**Submission to the Australian Law Reform Commission**

**Issues Paper: 'Traditional Rights and Freedoms – Encroachments by Commonwealth Laws' (IP 46)**

This submission responds to the December 2014 call by the Australian Law Reform Commission (**ALRC**) for public comment on the ALRC's issues paper on 'Traditional Rights and Freedoms – Encroachments by Commonwealth Laws' (**Issues Paper**).

The ALRC has been asked to "identify and critically examine Commonwealth laws that encroach upon 'traditional' or 'common law' rights, freedoms and privileges".[[1]](#footnote-1) The Terms of Reference set out the scope of the inquiry and the particular laws that encroach upon these traditional rights, freedoms and privileges.[[2]](#footnote-2)

At Question 10-2 of the Issues Paper, the ALRC requests responses on which Commonwealth laws unjustifiably exclude the privilege against self-incrimination, and why these laws are unjustified. Of particular attention is the right to claim privilege against self-incrimination. This right has a long heritage, has been recognised by courts in Australia, England and other common law countries, and pre-date many international conventions and declarations that now also protect these rights.

While the ALRC has asked for submissions to consider commercial and corporate regulation, environmental regulation and workplace relations, this submission will focus on the *Competition and Consumer Act 2010* (Cth)(**CCA**)and the *Australian Securities and Investment Commission Act 2001* (Cth)(**ASIC Act**) and how these Commonwealth laws tend to encroach upon the right to claim privilege against self-incrimination.

# The privilege against self-incrimination generally

The privilege against self-incrimination provides that a person is not bound to answer a question or produce a document or thing that would tend to expose that person to conviction for a crime.[[3]](#footnote-3) The privilege also protects individuals from making a disclosure that may lead indirectly to incrimination or to the discovery of other evidence of an incriminating nature.[[4]](#footnote-4)

The privilege has been described as a 'fundamental bulwark of liberty'[[5]](#footnote-5), a 'substantive human right'[[6]](#footnote-6), and more broadly, it has been described as one part of a 'bundle' or rights which make up the broader right to silence.[[7]](#footnote-7)

While the privilege is not expressly protected by the *Australian Constitution*, the High Court has on several occasions held that the privilege can be abrogated in order to balance competing rights and the public interest. However, in my submission the CCA and the ASIC Act both unjustifiably exclude the privilege against self-incrimination and thereby encroach on this substantive human right. While the right is not immutable and may be diminished or removed by legislation, the provisions of the ASIC Act and the CCA do not justifiably balance the rights of the individual and the broader public interest through the removal of the privilege.

# The Competition and Consumer Act 2010 – s 155(7)

The ACCC's investigative powers are extensive and, for those on the receiving end, can be intrusive, frightening, disruptive and costly. The ACCC has powers to obtain documents, information and evidence pursuant to section 155 of the CCA. It does so by written notice served on the person to whom it is directed. The ability to object to the exercise of those powers is extremely limited.

Section 155 of the CCA sets out the Commission's power to obtain information, documents and evidence. Section 155(7) states that:

*"A person is not excused from furnishing information or producing a document in pursuance of this section on the ground that the information or document may tend to incriminate the person or expose the person to a penalty, but the answer by an individual to any question asked in a notice under this section or the furnishing by an individual of any information in pursuance of such a notice is not admissible in evidence against the individual in any criminal proceedings, other than:*

*(a) proceedings for an offence against this section; or*

*(b) proceedings for an offence against section 137.1, 137.2 or 149.1 of the Criminal Code that relates to this section."*

The privilege against self-incrimination, which Australia is bound under international treaties to accord individuals and which applies in the common law, is abrogated by section 155 and replaced with a narrower countervailing protection which provides that the incriminating information must not be used in criminal proceedings. However, the ACCC is at liberty to use self-incriminatory answers and information in civil penalty proceedings. As such, a corporation or individual person is not excused from answering a section 155 notice on the ground that the response may tend to incriminate the person - there is no right to remain silent.

This abrogation of the privilege is unjustified because it does not recognise the power imbalance of the individual against the statutory power and resources of the ACCC. The stressful environment of investigation can place pressure on examinees to provide answers and information, even in circumstances where the examinee either has no recollection or an imperfect recollection of the relevant subject or event. The answers and information extracted from examinees in the stressful environment of a statutory examination may incriminate them, be prejudicial to their case, or even include information which is inadvertently incorrect. The right to claim privilege against self-incrimination can act as a safeguard against inadvertently incorrect, but nonetheless damaging, answers being given during a stressful and often very lengthy examination of nervous, yet innocent, examinees.

A further and completely unnecessary source of stress is imposed upon examinees as a result of the archaic process followed by the ACCC under which examinees are required to state the word "privilege" before answering every question put to them by an investigating authority in order to secure the limited right not to have their answers tendered against them in criminal proceedings. This archaic process should be abandoned, as it is unnecessarily cumbersome, prejudicial to examinees and results in an inefficient investigative process.

Given the legislative history of the CCA, amendments were made to the superseded *Trade Practices Act 1974* (Cth) in 2009 to introduce criminal penalties alongside civil prohibitions for proscribed forms of cartel conduct.[[8]](#footnote-8) No amendments were made to the operation of section 155 to ensure that those facing criminal penalties maintained their right to remain silent. The lack of legislative amendment in this part means that a person is not excused from answering a question put to them during examination in any criminal proceedings that might tend to incriminate them, thereby unjustly abrogating fundamental liberties and rights to remain silent. Legislative amendment should be introduced so as to excuse those examinees from answering questions or providing information during a criminal investigation that might tend to incriminate them or expose them to a penalty.

## Entitlement to human rights in competition law investigations

There are important human rights being eroded by the abrogation of the privilege against self-incrimination. As has been previously mentioned, the privilege against self-incrimination has been recognised as more than just a rule of evidence – it has been described as a cardinal principle of our system of justice[[9]](#footnote-9) and an integral part of international human rights law.[[10]](#footnote-10) The right to claim privilege against self-incrimination is found in art 14(3)(g) of the International Covenant on Civil and Political Rights (**ICCPR**) which provides that in the determination of any criminal charge, an individual is not to be compelled to testify against themselves or to confess guilt. It is a fundamental requirement that the prosecution must prove its criminal case beyond all reasonable doubt by reference to evidence other than that sourced from the defendant, who should be able to maintain the privilege against self-incrimination. This requirement, which is supported by the ICCPR, underpins the right to a fair trial. As matters stand, there are insufficient safeguards to protect accused persons from the serious consequences of an unfair trial, owing to the absence of protection from self-incrimination in the investigatory and enforcement process.[[11]](#footnote-11) Section 155(7) of the CCA presently stands in breach of Australia's obligations under art 14 of the ICCPR.

As such, there is sufficient weight to support the argument that the privilege has been unjustly abrogated because the protection of human dignity, privacy, freedom and the right to a fair trial as recognised by Justice Murphy in *Rochfort v Trade Practices Commission[[12]](#footnote-12)* have been disturbed.

# The Australian Securities and Investment Commission Act 2001 – s 68

ASIC is also charged with the duty of investigating offences against the *Corporations Act 2001* (Cth). Most of ASIC's investigative powers are contained in the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**). One of the most common investigative tools used by ASIC is its power to conduct compulsory examinations pursuant to section 19 of the ASIC Act. This power allows ASIC to compel an examinee pursuant to a written notice in the prescribed form, to appear before ASIC investigators to answer questions on oath or affirmation, and where appropriate, to also give ASIC all reasonable assistance in connection with the investigation. This power arises were ASIC has reasonable grounds to suspect or believe that a person can give information relevant to a matter that it is investigating.[[13]](#footnote-13)

ASIC may investigate matters which may expose examinees to civil penalty proceedings (such as for breach of directors’’ duties) or criminal proceedings (such as insider trading, which may be prosecuted as either a civil penalty offence or criminal offence).

ASIC’s notice requiring a person to attend an examination ordinarily makes reference to section 68 of the ASIC Act, which relates to self-incrimination. Section 68 of the ASIC Act states that:

*”(1) For the purposes of this Part, of Division 3 of Part 10, and of Division 2 of Part 11, it is not a reasonable excuse for a person to refuse or fail:*

*(a) to give information; or*

*(b) to sign a record; or*

*(c) to produce a book;*

*in accordance with a requirement made of the person, that the information, signing the record or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty."*

In the 'notice of relevant statutory provisions' attached to ASIC’s notice to attend an examination, it ordinarily states that:

*"(2) It is not a reasonable excuse for failure to comply with this notice that giving information or signing a record of producing a book might tend to incriminate you or expose you to a penalty (see subsection 68(1) of the Act).*

*(3) However, if:*

*(a) before making an oral statement or signing a record in answer to this notice you claim that making the statement or signing the record might tend to incriminate you or expose you to a penalty; and*

*(b) by making the statement or signing the record might in fact tend to incriminate you or expose you to a penalty;*

*the statement, or the fact that you have signed the record, is not admissible in evidence in any criminal proceedings, or proceedings for the imposition of a penalty, against you other than proceedings in respect of the falsity of the statement or the record."*

Section 68 of the ASIC Act also provides a mechanism whereby a person being required to make a statement or sign a record pursuant to a Pt 3 power may prevent the information from being admitted in evidence at certain subsequent proceedings. As has been previously discussed, the common law privilege against self-incrimination entitles a person to refuse to answer a question if that answer might tend to incriminate them or expose them to a penalty. However, section 68 abrogates this common law right by providing that the privilege is not a reasonable excuse for the examinee refusing to answer questions at an oral examination. The examinee must answer the self-incriminating questions but is afforded 'use' evidential immunity in relation to those answers that might tend to incriminate that examinee or make that examinee liable to a penalty.[[14]](#footnote-14)

The privilege does not apply automatically. In order to lawfully claim the direct evidential immunity available under section 68 of the ASIC Act, various preconditions must be satisfied. To begin with, like section 155(7) of the CCA, the examinee is not open to make a blanket claim of privilege against self-incrimination at the beginning or during the examination. The claim of self-incrimination must be made separately in relation to each proposed statement which the person asserts might tend to incriminate them. There is no prescribed expression for claiming the privilege, as long as the intention is evident on the face of the record of the examination. Again, a torturous practice has arisen whereby an examinee is required to say the word "privilege" before answering a question or otherwise making a statement giving information.[[15]](#footnote-15) This has led to the development of a time consuming and non-productive practice in ASIC compulsory investigations, where the examinee is distracted by the need to invoke the privilege rather than focusing upon the question being asked and the substantive answer to be given.

The claim may only be made by the examinee. Even though an examinee has a discretion as to when and how often to invoke the privilege, they are not entitled to have an adjournment after each question is put to them, for the purpose of consulting their legal advisers as to whether they should claim self-incrimination.[[16]](#footnote-16) While the examinee can seek advice before answering, using this approach repeatedly may constitute obstruction.

As a result of this torturous and archaic practice similar to that witnessed during ACCC examinations under the CCA, examinees are forced to answer any question put to them by regulators. There is a strong argument to be put that an individual should not be required to answer any question that is put to them when they are under duress. It is a serious violation and unjustifiable encroachment on an individual’s substantive rights and the cardinal principles of our system of justice.

# International positions

Looking internationally, there is little international support for the abrogation of the privilege against self-incrimination, further reinforcing that both the CCA and the ASIC Act both unjustifiably encroach on the privilege against self-incrimination. In many other jurisdictions it is clear that the privilege is given the greatest respect. As the Commission outlines in its Issues Paper, the privilege is enshrined in bills of rights and human rights statutes in various jurisdictions, including the United States, the United Kingdom, Canada and NZ.[[17]](#footnote-17) Given the fact that the privilege is given the greatest respect and has been characterised as a human right in the European Union,[[18]](#footnote-18) the CCA and the ASIC Act are both inconsistent with the law of a number of significant overseas jurisdictions. This emphasises that the abrogation of the privilege against self-incrimination as it appears in these two legislative materials is unjustified.

I thank you for the opportunity to comment.

Yours sincerely

**Murray Deakin**

1. Australian Law Reform Commission, 'Traditional Rights and Freedoms – Encroachments by Commonwealth Laws' Issues Paper 46, December 2014, 9, [↑](#footnote-ref-1)
2. Ibid 3. [↑](#footnote-ref-2)
3. *Lamb v Munster* (1882) 10 QBD 110, 111; *Sorby v Commonwealth* (1983) 152 CLR 281, 288; 46 ALR 237; *Microsoft Corporation v CX Computer Pty Ltd* (2002) 116 FCR 372; 187 ALR 362 [32] and [37]. [↑](#footnote-ref-3)
4. *Sorby v Commonwealth* (1983) 152 CLR 281, 310 (Mason, Wilson and Dawson JJ). [↑](#footnote-ref-4)
5. *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 340 (Mason ACJ, Wilson and Dawson JJ) [↑](#footnote-ref-5)
6. See eg, *X7 v Australian Crime Commission* (2013) 248 CLR 92 [70] (Hayne and Bell JJ). [↑](#footnote-ref-6)
7. Parliament of New South Wales Legislation Review Committee, *The Right to Silence: Discussion Paper,* Discussion Paper No 1, 2005, 4; See also *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1 per Lord Mustill at 30. [↑](#footnote-ref-7)
8. Amendments were introduced by the amending legislation, the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009.* [↑](#footnote-ref-8)
9. *Sorby v Commonwealth of Australia* (1983) ALR 237, 249. [↑](#footnote-ref-9)
10. See ICCPRArticle 14, paragraph 3(g). [↑](#footnote-ref-10)
11. Taylor, Nicolas and Elisabetta Santi, 'Corporate executives are entitled to human rights in competition law investigations' (2014) 21 *Competition and Consumer Law Journal* 264, 265. [↑](#footnote-ref-11)
12. *Rochfort v Trade Practices Commission* (1982) 153 CLR 134, 150. [↑](#footnote-ref-12)
13. *Australian Securities and Investments Commission Act 2001* s 19(1). [↑](#footnote-ref-13)
14. *Hugall v Mc Cusker* (1990) 2 WAR 350; 2 ACSR 247; 8 ACLC 659. [↑](#footnote-ref-14)
15. *Brian Millwood Smith v R* (2007) 35 WAR 201; 213 FLR 12; [2007] WASCA 163 [66]. [↑](#footnote-ref-15)
16. See *Robert Sterling Pty Ltd (in liq)* [1979] 2 NSWLR 728; (1979) 4 ACLR 385. [↑](#footnote-ref-16)
17. See Australian Law Reform Commission, 'Traditional Rights and Freedoms – Encroachments by Commonwealth Laws' Issues Paper 46, December 2014, 77-8. [↑](#footnote-ref-17)
18. *European Convention for the Protection of Human Rights and Fundamental Freedoms* 4XI, 1950 (entered into Force 3 September 1953) art 6. See also *Funke v France* [1993] 16 EHRR 297 [44]. [↑](#footnote-ref-18)