CORPORATIONS AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

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I. INTRODUCTION

The issue of whether the common law privilege against self-incrimination extends to corporations, has been the subject of considerable uncertainty in Australian judicial decisions. The question has to date been left open by the High Court of Australia and lower courts have demonstrated a division of views. Most recently, a decision in the New South Wales Land and Environment Court denying the protection of the privilege to a corporation[1] has been overturned by the New South Wales Court of Criminal Appeal.[2] It appears likely that the issue will not be finally resolved until addressed by the High Court.[3]

This article examines Australian and overseas judicial decisions regarding corporations and the privilege against self-incrimination. Further, it discusses difficulties which arise in relation to reliance upon overseas decisions and

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1 *State Pollution Control Commission v Caltex Refining Co Pty Ltd* (1991) 72 LGRA 212.

2 *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 74 LGRA 46.

3 On 5 June 1992 the High Court grated the Environment Protection Authority special leave to appeal the decision of the Court of Appeal in *Caltex*.

identifies a number of considerations which may be relevant in any final judicial determination of the issue.

II. THE POSITION IN ENGLAND, CANADA AND THE UNITED STATES OF AMERICA

The principal English case in this area is the Court of Appeal decision in *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass Ltd.*[4] In that case the Court was called upon to decide whether the defendant corporation was entitled to rely upon the privilege against self-incrimination in response to a request to answer interrogatories. Du Parcq LJ, delivering the judgement of the Court, held that a corporation could take advantage of the privilege against self-incrimination. The issue was dealt with briefly in the following terms:

> Finally, we agree with the opinion of the Supreme Court of Alberta in *Webster v Solloway Mills & Co*,[5] to which our attention was drawn, that on principle one cannot see any reasonable ground for the support of the view that this claim of privilege should be limited to natural persons and that it could not be taken advantage of by a corporation.
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> It is true that a company cannot suffer all the pains to which a real person is subject. It can, however, in certain cases, be convicted and punished, with grave consequences to its reputation and to its members, and we can see no ground for depriving a juristic person of those safe-guards which the law of England accords even to the least deserving of natural persons. It would not be in accordance with principle that any person capable of committing, and incurring the penalties of, a crime should be compelled by process of law to admit a criminal offence.[6]

More recently, the House of Lords in *Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation*[7] adopted the reasoning of the Court of Appeal in *Triplex Safety Glass* and confirmed the availability of the privilege against self-incrimination to corporations.

The decision of the Supreme Court of Alberta in *Webster v Solloway Mills & Co*,[8] which was referred to in *Triplex Safety Glass*, had held that the privilege against self-incrimination was not limited to natural persons and could be taken advantage of by corporations.[9] The Court in *Webster* dealt with the issue as follows.

> The last objection was that this claim of privilege should be limited to natural persons and that it could not be taken advantage of by a corporation. On principle one cannot see any reasonable ground for the support of such a view. There seems little doubt that at the trial the plaintiff can call the defendant's officer and require the production of these documents and it would seem that they ought to be

4 (1939) 2 All ER 613.
5 (1931) 1 DLR 831 at 833-4.
6 *Ibid* at 621.
7 (1978) AC 547.
8 Note 5 *supra*.
9 *Reg v Bank of Montreal* (1962) 36 DLR 45; *Klein v Bell* (1955) 2 DLR 513.

> able to know what the documents are so as to be prepared to have the real issue fairly tried, which is the purpose of the rules permitting discovery but the rule that one cannot be compelled to criminate himself has for centuries been firmly established as a part of our common law and must be deemed to exist except so far only as it has been affected by legislation.[10]

However, subsequent Canadian decisions have significantly limited the scope of the privilege in its application to corporations. In *R v Judge of General Sessions of the Peace for County of York*[11] it was held that the privilege against self-incrimination does not, in relation to corporations, apply in respect of testimony by officers and employees of a corporation at a trial. Since the testimony of a corporation can only take place through its officers and employees, the effect is to completely remove the protection of the privilege in testimony at a trial.[12] The corporation can still avail itself of the privilege in pre-trial stages of proceedings such as discovery.[13]

In the United States of America, the privilege against self-incrimination is dealt with in the Fifth Amendment to the Constitution. This states in part that "No person shall.... be compelled in any criminal case to be a witness against himself". Because the privilege is derived from the Constitution, rather than common law, it is inviolable by statute.

The privilege is subject to certain limitations in scope. In particular, the Amendment applies only where a person is asked to give incriminating information. Accordingly, where statutes provide immunity against prosecution in relation to questions asked or documents demanded of a witness, the Amendment will provide no exemption from the required testimony or production of documents since the threat of incrimination is removed.[14]

Most importantly, the United States Supreme Court has held that the privilege against self-incrimination is confined to natural persons. This was first established in *Hale v Henkel*[15] which denied the benefits of the Fifth Amendment privilege against self-incrimination to a corporation. Brown J, with whom the other members of the court concurred on this point, stated the reasons for this as follows:

> ...the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorised by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain

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10 Note 5 *supra* at 833-4.

11 (1970) 16 DLR (3d) 609.

12 See also *R v N M Paterson & Sons Ltd* (1980) 117 DLR (3d) 517.

13 In *Regina v Amway Corp* (1989) 56 DLR (4th) 309, the Supreme Court of Canada held that s 11(c) of the *Canadian Charter of Rights and Freedoms* which expresses the privilege does not apply to corporations.

14 *Counselman v Hitchcock* 142 US 547 (1881); *Brown v Walker* 161 US 591 (1895).

15 202 US 43 (1906).

> franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.[16]

Brown J contrasted the rights of the corporation with those of the individual whose "rights are such as existed by the law of the land long antecedent to the organisation of the State, and can only be taken from him by due process of law, and in accordance with the Constitution".[17] The denial of Fifth Amendment rights to corporations is known in the United States as the 'collective entity' rule which subsequent decisions have held to include partnerships[18] and trade unions.[19]

III. THE LAW IN AUSTRALIA

A number of Australian courts have held that the privilege against self-incrimination applies to corporations as well as individuals. In *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs*[20] all three judges of the Full Court of the Victorian Supreme Court held that the privilege may be claimed by corporations. The Court noted that while the issue had not been put to rest in Australia by a decision of the High Court, they would not dissent from the reasoning of the English Court of Appeal in *Triplex Safety Glass* and, "if necessary, would hold that no rational distinction can be made in the application of the principle between a company and a natural person".[21] Similarly, in *Trade Practices Commission v TNT Management Pty Ltd*[22] Franki J sitting as a single judge of the Federal Court, stated that he considered himself bound by the decisions of the English Court of Appeal in *Triplex Safety Glass* and the House of Lords in *Rio Tinto Zinc* to find that the privilege against self-incrimination is available to a corporation.[23]

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16 *Ibid* at 74-5.

17 *Ibid* at 74.

18 *Bellis v United States* 417 US 85 (1974).

19 *United States v White* 322 US 694 (1944).

20 [1984] VR 137.

21 *Ibid* per Marks J at 152.

22 (1984) 53 ALR 214.

23 A number of other Australian cases have proceeded on the assumption that a corporation may avail itself of the privilege against self-incrimination. In *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Livestock Corporation* (1979) 42 FLR 204 an acceptance that the privilege extends to corporations is implied in Justice Deane's reasoning regarding an objection to discovery of documents

To date, the High Court of Australia has not expressly dealt with the issue. *Rochfort v Trade Practices Commission*[24] involved an unincorporated trade association which was seeking to avoid production of documents on subpoena. On the facts, the majority of the Court did not consider it necessary to decide the issue of the application to the association of the privilege against self-incrimination. However, Murphy J in discussing the issue stated that he found the English decisions such as *Triplex Safety Glass* unconvincing. He stated:

> the privilege against self-incrimination is a human right, but based on the desire to protect personal freedom and human dignity. The history of, and reasons for, the privilege suggest that it should not be extended to artificial persons such as corporations or to large or amorphous voluntary organisations.[25]

In *Pyneboard Pty Ltd v Trade Practices Commission*[26] one of the issues which fell for determination by the High Court was whether a corporation could claim privilege in relation to a notice served under the *Trade Practices Act* 1974 (Cth) which required the furnishing to the Trade Practices Commission of certain information. Mason ACJ, Wilson and Dawson JJ noted that the English Court of Appeal in *Triplex Safety Glass* had seen no reason to support the view that the common law privilege should be limited to natural persons. While assuming that the privilege extended to a corporation,[27] the matter before the court was determined on the basis of the statutory construction of the relevant provision of the *Trade Practices Act* and accordingly, the issue of the application of the privilege to corporations was not expressly decided. Murphy J, adopted the reasoning he earlier advanced in *Rochfort v Trade Practices Commission* and held that the privilege against self-incrimination was an individual right and that the history and rationale for the privilege did not justify its extension to artificial persons such as corporations.[28]

In *Controlled Consultants v Commissioner for Corporate Affairs*[29] an objection by a corporation to production of documents was dealt with by the High Court on the basis of construction of the relevant statutory provision. Gibbs CJ, Mason and Dawson JJ briefly considered whether privilege could apply to a corporation and stated that "the matter may be left for decision in a later case."[30] Murphy J again asserted the view that the privilege was confined to natural persons.[31]

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and answering of interrogatories (at 207); see also *Birrel v Australian National Airlines Commission* (1984) 1 FCR 526 per Gray J at 527; *Harris v Ansett Transport Industries Operations) Pty Ltd* (1978) 45 FLR 469 per Keely J at 473; *Navir Pty Ltd v Transport Workers Union of Australia* (1981) 52 FLR 177 per Evatt J at 191; *R v Associated Northern Collieries* (1910) 11 CLR 738 per Isaacs J at 745.

24 (1982) 153 CLR 134.

25 *Ibid* at150.

26 (1982) 152 CLR 328.

27 *Ibid* at 335.

28 *Ibid* at 346.

29 (1985) 156 CLR 385.

30 *Ibid* at 394. Brennan J also declined to consider the issue.

31 *Id.*

Murphy J's view that the privilege against self-incrimination does not extend to corporations, has attracted some, albeit restrained, judicial support. *National Companies and Securities Commission v Sim (No 3)*[32] concerned a claim of privilege by the managing director of a company in his personal capacity or alternatively on behalf of the company. Nicholson J dealt with the matter by finding that provisions of the relevant Act impliedly excluded the privilege in both capacities. Although deciding the issue on that ground, Nicholson J referred to submissions by counsel that the principles stated in *Triplex Safety Glass* and *Rio Tinto Zinc* were to be preferred to United States authorities and that a judge at first instance was bound to follow English authorities and stated:

> Although I am doubtful as to the validity of either of those arguments, it is unnecessary for me to determine them, having regard to my conclusion that the respondent is bound to answer the relevant questions in any event.[33]

In *Master Builders Association of New South Wales v Plumbers and Gasfitters Employees Union of Australia*[34] Gray J canvassed the case law to date. His Honour was clearly influenced by the views expressed by Murphy J in the High Court[35] and he commented that the English decisions extending the privilege to corporations were made without any real dicussion of the appropriateness of so doing.[36] However, he considered himself constrained by his position as a judge at first instance to follow the reasoning in the English cases and to hold that a corporation could avail itself of the privilege against self-incrimination.[37]

The first decision in Australia to explicitly hold that the privilege against self-incrimination does not apply to a corporation was that of Stein J in the Land and Environment Court of New South Wales in *State Pollution Control Commission v Caltex Refining Co Pty Ltd.*[38] The decision was given in an application by Caltex which sought to set aside a notice requiring production of documents, which was issued by the State Pollution Control Commission (now the

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32 (1987) 5 ACLC 500.

33 *Ibid* at 506.

34 (1987) ATPR 48,570.

35 *Ibid* at 48,577.

36 *Ibid* at 48,574.

37 See also *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees Union of Australia* (1987) 71 ALR 501 which concerned a subpoena addressed to an officer of a corporation. While assuming the right of a corporation to claim privilege against self-incrimination, Wilcox J drew a distinction between a subpoena addressed to an officer of a corporation and a subpoena addressed to the corporation itself stating that the corporation may have no resort to privilege in the former case since no question of self-incrimination arose. On the facts no issue of incrimination of the officer himself arose and Wilcox J did not consider the officer able to claim privilege on behalf of the corporation. Justice Wilcox's judgement is a difficult one which he himself admitted "may appear pedantic" (at 519). While not expressly denying privilege to corporations, His Honour's decision appears motivated by an underlying concern to reduce the potential or effectiveness of corporate privilege. In the course of the judgement, Wilcox J noted with approval the statement by Murphy J in *Rochfort* note 24 *supra* that the privilege against self-incrimination was part of the common law of human rights.

38 Note 1 *supra*.

Environment Protection Authority) under s 29(2)(a) of the *Clean Waters Act* 1970. Stein J held that upon construction of s 29 and related sections of the Act, the legislature had by necessary implication excluded the application of the privilege against self-incrimination. Stein J also considered the question of whether at common law the privilege against self-incrimination extended to a corporation. In addressing this issue His Honour noted that the High Court had not yet ruled upon it, that there was no authority binding on him and that the "contest is essentially between American and English authority".[39] Stein J also noted with approval the view expressed by Murphy J in the High Court that the privilege against self-incrimination applied only to natural persons and did not extend to artificial persons such as corporations. Stein J stated:

> It is clear that this Court is not bound by the English authorities, although they are persuasive; see *Cook v Cook*.[40] However, the lack of discussion of the policy considerations inherent in the decisions reduces the weight of the persuasiveness, at least upon me. They stand in manifest contrast to the decisions of the United States Supreme Court which thoroughly analyse the policy considerations and historical development of the rule. A reading of the decisions does not convince me that the interpretation of the Fifth Amendment played any significant role in the outcome, and certainly did not appear to affect the historical and policy considerations involved.
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> The judgments of Murphy J in *Pyneboard*, *Rochfort* and *Controlled Consultants* are also persuasive. Read in conjunction with the history of the development of the privilege against self-incrimination, expounded by Brennan J in *Sorby*, leads me to favour the view that the privilege against self-incrimination was always intended to be and remains a personal one. Nothing in the history of the privilege and the reasons for its development justifies its extension to artificial persons such as corporations or trade unions. I prefer the analysis of the United States Supreme Court of the nature of corporations. To my mind there is no satisfactory policy rationale to extend the privilege beyond natural beings to entities which are the invention of the State and cannot be punished by the deprivation of liberty.
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> Having reached this definite conclusion, what should I do? Should I say, as did Gray J, that a Judge at first instance should not make such a decision because of its implications? It seems to me that acknowledging the status of a first instance Judge and also the need for the issue to be determined by an appellate tribunal, preferably the High Court, it would nonetheless be an excessive exercise in judicial timidity or reticence not to state my opinion and so rule.[41]

Subsequent to handing down his decision, Stein J referred certain questions of law to the New South Wales Court of Criminal Appeal for determination including whether a corporation is entitled at common law to the privilege against self-incrimination. Judgment was delivered by Gleeson CJ with whom the other members of the Court, Mahoney JA and McLelland J agreed.[42]

Gleeson CJ noted that three different subjects are often confused in discussions of the privilege against self-incrimination, namely; the reasons why

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39 *Ibid* at 215.

40 (1986) 162 CLR 376.

41 Note 1 *supra* at 218-19.

42 Note 2 *supra*.

it originally became established; the reasons why as a matter of history, the rule has prevailed; and, "the modern conceptual justification for the retention of the rule to the extent to which it has not been modified by statute".[43] Gleeson CJ stated that in terms of the modern conceptual justification for the privilege, it should be seen as serving three main purposes as follows:

> First, it is an aspect of individual privacy and dignity. To this extent I respectfully agree with Murphy J. Where I part company with his Honour is in regard to what I consider to be the incompleteness of his justification of the privilege. It has two other main purposes. One of them is that it assists to hold a proper balance between the powers of the State and the rights and interests of citizens. In that term I include what are commonly described as "corporate citizens". Modern companies are frequently reminded that they have duties of citizenship. I accept that; but I also consider they have rights of citizenship, and the holding of a proper balance between these rights and the power of the State is a concern of the courts. I also include citizens who have an interest in corporations as members. The third purpose to which I refer is that the privilege is a significant element maintaining the integrity of our accusatorial system of criminal justice, which obliges the Crown to make out a case before an accused must answer. It is closely related to, although not co-extensive with, the right to silence.[44] It constitutes a part of what we accept as "due process".[45]In those two last respects the rationale of the privilege is just as applicable to corporations as to individual persons.[46]

Gleeson CJ noted three further arguments which supported the application of the privilege against self-incrimination to corporations. These were: first, that "[i]t is consistent with the organic theory underlying principles of corporate criminal liability to treat corporations as entitled to the privilege"[47] secondly, "although the privilege against self-incrimination is not the same as the privilege against self-exposure to civil penalties and forfeitures, they are closely linked in their historical and conceptual basis and why the last two kinds of privilege should apply to natural persons but not to corporations is difficult to understand"[48] and thirdly, "in modern times, probably the majority in number of corporations are one or two-person, or family, companies, and I see no justification in principle for distinguishing them from natural persons in relation to the privilege".[49]

IV. RELIANCE UPON OVERSEAS DECISIONS

It is clear that Australian judicial decisions regarding corporations and the privilege against self-incrimination have placed substantial reliance upon

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43 *Ibid* at 53.
44 *Petty v The Queen* (1991) 65 ALJR 625.
45 *Adler v District Court of NSW* (1990) 19 NSWLR 317 at 345-53 per Priestley JA.
46 Note 2 *supra* at 53.
47 *Id.*
48 *Ibid* at 54.
49 *Id.*

foreign authorities. Typically, foreign decisions have been seen as divided between those of England and Canada on the one hand and those of the United States on the other.[50] To the extent to which reliance upon foreign authority has taken place at the expense of a comprehensive analysis of the relevant policy considerations, it is highly problematic, since these cases demonstrate both special circumstances which limit their application and a lack of comprehensive reasoning which renders their application questionable.

Australian decisions allowing corporations the protection of the privilege against self-incrimination have principally relied upon the English Court of Appeal decision in *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass.* However, as noted above, this decision contains little by way of reasoning on that issue and instead relies upon the decision of the Supreme Court of Alberta in *Webster v Solloway Mills & Co. Webster* is a decision which itself contains little by way of discussion and instead adopts an automatic extension of the privilege to corporations. In addition, subsequent to the reliance by the English Court of Appeal in *Triplex Safety Glass* in 1939 on *Webster*, the application of the privilege to corporations has been substantially curtailed by succeeding Canadian decisions. Accordingly, it is apparent that the hereditary line of reasoning in decisions extending the privilege to corporations is weak, and does not reveal a comprehensive analysis of policy considerations.

Australian judicial decisions supporting the view that corporations cannot avail themselves of the privilege against self-incrimination, such as that of Stein J at first instance in *State Pollution Control Commission v Caltex Refining Co Pty Ltd*, place great reliance upon decisions of United States courts. As noted above, the position in the United States is somewhat different to that in Australia, England and Canada in that the privilege derives from the Constitution rather than the common law. Consequently, to the extent to which the privilege applies, it is immune from legislative challenge.

Stein J states of the United States decisions:

> A reading of the decisions does not convince me that the interpretation of the Fifth Amendment played any significant role in the outcome, and certainly did not appear to affect the historical and policy considerations involved.[51]

However, His Honour's statement is difficult to sustain given the often explicit statements in the United States decisions that the courts are concerned to read down the limitation imposed by the Fifth Amendment privilege on legislative sovereignty with respect to corporations. In *Hale v Henkel* referred to above, in which the benefit of the First Amendment privilege was denied to corporations, the court stated:

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50 See for example the comments of Mason ACJ and Wilson and Dawson JJ in *Pyneboard Pty Ltd v Trade Practices Commission* note 26 *supra* at 335; Gray J in *Master Builders Association of New South Wales v The Plumbers and Gasfitters Employees Union of Australia* note 34 *supra* at 48,577 and Stein J in *State Pollution Control Commission v Caltex Refining Co Pty Ltd* note 1 *supra* at 215.

51 *Ibid* at 219.

> it would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, *could not in the exercise of its sovereignty* enquire how these franchises had been employed, and whether they had been abused.[52]

Similarly, in *United States v White* which denied the application of the Fifth Amendment privilege to trade unions, the court stated:

> The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organisations *so as to nullify appropriate governmental regulations*.[53]

Statements such as the above indicate that to some degree the decisions of United States courts have been influenced by the particular circumstances arising from the Fifth Amendment. Accordingly, it is apparent that reliance upon United States decisions in the absence of a separate consideration of relevant policy factors is problematic.

V. RELEVANT FACTORS

In this section of the article a number of factors which should be relevant to any comprehensive judicial decision regarding the application to corporations of the privilege against self-incrimination are identified and considered.

A. LAW ENFORCEMENT

The privilege against self-incrimination is an exemption from the obligations which otherwise exist to make information available. Accordingly, in any situation where the application of the privilege is under consideration, it is important to weigh the impediments posed by the privilege to the administration of justice[54] against the justifications in favour of the privilege. It is these impediments to the state's ability to investigate and prosecute crime which lie behind a range of statutory restrictions on the privilege[55] and which have led to frequent calls for the privilege to be further curtailed.[56]

In many cases, the impediments to law enforcement presented by the privilege become more marked where the conduct is that of a corporation. The scope and complexity of corporate conduct is such that it is often the case that a

52 Note 15 *supra* at 75 (emphasis added).

53 Note 19 *supra* at 700 (emphasis added).

54 In some cases the privilege may operate to induce a witness to give evidence and to refrain from perjury. See part V(C) *infra*.

55 See *Crimes Act* 1958 (Vic) s 399(4); s 15(1) *Evidence Act* 1977 (Qld) s 15(1).

56 See the recommendations of Justice Stewart *Royal Commission of Enquiry into Drug Trafficking* (1983) p 845 that persons appearing before the Commission be required to answer questions irrespective of whether or not the answers may tend to incriminate that person; see also s 17 *Royal Commissions Act* 1923 (NSW).

determination of illegal behaviour can only be made upon examination of the documents and records of the relevant corporation.[57] In addition, unlike conventional crime which usually has an identifiable victim, the victim of illegal behaviour by a corporation is often a more amorphous entity such as a market. This places greater pressure on law enforcers to obtain evidence from the corporations themselves.

In considering law enforcement and corporations, the social impact of corporate crime is also relevant. While reference to this issue is lacking in decisions of Australian courts, decisions of United States courts regarding privilege have made reference to the prevalence of corporate crime. In *Braswell v United States* the court made reference to studies in the area and stated that allowing corporations to claim the privilege against self-incrimination "would have a detrimental impact on the Government's efforts to prosecute 'white collar crime', one of the most serious problems confronting law enforcement authorities".[58]

Similarly, in a recent report of the Australian Federal Parliament's Joint Statutory Committee on Corporations and Securities[59] it is stated:

> The Committee is concerned that the behaviour of the corporate sector in Australia in the 1980's adversely affected the confidence of both Australian and foreign investors and the efficiency of Australia's capital markets. In part this resulted from the inability of the regulatory authorities to enforce the law effectively.[60]

It is clear that law enforcement issues gain more force with respect to corporations both by reason of the nature of illegal behaviour by corporations and the prevalence and impact of that behaviour.

B. INDIVIDUAL RIGHTS

The notion that individuals possess certain rights which must be accorded protection, has been a central justification for the privilege against self-incrimination. The privilege is often described in such a way as to suggest that it is a fundamental human right. Murphy J in *Pyneboard v TPC* stated:

> The privilege against compulsory self-incrimination 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

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57 See the comments to this effect in *Hale v Henkel* note 15 *supra* at 74; *United States v White* note 19 *supra* at 700. "The greater portion of evidence of wrongdoing by an organisation or its representatives is usually to be found in the official records and documents of that organisation."

58 108 S Ct 2284 (1988) at 2294.

59 Report of the Joint Federal Parliamentary Statutory Committee on Corporations and Securities *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (November 1991).

60 *Ibid* p 26.

> personality.... the privilege developed in England out of concern for lack of due process in Star Chamber and criminal proceedings. It was introduced into the Constitutions of several of the American states following the 1788 revolution, and entrenched in the federal Bill of Rights.... It is referred to in the *International Covenant on Civil and Political Rights*, Article 14(3)(g)."[61]

Similarly, the Australian Law Reform Commission in its report on evidence stated of the privilege against self-incrimination that "the role it plays in defining the relationship between the individual and the State is significant and warrants the categorisation of 'human right'."[62]

Features inherent in the privilege being characterised as a human right, such as the promotion of dignity, privacy and freedom do not extend easily beyond individuals to corporations. Corporations are artificial creations. They do not possess innate rights and cannot be subject to such human ordeals as the deprivation of liberty. For these reasons, the individual rights justification does not, of itself, support the application of the privilege to corporations.[63]

While the foregoing reasoning appears to be sound, there are, as the New South Wales Court of Appeal decision in *Caltex v State Pollution Control Commission* demonstrates, other factors which may justify corporate privilege. However, an important consideration in any determination of the issue is the following. Given that the privilege against self-incrimination involves, as noted above, a balance between competing interests, are these remaining justifications sufficient to weigh the balance in favour of allowing corporate privilege. Certainly, the elimination of the individual rights justification should be cause for reconsideration of the issue rather than an automatic extension of the privilege from individuals to corporations.

C. EVIDENTIARY JUSTIFICATIONS

Some justifications for the privilege against self-incrimination have been suggested in its tendency to promote certain desirable evidentiary practices. The Australian Law Reform Commission in its report on evidence notes three such evidentiary arguments.[64] These are:

1. "Encouraging persons to give evidence. The privilege against self-incrimination may encourage witnesses to testify. Its effect is that the witness can give evidence without fear of having to give answers against his own interests."
2. "Avoidance of undue hardship and perjured testimony. The witness can escape the unpleasant dilemma of choosing between harmful disclosure, contempt and perjury."

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61 Note 26 *supra* at 346.

62 Australian Law Reform Commission Report No 26 *Evidence* (Vol 1, 1985) p 485.

63 See Murphy J in *Pyneboard* note 26 *supra* at 346; Gleeson CJ in *Caltex v SPCC* note 2 *supra* at 53.

64 Note 62 *supra* pp 485-6.

3. "Avoiding suspect evidence. If a witness is compelled to answer incriminating questions the quality of the evidence provided may well be suspect because of the likelihood of perjury."

These evidentiary arguments apply to individuals both as witnesses at a trial and in respect of pre-trial procedures such as discovery or interrogatories. However, their application to corporations is problematic. A corporation cannot be called to give evidence as a witness.[65] Where an officer of a corporation gives evidence it is the officer who is a witness rather than the corporation. In such circumstances, the corporation itself is not the subject of any self-incrimination by the evidence and the corporation's privilege does not of itself protect the witness.[66] Accordingly, these evidentiary justifications which depend to a large degree on the giving of testimony, do not to that extent lend their support to corporate privilege. Their application with respect to corporations is limited to pre-trial evidentiary procedures.

In addition, a reverse argument arises with respect to the above evidentiary justifications and corporations. In many cases corporate documents tend to speak for themselves and are less fallible than oral testimony. If the availability of such documents is restricted because the corporation can claim the privilege against self incrimination, this will force regulatory authorities to place greater emphasis on the testimony of company officers and employees. This raises potential problems. For example, officers of the company may be placed in a situation where they will be faced with the dilemma of harmful disclosure, contempt and perjury and give suspect evidence in a situation where the required evidence may be more accurately revealed in the corporation's documents.

D. THE EFFECT ON SMALL CORPORATIONS

The issue of whether corporations should be entitled to the privilege against self-incrimination raises particular concerns in relation to small corporations. A denial of the privilege to corporations would apply both to large corporations and to numerous private corporations with only two shareholders (the minimum required by the *Corporations Law*). As a consequence, the privilege would be denied to a small business where the business had adopted a corporate status although the decision to adopt that status had been made for unrelated reasons. This matter was referred to by Gleeson CJ in *Caltex v State Pollution Control Commission*[67] and accordingly appears to carry some weight.[68]

An argument in response to this concern is that a denial of privilege to corporations is simply just one of numerous burdens which apply to

65 *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 483-5; *Re Rothwells Ltd* (1989) 15 ACLR 168 at 187.

66 *R v Wright* [1980] VR 593; *NCSC v Sim* (No 2) [1987] VR 421.

67 Note 2 *supra* at 54.

68 See also *NZ Apple and Pear Marketing Board v Master & Sons* at 196-7 where this issue is referred to.

corporations, irrespective of their size, by virtue of the decision to adopt the status of a corporation with its corresponding advantages. Courts in many other areas have imposed burdens upon corporations irrespective of their size. For example, courts have denied to corporations a right of appearance through their officers in court proceedings. Courts have held this to be so despite the fact that this applies to small corporations where in the same circumstances the individuals involved could appear in court proceedings if an alternate business structure had been adopted.[69] In relation to all such restrictions imposed upon small corporations it can be argued that the decision to adopt that form of business structure with all its privileges, entails an acceptance of the other consequences which attach to the corporate structure.

E. STATUTORY PROVISIONS AND THE COMMON LAW PRIVILEGE AGAINST SELF-INCRIMINATION

In Australia, the common law privilege against self-incrimination is not inviolable and may be overcome or modified by the express words or necessary implication of a statutory provision.[70] On this basis, there now exists in Australia a range of statutory provisions which modify or limit the application of the privilege against self-incrimination in certain contexts. For example, *Evidence Acts* in Queensland, Western Australia, Tasmania, South Australia and the Australian Capital Territory and the *Crimes Act* in Victoria all modify to some extent the common law privilege against self-incrimination.[71] Of greater significance with respect to corporations are the range of provisions abolishing or modifying the privilege in relation to particular areas such as trade practices law, corporations and securities law and environmental law. For example, the recently inserted s 1316A of the *Corporations Law* provides that corporations have no privilege against self-incrimination in criminal proceedings arising under the *Corporations Law*.[72]

One of many examples of statutory modification of the privilege is provided by ss 17P and 25 of the *Pollution Control Act* 1970 (NSW). Section 25 of the Act allows the Authority to require the furnishing of information by any party. The section provides that in relation to such requests, the information must be provided despite any claim of privilege. However, if privilege is claimed, the information cannot be subsequently used in any prosecution of the provider. Section 17P requires the holders of pollution control licences to provide certain information. However, in this case, the information so provided is admissible in a prosecution of the provider, despite any claim of privilege. The different

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69 *Federated Engine Drivers v BHP* (1913) 16 CLR 245.

70 *Hamilton v Oades* (1988-89) 166 CLR 486, *Sorby v Commonwealth* (1983) 152 CLR 281.

71 *Evidence Act* 1977 (Qld) s 15(1); *Evidence Act* 1906 (WA) s 8(1)(d); *Evidence Act* 1910 (Tas) s 85(10); *Evidence Act* 1929 (SA) s 18(1); *Evidence Ordinance* 1971 (ACT) s 70(1); *Crimes Act* 1958 (Vic) s 399(4).

72 This provision was introduced by the *Corporations Legislation (Evidence) Amendment Act* 1992.

treatment of the privilege evident in these provisions appears to flow from a policy decision to impose higher standards of disclosure in relation to holders of pollution control licences than in relation to general requests for information by the Authority.

The foregoing provisions relevant to corporations law and environmental law are examples of a number of provisions restricting the application of the privilege in particular areas. Against this background a number of considerations are relevant to any judicial determination regarding the application to corporations of the common law privilege against self-incrimination.

First, judges would be cognisant of the fact that in many instances the entitlement of corporations to the privilege is governed by statutory provisions. To that extent the significance of the common law privilege is reduced. Secondly, many of the statutory provisions modifying the privilege do not distinguish between individuals and corporations and accordingly include an assumption that the privilege applies to corporations at common law in the same manner as to individuals. This may place some pressure on courts to maintain this assumption. Otherwise, there could be a range of unintended consequences. For example, those legislative provisions whose effect is to provide corporations with a limited form of privilege would, if there was no common law entitlement, leave those corporations in a favoured position where the intention behind the legislation was that such corporations should have greater obligations to provide information imposed upon them than they would otherwise.

Thirdly, the courts may be influenced by a perception that the legislature is in a better position to deal with the various policy considerations regarding the application to corporations of the privilege. Statutory provisions such as those from the *Pollution Control Act* described above, apply the privilege to differing degrees depending upon the circumstances. This would be more difficult for the courts. In the absence of establishing a discretionary power to modify the privilege on a case by case basis, the issue of the application of the privilege to corporations at common law appears to require a blanket affirmative or negative answer from the courts.

The considerations outlined above may have influenced judicial decisions to date regarding corporations and the privilege against self-incrimination. It is clear that justifications for the privilege are significantly weaker where dealing with corporations as opposed to individuals and that competing concerns regarding law enforcement become more compelling. Accordingly, a forceful case exists for denying the privilege to corporations, a view reflected in some judicial decisions. However, those decisions which extend the privilege to corporations may reflect a concern that given the range of statutory provisions in the area and the assumption in many of those provisions that the privilege does apply to corporations at common law, it is better to support that

assumption and to leave any modifications which must be made to the legislature which is better placed to do so.

VI. CONCLUSION

In examining Australian judicial decisions regarding corporations and the privilege against self-incrimination, three significiant aspects can be identified. First, there has been a reliance upon decisions of foreign courts which to a large extent are unsatisfactory in their application to Australia. Secondly, there are a range of relevant factors regarding corporate privilege, some of which are canvassed in this article, which have not been fully dealt with in decisions to date. Thirdly, there is a significant division of opinion within decisions dealing with the issue. Inroads have been made by legislation in specific areas regarding corporations and the privilege against self-incrimination. There is however, an absence of comprehensive legislation governing the area. Accordingly, it is likely that the question whether the privilege against self-incrimination extends to corporations will persist and be the cause of serious uncertainty until determined by the High Court of Australia.