CHAPTER 8

THE PRIVILEGE AGAINST SELF-INCRIMINATION

The Common Law

8.1 At common law a person cannot be compelled to incriminate himself or herself, and may refuse to answer any question, or produce a document or thing, which may put the person at risk of being convicted of a criminal offence. Subsection 68(1) expressly abrogates this common law privilege for the purposes of ASC investigations. Subsection 68(1) provides that

> it is not a reasonable excuse for a person to refuse or fail:
> (a) to give information;
> (b) to sign a record; or
> (c) to produce a book;
> in accordance with a requirement made of the person, that the information, signing the record or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty.

Use/Derivative Use Immunity

8.2 Until 14 May 1992 the abrogation of the common law privilege against self incrimination was balanced by a use/derivative use immunity in subsection 68(3) of the ASC Law. Such an immunity provides that self incriminatory material provided under compulsion, and any further material which is derivative of the self incriminatory material, is not admissible in evidence against the person in a criminal proceeding

except for a proceeding for false swearing or the like. On 14 May 1992, the commencement date for the *Corporations Legislation (Evidence) Amendment Act 1992*, the protective immunity was amended to a use immunity only (i.e. the derivative extension was removed). This change to the law followed the recommendation of the Parliamentary Joint Committee on Corporations and Securities in its report *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission* which was tabled in the Senate on 26 November 1991.

8.3 The Committee has decided that it is not appropriate to review this change because of the very recent time of the change. Moreover, the Committee notes that section 10 of the 1992 amending Act presently contains a requirement for a review by stating that the change be reviewed by mid-1997.

Criticism of the Abrogation of the Privilege

8.4 In relation to the operation of the abrogation of the privilege in relation to compulsory examinations, two significant criticisms were made to the Committee. The first related to the requirement that the privilege be asserted before each answer in question. In other words a blanket, or ambit, claim to the privilege is not permissible. Once again, the edited transcript at Appendix 3 illustrates the operation of this principle. It will be noted that numerous answers are prefaced with the word 'privilege', which signifies that the privilege against self incrimination has been claimed. The second criticism related to the unavailability of a corporate privilege against self incrimination. Also, of course, the question was raised whether it was sound policy to tamper with the common law privilege at all.

Blanket Claim to the Privilege Against Self-Incrimination

8.5 On the first point (the desirability for a right to make a blanket claim to the privilege) the legal representative for the NRMA stated that the need to make the claim before each answer

> interrupts the flow of the examination and it is a distraction to the witness, because half of his mind is directed towards whether or not he has remembered to say 'privilege'. Time and time again the witness will turn and say, 'Did I remember to say "privilege"?' halfway through the examination. So his thought processes are not focussing on the subject matter of the inquiry. It is, frankly, if you have ever seen it, a perfectly ridiculous process.[155]

This criticism was endorsed by other witnesses. For example, Mr Norman O'Bryan described the process as 'absurd' and a 'crazy situation'.[156]

8.6 An examination of the edited transcript at Appendix 3 suggests that the need to claim the privilege before each answer may well be distracting, both to the examinee and to the others present at the examination. The ASC conceded that it was 'a cumbersome process'[157] but expressed difficulty with the suggestion that there be a right to make an ambit claim to the privilege. It was argued

> that there be a serious consideration of whether it is appropriate to claim the privilege, and the examinee ought to genuinely turn his or her mind to the question of whether the privilege ought to be claimed. There is a danger, if the amendment is made to allow a blanket claim, that people will tend to simply make that blanket claim without really turning their mind to it - as a matter of safety as much as anything else.[158]

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155 *Evidence p 268 (Mr P Cameron).*

156 *Evidence pp 292-293 (Mr N O'Bryan).*

157 *Evidence p 269 (Mr Procter).*

158 *Evidence pp 267-268 (Mr A Procter).*

Corporate Privilege Against Self-Incrimination

8.7 In 1992 the *Corporations Legislation (Evidence) Amendment Act 1992* amended section 68 of the ASC Law by substituting a new subsection 68(2). Amongst other things, the outcome of this amendment was to expressly remove the right of a corporation to claim the privilege against self-incrimination (and, also, as noted above, to abolish the 'derivative use' immunity). The Law Council pointed out[159] that a corporation might wish to claim the privilege in two circumstances: when responding to a notice to produce documents, and when a company officer is giving evidence as a mouthpiece of the corporation at a compulsory examination.[160]

8.8 The Law Council noted that the removal of the right to the privilege in relation to notices to produce documents merely restored the situation which existed under the earlier co-operative scheme companies legislation.[161] The Law Council also noted that the position following the amendment of subsection 68(2) is comparable with the situation applying to other forms of compulsory requirement to produce documents, such as section 155 of the Trade Practices Act. Accordingly, the Law Council did not consider, in this area (ie in relation to notices to produce documents), 'the revised operation of section 68 to be

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159 *Submissions no. 90 (Law Council of Australia) pp 17-18.*

160 *Where the company officer is giving evidence in his or her personal capacity at a compulsory examination the examinee will be entitled to the protection of the statutory provisions relating to the privilege against self incrimination.*

161 *Submissions no. 90 (Law Council of Australia) p 18, citing Controlled Consultants Pty Limited v Commissioner for Corporate Affairs (1985) 156 CLR 385 as authority.*

objectionable.[162]

8.9 However, the Law Council argued that the privilege should apply for company officers appearing at compulsory examinations in their capacity as mouthpieces of the corporation.

8.10 The High Court has recently held, in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, that the privilege against self incrimination is not available to corporations, because the privilege is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them. Mason CJ and Toohey J felt that there was no difficulty in relation to the giving of oral evidence by company officers because '[o]ral evidence given by an officer of a corporation is that of the witness, not that of the corporation.'[163] Moreover, as pointed out by Deane, Dawson and Gaudron JJ in their dissent, 'when an officer or employee is called, even in criminal proceedings against the corporation, the officer or employee may not refuse to answer upon the basis that the answer would tend to incriminate the corporation. Thus the debate about whether a corporation may claim privilege against self-incrimination centres on the relatively confined area of the production of documents or the answering of interrogatories because these are things

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162 *Submissions no. 90 (Law Council of Australia) p 18.*

163 *(1993) 68 ALJR 127 at 138, citing Smorgon v Australia & New Zealand Banking Group Ltd (1976) 134 CLR 475 and Penn-Texas Corporation v Murat Anstalt [1964] 1 QB 40 as authority.*

which a corporation itself may be required to do.[164]

8.11 Accordingly, the Committee is not persuaded that there is a need to change the law relating to the privilege against self-incrimination in relation to corporations.

Wisdom of Tampering With the Common Law Privilege

8.12 One expert witness gave evidence that the abrogation of the privilege against self incrimination may very well be counter productive for the ASC. Mr Warren Scott, a partner with Coudert Brothers, pointed out that the SEC in the United States does not possess a similar power. Mr Scott argued that conferring this power on the ASC may hinder the ASC's ability to investigate a matter 'since I would doubt that few examinees will actually answer truthfully to a question the response to which may incriminate them.'[165]

8.13 Mr Scott pointed out that in the United States, in an investigation by the SEC,

> to have any witness claim the right not to answer on the grounds that it could incriminate them is something that you do not do lightly. By making that claim, you are obviously letting the investigators know that they are onto something, so it is rare that someone is going to claim a privilege not to answer.
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> Unfortunately, since you can still be compelled to testify in an ASC investigation, even if you [can't] claim the privilege, you are going to claim the privilege all the time. In an SEC investigation, you do not claim the refusal to answer on self-incrimination grounds unless you really want to tell the investigators, 'You've got me, but you are going to have to find out how to get

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164 *Ibid p 155.*

165 *Evidence p 281 (Mr W Scott).*

me from somebody else.'[166]

8.14 The ASC conceded that the powers of the ASC and of the SEC are different with respect to the privilege against self incrimination, pointing out the role of the Constitutional Fifth Amendment in relation to self incrimination in the US.[167] The ASC stated that the treatment of the privilege against self incrimination in the ASC is analogous to the handling of the privilege in the United Kingdom.[168]

8.15 In the recent High Court decision in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 Mason CJ and Toohey J discussed the origins and relevance of the privilege against self-incrimination. They indicated that, in its application to natural persons, there may be cause to distinguish between the protection from the production of documents and the protection from the giving of oral evidence:

> It is one thing to protect a person from testifying to guilt; it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt, especially documents which are in the nature of *real* evidence.[169]

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166 Evidence *p 283 (Mr W Scott).*

167 Submissions, *no. 129 (ASC), p65.*

168 *Ibid.*

169 *(1993) 178 CLR 477 at 502. (Emphasis in original. The reference to 'real' evidence would seem to be a reference to the fact that the privilege protects a person from discovering or revealing information which may lead to the discovery of admissible evidence of guilt not in his or her possession or power.)*

Conclusion

8.16 The Committee is concerned at the extensive abridgment of the usual protection which are available to a person being questioned by an investigative authority. The transcripts of compulsory hearings examined by the Committee indicate that the privilege against self-incrimination is claimed almost as a matter of form by many examinees. The Committee feels that the evidence of Mr Scott of Coudert Brothers about the law and practice in the United States was compelling and persuasive. The Committee believes that some redress of the balance of rights is needed to protect examinees at compulsory hearings. However, the Committee believes that the law in relation to the privilege against self-incrimination should not be changed in relation to notices to produce documents nor in relation to corporations.

Recommendation

Recommendation 14: The Committee recommends that:

- **the ASC Law be amended in order that an examinee appearing at a compulsory hearing under section 19 shall be entitled to the protection of the privilege against self-incrimination;**
- **the privilege should not be available in relation to documents discovered pursuant to a notice to produce documents or the examination; and**
- **the privilege should not be available in relation to corporations.**