

11. Privilege Against Self-incrimination

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Summary

11.1 The privilege against self-incrimination allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime.

11.2 A statutory form of the privilege is available in the Uniform Evidence Acts. The statutory protection is only available to resist disclosure of information in a court proceeding. The common law privilege is available to persons subject to questioning in both judicial and other proceedings.

11.3 A number of rationales have been said to underpin the privilege. In recent judgments, it has been said to be necessary to preserve the proper balance between the powers of the state and the rights and interests of citizens, to preserve the presumption of innocence and to ensure that the burden of proof remains on the prosecution. At other times, the courts have described the privilege as a human right, necessary to protect the privacy, freedom and dignity of the individual.

11.4 The privilege places barriers in the way of investigations and prosecutions, particularly where information is peculiarly within the knowledge of certain persons who cannot be expected to share that information voluntarily. Parliament has, at times, considered that the public interest in the full investigation of matters of public concern outweighs the public interest in the maintenance of the privilege. Many Commonwealth statutes give government agencies—including the Australian Crime Commission (ACC), the Australian Competition and Consumer Commission (ACCC), the Australian Security Intelligence Organisation (ASIO), and the Australian Securities and Investments Commission (ASIC)—the power to compel a person to answer questions, and provide that the privilege against self-incrimination does not excuse a person from answering questions. These powers are intended to facilitate the timely exposure of wrongdoing and prevent further harm.

11.5 Laws abrogating the privilege usually provide use immunity regarding the answers given—that is, they provide that the answers given are not admissible against the person in a subsequent proceeding. Some laws also provide derivative use immunity—that is, they provide that evidence obtained as a result of a person having made a statement is not admissible against the person in a subsequent proceeding. Other statutory safeguards against incrimination may also be provided, including restrictions on sharing the information obtained with law enforcement agencies. The courts also have inherent powers to exclude evidence that would render a trial unfair.

11.6 There have been several reviews of the privilege against self-incrimination and the availability of use immunities to protect witnesses who are compelled to answer questions or produce documents. These reviews largely concluded that use immunities are an appropriate safeguard of individual rights and may, therefore, appropriately justify laws that exclude the privilege against self-incrimination. However, there have been recent developments in the area, including the use of compulsory powers to question a person subject to charge. The High Court has said that such questioning has the potential to ‘fundamentally alter the accusatorial judicial process’.¹ The Court has also expressed concern about the publication of transcripts of examinations to prosecutors.²

1 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [124] per Hayne and Bell JJ, Kiefel J agreeing.

2 *Lee v The Queen* [2014] HCA 20 (21 May 2014).

11.7 The ALRC considers further review of the abrogation of self-incrimination in Commonwealth laws is warranted. Such a review could consider whether the abrogation in more than 40 Commonwealth laws has been sufficiently justified, and if so, what type of immunity is appropriate. It could also consider whether, and in what circumstances, the compulsory examination of persons subject to charge, about the subject matter of the charge, and the publication of transcripts of examinations to prosecutors, is justified.

11.8 The *Taxation Administration Act 1953* (Cth) Sch 1 s 353-10 is unusual, in that it abrogates the privilege against self-incrimination,³ and no use immunity is available. The Commissioner of Taxation may disclose the information provided to a law enforcement agency.⁴ Further review should consider whether these laws are appropriately justified, or whether statutory protections should be made available.

A common law right

11.9 The privilege against self-incrimination is ‘a basic and substantive common law right, and not just a rule of evidence’.⁵ It reflects ‘the long-standing antipathy of the common law to compulsory interrogations about criminal conduct’.⁶

11.10 In 1983 the High Court described the privilege as follows:

A person may refuse to answer any question, or to produce any document or thing, if to do so ‘may tend to bring him into the peril and possibility of being convicted as a criminal’.⁷

11.11 Similarly, in 2004 the Full Federal Court said:

The privilege is that a person (not company) is not bound to answer any question or produce any document if the answer or the document would expose, or would have a tendency to expose, the person to conviction for a crime.⁸

11.12 The common law privilege is available not only to persons questioned in criminal proceedings, but to persons suspected of a crime,⁹ to persons questioned in civil proceedings¹⁰ and in non-curial contexts.¹¹

3 *Taxation Administration Act 1953* (Cth) sch 1 s 353–10; *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564.

4 *Taxation Administration Act 1953* (Cth) s 355–190.

5 *Reid v Howard* (1995) 184 CLR 1, [8].

6 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, [1] (French CJ).

7 *Sorby v Commonwealth* (1983) 152 CLR 281, 288. The Court cited *Lamb v Munster* (1882) 10 QBD 110, 111.

8 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, [27]; *Sorby v Commonwealth* (1983) 152 CLR 281, [44].

9 *Petty & Maiden v R* (1991) 173 CLR 95.

10 *Reid v Howard* (1995) 184 CLR 1, [15].

11 *Griffin v Pantzer* (2004) 137 FCR 209, [44].

11.13 The privilege is one aspect of the right to silence.¹² The right to silence protects the right not to be made to testify against oneself (whether or not that testimony is incriminating).¹³ The privilege against self-incrimination is narrower, in that it protects the right not to be made to incriminate oneself. A statute might require a person to answer questions, thus breaching the right to silence, but allow the person to refuse to give incriminating answers, thus preserving the privilege against self-incrimination.¹⁴

11.14 There are two closely related privileges that arose in equity: the privileges against exposure to a civil penalty and exposure to a forfeiture.¹⁵ This Inquiry focuses on the common law privilege against self-incrimination.

Testimony and documents

11.15 The privilege is testimonial in nature, protecting a witness from being convicted 'out of his own mouth'.¹⁶

11.16 The privilege does not prevent persons from being compelled to incriminate themselves through the provision of evidence that is non-testimonial in nature.¹⁷ Non-testimonial evidence may include, for instance, fingerprints or DNA samples.¹⁸ In *Sorby v Commonwealth*, Gibbs CJ explained that 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 was identified.¹⁹

11.17 While recent Australian decisions have indicated that the privilege extends to documents,²⁰ questions have been raised as to whether that continues to be the case. The Australian Securities and Investments Commission (ASIC) noted that in the United States and the United Kingdom, the privilege against self-incrimination no longer extends to the production of documents, but only protects testimonial communications.²¹

12 Queensland Law Reform Commission, *The Abrogation of the Principle against Self-Incrimination* Report No 59 (2004) 54; *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1. See also Anthony Gray, 'Constitutionally Heeding the Right to Silence in Australia' (2013) 39 *Monash University Law Review* 156, 158.

13 Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 204.

14 See, eg, *Broadcasting Services Act 1992* (Cth) s 202.

15 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [45]. See also Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [25070]; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, [24], [50]. The privilege against exposure to a civil penalty is now recognised by the common law: *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [13].

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

17 See, eg, Australian Securities and Investments Commission, *Submission 74*.

18 Heydon, above n 15, [25095].

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

20 *Ibid* 288; *Griffin v Pantzer* (2004) 137 FCR 209, 37.

21 Australian Securities and Investments Commission, *Submission 74*; ASIC relied upon the following authorities: *Attorney General's Reference (No 7 of 2000)* (2001) 2 Cr App R 19; *R v Kearns* (2001) 1 WLR 2815; *Fisher v United States* (1976) 425 US 391.

11.18 ASIC also noted that doubts have been expressed by Australian courts about the extension of the privilege to documents. In three judgments of the High Court, documents have been referred to as being ‘in the nature of real evidence which speak for themselves’, in contrast to testimonial evidence, with the inference that the privilege may be unnecessary with regard to documents.²² However, in those cases it was not necessary for the Court to definitively confirm the existence—or otherwise—of the common law privilege regarding documents.

11.19 If the privilege continues to extend to documents, it only excuses the person from producing them. If the documents are, for example, seized under a warrant, they are not protected by the privilege.²³

Corporations may not claim the privilege

11.20 The privilege against self-incrimination extends to natural persons, but not corporations.²⁴ In *Environment Protection Authority v Caltex*, the High Court reviewed the historical and modern rationales for the privilege and held that these did not support the extension of the privilege to corporations. In particular, the Court noted that

a corporation is usually in a stronger position vis-a-vis the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons ... Accordingly, in maintaining a ‘fair’ or ‘correct’ balance between state and corporation, the operation of the privilege should be confined to natural persons.²⁵

11.21 The privilege is also not available to other entities such as political parties, sporting clubs, advocacy groups, small businesses and unions.²⁶

The origins of the privilege

11.22 There is some debate among legal historians about the origins of the privilege.²⁷ Some have suggested it is of ancient origin, arising from the common law maxim *nemo tenetur prodere seipsum*, meaning that people should not be compelled to betray

22 *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 392; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 326; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 502. In the context of discovery of documents by a corporation subject to contempt proceedings, see *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2015] HCA 21 (17 June 2015) [38], [79].

23 Heydon, above n 15, [25090].

24 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. While companies are not entitled to claim the privilege against self-incrimination, company directors can claim the privilege where a disclosure would tend to make them personally liable: *Upperedge v Bailey* (1994) 13 ACSR 541. See also Uniform Evidence Acts s 187 which abolished the privilege regarding bodies corporate.

25 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 500.

26 Jeremy Gans, *Prove Your Own Contempt: CFMEU v Boral* (20 July 2015) Opinions on High <<http://blogs.unimelb.edu.au/opinionsonhigh/2015/07/20/gans-boral/>>.

27 McHugh J details some of the arguments in *Azopardi v R* (2001) 205 CLR 50, [119]–[152]. See also Cosmas Moisisdis, *Criminal Discovery. From Truth to Proof and Back Again* (Institute of Criminology Press, 2008); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 135 [100] (Hayne and Bell JJ).

themselves.²⁸ Professor Richard Helmholz said that the *ius commune* or common law of the 12th and 13th centuries, a combination of the Roman and canon laws, included an early privilege against self-incrimination that influenced the modern iteration of the privilege at common law.²⁹

11.23 In his *Commentaries on the Laws of England*, William Blackstone explained that the maxim was enlivened where a defendant's fault 'was not to be wrung out of himself, but rather to be discovered by other means and other men'.³⁰

11.24 Others point to the development of the privilege in the 17th century as a response to the unpopularity of the Star Chamber in England whose practices included requiring suspects on trial for treason to answer questions without protection from self-incrimination.³¹

11.25 On the other hand, Professor John Langbein suggested the privilege did not arise until much later. He pointed to the development of the privilege as part of the rise of the adversarial criminal justice system, where the prosecution is charged with proving the guilt of a defendant beyond a reasonable doubt and subject to protections surrounding the manner of criminal discovery.³²

11.26 In a vigorous dissent in *Azzopardi v R*, McHugh J endorsed Langbein's approach, observing that:

these lawyers and historians have convincingly demonstrated that the self-incrimination principle originated from the European inquisitorial procedure and that it did not become firmly established as a principle of the criminal law until the mid-19th century or later.³³

The rationale for the privilege

11.27 A number of rationales have been offered for the privilege. Most recently, the High Court has emphasised the functional role of the privilege. In *X7 v Australian Crime Commission*, it was said to be essential to the accusatorial system:

The accusatorial process of criminal justice and the privilege against self-incrimination both reflect and assume the proposition that an accused person need never make any answer to any allegation of wrong-doing.³⁴

28 Richard Helmholz, 'Introduction' in Richard Helmholz (ed), *The Privilege Against Self-incrimination: Its Origins and Development* (University of Chicago Press, 1997).

29 Ibid 7.

30 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol IV, bk IV, ch 22, 293.

31 Leonard Levy, *Origins of the Fifth Amendment* (Macmillan, 1986); John Wigmore, *Evidence in Trials at Common Law* (Little Brown, 1961) vol 1. See also *Sorby v Commonwealth* (1983) 152 CLR 281, 317; *Griffin v Pantzer* (2004) 137 FCR 209, [40]. For further background, see, David Dolinko, 'Is There a Rationale for the Privilege against Self-Incrimination?' (1986) 3 *UCLA Law Review* 1063, 1079.

32 John Langbein, 'The Historical Origins of the Privilege against Self-Incrimination at Common Law' (1994) 92 *Michigan Law Review* 1047, 1047.

33 *Azzopardi v R* (2001) 205 CLR 50; see also Moisisdis, above n 27; *X7 v Australian Crime Commission* (2013) 248 CLR 92, 135 [100].

34 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [104].

11.28 The High Court returned to this theme in *Lee v The Queen*, when considering the compulsory examination powers of the NSW Crime Commission:

Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in *X7*. The principle is so fundamental that ‘no attempt to whittle it down can be entertained’ albeit its application may be affected by a statute expressed clearly or in words of necessary intendment. The privilege against self-incrimination may be lost, but the principle remains. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.

The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.³⁵

11.29 The privilege has been said to be necessary to preserve the presumption of innocence, and to ensure that the burden of proof remains on the prosecution. In *Cornwell v The Queen*, Kirby J said:

Such self-incrimination has been treated in the jurisprudence as objectionable, not only because the methods used to extract it are commonly unacceptable but because the practice is ordinarily incompatible with the presumption of innocence. This presumption normally obliges proof of criminal wrong-doing from the evidence of others, not from the mouth of the person accused, given otherwise than by his or her own free will.³⁶

11.30 Another functional role of the privilege is to reduce the power imbalance between the prosecution and a defendant,³⁷ or as Gleeson CJ put it, to hold ‘a proper balance between the powers of the State and the rights and interests of citizens’.³⁸

11.31 Rights based rationales are also important. The privilege is said to protect the right to dignity, privacy and freedom. In *Pyneboard Pty Ltd v Trade Practices Commission*, Murphy J explained that the privilege 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. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society’s acceptance of the inviolability of the human personality.³⁹

11.32 Also in *Pyneboard*, the privilege was described as a ‘fundamental bulwark of liberty’.⁴⁰

35 *Lee v The Queen* [2014] HCA 20 (21 May 2014) [32]–[33]. See also *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [146].

36 *Cornwell v R* (2007) 231 CLR 260, [176]; see also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 527; *X7 v Australian Crime Commission* (2013) 248 CLR 92, [55].

37 *Moisisdis*, above n 27, 136.

38 *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118, 127. See also Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [857].

39 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346.

40 *Ibid* 340 (Mason CJ, Wilson and Dawson JJ).

11.33 In more utilitarian terms, the privilege may offer the following benefits.

- It may encourage witnesses to cooperate with investigators and prosecutors, as they are able to do so without giving answers to questions that may incriminate them.⁴¹
- It may protect individuals from unlawful coercive methods used to obtain confessions,⁴² and in this sense protects personal liberty.
- It may reduce the incidence of false confessions. The stressful environment of police interviews may be ‘conducive to false confessions on account of the authority of police, the isolation, uncertainty and anxiety of the suspect and the expectations of the interrogation officer’.⁴³ Being compelled to give a statement in this environment could exacerbate the problem.
- It may reduce the incidence of untruthful evidence in court proceedings, on the basis that a person who is compelled to give evidence is more likely to lie.⁴⁴

Protections from statutory encroachment

Australian Constitution

11.34 The privilege is not expressly protected by the *Australian Constitution*, nor has protection been implied by the courts. The High Court has on numerous occasions ‘discarded any link between the privilege and the requirements of Ch III of the *Australian Constitution*’.⁴⁵ For instance, in *Sorby v Commonwealth*, a majority of the High Court held that the privilege against self-incrimination is not an integral element in the exercise of judicial power reposed in the courts by Ch III of the *Constitution*.⁴⁶

Principle of legality

11.35 The principle of legality provides some protection to the privilege against self-incrimination.⁴⁷ When interpreting a statute, courts will presume that Parliament did not intend to interfere with the privilege, unless a legislative intent to do so ‘clearly emerges, whether by express words or necessary implication’.⁴⁸

11.36 In *Pyneboard Pty Ltd v Trade Practices Commission*, the High Court held that the right to claim the privilege against self-incrimination could be revoked where a

41 Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [852], [861]; Heydon, above n 15, [25140].

42 Moisisdis, above n 27, 133.

43 Ibid 129.

44 Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [855].

45 See discussion in Anthony Gray, ‘Constitutionally Protecting the Presumption of Innocence’ (2012) 31 *University of Tasmania Law Review* 132, 162.

46 *Sorby v Commonwealth* (1983) 152 CLR 281, 308 (Mason, Wilson and Dawson JJ). See also *X7 v Australian Crime Commission* (2013) 248 CLR 92, [63]–[65] (French CJ and Crennan J).

47 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 2.

48 *Sorby v Commonwealth* (1983) 152 CLR 281, [14] (Gibbs CJ); Gibbs CJ relied on DC Pearce, *Statutory Interpretation in Australia* (Butterworths, 2nd ed, 1981).

statutory body, like the Trade Practices Commission, was authorised to compel individuals to produce information which may incriminate that individual. In that case, s 155(1) of the *Trade Practices Act 1974* (Cth) required a person to provide information or documents to the Commission. The High Court held that 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. That is so when the object of imposing the obligation is to ensure the full investigation on 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.⁴⁹

International law

11.37 The right to claim the privilege against self-incrimination is contained in art 14.3(g) of the *International Covenant on Civil and Political Rights* (ICCPR)⁵⁰ which provides that, in the determination of any criminal charge, everyone shall be entitled not to be compelled to testify against himself or to confess guilt.

11.38 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.⁵¹ However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.⁵² The High Court has confirmed the influence of art 14 of the ICCPR on the common law.⁵³

Bills of rights

11.39 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Article 6 of the *European Convention on Human Rights* protects the right to a fair trial and the presumption of innocence.⁵⁴ While the privilege against self-incrimination is not specifically mentioned, the European Court has held that

the right to silence and the right not to incriminate oneself, are generally recognised international standards, which lie at the heart of the notion of a fair procedure under article 6.⁵⁵

49 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 618 (Mason ACJ, Wilson and Dawson JJ).

50 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

51 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

52 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 2.

53 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499 (Mason CJ and Toohey J).

54 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6. Ibid.Ibid.Ibid.The European Court of Human Rights has upheld the centrality of the presumption of innocence as part of the inquisitorial systems of European nations’ criminal justice systems: *Funke v France* [1993] 16 EHRR 297 (1993).

55 *Heaney and McGuinness v Ireland* (2001) 33 Eur Court HR 12, [40].

11.40 In the UK case of *R v Lambert*, Lord Hope explained that art 6.2 is

not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality.⁵⁶

11.41 The privilege is protected in bills of rights and human rights statutes in the United States,⁵⁷ the United Kingdom,⁵⁸ Canada,⁵⁹ South Africa⁶⁰ and New Zealand.⁶¹ For example, the *Canadian Charter of Rights and Freedoms* provides:

Any person charged with an offence has the right ...

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence.⁶²

11.42 The right or privilege against self-incrimination is also protected in the Victorian *Charter of Human Rights and Responsibilities* and the ACT's *Human Rights Act*.⁶³

Justifications for excluding the privilege against self-incrimination

11.43 The right to claim the privilege against self-incrimination is not absolute and may be removed or diminished by statute.⁶⁴ In *Hamilton v Oades*, the High Court held that

it is well established that Parliament is able to interfere with established common law protections, including the right to refuse to answer questions, the answers to which may tend to incriminate the person asked.⁶⁵

11.44 The High Court has observed that legislatures may choose to exclude the privilege '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'.⁶⁶

11.45 Removing the right to claim the privilege, while providing immunities regarding the use of the information, may serve the public interest in having information revealed to agencies responsible for investigating crime or misconduct. Gathering information for the purpose of investigating serious crime or maintaining regulatory schemes is an important function of the executive branch of government.

56 *R v Lambert* [2002] 2 AC 545, [88].

57 *United States Constitution* amend V.

58 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 6.

59 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 13.

60 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 35.

61 *New Zealand Bill of Rights Act 1990* (NZ) s 25(d).

62 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 11(c).

63 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(k); *Human Rights Act 2004* (ACT) s 22(2)(i).

64 See, for example, *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503 (Mason CJ and Toohey J).

65 *Hamilton v Oades* (1989) 166 CLR 486, 494.

66 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503 (Mason CJ and Toohey J). See also *Sorby v Commonwealth* (1983) 152 CLR 281, 298 (Gibbs CJ); *Rees v Kratzman* (1965) 116 CLR 63, 80 (Windeyer J).

11.46 Again, the High Court said in *X7 v Australian Crime Commission*:

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 overcome some of the common law's traditional consideration for the individual.⁶⁷

11.47 The High Court, in the passages above, described the public interest being balanced against the individual's interest in avoiding self-incrimination. A slightly different approach was taken by the Queensland Law Reform Commission in its 2004 report, *The Abrogation of the Privilege Against Self-incrimination*, where two public interests were described:

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.⁶⁸

11.48 Stakeholders and commentators have proposed a range of factors that should be considered in the balancing exercise.

Public benefit and avoiding serious risks

11.49 The Law Council of Australia said that to justify abrogating the privilege, there should be an 'assessment that the public benefit which will derive from negation of the privilege must decisively outweigh the resultant harm to the maintenance of civil rights'.⁶⁹ The Law Council suggested that an investigation into 'major criminal activity, organised crime or official corruption' might justify an abrogation of the privilege, as would risks such as 'danger to human life, serious personal injury or damage to human health, serious damage to property or the environment or significant economic detriment'.⁷⁰

11.50 The Australian Council of Trade Unions (ACTU) agreed that only the intention to avoid serious risks would justify abrogating the privilege.⁷¹ The ACTU approved of the abrogation of the privilege in the *Model Work Health and Safety Act*, noting that nearly 200 workers were killed in 2013, and arguing that the clear public interest in healthy and safe workplaces justified the abrogation. However, the ACTU was critical of the abrogation of the privilege in workplace relations laws, arguing that no such pressing public interest was at stake.⁷²

67 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [28].

68 Queensland Law Reform Commission, *The Abrogation of the Principle against Self-Incrimination* Report No 59 (2004) [6.3].

69 Law Council of Australia, *Submission 75*.

70 *Ibid.*

71 Australian Council of Trade Unions, *Submission 44*.

72 *Ibid.*

11.51 In 2000, the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) expressed concern at the loss of the privilege, and (citing its own 1993 report) commented that

it was 'reluctant to see the use of provisions abrogating the privilege—even with a use/derivative use indemnity—being used as a matter of course.' The Committee preferred to see the use of such provisions 'limited to "serious" offences and to situations where they are absolutely necessary'.⁷³

11.52 ASIC also considered that 'the importance of the public interest sought to be advanced by the exclusion' is relevant to the assessment of whether a law that excludes the privilege against self-incrimination is appropriately justified.⁷⁴

Proportionality

11.53 Justifications that refer to public benefit and the investigation of serious offences implicitly incorporate a proportionality approach, which asks whether the law limiting the right pursues an objective of sufficient importance to warrant limiting the right. Such an approach was explicitly proposed by two stakeholders. The Law Council said:

Other considerations include whether the information could not reasonably be obtained by any other lawful means; whether the abrogation is no more than is necessary to achieve the identified purpose; and the consequences of abrogation.⁷⁵

11.54 Professor Gans et al also endorsed a proportionality approach. He explained the balancing exercise which must be conducted in any coercive information-gathering exercise and said:

These processes may limit the privacy of citizens, but, assuming that the material gathered is sufficiently narrow and the government's purposes are proportionate to the infringement, they will be compatible with the right.⁷⁶

11.55 It cannot be assumed that limiting the privilege against self-incrimination will necessarily result in better investigation, detection, prevention and prosecution of crime.⁷⁷ Evidence regarding the effect of changing legal processes is not easy to come by, but there is some evidence that curtailing the right to silence does not produce increased conviction rates.⁷⁸ Justifications for encroachments on fundamental common law rights should include some assessment of whether the encroachment will actually achieve the identified purpose.

73 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest* No 4 of 2000 12, 20.

74 Australian Securities and Investments Commission, *Submission 74*.

75 Law Council of Australia, *Submission 75*.

76 Gans et al, above n 13, 235.

77 Justice Mark Weinberg, 'The Impact of Special Commissions of Inquiry/Crime Commissions on Criminal Trials' (Paper, Supreme Court of NSW Annual Conference, Wollongong, 1 August 2014) 204; Mark Findlay, Stephen Odgers and Stanley Yeo, 'Expanding Crime Investigation' in *Australian Criminal Justice* (Oxford University Press, 2014).

78 See the studies of Professors Jackson and Leng referred to in Barbara Hocking and Laura Manville, 'What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction?' (2001) 1 *Macquarie Law Journal* 63, 71.

11.56 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) has noted that, while art 14.3(g) of the ICCPR protects the right not to incriminate oneself, the right is ‘subject to permissible limitations, provided that the limitations are for a legitimate objective, and are reasonable, necessary and proportionate to that objective’.⁷⁹

11.57 Under the *European Convention on Human Rights*, the right to a fair trial is absolute, but the implied right against self-incrimination may be restricted to achieve a legitimate aim, if there is ‘a reasonable relationship of proportionality between the means employed and the aim sought to be realised’.⁸⁰ In *Procurator Fiscal v Brown* the Privy Council considered whether road traffic legislation—which required a person to identify the driver of a car—was compatible with the implied right against self-incrimination. It was relevant to the proportionality test that the legislation in question was road traffic legislation, with the important and legitimate aim of protecting public safety. The Court noted that there were 37,770 fatal and serious accidents in 1998 in Great Britain, and that it can be difficult for the police to identify drivers of vehicles. The restriction on the privilege was held to be compatible with the European Convention.⁸¹

Voluntary participation in regulatory scheme

11.58 Infringements on the privilege may be justified when the person required to provide information is a voluntary participant in a regulatory scheme.⁸² Professor Gans suggested that in such a case, ‘there is a good argument that the decision to participate renders any subsequent self-incrimination voluntary, rather than compelled’ and gave the example of a regulatory scheme requiring company officers to supply information about a company.⁸³

11.59 The Queensland Law Reform Commission has also suggested that ‘society is entitled to insist on the provision of certain information from those who voluntarily submit themselves to such a regulatory scheme’.⁸⁴ ASIC cited this suggestion with approval, and argued that:

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.⁸⁵

79 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fifth Report of 2012* (October 2012) [1.58]. See also United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984), discussed in Ch 2.

80 *Procurator Fiscal v Brown (Scotland)* (Unreported, UKPC D3, 5 December 2000) (Lord Hope).

81 *Ibid.*

82 J Gans, *Submission 2*; Australian Securities and Investments Commission, *Submission 74*. See further Cole J’s comments in *Spedley Securities Ltd v Bond Brewing Investments Pty Ltd* (1991) 4 ACSR 229.

83 J Gans, *Submission 2*.

84 Queensland Law Reform Commission, *The Abrogation of the Principle against Self-Incrimination Report No 59* (2004) [6.54].

85 Australian Securities and Investments Commission, *Submission 74*.

11.60 The *Guide to Framing Commonwealth Offences* provides that ‘it may be appropriate to override the privilege when its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence’.⁸⁶

Immunities

11.61 Nearly all laws that abrogate the privilege provide a safeguard in the form of use immunity regarding the answers given—that is, they provide that the answers given are not admissible against the person in a subsequent proceeding.⁸⁷ Some laws also provide derivative use immunity—that is, they provide that evidence obtained as a direct or indirect result of a person having made a statement is not admissible against the person. The *Guide to Framing Commonwealth Offences* indicates that where a law excludes the privilege, it is ‘usual to include a use immunity or a derivative use immunity provision’. The Guide explains that the rationale for this protection is that ‘removing the privilege against self-incrimination represents a significant loss of personal liberty for an individual who is forced to give evidence that would tend to incriminate him or herself’.⁸⁸

11.62 The Human Rights Committee and the Scrutiny of Bills Committee have both indicated that noted that an abrogation of the privilege is more likely to be considered justified if it is accompanied by both use and derivative use immunity.⁸⁹

Inherent powers

11.63 The courts have inherent power to exclude evidence where admitting such evidence would render the trial unfair.⁹⁰ This may be used to justify a statutory encroachment on the privilege against self-incrimination, because it reduces or eliminates the risk that the encroachment will result in an unfair trial.⁹¹

11.64 If a statutory abrogation of the privilege results in the prosecution obtaining an unfair forensic advantage, there is a question over the admissibility of that evidence:

the trial judge has a discretion in relation to the admissibility of such [derivative] evidence, and the court has a power to control any use of derivative evidence which amounts to an abuse of process.⁹²

86 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 95.

87 Some statutes provide that the answers are inadmissible in all proceedings, others refer only to criminal proceedings, and still others to criminal proceedings and proceedings for a civil penalty.

88 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 96.

89 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fifth Report of 2012* (October 2012) [1.58]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2006* (June 2006) 81.

90 *Dietrich v R* (1992) 177 CLR 292, [4]. See further Ch 8.

91 See, eg, Australian Securities and Investments Commission, *Submission 125*.

92 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [58].

11.65 A court may prevent the examination of a person if such an examination would prejudice the person in their criminal trial.⁹³ It may quash a conviction if compelled questioning results in a trial that is fundamentally flawed. The High Court exercised this power in *Lee v The Queen* when the transcripts of the defendants for questioning before the NSW Crime Commission were published to the prosecution:

It is a breach of the principle of the common law, and a departure in a fundamental respect from a criminal trial which the system of criminal justice requires an accused person to have, for the prosecution to be armed with the evidence of an accused person obtained under compulsion concerning matters the subject of the charges.⁹⁴

11.66 The common law regarding contempt of court also restrains the use of coercive information-gathering powers. In *Deputy Commissioner of Taxation v De Vonk*, the Full Federal Court held that the questioning of a person charged with a criminal offence about matters relevant to that charge will be contempt of court if there is a real risk of interference with the course of justice. The Court relied on Gibbs CJ in *Hammond v Commonwealth*:

Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence.⁹⁵

11.67 ASIC emphasised the existence of

wide and flexible judicial discretion to exclude the admission of derivative evidence, and further restrict the use of both information compelled from a person and derivative evidence, in order to prevent unfair prejudice to an accused or fundamental departures from ordinary criminal trial processes.⁹⁶

11.68 However Warren CJ of the Victorian Supreme Court, considering the compatibility of certain coercive questioning powers with the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* has cast some doubt on whether the discretions available to the trial judge sufficiently protect the privilege against self-incrimination, particularly with regard to derivative evidence.⁹⁷

Other statutory safeguards

11.69 Statutes that abrogate the privilege may be more justifiable if they include safeguards such as a requirement for reasonable suspicion of wrongdoing before a

93 *Hammond v Commonwealth* (1982) 152 CLR 188.

94 *Lee v The Queen* [2014] HCA 20 (21 May 2014) [46].

95 *Hammond v Commonwealth* (1982) 152 CLR 188 cited in *Deputy Commission of Taxation v de Vonk* (1995) 61 FCR 564.

96 Australian Securities and Investments Commission, *Submission 125*.

97 *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [57]–[78]. ASIC submitted that it is now clear that courts have sufficient discretion: Australian Securities and Investments Commission, *Submission 125*.

person can be subject to compulsory questioning, as is the case in s 39A of the *Proceeds of Crime Act (2002)* (Cth). Examples of other statutory safeguards in relation to the powers of the Australian Crime Commission, ASIC and Australian Security Intelligence Organisation are noted below.⁹⁸

11.70 Abrogation of the privilege may be more justifiable where the examination is to be conducted with judicial supervision. In this case, an officer of the court can ‘control the course of questioning and to make suppression or non-publication orders limiting the timing and scope of any use or dissemination by the Commission of answers given or documents produced’.⁹⁹

Laws that exclude the right to claim the privilege

11.71 A range of Commonwealth laws empower federal agencies to conduct coercive information-gathering investigations. For the purpose of performing their investigatory functions, these agencies have the power to require a person to produce documents and answer questions. Most of these laws provide that those answers or documents are not admissible against the person in criminal proceedings or proceedings for a penalty. It is possible to characterise these laws as preserving the privilege against self-incrimination, because of inadmissibility of the material.¹⁰⁰ For the purpose of this Inquiry, these laws will be characterised as excluding the privilege, because at common law there is a right *not to speak*, rather than a right not to have one’s answers used against one.¹⁰¹ If this broader approach to the right is taken, there are many provisions in Commonwealth laws that exclude the right to claim the privilege against self-incrimination. Most include use or derivative use immunity. However, as Professor Ben Saul and Michelle McCabe reported, ‘there is no consistent approach to the individual rights and protections available’.¹⁰²

11.72 This chapter will focus particularly on laws that abrogate the privilege and offer either no immunity, or use immunity only. Such laws give federal government agencies, including the Australian Tax Office (ATO), ASIC, ASIO, the ACC, and the Australian Competition and Consumer Commission (ACCC), powers to require persons to answer questions or produce documents.

Taxation

11.73 Section 353–10 of sch 1 of the *Taxation Administration Act 1953* (Cth) provides that the Australian Tax Commissioner may require a person to give the Commissioner any information that the Commission requires, attend and give evidence before the Commissioner, or produce any document in the person’s custody or control. The

98 See further the safeguards recommended in Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (May 2008) Principle 17.

99 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, [340]; *X7 v Australian Crime Commission* (2013) 248 CLR 92, [50].

100 See, eg, J Gans, *Submission 2*.

101 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [104]; *Sorby v Commonwealth* (1983) 152 CLR 281, 290–292.

102 Ben Saul and Michelle McCabe, ‘The Privilege against Self-Incrimination in Federal Regulation’ (2001) 78 *Australian Law Reform Commission Reform Journal* 54.

Commissioner may also enter premises and inspect and make copies of any documents.¹⁰³

11.74 This provision does not expressly abrogate the privilege against self-incrimination, but in *Deputy Commissioner of Taxation v De Vonk* the Federal Court said:

If the argument were to prevail that the privilege against self-incrimination was intended to be retained in tax matters, it would be impossible for the Commissioner to interrogate a taxpayer about sources of income since any question put on that subject might tend to incriminate the taxpayer by showing that the taxpayer had not complied with the initial obligation to return all sources of income. Such an argument would totally stultify the collection of income tax.¹⁰⁴

11.75 However, the Court also held that the coercive questioning of a taxpayer about matters that are before the court could amount to contempt.¹⁰⁵

11.76 The Tax Institute raised concerns about these powers. It submitted that the laws should be subject to the privilege against self-incrimination. It also noted that there are provisions in the *Taxation Administration Act* which allow the disclosure of information by taxation officers to the court for the purpose of criminal proceedings, and was concerned that the encroachment on the privilege is not ‘balanced by statutory limitations on derivative use of the information in criminal proceedings’.¹⁰⁶

11.77 The ATO has indicated that its notice powers, which include the power to require a person to attend and give evidence, are

wide and flexible, but they are not unlimited. We endeavour to exercise our powers:

- in good faith
- in strict compliance with the law under which the notice has been issued
- for the proper purposes of that law.¹⁰⁷

11.78 On its face, s 353–10 is a significant encroachment on the common law privilege against self-incrimination. It is not balanced by any statutory immunity, although the court’s inherent power to ensure a fair trial provides some protection. It may be that this encroachment is necessary for the protection of public revenue. Further review should consider whether this provision is appropriately justified, or whether statutory protections should be made available.

Corporate and commercial regulation

11.79 ASIC is the Commonwealth’s corporate, markets and financial services regulator. It is empowered to compel persons to produce books and attend

103 *Taxation Administration Act 1953* (Cth) s 353–15.

104 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, 583; *Binetter v Deputy Commissioner of Taxation* (2012) 206 FCR 37.

105 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, [60].

106 The Tax Institute, *Submission 68*.

107 Australian Taxation Office, *Our Approach to Information Gathering* <<https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting>>.

examinations and answer questions.¹⁰⁸ The privilege against self-incrimination is not available, but use immunity is available regarding statements and the signing of a record.¹⁰⁹ ASIC may only begin an investigation if it has reason to suspect wrongdoing,¹¹⁰ and may only question a person if it has reasonable grounds for believing that the person can provide relevant information.¹¹¹ However, there is no requirement that ASIC suspect that the person questioned was involved in the wrongdoing. ASIC may release the transcripts to private litigants and government agencies in certain circumstances.¹¹²

11.80 ASIC may also apply to a court for an officer or a provisional liquidator of a corporation to be summoned for a public examination about the corporation's affairs. The privilege against self-incrimination is not an excuse for not answering a question, and use immunity is available.¹¹³

11.81 ASIC submitted that because company officers occupy positions of trust, and have extensive opportunities to commit wrongdoing and cause immense harm, the need to regulate them justifies excluding the privilege. ASIC also suggested that company officers should be considered to be voluntary participants in a regulatory scheme, which would justify the abrogation of the privilege.¹¹⁴

11.82 ASIC's powers, particularly regarding the use to which compelled disclosures may be put, have been the subject of several reviews since 1989. In 1989, derivative use immunity became available in the Corporations Law. In 1991, the Joint Statutory Committee on Corporations and Securities—now the Parliamentary Joint Committee on Corporations and Financial Services—conducted an inquiry into use immunity provisions in the Corporations Law. It reported on the concerns raised by the Australian Securities Commission (now ASIC) that 'the danger of imperilling future criminal prosecutions has led the Commission to decide not to formally interview witnesses', meaning that the power of compulsory examination was not used.¹¹⁵ One outcome was that 'investigations which could be discharged within a period of months are taking periods of years'.¹¹⁶ The Director of Public Prosecutions raised concerns that a prosecutor might have to prove that each piece of evidence tendered was not acquired as a result of information disclosed in a compelled examination.¹¹⁷ Other stakeholders challenged these claims.¹¹⁸

108 *Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 21, 30, 31, 33.

109 *Ibid* s 68.

110 *Australian Securities and Investments Commission Act 2001* (Cth) s 13.

111 *Ibid* s 19(1).

112 *Ibid* ss 25, 37 and 127; see further Australian Securities and Investments Commission, *Confidentiality and Release of Information* Regulatory Guide 103, 27 November 1995.

113 *Corporations Act 2001* (Cth) s 597(12).

114 Australian Securities and Investments Commission, *Submission 74*.

115 Joint Statutory Committee on Corporations and Securities, 'Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law' (1991) [3.1.5].

116 *Ibid* [3.2.1].

117 *Ibid* [3.5.1].

118 *Ibid* [3.5.3]–[3.10.3].

11.83 The Committee recommended removal of the derivative use immunity provisions and they were in fact removed in 1992. A 1997 review of that legislative change by John Kluver found that the amendments ‘greatly assisted the ASC in its enforcement of the national scheme laws, primarily by increasing the Commission’s ability to more fully and expeditiously utilise its power to conduct compulsory oral examinations’ but had not led to examinees being unjustifiably prejudiced.¹¹⁹

11.84 Professor Gans criticised the quality of both the Joint Statutory Committee’s review and the Kluver review. He argued that the concerns about derivative use immunity have been overstated,¹²⁰ while ASIC restated its concerns about such an immunity impeding the regulation of corporations and the prosecution of criminal activities.¹²¹ In particular, ASIC expressed concern that derivative use immunity would exclude evidence discovered as a result of the disclosure, ‘even if it would or could have been discovered without the particular information disclosed by the person’.¹²² ASIC offered examples of situations where a suspect would be effectively rendered ‘conviction-proof’ for an unforeseeable range of offences by such an immunity.¹²³

11.85 In later submissions, both ASIC and Professor Gans pointed to a possible model approach to immunity—a flexible approach that would exclude some, but not all, derivative evidence.¹²⁴ This model is discussed further in the conclusion to this chapter.

Serious and organised crime

11.86 The ACC is a criminal intelligence agency, responsible for investigating serious and organised crime. The ACC Board may declare that an investigation is a ‘special investigation’, in which case the coercive information-gathering powers in pt II div 2 of the *Australian Crime Commission Act 2002* (Cth) (*ACC Act*) are available.¹²⁵

11.87 The ACC may summon a person for questioning.¹²⁶ Failing to attend or answer questions, as required by a summons, is an offence.¹²⁷ Self-incrimination is not an excuse for such failure, but if the person claims that answering the question or producing a document might incriminate the person, the answer or document is not admissible in a criminal proceeding.¹²⁸

11.88 There are safeguards in the Act, including a requirement that an examination must be held in private. Transcripts and derivative material may be disclosed to the

119 John Kluver, *Report on the Review of the Derivative Use Immunity Reforms* (Australian Government Press, 1997).

120 J Gans, *Submission 77*; J Gans, *Submission 2*.

121 Australian Securities and Investments Commission, *Submission 74*.

122 Australian Securities and Investments Commission, *Submission 125*; Australian Securities and Investments Commission, *Submission 74*.

123 Australian Securities and Investments Commission, *Submission 125*.

124 *Ibid*; J Gans, *Submission 77*.

125 *Australian Crime Commission Act 2002* (Cth) s 7C(3).

126 *Ibid* s 28.

127 *Ibid* s 30(6).

128 *Ibid* s 30.

prosecutor of the examinee,¹²⁹ but the examiner must direct that a transcript must not be published if to do so would prejudice the person's safety or their fair trial.¹³⁰

11.89 The predecessor to the ACC Act was the *National Crime Authority Act 1984* (Cth), which, for a time, provided derivative use immunity to witnesses. When the legislation was changed to allow use immunity only, the Explanatory Memorandum said:

The Authority is unique in nature and has a critical role in the fight against serious and organised crime. This means that the public interest in the Authority having full and effective investigatory powers, and to enable, in any subsequent court proceedings, the use against the person of incriminating material derived from the evidence given to the Authority, outweigh the merits of affording full protection to self-incriminatory material.¹³¹

11.90 Part II div 2 was recently the subject of High Court consideration in *X7 v Australian Crime Commission (X7 v ACC)*.¹³² The plaintiff was charged with drug trafficking offences, and while in custody, was served with a summons to appear before an ACC examiner. When he declined to answer questions concerning the subject matter of the charges, he was informed that he would be charged with failing to answer questions.

11.91 The Court held (by majority) that the *ACC Act* did not authorise the examination of an accused person about the subject matter of the pending charge. Hayne and Bell JJ said that if the provisions did this, 'they would effect a fundamental alteration to the process of criminal justice', and that such an alteration could only be made 'clearly by express words or necessary intendment'.¹³³ Kiefel J agreed, and added that 'the conduct of any inquiry parallel to a person's criminal prosecution would ordinarily constitute a contempt because the inquiry presents a real risk to the administration of justice'.¹³⁴

11.92 Since *X7 v ACC*, the *ACC Act* has been amended to clarify that an ACC examiner may question a person who has been charged with an offence about matters that are the subject matter of the charge.¹³⁵ The Explanatory Memorandum for the amending act indicated that these amendments were necessary to ensure that the ACC has 'appropriate powers to understand, disrupt and prevent ... serious and organised criminal activity'. It also noted that requiring the ACC to wait until the conclusion of criminal proceedings to examine the person 'would diminish the value of any intelligence gained out of the examination or hearing about the contemporary activities, operations and practices of the organised criminal group'.¹³⁶

129 Ibid ss 25B, 25C.

130 Ibid s 25A.

131 Explanatory Memorandum, National Crime Authority Legislation Amendment Bill 2000.

132 *X7 v Australian Crime Commission* (2013) 248 CLR 92.

133 Ibid [118]–[119].

134 Ibid [161].

135 *Law Enforcement Legislation Amendment (Powers) Act 2015* (Cth); *Australian Crime Commission Act 2002* (Cth) ss 25A–25E.

136 Explanatory Memorandum, *Law Enforcement Legislation Amendment (Powers) Bill 2015* 15.

11.93 The Law Council has expressed concern that the amendments to the *ACC Act* ‘would allow derivative use to be made of post-charge examination material, which could then be made available to the prosecutor of the person being examined, which may affect the right to a fair trial’. The Law Council suggested that ACC examiners should be required to seek judicial authorisation before conducting a post-charge examination of a witness, providing a further safeguard to the right to a fair trial.¹³⁷

Proceeds of crime

11.94 The ACC has joint responsibility, with the Australian Federal Police and the Commonwealth Director of Public Prosecutions, for the administration of the *Proceeds of Crime Act 2002* (Cth). This Act enables the seizure of property used in, or derived from, terrorism offences, and the confiscation of profits from drug trafficking, people smuggling, money laundering and large-scale fraud.¹³⁸ Several provisions exclude the privilege against self-incrimination:

- s 39A excludes the use of the privilege as a reason to refuse to provide a sworn statement to the Australian Federal Police under s 39(1)(d) where authorities harbour a suspicion that a person may have information about, or assets derived from, the suspected criminal activities of others. Use immunity is available.
- s 206 is a similar provision that states that the privilege does not excuse a person from providing information with regard to a production order. Use immunity is available.
- s 271 provides that a person is not excused from providing information to the Official Trustee if the information may tend to incriminate them. Derivative use immunity is available.

Competition and consumer law

11.95 The *Competition and Consumer Act 2010* (Cth) includes several provisions that encroach on the privilege against self-incrimination. The most important of these is s 155, which allows a member of the ACCC to issue a notice requiring a person to provide information, documents, or evidence, if the ACCC has reason to believe that the person has information about a contravention of the Act. Self-incrimination is not an excuse not to answer, and use immunity is available. The Act also includes other coercive information-gathering powers that exclude the privilege against self-incrimination, all of which provide use or derivative use immunity.¹³⁹

11.96 The ACCC has noted that there are implied limits on the use of s 155 powers, and in particular, that

issuing s 155 notices to respondents in proceedings instituted by the ACCC may interfere with rights and protections against self-incrimination ... which apply in court proceedings, and may interfere with the court’s inherent power to conduct its own

137 Law Council of Australia, *Submission 140*.

138 Explanatory Memorandum, *Proceeds of Crime Bill* (Cth) 2002.

139 *Competition and Consumer Act 2010* (Cth) ss 133D, 135B, 151BUF, 155B.

proceedings ... Accordingly, the ACCC is unlikely to issue a notice addressed to a respondent or non-party to ACCC proceedings where the notice relates to the subject matter of those proceedings.¹⁴⁰

National security

11.97 ASIO's main role is 'to gather information ... that will enable it to warn the government about activities or situations that might endanger Australia's national security'.¹⁴¹

11.98 The Director-General may request a warrant authorising a person to be taken into custody and questioned.¹⁴² Section 34L(8) provides that a person cannot fail to provide information to ASIO officers even if that information may incriminate them.¹⁴³ Use immunity is available in s 34L(9).

11.99 According to the Explanatory Memorandum,

[T]he normal privilege against self-incrimination does not apply in relation to proposed new subsection 34G(8) to maximise the likelihood that information will be given or records or things produced that may assist to avert terrorism offences. The protection of the community from such violence is, in this special case, considered to be more important than the privilege against self-incrimination.¹⁴⁴

11.100 Several stakeholders raised concerns about this provision.¹⁴⁵ Lisa Burton, Nicola McGarrity and Professor George Williams considered that

the problem with these justifications is that they are not reflected in the criteria for issuing a questioning warrant. That is, the legislation does not require any proof of imminent danger or that the intelligence sought is capable of preventing a terrorism offence before coercive questioning is permitted.¹⁴⁶

11.101 Statutory safeguards are contained within the legislation, including the requirement for a warrant, an explanation to the person about what the warrant authorises ASIO to do, provision for interpreters, permission from a judge if questioning continues for more than eight hours, and a requirement for humane treatment.¹⁴⁷

140 Australian Competition and Consumer Commission, *Section 155 of the Trade Practices Act* (2008) 12.

141 Home (2015) ASIO <www.asio.gov.au>.

142 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D.

143 This provision was raised by several stakeholders: Law Council of Australia, *Submission 75*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

144 Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

145 Law Council of Australia, *Submission 75*; Institute of Public Affairs, *Submission 49*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

146 Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36 *Melbourne University Law Review* 415, 446.

147 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 30E, 34J, 34M, 34N, 34R, 34T.

11.102 The Law Council considered that this law may unjustifiably exclude the privilege, noting that a person

may be required to give information regardless of whether doing so might tend to incriminate the person or make them liable to a penalty. The mandatory presence of a police officer throughout questioning, required by ASIO's Statement of Procedures, ensures law enforcement agencies have ready access to information and material provided to ASIO by the detained person, and thus may increase the likelihood of derivative use of information in a subsequent prosecution brought against the person who has been compelled to divulge it.¹⁴⁸

11.103 When considering s 34L(8), the Independent National Security Legislation Monitor (INSLM) noted that it is 'not at all unusual for laws to abrogate the privilege against self-incrimination albeit with protection against the use of such answers in criminal proceedings'. Given this, the INSLM concluded:

[o]n balance and provisionally, the view of the INSLM is that there are so many such provisions given effect every day in Australia that the issue cannot be given top priority. It does seem as if the pass has been sold on statutory abrogations of this privilege.¹⁴⁹

11.104 The Australian Human Rights Commission also raised concerns about this provision, particularly the lack of protection against derivative use.¹⁵⁰

Workplace relations laws

11.105 The Terms of Reference for this Inquiry ask the ALRC to include particular consideration of Commonwealth laws in the areas of commercial and corporate regulation, environmental regulation and workplace relations.

11.106 Several provisions in workplace relations legislation exclude the privilege against self-incrimination, primarily for the purpose of empowering Commonwealth officials to examine individuals in relation to workplace offences. The following provisions include use and derivative use immunities:

- *Fair Work Act 2009* (Cth) s 713 provides that a person is not excused from producing a record or document under ss 709(d) and 712 on the grounds that it may tend to incriminate that person;
- *Fair Work (Registered Organisations) Act 2009* (Cth) ss 337 and 337A provide that a person may not refuse to give information, produce documents or answer questions on the ground that the information may incriminate that person; and
- *Fair Work (Building Industry) Act 2012* (Cth) s 53 provides that a person may not refuse to give information, produce documents, or answer questions if required to do so by an examination notice relating to a building industry workplace investigation on the grounds that it may incriminate the person.

148 Law Council of Australia, *Submission 75*.

149 Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2011) 28.

150 Australian Human Rights Commission, *Submission to the Independent National Security Legislation Monitor* (2012).

11.107 The ACTU criticised the encroachment on the privilege in workplace relations laws. It suggested that abrogating the privilege is justifiable when the intention is to avoid ‘serious damage to property or the environment, danger to human life or significant economic detriment’. It commented that

[n]o satisfactory explanation has been offered as to the abrogation of the privilege in the industrial arena. The enforcement of industrial law ... simply does not go to these issues of vital public importance’.¹⁵¹

Environmental regulation

11.108 A number of Commonwealth laws with the objective of environmental protection encroach upon the privilege against self-incrimination, and all provide both use and derivative use immunities. For example:

- *Quarantine Act 1908* (Cth) s 79A;
- *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 189, 202;
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 112, 486J;
- *Great Barrier Reef Marine Park Act 1975* (Cth) s 39P(4);
- *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* (Cth) ss 44(4), 46S(4).

Uniform Evidence Acts

11.109 The common law privilege against self-incrimination is replaced by s 128 of the Uniform Evidence Acts in federal courts, New South Wales, Victoria, Tasmania, the ACT and the Northern Territory. These provisions encroach on the common law privilege to the extent that a court may require the witness to give evidence ‘if the interests of justice require’.¹⁵² If a witness is required to give incriminating evidence, the court must give the witness a certificate which provides that the evidence cannot be directly or indirectly used against the witness in any proceeding in an Australian court.¹⁵³

11.110 The Uniform Evidence Acts are only relevant to court proceedings, and do not apply to compulsory questioning by other government agencies.

Other laws

11.111 A large number of other laws exclude the right to claim the privilege, some expressly, and some by necessary intendment. The ALRC has identified 26 laws that provide use immunity only and 46 that provide derivative use immunity.¹⁵⁴ These laws

151 Australian Council of Trade Unions, *Submission 44*.

152 Uniform Evidence Acts s 128(4).

153 *Ibid* s 128(6), (7).

154 Some of these provisions were highlighted by stakeholders: J Gans, *Submission 77*; The Tax Institute, *Submission 68*; Institute of Public Affairs, *Submission 49*; J Gans, *Submission 2*.

cover a wide range of areas, including the regulation of transport, charities, sports doping, crime and the proceeds of crime, superannuation and many other matters.

Approaches to immunities

11.112 The privilege against self-incrimination is abrogated in a wide range of Commonwealth laws. Some of these laws provide use immunity and some derivative use immunity, and there is no consistent approach.¹⁵⁵ The laws administered by four of the Commonwealth's most active and powerful agencies—ACC, ACCC, ASIC and ASIO—contain use immunity only, while tax laws contain no immunity. In the Interim Report, the ALRC proposed that there should be further review of use and derivative use immunities.

11.113 Two regulators responded to this proposal, and their responses have been discussed above. ASIC considered that use immunity was appropriate in the context of corporations law, and both ASIC and the ATO emphasised that the inherent power of the court to ensure a fair trial provides important safeguards.¹⁵⁶

11.114 The Law Council considered that a law that excludes the privilege and provides use, but not derivative use, immunity may, for that reason, be unjustifiable.¹⁵⁷ It suggested that the 'exercise of coercive information gathering powers should be regarded as exceptional ... because of the intrusive impact on individual rights'.¹⁵⁸

11.115 The National Association of Community Legal Centres (NACLC) considers the privilege against self-incrimination to be a key protection 'for vulnerable individuals facing the weight of state resources and prosecution' and was concerned about 'a general trend towards limiting the privilege'. NACLC supported a review of immunities but preferred protections to ensure that privilege could not be overridden.¹⁵⁹

11.116 The Councils for Civil Liberties (CCL) were also concerned about the 'significant loss of personal liberty for persons who are forced to answer questions'. The CCL supported both a review of immunities and a broader review of justification for abrogation.¹⁶⁰

11.117 Professor Gans pointed out that at least 40 Commonwealth laws encroach upon this important common law right, and submitted that previous reviews of use and derivative use immunities have not all been of high quality, and have been limited in scope. He argued that further consideration of the issue is necessary.¹⁶¹

155 Saul and McCabe, above n 102.

156 Australian Taxation Office, *Submission 137*; Australian Securities and Investments Commission, *Submission 125*.

157 Law Council of Australia, *Submission 75*.

158 Law Council of Australia, *Submission 140*.

159 National Association of Community Legal Centres, *Submission 143*.

160 Councils for Civil Liberties, *Submission 142*.

161 J Gans, *Submission 77*.

11.118 Professor Gans also suggested that the conversation has, to date, been based on a false dichotomy between US style derivative use immunity, and bare use immunity.

11.119 The US approach is usefully described in the submission from ASIC. It imposes a positive obligation on the prosecution to prove that the evidence it proposes to adduce is wholly independent of the compelled testimony. Such an approach is said to lead to the exclusion of evidence even where that evidence would or could have been discovered without the compelled testimony, and to have led to the failure of many prosecutions.¹⁶² ASIC reported that the likely result of the introduction of such immunity in Australian corporations law is that ASIC would exercise its compulsory information-gathering powers less frequently, undermining the public purpose for which those powers were created.¹⁶³

11.120 In contrast, bare use immunity only renders inadmissible the statements made and documents provided by the compelled witness. Evidence discovered as a result of those statements is not rendered inadmissible, even where it could not have been discovered, or its significance could not be understood, without the compelled disclosure.

11.121 Professor Gans suggested that consideration should be given to whether Commonwealth statutes abrogating the privilege should contain a flexible, or partial, derivative use immunity. Such an immunity would render inadmissible only evidence which would not have been discovered without the compelled disclosure (rather than all evidence that was in fact discovered in reliance on leads from the disclosure).¹⁶⁴

11.122 Warren CJ of the Supreme Court of Victoria considered that the partial derivative use immunity adopted in Canada was the appropriate protection for the privilege. The Canadian Supreme Court held that Charter protection is only given to derivative evidence which ‘could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness’.¹⁶⁵ However, Warren CJ found that, while Australian courts have inherent powers to exclude evidence that would render a trial unfair, a discretionary or case-by-case approach would not provide sufficient protection.¹⁶⁶

11.123 ASIC also considered that the Canadian approach offered a useful model for the appropriate immunity but emphasised that the Canadian courts rejected US style statutory derivative use immunity in favour of ‘use immunity plus a flexible judicial discretion to exclude a narrow category of derivative evidence’.¹⁶⁷

11.124 The ALRC has considered this question in three reports—*Principled Regulation* (2003), *Privilege in Perspective* (2008), and *Making Inquiries* (2009). In

162 Australian Securities and Investments Commission, *Submission 125*.

163 Australian Securities and Investments Commission, *Submission 74*.

164 J Gans, *Submission 77*.

165 *R v S (RJ)* [1995] 1 SCR 451, 561.

166 *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [159].

167 Australian Securities and Investments Commission, *Submission 125*.

each of these it concluded that use immunity was appropriate.¹⁶⁸ The Queensland Law Reform Commission in 2004 also concluded that the default position should be use immunity, rather than derivative use.¹⁶⁹ However, those inquiries did not address some issues that have only recently arisen, including the compelled questioning of persons subject to charge regarding the subject matter of the charge, and the publication of transcripts of compelled questioning to prosecutors. These inquiries also did not consider whether statutes should include partial derivative use immunity.

Conclusion

11.125 The ALRC considers further review of the encroachments on the privilege against self-incrimination in Commonwealth laws is warranted. The following matters have led to this conclusion:

- the large number of Commonwealth acts that encroach upon the privilege, and the apparent inconsistency regarding the availability of use and derivative use immunity;
- the serious concerns raised by the High Court in *X7 v ACC* and *Lee v The Queen*, and by Warren CJ in the Victorian Supreme Court, regarding the impact on the fair trial of compelled questioning of a person who is subject to charge; and
- concerns heard from stakeholders and commentators.¹⁷⁰

11.126 Such a review could consider:

- whether the many encroachments on the privilege against self-incrimination on Commonwealth laws are justified, either by implied waiver (by persons participating in a regulatory scheme), or by the serious public risks that are sought to be averted by the encroachment;
- if an encroachment is justified, then whether use immunity, partial derivative use immunity, or full US-style derivative use immunity is appropriate;
- if partial derivative use immunity is appropriate, then whether the inherent powers of the court already provide, or could provide, such an immunity, or whether statutory protection is necessary;
- whether there should be any statutory immunity in relation to compelled examinations in taxation law;

168 Australian Law Reform Commission, 'Principled Regulation: Federal Civil and Administrative Penalties in Australia' (No. 95 2003) ch 18; Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) ch 7; Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report No 111 (2009) ch 17.

169 Queensland Law Reform Commission, *The Abrogation of the Principle against Self-Incrimination* Report No 59 (2004) [9.89].

170 National Association of Community Legal Centres, *Submission 143*; Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; J Gans, *Submission 77*; The Tax Institute, *Submission 68*; J Gans, *Submission 2*.

- whether compelled examinations of persons subject to charge, regarding the subject matter of the charge, should be permitted, and if so, under what conditions; and
- whether it is appropriate for a prosecutor to be given transcripts of compelled questioning.