

# ASPECTS OF EVIDENTIARY PRIVILEGES IN AUSTRALIA

Law Asia Conference

Public Interest / Corporate Law Presentation

Wednesday 20 September 2017

Tokyo, Japan

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## INTRODUCTION

- 1 An evidentiary privilege is an immunity exempting a party or witness from disclosing information that the law would otherwise require be disclosed.<sup>1</sup> There are many such privileges, but in this paper I shall deal only with two. The Australian Law Reform Commission (“ALRC”) has recently issued a report titled ‘Traditional Rights and Freedoms – Encroachments by Commonwealth Laws’.<sup>2</sup> That report considers whether the current operation

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<sup>1</sup> J Gans and A Palmer, *Australian Principles of Evidence* (2<sup>nd</sup> ed, 2004) 91.

<sup>2</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Report No 129 (2015). The Freedoms Report was the result of the Freedoms Inquiry, which was conducted over a two year period. The ALRC received Terms of Reference on 19 May 2014: Australian Law Reform Commission, *Terms of Reference Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges*

<<http://www.alrc.gov.au/inquiries/freedoms/terms-reference>>. The ALRC released an Issues Paper and called for submissions on 10 December 2014. Submissions closed on 27 February 2015: Australian Law Reform Commission, *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014). An Interim Report was released on 3 August. Submissions closed on 21 September 2015: Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachment by Commonwealth laws*, Interim Report No 127 (2015). The Final Report was tabled and launched in Canberra by Attorney-General the Hon George Brandis on 2 March 2016: Attorney-General Senator George Brandis, 'Address at the launch of the Australian Law Reform Commission Report on Traditional Rights and Freedoms ' Canberra, 2 March 2016) <<https://www.attorneygeneral.gov.au/Speeches/Pages/2016/FirstQuarter/2-March-2016-Address-at-the-launch-of-the-Australian-Law-Reform-Commission-Report-on-Traditional-Rights-and-Freedoms.aspx>>.

of the common law privilege against self-incrimination (“PSI”) and legal professional privilege (“LPP”), their expression in the so-called Uniform Evidence Legislation,<sup>3</sup> and their abrogation by certain Commonwealth legislation strike a fair balance between the competing interests at stake, and whether that balance helps or hinders the administration of justice in Australian courts. That is the topic I propose to examine.

- 2 In this paper, I will first consider the history and rationale behind each privilege. A return to the privileges’ respective foundations will inform the analysis of their current operation and relevance. An exploration of the history and rationale demonstrates that the privileges themselves are the product of a balancing exercise of various public and private interests, and have evolved and transformed over time. Next, I will consider the privileges’ operation at common law and under the Uniform Evidence Legislation.
- 3 Neither the PSI nor the LPP is immutable and both may be subject to statutory encroachment. A case study of the information-gathering powers conferred on the Australian Securities and Investments Commission (“ASIC”) will show how that encroachment can operate in practice. This case study will consider the tension between the rights enshrined in the LPP and the PSI on one hand and the coercive information-gathering powers that may be conferred on regulatory bodies – powers that, in some cases, abrogate common law privileges – in the name of the public interest in effective regulation on the other. The ALRC touched on this in its report, commenting that the abrogation of the PSI in the *Australian Securities and Investments Commission Act 2001* (Cth) (“the ASIC Act”) warranted further review.<sup>4</sup>

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<sup>3</sup> “Uniform Evidence Legislation” refers to the following statutes: *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2011* (Tas); *Evidence Act 2011* (ACT) and the *Evidence (National Uniform Legislation) Act 2011* (NT). Throughout this paper I will refer to the relevant section of the *Evidence Act 1995* (Cth).

<sup>4</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws*, Report No 129 (2015) [1.47].

# PART ONE: LEGAL PROFESSIONAL PRIVILEGE

## Introduction

4 The LPP originated as a fundamental common law principle that entitles a person to “resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services.”<sup>5</sup> It is a substantive common law right, as opposed to a mere rule of evidence.<sup>6</sup> Accordingly, it is applicable to all forms of compulsory disclosure, including pre-trial procedures,<sup>7</sup> and non-judicial or quasi-judicial proceedings.<sup>8</sup>

5 The Uniform Evidence Legislation contains a statutory equivalent of the LPP, named the “client legal privilege”.<sup>9</sup> This title was chosen because the traditional description was thought to suggest “that the privilege is that of the members of the legal profession, which it is not. It is the client’s privilege”.<sup>10</sup> This is substantiated by the fact that at common law and under statute the privilege can only be waived by the client. For convenience, I will continue to use “LPP” to refer specifically to the common law form of the privilege. This is because the common law privilege is this paper’s point of departure. Maintaining the different titles will also be useful when distinguishing between the privilege at common law and statute. At times, at the risk of confusion, I will refer to the privilege generally.

## History and evolution of the privilege

6 The LPP has existed for over 400 years,<sup>11</sup> and has been strictly applied by the High Court of Australia since 1908.<sup>12</sup> Like the PSI, its history is contested.

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<sup>5</sup> *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552 [9] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (“*Daniels*”).

<sup>6</sup> *Baker v Campbell* (1983) 153 CLR 52, 121-2, 129-32 (Dawson J) (“*Baker*”); *Daniels*, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [44] (McHugh J), [88] (Kirby J), [132] (Callinan J).

<sup>7</sup> *Mann v Carnell* (1999) 201 CLR 1.

<sup>8</sup> *Baker*, 88 (Murphy J), 93 (Wilson J), 118 (Deane J), 129 (Dawson J).

<sup>9</sup> *Evidence Act 1995* (Cth), ss 118, 119.

<sup>10</sup> *Baker*, 85 (Murphy J).

<sup>11</sup> *Ibid* 84 (Murphy J).

However, unlike the PSI, there is less preoccupation on the part of judges and academics with the LPP's origins. I suggest this is because the LPP has a rationale that is defensible and relevant to the modern Australian legal system, and accordingly, recourse to its historical foundations is not necessary to justify its existence.

7 The LPP has evolved over time. Significant developments include:

- extension to non-judicial contexts in the 20<sup>th</sup> century, in response to the creation of government agencies with broad coercive information-gathering powers;<sup>13</sup>
- adoption of the “sole purpose test” in place of the prevailing “dominant purpose test” in 1976. The result was to limit the protection to documents brought into existence for the sole purpose of obtaining legal advice or use in legal proceedings;<sup>14</sup> and
- rejection of the “sole purpose test” and return to the “dominant purpose test” in 1999, which again extended the LPP to documents brought into existence for the dominant purpose of seeking legal advice or use in legal proceedings,<sup>15</sup> and brought the LPP into line with the statutory client legal privilege.

8 This brief list gives weight to the observation that “a glance at the numerous cases in Australia and the United Kingdom which have concerned [the LPP] in the last 20 years or so indicates twists and turns in the application of the general principles within single jurisdictions.”<sup>16</sup> The LPP's development was

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<sup>12</sup> *Daniels*, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>13</sup> *Baker*. See also Jonathon Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000), 13.

<sup>14</sup> *Grant v Downs* (1976) 135 CLR 674 (“*Grant*”).

<sup>15</sup> *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49 (“*Esso*”).

<sup>16</sup> *Arrow Pharmaceuticals Ltd v Merck & Co Inc* (2004) 210 ALR 593, 597 [13] (Gyles J).

also complicated or “bedevilled” by *majority* decisions of the High Court.<sup>17</sup> Sackville J, speaking extracurially, aptly referred to the transitional periods between these developments as “a paradigm example of law reform generating an urgent need for further law reform.”<sup>18</sup> That further law reform occurred through the introduction of the Uniform Evidence Legislation and the further development of the common law by the High Court to render it consistent with the statutory privilege. While there are some divergences in the various State iterations of the Uniform Evidence Legislation, there are limited relevant differences for our purposes. Those differences that do exist tend to arise out of rules of the Court.

### **The rationale behind the privilege**

9 Generally, the effect of a successful privilege claim is that information which may be important for the proper administration of justice is suppressed. In that circumstance, Dr McNicol has recognised that “it is important to ascertain whether there are worthwhile rationales behind each head of privilege such that each privilege can be defended against the valid competing claims of the proper administration of justice.”<sup>19</sup> There is a clear and ongoing conflict between what can be referred to as utilitarian public interest arguments in favour of disclosure and libertarian private interest arguments in defence of privilege.<sup>20</sup> The difficulty that arises in relation to the LPP is that the principal rationale behind it is the public interest in the administration of justice. Accordingly, a unique situation arises where the competing interests are both public interests, and in fact, both said to be in pursuit of the same end.

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<sup>17</sup> Dr R J Desiatnik, ‘Legal professional privilege: A parochial doctrine?’ (2012) 86 *Australian Law Journal* 536, 536. See, for eg, *Grant; Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

<sup>18</sup> Justice Ronald Sackville, ‘Lawyer/Client Privilege’ (Paper presented at a seminar conducted by the College of Law, Sydney, 25 March 1999).

<sup>19</sup> Sue McNicol, ‘Implications of the Human Right Rationale for Legal Professional Privilege – The Demise of Implied Statutory Abrogation?’ in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (LexisNexis, 2003) 48, 1.

<sup>20</sup> See also Justice John Gilmour, ‘Legal Professional Privilege: Current Issues and Latest Developments’ (Paper presented at a Law Society of Western Australia seminar, Perth, 13 March 2012).

*An instrumentalist rationale: the administration of justice*

- 10 The LPP is said to have a truth-promoting effect – clients will be more inclined to disclose all relevant information to their legal adviser if they are assured that those communications will remain confidential.<sup>21</sup> Facilitating and promoting “full and frank” disclosure between clients and their legal advisers is said in turn to facilitate the provision of proper advice and representation.<sup>22</sup> There is a concern that “if the privilege did not exist ‘a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.’”<sup>23</sup> For the proper conduct of litigation, “litigants should be represented by qualified and experienced lawyers rather than ... appear for themselves.”<sup>24</sup> Proper representation contributes to the *efficient* functioning of the adversarial system and thus, the administration of justice.
- 11 Another benefit that flows from full and frank disclosure is that legal advisers are better placed to, where appropriate, discourage litigation in favour of settling or other alternative dispute resolution.<sup>25</sup> This reduces the burden on the adversarial system, which is again in the public interest.
- 12 The LPP also applies to the provision of legal advice generally, not related to existing or contemplated litigation. There is an unresolved, but for the purposes of this paper irrelevant, controversy regarding whether the LPP is a single privilege with two applications – legal advice and litigation – or two privileges with different functions. In any event, the application of the LPP to legal advice also encourages compliance with the law.<sup>26</sup> In situations where a client approaches a legal adviser to determine the legality of a course of action that they wish to take, “full and frank disclosure”<sup>27</sup> enables the adviser

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<sup>21</sup> *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475.

<sup>22</sup> *Baker*, 68 (Gibbs CJ); *Esso*, 35 (Gleeson CJ, Gaudron and Gummow JJ); *Carter v Northmore Hale Davy & Leaker* (1995) 183 CLR 121, 147 (Toohey J).

<sup>23</sup> *Baker*, 68 (Gibbs CJ). The first part of that argument could lead one to ask why a privilege of this kind should be restricted to communications with lawyers. Indeed, the *Evidence Act 1995* (NSW) Pt 3.10, Div 1A provides for a discretionary professional confidential relationship privilege. See generally R Desiatnik, *Legal Professional Privilege in Australia* (LexisNexis, 3<sup>rd</sup> ed, 2016), 317-325.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid* 94 (Wilson J).

<sup>26</sup> *Ibid.*

<sup>27</sup> *Grant*, 685 (Stephen, Mason and Murphy JJ).

to “chart a course of conduct [for the client] in conformity with the law.”<sup>28</sup> Compliance with the law again reduces the burden on the Court’s resources, facilitating the administration of justice.

#### *A rights-based rationale*

- 13 The LPP has also been recognised as protecting private interests. It has been said to protect the right to privacy and the right to consult a lawyer, as well as the client’s freedom and dignity. It has been described as “an important human right deserving of special protection” and a “bulwark against tyranny and oppression ... not to be sacrificed even to promote the search for truth and justice.”<sup>29</sup> However, for the most part, the rights-based rationale appears to be secondary to the instrumentalist rationale, or alternatively, a supporting framework for the instrumentalist rationale.

#### *The first balancing exercise*

- 14 The LPP balances competing public interests. The benefits seen to flow from the LPP, promoting the efficient conduct of legal business and litigation, are considered to outweigh the conflicting public interest in having all the information available to the court to assist in decision making.<sup>30</sup> It follows that the LPP is bound by contradiction, and at once both helps and hinders the administration of justice. Dr Desiatnik acknowledges this: “[t]antalisingly, the greater [the LPP’s] successful application, the greater its failure”.<sup>31</sup> This conundrum also explains the aforementioned “twists and turns” in the development of this doctrine,<sup>32</sup> and the courts’ difficulty in striking the right balance.

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<sup>28</sup> *Carter v Northmore Hale & Leake* (1995) 183 CLR 121, 127 (Brennan J).

<sup>29</sup> *Esso*, 92 [111]; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 490 (Deane J). See also *AWB v Cole* (2006) 152 FCR 382, 396 [37] (Young J).

<sup>30</sup> *Attorney General (NT) v Maurice* (1986) 161 CLR 475, 487, 490 (Deane J).

<sup>31</sup> Desiatnik, above n 17, 536.

<sup>32</sup> Dr R J Desiatnik ‘Legal professional privilege and the Pratt Holdings Saga’ (2006) 80 *Australian Law Journal* 462, 462.

15 The High Court has clarified that:

... legal professional privilege is itself the product of a balancing exercise between competing public interests and that, given the application of the privilege, no further balancing exercise is required.<sup>33</sup>

16 Thus, the High Court considers the public interest served by the LPP to outweigh the public interest in disclosure. The former is paramount.<sup>34</sup> However, in the event of statutory abrogation, there is in fact a second balancing exercise, this time undertaken by Parliament. This is where the LPP's rationale has work to do.

### The privilege at common law

17 Because of the competing public interests at stake, Courts have imposed several conditions on the LPP's operation. In brief, there must be a *communication*, which must be *made* for the *dominant purpose*<sup>35</sup> of submission to the legal adviser for advice or use in existing or anticipated litigation.<sup>36</sup> The communication may be oral,<sup>37</sup> or in the form of written or other material.<sup>38</sup> Documents or other material that are merely delivered to the legal adviser are not protected,<sup>39</sup> unless they were physically brought into existence and communicated for the relevant purpose.<sup>40</sup> The LPP is also not available if a client seeks advice in order to facilitate the commission of a crime, fraud or civil offence, or where the communication is made to further an illegal purpose.<sup>41</sup> The LPP may be lost through implied or explicit waiver. The

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<sup>33</sup> *Esso*, [35] (Gleeson CJ, Gaudron and Gummow JJ). See also *Waterford v Commonwealth* (1987) 163 CLR 54, 64–65 (Mason and Wilson JJ).

<sup>34</sup> *Commissioner of AFP v Propend Finance* (1997) 188 CLR 501, 552 (McHugh J); *Waterford v Commonwealth* (1987) 163 CLR 54, 65 (Mason and Wilson JJ).

<sup>35</sup> *Esso*, 107 (Callinan J).

<sup>36</sup> *Esso*; *Grant*, 688 (Stephen, Mason and Murphy JJ); *Baker*, 112 (Deane J).

<sup>37</sup> *Tuckiar v Jaine* (1934) 52 CLR 335, 346 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ), 354 (Starke J).

<sup>38</sup> *Rosenberg v Jaine* [1983] NZLR 1, 7 (Davison CJ).

<sup>39</sup> *Commissioner of Taxation (Cth) v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499, 521-522 (Gibbs ACJ); *Baker*, 112 (Deane J).

<sup>40</sup> This is simply a corollary of the proposition that the LPP protects communications and not documents per se: *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 515 (Dawson J), 525 (Toohey J), 543 (Gaudron J), 552 (McHugh J) and 569 (Gummow J).

<sup>41</sup> *R v Cox* [1881-85] All Er Rep 68; *Bullivant v A-G (Vic)* [1901] AC 196; *Day v Dalton* [1981] WAR 316; *Baker*; *R v Bell*; *Ex parte Lees* (1980) 146 CLR 141; *Jonas v Ford* (1885) 11 CLR 240.



privilege is waived where “the actions of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect”.<sup>42</sup>

### *Dominant purpose*

18 There has been extensive debate over the element of purpose, and specifically, the requisite degree or extent of the connection between the purpose of the document’s creation and the provision of legal advice or preparation for litigation. Over time it has been argued that it must be the sole purpose, the dominant purpose, a substantial purpose or merely a purpose of the communications’ creation. This question was settled by the High Court in *Esso*. That decision overturned the former “sole purpose” test and introduced the “dominant purpose” test. The majority – comprised of a joint judgment by Gleeson CJ, Gaudron and Gummow JJ, and the judgment of Callinan JJ – held the “dominant purpose” test strikes a just balance between the competing public interests at hand. This brought the test into conformity with the statutory form of the privilege in the Uniform Evidence Legislation, concluding a five year period where Courts were required to apply different tests depending on the jurisdiction or the phase in the litigation. The “dominant purpose” test is used in other common law jurisdictions, including England, New Zealand, Ireland and Canada.

19 The dominant purpose is the “ruling, prevailing, or most influential purpose.”<sup>43</sup> In *Esso*, Gleeson CJ and Gaudron and Gummow JJ said that the following test “appears close to a dominant purpose test”:

“[I]f a document is created for the purpose of seeking legal advice, but the maker has in mind to use it also for a subsidiary purpose which would not, by itself, have been sufficient to give rise to the creation of the document, the existence of that subsidiary purpose will not result in the loss of privilege.”

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<sup>42</sup> *Mann v Carnell* (1999) 201 CLR 1, 13 [29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

<sup>43</sup> *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 416 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

20 Batt JA also explained the meaning of “dominant” as follows:

“In its ordinary meaning “dominant” indicates that purpose which was the ruling, prevailing, or most influential purpose. Barwick CJ, whose view in *Grant v Downs* propounding the test of dominant purpose has now been adopted by the majority decision in *Esso Australia Resources*, distinguished “dominant” from “primary” and “substantial”. Lord Edmund-Davies in *Waugh [v British Railways Board [1980] AC 521]*, in adopting the test propounded by Barwick CJ, was of the view that the element of clear paramountcy should be the touchstone. That, as it seems to me, shows the meaning of “dominant”.”<sup>44</sup>

21 The purpose of the communication is to be determined as at the time of creation<sup>45</sup> having regard to its contents, the intention of the maker or the intention of the person requiring the document or communication be brought into existence,<sup>46</sup> the function or identity of the maker, and the routine procedures of the individuals involved.<sup>47</sup> The Court may inspect a document to determine the dominant purpose.<sup>48</sup> The dominant purpose test is of particular importance to privilege claims by in-house counsel, and I will return to that point.

### **Statutory expression in the Uniform Evidence Legislation**

22 In addition to the change of name, which I have already mentioned, there are several differences between the (common law) LPP and the (statutory) client legal privilege. Fortunately, following *Esso* and amendments in 2008,<sup>49</sup> many of these have been ironed out. For the purposes of considering whether the LPP helps or hinders the administration of justice in Australian courts, the primary remaining difference is scope.

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<sup>44</sup> *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332, 336-337 [10] (Batt JA) (omitting citations).

<sup>45</sup> *Baker*, 112 (Deane J); *Grant*, 688 (Stephen, Mason and Murphy JJ).

<sup>46</sup> *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332, 338 [14] (Batt JA); *Hartogen Energy Ltd (in liq) v Australasian Gas Light Co* (1992) 36 FCR 557, 568-9 (Gummow J), *Grant*, 677 (Barwick CJ)

<sup>47</sup> See generally M Legg ‘Legal professional privilege after *Esso* – applying a dominant purpose test’ (2000) 20 *Australian Bar Review* 40.

<sup>48</sup> *Grant*, 689 (Stephen, Mason and Murphy JJ).

<sup>49</sup> *Evidence Amendment Act 2008* (Cth).

## Scope

23 Client legal privilege concerns only the admissibility of communications into evidence.<sup>50</sup> That means the statutory protection only applies to evidence led in court. In all other contexts (such as pre-trial or non-judicial), the LPP remains available. Some are of the view that there is an undesirable inconsistency where a Court is required to apply the LPP to pre-trial procedures and the client legal privilege to evidence adduced at trial. Despite attempts by members of the judiciary to construe the client legal privilege as applicable to pre-trial procedures, the High Court held that it is not.<sup>51</sup> However, the position has been modified in some Australian states by legislation in relation to pre-trial procedures. For example, in New South Wales courts, the *Uniform Civil Procedure Rules 2005* (NSW) (“UCPR”) extend the application of the statutory client legal privilege to pre-trial processes. Accordingly, in those states one test is applied consistently.

## Novel privilege

24 There is also a novel privilege for unrepresented parties in the Uniform Evidence Legislation. Section 120(1) prevents evidence being adduced if, on objection by an unrepresented party to litigation, the court finds that adducing the evidence would result in disclosure of a confidential communication which was prepared by the party for the dominant purpose of preparing for or conducting the proceedings.

## Loss of privilege

25 Section 121 of the Uniform Evidence Legislation also specifies three general situations in which the client legal privilege can be lost:

- evidence concerning the intentions, or competence in law, of a client or party who has died;

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<sup>50</sup> *Evidence Act 1995* (Cth), ss 118, 119.

<sup>51</sup> *Northern Territory v GPAO* (1999) 196 CLR 553, 571 [16]-[17] (Gleeson CJ and Gummow J), 629 [199] (McHugh J and Callinan JJ), 650 [254] (Hayne J); *Esso*.

- evidence required to enforce an order of an Australian court; and
- evidence that affects a right of a person.

### **Abrogation of or exceptions to the privilege**

26 What I shall call the second balancing exercise occurs where Parliament considers the LPP does not strike the right balance between these competing interests, because of particular circumstances. However, perhaps due to the Court’s warning in *Esso*<sup>52</sup> or the ALRC’s earlier recommendation that the LPP only be abrogated in “exceptional circumstances”,<sup>53</sup> Commonwealth laws that abrogate the LPP are rare – the ALRC identified only 7 laws that abrogate the LPP, as opposed to over 30 laws that abrogate the PSI.<sup>54</sup>

27 In an earlier report, the ALRC provided guidance to Parliament by way of criteria justifying an abrogation of the LPP, including:

- whether the inquiry concerns a matter of major public importance;
- whether the information sought can be obtained in a timely and complete way by using alternative means that do not abrogate the LPP; and
- the degree to which the privilege claim will hamper or frustrate the investigation.<sup>55</sup>

28 In brief, these criteria set out a proportionality approach (or, as I have called it, the second balancing exercise) – a consideration of whether the abrogation has a legitimate objective, is necessary to meet that objective, and is in the public interest.

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<sup>52</sup> *Esso*, [35] (Gleeson CJ, Gaudron and Gummow JJ). See also *Waterford v Commonwealth* (1987) 163 CLR 54, 64–65 (Mason and Wilson JJ).

<sup>53</sup> Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report no 107 (2008), Rec 6-1.

<sup>54</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Report No 129 (2015) [12.54]. Those who know the PSI as an entrenched constitutional right may find this rather strange.

<sup>55</sup> Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report no 107 (2008), Rec 6-1.

- 29 Interestingly, in the context of the LPP and in stark contrast to the PSI, the second balancing exercise rarely results in abrogation. In very limited circumstances, the public interests in open and accountable government have been relied on to justify statutory abrogation of the LPP.<sup>56</sup> Again, in very limited circumstances, the LPP has been abrogated regarding production of a document, information or other evidence relating to a serious terrorism offence,<sup>57</sup> and in relation to the proceeds of crime.<sup>58</sup> These laws tend to confer compensatory statutory protections for the abrogation in the form of evidentiary immunities. This means the privileged material is not admissible in evidence against the person.<sup>59</sup>
- 30 In Australia, Commonwealth agencies with coercive information-gathering powers do not have the power to require the production of material subject to LPP.<sup>60</sup> Historically, there was some doubt regarding whether the *ASIC Act* abrogated the LPP. However, since 2007 ASIC itself has notified persons subject to compulsory powers that they are not required to provide documents or information that are subject to the LPP and its Information Sheet 165 indicates that a person may withhold information that attracts a valid claim of LPP.<sup>61</sup>
- 31 Whilst this appears reassuring, there is an historical exception which may be cause for concern. The *James Hardie (Investigations and Proceedings) Act 2004* (Cth) abrogated the LPP specifically and only in relation to James Hardie investigations or proceedings.<sup>62</sup> This permitted ASIC and the Commonwealth DPP to use evidence obtained under its information-gathering

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<sup>56</sup> See, eg, *Ombudsman Act 1976* (Cth) s 9; *Crimes Act 1914* (Cth) ss 3ZZGE, 15HV; *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(5); *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18.

<sup>57</sup> *Crimes Act 1915* (Cth) s 3ZQR.

<sup>58</sup> *Proceeds of Crime Act 2002* (Cth) s 206.

<sup>59</sup> Evidentiary immunities in the context of the PSI will be considered in more detail in Part Three of this paper.

<sup>60</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Report No 129 (2015) [12.54].

<sup>61</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Report No 129 (2015) [12.59]-[12.66].

<sup>62</sup> There is neither time nor space to explain the factual background.

powers for the purpose of the James Hardie Special Commission of Inquiry. The justifications for this Act included:

- the prevalence of ‘claims for [LPP] that [the witness] knew could not honestly be made’<sup>63</sup>;
- the need for efficient use of ASIC’s information-gathering powers;<sup>64</sup> and
- the importance of the regulation of corporate conduct, financial markets and services.<sup>65</sup>

32 Whilst the Act had a very limited application, some practitioners have expressed concern that the language in the Explanatory Memorandum and other extrinsic materials may indicate a growing preference for prioritising the public interest in effective regulation over, and thus compromising, the public interests served by the LPP.<sup>66</sup> It is conceivable that there will be further movement away from the paramountcy of the LPP. As Desiatnik warned, the scope of legal principles justified by public interest grounds are particularly susceptible to change because “the grading of values accorded to competing interests can change.”<sup>67</sup> This would also correspond with the steady trend of statutory limitation of the PSI.<sup>68</sup> Part Two of this Paper illustrates the consistent prioritisation of the public interest in effective regulation over the private interests protected by the PSI. Irrespective of where the right balance between interests lies, it is clear that we are all in Parliament’s hands.

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<sup>63</sup> D F Jackson, ‘Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation’ (2004) 419.

<sup>64</sup> Explanatory Memorandum, *James Hardie (Investigations and Proceedings) Bill 2004* (Cth) [4.23]-[4.24].

<sup>65</sup> *Ibid* [4.23]-[4.24].

<sup>66</sup> Healy G and Eastwood A, “Legal Professional Privilege and the Investigative Powers of the Australian Securities and Investments Commission” (2005) 23 *Company and Securities Law Journal* 275, 390.

<sup>67</sup> R J Desiatnik, *Legal Professional Privilege in Australia* (2<sup>nd</sup> ed, LexisNexis, 2005) 63.

<sup>68</sup> E Rumble, “Conflicting (public) interests affecting disclosure: Section 19 examinations, legal professional privilege and public interest immunity” (2014) 32 *Company and Securities Law Journal* 44, 62.

## The LPP and its application to in-house counsel

- 33 Significant recent case law deals with the privilege in the context of in-house counsel. In recent years, the landscape of the profession, and the structure of the domestic and international commercial sectors has changed significantly. Lawyers are no longer faced with a clear choice between operating as a sole practitioner or in a partnership. Today, an alternative career option exists – namely, as a salaried lawyer within a corporation. The rise of multinational companies with cross-jurisdictional work and permanent in-house counsel has caused questions regarding the LPP’s application to salaried lawyers and foreign lawyers to come to the fore.<sup>69</sup>
- 34 The Courts have recognised that in-house counsel have a unique position, different to other legal advisers. This is because they are both legal adviser and employee. It follows that the type of work and the structure of the relationship differs. In-house counsel often have dual responsibilities in an organisation, and are more likely to have commercial or managerial functions as well as legal ones.<sup>70</sup> The distinction between legal and non-legal work can be blurred. In fact, in large organisations it has been recognised that a “multiplicity of purposes is commonplace.”<sup>71</sup>
- 35 Accordingly, there was initially some debate concerning whether communications between commercial and legal branches of the same entity can or should be privileged. In 2008, the federal government commissioned the ALRC report, “Privilege in Perspective: Client Legal Privilege in Federal Investigations”,<sup>72</sup> to consider these issues. The ALRC noted “strong opposition” to treating in-house counsel differently.<sup>73</sup> Following “some initial hesitancy by the common law”,<sup>74</sup> the courts have adopted an approach that

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<sup>69</sup> See, Maxine Evers and Jason Harris, ‘The duties of in-house counsel: The bold, the bright and the blurred?’ (2009) 37 *Australian Business Law Review* 267.

<sup>70</sup> *Sydney Airports Corp Ltd v Singapore Airlines Ltd* [2005] NSWCA 47, [24], [57]-[58] (Spigelman CJ) (Sheller JA and Campbell AJA agreeing).

<sup>71</sup> *Gaynor v Chief of the Defence Force (No 2)* [2015] FCA 817, 13 [57] (Katzmann J).

<sup>72</sup> Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report no 107 (2008).

<sup>73</sup> *Ibid* [8.101].

<sup>74</sup> Desiatnik, above n 17, 537.

places paramount importance on the “independence” of in-house counsel, in addition, of course, to the dominant purpose test.

36 Before exploring these requirements, it is important to recognise that the regulatory framework governing practising lawyers imposes the same common law duties, statutory obligations, government scrutiny and self-regulation on all practitioners – be they employees of or partners in a law firm, sole practitioners or in-house counsel. At the outset it is clear that even if the roles and functions of in-house counsel vary, the ethical duties remain the same.<sup>75</sup>

37 It should also be acknowledged that the same changes in the legal profession that gave led to the rise of in-house counsel also contributed to a change in the repertoire of private practitioners. Lawyers in private practice are now expected to provide their clients with commercial advice and expertise. There is a “close association between the legal and corporate worlds”,<sup>76</sup> which has been recognised in case law.<sup>77</sup> Accordingly, these cases also provide a lesson for private practitioners whose work has multiple purposes, and who “wear both a corporate and a legal hat”<sup>78</sup> – to keep on the correct side of that blurred line between legal and non-legal work.<sup>79</sup>

### *Independence*

38 Numerous high profile Australian cases illustrate the courts’ concerns as to the conduct of in-house counsel.<sup>80</sup> The key difference is the dependence and proximity between in-house counsel and their corporate employers. The internal lawyer is dependent on the employer client for their salary. In addition, Professor Dal Pont notes that an in-house counsel is often in a more onerous

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<sup>75</sup> Evers and Harris, above n 69, 270.

<sup>76</sup> Evers and Harris, above n 69, 271.

<sup>77</sup> *McCabe v British American Tobacco Services Ltd* [2002] VSC 73, [62] (Eames J); *Seven Network Ltd v News* [2005] FCA 142, [14]-[21] (Tamberlin J).

<sup>78</sup> Evers and Harris, above n 69, 273.

<sup>79</sup> Evers and Harris, above n 69, 277.

<sup>80</sup> See, eg, *British American Tobacco Australia Ltd v Cowell* (2002) 7 VR 524; *Seven Network Ltd v News Ltd* [2005] FCA 142.



position with respect to advice and conduct than the external lawyer, because of their proximity to client information.<sup>81</sup>

39 The question was first addressed in *Waterford v Commonwealth of Australia*.<sup>82</sup> There, the High Court held that the LPP can attach to communications between clients and their salaried legal advisers provided the lawyers in question are independent from their employer and competent. Brennan J reasoned that the rationale of the privilege can only be fulfilled where the legal adviser is competent and independent:

Competent, in order that the legal advice be sound and the conduct of litigation be efficient; independent, in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice which he gives or the fairness of his conduct of litigation on behalf of his client.<sup>83</sup>

40 I interpose that this demonstrates the utility of the privilege's rationale – it provides an example of the rationale being “resorted to as a solid foundation against which to test the [application of the privilege].”<sup>84</sup>

41 Accordingly, communications between in-house counsel and their employer may remain subject to the LPP provided they are able to establish “an appropriate degree of independence” from their employer.<sup>85</sup> This is a question of fact, and each case will depend on the way in which the position is structured and executed.<sup>86</sup> Importantly, some degree of commercial involvement will not automatically negate any privilege claim.<sup>87</sup>

42 As Tamberlin J, writing extracurially, and Bastin observed:

Involvement which might be regarded as vitiating the independence of the in-house counsel may include membership of certain committees, intensive dealings with the finance or policy arrangements of the organisation, employment in other non-legal offices such as secretary or director of the

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<sup>81</sup> G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 2006), 289.

<sup>82</sup> (1987) 163 CLR 54.

<sup>83</sup> *Waterford v Commonwealth of Australia* (1987) 163 CLR 54, 70 (Brennan J).

<sup>84</sup> McNicol, above n 19, 65.

<sup>85</sup> *Seven Network Ltd v News Ltd* [2005] FCA 142, [4]-[5] (Tamberlin J).

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid* [38] (Tamberlin J).

corporation, or a devotion of a majority of the employee's time to activities not relating to the provision of legal advice.<sup>88</sup>

- 43 In short, the requisite degree of independence requires in-house counsel to be lawyers first and employees second.

*Dominant purpose*

- 44 The requirements of independence and competence relate to the lawyers. Once those requirements are met, attention turns to the communication itself, which of course must be one made for the dominant purpose of obtaining legal advice or preparation for litigation. However, determining the dominant purpose in the context of in-house counsel can be a difficult task. It is particularly problematic where in-house counsel hold dual commercial and legal roles.

- 45 For example, merely copying in-house counsel into an email intended for other recipients within the business is not sufficient to attract privilege.<sup>89</sup> Likewise, "routine reports and other documents prepared by subordinates for the information of their superiors" will not attract privilege just because it is in "the ordinary course" of procedure at that business to provide such documents to the in-house counsel.<sup>90</sup>

- 46 The facts in *Singapore Airlines Ltd v Sydney Airports Corporation Ltd & Anor*<sup>91</sup> illustrate the difficulties that arise in this context. I heard this case under the Uniform Evidence Legislation. My decision was upheld on appeal. In that case, there was an incident at Sydney Airport when an aerobridge came into contact with a door of a Boeing 747-400 aircraft owned and operated by Singapore Airlines. Singapore Airlines claimed to have suffered substantial loss. Shortly after the incident occurred, an in-house lawyer employed by

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<sup>88</sup> Justice Brian Tamberlin and Lucas Bastin, 'In-house Counsel and Privilege: The Client's Man of Business' (2008) 31 *Australian Bar Review* 188, 200.

<sup>89</sup> *Dye v Cth Securities Ltd (No 5)* [2010] FCA 950, [50] (Katzmann J).

<sup>90</sup> *Esso*, 67 (Gleeson CJ, Gaudron and Gummow JJ).

<sup>91</sup> [2004] NSWSC 380. This decision was appealed and upheld in the New South Wales Court of Appeal: *Sydney Airports Corporation Ltd v Singapore Airlines Ltd & Qantas Airways Ltd* [2005] NSWCA 47 (Spigelman CJ, Sheller JA and Campbell AJA).

Sydney Airports Corporation Ltd (SACL) commissioned an expert report. Singapore Airlines sought an order for production. SACL claimed the report was privileged.

47 The primary issue concerned the purpose for which the report was prepared. It was possible to assign at least three purposes:

- (1) for use in the litigation that SACL's in-house counsel thought was "likely";
- (2) to enable SACL to allay the concerns of the Airline Operations Committee (AOC), both in relation to the particular aerobridge and in relation to other similar aerobridges, so as to persuade the AOC to allow the aerobridge to be put back into service; and
- (3) for SACL's own operational reasons: to seek to ensure that similar incidents would not occur again.

48 SACL was unable to establish that the first purpose was the dominant purpose for commissioning the report. In the ordinary case, the purpose would be that of the person who brings the document (in which the relevant communication is embodied) into existence. In *Grant v Downs*, Barwick CJ referred to the dominant purpose as being "of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence".<sup>92</sup> In this case, the relevant purpose is that of the corporation, because the in-house lawyer was the human agent whose thoughts and actions were those of the employer.

49 The three identified purposes included a purpose specific to the in-house solicitor's legal function (the first purpose); and two others that more generally, were managerial or commercial purposes (the second and third purposes). The evidence did not demonstrate that the first purpose was

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<sup>92</sup> *Grant*, 677 (Barwick CJ).

“dominant”. Nor was it possible, looking at the matter objectively, to say that one purpose was inherently such that it should be regarded as dominant. Accordingly, the report was not privileged. The judgment was upheld on appeal. Spigelman CJ (Sheller JA and Campbell AJA agreeing), also commented that the status of the legal practitioner (as an in-house counsel or external solicitor) was “not irrelevant” to the dominant purpose inquiry.<sup>93</sup>

### *Foreign lawyers*

50 Changes in the legal landscape also raise the question of whether foreign lawyers advising on Australian law, or vice versa, are entitled to the privilege. This is connected to the general requirement that the adviser be engaged in a legal capacity. This has been said not to amount to a requirement that the adviser have a current practising certificate.<sup>94</sup>

51 Three situations arise:

- (1) when a foreign lawyer advises on Australian law;
- (2) when an Australian lawyer advises on foreign law; and
- (3) when a foreign lawyer advises on foreign law.

52 At common law, it has been clarified that the advice of a foreign lawyer on Australian law is entitled to privilege<sup>95</sup> and the advice of an Australian lawyer on foreign law is also entitled to privilege.<sup>96</sup> The third situation, whether communications relating to a foreign lawyer advising on foreign law was privileged in proceedings in Australia, arose in *Kennedy v Wallace*.<sup>97</sup> Allsop J, divided this into two separate situations, namely where the communications would have been privileged in the foreign jurisdiction in question and where

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<sup>93</sup> *Sydney Airports Corporation Ltd v Singapore Airlines Ltd & Qantas Airways Ltd* [2005] NSWCA 47, [24] (Spigelman CJ, Sheller JA and Campbell AJA).

<sup>94</sup> *Commonwealth v Vance* (2005) 158 ACTR 47, [45] (Gray, Connolly and Tamberlin JJ).

<sup>95</sup> *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82

<sup>96</sup> *Australian Hospital Care (Pindara) Pty Ltd v Duggan* [1999] VSC 141.

<sup>97</sup> (2004) 142 FCR 185.

they would not. Allsop J considered that the reality of modern commercial business and the LPP's rationale justified its application to communications from foreign lawyers advising on foreign law in Australian proceedings. His Honour held that the privilege should not be a "jurisdictionally specific right" and that there was "no basis for viewing foreign lawyers and foreign legal advisers differently to Australian lawyers and legal advice."<sup>98</sup> However, he clarified that "nothing I have said should be taken as expressing a view on the existence of privilege in Australia where, under the legal system governing the foreign lawyer, or under the legal system of the state where the advice was given, no privilege would attach."<sup>99</sup> Accordingly, this question is left open.

53 In 2008, the Uniform Evidence Legislation was amended so that the definition of "lawyer" now includes "Australian registered foreign lawyers" and "overseas registered foreign lawyers."<sup>100</sup> The Explanatory Memorandum referred to the LPP's rationale and indicated that the amendment was in line with the LPP's rationale and intended to reflect the reasoning in *Kennedy v Wallace*.<sup>101</sup> It follows that client legal privilege under the Uniform Evidence Legislation may extend to communications from a foreign lawyer advising on foreign law, and protect them from compulsory production in Australian legal proceedings. However, the Explanatory Memorandum did not refer to the first two situations I mentioned – where a foreign lawyer advises on Australian law or an Australian lawyer advises on foreign law. In any event, the Uniform Evidence Legislation does not change the common law.

54 In summary, the case law relating to in-house counsel and foreign lawyers reminds both salaried lawyers and external practitioners that to satisfy a privilege claim, communications must be brought into existence in a professional capacity, must retain an independent character, and must be for the dominant purpose of providing legal advice.

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<sup>98</sup> Ibid [200], [202], [207], [216].

<sup>99</sup> Ibid [14].

<sup>100</sup> *Evidence Amendment Act 2008* (Cth); *Evidence Act 1995* (Cth), s 117.

<sup>101</sup> Explanatory Memorandum, *Evidence Amendment Bill 2008* [174].

## Does the LPP help or hinder the administration of justice in Australian courts?

### *Against the LPP: theoretical concerns*

55 For some, the very existence of the LPP is an obstacle to the administration of justice. This is because, in their view, the interest in both the parties and the decision-maker having unfettered access to information should be higher in the hierarchy of public interests than the benefits that flow from the LPP. In short, those who object to the LPP argue that it hinders the Court's search for truth.<sup>102</sup> Jeremy Bentham, the English philosopher and legal positivist, is among their number. According to Bentham, the LPP operates to shield guilty clients and withhold relevant information from the parties and the decision-maker. This is based on an argument that the innocent have nothing to hide, and therefore the LPP only assists guilty people. It follows, he said, that removal of the LPP would result "in a guilty person not being able to derive quite so much assistance" and access to all relevant information for the parties and the decision-maker.<sup>103</sup>

56 This argument is flawed for several reasons.

57 First, it assumes a bright line distinction between innocent and guilty, which, particularly in civil litigation, does not always exist.<sup>104</sup> That is recognised, even in the criminal sphere, by the Scottish verdict "not proven"; more generally, a verdict of "not guilty" need convey no more than that one or two of 12 citizens was not persuaded beyond reasonable doubt of the accused's guilt.

58 Second, this line of criticism wrongly assumes that the client can discern which facts are legally incriminating and which are exculpatory. Conversely, as recognised by the public interest rationale in support of the LPP, clients may require skilled legal advice in order to determine relevance. Without the immunity provided by the privilege, a client may unnecessarily withhold

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<sup>102</sup> Justice R Finkelstein, 'The Adversarial System and the Search for Truth' (2011) 37(1) *Monash University Law Review* 135,144.

<sup>103</sup> Jeremy Bentham, *Rationale for Judicial Evidence* (1827) Vol VII, 474 (Banring ed), extracted in M Pirsig and K Kirwin, *Professional Responsibility: Cases and Materials* (4<sup>th</sup> ed, 1984) 113-14.

<sup>104</sup> Justice John Gilmour, above n 20, 5; Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (5<sup>th</sup> ed, 2010) 371.

information that he or she misconstrues as incriminating. Accordingly, removing the privilege would not automatically mean that the Court would gain access to more and significant evidence. In fact, there is every possibility that less information, or indeed false information, would be volunteered instead. In addition, without the opportunity for candour and full and frank disclosure between the client and the lawyer, the client may not learn of a defence available to them. In this sense, the privilege helps, rather than hinders, the administration of justice. Compelling disclosure of confidential communications would not automatically make the court any wiser.<sup>105</sup>

59 Third, this argument really only addresses the litigation component of the LPP. As has been acknowledged, the LPP relates also to the provision of legal advice unconnected to existing or contemplated litigation. For example, people often consult lawyers to determine the legality of some action they are considering taking. Proponents of the LPP assume that most clients would refrain from doing an act if they are told that it is unlawful.<sup>106</sup> Whether that assumption is naïve is a topic on which I do not feel qualified to express an opinion.

60 At least theoretically, the LPP is supportable and contributes to the administration of justice. Even so, there remains room for legitimate criticism of the absolute nature of the privilege. This is a point picked up by Lord Taylor, in *R v Derby Magistrates' Court; Ex parte B*,<sup>107</sup> and adopted by Finkelstein J, writing extracurially.<sup>108</sup> Lord Taylor recognised that “if a balancing exercise was ever required in the case of [LPP], it was performed once and for all in the sixteenth century, and since then has applied across the board in every case, irrespective of the client’s individual merits.”<sup>109</sup> Finkelstein J suggested a reform of the LPP to give the court discretion to admit privileged evidence, where the interests of justice require it. Essentially,

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<sup>105</sup> D Luban, *Lawyers and Justice – An Ethical Study* (1988) 190-191; K Kipnis, *Legal Ethics* (1986) 74-77.

<sup>106</sup> *Ibid.*

<sup>107</sup> [1996] AC 487.

<sup>108</sup> Justice R Finkelstein, ‘The Adversarial System and the Search for Truth’ (2011) 37(1) *Monash University Law Review* 135,144.

<sup>109</sup> *R v Derby Magistrates' Court; Ex parte B* [1996] AC 487, 508.

he argued that the balancing exercise should be performed by the judiciary on a case by case basis.<sup>110</sup> Judges have a not dissimilar balancing exercise to perform when considering whether the LPP has been waived or whether client legal privilege has been lost on the ground of inconsistency.

*Against the LPP: practical concerns*

61 Despite having arguably sound theoretical foundations, it is plain that the privilege, like any legal principle, could be misused to the point where it causes harm. For instance, it may tempt practitioners and their clients into false swearing.<sup>111</sup> More readily available are examples of privilege claims leading to time-consuming interlocutory disputes.<sup>112</sup> Such practices do not support the just, quick and cheap resolution of legal disputes, and are arguably incompatible with the administration of justice.

62 The inadvertent disclosure of privileged documents during the discovery process can give rise to lengthy and complex disputes. The volume and nature of electronically stored information in the information age heightens the risk that privileged material will not be identified and protected during discovery.<sup>113</sup> There may also be circumstances where the cost and burden of performing a review to identify privileged documents will be too great, and documents theoretically entitled to client legal privilege will be inadvertently disclosed.<sup>114</sup>

63 The High Court considered the mistaken provision of privileged documents in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*.<sup>115</sup> This case started life in the Commercial List of the Equity Division of the Supreme Court of New South Wales. In that case, the discovery process involved reviewing approximately

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<sup>110</sup> Justice R Finkelstein, above n 102.

<sup>111</sup> J D Heydon, 'The non-uniformity of the "uniform" Evidence Acts and their effect on the general law', (2013) 2 *Journal of Civil Litigation and Practice* 169, 177.

<sup>112</sup> Ibid.

<sup>113</sup> Michael Legg, 'Client legal privilege, discovery and Expense Reduction in the information age' (2014) 3 *Journal of Civil Litigation and Practice* 78, 78.

<sup>114</sup> Ibid.

<sup>115</sup> (2013) 250 CLR 303 ("*Expense Reduction*").



60,000 documents. The defendant inadvertently omitted to claim the LPP for 13 confidential documents that were disclosed to the plaintiff. The plaintiff declined to return the privileged documents and claimed that the client legal privilege had been waived upon disclosure.

64 The High Court reasoned that the provision of the privileged documents occurred as part of the process of discovery, which is a court-ordered process subject to regulation under the UCPR.<sup>116</sup> Orders for discovery are subject to the overriding purpose of facilitating the “just, quick and cheap resolution of the real issues in the dispute or proceedings” (the “overriding purpose”).<sup>117</sup> The High Court held that it followed from this that the Supreme Court had all the powers necessary to resolve the dispute, including “essentially, that a party be permitted to correct a mistake.”<sup>118</sup> Mistakes do happen and the risk is certainly higher in large cases where the volume of discovery is vast.<sup>119</sup> Accordingly, the correct approach would have been for the primary judge to permit the correction of the verified list of documents and order the return of those entitled to privilege. This endorsement of “robust and proactive”<sup>120</sup> case management demonstrates that the Supreme Court has adequate powers to deal with inadvertent disclosure.

65 The High Court’s reasoning reiterated the court’s broad powers to facilitate the overriding purpose. That is not to say that judges may engage in a second balancing exercise. The privilege remains a substantive right protected by the principle of legality, which may only be abrogated expressly by statute. In addition, it was stressed by the High Court that the parties and their lawyers also have a duty to assist the court in achieving the overriding purpose.<sup>121</sup> There is thus some uncertainty regarding the extent to which disputes should be solved by the law governing the parties’ substantive rights or by the

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<sup>116</sup> *Expense Reduction*, 319-320 [43]-[50] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

<sup>117</sup> *Civil Procedure Act 2005* (NSW), s 56(1).

<sup>118</sup> *Expense Reduction*, 309 [7] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

<sup>119</sup> Legg, above n 108, 85.

<sup>120</sup> *Expense Reduction*, 323 [57] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

<sup>121</sup> *Expense Reduction*, 323 [56] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

application of case management powers or choices by the parties.<sup>122</sup> Some authors have queried whether the High Court's comment that "[u]nduly technical and costly disputes about non-essential issues are clearly to be avoided"<sup>123</sup> suggests that "a decision to dispute an issue should turn on the identification of the issue as "non-essential", as well as being unduly technical or costly."<sup>124</sup> No such general rule has been articulated. Following the *Expense Reduction* decision, it is at least clear that it is not intended that the privilege should take on independent life in "satellite interlocutory litigation" in Australian courts.<sup>125</sup> The practical effect of the High Court's guidance will unfold through case by case implementation in the lower courts.

## **PART TWO: THE PRIVILEGE AGAINST SELF-INCRIMINATION**

### **Introduction**

66 The PSI confers immunity from an obligation to provide information tending to prove one's own guilt. A person is not bound to answer any question or produce any document or thing if that material would have a tendency to expose that person to conviction for a crime.<sup>126</sup> In Australia, the PSI is a substantive common law right.<sup>127</sup> However, it is not an entrenched constitutional right. Like the LPP, it is not immutable and must be balanced against competing rights and interests.

67 The ALRC has raised a number of issues for consideration concerning legislative provisions that abrogate the PSI, including:

- (1) "whether the extensive abrogation of or encroachment on the privilege by Commonwealth laws is justified;

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<sup>122</sup> Jocelyn Williams, 'Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management & Marketing Pty Ltd: Implications for case management obligations and the doctrine of waiver' (2014) 3 *Journal of Civil Litigation and Practice* 32, 39.

<sup>123</sup> *Expense Reduction*, 323 [57] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

<sup>124</sup> Williams, above n 119.

<sup>125</sup> *Expense Reduction*, 324 [59] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

<sup>126</sup> *Sorby v The Commonwealth* (1983) 152 CLR 281, 288 (Gibbs CJ).

<sup>127</sup> *Reid v Howard* (1995) 184 CLR 1, 8 (Toohey, Gaudron, McHugh and Gummow JJ).

- (2) if abrogation or encroachment is justified, whether use immunity, partial derivative use immunity, or full derivative use immunity is appropriate;
- (3) if partial derivative use immunity is appropriate, then whether the inherent powers of the court already provide, or could provide, such an immunity, or whether statutory protection is necessary;
- (4) whether compelled examinations of persons subject to charge, regarding the subject matter of the charge, should be permitted, and if so, under what conditions; and
- (5) whether it is appropriate for a prosecutor to be given transcripts of compelled questioning.”<sup>128</sup>

68 In considering the impact of the PSI on the administration of justice, this paper really picks up the first three points.

### History of the privilege

69 The history of the PSI has been the subject of historiographical controversy. Until recently, it was thought the PSI emerged in the 17<sup>th</sup> century, born out of dissatisfaction with the practices of the prerogative and ecclesiastical courts of the High Commission and Star Chamber.<sup>129</sup> This theory, which is chiefly based on the writings of Professors Wigmore<sup>130</sup> and Levy,<sup>131</sup> contends that the abolition of these bodies and the oath *ex officio* in 1641 inspired the introduction of the PSI into the common law. However, research by modern legal historians who have had access to material that was not available to earlier scholars has now ‘convincingly demonstrated’<sup>132</sup> that the modern form of the PSI, which protects an accused and defendant before and at trial, did

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<sup>128</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Report No 129 (2015) [11.26].

<sup>129</sup> See, eg, *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503, 525-526 (Burchett J); *Smith v The Queen* (2007) 35 WAR 201, [50]; *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (“*Caltex*”).

<sup>130</sup> John Wigmore, *Evidence in Trials at Common Law* (Little Brown, 1961) vol 1.

<sup>131</sup> Leonard Levy, *Origins of the Fifth Amendment* (Macmillan, 1968).

<sup>132</sup> *Azzopardi v The Queen* (2002) 205 CLR 50, 91 [119] (McHugh J).

not originate until the mid-19<sup>th</sup> century or later.<sup>133</sup> At this time, the PSI developed gradually as a result of the ‘lawyerisation’ of the criminal trial and the adoption of the adversarial system.<sup>134</sup> Prior to this, defendants were unrepresented and disqualified from testifying.<sup>135</sup>

70 A third theory suggests the PSI is a modern iteration of the ancient common law maxim *nemo tenetur prodere seipsum*.<sup>136</sup> It could be thought that this does not say very much about the origins of the PSI.

71 Ultimately, these three theories can coexist. Cumulatively, they highlight the many facets of the PSI and demonstrate the PSI’s evolution over time. It has been recognised that the PSI encompasses ‘a disparate group of immunities, which differ in nature, origin, incidence and importance’.<sup>137</sup> More specifically, the PSI encompasses three distinct privileges: (1) a privilege against self-incrimination; (2) a privilege against self-exposure to a civil or administrative penalty; and, (3) a privilege against self-exposure to the forfeiture of an existing right.

72 The PSI can be claimed in three circumstances: (1) by a witness; (2) by a defendant during trial; and, (3) by a suspect during pre-trial investigation. The PSI is also related to other rights. For example, other jurisdictions, including Hong Kong, South Africa and Europe, incorporate the PSI as an integral part of the right to a fair trial,<sup>138</sup> or refer to the PSI interchangeably with the right to silence.<sup>139</sup>

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<sup>133</sup> John Langbein, ‘The Historical Origins of the Privilege against Self-Incrimination at Common Law’ (1994) 92 *Michigan Law Review* 1047.

<sup>134</sup> Pat McInerney, ‘Privilege against self-incrimination from early origins to judges’ rules’ 18 *International Journal of Evidence & Proof* 101-138, 109.

<sup>135</sup> It follows that there was a prohibition from speaking, as opposed to a right not to speak.

<sup>136</sup> *Nemo tenetur prodere seipsum* translates to ‘people should not be compelled to betray themselves.’ For an analysis of the third theory, see Richard Helmholz, ‘Introduction’ in Richard Helmholz (ed), *The Privilege against Self-Incrimination: Its Origins and Development* (University of Chicago Press, 1997), 7; M R T Macnair, ‘The Early Development of the Privilege against Self-incrimination’ (1990) 10 *Oxford Journal of Legal Studies* 66; Langbein, above n 133. See also William Blackstone, *Commentaries on the Laws of England* (1765).

<sup>137</sup> *R v Director of Serious Fraud Office; Ex parte Smith* [1993] 1 AC, 30-31 (Lord Mustill).

<sup>138</sup> See, eg, *Funke v France* (1993) 16 EHRR 297; *Murray v United Kingdom* (1996) 22 EHRR 29; *Saunders v United Kingdom* (1997) 23 EHRR 313; *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133;

73 In my view, the incremental history of the PSI demonstrates that it is susceptible to re-evaluation and evolution, in conformity with shifts in the complexity of society (and the economy) and in society's identification of key values.

### **The rationale behind the privilege**

74 As mentioned in Part One, a rule's rationale should justify its existence and help to define its scope and operation. However, a number of competing rationales claim to justify the existence of the PSI.

#### *Rights-based rationales*

75 The first group of rationales may be called the rights-based rationales. These include the protection of privacy, autonomy and the presumption of innocence; the undesirability of the State's subjecting individuals to the 'cruel trilemma' of self-accusation, perjury or contempt; and a fear that self-incriminating statements may be elicited by inhumane treatment and thus be inherently unreliable. It will be seen that individually, the rationales are problematic and cumulatively, they are overbroad or inconsistent. Some of this confusion was resolved by the High Court's modern restatement of the PSI's purpose, framed specifically in terms of human rights.<sup>140</sup> In the alternative, recourse can be had to the instrumentalist or utilitarian rationales.

#### **Prevention of abuse of power**

76 Traditionally the PSI was intended to prevent a potential abuse of power:

Once the Crown is able to compel the answering of a question, it is a short step to accepting that the Crown is entitled to use such means as are necessary to get the answer. ... By insisting that a person could not be compelled to incriminate himself or herself, the common law thus sought to ensure that the Crown would not use its power to oppress an accused person

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*Ferreira v Levin and others; Vryenhoek and others v Powel NO and others* (1996) 1 SA 984 (Constitutional Court).

<sup>139</sup> *Secretary for Justice v Lam Tat Ming* (2000) 3 HKCFAR 168, 178.

<sup>140</sup> *Caltex*, 498 (Mason CJ and Toohey J).

or witness and compel that person to provide evidence against him or herself.<sup>141</sup>

77 This argument contends that the PSI exists to prevent evidence from being elicited by torture, inhumane treatment or abuse.<sup>142</sup> However, on one view, it is unlikely that this remains a real risk in the context of Australian police or regulatory examinations. This is because that risk is diverted by other laws.<sup>143</sup> Lord Templeman considered the PSI ‘profoundly unsatisfactory when no question of ill-treatment or dubious confession is involved’<sup>144</sup> and was quoted with approval by Lord Griffiths, who added “days [where people were tortured into providing evidence] are surely past”.<sup>145</sup> Thus, if this is the sole, or even main, rationale for the PSI it could be concluded that the PSI is an ‘archaic and unjustifiable survival from the past’<sup>146</sup> based on fear rather than reason.

78 Nevertheless, this rationale continues to be invoked because it ‘resonate[s] well ... [in] the twentieth century.’<sup>147</sup> Even acknowledging the protections available in Australia,<sup>148</sup> I am not prepared to dismiss this rationale entirely. Historically, in societies where freedom from self-incrimination is not available, coercive means have been used to compel a person to speak. The treatment of suspected “terrorists” and “jihadists” after the initial phase of the current war in Afghanistan shows that the lessons of history remain relevant today. A nation that has the PSI enshrined in its Constitution has denied it to others within its power, and has at the least condoned the use of illegitimate means

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<sup>141</sup> *Caltex*, 544 (McHugh J). See also *Hamilton v Naviede* [1995] 2 AC 75, 95; *AT and Tistel Ltd v Tully* [1993] AC 45, 53, 57.

<sup>142</sup> *Caltex*, 498-499; *Hamilton v Naviede* [1995] 2 AC 75, 95; *AT and Tistel Ltd v Tully* [1993] AC 45, 53, 57.

<sup>143</sup> See, for eg, *Police Integrity Commission Act 1996* (NSW) s 28; *Independent Commission Against Corruption Act 1988* (NSW) s 24.

<sup>144</sup> *AT and Tistel Ltd v Tully* [1993] AC 45, 53.

<sup>145</sup> At the time his Lordship said that Guantanamo Bay was only a geographical area of Cuba under American control, not a metaphor for humans rights abuse.

<sup>146</sup> *Ibid* 53.

<sup>147</sup> *Rich v Silbermann v Australian Securities and Investments Commission* (2003) 203 ALR 671, 712 (McColl JA).

<sup>148</sup> See, eg, *Police Integrity Commission Act 1996* (NSW), s 28; *Independent Commission Against Corruption Act 1988* (NSW). Relevant to the case study in Part Three, ASIC is accountable to the Commonwealth Government Minister, the Parliament, and through administrative and judicial review: *Australian Securities and Investments Commission Act 2001* (Cth) 11, 12, 14, 123, 162, 183, 214, 235B, 235J, 243, 244 (among others). See also Joanna Bird, 'Regulating the Regulators: Accountability for Australian Regulators' (2011) 35(3) *Melbourne University Law Review* 739.

in furtherance of the denial.<sup>149</sup> Hence, no doubt, the casuistry as to what is or is not “torture”.<sup>150</sup>

### **Protection of the presumption of innocence and the adversarial system**

79 The PSI was also intended to protect the adversarial system of criminal justice. The fundamental principle of Australia’s adversarial system is that the Crown bears the onus of proof beyond a reasonable doubt. The presumption of innocence until proven guilty underpins the PSI against self-incrimination. Those who allege another’s guilt should not be able to compel the accused to give evidence against themselves;<sup>151</sup> a proposition that begs rather than answers the question, and that might surprise lawyers and judges trained in the civilian/inquisitorial system.

### **Protection from the ‘cruel trilemma’**

80 The ‘cruel trilemma’ refers to the choice between lying and risking punishment for perjury, refusing to answer and risking punishment for contempt and answering honestly and providing incriminating evidence.<sup>152</sup> This has been criticised as an appeal to emotion rather than reason. The prosecution of individuals is an integral part of the adversarial system, from which the PSI developed, and which the PSI is apparently intended to serve. The trilemma is only relevant to individuals who have contravened the law, and it is reasonable that they may be required to confront this choice, albeit unpleasant or difficult. It is difficult to see how this could be considered cruel. In isolation, this rationale does not support the existence of the PSI.

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<sup>149</sup> See generally Paulo C Alves, ‘Taking the Fifth Beyond Trial’ (2012) 26 *Journal of Civil Rights & Economic Development* 251, 275; John T Parry, ‘Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after Chavez v Martinez’ (2005) 39 *Georgia Law Review* 733, 821-823; Mary Strauss, ‘Torture’ (2003) 28 *New York University Law Review* 201, 251, 268.

<sup>150</sup> Jeremy Waldron, ‘Torture and Positive Law: for the White House’ (2005) 105 *Columbia Law Review* 1681, 1700.

<sup>151</sup> *Cornwell v R* (2007) 231 CLR 260.

<sup>152</sup> *Caltex*, 498-499 (Mason CJ and Toohey J).

## The rights-based rationale

- 81 In *Environment Protection Authority v Caltex Refining Co Pty Ltd*<sup>153</sup> the High Court, after considering the traditional position, provided a reassessment of the underlying rationales for the PSI. The “modern rationale” frames the PSI in terms of human rights: specifically the rights to dignity, privacy and freedom. This rationale underpins the concept of the PSI as a substantive human right rather than simply a rule of evidence. Murphy J in *Rochfort v Trade Practices Commission* said that: [t]he privilege against self-incrimination is a human right, based on the desire to protect personal freedom and human dignity.<sup>154</sup> On this view, the privilege prevents “the indignity and invasion of privacy which occurs in compulsory self-incrimination.”<sup>155</sup>
- 82 Again, this view of the PSI could be seen to justify it in a self-referential and essentially circular way. More significantly it could be seen to elevate the suggested right above the numerous and weighty public interests in the criminal justice system: vindication of the law, punishment, protection, and all the other ends that the criminal justice system serves.

## Instrumentalist rationales

- 83 In its recent Report, the ALRC also referred “in more utilitarian terms” to other “benefits”<sup>156</sup> that it said flowed from the PSI. These included that the protection provided by the PSI may encourage witnesses to cooperate with investigators and prosecutors,<sup>157</sup> may prevent unlawful coercion to obtain evidence,<sup>158</sup> and may reduce the incidence of false confessions<sup>159</sup> or untruthful evidence<sup>160</sup>. Like the utilitarian rationales, these are not bullet-proof. For instance, ascertaining evidence, and the truth or falsity of it, is a

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<sup>153</sup> Ibid.

<sup>154</sup> *Rochfort v Trade Practices Commission* (1982) 153 CLR 134, 150 (Murphy J).

<sup>155</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346 (Murphy J).

<sup>156</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachment by Commonwealth laws*, Interim Report No 127 (2015) 343 [12.22].

<sup>157</sup> Ibid.

<sup>158</sup> Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [852], [861].

<sup>159</sup> Cosmas Mosidis, *Criminal Discovery: From the Truth to Proof and Back Again* (Institute of Criminology Press, 2008) 133.

<sup>160</sup> Ibid 129.



necessary component of any police or regulatory investigation and the PSI only has the potential to assist. It will be seen that these by-products could also be achieved through the provision of statutory use immunities.

### The privilege at common law

84 At common law, the PSI entitles a natural person to refuse to answer any question if the answer would have a tendency to expose him or her, either directly or indirectly, to the risk of incrimination.<sup>161</sup> The PSI is available to natural persons who are suspected of a crime,<sup>162</sup> in criminal proceedings,<sup>163</sup> in civil proceedings<sup>164</sup> and in non-criminal contexts.<sup>165</sup> Its operation has been described as 'wide and inclusive', because it applies in circumstances where the answer would have a tendency to expose the person to incrimination<sup>166</sup> as opposed to applying only where the answer actually does expose the person to incrimination.

#### *Type of evidence*

85 Not all evidence is protected by the PSI. The PSI protects against compulsion to provide testimonial evidence. It does not apply to the production of non-testimonial evidence, such as fingerprints or DNA samples.<sup>167</sup> This reflects a settled conceptual distinction between compulsion to produce real evidence,

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<sup>161</sup> Australian Law Reform Commission, *Evidence Interim Report No 26* (1985) 855. For its seminal articulation, see *Blunt v Park Lane Hotel Ltd* [1943] 2 KB 253, 257.

<sup>162</sup> *Smith v The Queen* (2007) 35 WAR 201, [46]; *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412, 257; *Reid v Howard* (1995) 184 CLR 1, 420-421; *Smith v The Queen* (2007) 35 WAR 201, 6-7; *Sorby v The Commonwealth* (1983) 152 CLR 281, 288; *Griffin v Pantzer* (2004) 137 FCR 209, [37].

<sup>163</sup> *Sorby v Commonwealth* (1983) 152 CLR 281, 288; *Lamb v Munster* (1882) 10 QBD 110, 111; *Griffin v Pantzer* (2004) 137 FCR 209, [44].

<sup>164</sup> *Petty & Maiden v R* (1991) 173 CLR 95.

<sup>165</sup> *Reid v Howard* (1995) 184 CLR 1.

<sup>166</sup> *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 392; *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 326; *Caltex*, 502 (emphasis added).

<sup>167</sup> *Hamilton v Oades* (1989) 166 CLR 486; *Sorby v Commonwealth* (1983) 152 CLR 281, 292.

which exists independently of the person, and compulsion to create testimony.<sup>168</sup>

- 86 There is some debate as to whether the PSI extends to the production of documents in Australia. While certain decisions have indicated that it does,<sup>169</sup> three judgments of the High Court referred to documents as non-testimonial evidence, suggesting that the PSI may not apply.<sup>170</sup> The production of documents is also not protected by the PSI in the United States and the United Kingdom.<sup>171</sup>

### *Application to corporations*

- 87 A corporation is not entitled to the PSI.<sup>172</sup> The High Court's modern restatement of the rights-based rationale behind the PSI has no application to corporations. In Australia as in England, a corporation "has no body to be kicked or soul to be damned",<sup>173</sup> and cannot suffer an encroachment on its human rights.

- 88 Further, application of the PSI to corporations would prevent the effective administration of justice:

In practice, corporate conduct is often complex. Assessment of a corporation's conduct may only be possible through an examination of its documents. ... A true understanding of [a] corporation's procedures is likely to be gained only through evidence from the corporation itself, particularly from its records.<sup>174</sup>

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<sup>168</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Report No 129 (2015) [11.15]-[11.16]. See generally *Hamilton v Oades* (1989) 166 CLR 486, 496; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 326; *Caltex*, 544; *X7 v Australian Crime Commission* (2013) 248 CLR 92, [5]; *Sorby v The Commonwealth* (1983) 152 CLR 281, 316; *Lee v NSW Crime Commission* (2013) 251 CLR, [136], [181], [187].

<sup>169</sup> *Sorby v The Commonwealth* (1983) 152 CLR 281, 288; *Griffin v Pantzer* (2004) 137 FCR 209, [37].

<sup>170</sup> *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 392; *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, 326; *Caltex*, 502.

<sup>171</sup> See, eg, *Attorney General's Reference (No 7 of 2000)* (2001) 2 Cr app R 19; *R v Kearns* (2001) 1 WLR 2815; *Fisher v United States* (1976) 425 US 391.

<sup>172</sup> *Caltex*, 516 (Brennan J); *Daniels*, 31 (Gleeson CJ, Gaudon, Gummow and Hayne JJ).

<sup>173</sup> *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1127 (Lord Denning MR).

<sup>174</sup> *Caltex*, 554 (McHugh J).

## Statutory expression in the Uniform Evidence Acts

- 89 A statutory form of the PSI is provided in the Uniform Evidence Legislation. Unlike the PSI, the statutory protection only applies to disclosure of information in a court proceeding.
- 90 Section 128 of the *Evidence Act* provides that an individual may object to giving particular evidence of the ground of self-incrimination. If the objection is found to be justified, the Court may issue a certificate, the effect of which is to provide some (although not complete) protection, and thereafter require the witness to answer the question.
- 91 Section 187 of the *Evidence Act* reflects the common law position and expressly denies the PSI to corporations.

### *Application to documents*

- 92 Section 128 is not directed in terms to the production of documents under compulsion of law; s 187 suggests that the legislature was well aware of the distinction between answering questions and producing documents.
- 93 There is however in s 87 of the *Civil Procedure Act 2005* (NSW) a regime broadly equivalent to s 128 of the *Evidence Act* in relation to the provision of evidence, including by the production of documents, pursuant to an order of a court. Also note the definitions of “privileged document” and “privileged information” in the Dictionary to the Uniform Civil Procedure Rules, in relation to (for example) the discovery process and notices to produce.<sup>175</sup> Thus, an individual may (subject to legislation) resist producing documents even where the documents that form the subject of the subpoena or notice to produce provide the only evidence as to impropriety.

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<sup>175</sup> UCPR, part 21.

## Abrogation of or exceptions to the privilege

- 94 Despite the numerous rationales justifying the PSI, none has been strong enough to prevent statutory erosion. I repeat that in Australia, the PSI is not an entrenched constitutional right. There are circumstances where the legislature has decided that the public interest in the full investigation of a matter outweighs the public interest in the maintenance of the PSI. In these cases, Parliament has conferred on government agencies the power to compel a person to answer questions or produce documents. These agencies include the Australian Crime Commission (“ACC”), the Australian Competition and Consumer Commission (“ACCC”), the Australian Security Intelligence Organisation (“ASIO”), and ASIC.
- 95 In an attempt to strike a fair and workable balance between Parliament’s objectives and the common law right, statutes that abrogate the PSI tend to provide compensatory protection by way of either direct use immunity or derivative use immunity. Direct use immunity provides that the *compelled testimonial evidence* is not admissible against the person in a subsequent proceeding. This means the person is compelled to give evidence, however the subsequent use of that evidence is limited. Derivative use immunity renders inadmissible *any material subsequently derived, directly or indirectly*, from the information disclosed by the statement-maker.<sup>176</sup>

## PART THREE: THE ASIC CASE STUDY

### Operation and evolution of s 68

- 96 Section 68(1) of the ASIC Act abrogates the PSI in relation to the giving of information, the signing of a record or the production of books and governs the admissibility of evidence compulsorily obtained under ASIC’s information-

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<sup>176</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws*, Report No 129 (2015) [11.2].

gathering powers. That abrogation has been in operation for 25 years, having come into force in the precursor to the ASIC Act in May 1992.<sup>177</sup>

97 Before 1991, direct use immunity was available for compelled testimony and no immunity was available for the act of producing books. From January 1991 to May 1992, direct use and derivative use immunity was available for compelled testimony and the act of producing books. This was the high watermark of protection. After less than a year, the Parliamentary Joint Committee on Corporations and Securities ('PJCCS') conducted an inquiry. Following their recommendations, in May 1992,<sup>178</sup> Parliament removed derivative use immunity in relation to compelled statements and removed all immunity in relation to the act of producing documents. Since that time, the provision has not been amended.

98 Section 68 operates as follows. Direct use immunity is conferred by s 68(3). This means that a self-incriminating or penalty-exposing statement, or the fact that a person has signed a record, is not admissible in subsequent proceedings against that person.<sup>179</sup> Such evidence is only admissible in a proceeding against that person in respect of the falsity of the evidence.<sup>180</sup> There is no prohibition against the admissibility of the evidence against another person or corporation.<sup>181</sup> This is because there is no privilege against 'other-incrimination'.<sup>182</sup> The direct use immunity in s 68 also does not apply to the act of producing incriminating books and records. It is a condition of the direct use evidential immunity contained in s 68(3) that the subsequent proceeding must be a criminal proceeding or a proceeding for the imposition of a penalty.<sup>183</sup> There is no protection against use in civil proceedings.<sup>184</sup>

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<sup>177</sup> Identical wording was adopted in the ASIC Act, which came into force in July 2001.

<sup>178</sup> *Corporations Legislation (Evidence) Amendment Act 1992* (Cth).

<sup>179</sup> ASIC Act, s 68(3).

<sup>180</sup> ASIC Act, s 68(3)(c)-(d).

<sup>181</sup> *Smith v The Queen* (2007) 35 WAR 201, [75].

<sup>182</sup> For an analysis of "other-incrimination" see Mike Redmayne, 'Rethinking the Privilege Against Self-Incrimination' (2007) 27(2) *Oxford Journal of Legal Studies* 209.

<sup>183</sup> This includes any proceeding or hearing before, or examination by or before, a court of tribunal. It includes matters of civil, administrative, criminal, disciplinary or other nature: ASIC Act s 5(1)

## Justifications for abrogating the privilege

99 It is reasonably settled that the abrogation of the PSI by the ASIC Act is justified.

### *Effective regulation*

100 Regulatory regimes that compel evidence are understood to be pursuing the following legitimate end:

‘[T]he full investigation on the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation.’<sup>185</sup>

101 A limitation on the availability of the PSI is more likely to be justified if it avoids *serious* risks and is in the public interest. Effective investigation and prosecution of corporate malfeasance is important. ASIC has significant responsibilities for safeguarding Australia’s financial system and millions of consumers and investors. Australia’s financial and insurance sector contributes 4.9% of Australia’s real gross value added by industry (second only to the ‘Information Media and Telecommunications’ sector); employs 3.6% of Australia’s total workforce (over 460,000 people); and holds assets of A\$7,500 billion (4.5 times Australia’s nominal GDP).<sup>186</sup> Contraventions of the law can damage the Australian economy and can damage individuals’ financial or social positions. This sector is of ‘national strategic important to Australia’<sup>187</sup> and it is settled that ‘[t]he honest conduct of the affairs of companies is a matter of great public concern’.<sup>188</sup>

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“proceeding”. A tribunal includes any body, authority or person that has power to hear, receive or examine evidence: ASIC Act s 5(1) “tribunal”.

<sup>184</sup> For example, injunction proceedings under s 1324 or in support of an application to appoint a receiver or otherwise control the property of a company under s 1323.

<sup>185</sup> *Pyrneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341 (Mason ACJ, Wilson and Dawson JJ).

<sup>186</sup> Australian Trade and Investment Commission (Austrade), *Why Australia Benchmark Report 2017* (2017) 9, 21, 33.

<sup>187</sup> Helen Bird and George Gilligan, ‘Financial Services Misconduct and the Corporations Act 2001’ (Working Paper No 2, Centre for Corporate Law and Securities Regulation, 2015) 1.

<sup>188</sup> *Rees v Kratzmann* (1965) 114 CLR 63, 80.

### *The corporate context*

102 In addition, as I mentioned, there are unique difficulties associated with enforcement of corporate law that render compulsory testimony useful, and often necessary, for regulation and law enforcement. Enforcement in this context has been recognised as ‘notoriously’ difficult for three reasons.<sup>189</sup> First, the evidence is extremely complex and can be unreliable. It is often necessary to have direct assistance from the perpetrator to comprehend the thousands of available documents.<sup>190</sup> In addition to their sheer quantity, the documents may be inadvertently or intentionally incomplete, or may have been created to deceive.<sup>191</sup> Second, the corporate structure may be manipulated to obfuscate illegal activity,<sup>192</sup> and subordinates ‘may not know the full story’.<sup>193</sup> Third, there is often no clear victim capable of giving evidence.<sup>194</sup> Combined, these factors mean that greater assistance is required from the perpetrator.<sup>195</sup> It follows that compelled testimony would indeed facilitate law enforcement.

103 An alternative way to demonstrate the utility of the limitation is to consider ASIC’s operation without it. The High Court has often observed that ASIC’s powers, and thus its ability to regulate, would be frustrated and rendered nugatory if they were subject to the PSI.<sup>196</sup> It has been recognised that ‘the shield of PSI as applied to corporations [would be] a formidable obstacle to the ascertainment of the true facts in the realm of corporate activities.’<sup>197</sup> Accordingly, because of the nature of the corporate context, a limitation on the

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<sup>189</sup> Paul Sofronoff, ‘Derivative use immunity and the investigation of corporate wrongdoing’ (1994) 10 *Queensland University of Technology Law Journal* 122, 122.

<sup>190</sup> Joseph P Longo, ‘The powers of investigation of the Australian Securities Commission: balancing the interests of persons and companies under investigation with the interests of the state’ (1992) 10(4) *Company and Securities Law Journal* 237, 240.

<sup>191</sup> Commonwealth, Parl Paper No 483 (1991) [3.2.2].

<sup>192</sup> Sofronoff, above n 189, 122; *Caltex*, 554 (citations omitted).

<sup>193</sup> Longo, above n 190, 240.

<sup>194</sup> Commonwealth, Parl Paper No 483 (1991) [4.8]. The victim is often an ‘amorphous entity such as a market’: *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 554 (citations omitted).

<sup>195</sup> See also Australian Securities & Investments Commission (Submission No 74 to Australian Law Reform Commission Issues Paper (IP 46)), *Freedoms Inquiry* March 2015, [127]-[129].

<sup>196</sup> *Mortimer v Brown* (1969) 122 CLR 493, 496-496.

<sup>197</sup> *Caltex*, 503-504 (citations omitted).

availability of the PSI facilitates the completion of ASIC's function, and in turn, the administration of justice.

### *Implied waiver*

104 There is also an argument that abrogation of the PSI may be justified where the person affected participates voluntarily in a regulated activity or market.<sup>198</sup> This argument suggests that those who choose to operate in the corporate, markets, financial services or consumer credit sectors thereby choose to submit to the regulatory scheme that governs them, and have impliedly waived their right to the PSI (the "implied waiver argument"). These people generally enjoy benefits because of the scheme. The limitation is justified not only by the person's voluntary involvement and acceptance of the requirements of the scheme, but also because to do otherwise may undermine the scheme itself.<sup>199</sup> This argument has been relied on extensively internationally and by ASIC.<sup>200</sup> However because ASIC's information-gathering power applies to "any person",<sup>201</sup> ASIC seeks to extend the implied waiver argument to 'those who interact with [voluntary members of a regulatory scheme] (e.g. contractors, investors or consumers) or otherwise participate within the field of regulation.'<sup>202</sup> This argument is a stretch – mere participation in or interaction with the corporate, markets, financial services or consumer credit sectors cannot amount to a voluntary implied waiver of rights.

### **Appropriateness of direct use immunity**

105 I turn to consider the form of the abrogation, and the available compensatory statutory protections in relation to the admissibility of the compelled evidence.

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<sup>198</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Report No 129 (2015) [75]; Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-incrimination*, Report No 59 (2004) [6.53]-[6.55].

<sup>199</sup> Attorney-General's Department (Cth), 'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011) 95.

<sup>200</sup> Australian Securities & Investments Commission (Submission No 74 to Australian Law Reform Commission Issues Paper (IP 46)), *Freedoms Inquiry* March 2015, [75].

<sup>201</sup> ASIC Act s 19(1).

<sup>202</sup> Australian Securities & Investments Commission (Submission No 74 to Australian Law Reform Commission Issues Paper (IP 46)), *Freedoms Inquiry* March 2015, [76] (emphasis added).



106 The primary objection to the availability of only direct use immunity is that the protection it affords is insufficient to protect the rights-based rationale. In 1991, the Law Institute of Victoria adopted the analogy of fruit from a tree to oppose the provision of only direct use immunity: '[t]here is little use in rejecting the tree when the fruits of the tree are freely admissible.'<sup>203</sup> Direct use immunity also does not secure the instrumentalist 'truth-promoting effect'. Examinees armed with the knowledge that ASIC may derive clues from their testimony may be inclined to lie. However, the balancing exercise has in large part been determined by whether derivative use immunity is practical and operational, as opposed to the theoretical deficiencies in the direct use immunity model.

#### *The practical operation of derivative use immunity*

107 It has been argued many times that the practical difficulties allegedly associated with derivative use immunity outweigh its benefits. ASIC and its precursors have contended to the contrary that the introduction of derivative use immunity would render the regulator's investigative powers useless. They argue that derivative use immunity creates 'insurmountable obstacles' to prosecution and is inconsistent with the regulator's function.<sup>204</sup> At its highest, it was argued that the practical difficulties associated with derivative use immunity meant it was preferable to abstain from using the powers until they were amended.<sup>205</sup>

108 According to ASIC and the DPP, the difficulty lies in the task of establishing that a particular piece of evidence did not derive from the protected examination, and is thus admissible. It is argued that this would result in prolix, complicated and lengthy trials.<sup>206</sup> In reality, commentary regarding the

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<sup>203</sup> Commercial Law Section of the Law Institute of Victoria (Submission to Joint Committee on Corporations and Securities), *Privilege Against Self-Incrimination*, of 1991, 7.

<sup>204</sup> Joint Statutory Committee on Corporations and Securities, (1991) [1.12]-[1.18], [3.1]-[3.10.3].

<sup>205</sup> *Ibid* [3.15]. ASIC advised that for this reason it did not examine officers of Bond Corporation and Qintex. In this Section, 'ASIC' refers also to its predecessors.

<sup>206</sup> Australian Securities & Investments Commission (Submission No 74 to Australian Law Reform Commission Issues Paper (IP 46)), *Freedoms Inquiry* March 2015, [135]-[144]; Joint Statutory Committee on Corporations and Securities, (1991) [3.5.1].

operation of derivative use immunity in the ASIC context is mere speculation because it has not been tested in court in Australia.

- 109 In addition to concerns regarding difficulty, a Queensland Law Reform Commission Report and the Kluver Report (a report that reviewed the precursor to the ASIC Act and recommended the retention of direct use immunity only) observed also the risk that examinees might deliberately incriminate themselves to gain derivative use immunity.<sup>207</sup> However, there is no evidence of conscious exploitation occurring in Australia, which is hardly surprising given the non-existence of the test condition.

*Direct use immunity v derivative use immunity*

- 110 ASIC's objectives are important. They serve the public interest. They are difficult to manage and constrained by resources. Accordingly, Parliament would be disinclined to grant ASIC's mandate and then frustrate its work with complicated information-gathering powers that are limited in utility. Derivative use immunity may be a less restrictive intrusion on the PSI. However this factor alone will not render it justifiable. Direct use immunity facilitates the public interest in effective regulation, but does so consistently with the essence of the PSI. This is because it prohibits the admission of direct testimony, which is what the PSI, from its origins, was designed to protect.<sup>208</sup> While the libertarian view argues for full derivative use immunity, it is not conceptually effective, and is not rationally connected or reasonably appropriate and adapted to the legitimate end of regulation and law enforcement. Conversely, it misconceives and complicates that end. Accordingly, if the choice is between direct use immunity and derivative use immunity, practicality and efficiency dictate that the former is more appropriate to the Australian corporate context.

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<sup>207</sup> Queensland Law Reform Commission, *The Abrogation of the Principle against Self-Incrimination*, (2004) [9.26]; Kluver J, *Report on Review of the Derivative Use Immunity Reforms* (1997) 37-38.

<sup>208</sup> A distinction between testimonial and non-testimonial evidence is already established.

### *Partial derivative use immunity*

111 As I have tried to show, the current direct use immunity model is a justifiable approach and can be defensibly maintained. However, a third option exists, namely, partial derivative use immunity.

112 Canada has implemented a ‘partial derivative use immunity discretion’.<sup>209</sup> Under this model, trial judges have a flexible discretion to exclude ‘derivative evidence that could not have been found or appreciated except [because] of the compelled testimony’.<sup>210</sup> This means that some derivative evidence is admissible; for example, evidence that would have been obtained under an alternative information-gathering power. La Forest J highlighted a conceptual distinction between compelled testimony, and real non-testimonial evidence derived from that testimony. Direct use of compelled testimony at trial is the only circumstance where the accused has been compelled to *create* self-incriminatory evidence. Derivative evidence is, by definition, evidence that existed independently of the compulsion. The derivative evidence can only be called self-incriminatory because of the circumstances leading to its discovery, as opposed to being so by its very nature. This is an extension of the PSI’s demarcation between testimonial evidence and non-testimonial real evidence,<sup>211</sup> and its protection only of the former. However, beyond the distinction between derivative evidence that could have been found and understood independently of the compelled testimony and derivative evidence that could not have been, the Canadian Courts have been hesitant to elaborate or ‘imagine’ the way in which the ‘partial derivative use immunity discretion’ will be exercised.<sup>212</sup>

113 The Canadian Courts also reiterate the importance of information-gathering powers and pre-trial investigation, bolstering the Australian jurisprudence. In

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<sup>209</sup> *Thomson Newspapers Ltd v Canada* [1990] 1 SCR 425.

<sup>210</sup> *Ibid* [221]; *R v S (RJ)* [1995] 1 SCR 451, [196]-[205].

<sup>211</sup> *Thomson Newspapers Ltd v Canada* [1990] 1 SCR 425, [199]-[223].

<sup>212</sup> ‘It is neither necessary nor advisable in this appeal to attempt a more extensive elaboration of the more flexible approach to derivative evidence I have suggested...’: *ibid* [221]-[223]; ‘I will not try to imagine today the factual circumstances in which [such] derivative-use immunity might not be protected. When, if ever, that might occur, is an issue I leave for another day’: *R v S (RJ)* [1995] 1 SCR 451, [202]-[205].

formulating the partial derivative use immunity discretion, La Forest J relied on the importance of focusing investigations quickly and precisely, to increase effective regulation.<sup>213</sup>

- 114 The partial derivative use immunity model has the benefit of providing greater compensatory protection than the existing provision, and in turn, greater consistency with the PSI's rights-based rationale. At the same time, it does not operate to quarantine evidence to the point of frustrating completely a regulator's powers. It has been said to rely on and expand a settled and workable distinction between types of evidence.<sup>214</sup>
- 115 If this argument were to be put up for debate, it would be necessary to consider whether the analysis required is practicable; whether it is likely to complicate investigations, clog up the courts, and prolong trials; and whether it will have any other significant impact on the investigation of potential criminal activity. As an alternative, perhaps, one could ask whether the inherent powers of the court already provide, or could provide, such an immunity, or whether statutory protection is necessary.
- 116 ASIC contends that the Court's inherent and statutory discretions to exclude evidence where its prejudicial effect outweighs its probative value are sufficient protection. That is not to the point. ASIC's suggestion looks at the use of evidence that has been obtained, as opposed to the way it has been obtained. They are difference exercises, both conceptually and practically.
- 117 Regardless, it is my view that, a carbon copy adoption of Canada's model would be problematic. Australian criticisms of derivative use immunity have largely focused on the concern regarding prolix and complicated trials concerning admissibility of evidence. A flexible judicial discretion based on the Canadian model would not necessarily solve this concern. The two types of derivative evidence delineated by the Canadian model – (1) evidence that could not have been found or understood without the compelled testimony

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<sup>213</sup> *Thomson Newspapers Ltd v Canada* [1990] 1 SCR 425, [212]-[216].

<sup>214</sup> Gans (Submission No 77 to Australian Law Reform Commission), *Freedoms Inquiry* 2015.

and (2) evidence that could have been found and understood without the compelled testimony – are not always easily demarcated in practice. A statutory ‘but for’ test, while possible, would raise all manner of practical difficulties. In my view, it would be unlikely to create a consistent, practical application with predictable outcomes. On the contrary as I have suggested, it would be likely to create a diversion of public resources, for the benefit of the well-resourced malefactor and the detriment of the public interest.

118 Neither the historical development nor the PSI’s rationales support a rule whose application is determined on a case by case basis, based on regard to the probative weight of evidence or other factors which the Canadian judiciary have been reticent to outline but accept may be present. The probative weight of evidence was a consideration used to demarcate whether the PSI applied to testimonial or non-testimonial evidence. Once settled, it did not operate flexibly. While Australian judges maintain a residual discretion to reject admissible but unfairly prejudicial evidence, its exercise is an exception to the rule, as opposed to the rule itself. The consistent provision of blanket rules where the PSI has been abrogated by statute demonstrates Parliament’s preference for this model.

## **CONCLUSION**

119 This paper has reviewed the common law LPP and PSI, their statutory expression in the uniform evidence legislation and their operation in the ASIC context. In relation to the LPP, its history and rationale were theoretically sound, and it follows that its statutory abrogation is rare. Its current operation at common law and under the uniform evidence legislation has created some difficulties, but judicial and legislative efforts have clarified its scope and application. There remains room for misuse or error, however, the case management powers of Australian courts can contain its effect and ensure it has a positive contribution to the administration of justice.

120 The PSI's foundations are less stable. Controversy surrounds its origins, development and current rationale. By consequence, it is frequently abrogated by Commonwealth laws, particularly in the regulatory context.

121 A case study of the ASIC Act has underpinned consideration and evaluation of the compensatory statutory protections conferred where the PSI is abrogated. Ultimately, it concluded that the current position of direct use immunity is supportable. Evidentiary immunities have shaped investigations and prosecutions for over 150 years.<sup>215</sup> The modern corporate world is characterised by increasingly complex crime and limited resources. The perspectives of commentators, practitioners and judges have informed this evaluation; the way forward is in Parliament's hands.

122 Analysis of the LPP and the PSI and the case study of abrogation of the PSI in the ASIC Act suggests that:

- (1) at the level of theory, both forms of privilege are compatible with the effective administration of both criminal and civil justice; and
- (2) where problems are seen to arise, they are best dealt with by specific and targeted legislation, not by wholesale abrogation or limitations upon the privileges.

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<sup>215</sup> See, eg, *X7 v Australian Crime Commission* (2013) 248 CLR 92, [28], [121], [129]-[140]; *Companies Statute 1964* (Vic) s LVI.