

DERIVATIVE USE IMMUNITY AND THE INVESTIGATION OF CORPORATE WRONGDOING

by

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1. Introduction

There has long been a tension between public and private interests in relation to the privilege against self-incrimination. Nowhere are these tensions and the conflicting arguments more apparent than in the area of companies. To a large extent this has reflected growing community disaffection with the apparent immunity of some of this country's former "high fliers". Prosecutions against company officers for fraud or offences of dishonesty are notoriously difficult to prosecute.¹ One of the attractions of the corporate structure is the way in which it can be used to obfuscate and hide the activities of a fraudulent controller. Lord Denning MR, in a characteristically colourful statement, set out the rationale for having compulsive evidence gathering powers in this way:

"People who combine together to keep up prices do not shout it from the house tops. They keep it quiet. They make their own arrangements in the cellar, where no one can see. They will not put anything in writing, nor into words. A nod or a wink will do."²

The availability of jurisdictions, where the activities of bodies incorporated there are not open to scrutiny, has assisted this process. For example, at the height of its activities, there were more than 500 companies in the Bond group, incorporated in some 35 different jurisdictions. Invariably, an investigator faces an almost insurmountable task in working out the trail of moneys or the chain of control without the assistance of an insider.

To assist investigators and liquidators, Parliament has removed the privilege against self incrimination, so that persons can be compelled to answer questions relating to the affairs of companies. As the privilege is a fundamental principle of the criminal law, legislators have sought to protect the rights of individuals by applying various immunities on the use that can be made of evidence obtained under compulsion.

Immunity in relation to compelled evidence comes in three main forms. The first, and most comprehensive, is "personal" immunity. This immunity means that if a person is compelled to give answers, the person is immune from future prosecution. This form of immunity is rare in the corporate arena and no longer even applies in the United States.

The second form of immunity is what is termed "use" immunity. If a person is compelled to answer, and claims before answering, that the answers would tend to incriminate him or her, the answers cannot be admitted in evidence against that person. There is usually an exception in the case of a prosecution for perjury.

The third immunity is called "derivative use" immunity. It operates in the same way as use immunity except that it also renders inadmissible any other evidence obtained as a result of the person giving that answer. Therefore, any documents obtained or other witnesses identified as a result of the answer given are not admissible against the person compelled to answer.

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1 Lord Roskill (Chair) 'Fraud Trials Committee Report' (1986) HMSO UK at 1 and 5. Also see generally GFK Santow 'The Trial of Complex Corporate Transgressions — The United Kingdom Experience and the Australian Context' (1993) 67 *ALJ* 265.

2 *Registrar of Restrictive Trading Agreements v. WH Smith & Son Ltd* [1969] LR 7 RP 122 at 145.

There are three important aspects to the application of these immunities. The common law privilege against self incrimination is abrogated by statute. Consequently, the form of immunity is that specified in the statute. The legislature can choose to abrogate the privilege without providing for any counterbalancing immunity. Secondly, the immunity only applies where the person claims the privilege before answering. The immunity is of no benefit if the privilege is not raised or is raised after answering.³ Finally, the answer must actually tend to incriminate the person giving it. A person's assertion of privilege is not conclusive. Justice Beaumont held that the question must be determined by considering whether the prospect of prosecution is "real and appreciable, and not of an imaginary or insubstantial character".⁴

The law in the United States of America and the United Kingdom is different from that which applies in Australia. In particular, the American Constitution guarantees the privilege against self-incrimination, with the result that abrogation of it can only occur when strict derivative use immunity provisions apply.

In Australia, the advent of the *Corporations* 1989 (Cth) (hereafter the *Corporations Law*) and *Australian Securities Commission Act* 1989 (Cth) (hereafter the *ASC Act*) saw the inclusion of a derivative use immunity in respect of evidence obtained under compulsion. Answers and documents obtained directly, and any evidence obtained indirectly as a result of the giving of those answers or the production of those documents were not admissible in later proceedings.⁵ The change was criticised by the investigators – the Australian Securities Commission ("the ASC") which had come into being with promises of swifter and more effective action against corporate wrongdoers – and the Commonwealth Director of Public Prosecutions ("the DPP").

2. History of Privilege

The classic statement in relation to the privilege of self-incrimination was made by Goddard LJ:

"... The rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for. ... A party can also claim a privilege against discovery of documents on the like ground."⁶

This statement has been refined so that the privilege now extends to the imposition of civil penalties.⁷

The privilege appears to have developed in response to the procedure of administering the *ex officio* oath employed by the Star Chamber.⁸ Following the intervention of the Parliament, an *ex officio* oath could not be administered to a person whereby he or she might be obliged:

"... to confess or to accuse himself or herself of any crime, offence, delinquency or misdemeanour or any neglect, matter or thing, whereby or by reason whereof he or she shall or may be liable or exposed to any censure, pain, penalty or punishment whatsoever ..."⁹

³ *R v. Owen* [1951] VLR 393; *McClelland Pope & Langley Ltd v. Howard* [1968] 1 All ER 569.

⁴ *Trade Practices Commission v. Arnotts Ltd* (1990) 12 ATPR 41-010 at 51,191; see also *Controlled Consultants Pty Ltd v. CAC* (1985) 156 CLR 385; *Concrete Constructions Pty Ltd v. Plumbers and Gasfitters Employees Union of Australia* (1987) 71 ALR 501 at 517-22 and *Re New World Alliance Pty Ltd v. Baseler* (1993) 118 ALR 699.

⁵ Section 68 *ASC Act* and s.597 *Corporations Law*.

⁶ *Blunt v. Park Lane Hotel Limited* [1942] 2 KB 253 at 257.

⁷ *Pyneboard v. Trade Practices Commission* (1983) 152 CLR 328; *Sorby v. The Commonwealth* (1983) 152 CLR 281; *Price v. McCabe; Ex parte Price* [1985] 2 Qd R 510.

⁸ SB McNichol *Law of Privilege* Law Book Company Australia at 137; *Sorby v. The Commonwealth of Australia* (1983) 152 CLR 281 at 317 and the articles cited by Marks J in *Martin v. Police Service Board* [1983] 2 VR 357 at 372 and *Controlled Consultants Pty Ltd v. Commissioner for Corporate Affairs* [1984] VR 137 at 154.

⁹ *Sorby v. The Commonwealth of Australia* (1983) 152 CLR 281 at 317.

The common law provision is now expressed in most Evidence Acts throughout Australia.¹⁰ Lord Mustill explained the “right to silence” as encompassing a number of different immunities:

“I turn from the statutes to the ‘right to silence’. This expression arouses strong but unfocussed feelings. In truth it does not denote any single right, but rather it refers to a disparate group of immunities, which differ in nature, origin incidence and importance, and also as to the extent to which they have already been encroached by statute. Amongst these may be identified:

1. A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
2. A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
3. A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
4. A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
5. A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.
6. A specific immunity (at least in certain circumstances, which it is unnecessary to explore) possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before trial, or (b) to give evidence at the trial. Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to assume that they are all different ways of expressing the same principle, whereas in fact they are not. In particular it is necessary to keep distinct the motives which have caused them to become embedded in English law; otherwise objections to the curtailment of one immunity may draw spurious reinforcement from association with other, and different, immunities commonly grouped under the title of a ‘right to silence’.”¹¹

Whilst it may be the popular view that the privilege should not be generally abrogated, this opinion seems to be changing in specific areas. In particular, the perception is that for companies and the people who hide behind them, the private benefit seems to outweigh the public benefit. Recently, significant amendments were made to the *Bankruptcy Act 1966* (Cth) in response to the public disquiet over bankrupted entrepreneurs being able to maintain a seemingly affluent lifestyle.¹² The erosion of the privilege in specific areas has occurred in various statutes.¹³ The power of Parliament to do this has been long recognised.¹⁴

¹⁰ For example, *Evidence Act 1977* (Qld), s.10.

¹¹ *R v. Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1 at 30-31.

¹² *Bankruptcy Amendment Act 1991* (Cth).

¹³ For example, the *Trade Practices Act 1974* (Cth) and the *Income Tax Assessment Act 1936* (Cth).

¹⁴ *R v. Scott* (1856) 169 ER 909 at 914.

In order for Parliament to successfully abrogate the right to the privilege against self-incrimination, express wording or clear implication is required.¹⁵ Nevertheless, the courts views on this have changed. In *Mortimer v. Brown*¹⁶ persons were to be publicly examined pursuant to s.250 of the *Companies Act* 1961 (Qld). The following subsections were relevant to the question of whether the privilege against self-incrimination was available to the examinees:

- “(3) The Court may put or allow to be put such questions to the person examined as the Court thinks fit.
- (4) The person examined shall be examined on oath and shall answer all such questions as the Court puts or allows to be put to him.
- (7) Notes of the examination —
 - (a) shall be reduced to writing;
 - (b) shall be read over to or by and signed by the person examined;
 - (c) may thereafter be used in evidence in any legal proceedings against him.”

The majority there found that the privilege was impliedly abrogated:

“Having regard to the purpose of s. 250 and to the public interest which it is intended to serve, the contention should not be accepted that there should be applied to its construction the principle that a statute should not be construed as being intended to take away common law rights unless that intention is specifically stated.”¹⁷

In *Attorney General (Vic) v. Riach*¹⁸ Kay J considered the question of whether the privilege had been impliedly abrogated where a statute provided for direct use immunity. An argument was raised by counsel that an answer to a question might not be able to be used in a subsequent criminal proceeding, but that answer might lead to further investigations. Those further investigations, together with other evidence might form a chain of evidence which could found a criminal charge. The use immunity protection would not apply to that derivative evidence. As a result, so the argument went, the answer by the witness had the tendency to expose him to the risk of conviction. Justice Kay rejected this argument, saying:

“... the privilege is designed to exclude from use by way of evidence the witness’s own testimony. What might be discovered from investigations made as a result of a witness’s statement in the course of evidence would not be a link in a chain of evidence because the evidence given by the witness, which might provoke investigation, would be inadmissible in any prosecution against him by operation of [the statute].”¹⁹

The High Court in *Sorby’s Case* rejected the reasoning of Kay J. Chief Justice Gibbs said that: “If a witness is compelled to answer questions which may show that he has committed a crime with which he may be charged, his answers may place him in real and appreciable danger of conviction, notwithstanding that the answers themselves may not be given in evidence ... It is true that in some cases the legislature may consider that it can only achieve the intended purpose of the statute by limiting or abrogating the privilege against self-incrimination, but, as I have said, if the legislature intends to render the privilege unavailable it must manifest clearly its intention to do so. To provide that the answers may not be used in evidence is not to reveal clearly an intention that the privilege should be unavailable, although, if the legislature did intend to remove the privilege, it might, in fairness, at the same time prevent the use in criminal proceedings of statements which otherwise would have been privileged ...”²⁰

15 *R v. Associated Northern Collieries* (1910) 11 CLR 738 at 748; *Ex Parte Grinham; Re Snedden and Anor* SR (NSW) 862 at 870, 874-875; *supra* n.9 at 289.

16 (1970) 122 CLR 493.

17 *Ibid* at 499; see also at 495.

18 [1978] VR 301.

19 *Ibid* at 311.

20 *Supra* n.9 at 294-295.

Finally, *Sorby's case* involved a submission, that the section which purported to abrogate the privilege in that case infringed the right to trial by jury in s.80 of the Australian Constitution. The court noted that this submission had been “resoundingly rejected” in *Huddart Parker & Co Pty Ltd v. Moorehead*²¹ and approved of the following statement by O'Connor J:

“The principle that a witness shall not be compelled to criminate himself has become a principle of British criminal law, departed from no doubt in special instances, as in the case of offences against the bankruptcy laws, but still maintained and administered as part of the great body of British criminal jurisprudence. But it is no part of the system of trial by jury, and the authority of the Parliament of the Commonwealth to create and punish offences as incidental to the exercise of the powers conferred by the Constitution would certainly extend to the modification of any principle of British criminal law, no matter how fundamental, so long as the modification is not forbidden expressly or impliedly by the Constitution.”²²

It is also worth noting that the High Court has recently decided that the privilege against self incrimination is not available to companies.²³

3. United States Position

In the United States of America the development of the law relating to the self-incrimination privilege has been shaped by the fact that it is a right guaranteed by the Constitution.²⁴ The familiar images of American Senate hearings reproduced in Hollywood movies, has meant that even in Australia the phrase “taking the Fifth” is well understood.

The case of *Counselman v. Hitchcock*²⁵ established that “... a statutory enactment [which removes the privilege], to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates”.²⁶ But, even in America, that protection has been eroded. The United States Supreme Court has since decided, in *Kastigar v. United States*,²⁷ that personal immunity from prosecution is no longer required. In *Kastigar* it was held that abrogation of the privilege requires that the statute provide the witness be immune from use of not only the compelled testimony but also of any evidence derived directly or indirectly therefrom; that is, derivative use immunity.²⁸

4. United Kingdom Position

In the United Kingdom, Lord Wilberforce in *Rank Film Ltd v. Video Information Centre*²⁹ considered the availability of the privilege in respect of the discovery and answering questions:

“I do not think that adequate protection can be given by extracting from the plaintiffs, as a term of being granted an *Anton Piller* order, an undertaking not to use the information obtained in criminal proceedings. Even if such an undertaking were binding ... the protection is only partial, viz. against prosecution by the plaintiff himself. Moreover, whatever direct use may or may not be made of information given, or material disclosed, under the compulsory process of the court, it must not be overlooked that, quite apart

21 (1910) 8 CLR 330.

22 *Ibid* at 375; approved by Mason, Wilson and Dawson JJ in *Sorby*, *supra* n.9 at 308.

23 *Environment Protection Authority v. Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. See also *Trade Practices Commission v Abco Ice Works Pty Ltd* (1994) 123 ALR 503 in respect of penalties.

24 Contained in the Fifth Amendment; see *Brown v. Walker* (1896) 161 US 591 at 597 where the court referred to the “impregnability of a constitutional enactment”.

25 (1892) 142 US 547.

26 *Ibid* at 586.

27 (1972) 406 US 441.

28 *Ibid* at 453.

29 [1982] AC 380.

from that, its provision or disclosure may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character. ... The party from whom disclosure is asked is entitled, on established law, to be protected from these consequences."³⁰

The United Kingdom Parliament has provided by statute that inspectors from the Department of Trade and Industry (who investigate most breaches of the *Companies Act* 1985) may compel answers and there is no restriction on the use to which evidence thereby obtained may be put. There is no immunity protection at all. It has been held that the fact that the answers are compelled is, of itself, insufficient ground for a Judge to exclude the evidence on the grounds of fairness to the accused.³¹

In respect of the Serious Fraud Office in the United Kingdom, it has been confirmed that prosecutors may use compelled answers obtained before trial for the limited purpose of contradicting inconsistent evidence at trial.³² In *Bishopgate Investment Management Ltd v. Maxwell*³³ it was accepted that liquidators may compel answers and use those answers in evidence. There is no requirement that the accused give inconsistent evidence.

5. The Pre-Existing Law in Respect of Derivative Use Immunity Under the *Corporations Law* and *A.S.C. Act*

The decision in *Mortimer v. Brown*³⁴ indicated a ready acceptance by the High Court that statutes could impliedly abrogate the privilege against self-incrimination. Prior to the commencement of the *Corporations Law* and the *ASC Act*, the *Companies Act* 1981 (Cth) and Codes operated in Australia. The provisions under that statutory regime dealing with the privilege are well illustrated by s.541 which dealt with the public examination of officers in a winding up. Subsection (12) was in the following terms:

"A person is not excused from answering a question put to him ~ on the ground that the answer might tend to incriminate him but, where the person claims, before answering the question, that the answer might tend to incriminate him, the answer is not admissible in evidence against him in criminal proceedings other than proceedings under this section or other proceedings in respect of the falsity of the answer."

In *Hamilton v. Oades*³⁵ it was held by the High Court that this subsection abrogated the common law privilege against self-incrimination. Chief Justice Mason noted that the section gave no protection to a witness against the use of derivative evidence: "by enacting s.541 without providing such specific protection, Parliament has made its legislative judgment that such action is not required".³⁶

A similar form of words was utilised in s.296(7) of the Act which dealt with Special Investigations. In *Corporate Affairs Commission (NSW) v. Yuill*³⁷ the High Court held that the section had abrogated the privilege.

When the *Corporations Law* and *ASC Act* replaced the *Companies Act* 1981 and Codes, there were three changes to the sections dealing with self-incrimination. The first, reflective of the common law position,³⁸ was the extension of the protection to where the examinee might be liable

30 *Ibid* at 443.

31 *R v. Seelig and Spens* [1992] 1 WLR 148; *In re London United Investments PLC* (1992) 2 WLR 850.

32 *Supra* n.11; and *Criminal Justice Act* 1987 (UK), s.2(8).

33 [1992] 2 WLR 991.

34 *Supra* n.16.

35 (1989) 166 CLR 486.

36 *Ibid* at 496.

37 (1991) 172 CLR 319.

38 For example, *Pyneboard v. Trade Practices Commission* (1983) 152 CLR 328 at 337.

to a penalty. This also reflected the use of what were termed “civil penalties” introduced by the *Corporations Law*. The second change and by far the most significant was the inclusion of a derivative use immunity. As an example, s.68(3) of the *ASC Act* provided that if the person claimed privilege before answering, neither the answer, nor anything obtained as a result of the person giving the answer, was admissible. This significant change was heralded in the explanatory memorandum to the Act in the following minimalist way:

“185. This clause is substantially based on a number of corresponding [*Companies Act*] provisions, ~ but extends the privilege against self incrimination.”

Similarly, there is no mention of the extension in the Hansard Debates. The Joint Statutory Committee on Corporations and Securities explained the derivative use immunity in this way:

“The sections go further and indemnify the person against the use of evidence gained indirectly from ‘leads’ provided by answers to questions or documents produced to the investigators.”³⁹

The final change was really one of wording only. Section 68 referred to (and still refers to) books also. Therefore, the privilege against self-incrimination that might arise from the production of books was also abrogated. As noted, this was a change of wording only. The section made express what had previously been implied by the High Court. Dawson and Toohey JJ in *CAC v. Yuill*⁴⁰ held, in relation to the *Companies Act* s.296(7) that:

“It is of significance that s.296(7) expressly denies the privilege against self-incrimination to an officer in answering questions put to him by an inspector. That provision does not extend to the production of books, but the questions that may be put by an inspector under s.295(1) clearly may include those relating to the compilation of books or to matters to which the books relate. That fact, together with the requirement that books be produced to an inspector when requested, point to the conclusion that the privilege against self-incrimination in relation to the production of books is excluded by necessary implication: see *Controlled Consultants Pty Ltd v. Commissioner for Corporate Affairs* (1985) 156 CLR 385.”⁴¹

Therefore, s.68 of the *ASC Act* added a considerable hurdle for investigators to negotiate. If the investigator required a person to answer questions or provide books, not only couldn’t that direct evidence be used if privilege were claimed, but also indirect evidence that had been discovered as a consequence of that direct evidence was protected. The investigator now had to make a value judgment on whether to require a person to answer questions.

6. The Arguments for Change

As far back as 1989, the National Companies and Securities Commission (“the NCSC”) was arguing before the Joint Select Committee on Corporations Legislation that s.68 would make the compulsive powers of the *ASC* “virtually useless”.⁴²

That committee produced an inconsistent response to the submissions by the NCSC and others. The committee’s report identifies the need to balance individual and public interests. The committee’s conclusion was that s.68 be amended:

“... to apply only to statements made by a person, and not to documents nor to any information, document, or other thing obtained as a direct or indirect consequence of the person making the statement.”⁴³

39 ME Beahan (Chair) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law*, Report by the Joint Statutory Committee on Corporations and Securities (1991) AGPS at para 1.11.

40 *Supra* n.37.

41 *Ibid* at 855.

42 ‘Report of the Joint Select Committee on Corporations Legislation’ (1989) AGPS at 39.

43 *Ibid* at 41.

Paradoxically, the committee's final recommendation was that "... the use in criminal proceedings of information obtained as a direct or indirect consequence of the production of books to the ASC..." be permitted. The recommendation did not mention derivative use immunity in relation to oral statements. In the end the confusion meant nothing. The Commonwealth Attorney-General's Department held its ground and s.68 was enacted with the effect that derivative use immunity applied to both oral statements and documents.

The ASC and the DPP launched a combined offensive against the derivative use immunity introduced by the *ASC and Corporations Laws*. It was suggested that the practical effect of the provisions was to "place insurmountable obstacles in the way of successful criminal prosecutions".⁴⁴ The then Chairman of the ASC, Tony Hartnell, had previously stressed that the ASC would use its extensive civil powers to preserve and recover assets as a quick response to breaches of the legislation. Criminal prosecutions were to follow in due course.⁴⁵ The ASC explained the problem that derivative use immunity caused to this practice in the following way:

"... if we are to maintain the integrity of the securities markets, we believe that we should retain the option to use both civil and criminal remedies and that it is inappropriate that our investigation in order to bring forward a civil remedy should, of necessity, jeopardise criminal prosecutions."⁴⁶

The evidence presented to the Joint Statutory Committee painted a dire picture of the effect of derivative use immunity on the ASC's ability to properly investigate matters. The point was made that s.58 gives the ASC the power to summon witnesses and take evidence, whilst s.68 "... establishes dire consequences for exercising it" because you then cannot use the material you find as a result of the answer to the question."⁴⁷

The ASC was also able to point to a specific instance where an examination of certain persons did not take place after counsel advised that derivative use immunity:

"... creates a difficulty so profound ... that an examination of those who are suspected may have committed an offence should not take place until it is amended."⁴⁸

The ASC advised that examinations of officers of Bond Corporation and Qintex had not taken place for this reason. Indirect investigatory techniques were substituted for the more direct examination process. The ASC suggested that in practical terms this could mean that investigations which could have been discharged within a period of months would take years.⁴⁹

In short, the ASC maintained that if there was a possibility of criminal prosecution in relation to a matter, the power to compel evidence could not be profitably used. The ASC made the point that most matters under investigation are not able to be readily discerned from an examination of documents. Therefore, oral explanation of transactions is necessary. This was said to create the following problem:

"... in the course of investigating the matter, we asked the simple question of one of the parties 'Did you in fact come to any agreement concerning your shares with X?' The unfortunate position is that when the answer to that is, 'Yes, I did. We discussed it on two occasions; the nature of the agreement was to this effect', we cannot thereafter use not only the evidence of the person subject to the examination but also the evidence of X to whom he refers."⁵⁰

44 *Supra* n.39 at para 1.12.

45 AG Hartnell 'The National Companies Scheme: The ASC's Approach to Enforcement' (1990) 6 *ACLB* 72.

46 *Supra* n.39 at para 1.12.

47 *Ibid*, *supra* n.39 at para 3.1.4.

48 *Ibid*, *supra* n.39 at para 3.1.5.

49 *Ibid*, *supra* n.39 at para 3.2.1.

50 *Ibid* at para 3.4.4.

Stephen Menzies, the ASC's Special Adviser on national investigations, noted that:

"When the investigation plan is being prepared the ASC cannot know whether it will pursue civil remedies or criminal prosecutions or both, nor will it be in a position to know the specific remedies or charges which will arise for consideration or the possible or likely defendants. The strategy which must be adopted, therefore, is that the ASC must have regard to the derivative use immunity so as to minimise any prejudice to the possibility of either civil or criminal proceedings. ~ The prosecution of such an offender will be jeopardised because of the likely inadmissibility, as against that person, of evidence obtained after his or her examination."⁵¹

The concern for the DPP was the likelihood of persons forcing a prosecutor to prove that the evidence sought to be relied on did not arise indirectly from the answers or documents for which privilege was claimed:

"... if there is an examination, every piece of evidence collected after that examination will be subject to debate ... that is going to unduly complicate trials, make them prolix, there will be hearings within hearings to determine just when the document was obtained, whether its use was derivative, et cetera."⁵²

The Queensland Bar Association's submission to the Joint Statutory Committee on this point went even further:

"The practical effect of the extension of the privilege may be to extend it to all documents or any information relating to the examinee not obtained prior to the examination of the person concerned."⁵³

Stephen Menzies suggested that:

"In such circumstances, the overall prosecution may well fail, not because the evidence it has is derived from the evidence before the Commission but because the DPP cannot discharge the onus of proving that it was not so derived."⁵⁴

The DPP also raised its obligation to not bring to trial a case where there is insufficient admissible evidence to ensure a reasonable prospect of the person being convicted. In short, the derivative use immunity would operate to exclude probative evidence.

Practical problems have also been identified for persons seeking to rely on the protection. Justice Murphy noted that:

"Even immunity from derivative use is unsatisfactory, because of the problems of proving that other evidence was derivative, and because of the real possibilities of innocent or deliberate breach of the immunity."⁵⁵

7. The Arguments Against Change

The arguments against removal of the derivative use immunity seem to have been based on the view that the right to silence is a fundamental right. That is, a theoretical analysis rather than the practical assessment of cause and effect advanced by the proponents for change. It is of course the argument which gave rise to the privilege against self-incrimination in the first place. The minority members of the Joint Statutory Committee cited, with approval, the words of Knight Bruce VC:

51 S Menzies 'The Investigative Powers of the ASC' Extract from a speech 31.10.91 reprinted in *Australian Securities Commission Releases* (1991) CCH Australia ¶80-028 at 158, 162.

52 *Supra* n.39 at para 3.5.1.

53 Bar Association of Queensland. Submission to the Joint Statutory Committee on Corporations and Securities in relation to Use Immunity Provisions in the Corporations Law and Australian Securities Commission Law at p.1.

54 *Supra* n.51 at 162.

55 *Supra* n.9 at 312; see also *supra* n. 35 at 496 per Mason CJ.

"The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of those objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination, ... Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much."⁵⁶

The fundamental basis of the privilege has been argued in this way:

"... it is the function of the Crown, representing the State, to prove the criminal charges that it brings against its citizens. It is not for that citizen to prove his or her innocence."⁵⁷

Another commentator has highlighted the conscience argument. If the privilege against self-incrimination is removed and there is no use immunity protection, an accused would be faced with three alternatives:

- (a) being punished for failure to answer questions;
- (b) being punished for perjury if he or she speaks falsely;
- (c) being punished for crimes if he or she speaks truthfully.⁵⁸

Lord Mustill also talked in principles when he suggested that the principle against self-incrimination was a reflection of the popular view that one person should, so far as is possible, be entitled to tell another person to mind his own business.⁵⁹

In *Istel Ltd v. Tully*⁶⁰ Lord Templeman suggested that the privilege could only be justified on two grounds. Firstly, that it discouraged the ill treatment of suspects and secondly, that it discouraged the production of dubious confessions. One might expect, however, that in this day, alternative means of safeguarding these elements are available even if they are not necessarily in place.⁶¹

Another argument against change relies on the fact that the ASC and DPP were not able to produce any statistical evidence of the effect of derivative use immunity. The Commercial Law Section of the Law Institute of Victoria made the point in this way:

"There is little use in rejecting the tree when the fruits of the tree are freely admissible. Any attempt to admit as evidence in criminal proceedings *indirect* consequences of the person giving the answer or information document or thing, would clearly undermine the protection granted in respect of the answer itself. It would make such protection meaningless in many cases.

In any event, there is no evidence that the present protections have, in any way, hampered the authorities in criminal investigations or prosecutions. In the absence of such evidence, the legislator should err on the side of civil liberties and retain the protections introduced by sub-sections 597(12) and 68(3)."⁶²

8. Report of the Joint Statutory Committee on Corporations and Securities

(a) Duties of the Committee and Terms of Inquiry

Section 241 of the *ASC Act* established the Joint Parliamentary Committee on Corporations and Securities to be made up of 5 senators and 5 members of the House of Representatives. Section

56 *Pearse v. Pearse* (1846) 1 De G & Sm 12; 63 ER 950 at 957.

57 J Coldrey 'The Right to Silence: Should it be Curtailed or Abolished' (1991) 20 *AALR* 51 at 52.

58 JD Heydon 'Statutory Restrictions on the Privilege against Self-Incrimination' (1971) 87 *LQR* 214 at 217.

59 *Supra* n.11 at 75.

60 [1992] 3 *WLR* 344.

61 *Ibid* at 350.

62 Cited in JP Longo 'The Powers of Investigation of the ASC: Balancing the Interests of Persons and Companies Under Investigation with the Interests of the State' (1992) 10 *CSLJ* 237 at 242.

243 sets out the committee's duties which consist of, *inter alia*, the duty to inquire into and report on:

- (i) the activities of the ASC; or
- (ii) the operation of any national scheme law.

Senator Michael Beahan, then Chair of the committee, stated that it "resolved in June 1991 to inquire into the effect of the use immunity provisions in both Acts upon the ability of the Australian Securities Commission to discharge its duties."⁶³

(b) Majority Report

The majority of the Joint Statutory Committee on Corporations and Securities preceded their conclusion and recommendations with the statement that the matter is in essence a policy question.⁶⁴ They then considered the need to choose between the right to privacy of the individual and the need to ensure that the ASC is not prejudiced in its investigations. Much of the opposition to change centred on the need to preserve the right of the individual to maintain his or her silence in the face of questions. Whilst this principle is no doubt sound and widely supported in relation to individuals, it is difficult to justify extending the privilege to artificial creatures born of statute. The majority said on this point:

"[Companies] are creations of the Parliament and the conditions under which they are created and the rules governing their operations are determined by the Parliament. The Committee believes that this privileged position carries with it obligations of accountability which may require the restriction of the rights of those participating in the corporate sector, including the right to remain silent."⁶⁵

The majority also considered the position in the United Kingdom where both direct and derivative use immunity does not apply to evidence obtained by Department of Trade and Industry inspectors investigating corporate crime. The United Kingdom Court of Appeal has endorsed the statement by the first instance judge that:

"... those likely to be questioned under that statutory regime are those whose responsibilities under the Companies Act 1985 and at common law in relation to shareholders funds and the integrity of the market are reflected in the privileged position they have. It is not asking too much, in my judgment, to impose limits on their civil rights, as parliament has done by an obligation to answer questions in circumstances where those answers may be used in criminal proceedings against them."⁶⁶

The committee also looked at the question of whether corporate crime was different from what might be classed as "ordinary" crime. The committee accepted that:

"The perpetrators of corporate crimes are generally exploiting the privileged position they occupy; they may be the only people with actual knowledge of the crime; there is no clear victim (in the sense that a victim of theft or assault has some direct knowledge of the crime) and much of the evidence will be in the form of records kept by the perpetrators."⁶⁷

In support of this contention, Santow argues that:

"In the context of inquiry as to Corporations Law offences by a *corporation*, it may be said that the privilege of limited liability, with its opportunity to conceal or carry out

63 *Supra* n.39 at v.

64 *Supra* n.39 at para 4.1.

65 *Ibid* at para 4.5.

66 *R v. Seelig & Spens* [1992] 1 WLR 148 at 161.

67 *Supra* n.39 at para 4.8.

fraudulent activities by proxy, is adequate policy reason for a statutory compulsion to render an admissible account in action against the corporation itself.”⁶⁸

The majority also noted that the changes to the protection brought about by the *Corporations Law* and the *ASC Act* were not debated by the Parliament and were not properly considered by the Joint Select Committee.

The majority recommended that s.597(12) of the *Corporations Law* and s.68(3) of the *ASC Act* be amended to remove the derivative use immunity provisions and that section 68(3) also be amended to remove the use immunity with regard to the fact that a person has produced a document. The committee also recommended that these amendments lapse automatically after five years unless the parliament confirmed their application.⁶⁹

This recommendation covered the two aspects that the ASC and DPP had raised in their submissions to the committee. However the majority decided to go further. They formed the view that since a corporation is a legal entity, and not a real person no question of civil rights is raised by the protection, and that therefore the *Corporations Law* and the *ASC Act* should be amended to ensure that neither the use immunity nor the derivative use immunity is available to corporations.⁷⁰

It is noted in relation to this latter recommendation that the High Court has recently decided that the common law privilege against self-incrimination is not available to corporations.⁷¹

(c) Minority Report

Senators Cooney and Campbell and Mr Ford MP dissented from the majority report. Their opposition to the proposals urged upon them by the ASC and the DPP can be best summed up by the following statement:

“We consider the modifications sought puts people’s rights too much at risk. In the interests of a free and fair society there must be a limit to the methods used in carrying out investigations.”⁷²

The minority criticised the lack of any empirical evidence to support the ASC and DPP’s contentions that prosecutions were affected. They pointed to the fact that the ASC and DPP’s arguments had not been contested in a court of law.

The minority were also concerned that removal of the protection granted by use immunity and derivative use immunity would be a precedent for changing the law governing the investigation of crime generally. The minority report asks:

“Are corporate offences more serious than murder, rape, kidnapping, incest or armed robbery? Why not compel answers from suspects or others who may be able to help solve those crimes? ... Why should the right to silence be given to a person when under investigation for murder, hijacking, fraud or burglary but denied to him or her when questioned in respect of a corporate crime? Should a man who kills his wife and children be given greater protection against self-incrimination than when he commits even a relatively minor offence against the shareholders of a company he manages?”⁷³

The minority also questioned the suggestion by the majority that companies are in a privileged position in society. The minority made the point that even if a company is in such a privileged position, it does not follow that those associated with it are likewise privileged.⁷⁴

69 Joint Statutory Committee Report, *supra* n.39 at para 4.20.

70 *Supra* n.39 at para 4.21.

71 *Supra* n.23.

72 *Supra* n.39 at 31.

73 *Ibid* at 32-33.

74 *Ibid* at 35.

68 GFK Santow ‘The Trial of Complex Corporate Transgressions – The United Kingdom Experience and the Australian Context’ (1993) 67 ALJ 265 at 265.

The minority stressed that persons who might be required to answer questions pursuant to s.597 or s.68 could be relatively minor players in a corporation and yet they would be subject to the same compulsion as a managing director. Nevertheless, against this argument, one commentator suggests that:

“In practice of course, many recent frauds have involved the real perpetrators staying off the board and installing those who do their bidding ...”⁷⁵

The minority’s final conclusion was as follows:

“The law treats the right to silence, as a matter of high principle. The protection it provides against the power of the State should not be diminished in our view, except in accordance with a principle of comparable standing. A principle of that quality has not been advanced in this instance.”⁷⁶

9. Government Response and Change to Law

In May 1992, the Commonwealth enacted the *Corporations Legislation (Evidence) Amendment Act*. The Act abolishes the derivative use immunity previously available under s.597 of the *Corporations Law* and s.68 *ASC Act*. Further the fact of producing a book is no longer subject to use immunity. Finally, new s.1316A of the *Corporations Law* makes it clear that the privilege against self incrimination is not available to bodies corporate.⁷⁷

As can be seen these amendments followed the recommendations made by the majority of the Joint Statutory Committee. The reforms were explained in the Bill’s Explanatory Memorandum. It was said there that derivative use immunity placed an:

“... excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that an item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity.”⁷⁸

The amendments were justified to ensure that the “effective investigation and prosecution of corporate offences is not hindered by inappropriate evidentiary requirements in the particular circumstances of corporate crime.”⁷⁹

In the Minister’s Second Reading Speech, another reason for removing the derivative use immunity was raised:

“It is also possible for persons to exploit, quite consciously, the immunity provisions by claiming that answers may tend to be self-incriminating, then making a full confession; thereby ensuring that no evidence will be admissible against them in criminal proceedings.”⁸⁰

In an amendment added by the Senate, the Act requires that a report be made to the Attorney-General by 1997 in relation to:

- “(a) how much and in what ways the amended provisions have helped in the enforcement of national scheme laws ...; and
- (b) how much and in what ways the amended provisions have helped the Australian Securities Commission in making investigations and gathering information; and
- (c) the extent (if any) to which persons, to whom the amended provisions have applied, have been unjustifiably prejudiced ...; and
- (d) the changes (if any) to administrative arrangements made for the purposes of national scheme laws that have resulted from the amended provisions.”⁸¹

75 *Supra* n.68 at 276.

76 *Supra* n.39 at 35.

77 Section 68(2) *ASC Act*.

78 Explanatory Memorandum for *Corporations Legislation (Evidence) Bill 1992* at 1.

79 *Ibid* at 2.

80 Hansard House of Representatives 26.2.92 190 at 191, Mr Duncan MP.

81 *Corporations Legislation (Evidence) Amendment Act 1992* (Cth), s.10.

10. Conclusion and Options for Reform

Since the 1961 Companies Acts, the privilege against self incrimination has not been available to avoid producing a document or answering a question in specific investigations.⁸² It seems unlikely then, that the powers of compulsion given to investigators will be removed. The question of immunity perhaps remains open for change.

There seems to have been no attempt by the ASC or the DPP to publicise the effect (if any) of the removal of the derivative use immunity. As noted above, a full review is to take place by 1997.

Even so, the question of immunity generally continues to be debated. Justice Cole has argued strongly for the removal of the direct use immunity in relation to corporate investigations:

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

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

... The Legislature has, to a limited extent, recognised this; for example in the case of companies in liquidation ... Whilst a witness may be required to answer all questions, and sign a transcript of his evidence, and such transcript may be used in any proceedings against that person, and whilst the person is not permitted to decline to answer questions upon the ground of self-incrimination, any question obligatorily answered after claiming privilege may not be used in criminal proceedings against that person (subject to presently irrelevant exceptions).

This results in Gilbertian farce which brings the law into disrepute. The person being examined now precedes every answer with the word 'privilege'. The answer thus given cannot be used in a prosecution of the person being examined.

... The law, at present, protects the interests of the civil and criminal wrong-doers. It should protect the interests of the investing public."⁸³

Mark Aronson has made a number of recommendations in relation to the conduct of serious fraud trials in a recent report for the Australian Institute of Judicial Administration.⁸⁴ Of particular relevance in relation to the subject matter of this paper, Mr Aronson makes the following recommendations in relation to the self-incrimination privilege and use immunity:

- "1. An accused person's right to silence includes the right to be free of an adverse inference of guilt from that person's lack of co-operation with the prosecution at trial. That freedom should be preserved.
2. However, existing laws which overrode the right to silence in return for 'use immunity' or 'derivative use immunity' should be altered so as to permit the use of a compelled answer where the person has contradicted it at his or her trial."

Other recent moves in Australia include the Victorian *Crimes (Fraud) Bill* of 1992 which closely follows the English model. Also the Commonwealth *Evidence Bill* of 1993 provides that the privilege against self-incrimination is not available to corporations.⁸⁵

⁸² *Supra* n.62 at 242 where the author suggests that section 146(5) of the Victorian *Companies Act* 1958 was the first section in the common law world to make express provision for abrogating the privilege.

⁸³ *Spedley Investments Ltd (in liq) v. Bond Brewing Investments Pty Ltd* (1991) 9 ACLC 522 at 535-536.

⁸⁴ M Aronson *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, discussed *supra* n.68 at 267-268.

⁸⁵ Clause 187.

In the United Kingdom, as noted above, the direct use immunity does not apply in a number of circumstances involving corporate investigations. In 1993 Lord Runciman's Royal Commission was constituted to inquire into criminal justice generally. One of the areas examined was the so-called "right to silence". Following the Commission report, the *Criminal Justice and Public Order Act 1994* was enacted. Sections 34 to 37 remove the various rights to silence, and provide that a court or jury "may draw such inferences from the failure as appear proper".

Presently, the Commonwealth Parliament has popular support for legislative measures which increase the prospect that persons involved in corporate wrongdoing will be punished. It remains to be seen whether the removal of the derivative use immunity will have that effect. Certainly, to this point, the claims of increased efficiency in bringing offenders to justice, made at the coming into being of the ASC, have not been demonstrated.