation to acts of production;¹³¹ and
- (d) since 1 January 1991 the immunity provided (when properly claimed) has applied to information tending to incriminate the person or make him/her liable to a “penalty” and immunised information or evidence has generally been inadmissible in criminal proceedings¹³² and proceedings for the imposition of a “penalty”.¹³³

138 The most significant developments in this legislative history are referred to below.

Removal of derivative use immunity in 1992

139 It appears that the expanded compensatory protection referred to in paragraph 137(b) above, including *derivative use immunity*, was introduced without adequate consideration.¹³⁴ After less than a year the Parliamentary Joint Committee on Corporations and Securities (PJCCS) held an inquiry into the relevant provisions. At the inquiry ASIC’s predecessor, the Australian Securities Commission (ASC), and the Commonwealth Director of Public Prosecutions (DPP) submitted that the “practical effect” of the derivative use immunity “is to place insurmountable obstacles in the way of successful prosecutions” and identified a range of problems (along the lines of those identified at paras 103 to 115 above) by

¹²⁹ See, eg, the authorities and legislation referred to or cited in paragraphs 54, 55, 112 of this submission; PJCCS, above n122, [2.4.1]-[2.4.2]; Kluver, above n126, [2.3].

¹³⁰ See, eg, PJCCS, above n122, [1.9]-[1.11], [2.2.4]-[2.3.3]; Kluver, above n126, [2.4]-[2.6].

¹³¹ See, eg, Kluver, above n126, [2.7]-[2.12]; ASIC Act: s.68; NCCP Act: s.295. Also see Corporations Act: s.597(12A).

¹³² The use immunity in relation to statements is necessarily subject to the standard exception that such evidence is admissible in proceedings in respect of the alleged falsity of the statements (e.g. a prosecution under s.64 of the ASIC Act making false statements during an examination): ASIC Act: s.68(3); NCCP Act: s.295(3); Corporations Act: s.597(12A).

¹³³ Prior to *Rich v ASIC* (2004) 220 CLR 129 it was generally considered that orders to merely ban, disqualify or suspend etc. a person from engaging in regulated activity (e.g. cancel a license), without imposing any pecuniary penalty, did not constitute a “penalty” for present purposes, meaning that compelled statements were generally admitted in proceedings in which such orders were sought. However, in that case a majority of the High Court held to the contrary, meaning that compelled statements could no longer be admitted in such proceedings. In 2007 Parliament reversed the effect of this decision by introducing s.1349 of the Corporations Act, which, among other things, provides that the use immunity afforded in relation to compelled statements under s.68(3)(b) of the ASIC Act does not extend to a specified range of such proceedings. In the Minister’s Second Reading Speech this reform was described as follows (emphasis added): “In support of ASIC’s important enforcement work in this area, **the government will legislate to restore the longstanding position that the privilege against exposure to a penalty does not apply in proceedings where ASIC is seeking disqualification or banning orders and no other penalty.** Banning and disqualification orders, and orders to cancel or suspend a licence under the Corporations Act, are important tools for deterring corporate misconduct. They serve a protective function, by allowing the removal of unwanted participants from the market. One of their main benefits is that they allow for an expeditious response to corporate misconduct. This reform will provide significant assistance to ASIC’s work in discouraging company misconduct, including unlawful ‘phoenix company’ activity”: House of Representatives, Parliamentary Debates, 8 August 2007, *Corporations Amendment (Insolvency) Bill*.

¹³⁴ PJCCS, above n122, [2.3.1]-[2.3.3] & [4.12].

reference to specific examples.¹³⁵ ASC and the DPP submitted that the provisions should be amended to remove derivative use immunity in relation to compelled statements and use immunity in relation to acts of production (thereby effectively restoring the law the same state as it was prior to 1 January 1991) and the PJCCS agreed, stating:

The Committee is concerned that the behaviour of the corporate sector in Australia in the 1980's adversely affected the confidence of both Australian and foreign investors and the efficiency of Australia's capital markets. In part this resulted from the inability of regulatory authorities to enforce the law effectively ...

The current legislation was enacted with the clear intention of correcting this problem. To do so requires that the ASC has both the necessary resources and investigatory powers. The Committee accepts the evidence of the ASC that the immunity applying to the [act of producing] documents and the derivative immunity applying to oral evidence curtail the ASC's investigatory powers to an extent that seriously limits its capacity to discharge the responsibilities placed on it by the Parliament.

The ASC's investigative power has been described as:

a poisoned chalice – since you get the investigative power and if you use it you kill your ability to bring a criminal action in some cases ...

The increased protection granted to witnesses before ASC investigations (when compared with the Companies Code) was not addressed during Parliamentary debate on the Corporations Law. The Joint Select Committee on Corporations Legislation did consider the issue however its conclusion and recommendation were not consistent and no changes to that part of the bill resulted ...

The Committee is persuaded that, in all the circumstances, the difficulties facing the ASC and DPP and affecting the standing of Australia's capital markets justify ... immediate action ...

The ASC/DPP submission seeks two changes to the legislation; the removal of the derivative use immunity [applying to compelled statements] and the use immunity applying to the fact that a person has produced a document. *The latter change is relatively minor.* It removes the difficulty of having to prove by other means that a person had the document in their possession and provided it to the ASC at a hearing.

The removal of derivative use immunity [in relation to compelled statements] is a major step ... Chapter 3 of this report summarised the difficulties that the derivative use provisions impose on the ASC. The Committee accepts that the ASC is not giving undue emphasis to the pursuit of criminal prosecution over civil action nor exaggerating the difficulties it faces in working within the legislation ...

The Committee therefore recommends that section 597(12) of the Corporations Law and section 68(3) of the Australian Securities Commission Law be amended to remove the derivative use immunity provisions and that section 68(3) also be amended to remove the use immunity with regard to the fact that a person has produced a document.¹³⁶

- 140 The PJCCS's recommendations were accepted and the requisite amendments (**1992 amendments**) were made by the *Corporations Legislation (Evidence) Amendment Act 1992*, which commenced on 14 May 1992. The accompanying Explanatory Memorandum stated:

The proposed amendments ... arise from practical experience of the operation of the present provisions in the national scheme legislation for companies and securities which relate to the abrogation of the privilege against self-incrimination. Serious difficulties in investigations and prosecutions have been caused by the compensatory provision that neither a person's self-incriminatory statements, nor the signing of a record nor the fact of having produced a book

¹³⁵ PJCCS, above n122, [1.12]-[1.18] & [3.1]-[3.10.3].

¹³⁶ PJCCS, above n122, [4.10]-[4.20].

("use immunity"), nor any information or material derived from, or obtained as a result of, these statements or actions ("derivative use immunity") are admissible in evidence against the person in criminal proceedings and other proceedings for the recovery of a penalty.

The major problems are caused by:

- the derivative use immunity which places an excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that any item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity; and
- that aspect of the use immunity which prevents the admission into evidence of the fact that a person, having claimed that to do so might tend to be self-incriminatory, has produced a book (which is broadly defined to include virtually all business-related records) ...

The proposed amendments ... provide for the removal of the derivative use immunity available to witnesses giving evidence under compulsion in investigations under that Act, and, for witnesses who have produced a document under a claim of potential self-incrimination, of the use immunity currently available in relation to the fact of production ...

*The proposed amendments are required to ensure that effective investigation and prosecution of corporate offences is not hindered by inappropriate evidentiary requirements in the particular circumstances of corporate crime ...*¹³⁷

141 In the accompanying Second Reading Speech the Attorney-General elaborated as follows:

The purpose of this Bill is to remove certain immunities available to witnesses under the Australian Securities Commission, ASC, law and the corporations law. The need for the legislation arises from difficulties encountered by the Australian Securities Commission in investigating complex corporate frauds, to which I shall refer shortly.

At the outset, however, it is necessary to understand the background against which the issues addressed in this Bill arise. *It has been an established rule of the common law, since the seventeenth century, that a person cannot be compelled to incriminate himself, and may refuse to answer any question, or produce any document or thing, which may put him at risk of conviction. This rule arose out of the principle, fundamental to our system of justice, that the Crown must prove the guilt of accused persons, rather than allow the Executive to require suspects to convict themselves out of their own mouths.*

In various circumstances, however, legislatures have recognised that the intended purpose of a statute may only be achieved by either limiting or abrogating this privilege against self-incrimination. The superseded cooperative scheme companies legislation, which preceded the current national scheme legislation, was such a case. Under that scheme the National Companies and Securities Commission could conduct examinations in which the common law privilege against self-incrimination was excluded by legislation. In return, the legislation provided an immunity, known as the 'use immunity' which prevented answers which tended to be self-incriminatory from later being used in evidence against a person in criminal proceedings or proceedings for the imposition of a penalty ...

The Australian Securities Commission and the Director of Public Prosecutions, the agencies responsible respectively for investigating and prosecuting corporate fraud, have been experiencing serious problems in bringing effective prosecutions as the 'use immunity' prevents the admission of evidence of the fact that a particular person produced a particular document, and the 'derivative use immunity' protects evidence gained as a result of answers to questions ...

Another problem arising from the application of the provisions is that complex cases involve the admission into evidence of hundreds, even thousands, of documents, all or many of which

¹³⁷ Explanatory Memorandum, *Corporations Legislation (Evidence) Amendment Bill 1992*, pp.1-2 (emphasis added).

may be challenged by the defence on the grounds of derivative use immunity. This has the potential to make cases extremely lengthy and costly.

Finally, because the fact that a person has produced a document is not admissible against the person, the link between the person's original possession of the document and its introduction into evidence against the person is broken. This may mean that the person escapes conviction because an essential link in the chain of evidence is missing.

In developing the new corporations and securities legislation the aim was to balance the conflicting interests of efficient business, shareholders and creditors, civil liberties and effective law enforcement, so as to achieve a workable result.

The law as it stands at present fails to take adequate account of the difficulties faced by the ASC and the DPP, the bodies responsible for effectively investigating and prosecuting corporate crime. The practical position is that the ASC cannot use its powers to investigate certain suspected criminal activity. The problems of proof created by the derivative use immunity and the immunity for the fact of a person signing a record or producing a document are affecting its role in corporate law enforcement.

The issue was recently re-examined by the Parliamentary Joint Committee on Corporations and Securities which, in its report tabled on 15 November 1991, recommended the removal of the derivative use immunity from the national scheme, together with the use immunity with regard to the fact that a person has produced a document ... *These recommendations followed the recognition that the availability of full use-derivative use immunity is threatening to defeat the purpose of significant portions of the corporations legislation.*

This Bill adopts these recommendations by removing the derivative use immunity from subsection 68(3) of the Australian Securities Commission Act 1989 ... It removes the immunity in respect of the fact that a person had produced a document from subsection 68(3) of the Australian Securities Commission Act 1989 ...

The Government is committed to the objective of ensuring that the law cannot be used to protect from prosecution those individuals who direct corporate activity and who have breached the law. I believe that the solution represented by the Bill appropriately balances the competing interests of civil liberties inherited from centuries of the common law and fundamental to our system of criminal justice, with the responsibility of the Government to ensure that the laws of the Parliament are properly enforceable.

*Effective corporate regulation in Australia requires legislation with teeth, in the form of criminal provisions which can be enforced. The Australian community expects corporate malfactors to be exposed to the full ambit of the criminal justice system, not shielded from it by legislation, and that is the intention of the amendments contained in this Bill.*¹³⁸

The Kluver review

142 Section 10 of *Corporations Legislation (Evidence) Amendment Act 1992* required the Minister to appoint a suitably qualified and appropriate person to review the operation of the amended provisions after 4.5 years and prepare a report addressing specified issues. In March 1997 Mr John Kluver was appointed and in May 1997 he completed his report. It contains a resounding endorsement of the 1992 amendments, particularly the removal of derivative use immunity, and includes the following specific conclusions:

The amendments have greatly assisted the ASC in its enforcement of the national scheme laws, primarily by increasing [its] ability to more fully and expeditiously utilise its power to conduct compulsory oral examinations. Under the provisions in force from January 1991 to May 1992 the ASC was hampered in using this power, to avoid giving some examinees scope to immunise themselves against criminal prosecution through their disclosures.

¹³⁸ House of Representatives, *Parliamentary Debates*, 26 February 1992, pp.190-193 (emphasis added).

The amendments have also assisted the ASC in initiating early injunctive or other civil protective proceedings to preserve assets or otherwise limit or reduce the financial harm arising from suspected wrongdoing.

The amendments have helped the ASC to conduct and conclude many of its investigations. Early use of the oral examination power considerably shortens investigations and expedites civil remedial proceedings. These goals may not have been achievable if the amended provisions had not been implemented, given that the effect of the law was to considerably slow down some investigations, particularly in their early stages.

The amendments have reduced the ability of examinees to exclude the admission into evidence against them, in criminal or civil penalty proceedings, of some information derived from their compulsory examination by the ASC. However, *those changes have not led to these persons being unjustifiably prejudiced*. Also, there are adequate internal and external controls to protect examinees from any improper use of the ASC's examination powers ...

An examinee should not be permitted to lawfully invoke the privilege against self-incrimination or exposure to a penalty to refuse to answer questions at an ASC examination.

The current obligation on examinees to answer questions, coupled with a direct use immunity for answers ... should remain at this stage. Conversely, to restore the provisions that were repealed under the Amendment Act 1992 would most likely decrease the level of effective corporate regulation, increase the costs of investigation and enforcement and in some instances prevent the criminal prosecution of corporate malfeasance ...

*The current law should remain, whereby no person is entitled to refuse to produce a document to the ASC on the grounds of self-incrimination or exposure to a penalty, with no direct use or derivative use immunity applying to the contents of those documents or the fact of their production.*¹³⁹

143 The Kluver report elaborates on the problems with derivative use immunity as follows:

Derivative use immunity goes much further than the common law privilege [against self-incrimination]. It enables an examinee, in answering questions or making statements, to quarantine a potentially large amount of evidence against him or her. This outcome is not possible merely through exercise of any right to refuse to answer questions ...

The direct use immunity ensures that the ASC investigators cannot force an admissible confession from examinees. To provide a wider immunity may seriously undermine the effectiveness of the investigation and enforcement provisions of the national scheme laws ...

Re-introduction of the derivative use immunity in the national scheme laws, far from being a proper and balanced counterweight to the ASC's compulsory information-gathering powers, would give some examinees a forensic advantage far in excess of what was ever contemplated under the common law privilege and which could be perceived as amounting to unjustified special treatment for suspected white collar criminals.

The investigation methods that the ASC would have to employ to counter these consequences could fundamentally prejudice its ability to discharge its statutory responsibilities to enforce national scheme laws, both criminally and civilly, in an efficient, effective and time manner for the public good.¹⁴⁰

144 The matters referred to in paragraphs 135 to 143 above convincingly demonstrate the adequacy (if not optimal nature) of the compensatory protection provided for exclusion of the privilege against self-incrimination in relation to ASIC's main compulsory investigation powers. They also reinforce the more general matters stated in paragraphs 93 to 116 above.

¹³⁹ Kluver, above n126, 1-3.

¹⁴⁰ Kluver, above n126, 29-32.

(vi) Procedural safeguards

145 The following important procedural safeguards apply in relation to ASIC's examination powers:

- ASIC may only issue a notice to a person (**examinee**) requiring him or her to attend an examination where it has reasonable grounds for suspecting or believing that the examinee can give information relevant to a matter ASIC is investigating.¹⁴¹
- The notice must be in a prescribed written form that sets out the general nature of the matter ASIC is investigating and includes a prescribed statement of the examinee's rights and obligations, including an explanation of the process that needs to be followed to receive the available compensatory protection (i.e. use immunity).¹⁴²
- An examinee is entitled to have his or her lawyer present at the examination.¹⁴³
- An examinee is only required to answer questions that are relevant to a matter that ASIC is investigating.¹⁴⁴
- An examination must take place in private.¹⁴⁵
- An examinee is entitled to receive a copy of a record of the examination.¹⁴⁶
- Judicial review is available in respect of examination decisions made by ASIC.

146 These safeguards provide significant practical protection to examinees from unjustifiable invasions of privacy, abusive questioning and other potential forms of ill-treatment, some of the traditional concerns underpinning the privilege against self-incrimination. Accordingly, they assist in justifying exclusion of the privilege.¹⁴⁷

¹⁴¹ ASIC Act: s.19(1); NCCP Act: s.253(1).

¹⁴² ASIC Act: s.19(2) & (3); *Australian Securities and Investments Commission Regulations 2001* (Cth): reg 4 & sch 1, form 1; NCCP Act: s.253(2) & (3); *National Consumer Credit Protection Regulations 2010* (Cth): reg 32 & sch 1, form 1.

¹⁴³ ASIC Act: s.23; NCCP Act: s.257.

¹⁴⁴ ASIC Act: s.21(3); NCCP Act: s.255(1).

¹⁴⁵ ASIC Act: s.22; NCCP Act: s.256.

¹⁴⁶ ASIC Act: s.24; NCCP Act: s.258.

¹⁴⁷ PJCCS, above n122, [4.18]; Kluver, above n126, [322].

Client Legal Privilege

147 There are no current Commonwealth laws that abrogate client legal privilege specifically for ASIC's activities.

148 ASIC accepts that client legal privilege is a general principle of the common law¹⁴⁸ and has accepted the generally advanced rationale for the privilege. As ASIC previously submitted to the ALRC inquiry *Privilege in Perspective: Client Legal Privilege in Federal Investigations*:

Although client legal privilege embodies a private 'right', its principal rationale is that it serves the public interest by promoting the effective administration of justice by encouraging clients to seek legal advice and communicate frankly with their lawyers. Doing so promotes compliance with the law, reduces the incidence of and encourages earlier and more effective resolution of legal disputes.¹⁴⁹

149 Indicative of ASIC's approach to claims for client legal privilege is ASIC Information Sheet 165.¹⁵⁰

150 There are competing interests between the policy behind client legal privilege and the desirability, in a number of varied circumstances, of obtaining access to all potentially relevant information, including privileged communications. This is captured in Chapter 11 of the Issues Paper.

151 ASIC accepts that client legal privilege can, by legislation, be modified or abrogated.¹⁵¹ There are also a number of common law exceptions to the privilege and the categories of exception are not closed.

152 While there are various rationales for these exceptions their tenor is generally captured by the passage of Gibbs CJ in *R v Bell: Ex parte Lees*:

The privilege, which arises only because the public interest requires it, does not exist when it is seen that it would be contrary to a higher public interest to give effect to it.¹⁵²

153 Articulating principles or criteria to determine whether a law which abrogates privilege is justified requires, in advance of given fact situations, the comparative ranking of various strata of public interest. What would then be left (assuming the privilege is otherwise properly made out) would be decisions by courts, resolving, in specific instances, competing public interests. Such public interests include that all relevant information should be available to a court and to government agencies conducting investigations.

154 ASIC's investigations into contraventions of the corporations law and the carrying out of ASIC's functions generally can be, and have been, impacted by claims of client legal privilege. These claims prevent (or, even if unsuccessful, at the very least delay¹⁵³) access by ASIC to material that may otherwise facilitate an expeditious and thorough investigation,

¹⁴⁸ *Baker v Campbell* (1983) 153 CLR 52, 117 per Deane J.

¹⁴⁹ Submission LPP 70, 29 June 2007.

¹⁵⁰ <http://www.asic.gov.au/about-asic/asic-investigations-and-enforcement/claims-of-legal-professional-privilege/>.

¹⁵¹ A stark example of this is the *James Hardie (Investigations and Proceedings) Act 2004* (Cth), which abrogated privilege in relation to certain material, allowing its use in investigations of the James Hardie Group and any related proceedings.

¹⁵² (1980) 146 CLR 141. See also *Attorney-General for the Northern Territory v Kearney* (1985) 158 CLR 500, 532.

¹⁵³ An instance of such delay is set out in paragraph 11.18 of the Issues Paper.

the results of which would inform subsequent, likely more speedy, action, to be taken by ASIC.

155 Litigating claims of client legal privilege, if necessary, is also costly. In ASIC's experience, persons of interest to ASIC have refused to disclose the content of communications in an attempt to claim client legal privilege. In essence:

The effect of a successful claim for privilege is often that information which may be vital and relevant to the proper administration of justice is suppressed.¹⁵⁴

156 In its 2008 report, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (ALRC Report 107), the ALRC made 45 recommendations relating to the abrogation and modification of client legal privilege in federal investigations.

157 Recommendation 8-3 of ALRC Report 107 proposes a mechanism governing the making and handling of privilege claims in federal investigations. Relevantly, this requires the person making the claim:

- (a) specifying the grounds on which client legal privilege is claimed;
- (b) describing the facts relied upon as giving rise to the claim;
- (c) providing details of the documents sufficiently to enable the document or bundle to be identified including:
 - (i) the nature of the document and the type of communication; and
 - (ii) the names and positions of the authors and recipients of the communications;
- (d) providing the particulars of the privileged documents and the basis for the claims on oath or affirmation, if an agency requests this information; and
- (e) providing details of the date, time, parties to, location and means by which the communication took place, where the claims are made in respect of oral communications.

158 The ALRC also recommended that if a person is legally represented in the investigation or has otherwise received legal advice in relation to making a claim for privilege, the person's lawyer is to certify that having reviewed the documents the subject of a privilege claim, that in his or her opinion, based on the client's instructions, there are reasonable grounds for the making of the claim. An agency may request such certification by a lawyer in the absence of requesting particularisation of the communications over which privilege is claimed.

159 ASIC supports the mechanism proposed in recommendation 8-3, which has not yet been implemented. An efficient and uniform mechanism across federal bodies would be a significant step towards reducing the delay to investigations when dealing with claims of client legal privilege. This mechanism would also prevent persons from making unsubstantial claims of client legal privilege in an attempt to delay or frustrate an investigation.

¹⁵⁴ McNicol, "Implications of the Human Rights Rationale for Legal Professional Privilege – The Demise of Implied Statutory Abrogation" in Mirfield & Smith (eds), *Essays for Colin Tapper* (2003) 48 at 65.

Procedural Fairness

- 160 ASIC agrees with the proposition stated at paragraph 14.19 of the Issues Paper that in some circumstances, urgent action to prevent a greater harm is a justification for limiting procedural fairness. While the Issues Paper gives as an example harm of a physical nature, Parliament has long accepted that limitations are also appropriate to prevent financial loss or to protect the integrity of financial markets.
- 161 There are limitations to procedural fairness of this kind in the Corporations Act and the NCCP Act. For example:
- (a) Section 915B of the Corporations Act enables ASIC to suspend or cancel an Australian financial services licence without first providing procedural fairness where, among other things, 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. In other, less serious, circumstances, ASIC is specifically required to afford procedural fairness by way of a hearing before suspending or cancelling a licence (see, eg, s.915C of the Corporations Act). There are corresponding provisions in the NCCP Act.
 - (b) Section 739 of the Corporations Act enables ASIC to issue "stop orders" (i.e. orders prohibiting offers of securities where the relevant disclosure document or associated advertisement is defective in a relevant way) without first providing procedural fairness where ASIC considers any delay in making the order would be prejudicial to the public interest. Such an interim order can be in effect for up to 21 days. A hearing has to be held to make an ongoing order or to make an order in circumstances where ASIC does not consider that any delay would be prejudicial to the public interest. There is a corresponding provision in s.1020E of the Corporations Act that applies in relation to financial products that are not securities.
- 162 Provisions of this kind in legislation administered by ASIC are the exception rather than the rule. For the most part, that legislation is silent on the question and, consequently, procedural fairness is required in accordance with the established principles.

Delegating Legislative Power

- 163 ASIC agrees with the proposition stated at paragraph 15.12 of the Issues Paper that delegation of legislative power is both legitimate and desirable:
- (a) if it saves pressure on Parliamentary time; or
 - (b) where the primary legislation would be too technical or detailed; or
 - (c) where the legislation must deal with rapidly changing or uncertain situations.
- 164 The nature of the laws that ASIC administers—laws dealing with consumer protection and business facilitation (principally reflected in the Corporations Act and the NCCP Act)—are such that it would be impossible for primary legislation dealing with that subject matter to satisfactorily accommodate every circumstance currently known and that may arise in the future. These Acts regulate, among other things, the provision of financial services, the provision of credit to consumers and the operation of financial markets. These sectors of the Australian economy are complex and subject to constant innovation. Without delegated legislative power, primary legislation would be unable to anticipate and respond in a timely way to the challenges and issues raised by these sectors.
- 165 Furthermore, where ASIC exercises delegated legislative power in a way that affects a class of persons (i.e. has a broad impact), the instrument will be a legislative instrument and is required to be registered under the *Legislative Instruments Act 2003*. As part of that process, ASIC is required to engage in appropriate consultation before making such an instrument, ASIC must explain in an Explanatory Statement the justification for making the instrument, the instrument is subject to disallowance (repeal) by either House of Parliament during a disallowance period and the instrument will expire by operation of law after 10 years (unless earlier repealed or earlier ceasing to have effect according to its terms).

Judicial Review

166 ASIC considers that restrictions on access to judicial review (including on questions of whether there has been a jurisdictional error) are justified where:

- (a) the potential harm from setting the decision aside outweighs the public interest in ensuring that the relevant power was properly exercised; and
- (b) the potential harm from the delay that is likely to be occasioned by the review process outweighs the public interest in ensuring that the relevant power was properly exercised; and appropriate remedies are otherwise available.

167 In regard to the former, s.1274(7A) of the Corporations Act provides that a certificate of registration of a company issued by ASIC is conclusive evidence that all requirements of that Act for the registration have been complied with and the company was duly registered on the date specified in the certificate. A conclusive certificate provision of this kind has been a long standing feature of company law in Australia (and elsewhere). The rationale for provisions of this kind is to avoid the problems attendant with dealing with transactions and legal relationships purportedly entered into by a company which is later found to have never existed or whose existence is suddenly ended as a result of a judicial review decision. The need for certainty about the existence of artificial legal entities is not controversial.

168 In regard to the latter, s.659B of the Corporations Act precludes people other than ASIC (and various officers/agencies of government) from commencing court proceedings (other than proceedings under s.75(v) of the Constitution), among other things, seeking the review of a decision under the Act in relation to a takeover bid, before the bid has concluded. While the bid is on foot:

- (a) the Takeovers Panel is empowered to decide whether there has been unacceptable conduct (essentially conduct that contravenes certain principles about takeover bids whether or not there has been a contravention of the law) and, if so, to provide remedies;
- (b) the decisions of the Takeover Panel relating to unacceptable conduct are subject to the Panel's appeal processes; and
- (c) the Takeovers Panel is also empowered to (merits) review relevant decisions taken by ASIC.

169 The rationale for this regime is to prevent "tactical litigation" being used to frustrate hostile takeover bids; and to ensure that the Takeovers Panel (essentially a peer review body) is the main forum for resolving disputes about takeovers.¹⁵⁵

170 The Explanatory Memorandum introducing the regime further explained:

This will allow takeover disputes to be resolved as quickly and efficiently as possible by a specialist body largely comprised of takeover experts, so that the outcome of the bid can be resolved by the target shareholders on the basis of its commercial merits. Other benefits of an

¹⁵⁵ See, eg, Treasury, *Takeovers Corporate control: a better environment for productive investment Corporations Law Economic Reform Program Proposals for reform: Paper No 4* (1997).

effective panel for dispute resolution include the minimisation of tactical litigation and the freeing up of court resources to attend to other priorities.¹⁵⁶

171 This regime has been in place for over a decade and is generally regarded as working effectively.

172 However, in noting the above, sections 1274(7A) and 659B are very much the exception. Decisions by ASIC under the legislation which it administers are generally subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, s.39B of the *Judiciary Act 1903* and ss.1337B and 1337D of the *Corporations Act*.

¹⁵⁶ Explanatory Memorandum, *Corporate Law Economic Reform Program Bill 1998*.

Further information

- 173 ASIC recognises the importance of traditional rights and freedoms and supports the ALRC's 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 raised in the Issues Paper.