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INCRIMINATION IN CIVIL PROCEEDINGS BETWEEN PRIVATE  
PARTIES IN AUSTRALIA AND NEW ZEALAND: IS DERIVATIVE  
USE IMMUNITY THE ANSWER?"**

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**THE PRIVILEGE AGAINST SELF-  
INCRIMINATION IN CIVIL  
PROCEEDINGS BETWEEN PRIVATE  
PARTIES IN AUSTRALIA AND NEW  
ZEALAND: IS DERIVATIVE USE  
IMMUNITY THE ANSWER?**

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A thesis submitted for the degree of Doctor of  
Philosophy at the University of Otago, Dunedin, New  
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## ABSTRACT

This thesis addresses the problem of the privilege against self-incrimination ("the privilege") in civil proceedings between private parties in Australia and New Zealand. This problem has been recognised by judges, law reform bodies and legislators in both countries for twenty years. However, the legislative response has been inadequate.

The privilege is easily confused with other related concepts, particularly the right to silence in criminal proceedings. The reasons for the privilege in civil proceedings are not necessarily the same as for the right to silence. Care is therefore taken to define the terminology and scope of the thesis. It sets out the modern law on the privilege in civil proceedings between private parties. It describes how the privilege causes particular problems in those proceedings. It surveys the literature, finding that most of it concerns the right to silence.

The thesis draws heavily on the history of the privilege. It argues that, although witness privilege came from the common law, the privilege in interlocutory civil proceedings had its origins in the discretionary remedies devised by the courts of equity. They were sensitive to abuse of their remedies. For the same reason, modern prosecutors should not be encouraged to rely excessively upon evidence acquired through compulsory powers.

Derivative use immunity is one of several substitutes suggested for the privilege. The thesis looks at the various substitutes. It concludes that derivative use immunity is the only satisfactory substitute for the privilege in civil proceedings.

Derivative use immunity originated in the United States. The thesis looks closely at the American experience. The history and scope of the Fifth Amendment are discussed in detail, particularly the supposed removal of its protection from documents. This will show that the removal of the privilege from documents is not as simple as law reform bodies in Australia and New Zealand suggest.

Exaggerated claims have been made by Australian prosecutors about the problems caused by derivative use immunity. The claims are examined in the light of American case-law. This shows that an impossible burden is not imposed on prosecutors. The same point emerges when the thesis examines the operation of derivative use immunity under Australian certification procedures since 1995.

Particular procedural and legislative difficulties need to be addressed, particularly when derivative use immunity replaces the privilege in interlocutory proceedings. However, certification by the court has an important advantage. The court's exercise of its discretion provides the flexibility which automatic statutory immunity lacks.

The question in the title is therefore answered in the affirmative. Derivative use immunity under a statutory certification procedure can provide the answer. Cooperation between the Commonwealth and States may be needed to overcome constitutional difficulties, but most other problems can be overcome if derivative use immunity is given a sound statutory basis.



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# **CHAPTER I: INTRODUCTION**

## **(A) GENERAL**

### **(1) THEMES**

This thesis is about the privilege against self-incrimination. Though obvious from the title, this needs to be emphasised at the outset because the privilege against self-incrimination is often confused with other apparently similar legal rights. The most significant confusion is with the right to silence which arises mainly in criminal proceedings. In fact, the privilege against self-incrimination differs from the right to silence in its nature and origins and in the problems which it causes.

The privilege against self-incrimination protects a person from disclosing information which may lead to criminal proceedings against that person. This thesis will look at the problems which that protection causes in civil proceedings between private parties in Australia and New Zealand. Those problems will be described and solutions suggested, covering a broad range of legal and policy issues.

Close attention will also be given to the rich and complex history of the privilege against self-incrimination. It will be argued that the old courts of equity had an important role in the development of the privilege against self-incrimination and that history offers guidance in solving modern problems. The importance of history is one of the central themes in this thesis.

Another central theme is that if the privilege against self-incrimination did not exist in civil proceedings, prosecuting authorities would be encouraged to rely excessively upon compelled evidence from those proceedings. To support that

argument, this thesis will point to evidence from other proceedings, in which the privilege has been removed by statute.

At the same time, it is undeniable that the privilege against self-incrimination causes problems in civil proceedings. What is needed is a substitute which provides as much protection as the privilege against self-incrimination but which avoids those problems. This thesis will find an adequate substitute in the statutory procedure for certification. That procedure will give discretion to the courts to replace the privilege against self-incrimination with a type of immunity known as derivative use immunity.

If that immunity is substituted in civil proceedings, equally effective protection will be provided. Abuses will be prevented by the exercise of the court's discretion. The result will be in the best traditions of the equitable courts, which were probably responsible for the development of the privilege against self-incrimination in the first place.

## **(2) UNDERSTANDING THE THEMES**

### **(a) INTRODUCTION**

It is already evident that this area of the law has its own specialised terminology. Many of the terms will be analysed in detail in this and later chapters. A separate glossary is provided in Appendix 1, but it is useful to explain several terms even this early in the introduction.

### **(b) THE PRIVILEGE**

For convenience "the privilege against self-incrimination" is shortened in this thesis to "the privilege". In this sense, privilege means an exemption from a legal obligation to provide information. Privilege has other meanings. In common usage it means an advantage given to some but not to others. In legal philosophy,

on the other hand, it is given a special technical meaning as part of a complex structure of rights and privileges, but legal philosophy does not play a significant part in this thesis for reasons given in Chapter III.

The privilege against self-incrimination is one of several types of privilege giving exemption from a legal obligation to provide information. Another well-known privilege is legal professional privilege.<sup>1</sup> References to “the privilege” could cause confusion when discussing other types of privilege. The longer version will be used in this thesis where it is necessary to avoid such confusion. It will not often be necessary because other types of privilege generally fall outside the scope of the thesis.

Confusion is most likely with penalty privilege, which protects against exposure to non-criminal penalties. Although that protection is analogous to the protection against self-incrimination, the term “the privilege” in this thesis does not include penalty privilege. Nor does it include the privilege against exposure to forfeiture or the privilege against exposure to ecclesiastical censure.

Exposure to penalty, forfeiture and ecclesiastical censure are sometimes described as three limbs of the same privilege, with self-incrimination as its fourth limb. For reasons given in Chapter II, this thesis will only use the term “the privilege” in the context of self-incrimination and not to cover any of the other three “limbs”. The privilege against self-incrimination is more likely to be confused with the right to silence.

---

<sup>1</sup> This is called client legal privilege in the uniform Australian evidence legislation: e.g. in ss121-126 Evidence Act 1995 (Cth).



### (c) RIGHT TO SILENCE

The right to silence is commonly used to describe the rights which are available to suspects and defendants in the context of criminal proceedings. Broadly speaking, they can refuse to answer all questions, not just incriminating ones. The privilege, on the other hand, applies to witnesses in all proceedings.

This thesis addresses the problem of the privilege in civil proceedings. It is not directly concerned with the right to remain silent in the context of criminal proceedings. That right may or may not have the same justification as the privilege in civil proceedings. This thesis argues that the privilege in civil proceedings must be considered separately.

### (d) IMMUNITY

The privilege and the various rights of silence are sometimes called “immunities”. In this sense the privilege gives immunity from disclosure in a particular proceeding. If so, the disclosure need not take place.

In this thesis “immunity” usually means the protection of the discloser from the incriminating consequences of a disclosure. The disclosure has usually taken place because the privilege has been abrogated by statute. The protection of the immunity is supposed to compensate for the removal of the privilege.

The degree of protection depends upon the type of immunity. The strongest protection is immunity from prosecution, usually called “transactional immunity”. This gives the discloser immunity from prosecution, thereby removing any possibility of criminal liability resulting from the compelled disclosure.

Legislation generally favours a weaker form of immunity known as “use immunity”. The disclosure becomes immune from use as evidence in subsequent

criminal proceedings against the discloser. This thesis argues that use immunity does not provide an adequate substitute for the privilege because it does not protect the discloser against derivative evidence.

#### (e) DERIVATIVE USE IMMUNITY

Derivative evidence is incriminating evidence which may be discovered as a result of the disclosure. Derivative evidence may prejudice the discloser in criminal proceedings even though the disclosure itself is made inadmissible by use immunity. Derivative use immunity protects the discloser from that possible prejudice.

If the discloser had claimed the privilege and avoided the original disclosure, no derivative evidence would have been available to the prosecution. The aim of derivative use immunity is to prevent the use of derivative evidence in later criminal proceedings. This thesis argues that an adequate substitute for the privilege must give derivative use immunity as well as use immunity.

Although such immunity should really be called “use and derivative use immunity”, that term is unwieldy. In this thesis “derivative use immunity” will generally be used as a short-hand term for use and derivative use immunity. This can be justified on the ground that derivative use immunity makes no sense, and is never granted, without use immunity.

#### (f) ONLY PRIVATE CIVIL PROCEEDINGS

The focus of this thesis is upon the privilege in civil proceedings between private parties. Its argument is that the privilege should remain in civil proceedings for policy reasons. Otherwise, civil proceedings will become subject to the type of exploitation which results from the abrogation of the privilege in administrative proceedings.

The privilege applies whenever information is compulsorily sought, but administrative proceedings are usually established by legislation for the express purpose of obtaining information. Such proceedings are generally outside the scope of this thesis. Possibly, the practicalities of law enforcement weigh more heavily against the privilege in administrative proceedings than in civil proceedings between private parties. Certainly, it is harder to answer government arguments that law enforcement agencies will be unduly obstructed by the privilege. Even so, this thesis will argue that such arguments are exaggerated.

In civil proceedings to which the State is a party, the argument for the privilege appears stronger than in administrative proceedings. Examples will be given of the courts objecting to such proceedings being used to circumvent the protection which a citizen would normally receive in criminal or other penalty proceedings.<sup>2</sup> However, the focus of this thesis is on private proceedings, not those involving the State.

In civil proceedings between private parties, the argument for the privilege becomes strongest of all. Without it, incriminating disclosures can be obtained by prosecuting authorities through the back-door. Their powers are enlarged without the specific legislative authority which underpins administrative proceedings.

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<sup>2</sup> E.g. the dissenting judgment of Deane, Dawson and Gaudron JJ in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 537 (statutory abrogation of the privilege must be express and in clear terms if the State is to use its executive powers to “obtain compulsorily from the defendant after the prosecution has been commenced, the evidence which it requires to discharge the onus cast upon it to prove its own case”).

## **(B) BACKGROUND**

### **(1) PREVIOUS WORK**

The first person is not generally used in this thesis. It is used in this section because the thesis will perhaps be easier to follow if I explain how it came to be written. I became interested in the privilege when writing a thesis about it in 1993 at Cambridge University in England.<sup>3</sup> My Cambridge thesis was published in a modified form in 1994 in a three-part article.<sup>4</sup> This article concentrated on the use of the privilege by company directors in civil proceedings in the United Kingdom and Australia.

I later wrote several shorter journal articles on current developments affecting the privilege.<sup>5</sup> The nature of my shorter articles shows one obvious reason for writing this thesis. In the United Kingdom and Australia the law on the privilege has undergone great changes over the last decade.

### **(2) CHANGES IN LAW**

Because of changes in British law it is no longer practicable to include the United Kingdom as a subject for detailed discussion in this thesis. For reasons explained later in this chapter, it has been replaced by New Zealand. The focus of this thesis is now mainly upon Australia and New Zealand.

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<sup>3</sup> Cotton, J. (1993) *Statutory Use Immunity And Company Directors in England and Australia: Is It The Best Way To Prevent Them Exploiting The Privilege Against Self-Incrimination In Civil and Administrative Proceedings?* *Faculty of Law* (Cambridge: Cambridge University).

<sup>4</sup> Cotton, J. (1994) "Company directors and the privilege against self-incrimination in civil proceedings: Is use immunity the answer? (Part I)." *Company Lawyer* 15(4): 99; Cotton, J. (1994) "Company directors and the privilege against self-incrimination in civil proceedings: Is use immunity the answer? (Part 2)." *Company Lawyer* 15(5): 131; and Cotton, J. (1994) "Company directors and the privilege against self-incrimination in civil proceedings: Is use immunity the answer? (Part 3)." *Company Lawyer* 15(6): 163.

<sup>5</sup> Cotton, J. (1994) "The House of Lords decision in *AT & T Istel v Tully*." *Company Lawyer* 15(1): 26; Cotton, J. (1994) "The *Caltex* decision." *Company Lawyer* 15(9): 277; Cotton, J. (1996) "The Privilege against Self-Incrimination in Australian Civil Proceedings: the Decision in *Reid v Howard*." *Journal of Financial Crime* 3(4): 400; Cotton, J. (1998) "Australia: The Privilege against Self-Incrimination: Recent Developments." *Journal of Financial Crime* 5(3): 283; and Cotton, J. (1998) "Self-incrimination in company legislation." *Company Lawyer* 19(6): 182.

The law in Australia has also been the subject of substantial changes, in particular by two important High Court decisions.<sup>6</sup> Moreover, it has been affected by fundamental legislative changes to the law of evidence. Most notably, the Commonwealth passed a federal Evidence Act in 1995.

The same legislation was intended to be adopted in all jurisdictions, resulting in uniformity across Australia.<sup>7</sup> Up to now only New South Wales and Tasmania have followed the Commonwealth model.<sup>8</sup> The uniform legislation includes provisions for derivative use immunity to be granted to witnesses in place of the privilege. Those provisions have helped to change my negative view of possible solutions to the problem of the privilege.

### **(3) UNSETTLED ISSUES**

#### **(a) INTRACTABLE PROBLEM**

At the end of my three-part article, my negative view caused me to echo Belloc's Physicians of the Utmost Fame who "answered, as they took their Fees, There is no cure for this Disease".<sup>9</sup> The privilege in civil proceedings appeared to be an intractable problem. I could see no solution which addressed both the needs of law enforcement and the reasons for the privilege.

The only choice seemed to be between leaving the privilege intact or abolishing it completely. The attempted compromises created more problems than they solved. Statutory use immunity, for example, was in my view not the answer, because it protected the discloser only against evidentiary use of the compelled disclosure. It

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<sup>6</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (scope of privilege narrowed by denying it to companies); *Reid v Howard* (1995) 184 CLR 1 (privilege in civil proceedings strengthened by disapproving all court-devised substitutes).

<sup>7</sup> Evidence Act 1995 (Cth).

<sup>8</sup> Evidence Act 1995 (NSW); Evidence Act 2001 (Tasmania).

<sup>9</sup> Belloc, H. (1907) *Cautionary Tales For Children: Henry King* (London: J.M. Dent & Sons Ltd) at 415 (quoted Cotton, J. (1994) "Company directors and the privilege against self-incrimination in civil proceedings: Is use immunity the answer? (Part 3)." *Company Lawyer* 15(6): 163).

provided no protection against the indirect consequences of disclosure. Derivative use immunity was needed to provide such protection.

My attitude to use immunity has not changed. I still regard it as a compromise which penalises both sides arbitrarily with little regard to the reasons for the privilege. What has changed, however, is my attitude to derivative use immunity. In 1993, I accepted the view expressed by the government agencies that derivative use immunity created too many problems for law enforcement.

The feasibility of derivative use immunity was one of several questions which arose regularly during my 1992 research without being satisfactorily answered. The outstanding questions could usually be traced to one of three topics: the confusion between the privilege and the right to silence; the use of history to justify policy decisions about the privilege; and the transplanting of law from the United States to justify policy decisions about the privilege.

The conflicting views on these three topics confused the debate on other questions such as the status of the privilege as a human right and the application of the privilege to documents, companies and company officers. I did not have time to research the three topics fully for my 1993 thesis, but they were treated by other writers in a way which was not in my view convincing.

Chapter II will seek to resolve the confusion between the privilege and the right to silence. Other chapters will deal with historical matters and American experience, but a few personal comments on those subjects might be useful.

#### (b) ARCHAIC SURVIVAL

My doubts about the history found a focus in mid-1992 when Lord Templeman described the privilege in civil proceedings as “an archaic and unjustifiable

survival from the past”.<sup>10</sup> Lord Griffiths quoted Lord Templeman with approval.<sup>11</sup> Their comments were reported at the time as if they heralded the imminent removal of the privilege (or, according to some reports, the right to silence) from all civil proceedings in the United Kingdom.<sup>12</sup> In fact, as discussed in Chapter IV, their comments were directed at the privilege not in all civil proceedings but only in interlocutory civil proceedings involving documents.<sup>13</sup>

I was less interested in the detail of their comments than in the underlying issue: why did the privilege exist in civil proceedings at all? On the face of the reasons given by the Law Lords, the question was not whether the privilege should remain in civil proceedings but rather why it was ever there in the first place.

### (c) HISTORY

My 1993 thesis avoided history by adopting the comment in *Wigmore on Evidence*: “The history of the privilege does not settle the policy of the privilege”.<sup>14</sup> That approach was convenient because I was confused by the way in which the history of the privilege was used by judges and commentators. It was mentioned surprisingly often but rarely in terms which made much sense.

I took a different approach in researching this thesis. I assumed that an understanding of the history of the privilege would be helpful, possibly even indispensable, in my search for solutions to the problem of the privilege.

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<sup>10</sup> *AT & T Istel Ltd v Tully* [1993] AC 45 at 53.

<sup>11</sup> *AT & T Istel Ltd v Tully* [1993] AC 45 at 57.

<sup>12</sup> I first heard of the comments from a fellow post-graduate student at a conference in Cambridge. The day after the comments were made, he gleefully suggested that they rendered my research obsolete and thrust in my direction the newspaper article which reported them: Mason, C. (1992) “Lords set limit on right to silence”. *Financial Times* (21 July) (London) 8.

<sup>13</sup> *AT & T Istel Ltd v Tully* [1993] AC 45 at 53 and 57.

<sup>14</sup> Wigmore, J. H. (1961) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) para 2251 p295. In fact, those words were written by Macnaughton who revised that edition. The words of Wigmore himself turned out to be less definite. “Neither the history of the privilege, nor its firm constitutional anchorage, need deter us from discussing at this day its policy”: Wigmore, J. H. (1923) *A Treatise on the Anglo-American System of Evidence at Trial* (Boston: Little Brown & Co) para 2251 p819.

Certainly, research into the history has been fascinating for me, as it has apparently been for other commentators.<sup>15</sup>

The history has also fascinated several Australian judges.<sup>16</sup> However, more often, Australian judges have made passing references to the history of the privilege without much apparent research. The surprising frequency of such references in itself supports the extensive treatment of history in this thesis.

Nevertheless, lawyers can have unrealistic expectations about what history can show.

So I began to demand of history an Explanation. Only to uncover in this dedicated search more mysteries, more fantasticalities, more wonders and grounds for astonishment than I started with, only to conclude.....that history is a yarn.<sup>17</sup>

I have not concluded that the history of the privilege is a yarn, but as a lawyer, I did expect history to produce clearer results. History can provide insights, but not too much must be claimed for it. I came to the same conclusion about American experience.

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<sup>15</sup> E.g. Tollefson, E. A. (1975) *The Privilege against Self-Incrimination In England and Canada. Faculty of Law* (Oxford: Oxford University) at 1 (the "temptation is great to dwell upon the history" and "it would be most interesting and enjoyable to write a full-length history of the privilege"). Also see Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 93 ("to seek a rationale in history for today's relevance of the privilege is interesting").

<sup>16</sup> E.g. Davies, G. L. (2000) "The prohibition against adverse inferences: a rule without reason? - Part I." *Australian Law Journal* 74(1): 26; Marks, K. M. (1984) "'Thinking up' about the right of silence and unsworn statements." *Law Institute Journal* 58(4): 360. Also compare McHugh J's brief treatment of the history in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 547 with his lengthy treatment in *Azzopardi v R* (2001) 205 CLR 50 at 90-102.

<sup>17</sup> Swift, G. (1983) *Waterland* (Oxford: Heinemann New Windmills) at 57.



## (d) AMERICAN EXPERIENCE

### (i) Relevance

This has become more of an issue in Australia and New Zealand than in the United Kingdom. Since the 1970s Australian High Court judges have become increasingly influenced by American case-law on the Fifth Amendment. Chapters VIII and X will reflect that trend by dealing extensively with the treatment of the privilege in the United States.

Those chapters deal with particular topics from the United States: derivative use immunity; corporations; documents; and human rights. To this extent, the use of American experience in this thesis is similar to its use of history. Like history, American experience can arguably be discounted in formulating the policy of the privilege. Case-law on the Fifth Amendment could be said to provide little guidance for Australasia because it is about a constitutional right. As with history, the different background needs to be taken into account before incorporating American principles into local law in Australia and New Zealand.

### (ii) Derivative Use Immunity

In the United Kingdom, the courts have long been aware of the problem of derivative evidence but have not given it a high priority.<sup>18</sup> Derivative use immunity is an American concept which has been widely adopted in Australian legislation. It appears, for example, in the Australian certification procedures discussed in Chapter XII.

This thesis will look at the American case-law on derivative use immunity to see how it operates. It will then look at the Australian case-law on certification in the

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<sup>18</sup> Lord Ackner even seemed to question the availability of the privilege to protect against such evidence: *AT & T Istel Ltd v Tully* [1993] AC 45 at 63 (“Assuming without deciding that the privilege against self-incrimination can be used to prevent a process being set in train”).

light of American experience. The conclusion will be that derivative use immunity can help to solve the problem of the privilege.

### **(iii) Corporations**

In the United Kingdom the privilege is available to companies as well as individuals.<sup>19</sup> The American collective entity rule was influential in the rejection of the British approach by the Australian High Court.<sup>20</sup> That approach had already been widely adopted in Australian legislation.<sup>21</sup> It was also adopted in the 2005 Evidence Bill in New Zealand.<sup>22</sup>

This thesis will not debate the merits of removing the privilege from corporations. However, it will consider the effect of such removal upon the personal privilege of corporate officers. On that issue, the American position has not yet been adopted in Australia or New Zealand.

### **(iv) Documents**

Chapter VIII will discuss the American case-law applying the Fifth Amendment to documents. This is particularly relevant because of the proposal in New Zealand to abolish the privilege for pre-existing documents.<sup>23</sup> That proposal influenced the ALRC to recommend the removal of the privilege from pre-existing documents in interlocutory asset protection proceedings.

Removal of the privilege from documents is said to reflect the position in the United States. Chapter IX will use the American case-law to argue against the proposal in New Zealand. The protection provided by the privilege will be unduly weakened if documents are treated like other physical evidence. The conclusion

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<sup>19</sup> *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395; *In Re Westinghouse Uranium Contract* [1978] AC 547.

<sup>20</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

<sup>21</sup> E.g. s1316A Corporations Act 2001 (Cth); s187 Evidence Act 1995 (Cth).

<sup>22</sup> New Zealand Government (2005) *Evidence Bill* (Wellington) clause 56(4) (a).

<sup>23</sup> New Zealand Government (2005) *Evidence Bill* (Wellington) clause 47(3)(b)(i).

will be that the privilege should continue to cover the contents of documents in Australia and New Zealand.

#### **(v) Human Rights**

Research into the Fifth Amendment has led me to the more general conclusion that little is to be gained from including the privilege in “the rhetoric of human rights”.<sup>24</sup> The focus of such rhetoric is the protection of particular rights because of their inherent worth. However, the argument in this thesis is that the privilege is worth preserving for policy reasons which are more concerned with the need to control prosecuting authorities.

#### **(4) FOCUS**

##### **(a) EARLIER THESIS**

The scope of this thesis is both broader and narrower than my 1993 Cambridge thesis. That dealt with the privilege in civil and administrative proceedings involving company directors in Australia and the United Kingdom. This thesis is broader because it deals with all types of defendants, not just company directors.

On the other hand, its scope is narrower because it does not cover administrative proceedings or civil proceedings in which the State is the plaintiff. The reasons for that change of focus will be explained later in this chapter. First, it is necessary to explain another important change: the substitution of New Zealand for the United Kingdom as one of the two jurisdictions which are the subject of this thesis.

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<sup>24</sup> Brennan J in *Sorby v The Commonwealth* (1983) 152 CLR 281 at 309.

## (b) UNITED KINGDOM

### (i) Only Persuasive Authority

The British law on the privilege will be mentioned in this thesis because of its influence on the privilege in Australia and New Zealand. Australasian judges often refer to British law. It is easy to forget that British law is no more than persuasive authority.

The degree of persuasiveness varies. Even on basic issues, there have often been significant differences between Australian, New Zealand and British law on the privilege. Nearly forty years ago, for example, British legislation made it clear that the privilege could not be claimed to protect against possible incrimination under foreign laws.<sup>25</sup> In New Zealand the same result emerged from the common law.<sup>26</sup> Yet in Australia it is still unclear whether foreign incrimination provides a valid ground for claiming the privilege.<sup>27</sup>

Another example is the privilege for corporations. As mentioned earlier in this chapter, the privilege is available to corporations in the United Kingdom but is no longer available to corporations in Australia and soon will not be in New Zealand. Such deviations from the British model have become more common because of changing influences both in the United Kingdom and in Australasia.

### (ii) American Influence

Australia and New Zealand now look increasingly to the United States for legal guidance. American influence was evident in the removal of the privilege from corporations in Australia. It is also evident in other Australian legislation: for example, in the introduction of derivative use immunity.

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<sup>25</sup> See s14(1)(a) Civil Evidence Act 1968 (UK).

<sup>26</sup> *Brannigan v Davison* [1997] AC 238 at 250.

<sup>27</sup> Theophilopolous, C. (2003) "The Anglo-American Privilege Against Self-Incrimination and the Fear of Foreign Incrimination." *Sydney Law Review* 25(3): 305 at 306.

New Zealand looks primarily to British law, but occasional judicial references show American influence.<sup>28</sup> That influence was also evident in the NZLC's reasons for proposing the removal of the privilege from pre-existing documents.<sup>29</sup> It was also evident in the NZLC proposal to remove the privilege from companies.<sup>30</sup>

### **(iii) European Influence**

British law is becoming less relevant in Australasia because it is being radically changed by European law.<sup>31</sup> Before long, British cases will become as mystifying to Australian lawyers as the US Bill of Rights law.<sup>32</sup> The European Convention on Human Rights has been the main cause of change.

Most obviously, provisions of the European Convention relating to the privilege have been incorporated into the law of the United Kingdom by the Human Rights Acts. As a result, fundamental changes have been made to the law on the privilege. A whole thesis could be devoted to the case-law on those Acts and on Article 6 of the European Convention.

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<sup>28</sup> E.g. McMullin J in *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191 at 194-195.

<sup>29</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 195.

<sup>30</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 224; New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) para 283.

<sup>31</sup> The British legal system would be even less recognisable if structural changes proposed in 2004 were implemented: e.g. the House of Lords would be replaced as the highest court of appeal by a supreme court. "Unlike the Australian High Court, it could not strike down legislation, making it subordinate to Parliament": Associated Press (2004) "Lords query overhaul of legal system". *The West Australian* (10 March) (Perth) 30.

<sup>32</sup> Liverani, M. R. (1999) "New U.K. Human Rights Act "turning point for Australian lawyers"." *Law Society Journal* 37(1): 57 at 57, reporting comments made in 1998 by Chief Justice Spigelman of the New South Wales Supreme Court.

Chapter IV will refer to that case-law which treats the privilege primarily as a human right.<sup>33</sup> However, that is not the perspective adopted in this thesis. This is one of the reasons why New Zealand will replace the United Kingdom as one of the two main jurisdictions which will be discussed.

### (c) NEW ZEALAND

Judges in New Zealand have regarded pre-1990s British law as highly persuasive when faced with novel problems involving the privilege, but they have still been prepared to go their own way.<sup>34</sup> So have New Zealand legislators: for example, in passing the New Zealand Bill of Rights Act 1990. However, the proposals of the NZLC provide the main reason for including New Zealand in this thesis.

In 1996 the NZLC produced a detailed discussion paper on the privilege.<sup>35</sup> In 1999 it recommended sweeping reforms in the law of evidence.<sup>36</sup> A few of its radical reforms related directly to the privilege and not all of them were included in the 2005 Evidence Bill.<sup>37</sup> Nevertheless, the current law in New Zealand and the proposed changes will provide valuable comparisons with the Australian position.

### (d) AUSTRALIA

Australia consists of nine jurisdictions: the Commonwealth and eight States and Territories. Attempts have been made in recent years to achieve uniformity in evidence law across Australia, but with only partial success. Substantially, the same evidence law applies in Commonwealth courts and in the courts of New South Wales, Tasmania and the Australian Capital Territory. The courts in the

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<sup>33</sup> *Saunders v United Kingdom* (1996) 23 EHHR 313.

<sup>34</sup> E.g. the novel approach to the privilege and *Anton Piller* orders in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461.

<sup>35</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission).

<sup>36</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission).

<sup>37</sup> New Zealand Government (2005) *Evidence Bill* (Wellington).

other five jurisdictions apply rules of evidence set out in their own legislation, although Victoria has shown interest in adopting the uniform legislation.<sup>38</sup>

Admittedly, similar general principles apply to the privilege, even in States which have not adopted the uniform legislation, but traditionally each State law has had its own quirks.<sup>39</sup> Moreover, State Parliaments are fond of amending their own legislation.<sup>40</sup> This thesis will not describe each State's provisions. Instead, it aims to discuss the privilege as a matter of principle and policy.

## **(C) DRAWING BOUNDARIES**

### **(1) INTRODUCTION**

This thesis deals primarily with the privilege in civil proceedings between private parties. Space does not permit a full treatment of criminal or administrative proceedings. If criminal proceedings were covered, the right to silence would need to be discussed as well as the privilege. A single thesis could not properly cover, as well as the privilege, the various immunities covered by the right to silence.

Administrative proceedings are excluded for a different reason. The orthodox view is that they raise issues involving the privilege rather than the right to silence. That view probably underrates the importance of the right to silence in administrative proceedings, but that is an argument worthy of a separate thesis. Besides, in a single thesis it would be difficult to cover, as well as civil

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<sup>38</sup> E.g. in November 2004, the Victorian Law Reform Commission received a reference from the Attorney-General to advise how the uniform evidence legislation could be implemented in Victoria: Victorian Law Reform Commission (2005) *Review of Laws of Evidence* (Melbourne: Victorian Law Reform Commission) Appendix I.

<sup>39</sup> E.g. transactional immunity was replaced by statutory use immunity in WA in 1990. Transactional immunity continued in Tasmania until it was replaced by use and derivative use immunity in the Evidence Act 2001 (Tasmania).

<sup>40</sup> E.g. the Uniform Companies Acts of the early 1960s soon became far from uniform.

proceedings, the complex legislative provisions which vary the privilege in administrative proceedings.

Boundaries are therefore drawn limiting this thesis to civil proceedings between private parties. Like the boundaries of a colonial empire, they cannot avoid being arbitrary and artificial. They cannot be drawn to include every aspect of the privilege which should logically be considered. In particular, they are artificial because they cut across the reality that the problem of the privilege arises in two separate stages.

## **(2) ARTIFICIALITY**

### **(a) TWO-STAGE PROBLEM**

The first stage is more obvious than the second. The issue in the first stage is whether the privilege is available to resist disclosure in a particular proceeding. A successful claim of privilege means that disclosure can be resisted if the result would incriminate the discloser.

The second stage raises the issue of whether the disclosure made in the first proceeding can be used against the discloser in another later proceeding. The issue in the second stage does not arise if the privilege has been successfully claimed during the first stage. It only arises when the privilege has not been claimed.

The privilege may not have been claimed for various reasons. Usually, it has not been claimed because it has been abrogated by statute. Some form of immunity may then be granted by the statute by way of substitute protection.<sup>41</sup>

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<sup>41</sup> However, it can also arise when a disclosure is compelled in spite of a justified claim of privilege: *R v Garbett* (1847) 1 Den 236 at 257-258 (169 ER 227 at 235-236) (answers inadmissible in later criminal proceedings when civil witness compelled to answer in spite of justified claims of privilege).



At first sight, the two stages can easily be distinguished because they involve distinct proceedings. There also appears to be a clear distinction between refusing to make a disclosure at all and preventing the use of a disclosure once made. It seems reasonable, therefore, to draw boundaries around civil proceedings as an example of the first stage. That is what this thesis does, but it must be admitted that conceptually the exercise is artificial.

#### (b) HARD TO SEPARATE

The term “privilege against self-incrimination” shows the problem. Self-incrimination necessarily looks forward to the later criminal proceedings. So, in fact, does the fundamental argument in this thesis that the privilege is needed in civil proceedings to prevent abuse by prosecutors.

The danger is that prosecutors will exploit compulsory civil procedures to provide evidence for later criminal proceedings. The suggested substitutes also look forward. By limiting the use of compelled evidence in the later criminal proceedings, they are designed to achieve a result equivalent to the privilege in the earlier proceedings.

Australian High Court judges noted the conceptual difficulty in drawing boundaries.<sup>42</sup> According to the US Supreme Court, the nature of the proceeding at which a disclosure took place was less important than what happened to the disclosure afterwards.<sup>43</sup> The NZLC also regarded the nature of the first proceeding as relatively unimportant.<sup>44</sup>

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<sup>42</sup> Deane, Dawson and Gaudron JJ in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 532 (“There is very little difference in principle between being compelled to incriminate oneself in other proceedings so that the evidence is available at one's trial and being compelled to incriminate oneself during the actual trial”).

<sup>43</sup> “The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it”: Justice Brandeis in *McCarthy v Arndstein*, 266 US

Nevertheless, this thesis addresses primarily the problems which arise in civil proceedings between private parties. These are problems which arise in the first stage and, even then, only a portion of it. The difficulties of classification provide another reason for addressing only the problems in civil proceedings between private parties. Even within the first stage, it is hard to categorise the various types of proceeding.

### **(3) PROBLEMS OF CLASSIFICATION**

#### **(a) INTRODUCTION**

Disclosure can be enforced in a bewildering variety of actions.<sup>45</sup> It helps little to say that “it is the characteristics of the proceedings that matter, not the precise compartment or compartments into which they fall”.<sup>46</sup> In this thesis the various types of proceeding need at least to be identified because they will be mentioned by way of comparison with civil proceedings.

#### **(b) CRIMINAL PROCEEDINGS**

Criminal proceedings are given their usual meaning in Australia and New Zealand. The aim of a criminal proceeding is to punish an offender for breach of the criminal law. To be convicted the offence must be proved guilty beyond reasonable doubt.

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34, 40 (1922) (examination in bankruptcy classified as a civil proceeding, even though usually regarded as an administrative proceeding).

<sup>44</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 164 (“broad context (ie, civil or criminal investigations or proceedings) should not determine the privilege's availability in any given case. The risk of self-incrimination in the particular circumstances should be taken into account”).

<sup>45</sup> E.g. the disclosure of information may occur in an affidavit in support of a *Mareva* injunction (interlocutory civil proceeding), a company investigation or disqualification proceedings against directors (administrative proceeding), an action for recovery of unpaid taxes or forfeiture of proceeds of crime (civil proceeding) or an investigation by the Serious Fraud Office in New Zealand (concurrent criminal investigation).

<sup>46</sup> Sachs LJ in *Re Pergamon Press Ltd* [1970] 3 All ER 535 at 542 (company inspections held to be subject to overriding standards of fairness).

Prosecutions are almost always brought by the State. Several examples of private prosecutions will appear in the historical chapters.<sup>47</sup> Otherwise, private prosecutions will not be mentioned, even though they still occur in both Australia and New Zealand.<sup>48</sup>

The State brings criminal proceedings through numerous prosecuting authorities ranging from the police to the Directors of Public Prosecution in the various jurisdictions. Regulatory bodies have powers to take criminal, civil, civil penalty or administrative proceedings. The classification as criminal can hinge upon use of terms such as “conviction” in the enabling statute.<sup>49</sup>

Although the right to silence of criminal defendants is generally outside scope of this thesis, it may be mentioned by way of comparison.<sup>50</sup> Criminal proceedings may also be mentioned because the operation of witness privilege is similar for third party witnesses in both criminal and civil proceedings.

## (c) CIVIL PROCEEDINGS

### (i) Between Private Parties

The term “civil proceedings between private parties” is given its traditional meaning. A court decides between contesting parties and provides relief based upon remedying the wrong rather than punishing the wrong-doer. The court is acting judicially in determining the issue between the parties.

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<sup>47</sup> E.g. *Waters v Earl of Shaftesbury* (1865) 12 Jur NS 3, 14 WR 259 (defendant brought private prosecution against the plaintiff for embezzlement under drainage contracts for which the plaintiff was suing the defendant for an account).

<sup>48</sup> E.g. the Perth man who brought 48 private prosecutions between 1991 and 2002: Magill, P. (2002) “Man faces legal action ban”. *West Australian* (3 August) (Perth) 7.

<sup>49</sup> E.g. *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 (Excise Act 1901(Cth)). However, the “question of what amounts to a conviction admits of no single, comprehensive answer”: *Maxwell v R* (1995) 184 CLR 501 at 507 (*per Dawson and McHugh JJ*).

<sup>50</sup> E.g. the drawing of adverse inferences from silence.

The term also includes interlocutory civil proceedings. They have caused much of the recent case-law. However, this thesis will not be primarily concerned with civil litigation which involves the State as one of the parties.

## **(ii) State as Party**

Modern statutes have considerably extended the powers of regulators to apply to the courts for civil remedies, particularly interlocutory civil remedies. Regulators can often obtain injunctive relief to stop breaches of legislation.<sup>51</sup> Prevention is thought to serve the public interest better than punishment after the event. These civil proceedings are brought in the regulator's name or occasionally in the name of another person.<sup>52</sup>

Some types of proceedings taken by the State might be thought to be criminal but are in fact civil. The taxation authorities, for example, can take civil action to enforce unpaid assessments.<sup>53</sup> Forfeiture proceedings are also civil actions.

Forfeiture of property to the Crown was common in medieval times. It still exists in modern Australian legislation for the confiscation of assets by criminals. The legislation shows that confiscation proceedings are civil proceedings.<sup>54</sup> They have long been regarded as civil proceedings in the United States.<sup>55</sup>

In principle, the privilege operates in the same way in civil proceedings, whether they are brought by a private party or a regulator. However, when the State is a

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<sup>51</sup> E.g. ASIC's power to apply for injunctions under s1324, Corporations Act 2001 (Cth).

<sup>52</sup> E.g. ASIC under s50, Australian Securities and Investments Commission Act 2001 (Cth). See *Deloitte Touche Tohmatsu v Australian Securities Commission* (1995) 128 ALR 318 (ASC sues under s50, Australian Securities Commission Act 1989 (Cth)).

<sup>53</sup> However, criminal proceedings can be taken for fraud and other more serious breaches of the taxation legislation.

<sup>54</sup> E.g. s315, Confiscation of Assets Act 2002 (Cth) (confiscation proceedings are not criminal and are covered by the rules of civil evidence).

<sup>55</sup> *Boyd v United States*, 116 US 616 (1886). Even under the European Convention, they are not criminal proceedings: see *Her Majesty's Advocate v McIntosh* (2001) 151 NLJ 1282.

party to civil proceedings, the compulsory civil procedures are in greater danger of being abused. The State might try to obtain information which would not be available to it through the normal criminal procedures. This danger has been shown particularly in civil penalty proceedings.

### **(iii) Civil Penalty Proceedings**

The purpose of civil penalty proceedings is usually punishment. In this respect, they are distinguished from civil proceedings which have no element of punishment.<sup>56</sup> A civil action for a penalty sounds like a contradiction in terms, but such actions are centuries old. They come from a time when there was no police force. Citizens had to be encouraged to enforce the law themselves.

Civil penalty proceedings have had a modern revival under statutory enforcement regimes. They have become an important remedy for modern regulators. They are more likely to trigger the privilege against exposure to penalties than the privilege against self-incrimination.

Civil penalty proceedings are different from civil proceedings to which the State is a party. However, it becomes difficult to draw the line precisely between them: for example, when the civil penalty proceedings seek not pecuniary penalties but rather disqualification of directors from office.<sup>57</sup> The difficulty is increased because some proceedings to disqualify directors are deemed to be administrative proceedings.

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<sup>56</sup> *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Livestock Corporation* (1979) 42 FLR 204.

<sup>57</sup> *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 (penalty privilege available in civil penalty proceedings not involving pecuniary penalties).

## (d) ADMINISTRATIVE

### (i) Difficulty of Definition

The usual aim of administrative proceedings is investigation, often for the purpose of deciding whether further legal action is necessary. More broadly, however, administrative proceedings are those which cannot be classified as criminal or civil. This may be because they do not involve a court at all or because, although a court is involved, it does not exercise a judicial function.

In Australia coronial inquests are administrative proceedings, even though they are held in court.<sup>58</sup> So are liquidators' examinations. The court provides a forum for the examination by the liquidator but does not decide between two adversaries.<sup>59</sup>

ASIC has the power to disqualify directors.<sup>60</sup> It may hold a "show cause" hearing as one of the steps in that disqualification procedure, but it is not clear whether this hearing is a civil or administrative proceeding.<sup>61</sup> The distinction can be significant.<sup>62</sup>

The classification of administrative proceedings in Australia is not usually a problem in the context of the privilege. Most of the Australian cases on administrative proceedings involve investigations or examinations which are

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<sup>58</sup> E.g. in WA a coroner's court. They are still subject to overriding standards of fairness: *Annetts v McCann* (1990) 170 CLR 596 at 598.

<sup>59</sup> *Re Spedley Securities Ltd; Ex parte Ahrens* (1990) 3 ACSR 349 at 353. Compare with United States authority: *McCarthy v Arndstein*, 266 US 34, 40 (1922).

<sup>60</sup> Now under s206F Corporations Act 2001 (Cth). However, see *Rich v Australian Securities and Investments Commission* [2004] HCA Trans 33 paras 805 to 860 (doubts expressed about the constitutional validity of ASIC's disqualification power as compared with prohibition by the courts under s206D or s206E Corporations Act 2001 (Cth)).

<sup>61</sup> Compare *Dwyer v National Companies and Securities Commission* (1988) 13 ACLR 716 at 724 (show cause hearing held to be civil) with *Brown v Corporate Affairs Commissioner (NSW)* (1989) 14 ACLR 781 at 786 and *Corporate Affairs Commissioner (NSW) v Prime Commodities Pty Ltd* [1987] 11 ACLR 584 at 586 (show cause hearings held to be administrative).

<sup>62</sup> *Corporate Affairs Commissioner (NSW) v Prime Commodities Pty Ltd* [1987] 11 ACLR 584 (interlocutory remedies only available in support of civil not administrative proceedings).

clearly identifiable as administrative. The distinction between civil and administrative proceedings may be less clear in New Zealand.

## **(ii) Hard To Separate**

In New Zealand a civil proceeding is sometimes regarded as any proceeding which is not criminal or penal in character.<sup>63</sup> Chapter III will mention an article by Judge Harvey. He proposed to examine the privilege in the context of civil proceedings between private litigants, particularly the tension which it created between the criminal and civil justice systems.<sup>64</sup> Yet his article included discussion of the privilege in contexts outside the courts, such as at government inquiries.<sup>65</sup>

Similarly, the NZLC Discussion Paper on the privilege covered administrative as well as civil proceedings.<sup>66</sup> This shows the difficulty of maintaining strict boundaries between the various types of proceeding.

## **(4) CONCLUSION**

It is perhaps better to accept that types of proceedings cannot be distinguished by watertight definitions. The privilege in civil proceedings is the focus of this thesis, but other types of proceedings will be mentioned if they cast light upon the operation of the privilege in civil proceedings.

Reference will therefore be made to administrative proceedings and even to the proceedings of grand juries in the United States. They are part of the American

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<sup>63</sup> E.g. Heath, P. (1993) "Bankruptcy and the Bill of Rights." *New Zealand Law Journal*(October): 347 at 348 ("civil procedures such as s68 Insolvency Act or s262A Companies Act").

<sup>64</sup> Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 60.

<sup>65</sup> E.g. the *Winebox Inquiry* was among the "recent developments" which he wished to examine: see Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 62.

<sup>66</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 5 ("the privilege can be claimed in a variety of contexts, including civil discovery, disciplinary proceedings, before commissions of inquiry, and under examination on oath by a judicial officer"). The NZLC dealt in chapters 12, 13 and 14 with the removal of the privilege from administrative proceedings by statutory provision and the substitution of various types of immunity.

criminal procedure but can still give useful insights into the operation of derivative use immunity in civil proceedings. These insights should not be lost because an arbitrary boundary has been drawn.

The conclusion will be that in civil proceedings the privilege or an adequate substitute is necessary for public policy reasons. An adequate substitute will be found in a statutory certification procedure under which the courts grant derivative use immunity if the privilege is abrogated. This immunity should be available to civil witnesses in all courts in Australia and New Zealand, as well as in interlocutory proceedings in those courts. The certification procedure will combine the consistency provided by the statutory framework with the flexibility provided by the involvement of the courts.

## **(D) OUTLINE OF CHAPTERS**

### **I Introduction**

By way of introduction this chapter has described the general nature of the problem addressed in this thesis. It has sought to place the problem in context by explaining how the thesis came to be written. It has drawn boundaries which, though arbitrary, are necessary to enable discussion of the broad issues. Finally, it has summarised the conclusion of the thesis on how best to deal with the problem. The later chapters will lead to that conclusion as follows.

### **II Problems with the Privilege**

Chapter II will outline the modern law on the privilege in civil proceedings between private parties, providing a more detailed discussion of issues raised in Chapter I. It will distinguish the privilege from the right to silence and penalty privilege. It will then describe how the privilege causes a particular problem in civil proceedings.



### III Approach to the Problem

Chapter III will survey the literature, finding that most of the debate relates to the right to silence. It will then describe the methodology used in this thesis. Finally, it will explain why history forms an important part of its analysis but legal philosophy does not.

### IV Need for the Privilege in Civil Proceedings

Chapter IV will contain the central argument underlying this thesis. It will argue that the reasons for the privilege in civil proceedings are not the same as for the right to silence. The main reason for the privilege in civil proceedings is not to be found in terms of detriment to the human rights of the discloser. Rather, it lies in the undesirability of allowing prosecutors to rely excessively upon compulsorily acquired evidence.

### V Possible Substitutes

Chapter V will discuss whether there are other ways in which the values of the privilege can be maintained in civil proceedings. It will conclude that derivative use immunity is the only satisfactory substitute for the privilege.

### VI History of the Right to Silence and Witness Privilege

Chapter VI will distinguish the history of witness privilege from that of the privilege in interlocutory civil proceedings. It will show the historical origins of witness privilege to be bound up with history of the right to silence. It will therefore contain a discussion of the historical debate about the right to silence. It will then show witness privilege developing in the common law courts in both criminal and civil proceedings, but separately from the right to silence.

### VII History of the Privilege for Civil Parties

Chapter VII will argue that, although witness privilege came from the common law, the privilege in interlocutory civil proceedings had its origins in the

discretionary remedies devised by the courts of equity. Those courts were sensitive to abuse of their remedies which were effective as well as being discretionary. That sensitivity encouraged the creation of the privilege, particularly in interlocutory proceedings.

#### VIII Documents in the United States

Chapter VIII will discuss the American experience in removing the protection of the Fifth Amendment from documentary evidence. It will use the American experience in its discussion of whether the privilege should apply to documents at all. The convoluted case-law and unexpected difficulties suggest that the removal of the privilege from documents is not as simple as it appears.

#### IX Documents in Australia and New Zealand

Chapter IX will suggest that the courts of equity had an important role in extending the privilege to documents. The privilege still covers documents in Australia and New Zealand. Proposals to alter that position will be considered in the light of the American experience. They will be rejected.

#### X Derivative Use Immunity in the United States

Chapter X will examine the operation of derivative use immunity in the United States where it had its origins. The conclusion will be that derivative use immunity does not impose an impossible burden on prosecutors, even though it may make their job harder. By maintaining the integrity of prosecution procedures derivative use immunity is consistent with the main reason for the privilege in civil proceedings.

#### XI Derivative Use Immunity in Australia

Chapter XI will examine derivative use immunity in Australia in two parts. The first part will describe the debate which took place in Australia when derivative use immunity was introduced. It will argue that prosecuting authorities

exaggerated the burden which such immunity would place upon them. The second part will look at the way in which derivative use immunity has operated in recent Australian cases. The conclusion will be that the case-law does not justify the fears expressed by the prosecuting authorities, but that particular procedural and legislative difficulties need to be addressed.

## XII Certification in Australia and New Zealand

Chapter XII will focus on the procedural and legislative difficulties which need to be addressed. Certification has provided a satisfactory substitute for witness privilege in civil proceedings in Australia. The problems have arisen with interlocutory proceedings. They can be substantially overcome if a sound statutory structure is provided, but this will require cooperation between the Commonwealth and States to overcome possible constitutional difficulties.

## XIII Conclusion

Chapter XIII will summarise the practical recommendations of this thesis. These will be seen in the context of the unsettled topics mentioned in this chapter.

## CHAPTER II: PROBLEMS WITH THE PRIVILEGE

### (A) DEFINITION

#### (1) INTRODUCTION

“When *I* use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean - neither more nor less”.

“The question is,” said Alice, “whether you *can* make words mean so many different things”.<sup>1</sup>

Although that passage comes from a children’s book, it provides a suitable opening for this chapter. Lord Atkin quoted it in his famous solitary dissent in *Liversidge v Anderson*.<sup>2</sup> He was arguing that normal principles of legislative construction should not be discarded in war-time Britain.<sup>3</sup>

The passage is quoted here to epitomise the surprising looseness in the terminology associated with the privilege. The definition of terms is usually the starting-point for any serious legal discussion. No obvious difficulty is involved in defining the terms in this area of the law, but judges, lawyers and commentators have shown an uncharacteristic reluctance to undertake that elementary exercise. As a result the terms vary not only between but also within jurisdictions. The variations obscure more fundamental issues.

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<sup>1</sup> Carroll, L. (1872) *Through The Looking Glass* (London: Random House 1939 edition) Chapter 6 at 214.

<sup>2</sup> [1942] AC 206 at 245. The Lord Chancellor twice wrote to Lord Atkin asking him to remove the passage because it might be taken to “ridicule” the other Law Lords, who took a different view: Lewis, G. (1983) *Lord Atkin* (London: Butterworths) at 139-140.

<sup>3</sup> *Liversidge v Anderson* [1942] AC 206 at 245 (“To recapitulate: The words have only one meaning”).

Even the origins of the term “privilege against self-incrimination” are obscure.<sup>4</sup> Levy wrote that the “familiar phrase of contemporary usage seems to be of twentieth century vintage”.<sup>5</sup> He departed from his usual rigorous practice by failing to indicate his sources. Surprisingly, historians who agreed with Levy about little else cited him as the authority on this point.<sup>6</sup> His version will be accepted here.

## (2) SIMILAR PRIVILEGES

The NZLC treated penalty privilege, privilege against forfeiture and privilege against ecclesiastical censure as “lesser known limbs” of the privilege against self-incrimination.<sup>7</sup> The NZLC was expressing the traditional view taken from English cases.<sup>8</sup>

However, the Australian courts decided that they were “different aspects or grounds of privilege” rather than limbs of the privilege against self-incrimination.<sup>9</sup> Most obviously, they declined “to treat the grounds of self-incrimination and self-exposure to a penalty as but aspects of a single general rule”.<sup>10</sup> The High Court included penalty privilege, privilege against forfeiture and privilege against

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<sup>4</sup> Wigmore used the slightly different term “privilege against self-crimination” before 1900 (e.g. Wigmore, J. H. (1891) “Nemo tenetur seipsum prodere.” *Harvard Law Review* 5: 71 at 81). By June 1919 “the privilege against self-incrimination” was being mixed with Wigmore’s version: e.g. in Cook, W. W. (1919) “Hohfeld’s Contributions to the Science of Law.” *Yale Law Journal* 28(8): 721 at 725 (compare “self-incrimination” in text with “self-crimination” in n3).

<sup>5</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at ix.

<sup>6</sup> E.g. Helmholz, R. H. (1997) “Introduction”. *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 1 at 208 n38.

<sup>7</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) at p54.

<sup>8</sup> The traditional four grounds were “punishment, penalty, forfeiture, or ecclesiastical censure”: *Redfern v Redfern* [1891] P 139 at 147. Courts have often referred to only three of those grounds: e.g. in *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253 at 257 (“criminal charge, penalty or forfeiture”).

<sup>9</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 336 and 345-346. Also see Williams, D. (2001) “Chapter 4, Privilege Against Self-Incrimination”. *Laws of Australia (looseleaf) Vol 16 Law of Evidence*. V. Wayne (Ed.) (Sydney: Law Book Co) 81 at 82 (“Each of these heads of privilege represents separate and distinct grounds or aspects of privilege”).

<sup>10</sup> *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503 at 545 per Gummow J.

ecclesiastical censure in the “trilogy of privileges that bear some similarity with the privilege against self-incrimination”.<sup>11</sup>

Traditionally, Chancery allowed objections to discovery on the grounds of forfeiture or penalties. Those grounds were probably recognised before self-incrimination.<sup>12</sup> Nowadays, claims of privilege on the grounds of forfeiture are rare.<sup>13</sup>

Both the privilege on the grounds of forfeiture and the privilege against ecclesiastical censure have been criticised in Australia as anachronistic in modern legal systems.<sup>14</sup> Ecclesiastical censure has been invoked so rarely that it was omitted from the ALRC’s list of distinct privileges.<sup>15</sup> It is therefore surprising that history has recently been suggested as the basis for a special privilege for spouses.

### **(3) SPOUSE INCRIMINATION**

An Australian writer recently found the “Common Law Privilege Against Spouse-Incrimination” in English history.<sup>16</sup> According to him, this privilege still exists in

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<sup>11</sup> *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 141.

<sup>12</sup> Tollefson, E. A. (1975) *The Privilege against Self-Incrimination In England and Canada. Faculty of Law* (Oxford: Oxford University) at 44 (“in the 17th century the Chancery began to treat self-incrimination as being in the same category as penalties and forfeitures”).

<sup>13</sup> For a rare modern Australian example of the privilege against exposure to forfeiture being upheld, see *WM Collin & Sons Ltd v T & T Mining Corporation Pty Ltd* [1971] Qd R 427 at 438 (court decides to “give full effect to the principle of non-assistance to a plaintiff seeking to enforce a forfeiture”).

<sup>14</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 1 para 464 and Vol 2 Appendix C para 208. For criticism of ecclesiastical censure as a modern ground, see *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 345. In the United Kingdom, privilege in civil proceedings based upon liability to forfeiture was abolished by s16(1)(a), Civil Evidence Act 1968 (UK).

<sup>15</sup> Australian Law Reform Commission (2003) *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Canberra: Australian Law Reform Commission) para 18.2 (“Although broadly referred to as the privilege against self-incrimination, the concept encompasses three distinct privileges”).

<sup>16</sup> Lusty, D. (2004) “Is There a Common Law Privilege Against Spouse Incrimination?” *University of New South Wales Law Journal* 27(1): 1.

Australia “analogous to, yet separate and distinct from, the privilege against self-incrimination”.<sup>17</sup>

British legislation has for nearly forty years allowed a person to claim the privilege against self-incrimination in civil proceedings, even if the answer would only incriminate that person's spouse.<sup>18</sup> In Australia, it is unclear whether witnesses can claim the privilege against self-incrimination if only their spouses would be incriminated.<sup>19</sup> The idea of a separate “privilege against spouse-incrimination” has been accepted in some Australian courts but not in others.<sup>20</sup> It will not be mentioned in this thesis because it is still to be recognised by the High Court.<sup>21</sup> However, penalty privilege needs to be distinguished from the privilege against self-incrimination.

#### **(4) PENALTY PRIVILEGE**

Penalty privilege is accepted in Australia as a separate form of privilege analogous to the privilege against self-incrimination.<sup>22</sup> In fact, it has been given new vigour by modern statutes. It provides protection for individuals, made necessary by the increasing number of civil penalties imposed for breaching Australian corporate

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<sup>17</sup> Lusty, D. (2004) "Is There a Common Law Privilege Against Spouse Incrimination?" *University of New South Wales Law Journal* 27(1): 1 at 23.

<sup>18</sup> Under s14(1)(a) Civil Evidence Act 1968 (UK).

<sup>19</sup> E.g. s57(1), Evidence Ordinance 1971 (ACT) used to set out the British rule, but that rule is not repeated in s128 of the 1995 Evidence Act which applies in the ACT as well as in the Commonwealth, New South Wales and Tasmania. In the other States there is no authority except in Victoria where the British rule has been rejected: Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 1, para 107 and Vol 2, para 212.

<sup>20</sup> It was accepted by the Queensland Court of Appeal in *Callanan v B* [2005] 1 Qd R 348, but other courts have been less impressed: e.g. Kiefer J in *S v Boulton (Examiner, Australian Crime Commission)* [2005] FCA 821; LEXIS BC200504313 para [25] (“I regret that I am unable to agree that there is spousal privilege recognized by the common law”).

<sup>21</sup> Dowsett J in *Stoten v Sage (Examiner, Australian Crime Commission)* (2005) 222 ALR 451 at 456 (“the High Court will eventually consider the matter”).

<sup>22</sup> Kirby J received no support for his view that penalty privilege is “of a lower order of priority”: *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 179.

and commercial statutes. As a result, it has been the subject of numerous recent decisions.<sup>23</sup>

Although civil penalties have been less common in New Zealand legislation, the penalty privilege was recognised there in 1994.<sup>24</sup> That seemed similar to the Australian position. However, in its Preliminary Paper the NZLC proposed legislation which combined the two privileges.<sup>25</sup> The responses to its Preliminary Paper caused that proposal to be dropped. The NZLC proposed instead to abolish penalty privilege in New Zealand.<sup>26</sup> A similar approach was taken in the 2005 Evidence Bill.<sup>27</sup>

This thesis will treat the two privileges as separate and distinct. Penalty privilege will not be included within the terms “privilege against self-incrimination” or “the privilege”. Once made, the distinction between the privilege against self-incrimination and penalty privilege causes little difficulty.

Penalty privilege usually prevents any order for discovery in civil penalty proceedings.<sup>28</sup> It similarly prevents interrogatories being ordered in civil penalty

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<sup>23</sup> E.g. High Court decisions from *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 through to *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129.

<sup>24</sup> *Port Nelson Ltd v Commerce Commission* [1994] 3 NZLR 435 at 437 (s80, Commerce Act 1986 (NZ)).

<sup>25</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para C11, commenting on draft s3.

<sup>26</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) para 278. This was a surprising reversal of its earlier view that penalty privilege had a valid role (New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) paras 180-188). That earlier view accorded with the British as well as the Australian position: see s14(1)(a), Civil Evidence Act 1968 (UK).

<sup>27</sup> New Zealand Parliament, 2005 *Evidence Bill* (clause 56(1)(b) is restricted to incrimination for an offence punishable by a fine or imprisonment).

<sup>28</sup> *R v Associated Northern Collieries* (1910) 11 CLR 738; *Metroplaza Pty Ltd v Girvan NSW Pty Ltd (in liq)* (1993) 37 FCR 91.



proceedings.<sup>29</sup> In proceedings analogous to those for civil penalties, neither discovery nor interrogatories will be ordered.<sup>30</sup>

In Australia, they are separate but almost identical privileges, with many features in common.<sup>31</sup> Much greater differences exist between the privilege and the right to silence.

## **(5) RIGHT TO SILENCE**

### **(a) NEW ZEALAND**

In its Preliminary Paper the NZLC referred to the right of silence.<sup>32</sup> Right of silence and right to silence describe the same concept. This thesis uses right to silence. That term is also in common use in New Zealand.<sup>33</sup>

The NZLC noted the confusion between the privilege and two related concepts involving rights to silence.<sup>34</sup> The first related concept is the general freedom of a citizen at common law not to answer questions, whoever puts them. This will be discussed as the first of Lord Mustill's categories. It is rarely mentioned by the Australasian courts, perhaps because it is so extensively modified by statute. It will play little part in this thesis except briefly in the context of administrative proceedings.

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<sup>29</sup> *Re Deputy Commissioner of Taxation; Ex parte Briggs* (1987) 13 FCR 389 at 392; *Martin v Treacher* (1886) 16 QBD 507.

<sup>30</sup> Including an action seeking prerogative writs against tax officers: *Re Deputy Commissioner of Taxation; Ex parte Briggs* (1987) 13 FCR 389 at 394.

<sup>31</sup> *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 142.

<sup>32</sup> E.g. New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 8 (its other "papers on the right of silence, confessions and police questioning").

<sup>33</sup> Robertson, B. (1991) "The right to silence ill-considered." *Victoria University of Wellington Law Review* 21(2): 139; Thomas, E. W. (1991) "The So-Called Right to Silence." *New Zealand Universities Law Review* 14(December): 299; and Harvey, D. J. (1995) "Silence and self-incrimination protections in the Children, Young Persons, and Their Families Act." *Butterworths Family Law Journal* 1(September): 247.

<sup>34</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) paras 2 to 5.

The second related concept applies to suspects and defendants in criminal proceedings. This right to silence "is often linked with, but is different from, the privilege against self-incrimination".<sup>35</sup> It enables suspects and defendants in criminal proceedings to refuse to answer all questions, not just incriminating ones. It does not apply generally to witnesses, whether in criminal or civil proceedings.

The distinction between the right to silence and the privilege has not always been observed in New Zealand. Administrative proceedings cause particular difficulties because they arguably raise both concepts.<sup>36</sup> They have been confused even more in the United Kingdom.

## (b) UNITED KINGDOM

### (i) Before 1992

In 1992 Lord Mustill saw the need for greater precision in the terminology.<sup>37</sup> The shifting terminology could be seen, for example, in articles written by one distinguished commentator between 1973 and 1994. The first of those articles referred to right of silence and occasionally to right to silence.<sup>38</sup> In later articles the same right was described as the following: right against self-incrimination;<sup>39</sup> right of silence;<sup>40</sup> and right to silence.<sup>41</sup>

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<sup>35</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 4.

<sup>36</sup> E.g. *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191 at 193-194. McMullin J used the terms interchangeably, with occasional variations, such as the "rule against self-incrimination".

<sup>37</sup> *R v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1.

<sup>38</sup> Zuckerman, A. A. S. (1973) "Criminal Law Revision Committee 11th Report, Right of Silence." *Modern Law Review* 36(5): 509 e.g. at 509 line 4 ("the right to silence").

<sup>39</sup> Zuckerman, A. A. S. (1986) "The right against self-incrimination: an obstacle to the supervision of interrogation." *Law Quarterly Review* 102: 43 at 48 ("The right against self-incrimination is sometimes referred to as a right of silence but this is misleading").

<sup>40</sup> Zuckerman, A. A. S. (1989) "Trial by Unfair Means - The Report of the Working Group on the Right of Silence." *Criminal Law Review* [1989]: 855 and Zuckerman, A. A. S. (1990) "Procedural Fairness during Police Interrogation and the Right of Silence." *Journal of Criminal Law* 54(4): 499.

<sup>41</sup> Zuckerman, A. A. S. (1994) "The inevitable demise of the right to silence." *New Law Journal* 144(6659): 1104 and Zuckerman, A. A. S. (1994) "Bias and Suggestibility: Is There an Alternative to the

Gauk's research in 1990 found similar confusion.<sup>42</sup> Her Cambridge thesis will be discussed in Chapter III in the context of legal philosophy. Before applying philosophical principles, she looked at the terminology used to describe the rights of accused persons in the United Kingdom, Canada and the United States.

Gauk found that terms such as privilege against self-incrimination, right against self-incrimination and right of silence were used with "remarkable versatility".<sup>43</sup> There was no uniform understanding of what they meant, either across jurisdictions or within them. In the United Kingdom, she saw a move away from using the term privilege against self-incrimination "to describe the position of the ordinary witness, and toward a more general, and imprecise, use thereof".<sup>44</sup> Nevertheless, that term was not used in case-law to describe the right to silence of a criminal defendant.<sup>45</sup>

## (ii) Lord Mustill's definition

Lord Mustill saw the privilege, the right to silence and other related rights as forming a "disparate group of immunities, which differ in nature, origin, incidence, and importance".<sup>46</sup> He noted that it "is easy to assume that they are all different ways of expressing the same principle, whereas in fact they are not".<sup>47</sup>

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Right to Silence?" *Suspicion and Silence: The Right to Silence in Criminal Investigations*. D. Morgan and G. M. Stephenson (Ed.) (London: Blackstone Press Ltd) 117.

<sup>42</sup> Gauk, C. (1990) Self-Incrimination and silence: position of the defendant in England, the United States and Canada. *Faculty of Law* (Cambridge: Cambridge University).

<sup>43</sup> Gauk, C. (1990) Self-Incrimination and silence: position of the defendant in England, the United States and Canada. *Faculty of Law* (Cambridge: Cambridge University) at 3.

<sup>44</sup> Gauk, C. (1990) Self-Incrimination and silence: position of the defendant in England, the United States and Canada. *Faculty of Law* (Cambridge: Cambridge University) at 15.

<sup>45</sup> Gauk, C. (1990) Self-Incrimination and silence: position of the defendant in England, the United States and Canada. *Faculty of Law* (Cambridge: Cambridge University) at 13.

<sup>46</sup> *R v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1 at 30.

<sup>47</sup> *R v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1 at 31.

The same point had been made ten years before in the New South Wales Supreme Court.<sup>48</sup>

Lord Mustill's analysis has been the starting-point for many judges and commentators in Australia and New Zealand, as well as in the United Kingdom.<sup>49</sup> Although his structure has received wide acceptance, this thesis does not adopt every aspect of his analysis. First, his use of the term "immunities" needs to be clarified. Chapter I noted that immunity is more commonly used to describe what happens to disclosures afterwards. Immunity is often given to disclosures in later proceedings when they have been compelled in earlier proceedings by abrogating the privilege. Their inadmissibility in the later proceedings is an example of immunity in the sense used in this thesis.

Lord Mustill adopted a different meaning for immunity: a right which protects against making disclosures in the earlier proceedings in the first place. He listed six common immunities. He mostly referred to them as rights of silence or as part of the right of silence.<sup>50</sup> He also mentioned them as part of a right to silence.<sup>51</sup>

The six categories are said in Australia to make up the right to silence.<sup>52</sup> The right to silence will be the term preferred in this thesis with one substantial difference. The right to silence will not include Lord Mustill's second category: a general immunity from being forced to answer incriminating questions.

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<sup>48</sup> Wootten J in *McMahon v Gould* (1982) 7 ACLR 202 at 207 (right of silence is "a convenient rubric for several rules and practices which have various origins and serve various purposes").

<sup>49</sup> E.g. *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 503 and 526-7; *RPS v R* (2000) 199 CLR 620 at 630; *Azzopardi v R* (2001) 205 CLR 50 at 105-106; Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 71-72; *AT & T Istel Ltd v Tully* [1993] AC 45 at 51-52 and 67.

<sup>50</sup> E.g. *R v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1 at 30, 31, 35, 38, 39, 40 and 42.

<sup>51</sup> *R v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1 at 31 and 40.

<sup>52</sup> E.g. *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 503 and 526; *RPS v R* (2000) 199 CLR 620 at 630; *Azzopardi v R* (2001) 205 CLR 50 at 105.

### **(iii) Immunity against Self-Incrimination**

Lord Mustill's second category is in effect the privilege as defined in this thesis. It can be seen as a limited right to silence because it arises only in response to questions which are incriminating, but it needs to be distinguished in this thesis from the other categories of right to silence. Otherwise, the thesis could be distracted by the right to silence in criminal proceedings and by the adverse inferences which can be drawn from the exercise of that right. The removal of the second category has little effect upon the rest of Lord Mustill's structure. His third, fourth, fifth and sixth categories remain unaffected.

The third category allows a person suspected of a crime to refuse to answer any questions from the police. The fourth protects the accused from being forced to testify at a criminal trial. The fifth prevents the police putting any questions to a person who has been charged with a crime. The sixth prevents any adverse comment being made at a criminal trial about the exercise of the rights of the accused under the previous three categories.

This thesis will not deal with those four categories.<sup>53</sup> They are all specific immunities which directly relate to criminal proceedings. Moreover, they protect against non-incriminating questions, as well as incriminating ones. They can be clearly distinguished from the privilege as it operates in civil proceedings.

### **(iv) General Immunity from Questions**

Lord Mustill's first category is a general immunity from being forced to answer questions at all. It protects against answering all questions, not just incriminating

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<sup>53</sup> Except to note that Lord Mustill's third and fourth categories may need widening to make best use of the sixth category: Davies, G. L. (2000) "The prohibition against adverse inferences: a rule without reason? - Part I." *Australian Law Journal* 74(1): 26 at 27.

ones, and no matter who asks them.<sup>54</sup> It is different from the third, fourth, fifth and sixth categories because it is not linked to criminal proceedings.

In the absence of statute the first category applies, together with the privilege, in administrative proceedings.<sup>55</sup> In practice, legislation almost invariably abrogates the first category in those proceedings but sometimes leaves the privilege as an excuse for not answering.<sup>56</sup> Abrogation of the first category probably explains why it has rarely been mentioned by the Australasian courts.<sup>57</sup>

### **(v) Current Usage**

In the United Kingdom, the European Convention has overtaken Lord Mustill's analysis. The right to silence is still acknowledged as a separate right.<sup>58</sup> However, the old terminology has been replaced by the composite term "the right not to incriminate oneself and the right to silence".<sup>59</sup> British judges seem unwilling to distinguish between the two terms because they overlap so much.<sup>60</sup>

### **(c) CONCEPTUAL CONFUSION**

Admittedly, the two concepts are easily confused. One Australian judge said recently that the immunities included in the right to silence are "derived from the

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<sup>54</sup> Zuckerman, A. A. S. (1986) "The right against self-incrimination: an obstacle to the supervision of interrogation." *Law Quarterly Review* 102: 43 at 48 ("right of silence in that citizens have no duty to provide information. Broadly speaking, the citizen is free to withhold information from the police or anyone else for that matter").

<sup>55</sup> McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company) at 143 ("at common law a person is under no obligation to answer questions put by an administrative agency, nor is there any obligation to produce documents").

<sup>56</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) at para 6.

<sup>57</sup> For a rare e.g. see *Hamilton v Oades* [1989] 166 CLR 486 at 499 ("The so-called right not to disclose a defence is the result merely of the absence in ordinary circumstances of any statutory requirement that defences be revealed").

<sup>58</sup> E.g. *Brown v Stott* [2003] 1 AC 681 at 697, 711, 718, 727 and 729.

<sup>59</sup> E.g. in *Brown v Stott* [2003] 1 AC 681, three of the Law Lords adopted this phrase (at 697, 727 and 729). Another devised his own (Lord Hope of Craighead at 718: "the accused's right to silence at trial would be worthless if his right of silence and his right against self-incrimination were not available from the outset of the criminal investigation").

<sup>60</sup> Lord Steyn was a rare exception when he used the old terminology in *Brown v Stott* [2003] 1 AC 681 ("privilege against self-incrimination" at 709 and "the linked right to silence" at 711).

privilege against self-incrimination".<sup>61</sup> He was portraying the privilege as the broader concept.<sup>62</sup>

The privilege has a broader application in the respect that it is available to all witnesses in judicial proceedings. Moreover, it applies in all non-judicial proceedings in which information is compulsorily sought.<sup>63</sup> The right to silence usually only involves criminal suspects and defendants.

In other respects, the right to silence is the broader concept. It blocks not only incriminating questions but also questions which are not incriminating. Moreover, it allows the criminal defendant not to testify at the criminal trial. That implies the right not to have an adverse inference drawn from the failure to testify.

The right to silence may also be justified for reasons which are not connected with those underlying the privilege. This is reflected in the history of the two concepts.

#### (d) HISTORICAL DISTINCTION

Chapter VII will argue that the privilege in civil proceedings developed separately and distinctly from the right to silence in criminal cases. According to this argument, the privilege in civil proceedings arose in part from Chancery's objection to abuse of its compulsory procedures. The privilege developed in Chancery to prevent information disclosed under its compulsory procedures being used for other purposes.

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<sup>61</sup> McHugh J in *Azzopardi v R* (2001) 205 CLR 50 at 91.

<sup>62</sup> Also see Judge Martens in *Saunders v United Kingdom* (1996) 23 EHRR 313 at 351 (from a conceptual point of view the privilege is obviously "the broader right, which encompasses the right to silence")

<sup>63</sup> Strictly speaking, the Australian High Court decided only that it was "not prepared to hold that the privilege is inherently incapable of applying in non-judicial proceedings": *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341. However, that finding was restated in a contemporaneous decision as "the privilege against self-incrimination is inherently capable of applying in non-judicial proceedings": *Sorby v The Commonwealth* (1983) 152 CLR 281 at 309.

The history of the right to silence showed how it was claimed to avoid all questions, even non-incriminating ones. It was also claimed for reasons other than self-incrimination. Religious dissenters, for example, would answer questions about their own writings but not about their fellow dissenters.<sup>64</sup>

Chapter VI will describe how witness privilege developed historically somewhere between the privilege in civil proceedings and the right to silence. Witness privilege arose for third party witnesses in both civil and criminal trials. It reflected the need of third party witnesses for protection in court from the consequences of compulsory questioning. That protection is not quite the same as that needed by criminal defendants.

Chapter VI will argue that Wigmore erred in not distinguishing witness privilege from the right to silence of an accused person. Bentham did make that distinction. He was sceptical of witness privilege.<sup>65</sup> He was scathing about the right to silence.<sup>66</sup> Wigmore's error was surprising because his historical theories on the privilege owed much to Bentham.<sup>67</sup> Because Wigmore made little of the

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<sup>64</sup> E.g. John Marbeck in his third examination in 1543 ("how should I accuse them, of whom I know nothing?": Foxe, J. (1838) *The Acts and Monuments of John Foxe: A New and Complete Edition (vol 5)* (London: Seeley & Burnside) at 479); Elizabeth Young in her second examination in 1558 ("ye have my confession, and more than that I cannot say" : Foxe, J. (1838) *The Acts and Monuments of John Foxe: A New and Complete Edition (vol 8)* (London: Seeley & Burnside) at 537); Henry Barrow in his sixth examination in 1593 ("he doth not remember, hys memory is so decayed" : Carlson, L. H., Ed. (1962) *The Writings of John Greenwood and Henry Barrow 1591-1593*. Elizabethan Nonconformist Texts (London: George Allen & Unwin Ltd) at 224).

<sup>65</sup> Bentham, J. (1827) *Rationale of Judicial Evidence* (New York: Russell & Russell Inc) at 466 (Under the heading "Case of evidence self-disserving *alia in causa*", the witness need not give evidence which would be incriminating in "a cause already in prospect, or a cause liable to be produced by the disclosure made by the evidence").

<sup>66</sup> Bentham, J. (1823) *Traite Des Preuves Judiciaire* (Littleton, Colorado: Fred B Rothman & Co) at 240 ("The most remarkable singularity of the law of England is the rule which ordains, that an accused person shall not be judicially asked any question from which evidence of his guilt may be deduced. If such a question is put, he is not bound to answer it, and his silence is not to be held to furnish any legal presumption against him").

<sup>67</sup> E.g. the insight was that the privilege was established by an "association of ideas" during a general reaction against objectionable Stuart practices: Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 635.



distinction, both concepts became subsumed in the American “privilege against self-incrimination”.

#### (e) UNITED STATES

On the face of the Fifth Amendment and in common usage, the privilege against self-incrimination in the United States “reflects principles which parallel the right to silence under English law”.<sup>68</sup> Chapter IV will discuss how the Fifth Amendment has been given the status of a human right. In fact, that status is given to only one of several rights contained in the Fifth Amendment: the right not “to be compelled in any Criminal Case to be a witness against himself”.

The full text of the Fifth Amendment will be given in Chapter IV. In general terms, its focus is on criminal rather than civil proceedings.<sup>69</sup> Chapter VIII will discuss how the privilege has also been applied to civil proceedings in the United States in a way which superficially resembles the law in Australasia. Nevertheless, American discussion of the “privilege against self-incrimination” will usually involve the right to silence.

The terminological distinction in this thesis between the privilege against self-incrimination and the right to silence is not reflected in the United States. Nor is it reflected in Europe.

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<sup>68</sup> Berger, M. (2002) “American perspectives on self-incrimination and the compelled production of evidence.” *The International Journal of Evidence & Proof* 6(2): 218 at 219. On the other hand, the “self-incrimination privilege in Great Britain usually refers to the right of witnesses to refuse to answer incriminating questions”: Berger, M. (1984) “Rethinking Self-Incrimination in Great Britain.” *Denver Law Journal* 61(3): 507 at 507 n5.

<sup>69</sup> E.g. “no person shall be subject for the same offence to be twice put in jeopardy of life and limb”. However, civil proceedings might be contemplated elsewhere in the Fifth Amendment: e.g. the right “not to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”.

## (f) EUROPEAN CONVENTION

The European Convention does not mention the privilege or the right to silence at all. They have both been implied into Article 6 by the European Court of Human Rights. Under Article 6 an accused person has the right to a fair trial.

The European Court has devised the composite term “the right not to incriminate oneself and the right to silence”.<sup>70</sup> This unwieldy phrase is perhaps no more than a linguistic quirk. The German language often creates a new concept by combining two existing concepts in a single word.<sup>71</sup>

On the other hand, the composite phrase might import additional rights from the roman-civil tradition.<sup>72</sup> The European position is outside the scope of this thesis, but Article 6 will be mentioned again in Chapter IV in the context of international human rights. The question is whether in Australia and New Zealand the difference between the privilege and the right to silence is only semantic.

## (g) SUBSTANTIAL DIFFERENCE

According to this thesis, the difference is more than just semantic. If a clearer distinction had been made between the privilege and the right to silence, particular cases could have been decided more satisfactorily or simply.<sup>73</sup> However, that is

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<sup>70</sup> E.g. *Saunders v United Kingdom* (1996) 23 EHRR 313 at 337. However, the traditional version of the history of the privilege against self-incrimination was given in a concurring opinion by Judge Walsh at 344-5. He assumed that privilege to be the same as the Fifth Amendment privilege in the United States.

<sup>71</sup> E.g. *Schadenfreude* (pleasure in another person's misfortune); *Weltanschauung* (view of the world); *Zeitgeist* (spirit of the age); *Lebensraum* (space for living).

<sup>72</sup> E.g. Eriksen, M. (1996) “European Convention; the privilege against self-incrimination in criminal cases.” *Company Lawyer* 17(2): 55 at 56 (“In some jurisdictions the privilege of non self-incrimination embodies two main elements. The first is to remain silent, and the second is the option to perjure oneself unpunished”). Also see Eriksen, M. and T. Thorkildsen (1998) “The ban on self-incrimination after the Saunders judgment.” *Journal of Financial Crime* 5(2): 182 at 182 (“In most jurisdictions a suspect has the right to remain silent during criminal proceedings and he cannot be penalised for making false statements”: e.g. under ss 90 and 167(1) of the Norwegian Criminal Procedure Act).

<sup>73</sup> E.g. *State of Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121 at 173 (forcing builders to give statutory declarations breached their right to silence, not their privilege).

not the focus of this thesis. The important point is that the two concepts must be separated when looking at reasons for the privilege.

The confusion of terminology may reflect misunderstanding. Lord Griffiths, for example, said that the privilege against self-incrimination “is deeply embedded in English law”.<sup>74</sup> That statement was unexceptionable in itself.<sup>75</sup> However, Lord Griffiths used a similar phrase in another case which involved only the right to silence.<sup>76</sup>

Apparently, Lord Griffiths saw no reason to distinguish between the privilege and the right to silence. This was consistent with his comments in the *Tully* case.<sup>77</sup> However, it also meant that he searched less diligently in *Tully* for reasons to justify the privilege in civil proceedings. This diminished the authority of his view that the privilege was not justified in civil proceedings.

Even so, this thesis should not be too dogmatic about “correct” meanings. In legal philosophy, for example, privilege has a particular meaning which will be discussed in Chapter III.

## **(6) WORKING DEFINITIONS**

This section has shown the difficulty of definition in this area of the law.

Wherever boundaries are drawn, they will be open to criticism, particularly on the grounds of artificiality. However, working definitions will now be suggested to enable discussion of the privilege in civil proceedings involving private parties.

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<sup>74</sup> *AT & T Istel Ltd v Tully* [1993] AC 45 at 57.

<sup>75</sup> E.g. Dillon LJ in *Bishopsgate Investment Management Ltd (in prov liq) v Maxwell* [1993] Ch 1 at 38 (“so deeply entrenched in our law that any decision to curtail it or make it not available is essentially a political decision and a matter for Parliament”).

<sup>76</sup> *Lam Chi Ming v R* [1991] 2 AC 212 at 222 (“The privilege against self-incrimination is deep-rooted in English law and it would make a grave inroad upon it if the police were to believe that if they improperly extracted admissions from an accused”, those admissions could be used in criminal proceedings).

<sup>77</sup> *AT & T Istel Ltd v Tully* [1993] AC 45 at 57 (“The rule may once have been justified by the fear that without it an accused might be tortured into production of documents”).

The preferred definition of the privilege is based upon protection against self-incrimination. It does not include protection against exposure to non-criminal penalties. That will be covered by the separate term penalty privilege. The privilege and the penalty privilege do not include the protection traditionally given against forfeiture or ecclesiastical censure.

The privilege in civil proceedings covers compulsory disclosures in interlocutory civil proceedings, as well oral evidence from witnesses in civil trial proceedings. This thesis will address the problems which arise in both those areas. It will not deal with the privilege in administrative proceedings.

It will not deal with Lord Mustill's first category of right to silence. Nor will it address his third, fourth, fifth or sixth categories, because they involve only criminal proceedings. In effect, this thesis is about his second category which will be called the privilege and distinguished from the right to silence and penalty privilege.

## **(B) MODERN APPLICATION**

### **(1) NOT ONLY JUDICIAL**

Generally, the privilege applies in civil and criminal proceedings in Australian and New Zealand courts. In Australia it is even available in civil contempt proceedings.<sup>78</sup> Arguably, it should be "confined by principle and history to judicial proceedings".<sup>79</sup>

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<sup>78</sup> *Exagym Pty Ltd v Professional Gymnasium Equipment Company Pty Ltd* [1994] 2 Qd R 6.

<sup>79</sup> Brennan J in *Sorby v The Commonwealth* (1983) 152 CLR 281 at 321. He also expressed this view in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 357. He eventually decided to "defer" to the majority view in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 396. Also see McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company) at 147-151.

Nevertheless, it also applies in administrative proceedings. The High Court settled this in the early 1980s.<sup>80</sup> Since then, the privilege has been said in Australia to apply to “every situation where information is lawfully sought”.<sup>81</sup> The focus in this thesis is on the privilege in civil proceedings between private parties.

## **(2) GENERAL PRINCIPLES**

### **(a) BROAD APPLICATION**

Witnesses in civil cases can refuse to answer incriminating questions. Civil parties are in the same position as other witnesses. Unlike criminal defendants, civil parties can be compelled to give evidence.<sup>82</sup>

The privilege is available not only to witnesses answering questions during a civil trial but also to parties answering interrogatories or producing documents at an earlier stage in civil proceedings.<sup>83</sup> A claimant for the privilege does not have to show that the prosecution will certainly take place or will be successful. In a civil action for fraud or theft, for example, the defendant will usually have no difficulty showing the possibility of criminal prosecution.

### **(b) TENDENCY TO INCRIMINATE**

The courts have often discussed how great the danger of incrimination must be. The fear of incrimination must not be fanciful, but it is not necessary that criminal charges should already have been laid or that they should certainly lead to a conviction. Nor need the feared crime be serious. The NZLC proposed that the

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<sup>80</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

<sup>81</sup> Ligertwood, A. L. (2004) *Australian Evidence* (Sydney: Butterworths) at para [5.147].

<sup>82</sup> Heydon, J. D. (2004) *Cross on Evidence* (Sydney: Butterworths) at para [13020] (the defendant’s compellability is “beyond dispute”).

<sup>83</sup> *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253 at 257.

privilege should only be available if the feared crime was punishable by imprisonment.<sup>84</sup> This proposal was not implemented in the 2005 Evidence Bill.<sup>85</sup>

Ultimately, it is for the court to decide whether the danger of incrimination is sufficient.<sup>86</sup> This may involve questions of law. Foreign incrimination, for example, caused difficulties which required court decisions and even legislative provisions in some jurisdictions.<sup>87</sup> It is still unclear whether the fear of proceedings for contempt of court is a good ground for claiming the privilege.<sup>88</sup>

The disclosure does not itself have to be incriminating. The privilege may be claimed to avoid any disclosure which may lead to incrimination. For example, a disclosure may result in the discovery of derivative evidence which incriminates the discloser.

### (c) LINKS IN THE CHAIN

It has long been accepted that the privilege could be claimed in answer to a non-incriminating question, if it could “by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering”.<sup>89</sup> This

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<sup>84</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) para 278 (no privilege unless imprisonment is among the penalties for the feared criminal offence).

<sup>85</sup> New Zealand Government (2005). *Evidence Bill* (Wellington) clause 56(1)(b).

<sup>86</sup> *Ex Parte Reynolds, In Re Reynolds* (1882) 20 Ch D 294. One argument against the privilege in non-judicial proceedings is that there is no court to decide whether the claim is reasonable: Brennan J in *Sorby v The Commonwealth* (1983) 152 CLR 281 at 321 and *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 355.

<sup>87</sup> E.g. *Brannigan v Davison* [1997] AC 238 (foreign incrimination not enough to ground the privilege in New Zealand). Compare with s14(1)(a), Civil Evidence Act 1968 (UK) (incrimination expressly confined to British offences and penalties).

<sup>88</sup> Some British and Australian authorities suggest that it is: e.g. *Memory Corporation plc v Sidhu* [2000] 1 All ER 434 at 448; *Australian Competition and Consumer Commission v World Netsafe Ltd* (2003) 25 ATPR 41-919, 46,820 at 46,824.

<sup>89</sup> Cockburn CJ in *R v Boyes* (1861) 1 B & S 311 at 330 (121 ER 730 at 738). Also see *In Re Westinghouse Uranium Contract* [1978] AC 547 at 574. As early as 1823, Bentham noted that, although a criminal defendant in a continental court was not required to confess, “questions were put to him, which confirmed the other testimonies, or led to the discovery of new evidence”: Bentham, J. (1823) *Traite Des Preuves Judiciaire* (Littleton, Colorado: Fred B Rothman & Co) at 245.

principle enables the privilege to be claimed at an early stage in order to avoid providing any information at all.<sup>90</sup>

The principle also exposes the inadequacy of use immunity as a substitute for the privilege. The privilege provides protection against not only the material disclosed but also the consequences of disclosure.<sup>91</sup> Any substitute will inevitably be less effective than the privilege if, like use immunity, it protects the disclosure but not the consequences.

#### (d) PRODUCTION OF DOCUMENTS

The basic principle in Australasia is that the privilege applies to the production of documents. The contents of documents are protected as well as oral testimony. The privilege is a valid ground for refusal to produce documents which have incriminating contents. That basic principle applies in civil proceedings, but Australian statutes often remove the privilege from documents in administrative proceedings.

The NZLC proposed that the protection of the privilege should be removed generally from pre-existing documents and other real evidence. Chapter VIII will discuss the difficulties which removal of such protection caused in the United States. Chapter IX will conclude that the privilege should continue to apply to documents in Australasia.

### (3) CLAIMING THE PRIVILEGE

The claim for privilege must actually be put to the court to decide. Witnesses can be forced to attend the court by a subpoena. A subpoena *ad testificandum* requires testimony as a witness and a subpoena *duces tecum* the production of documents.

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<sup>90</sup> E.g. *Hamilton v Oades* (1989) 166 CLR 486 at 512.

<sup>91</sup> *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 443. However, the onus is on the witness to satisfy the court of the consequences: McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company) at 214-5.

The privilege can only be claimed upon attendance at the court.<sup>92</sup> It can only be claimed in respect of particular questions or documents. Blanket claims are generally not allowed.<sup>93</sup>

Similar principles apply in interlocutory proceedings. Claims must be made in respect of particular documents, interrogatories or questions. Blanket claims have caused particular difficulty. Many of the cases on discovery involve *in limine* applications. These cases accept that the privilege is available. The question is when it should be claimed. If self-incrimination results from merely identifying a document, even the initial list of documents does not have to be provided.<sup>94</sup>

If the privilege is not claimed, it is usually deemed to be waived. The resulting disclosure will normally be admissible in later proceedings.<sup>95</sup> However, an answer will not be admissible in criminal proceedings if it has been compelled in an earlier civil case, notwithstanding a justified claim of privilege.<sup>96</sup>

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<sup>92</sup> Australian judges sometimes vary this procedure: e.g. *Warman International Ltd v Envirotech Australia Pty Ltd* (1986) 67 ALR 253 at 267. Also see *Trade Practices Commission v TNT Management Pty Ltd* (1984) 56 ALR 647 at 697-9 (issue of the *subpoena* barred in action for civil penalties).

<sup>93</sup> However, repeated claims of privilege during cross-examination can apparently lead to the same result as a blanket claim: Kirby P in *Accidental Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 at 423 ("To demand a tedious repetition of questions, rebuffed every time by a claim of privilege which is upheld, would be pointless").

<sup>94</sup> E.g. when a statutory provision contains concurrent criminal and civil liability for directors. Compare two cases on s556(1) of the uniform Companies Code 1982: *EL Bell Packaging Pty Ltd v Allied Seafoods Ltd* (1990) 4 ACSR 85 (defendants not required to provide the list); *Southern Star Group Pty Ltd v Taylor* (1991) 4 ACSR 133 (list required).

<sup>95</sup> *R v Coote* (1873) LR 4 PC 599. The same principle applies if a bankrupt answers unauthorized questions: *R v Sloggett* (1856) Dears 656 (169 ER 885).

<sup>96</sup> *R v Garbett* (1847) 1 Den 236 (169 ER 227).



## (C) NATURE OF THE PROBLEM

### (1) INTRODUCTION

According to a British Committee in 1967, the privilege did not in practice cause “much difficulty or controversy in civil litigation”.<sup>97</sup> Currently, claims of privilege prevent civil courts from admitting evidence which would normally be available to them. That looks like a problem.

A legal problem can appear in different ways. One indication is regular discussion by the courts. In Australia, the privilege can be seen to be a problem in the lower civil courts on the basis of the number of cases mentioned in Chapter XI and XII. Similarly, the appeal courts in Australia and the United Kingdom have considered the privilege in numerous civil cases.

A further indication of a problem has been the length and complexity of the judgments. Above all, the problem has been evident from the repeated calls for legislative intervention.<sup>98</sup>

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<sup>97</sup> Law Reform Committee (1967) *Privilege in Civil Proceedings* (London: Law Reform Committee) para 6.

<sup>98</sup> E.g. for judicial calls for legislative change, see:

(1) *Tate Access Floors Inc v Boswell* [1991] Ch 512 at 532; *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310 at 338 (*Anton Piller* orders in fraud cases not involving copyright);

(2) *BPA Industries Ltd v Black* (1987) 11 NSWLR 609 at 613 (copyright);

(3) *Bishopsgate Investment Management Ltd (in prov liq) v Maxwell* [1993] Ch 1 at 38; *AT & T Istel Ltd v Tully* [1993] AC 45 at 57-58, 64 and 70 (interrogatories in support of *Mareva* injunctions);

(4) *Banque Brussels Lambert SA v Australian National Industries Ltd* (1990) (Unreported, NSW Supreme Court (NSW), Rogers CJ in Comm Div, 5th October) [1990] NSW LEXIS 10158, BC9001923; *Spedley Securities Ltd (in liq.) v Bond Brewing Investments Pty Ltd* (1991) 4 ACSR 229 at 248 (civil proceedings against directors of insolvent companies); and

(5) *Hamilton v Naviede* [1995] 2 AC 75 at 109; *Westpac Banking Corporation v Halabi* (1991) (Unreported in print, NSW Supreme Court, Powell J, 18 September) [1991] NSW LEXIS 9176; BC9101562 at [\*22]; *Pathways Employment Services v West* (2004) 212 ALR 140 at 155-157 (civil matters generally).

## **(2) LEGISLATIVE RESPONSE**

In the United Kingdom, the frustration of the courts has been increased by the failure of legislators to respond effectively to those calls.<sup>99</sup> In Australia, the legislators have responded by providing various procedures for statutory certification. Chapter XII will discuss the operation of those procedures and conclude that they have not completely solved the problem.

Certification has been most effective when used to compel the testimony of third party witnesses in civil trials. It has been less successful in interlocutory proceedings, mainly because of uncertainty over the underlying statutory authority. Chapter XII will discuss the case-law and the piecemeal nature of the legislation.

It is not surprising that most of the recent case-law on the privilege has concerned interlocutory remedies. That is the stage at which issues of privilege have traditionally arisen.<sup>100</sup> Much of the recent case-law has involved modern interlocutory remedies like *Mareva* injunctions and *Anton Piller* orders, but it is best to start with the traditional interlocutory remedies: discovery and interrogatories.

## **(3) INTERLOCUTORY REMEDIES**

### **(a) DISCOVERY AND INTERROGATORIES**

Australia adopted the British rule that a party may refuse to give discovery of a document because its contents are incriminating.<sup>101</sup> Discovery involves the production of documents by both parties. They exchange lists of relevant

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<sup>99</sup> E.g. Sir Mervyn Davies in *IBM United Kingdom Ltd v Prima Data International Ltd* [1996] 1 WLR 719 at 728 (“there are, as is well known, many other instances, all the remarks being unfavourable. However that may be the privilege may be exercised and usually has effect despite any distaste expressed”).

<sup>100</sup> Law Reform Committee (1967) *Privilege in Civil Proceedings* (London: Law Reform Committee) para 3.

<sup>101</sup> *Spokes v Grosvenor Hotel* [1897] 2 QB 124; *R v Associated Northern Collieries* (1910) 11 CLR 738.

documents in their possession, before producing the documents. A party cannot usually ask to be excused *in limine* from producing any documents at all because of the privilege. After the list is provided, the privilege can be claimed to refuse discovery on a document-by-document basis.<sup>102</sup>

Similarly, in Australia an answer to interrogatories need not be given if it would tend to incriminate the party giving it.<sup>103</sup> New Zealand has adopted similar principles.<sup>104</sup> The privilege clearly obstructs the normal course of civil litigation.

The purpose of compulsory pre-trial procedures is that the civil courts should have all the facts before them when they make their decisions. The privilege frustrates the traditional expectations of civil litigants. It also frustrates more modern remedies devised by the courts.

#### (b) MAREVA INJUNCTIONS

The British courts introduced *Mareva* injunctions to prevent defendants from evading their judgments. These injunctions enabled the assets of a civil defendant to be frozen to ensure that an adverse judgment could be enforced.<sup>105</sup> They were also used to stop foreign defendants removing local assets. They even prevented overseas assets being dissipated by a person subject to the court's jurisdiction.<sup>106</sup>

However, the effectiveness of these injunctions depended upon the applicant and the court having an accurate record of the defendant's assets. Details of the assets

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<sup>102</sup> *Spokes v Grosvenor Hotel* [1897] 2 QB 124 at 132-4.

<sup>103</sup> *Lamb v Munster* (1882) 10 QBD 110; *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395.

<sup>104</sup> *Holmes v Furness* (1884) 3 NZLR 416 at 417 (interrogatories); *Roskruge v Ryan* (1897) 15 NZLR 246 at 255 (discovery).

<sup>105</sup> Named after *Mareva Compania Naveira SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509; [1980] 1 All ER 213. Lord Denning regarded the *Mareva* injunction as "my most important contribution to commercial law", especially because "the House of Lords threw cold water on it" in 1979: (Denning, A. T. (1986) "Introduction." *The Denning Law Journal* [1986](1): 1 at 2). The decision took five years to find its way into the All England Reports.

<sup>106</sup> E.g. *Babanaft International Co SA v Bassatne* [1990] 1 Ch 13.

had to be given by the defendant, so that they could be frozen. This was where the privilege caused problems.

In the leading British case, for example, it was alleged that fraudulently obtained money had been concealed by a company by spending it.<sup>107</sup> An affidavit was required from the company's directors. They had to set out all dealings with the money and the assets into which it was converted. They also had to exhibit all documents relating to the dealings.

The Australian courts became as ready to grant *Mareva* injunctions as their British counterparts.<sup>108</sup> Initially, the privilege was not an obvious problem.<sup>109</sup> However, Chapters XI and XII will mention numerous *Mareva* cases in which the privilege was recognised as a problem in Australian courts.<sup>110</sup>

### (c) ANTON PILLER ORDERS

The privilege caused slightly different problems with *Anton Piller* orders. Like the *Mareva* injunction, this form of interlocutory order came from the British courts. It originated in intellectual property disputes. Materials which breached copyright could be sought and seized.

*Anton Piller* orders were initially designed to prevent the destruction of pirated material, to preserve evidence and to obtain details of suppliers in copyright cases.<sup>111</sup> It was therefore necessary to prove an intention to destroy evidence.<sup>112</sup> If

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<sup>107</sup> *AT & T Istel Ltd v Tully* [1993] AC 45, where in an action for \$5 million, *Mareva* injunctions and discovery covering 56 pages were ordered.

<sup>108</sup> E.g. on overseas assets: *Coombs and Barei Constructions Pty Ltd v Dynasty Pty Ltd and Coombs* (1986) 42 SASR 413 and *NAB v Dessau* [1988] VR 521.

<sup>109</sup> However, early signs were evident in *Sharp v Builders Labourers' Federated Union* [1989] WAR 138.

<sup>110</sup> E.g. the leading case of *Reid v Howard* (1995) 184 CLR 1. For more recent examples see *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436; *Pathways Employment Services v West* (2004) 212 ALR 140.

<sup>111</sup> *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

so, the defendant's premises could be searched. Documents could be removed and copied. Defendants could even be forced to answer interrogatories.

These orders were in particular danger of being abused because applications were usually made *ex parte*.<sup>113</sup> They were extended to fraud cases as a means of obtaining documentary evidence and other information. They were often combined with *Mareva* injunctions.<sup>114</sup>

The privilege did not offer a way of resisting *Anton Piller* orders in every respect. It was not available when they covered a broader range of activities than answers to questions and production of documents.<sup>115</sup> However, the *Rank* decision showed the vulnerability of these orders to the privilege when they required answers to questions and production of documents.<sup>116</sup>

In *Rank* the House of Lords accepted that the privilege was available to resist interrogatories and production of documents under *Anton Piller* orders.<sup>117</sup> The decision was made with some regret and with a strong recommendation for statutory use immunity.<sup>118</sup> In the United Kingdom this immunity was provided almost immediately but only in copyright cases.<sup>119</sup>

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<sup>112</sup> *Yousif v Salama* [1980] 1 WLR 1540 at 1542. Donaldson LJ dissented on the facts, describing the proof of the intention (at 1543) as "flimsy in the extreme".

<sup>113</sup> E.g. *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 76.

<sup>114</sup> E.g. in *Tate Access Floors Inc v Boswell* [1991] Ch 512, world-wide *Marevas* were granted against 11 defendants, who, in support, were required to swear affidavits disclosing the full value of their assets. By *Anton Piller* orders they were also required, in relation to the main proceedings, to allow access to search for documents, and to state where other documents were.

<sup>115</sup> E.g. *Twentieth Century Fox Film Corp Ltd v Tryrare* [1991] FSR 58 at 61 (privilege not applicable to order which involved the plaintiff's solicitor looking round the premises, remembering what was there and making a list). Also see *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 441, as explained in *Tate Access Floors Inc v Boswell* [1991] Ch 512 at 530 (privilege prevented search and seizure of the documents, but not of the infringing copies of the film). In Australia, see *Westpac Banking Corporation v Halabi* (1991) (Unreported in print, NSW Supreme Court, Powell J, 18 September) [1991] NSW LEXIS 9176, BC 910562.

<sup>116</sup> *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380.

<sup>117</sup> *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 445.

<sup>118</sup> *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 448.

<sup>119</sup> In s72 Supreme Court Act 1981 (UK).

The effect of the decision in *Rank* was that the value of *Anton Piller* orders in copyright cases “will be much reduced if not practically destroyed”.<sup>120</sup> Similarly, in fraud cases the privilege severely reduced the usefulness of *Anton Piller* orders. The British courts asked without success for statutory assistance.<sup>121</sup>

Relatively few reported Australian cases involved the privilege and *Anton Piller* orders.<sup>122</sup> That did not mean that plaintiffs were reluctant to apply for them.<sup>123</sup> In New Zealand these orders were the subject of the leading case on the privilege in civil proceedings.<sup>124</sup> The NZLC proposed specific provisions to cover the privilege in such cases.<sup>125</sup> Similar provisions were included in the 2005 Evidence Bill.<sup>126</sup>

#### **(4) TENSION**

##### **(a) DIFFERENT APPROACHES**

The term “tension” is often used in the context of the privilege.<sup>127</sup> Tension arises when compulsory procedures in civil proceedings require the disclosure of

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<sup>120</sup> Lord Fraser of Tullybelton in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 445.

<sup>121</sup> E.g. Browne-Wilkinson V-C in *Tate Access Floors Inc v Boswell* [1991] Ch 512 at 532 (the jurisdiction to grant them would to a large extent “become incapable of being exercised”).

<sup>122</sup> For older examples, see *Warman International Ltd v Envirotech Australia Pty Ltd* (1986) 67 ALR 253; *Authors Workshop v Bileru Pty Ltd* (1989) 88 ALR 211; *Polygram Records Pty Ltd v Monash Records (Australia) Pty Ltd* (1985) 72 ALR 35.

<sup>123</sup> For a recent example see *Pathways Employment Services v West* (2004) 212 ALR 140 at 141 (“Pursuant to the *Anton Piller* Order certain documents and a Notebook computer were surrendered”).

<sup>124</sup> *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461.

<sup>125</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 165.

<sup>126</sup> New Zealand Government (2005). *Evidence Bill* (Wellington) Clause 59. They provide for certification and resulting use and derivative use immunity. However, certification as a general concept has been omitted from the Bill.

<sup>127</sup> E.g. Law Reform Committee (1967) *Privilege in Civil Proceedings* (London: Law Reform Committee) para 6 (“existence of the privilege creates a tension between the civil and criminal procedure”); Harvey, D. J. (1996) “Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination.” *Waikato Law Review* 4(2): 60 at 68-69 (under heading “3.3 Tensions between Civil Proceedings and Criminal Prosecution”, the “existence of the privilege creates a tension between civil and criminal procedures”).

information which the right to silence would block in criminal proceedings. The privilege resolves that tension by giving priority to the requirements of the criminal proceedings.

The different approach of civil courts is reflected in their readiness to admit evidence illegally obtained. An old English *dictum* is still cited in Australia as authority for civil proceedings: "it matters not how you get it; if you steal it even, it would be admissible evidence".<sup>128</sup> The judge responsible for that *dictum* would probably have been surprised by its enduring authority in the English law of civil evidence.<sup>129</sup> Even in the United Kingdom, it is not certain that this was ever really the law, although Lord Denning thought that it was.<sup>130</sup> In Australia, civil courts will admit evidence obtained by misuse of compulsory powers, but subject to limitations which have still to be clarified.<sup>131</sup>

Unlike civil courts, criminal courts do not expect to have all possible evidence put before them.<sup>132</sup> It is accepted that criminal defendants should not be forced to assist in their own conviction by volunteering self-incriminating evidence. They can therefore refuse to testify in court in their own defence. They are allowed to

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<sup>128</sup> Crompton J in *R v Leatham* (1861) 8 Cox CC 498 at 501. E.g. it was recently cited by Landers J in *Southern Equities Ltd v Bond* (2001) 78 SASR 554 at 567.

<sup>129</sup> It is doubtful whether Crompton J was even referring to civil proceedings in *R v Leatham* (1861) 8 Cox CC 498 at 501. He was discussing derivative evidence resulting from a coerced confession to murder. Moreover, his remark was made during argument, not in his judgment. It was not mentioned at all in another report of the same case at 3 El & El 657 (121 ER 589). It does not appear at 121 ER 592, contrary to the statement by Landers J in *Southern Equities Ltd v Bond* (2001) 78 SASR 554 at 567 ("in *R v Leatham* (1861) 8 Cox CC 498 at 501; 121 ER 589 at 592 Crompton J said speaking of civil proceedings...").

<sup>130</sup> *Helliwell v Pigott-Sims* [1980] FSR 356 at 357 ("But so far as civil cases are concerned, it seems to me that the judge has no discretion...But, even if it was unlawfully obtained, nevertheless the judge is right to admit it in evidence"). This appeared in a judgment which Lord Denning delivered *ex tempore* ("off the reel", as he called it: Denning, A. T. (1986) "Introduction." *The Denning Law Journal* [1986](1): 1).

<sup>131</sup> E.g. *Pearce v Button* (1985) 60 ALR 537 at 552 (documents inadmissible if Customs officers extracted them by "threatening to shoot him"). The case-law is reviewed in *Southern Equities Ltd v Bond* (2001) 78 SASR 554. The limitations are acknowledged in *Mazinski v Bakka* (1979) 20 SASR 350 at 380-1 and *O'Neil v Wratten* (1986) 65 ALR 451 at 456. In jurisdictions adopting the Uniform Evidence Act, s138 makes admission of such new evidence less likely but stops short of excluding it absolutely.

<sup>132</sup> E.g. criminal proceedings are conducted under rules which enable the exclusion of particular types of prejudicial evidence.

testify if they think that it will help their case, but when testifying, they usually lose the protection of witness privilege.<sup>133</sup>

### **(b) SAFETY-VALVE**

The privilege can be seen as a safety-valve which resolves the tension between civil and criminal proceedings. The safety-valve operates, for example, when witnesses claim the privilege during a civil trial. Third party witnesses are obliged to answer questions truthfully in court. The tension is between that obligation and their right to remain silent if they are charged with criminal offences. The privilege allows the witnesses to remain silent if their answers could lead to self-incrimination.

The result is similar if the witness at a civil trial is one of the parties. Plaintiffs and defendants in civil proceedings can be compelled to testify and to answer questions truthfully. They must give answers, even if those answers are damaging to their civil case. Nevertheless, the privilege protects them from questions which might lead to self-incrimination.

The tension with criminal proceedings is greater in interlocutory civil proceedings than at the trial. The purpose of interlocutory proceedings is to ensure that civil courts make their decisions with all possible evidence before them. It is not surprising that issues of privilege have traditionally arisen in interlocutory proceedings. They also show the essential paradox in the operation of the privilege in civil proceedings.

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<sup>133</sup> E.g. Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 2, p236 at n186 cited legislative examples which removed the protection of the privilege from the defendant in relation to the offence charged.



## (5) PARADOX

The British courts have noted that the tension between civil and criminal proceedings leads to the paradox that criminality increases the ability to frustrate the civil remedies.<sup>134</sup> Not only does the privilege obstruct evidence which would normally be available to the civil courts. Worse still, the obstruction is of greatest benefit to those who least deserve it.

In civil proceedings between private parties, this paradox is most obvious when the privilege obstructs interlocutory procedures. Under these procedures both sides are required to disclose information in their possession, even if it is to their prejudice in the civil proceedings. Yet the privilege allows a defendant to avoid disclosing material which is likely to be prejudicial.

The privilege is an important tactical weapon which will usually benefit the defendant's case.<sup>135</sup> In the United Kingdom it has been abrogated in some civil proceedings.<sup>136</sup> However, in civil proceedings in Australasia the paradox largely remains. It reflects the fundamental problem of the privilege in civil proceedings.

Later chapters will mention legislative provisions which deal with that problem indirectly or seek to address parts of it. This thesis looks at the privilege in civil proceedings as a separate issue. The literature shows a reluctance to do that.

Chapter III will now survey that literature.

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<sup>134</sup> Lord Wilberforce in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 439 ("It may seem to be a strange paradox that the worse i.e. the more criminal, their activities can be made to appear, the less effective is the civil remedy that can be granted, but that prima facie is what the privilege achieves"). Also see *Bishopsgate Investment Management Ltd (in prov liq) v Maxwell* [1993] Ch 1 at 18; *Tate Access Floors Inc. v Boswell* [1991] Ch 512 at 532; and *AT & T Istel Ltd v Tully* [1993] AC 45 at 51.

<sup>135</sup> But not always: e.g. *Ex parte Symes* (1805) 11 Ves Jun 521 at 525-526 (32 ER 1191 at 1192) (party who invoked the privilege deemed still to have money received from a bankrupt because the privilege prevented him from showing how he had applied it).

<sup>136</sup> E.g. s72 Supreme Court Act 1981 (UK) and s31 Theft Act 1968 (UK).

## **CHAPTER III: APPROACH TO THE PROBLEM**

### **(A) LITERATURE SURVEY**

#### **(1) PURPOSE**

The purpose of this survey is to see how commentators and law reform bodies have addressed the problem of the privilege in civil proceedings. Relatively little has been written on the subject. The literature has concentrated on the right to silence. Numerous government reports have looked at the privilege, mostly in the context of administrative or civil penalty proceedings. The survey will start with the most important Australian reports.

#### **(2) AUSTRALIA**

##### **(a) REPORTS**

###### **(i) ALRC Reports on Evidence**

In the 1980s the Australian Law Reform Commission produced two Reports on Evidence: an Interim Report in 1985 and a Final Report in 1987.<sup>1</sup> Those Reports offered a good description of the legal position of the privilege in the different Australian jurisdictions at the time. Equally, they showed the limited value of describing the position in each of the nine Australian jurisdictions: policy issues became obscured in a mass of legislative detail.

These Reports formed the basis for the Evidence Act 1995 (Cth). This introduced certification procedures for witnesses in federal court proceedings. Certification

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<sup>1</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service); Australian Law Reform Commission (1987) *Evidence* (Canberra: Australian Government Publishing Service).

caused little comment in civil proceedings in the federal courts, but the corresponding procedures in the Evidence Act 1995 (NSW) led to numerous cases.

The case-law arose mainly because certification was unexpectedly applied in interlocutory civil proceedings by the New South Wales Supreme Court. Those judicial initiatives suggested a possible solution to some of the problems caused by the privilege in civil proceedings. They will be discussed in detail in Chapter XII.

### **(ii) ALRC Report on Penalties**

The ALRC recently produced a Discussion Paper and a Report on civil and administrative penalties.<sup>2</sup> Chapter 18 of the Report dealt with the privilege and penalty privilege in administrative and civil penalty proceedings. Because the focus of this thesis is on civil proceedings, it does not address the same issues as the ALRC Report.

Nevertheless, it is worth mentioning two statutory presumptions recommended by the Report. First, the privilege and penalty privilege should be presumed available to individuals giving oral evidence in judicial and administrative proceedings unless clearly and expressly excluded.<sup>3</sup> Second, use immunity should be presumed to be granted as a substitute if those privileges are excluded.<sup>4</sup>

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<sup>2</sup> Australian Law Reform Commission (2002) *Civil and Administrative Penalties: Civil and Administrative Penalties in Australian Federal Legislation* (Canberra: Australian Law Reform Commission) ; Australian Law Reform Commission (2003) *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Canberra: Australian Law Reform Commission) .

<sup>3</sup> Australian Law Reform Commission (2003) *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Canberra: Australian Law Reform Commission) Recommendations 18.1 (the privilege) and 18.2 (penalty privilege).

<sup>4</sup> Australian Law Reform Commission (2003) *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Canberra: Australian Law Reform Commission) Recommendation 18.3.

Both presumptions took a different approach from this thesis. The first presumption did not extend to documents.<sup>5</sup> The second did not provide for derivative use immunity.

### **(iii) Joint Review of Evidence Act**

Jointly with the New South Wales and Victorian Law Reform Commissions, the ALRC conducted a review of the reforms in the 1995 Evidence Acts.<sup>6</sup> In 2004 the ALRC published an Issue Paper.<sup>7</sup> In 2005 the Commissions jointly published a Discussion Paper which included nine pages relating to the privilege.<sup>8</sup>

The Discussion Paper proposed that the certification procedures under section 128 should be extended to cover pre-trial procedures. The Commissions produced a joint report in December 2005 which adopted that proposal but excluded pre-existing documents from its effect.<sup>9</sup> Chapter XII will discuss the proposal and the modification, both of which relate to the arguments discussed in this thesis.

### **(iv) QLRC**

The Queensland Law Reform Commission recently produced a Discussion Paper and then a Report on Statutory Abrogation of the Privilege.<sup>10</sup> Statutes abrogate the

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<sup>5</sup> Australian Law Reform Commission (2003) *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Canberra: Australian Law Reform Commission) Recommendation 18.3 (“no evidence given by any individual”).

<sup>6</sup> As the uniform legislation does not apply in Victoria, the VLRC’s involvement will “give Victoria the opportunity to learn how the Act is working in other jurisdictions”: Victorian Law Reform Commission (2005) *Review of Laws of Evidence* (Melbourne: Victorian Law Reform Commission) p9.

<sup>7</sup> Australian Law Reform Commission (2004) *Review of the Evidence Act 1995* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) .

<sup>8</sup> Australian Law Reform Commission (2005) *Review of the Uniform Evidence Acts* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) pp 403-412.

<sup>9</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) Recommendation 15-10.

<sup>10</sup> Queensland Law Reform Commission (2003) *The Abrogation of the Privilege against Self-Incrimination* (Brisbane: Queensland Law Reform Commission) ; Queensland Law Reform Commission (2004) *The Abrogation of the Privilege against Self-Incrimination* (Brisbane: Queensland Law Reform Commission) .

privilege often in administrative proceedings but only rarely in civil proceedings.<sup>11</sup> The Report was not therefore really about civil proceedings between private parties, but it made passing comments which will be relevant in later chapters.<sup>12</sup>

## (b) BOOKS

McNicol wrote a detailed Australian book on the privilege.<sup>13</sup> Her book covered other types of privilege, including legal professional privilege. It still dealt comprehensively with the privilege against self-incrimination in all nine jurisdictions.<sup>14</sup> McNicol's comprehensive approach led to frequent citation by Australian judges but reduced the value of her book in the long term.

The book was written in 1992 but was never updated. Much of McNicol's detail was rendered obsolete by the introduction of the uniform Evidence Act in some jurisdictions. In other jurisdictions it was overtaken by State Parliaments making changes to the local law of evidence.

McNichol's wealth of detail also tended to obscure the policy issues. Admittedly, some of her general observations about the privilege are echoed in this thesis. She emphasized, for example, the distinction between the privilege and the right to silence.<sup>15</sup>

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<sup>11</sup> Rare examples of statutory abrogation in civil proceedings are to be found in s72 Supreme Court Act 1981 (UK) and s31 Theft Act 1968 (UK). See ss178 and 179 Crimes Act 1900 (NSW) for a rare Australian example, which did not create "as wide an exemption" as the UK provisions (*Pathways Employment Services v West* (2004) 212 ALR 140 at 143-144).

<sup>12</sup> E.g. Queensland Law Reform Commission (2004). *The Abrogation of the Privilege against Self-Incrimination* (Brisbane: Queensland Law Reform Commission) para 9.112 (whenever the privilege is abrogated in civil proceedings, use immunity should be granted not only in criminal but in all subsequent proceedings); para 9.89 (derivative use immunity should only be granted in exceptional circumstances); and para 9.91 (the onus of proving the absence of immunity should then be on the party seeking admission of the evidence).

<sup>13</sup> McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company).

<sup>14</sup> Over 150 pages (with over 1000 footnotes) with numerous detailed descriptions of the important case-law and the legislation in each Australian jurisdiction.

<sup>15</sup> McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company) at 273 ("It should, however, be cautioned that the phrase 'right of silence' and the term 'privilege against self-incrimination' are not identical"). Also see McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company) at 139 ("It is,

She also advocated derivative use immunity.<sup>16</sup> However, unlike this thesis, she accepted the exaggerated fears expressed by the prosecuting authorities.<sup>17</sup> She was therefore pessimistic about the future of such immunity in Australia.<sup>18</sup>

Nor did she address directly the privilege in civil proceedings. On that subject, her book is no more than a useful source of information which may or may not be out of date. By concentrating on policy issues, this thesis will perhaps become outdated less quickly.<sup>19</sup>

### (c) CASE-NOTES

Numerous case-notes were written in the 1990s about two important High Court decisions involving the privilege in civil proceedings. The first was the *Caltex* decision.<sup>20</sup> That decision was the subject of at least thirty articles and case-notes, some of which will be mentioned in Chapter IV.<sup>21</sup> Most of them were simplified accounts of a complicated and unsatisfactory decision.<sup>22</sup>

The second important decision was in *Reid v Howard*.<sup>23</sup> The High Court's decision in that case addressed the problem of the privilege in civil proceedings

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therefore, submitted that the history and rationale of the privilege of an accused person should be treated separately from any possible rationale which may develop for the privilege against self-incrimination of witnesses and parties generally”).

<sup>16</sup> McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company) at 252-256.

<sup>17</sup> E.g. McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company) at 256 (the onus is on the prosecution to prove that evidence is not derivative).

<sup>18</sup> McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company) at 253.

<sup>19</sup> This was the approach taken by Ligertwood, A. L. (2004) *Australian Evidence* (Sydney: Butterworths) at para [5.181] (“this is not the place to catalogue the legislation which affects the privilege in specific cases”).

<sup>20</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

<sup>21</sup> E.g. Cotton, J. (1994) “The *Caltex* decision” *Company Lawyer* 15 (9) 277.

<sup>22</sup> However, at least one of them addressed broader issues than the privilege in civil proceedings: Hill, J. (1995) “Corporate rights and accountability - the privilege against self-incrimination and the implications of *Environment Protection Authority v Caltex Refining Co Pty Ltd*.” *Corporate and Business Law Journal* 7(2): 127 (what the denial of the privilege showed about the nature of companies).

<sup>23</sup> (1995) 184 CLR 1.

much more clearly than the *Caltex* decision. *Reid v Howard* has been discussed in a number of case-notes in Australia.<sup>24</sup>

The current problems were described better by Aitken in two recent case-notes concerning the privilege in interlocutory proceedings.<sup>25</sup> They discussed the New South Wales case-law and concluded that legislation was required, but they did not suggest what form it should take.<sup>26</sup> Chapters XI and XII will discuss the case-law and the legislation which was in fact passed.<sup>27</sup>

Aitken's case-notes were more helpful than the two most substantial Australian articles on the privilege in civil proceedings. They were written more than ten years ago: one by Magner in 1988, the other by Wood in 1990.<sup>28</sup>

#### (d) ARTICLES

Magner's article sought to address the problems with the privilege in interlocutory civil proceedings. She concluded that the courts should devise their own solutions. She suggested combining the court procedure used in New Zealand in the *Busby* case with the one used in Australia in the *Warman* case.<sup>29</sup>

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<sup>24</sup> E.g. Cotton, J. (1996) "The Privilege against Self-Incrimination in Australian Civil Proceedings: the Decision in *Reid v Howard*." *Journal of Financial Crime* 3(4): 400. Also see Aitken, L. (1994) "A Witness's Civil Immunity from Criminal Prosecution." *Sydney Law Review* 16: 394 for a discussion of the New South Wales Full Court decision which the High Court reversed (*Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118).

<sup>25</sup> Aitken, L. (2000) "Self-incrimination in Equity: *Reid v Howard* revisited in the light of *Vasil v National Bank*." *Law Society Journal* 38(3): 68; Aitken, L. (2005) "Self-incrimination privilege trumps sealed affidavits in equity." *Law Society Journal* 43(2): 67.

<sup>26</sup> Aitken, L. (2000) "Self-incrimination in Equity: *Reid v Howard* revisited in the light of *Vasil v National Bank*." *Law Society Journal* 38(3): 68 at 71 (legislative amendment needed to resolve tensions which were "acute, on-going, and ultimately irreconcilable"); Aitken, L. (2005) "Self-incrimination privilege trumps sealed affidavits in equity." *Law Society Journal* 43(2): 67 at 67 ("The matter clearly requires the intervention of Parliament. The cases make it clear that balancing the competing policies will be no easy task.").

<sup>27</sup> E.g. s87 Civil Procedure Act 2005 (NSW).

<sup>28</sup> Magner, E. S. (1988) "Dealing with Claims of the Privilege Against Self-incrimination in Civil Cases." *Australian Bar Review* 4(2): 149; Wood, P. M. (1990) "Collateral advantages of the privilege against self-incrimination in civil cases." *Commercial Law Quarterly*(March): 21.

<sup>29</sup> *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461; *Warman International Ltd v Envirotech Australia Pty Ltd* (1986) 67 ALR 253.

Those cases will be mentioned in Chapter V. Magner's approach differed from the certification procedure suggested in this thesis. One difference is that Magner's procedures were limited to providing use immunity. Only the disclosures themselves were immune from use in later criminal proceedings. The problem of derivative evidence was not addressed.

A more important difference is that, according to this thesis, a statutory framework is essential. Magner's argument was based upon a false premise. "If the legislature can substitute for the privilege the protection of a certificate, it is arguable that the courts can also".<sup>30</sup> The premise was rejected by the High Court in *Reid v Howard*. In Australia that case ruled out solutions devised purely by the courts.

Time has been kinder to Wood's article.<sup>31</sup> It even received praise from the New South Wales judiciary.<sup>32</sup> Wood suggested statutory use immunity as a substitute for the privilege in civil proceedings involving company directors. He assumed that an adequate substitute for the privilege could be provided by use immunity without derivative use immunity. That assumption will be challenged in Chapter V.

### **(3) NEW ZEALAND**

#### **(a) INTRODUCTION**

This thesis will not give a detailed account of the legislative provisions which currently cover the privilege in New Zealand. The discussion should be kept on

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<sup>30</sup> Magner, E. S. (1988) "Dealing with Claims of the Privilege Against Self-incrimination in Civil Cases." *Australian Bar Review* 4(2): 149 at 163.

<sup>31</sup> Wood, P. M. (1990) "Collateral advantages of the privilege against self-incrimination in civil cases." *Commercial Law Quarterly*(March): 21.

<sup>32</sup> Cole J in *Spedley Securities Ltd (in liq) v Bond Brewing Investments Pty Ltd* (1991) 4 ACSR 229 at 248.



the level of principle and policy. Its value would be greatly diminished if it addressed only the position of the privilege under current New Zealand law.

A decade ago, the NZLC proposed sweeping changes for the privilege. The NZLC proposals raised issues which are central to this thesis. Moreover, the New Zealand Parliament is considering the 2005 Evidence Bill which contains some of those proposals.<sup>33</sup>

### (b) NZLC

The proposals were first put forward in 1996 in a Preliminary Paper on the privilege.<sup>34</sup> Civil proceedings were covered specifically in Chapter 6 of that Paper. Proposals in that and other Chapters would affect directly and indirectly the operation of the privilege in civil proceedings in New Zealand. Many but not all of the proposals were adopted in the NZLC 1999 Report on Evidence.<sup>35</sup>

The 1999 proposals were to have been implemented in new evidence legislation, but they were not all included in the 2005 Evidence Bill. Nevertheless, the proposals provided a valuable contribution to the debate, particularly by way of comparison with the law in Australia. Some of them followed the law in Australia.<sup>36</sup> Others took the Australian law but made crucial changes.<sup>37</sup> Others bore no resemblance to the Australian position.<sup>38</sup>

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<sup>33</sup> New Zealand Government (2005). *Evidence Bill* (Wellington).

<sup>34</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) .

<sup>35</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) .

<sup>36</sup> E.g. the proposed removal of the privilege from companies.

<sup>37</sup> E.g. the NZLC proposed adopting the Australian certification procedures for witnesses, but left the ultimate control with the witness, instead of with the court, as in Australia. This proposal was omitted from the 2005 Evidence Bill: New Zealand Government (2005). *Evidence Bill* (Wellington).

<sup>38</sup> E.g. the effective abolition of penalty privilege and the removal of petty offences as a trigger for the privilege.

The NZLC proposals will not be discussed further in this literature survey because many of them will be covered in later chapters. For example, Chapter IX of this thesis will disagree with the NZLC proposal to remove the privilege from pre-existing documents.<sup>39</sup> This was one of the proposals adopted in the 2005 Evidence Bill.<sup>40</sup>

### (c) ARTICLES

In recent years only one substantial article has been published in New Zealand about the privilege in civil proceedings. This was written by Judge Harvey of the District Court.<sup>41</sup> He concentrated on “recent developments” in three jurisdictions.<sup>42</sup>

Some of Judge Harvey's views are echoed in this thesis: for example, his view that each of Lord Mustill's categories of right to silence should be examined separately.<sup>43</sup> Unfortunately, Judge Harvey did not really examine them separately. He argued that the privilege “is an integral part of the matrix of values and procedures that underpin the Anglo-American criminal justice system”.<sup>44</sup> That

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<sup>39</sup> E.g. New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) para 294.

<sup>40</sup> E.g. New Zealand Government (2005). *Evidence Bill* (Wellington) explanatory notes to Clause 59 (“Under the Bill, there is no privilege for pre-existing documents”).

<sup>41</sup> Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60. The article was just under 12,000 words and was based upon Judge Harvey's M.Jur. thesis at the University of Waikato.

<sup>42</sup> Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 60 (“recent developments in the law relating to the privilege against self-incrimination in the context of civil proceedings” and “the origins of the privilege and the current approaches toward it taken in Britain, Australia and New Zealand”).

<sup>43</sup> Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 72. Also see Harvey, D. J. (1995) "Silence and self-incrimination protections in the Children, Young Persons, and Their Families Act." *Butterworths Family Law Journal* 1(September): 247 at 247 (“There are three separate categories of silence”).

<sup>44</sup> Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 94.

bore a striking resemblance to the reasons which in an earlier article he expressed for the right to silence.<sup>45</sup>

Judge Harvey's conclusion was that the privilege in civil proceedings should not be disturbed.<sup>46</sup> His article was apparently published too late to be mentioned in the NZLC Preliminary Paper.<sup>47</sup> In any event, the NZLC did not apparently agree with his conclusion that the privilege should remain in all civil proceedings.<sup>48</sup>

In his article Judge Harvey referred only briefly to the substitution of any sort of statutory immunity for the privilege.<sup>49</sup> This thesis agrees with his view that the values of the privilege should be maintained in civil proceedings but argues that those values can be maintained by substituting derivative use immunity.

#### **(4) UNITED KINGDOM**

##### **(a) REPORTS**

The European Convention has taken British law in a different direction in the last decade, but it is worth mentioning two earlier Reports produced by the Lord

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<sup>45</sup> Harvey, D. J. (1995) "Right to silence and the presumption of innocence." *New Zealand Law Journal* (June): 181 (he similarly referred to the matrix of values and procedures in the justice system and concluded that "the exercise of silence by an accused, as a reflection and ingredient of that matrix, must remain unassailed").

<sup>46</sup> Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 94 (because "it is impossible to isolate the privilege and 'deal with it' without doing violence to the entire process and all its values and presumptions").

<sup>47</sup> However, it acknowledged Judge Harvey's "general advice on reform options": New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) at x.

<sup>48</sup> E.g. the "privilege should not be removed across the board in *all* civil proceedings": New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) p 53 (italics in original).

<sup>49</sup> Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 88 and 94. However, in an earlier article, he had called for derivative use immunity to be added to use immunity in s37(1) Children, Young Persons, and Their Families Act 1989, as substitute for the right to silence and the privilege in Family Group Conferences: Harvey, D. J. (1995) "Silence and self-incrimination protections in the Children, Young Persons, and Their Families Act." *Butterworths Family Law Journal* 1(September): 247 at 249.

Chancellor's Department. One covered the privilege in civil proceedings.<sup>50</sup> The other dealt with the application of the privilege to *Anton Piller* Orders.<sup>51</sup> Both recommended the extension of statutory use immunity to oral disclosures in all civil cases but not to documents.

Those recommendations were not implemented in spite of repeated judicial requests for statutory intervention. In 1999, it was "even possible that the bold step of abolishing the privilege without substituting any form of secondary privilege is being considered".<sup>52</sup> However, no legislative change resulted and the privilege continued to cause the same problems in civil proceedings as before.

#### (b) ARTICLES AND BOOKS

Numerous articles were written about Article 6 of the European Convention.<sup>53</sup> However, they did not directly address the problem of the privilege in civil proceedings. A few short articles dealt with particular aspects of the problem: for example, in the context of *Anton Piller* Orders.<sup>54</sup> The *Tully* decision also prompted numerous case-notes.<sup>55</sup>

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<sup>50</sup> Lord Chancellor's Department (1992) *The Privilege in Civil Proceedings* (London, Lord Chancellor's Department).

<sup>51</sup> Lord Chancellor's Department (1992) *Anton Piller Orders* (London, Lord Chancellor's Department).

<sup>52</sup> Tapper, C. F. H. (1999) *Cross and Tapper on Evidence* (London: Butterworths) at 438. This possibility was not raised again in Tapper, C. F. H. (2004) *Cross and Tapper on Evidence* (London: Lexis Nexis).

<sup>53</sup> E.g. Andrews, N. H. (1997) "Civil liberties and the pin-striped accused: the privilege against self-incrimination and human rights." *Cambridge Law Journal* 56(2): 243; Eriksen, M. (1996) "European Convention; the privilege against self-incrimination in criminal cases." *Company Lawyer* 17(2): 55; Eriksen, M. and T. Thorkildsen (1998) "The ban on self-incrimination after the Saunders judgment." *Journal of Financial Crime* 5(2): 182; Sarker, R. (1994) "Guinness - pure genius." *Company Lawyer* 15(10): 310; Yeung, K. (1997) "The Guinness Affair: Corporate Fraud and the Protection of Civil Liberties." *Companies and Securities Law Journal* 15(2): 127.

<sup>54</sup> Garnham, N. (1982) "Section 72 of the Supreme Court Act 1981: Its Effect on the Making of Anton Piller Orders." *New Law Journal* 132(6075): 983; Tettenborn, A. M. (1982) "Legislation to meet problem of Anton Piller orders and self-incrimination." *Company Lawyer* 3(3): 129.

<sup>55</sup> E.g. Andrews, N. H. (1993) "Privilege against self-incrimination and civil proceedings." *Cambridge Law Journal* 52(1): 42; Tapper, C. F. H. (1993) "A Suitable Case for Treatment." *Law Quarterly Review* 109(January): 48 and Cotton, J. (1994) "The House of Lords decision in *AT & T Istel v Tully*." *Company Lawyer* 15(1): 26.

Those articles will not be mentioned in this thesis, but Chapter VI and VII will refer to a historical article by Michael Macnair.<sup>56</sup> He wrote this article during his research for an Oxford D Phil thesis, which was later published as a book.<sup>57</sup> He argued that the origins of the privilege in civil proceedings were different from those of the right to silence in criminal cases. His work will be mentioned in detail in Chapters VI and VII because it is fundamental to the historical thrust of this thesis.

### (c) UNPUBLISHED THESES

Three unpublished doctoral theses from the United Kingdom should also be mentioned. They were written by Gauk, Tollefson and Andenas respectively.<sup>58</sup> None of them really addressed the problem of the privilege in civil proceedings.

Christina Gauk sought to apply Hohfeld's philosophical theories to the rights to silence of criminal defendants. As a preliminary exercise, she looked at the distinction between the privilege against self-incrimination and the right to silence in the United Kingdom, Canada and the United States. Chapter II noted that she found interchangeable use of the two phrases and a lack of uniform understanding of their meaning within or across the three jurisdictions.

Tollefson's thesis was about the rights of criminal defendants in the United Kingdom and Canada, even though "the privilege against self-incrimination" appeared in its title.<sup>59</sup> The best-known part of his thesis was the substantial

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<sup>56</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66.

<sup>57</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot).

<sup>58</sup> Gauk, C. (1990) Self-Incrimination and silence: position of the defendant in England, the United States and Canada. *Faculty of Law* (Cambridge: Cambridge University); Tollefson, E. A. (1975) The Privilege against Self-Incrimination In England and Canada. *Faculty of Law* (Oxford: Oxford University); Andenas, M. (1995) Enforcement of financial market regulation, problems of parallel proceedings. *Faculty of Law* (Cambridge: Cambridge University).

<sup>59</sup> Tollefson, E. A. (1975) The Privilege against Self-Incrimination In England and Canada. *Faculty of Law* (Oxford: Oxford University).

historical section.<sup>60</sup> It will be mentioned in later chapters because Australian courts have referred to it.

Andenas wrote his thesis in 1995 about the regulation of the British financial services industry through civil and administrative proceedings. He was surprisingly complacent about the situation.<sup>61</sup> He suggested several minor “adjustments”, including “a statute rendering inadmissible in criminal proceedings disclosure made in civil proceedings”.<sup>62</sup> He apparently had statutory use immunity in mind, not derivative use immunity.<sup>63</sup>

## (5) UNITED STATES

This thesis does not attempt to cover all aspects of the Fifth Amendment privilege in the United States, but later chapters will contain detailed treatment of several related topics, such as derivative use immunity and the application of the privilege to documents. The United States is only mentioned in this literature survey because of an article by Robert Heidt in 1982.<sup>64</sup> It filled a gap in the American

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<sup>60</sup> Tollefson, E. A. (1975) *The Privilege against Self-Incrimination In England and Canada. Faculty of Law* (Oxford: Oxford University) pp 1-85.

<sup>61</sup> Andenas, M. (1995) *Enforcement of financial market regulation, problems of parallel proceedings. Faculty of Law* (Cambridge: Cambridge University) at 324 (“the courts generally have found good solutions” and there were “no general principles that prevent further development”).

<sup>62</sup> Andenas, M. (1995) *Enforcement of financial market regulation, problems of parallel proceedings. Faculty of Law* (Cambridge: Cambridge University) at 322. He also refers to “a general statute on admissibility” at 324.

<sup>63</sup> Derivative use immunity is mentioned in passing: e.g. Andenas, M. (1995) *Enforcement of financial market regulation, problems of parallel proceedings. Faculty of Law* (Cambridge: Cambridge University) at 307 n70. However, its effect is not explored in that footnote or in the accompanying text.

<sup>64</sup> Heidt, R. (1982) “The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases.” *Yale Law Journal* 91(6): 1062.

literature on the privilege in civil proceedings.<sup>65</sup> Since then, little has been written on the subject.<sup>66</sup>

Heidt concentrated on forensic procedures. He showed no interest in the historical debate about the English origins of the privilege.<sup>67</sup> Nor did he spend much time on the broader policy objectives of the privilege.<sup>68</sup>

His aim was more practical. He thought that defendants were blocking civil discovery for forensic reasons, not because of any genuine concern about self-incrimination. He set out to devise procedures which would stop the privilege being used as a shield against plaintiffs. Unfortunately, his results were more modest. He could only suggest changes which "primarily reduce the disadvantage which plaintiffs suffer when the privilege weapon is used against them".<sup>69</sup>

Heidt's modest results did not detract from the thoroughness of his article.<sup>70</sup>

However, they did show that the forensic approach may not be much help in solving the problem of the privilege. This thesis adopts a broader approach based upon historical experience and policy.

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<sup>65</sup> Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1064 ("no one has systematically explored the operation of the privilege in the frequently complex battleground of civil litigation"). Heidt also wrote an authoritative article on the application of privilege to documents in criminal proceedings: Heidt, R. (1984) "The Fifth Amendment Privilege and Documents - Cutting Fisher's Tangled Line." *Missouri Law Review* 49(3): 439.

<sup>66</sup> Later articles were short and did not displace Heidt's analysis: e.g. Heller, G. W. (1995) "Invoking the Fifth in Civil Cases." *Trial* 31(6): 44; and Heller, G. W. (1995) "Is 'Pleading the Fifth' a Civil Matter?" *The Federal Lawyer* 42(8): 27.

<sup>67</sup> Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1083. He adopted the aphorism that the "history of the privilege does not settle the policy of the privilege" from Wigmore, J. H. (1961) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) para 2251 at 295. Yet he still described in detail the process by which the Fifth Amendment became part of the constitution of the United States: Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1083-1084.

<sup>68</sup> In civil proceedings between private litigants he found justification for the privilege in the "old woman's policy" rather than the "fox-hunter" policy favoured by this thesis: Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1084-1087.

<sup>69</sup> Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1135.

<sup>70</sup> His detailed examination of the forensic devices covered 71 pages with 261 footnotes.

## **(B) METHODOLOGY**

### **(1) THEORETICAL FRAMEWORK**

Although this thesis examines the law in depth, it is really a policy document. It suggests how the law can best achieve policy objectives. To inform policy, it examines the operation of the privilege in practice and the likely result if particular changes were made. The methodology includes examination of traditional primary legal sources, namely current case-law and legislation. Attention is also given to sources which lawyers consider secondary, such as government reports, journal articles and text-books.

That methodology relates only to modern material. Different methods were used to obtain historical material for this thesis. They will be described later in this chapter. Even so, historical research takes its place within the same theoretical framework. Once obtained, historical material is used to show how the privilege worked in an earlier context. Like the modern material, it indicates how the privilege would operate if changes were made.

### **(2) PRIMARY SOURCES**

Legislation is available more conveniently and accurately through the data bases than through traditional research methods in law libraries. The same is only partly true of case-law. This thesis refers to printed law reports whenever possible because references to electronic reports are unwieldy.

The data bases were helpful in showing cases which had not yet appeared, or would never appear, in the printed reports. Each data base had its own quirks, but generally the best approach was to search using the term "privilege against self-incrimination". The results were then checked individually to find the useful



cases. The narrowing of search terms did not generally lead to satisfactory results.<sup>71</sup>

### **(3) SECONDARY SOURCES**

Research for secondary material in law libraries followed more traditional methods.<sup>72</sup> These methods were supplemented by searches of the data bases using the terms “privilege against self-incrimination”, “right to silence” and “fifth amendment”. This produced lists of journal articles from Australia, New Zealand, the United Kingdom and the United States. These were then checked individually to find relevant articles.

Books, government reports, Second Reading speeches, Explanatory Memoranda and other secondary sources were also used. They are not usually considered primary sources but may be used to understand and interpret the law. Government reports may be authoritative as sources on policy. Second Reading speeches and Explanatory Memoranda may even be used by the Australian courts to interpret statutes.<sup>73</sup>

Modern technology has improved access to recent secondary sources. They could be found through the ever-increasing range of data bases, but traditional methods of legal research were needed for materials from before 1995.

## **(C) LEGAL PHILOSOPHY**

### **(1) POSSIBLE APPLICATION**

The concept of privilege might be thought to raise issues of legal philosophy, also known as analytical jurisprudence. Why, for example, is the privilege against self-

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<sup>71</sup> Searches for s128 certificates were a rare example of satisfactory results from narrowing search terms.

<sup>72</sup> E.g. following up references in footnotes and sifting through the bibliographies in books and government reports.

<sup>73</sup> E.g. under s15AA, Acts Interpretation Act 1901 (Cth).

incrimination a privilege, while the right to silence is a right? Levy raised this question in the preface to his book, which included in its title a reference to “The Right against Self-Incrimination”.<sup>74</sup>

Levy’s terminology was supposedly based upon ordinary usage of the terms “right” and “privilege”. Legal philosophers have given both these terms special meanings within their conceptual structures. Hohfeld included rights and privileges among his eight fundamental conceptions for stating legal problems.<sup>75</sup> Glanville Williams suggested an even more complex structure in which “liberty” replaced “privilege”.<sup>76</sup>

In spite of the complexity of these philosophical structures, they might appear worthy of discussion in this thesis. Legal philosophy should clarify not only terms but also the rationales underlying them. In 1964 Corbin accepted that Hohfeld's philosophical analysis “does much to define and clarify the issue that is in dispute”.<sup>77</sup> However, Corbin also concluded that Hohfeld's analysis “solves no problem of social or juristic policy”.<sup>78</sup>

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<sup>74</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at vii (“Although the legal profession customarily refers to the right against self-incrimination as a ‘privilege’, I call it a ‘right’ because it is one”). Others have also preferred the term “right against self-incrimination”: e.g. Zuckerman, A. A. S. (1986) “The right against self-incrimination: an obstacle to the supervision of interrogation.” *Law Quarterly Review* 102: 43 at 48; Geyh, C. G. (1987) “The Testimonial Component of the Right Against Self-Incrimination.” *Catholic University Law Review* 36(Spring): 611 generally.

<sup>75</sup> Hohfeld, W. N. (1919) *Fundamental legal conceptions as applied in judicial reasoning* (New Haven: Yale University Press) at 5. The other six conceptions were no-right, duty, disability, power, immunity and liability.

<sup>76</sup> Williams, G. (1968) “The Concept of Legal Liberty”. *Essays in Legal Philosophy*. R. Summers (Ed.) (Oxford: Basil Blackwell) 1 121 at 130 (Hohfeld’s meaning “not only runs counter to the popular use, but it departs from the technical legal use”). His structure involved liberties, rights and duties, as well as liberties not, no-rights, no-duties, no duties not and no rights not.

<sup>77</sup> Hohfeld, W. N. (1919) *Fundamental legal conceptions as applied in judicial reasoning* (New Haven: Yale University Press) at xi (Corbin’s foreword to the 1964 reprint).

<sup>78</sup> Hohfeld, W. N. (1919) *Fundamental legal conceptions as applied in judicial reasoning* (New Haven: Yale University Press) at xi (Corbin’s foreword to the 1964 reprint).

## (2) POLICY AND PHILOSOPHY

This thesis is a policy document. If Corbin's conclusion was right, a policy document should avoid legal philosophy. Corbin's conclusion was borne out by Christina Gauk's thesis, which was mentioned earlier in this chapter. She applied Hohfeld's theories to the right to silence of a criminal defendant in Canada.

Gauk's philosophical analysis was as obscure as her terminology.<sup>79</sup> The truth of Corbin's conclusion can be seen from the final section of her thesis. It addressed the practical question of whether adverse inferences should be drawn from the trial and pre-trial silence of a criminal defendant. Hohfeld was hardly mentioned.<sup>80</sup>

## (3) HOHFELD

Levy saw the Fifth Amendment as being obviously a right, not a privilege. He was a historian, but some legal philosophers after Hohfeld had a similar view. They portrayed the American Constitution as giving a right against self-incrimination which fitted into their philosophical structures.<sup>81</sup>

Yet Hohfeld himself did not see the privilege against self-incrimination in philosophical terms. He accepted that "in the law of evidence, the privilege

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<sup>79</sup> The right to silence was sometimes called the "privilege of silence": e.g. Gauk, C. (1990) *Self-Incrimination and silence: position of the defendant in England, the United States and Canada. Faculty of Law* (Cambridge: Cambridge University) at 73. The privilege against self-incrimination became the "right to exercise the privilege not to incriminate oneself": e.g. Gauk, C. (1990) *Self-Incrimination and silence: position of the defendant in England, the United States and Canada. Faculty of Law* (Cambridge: Cambridge University) at 85. The Hohfeldian right to silence was the defendant's "right not to be interfered with in not exonerating himself": e.g. Gauk, C. (1990) *Self-Incrimination and silence: position of the defendant in England, the United States and Canada. Faculty of Law* (Cambridge: Cambridge University) at 92.

<sup>80</sup> For rare mentions, see Gauk, C. (1990) *Self-Incrimination and silence: position of the defendant in England, the United States and Canada. Faculty of Law* (Cambridge: Cambridge University) at 325 and 429.

<sup>81</sup> E.g. Cook, W. W. (1919) "Hohfeld's Contributions to the Science of Law." *Yale Law Journal* 28(8): 721 at 725 n3 ("the statement that there is a "right" against self-crimination does indeed carry in addition to the idea of privilege, that of a right *stricto sensu*, and also when the general "right" in question is given by the constitution, of legal immunity, with correlative lack of constitutional power, i.e. disability, on the part of the legislative body to abolish the privilege and the right").

against self-crimination signifies the mere negation of a duty to testify”.<sup>82</sup> That is close to its technical meaning in law.

In any event, the value of Hohfeld’s ideas may be questioned. Forty years later, Corbin doubted whether Hohfeld’s analysis of legal relations and choice of terms were generally accepted.<sup>83</sup> Gauk’s difficulties with the right to silence suggest that legal philosophy helps little in resolving legal policy issues. Instead, this thesis will look to history for guidance.

## **(D) ROLE OF HISTORY**

### **(1) MEANING OF HISTORY**

It is worth establishing what is meant by the history of the privilege. Participants in the historical debate tend to use the terms “the history” and “the origins” of the privilege as if they mean the same thing. Strictly speaking, an account of the history of the privilege should include the origins, but references to the origins will cease to be accurate at some point in the history.

The shifting terminology can be seen in a recent dissenting judgment by a High Court judge. He dismissed the history of penalty privilege as irrelevant because it was “an exotic relic of legal history”.<sup>84</sup> Yet he did not appear to dismiss all history as irrelevant. He gave penalty privilege a lower priority than legal professional

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<sup>82</sup> Hohfeld, W. N. (1919) *Fundamental legal conceptions as applied in judicial reasoning* (New Haven: Yale University Press) at 46.

<sup>83</sup> Hohfeld, W. N. (1919) *Fundamental legal conceptions as applied in judicial reasoning* (New Haven: Yale University Press) at ix (According to Corbin, Hohfeld may have hoped that his analysis would be “generally accepted and followed in the course of time. Forty years of subsequent experience have shown that such a hope was in large part, but not altogether, vain”).

<sup>84</sup> Kirby J in *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 168 (“Excessive attention was paid in argument to the history of penalty privilege....Such exotic relics of legal history...throw but a candle’s light upon the issue in this appeal”).

privilege and the privilege against self-incrimination because “each of those privileges has a longer history in the law”.<sup>85</sup>

Later in the same judgment, the origins of a statutory provision were carefully traced to British legislation from the 1920s.<sup>86</sup> In one sense, everything from the past is history. Recent developments may or may not be as important as the origins or early history.<sup>87</sup>

Chapters VI and VII will show that the principles guiding the privilege in civil proceedings were settled not long after 1700. Those basic principles were not disturbed by the statutory developments of the mid-1800s.<sup>88</sup> When this thesis refers to the history of the privilege, it is primarily concerned with the early history. This has been the subject of many conflicting explanations.

## **(2) USE IN THIS THESIS**

Like the High Court judge, some commentators argue that “the history of the privilege against self-incrimination does little to illuminate the reasons for its existence”.<sup>89</sup> Another approach is to deal with the history by way of introduction, providing a perfunctory treatment which is not intended to be taken seriously.

This thesis, on the other hand, argues that the history of the privilege is important as a policy guide. The problems of the past were not so different from those of the present. With this in mind, the current position has been and will be considered before turning to the lessons of history. The history will be included in later

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<sup>85</sup> Kirby J in *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 179.

<sup>86</sup> Kirby J in *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 170-171.

<sup>87</sup> E.g. the history of the right to silence would be far less instructive if it failed to cover the statutory developments in the late 1800s and the 1900s.

<sup>88</sup> E.g. the abolition of disqualification rules and the fusing of common law and equity.

<sup>89</sup> Green, M. S. (1999) "The privilege's last stand: the privilege against self-incrimination and the right to rebel against the state." *Brooklyn Law Journal* 65(3): 627 at 63. Also see Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1083.

chapters. It is hoped that the similarity will become more evident if current problems are covered first.

Chapter VI and Chapter VII will deal exclusively with the historical aspects of the privilege. Other chapters will also have historical sections.<sup>90</sup> In those chapters, the historical arguments will be set out beside the modern legal aspect upon which they cast light.

Lawyers have a clear set of principles for deciding the weight and priority of different types of authority. Modern judges in Australia and New Zealand give more weight to statutes and prior decisions than to, say, the opinions of text-book writers. The same priorities do not necessarily apply when looking at the history of the privilege. Chapter I suggested that too much should not be claimed for history. This chapter will now consider what a study of the history can be expected to provide.

### **(3) VALUE OF HISTORY**

#### **(a) NOT HELPFUL**

One Australian judge suggested that judges should not approach the history of the privilege as if they were historians.<sup>91</sup> He still went on to mention “the hated procedure of the ex officio oath, formerly employed by the Court of Star Chamber and the Court of High Commission”.<sup>92</sup> In another Australian case, the majority in the High Court had a more consistent approach. They dismissed the history of the

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<sup>90</sup> E.g. Chapter IV (how the privilege was seen as a human right as part of the Fifth Amendment); and Chapter IX (how documents came to be covered by the privilege).

<sup>91</sup> Burchett J in *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503 at 525 (“as if this court were composed of historians delving into the distant sources at common law and in equity of the almost embryonic rules which appeared in the course of the seventeenth century in England”).

<sup>92</sup> *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503 at 525-6.

privilege as irrelevant and did not mention it again.<sup>93</sup> This approach has its attractions.

In the first place, it is not obvious why events in 1600 should provide solutions to current problems, given the extent of the social, cultural and technological changes since then. There are also other dangers, as Judge Iacobucci of the Canadian Supreme Court noted. “To search for the origins of the privilege is to embark upon a perilous journey” and the topic “is more amenable to an historical inquiry than to a legal one”. He questioned whether “the historical journey is worth the price”, especially “for those who lack Wigmore’s formidable expertise and skills”.<sup>94</sup>

At the very least, the historical cases should be seen in the context in which they were decided, but it might not seem worth the trouble of obtaining a sufficiently accurate picture of the historical context to inform modern policy. This thesis takes that trouble because so many judges have resorted to history when looking at the privilege. Why are historical explanations so often thought to be a necessary preamble to comments about the modern privilege?

#### (b) NOT BINDING

This thesis does not suggest that history is binding or even that it should be slavishly followed. An Australian judge recently referred to “the Holmesian axiom that in order to know what the law is we must first know what it has been”.<sup>95</sup> That does not mean that everything in the past is worth emulating.

In fact, Oliver Wendell Holmes himself did not advocate slavish adherence to the past. He thought it “revolting” to have no better reason for a rule of law than that

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<sup>93</sup> Gaudron, Gummow, Kirby and Hayne JJ in *Azzopardi v R* (2001) 205 CLR 50 at 65.

<sup>94</sup> *R v S (R/J)* [1995] 1 SCR 451 at 489-490.

<sup>95</sup> Gummow J in *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503 at 535.

it was laid down in the past.<sup>96</sup> Nevertheless, the true meaning of legal doctrines could be distorted if “we do not remember their history and origin”.<sup>97</sup>

Holmes saw knowledge of history as essential to the rational study of law, but only as the first step.<sup>98</sup> Wigmore saw it as part of the intelligent weighing of competing considerations.<sup>99</sup> If properly used, therefore, the early history of the privilege can provide guidance on current policy.

### (c) PERSPECTIVE

Many aphorisms extol the virtues of history. “Those who cannot remember the past are condemned to repeat it”.<sup>100</sup> “Without knowledge of the past, there is no way to the future”.<sup>101</sup> “The disadvantage of men not knowing the past is that they do not know the present”.<sup>102</sup>

These aphorisms suggest that historical perspective is enough in itself. Similarly, Tollefson’s account of the history of the privilege provided “perspective. Thus

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<sup>96</sup> Holmes, O. W. (1897) "The Path of the Law." *Harvard Law Review* 10(8): 457 at 478 (“It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past”).

<sup>97</sup> Holmes, O. W. (1931) "Misunderstandings of the Civil Law." *Harvard Law Review* 44(5): 759 at 764 (“A rule of law that has been gradually developed can only be understood by knowing the course of its development”).

<sup>98</sup> Holmes, O. W. (1897) "The Path of the Law." *Harvard Law Review* 10(8): 457 at 478 (“because without it, we cannot know the precise scope of rules which it is our business to know... When you get the dragon out of his cave onto the plain and in the daylight, you can count his teeth and claws and see what is his strength. But to get him out is only the first step”).

<sup>99</sup> Wigmore, J. H. (1891) "Nemo tenetur seipsum prodere." *Harvard Law Review* 5: 71 at 71 (“If we can throw the light of history upon this rule from its first appearance down to the time when it received its final shape, we shall be better able to judge how firm is its basis in our system of law, and how strong a claim, merely by virtue of its history and its lineage, it ought to have upon our respect. We may then weigh intelligently the various contesting considerations and be prepared to make a final adjustment of the claims of this principle to the important place which it now occupies”).

<sup>100</sup> Santayana, G. (1905) *The Life of Reason or The Phases of Human Progress* (New York: Charles Scribner's Sons) at 82. He was not talking about history at all. He was discussing the development of wisdom in young adulthood.

<sup>101</sup> These words were written by German Chancellor Gerhard Schroder in the Book of Remembrance before he accidentally turned off the eternal flame at the Holocaust Museum in Jerusalem: Australian (2000) "Schroder's slip-up". *The Australian* (2 November) (Sydney) 8.

<sup>102</sup> Chesterton, G. K. (1933) *All I Survey* (London: Methuen & Co Ltd) at 105 (“History is a hill or high point of vantage, from which alone men see the town in which they live or the age in which they are living”).



equipped, we will be better able to assess the operation and utility of the privilege".<sup>103</sup> His historical account comprised about a quarter of his thesis.<sup>104</sup> Unfortunately, the history of the privilege was not linked to the rest of his thesis, which contained an analysis of interviews about the right to silence.

The NZLC provided a "Brief History" at the start of its Preliminary Paper.<sup>105</sup> It made no further reference to the history. Judge Harvey devoted three pages to an account of the history, including an account of the historical debate over the right to silence.<sup>106</sup> Yet he saw history as being "of limited utility".<sup>107</sup> Moreover, the conclusion which he drew from history suggested that it provided perspective but little else.<sup>108</sup> Some judges have made more specific use of the history of the privilege.

#### **(4) USE BY JUDGES**

##### **(a) INTEREST**

Historians often quote Justice Frankfurter's comment that the "privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page

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<sup>103</sup> Tollefson, E. A. (1975) *The Privilege against Self-Incrimination In England and Canada. Faculty of Law* (Oxford: Oxford University) at 1.

<sup>104</sup> Tollefson, E. A. (1975) *The Privilege against Self-Incrimination In England and Canada. Faculty of Law* (Oxford: Oxford University). His first chapter of 33 pages consisted of a historical introduction intended to provide "perspective". His second chapter of 50 pages also drew heavily on historical authorities when discussing the scope and operation of what he termed the "privilege against self-incrimination", but what this thesis calls the right to silence in criminal proceedings.

<sup>105</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) paras 14 to 20. Paras 14 to 16 mentioned the right to silence debate describing it as a "disagreement about the precise origins of the privilege against self-incrimination" (para 14).

<sup>106</sup> Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 62-65.

<sup>107</sup> Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 93 ("To seek a rationale in history for today's relevance of the privilege is interesting but of limited utility, for it attempts to pare away the privilege from the development of other legal processes of which it has been an integral part").

<sup>108</sup> Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 93 ("If there is a common thread with history it involves the contest between the rights and inviolability of the individual and the interests of the State").

of history is worth a volume of logic' ”.<sup>109</sup> Yet Justice Frankfurter did not enunciate any profound, or even particularly clear, lesson which could be learnt from the history of the privilege.<sup>110</sup> Moreover, he was quoting Justice Holmes who had been addressing a point of taxation law long since forgotten.<sup>111</sup>

Australian judges have shown a surprising interest in the history of the privilege. This can be seen from their use of Tollefson's thesis.<sup>112</sup> They have referred to his introductory historical account but not to the analysis of interviews which comprised the rest of his thesis.<sup>113</sup>

## (b) PARTICULAR PURPOSES

Judges rarely look to early history for precedents which bind current law. In a recent High Court case one judge suggested that history had a binding effect on the current law on the right to silence.<sup>114</sup> The majority disagreed.<sup>115</sup>

More often, judges use the history of the privilege to support their view of what the current law is or should be. As another Australian judge said, “a significant

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<sup>109</sup> *Ullmann v United States*, 350 US 422 at 438 (1955). This was quoted by e.g. Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 431-2 and Helmholz, R. H. (1997) "Introduction". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 1 at 5.

<sup>110</sup> “For the history of the privilege establishes not only that it is not to be interpreted literally, but also that its sole concern is, as its name indicates, with the danger to a witness forced to give testimony”: *Ullmann v United States*, 350 US 422 at 438-439 (1955).

<sup>111</sup> *New York Trust Co v Eisner*, 256 US 345 at 349 (1920).

<sup>112</sup> Tollefson, E. A. (1975) *The Privilege against Self-Incrimination In England and Canada. Faculty of Law* (Oxford: Oxford University).

<sup>113</sup> E.g. Deane, Dawson and Gaudron JJ in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 528. Also see Marks J in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* [1984] VR 137 at 154 and in a much quoted article (Marks, K. M. (1984) “Thinking up' about the right of silence and unsworn statements.” *Law Institute Journal* 58(4): 360 at 373 n10.

<sup>114</sup> McHugh J in *Azzopardi v R* (2001) 205 CLR 50 at 109 (in his view, the repeal of legislation restored the common law as it stood on this subject nearly a century ago when such legislation was first enacted).

<sup>115</sup> Gaudron, Gummow, Kirby and Hayne JJ in *Azzopardi v R* (2001) 205 CLR 50 at 65 (“Whilst English and local legal history are undoubtedly of much interest, they do not in our view, dictate the emerging law on the subject of this judgment as it now appears in Australia”). The *Azzopardi* case concerned the comments which a judge may make to a jury about the failure of the accused to testify in criminal proceedings. This is an issue which is central to the right to silence but is outside the scope of this thesis.

element in the legitimacy of case-law based principle is that it embodies a measure of practical experience over time and varying circumstance”.<sup>116</sup>

The same judge held that, as a matter of history, the privilege developed before corporations existed and therefore should not be available to them.<sup>117</sup> He was not saying that history was binding. Rather, he was using history to support his view of the policies which justify the privilege.

He was not the first judge to note that the privilege originated before corporations.<sup>118</sup> He and the judges before him used history as an argument, as other judges use human rights: for example, the privilege is a human right and should not be available to a corporation because it is not a human.<sup>119</sup> Similarly, a judge might use statistical information to inform the policy of the privilege. Like an inaccurate statistic, bad history provides an inadequate basis for policy.

### (c) MISLEADING USE

Misleading use of history provides an even less satisfactory basis for policy. This involves judges selectively choosing bits of history to support their view of how the current law should look. Only a superficial effort is made to achieve historical accuracy.

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<sup>116</sup> Gummow J in *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503 at 535.

<sup>117</sup> Gummow J in *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503 at 543 and 550.

<sup>118</sup> E.g. Cole J in *Spedley Securities Ltd (in liq.) v Bond Brewing Investments Pty Ltd* (1991) 4 ACSR 229 at 247 (“The law regarding the right to silence and the right to freedom from self-incrimination evolved long before the evolution of corporations”). For a similar approach, see Bryson J in *Lombard Nash International Pty Ltd v Berentsen* (1990) 3 ACSR 343 at 346 (compulsory questioning of directors by liquidators “does not appear to me to be strange, unusual or potentially oppressive, as it seemed to judges of another age”).

<sup>119</sup> E.g. Murphy J in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 395; *Pyneboard v Trade Practices Commission* (1983) 152 CLR 328 at 346; *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 150.

As mentioned in Chapter I, the privilege in civil proceedings was dismissed by Lord Templeman and Lord Griffiths in the *Tully* case.<sup>120</sup> They were not necessarily dismissing it as archaic and unjustifiable in all civil proceedings. However, they made only a token effort to understand how the privilege came to exist in civil proceedings in the first place.<sup>121</sup>

Token use of history leads easily to this sort of brief definitive dismissal. History becomes just an excuse. The NZLC used history as an excuse when it proposed to make the privilege unavailable if the feared incrimination could not lead to imprisonment.<sup>122</sup>

The use of history has sometimes been so misleading as to conflict with the historical record and with commonsense. For nearly twenty years the conventional wisdom in the Australian High Court was that equity borrowed penalty privilege from the common law courts.<sup>123</sup> This startling proposition was taken from a judge who in 1864 relied upon a 1603 decision by Coke.<sup>124</sup>

Common law origins were found for penalty privilege because of a concern that its application was confined to discovery and other equitable procedures. The proposition was so startling that a High Court judge who adopted it in one case

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<sup>120</sup> *AT & T Istel Ltd v Tully* [1993] AC 45.

<sup>121</sup> E.g. Lord Griffiths in *AT & T Istel Ltd v Tully* [1993] AC 45 at 57 (“the rule may once have been justified by the fear that without it an accused person might be tortured into production of documents but those days are surely past and this consideration cannot apply in the context of a civil action”).

<sup>122</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) para 277 (“Many current applications of the privilege have moved far from the historical roots of the privilege. In the Commission’s view, there is a strained artificiality in modern applications of the privilege in which the potential detrimental effect of the incrimination involved is minimal”).

<sup>123</sup> *Pyneboard v Trade Practices Commission* (1983) 152 CLR 328 at 337 (“equity looked to the existing model of the common law and applied the rule which it had established”).

<sup>124</sup> Crompton J in *Pye v Butterfield* (1864) 5 B & S 829 at 838 (112 ER 1038 at 1042) relying upon *Dumpor’s Case* (1603) 4 Co Rep 119 b (76 ER 1110). His fellow judges chose simply to “abide by the principle on which this branch of jurisprudence has for centuries been administered in Courts of equity”: (1864) 5 B & S 829 at 837 (122 ER 1038 at 1042) *per* Cockburn CJ.

reconsidered it in another.<sup>125</sup> By then, the original concern had disappeared and, with it, the need for the historical excuse.<sup>126</sup>

#### (d) SUFFICIENT DEPTH

This thesis takes the approach that the history must be covered in sufficient depth to learn the valuable lessons which it has to offer. It is a matter of opinion what depth is sufficient. Lord Templeman and Lord Griffiths presumably thought that they knew enough about the history of the privilege to use it as the basis for valid statements of policy.

Judges in Australia regularly refer to the history of the privilege and the right to silence. How much historical research is needed to inform their views? Some judges researched the history in great depth, even publishing articles on the subject.<sup>127</sup> The litigants were spared the historical detail but had the benefit of the judges' historical insights.<sup>128</sup> Possibly, the same litigants wondered how judges using opposing historical theories about the privilege still managed to reach similar policy results.<sup>129</sup>

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<sup>125</sup> McHugh J in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 547 ("it is now settled that it was adopted by the Court of Chancery from the courts of law"). Compare this with his lengthy treatment in *Azzopardi v R* (2001) 205 CLR 50 at 90-102.

<sup>126</sup> *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503 at 522 per Burchett J ("the point does not seem to me significant").

<sup>127</sup> E.g. Davies, G. L. (2000) "The prohibition against adverse inferences: a rule without reason? - Part I." *Australian Law Journal* 74(1): 26; Davies, G. L. (2000) "The prohibition against adverse inferences: a rule without reason? - Part II." *Australian Law Journal* 74(2): 99. Also see Davies, G. L. (2000) "Application of Weissensteiner to direct evidence." *Australian Law Journal* 74(6): 371.

<sup>128</sup> E.g. Marks J in *Martin v Police Service Board* [1983] 2 VR 357 at 372-3: "The history of the privilege is too long to recount. It has, however, I think, real significance". He later published a much quoted article on the subject: Marks, K. M. (1984) "Thinking up' about the right of silence and unsworn statements." *Law Institute Journal* 58(4): 360 at 373 n10.

<sup>129</sup> E.g. compare Marks J in *Martin v Police Service Board* [1983] 2 VR 357; with McHugh J in *Azzopardi v R* (2001) 205 CLR 50. Both rejected the right to silence for policy reasons. Marks J relied upon the traditional historical views which were later revised by modern historians. McHugh J relied upon the contrary views of the revisionists.

### (e) PENALTY PRIVILEGE

The history of penalty privilege shows many of the above difficulties, but it also supports the historical argument put in this thesis. Brennan J looked in detail at the history of penalty privilege when deciding whether it should be available to companies.<sup>130</sup> He thought that the main aim of penalty privilege was not to protect the rights of the person against whom discovery was granted.<sup>131</sup> It was developed primarily as a check on discovery.<sup>132</sup>

Brennan J therefore concluded that penalty privilege should apply to companies, but his conclusion has been rejected in Australia.<sup>133</sup> His historical account was confined to penalty privilege. Even so, his reasons for Chancery creating penalty privilege were similar to the reasons given in this thesis for Chancery developing the privilege against self-incrimination.<sup>134</sup>

Lord Denning likewise put the historical argument for penalty privilege in terms used by this thesis for the privilege against self-incrimination. There “is, after all, good reason for retaining it - the same reason as lay behind its introduction centuries ago”.<sup>135</sup>

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<sup>130</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

<sup>131</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 519 (“The penalty privilege owes its existence not to the law’s historical protection of human dignity but to the limitation which the courts placed on the exercise of their powers”).

<sup>132</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 520 (“The policy which denies discovery in actions for a penalty is concerned more with the purpose for which discovery is sought than with the privilege of individual litigants”).

<sup>133</sup> *Trade Practices Commission v Abcco Ice Works Pty Ltd* (1994) 125 ALR 503.

<sup>134</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 519 (penalty privilege developed separately in Chancery “by analogy with the privilege against self-incrimination”).

<sup>135</sup> *In Re Westinghouse Uranium Contract* [1978] AC 547 at 564.

## (5) PARTICULAR PROBLEMS FOR LAWYERS

### (a) LAWYERS AND HISTORY

It is easy to criticise an unsupported historical opinion like that of Lord Griffiths.<sup>136</sup> It is more difficult when judges rely upon established historical theories. An analysis of the judgments is in danger of turning into a debate about the historical theories upon which they are based.

Besides, the nature of history is unfamiliar to lawyers. Disappointment awaits those who seek absolute truth in the history of the privilege. Post-modernist theories suggest that all history is partial and that truth is an illusion.<sup>137</sup> Lawyers struggle to find clear answers to even the most basic questions.

The emphasis on printed reports in this thesis is that of a modern lawyer. Historians have a different approach. This can be seen from Levy's view of Foxe's *Book of Martyrs*. In Levy's view the accuracy of the contents was less important than the fact that they were believed.<sup>138</sup>

The contents of Foxe's *Book of Martyrs* are fascinating. They have a timeless quality which in itself justifies the place of history in a policy document. Nevertheless, this thesis is a legal policy document. Like judges, it must focus not on perceptions but on the actual operation of the law. Unfortunately, the historical record is less complete than modern legal sources.

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<sup>136</sup> *AT & T Istel Ltd v Tully* [1993] AC 45 at 57.

<sup>137</sup> Young, R. C. (2001) *Postcolonialism: An Historical Introduction* (Oxford: Blackwell) at 390.

<sup>138</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 81 (it "would be a significant and reliable source for the right against self-incrimination, even if every word and every page were a complete fabrication. For Foxe's account was taken as authoritative in his own time and for long after").

## (b) INCOMPLETENESS OF RECORDS

Much still remains to be learnt about the history of the courts both of common law and equity. Bryson noted that “the vast majority of as yet unprinted manuscript reports are from the common law courts of Common Pleas and King's Bench”.<sup>139</sup> That leaves big gaps in the historical record of common law civil proceedings.

Equally incomplete is the history of Chancery. Holdsworth noted in the 1940s that thousands of volumes of Chancery records awaited analysis by historians.<sup>140</sup> In the 1960s Jones estimated that the records contained forty thousand Elizabethan Chancery cases.<sup>141</sup>

Some studies of Chancery records have been undertaken, but they have been statistical.<sup>142</sup> According to Macnair, “to add *doctrinal* information to that provided by the reports and treatises would require a different type of search”.<sup>143</sup>

## (c) USE BY THIS THESIS

This is not a history thesis. It spends little time on sources which historians consider to be important, such as practice books and treatises. In this respect, it differs from Macnair who included treatises among his core materials.<sup>144</sup> It also

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<sup>139</sup> Bryson, W. H., Ed. (2001) *Cases Concerning Equity and the Courts of Equity 1550-1660 (Vol I)*. Selden Society (Vol 117) (London: Selden Society) at xv.

<sup>140</sup> Holdsworth, W. (1944) *A History of English Law (Vol 5)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 262-4.

<sup>141</sup> Jones, W. (1967) *The Elizabethan Court of Chancery* (London: Oxford University Press) at 1 (“Furthermore, the nature of the records, their bulk and dispersion, ensures that it is highly unlikely that every facet can be discovered even for those cases which receive our close examination”).

<sup>142</sup> E.g. Horwitz, H. (1995) *Chancery Equity Records and Proceedings 1600-1800* (London: Her Majesty's Stationery Office) analysed the subject matter of Chancery proceedings and the social status of the plaintiffs.

<sup>143</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 41 n125 (emphasis in original). This is partly because the records include documents such as decrees, orders, master reports and certificates which provide little information about the reasons for the Court's decisions.

<sup>144</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 40 (his core materials were “reported cases and treatise literature relating to the courts of equity” between 1558 and 1714).



differs from judges who cited non-contemporaneous practice books to show the early history of the privilege.<sup>145</sup>

The historical chapters refer to numerous printed cases. A modern lawyer might think that the large number of reports shows comprehensive coverage, as if the research had been undertaken through one of the modern databases. In truth, these reports provide only the illusion of comprehensive coverage.

The research into primary sources was based upon citations in the secondary sources.<sup>146</sup> It was a sampling exercise limited to those citations. It was further restricted because several of the cases cited were not available.<sup>147</sup>

Most of the available cases appeared in the early twentieth century reprint series known as The English Reports. Those included approximately 12,000 Chancery cases from 1550. Even with that number of cases, a sampling exercise was involved.<sup>148</sup>

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<sup>145</sup> E.g. Gummow J in *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503 at 541-7 made use of practice books from the 1800s by Best, Bray, Wigram and Hare.

<sup>146</sup> E.g. the debate between Gray and Levy about the importance of Stowe MSS 424 made little sense without seeing a copy of the manuscript which they were discussing: see arguments in Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 244-246; rebutted by Gray, C. M. (1997) "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 47 at 69-70; and reasserted by Levy, L. W. (1997) "Origins of the Fifth Amendment and Its Critics." *Cardozo Law Review* 19(3): 821 at 824. The manuscript supported Gray's assessment that it "means practically nothing": Gray, C. M. (1997) "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 47 at 228 n45.

<sup>147</sup> E.g. the ecclesiastical cases cited by Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 32-37.

<sup>148</sup> Horwitz, H. (1995) *Chancery Equity Records and Proceedings 1600-1800* (London: Her Majesty's Stationery Office) at 84 ("since they were selected and printed because of their legal interest, they are not a representative sample of Chancery decided cases, much less of Chancery suits").

The English Reports have been supplemented by the recent publication of two Selden Society volumes.<sup>149</sup> In editing those volumes Bryson undertook the type of search which Macnair suggested. Bryson tried to identify every equity case in the available manuscript reports between 1550 and 1660. He still acknowledged the incompleteness of his search.<sup>150</sup>

#### (d) PROBLEMS WITH PRIMARY SOURCES

Even the printed reports contain obvious anomalies which cast doubt upon their reliability. Some were caused by the poor quality of the unprinted reports, particularly those from before 1600. The editors of the printed versions had to overcome numerous difficulties including poor handwriting, random use of shorthand expressions and the bad state of the manuscripts.

In unprinted reports, the spelling of English words was inconsistent even within a single sentence.<sup>151</sup> The spelling of names in print was just as unreliable. Even a printer spelled his own surname in eleven different ways in books which he printed.<sup>152</sup> It is not surprising that in printed reports the parties were not always clearly identified.<sup>153</sup>

The dating of cases was also unreliable. Substantial discrepancies arose because of the use of regnal years which started from the date of death of the previous

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<sup>149</sup> Bryson, W. H., Ed. (2001) *Cases Concerning Equity and the Courts of Equity 1550-1660 (Vol I)*. Selden Society (Vol 117) (London: Selden Society); Bryson, W. H., Ed. (2001) *Cases Concerning Equity and the Courts of Equity 1550-1660 (Vol II)*. Selden Society (Vol 118) (London: Selden Society): e.g. including the first available printed reports of *Loveday v Skarming* (1595) 117 SS 242 Case No 118-[84] and *Bullock v Hall* (1607) 117 SS 346 Case No 133.

<sup>150</sup> Bryson, W. H., Ed. (2001) *Cases Concerning Equity and the Courts of Equity 1550-1660 (Vol I)*. Selden Society (Vol 117) (London: Selden Society) at *xiii* ("some equity reports have been missed, and therefore what is printed here is a selection consisting of all that I could identify and not a complete corpus").

<sup>151</sup> Bryson, W. H., Ed. (2001) *Cases Concerning Equity and the Courts of Equity 1550-1660 (Vol I)*. Selden Society (Vol 117) (London: Selden Society) at *liii*.

<sup>152</sup> Richard Tottell: see Bryson, W. H., Ed. (2001) *Cases Concerning Equity and the Courts of Equity 1550-1660 (Vol I)*. Selden Society (Vol 117) (London: Selden Society) at *liii* n250.

<sup>153</sup> E.g. Wasorer, Vavator, Wooforer and Waserer are some of the versions of the name of the defendant in *Roe v Waforer* mentioned in Chapters VI and VII.

monarch.<sup>154</sup> This caused particular difficulty with the many cases known only as *Anonymous*.

Differences of one year were unavoidable because of the discrepancy between Old Style and New Style dates.<sup>155</sup> The conventional way round this problem was the unwieldy device of showing both years for dates between 1 January and 25 March.<sup>156</sup> This thesis departs from that convention by rendering such dates in New Style.<sup>157</sup>

A final surprise for a lawyer who is not a legal historian is the use of Law French in both printed and unprinted reports.<sup>158</sup> This was an odd combination of English, French and occasionally Latin words.<sup>159</sup> Judges and lawyers in the 1500s and 1600s actually preferred to use this bizarre pseudo-foreign language to record the facts, law and decisions in cases in which they were interested.<sup>160</sup>

## (6) CONCLUSION

Courts, law reform bodies and commentators have mentioned the privilege in civil proceedings, but none of them has treated it as a separate concept with its own rationale and its own history. The next chapter will show that there are special reasons why the privilege is needed in civil proceedings.

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<sup>154</sup> E.g. confusion between kings caused the English Reports to date *Eland v Cottington* as 1606. Macnair's interpretation of "6 Car" seems preferable, giving the date as 1628.

<sup>155</sup> Duncan, D. E. (1999) *The Calendar* (London: Fourth Estate Ltd) at 311. Dates between 1 January and 25 March were treated as part of the previous year in Old Style. New Style was introduced in England by statute in 1752 with the modern Gregorian calendar.

<sup>156</sup> E.g. the Perjury Act 1562-3 was passed in January 1563.

<sup>157</sup> E.g. following Bryson, W. H., Ed. (2001) *Cases Concerning Equity and the Courts of Equity 1550-1660 (Vol I)*. Selden Society (Vol 117) (London: Selden Society) at *liv*.

<sup>158</sup> E.g. *Bullock v Hall* (1607) 117 SS 346 Case No 133.

<sup>159</sup> The result is irresistibly reminiscent of the Franglais of the modern humorist Miles Kington: e.g. Kington, M. (1987) *The Franglais Lieutenant's Woman* (London: Penguin)

<sup>160</sup> Their preference was particularly surprising because "it is clear from both the vocabulary and the syntax that although writing in law French the reporters were thinking in English". Bryson, W. H., Ed. (2001) *Cases Concerning Equity and the Courts of Equity 1550-1660 (Vol I)*. Selden Society (Vol 117) (London: Selden Society) at *lii*. The *nemo tenetur* maxim had several versions, including "null est bound d'accuse luy mesme": see Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 70 n153.

## **CHAPTER IV: NEED FOR THE PRIVILEGE IN CIVIL PROCEEDINGS**

### **(A) OUTLINE OF ARGUMENT**

Chapter II distinguished the privilege from the right to silence. This chapter will concentrate on the need for the privilege in civil proceedings. It will not go into the reasons for the right to silence in criminal proceedings.

Nevertheless, the main argument in favour of the privilege in civil proceedings presupposes the existence of the right to silence in criminal proceedings.

Although not clear in every respect, the right to silence means that the prosecution can only obtain evidence from the accused in particular ways. Evidence cannot generally be obtained by compulsion from the accused unless the legislature has limited the right to silence in clear terms.

This chapter will argue that the protection provided by the right to silence in criminal proceedings would be unduly reduced if the privilege did not exist in civil proceedings. Evidence compelled for the civil proceedings would become available to the prosecution for criminal proceedings. Even if this was authorised by legislation, it would be objectionable.

Modern courts still hear complaints of “fishing expeditions”. The historical chapters will describe how early Chancellors objected to their compulsory procedures being used to provide evidence for criminal cases. This chapter will argue that in a similar way prosecutors would exploit compulsory civil procedures if the privilege did not exist in civil proceedings. Examples will be given to show how such practices would be detrimental to the administration of justice.

This is different from the argument that the absence of the privilege in civil proceedings could result in unfairness to the discloser, although the two arguments are related. The policy argument does not deny that human rights should be protected. If the privilege controls abuses by the State, the protection of human rights must be improved.

The argument of this thesis is that the reasons for the privilege do not really depend upon whether it has been or should be elevated to the status of a human right. Nevertheless, this chapter will deal with the human rights argument first as a comparatively minor justification for the privilege in civil proceedings between private parties.

## **(B) PRIVILEGE AS HUMAN RIGHT**

### **(1) OLD WOMAN'S REASON**

This chapter will not attempt an exhaustive analysis of the numerous justifications suggested for the privilege.<sup>1</sup> However, it will deal with two general categories which follow Reasons suggested by Bentham. Their meaning has been modified in order to provide a convenient framework for discussing the two main arguments for the privilege.<sup>2</sup>

The first category, termed the Old Woman's Reason, addresses primarily the rights of the discloser. The main purpose of the privilege is seen as the protection of those rights. The second category, termed the Fox-Hunter's Reason, is aimed

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<sup>1</sup> E.g. the various Due Process Natural Law Theories suggested by Theophilopolous, C. (2003) "The Anglo-American Privilege Against Self-Incrimination and the Fear of Foreign Incrimination." *Sydney Law Review* 25(3): 305.

<sup>2</sup> E.g. see Theophilopolous, C. (2003) "The Anglo-American Privilege Against Self-Incrimination and the Fear of Foreign Incrimination." *Sydney Law Review* 25(3): 305 at 315 and 317. His Personality-based theories resemble the Old Woman's Reason, whereas his Instrumental Theory is like the Fox-Hunter's Reason.

towards the general good rather than the individual rights of the discloser. The privilege is seen essentially as a check on procedures.

Bentham's Old Woman's Reason is adapted here to summarise the human rights justification for the privilege.<sup>3</sup> He ironically saw it as "hard upon a man to be obliged to criminate himself".<sup>4</sup> Removal of the privilege can be seen as hard on parties in civil cases.

Not everyone has sympathy for civil parties when they testify on their own behalf.<sup>5</sup> However, even with the privilege, they have hard choices to make.<sup>6</sup> Furthermore, in Australia they can be forced by subpoena to give evidence. In those circumstances, removal of their privilege "smacks unpleasantly of blackmail".<sup>7</sup>

Heidt thought that the Old Woman's Reason justified the privilege in civil proceedings between private parties.<sup>8</sup> This thesis does not reject totally the values

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<sup>3</sup> See Goldberg J in *Murphy v Waterfront Commission of New York Harbor*, 378 US 52, 55 (1964) ("our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt").

<sup>4</sup> Bentham, J. (1827) *Rationale of Judicial Evidence* (New York: Russell & Russell Inc) p452 ("The essence of this reason is contained in the word hard").

<sup>5</sup> E.g. Maguire, J. (1947) *Evidence: Commonsense and Common Law* (Chicago: Foundation Press) at 103 (the privilege "does not arouse lively sympathy as applicable to a civil litigant making up his mind whether to take the stand on his own behalf").

<sup>6</sup> E.g. should they withhold information which would help their civil arguments but which is potentially incriminating? See Templeman LJ in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 423 ("if a defendant wishes to maintain a plausible defence to the civil suit, he will waive the privilege and give frank answers to the interrogatories and full discovery"). Also see *Ex Parte Symes* (1805) 11 Ves Jun 521 (32 ER 1191) (petitioner claims privilege in bankruptcy proceeding).

<sup>7</sup> Magner, E. S. (1988) "Dealing with Claims of the Privilege Against Self-incrimination in Civil Cases." *Australian Bar Review* 4(2): 149 at 155.

<sup>8</sup> Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1085-1086 ("The policy which applies with most force in private civil cases is known as the 'old woman's policy'"); Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1087 ("the desire to avoid the 'cruel trilemma', if nothing else, requires that the privilege remain available in civil cases").

underlying the Old Woman's Reason. However, it puts them in the broader context which is provided by the Fox-Hunter's Reason.<sup>9</sup>

## (2) DIFFERENT FOCUS

The focus of the Old Woman's Reason is on the position of the discloser. The function of the privilege is primarily to protect the discloser from the harsh consequences of the compelled disclosure. In this role the privilege has been characterised as a fundamental human right. It has even been included in the New Zealand Bill of Rights Act.

In Australia its importance may have been only in "the rhetoric of rights".<sup>10</sup> The courts have stated repeatedly how important it is. In practice they have been more diligent in defending other less worthy rights.<sup>11</sup>

Nevertheless, the privilege is "more than a rule of evidence - it is a common law substantive right".<sup>12</sup> It is "now seen to be one of many internationally recognized human rights".<sup>13</sup> The recognition in international treaties will be discussed later in this chapter. The elevation of the privilege to a human right in Australia probably owes more to its status in the United States, where it is a fundamental constitutional right under the Fifth Amendment.

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<sup>9</sup> See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 528 ("Although the privilege against self-incrimination may reflect a desire to protect personal freedom and may be classified as a human right, it operates within a broader context").

<sup>10</sup> *Sorby v The Commonwealth* (1983) 152 CLR 281 at 314.

<sup>11</sup> The same paradox was noted in the United Kingdom by Heydon, J. D. (1971) "Statutory Restrictions on the Privilege Against Self-Incrimination." *Law Quarterly Review* 87(April): 214 at 239.

<sup>12</sup> Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) para 2.1.3.

<sup>13</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 498. Also see *Murphy J in Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 346 and *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 150; and Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 1, para 852.

### **(3) FIFTH AMENDMENT**

#### **(a) WHY LOOK AT AMERICAN HISTORY?**

This chapter will deal briefly with the enactment of the Fifth Amendment, because the constitutional status of the privilege has carried so much weight in Australia. As Chapters VI and VII will show, most of the debate on the history of the privilege has taken place in the United States, but little of that debate has been about American history. It has not been suggested that the privilege developed in the American colonies independently of its British origins.<sup>14</sup>

Surprisingly, the Fifth Amendment caused little stir when it was passed. The courts initially treated it as stating the existing common law on self-incrimination. Even as the privilege developed, it was not really the product of the draftsman of the Fifth Amendment. It was the result of broad interpretation by the US Supreme Court.

Chapter VIII will show how the US Supreme Court has been struggling with the problem of the privilege and documents for more than a century. Some judges and commentators suggested returning to the original intentions of the Founding Fathers. In fact, those intentions were far from clear.

#### **(b) LACK OF BACKGROUND INFORMATION**

There has been little academic debate about how the Fifth Amendment came to be included in the Bill of Rights and therefore in the Constitution. Levy provided the

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<sup>14</sup> This is surprising because in 1642 the American colonies were already using the *nemo tenetur* maxim which was closely linked to the development of the privilege, as Chapter VI will show. The maxim is mentioned twice in correspondence between the Governor of Boston and his ministers about the powers of inquisition given to magistrates in pre-trial criminal proceedings: Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 635 n1.



fullest account of how it was actually passed.<sup>15</sup> His account has been generally accepted by other commentators.<sup>16</sup> It has also been adopted by the judiciary.<sup>17</sup>

Little contemporary evidence survives. James Madison drafted the Fifth Amendment but gave no explanations and left no records showing his intentions.<sup>18</sup> The Fifth Amendment caused little debate when it passed through Congress.<sup>19</sup> The lack of debate was particularly surprising because an apparently important change was made to the Fifth Amendment in the Committee stage in the House of Representatives.

As a result of the change, the prohibition against being compelled “to be a witness against himself” was restricted to criminal cases. John Laurance saw some degree of conflict with “laws passed” if the prohibition applied in civil cases.<sup>20</sup>

Laurance's amendment was passed unanimously and the self-incrimination clause

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<sup>15</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 422-427.

<sup>16</sup> E.g. Moglen, E. (1997) "The Privilege in British North America: The Colonial Period to the Fifth Amendment". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 109 at 136-138 gives a similar account. He even cites Levy in his footnotes (at 258 n109). Also see Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1082-1083.

<sup>17</sup> E.g. *United States v Hubbell*, 530 US 27, 53 n3 (2000).

<sup>18</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 423; Moglen, E. (1997) "The Privilege in British North America: The Colonial Period to the Fifth Amendment". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 109 at 138.

<sup>19</sup> Moglen, E. (1997) "The Privilege in British North America: The Colonial Period to the Fifth Amendment". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 109 at 138 (“the legislative history of the Fifth Amendment adds little to our understanding of the privilege”).

<sup>20</sup> Laurance is thought to have had in mind section 15 of the 1789 Judiciary Act as the “laws passed” which created the conflict. Section 15 retained “the ordinary rules of proceeding in chancery” for the production of relevant documents by parties in civil proceedings. The problem is that it had only been “passed” by the Senate. The House of Representatives passed it later: Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 425-426; Moglen, E. (1997) "The Privilege in British North America: The Colonial Period to the Fifth Amendment". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 109 at 258 n109.

was accepted by the Senate in the restricted form.<sup>21</sup> The restriction to criminal proceedings appeared to be a substantial limitation, but in the long term Laurance's amendment had little practical effect on the scope of the Fifth Amendment.

### (c) CONTEXT

It is easy to forget that the self-incrimination clause formed only a small part of the Fifth Amendment. The Fifth Amendment addressed numerous other major concerns as well as self-incrimination in criminal proceedings.<sup>22</sup> Some of the Founding Fathers, notably Thomas Jefferson, had learnt from experience that important rights had to be enshrined in writing. The Bill of Rights, which included the Fifth Amendment, reflected that experience by addressing complaints which had been made against the former colonial masters.

The right to jury trial was central to these complaints. It was expanded in some State Constitutions to a cluster of legal rules known as the "trial rights cluster".<sup>23</sup> The rule against self-incrimination took its place among these trial rights.<sup>24</sup> Other

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<sup>21</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 424-427; Moglen, E. (1997) "The Privilege in British North America: The Colonial Period to the Fifth Amendment". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 109 at 138.

<sup>22</sup> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

<sup>23</sup> Moglen, E. (1997) "The Privilege in British North America: The Colonial Period to the Fifth Amendment". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 109 at 138 ("conceived not primarily as independent free-standing rights but rather as a part of a constitutional system for protecting all rights by ensuring that government activity met the fundamental check of jury trial").

<sup>24</sup> Moglen, E. (1997) "The Privilege in British North America: The Colonial Period to the Fifth Amendment". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 109 at 134, referring to section 8 of the Virginia Declaration of Rights.

State Constitutions included the right to jury trial without mentioning self-incrimination at all.<sup>25</sup>

When Madison drafted the Fifth Amendment, he departed from the State Constitutions by setting out the self-incrimination principle among provisions, many of which had nothing to do with jury trial. Moreover, he expressed that principle in terms of being “a witness against himself”. The State Constitutions had expressed the same principle as a right against compulsion “to give evidence” or “to furnish evidence”.<sup>26</sup>

#### (d) EFFECT

The combined effect of Madison’s drafting and Laurance’s amendment was that the Fifth Amendment appeared to protect only oral evidence in criminal proceedings. That literal interpretation of the Fifth Amendment was never adopted by the American courts.

Even in the context of oral evidence in criminal proceedings, the American courts initially treated the Fifth Amendment as declaratory of the common law rather than as giving new protection against self-incrimination. According to Levy, the early cases interpreted the Fifth Amendment as expressing a truth which had been established as self-evident.<sup>27</sup> This is not disputed, even by Levy’s opponents.<sup>28</sup>

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<sup>25</sup> E.g. South Carolina, Georgia, New Jersey and New York: Moglen, E. (1997) “The Privilege in British North America: The Colonial Period to the Fifth Amendment”. *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 109 at 135; Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 410.

<sup>26</sup> However, the concurring opinion in *Hubbell* concluded that “Madison’s phrasing was synonymous” with the phrasing in the State Constitutions: *United States v Hubbell*, 530 US 27 at 52 (2000).

<sup>27</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 430 (“its constitutional expression had the mechanical quality of a ritualistic gesture in favour of a self-evident truth needing no explanation”).

<sup>28</sup> E.g. Moglen, E. (1997) “The Privilege in British North America: The Colonial Period to the Fifth Amendment”. *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 109 at 141. In contemporary arguments about pre-trial examinations, Moglen found “ironic confirmation of the proposition that the new constitutional provisions

Moreover, as Wigmore noted, this early interpretation also applied the Fifth Amendment to civil proceedings.<sup>29</sup>

“The Constitution is what the judges say it is”, as Charles Evans Hughes said before he became Chief Justice.<sup>30</sup> The courts extended the prohibition on self-incrimination to witnesses in administrative proceedings.<sup>31</sup> They extended it to parties and witnesses in civil proceedings. They applied it for over a century to documentary as well as to oral evidence.

Chapter VIII will discuss the later American developments in relation to documents and civil proceedings. However, the Fifth Amendment has not been the only international influence encouraging the treatment of the privilege as a human right.

#### **(4) INTERNATIONAL AGREEMENTS**

##### **(a) NOT LOCALLY ENFORCEABLE**

Australian judges have sometimes mentioned the provisions of international agreements, but the local effect of those agreements is limited. An international

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had little effect on American criminal procedure”. The irony lay in the way that, when the relevant British statutes ceased to apply, American lawyers went not to the constitutional provisions but to the common law to fill the gap in the law on pre-trial examinations.

<sup>29</sup> Wigmore, J. H. (1979) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at para 2252 p325 (“The broader protection - of witnesses, and civil cases - was given during the first years of this nation solely on the basis of well-established common law without reference to constitutions”).

<sup>30</sup> During a speech at Elmira on 3 May 1907: Perkins, D. (1956) *Charles Evans Hughes and American Democratic Statesmanship* (Boston: Little Brown and Company) at 16. In 1908 he also said “The Constitution with its guarantees of liberty and its grants of Federal power, is finally what the Supreme Court determines it to mean”. Both comments were made while he was still Governor of the State of New York.

<sup>31</sup> The merest possibility of self-incrimination enables a witness to refuse, for example, to testify before a congressional committee. For a recent example, see Geller, A. (2002) “Black’s lawyers advise silence”. *The West Australian* (24 December) (Perth) 29 (“we advised Lord Black that he should exercise his constitutional right not to testify”) The former Worldcom chief Bernard Ebbers even tried to combine his refusal with a claim of total innocence, but without success: Los Angeles Times (2002) “WorldCom chief attacked after refusing to testify”. *The West Australian* (10 July) (Perth) 26 (“forfeited his Fifth Amendment right not to incriminate himself by elaborating on his innocence”). Ultimately, he was jailed for 25 years: Hamilton, W. (2005) “Ebbers pays for WorldCom fraud with 25 years in jail”. *The West Australian* (15 May) (Perth) 34 .

agreement does not give enforceable rights in Australia unless its obligations are incorporated into domestic law by legislation.<sup>394</sup>

Nevertheless, an international obligation can be significant in interpreting an ambiguous statutory provision. Parliaments are presumed to have legislated in conformity with the established rules of international law.<sup>395</sup> Moreover, ministerial discretion should be exercised in accordance with obligations in international agreements which Australia has ratified.<sup>396</sup>

Above all, international agreements may be “used by the courts as a legitimate guide in developing the common law”.<sup>397</sup> Australia is a signatory to the International Covenant on Civil and Political Rights. Article 14(3)(g) of the Covenant might assist in the development of the privilege as a human right.

#### (b) ARTICLE 14(3)(g)

This Article provides that in “the determination of any criminal charge against him, everyone shall be entitled.....(g) Not to be compelled to testify against himself or to confess guilt”. The Australian courts have cited it as an indication that the privilege is a human right.<sup>398</sup> It has even been enacted in some local legislation.<sup>399</sup> However, its practical effect remains unclear.

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<sup>394</sup> *Minister of State For Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 286-287. For British examples, *R v Home Secretary; Ex Parte Brind* [1991] 1 AC 696 at 747-8; *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770 at 818-819; *A v Secretary of State for the Home Department (No 2)* [2005] 1 WLR 414 at 509.

<sup>395</sup> *Minister of State For Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 287; *R v Home Secretary, Ex Parte Brind* [1991] 1 AC 696 at 748; *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770 at 818-819.

<sup>396</sup> *Minister of State For Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 291 (Immigration Minister ordered to review his department's decisions to deport the respondent and to refuse his application for permanent residence because the decisions breached the United Nations Convention on the Rights of the Child).

<sup>397</sup> *Minister of State For Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 288.

<sup>398</sup> E.g. *Ganin v NSW Crime Commission* (1992) 32 NSWLR 423 at 432 *per* Kirby P.

<sup>399</sup> E.g. s22(2) Human Rights Act (ACT) (“Anyone charged with a criminal offence is entitled...(i) not to be compelled to testify against himself or herself or to confess guilt”).

The full Federal Court avoided the issue in one case.<sup>38</sup> The privilege was totally abrogated in examinations by the taxation authorities. The Court held that the terms of Article 14(3)(g) did not apply in such administrative proceedings.<sup>39</sup>

The terms of Article 14(3)(g) could similarly be said not to apply in civil proceedings.<sup>40</sup> This narrow interpretation is consistent with the boundaries drawn in this thesis. However, it fails to address the two stages in the problem of the privilege.

The Article does not stop the compulsory questioning in the first stage, which does not involve criminal proceedings. The question is whether it applies in the second stage: namely, in the later criminal proceedings to exclude evidence obtained by abrogating the privilege in the earlier civil or administrative proceedings. The Federal Court raised the question but did not answer it.<sup>41</sup> Case-law on the European Convention suggests an affirmative response.

### (c) EUROPEAN CONVENTION

Under Article 6(1) of the European Convention everyone has the right to a fair hearing in “the determination of his civil rights and obligations or of any criminal charge against him”. This is different from Article 14(3)(g). The self-incrimination principle has been implied into Article 6(1) by the European Court: notably, in the *Saunders* decision.<sup>42</sup>

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<sup>38</sup> *Deputy Commissioner of Taxation v De Vonk* (1995) 133 ALR 303.

<sup>39</sup> *Deputy Commissioner of Taxation v De Vonk* (1995) 133 ALR 303 at 321 (“As a matter of construction, the treaty is concerned not with the right to refuse to answer questions posed in an administrative inquiry but, as it says, with the question of the determination of a criminal charge”).

<sup>40</sup> Muhammad, H. N. A. N. (1981) “Due process of law for persons accused of crime”. *The international bill of rights*. L. Henkin (Ed.) (New York: Columbia University Press) 138 at 155. Also see Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 1, para 852, n26.

<sup>41</sup> *Deputy Commissioner of Taxation v De Vonk* (1995) 133 ALR 303 at 321 (the “article may have relevance to the question whether a court would receive in evidence answers to questions put to Mr De Vonk in an investigation held under section 264”).

<sup>42</sup> *Saunders v United Kingdom* (1996) 23 EHRR 313.

Yet the *Saunders* decision was about the second stage in the problem of the privilege. The question was whether answers given by Saunders under compulsion to company inspectors, could be used at his later criminal trial. The European Court held that the use of that evidence against him breached his right to a fair trial under Article 6(1).

It did not address the first stage: namely whether the company inspectors should have been able to compel Saunders to answer questions in the first place. There have been European decisions suggesting a negative answer.<sup>43</sup> However, Strasbourg jurisprudence is often obscure. So is the literature thereon.<sup>44</sup> It has even been suggested that decisions on the first stage overlap with those on freedom of expression under Article 10.<sup>45</sup>

In any event, the *Saunders* decision did not provide authority which is binding in Australasia.<sup>46</sup> However, it showed that Article 14(3)(g) can apply to the second stage of the problem of the privilege. This can be easily overlooked, for example in the context of the New Zealand Bill of Rights Act 1990.

## **(5) NEW ZEALAND**

Section 25(d) of the 1990 Act provides that everyone who is charged with an offence has in relation to the determination of the charge, the right not to be

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<sup>43</sup> E.g. *Funke v France* (1993) 16 EHRR 297.

<sup>44</sup> E.g. Stessens, G. (1997) "The Obligation to Produce Documents Versus the Privilege Against Self-incrimination: Human Rights Protection Extended Too Far?" *European Law Review* 22: 45 at HRC/45 comparing *Funke v France* to *Saunders v United Kingdom* ("Whilst the former decision was seen by many as embodying an absolute prohibition against the use of compulsion with the purpose of obtaining self-incriminating documents, the latter decision of the Strasbourg Court seems less unequivocal on the point").

<sup>45</sup> Naismith, S. (1997) "Current Topic: Self-Incrimination - Fairness or Freedom." *European Human Rights Law Review* 2(3): 229.

<sup>46</sup> Mahoney, R. (1997) "Evidence." *New Zealand Law Review*(1): 57 at 71-72.

compelled to be a witness or confess guilt. That is similar to Article 14(3)(g).<sup>47</sup> The difference is that it is limited to charged persons. According to the NZLC section 25(d) does not apply in civil contexts at all.<sup>48</sup>

Sections 27(1) and 23(4) also appear not to apply to civil proceedings. Section 27(1) gives “the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination”. This is intended to provide a broad right to a fair trial.<sup>49</sup> However, according to the NZLC, it falls short of the right to a fair trial given by Article 6(1) of the European Convention.<sup>50</sup>

Under section 23(4) everyone who is arrested or detained for an offence or suspected offence has the right to refrain from making a statement and to be informed of that right. The reference to offences seems to make it inapplicable in civil or administrative proceedings.<sup>51</sup> For example, the section has been held not to apply in an examination by a liquidator.<sup>52</sup>

Besides, section 4 puts an overriding limitation on the rights given by these sections. They do not invalidate provisions which are inconsistent with them. Legislation can therefore be drafted to exclude the rights, if it is done clearly enough.<sup>53</sup> This raises questions about the status of human rights in general.

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<sup>47</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 146 (it “has been modelled on, and closely resembles” Article 14(3)(g)).

<sup>48</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 147.

<sup>49</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 148.

<sup>50</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 151.

<sup>51</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 142 (“the right to silence, applicable when offences are investigated”).

<sup>52</sup> *Official Assignee v Murphy* [1993] 3 NZLR 62 at 71-72.

<sup>53</sup> If it is not clear, the rights will apply: section 6, New Zealand Bill of Rights Act 1990.



## (6) STATUS OF HUMAN RIGHTS

### (a) SAFETY-NET

The concept of human rights has been highlighted by international agreements since the Second World War.<sup>54</sup> These agreements are said to express principles which have been around throughout history.<sup>55</sup> The aim of the agreements is to provide a safety-net of rights to which all human beings are entitled.

These rights should exist regardless of current circumstances. They should not vary depending upon the State's current perceptions of its needs, even in war-time. That was the basis for Lord Atkin's comments quoted at the start of Chapter II.<sup>56</sup>

At first sight, human rights arguments appear to take a zero tolerance approach. The slightest breach of human rights is the start of the slippery slide or the thin end of a wedge. In practice, a strict approach cannot be sustained, particularly with less obvious human rights like the privilege.

Presumably, some rights are so fundamental that they should not give way to current needs. Genocide would perhaps be such a right. It is more difficult to find universal agreement about which other rights should qualify as absolute.

The right not to be tortured might be seen as an absolute right, but some still argue that torture might be permissible.<sup>57</sup> Use of material obtained by torture is

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<sup>54</sup> Joint Committee on Foreign Affairs Defence and Trade (1992) *A Review of Australia's Efforts to Promote and Protect Human Rights* (Canberra: Australian Government Publishing Service) at para 1.5 (the atrocities in that war "caused the combined nations to articulate the underlying and universal principles of human rights").

<sup>55</sup> Joint Committee on Foreign Affairs Defence and Trade (1992) *A Review of Australia's Efforts to Promote and Protect Human Rights* (Canberra: Australian Government Publishing Service) at para 1.3.

<sup>56</sup> *Liversidge v Anderson* [1942] AC 206 at 245 (even during a perilous period for Britain during the Second World War, he protested against "a strained construction put on words with the effect of giving uncontrolled power of imprisonment to the Minister").

prohibited by international agreement.<sup>58</sup> Yet the British government may still be able to use such material to detain suspected terrorists.<sup>59</sup>

If torture is not seen universally and absolutely as a breach of human rights, it is hard to see the right to silence or the privilege in those terms. It is not surprising, therefore, that both these rights are often taken away by legislation.

## (b) PRIMACY OF LOCAL LEGISLATION

The privilege reached its high point as a human right in the *Saunders* decision.<sup>60</sup> Later decisions have undermined the idea of human rights as a safety-net. The European Convention has been read down by being made subject to the rights of local legislators to make special rules in exceptional cases.<sup>61</sup>

British legislation regularly abrogates the privilege in administrative proceedings. “The number and effect of these abrogations of the privilege should give pause for thought on the part of anyone who regards the privilege as a fundamental principle of English law”.<sup>62</sup> The same is true in Australia.<sup>63</sup>

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<sup>57</sup> E.g. in Australia a former NCA Chairman and two academics agreed that torture might be justified in extreme circumstances: West Australian Newspapers (2005) "QC says rip out their fingernails". *The West Australian* (23 May) (Perth) 10. For its operations in Iraq, the US sought to redefine torture to include only conduct causing serious physical injury: Eccleston, R. (2005) "Gonzales queries FBI claims". *The Australian* (8 January) (Sydney) 12. The Australian Attorney-General was sympathetic to such views: Sproull, R. (2006) "Sleep deprivation is not torture: Ruddock". *The Australian* (2 October) (Perth) 4.

<sup>58</sup> Article 15, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1990).

<sup>59</sup> E.g. Laws LJ in *A v Secretary of State for the Home Department* [2005] 1 WLR 414 at 503 (if the Secretary of State has “neither procured the torture nor connived at it, he has not offended the constitutional principle”). The Court of Appeal decision was overturned, but the House of Lords still stopped short of an absolute prohibition: *A v Secretary of State for the Home Department* [2006] 2 AC 221.

<sup>60</sup> *Saunders v United Kingdom* (1996) 23 EHRR 313.

<sup>61</sup> E.g. *Brown v Stott* [2003] 1 AC 681 at 710 *per* Lord Steyn (“national institutions are in principle better placed than an international court to evaluate local needs and conditions”).

<sup>62</sup> Tapper, C. F. H. (2004) *Cross and Tapper on Evidence* (London: Lexis Nexis) at 461 (footnote omitted). Also see examples in Heydon, J. D. (1971) "Statutory Restrictions on the Privilege Against Self-Incrimination." *Law Quarterly Review* 87(April): 214.

<sup>63</sup> E.g. powers given to tax authorities under ss263 and 264, Income Tax Assessment Act (Cth) (see *Donovan v Deputy Commissioner of Taxation* (1992) 105 ALR 661) and to the Trade Practices Commission under s155, Trade Practices Act (Cth). See Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 2, paras 226-228.

Moreover, the Australian High Court has followed the British courts in accepting that abrogation of the privilege can be by implication.<sup>64</sup> More surprisingly, the recipients of both the right to silence and the privilege choose regularly not to exercise their so-called human rights.

### (c) WAIVER OF RIGHT TO SILENCE

The right to silence is outside this thesis, but Chapter II acknowledged the possibility that its protection as a human right may be more justified than in the case of the privilege. Yet many defendants waive their rights to silence by giving evidence in their own defence at criminal trials.<sup>65</sup> There may be sound tactical reasons for doing so, but it casts doubt upon the fundamental nature of this human right.

Similar doubts arise when the right to silence is available to resist police questioning. Estimates from the United Kingdom in the 1980s were that less than ten per cent of suspects remained silent.<sup>66</sup> One study even estimated it below five per cent.<sup>67</sup> In other words, most suspects waive their right to silence.

The position in Australia is likely to be similar.<sup>68</sup> British experience has also been accepted in New Zealand.<sup>69</sup> The point made here was concisely expressed by a

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<sup>64</sup> *Sorby v The Commonwealth* (1983) 152 CLR 281 at 289 and 309. Occasionally the lower courts adopt a more critical approach (e.g. *Green v Purdon* (1987) 5 ACLC 407 at 420), but this is exceptional: McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company) at 262-7.

<sup>65</sup> E.g. criminal defendants in the District Court in Western Australia usually elect to testify. The accepted wisdom in the legal profession is that juries like to hear what the defendant has to say.

<sup>66</sup> Galligan, D. (1988) "The Right to Silence Reconsidered." *Current Legal Problems* [1988]: 69 at 74.

<sup>67</sup> Leng, R. (1993) *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate* (London: The Royal Commission on Criminal Justice) at 73.

<sup>68</sup> Dixon, D. (1995) "The Myth of the Right of Silence." *Polemic* 6(1): 13 at 16 ("the structural and ideological conditions appear very similar").

<sup>69</sup> Thomas, E. W. (1991) "The So-Called Right to Silence." *New Zealand Universities Law Review* 14(December): 299 at 304 ("most accused do not exercise their right of silence when being questioned by police"). Robertson, B. (1992) "Rights and Responsibilities in the Criminal Justice System." *Otago Law*

New Zealand judge. "A right which is not observed in practice is not a right at all".<sup>70</sup>

#### (d) WAIVER OF PRIVILEGE

Waiver of the privilege also sits uncomfortably with its status as a human right. If a witness voluntarily answers an incriminating question, the privilege is deemed to have been waived. Judges are not obliged to inform witnesses of the availability of the privilege, although many do.<sup>71</sup> It may not even be clear at the time that the privilege is available.<sup>72</sup>

Some of the rules favour the witness. By answering one incriminating question, the witness is not precluded from claiming the privilege for another question.<sup>73</sup> Furthermore, even though a matter has been covered in examination-in-chief, the privilege can be claimed during cross-examination to avoid answering questions on the same matter.<sup>74</sup>

Nevertheless, it is far from clear when the privilege will be impliedly waived by other conduct.<sup>75</sup> If some documents are disclosed, the privilege may be impliedly waived for associated documents.<sup>76</sup> Implied waiver seems inconsistent with the

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*Review 7(4)*: 501 at 142 was more guarded ("the great majority of prisoners, we are told, do answer questions").

<sup>70</sup> Thomas, E. W. (1991) "The So-Called Right to Silence." *New Zealand Universities Law Review* 14(December): 299 at 304.

<sup>71</sup> Under s128, Evidence Act (Cth) the onus is put on the witness to claim the privilege in Australia. A greater onus is put on the court to warn the witness under clause 58(1) of the New Zealand Evidence Bill 2005: New Zealand Government (2005) *Evidence Bill* (Wellington).

<sup>72</sup> E.g. *Bercove v. Hermes* (1983) 51 ALR 109 (its availability only became evident through a later court decision).

<sup>73</sup> *R v Garbett* (1847) 1 Den 236 (169 ER 227).

<sup>74</sup> This is "clearly illogical" according to Young, P. W. (1991) "Taking The Fifth." *Australian Law Journal* 65(7): 412 at 414.

<sup>75</sup> E.g. *Accident Insurance Mutual Holdings v McFadden* (1993) 31 NSWLR 412 (privilege not waived by out of court statements admitting criminal liability). The rules for implied waiver in Australia were not clear, although Kirby P (at 423) and Clarke JA (at 432) decided that the rules set out by *Wigmore On Evidence* did not apply.

<sup>76</sup> However, the courts will be cautious in inferring waiver of penalty privilege in these circumstances: Heydon, J. D. (2004) *Cross on Evidence* (Sydney: Butterworths) para [25010] n4.

idea of human rights. Other situations also show the difficulty of treating the privilege as an absolute human right.

#### (e) HARD CASES

##### **(i) Environmental Legislation**

The human rights of individuals inevitably conflict with the collective rights of society. This conflict is evident in the policing of environmental legislation. Ironically, left-wing advocates of human rights will often support environmental legislation.

The dilemma is that environmental laws can only be enforced through reporting requirements, which manifestly breach the polluter's privilege and right to silence. This has occurred in Australia.<sup>77</sup> It has also occurred in other jurisdictions.<sup>78</sup>

It shows the inherent difficulty with all but the most fundamental of human rights. They cannot be absolute. They do not operate in a vacuum regardless of the circumstances.

Freedom of expression, for example, is not boundless. That is why there are laws of defamation. If it is acknowledged that limitations must be imposed on such less fundamental rights, local legislators seem the best qualified to do it.

##### **(ii) Companies**

When companies are subject to environmental reporting requirements, human rights may present less of a problem. One convenient argument is that companies

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<sup>77</sup> E.g. *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 488 (licence granted on condition that company monitors, records and lodges information about discharge of pollutants).

<sup>78</sup> E.g. *R v Hertfordshire County Council; Ex Parte Green Environmental Industries Ltd* [2000] 2 AC 412 (United Kingdom); *R v Bata Industries Ltd (No 2)* (1992) 70 CCC (3d) 394 (Canada).

are not human and do not need human rights.<sup>79</sup> It has long been held in the United States that the privilege should not be available to corporations.<sup>80</sup>

The High Court followed the American approach in the *Caltex* decision.<sup>81</sup> It reached that decision by an unsatisfactory route.<sup>82</sup> Even so, the result was consistent with the legislative trend to remove the privilege from companies.<sup>83</sup>

New Zealand still follows the British approach. The privilege is available to companies in New Zealand at common law.<sup>84</sup> However, New Zealand is about to follow the approach of the United States and Australia.<sup>85</sup>

### **(iii) Arguments for Removal**

Two arguments have already been noted. The human rights argument denies the privilege to companies because they are not human. The historical argument denies the privilege to companies because they did not exist when the privilege first arose.<sup>86</sup>

Australian judges have also argued that it is peculiarly difficult to enforce the law against companies.<sup>87</sup> This is because of the nature of modern corporate crime.

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<sup>79</sup> Murphy J in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 394-5; *Pyneboard v Trade Practices Commission* (1983) 152 CLR 328 at 346-7; *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 150.

<sup>80</sup> *Hale v Henkel*, 202 US 43 (1906).

<sup>81</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

<sup>82</sup> Three judges held that the privilege against self-incrimination was available to companies, three that it was not. The balance was tipped by Brennan J who thought that it was not available to companies even though penalty privilege was. This resulted in final orders which "may be thought to be confusing" (*Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503 at 511).

<sup>83</sup> E.g. s1316A, Corporations Act 2001 (Cth); s198, Evidence Act 1995 (Cth).

<sup>84</sup> *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191 at 196, following *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395 and *In Re Westinghouse Uranium Contract* [1978] AC 547.

<sup>85</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) para 282-283. Now see clause 56(4)(a), New Zealand Government (2005) *Evidence Bill* (Wellington).

<sup>86</sup> *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503 at 539-545.

<sup>87</sup> E.g. McHugh J in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 555 (the case is "overpowering" for denying the privilege to companies because of the special difficulties

The use of offshore companies and trusts is not new. Nor is the exploitation of the secrecy provided by the laws of foreign countries, especially in banking.

However, these devices are now used more often to avoid detection because of the removal of exchange control requirements and because of technological advances like the speed of electronic transfers.<sup>88</sup>

Documentary evidence is indispensable in fraud cases involving companies.<sup>89</sup>

This will often be in the form of company records. They may be understandable only when explained by the suspect, who must therefore be compelled to give answers.<sup>90</sup>

The nature of the corporate form is inherently open to abuse, particularly when dealing with the money of unsophisticated investors. The separate artificial personality provides protection against undue commercial risk, but it can also be manipulated by directors to avoid liability and provides “myriad opportunities” for the concealment of fraudulent activities.<sup>91</sup>

There is often no obvious victim in corporate crime.<sup>92</sup> Corporate law must be enforced for less obvious reasons, such as to preserve the integrity of the market. Otherwise, investors will take their money elsewhere.<sup>93</sup>

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in suing them). The same arguments were put by Windeyer J in *Rees v Kratzmann* (1965) 114 CLR 63 at 80 (“the honest conduct of the affairs of companies is a matter of great public concern today. If the legislature thinks that in this field the public interest overcomes some of the common law’s traditional consideration for the individual, then effect must be given to the statute which embodies this policy”).

<sup>88</sup> Scott J at first instance in *Re London United Investments* [1992] BCLC 91 at 113. Also Fraud Trials Committee (1986) *Roskill Report on Fraud Trials* (London: Fraud Trials Committee) para 8.25-6.

<sup>89</sup> Murphy J in *United States v White*, 322 US 694, 700 (1944) (“The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization”).

<sup>90</sup> Scott J in *Re London United Investments* [1992] BCLC 91 at 114. Also see Cole J in *Spedley Securities Ltd (in liq) v Bond Brewing Investments Pty Ltd* (1991) 4 ACSR 229 at 246.

<sup>91</sup> *R v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1 at 7 per Nolan LJ.

<sup>92</sup> E.g. insider trading.

It is not only in Australia that difficulties of enforcement have been said to justify removing the privilege from companies.<sup>94</sup> However, this thesis sees the privilege primarily as a check on prosecuting authorities. "Official diligence and decency are surely important in the prosecution of a corporation as well as an individual".<sup>95</sup> This thesis does not therefore favour removing the privilege from companies. Another reason is that the removal of the privilege from a company will adversely affect the personal privilege of its directors.

#### **(iv) Company Directors**

Directors hold a special position of trust. The law has long recognized this by treating directors as being in a fiduciary relationship. However, in practice the old fiduciary law "is by no means the universal solvent to all the problems which can flow from the actions and activities of company directors".<sup>96</sup>

It is even argued that directors should not have personal privilege in the first place. The original purpose of the privilege was to protect the poor, the weak and the ill-educated. It is said to be unnecessary when dealing with sophisticated and intelligent businessmen surrounded by their teams of lawyers.<sup>97</sup>

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<sup>93</sup> E.g. Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) para 4.10.

<sup>94</sup> E.g. United States: see *Braswell v United States*, 487 US 99, 113 (1988) ("one of the most serious problems confronting law enforcement authorities").

<sup>95</sup> Maguire, J. (1947) *Evidence: Commonsense and Common Law* (Chicago: Foundation Press) p105.

<sup>96</sup> Senate Standing Committee on Legal and Constitutional Affairs (1989) *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Canberra: Australian Government Printing Service) para 4.9 quoting Professor Paul Finn.

<sup>97</sup> *R v Seelig* [1991] 4 All ER 429 at 436 and 442. Also see Rogers, A. (1991) "A Vision of Corporate Australia." *Australian Journal of Corporate Law* 1(1): 1 at 3 (the privilege is being claimed by those who "may not only be the most wealthy persons in the court, flanked by a battery of skilled legal advisers, but possibly the most intelligent persons in the court-room").



By this argument, company directors should be required to provide information, particularly if the company has financial difficulties.<sup>98</sup> This argument is strongest in administrative proceedings which are specifically designed to protect the investing public. However, in civil proceedings the removal of the privilege from companies has left a gap in the personal privilege of directors who are required to produce company documents.

This argument will be explored in detail in Chapter IX. For the moment, it needs only to be raised in the context of the privilege as a forensic tool for obtaining documents through “the back door”.<sup>99</sup> In Australia companies can now be required to produce documents which incriminate directors. Moreover, directors can still be required to produce those company documents, even though they are personally incriminating.

#### **(v) Human Rights Violations**

There is a final irony with human rights. Human rights may have to be suspended when bringing to justice violators of the most fundamental human rights. As mentioned earlier in this chapter, there are writers who suggest that torture is not necessarily a breach of fundamental human rights. By any standards, genocide must be seen as a serious violation of human rights.

It is in the nature of genocide that incriminating evidence is often destroyed. Principles like the presumption of innocence and proof beyond reasonable doubt can cause prosecutions to fail because of the “unique factual and legal obstacles to

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<sup>98</sup> Cole J in *Spedley Securities Ltd (in liq) v Bond Brewing Investments Pty Ltd* (1991) 4 ACSR 229 at 246. Also see Rogers CJ in Eq in *Spedley Securities Ltd (in liq) v Bond Corporation Holdings Ltd* (1990) 1 ACSR 726 at 738, and Rogers, A. (1991) "A Vision of Corporate Australia." *Australian Journal of Corporate Law* 1(1): 1

<sup>99</sup> The phrase comes from *In Re Westinghouse Uranium Contract* [1978] AC 547, 617, 632. However, “the back-door” was different. The House of Lords disapproved of the subversion of the privilege of corporations by serving subpoenas on innocent officers and obtaining production of privileged corporate documents through “the back door”.

international prosecution".<sup>100</sup> It is not surprising that prosecutors argue for relaxation of the rules in such cases.<sup>101</sup>

#### (f) CONCLUSION

The argument for exceptions is the same, whether the wrong-doer has instigated genocide, polluted the environment or committed white-collar crime. Normal rules need to be suspended to ensure that justice is visited upon offenders. The same argument was put when religious minorities refused to answer questions under oath in the 1500s.

Leaders of the established church believed that special measures were unavoidable. Without those measures, "the stretys were lykely to swarme full of heretykes before that ryght fewe were accused".<sup>102</sup> Those were the words of Sir Thomas More explaining why the usual need for formal accusers should be waived in criminal proceedings against religious dissenters.

It is hard to justify the right to silence and the privilege as human rights when they are regularly removed or waived without obvious detriment. However, if the focus is moved to issues of policy, the dangers of removal become more obvious. Sir Thomas More was himself a victim of special measures deemed necessary by those in power at the time. Three years later, he was executed for refusing to take an oath of loyalty to King Henry VIII.<sup>103</sup>

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<sup>100</sup> Stuntz, W. J. (2001) "Fair Trials and the Role of International Criminal Defense." *Harvard Law Review* 114: 1982 at 1991.

<sup>101</sup> Stuntz, W. J. (2001) "Fair Trials and the Role of International Criminal Defense." *Harvard Law Review* 114: 1982 at 1991 ("a burden of persuasion that strongly favors the protection of the innocent over the conviction of the guilty may also be an inappropriate transplant to tribunals that adjudicate extraordinarily heinous crimes").

<sup>102</sup> More, T. (1533) *The Apologye of Syr T More, Knight* (New York: Da Capo Press) at 219 (Chapter XL Bk ii).

<sup>103</sup> *Thomas More's Examination and Trial* (1535) 1 HST 385 at 389 (e.g. the argument of the Attorney-General: "Sir Thomas, though we have not one word or deed of yours to object against you, yet we have your silence which is an evident sign of the malice of your heart; because no dutiful subject, being lawfully asked this question, will refuse to answer it").

## (C) PRIVILEGE IN CIVIL PROCEEDINGS

### (1) UNITED KINGDOM

Chapter I mentioned the comments of Lord Templeman and Lord Griffiths in the *Tully* case.<sup>104</sup> They have sometimes been seen as advocating the abolition of the privilege in all civil proceedings.<sup>105</sup> In fact, they were addressing only the production of documents in interlocutory civil proceedings.<sup>106</sup> Moreover, their comments were made *obiter* in a case which was decided on its own special facts.<sup>107</sup>

Nevertheless, their comments raised the question of why the privilege existed in civil proceedings at all. Lord Templeman thought that the privilege could only be justified on the basis that it discouraged ill-treatment of suspects and production of dubious confessions.<sup>108</sup> Lord Griffiths referred to the fear that without the privilege "an accused may be tortured into production of documents".<sup>109</sup> If those were the only dangers addressed by the privilege, it could hardly be justified in civil proceedings to which the State is a party, still less those between private parties.<sup>110</sup>

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<sup>104</sup> *AT & T Istel Ltd v Tully* [1993] AC 45.

<sup>105</sup> E.g. Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 68; Theophilopolous, C. (2003) "The Anglo-American Privilege Against Self-Incrimination and the Fear of Foreign Incrimination." *Sydney Law Review* 25(3): 305 at 318.

<sup>106</sup> *AT & T Istel Ltd v Tully* [1993] AC 45: Lord Templeman at 53 ("an archaic and unjustifiable survival from the past when the court directs the production of relevant documents"); Lord Griffiths at 57 ("the privilege against producing a document the contents of which may go to show that the holder has committed an offence").

<sup>107</sup> It did not "represent a break-through in relation to the principle of self-incrimination; it is a decision on its own facts in the light of that principle": Lord Lowry in *AT & T Istel Ltd v Tully* [1993] AC 45 at 69. Lord Lowry did not advocate the abolition of the privilege in civil proceedings, notwithstanding suggestions that he did: e.g. in Harvey, D. J. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60 at 73.

<sup>108</sup> *AT & T Istel Ltd v Tully* [1993] AC 45 at 53.

<sup>109</sup> *AT & T Istel Ltd v Tully* [1993] AC 45 at 57.

<sup>110</sup> Not even on the basis of Lord Browne-Wilkinson's version in *Hamilton v Naviede* [1995] 2 AC 75 at 95 ("Although physical torture is a thing of the past, the principle remains embedded in our law").

Their Lordships have not been alone in questioning the value of the privilege in civil proceedings between private parties.<sup>111</sup> However, they seemed to suggest removing the privilege from civil proceedings for reasons which applied only to other categories of Lord Mustill's "rights to silence".<sup>112</sup> Their comments have been criticised in Australia.<sup>113</sup> This chapter will argue that civil proceedings have a special need for the privilege for policy reasons. Those reasons will be summarised by using Bentham's term: the Fox-Hunter's Reason.

## (2) FOX-HUNTER'S REASON

Bentham used this term sarcastically. The privilege upholds "the idea of *fairness*, in the sense in which the word is used by sportsmen".<sup>114</sup> If an even balance is not maintained between the hunter and the fox, the sport will be spoiled.

This Reason is adopted in this chapter to cover the argument that enforcement authorities should be obliged to act fairly for reasons of public policy. Without the privilege in civil cases, criminal authorities would be encouraged to rely upon, or even manipulate, the power of one civil litigant to force admissions of criminal conduct out of another. This thesis is not alone in finding this the most compelling argument in favour of the privilege in civil proceedings.<sup>115</sup>

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<sup>111</sup> Heydon, J. D. (1971) "Statutory Restrictions on the Privilege Against Self-Incrimination." *Law Quarterly Review* 87(April): 214 at 219 (the interests of private litigants "may perhaps be set aside as deserving of little sympathy"); Wigmore, J. H. (1961) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at para 2257(b) p339 (this application of the privilege "has little support in policy"); and McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company) at 139 (the libertarian justifications are "difficult to transpose" to civil proceedings between private parties).

<sup>112</sup> *R v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1 at 31 ("In particular it is necessary to keep distinct the motives which have caused them to become embedded in British law").

<sup>113</sup> E.g. Kirby P in *Ganin v NSW Crime Commission* (1992) 32 NSWLR 423 at 432 ("Not everyone shares Lord Templeman's view about the scope of self-incrimination").

<sup>114</sup> Bentham, J. (1827) *Rationale of Judicial Evidence* (New York: Russell & Russell Inc) p454 ("The fox is to have a fair chance for his life..... While under pursuit, he must not be shot").

<sup>115</sup> So did Heydon, J. D. (1971) "Statutory Restrictions on the Privilege Against Self-Incrimination." *Law Quarterly Review* 87(April): 214 at 219.

This argument is not primarily concerned with the position of the discloser. Rather, the focus is on the needs of a system of justice. This was the eighth of twelve reasons suggested by MacNaughton in his 1961 Revision of *Wigmore on Evidence*: the privilege “spurs the prosecutor to do a complete and competent independent examination”.<sup>116</sup> It overlapped with his twelfth reason.<sup>117</sup>

MacNaughton was not quite reproducing the views of Wigmore himself. In earlier editions Wigmore made the same point about prosecution examinations.<sup>118</sup> However, he saw the objection more broadly as a moral issue.<sup>119</sup>

This thesis argues that if the privilege is abolished in civil proceedings, the prosecution will be encouraged to look to those proceedings to provide evidence which cannot be obtained under normal criminal procedures. This chapter will give examples which show the readiness of prosecutors to exploit any forensic advantage.

The result is undesirable for the broader moral reason given by Wigmore. However, this thesis will apply the more practical policy reason which he gave. Private civil proceedings should not provide the opportunity for prosecutors to side-step the right to silence.

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<sup>116</sup> Wigmore, J. H. (1961) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at para 2251 p312.

<sup>117</sup> Wigmore, J. H. (1961) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at para 2251 p317 (the privilege “contributes toward a fair state-individual balance...by requiring the government in its contest with the individual to shoulder the entire load”).

<sup>118</sup> Wigmore, J. H. (1923) *A Treatise on the Anglo-American System of Evidence at Trial* (Boston: Little Brown & Co) at para 2251 p824 (the “inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources”).

<sup>119</sup> Wigmore, J. H. (1923) *A Treatise on the Anglo-American System of Evidence at Trial* (Boston: Little Brown & Co) at para 2251 p824 (“The real objection is that *any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby*”) (Emphasis in Wigmore).

### **(3) DANGERS**

The dangers can be summarised as follows:

- (1) Witnesses in civil trials would be made to provide oral evidence which could be used in criminal proceedings against them;
- (2) Parties in civil cases could be made to testify and provide oral evidence at civil trials, even though defendants do not have to testify at criminal trials;
- (3) Parties would be forced in civil proceedings to hand over documents which could then be compulsorily obtained by the prosecution for criminal proceedings;
- (4) The result will be numerous actions for stays of civil proceedings and contempt of court.

The first danger does not really arise in private civil proceedings. Curiously, Bentham saw nothing wrong with witnesses being “purposely entrapped”.<sup>120</sup>

Whatever the merits of his view, it is difficult to see how this could happen in civil proceedings unless the State was a party.

### **(4) CIVIL PARTIES**

Nor is this chapter greatly concerned with the second danger. It is true that, unlike criminal defendants, civil parties can be forced to testify at the trial. Judicial statements sometimes give the impression that, like criminal defendants, civil parties only testify by choice.<sup>121</sup> In fact, as one High Court judge noted, criminal

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<sup>120</sup> Bentham thought that the *nemo tenetur* maxim was as inappropriate for a witness as for an accused. He saw nothing wrong even if “an individual is purposely entrapped...Why, - that so a delinquent be but brought into the hands of justice, just as well may it be by these means as by any other” (Bentham, J. (1827) *Rationale of Judicial Evidence* (New York: Russell & Russell Inc) at 466).

<sup>121</sup> E.g. *Adler v Australian Securities and Investments Commission* (2003) 46 ACSR 504 at 644 *per* Gyles JA (“In ordinary civil proceedings the defendant cannot be forced to give evidence in his own case”).

cases are different from civil cases “because in a criminal case the accused cannot be compelled to give evidence”.<sup>122</sup>

In practice, civil parties are rarely compelled to testify in private civil proceedings.<sup>123</sup> Moreover, as with the first danger, it is difficult to see how this could happen in civil proceedings unless the State was a party.

## (5) PRIVATE PROCEEDINGS

One American writer thought that the privilege was not a problem in “purely civil proceedings where the government is not a factor”.<sup>124</sup> However, he accepted that prosecutors needed to be discouraged from “neglecting the more laborious and less dramatic forms of investigation”.<sup>125</sup>

Heidt likewise argued that “the so-called 'foxhunter' policies of the privilege” did not apply in private civil proceedings.<sup>126</sup> In his view the privilege was necessary in civil proceedings to which the State was a party but not in cases involving only private parties.<sup>127</sup> In those cases “the government lacks any opportunity for coercion”.<sup>128</sup> It was only a “minor” concern that abolishing the privilege in civil cases would “reduce the government's need to search elsewhere for evidence”.<sup>129</sup>

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<sup>122</sup> McHugh J in *Azzopardi v R* (2001) 205 CLR 50 at 90.

<sup>123</sup> Heydon, J. D. (2004) *Cross on Evidence* (Sydney: Butterworths) at para [13020]: “for obvious reasons, resort is not often made to it and the opponent cannot generally be treated as a hostile witness”. In particular, if a civil party fails to testify, an adverse inference can be drawn from it: *Jones v Dunkel* (1959) 101 CLR 298.

<sup>124</sup> Maguire, J. (1947) *Evidence: Commonsense and Common Law* (Chicago: Foundation Press) at 106.

<sup>125</sup> Maguire, J. (1947) *Evidence: Commonsense and Common Law* (Chicago: Foundation Press) at 104.

<sup>126</sup> Heidt, R. (1982) “The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases.” *Yale Law Journal* 91(6): 1062 at 1083 (i.e. policies which aim at “influencing the government's methods of investigating and prosecuting crime”).

<sup>127</sup> Heidt, R. (1982) “The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases.” *Yale Law Journal* 91(6): 1062 at 1085 (“this broader goal of the state-individual policy is not implicated in civil cases between private parties”).

<sup>128</sup> Heidt, R. (1982) “The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases.” *Yale Law Journal* 91(6): 1062 at 1084.

<sup>129</sup> Heidt, R. (1982) “The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases.” *Yale Law Journal* 91(6): 1062 at 1083.

The result of abolition would not be an “undue amount of unreliable self-incriminatory evidence”.<sup>130</sup>

This thesis takes a different view from Heidt. The privilege is necessary in Australian civil proceedings not so much because of human rights, but rather for the practical policy reason that prosecution authorities will be encouraged to sidestep the right to silence. This is likely to occur in the case of interlocutory proceedings.

## **(6) NEW ZEALAND**

In its Preliminary Paper the NZLC did not really see the privilege as presenting a problem in civil proceedings between private parties.<sup>131</sup> Nevertheless, it expressed “the general view that the policies supporting the privilege outweigh the interests of the private litigant”.<sup>132</sup> It recommended that the privilege “should not be removed across the board in *all* civil proceedings”.<sup>133</sup>

Unfortunately, the NZLC did propose the removal of the privilege from pre-existing documents.<sup>134</sup> In practice this removes the protection of the privilege in many interlocutory proceedings. The argument in this thesis is that if the privilege is removed from documents, the path is clear for prosecuting authorities to exploit private interlocutory proceedings to obtain disclosures. This path has been shown in Australia.

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<sup>130</sup> Heidt, R. (1982) “The Conjuror’s Circle - the Fifth Amendment Privilege in Civil Cases.” *Yale Law Journal* 91(6): 1062 at 1085.

<sup>131</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) at 53 (“the interest in maintaining a fair State-individual balance may be relevant in some civil proceedings (eg, when the State is one of the parties or when its representatives become interested in the proceedings for the purpose of criminal proceedings)”).

<sup>132</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) para 292.

<sup>133</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) p53 (italics in original).

<sup>134</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 203.



## (7) AUSTRALIA

### (a) TENSION

A whole thesis could be devoted to the problems which result from concurrent criminal, civil and administrative proceedings arising from the same facts.<sup>135</sup> This thesis will provide only a brief background discussion of the problems as they affect civil proceedings. Chapter II mentioned the tension between criminal and other proceedings. Criminal proceedings show greater tenderness towards the defendant's right to silence. Other proceedings require the disclosure of information, even if detrimental to the discloser's interests.

The reality is that once information has been disclosed in other proceedings, it will almost certainly find its way to criminal proceedings. The privilege reflects that reality by preventing the disclosure in the first place. When the privilege is abrogated in administrative proceedings, the result is sometimes litigation in which the privilege is not the issue and yet to which it forms the essential backdrop.<sup>136</sup>

### (b) INTERLOCUTORY DISCLOSURES

The tension is evident when civil courts are asked to approve the use, in criminal proceedings, of disclosures which have been made compulsorily in interlocutory civil proceedings. The British rule has been that documents disclosed during discovery may not normally be used for a collateral or ulterior purpose.<sup>137</sup> Such use requires the approval of the court.<sup>138</sup> Some Law Lords suggested that no such

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<sup>135</sup> Andenas sought to do this in the area of financial regulation: Andenas, M. (1995) Enforcement of financial market regulation, problems of parallel proceedings. *Faculty of Law* (Cambridge: Cambridge University).

<sup>136</sup> E.g. *Hamilton v Naviede* [1995] 2 AC 75 at 92 ("this yet another case in which the courts have had to grapple with impact of statutory provisions on the privilege").

<sup>137</sup> *Riddick v Thames Board Mills Ltd* [1977] 1 QB 881.

<sup>138</sup> *Crest Homes Plc v Marks* [1987] 1 AC 829 at 484.

approval was required for use in criminal proceedings.<sup>139</sup> That suggestion has probably not been implemented in the United Kingdom.<sup>140</sup> It has certainly not been implemented in Australia.

Such approval is clearly required in Australia.<sup>141</sup> Usually, it has been given on grounds of public interest.<sup>142</sup> Criminal proceedings are said to provide an almost irresistible reason for a release.<sup>143</sup> In fact, it has not always been given in such cases.<sup>144</sup> However, public interest has been said to require approval in most cases where the government is a party to civil proceedings at which the disclosure takes place.<sup>145</sup>

### (c) OVERRIDING STATUTE

Unfortunately, the careful exercise of the courts' discretion in these cases loses much of its point because they readily accept that it is overridden by statute.

Surprising authority has been accorded to a *dictum* in a High Court decision on

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<sup>139</sup> Lord Fraser in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 447 ("If a defendant's answers to interrogatories tend to show that he has been guilty of a serious offence I cannot think there would be anything improper in his opponent reporting the matter to authorities with a view to prosecution, certainly if he has first obtained leave from the court which ordered the interrogatories, and probably without such leave"). Lord Wilberforce (at 442) even doubted whether use in criminal proceedings was an "ulterior or collateral purpose" ("it has never been held that these expressions, however wide, extend to criminal proceedings: if they did there would be no need for the privilege").

<sup>140</sup> E.g. Browne-Wilkinson MR in *EMI Records Ltd v Spillane* [1986] 1 WLR 967 at 977 (with documents received on discovery and *Anton Piller* orders "in my judgment, it would be quite wrong to authorise their use in criminal proceedings"). The British reported cases since then have been more involved with foreign incrimination: e.g. *Bank of Crete SA v Koskotas (No 2)* [1993] 1 All ER 748 at 754.

<sup>141</sup> E.g. Pullin J in *Commonwealth v Temwood Holdings Pty Ltd* (2001) 25 WAR 31 at 39 ("With respect, I disagree with Lord Fraser's obiter suggestion that leave might not be necessary"); Lee J in *Bailey v Australian Broadcasting Commission* [1994] 1 Qd R 476 at 487 ("the general weight of authority supports the proposition that leave of the court is required").

<sup>142</sup> E.g. *Bailey v Australian Broadcasting Commission* [1994] 1 Qd R 476 at 490 ("the public interest in investigating the possibility of any criminal activity...outweighs the public interest in requiring strict adherence to the plaintiff's implied undertaking").

<sup>143</sup> Groves, M. (2003) "The implied undertaking restricting the use of material obtained during legal proceedings." *Australian Bar Review* 23(3): 314 at 330.

<sup>144</sup> E.g. *Dart Industries Inc v David Bryar and Associates Pty Ltd* (1997) 38 IPR 389 (documents obtained under an *Anton Piller* order could not be used for criminal proceedings).

<sup>145</sup> *Australian Trade Commission v McMahon* (1997) 46 ALD 338 at 343 (approval given to an *ex parte* application).

arbitration.<sup>146</sup> This has been interpreted as meaning that the implied undertaking in discovery gives way to compulsory statutory powers. The consequences of this interpretation were shown in the *Ampolex* decision.<sup>147</sup>

In that decision the New South Wales Court of Appeal held that the implied undertaking to the court was overridden by the compulsory powers of the corporate regulator. The implied undertaking does not constitute a reasonable excuse for failing to comply with notices from the regulator. Civil parties must therefore produce documents which they have received on discovery or pursuant to a subpoena.

These are civil proceedings to which the State is not a party. The only question is whether the prosecutors have compulsory statutory powers. In Australia, it cannot be assumed that abuses would be prevented by the criminal court making the disclosures inadmissible.<sup>148</sup>

This is apparently how abuses are prevented in the United States.<sup>149</sup> However, even there, when a disclosure is compelled by one government agency and then used in prosecution by another, criminal courts do not readily accept that the evidence has been obtained by that method.<sup>150</sup>

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<sup>146</sup> Mason CJ in *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 33 ("no doubt the implied obligation must yield to inconsistent statutory provisions").

<sup>147</sup> *Australian Securities Commission v Ampolex* (1995) 38 NSWLR 504.

<sup>148</sup> In Australia, powers of exclusion exist at common law, but their operation is also uncertain: see *R v Lee* (1950) 82 CLR 133; *R v Ireland* (1970) 126 CLR 321; *Bunning v Cross* (1978) 141 CLR 54 and *Cleland v R* (1982) 151 CLR 1. The result is an unwillingness to exercise this power: see e.g. *R v Zion* [1986] VR 609 at 616.

<sup>149</sup> Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1084 n92. However, the link between inadmissibility and breach of the privilege is not without its difficulties: see generally Herman, L. (1992) "The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)." *Ohio State Law Journal* 53(1): 101.

<sup>150</sup> E.g. *Securities and Exchange Commission v Gilbert*, 79 FRD 683, 687 (SDNY 1978). For a similar reluctance: see *R v Clyne* [1985] 2 NSWLR 740 at 748 (Australia); *R v Seelig* [1991] 4 All ER 429 at 433-4 and 441 (United Kingdom).

## (8) REAL DANGER OF ABUSE

### (a) ZERO TOLERANCE

Zero tolerance describes the public policy approach taken in this thesis. Any departure from the proper approach must be discouraged because it will lead to other and greater departures. This was one of the justifications for the right to silence given by Wigmore. "If there is a right to an answer there soon seems to be a right to an expected answer, - that is, to a confession of guilt".<sup>151</sup> A High Court judge recently put his own historical gloss on this argument.<sup>152</sup>

In the late 1800s Stephen noted the link between laziness and corruption.<sup>153</sup> The same link appeared in the comments of the detective who exposed the bashing, verballing and isolating of suspects by detectives in WA in the 1980s.<sup>154</sup>

Corruption like torture is a flexible concept.

An acting Commissioner for Corruption and Crime in Western Australia expressed a rigorous view of the dangers of corruption. "Corruption is rooted in too much confidence in the enjoyment of power; in on-going, exclusive relationships; in habits, self-interest and a sense of invulnerability".<sup>155</sup> Shortly after expressing this view, she was charged with corruption and attempting to pervert the course of

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<sup>151</sup> Wigmore, J. H. (1923) *A Treatise on the Anglo-American System of Evidence at Trial* (Boston: Little Brown & Co) at para 2251 p824.

<sup>152</sup> McHugh, J in *RPS v R* (2000) 199 CLR 620 at 643 ("History, and not only the history of totalitarian societies, shows that all too frequently those who have a right to obtain an answer soon believe that they have a right to the answer that they believe should be forthcoming").

<sup>153</sup> Admittedly, Stephen's 19th century Indian civil servant was talking about torture when he deplored the investigative practices of native police officers. "There is a lot of laziness in it. It is far pleasanter, to sit comfortably in the shade rubbing red pepper into a poor devil's eyes, than to go about in the sun hunting up evidence": Stephen, J. F. (1883) *A History of the Criminal Law* (London: Macmillan & Co) at 442 n1.

<sup>154</sup> Morfesse, L. (2002) "Forced confession 'common'". *The West Australian* (13 June) (Perth) 9 ("I didn't see it as being corrupt because there was no financial benefit, you were simply doing your job, which was to catch crooks...They obviously knew the person did it but they were just too lazy to do the ground work to provide proper evidence to get a conviction").

<sup>155</sup> Moira Rayner quoted in Morfesse, L. (2005) "Just how far should Moira's mateship go?" *The West Australian* (27 August) (Perth) 6 .

justice.<sup>156</sup>

This thesis accepts the broader moral reason given by Wigmore for not relying upon compulsory self-disclosure.<sup>157</sup> However, the main argument for the privilege in civil proceedings is practical. A system of justice should not encourage government authorities to take short cuts because of where it may lead. As a disgraced New South Wales detective noted, small acts of corruption can easily lead to larger ones.<sup>158</sup>

The words of Clement Verax from the 1600s are as relevant today: “our Accusation beginneth with the Examination of our persons, to make us state a Charge against our selves, and cut our own throats with our tongues”. Clement Verax was no religious fanatic. His real name was Clement Walker. He was a Member of the Long Parliament who was objecting to the way in which a heavy-handed Parliamentary Committee used its powers.<sup>159</sup> There are more recent examples of exploitation of compulsory powers for forensic advantage.

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<sup>156</sup> Taylor, R. (2005) "Crime Fighter Rayner faces her own charges". *The West Australian* (13 October) (Perth) 6. She allegedly warned a terminally ill friend that he was under investigation by her organisation.

<sup>157</sup> Wigmore, J. H. (1923) *A Treatise on the Anglo-American System of Evidence at Trial* (Boston: Little Brown & Co) at para 2251 p824.

<sup>158</sup> “When you start off into corrupt practice, it doesn't take very much to go up the ladder and the further you go up the ladder, the more acceptable things become until you reach a point where there's nothing unacceptable”: Trevor Haken during Australian Broadcasting Commission (2005) *Australian Story: "Dead Man Talking"*. Available: [www.abc.net.au/austory/content/2005/s1479833.htm](http://www.abc.net.au/austory/content/2005/s1479833.htm), [Accessed 26/10/06].

<sup>159</sup> Verax, T. (1648) *Relations and Observations Historical and Politick upon the Parliament begun Anno Dom. 1640* (London) at 55 (“Your Close Committee of Examinations carry on business so in the dark (being parties engaged with the Army, and not sworn to be true in their office) that no man can see how to defend himself or how he is dealt with or when he is free from trouble and danger. It seems that we are here called *ex tempore* to answer for our lives, *ore tenus*... and no Witnesses are produced nor so much as named: me thinks therefore that we are compelled to play at *blind-man-bough* for our lives, not seeing who strikes us”).

## (b) FORENSIC ADVANTAGE

### (i) Prosecution Indemnities

The first example involves prosecution authorities making unfair use of indemnities. Prosecution indemnities can give transactional immunity or evidential immunity. The technicalities of that distinction will be discussed Chapter V.

In a recent case, a whistle-blowing detective returned from overseas to Western Australia to give evidence on the basis of the DPP's written undertaking. He took the undertaking to mean that he would not be prosecuted. The DPP exploited a loop-hole in the undertaking and prosecuted him.

The District Court stayed the charges permanently as an abuse of process because "once such an agreement has been made, it must be honoured".<sup>160</sup> Other cases have been less clear, but similar unfair use of indemnities has been claimed.<sup>161</sup>

### (ii) Civil Penalty Proceedings

The corporate regulator has sought to exploit its forensic advantages in civil penalty proceedings. Current appeal authority conflicts on the question of whether regulators can use civil procedures to obtain valuable forensic information from defendants in advance of civil penalty hearings.<sup>162</sup>

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<sup>160</sup> *R v Lewandowski* (2003) 32 SR (WA) 247 at 256. Also see *Lewandowski v Sherman* [2002] WASC 239 (Unreported in print, WA Supreme Court, Hasluck J, 14 October 2002) LEXIS BC200206182 (reversal of decision by magistrate to refuse bail to whistle-blower pending hearing of those charges).

<sup>161</sup> *Registrar, Court of Appeal (NSW) v Craven* (1994) 126 ALR 668. Craven claimed that he had been misled about the indemnity which he would receive for testifying against the main culprit. According to the prosecutors he had been trying to force them to give him greater immunity than they had agreed.

<sup>162</sup> *Australian Competition and Consumer Commission v FFE Building Services Ltd* (2003) 25 ATPR 41-938 at 47,069 (no - full Federal Court); against *Sidebottom v Federal Commissioner of Taxation* (2003) 52 ATR 184 (yes - Victorian Court of Appeal).

This conflict could have been resolved by the High Court in a recent case, but the corporate regulator chose not to argue the issue.<sup>163</sup> That case arose when the regulator tried to avoid penalty privilege by applying not for pecuniary penalties but for less obviously punitive remedies. The High Court found against the regulator, but the case showed how far regulators will go to seek forensic advantage.

Forensic devices might be expected in civil penalty proceedings, even in New Zealand.<sup>164</sup> They might also be expected in civil proceedings to which the State is a party.<sup>165</sup> The line must be drawn to prevent this spreading to civil proceedings between private parties.

### (iii) ASIC Approach

The approach of the corporate regulator has been evident from its use of oral examinations.<sup>166</sup> Concerns have been expressed that ASIC “relies very heavily on individuals incriminating themselves in order to successfully bring prosecutions”.<sup>167</sup> Examinations usually take place at an early stage. They are combined with compulsory production of incriminating documents to provide direction for further investigation.

Chapter XI will discuss how the Kluver Report rejected the argument that early examinations were designed to avoid more onerous methods of investigation.<sup>168</sup>

However, the ASC submission seemed to bear out that argument. The ASC might

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<sup>163</sup> *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 136.

<sup>164</sup> *Port Nelson v Commerce Commission* [1994] NZLR 435 (NZ Court of Appeal allows forensic advantage from having disclosures before trial in civil penalty proceedings).

<sup>165</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

<sup>166</sup> E.g. more than 2,500 oral examinations in over 700 investigations between 1992 and 1997: Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.8.

<sup>167</sup> Longo, J. (1992) “Powers of Investigation of the Australian Securities Commission: Balancing the Interests of Persons and Companies under Investigation with the Interests of the State.” *Companies and Securities Law Journal* 10(4): 237 at 242.

<sup>168</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.37 (such arguments “may fail to fully take into account the particular nature of corporate crime”).

have been expected to provide numerous examples to show the benefits of early examinations, but only eight case studies were annexed to its submission.<sup>169</sup> The case-studies showed more about the priorities of regulators.

#### **(iv) Priorities**

The ASC kept emphasising that its objective was achieved more quickly and cheaply because it could start with compulsory oral examination of the principal suspects. The privilege was seen as an inconvenience which hampered cheap and efficient regulation. The ASC seemed to regard the independent collection of evidence as an exceptional and onerous procedure.<sup>170</sup> Even the identification of sources was too much trouble.<sup>171</sup>

At best, the case studies showed that early oral examination was the most convenient method of investigation for the ASC. It may even have been the quickest and most effective method. That did not mean that it was the only method or the best method in broad terms. The language of the case studies showed that regulators can easily forget this.

The language tended to support the criticism that regulators rely too much on compelled evidence. The corporate regulator looked like a modern version of Stephen's Indian native policemen sitting comfortably in the shade rather than hunting up evidence in the sun.

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<sup>169</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) Appendices 3 to 10.

<sup>170</sup> E.g. Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) Appendix 5 page iii (a year's delay in bringing a director to court where he pleaded guilty to charges of insolvent trading "so that all relevant evidence was collected before the directors were examined to avoid the possibility of application of derivative use immunity").

<sup>171</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) Appendix 8 page iii (information from its early examinations "may have been available from other sources. However, it is not certain if the ASC could have identified those sources").



## (v) American Subpoenas

American experience provides a final example of how prosecution practices can be moulded by forensic reality. Chapter VIII will describe how the US Supreme Court restricted the wide use of subpoenas by prosecutors in the *Hubbell* decision.<sup>172</sup> Until that decision, prosecutors preferred subpoenas to search warrants because they were easier to obtain.<sup>173</sup> To obtain search warrants they needed to “persuade a neutral magistrate” that the Fourth Amendment requirements were satisfied.<sup>174</sup>

It has been suggested that the *Hubbell* decision may have “enormous ramifications for white collar law enforcement”.<sup>175</sup> Prosecutors will no longer be able to rely upon wide-ranging subpoenas.<sup>176</sup> The question is whether they will use search warrants instead.<sup>177</sup>

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<sup>172</sup> *United States v Hubbell*, 530 US 27 (2000).

<sup>173</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 128-129 (“grand jury subpoenas for documents need not satisfy the Fourth Amendment particularity and probable cause requirements that apply to search warrants”). *Hale v Henkel*, 201 US 43 (1906) is accepted as having established the principle that subpoenas were not subject to any reasonable cause requirements, although in a surprisingly indirect way: see Stuntz, W. J. (2001) "Commentary; O.J.Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment." *Harvard Law Review* 114(3): 842 at 858 n62.

<sup>174</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 188.

<sup>175</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 185 (careful prosecutors can no longer rely upon “broad, all-encompassing boilerplate document subpoenas”).

<sup>176</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 185 (“use of broad ‘fishing expedition’ document subpoenas will be curtailed, and investigations will be more focused. Significant resources on both the prosecution and defense sides...will be freed up”).

<sup>177</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 188 (whether search warrants will “become more attractive to prosecutors than subpoenas *duces tecum* in white collar cases is a difficult question”). Also see Stuntz, W. J. (2001) "Commentary; O.J.Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment." *Harvard Law Review* 114(3): 842 at 865 (“When faced with subpoenas for documents, suspects can comply or not as they wish. For its part the government can search for evidence it wants, so long as it satisfies the probable cause and warrant requirements”).

The development of broad document subpoenas shows how prosecutors seek forensic advantage and where this leads if it remains unchecked. In the case of *Hubbell* it led to prosecution subpoenas being used to pursue a political target, free from the requirements of the Fourth Amendment.

## **(9) EFFECT OF REMOVAL**

### **(a) STAYS**

If civil proceedings might prejudice the defendant's right to silence, those proceedings can be stayed until the criminal proceedings are completed. However, Australian courts have made it clear that civil proceedings will not be stayed merely to protect the forensic advantage given to a criminal defendant by the right to silence.<sup>178</sup>

Currently, stays of civil proceedings are granted even though the privilege is available. Applications for stays are not really part of the problem of the privilege in civil proceeding, but if the privilege were removed from civil proceedings, the number of applications for stays could well become a problem.

### **(b) CONTEMPT OF COURT**

Contempt of court is more likely to occur in administrative proceedings or in civil proceedings taken by the State. Contempt of the criminal court might be claimed because the other proceedings have been used to obtain evidence for pending

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<sup>178</sup> *McMahon v Gould* (1982) 7 ACLR 202 at 208 ("the court need not be concerned to preserve these advantages").

criminal proceedings.<sup>179</sup> However, it also arises if unauthorised use is made of documents disclosed under compulsory civil procedures.<sup>180</sup>

The *Ampolex* case appears to make contempt of court inapplicable if prosecutors obtain interlocutory disclosures pursuant to statutory powers. However, if prosecutors overreach their powers, contempt of court applications might be possible.

#### **(D) CONCLUSION**

This thesis does not address the question of whether the right to silence is justified in criminal proceedings. At the very least, it is a check on the power of prosecutors to compel evidence from suspects. This check will be greatly weakened if the privilege is removed from civil proceedings between private parties.

This is more obvious in the case of civil penalty proceedings and civil proceedings to which the State is a party. The testimony of witnesses or civil parties could be compelled during trials to provide evidence for criminal proceedings. In private civil proceedings, it is difficult to see how that could happen, but even now prosecutors can side-step the right to silence by exploiting compulsory interlocutory civil procedures. The *Ampolex* decision leaves no doubt that they can use their statutory powers to obtain disclosures from such procedures.

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<sup>179</sup> E.g. *Hammond v The Commonwealth* (1982) 152 CLR 188 on Royal Commissions. The danger of contempt of court is now addressed e.g. by s6A, Royal Commissions Act 1902 (oral or written disclosure may be refused if penalty proceedings have already commenced). Other authorities also run the risk of being in contempt of court: e.g. *Saunders v Federal Commissioner of Taxation* (1988) 88 ATC 4344 and *Watson v Federal Commissioner of Taxation* (1999) 169 ALR 213 (tax authorities); *Brambles Holdings Ltd v Trade Practices Commission* (1980) 44 FLR 182 (trade practices regulator).

<sup>180</sup> E.g. *Harman v Secretary of State for the Home Department* [1983] AC 280 (civil contempt when discovered documents given to journalist). This was appealed to the European Court but was settled before hearing: see *Derbyshire County Council Ltd v Times Newspapers Ltd* [1992] QB 770 at 818.

This chapter has argued against giving the prosecution the opportunity to obtain evidence through the back door. If the legislature provides for that result, so be it. However, any legislation should be passed on the clear understanding that this will be the effect of removing the privilege from civil proceedings between private parties.

## CHAPTER V: POSSIBLE SUBSTITUTES

### (A) INTRODUCTION

Chapter IV argued that the privilege has a special function in civil proceedings. This thesis will now consider whether a substitute can fulfil the same function without causing as many problems. An adequate substitute will be found in derivative use immunity if it is granted by the court under statutory procedures.

This chapter will give a range of examples to show the problems with purely court-made solutions, before looking at the problems with open-ended statutory substitutes. It will start with New Zealand where the view has been that the court does not need statutory guidance.

### (B) JUDICIAL SOLUTIONS

#### (1) IMPOSITION OF CONDITIONS

##### (a) NEW ZEALAND

History shows that the privilege is judge-made. Arguably, therefore, the courts are best placed to devise answers to the problems which the privilege creates. That has been the traditional approach in New Zealand, but it has been modified under the NZLC proposals and the resulting 2005 Evidence Bill.

The traditional approach was taken by the New Zealand Court of Appeal in *Busby*.<sup>1</sup> In an *Anton Piller* order the court imposed a condition which prevented the use in later criminal proceedings of material disclosed under that order. Undertakings of non-disclosure were given by the parties and the court

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<sup>1</sup> *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 at 474 (“All that is needed is a modification of the practice so as to enable information to be obtained while preserving the privilege”).

created a rule of evidence that the material would be inadmissible in the criminal proceedings.<sup>2</sup>

The Court recognised from the outset that the approach depended upon special local features.<sup>3</sup> Its results have been described as “acceptable”.<sup>4</sup> A similar technique was used by the New Zealand High Court to overcome a claim of privilege in relation to a *Mareva* injunction.<sup>5</sup>

The rules in *Busby* were held to be unaffected by the New Zealand Bill of Rights Act 1990.<sup>6</sup> However, not everyone in New Zealand has agreed that Court-made solutions are the best. Even in *Busby* itself, a strong dissenting judgment argued that abrogation of the privilege should be left to legislation.<sup>7</sup>

The NZLC cut across that debate by proposing the removal of the privilege from documents.<sup>8</sup> The merits of that approach will be discussed in Chapter IX. In the case of civil witnesses, including parties, the privilege remains available much as before, contrary to earlier NZLC proposals.<sup>9</sup>

The privilege is still apparently available to defendants who are required to give self-incriminating evidence during interlocutory proceedings. However, the 2005 Evidence Bill provided an exception in the case of *Anton Piller*

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<sup>2</sup> *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 at 474.

<sup>3</sup> E.g. the small unified court system; the greater exercise of judicial control during criminal trials; and a traditional judicial readiness to adapt rules of evidence to meet modern conditions: *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 at 470.

<sup>4</sup> Harvey, D. (1996) "Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination." *Waikato Law Review* 4(2): 60-94 at 86.

<sup>5</sup> *Natural Gas Corporation Holdings Ltd v Grant* [1994] 2 NZLR 252.

<sup>6</sup> However, the High Court also required “as an added safeguard for the defendant, to have some kind of intimation from the Crown Solicitor or the Solicitor General”: *Natural Gas Corporation Holdings Ltd v Grant* [1994] 2 NZLR 252 at 256.

<sup>7</sup> Somers J in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 at 482 (“we must not pass beyond that which is truly adjudicatory to that which is truly legislative”). Also see Thorp J in *Radisich v O’Neil* [1995] NZFLR 377 at 383 (but clearly *obiter*).

<sup>8</sup> This result is apparently intended in clause 49(2) of the 2005 Evidence Bill: New Zealand Government (2005) *Evidence Bill* (Wellington).

<sup>9</sup> A general procedure for certification was included in clause 63(4) to (6) of the draft Evidence Code: see New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission). It does not appear in clause 58 of the 2005 Evidence Bill: New Zealand Government (2005) *Evidence Bill* (Wellington).

orders. The Court can order parties to give information under such orders even if the privilege is claimed, but the information will receive use and derivative use immunity.<sup>10</sup> The implications of that will be explored in Chapter XII.

### (b) AUSTRALIA

The Australian High Court has stopped the use of Court-made conditions as a substitute for the privilege. In the past Australian judges tentatively experimented with the imposition of conditions in court orders.<sup>11</sup> The High Court in *Reid v Howard* firmly ruled out these experiments.<sup>12</sup>

In practice such experiments were never very common because of the restrictive effect of the *Rank* decision in the United Kingdom.<sup>13</sup> It is worth looking briefly at the British authority.

### (c) UNITED KINGDOM

The *Rank* decision was read as confining abrogation of the privilege to legislation and preventing civil courts from devising their own protection as a substitute for the privilege.<sup>14</sup> In the *Rank* decision an *Anton Piller* order in a copyright case included a condition preventing use of disclosed evidence in later criminal proceedings. This was held to be an inadequate substitute for the privilege.<sup>15</sup> The House of Lords objected to civil courts imposing conditions on criminal courts.<sup>16</sup>

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<sup>10</sup> New Zealand Government (2005) *Evidence Bill* (Wellington) clause 59. No similar provision is made for *Mareva* injunctions or in other interlocutory proceedings.

<sup>11</sup> E.g. Evatt J in *Warman International Ltd v Envirotech Australia Pty Ltd* [1986] 67 ALR 253 at 259 and 266. However, Wilcox J preferred to resolve the issue of privilege by an inspection *in camera*: *Warman International Ltd v Envirotech Australia Pty Ltd* [1986] 67 ALR 253 at 267. Also see *Polygram Records Pty Ltd v Monash Records (Australia) Pty Ltd* (1985) 72 ALR 35 (Anton Piller order granted without the condition, but upon an undertaking by the applicant's counsel in similar terms).

<sup>12</sup> *Reid v Howard* (1995) 184 CLR 1.

<sup>13</sup> E.g. *Sharp v Builders Labourers' Federated Union* [1989] WAR 138 at 153; *BPA Industries Ltd v Black* (1987) 11 NSWLR 609 at 613.

<sup>14</sup> E.g. by Neill LJ in the Court of Appeal in *AT & T Istel Ltd v Tully* [1992] QB 315 at 329 and 332.

<sup>15</sup> *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 442-3 and 446.

<sup>16</sup> Lord Wilberforce in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 443. Also see [1982] AC 380 at 446 (*per* Lord Fraser). These comments were not *obiter* even though they were in response to a hypothetical argument from counsel. They were central to the decision that there was no way round the privilege.

The House of Lords found a way to meet that objection in *Tully*.<sup>17</sup> In an action alleging fraud, the plaintiffs sought a *Mareva* injunction against the defendant. He claimed the privilege to avoid disclosing documents and other information concerning his assets. His privilege was overridden because of a letter from the prosecuting authorities agreeing not to make use or derivative use of the material.<sup>18</sup>

Nevertheless, the House of Lords did not pretend that its decision was a breakthrough.<sup>19</sup> As a general solution, it was disapproved by both the House of Lords and the Court of Appeal.<sup>20</sup> Since then, British courts have only rarely applied the *Tully* decision.<sup>21</sup> They have not extended it to cases where the prosecuting authority has not given the necessary assurances.<sup>22</sup>

Moreover, later *Anton Piller* orders in the United Kingdom required the privilege to be brought to the attention of, and waived by, the persons upon whom they were executed.<sup>23</sup> Otherwise, “the privilege may be exercised and usually has effect despite any distaste expressed”.<sup>24</sup>

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<sup>17</sup> *AT & T Istel Ltd v Tully* [1993] AC 45.

<sup>18</sup> *AT & T Istel Ltd v Tully* [1993] AC 45 at 57, 63 and 69. The letter stated that only “material held and/or other material obtained independently” of the civil proceedings, could be used in criminal proceedings. The word “independently” in the letter gave not only use immunity but also derivative use immunity. The court order provided only use immunity.

<sup>19</sup> *AT & T Istel Ltd v Tully* [1993] AC 45 at 69 (“it did not represent a break-through in relation to the principle of self-incrimination; it is a decision on its own facts in the light of that principle”).

<sup>20</sup> *AT & T Istel Ltd v Tully* [1993] AC 45 at 56, 63 and 69 (House of Lords); *AT & T Istel Ltd v Tully* [1992] QB 315 at 324 (Court of Appeal).

<sup>21</sup> A rare example was *Boden v Inca Gemstones plc* (1994) (unreported, UK Court of Appeal (Civil Division), 20th January) (Transcript: John Larking). Even then, the assurances from the prosecuting authorities extended only to specified crimes, not to other crimes which might be revealed by the examination of a civil defendant as to his means and assets.

<sup>22</sup> E.g. *Johnstone v United Norwest Co-operatives Ltd* (1994) (UK Court of Appeal (Civil Division), 11th February) *The Times* 24 February 1994, *The Independent* 1 March 1994 (Transcript: John Larking) (privilege upheld in relation to *Anton Piller* orders and *Mareva* injunction).

<sup>23</sup> *IBM United Kingdom Ltd v Prima Data International Ltd* [1996] 1 WLR 719.

<sup>24</sup> *IBM United Kingdom Ltd v Prima Data International Ltd* [1996] 1 WLR 719 at 728.



## (2) JUDICIAL ABROGATION

### (a) INTRODUCTION

The *Tully* decision did not apparently establish that the privilege could only be abrogated by statute.<sup>25</sup> However, the British courts have been unwilling to accept case-law exceptions to the application of the privilege. This chapter will briefly mention five examples of exceptions which have been rejected, but which could be incorporated into legislative solutions.

### (b) ANCILLARY REMEDY

The first argument addressed the problem of important civil actions being obstructed by possible incrimination for petty criminal offences.<sup>26</sup> It stopped the defendant claiming the privilege in civil proceedings if the feared criminal sanction was ancillary to them.<sup>27</sup> The argument has not been adopted in Australia.<sup>28</sup> Nor has the NZLC proposal to this effect been implemented in the 2005 Evidence Bill in New Zealand.<sup>29</sup>

It would only help in rare cases in Australia.<sup>30</sup> The criminal proceedings will not usually be the minor remedy as compared to the civil action: for example, in cases of fraud.

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<sup>25</sup> However, that is the impression given by para (2) in the headnote of *AT & T Istel Ltd v Tully* [1993] AC 45 at 46 ("could only be removed or altered by Parliament"). Compare e.g. Lord Ackner at 62 ("then this must be done by Parliament") with Lord Templeman at 55 (the courts could act in situations "similar to and analogous to situations in which Parliament has intervened").

<sup>26</sup> *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 441 (impliedly) and 445 (expressly).

<sup>27</sup> This can easily be confused with the argument that the offence is so petty that no prosecution is likely. For an example of that argument, see the decision at first instance in *Busby* (sub nom. *Thorn EMI Video Programmes Ltd v Kitching and Busby* [1984] FSR 342).

<sup>28</sup> *Warman International Ltd v Envirotech Australia Pty Ltd* [1986] 67 ALR 253 at 265. Nor should it be accepted, according to Magner, E. S. (1988) "Dealing with Claims of the Privilege Against Self-incrimination in Civil Cases." *Australian Bar Review* 4(2): 149 at 157 and McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company) at 178.

<sup>29</sup> New Zealand Government (2005) *Evidence Bill* (Wellington) clause 56(1)(b) ("fine or imprisonment"). Compare with New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) para C253 Draft Code s61(1) (the privilege should only be claimable for crimes carrying jail sentences).

<sup>30</sup> E.g. where criminal liability arises under a catch-all default provision such as s1311(1), Corporations Act 2001 (Cth).

### (c) FRAUD

The second and third arguments addressed fraud cases. The second argument was suggested by Lord Denning. It was not surprising that he suggested exceptions. He found a recognisable principle in the old cases that “the courts - which grant the privilege against self-incrimination - will intervene to stop abuse of it”.<sup>31</sup>

Lord Denning’s argument was that the privilege should not be available if it assisted benefit from fraud.<sup>32</sup> This was based upon equity authority from the mid-1800s.<sup>33</sup> Lord Denning’s fellow judges on the Court of Appeal rejected the idea of exceptions for particular types of crime.<sup>34</sup> The argument was not raised in the appeal to the House of Lords.<sup>35</sup>

The third argument was more complicated and relied upon relatively recent authority.<sup>36</sup> It was based upon the automatic creation of a constructive trust when property was obtained by fraud. The beneficiary of that constructive trust was the defrauded person who took action as the plaintiff.

The argument was that the plaintiff as beneficiary had a proprietary right in documents which showed the state of the trust. The right was not based upon discovery. It was not therefore subject to the privilege or other exceptions to

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<sup>31</sup> *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 408.

<sup>32</sup> Lord Denning in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 408 (“when to do so would enable him to take advantage of his own fraud or other wrongdoing so as to defeat the just claims of the plaintiff in a civil suit.”).

<sup>33</sup> *Chadwick v Chadwick* (1852) 22 L J Ch 329, *Green v Weaver* (1827) 1 Sim 404 (57 ER 630) and *Robinson v Kitchin* (1856) 8 De GM & G 88 (44 ER 322). It is also reminiscent of the canon law version given by Cosin, mentioned in Chapter V.

<sup>34</sup> Templeman LJ in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 423 (exploitation of the privilege “is not an injustice which is acceptable in relation to some causes of action, but not others”). Also see Bridge LJ in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 414.

<sup>35</sup> *Bishopsgate Investment Management Ltd (in prov. liq) v Maxwell* [1993] Ch 1 at 34.

<sup>36</sup> E.g. *O'Rourke v Darbishire* [1920] AC 581; *In re Londonderry's Settlement* [1965] Ch 918.

discovery. Its effect was to make the privilege unavailable to the defendant in civil proceedings for fraud, but it was rejected in *Tully*.<sup>37</sup>

#### (d) FIDUCIARIES

The fourth argument was that fiduciaries should be deemed to have waived their privilege by implication because of the nature of their position.<sup>38</sup> This argument would apply particularly to company directors as fiduciaries, but it has now been rejected at all levels of the British judiciary.<sup>39</sup>

#### (e) PARTIES AS WITNESSES

The fifth argument was suggested by Lord Denning: the privilege should not be available to parties as witnesses in civil proceedings.<sup>40</sup> The ALRC recommended in its interim report that parties should be denied the privilege as witnesses.<sup>41</sup> The distinction appeared in State legislation for administrative proceedings but was soon abandoned.<sup>42</sup>

It has attractions when fraudulent defendants are being sued and prosecuted in the same matters. It stops the privilege being most available to the worst criminals, but it conflicts with the argument in Chapter IV that prosecution reliance on compelled information should be discouraged. Chapter IV noted that this argument is less compelling in civil proceedings involving private

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<sup>37</sup> *AT & T Istel Ltd v Tully* [1993] AC 45 at 66. Also see *AT & T Istel Ltd v Tully* [1992] QB 315 at 324-5 and 326-7.

<sup>38</sup> Templeman LJ in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 422.

<sup>39</sup> *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 414; *Tate Access Floors Inc v Boswell* [1991] Ch 512 at 528; *Bishopsgate Investment Management Ltd (in prov. liq) v Maxwell* [1993] Ch 1 at 38, 55 and 71; *AT & T Istel Ltd v Tully* [1993] AC 45 at 66-67.

<sup>40</sup> *In Re Westinghouse Uranium Contract* [1978] AC 547 at 573 (in the context of interlocutory civil proceedings for libel for which criminal prosecution was unlikely).

<sup>41</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol. 2, p52, Clause 104(5). This removed the privilege from defendants at both civil and criminal trials.

<sup>42</sup> Longo, J. (1992) "Powers of Investigation of the Australian Securities Commission: Balancing the Interests of Persons and Companies under Investigation with the Interests of the State." *Companies and Securities Law Journal* 10(4): 237 p 243, citing the Report of the Statute Law Revision Committee of Victoria on the Provisions of the Companies Act (re *Freighters Ltd*) (September 1957). It was implemented in s 146(5) and (6), Companies Act 1958 (Vic), but disappeared from the predecessors of the current s68(3), ASIC Act. A similar distinction appears in old cases on examination of bankrupts: e.g. *Ex parte Schofield: In re Firth* (1877) 6 Ch D 230 (privilege could be invoked by a "mere witness", but not by the bankrupt).

parties, but the protection is still necessary for a party in civil penalty proceedings and civil proceedings involving the State. Unlike a criminal defendant, a civil defendant can be compelled to testify.<sup>43</sup>

### (3) DISGUISED ABROGATION

#### (a) NATURE OF EXCEPTION

Lord Denning made little impression with his historical exceptions but had more success with another method of abrogating the privilege: the so-called Rule in *Brebner v Perry*.<sup>44</sup> This Rule was interpreted in the United Kingdom to say that the privilege was not available “where the witness is already at risk, and the risk would not be increased if he were required to answer”.<sup>45</sup>

This is an example of interpreting the rules for claiming the privilege so that they effectively abrogate the privilege in a particular area. It is seen as an application of the existing rules, leaving the privilege intact. The disclosure does not tend to incriminate because the discloser is already incriminated. It shows the undesirability of *ad hoc* law-making by judges.

#### (b) GLOSS

In the United Kingdom, the Rule in *Brebner v Perry* has been elevated to the level of a doctrine.<sup>46</sup> Yet the original decision was at first instance in Australia.<sup>47</sup> It was not even on the same point. The judge held only that the court can override a claim for the privilege which is not made out of a genuine fear of self-incrimination.<sup>48</sup> He said nothing about increasing risk.<sup>49</sup>

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<sup>43</sup> This was why the proposal in Clause 104(5) was abandoned: Australian Law Reform Commission (1987) *Evidence* (Canberra: Australian Government Publishing Service), para 217(a).

<sup>44</sup> [1961] SASR 177.

<sup>45</sup> Staughton LJ in *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310 at 324.

<sup>46</sup> Staughton LJ in *Sociedade Nacional Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310 at 326.

<sup>47</sup> Mayo J of the South Australian Supreme Court, on appeal by way of case stated from a magistrate.

<sup>48</sup> The case is cited as authority for this proposition in Tapper, C.F.H. (2004) *Cross and Tapper on Evidence* (London: Lexis Nexis) at 456 n104. Also see *Re Application for Inquiry, Election of Officers, Transport Workers Union of Australia, Western Australian Branch* (1989) 89 ALR 575 at 579; *Jackson v Gamble* [1983] 1 VR 552 at 556.

Lord Denning provided the gloss. He interpreted *Brebner v Perry* as showing that the privilege could not be invoked by a witness, if “there was no increase in risk by his being made to answer”.<sup>50</sup> In the United Kingdom this interpretation of *Brebner v Perry* has been accepted.<sup>51</sup> Moreover, the same principle has been approved by British and New Zealand courts without reference to *Brebner v Perry*.<sup>52</sup>

The flexibility of judge-made principles brings its own problems. This principle loses its sense when stretched by the agile minds of counsel. Arguably, regulatory authorities have such extensive powers to obtain disclosures that the risk of prosecution will never be increased by disclosing information in civil cases.<sup>53</sup> It is not surprising that, more recently, British judges have questioned the rule.<sup>54</sup>

### (c) AUSTRALIA

Australian courts have been more reluctant to accept Lord Denning’s gloss on *Brebner v Perry*. The High Court was not ready to embrace it.<sup>55</sup> Lower Australian courts have also expressed doubts.<sup>56</sup>

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<sup>49</sup> Here, it was thought that the witness was invoking the privilege only to protect the defendant. Doubts about the good faith of the witness arose because he had apparently made a full statement to the police before the hearing. The argument was thus open that he could not incriminate himself further, but it was not apparently put to the court.

<sup>50</sup> *In Re Westinghouse Uranium Contract* [1978] AC 547 at 574.

<sup>51</sup> E.g. *Sociedade Nacional Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310 at 324 and 326 (approved, but rejected on the facts).

<sup>52</sup> E.g. *Khan v Khan* [1982] 2 All ER 60 at 66 (applied to enforce tracing order in support of Mareva injunction); *Tate Access Floors Inc v Boswell* [1991] Ch 512 at 529 (rejected on the facts in relation to Anton Piller order). In New Zealand, see *Radisich v O’Neil* [1995] NZFLR 377 at 383 (husband in Family Court proceedings forced to give discovery in spite of fear of resulting tax prosecution because tax authorities could compel him to disclose same incriminating information).

<sup>53</sup> Rejected in *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310 at 326, but only because there were limitations on the use of the material by the Serious Fraud Office.

<sup>54</sup> E.g. Waller LJ in *Den Norske Bank ASA v Antonatos* [1999] QB 271 at 289 (“If there is a risk of self-incrimination and if there is no bad faith a ‘no increase in risk’ must be almost impossible to establish”).

<sup>55</sup> Gibbs CJ in *Sorby v The Commonwealth* (1983) 152 CLR 281 at 290 (declined to state whether it represents a “correct application of the principle that objection on the ground of privilege will not be upheld unless there is a real and appreciable risk to the witness.”).

<sup>56</sup> Clarke JA in *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 at 433 (“it may be that the correctness of *Brebner* will need to be considered at some time”).

It is also unclear whether disguised abrogation of this sort was excluded by *Reid v Howard*. That decision could be interpreted as proscribing court-made solutions of all types, but such a broad interpretation cannot be justified. The *Caltex* decision shows why.

In the *Caltex* decision the High Court created an exception from the privilege by deciding that it was not available to companies in Australia. Because no substitute protection was provided, this apparently avoided the proscription on court-made alternatives in *Reid v Howard*. Such fine distinctions can perhaps be made better by legislation than by *ad hoc* judicial law-making.

#### **(4) ADVERSE INFERENCES**

##### **(a) OPERATION**

The right to silence in criminal cases needs the protection of a related rule: no adverse inference can be drawn if the right to silence is exercised by the accused. This rule is accepted in Australia and New Zealand.<sup>57</sup> Judicial direction is supposed to prevent adverse inferences being drawn by juries.<sup>58</sup> It is outside the scope of this thesis to discuss whether it has that effect or whether adverse inferences should be allowed at all in criminal cases.

In Australian civil proceedings the rule about adverse inferences is reasonably well-accepted.<sup>59</sup> Adverse inferences cannot be drawn if the privilege is exercised.<sup>60</sup> However, this is an exception to a broader rule. Adverse inferences can be drawn when a civil party might have been expected to

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<sup>57</sup> In principle, at least: e.g. s89, Evidence Act 1995 (Cth) setting out principles established in case-law. Also see Clauses 28 and 29 in the 2005 Evidence Bill: New Zealand Government (2005) *Evidence Bill* (Wellington).

<sup>58</sup> McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company) at 277-81.

<sup>59</sup> A contrary view was expressed by Davies JA in *Thompson v Bella-Lewis* [1997] 1Qd R 429 at 436-437.

<sup>60</sup> E.g. *Dolan v Australian and Overseas Telecommunications Corporation* (1993) 114 ALR 231; *Pappas v New World Oil Developments* (1993) 117 ALR 304. This rule has a long history, although not without disagreement: see Lord Eldon in *Lloyd v Passingham* (1809) 16 Ves Jun 59 at 64 (33 ER 906 at 908) ("having observed a notion prevailing lately, that a witness who refuses to answer a question on that ground, is therefore not to be believed. Nothing can be more fallacious")

provide evidence if it had existed but failed to do so.<sup>61</sup> It is a fine line between the broad rule and the exception.<sup>62</sup>

The line would disappear if adverse inferences could be drawn from claims of privilege. The privilege would be claimed less often, reducing obstruction to disclosures in civil proceedings. This approach has been taken in civil proceedings in the United States.

### (b) AMERICAN MODEL

In civil proceedings between private parties in the United States, adverse inferences can be drawn against a party who invokes the privilege to avoid testifying.<sup>63</sup> This provides an incentive for civil parties to testify.<sup>64</sup> An extra incentive would be provided if an adverse inference led to an increase in the amount of damages against the party claiming the privilege.<sup>65</sup>

### (c) TOO HARD

Unfortunately, it is hard to set out with precision which adverse inferences are allowed to be drawn.<sup>66</sup> It is even harder to make sure that they are the ones which are drawn in practice. Refusal to answer, for example, could be taken either as an admission of facts implicit in the question or as a reflection on the credibility of the witness.<sup>67</sup>

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<sup>61</sup> *Jones v Dunkel* (1959) 101 CLR 298. Also see draft s35 New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) (adverse inferences from the silence of civil parties).

<sup>62</sup> *Rowell v Larter* (1986) 6 NSWLR 21 at 24 (adverse inference drawn from plaintiff's failure to testify, even though probably caused by fear of self-incrimination).

<sup>63</sup> *Baxter v Palmigiano*, 425 US 308, 318, 335 (1976). However, it must not be the sole basis for a decision against the defendant: *Lefkowitz v Cunningham*, 431 US 801, 808 n5 (1979).

<sup>64</sup> E.g. OJ Simpson testified in the civil but not the criminal proceedings concerning the killing of his wife and another person. He was acquitted of the criminal charges, but found liable for double murder in civil proceedings. The civil judgment was affirmed in *Rufo v Simpson*, 86 Cal App 4<sup>th</sup> 573, 103 Cal Rptr 2d 492 (2001).

<sup>65</sup> This may even happen under the present British law: see Templeman LJ in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 423-4. For a contrary view see Staughton LJ in *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310 at 319.

<sup>66</sup> E.g. *Murray v United Kingdom* (1996) 22 EHRR 29 at 61 (Criminal Evidence (Northern Ireland) Order 1988 allowed adverse inferences to be drawn from refusal to answer questions, yet "silence, in itself, cannot be regarded as an indication of guilt"). Also see Davies JA in *Thompson v Bella-Lewis* [1997] 1 Qd R 429 at 437 (four possible inferences discussed).

<sup>67</sup> Young, P. W. (1991) "Taking The Fifth." *Australian Law Journal* 65(7): 412 at 413.

A claim of privilege at an early stage might “merely suggest in a vague way that some circumstantial evidence of some criminal conduct exists”.<sup>68</sup> This raises the question of whether the inference should be drawn when the privilege is claimed to resist discovery. In the United States it cannot be.<sup>69</sup> On balance, it seems simpler to apply the current rule which excludes adverse inferences.

## (5) PROCEDURAL TINKERING

Chapter III referred to an article by Magner.<sup>70</sup> She advocated procedural solutions. Incrimination was prevented by making sure the disclosures never left the civil court-room. The proceedings were heard *in camera*. Incriminating questions were answered and documents produced, but they were kept secret.

These methods had some success in Australia in addressing unjustified claims of privilege.<sup>71</sup> The trial judge excluded them by inspecting the material himself.<sup>72</sup> Standard procedures could be devised based upon those decisions.<sup>73</sup>

Because the possibility of incrimination is usually in no doubt, these procedures only offered a limited solution.<sup>74</sup> Moreover, they seemed to impose

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<sup>68</sup> Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1123.

<sup>69</sup> Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1108-9.

<sup>70</sup> Magner, E. S. (1988) "Dealing with Claims of the Privilege Against Self-incrimination in Civil Cases." *Australian Bar Review* 4(2): 149.

<sup>71</sup> E.g. *Re Intercontinental Development Corporation Pty Ltd* (1975) 1 ACLR 253 at 258 (Bowen CJ in Equity, hearing sworn evidence with no transcript being taken).

<sup>72</sup> E.g. *Warman International Ltd v Ervirotech Australia Pty Ltd* [1986] 67 ALR 253 at 267 (Wilcox J looking at documents alone, before showing them to counsel).

<sup>73</sup> E.g. Magner, E. S. (1988) "Dealing with Claims of the Privilege Against Self-incrimination in Civil Cases." *Australian Bar Review* 4(2): 149 at 166-7. However, see *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 443 and 447-8 for severe criticism of *in camera* hearings. For inspection of documents in the absence of counsel to determine public interest immunity, see *Alister v R* (1984) 154 CLR 404 at 469. This was criticised by Murphy J in *Alister v R* (1984) 154 CLR 404 at 470. Also see *Australian Law Journal* (1984). "Right of counsel to see documents inspected by the court." *Australian Law Journal* 58(6): 313.

<sup>74</sup> E.g. in *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union* (1987) 71 ALR 501 at 522, Wilcox J used the same technique as in *Warman International Ltd v Ervirotech Australia Pty Ltd* (1986) 67 ALR 253. However, this time he found the material possibly incriminating and resorted to taking undertakings from the parties and limiting access to the material.



conditions on the use of material from the civil proceedings. The High Court proscribed such conditions in *Reid v Howard*.

## **(6) INCONSISTENCY**

Judge-made solutions to judge-made problems lead to inconsistency which the doctrine of precedent cannot really control. Chapters XI and XII will discuss the attempts by the New South Wales Supreme Court to apply certification procedures to pre-trial proceedings. They will show the need for a statutory structure within which judges can exercise their discretion. Without such a structure, judge-made solutions soon degenerate into *ad hoc* lawmaking.

## **(C) LEGISLATIVE SOLUTIONS**

### **(1) TOTAL ABROGATION**

#### **(a) OPERATION**

Statutes often remove the privilege in administrative proceedings. Witnesses must then answer questions or produce documents. Some statutes provide that the answers or documents may be used in any later proceedings. The legislature has decided that the protection afforded by the privilege should be totally abrogated for reasons of public policy.

This chapter has argued that in private civil proceedings the privilege should remain for reasons of public policy. Those reasons override the ones in favour of total abrogation. It is unnecessary, therefore, to deal in much detail with total abrogation, except for a brief comparison with statutory use immunity.

Unlike statutory use immunity, total abrogation can be effected by short provisions because the underlying concept is simple. The public policy balance has been decided in favour of the State in the later criminal proceedings. Any disclosures can be used against the criminal defendant.

## (b) HUMAN RIGHT

Notwithstanding the alleged importance of the privilege in the common law, its application is unquestionably subject to contrary statutory intention.<sup>75</sup>

Moreover, that intention can be found by implication as well as by express statutory provision. This was established by a British decision in the 1800s.<sup>76</sup> Since then the courts have allowed the privilege to be abrogated by provisions which showed an intention inconsistent with its application.<sup>77</sup>

This seems a strange way to treat a human right. Abrogation is not a difficult drafting exercise.<sup>78</sup> Effect should only be given to abrogation if it is clearly expressed. This has been the approach in New Zealand.<sup>79</sup> The same approach has been recommended in Australia.<sup>80</sup>

Even then, the problem with total abrogation is its political unacceptability. This was shown by the United Kingdom's response to the *Saunders* decision.<sup>81</sup> Use immunity replaced total abrogation in the offending provision.<sup>82</sup> Use immunity was considered to satisfy the human rights concerns. This chapter will take a different view of use immunity, but first it will look briefly at transactional immunity.

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<sup>75</sup> E.g. Lord Wilberforce in *IRC v Rossminster Ltd* [1980] AC 952 at 998 ("while the courts may look critically at legislation which impairs the rights of citizens and should resolve any doubt in interpretation in their favour, it is no part of their duty, or power, to restrict or impede the working of legislation").

<sup>76</sup> *R v Scott* (1856) Dears & B 47 (169 ER 909).

<sup>77</sup> E.g. where the purpose of the statute would be defeated by allowing refusal: *In Re London United Investments Ltd* [1992] Ch 578 at 601 ("because of the scheme and purpose of Part XIV" of the Companies Act 1985 (UK)). See Heydon, J. (1971) "Statutory Restrictions on the Privilege Against Self-Incrimination." *Law Quarterly Review* 87(April): 214-239 for criticism of this approach as an application of the principles of statutory construction.

<sup>78</sup> As shown in s72, Supreme Court Act 1972 (UK) and s31, Theft Act 1968 (UK).

<sup>79</sup> See s6, New Zealand Bill of Rights Act.

<sup>80</sup> Australian Law Reform Commission (2003) *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Canberra: Australian Law Reform Commission); Queensland Law Reform Commission (2004) *The Abrogation of the Privilege against Self-Incrimination* (Brisbane: Queensland Law Reform Commission).

<sup>81</sup> *Saunders v United Kingdom* (1966) 23 EHRR 313.

<sup>82</sup> In 1999 s434, Companies Act 1985 (UK) was amended by the insertion of ss(5A) which provided for use immunity; see Youth Justice and Criminal Evidence Act 1999 (UK) Schedule 3 Clause 5. The same Schedule made similar amendments to more than a dozen other UK statutes. This approach is also said to avoid problems with *Saunders* in New Zealand: Mahoney, R. (1997) "Evidence." *New Zealand Law Review*(1): 57 at 72.

## (2) TRANSACTIONAL IMMUNITY

### (a) RELEVANCE

Transactional immunity is known under various names.<sup>83</sup> It provides substitute protection in the form of total immunity from prosecution.<sup>84</sup> This protection is stronger than the privilege which it replaces.

There are few examples in Australasian legislation.<sup>85</sup> It used to be common in Australia, where it was granted in criminal proceedings and occasionally in civil proceedings.<sup>86</sup> However, it is not a practicable substitute for the privilege in civil proceedings between private parties.

Transactional immunity was the preferred substitute for the privilege in American statutes before 1972, but it was not used in civil proceedings between private parties.<sup>87</sup> Its extreme results make it unattractive in civil proceedings.

### (b) AGAINST PUBLIC INTEREST

Arguably, it is not in the public interest that criminal proceedings, which protect the wider community, should give way to civil proceedings, which involve only private parties. Admittedly, this argument applies to any

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<sup>83</sup> E.g. Kluver, J. (1992-2000) "ASC Investigations and Enforcement". *Australian Corporation Law: Principles and Practice* (Ed.) (Sydney: Butterworths) para [15.1.0090] ("prosecution immunity"); Australian Law Reform Commission (2003) *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Canberra: Australian Law Reform Commission) Clause 18.40 ("personal immunity").

<sup>84</sup> E.g. John Dean (the whistle-blower in the Watergate affair) recounted how his lawyer "was negotiating with the prosecutors for total immunity known in the trade as 'bath immunity', which meant that I could not be prosecuted" Dean, J. W. (1976) *Blind Ambition* (London: W.H. Allen & Co Ltd) at 292.

<sup>85</sup> In 2001 it ceased to apply in Tasmania. Since 1990 it has only applied in WA in a narrow range of financial offences under s12, Evidence Act 1906 (WA). A similar provision still exists in ss16 and 17 of the Evidence Act (NZ). Transactional immunity also appears in s248, Electoral Act 1993 (NZ) and 253, Legislature Act 1908 (NZ).

<sup>86</sup> See e.g. *Re Application for Inquiry, Election of Officers, Transport Workers Union of Australia, Western Australian Branch* (1989) 89 ALR 575 at 579 (s11 certificate granted in civil proceedings under the Industrial Relations Act 1988 (Cth)); *Sharp v Builders Labourers' Federated Union* [1989] WAR 138 at 150-3 (application for s11 certificate refused in civil proceedings).

<sup>87</sup> It would be "highly unlikely and generally undesirable": Latrobe, O. R. (1974) "Constitutional Law: Self-incrimination and Court Granted Immunity in Civil Litigation." *Oklahoma Law Review* 27: 243 at 248-9.

substitute for the privilege, as it does to the privilege itself. The problem with transactional immunity is that the criminal action is not just made more difficult. It is prevented completely.<sup>88</sup>

Unlike use immunity, transactional immunity is not usually given under an open-ended statutory provision. It is granted under a statutory provision but on a case by case basis. The grantor should know all the facts and understand the broader context. In the reported Western Australian cases, the grant was usually by judges or magistrates in criminal cases. They had to decide whether the grant was in the interests of justice and whether the evidence from the witness was satisfactory.

Even in criminal cases, the extreme results of granting transactional immunity were not always taken into account.<sup>89</sup> This occurred even with the assistance of the prosecuting authorities.<sup>90</sup> The problem would be greater in civil proceedings. In most civil cases, the prosecuting authorities would not be represented before the judge granting the immunity.<sup>91</sup>

The extreme results make transactional immunity vulnerable to exploitation. If it is granted before the testimony, witnesses may become less helpful.<sup>92</sup> This danger is usually addressed by giving the power to withdraw the immunity if the evidence is unsatisfactory. However, this necessary power of withdrawal raises difficulties which will be discussed in Chapter XII.

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<sup>88</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 1, para 861 doubted whether, even in criminal cases, transactional immunity would serve the public interest, because it would prevent prosecution "no matter how much other independent evidence existed. The State would pay a heavy price for obtaining the evidence".

<sup>89</sup> E.g. *Attorney-General for Western Australia v Cockram* [1990] 2 WAR 477.

<sup>90</sup> E.g. *Attorney-General for Western Australia v Cockram* [1990] 2 WAR 477 at 485 (the prosecuting counsel gave his consent).

<sup>91</sup> E.g. nobody from the Crown Prosecution Service attended the civil proceedings in *AT & T Istel Ltd v Tully* [1993] AC 45: see 56-57. Instead, the CPS sent a letter which Lord Griffith (at 57-58) thought ill-advised.

<sup>92</sup> E.g. Dean, J. W. (1976) *Blind Ambition* (London: W.H. Allen & Co Ltd) at 392 ("as soon as Paul got immunised his memory went bad. They've never even used him as a witness").

### (3) USE IMMUNITY

#### (a) OPERATION

Statutory use immunity involves abrogation of the privilege by statute and, by way of substitute, restriction on the use of answers given or documents produced. Usually, the restriction applies to criminal proceedings.<sup>93</sup> It is said to involve “partial abrogation” of the privilege.

Few Australian provisions grant use immunity as a substitute for the privilege in private civil proceedings.<sup>94</sup> The theory is that incriminating answers would be available for the purposes of the civil proceedings but could not be used in later criminal proceedings. This is said to provide protection equivalent to the privilege which has been abrogated.

Use immunity appears more often in statutory administrative provisions. These restrict the later use of the disclosures in various ways.<sup>95</sup> Some provisions expressly prevent the use of the disclosures in all civil and criminal proceedings.<sup>96</sup> Others only prevent later use in criminal proceedings or in some of them.<sup>97</sup>

#### (b) GILBERTIAN FARCE

This phrase was used by an Australian judge to describe the anomalies resulting from differences in the various abrogating provisions.<sup>98</sup> He was

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<sup>93</sup> However, this restriction rarely extends to proceedings for perjury and contempt of court. No further reference will be made to such proceedings in this thesis.

<sup>94</sup> For a rare example, see ss177 and 178, Crimes Act (NSW). They are less clear than British examples: see s72, Supreme Court Act 1981 (UK); s 31, Theft Act 1968 (UK).

<sup>95</sup> Lord Mustill described them as “unsystematic legislative techniques”: *R v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1 at 40. For examples of the various techniques, see Heydon, J. (1971) “Statutory Restrictions on the Privilege Against Self-Incrimination.” *Law Quarterly Review* 87(April): 214-239 at 226-7 (UK) and McNicol, S. B. (1992) *Law of Privilege* (Sydney: Law Book Company) at 242-5 (Australia).

<sup>96</sup> E.g. s243F(3), Customs Act 1901 (Cth).

<sup>97</sup> E.g. s597(12A), Corporations Act 2001 (Cth) (all criminal and penalty proceedings); s31, Theft Act 1968 (UK) (only Theft Act offences).

<sup>98</sup> *Cole J in Spedley Securities Ltd (in liq) v Bond Brewing Investments Pty Ltd* (1991) 4 ACSR 229 at 247 (“Gilbertian farce which brings the law into disrepute”). He was later removed by the NSW Court of Appeal from these proceedings. There was a reasonable apprehension that he might not approach

referring to the result of statutory use immunity in Australian liquidators' examinations.<sup>99</sup> His example was based upon the ability of a director to claim the privilege in civil proceedings to avoid giving evidence.

Yet the director was forced to give the same evidence at a liquidator's examination because his privilege was abrogated. His answers received use immunity, but the examination was held in public and widely reported. The judge suggested that the law was brought into disrepute because the civil court was prevented by the privilege from hearing evidence which was public knowledge.

These concerns were echoed by another Australian judge.<sup>100</sup> The main point is valid: different procedures should not be seen to lead to such widely varying results. As Chapter IV noted, the result is that prosecuting authorities can use different types of proceedings to side-step the right to silence. However, the anomalies arise because use immunity is not an adequate substitute for the privilege.

### (c) FORENSIC BATTLE-FRONT

This phrase was used by one commentator to describe the later court proceedings in which statutory use immunity is applied.<sup>101</sup> Difficult arguments have to be resolved in court, concerning the scope and operation of the

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them with an "impartial and unprejudiced mind": Fox, C. (1992) "Judge disqualified in Spedley action". *The Financial Review* (20 March) (Perth) 3.

<sup>99</sup> The description may also have been inspired by a procedure which effectively required the witness to say "privilege" at the start of every answer.

<sup>100</sup> Rogers, A. (1991) "A Vision of Corporate Australia." *Australian Journal of Corporate Law* 1(1): 1 at 3. He was discussing *Banque Brussels Lambert SA v Australian National Industries Ltd* (1990) (NSW Supreme Court, Rogers CJ in Comm Div, 5th October) NSW LEXIS 10158; BC9001923. The civil proceedings took place a week or so before the liquidator's examination. This was why there was no transcript of the examination available at the civil proceedings: Sutherland, G. (1990) "Evidently there is an urgent problem." *Commercial Law Quarterly*(June): 4 at 5.

<sup>101</sup> Used by Wood, P. M. (1990) "Collateral advantages of the privilege against self-incrimination in civil cases." *Commercial Law Quarterly*(March): 21 at 23.

provisions granting immunity. This happens even with apparently clear provisions.<sup>102</sup>

It was noted earlier in this chapter that, following British authority, the Australian courts have been ready to imply a statutory intention to abrogate the privilege. With provisions offering protection in place of the privilege, on the other hand, they have taken a strict approach based upon the same British authority.<sup>103</sup> They have only recognised such protection if it has been clearly expressed.<sup>104</sup>

This rule of interpretation is not consistent with the status of the privilege as a human right. In practice, it means that documents rarely receive the protection of use immunity.

#### (d) DOCUMENTS

Statutory provisions are often unclear about documents. For example, the British sections on civil proceedings give immunity to statements and admissions made in answering questions or complying with orders in civil proceedings.<sup>105</sup> There is some authority for the view that these sections give

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<sup>102</sup> E.g. the Australian High Court has confirmed three times in recent years that the privilege has been abrogated in liquidators' examinations, by "a statute which by its expression clearly intends...that all questions allowed to be put shall be answered": Barwick CJ in *Mortimer v Brown* (1970) 122 CLR 493 at 495 (s250, uniform Companies Act 1961). Also see *Rees v Kratzmann* (1965) 114 CLR 63 (s250, uniform Companies Act 1961); and *Hamilton v Oades* (1989) 166 CLR 486 (s541, uniform Companies Code 1982).

<sup>103</sup> *R v Scott* (1856) Dears & B 47 at 60 (169 ER 909 at 914) *per* Lord Campbell ("When the Legislature compels parties to give evidence accusing themselves, and means to protect them from the consequences of giving such evidence, the course of legislation has been to do so by express enactment").

<sup>104</sup> The Australian courts also follow the *Scott* approach: e.g. *R v M* (1979) 4 ACLR 610 at 620; *R v Zion* [1986] VR 609 at 614. For the British cases, see Heydon, J. (1971) "Statutory Restrictions on the Privilege Against Self-Incrimination." *Law Quarterly Review* 87(April): 214-239 at 227 and 238.

<sup>105</sup> See s72, Supreme Court Act 1981 (UK); s 31, Theft Act 1968 (UK).

immunity to documents which are disclosed.<sup>106</sup> It is more likely that they do not receive any immunity.<sup>107</sup>

Similarly, documents lose their protection when statutory abrogation of the privilege includes documents, but use immunity is restricted to oral statements.<sup>108</sup> Various reasons can be suggested why documents rarely receive statutory use immunity. Documents may be brought into existence to deceive. They are often incomplete and their evidentiary value is not fully realised unless supplemented by oral evidence.<sup>109</sup>

### (e) DERIVATIVE EVIDENCE

The most important defect of use immunity is that it does not cover derivative evidence. In American terms, use immunity does not provide protection which is coextensive with the privilege.<sup>110</sup> It provides less protection than the privilege because it only gives immunity to the disclosures themselves.

However, disclosure “may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating nature”.<sup>111</sup> That evidence is known as derivative evidence. It should be covered if the immunity is to provide an adequate substitute for the privilege.<sup>112</sup>

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<sup>106</sup> Sir Nicolas Browne-Wilkinson VC thought that both s72 and s31 immunised documents: *Tate Access Floors Inc v Boswell* [1991] Ch 512 at 527. Also see CLRC (1966) *Theft and Related Offences* (London: Criminal Law Revision Committee) para 200 (s 31 Theft Act applies to any “answer or disclosure”).

<sup>107</sup> E.g. Tapper, C.F.H. (2004) *Cross and Tapper on Evidence* (London: Lexis Nexis) at 458 n119 (“The abrogation extends to materials discovered while the restoration is limited to admissions and statements”).

<sup>108</sup> E.g. s68(3), Australian Securities and Investments Commission Act (2001) (Cth); s597(12A), Corporations Act 2001 (Cth).

<sup>109</sup> Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) para 3.3.

<sup>110</sup> E.g. in numerous decisions from *Counselman v Hitchcock*, 142 US 547 (1892) to *Kastigar v. United States*, 406 US 441 (1972).

<sup>111</sup> Lord Wilberforce in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 443

<sup>112</sup> Lord Wilberforce in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 443 (“the party from whom disclosure is asked is entitled on established law, to be protected from these consequences”). However, Lord Ackner was less sure in *AT & T Istel Ltd v Tully* [1993] AC 45 at 63.



In Australia, the problem of derivative evidence has long been acknowledged by the High Court.<sup>113</sup> Use immunity only prevents the disclosures themselves from being admitted in evidence. It provides no protection against derivative evidence which has been discovered as a result of the disclosures. Chapter VIII will discuss whether the discloser should be protected from other indirect uses.<sup>114</sup>

In the end, use immunity is reminiscent of Bentham's version of the fox-hunter's reason. It is an arbitrary and not too onerous handicap on the State, like not being allowed to shoot the fox.

#### **(4) USE AND DERIVATIVE USE IMMUNITY**

##### **(a) ACCEPTANCE**

This thesis argues that an adequate substitute for the privilege must give derivative use immunity as well as use immunity. The resulting term "use and derivative use immunity" is unwieldy. It is usually called derivative use immunity in this thesis but is also known by other names.<sup>115</sup> The important point is that it covers evidence directly or indirectly obtained as a result of the disclosure.

Australia has adopted derivative use immunity from the United States. For over a decade Commonwealth legislation has been drafted on the presumption that, in the absence of special circumstances, it will provide for derivative use

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<sup>113</sup> E.g. *Sorby v The Commonwealth* (1983) 152 CLR 281 at 293-4, 310, 312 and 316; *Hamilton v. Oades* (1989) 166 CLR 486 at 496. However, not everyone agrees: e.g. Santow's submission mentioned in Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) para 2.1.10.

<sup>114</sup> E.g. use by the prosecution in formulating questions for cross-examination. The disclosures can provide "vital material for cross-examination": Lord Widgery CJ in *R v Cheltenham Justices* [1977] 1 All ER 460 at 464. However, the source cannot be revealed to the jury (*R v Rice* (1963) 47 Crim App Rep 79 at 86) and cannot be made admissible by being put to the witness in cross-examination (*R v Treacy* (1944) 30 Crim App Rep 93 at 96).

<sup>115</sup> E.g. Kluser, J. (1992-2000) "ASC Investigations and Enforcement". *Australian Corporation Law: Principles and Practice* (Ed.) (Sydney: Butterworths) para [15.1.0090] ("direct and derivative evidential immunity"); New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) ("use and use fruits immunity").

immunity if it abrogates the privilege. This immunity appears in the 1995 uniform Evidence Act and in numerous other Commonwealth statutes.<sup>116</sup> Chapter IX will explain how prosecuting and enforcement authorities have sought to displace that presumption by claiming special circumstances.

Derivative use immunity does not appear in existing statutes in New Zealand, but it was included in the NZLC proposals.<sup>117</sup> One example survives in the 2005 Evidence Bill.<sup>118</sup>

### (b) OBJECTIONS

The main objection is that the success of prosecutions will be jeopardised if derivative use immunity is given to evidence which has been obtained by compulsory powers. It is claimed that, once evidence is compelled and given derivative use immunity, evidence obtained afterwards can be made inadmissible.

Chapter IX will discuss these claims about derivative use immunity. Such immunity probably adds to the task of prosecutors. Certainly, evidence will need to be obtained using methods which are less convenient than compulsory powers. However, Chapter IV argued that the privilege has an important function in keeping prosecutors honest. This function is not adequately fulfilled by use immunity but is fulfilled by derivative use immunity. It is not surprising that prosecutors argue against it. They would prefer the privilege to be removed with no substitute at all.

The question for this thesis is whether these arguments are relevant to private civil proceedings. The privilege prevents the incriminating disclosures being

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<sup>116</sup> E.g. s112(5)(c), Environment Protection and Biodiversity Conservation Act 1999 (Cth); s8S(2)(b), Health Insurance Commission Act 1973 (Cth).

<sup>117</sup> E.g. in its optional certification procedure for witnesses who could claim the privilege, but still wish to testify. This involved the court giving use and derivative use immunity: see draft ss63(4) to (6), New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission).

<sup>118</sup> Clause 59(5), New Zealand Government (2005) *Evidence Bill* (Wellington).

made in civil proceedings. There are no disclosures or derivative evidence which could be available to prosecutors.

Derivative use immunity would enable the disclosures to be made but would give equivalent protection to the discloser. It is hard to see how the prosecutors could be in a worse position than if the privilege had been claimed, but that will be discussed in Chapter IX.

#### **(D) CONCLUSION**

If judges take it upon themselves to abrogate the privilege, the results are often unpredictable, inconsistent or unclear. In Australia, at least, the High Court has discouraged judicial initiatives of this type. Abrogation is achieved more satisfactorily in a statute, as long as the statute provides a suitable substitute for the privilege.

This chapter has discussed the possible substitutes. Transactional immunity provides protection which is probably greater than the privilege. Moreover, for public interest reasons, it is not suitable for use in civil proceedings. Use immunity is inadequate as a substitute for the privilege because it fails to address the problem of derivative evidence. To provide protection equivalent to the privilege, the statute must give derivative use immunity as well as use immunity.

Automatic statutory immunity may open up the possibility of abuse. The danger of abuse can be avoided by making the grant of derivative use immunity dependent upon the discretion of the courts

## **CHAPTER VI: HISTORY OF RIGHT TO SILENCE AND WITNESS PRIVILEGE**

### **(A) ROLE OF HISTORY**

#### **(1) STRUCTURE**

Chapter II described the modern privilege and the problems which it creates in civil proceedings between private parties. Chapter IV concluded that the privilege satisfied particular needs in civil proceedings. Chapter V considered whether those needs could be met by modern judicial or legislative substitutes.

The problems of the present were described before turning to those of the past. According to this thesis, the history of the privilege is an important guide for policy. The problems of the present are often similar to the problems of the past. With that in mind, this chapter and Chapter VII will deal with the history of the right to silence and the privilege.

As Chapters II to IV showed, the reasons underlying the privilege in civil proceedings are not necessarily the same as those underlying the right to silence. Chapter VII will give a historical dimension to those differences. The privilege in civil proceedings had separate origins in the old Court of Chancery. That was where the privilege developed for civil parties, particularly in interlocutory proceedings. Chapter VII will argue that the privilege developed for parties in Chancery as a check on the abuse of its compulsory procedures

However, Chancery was not where the privilege developed for witnesses. The origins of witness privilege lay in the common law courts, not in Chancery. Witness privilege developed most obviously in common law criminal proceedings but separately from the right to silence for the accused in those proceedings.

In civil proceedings witness privilege developed separately from the privilege for parties. Witness privilege arose in common law civil proceedings as an exception when the compellability of witnesses was introduced by the 1563 Perjury Act. Because of the common law origins of witness privilege, this chapter will deal with the history of the right to silence in criminal proceedings.

This involves referring to the historical debate on the subject. It may seem surprising that the history of the right to silence is covered at all, let alone the historical debate. However, it provides the necessary background for the historical distinctions made in Chapter VII. In civil proceedings the privilege was different from the right to silence and witness privilege was different from the privilege for parties.

## **(2) WITNESS PRIVILEGE**

Witness privilege means that witnesses at the civil trial, whether parties or not, cannot be obliged to give self-incriminating testimony. In civil proceedings, witness privilege has caused relatively few problems. Nevertheless, any solution suggested by this thesis needs to take witness privilege into account.

Witness privilege applies in criminal as well as in civil proceedings. In fact, most of the historical examples of witness privilege came from criminal proceedings. This chapter will show that witness privilege originated in the common law and developed in the same way in both civil and criminal cases.

## **(3) GAP LEFT BY DEBATE**

It is necessary to mention the historical debate about the right to silence when distinguishing the origins of witness privilege from those of the right to silence. However, there is a more important reason why the historical debate is relevant to the history of the privilege in civil proceedings. Little has been written on

the origins of the privilege in civil proceedings. The lack of historical literature led Magner to describe those origins as “obscure”.<sup>1</sup>

Wood attacked Magner’s opinion as “both incorrect in fact and unjustly dismissive of the industry of many legal historians”.<sup>2</sup> Wood’s view seemed harsh. The industry of legal historians was directed almost exclusively towards the origins of the right to silence. The participants showed little interest in civil proceedings, which were mentioned only as an afterthought, if at all.

That focus was easy to forget. Almost all of the participants in the historical debate were American. They referred to “the history of the privilege against self-incrimination”. In the United States the “privilege against self-incrimination” usually means the right to silence in criminal proceedings.<sup>3</sup>

With hindsight, Wood could also have been criticised because he relied upon historical views which have since been revised. Wood relied mainly upon Wigmore who thought that the privilege developed first for the accused in criminal proceedings before 1650 and spread to civil proceedings after 1650. The modern revisionist view is that the development for the accused did not occur until the late 1700s. That really did obscure the origins of the privilege in civil proceedings. It raised the question: if the privilege did not come to civil proceedings from criminal proceedings, where did it come from?

#### **(4) FILLING THE GAP**

One answer was given by Macnair, an English historian. He argued that the privilege developed separately in civil proceedings in the Court of Chancery

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<sup>1</sup> Magner, E. S. (1988) "Dealing with Claims of the Privilege Against Self-incrimination in Civil Cases." *Australian Bar Review* 4(2): 149 at 149.

<sup>2</sup> Wood, P. M. (1990) "Collateral advantages of the privilege against self-incrimination in civil cases." *Commercial Law Quarterly*(March): 21 at 22.

<sup>3</sup> Berger, M. (1984) "Rethinking Self-Incrimination in Great Britain." *Denver Law Journal* 61(3): 507 at 507 n5; Berger, M. (2002) "American perspectives on self-incrimination and the compelled production of evidence." *The International Journal of Evidence & Proof* 6(2): 218 at 219.

during and after the late 1500s.<sup>4</sup> He apparently came to his conclusions independently of the American revisionists.<sup>5</sup> Nevertheless, they embraced his ideas in the right to silence debate.<sup>6</sup>

Chapter VII will adopt Macnair's view that the privilege can be traced to equitable developments involving civil parties and documents. During interlocutory civil proceedings the privilege protects parties from making self-incriminatory oral disclosures. It also protects them from producing documents, the contents of which are self-incriminatory.

Chapter VII will argue that this privilege in interlocutory civil proceedings developed separately from the right to silence and had its origins in the Court of Chancery. It owed as more to Chancery's objection to abuse of its compulsory processes than to any tenderness towards the rights of the examinee. Moreover, Chapter IX will suggest that Chancery practice, not the common law, was responsible for the extension of this privilege to documents.

## **(B) HISTORY OF THE RIGHT TO SILENCE**

### **(1) CHANGE IN HISTORICAL APPROACH**

#### **(a) NOTED BY COURTS**

The Star Chamber is mentioned often in the potted histories which judges often provide to open their discussions of the privilege.<sup>7</sup> Sometimes, the practices of

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<sup>4</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66. As Chapter III noted, his work was done as part of his research for an Oxford D Phil thesis which was later published in Germany: Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot).

<sup>5</sup> Langbein, J. H. (1994) "The historical origins of the privilege against self-incrimination at common law." *Michigan Law Review* 92(March): 1047 at 1072 n118.

<sup>6</sup> He was mentioned frequently and with evident approval in their 1997 book: Helmholz et al (1997) *The Privilege Against Self-Incrimination: Its Origins and Development* (Chicago: The University of Chicago Press) e.g at 208 n40, 211 n11, 232 n22, 234 n37, 242 n112, 244 n121 and 246 n127. He and Langbein have also commented on each other's pre-publication work: see Langbein, J. H. (1997) "The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 247 n134 and Macnair, M. R. T. (1994) "Sir Jeffrey Gilbert and his Treatises." *Journal of Legal History* 15(3): 252 at 268 n117.

the High Commission are also blamed for prompting the development of the privilege.<sup>8</sup>

Other judges preface their discussions of the privilege by attributing its origins to the jurisdictional struggle between the common law and the ecclesiastical courts over the oath *ex officio* in the 17th century. That version comes closest to the traditionalist view usually attributed to Wigmore.<sup>9</sup> Yet the Star Chamber was not involved in that jurisdictional struggle.<sup>10</sup> Nor was it obvious how a jurisdictional struggle over an oath could lead to the right to silence.<sup>11</sup>

The oath *ex officio* was surprisingly mild, even as administered by the High Commission at the height of its powers in the late 16th century.<sup>12</sup> Witnesses take a similar oath as a matter of course in modern court proceedings.

Admittedly, the oath was only part of a skilful and intimidating procedure. This procedure was used in ecclesiastical courts against accused persons to force them into self-incrimination.

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<sup>7</sup> E.g. Murphy J in *Pyneboard v Trade Practices Commission* (1983) 152 CLR 328 at 346 (“The privilege developed in England out of concern for lack of due process in Star Chamber and criminal proceedings”); and in *Hammond v The Commonwealth* (1982) 152 CLR 188 at 200 (“part of our legal heritage where it became rooted as a response to the horrors of the Star Chamber”). Also see the majority judgment in *Reid v Howard* (1995) 184 CLR 1 at 11 (“developed after the abolition of the Star Chamber by the Long Parliament in 1641”).

<sup>8</sup> E.g. Brennan J in *Sorby v The Commonwealth* (1983) 152 CLR 281 at 317 (“applied as a rule in the courts of common law and equity after the Court of Star Chamber and High Commission were abolished”) and in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (“a humanitarian desire to protect individuals from the Courts of Star Chamber and High Commission”).

<sup>9</sup> E.g. Mason CJ and Toohey J in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 497 (“the common law’s reaction against the use of the *ex officio* oath by ecclesiastical courts and the Court of Star Chamber and against the unjust methods of interrogating accused persons”).

<sup>10</sup> “The Star Chamber was untouchable”: Gray, C. M. (1997) “Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries”. *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 47 at 223-4 n4. No prohibitions were ever issued against the Star Chamber. Nor was the oath *ex officio* used there, although accused persons could be required to answer questions on oath.

<sup>11</sup> E.g. see Holdsworth, W. (1944) *A History of English Law (Vol 9)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 199 (a “somewhat illogical outcome”).

<sup>12</sup> “You shall swear to answer all such Interrogatories as shall be offered unto you and declare your whole knowledge therein, so God you help”: quoted by Maguire, M. H. (1936) “Attack Of The Common Lawyers On The Oath *Ex Officio* As Administered in the Ecclesiastical Courts in England”. *Essays in History and Political Theory In Honour of Charles Howard McIlwain*. C. Wittke (Ed.) (Cambridge, Massachusetts: Harvard University Press) 199 at 200.



Nevertheless, the revisionists thought that the jurisdictional struggle played no part in the development of the right to silence in criminal cases. Moreover, they showed that compulsory questioning remained an important part of the common law criminal procedure well into the 1700s. The revision was noted in the Australian courts. In 1993 one High Court judge gave the traditionalist version.<sup>13</sup> In 2001 the same judge rejected that version, even though it had formerly been the one which “most common lawyers believed”.<sup>14</sup>

The historical debate related primarily to the right to silence in criminal proceedings. The participants can conveniently be divided into two groups: the traditionalists and the revisionists.

#### (b) THE TRADITIONALISTS

The term “traditionalist” will be used to cover those historians who substantially adopted Wigmore’s approach.<sup>15</sup> He thought that the privilege developed from the jurisdictional struggle between the common law and ecclesiastical courts over the oath *ex officio*. However, it was not a simple story.

Wigmore separated the development into two stages: the jurisdictional struggle in the late 1500s and early 1600s; and the spread of the privilege to all courts by the late 1600s. He had difficulty linking the two stages.<sup>16</sup> He credited

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<sup>13</sup> McHugh J in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 543 (the “privilege against self-incrimination emerged in the seventeenth century as a result of dissatisfaction with the practices of the Council of Star Chamber and the Court of High Commission”).

<sup>14</sup> McHugh J in *Azzopardi v R* (2001) 205 CLR 50 at 91.

<sup>15</sup> Wigmore’s classic argument is set out in his standard work on evidence (Wigmore, J. H. (1961) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) para 2250). However, he initially advanced it in two Harvard Law Review articles (Wigmore, J. H. (1891) “Nemo tenetur seipsum prodere.” *Harvard Law Review* 5: 71; Wigmore, J. H. (1901/2) “The Privilege Against Self-Crimination; Its History.” *Harvard Law Review* 15: 610). Where possible, the articles are cited rather than his standard work because his views on the privilege later became obscured by those of the current editors.

<sup>16</sup> Wigmore, J. H. (1901/2) “The Privilege Against Self-Crimination; Its History.” *Harvard Law Review* 15: 610 at 636 (“How did a movement, which was directed, originally and throughout, against a method of procedure in the ecclesiastical courts, produce in its ultimate effect a rule against a certain testimony in common law courts?”).

Bentham with providing the answer. A general reaction against objectionable Stuart practices established the principle by an “association of ideas”, with the privilege “creeping in thus by indirection”.<sup>17</sup>

Wigmore was primarily concerned with the right to silence of criminal defendants. In his view, the privilege spread from criminal to civil proceedings in the 1650s.<sup>18</sup> He thought that it spread to witnesses in 1679.<sup>19</sup>

Mary Hume Maguire substantially followed Wigmore’s argument in her 1936 essay.<sup>20</sup> However, she had no difficulty with the transition from jurisdictional dispute to general acceptance. She attributed the interference of the common law courts to the nature of the oath *ex officio* itself, rather than to jurisdictional issues.<sup>21</sup> She then portrayed the spread of the privilege as a natural development.<sup>22</sup>

Wigmore's general approach was adopted by Levy in his celebrated book.<sup>23</sup> However, Levy placed the jurisdictional conflict in an even broader context

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<sup>17</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 635.

<sup>18</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633.

<sup>19</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633-4.

<sup>20</sup> Maguire, M. H. (1936) "Attack Of The Common Lawyers On The Oath *Ex Officio* As Administered in the Ecclesiastical Courts in England". *Essays in History and Political Theory In Honour of Charles Howard McIlwain*. C. Wittke (Ed.) (Cambridge, Massachusetts: Harvard University Press) 199. She had previously put the argument in an unpublished thesis "The History of the Oath *ex officio* in England" for which she received a PhD from Radcliffe College in 1923: see Marks, K. M. (1984) "'Thinking up' about the right of silence and unsworn statements." *Law Institute Journal* 58(4): 360 at n21.

<sup>21</sup> Maguire, M. H. (1936) "Attack Of The Common Lawyers On The Oath *Ex Officio* As Administered in the Ecclesiastical Courts in England". *Essays in History and Political Theory In Honour of Charles Howard McIlwain*. C. Wittke (Ed.) (Cambridge, Massachusetts: Harvard University Press) 199 at 228 ("more bitterness arose out of its use than historians have hitherto realised").

<sup>22</sup> Maguire, M. H. (1936) "Attack Of The Common Lawyers On The Oath *Ex Officio* As Administered in the Ecclesiastical Courts in England". *Essays in History and Political Theory In Honour of Charles Howard McIlwain*. C. Wittke (Ed.) (Cambridge, Massachusetts: Harvard University Press) 199 at 229 ("Not content with the abolition of inquisitorial procedure in any ecclesiastical court, it soon began to be claimed that no man is bound to incriminate himself in any charge no matter how instituted, or in any court in the land").

<sup>23</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee). It won the Pulitzer Prize when it was first published in 1968 and was reprinted in 1986 and 1999 with amendments only to the preface.

than Maguire. Even Levy's critics conceded that he extended Wigmore's theories "partly by using evidence Wigmore did not use".<sup>24</sup>

Levy's exhaustive research showed many earlier examples of religious dissenters objecting to self-accusation in the ecclesiastical courts, as well as later examples from proceedings in other courts and tribunals. He also included more grandiose arguments used by Parliamentarians in their struggles with the Stuarts and later with each other. These embraced Magna Carta, Natural Law and other statements of human rights.

Like Maguire, Levy had no difficulty with the spread from jurisdictional dispute to general acceptance. The sheer number of his examples was supposed to show the general emergence of a principle against self-accusation.<sup>25</sup> However, many of his examples involved no more than the use of the *nemo tenetur* maxim, which will be discussed later in this chapter. He interpreted any use of the maxim as evidence of the emerging principle.

### (c) THE REVISIONISTS

The term "revisionist" is used to cover the historians who rejected the traditionalist approach. They were Americans who contributed essays to an influential book published in 1997.<sup>26</sup> The traditionalists were challenged most directly in the essays contributed by Langbein, Gray and Helmholz. Their essays expressed views which had appeared in earlier articles, but the book gave these views wider exposure.<sup>27</sup>

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<sup>24</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 68.

<sup>25</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 42 (by a process which "can only be seen with a view of this breadth").

<sup>26</sup> Helmholz et al (1997) *The Privilege Against Self-Incrimination: Its Origins and Development* (Chicago: The University of Chicago Press).

<sup>27</sup> Helmholz, R. H. (1990) "Origins of the privilege against self-incrimination: the role of the European *ius commune*." *New York University Law Review* 65(October): 962; Langbein, J. H. (1994) "The historical origins of the privilege against self-incrimination at common law." *Michigan Law Review* 92(March): 1047; Gray, C. M. (1982) "Prohibitions and the privilege against self-incrimination". *Tudor rule and revolution: essays for G.R.Elton from his American friends*. D. J. Guth and J. W. McKenna (Ed.) (Cambridge: Cambridge University Press) 345; Alschuler, A. W. (1996) "A Peculiar

The revisionists were noticeably respectful of Wigmore.<sup>28</sup> They directed their harshest criticisms at Levy.<sup>29</sup> They had three basic criticisms of the traditionalist view. First, the incriminatory aspect of compulsory questioning played little part in the jurisdictional dispute. Second, the privilege did not appear in criminal proceedings until long after 1700. Third, the privilege was invented by the European *ius commune*, not by common law judges. For all these reasons, the privilege could not have spread from jurisdictional dispute to criminal proceedings.

## (2) INSIGHTS FROM THE DEBATE

### (a) UNCRITICAL ACCEPTANCE

The rest of this thesis could be taken up with the continuing right to silence debate. Levy believed that he successfully refuted the revisionists in an article in 1997.<sup>30</sup> "I have rarely had so much pleasure in destroying my critics, all of whom were flat wrong in their criticisms".<sup>31</sup>

Yet in 2001 an Australian High Court judge accepted the revisionist arguments without reservation: "the views of Wigmore and Levy concerning the origin and development of the self-incrimination privilege were dead wrong".<sup>32</sup>

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Privilege in Historical Perspective: The Right to Remain Silent." *Michigan Law Review* 94(August): 2625.

<sup>28</sup> E.g. although Wigmore was hampered by having only Howell's State Trials and the nominate law reports to work from, his "historical account constituted a remarkable advance in knowledge": Langbein, J. H. (1997) "The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 243 n117.

<sup>29</sup> E.g. for depicting the privilege "as such an obvious historical inevitability that the only puzzle is to wonder why it took the dummies so long to see the light": Langbein, J. H. (1997) "The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 106.

<sup>30</sup> Levy, L. W. (1997) "Origins of the Fifth Amendment and Its Critics." *Cardozo Law Review* 19(3): 821.

<sup>31</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at xi.

<sup>32</sup> *McHugh J in Azzopardi v R* (2001) 205 CLR 50 at 91.

He concluded that the “history of the common law shows that there is no general right to silence at common law”.<sup>33</sup> A Queensland Supreme Court judge similarly accepted the revisionist arguments without reservation.<sup>34</sup>

Surely both sides of the debate could not be “dead wrong” or “flat wrong”. This shows the problem with judges taking sides in historical debates. Levy’s latest arguments will not be examined in detail, but several will be mentioned during the following outline of the three main revisionist criticisms.

### (b) GRAY

The first revisionist criticism addressed the jurisdictional struggle which had been supposedly the first stage in the development of the privilege. Gray looked at the reasons for the prohibitions which were granted by the common law courts to restrain compulsory questioning by ecclesiastical courts. He found that in most of these cases the objection to compulsory questioning was not based upon self-incrimination.<sup>35</sup> This was said to show that the campaign by the common law judges was based upon other jurisdictional issues.<sup>36</sup>

According to Levy, Gray “fails to challenge my work”.<sup>37</sup> In fact, Gray showed that many of the prohibition cases cited by Levy were decided for reasons unconnected with self-incrimination.<sup>38</sup> To this extent, Gray did challenge

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<sup>33</sup> McHugh J in *Azzopardi v R* (2001) 205 CLR 50 at 109.

<sup>34</sup> Davies, G. L. (2000) “The prohibition against adverse inferences: a rule without reason? - Part I.” *Australian Law Journal* 74(1): 26 at 31 (the traditional approach was “false in two important respects. The first is that the privilege was part of English ecclesiastical law from the middle ages. And the second is that it did not become part of the English common law criminal trial, as a privilege available to criminal defendants until the middle of the 19th century”).

<sup>35</sup> Gray, C. M. (1982) “Prohibitions and the privilege against self-incrimination”. *Tudor rule and revolution: essays for G.R.Elton from his American friends*. D. J. Guth and J. W. McKenna (Ed.) (Cambridge: Cambridge University Press) 345 at 352.

<sup>36</sup> E.g. Macnair, M. R. T. (1990) “The early development of the privilege against self-incrimination.” *Oxford Journal of Legal Studies* 10(Spring): 66 at 68; (Helmholz, R. H. (1990) “Origins of the privilege against self-incrimination: the role of the European *ius commune*.” *New York University Law Review* 65(October): 962 at 968; Langbein, J. H. (1994) “The historical origins of the privilege against self-incrimination at common law.” *Michigan Law Review* 92(March): 1047 at 1073 n121.

<sup>37</sup> Levy, L. W. (1997) “Origins of the Fifth Amendment and Its Critics.” *Cardozo Law Review* 19(3): 821 at 823. Also see at 829 (Gray “lacks focus” and “is discursive and irrelevant at times”).

<sup>38</sup> E.g. the MSS 424 group of cases: Gray, C. M. (1997) “Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries”. *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 47 at 68-70.

Levy's work, even though Gray's arguments were obscured by his style, replete with double negatives.<sup>39</sup>

Gray also found several cases which involved self-incrimination in civil proceedings. They will be examined in Chapter VII.

### (c) LANGBEIN

The second criticism addressed Wigmore's view that the privilege spread from the jurisdictional dispute to criminal proceedings before 1650. That view was based upon the reports of State Trials. Langbein looked at the pamphlet reports of felony trials in London between 1670 and 1770.<sup>40</sup> He found that, even by the end of that period, the right to silence had not been incorporated into normal criminal procedure.<sup>41</sup> Langbein's conclusion was that the right to silence was invented by lawyers in the late 1700s.<sup>42</sup>

Langbein's research showed that in ordinary criminal trials the defendants did not exercise any right to silence. He conceded that they could remain silent, but in the trial the absence of legal representation made silence impracticable.<sup>43</sup> He interpreted this to mean that there was no right to silence in modern terms.

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<sup>39</sup> E.g. Gray, C. M. (1982) "Prohibitions and the privilege against self-incrimination". *Tudor rule and revolution: essays for G.R. Elton from his American friends*. D. J. Guth and J. W. McKenna (Ed.) (Cambridge: Cambridge University Press) 345 at 353 (Coke's fellow judges did not always share his views because "the bench in his day was not unnaturally unanimous").

<sup>40</sup> Langbein, J. H. (1994) "The historical origins of the privilege against self-incrimination at common law." *Michigan Law Review* 92(March): 1047 at 1066. He also cited studies which found similar results in other parts of England (e.g. in Surrey: see Langbein, J. H. (1994) "The historical origins of the privilege against self-incrimination at common law." *Michigan Law Review* 92(March): 1047 at 1066 n83).

<sup>41</sup> Langbein, J. H. (1994) "The historical origins of the privilege against self-incrimination at common law." *Michigan Law Review* 92(March): 1047 at 1084.

<sup>42</sup> Langbein, J. H. (1994) "The historical origins of the privilege against self-incrimination at common law." *Michigan Law Review* 92(March): 1047 at 1047 (its origins lay "in the rise of adversary criminal procedure at the end of the eighteenth century. The privilege against self-incrimination at common law was the work of defense counsel").

<sup>43</sup> Langbein, J. H. (1997) "The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 87.

A similar argument applied to the pre-trial examinations conducted by Justices of The Peace. The right to silence was only theoretical, even though the common law did not provide any punishment for refusal to answer.<sup>44</sup> Silence in the pre-trial examination would be reported at the trial and would count heavily against the defendant.<sup>45</sup>

Levy did not dispute Langbein's facts.<sup>46</sup> As often happened in the historical debate, the same evidence was used to support apparently opposing arguments.<sup>47</sup> An outside commentator even suggested that the views of the traditionalists and the revisionists "do not really contradict each other".<sup>48</sup>

#### (d) HELMHOLZ

The third criticism was that the privilege did not come from the common law at all. Helmholtz claimed to have found something similar to the privilege in the European *ius commune*, of which medieval canon law formed a part. That privilege was recognised by canon law writers and pleaded in ecclesiastical courts in medieval times. Oral or written questions in ecclesiastical criminal cases need not be answered if they would lead to self-incrimination.<sup>49</sup>

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<sup>44</sup> Williams, G.L. (1955) *The Proof of Guilt: A Study of the English Criminal Trial* (London: Stevens & Sons Ltd) at 41 n15.

<sup>45</sup> Morgan, E. M. (1949) "The Privilege Against Self-Incrimination." *Minnesota Law Review* 34(1): 1 at 18.

<sup>46</sup> In fact, he derided Langbein's "habit of saying something as if no one has said it before. Many of his points merely rephrase passages in my book": Levy, L. W. (1997) "Origins of the Fifth Amendment and Its Critics." *Cardozo Law Review* 19(3): 821 at 844.

<sup>47</sup> Compare Langbein's version, emphasising the lack of representation ("the right to remain silent when no one else can speak for you is simply the right to slit your throat and it is hardly a mystery that defendants did not hasten to avail themselves of such a privilege"), with Levy's apparently similar statement: Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 265 (if "he remained silent, resting on a claim that the law did not oblige him to accuse himself, he could rely on a verdict of guilty").

<sup>48</sup> Stuntz, W. J. (1995) "The Substantive Origins of Criminal Procedure." *Yale Law Journal* 105(2): 393 at 411. He in turn was criticised by Alschuler in the 1997 book: Alschuler, A. W. (1997) "A Peculiar Privilege in Historical Perspective". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholtz (Ed.) (Chicago: The University of Chicago Press) 181 at 281-2 fn 41

<sup>49</sup> E.g. Helmholtz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholtz (Ed.) (Chicago: The University of Chicago Press) 17-46 at 210 n5, quoting Panormitanus (Venice 1615).

In the 1997 book Helmholz admitted that the ecclesiastical text-books may not always have been followed in practice.<sup>50</sup> Nevertheless, he provided several case-law examples which did not appear in his original article. These examples were from civil cases rather than criminal.<sup>51</sup> They will be discussed in Chapter VII.<sup>52</sup> However, this ecclesiastical version of the privilege should not be confused with the *nemo tenetur* maxim.

#### (e) NEMO TENETUR MAXIM

##### (i) Meaning and Relevance

Chapter VII will argue that the *nemo tenetur* maxim had little to do with the privilege in civil proceedings, but the maxim appears often in this thesis. It is still quoted by modern judges, supposedly because it “is now recognised as embodying the common law self-incrimination principle”.<sup>53</sup>

The usual form of the maxim was *nemo tenetur seipsum prodere*.<sup>54</sup> Wigmore described it as “this rule that no man shall be compelled to incriminate himself”.<sup>55</sup> He did not like it.<sup>56</sup> Bentham considered it in the form *nemo tenetur seipsum accusare*.<sup>57</sup> Whatever words had been used, he would not have liked it.<sup>58</sup> He objected to that version because it “implies spontaneousness”.<sup>59</sup>

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<sup>50</sup> Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 46.

<sup>51</sup> Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 34 (“Active assertion of the canonical prohibition against compelled self-incrimination actually appeared in the court records more often in civil cases than in criminal”).

<sup>52</sup> E.g. Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 218-219 n97, n100 and n103.

<sup>53</sup> McHugh J in *Azzopardi v R* (2001) 205 CLR 50 at 93.

<sup>54</sup> “No one is bound to betray himself”.

<sup>55</sup> Wigmore, J. H. (1891) "Nemo tenetur seipsum prodere." *Harvard Law Review* 5: 71 at 71.

<sup>56</sup> E.g. “justice is miscarrying because of this extraordinary maxim (nothing in truth, but a misquotation consecrated by age)”: Wigmore, J. H. (1891) "Nemo tenetur seipsum prodere." *Harvard Law Review* 5: 71 at 88.

<sup>57</sup> “No one is bound to accuse himself”.

<sup>58</sup> Bentham, J. (1827) *Rationale of Judicial Evidence* (New York: Russell & Russell Inc) at 445 (in “plain English, the maxim is neither more nor less than so much nonsense”).



Levy, on the other hand, adopted the maxim too eagerly. He took it as embodying the “right against self-incrimination”. Surprisingly, he had little time for apparently similar rights in other ancient laws.<sup>60</sup> Instead, he took the Latin maxim and treated any use of it, regardless of the reason, as evidence of the developing right. Yet Lambert and Lilburne, two of Levy's central figures, used the maxim to express other procedural objections: for example, to the absence of any presentment of charges.<sup>61</sup>

The maxim arose most obviously in the context of the accused in criminal proceedings. However, taken literally, it was not the same as the right to silence. If people were not bound to betray themselves, the accused in a criminal case could refuse to answer incriminating questions but should still answer non-incriminating questions.

## (ii) Ecclesiastical Origins

Although the maxim had ecclesiastical origins, it was different from the privilege which Helmholz found in canon law. The maxim originally appeared as an introductory condition in a well-known canon law rule: “*Licet nemo tenetur seipsum prodere, tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare*”.<sup>62</sup>

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<sup>59</sup> Bentham, J. (1823) *Traite Des Preuves Judiciaire* (Littleton, Colorado: Fred B Rothman & Co) at 240 (“but he who gives an answer does not act spontaneously. A man may *inculpate* himself by his silence; but to say that his silence *accuses* him, is to use a rhetorical expression”).

<sup>60</sup> E.g. he rejected the link with Talmudic law: Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 441. He might have been expected to emphasise the Talmudic prohibition on self-incrimination: e.g. Epstein, I., Ed. (1936) *Yebamoth*. The Babylonian Talmud: Seder Nashim (Vol I) (London: The Soncino Press) folio 25b, p154 (“A man is his own relative and consequently no man may declare himself wicked”); Epstein, I., Ed. (1935) *Sanhedrin*. The Babylonian Talmud: Seder Nezikin (Vol III) (London: The Soncino Press) folio 9b, p39 (“Every man is considered a relative to himself and no one can incriminate himself”).

<sup>61</sup> E.g. Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 4 (Lambert “would take no oath that would force him to incriminate himself, because he had not been duly accused”); Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 288-9 (Lilburne “flatly refused to answer questions against himself. Taking the offensive, he demanded to know the charges against him”).

<sup>62</sup> This was translated in Wigmore, J. H. (1891) “*Nemo tenetur seipsum prodere*.” *Harvard Law Review* 5: 71 at 83 n2 as follows: “Though no one is bound to become his own accuser, yet when once a man

In this context the *nemo tenetur* maxim was no more than a reminder that accusers were needed to bring criminal charges unless the wrongdoing was a matter of public knowledge. Wrongdoers were not obliged to expose their wrongdoing themselves. This reflected an older principle that people should not be compelled to betray themselves in public.<sup>63</sup> In canon law it became a rule against fishing expeditions by public officials.<sup>64</sup>

The traditionalist view was that the common lawyers took the words *nemo tenetur seipsum prodere* and changed their meaning. Wigmore attributed the change to Sir Edward Coke in the case of *Collier v Collier* in 1590.<sup>65</sup> Levy went back further to Sir James Dyer in *Leigh's case* in 1568.<sup>66</sup> The revisionists did not accept the importance of the maxim.

### (iii) Privilege in Ecclesiastical Law

The revisionists thought that the privilege came from elsewhere in ecclesiastical law. Helmholz was referring to two separate concepts when he claimed that the privilege and the *nemo tenetur* maxim “actually turn out to be commonplaces taken from the traditions of the European *ius commune*”.<sup>67</sup>

The traditional maxim was generally accepted. Levy was ready to concede that “Helmholz demonstrated the existence of the *nemo tenetur* maxim in canon and

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has been accused (pointed at as guilty) by general report, he is bound to show whether he can prove his innocence and to vindicate himself”.

<sup>63</sup> Reputedly stated by Saint John Chryostom around 400 AD: Helmholz, R. H. (1997) "Introduction". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 1 at 1; Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 21.

<sup>64</sup> McHugh J in *Azzopardi v R* (2001) 205 CLR 50 (“What canon law was designed to prevent was a roving commission by public officials seeking to discover unknown wrongs”).

<sup>65</sup> This was surprising because Coke was a barrister, not a judge, in this case: *Collier v. Collier* (1589) 4 Leo 194, (74 ER 816); (1590) Moore (KB) 906 (72 ER 987); (1590) Cro Eliz 201 (78 ER 457)

<sup>66</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 97 (Dyer CJ “apparently wrenched the *nemo tenetur* clause out of context and gave it independent life”). *Leigh's Case* (1567) 12 Co Rep 26 (77 ER 1308); 110 SS 143 Case 200.

<sup>67</sup> Helmholz, R. H. (1990) "Origins of the privilege against self-incrimination: the role of the European *ius commune*." *New York University Law Review* 65(October): 962 at 967.

civil law, the *ius commune*".<sup>68</sup> However, Levy did not acknowledge the ecclesiastical privilege.<sup>69</sup> He derided the idea that it existed in the *ius commune*.<sup>70</sup>

By then Helmholz had toned down his claims for this privilege.<sup>71</sup> He described the privilege in the *ius commune* as only a "statement of legal principle" with little application in "the day-to-day running of a legal system".<sup>72</sup> Moreover, he accepted that the ecclesiastical version had been expanded by the common lawyers.<sup>73</sup> As a result, the version in the civilian law text-books was "admittedly a far cry from the modern privilege".<sup>74</sup>

Macnair also thought that a form of privilege existed in the canon law separately from the *nemo tenetur* rule.<sup>75</sup> Like Helmholz he conceded that it was very different from the modern privilege.<sup>76</sup> Nevertheless, he argued that canon law rules appeared in Chancery cases.<sup>77</sup>

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<sup>68</sup> Levy, L. W. (1997) "Origins of the Fifth Amendment and Its Critics." *Cardozo Law Review* 19(3): 821 at 834.

<sup>69</sup> Levy, L. W. (1997) "Origins of the Fifth Amendment and Its Critics." *Cardozo Law Review* 19(3): 821 at 836 ("the canon law did not recognise a right against self-incrimination beyond the maxim whose protection was extinguished by *fama*").

<sup>70</sup> Levy, L. W. (1997) "Origins of the Fifth Amendment and Its Critics." *Cardozo Law Review* 19(3): 821 at 830 ("a preposterous theme").

<sup>71</sup> E.g. Helmholz, R. H. (1997) "Introduction". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 1 at 7 (the privilege in the *ius commune* was a "check on overzealous officials rather than a subjective right which could be invoked by anyone who stood in danger of criminal prosecution").

<sup>72</sup> Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 46.

<sup>73</sup> Helmholz, R. H. (1990) "Origins of the privilege against self-incrimination: the role of the European *ius commune*." *New York University Law Review* 65(October): 962 at 990.

<sup>74</sup> Helmholz, R. H. (1997) "Introduction". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 1 at 7.

<sup>75</sup> E.g. Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 62-63.

<sup>76</sup> E.g. Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 62 ("It was not, however, by any means identical to the modern common law privilege").

<sup>77</sup> In this he can find support from Wigmore, although Wigmore did not see these rules as concerning self-incrimination: Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 632.

#### (iv) Common Law

The maxim sometimes appeared in the common law courts as no more than a general expression of dissent. The example of John Lilburne will be mentioned shortly. Coke also quoted the maxim regularly in his attempts to control the ecclesiastical courts.<sup>78</sup>

The maxim also had particular application to oaths in the common law.<sup>79</sup>

Oaths had special significance in the 1500s and 1600s.<sup>80</sup> Criminal defendants could not be forced to testify on oath in felony trials.<sup>81</sup> In fact, they could not answer questions on oath, even if they wanted to.<sup>82</sup> This had been the position under the common law since Elizabethan times, according to *Attorney-General v Lord Vaux* (1581).<sup>83</sup>

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<sup>78</sup> However, "Coke's integrity hardly appears to advantage in the history of this controversy" (Wigmore, J. H. (1891) "Nemo tenetur seipsum prodere," *Harvard Law Review* 5: 71 at 84). His daughter (Frances Villiers, Lady Purbeck) also relied upon the principle when accused of adultery before the High Commission in 1624: Bowen, C. D. (1957) *The Lion and the Throne: The Life and Times of Sir Edward Coke 1552-1634* (London: Hamish Hamilton) at 458 ("No one, she said stoutly, was obliged to accuse himself in court"). Also see Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 259.

<sup>79</sup> Helmholz, R. H. (1997) "Introduction". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 1 at 16 ("the privilege's limited reach and its invariable connection with oath-taking").

<sup>80</sup> Helmholz, R. H. (1997) "Introduction". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 1 at 15 ("We must suspend our skepticism about the importance of swearing and give to the oath the centrality it once held").

<sup>81</sup> Wigmore, J. H. (1979) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at 809; Holdsworth, W. (1944) *A History of English Law (Vol 9)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 195 and Alschuler, A. W. (1997) "A Peculiar Privilege in Historical Perspective". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 181 at 281 n41. However, Gray twice referred to medieval criminal defendants testifying on oath: Gray, C. M. (1982) "Prohibitions and the privilege against self-incrimination". *Tudor rule and revolution: essays for G.R.Elton from his American friends*. D. J. Guth and J. W. McKenna (Ed.) (Cambridge: Cambridge University Press) 345 at 346. The same references did not appear in his chapter in the 1997 book and should probably be disregarded.

<sup>82</sup> The judge at the Croydon Assizes was therefore in no position to honour his offer to John Udall: "We will offer you that favour which never any indicted of Felony had before; take your oath and swear you did it not, and it shall suffice" (*Udall's Trial* (1590) 1 HST 1272 at 1282).

<sup>83</sup> Bruce, J., Ed. (1844) *Archaeologia; or, Miscellaneous Tracts Relating to Antiquity* (London: Society of Antiquities) at 80, taken from Harley MS 859 fols 44-51. Also see brief account in 111 SS 397 Case No 518. Although it was a case in the Court of Star Chamber, it provided convincing evidence of the common law. The Chief Justices of the common law courts were sitting as members of the Court of Star Chamber. Their statements of the common law must be regarded as authoritative.

In that case Wray LCJKB said that no man should swear in the common law courts to accuse himself in a felony case where he might lose life or limb.<sup>84</sup>

The same view was expressed by Dyer LCJCP, who supported it with a reference to the *nemo tenetur* maxim.<sup>85</sup> The reporter then added "which I take to be Bracton's principall".<sup>86</sup> Levy attached great importance to these statements by the common law judges, particularly the reference to the *nemo tenetur* maxim.<sup>87</sup> In fact, the two judges were saying only that criminal defendants did not testify on oath in felony cases in the common law courts.

Unsworn statements were different. They did not breach the *nemo tenetur* rule because they were not made under oath.<sup>88</sup> Around 1619, Dalton's *Countrey Justice* used the *nemo tenetur* maxim to explain why only unsworn evidence was given by the accused to Justices of the Peace at pre-trial examinations.<sup>89</sup>

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<sup>84</sup> Bruce, J., Ed. (1844) *Archaeologia; or, Miscellaneous Tracts Relating to Antiquity* (London: Society of Antiquities) at 104-105 ("no man by lawe ought to sweare to accuse hymselfe when he might loose lyfe or lymme").

<sup>85</sup> Bruce, J., Ed. (1844) *Archaeologia; or, Miscellaneous Tracts Relating to Antiquity* (London: Society of Antiquities) at 104 ("saing that in case where a man might leese lyfe or lymme, that the lawe compelled not the partie to swear, and avouched this place *nemo tenetur seipsum prodere*, which I take to be Bracton's principall").

<sup>86</sup> Those words apparently contained the opinion of the reporter, not of Dyer LCJCP. However, the words caused a modern editor to refer to the "Bractonian doctrine of self-incrimination": Baker, J. H., Ed. (1994) *Reports from the Lost Notebooks of Sir James Dyer (Vol I)* (Selden Society (Vol 110) London: Selden Society) at lxxvii. In the absence of any explanation for this startling comment, it has not been investigated further in this thesis: *et idem indignor quandoque bonus dormitat Homerus, verum operi longo fas est obrepere somnum* (Horace *Ars Poetica*, lines 358-360: Horace *Satires, Epistles and Ars Poetica* (London: William Heinemann Ltd (1959 edition translated by H Rushton Fairclough)) at 480).

<sup>87</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 100; Levy, L. W. (1997) "Origins of the Fifth Amendment and Its Critics." *Cardozo Law Review* 19(3): 821 at 823 and 840. Maguire referred to the case in passing: see Maguire, M. H. (1936) "Attack Of The Common Lawyers On The Oath *Ex Officio* As Administered in the Ecclesiastical Courts in England". *Essays in History and Political Theory In Honour of Charles Howard McIlwain*. C. Wittke (Ed.) (Cambridge, Massachusetts: Harvard University Press) 1 199 at 224 n26. Neither Wigmore nor the revisionists mentioned it.

<sup>88</sup> Helmholz, R. H. (1997) "Introduction". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 1 at 15 (it could be "seriously maintained that no violation of the principle behind the *Nemo tenetur* maxim occurred when a person had been made to answer questions, as long as he was not required to answer them under oath").

<sup>89</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 79 n90; Bayne, C. G. and W. H. Dunham (1956) *Select Cases in the Council of Henry VII* Selden Society (Vol 75) (London: Bernard Quaritch) at xciv. However, also see Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 44. He cites Lambarde's *Eirenarcha* (1581) as showing that such examinations deviated from the *nemo tenetur* rule.

This had the unfortunate result that Justices of the Peace continued to bully and question the accused in pre-trial examinations until well into the 19th century.

Yet the pre-trial examination could be as damaging to the accused at the trial as a sworn statement.<sup>90</sup> A similar problem faced examinees at religious inquisitions. They sometimes refused to take the oath because of the *nemo tenetur* maxim but then gave unsworn answers which were just as incriminating and which took them to their death.<sup>91</sup>

### (3) RIGHT TO SILENCE

#### (a) CRIMINAL CASES BEFORE 1650

Langbein looked critically at the cases which, according to Wigmore, showed the spread of the privilege to criminal proceedings.<sup>92</sup> Wigmore cited only three cases in support of his proposition that the privilege was conceded to criminal defendants before 1650.<sup>93</sup> The small number is of particular relevance to this thesis.

Those three cases formed the basis for Wigmore's claim that the privilege was conceded in criminal trials before it was granted to ordinary witnesses and in civil cases.<sup>94</sup> One of them involved an ordinary witness and is discussed under witness privilege.<sup>95</sup> Another was a blatantly political trial for high treason

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<sup>90</sup> Langbein, J. H. (1997) "The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 92.

<sup>91</sup> E.g. the Separatists Henry Barrow and John Greenwood were hanged in 1590. Both refused to take the oath but then made incriminating admissions unsworn: e.g. Barrow's Fifth Examination (Carlson, L. H., Ed. (1962) *The Writings of Henry Barrow 1587-1590*. Elizabethan Nonconformist Texts (London: George Allen & Unwin Ltd) at 193-207); and Greenwood's First Examination (Carlson, L. H., Ed. (1962) *The Writings of John Greenwood 1587-1590*. Elizabethan Nonconformist Texts (London: George Allen & Unwin Ltd) at 22-29).

<sup>92</sup> Langbein, J. H. (1997) "The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 103-5.

<sup>93</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633 n5 and n6.

<sup>94</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633.

<sup>95</sup> *Trial of King Charles* (1649) 4 HST 989 at 1101.

before the House of Lords. In any event, the defendants in that trial quickly abandoned their claim that they were not "bound to accuse themselves".<sup>96</sup>

The last of the three cases involved John Lilburne.<sup>97</sup> His role goes to the heart of the debate between Levy and the revisionists. Wigmore was less impressed than Levy by Lilburne's objections to self-incrimination, noting that they were not made until late in Lilburne's career.<sup>98</sup>

Levy, on the other hand, portrayed Lilburne as a central heroic figure in the history of the privilege.<sup>99</sup> Levy was infuriated by Langbein's dismissal of Lilburne as, in truth, "an insignificant figure in the development of the privilege".<sup>100</sup> Both sides of the debate had their weaknesses.

#### (b) SIGNIFICANCE OF LILBURNE

Langbein did not mention the numerous appearances before various tribunals where Lilburne refused to incriminate himself, to answer any questions or even to swear an oath. Langbein also understated the number of Lilburne's objections to answering questions against himself at his treason trial in 1649.<sup>101</sup>

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<sup>96</sup> *Twelve Bishops' Trial* (1641) 4 HST 63 at 76. Shortly after making the claim, all but one bishop "voluntarily confessed, That they subscribed the said Petition, and did own the hand-writing".

<sup>97</sup> *Lilburne's Treason Trial* (1649) 4 HST 1269 at 1280, 1292, 1342 and 1445.

<sup>98</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633 ("Up to the last moment, Lilburn had never claimed the right to refuse absolutely to answer a crminating question; he had merely claimed a proper proceeding of presentment and accusation").

<sup>99</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 313 ("Lilburne had made the difference. From his time on, the right against self-incrimination was an established, respected rule of the common law").

<sup>100</sup> Langbein, J. H. (1997) "The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 244 n123. For Levy's incredulous response: see Levy, L. W. (1997) "Origins of the Fifth Amendment and Its Critics." *Cardozo Law Review* 19(3): 821 at 848.

<sup>101</sup> E.g. Langbein, J. H. (1997) "The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 244 n123 cited *Lilburne's Treason Trial* (1649) 4 HST 1269 at 1292 and 1340 but failed to mention the example at 4 HST 1342, even though it appeared in Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633 n5.

On the other hand, the breadth and number of Lilburne's claims detracted from Levy's argument. Lilburne's objection to accusing himself was one of his many objections to just about everything. Lilburne's clear purpose was to appeal to juries over the heads of judges. He raised the issue of self-incrimination, amongst many other complaints, in order to convince juries that judges were treating him unfairly.<sup>102</sup> The legitimacy or accuracy of his arguments mattered little, as long as they encouraged juries to give decisions which reflected his popularity.

Lilburne's claims against self-incrimination were founded upon an array of dubious sources.<sup>103</sup> This was a technique refined during a life-time of disputation. On other occasions he had appealed to different equally dubious sources.<sup>104</sup> His claims were of limited value in showing the existence of the privilege at that time.

It is doubtful whether Lilburne's ideas were as popular as he was. Levy argued that Lilburne's claims influenced others to make similar demands.<sup>105</sup> However, Levy did not show Lilburne's claims being adopted by criminal defendants in ordinary cases, although his name was occasionally mentioned by defendants in political or religious cases.<sup>106</sup>

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<sup>102</sup> Other objections at the 1649 trial ranged from his unsuccessful and often repeated complaint about not being given counsel (e.g. 4 HST at 1298) to his successful insistence on the doors of the court being left open (e.g. 4 HST at 1274).

<sup>103</sup> E.g. the Petition of Right (4 HST at 1293 and 1341); the Laws of God, Nature and the Kingdom (3 HST at 1349); or even higher authority ("I have read of the same to be practised by Christ and his Apostles": 4 HST at 1341).

<sup>104</sup> E.g. to Magna Carta (before the House of Lords in 1646: see Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 291; to a combination of Magna Carta and the Petition of Right (before a Commons Committee in 1645: see Gibb, M. A. (1947) *John Lilburne, the Leveller: a Christian Democrat* (London: Lindsay Drummond Ltd) at 128, and Gregg, P. (1961) *Free-born John: a Biography of John Lilburne* (London: George G. Harrap & Co Ltd) at 120; and to "the Liberties of England" and "not onely law, but Nature" (before the Council of State in 1649: see Haller, W. and G. Davies, Eds. (1944) *The Leveller Tracts 1647-1653* (New York: Columbia Press) at 201 and 202).

<sup>105</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 294.

<sup>106</sup> E.g. in *Love's Trial* (1651) 5 HST 43 at 53. However, Lilburne was mentioned after "Jesus Christ, who, when he was accused before a judicatory, answered not a word".



## (c) CRIMINAL CASES AFTER 1660

### (i) Few Criminal Cases

Wigmore gave no criminal examples from the 1650s. Nor were there were many criminal examples among the cases which he cited from after 1660. Moreover, he accepted that judges continued to question criminal defendants aggressively until well into the 1700s. The privilege “remained not much more than a bare rule of law, which the judges would recognise on demand”.<sup>107</sup>

Wigmore cited seventeen cases from after 1660 to show the privilege of which “there is no longer any doubt, in any court”.<sup>108</sup> In most of these cases, the privilege was claimed by witnesses. A few involved civil proceedings. Only four of Wigmore’s seventeen cases actually involved a criminal defendant objecting to self-incrimination.<sup>109</sup>

### (ii) Positive Examples

The best example was *Penn and Mead's Trial* (1670).<sup>110</sup> Mead refused to answer during a common law trial whether he was present at the “tumultuous assembly” which was the subject of the trial. He cited the *nemo tenetur* maxim and the question was withdrawn.<sup>111</sup>

A similar refusal was apparently accepted in *Scroop's Trial* (1660).<sup>112</sup> Scroop was asked whether he had sat upon the court which had condemned King Charles I to death.<sup>113</sup> The Commissioners told Scroop that he was not bound to

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<sup>107</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 635.

<sup>108</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633-4 n7.

<sup>109</sup> *Scroop's Trial* (1660) 5 HST 1034 at 1039; *Crook's Trial* (1662) 6 HST 201 at 205; *Penn and Mead's Trial* (1670) 6 HST 951 at 957; *Proceedings against Francis Jenkes* (1676) 6 HST 1189 at 1194.

<sup>110</sup> (1670) 6 HST 951.

<sup>111</sup> (1670) 6 HST 951 at 957.

<sup>112</sup> (1660) 5 HST 1034.

<sup>113</sup> (1660) 5 HST 1034 at 1038.

answer, but he did so. He admitted that he sat on the Court, although he denied showing his agreement to the sentence.<sup>114</sup>

### (iii) Less Convincing Examples

Wigmore's other two examples are less convincing. The claim for privilege received little sympathy in *Crook's Trial* (1662).<sup>115</sup> The defendant quoted the *nemo tenetur* maxim and objected to self-incrimination. However, self-incrimination was only one of several muddled arguments involving Magna Carta and his right to face his accusers.<sup>116</sup> The Court at the Old Bailey was unimpressed by his legal arguments.<sup>117</sup>

Even less convincing was the example from the *Proceedings against Francis Jenkes* (1676).<sup>118</sup> Its value in legal terms was limited because Jenkes was not the defendant in a common law trial.<sup>119</sup> All that can be said is that an exchange between Jenkes and the King suggested acceptance of the privilege.<sup>120</sup>

The exchange took place in the context of questions which were aimed at incriminating a third party. This limits its authority even further.<sup>121</sup> The privilege against self-incrimination does not block questions which only incriminate others, even though the right to silence may do so.

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<sup>114</sup> (1660) 5 HST 1034 at 1039.

<sup>115</sup> (1662) 6 HST 201.

<sup>116</sup> (1662) 6 HST 201 at 205.

<sup>117</sup> E.g. 6 HST at 215 ("Mr Crook, you are out of the way and do not understand the law").

<sup>118</sup> (1676) 6 HST 1189.

<sup>119</sup> In Langbein's opinion it had no place in Wigmore's list because it was a "pretrial investigation that was dropped without trial": Langbein, J. H. (1997) "The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 104 and 246 n129.

<sup>120</sup> Jenkes had been summoned before the King in Council to justify a speech which he had made at the Guildhall. The King kept pressing him to reveal who had caused him to make the speech. Eventually Jenkes refused to answer any more questions "since the law doth provide, that no man be put to answer to his own prejudice". The King himself replied: "We will take that for an answer" ((1676) 6 HST 1189 at 1194).

<sup>121</sup> E.g. the Australian High Court cited *Scroop's Trial*, *Crook's Trial* and *Penn and Mead's Trial* from Wigmore as the cases showing adoption of the privilege. It did not refer to the *Proceedings against Francis Jenkes*: see the joint judgment of Mason CJ and Toohey J in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 497-8.

#### (4) CONCLUSION

A full historical account of the right to silence would cover numerous other topics. These would include the development of legal representation and the extent to which defendants were incompetent to testify in criminal cases. The account would also cover the 19th century case-law and legislation which ultimately left criminal defendants as competent but not compellable witnesses.<sup>122</sup>

The history of the right to silence is, however, outside the scope of this thesis, except to the extent that it affects the privilege in civil proceedings. For this purpose, it is enough to say that the revisionists were justified in their claim that Wigmore's criminal examples from the 1600s did not provide convincing evidence of the right to silence.<sup>123</sup> Australian judges are increasingly accepting the revisionist view that no general right to silence in the modern sense existed in common law criminal proceedings in the 1500s and 1600s.<sup>124</sup>

Acceptance of that view requires reconsideration of Wigmore's account of the privilege spreading from criminal to civil proceedings and then later to witnesses. If it did not spread from criminal proceedings, where did it come from? Chapter VII will suggest that, for parties in civil proceedings, the privilege came from the practices which were developing in the Court of Chancery.

The same explanation cannot be offered for the development of the privilege for witnesses at civil trials. The story of witness privilege was written in the

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<sup>122</sup> E.g. some of these topics were examined by McHugh J in his judgment in *Azzopardi v R* (2001) 205 CLR 50 at 99-111.

<sup>123</sup> Macnair described them as "all very unusual cases, in which the judges may have been exceptionally concerned to show how fair they were": Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 82. This statement was criticised by Levy, L. W. (1997) "Origins of the Fifth Amendment and Its Critics." *Cardozo Law Review* 19(3): 821 at 842-843.

<sup>124</sup> McHugh J in *Azzopardi v R* (2001) 205 CLR 50 at 101: ("It is now clear that the notion of a right to silence, in the modern sense, was the invention of lawyers in the 19th and 20th centuries. Certainly, it is impossible to contend that the common law recognised a general 'right to silence' before the middle of the 19th century").

common law. It applied equally to witnesses in criminal proceedings, apart from the accused. Wigmore's authorities from the 1600s offered more convincing evidence about witness privilege than about the right to silence. The historical debate therefore provides the background to the history of witness privilege.

## **(C) HISTORY OF WITNESS PRIVILEGE**

### **(1) INTRODUCTION**

#### **(a) LIMITED RIGHT TO SILENCE**

Witness privilege is covered by Lord Mustill's second category of rights to silence, described in Chapter II. It is different from a criminal defendant's right to silence which allows all questions to be avoided. It is a right to silence in limited circumstances: that is, when a witness is required to give self-incriminating evidence. It only provides protection against incriminating questions.

Witness privilege applies to all witnesses in civil proceedings including the parties. In criminal proceedings it applies to witnesses other than the defendant. If a criminal defendant chooses to testify, legislation usually removes the protection of witness privilege.<sup>125</sup>

Witness privilege is the simplest form of privilege against self-incrimination. It seems to present a clear question of policy: whether witnesses should be compelled by court procedures to provide evidence for criminal charges against themselves. Some might see self-incrimination by a civil witness as the price of having all the relevant information before the civil court.

The history of witness privilege is relatively easy to trace. There are numerous reported examples in the 1600s of it being invoked by witnesses and recognised

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<sup>125</sup> E.g. s8(1)(c), Evidence Act 1906 (WA).

by the courts. The problem for this thesis is that all these examples occurred in common law criminal proceedings. It is hard to find examples which show witnesses claiming the privilege in civil proceedings much before 1800.

## (b) MACNAIR NOT FOLLOWED

Chapter VII will adopt Macnair's arguments in relation to the equitable origins of the privilege in civil proceedings. However, this chapter will not adopt the link which Macnair made between the privilege in civil proceedings and witness privilege. It will treat witness privilege as a separate historical development in the common law, not in equity.

Macnair thought that, like the privilege in civil proceedings, witness privilege came "into English law from the common family of European laws and particularly the canon law".<sup>126</sup> This chapter rejects that view. One reason is that most of Macnair's authorities on witness privilege actually came from the common law and involved criminal proceedings.

Nor does Macnair provide convincing authority for the existence of witness privilege in canon law. He claimed that the *nemo tenetur* maxim "was readily conceded to apply without significant exceptions to persons produced as witnesses in the canon law".<sup>127</sup> It "was affirmed, as far as the church courts went, by Whitgift in 1603".<sup>128</sup>

That was a reference to a comment by Archbishop Whitgift at a conference before James I.<sup>129</sup> In fact, Whitgift's comment showed little about witness

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<sup>126</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 67.

<sup>127</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 236.

<sup>128</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 78. Also see Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 236 n37.

<sup>129</sup> *Proceedings in a Conference at Hampton Court, respecting Reformation of the Church* (1604) 2 HST 70. He was responding to criticism that the Court of High Commission forced men to accuse themselves. "Your Lordship is deceived in the manner of proceeding; for, if the Article touch the party for life, liberty, or scandal, he may refuse to answer" ((1604) 2 HST 70 at 86.)

privilege because it referred to parties not to witnesses.<sup>130</sup> Moreover, as a statement of the ecclesiastical rule applying to parties, it set out a position which “a generation of the High Commission's prisoners would have been astonished to hear”.<sup>131</sup>

Although witness privilege did not spread from the roman-canon courts, they protected witnesses from self-incrimination in other ways. The canon law, for example, did not allow interrogatories which were aimed only at discrediting the witness.<sup>132</sup> A similar rule was found in the Star Chamber which also followed roman-canon procedure.

### (c) STAR CHAMBER

#### (i) Reputable Court

The privilege has often been portrayed as a reaction to the iniquitous practices of the Court of Star Chamber. It is therefore surprising that for most of its existence the Star Chamber was a reputable court which had Chief Justices of the Common Law Courts and other eminent people as its members. It allowed compulsory questioning on oath for the same reason as the Court of Chancery. Both had roman-canon origins.

It is also surprising that the Star Chamber in the early 1500s was concerned “as much with the adjudication of civil disputes as with the punishment of crime”.<sup>133</sup> Most of those proceedings were commenced by private parties who

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<sup>130</sup> Levy, L. W. (1997) “Origins of the Fifth Amendment and Its Critics.” *Cardozo Law Review* 19(3): 821 at 839. That criticism has more substance than his complaint that Macnair was wrong to give the date of the conference as 1603. It took place in January 1604 (New Style), which was January 1603 (Old Style).

<sup>131</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 212. For a similar view, see Wigmore, J. H. (1901/2) “The Privilege Against Self-Crimination; Its History.” *Harvard Law Review* 15: 610 621 n3.

<sup>132</sup> Cosin, R. (1593) *An Apologie For Sundrie Proceedings By Jurisdiction Ecclesiasticall, of late times by some chalenged, and also diversly by them impugned* (London: The Deputies of Christopher Barker) Part III at 112 (“tending to the discoverie of his own turpitude...because the end of such a criminous interrogatory...is onely to disable him”).

<sup>133</sup> Bayne, C. G. and W. H. Dunham (1956) *Select Cases in the Council of Henry VII* (London: Bernard Quaritch) at lxxvi.

sought both compensation and punishment using the civil bill procedures.<sup>134</sup> Even in criminal matters in which the sole aim was punishment, the Attorney-General followed the same bill procedures and was called the plaintiff.<sup>135</sup>

In the 1630s the criminal procedures in the Star Chamber became notorious, as it became linked with the court of High Commission.<sup>136</sup> Lilburne, for example, railed against its compulsory questioning under oath.<sup>137</sup> The notoriety of the Star Chamber was increased by the barbaric punishments meted out to dissenters like Lilburne and Prynne.<sup>138</sup> It had long been meting out equally cruel punishments to ordinary citizens.<sup>139</sup> Yet it showed surprising tenderness to witnesses.

## (ii) Witness Privilege

The authoritative account of Star Chamber procedure was written by Hudson in the 1620s.<sup>140</sup> Hudson's account was said by Helmholz to show that roman-canon procedure recognised some sort of rule protecting witnesses from incriminating themselves.<sup>141</sup> This rule appeared to cover civil witnesses: "if a witness conceive that the answering of a question may be prejudice to himself,

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<sup>134</sup> Sometimes with macabre results e.g. *Andrew v Ledsam* (1610) 2 Brownl and Golds 49 (123 ER 808) (double interest was not awarded against the defendant but he did have one ear cut off).

<sup>135</sup> *Attorney-General v Lord Vaux* (1581) 111 SS 397 Case No 518.

<sup>136</sup> E.g. in *Leighton's Case* (1630) 3 HST 384.

<sup>137</sup> *Lilburne's Star Chamber Trial* (1637) 3 HST 1315.

<sup>138</sup> E.g. Prynne had his ears cut off not once, but twice. "Lord Chief Justice Finch looking earnestly on Mr Prynne, said, I had thought Mr Prynne had no ears, but methinks he hath ears" (*Prynne's Trial* (1637) 3 HST 711 at 717). Henry Finch himself had been "an intellectual lawyer" who had argued against self-incrimination in the courts: Gray, C. M. (1997) "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 47 at 72.

<sup>139</sup> E.g. *Andrew v Ledsam* (1610) 2 Brown & Golds 49 (123 ER 808) (whether the defendant usurer should pay double damages and lose one ear or two). At that time Sir Edward Coke was a member of the Court of Star Chamber.

<sup>140</sup> Hudson's treatise was completed in 1621 and widely published in manuscript form in the late 1620s: Barnes, T. G. (1982) "Mr Hudson's Star Chamber". *Tudor rule and revolution: essays for G.R. Elton from his American friends*. D. J. Guth and J. W. McKenna (Ed.) (Cambridge: Cambridge University Press) 285 at 286.

<sup>141</sup> For this interpretation of Star Chamber procedure, see e.g. Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 44.

it seemeth that he need not to answer; for he is produced to testify betwixt others".<sup>142</sup>

By the time of Hudson the jurisdiction of the Star Chamber was almost exclusively in criminal cases.<sup>143</sup> Many of his comments concerned criminal cases.<sup>144</sup> One aim was to encourage prosecution witnesses in ordinary criminal cases.<sup>145</sup> That was why the Star Chamber prohibited cross-examination to credit.<sup>146</sup>

## (2) COURTS OF EQUITY

### (a) DIFFERENT FROM DISCOVERY

Chapter VII will argue that Chancery procedure contained the origins of the privilege for parties in civil proceedings. Parties in Chancery proceedings could refuse to answer incriminating questions which were put to them during compulsory discovery. However, in Chancery the testimony of witnesses was distinguished from discovery.

Under roman-canon procedures, witnesses gave their evidence outside the main trial.<sup>147</sup> The testimony of witnesses in Chancery proceedings was recorded in

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<sup>142</sup> Hudson, W. (1621) *A Treatise Of The Court Of Star Chamber* (Littleton, Colorado: Fred B. Rothman & Co) at 209.

<sup>143</sup> Bayne, C. G. and W. H. Dunham (1956) *Select Cases in the Council of Henry VII* Selden Society (Vol 75) (London: Bernard Quaritch) at *cliv-clv* (by then it had become "the tribunal for the punishment of crime. Although the bulk of its business still originated in the bills of private parties, the subject matter of the litigation was some criminal offence").

<sup>144</sup> Hudson, W. (1621) *A Treatise Of The Court Of Star Chamber* (Littleton, Colorado: Fred B. Rothman & Co) at 209 ("if the question concern not the cause he need not answer it, whether scandalous to himself or to any other, if not concerning *the crime in question*" (italics added)). Also see at 208 ("neither must it question the party to accuse him of a crime").

<sup>145</sup> Hudson, W. (1621) *A Treatise Of The Court Of Star Chamber* (Littleton, Colorado: Fred B. Rothman & Co) at 201 (The credit of witnesses was not examined because "causes being for the king, if witnesses lives should be so ripped up, no man would willingly be produced to testify").

<sup>146</sup> E.g. "this court suffereth not the parties to examine the credit of witnesses": Hudson, W. (1621) *A Treatise Of The Court Of Star Chamber* (Littleton, Colorado: Fred B. Rothman & Co) at 200. This was different from an ecclesiastical court "in which courte they examine their fame or disgrace in their whole lives": Hudson, W. (1621) *A Treatise Of The Court Of Star Chamber* (Littleton, Colorado: Fred B. Rothman & Co) at 201.

<sup>147</sup> For detailed discussion of the ecclesiastical procedure, see Helmholz, R. H. (2004) *Oxford History of The Laws of England (Vol 1)* (Oxford: Oxford University Press) at 338-9. It was not until 1854 that oral testimony was permitted at a trial in an ecclesiastical court: see *An Act to alter and improve the*



writing at separate examinations.<sup>148</sup> The court made its decisions using the written transcripts of the examinations.

By 1600 parties were disqualified from being witnesses in Chancery. This was the same rule as in the common law courts. It is not clear which of them had it first.<sup>149</sup> The odd result in Chancery was that civil parties could not have their testimony recorded at the separate examinations but still had to answer questions in writing under the bill procedures.

This chapter will look at third party witnesses in Chancery. They are not reported as refusing to answer questions because of self-incrimination. The simplest explanation would be that nothing like witness privilege existed in Chancery. A treatise on Chancery practice in the mid-1600s made no mention of the privilege amongst the rules dealing with the answers of witnesses and parties.<sup>150</sup>

However, that was not consistent with roman-canon procedure, which usually gave some sort of protection to witnesses compelled to answer questions. It is hard to believe that Chancery practice contained no protection at all for witnesses.

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*Mode of taking Evidence in the Ecclesiastical Courts of England and Wales*, 17 & 18 Vic c 47 [24 July 1854], *Statutes at Large*, Vol 94, p174.

<sup>148</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 632 n7, citing *Langdell, Equity Pleading* para 47.

<sup>149</sup> It spread from the common law courts to Chancery according to Wigmore, J. H. (1979) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at para 575 pp 807 n34. He cited *Hollingworth v Lucy* (1580) Cary 129 (21 ER 48) as the first example in Chancery, but the earliest reported common law case was *Dymoke's case* (1582) Savile 34 pl 81 (123 ER 997). Macnair therefore doubted whether disqualification of parties spread from the common law, suggesting that Wigmore's dating was rather early: Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 207 and 211.

<sup>150</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 635 n2, citing *Choice Cases in Chancery 1652-1672*.

## (b) CHANCERY PRACTICE

### (i) Procedure

It has been suggested that self-incriminating matters just did not arise during Chancery proceedings.<sup>151</sup> The next chapter will show the problem with that. After the late 1600s, self-incriminating matters often arose in Chancery cases. It is hard to see why similar matters would not have arisen in earlier Chancery cases

Macnair suggested more complex procedural reasons. Chancery applied the *nemo tenetur* maxim to witnesses only in two particular circumstances: to demur to scandalous interrogatories and to prohibit cross-examination to credit.<sup>152</sup>

### (ii) Demurrer to Interrogatories

The interrogatories were prepared by the parties in advance. The interrogatories of the adverse party were put to the witness by the examiners.<sup>153</sup> Witnesses could object by demurrer to the questions. They demurred on grounds of privilege until the early 1800s.<sup>154</sup>

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<sup>151</sup> E.g. Gray, C. M. (1997) "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 47 at 224 n4 (the jurisdiction of the court of Chancery was "entirely civil ... there was no more than a slight chance that they might incidentally ask an incriminating question"). Also see Tollefson, E. A. (1975) *The Privilege against Self-Incrimination In England and Canada. Faculty of Law* (Oxford: Oxford University) at 28 ("it was rare for criminal or ecclesiastical offences to be the subject matter of Chancery cases").

<sup>152</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 236 ("The mechanism by which it was applied in Chancery examination of witnesses was the prohibition of scandalous interrogatories and of cross-examination to credit"). Also see Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 78 (there "was little application for the rule in Chancery...because in Chancery cross-examination to the credit of witnesses was prohibited").

<sup>153</sup> After 1649 the examiners' discretion was severely limited by a General Order from the Parliamentary Commissioners: Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 177 n101.

<sup>154</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 176 ("the demurrer to interrogatories continued to be used to raise questions of privilege up to the early nineteenth century").

A good example was *Paxton v Douglas* (1809).<sup>155</sup> A witness successfully objected to interrogatories because of self-incrimination and forfeiture under the East India Company legislation.<sup>156</sup> On that basis, it is hard to see why similar examples were not reported in the preceding centuries.

## (ii) Interrogatories as to Credit

In the 1500s and early 1600s a witness could demur to interrogatories “if they were irrelevant, dangerous, or prejudicial”.<sup>157</sup> The grounds for a valid demurrer changed over time: for example, irrelevance ceased to be a valid ground in 1683.<sup>158</sup> However, those changes should not have affected demurrers for self-incrimination, which was surely prejudicial.

Self-incrimination was not apparently raised because of a broader prohibition. Equity procedure prohibited “interrogatories to the character of the witness”.<sup>159</sup> This general principle was stated by Justice Gawdy in 1599 and reaffirmed by Bacon in 1619.<sup>160</sup> Like most equitable principles it was flexible. It was not followed if a particular case depended upon the evidence of one or two witnesses.<sup>161</sup>

## (iii) Cross-examination as to Credit

It is hard to confirm Macnair’s comment that cross-examination to credit was prohibited. Cross-examination had little place in Chancery procedure at all. In his book Macnair devoted less than a page to cross-examination.<sup>162</sup> The printed

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<sup>155</sup> (1809) 16 Ves Jun 239 (33 ER 975).

<sup>156</sup> (1809) 16 Ves Jun 239 at 243 (33 ER 975 at 976) *per* Lord Eldon LC (“every one of those questions may be met by the witness: most of them as having a direct tendency to incriminate him: others as having a tendency, connecting them with those”).

<sup>157</sup> Macnair, M. R. T. (1990) “The early development of the privilege against self-incrimination.” *Oxford Journal of Legal Studies* 10(Spring): 66 at 75.

<sup>158</sup> *Ashton v Ashton* (1683) 1 Vern 165 (23 ER 390); 1 Eq Ca Ab 41 pl 11 (21 ER 859).

<sup>159</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 236 n37.

<sup>160</sup> Jones, W. (1967) *The Elizabethan Court of Chancery* (London: Oxford University Press) at 244 n2.

<sup>161</sup> Jones, W. (1967) *The Elizabethan Court of Chancery* (London: Oxford University Press) at 244 n2.

<sup>162</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 179-180.

reports showed only a few examples of cross-examination of witnesses in Chancery.<sup>163</sup>

An Australian judge recently described the right of cross-examination in Chancery as no more than theoretical.<sup>164</sup> The lawyers for the parties were not present to cross-examine the witnesses, even though they had prepared the interrogatories put at the examination.<sup>165</sup> Holdsworth saw this as just one among many defects in the procedure for separate examinations.<sup>166</sup>

### (c) EXCHEQUER

The shifting nature of equitable rules can be seen in *Gray v Alport* (1611).<sup>167</sup> The Court of Exchequer was exercising its equitable jurisdiction in that case. An information was exhibited there against a merchant for non-payment of custom duties on goods which he had landed. The Court held unanimously that the apprentices and servants of the defendant should not be examined as witnesses because of their obligations to their master.<sup>168</sup>

In making that decision the Court departed from its precedents. It is hard to see modern parallels with the decision. The modern privilege would not have applied in the first place, because the feared punishment would have been to the master, not to the servants themselves. Moreover, this decision depended upon the master being incriminated only under a penal law. The servants

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<sup>163</sup> E.g. *Ashton v Ashton* (1683) 1 Vern 165 (23 ER 390); 1 Eq Ca Ab 4 pl 11 (21 ER 859).

<sup>164</sup> Gummow J in *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503 at 545 (in Chancery most of the evidence “admitted on the hearing of a cause consisted of depositions taken upon the interrogatories by officers of the court, and the right of cross-examination was theoretical”).

<sup>165</sup> Holdsworth, W. (1944) *A History of English Law (Vol 9)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 355 (“It is obvious that under these circumstances, cross-examination was useless if not dangerous. It was in fact seldom resorted to”). Also see Holdsworth, W. (1944) *A History of English Law (Vol 9)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 341.

<sup>166</sup> Holdsworth, W. (1944) *A History of English Law (Vol 9)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 355 (“it may safely be said that a more futile method of getting at the facts of a case, than the system in use in Chancery from the seventeenth century onwards, never existed in a mature legal system”).

<sup>167</sup> *Gray v Alport* (1611) 117 SS 394 Case No 181.

<sup>168</sup> (1611) 117 SS 394 (it was “inconvenient and unreasonable” for them to “be sworn against him to betray him upon a penal law”).

would have been forced to incriminate him if a treason or felony had been involved.<sup>169</sup>

The relationship of a master and his servants and apprentices apparently carried a significance not found in such relationships nowadays.<sup>170</sup> In the end, *Gray v Alport* shows the difficulty of looking at old cases with modern eyes. It is at best an example of equity providing assistance on a case by case basis.

#### (d) CONCLUSION

The next chapter will argue that the privilege in civil proceedings came from Chancery rather than the common law. It would be convenient to come to a similar conclusion with witness privilege, particularly because the early rules about scandalous interrogatories showed the same desire to avoid abuse of Chancery procedure.<sup>171</sup> However, it is more likely that witness privilege came from the common law.

Modern witness privilege is easier to see in the common law authorities than in the equitable limitations on interrogatories. It is reassuring that an Australian High Court judge recently came to a similar conclusion.<sup>172</sup> The common law authorities will now be discussed.

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<sup>169</sup> (1611) 117 SS 394 ("But in case of treason or felony, which concern the state of the realm and the public good, it is otherwise").

<sup>170</sup> The court was influenced by the belief that possibly the contractual obligation of secrecy was reinforced by an oath: (1611) 117 SS 394 (the apprentices and servant were "perhaps sworn that they not disclose the secrets of their master").

<sup>171</sup> E.g. Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 75 ("Chancery was constantly concerned about abuse of process").

<sup>172</sup> Gummow J in *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 123 ALR 503 at 545 (in Chancery "the question was not whether any witness had the personal privilege of declining to answer particular questions" and "it is not entirely accurate to attribute to equity the same foundation for its development in this field as that of the common law courts").

### (3) COMMON LAW CRIMINAL PROCEEDINGS

#### (a) WIGMORE'S EXAMPLES

Wigmore mentioned most of the relevant cases on witness privilege. He included them in his list of cases showing the general existence of the privilege in the late 1600s of which "there is no longer any doubt, in any court".<sup>173</sup>

However, he did not distinguish cases involving witnesses from those involving criminal defendants. Nor did he note that the cases involving witnesses were far more numerous.<sup>174</sup>

Wigmore gave many examples of witness privilege in operation in the trials involving Catholics after 1679.<sup>175</sup> However, he concluded that the privilege was not extended to witnesses until 1679.<sup>176</sup> His dating was criticised as over-cautious by Macnair.

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<sup>173</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633-4 n7.

<sup>174</sup> As mentioned earlier in this chapter, only two of Wigmore's cases show the *nemo tenetur* maxim being clearly applied to criminal defendants *Scroop's Trial* (1660) 5 HST 1034 and *Penn and Mead's Trial* (1670) 6 HST 951.

<sup>175</sup> E.g. *Reading's Trial* (1679) 7 HST 259 at 296 (prosecution witness Bedlow was protected by North LCJ from questions "which would make him accuse himself", although Dolben J thought this to be unnecessary because Bedlow had already received a pardon); *Whitebread's Trial* (1679) 7 HST 311 at 361 (defendant's witness was not allowed by Scroggs LCJ to be asked whether he was a priest because "it would make him accuse himself. It would bring him in danger of treason"); *Langhorn's Trial* (1679) 7 HST 417 at 435-436 (prosecution witness had pardon, but still given the choice by Scroggs LCJ whether he answered defendant's question about when he became a Jesuit because it was "a criminal matter that may bring him into danger"); *Castlemaine's Trial* (1680) 7 HST 1067 at 1096 (defendant asked his own witness if he converted Oates to Catholicism and was told by Scroggs LCJ "not to ask him such questions, you bring him in danger of his life"); *Stafford's Trial* (1680) 7 HST 1293 at 1314 (prosecutor of impeachment trial before House of Lords complained that prosecution witness should not have been asked how long ago he was made a priest because "no man is bound to answer a question whereby he shall accuse himself", so the presiding Lord High Steward asked the same question in a different form); *Plunket's Trial* (1681) 8 HST 447 at 480-481 (prosecution objected to defendant asking prosecution witness "any questions that may tend to accuse himself" and Scroggs LCJ confirmed that the witness "is not bound to answer such a question"); *Rosewell's Trial* (1684) 10 HST 147 at 169 (Jeffreys LCJ told defendant that witnesses were not bound to answer any of his questions "whereby they charge themselves with any crime, or by answering may subject themselves to any penalty"); *Trial of Titus Oates* (1685) 10 HST 1079 at 1099 and 1123 (Jeffreys LCJ repeatedly told the defendant not to subject the prosecution witnesses to questions about their Catholic activities because "no man should ask you a question that might make you obnoxious to a penalty").

<sup>176</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633-4 ("the extension of the privilege to include an ordinary witness, and not merely the party charged, is for the first time made").

## (b) EARLIER EXAMPLES

Macnair thought that the privilege was extended to witnesses before 1679.<sup>177</sup> Levy took the same view.<sup>178</sup> Levy's departure from Wigmore was surprising because, like Wigmore, he did not distinguish cases involving witnesses from those involving criminal defendants.<sup>179</sup> Macnair and Levy both pointed to the *Trial of King Charles* (1649) as the first reported example of a witness actually exercising the privilege.<sup>180</sup> The problem was that the legitimacy of the trial in itself was in question.<sup>181</sup>

In any event, Macnair and Levy thought that even before 1649, the existence of witness privilege was acknowledged by the courts. Both saw common law recognition of witness privilege in *Fitz-Patrick's Trial* (1631).<sup>182</sup> No rule against self-incrimination was actually applied.<sup>183</sup> Hyde LCJKB merely conceded the existence of such a rule.<sup>184</sup> Wigmore mentioned *Fitz-Patrick's Trial* (1631) but did not see it in terms of witness privilege.<sup>185</sup>

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<sup>177</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 78-79.

<sup>178</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 489-490 n20.

<sup>179</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 314-320.

<sup>180</sup> (1649) 4 HST 989 at 1101 (a witness called Holder did not want to give evidence against the King. The Commissioners "perceiving that the Questions intended to be asked him, tended to accuse himself, thought fit to waive his Examination"). This was one of Wigmore's three cases which showed that the privilege was established in criminal proceedings before 1650: Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633.

<sup>181</sup> Some of the Commissioners were later tried themselves for their involvement: e.g. *Trial of the Regicides* (1660) 5 HST 995; *Scroop's Trial* (1660) 5 HST 1034.

<sup>182</sup> (1631) 3 HST 419, preceded by *Lord Audley's Trial* (1631) 3 HST 401.

<sup>183</sup> (1631) 3 HST 419 at 420. Fitz-Patrick had already answered the incriminating questions. Moreover, he was charged with the same crime of buggery as Lord Audley. He would therefore have come within the exception which Hyde LCJKB gave to the rule ("yet where his testimony served to take away any other's life, and made him guilty of the same crime, therein it should serve to cut him off also").

<sup>184</sup> (1631) 3 HST 419 at 420. Fitz-Patrick complained about the use against him of admissions which he had made as a prosecution witness at the trial of Lord Audley for rape and buggery. Hyde LCJKB replied: "It was true, that the law did not oblige any man to be his own accuser".

<sup>185</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 632 n2. Wigmore's account showed Fitz-Patrick committing rape, when in fact he was arraigned for buggery: (1631) 3 HST 419 at 421.

Levy also cited *Richmond's Trial* (1642).<sup>186</sup> During a debate in the House of Lords the opinion of the Judges was sought on whether the witness Scroop could be asked incriminating questions on oath.<sup>187</sup> The Judges gave their opinion that "in the ordinary courts of justice, Mr Scroop might, by law, be examined on oath".<sup>188</sup>

This case does not provide clear authority. Presumably, the opinion was sought because in 1642 some rule against self-incrimination was thought to exist in the common law courts, but the judges' opinion suggested otherwise. Nor was any such rule applied in the House of Lords debate.<sup>189</sup>

Each of these earlier examples has its difficulties. In terms of regular application of the privilege, Wigmore was justifiably cautious in dating its extension to witnesses as 1679.<sup>190</sup> Even then, procedural issues remained to be resolved.

### (c) PROCEDURE

In the *Trial of King Charles* (1649) the whole examination was avoided, not particular incriminating questions. This resembled the modern right to silence rather than witness privilege. A less extreme approach was taken in some of the later cases. They suggested that the court could stop a question being put to the witness at all if it could lead to an incriminating answer.<sup>191</sup> Other cases

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<sup>186</sup> (1642) 4 HST 111, cited by Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 490 n20.

<sup>187</sup> (1642) 4 HST 111 at 120 ("Whether Mr Scroop ought to be examined, upon oath, to know what directions the Duke gave him; because he might accuse himself"). Scroop was giving evidence in the House of Lords during a debate on whether to join the House of Commons in a petition against the Duke of Richmond. The Duke was alleged to have sent Scroop to make a corrupt approach to a Member of Parliament.

<sup>188</sup> (1642) 4 HST 111 at 120.

<sup>189</sup> Scroop merely confirmed his master's version and said nothing remotely self-incriminating: (1642) 4 HST 111 at 120.

<sup>190</sup> However, it was a rare exception to his tendency to "project the origins of the rules of evidence further back than the historical record reasonably supports": Langbein, J. H. (1997) "The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 243 n117.

<sup>191</sup> E.g. *Reading's Trial* (1679) 7 HST 259 at 296 ("if you offer to ask him any question upon his oath, to make him accuse himself, we must oppose it"); *Castlemaine's Trial* (1680) 7 HST 1067 at 1096



from the same period said that the question could be put, but the witness was not bound to answer.<sup>192</sup>

According to Tollefson, it was settled by the early 1800s that the question could always be put.<sup>193</sup> Even before 1700, there seems to have been little doubt, judging from *Freind's Trial* (1696).<sup>194</sup> All four judges in the Old Bailey thought that the privilege did not stop the question from being put.<sup>195</sup>

Not all aspects of witness privilege were settled by 1700. One judge in *Freind's Trial* (1696) mentioned the danger of “infamy” as a ground for witness privilege.<sup>196</sup> The other judges were not so specific, although they accepted that witness privilege protected against more than just criminal and penalty proceedings.<sup>197</sup> Infamy was not ultimately accepted as a ground for the privilege, but it was suggested from time to time until the early 1800s.<sup>198</sup>

#### (d) SPECIAL NATURE

Because of the special nature of criminal procedure, witness privilege emerged most clearly in common law criminal cases in the 1600s. For most of that

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(“you are not to ask him such questions”); *Earl of Shaftesbury's Trial* (1681) 8 HST 759 at 817 (North LCJ did not think it proper for member of grand jury to ask witness whether he had received a pardon because “You must not ask him to accuse himself”).

<sup>192</sup> E.g. *Langhorn's Trial* (1679) 7 HST 417 at 436 (“if Mr Oates pleases to answer that question he may”); *Plunket's Trial* (1681) 8 HST 447 at 481 (“we must tell you he is not bound to answer”); *Trial of Titus Oates* (1685) 10 HST 1079 at 1099 (“I tell you upon the oath you have taken, you are not bound to answer any such question”)

<sup>193</sup> Tollefson, E. A. (1975) *The Privilege against Self-Incrimination In England and Canada. Faculty of Law* (Oxford: Oxford University) at 65 (“Early decisions favoured prohibiting the putting of questions; but gradually judges began to permit the question to be asked, leaving it to the witness to decide whether to answer it and by the early 19th century the balance appears to have tipped in favour of the latter practice”).

<sup>194</sup> (1696) 13 HST 1, cited by Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 489 n27. Sir John Freind was on trial in the Old Bailey for high treason. He wanted to know the religion of a prosecution witness before that witness was even sworn.

<sup>195</sup> (1696) 13 HST 1 at 16-18.

<sup>196</sup> Treby LCJ in *Freind's Trial* (1696) 13 HST 1 at 17. He made a similar reference to infamy in *Cook's Trial* but only in the context of challenges to jurors: *Cook's Trial* (1696) 13 HST 311 at 334-5.

<sup>197</sup> E.g. Rokeby J in *Freind's Trial* (1696) 13 HST 1 at 18 (witness not bound to answer the question “because it may tend to make him accuse himself of a crime for which he may be prosecuted, and likewise will subject him to other penalties which the law cannot compel him to subject himself to”).

<sup>198</sup> E.g. *East India Company v Campbell* (1749) 1 Ves Sr 246 (27 ER 1010); *R v Lewis* (1802) 4 Esp 225 (170 ER 700) (Lord Ellenborough cited Treby LCJ as authority); *Macbride v Macbride* (1802) 4 Esp 242 (170 ER 706); *Dodd v Norris* (1814) 3 Camp 519 (170 ER 1467).

period only the prosecution could call witnesses. In the late 1600s criminal defendants were increasingly allowed to call their own voluntary witnesses, to compel witnesses to attend and to have defence witnesses giving evidence on oath.<sup>199</sup> The earlier development of witness privilege may therefore have been aided by a desire to encourage witnesses to testify for the King as prosecution witnesses, as occurred in the Star Chamber.<sup>200</sup>

The revisionists argued that witness privilege was established in the political trials of the late 1600s. They were uncomfortable with this argument because they disliked the “Stuart bullies” who established it.<sup>201</sup> However, the fact that privilege was granted to prosecution witnesses seems more important than the motives for granting it.<sup>202</sup> Besides, it was sometimes the defendant's witness who received protection from the Stuart bullies.<sup>203</sup>

Criminal procedure was reformed around 1700 because of the defects which were evident in the political trials of the late 1600s. The reforms were central to the debate on the right to silence between the traditionalists and the

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<sup>199</sup> However, this was not a consistent development. E.g. in *Reading's Trial* ((1679) 7 HST 259 at 278) not all those rights were granted. See generally Holdsworth, W. (1944) *A History of English Law* (Vol 9) (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 195-6 and Wigmore, J. H. (1979) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at para 575 pp 809-810.

<sup>200</sup> Hudson, W. (1621) *A Treatise Of The Court Of Star Chamber* (Littleton, Colorado: Fred B. Rothman & Co) at 201.

<sup>201</sup> E.g. Langbein had difficulty with the fact that in Wigmore's cases “the judges whom he treats as supposedly vindicating the privilege against self-incrimination were the notorious Stuart bullies, Scroggs and Jeffreys”: Langbein, J. H. (1997) “The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries”. *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 105. Wigmore merely thought this irony “interesting to note, in passing”: Wigmore, J. H. (1901/2) “The Privilege Against Self-Crimination; Its History.” *Harvard Law Review* 15: 610 at 634.

<sup>202</sup> E.g. Langbein, J. H. (1997) “The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries”. *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 105 (“efforts by the subservient Stuart bench to disadvantage defendants in baseless political and religious persecutions”).

<sup>203</sup> E.g. Langbein, J. H. (1997) “The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries”. *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 104-105 gives Mr Smith at *Stafford's Trial* ((1680) 7 HST 1293 at 1314) as an example of a defence witness being protected. In fact, Mr Smith was the first prosecution witness (7 HST at 1309). However, in *Whitebread's Trial* ((1679) 7 HST 311 at 361) and *Castlemaine's Trial* ((1680) 7 HST 1067 at 1096), defence witnesses were protected from self-incrimination by Scroggs LCJ.

revisionists.<sup>204</sup> They mainly concerned the rights of the accused and are thus outside the scope of this thesis.

The reforms around 1700 ensured that witness privilege was available to both prosecution and defence witnesses in criminal proceedings. Printed reports of criminal cases gave examples throughout the 1700s.<sup>205</sup> Unfortunately, witness privilege was not mentioned in the reports of civil cases from the same period.

#### **(4) COMMON LAW CIVIL PROCEEDINGS**

##### **(a) INTRODUCTION**

The rest of this chapter will consider the development of witness privilege in common law civil proceedings. It will argue that witnesses in the common law courts needed protection because of the introduction of compulsory questioning in those courts in 1563.

Witness privilege developed to protect witnesses in civil cases for the same reasons as in criminal proceedings. This was separate from the development of the privilege for parties in Chancery. The problem is that, unlike witness privilege in criminal cases, there was no mention of witness privilege in the printed reports of civil proceedings during most of the 1700s.

##### **(b) LACK OF CIVIL EXAMPLES**

Around 1800 there were several reported civil cases in which witness privilege was upheld or clearly acknowledged.<sup>206</sup> Most of them showed witness

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<sup>204</sup> E.g. see Langbein, J. H. (1997) "The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 248-249 n143.

<sup>205</sup> E.g. *Trial of the Earl of Macclesfield* (1725) 16 HST 767 at 920-3 and 1146-1150 (prosecution witness Bennett and defence witness Meller each excused from self-accusation at the impeachment trial in the House of Lords of a former Lord Chancellor for corruption); *R v Gordon* (1781) 2 Dougl 590 at 593 (99 ER 372 at 374) (King's Bench under Lord Mansfield CJ ruled that witness in treason trial was not obliged to answer whether he was a Roman Catholic "because if he were to say he was, his declaration would be evidence against him, and might subject him to penalties").

<sup>206</sup> E.g. *Cates v Hardacre* (1811) 3 Taunt 423 (128 ER 168) (witness already indicted for usury in respect of disputed bill of exchange and not obliged to answer questions because they "go to connect the witness with the bill, and they may be links in the chain"); *Maloney v Bartley* (1812) 3 Camp 209

privilege operating as it had in criminal cases for over a century. The only difference was that infamy was sometimes included as well as self-incrimination.<sup>207</sup> Before these cases it is hard to find any evidence of witness privilege in civil proceedings.<sup>208</sup>

It is tempting to assume that witnesses would have received similar protection in both criminal and civil proceedings.<sup>209</sup> Little assistance can be expected from the traditionalists. They did not really distinguish witness privilege from the right to silence given to criminal defendants.

### (c) MACNAIR'S EXAMPLES

Macnair offered no explanation for the absence of common law civil examples. He relied upon the usual common law criminal cases to show early acceptance of witness privilege. He also gave two new common law examples.<sup>210</sup>

The first example was probably criminal. It was not a report but a reference in a practitioner's guide.<sup>211</sup> It distilled a four-line statement of principle from a King's Bench decision for which the facts and the name were not given.<sup>212</sup>

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(170 ER 1357) (magistrate's clerk not obliged to answer questions in relation to a libellous affidavit which he drafted because "all concerned in writing and publishing it are, in point of law, guilty of a misdemeanour"); *Raines v Towgood* (1796) 1 Peake Add Cas 105 (170 ER 210) (broker not obliged to answer plaintiff's questions about making illegal stock-jobbing contracts because it "would subject him to a penalty"); *Roberts v Allatt* (1828) M & M 193 (173 ER 1128) (maker of illegal stock-jobbing contracts obliged to answer because over three years had elapsed thereby excluding any proceedings for penalties).

<sup>207</sup> E.g. compare *Dodd v Norris* (1814) 3 Camp 519 (170 ER 1467) (defendant sued for seducing the plaintiff's daughter, who did not have to testify whether "before her acquaintance with the defendant she had not been criminal with other men") with *Macbride v Macbride* (1802) 4 Esp 242 (170 ER 706) (witness not obliged to answer question which suggested that she "lived in a state of concubinage with the plaintiff" because it "had a direct and immediate effect to disgrace or disparage the witness").

<sup>208</sup> E.g. Morgan, E. M. (1949) "The Privilege Against Self-Incrimination." *Minnesota Law Review* 34(1): 1 at 11 ("scarcity or non-existence of reported cases in which the privilege was applied in civil actions at common law").

<sup>209</sup> Morgan, E. M. (1949) "The Privilege Against Self-Incrimination." *Minnesota Law Review* 34(1): 1 at 12 ("when the common law courts granted the privilege to witnesses in criminal proceedings, it is highly improbable that they would have denied it to witnesses in civil actions").

<sup>210</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 78.

<sup>211</sup> *Anon (KB)* (1647) Style Pract Reg 355.

<sup>212</sup> It was not clear whether the decision was civil or criminal. The *nemo tenetur* maxim was stated as the reason why a "Witness may not be compelled to answer upon a *voir dire* touching a Trespass done for the doing whereof, he may himself be lyable to an Action".

Macnair's second new example may have been civil.<sup>213</sup> Unfortunately, it was not about witnesses avoiding questions by claiming the privilege. It was about counsel excepting against witnesses to stop them testifying.<sup>214</sup>

There may have been some overlap between exceptions and the privilege. The courts of equity followed the ecclesiastical courts in allowing exceptions for bad character, such as the witness being convicted of some disqualifying offence.<sup>215</sup> Macnair's example shows a similar exception applying to witnesses in the common law courts.

Exceptions enabled counsel to stop a witness testifying. The privilege allowed the witness to elect not to testify. The interaction between the two concepts was elusive and complex.<sup>216</sup> That was perhaps why Macnair did not explore the relationship between them. Nor will this thesis.

## (d) COMPETENCE AND COMPELLABILITY

### (i) Introduction

Like the traditionalists the revisionists were mainly concerned with the right to silence in criminal cases.<sup>217</sup> They similarly relied upon criminal law

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<sup>213</sup> *Onbie's Case* (1641) March NR 83 (82 ER 422). It apparently took place in the Court of Common Pleas which generally only heard civil matters. Reeve J of the Common Pleas is mentioned in the next case reported in the paragraph.

<sup>214</sup> "And in examining of a witness counsel cannot question the whole life of the witness, as that he is a whoremaster, &c. But if he hath done such a notorious fact which is a just exception against him, then they may except against him. That was *Onbies case* of Grays-Inn".

<sup>215</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 192-196.

<sup>216</sup> E.g. in the 1690s and 1700s counsel tried unsuccessfully to except against accomplices "in civil proceedings i.e. witnesses whose evidence implicated them in frauds": Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 196.

<sup>217</sup> E.g. Smith, H. E. (1997) "The Modern Privilege: Its Nineteenth-Century Origins". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 145 at 156-157 ("witness privilege allowed a nonparty witness to refuse to testify to any question that would have the tendency to expose him or her to future prosecution"). To show "the core of this rule", a 19th century criminal case was cited: see Smith, H. E. (1997) "The Modern Privilege: Its Nineteenth-Century Origins". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 145 at 262 n55, citing *R v Slaney* (1832) 5 Car and P 213 (172 ER 944).

textbooks.<sup>218</sup> However, one of them also noted the “conventional landmark for the compulsion of witnesses at common law”.<sup>219</sup>

That landmark was the Perjury Act of 1563.<sup>220</sup> Holdsworth noted long ago that this Act “began a new epoch in the law of evidence”.<sup>221</sup> To understand the significance of the Act, the compellability of witnesses must be distinguished from their competence.

## (ii) Related but Different

Until the Perjury Act of 1563, the common law had no need for the privilege because testimony was voluntary.<sup>222</sup> Section 6 provided for the payment of penalties by witnesses who failed to attend a common law court when process had been served upon them. By compelling witnesses to answer questions, the Act put them in danger of self-incrimination if they answered truthfully.<sup>223</sup>

Competent witnesses can give evidence if they want to. Compellable witnesses can be forced to give evidence even if they do not want to. The Perjury Act established the general rule for witnesses that all competent persons are

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<sup>218</sup> Smith, H. E. (1997) "The Modern Privilege: Its Nineteenth-Century Origins". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 145 at 158 and 263 n62, citing 2 Hawkins *Pleas of the Crown* bk2, ch.46 sections 19-20 (London 1721) (“Also it is a general Rule that a Witness shall not be asked any Question the answering of which might oblige him to accuse himself of a Crime”). In the 1824 edition the same words appeared, this time supported by authorities from criminal State Trials: Hawkins, W. (1824) *A Treatise of the Pleas of the Crown* (London: Sweet, Pheney, Maxwell and Stevens) ch46, p604, section 101.

<sup>219</sup> Gray, C. M. (1982) "Prohibitions and the privilege against self-incrimination". *Tudor rule and revolution: essays for G.R.Elton from his American friends*. D. J. Guth and J. W. McKenna (Ed.) (Cambridge: Cambridge University Press) 345 at 346.

<sup>220</sup> *An act for the punishment of such as shall procure or commit any wilful perjury*, 5 Eliz c 9 [session starting 12 January 1563], *Statutes at Large*, Vol 6, p189.

<sup>221</sup> Holdsworth, W. (1944) *A History of English Law (Vol 9)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 195.

<sup>222</sup> Gray, C. M. (1997) "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 47 at 47 (“In principle, the matter simply did not arise in a common law setting”).

<sup>223</sup> Gray, C. M. (1982) "Prohibitions and the privilege against self-incrimination". *Tudor rule and revolution: essays for G.R.Elton from his American friends*. D. J. Guth and J. W. McKenna (Ed.) (Cambridge: Cambridge University Press) 345 at 346 (“the first crack in the ancient supposition that all testimony was voluntary and that witnesses thus assumed the risk of being asked what they could not answer truly without making admissions harmful or even incriminating to themselves”).

compellable.<sup>224</sup> That general principle still applies in Australia and New Zealand.<sup>225</sup> However, competence and compellability do not necessarily go together, even though they are often linked.<sup>226</sup>

### **(iii) Privilege and Compellability**

The privilege is an exception to compellability but does not affect competence. Witnesses are competent if they waive the privilege and choose to answer incriminating questions. Otherwise, the privilege makes them not compellable in that they cannot be forced to answer incriminating questions.

Witness privilege is only a limited exception to compellability. A witness must still answer questions not covered by privilege. A broader exception to compellability can be found in the right to silence enjoyed by criminal defendants. They need not testify at all, but they are competent to give evidence in their own defence if they choose. If they testify, legislation often adds to their compellability by denying them the privilege for matters at issue in the proceedings.<sup>227</sup>

As Holdsworth noted, the Perjury Act 1563 raised questions about “the admission of exceptions to the general rule of compulsion”.<sup>228</sup> Witness privilege was one of those exceptions. It mitigated the effect of compellability.

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<sup>224</sup> Holdsworth, W. (1944) *A History of English Law (Vol 9)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 197.

<sup>225</sup> E.g. as stated in s12(b), Evidence Act 1995 (Cth). However, there are important exceptions: e.g. ss17, 18 and 19, Evidence Act 1995 (Cth) in which special rules limit the competence and compellability of criminal defendants, their spouses and other relatives. Also see New Zealand Government (2005) *Evidence Bill* (Wellington) Clause 67(1)(b).

<sup>226</sup> Holdsworth, W. (1944) *A History of English Law (Vol 9)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 197.

<sup>227</sup> E.g. s8(1)(c), Evidence Act 1906 (WA). This follows the traditional form set out in s1(e), Criminal Evidence Act 1998 (UK). Modern legislation has adopted a more complicated approach based upon cross-examination as to credit: Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 2 at 236.

<sup>228</sup> Holdsworth, W. (1944) *A History of English Law (Vol 9)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 195.

Although it was not directly linked to the privilege, competence had a significant role in the history of the privilege during the 1500s and 1600s. It obscured the effect of compellability by substantially limiting those persons who were competent to be witnesses. During that period civil parties were disqualified from being witnesses at common law trials. This incompetence was later extended to non-party witnesses who had an interest in the proceedings.

#### **(iv) Incompetence of Parties**

Disqualification of parties is thought to have started before the Perjury Act of 1563, even though the first reported example was not until 1582.<sup>229</sup> Wigmore saw it as “apparently coming into existence during the 1500s”.<sup>230</sup> It may even have occurred in the early 1400s, so that “from the very beginning of modern witnesses, the party was incapable of being one”.<sup>231</sup>

The disqualification of civil parties continued until it was abolished by the Evidence Act 1851.<sup>232</sup> Since then, civil parties have been competent and compellable witnesses.<sup>233</sup> They have therefore received the protection of the privilege.

Disqualification meant that the Perjury Act of 1563 did not affect civil parties as it did third party witnesses. Civil parties were not competent witnesses.

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<sup>229</sup> *Dymoke's Case* (1582) Savile 34 pl 81 (123 ER 997) (abuse of the rule prevented by not allowing potential witnesses for the defendant to be named as fictitious parties and thereby disqualified).

<sup>230</sup> Wigmore, J. H. (1979) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at para 575 p806.

<sup>231</sup> Wigmore, J. H. (1979) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at para 575 p807. Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 207 claims that this dating is too early.

<sup>232</sup> *An Act to amend the Law of Evidence*, 14 & 15 Vict c 99 [7 August 1851], *Statutes at Large*, Vol 91, p657. This was also known as Lord Brougham's Act: Wigmore, J. H. (1979) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at para 575 p817.

<sup>233</sup> This reflects the idea that a civil court should have all the facts before it. This is not a new idea. According to ancient Talmudic principles, if the defendant in a civil case admits partial liability for a debt, “the admission of the defendant is equal to the evidence of a hundred witnesses” (Epstein, I., Ed. (1935) *Baba Mezi'a*. The Babylonian Talmud: Seder Nezikin (Vol I) (London: The Soncino Press) folio 3b, p9).



They could not testify even if they wanted to. Nor did they need the privilege to protect them against compellability under the Act.

Sometimes judges blurred the distinction between incompetence and non-compellability of parties.<sup>234</sup> It was not surprising that the privilege became confused with incompetence.<sup>235</sup> One old textbook on criminal proceedings mentioned the privilege only in the section dealing with the incompetence of a witness who had been previously attainted or convicted.<sup>236</sup>

### (v) Disqualification for Interest

Other interested persons were incompetent witnesses. They were disqualified for the same reason as parties. Testimony was considered unreliable if given by witnesses who had an interest in the result of the proceedings.

Disqualification of witnesses for interest became common after 1650.

Wigmore thought that the rule was adopted in the 1640s.<sup>237</sup> Macnair preferred an earlier date.<sup>238</sup> Certainly, the disqualification for interest rule was introduced for witnesses much later than for civil parties.<sup>239</sup> It was also

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<sup>234</sup> E.g. Lord Ellenborough in *R v Woburn* (1808) 10 East 395 at 403 (103 ER 825 at 828) (“It is a long-established rule of evidence that a party to a suit cannot be called upon *against his will* by the opposite party to give evidence” (emphasis added). Until 1851, the party could not be called at all).

<sup>235</sup> Holdsworth, W. (1944) *A History of English Law (Vol 9)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 198 (for the common lawyers “it was natural that they should regard the incompetence of the parties as witnesses, as carrying with it the privilege of not being liable to be called upon to answer at the suit of their opponents”).

<sup>236</sup> Hawkins, W. (1824) *A Treatise of the Pleas of the Crown* (London: Sweet, Phoney, Maxwell and Stevens) ch46, p604, section 101.

<sup>237</sup> Wigmore, J. H. (1979) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at para 575 pp802 and 804. He regarded Coke's commentary on Littleton as being influential in this development. That was not printed until 1642, although it was actually written in 1627.

<sup>238</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 207-210 cites *Mericke v King* (1630) Het 137 (124 ER 404) as well as earlier authority to show that Wigmore's dating is too late.

<sup>239</sup> This was why Wigmore rejected the earlier authority of *Mericke v King* (1630) Het 137 (124 ER 404) (purchaser of land from party “shall not be a witness if he claim under the same title”). Wigmore, J. H. (1979) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at para 575 p804 n16 said that this was “perhaps equivalent to the case of a party”.

applied to witnesses earlier and more strictly in civil than in criminal cases.<sup>240</sup>

It continued to apply until its abolition by the Evidence Act of 1843.<sup>241</sup>

Disqualification will be suggested shortly as an explanation for the lack of civil examples, but it also provides a problem for this thesis. Unlike witness privilege, disqualification for interest was mentioned as an issue in the printed reports of common law civil cases.<sup>242</sup>

This chapter will now examine three explanations for the lack of examples of witness privilege in civil proceedings in the 1600s and 1700s. These explanations are not mutually exclusive.

## (5) EXPLANATIONS

### (a) DISQUALIFICATION

The first explanation is that the disqualification of parties and interested witnesses caused the lack of examples of witness privilege in common law civil cases.<sup>243</sup> Undoubtedly, disqualification reduced the number of witnesses who might have claimed witness privilege, but it is not a complete explanation.

The disqualification rules did not cover every witness who might have claimed the privilege. Besides, examples of witness privilege occurred in the early 1800s before the disqualification of parties was removed.<sup>244</sup>

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<sup>240</sup> Wigmore, J. H. (1979) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at para 575 p808.

<sup>241</sup> *An Act for improving the Law of Evidence*, 6 & 7 Vict c 85 [22 August 1843], *Statutes at Large*, Vol 83, p551. This was also known as Lord Denman's Act: see Wigmore, J. H. (1979) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) at para 575 p817.

<sup>242</sup> E.g. *Tiley v Cowling* (1701) 1 Ld Raym 744 (91 ER 1398) (wife disqualified as witness in one action because her evidence could be used in another action in which her husband would be a party); *Craig v Earl of Anglesea* (1743) 17 HST 1139 at 1253 (defendant's lessee disqualified as witness because he stood to lose his lease if plaintiff succeeded in action for ejection against defendant).

<sup>243</sup> E.g. Morgan, E. M. (1949) "The Privilege Against Self-Incrimination." *Minnesota Law Review* 34(1): 1 at 11-12 ("from the early 1600s to the middle of the nineteenth century parties were disqualified as witnesses and so, at least after the middle of the 1600s were interested persons").

<sup>244</sup> E.g. in the early 19th century the *nemo tenetur* maxim became loosely associated with the incompetence of parties in common law proceedings because of their "disqualification for interest": see Smith, H. E. (1997) "The Modern Privilege: Its Nineteenth-Century Origins". *The Privilege Against*

## (b) NO INVOLUNTARY WITNESSES

The second explanation is that in practice the Perjury Act was not enforced. Civil witnesses were not required to testify against their will.<sup>245</sup> If the testimony was self-incriminating the witness could simply refuse to testify at all. As a result, the issue of self-incriminating testimony did not occur for over a century after the Perjury Act.<sup>246</sup>

This explanation is not consistent with the comments of Wray LCJKB in *Attorney-General v Lord Vaux* (1581).<sup>247</sup> Perhaps too much should not be read into *obiter* comments from a common law judge sitting in Star Chamber.<sup>248</sup> Nevertheless he seemed to be saying that, as a matter of course, common law courts were hearing the sworn testimony of third party witnesses in both criminal and civil cases twenty years after the Perjury Act.<sup>249</sup>

It seems unlikely that all those witnesses were voluntary. If they were involuntary, they would have needed the privilege as a safety-valve. That is what happened in criminal cases as the 1600s progressed. It is therefore necessary to look at the third explanation for the absence of reported examples of the privilege in civil cases.

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*Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 145 at 148-153.

<sup>245</sup> Gray, C. M. (1982) "Prohibitions and the privilege against self-incrimination". *Tudor rule and revolution: essays for G.R. Elton from his American friends*. D. J. Guth and J. W. McKenna (Ed.) (Cambridge: Cambridge University Press) 345 at 346 (the Perjury Act of 1563 appeared only to contemplate the practice of compelling witnesses "perhaps as something already commenced. The incidence of involuntary witnesses was probably low until much later").

<sup>246</sup> Gray, C. M. (1997) "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 47 at 47-48 ("there is in any event no indication that for upwards of a century it ever led to discussions or rulings on the propriety of asking incriminating questions of witnesses at common law trials").

<sup>247</sup> Bruce, J., Ed. (1844) *Archaeologia; or, Miscellaneous Tracts Relating to Antiquity* (London: Society of Antiquities) at 104-105.

<sup>248</sup> E.g. by Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 105 ("his point was that witnesses, unlike the accused, did not stand in criminal jeopardy by giving evidence").

<sup>249</sup> Bruce, J., Ed. (1844) *Archaeologia; or, Miscellaneous Tracts Relating to Antiquity* (London: Society of Antiquities) at 104-105 (he "avouched the practise of his court that usually they dyd swear men to geue evidence betwene partie and partie, and therefore *a fortiori* where the qene is a partie").

## (c) GAPS IN REPORTING

### (i) Common Law

The third explanation looks at the nature of the reporting of civil proceedings in the 1600s and 1700s. Perhaps claims of privilege were made but were not reported. Claims were most likely to have been reported in full transcripts of proceedings. Such transcripts appeared in the reports of State Trials, which were usually criminal proceedings. Those reports provided almost all the early examples of witness privilege in criminal cases.

Although that explains the existence of criminal examples, it does not explain the total absence of civil examples. A few civil cases appear in the reports of State Trials. One example was *Craig v Earl of Anglesea* (1743).<sup>250</sup> It has been mentioned as showing a witness being disqualified for interest.<sup>251</sup> It also discussed attorney-client privilege.<sup>252</sup> However, it did not mention witness privilege.<sup>253</sup>

The lack of *nisi prius* reporting could explain the absence of witness privilege from printed reports of early common law civil proceedings, other than the few reported as State Trials. Most civil trials after 1300 were proceedings at *nisi prius*.<sup>254</sup> Four of the examples of witness privilege in civil cases from around 1800 came from the *nisi prius* reports.<sup>255</sup>

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<sup>250</sup> (1743) 17 HST 1139.

<sup>251</sup> (1743) 17 HST 1139 at 1254.

<sup>252</sup> (1743) 17 HST 1139 at 1223-1253.

<sup>253</sup> In particular, witness privilege was not mentioned at 17 HST 1147. Levy cited this reference to show the privilege spreading from criminal to civil cases: see Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 492 n30.

<sup>254</sup> Even in the mid-1700s, more than half of the actions on the case in King's Bench went to trial at *nisi prius*: see Horwitz, H. (2002) "The *nisi prius* Trial Notes of Lord Chancellor Hardwicke." *Journal of Legal History* 23(2): 152 at 163 n9.

<sup>255</sup> *Raines v Towgood* (1796) 1 Peake Add Cas 105 (170 ER 210); *Maloney v Bartley* (1812) 3 Camp 209 (170 ER 1357); *Dodd v Norris* (1814) 3 Camp 519 (170 ER 1467); and *Macbride v Macbride* (1802) 4 Esp 242 (170 ER 706).

Very few *nisi prius* cases from before 1700 appeared in the English Reports.<sup>256</sup> From 1689 the English Reports included brief notes of occasional *nisi prius* cases from reporters, such as Lord Raymond. Other *nisi prius* cases were reported only in manuscript form or in printed nominate reports.<sup>257</sup> The English Reports did not include methodical reporting devoted solely to *nisi prius* trials until Peake's Reports of trials after 1790.<sup>258</sup>

It is therefore possible that before 1790 witness privilege was being claimed in trials at *nisi prius* without these claims appearing in the English Reports. The problem is that examples of disqualification of witnesses for interest still managed to find their way into the English reports. This was true before 1790.<sup>259</sup> It was equally true after the advent of methodical reporting devoted solely to *nisi prius* trials.<sup>260</sup> The same problem arises when considering the absence of the privilege from the reports of equity cases.

## (ii) Equity

As noted earlier in this chapter, separate prior examinations of witnesses were conducted by Commissioners appointed by the Court. Possibly, the reporters attended the Court hearings but not the separate examinations. Yet disqualification of witnesses for interest was often mentioned in the printed reports of Chancery proceedings from around 1700.<sup>261</sup>

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<sup>256</sup> Horwitz, H. (2002) "The *nisi prius* Trial Notes of Lord Chancellor Hardwicke." *Journal of Legal History* 23(2): 152 at 154 ("only a tiny minority of the printed reports of cases (as reprinted in *The English Reports*) from the sixteenth century to the late seventeenth century are of proceedings at *nisi prius*").

<sup>257</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 19-20.

<sup>258</sup> 170 ER 57 onwards. *Nisi prius* trials from 1793 were also covered by Espinasse (170 ER 261 onwards) and Campbell (170 ER 1060 onwards).

<sup>259</sup> E.g. Lord Raymond's collection of sixty-four *nisi prius* cases from around 1700 included no reference to witness privilege but it did mention a case of a witness being disqualified for interest: *Tiley v Cowling* (1701) 1 Ld Raym 744 (91 ER 1398) (wife incompetent as witness in one action because her evidence could be used in another action in which her husband would be a party).

<sup>260</sup> *Kennett v Greenwollers* (1790) Peake 3 (170 ER 58) (bankrupt incompetent as witness for plaintiffs who were his assignees in bankruptcy); and *Rotheroe v Elton* (1791) Peake 117 (170 ER 99) (shipowner incompetent as witness for plaintiffs in action against his insurers for goods lost on his ship).

<sup>261</sup> E.g. fifteen examples are to be found at 1 Eq Ca Abr 223-226 (21 ER 1005). The clearest of them is *Dowdeswell v Nott* (1694) 2 Vern 317 (23 ER 805), 1 Eq Ca Abr 225 pl 12 (21 ER 1005) (inhabitant of

Disqualification of witnesses might have been reported because it could not be adjudicated by the examiners and had to be reserved to the court.<sup>262</sup> Equally, an issue like the privilege might also have been expected to be reserved by the examiners to the court.<sup>263</sup> Yet the equity reporters did not mention it.

## (6) WITNESSES ACT OF 1806

In the end, the existence of witness privilege was confirmed by what is now known as the Witnesses Act of 1806.<sup>264</sup> The confirmation was indirect. The purpose of the Act was to ensure that witnesses could not claim the privilege if their testimony would lead to civil liability alone.

The Act was passed to declare the law on witness privilege.<sup>265</sup> In spite of numerous double negatives and disguised negatives, the wording showed that the witness could still refuse to answer if the answer had a “tendency to accuse himself, or to expose him to a penalty or forfeiture of any nature whatsoever”. This was confirmed in the preamble.<sup>266</sup>

The preamble shows that the Act was not addressing any doubts about the privilege for witnesses who feared self-incrimination, penalty or forfeiture.

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parish disqualified as witness in suit for misapplication of parish funds because “cases where the party was concerned in interest, though never so small, have always prevailed”).

<sup>262</sup> This was certainly the position in the Star Chamber: see Holdsworth, W. (1944) *A History of English Law (Vol 5)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 183. Lord Ellesmere settled similar procedures in Chancery and Star Chamber in the early 1600s: see Holdsworth, W. (1944) *A History of English Law (Vol 5)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 232.

<sup>263</sup> E.g. the examiners were not entitled to decide that interrogatories were irrelevant: Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 176, citing *Baker v Cole* (1612) Cotton Add 41661 fol 136b.

<sup>264</sup> *An act to declare the law with respect to witnesses refusing to answer*, 46 Geo III c 37, [5 May, 1806], *Statutes at Large*, Vol 46, p31.

<sup>265</sup> “That a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty, or of any other person or persons.”

<sup>266</sup> “Whereas doubts have arisen whether a witness can by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to any penalty or forfeiture but the answering of which may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit at the instance of his Majesty, or of some other person or persons.”

The doubts about the availability of the privilege were confined to situations in which only civil detriment was feared. These doubts came from case-law and had been raised during impeachment proceedings in the House of Lords.<sup>267</sup>

In 1795 Lord Kenyon was thought to have held that civil detriment, as well as a penalty, was enough to justify the privilege.<sup>268</sup> That view was not universally accepted, but in any event the 1806 Act settled the question by removing civil detriment as a ground for the privilege. There was no doubt that, like self-incrimination and exposure to forfeiture, exposure to a penalty remained a good ground for the privilege.<sup>269</sup>

The Act happened to coincide with the advent of *nisi prius* reporting. It was passed about the same time as the first cases were reported showing witness privilege in civil proceedings. However, witness privilege had probably been operating in civil proceedings throughout the 1700s.

The *nemo tenetur* maxim was never mentioned during the debates.<sup>270</sup> This was not surprising because the debates were addressing the danger of civil not criminal liability. The *nemo tenetur* maxim was more usually associated with the right to silence in criminal proceedings.

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<sup>267</sup> Smith, H. E. (1997) "The Modern Privilege: Its Nineteenth-Century Origins". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 145 at 159-161. In impeachment proceedings against Lord Melville, the House of Lords debated legislation which gave statutory immunity to witnesses in those proceedings. Opinion differed on whether or not the protection needed to cover purely civil detriment.

<sup>268</sup> *Bain v Hargraves* (1795) 1 Peake Add Cas 105 note (a)2 (170 ER 210) ("a witness was not bound to answer a question, the answering of which might make him liable to a civil action, or subject him to a penalty. It was a question upon which different opinions appeared to have prevailed among the Judges"). However, Lord Kenyon said the opposite in *Doxon v. Haigh* (1796) 1 Esp 410 at 411 (17ER 402 at 403) (Civil detriment "would not warrant him in refusing to answer as the rule was rather confined to a criminal one").

<sup>269</sup> *Raines v Towgood* (1796) 1 Peake Add Cas 105 (170 ER 210).

<sup>270</sup> Smith, H. E. (1997) "The Modern Privilege: Its Nineteenth-Century Origins". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 145 at 161.

## **(7) COMMON LAW CREATION**

Even with the gaps in the historical record, witness privilege almost certainly came from the common law, where the development of the witness privilege in criminal proceedings was mirrored in civil proceedings. The 1806 legislation was drafted on the assumption that witness privilege existed in common law civil proceedings. The lack of case-law examples was caused partly by the lack of *nisi prius* reporting before 1790 and partly by the disqualification of parties and other interested witnesses until the mid-1800s.

## **(D) CONCLUSION**

This Chapter has argued that witness privilege was developed by the common law courts as a safety-valve which became necessary when evidence could be compelled. A more general safety-valve might also have been expected to appear in courts which had adopted roman-canon procedures. Such procedures were similarly based upon the compulsion of evidence.

The roman-canon courts provided the model for the privilege for civil parties. This developed separately from witness privilege. The parties in roman-canon courts were compelled before the hearing to answer questions and to provide evidence including documents. This compulsion was an important reason why litigants went to the court of Chancery. Chapter VII will discuss how the privilege for parties developed in that court.



## **CHAPTER VII: HISTORY OF PRIVILEGE FOR CIVIL PARTIES**

### **(A) INTRODUCTION**

#### **(1) HISTORICAL DISTINCTIONS**

The need for the privilege in civil proceedings is different from its function in criminal or administrative proceedings. The argument in this thesis is that the privilege is required in civil proceedings for reasons of practical policy.

Undesirable prosecution practices are encouraged if parties in civil proceedings can be forced to make self-incriminatory oral disclosures and to produce documents with incriminating contents.

This justification can be seen from the early history of the privilege in civil proceedings. This chapter will argue that the origins of the privilege in civil proceedings are to be found in the history of Chancery, not the common law courts. Chapter IX will argue that Chancery practice was also responsible for the extension of the privilege to documents in civil proceedings.

The origins of the privilege for parties and documents in civil proceedings should be distinguished from the common law developments which led to the right to silence in criminal proceedings. They should also be distinguished from the common law developments which led to witness privilege. Witness privilege in civil proceedings is similar to witness privilege in criminal proceedings. Both forms of witness privilege had their origins in the common law, as Chapter VI explained, but those origins were different from those of the right to silence.

## **(2) ORIGINS IN EQUITY**

Macnair has been the only historian to delve deeply into equity to find the origins of the privilege in civil proceedings. Chapter VI did not accept his views on witness privilege. In relation to documents, on the other hand, Chapter IX will take his arguments further than he did. However, this chapter will substantially adopt his explanation of the origins of the privilege for civil parties. His explanation will be preferred to the approach of earlier historians who were primarily concerned with the right to silence.

Chapters II and IV argued that, when considering the operation and purpose of the privilege in civil proceedings, the privilege should be distinguished from the right to silence. This chapter will show that history supports that distinction. The development of the privilege in civil proceedings owed much to the Chancellor's objection to use of his compulsory processes to collect evidence for criminal proceedings.

This reason for the privilege in modern civil proceedings has not really changed. It stops the prosecution authorities relying excessively upon their compulsory powers. They cannot sidestep the right to silence but must instead obtain independent evidence. If the privilege is to be abrogated in civil proceedings, it must be replaced by a mechanism which achieves an equivalent result. Nothing less than derivative use immunity can provide an adequate substitute.

## **(3) LITERATURE ON CIVIL PROCEEDINGS**

### **(a) RIGHT TO SILENCE DEBATE**

Chapter VI described the historical debate about the right to silence. The participants in that debate did not really address the history of the privilege of civil proceedings. Macnair did this outside the right to silence debate.

Macnair was still dragged into the right to silence debate. Admittedly, his work made more sense in the context of that debate. He did not accept the traditionalist view that the privilege in civil proceedings somehow resulted from the jurisdictional struggle over the oath *ex officio* in the early 1600s.

Macnair suggested instead that the privilege for civil proceedings developed in Chancery, independently of the right to silence. In ecclesiastical textbooks he found evidence of a privilege similar to that identified by Helmholz.<sup>1</sup> Levy sought to rebut Macnair as part of his general attack on Helmholz and the other revisionists. Wigmore provides the best starting-point.

#### (b) WIGMORE

According to Wigmore, the privilege was established during the jurisdictional struggle over the oath *ex officio*. It was then “conceded by the judges - first in criminal trials...and afterwards, in the Protector's time, in civil cases”.<sup>2</sup> That involved three propositions: first, the privilege came from the jurisdictional struggle over the oath *ex officio*; second, it was established for criminal defendants before the 1650s; and third, it spread to civil cases in the 1650s.

Chapter VI described how the first and second propositions were discredited by the revisionists. That had implications for the third proposition. If the privilege had not already been established in criminal trials, it could not have spread from there to civil cases.

To show the existence of the privilege in all courts by 1700, Wigmore cited several civil cases from Chancery in a long list of mainly criminal cases from the

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<sup>1</sup> Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 32-37.

<sup>2</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633 (footnotes omitted).

late 1600s.<sup>3</sup> Macnair separated the civil cases from the criminal cases. In the civil cases he found Chancery adapting the ecclesiastical law principle noted by Helmholz.

(c) HELMHOLZ

**(i) Refusal to Answer Positions**

Helmholz conceded that the privilege in ecclesiastical law was primarily a legal principle appearing in text-books.<sup>4</sup> However, when he looked for case-law examples showing the legal principle in action, he found more civil than criminal cases.<sup>5</sup> These civil cases did not appear in his original article but were included in his chapter in the 1997 book.<sup>6</sup>

Civil procedure in the ecclesiastical courts was based upon “positions”. These were articles which contained the allegations of the parties and which had to be answered. According to Helmholz, “witnesses and parties to the litigation regularly refused to answer the positions on the ground of the canonical

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<sup>3</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633-634 n7, citing e.g. *Penrice v Parker* (1673) 1 Finch 75 (23 ER 40); *Bird v Hardwicke* (1682) 1 Vern 109 (23 ER 349); *Anonimous* (1682) 1 Vern 60 (23 ER 310); *African Company v Parish* (1691) 2 Vern 244 (23 ER 758).

<sup>4</sup> E.g. Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 46.

<sup>5</sup> Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 34 (“assertion of the canonical prohibition against compelled self-incrimination actually appeared in the court records more often in civil cases than in criminal”). He found nine civil examples.

<sup>6</sup> Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 34-35.

prohibition against self-incrimination".<sup>7</sup> All but one of his examples involved parties.<sup>8</sup>

It has not been practicable to check the reports to which Helmholz referred. This is unfortunate because his account of them left many questions unanswered.<sup>9</sup> Nor were his dates always reliable.<sup>10</sup>

Besides, some of the cases reflected a broader principle. In two defamation cases in the same year, the defendants refused to take the oath in the first place.<sup>11</sup> They apparently argued that by law they were not bound to answer any questions at all. That sounded more like a general right to silence.

Nevertheless, the reports did show the existence of a canonical prohibition against self-incrimination. The best two examples had similar facts, taking place in York and London over two centuries apart.<sup>12</sup> The proponent sought probate of a will,

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<sup>7</sup> Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 34.

<sup>8</sup> The one involving a witness came from much later: *Gifford v Perkins* (1671) cited by Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 32 and 217 n81.

<sup>9</sup> E.g. *Harrison v Brigges* (Durham 1616) cited by Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 219 n103. The defendant refused to answer an incriminating position, but it was not clear why he feared incrimination or what the court decided.

<sup>10</sup> The date of *Harrison v Brigges* is shown as 1616 in Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 219 n103, but appears in the text as 1609: Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 37.

<sup>11</sup> *Curtice v Cox* (Salisbury 1629) and *Penrise v Briscoe* (Carlisle 1629), both cited by Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 39 and 220 n119.

<sup>12</sup> Compare *Pykering v Huworth* (York 1399) (Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 35 and

but the will was missing, believed burnt. The defendant refused to answer positions which might show that he was involved in the burning.

The refusal was upheld in both cases. If the defendants were to be accused of the criminal offence of burning the will, one of the prescribed criminal procedures had to be followed first. In the absence of that procedure, the defendants need not answer self-incriminating questions in the civil cases.

## (ii) Proctors

The self-incrimination principle emerges clearly from the practice of proctors. They were the lawyers who practiced in ecclesiastical courts. They appeared in civil proceedings in the 1500s, long before they were allowed in criminal proceedings.<sup>13</sup> Perhaps this was why self-incrimination was asserted more often in civil proceedings.

At the start of one civil case, for example, a proctor sought to stipulate that "if any of the positions involve a crime, they are not to be sworn to, nor is there to be an examination upon them".<sup>14</sup> Another proctor devised a pre-emptive version. He stipulated before the examination that if, by inadvertence, his client answered a

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218 n99) with *Anonymous* (London 1610) (Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 36 and 218 n100 and n106).

<sup>13</sup> Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 34-35.

<sup>14</sup> *Bolton v Bolton* (York 1511) cited by Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 35 and 218 n97.

self-incriminating question, that answer should be counted a nullity.<sup>15</sup> It is not clear whether either of those stipulations had the desired effect.<sup>16</sup>

#### (d) MACNAIR

Macnair's starting-point was that "applications of the privilege, to witnesses and to allegations of crime in civil proceedings, came into English law from the common family of European laws and particularly the canon law".<sup>17</sup> As an explanation of the origins of witness privilege, this version was rejected in Chapter VI. In so far as Macnair's explanation applies to the parties in civil proceedings, it will be substantially adopted in this chapter.

Although Macnair and Helmholz had similar views about the influence of European law, they came to those views independently of each other.<sup>18</sup> Helmholz drew his conclusions from his study of ecclesiastical law. Macnair's research concentrated on the Court of Chancery. This took its procedures from the same roman-canon source as the ecclesiastical courts.<sup>19</sup>

Macnair's research led him to challenge the traditional view that the privilege spread from criminal to civil cases. Instead, he suggested that the privilege was to be found in Chancery cases before anything similar appeared in criminal proceedings. Other writers before him had raised this as a possibility.

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<sup>15</sup> *Bray v Betyk* (Exeter 1533) cited by Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 35 and 218 n98.

<sup>16</sup> Nor does any decision survive from *Nedham v Lee* (York 1559) where a defendant appealed against sentence on the basis that he had answered an incriminating position after making this stipulation: Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 35 and 218 n97.

<sup>17</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 67.

<sup>18</sup> Langbein, J. H. (1994) "The historical origins of the privilege against self-incrimination at common law." *Michigan Law Review* 92(March): 1047 at 1072 n118.

<sup>19</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 631-2.

## (e) OTHER WRITERS

Holdsworth usually adopted Wigmore's views on the history of the privilege. However, he mentioned the privilege as one of the rules which the Chancellors developed around 1600 to regulate discovery and which became important modern rules of evidence.<sup>20</sup> He cited as authority for that proposition a case later used by Macnair.<sup>21</sup>

Like Holdsworth, Morgan linked equity and the modern privilege. Citing six equity cases later used by Macnair, Morgan acknowledged that "the refusal of the equity courts to grant discovery in these cases might have been based on supposed grounds of fairness and reluctance to require or even permit one to allege his own turpitude".<sup>22</sup> However, he differed from Macnair because he saw the full recognition of the privilege in equity as only occurring in the mid-1700s.

Twenty-five years later, Tollefson suggested that "different forces shaped the development of the privilege in the Chancery courts".<sup>23</sup> According to him, the danger of penalty or forfeiture was a "more pressing problem".<sup>24</sup> At first self-incrimination was treated separately from forfeiture, but the two principles soon

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<sup>20</sup> Holdsworth, W. (1944) *A History of English Law (Vol 5)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 333 ("Of the rules which developed into important principles of the modern law of evidence the following illustrations are the most important:- A person was not obliged to answer if by doing so he exposed himself to the risk of criminal proceedings").

<sup>21</sup> *Viscountess Montague's Case* (1596) Cary 9 (21 ER 5): see Holdsworth, W. (1944) *A History of English Law (Vol 5)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 333 n2.

<sup>22</sup> Morgan, E. M. (1949) "The Privilege Against Self-Incrimination." *Minnesota Law Review* 34(1): 1 at 11, citing *Attorney-General v Mico* (1658) Hardr 137 (145 ER 419), *Bird v Hardwicke* (1682) 1 Vern 109 (23 ER 349), *Smith v Read* (1737) 1 Atk 526 (26 ER 332), *Duncalf v Blake* (1737) 1 Atk 52 (26 ER 35), *Baker v Pritchard* (1742) 2 Atk 387 (26 ER 634) and *Harrison v Southcote* (1751) 2 Ves Sen 389 (28 ER 249).

<sup>23</sup> Tollefson, E. A. (1975) *The Privilege against Self-Incrimination In England and Canada. Faculty of Law* (Oxford: Oxford University) at 28.

<sup>24</sup> Tollefson, E. A. (1975) *The Privilege against Self-Incrimination In England and Canada. Faculty of Law* (Oxford: Oxford University) at 28 ("it was rare for criminal or ecclesiastical offences to be the subject matter of Chancery cases").



blended.<sup>25</sup> The blending occurred in the 1650s and the privilege became established in the late 1600s.<sup>26</sup>

Like Holdsworth and Morgan, Tollefson made the link between equity and the privilege. Like them, he was primarily concerned with the right to silence in criminal proceedings. Perhaps Macnair's arguments would have been anticipated if those writers had concentrated on the privilege in civil proceedings.

#### (f) LEVY'S LAST WORD

The approval of Macnair by the revisionists brought him to the attention of Levy. Levy's 1997 article included five pages rebutting Macnair. He concluded that "Macnair's work is unreliable and his conclusions invalid".<sup>27</sup> However, Levy's criticisms were directed only at Macnair's brief treatment of witness privilege.

Chapter VI did not adopt Macnair's treatment of witness privilege, but not for the same reasons as Levy. However, this chapter will adopt Macnair's views on the privilege in civil proceedings. Levy devoted less than one paragraph to those views. He did not criticise or even discuss them. He simply made a general reference to the cases cited in a footnote in his book.<sup>28</sup>

In Levy's opinion, apparently, those cases rebutted Macnair's argument that the privilege emerged in civil proceedings before and separately from criminal

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<sup>25</sup> Tollefson, E. A. (1975) *The Privilege against Self-Incrimination In England and Canada. Faculty of Law* (Oxford: Oxford University) at 29 (Chancery "treated the power to relieve against forfeitures as being something separate from the privilege against self-incrimination; however, it appears the two principles were soon blended").

<sup>26</sup> Tollefson, E. A. (1975) *The Privilege against Self-Incrimination In England and Canada. Faculty of Law* (Oxford: Oxford University) at 29 ("it was sometime in the reign of the restored Stuarts that the privilege against self-incrimination was accepted and applied by all courts in England").

<sup>27</sup> Levy, L. W. (1997) "Origins of the Fifth Amendment and Its Critics." *Cardozo Law Review* 19(3): 821 at 843.

<sup>28</sup> Levy, L. W. (1997) "Origins of the Fifth Amendment and Its Critics." *Cardozo Law Review* 19(3): 821 at 843, citing what is now Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) p491, fn30.

proceedings. This chapter will argue that in reality these cases confirmed the earlier development of the privilege in equity.

#### **(4) CONCLUSION**

According to one Australian judge, the revisionist writers showed that “the privilege was part of English ecclesiastical law from the middle ages”.<sup>29</sup> That was the argument put by Helmholz. Macnair’s argument was slightly different. The ecclesiastical version was adapted by Chancery.<sup>30</sup>

This chapter will rely mainly upon Macnair’s later cases. It will conclude that the privilege only really developed in the late 1600s. It was then that Chancery finally settled upon a rule which protected against self-incrimination, forfeiture and penalties.

Nevertheless, the right to silence debate leaves a nagging question which must be addressed before turning to a detailed treatment of Macnair’s cases. The right to silence did not apparently result from the jurisdictional struggle, but did the privilege in civil proceedings result from that struggle? Prohibitions were often granted to restrain civil proceedings. This chapter will look at the cases in which those prohibitions were granted to restrain self-incrimination.

### **(B) PROHIBITIONS**

#### **(1) UNDERLYING REASONS**

Writs of prohibition were the main weapon of the common law courts in the jurisdictional struggle over the oath *ex officio*. The reasons for granting them were

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<sup>29</sup> Davies, G. L. (2000) “The prohibition against adverse inferences: a rule without reason? - Part I.” *Australian Law Journal* 74(1): 26 at 31.

<sup>30</sup> Macnair, M. R. T. (1990) “The early development of the privilege against self-incrimination.” *Oxford Journal of Legal Studies* 10(Spring): 66 at 75 (“a rule similar in its essentials to the canonist rules about allegations of crime in civil proceedings stated by Cosin was in operation in the Chancery and Exchequer in the late 16th and early 17th centuries, well before any rule appeared in the criminal cases at common law”).

not always obvious, as the right to silence debate showed. Common law criminal procedure contained no principle against self-incrimination. In criminal proceedings, therefore, prohibitions were not granted to impose a common law principle upon roman-canon courts.

Nor were prohibitions granted in civil proceedings to impose a common law principle upon roman-canon courts. The principle against self-incrimination was not an essential part of common law civil procedure. It only arose in the form of witness privilege. Even then, it only applied to third party witnesses. Civil parties were no longer competent to testify in common law proceedings.

Although common law civil proceedings had little use for the privilege, the common law courts might still have thought that it was needed in courts which had compulsory questioning. Roman-canon courts had procedures which compelled civil parties to give answers and documents as part of the pre-trial civil process. The common law courts granted some prohibitions against ecclesiastical courts to prevent compulsory questioning in civil proceedings.

Admittedly, most of these prohibitions were granted for jurisdictional reasons unconnected with self-incrimination. However, self-incrimination was mentioned often enough to suggest that common law courts were in favour of the privilege, even though they did not really need it in their own procedures.

## **(2) ECCLESIASTICAL PROHIBITIONS**

### **(a) INTRODUCTION**

Ecclesiastical civil proceedings were prohibited in about twenty reported cases for reasons said to involve self-incrimination. These included prohibitions against the High Commission in civil proceedings. As discussed in Chapter VI, the better

known prohibitions against the High Commission were in criminal proceedings.<sup>31</sup> Some prohibitions were directed at ecclesiastical courts other than the High Commission.

## (b) ECCLESIASTICAL COURTS

### (i) *Collier v Collier*

The ecclesiastical court in question was not always identified, as in the famous case of *Collier v Collier* (1589).<sup>32</sup> This was said to be the first properly reported example of a common law court using the *nemo tenetur* maxim.<sup>33</sup> It was the subject of three separate short printed reports, which seemed to be in conflict, but the prohibition apparently involved a civil proceeding.

The reports all agreed that the application for a prohibition was against a "Spiritual Court" but did not identify it. They disagreed on the spelling of the names of the parties, the date of the case, the court which decided the application and even the decision. Bentham convincingly reconciled the reports on the basis that they were about "two almost contiguous cases".<sup>34</sup>

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<sup>31</sup> Writs of prohibition in civil proceedings were not usually combined, as they were in criminal proceedings, with writs of habeas corpus because the applicant was not in prison. A rare exception was *Bradstone v High Commission* (1615) 2 Bulstr 300 (80 ER 1138).

<sup>32</sup> (1589) 4 Leo 194 (74 ER 816), (1590) Moore (KB) 906 (72 ER 987) and (1590) Cro Eliz 201 (78 ER 457).

<sup>33</sup> E.g. Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 620.

<sup>34</sup> Bentham, J. (1827) *Rationale of Judicial Evidence* (New York: Russell & Russell Inc) at 458. It is a mystery why Bentham's convincing explanation has not been adopted by modern writers: e.g. it was not mentioned by Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 620 n4; Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 221; Morgan, E. M. (1949) "The Privilege Against Self-Incrimination." *Minnesota Law Review* 34(1): 1 at 8. Maguire, M. H. (1936) "Attack Of The Common Lawyers On The Oath *Ex Officio* As Administered in the Ecclesiastical Courts in England". *Essays in History and Political Theory In Honour of Charles Howard McIlwain*. C. Wittke (Ed.) (Cambridge, Massachusetts: Harvard University Press) 199 at 223 referred to Bentham's description of the case but did not cite any of the reports or comment upon the differences between them.

According to Bentham, the Leonard report described an application for a prohibition in Michaelmas 1589 in the Court of Common Pleas, which reserved its decision.<sup>35</sup> The other two reports described an application to the King's Bench in Michaelmas the following year. It was in answer to that application that the King's Bench granted the prohibition in a limited form.<sup>36</sup>

The case involved the application by a husband for a prohibition to prevent the ecclesiastical court from requiring him to answer questions on oath about his incontinency. Incontinency was a crime which involved carnal knowledge of a woman. The result of his application was less important than the use of the *nemo tenetur* maxim in both of the English reports.<sup>37</sup>

The maxim also appeared in a paraphrased version, in the Law French report.<sup>38</sup> It was similarly paraphrased in the unprinted report of another case which Coke argued successfully at about the same time.<sup>39</sup> Like *Collier v Collier*, this other case was apparently a civil proceeding.

They both appeared to be civil proceedings because the term "sued" appeared in the unprinted report of the other case and in the two printed English reports in *Collier v Collier*.<sup>40</sup> However, this is an example of the difficulty in drawing the

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<sup>35</sup> (1589) 4 Leo 194 (74 ER 816) ("but the Court would advise of it").

<sup>36</sup> Bentham, J. (1827) *Rationale of Judicial Evidence* (New York: Russell & Russell Inc) at 458.

<sup>37</sup> (1589) 4 Leo 194 (74 ER 816); (1590) Cro Eliz 201 (78 ER 457).

<sup>38</sup> (1590) Moore (KB) 906 (72 ER 987) ("ils ne doyent eux mesmes prodere lou discredit ensue").

<sup>39</sup> *Anonymous (QB)* (1589) Add MS 25,196 fol 213v, Harl MS 1,633 fol 63v (interrogatory to man sued in a "spirituall court" for incontinency was prohibited because it asked if he was guilty or not). This time the Law French version was "serra compell de accuser lui mesme". Compare that version with "ils ne doyent eux mesmes prodere lou discredit ensue" (see previous footnote) and "null est bound d'accuse luy mesme" (see Chapter VI).

<sup>40</sup> *Anonymous (QB)* (1589) Add MS 25,196 fol 213v, Harl MS 1,633 fol 63v; *Collier v Collier* (1589) 4 Leo 194 (74 ER 816); (1590) Cro Eliz 201 (78 ER 457).

line between civil and criminal proceedings, particularly because Coke appeared in both cases at a time when he was the attorney-general.<sup>41</sup>

## (ii) Other Civil Cases

Although the *nemo tenetur* maxim was not actually mentioned, self-incrimination seemed to be the ground for other prohibitions against civil courts. Civil proceedings were apparently involved in the prohibition in *Gammon's Case* (1627).<sup>42</sup> An unspecified ecclesiastical court was prohibited from questioning a man under oath to find out whether he had broken an obligation not to consort with a certain woman.<sup>43</sup> The compulsory questioning was prohibited because the man could be drawn into admitting statutory offences.<sup>44</sup>

A similar prohibition against compulsory questioning was granted in *Spendlow v Smith* (1615).<sup>45</sup> The prohibition was granted against a civil ecclesiastical court called the Court of Arches, but it was not clear when it was granted or which court granted it.<sup>46</sup> In the Court of Arches the current parson was suing the executor of his deceased predecessor for failing to maintain the value of the living.

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<sup>41</sup> E.g. Bentham, J. (1827) *Rationale of Judicial Evidence* (New York: Russell & Russell Inc) at 458 ("Heartened by the authority and Latin of her Majesty's attorney-general, the great Sir Edward Coke"). Presumably, he was appearing in his private capacity, not as Attorney-General.

<sup>42</sup> (1627) Het 18 (124 ER 306). The date comes from Gray, C. M. (1997) "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 47 at 228 n41.

<sup>43</sup> (1627) Het 18 (124 ER 306) ("One was obliged in the Ecclesiastical Court not to accompany with such a woman unless to church or market overt").

<sup>44</sup> (1627) Het 18 (124 ER 306) ("it does not become them in the Ecclesiastical Court, to draw a man in examination for breaking of obligations, or for offences against statutes")

<sup>45</sup> (1615) Hob 84 (80 ER 234).

<sup>46</sup> Wigmore put the date as "probably, late in 1615": Wigmore, J. H. (1901/2) "The Privilege Against Self-Incrimination; Its History." *Harvard Law Review* 15: 610 at 622 n6. Maguire took that date but put the case in Common Pleas: Maguire, M. H. (1936) "Attack Of The Common Lawyers On The Oath *Ex Officio* As Administered in the Ecclesiastical Courts in England". *Essays in History and Political Theory In Honour of Charles Howard McIlwain*. C. Wittke (Ed.) (Cambridge, Massachusetts: Harvard University Press) 199 at 227-228. Gray put the case in King's Bench some time during the reign of James I: Gray, C. M. (1997) "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 47 at 228 n40.

The Court of Arches was proposing to examine the executor on oath about a fraudulent secret lease which he was alleged to have entered with the deceased. The common law court granted the prohibition to the executor because he risked criminal prosecution for the fraudulent conduct about which he was to be questioned.<sup>47</sup>

### (c) HIGH COMMISSION

Like the other ecclesiastical courts, the High Commission in the exercise of its civil jurisdiction was subjected to writs of prohibition: for example, in *Huntley v Cage* (1611).<sup>48</sup> A man had entered a bond not to marry or cohabit with anyone until a breach of promise suit had been resolved. The prohibition was granted against the High Commission because “they ought not to examine any man upon his oath to make him to betray himself, and to incur any penalty pecuniary or corporal”.<sup>49</sup>

A similar principle was applied in *Parson Latters v Sussex* (1613). The High Commissioners were prohibited from compelling a clergyman to answer on oath questions which would make him admit to the offence of simony.<sup>50</sup> That offence

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<sup>47</sup> (1615) Hob 84 (80 ER 234) (“the covin and fraud is criminal; and the avowing of it to be bona fide is punishable, both in the Star Chamber, and by the penal law of fraudulent gifts, and therefore not to be extorted out of himself by oath”).

<sup>48</sup> (1611) 2 Brownl and Golds 14 (123 ER 787). The date comes from Rolle's Abr “Prohibitions” (T) 6 (sub nom *Clifford v Huntley*).

<sup>49</sup> (1611) 2 Brownl and Golds 14 (123 ER 787-788).

<sup>50</sup> *Parson Latters v Sussex* (1613) Noy 151 (74 ER 1112). The date is uncertain. Wigmore described the case as “undated, but before 1616”: Wigmore, J. H. (1901/2) “The Privilege Against Self-Crimination; Its History.” *Harvard Law Review* 15: 610 at 623 n2). 1616 was suggested apparently because the report refers to “Cooke Chief Justice” and he ceased to be Chief Justice of the King's Bench in 1616. As the report identifies it as a decision of the Court of Common Pleas, it took place apparently before 1613 when he ceased to be Chief Justice of that court: Gray, C. M. (1997) “Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries”. *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 47 at 227 n30. Another possibility is that the detail of the report is unreliable: e.g. it also has “Cooke” referring to *Leigh's Case* incorrectly as *Smith's Case*: Maguire, M. H. (1936) “Attack Of The Common Lawyers On The Oath *Ex Officio* As Administered in the Ecclesiastical Courts in England”. *Essays in History and Political Theory In Honour of Charles Howard McIlwain*. C. Wittke (Ed.) (Cambridge, Massachusetts: Harvard University Press) 199 at 223 n71.

would by statute deprive him of his living.<sup>51</sup> However, like other cases involving the High Commission, the question of self-incrimination was obscured by jurisdictional issues.<sup>52</sup>

#### (d) JURISDICTIONAL ISSUES

Jurisdictional issues also obscured *Bradstone's Case* (1615).<sup>53</sup> That case involved an order for habeas corpus in the King's Bench under Coke. The habeas corpus was granted to release a man jailed by the High Commission, apparently for refusing to answer questions under oath about why he had not been paying his alimony.<sup>54</sup>

*Bradstone's Case* could be seen as an example of compulsory questioning being restrained because of exposure to penalties or forfeiture. However, Coke's decision was apparently based upon a general objection to bonds because common law courts did not use them.<sup>55</sup> Even when the High Commission was not involved, the common law judges seemed unduly ready to exercise their jurisdictional powers.<sup>56</sup>

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<sup>51</sup> *Parson Latters v Sussex* (1613) Noy 151 (74 ER 1112-1113) ("And a prohibition was granted that, none shall be compelled to accuse himself upon his oath; where he is to incur a temporal punishment, at the common law, or a temporal loss as in that case of his church").

<sup>52</sup> E.g. it was debatable whether the High Commission had any power to imprison or to enforce an obligation taken in another ecclesiastical court or to examine laymen on matters which were not matrimonial or testamentary: *Huntley v Cage* (1611) 2 Brownl and Golds 14 at 15 (123 ER 787 at 788).

<sup>53</sup> *Bradstone v High Commission* (1615) 2 Bulstr 300 (80 ER 1138). Also see Rolle's Abr. "Prohibitions" (T) 1 and 2. Rolle's classification perhaps explains why Wigmore thought it was a case on prohibitions: Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 622 n5.

<sup>54</sup> (1615) 2 Bulstr 300 (80 ER 1138) ("the cause of his refusall, was, because he feared to be intrapped by them, in his oath; having entred into a bond to Doctor Edwards, not to use his wife otherwise than well").

<sup>55</sup> (1615) 2 Bulstr 300 (80 ER 1138) ("no ground have they for taking of such bonds, this is an unreasonable urge").

<sup>56</sup> E.g. *Spendlow v Smith* (1615) Hob 84 (80 ER 234) (ecclesiastical courts were bluntly reminded that the interpretation of the relevant statute "and what shall be covin or not within the law, rests not in them to judge, but in the Courts of Common Law").



### (3) PROHIBITIONS UNDER THE 1661 ACT

#### (a) SEPARATE GROUP

The political upheavals of the seventeenth century resulted in the statutory abolition in 1641 of the Star Chamber, High Commission and the oath *ex officio*.<sup>57</sup> Judges have often mentioned the abolition of those symbols of tyranny in their potted histories of the privilege. They have mentioned less often that the oath *ex officio* was restored by another Act in 1661.<sup>58</sup> The final group of prohibition cases arose from that Act ("the 1661 Act").<sup>59</sup>

The oath *ex officio* was restored in the ecclesiastical courts subject to one important limitation. Under section 4 of the 1661 Act, oaths were prohibited in ecclesiastical matters if administered to a person who might thereby become liable for criminal liability, censure or punishment.<sup>60</sup> This meant that the privilege "was not wholly irrelevant in ecclesiastical courts" after 1661.<sup>61</sup>

As the 1661 Act provided no sanction, section 4 could be enforced only by applications for prohibition. The final group of prohibition cases involved the hearing of these applications for prohibition between 1664 and 1677.<sup>62</sup> They will

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<sup>57</sup> *An act for the regulating of the privy council, and for taking away the court commonly called the star-chamber*, 16 Car I c 10 [session starting 3 November 1640], *Statutes at Large*, Vol 7, p338; *An act for repeal of a branch of a statute primo Elizabethae, concerning commissioners for causes ecclesiastical*, 16 Car I c 11 [session starting 3 November 1640], *Statutes at Large*, Vol 7, p343.

<sup>58</sup> A rare example was Brennan J in *Sorby v The Commonwealth* (1983) 152 CLR 281 at 317.

<sup>59</sup> *An act for explanation of a clause contained in an act of parliament made in the seventeenth year of the late King Charles intituled, An act for repeal of a branch of a statute primo Elizabethae concerning commissioners for causes Ecclesiastical*, 13 Car II c 12 [session starting 8 May 1661], *Statutes at Large*, Vol 8, p20.

<sup>60</sup> 1661 Act s4 ("whereby such person to whom the same is tendred or administred may be charged or compelled to confesse or accuse or to purge him or her selfe of any criminall matter or thing whereby he or she may be lyable to any censure or punishment").

<sup>61</sup> Helmholz, R. H. (1997) "The Privilege and the *Ius Commune*: The Middle Ages to the Seventeenth Century". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 17 at 217 n81.

<sup>62</sup> They were discussed in Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 626 n5. Although Macnair did not deal with them in his book, he listed

be considered to see if section 4 provided in effect a form of statutory privilege in the ecclesiastical courts, at about the same time as the privilege was developing in Chancery.

Most of these prohibition cases involved the use of the oath to examine accused persons in ecclesiastical criminal proceedings. In these criminal proceedings, the statutory privilege provided protection, but only up to a point. A prohibition would be granted preventing sworn examinations of accused persons, but they could still be forced to answer unsworn.<sup>63</sup>

Witnesses in criminal cases were protected by section 4, according to *Payn v Bishop of Bristow* (1677).<sup>64</sup> Payn applied as plaintiff to the King's Bench to prohibit the ecclesiastical court from compelling his testimony as a witness in ecclesiastical criminal proceedings. A prohibition was granted "as to any questions whereby the plaintiff may accuse himself".<sup>65</sup> The position was less clear in ecclesiastical civil cases.

## (b) CIVIL PROCEEDINGS

There were few cases involving the operation of section 4 in ecclesiastical civil proceedings. According to Macnair, section 4 did not protect a civil party from being questioned under oath in an ecclesiastical court.<sup>66</sup> He relied upon statements

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them in his article and briefly discussed their effect: Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 80-81.

<sup>63</sup> E.g. *Anonymous* (1693) 12 Mod 40 (82 ER 1151) (required to answer to ecclesiastical offence of adultery, but not on oath); *Scurre v Archbishop of York* (1664) 1 Keb 812 and 824 (83 ER 1258 and 1265) (prohibition would have been granted against "an accusation by the archbishop of the party for sitting in the church with his hat on, requiring him to answer upon oath", but the archbishop "may still proceed in the cause without an oath").

<sup>64</sup> (1677) 3 Keb 815 (84 ER 1027).

<sup>65</sup> (1677) 3 Keb 815 (84 ER 1027). The criminal proceedings were against a preacher called Weeks for holding a conventicle. Payn objected to swearing on oath that he heard Weeks preach because this would have been admitting his own presence at the conventicle. The same case is apparently reported as *Weeks' Case* (1677) 2 Mod 279 (86 ER 1071), but as a decision in the Court of Common Pleas.

<sup>66</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 80.

in *Goulson v Wainwright* (1668).<sup>67</sup> Both the heading and the text stated that such questioning did not lead to a prohibition.<sup>68</sup>

The same result appeared from *Farmer Qui Tam v Browne* (1679).<sup>69</sup> Some Quakers refused to answer any questions under oath in ecclesiastical court proceedings for non-payment of church taxes. Counsel opposing them was successful in his argument that answering on oath in civil cases had long been the procedure in ecclesiastical courts as well as in Chancery.<sup>70</sup>

The Quakers therefore failed in their application to the Kings Bench for a prohibition to prevent the questioning under oath. However, they could perhaps have relied upon section 4 to avoid answering particular incriminating questions. That was what happened in Chancery

#### **(4) EQUITY PROHIBITIONS**

##### **(a) NOT AGAINST CHANCERY**

In *Farmer Qui Tam v Browne*, the counsel opposing the Quakers noted that “in Chancery they never compel a man to answer upon oath to matter criminal, or scandalous”.<sup>71</sup> No prohibitions were granted against Chancery to restrain self-incriminatory questioning. In fact, there were no reported grants of prohibition against Chancery at all.<sup>72</sup> The power structure within the court system meant that

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<sup>67</sup> (1668) 1 Sid 374 (82 ER 1165).

<sup>68</sup> “Si un soit sue en Spiritual Court a responder sur serement al chose naver prohibition auterment si criminal” (heading) (“If someone is sued in a Spiritual Court to reply on oath in a civil matter, there will be no prohibition but otherwise if criminal”) and “il a donque aver prohibition, mes si le matter soit civil ne poet issint fair, car donque doet responder” (text) (“he is then to have a prohibition, but if the matter is civil cannot do thus, for then he must reply”): (1668) 1 Sid 374 (82 ER 1165).

<sup>69</sup> (1679) 2 Lev 247 (83 ER 540).

<sup>70</sup> (1679) 2 Lev 247 at 248 (83 ER 540 at 541) (“their constant course time out of mind, as it is in Chancery, and every jot as allowable in this Court as in that”).

<sup>71</sup> *Farmer Qui Tam v Browne* (1679) 2 Lev 247 at 248 (83 ER 540 at 541).

<sup>72</sup> Gray, C. M. (1976) “The Boundaries of the Equitable Function.” *American Journal of Legal History* 20: 192 at 197.

the Star Chamber and the King's Council were untouchable.<sup>73</sup> The Court of Chancery was derived from the King's Council.<sup>74</sup>

If the arguments in this chapter are correct, prohibitions were not needed in any event because equity put its own limits on incriminatory questioning. There were two reported cases of prohibitions against self-incrimination in the lesser equity courts. These can be seen as enforcing compliance with equity's own rules.

#### (b) LESSER EQUITY COURTS

The two prohibitions on self-incrimination were almost a century apart. The first was in *Bullock v Hall* (1607).<sup>75</sup> A prohibition was requested against the equitable Court of Requests. Hall, the administrator of an estate, claimed that the estate had no assets. Austin Bullock, a creditor of the estate, alleged that Hall had engineered the insolvency by colluding with another person. They had created an obligation which stripped the estate.

Bullock wanted Hall to be compelled in the equitable Court of Requests to "answer upon his oath whether there was not any fraud in the said matter in the making of the obligation". Hall successfully applied to Coke's Court of Common Pleas for prohibition of the compulsory questioning. It was granted unanimously.

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<sup>73</sup> Gray, C. M. (1997) "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 47 at 223-4 n4.

<sup>74</sup> E.g. Baildon, W. P. (1896) *Select Cases in the Court of Chancery (1364-1471)* (Selden Society (Vol 10) London: Bernard Quaritch) ("Until the late fifteenth century it is disputable how far the Chancery was independent of the Council and it is difficult to settle at what date the chancellor sat alone").

<sup>75</sup> (1607) 117 SS 346 Case No 133.

Gray described this decision as “anomalous”.<sup>76</sup> It was notable for the use by Coke of the *nemo tenetur* maxim. Even so, the Court of Common Pleas could have been simply enforcing equity’s own rules.

This was what happened in the second example: *Sir Basil Firebrass's Case* (1700).<sup>77</sup> Wigmore cited this case to show the operation of the privilege after it became established in the 1600s.<sup>78</sup> The King's Bench granted a prohibition against the Chancery of the Duchy of Lancaster. The action in the equitable court was against the chief ranger of Enfield Chase for discovery of details of the deer and timber which he had taken.

The prohibition was granted because the discovery would have assisted a forfeiture.<sup>79</sup> The common law court required the lesser equity court to implement limitations which the Chancellors had placed on discovery. This chapter will now describe how, according to Macnair, those limitations were developed.

## **(C) EQUITY PROCEEDINGS**

### **(1) INTRODUCTION**

Macnair's research concentrated on three groups of cases: (1) a small group of Chancery cases from around 1600 (“Early Cases”); (2) an even smaller group of Exchequer Cases from around 1650 (“Exchequer Cases”); and (3) a large group of Chancery cases from around 1700 (“Restoration Cases”). His arguments find

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<sup>76</sup> Gray, C. M. (1997) "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 47 at 67.

<sup>77</sup> (1700) 2 Salk 550 (91 ER 465). The date is taken from Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 634 n7.

<sup>78</sup> E.g. by Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 634 n7.

<sup>79</sup> (1700) 2 Salk 550 (91 ER 465) (“he shall not be obliged to answer upon his oath, what is to make him forfeit his place, but it ought to be proved against him”).

more support in the Restoration Cases than in the Early Cases or the Exchequer Cases.

In the 1500s and 1600s the lines between civil and criminal proceedings were not drawn as they are today. In criminal proceedings in the King's Bench, for example, the Crown was regarded as a party.<sup>80</sup> Not too much should be made of the difficulty of distinguishing civil from criminal proceedings. The boundaries are not drawn all that clearly nowadays. Modern actions for forfeiture of the proceeds of crime or for the recovery of taxes are regarded as civil, even though the nominal plaintiff is the Attorney-General or some other agent of the State.

All except one of the Early Cases were clearly civil because they came from Chancery which had little if any criminal jurisdiction.<sup>81</sup> So were most of the Restoration Cases. The Exchequer Cases were less easy to classify because the Court of Exchequer had a broad range of jurisdiction.

The Exchequer Cases came from the exercise of the Court of Exchequer's equitable jurisdiction.<sup>82</sup> The Attorney-General was usually named as the plaintiff.<sup>83</sup> Macnair called these cases "quasi-criminal".<sup>84</sup> However, as in the Early Cases and the Restoration Cases, the defendants in the Exchequer cases refused to answer questions during the equitable procedure of discovery.

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<sup>80</sup> E.g. Wray LCJKB in *Attorney-General v Lord Vaux* in 1581 referred to cases in King's Bench "between partie and partie and therefore *a fortiori* where the quene is a partie" (Bruce, J., Ed. (1844) *Archaeologia; or, Miscellaneous Tracts Relating to Antiquity* (London: Society of Antiquities) at 104-105).

<sup>81</sup> The exception was *Anon* (1588) 3 Leo 204 (74 ER 634), which was decided in the Exchequer as described later in this chapter.

<sup>82</sup> These included some decisions which appeared to be in the Exchequer Chamber. This confusion of terminology is discussed later in this chapter.

<sup>83</sup> E.g. *Attorney-General v Mico* (1658) Hardr 137 (145 ER 419) (action against merchant who was alleged to have evaded customs duty and bribed customs officers "for which, if guilty thereof, the party may incur great penalties and forfeitures").

<sup>84</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 77.

## (2) EARLY CASES

### (a) INTRODUCTION

According to Langbein, Macnair's Restoration Cases were linked to "a larger set of equity cases, extending well back into Elizabethan times, that draw on canonist sources".<sup>85</sup> In fact, Macnair's Early Cases were not as numerous as his Restoration Cases. Nor did his Early Cases draw on canonist sources.

Macnair's article mentioned only ten Early Cases which had any possible relevance to the privilege.<sup>86</sup> Five of these cases were reported in the two volumes of equity cases from the early 1600s, recently published by the Selden Society.<sup>87</sup> Unfortunately, not all the Early Cases were consistent with the existence of the privilege in its modern form. Macnair did not claim that they were. To understand his argument, it is necessary to look at the background of those cases.

### (b) DISCOVERY

Discovery is a feature of modern civil proceedings in Australasia. Lists of documents are exchanged before both sides produce the documents which are relevant to the case. As will be mentioned in Chapter IX, modern discovery is a 19th century variation of the old Chancery procedures.

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<sup>85</sup> Langbein, J. H. (1997) "The Privilege and Common Law Criminal Procedure: The Sixteenth to The Eighteenth Centuries". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 82 at 246.

<sup>86</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 73-4. They were *Viscountess Montague's Case* (1596) Cary 9 (21 ER 5); *Fenton v Blomer* (1580) Toth 72 (21 ER 126), 117 SS 108 Case No 24; *Wolgrave v Coe* (1595) Toth 18 (21 ER 110), 117 SS 231 Case No 118-[7]; *Cary and Cottington v Mildmay* (1590) Toth 7 (21 ER 107) 117 SS 231 Case No 118-[9]; *Loveday v Skarming* (1595) 117 SS 242 Case No 118-[84]; *Cotton v Foster* (1583) Toth 25 (21 ER 112); *Eland v Cottington* (1628) Toth 12 (21 ER 108); *Wakeman v Smith* (1585) Toth 12 (21 ER 108); *Cromer v Peniston* (1597) Cary 9 (21 ER 5); and *Roe v Waforer* (1594) Toth 80 and 157 (21 ER 129 and 153); (1596) Moore (KB) 300 (72 ER 593); 117 SS 231 and 249 Cases No 118-[11] and 18-[130].

<sup>87</sup> Bryson, W. H., Ed. (2001) *Cases Concerning Equity and the Courts of Equity 1550-1660 (Vol I)*. Selden Society (Vol 117) (London: Selden Society) includes *Fenton v Blomer*, *Wolgrave v Coe*, *Cary and Cottington v Mildmay*, *Loveday v Skarming* and *Roe v Waforer*. Their references in Selden Society Volume 117 were given in the preceding footnote.

Traditionally, discovery gave a much broader power to compel parties to provide information. In fact, “discovery was of the very essence of the bill. Every bill for relief in equity was, in reality, a bill of discovery”.<sup>88</sup> This ability to force disclosure made Chancery procedures attractive to litigants, but the compulsory nature of discovery also left it open to abuse. That was why the Chancellors developed principles to regulate it.

### (c) WIGMORE’S EXPLANATIONS

Wigmore did not see much significance in the Chancery practice around 1600. He was more interested in finding the origins of the privilege in the oath *ex officio* and criminal proceedings. In his view, the ecclesiastical influence on Chancery procedures meant that they could not cast “light upon the common law notions of the time”.<sup>89</sup>

Nevertheless, Wigmore mentioned five of Macnair’s Early Cases.<sup>90</sup> However, he rejected the possibility of these “scantly reported” Chancery rulings showing an early version of the privilege.<sup>91</sup> He offered three explanations for the rulings.<sup>92</sup>

This thesis will not go into Wigmore’s three explanations and Macnair’s complex discussion of them.<sup>93</sup> Like Helmholz, Macnair found that the self-incrimination

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<sup>88</sup> Bray, E. (1885) *The Principles and Practice of Discovery* (London: Reeves and Turner) at 4.

<sup>89</sup> Wigmore, J. H. (1901/2) “The Privilege Against Self-Crimination; Its History.” *Harvard Law Review* 15: 610 at 632.

<sup>90</sup> *Viscountess Montague’s Case* (1596) Cary 9 (21 ER 5); *Wolgrave v Coe* (1595) Toth 18 (21 ER 110), 117 SS 231 Case No 118-[7]; *Cary and Cottington v Mildmay* (1590) Toth 7 (21 ER 107), 117 SS 231 Case No 118-[9]; *Cromer v Peniston* (1597) Cary 9 (21 ER 5); and *Wakeman v Smith* (1585) Toth 12 (21 ER 108).

<sup>91</sup> Wigmore, J. H. (1901/2) “The Privilege Against Self-Crimination; Its History.” *Harvard Law Review* 15: 610 at 631 (“Other explanations, however, lie open with equal plainness”).

<sup>92</sup> (1) Chancery had a general hostility to forfeiture and would not allow its procedures to be used to assist forfeiture; (2) Chancery was simply denying its jurisdiction in criminal matters by refusing to compel discovery; (3) Chancery was applying its own version of the rules which existed in the ecclesiastical courts; Wigmore, J. H. (1901/2) “The Privilege Against Self-Crimination; Its History.” *Harvard Law Review* 15: 610 at 631.



principle was well-established in canon law.<sup>94</sup> Wigmore did not find the self-incrimination principle in canon law, even though he was aware of the *nemo tenetur* maxim and other rules of canonist criminal procedure.<sup>95</sup>

Macnair in effect adopted Wigmore's third explanation that Chancery was applying an amended version of the ecclesiastical rules.<sup>96</sup> Macnair also noted that the Chancery version was not the same as the modern privilege.<sup>97</sup> The Early Cases gave him little choice.

#### (d) PRIVILEGE IN MODERN TERMS

##### (i) Support

All the Early Cases arose from plaintiffs exhibiting bills of discovery which required defendants to answer questions or provide information. The defendants demurred, claiming that no discovery could be compelled as a matter of law. The results of the ten Early Cases could be summarised as follows: four show an early form of the privilege; one looks like a good example but really is not; three are obscure to the point of being unhelpful; and two have little to do with the privilege.

The four good examples consist of two on forfeiture and two on self-incrimination. Two cases from the 1590s showed the equitable principle that

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<sup>93</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 74-5; Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 67-68.

<sup>94</sup> E.g. Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 62.

<sup>95</sup> E.g. an ecclesiastical court would not, in a case involving a criminal fact, "require the defendant to answer without due accusation by two witnesses or by presentment; that is to say, a plaintiff upon his unsworn bill alone, could not put the defendant to answer to a criminal fact": Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 632.

<sup>96</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 68 ("what was being applied may not have been the detailed canonist rules, but it was a version of the general principles of the roman-canon system").

<sup>97</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 66.

discovery would not be given to obtain a forfeiture.<sup>98</sup> In one, the court expressed the opinion that the defendant need not answer to a bill of discovery because he “might thereby disclose cause of forfeiture of his bond”.<sup>99</sup> In the other, the court refused to force the defendant to answer to “discover a forfeiture of his own estate”.<sup>100</sup>

To modern eyes, the two other cases seem to involve self-incrimination, the clearest being *Viscountess Montague's Case* (1596).<sup>101</sup> The Viscountess claimed, as her ward, the heir of one of her tenants. She thought that friends had abducted the ward. She sought discovery from them in Chancery, but “it seemed they should not answer to charge themselves criminally; especially in this case, where so great a punishment as abjuration may follow”.<sup>102</sup>

The other apparently clear example was *Loveday v Skarming* (1595).<sup>103</sup> Loveday wanted a bill to force Skarming to answer whether he had procured another person to take legal action. Skarming successfully resisted discovery because he would “thereby have laid himself open to maintenance”.<sup>104</sup>

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<sup>98</sup> This principle is not very different from Wigmore’s first “explanation”. It is hard to make any significant distinction between discovery being refused because of a general hostility to forfeiture, as Wigmore suggested, or from a more particular rule relating to discovery, as Macnair thought. Either way can lead to the origins of the modern privilege.

<sup>99</sup> *Wolgrave v Coe* (1595) Toth 18 (21 ER 110).

<sup>100</sup> The reported version actually says “forfeiture of his own hurt”: see *Cary and Cottington v Mildmay* (1590) Toth 7 (21 ER 107). Also see (1590) 117 SS 231 Case No 118-[9] for a similar version from Add MS 48097 showing the co-plaintiff as “Dodington”. The unreported version in Harleian MS 1576 fol 159 shows “forfeiture of his own estate”, the co-plaintiff as “Codrington” and the date as 1591. Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 65 n119 gives the date as 1590 but elsewhere puts it as late as 1600: see Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) in the text at 65 and also Wigmore, J. H. (1901/2) “The Privilege Against Self-Crimination; Its History.” *Harvard Law Review* 15: 610 at 631 n3.

<sup>101</sup> (1596) Cary 9 (21 ER 5). The date, adjusted to New Style, comes from Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 64 n115. Apparently the unprinted report containing that date was not available to Wigmore, who regarded the case as “undated, but probably before 1600” (Wigmore, J. H. (1901/2) “The Privilege Against Self-Crimination; Its History.” *Harvard Law Review* 15: 610 at 631 n3))

<sup>102</sup> (1596) Cary 9 (21 ER 5).

<sup>103</sup> (1595) 117 SS 242 Case No 118-[84].

<sup>104</sup> Maintenance involved attempting to influence the trial process. It was an important criminal offence in the 1300s and 1400s: see Holdsworth, W. (1944) *A History of English Law (Vol 9)* (London: Methuen &

## (ii) Deceptive

The printed reports seemed to provide another example of self-incrimination in *Fenton v Blomer* (1580).<sup>105</sup> The report said simply: “a defendant not compelled to disclose matter of usury”.<sup>106</sup> Macnair therefore cited it as authority for refusal of discovery if it could lead to criminal liability for usury.<sup>107</sup>

This case was apparently confirmed as an example of self-incrimination in the fuller report published by the Selden Society.<sup>108</sup> In the early stages of the proceedings “it was not thought reasonable by this court that the defendant should be compelled to disclose the same matter of usury, if any such were”. However, the fuller report showed additional complications.

The plaintiff had apparently lodged several bills of discovery, including one in the Court of Exchequer, in order to obtain a collateral advantage in pending litigation.<sup>109</sup> The order made it clear that the Master was being asked to decide whether the several bills “contain all one matter in effect or substance or not”.<sup>110</sup> According to Bryson, this “provides an early illustration of an important principle of equity practice”.<sup>111</sup>

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Co Ltd and Sweet & Maxwell Ltd) at 182 (“maintenance and conspiracy were crying evils of the time”). It was given a broad scope: see Holdsworth, W. (1944) *A History of English Law (Vol 1)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 334-335 (“the courts in order to cope with this evil, so enlarged the definition of the offences of maintenance and conspiracy that it was dangerous to come forward as a witness”).

<sup>105</sup> (1580) Toth 72 (21 ER 126).

<sup>106</sup> (1580) Toth 72 (21 ER 126).

<sup>107</sup> Macnair, M. R. T. (1990) “The early development of the privilege against self-incrimination.” *Oxford Journal of Legal Studies* 10(Spring): 66 at 73; Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 64 n113.

<sup>108</sup> (1580) 117 SS 108 Case No 24.

<sup>109</sup> Jones, W. (1967) *The Elizabethan Court of Chancery* (London: Oxford University Press) at 209 n3.

<sup>110</sup> (1580) 117 SS 108 Case No 24.

<sup>111</sup> Bryson, W. H., Ed. (2001) *Cases Concerning Equity and the Courts of Equity 1550-1660 (Vol 1)*. Selden Society (Vol 117) (London: Selden Society) at xiv. Unfortunately, he did not identify that principle. He was presumably referring to the prevention of abuse of Chancery process by lodging multiple bills, rather than any principle against self-incrimination.

### (iii) Unhelpful

The authority of *Fenton v Blomer* was further reduced by its conflict with *Cotton v Foster* (1583).<sup>112</sup> The report of *Cotton v Foster* was obscure, as Macnair noted.<sup>113</sup> The defendant's demurrer was overruled and he was forced to answer whether "the contract was to receive more money for interest than warranted". Yet his answers could have led to criminal liability for usury, as in *Fenton v Blomer*. They also appeared likely to lead to forfeiture.<sup>114</sup>

Equally unhelpful was the case of *Eland v Cottington* (1628).<sup>115</sup> The printed report only said "ordered to answer, though it be to his prejudice by statute laws". This seemed to contradict the idea of a privilege based upon offences or penalties under statute law. Macnair thought this "too brief a report to make anything of".<sup>116</sup> According to Holdsworth, it showed that exposure to civil proceedings under statute law was not sufficient ground for the privilege.<sup>117</sup>

The third case highlighted the difference between the rule in Chancery and the modern privilege. The report of *Wakeman v Smith* said that "although criminal causes are not here to be tried for the punishing of them, yet incidently for so

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<sup>112</sup> (1583) Toth 25 (21 ER 112).

<sup>113</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 66. It is also not clear why Macnair gave the date as 1595, not 1583 as in the English Reports. His article also gave the date as 1595: Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 74.

<sup>114</sup> (1583) Toth 25 (21 ER 112) ("if found that the defendant lent it without consideration, then to take the forfeiture in").

<sup>115</sup> (1628) Toth 12 (21 ER 108). This showed the date as "Trin. or Mich. 4 Car [1606]". 1606 was the date accepted by Holdsworth, W. (1944) *A History of English Law (Vol 5)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 333 n3. However, as it was the fourth year of the reign of Charles, Macnair was probably right that it was decided in 1628: Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 66 n129.

<sup>116</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 66 n129.

<sup>117</sup> Holdsworth, W. (1944) *A History of English Law (Vol 5)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 333 n3. He was apparently interpreting "prejudice by statute laws" as being limited to prejudice by civil proceedings.

much as concerneth the equity of the cause, they are to be answered".<sup>118</sup> Yet the modern privilege protects against answering in precisely that circumstance: if it incidentally involves criminal matters.

Macnair did not provide a satisfactory explanation of *Wakeman v Smith*.

According to his book, the rule was designed to "prohibit collateral allegations of crime i.e. those outside the jurisdiction of Chancery or not directly in issue".<sup>119</sup> In other words, the rule stopped plaintiffs from fishing for evidence upon which unconnected criminal proceedings could be based.

Chapter IV identified fishing for evidence as one of the evils which the privilege in civil proceedings seeks to prevent. The problem with *Wakeman v Smith* was that the defendant had to answer if the crime involved contempt or abuse of Chancery or if the crime was directly raised by the facts of the Chancery case. This took the rule a long way from the modern privilege.

#### **(iv) Other Reasons**

Macnair's other two cases involved successful resistance to discovery but not for reasons which suggested the privilege. They were only mentioned in Macnair's footnotes. He justifiably described as obscure the report of *Cromer v Peniston* (1597).<sup>120</sup> The discovery which was resisted was about the secret severance of a joint tenancy. The case had nothing to do with the modern privilege because it did not raise issues of self-incrimination or forfeiture.

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<sup>118</sup> (1585) Toth 12 (21 ER 108).

<sup>119</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 66.

<sup>120</sup> (1597) Cary 9 (21 ER 5). E.g. its finishing words: "The Lord Keeper overruled, that the defendant should not answer". Wigmore commented, "whatever this may mean"; Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 631 n1. Macnair took it to mean that an answer was required: Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 74 n47.

Nor were those issues raised in *Roe v Waforer* (1594).<sup>121</sup> Chancery refused as a matter of policy to grant discovery to help the plaintiff to overthrow the title of a *bona fide* purchaser. This case will, however, be mentioned in Chapter IX in the context of discovery of documents.

#### (e) OTHER DECISIONS

The decisions reported in the recent Selden Society volumes showed the difficulty of finding a pattern in Chancery's limitations on discovery. The procedures were complex and apparently arbitrary.<sup>122</sup> Many of the rules were devised around 1600 by Lord Keeper Egerton, later to become Lord Chancellor Ellesmere. The underlying principles were not always obvious.<sup>123</sup>

In *Hubberd v Hubberd* (1600) Egerton held that if "in the same bill is contained matter of fraud or trust or practice concerning the same or other matter, that then the defendant is to answer to the practice fraud or trust, but as to the rest demur".<sup>124</sup> In another case, he "relieved an executor against the defendant, who embezzled and purloined away the goods of the dead after the death of the testator or in time of his sickness".<sup>125</sup> His approach bore some resemblance to the

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<sup>121</sup> (1594) Toth 80 (21 ER 129).

<sup>122</sup> Such procedures led John Selden to suggest in his *Table Talk* that "they should make the standard for the measure we call a foot, a chancellor's foot. What an uncertain measure would this be". It is no less uncertain what he actually said and when he said it. This is the version is given in Reynolds, S. H., Ed. (1892) *The Table Talk of John Selden* (Oxford: Clarendon Press) Chapter XXXVII Para 2 page 61. The only clue to its date is that Selden died in 1654. The jibe left its mark on later Chancellors: e.g. Lord Eldon in *Gee v Pritchard* (1818) 2 Swanst 402 at 414 (36 ER 670 at 674) ("Nothing would inflict on me greater pain, in quitting this place than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot").

<sup>123</sup> Compare *Note* (1602) 117 SS 322 Case No 120-[30] (defendant must answer a "bill to fish out what secret estates or incumbrances he has made of the land in question"); with *Note* (1598-1602) 117 SS 277 Case No 119-5 (defendant need not answer if "any exhibit a bill in Chancery to the intent to fish out of the defendant some proofs whereby he may commence suit at the common law").

<sup>124</sup> *Hubberd v Hubberd* (1600) 117 SS 332 Case No 120-[83].

<sup>125</sup> *Darknall v Dennicott* (1602) 117 SS 324 Case No 120-[40].

ecclesiastical privilege. That privilege did not prevent answers about crimes which resulted in benefits and losses.<sup>126</sup>

Egerton required the defendants in both those cases to give answers in spite of the danger of self-incrimination. Even if the result had something in common with the ecclesiastical privilege, it bore no resemblance at all to the modern privilege, as Macnair acknowledged.<sup>127</sup> Moreover, his next cases were not until the 1650s.

### (3) EXCHEQUER CASES

#### (a) MACNAIR'S EXCHEQUER CASES

Macnair's three Exchequer Cases were *Protector v Lord Lumley* (1655), *Attorney-General v Mico* (1658) and *Attorney-General v ----* (1661).<sup>128</sup> They were all mentioned by Wigmore as showing the privilege spreading from criminal to civil cases "though not without ambiguity and hesitation".<sup>129</sup>

Macnair did not see any real ambiguity or hesitation in these cases. They were argued on the assumption that the privilege had already been "conceded in civil proceedings in equity".<sup>130</sup> Macnair saw them as part of the movement "towards

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<sup>126</sup> Cosin, R. (1593) *An Apologie For Sundrie Proceedings By Jurisdiction Ecclesiasticall, of late times by some challenged, and also diversly by them impugned* (London: The Deputies of Christopher Barker) Part III at 113 ("if the concealing of it, cannot procure his gaine, with another man's losse; then is not the partie himself (in such a case) bound to answere a position criminous moved by his oath").

<sup>127</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 66 (it had limited resemblance to the ecclesiastical privilege "but none at all to a general privilege derived from the common law").

<sup>128</sup> *Protector v Lord Lumley* (1655) Hardr 22 (145 ER 360); *Attorney-General v Mico* (1658) Hardr 137 (145 ER 419); *Attorney-General v ----* (1661) Hardr 201 (145 ER 452).

<sup>129</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633.

<sup>130</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 75. Macnair attributed the "ambiguity and hesitation" found by Wigmore to the absence of any decision in *Attorney-General v Mico*: Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 76 n66.

the general right to silence from more limited rules already applied in equity civil proceedings”.<sup>131</sup>

The Exchequer Cases all appeared in the English Reports. The arguments were reported in enough detail in one report to suggest that the privilege had been conceded in civil proceedings. However, a number of general defects prevented the reports from providing clear authority for the existence of the privilege in civil proceedings.

#### (b) DEFECTS

An obvious defect was that they were not decided in Chancery. They were not even normal civil proceedings. They involved the exercise by the Court of Exchequer of its equitable jurisdiction in relation to forfeiture. Even Macnair was concerned that they came from the revenue jurisdiction on the equity side of the Exchequer. He doubted whether the rule against exposure to a penalty belonged there “on the basis of the roman-canon conceptions or the earlier Chancery authority”.<sup>132</sup>

Another defect was that the authority consisted of arguments which counsel put to the Court or, in one case, intended to put. None of the reports showed the Court actually accepting the arguments. In one of the cases the defendant’s plea was even rejected.

In *Protector v Lord Lumley* (1655) the defendant had forfeited all his property because he had been declared an outlaw. The bill of discovery required him to answer questions about his real and personal estate. The defendant pleaded the

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<sup>131</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 72.

<sup>132</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 68-69.



*nemo tenetur* maxim, but “the court held that he ought to make answer to this bill, because the Protector is entitled to his estate in course of law”.<sup>133</sup>

Macnair and Wigmore both treated this case as showing the existence of the privilege, in spite of the failure of the defendant's plea.<sup>134</sup> They claimed that the general rule would have successfully blocked the questioning because it aided a forfeiture. It did not in this case because the forfeiture had already been established elsewhere.<sup>135</sup>

The other two cases were *Attorney-General v Mico* (1658) and *Attorney-General v ----* (1661) and had similar facts.<sup>136</sup> In each case the plaintiff was the Attorney-General seeking a forfeiture and the defendant was resisting discovery. The proceedings were technically civil, like modern actions for recovery of proceeds of crime. Macnair called them quasi-criminal proceedings in which the question for decision was “whether a rule conceded in equity can be applied under a statutory quasi-criminal jurisdiction”.<sup>137</sup> In neither case was the court's final decision recorded.

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<sup>133</sup> *Protector v Lord Lumley* (1655) Hardr 22 (145 ER 360).

<sup>134</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633 n6 (“thus the general principle is apparently assumed valid”); Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 76 (the decision “suggests acceptance of the general rule”).

<sup>135</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 67 n134 and 71. However, these references in Macnair's book made little of the decision, only mentioning it briefly in the context of Wigmore's general theories.

<sup>136</sup> *Attorney-General v Mico* (1658) Hardr 137 (145 ER 419) and *Attorney-General v ----*(1661) Hardr 201 (145 ER 452). They have even been identified as being the same case (e.g. see 1 Eq Ca Ab 75 pl 3 (21 ER 889); and Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 633 n6 (“probably the same case”). However, according to Macnair, “the misconduct claimed in the two cases is different”: Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 71 n157.

<sup>137</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 77.

### (c) INDIRECT AUTHORITY

The report of *Attorney-General v Mico* (1658) gave a detailed account of the arguments put to the court but did not record its decision.<sup>138</sup> The defendant was a merchant who allegedly evaded customs duty and bribed customs officers. In the bill the Attorney-General asked for “relief and discovery of the truth”, but the defendant refused to answer questions which might show a misdemeanour “for which, if guilty thereof, the party may incur great penalties and forfeitures”.<sup>139</sup>

According to Macnair, the existence of the privilege in civil cases was accepted by both sides.<sup>140</sup> The argument of counsel for the Attorney-General was that the privilege should not be extended to these quasi-criminal proceedings. Macnair’s view seemed justified on the face of the report, but its reliability may be questioned because Hardres, the reporter, was representing the defendant. Of the six pages in the English Reports, five were devoted to his arguments.<sup>141</sup> This calls into question the accuracy of his brief summary of his opponent’s arguments.

The report by Hardres of his own arguments raises even more questions. It can be said in favour of his reported arguments that, although heavily influenced by Coke, they carefully distinguished the *nemo tenetur* maxim under “the law of Nature” from the Magna Carta arguments under “the law of the land”.<sup>142</sup> However, the report did not show them being accepted by the court.<sup>143</sup> In fact, they were probably not put to the court at all.<sup>144</sup>

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<sup>138</sup> The civil war apparently intervened to prevent the arguments being completed or an order made: Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 71 n156.

<sup>139</sup> *Attorney-General v Mico* (1658) Hardr 137 (145 ER 419).

<sup>140</sup> Macnair, M. R. T. (1990) “The early development of the privilege against self-incrimination.” *Oxford Journal of Legal Studies* 10(Spring): 66 at 69.

<sup>141</sup> *Attorney-General v Mico* (1658) Hardr 137 at 139-147 (145 ER 419 at 420-424).

<sup>142</sup> *Attorney-General v Mico* (1658) Hardr 137 at 139-140 (145 ER 419 at 420-421).

<sup>143</sup> Any inference from this seems unjustified: e.g. by Herman, L. (1992) “The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part

According to Macnair, professional opinion preferred the defendant's argument that forfeiture was a valid reason for resisting discovery.<sup>145</sup> Macnair found support for this conclusion from the later case of *Attorney-General v -----* (1661).<sup>146</sup> The report of that case was short and concerned a technical point. The Attorney-General had been allowed discovery on condition that he waived his rights to forfeiture and penalties. The question was whether he was prevented from taking action subsequently because he was bound by that waiver.

That question was answered in later decisions.<sup>147</sup> The report of *Attorney-General v -----* (1661) only showed it being adjourned. Its authority was at best indirect. Forfeiture was presumably accepted as a valid reason for resisting discovery. Otherwise, the Attorney-General would not have needed to waive his rights to forfeiture in order to obtain discovery in the first place.<sup>148</sup>

#### (d) EARLIER EXCHEQUER DECISIONS

##### (i) Exchequer Chamber

The Exchequer Cases did not provide much direct evidence for the existence of the privilege in civil cases, but there were some earlier and more helpful Exchequer decisions. Most of these were not reported in print until the recent

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I)." *Ohio State Law Journal* 53(1): 101 at 146 n252 ("From the suspicious fact that no result is reported, one can infer that the defendant lost").

<sup>144</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 71 n156. The same was true of Nicholas Fuller's famous speech in defence of Maunsell and Ladd in 1607. It was published as a pamphlet but Fuller never actually delivered it in court. He had been jailed for defaming the Kings Bench at an earlier stage in the same proceedings: *Fuller's case* (1607) 12 Co Rep 41 (77 ER 1322); *Noy* 127 (74 ER 1091) He therefore published the speech in a pamphlet: Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 238.

<sup>145</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 71.

<sup>146</sup> (1661) *Hardr* 201 (145 ER 452).

<sup>147</sup> E.g. *Attorney-General v Cresner* (1710) *Park* 277 (145 ER 779) (Attorney-General bound by waiver but discovery refused because common informer could still take action for the penalties).

<sup>148</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 77.

Selden Society volumes. They arose from lodging a “bill in Exchequer Chamber”. That in itself causes difficulty.

There were two easily confused versions of the Court of Exchequer Chamber. These decisions were not apparently in either of them. The later version of the Court of Exchequer Chamber heard appeals from King’s Bench and barely existed by the time of these decisions.<sup>149</sup> The earlier and better known Court of Exchequer Chamber was a court of appeal from lower Exchequer Courts.<sup>150</sup> However, it only heard appeals from lower Exchequer Court decisions involving common law matters and private parties.<sup>151</sup>

The earlier Exchequer decisions did not look like appeals. They started with the lodging of a bill. That was how equitable relief was generally sought. The conventional wisdom used to be that equitable decisions in the Court of Exchequer were rarely reported during this period.<sup>152</sup> However, the Selden Society volumes included, according to their editor, almost as many cases on equitable matters from the Court of Exchequer as from Chancery.<sup>153</sup>

Unfortunately, the editor did not explain the references to Exchequer Chamber in some of these decisions. Nor did he mention the Court of Exchequer Chamber in his ground-breaking historical account of equity jurisdiction in the Court of

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<sup>149</sup> This was the statutory court called the Exchequer Chamber, which was established in 1585 to hear writs of error from the Court of King’s Bench: Holdsworth, W. (1944) *A History of English Law (Vol 1)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 244-245.

<sup>150</sup> The Court of Exchequer Chamber was established for this purpose by statute in 1358. The two Courts of Exchequer Chamber remained separate until 1830: Holdsworth, W. (1944) *A History of English Law (Vol 1)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 242-245.

<sup>151</sup> Bryson, W. H. (1975) *The Equity Side Of The Exchequer* (Cambridge: Cambridge University Press) at 31 (“The possibility of appeals from suits in equity from the exchequer ... did not arise until the middle of the seventeenth century.” Even then, the appeals were to the House of Lords).

<sup>152</sup> E.g. Yale, D. E. C., Ed. (1965) *Lord Nottingham's "Manual of Chancery Practice" and "Prologomena of Chancery and Equity"* (Cambridge: Cambridge University Press) at 18 n2 (“The Equity side of Exchequer, though ancient, does not produce enough law to attract reporters until the end of the eighteenth century”).

<sup>153</sup> Bryson, W. H., Ed. (2001) *Cases Concerning Equity and the Courts of Equity 1550-1660 (Vol 1)*. Selden Society (Vol 117) (London: Selden Society) at l.

Exchequer. According to him, the exchequer chamber was just the room where the court sat.<sup>154</sup>

The conclusion must be that lodging a “bill in Exchequer Chamber” meant the seeking of equitable relief in the Court of Exchequer. There are four decisions from the period between the Early Cases and the Exchequer Cases. They could be seen as supporting Macnair’s argument that the privilege had already been accepted in civil proceedings.

### **(ii) The Four Decisions**

The first of the earlier Exchequer decisions came from the printed reports: *Anon* (1588).<sup>155</sup> It was mentioned by Macnair, but only in his book.<sup>156</sup> A bill involving discovery was sought “in Exchequer Chamber” for treble value for not setting forth tithes according to statute. The bill was refused because the remedy should have been sought in the Court of Pleas in the Exchequer. It was therefore primarily a decision on Exchequer jurisdiction, but it did also show a reluctance to use equitable civil proceedings to achieve penal ends.<sup>157</sup>

The other three earlier Exchequer decisions appeared in the recent Selden Society volumes. The clearest support came from *Braynis v Rooke* (1632).<sup>158</sup> It involved an action by the customs collector against other customs officers in the port of Dover. He exhibited a bill against them “in Exchequer Chamber” for allowing horses and other goods to be transported without payment of duty.

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<sup>154</sup> Bryson, W. H. (1975) *The Equity Side Of The Exchequer* (Cambridge: Cambridge University Press) at 78 (“the large court room called the exchequer chamber or Elizabeth’s breakfasting room”).

<sup>155</sup> (1588) 3 Leo 204 (74 ER 634).

<sup>156</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 64.

<sup>157</sup> (1588) 3 Leo 204 (74 ER 634) (it was refused “also for that there shall be no suit or proceedings according to the order of the Exchequer Chamber in cases of conscience, upon any penal statute”).

<sup>158</sup> (1632) 118 SS 634 Case No 373a.

During the proceedings the plaintiff asked the court to compel the defendants to “answer in what boats the horses or merchandises were embarked”. The court did not require them to answer because “the bill was grounded upon a penal law and the defendants are not bound to accuse themselves”.<sup>159</sup> The action was dismissed.

The problem with this decision was that apparently the correct procedure was not followed. This should not have been a personal civil action by the customs collector. The Attorney-General should have brought a criminal information.<sup>160</sup> If the correct procedure had been followed, the privilege would not have been available. There was a clear exception to the privilege when a Crown officer had to answer a criminal information charging a misdemeanour in office.<sup>161</sup>

The Selden Society volumes included two other cases in which that exception was at issue. The first was in 1608.<sup>162</sup> The court rejected the defendant’s argument that “he should not be put to answer because it is upon a penal law and noone is held to accuse himself”.<sup>163</sup> In the second case in 1635, the defendants demurred because it was a penal statute and “because they should not be forced to answer to it upon oath”.<sup>164</sup> The Attorney-General argued for the exception, but the court’s decision was not reported.

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<sup>159</sup> (1632) 118 SS 634 Case No 373a.

<sup>160</sup> This is evident from an alternative ground given in the report: “if the parties have offended against the law, a Latin information should be preferred by the attorney-general”. Latin was preferred in common law proceedings, but equity courts preferred English: e.g. Bryson, W. H. (1975) *The Equity Side Of The Exchequer* (Cambridge: Cambridge University Press) at 13 (“it is clear that they are equity from the fact that they are in English”).

<sup>161</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 70 n153.

<sup>162</sup> *Attorney-General v Fenton* (1608) 117 SS 350 Case No 141. This is apparently the same case as *Attorney-General v Henton* cited by Macnair as showing the exception for royal officers: Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 70 n153.

<sup>163</sup> A criminal information was exhibited against a customs officer for concealing customs and for other frauds and misdemeanours. The defendant’s argument was rejected because “the bill is not grounded upon any particular statute but upon the fraud and misdemeanour at common law”.

<sup>164</sup> *Attorney-General v Lister* (1635) 118 SS 663 Case No 384. A criminal information was exhibited against Sir John Lister and others of Hull for evading duties on butter.

### **(iii) General Support**

The decision in *Braynis v Rooke* (1632) showed the existence of a principle against self-incrimination in civil proceedings. This was not really contradicted by the other two cases. Rather, the existence of the principle was suggested by the readiness of the defendants to claim it in those cases. As in Macnair's Exchequer Cases, the question was whether the same principle applied in quasi-criminal proceedings brought by the Attorney-General.

In these earlier Exchequer cases, issues of privilege became obscured by procedural technicalities and by the mixture of jurisdiction in the Exchequer courts. In Chancery, on the other hand, the jurisdiction was almost exclusively in civil proceedings. It was here that the privilege took a more settled form in the late 1600s.

## **(4) RESTORATION CASES**

### **(a) OUTLINE**

Macnair found about thirty Restoration Cases from between 1669 and 1709, mostly in the English Reports or in Lord Nottingham's Chancery Cases.<sup>165</sup> They showed more clearly than the Early Cases and the Exchequer Cases that the privilege existed in Chancery before 1700. According to the revisionists, this was long before the right to silence was enjoyed by criminal defendants in the common law courts.

In his article Macnair saw in these cases a movement from "the older rules in equity which prohibited the use of the compulsory oath for collateral purposes and fishing expeditions in general, towards the modern rule which is largely limited to

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<sup>165</sup> Yale, D. E. C., Ed. (1954) *Lord Nottingham's Chancery Cases (Vol I)*. Selden Society (Vol 73) (London: Bernard Quaritch) and Yale, D. E. C., Ed. (1961-2) *Lord Nottingham's Chancery Cases (Vol II)*. Selden Society (Vol 79) (London: Bernard Quaritch).

criminal liability".<sup>166</sup> He concluded that although the Restoration Cases showed "diverse applications of the general rule", the "rule in its application in equity appears to be a settled rule".<sup>167</sup>

In his book, on the other hand, Macnair noted that "the modern limitations or exceptions to the rule have not acquired a hard and fast character, and the older limitations and exceptions to the older rule have not altogether disappeared".<sup>168</sup> He concluded that the law "at the end of the period seems unsettled".<sup>169</sup> This chapter will look at the Restoration Cases and agree with the conclusion in his book. They showed the law as unsettled and in the course of developing the modern rule.

All the Restoration Cases involved discovery. Many of them showed the existence of a rule in equity limiting the scope of discovery. None of them mentioned the *nemo tenetur maxim*.

About half of them held that discovery was not to be compelled for reasons which were connected with incrimination or forfeiture.<sup>170</sup> In a few cases, discovery was refused for reasons which were more about preventing abuse of Chancery's compulsory processes. The remaining one-third of the cases showed discovery being compelled in spite of the objections of the defendants.

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<sup>166</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 77.

<sup>167</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 77 n76.

<sup>168</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 73.

<sup>169</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 68 n142.

<sup>170</sup> Possibly both: e.g. *Cook v Arnold* (1676) 79 SS 461 Case No 599 (no discovery because it might show forfeiture of land or offence of maintenance).



Macnair's list also included two cases which were about the technicalities of forfeiture unconnected with discovery.<sup>171</sup> Apart from those two cases, Macnair's Restoration Cases will now be examined. They can be conveniently divided into groups based upon the reasons claimed for resisting discovery: self-incrimination; forfeiture; abuse of process; and reasons which were held to be insufficient.

### (b) SELF-INCRIMINATION

In the largest group of cases the defendant refused to answer questions about matters which could result in criminal liability. Some of these would clearly qualify for the modern privilege: for example, the ex-librarian who refused to answer questions about his possession of goods which were stolen from the library during a fire.<sup>172</sup> In another case the managers of a company were accused of misuse of the company's funds.<sup>173</sup>

Several other cases in the group were decided on recognisably modern grounds.<sup>174</sup> Other cases in the group showed refusal of discovery for reasons which were analogous to self-incrimination, even if technically they might not support a modern claim for the privilege.<sup>175</sup> These cases were clearly different from those involving forfeiture.

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<sup>171</sup> *Fry v Porter* (1669) 1 Ch Rep 26, 1 Chan Ca 138, 1 Mod 300 (21 ER 918, 1047, 1083); *Attorney-General v Hesketh* (1706) 2 Vern 550 (23 ER 936).

<sup>172</sup> *Micklethwayte v Merrett* (1681) 79 SS 876 Case No 1097 (no discovery because "the charge of the bill amounted to theftboot, which was punishable by ransom and imprisonment").

<sup>173</sup> *Attorney-General v Reynolds* (1705) 1 Eq Ca Abr 131 pl 10 (21 ER 936) (no discovery of the company books and accounts from the managers because it would "subject them to Prosecutions at Law").

<sup>174</sup> E.g. *Penrice v Parker* (1673) 1 Finch 75 (23 ER 40), 73 SS 63 Case No 110 (client not required to answer questions about payment of attorney's fees because it might "draw him under a penal law" under the Statute of Maintenance); *Trevor v Lesguire* (1673) 1 Finch 72 (23 ER 39) (bill dismissed because it might show the creation of fictitious son for inheritance purposes which "would be a great and notorious crime"); *Pensax v Litten* (1674) 73 SS 23 Case No 46 (no discovery because it might lead to a statutory penalty for failure to seal charter party properly); *Fisher v Michel* (1675) 73 SS 245 Case No 362 (no discovery because it might show unlawful trading contrary to East India Act); *Anon* (1709) 2 Eq Ca Abr 70 pl 7 (22 ER 61) (defendant "shall not answer as to legal interest" after he "pleaded the Statute against Usury as to legal interest").

<sup>175</sup> E.g. *Harrison v Houblon* (1680) 79 SS 818 Case No 1024 (no discovery because the defendants' trading associates would be put in danger of penalties under Spanish Law); *Deacon v Lucas* (1676) 73 SS 331 Case No 463 (no discovery because it might show wrongful seizure of goods for unpaid rent).

### (c) FORFEITURE AND PENALTIES

The old equitable rule was that discovery would not be granted to enforce a forfeiture. As mentioned earlier in this chapter, the technicalities of forfeiture were interpreted differently by Wigmore and Macnair. In the end it did not seem to matter whether discovery was refused because of a general hostility to forfeiture, as Wigmore's first "explanation" suggested, or because of a more particular rule relating to discovery, as Macnair thought.<sup>176</sup> The result was the same: a bill to discover a forfeiture was never allowed.

The Restoration Cases added a minor complication by treating forfeiture and penalties in the same way. That was consistent with the common law which applied similar rules to both.<sup>177</sup> Chancery used the two terms interchangeably and with the same result: discovery was not granted if it would lead to a forfeiture or a penalty. That general principle was applied in numerous cases.<sup>178</sup> It was sometimes acknowledged even when discovery was ordered.<sup>179</sup>

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<sup>176</sup> Wigmore, J. H. (1901/2) "The Privilege Against Self-Crimination; Its History." *Harvard Law Review* 15: 610 at 631; Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 74-5; Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 67-68.

<sup>177</sup> Yale, D. E. C., Ed. (1961-2) *Lord Nottingham's Chancery Cases (Vol II)*. Selden Society (Vol 79) (London: Bernard Quaritch) at 11.

<sup>178</sup> E.g. *Monnins v Monnins* (1673) 2 Ch Rep 68 (21 ER 618), 1 Eq Ca Abr 40 pl 4 and 77 pl 10 (21 ER 858 and 890) (no discovery of facts about defendant's remarriage because it would result in forfeiture of interest under late husband's will); *Bird v Hardwicke* (1682) 1 Eq Ca Abr 76 pl 3 (21 ER 889), 1 Vern 109 (23 ER 349) (no discovery of facts in a dispute about wine importation because defendant might be shown to be in breach of a penal statute and "subject him to a forfeiture"); *Wynn v Wynn* (1676) 73 SS 382 Case No 517 (no discovery of whether necessary consent obtained for marriage because lack of consent would result in forfeiture of interest under settlement of land); *Hungerford v Goreing* (1688) 2 Vern 38 (23 ER 635) (no discovery of defendant's deeds because they might show errors in boundaries which could result in his eviction); *Fane v Attlee* (1701) 1 Eq Ca Abr 77 pl 15 (21 ER 890) (no discovery concerning assignment of lease which would make lease void "this being in the nature of a Penalty or Forfeiture"); *Attorney-General v Cresner* (1710) 1 Park 277 (145 ER 779) (no discovery because common informer could still take action for forfeiture even though Attorney-General had agreed not to).

<sup>179</sup> E.g. *Churchill v Isaack* (1673) 73 SS 12 Case No 27 (a bill to discover a forfeiture "is never allowed", but faced with conflicting decisions on the forfeiture of copyholds, Lord Nottingham compromised by ordering the defendant to answer unsworn).

#### (d) ABUSE OF PROCESS

Chancery had traditionally been concerned about the abuse of its compulsory processes.<sup>180</sup> A small group of Restoration Cases in 1670s and 1680s allowed discovery to be resisted, but not because of self-incrimination, forfeiture or penalties. The reason was to preserve the integrity of the court procedure.

For example, Lord Nottingham refused to order discovery in *Duke v Duke* (1675).<sup>181</sup> The defendant was allowed not to answer whether he was married to Elizabeth Goffe. As he had already said that he was married to Mrs Turbervile, the question was “all fiction purposely to introduce a discovery of a double marriage and so bastardise the issue of Mrs Turbervile”. Lord Nottingham did not want to encourage this “kind of art”.

The same principle was applied in other Restoration Cases.<sup>182</sup> Chancery was not solely concerned with whether the defendant would be unfairly prejudiced. It also wanted to be sure that the plaintiff was worthy of its assistance.

#### (e) DISCOVERY GRANTED

Discovery was granted in spite of demurrers from defendants in almost one third of the Restoration Cases. Sometimes the demurrer was overruled because of a technical defect in the defendant’s argument.<sup>183</sup> Other decisions were made on policy grounds. Chancery was, for example, noticeably sympathetic to requests

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<sup>180</sup> Macnair, M. R. T. (1990) “The early development of the privilege against self-incrimination.” *Oxford Journal of Legal Studies* 10(Spring): 66 at 75.

<sup>181</sup> *Duke v Duke* (1675) 2 Ch Cas 209 (22 ER 914), 73 SS 243 Case No 357.

<sup>182</sup> *Hincks v Nelthorp* (1686) 1 Eq Ca Abr 41 pl 5 and 77 pl 11 (21 ER 859 and 890), 1 Vern 204 (23 ER 414) (bill dismissed as “not a matter properly examinable or relievable in this court” because it asked for discovery of “hard usage” by a husband aimed at causing his wife to recede from a pre-nuptial agreement); *Williams v Countess of Arundel* (1673) 73 SS 17 Case No 39 (defendant’s demurrer upheld *inter alia* because it was hard “to sue the defendant and solicitor to make them discover against themselves matter tending to the dishonour of the Court”).

<sup>183</sup> E.g. *Anonymous* (1682) 1 Vern 60 (23 ER 310) (discovery allowed because the plaintiff claiming tithes was not the parson himself, who was entitled to a forfeiture, but his executor who “was not entitled to a forfeiture upon the statute”).

from great companies for discovery.<sup>184</sup> It was too sympathetic, according to the Court of Exchequer.<sup>185</sup>

Great companies were perhaps the coincidental beneficiaries of a more fundamental policy change. Chancery was reducing the categories of prejudice which could ground a claim to block discovery.<sup>186</sup> This reflected “the apparent narrowing of the rule in the direction of the modern approach”.<sup>187</sup>

#### (f) CONCLUSION

The Restoration Cases showed the privilege developing in civil proceedings separately from criminal proceedings. They provide a more plausible explanation than the traditionalist view that the privilege somehow spread from criminal to civil proceedings in the mid-1600s. Witness privilege was a separate development which was discussed in Chapter VI. It probably appeared in criminal proceedings in the mid to late 1600s. This was about the same time as Chancery was developing the privilege for parties as a ground for resisting discovery.

According to the revisionist view, the right to silence for criminal defendants was a much later development. This thesis need not go any further into the historical debate about the right to silence, except to note that it brought to light several civil cases from the mid-1700s. These should be mentioned briefly.

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<sup>184</sup> E.g. *East India Company v Mainston* (1676) 2 Ch Cas 218 (22 ER 918); 73 SS 385 Case No 521 (discovery ordered even though it would expose the defendant to contractual penalties); *East India Company v Fortescue* (1682) 79 SS 916 Case No 1147 (discovery ordered even though collusion with a dishonest agent was alleged); *East India Company v Evans* (1685) 1 Vern 305 (23 ER 486) (discovery ordered even though the claim was in tort for unlawful trading); *African Company v Parish* (1691) 2 Vern 244 (23 ER 758) (discovery ordered even though it would expose the defendant to contractual penalties).

<sup>185</sup> *East India Company v Campbell* (1749) 1 Ves Sen 246 at 248 (27 ER 1010 at 1011) (“nor should the privileges of great companies be extended further than the trade necessarily requires, to the oppression of others”).

<sup>186</sup> E.g. *Heathcote v Fleete* (1702) 1 Eq Ca Abr 76 pl 6 (21 ER 889); 2 Vern 442 (23 ER 883), *Morse v Buckworth* (1702) 1 Eq Ca Abr 76 pl 7 (21 ER 889); 2 Vern 443 (23 ER 883) (discovery ordered even though it could result in vicarious liability in tort for damage caused by a fire on a ship); *Smithier v Lewis* (1686) 1 Eq Ca Abr 77 pl 13 (21 ER 890); 1 Vern 398 (23 ER 542) (discovery ordered of assignment to defraud creditors, overriding defendant's claim that “he was not bound to discover his personal estate”).

<sup>187</sup> Macnair, M. R. T. (1999) *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot) at 72.

## (5) CASES FROM MID-1700s

As already mentioned, Levy did not criticise or even discuss Macnair's views on civil proceedings. He simply referred to the footnotes in his book for "the citation of dozens of civil cases".<sup>188</sup> In fact, he cited only sixteen civil cases, one of which was irrelevant.<sup>189</sup>

Six of Levy's cases were early enough to be mentioned by Macnair.<sup>190</sup> There was then a gap from 1710 until Levy's other nine cases which were decided between 1737 and 1752. Seven of the later cases came from Chancery. The other two were from the equity side of Exchequer.<sup>191</sup>

Levy's later cases fitted in with the traditionalist argument that the privilege spread to civil cases after being established in criminal cases. Moreover, they were decided when Lord Hardwicke was Chancellor. He has often been cited for his definitive statements of equitable principle.<sup>192</sup>

Nevertheless, the principles which Lord Hardwicke stated were substantially the same as those applied to the privilege in the Restoration Cases. He maintained the traditional refusal of Chancellors to grant discovery in aid of forfeiture.<sup>193</sup> He also

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<sup>188</sup> Levy, L. W. (1997) "Origins of the Fifth Amendment and Its Critics." *Cardozo Law Review* 19(3): 821 at 843 n128.

<sup>189</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 491 n29. *Craig v Earl of Anglesea* (1743) 17 HST 1139 at 1147 is not covered here because it had no apparent connection with the privilege.

<sup>190</sup> These six cases were from the period 1673 to 1710 (*Attorney-General v Mico*, *Trevor v Lesguire*, *Penrice v Parker*, *Bird v Hardwicke*, *Firebrass's Case*, *Attorney-General v Cresner*).

<sup>191</sup> *Jones v Meredith* (1739) 2 Com 661 (92 ER 1257); *East India Company v Campbell* (1749) 1 Ves Sen 246 (27 ER 1010). It is difficult to see any difference between these decisions and those from Chancery. In some of the Chancery cases, Barons of the Exchequer even sat as members of the court.

<sup>192</sup> He was Chancellor between 1737 and 1756. For an example of his definitive statements, see *Montague (Lord) v Dudman* (1751) 2 Ves Sen 396 at 398 (28 ER 253 at 254) ("A bill of discovery lies here...not to aid the prosecution of an indictment").

<sup>193</sup> E.g. *Boteler v Allington* (1746) 3 Atk 453 at 457 (26 ER 1061 at 1063) (parson need not answer questions about presentation to second living because that could lead to the loss of his first living and "a defendant is not obliged by discovery to subject himself to a forfeiture or anything in the nature of a forfeiture").

confirmed the effective disappearance of the distinction between exposure to forfeiture and exposure to penalties.<sup>194</sup>

Admittedly, there were some minor developments as the equitable procedures were refined. Unlike the Restoration Cases, these ones referred to the principle of not having to accuse oneself and even to the *nemo tenetur maxim*.<sup>195</sup> It was rarely suggested any longer that the privilege protected against civil liability.<sup>196</sup> Most of the cases involved incrimination of some kind, such as by breach of a statute.<sup>197</sup> Two of them showed that incrimination included offences in ecclesiastical courts.<sup>198</sup>

There were also signs of greater sophistication in the judgments. The “links in the chain” argument, for example, appeared in two cases.<sup>199</sup> Unfortunately, greater

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<sup>194</sup> E.g. *Harrison v Southcote* (1751) 2 Ves Sen 389 at 395 (28 ER 249 at 252) (defendant need not answer whether person from whom he purchased land was a papist because “a purchaser is not to be hurt by discovery of a matter, that will tend to forfeiture of his estate or be a loss in consequence of a penal law”).

<sup>195</sup> E.g. *Jones v Meredith* (1739) 2 Com 661 at 672 (92 ER 1257 at 1263) (defendants not required to answer whether they were Catholics because it “tends directly to make the defendants accuse themselves of those offences” and it “is the excellent temper of the English law, that nobody is compellable to accuse himself; *nemo tenetur seipsum accusare*”).

<sup>196</sup> A rare example was *East India Company v Campbell* (1749) 1 Ves Sen 246 at 247 (27 ER 1010 at 1011) (“the rule is, that the court shall not oblige one to discover that, which, if he answers in the affirmative, will subject him to the punishment of a crime”, but then infamy and civil liability were suggested as other reasons why “he should not be obliged to answer”). As described in Chapter VI, legislation had to be passed in 1806 to counter such suggestions in the context of witness privilege.

<sup>197</sup> E.g. *Duncalf v Blake* (1737) 1 Atk 52 at 53 (26 ER 35 at 35-6) (no answer required to the interrogatory part of bill exhibited by insurer of sunken ship because it would “draw in the defendant to accuse himself” of shipping wool to France in breach of statute).

<sup>198</sup> *Baker v Pritchard* (1742) 2 Atk 387 at 389 (26 ER 634 at 635) (no discovery of whether the defendant procured the subornation of perjury in an ecclesiastical case); *Brownsword v Edwards* (1751) 2 Ves Sen 244 at 246 (28 ER 157 at 158-9) (no discovery of the defendant's marriage to her deceased sister's husband because this would have made her guilty of the ecclesiastical crime of incest).

<sup>199</sup> Discovery should not be available when it “is not of a fact which might subject defendant to any penalty, but connected with some other fact which may” (*Brownsword v Edwards* (1751) 2 Ves Sen 244 at 246 (28 ER 157 at 159)). Also see *East India Company v Campbell* (1749) 1 Ves Sen 246 at 248 (27 ER 1010 at 1011) (“If defendant is not obliged to answer the facts, he need not answer the circumstances, although they have not such an immediate tendency to criminate”).

sophistication also led to fine technical distinctions.<sup>200</sup> The increasing procedural complexity ultimately brought Chancery into disrepute.<sup>201</sup>

## (D) CONCLUSION

The privilege for parties was established in principle in the Restoration Cases. The cases from the mid-1700s showed the equitable rules being developed to refine the privilege. The grounds for claiming it were narrowed. The permissible grounds were explored in greater depth.

Chapter VI argued that witness privilege was developed by the common law courts as a safety-valve. It was necessary to resolve the tension between compulsory questioning and the right to silence of the witness. The privilege for parties, on the other hand, was a creature of equity.

Like witness privilege in the common law, the privilege in equity was a necessary safety-valve in compulsory processes. Compulsory discovery was an attractive feature of equitable procedures. The Chancellors were careful to make sure that it was not abused.

In particular, Chancellors did not want compulsory discovery to be used to collect evidence for criminal proceedings. This danger was increased because parties could be compelled to produce documents during discovery. Special difficulties arise when applying the privilege to documents. Those difficulties will be discussed in Chapters VIII and IX.

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<sup>200</sup> E.g. *Earl of Suffolk v Green* (1739) 1 Atk 450 (26 ER 286) (demurrer against discovery was overruled, but “without prejudice to the defendants insisting by way of answer, against making any discovery touching the usurious contract, charged and suggested by the bill”).

<sup>201</sup> E.g. Dickens, C. (1853) *Bleak House* (London: David Campbell Publishers Ltd) Chapter 5, page 53: “it’s being ground to bits in a slow mill; it’s being roasted at a slow fire; it’s being stung to death by single bees; it’s being drowned by drops, it’s going mad by grains” (Mr Krook recounting Tom Jarndyce’s description of being a litigant in Chancery).

## CHAPTER VIII: DOCUMENTS IN THE UNITED STATES

### (A) INTRODUCTION

#### (1) RELEVANCE OF AMERICAN EXPERIENCE

Chapter IV looked at the use of the Fifth Amendment to support the argument in Australia that the privilege is a human right. This chapter will discuss the application of the privilege to documentary evidence in the United States. It will not try to cover every aspect of American law on this topic. Like Chapter IV it will concentrate on aspects relevant to this thesis. It will focus on whether the American experience supports the removal of the privilege from documents.

In civil proceedings in both New Zealand and Australia, the privilege in its current form protects the contents of documents as well as oral disclosures. In the United States the privilege no longer protects the contents of documents but to some extent protects the act of producing them. The American position is particularly relevant in New Zealand because the NZLC proposed that the privilege should be removed completely from documents.<sup>1</sup> In its final form the NZLC proposal went even further than the United States by removing the protection of the privilege from all acts of production of documents.<sup>2</sup>

Australian judges have sometimes criticised the application of the privilege to the contents of documents. However, the separation of documentary from oral evidence was given new impetus by the recent ALRC Report. It recommended removing the privilege from pre-existing documents in interlocutory asset

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<sup>1</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 203.

<sup>2</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) Vol I para 281.



protection proceedings.<sup>3</sup> The ALRC recommendation was influenced by the NZLC proposals and by the American case-law upon which they were based.<sup>4</sup>

The removal of the privilege from corporations also has American origins. The privilege has not been available to corporations in the United States for a century. Australia took this path ten years ago. New Zealand will do the same if the Evidence Bill 2005 is passed. Chapter IX will discuss one of the consequences of making the privilege unavailable to corporations. The question will be whether an officer can claim personal privilege to avoid producing incriminating corporate documents. That issue still remains unresolved in Australia.<sup>5</sup> This chapter will discuss the American approach to this issue.<sup>6</sup>

This thesis argues that the privilege should continue to apply to the contents of documents in civil proceedings as well as to oral evidence. The American experience shows that it is impracticable to distinguish the contents from the act of production of documents. Documents are in a grey area between oral evidence and physical evidence. Even if they are less worthy of protection than oral evidence, there are real difficulties in treating them simply as objects.

Above all, the American experience shows the dangers of transplanting law from another jurisdiction. These dangers are increased when the courts in that jurisdiction are themselves sharply divided on what that law should be.

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<sup>3</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) Recommendation 15.10.

<sup>4</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.148. This included a far-fetched link with the American "required records rule" which is discussed later in this chapter.

<sup>5</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 492-3 and 555.

<sup>6</sup> *Braswell v United States*, 487 US 99 (1988).

## (2) RESEARCH PROBLEMS

The difficulties with research into American law resemble those which have been noted in the context of historical research. Like the history of the privilege, the American position is full of hidden complications and subtleties. It cannot be summarised simply in a few felicitous phrases.

The researcher is left asking, as the Canadian judge asked about historical study, whether the “journey is worth the price”.<sup>7</sup> This thesis argues that, as with history, there is really no choice. The journey is necessary because judges, law reformers and legislators in Australasia have regularly embarked upon it. They have been influenced by their not always accurate perceptions of American law.

As in the case of the history, one of three approaches is usually taken to the American law on the privilege. The first is to dismiss it as irrelevant and move on. Its constitutional context is sufficiently esoteric to justify such an approach.

The second approach is often taken by Australian judges. They extract convenient pieces to support their view of how the law should operate in Australia. These extracts seem relevant but are taken out of context. This provides an unsatisfactory basis for policy.

The NZLC adopted this second approach in proposing complete removal of the privilege from documents. This chapter will suggest weaknesses in the NZLC's analysis of the American position. The next chapter will show how these weaknesses undermine the NZLC's sweeping proposal.

The third approach is the one taken in this thesis. American law is set out in sufficient detail to enable assessment of the policy implications if similar

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<sup>7</sup> *Iacobucci J in R v S (R)* [1995] 1 SCR 451 at 490.

principles were applied in Australasia. This is a lengthy exercise. It does not always lead to clear conclusions. Nevertheless, American experience shows, at the very least, that the removal of the privilege from documents is not as straightforward as the NZLC assumes.

## **(B) BACKGROUND**

### **(1) BROAD APPLICATION**

In the United States the privilege is not “ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used”.<sup>8</sup> It is therefore available “in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory”.<sup>9</sup> The principles discussed in this chapter apply equally to documents obtained under compulsory processes such as grand jury subpoenas or tax summonses.

Most of the American case-law has been about those other compulsory processes. That should not obscure the fact that the privilege applies in civil proceedings. Even American lawyers can overlook this application of the privilege.<sup>10</sup>

Chapter III mentioned the exhaustive analysis by Heidt of the privilege in American civil proceedings.<sup>11</sup> He concluded that civil defendants could “draw a surprisingly wide conjurer's circle around their conduct, a circle of mystery that works to their advantage”.<sup>12</sup> This occurs most obviously when witnesses

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<sup>8</sup> *McCarthy v Arndstein*, 266 US 34, 40 (1922).

<sup>9</sup> *Kastigar v United States*, 406 US 441, 444 (1972).

<sup>10</sup> Heller, G. W. (1995) "Is "Pleading the Fifth" a Civil Matter?" *The Federal Lawyer* 42(8): 27 at 27 (“Many civil litigators instinctively and mistakenly believe that the Fifth Amendment privilege against self-incrimination is irrelevant to their practice”). He also wrote another article to correct this “misperception”: Heller, G. W. (1995) "Invoking the Fifth in Civil Cases." *Trial* 31(6): 44.

<sup>11</sup> Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1064 (“systematically explored the operation of the privilege in the frequently complex procedural battleground of civil litigation”).

<sup>12</sup> Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1064.

claim the privilege to resist incriminating questions at the trial of civil proceedings.<sup>13</sup>

Up to a point, the privilege is available in the United States to resist the production of documents in civil proceedings. However, the position under the Fifth Amendment is far more complicated than in Australasia. In the first place, pre-trial proceedings are not quite the same in the United States.

## **(2) PRE-TRIAL CIVIL PROCEEDINGS**

### **(a) NATURE OF DISCOVERY**

Discovery in Australia and New Zealand involves the formalised exchange of lists and then of documents. Discovery is central to American pre-trial civil proceedings, but it has a different meaning. It is not exclusively, or even primarily, directed at documents. It includes "interrogatories, document requests, requests for admissions, and deposition questions".<sup>14</sup>

The privilege is a substantial obstruction to pre-trial discovery in the United States. Under the procedural rules governing civil proceedings, the Federal and most State courts will only order discovery of matter which is not privileged.<sup>15</sup> There are more than fifty jurisdictions, but this chapter will not deal with jurisdictional variations.

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<sup>13</sup> Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1067 (e.g. "the prototypical use of the privilege by a civil defendant on the witness stand"). Also see Heller, G. W. (1995) "Is "Pleading the Fifth" a Civil Matter?" *The Federal Lawyer* 42(8): 27 at 28.

<sup>14</sup> Heller, G. W. (1995) "Is "Pleading the Fifth" a Civil Matter?" *The Federal Lawyer* 42(8): 27 at 28. For a similar list see Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1067.

<sup>15</sup> E.g. Rule 26, Federal Rules for Civil Procedure (cited in *Campbell v Gerrans*, 592 F2d 1054, 1057 (CA9 1979)); Rule 26.02, Minnesota Rules of Civil Procedure (cited in *Minnesota State Bar Association v Divorce Assistance Association*, 248 NW2d 733, 737 (1976)); and 12 Okla section 482 (1971) (cited by Latrobe, O. R. (1974) "Constitutional Law: Self-incrimination and Court Granted Immunity in Civil Litigation." *Oklahoma Law Review* 27: 243 at 244).

Answers need not be given to interrogatories if the Fifth Amendment is invoked.<sup>16</sup> This is similar to the position in Australasia where the privilege has long been established as a ground for refusing to answer interrogatories.<sup>17</sup> Other American forms of discovery are less familiar.

Deposition questions and requests for admission are not to be found in Australasia. Deposition questions are part of the pre-trial questioning of the other party's witnesses with the results being recorded in writing. Requests for admission enable one party to request the other to admit the truth of any matter within the scope of discovery.

The Fifth Amendment is apparently available to resist both these forms of discovery, although doubts have been expressed.<sup>18</sup> In any event, these forms of discovery do not involve production of documents.

#### (b) DOCUMENT REQUESTS

The Federal Rules in the United States provide that one party can request the other to produce and permit the inspection and copying of documents.

Document requests therefore involve the production of documents. However, they have little in common with the exchange of relevant documents before a civil trial in Australasia.<sup>19</sup>

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<sup>16</sup> E.g. *Campbell v Gerrans*, 592 F2d 1054, 1057 (1979) (privilege invoked by the plaintiffs to avoid answering certain interrogatories which related to their involvement with drugs).

<sup>17</sup> This was clearly established by the English authorities: e.g. *Lamb v Munster* (1882) 10 QBD 110; *Martin v Treacher* (1886) 16 QBD 507. At about the same time the New Zealand courts took a similar approach but with procedural differences: e.g. *Holmes v Furness* (1884) 3 NZLR 416 at 417 (court gives privilege as reason for refusing leave to allow interrogatories to be put at all). The Australian courts simply followed the English approach: e.g. *Hughes v Watson* [1917] VLR 398 at 406 (court upheld objection to answering interrogatories in civil action for libel by following English authority in preference to local statutory provisions which applied only to trial witnesses).

<sup>18</sup> E.g. in *Hickman v Taylor*, 329 US 495, 507-8 (1947) on deposition questions and in Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1067 n17 on requests for admission.

<sup>19</sup> As a means of ensuring the disclosure of all relevant documents, document requests seem less effective than discovery in Australasia because documents must be requested with reasonable particularity.

Document requests are subject to the privilege like the other forms of discovery.<sup>20</sup> Yet it is hard to find reported cases in which document requests have been blocked by the privilege.<sup>21</sup> Too much significance should not necessarily be attached to the absence of reported examples. Pre-trial activity is not widely reported in the United States.<sup>22</sup> Nor are interlocutory appeals encouraged. In the federal courts, for example, interlocutory appeals are delayed until after final judgment.<sup>23</sup>

The real reason for the lack of reported cases probably lies elsewhere. The privilege is only available to resist document requests in accordance with general principles which apply to all types of proceedings.<sup>24</sup> These principles have been established in cases about subpoenas. Most of them have involved criminal proceedings.<sup>25</sup> They will be covered later in this chapter.

### (c) SUBPOENAS

Although document requests are the usual way of obtaining documents from civil parties, documents will be obtained from non-parties by subpoenas *duces tecum*. In some American jurisdictions subpoenas can also be served on civil parties for this purpose. However, very few cases have involved subpoenas in civil proceedings. The earliest was the *Boyd* decision, the first of the

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<sup>20</sup> E.g. Federal Rules of Civil Procedure, Rule 34(a) (power to make document requests) and Rule 26 (discovery subject to privilege).

<sup>21</sup> Sometimes the privilege is said to be invoked in answer to "discovery requests", but that could refer to one of the other modes of discovery: e.g. *Chicago v Reliable Truck Parts Co*, 822 F Supp 1288, 1293 (ND Ill 1993) (individual defendants within their rights to refuse plaintiff's "discovery requests", but details of requests not given).

<sup>22</sup> *Union City Barge Line v Union Carbide Corp*, 823 F2d 129, 134 n10 (CA5 1987) ("Thankfully, most of the mountainous volume of the District Courts' pre-trial activity never reaches the pages of a report or the files of a computer").

<sup>23</sup> E.g. 28 USC section 1291 (Federal Courts of Appeals have jurisdiction over "all final decisions" of District Courts).

<sup>24</sup> Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1067 (defendants may be able to "use the privilege to resist requests and subpoenas for documents to the same extent that they could use it to resist government subpoenas for documents in criminal cases").

<sup>25</sup> E.g. the *Fisher* guidelines mentioned below: Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1067 n19.

“beacons” discussed below.<sup>26</sup> Since *Boyd*, three cases have shown civil parties claiming the privilege successfully to avoid producing documents.<sup>27</sup>

The first case arose during an action under state legislation to restrain the illegal practice of medicine.<sup>28</sup> A lower court had ordered the defendant doctor to produce records in response to a subpoena. His appeal against the order was upheld by the Supreme Court of Oklahoma.<sup>29</sup>

In the second case, an attorney had been held in contempt of court for advising his client to disobey a subpoena to produce allegedly pornographic magazines in civil proceedings.<sup>30</sup> The US Supreme Court upheld the attorney’s appeal. However, it stopped short of saying that the client had a justified claim for the privilege.<sup>31</sup>

The third case arose during an action under state legislation to prevent unlawful practice of the law by a divorce association.<sup>32</sup> A subpoena had been served on the principal of the association to produce records. He had been held in contempt of court for refusing to do so. The Minnesota Supreme Court upheld an appeal against the finding of contempt but stopped short of saying that the witness was protected by the privilege from producing the documents.<sup>33</sup>

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<sup>26</sup> *Boyd v United States*, 116 US 616 (1886).

<sup>27</sup> Heidt, R. (1984) "The Fifth Amendment Privilege and Documents - Cutting *Fisher's* Tangled Line." *Missouri Law Review* 49(3): 439 at 440 n2 cited only three cases in which “courts have explicitly held that a litigant in a private civil case may suppress documents by claiming the privilege”: *Boyd v United States*, 116 US 616 (1886); *Rice v State Board of Medical Examiners*, 257 P2d 292 (1953); and *Minnesota State Bar Association v Divorce Assistance Association*, 248 NW2d 733 (1976). The same three examples were cited in Heidt, R. (1982) "The Conjuror's Circle - the Fifth Amendment Privilege in Civil Cases." *Yale Law Journal* 91(6): 1062 at 1067 n19. The last two are covered here along with *Maness v Meyers*, 419 US 449 (1975).

<sup>28</sup> *Rice v State Board of Medical Examiners*, 257 P2d 292 (1953).

<sup>29</sup> *Rice v State Board of Medical Examiners*, 257 P2d 292, 294 (1953) (the Constitution of Oklahoma was held to be violated by the order for the “a compulsory production of the defendant's records into court in order that they might be used in evidence against his interests”).

<sup>30</sup> *Maness v Meyers*, 419 US 449 (1975).

<sup>31</sup> The trial judge was wrong to assume that the “client was misadvised even to assert the privilege in a civil proceeding, regardless of its ultimate merit”: *Maness v Meyers*, 419 US 449, 465 (1975).

<sup>32</sup> *Minnesota State Bar Association v Divorce Assistance Association*: 248 NW2d 733 (1976).

<sup>33</sup> It quashed the contempt finding because the witness should have been given a “precompliance review of the trial court's rulings on his assertions of privilege”: *Minnesota State Bar Association v Divorce Assistance Association*, 248 NW2d 733, 738 (1976).

#### (d) EFFECT OF *FISHER*

None of those three cases provided convincing authority of any special rule allowing the privilege for documents in civil proceedings. The privilege could only be claimed to resist subpoenas by following principles laid down in criminal proceedings. As discussed later in this chapter, the US Supreme Court in *Fisher* adopted “a wholly new approach” to the availability of the privilege to protect documents.<sup>34</sup>

Two of the three cases were decided before the decision in *Fisher*.<sup>35</sup> The third was decided a year after *Fisher*.<sup>36</sup> The Minnesota Supreme Court noted that *Fisher* might “portend significant departure from the sweeping pronouncements of *Boyd*”.<sup>37</sup> The rest of this chapter will show how significant that departure was.

#### (e) CONCLUSION

Undoubtedly, some useful things can be learnt from the approach of the United States to the privilege in civil proceedings. For example, Chapter V mentioned how adverse inferences are used in the United States to deter exploitation of the privilege in civil proceedings.<sup>38</sup> However, it is difficult to learn any clear lessons from the cases on documentary evidence in civil proceedings.

This is partly because the different method of discovery makes comparison of pre-trial procedures difficult. It is also because the US Supreme Court has held that the privilege should be treated the same in civil and criminal cases. The law on subpoenas in civil proceedings depends upon the uncertain principles developed in the criminal cases.

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<sup>34</sup> Justice Marshall in *Fisher v United States*, 425 US 391, 430 (1976).

<sup>35</sup> *Rice v State Board of Medical Examiners*, 257 P2d 292 (1953); *Maness v Meyers*, 419 US 449 (1975).

<sup>36</sup> *Minnesota State Bar Association v Divorce Assistance Association*, 248 NW2d 733, 739 (1976) (*Fisher* “recently reaffirmed” that “non-private papers are not shielded by the Fifth Amendment”).

<sup>37</sup> *Minnesota State Bar Association v Divorce Assistance Association*, 248 NW2d 733, 739 n2 (1976).

<sup>38</sup> E.g. *Ikeda v Curtis*, 261 P2d 684 (1953).



It is therefore necessary to look at decisions involving criminal proceedings to find out how far the privilege is available to protect documents in civil proceedings. The wider story of the application of the Fifth Amendment to documents can best be told by highlighting three US Supreme Court decisions, each decided in a different century.<sup>39</sup>

### **(3) CIRCLE OF BEACONS**

These three cases can be seen as beacons which show the difficulties encountered in the United States in removing the protection of the privilege from the contents of documents. They chart a course which looks circular and should end in the effective return of protection to the contents of documents. The circle is close to completion, according to a recent concurring opinion in the US Supreme Court.<sup>40</sup>

This chapter will argue that the circular result is not surprising. The protection of the privilege should not have been removed from the contents of documents in the first place. The American experience has shown the folly of doing so.

The first of the beacons is the case of *Boyd*.<sup>41</sup> Although civil, this has usually been regarded as the first major case on the protection of documents by the Fifth Amendment in the United States.<sup>42</sup> The civil proceedings were taken by the customs authorities to obtain forfeiture of illegally imported plate glass. The US Supreme Court held that if the contents of a document were incriminating, the Fifth Amendment protected it from production.

In spite of fundamental problems with *Boyd*, the Fifth Amendment continued to protect the contents of particular documents for ninety years. This ended with

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<sup>39</sup> *Boyd v United States*, 116 US 616 (1886); *Fisher v United States*, 425 US 391 (1976); *United States v Hubbell*, 530 US 27 (2000).

<sup>40</sup> Justices Thomas and Scalia in *United States v Hubbell*, 530 US 27, 49-54 (2000).

<sup>41</sup> *Boyd v United States*, 116 US 616, 29 L Ed 746 (1886).

<sup>42</sup> E.g. see *Fisher v United States*, 425 US 391, 405 (1976).

the decision in *Fisher*, the second of the beacons.<sup>43</sup> The US Supreme Court held in *Fisher* that the Fifth Amendment did not protect the contents of any document unless it had been prepared under compulsion.

That did not leave documents totally without protection from the Fifth Amendment. The Court in *Fisher* recognised that the Fifth Amendment was still available to prevent the production of voluntarily prepared documents if the act of production was “testimonial”. The Court sought to assist the identification of testimonial acts by suggesting the three guidelines of “existence, possession and authenticity”. An act of production would be testimonial if it provided extra evidence of the existence, possession or authenticity of the documents produced.

For nearly thirty years, the American courts have struggled to apply the *Fisher* guidelines. This has led at best to uncertainty, at worst to the guidelines being disregarded. It has also led to the final beacon. In the recent case of *Hubbell* the US Supreme Court suggested yet another interpretation of the *Fisher* guidelines.<sup>44</sup> Under the guideline in *Hubbell* almost all acts of production seem to be testimonial, thereby returning effective protection to the incriminating contents of documents.

The concurring minority opinion in *Hubbell* suggested returning to the position in *Boyd*.<sup>45</sup> This is an attractive solution, but it may be too late. The retreat from *Boyd* has taken place in other areas apart from the *Fisher* guidelines. The retreat from *Boyd* will therefore be examined before dealing with the *Fisher* guidelines themselves.

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<sup>43</sup> *Fisher v United States*, 425 US 391 (1976).

<sup>44</sup> *United States v Hubbell*, 530 US 27 (2000).

<sup>45</sup> *United States v Hubbell*, 530 US 27, 49-54 (2000).

## (C) RETREAT FROM *BOYD*

### (1) DECISION IN *BOYD*

As already mentioned, the decision in *Boyd* was a rare example of civil proceedings in which the Fifth Amendment was applied to documents. However, the civil nature of the proceedings was of little significance.<sup>46</sup> The civil proceedings in question were forfeiture proceedings taken by the government.

The document in question was an invoice for some cases of illegally imported plate glass. The collector of customs had seized them so that they could be forfeited to the government. A lower court had ordered the production of the invoice because the number and value of the cases of glass had been disputed at the trial. The US Supreme Court declared the lower court order to be unconstitutional.

This chapter will discuss later whether the Fifth Amendment was originally intended to protect the contents of documents. The majority opinion in *Boyd* addressed the issue differently. It sought to link the Fifth Amendment with the Fourth Amendment which deals with powers of search and seizure. That link ultimately proved to be unsustainable.

The concurring opinion of Justice Miller stood the test of time rather better than the majority opinion. He relied solely on the Fifth Amendment to explain why the order to produce the invoice was unconstitutional.<sup>47</sup> For an accurate

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<sup>46</sup> In fact, the majority opinion thought that the “information, though technically a civil proceeding, is in substance and effect a criminal one” and of a “quasi-criminal nature”: *Boyd v United States*, 116 US 616, 633-634 (1886).

<sup>47</sup> *Boyd v United States*, 116 US 616, 639 (1886) (“That this is within the protection which the Constitution intended against compelling a person to be a witness against himself, is, I think, quite clear”).

statement of the law at that time, therefore, modern judges and academics look to Justice Miller's opinion.<sup>48</sup>

This chapter does not need to discuss the eventual rejection of the link between the Fourth and Fifth Amendments.<sup>49</sup> However, it will consider how the US Supreme Court retreated from *Boyd* by developing exceptions to the principle that the privilege protected the contents of documents. The first development was part of a broader exception to the Fifth Amendment: collective entities were held not to be entitled to claim the privilege at all.

## (2) COLLECTIVE ENTITY RULE

### (a) SUBSTANCE OF RULE

The collective entity rule started with *Hale v Henkel*.<sup>50</sup> That case established that the Fifth Amendment did not apply to corporations. They could therefore be compelled to produce their records and other documents.<sup>51</sup> The same rule was extended to other separate legal entities.<sup>52</sup> More surprisingly, it was also extended to unincorporated legal forms.<sup>53</sup>

In effect, the papers of sole proprietorships became the only business records which could be protected by the privilege.<sup>54</sup> As a result, individuals who

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<sup>48</sup> Nagareda, R. A. (1999) "Compulsion "To Be A Witness" And The Resurrection of *Boyd*." *New York University Law Review* 74(6): 1575 at 1659 ("For more than a century since his concurrence in *Boyd*, the Supreme Court has been wrong to ignore his guidance"). For similar reliance on Justice Miller's statement, see Alito, S. A. (1986) "Documents and The Privilege Against Self-Incrimination." *University of Pittsburgh Law Review* 48(1): 27 at 35 n37; and Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 132-133.

<sup>49</sup> That process included ill-fated experiments such as the "mere evidence rule" stemming from *Gouled v United States*, 255 US 298 (1921): see Geyh, C. G. (1987) "The Testimonial Component of the Right Against Self-Incrimination." *Catholic University Law Review* 36(Spring): 611 at 628 n83 for the story of how that rule was "born, bred and died".

<sup>50</sup> *Hale v Henkel*, 201 US 43 (1906).

<sup>51</sup> *Hale v Henkel* also established the principle that, unlike search warrants, subpoenas were not subject to any reasonable cause requirements: Stuntz, W. J. (2001) "Commentary; O.J.Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment." *Harvard Law Review* 114(3): 842 at 858.

<sup>52</sup> E.g. *United States v White*, 322 US 694 (1944) (labor unions).

<sup>53</sup> E.g. *McPhaul v United States*, 364 US 372 (1960) (unincorporated political associations); *Bellis v United States*, 417 US 85 (1974) (partnerships).

<sup>54</sup> E.g. *United States v Doe*, 465 US 605 (1984) (records of sole proprietorships protected).

carried on business as sole proprietors had a substantial advantage in litigation.<sup>55</sup> However, the collective entity rule did cover custodians who produced corporate documents.

## (b) CORPORATE CUSTODIANS

The early cases on custodians involved the production of corporate documents which had incriminating contents. It was soon established that a custodian could not claim personal privilege to resist a subpoena for corporate documents if it was addressed to the corporation.<sup>56</sup> Less understandably, the result was the same even if the subpoena was addressed to the custodian rather than the corporation.<sup>57</sup>

The reason for excluding personal privilege was that the corporate custodian was producing the records in only a representative capacity. The privilege was no more available to the corporation's agent than to the corporation itself. If the custodian merely produced the documents and identified them by oral testimony, the Fifth Amendment could not be invoked. However, if the oral testimony went any further, the custodian could claim the privilege to avoid answering self-incriminating questions.<sup>58</sup>

## (3) REQUIRED RECORDS RULE

### (a) SCOPE OF RULE

The US Supreme Court removed the protection of the privilege from many documents through the "required records" rule. This made the privilege inapplicable to business documents which were required to be kept by law.<sup>59</sup> The collective entity rule did not cover business documents which belonged to

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<sup>55</sup> Heidt, R. (1984) "The Fifth Amendment Privilege and Documents - Cutting *Fisher's* Tangled Line." *Missouri Law Review* 49(3): 439 at 441-2. However, as described later in this chapter, they are sometimes deprived of this advantage by the required records rule.

<sup>56</sup> *Wilson v United States*, 221 US 361, 385 (1911).

<sup>57</sup> *Dreier v United States*, 221 US 394, 400 (1911).

<sup>58</sup> *Curcio v United States*, 354 US 118, 123-4 (1957).

<sup>59</sup> *Shapiro v United States*, 335 US 1 (1947); *Grosso v United States*, 390 US 62 (1967).

sole proprietors, but such documents could be caught by the required records rule.

The required records rule had its origins in the US Supreme Court's decision in *Shapiro*.<sup>60</sup> This held that the documents in question were not covered by the privilege. They were “required records” because price control legislation required them to be kept and they had “public aspects”.<sup>61</sup> However, the *Shapiro* rule was reinterpreted by the US Supreme Court twenty years later in *Grosso*.<sup>62</sup>

### (b) THREE CRITERIA

In *Grosso* the US Supreme Court extracted three criteria from the *Shapiro* decision: the purposes of inquiry must be essentially regulatory; the records must be of a kind customarily kept for satisfying such inquiry; and the records must have assumed public aspects which render them analogous to public documents.<sup>63</sup> The documents in *Grosso* were government forms which required details of receipts from illegal betting, so that excise tax could be assessed.

The US Supreme Court held that the requirement to complete the forms would violate the privilege. They were not public documents because they were not really aimed at the public in general.<sup>64</sup> The required records rule was therefore inapplicable.

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<sup>60</sup> *Shapiro v United States*, 335 US 1, 33 (1947). Chief Justice Vinson adopted the definition of required records from *Wilson v United States*, 221 US 361, 380 (1911) (“records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of government regulation and the enforcement of restrictions”).

<sup>61</sup> *Shapiro v United States*, 335 US 1, 51 (1947). As Justice Frankfurter pointed out in his dissenting opinion, a requirement to keep records does not necessarily give them “public aspects”.

<sup>62</sup> *Grosso v United States*, 390 US 62 (1967).

<sup>63</sup> *Grosso v United States*, 390 US 62, 67-68 (1967).

<sup>64</sup> *Grosso v United States*, 390 US 62, 68 (1967) (the “statutory obligations are directed almost exclusively to individuals inherently suspect of criminal activities” and the “information here lacks every characteristic of a public document”).

## (c) REGULATION OR ENFORCEMENT?

The reasons for the required records rule are unclear. The original rule in *Shapiro* referred to “government regulation and enforcement of restrictions” as if the two terms had the same meaning.<sup>65</sup> It is true that regulation only works if it is combined with effective enforcement, but regulation and enforcement do not necessarily create the same need for the privilege.

The privilege is needed to protect against abuses in enforcement. It should not be used as a tool to improve enforcement. The information in *Grosso* was being sought for enforcement. The illegal activity was not really being “regulated”.

The line between enforcement and regulation is not always easy to draw. Even in the United States, the required records rule has not been pushed to its full extent.<sup>66</sup> Yet the ALRC recently cited the rule to support its argument for the removal of the privilege from pre-existing records.<sup>67</sup>

## (4) DOCUMENTS AS PHYSICAL EVIDENCE

### (a) TESTIMONIAL LIMITATION

If documents were treated strictly as objects, they would not nowadays receive the protection of the Fifth Amendment. For practical reasons, the American courts effectively removed the production of physical or “real” evidence from the scope of the privilege. This removal coincided with the increasing use of forensic evidence in the United States around 1900.<sup>68</sup> Before 1900 the view

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<sup>65</sup> *Shapiro v United States*, 335 US 1, 51 (1947).

<sup>66</sup> Alito, S. A. (1986) “Documents and The Privilege Against Self-Incrimination.” *University of Pittsburgh Law Review* 48(1): 27 at 73 (the “Supreme Court has been wary of embracing the required records rule, and governmental authorities have been markedly reluctant to rely on it”).

<sup>67</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.148.

<sup>68</sup> Geyh, C. G. (1987) “The Testimonial Component of the Right Against Self-Incrimination.” *Catholic University Law Review* 36(Spring): 611 at 627 (“With the rise of a professional criminal class, and developments in forensic science to combat the rise, came an ever-increasing government need for access to physical evidence and a judicial interpretation to accommodate that need”). Also see Cole, L. (2002) “The Fifth Amendment and Compelled Production of Personal Documents After *United States v*

held by the majority of courts was that the privilege “encompassed a right to refuse to cooperate actively or passively with prosecutorial authorities”.<sup>69</sup> This right was effectively removed in two US Supreme Court decisions over fifty years apart: *Holt* and *Schmerber*.<sup>70</sup>

One of the issues in *Holt* was whether the defendant's Fifth Amendment rights were breached by the use of evidence about a blouse which he had been compelled to wear. The evidence that the blouse had fitted him was held to be admissible by the US Supreme Court.<sup>71</sup> The court in *Holt* was influenced by the view attributed to Wigmore that, for practical reasons of law enforcement, the privilege should be limited to “communicative” or “testimonial” acts.<sup>72</sup>

In *Schmerber* the US Supreme Court held by majority that the Fifth Amendment did not protect an accused against being the source of physical evidence but that testimonial communications were still protected.<sup>73</sup> A minority opinion in *Schmerber* criticised the majority for being overly influenced by Wigmore's testimonial limitation.<sup>74</sup> Yet the majority rejected

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*Hubbell - New Protection for Private Papers?* *American Journal of Criminal Law* 29(2): 124 at 143, (narrowing of the privilege came with the application of the Fifth Amendment to the States because they were primarily responsible for criminal law).

<sup>69</sup> Geyh, C. G. (1987) "The Testimonial Component of the Right Against Self-Incrimination." *Catholic University Law Review* 36(Spring): 611 at 621. Geyh cites numerous cases from around 1900 to refute the statement in the majority opinion in *Schmerber* that history and “a long line of authorities in lower courts have consistently limited” the protection of the privilege to testimonial evidence: *Schmerber v California*, 384 US 757, 762-3 (1966).

<sup>70</sup> *Holt v United States* 218 US 245 (1910); *Schmerber v California*, 384 US 757 (1966).

<sup>71</sup> E.g. Justice Holmes in *Holt v United States*, 218 US 245, 252-253 (1910) (the privilege is “a prohibition of the use of physical or moral compulsion to extort communication from him, not an exclusion of his body as evidence when it may be material”). Compare with Verax, T. (1648) *Relations and Observations Historicall and Politick upon the Parliament begun Anno Dom. 1640* (London) at 53 (the Committee of Examinations wanted Clement Walker to don a grey suit to see if he matched the description of “an elderly Gentleman, of low stature, in a Gray suit”).

<sup>72</sup> Geyh, C. G. (1987) "The Testimonial Component of the Right Against Self-Incrimination." *Catholic University Law Review* 36(Spring): 611 at 628.

<sup>73</sup> *Schmerber v California*, 384 US 757, 764 (1966) (“the privilege is a bar against compelling ‘communications’ or ‘testimony’, but that compulsion which makes a suspect or accused the source of ‘real or physical evidence’ does not violate it”).

<sup>74</sup> In his minority opinion Justice Black expressed regret at seeing the word which Wigmore “used to narrow the Fifth Amendment's protection play such a major part in this Court's opinions”: *Schmerber v California*, 384 US 757, 774 (1966).



Wigmore's view that "testimonial" communications were confined to oral evidence.<sup>75</sup>

Words like "testimonial" or "communicative" are not clear or precise.<sup>76</sup> Nevertheless, they provided the basis for denying Fifth Amendment protection to physical evidence.

## (b) PHYSICAL EVIDENCE

The American courts after *Schmerber* consistently held that the Fifth Amendment did not protect against the production of physical evidence other than documents.<sup>77</sup> In some cases that protection was denied even where the production of the physical evidence had some identifiable testimonial element.<sup>78</sup> This approach at times led the US Supreme Court into obscure analysis.<sup>79</sup>

The communicative aspect of documents provided an important reason for distinguishing them from other physical evidence. Even in 1966 the majority of the US Supreme Court regarded it as "clear" that the protection of the

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<sup>75</sup> *Schmerber v California*, 384 US 757, 763 n7 (1966). The majority opinion in *Schmerber* was "not to be understood as adopting the Wigmore formulation" in so far as it would have confined the privilege to "the employment of legal process to *extract from the person's own lips* an admission of guilt". The latter quotation is taken by the majority opinion from Wigmore, J. H. (1961) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) para 2263 page 378 (Emphasis in Wigmore).

<sup>76</sup> *Schmerber v California*, 384 US 757, 774 (1966) *per* Justice Black (not "models of clarity and precision as the Court's rather labored explication shows").

<sup>77</sup> *Schmerber v California*, 384 US 757 (1966) (Fifth Amendment does not protect against compulsion to give a blood sample); *United States v Wade*, 388 US 218 (1967) (Fifth Amendment does not protect against compulsion to participate in an identity parade and to speak certain words); *Gilbert v California*, 388 US 263 (1967) (Fifth Amendment does not protect against compulsion to give a handwriting sample); *California v Byers*, 402 US 424 (1971) (Fifth Amendment does not relieve motorist from obligation to stop and leave name and address at the scene of an accident); *United States v Prewitt*, 553 F2d 1082, 1085-1086 (CA7 1977) (Fifth Amendment does not prevent arrested person from being asked whether he used any aliases).

<sup>78</sup> E.g. it could in some circumstances be both testimonial and incriminating to provide examples of hand-writing or to give names and addresses at an accident scene: Geyh, C. G. (1987) "The Testimonial Component of the Right Against Self-Incrimination." *Catholic University Law Review* 36(Spring): 611 at 635-6.

<sup>79</sup> E.g. the Fifth Amendment does not apply to handwriting examples because they are "strictly nontestimonial, not because they are insufficiently testimonial": *Fisher v United States*, 425 US 391, 429 (1976).

privilege covered all forms of communication.<sup>80</sup> Until 1976, therefore, the contents of documents received the protection of the privilege except where it was denied by the required records rule or the collective entity rule. The personal nature of documents was also seen as a reason for protecting them.

## **(5) PERSONAL PAPERS**

### **(a) PROPERTY RIGHTS RATIONALE**

The retreat from *Boyd* in relation to personal papers has been a progression through three rationales: “property rights”, “privacy” and “implied admissions”.<sup>81</sup> The decision in *Boyd* reflected the property rights rationale then prevailing.<sup>82</sup> This rationale allowed an owner's property law rights to place personal papers beyond the reach of the government and other litigants.

This rationale allowed the recipient of a subpoena to withhold almost all personal documents. The effective result was that the contents of those documents were protected.

### **(b) PRIVACY RATIONALE**

During the early 1900s the property rights rationale gave way to the privacy rationale. In theory, the privacy rationale only enabled the Fifth Amendment to protect the contents of those personal documents in which the owner maintained an expectation of privacy. This appeared to protect fewer documents than the property rights rationale. In practice, the privacy rationale was not universally accepted.

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<sup>80</sup> *Schmerber v California*, 384 US 757, 762 (1966) (“reaches an accused's communications, whatever form they may take and the compulsion of responses, which are also communications, for example, compliance with a subpoena to produce one's papers”).

<sup>81</sup> Heidt, R. (1984) “The Fifth Amendment Privilege and Documents - Cutting *Fisher's* Tangled Line.” *Missouri Law Review* 49(3): 439 at 442-3.

<sup>82</sup> Heidt, R. (1984) “The Fifth Amendment Privilege and Documents - Cutting *Fisher's* Tangled Line.” *Missouri Law Review* 49(3): 439 at 442. Also see Cole, L. (2002) “The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?” *American Journal of Criminal Law* 29(2): 124 at 133 (“based on an ill-conceived property rights rationale”).

As late as 1974 the US Supreme Court said that the Fifth Amendment “applies to the business records of the sole proprietor as well as to personal documents containing more intimate information about the individual's private life”.<sup>83</sup> That sounded more like the property rights rationale than the privacy rationale. In any event, both rationales were rejected soon afterwards.

### (c) IMPLIED ADMISSIONS RATIONALE

In *Fisher* the Supreme Court “rejected the privacy rationale and adopted the implied admissions rationale”.<sup>84</sup> The implied admissions rationale meant that the production of documents could only be refused if the act of production involved implicit self-incriminating admissions. This rationale took little account of the personal nature of the contents of documents. It addressed documentary evidence in a radically different way.

The emphasis moved from the contents of the documents to the act of producing them. In a sense, the documents were now seen as pieces of physical evidence rather than as extensions of personal testimony. In practice the American courts denied the protection of the Fifth Amendment to other physical evidence. Yet the personal nature of documents places them somewhere between physical evidence and personal testimony.

### (d) SPECIAL NATURE

The *Fisher* guidelines acknowledged the special nature of documents. Even if documents were to be treated as physical evidence, they were still physical evidence of a special kind. Since the early 1900s the practicalities of law enforcement in the United States have been reflected in the effective withdrawal of Fifth Amendment protection from physical evidence. The same

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<sup>83</sup> *Bellis v United States*, 417 US 85, 87-88 (1974).

<sup>84</sup> Heidt, R. (1984) "The Fifth Amendment Privilege and Documents - Cutting *Fisher's* Tangled Line." *Missouri Law Review* 49(3): 439 at 441. Also see Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 142 (“rejected both property rights and personal privacy as rationales”).

rules have not been applied to documents.<sup>85</sup> Before looking at the *Fisher* guidelines, it is worth considering the features which make documents special.

The majority opinion in *Fisher* had difficulty finding a rationale for applying the Fifth Amendment to private documents.<sup>86</sup> The lower courts had less difficulty: for example, seeing documents as extensions of personal thoughts.<sup>87</sup> One writer noted the intuitive link between oral testimony and the later compulsory production of the same words written in a document.<sup>88</sup> With it goes the feeling that privacy is somehow breached by the compulsory production of personal documents.<sup>89</sup>

The intuitive feelings are not easily shed. The US Supreme Court decided in *Fisher* that the contents of the documents should no longer be protected, but it did not leave documents totally unprotected. The protection was moved to the act of producing those documents.<sup>90</sup>

Even in *Fisher*, one Justice believed that similar protection would result.<sup>91</sup> That belief is borne out in the recent *Hubbell* decision.<sup>92</sup> Broad protection of the act of production appears to give effective protection to the contents of

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<sup>85</sup> Contrary to the assumption by the NZLC: e.g. New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) paras 198-203.

<sup>86</sup> *Fisher v United States*, 425 US 391, 409 (1976) ("the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment").

<sup>87</sup> *In Re Grand Jury Subpoena Duces Tecum Dated May 9, 1990*, 741 F Supp 1059, 1068 (SDNY 1990) ("an appealing, defensible, analytical proposition that the compelled production of one's personal papers is testimonial to the extent that those papers are no more than an extension of one's thoughts").

<sup>88</sup> Uviller, H. R. (2001) "Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook." *The Journal of Criminal Law and Criminology* 91(2): 311 at 329 (self-inculpatory words spoken under compulsion "do not seem intuitively so different from words spoken or written freely but produced under compulsion of the subpoena *duces tecum*").

<sup>89</sup> Uviller, H. R. (2001) "Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook." *The Journal of Criminal Law and Criminology* 91(2): 311 at 328 ("we do sympathize, viscerally, with the idea that private records and papers should not be subject to invasion or compulsory process in the same way that other physical evidence is").

<sup>90</sup> Justice Marshall in *Fisher v United States*, 425 US 391, 431 ("technical and somewhat esoteric focus on the testimonial elements of production rather than on the content of the evidence which the investigator seeks").

<sup>91</sup> Justice Marshall in *Fisher v United States*, 425 US 391, 432 (1976) (the new guidelines would "provide substantially the same protection as our prior focus on the contents of the documents").

<sup>92</sup> *United States v Hubbell*, 530 US 27 (2000).

documents. To understand why, it is necessary to look at the *Fisher* guidelines themselves.

## **(D) PROBLEMS WITH FISHER**

### **(1) DECISION IN FISHER**

In *Fisher* the US Supreme Court held that the Inland Revenue Service could by summons compel the taxpayer's attorneys to produce working papers prepared by his accountants.<sup>93</sup> The papers were relevant to the taxpayer's civil and criminal tax liability. The decision was based upon the crucial finding that the papers could have been compelled from the taxpayer himself.

In making this finding the Court consciously broke new ground.<sup>94</sup> Until then, production of documents could be resisted simply because the contents of those documents were incriminating. Since then, the contents have only attracted the protection of the privilege if the preparation of the document has been compelled.<sup>95</sup>

However, the Court also held in *Fisher* that when documentary evidence had to be produced in response to a subpoena, the act of production had communicative aspects of its own. The starting-point was the implicit admission of the existence, possession and authenticity of the documents being produced.<sup>96</sup> If the act of production involved other admissions, the act could attract the protection of the Fifth Amendment, even though the contents of the document no longer did.

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<sup>93</sup> *Fisher v United States*, 425 US 391 (1976).

<sup>94</sup> E.g. Justice Marshall in *Fisher v United States*, 425 US 391, 430 (1976) ("a wholly new approach for deciding when the Fifth Amendment privilege against self-incrimination can be asserted to bar production of documentary evidence").

<sup>95</sup> *Fisher v United States*, 425 US 391, 409 (1976); *United States v Doe*, 465 US 605, 611-612 (1984); *United States v Hubbell*, 530 US 27, 35-36 (2000).

<sup>96</sup> *Fisher v United States*, 425 US 391; 410 (1976) ("Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession and control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena").

## (2) GUIDELINES

### (a) IMPLICIT ADMISSIONS

Under the new approach in *Fisher* the Fifth Amendment would protect as “testimonial” whatever was said or done to raise the implicit admissions of existence, admission and authenticity “to the level of testimony within the protection of the Fifth Amendment”.<sup>97</sup> Unfortunately, those guidelines have not provided a clear test for deciding whether an act of production should receive the protection of the privilege.<sup>98</sup>

The guidelines have been the subject of two conflicting approaches.<sup>99</sup> They can be applied broadly so that they almost always protect the act of production and, in effect, the contents of documents. Equally, they can be applied narrowly so that the act of production is protected only in rare cases.

### (b) MANNA FROM HEAVEN

The actual decision in *Fisher* was seen as support for the narrow approach. The majority held that, on the facts, the act of production did not raise the implicit admissions to the level of testimony and did not therefore attract the protection of the Fifth Amendment.<sup>100</sup> This gave rise to the view that the guidelines would be interpreted to exclude the Fifth Amendment in most cases. The privilege would only be available where “the prosecutor proposes to use the evidence of the subpoena as inculpatory in itself”.<sup>101</sup> The documents themselves would be treated like “manna from heaven”.<sup>102</sup>

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<sup>97</sup> *Fisher v United States*, 425 US 391, 411 (1976).

<sup>98</sup> The Court's analysis “ultimately would raise more questions than it answered”: see Cole, L. (2002) “The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?” *American Journal of Criminal Law* 29(2): 124 at 146.

<sup>99</sup> McLennan, R. (2001) “Does Immunity Granted Really Equal Immunity Received?” *The Journal of Criminal Law and Criminology* 91(2): 469 at 494 (“the same historical issues and holdings regarding the testimonial aspects of compelled production are discussed in nearly every Fifth Amendment compelled production case, because there is no bright line test to enforce”).

<sup>100</sup> *Fisher v United States*, 425 US 391, 411 (1976) (production was an act of surrender, not a testimonial act, because the existence and location of the documents were a foregone conclusion and the taxpayer added little by conceding their authenticity).

<sup>101</sup> Uviller, H. R. (2001) “Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook.” *The Journal of Criminal Law and Criminology* 91(2): 311 at 312. This was the legal

If this approach ever reflected the prevailing view in the US Supreme Court, it no longer does so.<sup>103</sup> It was never universally accepted in the lower courts.<sup>104</sup> That was where it needed to be accepted for reasons which were evident in *Doe*.<sup>105</sup>

### (c) DECISION IN *DOE*

In *Doe* the respondent was the sole proprietor of several businesses. He successfully invoked the privilege to resist five grand jury subpoenas which required production of the records of those businesses. The act of production of the business records was held by the US Supreme Court to involve testimonial self-incrimination.

The Fifth Amendment was claimed only for the act of production of the documents.<sup>106</sup> The contents of the documents did not themselves attract the protection of the Fifth Amendment because they were not prepared under compulsion. Justice O'Connor left no room for doubt about this during her concurring opinion.<sup>107</sup>

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position which he had for over twenty years "carefully explained to bewildered students" at Columbia University.

<sup>102</sup> Judge Williams dissenting in the Court of Appeals in *United States v Hubbell*, 167 F3d 552, 597 (CADC 1999) (act of production of documents has no testimonial aspect when the prosecutor "has only used information that he would have had if the documents had appeared in his office, unsolicited and without explanation").

<sup>103</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 182-183 (*Hubbell* "permanently put to rest the 'manna from heaven' conception of the act of production privilege").

<sup>104</sup> E.g. the "manna from heaven" approach was specifically rejected by the Court of Appeals: *United States v Hubbell*, 167 F3d 552, 583 (CADC 1999).

<sup>105</sup> *United States v Doe*, 465 US 605 (1984).

<sup>106</sup> As Justice Marshall's opinion pointed out, the case before them "presented nothing remotely close to the question which Justice O'Connor eagerly poses and answers": *United States v Doe*, 465 US 605, 619 (1984). Nevertheless, Uviller still thought that "the coup de grace was delivered to the old *Boyd* doctrine by Justice O'Connor": see Uviller, H. R. (2001) "Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook." *The Journal of Criminal Law and Criminology* 91(2): 311 at 330. Also see Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 128 ("since *Doe*, most of the federal courts of appeals have followed her lead").

<sup>107</sup> E.g. "the Fifth Amendment provides no protection for the contents of private papers of any kind" and the Court's decision in *Fisher* "sounded the death knell for *Boyd*": *United States v Doe*, 465 US 605, 618 (1984).

This case was different from *Fisher* because the District Court and the Court of Appeals had both held that the act of production would do more than simply compel the respondent to “admit that the records exist, that they are in his possession, and that they are authentic”.<sup>108</sup> The District Court found the necessary testimonial element in the government “attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself”.<sup>109</sup>

Since that is the purpose of most subpoenas, the District Court was apparently giving to the Fifth Amendment a broad interpretation which would protect most documents. Yet the US Supreme Court affirmed the testimonial nature of this act of production. It would not overturn the District Court's decision “unless it has no support in the record”, as well as being “reluctant to disturb findings of fact in which two courts below have concurred”.<sup>110</sup>

#### (d) LOWER COURTS

Some of the early decisions suggested ignorance of the *Fisher* guidelines.<sup>111</sup> More usually, the lower courts have recognised that the focus for Fifth Amendment protection has changed.<sup>112</sup> Undoubtedly, the lower courts have been confused by the new approach.<sup>113</sup>

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<sup>108</sup> *United States v Doe*, 465 US 605, 608 (1984). For District Court see *In Re Grand Jury Empanelled March 19, 1980*, 541 F Supp 1, 3 (DNJ 1981) (rejected government's argument that “the existence, possession and authenticity of the documents can be proved without his testimonial communication”). For Court of Appeals see *In Re Grand Jury Empanelled March 19, 1980*, 680 F2d 327, 335 (CA3 1982) (the government did not know “as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control”).

<sup>109</sup> *In Re Grand Jury Empanelled March 19, 1980*, 680 F2d 327, 335 (CA3 1982).

<sup>110</sup> *United States v Doe*, 465 US 605, 613 (1984).

<sup>111</sup> E.g. even in 1980, a Court of Appeals could state as “a firmly embedded tenet of American constitutional law that the fifth amendment absolutely protects an accused from having to produce, under government compulsion, self-incriminating private papers”: *In Re Grand Jury Proceedings*, 632 F2d 1033, 1042 (CA3 1980) (attorney-client privilege protects pocket diaries from grand jury subpoena because client would have been covered by the Fifth Amendment).

<sup>112</sup> *United States v Wujkowski*, 929 F2d 981, 983 (CA4 1991) (“shifted to whether the act of production associated with relinquishing an item would be self-incriminating”) (appointment books and records relating to vacation home not covered by Fifth Amendment).

<sup>113</sup> Heidt, R. (1984) “The Fifth Amendment Privilege and Documents - Cutting *Fisher's* Tangled Line.” - *Missouri Law Review* 49(3): 439 at 443 n14 (“*Fisher* has produced utter confusion in the lower courts”). Also see Cole, L. (2002) “The Fifth Amendment and Compelled Production of Personal



That has sometimes stopped the Fifth Amendment being upheld.<sup>114</sup> However, more often the courts have responded to “a standard pettifogging in principle and unworkable in practice” and “so dubious and difficult to apply” by upholding claims of privilege.<sup>115</sup> That is not surprising. The government will rarely know which documents are relevant. It will therefore be unable to specify them in the subpoena or provide its own witnesses to authenticate them.<sup>116</sup>

Mostly, the government will be relying upon the act of production to find out about relevant documents. In a typical case, a taxpayer successfully invoked the privilege to resist a summons from the Inland Revenue Service.<sup>117</sup> The summons required him to produce all documents and records reflecting his income for the 1988 tax year. The IRS agent who served the summons admitted having no specific knowledge of the records. The District Court therefore held that that the act of production was testimonial.<sup>118</sup>

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Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 147 (“the confusion and criticism that the *Fisher* opinion has spawned in the twenty-five years since it was decided”).

<sup>114</sup> E.g. one Court of Appeals distinguished *Boyd* on the basis that it was a case on business documents: *In Re Grand Jury Subpoena Duces Tecum*, 1 F3d 87, 92 (CA2 1993) (contents of personal diary or calendar not covered by Fifth Amendment).

<sup>115</sup> Thus “individuals and sole proprietorships generally remain able to suppress documents in their possession” Heidt, R. (1984) “The Fifth Amendment Privilege and Documents - Cutting *Fisher's* Tangled Line.” *Missouri Law Review* 49(3): 439 at 443 n14 citing e.g. *United States v Helina*, 549 F2d 713, 716 (CA9 1977) (government does not even challenge, and court upholds, taxpayer's right under the Fifth Amendment to refuse to produce books and records during IRS criminal investigation). Also see Heidt, R. (1984) “The Fifth Amendment Privilege and Documents - Cutting *Fisher's* Tangled Line.” *Missouri Law Review* 49(3): 439 at 443 (“most persons have remained able to suppress their documents”) and at 441 n6 (while the test in *Fisher* “severely restricts the ability of a sole proprietor to suppress documents, many courts continue to allow sole proprietors to suppress all business documents”).

<sup>116</sup> The facts of *Fisher* were exceptional because the government had prior knowledge of the location and existence of the documents: Cole, L. (2002) “The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?” *American Journal of Criminal Law* 29(2): 124 at 147.

<sup>117</sup> *United States v Berry*, 807 F Supp 439 (WDTenn 1992).

<sup>118</sup> *United States v Berry*, 807 F Supp 439, 442 (WDTenn 1992) (the taxpayer was forced “not only to verify the existence of such records ... but also that the documents are in his possession and control, that they are reliable and authentic, and that they are indeed the specific records called for”).

An FBI lawyer wrote in 1988 of “the relatively few limits that privilege places upon government efforts to gain custody of documents for use as evidence in a criminal prosecution”.<sup>119</sup> Even though the District Courts have applied the guidelines broadly, many documents have fallen outside the scope of the privilege because of the collective entity and required records rules. Those rules have also been confused by the *Fisher* guidelines.

### (3) REQUIRED RECORDS RULE

The *Fisher* guidelines needed to be related to the required records rule. It was even suggested in 1986 that “the new analytical framework of *Fisher* and *Doe* provides a firmer basis for this unstable doctrine”.<sup>120</sup> The lower courts have taken a different view.<sup>121</sup>

In a 1994 Court of Appeals decision, the effect of *Fisher* was considered directly.<sup>122</sup> The Court put forward several convincing reasons for preserving the required records rule.<sup>123</sup> It therefore upheld that rule.<sup>124</sup>

There was more difficulty with the effect of *Fisher* on the collective entity rule. This arose in the context of custodians producing corporate documents which were personally incriminating.

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<sup>119</sup> Sauls, J. S. (1988) "Documents and Compulsory Self-incrimination: Fifth Amendment Considerations." *FBI Law Enforcement Bulletin* 57(12): 17 at 21.

<sup>120</sup> Alito, S. A. (1986) "Documents and The Privilege Against Self-Incrimination." *University of Pittsburgh Law Review* 48(1): 27 at 74.

<sup>121</sup> The “lower courts have generally held that *Fisher* and *Doe* do not disturb the required records rule”: Alito, 1986 #385] at 74 n210.

<sup>122</sup> *In Re Grand Jury Subpoena*, 21 F3d 226, 228 (CA8 1994) (it was accepted that the records were covered by a grand jury subpoena, that they qualified as required records, and that “the act of production would be self-incriminating. The sole issue is whether the required records exception applies to an incriminating act of production by a sole proprietor”).

<sup>123</sup> E.g. the purpose of regulatory schemes would be frustrated by non-disclosure; individuals waived their privilege by participating; and little would be admitted by the production of documents which were publicly available: *In Re Grand Jury Subpoena*, 21 F3d 226, 228 (CA8 1994)

<sup>124</sup> *In Re Grand Jury Subpoena*, 21 F3d 226, 230 (CA8 1994) (“will apply to the act of production by a sole proprietor even where the act of production could involve compelled testimonial self-incrimination”).

## (4) CORPORATE CUSTODIANS

### (a) PERSONAL DOCUMENTS

Before *Fisher* the Fifth Amendment could be invoked to resist the production of documents which belonged to the custodian personally. The collective entity rule did not apply to personal documents even if they related to the affairs of a collective entity. Contentious issues of fact could arise with documents usually regarded as personal, such as pocket diaries and desk calendars.<sup>125</sup>

After 1976, personal documents of a corporate custodian still avoided the collective entity rule, but the act of producing them had to satisfy the *Fisher* guidelines.<sup>126</sup> Greater difficulty arose with the production of corporate documents which were personally incriminating to the custodian producing them. In that situation, the US Supreme Court decided in *Braswell* that the collective entity rule should prevail.<sup>127</sup>

### (b) RELEVANCE OF AMERICAN LAW

The position of corporate custodians is of particular interest in both Australia and New Zealand. The position in those jurisdictions will be discussed in detail in the next chapter. The question is whether they go down the same path as the United States.

*Braswell* was decided by the barest of majorities, but the closeness of the decision did not reflect doubts about the new *Fisher* guidelines. It was generally accepted that *Fisher* had moved the Fifth Amendment protection from the contents of a document to the act of production. However, the

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<sup>125</sup> E.g. *In Re Grand Jury Subpoena Duces Tecum Dated April 23, 1981, Witness*, 657 F2d 5, 8 (CA2 1981) (rules of interpretation suggested to decide whether document was personal or not).

<sup>126</sup> For discussion of the confusion between a "personal" claim to the privilege and "personal" property, see Heidt, R. (1984) "The Fifth Amendment Privilege and Documents - Cutting *Fisher's* Tangled Line." *Missouri Law Review* 49(3): 439 at 441 n5.

<sup>127</sup> *Braswell v United States*, 487 US 99 (1988).

majority opinion followed previous decisions on the collective entity rule.<sup>128</sup> Those decisions had been made at a time when the contents of documents of individuals had been protected.

### (c) DECISION IN *BRASWELL*

A federal grand jury issued a subpoena to Braswell in his capacity as president of two corporations. He was required to produce their books and records. He invoked the Fifth Amendment to resist the subpoena, relying upon two main arguments.

His first argument was that special circumstances made him an exception to the collective entity rule. He had formerly been sole proprietor of the businesses which were now owned by the corporations. He had exclusive control of the share structure and the management of each corporation. The majority opinion held that the collective entity rule still applied to him.<sup>129</sup>

His second and more important argument was that the previous cases on corporate custodians had been decided when the Fifth Amendment protected the contents of the documents. The protection had now shifted to the act of production. He relied on authority from the Court of Appeals that the *Fisher* guidelines for acts of production had changed the rules for production by custodians.<sup>130</sup>

The majority opinion rejected this argument. It held that *Fisher* did not displace the collective entity rule or its underlying agency rationale.<sup>131</sup>

Braswell was producing the corporate records as agent. This made his personal

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<sup>128</sup> E.g. *Dreier v United States*, 221 US 394 (1911); *Wilson v United States*, 221 US 361, 380 (1910).

<sup>129</sup> *Braswell v United States*, 487 US 99, 102 (1988) (argument rejected that “the collective entity doctrine does not apply when a corporation is so small that it constitutes nothing more than the individual's alter ego”).

<sup>130</sup> E.g. *In Re Grand Jury Matter (Brown)*, 768 F2d 525, 528 (CA3 1985) (the significant factor was “neither the nature of the entity which owned the documents, nor the contents of the documents, but rather the communicative or noncommunicative nature of the arguably incriminating disclosures sought to be compelled”).

<sup>131</sup> *Braswell v United States*, 487 US 99, 100 (1988) (*Fisher* had not “rendered the collective entity rule obsolete. The agency rationale undergirding the collective entity decisions... survives”).

incrimination irrelevant, according to past case-law. The *Fisher* guidelines were simply not needed.

The majority opinion would have been more convincing if it had stopped there. However, having declared that the collective entity rule survived *Fisher*, the majority opinion then held that the act of production by Braswell could not be used in evidence in a criminal prosecution against him. The act of production received the protection of *de facto* use immunity, even though it had been denied the protection of the Fifth Amendment by the collective entity rule. The practical effect of the decision remains unclear.

#### (d) MINORITY IN *BRASWELL*

There is no need to discuss the minority opinions in detail. Dissent by four out of nine Justices showed that the issues were not simple. However, none of those Justices suggested that the incriminating contents of documents provided the basis for the privilege to be claimed by corporate custodians.<sup>132</sup>

The closeness of the decision reflected disagreement over the proper protection for acts of production of documents. For the purposes of the appeal, the act of production had been conceded as being testimonial and incriminating.<sup>133</sup> The minority wanted to grant use and derivative use immunity to the custodian to the extent that the act of production was testimonial and incriminating.<sup>134</sup>

The majority argued that the difficulty of prosecuting corporate crime made such immunity unacceptable.<sup>135</sup> As Chapter IV discussed, a similar argument has arisen in other jurisdictions. The minority opinion had two answers, both of which bear repetition.

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<sup>132</sup> *Braswell v United States*, 487 US 99, 120 (1988).

<sup>133</sup> *Braswell v United States*, 487 US 99, 122 (1988).

<sup>134</sup> *Braswell v United States*, 487 US 99, 130 (1988).

<sup>135</sup> *Braswell v United States*, 487 US 99, 117 (1988).

The first, and most fundamental, is that the text of the Fifth Amendment does not authorize exceptions premised on such rationales. Second, even if it were proper to invent such exceptions, the dangers prophesied by the majority are overstated.<sup>136</sup>

### (e) AGENCY ANALYSIS

In Australasia the contents of documents receive the protection of the privilege. Since 1976 the Fifth Amendment has not provided such protection in the United States, but the persuasive authority of the *Braswell* decision cannot be dismissed simply for that reason. Before 1976 the contents of documents were protected in the United States. Even then, the Fifth Amendment did not protect the custodian of corporate records who was personally incriminated by producing them.

According to the minority in *Braswell*, corporate custodians were victims of the familiar exaggerated argument: the privilege is an insurmountable barrier to the successful prosecution of corporate crime. The result is unfair. This becomes particularly obvious when statutes make companies and their officers concurrently liable for the same offences. In that situation, the custodian will be incriminated personally by producing corporate documents which incriminate the company.

Much of the unfairness results from the agency analysis underlying the American case-law. This analysis assumes the production of corporate documents to be a mechanical act without consequences for anyone except the company. The minority opinion in *Braswell* justifiably dismissed that assumption as a fiction.<sup>137</sup> Arguably, the majority justices acknowledged the criticisms of the agency analysis by giving *de facto* use immunity to the act of

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<sup>136</sup> *Braswell v United States*, 487 US 99, 129 (1988).

<sup>137</sup> *Braswell v United States*, 487 US 99, 127 (1988) (“The heart of the matter, as everyone knows, is that the Government does not see *Braswell* as a mere agent at all”). Also *Braswell v United States*, 487 US 99, 128 (1988) (“What the government seeks instead is the right to choose any corporate agent as a target of its subpoena and compel that individual to disclose certain information by his own actions”).

production, but that seems a circuitous method of protecting a corporate custodian against self-incrimination.

## (f) CONCLUSION

The decision in *Braswell* is the latest in a line of American cases in which the agency analysis has prevailed over the policy underlying the Fifth Amendment. In a broader sense, the problem lies in the collective entity rule from which the agency analysis stems. Anomalies are likely if a distinction is made between corporations, which cannot claim the privilege, and individuals who can. The logic of that distinction is not explored in this thesis because it is likely to continue in Australia. Under the 2005 Evidence Bill, New Zealand will go down the same path.

In relation to both the required records rule and the collective entity rule, the American courts preferred an established rule to the uncertain effect of the *Fisher* guidelines. When the US Supreme Court tried yet again to make sense of those guidelines in the *Hubbell* decision, uncertainty gave way to emasculation.<sup>138</sup>

## (E) FULL CIRCLE WITH *HUBBELL*

### (1) INTRODUCTION

The *Hubbell* decision has been the subject of extensive commentary in the United States. The purpose of this chapter is not to add to that commentary. The decision is relevant in Australasia for a particular reason. It shows the hidden difficulties involved in removing the privilege from the contents of documents.

The decision itself was complicated. The facts forced the courts “to include the element of immunity in the already complicated Fifth Amendment act of

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<sup>138</sup> *United States v Hubbell*, 530 US 27 (2000).

production analysis”.<sup>139</sup> The approach to derivative use immunity in the United States will be discussed in Chapter X. That chapter will describe the version of derivative use immunity which the majority justices adopted in *Hubbell*.

Another difficulty arises when discussing *Hubbell* in the context of civil proceedings. The facts involved the American use of subpoenas to compel documents before grand juries, preliminary to criminal proceedings. Grand jury proceedings do not exist in Australasia.

The equivalent proceedings fall somewhere between administrative proceedings and preliminary committal hearings in criminal cases.<sup>140</sup> Nevertheless, the rules for subpoenas in the United States are the same in civil, administrative and criminal proceedings. General lessons about civil proceedings can therefore be learnt from American experience in other types of proceeding.

The rest of this chapter will describe the proceedings in *Hubbell* and the lessons which can be learnt. For example, the lower court proceedings showed yet again how confusing the *Fisher* guidelines were in practice. The majority opinion of the US Supreme Court applied a test which would in effect give the protection of the Fifth Amendment to all acts of production.

The decision also showed the attitude of the American courts to “fishing expeditions”. These have often been mentioned in this thesis. Finally, this chapter will discuss the historical approach taken by the concurring Justices in the US Supreme Court. They suggested that the Fifth Amendment should go back to the meaning intended by the Founding Fathers.

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<sup>139</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 150.

<sup>140</sup> Preliminary committal hearings no longer take place in Western Australia because of ss101-104, Justices Act 1902 (WA) (inserted by Criminal Law (Procedure) Amendment Act 2002 (WA)).



## **(2) DECISION IN *HUBBELL***

### **(a) FACTS**

Hubbell was a former United States Associate Attorney-General. In previous criminal proceedings he had been convicted for mail fraud and tax evasion in connection with his Arkansas law practice. Those charges had arisen from investigations by an Independent Counsel into the infamous Whitewater affair, which had involved President Clinton and his advisers. Hubbell had received a jail term of twenty-one months after making a plea agreement with the Independent Counsel.

The plea agreement included a promise to provide full and accurate information to the Independent Counsel. He suspected a violation of this promise and served a subpoena on Hubbell, who was still in jail. Hubbell was required to produce eleven categories of documents before a grand jury in Arkansas. These documents included all Hubbell's business, financial and tax records from the start of 1993.

When Hubbell appeared before the grand jury in Arkansas, he invoked the Fifth Amendment and refused to produce any documents at all. The prosecutor obtained an order from the District Court directing Hubbell to answer and granting him immunity "to the extent allowed by the law". Hubbell quickly produced 13,120 pages of documents on the basis that they would be covered by use and derivative use immunity under the relevant statutory provision.<sup>141</sup>

The Independent Counsel's office went through these documents, ostensibly checking for violation of the plea agreement. Instead, it found evidence of tax-related crimes and mail and wire fraud. The Independent Counsel had not been aware of any of this evidence. Hubbell was indicted by a grand jury in

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<sup>141</sup> 18 USC 6002 granted use and derivative use immunity to documents which were compulsorily produced in spite of claims of privilege, but "only to the extent allowed by the law". If the Fifth Amendment did not cover the documents in the first place, they did not receive immunity under 18 USC 6002.

Washington on ten counts arising entirely from the information contained in the documents.

### (b) CENTRAL ISSUE

Hubbell made a conditional plea agreement with respect to these new charges. They would be dismissed if the Supreme Court ruled that the statutory immunity extended to the documents. If not, he would plead guilty and receive a sentence which would not include incarceration.<sup>142</sup>

The central issue was therefore whether the Fifth Amendment covered the documents at the time when Hubbell first claimed it. If it did, their production could only be compelled in exchange for use and derivative use immunity. The result would be to exclude all the prosecution evidence as inadmissible and to make dismissal of the charges inevitable.

Conversely, if the Fifth Amendment did not protect the documents in the first place, they would not receive any immunity. The statutory provision only gave immunity "to the extent allowed by the law".<sup>143</sup> Hubbell acknowledged by his conditional plea of guilty that he was doomed if, as a matter of law, it turned out that the documents would not have been covered by the Fifth Amendment.

### (c) FISHER GUIDELINES

The *Fisher* guidelines should have provided the basis for deciding the central issue, but the confusion over their application was as evident here as in previous cases. The District Court, the Court of Appeals and the US Supreme Court each held that Hubbell's act of production was covered by the Fifth Amendment, but each applied the guidelines differently.

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<sup>142</sup> *United States v Hubbell*, 530 US 27, 33-34 (2000).

<sup>143</sup> 18 USC section 6002. This "timid phraseology" is "a way of informing the target witness that he will receive only the minimum statutory protection": Uviller, H. R. (2001) "Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook." *The Journal of Criminal Law and Criminology* 91(2): 311 at 326.

The District Court found that all of the prosecution evidence resulted from the act of producing the documents. That provided the necessary testimonial element to satisfy the guidelines. Hubbell's act of production "added to the 'sum total' of the independent counsel's information about him".<sup>144</sup>

According to the Court of Appeals, the District Court was asking the wrong question. It should have been asking not what the Independent Counsel knew of the contents of the documents, but rather what he knew of the "existence, possession and authenticity" of the documents.<sup>145</sup> Even so, the Court of Appeals found in favour of Hubbell because he had provided the necessary extra element to raise his act of production to the level of testimony. The majority opinion of the US Supreme Court disagreed with the reasons given by each of the lower courts but still found in Hubbell's favour.

### **(3) CURRENT POSITION**

#### **(a) ARGUMENTS SETTLED**

In spite of the disagreement between the three courts, none of the judges suggested that the Fifth Amendment any longer protects the contents of documents.<sup>146</sup> However, as discussed later in this chapter, two judges did advocate in effect a return to that position.<sup>147</sup>

More surprisingly, the "manna from heaven" argument was only adopted by two judges in the three courts.<sup>148</sup> By that argument, the Fifth Amendment protects an act of production only if the prosecution introduces evidence about the production of the documents. The majority opinion was prepared to assume that the documents could be introduced in the trial without having to

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<sup>144</sup> *United States v Hubbell*, 11 F Supp 2d 25, 35 (DDC 1998).

<sup>145</sup> *United States v Hubbell*, 167 F3d 552, 581 (CAD 1999).

<sup>146</sup> *United States v Hubbell*, 530 US 27, 36 (2000) (majority opinion accepted as "clear" that "Hubbell could not avoid compliance with the subpoena served on him merely because the demanded documents contained incriminating evidence, whether written by others or voluntarily prepared by himself").

<sup>147</sup> *United States v Hubbell*, 530 US 27, 49 (2000)

<sup>148</sup> Chief Justice Rehnquist in *United States v Hubbell*, 530 US 27, 49 (2000); Judge Williams in *United States v Hubbell*, 167 F3d 552, 597 (CAD 1999).

mention Hubbell's act of production.<sup>149</sup> Under the “manna from heaven” argument that should have ruled out the privilege for the act of production, but the majority justices in the US Supreme Court took a different view.<sup>150</sup>

## (b) ORAL TESTIMONY

Entry into the witness stand might have been expected to assist in raising an act of production to the level of testimony.<sup>151</sup> Hubbell himself had taken the witness stand before the grand jury and confirmed that he had produced everything demanded by the subpoena. Neither of the lower courts took that into account.

The lower courts were reflecting earlier US Supreme Court authority.<sup>152</sup> This was confirmed in the majority opinion in the US Supreme Court. Like the answers of a custodian producing corporate records, Hubbell's answers on the stand did not, in themselves, attract the privilege. They were to be assessed under the *Fisher* guidelines on the same basis as his act of production.<sup>153</sup>

The problem with the majority opinion was that it did not really apply the *Fisher* guidelines at all. It mentioned the existence, possession and authenticity of the documents as relevant factors in deciding whether acts of production are sufficiently testimonial. It then used a different test for Hubbell's act of production.

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<sup>149</sup> *United States v Hubbell*, 530 US 27, 41 (2000). In fact, the prosecution was not intending to introduce the contents of the documents as evidence.

<sup>150</sup> The majority opinion was therefore criticised as “plain wrong”: Uviller, H. R. (2001) “Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook.” *The Journal of Criminal Law and Criminology* 91(2): 311 at 326.

<sup>151</sup> The District Court in particular should have been impressed by Hubbell's entry into the witness stand. His testimony was inconsistent with the Independent Counsel's central argument. This was characterised by the District Court as “no problem as long as the finder of fact never learns who produced the documents”: *United States v Hubbell*, 11 F Supp 2d 25, 35 (DDC 1998).

<sup>152</sup> E.g. *Curcio v United States*, 354 US 118, 125 (1957) (the testimony “to identify or authenticate the documents merely makes explicit what is implicit in the production itself”).

<sup>153</sup> *United States v Hubbell*, 530 US 27, 37 (2000) (“Whether the constitutional privilege protects answers to such questions, or protects the act of production itself, is a question that is distinct from the question whether the unprotected contents of the documents themselves are incriminating”).

#### (d) NEW GUIDELINE

The majority opinion in effect substituted a new guideline: if the prosecution could make derivative use of the documents, the act of production was sufficiently testimonial to attract the protection of the Fifth Amendment. Under this guideline, the prosecution made derivative use of Hubbell's act of production, simply by receiving the documents. He had found, listed and produced them in answer to the subpoena. His actions could in themselves provide a prosecutor with a lead to incriminating evidence or a link in the chain of evidence needed to prosecute.<sup>154</sup>

When deciding whether the act of producing documents should be regarded as sufficiently testimonial to attract the protection of the Fifth Amendment, later derivative use of documents could perhaps be regarded as a relevant factor. However, it was not included in the *Fisher* guidelines. They focus, however obscurely, on what the producer does to raise the level of the act of production to testimony.

The guideline in *Hubbell*, on the other hand, moves the emphasis away from the actions of the producer.<sup>155</sup> The guideline looks at whether the prosecution has made derivative use of the documents which have been produced. In practice, this “comes dangerously close to allowing the Fifth Amendment ‘privilege’, and the immunity coterminous therewith, to shield the contents of freely written documents”.<sup>156</sup>

#### (e) PRACTICAL RESULT

The new guideline seems to offer a claim for the privilege in almost every case in which documents are produced in answer to a subpoena. The producer will

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<sup>154</sup> *United States v Hubbell*, 530 US 27, 42 (2000).

<sup>155</sup> *United States v Hubbell*, 530 US 27, 43 (2000) (the majority opinion obscured this change of emphasis by referring to the importance of the producer giving a “truthful reply to the subpoena” and “extensive use of ‘the contents of his own mind’ in identifying the hundreds of documents responsive to the requests in the subpoena”).

<sup>156</sup> Uviller, H. R. (2001) "Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook." *The Journal of Criminal Law and Criminology* 91(2): 311 at 335.

have to identify documents for production and give a truthful reply to the subpoena. The result is that “*Hubbell* has, at least in practical effect, overruled *Fisher* and restored full, meaningful (as opposed to “act of production”) Fifth Amendment protection to most private papers in the possession of an individual”.<sup>157</sup>

This protection will be available to individuals to avoid production of their incriminating documents. The confusion over the *Fisher* guidelines perhaps led to the lower American courts providing this protection in any event.<sup>158</sup> This was the result desired by at least one of the Justices who decided the *Fisher* decision.<sup>159</sup> In *Hubbell* the majority opinion substituted a new guideline which may have reflected the actual practice under the old guidelines.

The decision in *Hubbell* also had a broader aspect: the almost unanimous rejection of prosecution subpoenas for fishing expeditions and the effect which this rejection had on prosecution practices.

#### **(4) FISHING EXPEDITIONS**

##### **(a) INGENUITY**

Chapter X will discuss the ingenuity with which the majority opinion expanded the limits of derivative use immunity. It showed similar ingenuity in mixing the issues of immunity and privilege.<sup>160</sup> It dealt with them back-to-front.<sup>161</sup>

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<sup>157</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 190.

<sup>158</sup> Heidt, R. (1984) "The Fifth Amendment Privilege and Documents - Cutting *Fisher's* Tangled Line." *Missouri Law Review* 49(3): 439 at 441 n6.

<sup>159</sup> Justice Marshall expressed the hope that the guidelines would provide substantially the same protection to the contents of documents as the previous law: *Fisher v United States*, 425 US 391, 432 (1976).

<sup>160</sup> "Only after framing the issue in terms of the immunity grant and its consequences did the court address what it identified as the 'disagreement between the parties' in *Hubbell*": Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 163.

<sup>161</sup> Namely, "the Supreme Court discussed *Hubbell's* act of production immunity before it addressed whether *Hubbell's* act of production was testimonial in nature": Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 163 (footnotes omitted).

Immunity for the documents depended upon the answer to the central question of privilege: whether the privilege had been available in the first place. The answer to the central question of privilege depended upon whether the act of production was sufficiently testimonial for the Fifth Amendment to protect it.

The majority opinion looked at derivative use, which is an immunity issue, to decide whether the act was sufficiently testimonial, an issue of privilege. The majority opinion used derivative use as the reason for finding the act to be sufficiently testimonial. The privilege applied. The documents received derivative use immunity. This exercise was circular, as well as having nothing to do with the *Fisher* guidelines.

The majority opinion was actually written by Justice Stevens. Nearly twenty years before, he had explored derivative use immunity with similar ingenuity in his minority opinion in *Pillsbury Co v Conboy*.<sup>162</sup> On that occasion he had been able to persuade only one other Justice to join him. This time, out of ten judges on three courts, eight agreed with his conclusion.

It might be asked why his argument had now become so attractive.<sup>163</sup> One explanation is that the particular facts of *Hubbell* showed the unpalatable results of treating documents like other physical evidence.

## (b) FUNDAMENTAL OBJECTION

Use of the documents against Hubbell would hardly have inspired confidence in the continuing vigour of constitutional rights in the United States. The bare facts speak for themselves. A man in jail received a subpoena to produce a wide range of personal and business documents. He invoked the Fifth

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<sup>162</sup> *Pillsbury Co v Conboy*, 459 US 248, 282 (1983).

<sup>163</sup> E.g. Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 183 n378 ("how dramatically the Court has departed from the conventional understanding of the *Fisher* act of production doctrine").

Amendment. His constitutional right was overridden on the basis that he was receiving an adequate substitute, which would protect him against self-incrimination in producing the documents. The compulsorily produced documents contained information unknown to the prosecutors. This information led to further charges similar to those for which he had already been jailed.

The District Court characterised the subpoena in this case as “the quintessential fishing expedition”.<sup>164</sup> Little judicial effort was directed towards approving such an expedition.<sup>165</sup> Only two judges on any level dissented.<sup>166</sup>

This thesis does not take the position that the privilege should necessarily be preserved in criminal or administrative proceedings. The policy issues are less clear in criminal and administrative proceedings than in civil proceedings, for reasons which Uviller outlines.<sup>167</sup> Compulsory questioning has its place.<sup>168</sup> So has investigative enterprise.<sup>169</sup> In criminal and administrative proceedings there is indeed a fine line between a legitimate investigation and a “fishing expedition”. All but two of the judges in *Hubbell* placed the Independent Counsel's subpoena on the wrong side of the line.

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<sup>164</sup> *United States v Hubbell*, 11 F Supp 2d 25, 37 (DDC 1998).

<sup>165</sup> *United States v Hubbell*, 530 US 27, 42 (2000) (according to the majority opinion, it “did produce a fish, but not the one that the Independent Counsel expected to hook”).

<sup>166</sup> Chief Justice Rehnquist in *United States v Hubbell*, 530 US 27, 49 (2000); Judge Williams in *United States v Hubbell*, 167 F3d 552, 597 (CADC 1999). They felt bound to follow the “manna from heaven” approach which in their view had been laid down in *Fisher*.

<sup>167</sup> Uviller, H. R. (2001) “Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook.” *The Journal of Criminal Law and Criminology* 91(2): 311 at 323 (the Independent Counsel should have been allowed to use the documents because the subpoenas had not been “hopelessly broad or severely burdensome”. There had until *Hubbell* “been nothing wrong with prosecutorial expeditions that fish for evidence of crime with subpoenas *duces tecum*. Indeed, prosecutors - and the juries they lead - are supposed to go fishing”).

<sup>168</sup> Uviller, H. R. (2001) “Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook.” *The Journal of Criminal Law and Criminology* 91(2): 311 at 334 (he found the decision in *Hubbell* “disturbing for the threat it poses to the free-ranging grand jury investigation of official corruption, financial crimes, and other frauds”).

<sup>169</sup> Uviller, H. R. (2001) “Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook.” *The Journal of Criminal Law and Criminology* 91(2): 311 at 335 (to call an “inquiry with an uncertain scope, an unclear focus, and perhaps an unidentified culprit, pejoratively a ‘fishing expedition’ defeats the value of investigative enterprise”).



The subpoena in *Hubbell* was not being used in a civil proceeding.

Nevertheless, the decision supports the argument in this thesis that removal of the privilege from documents is not as easy as it looks. Moreover, its results support the broader argument in Chapter IV. The existence of the privilege can have a positive effect on prosecution procedures.

### (c) SUBPOENAS TO SEARCH WARRANTS

Before *Hubbell*, subpoenas were preferred to search warrants because prosecutors could issue them with little accountability.<sup>170</sup> Search warrants were only issued if prosecutors could first “persuade a neutral magistrate” that the Fourth Amendment requirements were satisfied.<sup>171</sup> *Hubbell* could have “enormous ramifications for white collar law enforcement” because careful prosecutors are likely to stop relying on “broad all-encompassing boilerplate document subpoenas”.<sup>172</sup>

It is perhaps too soon to judge whether *Hubbell* will lead to greater reliance upon search warrants.<sup>173</sup> Nevertheless, some change is likely.<sup>174</sup> The use of

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<sup>170</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 128-129 (“without judicial review or approval, and grand jury subpoenas for documents need not satisfy the Fourth Amendment particularity and probable cause requirements that apply to search warrants”). *Hale v Henkel*, 201 US 43 (1906) is accepted as having established the principle that subpoenas were not subject to any reasonable cause requirements, even though it did so indirectly: Stuntz, W. J. (2001) "Commentary; O.J.Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment." *Harvard Law Review* 114(3): 842 at 858 n62.

<sup>171</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 188.

<sup>172</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 185.

<sup>173</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 188 (whether search warrants “become more attractive to prosecutors than subpoenas *duces tecum* in white collar cases is a difficult question”). Also see Stuntz, W. J. (2001) "Commentary; O.J.Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment." *Harvard Law Review* 114(3): 842 at 865 (“When faced with subpoenas for documents, suspects can comply or not as they wish. For its part the government can search for evidence it wants, so long as it satisfies the probable cause and warrant requirements”).

<sup>174</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 185 (“use of broad ‘fishing expedition’ document subpoenas will be curtailed, and

broad document subpoenas shows how prosecutors cut corners and where this leads if it remains unchecked. In *Hubbell* prosecution subpoenas were used to avoid the requirements of the Fourth Amendment and, for political reasons, to pursue further a person who was already in jail.

(d) NOT FULL CIRCLE

The majority opinion in *Hubbell* contained a new guideline which appeared to make the privilege available to resist almost all subpoenas for private documents. If the guideline leads to that result, the contents of private documents will be effectively protected as they were before 1976.<sup>175</sup> However, the law on the Fifth Amendment and documents will not have gone full circle.

Justice Miller said in *Boyd* that the Fifth Amendment protected the incriminating contents of all documents. Even if the business documents of individuals were to receive pre-*Fisher* protection, the collective entity and required records rules would remain. Completion of the circle would require those two rules to be discarded. This was apparently advocated in the concurring opinion of two Justices in *Hubbell*. They suggested reversing a century of case-law on the application of the Fifth Amendment to physical evidence.

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investigations will be more focused. Significant resources on both the prosecution and defense sides...will be freed up”).

<sup>175</sup> Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 144 n139 ("net result of the *Hubbell* holding is to restore Fifth Amendment protection of an individual's documents to something very near the straightforward, common-sense rules that applied prior to *Fisher*").

## **(5) CONCURRING OPINION**

### **(a) HISTORICAL SOUNDNESS**

#### **(i) Resort to History**

Justice Thomas was joined in the concurring opinion by Justice Scalia.<sup>176</sup> They criticised the *Fisher* decision because it failed to take the historical background into account. They looked to history to solve a current problem. That is how this thesis seeks to use history.

The concurring opinion advocated a return to the original intention of the Fifth Amendment.<sup>177</sup> “A substantial body of evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence”.<sup>178</sup> Even a critic of the concurring opinion admitted that it was “historically sound and logically persuasive”.<sup>179</sup>

The logic of the concurring opinion will be discussed shortly. First it is worth considering briefly the historical soundness of the view that the Fifth Amendment was intended to cover documentary evidence. The Justices based their view on three arguments.

#### **(ii) Madison’s Intention**

Their first argument was that Madison did not intend to exclude documentary evidence when he used the phrase “to be a witness”.<sup>180</sup> The Justices relied

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<sup>176</sup> *United States v Hubbell*, 530 US 27 (2000).

<sup>177</sup> *United States v Hubbell*, 530 US 27, 49 (2000).

<sup>178</sup> *United States v Hubbell*, 530 US 27, 49 (2000).

<sup>179</sup> Uviller, H. R. (2001) "Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook." *The Journal of Criminal Law and Criminology* 91(2): 311 at 324 (this “highly unusual preview of the disposition of two Justices, addressed to an abstract question, may be historically sound and logically persuasive”).

<sup>180</sup> This argument came primarily from Nagareda, R. A. (1999) "Compulsion "To Be A Witness" And The Resurrection of *Boyd*." *New York University Law Review* 74(6): 1575 at 1580.

upon academic opinion that a “witness” in the late 1700s included a person producing documents.<sup>181</sup>

As mentioned in Chapter IV, there was no contemporary evidence explaining why Madison adopted that phrase.<sup>182</sup> The State Constitutions used the more common phrases “to give evidence” or “to furnish evidence”. According to the concurring opinion, Madison regarded all these phrases as having the same meaning.<sup>183</sup>

### (iii) English Common Law

Their second argument was that that the Fifth Amendment reproduced English common law privilege which at that time covered documents.<sup>184</sup> They pointed to considerable academic authority to support their statement of the English position.<sup>185</sup> Like that academic authority, the concurring opinion was based upon a small group of English criminal cases.<sup>186</sup> Five of those cases will be among the six cases discussed in Chapter IX.<sup>187</sup>

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<sup>181</sup> E.g. Nagareda, R. A. (1999) "Compulsion "To Be A Witness" And The Resurrection of *Boyd*." *New York University Law Review* 74(6): 1575 at 1608-9.

<sup>182</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 424-7. Also see Moglen, E. (1997) "The Privilege in British North America: The Colonial Period to the Fifth Amendment". *The Privilege Against Self-Incrimination: Its Origins and Development*. R. H. Helmholz (Ed.) (Chicago: The University of Chicago Press) 109 at 137-8.

<sup>183</sup> *United States v Hubbell*, 530 US 27, 53-55 (2000).

<sup>184</sup> *United States v Hubbell*, 530 US 27, 51 (2000) (“The 18th-century common law privilege against self-incrimination protected against compelled production of physical evidence such as papers and documents”).

<sup>185</sup> Nagareda, R. A. (1999) "Compulsion "To Be A Witness" And The Resurrection of *Boyd*." *New York University Law Review* 74(6): 1575 at 1618-23, Morgan, E. M. (1949) "The Privilege Against Self-Incrimination." *Minnesota Law Review* 34(1): 1 at 34 and Alito, S. A. (1986) "Documents and The Privilege Against Self-Incrimination." *University of Pittsburgh Law Review* 48(1): 27 at 35 n37.

<sup>186</sup> *United States v Hubbell*, 530 US 27, 51 (2000) citing *R v Mead* (1704) 2 Ld Raym 927 (92 ER 119), *R v Worsenham* (1701) 1 Ld Raym 705 (91 ER 1370); *R v Cornelius* (1744) 2 Str 1210 at 1211 (93 ER 1133 at 1134); *R v Purnell* (1744) 1 Wils KB 239 at 242 (95 ER 595 at 597); *R v Heydon* (1762) 1 Black W 351 (96 ER 195).

<sup>187</sup> The six cases came from Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 492 n30. The only one not mentioned in the concurring opinion was *Roe dem Haldane v Harvey* (1769) 4 Burr 2484 at 2489 (98 ER 302 at 305).

Chapter IX will conclude that these cases probably set out the law for criminal proceedings. As *Hubbell* involved criminal proceedings, the concurring opinion may have been justified in relying upon these cases.<sup>188</sup>

#### **(iv) American Common Law**

Their third argument was that the contents of documents were protected under the American case-law on the Fifth Amendment during the 1800s.<sup>189</sup> In 1832, for example, the US Supreme Court held that a witness could not be compelled to produce a subpoenaed document “and thereby furnish evidence against himself”.<sup>190</sup> Similarly, Justice Miller's statement in *Boyd* fifty years later assumed that the Fifth Amendment had originally been intended to protect documents.

While discussing *Boyd*, the concurring opinion made a link with Chancery which is relevant to this thesis.<sup>191</sup> Chapter IX will argue that the six English criminal cases had little to do with the application of the privilege to documents in civil proceedings. It will look instead to the history of Chancery. This argument finds support in *Boyd*.

#### **(v) Chancery Link**

In *Boyd* the US Supreme Court established the rules for the application of the privilege to documentary evidence, even if those rules did not last. It did so without mentioning one of the six English criminal cases which are usually cited, as discussed in Chapter IX. Instead, the majority opinion praised the

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<sup>188</sup> Nagareda was more circumspect: see Nagareda, R. A. (1999) "Compulsion "To Be A Witness" And The Resurrection of *Boyd*." *New York University Law Review* 74(6): 1575 at 1622 (those cases were “far from anomalous in the legal world contemporaneous with the Fifth Amendment”).

<sup>189</sup> Nagareda, R. A. (1999) "Compulsion "To Be A Witness" And The Resurrection of *Boyd*." *New York University Law Review* 74(6): 1575 at 1584-5.

<sup>190</sup> *United States v Reyburn*, 31 US 352, 366-7 (1832).

<sup>191</sup> *United States v Hubbell*, 530 US 27, 51 (2000), citing *Boyd v United States*, 116 US 616, 631 (1886). Also see Nagareda, R. A. (1999) "Compulsion "To Be A Witness" And The Resurrection of *Boyd*." *New York University Law Review* 74(6): 1575 at 1622.

wisdom of section 15 of the Judiciary Act of 1789 (US) in linking the production of documents to the ordinary powers of Chancery.

The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavour to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been thought hazardous. Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict a party of a crime, or to forfeit his property.<sup>192</sup>

Much of the majority opinion in *Boyd* has been discarded, most obviously its attempt to link the Fourth and Fifth Amendments. However, the above passage seemed to support the connection which will be suggested in Chapter IX between discovery and the application of the privilege to documents in civil cases.

#### (b) PRACTICAL RESULT

An American commentator described a return to the original intent of the Fifth Amendment as “a hard sell at this juncture in our doctrinal development”.<sup>193</sup>

Another writer was attracted by the simplicity of the historical approach if it “creates a lucid comprehensible rule for future courts to obey”.<sup>194</sup>

Unfortunately, it was not entirely clear what the Justices were suggesting.

At first sight, they were suggesting a return to the principle stated by Justice Miller in *Boyd*. It would mean that if the contents of a document were incriminating, the privilege would be available to resist production of that

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<sup>192</sup> *Boyd v United States*, 116 US 616, 631 (1886).

<sup>193</sup> Uviller, H. R. (2001) "Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook." *The Journal of Criminal Law and Criminology* 91(2): 311 at 324. He doubted “whether these two venturesome Justices can convince at least three colleagues to overrule *Schmerber*”. The reference to *Schmerber*, rather than *Fisher*, reflects Uviller's view that documents should attract the privilege no more than other physical evidence.

<sup>194</sup> McLennan, R. (2001) "Does Immunity Granted Really Equal Immunity Received?" *The Journal of Criminal Law and Criminology* 91(2): 469 at 496.

document. Because this reflects the position in Australia and New Zealand, it is tempting to assume that this is what the Justices were suggesting.

In the United States that result raises obvious difficulties. The concurring opinion does not mention the collective entity rule or the required records rule. The Justices did not say whether their version of the privilege for documents would be limited to individuals or private records.

Nor did the concurring Justices make any reference to the contents of documents as such. The protection which they suggested was broad enough to cover the contents of documents, but it was also broad enough to include other physical evidence. It is one thing to suggest that the contents of documents should be protected by the privilege. It is quite another to extend the same protection to physical evidence like blood samples or handwriting examples.

It may be true that the courts in the United States have not fully acknowledged the testimonial element in the production of physical evidence.<sup>195</sup>

Nevertheless, a return to *Boyd* for all physical evidence is surely out of the question.

## **(6) CONCLUSION**

It is fitting that this chapter should end with the concurring opinion in *Hubbell*. The concurring opinion reinforces the theme of the chapter. If the special nature of documents is disregarded and they are simply treated as physical evidence, the results are likely to be unsatisfactory.

Admittedly, many of the problems in the United States stem from the fact that documents are not treated exactly like other physical evidence. The *Fisher* guidelines placed documents in an uncomfortable position somewhere between

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<sup>195</sup> Geyh, C. G. (1987) "The Testimonial Component of the Right Against Self-Incrimination." *Catholic University Law Review* 36(Spring): 611 at 635-6.

oral evidence and physical evidence. It is no wonder that precise definition of that position has proved elusive.

The NZLC apparently considered that the problems would disappear if the protection of the privilege was denied to all aspects of the production of physical evidence including documents. The basis for that view was not clear. The concurring opinion in *Hubbell* put the opposite view. The privilege should protect all physical evidence including documents.

Chapter IX will start with a critical discussion of the English common law authorities which were accepted by the concurring Justices. They were wise to ask how documents came to be covered by the privilege in the first place. Chapter IX will suggest an answer to that question before discussing whether documents should receive the protection of the privilege in Australasia.



## CHAPTER IX: DOCUMENTS IN AUSTRALIA AND NEW ZEALAND

### (A) INTRODUCTION

#### (1) MAIN LESSON

Chapter VIII suggested that several lessons could be learnt from the application of the Fifth Amendment to documents in the United States. This chapter will seek to apply those lessons to civil proceedings in Australia and New Zealand.

The main lesson is that hidden difficulties lie in an approach which treats documents as just another piece of physical evidence. This is particularly relevant in New Zealand where the protection of the privilege will be removed from pre-existing documents if the 2005 Evidence Bill is passed.<sup>1</sup> It may also become relevant in Australia, where the ALRC recently recommended a similar approach in interlocutory asset protection proceedings.<sup>2</sup>

#### (2) ACTS OF PRODUCTION

Although the NZLC proposal was said to be based upon American case law, the protection of the Fifth Amendment was removed from the contents of documents but not from documents in every respect. The *Fisher* guidelines applied a test which gave limited protection to the act of producing documents. Documents were placed somewhere between oral and physical evidence. The final NZLC proposal departed from those guidelines by denying the protection of the privilege to the act of producing documents, as well as to their contents.

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<sup>1</sup> New Zealand Government (2005) *Evidence Bill* (Wellington) Clause 47(3)(b)(i).

<sup>2</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) Recommendation 15.10.

The reasons for that departure will be considered before looking at the different versions of the act of production doctrine which have found their way from the United States. This chapter will compare those versions with the traditional approach of applying the privilege to the contents of documents. It will also compare them with the NZLC proposal to remove the privilege from documents completely. The conclusion will be that the traditional approach is preferable to both the act of production doctrine and the NZLC proposal.

### **(3) CORPORATIONS**

In Australia the traditional approach was obscured by legislative and judicial changes in the 1990s. These changes have removed the protection of the privilege from corporate documents. Like the act of production doctrine, they owed much to the law in the United States.

Chapter IV discussed whether the privilege should be available to corporations. A negative answer has been given as a matter of policy in Australia. The same answer has been proposed in New Zealand. This chapter will discuss whether that answer should deprive an officer of personal privilege in relation to corporate documents. It will conclude that a custodian should be able to invoke personal privilege to resist production of incriminating documents whether corporate or private.

### **(4) RELEVANCE OF HISTORY**

It is easy to lose sight of the central question raised by the application of the privilege to documents: why should the privilege protect documents in any way at all? Chapter VIII ended with a concurring minority opinion from the US Supreme Court. That opinion suggested returning to the historical basis for the Fifth Amendment. Even if their historical account was flawed, it seemed reasonable for

them to ask how the privilege came to cover the contents of documents in the first place.

By removing the protection of the privilege from documents, the NZLC proposal rejected the traditional English common law approach, but the NZLC did not really ask how or why the protection arose. This was perhaps understandable. The history of the application of the privilege to documents is even less clear than the historical issues discussed in Chapters VI and VII.

This chapter will be more tentative in its conclusions than the other historical chapters. Even so, the historical background will provide insights which are particularly relevant to civil proceedings. It will therefore be covered before looking at the NZLC approach to the privilege and documents.

## **(B) HISTORY**

### **(1) INTRODUCTION**

Macnair and other historians cited enough contemporary cases to ground the conclusions which were drawn in Chapters VI and VII. Even if the cases did not provide conclusive proof, they gave substantial support to the main two historical arguments in those chapters: first, that the privilege developed for parties in Chancery as a check on the abuse of its compulsory procedures; and second, that witness privilege developed in the Common Law courts as a reaction to the Perjury Act.

This chapter will seek to explain how the privilege came to be applied to documents in civil proceedings. Its explanation reflects the central role played by Chancery in the history described in Chapter VII. A similar explanation has been suggested by the High Court and other modern authorities.

It must be admitted that sufficient support cannot be found for this explanation in contemporary authority. However, the explanation is more satisfactory than the generally accepted theory, at least in relation to documents in civil proceedings. Judges and commentators have based this theory upon a small group of cases which do not justify it. First, it is necessary to look at these cases.

## **(2) COMMON LAW**

### **(a) CRIMINAL**

#### **(i) Six Cases**

Six common law authorities have regularly been cited to show the extension of the privilege to documents. The standard theory has not necessarily included all six: for example, only five were cited in the concurring opinion in *Hubbell*, mentioned at the end of Chapter VIII. This opinion suggested that the privilege in the late 1700s protected against the compelled production of all incriminating physical evidence including documents.<sup>3</sup>

The most frequently cited of the six cases has been *R v Mead*.<sup>4</sup> Levy described this case as foreshadowing the development of a new doctrine that the privilege “which originated to protect against the compulsion of oral testimony, applied to papers and documents which might incriminate”.<sup>5</sup> To support that proposition Levy cited the other five cases.<sup>6</sup>

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<sup>3</sup> *United States v Hubbell*, 530 US 27, 51 (2000) (“Several 18th-century cases explicitly recognized such a self-incrimination privilege”).

<sup>4</sup> *R v Mead* (1704) 2 Ld Raym 927 (92 ER 119).

<sup>5</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 320.

<sup>6</sup> Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 492 n30, citing *R v Worsenham* (1701) 1 Ld Raym 705 (91 ER 1370); *R v Cornelius* (1744) 2 Str 1210 at 1211 (93 ER 1133 at 1134); *R v Purnell* (1744) 1 Wils KB 239 at 242 (95 ER 595 at 597); *R v Heydon* (1762) 1 Black W 350 (96 ER 195); *Roe dem Haldane v Harvey* (1769) 4 Burr 2484 at 2489 (98 ER 302 at 305).

Levy's list was influential in the US Supreme Court. All six cases, and Levy himself, were cited in *Fisher*.<sup>7</sup> They have also influenced American commentators. One recent article found surprising unanimity in the American literature which discussed the extension of the privilege to documents.<sup>8</sup>

Australian High Court judges have cited several of these cases as authority for the extension of the privilege to documents in civil proceedings.<sup>9</sup> Yet five of the six cases were criminal. Moreover, the one civil case has usually been cited because of an *obiter dictum* from Lord Mansfield about criminal proceedings.<sup>10</sup> It is difficult to accept that these criminal cases provided much authority in civil proceedings.

## (ii) King's Bench Rules

The six cases were not really about the privilege at all. They were primarily concerned with orders made by the Court of King's Bench for production of documents during its proceedings. Such orders were confusingly called "King's Bench rules". King's Bench could grant a rule in both civil and criminal proceedings.

Traditionally, common law courts could not order discovery. Discovery orders were left to courts of equity because they were able to take into account all the

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<sup>7</sup> *Fisher v United States*, 425 US 391, 418 n4 (1976) (*per* Justice Brennan) (they showed that "the common law privilege against self-incrimination in England extended to protection against incriminating personal papers prior to the adoption of the United States Constitution").

<sup>8</sup> Nagareda, R. A. (1999) "Compulsion "To Be A Witness" And The Resurrection of *Boyd*." *New York University Law Review* 74(6): 1575 at 1619 n172 ("All sources to address the point concur"). The concurring sources often cited all six cases (e.g. Alito, S. A. (1986) "Documents and The Privilege Against Self-Incrimination." *University of Pittsburgh Law Review* 48(1): 27 at 35).

<sup>9</sup> E.g. *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 501-2 and 521.

<sup>10</sup> *Roe dem Haldane v Harvey* (1769) 4 Burr 2484 at 2489 (98 ER 302 at 305) ("in a criminal or penal cause, the defendant is never forced to produce any evidence; though he should hold it in his hands, in Court"). E.g. quoted by Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-incrimination* (Chicago: Ivan R. Dee) at 390.

facts of the case. Only in limited circumstances could a common law court could make a “rule” for production or inspection of documents.<sup>11</sup>

The six cases showed three of those circumstances: the documents had to be for use in court; they had to be of a public character; and the party seeking them had to show a sufficient interest in them.<sup>12</sup> The last one caused the most difficulty. There was a fine line between what was sufficient and what was not.<sup>13</sup>

Even if documents were of a public character, the prosecutor in a criminal case generally had difficulty showing a sufficient interest in them. The result was that in criminal cases the King's Bench often refused to grant a rule for the production of documents. This was because the prosecutor had an insufficient interest. It had nothing to do with the documents incriminating the accused.

### **(iii) Self-Incrimination**

Nevertheless, a reference to self-incrimination was often added as a make-weight. In *R v Mead*, for example, in the same sentence it was added to the real reason for the refusal: the private nature of the records.<sup>14</sup> Similar additions were made in other cases in the list.<sup>15</sup>

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<sup>11</sup> Bray, E. (1885) *The Principles and Practice of Discovery* (London: Reeves and Turner) at 4.

<sup>12</sup> Bray, E. (1885) *The Principles and Practice of Discovery* (London: Reeves and Turner) at 281-282.

<sup>13</sup> E.g. see *R v Newcastle* (1745) 2 Str 1223 (93 ER 1144) and the two-page note annexed to it in the English Reports, setting out numerous cases and complicated principles (93 ER at 1144-1146).

<sup>14</sup> E.g. *R v Mead* (1704) 2 Ld Raym 927 (92 ER 119) (the production in court of surveyors' records was “denied because they are of a perfectly private nature and it would be to make a man produce evidence against himself in a criminal prosecution”).

<sup>15</sup> Also see *R v Worsenham* (1701) 1 Ld Raym 705 (91 ER 1370) (no rule granted in respect of Custom-House books “because the said books are a private concern, in which the prosecutor has no interest; and therefore it would be in effect, to compel the defendants, to produce evidence against themselves”); *R v Cornelius* (1744) 2 Str 1210 at 1211 (93 ER 1133 at 1134) (prosecution not allowed to inspect books of corporation, a particular right “not being in issue. And it is in effect obliging a defendant indicted for a misdemeanour, to furnish evidence against himself”).

The courts themselves seemed to confuse the primary reason with the make-weight.<sup>16</sup> However, in one of the six cases, self-incrimination was not even mentioned.<sup>17</sup> The case still appeared in several lists.<sup>18</sup>

Macnair provided a plausible explanation of how the criminal cases on King's Bench rules became associated with the right to silence.<sup>19</sup> The association made sense in criminal proceedings. The enforced production of personal documents to the prosecution was clearly inconsistent with any right to silence enjoyed by the accused. However, none of that was easy to translate to civil proceedings. Moreover, in Chancery the parties were routinely compelled to provide information to each other.

## (b) CIVIL

As the right to silence is generally outside the scope of this thesis, this chapter will consider the numerous civil cases in which a King's Bench rule was requested. Few of them mentioned self-accusation as an issue.<sup>20</sup> There were occasional

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<sup>16</sup> E.g. compare *R v Purnell* (1744) 1 Wils KB 239 at 241 (95 ER 595 at 596-597) (court says that self-incrimination was the only reason for refusal of rules in both *R v Mead* and *R v Cornelius*) with *R v Purnell* (1744) 1 Black W 37 at 45 (96 ER 20 at 23) (court gives self-incrimination as the only reason for refusing the rule in *R v Cornelius* but correctly identifies self-incrimination as being the secondary reason for refusing the rule in *R v Mead*).

<sup>17</sup> E.g. *R v Heydon* (1762) 1 Black W 350 (96 ER 195). The Corporation of Evesham successfully objected to producing its books for criminal proceedings alleging election bribery. The Corporation was not the defendant. Its books were required only to prove that a prosecution witness was a freeman. The report simply said that a corporation need not produce its records as evidence in court for a criminal prosecution. Self-incrimination was not mentioned because it was not an issue.

<sup>18</sup> E.g. Levy, L. W. (1999) *Origins of the Fifth Amendment: The Right against Self-Incrimination* (Chicago: Ivan R. Dee) at 492 n30; Alito, S. A. (1986) "Documents and The Privilege Against Self-Incrimination." *University of Pittsburgh Law Review* 48(1): 27 at 35. Also see *Fisher v United States*, 425 US 391, 418 n4 (1976) (*per* Justice Brennan). Others were more discerning; e.g. *United States v Hubbell*, 530 US 27, 51 (2000) (*R v Heydon* not cited) and Gerstein, R. S. (1979) "The Demise of *Boyd*: Self-incrimination and Private Papers in the Burger Court." *UCLA Law Review* 27: 343-397 at 358 n76 (noted absence of self-incrimination claim in *R v Heydon*).

<sup>19</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 83 ("A rule about compelling the adverse party to produce *his own* evidence, apparently based on property rights, had thus become associated with a general 'right to silence' ") (emphasis in original).

<sup>20</sup> A rare example is *Chetwind v Marnell* (1798) 1 Bos & Pul 271 at 272 (126 ER 900) in which Eyre CJ "thought it would be a violent measure to order the Plaintiff to produce an instrument which would be a

statements about the unfairness of making civil parties provide evidence which might damage their civil case, but that is a different issue. It arises in any civil procedure which includes compulsory discovery.<sup>21</sup>

Most of the civil cases about the King's Bench rule involved fine arguments about the existence or otherwise of proprietary interests in the documents in question.<sup>22</sup> Some of the decisions could be readily understood in those terms.<sup>23</sup> Others were harder to explain.<sup>24</sup>

In any event, the finer points of law were less important than the underlying procedural reality. In civil proceedings King's Bench rules were much inferior to the bills of discovery offered by the Courts of Equity. This reality was acknowledged in occasional statements in the reports.<sup>25</sup>

When Lord Mansfield was Chief Justice of the King's Bench, he sought to overcome Chancery's procedural advantages. He removed the limitations on King's Bench rules for production of documents. The intention was to save parties in the King's Bench from the cost and trouble of going to Chancery to get

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means of convicting him of a capital felony". However, Eyre CJ also noted the forensic reality that the plaintiff could not succeed in his action without producing the instrument voluntarily.

<sup>21</sup> E.g. *May v Gwynne* (1821) 4 B & Ald 301 (106 ER 948) (Abbott CJ was "of opinion that the Court ought not to order a plaintiff to furnish evidence against himself").

<sup>22</sup> E.g. contrast *Love v Dr Bentley* (1707) 11 Mod 134 (88 ER 947) (parishioners succeed in enforcing production of parish records); with *Cox v Copping* (1698) 5 Mod 395 (87 ER 726), 1 Ld Raym 337 (91 ER 1121) (no production of parish records ordered for the impropiator of an ecclesiastical benefice in his action against the parish).

<sup>23</sup> E.g. *Collegium Medicorum London v West* (1714) Gilb Cas 134 (93 ER 284) (unlicensed physician not entitled to production of records of College of Physicians, even though he was a graduate of Oxford).

<sup>24</sup> E.g. *Ward v Apprice* (1704) 6 Mod 264 (87 ER 1011) (partners not required to produce partnership books when suing a co-partner for misuse of partnership funds).

<sup>25</sup> E.g. *Ward v Apprice* (1704) 6 Mod 264 (87 ER 1011) ("You have entrusted him with the custody of this book; and if he has broke his trust, you must seek for remedy in equity"); *Cox v Copping* (1698) 5 Mod 395 at 396 (87 ER 726) ("It was likewise said, that if the plaintiff should exhibit a bill against the churchwardens he would have an account of the parish-books").



an order for discovery.<sup>26</sup> The result was a King's Bench procedure confusingly called the "equitable common law jurisdiction".<sup>27</sup>

When Lord Kenyon replaced Lord Mansfield as Chief Justice, that King's Bench procedure was quickly discarded. Orders for discovery were again seen as being best left to a court of equity because it "can adapt its rules to the individual case in the manner best calculated to attain the ends of justice".<sup>28</sup> Control of discovery remained with the equity courts until common law and equity were fused in the mid-1800s.<sup>29</sup>

### **(3) EQUITY**

#### **(a) ORIGINS IN EQUITY**

##### **(i) United States**

Chapter VIII dealt with the US Supreme Court's decision in *Boyd*.<sup>30</sup> It is worth looking at it again because it was the first major US Supreme Court decision on the application of the Fifth Amendment to the production of documents.

Furthermore, it involved civil proceedings.

The majority opinion in *Boyd* looked to chancery practice for guidance on the rules for producing books and writings in civil proceedings.<sup>31</sup> It did not mention

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<sup>26</sup> Lord Mansfield's aim was reflected in his comment that "in civil causes, the Court will force parties to produce evidence which may prove against themselves": *Roe dem Haldane v Harvey* (1769) 4 Burr 2484 at 2489 (98 ER 302 at 305). This comment was only true for as long as he was CJKB. It is quoted much less often than his *obiter* comment on criminal procedure mentioned above.

<sup>27</sup> E.g. by Bray, E. (1885) *The Principles and Practice of Discovery* (London: Reeves and Turner) at 284.

<sup>28</sup> *Mayor of Southampton v Graves* (1800) 8 TR 590 (101 ER 1563 at 1564).

<sup>29</sup> E.g. Lord Campbell CJKB noted that the 1851 Evidence Act enabled the common law courts to compel the inspection of documents in civil actions, "the only means for obtaining which, before the Act, was the filing of a bill of discovery in equity": *R v Ambergate Railway Company* (1852) 17 QB 957 at 966 (117 ER 1548 at 1551).

<sup>30</sup> *Boyd v United States*, 116 US 616; 29 L Ed 746 (1886).

<sup>31</sup> *Boyd v United States*, 116 US 616, 631; 29 L Ed 746, 751 (1886) ("one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property").

any of the six cases. Admittedly, it was interpreting a legislative provision, which applied the “ordinary rules of proceeding in chancery” to the production of books and writings by civil parties in the courts of the United States.<sup>32</sup>

In 1886, the majority in the US Supreme Court made the link between the production of documents in civil proceedings and the chancery practice of discovery.<sup>33</sup> Unfortunately, the English Court of Appeal from the same period questioned whether the privilege applied to documents at all.

## **(ii) England**

The contrary English authority was in *Webb v East*.<sup>34</sup> This decision was given almost thirty years after equity was fused with the common law. The plaintiff in a defamation case did not have copies of the defamatory material. He was successful in obtaining them from the defendant. It was held that the defendant had failed to claim the privilege properly.

The Court of Appeal did not have to decide whether the privilege would have been available to block the production of the documents in the first place. However, the judges doubted whether it would have been available.<sup>35</sup> Jessell MR, for example, appeared far from convinced that documents attracted the protection of the privilege.<sup>36</sup>

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<sup>32</sup> Originally section 15 of the Judiciary Act 1789.

<sup>33</sup> *Boyd v United States*, 116 US 616, 631; 29 L Ed 746, 751 (1886) (the “court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice”).

<sup>34</sup> (1880) 5 Ex D 108.

<sup>35</sup> (1880) 5 Ex D 108 at 112, 114 and 115.

<sup>36</sup> E.g. Jessell MR seemed unimpressed by the authority offered by counsel in reply to this question during argument. “According to the rule in equity a defendant was not bound to answer where doing so might tend to incriminate him, but is there any authority that he can decline to produce a document because it might tend to incriminate him?” ((1880) 5 Ex D 108 at 109).

The doubts were overcome in later case law. Within twenty years, the Court of Appeal was prepared to assume that the privilege applied to documents on discovery.<sup>37</sup> Even so, *Webb v East* gives pause for thought. On the one hand, it shows that the extension of the privilege to documents was not achieved seamlessly by six common law decisions in the early 1700s. Like the US Supreme Court in 1886, the Court of Appeal in 1880 did not mention those decisions.

On the other hand, Jessell MR expressed his doubts after due consideration of the rule in equity. That suggests that the link between the equitable remedy of discovery and the privilege for documents was not obvious at that time. It may seem unduly optimistic in the twenty-first century to look for a link which was not evident to Jessell MR in the nineteenth, but that is what this chapter will seek, in a limited way, to do.

### **(iii) Australia**

This issue is of interest in Australasia where the application of the privilege to documents causes problems in civil proceedings. It has not been much explored, even by judges with an interest in history. Brennan J stood out among Australian judges because he linked the history of the privilege with the history of discovery. Civil proceedings were involved in *Caltex*, but he still cited four of the usual criminal authorities as historical authority on the privilege and documents.<sup>38</sup>

It was left to three minority judges in *Caltex* to suggest the link between discovery and the application of the privilege to documents in civil proceedings. According to their joint dissenting judgment, the privilege

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<sup>37</sup> *Spokes v Grosvenor Hotel* [1897] 2 QB 124 at 132-134.

<sup>38</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 521-522 (the "courts have traditionally refused to compel an accused person to furnish evidence against himself, either testimonially or by the production of documents"). He cited *R v Worsenham* (1701) 1 Ld Raym 705 (91 ER 1370); *R v Cornelius* (1744) 2 Str 1210 at 1211 (93 ER 1133 at 1134); *R v Mead* (1704) 2 Ld Raym 927 (92 ER 119); and *R v Purnell* (1744) 1 Wils KB 239 at 242 (95 ER 595 at 597).

was extended to the production of documents apparently as a result of Chancery influence. Discovery was an equitable remedy and the Court of Chancery would not order the production of documents if to do so would have exposed the party against whom discovery was sought to a penalty or forfeiture. The Court came to recognize self-incrimination as affording similar protection. The same policy was extended to the subpoena duces tecum, which was originally a Chancery writ. When the common law courts were given the power to use the subpoena, they used it consistently with Chancery practice. The general aversion in seventeenth century England to inquisitorial procedures meant that no distinction was drawn between documents and testimonial evidence.<sup>39</sup>

In its footnotes the dissenting judgment acknowledged Tollefson's thesis as a source.<sup>40</sup> In fact, the passage was taken almost *verbatim* from Tollefson's thesis.<sup>41</sup> The final sentence was the only substantial addition.

The final sentence included a footnote reference to *R v Mead*.<sup>42</sup> This was the only one of the usual six cases which was cited. The aim was apparently to provide a link with the common law cases on the King's Bench rule.<sup>43</sup>

The second sentence in the above passage was supported by references in footnotes to two other cases.<sup>44</sup> They were mentioned in Chapter VII among the Restoration cases in which Chancery refused discovery because of possible

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<sup>39</sup> Deane, Dawson and Gaudron JJ in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 528 (footnotes omitted).

<sup>40</sup> Deane, Dawson and Gaudron JJ in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 528 footnote (99).

<sup>41</sup> Tollefson, E. A. (1975) *The Privilege against Self-Incrimination In England and Canada. Faculty of Law* (Oxford: Oxford University) at 44-5.

<sup>42</sup> *R v Mead* (1704) 2 Ld Raym 927 (92 ER 119) cited in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 528 footnote (1).

<sup>43</sup> The judgments of Mason CJ and Toohey J and the judgment of Brennan J each cited *R v Mead* along with three others from Levy's list: (1993) 178 CLR at 501-502 and 521.

<sup>44</sup> *Monnins v Monnins* (1672) 2 Ch Rep 68 (21 ER 618); *Bird v Hardwicke* (1682) 1 Vern 109 (23 ER 349).

forfeiture or penalties. Unfortunately, neither of these two cases involved the production of documents.

In short, the dissenting judges in *Caltex* did not really explore the link between discovery and the application of the privilege to documents. That link has been further obscured by quirks in the history of discovery.

## (b) NATURE OF DISCOVERY

The historical meaning of discovery needs to be distinguished from its modern meaning. In Australasia discovery involves the exchange of affidavits of documents and then production of the documents themselves. This procedure has more recent origins and is much narrower than the old Chancery procedure of discovery.

Production of documents was originally obtained in Chancery by means of interrogatories. The contents of a document were only relevant in so far as they provided the answer to an interrogatory.<sup>45</sup> Production of the document occurred in that context.<sup>46</sup>

Interrogatories also shaped the form of the modern affidavit of documents. The affidavit is now an integral part of modern discovery, but it was only introduced by statute in the mid-1800s.<sup>47</sup> It was “in reality an answer to an imaginary

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<sup>45</sup> Bray, E. (1885) *The Principles and Practice of Discovery* (London: Reeves and Turner) at 152 (“the production of a document was a substitute for the ancient practice of setting out its contents in the answer, and was therefore part of the answer and necessary to complete its fullness”).

<sup>46</sup> Bray, E. (1885) *The Principles and Practice of Discovery* (London: Reeves and Turner) at 155: (interrogatories were “framed to compel the party to set forth the short contents of the documents in his answer (and if necessary the court would also order their production)”).

<sup>47</sup> Chancery Procedure Act 1852, sections 18 and 20: see Bray, E. (1885) *The Principles and Practice of Discovery* (London: Reeves and Turner) at 156.

interrogatory, and ... must be made in the same manner and under the same conditions as interrogatories must be answered".<sup>48</sup>

As noted in Chapter VII, the historical remedy of discovery was not confined to documents. An order for discovery might require the defendant or a third party to give oral information or to bring documents or other objects to court. It could be combined with another of the Chancellor's remedies.<sup>49</sup> The results could look surprisingly modern. The precursors of *Mareva* injunctions and ancillary affidavits existed at the time of Agincourt.<sup>50</sup>

Discovery orders were made against third parties to provide information for a court action.<sup>51</sup> Similarly, third parties might be required to produce documents.<sup>52</sup> The Chancellor had documents produced without any of the technicalities which hampered the King's Bench judges when they granted rules in the 1700s.<sup>53</sup> He was equally efficient in providing orders for discovery against defendants.

### (c) DISCOVERY AGAINST DEFENDANTS

Although many discovery orders were made against third parties, "the species of bill usually distinguished by that title was a bill for discovery of facts resting within the knowledge of the defendant, or of deeds or writings or other things in

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<sup>48</sup> Bray, E. (1885) *The Principles and Practice of Discovery* (London: Reeves and Turner) at 220.

<sup>49</sup> Holdsworth, W. (1944) *A History of English Law (Vol 1)* (London: Methuen & Co Ltd and Sweet & Maxwell Ltd) at 458.

<sup>50</sup> *Craven v Buckton* (1415-1417) 10 SS 110 Case No 112. At the Battle of Agincourt some prisoners were captured by Craven and Irby. They alleged that Buckton had later taken these prisoners by force and ransomed them. They asked for Buckton to be brought before the Chancellor to declare the names of the prisoners. They also asked, in effect, for a freezing order against the wife of the Treasurer of Calais to secure part of the ransom which she was said to be holding.

<sup>51</sup> E.g. *Stauden v Bullock* (1596) Toth 9 (21 ER 107) (assignor of lease ordered to set down name of assignee and names of persons who felled trees on the leased property); *Pembroke (Earl of) v Bostock* (1626) Toth 16 (21 ER 156) (cleric ordered to name patron who presented him to benefice, so that action could be taken against patron).

<sup>52</sup> E.g. *Anonymous* (1469) Cary 15 (21 ER 8) ("if lands be severally given by one deed to two men; he which hath the deed shall be compelled here to shew it for defence of the other's title").

<sup>53</sup> "Where certainty wanteth, the common law faileth, but yet help is to be found in Chancery for it": *Anonymous* (1457) Cary 15 (21 ER 9) (inventories to be produced by current holders of goods which the previous owner should have forfeited to the crown).

his custody or power”.<sup>54</sup> This species of bill was needed when a common law plaintiff sought information, documents or other things which could not be obtained under the common law procedures.

Orders for discovery of documents had been available since the earliest days of Chancery, although the basis for the discovery of documents was not always clear. One early order required the production of documents on the basis that they were objects.<sup>55</sup> However, the same rules were applied around 1600 to the production of documents by a party for evidentiary purposes.<sup>56</sup>

This chapter will not explore the link between the privilege and the history of subpoenas, made by the dissenting judges in *Caltex*.<sup>57</sup> They relied upon Tollefson's thesis, but neither they nor he provided any case examples or further explanation. In any event, during the 1600s discovery of documents began to be ordered without the need for a subpoena.<sup>58</sup>

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<sup>54</sup> Bray, E. (1885) *The Principles and Practice of Discovery* (London: Reeves and Turner) at 609.

<sup>55</sup> E.g. *Farendon v Kelsey* (1407-9) 10 SS 107 Case No 109. William Farendon wanted to recover from Alice Kelsey some documents (“muniments”) and valuable objects which had been held by her deceased husband as Farendon's attorney. She was summoned to appear in Chancery for examination which showed that she had given the objects and documents to the Mayor of London for delivery to Farendon. The Chancellor “ordered the said Alice that if she could find any more muniments touching the said William, that then she should deliver them to him” (10 SS at 108).

<sup>56</sup> A Note of Lord Keeper Egerton's practice from around 1600 stated that if the defendant confessed to having evidences for which a bill was exhibited, “accordingly upon a subpoena *duces tecum* they are brought in and delivered to the plaintiff” (Note (c 1600) 117 SS 287 Case No 119-91). Also see e.g. *Gifford v Tripconny* (1582) Choyce Cases 163 (21 ER 95) (plaintiff claimed to hold a lease jointly with the defendant and Chancellor “therefore ordered a Subpoena *duces tecum* be awarded against the Defendant to bring the same into the Court to be seen and perused as this Court shall think fit”).

<sup>57</sup> Deane, Dawson and Gaudron JJ in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 528.

<sup>58</sup> E.g. *Brookbank v Brookbank* (1691) 1 Eq Ca Abr 168 pl 7 (21 ER 963). The defendant A made a settlement under which his brother was named as the default beneficiary. A destroyed the original Settlement Deed when it became clear that the default would occur and the settled property go to his brother. The brother obtained an order from Chancery to make A produce the counterpart in court “there to remain, and thereby hinder A from selling the Estate from the plaintiff”. Also see *Comes Banbury v Briscoe* (1680) 2 Chan Cas 42 (22 ER 837), 1 Eq Ca Abr 168 pl 6 (21 ER 963) (Deed of Settlement under which two persons claimed was ordered to be brought into court for safe custody, inspection and copying). Nor was a *subpoena* any longer needed for document production by third parties: e.g. *Pie v Bevill* (1635) Toth 16 (21 ER 110) (third party “ordered to show evidences, to direct what tenants ought to attorn, and to discover who is tenant”).

Nor will this chapter explore the link made by one writer between discovery and the incompetence of parties in common law actions.<sup>59</sup> The argument in this chapter is that the privilege as a limitation on discovery applied to documents, as it did to oral answers. It did not need to be extended from oral discovery to the production of documents because it was always there. Whatever form the privilege took at a given time, it applied as a limitation on all forms of discovery.

#### (d) CLAIMS OF PRIVILEGE

##### (i) Five of Bray's Cases

As mentioned earlier in this chapter, the application of the privilege to documents was doubted in *Webb v East*.<sup>60</sup> Yet *Bray on Discovery* ("Bray") claimed that there was "ample authority" for the proposition doubted in *Webb v East*.<sup>61</sup> This authority consisted of only six cases, the earliest of which was decided in 1816.<sup>62</sup> They will be discussed before looking at the older cases.

Only three of the cases showed the privilege being successfully claimed to resist discovery of documents. The judges in these three cases made no distinction between discovery of documents and oral discovery. In the latest of them, for

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<sup>59</sup> Bryson, W. H., Ed. (2001) *Cases Concerning Equity and the Courts of Equity 1550-1660 (Vol I)*. Selden Society (Vol 117) (London: Selden Society) at xxiii ("In order to prevent mechanical failures of justice arising from this rule, the courts of equity provided the plaintiff at common law with a bill of discovery"). Bryson did not provide any further explanation or authority to connect discovery with the incompetence of parties.

<sup>60</sup> (1880) 5 Ex D 108.

<sup>61</sup> Bray, E. (1885) *The Principles and Practice of Discovery* (London: Reeves and Turner) at 314 ("ample authority in equity for the proposition that the privilege (both as to criminatory and other penalising matter) obtains equally in regard to the production of documents as to answers to interrogatories").

<sup>62</sup> *Ewing v Osbaldiston* (1834) 6 Sim 608 (58 ER 721); *King of Two Sicilies v Willcox* (1851) 1 Sim (NS) 301 (61 ER 116); *Waters v Earl of Shaftesbury* (1865) 14 WR 259, 12 Juris NS 3; *Parkhurst v Lowten* (1816) 1 Mer 392 (35 ER 718), (1819) 2 Swanst 194 (36 ER 589); *Nelme v Newton* (1819) 2 Y & J 185 (148 ER 884); *Mitchell v Koecker* (1849) 11 Beav 380 (50 ER 863).



example, Lord Langdale MR just applied the same rule to documentary as to oral evidence.<sup>63</sup>

The other two of cases involved Lord Chancellor Eldon.<sup>64</sup> His enthusiasm for the privilege has sometimes misled later judges.<sup>65</sup> In one of them he described the privilege as “having been for ages a principle of British jurisprudence, and I hope it will continue so long as the law continues, that no man shall be called on in a court of justice to accuse himself of an offence”.<sup>66</sup> Lord Eldon did not say that the privilege had applied to documents “for ages”. It may have done, but the six cases were all relatively recent.

In the fourth and fifth cases the courts refused on the facts to allow the privilege to be claimed to resist discovery of documents. Nevertheless, Bray was justified in mentioning these decisions. Both assumed that the privilege would have been available to resist discovery of documents.<sup>67</sup> Like the other three they could be

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<sup>63</sup> *Mitchell v Koecker* (1849) 11 Beav 380 at 382 (50 ER 863 at 864) (“in the case which may probably exist, the disclosure of the truth may render him liable to penalties, and, for that reason, I allow the demurrer”) (purchaser of dentistry business refused discovery of vendor's tax return because not only might it show that the vendor overstated the income of the business to the purchaser, but also that he understated its income to the Commissioners of Taxation, exposing him to penalties).

<sup>64</sup> *Parkhurst v Lowten* (1816) 1 Mer 392 at 401 (35 ER 718 at 721) (defendant's executor enjoyed defendant's protection from discovery of his books and papers “upon the ground of the forfeiture attached to a simoniacal contract; and there is no doubt that, if the contract were really simoniacal, he could not be compelled to make the discovery”); *Nelme v Newton* (1819) 2 Y & J 185 (148 ER 884 at 885) (executor filed bill of account against partners in firm of notaries, but Lord Eldon allowed partners to resist discovery of a relevant document because they could be struck off the roll of notaries if their answers revealed co-partnership with testator who had no certificate to practise as notary).

<sup>65</sup> E.g. his comments in *Attorney-General v Brown* (1818) 1 Swanst 265 (36 ER 384) were cited as showing that the privilege lies to resist discovery and interrogatories (by Campbell J in *Pathways Employment Services v West* (2004) 212 ALR 140 at 143). Even if this can be implied from Lord Eldon's comments, they were clearly *obiter*. The proceedings did not involve discovery but rather a general demurrer to the Attorney-General's information.

<sup>66</sup> *Parkhurst v Lowten* (1819) 2 Swanst 194 at 214 (36 ER 589 at 595).

<sup>67</sup> *Ewing v Osbaldiston* (1834) 6 Sim 608 (58 ER 721) (defendant unsuccessful in claiming privilege because he had already admitted incurring penalties under the Act and “consequently could not be damnified by a production of the documents”); *King of Two Sicilies v Willcox* (1851) 1 Sim (NS) 301 (61 ER 116) (defendants unsuccessful in claiming privilege against discovery of documents because incrimination under foreign law held not to be sufficient ground to claim the privilege).

said to provide the authority claimed by Bray rather than to justify the doubts expressed by the Court of Appeal in *Webb v East*.

## (ii) Use of Chancery Procedures

The sixth of Bray's cases was *Waters v Earl of Shaftesbury*.<sup>68</sup> This did not directly involve the privilege. Stuart V-C refused to order the plaintiff to give discovery of certain documents, because they could not be sought for any legitimate purpose in the civil action.

Although it was not about the privilege, *Waters v Earl of Shaftesbury* was consistent with the arguments in this thesis. The defendant wanted the documents to assist his private prosecution of the plaintiff for embezzlement arising from the same matters. Stuart V-C expressed Chancery's long-standing objection to its compulsory procedures being used to collect evidence for criminal proceedings.<sup>69</sup>

Lord Hardwicke expressed a similar view in *Montague (Lord) v Dudman*.<sup>70</sup> This was not one of Bray's six cases. Nor did it involve the privilege. Lord Hardwicke refused to grant discovery of some conveyances which were said to be made fraudulently. He objected to discovery being used to provide evidence for criminal proceedings.<sup>71</sup> His statement has been said in Australia to rule out any discovery at all in criminal proceedings.<sup>72</sup>

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<sup>68</sup> (1865) 14 WR 259, 12 Juris NS 3.

<sup>69</sup> (1865) 14 WR at 260 ("the interests of the public should never be served at the expense of injustice to individuals, and still less by making use of the machinery of this court").

<sup>70</sup> (1751) 2 Ves Sen 396 (28 ER 253).

<sup>71</sup> (1751) 2 Ves Sen at 398 (28 ER at 254) ("A bill of discovery lies here in aid of some proceedings in this court in order to deliver the party from the necessity of procuring evidence, or to aid in the proceeding in some suit relating to a civil right in a court of common law, as an action; but not to aid the prosecution of an indictment, or aid the defence to it").

<sup>72</sup> Brooking J in *Sobh v Police Force of Victoria* [1994] 1 VR 41 at 45-6 ("the absence of any precedent for the use of a bill of discovery as auxiliary to criminal proceedings").

### (iii) Earlier Cases

Macnair's Restoration cases included one possible example of the privilege being successfully used to resist the discovery of documents. In that case discovery was refused because of the danger of forfeiture.<sup>73</sup> Even then, the defendant was perhaps resisting discovery of information rather than documents.<sup>74</sup>

In his book on the Elizabethan Court of Chancery, Jones noted that the defendant had to produce “all relevant evidences in his possession and meet the bill with all the facts in his knowledge”.<sup>75</sup> These “evidences” included documents.<sup>76</sup>

“Naturally there were some limitations, and defendants did not have to reply in such a fashion that they would be exposed to a penalty or forfeiture”.<sup>77</sup>

Unfortunately, these limitations were shown only indirectly in the Elizabethan cases which were reported in print.

In one case, a defendant successfully pleaded the danger of forfeiture to resist discovery, but the bill sought information about the documents rather than discovery of the documents themselves.<sup>78</sup> Another case did involve discovery of documents, but the court refused to grant discovery for reasons which had nothing to do with forfeiture or self-incrimination.<sup>79</sup>

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<sup>73</sup> *Hungerford v Goreing* (1687) 2 Vern 38 (23 ER 652).

<sup>74</sup> The plaintiff wanted discovery of “the boundaries of the defendant's estate, alledging the same fully appeared by the deeds and writings in his hands”. It was held in Chancery that, as this might result in his eviction, there was “no reason to compel the defendant to discover the boundaries in his deeds”.

<sup>75</sup> Jones, W. (1967) *The Elizabethan Court of Chancery* (London: Oxford University Press) at 455.

<sup>76</sup> E.g. *Hungerford v Dean of Salisbury* (1591) C33/83 fol 22: see Jones, W. (1967) *The Elizabethan Court of Chancery* (London: Oxford University Press) at 456 n1.

<sup>77</sup> Jones, W. (1967) *The Elizabethan Court of Chancery* (London: Oxford University Press) at 455 citing at n1 *Blithe v Bathcombe* (1594) C38/1.

<sup>78</sup> *Wolgrave v Coe* (1594) Toth 18 (21 ER 110) (discovery to force the defendant to answer whether he still had documents which he was secured by a bond to deliver and “the opinion of the Court was, the defendant needed not to answer, because he should thereby disclose cause of forfeiture of the bond”).

<sup>79</sup> *Vavator v Row* (1591) Toth 157 (21 ER 153) (Row was challenging Vavator's title because he himself claimed a leasehold interest in the land. Row was ordered to bring the leases into court. He in turn sought discovery of “the ancient evidences” which would show the defects in Vavator's title). This was one of several cases involving the same parties, although the spelling of their names of the parties varied from case to case: e.g. *Roe v Waforer* (1594) Toth 80 (21 ER 129).

#### (4) CONCLUSION

It would be simpler and safer to recite the usual list of six common law authorities given early in this chapter for the extension of the privilege to documents. This may even be justified in the case of criminal proceedings. The six cases seemed to support the development towards a general right to silence, along the lines suggested by Macnair.<sup>80</sup> However, the civil cases on documents contained few, if any, indications of a link between King's Bench rules and the privilege. Moreover, they did not seriously challenge Chancery's position as the best place to obtain the production of documents in civil cases.

This chapter has suggested that the privilege was not extended from oral evidence to documents in civil proceedings. It was already there. The Chancellor imposed the same limitations on the discovery of documents as on oral discovery. The privilege was one of those limitations. It applied to documents as it had applied to oral disclosures from early in the development of Chancery practice.

Although that approach is consistent with statements by Lord Chancellors after 1800, little support can be found for it in case law before that date. Like witness privilege in civil trials, the explanation for the lack of historical examples may be simple or it may be complicated. Hopefully, the gaps will be filled as more material emerges in volumes like those published in recent years by the Selden Society.

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<sup>80</sup> Macnair, M. R. T. (1990) "The early development of the privilege against self-incrimination." *Oxford Journal of Legal Studies* 10(Spring): 66 at 83 ("A rule about compelling the adverse party to produce *his own* evidence, apparently based on property rights, had thus become associated with a general 'right to silence'

## (C) DOCUMENTS IN NEW ZEALAND

### (1) PROPOSALS FOR REFORM

The application of the privilege to documents in New Zealand is currently similar to the Australian position. The privilege can be claimed to resist the production of incriminating documents.<sup>81</sup> Moreover, it can be claimed whether those documents are pre-existing or newly created.<sup>82</sup> This is a distinction which has not been significant in the past.<sup>83</sup>

The NZLC was therefore proposing fundamental change when it recommended in its Preliminary Paper that the contents of documents should no longer be covered by the privilege.<sup>84</sup> However, the privilege would be removed only from the contents of pre-existing documents, not from the contents of documents which were created as a result of compulsion.<sup>85</sup> In its later Report on Evidence, the NZLC confirmed its proposal to remove the privilege from the contents of pre-existing documents.<sup>86</sup> The proposal was included in the 2005 Evidence Bill.<sup>87</sup>

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<sup>81</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 24, citing *Taranaki Co-operative Dairy Co Ltd v Rowe* [1970] NZLR 895 (“In New Zealand, the privilege can be claimed for the contents of documents produced by the claimant”).

<sup>82</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 35 (“the courts have made no distinction between pre-existing and newly created documents. The privilege applies to both”).

<sup>83</sup> E.g. *R v Barker* [1941] 2 KB 381 at 384-5. The Court of Appeal in the United Kingdom declined, in the context of inadmissibility of evidence, to distinguish incriminating ledgers which were pre-existing, from an incriminating letter which was written as a result of a false promise of immunity.

<sup>84</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 203 (“the privilege should not apply to pre-existing documents or real evidence in existence at the time their possessor is asked to produce them”).

<sup>85</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 204.

<sup>86</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) Vol 1 para 281 (encouraged by support for the proposal in the “bulk of submissions”).

<sup>87</sup> Explanatory notes to clause 59: New Zealand Government (2005) *Evidence Bill* (Wellington) (“Under the Bill, there is no privilege for pre-existing documents”). Clause 49(2) restricts the privilege to information. This is defined in clause 47(3)(b)(i) as including documents only if they are created afterwards.

As Chapter VIII showed, the privilege can protect documents indirectly by covering the act of producing them. In its Preliminary Paper, the NZLC expressed the view that the privilege should protect testimonial acts of production of physical evidence including documents.<sup>88</sup> However, in its Report on Evidence, the NZLC changed this preliminary view. It proposed that the privilege should not provide any protection at all for the production of physical evidence including documents.<sup>89</sup> The combined effect of the NZLC proposals was therefore that documents would receive no protection from the privilege, except for the contents of documents created under compulsion.

## **(2) GENERAL CRITICISMS**

### **(i) HISTORY REJECTED**

The NZLC proposals removed the protection which the contents of documents had received for centuries in some common law jurisdictions. The wisdom of that change in policy terms is considered below. It is revealing how these bold conclusions were reached.

The NZLC did not, for example, explore the history of the privilege to see how and why it came to cover documentary evidence in the first place. In view of the historical gaps admitted earlier in this chapter, the NZLC can hardly be criticised for that, but its use of American case-law can be criticised.

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<sup>88</sup> Its preliminary view was that “when there is a communicative aspect to an action (eg, when the act of production is itself an acknowledgement that an offence has been committed), the privilege should be claimable”: New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) page 64.

<sup>89</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) Vol 1 para 281.

## (ii) AMERICAN INFLUENCE

The NZLC was undoubtedly influenced by the position in the United States. The Preliminary Paper referred to American case-law.<sup>90</sup> Unfortunately, the proposals in the Preliminary Paper were based upon an incomplete version of that law. Furthermore, in its Report on Evidence the NZLC adopted a different but also incomplete version of the American position.

The main problem with the version in the Preliminary Paper was its assumption that the Fifth Amendment protects documents in the United States in the same way as it protects other physical evidence.

## (3) DOCUMENTS AS PHYSICAL EVIDENCE

As Chapter VIII showed, physical evidence in the United States has rarely been protected by the Fifth Amendment, but documents often have been, depending upon a particular court's interpretation of the *Fisher* guidelines. The NZLC dealt with them under the same heading "Documentary and Real Evidence" in Chapter 8 of its Preliminary Paper. Although there were separate sections for documents and real evidence within Chapter 8, documents and other physical evidence were often included in the same phrase, as if the privilege applied to them on a similar basis.<sup>91</sup>

They were also mentioned together when describing the American law on the subject.<sup>92</sup> The NZLC did not recognise the importance which the US Supreme Court itself attached to *Fisher*. The decision specifically created a new approach for documents, but the Preliminary Paper mentioned it as only supporting

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<sup>90</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 195 (the main issues were "traversed, by focusing on the United States case law, which first recognised and then restricted the Fifth Amendment's application to documents").

<sup>91</sup> E.g. New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) paras 196, 202, 203 and 206.

<sup>92</sup> E.g. New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) paras 196 and 202.

authority.<sup>93</sup> A later case on search warrants was cited as overruling *Boyd* in the context of documents.<sup>94</sup>

The guidelines of “existence, possession and authenticity” were laid down in *Fisher* for documents. The NZLC mentioned them in a paragraph dealing with physical evidence generally.<sup>95</sup> Even then, they were attributed to a later decision.<sup>96</sup>

Perhaps the NZLC was distracted by the references to the act of production doctrine in the *Apple and Pear* case.<sup>97</sup> In its Preliminary Paper the NZLC approach to acts of production was influenced by the views expressed in that case.<sup>98</sup>

#### **(4) ACTS OF PRODUCTION**

##### **(a) CASE LAW**

The *Apple and Pear* case was itself an egregious example of the dangers of transplanting law from another jurisdiction. It could hardly be said to have provided a sound basis for applying the American act of production doctrine to

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<sup>93</sup> E.g. New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 198.

<sup>94</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 198 citing *Andresen v Maryland*, 427 US 463 (1976). Yet *Fisher* was the basis for the majority opinion in that case: *Andresen v Maryland*, 427 US 463, 472 (1976).

<sup>95</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 202.

<sup>96</sup> *Doe v United States*, 487 US 201, 209 (1988) (“*Doe II*”) (Fifth Amendment did not protect against compelled signing of form consenting to the disclosure of foreign banking records). This case fell somewhere between providing physical evidence and creating a document under compulsion. The signing of the consent form could justifiably be added to Geyh’s list of communicative acts, which should really be protected but have not been because they are not “sufficiently testimonial”: Geyh, C. G. (1987) “The Testimonial Component of the Right Against Self-Incrimination.” *Catholic University Law Review* 36(Spring): 611 at 633 and 637.

<sup>97</sup> *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191 at 194-195.

<sup>98</sup> E.g. New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) paras 193, 202 and 206.



documents in New Zealand. It involved the inspection of apples, not the production of documents.

In the *Apple and Pear* case, McMullin J delivered the judgment of the New Zealand Court of Appeal. This decided that the privilege was not available to stop a fruit inspector from inspecting apples kept in cold store by a road-side vendor. The same conclusion could probably have been reached by a literal reading of the statutory provisions which governed such inspections.<sup>99</sup>

McMullin J chose instead to address the broader question of whether the privilege protected against the production of incriminating physical evidence. Finding the discussion in local sources inconclusive, he looked to *Wigmore on Evidence* for assistance. He concluded from *Wigmore on Evidence* that there “may be cases where permission to examine an object would involve a person in a testimonial disclosure of an incriminating nature”.<sup>100</sup> That general statement did not mention documents. Nor did McMullin J find any testimonial disclosures involved in the inspection of apples in the case in question.

McMullin J applied the formulation in the 1961 edition of *Wigmore on Evidence* to decide which acts of production were sufficiently testimonial to qualify for protection under the Fifth Amendment.<sup>101</sup> In relation to physical evidence, that formulation had been partly rejected in 1966 by the US Supreme Court in *Schmerber*.<sup>102</sup> In relation to documents, the formulation was overtaken by the new

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<sup>99</sup> E.g. s45, Apple and Pear Marketing Act 1971.

<sup>100</sup> *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191 at 195.

<sup>101</sup> *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191 at 194, adopting the formulation from Wigmore, J. H. (1961) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) para 2263 page 378.

<sup>102</sup> *Schmerber v California*, 384 US 757, 763 n7 (1966), partly rejecting the formulation from Wigmore, J. H. (1961) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) para 2263 p378.

approach introduced in *Fisher* in 1976.<sup>103</sup> In 1986 McMullin J was seeking to adopt principles which were no longer current in the United States.

#### (b) NZLC APPROACH

In its Preliminary Paper the NZLC proposed that testimonial disclosures should cover all physical objects including documents. It was influenced by McMullin J's general statement in favour of protecting testimonial disclosures.<sup>104</sup> It suggested that this avenue should not be closed off.<sup>105</sup> Presumably, like McMullin J, it was basing its proposal on superseded American case-law from 1961.

In its later Report on Evidence the NZLC discarded the act of production doctrine for physical objects. It did so because of the public response to the proposal.<sup>106</sup> It considered the doctrine illogical when applied to documents.<sup>107</sup> This did not take into account the US Supreme Court's attempts to make the *Fisher* guidelines work.

In its Report on Evidence, the NZLC applied the same rules to documentary as to other physical evidence. It simply excluded the protection of testimonial disclosures, whether for physical objects or documents. That result did not replicate the American position any more accurately than the proposal in the Preliminary Paper did.

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<sup>103</sup> *Fisher v United States*, 425 US 391 (1976).

<sup>104</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 193 n42.

<sup>105</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 206 (it "appears artificial for the law to make distinctions between, for example, telling the police where the body is, producing the body, or showing where it is").

<sup>106</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) Vol 1 para 281 (submissions showed "support for removing testimonial disclosures implied from producing an object from the scope of the privilege").

<sup>107</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) Vol 1 para 281 (it was "illogical to remove the privilege from pre-existing documents and then to allow them to be protected on the grounds that the act of producing the document was a testimonial disclosure coming within the scope of the privilege").

## (5) ARGUMENT FOR TOTAL REMOVAL

### (a) AMERICAN OPINION

Admittedly, some American commentators have advocated complete removal of the privilege from pre-existing documents. They have not accepted that when the protection of the Fifth Amendment is removed from the contents of documents, it should necessarily shift to the act of production.<sup>108</sup> However, the discussion has centred on particular American procedures.

In Australasia the exchange of documents known as discovery forms an integral part of civil proceedings. As noted in Chapter VIII, there is no exact American equivalent. Discovery procedures in the United States involve mainly oral discovery such as interrogatories and depositions.

Particular local procedures also explain the American argument that the privilege should be removed from the business documents of individuals. The business documents of corporations have not received the protection of the Fifth Amendment for almost a century because of the collective entity rule. As the absence of protection has not led to abuse, it has been argued that the protection of the Fifth Amendment should be likewise removed from the business documents of individuals.<sup>109</sup>

The view underlying this thesis, however, is that the privilege is indispensable in preserving a fair State-individual balance. An important reason for this view lies

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<sup>108</sup> E.g. Heidt, R. (1984) "The Fifth Amendment Privilege and Documents - Cutting *Fisher's* Tangled Line." *Missouri Law Review* 49(3): 439 at 491 (he called for "a decent burial" of the notion that the Fifth Amendment provides protection against subpoenas which request documents).

<sup>109</sup> Alito, S. A. (1986) "Documents and The Privilege Against Self-Incrimination." *University of Pittsburgh Law Review* 48(1): 27 at 80 ("What reason is there to believe that abuse would result if the business records of individuals were placed on the same footing?").

in practical concerns over the nature of documentary evidence and its easy availability once it has been produced in civil proceedings.

#### (b) NEW ZEALAND

According to the NZLC, such concerns could be addressed simply by the prohibition of unreasonable search and seizure.<sup>110</sup> In brief, conclusive phrases, the NZLC found that the usual reasons for the privilege were inapplicable to pre-existing documents. Unless they were created under compulsion, the privilege was not needed to ensure reliability of contents, protection from oppression and privacy.<sup>111</sup> The NZLC approach has its superficial attractions.

One effect of the NZLC proposals is that the privilege no longer applies in interlocutory civil proceedings, such as discovery, where pre-existing documents have to be handed over. At first sight, removal of the privilege solves at a stroke the fundamental problem which it causes in interlocutory proceedings. The NZLC made little of this dramatic result.

New Zealand resembles the United Kingdom in the form of its interlocutory proceedings and in the protection which the privilege gives to the contents of documents. The NZLC could find support in the comments of Lord Templeman and Lord Griffiths in the United Kingdom. As mentioned in Chapter I, they suggested that the privilege should not apply to pre-existing documents in civil

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<sup>110</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 203 (“In relation to pre-existing evidence, the concern behind the privilege of maintaining a fair State-individual balance may be adequately addressed by the prohibition of unreasonable search and seizure”). That prohibition is contained in section 21 of the New Zealand Bill of Rights Act 1990.

<sup>111</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 203.

proceedings.<sup>112</sup> The Lord Chancellor's Department put forward a similar proposal.<sup>113</sup>

Chapter VIII showed unexpected difficulties in the United States when the privilege was removed from documents. Difficulties for corporate custodians have been caused in Australia by the effective removal of the privilege from corporate documents. The position in Australia will be covered later in this chapter.

Under the NZLC proposals, the position of corporate custodians shows the broad consequences of removing the privilege from documents. The simplicity of this approach can be deceptive, leading instead to complicated and unfair results.

## **(6) CORPORATE DOCUMENTS**

Chapter VIII contained a detailed description of the *Braswell* decision in the US Supreme Court. This chapter will explore later the implications of that decision for Australia. The question here is whether in New Zealand the privilege allows an officer to refuse to produce corporate documents which incriminate that officer personally.

The question does not arise under the current law in New Zealand because the privilege is available to the corporation itself. The privilege of the corporation usually ensures that incriminating corporate documents do not have to be produced at all. The officer does not need to resort to personal privilege to avoid producing them.

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<sup>112</sup> *AT & T Istel Ltd v Tully* [1993] AC 45 at 53.

<sup>113</sup> Lord Chancellor's Department (1992) *The Privilege Against Self-Incrimination in Civil Proceedings* (London: Lord Chancellor's Department) at para 30 (privilege "should no longer apply in any civil proceedings" to be replaced by use immunity except "in respect of evidence which has a physical existence, including documents").

That result changes if, as in Australia, the privilege is not available to the corporation in the first place. The NZLC followed Australia in recommending that the privilege should not be available to corporations.<sup>114</sup> However, even if that recommendation is implemented, the result for corporate custodians will be different from the position in Australia.

Under the NZLC proposals no question would arise in New Zealand about the personal privilege of a corporate custodian. The officer could not claim personal privilege to avoid producing corporate documents, simply because they are documents.<sup>115</sup> The NZLC proposals achieved the same result as the *Braswell* decision but by a simpler route.

The Preliminary Paper and the Report on Evidence both said that officers would be protected by their personal privilege.<sup>116</sup> That protection was not apparently intended to apply to the production of incriminating corporate records. The Preliminary Paper cited an American decision to this effect, noting that it showed a “more restrictive approach”.<sup>117</sup> It is little comfort that American case-law allows the officers to invoke the Fifth Amendment during their oral testimony at the time of the production. They can only invoke it to avoid incriminating answers which require more than simple identification of the documents.<sup>118</sup>

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<sup>114</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) Vol 1 para 282. Now see clause 56(4)(a) New Zealand Government (2005) *Evidence Bill* (Wellington).

<sup>115</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) Vol 1 para 281.

<sup>116</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 238 (“With the removal of the privilege for corporations, the officer would be required ‘to come out into the open’ and invoke the privilege on his or her behalf”).

<sup>117</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 225 citing *Bellis v United States*, 417 US 88 (1974) (“a more restrictive approach has been taken in some cases suggesting that corporate officers are not even entitled to claim the privilege on their own behalf”). Also see New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) Vol 2 p161 para C258, commenting on section 61(4)(a) of the draft Evidence Code (The removal of the privilege from companies “does not preclude corporate employees or officers claiming the privilege on their own behalf when they are personally liable to self-incrimination”).

<sup>118</sup> *Curcio v United States*, 354 US 118, 123-4 (1957).

The NZLC approach again reflects the view that the simplest way to solve problems caused by the privilege is to remove it from documents completely. That does not necessarily achieve the fairest result. This thesis will argue that corporate officers and employees should be able to claim personal privilege to avoid producing corporate documents.

## **(7) CONCLUSION**

It is hard to see how American case-law justifies the NZLC's recommendation that the privilege should be removed from pre-existing documents. By treating them as physical evidence, the NZLC did not correctly represent the position in the United States. Nor did it replicate the American position when it later took a different approach and proposed removing the privilege from all acts of production.

Even if made under a misapprehension, a policy decision can turn out to be justified. It is hard to predict such a happy accident in New Zealand if the privilege is removed from documents completely. In the end, the NZLC might wonder, like the two concurring judges in *Hubbell*, whether there is not something to be said, after all, for allowing the privilege to protect the contents of documents. So might the ALRC which, in its recent Report, followed the NZLC.

## **(D) DOCUMENTS IN AUSTRALIA**

### **(1) INTRODUCTION**

#### **(a) ALRC RECOMMENDATION**

The ALRC Final Report recommended that certification should be extended to orders in civil proceedings for disclosure of information or searching of premises. That recommendation will be discussed in greater detail in the Chapter XII. It is

mentioned in this chapter because it adopted special rules for pre-existing documents.

The current legislative provisions for certification allow the court to grant use and derivative use immunity as a substitute for the privilege.<sup>119</sup> However, certification under the ALRC recommendation would lead to no immunity at all for pre-existing documents and only to use immunity for all other disclosures.<sup>120</sup> It is surprising that the ALRC should suggest this deviation from the existing legislative framework for certification.

It is even more surprising that the ALRC accepted the NZLC's analysis of American case-law as authoritative and the NZLC's approach to pre-existing documents as worthy of imitation.<sup>121</sup> Besides, it is technically difficult to draft provisions which achieve immunity in only limited circumstances.<sup>122</sup> No draft provision was included in the Appendix to the ALRC Report.<sup>123</sup> However, the main objection to the recommendation is that it treats some pre-trial documents differently from other pre-trial documents and from most other documents.

## (b) CURRENT POSITION

In principle, the privilege protects the contents of documents in Australia but subject to substantial exceptions. Most obviously, the privilege does not provide any protection to corporate documents. This is the general result of the *Caltex*

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<sup>119</sup> See s128, uniform Evidence Acts; s87, Civil Procedure Act 2005 (NSW).

<sup>120</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) Recommendation 15.10.

<sup>121</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.151.

<sup>122</sup> E.g. s72, Theft Act 1982 (UK). "My Lords, I confess that I have found the section far from easy to construe" (Lord Oliver of Aylmerton in *Crest Homes Plc v Marks* [1987] 1 AC 829 at 855-6).

<sup>123</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.151.



decision.<sup>124</sup> It also results from two statutory provisions which deny the privilege to a body corporate as a ground for failing to comply with a requirement to produce a document “or any other thing”.<sup>125</sup>

Another exception is common in Australian administrative proceedings. Statutory provisions often deny the protection of the privilege to the production of documents. The compelled evidence may receive some form of immunity to compensate for the removal of the privilege, but many provisions offer inadequate substitutes or none at all.

Some Australian High Court judges have found the argument for the privilege weaker for documents than for oral statements.<sup>126</sup> The ALRC presumably took the same view in its recent Report. Nevertheless, the general principle in Australian civil proceedings is that the privilege will enable the production of a document to be refused if its contents could incriminate the person producing it.

The privilege can, for example, be claimed during Australian pre-trial discovery procedures to avoid production of documents with incriminating contents. American experience should have little relevance in Australia because the pre-trial procedures are different and because the contents of documents are not protected in the United States. Nevertheless, Australian judges and legislators have undoubtedly been influenced by the principles perceived to apply in the United States.

The rest of this chapter will deal with two areas of Australian law showing evidence of that influence. Both show the dangers of transplanting law from

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<sup>124</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

<sup>125</sup> See s187, Evidence Act 1995 (Cth) and s1316A, Corporations Act 2001 (Cth).

<sup>126</sup> E.g. *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 503 (Mason CJ, Toohey J). Also see 178 CLR 477 at 555 (McHugh J).

another jurisdiction. The first covers Australian statutory provisions which give statutory use immunity to the “fact of production” of documents. The second area covers the position of officers producing corporate documents which are personally incriminating.

## (2) FACT OF PRODUCTION

### (a) DOCUMENTS NOT PHYSICAL EVIDENCE

Unlike the NZLC, Australian judges have distinguished documents from other physical evidence.<sup>127</sup> They have usually referred to American case law in the context of physical evidence other than documents, with a particular emphasis on *Schmerber*.<sup>128</sup> However, it is not certain that the privilege applies to the compulsion of physical evidence in Australia in the first place.<sup>129</sup>

This uncertainty is surprising. Australian legislation often purports to remove the privilege in relation to particular types of physical evidence.<sup>130</sup> To add to the confusion, the act of production doctrine has been reflected in Australian legislation by references to the “fact of production”.

### (b) LEGISLATIVE BACKGROUND

The fact of production concept has found its way into both Federal and State legislation in Australia. For over 20 years, South Australian statutes have included

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<sup>127</sup> E.g. *Sorby v The Commonwealth* (1983) 152 CLR 281 per Gibbs CJ (Privilege applies to any “document or thing” (at 288), but there is “a distinction between statements or other communications made by a witness on the one hand and real or physical evidence provided by the witness on the other”(at 292)).

<sup>128</sup> E.g. *Sorby v The Commonwealth* (1983) 152 CLR 281 at 291-2; *King v R* (1996) 16 WAR 540 at 545 and 548-549. Both cited *Schmerber v California*, 384 US 757 (1966).

<sup>129</sup> E.g. *King v R* (1996) 16 WAR 540 (privilege does not apply to taking of compulsory blood samples); and *Hawes v Governor of Goulburn Correctional Centre* (Unreported, NSW Court of Appeal, CA 40368/97, Mason P, Handley and Cole JJ, 18 December 1997) [1997] NSW LEXIS 1877, BC 9707659, para [\*7] (“the privilege against self-incrimination is probably restricted to testimonial incrimination”). Compare *R v McLellan* [1974] VR 773 at 778 (privilege does not apply to taking of compulsory breath samples) with *Fernando v Commissioner of Police* (1995) 36 NSWLR 567 at 591-592 per Powell JA (privilege applies to taking of compulsory blood samples).

<sup>130</sup> E.g. s353A, Crimes Act (NSW) authorising the taking of compulsory blood samples. This section had to be amended to avoid the effect of *Fernando v Commissioner of Police* (1995) 36 NSWLR 567.

a standard provision when abrogating the privilege for oral answers and the production of documents in particular administrative proceedings. In later criminal and penalty proceedings, use immunity is given to the oral answers and to the “fact of production of the document (as distinct from the contents)”.<sup>131</sup>

The fact of production concept in Australia is not necessarily the same as the act of production doctrine in the United States. Some similarity is suggested by references to “production of the document (as distinct from the contents)”. The difference is that the American cases considered whether production of documents could itself be refused under the Fifth Amendment.

The Australian provisions, on the other hand, do not concern the refusal of production of documents in the first place. They concern later use of documents which have been produced. They address the fact of production only in the context of use immunity, not in relation to the privilege which the use immunity is supposed to replace. Their effect is that the fact of production cannot be used as evidence against the producer in court.

South Australia has enacted most of these statutory provisions. The rare examples in other States can usually be traced to schemes for uniform national legislation.<sup>132</sup> No Australian decisions have dealt in detail with fact of production immunity. The only real discussion of the scope of fact of production immunity has arisen from the removal of one of the uniform national provisions.

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<sup>131</sup> E.g. s31(2)(a), Dangerous Substances Act 1979 (SA); s95C(2)(a), Legal Practitioners Act 1981 (SA). For a recent e.g. see s71(2)(a), Livestock Act 1997 (SA).

<sup>132</sup> E.g. s37(4), Friendly Societies (Victoria) Act 1996 (implementing a national scheme to regulate Friendly Societies).

### (c) STATUTORY REMOVAL

Chapter XI will contain a detailed discussion of the Corporations Legislation (Evidence) Amendment Act 1992 (“the 1992 Act”). It will discuss how the 1992 Act removed derivative use immunity from two statutory provisions for administrative company proceedings. Derivative use immunity had formerly been given to oral statements during ASC inspections and examinations by liquidators.<sup>133</sup>

This chapter will discuss another change which was made by the Act, but which attracted less attention. It removed use immunity from the fact of production of books during ASC inspections.

### (d) PRIVILEGE NOT ESTABLISHED

Australian statutes often abrogate the privilege when the production of documents is compelled in administrative proceedings.<sup>134</sup> It is generally assumed that such provisions are intended to stop the privilege protecting the contents of the documents, not the act (or fact) of producing them.<sup>135</sup> Australian lawyers can easily overlook the American doctrine that the privilege may also be available to resist the act of production of documents.

Between January 1991 and May 1992, section 68(3) of the federal Australian Securities Commission Act granted use immunity to the fact of production of a “book” in answer to ASC notices.<sup>136</sup> No immunity was granted to the contents of books. The limited immunity for the fact of production of books was removed by the 1992 Act.

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<sup>133</sup> Then s68(3), ASC Act 1989 (Cth) and s597(12), Corporations Law 1990 (uniform).

<sup>134</sup> E.g. s155, Trade Practices Act 1974 (Cth); s254, Income Tax Assessment Act 1936 (Cth).

<sup>135</sup> E.g. the ASC informed the Beahan Committee that the ASC Act abrogated the privilege for the contents of documents and did not replace it with any immunity: ASC and DPP (1991) Joint Submission to the Beahan Committee (Canberra: Unpublished - copy on file with author) para 2.7.1.

<sup>136</sup> Then s68(3), ASC Act 1989 (Cth). The definition of “books” included “(c) a document”: see s5(1), ASC Act 1989 (Cth).

The 1992 Act did not deal with the privilege as such. The amendment involved the use immunity which was assumed to be a substitute for the privilege. The former section 68(3) had three results. First, the protection of the privilege was removed from the contents and the fact of production of the documents. Second, no immunity for the contents was substituted for the privilege. Third, use immunity was substituted for the privilege in relation to the fact of production of the documents.

The amendment addressed the third result, not the other two. It removed the use immunity for facts of production. Like the contents, they now had no immunity at all. The discussion of the amendment did not therefore need to address whether in fact the privilege would have applied to the fact of production in the first place.

The question remains unanswered. The former statutory provision had assumed that the privilege was available for fact of production in the first place, but that assumption was not necessarily correct or legally conclusive.<sup>137</sup> “It is a trite observation that Parliament does not change the existing law simply by betraying a mistaken view of it”.<sup>138</sup> The debate about the 1992 Act showed the wisdom of that observation.

#### (e) DEBATE ABOUT USE IMMUNITY

The removal of use immunity was recommended by the Beahan Report in 1991.<sup>139</sup> The amendment was made by Parliament in the 1992 Act.<sup>140</sup> The operation of the

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<sup>137</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 505-506.

<sup>138</sup> Lord Donovan in *Birmingham Corporation v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874 at 911.

<sup>139</sup> Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) para 4.20.

<sup>140</sup> Corporations Legislation (Evidence) Amendment Act 1992 (uniform).

amended section was reviewed and found to be satisfactory by the Kluver Report in 1997.<sup>141</sup>

The removal of use immunity for the fact of production was said to be necessary for a reason which will be discussed more generally in Chapter XI. The immunity created evidentiary difficulties which unduly hampered prosecution. The Beahan Report accepted this argument, even though it described the amendment as “relatively minor”.<sup>142</sup> The Kluver Report also accepted the argument.<sup>143</sup>

There were even said to be practical examples of abuse of this immunity. During the Parliamentary debate on the 1992 Act, a member claimed that executives of Bond Corporation had produced wads of documents at a Special Investigation to prevent their use as evidence in criminal proceedings.<sup>144</sup> Abuses of this kind have usually been claimed during arguments against derivative use immunity. The member’s claim will therefore be discussed in Chapter XI, even though he was actually discussing use immunity for facts of production, not derivative use immunity.

The ASC submitted numerous hypothetical examples to the Beahan Committee to show “the practical effect of the provisions in this respect”.<sup>145</sup> Some of these examples also appeared in the Kluver Report.<sup>146</sup> This chapter will not deal with

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<sup>141</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) .

<sup>142</sup> Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) para. 4.15 (It “removes the difficulty of having to prove by another means that a person had a document in their possession and provided it to the ASC at a hearing”).

<sup>143</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) at 3.112 (It could “prevent a person from being linked to documents which established the commission of an offence, thereby preventing any effective prosecution of that person”).

<sup>144</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 1992, 1383 (Fergus Stewart McArthur MHR).

<sup>145</sup> ASC and DPP (1991) Joint Submission to the Beahan Committee (Canberra: Unpublished - copy on file with author) para 2.7.2.

<sup>146</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) paras 3.110 to 3.112.

them because they showed nothing about the privilege which the use immunity was supposed to be replacing.

They did show how prosecuting authorities tend to exaggerate the barriers to successful prosecution, but this will emerge more clearly from the examples given by the same authorities to justify the removal of derivative use immunity. Those examples will be discussed in detail in Chapter XI.

#### (f) RELEVANCE TO CIVIL PROCEEDINGS

The contents of documents are distinguished from the fact of producing them in only a few Australian statutory provisions for administrative proceedings. In Australian civil proceedings, there has been no need for that distinction. Protection for the act of production is unnecessary because the privilege will protect the contents of the documents.

This thesis argues that the privilege should continue to protect the contents of documents in civil proceedings. However, it accepts that derivative use immunity for the contents would provide an adequate substitute for the privilege. The rest of this chapter deals with an area in which the protection of the contents of documents is already under threat.

This occurs when a custodian produces corporate documents with personally incriminating contents. The Fifth Amendment does not cover these documents. Nor would they be protected in New Zealand under the final NZLC proposals. The question is whether they are protected in Australia.

### (3) CORPORATE OFFICERS

#### (a) ORAL EVIDENCE

The removal of the privilege from Australian corporations puts in doubt its availability to officers acting in their corporate capacity. That availability depends upon whether the officers are giving oral evidence or producing corporate documents.

If they are giving oral evidence, removal of the privilege from corporations has not greatly affected their position. The High Court laid down the general principle. "Oral evidence given by an officer of a corporation is that of the witness, not that of the corporation".<sup>147</sup> The privilege is therefore available to officers only if they can show personal incrimination.<sup>148</sup> If so, the officer must be replaced as a witness by another corporate representative who will not be personally incriminated.<sup>149</sup>

The corporation is a separate legal person from the officer. The privilege cannot be claimed by the officer to protect against the incrimination of another person, namely the corporation. It is perhaps surprising that an officer would want to claim the privilege unless personally incriminated. Nevertheless, before 1992 it was argued in Australia that an officer could claim the corporation's privilege as its *alter ego*.

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<sup>147</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 504, citing *Smorgon v ANZ Banking Group Ltd* (1976) 134 CLR 475 at 483-485.

<sup>148</sup> *National Companies and Securities Commission v Sim (No. 3)* (1987) 5 ACLC 500 at 505-506.

<sup>149</sup> *Australian Securities and Investments Commission v United Investment Funds Pty Ltd* (2003) 46 ACSR 386 at 390. When an order is made upon a company to answer interrogatories, the court has discretion to say which officer shall make the answer: *Smith Kline & French Laboratories Ltd v Intercontinental Pharmaceuticals (Australia) Pty Ltd* (1969) 123 CLR 514 at 521.



The courts did not deal clearly with that argument.<sup>150</sup> In that respect, the law in Australia has perhaps been improved by removing the privilege from corporations. If the corporation alone will be incriminated, the privilege will not be available, regardless of whether the officer is its *alter ego*.

An officer's oral evidence is now treated in Australia as it is in the United States. Corporate officers can claim the privilege to avoid giving oral evidence which may incriminate them personally.<sup>151</sup> It is less clear whether Australia has also followed the United States in relation to the production of incriminating corporate documents. The contents of a document might incriminate the corporation alone, the officer alone or both the corporation and the officer. The three possibilities need to be considered separately.

## (b) CORPORATE DOCUMENTS

### (i) Corporation Incriminated

If the corporation alone is incriminated, removal of its privilege does not greatly disadvantage the officer. The officer previously had difficulty claiming the privilege in this situation because the corporation was a separate legal person. It was even harder to claim the privilege in this situation for documents than for oral evidence.<sup>152</sup> Any possibility of such an argument disappears with the removal of the privilege from corporations.

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<sup>150</sup> This argument was not favoured by Nicholson J in *National Companies and Securities Commission v Sim*, (No 3) [1987] VR 421 at 430. Also see *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 145 and 150 (Association's privilege not available to employee). Compare with *Trade Practices Commission v Arnotts Ltd* (1990) 12 ATPR 41-010, 51, 163 at 51,195 (director claims company's privilege to resist production of company documents).

<sup>151</sup> *Curcio v United States*, 354 US 118, 124 (1957); *Wilson v United States*, 221 US 361, 385 (1911); *Shapiro v United States*, 335 US 1, 27 (1947).

<sup>152</sup> Even so, the claim was accepted in *Trade Practices Commission v Arnotts Ltd* (1990) 12 ATPR 41-010 at 51,195.

Removal of the privilege from corporations also rules out another possibility. The corporation no longer has any privilege which can be subverted by serving subpoenas on innocent officers and obtaining production of its privileged documents through "the back door".<sup>153</sup>

### **(ii) Officer Incriminated**

Before 1992, if the officer was incriminated but not the corporation, the Australian position was unclear. It was never settled because in practice the corporation was usually incriminated as well. The privilege could be claimed on its behalf.

Since 1992 no privilege has been available in Australia to protect the corporation from incrimination. The position under this heading is effectively the same as under the next heading.

### **(iii) Both Incriminated**

Under the current law in the United Kingdom and New Zealand, the production of incriminating corporate documents can usually be refused on behalf of the corporation because it will be incriminated. Now that the privilege has been taken from corporations in Australia, officers need the protection of their personal privilege. They are often made liable with corporations for the same offences.

If the corporate documents incriminate the corporation, they will usually incriminate the officer personally. The removal of the privilege from corporations opens another back door. The officer can be made to produce corporate documents which are then used to incriminate that officer.<sup>154</sup>

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<sup>153</sup> *In Re Westinghouse Uranium Contract* [1978] AC 547 at 617 and 632. Also see *Trade Practices Commission v Arnotts Ltd* (1990) 12 ATPR 41-010, 51, 163 at 51,195 ("doing indirectly what cannot be done directly").

<sup>154</sup> Puls, J. (1996) "Corporate Privilege - Do Directors Really Have A Right to Silence Since Caltex and Abcco?" *Environment and Planning Law Journal* 13(5): 364 at 369.

The producer of documents can normally claim the privilege to avoid producing personal documents which have incriminating contents. It seems unfair if an officer cannot claim the same privilege to resist producing corporate documents which are personally incriminating. However, as past High Court authority has established, “production of documents by a corporation stands in a special position”.<sup>155</sup>

In the United States, where the protection of the Fifth Amendment has long been denied to corporations, the protection of personal privilege has similarly been denied to custodians producing corporate documents. The question is whether the American position has been or should be adopted in Australia.<sup>156</sup> This chapter will now argue that it has not been and should not be.

### (c) AMERICAN POSITION

#### (i) Recently Reaffirmed

The US Supreme Court has held since 1911 that a custodian cannot resist a subpoena for corporate documents by invoking personal privilege.<sup>157</sup> As described in Chapter VIII, this principle was reaffirmed by a bare majority of the US Supreme Court in the *Braswell* decision.<sup>158</sup> The closeness of the *Braswell* decision reflected the general confusion surrounding the application of the Fifth Amendment to documents.

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<sup>155</sup> *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 146.

<sup>156</sup> E.g. *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 492-493.

<sup>157</sup> E.g. *Wilson v United States*, 221 US 361 (1911); *Dreier v United States*, 221 US 394 (1911); *United States v White*, 322 US 694 (1944).

<sup>158</sup> *Braswell v United States*, 487 US 99 (1988).

Its authority was further weakened by subsequent decisions, particularly *Hubbell*.<sup>159</sup> Both decisions show important differences between American and Australian law when applying the privilege to documents. It is therefore tempting to distinguish the American position on purely legal grounds.

## **(ii) No Legal Distinction**

The first difference is that *Braswell* dealt with an incriminating act of production, not with the production of documents with incriminating contents. This is not surprising because the contents of documents do not themselves receive the protection of the privilege in the United States as they do in Australia. However, the difference might encourage the conclusion that American case-law should not be followed in Australia.

Unfortunately, the decision in *Braswell* cannot be distinguished on purely legal grounds. It followed a line of decisions which applied the same approach to documents with incriminating contents. Before 1976 the contents of documents were protected by the Fifth Amendment. Even then, corporate custodians in the United States did not receive any protection against producing corporate documents which were personally incriminating.<sup>160</sup>

The American decisions were based upon the principle that the custodian was acting as agent for the collective entity to which the documents belonged. The decision in *Braswell* was therefore less about the Fifth Amendment and documents than about an agency principle which is closely related to the collective entity rule. It was essentially a policy decision.<sup>161</sup> Australia has followed American policy by

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<sup>159</sup> E.g. in *United States v Hubbell*, 530 US 27, 50 (2000) Chief Justice Rehnquist was the only dissenting justice because of his outdated approach to the *Fisher* guidelines, yet he delivered the majority opinion in *Braswell v United States*, 487 US 99, 100 (1988).

<sup>160</sup> E.g. *Wilson v United States*, 221 US 361 (1911); *Dreier v United States*, 221 US 394 (1911); *United States v White*, 322 US 694 (1944).

<sup>161</sup> E.g. "there exists no historical or logical relationship between the so-called collective entity rule and the individual's claim of privilege": the dissenting opinion in *Braswell v US*, 487 US 99, 121 (1988).

adopting the collective entity rule for corporations. The question is whether it has also embraced the agency principle and the decision in *Braswell*.

#### (d) AUSTRALIAN POSITION

##### (i) Still Not Settled

One English judge regarded as “quite clear” that any privilege relating to a company document “belongs” to the company.<sup>162</sup> It seems to follow that the officer cannot claim the privilege in respect of that document. One Australian writer suggested that this was the Australian position.<sup>163</sup> Another Australian writer suggested that the “American position at present is similar to the post *Caltex* and *Abbco* position”.<sup>164</sup> Both those statements were premature. The majority in the *Caltex* case expressed no view on whether the *Braswell* decision should be adopted in Australia.<sup>165</sup>

More recently, an Australian judge noted that removal of the privilege from corporations is likely to result in the production of documents which implicate officers.<sup>166</sup> Chapter IV discussed how the privilege is often portrayed in Australia as a fundamental human right. Chapter IV did not accept that characterisation, but it has its supporters. For this reason alone, legislation might be thought indispensable to abrogate the privilege of an officer to refuse production of corporate documents which are personally incriminating.<sup>167</sup>

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<sup>162</sup> Walton J in *Garvin v Domus Publishing Ltd* [1989] 1 Ch 335 at 343.

<sup>163</sup> E.g. Williams, D. (2001) "Chapter 4, Privilege Against Self-Incrimination". *Laws of Australia (looseleaf) Vol 16 Law of Evidence*. V. Wayne (Ed.) (Sydney: Law Book Co) 81 at para 70 page 102 (the position “will depend upon the identity of the real owner of the document as it is that person (if anyone) who is entitled to claim the privilege not to produce it”).

<sup>164</sup> Puls, J. (1996) "Corporate Privilege - Do Directors Really Have A Right to Silence Since *Caltex* and *Abbco*?" *Environment and Planning Law Journal* 13(5): 364 at 370.

<sup>165</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 492-493.

<sup>166</sup> Sheppard J in *Trade Practices Commission v Abbco* (1994) 123 ALR 503 at 513.

<sup>167</sup> E.g. see *Bishopsgate Investment Management Ltd (in prov liq) v Maxwell* [1993] Ch 1 at 38 per Dillon LJ (the privilege “is so deeply entrenched in our law that any decision to curtail it or make it not available is essentially a political decision, and a matter for Parliament”). Besides, denial of the privilege against self-incrimination “tends to be dictated by pragmatism rather than principle” and therefore “the extent of

## (ii) Exaggeration

One of the themes of this thesis is that law enforcement bodies tend to exaggerate potential problems posed by the privilege. Chapter VIII noted that the majority opinion in *Braswell* contained dire warnings of the special problem presented by white-collar crime.<sup>168</sup> The minority opinion disagreed in blunt terms.<sup>169</sup>

Familiar ground was also covered in the majority opinion when it refused to give derivative use immunity to the custodian because an excessive burden would be imposed on the prosecution.<sup>170</sup> Chapter XI will discuss how this well-worn argument exaggerates the detrimental effect of derivative use immunity. More revealing was the rejection of another suggested alternative.

## (iii) Agency Principle Unrealistic

The company could choose an agent who would not be personally incriminated by producing the documents.<sup>171</sup> The majority opinion in *Braswell* refused to leave this choice to the corporation because “the corporate custodian is the only person with the knowledge”.<sup>172</sup> This in itself cast doubt upon the American agency principle, which assumes the production of documents to be a mechanical act without consequences for anyone except the corporation. That assumption flies in the face of common sense and “gives the corporate agent fiction a weight it simply cannot bear”.<sup>173</sup>

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any denial is more appropriately a matter for the legislature than the courts”: see the dissenting minority judgment in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 534.

<sup>168</sup> *Braswell v United States*, 487 US 99, 115 (1988) (“one of the most serious problems confronting law enforcement authorities”).

<sup>169</sup> *Braswell v United States*, 487 US 99, 129 (1988) (“the dangers prophesied by the majority are overstated”).

<sup>170</sup> *Braswell v United States*, 487 US 99, 117 (1988).

<sup>171</sup> *Braswell v United States*, 487 US 99, 116 (1988). This solution was foreshadowed in Alito, S. A. (1986) “Documents and The Privilege Against Self-Incrimination.” *University of Pittsburgh Law Review* 48(1): 27 at 71.

<sup>172</sup> *Braswell v United States*, 487 US 99, 117 (1988) (“the appointed guardian will essentially be sent on an unguided search”).

<sup>173</sup> Minority opinion in *Braswell v United States*, 487 US 99, 128 (1988).

The recent *Hubbell* decision cast further doubt upon the idea that production of documents is no more than a mechanical act. The US Supreme Court found that, in answering a subpoena, the producer of documents gave to the prosecution “assistance both to identify potential sources of information and to produce those sources” and made “extensive use of ‘the contents of his own mind’ in identifying the hundreds of documents responsive to the requests in the subpoena”.<sup>174</sup>

If such mental activity attracts the protection of the Fifth Amendment, the production of corporate documents is hard to portray as a purely mechanical act. One Australian judge looked beyond a simple agency principle when corporate documents were produced.<sup>175</sup> His approach reflected more realistically the exposure of officers to personal incrimination.

#### **(iv) Suggested Approach**

Corporations and their officers can be prosecuted for the same or related criminal offences under many Australian statutes.<sup>176</sup> Acts of production have consequences which are as serious for officers as for corporations. The consequences may even be more serious for officers because imprisonment can be enforced against an individual.<sup>177</sup>

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<sup>174</sup> *United States v Hubbell*, 530 US 27, 41, 43 (2000).

<sup>175</sup> E.g. *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union* (1987) 71 ALR 501 at 519 *per Wilcox J* (it “may appear pedantic” to distinguish production of documents by a corporation from production of the same documents by its secretary, but “I think that the result does reflect the reason - or at least the primary reason - for the privilege itself”).

<sup>176</sup> Puls, J. (1996) “Corporate Privilege - Do Directors Really Have A Right to Silence Since *Caltex and Abbco?*” *Environment and Planning Law Journal* 13(5): 364 at 367-369 gives specific examples from environmental law. Moreover, concurrent liability seems inevitable under any statute which imposes criminal liability upon all persons involved in the commission of an offence by a company: e.g. s79, Corporations Act 2001 (Cth).

<sup>177</sup> An offence under the Corporations Act 2001 (Cth) may lead to imprisonment for an officer, even though it imposes primary criminal liability on the company: e.g. s113(1) and Schedule 3 (\$5500 fine or imprisonment for 1 year, or both, if proprietary company exceeds 50 shareholders limit). An individual can be convicted of the same offence and imprisoned as a person involved in the company's crime under s79, Corporations Act 2001 (Cth).

It is therefore unrealistic to deny the privileges “to corporations, but to insist as the majorities in *Caltex* and *Abcco* did, that the privileges remain unaffected for company officers”.<sup>178</sup> For policy reasons the approach in *Braswell* should not be adopted in Australia. The privilege should protect officers in Australia from producing corporate documents which incriminate them personally.

That should not preclude the corporation from producing the documents by some other method. This could include allowing the corporation to choose an agent who would not be personally incriminated by producing the documents. Even though it was rejected by the majority in *Braswell*, there is some authority for this method in Australia.<sup>179</sup>

This still leaves open the possibility of corporate documents being obtained through innocent officers for use against guilty officers. Back door methods are the inevitable consequence of denying the privilege to corporations while it still remains available to individuals. The creation of such anomalies is one reason why the removal of the privilege from corporations is to be regretted. There is something to be said for restoring the privilege to corporations in Australia. It would be preferable to the partial solution said to have been adopted in Canada.

## (e) CANADIAN ALTERNATIVE

### (i) Law

This thesis generally avoids comparisons with Canada. Differences in constitutional background limit the value of the guidance which Canadian case-

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<sup>178</sup> Puls, J. (1996) "Corporate Privilege - Do Directors Really Have A Right to Silence Since *Caltex* and *Abcco*?" *Environment and Planning Law Journal* 13(5): 364 at 370. Some of the minority judges took a more realistic approach: e.g. Sheppard J in *Trade Practices Commission v Abcco Ice Works* (1994) 123 ALR 503, 513. Others addressed less obviously relevant interests: e.g. McHugh J in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 549 (incrimination of the corporation's members).

<sup>179</sup> *Australian Securities and Investments Commission v United Investment Funds Pty Ltd* (2003) 46 ACSR 386 at 390.



law can give to Australian policy. It is only mentioned here because of an Australian perception that the Canadian courts allow the “privilege to be invoked by corporations where to deny it would be to subject a natural person to the injustice of self-incrimination”.<sup>180</sup>

A corporation does not qualify as a person under section 7 of the Canadian Charter of Rights and Freedoms.<sup>181</sup> Even so, an Ontario court said in one criminal case that “a corporation is entitled to shelter under the s.7 umbrella if the canopy of that protection is utilized to protect the right to life, liberty or security of a human being”.<sup>182</sup> On this basis an officer could, on behalf of a corporation, refuse to produce corporate documents if they incriminated the officer personally, but the Canadian authority may not justify that conclusion.

## **(ii) Authority**

In the Ontario case a company and three of its officers were charged with environmental offences arising from the discharge of industrial waste. The environmental authorities had required the company and its president to obtain a report from outside consultants assessing the damage caused by the discharge. The report from the consultants was held not to be admissible in the criminal proceedings because it might incriminate the company president and breach his rights under section 7 of the Charter.

However, the case does not establish any general Canadian principle that the privilege is restored to companies to resist production of documents which will incriminate individuals.<sup>183</sup> It involved the admissibility of evidence in criminal

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<sup>180</sup> Puls, J. (1996) "Corporate Privilege - Do Directors Really Have A Right to Silence Since Caltex and Abbco?" *Environment and Planning Law Journal* 13(5): 364 at 371.

<sup>181</sup> *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927 at 1002-1004.

<sup>182</sup> *R v Bata Industries Ltd (No 1)* (1991) 70 CCC (3d) 391 at 392.

<sup>183</sup> E.g. Puls, J. (1996) "Corporate Privilege - Do Directors Really Have A Right to Silence Since Caltex and Abbco?" *Environment and Planning Law Journal* 13(5): 364 at 371 (where “an individual would have

proceedings, not a claim of privilege to resist production of documents. Nor are the rights under section 7 of the Charter identical to the privilege.<sup>184</sup>

Above all, the criminal proceedings against all four defendants were tried together.<sup>185</sup> For forensic reasons, it is understandable that the evidence heard at the trial did not include an environmental report which had been obtained by only two of the four defendants.

### **(iii) Policy**

The result would be unsatisfactory, even if it did close the back door by which incriminating documents can be obtained from a corporation to use against the producer. The removal of the privilege from companies is a policy decision. Partial restoration is complicated and illogical. The same policy result could be achieved more simply if officers were allowed to claim personal privilege on their own behalf when producing corporate documents.

### **(f) SOLUTION FOR AUSTRALIA**

As a matter of law, American courts have not allowed the Fifth Amendment to protect custodians producing corporate documents. However, there are good policy reasons why a different approach should be taken in Australia. As *Braswell* has not yet been adopted, it is still open to Australian judges or legislators to recognise that the privilege should be available to officers producing corporate documents.

The simplest solution is to allow the corporation to have the same documents produced on its behalf by another officer who will not be personally incriminated.

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to provide information on behalf of the company which would also incriminate that individual personally, that company officer would not be required to disclose the information”).

<sup>184</sup> Under section 7 of the Charter a person must not be deprived of the right to life, liberty and security except in accordance with the principles of fundamental justice, one of which is the privilege.

<sup>185</sup> *R v Bata Industries Ltd (No 2)* (1992) 70 CCC (3d) 394 at 399.

A balance is achieved between the need for full disclosure from companies and the need for the protection which personal privilege provides for the officers. Even then, it may not be easy to find an innocent officer because the liability under Australian statutes is so wide-ranging.<sup>186</sup>

## **(E) CONCLUSION**

It must be admitted that the application of the privilege to documents is uncomfortable. This is shown by the historical gaps which make it hard to find how or why the privilege came to apply to documents. The general air of uncertainty could encourage the conclusion that the privilege should not apply to any documents at all.

The American experience does not lead to that conclusion. In fact, it should give pause for thought to those who, like the NZLC, are attracted by the bold and apparently simple solution of removing documents from the scope of the privilege. The American experience shows, if nothing else, that removing documents from the scope of the privilege is not as simple as it appears.

The concurring judges in *Hubbell* suggested that the United States should go back to protecting the contents of documents. In Australia and New Zealand the privilege should continue to protect the contents of documents. The recommendations to the contrary by the ALRC and the NZLC should not be followed.

Similarly, New Zealand should not enact the proposed legislation which would remove the privilege from corporations. It is perhaps too late to reverse the policy decision which took Australia down that path. Even so, the privilege should be

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<sup>186</sup> *Australian Securities and Investments Commission v United Investment Funds Pty Ltd* (2003) 46 ACSR 386 at 390 (“The position would be different if no such person exists”).

available in Australia to an officer to resist production of corporate documents which are personally incriminating.

## **CHAPTER X: DERIVATIVE USE IMMUNITY IN THE UNITED STATES**

### **(A) INTRODUCTION**

Chapter VIII examined the position in the United States to see if it supported the argument that the privilege should not protect documents. The conclusion was that the American position did not really support that argument. Chapter IX then rejected that argument for Australia and New Zealand.

A similar approach will be taken when looking at derivative use immunity. This chapter will discuss the operation of derivative use immunity in the United States. It will conclude that the American legal position does not really justify the fears expressed in Australia and New Zealand.

Derivative use immunity will therefore be recommended in this thesis as a substitute for the privilege in civil proceedings. This form of immunity has been said by Australian prosecuting authorities to hamper unduly the prosecution of white-collar criminals. It is criticised because it places on the prosecution the onus of proving in later criminal proceedings that evidence is not derivative. This in turn is said to rule out an essential avenue of investigation: namely, the early examination of the main suspects.

Each of those criticisms is examined in this chapter. The aim is to look at the American case-law to see how derivative use immunity works in practice. It is described in sufficient detail to enable assessment of its policy implications for Australasia. Chapter VIII found relatively few civil cases on the Fifth

Amendment. Similarly, few of the American cases on derivative use immunity come from civil proceedings.

Derivative use immunity was devised as a substitute for the constitutional rights contained in the Fifth Amendment. It has been an issue primarily in criminal and administrative proceedings in the United States. They will provide the best insight into the arguments which have been put by the prosecuting authorities in Australia.

This chapter looks first at the American cases which suggest that derivative use immunity places too heavy a burden on the prosecution. It will argue that American prosecutors have made that burden manageable by taking simple practical steps. In fact, there are those in the United States who argue that derivative use immunity provides too little protection for the witness because of non-evidentiary use of derivative evidence.

## **(B) OVERVIEW**

### **(1) SUBSTITUTE PROTECTION**

The US Supreme Court held in 1892 that use immunity by itself did not provide sufficient constitutional protection as a substitute for the Fifth Amendment privilege.<sup>1</sup> Legislation in the United States then returned to transactional immunity in spite of its drawbacks.<sup>2</sup> More than eighty years later, derivative use immunity was combined with use immunity to provide a statutory alternative to transactional immunity and was approved by the US Supreme Court.<sup>3</sup>

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<sup>1</sup> *Counselman v Hitchcock*, 142 US 547 (1892).

<sup>2</sup> E.g. it “affords the witness considerably broader protection than does the Fifth Amendment privilege” (*Kastigar v United States*, 406 US 441, 453 (1972)). It is also vulnerable to abuse.

<sup>3</sup> “The statute is a product of careful study and consideration by the National Commission on Reform of Federal Laws, as well as by Congress” (*Kastigar v United States*, 406 US 441, 452 n36 (1972)).

Since then it has been accepted that the Fifth Amendment privilege can be replaced by use and derivative use immunity. If a witness is compelled to testify in spite of a justified claim of privilege, the testimony must receive use and derivative use immunity. This form of immunity protects against the use of the testimony itself as evidence and against the derivative use of that testimony in later criminal proceedings against the witness.

Derivative use immunity covers further evidence discovered as a result of the immunised testimony. Less obviously, it prevents some non-evidentiary uses of the immunised testimony. The prosecution may not, for example, use immunised testimony in the preparation of strategy in later criminal proceedings against the witness.

It is surprising that the American courts are loose in their application of the terms use immunity and derivative use immunity. Sometimes they will apply the term use immunity to cover all evidentiary immunity. This is distinguished from immunity from prosecution, also known as transactional immunity. That application includes derivative use immunity within use immunity. This chapter will not use this broader application of the term use immunity. However, for the reasons given in Chapter I, the term derivative use immunity will be used to cover both use and derivative use immunity.

## **(2) NOT IDENTICAL**

The US Supreme Court approved derivative use immunity because it “leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege”.<sup>4</sup> Although transactional immunity was not immediately replaced in all American statutes, derivative use

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<sup>4</sup> *Kastigar v United States*, 406 US 441, 462 (1972).

immunity is now used in most statutes which abrogate the Fifth Amendment privilege.<sup>5</sup>

No substitute can place the witness in a position identical to the Fifth Amendment privilege. Derivative use immunity has been held to provide similar enough protection for the constitutional rights of the witness if certain rules are followed.<sup>6</sup> Those rules form the basis of the American case-law which will be discussed in this chapter. The rules and case-law are relevant in Australia where derivative use immunity has been adopted. They will also be relevant in New Zealand if the NZLC proposals are implemented.

### **(3) TOO MUCH PROTECTION**

This chapter will focus on those aspects of the American case-law which relate to the arguments put in Australia against derivative use immunity. The most common arguments are discussed in detail in Chapter XI. According to the prosecuting authorities, these arguments show that derivative use immunity provides too much protection for the witness, thereby obstructing later prosecution.

There are two main arguments. First, the onus lies on the prosecution to prove that evidence is not derivative. The second argument depends upon the first. Because the onus lies on the prosecution, derivative use immunity effectively rules out early examination of the main suspects. The prosecution cannot prove that evidence obtained after an examination is not derived from the examination. All such evidence will therefore be immunised as derivative evidence. The earlier the examination, the more evidence will be immunised.

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<sup>5</sup> E.g. Florida in 1979: see *United States v Hampton*, 775 F2d 1479, 1490 (CA11 1985).

<sup>6</sup> E.g. *Kastigar v United States*, 406 US 441, 460-461 (1972).



This chapter will show that the first argument correctly states the American position. The US Supreme Court saw this rule as central to providing realistic protection against derivative evidence.<sup>7</sup> The rule has been consistently applied in the lower American courts. However, the same rule does not necessarily apply in Australia.

The second argument does not correctly state the American position. The American courts do not automatically exclude evidence which has been obtained after derivative use immunity has been given.

#### **(4) HARDER TASK**

Admittedly, derivative use immunity does make the prosecution's task harder. As a Court of Appeals acknowledged in one case, a hearing to determine derivative use immunity was from "a prosecutor's standpoint, an unhappy product of the Fifth Amendment" and it could "readily understand how court and counsel might sigh prior to such an undertaking".<sup>8</sup> Moreover, the extra expense and time might only "lead to the conclusion that a defendant - perhaps a guilty defendant - cannot be prosecuted".<sup>9</sup>

The same criticism could be levelled at the privilege which derivative use immunity replaces. Whether the increased difficulty is too great depends upon one's view of the value of the privilege itself. The same Court of Appeals considered the increased difficulty to be necessary:

to prevent the prosecutor transmogrifying into the inquisitor, complete with that officer's most pernicious tool - the power of the state to force a person to incriminate himself. As between the clear constitutional command and the

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<sup>7</sup> *Kastigar v United States*, 406 US 441, 460-461 (1972).

<sup>8</sup> *United States v North*, 910 F2d 843, 861 (DCC 1990).

<sup>9</sup> *United States v North*, 910 F2d 843, 861 (DCC 1990).

convenience of the government, our duty is to enforce the former and discount the latter.<sup>10</sup>

This thesis argues that in Australasia the privilege or an adequate substitute is likewise necessary as a check on “the convenience of the government”.

## **(C) NATURE OF THE CASES**

### **(1) BASIC STRUCTURE**

The US Supreme Court laid down the broad principles governing the burden of proof. The burden of proof was “not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony”.<sup>11</sup> This would place on the prosecution “the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources”.<sup>12</sup>

The US Supreme Court has provided little of the subsequent case-law on derivative use immunity.<sup>13</sup> Now that the broad principles have been established, it has been “left to the lower courts to define the exact contours of the standards”.<sup>14</sup>

### **(2) LEVEL OF COURTS**

Most of the reported cases on derivative use immunity were decided at Court of Appeals level. The appeal cases usually involved criminal defendants. They claimed that their immunised testimony had been used to provide incriminating evidence to indict or convict them. The other reported judgments were from the

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<sup>10</sup> *United States v North*, 910 F2d 843, 861 (DCC 1990).

<sup>11</sup> *Kastigar v United States*, 406 US 441, 460 (1972).

<sup>12</sup> *Kastigar v United States*, 406 US 441, 461 (1972).

<sup>13</sup> *Pillsbury Co v Conboy*, 459 US 248 (1983) is a rare example.

<sup>14</sup> *United States v Pantone*, 634 F2d 716, 719 (CA3 1980).

District Courts which were deciding whether, as a matter of fact, the prosecution had or had not discharged its burden.<sup>15</sup>

The lower courts themselves criticised the lack of guidance from the US Supreme Court.<sup>16</sup> Not surprisingly, they sometimes made statements of law which conflicted with principles established in the appellate courts.<sup>17</sup> Nevertheless, the reported cases showed how derivative use immunity operated in practice.

### (3) CRIMINAL PROCEEDINGS

Most of the cases arose from criminal proceedings because derivative use immunity took effect there. It may have actually been granted during criminal proceedings but before the trial: for example, from testimony being compelled before a grand jury as a preliminary to criminal charges being laid.<sup>18</sup>

In some cases, the immunised testimony was given in an administrative proceeding.<sup>19</sup> In others, the immunity was given informally.<sup>20</sup> Informal immunity

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<sup>15</sup> E.g. *United States v Seiffert*, 357 F Supp 801 (SDTex 1973) (prosecution discharged burden with ease); *United States v Dornau*, 359 F Supp 684 (SDNY 1973) (indictments dismissed because prosecution failed to discharge burden with some evidence); *United States v Hossbach*, 518 F Supp 759 (EDPa 1980) (all evidence suppressed because prosecution failed to discharge burden with some evidence); *United States v Smith*, 580 F Supp 1418 (DNJ 1984) (prosecution discharged burden); *United States v Carpenter*, 611 F Supp 768 (NDGa 1985) (conviction vacated because prosecution made non-evidentiary use of immunised evidence at trial, but indictments not dismissed because not used before grand jury); *United States v Tormos-Vega*, 656 F Supp 1525 (DPR 1987) (indictments dismissed because of non-evidentiary use of videotape of immunised testimony); *United States v Serrano*, 680 F Supp 58 (DPR 1988) (prosecution failed to rebut derivative use but that use held to be harmless); *United States v Harris*, 780 F Supp 385 (NDWVa 1991) (all charges dismissed except perjury because prosecutor had knowledge of immunised evidence); *United States v Starfa*, 1996 WL 417168 (EDPa 1996) (prosecution discharged burden).

<sup>16</sup> E.g. *United States v Smith*, 580 F Supp 1418, 1421 (DNJ 1984) (“Regrettably” the court in *Kastigar* “neglected to precisely outline the procedures to be used”); *United States v Pantone*, 634 F 2d 716, 721 (CA3 1980) (existing “case-law appears to offer no sure guidance to the trial courts”).

<sup>17</sup> E.g. *United States v Hossbach*, 518 F Supp 759, 772 (EDPa 1980) and *United States v Smith*, 580 F Supp 1418, 1422 (DNJ 1984) (each required proof by “clear and convincing evidence”, but the established requirement was only the preponderance of evidence).

<sup>18</sup> E.g. under the Organized Crime Control Act of 1970, 18 USC Section 6002.

<sup>19</sup> E.g. under Section 7a(10), Bankruptcy Act, 11 USC Section 25(a)(10), as amended in 1970 to incorporate 18 USC Section 6002: e.g. *United States v Dornau*, 359 F Supp 684, 686 (SDNY 1973); *United States v Seiffert*, 357 F Supp 801, 803 (SDTex 1973); *In Re Grand Jury Proceedings*, 497 F Supp 979 (EDPa 1980).

was subject to the same rules as statutory immunity.<sup>21</sup> Even though an immunity agreement was made without authority, it was still held to have created “equitable immunity”.<sup>22</sup>

It is not surprising that few reported cases involved civil proceedings. In practice, derivative use immunity does not need to be granted in civil proceedings.

Compulsory questioning can be resisted by simply invoking the Fifth Amendment. This emerges from the discussion later in this chapter of one of the few US Supreme Court decisions involving civil proceedings and derivative use immunity.<sup>23</sup>

#### **(4) KASTIGAR HEARINGS**

When derivative use immunity arose, the normal procedure was to hold a “trial within a trial” known as a *Kastigar* hearing. This could be held before, during or after the main trial. Pre-trial hearings used to be held “in almost every instance”.<sup>24</sup> In the 1990s they became “the most common choice”.<sup>25</sup> Post-trial hearings were sometimes thought appropriate: for example, where non-evidentiary derivative use was alleged.<sup>26</sup>

A *Kastigar* hearing could result from an interlocutory or summary proceeding to dismiss the indictment.<sup>27</sup> It could also result from a remand by a Court of Appeals

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<sup>20</sup> E.g. *United States v Harris*, 780 F Supp 385, 387 (NDWVa 1991) (government letter grants immunity to encourage informant at interview).

<sup>21</sup> *United States v Dudden*, 65 F3d 1461, 1468-9 (CA9 1995).

<sup>22</sup> E.g. *United States v Carpenter*, 611 F Supp 768 (NDGa 1985).

<sup>23</sup> *Pillsbury Co v Conboy*, 459 US 248 (1983) (witness allowed to invoke the privilege in civil proceedings to avoid answering questions which he had already been forced to answer under immunity before a grand jury).

<sup>24</sup> *United States v Smith*, 580 F Supp 1418, 1425 (DNJ 1984).

<sup>25</sup> *United States v North*, 910 F2d 843, 854 (DCC 1990).

<sup>26</sup> E.g. *United States v Stanfa*, 1996 WL 417168 (EDPa 1996); *United States v Byrd*, 765 F2d 1524, 1531 (CA11 1985).

<sup>27</sup> E.g. *United States v Catalano*, 491 F2d 268 (CA2 1974).

which saw evidence of unresolved *Kastigar* issues in the main trial.<sup>28</sup> It was usually held in the District Court, but a magistrate could receive submissions *in camera* beforehand and prepare a report for the District Court.<sup>29</sup>

A *Kastigar* hearing was not held in every case in which issues of derivative evidence had to be resolved.<sup>30</sup> Some of the reported cases involved appeals by convicted defendants against the refusal to hold a *Kastigar* hearing.<sup>31</sup> More often, however, the cases involved appeals by convicted defendants against findings in *Kastigar* hearings. It was rare for the appeal to be instigated by the prosecution.<sup>32</sup>

The complaint of convicted defendants was usually that the District Court relied upon insufficient proof from the prosecution and wrongly admitted immunised evidence. Often it was said to be wrongly admitted because, coming after the immunised testimony, that must have been its source. This resembles the second of the two Australian arguments mentioned earlier in this chapter.

## **(D) BURDEN ON PROSECUTION**

### **(1) SHIFTING BURDEN OF PROOF**

The US Supreme Court sought to make derivative use immunity as little of a burden to the defendant as possible. The defendant need only show that the witness “testified under a grant of immunity in order to shift to the government the heavy burden of proving that all the evidence which it proposes to use was derived

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<sup>28</sup> E.g. *United States v Seiffert*, 463 F2d 1089 (CA5 1972) remanded to *United States v Seiffert* 357 F Supp 801 (SDTex 1973).

<sup>29</sup> E.g. *United States v Burke*, 856 F2d 1492, 1494 (CA11 1988).

<sup>30</sup> E.g. *United States v Dynalectric*, 859 F2d 1559 (CA11 1988).

<sup>31</sup> E.g. *United States v Semkiw*, 712 F2d 891, 895 (CA3 1983); *United States v North*, 910 F2d 843, 854 (DCC 1990).

<sup>32</sup> A rare example was *United States v Byrd*, 765 F2d 1524, 1529 (CA11 1985) (prosecution successfully challenged decisions by magistrate and District Court to exclude immunised evidence and to dismiss the indictment).

from legitimate independent sources”.<sup>33</sup> A District Court described as “light” the burden which this places on the defendant.<sup>34</sup>

Moreover, the general proof of testimony was seen as shifting the burden in relation to all of the evidence. The American courts rejected attempts to change that rule: for example, by substituting some other requirement.<sup>35</sup> However, if an appeal was contemplated, there were problems with the defendant doing no more than showing testimony under immunity.

## (2) CONDUCT OF APPEALS

The ordinary rule was that appellate courts would consider only those issues which had been raised in the court below. In exceptional situations they also had discretion to consider newly raised issues.<sup>36</sup> Nevertheless, the courts sometimes resorted to the ordinary rule as an excuse for avoiding difficult legal questions of immunity: for example, the problem of non-evidentiary use discussed later in this chapter.<sup>37</sup>

The excuse obscured the rule set out in *Kastigar* for shifting the burden of proof to the prosecution. Nevertheless, the American courts needed that excuse to stop the prosecution's burden from being too heavy. That was one of several strategies used for that purpose. The others are discussed later in this chapter

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<sup>33</sup> *Kastigar v United States*, 406 US 441, 461 (1972).

<sup>34</sup> E.g. *United States v Harris*, 780 F Supp 385, 390 (NDWVa 1991). To foreign eyes, the obligation on the defendant is perhaps too small to be seen as a burden of proof which has to be shifted, but that is how the American courts have chosen to describe it.

<sup>35</sup> E.g. *United States v Gregory*, 730 F2d 692, 698 (CA11 1984) (witness cannot be required to specify examples of alleged use of immunised testimony, leaving the prosecution only to prove that its evidence is wholly independent of those specific examples).

<sup>36</sup> E.g. the five situations listed in *United States v Krynicki*, 689 F2d 289, 291-292 (CA1 1982).

<sup>37</sup> E.g. *United States v Serrano*, 870 F2d 1, 17 (CA1 1989) (refusal to consider issue of non-evidentiary use of immunised testimony during appeal against denial of pre-trial motion, even though issue raised at the hearing of post-trial motion in same case); *United States v Burke*, 856 F2d 1492, 1494n5 (CA11 1988) (claim of non-evidentiary use of immunised evidence in negotiation of plea bargain, dismissed by Court of Appeals because the defendant should “first have raised the issue in some manner in order to have placed the burden of proof on the government on that issue”).

### (3) ASSERTION

Once the burden was shifted, the prosecution had to prove wholly independent sources for every piece of evidence used in its case. Justice Marshall expressed the fear in *Kastigar* that the prosecution could meet this obligation by mere assertion, particularly on behalf of an “investigative apparatus, often including hundreds of employees”.<sup>38</sup> His fear was borne out less in the appellate courts than in the District Courts.

The appellate courts turned out to be intolerant of attempts by the prosecution to meet its burden in this way.<sup>39</sup> The prosecution was not allowed to link only a portion of its evidence to independent sources. Nor was it allowed to justify the rest of its evidence by “utilizing conclusory denials of use or derivative use mouthed by state and federal officials to fill in the numerous evidentiary holes which remain”.<sup>40</sup> These denials were no “substitute for the affirmative showing of an independent source required for each and every item of evidence”.<sup>41</sup>

The District Courts were more tolerant of government assertions. This will be discussed among the advantages which in practice make derivative use immunity manageable for the prosecution. However, before considering those prosecution advantages, one final disadvantage for the prosecution will be discussed: the drastic effect on its case if it is found to have breached derivative use immunity. Surprisingly, Australian prosecuting authorities have made little of this disadvantage.

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<sup>38</sup> *Kastigar v United States*, 406 US 441, 469 (1972).

<sup>39</sup> *United States v Hampton*, 775 F2d 1479, 1489 (CA11 1985) (a disclaimer from a prosecutor does not preclude the possibility of other persons being led to incriminating evidence, because they have seen the compelled testimony); *United States v Seiffert*, 463 F2d 1089, 1092 (CA5 1972) (“These conclusory statements are simply not enough to carry the burden”).

<sup>40</sup> *United States v Hampton*, 775 F2d 1479, 1489 (CA11 1985).

<sup>41</sup> *United States v Hampton*, 775 F2d 1479, 1489 (CA11 1985).

## (4) EFFECT OF TAINT

### (a) DRASTIC CONSEQUENCES

The American courts often said that the prosecution case would only survive a *Kastigar* hearing if “none of the evidence” was derived from the immunised testimony.<sup>42</sup> There could be “most drastic consequences” if the prosecution failed to prove all its evidence to be wholly independent.<sup>43</sup>

If any of the evidence was tainted, the usual result was dismissal of the indictment or the grant of a new trial. The purpose of derivative use immunity was to put the discloser and the government in “substantially the same position” as if the privilege had been invoked and no disclosures made. The taint apparently made this impossible.

On the other hand, it seemed harsh that one minor gap in the evidentiary chain should put the prosecution back where it started. Two rules mitigated this drastic result. The first allowed the effect of tainted evidence to be disregarded if it caused no harm. The second allowed the court in the *Kastigar* hearing to exclude the tainted evidence from the trial, leaving it to proceed on other evidence.

### (b) HARMLESSNESS OF USE

This first exception was mentioned in numerous judgments at Court of Appeals level: even if evidence was tainted, the indictment or conviction would remain “where the use is found to be harmless beyond a reasonable doubt”.<sup>44</sup>

Unfortunately, none of those judgments showed practical application of the

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<sup>42</sup> *United States v Byrd*, 765 F2d 1524, 1530 (CA11 1985); *United States v Hampton*, 775 F2d 1479, 1489 (CA11 1985).

<sup>43</sup> *United States v North*, 910 F2d 843, 854 (DCC 1990).

<sup>44</sup> *United States v North*, 910 F2d 843, 854 (DCC 1990). Similar wording appears in e.g. *United States v Gregory*, 730 F2d 692, 698 (CA11 1984); *United States v Byrd*, 765 F2d 1524, 1529 n8 (CA11 1985); *United States v Beery*, 678 F2d 856, 863 (CA10 1982); *United States v Hampton*, 775 F2d 1479, 1489 n51 (CA5 1985).



exception or suggested how it worked.

At District Court level there was one rare reported example in which the exception was applied.<sup>45</sup> In that case the defendant had given immunised evidence on several criminal matters to a committee of the State legislature. A government agent made a single passing reference to the immunised evidence in his own testimony to a grand jury.

The reference to the defendant's immunised evidence only related to another criminal matter, not the one before the grand jury. The District Court therefore found that while the statement by the agent was improper, it was harmless and could be ignored.<sup>46</sup> The facts of this case made it surprising that the court should have been so tolerant.<sup>47</sup> Another District Court was more severe when the same federal agent committed similar indiscretions before another grand jury. This time the indictment was dismissed.<sup>48</sup>

The lack of examples may reflect deeper difficulties of principle. The exception is inconsistent with the whole idea of taint. It seems to derive from the US Supreme Court's view that derivative use immunity is analogous to the effect of a coerced confession.<sup>49</sup>

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<sup>45</sup> *United States v Serrano*, 680 F Supp 59 (DPR 1988).

<sup>46</sup> *United States v Serrano*, 680 F Supp 59, 65 (DPR 1988) ("it was nevertheless harmless, beyond a reasonable doubt, in light of the more than adequate untainted testimonial as well as documentary evidence adduced to support the indictment and subsequent conviction").

<sup>47</sup> The immunised evidence had been televised. The federal agent admitted videotaping it and using it to corroborate the other evidence in his possession. The prosecutor not only received a copy of the transcript of the immunised evidence but also included it as a trial exhibit. The court criticised both government employees for these actions, as well as for their ignorance of the federal prosecution guidelines mentioned later in this chapter.

<sup>48</sup> *United States v Tormos-Vega*, 656 F Supp 1525, 1535 (DPR 1987). However, before this grand jury the agent made three references to the immunised testimony and the court also found other non-evidentiary uses.

<sup>49</sup> *Kastigar v United States*, 406 US 441, 461 (1972).

The coerced confessions analogy leads to difficulties. According to one writer, the exceptions to it “would be wholly improper if applied to immunity cases”.<sup>50</sup> The “harmless error” doctrine is one of those exceptions.

### (c) EXCLUSION ONLY

The coerced confession analogy leads to another difficulty. It suggests that the remedy for taint is limited to the exclusion of the tainted evidence.<sup>51</sup> Chapter XI will note that the Australian prosecuting authorities have assumed the existence of such a rule. In fact, its existence is far from certain in the United States.

In 1978 the American courts were said to be “split on whether dismissal or suppression is the appropriate remedy for impermissible use of immunized disclosures”.<sup>52</sup> American case-law after 1978 did not clarify the position. The appellate courts in the United States generally gave the impression that if the prosecution failed to discharge its *Kastigar* burden, the only possible results were the dismissal of the indictment or the ordering of a retrial.<sup>53</sup>

That did not discourage claimants from applying to District Courts for suppression of evidence.<sup>54</sup> For their part, the District Courts seemed to regard suppression of evidence as an option open to them. However, they contemplated the suppression of all the evidence, not merely the tainted portion.<sup>55</sup>

As in the case of other doubts surrounding derivative use immunity, prosecutors

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<sup>50</sup> Strachan, K. (1978) "Self-Incrimination, Immunity, and Watergate." *Texas Law Review* 56(5): 791 at 829.

<sup>51</sup> Strachan, K. (1978) "Self-Incrimination, Immunity, and Watergate." *Texas Law Review* 56(5): 791 at 832 (“impermissible evidentiary and non-evidentiary use immunised evidence should be remedied by exclusion of evidence, but should not warrant dismissal of the prosecution”).

<sup>52</sup> Strachan, K. (1978) "Self-Incrimination, Immunity, and Watergate." *Texas Law Review* 56(5): 791 at 832 n180 (because of “failure to distinguish the coerced confession cases from the statutory immunity cases”).

<sup>53</sup> E.g. *United States v North*, 910 F2d 843, 854 (DCC 1990).

<sup>54</sup> E.g. *United States v Smith*, 580 F Supp 1418 (DNJ 1984); *United States v Tormos-Vega*, 656 F Supp 1525, 1536 (DPR 1987).

<sup>55</sup> *United States v Hossbach*, 518 F Supp 759, 773 (EDPa 1980).

seem the most likely to suffer prejudice from the uncertainty over the effect of taint. In Australia prosecuting authorities have thrown up their hands at the difficulty of it all, but derivative use immunity does operate in the United States.

## **(E) DISCHARGING THE BURDEN**

### **(1) BURDEN NOT IMPOSSIBLE**

The basic point for Australia can be made before looking at particular cases involving the *Kastigar* requirements. If the burden is placed on the prosecution, its job is made harder but not impossible.<sup>56</sup> If the prosecution's job were made impossible, derivative use immunity would be no better than the transactional immunity which it replaced.<sup>57</sup>

The question was how heavy the courts would make the burden. Ideally, the prosecutor had to set out each piece of evidence and link it to an independent source.<sup>58</sup> However, the appeal courts did not necessarily overturn decisions which accepted something less.<sup>59</sup> Moreover, they provided a network of rules which prosecutors found manageable.<sup>60</sup>

It is therefore accurate to say that derivative use immunity makes later prosecution more difficult. However, the Australian government agencies have exaggerated the difficulties to the point of inaccuracy: for example, regarding the standard of

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<sup>56</sup> It is probably even an exaggeration to say that "in most cases it will be exceedingly difficult for the government to make the showing required by *Kastigar*": Cole, L. (2002) "The Fifth Amendment and Compelled Production of Personal Documents After *United States v Hubbell* - New Protection for Private Papers?" *American Journal of Criminal Law* 29(2): 124 at 188.

<sup>57</sup> "That would place a virtually insurmountable burden of proof upon the government, and would approach (if not result in) *de facto* transactional immunity": *United States v Byrd*, 765 F2d 1524, 1530 (CA11 1985). Also see *United States v Serrano*, 870 F2d 1, 17 (CA1 1989).

<sup>58</sup> E.g. *United States v Dynalectric*, 859 F2d 1559, 1579 (CA11 1988) (in the prosecutor's affidavit).

<sup>59</sup> E.g. *United States v McGuire*, 45 F3d 1177, 1182-3 (CA8 1995) (no prejudicial misconduct by the prosecutor "convincingly shown"); *United States v Caporale*, 806 F2d 1487, 1518 (CA11 1986) (no "persuasive proof" of use by prosecutor of his admitted knowledge of immunised testimony); *United States v Catalano*, 491 F2d 268, 272 (CA2 1974) (court accepted prosecutor's word that he already knew "substantially all the information" in the immunised testimony).

<sup>60</sup> E.g. cases like *United States v Dynalectric*, 859 F2d 1559 (CA11 1988).

proof required.

## (2) PREPONDERANCE OF EVIDENCE

According to prosecuting authorities in Australia, the prosecution must prove beyond reasonable doubt that evidence is not derivative.<sup>61</sup> This was not the standard of proof required in the case-law in the United States.<sup>62</sup> Admittedly, a few District Court judges sought “clear and convincing evidence” that the prosecution used wholly independent sources.<sup>63</sup>

The Courts of Appeals rejected that approach. They consistently held that the inquiry only needed to be satisfied on the preponderance of evidence.<sup>64</sup> Nor was the prosecution required to negative all possibility that its evidence might have been tainted by derivative use of immunised evidence.<sup>65</sup> As a result, although there were many reported appeals against *Kastigar* findings in favour of the prosecution, few of those appeals were successful.

## (3) DECISIONS ON FACTS

Like lower courts everywhere, the District Courts tried to head off appeals about legal principles by basing their decisions on the facts. A sympathetic court found factual reasons for disregarding the exposure of a prosecutor to immunised testimony.<sup>66</sup> On the other hand, an unsympathetic court refused to believe that a

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<sup>61</sup> E.g. see Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.76, discussed in the next chapter.

<sup>62</sup> “Though ancillary to the process of proof in the criminal trial, this inquiry into the source of the Government's evidence need not be satisfied beyond a reasonable doubt”: see *United States v Seiffert*, 501 F2d 974, 982 (CA5 1974) affirming *United States v Seiffert*, 357 F Supp 801 (SDTex 1973).

<sup>63</sup> E.g. *United States v Hossbach*, 518 F Supp 759, 772 (EDPa 1980); *United States v Smith*, 580 F Supp 1418, 1422 (DNJ 1984).

<sup>64</sup> E.g. *United States v Seiffert*, 501 F2d 974, 982 (CA5 1974); *United States v Caporale*, 806 F2d 1487, 1518 (CA11 1986); *United States v Byrd*, 765 F2d 1524, 1529 (CA11 1985).

<sup>65</sup> *United States v Byrd*, 765 F2d 1524, 1529 (CA11 1985) (the District Court's rejection of evidence on this basis was held to be incorrect).

<sup>66</sup> *United States v McGuire*, 45 F3d 1177, 1183 (CA8 1995) (the testimony was irrelevant and of no use to him); *United States v Catalano*, 491 F2d 268, 272 (CA2 1974) (he did not actually use the testimony); *United States v Caporale*, 806 F2d 1487, 1518 (CA11 1986) (he knew substantially all the content of the testimony already).

prosecutor “wholly obliterated” from his mind three volumes of transcript which he had read twice, respectively three and eight months before the indictment.<sup>67</sup>

Such decisions of fact were unlikely to be reversed by a Court of Appeals. An appellant had to show that a District Court’s decision was “clearly erroneous”.<sup>68</sup>

This usually occurred only when there had been a clear mistake of law.<sup>69</sup>

However, mistakes of fact and law are not always easy to separate.

In one case, for example, the prosecution thought that general denials were good enough to exclude doubts over some portions of its evidence. After holding a full *Kastigar* hearing, the District Court agreed, but the Court of Appeals wished to “disabuse the government of this faulty notion” and reversed the District Court’s decision.<sup>70</sup> This raises doubts about the rigour of *Kastigar* hearings.

#### (4) PROOF OF INDEPENDENCE

Many of the *Kastigar* hearings were truly rigorous.<sup>71</sup> There was no set procedure which had to be followed at such hearings. Inevitably, hearings before trial were conducted differently from those after trial.<sup>72</sup>

Judges in most pre-trial and post-trial *Kastigar* hearings required the source of

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<sup>67</sup> *United States v McDaniel*, 482 F2d 305, 312 (CA8 1973). Also see *United States v Harris*, 780 F Supp 385, 393 (NDWVa 1991) (it “is no legal answer for the prosecutor to assure the Court that he had forgotten” about an interview conducted with the defendant under immunity).

<sup>68</sup> *United States v Gregory*, 730 F2d 692, 697 n5 (CA11 1984); *United States v North*, 910 F2d 843, 855 (DCC 1990).

<sup>69</sup> E.g. *United States v Byrd*, 765 F2d 1524, 1534 (CA11 1985) (reversal of District Court decision based on erroneous view that the prosecution must negative all possibility of taint), *United States v Dudden*, 65 F3d 1461, 1469 (CA9 1995) (reversal of District Court decision based on erroneous view that different rules apply to immunity given under informal agreement and under statute).

<sup>70</sup> *United States v Hampton*, 775 F2d 1479, 1489 (CA11 1985).

<sup>71</sup> E.g. *United States v Seiffert*, 357 F Supp 801 (SDTex 1973); *United States v Smith*, 580 F Supp 1418 (DNJ 1984); *United States v Stanfa*, 1996 WL 417168 (EDPa 1996).

<sup>72</sup> E.g. compare *United States v Hossbach*, 518 F Supp 759, 772 (EDPa 1980) (prosecution expected to “present at a pre-trial hearing all of the testimony and evidence it proposes to present at trial”, so that the judge could in effect “purge the record to be developed at trial”) with *United States v Stanfa*, 1996 WL 417168 (EDPa 1996) (post-trial hearing described below).

each item of documentary evidence to be explained by the prosecution. Sometimes, the court satisfied itself simply by looking at court transcripts, even in the contentious area of non-evidentiary use of immunised testimony.<sup>73</sup> More often, trial witnesses had to be called and cross-examined.<sup>74</sup> Failure to do so could be fatal to the prosecution case.<sup>75</sup>

Even if no *Kastigar* hearing was held, the process could still be rigorous. In one case, a magistrate and a District Court judge examined *in camera* the prosecution's sixty-five page affidavit attaching fifty exhibits, together with the transcripts of the defendant's immunised testimony and the evidence to the grand jury allegedly derived from it.<sup>76</sup> As the prosecution in its affidavit had meticulously charted the sources of its evidence, the absence of a hearing was approved by the Court of Appeals.<sup>77</sup> This example puts into perspective the arguments against derivative use immunity in Australia. A well-organised prosecutor does not even need a hearing to satisfy a court that evidence is not derivative.<sup>78</sup>

It is true that some *Kastigar* hearings have been too long.<sup>79</sup> However, many *Kastigar* hearings have been completed quickly, even when trial witnesses were examined. In one post-trial hearing, eleven witnesses were called but only six days of evidence were needed for the prosecution to satisfy the District Court.<sup>80</sup>

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<sup>73</sup> E.g. *United States v Pantone*, 634 F2d 716, 722 (CA3 1980) (prosecution's presentation on retrial held to be identical to that in the original case and thus unaffected by the defendant's grand jury testimony between the two trials in another matter).

<sup>74</sup> E.g. *United States v Seiffert*, 357 F Supp 801 (SDTex 1973); *United States v Smith*, 580 F Supp 1418, 1425 (DNJ 1984); *United States v Stanfa*, 1996 WL 417168 (EDPa 1996); *United States v Harris*, 780 F Supp 385, 386 (NDWVa 1991).

<sup>75</sup> E.g. *United States v Hossbach*, 518 F Supp 759, 772 (EDPa 1980) (prosecution held not to have discharged burden of proof because it failed to call all its trial witnesses).

<sup>76</sup> *United States v Dynalectric*, 859 F2d 1559, 1578 (CA11 1988).

<sup>77</sup> *United States v Dynalectric*, 859 F2d 1559, 1580 (CA11 1988).

<sup>78</sup> Contrary to statements in ASC and DPP (1991) Joint Submission to the Beahan Committee (Canberra: Unpublished - copy on file with author) paras 2.6.3 and 2.6.5.

<sup>79</sup> E.g. *United States v Smith*, 580 F Supp 1418, 1425 (DNJ 1984) (the evidentiary hearing lasted twenty-six days and produced over 3,500 pages of transcript).

<sup>80</sup> *United States v Stanfa*, 1996 WL 417168 (EDPa 1996).

The same case showed the effectiveness of Chinese Walls in limiting derivative use immunity.

## (5) CHINESE WALLS

This device is also used in financial institutions, lawyers' firms and many other commercial contexts. An invisible wall is erected between people who would normally work together and exchange information freely. The aim in the commercial world is to avoid the perception of a conflict of interest where one organisation acts for several clients or in different capacities.

In the context of derivative use immunity, the purpose is to insulate prosecution evidence so that it cannot be held to be derived from prior immunised testimony. For example, a Chinese Wall can be erected to separate the prosecutors who read or hear the immunised testimony from those who make the decision to indict or to conduct the trial.<sup>81</sup> In fact, the guidelines for federal prosecutors suggest that such a wall should be erected whenever a witness is prosecuted after giving immunised testimony.<sup>82</sup>

Chinese Walls have also been used where the conflict for prosecution authorities goes beyond the simple in-house conflict contemplated by the guidelines. They have been successfully erected to insulate state investigating authorities from federal prosecutors.<sup>83</sup> Some insight into their operation can be obtained by looking at the *Stanfa* case in which the defendant was a Mafia crime boss.<sup>84</sup>

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<sup>81</sup> *United States v Semkiw*, 712 F2d 891, 895 (CA3 1983) ("by having the prosecution handled by an attorney unfamiliar with the substance of the compelled testimony").

<sup>82</sup> Section 1-11.400 of the United States Attorneys' Manual requires the personal authority of the Attorney-General for such a prosecution. A Chinese Wall is the suggested method for satisfying the Attorney-General that there has been no non-evidentiary use of the defendant's immunised testimony.

<sup>83</sup> E.g. *United States v Smith*, 580 F Supp 1418, 1425 (DNJ 1984) (Chinese Wall prevented contamination of Federal prosecution by immunised evidence from hearings of the New Jersey State Commission of Investigation, two of them in public).

<sup>84</sup> *United States v Stanfa*, 1996 WL 417168 (EDPa 1996) (Chinese Wall prevented contamination of Federal prosecution by immunised evidence before grand jury in the State of New Jersey).

The New Jersey investigating authorities wanted to give immunity to this Mafia figure in exchange for his testimony before a grand jury. Federal prosecutors thought that they had enough evidence from existing sources to have him convicted. As his examination before the New Jersey grand jury could not be prevented, an elaborate Chinese Wall was erected around the prosecutors to make sure that his immunised testimony did not contaminate the prosecution case.

The Chinese Wall was successful in the *Stanfa* case, but the defendant made the prosecution's task easier by the nature of his evidence. Surprisingly often, witnesses help the prosecution to meet its heavy burden.

## **(6) HELP FROM WITNESS**

Witnesses made the prosecution's task easier in different ways: for example, the immunised testimony concerned matters which had little or nothing to do with the charge in question;<sup>85</sup> it was uninformative;<sup>86</sup> or it was clearly self-serving.<sup>87</sup> Sometimes it was so flawed as to lead to court action against the witness.<sup>88</sup> In such cases it was easier for the courts to accept that the immunised testimony added nothing to the prosecution's previous knowledge.<sup>89</sup>

The judge in the *Stanfa* case described the defendant's testimony to the New Jersey grand jury as "a monument to one man's refusal to budge from his own code of

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<sup>85</sup> E.g. *United States v McGuire*, 45 F3d 1177, 1183 (CA8 1995) (gambling matters not related to contract killing); *United States v Pantone*, 634 F2d 716, 721 (CA3 1980) (magistrate's corrupt relationship with a different third party not related to corruption for which he was charged).

<sup>86</sup> E.g. *United States v Burke*, 856 F2d 1492, 1494 (CA11 1988) (merely confirmed information previously obtained from immigration forms).

<sup>87</sup> E.g. *United States v Caporale*, 806 F2d 1487, 1518-1519 (CA11 1986) (so self-serving that the chief prosecutor believed it to be untruthful).

<sup>88</sup> *United States v Dynalectric*, 859 F2d 1559, 1579 n28 (CA11 1988) (witness convicted for perjury and obstruction of justice); *United States v Catalano*, 491 F2d 268, 272 (CA2 1974) (witness cited for contempt of court).

<sup>89</sup> E.g. *United States v Catalano*, 491 F2d 268, 272 (CA2 1974); *United States v Burke*, 856 F2d 1492, 1494 (CA11 1988).



omerta. He did not implicate himself or any other person as a participant in organized crime".<sup>90</sup> The prosecutors even had to seek an order against him during the proceedings for contempt of court.<sup>91</sup>

The *Stanfa* case shows another way in which the courts help prosecutors to meet the heavy *Kastigar* burden. While purporting to eschew "conclusory denials", the courts rely greatly upon the word of government officials.

### **(7) MERE ASSERTIONS**

The District Court in the *Stanfa* case refused to have a *Kastigar* hearing before the trial but held one on the motion of the defendant after his conviction. At that hearing the judge rejected the defendant's allegation that his New Jersey grand jury testimony had been used derivatively in the federal prosecution. The Chinese Wall was successful. Not surprisingly, most of the witnesses were members of the federal prosecution team or members of the grand jury investigation team.

Memoranda were exhibited showing the procedures which were put in place. However, in the end the judge was being asked to accept the word of the government witnesses that the Chinese Wall had not been breached. For each witness, the judge recorded a nine-point catechism.

Each witness denied using the defendant's grand jury testimony to do any of the following: (1) initiate investigations; (2) focus investigations; (3) develop leads; (4) obtain cooperation of witnesses; (5) secure search warrants; (6) prepare for trial; (7) focus the questioning of witnesses; (8) obtain evidence; (9) inform witnesses.<sup>92</sup> These denials by government officials were the basis for the Court's

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<sup>90</sup> 1996 WL 417168 para [\*13].

<sup>91</sup> 1996 WL 417168 para [\*4].

<sup>92</sup> The denied practices can be traced to particular cases: e.g. (2) to *United States v Tormos-Vega*, 656 F Supp 1525, 1535 (DPR 1987); (5) to *United States v Hossbach*, 518 F Supp 759, 772 (EDPa 1980); (7) to

finding that the Chinese Wall had not been breached and that there had been no derivative use. The District Court's decision showed the point made earlier in this chapter. District Courts accept government assertions more readily than appellate courts.

Most of the nine points addressed particular problems which have emerged from the case-law on non-evidentiary derivative use. However, it is not always possible to distil clear principles from the case-law to guide prosecutors who are in contact with immunised evidence.

## **(F) PROSECUTION PROCEDURES**

### **(1) CAN BE SIMPLE**

Where possible, the American courts have preferred to decide each case on its own facts and to avoid issues of law. The Australian prosecuting authorities pointed to the resulting uncertainty as an argument against allowing derivative use immunity at all.

Nevertheless, the American experience shows that the problem can be handled by following "reliable procedures for segregating the immunised testimony and its fruits from officials pursuing any subsequent investigation".<sup>93</sup> This makes it "incumbent on the prosecutor to employ objective measures to ensure that the subsequent prosecution is built on a wholly independent footing".<sup>94</sup> As the cases on Chinese Walls showed, it is possible to insulate federal prosecutions from immunised testimony given in state proceedings, even when the testimony is given

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*United States v Carpenter*, 611 F Supp 768, 780 (NDGa 1985); (9) to *United States v North*, 910 F2d 843, 860 (DCC 1990).

<sup>93</sup> *United States v Hampton*, 775 F2d 1479, 1490 (CA11 1985).

<sup>94</sup> *United States v Harris*, 780 F Supp 385, 393 (NDWVa 1991).

in public.<sup>95</sup>

By the application of simple procedures, prosecutors should similarly be able to avoid internal problems with immunised testimony. Whenever an immunised witness is indicted, the trial should be handled by an attorney who has had no contact with the immunised testimony. Simple guidelines to this effect were drafted for American federal prosecutors in order to address problems created by the *Kastigar* decision.<sup>96</sup>

## (2) MUST BE FOLLOWED

A surprising feature of the American cases is how often prosecutors have invited problems by not following these guidelines.<sup>97</sup> This has surprised even the courts. In one case the Court referred to the Attorney-General's Manual and noted that “the government might easily have removed any cloud from the trial by assigning it to another attorney who did not and would not review the immunised testimony. This procedure is not novel”.<sup>98</sup>

The result has not necessarily been a finding of derivative use immunity because “*Kastigar* made no mention of any duty on the government to erect an impenetrable barrier”.<sup>99</sup> Failure to follow the guidelines “only makes the government's burden of affirmatively proving independent sources for its evidence

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<sup>95</sup> E.g. *United States v Smith*, 580 F Supp 1418, 1420 (DNJ 1984) (no derivative use, even though two out of eight appearances before New Jersey State Commission of Investigation were in public hearings). Also see *United States v Stanfa*, 1996 WL 417168 (EDPa 1996) (no derivative use in Federal prosecution of immunised evidence given before grand jury in the State of New Jersey).

<sup>96</sup> *United States v Pantone*, 634 F2d 716, 721 n11 (CA3 1980).

<sup>97</sup> *United States v Pantone*, 634 F2d 716, 718 (CA3 1980) (same prosecutor handled the trial, the retrial and the intervening grand jury proceedings concerning an independent but analogous matter, at which the defendant testified under immunity); *United States v McGuire*, 45 F3d 1177, 1183-4 (CA8 1995) (same prosecutor and grand jury heard immunised evidence from the defendant in one matter, and then indicted him in a separate matter).

<sup>98</sup> *United States v Semkiw*, 712 F2d 891, 895 (CA3 1983) (prosecutor was alleged to have read the transcript of the defendant's immunised testimony).

<sup>99</sup> *United States v Serrano*, 680 F Supp 58, 63 (DPR 1988).

a more heavy one".<sup>100</sup>

The Courts could even be said to have encouraged prosecution abuses by failing to insist on these simple procedures. If an indictment has been dismissed because of derivative use of immunised evidence, the retrial ought to be handled by another attorney who has not heard the immunised testimony nor had access to the transcript.<sup>101</sup>

The prosecutor in the original trial should not be involved in the retrial in any way. Yet in one case a Court of Appeals did not rule out the involvement of the original prosecutor in the decision to bring the second indictment or in planning strategy in the retrial. It just held that this involvement could only be scrutinised after the trial, not as a mere theoretical possibility.<sup>102</sup>

Admittedly, the application of even simple procedures requires a degree of organisation which may be difficult to achieve in the muddled legal system of a federation. In one case, the federal prosecutors had to rely upon conclusory denials because they had nothing else.<sup>103</sup> That was not necessarily their fault. The prosecution had initially been a state matter in Florida. As transactional immunity had applied in Florida at the time, the witness had been thought to be immune from prosecution. The prosecuting authorities did not therefore think it necessary to segregate his evidence.<sup>104</sup>

### **(3) BURDEN MANAGEABLE**

As mentioned earlier in this chapter, the Australian prosecuting authorities put two

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<sup>100</sup> *United States v Serrano*, 680 F Supp 58, 65 (DPR 1988) (derivative use negated, even though a copy of the defendant's immunised testimony before a committee of the State legislature was actually included by the prosecutor as a trial exhibit). Also see *United States v Serrano*, 870 F2d 1, 13 n14 (CA1 1989).

<sup>101</sup> E.g. *United States v Byrd*, 765 F2d 1524, 1526 (CA11 1985).

<sup>102</sup> *United States v Byrd*, 765 F2d 1524, 1530 (CA11 1985).

<sup>103</sup> *United States v Hampton*, 775 F2d 1479 (CA11 1985).

<sup>104</sup> *United States v Hampton*, 775 F2d 1479, 1490 (CA11 1985).

main arguments against derivative use immunity: first, the onus lies on them to prove a negative; second, this effectively excludes any evidence after an examination and rules out early examination of the principal suspects. Even if the first represents the existing law or is enacted in Australia, the American cases do not support the second.

In most cases the problem is manageable if prosecutors follow simple procedures and comply with the law. The preponderance of evidence standard allows acceptance of prosecution assurances by the District Courts. Their decisions on matters of fact are rarely overturned by the appellate courts. The American cases show numerous examples of successful early examinations.

The problem of derivative use immunity is no greater than numerous other evidentiary problems with which prosecutors routinely cope. A *Kastigar* hearing is just another evidentiary “trial within a trial”. The courts work their way through the problems and arrive at a set of accepted rules. Prosecutors grumble about having to conform to those rules but quickly devise procedures to avoid breaches. It is yet another round in the perpetual forensic contest.

The debate in Australia has been dominated by the argument that derivative use immunity provides too much protection. However, there is a body of opinion in the United States that derivative use immunity provides too little protection. This argument has also arisen in the Australian debate.

## **(G) NON-EVIDENTIARY USE**

### **(1) TOO LITTLE PROTECTION**

Derivative use immunity has been said to provide too little protection for the witness because of the practical difficulty which the defendant would have in

proving that derivative use has taken place. These doubts were expressed during the US Supreme Court case which established derivative use immunity. One Justice suggested that the prosecution burden could be too easily discharged by mere assertion.<sup>105</sup> Another thought that the immunity would be unenforceable.<sup>106</sup>

Subsequent American case-law did not appear to bear out these fears.<sup>107</sup> That was perhaps because the lower courts tried to address the dangers.<sup>108</sup> Besides, the fears were surprising. The defendant had only to show that the immunised testimony had been given. The onus of proof was effectively on the prosecution to prove that evidence was not derivative. What was the defendant going to find so hard to prove?

The answer lay in a less obvious but no less serious gap, which appeared in derivative use immunity. Prosecutors could make use of immunised evidence for non-evidentiary purposes. In 1978 one commentator went so far as to argue that non-evidentiary use prevented any immunity less than transactional immunity from providing sufficient protection to a compelled witness.<sup>109</sup> Since then, the American courts have added to the confusion by deciding that some non-evidentiary uses are prevented by derivative use immunity, while others are not.

## **(2) SUBSTITUTE**

The American courts were keen to ensure that the substitute immunity provided protection equivalent to the privilege. They were constitutionally constrained

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<sup>105</sup> *Kastigar v United States*, 406 US 441, 469 (1972) *per* Justice Marshall (“information relevant to the question of taint is uniquely within the knowledge of the prosecuting authorities” and the “government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence”).

<sup>106</sup> *Kastigar v United States*, 406 US 441, 467 n2 (1972) *per* Justice Douglas (“futile to expect that a ban on use or derivative use compelled testimony can be enforced”).

<sup>107</sup> Nevertheless, more than ten years later, Justice Marshall was still expressing these fears in *Pillsbury Co v Conboy*, 459 US 248, 268 (1983).

<sup>108</sup> E.g. they purported not to rely upon the mere assertions of government officials.

<sup>109</sup> Strachan, K. (1978) "Self-Incrimination, Immunity, and Watergate." *Texas Law Review* 56(5): 791 at 807-810.

from providing too little, but they were reluctant to provide too much protection. They therefore preferred derivative use immunity to transactional immunity.

The need for equivalent protection meant that the American courts could not avoid the issue of whether the privilege would protect against a particular non-evidentiary use. However, non-evidentiary use is not a problem which is confined to the United States.<sup>110</sup> The issue of non-evidentiary use needs to be clearly addressed in any legislation for derivative use immunity in Australia or New Zealand.

### **(3) MEANING**

#### **(a) INTRODUCTION**

Derivative use does not only result in evidence which is produced in court. The prosecution case can benefit from immunised testimony in other ways. The question is whether a particular non-evidentiary use counts as a derivative use. If it does, derivative use immunity is breached.

It is clear from the case-law that some types of non-evidentiary use are breaches of derivative use immunity. Not surprisingly, the prosecuting authorities have objected to extension of the immunity to non-evidentiary uses. The prosecution's burden becomes even heavier if it must not only prove absence of evidentiary use, but also show that it did not make non-evidentiary use of the immunised evidence.

The American courts did not think that all non-evidentiary uses should avoid derivative use immunity. Equally, they did not think that derivative use immunity should prevent all non-evidentiary uses of immunised evidence. The difficulty is

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<sup>110</sup> E.g. in the United Kingdom the privilege cannot apparently prevent use of incriminating material to prepare questions for cross-examining witnesses: see *R v Cheltenham Justices* [1977] 1 All ER 460 at 464.

in distinguishing the non-evidentiary uses which breach the immunity from those which are permissible.

#### (b) NOT IDENTICAL

The American courts did not expect derivative use immunity, when combined with use immunity, to place the witness in a position identical to the one enjoyed under the privilege. According to the US Supreme Court in *Kastigar*, the position of the parties did not have to “remain absolutely identical in every conceivable and theoretical respect”.<sup>111</sup>

It was even “analytically incorrect” to equate the benefits of claiming the privilege with those provided by immunity.<sup>112</sup> It was only necessary that derivative use immunity should operate in such a way that the witness would be left in “substantially the same position” as if the privilege had been claimed.<sup>113</sup>

This is easier to judge if there is an evidentiary result. The court can look at the particular piece of evidence and decide whether it is derived from the immunised testimony. If so, the evidence receives immunity. The court does not need to explore its effect on the position of the immunised witness.

It is more difficult to protect the witness against non-evidentiary use of the immunised material. The use produces no identifiable evidentiary result. Yet it may well have improved the position of the prosecution.

#### (c) DEFINITION

There is no clearly accepted definition of “non-evidentiary use”, even though the

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<sup>111</sup> *United States v Byrd*, 765 F2d 1524, 1530 (CA11 1985). Also see *United States v Serrano*, 870 F2d 1, 17 (CA1 1989).

<sup>112</sup> *United States v Apfelbaum*, 445 US 115, 127 (1980) (e.g. the possibility of perjury cannot arise if the privilege is claimed, but it can when the witness is forced to testify under immunity).

<sup>113</sup> *Kastigar v United States*, 406 US 441, 458-9 (1972) quoting *Murphy v Waterfront Commission of New York Harbor*, 378 US 52, 79 (1964).



term is commonly used. According to one writer, it "can be broadly described as use of immunized disclosures that does not culminate directly or indirectly in the presentation of evidence against the immunized person in a subsequent criminal prosecution".<sup>114</sup>

The same writer classified non-evidentiary use by the prosecution under five headings: (1) making discretionary prosecutorial decisions; (2) preparing and planning strategy for trial; (3) informing requests for discovery; (4) finding out what evidence to seek from independent sources; and (5) facilitating perjury prosecutions.<sup>115</sup>

The courts have preferred to delineate non-evidentiary use "by example rather than by definition".<sup>116</sup> This does little to clarify what is permissible and what is not.<sup>117</sup> In the end "the question of whether a non-evidentiary use of immunized testimony has occurred is sometimes one of metaphysical subtlety".<sup>118</sup>

The importance of the distinction is that the courts have drawn a distinction between non-evidentiary use and indirect evidentiary use. Some forms of non-evidentiary use are permissible and do not breach derivative use immunity. It is these permissible uses which lead to the criticism that derivative use immunity gives too little protection. Indirect evidentiary use, on the other hand, is a clear breach of derivative use immunity.

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<sup>114</sup> Strachan, K. (1978) "Self-Incrimination, Immunity, and Watergate." *Texas Law Review* 56(5): 791 at 807.

<sup>115</sup> Strachan, K. (1978) "Self-Incrimination, Immunity, and Watergate." *Texas Law Review* 56(5): 791 at 807-810.

<sup>116</sup> E.g. *United States v North*, 910 F2d 843, 856-7 (DCC 1990).

<sup>117</sup> E.g. *United States v Byrd*, 765 F2d 1524, 1531 (CA11 1985) (use in prosecutorial decision to indict is permissible, but use to inform discovery and plan trial strategy may be impermissible).

<sup>118</sup> *United States v Pantone*, 634 F2d 716, 723 (CA3 1980).

#### (d) INDIRECT EVIDENTIARY USE

With non-evidentiary use, no evidence can be traced to the derivative use. With indirect evidentiary use, the jury is presented with evidence, but this evidence is affected by the derivative use of the immunised testimony. Derivative use immunity was breached, for example, when witnesses refreshed their memories by reading immunised testimony.<sup>119</sup>

The distinction is elusive. It was held to be a non-evidentiary use when the same grand jury heard immunised testimony in one case and later in a second case indicted the witness on charges arising from the same subject-matter as the testimony.<sup>120</sup> It did not count as indirect evidentiary use because the evidence for the indictment in the second case did not include the immunised evidence. Nevertheless, the immunised testimony was held to have influenced the grand jury in assessing the evidence in the second case.

The term "metaphysical subtlety" seems reasonable to describe the distinction between that example and the example of indirect evidentiary use in which witnesses refreshed their memories by reading immunised testimony. Those two examples cannot be distinguished simply by asking whether evidence is presented to the jury. That was the test in the definition suggested by the American writer, quoted earlier in this chapter.<sup>121</sup>

It is now accepted that some forms of non-evidentiary use are permissible and do not breach derivative use immunity. However, at one time the permissibility of

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<sup>119</sup> *United States v North*, 910 F2d 843, 860-1 (DCC 1990) (witnesses in criminal proceedings had refreshed their memories by reading the immunised testimony which the defendant had given before a Congressional Committee).

<sup>120</sup> E.g. *United States v Byrd*, 765 F2d 1524, 1526 (CA11 1985) (first indictment dismissed because returned by same grand jury which had heard immunised testimony).

<sup>121</sup> Strachan, K. (1978) "Self-Incrimination, Immunity, and Watergate." *Texas Law Review* 56(5): 791 at 807.

any form of non-evidentiary use was in doubt.

#### **(4) EXTENT OF PROHIBITION**

##### **(a) TOTAL PROHIBITION**

The cases on non-evidentiary use took one of two broad approaches. The first approach totally prohibited derivative use for any non-evidentiary purpose. The first approach seemed to have the support of the US Supreme Court in *Kastigar*. Having noted the statute's "sweeping proscription of any use, direct or indirect", the Court then referred to this "total prohibition on use".<sup>122</sup>

The early cases adopted this strict interpretation. One Court of Appeals held that if the protection is "to be constitutionally sufficient, then it must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury".<sup>123</sup> Similarly, courts in some later cases held that the exposure of a prosecutor to immunised evidence should result in no further involvement in any capacity.<sup>124</sup>

##### **(b) PARTIAL PROHIBITION**

The second approach, on the other hand, allowed derivative use for non-trial purposes and even for some non-evidentiary purposes relating to the trial. This approach was taken in more recent cases. These cases saw the remarks in *Kastigar* as an absolute prohibition only on those derivative uses which resulted in evidence for the trial. This approach allowed the prosecution to make use of immunised evidence for some non-evidentiary derivative uses but not for others. Unfortunately, it was not clear which uses were permissible.

One Court of Appeals gave five examples of non-evidentiary uses: (1) deciding

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<sup>122</sup> *Kastigar v United States*, 406 US 441, 460 (1972).

<sup>123</sup> *United States v McDaniel*, 482 F2d 305, 311 (CA8 1973).

<sup>124</sup> E.g. *United States v Semkiw*, 712 F2d 891, 895 (CA3 1983).

which witnesses to call at trial; (2) planning cross-examination of defence witnesses; (3) interpreting previously discovered evidence; (4) deciding what evidence to introduce at trial; and (5) deciding whether to indict or not.<sup>125</sup> Some “would probably constitute an impermissible use”, but in advance of the trial, the Court was prepared to classify only the last of the five examples as clearly a permissible derivative use.<sup>126</sup>

Prosecuting authorities have to make immediate decisions about which non-evidentiary uses are permissible. Some non-evidentiary uses are in practice regarded by prosecutors as impermissible.<sup>127</sup> There are still grey areas: for example, the use of immunised evidence to corroborate other evidence.<sup>128</sup> The inherent flexibility of derivative use immunity means that new types of use will keep appearing.

### (c) PLEA BARGAINS

Plea bargains show how derivative use immunity can unexpectedly contaminate the prosecution case. In a typical example, two suspects have been involved in a crime. The first suspect gives immunised testimony to a grand jury. The prosecution uses the content of that immunised testimony to persuade the second suspect to make a plea bargain. The plea bargain gives a lesser sentence to the second suspect in exchange for pleading guilty and testifying for the prosecution at the first suspect's trial.

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<sup>125</sup> *United States v Byrd*, 765 F2d 1524, 1531 (CA11 1985).

<sup>126</sup> *United States v Byrd*, 765 F2d 1524, 1530 (CA11 1985) (it did “not read *Kastigar* to require a court to inquire into a prosecutor's motives in seeking indictment”).

<sup>127</sup> E.g. the nine-point catechism in *United States v Starfa*, 1996 WL 417168 (EDPa 1996).

<sup>128</sup> Compare *United States v Carpenter*, 611 F Supp 768, 780 (NDGa 1985) (government failed to negate this non-permissible use) with *United States v Serrano*, 680 F Supp 58, 64 (DPR 1988) and *United States v Tormos-Vega*, 656 F Supp 1525, 1535 (DPR 1987) (apparently no problem with federal agent viewing videotaped immunised testimony to corroborate what was already in his possession, although the courts in the two cases differed on whether he had in fact done more than that).

One Court of Appeals held that a plea bargain breached the derivative use immunity granted to the first suspect for his grand jury testimony.<sup>129</sup> However, in a later case the Court of Appeals took a different view.<sup>130</sup> At the very least, plea bargains showed how easily derivative use immunity could contaminate the prosecution case.

On the other hand, the cases on plea bargains also showed how easily the prosecution could avoid the breach of immunity. The second suspect needed only to testify at a *Kastigar* hearing that the immunised testimony was not a factor which influenced acceptance of the plea bargain.<sup>131</sup> That showed why derivative use immunity was said in the United States to give too little protection to the witness, not too much.

#### (d) TOO LITTLE PROTECTION

Many forms of prosecutorial knowledge and use “cannot be measured or cured”.<sup>132</sup> According to Strachan, permissible non-evidentiary uses unduly weakened the protection provided by derivative use immunity because the prosecutor “could have used it in a variety of ways in this prosecution”.<sup>133</sup> It was impossible to exclude particular evidence because it was tainted. “Dismissal may

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<sup>129</sup> *United States v Hampton*, 775 F2d 1479, 1488-9 (CA5 1985) (Musselwhite testified at the defendant's trial under a plea bargain prompted by the defendant's immunised testimony before a grand jury).

<sup>130</sup> *United States v Burke*, 856 F2d 1492, 1494 n5 (CA11 1988) (defendant Joyce Greeson gave immunised evidence to a grand jury implicating another person, who later struck a plea bargain and testified at her trial, but Court of Appeals refused to consider breach of derivative use immunity because issue not raised until appeal).

<sup>131</sup> Compare with *United States v Hampton*, 775 F2d 1479, 1489 (CA5 1985) (Musselwhite testified at a *Kastigar* hearing but was not asked “what factors motivated him to accept the plea bargain”).

<sup>132</sup> Strachan, K. (1978) “Self-Incrimination, Immunity, and Watergate.” *Texas Law Review* 56(5): 791 at 832 referring in n180 to authority which included *United States v Dornau*, 359 F Supp 684, 687 (SDNY 1973) and *United States v McDaniel*, 482 F2d 305, 312 (CA8 1973).

<sup>133</sup> *United States v Dornau*, 359 F Supp 684, 687 (SDNY 1973) (judge preferred dismissal to suppression of evidence because the range of possible non-evidentiary uses made it “impossible to suppress specific evidence in the light of the problem involved”). Also see *United States v McDaniel*, 482 F2d 305, 312 (CA8 1973) (Court of Appeals approves views expressed on this point by judge in *Dornau* even though his decision had been reversed on appeal on other grounds).

thus be the only remedy consistent with the constitutional imperative".<sup>134</sup>

Personal experience perhaps made Strachan unduly wary of non-evidentiary use of immunised testimony.<sup>135</sup> However, she was not alone in her conclusion that the constitutional requirements could only be fulfilled by transactional immunity.<sup>136</sup> Moreover, she was writing in 1978 when some courts were interpreting the *Kastigar* decision as a total prohibition on non-evidentiary uses.<sup>137</sup>

Strachan's views were not borne out in American case-law in the 1980s and 1990s. The recognition of permissible uses opened the way for immunised evidence to be used to the disadvantage of the witness. However, the scope of permitted uses was limited by the decision in *Hubbell*, which will be discussed shortly.

The majority opinion in *Hubbell* showed great ingenuity in extending derivative use immunity into unexpected areas, effectively limiting non-evidentiary uses. This is another problem with derivative use immunity. Its inherent flexibility invites "metaphysical subtlety".

## **(5) FLEXIBILITY**

### **(a) CIVIL PROCEEDINGS**

Very few civil cases are mentioned in this chapter. Derivative use immunity has rarely been discussed in civil proceedings in the United States. As Chapter VIII

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<sup>134</sup> Strachan, K. (1978) "Self-Incrimination, Immunity, and Watergate." *Texas Law Review* 56(5): 791 at 832. Her authority in n180 on the same page included *Dornau* and *McDaniel*.

<sup>135</sup> Her conclusions were "undeniably affected by the author's familial involvement in the Watergate litigation". Her husband gave immunised testimony, which was later used to indict him, but the case was ultimately dismissed on motion of the prosecution: Strachan, K. (1978) "Self-Incrimination, Immunity, and Watergate." *Texas Law Review* 56(5): 791 at 791 n1 and 814-9.

<sup>136</sup> E.g. *Kastigar v United States*, 406 US 441, 469 (1972) *per* Justice Marshall and *Kastigar v United States*, 406 US 441, 467 n2 (1972) *per* Justice Douglas.

<sup>137</sup> E.g. *United States v McDaniel*, 482 F2d 305, 311 (CA8 1973).

showed, the Fifth Amendment applies in many civil proceedings. If it applies, it is invoked. The issue of derivative use immunity does not usually arise.

A rare exception is found in the US Supreme Court decision of *Pillsbury Co v Conboy*.<sup>138</sup> This held that a witness was not prevented from invoking the privilege in civil proceedings because he had given immunised testimony before a grand jury on the same or similar matters. The majority decision can be simply stated, but the conflicting views on the court were reflected in no less than five separate opinions.<sup>139</sup>

The decision itself was not objectionable in the context of civil proceedings. In principle, the interests of witnesses in civil proceedings should not be overridden by the requirements of concurrent criminal proceedings. The decision itself will be examined here only in terms of the development of derivative use immunity.

The immunised grand jury testimony of the witness was used to prepare the questions put to him in the civil proceedings. The Justices had to decide whether the questions and the answers given by the witness were derived from that testimony and covered by derivative use immunity. As both the questions and the answers tracked the grand jury testimony, it needed little ingenuity to find that they were derived from it and therefore covered by derivative use immunity.

Yet only a minority of the Justices took that view in *Pillsbury Co v Conboy*.<sup>140</sup> Nearly twenty years later, one of them wrote the majority opinion which took an ingenious approach to derivative use immunity in *Hubbell*.<sup>141</sup>

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<sup>138</sup> *Pillsbury Co v Conboy*, 459 US 248 (1983).

<sup>139</sup> The actual decision was decided by 8-2. Justice Powell delivered the majority opinion (459 US at 250); Justices Marshall, Brennan and Blackmun concurring opinions (459 US at 264, 271 and 272 respectively); and Justices Stevens and O'Connor a joint dissenting opinion (459 US at 282).

<sup>140</sup> Joint dissenting opinion (questions and answers "clearly" derivative) (459 US at 283); and Justice Marshall (questions and answers derivative, as well as themselves providing further leads) (459 US at 265)

## (b) ANSWERING SUBPOENAS

The *Hubbell* decision raised complex questions about the application of the privilege to the contents and the act of production of documents. The decision and those questions were covered in Chapter VIII. The majority opinion is noted here in passing because of its broad interpretation of “derivative use”. It was delivered by Justice Stevens who wrote the dissenting opinion in *Pillsbury Co v Conboy*.<sup>142</sup>

For reasons explained in Chapter VIII, the majority opinion depended upon whether the prosecution had made derivative use of the production of the documents “in obtaining the indictment against respondent and in preparing its case for trial. It clearly has”.<sup>143</sup> The derivative use consisted of the prosecution being provided with leads and links in the chain of evidence by “a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories”.<sup>144</sup>

According to the majority opinion, the prosecution had made derivative use of the contents of the respondent's mind “in identifying the hundreds of documents responsive to the requests in the subpoena”.<sup>145</sup> This raises a number of difficulties which were discussed in Chapter VIII. In the context of non-evidentiary use, the broad view of derivative use in *Hubbell* seems to limit the permissible non-evidentiary uses by the prosecution.

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and 268). Compare with majority opinion (questions derivative, answers not) (459 US at 255); and Justice Blackmun (“little difficulty” in agreeing that questions were derivative, answers not) (459 US at 279). Justice Brennan did not express a view on the point (459 US at 271-2).

<sup>141</sup> *United States v Hubbell*, 530 US 27 (2000).

<sup>142</sup> Justice O'Connor, who joined in the dissenting opinion in *Pillsbury Co v Conboy*, joined in the majority opinion in *Hubbell*, along with six other members of the court.

<sup>143</sup> *United States v Hubbell*, 530 US 27, 41 (2000).

<sup>144</sup> *United States v Hubbell*, 530 US 27, 41 (2000).

<sup>145</sup> *United States v Hubbell*, 530 US 27, 43 (2000).



## (H) CONCLUSION

Australian prosecutors might point to the *Hubbell* decision to support their claim that derivative use immunity is just too difficult. However, this chapter has shown that prosecuting authorities in Australia exaggerate the problems resulting from derivative use immunity. In the United States, it has been made to work in spite of difficulties arising from overriding constitutional requirements.

The American case-law shows how prosecutors can adapt their procedures to meet evidential difficulties. It also shows how the courts apply certain rules to assist the prosecution in practice. The lower courts have decided that the purpose of derivative use immunity would be defeated if the burden were made insurmountable for prosecutors. It would then become effectively the same as transactional immunity, which it had been introduced to replace.

This chapter has not denied that derivative use immunity makes the prosecutor's job harder. This is not surprising. So does the Fifth Amendment privilege which it replaces.

In Australia and New Zealand there is no clear constitutional command like the Fifth Amendment. Derivative use immunity can be made to work even better by legislative provision. The American experience shows problems which should be addressed in such legislation. Legislation can provide for the operation of a substitute which best implements the policy of the privilege. That policy does not require the onus of proof of a negative to be placed on the prosecution, still less to be discharged beyond reasonable doubt. Moreover, derivative use immunity should be extended to cover all non-evidentiary uses of disclosed material.

This thesis argues that the privilege in civil proceedings is needed primarily as a check on prosecuting authorities. The next chapter will therefore discuss the

evidence in Australia that derivative use immunity would provide this check and be an appropriate substitute for the privilege.

# CHAPTER XI: DERIVATIVE USE IMMUNITY IN AUSTRALIA

## (A) LEGISLATIVE RECOGNITION

### (1) AUSTRALIA

#### (a) BACKGROUND

The issue of derivative evidence was highlighted in Australia by the High Court in *Sorby v The Commonwealth*.<sup>1</sup> The Federal Parliament responded by taking account of derivative evidence in its general recognition of the privilege as a human right. In the mid-1980s a presumption was adopted when drafting legislation that, if the privilege was to be abrogated in a particular proceeding, derivative use immunity should be provided by way of a substitute. This owed much to the American constitutional requirement for an adequate substitute, even though there was no equivalent obligation in Australia.

The absence of that obligation was reflected in Australian legislative procedures. If derivative use immunity was not substituted, a Parliamentary Committee for the Scrutiny of Bills had to express an opinion on whether the human rights of Australians were thereby put at risk. The Committee's opinion was persuasive, but it was also subject to the harsh realities of policy. Its disapproval could be overridden. In this respect its opinion was like a recommendation from the ALRC.<sup>2</sup>

#### (b) FEDERAL STATUTES

The ALRC has criticized the inconsistent treatment of the privilege in Federal legislation.<sup>3</sup> Some Federal statutes preserve the privilege.<sup>4</sup> Others abrogate it

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<sup>1</sup> (1983) 152 CLR 281 at 293-4, 310, 312 and 316.

<sup>2</sup> E.g. the government did not include derivative use immunity in the disciplinary processes of the Australian Federal Police and National Crime Authority, contrary to Australian Law Reform Commission (1996) *Integrity: but not by trust alone* (Canberra: Australian Law Reform Commission) Recommendation 57.

<sup>3</sup> Australian Law Reform Commission (2003) *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Canberra: Australian Law Reform Commission) para 18.25.

<sup>4</sup> E.g. s243SC(1), Customs Act 1901 (Cth).

with use immunity alone being substituted. Sometimes the abrogation is not accompanied by any substitute at all.

In some Federal statutes the privilege has been replaced by derivative use immunity, only for that immunity to be removed later as a result of lobbying from government agencies.<sup>5</sup> Much of the discussion in this chapter will concern the government arguments which achieved that result.

Even so, derivative use immunity still appears often in Federal provisions. Many of them abrogate the privilege to ensure the disclosure of information to government agencies.<sup>6</sup> Environmental legislation, for example, is hard to enforce without information provided by the polluters themselves.<sup>7</sup>

### (c) STATE STATUTES

Relatively few examples are to be found in legislation passed by the States. Examples are more common in the legislation of the Australian Capital Territory and the Northern Territory which were formerly under federal control and in some respects still are. Examples in other States sometimes result from exercise of federal powers in a particular area.<sup>8</sup> They can also result from the enactment of uniform legislation based on a federal model.<sup>9</sup>

This last group includes the certification procedure under section 128 of the 1995 Commonwealth Evidence Act, but New South Wales and Tasmania are still the only States which have adopted the uniform legislation.<sup>10</sup> The use of the certification procedure in New South Wales has provided many examples

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<sup>5</sup> E.g. Corporations Legislation (Evidence) Amendment Act 1992 (liquidators' examinations and ASIC investigations); National Crime Authority Legislation Amendment Act 2001 (NCA investigations).

<sup>6</sup> E.g. s14, Laying Chicken Collection Act 1988 (Cth). For a more recent example see s48, Waste Minimisation Act 2001 (Cth).

<sup>7</sup> E.g. s112, Environment Protection and Biodiversity Conservation Act 1999 (Cth).

<sup>8</sup> E.g. s15, Telecommunications (Interception) Act 1996 (WA).

<sup>9</sup> E.g. s53, Crimes (Confiscation) Act 1989 (Qld).

<sup>10</sup> E.g. s128, Evidence Act 1995 (NSW) and s128, Evidence Act 2001 (Tas). The Commonwealth legislation took effect in the Australian Capital Territory in 1995: see Commonwealth Parliamentary Debate Evidence Bill 1993 *House of Representatives* (Canberra: Commonwealth Government Printer) 4087. The ACT is not a State and its laws can still be enacted by the Commonwealth Parliament.

of its operation in practice. Those examples are discussed later in this chapter and in Chapter XII.

## **(2) NEW ZEALAND**

Derivative use immunity does not currently appear in legislation in New Zealand, although judges have shown some awareness of it.<sup>11</sup> In this respect New Zealand is similar to the United Kingdom. Derivative use immunity does not appear in British statutes even though judges have long recognized the problem of derivative evidence.<sup>12</sup>

At one time New Zealand seemed to be moving towards recognition of derivative use immunity. In its draft Evidence Code, the NZLC included an optional certification procedure for witnesses who could claim the privilege but preferred to testify.<sup>13</sup> This involved the court granting use and derivative use immunity if a witness chose to testify rather than claim the privilege.

Section 128 of the Australian legislation was the model for the NZLC proposal, although there were important differences which will be discussed in Chapter XII. In any event, the general certification procedure was omitted from the 2005 Evidence Bill. This provides for derivative use immunity only when the privilege is removed in relation to *Anton Piller* Orders.<sup>14</sup>

## **(B) AUSTRALIAN EXAMINATIONS**

### **(1) INTRODUCTION**

Chapter X discussed the American cases on derivative use immunity. Most of them arose in criminal proceedings, but the immunity had been granted in a

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<sup>11</sup> E.g. *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 at 474. Cooke J seemed to have derivative evidence in mind when framing the plaintiffs' undertaking but did not make derivative evidence inadmissible under the first of his conditions.

<sup>12</sup> E.g. *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 443. Lord Wilberforce pointed to the need to protect a discloser against "a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating nature".

<sup>13</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) draft section 63.

<sup>14</sup> New Zealand Government (2005) *Evidence Bill* (Wellington) clause 59(5).

variety of procedures aimed at the compulsory gathering of information. Some of those procedures would be classified as administrative or even criminal in Australia or New Zealand.

This reflects the difficulty with artificial boundaries mentioned in Chapter I. The nature of derivative use immunity means that its effects become most obvious in later criminal proceedings. These effects should be taken into account if immunity is used to address the problem of the privilege in civil proceedings.

Derivative use immunity has usually been discussed in Australia in the context of proceedings other than private civil proceedings: for example, in examinations under company legislation and under the National Crime Authority Act. The next part of this chapter will deal with that discussion, even though it arose in the context of administrative proceedings.

The final part of the chapter will see what can be learnt about derivative use immunity from the Australian case-law on section 128 certificates. Since the 1995 Evidence Acts, many of these certificates have been granted in Australia, resulting in derivative use immunity. The certification procedure has led to various problems which will be covered in Chapter XII, but derivative use immunity has not been prominent among those problems.

The question is whether derivative use immunity could cause the same problems in civil proceedings as it supposedly causes in administrative proceedings. That question will be examined at the end of this chapter. First, it will provide an overview of the Parliamentary and government reports which discuss derivative use immunity.

## (2) RELEVANT REPORTS

### (a) BEAHAN COMMITTEE

This 1991 Senate Committee recommended the removal of derivative use immunity from company proceedings involving liquidators' examinations and company inspections.<sup>15</sup> It accepted the arguments against derivative use immunity put by the ASC.<sup>16</sup> The result was the Corporations Legislation (Evidence) Amendment Act 1992 ("the 1992 Amending Act"). This abrogated the privilege and gave only use immunity as a substitute.

### (b) LAVARCH COMMITTEE

This 1989 House of Representatives Committee dealt with a broad range of company law issues.<sup>17</sup> It brought about several important company law reforms.<sup>18</sup> Nevertheless, the Lavarch Committee rejected the ASC arguments which led to the 1992 Amending Act, even though it heard submissions at about the same time as the Beahan Committee,

### (c) ELLISON COMMITTEE

This 1995 Committee looked at the procedures of the ASC.<sup>19</sup> It recommended that the privilege should be restored during those procedures. This recommendation was rejected in the Kluver Report.

### (d) KLUPER REPORT

This 1997 Report reviewed the removal of derivative use immunity from company proceedings involving liquidators' examinations and ASC

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<sup>15</sup> Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) .

<sup>16</sup> The Australian Securities Commission, later to become the Australian Securities and Investments Commission ("ASIC").

<sup>17</sup> Senate Standing Committee on Legal and Constitutional Affairs (1989) *Company Director's Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Canberra: Australian Government Publishing Service) .

<sup>18</sup> E.g. the introduction of civil penalty provisions for breach of directors' duties.

<sup>19</sup> Senate Legal and Constitutional References Committee (1995) *The Investigatory Powers of the Australian Securities Commission* (Canberra: Senate Printing Unit) .

inspections.<sup>20</sup> The Report did not accept all the ASC's arguments but still found that the removal of derivative use immunity was justified.

### **(3) REMOVAL OF DERIVATIVE USE IMMUNITY**

#### **(a) LEGISLATIVE CHANGE**

Between January 1991 and May 1992 use and derivative use immunity appeared in two statutory provisions involving Australian companies.<sup>21</sup> This immunity was given to examinees if, notwithstanding their claims of privilege, they were compelled to answer questions during company investigations and liquidators' examinations. It was replaced by use immunity alone under the provisions of the 1992 Amending Act, following the recommendations of the Beahan Committee.

The 1992 Amending Act required Parliament to review the derivative use immunity reforms after five years.<sup>22</sup> The Kluver Report confirmed the removal of derivative use immunity and recommended only minor changes. Like the Beahan Committee, Kluver was greatly influenced by submissions from the ASC.

The ASC argued that derivative use immunity was unworkable. This thesis argues that prosecuting authorities have exaggerated the problems, portraying as impossible what is merely inconvenient. This is a good example. The ASC based its submissions upon problems said to have occurred in the United States. It purported to show that similar problems had occurred and would increase if derivative use immunity remained in these two company provisions.

The ASC made broad and often vague claims of past and future problems caused by derivative use immunity. They can be summarised in five related arguments.

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<sup>20</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra).

<sup>21</sup> Then s68(3) ASC Act 1989 (Cth) and s597(12) Corporations Law 1990 (uniform).

<sup>22</sup> See s10, Corporations Legislation (Evidence) Amendment Act 1992 (Cth).



## (b) ARGUMENTS

First, where derivative use immunity is alleged, the burden lies on the prosecution to prove that its evidence is not derivative and is therefore admissible.

Second, the prosecution must prove beyond reasonable doubt that its evidence is not derivative.

Third, derivative use immunity rules out the early examination of principal suspects because all evidence discovered afterwards is effectively excluded by derivative use immunity.

Fourth, in the absence of early examination of the principal suspects, the necessary evidence can only be obtained by early examination of minor players, who therefore escape prosecution.

Fifth, derivative use immunity enables witnesses to neutralize evidence: for example, by producing documents to render them inadmissible in later criminal proceedings. This is said to have occurred in the United States, as well as in Australia. It raises the question of the relevance of American experience.

## (c) AMERICAN EXPERIENCE

There are obvious dangers in transplanting law and practice from the United States, where a Federal system operates in accordance with its own Constitution. Moreover, Australian legislation can modify the American position on the onus of proof and any other aspect of derivative use immunity. Yet judges have been influenced by their perceptions of the position in the United States, just as they have been influenced by their views of history.

Their perceptions have not always been accurate. As mentioned in Chapter IV, the privilege did not emerge from the US Constitution as a fully-formed

fundamental human right, as some Australian judges have seemed to suggest.<sup>23</sup> Chapter X gave a detailed account of the American case-law on derivative use immunity. This chapter will discuss whether that case-law justifies the arguments which have been used against derivative use immunity in Australia.

## (C) NEGATIVE ARGUMENTS

### (1) ONUS OF PROOF

#### (a) LACK OF CASE-LAW

The Beahan Committee expressed misgivings about relying upon the ASC's view of the law but for policy reasons could not wait for Australian case-law on the subject.<sup>24</sup> In 1997 the Kluver Report cited only one new Australian case and that came from the lower courts.<sup>25</sup> The lack of case-law was perhaps the result of the unwillingness of the prosecuting authorities to test the law. In 1992 they chose to remove the derivative use immunity provisions from company law instead of clarifying the effect of those provisions in court proceedings.<sup>26</sup>

Since 1995 the lower Australian courts have provided little insight into derivative use immunity. Judges in New South Wales have made conflicting comments about the onus of proof of derivative use immunity. These comments have been made mostly in the context of section 128 certificates given during pre-trial civil proceedings. They will be discussed in detail later in this chapter. They do not show a clear view on the onus of proof.<sup>27</sup>

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<sup>23</sup> E.g. Murphy J in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 346.

<sup>24</sup> Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) para 4.13.

<sup>25</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.79. That case was *Re Ardina Electrical (Qld) Pty Ltd* (1992) 7 ACSR 297.

<sup>26</sup> See Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) para 3.5.5 for excuses from the DPP's representative for this approach.

<sup>27</sup> Compare *AMP v Prasad* [1999] NSWSC 252 (Unreported in print, NSW Supreme Court, Hamilton J, 23 March 1999) LEXIS BC9901480 (onus on defendant); with *Bax Global v Evans* (1999) 47 NSWLR 538 at 553 per Austin J ("difficult factual and legal questions could well arise" if evidence was discovered after a disclosure was made with derivative use immunity).

## (b) ONUS ON DEFENDANT

Authority in the federal courts has been against the ASC's argument that the onus is on the prosecution. The Kluver Report noted that the High Court seemed to place on the defendant "some onus to establish a causal link between an item of evidence and the information given by that person at a compulsory examination".<sup>28</sup> However, this was based only upon *obiter dicta* from Murphy J and Mason CJ.

Murphy J said that the protection which derivative use immunity gave to the defendant was "unsatisfactory because of the problems of proving that other evidence was derivative". He gave no explanation and cited no authority for that proposition.<sup>29</sup> Although he cited several American authorities, he failed to mention the leading case in which the US Supreme Court placed the onus of proof on the prosecution.<sup>30</sup> Nevertheless, he was in turn cited by Mason CJ as authority for the view that immunity "from derivative use tends to be ineffective by reason of the problem of proving that other evidence is derivative".<sup>31</sup>

A Federal Court judge expressed a similar view. Derivative use immunity was provided for examinations under the federal Proceeds of Crime Act.<sup>32</sup> The judge noted that derivative use immunity provided better protection for the discloser than use immunity, but even then the protection was less than complete.<sup>33</sup>

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<sup>28</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.81.

<sup>29</sup> *Sorby v The Commonwealth* (1983) 152 CLR 281 at 312.

<sup>30</sup> *Kastigar v United States*, 406 US 441 (1972).

<sup>31</sup> *Hamilton v Oades* (1989) 166 CLR 486 at 496: see Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.80.

<sup>32</sup> Under s48(6), Proceeds of Crime Act 1987 (Cth).

<sup>33</sup> *Director of Public Prosecutions v Elite Woodproducts (Australia) Pty Ltd* (1989) 42 A Crim R 45 at 52 per Studdert J ("It may well be that s48(6) would not afford of necessity watertight protection against incriminating evidence that may come to light following his examination"). His worry was apparently that some evidence discovered after an examination might be admissible. He did not, therefore, accept the argument that all evidence discovered after an examination was effectively rendered inadmissible.

### (c) TOO LITTLE PROTECTION

If the onus is on the defendant, derivative use immunity can be said to provide too little immunity, not too much. Even if the onus of proof is on the prosecution, the same argument applies when the onus can be too easily shifted to the defendant. This argument has recurred in various forms since it was put forward in the leading case in the US Supreme Court.<sup>34</sup> It is based upon the fact that the prosecution controls the information which could show derivative use. Mere assertion by the prosecution could effectively put the onus onto the witness to produce evidence of derivative use.

This argument was echoed in one of the submissions to the Beahan Committee.<sup>35</sup> The submission suggested that the ASC could shift the onus simply by showing that its normal procedure was to issue notices to produce all relevant documentation and that a particular document would have been obtained. That document would not then receive derivative use immunity, even if it was mentioned by the witness during examination.

The Kluver Report rejected this submission.<sup>36</sup> It preferred the argument that derivative use immunity provided too much protection to the defendant.

### (d) KLUVER REPORT

Kluver himself had previously acknowledged at least one benefit of derivative use immunity.<sup>37</sup> Moreover, his Report did not accept that the United States position applied in Australia and concluded that it remained to be settled in

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<sup>34</sup> By Justice Marshall in *Kastigar v United States*, 406 US 441 at 469 (1972).

<sup>35</sup> Paul Ehrlich's submission mentioned in Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) para 3.5.3. None of the other submissions to the Beahan Report agreed with it.

<sup>36</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.85 ("it does not overcome some of the fundamental problems that this immunity creates for effective investigation and enforcement").

<sup>37</sup> Kluver, J. (1990) "ASC Investigations and criminal pre-trial disclosures." *Butterworths Australian Corporation Law Bulletin*(21): [311] p269 n10 (in practice it would be difficult to use ASC examinations as fishing expeditions to shore up existing prosecutions, "given the width of the 'derivative use' immunity when properly invoked by the accused").

Australia where the onus of proof lay.<sup>38</sup> Nevertheless, the Report still accepted the ASC's submissions that derivative use immunity could obstruct its enforcement procedures.

Even if some onus was on the defendant, the result would still be "litigious difficulties and the potential for long and costly delays".<sup>39</sup> A defendant would not be in a position to discharge that onus because the necessary information was held by the ASC.<sup>40</sup>

## **(2) STANDARD OF PROOF**

Australian prosecuting authorities have assumed that not only is the onus on the prosecution, but also it must prove beyond reasonable doubt that evidence is not derivative.<sup>41</sup> That assumption is not justified. Chapter X showed that in the United States the prosecution bears the onus of proof of the negative, but it also showed that the prosecution only has to prove the negative on the preponderance of evidence.<sup>42</sup>

It is difficult to see why prosecutors should be in a worse position under the common law in Australia than in the United States. In any event, the prosecution's burden could be lightened by statutory provision.

## **(3) EARLY EXAMINATION OF INDIVIDUALS**

### **(a) RELIANCE ON ORAL EXAMINATIONS**

The Kluver Report accepted the ASC's argument that early examination of the key players was a valuable investigatory tool and that derivative use immunity effectively made it unavailable. This was said to be because all evidence

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<sup>38</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) paras 3.76 to 3.85. Also see Heydon, J. D. (1997) *A Guide To The Evidence Acts 1995 (NSW) And (Cth)* (North Ryde, New South Wales: Butterworths) para [3.650]: "it is unclear where the onus lies".

<sup>39</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.83.

<sup>40</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.83 ("To deny access could be unfair; to permit full access could fundamentally elongate and complicate the prosecution process").

<sup>41</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.76.

<sup>42</sup> E.g. *United States v Seiffert*, 501 F2d 974, 982 (CA5 1974).

discovered after such an examination would be inadmissible in criminal proceedings.<sup>43</sup> The prosecution could not discharge the onus of proving that such evidence did not result from the examination.

The ASC claimed that it chose not to use its compulsory powers at all in the period before May 1992. It would have risked rendering key evidence inadmissible because of derivative use immunity. Examples were given of the ASC avoiding formal examinations of persons associated with particular companies.<sup>44</sup> It even refused the request of one executive for a formal examination and insisted on an informal interview instead.<sup>45</sup>

This did not really prove that derivative use immunity had hampered criminal prosecutions.<sup>46</sup> Nevertheless, the Beahan Committee concluded that derivative use immunity did "curtail the ASC's powers to an extent that seriously limits its capacity to discharge the responsibilities placed on it by the Parliament".<sup>47</sup> The Kluver Report in 1997 came to a similar conclusion.<sup>48</sup>

## (b) LOWER COURTS

It might be thought that the period between January 1991 and May 1992 would have produced valuable case-law on derivative use immunity in liquidators' examinations and company inspections. In fact, little authority resulted. The

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<sup>43</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.78. However, the argument is attributed to the Queensland Bar Association.

<sup>44</sup> E.g. Occidental Life Insurance, Regal Life Assurance, Qintex and Bond Corporation: Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) paras 3.1.5 and 3.1.6.

<sup>45</sup> ASC and DPP (1991) Joint Submission to the Beahan Committee (Canberra: Unpublished - copy on file with author) para 2.4.8. The executive was from Interwest.

<sup>46</sup> E.g. Longo, J. (1992) "Powers of Investigation of the Australian Securities Commission: Balancing the Interests of Persons and Companies under Investigation with the Interests of the State." *Companies and Securities Law Journal* 10(4): 237 at 241-2. Possibly his views have changed since then, because he was a consultant to the ASC from early 1995 and in 1996 became its National Enforcement Coordinator: ASC News (1996) "Procter exits for Honkers, Longo the new enforcer." *Butterworths Corporation Law Bulletin*(17): [317].

<sup>47</sup> Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) para 4.12.

<sup>48</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.87.

most relevant decision was from the Queensland Supreme Court in *Re Ardina Electrical (Qld) Pty Ltd.*<sup>49</sup> Derivative use immunity was mentioned in a single paragraph as a minor reason for refusing a stay of proceedings.<sup>50</sup>

In that case Williams J refused to stop the liquidator from examining a director who was facing criminal charges. Most of the judgment discussed the grounds for a stay of proceedings. Admittedly, the judgment suggested that the liquidator's examination could only improve the director's position in the criminal trial because of derivative use immunity, but derivative use immunity only had this effect because of the special facts of the case.

A committal hearing had already taken place.<sup>51</sup> Williams J reasoned that the examination could be assumed to be the source of any new evidence which the prosecution produced at the trial. The new evidence would therefore have been rendered inadmissible in the criminal trial by derivative use immunity, thus improving the director's position. The case shows nothing about the general operation of derivative use immunity.

Other cases on liquidators' examinations provided even less satisfactory authority. In one case the judge stated that the broad consequences of derivative use immunity justified the liquidator checking with the ASC before holding an examination.<sup>52</sup> That general statement might have carried more authority if derivative use immunity had in fact applied to the liquidator's examination in question.<sup>53</sup>

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<sup>49</sup> (1992) 7 ACSR 297.

<sup>50</sup> 7 ACSR at 299.

<sup>51</sup> The prosecution should have placed all relevant evidence before the court at the committal hearing.

<sup>52</sup> *Whelan v Australian Securities Commission* (1994) 13 ACSR 427 at 429 *per* Burchett J ("It is obvious that, in some circumstances, the Commission would not wish to risk even a remote prospect that so ample a shield might be provided to a suspect").

<sup>53</sup> The removal of derivative use immunity from s597(12) took effect upon Royal Assent on 14 May 1992 (s2, Corporations Legislation (Evidence) Amendment Act 1992 (Cth)). This examination was not proposed until July 1992 (see 13 ACSR 427 at 428). Derivative use immunity did not therefore apply to it.

Even in cases where derivative use immunity did apply, not all judges were necessarily aware of it. On appeal from a magistrate, a Tasmanian Supreme Court judge excluded some privileged oral answers which should not have appeared in the transcript of a liquidator's examination.<sup>54</sup> They should not have been put before the magistrate.<sup>55</sup> In considering the appeal, the judge simply "paid no regard to these portions of the transcript".<sup>56</sup>

It is unlikely that American judges would have taken this approach to the breach of use immunity for the answers.<sup>57</sup> They would also have considered the evidence which was derived from the answers.<sup>58</sup> The Tasmanian judge never mentioned derivative evidence. If there was any, it should also have been excised.

### (c) CASE-STUDIES

Chapter IV mentioned briefly the eight case studies which the ASC provided to the Kluver Report.<sup>59</sup> These were supposed to provide empirical evidence to show that derivative use immunity prevented early examination of the principal suspects.<sup>60</sup> Such examinations were the ASC's preferred method of investigation. They led the ASC to the relevant documents, which it could then order to be produced.

According to the ASC, derivative use immunity prevented this convenient procedure. Instead, the initial inquiries had to be based upon notices for

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<sup>54</sup> *Schreuder v Australian Securities Commission* [1999] TASC 108 (Unreported in print, Supreme Court of Tasmania, Evans J, 26 October 1999) LEXIS BC9907021.

<sup>55</sup> *Schreuder v Australian Securities Commission* [1999] TASC 108 (Unreported in print, Supreme Court of Tasmania, Evans J, 26 October 1999) LEXIS BC9907021 at para [26] ("should have been excised as, pursuant to the Corporations Law s597(12), they were not admissible in evidence against the appellant").

<sup>56</sup> *Schreuder v Australian Securities Commission* [1999] TASC 108 (Unreported in print, Supreme Court of Tasmania, Evans J, 26 October 1999) LEXIS BC9907021 at para [26].

<sup>57</sup> The only comparable approach in the United States would be if the court decided to apply the harmlessness of use exception.

<sup>58</sup> *Schreuder v Australian Securities Commission* [1999] TASC 108 (Unreported in print, Supreme Court of Tasmania, Evans J, 26 October 1999) LEXIS BC9907021 at para [24] (the examination was conducted "in late 1991 and early 1992").

<sup>59</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) Appendices 3 to 10.

<sup>60</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.69.



production of documents. The danger then was that if the notices were too general or vague, they could be set aside by the courts.<sup>61</sup>

The Kluver Report concluded that derivative use immunity would make corporate investigations “more circuitous, costly and less time-efficient”.<sup>62</sup> It would unduly disrupt the ASC’s preferred procedure. The Report found that this procedure was not simply a way of avoiding more onerous methods of investigation.<sup>63</sup>

Chapter IV questioned that finding. Furthermore, the Report’s vague references to delays and complications did not really explain how derivative use immunity precluded early examination of individuals. In particular, the case-studies themselves did not show that documents obtained after an early examination were necessarily immunized as a result.

#### (d) EFFECT ON PROSECUTION

Only one of the eight Appendices showed non-prosecution resulting from derivative use immunity.<sup>64</sup> In that example, the DPP advised termination of the prosecution of a promoter of the failed company. The promoter had been examined by the ASC and had been compelled to answer in spite of his claims of privilege. Afterwards, search warrants were executed on his home and office because of information given in his answers.<sup>65</sup>

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<sup>61</sup> E.g. *Macdonald v Australian Securities Commission* (1993) 11 ACSR 128. That case dealt with notices served in early 1993, a year after derivative use immunity had been omitted from the company legislation.

<sup>62</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para. 3.56. Also see para. 3.87.

<sup>63</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.37.

<sup>64</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) Appendix 4 (Aust-Home Investments Ltd).

<sup>65</sup> It is the only case in the Appendices which bears any resemblance to the examples from the United States: e.g. *United States v Hossbach*, 518 F Supp 759, 772 (EDPa 1980).

That single example hardly justified the Kluver Report's glowing description of the Appendices.<sup>66</sup> Moreover, it showed the dangers of transplanting American law. The DPP assumed that the prosecution had to prove beyond reasonable doubt that evidence was not derivative.<sup>67</sup> His advice was therefore that the prosecution would be unsuccessful.

As mentioned earlier in this chapter, Australian judicial authorities do not show that the onus of proof is wholly on the prosecution. Moreover, even in the United States, proof is required only on the preponderance of evidence, not beyond reasonable doubt.<sup>68</sup> The DPP's advice to terminate the prosecution was based upon an over-cautious view of the law. Nor do the other seven examples provide much real support for the ASC's arguments.

#### (e) OTHER EXAMPLES

Only two of the seven examples occurred before 1992 when derivative use immunity was still in the legislation. The ASC claimed to have been deterred from early examination of the principal participants.<sup>69</sup> If so, the consequences do not seem to have been disastrous.<sup>70</sup>

The relevance of the other five examples might be challenged because they occurred after 1992. They had nothing to do with derivative use immunity. At best, two of them showed early examinations leading to guilty pleas in criminal

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<sup>66</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.70 (that they contained "specific examples of investigations which were hampered by the derivative use immunity, in particular leading to the non-prosecution of some principal suspects").

<sup>67</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) Appendix 4 para 8.1.6 ("the onus of establishing that particular evidence was not obtained derivatively would be based on judicial authorities in this and other jurisdictions, be on the prosecution to prove *beyond reasonable doubt*") (Emphasis in original). That would now be inconsistent with s142, Uniform Evidence Act.

<sup>68</sup> E.g. *United States v Seiffert*, 501 F2d 974, 982 (CA5 1974).

<sup>69</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) Appendix 3 (Girvan Corporation) and Appendix 5 (a construction company in liquidation). In both cases the crucial examinations of directors were delayed until after May 1992 by which time the 1992 amending Act had removed derivative use immunity.

<sup>70</sup> The delay in examination meant that the directors of the construction company pleaded guilty to insolvent trading 12 months' later: Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) Appendix 5 page iii. No adverse consequences from the delay were specified in the case of Girvan Corporation: Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) Appendix 3 para 1.1.6.

proceedings.<sup>71</sup> It is surprising that the ASC could not find any more striking examples than these.

#### (f) NO MORE THAN INCONVENIENT

There were surprising omissions from the Appendices to the Kluver Report. They did not refer to Bond Corporation, Qintex or some of the other extreme cases which were mentioned in the Beahan Report.<sup>72</sup> Possibly the terms of reference caused the ASC to concentrate instead on the five year review period.<sup>73</sup>

As noted in Chapter IV, the Appendices were more revealing about the priorities of regulatory authorities. The ASC kept emphasizing that its objective was achieved more quickly and cheaply because it could start with compulsory oral examination of the principal suspects. Derivative use immunity was seen, like the privilege itself, as a barrier to cheap and efficient regulation.

The evidence provided by the ASC does little to contradict the lessons which emerge from the American case-law. Admittedly, Chapter X showed that a few *Kastigar* hearings were excessively long.<sup>74</sup> Undoubtedly, derivative use immunity is inconvenient for the prosecution. That does not mean that proof is impossible. Nor does it mean that all evidence acquired after an early examination is effectively immunised.

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<sup>71</sup> Insider trading (Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) Appendix 6) and stealing from a company (Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) Appendix 7).

<sup>72</sup> Also e.g. Occidental Life Insurance and Regal Life Assurance: Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) paras 3.1.5 and 3.1.6.

<sup>73</sup> Even so, the prosecution of Bond Corporation executives occurred in that period but was not mentioned.

<sup>74</sup> E.g. *United States v Smith*, 580 F Supp 1418, 1425 (DNJ 1984).

#### (4) ACCESSORIES

The Lavarch Committee described the fourth argument. Derivative use immunity prevented the prosecution of “professionals associated with the offence such as accountants and lawyers who may themselves have acted as accessories”.<sup>75</sup> A related argument appeared in the Joint ASC and DPP Submission to the Beahan Report. Because early examination of the main players was excluded by derivative use immunity, “persons having a less significant role in the conduct under review must be more heavily relied upon as examinees”.<sup>76</sup>

The result was said to give the ASC an unenviable choice. To ensure conviction of the main suspects, it could subject the accessories to an early examination which would remove any chance of prosecuting those accessories. This fourth argument assumes that derivative use immunity will exclude all evidence obtained after early examinations of the accessories, as well as the main players. In other words, it presupposes the correctness of the third argument, which has just been doubted. In any event, the ASC's choice involves the sort of tactical decision which prosecuting authorities might often be expected to make.

Nor should too much sympathy be offered to prosecuting authorities in these circumstances. Except in the case of transactional immunity, they usually have the whip hand in their bargaining with accessories.<sup>77</sup> Furthermore, accessories from the professions do not always receive the protection which they might expect.<sup>78</sup>

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<sup>75</sup> Senate Legal and Constitutional References Committee (1995) *The Investigatory Powers of the Australian Securities Commission* (Canberra: Senate Printing Unit) para 6.4.20.

<sup>76</sup> ASC and DPP (1991) Joint Submission to the Beahan Committee (Canberra: Unpublished - copy on file with author) para 2.3.3.

<sup>77</sup> E.g. see the Craven litigation described in Chapter XII.

<sup>78</sup> E.g. see the recent restrictions on legal professional privilege introduced in s6AA Royal Commissions Act 1902 (Cth) by the Royal Commissions Amendment Act 2006 (Cth). Nor is there any legal professional privilege at ASC examinations (*Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319) even though it is available in response to ACCC notices (*The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543), at

## (5) NEUTRALIZING EVIDENCE

### (a) DOES IT HAPPEN?

One justification for the 1992 amending Act was said to be that a corporate criminal “may consciously use the present immunities, provided by operation of statute, to make a full confession of crimes for which he or she may then not be prosecuted”.<sup>79</sup> A similar problem was noted with investigating committees in the United States, but those committees offered transactional immunity.<sup>80</sup> Transactional immunity is by its nature more open to exploitation than use or derivative use immunity.<sup>81</sup>

Australian examples have also been claimed. The Kluver Report referred to the argument that derivative use immunity enables examinees “to quarantine a potentially large quantity of directly or indirectly incriminating evidence”.<sup>82</sup> It also mentioned the ASC's claims that this might make prosecutions more difficult or even impossible.<sup>83</sup>

Similarly, the Australian press reported the concerns of a consultant to the ASC that possible corporate crooks could use derivative use immunity to neutralize incriminating documentary evidence.<sup>84</sup> The recent ALRC Report showed the

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bankruptcy examinations (*Re Bond: ex parte Ramsay* (1994) 126 ALR 720) and apparently at liquidator's examinations (*Re Transequity Ltd (In Liquidation)* [1991] Tas R 308).

<sup>79</sup> Explanatory Memorandum (1992) *Corporations Legislation (Evidence) Amendment Bill*.

<sup>80</sup> Wigmore, J. H. (1961) *Evidence in Trials at Common Law* (Boston: Little Brown & Co) Vol VIII, para 2283, p 521, n1. The alleged abuse in the mid-1800s led to the passing of the 1862 use immunity statute which was eventually held not to provide an adequate substitute for the privilege: *Counselman v Hitchcock*, 142 US 547 (1892).

<sup>81</sup> E.g. in the 1980s when transactional immunity could be granted in Western Australia and Tasmania, witnesses had “a positive incentive to confess to crimes that they had committed during counsel's examination; by doing so they acquire immunity from prosecution”: Freckleton, I. (1985) “Witnesses and the Privilege against Self-incrimination.” *Australian Law Journal* 59(4): 204 at 213.

<sup>82</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.61. This claim was substantially repeated in para 3.63 where it formed the basis for the opinion that derivative use immunity “goes much further than the common law privilege”.

<sup>83</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.54 (suspected principal offenders might “achieve a considerable forensic advantage for themselves”); and Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.55 (“the possibility of these persons attempting to make themselves prosecution-proof in this way”).

<sup>84</sup> Durie, J. (1991) “Hartnell Tells US of ASC's Frustration”. *The Australian* (23 November) (Sydney) 42 (“Worse still, any document produced by the crook, who will happily provide all the evidence necessary knowing the ASC won't be able to use it against him, also cannot be used in court”). The

DPP still putting the same argument.<sup>85</sup> However, it is hard to find actual examples.

## (b) SINGLE EXAMPLE

One alleged example appears in several contexts: the abrupt termination of the Special Investigation by John Sulan into Bond Corporation at the end of March 1991. During the Parliamentary debate on the 1992 amending Act, a member accused Bond Corporation of trying to neutralize documentary evidence.<sup>86</sup>

Unfortunately, the member was not talking about derivative use immunity at the time.<sup>87</sup> Nevertheless, indirect support for his account was given by a 1993 newspaper report.<sup>88</sup> More direct support was given in a 1996 newspaper report.<sup>89</sup>

The Sulan Report did not apparently say that evidence had been neutralized.<sup>90</sup> Nor did the Joint ASC and DPP Submission to the Beahan Report refer to this as an abuse of derivative use immunity. According to the Submission, the

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consultant was Kim Santow, later Santow J of the NSW Supreme Court, but the words in the newspaper report were not necessarily his.

<sup>85</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.140 ("A person can 'engineer' a compulsory disclosure so that the prosecution in any subsequent trial is obliged to prove that none of its evidence derives directly or indirectly from the compulsory disclosure").

<sup>86</sup> Commonwealth Parliamentary Debate Corporations Legislation Evidence (Amendment) Bill (House of Representatives, 30 March 1992) (Canberra: Commonwealth Government Printer)1383 (Fergus Stewart McArthur MHR) (One of the "favourite techniques of the Bond Corporation has been to have documents tabled at an investigation by the Australian Securities Commission and then to claim that the documents will be self-incriminating so that the Australian Securities Commission is unable to mount a criminal prosecution linking the previously produced records with the individual concerned").

<sup>87</sup> At that point in his speech the MHR was talking about immunity from the fact of production of the documents. This is a separate issue which was discussed in Chapter IX.

<sup>88</sup> Ryan, C. (1993) "Bond Saga Illustrates Corporate Law Crawl". *The West Australian* (19 November) (Perth) 49. A drafting error in the company legislation could "potentially have destroyed any prosecutions arising out of the Bond investigation. The legislation has now been amended to remove the problem but the Bond investigation was the rather large victim in the meantime".

<sup>89</sup> Frith, B. (1996) "At long last, end in sight for sorry saga of Bond Corp". *The Australian* (5 December) (Sydney) 40. Three months after the ASC took over the Bond investigation from John Sulan, it "ceased holding hearings because it was shackled by the introduction of derivative use immunity". The result was that "witnesses turned up with wads of documents, which the ASC would later be unable to use as evidence".

<sup>90</sup> Moore J in *Oates v Attorney-General* (1998) (Unreported in print, Federal Court, Moore J, 27 February) [1998] AUST FEDCT LEXIS 71; BC9800446, paras [\*23] to [\*24] (The Report indicated merely that "Mr Sulan had reservations about the credibility of many of the witnesses who were examined and that examinees...had availed themselves of the protection conferred by s68...by claiming privilege").

as an abuse of derivative use immunity. According to the Submission, the Sulan Investigation was abruptly terminated "because of concerns as to the ability of the ASC to facilitate any subsequently desired prosecution".<sup>91</sup> The Beahan Committee simply repeated the words of the Submission.<sup>92</sup>

If Bond Corporation executives tried to neutralize evidence, their efforts were ultimately in vain. The ASC successfully prosecuted the principal players.<sup>93</sup> The abolition of derivative use immunity could have contributed to the success of these prosecutions, but the ASC would surely have mentioned that in its submission to the Kluver Report. Yet Bond Corporation was not among the case-studies submitted to the Kluver Report and was not mentioned in the Report at all.

### (c) HIGH RISK STRATEGY

Deliberate neutralizing of evidence would be a strategy carrying high risks. By volunteering prejudicial information white collar criminals would be making themselves vulnerable to civil proceedings. The obstruction of criminal proceedings at all costs may be an attractive option if they have no assets and wish to avoid jail. That is not typically the approach of white collar criminals.<sup>94</sup>

Volunteering prejudicial information would expose them to civil remedies, including those which could be taken by the corporate regulator or the liquidator. The Kluver Report noted that the "prospect of these persons still

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<sup>91</sup> ASC and DPP (1991) Joint Submission to the Beahan Committee (Canberra: Unpublished - copy on file with author) para 2.4.5.

<sup>92</sup> Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) para 3.1.6.

<sup>93</sup> Alan Bond and Peter Mitchell pleaded guilty in December 1996 to offences arising from the transactions under investigation and received substantial jail sentences: Frith, B. (1996) "At long last, end in sight for sorry saga of Bond Corp". *The Australian* (5 December) (Sydney) 40. Tony Oates received a similar sentence when he pleaded guilty to the same offences in 2005: Darragh, D. (2005) "Jailed, but Oates could soon go free". *The West Australian* (8 September) (Perth) 5.

<sup>94</sup> White collar criminals are often entrepreneurs. Entrepreneurs are optimists by nature. They underestimate the possibility of being convicted under the criminal law. They will perhaps be more wary of civil remedies which deprive them of the fruits of their crimes.

being open to civil or administrative remedies could fall far short of community expectations".<sup>95</sup> Nevertheless, those remedies could cause considerable financial detriment to a white collar criminal.

Liquidators' examinations show the risks. In Australia a liquidator may obtain information from a director at an examination and then use it against the director in civil proceedings on behalf of the company.<sup>96</sup> Volunteering prejudicial information in an examination would greatly increase the chances of losing expensive civil proceedings. This seems a high price to pay for neutralising evidence in criminal proceedings.

#### (d) ORAL AND WRITTEN EVIDENCE

According to a British Committee in 1992, use immunity for existing documents "would clearly be open to abuse, allowing a person to neutralise existing evidence which he regards as potentially dangerous to him".<sup>97</sup> The Committee therefore recommended abolishing the privilege for documents in all civil proceedings without substituting use immunity.

That drastic solution was never adopted in the United Kingdom. The same result would be achieved to a limited extent by the proposals in New Zealand and Australia to remove the privilege from pre-existing documents. The British Committee is mentioned here because it suggested that documents are easier to neutralize than oral answers.

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<sup>95</sup> Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) para 3.59.

<sup>96</sup> E.g. numerous decisions starting with *Re Hugh J Roberts Pty Ltd* [1970] 2 NSW 582. A recent example is *Southern Equities v Bond* (2001) 78 SASR 554 at 571-572. Also see Kunc, F. (1990) "Section 541 examinations and concurrent litigation - Are there really any limits? Part 1." *Butterworths Australian Corporation Law Bulletin*(17): 210, Kunc, F. (1990) "Section 541 examinations and concurrent litigation - Are there really any limits? Part 2." *Butterworths Australian Corporation Law Bulletin*(18): 222 and Keay, A. R. (1991) "'Gone Fishing!' Is It Legitimate in an Examination Under Section 597 of the Corporations Law (Companies Code, Section 541)?" *Companies and Securities Law Journal* 9(2): 70 for discussion of the 1980s case-law and of the fine line separating such examinations from fishing expeditions. The British approach is similar: *British and Commonwealth Holdings Plc (Joint Administrators) v Spicer and Oppenheim* [1993] AC 427 at 439-440.

<sup>97</sup> Lord Chancellor's Department (1992) *The Privilege Against Self-Incrimination in Civil Proceedings* (London: Lord Chancellor's Department) para 21.



In fact, oral answers and documents are vulnerable to essentially the same abuse. It is as easy to “feed” an answer to give it the protection of use immunity, as it is to produce a document for the same purpose. This will be shown by the Family Court’s allegation of abuse of certification, mentioned later in this chapter. The same is true of derivative use immunity.

The drastic results of derivative use immunity make it more open to abuse than use immunity, but the results are again similar for oral and written evidence. If an oral answer is “fed”, any derivative evidence will be neutralized as well as the answer itself. The same principle applies to evidence derived from a document which is “fed” by being produced.

#### **(e) CONCLUSION**

It is doubtful whether abuse of use or derivative use immunity has occurred much in practice in Australia. Even if the example of Bond Corporation could be substantiated, it would also show the high risk involved in volunteering evidence to neutralize it. The wads of documents would have been useful to the liquidator of Bond Corporation (now Southern Equities). Over ten years later he was still pursuing civil remedies against individuals involved with the company.<sup>98</sup>

#### **(6) OTHER APPROACHES**

##### **(a) LAVARCH COMMITTEE**

The ASC's arguments were accepted by the Beahan Joint Parliamentary Committee in November 1991. The same arguments were rejected in 1989 by the Lavarch House of Representatives Committee. Although the Lavarch Committee was primarily concerned with shareholder protection, it specifically

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<sup>98</sup> E.g. *Southern Equities v Bond* (2001) 78 SASR 554.

noted that, as far as removal of derivative use immunity was concerned, it was not “persuaded that the proposal of the ASC is justified”.<sup>99</sup>

Unfortunately, the Committee’s view was not based upon analysis of the technicalities of derivative use immunity. Rather, derivative use immunity was dismissed as a problem because it “does not seem to have impeded the effective investigation and enforcement action of the United States Securities and Exchange Commission”.<sup>100</sup> This argument raised more questions than it answered.

The Beahan Committee turned the argument to its advantage. Because of derivative use immunity, the SEC had been forced to resort to indirect methods of extracting evidence and pleas of guilty and “properly regulated investigations by the ASC are preferable to such methods”.<sup>101</sup> The Beahan Committee’s suggestion is consistent with criticism in the United States that the SEC’s pragmatic approach to securities regulation leads to uncertainty.<sup>102</sup>

This chapter will not explore the link between the SEC’s approach and derivative use immunity in the United States. Chapter X looked at examples from a broad range of proceedings to find out how derivative use immunity really operates in the United States. Few of those examples involved the SEC. The Lavarch Committee probably could not deduce anything useful about derivative use immunity from the SEC’s success. Assessments of overseas experiments are rarely reliable.

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<sup>99</sup> Senate Standing Committee on Legal and Constitutional Affairs (1989) *Company Directors’ Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Canberra: Australian Government Printing Service) para 6.4.21.

<sup>100</sup> Senate Standing Committee on Legal and Constitutional Affairs (1989) *Company Directors’ Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Canberra: Australian Government Printing Service) para 6.4.21.

<sup>101</sup> Joint Statutory Committee on Corporations and Securities (1991) *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (Canberra: Commonwealth Government Printer) para 4.14.

<sup>102</sup> In the United States “securities laws are a perpetual orange light, not red, not green”: Arthur Liman, a New York lawyer, quoted in Durie, J. (1991) “Hartnell Tells US of ASC’s Frustration”. *The Australian* (23 November) (Sydney) 42.

## (b) ELLISON COMMITTEE

In 1995 the procedures of the ASC were discussed by the Ellison Senate Committee.<sup>103</sup> It recommended that the privilege should be completely restored to protect oral statements compelled at ASC examinations but not to resist notices to produce documents. This recommendation was part of an attempt to strike a balance “between two competing interests: the need for effective corporate regulation and the need to protect individuals from an excess of administrative powers”.<sup>104</sup>

The Ellison Committee said nothing about derivative use immunity. However, its recommendations were addressed in the Kluver Report when it reviewed the 1992 amending Act. The purpose of that Act was to remove derivative use immunity, thereby reducing the protection given by substitutes for the privilege in ASC and liquidators' examinations. The reduction was clearly inconsistent with the Ellison Committee's main recommendation that the privilege should be restored in ASC examinations.

The Kluver Report did not accept the Ellison Report's main recommendation. On the contrary, Kluver endorsed the abolition of derivative use immunity. In fact, none of the Ellison Report's recommendations found their way into legislation, even though several met with approval.<sup>105</sup>

## (c) NCA HEARINGS

The shifting nature of the arguments can be seen in the Parliamentary debate on the National Crime Authority Amendment Act 2001. The amendments

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<sup>103</sup> Senate Legal and Constitutional References Committee (1995) *The Investigatory Powers of the Australian Securities Commission* (Canberra: Senate Printing Unit) . Also see Pascoe, J. (1996) "Review of Australia's Corporate Legislator." *Company Lawyer* 17(3): 91.

<sup>104</sup> Senate Legal and Constitutional References Committee (1995) *The Investigatory Powers of the Australian Securities Commission* (Canberra: Senate Printing Unit) para 4.3.

<sup>105</sup> E.g. both the ASC and the Kluver Report accepted the Ellison Committee's view that blanket claims of privilege should be allowed at ASC and liquidators' examinations: see Kluver, J. (1997) *Review of Derivative Use Immunity Reforms* (Canberra) paras 3.129 to 3.134.

removed derivative use immunity from the legislation governing the National Crime Authority (now known as the Australian Crime Commission).

This time, the “onus of proof” argument was not mentioned as a justification. A simpler argument was used. The removal of derivative use immunity was necessary to bring the NCA powers into line with those enjoyed by ASIC, the ACCC and the NSW Crime Commission.<sup>106</sup> This was not consistent with the general acceptance of derivative use immunity as a substitute for the privilege in federal legislation.

The broad “litigious delays” and “manipulation of the rules” arguments were redirected at the other important amendment in the Act: the removal of the privilege as a reasonable excuse for not answering questions at NCA hearings.<sup>107</sup> Even with the protection of parliamentary privilege, no specific examples were given to show the privilege being exploited as a reasonable excuse for declining to answer.<sup>108</sup> Nevertheless, the result was said to be an “almost insurmountable impediment to the National Crime Authority”.<sup>109</sup>

Surprisingly, there is one feature of derivative use immunity which the prosecuting authorities could have highlighted but never have: the effect of taint which results from derivative use immunity in the United States

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<sup>106</sup> Commonwealth Parliamentary Debate NCA Act (House of Representatives 24 September 2001) (Canberra: Commonwealth Government Printer) 31137 (Duncan Kerr MHR). However, the legislation governing the ACCC is not entirely devoid of derivative use immunity: see s151BUF Trade Practices Act 1974.

<sup>107</sup> Commonwealth Parliamentary Debate NCA Act (House of Representatives 24 September 2001) (Canberra: Commonwealth Government Printer) 31134 (Second Reading Speech) (“If a person refuses to answer a question in a hearing, it has been possible for that refusal to be litigated through the courts, with delays of months or even years”, reflecting “the way persons under investigation have manipulated the rules”).

<sup>108</sup> Commonwealth Parliamentary Debate NCA Act (House of Representatives 24 September 2001) (Canberra: Commonwealth Government Printer) 31136 (Duncan Kerr MHR). A former chair of the NCA was credited with an anecdote in which a witness “refused to confirm a family relationship on the grounds that to do so would be self-incriminating”. This anecdote in fact raises issues of some difficulty, even though it was cited as an example of a frivolous claim. E.g. see *F v National Crime Authority* (1998) 154 ALR 471 at 482 (current investigation of motor-cycle gang “casts a different outlook on the apparent innocence of the question” which merely asked members to identify themselves).

<sup>109</sup> Commonwealth Parliamentary Debate NCA Act (House of Representatives 24 September 2001) (Canberra: Commonwealth Government Printer) 31136 (Duncan Kerr MHR).

#### **(d) TAINT**

Australian prosecuting authorities have assumed that a breach of derivative use immunity would lead only to exclusion of the tainted evidence.<sup>110</sup> The effect of taint in the United States is usually more drastic than that. The prosecution itself cannot proceed if even a portion of its evidence is tainted.

That is not because of the practical difficulties of proof. Rather, it reflects the effect of breaching constitutional rights in the United States. The same result probably would not occur in Australia. Even if it did, it could be corrected by statute.

#### **(7) CONCLUSION**

In the United States constitutional requirements have forced the prosecuting authorities and the courts to face up to the realities of derivative use immunity. It has turned out to be reasonably manageable. In Australia the prosecuting authorities have obscured the issues by having derivative use immunity removed from the legislation.

Derivative use immunity applied for less than eighteen months in company legislation. There was little case-law on that legislation. In the absence of actual examples, the prosecuting authorities can make sweeping claims.

They continue to claim, therefore, that derivative use immunity prevents early examination of individuals. In Australia the onus of proof is probably not, and need not be, on the prosecution. Even if it is, the American experience shows that the giving of immunised testimony at an examination, however early, does not necessarily rule out all evidence obtained afterwards.

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<sup>110</sup> ASC and DPP (1991) Joint Submission to the Beahan Committee (Canberra: Unpublished - copy on file with author) para 2.6.4. ("highly probative evidence may be rendered inadmissible simply because the prosecution is unable to discharge the onus placed upon it" and "that prosecutions simply cannot proceed").

There has been little case-law on the numerous statutes giving derivative use immunity in administrative proceedings. However, as part of the certification procedure under the uniform Evidence Acts, the courts have since 1995 had the power to grant derivative use immunity in civil and criminal proceedings. It should be asked whether the exercise of that power has shown derivative use immunity obstructing law enforcement. The rest of this chapter will find little evidence of such obstruction.

## **(D) OPERATION IN CERTIFICATION PROCEDURES**

### **(1) INTRODUCTION**

In 1995 the new Evidence Acts gave the power to the Federal and New South Wales courts to issue certificates carrying use and derivative use immunity.<sup>111</sup> Tasmanian courts were given the same power in late 2001.<sup>112</sup> Under section 128 of the respective Acts, a certificate can be granted to a witness in criminal or civil proceedings as a substitute for the privilege.

The section 128 procedure enables courts to grant certificates on a case-by-case basis. If the privilege is claimed, the court can give the witness the choice between relying on the privilege or making the disclosure with use and derivative use immunity. If the witness still wishes to rely upon the privilege, the court may compel the disclosure. It can only do so if it considers that compulsion is in the interests of justice and if it grants a certificate of immunity.

Recognition of derivative use immunity in section 128 shows the long-term viability of this type of immunity in Australia. Moreover, the case-law since 1995 has shown that these certificates work well when given to witnesses during trials. Most of the problems have arisen in pre-trial proceedings in New

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<sup>111</sup> Under s128, Evidence Act 1995 (Cth) and Evidence Act 1995 (NSW).

<sup>112</sup> Under s128, Evidence Act 2001 (Tas).

South Wales when the procedure was applied for purposes for which it was never intended.

The rest of this chapter and Chapter XII will discuss in detail the numerous cases on the New South Wales provision and the few cases on the Federal provision. No significant case-law has been generated by the equivalent provision in the Australian Capital Territory or Tasmania.<sup>113</sup>

## (2) GENERAL ISSUES

### (a) CONCERNS BEFORE ENACTMENT

Derivative use immunity was included in certification procedures without causing the dire predictions made in the case of administrative proceedings. Section 128 was not mentioned at all in the Second Reading Speech when the Evidence Bill 1993 was before Parliament.<sup>114</sup> However, section 128 attracted comment from witnesses appearing before the Standing Committee which considered the Bill in the Senate.<sup>115</sup> Derivative use immunity was one of two aspects which caused concern.<sup>116</sup>

Derivative use immunity caused concern because it did not seem to prevent the use of certified testimony in later criminal proceedings against the witness as a prior inconsistent statement. The New South Wales Law Society put this argument strongly.<sup>117</sup> However, the Standing Committee preferred the government's view that derivative use immunity prevented such use in later proceedings.<sup>118</sup>

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<sup>113</sup> The jurisdiction of the ACT courts is too small. In Tasmania section 128 has not been in operation long enough.

<sup>114</sup> Commonwealth Parliamentary Debate Evidence Bill 1993 *House of Representatives* (Canberra: Commonwealth Government Printer).

<sup>115</sup> Senate Standing Committee on Legal and Constitutional Affairs(1993) Hearings on Evidence Bill 1993 (Canberra: Commonwealth Government Printer).

<sup>116</sup> The other was the exercise of the court's overriding power in the interests of justice. The second aspect will be discussed in Chapter XII.

<sup>117</sup> Senate Standing Committee on Legal and Constitutional Affairs(1993) Hearings on Evidence Bill 1993 (Canberra: Commonwealth Government Printer) at SLC 143.

<sup>118</sup> Senate Standing Committee on Legal and Constitutional Affairs (1994) *Interim Report on Evidence Bill 1993* (Canberra: Senate Printing Unit) para 1.161.

Surprisingly, the concern was not that the derivative use immunity provided too much protection for the witness. The debate was only about whether it provided too little.<sup>119</sup> The Queensland Law Society submitted that a specific provision was needed to provide workable protection in place of the privilege. That provision should provide that the onus was on the prosecution in the later proceedings to prove the absence of derivative evidence.<sup>120</sup>

The Standing Committee referred to these submissions without comment in its Interim report. They did not apparently make much impression. Derivative use immunity was not mentioned in the Committee's Final Report.<sup>121</sup>

The final word should perhaps be left to the Attorney-General's Representative before the Standing Committee. There "is sometimes a fear of the unknown and that may be reflected to some extent here".<sup>122</sup> He was merely referring to the idea of courts giving certificates of immunity. His words were equally suitable to describe the approach of government authorities to derivative use immunity.

#### (b) COURT CERTIFICATION

Certificates can be granted under section 128 in both civil and criminal court proceedings. Those proceedings are different from the Australian administrative proceedings mentioned earlier in this chapter. These administrative proceedings usually involved the automatic grant of derivative use immunity pursuant to a statutory provision.

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<sup>119</sup> E.g. Senate Standing Committee on Legal and Constitutional Affairs (1994) *Interim Report on Evidence Bill 1993* (Canberra: Senate Printing Unit) para 1.160 n166 (submission from Stephen Odgers) ("it would often be difficult to demonstrate that evidence was obtained from what a witness was forced to reveal in legal proceedings, thus negating the benefit of a certificate").

<sup>120</sup> Senate Standing Committee on Legal and Constitutional Affairs (1994) *Interim Report on Evidence Bill 1993* (Canberra: Senate Printing Unit) para 1.161.

<sup>121</sup> Senate Standing Committee on Legal and Constitutional Affairs (1994) *Final Report on Evidence Bill 1993* (Canberra: Senate Printing Unit).

<sup>122</sup> Senate Standing Committee on Legal and Constitutional Affairs (1993) *Hearings on Evidence Bill 1993* (Canberra: Commonwealth Government Printer) at SLC 102-103.



The derivative use immunity given under section 128 extends to all subsequent court proceedings, not just criminal cases. The extension of derivative use immunity beyond criminal proceedings is perhaps surprising in view of the extreme detriment which derivative use immunity is said to cause. It also raises conceptual difficulties which will be discussed in Chapter XII.

Section 128 contemplates that ultimate control of the certification procedure lies in the hands of the court. If the witness chooses the protection of the privilege, the court has the power to override that choice. It can insist upon evidence being given under certificate and receiving derivative use immunity. Unfortunately, the court's control is incomplete.

The section gives the choice initially to the witness. If the witness chooses to testify, the court must give a certificate. This appears to leave the opportunity for abuse. According to the Family Court of Australia in its submission to the recent ALRC Report, this has in fact occurred.<sup>123</sup>

The submission claimed that the current procedure "enables an unscrupulous witness to obtain an unintended forensic advantage in subsequent criminal proceedings by volunteering information to the court".<sup>124</sup> It assumed that the onus of proof is on the prosecution to prove that later evidence is not derivative.<sup>125</sup> In any event, the ALRC rejected the Family Court's submission.<sup>126</sup>

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<sup>123</sup> Family Court of Australia, *Submission E 80*, 16 September 2005.

<sup>124</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.99.

<sup>125</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.99 ("This will have the practical effect of putting any later prosecuting authority in the position of having to prove affirmatively that the evidence relied on in a proceeding is derived from a legitimate source wholly independent of the induced testimony").

<sup>126</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.104 ("It is not considered that a sufficient problem has been identified at this stage to warrant fundamental reconsideration of the provision").

### (c) DISCRETION

Certification has definite advantages. A grant of immunity at the discretion of the court is different from an automatic grant of immunity under the provisions of a statute.<sup>127</sup> It should also be distinguished from the grant of immunity by the government or one of its officials. In the United States, for example, grants of immunity are considered to be a matter for the executive rather than the judiciary. This is also how immunity is granted under some Australian statutes.<sup>128</sup> This thesis argues that certification by a court is preferable to grants of immunity granted by a statute or by the government.

The case-law on certification has shown few of the problems which prosecuting authorities predicted for derivative use immunity in administrative proceedings. That may be explained by the nature of the proceedings. The purpose of administrative proceedings is often to provide information for use in criminal proceedings. The same is not true of civil proceedings. The difference is reflected in the general nature of the cases on certificates.

### (d) NATURE OF CASES

This chapter and Chapter XII will look at cases reported in printed law reports; cases reported electronically and unreported cases. Less than a quarter of the cases on section 128 certificates have appeared in printed law reports. Any such case will be identified only by reference to the printed report.

Most of the cases on section 128 have only been reported electronically. Cases which are only reported electronically will be identified as “reported” in the database which is most convenient. The footnote references will show them as

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<sup>127</sup> E.g. s68(3) ASC Act 1989 (Cth) and s597(12) Corporations Law 1991 (uniform) before amendment in 1992, as discussed earlier in this chapter.

<sup>128</sup> E.g. s9(6) Director of Prosecutions Act 1983 (Cth), which was at issue in the Craven litigation mentioned in Chapter XII.

“unreported in print”, but the text will use the term “unreported” only for the few cases which do not appear either electronically or in print.<sup>129</sup>

The rest of this chapter will look at derivative use immunity in the reported cases on certification. The Federal and New South Wales courts have for ten years been granting section 128 certificates carrying derivative use immunity. They might be expected to show derivative use immunity causing the problems which it is said to cause in Australian administrative proceedings. In fact, very few of the cases on certification even mentioned derivative use immunity as an issue.

More than seventy cases have raised questions about section 128 certificates. There were more civil than criminal cases. Only a few of them have been in the Federal courts. Most have been decided in New South Wales. The cases can be divided into three groups: civil trial and pre-trial proceedings and criminal trials.

### **(3) CIVIL TRIALS**

#### **(a) CERTIFICATES GIVEN**

The cases on civil trials involved witnesses. They contained some general comments about the effect on later criminal proceedings of granting immunity. However, those comments did not relate to the special issues which arise from the grant of derivative use immunity.

Chapter XII will conclude that the section 128 procedure was most effective when applied to non-party witnesses in civil trials. It enabled them to give evidence which otherwise would not have been available because they would have claimed the privilege.<sup>130</sup> This worked best when charges had not actually

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<sup>129</sup> This is different from and less confusing than the practice of the databases. The term “unreported” is used by the databases to include cases which are only reported electronically.

<sup>130</sup> E.g. *Credit Corporation v Atkins* (1999) 30 ACSR 727 at 759 (witness was an accountant who faced possible criminal liability because of his involvement in tax evasion); *James v CBA* (1995) (Unreported

been laid against the witness and the feared crimes were not particularly serious.<sup>131</sup> However, the courts in these cases could not really be expected to address the effect of derivative use immunity on the success of possible future criminal proceedings.

The civil courts usually took a similar approach when the witness was a party. As with third party witnesses, the courts used section 128 certificates to receive evidence which formerly would have been blocked by relatively minor criminal concerns. Again, the courts did not consider the effect of the derivative use immunity which they were granting.<sup>132</sup>

The effect on later criminal proceedings is of obvious concern in asset forfeiture proceedings if the criminal defendant gives evidence before the criminal trial. Asset forfeiture proceedings are usually classified as civil proceedings in the enabling legislation.<sup>133</sup> If a criminal defendant gives evidence in asset forfeiture proceedings before trial in New South Wales, the evidence can be made the subject of a section 128 certificate.

One judge accepted that this immunity prevented that evidence being used at a later criminal trial, even for non-evidentiary purposes.<sup>134</sup> However, derivative use immunity has a much broader effect than that.

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in print, NSW Supreme Court, Young J, 5 October); [1995] NSW LEXIS 10714; BC9501684 (witness was the director of a failed company in an action brought by the liquidator for voidable preferences in favour of the company's bank).

<sup>131</sup> Tax evasion or misleading a liquidator must surely be regarded as involving a minor degree of criminality when compared with theft or fraud involving large sums.

<sup>132</sup> E.g. *Stelzer v McDonald* [1999] NSWSC 602 (Unreported in print, NSW Supreme Court, Bergin J, 8 June 1999); LEXIS BC9903586 (civil defendant gave evidence which made him technically guilty of a crime involving fraud because he obtained a cheap airfare pretending to be the *de facto* partner of an airline employee). Also see *Brown v Macleod* (1996) (Unreported in print, NSW Supreme Court, Macready M, 18 October); [1996] NSW LEXIS 3430; BC9604879 (civil defendant in property dispute gave evidence about property the rents from which he had failed to declare for tax purposes).

<sup>133</sup> E.g. s5, Criminal Assets Recovery Act 1990 (NSW).

<sup>134</sup> E.g. "then the evidence he gives will not be able to be tendered at his trial nor will he be able to be cross-examined upon it as to his credibility": *New South Wales Crime Commission v Ahmadi* (1997) (Unreported in print, NSW Supreme Court, Common Law Division, Matter No 12589/94, Smart J, 23 September 1997) AUSTLII cases/nsw/supreme\_ct/1997/unrep520.html (s128 certificate given at hearing under the Criminal Assets Recovery Act 1990 (NSW) for an order for forfeiture of real property and a car belonging to a person charged with supplying heroin).

## (b) CERTIFICATES NOT GIVEN

The courts refused in several cases to exercise their overriding power to compel witnesses to give evidence under immunity. However, their reasons did not include misgivings about derivative use immunity. They were much more practical.<sup>135</sup>

Some of the cases contained detailed speculation about the effect of section 128 on the principles for granting stays of proceedings. One judge suggested that the section 128 procedure may have changed the traditional rule that criminal proceedings should be resolved before civil proceedings on the same subject matter.<sup>136</sup> That suggestion did not fully acknowledge the problem of derivative use immunity.

Arguably, the earlier civil proceedings still need to be stayed. If a section 128 certificate were given at those proceedings, derivative use immunity could prevent the prosecution leading evidence which would otherwise be available at the criminal trial. As another judge noted, the result would “be against the proper administration of justice in the conduct of the criminal trial”.<sup>137</sup>

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<sup>135</sup> E.g. *Standard Chartered Bank v Dean* [1999] NSWSC 1042 (Unreported in print, NSW Supreme Court, Hunter J, 22 October 1999); LEXIS BC 9906924 (neither side thought that the evidence to be given by the witness was important enough in the proceedings to justify compelling it); *Decker v State Coroner (NSW)* (1999) 46 NSWLR 415 (NSW Court of Appeal upheld the decision of a coroner that s128 did not apply to NSW inquests).

<sup>136</sup> E.g. *McCann v Switzerland Insurance* (1997) (Unreported in print, NSW Supreme Court, Giles CJ Comm D, 6 February 1997) LEXIS BC9700068 (s128 meant that it was “not a simple matter of no evidence before the criminal proceedings, but evidence after the criminal proceedings”).

<sup>137</sup> Hungerford J in *Aslanis v Brambles* (1997) 82 IR 220 at 235 (plaintiff successfully applied for civil proceedings to be stayed in an industrial matter until criminal proceedings against him were completed).

## (4) PRE-TRIAL CIVIL PROCEEDINGS

### (a) INTRODUCTION

The remaining civil cases on section 128 certificates did not involve witnesses in trial proceedings. They showed the attempted use of the certificates in pre-trial proceedings in the Equity Division of the Supreme Court of New South Wales. These proceedings involved the production of documents and the lodging of affidavits, particularly in connection with *Mareva* injunctions.

Chapter XII will discuss how recent legislation has extended certification to some pre-trial proceedings.<sup>138</sup> The old case-law is still relevant to other pre-trial proceedings. Besides, it showed the possibilities and limitations both of derivative use immunity and of certification.

### (b) NATURE OF THE CASES

There were about thirty decisions from New South Wales, mostly from the Equity Division. Only a few of them appeared in the printed reports.<sup>139</sup> Other aspects of the decisions will be discussed in Chapter XII. The question here is what they showed about derivative use immunity.

The judges in pre-trial proceedings were more aware of possible later criminal proceedings than trial judges who gave certificates to witnesses. This is not perhaps surprising. Most of the pre-trial cases involved *Mareva* injunctions. The standard ground for a *Mareva* injunction is that the defendant is facing criminal charges. The defendants in these cases had either been charged or were about to be charged with serious crimes involving substantial sums.<sup>140</sup>

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<sup>138</sup> See s87, Civil Procedure Act 2005 (NSW).

<sup>139</sup> E.g. *Vasil v NAB* (1999) 46 NSWLR 207; *Bax Global v Evans* (1999) 47 NSWLR 538; *Griffin v Sogelease Australia Ltd* (2003) 57 NSWLR 257; *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436; *Pathways Employment Services v West* (2004) 212 ALR 140.

<sup>140</sup> E.g. theft by bank employee (*NAB v Rusu* (1999) 47 NSWLR 309); theft of computer equipment (*Bax Global v Evans* (1999) 47 NSWLR 538); fraudulently obtaining bank loans (*Vasil v NAB* (1999) 46 NSWLR 207).

The defendants were usually required to lodge affidavits containing information about their bank accounts and other property so that the *Mareva* freezing orders could be imposed. They could claim the privilege to avoid giving that information. Section 128 certificates were seen as a feasible substitute.

### (c) AWARENESS OF PROSECUTION

Chapter XII will discuss how, before the 2005 amendments, judges in the Equity Division tried to grant section 128 certificates in pre-trial proceedings. Unlike trial judges giving certificates to witnesses, the judges in interlocutory proceedings were aware of some of the implications of derivative use immunity. They did consider the effect which the certificates might have on later criminal proceedings.

The problem was addressed by giving notice to the prosecution authorities so that they could be present when the certificate was granted. Prosecution authorities would make the court aware of the certificate's possible adverse effect on later criminal proceedings. Such notices were not given in trial proceedings.<sup>141</sup> In pre-trial proceedings the involvement of the prosecuting authorities was purely at the discretion of the judge concerned.<sup>142</sup> However, it was considered to be a desirable part of the procedure.<sup>143</sup>

Admittedly, the procedure had its problems. The interest of the prosecuting authorities varied, depending upon how serious the charges were and whether they had already been or were likely to be laid. Where no charges were pending, the prosecuting authorities were less likely to be given notice.<sup>144</sup> In

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<sup>141</sup> E.g. *Ferrall v Blyton* (2000) 27 Fam LR 178 at 200-201 (no notice given of husband's certificated affidavit in which he admitted to conspiracy with his accountant earlier in the same Family Court proceedings).

<sup>142</sup> Even counsel for the Attorney-General accepted that the judge had discretion whether or not to involve the prosecuting authorities: *Ferrall v Blyton* (2000) 27 Fam LR 178 at 200-201.

<sup>143</sup> E.g. Austin J included it in his summary of the preferred procedure in *Bax Global v Evans* (47 NSWLR at 550).

<sup>144</sup> *Phoenix Management Corp v Barrenjoey Road* [2001] NSWSC 1098 (Unreported in print, NSW Supreme Court, Hamilton J, 16 November) [2001] NSW LEXIS 1658, BC200108774 (no charges

*Mareva* cases this was not usually a problem because serious charges and substantial sums were involved.<sup>145</sup>

Even then, the dangers of derivative use immunity were not always taken seriously by the prosecuting authorities.<sup>146</sup> Moreover, Australian judges had to consider the argument of defendants that derivative use immunity did not provide enough protection for the witness.

#### (d) DERIVATIVE USE IMMUNITY

##### (i) Not Enough Protection

This argument echoed the fears expressed by Justice Marshall in the US Supreme Court over thirty years ago.<sup>147</sup> Derivative use immunity does not necessarily exclude all prejudicial results deriving from the disclosure. Chapter X discussed the American case-law on uses which are permissible and therefore not excluded by derivative use immunity.

This argument was recently acknowledged by an Appeal Judge in New South Wales.<sup>148</sup> It was put more strongly in the Industrial Commission of New South Wales in Court Session.<sup>149</sup> The proceedings were criminal prosecutions for breaches of the Occupational Health and Safety Act. The breaches had resulted in the death of an employee in an accident on a building site.

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likely and no mention of notice to the DPP when certificate given for affidavit ancillary to *Mareva* injunction to freeze assets of joint venturer who had not applied joint venture funds as authorised).

<sup>145</sup> In both *NAB v Rusu* and *AMP v Prasad* criminal proceedings had already commenced. In *HPM Industries v Graham*, charges had not yet been laid against an employee for theft of substantial sums, but they were “a distinct possibility”.

<sup>146</sup> *HPM Industries v Graham (No 2)* (1996) (Unreported in print, NSW Supreme Court, Young J, 27 August) [1996] NSW LEXIS 3201, BC9603927 (Counsel representing the Attorney-General restricted his comments to the contents of the lists to be provided by the defendants. The effect of the immunity on the evidence in the criminal case was not mentioned).

<sup>147</sup> *Kastigar v United States* 406 US 441 at 469 (1972).

<sup>148</sup> Giles JA in *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436 at 451 (“It is important, in my view, to recognize that the balance struck by s128 does not give the disclosing party complete protection”).

<sup>149</sup> *Workcover Authority of New South Wales (Inspector Carmody) v Tsougranis* (2002) 117 IR 203 at 212-216 (prosecution pending against two builders in relation to death on building site and, when engineer prosecuted separately, one builder chooses to testify under certificate and the other is allowed to rely upon the privilege).



A witness at the criminal trial exercised his option to rely upon the privilege Haylen J declined to force him to testify under certificate. He clearly had a realistic fear of self-incrimination because “the prosecuting authority has itself also commenced proceedings against him in respect of the same issues”.<sup>150</sup> In Haylen J's view the problem with derivative use immunity was that it provided insufficient protection for witnesses.<sup>151</sup>

Prosecuting counsel in this case had quite properly returned the prosecution brief against the witness. Nevertheless “others may be involved and be in a position, even inadvertently, of coming into possession of that evidence”.<sup>152</sup> That was reminiscent of the fears expressed by Marshall J in *Kastigar*.<sup>153</sup>

In the *Bax Global* case Austin J suggested that derivative use immunity did not give complete protection to the defendants.<sup>154</sup> If they disclosed the location of some computer equipment, “the exercise of their right to put the Crown to proof of that matter in the criminal trials could well be compromised”.<sup>155</sup> Similarly, they could be prejudiced if the disclosures provided material which could be used later in the cross-examination.<sup>156</sup>

This raises again the question of the onus of proof of derivative use. In *AMP v Prasad* Hamilton J found “some substance” in counsel’s claim that defendants

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<sup>150</sup> (2002) 117 IR at 215.

<sup>151</sup> (2002) 117 IR at 212 (“Court orders restricting access to the transcript can attempt to address the issue and may be effective to a degree, but no such system is ironclad in providing protection for the witness providing the evidence”). Also at 214 (“unable to agree that the scheme of s128 establishes sufficient protection for the witness so that, almost as a matter of course, the witness will be required to give the evidence”).

<sup>152</sup> (2002) IR at 212.

<sup>153</sup> *Kastigar v United States* 406 US 441, 469 (1972).

<sup>154</sup> *Bax Global v Evans* (1999) 47 NSWLR 538 at 552 (“very real risk that the defendants would be prejudiced in their defences to the criminal charges”).

<sup>155</sup> 47 NSWLR at 552.

<sup>156</sup> 47 NSWLR at 553 (he left open the question of whether such use would be allowed, but there was “a plausible view” that it could be).

had difficulty in proving evidence to be derivative.<sup>157</sup> He did not question the premise upon which the claim was based: namely that the onus was on the defendant to demonstrate that the step was connected to the information.

## (ii) Too Much Protection

In any event, Hamilton J decided that the discloser was sufficiently protected. For reasons which he did not explain, there was only “a very remote chance that harm may be done”.<sup>158</sup> He therefore addressed the more common argument that derivative use immunity provides too much protection to the witness.

Hamilton J proposed that the prosecuting authorities should be given notice that a certificate was to be granted. If they put forward valid objections, the disclosures should be destroyed to prevent their use directly or derivatively. He thought that this preserved “an even balance between the parties to the criminal prosecution”.<sup>159</sup>

According to Austin J, the prosecution had the problem of making sure that its evidence was not immunised through being derived from the material in the affidavit. The derivative use immunity provided by section 128(7) would raise difficult factual and legal questions as to admissibility of evidence.<sup>160</sup> He therefore thought that disclosures should be kept in sealed envelopes with limited access in order to protect the prosecutors from having their evidence “corrupted by knowledge of the witness' civil evidence”.<sup>161</sup>

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<sup>157</sup> *AMP v Prasad* [1999] NSWSC 252 (Unreported in print, NSW Supreme Court, Hamilton J, 23 March 1999) LEXIS BC9901480 para [\*3] (“the difficulty which he says that the accused person will be under in demonstrating that it is through the information coming into the hands of the prosecuting authority that some step has been taken by that authority”).

<sup>158</sup> *AMP v Prasad* [1999] NSWSC 252 (Unreported in print, NSW Supreme Court, Hamilton J, 23 March 1999) LEXIS BC9901480 para [\*4].

<sup>159</sup> *AMP v Prasad* [1999] NSWSC 252 (Unreported in print, NSW Supreme Court, Hamilton J, 23 March 1999) LEXIS BC9901480.

<sup>160</sup> 47 NSWLR at 553 (“if disclosure orders are made and the police discover the location of the computer equipment, difficult factual and legal questions could well arise as to the admissibility of evidence of that discovery”).

<sup>161</sup> 47 NSWLR at 550. Compare with Haylen J’s view in *Workcover Authority of New South Wales (Inspector Carmody) v Tsougranis* (2002) 117 IR 203 at 212-213 (such steps were designed to protect

Austin J seemed to suggest that derivative use immunity could cause the same immunity problems in civil proceedings as it is said to cause in administrative proceedings. His views carried particular weight because they came not from prosecution authorities, but from a judge.

## **(5) CRIMINAL COURTS**

Judges in civil trials can perhaps be forgiven for failing to contemplate later criminal proceedings. Judges in criminal trials should be more conscious of the dangers for later criminal proceedings of granting immunity to witnesses. Yet judges in criminal cases have said little about the broad effect of derivative use immunity when granting section 128 certificates.

Certificates were issued in about half of the criminal cases which were reported on the databases. Almost all those certificates were issued to third party witnesses. This was to be expected because certificates are not usually available to a criminal defendant who elects to testify during the trial. Like the privilege, a section 128 certificate is only available for a criminal defendant in relation to incrimination for other offences.

The criminal cases provided some insights which will be mentioned in Chapter XII. The question for this chapter is whether derivative use immunity contributed or led to the failure of later prosecutions against witnesses to whom certificates had been granted. The reports of the criminal cases did not suggest that result.

They did not even raise as an issue the nature of the immunity which results from a certificate. The case of *Adam v R* was the most fully reported case involving a section 128 certificate, as well as being the only one to go as far as

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the witness from information leaking to the prosecution) and Giles J in *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436 at 451 (agreed with Haylen J, not Austin J)

They did not even raise as an issue the nature of the immunity which results from a certificate. The case of *Adam v R* was the most fully reported case involving a section 128 certificate, as well as being the only one to go as far as the High Court.<sup>162</sup> The High Court and the New South Wales Court of Criminal Appeal did no more than refer in passing to section 128 certificates and to the effect of derivative use immunity under them.<sup>163</sup>

## **(6) CONCLUSION**

This thesis argues that the privilege or an adequate substitute should remain in civil proceedings. This chapter has discussed the adequacy of derivative use immunity as a substitute for the privilege. It has examined the conflicting arguments that such immunity provides too little protection and too much.

Arguments claiming inadequate protection have occasionally been put by judges. Arguments claiming excessive protection have come mainly from prosecuting authorities but have received some judicial support. The views of judges should not be lightly disregarded, but in the end this chapter rejects both sides of the argument.

For at least twenty years, information has been collected under numerous Commonwealth statutes in exchange for derivative use immunity. Courts in the two largest Australian jurisdictions have been granting section 128 certificates since 1995. Yet in practice derivative use immunity has not appeared to be much of a problem.

As described earlier in this chapter, ASIC offered only a single Australian example where derivative use immunity caused a criminal prosecution not to

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<sup>162</sup> *Adam v R* (2001) 207 CLR 96, affirming the decision of the New South Wales Court of Criminal Appeal in *R v Adam* (1999) 47 NSWLR 267. Although this case concerned evidence given under a section 128 certificate, the issue was not the effect of derivative use immunity but the method by which the prosecution cross-examined its own witness.

<sup>163</sup> 207 CLR at 101 (High Court); 47 NSWLR at 275 (NSW Court of Criminal Appeal).

Derivative use immunity in Australia does not have to take the same form as it has taken in the United States. Even if it does, American experience has shown that the courts and prosecutors can devise procedures which make the system workable. Unquestionably, derivative use immunity has made things harder for American prosecutors. That is hardly surprising. So does the privilege which it replaces. Whether the increased difficulty is too great depends upon one's view of the value of the privilege itself.

It might be thought that the United States has to take the trouble to comply with a constitutional requirement, but that Australia does not need to. If that attitude prevails, it will cast doubt yet again on the status of the privilege as a fundamental human right in Australia, but this thesis argues that Australia should take the trouble for another reason. Even in the absence of a clear constitutional command, the convenience of government should be constrained by the values of the privilege.

## CHAPTER XII: CERTIFICATION IN AUSTRALIA AND NEW ZEALAND

### (A) INTRODUCTION

#### (1) PRE-TRIAL AND TRIAL PROCEEDINGS

Chapter XI looked at the Australian cases on certification to see if derivative use immunity caused serious problems. The conclusion was that problems arose not from derivative use immunity but from other aspects of the certification procedure. Those aspects will now be examined, but certification in civil trials needs to be distinguished from certification in pre-trial proceedings.

When given to witnesses in civil trial proceedings, section 128 certificates generally achieved their objective. The civil court received evidence which would not otherwise have been available because of the privilege. Some procedural improvements will be suggested, but in principle section 128 certificates offer an adequate substitute for the privilege in trial proceedings.

Certification in pre-trial proceedings has been less successful. Judges tried to incorporate certification into pre-trial procedure in New South Wales, but the result was confusion and uncertainty. The case-law showed increasingly that legislation was needed to save the New South Wales experiment.<sup>1</sup>

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<sup>1</sup> E.g. *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436 at 452; *Pathways Employment Services v West* (2004) 212 ALR 140 at 156-7.

In 2005 legislation was passed for this purpose.<sup>2</sup> In New South Wales pre-trial certification now has a basis in statute, but the statute does not apply to all pre-trial civil proceedings. Moreover, it may need to be amended to fit in with the latest ALRC proposals. They also sought to address the problems with the privilege in particular pre-trial civil proceedings.<sup>3</sup>

Nevertheless, this chapter will conclude that, if suitable legislation could be put in place, derivative use immunity by certification would offer an adequate substitute for the privilege in pre-trial civil proceedings in Australia.

## **(2) RELEVANCE TO NEW ZEALAND**

Chapter XI dealt only with the law and practice in Australia. This chapter will also consider the position in New Zealand. This is currently uncertain. Changes were proposed by the NZLC, but those proposals were only partly adopted in the 2005 Evidence Bill.

If the original NZLC proposals had been adopted, certification procedures would have applied to witnesses in trials in New Zealand. With one important difference, the proposed procedures would have resembled those in Federal, New South Wales and Tasmanian courts.<sup>4</sup> However, these procedures were omitted from the 2005 Evidence Bill.<sup>5</sup> Australian case-law on certification is now of little relevance in New Zealand.

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<sup>2</sup> By s87 Civil Procedure Act 2005 (NSW). The need for this legislation had been apparent since *Vasil v NAB* (1999) 46 NSWLR 207: e.g. Aitken, L. (2000) "Self-incrimination in Equity: *Reid v Howard* revisited in the light of *Vasil v National Bank*." *Law Society Journal* 38(3): 68 at 72.

<sup>3</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.151 ("not clear how such a recommendation would interact with the new s87").

<sup>4</sup> The important difference was that the court in New Zealand would not have had an overriding power to force witnesses to give evidence against their will in exchange for a certificate of immunity.

<sup>5</sup> Compare New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) draft section 63 with New Zealand Government (2005) *Evidence Bill* (Wellington) clause 58.

For New Zealand pre-trial civil proceedings it is harder to state simply the relevance of Australian law. The NZLC proposals differed from Australia on basic issues which related to the privilege in civil proceedings. The 2005 Evidence Bill jettisoned some of those proposals.<sup>6</sup> However, it did keep the radical NZLC proposal that the privilege should be removed from pre-existing documents.<sup>7</sup> This raised questions which were not addressed in the Australian cases on section 128 certificates.

Those cases still have some relevance for another NZLC proposal which was adopted in the 2005 Evidence Bill. Use and derivative use immunity should be given by court order in *Anton Piller* cases.<sup>8</sup> The 2005 Evidence Bill made no provision for *Mareva* proceedings. In New Zealand, apparently, the privilege has only been a problem in *Anton Piller* cases.<sup>9</sup>

In Australia, more difficulty has arisen from claims of privilege in respect of *Mareva* affidavits.<sup>10</sup> However, the relatively few Australian cases on *Anton Piller* orders showed the privilege raising issues similar to those addressed by the NZLC.<sup>11</sup>

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<sup>6</sup> E.g. the 2005 Evidence Bill did not reduce the scope of the privilege as much as the NZLC proposals did. Compare New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) para 277 (privilege only available if feared offence carried imprisonment) with clause 56(1)(b) New Zealand Government (2005) *Evidence Bill* (Wellington) (privilege available if person likely to be incriminated "for an offence punishable by a fine or imprisonment").

<sup>7</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) paras 280-281. Its proposed definition of "information" in section 4 excluded pre-existing documents. Now see clause 49(2) New Zealand Government (2005) *Evidence Bill* (Wellington)

<sup>8</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) para 295. Now see New Zealand Government (2005) *Evidence Bill* (Wellington) clause 59.

<sup>9</sup> E.g. *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461.

<sup>10</sup> *Pathways Employment Services v West* (2004) 212 ALR 140 (claim of privilege accepted by the parties for *Anton Piller* order, but disputed for *Mareva* affidavit).

<sup>11</sup> E.g. *BPA Industries Ltd v Black* (1987) 11 NSWLR 609 (Waddell CJ unwillingly allows privilege for *Anton Piller* order but says legislative assistance needed). Also see *Authors Workshop v Bileru Pty Ltd* (1989) 88 ALR 211 (no privilege here because no real risk of incrimination from *Anton Piller* order); *Polygram Records Pty Ltd v Monash Records (Australia) Pty Ltd* (1985) 72 ALR 35 (privilege supposedly satisfied in *Anton Piller* order by substituting undertakings not to disclose).



### (3) NATURE AND JURISDICTION

The approximate number of cases should be mentioned as an indication of the problem, even though this chapter is a sampling exercise, not a statistical study. Over one hundred cases since 1995 have been researched because they referred to section 128 certificates. More than ninety per cent of them concerned section 128 of the New South Wales legislation.

Civil proceedings, usually between private parties, were involved in over two-thirds of the cases which referred to section 128. Even then, not all the civil cases on certificates found their way onto the data bases. Printed or electronic reports occasionally referred to cases which did not themselves appear on the data bases.<sup>12</sup>

Pre-trial proceedings were involved in about one fifth of all the cases in which section 128 was discussed. The reported pre-trial decisions all came from New South Wales, mostly from the Equity Division of the Supreme Court. Although there were about thirty decisions, only a few were reported in print.<sup>13</sup> Most were reported in electronic form on the data bases.<sup>14</sup> A case could appear in the printed reports without its interlocutory proceedings being reported in print or electronically.<sup>15</sup>

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<sup>12</sup> E.g. *Menzies v Perkins* (1999) mentioned later in this chapter.

<sup>13</sup> *Vasil v NAB* (1999) 46 NSWLR 207; *Bax Global v Evans* (1999) 47 NSWLR 538; *Griffin v Sogelease Australia Ltd* (2003) 57 NSWLR 257; *Ross v Internet Wines Pty Ltd* [2004] 60 NSWLR 436; and *Pathways Employment Services v West* (2004) 212 ALR 140.

<sup>14</sup> *Kwok v Thang* (1999) (Unreported in print, NSW Supreme Court, Austin J, 10 October) [1999] NSW LEXIS 711, BC9906709; *AMP v Prasad* [1999] NSWSC 252 (Unreported in print, NSW Supreme Court, Hamilton J, 23 March 1999) LEXIS BC9901480; *AMP v Prasad* [1999] NSWSC 349 (Unreported in print, NSW Supreme Court, Hamilton J, 16 April 1999) LEXIS BC9901964; *HPM Industries v Graham* (1996) (Unreported in print, NSW Supreme Court, Young J, 17 July) [1996] NSW LEXIS 3200, BC9603926; *HPM Industries v Graham (No 2)* (1996) (Unreported in print, NSW Supreme Court, Young J, 27 August 1996) [1996] NSW LEXIS 3201, BC9603927.

<sup>15</sup> E.g. *NAB v Rusu* (1999) 47 NSWLR 309 was the subject of a printed report on a different point of law (the best evidence rule). However, there was no printed or electronic report of the five interlocutory judgments in the same case concerning section 128. The relevant but unreported judgments were from Hamilton J dated 2 May 1996 and 6 August 1996 (both mentioned 46 NSWLR at 221) and from Hamilton J dated 6 April 1998 and 7 May 1998 and from Cohen J dated 13 February 1997 (all mentioned 47 NSWLR at 547).

The data bases showed relatively few cases of certification in the Federal Court.<sup>16</sup> This is hard to understand because the same data bases showed the Federal Court regularly discussing the term “privilege against self-incrimination”. Admittedly, the Federal Court does not deal with criminal proceedings at first instance, but this is only a partial explanation. In New South Wales criminal proceedings provided only a minority of the reported cases on section 128 certificates. This chapter is concerned primarily with civil proceedings. Certification in civil trial proceedings will be covered first.

## **(B) CIVIL WITNESSES**

### **(1) GROUPS**

The cases involving trial witnesses are divided into four groups. In the first group, certificates were given to witnesses in civil trials, including parties. In these cases certification effectively solved the problem of the privilege.

The second group took place in the Federal Court, mostly involving family law. The issue was again whether certificates should be given to witnesses. They were often parties.

In the third group, the courts refused to override the privilege in the interests of justice. They had discretion to force witnesses to give evidence with immunity under section 128. This group showed that the courts were careful in the exercise of that discretion.

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<sup>16</sup> E.g. *Credit Corporation v Atkins* (1999) 30 ACSR 727 at 759; *Versace v Monte* [2001] FCA 1572 (Unreported in print, Federal Court, Tamberlin J, 6 November 2001) LEXIS BC200107025.

The fourth group contained most of the New South Wales cases which referred to section 128 certificates. In these cases a section 128 certificate was mentioned as a possibility but was not apparently given.

## (2) SUCCESS STORIES

The first group showed successful use of section 128 certificates. They enabled witnesses in civil trials to give evidence which the privilege would have blocked. Most of these certificates were granted to non-party witnesses.<sup>17</sup>

A good example was the director of a failed company in an action brought by the liquidator for voidable preferences in favour of the company's bank.<sup>18</sup> During his testimony the director admitted to swearing false affidavits and generally giving unreliable information to the liquidator. Charges had not been brought against the witness. Even if they had been brought, they would have been relatively minor.<sup>19</sup>

In the same jurisdictions the privilege would formerly have prevented such evidence being put before the civil court.<sup>20</sup> This is still the position in other Australian jurisdictions. In Victoria, for example, Steve Vizard's fear of self-incrimination severely prejudiced the criminal and civil proceedings in which he was a crucial witness.<sup>21</sup>

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<sup>17</sup> E.g. *Lewis v Nortex Pty Ltd* [2003] NSWSC 354 (Unreported in print, NSW Supreme Court, Hamilton J, 29 April 2003) LEXIS BC200302161 (defence witness given certificate because of participation in tax evasion).

<sup>18</sup> *James v CBA* (1995) (Unreported in print, NSW Supreme Court, Young J, 5 October) [1995] NSW LEXIS 10714, BC9501684.

<sup>19</sup> The criminality involved in misleading a liquidator can justifiably be seen as minor when compared with the theft or fraud involving large sums.

<sup>20</sup> E.g. *Sydow v Melwren* (1994) 13 ACSR 144 (accountant facing possible criminal liability successfully invoked the privilege in the NSW Supreme Court to avoid giving evidence as witness).

<sup>21</sup> He did not testify in criminal proceedings in *R v Hilliard* (Melbourne County Court): Sexton, E. (2005) "Failure to testify lets Hilliard walk free". *The West Australian* (13 August) (Perth) 71. He made numerous claims of privilege to avoid answering questions in the civil proceedings in *Westpac Banking Corporation v Hilliard* (Supreme Court of Victoria): Pennells, S. (2006) "Vizard ducks questions in court on his finances". *The West Australian* (5 September) (Perth) 34.

Civil parties in New South Wales can also be compelled to provide incriminating evidence under section 128 certificates.<sup>22</sup> The ALRC originally proposed that certification should not be available to party witnesses at all.<sup>23</sup> The rejection of this proposal can be seen from the definitions given in the dictionary at the end of the Evidence Act (NSW).<sup>24</sup>

### (3) FEDERAL COURT

The second group contains the rare examples of certificates being granted in the Federal Court. In one case the witness was an accountant who faced possible criminal liability because of his involvement in tax evasion.<sup>25</sup> He had advised company directors who were being sued for insolvent trading. Under certificate he gave evidence of the content of that advice. This result was better than the non-disclosure of evidence in Federal Court cases before 1995.<sup>26</sup>

Civil parties received certificates in the Federal Court, as they did in New South Wales.<sup>27</sup> In the Family Court, most of the witnesses claiming the privilege were parties.<sup>28</sup> Certificates were needed for evidence which, for example, admitted to

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<sup>22</sup> E.g. *Stelzer v McDonald* [1999] NSWSC 602 (Unreported in print, NSW Supreme Court, Bergin J, 8 June 1999) LEXIS BC9903586 (civil defendant gives evidence which would make him technically guilty of a crime involving fraud because he obtained a cheap airfare pretending to be the *de facto* partner of an airline employee); *Smyrnis v Legal Practitioners Admission Board* [2003] NSWCA 64 (Unreported in print, NSW Court of Appeal, 2 April 2003) LEXIS BC200301374 (legal practitioner applies to be struck off the roll for admitted unprofessional conduct as long as he receives a certificate in respect of other more serious conduct); and *Brown v Macleod* (1996) (Unreported in print, NSW Supreme Court, Macready M, 18 October) [1996] NSW LEXIS 3430; BC9604879 (civil defendant in property dispute gives evidence about rental properties which he has failed to declare for tax purposes).

<sup>23</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Draft Bill clause 104(5) (parties excluded from certification procedure).

<sup>24</sup> Evidence Act 1995 (NSW), Dictionary Part 1 Section 7(1) ("a witness" includes "a party giving evidence")

<sup>25</sup> *Credit Corporation v Atkins* (1999) 30 ACSR 727 at 759.

<sup>26</sup> E.g. *Groffam v Macauley* (1994) 121 ALR 22 (solicitor facing possible criminal liability successfully invoked the privilege in the Federal Court to avoid giving evidence as witness).

<sup>27</sup> *Pears v Balzer* (1996) 137 ALR 180 (defendant in wagering contract case invokes privilege because he fears incrimination for taxation offences). Not all the judgment is reported in print. The reference to the certificate is in para [32] which appears only in LEXIS BC9601318.

<sup>28</sup> E.g. *Ferrall v Blyton* (2000) 27 Fam LR 178 at 200-201 (defendant husband gives evidence of his conspiracy with his accountant earlier in the same Family Court proceedings, the result being an arrangement which the accountant was now seeking to enforce).

violence during the marriage or to tax evasion during disputes over maintenance, but the reasons were sometimes more complicated.<sup>29</sup>

#### (4) DISCRETION EXERCISED

In the third group of cases the courts considered whether to exercise their overriding power to compel evidence in the interests of justice. Section 128 does not provide any criteria for the court, in spite of suggestions before enactment that it should.<sup>30</sup>

Even without statutory criteria, the New South Wales and Federal judges were careful to use their discretion when exercising their overriding power. They did not always hold that the interests of justice would be served by forcing a witness to give evidence under immunity.<sup>31</sup> Moreover, if a judge decided that compulsion was not in the interests of justice, the New South Wales Court of Appeal did not interfere merely because it would have come to a different conclusion on the facts.<sup>32</sup>

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<sup>29</sup> *In the Marriage of Reilly* (1995) 19 Fam LR 213 (certificate considered so that husband's action for variation of order for access to children could proceed before or at the same time as his action for contempt of the existing order for access).

<sup>30</sup> E.g. Justice Smith's evidence to Senate Standing Committee on Legal and Constitutional Affairs 91993) Hearings on Evidence Bill 1993 (Canberra: Commonwealth Government Printer) at SLC 97-98. His arguments were not accepted by a majority of Senate Standing Committee on Legal and Constitutional Affairs (1994) *Final Report on Evidence Bill 1993* (Canberra: Senate Printing Unit). However, in his Additional Remarks for the Final Report, Senator Spindler suggested the inclusion of some of Justice Smith's criteria in his second and third amendments.

<sup>31</sup> E.g. *Standard Chartered Bank v Dean* [1999] NSWSC 1042 (Unreported in print, NSW Supreme Court, Hunter J, 22 October 1999) LEXIS BC 9906924 (the parties agreed that the evidence to be given by the witness was not important enough in the proceedings to justify compelling it); *Decker v State Coroner (NSW)* (1999) 46 NSWLR 415 at 422 (NSW Court of Appeal upheld the decision of a coroner that section 128 did not apply to NSW inquests and, even if it had, he would not have compelled answers from the engineer witness); *Versace v Monte* [2001] FCA 1572 (Unreported in print, Federal Court, Tamberlin J, 6 November 2001) LEXIS BC200107025 (defendant in defamation case not forced to answer questions admitting to bribery because it happened too long ago).

<sup>32</sup> *Cureton v Blackshaw Services* [2002] NSWCA 187 (Unreported in print, NSW Court of Appeal, 26 June 2002) LEXIS BC200203514 (appeal court disagreed with judge stopping cross-examination but still upheld his decision not to make a third party witness answer questions which might incriminate him on tax offences).

This thesis sees judicial discretion as an important advantage of certification, but primarily as a safeguard against abuse of immunity. None of these cases showed abuse of the immunity by using it to neutralise evidence. Yet section 128 is open to at least one form of abuse.

### **(5) LOOP-HOLE**

Section 128(2) leaves the choice with the witness if the witness claims the privilege on reasonable grounds. Under section 128(3) the court is obliged to give a certificate to a witness who chooses to give evidence rather than to rely upon the privilege. The witness apparently has the opportunity to neutralise importance evidence by making it immune.

The same loop-hole in pre-trial proceedings was contained in the 2005 legislation in New South Wales.<sup>33</sup> Moreover, as mentioned in Chapter XI, the ALRC rejected a submission from the Family Court of Australia that this was a loop-hole which needed to be closed.<sup>34</sup> This confirmed the impression given by the case-law that witnesses have not been abusing this procedure.

### **(6) REDRAFT**

The ALRC suggested redrafting section 128 because the procedure was too complicated.<sup>35</sup> A New South Wales judge suggested that it was too difficult for a

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<sup>33</sup> See s87(4), Civil Procedure Act 2005 (NSW).

<sup>34</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.103 (“The Family Court’s concern has not been raised elsewhere”).

<sup>35</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) recommendation 15-7.

party representing himself.<sup>36</sup> It seemed to have baffled the trial judge in at least one Federal Family Court case.<sup>37</sup>

The redrafted version was shorter and clearer, but it still left the initial choice with the witness and required the court to give a certificate if the witness chose to testify.<sup>38</sup> The ALRC apparently wanted, as far as possible, to preserve the optional certification procedure which appeared in its original proposal in the 1980s.<sup>39</sup> The wisdom of that approach will be questioned later in this chapter.

## (7) CERTIFICATE NOT GIVEN

In the fourth group of cases, section 128 was mentioned in passing. It was sometimes mentioned not in the context of certification, but rather as a shorthand term for the privilege.<sup>40</sup> One New South Wales judge, for example, suggested that section 128 “replaces the common law privilege at least in the in-court situation”.<sup>41</sup> Numerous conflicting judicial views were expressed on how section 128 interacts with the existing case-law and with other legislative provisions relating to the privilege.<sup>42</sup> This chapter will not deal with those views.

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<sup>36</sup> Austin J in *Kwok v Thang* (1999) (Unreported in print, NSW Supreme Court, Austin J, 10 October) [1999] NSW LEXIS 711, BC9906709.

<sup>37</sup> E.g. *In the Marriage of Atkinson* (1997) 21 Fam LR 279 at 311-2 (trial judge fails to exercise his overriding power under s128(5) before drawing adverse inference against witness who has invoked the privilege).

<sup>38</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) Appendix 1: draft section 128(5A).

<sup>39</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.103 (“Whilst the ALRC’s original proposal was later modified...the option of voluntarily giving evidence in exchange for a certificate remained”). For the original proposal, see Australian Law Reform Commission (1987) *Evidence* (Canberra: Australian Government Publishing Service) para 215 and draft section 110(2) in Appendix A.

<sup>40</sup> *Australian Competition and Consumer Commission v World Netsafe Pty Ltd* (2003) ATPR 41-919, 46,820 at 46,824 (“the applicability of s128 of the Evidence Act 1995 (Cth) was not contested” when the respondent simply claimed the privilege and refused to answer questions in enforcement proceedings against him for contempt of court).

<sup>41</sup> *Lewis v Nortex Pty Ltd* [2002] NSWSC 1192 (Unreported in print, NSW Supreme Court, Hamilton J, 9 December) LEXIS BC200208077.

<sup>42</sup> E.g. *Bax Global v Evans* (1999) 47 NSWLR 538 at 547 (by providing sufficient protection “s128 overcomes the effect of the High Court’s decision in *Reid v Howard*”); *Workcover Authority of New South*

In most of these cases, a certificate was clearly not given, but sometimes this was not certain.<sup>43</sup> In any event, lessons can still be learnt from these cases, even if a section 128 certificate was not given.<sup>44</sup> In practical terms, its availability might still have avoided unjustified resort to the privilege. Witnesses might claim possible but unlikely criminal charges as a convenient excuse for not testifying when the real reasons lie elsewhere.<sup>45</sup> Certification provides the flexibility to cope with these unrealistic claims.<sup>46</sup>

One of the underlying reasons for the privilege is said to be to encourage witnesses to testify.<sup>47</sup> Certification provides a preferable substitute if it persuades reluctant witnesses to give evidence which would otherwise have been blocked by the privilege.<sup>48</sup> The procedure itself is not to blame if for forensic reasons

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*Wales (Inspector Carmody) v Tsougranis* (2002) 117 IR 203 at 214 (“the statutory scheme provided by s128 of the Evidence Act has not diminished the importance of the privilege”); *Cohen v Prentice* (2002) 196 ALR 45 at 58 (s128 applies to the conduct of a bankruptcy examination even though s81(11AA) expressly abrogates the privilege).

<sup>43</sup> E.g. *Strata Consolidated v Bradshaw* (1997) (Unreported in print, NSW Supreme Court, Hunter J, 27 October) [1997] NSW LEXIS 2342, BC9708038 paras [\*224] and [\*226] (witness had “recourse to s128” and then admitted crimes involving theft and deception, but no certificate is mentioned by the judge who is more concerned with whether the evidence of the witness can be considered reliable in the civil proceedings before him).

<sup>44</sup> E.g. *In the Marriage of Reilly* (1995) 19 Fam LR 213 at 220 (the availability of certification weakens the traditional assumption that an action for contempt of a Family Court Order should be heard before an application for variation of that Order).

<sup>45</sup> E.g. the journalists who claimed the privilege when their real reason for not testifying was to protect their sources: *R v Kelly* (2005) (Unreported, Victorian County Court, Rozenes J, 23 August) (Transcript Victorian Government Reporting Service). Because Victoria did not have any certification procedure, the prosecuting authorities had to grant indemnities to the journalists to expose journalistic ethics as the true reason for their refusal to answer the questions.

<sup>46</sup> E.g. *Chambers v Commissioner of Taxation* [1999] FCA 163 (Unreported in print, Federal Court, Mansfield J, 26 February 1999) LEXIS BC9900504 (taxpayer required to lodge affidavit in civil tax recovery proceedings, omitting any incriminating material which could be given, if necessary, at a court hearing under certificate); *Marsden v Amalgamated Television* [2000] NSWSC 238 (Unreported in print, NSW Supreme Court, Levine J, 27 March 2000) LEXIS BC200001291 (Sydney male prostitutes offered pseudonyms and certificates to encourage them to give evidence in a libel action).

<sup>47</sup> E.g. by Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) para 852.

<sup>48</sup> E.g. *Newington v Beneficial Finance* [2000] FCA 338 (Unreported in print, Full Federal Court, 17 March 2000) LEXIS BC200001154 (defendant's building manager not available at the first hearing but agrees to give evidence under s128 certificate at a later hearing).



certification is not pursued but instead the evidence remains blocked by the privilege.<sup>49</sup>

## (C) PRE-TRIAL CIVIL PROCEEDINGS

### (1) INTRODUCTION

These cases did not involve witnesses giving evidence in trial proceedings. They concerned the use of section 128 certificates to obtain the production of documents and lodging of affidavits in pre-trial civil proceedings, particularly in connection with *Mareva* injunctions.

The Equity Division of the New South Wales Supreme Court developed a pre-trial certification procedure after the enactment of the Evidence Act 1995 (NSW). This chapter will describe how the practice became the subject of mounting criticism from the New South Wales Court of Appeal after 1999. The criticism lessened enthusiasm for the practice but did not stop it completely.<sup>50</sup> In the end, the New South Wales Parliament sought to provide the necessary statutory footing in the Civil Procedure Act 2005 (NSW).

The 2005 Act addressed the lack of statutory authority, but it did not apparently cover all pre-trial proceedings. Moreover, it took the State's evidence legislation further away from the uniform model.<sup>51</sup> If the Commonwealth legislation is

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<sup>49</sup> E.g. *Nagle v Lavender* [2002] NSWSC 611 (Unreported in print, NSW Supreme Court, 16 July 2002) LEXIS BC200203999 (certificate offered when defendant claimed privilege against question about payment of tax on the disputed funds, but "counsel did not take the matter further", preferring to argue later that an adverse inference should be drawn against the defendant).

<sup>50</sup> E.g. in *Phoenix Management Corp v Barrenjoey Road* [2001] NSWSC 1098 (Unreported in print, NSW Supreme Court, Hamilton J, 16 November) [2001] NSW LEXIS 1658, BC200108774 (certificate for affidavit in support of *Mareva* injunction).

<sup>51</sup> The wording will never be identical because of the references to the State concerned, but some differences go further than that: e.g. the enforceability provisions in section 128(10) to (13) of the Evidence Act (Cth), discussed later in this chapter.

amended as recommended by the latest ALRC Report, the difference between the Commonwealth and New South Wales legislation will be even greater.<sup>52</sup>

## (2) GRAVITATIONAL PULL

The original New South Wales legislation adopted a certification procedure which was similar to section 128 of the Commonwealth Evidence Act. The Civil Procedure Act 2005 did not amend the existing certification procedure. It provided an extra one for pre-trial proceedings.

The aim was to address a fundamental problem with the Commonwealth model. The Commonwealth Act was based upon the ALRC reports in 1985 and 1987.<sup>53</sup> Those reports assumed that the Attorney-General's reference in 1979 was not intended to cover evidence outside the court-room.<sup>54</sup> The ALRC could not therefore address the problem of the privilege in pre-trial civil proceedings and did not do so.

The New South Wales judges managed to cope with some of the problems which emerged from the adoption of the Commonwealth model. They extended the certification procedure from testimony in person at civil trials to testimony by affidavit.<sup>55</sup> That is now the standard method of giving evidence in chief in the

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<sup>52</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.151.

<sup>53</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service); Australian Law Reform Commission (1987) *Evidence* (Canberra: Australian Government Publishing Service).

<sup>54</sup> E.g. Australian Law Reform Commission (1987) *Evidence* (Canberra: Australian Government Publishing Service) para 199.

<sup>55</sup> E.g. reading of affidavit is sufficient "although the giving of oral evidence may be a preferable approach on occasions" (Austin J in *Bax Global v Evans* (1999) 47 NSWLR 538 at 548). An affidavit was enough for Young J in *HPM Industries v Graham* (1996) (Unreported in print, NSW Supreme Court, Young J, 17 July) [1996] NSW LEXIS 3200, BC9603926. However, he later changed his mind and decided some oral evidence was necessary (*HPM Industries v Graham (No 2)* (1996) (Unreported in print, NSW Supreme Court, Young J, 27 August 1996) [1996] NSW LEXIS 3201, BC9603927.

Federal Court and many other courts in Australia. However, when the New South Wales judges applied section 128 in pre-trial proceedings, they stretched it too far.

The Evidence Act provisions covering legal professional privilege had a similar problem with pre-trial proceedings. The New South Wales courts tried to fill the gap in legal professional privilege through a process called “derivative alteration” or “gravitational pull”. By this process pre-trial rules were construed as being the same as those applying in trials.<sup>56</sup> The “gravitational pull” argument was similarly used to justify the extension of section 128 to pre-trial proceedings.<sup>57</sup>

The appellate Australian courts rejected the “gravitational pull” argument in the context of legal professional privilege.<sup>58</sup> A similar result was expected in section 128 cases. Legislation was therefore needed to achieve the result which could not be reached through common law interpretation. It was also needed to overcome contrary High Court authority.

### **(3) CONFLICT WITH *REID v HOWARD***

In *Reid v Howard*, the High Court struck down orders from the New South Wales Supreme Court.<sup>59</sup> These granted judicial use immunity along the lines suggested in New Zealand.<sup>60</sup> The High Court held in strong terms that it was for legislators, not the courts, to devise substitutes for the privilege. In making that decision the High Court showed the firmness and clarity which were lacking in its previous leading decision on the privilege.<sup>61</sup>

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<sup>56</sup> E.g. *Akins v Abigroup Ltd* (1998) 43 NSWLR 539 at 547.

<sup>57</sup> E.g. *Vasil v NAB* (1999) 46 NSWLR 207 at 222.

<sup>58</sup> *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 58 and 100-101 (High Court).

<sup>59</sup> *Reid v Howard* (1995) 184 CLR 1.

<sup>60</sup> *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461.

<sup>61</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

The decision in *Reid v Howard* formed the basis for mounting criticism of the Equity Division's procedure. The pre-trial use of certificates seemed to conflict with the High Court's prohibition on court-devised substitutes for the privilege. The Equity Division judges tried to resolve the conflict by claiming not to be providing their own substitute for the privilege, but rather to be implementing the statutory substitute contained in section 128.<sup>62</sup>

The New South Wales Court of Appeal expressed increasing misgivings about the procedure. The initial decision criticised the Common Law Division for breaching the principle in *Reid v Howard*.<sup>63</sup> However, later decisions were aimed at the Equity Division.<sup>64</sup>

Equity Division judges in New South Wales eventually accepted this.<sup>65</sup> Most of them went back to allowing the privilege to block pre-trial proceedings. The Civil Procedure Act 2005 was the legislative solution, but it did not apply to all pre-trial proceedings. This reflected the approach of the Equity Division which had granted certificates in some pre-trial proceedings but not in others.

#### **(4) NATURE OF THE CASES**

Most of the reported cases on pre-trial proceedings involved evidence which was sought compulsorily in support of *Mareva* injunctions. Usually the defendants had been, or were about to be, charged with serious crimes involving substantial

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<sup>62</sup> E.g. *Bax Global v Evans* (1999) 47 NSWLR 538 at 546-7.

<sup>63</sup> In *Vasil v NAB* (1999) 46 NSWLR 207 the common law judge had ordered disclosures ancillary to a *Mareva* injunction to be made by affidavit delivered directly to the other party. Because the disclosure was not through the court, the disclosing party had no opportunity to assert the privilege.

<sup>64</sup> *Griffin v Sogelease Australia Ltd* (2003) 57 NSWLR 257 at 265-6; *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436 at 452.

<sup>65</sup> *Pathways Employment Services v West* (2004) 212 ALR 140 at 153. Also at 156-7 ("it cuts down a privilege against self-incrimination in circumstances where the legislature has not clearly indicated it is appropriate to cut the privilege down").

sums.<sup>66</sup> The ground for a *Mareva* application is often that the defendant is subject to criminal charges and therefore may not honour a civil judgment.

The defendants in *Mareva* proceedings were usually required to lodge affidavits containing information about their bank accounts and other property to enable freezing orders to be imposed. They would have been entitled to claim the privilege to avoid providing such details. That is still the position in most jurisdictions in Australia.<sup>67</sup>

That was the position to which New South Wales returned after the Court of Appeal's criticisms.<sup>68</sup> The Civil Procedure Act 2005 was designed to remedy the situation for *Mareva* injunctions and *Anton Piller* orders, but not apparently for traditional interlocutory proceedings. This was consistent with the New South Wales case-law.

## (5) TRADITIONAL PROCEEDINGS

Even before the Court of Appeal disapproved the procedure, the Equity Division judges were reluctant to grant certificates as a substitute for the privilege in traditional pre-trial civil proceedings. This reluctance was shown in *Kwok v Thang*.<sup>69</sup> It was a civil action over unauthorised videotapes which showed the

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<sup>66</sup> E.g. theft by bank employee (*NAB v Rusu* (1999) 47 NSWLR 309); theft of computer equipment (*Bax Global v Evans* (1999) 47 NSWLR 538); fraudulently obtaining bank loans (*Vasil v NAB* (1999) 46 NSWLR 207); misappropriation by employee (*AMP v Prasad* [1999] NSWSC 252 (Unreported in print, NSW Supreme Court, Hamilton J, 23 March 1999) LEXIS BC9901480); and theft by employee (*HPM Industries v Graham* (1996) (Unreported in print, NSW Supreme Court, Young J, 17 July) [1996] NSW LEXIS 3200, BC9603926; *HPM Industries v Graham (No 2)* (1996) (Unreported in print, NSW Supreme Court, Young J, 27 August) [1996] NSW LEXIS 3201, BC9603927); and misappropriation of \$1.1m by accountant (*Pathways Employment Services v West* (2004) 212 ALR 140).

<sup>67</sup> E.g. in Victoria see *Lurgi (Australia) Pty Ltd v Gratz and Dietrich* (1996) (Unreported in print, Victorian Supreme Court, Beach J, 17 May) [1996] VIC LEXIS 977, BC9601879 (defendants claimed privilege to avoid providing ancillary affidavits of assets in *Mareva* proceedings).

<sup>68</sup> *Pathways Employment Services v West* (2004) 212 ALR 140 and *Macquarie Bank Ltd v Riley Street Nominees Pty Ltd* [2005] NSWSC 162, LEXIS BC200501062.

<sup>69</sup> *Kwok v Thang* (1999) (Unreported in print, NSW Supreme Court, Austin J, 10 October) [1999] NSW LEXIS 711, BC9906709.

indiscretions of an Asian pop star in a hotel room. No criminal proceedings were pending. No *Mareva* injunction was sought.

Applications were made in the normal course of the civil proceedings for orders to disclose the location of the tapes, but Austin J held that the usual civil procedure of interrogatories provided adequate disclosure, even though the privilege was available to resist giving incriminating answers. He therefore refused to compel disclosure by issuing a certificate, notwithstanding an earlier unreported decision to this effect.<sup>70</sup>

The doubts about certificates apply to discovery, as well as to interrogatories. The New South Wales Court of Appeal cast doubt upon the use of certificates as a substitute for discovery.<sup>71</sup> It upheld the trial judge's refusal to order discovery because of the danger of self-incrimination. The civil action sought to recover \$10 million from him. He was also likely to be charged with misappropriation of that sum. The Court of Appeal questioned, but did not finally decide, whether the section 128 procedure was available in discovery proceedings.<sup>72</sup>

## **(6) REFORMS**

Section 87 of the Civil Procedure Act 2005 (NSW) was enacted to provide a statutory basis for the Equity Division's practice. A procedure similar to section 128 exists in interlocutory proceedings for production of evidence, where "culpable conduct" is likely to be disclosed. Nevertheless, the first step remains

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<sup>70</sup> *Menzies v Perkins* (1999) (Unreported, NSW Supreme Court No 2965/99, Einstein J, 13 August), in which a certificate had apparently been granted in a similar situation. *Menzies v Perkins* is not reported in print or electronic form.

<sup>71</sup> *Griffin v Sogelease Australia Ltd* (2003) 57 NSWLR 257.

<sup>72</sup> *Griffin v Sogelease Australia Ltd* (2003) 57 NSWLR 257 at 269-270.

the same. The order for disclosure of assets is made subject to the right of the discloser to claim privilege.<sup>73</sup>

Section 87 is not apparently intended to cover traditional proceedings such as discovery and interrogatories.<sup>74</sup> However the drafting of the section leaves room for doubts.<sup>75</sup> The same doubts arose with the draft section 128A in the ALRC Discussion Paper.<sup>76</sup> Proposal 13-10 of the Discussion Paper made it clear that section 128A was confined in its effect to orders in asset disclosure and similar proceedings.<sup>77</sup> Yet the definition of court order could be given a broader interpretation.

The ALRC Discussion Paper has now been overtaken by the ALRC Final Report. This recommended that certification should be extended to orders in civil proceedings involving disclosure of information or searching of premises. However, no draft provision was included in the Appendix.<sup>78</sup>

The drafting of such a provision will be no easy task if its scope is to be limited to interlocutory orders for disclosure such as *Mareva* relief and *Anton Piller* orders.

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<sup>73</sup> E.g. Campbell J made an order to this effect in March 2006 (*Auto Group Ltd v England* [2006] NSWSC 141, LEXIS BC20061171) as he did in March 2005 (*Macquarie Bank Ltd v Riley Street Nominees Pty Ltd* [2005] NSWSC 162, LEXIS BC200501062).

<sup>74</sup> Atkinson, J. and S. Olischlager (2005) *An Introduction To Civil Procedure Act 2005* (Sydney: Attorney-General's Department of New South Wales) at 21 ("It extends the protection against self-incrimination contained in s128 of the Evidence Act 1995 to interlocutory orders for disclosure such as *mareva* relief and *Anton Piller* Orders").

<sup>75</sup> An "order for production" is defined in s87(1) as "an interlocutory order requiring a person other than a body corporate to provide evidence to the court or to a party to a proceeding before a court".

<sup>76</sup> Australian Law Reform Commission (2005) *Review of the Uniform Evidence Acts* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission).

<sup>77</sup> Australian Law Reform Commission (2005) *Review of the Uniform Evidence Acts* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 13.237 (it considered "that a general abrogation of the privilege in civil proceedings is unwarranted and prefers the limited abrogation of the privilege to specific types of orders to rectify the present problem with s128").

<sup>78</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.151.

The New South Wales provision showed the difficulty of that drafting exercise. The ALRC recommendation added to the difficulty. It recommended replacing the use and derivative use immunity granted in section 128 of the Evidence Acts and in section 87 of the Civil Procedure Act 2005 (NSW).

Instead, the ALRC recommended granting no immunity at all to pre-existing documents and only use immunity to other disclosures. Not only will it be technically difficult to draft a provision which achieves the intended result. If the arguments put by this thesis are correct, the whole exercise will be conceptually flawed.

## **(7) HARD CASES**

The case-law showed one final problem with a general certification provision in civil proceedings. Certification should not be ordered to disclose material which would also form the basis of criminal proceedings. The serious nature of that limitation was shown in the *Bax Global* case.<sup>79</sup>

The *Bax Global* case was mentioned in Chapter XI because of Austin J's comments about derivative use immunity. His judgment also contained an account of the Equity Division certification procedure in pre-trial proceedings.<sup>80</sup> Not everyone agreed with his account.<sup>81</sup> However, that debate was overtaken by statute in 2005.<sup>82</sup>

The *Bax Global* case involved applications for *Mareva* injunctions during civil proceedings for conversion of computer equipment. The first defendant gave the

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<sup>79</sup> *Bax Global v Evans* (1999) 47 NSWLR 538.

<sup>80</sup> *Bax Global v Evans* (1999) 47 NSWLR 538 at 548.

<sup>81</sup> E.g. *Griffin v Sogelease Australia Ltd* (2003) 57 NSWLR 257, *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436 and *Vasil v NAB* (1999) 46 NSWLR 207 (NSW Court of Appeal). Also see *Pathways Employment Services v West* (2004) 212 ALR 140 (Campbell J).

<sup>82</sup> By s87, Civil Procedure Act 2005 (NSW)



*Mareva* affidavit voluntarily in exchange for a section 128 certificate, which Austin J granted to him. The second and third defendants refused to do the same.

Criminal charges were pending against those two defendants. Austin J declined to use his overriding power to make them give affidavits in exchange for certificates. The facts to be disclosed in the affidavits were too closely connected to the facts at issue in the pending criminal charges. When the criminal and civil actions are based upon the same facts, "the court should consider using alternative procedures for disclosure when they are available, including the procedure for the administration of interrogatories".<sup>83</sup>

In that case, the interrogatories were blocked by the privilege. Austin J therefore had to resort to a solution which was common twenty years ago: a partial stay of proceedings.<sup>84</sup> Unfortunately, the facts of this case were not exceptional. The problem is likely to arise whenever the standard justification for *Mareva* injunctions is used. The defendant will usually be faced with criminal charges.

Section 128 certificates will not therefore be available when they are needed most. Certification then loses some of its attraction as a solution to the problem of the privilege. This reflects yet again the paradox which Lord Wilberforce pointed out.<sup>85</sup> The advantage of avoiding disclosure is most available to the most criminal. The least deserving defendants benefit most from the privilege.

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<sup>83</sup> *Bax Global v Evans* (1999) 47 NSWLR 538 at 547.

<sup>84</sup> (1999) 47 NSWLR 538 at 554. See Wood, P. M. (1990) "Collateral advantages of the privilege against self-incrimination in civil cases." *Commercial Law Quarterly*(March): 21 for comment on this solution.

<sup>85</sup> *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 439.

## (8) CONCLUSION

The ALRC saw a continuing role for the privilege in civil proceedings.<sup>86</sup>

However, in asset disclosure proceedings, that role was restricted. The ALRC provided no immunity for pre-existing documents and no derivative use immunity at all.

New South Wales offers a more promising model. In pre-trial asset disclosure proceedings the Civil Procedure Act 2005 now provides certification with the statutory basis which it formerly had only in trial proceedings.<sup>87</sup> However, this authority does not apparently extend to traditional procedures such as discovery and interrogatories. They will continue to be protected by the privilege.<sup>88</sup>

According to this thesis, a certification procedure should apply consistently across all civil proceedings and should give derivative use immunity. Even then, the court may need to refuse certificates when the criminal and civil proceedings are based upon essentially the same facts.

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<sup>86</sup> Australian Law Reform Commission (2005) *Review of the Uniform Evidence Acts* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 13.237 (it considered “that a general abrogation of the privilege in civil proceedings is unwarranted”).

<sup>87</sup> While pre-trial certificates have been in doubt, certificates have still been granted in New South Wales trials: e.g. *Lewis v Nortex Pty Ltd* [2002] NSWSC 1192 (Unreported in print, NSW Supreme Court, Hamilton J, 9 December) [2002] NSW LEXIS 937; BC200208077 (certificate given to controller of plaintiff company during his evidence in chief because of his admission of involvement in tax evasion).

<sup>88</sup> E.g. discovery (*Griffin v Sogelease Australia Ltd* (2003) 57 NSWLR 257) and interrogatories (*Kwok v Thang* (1999) (Unreported in print, NSW Supreme Court, Austin J, 10 October) [1999] NSW LEXIS 711, BC9906709).

## (D) CERTIFICATION ISSUES

### (1) GENERAL

#### (a) CONCEPTUAL APPROACH

The certification procedure reflects a particular approach to the problem of the privilege. Conceptually, approaches have traditionally been either judicial or legislative. Different approaches have been taken in Australia and New Zealand.

New Zealand courts used to regard the problem of the privilege as one which they themselves should address. Judge-made procedures had the flexibility to take account of particular circumstances. The ingredients of the problem were seen as “Judge-made processes of discovery and interrogation: a Judge-made privilege: Judge-made practice as to the evidence that will be received in a criminal trial”.<sup>89</sup> In other words, judges created the privilege and they are best placed to fix any problems.

Australia, on the other hand, has favoured the legislative approach.<sup>90</sup> The prevailing view has been that judicial exceptions lead to *ad hoc* law-making. Reform of the privilege should be left to legislators who can take into account the broader issues.<sup>91</sup>

Unfortunately, legislators in the nine Australian jurisdictions have differing views on how the privilege should be modified. Moreover, open-ended statutory provisions do not operate well in unforeseen situations and can lead to abuse. The

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<sup>89</sup> *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 at 474.

<sup>90</sup> *Reid v Howard* (1995) 184 CLR 1 at 14 (“There is simply no scope for an exception to the privilege, other than by statute”).

<sup>91</sup> E.g. if the denial of the privilege “tends to be dictated by pragmatism rather than principle, then the extent of the denial is more appropriately a matter for the legislature than the courts”: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 534 (minority judgment).

certification procedure offers a third approach which seeks to combine the predictability of legislation with the flexibility of judicial decision-making.

### (b) AIM OF CERTIFICATION

The best form of certification procedure leaves ultimate control with the court but within a clear framework laid down by the legislation. The court can then take special circumstances into account and guard against abuses.

Judges exercise their discretions carefully. As mentioned earlier in this chapter, New South Wales judges showed this when they exercised their discretion under section 128 to compel answers in the interests of justice. The problems arose in pre-trial proceedings because judges tried to apply the certification procedure creatively in areas for which it was never intended. They crossed the line into *ad hoc* law-making.

Those problems can apparently be remedied by legislation if it provides a clear statutory structure for certification in all pre-trial proceedings. Lessons can be learnt from certification procedures under State legislation.

### (c) STATE MODELS

The certification procedures in the Commonwealth and the States are sometimes cited together as if they are all the same.<sup>92</sup> In fact, section 128 adopted a certification procedure which was different from the State certification procedures. Nor were all the State procedures identical.

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<sup>92</sup> E.g. Cairns, B. (2002) *Australian Civil Procedure* (Sydney: Law Book Co) cites all the section numbers in one list at 313 n108.

The ACT provision was different from the Western Australian and Tasmanian provisions.<sup>93</sup> Certificates granted transactional immunity in Western Australia until 1990.<sup>94</sup> They granted it in Tasmania until 2001.<sup>95</sup> The procedure was so similar that the Tasmanian Supreme Court looked to pre-1990 case-law from Western Australia for guidance.<sup>96</sup>

Even when it was available in Tasmania and Western Australia, transactional immunity was not automatically granted.<sup>97</sup> Moreover, the statutory provisions gave two controls to the court. First, the court, not the witness, decided whether the evidence should receive immunity under a certificate. Second, the court could withdraw the certificate if the evidence was not satisfactory. The section 128 procedure has neither of these controls.

## **(2) CONTROL**

### **(a) OPTIONAL**

When the ALRC considered certification, it was influenced by the procedure in the ACT.<sup>98</sup> However, it departed from that procedure by “allowing the witness, not the judge, to be the one who makes the choice”.<sup>99</sup> It recommended a provision which “does not encourage the State to assume an improper position of advantage

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<sup>93</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 2 para 218 citing s57(5), Evidence Ordinance 1971 (ACT). Since 1995 section 128 of the Commonwealth Act has applied in Federal courts and in the courts of the Australian Capital Territory.

<sup>94</sup> Then sections 11-13 and 24, Evidence Act 1906 (WA).

<sup>95</sup> Tasmania adopted the uniform evidence legislation in the Evidence Act 2001 (Tas).

<sup>96</sup> *Walsh v R* (1996) 6 Tas R 70 at 79, citing *Woods v Smith* [1976] WAR 13.

<sup>97</sup> E.g. *Samoukovic v Brown* (1993) (Unreported in print, Supreme Court of Tasmania Appellate, Zeeman J, 4 August 1993) LEXIS BC9300070 at 3 (magistrate said to have considered and refused certificate for witness).

<sup>98</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 1, para 861 referred to information showing that the certification procedure was invoked in the ACT Court of Petty Sessions approximately 25 times a year.

<sup>99</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) para 861.

over the individual. It avoids hardship and minimises the risk of perjured testimony".<sup>100</sup>

Section 128 was therefore drafted to give the initial choice to the witness. If the witness chose to testify, the court had to give a certificate. As mentioned earlier in this chapter, the cases did not show this leading to abuses in practice, in spite of the claims of the Family Court. However, the pre-trial cases showed some discomfort among the Equity Division judges in New South Wales.

### (b) TIMING

Austin J noted that "uncertainty relates to the point at which the judge should make a decision as to the issue of a certificate".<sup>101</sup> He agreed with the refusal by Hamilton J to grant a certificate for an affidavit in advance.<sup>102</sup> Young J was similarly reluctant to promise a certificate for an affidavit before he had inspected it.<sup>103</sup>

If the judge effectively promised a certificate beforehand, evidence could be immunised even though it turned out to be unsatisfactory or, worse still, was deliberately being neutralised. This was the danger when the witness chose certification under section 128. The court was locked in as soon as it decided that there were reasonable grounds for the privilege. This problem arose with trial witnesses as well as in pre-trial proceedings.<sup>104</sup> It even arose if the court exercised its power to compel testimony in the interests of justice.

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<sup>100</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) para 861. Also see Australian Law Reform Commission (1987) *Evidence* (Canberra: Australian Government Publishing Service) para 215 (compulsion "likely to result in evidence of limited value").

<sup>101</sup> Austin J in *Bax Global v Evans* (1999) 47 NSWLR 538 at 548.

<sup>102</sup> Austin J in *Bax Global v Evans* (1999) 47 NSWLR 538 at 549 citing *NAB v Rusu* (1998) (Unreported, NSW Supreme Court, Hamilton J, 6 April 1998).

<sup>103</sup> *HPM Industries v Graham* (1996) (Unreported in print, NSW Supreme Court, Young J, 17 July) [1996] NSW LEXIS 3200, BC9603926.

<sup>104</sup> It is odd to see the court in a family law case asking the witness to nominate the pages of the transcript for certification after the testimony has been given: *Brown v Macleod* (1996) (Unreported in print, NSW

### (c) INTERESTS OF JUSTICE

If the witness chose not to testify and to rely on the privilege, the court had the power to force the witness to testify with a certificate in the interests of justice. This compulsory power was added when section 128 was put before the Parliament. The departure from the ALRC model was not explained.<sup>105</sup>

In the Explanatory Memoranda for both Commonwealth and NSW Acts, the relevant passages were brief.<sup>106</sup> Nor was there any explanation in the Senate Papers and other Parliamentary documents. A judge who was influential in the original ALRC proposal appeared before the Senate Committee, but he seemed concerned less about the introduction of the court's overriding power than about the absence of criteria for exercising that power "in the interests of justice".<sup>107</sup>

Certification resulted more often from the choice of the witness than from exercise of the overriding power.<sup>108</sup> Nevertheless, the overriding power was regularly exercised.<sup>109</sup> It was more than just "an exceptional instance".<sup>110</sup>

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Supreme Court, Macready M, 18 October) 1996 NSW LEXIS 3430, BC9604879. Also see *N & S* [2002] FMCAfam 61 (Unreported in print, Federal Magistrates Court, Scarlett FM, 4 March 2002) AUSTLII cases/cth/FMCAfam/2002/61.html (a certificate might persuade counsel to call a witness who feared that his evidence would incriminate him for drug offences).

<sup>105</sup> Unexplained changes were also made to the ALRC's model for legal professional privilege (*Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 at 100 *per* Callinan J).

<sup>106</sup> Explanatory Memorandum (1994) *Evidence Bill 1994* (Canberra: Commonwealth Government Printer) paras 223 to 225; Explanatory Memorandum (1995) *Evidence Bill 1995* (Sydney: NSW Printer) at page 26.

<sup>107</sup> Mr Justice Smith's evidence to Senate Standing Committee on Legal and Constitutional Affairs (1993) Hearings on Evidence Bill 1993 (Canberra: Commonwealth Government Printer) at SLC 97-98.

<sup>108</sup> *Workcover Authority of New South Wales (Inspector Carmody) v Tsougranis* (2002) 117 IR 203 (prosecution pending against two builders in relation to death on building site and, when engineer prosecuted separately, one builder chooses to testify under certificate and the other is allowed to rely upon the privilege).

<sup>109</sup> E.g. *R v Fowler* [2000] NSWCCA 142 (Unreported in print, NSW Court of Criminal Appeal, 23 May 2000) LEXIS BC200002699 (four witnesses given certificates overriding their choice and leave even had to be given to cross-examine three of them as hostile witnesses).

<sup>110</sup> Heydon, J. D. (1997) *A Guide To The Evidence Acts 1995 (NSW) And (Cth)* (North Ryde, New South Wales: Butterworths) para [3.660].

The court's overriding power should have taken control away from the witness and given it to the court. However, even when the court exercised this power, it still could not withhold its certificate if the evidence turned out to be unsatisfactory. This showed the need for the second control: the power to withdraw certificates.

### **(3) WITHDRAWAL**

#### **(a) IMPROPER POSITION**

In a certification procedure the court should have discretion to withdraw the immunity if the evidence is unsatisfactory for any reason. The possibility of unsatisfactory evidence will be shown by the criminal cases which will be discussed shortly. However, there is also the broader question of whether the State thereby assumes an improper position of advantage.

The ALRC saw the power to withdraw immunity as encouraging "the State to assume an improper position of advantage over the individual".<sup>111</sup> Under the Australian Constitution judicial powers are separated from executive powers. It might be asked whether judges represent "the State" when granting or withdrawing immunity.

In the United States there is no doubt which power is involved. American prosecutors, not courts, grant immunity to witnesses because that responsibility "is peculiarly an executive one".<sup>112</sup> Misuse of power seems more of a danger in such cases.

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<sup>111</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol. 1, para. 861.

<sup>112</sup> *Pillsbury Co v Conboy*, 459 US 248, 261 (1983).



Even in Australasia, executive power is clearly involved when the prosecuting authorities themselves have the statutory power to grant immunity to witnesses, especially transactional immunity.<sup>113</sup> As Chapter IV described, that sort of power has apparently led to abuse in Australia. However, it is difficult to see judicial certification as an exercise of the State's power at all.

Nevertheless, the ALRC thought that the State could only avoid assuming an improper position of advantage if the certification was left totally within the control of the witness. According to the ALRC, presumably, the court would take an improper position if it exercised the power, added in section 128, to intervene in the interests of justice. *A fortiori* the court would be in an improper position if it could withdraw a certificate later.

#### (b) POWER OF WITHDRAWAL

The power existed in Western Australia and Tasmania for the court to withdraw a certificate giving transactional immunity if the evidence was unsatisfactory.<sup>114</sup>

This was perhaps because abuse of transactional immunity could lead to irrevocable consequences, but the power remained in the Western Australian provisions even after they were amended to replace transactional immunity with use immunity.<sup>115</sup> The Western Australian amendment was said to follow the ACT.<sup>116</sup>

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<sup>113</sup> E.g. under s20(6D), Director of Public Prosecutions Act 1983 (Cth); s20(2)(c) Director of Public Prosecutions Act 1991 (WA). In New Zealand, see *R v McDonald* [1983] NZLR 252 (Privy Council upholds decision by New Zealand courts based on evidence from witnesses who received undertaking from Solicitor-General to stay prosecution).

<sup>114</sup> See s11(2), Evidence Act 1906 (WA) ("such person shall have given his evidence to the satisfaction of the judge"). Also see s87, Evidence Act 1910 (Tas); e.g. *Walsh v R* (1996) 6 Tas R 70 at 79.

<sup>115</sup> By the Evidence Amendment Act 1990 (WA). However, transactional immunity can still be given in trials of a small range of revenue offences (ss12 and 13 Evidence Act 1906 (WA)).

<sup>116</sup> WA Parliamentary Debate Evidence Amendment Bill *Legislative Assembly* (Perth: WA State Government Printer) at 7349 ("into line with a provision modelled on section 57 of the Australian Capital Territory Evidence Ordinance of 1971").

In fact, the ACT provision never gave the power to the court to withhold its certificate if the evidence was unsatisfactory.<sup>117</sup> The ALRC followed the ACT provision and section 128 was enacted without any power of withdrawal.<sup>118</sup> The ALRC also followed the ACT in recommending only use immunity under certificates.<sup>119</sup>

The consequences of use immunity are not irrevocable, unlike transactional immunity. Derivative use immunity is closer to transactional immunity in this respect. The addition of derivative use immunity in section 128 increased the danger that evidence could be deliberately neutralised by a witness, but the civil cases did not show witnesses seeking to neutralise evidence. Nor did the criminal cases, but they did show judges giving certificates and being dissatisfied with the resulting testimony.

#### **(4) CRIMINAL CASES**

##### **(a) OPTIONAL CERTIFICATION**

The ALRC still likes the idea of optional certification.<sup>120</sup> The NZLC followed the ALRC by not giving ultimate control over certification to the court.<sup>121</sup> It proposed optional certification, which left the decision to the witness.<sup>122</sup> However, the general procedure for certification was omitted from the 2005 Evidence Bill.

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<sup>117</sup> This is presumably why in the ACT such control was not thought necessary in certification leading to use immunity. See Evidence Ordinance 1971 (ACT) s57(4) (“the court shall give to the person a certificate”).

<sup>118</sup> The Senate Committee noted a statement from the Attorney-General's Department that “it was unaware of any complaints arising from the operation of a broadly similar provision in the ACT”: Senate Standing Committee on Legal and Constitutional Affairs, (1994) *Interim Report on Evidence Bill 1993* para 1.159.

<sup>119</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 2 draft section 104(2) following Section 57(5) Evidence Ordinance 1971 (ACT).

<sup>120</sup> E.g. Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.103.

<sup>121</sup> New Zealand Law Commission (1996) *The Privilege Against Self-Incrimination* (Wellington: New Zealand Law Commission) para 423.

<sup>122</sup> New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) draft section 63(4) to (6).

Certification is now only proposed in relation to *Anton Piller* orders.<sup>123</sup> Control is clearly in the hands of the court.

Legislators in Australia and New Zealand have probably been wise to reject optional certification. It would not lead to more testimony. Given a free choice, most witnesses will prefer to say nothing rather than testify under a certificate.<sup>124</sup>

That conclusion was supported indirectly by the Australian civil cases in which the courts were considering whether to override claims of privilege in the interests of justice. In those cases, the witnesses had already opted not to testify with certificates.<sup>125</sup> More direct support for that conclusion is to be found in the application of section 128 to witnesses in criminal proceedings.

## (b) CRIMINAL WITNESSES

In New South Wales witnesses appeared to receive certificates in criminal cases less often than in civil proceedings. Certification was perhaps occurring in practice in criminal cases without attracting the attention of the databases.<sup>126</sup> Even so, the reports show certificates being granted regularly in criminal cases.<sup>127</sup>

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<sup>123</sup> New Zealand Government (2005) *Evidence Bill* (Wellington) clause 59(3).

<sup>124</sup> Australian Law Reform Commission (1987) *Evidence* (Canberra: Australian Government Publishing Service) at para 216 ("Some involved in the prosecution of offences argued that the optional certificate system proposed will not result in much additional evidence being available".)

<sup>125</sup> E.g. *In the Marriage of Atkinson* (1997) 21 Fam LR 279 at 311-2 (witness chooses privilege and judge fails to override the choice correctly); *Standard Chartered Bank v Dean* [1999] NSWSC 1042 (Unreported, NSW Supreme Court, 50019/99, Hunter J, 22 October 1999) LEXIS BC 9906924 (judge allows witness to choose privilege); *Decker v State Coroner (NSW)* (1999) 46 NSWLR 415 at 417 (coroner allows engineer to rely on privilege at inquest); *Versace v Monte* [2001] FCA 1572 (Unreported in print, Federal Court, Tamberlin J, 6 November 2001) LEXIS BC200107025 (judge does not force defendant in defamation case to answer questions admitting to bribery).

<sup>126</sup> E.g. the judge's complaint in *R v Skinner* [2000] NSWSC 303 ("the difficulty of obtaining various witnesses in a milieu in which any witness as to matters of fact required an indemnity or a certificate under s128") LEXIS BC200001966.

<sup>127</sup> E.g. *Adam v R* (2001) 207 CLR 96 (certificate to gang member present at and initially charged with stabbing of policeman); *RAT v R* [2000] NSWCCA 77 (Unreported in print, NSW Court of Criminal Appeal, 24 March 2000) LEXIS BC200001229 (certificate to witness who had sexual relations with a minor, so that he could testify about parental abuse); *R v Fish* [2002] NSWCCA 196 (Unreported in print, NSW Court of Criminal Appeal, 14 June 2002) LEXIS BC200203254 (certificate to witness who admitted to understating at an earlier court hearing how often he had been beaten by police); *R v Fowler* [2000] NSWCCA 142 (Unreported in print, NSW Court of Criminal Appeal, 23 May 2000) LEXIS BC200002699 (certificates to witnesses present at shooting of brother-in-law).

Certificates were sometimes given to more than one witness in the same case.<sup>128</sup>

They were even given to the accused in respect of other offences, as contemplated by section 128(8).<sup>129</sup> Certificates were also refused in criminal cases, occasionally without good reason.<sup>130</sup> Even where no certificate was actually issued, criminal cases could, like civil cases, establish significant points of law about certification.<sup>131</sup>

### (c) LIMITATIONS

The limitations of certification for trial witnesses were more evident in criminal than in civil cases. Certification did not necessarily lead to more or better evidence. The fear of reprisal made the evidence of some witnesses unreliable, no matter what incentive was offered.<sup>132</sup>

In one case a certificate was combined with a limited indemnity from the DPP.<sup>133</sup> It was still not enough to persuade a witness to reproduce his earlier statements for the benefit of the prosecution.<sup>134</sup> Nor could a certificate persuade a female associate of a motor cycle gang to give evidence for the prosecution, even if it

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<sup>128</sup> *R v Fowler* [2000] NSWCCA 142 (Unreported in print, NSW Court of Criminal Appeal, 23 May 2000) LEXIS BC200002699 (four witnesses receive certificates).

<sup>129</sup> *R v Parkes* [2003] NSWCCA 12 (Unreported in print, NSW Court of Criminal Appeal, 17 February 2003) LEXIS BC200300319 (defendant giving evidence in insolvent trading case receives certificate giving immunity in respect of forgery). Also see *R v Phan* (2001) 126 A Crim R 257 at 261 (Greg James J thought that certificate could have been granted to an accused).

<sup>130</sup> E.g. *R v McGoldrick* (1998) (Unreported in print, NSW Court of Criminal Appeal, 20 July) [1998] NSW LEXIS 1516; BC9801407 (retrial ordered after judge mistook the effect of an existing indemnity and refused to grant s128 certificate to defence witness in spite of requests from both the prosecution and the defence).

<sup>131</sup> E.g. *R v Bikic* [2001] NSWCCA 537 (Unreported in print, NSW Court of Criminal Appeal, 13 December) [2001] NSW LEXIS 1602; BC200108621 (certificate could be granted to a witness before an appeal court, although refused in this case).

<sup>132</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) para 856. Also see Mr Justice Smith's evidence to Senate Standing Committee on Legal and Constitutional Affairs (1993) Hearings on Evidence Bill 1993 (Canberra: Commonwealth Government Printer) at SLC 98.

<sup>133</sup> *Adam v R* (2001) 207 CLR 96 (DPP's indemnity of gang member against prosecution did not extend to charges of murder).

<sup>134</sup> Even though he was cross-examined by the prosecution as a hostile witness: *Adam v R* (2001) 207 CLR 96 at 101.

meant going to jail for contempt of court.<sup>135</sup> Optional certification would be unlikely to persuade such witnesses to testify if compulsory certification failed to persuade them.

Several of the criminal cases also showed why the court should have the power to withhold certificates. Certificates had to be granted even when the evidence given under certificate was clearly unsatisfactory.<sup>136</sup> The conclusion must be that section 128 should be amended to give that power to the court.

## **(5) EXCESSIVE IMMUNITY**

### **(a) NEW ZEALAND**

The NZLC originally proposed an optional certification procedure which resulted in use and derivative use immunity in all court proceedings, not just in criminal proceedings.<sup>137</sup> The NZLC did not explain the broad scope of the immunity.<sup>138</sup> It has now become irrelevant in New Zealand because the proposals for optional certification were omitted from the 2005 Evidence Bill.

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<sup>135</sup> *R v Duncan* [2000] NSWSC 440 (Unreported in print, NSW Supreme Court, Dowd J, 23 May 2000) LEXIS BC200002744 (female associate sentenced to two months' jail for refusing, even though offered a certificate, to answer particular questions at trial of motor cycle gang member for murder).

<sup>136</sup> *Adam v R* (2001) 207 CLR 96 at 103 (prosecution witness forced to testify in the interests of justice and then cross-examined as hostile witness with results which should be approached "with the greatest of care"); *R v Fowler* [2000] NSWCCA 142 (Unreported in print, NSW Court of Criminal Appeal, 23 May 2000) LEXIS BC200002699 (three prosecution witnesses cross-examined as hostile with negligible results after being forced to testify in the interests of justice); *R v Yates* [2002] NSWCCA 520 (Unreported in print, NSW Court of Criminal Appeal, 20 December) [2002] NSW LEXIS 917, BC200208054 (certificate given to partner of accused as prosecution witness for her "truthful answers" but judge doubted later whether she was "making any genuine effort"); *R v Cheung* (1997) (Unreported in print, NSW Court of Criminal Appeal, 21 November 1997) LEXIS BC9708060 (only formal evidence was adduced from a defence witness under certificate before the "attempt to lead evidence from this witness was abandoned and he was returned to Berrima jail").

<sup>137</sup> See New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) for draft section 63 and commentary in paras 290 and C267.

<sup>138</sup> Although the immunity does not extend to tribunal hearings, it may apply in arbitration proceedings: New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) Vol 2 p167 para C267.

This also removed the inconsistency with the NZLC proposal which covered *Anton Piller* orders.<sup>139</sup> This proposal has been included in the Evidence Bill. It provides that use and derivative use immunity should extend only to later criminal prosecutions when granted to disclosures under *Anton Piller* orders.<sup>140</sup> This avoids the mismatch between the privilege and the immunity which was being substituted for it. This mismatch exists in section 128 in the uniform Australian legislation.

## (b) AUSTRALIA

### (i) Current Provision

A common feature of the State certification procedures was that they granted immunity only in later criminal proceedings, although they used different forms of wording to achieve this result.<sup>141</sup> The application of the immunity under Section 128 is much broader. Under section 128(7) the disclosure cannot be used against the discloser “in any proceeding in any Australian court”. That immunity clearly extends to later Australian civil proceedings.<sup>142</sup>

Many Australian statutory provisions limit the immunity to criminal proceedings.<sup>143</sup> This was true of the company law provisions which were amended to remove derivative use immunity in 1992.<sup>144</sup> However, Australian

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<sup>139</sup> Formerly draft section 64: New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) para 295.

<sup>140</sup> New Zealand Government (2005) *Evidence Bill* (Wellington) Clause 59(5) (“cannot be used against the person in any criminal proceeding in New Zealand”).

<sup>141</sup> E.g. s11(2a), Evidence Act 1906 (WA) (“in any criminal proceedings against the person other than on a prosecution for perjury committed in the proceedings”); and s57(5), Evidence Ordinance 1971 (ACT) (“in any criminal proceedings other than proceedings for an offence out of falsity of the statement”).

<sup>142</sup> The NZLC proposal similarly provided for derivative use immunity in civil as well criminal proceedings, but the commentary specifically excluded such immunity in non-judicial proceedings: see New Zealand Law Commission (1999) *Evidence (Vol 1)* (Wellington: New Zealand Law Commission) for draft section 63(6) and C267 for commentary.

<sup>143</sup> E.g. s112(5), Environment Protection and Biodiversity Conservation Act 1999 (Cth); s217, Proceeds of Crime Act 2001 (Cth); s8S(2), Health Insurance Commission Act 1973 (Cth).

<sup>144</sup> Formerly s68(3), ASC Act and s597(12), Corporations Law.

commentators have not considered the broader application of the immunity in section 128 to be worthy of discussion.<sup>145</sup>

The broader application sometimes appears in Australian statutes which provide for use immunity alone.<sup>146</sup> It is common in Australian statutes which grant use and derivative use immunity.<sup>147</sup> It was included without explanation in the ALRC's original proposal.<sup>148</sup> The recent ALRC Report mentioned the question of the proceedings in which immunity should be available, but its main concern was to prevent the immunity extending to a retrial for the same offence.<sup>149</sup>

## **(ii) Broader Immunity**

The ALRC recommended that the immunity should extend to any body authorised to receive evidence in New South Wales.<sup>150</sup> Its reasons were not given, but it cited Odgers without comment.<sup>151</sup> He favoured broader immunity “given the principle that a liberal interpretation should be given to the protective provisions in a statute

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<sup>145</sup> E.g. Heydon, J. D. (1997) *A Guide To The Evidence Acts 1995 (NSW) And (Cth)* (North Ryde, New South Wales: Butterworths) para [3.650] states the words of the section without comment.

<sup>146</sup> E.g. s18B(2) New South Wales Crime Commission Act 1985 (“in any civil or criminal proceeding or in any disciplinary proceedings”).

<sup>147</sup> E.g. s13(2), Criminal Assets Recovery Act 1990 (NSW); s9(6)(ba), Director of Public Prosecutions Act 1983 (Cth) (the form of indemnity which was offered by the DPP in *R v Craven*, as discussed later in this chapter).

<sup>148</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 2 p 52. The proposed s104(4) gives immunity “in any legal or administrative proceeding”. Unfortunately, Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 1 para 861 refers to “prosecution” and “the accused” when discussing subsequent proceedings, terms which are only appropriate for criminal proceedings.

<sup>149</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) paras 15.110 to 15.118. Recommendation 15-8 excluded immunity in a retrial for the same offence.

<sup>150</sup> Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) Recommendation 15-9.

<sup>151</sup> E.g. Australian Law Reform Commission (2005) *Uniform Evidence Law* (Sydney: Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission) para 15.111.

purporting to protect a person from the consequences of the abrogation of the protections against self-incrimination".<sup>152</sup>

Unfortunately, Odgers was taking as "given" a principle of interpretation for which there is little Australian authority.<sup>153</sup> This chapter will argue that extension of the immunity to later civil proceedings is unnecessary. This argument finds support in American case-law.

### (c) UNITED STATES

As Chapter X mentioned, American immunity statutes have made compelled disclosures immune from use in later criminal proceedings but not in other proceedings.<sup>154</sup> The American approach has been that the substitute for the privilege should give equivalent protection, not greater protection.

The constitutional implications required the American courts to be clear in their analysis, because the effect of the substitute had to be as close as possible to the effect of the privilege. Transactional immunity was rejected because it gave too much immunity.<sup>155</sup> Use immunity was rejected because it gave too little.<sup>156</sup>

Derivative use immunity has been accepted by the American courts as an adequate substitute. They did not require the witness to be placed in a position identical to

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<sup>152</sup> Odgers, S. (2004) *Uniform Evidence Law* (Pyrmont, New South Wales: Lawbook Co) para [13.13100]. Also see para [13.1280].

<sup>153</sup> The only authority which Odgers cites for this "principle" is a single Appeal Judge in New South Wales: *Hartmann v Commissioner of Police* (1997) 91 A Crim R 141 at 147 (Cole JA). In England a contrary approach has been taken based upon *R v Scott* (1856) Dears and B 47 (169 ER 909); Heydon, J. D. (1971) "Statutory Restrictions on the Privilege Against Self-Incrimination." *Law Quarterly Review* 87(April): 214 at 233 ("the courts have interpreted statutory provisions which provide safeguards against the abuse of compulsory questioning very narrowly"). Australian courts have generally followed the English approach: e.g. *R v Zion* [1986] VR 609 at 614 (answers from bankruptcy examination could be used in later criminal proceedings because statute did not specifically prohibit such use).

<sup>154</sup> E.g. 18 USC Section 6002, set out in *United States v Hubbell*, 530 US 27 (2000).

<sup>155</sup> *Kastigar v United States*, 406 US 441 (1972).

<sup>156</sup> *Counselman v Hitchcock*, 142 US 547 (1892).



that enjoyed under the privilege.<sup>157</sup> It was “analytically incorrect” to expect the two positions to be identical.<sup>158</sup>

The aim of the substitute was to leave the witness in “substantially the same position” as if the privilege had been claimed.<sup>159</sup> Legislators and judges in the United States took the view that this involved restricting the immunity to criminal proceedings. Immunity was not extended to later civil proceedings.

#### (d) RESOLVING TENSION

There is also a specious argument for extending the immunity beyond criminal proceedings. In practice, disclosures which are self-incriminatory will usually be prejudicial to the discloser's civil case as well. If the privilege is exercised, the material is not disclosed at all. It will not prejudice the criminal case. Nor will it prejudice the later civil proceedings.

According to the specious argument, substitute protection should therefore prevent disclosure in later civil as well as criminal proceedings. The problem is that the civil consequences are only an incidental result of claiming the privilege. The purpose of the privilege is to resolve the tension between criminal and civil proceedings. The privilege achieves that purpose by stopping disclosures which will provide material for later criminal proceedings. Later civil proceedings are irrelevant.

The immunity should be a substitute for the intended purposes of the privilege, not for accidental forensic advantages. It should do no more than is necessary to relieve the tension. It should therefore be limited to criminal and penalty

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<sup>157</sup> *United States v Byrd*, 765 F2d 1524, 1530 (CA11 1985); *United States v Serrano*, 870 F2d 1, 17 (CA1 1989).

<sup>158</sup> *United States v Apfelbaum*, 445 US 115, 127 (1980).

<sup>159</sup> *Kastigar v United States*, 406 US 441, 458-9 (1972).

proceedings. As long as the disclosures cannot find their way to those proceedings, they should be freely available to another civil court so that it has all the evidence before it.

### (e) CONCLUSION

Admittedly, the extension of the immunity to civil proceedings has not loomed large as an issue in the case-law. The mismatch even has a positive aspect. It is a reminder that Australasian legislation is not subject to the same constitutional imperative as in the United States. The protection does not necessarily have to be coextensive with the privilege which it replaces.

Statutory provisions in Australia and New Zealand can therefore provide a flexibility which is not possible in the United States.<sup>160</sup> Even so, it is not necessary or logical for the statutory certification provision to immunise evidence in later civil proceedings. Immunity should only be available in later criminal proceedings.

## (E) CONSTITUTIONAL QUESTIONS

### (1) CONSTITUTIONAL BASIS

It has generally been assumed that properly drafted legislation could cure any defects in certification procedures.<sup>161</sup> The Civil Procedure Act 2005 was passed in New South Wales on that assumption. That Act resolved the conflict with *Reid v*

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<sup>160</sup> The lack of flexibility in the United States caused one commentator (now a US Supreme Court Justice) to lament "the wages of insisting that the Constitution answer a question that should be entrusted to the mundane processes of democratic government": Alito, S. A. (1986) "Documents and The Privilege Against Self-Incrimination." *University of Pittsburgh Law Review* 48(1): 27 at 81.

<sup>161</sup> *Ross v Internet Wines Pty Ltd* 60 NSWLR 436 at 452 ("well-devised legislation of general application"); *Pathways Employment Services v West* (2004) 212 ALR 140 at 156 ("Even if there were to be legislation... care would need to be taken"). Aitken, L. (2000) "Self-incrimination in Equity: *Reid v Howard* revisited in the light of *Vasil v National Bank*." *Law Society Journal* 38(3): 68 at 72 suggested that *Vasil v NAB* showed the need for legislative changes. Later case-law reinforced his view: Aitken, L. (2005) "Self-incrimination privilege trumps sealed affidavits in equity." *Law Society Journal* 43(2): 67 at 68 ("The matter clearly requires the intervention of Parliament. The cases make it clear that balancing the competing policies will be no easy task.").

*Howard* by incorporating the Equity Division's pre-trial procedure. The privilege was replaced by a substitute duly authorised by legislation.

Constitutional difficulties are not so easily remedied. The Attorney-General's original reference to the ALRC was limited to proceedings in court. The limitation was perhaps because the ALRC's enabling legislation did not allow it to consider proceedings outside the court-room. However, it might also have indicated a lack of Commonwealth power. The same lack of power is suggested by the Australia-wide practice of covering pre-trial civil proceedings in State legislation, rules and regulations.

Jurisdictional problems were to have been solved in 1995 by all the States adopting the same Evidence Act as the Commonwealth.<sup>162</sup> In fact, the uniform legislation was adopted only by New South Wales initially and by Tasmania six years later.<sup>163</sup> Moreover, the New South Wales and Tasmanian versions of section 128 are not identical to the Commonwealth version. The differences are not necessarily caused by the lack of Commonwealth power in extra-curial proceedings, but they do raise questions about the extra-territorial effect of certificates.

## **(2) EXTRA-TERRITORIAL EFFECT**

### **(a) UNITED STATES**

If immunity is granted in the United States, it is enforceable in any court in the American legal system. In 1964 the US Supreme Court held that "the constitutional privilege against self-incrimination protects a state witness against

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<sup>162</sup> See Commonwealth Parliamentary Debate Evidence Bill 1993 *House of Representatives* (Canberra: Commonwealth Government Printer) 4088.

<sup>163</sup> The Commonwealth Act also covered the Australian Capital Territory over which the Federal Parliament has the power to make laws.

incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law".<sup>164</sup>

That statement by the US Supreme Court did not specifically hold immunity granted by one state to be enforceable in another state. However, it held in 1964 that the Fourteenth Amendment, by guaranteeing due process, made the Fifth Amendment applicable to the states and available in state proceedings.<sup>165</sup> The combined result of those decisions was that "one jurisdiction's grant of protection against prosecution and testimony use automatically prohibits, via the Fifth Amendment, all other jurisdictions from using the witness's testimony against him".<sup>166</sup>

#### (b) AUSTRALIA

In Australia the extra-territorial enforcement of immunities raises questions which have still to be answered. The questions involve the division of powers between the Commonwealth and the States. The possible answers depend upon the jurisdictions in which a certificate is issued and is to be enforced.

The ALRC was aware of possible difficulties in enforcing certificates in other jurisdictions but did not fully explore these difficulties in its Reports. Further explanation was provided in an article written at the time by one of the writers of the Reports.<sup>167</sup> However, the article and the Reports expressed only tentative views.

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<sup>164</sup> *Murphy v Waterfront Commission of New York Harbor*, 378 US 52, 77-78 (1964).

<sup>165</sup> *Malloy v Hogan*, 378 US 1 (1964).

<sup>166</sup> Bovino, S. (1993) "A Systematic Approach to Privilege Against Self-Incrimination Claims When Foreign Prosecution Is Feared." *University of Chicago Law Review* 60(3) and (4): 903 at 908.

<sup>167</sup> Freckleton, I. (1985) "Witnesses and the Privilege against Self-incrimination." *Australian Law Journal* 59(4): 204 at 211-213. He was Senior Law Reform Officer with the ALRC at the time. Although the views in this article were expressed to be his own, it contained similar wording to the ALRC Reports.

In the twenty years since those views were expressed, the division of powers under the Constitution has been the subject of several High Court decisions which surprised government lawyers.<sup>168</sup> Questions have also been raised in State courts: for example, in the *Craven* litigation which will be discussed shortly. At the very least, it showed that the enforcement of certificates throughout Australia cannot be guaranteed. Yet, if certificates do not provide immunity in other jurisdictions, “the supposed protection offered to the witness by the certification procedure may be almost illusory”.<sup>169</sup>

It is hard to state the law in this area in simple, definitive terms. The position can be seen most clearly under four headings: State to Federal; Federal to Federal; Federal to State and State to State.

### (c) STATE TO FEDERAL

In 1997 sub-sections (10) to (13) were added to section 128 of the Commonwealth Act.<sup>170</sup> They provided that a section 128 certificate given under the New South Wales Evidence Act would have the same effect in Federal Courts as in the New South Wales courts. A similar rule applied to certificates given under section 128 of the Tasmanian Evidence Act.<sup>171</sup>

The Second Reading speeches which introduced the amending legislation did not explain why, after two years of operation of the Act, it was thought necessary to address this problem.<sup>172</sup> Nevertheless, the amendments appeared to achieve their

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<sup>168</sup> E.g. *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 (some cases under the National Companies Scheme legislation held to be beyond jurisdiction of Federal Court).

<sup>169</sup> Freckleton, I. (1985) "Witnesses and the Privilege against Self-incrimination." *Australian Law Journal* 59(4): 204 at 209.

<sup>170</sup> Inserted by the Law and Justice Legislation Amendment Act 1997 (Cth) with effect from 17 April 1997.

<sup>171</sup> Tasmanian certificates are enforceable in Federal courts because they are given under “a prescribed State or Territory provision” (s128(10) and (11)(b) Evidence Act 1995 (Cth)).

<sup>172</sup> Commonwealth Parliamentary Debate Evidence Act Amendment (1997) *House of Representatives* (Canberra: Commonwealth Government Printer); Commonwealth Parliamentary Debate Evidence Act Amendment (1997) *Senate* (Canberra: Commonwealth Government Printer).

aim. The Commonwealth courts must recognise certificates granted in the courts of New South Wales or Tasmania.

#### (d) FEDERAL TO FEDERAL

Federal certificates will be enforceable in Federal courts, but only when they are exercising Federal jurisdiction. Federal immunity will not apply in Federal Courts which are exercising State jurisdiction.<sup>173</sup> In those circumstances the immunity will be subject to the same uncertainty as Federal certificates in State courts.

#### (e) FEDERAL TO STATE

New South Wales and Tasmania do not have sub-sections (10) to (13) mirroring those included in the Federal provision. Their versions do not provide that certificates granted by Federal courts are enforceable in the courts of those States. Nevertheless, the Commonwealth Evidence Act reflects the intention that Federal certificates should be enforceable in the courts of any State which adopts the uniform Evidence Act.

By section 128(7) of the Commonwealth Act a certificate in a Federal Court will provide immunity in "any proceeding in any Australian court". "Australian court" is defined as including not only Federal courts but also the courts of all Australian States.<sup>174</sup> The question is whether the State courts can be validly bound by a Federal provision in these terms.

According to the ALRC, "the effect of the Commonwealth legislation will be that the certificate issued by a federal court will be recognised by all courts in Australia".<sup>175</sup> The ALRC regarded this as a valid exercise of powers under the

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<sup>173</sup> See the example given by Freckleton, I. (1985) "Witnesses and the Privilege against Self-incrimination." *Australian Law Journal* 59(4): 204 at 209.

<sup>174</sup> Dictionary annexed to the Evidence Act (Cth) ("(c) a court of a State or Territory").

<sup>175</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 1, para 862.

Commonwealth's judicial power under the Constitution. Federal certificates became enforceable in all State courts without the need for enabling State legislation.

#### (f) CHANGE OF VIEW

The constitutional law of Australia is complicated, unpredictable and generally outside the scope of this thesis. Unfortunately, the ALRC said in its original Report that Commonwealth certificates were unenforceable in State courts. The ALRC identified the problem in the context of certificates giving transactional immunity. "To be effective, however, the ban must extend to prosecution by State authorities under State laws. It is very doubtful whether Commonwealth legislative power would justify such provisions".<sup>176</sup>

The ALRC feared that transactional immunity would be held to be interference by the Commonwealth in criminal law, which is predominantly a matter for the States. That seemed to rule out the Federal Courts granting transactional immunity, enforceable in State courts. The question is whether the same danger arises with Federal certificates granting use and derivative use immunity.

The "full faith and credit" provisions in section 118 of the Australian Constitution are said to provide the basis for enforceability of Federal certificates in State Courts.<sup>177</sup> Section 128(7) of the Commonwealth Act "can be seen to be intended to apply in its protection of testimony to all courts in Australia".<sup>178</sup> The argument remains untested. "It is, however, by no means certain whether if they had to be invoked, a broad or narrow interpretation would be given to the full faith and

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<sup>176</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Vol 1, para 861.

<sup>177</sup> Section 118 - "Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State".

<sup>178</sup> Freckleton, I. (1985) "Witnesses and the Privilege against Self-incrimination." *Australian Law Journal* 59(4): 204 at 211.

credit provisions in so far as they apply to legislation relating to self-incrimination".<sup>179</sup>

In view of this uncertainty, it is surprising that the ALRC did not express the same doubts about the enforceability of use and derivative use immunity as it expressed about transactional immunity. If prosecuting authorities are to be believed, criminal proceedings are hampered almost as much by use and derivative use immunity as by transactional immunity.

### (g) STATE TO STATE

The original ALRC Report also assumed that certificates issued under the Evidence Act of one State were not enforceable in the courts of another State.<sup>180</sup>

This meant that a certificate from one State could not be enforced in the courts of another State unless the latter State provided the necessary authority in its own legislation.

Transactional immunity again influenced the ALRC's views. The certification provisions in Tasmania and Western Australia at that time offered transactional immunity. An intra-territorial interpretation was appropriate for those provisions. It was unlikely that the Constitution would be construed to "allow Tasmania and Western Australia to interfere drastically with proceedings that could be brought in other States and Territories".<sup>181</sup>

That argument became less compelling when certificates offered only use immunity, such as under the old ACT procedure. Nevertheless, the ALRC thought

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<sup>179</sup> Freckleton, I. (1985) "Witnesses and the Privilege against Self-incrimination." *Australian Law Journal* 59(4): 204 at 212.

<sup>180</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Appendix C, para 225. Also see Freckleton, I. (1985) "Witnesses and the Privilege against Self-incrimination." *Australian Law Journal* 59(4): 204 at 212-213.

<sup>181</sup> Freckleton, I. (1985) "Witnesses and the Privilege against Self-incrimination." *Australian Law Journal* 59(4): 204 at 213.



that such certificates would “once again probably be confined intra-territorially by reason of conflict of law rules”.<sup>182</sup> That view is reflected in section 128 of the uniform State Evidence Acts.<sup>183</sup>

The State provisions do not purport to give extra-territorial effect to State certificates. The assumption seems to be that, if a State court grants use and derivative use immunity, that immunity will not be enforceable in the courts of another State. If that assumption is correct, it severely reduces the adequacy of certification as a substitute for the privilege.

A related question has arisen in New South Wales. Federal prosecutors have statutory power to give use and derivative use immunity. If they grant such immunity in the courts of one state, is it enforceable in the courts of another? That question caused memorable confusion in the recent *Craven* cases.

### **(3) THE CRAVEN CASES**

#### **(a) SECTION 128 NOT INVOLVED**

The *Craven* cases showed the difficulty of deciding whether immunity granted in one jurisdiction will be enforceable in the courts of another jurisdiction. The cases involved use and derivative use immunity, but it was not granted under section 128, or even by a court. It was granted pursuant to an undertaking from the Commonwealth DPP.<sup>184</sup>

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<sup>182</sup> Australian Law Reform Commission (1985) *Evidence* (Canberra: Australian Government Publishing Service) Appendix C, para 225. The same words appear in Freckleton, I. (1985) "Witnesses and the Privilege against Self-incrimination." *Australian Law Journal* 59(4): 204 at 212.

<sup>183</sup> Evidence Act 1995 (NSW), s128(7) ("any proceeding in a NSW court"); Evidence Act 2001 (Tas), s128(7) ("any proceeding in a Tasmanian court").

<sup>184</sup> See *Registrar Court of Appeal (NSW) v Craven* (1994) 126 ALR 668 at 683 for the terms of the DPP's undertaking.

The cases arose in criminal proceedings which resulted from the failure of the Spedley merchant bank. The main target for prosecution was Brian Yuill the chief executive officer of the bank. James Craven was thought to have valuable information because he was Corporate Manager and a close associate of Yuill.<sup>185</sup>

The Commonwealth DPP would only grant use and derivative use immunity to Craven in exchange for his cooperation, but he wanted transactional immunity.<sup>186</sup> He therefore refused to answer questions at Yuill's trial and was found guilty of contempt of court.<sup>187</sup>

#### (b) FIRST CONTEMPT HEARING

At the first hearing before the New South Wales Court of Appeal, Craven was held to be in contempt for not answering three questions.<sup>188</sup> These questions were representative of the total number of questions which he refused to answer. He was obliged to answer these three questions either because they were not incriminating or because he had waived the privilege by answering similar questions at earlier civil proceedings.<sup>189</sup>

The issue of extra-territoriality arose in relation to six other representative questions.<sup>190</sup> The Court of Appeal initially held Craven not to be in contempt for

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<sup>185</sup> E.g. at the liquidator's examination he was the only witness who was allowed to be examined in private: see *GPI Leisure Corporation Ltd v The ANI Corporation Ltd* (1991) 6 ACSR 412 at 413.

<sup>186</sup> With good reason, as it turned out. He was later convicted of company law offences and given a jail term: *R v Craven* (1995) 17 ACSR 368.

<sup>187</sup> Views differ on the total number of questions which he refused to answer. Compare Kirby P (126 ALR at 684) (100 out of about 150) with Meagher JA (126 ALR at 693) (30 or 40 in all). The estimate given by Craven's counsel to the High Court was 145 out of 215: *Craven v Registrar of the NSW Court of Appeal* (1995) (Unreported in print, High Court transcript, 23 November 1995) AUSTLII [au/other/hca/transcripts/1995/595/1.html](http://au/other/hca/transcripts/1995/595/1.html).

<sup>188</sup> *Registrar Court of Appeal (NSW) v Craven* (1994) 126 ALR 668 at 670.

<sup>189</sup> *Registrar Court of Appeal (NSW) v Craven* (1994) 126 ALR 668 at 698-9. Or for both reasons: e.g. the first question was not incriminating and had also been answered in civil proceedings: "Whether Mr Yuill was the managing director of Spedley Securities Ltd in August 1978" (126 ALR at 670).

<sup>190</sup> E.g. the final question was "Whether in 1988 he arranged with Ann Jenkins for some cheques to be drawn on Spedley Securities Ltd to be paid to Bachot Pty Ltd" (*Registrar Court of Appeal (NSW) v Craven* (1994) 126 ALR 668 at 670).

refusing to answer these six questions because they could still incriminate him. The assumption was that the use and derivative use immunity offered by the DPP would not have provided effective immunity in criminal proceedings against him in another State.

### (c) SECOND CONTEMPT HEARING

Five months' later, the same Court of Appeal judges reversed their finding on the six incriminating questions.<sup>191</sup> The majority now admitted to misinterpreting the relevant section in the Commonwealth DPP's legislation.<sup>192</sup> The section purported to give to the DPP the power to grant immunity which was effective in all jurisdictions. The majority elected to treat the power as constitutionally valid because the contrary argument had not been fully argued before them.

The DPP's power was therefore assumed to be effective, in terms of the section, to protect Craven against criminal proceedings in another State. Like the first three questions, these six questions were now held not to be incriminating. Craven was therefore sentenced to a fine of \$10,000 and six months' jail for his contempt in refusing to answer all nine questions.

### (d) HIGH COURT APPLICATION

The High Court rejected Craven's application for special leave to appeal.<sup>193</sup> The application was argued before three distinguished members of the Court.<sup>194</sup> However, the transcript of the hearing and the reasons for the refusal throw little light on the extra-territorial effect of the DPP's indemnity.

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<sup>191</sup> *Registrar, Court of Appeal v Craven [No. 2]* (1995) 120 FLR 464.

<sup>192</sup> Section 9(6), Director of Public Prosecutions Act (Cth). *Registrar Court of Appeal (NSW) v Craven* (1994) 126 ALR 668 at 667 (*per Kirby P*) and at 676 (*per Meagher JA*). Powell J (at 480-481) did not really seem to accept that any error had been made in the first place.

<sup>193</sup> *Craven v Registrar of the NSW Court of Appeal* (1995) (Unreported in print, High Court transcript, 23 November 1995) AUSTLII au/other/hca/transcripts/1995/595/1.html.

<sup>194</sup> Dawson, Toohey and McHugh JJ.

The High Court forestalled argument on Craven's behalf because "the question of the scope of the indemnity afforded the applicant was decided in his favour and would not provide any basis for the grant of special leave".<sup>195</sup> The High Court's view was not challenged during the hearing.<sup>196</sup> However, it is hard to see how the Court of Appeal's reversal of its earlier decision was in Craven's favour.<sup>197</sup> Perhaps the High Court was really avoiding the issue of extra-territoriality because it had not been fully argued in the Court of Appeal.

#### **(4) CONCLUSION**

Immunity granted in Federal courts or in New South Wales or Tasmania will be enforceable in the Federal Courts. The problems arise when Federal or State immunity is enforced in State courts. The decision which the Court of Appeal finally reached in the *Craven* cases was less than convincing. Enforcement of Federal certificates in State courts seems to depend upon the application of section 118 of the Constitution and upon some fine distinctions between transactional immunity and use and derivative use immunity.

Constitutional law seems to lie at the heart of the problem of extra-territoriality. It may also be part of the problem with certification in pre-trial proceedings. Constitutional problems can be solved most effectively by cooperation between Federal and State governments. That cooperation cannot be taken for granted in the area of evidence, as can be seen from the small number of States adopting the Commonwealth Act.

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<sup>195</sup> *Per* Dawson J.

<sup>196</sup> E.g. Craven's counsel gave affirmative answers to both of the following questions from Toohy J during argument: "Not only that, you would be asking us to consider something in respect of which you have findings in your favour?"; and "But it is really an academic exercise in so far as you are asking the Court to consider the scope of the indemnity, is it not?"

<sup>197</sup> It increased from three to nine the charges of contempt for which he was convicted.

Some comfort might be taken from the establishment in July 2001 of the current national scheme of company regulation. This was the fourth attempt in forty years to arrive at an acceptable structure.<sup>198</sup> Each attempt moved the area further and further away from State independence towards Commonwealth control, but it took a High Court decision to acknowledge the unsound basis of the third attempt.<sup>199</sup>

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<sup>198</sup> E.g. see the “Uniform Companies Acts” of the 1960s (State legislation effective from 1962 or, in SA and Tasmania, 1963); the “Companies Code” of the 1980s (State legislation effective from 1982); the “Corporations Law” of the 1990s (State legislation effective from 1991); and finally the Corporations Act (Cth) 2001.

<sup>199</sup> *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 at 554 *per* McHugh J (State and Federal company statutes “invalid in so far as they purport to give the Federal Court of Australia jurisdiction to exercise State judicial power”).

## CHAPTER XIII: CONCLUSIONS

The first person will be used in this chapter, as it was in Chapter I. This thesis has involved a personal investigation of the three unsettled topics mentioned in Chapter I: the confusion between the privilege and the right to silence; the use of history and the use of American experience. On a critical view this thesis could be said to show that the confusion with the right to silence can be resolved by simple definition; that lessons from American experience are, because of the different constitutional background, selective and of little value in Australasia; and that history can be used to show just about anything.

I do not share that critical view. Nor do judges, legislators or law reformers, if their continuing references to these topics are any indication. Even if these topics do not hold the key to the problem of the privilege, my research into them has moved me in a similar direction to legislative changes during the period of research and writing. Chapter III questioned the conclusion by Andenas at the end of his thesis that little change was needed in the British financial industry. I have to admit that the changes recommended in this thesis seem far less radical now than when I first looked at the privilege.

The conclusion in my 1993 thesis was essentially that the privilege posed problems which were intractable. None of the proposed compromise solutions really reconciled the conflicting priorities. Certainly statutory use immunity did not do so. That left the legislators with no real choice. If their priority was law and order, the privilege would have to go.

History and my observations since 1993 have led me to conclude that the privilege does have an important role in maintaining the balance between the individual and

the State. That role might cause the privilege to be characterised as a human right. I prefer to focus on the importance of the privilege in making the State follow proper procedures.

I also now think that derivative use immunity could be a feasible substitute for the privilege, particularly for witness privilege in civil proceedings. Although some of the problems caused by the privilege may still prove intractable, most can be solved by structured use of derivative use immunity. However, the structure should provide sufficient discretion for the courts to control abuses of the process.

In interlocutory proceedings there is a particular need for the flexibility provided by overriding court discretion. The suggestions in this thesis are therefore consistent with its description of how the privilege arose in civil proceedings in the first place. The privilege was developed in civil proceedings by the court of Chancery to address the dangers inherent in its compulsory procedures, particularly exploitation to obtain evidence for other proceedings.

My practical conclusions can be summarised as follows:

- (1) The privilege or an adequate substitute must remain as a necessary protection in civil proceedings.
- (2) Contrary to the recommendations of the ALRC and the NZLC, such protection is necessary for written as well as for oral disclosures.
- (3) Removal of such protection would upset the balance between State and individual by making prosecuting authorities unduly reliant upon evidence compulsorily acquired.
- (4) Use immunity is not an adequate substitute for the privilege unless accompanied by derivative use immunity.

- (5) Use and derivative use immunity could possibly lead to abuses if contained in open-ended statutory provisions, particularly where documents are involved.
- (6) The Australian certification procedure provides a statutory framework which gives discretion to the court to protect against abuse of its processes, but the power to withdraw immunity needs to be added to that procedure.
- (7) Certification procedures should apply in all civil proceedings, including interlocutory proceedings and those involving documents.
- (8) There will still be hard cases in which stays have to be granted, but they will be a small minority.
- (9) The above recommendations apply equally to New Zealand and Australia, but within Australia the additional problem of extra-territorial enforcement needs to be addressed by complementary legislation passed by the Commonwealth and the States.



## Appendix 1: Glossary and Abbreviations

Abrogation	Removal, usually by statutory provision, of the common law privilege in contexts in which it might otherwise have been claimed.
ACC	Australian Crime Commission (Commonwealth) (formerly NCA)
ACCC	Australian Competition and Consumer Commission (Commonwealth) (formerly TPC)
ACT	Australian Capital Territory
ALRC	Australian Law Reform Commission (Commonwealth)
America	United States of America
<i>Anton Piller</i> orders	Orders made by judges in civil proceedings requiring parties on whom they have been served to answer questions and provide access to their premises for inspection purposes. They are used when one party fears that the other will conceal, remove or destroy incriminating evidence. They owe their name to in <i>Anton Piller KG v Manufacturing Processes Ltd</i> [1976] Ch 55.
ASIC	Australian Securities and Investments Commission (Commonwealth) (the current Australian corporate regulator)
ASIC Act	Australian Securities and Investments Commission Act 2001 (Commonwealth)
ASC	Australian Securities Commission (Commonwealth) (Australian corporate regulator before ASIC)
Australasia	Australia and New Zealand

CA	Corporations Act 2001 (Commonwealth)
CAC	Corporate Affairs Commission, formerly corporate regulator in each State
CCC	Corruption and Crime Commission (Western Australia)
Certification	Procedure by which courts can require disclosures to take place in spite of the availability of the privilege but must grant immunity for those disclosures
Civil Penalties	They arise out of civil proceedings, and their aim is to punish or discipline the defendant rather than to compensate the plaintiff. They can be pecuniary penalties but can also involve awards of compensation or disqualification.
Common law	Law which is made by the courts rather than enacted by legislation
Commonwealth	Australian federal jurisdiction
Derivative use immunity	Immunity from the admissibility of evidence discovered as a consequence of compelled self-incriminating information being disclosed
DPP	Director of Public Prosecutions (prosecuting authority in Commonwealth and each State jurisdiction)
European Convention	The European Convention on Human Rights. It was originally adopted by the Council of Europe in 1950 as the Convention for the Protection of Human Rights and Fundamental Freedoms.
<i>Mareva</i> injunctions	Injunctions granted by judges in civil proceedings to freeze the assets of a party. The assets cannot be removed to other jurisdictions or otherwise dealt with to forestall the effects of an adverse judgment. The injunctions owe their name to <i>Mareva Compania Naveira SA v International Bulk Carriers SA</i> [1980] 1 All ER 213

NCA	National Crime Authority (Commonwealth) (later ACC)
NCSC	National Companies and Securities Commission (Commonwealth) (Australian corporate regulator before ASIC and ASC)
NSW	New South Wales
NZLC	New Zealand Law Commission
Partial abrogation	Removal of the common law privilege with immunity being provided as a substitute.
Penalty privilege	Privilege against liability to a civil penalty
QLRC	Queensland Law Reform Commission
The 1641 Acts	The Acts which effectively abolished the oath <i>ex officio</i> and the Courts of Star Chamber and High Commission (16 Car I c 10 and c 11)
The 1661 Act	The Act which restored the oath <i>ex officio</i> in ecclesiastical courts (13 Car II c 12)
The 1992 Amending Act	Corporations Legislation Evidence (Amendment) Act 1992 (Commonwealth)
Total abrogation	Removal of the common law privilege without any protection being provided as a substitute.
TPC	Trade Practices Commission (Commonwealth) (later ACCC)
Transactional immunity	Immunity from prosecution arising as a direct or indirect result of giving compelled self-incriminating information
Use fruits immunities	Another term for derivative use immunity
Use immunity	Immunity from the admissibility of self-incriminating information in later proceedings
WA	Western Australia

## Appendix 2: Old Cases (Before 1870)

- African Company v Parish* (1691) 2 Vern 244 (23 ER 758)  
*Andrew v Ledsam* (1610) 2 Brownl and Golds 49 (123 ER 808)  
*Anonymous* (1457) Cary 15 (21 ER 9)  
*Anonymous* (1469) Cary 15 (21 ER 8)  
*Anon* (1588) 3 Leo 204 (74 ER 634)  
*Anonymous (QB)* (1589) Add MS 25,196 fol 213v; Harl MS1633 fol 63v  
*Anonymous* (1610) (London Ecclesiastical Court) Guildhall MS 11,448 fols 146, 149  
*Anon (KB)* (1647) Style Pract Reg 355  
*Anonimous* (1682) 1 Vern 60 (23 ER 310)  
*Anonymous* (1693) 12 Mod 40 (82 ER 1151)  
*Anon* (1709) 2 Eq Ca Abr 70 pl 7 (22 ER 61)  
*Ashton v Ashton* (1683) 1 Vern 165 (23 ER 390); 1 Eq Ca Ab 41 pl 11 (21 ER 859)  
*Attorney-General v -----* (1661) Hardr 201 (145 ER 452); 1 Eq Ca Ab 75 Ex (E) (21 ER 889)  
*Attorney-General v Brown* (1818) 1 Swanst 265 (36 ER 384)  
*Attorney-General v Cresner* (1710) 1 Park 277 (145 ER 779)  
*Attorney-General v Fenton* (1608) 117 SS 350 Case No 141  
*Attorney-General v Hesketh* (1706) 2 Vern 550 (23 ER 956);  
*Attorney-General v Lister* (1635) 118 SS 663 Case No 384  
*Attorney-General v Lord Vaux, Tresham, Catesby, Powdrell, Griffith and Griffith* (1581) Harleian MS 859 fols 44-51; 111 SS 397 Case No 518  
*Attorney-General v Mico* (1658) Hardr 137 (145 ER 419); 1 Eq Ca Ab 75 Ex (E) (21 ER 889)  
*Attorney-General v Reynolds* (1705) 1 Eq Ca Ab 131 pl 10 (21 ER 936)  
*Bain v Hargraves* (1795) 1 Peake Add Cas 105 note (a)2 (170 ER 210)  
*Baker v Cole* (1612) Cotton Add 41661 fol 136b  
*Baker v Pritchard* (1742) 2 Atk 387 (26 ER 634)  
*Bird v Hardwicke* (1682) 1 Vern 109 (23 ER 349); 1 Eq Ca Abr 76 pl 3 (21 ER 889)  
*Blithe v Bathcombe* (1594) C38/1  
*Bolton v Bolton* (1511) (York Ecclesiastical Court) BIHR, D/C.AB.2, fol.113v  
*Boteler v Allington* (1746) 3 Atk 453 (26 ER 1061)  
*Bradstone v High Commission* (1615) 2 Bulstr 300 (80 ER 1138), 2 Rolle's Abr 305 "Prohibitions" (T) 1 and 2 (sub nom. *Bradston's Case* or *Bradshaw's Case*)  
*Bray v Betyk* (1533) (Exeter Ecclesiastical Court) Devon Record Office, Exeter, Act book Chanter MS 778, s d 17 December  
*Braynis v Rooke* (1632) 118 SS 634 Case No 373a  
*Brookbank v Brookbank* (1691) 1 Eq Ca Abr 168 pl 7 (21 ER 963)  
*Brownsword v Edwards* (1750) 2 Ves Sen 244 (28 ER 157)  
*Bullock v Hall* (1607) 117 SS 346 Case No 133  
*Cary and Cottington v Mildmay* (1590) Toth 7 (21 ER 107); 117 SS 231 Case No 118-[9]  
*Castlemaine's Trial* (1680) 7 HST 1067  
*Cates v Hardacre* (1811) 3 Taunt 423 (128 ER 168)  
*Chadwick v Chadwick* (1852) 22 LJ Ch 329

*Chetwind v Marnell* (1798) 1 Bos & Pul 271 (126 ER 900)  
*Churchill v Isaack* (1673) 73 SS 12 Case No 27  
*Collegium Medicorum London v West* (1714) Gilb Cas 134 (93 ER 284)  
*Collier v Collier* (1589) 4 Leo 194 (74 ER 816); (1590) Moore (KB) 906 (72 ER 987);  
 (1590) Cro Eliz 201 (78 ER 457 sub nom *Cullier v Cullier*)  
*Comes Banbury v Briscoe* (1680) 2 Chan Cas 42 (22 ER 837); 1 Eq Ca Abr 168 pl 6 (21  
 ER 963)  
*Cook v Arnold* (1676) 79 SS 461 Case No 599  
*Cook's Trial* (1696) 13 HST 311  
*Cotton v Foster* (1583) Toth 25 (21 ER 112)  
*Cox v Copping* (1698) 5 Mod 395 (87 ER 726), 1 Ld Raym 337 (91 ER 1121)  
*Craig v Earl of Anglesea* (1743) 17 HST 1139  
*Craven v Buckton* (1415-1417) 10 SS 110 Case No 112  
*Cromer v Peniston* (1597) Cary 9 (21 ER 5)  
*Crook's Trial* (1662) 6 HST 201  
*Curtice v Cox* (1629) (Salisbury Ecclesiastical Court) Wiltshire Record Office,  
 Trowbridge D1/39/1/51 fol 28  
*Darknall v Dennicott* (1602) 117 SS 324 Case No 120-[40]  
*Deacon v Lucas* (1676) 73 SS 331 Case No 463  
*Dodd v Norris* (1814) 3 Camp 519 (170 ER 1467)  
*Dowdeswell v Nott* (1694) 2 Vern 317 (23 ER 805); 1 Eq Ca Abr 225 pl 12 (21 ER 1007)  
*Doxon v Haigh* (1796) 1 Esp 410 (170 ER 402)  
*Duke v Duke* (1675) 2 Ch Cas 209 (22 ER 914); 73 SS 243 Case No 357  
*Dumpor's Case* (1603) 4 Co Rep 119 b (76 ER 1110)  
*Duncalf v Blake* (1737) 1 Atk 52 (26 ER 35)  
*Dymoke's case* (1582) Savile 34 pl 81 (123 ER 997)  
*Earl of Shaftesbury's Trial* (1681) 8 HST 759  
*Earl of Suffolk v Green* (1739) 1 Atk 450 (26 ER 286)  
*East India Company v Campbell* (1749) 1 Ves Sen 246 (27 ER 1010)  
*East India Company v Evans* (1685) 1 Vern 305 (23 ER 486)  
*East India Company v Fortescue* (1682) 79 SS 916 Case No 1147  
*East India Company v Mainston* (1676) 12 Ch Cas 218 (22 ER 918); 73 SS 385 Case No  
 521 (sub nom *East India Company v Maniston*)  
*Eland v Cottington* (1628) Toth 12 (21 ER 108)  
*Ewing v Osbaldiston* (1834) 6 Sim 608 (58 ER 721)  
*Ex parte Symes* (1805) 11 Ves Jun 521 (32 ER 1191)  
*Fane v Ailee* (1701) 1 Eq Ca Abr 77 pl 15 (21 ER 890)  
*Farendon v Kelsey* (1407-1409) 10 SS 107 Case No 109  
*Farmer Qui Tam v Browne* (1679) 2 Lev 247 (83 ER 540); (1679) 1 Ventris 339 (86 ER  
 219 sub nom *Herne v Brown*); 1 Freem 296 (89 ER 214 sub nom. *Farmer v  
 Browne*); (1677) Jones T 122 (84 ER 1178 sub nom *Farmer v Browne*) Jones T  
 90 (84 ER 1161 sub nom *Inhabitants of Parish of Bermondsey*); 3 Keble 819 (86  
 ER 819 sub nom *Brown v Farmor*); 3 Keble 803 (86 ER 1021 sub nom *Brown v  
 Farmer*); (1677) 2 Mod 222 (84 ER 1038 sub nom *St Mary Magdalen  
 Bermondsey Church in Southwark*)  
*Fenton v Blomer* (1580) Toth 72 (21 ER 126), 117 SS 108 Case No 24

*Fisher v Michel* (1675) 73 SS 245 Case No 362  
*Fitz-Patrick's Trial* (1631) 3 HST 419  
*Freind's Trial* (1696) 13 HST 1  
*Fry v Porter* (1669) 1 Ch Rep 26, 1 Chan Ca 138, 1 Mod 300 (21 ER 918, 1047, 1083)  
*Fuller's Case* (1607) 12 Co Rep 41 (77 ER 1322); Noy 127 (74 ER 1091)  
*Gammon's case* (1627) Het 18 (124 ER 306)  
*Gee v Pritchard* (1818) 2 Swanst 402 (36 ER 670)  
*Gifford v Perkins* (1671) Columbia Law School MS M 315 fol 12v  
*Gifford v Tripconny* (1582) Choyce Cases 163 (21 ER 95)  
*Goulson v Wainwright* (1668) 1 Sid 374 (82 ER 1165)  
*Gray v Alport* (1611) 117 SS 394 Case No 181  
*Green v Weaver* (1827) 1 Sim 404 (57 ER 630)  
*Harrison v Brigges* (1616) (Durham Bishop's Consistory Court) Department of  
 Paleography and Diplomatic, University of Durham, DDR XVIII/3, fol. 258v  
*Harrison v Houblon* (1680) 79 SS 818 Case No 1024  
*Harrison v Southcote* (1751) 2 Ves Sen 389 (28 ER 249)  
*Heathcote v Fleete* (1702) 2 Vern 442 (23 ER 883); 1 Eq Ca Abr 76 pl 6 (21 ER 889)  
*Hincks v Nelthorpe* (1683) 1 Vern 204 (23 ER 414); 1 Eq Ca Abr 41 pl 5 and 77 (21 ER  
 859 and 890)  
*Hollingworth v Lucy* (1580) Cary 129 (21 ER 48)  
*Hubberd v Hubberd* (1600) 117 SS 332 No 120-[83]  
*Hungerford v Goreing* (1688) 2 Vern 38 (23 ER 652)  
*Hungerford v Dean of Salisbury* (1591) C33/83 fol 22  
*Huntley v Cage* (1611) 2 Brownl and Golds 14 (123 ER 787); 2 Rolle's Abr 305  
 "Prohibitions" (T) 6 (sub nom *Clifford v Huntley*)  
*Jones v Meredith* (1739) 2 Com 661 (92 ER 1257)  
*Kennett v Greenwollers* (1790) Peake 3 (170 ER 58)  
*King of Two Sicilies v Willcox* (1851) 1 Sim (NS) 301 (61 ER 116)  
*Langhorn's Trial* (1679) 7 HST 417  
*Leigh's Case* (1567) 12 Co Rep 26 (77 ER 1308); 110 SS 143 Case 200 (sub nom  
*Thomas Lee's Case*)  
*Leighton's Trial* (1630) 3 HST 384  
*Lilburne's Star Chamber Trial* (1637) 3 HST 1315  
*Lilburne's Treason Trial* (1649) 4 HST 1269  
*Lloyd v Passingham* (1809) 16 Ves Jun 59 (33 ER 906)  
*Lord Audley's Trial* (1631) 3 HST 401  
*Love v Dr Bentley* (1707) 11 Mod 134 (88 ER 947)  
*Loveday v Skarming* (1595) 117 SS 242 Case No 118-[84]  
*Love's Trial* (1651) 5 HST 43  
*Macbride v Macbride* (1802) 4 Esp 242 (170 ER 706)  
*Maloney v Bartley* (1812) 3 Camp 209 (170 ER 1357)  
*May v Gwynne* (1821) 4 B and Ald 301 (106 ER 948)  
*Mayor of Southampton v Graves* (1800) 8 TR 590 (101 ER 1563)  
*Mericke v King* (1630) Het 137 (124 ER 404)  
*Micklethwayt v Merrett* (1681) 79 SS 876 Case No 1097  
*Mitchell v Koecker* (1849) 11 Beav 380 (50 ER 863); 12 Beav 44 (50 ER 976)

*Monnins v Monnins* (1673) 2 Ch Rep 68 (21 ER 618); 1 Eq Ca Abr 40 pl 4 and 77 pl 10  
 (21 ER 858 and 890)  
*Montague (Lord) v Dudman* (1751) 2 Ves Sen 396 (28 ER 253)  
*Morse v Buckworth* (1702) 2 Vern 443 (23 ER 883); 1 Eq Ca Abr 76 pl 7 (21 ER 889)  
*Nedham v Lee* (1559) (York Ecclesiastical Court) BIHR, Cons AB 21, fol 490  
*Needham v Smith* (1704) 2 Vern 465 (23 ER 897)  
*Nelme v Newton* (1819) 2 Y and J 185 (148 ER 884)  
*Note* (1598-1602) 117 SS 277 No 119-5  
*Note* (c 1600) 117 SS 287 No 119-91  
*Note* (1602) 117 SS 322 Case No 120-[30]  
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