

# The Privilege Against Self-incrimination: a time for reassessment

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## 1. Introduction

In a recent report, 'Privilege in Perspective: Client Legal Privilege in Federal Investigations',<sup>2</sup> the Australian Law Reform Commission recommended that in certain circumstances client legal privilege be abrogated. These recommendations have raised a number of issues for consideration. One such issue, which I will address today, is the availability of a claim for privilege against self-incrimination in circumstances where client legal privilege has been abrogated or overridden by statute.

In New South Wales, client legal privilege is protected both under the common law and by sections 118 and 119 of the *Evidence Act 1995* (NSW). The privilege applies to confidential communications between clients, their lawyers and third parties made for the dominant purpose of use in litigation (whether actual or contemplated) or made for the dominant purpose of giving or receiving legal advice.<sup>3</sup>

In consequence, the general position in New South Wales is (subject to statutory abrogation) that any document produced for the dominant purpose of use in litigation or for the giving or receiving of legal advice would not have to be given in evidence or otherwise disclosed.

But what will the position be in circumstances where a document is produced, because client legal privilege has been abrogated by statute, and the document incriminates the client? Assuming the document's production cannot be resisted on the ground of client legal privilege, may it be resisted in reliance on the privilege against self-incrimination?

In answering these questions, it is necessary to consider the scope of the privilege against self-incrimination, its historical foundations, underlying theoretical rationales and the legal status of the client making the claim.

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<sup>2</sup> Australian Law Reform Commission, Report 107, 'Privilege in Perspective: Client Legal Privilege in Federal Investigations' (January 2008).

<sup>3</sup> *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; and ss 118 and 119 of the Evidence Act 1995 (NSW).

## 2. Nature of the Privilege

The privilege against self-incrimination 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>4</sup>

In effect, the privilege represents a balancing exercise, between the state's interest in detecting and punishing crime, and the individual's insistence on the "golden thread" of criminal jurisprudence. Of its nature, I suggest, the privilege 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.

## 3. Rationale

In order to determine whether the privilege against self-incrimination will entitle a client to resist producing a document in circumstances where client legal privilege has been abrogated by statute, it is helpful to consider the underlying rationales of the privilege:

[T]he rationale can be resorted to as a solid foundation against which to test the [application of the privilege]. If consistency cannot be achieved between the proposed [application] of the privilege on the one hand and the enshrined rationale on the other, then a strong case should be made out before the scope of the privilege is altered.<sup>5</sup>

A number of underlying rationales are accepted as justifying the existence of the privilege against self-incrimination. Traditionally the privilege 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 or witness and compel that person to provide evidence against him or herself.<sup>6</sup>

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<sup>4</sup> *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 288.

<sup>5</sup> S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege – the Demise of the Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48 at 65.

<sup>6</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per McHugh J at 544.

Thus the privilege was intended to maintain a “proper balance between the powers of the State and the rights and interests of citizens”.<sup>7</sup> Some may dismiss this as a “thin end of the wedge” argument, based on fear rather than reason. I am not among their number. 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 history is still alive today. Ironically, a nation that has the privilege enshrined in its Constitution is prepared to deny it to others within its power, and to condone the use of (if not itself to procure or use) illegitimate means in furtherance of the denial. Hence, no doubt, the casuistry as to what is or is not “torture”.

The privilege 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 privilege against self-incrimination. Those who allege an individual’s guilt should not be able to compel them to give evidence against themselves.<sup>8</sup>

Further, individuals were to be protected from being confronted by the ‘cruel trilemma’ of punishment. This referred to witness’s having to choose between refusing to answer questions (thereby risking punishment for contempt of court), answering honestly (and thereby providing evidence of guilt), or lying (thereby risking punishment for perjury).<sup>9</sup>

In *Environment Protection Authority v Caltex Refining Co Pty Ltd*<sup>10</sup> the High Court, after considering the traditional position, provided a reassessment of the underlying rationales for the privilege against self-incrimination. The modern rationale frames the privilege in terms of human rights: specifically the rights to dignity, privacy and freedom. This rationale underpins the concept of privilege against self-incrimination as a human right rather than simply a rule of evidence.<sup>11</sup> 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>12</sup>

On this view, the privilege prevents “the indignity and invasion of privacy which occurs in compulsory self-incrimination.”<sup>13</sup>

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<sup>7</sup> *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 per Gleeson CJ at 127.

<sup>8</sup> *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 294.

<sup>9</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 498.

<sup>10</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

<sup>11</sup> *Accident Insurance Mutual Holdings Ltd v McFadden and Another* (1993) 31 NSWLR 412 per Kirby P at 420-421.

<sup>12</sup> *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 per Murphy J at 150.

<sup>13</sup> *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Murphy J at 346.

However despite this reformulated rationale, and although the privilege against self-incrimination is often considered a substantive right, the position in Australia is that it is not immutable and therefore must be balanced against other competing rights and interests. Whether the privilege against self-incrimination would offer a ground on which to resist the production of a document in response to a subpoena or a notice to produce will depend at one level on the legal status of your client. Thus, in order to determine whether protection will be provided, it is necessary first to consider the individual classes of client which may claim the privilege and any relevant competing interests.

#### 4. Is your client protected?

##### Corporations

A corporation “has no body to be kicked or soul to be damned”,<sup>14</sup> so that it can not suffer an encroachment on its human rights. In light of the High Court’s reassessment of the underlying rationale of the privilege, being the protection of human rights and dignity, it is clear that this protection has no application to a corporation.

Further, application of the privilege to corporations prevents the effective administration of justice:

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>15</sup>

If corporations were able to refuse to produce documents on the basis of the privilege against self-incrimination then they would effectively be able to defeat the operation of the criminal justice system by denying it access to the only reliable evidence of guilt.

To anticipate a point with which I deal later, one may ask: why should this justification for denying the privilege to corporations not apply to individuals engaged in corporate or fiscal crime? The level of complexity is not necessarily different; nor is the level of criminality.

Section 187 of the *Evidence Act* expressly abrogates the privilege against self-incrimination for a corporate body. A corporation is not entitled to refuse to produce a document “on the ground that... producing the document..., might tend to incriminate... the [corporation].”<sup>16</sup> This provision reflects the common law position that a corporation may not claim the privilege against self-incrimination.<sup>17</sup>

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<sup>14</sup> *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 per Lord Denning MR at 1127.

<sup>15</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per McHugh J at 554.

<sup>16</sup> *Evidence Act 1995* (NSW) s 187(2).

<sup>17</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Brennan J at 516; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at 31.

It is clear then, that in a circumstance where client legal privilege is abrogated or overridden by statute, a corporate client would be unable to rely on the privilege against self-incrimination in resisting the production of documents.

### Corporate officers

Given that a corporation would be unable to claim privilege, does that disentitlement extend to individual officers of a corporation? Would officers be entitled to rely on their personal privilege to resist production of corporate documents which tend to incriminate the individual officer as well as the corporation?

The position in the United States is that corporate officers are compelled to produce corporate documents in their possession, even where those documents tend to personally incriminate the officer.<sup>18</sup> This position was considered in *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union of Australia*. Wilcox J said that:

[i]n a case where the corporation is required to supply the relevant information as, for example, when the subpoena is addressed to the corporation itself... although the corporation must, of necessity, act through an agent, the act of the agent is the act of the corporation itself.<sup>19</sup>

Thus it seems that an officer acting on behalf of – being the animate agent of – the corporation may not be able to resist the production of documents by claiming the privilege for him or herself where the subpoena or notice to produce is addressed to the company. This is so even where those documents incriminate the individual officer.

This is distinct from the position in cases where the officer of the corporation is called as a witness and speaks in his or her own right, rather than as a “mouthpiece of the corporation”.<sup>20</sup> In such a circumstance the officer would be entitled to claim a personal privilege.

### Individuals

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. 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.

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<sup>18</sup> *Braswell v United States* (1988) 487 US 99.

<sup>19</sup> *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union of Australia* (1987) 71 ALR 501.

<sup>20</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 495.

There is however in s87 of the *Civil Procedure Act 2005* a regime broadly equivalent to s128 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>21</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.

## 5. Reassessment of the scope of application of the privilege

It is now time for the scope of the application of the privilege against self-incrimination to be reassessed. Changes in society, the increasing complexity of the economy and the proliferation of questionable corporate (and other) activity require us to rethink the continuing availability of the privilege at least in relation to commercial documents.

It needs to be remembered that the privilege against self-incrimination is a creature of history. It was created at a time when individuals had substantially fewer rights and when the penalty for a large number of crimes was death. Given the context within which contemporary criminal trials and investigatory situations are conducted in Australia, it is difficult to justify the privilege on the basis that it is necessary to prevent an abuse of power.<sup>22</sup> Legislation such as the *Police Integrity Commission Act*<sup>23</sup> and the *Independent Commission Against Corruption Act*<sup>24</sup> provide for the preservation of the rights of individuals in investigations.

It is also arguable that it is inconsistent to deny corporations the ability to claim privilege and yet allow individuals operating within non-corporate structures the ability to withhold information and documents on the grounds of self-incrimination. The integrity of the administration of justice requires that the principle established in *Caltex* (that corporations cannot claim the privilege) should be extended to non-corporate commercial structures which may otherwise shield their criminal activities by hiding behind the privilege.

The United States Supreme Court in, *United States v White* noted that, “[t]he greater portion of evidence of wrongdoing by an organisation or its representatives is usually to be found in the official records and documents of that organisation.”<sup>25</sup> The Court found that the United States equivalent to the privilege against self-incrimination was inapplicable to the business records of

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<sup>21</sup> Uniform Civil Procedure Rules, part 21.

<sup>22</sup> Dolinko D, “Is there a Rationale for the Privilege against Self-incrimination?” (1986) 33 *UCLA Law Review* 1063 at 1079.

<sup>23</sup> *Police Integrity Commission Act 1996* (NSW), s 28.

<sup>24</sup> *Independent Commission Against Corruption Act 1988* (NSW), s 24.

<sup>25</sup> *United States v White* (1944) 322 US 694 per Murphy J at 700.

unincorporated collective entities. This reasoning was quoted with approval by Mason CJ, Toohey and Brennan JJ in *Caltex*.<sup>26</sup>

Given that the best and sometimes only available evidence of wrongdoing is contained in the documents in the possession of the individual, the administration of justice rationale provides a justification for abrogating the availability of the privilege to claims in relation to commercial documents.

## 6. 'Real' vs 'testimonial' evidence

It may be that the removal of the protection of the privilege from the business records of individuals would frustrate the rationale of human rights protection. However it is arguable that there is a conceptual distinction between compulsion to produce documents and compulsion to answer questions, and that the rationale for the privilege in the latter case does not necessarily apply with equal force to the former.

The privilege against self-incrimination protects an individual from being compelled to communicate information that would tend to incriminate him or her. It has been suggested that the common law recognises a distinction, on the one hand, between information communicated by an individual in the context of an investigation or inquiry and on the other, "real" evidence provided by the individual, which exists independently of any act of communication. On this analysis, it is arguable that only the individual's "testimonial" act of communication that should be protected by privilege. "Real" evidence should not receive protection. In *Caltex*, Mason CJ and Toohey J said that:

[i]t is one thing to protect a person from testifying as to guilt; it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt. ... [Documents] are in the nature of real evidence which speak for themselves as distinct from testimonial oral evidence which is brought into existence in response to an exercise of investigatory power or in the course of legal proceedings.<sup>27</sup>

The suggested distinction between "real" and "testimonial" evidence indicates that as an individual would not need to undertake any "incriminating act" of communication, the protection of human dignity, in not being compelled to speak against oneself, would be protected.<sup>28</sup> Thus, the High Court's recognition of documents as "real" evidence provides a basis on which to abrogate the privilege in relation to commercial documents.

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<sup>26</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at per Mason CJ and Toohey J at 491 and Brennan J at 515.

<sup>27</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 502.

<sup>28</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Brennan at 514.

## 7. Conclusion

In light of the recommendations of the Australian Law Reform Commission in their recent report, there now exists an uncertainty in relation to the application of the privilege against self-incrimination in circumstances where client legal privilege has been abrogated or overridden by statute.

Traditionally the privilege against self-incrimination was intended to prevent an abuse of power, and to maintain a “proper balance between the powers of the State and the rights and interests of citizens”.<sup>29</sup> More recently the privilege has been framed in terms of a human right focused on preventing “the indignity ... which occurs in compulsory self-incrimination.”<sup>30</sup>

Given the contemporary context in which the privilege applies, a rebalancing exercise of the rationales underlying the privilege and the competing interests of society needs to be undertaken. The protection of an individual’s right needs to be balanced against the need for effective and encompassing administration of justice. Consideration must be given to circumstances where, as with corporations, the abrogation of the privilege in relation to documents is the only way to ensure compliance with the law.

It may be that the removal of the protection of the privilege from individuals’ documents would frustrate the rationale of human rights protection; however the distinction between “testimonial” and “real” evidence in relation to documents may allow for the privilege to be abrogated in relation to documents yet still accommodate, to a significant extent, the reformulated human rights rationale.

Any limitation or abrogation on the scope of the privilege against self-incrimination must be introduced by the legislature. “There is simply no scope for an exception to the privilege, other than by statute. ... [M]odification ... can be achieved only by legislation.”<sup>31</sup> Given the contemporary context in which the privilege against self-incrimination applies, a rebalancing exercise of the rationales underlying the privilege and the competing interests of society needs to be undertaken. Until such an exercise is undertaken by Parliament, individuals will continue to be protected from disclosing documents by the privilege against self-incrimination, except to the extent that the privilege is over-ridden by individual statutes.

Just as the piecemeal statutory erosion of legal professional privilege led to an inquiry into wholesale rationalisation, so too with the privilege against self-incrimination. It is time for a comprehensive re-evaluation of the privilege, and the introduction of a uniform and consistent restatement of its scope. As part of that, the present patchwork of one off abrogation should go to the recycling bin of legal history.

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<sup>29</sup> *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 per Gleeson CJ at 127.

<sup>30</sup> *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Murphy at 346.

<sup>31</sup> *Reid v Howard* (1995) 69 ALJR 863 per Toohey, Gaudron, McHugh and Gummow JJ at 870.