# Submission to ALRC Freedoms Inquiry (in response to the Interim Report)

I’m a Professor at Melbourne Law School. I previously made a submission (#2 in your list) in response to this Inquiry’s Issues Paper, examining various criminal process rights.

This submission is narrower. It responds to the query raised at the end of Chapter 12 of the Interim Report: “The ALRC is interested in comment as to whether further review of the use and derivative use immunities is necessary.” Presumably, ASIC and I will duke it out on this one again, but perhaps some enforcement agencies will join the party.

## Federal laws that limit derivative use immunity

My first point is that we are talking here about a lot of laws, covering a lot of subjects, many quite central to the federal regulatory sphere and Australian life.

The Interim Report identifies the following laws as limiting the privilege against self-incrimination and not providing derivative use immunity:

* *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 54
* *Australian Crime Commission Act 2002* (Cth) s 30
* *Australian Federal Police Act 1979* (Cth) ss 40A, 40VG, 40VE and 40L
* *Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 21, 30, 31, 33
* *Australian Security Intelligence Organisation Act 1979* (Cths 34L
* *Aviation Transport Security Act 2004* (Cth) s 112
* *Bankruptcy Act 1966* (Cth) s 81(11AA)
* *Competition and Consumer Act 2010* (Cth) ss 133E, 135C, 151BUF, 154R, 155(7), 155B, 159
* *Corporations Act 2001* (Cth) s 597(12)
* *Defence Trade Controls Act 2012* (Cth) ss 44, 57
* *Dental Benefits Act 2008* (Cth) s 32E
* *Income Tax Assessment Act 1936* (Cth) s 264 (now Division 353 of the Schedule to the *Taxation Administration Act 1953* (Cth)
* *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 80, 96
* *Mutual Assistance in Business Regulation Act 1992* (Cth) s 14
* *National Consumer Credit Protection Act 2009* (Cth) s 295
* *Ombudsman Act 1976* (Cth) s 9
* *Parliamentary Service Act 1999* (Cth) ss 65AC, 65AD
* *Private Health Insurance Act 2007* (Cth) s 214.15
* *Proceeds of Crime Act 2002* (Cth), 39A, 206
* *Public Service Act 1999* (Cth) ss 72C, 72D
* *Quarantine Act 1908* (Cth) s 79A
* *Retirement Savings Accounts Act 1997* (Cth) s 120
* *Superannuation Industry (Supervision) Act 1993* (Cth) ss 130B, 287, 290, 336
* *Veterans’ Entitlements Act 1986* (Cth) s 129

That’s a lot of laws, right? About 25 different statutes, many quite important. But there’s more.

My own submission to the Issues Paper identified a further 15 (all concerned only with oral answers from natural persons):

* *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, ss. 150, 167/9, 202/205
* *Autonomous Sanctions Act 2011*, s, 22
* *Banking Act 1958*, s. 52F
* *Charter of the United Nations Act 1945*, s. 33
* *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, s. 461.15
* *Customs Act 1901*, ss. 183Q, 214B
* *Dairy Produce Act 1986*, s. 113
* *Export Inspection and Meat Charges Collection Act 1985*, s. 10
* *Foreign Acquisitions and Takeovers Act 1975*, s. 36
* *Historic Shipwrecks Act 1976*, s. 10
* *Inspector-General of Intelligence and Security Act 1986*, s. 18
* *Insurance Act 1973*, ss. 38F, 56, 62D, 115AB
* *Interstate Road Transport Act 1985*, s. 45
* *Life Insurance Act 1996*, s. 156F
* *Liquid Fuel Emergency Act 1984*, s. 30

Some of these are pretty important laws too. And I bet there are others. For instance, there’s also the *Royal Commissions Act 1902* s6A, which doesn’t expressly provide for any immunity.

Everyone agrees that these laws limit the common law right against self-incrimination. So, the question for the ALRC is: in its review of federal laws that limit common law rights, should it take a closer look at the justification for forty federal statutes, many in major parts of federal law (like crime, spying, bankruptcy, consumer law, tax, public service, customs and banking), that clearly limit a common law right? In my view, the number and variety of laws is a reason in and of itself to conduct a review of their compatibility with an important common law right. Of course, I realise that the ALRC doesn’t have the luxury of time or resources. But if that’s a barrier to review, then the ALRC should clearly say that and recommend that the review should happen later, rather than simply finding some justification for not doing a review.

## Past reviews of derivative use immunity

The only plausible justification for not doing a review is if the issue of derivative use immunity in these federal laws has been adequately covered in previous reviews. The answer is: no.

The Interim Report identifies three earlier reviews:

* Joint Statutory Committee on Corporations and Securities, *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (1991)
* J Kluver, *Report on Review of the Derivative Use Immunity Reforms* (1997)
* Queensland Law Reform Commission, *Report No. 59: The Abrogation of the Privilege Against Self-Incrimination* (2004)

An obvious point to note is that the first two of these inquiries related exclusively to just two of the above federal provisions (in the ASIC and Corporations Acts), while the third was concerned with Queensland laws. Closer inspection of the first two reviews reveals that they fell well short of the standards of modern law reform

The first inquiry was a four month self-referred inquiry conducted nearly 25 years ago by a parliamentary committee with responsibility for corporations law, the first ever inquiry done by that Committee. The 10-member Committee (4 with legal training) wrote to 50 stakeholders received 13 submissions, heard from 8 witnesses and produced a 29 page report. The Committee characterised the issue of derivative use immunity as ‘in essence a policy question’ and that ‘[p]roviding the ASC with the necessary legal powers is not difficult once the policy objective has been clarified.’[[1]](#footnote-1) While the Committee confessed that it ‘would have preferred to have seen the existing legislation tested in the courts rather than relying on legal opinions about the interpretation of the legislation and its impact on ASC investigations’, it was nevertheless ‘persuaded that, in all the circumstances, the difficulties facing the ASC and DPP And affecting the standing of Australia’s capital markets justify more immediate action.’[[2]](#footnote-2) The majority recommended amendments ‘to remove the derivative use immunity’ from the ASIC and Corporations Acts, but with a five-year sunset clause.[[3]](#footnote-3) Two MPs (a Labor ex-barrister, a Liberal ex-company director) dissented.[[4]](#footnote-4) The resulting legislation removed the immunities without any sunset clause.[[5]](#footnote-5)

The second inquiry, conducted over 18 years ago, was the result of a clause inserted in place of the sunset clause, requiring that the Minister ‘cause a person’ to conduct a review of the amendments within five years of their passage in 1992, who must be ‘suitably qualified and appropriate’ and to ‘provide a reasonable opportunity for members of the public to make submissions’.[[6]](#footnote-6) The reviewer, appointed by the Parliamentary Secretary to the Treasurer, was John Kluver, the Executive Officer of the Corporate Markets and Advisory Committee from 1989 until that committee’s recent abolition this year, and who had written an article five years earlier describing the abolition of derivative use immunity in ASIC investigations as ‘undoubtedly the single most profound change to this process since the inception of national scheme laws.’[[7]](#footnote-7) Kluver was given exactly two months to conduct his review.[[8]](#footnote-8) He advertised in 2 newspapers, received 8 submissions, heard from no witnesses and produced a 60 page report (with quite large font and margins, and just 10 pages assessing derivative use immunity, as opposed to further issues referred for review.) The report (which was required to be tabled in parliament for 15 days) is not available online and seems to be only available in government and university libraries. In it, Kluver wrote that his ‘policy approach’ would be to assess the reforms ‘against the need to achieve a satisfactory and workable balance between the interests of persons subject to ASC investigations and the public interest (including that of the investing public, creditors or corporations and the integrity and reputation of Australia’s financial markets.)’[[9]](#footnote-9) His analysis relied heavily on submissions from the regulator and prosecutors and took the unexplained stance that ‘[d]erivative use immunity goes much further than the common law privilege’.[[10]](#footnote-10) His two paragraph conclusion found that derivative use immunity ‘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’.[[11]](#footnote-11) Noting the significance of ‘the ASC’s own commercial market research’ that revealed a ‘clear public expectation… that the Commission’s investigative powers should be harnessed to achieve expeditious corporate law enforcement’, he recommended against reintroducing derivative use immunity.[[12]](#footnote-12)

In short, both of these inquiries were short, received only a small number of submissions, were entirely focused on and founded upon issues relating to corporations law, were conducted by politicians or ad hoc appointees by politicians, and were conducted along pragmatic, rather than human rights, lines. The first inquiry’s recommendation was made on an urgent basis without independent legal advice, while the second was a ‘quick and dirty’ review resting on the unexplained and assumption that derivative use immunity is not required by the common law. To the extent that these decades-old reviews count at all as ‘procedural’ justifications, they are obviously (and expressly) limited to just two of the forty or more current federal laws.

By contrast, the third inquiry, in 2004, was a classic exercise in law reform, the only one to date on this issue. The 7-member Queensland Law Reform Commission took 2 years to conduct its review and produced both a Discussion Paper and a final Report, respectively over 200 and 100 pages (although the reports covered many other issues than immunity.) It received 13 submissions, all apparently from Queenslanders. The report’s discussion of derivative use immunity cited 4 submissions (including two from government departments) in favour of derivative use immunity (for at least some legislation) and none against,[[13]](#footnote-13) but also noted Kluver’s speculation in 1997 that examinees might deliberately incriminate themselves in order to gain immunity at later prosecutions.[[14]](#footnote-14) In a two-paragraph discussion and without further explanation, the report recommended that derivative use immunity ‘should not be granted unless there are exceptional circumstances to justify the extent of its impact.’[[15]](#footnote-15)

The question for ALRC is whether this single instance of law reform from just one Australian jurisdiction, combined with the routine parliamentary scrutiny (generally) given to self-incrimination issues, is enough. I don’t think it is. As well, as I will now outline, all of the reviews to date have posed a false choice between two fictions: the fiction of ‘use immunity’ and a fictitious view of derivative use immunity.

## The fiction of ‘use immunity’

Here’s how ‘use immunity’ works:

“I’m going to ask you a question that you must answer. I have good news and bad news. The good news is: no-one can use your answer against you in court. The bad news: my question is ‘Please tell me where I can find evidence that someone can use against you in court.’ You can’t refuse to answer, or you’ll go to jail. You can’t lie, or you’ll go to jail. If you tell me where the evidence is, your prosecutor will use it to send you to jail.”

In short, use immunity is useless. That is, except in cases where the only evidence against a criminal suspect is in his or her head, use immunity provides no protection against compelled self-incrimination. When law enforcement agencies argue in favour of use immunity, what they are really arguing in favour of is no protection against self-incrimination at all. What they want is the power to place people they question in the very ‘cruel trilemma’ (contempt, perjury or incrimination) that the privilege against self-incrimination is meant to avoid. Maybe they’re right in arguing that the privilege against self-incrimination is an archaic, silly and inconvenient protection. Many people have argued that for centuries. But at least all of those people were up front that they were arguing in favour of abolishing the privilege altogether. Alas, not in Australia.

Instead, in Australia, the question has typically been framed as a choice between ‘levels’ of immunity, implying that both offer some genuine protection against compelled self-incrimination. The argument then proceeds by process of elimination: derivative use immunity is horrible and unworkable and over-protective, so that leaves use immunity. None of the inquiries addressed how use immunity is actually supposed to work. It’s only in the last two years that the High Court has noticed that use immunity (without additional protection) allows investigators to discard fundamental features of the the accusatorial justice system (for example, questioning people currently facing charges about those charges, or providing transcripts of compelled questioning to that person’s prosecutors as they prosecute.) The Court responded by developing a new ‘companion’ principle to the privilege against self-incrimination and the Australian parliament responded to that by rejecting that principle when it comes to Australian Crime Commission and Law Enforcement Integrity Commission investigations. The constitutionality of that rejection is yet to be determined by the High Court. (I wouldn’t hold my breath.) Anyway, these new developments on the law of use immunity, which all came up the previous inquiries, surely merit a fresh review of use immunities in and of themselves, right?

In its submission to the Issues Paper, ASIC gave the impression that use immunity is quite common in comparable countries. It said that:[[16]](#footnote-16)

courts and legislatures in Canada, South Africa, Hong Kong and the United Kingdom have generally declined to follow the US approach and expressed a preference for statutory provisions that afford use immunity only.

But this is a half-truth. Let’s not mince words, it’s also a half-lie. Yes, all of these jurisdictions have rejected the ‘US approach’. But, with the arguable exception of Hong Kong, none of them endorsed ‘provisions that afford use immunity only’. Rather, all except Hong Kong endorsed derivative use immunity, albeit a somewhat narrower formulation developed in Canada in the 1990s and recently adopted in Victoria in 2009. ASIC’s submission sets out lengthy quotes from the Canadian judgment rejecting a so-called ‘full’ or ‘complete’ derivative use immunity, but its submission misleading omits the approach the Canadian courts settled on:[[17]](#footnote-17)

[D]erivative evidence that could not have been found or appreciated except as a result of the compelled testimony under the Act should in the exercise of the trial judge's discretion be excluded since its admission would violate the principles of fundamental justice.

This ‘flexible’ or ‘partial’ derivative use immunity developed in Canada was then expressly adopted in South Africa, the UK and (more recently) Victoria. [[18]](#footnote-18) Only Hong Kong rejected the Canadian approach (and only in a corporate regulation context due to ‘differences in detail’) and in light of a Hong Kong ‘court’s residual discretion to exclude evidence to secure the fairness of the trial’.[[19]](#footnote-19) In short, ‘use immunity’ as it appears in over forty Australian federal statutes isn’t common elsewhere. Only one overseas court has endorsed it (and in only one context.) Australia is an outlier.

## The fictions of ‘derivative use immunity’

The United States Congress developed ‘derivative use immunity’ (a ban on using compelled information ‘or any information directly or indirectly derived from such testimony or other information’ against that person in a criminal case[[20]](#footnote-20)) as an alternative to ‘transactional immunity’ (giving any person required to reveal their criminality a complete immunity from prosecution for that criminality) and ‘use immunity’ (which the United States Supreme Court held was inadequate for constitutional purposes.) Five judges of the United States Supreme Court upheld this middle-ground in its 1972 *Kastigar* decision as ‘a very substantial protection, commensurate with that resulting from invoking the privilege itself.’[[21]](#footnote-21) Two judges dissented, holding that ‘[g]overnment acts in an ignoble way when it stoops to the end which we authorize today’. Responding to concerns at the time that the protection would be similar to mere ‘use immunity’ due to proof problems, the majority held that a prosecutor has ‘the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.’ That is what the Canadians refer to as ‘full’ derivative use immunity.

Nevertheless, Kluver and ASIC argue that ‘derivative use immunity’ is actually similar to transactional immunity, effectively immunising people questioned about a crime from subsequent prosecution for that crime. They cite no court holdings whatsoever for this claim. Instead, they exclusively cite internal legal advice to this effect from ASIC, the same legal advice ASIC relied on back in 1991 to advocate against derivative use immunity. They even raise the spectre of a compelled witness deliberately revealing incriminating information in order to immunise themselves from prosecution, but no-one cites a single instance of that unlikely event happening. No analysis is made of US decisions applying the *Kastigar* standard, although ASIC makes an unreferenced claim that regulators have been forced into alternative investigative methods, such as negotiated pleas, to overcome the alleged barrier caused by derivative use immunity. In short, the case against derivative use immunity is nothing more than speculation entirely sourced from unsourced internal legal advice within the very agencies arguing against such an immunity. That is yet another reason why an external review of the federal use of use immunity is warranted.

The thing is: if full derivative use immunity is as bad as ASIC and others say, then wouldn’t there be plenty of real examples by now? After all, full derivative use immunity has been part of Australia’s uniform evidence law (now 7 Australian statutes and 4 Caribbean ones) since 1995. As well, quite a lot of federal statutes do provide full derivative use immunity. The Interim Report notes 14:

* *Australian Sports Anti-Doping Authority Act 2006* (Cth) s13D
* *Carbon Credits (Carbon Farming Initiative) Act 2011* s189
* *Crimes Act 1914* s3ZZGE
* *Environment Protection and Biodiversity Conservation Act 1999* s486J
* *Great Barrier Reef Marine Park Act 1975* s39P
* *Fair Work Act 2009* s713
* *Fair Work (Registered Organisations) Act 2009* ss 337 & 337A
* *Fair Work (Building Industry) Act 2012* s53
* *Migration Act 1958* ss 24, 140XG, 268BK, 305C, 306J, 308, 311EA, 487C
* *Proceeds of Crime Act 2002* s271
* *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* ss 44, 46S
* *Therapeutic Goods Act 1989* ss 31F, 32JD, 32JK, 41JC, 41JJ
* *Tobacco Plain Packaging* s83
* *Work Health and Safety Act 2011* s172

But that’s just the tip of the iceberg, as a quick search shows:

* *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* s34
* *Aircraft Noise Levy Collection Act 1995* s15
* *Anti-Personnel Mines Convention Act 1998* s24
* *Australian Charities and Not-For-Profits Commission Act 2012* ss70.25, 75.40
* *Australian Participants in British Nuclear Tests (Treatment) Act 2006* s35
* *Aviation Transport Security Act 2004* ss 110, 112
* *Banking Act 1959* s14AD
* *Carbon Credits (Carbon Farming Initiative) Act 2011* s202
* *Civil Aviation Act 1988* s32AJ
* *Coastal Trading (Revitalising Australian Shipping) Act 2012* s82
* *Competition and Consumer Act 2010* s15BUF, 155B
* *Corporations Act 2001* s307C
* *Corporations (Aboriginal and Torres Strait Islander) Act 2006* s359.50
* *Crimes Act 1914* s3ZQR, 15HV
* *Customs Act 1901* s243F
* *Dairy Produce Act 1986* Schedule 2 s40
* *Defence Act 1903* ss 51SO, 124
* *Defence Force Discipline Act 1982* s188GD
* *Defence Trade Controls Act 2012* ss 44, 57, 62
* *Defence Force Discipline Act 1982* s188GD
* *Dental Benefits Act 2008* s32E
* *Director of Public Prosecutions Act 1983* s9
* *Disability Services Act 1985* s27
* *Environment Protection and Biodiversity Conservation Act 1999* s112
* *Fair Work (Registered Organisations) Act 2009* ss 51, 103, 202, 258
* *Horse Disease Response Levy Collection Act 2011* s12
* *Industrial Chemicals (Notification and Assessment) Act 1989* ss 40M, 100H
* *Insurance Acquisitions and Takeovers Act 1991* s73
* *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* s54
* *Maritime Transport and Offshore Facilities Security Act 2003* s185
* *Military Rehabilitation and Compensation Act 2004* s407
* *National Vocational Education and Training Regulator Act 2011* s65
* *Native Title Act 1993* s203DG
* *Offshore Minerals Act 1994* s373
* *Offshore Petroleum and Greenhouse Gas Storage Act 2006* ss 702, 728 761, Schedule 2A s8, Schedule 3 s74
* *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* s65
* *Petroleum Excise (Prices) Act 1987* s10
* *Privacy Act 1988* s66
* *Private Health Insurance Act 2007* ss 194.5, 194.10
* *Proceeds of Crime Act 1987* ss 48, 66
* *Product Grants and Benefits Administration Act 2000* s43
* *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* ss 44, 46S
* *Renewable Energy (Electricity) Act 2000* s125B
* *Retirement Savings Accounts Act 1997* s117
* *Sea Installations Act 1987* s63
* *Seafarers Rehabilitation and Compensation Levy Collection Act 1992* s7
* *Surveillance Devices Act 2004* s57
* *Superannuation Act 1976* s163A
* *Tax Agent Services Act 2009* s60.115
* *Telecommunications Act 1997* s524
* *Telecommunications (Interception and Access) Act 1979* s88
* *Tertiary Education Quality and Standards Agency Act 2011* ss 69, 76
* *Textile, Clothing and Footwear Investment and Innovation Programs Act 1999* s40

That’s a lot right? Around 60 (including some tricky fields, like industrial relations, migration, environment protection, aviation security, sports doping…), compared to the 40 federal laws with only use immunity. If full derivative use immunity is so disastrous for regulators, then why haven’t these regulators come forward with their horror stories of failed investigations and moustache-twirling self-immunising villains? If ASIC knew of any such stories, you can bet it would have put them in its submission.

Any review of derivative use immunity in federal laws would surely ask: what is the difference between all of the above regimes that use full use immunity, and the forty-odd regimes where there is use(less) immunity? Isn’t that worth looking into? No-one has to date.

## Future review of derivative use immunity

Now, don’t panic. I’m not suggesting that a review would need to reopen all the past arguments about self-incrimination or examine 100 different federal regimes. It’s possible to do a much narrower review within the ALRC’s terms of reference.

First, although the ALRC was right to observe in its Issues Paper that the debate is in part about the precise meaning of derivative use immunity, any future review would, unlike all the previous reviews, have the benefit of an Australian court decision determining exactly what sort of immunity is required by the traditional common law protection against self-incrimination. That decision is the 2009 decision of Warren CJ concerning Victoria’s crime commission equivalent, the ‘Chief Examiner’. Chief Justice Warren held that the protection required under Victoria’s Charter is equivalent to the common law, which is in turn equivalent to the ‘flexible’ or ‘partial’ derivative use immunity developed in Canada in the 1990s:[[22]](#footnote-22)

[D]erivative use immunity must be extended to a witness interrogated… where the evidence elicited from the interrogation could not have been obtained, or the significance of which could not have been appreciated, but for the evidence of the witness. Derivative use of the evidence obtained pursuant to compelled tesimtony must not be admissible against any person affected… unless the evidence is discoverable through alternative means.

Nifty, hey? And the Victorian government never appealed this decision, nor Warren CJ’s finding that a mere use immunity would not be a reasonable limit on this right. For what it’s worth, the Victorian parliament later removed derivative use immunity in this instance, and provided a statement of compatibility explaining its reasons. But none of that affects the technical issue of what is required by the common law. The relevant issue for the inquiry is whether the forty or so federal laws that only provide use immunity should provide this ‘partial’ derivative use immunity instead.

Second, the ALRC would not need to look at every one of the forty laws, at least not in their entirety. ASIC’s submission eloquently argues why there’s no problem denying the privilege against self-incrimination:

* for all corporations
* for all pre-existing documents
* for people who voluntarily participate in a closely regulated field.

On the latter issue, ASIC rightly quotes the QLRC report:[[23]](#footnote-23)

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.

The issue for any review is relatively narrow: whether partial derivative use immunity should be available for individuals who did not voluntarily participate in a closely regulated field but are nevertheless forced to provide oral self-incriminatory evidence to a regulator.

Here’s what ASIC had to say about why its current powers (with only a use immunity) to compulsorily examine non-volunteers (such as a director’s family, neighbours, employees, customers…) should remain:[[24]](#footnote-24)

ASIC agrees with [the QLRC’s] 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.

Does this convince you that it’s OK for ASIC to compel a director’s family, neighbours, employees and customers to direct ASIC to evidence that could be used to prosecute them? Sure, ASIC is right that it’s important to ask these people tough questions about their own criminality, but why shouldn’t those people get the benefit of at least partial derivative use immunity?

That’s the nub of the issue that should be reviewed. And, by ‘reviewed’, I don’t mean appointing some corporate law specialist to do another super-speedy review. Rather, the review should be done by an experienced, independent agency that has a lot of expertise in both federal law and regulation and traditional rights review. That would be you. Please don’t duck this. If you don’t do this review, no-one else will.

1. [4.1]-[4.2]. [↑](#footnote-ref-1)
2. [4.13]. [↑](#footnote-ref-2)
3. [4.20]. [↑](#footnote-ref-3)
4. Pages 31-35. [↑](#footnote-ref-4)
5. *Corporations Legislation (Evidence) Amendment Act 1992*. [↑](#footnote-ref-5)
6. S10. [↑](#footnote-ref-6)
7. ‘ASC Investigations and Enforcement: Issues and Initiatives’ (1992) 15 UNSWLJ 31, 59. [↑](#footnote-ref-7)
8. 14 March 1997 to 14 May 1997. [↑](#footnote-ref-8)
9. [1.16]. [↑](#footnote-ref-9)
10. [3.63]. [↑](#footnote-ref-10)
11. [3.86]. [↑](#footnote-ref-11)
12. [3.87]. [↑](#footnote-ref-12)
13. [9.35]-[9.39]. [↑](#footnote-ref-13)
14. [9.26]. [↑](#footnote-ref-14)
15. [9.88]-[9.89]. [↑](#footnote-ref-15)
16. [107]. [↑](#footnote-ref-16)
17. *Thomson newspapers ltd. v. Canada (Director of investigation and research, restrictive trade practices commission*), [1990] 1 SCR 425 (last page or so of La Forrest J’s judgment.) See also *S(RJ)* [1995] 1 SCR 451, 561, 564. [↑](#footnote-ref-17)
18. See *Ferreira v Levin* [1995] ZACC 13, [140]; *Her Majesty's Advocate v P (Scotland)* [2011] UKSC 44, [27]; *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [156]. [↑](#footnote-ref-18)
19. *HKSAR v Lee Ming Tee* [2001] HKCFA 32, [123], [130]. In Australia, see now *Police v Dunstall* [2015] HCA 26. [↑](#footnote-ref-19)
20. 18 U.S.C. § 6002. [↑](#footnote-ref-20)
21. *Kastigar v US*, 406 US 441 (1972). [↑](#footnote-ref-21)
22. *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [177]. [↑](#footnote-ref-22)
23. [75], citing [6.53]-[6.55]. [↑](#footnote-ref-23)
24. [76]. [↑](#footnote-ref-24)