12. Privilege Against Self-incrimination

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A common law right

12.1 The privilege against self-incrimination is 'a basic and substantive common law right, and not just a rule of evidence'.[1] It reflects 'the long-standing antipathy of the common law to compulsory interrogations about criminal conduct'.[2]

1 *Reid v Howard* (1995) 184 CLR 1, [8].
2 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, [1] (French CJ).

12.2 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'.[3]

12.3 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.[4]

12.4 The common law privilege is available not only to persons questioned in criminal proceedings, but to persons suspected of a crime,[5] to persons questioned in civil proceedings[6] and in non-curial contexts.[7]

12.5 The privilege is one aspect of the right to silence.[8] The right to silence protects the right not to be made to testify against oneself (whether or not that testimony is incriminating).[9] 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.[10]

12.6 This chapter is only concerned with the privilege against self-incrimination, which arose in the common law courts, rather than the privilege against exposure to a civil penalty or forfeiture, which arose in equity.[11] This is consistent with the Terms of Reference for this Inquiry which require the ALRC to consider laws that encroach on traditional, or common law, rights, freedoms and privileges.

Testimony and documents

12.7 The privilege is testimonial in nature, protecting individuals from convicting themselves out of their 'own mouths'.[12]

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3 *Sorby v Commonwealth* (1983) 152 CLR 281, 288. The Court cited *Lamb v Munster* (1882) 10 QBD 110 at 111.
4 *Griffin v Pantzer* (2004) 137 FCR 209, [37] (Allsop J).
5 *Petty & Maiden v R* (1991) 173 CLR 95.
6 *Reid v Howard* (1995) 184 CLR 1, [15].
7 *Griffin v Pantzer* (2004) 137 FCR 209, [44].
8 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. The right to silence is a negative right, a right not to be made to do something, namely, testify against yourself: Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 204.
9 Gans et al, above n 8, 204.
10 See, eg, *Broadcasting Services Act 1992* (Cth) s 202.
11 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [45]. See also Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [25070]; *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, [24], [50].
12 *Hamilton v Oades* (1989) 166 CLR 486, 496.

12.8 The privilege does not prevent persons from being compelled to incriminate themselves through the provision of evidence that is non-testimonial in nature.[13] Non-testimonial evidence may include, for instance, fingerprints or DNA samples.[14] 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.[15]

12.9 While recent Australian decisions have indicated that the privilege extends to documents,[16] 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.[17]

12.10 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 '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.[18] 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.

12.11 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.[19]

Corporations may not claim the privilege

12.12 The privilege against self-incrimination extends to natural persons, but not corporations.[20] In *Environment Protection Authority v Caltex*, the High Court reviewed

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13 See, eg, ASIC's submission on this point: Australian Securities and Investment Commission, *Submission 74*.

14 Heydon, above n 11, [25095].

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

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

17 Australian Securities and Investment Commission, *Submission 74*; ASIC relied upon the following: *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.

18 *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 392; *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 326; *Environmental 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].

19 Heydon, above n 11, [25090].

20 *Environmental 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 *Evidence Act 1995* (Cth) 1995 s 187 which abolished the privilege regarding bodies corporate.

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.[21]

The origins of the privilege

12.13 There is some debate among legal historians about the origins of the privilege.[22] 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 themselves.[23] Professor Richard Helmholz reports 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.[24]

12.14 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'.[25]

12.15 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.[26]

12.16 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.[27]

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

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21 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, [39].

22 For example, *Azzopardi v R* (2001) 205 CLR 50, 91 [120] (McHugh J). See also Cosmas Mosidis, *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).

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

24 Ibid 7.

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

26 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.

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

> … 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.[28]

The rationale for the privilege

12.18 A number of rationales have been offered for the privilege. First, and perhaps most importantly, the privilege is said to protect freedom and dignity. 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.[29]

12.19 Also in *Pyneboard*, the privilege was described as a 'fundamental bulwark of liberty'.[30]

12.20 Secondly, the privilege is 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.[31]

12.21 Thirdly, the privilege is thought to reduce the power imbalance between the prosecution and a defendant,[32] or as Gleeson CJ put it, to hold 'a proper balance between the powers of the State and the rights and interests of citizens'.[33]

12.22 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.[34]

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28 *Azzopardi v R* (2001) 205 CLR 50; see also Mosidis, above n 22; *X7 v Australian Crime Commission* (2013) 248 CLR 92, 135 [100].

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

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

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

32 Mosidis, above n 22, 136.

33 *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118, 127. See also Australian Law Reform Commission, 'Evidence' (Interim Report 26) [857].

34 Australian Law Reform Commission, above n 33, [852], [861]; Heydon, above n 11, [25140].

- It may protect individuals from unlawful coercive methods used to obtain confessions.[35]
- 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'.[36] Being compelled to give a statement in this environment could exacerbate the problem.
- It may reduce the incidence of untruthful evidence, on the basis that a person who is compelled to give evidence is more likely to lie.[37]

Statutory protection

12.23 Some statutes protect the privilege against self-incrimination. For example, s 128(1) of the *Evidence Act 1995* (Cth) provides that where a witness objects to giving particular evidence that 'may tend to prove' that the witness has committed an offence under Australian or foreign law, or is liable to a civil penalty, a court may determine whether there are 'reasonable grounds' for an objection to providing that evidence.[38] If there are reasonable grounds, the court is to inform the witness that the witness need not give the evidence.[39]

12.24 In one respect, the *Evidence Act* offers superior protection than the common law. The *Evidence Act* requires a court, if it appears that a witness may have grounds to claim the privilege, to ensure that the witness is aware of the privilege.[40] At common law, there is no duty on the judge to warn a witness that there is no obligation to answer incriminating questions,[41] and many judges did not do so before the introduction of the statutory obligation.[42]

Protections from statutory encroachment

Australian Constitution

12.25 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*'.[43] For instance, in *Sorby v Commonwealth,* a majority of the

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35 Mosidis, above n 22, 133.
36 Ibid 129.
37 Australian Law Reform Commission, above n 33, [855].
38 *Evidence Act 1995* (Cth) 1995 s 128. See also cognate state and territory legislation.
39 Ibid s 128(3)(a).
40 Ibid s 132.
41 Heydon, above n 11, [25.105].
42 Australian Law Reform Commission, above n 33, [464].
43 See discussion in Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31 *University of Tasmania Law Review* 132, 162.

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*.[44]

12.26 However, courts have an inherent power to prevent injustice and to ensure fair processes.[45] 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.[46]

Principle of legality

12.27 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 this intention was made unambiguously clear.[48]

12.28 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 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

12.29 The right to claim the privilege against self-incrimination is enshrined in art 14(3)(g) of the *International Covenant on Civil and Political Rights*[50] (ICCPR) 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.

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44 *Sorby v Commonwealth* (1983) 152 CLR 281, 308 (Mason, Wilson and Dawson JJ).

45 *Dietrich v R* (1992) 177 CLR 292, [4]. See further Ch 10.

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

47 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

48 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Crafter v Kelly* [1941] SASR 237.

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).

12.30 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

12.31 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]

12.32 In the UK case of *R v Lambert,* Lord Hope explained that art 6(2)

> [i]s 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]

12.33 The privilege is enshrined in bills of rights and human rights statutes in the United States,[57] the United Kingdom,[58] Canada[59] and New Zealand.[60] 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.[61]

12.34 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*.[62]

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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 1.

53 *Environmental 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. 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].

56 *R v Lambert* [2001] UKHL 37 [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 c 11* s 13.

60 *Bill of Rights Act 1990* (NZ) s 25(d).

61 *Canada Act 1982 c 11* s 11(c).

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

Laws that exclude the right to claim the privilege

12.35 Many Commonwealth laws require a person to answer questions or produce documents, but provide that those answers or documents are not admissible against the person in criminal proceedings. It is possible to characterise these laws as preserving the privilege against self-incrimination, because of inadmissibility of the material.[63] However, 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.[64] 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.

12.36 Nearly all of these provisions provide statutory protections for witnesses, primarily by way of use or derivative use immunities that render incriminating evidence inadmissible against the relevant person in future criminal proceedings. Use immunity means that the statement given or record produced cannot be used in subsequent criminal or civil penalty proceedings against the person, except in proceedings in relation to the falsity of the evidence itself.[65] Derivative use immunity means that evidence obtained as a result of the person having made a statement, or provided a document, cannot be used in subsequent proceedings.[66]

12.37 Some stakeholders expressed concern at the exclusion of the privilege in Commonwealth laws.[67]

12.38 This chapter identifies provisions in Commonwealth laws that exclude the right to claim the privilege in the following areas:

- workplace relations laws;
- work health and safety laws;
- corporate and commercial regulation;
- national security laws;
- the powers of federal investigative and regulatory bodies; and
- migration law.

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63 See, eg, J Gans, *Submission 02*.

64 The Institute of Public Affairs also took this approach: Institute of Public Affairs, *Submission 49*.

65 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008).

66 Ibid [7.34]–[7.35].

67 Law Council of Australia, *Submission 75*; Australian Securities and Investment Commission, *Submission 74*; The Tax Institute, *Submission 68*; Institute of Public Affairs, *Submission 49*; Australian Council of Trade Unions, *Submission 44*; J Gans, *Submission 02*.

Workplace relations laws

12.39 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.

12.40 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 them.
- *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.
- *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.

Work health and safety laws

12.41 Section 172 of the *Work Health and Safety Act 2011* (Cth) provides that a person is not excused from answering a question or providing information or a document on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty. Use and derivative use immunity is provided. The provision concerns investigations into unsafe or unlawful work practices.

12.42 The Australian Council of Trade Unions (ACTU) argued that there is a 'clear public interest' in ensuring workers are healthy and safe at work and employers comply with workplace laws, and therefore 'inspectors need to have strong unambiguous powers to obtain information'.[68]

12.43 The Explanatory Memorandum to the Work Health and Safety Bill 2011 (Cth) provides a justification for the abrogation of the privilege:

> These arrangements are proposed because the right to silence is clearly capable of limiting the information that may be available to inspectors or the regulator, which may compromise inspectors' or the regulator's ability to ensure ongoing work health and safety protections. Securing ongoing compliance with the Bill and ensuring work health and safety are sufficiently important objectives as to justify some limitation of the right to silence.

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

12.44 The ACTU argued that the provision is proportionate and necessary as inspectors need ‘strong unambiguous powers to obtain information’ in order to reduce the risk of workplace injury:

> The abrogation of the privilege against self-incrimination is justifiable and should be retained. There is a clear public interest in ensuring healthy and safe working conditions. Workers are entitled to healthy and safe conditions of work.[69]

Corporate and commercial regulation

12.45 As the Commonwealth regulator in the area of corporate and commercial regulation, ASIC has compulsory investigatory powers that exclude the privilege against self-incrimination.

12.46 ASIC is empowered to compel persons to:

- produce specified books relating to regulated entities or activities (production powers);[70] and
- attend examinations and answer relevant questions on oath (examination powers).[71]

12.47 The fact that producing documents or answering questions may incriminate the person is not a reasonable excuse for refusing to do so. Use immunity is available regarding statements and the signing of a record.[72]

12.48 Procedural safeguards are available in the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act), including:

- the provision of a notice setting out the general nature of the matter being investigated, and information about the examinee’s rights and obligations;
- the right to have a lawyer present;
- an examinee is only required to answer questions that are relevant to a matter that ASIC is investigating;
- an examination must take place in private;
- an examinee is entitled to a copy of the record of the examination; and
- judicial review is available regarding examination decisions made by ASIC.[73]

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69 Ibid.
70 *Australian Securities and Investments Commission Act 2001* (Cth) ss 30, 31, 33.
71 Ibid ss 19, 21.
72 Ibid s 68.
73 Ibid ss 19, 22, 23, 24; Australian Securities and Investment Commission, *Submission 74*.

National security laws

12.49 There are a number of Commonwealth laws that exclude the right to claim the privilege against self-incrimination in order to detect and prevent serious crime, particularly serious crimes such as terrorism. These laws include the following:

- *Crimes Act 1914* (Cth) s 3ZZGE(1)(c) provides that a person is not excused from giving information, answering a question, or giving access to a document to the Commonwealth Ombudsman, on the grounds that it may incriminate them. Use and derivative use immunities are available: s 3ZZGE(2).
- *Australian Security Intelligence Organisation Act* 1979 (Cth) (ASIO Act) s 34L(8) provides that a person cannot fail to provide information to ASIO officers even if that information may incriminate them.[74] Use immunity is available in s 34L(9).
- *Australian Federal Police Act 1979* (Cth) ss 40A, 40VG, 40VE and 40L exclude the right to claim the privilege against self-incrimination for Australian Federal Police (AFP) employees who are subject to investigations or questioning about professional standards and other internal matters. Use immunity is available.

12.50 The *Proceeds of Crime Act 2002* (Cth) is intended to enable the seizure of property used in, or derived from, terrorism offences, as well as to enable the confiscation of profits from drug trafficking, people smuggling, money laundering and large-scale fraud.[75] Several provisions exclude the privilege against self-incrimination. All contain use, but not derivative use, immunities.

- Section 39A excludes the use of the privilege as a reason to refuse to provide a sworn statement to the AFP 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.
- Section 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.
- Section 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.

12.51 Some of these provisions—discussed below—have been subject to criticism by parliamentary and other reviews, for excluding the privilege without appropriate justification.

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

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

Compulsory disclosure of information to the Commonwealth Ombudsman

12.52 In 2014, changes were made to the criminal laws regarding terrorism offences which had an impact on a range of rights and freedoms.[76] Safeguards were included in the legislation, including oversight by the Commonwealth Ombudsman. Officers of eligible agencies are required to provide information to the Ombudsman and are denied the privilege against self-incrimination, subject to use and derivative use immunities.[77] The Senate Standing Committee on the Scrutiny of Bills noted that this provision amounted to a 'possible undue trespass on individual rights and liberties',[78] and left the question of whether the provision was 'appropriate' to the Senate.[79]

12.53 The Explanatory Memorandum to the legislation that introduced the provision explained that the abrogation of the privilege against self-incrimination 'recognises the public interest in the effective monitoring of the use of delayed notification search warrants to ensure that civil liberties are not unduly breached'.[80]

Compulsory disclosure of information to ASIO

12.54 Several stakeholders raised concerns about s 34L(8) of the ASIO Act, which provides that a person cannot fail to provide information to ASIO officers, even if that information may incriminate them.[81] Direct use immunity is available.[82] According to the Explanatory Memorandum,

> The 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.[83]

12.55 Lisa Burton, Nicola McGarrity and 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.[84]

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76 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) item 35.

77 *Crimes Act 1914* (Cth) s 3ZZGE(3).

78 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014,* (October 2014) 789.

79 Ibid 790.

80 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

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

82 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34(9).

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

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

12.56 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.[85]

12.57 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.[86]

12.58 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 that,

> On 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.[87]

12.59 The Australian Human Rights Commission also raised concerns about this provision, particularly the lack of protection against derivative use.[88]

Other coercive information-gathering agencies

12.60 A range of Commonwealth laws empower federal agencies to conduct coercive information-gathering investigations. For the purpose of performing their investigatory functions, these statutory agencies, such as the Australian Crime Commission and the Australian Taxation Office (ATO) have the ability to obtain information and documents in ways that deny the privilege against self-incrimination.

12.61 The justifications for these encroachments will necessarily vary depending on the particular area of law. Generally, they have been justified on public interest grounds to promote the investigation of and to prevent unlawful practices such as tax evasion, corruption and environmental pollution and degradation. Overwhelmingly, these provisions provide use or derivative use immunities to protect individuals from future criminal proceedings.

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

86 Law Council of Australia, *Submission 75*.

87 Independent National Security Legislation Monitor, *Annual Report* (16 December 2011) 28.

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

12.62 The Terms of Reference for this Inquiry ask the ALRC to include consideration of Commonwealth laws that exclude the right to claim the privilege in commercial and corporate regulation, environmental regulation and workplace relations. The ALRC has identified provisions in these areas of law, as well as in other areas.[89] Unless otherwise stated, these provisions confer use immunity only. They include the following:

- *Australian Crime Commission Act 2002* (Cth) s 30;
- *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 189—derivative use immunity;
- *Competition and Consumer Act 2010* (Cth) ss 133E, 135C, 151BUF, 154R, 155(7), 155B, 159;
- *Corporations Act 2001* (Cth) s 597(12);
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 486J—derivative use immunity;
- *Great Barrier Reef Marine Park Act 1975* (Cth) s 39P(4)—derivative use immunity;
- *Income Tax Assessment Act 1936* (Cth) s 264—no use or derivative use immunity;
- *Law Enforcement Integrity Commissioner Act* 2006 (Cth) ss 80, 96;
- *Mutual Assistance in Business Regulation Act 1992* (Cth) s 14;
- *National Consumer Credit Protection Act 2009* (Cth) s 295;
- *Ombudsman Act 1976* (Cth) s 9;
- *Parliamentary Service Act 1999* (Cth) ss 65AC, 65AD;
- *Private Health Insurance Act 2007* (Cth) s 214.15;
- *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* (Cth) ss 44(4), 46S(4) —derivative use immunity;
- *Public Service Act 1999* (Cth) ss 72C, 72D;
- *Retirement Savings Accounts Act 1997* (Cth) s 120;
- *Superannuation Industry (Supervision) Act 1993* (Cth) ss 130B, 287, 290, 336;
- *Tobacco Plain Packaging* (Cth) s 83; and
- *Veterans' Entitlements Act 1986* (Cth) s 129.

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89 Some of these provisions were highlighted by stakeholders: The Tax Institute, *Submission 68*; Institute of Public Affairs, *Submission 49*; J Gans, *Submission 02*.

Taxation law

12.63 The Tax Institute raised concerns about ss 263 and 264 of the *Income Tax Assessment Act 1936* (Cth), which provide the Australian Tax Commissioner with powers to obtain information relating to a person's income tax liability. When gathering information to establish whether an individual has returned the correct amount of taxable income, the ATO can issue a notice under s 264, and in doing so, abrogate the privilege against self-incrimination.

12.64 These access and information-gathering powers allow ATO officers to enter taxpayers' premises in order to access and make copies of books, documents and other papers, as well as requiring taxpayers to produce documents, provide information in writing and attend interviews.

12.65 The Tax Institute conceded that, on occasion, the Tax Commissioner 'must sometimes act quickly' as 'powers of compulsion, for example to overcome banker-customer confidentiality, are necessary'. However, it went on to argue that these powers 'are not balanced by statutory limitations on derivative use of the information in criminal proceedings'.[90]

12.66 This provision was considered in *Deputy Commissioner of Taxation v De Vonk*, where the 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.[91]

Migration law

12.67 There are numerous provisions in migration law that exclude the privilege against self-incrimination where officials from the Migration Agents Registration Authority (MARA) or Immigration Department officials are investigating criminal offences and civil penalty provisions concerning visa fraud. Generally speaking, the provisions empower MARA to compel information from registered or former migration agents that may be relevant to their investigations.

12.68 These provisions are in the *Migration Act 1958* (Cth) (*Migration Act*) and include derivate use immunities. They include the following.

- Section 24: a person is not excused from giving information or providing documents when that evidence concerns unlawful work practices or the violation of visa work conditions by non-citizens.

90 The Tax Institute, *Submission 68*.
91 *Commissioner of Taxation v de Vonk* (1995) 61 FCR 564, 583.

- Section 140XG: a person is not excused from giving information or providing documents to an inspector when that inspector is on their work premises and acting under s 140XC(d).
- Section 268BK: a person is not excused from giving information or providing documents concerning the investigation of student visas.
- Section 305C(6): a person is not excused from giving information or providing documents concerning where an individual has information relevant to a decision by MARA to refuse a registration application from a registered migration agent or make a decision to cancel or suspend such an agent's registration or to caution such an agent.
- Section 306J: an individual is not excused from producing a document under ss 306D, 306E or 306F on the ground that the production of the document may tend to incriminate the individual or expose the individual to a penalty.[92]
- Section 308(3): empowers MARA to compel information from registered migration agents, even if the information would tend to incriminate the agent.
- Section 311EA(6): empowers MARA to compel information from former migration agents, even if the information would tend to incriminate the agent.
- Section 487C(1): provides that a person is not excused from giving evidence or producing a document relating to a work-related offence under s 487B, even if the disclosure incriminates that person.

Other laws

12.69 There are many other Commonwealth laws that exclude the right to claim the privilege against self-incrimination,[93] including the following provisions. Unless otherwise stated, these provisions confer derivative use immunities.

12.70 The laws include the following:

- *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 54—use immunity only;
- *Australian Border Force Act 2015* (Cth) ss 26—use immunity only;
- *Australian Sports Anti-Doping Authority Act 2006* (Cth) s13D;
- *Aviation Transport Security Act* 2004 (Cth) s 112;
- *Banking Act 1959* (Cth) s 52F—use immunity only;

92 Those sections relate to the power to compel the production of documents from inactive migration agents and the representatives of deceased migration agents.

93 The Institute of Public Affairs identified ‘108 current federal laws that restrict the privilege against self-incrimination’: Institute of Public Affairs, *Submission 49*.

- *Bankruptcy Act 1966* (Cth) s 81(11AA). There is no express provision for immunity, but the abrogation of the privilege is 'subject to any contrary direction by the Court, the Registrar or the magistrate';
- *Defence Trade Controls Act 2012* (Cth) ss 44, 57;
- *Dental Benefits Act 2008* (Cth) s 32E;
- *Quarantine Act 1908* (Cth) s 79A; and
- *Therapeutic Goods Act 1989* (Cth) ss 31F, 32JD, 32JK, 41JC, 41JJ.

Justifications for excluding the privilege against self-incrimination

12.71 The right to claim the privilege against self-incrimination is not absolute and may be removed or diminished by statute.[94] 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.[95]

12.72 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'.[96]

12.73 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.

12.74 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.[97]

12.75 The High Court, in the passages above, described the public interest being balanced against the individual's interest in avoiding self-incrimination. A slightly

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

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

96 *Environmental 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).

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

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.[98]

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

Public benefit and avoiding serious risks

12.77 The Law Council 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'.[99] The 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'.[100]

12.78 The ACTU offered a similar list of risks that might justify restricting the privilege, including 'serious damage to property or the environment, danger to human life or significant economic detriment'.[101] This submission 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. The ACTU contrasted work safety laws with the regulation of industrial action, and said:

> No 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.[102]

12.79 In 2000, the Senate Standing Committee for the Scrutiny of Bills 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'.[103]

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98 Queensland Law Reform Commission, above n 8, [6.3].
99 Law Council of Australia, *Submission 75*.
100 Ibid.
101 Australian Council of Trade Unions, *Submission 44*.
102 Ibid.
103 Senate Standing Committee on the Scrutiny of Bills, Parliament of Australia, *Alert Digest No. 4 of 2000* (2000) 12, 20.

12.80 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.[104]

Proportionality

12.81 Justifications that refer to public benefit and the investigation of serious offences implicitly incorporate a proportionality approach, in that these justifications compare the seriousness of the infringement of the privilege with the importance of the objective sought to be achieved by the infringement.[105] 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.[106]

12.82 Professor Gans et al also endorsed a proportionality approach when explaining the balancing exercise which must be conducted in any coercive information-gathering exercise:

> 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.[107]

12.83 The Parliamentary Joint Committee on Human Rights has noted that, while art 14(3)(g) of the ICCPR protects the right to be free from self-incrimination, 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'.[108]

12.84 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'.[109] 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 Convention.[110]

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104 Australian Securities and Investment Commission, *Submission 74*.
105 See further Ch 1 regarding proportionality.
106 Law Council of Australia, *Submission 75*.
107 Gans et al, above n 8, 235.
108 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].
109 *Procurator Fiscal v Brown (Scotland)* (Unreported, UKPC D3, 5 December 2000), Lord Hope.
110 Ibid.

Voluntary participation in regulatory scheme

12.85 Infringements on the privilege may be justified when the person required to provide information is a voluntary participant in a regulatory scheme.[111] 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.[112]

12.86 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'.[113] 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.[114]

12.87 ASIC considered that because those persons occupy positions of trust, and have extensive opportunities to commit wrongdoing and cause immense harm, the need to regulate them justifies excluding the privilege.[115] On the other hand, the Institute of Public Affairs raised concerns about the number of statutes that remove the privilege in relation to companies and their directors and agents, and proposed that 'provisions which remove legal rights of company directors' should be repealed.[116]

12.88 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'.[117]

Immunities

12.89 As outlined at the start of this chapter, laws that exclude the privilege will generally be accompanied by use or derivative use immunity.[118] 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-

111 J Gans, *Submission 02*; Australian Securities and Investment Commission, *Submission 74*.
112 J Gans, *Submission 02*.
113 Queensland Law Reform Commission, above n 8, [6.54].
114 Australian Securities and Investment Commission, *Submission 74*.
115 Ibid.
116 Institute of Public Affairs, *Submission 49*.
117 Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011) 95.
118 Australian Securities and Investment Commission, *Submission 74*. Generally, courts are more inclined to uphold the validity of use immunity rather than derivative use immunity, see for example, Mason CJ's judgment in *Hamilton v Oades* (1989) 166 CLR 486, 496.

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'.[119]

12.90 Legislators must make a judgment as to whether use immunity sufficiently balances the loss of the privilege, or whether derivative use immunity is necessary. There are different views on this issue.

12.91 The Human Rights Committee noted that an abrogation of the privilege is more likely to be considered permissible if it is accompanied by both a use and derivative use immunity.[120]

12.92 The Supreme Court of Victoria was asked to consider whether a statute that provided use immunity only was consistent with the *Charter of Human Rights and Responsibilities*, which protects the right to a fair hearing and the privilege against self-incrimination. Warren CJ held that the removal of the derivative use immunity in the statute in question went too far:

> In the context of organised crime, such a limitation means that investigators are not required to give careful consideration to which persons will be charged and interrogated … thereby raising the possibility of innocent or deliberate breaches of the right against self-incrimination … In my view, the purpose of the limitation may still be achieved whilst retaining a form of derivative use immunity.[121]

12.93 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.[122]

12.94 On the other hand, derivative use immunities have been criticised on the basis that they have the potential to quarantine large amounts of material and render a witness immune from prosecution altogether. A thorough review conducted by the Queensland Law Reform Commission in 2004 concluded that the default position should be use immunity, rather than derivative use, because

> the potential effect of a derivative use immunity is wider than the scope of the protection that would have been available if the privilege had not been abrogated. The Commission therefore considers that a derivative use immunity, because of its capacity to effectively quarantine from use additional material that proves the guilt of an individual who has provided self-incriminating information, should not be granted unless there are exceptional circumstances to justify the extent of its impact.[123]

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119 Attorney-General's Department, above n 117, 96.

120 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].

121 *Re an application under the Major Crime (Investigative Powers) Act 2004* (2009) 198 Crim R 305, [155]–[156].

122 Law Council of Australia, *Submission 75*.

123 Queensland Law Reform Commission, above n 8, [9.89].

12.95 It has even been suggested that a witness might deliberately disclose information in order to claim immunity against disclosure of information that may have been obtained by other means during the investigation.[124]

12.96 The question has been particularly prominent in relation to the regulation of corporations, and has been the subject of several reviews over the last 20 years. 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.[125] One outcome was that 'investigations which could be discharged within a period of months are taking periods of years'.[126] 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 pursuant to an immunity.[127] Other stakeholders challenged these claims.[128]

12.97 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.[129]

12.98 In submissions to this ALRC Inquiry, Professor Gans argued that the concerns about derivative use immunity have been overstated,[130] while ASIC restated its concerns about such an immunity impeding the regulation of corporations and the prosecution of criminal activities.[131] The disagreement may, in part, be due to different understandings of the scope of derivative use immunity. The usual form of words for Australian statutes that provide derivative use immunity is that evidence obtained 'as a direct or indirect consequence' of the person having given evidence cannot be used against the person.[132]

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124 Australian Administrative Review Council, 'The Coercive Information-Gathering Powers of Government Agencies' (Report 48, 2008) 50.

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

126 Ibid [3.2.1].

127 Ibid [3.5.1].

128 Ibid [3.5.3]–[3.10.3].

129 John Kluver, 'Review of the Derivative Use Immunity Reforms' (1997).

130 J Gans, *Submission 02*.

131 Australian Securities and Investment Commission, *Submission 74*.

132 *Evidence Act 1995* (Cth) 1995 s 128; *Migration Act 1958* (Cth) s 24; *Proceeds of Crime Act 2002* (Cth) s 271; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 486J.

12.99 The Canadian Supreme Court considered a range of possible approaches to derivative use immunity and concluded 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'.[133] This approach was adopted by the Victorian Supreme Court in the Charter case mentioned above.[134] However ASIO has expressed concern that derivative use immunity could render inadmissible material that 'would or could have been discovered without the particular information disclosed by the person'.[135]

Other statutory safeguards

12.100 Statutes that abrogate the privilege may be more justifiable if they include safeguards such as a requirement for reasonable suspicion of wrongdoing before a person can be subject to compulsory questioning, as is the case in s 39A of the *Proceeds of Crime Act*. Examples of other statutory safeguards in relation to the powers of ASIC and ASIO are noted above.[136]

12.101 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'.[137]

Conclusions

12.102 The privilege against self-incrimination is a common law right that protects a person from being compelled to answer a question or produce a document. It is said to protect the privacy, dignity and personal freedom of the individual, to preserve the presumption of innocence, and to maintain the proper balance between the citizen and the state. It is also thought to protect individuals from improper pressure to confess, and to reduce the incidence of unreliable testimony.

12.103 The privilege places barriers in the way of investigations and prosecutions. Parliament has, at times, considered that the public interest in facilitating fact-finding, whether for regulation, investigation or prosecution, outweighs the important interests protected by the privilege. The privilege has been abrogated in a wide range of legislation, including laws addressing workplace relations, work health and safety, corporate and commercial regulation, taxation, national security and migration.

12.104 In nearly all cases identified by this Inquiry to date, the abrogation of the privilege has been accompanied by a use or derivative use immunity, as recommended by the Guide to Framing Commonwealth Offences. Use immunities prohibit the use of

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

134 *Re an application under the Major Crime (Investigative Powers) Act 2004* (2009) 198 Crim R 305, [159].

135 Australian Securities and Investment Commission, *Submission 74*.

136 See further the safeguards recommended in Australian Administrative Review Council, above n 124, Principle 17.

137 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, [340]; *X7 v Australian Crime Commission* (2013) 248 CLR 92, [50].

the information revealed in subsequent proceedings against the person. Derivative use immunities render inadmissible information obtained as a result of the person having revealed information.

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

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