

**THE ABROGATION OF THE PRIVILEGE AGAINST
SELF-INCRIMINATION**

Discussion Paper

WP No 57

Queensland Law Reform Commission
August 2003

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You are invited to make comments and submissions on the issues in this Discussion Paper.

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CHAPTER 1

INTRODUCTION

1. TERMS OF REFERENCE

The Attorney-General, the Hon R Welford MP, has requested the Commission to conduct a review of the abrogation of the privilege against self-incrimination. The terms of reference are:

The privilege against self-incrimination (which applies to both documents and oral testimony) is sometimes abrogated by statute. Sometimes the statutory provisions contain both use and derivative use immunities and on other occasions only a use immunity. Sometimes the use immunity applies only to criminal proceedings and on other occasions to any proceedings. The Queensland Law Reform Commission is requested to:

- Examine the various statutory provisions abrogating the privilege in Queensland.
- Examine the bases for abrogating the privilege.
- Recommend whether there is ever justification for the abrogation of the privilege and, if so, in what circumstances and before what type of forum.
- If there are circumstances and forums where the abrogation may be justified, recommend whether the abrogation be accompanied by both a use and derivative use immunity, especially having regard to the limitations that a derivative use immunity may have on subsequent prosecutions.
- Recommend whether these immunities should apply to subsequent criminal proceedings only or to all subsequent proceedings (including civil or disciplinary proceedings).
- If there are circumstances and forums where the abrogation may be justified, recommend an appropriate statutory formula which can be used to rationalise existing provisions and as a model for future provisions.

2. THE COMMISSION'S METHODOLOGY

The review requested by the Attorney-General involves consideration of all the existing statutory provisions in Queensland that have the effect of removing the common law privilege against self-incrimination.

In order to assist it to identify these provisions, the Commission wrote to the head of each government department seeking information about provisions in legislation administered by that department. The Commission asked for identification of provisions which abrogated the privilege, and for information about whether the abrogation was accompanied by either a use or derivative use immunity¹ and

¹

The terms "use immunity" and "derivative use immunity" are explained in Chapter 2 of this Discussion Paper.

whether, in the view of the department, the abrogation should continue. The full text of the letter to department heads is set out at Appendix 1 to this Discussion Paper. Unfortunately, time constraints have meant that it has not been possible to seek departmental views in relation to some recently passed legislation.

The Commission is grateful for the co-operation it has received from departmental heads and officers. Where a department has provided relevant information, that information has been incorporated into this Discussion Paper. In relation to recent legislation, views expressed by the departments concerned after the publication of this Discussion Paper will be taken into account in the next stage of the reference.

In addition to the material provided to the Commission by the various departments, the Commission has undertaken its own research to identify abrogation provisions. However, because of the number of legislative provisions in Queensland and the varying forms that abrogation can take, the Commission is not in a position to guarantee that all relevant provisions have been identified.²

3. ABOUT THIS DISCUSSION PAPER

In modern democratic societies, the privilege against self-incrimination is regarded as a significant factor in the protection of individual liberties.

However, it is clear that public policy considerations have sometimes resulted in the importance of the privilege being weighed against the need to ensure that an investigating authority is able to obtain information about the facts of a particular situation. On occasion, the right of an individual to refuse to provide information that is self-incriminatory has been displaced, in whole or in part, by the perceived strength of the public interest in issues raised by the investigation:³

Statutory investigations are an increasingly important tool in modern administration and regulation. In the past year, governments have come under renewed pressure to strengthen the powers of regulatory and investigatory bodies. Terrorism and dramatic corporate collapses both here and overseas have led to fresh demands on regulatory bodies. Against this call for greater powers is an equally loud plea for a review of the way in which regulators exercise their powers. ...

Inevitably a tension arises between the need to regulate and the very real prospect of diminished individual rights.

² On p 202 of this Discussion Paper, the Commission has asked a question about provisions that are not identified in the Paper. The Commission would welcome submissions from respondents who are aware of any further abrogation provisions.

³ Crosbie F and Kumar B, "Power versus privilege: The Implications of Daniels v ACCC" (2003) 31 *Australian Business Law Review* 7 at 7.

The nature of this tension has recently been highlighted by the Australian Law Reform Commission:⁴

Abrogation or modification of the privilege, combined with powers to obtain information and documents, is a useful tool for regulators unable to obtain information through informal, voluntary or cooperative methods.

On the other hand, the abrogation of the privilege - as a protection from the intrusive power of the state and as a human right - may have serious consequences for individuals, and the courts have made it clear that the privilege should not be removed lightly.

The purpose of this Discussion Paper is to give members of the Queensland community the opportunity to make an informed contribution to the debate which the Commission believes should take place on the questions raised by the terms of the reference.

Chapter 2 briefly outlines the history and the nature of the privilege against self-incrimination, and explains some of the terms used in the terms of reference.

Chapters 3 to 8 deal with existing Queensland provisions that abrogate, or may have the effect of abrogating, the privilege. Chapter 3 explains the Commission's methodology and the way in which the existing provisions have been classified in this Discussion Paper. Chapters 4, 5 and 6 deal with provisions which expressly abrogate the privilege. Provisions which confer no immunity are set out in Chapter 4. Chapters 5 and 6 deal with provisions which restrict the use of information obtained as a result of the abrogation of the privilege. Provisions which grant a use immunity⁵ are set out in Chapter 5 and provisions which grant a derivative use immunity⁶ are set out in Chapter 6. Provisions which abrogate the privilege by reference to the *Commissions of Inquiry Act 1950* (Qld) are considered in Chapter 7. Chapter 8 deals with provisions that abrogate, or may possibly abrogate, the privilege, not by express words, but by implication.

Chapter 9 discusses some general issues raised by the privilege against self-incrimination. Issues raised by existing Queensland legislative provisions that abrogate, or may have the effect of abrogating, the privilege are considered in Chapter 10.

Unless otherwise specified, the law is stated in this Discussion Paper as at 1 July 2003.

⁴ Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at [18.23]-[18.24].

⁵ For an explanation of the term "use immunity" see pp 19-20 of this Discussion Paper.

⁶ For an explanation of the term "derivative use immunity" see pp 20-22 of this Discussion Paper.

4. CALL FOR SUBMISSIONS

The Commission seeks comments and submissions on the issues arising from the terms of reference. Details on how to make a submission are set out at the beginning of this Discussion Paper. To assist respondents in making submissions, some questions for consideration are set out at pages 180 and 201-202 of this Discussion Paper.

The closing date for submissions is 7 November 2003.

CHAPTER 2

THE PRIVILEGE AGAINST SELF-INCRIMINATION

1. INTRODUCTION

In the law of evidence, the word “privilege” denotes an immunity conferred on a witness, in particular circumstances, from the obligation to answer certain questions or to provide certain information. Privilege has been described as:⁷

... a right to withhold from a court, or a tribunal exercising judicial functions, material which would otherwise be admissible in evidence.

The privilege against self-incrimination gives a witness immunity against having to give evidence or to supply information that would tend to prove the witness’s own guilt. It protects not only from direct incrimination, but also from making a disclosure that may lead indirectly to incrimination or to the discovery of other evidence of an incriminating nature.⁸

It is one of several immunities that, together, make up what is commonly referred to as “the right to silence”.⁹ Because of its role in the protection of individual liberty, it has now come to be regarded as not merely a rule of evidence but rather as a substantive right.¹⁰

The privilege in its modern form 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.

The significance of the privilege has received widespread judicial recognition. It has been described as “a cardinal principle of our system of justice”,¹¹ a “bulwark of liberty”,¹² and “fundamental to a civilised legal system”.¹³ It is also recognised in

⁷ *Parry-Jones v Law Society and Others* [1969] 1 Ch 1 per Diplock LJ at 9.

⁸ *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Mason, Wilson and Dawson JJ at 310.

⁹ *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 23 per Lord Mustill at 30.

¹⁰ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 508. See also *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Murphy J at 311; *Accident Insurance Mutual Holdings Ltd v McFadden and Another* (1993) 31 NSWLR 412 per Kirby P at 420.

¹¹ *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 294.

¹² *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 340.

¹³ *Accident Insurance Mutual Holdings Ltd v McFadden and Another* (1993) 31 NSWLR 412 per Kirby P at 420.

international human rights law.¹⁴

However, despite its importance, the privilege against self-incrimination can be abrogated by statute where the interests of public policy demand:¹⁵

If the legislature thinks that ... 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.

2. THE HISTORY OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

(a) The traditional view

The traditional explanation of the origin of the privilege against self-incrimination is that it developed in England in the seventeenth century as a reaction to the “odious procedure”¹⁶ formerly adopted by the Court of Star Chamber and the Court of High Commission.

In a criminal trial in these courts, the accused was obliged to take an oath - the *ex officio* oath - requiring him or her to tell the truth. The oath:¹⁷

... compelled persons to swear, at the outset of their investigatory examination, to answer any questions that the court might subsequently put ...

The *ex officio* oath was a powerful tool in the hands of the court:¹⁸

... in those days of strong religious beliefs and a strong church, the oath assumed a much greater importance than it does today; it was, like torture, a form of compulsion. It was the spiritual consequence of lying on oath, more than the risk of perjury, which compelled the truth.

Accordingly, the examination of the accused upon oath was the central feature of these proceedings,¹⁹ and “torture was freely used, to extort either a confession, or the disclosure of further information”.²⁰

¹⁴ International Covenant on Civil and Political Rights, Article 14.3(g).

¹⁵ *Rees and Another v Kratzmann* (1965) 114 CLR 63 per Windeyer J at 80.

¹⁶ *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Brennan J at 317.

¹⁷ Davies, the Hon Justice GL, “The Prohibition against Adverse Inferences from Silence: A Rule without Reason?” Part 1, (2000) 74 *Australian Law Journal* 26 at 32.

¹⁸ *Id* at 31.

¹⁹ Holdsworth W, *A History of English Law* (3rd ed, 1966) Vol IX at 199.

²⁰ *Id*, Vol V at 184.

The traditional theory holds that it was after the Court of Star Chamber and the Court of High Commission were abolished in 1641, and the administration of the *ex officio oath* was subsequently forbidden, that the privilege against self-incrimination made its appearance.²¹

By the second half of the seventeenth century, the privilege was well established at common law, which affirmed the principle *nemo tenetur accusare seipsum* or “no man is bound to accuse himself”.

Historically, the privilege developed to protect individual human persons from being compelled to testify, on pain of excommunication or physical punishment, to their own guilt. [notes omitted]

It was also believed that the privilege was developed “to ensure that European inquisitorial procedures would have no place in the common law adversary system of criminal justice”.²² The privilege was thought to be linked “with the cherished view of English lawyers that their methods are more just than are the inquisitorial procedures of other countries”.²³

(b) Recent developments

Recent research has raised doubts that challenge the accuracy of the traditional view.²⁴ These doubts have three principal bases.

First, it has been argued that the *nemo tenetur* principle,²⁵ from which the privilege against self-incrimination is said to be derived, had its origins in the European *ius commune*, the combination of Roman and church law which developed during the middle ages, and which provided the basis for legal education in England and the basic rules that governed practice in the English ecclesiastical courts.²⁶ This early influence of the *ius commune* in English legal history, predating the Court of High Commission and the Star Chamber, is said to undermine the traditional theory of the privilege.²⁷

²¹ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 497-498.

²² The traditional view was summarised by McHugh J in *Azzopardi v R* (2001) 205 CLR 50 at 91.

²³ *Rees and Another v Kratzmann* (1965) 114 CLR 63 per Windeyer J at 80.

²⁴ See generally Helmholtz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997). See also Davies, the Hon Justice GL, “The Prohibition against Adverse Inferences from Silence: A Rule without Reason?” Part 1, (2000) 74 *Australian Law Journal* 26 at 31 ff and *Azzopardi v R* (2001) 205 CLR 50 per McHugh J at 93 ff. But see also, in response to Helmholtz et al: Levy LW, “Origins of the Fifth Amendment and Its Critics” (1997) 19 *Cardozo Law Review* 821.

²⁵ The Latin maxim “*Nemo tenetur se ipsum accusare (or prodere)*” translates as “No one is bound to incriminate himself”: Osborn’s Concise Legal Dictionary.

²⁶ Helmholtz RH, “Introduction” in Helmholtz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997) 1 at 6-7.

²⁷ Langbein JH, “The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries” in Helmholtz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997) 82 at 100.

... as an English invention intended to protect the indigenous adversarial criminal procedure against incursions of European inquisitorial procedure.

Secondly, it is said that the *nemo tenetur* principle, although recognised in seventeenth century English law, at that time had a much more limited application than the modern privilege against self-incrimination. The principle did not give an accused the “unqualified right to refuse to answer any and all questions about his past conduct”.²⁸ Rather, it was intended to prevent what would now be called “fishing expeditions”, to uncover evidence of wrongdoing in the absence of any specific allegation.²⁹

The privilege was a check on overzealous officials rather than a subjective right that could be invoked by anyone who stood in danger of a criminal prosecution. ... It was designed to guarantee that only when there was good reason for suspecting that a particular person had violated the law would it be permissible to require that person to answer incriminating questions.

Consequently, there were significant exceptions to the *nemo tenetur* principle. It did not apply, for example:³⁰

... where there was public knowledge that a crime had been committed, where the public had an interest in punishing the crime, and where there were legitimate indicia that the defendant being questioned had committed it.

This view therefore makes a distinction between the *nemo tenetur* principle and the privilege against self-incrimination:³¹

... the maxim did not make the privilege. It was rather the privilege - which developed much later - that absorbed and perpetuated the maxim.

Thirdly, the existence of the privilege in the seventeenth century is said to be inconsistent with the practice in criminal trials in the common law courts of the era:³²

... an array of structural attributes of common law criminal procedure would have made the privilege unnatural and unworkable in the criminal trial of the later seventeenth century.

The reason for this claim is that, in the seventeenth century, an accused person was not allowed legal representation in a criminal trial, but was obliged to conduct his or

²⁸ Helmholtz RH, “The Privilege and the *Ius Commune*: the Middle Ages to the Seventeenth Century” in Helmholtz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997) 17 at 44.

²⁹ Helmholtz RH, “Introduction” in Helmholtz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997) 1 at 7.

³⁰ Helmholtz RH, “The Privilege and the *Ius Commune*: the Middle Ages to the Seventeenth Century” in Helmholtz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997) 17 at 28.

³¹ Langbein JH, “The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries” in Helmholtz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997) 82 at 107.

³² Id at 103.

her own defence.³³ The right of an accused to call witnesses to give sworn testimony on his or her behalf was also significantly restricted.³⁴ As a result, with no one else to speak on his or her behalf, an accused was forced to respond in person to the evidence against him or her. A refusal to do so would, it has been suggested, have been “suicidal”, amounting to a “forfeiture of all defense”.³⁵ According to this theory, the privilege against self-incrimination could not have come into existence in the seventeenth century since, at the time:³⁶

... the fundamental safeguard for the defendant in common law criminal procedure was not the right to remain silent but rather the opportunity to speak.

Defence counsel were not generally permitted to examine and cross-examine witnesses until the middle of the eighteenth century or to address the jury until the beginning of the nineteenth century.³⁷ It is argued that it was these changes to common law criminal procedure, together with the adoption of the presumption of innocence and the requirement of proof beyond reasonable doubt, and the development of rules of criminal evidence,³⁸ that were the real driving force behind the emergence of the privilege against self-incrimination.³⁹

Only when defense counsel succeeded in restructuring the criminal trial to make it possible to silence the accused did it finally become possible to fashion an effective privilege against self-incrimination at common law.

3. CURRENT RATIONALES FOR THE PRIVILEGE

In its modern form, the privilege against self-incrimination has been ascribed to a number of different rationales:⁴⁰

... it is not easy to assert confidently that the privilege serves one particular policy or purpose.

It would appear that, as the privilege has developed over time, its underlying rationale has also changed in response to political and social conditions.

33 Id at 84.

34 Id at 88-89.

35 Id at 83.

36 Id at 82.

37 Id at 87.

38 Id at 98-99.

39 Id at 107.

40 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 335.

According to the traditional view of the history of the privilege, it was originally intended as a curb on State powers.⁴¹

... it probably arose as a response to what was perceived as an abuse or potential abuse of power by the Crown in the examination of suspects or witnesses. Once the Crown is able to compel the answering of a question, it is a short step to accepting that the Crown is entitled to use such means as are necessary to get the answer. ... By insisting that a person could not be compelled to incriminate him or herself, the common law thus sought to ensure that the Crown would not use its power to oppress an accused person or witness and compel that person to provide evidence against him or herself.

However, it has been observed that, in the context of contemporary criminal trials in Australia, "it is difficult to justify the privilege on the ground that it is necessary to prevent an abuse of power", since a conviction based on abuse of the proceedings by the prosecution would be set aside.⁴² It is therefore desirable to seek alternative justifications for the continued existence of the privilege.

The traditional explanation of the privilege also portrays its development as a protection for an accused person or a suspect from the invidious choice imposed by the obligation to take the *ex officio* oath - that is, to be punished for refusing to testify under oath; to be punished as a result of testifying truthfully, thereby providing evidence of guilt; or to be punished for perjury for testifying untruthfully in an attempt to avoid providing evidence of guilt. It has been suggested that, today, the rationale for the privilege remains substantially the same as this historical justification, even though the original methods of punishment - torture or excommunication - have been replaced by more modern sanctions such as fines and/or imprisonment.⁴³

Expanding on this rationale, Australian courts have recently focused on the notion of the privilege as "part of the common law of human rights",⁴⁴ based on the protection of personal freedom and human dignity:⁴⁵

It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society's acceptance of the inviolability of the human personality.

This view is consistent with court decisions in both the United States and Canada.⁴⁶

41 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per McHugh J at 544.

42 *Id* per McHugh J at 545.

43 *Id* per Mason CJ and Toohey J at 498.

44 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Murphy J at 346.

45 *Ibid*. See also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 498-499, 508; *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Murphy J at 311; *Accident Insurance Mutual Holdings Ltd v McFadden and Another* (1993) 31 NSWLR 412 per Kirby P at 420.

46 See for example the cases cited in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 490-493 and 494-496 and per Brennan J at 513.

However, it has also been suggested that the protection of personal freedom and human dignity is not of itself a sufficient rationale for the privilege against self-incrimination. This view is based on the proposition that evidence which is not privileged and which is therefore given under compulsion in judicial proceedings frequently constitutes an invasion of privacy, even although it is not self-incriminating.⁴⁷ According to this line of reasoning, the real basis for the privilege is the accusatorial system of justice.⁴⁸

The privilege against self-incrimination confers an immunity which is deeply embedded in the law. In the end, it is based upon the deep-seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself. [note omitted]

A number of further justifications for the privilege are also based on benefits that it is said to confer on the legal system. Since it allows a witness to give evidence without being obliged to give answers that are against his or her own interests, it may encourage witnesses to testify. However, the effectiveness of this “carrot” may be qualified by the fact that refusal to testify on certain matters on the grounds of self-incrimination would tend to indicate that a witness had something to hide.⁴⁹ The privilege may also help to maintain the integrity and quality of evidence.⁵⁰

If a witness is compelled to answer incriminating questions the quality of the evidence provided may well be suspect because of the likelihood of perjury. The privilege may, thus, be viewed as a recognition by the law of the folly of commanding the unlikely and the untrustworthy.

4. THE SCOPE OF THE PRIVILEGE

The current effect of the privilege against self-incrimination in Australia has been stated to be that:⁵¹

... a person is not bound to answer any question or produce any document if the answer or the document would have the tendency to expose that person, either directly or indirectly, to a criminal charge, the imposition of a penalty or the forfeiture of an estate which is reasonably likely to be preferred or sued for.

⁴⁷ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Deane, Dawson and Gaudron JJ at 532.

⁴⁸ *Ibid.* See also *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 294; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per McHugh J at 546.

⁴⁹ Australian Law Reform Commission, Report, *Evidence* (ALRC 26, 1985) Vol 1 at 485.

⁵⁰ *Id* at 486.

⁵¹ *Bridal Fashions Pty Ltd v Comptroller-General of Customs and Another* (1986) 140 ALR 681 per Malcolm CJ, Ipp and Owen JJ at 684. However, the privilege against forfeiture of an estate has been abolished in Queensland: *Evidence Act 1977* (Qld) s 14(1)(a).

This formulation of the rule is an updated version of the definition of the privilege given some sixty years ago by the Court of Appeal in England. The Court of Appeal held that:⁵²

... no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for.

The modern statement of the rule as it presently operates in Australia reflects the effect of court cases that have been decided in the intervening period, in particular in the High Court of Australia. Aspects of the privilege that have received judicial consideration include the forum in which the privilege can be raised, the nature of the risk that a witness must face in order for the privilege to apply, the kind of information for which the privilege can be claimed and whether, for the purposes of claiming the privilege, the legal concept of a “person” includes a corporation.

(a) The forum in which the privilege can be raised

While, under the older English formulation, entitlement to claim the privilege was dependent on the opinion of a judge, there is no such requirement in the current Australian statement of the rule.

The difference between the two propositions raises the question of whether the application of the privilege is confined to judicial proceedings and whether, in consequence, the privilege is inherently incapable of application in non-judicial proceedings.

Formerly, the accepted view was that, since the privilege was a rule of evidence regulating the admissibility of evidence in judicial and quasi-judicial proceedings, reliance on the privilege was restricted to judicial proceedings.⁵³ It was also believed that the development of the privilege at common law “did not purport to extend the privilege to qualify an inquisitorial power not under judicial control”.⁵⁴ This view was based on the belief that an inquiry “for the purpose of ascertaining whether an offence has been committed and by whom, or whether any penalty or forfeiture has been incurred, is an invasion of the judicial power of the courts”.⁵⁵ For example, a commission of inquiry established under the Crown prerogative had, at common law, no power to compel the production of documents or the giving of evidence. A

⁵² *Blunt v Park Lane Hotel Ltd and Another* [1942] 2 KB 253 per Goddard LJ at 257.

⁵³ *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 340.

⁵⁴ *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Brennan J at 319.

⁵⁵ *McGuinness v The Attorney-General of Victoria* (1940) 63 CLR 73 per Dixon J at 95, citing Sir W Harrison Moore, *Commonwealth of Australia* (2nd ed, 1910) at 309.

commission could be given the same authority as a court to compel the attendance of witnesses only if it were conferred by legislation.⁵⁶

It was also thought that there were practical reasons why the privilege against self-incrimination could not apply in non-judicial proceedings. Concerns were expressed about how, in the absence of a judge, a claim for privilege could be adequately dealt with.⁵⁷

There is in addition the problem of deciding whether it is for the authority requiring the answer, production of documents or the provision of information, or the court in subsequent proceedings by way of prosecution for an offence, to decide whether the claim for privilege is correctly made. It is difficult to suppose that the determination is to be left to an unqualified person. And there are practical problems in leaving the determination of the correctness of the claim for privilege to a court in proceedings by way of prosecution for the offence of refusing to answer questions, provide information or produce documents.

However, this view has now given way to the view that the privilege against self-incrimination is too important to be categorised as merely a rule of evidence, applicable only in judicial or quasi-judicial proceedings,⁵⁸ and that it is part of “the common law of human rights”.⁵⁹ Accordingly, it has been held that the privilege can apply in non-judicial proceedings.⁶⁰ The availability of the privilege in proceedings of a non-judicial nature will depend on the language of the statute conferring the power to demand the information or the production of the document in question.⁶¹

(b) The kind of information for which the privilege can be claimed

The privilege provides an immunity from an obligation to testify to one’s own guilt.⁶² It attaches to the disclosure by a person of information that would be likely to incriminate the person or to expose him or her to a civil penalty.

It can therefore apply both to oral answers in response to questions and to information in documentary form. A person under interrogation may, subject to any statutory provision to the contrary, refuse to answer a question on the basis that to

⁵⁶ *McGuinness v The Attorney-General of Victoria* (1940) 63 CLR 73 per Dixon J at 99.

⁵⁷ *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 340. See also per Brennan J at 355-356. See also *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Brennan J at 321.

⁵⁸ *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 340.

⁵⁹ *Id* per Murphy J at 346.

⁶⁰ *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 341 and per Murphy J at 347; *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Mason, Wilson and Dawson JJ at 309 and per Murphy J at 311.

⁶¹ See pp 18-19 of this Discussion Paper for a discussion of the statutory abrogation of the privilege.

⁶² *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Brennan J at 512.

do so would tend to incriminate him or her or to expose him or her to a penalty. Again subject to any statutory provision to the contrary, a person may also refuse, on the basis of the privilege, to disclose or produce a document, or to provide written answers to questions.

However, since the privilege “is designed not to provide a shield against conviction but to provide a shield against conviction by testimony wrung out of the mouth of the offender”,⁶³ it does not apply if the information can be obtained by, for example, seizure under a search warrant.⁶⁴

Moreover, while the privilege applies to testimonial evidence or “statements or other communications” made by a person, it does not apply to “real or physical evidence” provided by the person,⁶⁵ which has an existence independent of the person’s testimony. So, for example, the privilege will not protect a person from an obligation to provide fingerprints, or a blood sample or to undertake a breath test.⁶⁶

The distinction between “testimonial” and “real” evidence can be problematic in relation to documentary material. It has been recognised that some documents are “in the nature of real evidence which speak for themselves”.⁶⁷ The application of the privilege to documentary material has therefore been described as “more far reaching in the protection which it gives”⁶⁸ than its application to oral answers.⁶⁹

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. ... [original emphasis]

(c) The nature of the risk

Both the English definition of the privilege against self-incrimination and the current Australian statement of the rule refer to the risk of criminal charges, the imposition of a penalty or the forfeiture of an estate. The privilege against forfeiture of an estate has been abolished in Queensland⁷⁰ and will not be considered further in this Paper.

⁶³ Id per Brennan J at 514.

⁶⁴ *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1984) 156 CLR 385 per Gibbs CJ, Mason and Dawson JJ at 393.

⁶⁵ *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 292.

⁶⁶ Ibid.

⁶⁷ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 502. See also per Deane, Dawson and Gaudron JJ at 527 and per McHugh J at 555.

⁶⁸ Id per Mason CJ and Toohey J at 502.

⁶⁹ Ibid.

⁷⁰ *Evidence Act 1977* (Qld) s 14(1)(a).

The reference to the imposition of a penalty raises the question of the relationship between the privilege against self-incrimination and the privilege against self-exposure to a penalty. The latter, sometimes referred to as “penalty privilege”, may arise in proceedings which, although not criminal in nature, may nonetheless expose a party to the imposition of a penalty.

The risk of exposure to a civil penalty, as opposed to the risk of liability for a criminal offence, can occur in two different ways.⁷¹ The first is in what has been described as a “mere action for a penalty”.⁷² In such a situation, the sole purpose of the proceeding is the imposition of a penalty. The effect of a requirement that a party against whom the proceeding is brought provide information against that party’s own interest is evident from the nature of the proceeding. That party therefore should not, in the absence of a statutory provision to the contrary, be subjected to an order to provide information that must inevitably result in the intended consequence of the proceeding. The second is where the imposition of a penalty is not of itself the purpose of the proceeding in question, but where the obligation of a party to provide information may lead to the identification of conduct that would expose the party to a further proceeding for the recovery of a penalty. In this situation, since provision of the information will not necessarily result in the imposition of a penalty, there is no general rule that the party cannot be ordered to provide the information. If such an order is made, it is for the party to show that compliance with it will result in self-exposure to a penalty and to claim the privilege.⁷³

Although the origins of the privilege against self-exposure to a penalty are somewhat obscure,⁷⁴ it is clear that for several centuries that privilege, while distinct from the privilege against self-exposure for conviction of a criminal offence,⁷⁵ has developed parallel to it, and in accordance with the same principles.⁷⁶

It is ... wrong to regard the two grounds or aspects of privilege as depending on unrelated or different considerations. They should not be seen as separate props in the structure of justice, but rather as interlocking parts of a single column.

71 *R v Associated Northern Collieries and Others* (1910) 11 CLR 738 per Isaacs J at 742-743.

72 *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat and Livestock Corporation and Others* (1979) 42 FLR 204 per Deane J at 207-208.

73 *Trade Practices Commission v Abbco Ice Works Pty Ltd and Others* (1994) 52 FCR 96 per Gummow J at 133-134.

74 For example, in *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 Mason ACJ, Wilson and Dawson JJ at 337 regarded the privilege as a common law creation which had been adopted by the courts of equity. A similar view was expressed by McHugh J in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 547. However, in *Trade Practices Commission v Abbco Ice Works Pty Ltd and Others* (1994) 52 FCR 96, Gummow J at 135 referred to the privilege as having been developed in equity.

75 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 337.

76 *Trade Practices Commission v Abbco Ice Works Pty Ltd and Others* (1994) 52 FCR 96 per Burchett J at 129. See also the discussion by Burchett J at 117-129 of the historical relationship between the privilege against self-incrimination and the privilege against self-exposure to a penalty.

The penalty privilege has been held to apply in non-judicial proceedings.⁷⁷ Similarly, despite its original emphasis on protection from orders for discovery and for the production of documents,⁷⁸ its application is not now confined to these situations:⁷⁹

It is a general privilege which, absent a contrary legislative indication, may be invoked outside the course of judicial proceedings whenever a person is asked to answer questions or provide information which may tend to expose that person to a penalty.

(d) Whether the privilege is available to a corporation

For many years the question of whether a corporation could claim the privilege against self-incrimination remained unresolved in Australia.⁸⁰ However, it is now accepted that neither the traditional nor the modern explanation for the existence of the privilege justifies its application to an artificial entity such as a corporation,⁸¹ with the consequence that a corporation is not entitled to rely on it.⁸²

According to the traditional view of the development of the privilege, it was based on a desire to protect individuals from the excesses of the seventeenth century court procedures.⁸³ However, the concept of the corporation had not emerged at that time and, in any event, a corporation would not have been at risk of the dangers of physical torture or excommunication, against which, on this view, the privilege was intended to provide a shield.⁸⁴ Members of the High Court have referred to the

⁷⁷ *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 341. But see also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561, where Gleeson CJ, Gaudron, Gummow and Hayne JJ observed (obiter) at [31] that: "there seems little, if any, reason why [the penalty privilege] should be recognised outside judicial proceedings".

⁷⁸ See for example the discussion in *Trade Practices Commission v Abbco Ice Works Pty Ltd and Others* (1994) 52 FCR 96 per Burchett J at 117-129.

⁷⁹ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per McHugh J at 547.

⁸⁰ See for example *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328, where Mason ACJ, Wilson and Dawson JJ at 335 assumed, without deciding, that both the privilege against self-incrimination and the penalty privilege were available to a corporation. However, on a number of occasions, Murphy J expressed the view that the privilege could be claimed by natural persons only: see for example *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 150; *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 at 346-347; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 395.

⁸¹ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 507-508.

⁸² Id per Mason CJ and Toohey J at 508, per Brennan J at 516 and per McHugh J at 556 (Deane, Dawson and Gaudron JJ dissenting). See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [31]. The situation is less clear in relation to the privilege against self-exposure to a penalty. In *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, Mason CJ and Toohey J at 504 and McHugh J at 548, 556 held, although the point was not fully argued, that the penalty privilege would not be available to a corporation. Brennan J, on the other hand, held at 521 that a corporation would be entitled to claim the penalty privilege to resist discovery in any proceedings brought to enforce liability to a penalty. Deane, Dawson and Gaudron JJ did not directly address the issue of whether a corporation could claim the penalty privilege.

⁸³ See pp 6-7 of this Discussion Paper.

⁸⁴ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 498 and per Brennan J at 521.

observation by an English judge that a corporation “has no body to be kicked or soul to be damned”.⁸⁵ Further, the traditional concern to protect an individual against abuse of State power has been said to be irrelevant to a corporation.⁸⁶

In general, a corporation is usually in a stronger position vis-à-vis the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons.

In the modern context, the privilege is regarded as a substantive human right and, as such, has been held not to be applicable to an artificial entity such as a corporation.⁸⁷ Similarly, the modern view of the privilege as protecting the privacy of an individual is considered irrelevant in relation to a corporation, since corporations are already compelled by law to make disclosures about their affairs beyond those required of individuals.⁸⁸ Even the importance of the privilege as an element of the accusatorial system of justice has not been sufficient to extend its application to corporations,⁸⁹ even though denial of the privilege will considerably weaken the forensic position of a corporation in the adversarial system.⁹⁰

The overriding factor in the decision not to allow a corporation to claim the privilege has been the public interest in upholding the integrity of corporate behaviour and a recognition that, if a corporation were entitled to rely on the privilege, inability to access the corporation’s records would significantly hamper the enforcement of laws regulating the corporation’s activities.⁹¹ Another important consideration has been the nature of the information that a corporation can be required to provide. As an artificial entity, a corporation cannot be a witness.⁹² Oral evidence about the conduct of the corporation can be given only by its officers, who may be required to testify against the corporation unless they are able to claim the privilege personally.⁹³ The information that a corporation can itself be compelled to provide is therefore restricted to material in documentary form. This information may be the best

85 *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 per Lord Denning MR at 1127, cited in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 494 and per Brennan J at 512.

86 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 500. See also per Brennan J at 514 and per McHugh J at 548.

87 Id per Mason CJ and Toohey J at 500 and per McHugh J at 551.

88 Id per McHugh J at 549-550. See also per Mason CJ and Toohey J at 500.

89 Id per Mason CJ and Toohey J at 503 and per McHugh J at 556.

90 Id per McHugh J at 552.

91 Id per Mason CJ and Toohey J at 504, per Brennan J at 515 and per McHugh J at 554-556.

92 Id per Brennan J at 513 and per Deane, Dawson and Gaudron JJ at 535.

93 Id per Mason CJ and Toohey J at 504. Officers of a corporation, unless they are able to claim privilege, may also be compelled to provide self-incriminating answers to an authorised investigator. If an officer’s entitlement to claim the privilege against self-incrimination has been abrogated by statute, the information may be subject to an immunity restricting its future use: see pp 18-22 of this Discussion Paper in relation to use and derivative use immunities.

evidence of the corporation's activities.⁹⁴ Moreover, the case for protecting information in the form of a corporation's books and records, which "are in the nature of real evidence and which speak for themselves as distinct from testimonial oral evidence which is brought into existence in response to an exercise of investigative power or in the course of legal proceedings",⁹⁵ has been thought to be less strong than the case for protecting an individual from being compelled to make an admission of guilt.⁹⁶

5. STATUTORY ABROGATION OF THE PRIVILEGE

Although the privilege against self-incrimination is often referred to as a substantive right, the current legal position in Australia is that it is not immutable and that it must therefore be balanced against other competing rights and interests. It is clear that the privilege may be abrogated by statute where the legislature considers that it is outweighed by other factors:⁹⁷

The legislatures have taken this course when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained.

Whether legislation does in fact abrogate the privilege will depend on the construction of the provision in question.⁹⁸ Because of the significance of the privilege as a substantive right, the policy of the law favours an immunity from self-incrimination.⁹⁹ Accordingly, the courts will interpret legislation as having abrogated the privilege only if the intention to do so is clearly apparent in the legislation itself.¹⁰⁰ The exclusion of the privilege need not be expressly stated:¹⁰¹

... an intention to exclude the privilege may appear although there are no express words of exclusion.

⁹⁴ Id per Mason CJ and Toohey J at 504 and per McHugh J at 554.

⁹⁵ Id per Mason CJ and Toohey J at 502-503.

⁹⁶ Id at 503. See also per McHugh J at 555-556.

⁹⁷ Id at 503.

⁹⁸ *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 341.

⁹⁹ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Brennan J at 509. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561.

¹⁰⁰ *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 289-290.

¹⁰¹ Id at 289. See also *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Mason, Wilson and Dawson JJ at 309; *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 341. But see also the comments of Murphy J (*Sorby* at 311, *Pyneboard* at 347) in relation to the need for "unmistakeable language".

Where there are no express words of abrogation, the question of whether the privilege has been impliedly excluded will depend on “the language and character of the provision and the purpose which it is designed to achieve”.¹⁰²

6. PROTECTION FROM THE EFFECTS OF ABROGATION

Concerns have been expressed about the effect that abrogation of the privilege may have on the onus of proof in subsequent proceedings. This is particularly so in relation to the onus in criminal proceedings, where the prosecution must establish beyond a reasonable doubt the commission of the alleged offence.¹⁰³

... to remove the privilege in civil or extra-judicial proceedings without prohibiting the subsequent use of the incriminating evidence inevitably raises the question whether that onus survives unimpaired. ... There is really 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.

Accordingly, legislation that abrogates the privilege against self-incrimination may restore some measure of protection to the individual by imposing limits on what may be done with information obtained under the powers of compulsion. Depending on the extent of the protection it offers, such a provision is said to confer a “use immunity” or a “derivative use immunity”.¹⁰⁴

However, any immunity conferred by legislation in relation to the use of information provided under compulsion may itself be subject to a number of exceptions. The most common exception concerns proceedings for perjury,¹⁰⁵ or for making false or misleading statements to an inquiry or an investigation.¹⁰⁶

(a) Use immunity

The legislation may restrict the use that may be made of the information by conferring a “use” immunity on the incriminating material. An example of a use immunity is section 14A(1) of the *Commissions of Inquiry Act 1950* (Qld). Section

¹⁰² *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 341. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561. The test for implied abrogation is discussed at pp 165-166 of this Discussion Paper.

¹⁰³ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Deane, Dawson and Gaudron JJ at 532. See also *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 294.

¹⁰⁴ Issues arising in relation to the provision of an immunity are considered in Chapter 10 of this Discussion Paper.

¹⁰⁵ “Perjury” is the act of “making on oath by a witness ... in a judicial proceeding of a statement material in that proceeding, which he knows to be false or which he does not believe to be true.”: *Osborn’s Concise Law Dictionary*.

¹⁰⁶ See for example *Coal Mining Safety and Health Act 1999* (Qld) s 159(6).

14(1A) of that Act provides that, when a person is ordered by the chairperson of a commission of inquiry to give evidence about a matter relevant to the commission's inquiry, the person is not entitled to remain silent¹⁰⁷ or to refuse or fail to answer any question that the person is required to answer.¹⁰⁸ However, section 14A(1) further provides that, subject to certain exceptions:

A statement or disclosure made by any witness in answer to any question put to the witness by a commission or any commissioner or before a commission shall not ... be admissible in evidence against the witness in any civil or criminal proceedings.

In other words, a use immunity prevents evidence of the fact of disclosure made under compulsion or of the information disclosed being used in subsequent proceedings against the person who provided the self-incriminatory material.

(b) Derivative use immunity

The protection conferred by a use immunity is not coextensive with that given by the privilege itself. If a person is entitled to a privilege excusing him or her from answering questions or producing documents, the person is therefore also protected from the use of those answers or documents to search out other evidence to be used against him or her. But where the privilege is abrogated:¹⁰⁹

... there is the possibility that the answer may involve the disclosure of a defence or lead to the discovery of other evidence, these being consequences against which a person charged with a criminal offence is usually entitled to be protected. [note omitted]

The obligation to provide information, even if coupled with a use immunity, “does not prevent the derivative use of incriminating testimony”.¹¹⁰

Consequently, legislation abrogating the privilege may go one step further than a mere use immunity and also protect against the use of information that is obtained as a result of an answer given without the benefit of the privilege - a “derivative use” immunity. A derivative use immunity prevents the use of material that has been compulsorily disclosed to “set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character”.¹¹¹ An example of a derivative use immunity is section 137(6) of the *Guardianship and Administration Act 2000* (Qld). Section 137 of that Act abrogates the privilege

¹⁰⁷ *Commissions of Inquiry Act 1950* (Qld) s 14(1A)(a).

¹⁰⁸ *Commissions of Inquiry Act 1950* (Qld) s 14(1A)(b).

¹⁰⁹ *Hamilton v Oades* (1989) 166 CLR 486 per Deane and Gaudron JJ at 503.

¹¹⁰ *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Brennan J at 316.

¹¹¹ *Rank Film Distributors Ltd and Others v Video Information Centre and Others* [1982] AC 380 per Lord Wilberforce at 443.

against self-incrimination for witnesses at a hearing of the Guardianship and Administration Tribunal. Section 137(6) further provides that, subject to certain exceptions:

... evidence of, or directly or indirectly derived from, a person's answer or production of a document or thing that might tend to incriminate the person is not admissible in evidence against the person in a civil or criminal proceeding ...

The creation of a derivative use immunity gives rise to the issue of who should bear the onus of proof in relation to the derivative nature of evidence that is sought to be admitted in subsequent proceedings. The question is whether the person who has been compelled to provide information should be required to prove that the evidence *has* been obtained as a result of the information provided, or whether the party seeking to use the evidence should have to show that it *has not* been derived from that information.¹¹²

There does not appear to be an authoritative Australian statement of the law on this point.

Some commentators have assumed that the party seeking to use the evidence must prove that it is not derivative.¹¹³ In relation to proceedings against an officer of a corporation for wrongdoing in the conduct of the corporation's affairs, it has been observed that the effect of a derivative use immunity could be that:¹¹⁴

... any evidence obtained after the person has given evidence before the [Australian Securities Commission], even if not derived indirectly or directly from that evidence, is inadmissible. In such circumstances, the overall prosecution may well fail, not because the evidence it has is derived from the evidence before the Commission but because the [Commonwealth Director of Public Prosecutions] cannot discharge the onus of proving that it was not so derived.

On the other hand, there have been some suggestions in the High Court that the person who provided the information has the onus of proof:¹¹⁵

112 See the discussion of this issue in the context of company law and securities law in Kluver J, *Report on Review of the Derivative Use Immunity Reforms* (1997) at [3.76]-[3.84].

113 This assumption is consistent with the position in the United States, where the prosecution has an affirmative duty to prove that evidence it proposes to use is derived from a legitimate source wholly independent of the testimony obtained under a derivative use immunity: *Kastigar v United States* 406 US 441 (1972) per Powell J at 461.

114 S Menzies, "The Investigative Powers of the ASC" in *Australian Securities Commission Releases* (1991) CCH Australia ¶80-028 at 158, 162. See also Sofronoff P, "Derivative Use Immunity and the Investigation of Corporate Wrongdoing" (1994) 10 *Queensland University of Technology Law Journal* 122. These articles refer to section 68 (the abrogation provision) of the *Australian Securities Commission Act 1989* (Cth). As originally enacted, section 68 provided a derivative use immunity. However, it was amended in 1992 and a use immunity was substituted for the derivative use immunity: *Corporations Legislation (Evidence) Amendment Act 1992* (Cth) s 4. A 1997 review of the provision recommended that the derivative use immunity should not be reintroduced: Kluver J, *Report on Review of the Derivative Use Immunity Reforms* (1997) at 50. The current provision is located in section 68 of the *Australian Securities and Investments Commission Act 2001* (Cth).

115 *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Murphy J at 312. See also *Hamilton v Oades* (1989) 166 CLR 486 per Mason CJ at 496, and *Re Ardina Electrical (Queensland) Pty Ltd (now known as Fused Electrics Pty Ltd) (in liq)* (1992) 7 ASCR 297 per Williams J at 299.

... immunity from derivative use is unsatisfactory, because of the problems of proving that other evidence was derivative ...

However, these observations were made in a context where the question of the onus of proof was not in issue.¹¹⁶

(c) *Legislative Standards Act 1992 (Qld)*

The provision of an immunity for information compulsorily obtained is consistent with the requirement of the *Legislative Standards Act 1992 (Qld)* that Queensland legislation should have sufficient regard to the rights and liberties of individuals, including appropriate protection against self-incrimination.¹¹⁷

116

See also the decision of Williams J in *Re Ardina Electrical (Queensland) (now known as Fused Electrics Pty Ltd) (in liq)* (1992) 7 ACSR 297. In that case, the appellant, an officer of a company, unsuccessfully sought an adjournment of an examination under the *Corporations Law* about the affairs of the company. Prior to making the adjournment application, he had been committed for trial in relation to a number of offences relating to the management of the company. It was submitted that, in the interests of justice, the examination should be adjourned until after the disposition of the criminal proceedings. However, the *Corporations Law* conferred a derivative use immunity in respect of answers given under compulsion at an examination. Refusing the adjournment, Williams J referred to the prohibition against the use of derivative evidence and noted, at 299:

That does not entirely overcome the problem of proving that evidence sought to be led on the subsequent criminal charge is "derivative", but that task is made easier here because the committal proceedings against the appellant have been completed. If, as must be assumed, the prosecution has discharged its duty by placing all relevant evidence against the appellant before the court in the committal proceedings, it can fairly be assumed that any additional evidence sought to be introduced after the examination ... would be evidence caught by [the derivative use immunity].

117

Legislative Standards Act 1992 (Qld) s 4(3)(f).

CHAPTER 3

EXISTING QUEENSLAND STATUTORY PROVISIONS

The Commission's terms of reference require it to examine the various statutory provisions abrogating the privilege against self-incrimination in Queensland and to examine the bases for abrogating the privilege.¹¹⁸ In order to identify existing Queensland provisions that have the effect of abrogating, in whole or in part, the privilege against self-incrimination, the Commission sought the assistance of heads of government departments in Queensland, and asked them to provide certain information in relation to legislation administered by their departments.¹¹⁹ The information sought by the Commission included the reason for the abrogation of the privilege.

As a result of its own research and of the information provided in response to the request to government departments, the Commission has identified numerous provisions in Queensland legislation that abrogate the privilege against self-incrimination.¹²⁰ These provisions can be divided into a number of categories.

The majority of the identified provisions contain express words of abrogation. Whilst some of these provisions impose restrictions on the use that may be made of information obtained under a power of compulsion, there are others which confer no immunity in exchange for the loss of the privilege. In addition to the provisions that expressly abrogate the privilege, there are other provisions that achieve the same effect by reference to the *Commissions of Inquiry Act 1950* (Qld). There are also some provisions that do not abrogate the privilege expressly but, as explained in Chapter 2, may abrogate it by implication.¹²¹

Chapters 4 to 8 of this Discussion Paper set out the provisions identified by the Commission as abrogating, or possibly abrogating, the privilege. The views of relevant government departments on the need for the abrogation and for the immunity, if any, conferred by the provisions are also set out.

Chapters 4, 5 and 6 deal with provisions that expressly abrogate the privilege. Provisions which confer no immunity are set out in Chapter 4. Chapters 5 and 6 deal with provisions which restrict the use of information obtained as a result of the

118 The terms of reference are set out at p 1 of this Discussion Paper.

119 The text of the letter sent by the Commission to departmental heads is set out in Appendix 1 to this Discussion Paper.

120 However, because of the varying forms that abrogation can take, the Commission is not in a position to guarantee that all relevant provisions have been identified. On p 202 of this Discussion Paper, the Commission has asked a question about provisions that are not identified in the Paper. The Commission would welcome submissions from respondents who are aware of any further abrogation provisions.

121 See pp 18-19 of this Discussion Paper.

abrogation of the privilege. Provisions that grant a use immunity¹²² are set out in Chapter 5 and provisions that grant a derivative use immunity¹²³ are set out in Chapter 6. Provisions that abrogate the privilege by reference to the *Commissions of Inquiry Act 1950* (Qld) are considered in Chapter 7. Chapter 8 deals with the issue of implied abrogation, and considers a number of provisions that abrogate, or may possibly abrogate, the privilege, not by express words, but by implication.

122 For an explanation of the term “use immunity” see pp 19-20 of this Discussion Paper.

123 For an explanation of the term “derivative use immunity” see pp 20-22 of this Discussion Paper.

CHAPTER 4

PROVISIONS THAT DO NOT CONFER AN IMMUNITY

1. INTRODUCTION

This chapter considers Queensland legislative provisions that abrogate the privilege against self-incrimination but do not provide, by way of compensation for the loss of the privilege, any restrictions on the use of information obtained or documents produced as a result of the removal of the privilege.

The provisions are set out alphabetically according to the government department that administers them.

2. EXISTING PROVISIONS

(a) Department of Employment, Training and Youth

(i) *Training and Employment Act 2000 (Qld)*

The objectives of the *Training and Employment Act 2000* (Qld) include to establish a system for the effective and efficient provision of high quality vocational education and training to meet the immediate and future needs of the community,¹²⁴ to support the continued development of high quality training by and within industry,¹²⁵ to facilitate the provision of vocational education and training that is relevant to employment and encourages the generation of employment opportunities,¹²⁶ and to regulate the registration of training organisations within the State.¹²⁷

A regulation made under the Act¹²⁸ requires certain records to be kept in relation to the training of an apprentice or a trainee.¹²⁹

124 *Training and Employment Act 2000* (Qld) s 3(a).

125 *Training and Employment Act 2000* (Qld) s 3(c).

126 *Training and Employment Act 2000* (Qld) s 3(d).

127 *Training and Employment Act 2000* (Qld) s 3(e).

128 *Training and Employment Act 2000* (Qld) s 291.

129 *Training and Employment Regulation 2000* (Qld) s 20.

The Act provides for the appointment of inspectors,¹³⁰ who have certain powers under the Act. In particular, for monitoring or enforcing compliance with the Act, an inspector may enter¹³¹ and search¹³² a place, and inspect a document in or on the place.¹³³ An inspector may also require the occupier of the place or a person at the place to give the inspector reasonable help to exercise these powers¹³⁴ or to give the inspector information to help the inspector ascertain whether the Act is being complied with.¹³⁵

A person required to give help or information to an inspector must comply with the requirement unless the person has a reasonable excuse.¹³⁶ If the requirement is to be complied with by the person producing a document required to be kept by the person under the Act, it is not a reasonable excuse for the person to fail to comply that complying with the requirement might tend to incriminate the person.¹³⁷

(b) Environmental Protection Agency

(i) Nature Conservation Act 1992 (Qld)

The purpose of the *Nature Conservation Act 1992* (Qld) is the conservation of nature,¹³⁸ which is to be achieved by an integrated and comprehensive strategy for the whole of Queensland that involves, among other things, the management of protected areas,¹³⁹ protection of native wildlife and its habitat,¹⁴⁰ and provision for the ecologically sustainable use of protected wildlife and areas by the preparation and implementation of management and conservation plans.¹⁴¹

130 *Training and Employment Act 2000* (Qld) s 257.

131 *Training and Employment Act 2000* (Qld) s 262.

132 *Training and Employment Act 2000* (Qld) s 267(3)(a).

133 *Training and Employment Act 2000* (Qld) s 267(3)(b).

134 *Training and Employment Act 2000* (Qld) s 267(3)(e).

135 *Training and Employment Act 2000* (Qld) s 267(3)(f).

136 *Training and Employment Act 2000* (Qld) s 268(1).

137 *Training and Employment Act 2000* (Qld) s 268(2).

138 *Nature Conservation Act 1992* (Qld) s 4.

139 *Nature Conservation Act 1992* (Qld) s 5(c).

140 *Nature Conservation Act 1992* (Qld) s 5(d).

141 *Nature Conservation Act 1992* (Qld) s 5(e).

A regulation made under the Act¹⁴² deals with the granting of licences,¹⁴³ permits¹⁴⁴ and authorities¹⁴⁵ for certain activities. The regulation also requires the keeping of certain records in relation to those activities.¹⁴⁶

The Act provides for the appointment of conservation officers,¹⁴⁷ on whom it confers certain powers.¹⁴⁸ A conservation officer who enters a place may search the place, inspect or examine anything in or on the place, and take extracts from and make copies of any documents in or on the place.¹⁴⁹ The conservation officer is authorised to require the occupier or any person in the place to give the conservation officer reasonable assistance in the exercise of these powers.¹⁵⁰ A person must not, without reasonable excuse, fail to comply with such a requirement.¹⁵¹ If the help required to be given relates to the production of a document required to be kept by the person under a regulation,¹⁵² it is not a reasonable excuse for a person to fail to produce the document that producing the document might tend to incriminate the person.¹⁵³

The work of the Environmental Protection Agency focuses on protecting the State's natural and cultural heritage, promoting sustainable use of natural capital, and ensuring a clean environment. The Agency has informed the Commission that its powers of compulsion serve three purposes: to allow the Agency to investigate and address conservation and environmental issues; to allow independent witnesses to freely provide information without fear of acquiring consequential liability; and to compel possible defendants to participate in a formal record of interview and answer all questions that do not give rise to a privilege against self-incrimination. The Agency observed that, in many cases, its objectives can be achieved by working with the community. In relation to the legislation that it administers, the Agency commented generally that the Agency's view is that, since it is often seeking information

142 *Nature Conservation Act 1992* (Qld) s 175.

143 *Nature Conservation Regulation 1994* (Qld) s 93(1).

144 *Nature Conservation Regulation 1994* (Qld) ss 37, 107.

145 *Nature Conservation Regulation 1994* (Qld) s 28.

146 See for example *Nature Conservation Regulation 1994* (Qld) ss 170B(a) (Obligations of licensee under commercial wildlife licence), 243(1)(b), 243(2)(b) (Proof of identity), 244 (Stolen wildlife), 259(2)(c), (f) (Return of operations).

147 *Nature Conservation Act 1992* (Qld) s 127.

148 *Nature Conservation Act 1992* (Qld) ss 147, 151, 152, 154.

149 *Nature Conservation Act 1992* (Qld) s 147(1)(a)-(c).

150 *Nature Conservation Act 1992* (Qld) s 147(1)(e).

151 *Nature Conservation Act 1992* (Qld) s 147(2).

152 *Nature Conservation Act 1992* (Qld) ss 175, 154(b)(ii).

153 *Nature Conservation Act 1992* (Qld) s 147(3).

for non-prosecutorial purposes, it is not averse to widening any immunity conferred on information obtained as a result of powers of compulsion contained in that legislation.¹⁵⁴ However, the Agency has also expressed the view that removal of compulsive powers would change the balance between the Agency and the public, making it potentially more difficult for the Agency to achieve its objectives. The Agency is therefore of the view that it should retain its compulsive powers.¹⁵⁵

(ii) *Wet Tropics World Heritage Protection and Management Act 1993 (Qld)*

The purpose of the *Wet Tropics World Heritage Protection and Management Act 1993 (Qld)* is to provide for the protection and management of the Wet Tropics of Queensland World Heritage Area. The Act is a legislative response to the World Heritage listing of the wet tropics area under the World Heritage Convention, which was adopted by the General Conference of the United Nations Education, Scientific and Cultural Organization and to which Australia is a party. The Act demonstrates the intention of the Queensland Parliament that the area be established and maintained as a world heritage area of the highest standard and that effective, active measures be taken to meet Australia's obligation under the Convention.¹⁵⁶

The Act provides for the appointment of authorised officers,¹⁵⁷ who have certain powers under the Act. An authorised officer who enters a place¹⁵⁸ may search the place, inspect or examine anything in or on the place, and take extracts from or make copies of any documents in or on the place.¹⁵⁹ The authorised officer may require the occupier of or any person in the place to give the authorised officer reasonable assistance in the exercise of the powers.¹⁶⁰ A person must not, without reasonable excuse, fail to comply with such a requirement.¹⁶¹ If the help required to be given relates to the production of a document required to be kept by the person under a regulation, it is not a reasonable excuse for a person to fail to produce the document that producing the document might tend to incriminate the person.¹⁶²

154 Letter to the Chairperson of the Commission from the Director-General of the Agency dated 8 October 2002.

155 Letter to the Commission from the Environmental Protection Agency dated 24 February 2003.

156 *Wet Tropics World Heritage Protection and Management Act 1993 (Qld)* Preamble.

157 *Wet Tropics World Heritage Protection and Management Act 1993 (Qld)* s 58.

158 *Wet Tropics World Heritage Protection and Management Act 1993 (Qld)* ss 68, 69.

159 *Wet Tropics World Heritage Protection and Management Act 1993 (Qld)* s 70(1)(a)-(c).

160 *Wet Tropics World Heritage Protection and Management Act 1993 (Qld)* s 70(1)(e).

161 *Wet Tropics World Heritage Protection and Management Act 1993 (Qld)* s 70(2).

162 *Wet Tropics World Heritage Protection and Management Act 1993 (Qld)* s 70(3).

The work of the Environmental Protection Agency focuses on protecting the State's natural and cultural heritage, promoting sustainable use of natural capital, and ensuring a clean environment. The Agency has informed the Commission that its powers of compulsion serve three purposes: to allow the Agency to investigate and address conservation and environmental issues; to allow independent witnesses to freely provide information without fear of acquiring consequential liability; and to compel possible defendants to participate in a formal record of interview and answer all questions that do not give rise to a privilege against self-incrimination. The Agency observed that, in many cases, its objectives can be achieved by working with the community. In relation to the legislation that it administers, the Agency commented generally that the Agency's view is that, since it is often seeking information for non-prosecutorial purposes, it is not averse to widening any immunity conferred on information obtained as a result of powers of compulsion contained in that legislation.¹⁶³ However, the Agency has also expressed the view that removal of compulsive powers would change the balance between the Agency and the public, making it potentially more difficult for the Agency to achieve its objectives. The Agency is therefore of the view that it should retain its compulsive powers.¹⁶⁴

(c) Department of Families

(i) *Child Care Act 2002 (Qld)*

The object of the *Child Care Act 2002 (Qld)* is to protect, and promote the best interests of, children receiving child care.¹⁶⁵ The ways in which this object is to be achieved include establishing a licensing system for child care services, regulating the way child care services are conducted and setting standards for persons who provide child care.¹⁶⁶

The Act provides for the appointment of authorised officers,¹⁶⁷ who have certain powers under the Act.¹⁶⁸ In particular, an authorised officer may require a person to produce certain documents.¹⁶⁹ A person required to produce such a document must comply with the requirement unless the

163 Letter to the Chairperson of the Commission from the Director-General of the Agency dated 8 October 2002.

164 Letter to the Commission from the Environmental Protection Agency dated 24 February 2003.

165 *Child Care Act 2002 (Qld)* s 8(1).

166 *Child Care Act 2002 (Qld)* s 8(2).

167 *Child Care Act 2002 (Qld)* s 111.

168 See for example *Child Care Act 2002 (Qld)* ss 118 (Power to enter places), 125 (General powers after entering a place), 128-129 (Power to seize evidence) and 134-137 (Power to obtain information).

169 *Child Care Act 2002 (Qld)* s 137(1).

person has a reasonable excuse.¹⁷⁰ If the requirement relates to a person's licence¹⁷¹ or to a document required to be kept by the person under the Act,¹⁷² it is not a reasonable excuse for an individual not to comply with the requirement that complying with the requirement might tend to incriminate the individual.¹⁷³

The Department of Families acknowledges that the abrogation provision may infringe individual rights, but points out that its operation is limited to documents that are relevant to ensuring the safe and appropriate conduct of a child care service or the safe and appropriate provision of child care.¹⁷⁴ The Department has advised the Commission that the documents to which the abrogation provision relates are part of the regulatory scheme designed to provide accountability for the purpose of ensuring that safe and suitable child care is provided for children attending child care centres. It serves to make clear that, in any conflict between the self-incrimination of an individual and transparent and open compliance with accountability requirements that promote and protect the best interests of children, the interests of children must prevail. According to the Department, there is no particular reason for not providing any immunity for information obtained as a result of the abrogation, as the matter was not considered when the Act was drafted. The Department relied on the Office of Parliamentary Counsel to draft the legislation in a manner consistent with other similar Queensland legislation.¹⁷⁵

(d) Department of Housing

(i) Queensland Building Services Authority Act 1991 (Qld)

The objects of the *Queensland Building Services Authority Act 1991* (Qld) include to regulate the building industry in Queensland by ensuring the maintenance of proper standards within the industry and by achieving a reasonable balance between the interests of building contractors and consumers, and to provide remedies for defective building work.¹⁷⁶

170 *Child Care Act 2002* (Qld) s 138(1).

171 *Child Care Act 2002* (Qld) ss 16, 19.

172 See for example *Child Care Act 2002* (Qld) s 72 (Evidence of staff qualifications and competencies).

173 *Child Care Act 2002* (Qld) s 138(2).

174 Explanatory Notes, *Child Care Bill 2002* (Qld) at 5-6.

175 Letter to the Commission from the Department of Families dated 17 April 2003.

176 *Queensland Building Services Authority Act 1991* (Qld) s 3.

The Act establishes the Queensland Building Services Authority.¹⁷⁷ It also provides for a system of builder licensing and registration, to be administered by the Authority.¹⁷⁸

The Authority has power to audit licensees to determine whether they continue to satisfy relevant financial requirements or whether they have been complying with specified legislative requirements.¹⁷⁹ The Authority may give written notice to a licensee requiring the licensee to give the Authority copies of, or access to, the financial records described in the notice or documents described in the notice relating to the licensee's obligations under the specified legislation.¹⁸⁰ It is not a reasonable excuse for failing to comply with a written notice that complying with the notice might tend to incriminate the person.¹⁸¹

The Authority may also appoint inspectors to perform certain functions under the Act.¹⁸² An inspector may require a person who has obligations under the Act or under other specified legislation to produce a document relating to those obligations.¹⁸³ If the inspector makes a copy of the document or an entry in the document, the inspector may require the person responsible for keeping the document to certify the copy as a true copy of the document or entry.¹⁸⁴ A person who is required to produce a document must comply with the requirement unless the person has a reasonable excuse.¹⁸⁵ It is not a reasonable excuse for failing to produce the document that producing the document might tend to incriminate the person.¹⁸⁶ A person who is required to certify a document or entry must comply with the requirement unless the person has a reasonable excuse.¹⁸⁷ It is not a reasonable excuse for failing to certify a document or entry that certifying the document or entry might tend to incriminate the person.¹⁸⁸

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- 177 *Queensland Building Services Authority Act 1991* (Qld) s 5.
- 178 *Queensland Building Services Authority Act 1991* (Qld) ss 34, 39.
- 179 *Queensland Building Services Authority Act 1991* (Qld) ss 50A, 50C(1).
- 180 *Queensland Building Services Authority Act 1991* (Qld) s 50C(2).
- 181 *Queensland Building Services Authority Act 1991* (Qld) s 50C(4A).
- 182 *Queensland Building Services Authority Act 1991* (Qld) s 104.
- 183 *Queensland Building Services Authority Act 1991* (Qld) s 106A(1).
- 184 *Queensland Building Services Authority Act 1991* (Qld) s 106A(3).
- 185 *Queensland Building Services Authority Act 1991* (Qld) s 106B(1).
- 186 *Queensland Building Services Authority Act 1991* (Qld) s 106B(2).
- 187 *Queensland Building Services Authority Act 1991* (Qld) s 106C(1).
- 188 *Queensland Building Services Authority Act 1991* (Qld) s 106C(2).

The abrogation provisions in the *Queensland Building Services Authority Act 1991* (Qld) are the result of recent amendments to the Act.¹⁸⁹ The Explanatory Notes to the amending legislation state that the objective of the amendments is to provide for the ongoing maintenance of proper standards in the building industry by increasing accountability, providing greater consumer protection and improving compliance.¹⁹⁰ The Notes acknowledge that the abrogation of the privilege against self-incrimination is contrary to the fundamental legislative principles established by the *Legislative Standards Act 1992* (Qld), but argue that, in relation to the extended audit provisions, the breach is justified on the grounds that the Authority has an obligation to ensure that licensees comply with their legislative obligations.¹⁹¹

The Minister for Housing has expressed the view that the Authority requires the power to check whether a contractor meets relevant financial standards so that subcontractors and consumers are not disadvantaged because of the contractor's financial failure. The Minister is concerned that the legislation will not achieve its objective of addressing the imbalance of power between contractors and subcontractors and between contractors and consumers unless the Authority has the power to require the production of relevant documents from contractors.¹⁹²

(ii) ***Residential Tenancies Act 1994* (Qld)**

The *Residential Tenancies Act 1994* (Qld) provides for the rights and obligations of lessors and tenants under residential tenancy agreements to which it applies.¹⁹³ In particular, the Act requires certain records relating to the payment of rent¹⁹⁴ and rental bonds¹⁹⁵ to be kept.

The Act also establishes the Residential Tenancies Authority (RTA),¹⁹⁶ which has certain functions under the Act in relation to residential tenancies.¹⁹⁷

The RTA may appoint authorised persons¹⁹⁸ to help it deal with issues about

189 *Queensland Building Services Authority and Other Legislation Amendment Act 2003* (Qld).

190 Explanatory Notes, *Queensland Building Services Authority and Other Legislation Amendment Bill 2002* (Qld) at 1.

191 Id at 8.

192 Letter to the Chair of the Scrutiny of Legislation Committee of the Queensland Parliament from the Minister for Housing dated 5 December 2002.

193 *Residential Tenancies Act 1994* (Qld) s 10.

194 *Residential Tenancies Act 1994* (Qld) s 51.

195 *Residential Tenancies Act 1994* (Qld) s 76.

196 *Residential Tenancies Act 1994* (Qld) s 286.

197 *Residential Tenancies Act 1994* (Qld) s 289.

198 *Residential Tenancies Act 1994* (Qld) s 259.

compliance with the requirements of the Act.¹⁹⁹ An authorised officer has power to enter a place²⁰⁰ and conduct a search²⁰¹ or an examination or inspection,²⁰² copy²⁰³ or seize²⁰⁴ a document or require the occupier or a person at the place to give the authorised person reasonable help for the exercise of the authorised person's powers.²⁰⁵ A person who is required to help an authorised person to exercise the authorised person's powers must comply with the requirement unless the person has a reasonable excuse for not complying with it.²⁰⁶ If the help is required to be given by producing an authority or other document required to be kept by the person under the Act or another Act, it is not a reasonable excuse for failing to produce the document that complying with the requirement might tend to incriminate the person.²⁰⁷

The RTA drew the Commission's attention to the circumstances in which the power to require the production of a document can be exercised - namely where the authorised person has entered a place with the consent of the owner, has entered a public place or has entered pursuant to a search warrant.²⁰⁸ In the RTA's view, it is only in the third of these situations that the issue of the abrogation of the privilege against self-incrimination is likely to arise. The RTA noted that where entry is by consent, the occupier would be free to withdraw the consent and, as a result, the authorised officer would have to leave the place and would no longer have the capacity to require production of the document. Similarly, if the entry is to a public place, it is likely that the document in question would already be in the public domain. However, if the authorised person's entry is obtained through executing a search warrant, the document production requirement would serve to minimise the inconvenience and disruption caused by the execution of the warrant. The abrogation of the privilege would avoid the need for the authorised person to undertake a lengthy and disruptive search of the premises, thus facilitating a speedier and cost-effective resolution of the situation. The RTA also referred the Commission to the checks and balances imposed on the process of obtaining a warrant from a magistrate.

199 *Residential Tenancies Act 1994* (Qld) s 258(2).

200 *Residential Tenancies Act 1994* (Qld) s 264.

201 *Residential Tenancies Act 1994* (Qld) s 267(1)(a).

202 *Residential Tenancies Act 1994* (Qld) s 267(1)(b).

203 *Residential Tenancies Act 1994* (Qld) s 267(1)(c).

204 *Residential Tenancies Act 1994* (Qld) s 267(1)(ca).

205 *Residential Tenancies Act 1994* (Qld) s 267(1)(e).

206 *Residential Tenancies Act 1994* (Qld) s 267(2).

207 *Residential Tenancies Act 1994* (Qld) s 267(3)(b).

208 *Residential Tenancies Act 1994* (Qld) s 264.

The RTA informed the Commission that it had not yet carried out a detailed assessment of the documents affected by the abrogation of the privilege. The types of document required to be kept under the *Residential Tenancies Act 1994* (Qld) are in the nature of tenancy agreements and rent records. However, an authorised officer also has power to demand the production of a document required to be kept under another Act. The RTA noted that records required to be kept under the *Property Agents and Motor Dealers Act 2001* (Qld), for example, can be an important source of information for the RTA.

The RTA advised that, although to date it had not relied on the abrogation provision in investigations carried out under the *Residential Tenancies Act 1994* (Qld), there was potential for the provision to play a more significant role in its activities because of increased investigative responsibilities conferred on the RTA by the *Residential Services (Accommodation) Act 2002* (Qld). The documents required to be kept under these Acts generally ensure consumer protection. They reflect a strong legislative policy that certain records are necessary for the advancement and fair regulation of the residential tenancies and residential services sectors. The failure to create or maintain these documents is the very essence of the problems Parliament sought to overcome. For the RTA to effectively carry out its legislative role, it must be able to ascertain the existence of the documents. In the view of the RTA this would be difficult to achieve if it were necessary to rely on cumbersome and inefficient search processes.

The RTA therefore considered that the abrogation of the privilege should be retained for at least many of the documents in question. However, it was not aware of any reason why the provision did not include any restriction on the use that could be made of the information obtained, and indicated that it would be happy to consider this issue further.²⁰⁹

(e) Department of Industrial Relations

(i) *Electrical Safety Act 2002* (Qld)

The purpose of the *Electrical Safety Act 2002* (Qld) is to try to eliminate the human cost of death, injury and destruction that can be caused by electricity.²¹⁰ To this end, the Act establishes a legislative framework aimed at preventing persons from being killed or injured by electricity²¹¹ and preventing property from being damaged or destroyed by electricity.²¹² The ways in which the purpose of the Act is to be achieved include imposing obligations on

²⁰⁹ Letter to the Commission from the Residential Tenancies Authority dated 9 July 2003.

²¹⁰ *Electrical Safety Act 2002* (Qld) s 4(1).

²¹¹ *Electrical Safety Act 2002* (Qld) s 4(2)(a).

²¹² *Electrical Safety Act 2002* (Qld) s 4(2)(b).

persons who may affect the electrical safety of others by their acts or omissions²¹³ and providing for the safety of all persons through licensing and discipline of persons who perform electrical work.²¹⁴

The Act imposes electrical safety obligations on certain categories of persons.²¹⁵ It requires that a person who performs or supervises electrical work be the holder of a current electrical work licence under the Act²¹⁶ and that a person who conducts a business or undertaking that includes the performance of electrical work be the holder of a current electrical contractor licence.²¹⁷ There are also record-keeping requirements imposed by the Act.²¹⁸

The Act provides for the appointment of inspectors²¹⁹ who have certain powers under the Act. An inspector may enter a place²²⁰ and, for the purpose of monitoring and enforcing compliance with the Act, may search, inspect, measure, test and take samples, make inquiries about the degree of electrical risk and standards of electrical safety at the place and inquire into the circumstances and probable causes of any serious electrical incident²²¹ or dangerous electrical event²²² at the place.²²³ The inspector may require a person at the place to give the inspector reasonable help to exercise these powers²²⁴ or to answer questions to help the inspector ascertain whether the Act has been or is being complied with.²²⁵ A person of whom such a requirement is made must comply with the requirement unless the person has

213 *Electrical Safety Act 2002* (Qld) s 5(a).

214 *Electrical Safety Act 2002* (Qld) s 5(c).

215 *Electrical Safety Act 2002* (Qld) s 26.

216 *Electrical Safety Act 2002* (Qld) s 55(1).

217 *Electrical Safety Act 2002* (Qld) s 56(1).

218 See for example *Electrical Safety Regulation 2002* (Qld) ss 15 (Certificate of testing and safety), 17 (Testing and maintenance of safety equipment), 126 (Hiring electrical equipment), 152 (Reconnection of electrical installation to electricity source), 159 (Certificate of testing and compliance), 162 (Keeping copy of report), 180 (Records of tests to be kept), 197 (Recording serious electrical incident or dangerous electrical event).

219 *Electrical Safety Act 2002* (Qld) s 122.

220 *Electrical Safety Act 2002* (Qld) s 137.

221 A “serious electrical incident” is defined as an incident involving electrical equipment if, in the incident, a person is killed by electricity, a person receives a shock from electricity and is treated for the shock or injury by or under the supervision of a doctor, or a person receives a shock from electricity at high voltage, whether or not the person receives treatment: *Electrical Safety Act 2002* (Qld) s 11.

222 See *Electrical Safety Act 2002* (Qld) s 12 for the definition of “dangerous electrical event”.

223 *Electrical Safety Act 2002* (Qld) s 144(3)(a)-(f).

224 *Electrical Safety Act 2002* (Qld) s 144(3)(h).

225 *Electrical Safety Act 2002* (Qld) s 144(3)(i).

a reasonable excuse.²²⁶ If the requirement is to be complied with by the person producing a document required to be kept by the person under the Act, it is not a reasonable excuse for the person to fail to comply with the requirement that complying with the requirement might tend to incriminate the person.²²⁷

If an inspector becomes aware, or reasonably suspects, that a serious electrical incident or dangerous electrical event has taken place, the inspector may inquire into the circumstances and probable causes of the incident or event.²²⁸ The inspector may require a person who has knowledge, or whom the inspector reasonably suspects to have knowledge, of the relevant circumstances to give the inspector reasonable help to carry out the inquiry.²²⁹ A person must comply with such a requirement unless the person has a reasonable excuse.²³⁰ If the requirement is to be complied with by the person producing a document required to be kept by the person under the Act, it is not a reasonable excuse for the person to fail to comply with the requirement that complying with the requirement might tend to incriminate the person.²³¹

(ii) **Workplace Health and Safety Act 1995 (Qld)**

The objective of the *Workplace Health and Safety Act 1995* (Qld) is, by preventing or minimising the risk of death, injury or illness caused by a workplace, by workplace activities or by high risk plant, to prevent death,

²²⁶ *Electrical Safety Act 2002* (Qld) s 144(5).

²²⁷ *Electrical Safety Act 2002* (Qld) s 144(6).

²²⁸ *Electrical Safety Act 2002* (Qld) s 157A(1), (2).

²²⁹ *Electrical Safety Act 2002* (Qld) s 157A(3).

²³⁰ *Electrical Safety Act 2002* (Qld) s 157A(5).

²³¹ *Electrical Safety Act 2002* (Qld) s 157A(6). Section 157A is headed "Power to inquire into serious electrical incident or dangerous electrical event". Section 157A(6) provides:

If the requirement is to be complied with by the person giving information, or producing a document, other than a document required to be kept by the person under this Act, it is a reasonable excuse for the person to fail to comply with the requirement if complying with the requirement might tend to incriminate the person.

However, section 158 of the Act (Power to require production of certain documents) confers on an inspector power to require a person to produce to the inspector a document issued to the person or required to be kept by the person under the Act: *Electrical Safety Act 2002* (Qld) s 158(1)(a). The person must comply unless the person has a reasonable excuse: s 158(2). Under section 158(3), it is a reasonable excuse for the person not to comply with the requirement if complying with the requirement might tend to incriminate the person.

In the view of the Commission these provisions give rise to some degree of uncertainty. It might perhaps be argued, as an alternative to the above interpretation of section 157A(6), that documents required to be kept under the legislation are excepted from section 157A because they are dealt with under section 158, and that there is therefore no abrogation of the privilege in relation to them. On the other hand, it could be argued that, as section 157A, which is a recently enacted amendment to the Act, is a specific provision dealing with a particular situation (that is, the occurrence of a "serious electrical incident or dangerous electrical event"), section 158 (which is a general provision) does not apply to documents covered by section 157A. This argument would support the view that the exception in section 157A(6) operates to abrogate the privilege.

Because of time constraints, it has not been possible to obtain the view of the Department of Industrial Relations on the effect of the provision.

injury or illness caused in the workplace.²³² The Act establishes a framework for preventing or minimising exposure to risk.²³³

Under the Act, obligations are imposed on certain persons in relation to workplace health and safety.²³⁴ A person on whom a workplace health and safety obligation is imposed must discharge the obligation.²³⁵ The legislative scheme requires the keeping of certain records.²³⁶

The Act provides for the appointment of inspectors²³⁷ who have certain powers under the Act. An inspector may enter a place²³⁸ and, for the purpose of monitoring or enforcing compliance with the Act, undertake investigations²³⁹ and inquire into the circumstances and probable causes of workplace incidents.²⁴⁰ An inspector may also require the occupier or a person at the place to give the inspector reasonable help to exercise the inspector's powers.²⁴¹ A person required to help the inspector must comply with the request unless the person has a reasonable excuse.²⁴² If the requirement to be complied with consists of producing a document required to be kept by the person under the Act, it is not a reasonable excuse for failing to comply with the requirement that complying with the requirement might tend to incriminate the person.²⁴³ Similarly, if an inspector becomes aware, or reasonably suspects, that a workplace incident has happened, the inspector may inquire into the circumstances and probable causes of the incident.²⁴⁴ In making the inquiry, the inspector may require a person who has knowledge, or whom the inspector reasonably expects to have knowledge, of the circumstances of the

232 *Workplace Health and Safety Act 1995* (Qld) s 7(1), (2).

233 *Workplace Health and Safety Act 1995* (Qld) s 7(3).

234 *Workplace Health and Safety Act 1995* (Qld) ss 28-36.

235 *Workplace Health and Safety Act 1995* (Qld) s 24.

236 See for example *Workplace Health and Safety Regulation 1997* (Qld) ss 53 (Recording work caused illnesses, work injuries or dangerous events), 67 (Principal contractor to keep records of hazardous substances), 69F (Asbestos materials register), 78 (Risk from certain medical conditions), 86B (Count of all persons on board to be made and recorded).

237 *Workplace Health and Safety Act 1995* (Qld) s 99.

238 *Workplace Health and Safety Act 1995* (Qld) s 104.

239 *Workplace Health and Safety Act 1995* (Qld) s 108(3)(a)-(e).

240 *Workplace Health and Safety Act 1995* (Qld) s 108(3)(f). A "workplace incident" means an incident resulting in a person suffering a work injury, a work caused illness, a dangerous event or another matter decided by the Minister to be a workplace incident: *Workplace Health and Safety Act 1995* (Qld) Schedule 3 (definition of "workplace incident").

241 *Workplace Health and Safety Act 1995* (Qld) s 108(3)(h).

242 *Workplace Health and Safety Act 1995* (Qld) s 108(4).

243 *Workplace Health and Safety Act 1995* (Qld) s 108(5).

244 *Workplace Health and Safety Act 1995* (Qld) s 121(1), (2).

incident to give the inspector reasonable help.²⁴⁵ A person must comply with such a requirement unless the person has a reasonable excuse for not complying.²⁴⁶ If the requirement is to be complied with by the person producing a document required to be kept by the person under the Act,²⁴⁷ it is not a reasonable excuse for failing to comply with the requirement that complying with the requirement might tend to incriminate the person.²⁴⁸

(f) Department of Justice and Attorney-General

(i) Commissions of Inquiry Act 1950 (Qld)

Section 14(1A) of the *Commissions of Inquiry Act 1950* (Qld) removes the privilege against self-incrimination of a witness who is summoned to appear before a commission of inquiry. It provides that the witness is not entitled, on the grounds of self-incrimination, to remain silent, to refuse to answer questions or to produce documents or records when required by the chairperson of the commission to give evidence before the commission.²⁴⁹

Although section 14A confers a use immunity on answers given by the witness,²⁵⁰ the immunity does not apply to evidence in documentary form. There is therefore no immunity in relation to documents or records produced to a commission of inquiry.

²⁴⁵ *Workplace Health and Safety Act 1995* (Qld) s 121(3).

²⁴⁶ *Workplace Health and Safety Act 1995* (Qld) s 121(5).

²⁴⁷ See note 236 above for examples of documents required to be kept under the Act.

²⁴⁸ *Workplace Health and Safety Act 1995* (Qld) s 121(6). Section 121 is headed "Power to inquire into workplace incident". Section 121(6) provides:

If the requirement is to be complied with by the person giving information, or producing a document, other than a document required to be kept by the person under this Act, it is a reasonable excuse for the person to fail to comply with the requirement if complying with the requirement might tend to incriminate the person.

However, section 122 of the Act (Power to require production of certain documents) confers on an inspector power to require a person to produce to the inspector a document issued to the person or required to be kept by the person under the Act: *Workplace Health and Safety Act 1995* (Qld) s 122(1)(a). The person must comply unless the person has a reasonable excuse: s 122(2). Under section 122(3), it is a reasonable excuse for the person not to comply with the requirement if complying with the requirement might tend to incriminate the person.

In the view of the Commission these provisions give rise to some degree of uncertainty. It might perhaps be argued, as an alternative to the above interpretation of section 121(6), that documents required to be kept under the legislation are excepted from section 121 because they are dealt with under section 122, and that there is therefore no abrogation of the privilege in relation to them. On the other hand, it could be argued that, as section 121, which is a recently enacted amendment to the Act, is a specific provision dealing with a particular situation (that is, the occurrence of a "workplace incident"), section 122 (which is a general provision) does not apply to documents covered by section 121. This argument would support the view that the exception in section 121(6) operates to abrogate the privilege.

Because of time constraints, it has not been possible to obtain the view of the Department of Industrial Relations on the effect of the provision.

²⁴⁹ Section 14(1A) of the *Commissions of Inquiry Act 1950* (Qld) is set out in full on pp 150-151 of this Discussion Paper.

²⁵⁰ Section 14A of the *Commissions of Inquiry Act 1950* (Qld) is set out in full on p 151 of this Discussion Paper.

The Department of Justice and Attorney-General has advised the Commission that:²⁵¹

Traditionally, commissions of inquiry have always had such powers and hence the inclusion of the abrogation in the Act.

(ii) Evidence Act 1977 (Qld)

Section 15 of the *Evidence Act 1977* (Qld) provides that where, in a criminal proceeding, the accused person elects to give evidence, the person is not entitled to refuse to answer a question or produce a document on the ground that to do so would tend to prove the commission by the person of the offence with which the person is charged.

The Department of Justice and Attorney-General noted that this provision is of a very different character from the usual kind of abrogation provision, and must therefore be considered in the context of its role in a criminal hearing.²⁵²

A person charged with a criminal offence cannot be compelled to give evidence at his or her trial.²⁵³ However, the person may choose to do so. In this situation, the ability of the prosecution to cross-examine the person effectively would be likely to be adversely affected if the person could claim the privilege against self-incrimination.

The Department of Justice and Attorney-General supports the continuation of section 15(1) on the basis that, if a person decides to give evidence in his or her own defence, it would be against the interests of justice for the prosecution not to be able to fully test that evidence by way of cross-examination.

(iii) Public Trustee Act 1978 (Qld)

The *Public Trustee Act 1978* (Qld) establishes the office of the Public Trustee of Queensland,²⁵⁴ and confers certain powers and obligations on the Public Trustee.

Part 8 of the Act deals with unclaimed property. The object of Part 8 is to provide a scheme for paying or giving unclaimed property held by particular persons to the Public Trustee and for returning unclaimed property to persons lawfully entitled to it.²⁵⁵

251 Letter to the Chairperson of the Commission from the Director-General of the Department of Justice and Attorney-General dated 11 September 2002.

252 Letter to the Commission from the Department of Justice and Attorney-General dated 10 December 2002.

253 *Evidence Act 1977* (Qld) s 8(1).

254 *Public Trustee Act 1978* (Qld) s 7(1).

255 *Public Trustee Act 1978* (Qld) s 97A(1).

An accountable person²⁵⁶ must keep and maintain, in the form approved by the Public Trustee, a register in which particulars of unclaimed moneys held by the person are entered each year.²⁵⁷ Unclaimed moneys or unclaimed superannuation benefits held by an accountable person must be paid to the Public Trustee.²⁵⁸

The Public Trustee may appoint inspectors²⁵⁹ who may enter a place²⁶⁰ and, for the purpose of enforcing compliance with the Act, may exercise certain powers.²⁶¹ In particular, an inspector may require the occupier of the place, or a person at the place, to give the inspector reasonable help to exercise those powers.²⁶² The person must comply with such a requirement unless the person has a reasonable excuse.²⁶³ If the requirement is to be complied with by the person producing a document required to be kept by the person under the Act, it is not a reasonable excuse for failing to comply with the requirement that complying with the requirement might tend to incriminate the person.²⁶⁴

The Official Solicitor to the Public Trustee has advised the Commission that the section abrogating the privilege is included in the enforcement provisions of Part 8 of the Act to ensure compliance with the scheme established by that Part, so that unclaimed property is properly dealt with. Although the power to compel the production of documents has apparently never been used, it may be needed in the future.²⁶⁵

In relation to the power of an inspector to require the production of a self-incriminating document, which is expressed to apply for the purpose of enforcing compliance with the Act as a whole, rather than merely with Part 8 of the Act where the relevant provision is located, and which refers to documents required to be kept under the Act rather than under Part 8, the Official Solicitor noted:²⁶⁶

256 “Accountable person” means a person (other than the Crown) or body (other than a body representing the Crown) having as an object the carrying on of any trade, business or profession in the ordinary course of which money is held for payment to others: *Public Trustee Act 1978* (Qld) s 98 (definition of “accountable person”).

257 *Public Trustee Act 1978* (Qld) s 100(1), (1A).

258 *Public Trustee Act 1978* (Qld) s 102.

259 *Public Trustee Act 1978* (Qld) s 117B.

260 *Public Trustee Act 1978* (Qld) s 117G.

261 *Public Trustee Act 1978* (Qld) s 117L(3)(a)-(d).

262 *Public Trustee Act 1978* (Qld) s 117L(3)(e).

263 *Public Trustee Act 1978* (Qld) s 117M(1).

264 *Public Trustee Act 1978* (Qld) s 117M(2).

265 Letter to the Commission from the Official Solicitor to the Public Trustee dated 20 May 2003.

266 *Ibid.*

As to the extent of the application of s 117M, I take the point that it is expressed in wide terms. However, the requirement is to give reasonable help to an inspector, and in the context the section applies only to the enforcement of Part 8 of the Act. Further, the only provision in the Act referring to “a document required to be kept by the person under this Act” appears to be the reference to the accountable person’s register of unclaimed moneys referred to in s 100.

In my view therefore, the provision will apply only to Part 8 of the Act.

(g) Department of Natural Resources and Mines

(i) *Explosives Act 1999 (Qld)*

The *Explosives Act 1999* (Qld) regulates the manufacture, possession, sale, storage, transport and use of explosive material in Queensland.²⁶⁷

The regulatory scheme established by the Act requires that certain documents relating to explosives be held or kept. For example, the Act provides for the issue of various kinds of authority,²⁶⁸ and the possession,²⁶⁹ manufacture,²⁷⁰ sale,²⁷¹ storage²⁷² or use²⁷³ of any explosive is prohibited without an appropriate authority. Persons who hold an authority must keep records of certain activities and transactions.²⁷⁴

The Act provides for the appointment of inspectors,²⁷⁵ who have powers of entry²⁷⁶ and are given certain powers in relation to monitoring or enforcing compliance with the Act.²⁷⁷ An inspector may also require a person to produce to the inspector a document that the Act requires the person to hold or keep.²⁷⁸ The person must produce the document unless the person has a

267 *Explosives Act 1999* (Qld) s 11(1).

268 *Explosives Act 1999* (Qld) s 13.

269 *Explosives Act 1999* (Qld) s 34.

270 *Explosives Act 1999* (Qld) s 38.

271 *Explosives Act 1999* (Qld) s 41.

272 *Explosives Act 1999* (Qld) s 44.

273 *Explosives Act 1999* (Qld) s 53.

274 See for example *Explosives Regulation 2003* (Qld) ss 51 (Records), 72 (Documents to be kept), 79 (Requirements for holder of licence to sell explosives), 96 (Records of explosives stored).

275 *Explosives Act 1999* (Qld) s 78.

276 *Explosives Act 1999* (Qld) s 83.

277 *Explosives Act 1999* (Qld) s 89(1).

278 *Explosives Act 1999* (Qld) s 100(1).

reasonable excuse for failing to do so.²⁷⁹ It is not a reasonable excuse for failing to produce the document that production of the document might tend to incriminate the person.²⁸⁰

The Department has advised the Commission that this provision was included in the legislation to allow for complete and proper investigation of persons required to keep records under the Act, so that audits could be conducted, safety issues addressed and risks managed.²⁸¹

(ii) *Fossicking Act 1994 (Qld)*

The *Fossicking Act 1994 (Qld)* regulates recreational and tourist fossicking for minerals, gemstones and ornamental stones.

In particular, the Act provides for different kinds of fossickers licences,²⁸² and makes it an offence for a person to fossick unless the person holds or is covered by an appropriate licence.²⁸³

The Act also provides for various kinds of fossickers camping permits.²⁸⁴ A person must not camp on land that has been designated as “regulated camping land” for the purposes of the Act²⁸⁵ unless the person holds or is covered by an appropriate permit.²⁸⁶

Under the Act, certain obligations are imposed on licensees. For example, a licensee must not, in trade or commerce, sell material collected under a licence, or use the material in the production of something else for sale in trade or commerce.²⁸⁷ A licensee must not contravene a restriction prescribed by regulation on the volume, weight or number of fossicking specimens an individual may collect.²⁸⁸

279 *Explosives Act 1999 (Qld)* s 100(2).

280 *Explosives Act 1999 (Qld)* s 100(3).

281 Letter to the Commission from the Department of Natural Resources and Mines dated 21 March 2003.

282 *Fossicking Act 1994 (Qld)* s 14.

283 *Fossicking Act 1994 (Qld)* s 25.

284 *Fossicking Act 1994 (Qld)* s 58.

285 *Fossicking Act 1994 (Qld)* s 66.

286 *Fossicking Act 1994 (Qld)* s 67.

287 *Fossicking Act 1994 (Qld)* s 36.

288 *Fossicking Act 1994 (Qld)* s 37.

An authorised officer appointed under the Act²⁸⁹ may ask a person apparently fossicking under a licence or camping on regulated camping land to produce the person's licence or permit immediately for inspection.²⁹⁰ It is an offence to fail to produce the licence or permit, unless the person has a reasonable excuse for not producing it.²⁹¹

An authorised officer may also enter a place²⁹² or a vehicle, provided that, in the latter case, the authorised officer has reasonable grounds for suspecting that the vehicle has been used in the commission of an offence against the Act.²⁹³ The authorised officer may search the place or vehicle, examine, inspect, test anything in or on the place or vehicle or take samples of or from anything in or on the place or vehicle.²⁹⁴ The authorised officer may also require the occupier of the place, or a person in or on the place or vehicle to give the authorised officer reasonable help to exercise these powers.²⁹⁵

A person of whom a help requirement is made must comply unless the person has a reasonable excuse.²⁹⁶ If the help is required to be given by a person by producing a document, it is not, in relation to a requirement to produce a licence or permit, a reasonable excuse for the person to refuse to comply on the grounds of self-incrimination.²⁹⁷

In the view of the Department of Natural Resources and Mines, the abrogation of the privilege against self-incrimination for a help requirement relates to the offence of failing to produce a licence or permit. The Department notes that the offence provision does not contain a reference to the privilege. The objective of the offence provision is to allow an authorised officer to establish whether a person has the legal right (in the form of a licence or permit) to be in a designated fossicking area or camping area. To include the privilege in this provision would result in the situation that a person could fail to produce a licence or permit on the grounds that it may be self-incriminatory. Such a situation would render the provision a nullity.²⁹⁸

289 *Fossicking Act 1994* (Qld) s 72.

290 *Fossicking Act 1994* (Qld) s 81(1).

291 *Fossicking Act 1994* (Qld) s 81(2).

292 *Fossicking Act 1994* (Qld) s 82.

293 *Fossicking Act 1994* (Qld) s 85.

294 *Fossicking Act 1994* (Qld) s 86(1)(a)-(d).

295 *Fossicking Act 1994* (Qld) s 86(1)(f).

296 *Fossicking Act 1994* (Qld) s 86(3).

297 *Fossicking Act 1994* (Qld) s 86(4).

298 Letter to the Commission from the Department of Natural Resources and Mines dated 20 May 2003.

(h) Department of the Premier and Cabinet**(i) *Crime and Misconduct Act 2001 (Qld)***

The purposes of the *Crime and Misconduct Act 2001 (Qld)* are to combat and reduce the incidence of major crime,²⁹⁹ and to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector.³⁰⁰

The Act's purposes are achieved primarily by the establishment of a permanent commission called the Crime and Misconduct Commission (CMC).³⁰¹

The Act contains a number of provisions abrogating the privilege against self-incrimination. Some of these provisions apply to a person required to give information in relation to an investigation carried out by the CMC, while others relate to the investigation of the operation of the CMC itself.

A. Crime and misconduct investigations

To enable the CMC to achieve its objectives, the Act confers it with investigative powers with respect to major crime³⁰² and to serious misconduct in units of public administration.³⁰³

The CMC has a crime function³⁰⁴ to conduct investigations³⁰⁵ and to gather evidence for the prosecution of persons for offences³⁰⁶ and for the recovery of the proceeds of major crime.³⁰⁷

It also has misconduct functions³⁰⁸ which include investigating public sector misconduct³⁰⁹ and gathering evidence for the prosecution of offences or for disciplinary proceedings.³¹⁰

299 *Crime and Misconduct Act 2001 (Qld)* s 4(1)(a).

300 *Crime and Misconduct Act 2001 (Qld)* s 4(1)(b).

301 *Crime and Misconduct Act 2001 (Qld)* s 5(1).

302 *Crime and Misconduct Act 2001 (Qld)* s 5(2).

303 *Crime and Misconduct Act 2001 (Qld)* s 5(3).

304 *Crime and Misconduct Act 2001 (Qld)* s 25.

305 *Crime and Misconduct Act 2001 (Qld)* s 26(a).

306 *Crime and Misconduct Act 2001 (Qld)* s 26(b)(i).

307 *Crime and Misconduct Act 2001 (Qld)* s 26(b)(ii).

308 *Crime and Misconduct Act 2001 (Qld)* s 33.

309 *Crime and Misconduct Act 2001 (Qld)* s 35(1)(f), (g).

310 *Crime and Misconduct Act 2001 (Qld)* s 35(1)(h).

The CMC's investigative powers, in relation to both its crime and misconduct functions, include the ability to require information to be given to a CMC officer³¹¹ and to hold hearings.³¹²

Requirement to give information to a CMC officer

The Act gives the chairperson of the CMC certain powers to require a person to produce documents³¹³ or provide information³¹⁴ to an identified CMC officer.

A person who is required to provide an oral or written statement of information or to produce a document or thing for a misconduct investigation³¹⁵ must comply with the requirement.³¹⁶ It is an offence not to comply with the requirement,³¹⁷ unless the information, document or thing is subject to privilege.³¹⁸ However, in the context of a misconduct investigation, the term "privilege" does not include the privilege against self-incrimination.³¹⁹

If the person objects to producing a document or thing³²⁰ on the ground of self-incrimination,³²¹ the person must nevertheless produce the document or thing unless the person has a reasonable excuse.³²² It is not a reasonable excuse for failing to produce the document or thing that producing the document or thing might tend to incriminate the person,³²³ and no immunity attaches to the document or thing.³²⁴

311 *Crime and Misconduct Act 2001* (Qld) ss 72, 74, 75.

312 *Crime and Misconduct Act 2001* (Qld) s 176.

313 *Crime and Misconduct Act 2001* (Qld) ss 72(2)(b), (2)(c), (3)(b), 74(2), 75(2)(b), (c).

314 *Crime and Misconduct Act 2001* (Qld) ss 72(2)(a), 75(2)(a).

315 If the requirement is made for the purpose of a crime investigation, there is no abrogation of the privilege against self-incrimination: *Crime and Misconduct Act 2001* (Qld) s 74(5), (7), Schedule 2 (definition of "privilege").

316 *Crime and Misconduct Act 2001* (Qld) s 75(3).

317 *Crime and Misconduct Act 2001* (Qld) s 75(3).

318 *Crime and Misconduct Act 2001* (Qld) s 75(5)(a).

319 *Crime and Misconduct Act 2001* (Qld) Schedule 2 (definition of "privilege").

320 The position with respect to answers to questions or the provision of oral or written statements is discussed in Chapter 5 of this Discussion Paper.

321 *Crime and Misconduct Act 2001* (Qld) s 188(1).

322 *Crime and Misconduct Act 2001* (Qld) s 188(2)(b).

323 *Crime and Misconduct Act 2001* (Qld) s 188(3).

324 *Crime and Misconduct Act 2001* (Qld) s 188(4).

CMC hearings

The Act provides that the CMC may authorise the holding of a hearing in relation to any matter relevant to the performance of its functions.³²⁵

A person who has been issued with an attendance notice for a misconduct hearing requiring the person to produce a stated document or thing at the hearing³²⁶ must produce the document or thing at the hearing unless the person has a reasonable excuse.³²⁷ It is not a reasonable excuse for failing to produce the document or thing that producing the document or thing might tend to incriminate the person,³²⁸ and no immunity attaches to the document or thing.³²⁹

The CMC has advised this Commission that, in relation to misconduct investigations, the continued abrogation of the privilege against self-incrimination is necessary if it is to carry out its statutory functions effectively. It notes that official misconduct often involves elaborate and sophisticated schemes, and may concern the conduct of senior public officials or police officers. Traditional methods of investigation have been found to be ineffective when dealing with these types of official corruption and misconduct. The CMC is therefore of the view that, if prospective witnesses could simply refuse to produce documents or things on the grounds of the privilege against self-incrimination, its conduct of important public functions would be severely hampered.³³⁰

B. Investigation of CMC operations

The *Crime and Misconduct Act 2001* (Qld) provides for the appointment of a parliamentary commissioner,³³¹ whose functions include investigating various aspects of the operations of the CMC.³³²

The Act authorises the parliamentary commissioner, in carrying out those functions, to require, by giving written notice to the chairperson of the CMC, a CMC officer to produce or to allow the parliamentary commissioner access to

325 *Crime and Misconduct Act 2001* (Qld) s 176.

326 *Crime and Misconduct Act 2001* (Qld) s 82(1)(b), (2)(a).

327 *Crime and Misconduct Act 2001* (Qld) s 188(2)(b).

328 *Crime and Misconduct Act 2001* (Qld) s 188(3).

329 *Crime and Misconduct Act 2001* (Qld) s 188(4), inserted by cl 30 of Schedule 3 of the *Criminal Proceeds Confiscation Act 2002* (Qld).

330 Letter to the Commission from the Chairperson of the Crime and Misconduct Commission dated 3 December 2002.

331 *Crime and Misconduct Act 2001* (Qld) s 303.

332 *Crime and Misconduct Act 2001* (Qld) s 314.

documents in the possession of the CMC,³³³ or to give the parliamentary commissioner all reasonable help in the performance of his or her functions.³³⁴ The parliamentary commissioner may also, by written notice to a public official, require the public official to produce or allow the parliamentary commissioner access to documents in the possession of the unit of public administration in which the public official holds an appointment,³³⁵ or to give the parliamentary commissioner all reasonable help in the performance of his or her functions.³³⁶ A person required to do something by such a notice must comply with the requirement.³³⁷

Section 322 of the Act provides that, in relation to an investigation by the parliamentary commissioner or the production of documents or the giving of evidence, neither the CMC nor a CMC officer is entitled to a privilege against self-incrimination.³³⁸ There is no immunity granted in relation to information obtained as a result of the abrogation of the privilege.³³⁹

The Department of the Premier and Cabinet has advised this Commission that the CMC has a number of powers conferred on it by the *Crime and Misconduct Act 2001* (Qld) that may intrude on the rights and liberties of individuals. In particular, the Department noted that the Act contains a number of provisions abrogating the privilege against self-incrimination for a witness required to testify before the CMC.³⁴⁰

However, the Department also notes the existence of safeguards in relation to the abrogation by the Act of the privilege against self-incrimination in the conduct of investigations by the CMC. Amongst these safeguards are the roles of the parliamentary committee and the parliamentary commissioner, which impose accountability mechanisms on the CMC itself. The abrogation of the privilege against self-incrimination for the CMC and its officers in investigations conducted by the parliamentary commissioner into the operations of the CMC is one such mechanism. According to the Department of the Premier and Cabinet, this abrogation provision is necessary and should

333 *Crime and Misconduct Act 2001* (Qld) s 317(2)(a).

334 *Crime and Misconduct Act 2001* (Qld) s 317(2)(b).

335 *Crime and Misconduct Act 2001* (Qld) s 317(3)(a).

336 *Crime and Misconduct Act 2001* (Qld) s 317(3)(b).

337 *Crime and Misconduct Act 2001* (Qld) s 317(6).

338 *Crime and Misconduct Act 2001* (Qld) s 322.

339 See p 93 of this Discussion Paper for a discussion of the relationship between ss 318 and 322 of the *Crime and Misconduct Act 2001* (Qld).

340 See pp 46, 89-91 of this Discussion Paper for a discussion of these provisions.

be retained as part of the system of strict safeguards to ensure the accountability of the CMC.³⁴¹

(i) Department of Primary Industries

(i) *Agricultural Standards Act 1994 (Qld)*

The purpose of the *Agricultural Standards Act 1994* (Qld) is to establish an administrative framework for the making of standards about agriculture and to provide appropriate powers to ensure that the standards are complied with.³⁴² Standards may be made in relation to a number of agricultural activities regulated by the Act.³⁴³ A standard may also be made in relation to licences about agriculture.³⁴⁴

The Act provides for the appointment of inspectors,³⁴⁵ who have powers of entry into places³⁴⁶ to conduct certain investigations.³⁴⁷ An inspector may require the occupier of the place or a person in the place to give the inspector reasonable assistance in the exercise of the inspector's powers.³⁴⁸ The person must comply with such a requirement unless the person has a reasonable excuse.³⁴⁹ In relation to a requirement to produce a document required to be kept by the person under the Act, such as a licence, it is not a reasonable excuse to fail to comply with the requirement that complying with the requirement might incriminate the person.³⁵⁰

The Department of Primary Industries is of the view that the document producing requirement contained in the Act is essential in ensuring that standards are complied with. The Department has advised the Commission that the Act relates to specific activities that an individual may choose to participate in, with the full knowledge that there are legislative monitoring processes in place. The Department does not think it unreasonable that the rights of an individual, who chooses to participate in one of these activities

³⁴¹ Letter to the Chairperson of the Commission from the Acting Director-General of the Department of the Premier and Cabinet dated 11 October 2002.

³⁴² *Agricultural Standards Act 1994* (Qld) s 3.

³⁴³ *Agricultural Standards Act 1994* (Qld) s 5(1).

³⁴⁴ *Agricultural Standards Act 1994* (Qld) s 5(2).

³⁴⁵ *Agricultural Standards Act 1994* (Qld) s 15.

³⁴⁶ *Agricultural Standards Act 1994* (Qld) s 20.

³⁴⁷ *Agricultural Standards Act 1994* (Qld) s 33.

³⁴⁸ *Agricultural Standards Act 1994* (Qld) s 33(1)(f).

³⁴⁹ *Agricultural Standards Act 1994* (Qld) s 33(2).

³⁵⁰ *Agricultural Standards Act 1994* (Qld) s 33(3)(b).

with full knowledge of these monitoring processes and who then does not comply with the relevant legislative standards, should be abrogated in certain circumstances.³⁵¹

(ii) *Animal Care and Protection Act 2001 (Qld)*

The purposes of the *Animal Care and Protection Act 2001 (Qld)* are to promote and to provide standards for the responsible care and use of animals, to protect animals from unjustifiable, unnecessary or unreasonable pain and to ensure that the use of animals for scientific purposes is accountable, open and responsible.³⁵²

The Act provides for the appointment of inspectors³⁵³ to investigate and enforce compliance with the Act.³⁵⁴ An inspector is authorised to require a person to give the inspector reasonable help to exercise his or her powers, for example by the production of a document or the giving of information (a “help requirement”).³⁵⁵ A person of whom a help requirement has been made must comply with the requirement unless the person has a reasonable excuse.³⁵⁶ In relation to a document required to be held or kept by the person under the Act or, if the document relates to the transportation of live animals, under another Queensland Act or legislation in any other Australian jurisdiction, it is not a reasonable excuse for an individual not to comply with a help requirement if complying with the requirement might tend to incriminate the person.³⁵⁷ An inspector may also make a “document production requirement”.³⁵⁸ A person of whom such a requirement is made must comply with the requirement unless the person has a reasonable excuse.³⁵⁹ In relation to a document required to be held or kept by the person under the Act or, if the document relates to the transportation of live animals, under another Queensland Act or legislation in any other Australian jurisdiction, it is not a reasonable excuse for an individual not to comply with a help requirement if complying with the requirement might tend to incriminate the person.³⁶⁰

351 Letter to the Commission from the Department of Primary Industries dated 4 June 2003.

352 *Animal Care and Protection Act 2001 (Qld)* s 3.

353 *Animal Care and Protection Act 2001 (Qld)* s 114.

354 *Animal Care and Protection Act 2001 (Qld)* s 115.

355 *Animal Care and Protection Act 2001 (Qld)* s 138.

356 *Animal Care and Protection Act 2001 (Qld)* s 139(1).

357 *Animal Care and Protection Act 2001 (Qld)* s 139(3).

358 *Animal Care and Protection Act 2001 (Qld)* s 168(1).

359 *Animal Care and Protection Act 2001 (Qld)* s 169(1).

360 *Animal Care and Protection Act 2001 (Qld)* s 169(3).

The Act contains a number of provisions relating to the need to hold or keep documents. For example, a person must not use an animal for a scientific purpose unless the person is registered³⁶¹ and has been granted a registration certificate.³⁶² A registered person is required to fulfil certain reporting obligations,³⁶³ which necessarily involve the keeping of records. These obligations include the provision of information about matters such as the species and class of the animals, the number of animals used, the details of the source, place of use, duration of use and method of disposal of the animals³⁶⁴ and complaints received by the person about the person's use of animals for scientific purposes.³⁶⁵

There is also provision in the Act for the making of codes of practice about animal welfare.³⁶⁶ In addition to prescribing standards of animal care, a code of practice may impose record keeping requirements.

The Department of Primary Industries has advised the Commission that relevant document producing requirements are necessary to enable effective monitoring to be undertaken to ensure that the purposes of the legislation are achieved. For example, the *Queensland Code of Practice for the Welfare of Animals in Circuses* provides various requirements for record keeping in relation to animal trainers, medical care of animals and drug administration. In the view of the Department, these records are important in ensuring that a person has complied with the standards of care imposed by a code of practice. The functions of authorised officers in monitoring compliance with and promoting standards of animal care rely on the ability of officers to inspect records kept in accordance with the legislative provisions.³⁶⁷

In relation to the transportation of live animals, the Department is of the view that it is most important that the abrogation of the privilege against self-incrimination be maintained. The Department has advised the Commission that it is often critical for an inspector to be able to obtain information such as where animals were loaded for transport and how long they have been travelling in order to establish whether a person in charge of the animals has met the duty of care for the animals imposed by section 17 of the Act and to

361 *Animal Care and Protection Act 2001* (Qld) s 51(1).

362 *Animal Care and Protection Act 2001* (Qld) s 57(b).

363 *Animal Care and Protection Act 2001* (Qld) s 87.

364 *Animal Care and Protection Regulation 2002* (Qld) s 28(1).

365 *Animal Care and Protection Regulation 2002* (Qld) s 28(2).

366 *Animal Care and Protection Act 2001* (Qld) s 13.

367 Letter to the Commission from the Department of Primary Industries dated 4 June 2003.

investigate an animal cruelty offence pursuant to section 18(2)(f) of the Act.³⁶⁸ Since it may be difficult to investigate animal cruelty allegations while animals are in transit, it is crucial for inspectors to have the ability to require the production of certain documents that may aid in the investigation of the allegations.³⁶⁹

(iii) ***Drugs Misuse Act 1986 (Qld)***

Part 5B of the *Drugs Misuse Act 1986* (Qld) regulates the commercial production of industrial cannabis. The object of Part 5B is to facilitate the processing and marketing of, and trade in, industrial cannabis fibre and fibre products,³⁷⁰ and the processing and marketing of, and trade in, industrial cannabis seed and seed products, other than for any purpose directly or indirectly related to administration to, or consumption or smoking by, a person.³⁷¹ This objective is to be achieved by enabling certain activities to be carried out under controlled conditions.³⁷² The activities permitted by Part 5B are the commercial production of industrial cannabis fibre and seed,³⁷³ plant breeding programs for developing new or improved strains of cannabis for use in the commercial production of industrial cannabis fibre and seed,³⁷⁴ and research into the use of industrial cannabis as a commercial fibre and seed crop,³⁷⁵ into how cannabis seed can be denatured,³⁷⁶ and how processed cannabis can be used.³⁷⁷

The Act provides for various categories of licences,³⁷⁸ which authorise the licensee to undertake certain activities.³⁷⁹ Obligations are imposed on

³⁶⁸ Section 18(2)(f) of the *Animal Care and Protection Act 2001* (Qld) provides that a person is taken to be cruel to an animal if the person confines or transports the animal: without appropriate preparation, including, for example, appropriate food, rest, shelter or water; when it is unfit for the confinement or transport; in a way that is inappropriate for the animal's welfare; or in an unsuitable container or vehicle.

³⁶⁹ Letter to the Commission from the Department of Primary Industries dated 16 April 2003.

³⁷⁰ *Drugs Misuse Act 1986* (Qld) s 44(a).

³⁷¹ *Drugs Misuse Act 1986* (Qld) s 44(b).

³⁷² *Drugs Misuse Act 1986* (Qld) s 45(1).

³⁷³ *Drugs Misuse Act 1986* (Qld) s 45(1)(a).

³⁷⁴ *Drugs Misuse Act 1986* (Qld) s 45(1)(c).

³⁷⁵ *Drugs Misuse Act 1986* (Qld) s 45(1)(b).

³⁷⁶ *Drugs Misuse Act 1986* (Qld) s 45(2)(a).

³⁷⁷ *Drugs Misuse Act 1986* (Qld) s 45(2)(b).

³⁷⁸ *Drugs Misuse Act 1986* (Qld) s 49.

³⁷⁹ *Drugs Misuse Act 1986* (Qld) ss 50, 51, 52.

licensees and on other people involved in these activities to keep records relating to the use of cannabis.³⁸⁰

The Act also provides for the appointment of inspectors,³⁸¹ who have powers to enter a place,³⁸² and to examine, inspect, film or photograph a document or other thing at the place³⁸³ and to take samples for analysis and testing.³⁸⁴ An inspector may also require a person at a place the inspector has entered to give the inspector reasonable help to exercise these powers.³⁸⁵ The person must comply with a help requirement unless the person has a reasonable excuse.³⁸⁶ If the requirement is to produce a document required to be held or kept by the person under this Act, it is not a reasonable excuse for failing to comply that complying might tend to incriminate the person.³⁸⁷

An inspector also has power to require a person to produce, at a stated time and place, a document required to be kept by the person under the Act or a document in the person's possession about a stated matter relating to the Act.³⁸⁸ The person must comply with the requirement unless the person has a reasonable excuse.³⁸⁹ If the document is required to be held or kept by the person under the Act, it is not a reasonable excuse for failing to comply that complying might tend to incriminate the person.³⁹⁰

The Department of Primary Industries has advised the Commission that the documents that a person is required to hold or keep under the Act are an integral part of the regulatory monitoring system conducted by industrial hemp inspectors to ensure that there is a clear distinction between legal and illegal activities associated with the production of cannabis sativa. There are serious penalties for persons who supply, produce, or possess cannabis sativa otherwise than in accordance with the legislative provisions. The Department does not consider it unreasonable that the rights of a person who chooses to participate in an activity such as the commercial production of cannabis sativa, in the full knowledge that there are legislative monitoring processes in

380 *Drugs Misuse Regulation 1987* (Qld) s 10(2), Schedules 7, 8.

381 *Drugs Misuse Act 1986* (Qld) s 91.

382 *Drugs Misuse Act 1986* (Qld) s 98.

383 *Drugs Misuse Act 1986* (Qld) s 101(a).

384 *Drugs Misuse Act 1986* (Qld) s 101(b).

385 *Drugs Misuse Act 1986* (Qld) s 102(1).

386 *Drugs Misuse Act 1986* (Qld) s 103(1).

387 *Drugs Misuse Act 1986* (Qld) s 103(3).

388 *Drugs Misuse Act 1986* (Qld) s 107(1).

389 *Drugs Misuse Act 1986* (Qld) s 108(1).

390 *Drugs Misuse Act 1986* (Qld) s 108(3).

place, should be abrogated in certain circumstances if the person fails to comply with the relevant legislative standards. The Department supports the continued use of the abrogation provision, as the community benefit associated with the purposes of the Act significantly outweighs any perceived disadvantage associated with the abrogation of the privilege against self-incrimination for individuals who do not comply with the Act.³⁹¹

(j) Queensland Health

(i) Health Act 1937 (Qld)

The Health Act 1937 (Qld) is a consolidation of the laws in Queensland relating to public health. Part 4 of the Act contains provisions relating to various substances or items that might endanger public health. Part 4A of the Act establishes a scheme for the monitoring, investigation and enforcement of certain provisions (the “relevant provisions”) in Part 4.³⁹²

The Act also provides for the appointment of inspectors,³⁹³ who are authorised to require a person to make available or to produce for inspection a document issued to the person under a relevant provision or required to be kept by the person under a relevant provision.³⁹⁴ Such a requirement is called a “document production requirement”.³⁹⁵

A person of whom a document production requirement is made must comply with the requirement, unless the person has a reasonable excuse.³⁹⁶ It is not a reasonable excuse for a person not to comply with a document production requirement that complying with the requirement might tend to incriminate the person.³⁹⁷

Queensland Health has advised the Commission that the documents that are, or are anticipated to be, caught by the operation of these provisions are those required to be kept under the Act (for example, records of transactions involving controlled or restricted drugs). The Department explained that the reason that the privilege against self-incrimination does not apply to the production of this category of documentation is the necessity for inspectors

391 Letter to the Commission from the Department of Primary Industries dated 4 June 2003.

392 Part 4A applies to Part 4 Divisions 1 (Preliminary), 2 (Drugs etc), 3 (Cooking utensils, toys, wearing apparel, matches and the use of lead) and 6 (Labelling of drugs and poisons): *Health Act 1937 (Qld)* s 134.

393 *Health Act 1937 (Qld)* s 137.

394 *Health Act 1937 (Qld)* s 153N(1).

395 *Health Act 1937 (Qld)* s 153N(6).

396 *Health Act 1937 (Qld)* s 153O(1).

397 *Health Act 1937 (Qld)* s 153O(2).

appointed under the Act to have access to the documents for the purpose of monitoring and enforcing a person's compliance with his or her obligations under the Act. In the view of the Department, the continued existence of the provisions, particularly those relating to requirements to keep documents, is highly desirable, since ensuring compliance with these Acts is necessary to facilitate the achievement of the objectives of the Act.³⁹⁸

(ii) Health practitioner registration legislation

In Queensland, the registration of various kinds of health practitioners is regulated by legislation. These registration Acts contain identical provisions relating to the production of documents.³⁹⁹

For example, the *Medical Practitioners Registration Act 2001* (Qld) provides that an inspector may require a person to produce a document issued to the person under the Act.⁴⁰⁰ Such a requirement is called a "document production requirement".⁴⁰¹ A person of whom a document production requirement is made must comply with the requirement unless the person has a reasonable excuse.⁴⁰² It is not a reasonable excuse for failing to comply with the requirement that producing the document might tend to incriminate the person.⁴⁰³

Queensland Health has advised the Commission that the documents that are, or are anticipated to be, caught by the operation of these provisions are those, such as a certificate of registration, issued to a person under the relevant Act. The Department explained that the reason that the privilege against self-incrimination does not apply to the production of this category of documentation is the necessity for inspectors appointed under the Acts to have access to the documents for the purpose of monitoring and enforcing a person's compliance with his or her obligations under the Acts. In the view of the Department, the continued existence of the provisions, particularly those relating to requirements to keep documents, is highly desirable, since

³⁹⁸ Letter to the Chairperson of the Commission from the Director-General of Queensland Health dated 5 November 2002.

³⁹⁹ *Chiropractors Registration Act 2001* (Qld) s 168; *Dental Practitioners Registration Act 2001* (Qld) s 190; *Dental Technicians and Dental Prosthetists Registration Act 2001* (Qld) s 172; *Medical Practitioners Registration Act 2001* (Qld) s 229; *Medical Radiation Technologists Registration Act 2001* (Qld) s 183; *Occupational Therapists Registration Act 2001* (Qld) s 168; *Optometrists Registration Act 2001* (Qld) s 168; *Osteopaths Registration Act 2001* (Qld) s 168; *Pharmacists Registration Act 2001* (Qld) s 173; *Physiotherapists Registration Act 2001* (Qld) s 168; *Podiatrists Registration Act 2001* (Qld) s 168; *Psychologists Registration Act 2001* (Qld) s 184; *Speech Pathologists Registration Act 2001* (Qld) s 168.

⁴⁰⁰ *Medical Practitioners Registration Act 2001* (Qld) s 228(1).

⁴⁰¹ *Medical Practitioners Registration Act 2001* (Qld) s 228(5).

⁴⁰² *Medical Practitioners Registration Act 2001* (Qld) s 229(1).

⁴⁰³ *Medical Practitioners Registration Act 2001* (Qld) s 229(2).

ensuring compliance with these Acts is necessary to facilitate the achievement of the objectives of the Acts.⁴⁰⁴

(iii) *Nursing Act 1992 (Qld)*

The *Nursing Act 1992 (Qld)* provides for the registration and enrolment of nurses, the practice of nursing and the education of nurses. The object of the Act is to make provision for ensuring safe and competent nursing practice.⁴⁰⁵

The Act establishes the Queensland Nursing Council.⁴⁰⁶ The Council's functions include to regulate certain aspects of nurse education.⁴⁰⁷

An inspector appointed under the Act⁴⁰⁸ may enter premises for the purposes of monitoring compliance with the Act⁴⁰⁹ and for finding evidence of the commission of an offence against the Act.⁴¹⁰ An inspector who enters a place may search the place⁴¹¹ and inspect or examine anything in the place.⁴¹² The inspector may require the occupier of the place, or any person in the place, to give the inspector reasonable assistance in the exercise of the inspector's powers.⁴¹³ A person must not, without reasonable excuse, fail to comply with such a requirement.⁴¹⁴ In relation to a document required to be kept by a person under the Act,⁴¹⁵ it is not a reasonable excuse for a person to fail to produce the document that producing the document might tend to incriminate the person.⁴¹⁶

Queensland Health has advised the Commission that it is necessary for inspectors to have access to these documents to monitor standards of nursing training for the purpose of the Queensland Nursing Council exercising its

404 Letter to the Chairperson of the Commission from the Director-General of Queensland Health dated 5 November 2002.

405 *Nursing Act 1992 (Qld)* s 3.

406 *Nursing Act 1992 (Qld)* s 6.

407 *Nursing Act 1992 (Qld)* s 7(c)-(e).

408 *Nursing Act 1992 (Qld)* s 125.

409 *Nursing Act 1992 (Qld)* s 128.

410 *Nursing Act 1992 (Qld)* s 129.

411 *Nursing Act 1992 (Qld)* s 130(1)(a).

412 *Nursing Act 1992 (Qld)* s 130(1)(b).

413 *Nursing Act 1992 (Qld)* s 130(1)(e).

414 *Nursing Act 1992 (Qld)* s 130(2).

415 See for example *Nursing Act 1992 (Qld)* s 79 (Schools of nursing to keep records).

416 *Nursing Act 1992 (Qld)* s 130(3)(b).

function of accrediting nursing courses. It considers that, as the abrogation provision facilitates the achievement of the object of the Act, its continued existence is highly desirable.⁴¹⁷

(iv) *Pest Management Act 2001 (Qld)*⁴¹⁸

The main object of the *Pest Management Act 2001 (Qld)* is to protect the public from health risks associated with pest control activities and from the adverse results of the ineffective control of pests.⁴¹⁹ These objects are to be achieved by establishing a licensing regime to regulate pest control and fumigation activities and to ensure that these activities are carried out by pest management technicians in a safe and competent way,⁴²⁰ and by providing for compliance with the Act to be monitored and enforced.⁴²¹

The Act provides that a person must not carry out a pest management activity unless the person is either a pest management technician licensed for the activity or a trainee who is being properly supervised by a licensed pest management technician.⁴²² There are certain obligations imposed by the Act on pest management technicians.⁴²³

The Act also provides for the appointment of inspectors,⁴²⁴ who have certain powers under the Act. An inspector may require a person to make available for inspection by an inspector, or to produce to the inspector for inspection, at a reasonable time and place nominated by the inspector, a document issued

417 Letter to the Commission from Queensland Health dated 26 May 2003.

418 The *Pest Management Act 2001 (Qld)* is not yet in force. The Act was assented to on 19 December 2001. It provides that it will commence on a date to be fixed by proclamation: *Pest Management Act 2001 (Qld)* s 2. If an Act that is to commence on proclamation has not been proclaimed within a year of the date of assent, it will commence automatically on the following day unless the commencement is postponed by regulation to a date no later than two years after the date of assent: *Acts Interpretation Act 1954 (Qld)* s 15DA. The commencement of the *Pest Management Act 2001 (Qld)* has been deferred by regulation to 20 September 2003: *Pest Management (Postponement) Regulation 2002 (Qld)*.

419 *Pest Management Act 2001 (Qld)* s 4(1).

420 *Pest Management Act 2001 (Qld)* s 4(2)(a).

421 *Pest Management Act 2001 (Qld)* s 4(2)(b). The *Pest Management Act 2001 (Qld)* does not apply to certain specified pest control activities, including a pest control activity carried out by aerial distribution of an agricultural chemical product: *Pest Management Act 2001 (Qld)* s 7. The distribution of agricultural chemicals from aircraft and from ground equipment is controlled by the *Agricultural Chemicals Distribution Control Act 1966 (Qld)*. The *Agricultural Chemicals Distribution Control Act 1966 (Qld)* does not abrogate the privilege against self-incrimination: see for example *Agricultural Chemicals Distribution Control Act 1966 (Qld)* s 34(2).

422 *Pest Management Act 2001 (Qld)* s 11.

423 See for example *Pest Management Act 2001 (Qld)* ss 50 (Holding out while unlicensed), 51 (When pest management technician must not permit or require another person to carry out a pest management activity), 52 (Failure to supervise trainee), 53 (Pest management technician to give chief executive notice about certain events), 54 (Notice of change in circumstances).

424 *Pest Management Act 2001 (Qld)* s 55.

to the person under the Act or required by the Act to be kept by the person (a “document production requirement”).⁴²⁵

A person of whom a document production requirement is made must comply with the requirement, unless the person has a reasonable excuse.⁴²⁶ It is not a reasonable excuse for a person not to comply with a document production requirement that complying with the requirement might tend to incriminate the person.⁴²⁷

(v) ***Tobacco and Other Smoking Products Act 1998 (Qld)***

The object of the *Tobacco and Other Smoking Products Act 1998 (Qld)* is to improve the health of members of the public by reducing their exposure to tobacco and other smoking products.⁴²⁸ One of the ways in which this object is to be achieved is by restricting the supply of tobacco and other smoking products to children.⁴²⁹

The Act requires a supplier of smoking products⁴³⁰ to give certain instructions and a warning to the supplier’s employees in relation to preventing the supply of smoking products to children.⁴³¹ The supplier must obtain written acknowledgment by an employee that the employee received the instructions and the warning.⁴³² The Act also requires a person in charge of a tobacco product vending machine in a bar area or gaming machine area to give certain instructions to the person’s employees in relation to preventing the use of the vending machine by a child. The person must obtain written acknowledgment by each employee that the employee received such instructions.⁴³³

The Act provides for the appointment of authorised persons⁴³⁴ who have certain powers under the Act. One of the powers conferred on an authorised

425 *Pest Management Act 2001 (Qld)* s 85(1), (6).

426 *Pest Management Act 2001 (Qld)* s 86(1).

427 *Pest Management Act 2001 (Qld)* s 86(2).

428 *Tobacco and Other Smoking Products Act 1998 (Qld)* s 3.

429 *Tobacco and Other Smoking Products Act 1998 (Qld)* s 3A(a).

430 “Supplier” means a person who, as part of a business activity, supplies smoking products to the public, but does not include an employee of such a person: *Tobacco and Other Smoking Products Act 1998 (Qld)* Schedule (definition of “supplier”).

431 A “child” is a person under the age of 18 years: *Tobacco and Other Smoking Products Act 1998 (Qld)* Schedule (definition of “child”).

432 *Tobacco and Other Smoking Products Act 1998 (Qld)* ss 9 (definition of “prevention measures”), 9A.

433 *Tobacco and Other Smoking Products Act 1998 (Qld)* ss 14 (definition of “prevention measures”), 15A.

434 *Tobacco and Other Smoking Products Act 1998 (Qld)* s 27.

person enables the authorised person to require a supplier or a person in charge of a tobacco product vending machine to produce or make available for inspection a written acknowledgment obtained by the supplier or person from an employee.⁴³⁵ A person of whom such a requirement is made must comply with the requirement unless the person has a reasonable excuse.⁴³⁶ It is not a reasonable excuse for a person not to comply with the requirement that complying with the requirement might tend to incriminate the person.⁴³⁷

Queensland Health has advised the Commission that it is necessary for authorised persons to have access to these documents to monitor and enforce compliance with the obligations of a person who sells tobacco or is in charge of a tobacco vending machine. It considers that, as the abrogation provision facilitates the object of the Act, its continued existence is highly desirable.⁴³⁸

(k) Department of Tourism, Racing and Fair Trading

(i) *Classification of Computer Games and Images Act 1995 (Qld)*

The *Classification of Computer Games and Images Act 1995 (Qld)* provides for the classification of computer games,⁴³⁹ and regulates their demonstration,⁴⁴⁰ advertising and supply.⁴⁴¹ The Act also creates a number of offences in relation to objectionable computer games.⁴⁴²

An inspector appointed under the Act⁴⁴³ may enter a place⁴⁴⁴ and may exercise certain powers for the purpose of monitoring or enforcing compliance.⁴⁴⁵ In particular, the inspector may require the occupier of the place or a person at the place to give the inspector reasonable help to

435 *Tobacco and Other Smoking Products Act 1998 (Qld)* s 44D(1), (7).

436 *Tobacco and Other Smoking Products Act 1998 (Qld)* s 44E(1).

437 *Tobacco and Other Smoking Products Act 1998 (Qld)* s 44E(2).

438 Letter to the Commission from Queensland Health dated 26 May 2003.

439 *Classification of Computer Games and Images Act 1995 (Qld)* Part 2.

440 *Classification of Computer Games and Images Act 1995 (Qld)* Part 3.

441 *Classification of Computer Games and Images Act 1995 (Qld)* Part 4.

442 *Classification of Computer Games and Images Act 1995 (Qld)* Part 5. The term "objectionable computer game" is defined in the Dictionary to the Act: *Classification of Computer Games and Images Act 1995 (Qld)* s 3, Schedule 2.

443 *Classification of Computer Games and Images Act 1995 (Qld)* s 30.

444 *Classification of Computer Games and Images Act 1995 (Qld)* s 34.

445 *Classification of Computer Games and Images Act 1995 (Qld)* s 38(2).

exercise these powers.⁴⁴⁶ A person must comply with such a requirement unless the person has a reasonable excuse.⁴⁴⁷ If the requirement is to be complied with by the person producing a document, it is not a reasonable excuse, in relation to a document required to be kept by a person under Part 6 of the Act, that complying with a requirement to produce the document might tend to incriminate the person.⁴⁴⁸

The Department of Tourism, Racing and Fair Trading notes that it is only documents that are required to be kept under the Act that a person can be compelled to produce. The Department has advised the Commission that production provisions of this kind in legislation that it administers allow for an appropriate level of monitoring to ensure that people in the various industries concerned are properly licensed and regulated. The documents production of which can be compelled assist in ensuring that the relevant legislative regimes are being complied with. This in turn ensures that consumers and the community are adequately protected and can have confidence in these industries.⁴⁴⁹

The Department has also observed that, whilst there are no express restrictions on the use of information obtained through the requirement to produce these documents, their use is necessarily limited to ensuring compliance with the requirements of the legislation in question and/or prosecuting offences under the legislation.⁴⁵⁰

(ii) ***Introduction Agents Act 2001 (Qld)***

The purpose of the *Introduction Agents Act 2001 (Qld)* is to provide for fair trading within the introduction agency industry.⁴⁵¹ This is to be achieved in a number of ways, including by establishing a licensing system for introduction agents,⁴⁵² by setting minimum standards for carrying on the business of an introduction agent,⁴⁵³ and by ensuring that representations about introduction services include accurate details of the services provided.⁴⁵⁴

446 *Classification of Computer Games and Images Act 1995 (Qld)* s 38(2)(f).

447 *Classification of Computer Games and Images Act 1995 (Qld)* s 38(3).

448 *Classification of Computer Games and Images Act 1995 (Qld)* s 38(4).

449 Letter to the Commission from the Department of Tourism, Racing and Fair Trading dated 23 May 2003.

450 *Ibid.*

451 *Introduction Agents Act 2001 (Qld)* s 3.

452 *Introduction Agents Act 2001 (Qld)* s 3(a).

453 *Introduction Agents Act 2001 (Qld)* s 3(c).

454 *Introduction Agents Act 2001 (Qld)* s 3(e).

The Act provides that a person must not carry on the business of an introduction agent unless the person holds a licence under the Act.⁴⁵⁵ Before entering into an introduction agreement with a person, an introduction agent must give the person a detailed and clearly expressed written statement describing the introduction service to be provided under the agreement.⁴⁵⁶ The agent must not enter into an introduction agreement with a person unless the agent has obtained a written acknowledgment from the person that the person has received such a statement.⁴⁵⁷ Immediately upon entering into an introduction agreement, the agent must give the client a copy of the agreement signed by both the agent and the client.⁴⁵⁸ The agent must keep copies of these documents for a period specified by the Act.⁴⁵⁹

An inspector appointed under the Act⁴⁶⁰ may enter a place⁴⁶¹ and, for the purpose of monitoring or enforcing compliance with the Act, may exercise certain specified powers.⁴⁶² The inspector may require the occupier of the place or a person at the place to give the inspector reasonable help to exercise these powers.⁴⁶³ A person must comply with such a requirement unless the person has a reasonable excuse.⁴⁶⁴ If the help is required to be given to the inspector by producing an authority or a document required to be kept under the Act, it is not a reasonable excuse for failing to produce the document that complying with the requirement might tend to incriminate the person.⁴⁶⁵

The Department of Tourism, Racing and Fair Trading notes that it is only documents that are required to be kept under the Act that a person can be compelled to produce. The Department has advised the Commission that production provisions of this kind in legislation that it administers allow for an appropriate level of monitoring to ensure that people in the various industries concerned are properly licensed and regulated. The documents production of

455 *Introduction Agents Act 2001* (Qld) s 18.

456 *Introduction Agents Act 2001* (Qld) s 43(1).

457 *Introduction Agents Act 2001* (Qld) s 43(3).

458 *Introduction Agents Act 2001* (Qld) s 45(1).

459 *Introduction Agents Act 2001* (Qld) s 42(1).

460 *Introduction Agents Act 2001* (Qld) s 61.

461 *Introduction Agents Act 2001* (Qld) s 65.

462 *Introduction Agents Act 2001* (Qld) s 71(2)(a)-(e).

463 *Introduction Agents Act 2001* (Qld) s 71(2)(f).

464 *Introduction Agents Act 2001* (Qld) s 72(1).

465 *Introduction Agents Act 2001* (Qld) s 72(2)(b).

which can be compelled assist in ensuring that the relevant legislative regimes are being complied with. This in turn ensures that consumers and the community are adequately protected and can have confidence in these industries.⁴⁶⁶

The Department has also observed that, whilst there are no express restrictions on the use of information obtained through the requirement to produce these documents, their use is necessarily limited to ensuring compliance with the requirements of the legislation in question and/or prosecuting offences under the legislation.⁴⁶⁷

(iii) *Liquor Act 1992 (Qld)*

The *Liquor Act 1992* (Qld) regulates the sale and supply of liquor in Queensland. The objects of the Act include to facilitate and regulate the optimum development of the tourist, liquor and hospitality industries of the State, having regard to the welfare, needs and interests of the community and the economic implications of change;⁴⁶⁸ to provide for a flexible, practical system for regulation of the liquor industry of the State with minimum formality, technicality or intervention consistent with the proper and efficient administration of the Act;⁴⁶⁹ and to provide revenue for the State to enable the attainment of the objects of the Act and for other purposes of government.⁴⁷⁰

The Act provides for the granting of various kinds of licences⁴⁷¹ and permits.⁴⁷² A licensee or permittee must keep the licence or permit at the premises to which the licence or permit relates, unless the licensee or permittee has a reasonable excuse for not doing so.⁴⁷³

The Act also requires a licensee or permittee to keep certain records. For example, the secretary of a club that has a restricted club permit must keep club membership and guest registers.⁴⁷⁴ A licensee must keep certain records relating to the purchase of and sale or supply of liquor by the

466 Letter to the Commission from the Department of Tourism, Racing and Fair Trading dated 23 May 2003.

467 Ibid.

468 *Liquor Act 1992* (Qld) s 3(a).

469 *Liquor Act 1992* (Qld) s 3(c).

470 *Liquor Act 1992* (Qld) s 3(g).

471 *Liquor Act 1992* (Qld) s 58(1).

472 *Liquor Act 1992* (Qld) s 97.

473 *Liquor Act 1992* (Qld) s 145.

474 *Liquor Act 1992* (Qld) s 103D(1)(c), (d).

licensee,⁴⁷⁵ the transactions and financial position of the licensee's business⁴⁷⁶ and, in the case of particular licensees, details of the amount and type of liquor sold and details of meals ordered and supplied.⁴⁷⁷

An investigator authorised under the Act⁴⁷⁸ may enter a place⁴⁷⁹ and exercise certain powers.⁴⁸⁰ In particular, the investigator may require the occupier or any person in or on the place to give the investigator reasonable assistance in relation to the exercise of these powers.⁴⁸¹ A person must not, without reasonable excuse, fail to comply with such a requirement.⁴⁸² In relation to a document required to be kept by a person under the Act, it is not a reasonable excuse for failing to produce the document that producing the document might tend to incriminate the person.⁴⁸³

The Department of Tourism, Racing and Fair Trading notes that it is only documents that are required to be kept under the Act that a person can be compelled to produce. The Department has advised the Commission that production provisions of this kind in legislation that it administers allow for an appropriate level of monitoring to ensure that people in the various industries concerned are properly licensed and regulated. The documents production of which can be compelled assist in ensuring that the relevant legislative regimes are being complied with. This in turn ensures that consumers and the community are adequately protected and can have confidence in these industries.⁴⁸⁴

The Department has also observed that, whilst there are no express restrictions on the use of information obtained through the requirement to produce these documents, their use is necessarily limited to ensuring compliance with the requirements of the legislation in question and/or prosecuting offences under the legislation.⁴⁸⁵

475 *Liquor Act 1992* (Qld) s 217(1), *Liquor Regulation 2002* (Qld) s 25.

476 *Liquor Act 1992* (Qld) s 217(3).

477 *Liquor Regulation 2002* (Qld) s 27.

478 *Liquor Act 1992* (Qld) s 174(1).

479 *Liquor Act 1992* (Qld) ss 176, 177.

480 *Liquor Act 1992* (Qld) s 178.

481 *Liquor Act 1992* (Qld) s 178(1)(f).

482 *Liquor Act 1992* (Qld) s 178(2).

483 *Liquor Act 1992* (Qld) s 178(3).

484 Letter to the Commission from the Department of Tourism, Racing and Fair Trading dated 23 May 2003.

485 *Ibid.*

(iv) *Racing Act 2002 (Qld)*

The main purposes of the *Racing Act 2002 (Qld)* are to maintain public confidence in the racing of animals in Queensland for which betting is lawful, to ensure the integrity of all persons involved with racing or betting under the Act, and to safeguard the welfare of all animals involved in racing under the Act.⁴⁸⁶ One of the ways in which it is intended that these purposes will be achieved is by the investigation of matters under, and enforcement of compliance with, the Act by authorised officers.⁴⁸⁷

The Act provides for the appointment of authorised officers⁴⁸⁸ and confers on them certain powers to enable them to investigate and enforce compliance with the Act. In particular, an authorised officer may require a person to make available or produce to the authorised officer a document required to be kept by the person under the Act.⁴⁸⁹ A person required to make available or to produce such a document for inspection must comply with the requirement unless the person has a reasonable excuse.⁴⁹⁰ It is not a reasonable excuse for a person that complying with the requirement might tend to incriminate the person.⁴⁹¹

The Department of Tourism, Racing and Fair Trading has advised the Commission that, as part of the framework for regulating the racing industry in Queensland, the Act imposes certain obligations on persons to prepare and retain documents. For example, a control body has obligations in relation to copies of policies and rules of racing made by the control body.⁴⁹² There are also requirements imposed on bookmakers in relation to their licences.⁴⁹³ According to the Department, the removal of the protection of the privilege against self-incrimination assists those who have responsibility for monitoring the probity, integrity and accountability of persons and organisations involved in the racing industry. The Department observed that without the abrogation provision a control body, for example, that may not be managing its code of racing properly may be able to conceal documents that could lead to a diminution of public confidence in the racing of animals for which betting is lawful, or otherwise undermine the purposes of the Act. In the view of the Department, it would also be unfair to allow a person who has a positive duty

486 *Racing Act 2002 (Qld)* s 4(1).

487 *Racing Act 2002 (Qld)* s 4(2)(h).

488 *Racing Act 2002 (Qld)* s 261.

489 *Racing Act 2002 (Qld)* s 303(1).

490 *Racing Act 2002 (Qld)* s 304(1).

491 *Racing Act 2002 (Qld)* s 304(2).

492 *Racing Act 2002 (Qld)* ss 84, 94.

493 *Racing Act 2002 (Qld)* ss 194, 196.

to retain a document to refuse to produce the document on the grounds that production (or non-production) of the document may tend to incriminate the person.⁴⁹⁴

(v) Residential Services (Accreditation) Act 2002 (Qld)

The objects of the *Residential Services (Accreditation) Act 2002* (Qld) include to regulate the conduct of residential services in order to protect the health, safety and basic freedoms of residents⁴⁹⁵ and to encourage service providers to continually improve the way they conduct residential services.⁴⁹⁶ These purposes are to be achieved by establishing a registration system, under which a residential service is registered only if the service provider and associates are suitable and the premises in which the service is conducted are safe and otherwise suitable,⁴⁹⁷ and by establishing an accreditation system, under which a residential service is accredited to provide a type of service only if that service is provided in a way that meets minimum standards.⁴⁹⁸

Under the Act, it is an offence for a person to conduct a residential service unless the service is registered, the person is registered as the service provider for the service and the premises where the service is provided are the registered premises for the service.⁴⁹⁹ The Act also provides for various levels of accreditation.⁵⁰⁰ As a minimum requirement, all residential services must be accredited at the lowest level.⁵⁰¹

The Act requires the service provider for a residential service to keep certain documents.⁵⁰²

An authorised officer appointed under the Act⁵⁰³ may require a service provider for a registered service to produce a document required to be kept by

494 Letter to the Chairperson of the Commission from the Director-General of the Department of Tourism, Racing and Fair Trading dated 5 November 2002.

495 *Residential Services (Accreditation) Act 2002* (Qld) s 8(1)(a).

496 *Residential Services (Accreditation) Act 2002* (Qld) s 8(1)(b).

497 *Residential Services (Accreditation) Act 2002* (Qld) s 8(2)(a).

498 *Residential Services (Accreditation) Act 2002* (Qld) s 8(2)(b).

499 *Residential Services (Accreditation) Act 2002* (Qld) s 9(1).

500 *Residential Services (Accreditation) Act 2002* (Qld) s 34.

501 *Residential Services (Accreditation) Act 2002* (Qld) s 34(5)(a).

502 See for example *Residential Services (Accreditation) Act 2002* (Qld) ss 76 (Maintenance, implementation and accessibility of fire safety management plan), 77 (Service provider for registered service must keep records) and *Residential Services (Accreditation) Regulation 2002* (Qld) s 10.

503 *Residential Services (Accreditation) Act 2002* (Qld) s 106.

the service provider, or a document issued to the service provider under the Act.⁵⁰⁴ The service provider must comply with the requirement unless the service provider has a reasonable excuse.⁵⁰⁵ It is not a reasonable excuse for an individual not to comply with the requirement that complying with the requirement might tend to incriminate the individual.⁵⁰⁶

The Department of Tourism, Racing and Fair Trading has advised the Commission that the framework for the regulation of the residential service industry was introduced in order to protect the rights of disadvantaged individuals who have, in the past, been subject to substandard accommodation and less than satisfactory service with little or no protection for their rights. It notes that the documentation required to be held or kept by the operator of a residential service contributes to the scheme by allowing, in the case of a registration certificate, easy identification of the service provider for the purpose of taking action under the Act and by creating confidence, in the case of documents relating to safety issues and building standards, that the provider's services comply with agreed standards.

The Department also points out that the documents that an authorised officer can require a person to produce are limited to those that must be issued to or kept by the service provider under the Act. Given this limitation, it is the view of the Department that, even though the Act does not confer any immunity on the documents in question, their use is necessarily restricted to ensuring compliance with and/or prosecuting offences under the Act.⁵⁰⁷

(vi) *Travel Agents Act 1988 (Qld)*

The principal objectives of the *Travel Agents Act 1988 (Qld)* are to provide for the licensing of travel agents in Queensland,⁵⁰⁸ to provide for the regulation of the conduct of business as a travel agent,⁵⁰⁹ and to provide access to the travel industry compensation fund by consumers entitled to compensation under the scheme established by the Act.⁵¹⁰

Under the Act, a person may apply for a licence,⁵¹¹ and is prohibited from carrying on business as a travel agent otherwise than in accordance with the

504 *Residential Services (Accreditation) Act 2002 (Qld)* s 134(1).

505 *Residential Services (Accreditation) Act 2002 (Qld)* s 135(1).

506 *Residential Services (Accreditation) Act 2002 (Qld)* s 135(2).

507 Letter to the Commission from the Department of Tourism, Racing and Fair Trading dated 7 May 2003.

508 *Travel Agents Act 1988 (Qld)* s 3(a).

509 *Travel Agents Act 1988 (Qld)* s 3(b).

510 *Travel Agents Act 1988 (Qld)* s 3(c), Part 5.

511 *Travel Agents Act 1988 (Qld)* s 14.

authority conferred on the person by a licence.⁵¹² It is an offence for a person to carry on business as a travel agent in partnership with a person who is not a licensee,⁵¹³ or for an unlicensed person to hold himself or herself out as a travel agent.⁵¹⁴

A person who conducts a business as a travel agent must keep such accounting records as are necessary to correctly record and explain the financial transactions and the financial position of the business.⁵¹⁵

The Act enables an authorised officer⁵¹⁶ to enter a place⁵¹⁷ and to exercise certain powers.⁵¹⁸ In particular, an authorised officer may require the occupier, or a person in or on the place, to give the authorised officer reasonable help to exercise those powers.⁵¹⁹ A person must comply with such a requirement unless the person has a reasonable excuse for not complying with it.⁵²⁰ In relation to a requirement to produce a document required to be kept by the person under the Act, it is not a reasonable excuse for failing to comply with the requirement that complying might tend to incriminate the person.⁵²¹

The Department of Tourism, Racing and Fair Trading notes that it is only documents that are required to be kept under the Act that a person can be compelled to produce. The Department has advised the Commission that production provisions of this kind in legislation that it administers allow for an appropriate level of monitoring to ensure that people in the various industries concerned are properly licensed and regulated. The documents production of which can be compelled assist in ensuring that the relevant legislative regimes are being complied with. This in turn ensures that consumers and the community are adequately protected and can have confidence in these industries.⁵²²

512 *Travel Agents Act 1988* (Qld) s 12(1)(a).

513 *Travel Agents Act 1988* (Qld) s 12(1)(b).

514 *Travel Agents Act 1988* (Qld) s 12(2).

515 *Travel Agents Act 1988* (Qld) s 33.

516 *Travel Agents Act 1988* (Qld) s 6 (definition of "authorised officer").

517 *Travel Agents Act 1988* (Qld) s 45A.

518 *Travel Agents Act 1988* (Qld) s 45D.

519 *Travel Agents Act 1988* (Qld) s 45D(2)(g).

520 *Travel Agents Act 1988* (Qld) s 45D(3).

521 *Travel Agents Act 1988* (Qld) s 45D(4)(b).

522 Letter to the Commission from the Department of Tourism, Racing and Fair Trading dated 23 May 2003.

The Department has also observed that, whilst there are no express restrictions on the use of information obtained through the requirement to produce these documents, their use is necessarily limited to ensuring compliance with the requirements of the legislation in question and/or prosecuting offences under the legislation.⁵²³

(l) Treasury

(i) *Charitable and Non-Profit Gaming Act 1999 (Qld)*⁵²⁴

The overarching object of the *Charitable and Non-Profit Gaming Act 1999* (Qld) is to ensure that, on balance, the State and the community as a whole benefit from general gaming.⁵²⁵ The balance is achieved by allowing general gaming subject to a system of regulation and control designed to protect players and the community. The system is designed to ensure the integrity and fairness of games and the probity of those involved in the conduct of general gaming, and to minimise the potential for harm from general gaming.⁵²⁶

The Act provides for the issue of a number of different kinds of licence for conducting gaming activities.⁵²⁷ It also imposes obligations to keep records about the conduct of the activity authorised by the licence,⁵²⁸ and to keep accounting records.⁵²⁹

The Act authorises the appointment of inspectors,⁵³⁰ who have power under the Act to enter a place⁵³¹ and, for the purpose of monitoring or enforcing compliance with the Act, to carry out investigations and examinations at the place.⁵³² An inspector may also require the occupier of the place or a person at the place to give the inspector reasonable help to exercise the inspector's powers⁵³³ or to give the inspector information to help the inspector ascertain

523 Ibid.

524 Queensland Treasury administers a number of other Acts which also regulate gaming activities: *Interactive Gambling (Player Protection) Act 1998* (Qld); *Keno Act 1996* (Qld); *Lotteries Act 1997* (Qld); *Wagering Act 1998* (Qld).

525 *Charitable and Non-Profit Gaming Act 1999* (Qld) s 3(1).

526 *Charitable and Non-Profit Gaming Act 1999* (Qld) s 3(2).

527 *Charitable and Non-Profit Gaming Act 1999* (Qld) ss 36, 37.

528 *Charitable and Non-Profit Gaming Act 1999* (Qld) ss 74-76.

529 *Charitable and Non-Profit Gaming Act 1999* (Qld) s 78.

530 *Charitable and Non-Profit Gaming Act 1999* (Qld) s 111.

531 *Charitable and Non-Profit Gaming Act 1999* (Qld) s 119.

532 *Charitable and Non-Profit Gaming Act 1999* (Qld) s 125(3)(a)-(f).

533 *Charitable and Non-Profit Gaming Act 1999* (Qld) s 125(3)(g).

whether the Act is being complied with.⁵³⁴ The person must comply with such a requirement unless the person has a reasonable excuse.⁵³⁵ If the requirement is to be complied with by the person producing a document required to be kept by the person under the Act, it is not a reasonable excuse for the person to fail to comply with the requirement that complying might tend to incriminate the person.⁵³⁶

The Under Treasurer has advised the Commission that this provision, and similar provisions in other gaming legislation administered by Queensland Treasury,⁵³⁷ were developed to allow effective monitoring of gaming activities to ensure integrity and fairness. The Office of Gaming Regulation within Queensland Treasury is of the view that the continued existence of the provisions is essential to player and community protection, and that to allow any type of immunity restricting the use of documents obtained under the provisions would potentially result in offending conduct going unpunished, contrary to the interests of the community and compliant members of the industry.⁵³⁸

(ii) ***Tobacco Products (Licensing) Act 1988 (Qld)***

The *Tobacco Products (Licensing) Act 1988 (Qld)* contains provisions about the licensing of persons who carry on the business of selling tobacco,⁵³⁹ and also creates a number of offences relating to the sale of tobacco.⁵⁴⁰ The Act establishes the position of commissioner of tobacco products licensing,⁵⁴¹ and confers certain powers on the commissioner. Amongst these powers is the ability to authorise an officer engaged in the administration of the Act to be an investigating officer.⁵⁴²

An investigating officer may conduct inquiries into certain matters⁵⁴³ and, for the purpose of an investigation, may request a person to produce relevant material that, at the time of the request, is in the possession, under the

534 *Charitable and Non-Profit Gaming Act 1999 (Qld)* s 125(3)(h).

535 *Charitable and Non-Profit Gaming Act 1999 (Qld)* s 126(1).

536 *Charitable and Non-Profit Gaming Act 1999 (Qld)* s 126(2).

537 See *Interactive Gambling (Player Protection) Act 1998 (Qld)* s 205(2); *Keno Act 1996 (Qld)* s 181(2); *Lotteries Act 1997 (Qld)* s 167(2); *Wagering Act 1998 (Qld)* s 247(2).

538 Letter to the Chairperson of the Commission from the Under Treasurer dated 28 May 2003.

539 *Tobacco Products (Licensing) Act 1988 (Qld)* Part 5.

540 *Tobacco Products (Licensing) Act 1988 (Qld)* Part 4.

541 *Tobacco Products (Licensing) Act 1988 (Qld)* s 8.

542 *Tobacco Products (Licensing) Act 1988 (Qld)* s 34(1).

543 *Tobacco Products (Licensing) Act 1988 (Qld)* s 34(3).

control, or at the order or disposition of that person.⁵⁴⁴ “Relevant material” includes accounts, records, books or documents that will or are reasonably believed to afford evidence of an offence against the Act, or that are or are reasonably suspected to be relevant to the assessment of a licence fee.⁵⁴⁵ A person is not excused from producing such a document on the ground that it contains information that might tend to incriminate the person or make the person liable to a penalty.⁵⁴⁶

In 1997, in a case that challenged the validity of similar legislation in New South Wales, the High Court held that provisions imposing a liability to pay a fee for a licence to sell tobacco contravened the Constitution of the Commonwealth of Australia.⁵⁴⁷ The majority⁵⁴⁸ held that the fee constituted the imposition of a duty of excise, contrary to the exclusive power of the Commonwealth, conferred by section 90 of the Constitution, to impose such duties. As a result of the High Court decision, the abrogation of the privilege against self-incrimination is no longer of any practical relevance. Accordingly, the Under Treasurer has advised the Commission that it is not necessary for the provision to be retained.⁵⁴⁹

3. OVERVIEW OF PROVISIONS

It can be seen from the above that, in a wide variety of situations, Queensland legislation abrogates the privilege against self-incrimination without conferring any compensatory immunity restricting the use of information obtained under a power of compulsion. The situations in which the privilege has been abrogated include the investigation of serious crime, environmental protection, regulation of child care centres, management of explosive material, animal welfare, nurse education, consumer protection and the monitoring of licensed gaming activities.

544 *Tobacco Products (Licensing) Act 1988* (Qld) s 34(4)(d).

545 *Tobacco Products (Licensing) Act 1988* (Qld) s 34(8).

546 *Tobacco Products (Licensing) Act 1988* (Qld) s 34(9).

547 *Ha and Another v State of New South Wales and Others* (1997) 189 CLR 465.

548 Brennan CJ, McHugh, Gummow and Kirby JJ (Dawson, Toohey and Gaudron JJ dissenting).

549 Letter to the Chairperson of the Commission from the Under Treasurer dated 11 October 2002.

CHAPTER 5

PROVISIONS THAT CONFER A USE IMMUNITY

1. INTRODUCTION

The provisions discussed in this chapter abrogate the privilege against self-incrimination. However, to mitigate the effect of the abrogation, restrictions are imposed on the use that may be made, as evidence in subsequent proceedings, of information obtained as a result of the loss of the privilege.

The extent of the restrictions imposed varies considerably. Some provisions totally prohibit the use of the information except in limited circumstances such as proceedings relating to the falsity or misleading nature of the information itself. Others provide that the information may not be used in specified proceedings. There is also significant variation in the kinds of proceedings in relation to which the immunity applies. For example, some provisions state that the information may not be used in criminal proceedings, whereas others prohibit the use of the material in both criminal and civil proceedings. Other provisions limit the use of the material to disciplinary proceedings or to proceedings for an offence under the Act in question.

The provisions are set out alphabetically according to the government department that administers them.

2. EXISTING PROVISIONS

(a) Department of Emergency Services

(i) *Fire and Rescue Service Act 1990 (Qld)*

The *Fire and Rescue Service Act 1990 (Qld)* establishes the Queensland Fire and Rescue Service. It also makes provision for the prevention of and response to fire and other incidents that endanger persons, property or the environment.

The Act enables an authorised fire officer⁵⁵⁰ to require a person to answer any question or provide any information for the purpose of protecting persons, property or the environment against danger caused by a fire or a chemical incident or for the purpose of protecting persons trapped in a vehicle or building or otherwise endangered.⁵⁵¹

550 *Fire and Rescue Service Act 1990 (Qld)* s 6A.

551 *Fire and Rescue Service Act 1990 (Qld)* s 53(2)(j).

It is not a lawful excuse for a person to fail to comply with such a requirement that to do so may tend to incriminate the person.⁵⁵² However, if the person has objected to providing the information on the grounds of self-incrimination, any answer given or information provided is not admissible against the person in proceedings other than proceedings for giving an answer or providing information knowing it to be false or misleading.⁵⁵³

The Department of Emergency Services has advised the Commission that:⁵⁵⁴

[The abrogation provision] was put in place to provide assistance to fire officers in gaining necessary information related to the conduct of investigations into, and the prevention of, fires. The immunity provides a safeguard to persons imparting information to fire officers which assists in fire investigations or fire prevention.

It is considered that it is in the public interest that such investigations and fire prevention measures continue with maximum assistance from the public and on that basis, the continued existence of the above provision is necessary.

(b) Environmental Protection Agency

(i) *Environmental Protection Act 1994 (Qld)*

The object of the *Environmental Protection Act 1994 (Qld)* is to protect Queensland's environment while allowing for ecologically sustainable development.⁵⁵⁵ This object is to be achieved by an integrated management program that is consistent with ecologically sustainable development.⁵⁵⁶

The Act imposes certain obligations on a person who, while carrying out an activity, becomes aware that, as a result of that activity or another activity being carried out in association with it, serious or material environmental harm is caused or threatened.⁵⁵⁷ Such a person is required to report the harm or risk of harm to the relevant administering authority⁵⁵⁸ or, if the person is an agent or employee of another person, to the employer, who must then report it to the administering authority.⁵⁵⁹

552 *Fire and Rescue Service Act 1990 (Qld)* s 58.

553 *Fire and Rescue Service Act 1990 (Qld)* s 58.

554 Letter to the Chairperson of the Commission from the Director-General of the Department of Emergency Services dated 17 September 2002.

555 *Environmental Protection Act 1994 (Qld)* s 3.

556 *Environmental Protection Act 1994 (Qld)* s 4.

557 *Environmental Protection Act 1994 (Qld)* s 320.

558 *Environmental Protection Act 1994 (Qld)* s 320(3)(b).

559 *Environmental Protection Act 1994 (Qld)* s 320(3)(a), (4).

A person must not fail to comply with these obligations without a reasonable excuse.⁵⁶⁰ It is not a reasonable excuse for a person to fail to give the required notice on the ground that the notice, or the giving of the notice, might tend to incriminate the person.⁵⁶¹ However, the notice may not be used as evidence against the person or, if relevant, the employer, in subsequent criminal proceedings for an offence against the Act constituted by the conduct that caused or threatened the harm to which the notice refers.⁵⁶² Despite the inclusion of this use immunity, a derivative use immunity is expressly excluded, and other evidence obtained because of the notice, or the giving of the notice, may be admitted in any legal proceeding against the person or the employer.⁵⁶³

The Act also provides for the appointment of authorised persons,⁵⁶⁴ who have certain powers under the Act.⁵⁶⁵ These powers include to search a place or vehicle; to inspect, examine, test, measure the place or vehicle or anything in or on the place or vehicle; to take samples of any contaminant; to test, analyse and record the release of contaminants into the environment;⁵⁶⁶ and to require the occupier of the place, or any person in or on the place or vehicle, to give the authorised person reasonable help to exercise the authorised person's powers.⁵⁶⁷

An authorised person also has emergency powers to deal with serious environmental harm.⁵⁶⁸ If, in the exercise of these emergency powers, an authorised person requires a person to give reasonable help in relation to the exercise of a power, the person must comply with the requirement, unless the person has a reasonable excuse for not complying with it.⁵⁶⁹ Where the help required is the answering of a question or the production of a document (other than certain specified documents), it is not a reasonable excuse for a person to fail to answer the question or produce the document on the ground that complying with the requirement might tend to incriminate the person.⁵⁷⁰ If,

560 *Environmental Protection Act 1994* (Qld) s 320(5).

561 *Environmental Protection Act 1994* (Qld) s 320(6).

562 *Environmental Protection Act 1994* (Qld) s 320(7).

563 *Environmental Protection Act 1994* (Qld) s 320(8).

564 *Environmental Protection Act 1994* (Qld) s 445.

565 See for example *Environmental Protection Act 1994* (Qld) ss 452 (Entry of place - general), 459 (Entry or boarding of vehicles), 460 (General powers for places and vehicles).

566 *Environmental Protection Act 1994* (Qld) s 460(1)(a)-(d).

567 *Environmental Protection Act 1994* (Qld) s 460(1)(h).

568 *Environmental Protection Act 1994* (Qld) s 467.

569 *Environmental Protection Act 1994* (Qld) s 473(1), (2).

570 *Environmental Protection Act 1994* (Qld) s 473(3).

however, before complying with the requirement, the person objects on the grounds of self-incrimination, the answer or producing of the document is not admissible in evidence against the person in a prosecution for an offence under the Act, other than an offence about the false, misleading or incomplete nature of the document or the false or misleading nature of the information.⁵⁷¹

The work of the Environmental Protection Agency focuses on protecting the State's natural and cultural heritage, promoting sustainable use of natural capital, and ensuring a clean environment. The Agency has informed the Commission that its powers of compulsion serve three purposes: to allow the Agency to investigate and address conservation and environmental issues; to allow independent witnesses to freely provide information without fear of acquiring consequential liability; and to compel possible defendants to participate in a formal record of interview and answer all questions that do not give rise to a privilege against self-incrimination. The Agency observed that, in many cases, its objectives can be achieved by working with the community. In relation to the legislation that it administers, the Agency commented generally that the Agency's view is that, since it is often seeking information for non-prosecutorial purposes, it is not averse to widening the immunity conferred on information obtained as a result of powers of compulsion contained in that legislation.⁵⁷² However, the Agency has also expressed the view that removal of compulsive powers would change the balance between the Agency and the public, making it potentially more difficult for the Agency to achieve its objectives. The Agency is therefore of the view that it should retain its compulsive powers.⁵⁷³

(c) Department of Housing

(i) Queensland Building Services Authority Act 1991 (Qld)

The objects of the *Queensland Building Services Authority Act 1991* (Qld) include to regulate the building industry to ensure the maintenance of proper standards in the industry and to achieve a reasonable balance between the interests of building contractors and consumers.⁵⁷⁴

The Act establishes the Queensland Building Services Authority,⁵⁷⁵ which has certain functions under the Act.

571 *Environmental Protection Act 1994* (Qld) s 473(5).

572 Letter to the Chairperson of the Commission from the Director-General of the Environmental Protection Agency dated 8 October 2002.

573 Letter to the Commission from the Environmental Protection Agency dated 24 February 2003.

574 *Queensland Building Services Authority Act 1991* (Qld) s 3(a).

575 *Queensland Building Services Authority Act 1991* (Qld) s 5.

The Authority may apply to the Commercial and Consumer Tribunal⁵⁷⁶ for the Tribunal to conduct a public examination into certain matters.⁵⁷⁷ The Tribunal may hold a public examination that investigates the conduct or competence of a person who has carried out or undertaken to carry out particular building work,⁵⁷⁸ or that investigates whether a person meets the financial requirements imposed for the licence held by the person,⁵⁷⁹ is a fit and proper person to hold a licence⁵⁸⁰ or has breached a condition imposed on the person's licence.⁵⁸¹ At such a public examination, the person must answer certain questions about the person's financial affairs, and is not entitled to claim the privilege against self-incrimination. However, there is a use immunity conferred upon the person's answers.⁵⁸²

The *Queensland Building Services Authority Act 1991* (Qld) was amended by the *Commercial and Consumer Tribunal Act 2003* (Qld), which transferred to the former Act the public examination provisions previously contained in the now repealed *Queensland Building Tribunal Act 2000* (Qld).⁵⁸³ The amendments came into effect on 1 July 2003. Because of time constraints, it has not been possible to seek the views of the Department of Housing on the abrogation of the privilege against self-incrimination.

However, in relation to identical provisions in the *Queensland Building Tribunal Act 2000* (Qld), the Department of Tourism, Racing and Fair Trading advised the Commission that the purpose of the abrogation of privilege in relation to a question, at a public examination, about the financial affairs of a person who undertakes building work is to avoid harm to members of the public, in particular consumers, suppliers, sub-contractors and employees, and also to ensure public confidence in the building industry. The Department noted the high level of propensity for civil and criminal wrongdoing in the building industry. It considered that, in the absence of such a provision, the

576 *Queensland Building Services Authority Act 1991* (Qld) s 92, Schedule 2 (definition of "tribunal"). The Commercial and Consumer Tribunal was established by the *Commercial and Consumer Tribunal Act 2003* (Qld): *Commercial and Consumer Tribunal Act 2003* (Qld) s 6.

577 *Commercial and Consumer Tribunal Act 2003* (Qld) s 110, Schedule 2 (definition of "empowering Act"); *Queensland Building Services Authority Act 1991* (Qld) s 92.

578 *Queensland Building Services Authority Act 1991* (Qld) ss 92(a), 75.

579 *Queensland Building Services Authority Act 1991* (Qld) s 92(b)(i).

580 *Queensland Building Services Authority Act 1991* (Qld) s 92(b)(iv).

581 *Queensland Building Services Authority Act 1991* (Qld) s 92(b)(vi).

582 See pp 106-107 of this Discussion Paper in relation to the obligation of a person to answer questions at a public examination held by the Commercial and Consumer Tribunal.

583 The *Queensland Building Tribunal Act 2000* (Qld) is repealed by the *Commercial and Consumer Tribunal Act 2003* (Qld) s 168.

law would protect the interests of the civil and criminal wrongdoers, rather than those of the public.⁵⁸⁴

There is no public interest in being unable to establish factual matters which are known only to such wrongdoers ...

The Department was therefore of the view that the continued existence of the provision is necessary.⁵⁸⁵

(d) Department of Industrial Relations

(i) *Workers' Compensation and Rehabilitation Act 2003 (Qld)*⁵⁸⁶

The *Workers' Compensation and Rehabilitation Act 2003 (Qld)* establishes a workers' compensation scheme for Queensland⁵⁸⁷ and imposes on employers an obligation to insure against accidental injury to a worker.⁵⁸⁸

The Act also establishes WorkCover Queensland⁵⁸⁹ to provide for the efficient and economic administration of the compensation scheme.⁵⁹⁰ It includes provisions relating to the accountability of WorkCover⁵⁹¹ and to the duties and liabilities of directors and other officers,⁵⁹² and enables the public examination of certain persons in relation to the management of WorkCover.⁵⁹³

If it appears to the Attorney-General that a person concerned in WorkCover's management, administration or affairs has been, or may have been, guilty of fraud, negligence, default, breach of trust, breach of duty or other misconduct in relation to WorkCover,⁵⁹⁴ or that a person may be capable of giving

584 Letter to the Chairperson of the Commission from the Director-General of the Department of Tourism, Racing and Fair Trading dated 5 November 2002.

585 Ibid.

586 This Act repeals the *WorkCover (Qld) Act 1996 (Qld): Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 588. The relevant provisions commenced operation on 1 July 2003: *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 2.

587 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 5.

588 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 48.

589 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 380.

590 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 6.

591 See for example *Workers' Compensation and Rehabilitation Act 2003 (Qld)* ss 411 (Quarterly reports), 412 (Matters to be included in the Annual Report), 414 (Board to keep Minister informed).

592 See for example *Workers' Compensation and Rehabilitation Act 2003 (Qld)* ss 415 (Disclosure of interests by director), 416 (Voting by interested director), 417 (Duty and liability of certain officers of WorkCover), 418 (Prohibition on loans to directors).

593 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 421.

594 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 421(1)(a).

information about WorkCover's management, administration or affairs,⁵⁹⁵ the Attorney-General may apply to the Supreme Court or a District Court for an order that the person attend before the court to be examined on oath.⁵⁹⁶ At such an examination, the person must not fail to answer a question that the person is directed by the court to answer.⁵⁹⁷ The person is not excused from answering a question put to the person at the examination on the ground that the answer might tend to incriminate the person or make the person liable to a penalty.⁵⁹⁸

However, provided that the person claims, before answering the question, that the answer might tend to incriminate the person or make the person liable to a penalty,⁵⁹⁹ and provided also that the answer might in fact tend to incriminate the person or make the person liable to a penalty,⁶⁰⁰ the answer is not admissible in evidence against the person in a criminal proceeding⁶⁰¹ or a proceeding for the imposition of a penalty,⁶⁰² other than a proceeding relating to the falsity of the answer.

(e) Department of Justice and Attorney-General

(i) *Commissions of Inquiry Act 1950 (Qld)*

The *Commissions of Inquiry Act 1950 (Qld)* removes the privilege against self-incrimination of a witness who is summoned to appear before a commission of inquiry.⁶⁰³ It provides that the witness is not entitled, on the grounds of self-incrimination, to remain silent, to refuse to answer questions or to produce documents or records when required by the chairperson of the commission to give evidence before the commission.⁶⁰⁴

However, the Act confers a use immunity on answers given by the witness.⁶⁰⁵ It provides that such answers may not be used except in proceedings for

595 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 421(1)(b).

596 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 421(2), (3).

597 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 421(8).

598 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 421(13).

599 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 421(14)(a).

600 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 421(14)(b).

601 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 421(14)(c).

602 *Workers' Compensation and Rehabilitation Act 2003 (Qld)* s 421(14)(d).

603 *Commissions of Inquiry Act 1950 (Qld)* s 14(1A).

604 *Commissions of Inquiry Act 1950 (Qld)* s 14(1A). This section is set out in full on pp 150-151 of this Discussion Paper.

605 *Commissions of Inquiry Act 1950 (Qld)* s 14A. This section is set out in full on p 150 of this Discussion Paper.

contempt of the commission or for an offence against certain provisions of the *Criminal Code* relating to interference with the course of criminal proceedings.⁶⁰⁶ The use immunity does not apply to evidence in documentary form.

The Department of Justice and Attorney-General has advised the Commission that:⁶⁰⁷

Traditionally, commissions of inquiry have always had such powers and hence the inclusion of the abrogation in the Act.

(ii) ***Criminal Code (Qld)***

The Queensland *Criminal Code* provides that a person who is called as a witness in any proceeding for an offence against certain specified sections of the Code⁶⁰⁸ must not be excused from answering any question relating to the offence on the ground that to answer the question may incriminate or tend to incriminate the person.⁶⁰⁹

However, an answer to a question in a proceeding to which the section applies is not admissible in evidence against the person giving the answer other than in the proceeding or in a prosecution for perjury in respect of the answer.⁶¹⁰

These provisions were inserted into the *Criminal Code* in 1997.⁶¹¹ The Department of Justice and Attorney-General has advised the Commission that the amendment resulted from recommendations made to the Attorney-General by a working group set up to advise the Attorney-General on reform of the *Criminal Code*. The reason for the recommendation to abrogate the privilege was the difficulty in proving corrupt transactions, for which direct evidence can only be provided by a party to the transaction.⁶¹²

606 These offences are set out in note 1182 on p 151 of this Discussion Paper.

607 Letter to the Chairperson of the Commission from the Director-General of the Department of Justice and Attorney-General dated 11 September 2002.

608 The relevant sections are ss 59 (Member of Parliament receiving bribes), 60 (Bribery of Member of Parliament), 87 (Official corruption), 103 (Bribery), 118 (Bargaining for offices in public service), 120 (Judicial corruption), 121 (Official corruption not judicial but relating to offences), 122 (Corrupting or threatening jurors), 127 (Corruption of witnesses) and 133 (Compounding crimes).

609 *Criminal Code (Qld)* s 644A(1).

610 *Criminal Code (Qld)* s 644A(2).

611 *Criminal Law Amendment Act 1997 (Qld)* s 117.

612 Criminal Code Advisory Working Group, *Report to the Attorney General* (July 1996) at 106.

(iii) ***Criminal Proceeds Confiscation Act 2002 (Qld)***

The *Criminal Proceeds Confiscation Act 2002 (Qld)* repeals the *Crimes (Confiscation) Act 1989 (Qld)*.⁶¹³ The relevant provisions of the Act came into operation on 1 January 2003.⁶¹⁴

The main object of the Act is to remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity.⁶¹⁵ Other objects of the Act include ensuring that persons whose property rights may be affected by orders under the Act are given a reasonable opportunity to establish the lawfulness of the activity through which they acquired the relevant property rights,⁶¹⁶ and protecting property honestly acquired by persons innocent of illegal activity from forfeiture and other orders affecting property.⁶¹⁷

The Act provides for confiscation of certain property both before⁶¹⁸ and after⁶¹⁹ conviction.

Where a person has not been convicted of an offence, the State may apply to the Supreme Court for a restraining order to prevent any person from dealing with specified property (the restrained property) in a stated way or in stated circumstances.⁶²⁰ The application may relate to the property of a person suspected of having engaged in serious crime related activity,⁶²¹ or to stated property of a stated person.⁶²²

The court must make the order if it is satisfied that there are reasonable grounds for the suspicion on which the application is based.⁶²³ The court may also make other orders that it considers appropriate in relation to a restraining order,⁶²⁴ including an order (an examination order) requiring a person whose

613 *Criminal Proceeds Confiscation Act 2002 (Qld)* s 282.

614 *Criminal Proceeds Confiscation Act 2002 (Qld)* s 2.

615 *Criminal Proceeds Confiscation Act 2002 (Qld)* s 4(1).

616 *Criminal Proceeds Confiscation Act 2002 (Qld)* s 4(2)(b).

617 *Criminal Proceeds Confiscation Act 2002 (Qld)* s 4(2)(c).

618 *Criminal Proceeds Confiscation Act 2002 (Qld)* Chapter 2.

619 *Criminal Proceeds Confiscation Act 2002 (Qld)* Chapter 3.

620 *Criminal Proceeds Confiscation Act 2002 (Qld)* s 28(1).

621 *Criminal Proceeds Confiscation Act 2002 (Qld)* s 28(3)(a).

622 *Criminal Proceeds Confiscation Act 2002 (Qld)* s 28(3)(b).

623 *Criminal Proceeds Confiscation Act 2002 (Qld)* s 31(1).

624 *Criminal Proceeds Confiscation Act 2002 (Qld)* s 37(1).

property is restrained under the restraining order or a stated person to attend for examination on oath before the court or a judicial registrar.⁶²⁵ The examination may relate to the affairs of any person whose property is restrained under the restraining order,⁶²⁶ the nature and location of any property of a person whose property is restrained under a restraining order,⁶²⁷ and the nature and location of any property restrained under the order that is reasonably suspected of being property derived from serious crime.⁶²⁸

A person examined under an examination order is not excused from answering a question, or from producing a document or other thing, on the ground that answering the question or producing the document or thing may tend to incriminate the person or make the person liable to a forfeiture or penalty.⁶²⁹ However, a statement or disclosure made by a person or a document or other thing produced in the examination is not admissible against the person in any civil or criminal proceeding other than:⁶³⁰

- a proceeding about the false or misleading nature of the statement or disclosure;
- a proceeding on an application under the Act;
- a proceeding for the enforcement of a confiscation order; or
- for a document or other thing, a proceeding about a right or liability it confers or imposes.

If a person (a prescribed respondent) has been, or is about to be, charged with a confiscation offence⁶³¹ or has been convicted of a confiscation offence,⁶³² the State may apply to the Supreme Court for an order restraining any person from dealing with property stated in the order (restrained property) other than in a stated way or in stated circumstances.⁶³³ The application may relate to the property of a prescribed respondent or to stated property of a stated person other than a prescribed respondent.⁶³⁴

625 *Criminal Proceeds Confiscation Act 2002* (Qld) s 38(1)(c).

626 *Criminal Proceeds Confiscation Act 2002* (Qld) s 38(1)(c)(i).

627 *Criminal Proceeds Confiscation Act 2002* (Qld) s 38(1)(c)(ii).

628 *Criminal Proceeds Confiscation Act 2002* (Qld) s 38(1)(c)(iii).

629 *Criminal Proceeds Confiscation Act 2002* (Qld) s 40(1)(a).

630 *Criminal Proceeds Confiscation Act 2002* (Qld) s 40(2).

631 For a definition of the term "confiscation offence" see *Criminal Proceeds Confiscation Act 2002* (Qld) s 99.

632 *Criminal Proceeds Confiscation Act 2002* (Qld) s 116.

633 *Criminal Proceeds Confiscation Act 2002* (Qld) s 117(1).

634 *Criminal Proceeds Confiscation Act 2002* (Qld) s 117(4).

If the court makes a restraining order,⁶³⁵ it may also make other orders that it considers appropriate in relation to a restraining order,⁶³⁶ including an order (an examination order) requiring a person whose property is restrained under the restraining order or a stated person to attend for examination on oath before the court or a judicial registrar.⁶³⁷ The examination may relate to the affairs of any person whose property is restrained under the restraining order,⁶³⁸ the nature and location of any property of a person whose property is restrained under a restraining order,⁶³⁹ and the nature and location of any property restrained under the order that is reasonably suspected of being tainted property.⁶⁴⁰

A person examined under an examination order is not excused from answering a question, or from producing a document or other thing, on the ground that answering the question or producing the document or thing may tend to incriminate the person or make the person liable to a forfeiture or penalty.⁶⁴¹ However, a statement or disclosure made by a person or a document or other thing produced in the examination is not admissible against the person in any civil or criminal proceeding other than:⁶⁴²

- a proceeding about the false or misleading nature of the statement or disclosure;
- a proceeding on an application under the Act;
- a proceeding for the enforcement of a confiscation order; or
- for a document or other thing, a proceeding about a right or liability it confers.

According to the Explanatory Notes that accompanied the introduction of the legislation, the examination provisions, which were included in the original confiscation legislation, were introduced because they were considered necessary to enable complete information to be obtained about the affairs of a person the subject of a confiscation application.⁶⁴³

635 *Criminal Proceeds Confiscation Act 2002* (Qld) s 122.

636 *Criminal Proceeds Confiscation Act 2002* (Qld) s 129(1).

637 *Criminal Proceeds Confiscation Act 2002* (Qld) s 130(c).

638 *Criminal Proceeds Confiscation Act 2002* (Qld) s 130(c)(i).

639 *Criminal Proceeds Confiscation Act 2002* (Qld) s 130(c)(ii).

640 *Criminal Proceeds Confiscation Act 2002* (Qld) s 130(c)(iii). "Tainted property" is defined in s 104 of the Act.

641 *Criminal Proceeds Confiscation Act 2002* (Qld) s 132(1)(a).

642 *Criminal Proceeds Confiscation Act 2002* (Qld) s 132(2).

643 Explanatory Notes, *Criminal Proceeds Confiscation Bill 2002* (Qld) at 5.

The justification for the power is that it enables investigators to obtain full details of a person's property and financial dealings which in turn would allow appropriate action to be taken ... to forfeit illegally obtained property or release legitimate property from restraint. The information sought could include information which is exclusively within the knowledge of the person concerned.

Unlike its predecessor, the Act contains a use, rather than a derivative use, immunity in return for the removal of the privilege against self-incrimination, so that evidence given at an examination can be used as the basis for investigations.⁶⁴⁴

The inclusion of a derivative use immunity could potentially thwart prosecutions by allowing the defendant to seek exclusion of the evidence on the basis that it derived indirectly from evidence given at the examination. Such a contention could be difficult to refute by the prosecution in relation to a criminal investigation without disclosing confidential sources or informants.

(f) Department of Local Government and Planning

(i) *Local Government Act 1993 (Qld)*

The objects of the *Local Government Act 1993 (Qld)* include providing a legal framework for an effective, efficient, and accountable system of local government.⁶⁴⁵ Part of this framework consists in authorising local governments to implement corporatisation in relation to significant business activities of the local government.⁶⁴⁶ Corporatisation is intended to improve overall economic performance and the ability of local governments to carry out their responsibilities for the good rule and government of their areas.⁶⁴⁷

The Act sets out the responsibilities and liabilities of the directors of corporations that are owned by local governments.⁶⁴⁸ In particular, where there are reasonable grounds for believing that a person who has been concerned or taken part in the management of such a corporation has or may have been guilty of fraud, negligence, default, breach of trust or breach of duty or other misconduct in relation to the corporation,⁶⁴⁹ the Supreme Court or District Court may order that the person attend before the court to be examined on oath on any matters relating to the corporation's management,

644 Id at 6.

645 *Local Government Act 1993 (Qld)* s 2(a).

646 *Local Government Act 1993 (Qld)* s 584.

647 *Local Government Act 1993 (Qld)* s 586.

648 *Local Government Act 1993 (Qld)* Chapter 8 Part 7 Division 3 Subdivision 17.

649 *Local Government Act 1993 (Qld)* s 696(1).

administration or affairs.⁶⁵⁰ The person must not fail to answer a question that the person is directed by the court to answer.⁶⁵¹

The person is not excused from answering a question put to the person at the examination on the ground that the answer might tend to incriminate the person or make the person liable to a penalty.⁶⁵² However, if the person objects to answering the question on the ground of self-incrimination and if the answer might in fact tend to incriminate the person or make the person liable to a penalty, the answer is not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty, other than a proceeding for an offence in relation to the examination or a proceeding in relation to the falsity of an answer.⁶⁵³

The Department of Local Government and Planning has advised the Commission that the provisions in the *Local Government Act 1993* (Qld) relating to “Local Government Owned Corporations”, including the provision that abrogates the privilege against self-incrimination, are modelled on the equivalent provisions in the *Government Owned Corporations Act 1993* (Qld).⁶⁵⁴ They were included in the *Local Government Act 1993* (Qld) to ensure consistency between that Act and the *Government Owned Corporations Act 1993* (Qld) and, in the view of the Department, their continued existence is required to maintain that consistency.⁶⁵⁵

(g) Department of Natural Resources and Mines

(i) *Foreign Ownership of Land Register Act 1988* (Qld)

The *Foreign Ownership of Land Register Act 1988* (Qld) establishes a Foreign Ownership of Land Register.⁶⁵⁶ A foreign person who acquires land in Queensland must, within 90 days of the acquisition, lodge a notification of ownership with the registrar.⁶⁵⁷

The registrar has power, for the purpose of investigating compliance with the notification requirement, to require a person to provide additional information,

650 *Local Government Act 1993* (Qld) s 696(4).

651 *Local Government Act 1993* (Qld) s 696(9).

652 *Local Government Act 1993* (Qld) s 696(14).

653 *Local Government Act 1993* (Qld) s 696(15).

654 The relevant provisions of the *Government Owned Corporations Act 1993* (Qld) are discussed at p 115-116 of this Discussion Paper.

655 Letter to the Commission from the Department of Local Government and Planning dated 7 May 2003.

656 *Foreign Ownership of Land Register Act 1988* (Qld) s 11.

657 *Foreign Ownership of Land Register Act 1988* (Qld) s 18.

either verbally on oath or in writing by statutory declaration.⁶⁵⁸ A person is not excused from complying with a requirement to answer questions or provide further information on the ground that the answer or information might tend to incriminate the person or make the person liable to a penalty.⁶⁵⁹

However, an answer or information that might tend to incriminate the person or make the person liable to a penalty is not admissible against the person in any court proceedings, apart from proceedings in respect of an offence under the Act or of an offence in connection with verification of the answer or information, brought against the person in Queensland with a view to the punishment of the person for an alleged offence.⁶⁶⁰

According to the then Minister, the purpose of introducing the legislation was “to monitor the extent of foreign ownership to allow for the collection of statistical details, so that the Government and the community can see the extent of that ownership and its impact on our State”.⁶⁶¹ The Minister noted further that “if the register is to be of value and not misleading, the information recorded must be accurate and as complete as humanly possible. To assist the registrar in the accurate maintenance of the register, offences have been created and penalties defined.”⁶⁶²

The Department of Natural Resources and Mines has advised the Commission that the abrogation of the privilege was inserted into the Act in order to ensure compliance with the registrar’s investigative powers. Although, to date, the registrar has never invoked the power to require a person to provide additional information, the Department is of the view that it cannot be said that the power will not be invoked in the future for the purpose of maintaining an accurate and complete register of foreign owned land in Queensland.⁶⁶³

(ii) ***Mineral Resources Act 1989 (Qld)***

The *Mineral Resources Act 1989 (Qld)* provides for the assessment, development and utilisation of mineral resources to the maximum extent practicable consistent with sound economic and land use management. The

658 *Foreign Ownership of Land Register Act 1988 (Qld)* s 22.

659 *Foreign Ownership of Land Register Act 1988 (Qld)* s 24(3).

660 *Foreign Ownership of Land Register Act 1988 (Qld)* s 24(4).

661 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 October 1988 at 1593 (Hon William Glasson MLA, Minister for Land Management).

662 *Id* at 1595.

663 Letter to the Commission from the Department of Natural Resources and Mines dated 21 March 2003.

objectives of the Act include to ensure an appropriate financial return to the State from mining.⁶⁶⁴

Under the Act, minerals found on or below the surface of land in the State are, subject to certain exceptions, the property of the Crown.⁶⁶⁵ The holder of a mining claim or mining lease who mines, or allows to be mined, mineral is liable to pay royalties to the Crown.⁶⁶⁶ A royalty return must be lodged,⁶⁶⁷ whether or not mineral has been mined during the period of the return.⁶⁶⁸ A person who holds a mining claim or a mining lease, or who otherwise mines minerals from land, is obliged to keep accurate and proper accounting records for determining the amount of royalty payable.⁶⁶⁹

The Minister for Natural Resources and Mines may require a person to provide information or to produce records⁶⁷⁰ or to attend to give information, produce records, and answer questions or to do all or any of those things.⁶⁷¹ A person must comply with such a requirement⁶⁷² and is not excused from complying on the ground that the information or answer might tend to incriminate the person or make the person liable to a penalty.⁶⁷³

However, information that might tend to incriminate the person or make the person liable to a penalty is not admissible against the person in any court proceedings in Queensland with a view to the person's punishment for an alleged offence, except proceedings in respect of an offence under the Act or proceedings in respect of an offence in connection with verification of the information or answer by oath or affirmation.⁶⁷⁴

The Department of Natural Resources and Mines has advised the Commission that, as some miners wish to pay as little as possible by way of royalties, there are frequently attempts to lodge misleading royalty returns. Although the Minister can request a miner to provide information or to answer questions relating to the miner's liability to pay royalty, the determination of

664 *Mineral Resources Act 1989* (Qld) s 2(e).

665 *Mineral Resources Act 1989* (Qld) s 8.

666 *Mineral Resources Act 1989* (Qld) s 320(1).

667 *Mineral Resources Act 1989* (Qld) s 320(4).

668 *Mineral Resources Act 1989* (Qld) s 320(5).

669 *Mineral Resources Act 1989* (Qld) s 326(1).

670 *Mineral Resources Act 1989* (Qld) s 327(1)(e).

671 *Mineral Resources Act 1989* (Qld) s 327(1)(f).

672 *Mineral Resources Act 1989* (Qld) s 328(1).

673 *Mineral Resources Act 1989* (Qld) s 328(3).

674 *Mineral Resources Act 1989* (Qld) s 328(4).

some miners to avoid paying makes it difficult to ensure compliance. Accordingly, the Minister has need of sanctions to enforce compliance with royalty provisions. In the view of the Department, as the primary objective of the provisions is to establish the correct liability to pay royalty to the State for mineral produced and to collect the royalty payable, the abrogation of the privilege against self-incrimination is necessary to ensure compliance and thus to protect the revenue of the State received from mining. The provision of a use immunity is considered to provide a balance between the rights of the citizen and the need to establish the correct liability.⁶⁷⁵

(iii) *Petroleum (Submerged Lands) Act 1982 (Qld)*

The *Petroleum (Submerged Lands) Act 1982 (Qld)* regulates off shore petroleum exploration and recovery operations.

Under the Act, if the relevant Minister or an inspector appointed under the Act⁶⁷⁶ has reason to believe that a person is capable of giving information or producing documents relating to the administration of the Act, the Minister may require the person to furnish information in writing or to attend to answer questions or produce specified documents.⁶⁷⁷

A person must not fail to comply with the Minister's requirement,⁶⁷⁸ and is not excused from furnishing information, answering questions or producing documents on the ground of self-incrimination or exposure to penalty,⁶⁷⁹ but the information furnished or answer given is not admissible in evidence against the person in proceedings other than proceedings about the falsity or the misleading nature of the information, document or statement.⁶⁸⁰

The Department of Natural Resources and Mines has advised the Commission that these provisions, which have never been put to use, were inserted to mirror Commonwealth legislation. However, the *Petroleum (Submerged Lands) Act 1982 (Qld)* is due for repeal or replacement as the Commonwealth government is looking to take over all off shore safety provisions under the auspices of the National Offshore Petroleum Safety Authority.⁶⁸¹

675 Letter to the Commission from the Department of Natural Resources and Mines dated 19 May 2003.

676 *Petroleum (Submerged Lands) Act 1982 (Qld)* s 125.

677 *Petroleum (Submerged Lands) Act 1982 (Qld)* s 115(1).

678 *Petroleum (Submerged Lands) Act 1982 (Qld)* s 117(a).

679 *Petroleum (Submerged Lands) Act 1982 (Qld)* s 115(2).

680 *Petroleum (Submerged Lands) Act 1982 (Qld)* ss 115(2), 117(b), (c).

681 Letter to the Commission from the Department of Natural Resources and Mines dated 21 March 2003.

(iv) **Water Act 2000 (Qld)**

The *Water Act 2000* (Qld) provides for the sustainable management of water resources, and for a regulatory framework for providing water and sewerage services. It establishes and provides for the operation of water authorities.

The Act allows for the public examination of a person if it appears to the Attorney-General that a person who has been concerned, or taken part, in a water authority's management, administration or affairs has been, or may have been, guilty of fraud, negligence, default, breach of trust or breach of duty or other misconduct in relation to the authority.⁶⁸² It applies also if it appears to the Attorney-General that a person may be capable of giving information in relation to a water authority's management, administration or affairs.⁶⁸³

The Attorney-General may apply to the Supreme Court or the District Court for an order that the person attend to be examined on oath on any matters relating to the water authority's management, administration or affairs.⁶⁸⁴ If such an order is granted, it is not an excuse for the person to refuse to answer a question at the examination that the answer might tend to incriminate the person or make the person liable to a penalty.⁶⁸⁵

However, if the person objects to answering the question on the ground of self-incrimination, the answer is not admissible in evidence against the person in a criminal proceeding or in a proceeding for the imposition of a penalty, except for a proceeding for an offence against the abrogation provision itself or a proceeding relating to the falsity of an answer given at the examination.⁶⁸⁶

The Department of Natural Resources and Mines has advised the Commission that the abrogation of the privilege against self-incrimination was designed to allow the Chief Executive of the Department, as a regulator of water authorities supplying water to the public (being essential public infrastructure), to compel information to be provided by persons involved in the management, administration or affairs of a water authority. Because such persons may include directors of water supply companies, the use immunity was included to allow such persons to give information about the operation of

682 *Water Act 2000* (Qld) s 617(1)(a).

683 *Water Act 2000* (Qld) s 617(1)(b).

684 *Water Act 2000* (Qld) s 617(2), (3).

685 *Water Act 2000* (Qld) s 617(13).

686 *Water Act 2000* (Qld) s 617(14), (15).

the company without fear that they themselves will be prosecuted, while still allowing the Chief Executive to take action against the water authority itself.⁶⁸⁷

(h) Department of the Premier and Cabinet

(i) *Crime and Misconduct Act 2001 (Qld)*

The purposes of the *Crime and Misconduct Act 2001 (Qld)* are to combat and reduce the incidence of major crime,⁶⁸⁸ and to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector.⁶⁸⁹ The Act's purposes are achieved primarily by the establishment of a permanent commission called the Crime and Misconduct Commission (CMC).⁶⁹⁰

The Act contains a number of provisions abrogating the privilege against self-incrimination. Some of these provisions apply to a person required to give information in relation to an investigation carried out by the CMC, while others relate to the investigation of the operation of the CMC itself.

A. Crime and misconduct investigations

To enable the CMC to achieve its objectives, the Act confers it with investigative powers with respect to major crime⁶⁹¹ and to serious misconduct in units of public administration.⁶⁹²

The CMC has a crime function⁶⁹³ to conduct investigations⁶⁹⁴ and to gather evidence for the prosecution of persons for offences⁶⁹⁵ and for the recovery of the proceeds of major crime.⁶⁹⁶ It also has misconduct functions⁶⁹⁷ which

687 Letter to the Chairperson of the Commission from the Director-General of the Department of Natural Resources and Mines dated 11 October 2002.

688 *Crime and Misconduct Act 2001 (Qld)* s 4(1)(a).

689 *Crime and Misconduct Act 2001 (Qld)* s 4(1)(b).

690 *Crime and Misconduct Act 2001 (Qld)* s 5(1).

691 *Crime and Misconduct Act 2001 (Qld)* s 5(2).

692 *Crime and Misconduct Act 2001 (Qld)* s 5(3).

693 *Crime and Misconduct Act 2001 (Qld)* s 25.

694 *Crime and Misconduct Act 2001 (Qld)* s 26(a).

695 *Crime and Misconduct Act 2001 (Qld)* s 26(b)(i).

696 *Crime and Misconduct Act 2001 (Qld)* s 26(b)(ii).

697 *Crime and Misconduct Act 2001 (Qld)* s 33.

include investigating public sector misconduct⁶⁹⁸ and gathering evidence for the prosecution of offences or for disciplinary proceedings.⁶⁹⁹

The CMC's investigative powers, in relation to both its crime and misconduct functions, include the ability to require information to be given to a CMC officer⁷⁰⁰ and to hold hearings.⁷⁰¹

Requirement to give information to a CMC officer

The Act gives the chairperson of the CMC certain powers to require a person to produce documents⁷⁰² or provide information⁷⁰³ to an identified CMC officer.⁷⁰⁴

A person who is required to provide an oral or written statement of information or to produce a document or thing for a misconduct investigation must comply with the requirement.⁷⁰⁵ It is an offence not to comply with the requirement,⁷⁰⁶ unless the information, document or thing is subject to privilege.⁷⁰⁷ However, in the context of a misconduct investigation, the term "privilege" does not include the privilege against self-incrimination.⁷⁰⁸ If the person objects to answering a question on the ground of self-incrimination, the answer cannot be used in evidence against the person without the person's consent in any civil, criminal or administrative proceeding other than:

- a proceeding about the falsity or misleading nature of the evidence;
- a proceeding for an offence against the Act; or
- a proceeding for contempt of a person conducting the hearing.⁷⁰⁹

698 *Crime and Misconduct Act 2001* (Qld) s 35(1)(f), (g).

699 *Crime and Misconduct Act 2001* (Qld) s 35(1)(h).

700 *Crime and Misconduct Act 2001* (Qld) ss 72, 74, 75.

701 *Crime and Misconduct Act 2001* (Qld) s 176.

702 *Crime and Misconduct Act 2001* (Qld) ss 72(2)(b), (2)(c), (3)(b), 74(2), 75(2)(b), (c).

703 *Crime and Misconduct Act 2001* (Qld) ss 72(2)(a), 75(2)(a).

704 If the requirement is made for the purpose of a crime investigation, there is no abrogation of the privilege against self-incrimination: *Crime and Misconduct Act 2001* (Qld) s 74(5), (7), Schedule 2 (definition of "privilege").

705 *Crime and Misconduct Act 2001* (Qld) s 75(3).

706 *Crime and Misconduct Act 2001* (Qld) s 75(3).

707 *Crime and Misconduct Act 2001* (Qld) s 75(5)(a).

708 *Crime and Misconduct Act 2001* (Qld) Schedule 2 (definition of "privilege").

709 *Crime and Misconduct Act 2001* (Qld) s 197. The immunity conferred by s 197 does not apply to documents. The position with respect to documents is discussed in Chapter 4 of this Discussion Paper.

CMC hearings

The Act also provides that the CMC may authorise the holding of a hearing in relation to any matter relevant to the performance of its functions.⁷¹⁰

A person who has been issued with an attendance notice⁷¹¹ requiring the person to attend a hearing in a crime investigation and to produce a stated document must produce the document at the hearing unless the person has a reasonable excuse.⁷¹² A claim of privilege against self-incrimination is not a reasonable excuse.⁷¹³ A witness at such a hearing must answer a question put to the witness,⁷¹⁴ and is not entitled to refuse to answer on the ground of self-incrimination.⁷¹⁵ However, if the person objects to answering a question or producing a document on the ground of self-incrimination, the answer or document cannot be used in evidence against the person without the person's consent in any civil, criminal or administrative proceeding other than:

- a proceeding about the falsity or misleading nature of the evidence;
- a proceeding for an offence against the Act;
- a proceeding for contempt of a person conducting the hearing; or
- in the case of a document, a civil proceeding about a right or liability conferred or imposed by the document.⁷¹⁶

A witness who has been required by an attendance notice to appear at a misconduct hearing⁷¹⁷ must answer a question put to the person⁷¹⁸ and is not entitled to refuse to answer on the ground of the privilege against self-incrimination.⁷¹⁹ However, if the person objects to answering a question on the ground of self-incrimination, the person's answer cannot be used in evidence against the person without the person's consent in any civil, criminal or administrative proceeding other than:

710 *Crime and Misconduct Act 2001* (Qld) s 176.

711 *Crime and Misconduct Act 2001* (Qld) s 82.

712 *Crime and Misconduct Act 2001* (Qld) s 185(1)(b).

713 *Crime and Misconduct Act 2001* (Qld) s 185(2).

714 *Crime and Misconduct Act 2001* (Qld) s 190(1).

715 *Crime and Misconduct Act 2001* (Qld) s 190(2).

716 *Crime and Misconduct Act 2001* (Qld) s 197.

717 *Crime and Misconduct Act 2001* (Qld) s 82(1)(a), (2)(a).

718 The position with respect to the production of documents at a misconduct hearing is discussed in Chapter 4 of this Discussion Paper.

719 *Crime and Misconduct Act 2001* (Qld) s 192(1), (2).

- a proceeding about the falsity or misleading nature of the evidence;
- a proceeding for an offence against the Act; or
- a proceeding for contempt of a person conducting the hearing.⁷²⁰

The Department of the Premier and Cabinet acknowledges that a number of the powers conferred on the CMC by the *Crime and Misconduct Act 2001* (Qld) may intrude on the rights and liberties of individuals. However, in the view of the Department, these powers are justified on the basis of the CMC's important functions.⁷²¹

The Department considers that these abrogation provisions should continue, since the CMC's power to compel the provision of information or access to documents or other things is limited to the investigation of the most serious crimes and is critical to the effective functioning of the CMC to combat and reduce the incidence of major crime. The Department also notes the existence of safeguards in relation to the abrogation by the Act of the privilege against self-incrimination. These safeguards include a right of appeal to the Supreme Court in certain circumstances, the conferral of a use immunity on answers and information given and on some documents produced under compulsion, and accountability mechanisms imposed on the CMC, including the Parliamentary Crime and Misconduct Committee established under the Act.⁷²²

It will be noted that there is a difference between the abrogation provisions that relate to crime investigations and those that relate to misconduct investigations. According to the CMC, the difference arose from its creation as the result of a merger between the former Criminal Justice Commission (CJC) and the former Queensland Crime Commission (QCC), each of which had previously operated under its own legislation and had its own regime for the conduct of investigations and claims of privilege.⁷²³

It was the Government's policy generally in respect of the merger project that the powers which the CJC and the QCC had before the merger should not be increased or decreased during the process. For this reason, the differences between the powers which could be exercised for the investigation of crime and those which could be exercised for investigation of misconduct were preserved in the Act, as were the different privileges available in respect of those powers.

In relation to crime investigations the CMC expressed the view that the continued abrogation of the privilege against self-incrimination is justified,

720 *Crime and Misconduct Act 2001* (Qld) s 197.

721 Letter to the Chairperson of the Commission from the Acting Director-General of the Department of the Premier and Cabinet dated 11 October 2002.

722 Ibid.

723 Letter to the Commission from the Chairperson of the Crime and Misconduct Commission dated 3 December 2002.

especially as the CMC's investigative jurisdiction is limited to major crime, including organised crime and paedophilia. The CMC noted that, as criminal networks in Australia become more sophisticated, traditional methods of investigation are proving increasingly ineffective. It concluded that abrogation of the privilege, coupled with a restriction on the use that may be made of evidence obtained through the abrogation, strikes the right balance between the right to silence traditionally enjoyed by suspects and the public interest in the successful investigation of organised crime and paedophilia.⁷²⁴

The CMC was also of the view that, in relation to misconduct investigations, the continued abrogation of the privilege against self-incrimination is essential if it is to carry out its statutory functions effectively:⁷²⁵

Official misconduct often involves elaborate and sophisticated schemes, and may concern the conduct of senior public officials or police officers. ... If prospective witnesses can simply refuse to answer questions or produce documents or things on the grounds of the privilege against self-incrimination, the CMC would be severely hampered in carrying out its important public functions.

On the question of the kind of immunity, if any, that should be provided as compensation for the abrogation, the CMC considered that it would be difficult to investigate information obtained under its compulsory powers if all derivative evidence was inadmissible in other proceedings. It suggested that the inclusion of a derivative use immunity, in relation to either crime or misconduct investigations, could actually discourage the use of the CMC's hearing power and other investigative powers, because of the potential for arguments to be raised that information later uncovered was inadmissible as it was derived from information discovered through those processes.

B. Investigation of CMC operations

The Parliamentary Crime and Misconduct Committee is established under the Act⁷²⁶ to monitor and review the performance of the CMC's functions⁷²⁷ and to report to the Legislative Assembly on certain matters relating to the CMC.⁷²⁸

The Act also provides for the appointment of a parliamentary commissioner,⁷²⁹ whose functions include investigating various aspects of the

724 *Ibid.*

725 *Ibid.*

726 *Crime and Misconduct Act 2001* (Qld) s 291.

727 *Crime and Misconduct Act 2001* (Qld) s 292(a).

728 *Crime and Misconduct Act 2001* (Qld) s 292(b).

729 *Crime and Misconduct Act 2001* (Qld) s 303.

operations of the CMC.⁷³⁰ The parliamentary commissioner has a general power to do all things necessary or convenient for the performance of the parliamentary commissioner's functions.⁷³¹ Specific powers conferred on the parliamentary commissioner include the authority to require a CMC officer or a public official to assist in an investigation.⁷³² The parliamentary commissioner may also conduct hearings to obtain information.⁷³³

Holding a hearing

The parliamentary committee may, in certain circumstances, authorise the parliamentary commissioner to hold hearings,⁷³⁴ which are closed to the public,⁷³⁵ to obtain information about a matter under investigation. In such a situation, the parliamentary commissioner may require an officer of the CMC or a person who holds or held an appointment in a unit of public administration (the "person") to appear at the hearing to be examined on oath or to produce a document.⁷³⁶

The person must comply with the notice,⁷³⁷ and must answer a question put to the person by the parliamentary commissioner at the hearing or produce a document if required to do so by the parliamentary commissioner.⁷³⁸ Section 318(8) of the Act provides that the person is not entitled to remain silent, to refuse to answer a question or to fail to produce the document on the grounds of self-incrimination.⁷³⁹

However, section 318(9) further provides that the evidence given or produced under compulsion cannot be used against the person in any subsequent civil or criminal proceeding other than a proceeding for an offence about the falsity of the answer or a disciplinary action brought against the officer.⁷⁴⁰

730 *Crime and Misconduct Act 2001* (Qld) s 314.

731 *Crime and Misconduct Act 2001* (Qld) s 317(1).

732 *Crime and Misconduct Act 2001* (Qld) s 317(2), (3), (6). In relation to a public official, there is no abrogation of the privilege. In relation to a CMC officer, the privilege against self-incrimination is abrogated by section 322 of the Act, which does not confer any immunity for documents produced or information provided. See pp 47 and 93 of this Discussion Paper for a discussion of section 322.

733 *Crime and Misconduct Act 2001* (Qld) s 318.

734 *Crime and Misconduct Act 2001* (Qld) s 318(1), (2).

735 *Crime and Misconduct Act 2001* (Qld) s 318(10).

736 *Crime and Misconduct Act 2001* (Qld) s 318(4).

737 *Crime and Misconduct Act 2001* (Qld) s 318(5).

738 *Crime and Misconduct Act 2001* (Qld) s 318(7).

739 *Crime and Misconduct Act 2001* (Qld) s 318(8).

740 *Crime and Misconduct Act 2001* (Qld) s 318(9).

According to the Department of the Premier and Cabinet, these provisions are necessary and should be retained as part of the system of strict safeguards to ensure the accountability of the CMC.⁷⁴¹

C. Legislative inconsistency

Whilst section 318(9) appears to confer a use immunity on the evidence that a CMC officer is required to give or produce at a hearing held by the parliamentary commissioner, a question arises as to the relationship between that provision and section 322 of the Act.⁷⁴²

Section 322 abrogates the privilege against self-incrimination for the CMC itself and for CMC officers in relation to an investigation by the parliamentary commissioner, and in relation to the production of documents and the giving of evidence. It does not confer any immunity.

Section 322 obviously applies to information given to the parliamentary commissioner by a CMC officer under section 317 of the Act, which sets out the powers of the parliamentary commissioner. However, section 317 refers only to the production of documents⁷⁴³ and the giving of “reasonable help”⁷⁴⁴ to the parliamentary commissioner. It does not refer to the giving of evidence. It is therefore arguable that section 322 applies also to evidence given by a CMC officer at a hearing conducted by the parliamentary commissioner under section 318. To the extent that both sections 318 and 322 may apply to information provided under compulsion by a CMC officer, and that one provides a use immunity while the other does not, the provisions appear to be inconsistent.

(ii) *Financial Administration and Audit Act 1977 (Qld)*

The *Financial Administration and Audit Act 1977 (Qld)* regulates the administration and management of public accounts in Queensland. It contains provisions setting out the powers available to the Auditor-General and other authorised auditors to obtain information relevant to the conduct of audits of public accounts and of the accounts of public entities. Some of these provisions abrogate the privilege against self-incrimination.

741 Letter to the Chairperson of the Commission from the Acting Director-General of the Department of the Premier and Cabinet dated 11 October 2002.

742 Section 322 is discussed at p 47 of this Discussion Paper.

743 *Crime and Misconduct Act 2001 (Qld)* s 317(2)(a).

744 *Crime and Misconduct Act 2001 (Qld)* s 317(2)(b).

The Act authorises an auditor to enter premises,⁷⁴⁵ make inspections,⁷⁴⁶ take extracts and make copies from documents⁷⁴⁷ and to require a person to give reasonable assistance in relation to the exercise of these powers.⁷⁴⁸ A person must not, without reasonable excuse, fail to comply with such a requirement.⁷⁴⁹ It is not a reasonable excuse for failing to comply with the requirement that compliance might tend to incriminate the person.⁷⁵⁰

However, the fact that a document was produced by the person in response to the requirement is not admissible in evidence against the person in a criminal proceeding other than a proceeding relating to the falsity of the document, provided that the person objected to producing the document on the grounds of self-incrimination and that production of the document might in fact tend to incriminate the person.⁷⁵¹

If it is reasonably necessary for the purposes of an audit, an authorised auditor may, by written notice, require a person to attend before an authorised auditor to answer questions and may also require the person to produce documents belonging to or in the custody or control of the person.⁷⁵² A person must not, without reasonable excuse, fail to comply with the notice.⁷⁵³ It is not a reasonable excuse for failing to comply that compliance with the notice might tend to incriminate the person.⁷⁵⁴

However, the fact that a person produced a document in compliance with the notice is not admissible in evidence against the person in a criminal proceeding other than a proceeding relating to the falsity of the document, provided that the person objected to producing the document on the grounds of self-incrimination and that production of the document might in fact tend to incriminate the person.⁷⁵⁵

745 *Financial Administration and Audit Act 1977* (Qld) s 85(3)(a).

746 *Financial Administration and Audit Act 1977* (Qld) s 85(3)(b).

747 *Financial Administration and Audit Act 1977* (Qld) s 85(3)(c).

748 *Financial Administration and Audit Act 1977* (Qld) s 85(3)(e).

749 *Financial Administration and Audit Act 1977* (Qld) s 85(4).

750 *Financial Administration and Audit Act 1977* (Qld) s 85(5).

751 *Financial Administration and Audit Act 1977* (Qld) s 85(7).

752 *Financial Administration and Audit Act 1977* (Qld) s 87(1).

753 *Financial Administration and Audit Act 1977* (Qld) s 87(7).

754 *Financial Administration and Audit Act 1977* (Qld) s 87(8).

755 *Financial Administration and Audit Act 1977* (Qld) s 87(10). The immunity conferred in relation to answers to questions is discussed at pp 136-137 of this Discussion Paper.

The Department of the Premier and Cabinet has advised the Commission that the Auditor-General and other authorised auditors require the power to compel the provision of information and access to documents and property relevant to an audit, even where that power might abrogate the privilege against self-incrimination, in order to conduct precise and comprehensive audits of public accounts and the accounts of all public sector entities. The Department is of the view that limitations on the use that may be made of information provided by a person under compulsion provides a sufficient safeguard.⁷⁵⁶

The Auditor-General has advised the Commission that the relevant provisions were inserted into the legislation in 1993 as part of a suite of amendments resulting from a review of public sector auditing by the Electoral and Administrative Review Commission. The Auditor-General noted that, according to the second reading speech accompanying the *Audit Legislation Amendment Bill 1992*, the intent of the provisions was to strengthen the Auditor-General's powers of access to information, while also providing for appropriate checks and balances in the exercise of those powers. It is the view of the Auditor-General that, given the nature of the role, it is critical that the provisions remain unchanged.⁷⁵⁷

(iii) ***Parliament of Queensland Act 2001 (Qld)***

Under the *Parliament of Queensland Act 2001 (Qld)*, a person may be required, in certain circumstances, to appear before the Legislative Assembly or before a parliamentary committee⁷⁵⁸ and to answer questions or to produce documents.⁷⁵⁹ The person may object on the grounds of self-incrimination⁷⁶⁰ and, in determining whether to uphold the objection, the Assembly must weigh the public interest in having the questions answered against the public interest in providing appropriate protection to individuals against self-incrimination.⁷⁶¹

If the Assembly orders the person to answer the question or produce the document, the evidence given under compulsion is protected by a use immunity. Evidence may not be given of an answer before a committee or of the fact that the person produced a document to a committee in any proceeding other than:⁷⁶²

756 Letter to the Chairperson of the Commission from the Acting Director-General of the Department of the Premier and Cabinet dated 11 October 2002.

757 Letter to the Chairperson of the Commission from the Auditor-General dated 9 October 2002.

758 *Parliament of Queensland Act 2001 (Qld)* s 25.

759 *Parliament of Queensland Act 2001 (Qld)* ss 32, 33.

760 *Parliament of Queensland Act 2001 (Qld)* s 34.

761 *Parliament of Queensland Act 2001 (Qld)* s 35.

762 *Parliament of Queensland Act 2001 (Qld)* s 36.

- a proceeding before the Assembly or a parliamentary committee;
- a criminal proceeding in relation to the falsity, or the misleading, threatening or offensive nature of the answer or document; or
- a criminal proceeding in relation to the person's refusal to comply with the order of the Assembly.

The Department of the Premier and Cabinet has advised the Commission that the Assembly and parliamentary committees need the power to compel the provision of information and access to documents, even where that power might abrogate the privilege against self-incrimination, in order to carry out their responsibilities to investigate and preserve the accountability of the executive government to the Parliament. The Department considers that, in view of the importance of the provisions, and the safeguard provided by the use immunity, the provisions should continue.⁷⁶³

(i) Queensland Health

(i) *Health Rights Commission Act 1991 (Qld)*

The objectives of the *Health Rights Commission Act 1991 (Qld)* include to provide for the oversight, review and improvement of health services by establishing an accessible, independent facility to preserve and promote health rights and to participate in the resolution of health service complaints.⁷⁶⁴

The Act establishes the Health Rights Commission⁷⁶⁵ and provides for the appointment of a Health Rights Commissioner.⁷⁶⁶ The Health Rights Commissioner's role includes a number of functions involving the assessment, investigation and resolution of health service complaints.⁷⁶⁷

The Act confers certain powers in relation to obtaining information. The Health Rights Commissioner may, by notice given to a person, require the person to give specified information, to attend to answer questions or to produce a specified record in the person's possession.⁷⁶⁸ The Health Rights Commissioner may also summon a person to an inquiry hearing to give evidence or to produce a specified record that is in the person's

763 Letter to the Chairperson of the Commission from the Acting Director-General of the Department of the Premier and Cabinet dated 11 October 2002.

764 *Health Rights Commission Act 1991 (Qld)* s 4(a).

765 *Health Rights Commission Act 1991 (Qld)* s 7.

766 *Health Rights Commission Act 1991 (Qld)* s 9.

767 *Health Rights Commission Act 1991 (Qld)* s 10.

768 *Health Rights Commission Act 1991 (Qld)* s 96(1).

possession.⁷⁶⁹ A person authorised by the Health Rights Commissioner to exercise certain powers conferred by the Act⁷⁷⁰ may enter premises and search any part of the premises, inspect or examine anything on the premises, make inquiries on the premises and require the occupier or any person on the premises to give the authorised person reasonable assistance in the exercise of these powers.⁷⁷¹

In each case, the person of whom the requirement is made must not, without reasonable excuse, fail to comply.⁷⁷² Provided that the person claims the privilege,⁷⁷³ it is a reasonable excuse that compliance might tend to incriminate the person of an indictable offence.⁷⁷⁴

However, there is no privilege against self-incrimination in relation to non-indictable offences or the imposition of a penalty, although there are limits as to the use that can be made of information obtained as a result of the exercise of these powers. Information obtained in response to a notice to provide information is not admissible in evidence against the person in a proceeding other than a disciplinary proceeding before a disciplinary body or a prosecution under the Act for an offence involving the giving of the information.⁷⁷⁵ Evidence given or a record produced by a person at an inquiry in response to a summons is not admissible in evidence against the person in a proceeding other than a prosecution for an offence under certain provisions of the Act relating to contempt of the inquiry or involving the giving of the information, or a prosecution under Chapter 16 of the *Criminal Code*.⁷⁷⁶ Information provided in response to a requirement by an authorised person to provide reasonable assistance is not admissible in evidence against the person in any proceedings other than a prosecution under the Act for an offence involving the giving of the information.⁷⁷⁷

Queensland Health has advised the Commission that it is unclear why the provision abrogates the privilege against self-incrimination in relation to non-indictable offences.⁷⁷⁸ The Department suggested that, as health service

769 *Health Rights Commission Act 1991* (Qld) s 105(1).

770 *Health Rights Commission Act 1991* (Qld) s 24.

771 *Health Rights Commission Act 1991* (Qld) s 115(1).

772 *Health Rights Commission Act 1991* (Qld) ss 99, 107, 115(2).

773 *Health Rights Commission Act 1991* (Qld) s 121(1).

774 *Health Rights Commission Act 1991* (Qld) s 121(2).

775 *Health Rights Commission Act 1991* (Qld) s 96(5).

776 *Health Rights Commission Act 1991* (Qld) s 105(2). Chapter 16 of the *Criminal Code* (Qld) deals with offences relating to the administration of justice.

777 *Health Rights Commission Act 1991* (Qld) s 115(3).

778 Letter to the Commission from Queensland Health dated 30 January 2003.

complaints investigated under the Act can be of a very serious nature, it may be that the public interest in enabling information to be obtained under the Act's investigative powers was considered sufficient to outweigh the need to confer protection against self-incrimination in respect of minor offences. However, the Department noted that the provision is inconsistent with recently enacted Health portfolio legislation containing investigative powers dealing with similar subject matter to that dealt with in the Act.⁷⁷⁹

(j) Queensland Police Service

(i) Weapons Act 1990 (Qld)

The purpose of the *Weapons Act 1990* (Qld) is to prevent the misuse of guns.⁷⁸⁰ The principles underlying the Act are that weapon possession and use are subordinate to the need to ensure public and individual safety, and that public and individual safety is improved by imposing strict controls on the possession of weapons and requiring the safe and secure storage and carriage of weapons.⁷⁸¹

The Act implements a scheme for licensing the possession of firearms.⁷⁸² It creates various categories of licence⁷⁸³ and prescribes the procedure for applying for a licence.⁷⁸⁴ An application must be accompanied by certain information.⁷⁸⁵ The Act also prescribes a number of conditions that a person must satisfy in order to obtain a licence. One of these conditions is that a person must be a fit and proper person to hold a licence.⁷⁸⁶ It is also a condition of each licence that a licensee must give notification of the happening of certain events.⁷⁸⁷

The Act was recently amended by the *Weapons (Handgun and Trafficking) Amendment Act 2003* (Qld).⁷⁸⁸ The relevant amendments relate to licensed dealers. The effect of the amendments is that a licensed dealer will be

⁷⁷⁹ For example, *Health Practitioners (Professional Standards) Act 1999* (Qld) s 80.

⁷⁸⁰ *Weapons Act 1990* (Qld) s 3(2).

⁷⁸¹ *Weapons Act 1990* (Qld) s 3(1).

⁷⁸² *Weapons Act 1990* (Qld) Part 2.

⁷⁸³ *Weapons Act 1990* (Qld) s 12.

⁷⁸⁴ *Weapons Act 1990* (Qld) s 13.

⁷⁸⁵ *Weapons Act 1990* (Qld) s 13(1)(c)(iii), (iv).

⁷⁸⁶ *Weapons Act 1990* (Qld) s 10(2)(e).

⁷⁸⁷ *Weapons Act 1990* (Qld) s 24(1).

⁷⁸⁸ The *Weapons (Handgun and Trafficking) Amendment Act 2003* (Qld) was passed on 28 May 2003 and assented to on 2 June 2003. The relevant provisions commenced on 1 July 2003.

deemed not to be a fit and proper person to hold a licence unless each of the dealer's associates is a fit and proper person to be an associate of a licensed dealer.⁷⁸⁹ A licensed dealer will also be required to give notification of a change in the dealer's associates.⁷⁹⁰ An authorised officer will be able to require a licensed dealer to provide a declaration to the authorised officer of any associates of the dealer within a prescribed time. It will be an offence for a licensed dealer to fail to give a declaration required under the section. However, a dealer who makes a declaration to an authorised officer about the dealer's associates will be immune from prosecution for failing to disclose that information before the authorised officer made the requirement. It will not be a reasonable excuse for failing to give a declaration that giving the declaration may incriminate the licensed dealer for an offence for which the dealer is immune from prosecution.⁷⁹¹

(k) Queensland Transport

(i) *Transport Infrastructure Act 1994 (Qld)*

Under the *Transport Infrastructure Act 1994 (Qld)*, the Minister for Transport may constitute a board of inquiry to investigate and report on an incident that the Minister considers to be a serious incident that has happened on or involving a railway.⁷⁹²

The chairperson of the board of inquiry may, by written notice, require a person to attend the inquiry to give evidence or to produce stated documents.⁷⁹³ A person appearing as a witness at the inquiry must not fail, without reasonable excuse, to answer a question that the person is required to answer by a member of the board or to produce a document that the person has been required by notice to produce.⁷⁹⁴ The person is not excused from answering a question or producing a document on the ground that the answer or the production of the document might tend to incriminate the person.⁷⁹⁵

However, provided that the person objects to answering the question or producing the document on the grounds of self-incrimination and provided

789 *Weapons Act 1990 (Qld)* s 10B(3), inserted by *Weapons (Handgun and Trafficking) Amendment Act 2003 (Qld)* s 6.

790 *Weapons Act 1990 (Qld)* s 24(2)(e), inserted by *Weapons (Handgun and Trafficking) Amendment Act 2003 (Qld)* s 17(3).

791 *Weapons Act 1990 (Qld)* s 25A, inserted by *Weapons (Handgun and Trafficking) Amendment Act 2003 (Qld)* s 19.

792 *Transport Infrastructure Act 1994 (Qld)* ss 110, 111.

793 *Transport Infrastructure Act 1994 (Qld)* s 122(1).

794 *Transport Infrastructure Act 1994 (Qld)* s 125(2).

795 *Transport Infrastructure Act 1994 (Qld)* s 126(1).

also that the answer or the production of the document might in fact tend to incriminate the person, neither the answer nor the fact that the person has produced the document is admissible against the person in a criminal proceeding other than a proceeding about the falsity or the misleading nature of the answer or the document.⁷⁹⁶

Queensland Transport has advised the Commission that, because railway incidents may involve dangerous situations, it is important for the department to be able to quickly assess the appropriate and safe course of action in the event of an incident occurring.⁷⁹⁷ In the view of the Department, the abrogation of the privilege against self-incrimination is justified in such circumstances because the ability to act quickly hinges on being able to obtain information rapidly.

The Department considers that, since the abrogation provision is contained in legislation dealing with dangerous situations and relates to the ability to obtain information in order to minimise or prevent these dangerous situations, the continued existence of the abrogation is necessary to uphold the objectives of the Act. While recognising the importance of the privilege against self-incrimination, the Department believes that the inclusion of the immunity against the use of information provided under compulsion achieves the appropriate balance between the fundamental right to silence and the right of the Department to obtain information that is vital to the prevention of dangerous situations.

(ii) *Transport Operations (Marine Pollution) Act 1995 (Qld)*

The *Transport Operations (Marine Pollution) Act 1995 (Qld)* grants certain powers to authorised officers in relation to the prevention of, and mitigation of damage caused by, marine pollution.

The Act authorises the searching⁷⁹⁸ and inspection⁷⁹⁹ of ships or places, the taking of samples,⁸⁰⁰ the recording, measuring, testing or analysis of the release of pollutants into coastal waters from a ship,⁸⁰¹ and the establishment of a program for monitoring the ship's release of pollutants into coastal waters.⁸⁰² In addition, it provides that an authorised officer may require the

796 *Transport Infrastructure Act 1994 (Qld)* s 126(2).

797 Letter to the Chairperson of the Commission from the Director-General of Queensland Transport dated 28 October 2002.

798 *Transport Operations (Marine Pollution) Act 1995 (Qld)* s 81(1)(a).

799 *Transport Operations (Marine Pollution) Act 1995 (Qld)* s 81(1)(b).

800 *Transport Operations (Marine Pollution) Act 1995 (Qld)* s 81(1)(c).

801 *Transport Operations (Marine Pollution) Act 1995 (Qld)* s 81(1)(d).

802 *Transport Operations (Marine Pollution) Act 1995 (Qld)* s 81(1)(g).

ship's master, or any person on the ship, or any occupier of a place to give the officer reasonable help for the exercise of any of these powers.⁸⁰³

The Act also enables an authorised officer who is satisfied on reasonable grounds that a discharge of pollutant into coastal waters has happened or is likely to happen, and that urgent action is necessary to prevent or minimise the discharge and its effect on the environment, to take certain steps to deal with the emergency.⁸⁰⁴ Where the steps taken by an authorised officer in such an emergency include requiring a person to give reasonable help to exercise a power granted by section 81,⁸⁰⁵ the person must comply with the requirement unless the person has a reasonable excuse for not complying with it.⁸⁰⁶ If the help required is the answering of a question or the production of a document, it is not a reasonable excuse for the person to fail to answer the question or to produce the document that complying with the requirement might tend to incriminate the person.⁸⁰⁷

However, if the person objects to complying with the requirement on the grounds of self-incrimination, the answer or the production of the document is not admissible in evidence against the person in a prosecution for an offence against the Act,⁸⁰⁸ other than an offence relating to the production of false, or misleading or incomplete documents⁸⁰⁹ or to the giving of false or misleading information.⁸¹⁰

Queensland Transport has informed the Commission that the continued abrogation of the privilege against self-incrimination contained in the *Transport Operations (Marine Pollution) Act 1995* (Qld) is necessary because the ability to obtain relevant information, even if it is of a self-incriminatory nature, is important to uphold the objectives of the Act, which deals with the protection of a valuable resource, namely the marine environment. The Act gives effect to an international convention (known as MARPOL) for the prevention of pollution of the marine environment and coastlines by the discharge of ship-sourced pollutants. Its principal objective is to protect Queensland's marine and coastal environment by minimising deliberate and negligent discharges in coastal waters.

803 *Transport Operations (Marine Pollution) Act 1995* (Qld) s 81(1)(h).

804 *Transport Operations (Marine Pollution) Act 1995* (Qld) s 95.

805 *Transport Operations (Marine Pollution) Act 1995* (Qld) s 101(1).

806 *Transport Operations (Marine Pollution) Act 1995* (Qld) s 101(2).

807 *Transport Operations (Marine Pollution) Act 1995* (Qld) s 101(3).

808 *Transport Operations (Marine Pollution) Act 1995* (Qld) s 101(5).

809 *Transport Operations (Marine Pollution) Act 1995* (Qld) s 105.

810 *Transport Operations (Marine Pollution) Act 1995* (Qld) s 106.

While recognising the importance of the privilege against self-incrimination, the Department believes that the inclusion of the immunity against the use of information provided under compulsion achieves the appropriate balance between the fundamental right to silence and the right of the Department to obtain information that is vital to the prevention of dangerous situations.⁸¹¹

(iii) *Transport Operations (Marine Safety) Act 1994 (Qld)*

The purpose of the *Transport Operations (Marine Safety) Act 1994 (Qld)* is to provide government with a strategic overview of marine safety and related marine operational issues.⁸¹² It establishes a system under which marine safety and related marine operational issues can be effectively planned and efficiently managed,⁸¹³ influence can be exerted over marine safety and related marine operational issues in a way that contributes to overall transport efficiency,⁸¹⁴ and account is taken of the need to provide adequate levels of safety with an appropriate balance between safety and cost.⁸¹⁵

Under the Act, the Minister for Transport may establish a board of inquiry to investigate a marine incident.⁸¹⁶ The board of inquiry must inquire into the circumstances and probable causes of the relevant marine incident, and report its findings to the Minister.⁸¹⁷ A person called to appear as a witness at the inquiry is not excused from answering a question put to the person at the inquiry or producing a document at the inquiry on the ground that the answer or the production of the document might tend to incriminate the person.⁸¹⁸

However, neither the answer nor the fact that the person produced the document is admissible in evidence against the person in a criminal proceeding other than a proceeding about the falsity or misleading nature of the answer or document, provided that the person objected to answering the question or producing the document on the grounds of self-incrimination and

811 Letter to the Chairperson of the Commission from the Director-General of Queensland Transport dated 28 October 2002.

812 *Transport Operations (Marine Safety) Act 1994 (Qld)* s 3(2)(a).

813 *Transport Operations (Marine Safety) Act 1994 (Qld)* s 3(2)(b)(i).

814 *Transport Operations (Marine Safety) Act 1994 (Qld)* s 3(2)(b)(ii).

815 *Transport Operations (Marine Safety) Act 1994 (Qld)* s 3(2)(b)(iii).

816 *Transport Operations (Marine Safety) Act 1994 (Qld)* s 131(1). A “marine incident” is defined as an event causing or involving the loss of a person from a ship; the death of, or grievous bodily harm to, a person caused by a ship’s operations; the loss or presumed loss or abandonment of a ship; a collision with a ship; the stranding of a ship; material damage to a ship; material damage caused by a ship’s operations; danger caused to a person by a ship’s operations; danger of serious damage to a ship; or danger of serious damage to a structure caused by a ship’s operations: *Transport Operations (Marine Safety) Act 1994 (Qld)* s 123(1).

817 *Transport Operations (Marine Safety) Act 1994 (Qld)* s 132(1).

818 *Transport Operations (Marine Safety) Act 1994 (Qld)* s 147(1).

provided also that answering the question or producing the document might in fact tend to incriminate the person.⁸¹⁹

Queensland Transport has advised the Commission that the continued existence of the abrogation of the privilege against self-incrimination is considered necessary to obtain relevant information to uphold the objectives of the legislation - in this case the investigation of the causes of dangerous marine accidents for the purposes of improving marine safety and, where appropriate, avoiding similar future accidents by the imposition of safety obligations. In the view of the Department, regulation of the maritime industry to maintain marine safety enables the effectiveness and efficiency of the Queensland maritime industry to be further developed. While recognising the importance of the privilege against self-incrimination, the Department believes that the inclusion of the immunity against the use of information provided under compulsion achieves the appropriate balance between the fundamental right to silence and the right of the Department to obtain information that is vital to the prevention of dangerous situations.⁸²⁰

(iv) *Transport Operations (Road Use Management) Act 1995 (Qld)*

The purpose of the *Transport Operations (Road Use Management) Act 1995 (Qld)* is to provide for the effective and efficient management of road use in Queensland.⁸²¹ It establishes a scheme for managing the use of the State's roads that is intended, amongst other things, to promote the effective and efficient movement of people, goods and services and to improve road safety and the environmental impact of road use.⁸²² It allows for the identification of vehicles, drivers and road users; the establishment of performance standards for vehicles, drivers and road users; the establishment of rules for on-road behaviour; the monitoring of compliance with the provisions of the Act; the management of non-performing vehicles, drivers and road users; and the management of traffic to enhance safety and transport efficiency.⁸²³

The Act provides for the appointment of authorised officers,⁸²⁴ and grants them certain powers in relation to dangerous situations.⁸²⁵ An authorised officer who reasonably believes that a person may be able to provide

819 *Transport Operations (Marine Safety) Act 1994 (Qld)* s 147(2).

820 Letter to the Chairperson of the Commission from the Director-General of Queensland Transport dated 28 October 2002.

821 *Transport Operations (Road Use Management) Act 1995 (Qld)* s 3(1)(a).

822 *Transport Operations (Road Use Management) Act 1995 (Qld)* s 3(1)(b).

823 *Transport Operations (Road Use Management) Act 1995 (Qld)* s 3(2).

824 *Transport Operations (Road Use Management) Act 1995 (Qld)* s 20.

825 A "dangerous situation" is a situation involving the transportation of goods by road that is causing or is likely to cause imminent risk of the death of, or of significant injury to, a person; risk of significant harm to the environment; or risk of significant damage to property: *Transport Operations (Road Use Management) Act 1995 (Qld)* Schedule 4.

information or produce a document that will help to prevent the dangerous situation may require the person to give the information or to produce the document.⁸²⁶ The person must give the information or produce the document unless the person has a reasonable excuse.⁸²⁷ It is not a reasonable excuse that giving the information or providing the document might tend to incriminate the person.⁸²⁸

However, the information or document is not admissible in evidence against the person, other than a corporation, in criminal proceedings other than proceedings under the Act for making a false or misleading statement or for providing a false or misleading document.⁸²⁹

Queensland Transport has advised the Commission that the abrogation of the privilege against self-incrimination forms part of the national uniform dangerous goods legislation prepared as part of the 1992 Heads of Government Agreement. The purpose of the provision is to ensure that authorised persons are able to quickly and accurately assess dangerous situations and to enable rapid and appropriate responses.

In the view of the Department, the abrogation of the privilege is justified in this instance because many dangerous goods - for example sulphuric acid - are clear and odourless. This makes it difficult for an authorised person, without access to relevant information, to quickly assess the appropriate and safe course of action if an incident should occur. The granting of an immunity to a person who provides self-incriminating information achieves a balance between the right to silence and the right of the Department to obtain full information vital to the prevention of dangerous situations. The immunity applies unless the information provided has been false or misleading. The Department notes that, in a dangerous situation, false or misleading information can mean that the relevant authorities are not notified of the presence of dangerous goods or are incorrectly notified of the type of dangerous goods, thereby seriously hampering emergency response and putting lives at risk.

Queensland Transport considers that the continued existence of the provision is necessary to minimise the danger to the community and to emergency service personnel arising from the transport of dangerous goods by road.⁸³⁰

826 *Transport Operations (Road Use Management) Act 1995* (Qld) s 51B(1), (2).

827 *Transport Operations (Road Use Management) Act 1995* (Qld) s 51B(3).

828 *Transport Operations (Road Use Management) Act 1995* (Qld) s 51C(1).

829 *Transport Operations (Road Use Management) Act 1995* (Qld) ss 51C(2), 52, 53.

830 Letter to the Chairperson of the Commission from the Director-General of Queensland Transport dated 28 October 2002.

(l) Department of Tourism, Racing and Fair Trading**(i) *Business Names Act 1962 (Qld)***

The *Business Names Act 1962* (Qld) establishes a scheme to regulate the use of business names in Queensland. It provides that the name of a business must be registered unless it consists only of the names of the people carrying on the business.⁸³¹

Under the Act, the Registrar of Business Names⁸³² must keep a register of business names registered under the Act.⁸³³ The Registrar may require, by notice in writing, that a person provide information that the Registrar considers necessary to determine whether the person has complied with his or her obligations under the Act.⁸³⁴ The person must provide such information as it is within the person's power to provide and must not supply any information that the person knows to be false in any particular.⁸³⁵ It is not an excuse for not providing the required information that the information might tend to incriminate the person or make the person liable for a penalty.⁸³⁶ However, the information provided by the person is not admissible in evidence against the person in any criminal or civil proceedings except for proceedings under the Act relating to the falsity of the information.⁸³⁷

The Department of Tourism, Racing and Fair Trading has advised the Commission that the abrogation of the privilege against self-incrimination enables the Registrar to maintain control over the names of those who carry on a business, and over the lodgement of statements under the Act, and to maintain an accurate public register of business names. The accuracy of the register is important to enable the public to access the names of persons carrying on a business, either alone or in association with others, so that they are able to ascertain who they are dealing with and, where necessary, effect service and pursue legal action for consumer and business related matters.

The Department considers that the continued existence of the abrogation provision is necessary in the public interest to allow the Registrar to continue to maintain an accurate register.⁸³⁸

831 *Business Names Act 1962* (Qld) s 5.

832 *Business Names Act 1962* (Qld) s 4(1).

833 *Business Names Act 1962* (Qld) s 6(1).

834 *Business Names Act 1962* (Qld) s 13(1).

835 *Business Names Act 1962* (Qld) s 13(2).

836 *Business Names Act 1962* (Qld) s 13(3).

837 *Business Names Act 1962* (Qld) s 13(3).

838 Letter to the Chairperson of the Commission from the Director-General of the Department of Tourism, Racing and Fair Trading dated 5 November 2002.

(ii) **Commercial and Consumer Tribunal Act 2003 (Qld)**

The *Commercial and Consumer Tribunal Act 2003* (Qld) establishes the Commercial and Consumer Tribunal⁸³⁹ to deal with matters it is empowered to deal with under an empowering Act in a way that is just, fair, informal, cost efficient and speedy.⁸⁴⁰

“Empowering Act” means one of the following Acts:⁸⁴¹ *Architects Act 2002* (Qld); *Building Act 1975* (Qld); *Domestic Building Contracts Act 2000* (Qld); *Gaming Machine Act 1991* (Qld); *Liquor Act 1992* (Qld); *Pest Management Act 2001* (Qld); *Plumbing and Drainage Act 2002* (Qld); *Professional Engineers Act 2002* (Qld); *Property Agents and Motor Dealers Act 2000* (Qld); *Queensland Building Services Authority Act 1991* (Qld); *Residential Services (Accreditation) Act 2002* (Qld); *Retirement Villages Act 1999* (Qld); *Tourism Services Act 2003* (Qld);⁸⁴² *Wine Industry Act 1994* (Qld).

The Tribunal may conduct public examinations if the power to do so is given under an empowering Act.⁸⁴³ The power to conduct public examinations is given under the *Property Agents and Motor Dealers Act 2000* (Qld)⁸⁴⁴ and the *Queensland Building Services Authority Act 1991* (Qld).⁸⁴⁵

A person examined during a public examination must, unless the person has a reasonable excuse, answer certain questions about the person’s financial affairs.⁸⁴⁶ It is not a reasonable excuse to fail to answer a question that answering might tend to incriminate the person.⁸⁴⁷ However, the answer is not admissible in any civil or criminal proceeding against the person, other than the public examination of a person, a proceeding to review a reviewable decision or a perjury proceeding.⁸⁴⁸ The tribunal must inform the person required to answer the question that, if the answer might incriminate the person, the person may claim, before answering, that the answer might be self-incriminatory. The tribunal must also advise the person of the effect that

839 *Commercial and Consumer Tribunal Act 2003* (Qld) s 6.

840 *Commercial and Consumer Tribunal Act 2003* (Qld) s 4.

841 *Commercial and Consumer Tribunal Act 2003* (Qld) s 5, Schedule 2.

842 The *Tourism Services Act 2003* (Qld) referred to in Schedule 2 has not yet been passed. The second reading of the *Tourism Services Bill 2003* (Qld) was adjourned on 27 May 2003.

843 *Commercial and Consumer Tribunal Act 2003* (Qld) s 110.

844 *Property Agents and Motor Dealers Act* (Qld) s 528A. See pp 112-113 of this Discussion Paper.

845 *Queensland Building Services Authority Act 1991* (Qld) s 92. See p 74 of this Discussion Paper.

846 *Commercial and Consumer Tribunal Act 2003* (Qld) s 112(1), (3).

847 *Commercial and Consumer Tribunal Act 2003* (Qld) s 112(4).

848 *Commercial and Consumer Tribunal Act 2003* (Qld) s 112(5).

making the claim will have on the admissibility of the answer in proceedings against the person.⁸⁴⁹

These provisions came into effect on 1 July 2003. Because of time constraints, it has not been possible to seek the views of the Department of Tourism, Racing and Fair Trading in relation to them. However, prior to the enactment of the *Commercial and Consumer Tribunal Act 2003* (Qld), similar provisions abrogating the privilege against self-incrimination existed in both the *Queensland Building Tribunal Act 2000* (Qld) and the *Property Agents and Motor Dealers Act 2000* (Qld). The views of the relevant Department in relation to these provisions are set out at pages 74-75 and 113-114 of this Discussion Paper respectively.

(iii) **Cooperatives Act 1997 (Qld)**

The *Cooperatives Act 1997* (Qld) provides for the formation, registration and management of cooperatives. It authorises the appointment of inspectors to perform certain functions under the Act.⁸⁵⁰

The powers that the Act confers on inspectors include requiring a person who is involved in the activities of a cooperative to produce specified documents relating to the cooperative,⁸⁵¹ and to attend before the inspector⁸⁵² to answer questions put to the person by the inspector relating to the promotion, formation, membership, control, transactions, dealings, business or property of the cooperative.⁸⁵³

An inspector also has a power of entry⁸⁵⁴ and, on a place an inspector is authorised to enter, the inspector may require a person on the place to produce any relevant document in the person's custody or under the person's control.⁸⁵⁵ In relation to a relevant document found by or produced to the inspector, the inspector may require a person who was party to the creation of the document to make a statement giving any explanation the person is able to give as to any matter relating to the creation of the document or as to any matter to which the document relates.⁸⁵⁶ A person is not excused from making a statement on the ground that the statement might tend to

849 *Commercial and Consumer Tribunal Act 2003* (Qld) s 112(2).

850 *Cooperatives Act 1997* (Qld) s 382.

851 *Cooperatives Act 1997* (Qld) s 390(1)(b).

852 *Cooperatives Act 1997* (Qld) s 390(1)(c)(i).

853 *Cooperatives Act 1997* (Qld) s 390(1)(c)(ii).

854 *Cooperatives Act 1997* (Qld) s 388.

855 *Cooperatives Act 1997* (Qld) s 391(b).

856 *Cooperatives Act 1997* (Qld) s 392(1)(c).

incriminate him or her.⁸⁵⁷ However, if the person claims before making a statement that the statement might tend to incriminate him or her, the statement is not generally admissible in evidence against the person in a criminal proceeding.⁸⁵⁸

The Department of Tourism, Racing and Fair Trading has advised the Commission that one of the objectives of the legislation is to strengthen powers of investigation and enforcement of compliance in relation to cooperatives to ensure that the interests of the cooperatives themselves, their members and the public generally are protected. In the view of the Department, the reasons for the legislation are still in existence. The Department is therefore of the view that the abrogation provision should continue.

The Department also noted that the *Cooperatives Act 1997* (Qld) adopted core consistent provisions found in the equivalent Victorian legislation⁸⁵⁹ which all Australian States and Territories have agreed to adopt, and that any significant amendment may require approval from the Ministerial Council for Co-operatives Laws, since unilateral change would make the Queensland legislation inconsistent with legislation in other Australian jurisdictions.⁸⁶⁰

(iv) ***Fair Trading Act 1989* (Qld)**

The principal objective of the *Fair Trading Act 1989* (Qld) is to provide for an equitable, competitive, informed and safe market place.⁸⁶¹ The Act provides for the appointment of a Commissioner for Fair Trading to perform certain functions under the Act,⁸⁶² and for the appointment of inspectors and other officers necessary to assist the Commissioner.⁸⁶³

If the Commissioner believes, on reasonable grounds, that a person has caused a false or misleading statement to be published to promote, or apparently intended to promote, the supply of goods and services,⁸⁶⁴ the Commissioner may, by written notice, ask the person to give the

857 *Cooperatives Act 1997* (Qld) s 393(1).

858 *Cooperatives Act 1997* (Qld) s 393(2). However, a statement is admissible in a proceeding under Division 1 of Part 15 of the Act.

859 *Co-operatives Act 1996* (Vic) Part 15 Division 1.

860 Letter to the Chairperson of the Commission from the Director-General of the Department of Tourism, Racing and Fair Trading dated 5 November 2002.

861 *Fair Trading Act 1989* (Qld) s 3.

862 *Fair Trading Act 1989* (Qld) s 19(1).

863 *Fair Trading Act 1989* (Qld) s 19(1).

864 *Fair Trading Act 1989* (Qld) s 88B(1).

Commissioner written proof that supports any representation made in the statement.⁸⁶⁵

The person must respond to the notice within the time limit imposed by the Commissioner in the notice, unless the person has a reasonable excuse.⁸⁶⁶ It is not a reasonable excuse for the person to fail to respond to the notice on the ground that information given in the response might tend to incriminate the person.⁸⁶⁷ However, self-incriminatory information provided in response to a notice is not admissible against an individual in any criminal proceedings or against a body corporate in any criminal proceedings other than proceedings under the Act.⁸⁶⁸

Inspectors appointed under the Act have a number of powers related to the purposes of the Act.⁸⁶⁹ In particular, in relation to any matter relevant to the operation or enforcement of the provisions of the Act, an inspector may, by oral or written requisition, require a person to provide any information or records in the person's possession.⁸⁷⁰ A person must not, without reasonable excuse, refuse or fail to comply with such a requirement.⁸⁷¹ It is not a reasonable excuse for refusing or failing to provide information or records that the information or records might tend to incriminate the person.⁸⁷² However, self-incriminatory material provided in response to an inspector's requisition is not admissible against an individual in any criminal proceedings or, for a body corporate, in any criminal proceedings other than proceedings brought under the Act.⁸⁷³

The Department of Tourism, Racing and Fair Trading has advised the Commission that the present abrogation provisions are the result of amendments to the Act that were introduced to increase consumer protection by enhancing the Act's enforcement options and mechanisms. The provision of a use, rather than a derivative use, immunity was intended to facilitate the prosecution of offences under the Act by allowing information obtained under compulsion to be used to attempt to find other admissible evidence to prove the commission of an offence. The limitation of the application of the immunity to criminal proceedings was intended to assist consumers in

865 *Fair Trading Act 1989* (Qld) s 88B(2).

866 *Fair Trading Act 1989* (Qld) s 88B(4).

867 *Fair Trading Act 1989* (Qld) s 88B(5).

868 *Fair Trading Act 1989* (Qld) s 88B(6).

869 See for example *Fair Trading Act 1989* (Qld) s 89.

870 *Fair Trading Act 1989* (Qld) s 90(1).

871 *Fair Trading Act 1989* (Qld) s 90(4)(a).

872 *Fair Trading Act 1989* (Qld) s 90(5).

873 *Fair Trading Act 1989* (Qld) s 90(6).

bringing any civil action against traders who make false or misleading representations about goods and services. The Department is of the view that the reasons for the enactment of the abrogation provisions in their present form are still in existence, and that the abrogation provisions should therefore continue.⁸⁷⁴

(v) *Land Sales Act 1984 (Qld)*

The *Land Sales Act 1984* (Qld) regulates certain sales of land. Its objects include facilitating property development in Queensland, while protecting the interests of consumers.⁸⁷⁵

The Act provides for the appointment of inspectors,⁸⁷⁶ who have certain powers under the Act. In particular, an inspector may enter a place,⁸⁷⁷ and may search any part of the place⁸⁷⁸ and may inspect, examine, photograph or film anything in or on the place.⁸⁷⁹ An inspector may also require the occupier of the place, or any person in or on the place, to give the inspector reasonable help in exercising these powers.⁸⁸⁰ The person must comply with the requirement unless the person has a reasonable excuse.⁸⁸¹

If the help required consists of producing a document required to be kept by the person under the Act, it is not a reasonable excuse for failing to comply that the document might tend to incriminate the person.⁸⁸² However, information or a document obtained is not admissible in evidence against the person, if the person is an individual, in any criminal proceedings or, if the person is a corporation, in any criminal proceedings other than proceedings under the Act.⁸⁸³

The Department of Tourism, Racing and Fair Trading notes that it is only documents that are required to be kept under the Act that a person can be compelled to produce. The Department has advised the Commission that production provisions of this kind in legislation that it administers allow for an

874 Letter to the Chairperson of the Commission from the Director-General of the Department of Tourism, Racing and Fair Trading dated 5 November 2002.

875 *Land Sales Act 1984* (Qld) s 2(a), (b).

876 *Land Sales Act 1984* (Qld) s 30(1).

877 *Land Sales Act 1984* (Qld) s 30C.

878 *Land Sales Act 1984* (Qld) s 30F(2)(a).

879 *Land Sales Act 1984* (Qld) s 30F(2)(d).

880 *Land Sales Act 1984* (Qld) s 30F(2)(g).

881 *Land Sales Act 1984* (Qld) s 30F(3).

882 *Land Sales Act 1984* (Qld) s 30F(4)(b).

883 *Land Sales Act 1984* (Qld) s 30F(5).

appropriate level of monitoring to ensure that people in the various industries concerned are properly licensed and regulated. The documents production of which can be compelled assist in ensuring that the relevant legislative regimes are being complied with. This in turn ensures that consumers and the community are adequately protected and can have confidence in these industries.⁸⁸⁴

(vi) *Mobile Homes Act 1989 (Qld)*

The *Mobile Homes Act 1989 (Qld)* regulates agreements entered into between occupiers of mobile homes and the owners of sites where mobile homes are positioned.

The Act provides for the appointment of inspectors,⁸⁸⁵ who are authorised to require a person to give an inspector reasonable help for the exercise of the powers conferred on the inspectors by the Act.⁸⁸⁶ A person who is required by an inspector to give the inspector help for the exercise of a power must comply with the requirement, unless the person has a reasonable excuse for not complying with it.⁸⁸⁷

If the help required to be given by a person consists of answering a question or producing a document (other than a document required to be kept by the person under the Act), it is not a reasonable excuse for the person to fail to comply with the requirement that the information or document might tend to incriminate the person.⁸⁸⁸ However, the information or document is not admissible in evidence against an individual in any criminal proceedings or, for a person other than an individual, in any criminal proceedings other than proceedings under the Act.⁸⁸⁹

The Department of Tourism, Racing and Fair Trading has advised the Commission that the *Mobile Homes Act 1989 (Qld)* was amended in 1996 to overcome problems with enforcement of the Act caused by the fact that mobile home parks are located on private property. Previously, inspectors were powerless to enter on to the property to speak to a complainant resident and the park owner to determine whether an offence against the Act had been committed. The provisions inserted as a result of the amendments help protect the security of tenure of residents in mobile home parks, many of

884 Letter to the Commission from the Department of Tourism, Racing and Fair Trading dated 23 May 2003.

885 *Mobile Homes Act 1989 (Qld)* s 12.

886 *Mobile Homes Act 1989 (Qld)* s 12F(2)(g).

887 *Mobile Homes Act 1989 (Qld)* s 12F(3).

888 *Mobile Homes Act 1989 (Qld)* s 12F(4).

889 *Mobile Homes Act 1989 (Qld)* s 12F(5).

whom were forced from mobile home parks by unscrupulous operators who unreasonably increased the rental rates of sites.

The Department expressed the view that the abrogation of the privilege against self-incrimination in relation to answering a question or producing a document assists inspectors in monitoring the conduct of mobile home park operators and in protecting the rights of mobile home owners. However, the Department noted that the Act is currently under review, and that new legislation is expected to be introduced in the near future. It is expected that the sections relating to the powers of inspectors will be updated in line with more recent trends in this area and will not contain an abrogation provision.⁸⁹⁰

(vii) *Property Agents and Motor Dealers Act 2000 (Qld)*

The *Property Agents and Motor Dealers Act 2000* (Qld) (PAMDA) sets up a system for licensing and regulating persons, such as real estate agents and property developers, who are concerned in the promotion and sale of residential property.⁸⁹¹ It is also intended to provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property.⁸⁹²

The Act enables the chief executive of the Department of Tourism, Racing and Fair Trading to commence “marketeer proceedings”.⁸⁹³ The grounds for bringing a “marketeer proceeding”⁸⁹⁴ are that a marketeer⁸⁹⁵ has contravened or is contravening, or is likely or proposing to engage in conduct that would contravene, the provisions of the Act relating to misleading⁸⁹⁶ or unconscionable conduct,⁸⁹⁷ or to false representations and other misleading conduct in relation to residential property.⁸⁹⁸ Marketeer proceedings are heard by the Commercial and Consumer Tribunal.⁸⁹⁹ The Tribunal may conduct a public examination to investigate the conduct of the alleged

890 Letter to the Commission from the Department of Tourism, Racing and Fair Trading dated 28 January 2003.

891 *Property Agents and Motor Dealers Act 2000* (Qld) s 10(1).

892 *Property Agents and Motor Dealers Act 2000* (Qld) s 10(2).

893 *Property Agents and Motor Dealers Act 2000* (Qld) s 500B.

894 *Property Agents and Motor Dealers Act 2000* (Qld) s 500A.

895 A “marketeer” is defined in Schedule 3 of the Act as “a person directly or indirectly involved in any way in the sale, or promotion of the sale, or provision of a service in connection with the sale, of residential property, alone, or with others under a formal or informal arrangement”.

896 *Property Agents and Motor Dealers Act 2000* (Qld) s 573A.

897 *Property Agents and Motor Dealers Act 2000* (Qld) s 573B.

898 *Property Agents and Motor Dealers Act 2000* (Qld) s 573C.

899 *Property Agents and Motor Dealers Act 2000* (Qld) s 450(c), Schedule 2 (definition of “tribunal”). The Commercial and Consumer Tribunal was established by the *Commercial and Consumer Tribunal Act 2003* (Qld): *Commercial and Consumer Tribunal Act 2003* (Qld) s 6.

marketeer.⁹⁰⁰ At such a public examination, the person must answer certain questions about the person's financial affairs, and is not entitled to claim the privilege against self-incrimination. However, there is a use immunity conferred upon the person's answers.⁹⁰¹

PAMDA was amended by the *Commercial and Consumer Tribunal Act 2003* (Qld), which transferred the jurisdiction to hear proceedings under PAMDA from the Property Agents and Motor Dealers Tribunal previously established under that Act to the newly created Commercial and Consumer Tribunal.⁹⁰² The amendments came into effect on 1 July 2003. Because of time constraints, it has not been possible to seek the view of the Department on the amendments. However, the procedure adopted by the amended public examination provisions reflects that previously prescribed by PAMDA.

In relation to the previous provisions, the Department of Tourism, Racing and Fair Trading advised the Commission that the reason for abrogating the privilege against self-incrimination was to avoid harm that may be caused to the public by marketeering offences. These are serious offences that may result in the loss of considerable sums of money by vulnerable people such as the elderly, or by retired people who have lump sum superannuation payments to invest, or by people who do not have a knowledge of the local property market, such as investors from interstate or overseas. The public examination of marketeers suspected of having contravened the marketeering offence provisions is regarded as a vital part of the strategy to deter the unconscionable behaviour of some marketeers and, because the use immunity does not prevent the answers given at the examination forming the basis for further investigations, to discover information that will be pivotal in prosecutions and in the future protection of consumers against this kind of behaviour.⁹⁰³

It is the view of the Department that, where questions put to a witness before a public examination concern matters that are peculiarly within the knowledge of the witness and that would be difficult or impossible to establish by any alternative evidentiary means, it is in the interests of the public that the witness be obliged to answer questions. The Department was concerned that the practical effect of the privilege against self-incrimination in the context of public examinations would be that the public examination would elicit no evidence from potentially serious offenders of the chain of misleading activities that characterises marketeering offences. The Department considered that the power to compel answers to questions is fundamental to

900 *Property Agents and Motor Dealers Act 2000* (Qld) s 528A(1).

901 See pp 106-107 of this Discussion Paper in relation to the obligation of a person to answer questions at a public examination held by the Commercial and Consumer Tribunal.

902 *Commercial and Consumer Tribunal Act 2003* (Qld) s 110, Schedule 2 (definition of "empowering Act").

903 Letter to the Chairperson of the Commission from the Director-General of the Department of Tourism, Racing and Fair Trading dated 5 November 2002.

the effectiveness of the public examination power, and is therefore of the view that the abrogation of the privilege should continue.⁹⁰⁴

(viii) *Trade Measurement Act 1990 (Qld)*

The *Trade Measurement Act 1990* (Qld) regulates the use of measuring instruments for trade and the measurement of goods for sale.

The Act confers certain powers on inspectors appointed under the *Trade Measurement Administration Act 1990* (Qld).⁹⁰⁵ It authorises an inspector to enter and search business premises or vehicles for the purpose of investigating an offence committed, or reasonably believed by the inspector to have been committed, against the Act or for the purpose of exercising any of the inspector's functions under the Act.⁹⁰⁶

In relation to measuring instruments, if the inspector reasonably believes that the instrument is used for trade, the inspector may require a person in the premises or vehicle where the instrument is found, to answer questions or produce records under the person's control, concerning the instrument or its use.⁹⁰⁷ In relation to articles for sale by reference to the measurement of the article, or to prepacked articles, the inspector may require a person in the premises or vehicle where an article is found to answer questions or to produce records under the person's control, concerning the article.⁹⁰⁸

A person is not excused from answering any question or producing any record on the ground that the answer or record might tend to incriminate the person or make the person liable to a penalty.⁹⁰⁹ However, an answer given or a document produced by a person in compliance with an inspector's requirement is not admissible against the person in any criminal proceedings other than proceedings under the Act for making false or misleading statements.⁹¹⁰

The Department of Tourism, Racing and Fair Trading has advised the Commission that the provisions of the *Trade Measurement Act 1990* (Qld) form part of a uniform national system of regulating the measurement of commodities, aimed at facilitating trade throughout Australia. The Department

904 *Ibid.*

905 *Trade Measurement Administration Act 1990* (Qld) s 5(1).

906 *Trade Measurement Act 1990* (Qld) s 60(1)(a).

907 *Trade Measurement Act 1990* (Qld) s 61(1)(b).

908 *Trade Measurement Act 1990* (Qld) s 62(1)(c).

909 *Trade Measurement Act 1990* (Qld) s 66(1).

910 *Trade Measurement Act 1990* (Qld) s 66(2). Section 73 of the Act makes it an offence to make false or misleading statements in certain circumstances.

notes that the ability to use incriminating material in relation to prosecutions for false or misleading statements assists in controlling and maintaining uniform national standards and in protecting consumers from manipulative practices. It is the view of the Department that the reasons for the introduction of the legislation are still relevant, and that the continued existence of the abrogation provision is necessary.

(m) Treasury

(i) *Government Owned Corporations Act 1993 (Qld)*

The *Government Owned Corporations Act 1993 (Qld)* provides for the examination of a person who has been concerned or taken part in the management, administration or affairs of a statutory government owned corporation (GOC) and who has been or may have been guilty of fraud, negligence, default, breach of trust or breach of duty or other misconduct in relation to the GOC.⁹¹¹ The relevant provision also applies to a person who may be capable of giving information in relation to the management, administration or affairs of a statutory GOC.⁹¹²

The Act authorises the Attorney-General to apply to the Supreme Court or the District Court for an order that the person be examined before the court on any matters relating to the GOC's management, administration or affairs.⁹¹³ If the order is granted, the person must not fail to answer a question that the person is directed by the court to answer.⁹¹⁴ The person is not excused from answering a question put to the person at the examination on the ground that the answer might tend to incriminate the person or make the person liable to a penalty.⁹¹⁵ However, if, before answering, the person objects to answering on the ground of self-incrimination and if the answer might in fact tend to incriminate the person or make the person liable to a penalty, the answer is not admissible against the person in a criminal proceeding or a proceeding for the imposition of a penalty.⁹¹⁶

The Under Treasurer has advised the Commission that the reason for abrogating the privilege against self-incrimination and for providing a use immunity was to ensure consistency with the relevant provision of the

911 *Government Owned Corporations Act 1993 (Qld)* s 142(1)(a).

912 *Government Owned Corporations Act 1993 (Qld)* s 142(1)(b).

913 *Government Owned Corporations Act 1993 (Qld)* s 142(1), (2).

914 *Government Owned Corporations Act 1993 (Qld)* s 142(7).

915 *Government Owned Corporations Act 1993 (Qld)* s 142(12).

916 *Government Owned Corporations Act 1993 (Qld)* s 142(13).

Corporations Law.⁹¹⁷ The Under Treasurer is also of the view that the continued abrogation of the privilege is necessary to ensure that the Queensland Act reflects the relevant provision of the *Corporations Law*.⁹¹⁸

Schedule 3 of the *Government Owned Corporations Act 1993* (Qld) subjects GOCs to provisions of the *Financial Administration and Audit Act 1977* (Qld) that abrogate the privilege against self-incrimination. Some of these provisions confer a use immunity in relation to certain evidence. These provisions are considered on page 94 of this Discussion Paper under the Department of the Premier and Cabinet, which administers the relevant provisions of the *Financial Administration and Audit Act 1977* (Qld).

(ii) **Liquid Fuel Supply Act 1984 (Qld)**

The *Liquid Fuel Supply Act 1984* (Qld) enables the regulation of the supply and distribution of liquid fuel, particularly in times of fuel shortage.

A person authorised under the Act⁹¹⁹ who suspects on reasonable grounds that a person is in a position to provide information or produce a document concerning the administration of the Act may, by notice in writing, require that person to provide a written statement of the information or to produce the document.⁹²⁰ A person must not refuse or fail to comply with such a notice,⁹²¹ and is not excused from complying with the notice on the ground that the information or the production of the document might tend to incriminate the person.⁹²²

However, the information provided or the document produced is not admissible in evidence against the person in proceedings for an offence other than an offence of failing to comply with the requirement or of knowingly providing information that is false or misleading,⁹²³ or an offence of using or misusing a document with intent to deceive.⁹²⁴

The Under Treasurer has advised the Commission that the abrogation provision was enacted in order to maximise the chances of successful prosecution of any persons who, in a time of liquid fuel crisis, deliberately

917 *Corporations Act 2001* (Cth) s 597.

918 Letter to the Chairperson of the Commission from the Under Treasurer dated 11 October 2002.

919 *Liquid Fuel Supply Act 1984* (Qld) s 36.

920 *Liquid Fuel Supply Act 1984* (Qld) s 40(1).

921 *Liquid Fuel Supply Act 1984* (Qld) s 40(2).

922 *Liquid Fuel Supply Act 1984* (Qld) s 40(4).

923 *Liquid Fuel Supply Act 1984* (Qld) s 40(4).

924 *Liquid Fuel Supply Act 1984* (Qld) s 40(4).

falsified documents or statements to gain access to fuel to which they would not otherwise be entitled. The aim of the provision was, by maximising the chances of successful and speedy prosecution in such cases, to provide a practical deterrent to those persons who would seek to falsely access limited fuel stocks. At the time it was enacted, the provision was considered to be directly relevant to the intent of the Act, which was to ensure that the supply of fuel to “essential users” was maintained for as long as possible in a fuel supply crisis.⁹²⁵

(iii) *Motor Accident Insurance Act 1994 (Qld)*

The *Motor Accident Insurance Act 1994 (Qld)* contains provisions relating to the licensing of insurers under the Act and to the supervision of licensed insurers.

The Act provides for the examination of officers of an insurer whose affairs are being investigated under the Act.⁹²⁶ An officer is not excused from answering a question put to the officer by an investigator or from producing a document to an investigator on the ground that answering the question or producing the document might tend to incriminate the officer.⁹²⁷ However, neither the answer, nor the fact that the officer has produced a document, is admissible in evidence against the officer in a criminal proceeding other than a proceeding about the falsity of the answer or the document, provided that the officer had asserted that answering the question or producing the document might tend to incriminate the officer and provided also that the answer or production of the document might in fact tend to incriminate the officer.⁹²⁸ Before requiring an officer to answer a question or to produce a document, an investigator must inform the officer of his or her right to assert the privilege against self-incrimination and of the effect of such an assertion on the admissibility of information provided by the officer in any subsequent proceedings against the officer.⁹²⁹

The Under Treasurer has advised the Commission that, because of the size and importance of the Compulsory Third Party insurance scheme, it is in the public interest to be able to obtain all relevant information in order to assess the impact on the scheme of the situation that has led to the investigation of the affairs of an insurer. It is therefore the view of the Under Treasurer that the existing provision abrogating the privilege against self-incrimination should be retained.⁹³⁰

925 Letter to the Chairperson of the Commission from the Under Treasurer dated 11 March 2003.

926 *Motor Accident Insurance Act 1994 (Qld)* s 78.

927 *Motor Accident Insurance Act 1994 (Qld)* s 79(1).

928 *Motor Accident Insurance Act 1994 (Qld)* s 79(3).

929 *Motor Accident Insurance Act 1994 (Qld)* s 79(2).

930 Letter to the Chairperson of the Commission from the Under Treasurer dated 11 October 2002.

(iv) Tobacco Products (Licensing) Act 1988 (Qld)

The *Tobacco Products (Licensing) Act 1988* (Qld) contains provisions about the licensing of persons who carry on the business of selling tobacco,⁹³¹ and also creates a number of offences relating to the sale of tobacco.⁹³² The Act establishes the position of commissioner of tobacco products licensing,⁹³³ and confers certain powers on the commissioner.

The commissioner may, by notice in writing, require any person to provide such information as the commissioner requires or to attend and give evidence before the commissioner. The commissioner may also require the person to produce books, documents and papers in the person's custody or under the person's control.⁹³⁴ A person is not excused from providing information or producing any book, document or other paper on the ground that the information provided or any information in the book, document or paper might tend to incriminate the person or make the person liable to a penalty.⁹³⁵ However, the information or the contents of the book, document or paper are not admissible in proceedings under the Act against that person.⁹³⁶

In 1997, in a case that challenged the validity of similar legislation in New South Wales, the High Court held that provisions imposing a liability to pay a fee for a licence to sell tobacco contravened the Constitution of the Commonwealth of Australia.⁹³⁷ The majority⁹³⁸ held that the fee constituted the imposition of a duty of excise, contrary to the exclusive power of the Commonwealth, conferred by section 90 of the Constitution, to impose such duties. As a result of the High Court decision, the abrogation by the Act of the privilege against self-incrimination is no longer of any practical relevance. Accordingly, the Under Treasurer has advised the Commission that it is not necessary for the provision to be retained.⁹³⁹

931 *Tobacco Products (Licensing) Act 1988* (Qld) Part 5.

932 *Tobacco Products (Licensing) Act 1988* (Qld) Part 4.

933 *Tobacco Products (Licensing) Act 1988* (Qld) s 8.

934 *Tobacco Products (Licensing) Act 1988* (Qld) s 39(1).

935 *Tobacco Products (Licensing) Act 1988* (Qld) s 39(6).

936 *Tobacco Products (Licensing) Act 1988* (Qld) s 39(6). However, proceedings under certain specified sections of the Act are excepted from the immunity.

937 *Ha and Another v State of New South Wales and Others* (1997) 189 CLR 465.

938 Brennan CJ, McHugh, Gummow and Kirby JJ (Dawson, Toohey and Gaudron JJ dissenting).

939 Letter to the Chairperson of the Commission from the Under Treasurer dated 11 October 2002.

3. OVERVIEW OF PROVISIONS

There are numerous Queensland provisions that abrogate the privilege against self-incrimination, conferring in its place a use immunity on the information obtained under the power of compulsion. These provisions apply in situations concerning such diverse activities as fire prevention, environmental and consumer protection, regulation of the building industry, the confiscation of profits of crime, the investigation of serious crime, the licensing of firearms, transport safety and the supervision of compulsory third party insurers.

CHAPTER 6

PROVISIONS THAT CONFER A DERIVATIVE USE IMMUNITY

1. INTRODUCTION

As noted in Chapter 2 of this Discussion Paper,⁹⁴⁰ a use immunity does not protect a person who is required to provide information to the same extent as the privilege against self-incrimination. A mere use immunity limits the proceedings in which that information may be admitted in evidence. It does not limit the use of the information for any other purpose, such as providing leads for further investigation. However, a person who is entitled to a privilege excusing him or her from answering questions or producing documents is also protected from the use of those answers or documents to search out other evidence to be used against him or her.

To remedy this situation, some provisions that abrogate the privilege against self-incrimination confer an extended immunity, called a “derivative use immunity”. This type of immunity prevents not only the use as evidence of information obtained as a result of the abrogation of the privilege, but also the use of such information to try to discover further evidence against the person who provided it.⁹⁴¹

This chapter deals with existing Queensland provisions that confer a derivative use immunity. The provisions are set out alphabetically according to the government department that administers them.

2. EXISTING PROVISIONS

(a) Department of Justice and Attorney-General

(i) *Coroners Act 2003 (Qld)*⁹⁴²

The objects of the *Coroners Act 2003 (Qld)* include establishing the

⁹⁴⁰ See p 20 of this Discussion Paper. Provisions that the Commission has identified as conferring only a use immunity are discussed in Chapter 5 of this Discussion Paper.

⁹⁴¹ *Rank Film Distributors Ltd and Others v Video Information Centre and Others* [1982] AC 380 per Lord Wilberforce at 443.

⁹⁴² The *Coroners Act 2003 (Qld)* was assented to on 9 April 2003. The sections referred to in this Discussion Paper will commence operation on a date to be fixed by proclamation: *Coroners Act 2003 (Qld)* s 2(2). If the relevant provisions have not been proclaimed within a year of the date of assent, they will commence automatically on the following day unless the commencement is postponed by regulation to a date no later than two years after the date of assent: *Acts Interpretation Act 1954 (Qld)* s 15DA.

procedures for investigations by coroners into particular deaths.⁹⁴³ The Act is also intended to help prevent deaths from similar causes happening in the future by allowing coroners at inquests to comment on matters, such as issues related to public health and safety and to the administration of justice, connected with deaths that are the subject of an investigation.⁹⁴⁴

One method of investigation available to a coroner is the holding of an inquest. An inquest may be held into a reportable death⁹⁴⁵ if the coroner investigating the death considers it desirable to hold an inquest.⁹⁴⁶ If the coroner investigating a death considers that the death is a death in custody⁹⁴⁷ or a death in care⁹⁴⁸ in circumstances that raise issues about the deceased person's care, the coroner must hold an inquest.⁹⁴⁹

If a witness at an inquest held under the legislation refuses to give oral evidence on the ground of self-incrimination,⁹⁵⁰ the coroner may require the witness to give the self-incriminatory evidence if the coroner is satisfied it is in the public interest for the witness to do so.⁹⁵¹

However, the evidence is not admissible against the witness in any other proceeding, other than a criminal proceeding in which the false or misleading nature of the evidence is in question.⁹⁵² Any information, document or other evidence obtained as a direct or indirect result of the evidence given by the witness is inadmissible against the witness in any criminal proceeding.⁹⁵³

The Explanatory Notes to the *Coroners Bill 2002* (Qld) indicate that the reason for the abrogation of the privilege against self-incrimination was to help a coroner conducting an inquest to find out what actually happened to cause the death, so that the coroner can make appropriate comments or recommendations to prevent similar deaths happening in the future. The

943 *Coroners Act 2003* (Qld) s 3(c).

944 *Coroners Act 2003* (Qld) s 3(d).

945 *Coroners Act 2003* (Qld) s 8 (definition of "reportable death").

946 *Coroners Act 2003* (Qld) s 28(1).

947 "Death in custody" is defined in s 10 of the Act.

948 "Death in care" is defined in s 9 of the Act.

949 *Coroners Act 2003* (Qld) s 27(1).

950 *Coroners Act 2003* (Qld) s 39(1).

951 *Coroners Act 2003* (Qld) s 39(2).

952 *Coroners Act 2003* (Qld) s 39(3), (5).

953 *Coroners Act 2003* (Qld) s 39(4), (5).

Explanatory Notes express the view that the provision of a derivative use immunity constitutes a sufficient safeguard.⁹⁵⁴

The abrogation of the privilege is also supported by the Department of Aboriginal and Torres Strait Islander Policy (DATSIP).⁹⁵⁵ Although not the administering department, DATSIP has a strong interest in the legislation, stemming from the fact that, in line with Recommendation 11 of the Royal Commission into Aboriginal Deaths in Custody, any death in custody will attract a mandatory inquest. DATSIP's view is that abrogation of the privilege facilitates the inquisitorial role of a coronial investigation, and that it is only after a thorough investigation that the coroner will be able to make meaningful recommendations to prevent future deaths in custody.⁹⁵⁶

A coronial inquest is not a trial, but an inquisitorial process to establish facts. These facts frequently form the basis of coronial recommendations which are intended to prevent the occurrence of a future similar death. In light of this particular role of a coroner, it is considered essential that as much information as possible be made available at the inquest. Deaths in custody inquests have, in the past, uncovered systemic deficiencies in government agencies which have resulted, for example, in vital medical information not being passed from one institution to another.

(ii) ***Guardianship and Administration Act 2000 (Qld)***

Together with the *Powers of Attorney Act 1998 (Qld)*, the *Guardianship and Administration Act 2000 (Qld)* provides a comprehensive scheme to facilitate the exercise of power for financial matters and personal matters by or for an adult who needs, or may need, another person to exercise power for the adult.⁹⁵⁷

The Act provides that a witness may, by written notice, be required to attend and give evidence or produce stated documents at a hearing of the Tribunal established by the Act.⁹⁵⁸ A person given notice must not fail to attend unless the person has a reasonable excuse.⁹⁵⁹ Nor must a person, without reasonable excuse, fail to answer a question the person is required by the presiding member to answer, or fail to produce a document the person is required by the notice to produce.⁹⁶⁰ It is not a reasonable excuse for a

954 Explanatory Notes, *Coroners Bill 2002 (Qld)* at 4.

955 Letter to the Chairperson of the Commission from the Director-General of the Department of Aboriginal and Torres Strait Islander Policy dated 22 October 2002.

956 Letter to the Commission from the Department of Aboriginal and Torres Strait Islander Policy dated 15 October 2002.

957 *Guardianship and Administration Act 2000 (Qld)* s 7(b).

958 *Guardianship and Administration Act 2000 (Qld)* s 135(2).

959 *Guardianship and Administration Act 2000 (Qld)* s 137(1).

960 *Guardianship and Administration Act 2000 (Qld)* s 137(3).

person to fail to answer a question⁹⁶¹ or to produce a document⁹⁶² on the grounds that answering the question or producing the document might tend to incriminate the person.

However, evidence of, or directly or indirectly derived from, a person's answer or production of a document is not generally admissible against the person in a civil or criminal proceeding.⁹⁶³ Certain proceedings concerning the falsity of the answer or document,⁹⁶⁴ or the person's employment,⁹⁶⁵ professional registration or licence,⁹⁶⁶ or the person's registration, licence or approval as the proprietor or operator of a service or facility⁹⁶⁷ are excluded from the immunity.

The Act also provides that the Adult Guardian, the holder of a statutory office created by the Act, may by written notice require a person to attend before the Adult Guardian to give information and answer questions or produce stated documents relevant to the performance of the Adult Guardian's functions under the Act.⁹⁶⁸ The person must comply with the notice unless the person has a reasonable excuse.⁹⁶⁹ It is not a reasonable excuse for failing to comply with the notice that compliance might tend to incriminate the person.⁹⁷⁰

If a person fails, without reasonable excuse, to comply with a notice a Magistrates Court may, at the request of the Adult Guardian, issue a subpoena requiring the appearance of the person before the court,⁹⁷¹ where the person may be examined by the Adult Guardian.⁹⁷² If a person who has been subpoenaed attends the court but, without reasonable excuse, refuses to answer a question put to the person or fails to answer to the court's satisfaction, the court may treat the person's refusal or failure as a contempt

961 *Guardianship and Administration Act 2000* (Qld) s 137(4).

962 *Guardianship and Administration Act 2000* (Qld) s 137(5).

963 *Guardianship and Administration Act 2000* (Qld) s 137(6).

964 *Guardianship and Administration Act 2000* (Qld) s 137(6)(a).

965 *Guardianship and Administration Act 2000* (Qld) s 137(6)(b).

966 *Guardianship and Administration Act 2000* (Qld) s 137(6)(c).

967 *Guardianship and Administration Act 2000* (Qld) s 137(6)(d).

968 *Guardianship and Administration Act 2000* (Qld) s 185(1).

969 *Guardianship and Administration Act 2000* (Qld) s 185(2).

970 *Guardianship and Administration Act 2000* (Qld) s 188(2).

971 *Guardianship and Administration Act 2000* (Qld) s 186(2)(a).

972 *Guardianship and Administration Act 2000* (Qld) s 186(5).

of court.⁹⁷³ It is not a reasonable excuse for refusing to answer a question in the Magistrates Court, or for failing to answer to the satisfaction of the court, that answering the question or giving an answer to the court's satisfaction might tend to incriminate the person.⁹⁷⁴

However, evidence of, or directly or indirectly derived from, a person's answer or production of a document is not generally admissible against the person in a civil or criminal proceeding.⁹⁷⁵ Certain proceedings concerning the falsity of the answer or document,⁹⁷⁶ or the person's employment,⁹⁷⁷ professional registration or licence,⁹⁷⁸ or the person's registration, licence or approval as the proprietor or operator of a service or facility⁹⁷⁹ are excluded from the immunity.

The Department of Justice and Attorney-General noted that the abrogation provision in relation to tribunal hearings was included in the legislation on the basis of a recommendation from this Commission.⁹⁸⁰ In its *Report on Assisted and Substituted Decisions*,⁹⁸¹ the Commission explained its decision to recommend the abrogation of the privilege against self-incrimination in proceedings before the Tribunal:⁹⁸²

... it is essential for the tribunal to be able to obtain information necessary to protect the interests of people at risk because of impaired decision-making capacity since, without access to such information, the tribunal might not be able to determine what is in the best interests of a person whose decision-making capacity is impaired or to take appropriate action to safeguard those interests.

The Department of Justice and Attorney-General also advised the Commission that the abrogation of the privilege in relation to the powers of the Adult Guardian to obtain information was included in the legislation because:⁹⁸³

973 *Guardianship and Administration Act 2000* (Qld) s 187.

974 *Guardianship and Administration Act 2000* (Qld) s 188(2)(b).

975 *Guardianship and Administration Act 2000* (Qld) s 188(3).

976 *Guardianship and Administration Act 2000* (Qld) s 188(3)(a).

977 *Guardianship and Administration Act 2000* (Qld) s 188(3)(b).

978 *Guardianship and Administration Act 2000* (Qld) s 188(3)(c).

979 *Guardianship and Administration Act 2000* (Qld) s 188(3)(d).

980 Letter to the Chairperson of the Commission from the Director-General of the Department of Justice and Attorney-General dated 11 September 2002.

981 Queensland Law Reform Commission, Report, *Assisted and Substituted Decisions* (R 49, June 1996).

982 Id at 256.

983 Letter to the Chairperson of the Commission from the Director-General of the Department of Justice and Attorney-General dated 11 September 2002.

... the protection of persons with a decision-making disability from neglect, abuse or exploitation was seen as the paramount consideration.

The then Adult Guardian, Mr Jim Cockerill, observed that investigations by the Adult Guardian under the Act involve an inquiry into the suspected personal or financial abuse of a person with impaired capacity. As a result they are unlike investigations conducted by other agencies, because the victim is usually unable or has very little ability to provide relevant information. In addition, the person with the most, and perhaps the only, information about the matter is often the alleged perpetrator of the abuse or someone who may be implicated. In Mr Cockerill's view, these people may exploit the position of confidence in which they are held and therefore be able to more effectively conceal their actions than would ordinarily be the case. Mr Cockerill expressed concern that, without the ability to compel a person to give information and answer questions, the investigation - and therefore the effective protection of the rights and interests of adults with impaired capacity - could be compromised.⁹⁸⁴

The Guardianship and Administration Tribunal also supported the abrogation of the privilege. While recognising the role of the privilege against self-incrimination, the Tribunal was nevertheless of the view that its primary objective - the protection of people who are at risk because of a decision-making incapacity - is a public interest of greater magnitude than the common law's traditional consideration for the individual as manifested in the privilege.⁹⁸⁵ It envisaged that the circumstances in which a person may be compelled to answer a question or produce a document, notwithstanding the potential for self-incrimination, would include an investigation or inquiry into matters such as:

- the manner in which the person has administered an adult's estate, including for example, questions about the appropriation of an adult's funds;
- the manner in which the person has protected or has failed to protect the adult's health and well-being, including for example, allegations that the person has assaulted the adult;
- the appropriateness and competency of a person to be appointed or continue as the authorised decision-maker for the adult.

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Letter to the Commission from Mr J Cockerill dated 15 October 2002.

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Letter to the Commission from the President of the Guardianship and Administration Tribunal dated 11 December 2002.

The Tribunal agreed with the views of this Commission in its Report on Assisted and Substituted Decisions.⁹⁸⁶ It noted that abrogation of the privilege is warranted because the fiduciary nature of the appointee-adult relationship makes it imperative that the appointee's dealings and actions are beyond reproach and open to complete scrutiny and rigorous accountability.

The Tribunal also recognised the importance of the granting of immunities in relation to the use of information obtained as a result of the abrogation of the privilege against self-incrimination. In its Report, this Commission recommended that abrogation of the privilege be accompanied, in all situations apart from those that it considered should be excepted from the immunity, by a use immunity in respect of information obtained as a result of the abrogation.⁹⁸⁷ The Commission's recommendation was based on the need to encourage people to assist a tribunal investigation without fear of prosecution for a criminal offence or of incurring civil liability as a result of the information provided. However, although the Commission recommended the inclusion of a use immunity, the relevant provisions confer a derivative use immunity. The Department of Justice and Attorney-General informed the Commission that the decision to include a derivative use immunity was based on a perceived need to ensure adequate protection against self-incrimination, an approach consistent with the *Legislative Standards Act 1992* (Qld).⁹⁸⁸

The then Adult Guardian, Mr Jim Cockerill, considered the extent of the immunity conferred in relation to information provided to the Adult Guardian to be wider than necessary. Originally, the abrogation provision, enacted as section 136 of the *Powers of Attorney Act 1998* (Qld), did not provide any kind of immunity for information provided under compulsion. However, when the provisions of the *Powers of Attorney Act 1998* (Qld) relating to the office of Adult Guardian were transferred from that Act to the *Guardianship and Administration Act 2000* (Qld) a derivative use immunity, which applies to not only criminal but also civil proceedings, was included.

In Mr Cockerill's view, the extent of the immunity provided by the legislation to a person suspected of having abused a vulnerable person with impaired decision-making capacity inevitably raises the question of the extent to which the rights of the victim should be subordinated to the rights of the alleged perpetrator. Mr Cockerill favoured a return to the original position but, failing that, argued that any immunity should be restricted to a use, rather than a derivative use immunity, and should not extend to civil proceedings. He considered that the provision of a derivative use immunity that applied to civil

986 Queensland Law Reform Commission, Report, *Assisted and Substituted Decisions* (R 49, June 1996) Vol 1 at 254-259. See p 124 of this Discussion Paper.

987 Queensland Law Reform Commission, Report, *Assisted and Substituted Decisions* (R 49, June 1996) Vol 1 at 254-259.

988 Letter to the Chairperson of the Commission from the Director-General of the Department of Justice and Attorney-General dated 11 September 2002. See *Legislative Standards Act 1992* (Qld) s 4(3)(f).

as well as criminal proceedings could enable a perpetrator of financial abuse to avoid disgorging his or her ill-gotten gains.⁹⁸⁹

The Tribunal agreed with the recommendation of this Commission concerning the situations that should be excepted from the grant of an immunity⁹⁹⁰ and with the list of statutory exceptions based on that recommendation.⁹⁹¹ The Tribunal also recommended that a further exception should be added to the existing list, namely:

- if the answer or production is relevant to a person's acts as an attorney, administrator or guardian - a proceeding about the person's acts.

The Tribunal noted that, in a situation where a person appointed as a decision-maker for an adult with impaired decision-making capacity (whether as an attorney, administrator or guardian) made admissions before the Tribunal that demonstrated that the decision-maker was not acting in the adult's best interests, the only course of action available to the Tribunal would be to revoke the person's appointment. However, the facts of the case may warrant more serious investigation, with a view to bringing criminal or civil proceedings against the person. In the view of the Tribunal, a blanket prohibition on the use of self-incriminatory evidence obtained at a Tribunal hearing would have the potential to severely hamper proceedings to prosecute the appointee or to recover damages for repatriation to the adult's estate. The Tribunal was also of the view that its proposed addition to the list of exceptions to the immunity was consistent with its objective of protecting people made vulnerable by impaired decision-making capacity.

Apart from these exceptions, the Tribunal supported the granting of a use immunity with respect to self-incriminatory information obtained at its hearings. However, the Tribunal agreed with the former Adult Guardian that a derivative use immunity was not appropriate, primarily because of the difficulties created by the test of and onus of proving derivation.⁹⁹² The Tribunal noted that courts are empowered to give directions and to restrain questions where the examination is being conducted for an improper purpose. It concluded that, in the absence of a derivative use immunity, the inherent powers of a court, judicial discretion and the duty of a court to ensure the proper administration of justice would create an overarching balance or safeguard for witnesses.

989 Letter to the Commission from Mr J Cockerill dated 15 October 2002.

990 The Commission's recommendation is set out on p 124 of this Discussion Paper.

991 See p 124 of this Discussion Paper.

992 The issue of onus of proof in relation to a derivative use immunity is discussed at pp 21-22 and 188-189 of this Discussion Paper.

(b) Department of Natural Resources and Mines**(i) Coal Mining Safety and Health Act 1999 (Qld)**

The objects of the *Coal Mining Safety and Health Act 1999* (Qld) are to protect the safety and health of persons at coal mines and persons who may be affected by coal mining operations,⁹⁹³ and to require that the risk of injury or illness to any person resulting from coal mining operations be minimised.⁹⁹⁴ The Act specifies a number of ways of achieving these objects, including imposing safety and health obligations on persons who operate coal mines or who may affect the safety or health of others at coal mines,⁹⁹⁵ providing for safety and health management systems at coal mines to manage risk effectively;⁹⁹⁶ making regulations and recognised standards for the coal mining industry to require and promote risk management and control;⁹⁹⁷ and providing for inspectors and other officers to monitor the effectiveness of risk management and control at coal mines, and to take appropriate action to ensure adequate risk management.⁹⁹⁸

Inspectors and inspection officers appointed under the Act⁹⁹⁹ have certain powers related to monitoring and enforcing compliance with the Act. They may require a person to answer questions to help them determine whether the Act has been or is being complied with,¹⁰⁰⁰ or to produce a document that relates to the person's obligations under the Act.¹⁰⁰¹ A person must comply with a requirement to answer a question¹⁰⁰² or produce a document¹⁰⁰³ unless the person has a reasonable excuse. It is not a reasonable excuse for failing to produce a document that production of the document might incriminate the person.¹⁰⁰⁴ However, provided that the person has objected on the grounds of self-incrimination to producing the document, the document or anything obtained as a direct or indirect result of the person's producing the document

993 *Coal Mining Safety and Health Act 1999* (Qld) s 6(a).

994 *Coal Mining Safety and Health Act 1999* (Qld) ss 6(b), 29.

995 *Coal Mining Safety and Health Act 1999* (Qld) s 7(a).

996 *Coal Mining Safety and Health Act 1999* (Qld) s 7(b).

997 *Coal Mining Safety and Health Act 1999* (Qld) s 7(c).

998 *Coal Mining Safety and Health Act 1999* (Qld) s 7(f).

999 *Coal Mining Safety and Health Act 1999* (Qld) s 125.

1000 *Coal Mining Safety and Health Act 1999* (Qld) s 139(3)(g).

1001 *Coal Mining Safety and Health Act 1999* (Qld) s 154(1).

1002 *Coal Mining Safety and Health Act 1999* (Qld) s 141(1).

1003 *Coal Mining Safety and Health Act 1999* (Qld) s 155(1).

1004 *Coal Mining Safety and Health Act 1999* (Qld) s 155(2).

is not admissible against the person in any proceeding for an offence other than an offence under the Act.¹⁰⁰⁵

If the question that the person is required to answer is about a “serious accident”¹⁰⁰⁶ or a “high potential incident”,¹⁰⁰⁷ the person must answer the question unless the person has a reasonable excuse.¹⁰⁰⁸ It is not a reasonable excuse for failing to answer that answering the question might tend to incriminate the person.¹⁰⁰⁹ However, if, before answering the question, the person claims that the answer might incriminate the person, neither the answer nor any information, document or other thing obtained as a direct or indirect result of the person giving the answer is admissible in any proceeding, other than a proceeding in which the falsity or misleading nature of the answer is relevant, against the person.¹⁰¹⁰

The Department of Natural Resources and Mines has advised the Commission that the abrogation of the privilege against self-incrimination under the *Coal Mining Safety and Health Act 1999* (Qld) is in the context of a scheme to allow for a complete and proper investigation of mines or incidents related to safety in them, so that any past incidents or future risk to life or property can be identified and addressed.¹⁰¹¹

(ii) **Land Act 1994 (Qld)**

The *Land Act 1994* (Qld) is concerned with the administration and management of non-freehold land in Queensland. Its provisions are based on a number of principles which include sustainable resource use, and protection of environmentally and culturally valuable and sensitive areas and features.¹⁰¹² Under the Act, the chief executive of the Department of Natural Resources and Mines may appoint authorised persons¹⁰¹³ who may enter

1005 *Coal Mining Safety and Health Act 1999* (Qld) s 155(4)(b).

1006 A “serious accident” is defined as an accident at a coal mine that causes the death of a person or injury to a person that is sufficiently serious to require hospitalisation: *Coal Mining Safety and Health Act 1999* (Qld) s 16.

1007 A “high potential incident” is defined as an event or series of events at a coal mine that causes or has the potential to cause a significant adverse effect on the safety or health of a person: *Coal Mining Safety and Health Act 1999* (Qld) s 17.

1008 *Coal Mining Safety and Health Act 1999* (Qld) s 159(3).

1009 *Coal Mining Safety and Health Act 1999* (Qld) s 159(4).

1010 *Coal Mining Safety and Health Act 1999* (Qld) s 159(5), (6).

1011 Letter to the Chairperson of the Commission from the Director-General of the Department of Mines and Natural Resources dated 11 October 2002.

1012 *Land Act 1994* (Qld) s 4.

1013 *Land Act 1994* (Qld) s 395.

land to which the Act applies and inspect the land and uses made of the land.¹⁰¹⁴

One of the objects of the Act is to manage trees on land to which the Act applies, taking into account specified factors including the prevention of land degradation, the maintenance of biodiversity, the maintenance of the environmental and amenity values of the landscape and the maintenance of the scientific, recreation and tourism values of the land.¹⁰¹⁵ Subject to certain exceptions, it is an offence under the Act to clear a tree, or to allow a tree to be cleared, without a tree clearing permit.¹⁰¹⁶

The provisions in the Act relating to tree clearing have recently been amended.¹⁰¹⁷ The amendments enable an authorised person¹⁰¹⁸ who reasonably believes that a tree clearing offence has been or is being committed to give a person a compliance notice requiring that person to stop committing the offence and/or rectify the matter.¹⁰¹⁹ They also enable an authorised person who reasonably believes that a tree clearing offence or a compliance notice offence has been committed, and that a person may be able to give information about the offence,¹⁰²⁰ to require the person, by notice given to the person, to give information about the offence to the authorised person.¹⁰²¹ The person must comply with the requirement unless the person has a reasonable excuse.¹⁰²² It is not a reasonable excuse for a person to fail to give the information that giving the information might tend to incriminate the person.¹⁰²³ However, information that might tend to incriminate an individual person, or evidence directly or indirectly derived from that evidence, is not admissible against the individual in any civil or criminal proceeding, other than a proceeding about the falsity of the information.¹⁰²⁴

The amendments also enable an authorised person to require the production of a document relating to the clearing of trees (a document production

1014 *Land Act 1994* (Qld) s 400(1)(b).

1015 *Land Act 1994* (Qld) s 252.

1016 *Land Act 1994* (Qld) s 255.

1017 The amendments were introduced into the Act by the *Natural Resources and Other Legislation Amendment Act 2003* (Qld) and came into effect on the date of assent. The *Natural Resources and Other Legislation Amendment Act 2003* (Qld) was assented to on 28 March 2003.

1018 *Land Act 1994* (Qld) s 395.

1019 *Land Act 1994* (Qld) s 274A.

1020 *Land Act 1994* (Qld) s 400V(1).

1021 *Land Act 1994* (Qld) s 400V(2).

1022 *Land Act 1994* (Qld) s 400V(3).

1023 *Land Act 1994* (Qld) s 400V(4).

1024 *Land Act 1994* (Qld) s 400V(5).

requirement).¹⁰²⁵ A person of whom a document production requirement is made must comply with the requirement unless the person has a reasonable excuse.¹⁰²⁶ It is not a reasonable excuse for a person not to comply with a document production requirement that complying with the requirement might tend to incriminate the person.¹⁰²⁷ However, if the document might tend to incriminate an individual person, evidence of, or evidence directly or indirectly derived from, the document is not admissible against the individual in any civil or criminal proceeding, other than a proceeding about the falsity of the information.¹⁰²⁸

The Explanatory Notes accompanying the amending legislation point out that effective enforcement of vegetation clearing legislation is required to prevent serious and often irreversible impacts on biodiversity and land degradation. They observe that, for successful enforcement of vegetation management legislation, a balance between the rights of the individual and the need for the community to be able to provide an effective deterrent is necessary.¹⁰²⁹

(iii) ***Mining and Quarrying Safety and Health Act 1999 (Qld)***

The objects of the *Mining and Quarrying Safety and Health Act 1999 (Qld)* mirror those of the *Coal Mining Safety and Health Act 1999 (Qld)*.¹⁰³⁰ They are, in relation to the mining industry generally, to protect the safety and health of persons at mines and persons who may be affected by mining operations,¹⁰³¹ and to require that the risk of injury or illness to any person resulting from mining operations be minimised.¹⁰³² The Act specifies a number of ways of achieving these objects, including imposing safety and health obligations on persons who operate mines or who may affect the safety or health of others at mines;¹⁰³³ providing for safety and health management systems at mines to manage risk effectively;¹⁰³⁴ making regulations and recognised standards for the mining industry to require and promote risk management and control;¹⁰³⁵ and providing for inspectors and other officers to

1025 *Land Act 1994 (Qld)* s 400W.

1026 *Land Act 1994 (Qld)* s 400Y(1).

1027 *Land Act 1994 (Qld)* s 400Y(2).

1028 *Land Act 1994 (Qld)* s 400Y(3).

1029 Explanatory Notes, *Natural Resources and Other Legislation Amendment Bill 2003 (Qld)* at 10.

1030 The relevant provisions of the *Coal Mining Safety and Health Act 1999 (Qld)* are considered at pp 128-129 of this Discussion Paper.

1031 *Mining and Quarrying Safety and Health Act 1999 (Qld)* s 6(a).

1032 *Mining and Quarrying Safety and Health Act 1999 (Qld)* ss 6(b), 26.

1033 *Mining and Quarrying Safety and Health Act 1999 (Qld)* s 7(a).

1034 *Mining and Quarrying Safety and Health Act 1999 (Qld)* s 7(b).

1035 *Mining and Quarrying Safety and Health Act 1999 (Qld)* s 7(c).

monitor the effectiveness of risk management and control at mines, and to take appropriate action to ensure adequate risk management.¹⁰³⁶

Inspectors and inspection officers appointed under the Act¹⁰³⁷ have certain powers related to monitoring and enforcing compliance with the Act. They may require a person who has a health and safety obligation under the Act to produce a document to which the person has access that relates to the person's obligations under the Act.¹⁰³⁸ A person who is required to produce a document must comply with the requirement, unless the person has a reasonable excuse.¹⁰³⁹ It is not a reasonable excuse for failing to produce the document that production of the document might incriminate the person.¹⁰⁴⁰ However, provided that the person has objected on the grounds of self-incrimination to producing the document, the document or anything obtained as a direct or indirect result of the person's producing the document is not admissible against the person in any proceeding for an offence other than an offence under the Act.¹⁰⁴¹

An inspector has a further power to require a person to attend before the inspector to answer questions about the discharge of the person's safety and health obligations under the Act or about safety and health matters relevant to mining operations.¹⁰⁴² An inspector may also require a person to answer questions to ascertain whether the Act is being complied with.¹⁰⁴³ A person of whom such a requirement is made by an inspector must not fail to attend or to answer a question unless the person has a reasonable excuse.¹⁰⁴⁴ If the question is about a "serious accident"¹⁰⁴⁵ or a "high potential incident",¹⁰⁴⁶ it is not a reasonable excuse that the answer might tend to incriminate the person.¹⁰⁴⁷ However, if before answering the question, the person claims that

1036 *Mining and Quarrying Safety and Health Act 1999* (Qld) s 7(f).

1037 *Mining and Quarrying Safety and Health Act 1999* (Qld) s 122.

1038 *Mining and Quarrying Safety and Health Act 1999* (Qld) s 151(1).

1039 *Mining and Quarrying Safety and Health Act 1999* (Qld) s 152(1).

1040 *Mining and Quarrying Safety and Health Act 1999* (Qld) s 152(2).

1041 *Mining and Quarrying Safety and Health Act 1999* (Qld) s 152(4).

1042 *Mining and Quarrying Safety and Health Act 1999* (Qld) s 154(1)(a), (b).

1043 *Mining and Quarrying Safety and Health Act 1999* (Qld) s 154(1)(c).

1044 *Mining and Quarrying Safety and Health Act 1999* (Qld) s 155(1).

1045 A "serious accident" is defined as an accident at a mine that causes the death of a person or injury to a person that is sufficiently serious to require hospitalisation: *Mining and Quarrying Safety and Health Act 1999* (Qld) s 17.

1046 A "high potential incident" is defined as an event or series of events at a mine that causes or has the potential to cause a significant adverse effect on the safety or health of a person: *Mining and Quarrying Safety and Health Act 1999* (Qld) s 18.

1047 *Mining and Quarrying Safety and Health Act 1999* (Qld) s 156(4).

the answer might incriminate the person, neither the answer nor any information, document or other thing obtained as a direct or indirect result of the person giving the answer is admissible in any proceeding, other than a proceeding in which the falsity or misleading nature of the answer is relevant, against the person.¹⁰⁴⁸

The Department of Natural Resources and Mines has advised the Commission that the abrogation of the privilege against self-incrimination under the *Mining and Quarrying Safety and Health Act 1999* (Qld) is in the context of a scheme to allow for a complete and proper investigation of mines or incidents related to safety in them, so that any past incidents or future risk to life or property can be identified and addressed.¹⁰⁴⁹

(iv) *Offshore Minerals Act 1998* (Qld)

The *Offshore Minerals Act 1998* (Qld) relates to the exploration for, and the recovery of, minerals other than petroleum in the first three nautical miles of Queensland's territorial waters.

Under the Act, the Minister for Natural Resources and Mines has certain powers to require the provision of information. The Minister may ask a person to give information to the Minister or to an inspector nominated by the Minister.¹⁰⁵⁰ If the Minister has reasonable grounds for believing that a person is able to give information relevant to the operation of the Act, the Minister may, by notice, ask the person to appear personally before the Minister or an inspector nominated by the Minister to give the information or to answer questions about the activity to which the information relates.¹⁰⁵¹ The Minister may also, by notice, ask a person whom the Minister has reasonable grounds for believing is able to produce a document relevant to the operation of the Act to produce the document to the Minister or an inspector nominated by the Minister.¹⁰⁵² If the Minister has reasonable grounds for believing that the person is able to produce a sample taken from the seabed or subsoil in coastal waters, and that the sample is relevant to the operation of the Act, the Minister may, by notice, ask the person to give the sample to the Minister or to an inspector nominated by the Minister.¹⁰⁵³

1048 *Mining and Quarrying Safety and Health Act 1999* (Qld) s 156(5), (6).

1049 Letter to the Chairperson of the Commission from the Director-General of the Department of Natural Resources and Mines dated 11 October 2002.

1050 *Offshore Minerals Act 1998* (Qld) s 367. The Minister may appoint an officer of the public service to be an inspector for the purpose of the Act: *Offshore Minerals Act 1998* (Qld) s 421.

1051 *Offshore Minerals Act 1998* (Qld) s 368.

1052 *Offshore Minerals Act 1998* (Qld) s 370.

1053 *Offshore Minerals Act 1998* (Qld) s 371.

A person of whom such a request is made must not, without reasonable excuse, fail to comply with the request.¹⁰⁵⁴ A person is not excused from complying with the request on the ground that complying with the request might tend to incriminate the person or make the person liable to a penalty.¹⁰⁵⁵ However, information or answers given, documents and samples produced, as well as any information, document or thing obtained as a direct or indirect consequence of the giving of the information or answer or of the production of the document or sample, are not admissible in evidence against the person in any proceeding other than a proceeding for giving false or misleading information in response to the request.¹⁰⁵⁶

The Department of Natural Resources and Mines has informed the Commission that the above provisions are part of a legislative scheme intended to ensure that true and correct information or samples are provided when requested. Supply of such information is essential to allow the Minister to determine the true state of operations on a tenure or compliance with the conditions of a tenure and, in the view of the Department, the continued existence of the provisions is necessary to ensure compliance with the Act or with the conditions of a tenure. The derivative use immunity ensures that the rights of the citizen are balanced against the need to ensure compliance with the Act.¹⁰⁵⁷

(v) *Vegetation Management Act 1999 (Qld)*

The purposes of the *Vegetation Management Act 1999* (Qld) include the regulation of the clearing of vegetation on freehold land to preserve endangered ecosystems and to preserve vegetation in areas of high nature conservation value and areas vulnerable to land degradation.¹⁰⁵⁸ One of the ways in which this purpose is to be achieved is through the enforcement of vegetation clearing provisions.¹⁰⁵⁹

Under the Act, the chief executive of the Department of Natural Resources and Mines may appoint authorised officers¹⁰⁶⁰ to conduct investigations and inspections to monitor compliance with the Act and with vegetation clearing

1054 *Offshore Minerals Act 1998* (Qld) s 372(1).

1055 *Offshore Minerals Act 1998* (Qld) s 372(2).

1056 *Offshore Minerals Act 1998* (Qld) ss 373, 372(3).

1057 Letter to the Commission from the Department of Natural Resources and Mines dated 19 May 2003.

1058 *Vegetation Management Act 1999* (Qld) s 3(1)(a).

1059 *Vegetation Management Act 1999* (Qld) s 3(2)(b).

1060 *Vegetation Management Act 1999* (Qld) s 24(1).

provisions.¹⁰⁶¹ An authorised officer has powers to enter,¹⁰⁶² search, inspect, take samples for analysis or testing and to require a person to give the authorised officer reasonable help to exercise the authorised officer's powers or to provide the authorised officer with relevant information.¹⁰⁶³

In particular, if an authorised officer reasonably believes that a vegetation clearing offence has been committed and that a person may be able to give information about the offence, the authorised officer may, by notice given to the person, require the person to give information about the offence to the authorised officer. The person must comply with such a requirement unless the person has a reasonable excuse.¹⁰⁶⁴

An authorised officer may also require a person to make available for inspection, or to produce to the authorised officer for inspection, a document relating to the clearing of vegetation (a document production requirement).¹⁰⁶⁵ A person of whom a document production requirement is made must comply with the requirement, unless the person has a reasonable excuse.¹⁰⁶⁶

In each of the above cases, it was, when the legislation was originally enacted, a reasonable excuse that giving the information or producing the document might tend to incriminate the individual. However, recent amendments to the *Vegetation Management Act 1999* (Qld)¹⁰⁶⁷ provide that it is not a reasonable excuse for a person to fail to give information that giving the information might tend to incriminate the person,¹⁰⁶⁸ or to fail to comply with a document production requirement that complying with the requirement might tend to incriminate the person.¹⁰⁶⁹ The amendments also confer on an individual person a derivative use immunity in respect of both information given¹⁰⁷⁰ and documents produced.¹⁰⁷¹

1061 *Vegetation Management Act 1999* (Qld) s 25(1).

1062 *Vegetation Management Act 1999* (Qld) s 30.

1063 *Vegetation Management Act 1999* (Qld) s 36(3).

1064 *Vegetation Management Act 1999* (Qld) s 51(1)-(3).

1065 *Vegetation Management Act 1999* (Qld) s 52(1), (6).

1066 *Vegetation Management Act 1999* (Qld) s 54(1).

1067 The amendments were introduced into the Act by the *Natural Resources and Other Legislation Amendment Act 2003* (Qld) and came into effect on the date of assent. The *Natural Resources and Other Legislation Amendment Act 2003* (Qld) was assented to on 28 March 2003.

1068 *Vegetation Management Act 1999* (Qld) s 51(4).

1069 *Vegetation Management Act 1999* (Qld) s 54(2).

1070 *Vegetation Management Act 1999* (Qld) s 51(5).

1071 *Vegetation Management Act 1999* (Qld) s 54(3).

While the legislation as originally enacted provided for the power to require information and to require a document to be produced, it also expressly preserved the privilege against self-incrimination. However, the privilege has now been abrogated. According to the Explanatory Notes accompanying the introduction of the amending legislation, the change is necessary to avoid the situation where an employee of a company could decline to provide information or to produce a document, thereby making it extremely difficult to obtain sufficient evidence against the corporate entity regarding an alleged offence. Under the legislation in its original form, a corporation could, for example, effectively choose to accept a smaller penalty for failure to comply with the requirement rather than risk prosecution for the original offence of unlawful clearing. The Explanatory Notes also point out that a safeguard is provided in the form of a derivative use immunity, so that the information or document, or evidence obtained therefrom, may not be used to prosecute the individual person providing it.¹⁰⁷²

(c) Department of the Premier and Cabinet

(i) *Financial Administration and Audit Act 1977 (Qld)*

The *Financial Administration and Audit Act 1977* (Qld) regulates the administration and management of public accounts in Queensland. It contains provisions setting out the powers available to the Auditor-General and other authorised auditors to obtain information relevant to the conduct of audits of public accounts and of the accounts of public entities.

The Act authorises an auditor to enter premises,¹⁰⁷³ make inspections,¹⁰⁷⁴ take extracts and make copies from documents¹⁰⁷⁵ and to require a person to give reasonable assistance in relation to the exercise of these powers.¹⁰⁷⁶ A person must not, without reasonable excuse, fail to comply with such a requirement.¹⁰⁷⁷ It is not a reasonable excuse for failing to comply with the requirement that compliance might tend to incriminate the person.¹⁰⁷⁸

However, neither an answer given in response to the requirement, nor any information, document or other thing obtained as a direct or indirect consequence of the person giving the answer, is admissible in a criminal

¹⁰⁷² Explanatory Notes, *Natural Resources and Other Legislation Amendment Bill 2003* (Qld) at 12.

¹⁰⁷³ *Financial Administration and Audit Act 1977* (Qld) s 85(3)(a).

¹⁰⁷⁴ *Financial Administration and Audit Act 1977* (Qld) s 85(3)(b).

¹⁰⁷⁵ *Financial Administration and Audit Act 1977* (Qld) s 85(3)(c).

¹⁰⁷⁶ *Financial Administration and Audit Act 1977* (Qld) s 85(3)(e).

¹⁰⁷⁷ *Financial Administration and Audit Act 1977* (Qld) s 85(4).

¹⁰⁷⁸ *Financial Administration and Audit Act 1977* (Qld) s 85(5).

proceeding other than a proceeding relating to the falsity of the answer, provided that, before giving the answer, the person claimed that giving the answer might tend to incriminate the person, and that the answer might in fact tend to incriminate the person.¹⁰⁷⁹

An authorised auditor may also give written notice to a person, requiring the person to give specified information in a way specified in the notice.¹⁰⁸⁰ A person must not, without reasonable excuse, fail to comply with the notice.¹⁰⁸¹ It is not a reasonable excuse for failing to comply that compliance might tend to incriminate the person.¹⁰⁸²

However, neither information given in response to the notice, nor any other information or document or other thing obtained as a direct or indirect consequence of the person giving the information, is admissible in a criminal proceeding other than a proceeding relating to the falsity of the answer, provided that, before giving the information, the person claimed that giving the information might tend to incriminate the person, and that giving the information might in fact tend to incriminate the person.¹⁰⁸³

If it is reasonably necessary for the purposes of an audit, an authorised auditor may, by written notice, require a person to attend before an authorised auditor to answer questions and may also require the person to produce documents belonging to or in the custody or control of the person.¹⁰⁸⁴ A person must not, without reasonable excuse, fail to comply with the notice.¹⁰⁸⁵ It is not a reasonable excuse for failing to comply that compliance with the notice might tend to incriminate the person.¹⁰⁸⁶

However, neither an answer given in response to the requirement, nor any information, document or other thing obtained as a direct or indirect consequence of the person giving the answer, is admissible in a criminal proceeding other than a proceeding relating to the falsity of the answer, provided that, before giving the answer, the person claimed that giving the answer might tend to incriminate the person, and that the answer might in fact tend to incriminate the person.¹⁰⁸⁷

1079 *Financial Administration and Audit Act 1977* (Qld) s 85(6).

1080 *Financial Administration and Audit Act 1977* (Qld) s 86(1).

1081 *Financial Administration and Audit Act 1977* (Qld) s 86(2).

1082 *Financial Administration and Audit Act 1977* (Qld) s 86(3).

1083 *Financial Administration and Audit Act 1977* (Qld) s 86(4).

1084 *Financial Administration and Audit Act 1977* (Qld) s 87(1).

1085 *Financial Administration and Audit Act 1977* (Qld) s 87(7).

1086 *Financial Administration and Audit Act 1977* (Qld) s 87(8).

1087 *Financial Administration and Audit Act 1977* (Qld) s 87(9).

The Department of the Premier and Cabinet has advised the Commission that the Auditor-General and other authorised auditors require the power to compel the provision of information and access to documents and property relevant to an audit, even where that power might abrogate the privilege against self-incrimination, in order to conduct precise and comprehensive audits of public accounts and the accounts of all public sector entities. The Department is of the view that limitations on the use that may be made of information provided by a person under compulsion provides a sufficient safeguard.¹⁰⁸⁸

The Auditor-General has advised the Commission that the relevant provisions were inserted into the legislation in 1993 as part of a suite of amendments resulting from a review of public sector auditing by the Electoral and Administrative Review Commission. The Auditor-General noted that, according to the second reading speech in relation to the *Audit Legislation Amendment Bill 1992*, the intent of the provisions was to strengthen the Auditor-General's powers of access to information, while also providing for appropriate checks and balances in the exercise of those powers. It is the view of the Auditor-General that, given the nature of the role, it is critical that the provisions remain unchanged.¹⁰⁸⁹

(d) Queensland Police Service

(i) *National Crime Authority (State Provisions) Act 1985 (Qld)*

The *National Crime Authority (State Provisions) Act 1985 (Qld)* authorises the National Crime Authority to investigate an offence or offences against a law of the State of Queensland¹⁰⁹⁰ if the matter has been referred to the Authority by the relevant Minister.¹⁰⁹¹

The Act provides that a person appearing at a hearing before the Authority shall not, without reasonable excuse, refuse or fail to answer a question¹⁰⁹² or to produce a document.¹⁰⁹³ The Act also provides that the person may be given a written undertaking that any answer given, document produced or any information obtained as a direct or indirect consequence of the answer or the production of the document will not be used in evidence in criminal

1088 Letter to the Chairperson of the Commission from the Acting Director-General of the Department of the Premier and Cabinet dated 11 October 2002.

1089 Letter to the Chairperson of the Commission from the Auditor-General dated 9 October 2002.

1090 *National Crime Authority (State Provisions) Act 1985 (Qld)* s 5(4).

1091 *National Crime Authority (State Provisions) Act 1985 (Qld)* s 5(1).

1092 *National Crime Authority (State Provisions) Act 1985 (Qld)* s 19(2)(b).

1093 *National Crime Authority (State Provisions) Act 1985 (Qld)* s 19(2)(c).

proceedings against the person.¹⁰⁹⁴ If such an undertaking has been given, it is not a reasonable excuse that the answer to the question or the production of the document might tend to incriminate the person.¹⁰⁹⁵

The immunity conferred by the Act is extended by a provision making disclosure of information by a member of the Authority or a member of the staff of the Authority unlawful in certain circumstances.¹⁰⁹⁶ In particular, subject to certain exceptions, a member of the Authority or of the Authority's staff is not to be required to produce in any court a document that has come into the person's custody or control because of the person's duties under the Act, or to divulge to a court information that has come to the person's notice because of those duties.¹⁰⁹⁷

The Queensland Commissioner of Police has advised this Commission that the *National Crime Authority (State Provisions) Act 1985* (Qld) is part of a national plan of action to investigate organised criminal activity. Each Australian State and Territory has similar legislation, based on a federal model,¹⁰⁹⁸ thus enabling the Authority to operate Australia wide. The Commissioner also noted that the abrogation of the privilege against self-incrimination is activated only under specified conditions including that the giving of an undertaking is authorised and that there are special grounds in the public interest.¹⁰⁹⁹

(ii) ***Police Powers and Responsibilities Act 2000 (Qld)***

The purposes of the *Police Powers and Responsibilities Act 2000* (Qld) include to provide powers necessary for effective modern policing and law enforcement.¹¹⁰⁰

The Act confers certain powers on police officers in relation to offences under the *Criminal Proceeds Confiscation Act 2002* (Qld).¹¹⁰¹ If a police officer reasonably suspects that a person possesses a document of a specified kind

1094 *National Crime Authority (State Provisions) Act 1985* (Qld) s 19(5), (7), (9).

1095 *National Crime Authority (State Provisions) Act 1985* (Qld) s 19(5), (7), (9).

1096 *National Crime Authority (State Provisions) Act 1985* (Qld) s 30.

1097 *National Crime Authority (State Provisions) Act 1985* (Qld) s 30(3).

1098 The original federal legislation was the *National Crime Authority Act 1984* (Cth), which, in an amended form, was renamed the *Australian Crime Commission Act 2002* (Cth): *Australian Crime Commission Establishment Act 2002* (Cth) s 2.

1099 Letter to the Chairperson of the Commission from the Commissioner of Police dated 13 November 2002.

1100 *Police Powers and Responsibilities Act 2000* (Qld) s 4(b).

1101 *Police Powers and Responsibilities Act 2000* (Qld) s 105(1), Schedule 4 (definition of "Confiscation Act").

relating to a confiscation offence or a suspected confiscation offence,¹¹⁰² the police officer may apply to a Supreme Court judge for an order (a “production order”) requiring the person named in the application to produce the document to a police officer.¹¹⁰³

If the judge considers that there are reasonable grounds for suspecting that the person possesses a relevant document, the judge may make a production order.¹¹⁰⁴

A person must not contravene a production order unless the person has a reasonable excuse.¹¹⁰⁵ A person is not excused from producing a document or making a document available when required to do so by a production order on the ground that producing the document or making the document available might tend to incriminate the person or make the person liable to a penalty.¹¹⁰⁶

However, neither the fact that the person produced the document, nor the fact that the person made the document available, nor any information, document or thing directly or indirectly obtained because the document was produced or made available is admissible against the person in any criminal proceeding other than a proceeding relating to the false or misleading nature of the document.¹¹⁰⁷

The Commissioner of Police has advised this Commission that the abrogation of the privilege provides police with the power to obtain documents that they may have otherwise been unable to obtain through informal, voluntary or co-operative methods. In the view of the Commissioner, this is in the public interest, since it facilitates the police investigation process of proving a nexus between illegal activity and property derived in relation to it, which, in turn, results in the capacity to have the property forfeited to the State and/or a pecuniary penalty being imposed under the *Criminal Proceeds Confiscation Act 2002* (Qld). The Commissioner is therefore of the view that the continued existence of the provision is necessary.¹¹⁰⁸

The Commissioner notes that the abrogation provision confers a derivative use immunity, thereby maintaining some consistency with fundamental

1102 *Police Powers and Responsibilities Act 2000* (Qld) s 106(1), Schedule 4 (definitions of “confiscation offence”, “property tracking document”).

1103 *Police Powers and Responsibilities Act 2000* (Qld) s 106(2).

1104 *Police Powers and Responsibilities Act 2000* (Qld) s 107(1).

1105 *Police Powers and Responsibilities Act 2000* (Qld) s 111(1).

1106 *Police Powers and Responsibilities Act 2000* (Qld) s 112(1)(a).

1107 *Police Powers and Responsibilities Act 2000* (Qld) s 112(3).

1108 Letter to the Commission from the Commissioner of Police dated 20 May 2003.

legislative principles, and striking a balance between the protection of individual rights and the public interest. The Commissioner further notes that the proceeding for a production order is not criminal in nature and does not result in punishment or sentence for any offence. The purpose of the proceeding is to enable forfeiture of property or imposition of a pecuniary penalty in relation to property proven to be connected with a criminal activity. The Commissioner is therefore of the view that the provision in question abrogates the privilege against imposition of a civil penalty, rather than the privilege against self-incrimination, and that limiting the abrogation in this way impinges to a lesser degree on individual rights.¹¹⁰⁹

(e) Queensland Transport

(i) *Transport Operations (Passenger Transport) Act 1994 (Qld)*

The *Transport Operations (Passenger Transport) Act 1994* (Qld) is intended to achieve the provision of the best possible public passenger transport at a reasonable cost to the community and government, keeping government regulation to a minimum.¹¹¹⁰ It contains provisions relating to various forms of public transport, including railways.

Under the Act, certain powers are conferred on “authorised persons”¹¹¹¹ for railways.¹¹¹² The Act also provides that authorised persons for railways have additional powers in relation to dangerous situations involving rail vehicles.¹¹¹³ If an authorised person reasonably believes that a person may be able to give information or produce a document that will help deal with a dangerous situation,¹¹¹⁴ the authorised person may require the person to give the information or produce the document,¹¹¹⁵ and the person must comply unless the person has a reasonable excuse.¹¹¹⁶ The fact that giving the information or producing the document might tend to incriminate the person is not a reasonable excuse for failing to comply.¹¹¹⁷

1109 *Ibid.* For a discussion of the penalty privilege, see pp 14-16 of this Discussion Paper.

1110 *Transport Operations (Passenger Transport) Act 1994* (Qld) s 2(1).

1111 *Transport Operations (Passenger Transport) Act 1994* (Qld) s 116.

1112 *Transport Operations (Passenger Transport) Act 1994* (Qld) ss 137-140, 126H-126K.

1113 A “dangerous situation” is a situation involving the transportation of dangerous goods by rail that is causing, or is likely to cause, imminent risk of the death of, or significant injury to, a person; significant harm to the environment; or significant damage to property: *Transport Operations (Passenger Transport) Act 1994* (Qld) s 126L.

1114 *Transport Operations (Passenger Transport) Act 1994* (Qld) s 126M(1).

1115 *Transport Operations (Passenger Transport) Act 1994* (Qld) s 126M(2).

1116 *Transport Operations (Passenger Transport) Act 1994* (Qld) s 126M(3).

1117 *Transport Operations (Passenger Transport) Act 1994* (Qld) s 126M(4).

However, evidence of, or directly or indirectly derived from, the information or the production of the document is not admissible in evidence against the person in a proceeding other than for an offence under the Act relating to giving false or misleading information¹¹¹⁸ or to producing false, misleading or incomplete documents,¹¹¹⁹ or for any other offence about the falsity of the information or document.¹¹²⁰

Queensland Transport has advised the Commission that the purpose of the abrogation of the privilege against self-incrimination, which applies only in dangerous situations, is to enable authorised persons to quickly assess the appropriate and safe course of action if an incident should occur. It is of the view that the continued existence of the provision is important because the ability to obtain relevant information, even if it involves the person giving the information incriminating himself or herself, is necessary to uphold the objectives of the legislation.

The Department notes that the provision seeks to strike a balance between the powers necessary to promote public safety and the protection of the rights of a person who may have jeopardised that safety. The person who provides self-incriminating information or documents is granted an immunity against prosecution, but only to the extent that the information or documents are not false or misleading. In the view of the Department it is justified that a person who aggravates a dangerous situation by knowingly providing false information should not benefit from the rule against self-incrimination.¹¹²¹

(ii) *Transport Operations (Road Use Management) Act 1995 (Qld)*

The purpose of the *Transport Operations (Road Use Management) Act 1995 (Qld)* is to provide for the effective and efficient management of road use in Queensland.¹¹²² It establishes a scheme for managing the use of the State's roads that is intended, amongst other things, to promote the effective and efficient movement of people, goods and services and to improve road safety and the environmental impact of road use.¹¹²³ It allows for the identification of vehicles, drivers and road users; the establishment of performance standards for vehicles, drivers and road users; the establishment of rules for on-road behaviour; the monitoring of compliance with the provisions of the Act; the

1118 *Transport Operations (Passenger Transport) Act 1994 (Qld)* s 130.

1119 *Transport Operations (Passenger Transport) Act 1994 (Qld)* s 131.

1120 *Transport Operations (Passenger Transport) Act 1994 (Qld)* s 126M(5).

1121 Letter to the Chairperson of the Commission from the Director-General of Queensland Transport dated 28 October 2002.

1122 *Transport Operations (Road Use Management) Act 1995 (Qld)* s 3(1)(a).

1123 *Transport Operations (Road Use Management) Act 1995 (Qld)* s 3(1)(b).

management of non-performing vehicles, drivers and road users; and the management of traffic to enhance safety and transport efficiency.¹¹²⁴

The Act provides for the appointment of authorised officers,¹¹²⁵ and grants them certain powers. If an authorised officer reasonably believes that an information offence has been committed and that a person may be able to give information about the offence, the officer may require the person to give information about the offence.¹¹²⁶ The person must give the information unless the person has a reasonable excuse.¹¹²⁷ It is a reasonable excuse for an individual to fail to give the information if giving the information might tend to incriminate the individual.¹¹²⁸

Recent amendments to the *Transport Operations (Road Use Management) Act 1995* (Qld) have strengthened the ability of transport authorities to obtain such information. They allow the chief executive of Queensland Transport¹¹²⁹ or the Commissioner of the Queensland Police Service,¹¹³⁰ by written notice, to require a person to give information about an information offence to the chief executive or to the Commissioner.¹¹³¹ The person must give the information unless the person has a reasonable excuse.¹¹³² It is not a reasonable excuse for the person to fail to give the information that the information might tend to incriminate the person.¹¹³³ However, the information, or any evidence directly or indirectly derived from the information that might tend to incriminate the person, is not admissible against the person in a civil or criminal proceeding, other than a proceeding for an offence about the falsity of the information.¹¹³⁴

Queensland Transport considers that the abrogation of the privilege is justified by the need to improve safety in the heavy transport industry.¹¹³⁵ It notes

1124 *Transport Operations (Road Use Management) Act 1995* (Qld) s 3(2).

1125 *Transport Operations (Road Use Management) Act 1995* (Qld) s 20.

1126 *Transport Operations (Road Use Management) Act 1995* (Qld) s 50(2), (3). "Information offence" means an offence against a transport Act that involves a heavy vehicle or a contravention of a regulation made under section 148 of the Act prescribing vehicle standards or rules about vehicle inspections and that is declared under a regulation to be an information offence: *Transport Operations (Road Use Management) Act 1995* (Qld) s 50(1).

1127 *Transport Operations (Road Use Management) Act 1995* (Qld) s 50(5).

1128 *Transport Operations (Road Use Management) Act 1995* (Qld) s 50(6).

1129 *Acts Interpretation Act 1954* (Qld) s 33(11): definition of "chief executive".

1130 *Transport Operations (Road Use Management) Act 1995* (Qld) Schedule 4 (Dictionary): definition of "commissioner".

1131 *Transport Operations (Road Use Management) Act 1995* (Qld) s 50AA(1), (2).

1132 *Transport Operations (Road Use Management) Act 1995* (Qld) s 50AA(4).

1133 *Transport Operations (Road Use Management) Act 1995* (Qld) s 50AA(5).

1134 *Transport Operations (Road Use Management) Act 1995* (Qld) s 50AA(6).

1135 Explanatory Notes, *Transport Legislation Amendment Bill (No 2) 2002* (Qld) at 2.

that, in the twelve months to September 2001, there were 57 fatal road accidents in Queensland involving heavy vehicles.¹¹³⁶ Queensland Transport also notes that, in the heavy vehicle industry, drivers may be requested, instructed or directed to perform their duties in ways that result in unsafe driving practices because of fatigue or because of mass or loading offences. As persons other than the driver - for example, consignors, loaders, packers and employers - may influence the way heavy vehicles are used on the road, it is important in the interests of safer heavy vehicle driving practices, and thus a safer road environment for all road users, to be able to identify and bring to account those persons adversely affecting driving behaviour. While, traditionally, only the actions of the driver have attracted enforcement measures, it is now recognised that, linked to driving behaviour in the heavy transport industry, there is a “chain of responsibility” involving consignors, loaders, packers and employers, and that there is a need to make each party responsible for conduct resulting in unsafe practices. The purpose of the abrogation provision is to enable the information obtained to be used to activate extended liability provisions or to enforce other offences such as the specified obligations of employers, consignors or loaders under fatigue management or dangerous goods provisions.¹¹³⁷

Queensland Transport notes that the amendment includes an immunity for the person who gives the information,¹¹³⁸ and that it is consistent with provisions in other transport legislation.¹¹³⁹ It concludes that it is a natural progression from the existing legislation to meet community and industry expectations.¹¹⁴⁰

(f) Treasury

(i) *Fuel Subsidy Act 1997 (Qld)*

The *Fuel Subsidy Act 1997 (Qld)* establishes a scheme of fuel subsidies for licensed retailers¹¹⁴¹ and licensed bulk end users.¹¹⁴²

The Act provides for authorised persons to conduct investigations and inspections to monitor and enforce compliance with the Act.¹¹⁴³ An authorised

1136 Id at 6.

1137 Id at 7.

1138 Id at 2, 6.

1139 Id at 6.

1140 Id at 7.

1141 *Fuel Subsidy Act 1997 (Qld)* Chapter 2.

1142 *Fuel Subsidy Act 1997 (Qld)* Chapter 3.

1143 *Fuel Subsidy Act 1997 (Qld)* s 58.

person has certain powers under the Act, including a power of entry,¹¹⁴⁴ and powers to search and inspect a place, to take samples, to copy documents, and to access electronic systems.¹¹⁴⁵ An authorised person may also require the occupier of, or a person at, the place to give the authorised person reasonable help in the exercise of these powers¹¹⁴⁶ or to give the authorised person information to help the authorised person ascertain whether the Act is being complied with.¹¹⁴⁷

A person required to give help or to provide information must comply with the requirement, unless the person has a reasonable excuse.¹¹⁴⁸ If the requirement is to give help in the exercise of the authorised person's powers, and involves giving information or producing a document, it is not a reasonable excuse that giving the information or producing the document might tend to incriminate the person.¹¹⁴⁹ If the requirement is to give the authorised person information relevant to compliance with the Act, it is not a reasonable excuse that giving the information might tend to incriminate the person.¹¹⁵⁰

However, evidence of, or directly or indirectly derived from a document, from information provided in response to a requirement to assist an authorised person in the exercise of his or her powers,¹¹⁵¹ or from information provided to assist an authorised person to determine compliance with the Act¹¹⁵² is not admissible in evidence against the person in a civil or criminal proceeding, other than a proceeding for an offence about the falsity of the document.

An authorised person also has power under the Act to require, by written notice, that a person give information about a matter that is in the person's knowledge and that is stated in the notice;¹¹⁵³ produce a document in the person's possession or control about a matter stated in the notice;¹¹⁵⁴ or

1144 *Fuel Subsidy Act 1997* (Qld) s 66.

1145 *Fuel Subsidy Act 1997* (Qld) s 73(3)(a)-(e).

1146 *Fuel Subsidy Act 1997* (Qld) s 73(3)(g).

1147 *Fuel Subsidy Act 1997* (Qld) s 73(3)(h).

1148 *Fuel Subsidy Act 1997* (Qld) ss 74(1), 75(1).

1149 *Fuel Subsidy Act 1997* (Qld) s 74(2).

1150 *Fuel Subsidy Act 1997* (Qld) s 75(2).

1151 *Fuel Subsidy Act 1997* (Qld) s 74(3).

1152 *Fuel Subsidy Act 1997* (Qld) s 75(3).

1153 *Fuel Subsidy Act 1997* (Qld) s 89(1)(a).

1154 *Fuel Subsidy Act 1997* (Qld) s 89(1)(b).

attend before the authorised person to give information or produce a document about a matter stated in the notice.¹¹⁵⁵

A person must comply with such a requirement unless the person has a reasonable excuse.¹¹⁵⁶ It is not a reasonable excuse for failing to comply with the requirement that giving the information or producing the document might tend to incriminate the person.¹¹⁵⁷

However, evidence of, or evidence directly or indirectly derived from, the information or document is not admissible in evidence against the person in a civil or criminal proceeding, other than a proceeding for an offence about the falsity of the information or document.¹¹⁵⁸

The Under Treasurer has advised the Commission that the reason for the abrogation of the privilege is that persons of whom information or document requirements are made are usually uniquely in a position to provide the information necessary for a proper determination of subsidy entitlement. If they were able to avoid disclosing the information, it would often be very difficult to determine whether the appropriate amount of subsidy was being claimed and paid. The Under Treasurer is of the view that the abrogation provisions should continue because it is in the public interest that information relevant to the subsidy is able to be obtained.¹¹⁵⁹

Under the Act, the Commissioner of State Revenue appointed under the *Taxation Administration Act 2001 (Qld)*¹¹⁶⁰ has certain powers in relation to the payment of fuel subsidies.¹¹⁶¹ The Act also imposes obligations, in relation to the keeping of records and the giving of notices to the Commissioner, on persons entitled to claim a fuel subsidy.¹¹⁶²

The Commissioner may, by written notice given to a person, require the person to give the commissioner, at a time and in a way stated in the notice,

1155 *Fuel Subsidy Act 1997 (Qld)* s 92(1).

1156 *Fuel Subsidy Act 1997 (Qld)* ss 90(1), 94(1).

1157 *Fuel Subsidy Act 1997 (Qld)* ss 90(2), 94(2).

1158 *Fuel Subsidy Act 1997 (Qld)* ss 90(3), 94(3).

1159 Letter to the Chairperson of the Commission from the Under Treasurer dated 11 October 2002.

1160 *Fuel Subsidy Act 1997 (Qld)* Schedule 2 (definition of "commissioner").

1161 See for example *Fuel Subsidy Act 1997 (Qld)* ss 19 (Calculating provisional subsidy), 21 (Commissioner may require guarantee), 114 (Person receiving subsidy without entitlement).

1162 See for example *Fuel Subsidy Act 1997 (Qld)* ss 26 (Notice of ceasing operations as a retailer), 27 (Notice of ceasing to operate a retail site), 28 (Notice of starting to operate a further retail site), 29 (Records to be kept), 30 (Return), 34H (Notice of ceasing to use bulk end user fuel), 34I (Notice of ceasing to use a storage site), 34J (Notice of starting to use a storage site).

information about a matter stated in the notice¹¹⁶³ or a document in the person's possession or control that is about a matter stated in the notice.¹¹⁶⁴

The person must comply with the notice unless the person has a reasonable excuse.¹¹⁶⁵ It is not a reasonable excuse for the person to fail to comply with the requirement that complying with the requirement might tend to incriminate the person.¹¹⁶⁶

However, evidence of, or evidence directly or indirectly derived from, self-incriminatory information or a self-incriminatory document given by the person in compliance with the requirement is not admissible against the person in a civil or criminal proceeding, other than a proceeding in which the falsity or misleading nature of the information or document is relevant.¹¹⁶⁷

The reason for abrogating the privilege against self-incrimination is to ensure that the Commissioner is able to access all information relevant to the proper determination of a licensee's fuel subsidy entitlement under the Act. Accordingly, the derivative use immunity prevents the use of information so obtained except where the falsity or the misleading nature of the information is in issue. This approach recognises that licensees often uniquely possess the information necessary to enable the Commissioner to determine whether they have properly satisfied their obligations, so that any refusal to provide that information would preclude the accurate determination of a licensee's fuel subsidy entitlement. In doing so, the provision is considered to strike an appropriate balance between revenue protection for the State and licensees' rights.¹¹⁶⁸

The Under Treasurer has advised the Commission that the fuel subsidy scheme provides significant benefits to Queensland fuel users. The abrogation of the privilege assists the Commissioner to effectively administer the legislation by enabling the correct determination of a person's eligibility to receive a fuel subsidy and ensuring that the amount paid in subsidies is appropriate and not subject to abuse. Without the information able to be obtained as a result of the abrogation provision, it would often be very difficult to ascertain whether the appropriate amount of subsidy was being claimed and paid. Further, since the Act is revenue related, the provision is necessary to ensure that the revenue of the State is appropriately protected. The

1163 *Fuel Subsidy Act 1997* (Qld) s 138A(1)(a).

1164 *Fuel Subsidy Act 1997* (Qld) s 138A(1)(b).

1165 *Fuel Subsidy Act 1997* (Qld) s 138A(2).

1166 *Fuel Subsidy Act 1997* (Qld) s 138A(3).

1167 *Fuel Subsidy Act 1997* (Qld) s 138A(4).

1168 Explanatory Notes, *Revenue Legislation Amendment Bill 2002* (Qld) at 18. Section 138A of the *Fuel Subsidy Act 1997* (Qld) was inserted by section 46 of the *Revenue Legislation Amendment Act 2002* (Qld).

continued ability to access the information is considered important and therefore the continued existence of the provision is considered necessary.¹¹⁶⁹

(ii) Government Owned Corporations Act 1993 (Qld)

Schedule 3 of the *Government Owned Corporations Act 1993* (Qld) subjects government owned corporations to the provisions of the *Financial Administration and Audit Act 1977* (Qld) that abrogate the privilege against self-incrimination. Some of these provisions confer a derivative use immunity in relation to certain evidence. These provisions are considered on pages 136-137 of this Discussion Paper under the Department of the Premier and Cabinet, which administers the relevant provisions of the *Financial Administration and Audit Act 1977* (Qld).

(iii) Taxation Administration Act 2001 (Qld)

The *Taxation Administration Act 2001* (Qld) is concerned with the administration and enforcement of Queensland revenue laws.¹¹⁷⁰ It provides for the appointment of a Commissioner of State Revenue,¹¹⁷¹ who is responsible for the administration and enforcement of Queensland taxation laws,¹¹⁷² and may also perform certain functions under Commonwealth taxation legislation.¹¹⁷³

The Act provides that if, under a tax law, a person is required to give information or a document to the Commissioner or an investigator or to lodge a document, it is not a reasonable excuse for failing to comply with the requirement that the information or document might tend to incriminate the person.¹¹⁷⁴ However, where self-incriminatory information or documents are provided in compliance with the requirement, evidence of, or directly or indirectly derived from, the information or documents is not admissible against the person in a criminal proceeding, other than a proceeding in which the falsity or misleading nature of the information or document is relevant.¹¹⁷⁵

The Under Treasurer is of the view that it is necessary for the abrogation provisions to continue. To support this conclusion, the Under Treasurer notes that taxpayers often uniquely possess the information necessary to enable the

1169 Letter to the Chairperson of the Commission from the Under Treasurer dated 28 May 2003.

1170 *Taxation Administration Act 2001* (Qld) s 3(1).

1171 *Taxation Administration Act 2001* (Qld) s 7(1).

1172 *Taxation Administration Act 2001* (Qld) s 8(1).

1173 *Taxation Administration Act 2001* (Qld) s 8(2).

1174 *Taxation Administration Act 2001* (Qld) s 124(2).

1175 *Taxation Administration Act 2001* (Qld) s 124(3).

Commissioner to determine whether or not they have properly satisfied their tax liabilities, so that any refusal to provide that information would prevent the Commissioner from making an accurate assessment of liability. The Under Treasurer considers that it would be inappropriate, and inequitable to others who comply with their tax obligations, if a taxpayer could avoid the proper determination of tax liability simply by refusing to provide information or documents to the Commissioner. It would also have direct revenue consequences for the State, as enforcement of compliance would become problematic once taxpayers became aware of this avoidance technique. The Under Treasurer has advised the Commission that the reason for conferring a derivative use immunity was to achieve an appropriate balance between revenue protection for the State and taxpayers' rights.¹¹⁷⁶

3. OVERVIEW OF PROVISIONS

In Queensland, there are fewer provisions that confer a derivative use immunity than confer a use immunity or no immunity at all. Nonetheless, those that exist apply in a variety of situations - for example, coronial investigations into certain deaths, mining accidents, vegetation management, transport safety, investigation of serious crime and revenue protection.

1176

Letter to the Chairperson of the Commission from the Under Treasurer dated 11 October 2002.

CHAPTER 7

PROVISIONS THAT REFER TO THE *COMMISSIONS OF INQUIRY ACT 1950 (QLD)*

1. INTRODUCTION

In addition to those provisions that expressly abrogate the privilege against self-incrimination, other provisions abrogate the privilege by reference to the *Commissions of Inquiry Act 1950 (Qld)*.

The way in which other legislation abrogates the privilege against self-incrimination by reference to the *Commissions of Inquiry Act 1950 (Qld)* varies from Act to Act, probably as a result of changes in legislative drafting style. The most common methods are to deem a person or body to be a commission of inquiry within the meaning of that Act¹¹⁷⁷ or to provide that a person or body is to have the powers conferred on a commission of inquiry by the Act.¹¹⁷⁸ Other provisions state that an investigation or inquiry is to be conducted as a commission of inquiry,¹¹⁷⁹ or that the *Commissions of Inquiry Act 1950 (Qld)* applies to a person or body conducting an investigation or inquiry.¹¹⁸⁰

The purpose of the *Commissions of Inquiry Act 1950 (Qld)* is to facilitate the operation of commissions of inquiry established to make investigations into matters of public importance. The Act sets out the powers of a commission of inquiry and the obligations of witnesses summoned to appear before a commission. Section 14(1A) of the Act provides:

A person attending before a commission is not entitled -

- (a) to remain silent with respect to any matter relevant to the commission's inquiry upon the chairperson's requiring the person to give evidence with respect to that matter; or
- (b) to refuse or fail to answer any question that the person is required by the chairperson to answer; or

1177 See for example *Alcan Queensland Pty Ltd Agreement Act 1965 (Qld)* Schedule s 50.

1178 See for example *Petroleum Act 1923 (Qld)* s 8(3).

1179 See for example *State Development and Public Works Organisation Act 1971 (Qld)* s 12(2).

1180 See for example *Law Reform Commission Act 1968 (Qld)* s 11(2).

- (c) to refuse or fail to produce any book, document, writing, record, property or thing that the person has been summoned to produce or required by the chairperson to produce;

on the ground that to do otherwise would or might tend to incriminate the person.

Whatever drafting style is adopted, the effect of the reference to the *Commissions of Inquiry Act 1950* (Qld) is that, unless the application of section 14(1A) of that Act is excepted,¹¹⁸¹ a person cannot refuse to provide information on the grounds that to do so would tend to incriminate the person.

To compensate for the abrogation of the privilege against self-incrimination, section 14A of the *Commissions of Inquiry Act 1950* (Qld) confers a use immunity on answers given by the witness. It provides:

- (1) A statement or disclosure made by any witness in answer to any question put to the witness by a commission or any commissioner or before a commission shall not (except in proceedings in respect of contempt of the commission or of an offence, or a conspiracy by the witness with another person to commit an offence, against any of the sections of the Criminal Code specified in section 22)¹¹⁸² be admissible in evidence against the witness in any civil or criminal proceedings.
- (2) A book, document, writing, record, property or anything produced by a witness is not and it is declared never was a statement or disclosure to which subsection 1 applies. [note added]

Unless a provision states otherwise, the abrogation of the privilege against self-incrimination by reference to the *Commissions of Inquiry Act 1950* (Qld) would also confer a use immunity.

This chapter considers existing Queensland provisions that abrogate the privilege by reference to the *Commissions of Inquiry Act 1950* (Qld). The provisions are listed alphabetically according to the government department that administers them. The views of the relevant department are also set out.

1181 See for example *Gaming Machine Act 1991* (Qld) s 335(2).

1182 Section 22 of the *Commissions of Inquiry Act 1950* (Qld) specifies the following provisions of the *Criminal Code*, which are located in Chapter 16 (Offences relating to the administration of justice): ss 120 (Judicial corruption), 123 (Perjury), 126 (Fabricating evidence), 127 (Corruption of witnesses), 128 (Deceiving witnesses), 129 (Destroying evidence) and 130 (Preventing witnesses from attending).

2. EXISTING QUEENSLAND PROVISIONS

(a) Department of Aboriginal and Torres Strait Islander Policy

- (i) ***Community Services (Aborigines) Act 1984 (Qld)***
- (ii) ***Community Services (Torres Strait) Act 1984 (Qld)***

The purpose of the *Community Services (Aborigines) Act 1984 (Qld)* and the *Community Services (Torres Strait) Act 1984 (Qld)* is to provide for support, administrative services and assistance for, respectively, Aboriginal communities resident in Queensland and for communities resident in Torres Strait or deemed so to be, and for management of lands for use by those communities.

Each of the Acts contains a provision enabling the Governor in Council to authorise inspections, investigations and inquiries for the purposes of the Act. The Acts further provide that a person authorised to undertake an inspection, investigation or inquiry has and may exercise the powers, authorities, protection and jurisdiction of a commission under the *Commissions of Inquiry Act 1950 (Qld)*.¹¹⁸³

The Department of Aboriginal and Torres Strait Islander Policy has advised this Commission that the Department's principal interest is that in any investigation of indigenous issues, the body or person conducting the inquiry have access to as much information as possible. In the view of the Department, only an abrogation of the privilege against self-incrimination will achieve this. The Department does not hold any firm views on the relative merits and benefits of use and derivative use immunity, but considers, that, from a practical point of view, the absence of immunity would not foster maximum disclosure by witnesses.¹¹⁸⁴

(b) Environmental Protection Agency

(i) ***Beach Protection Act 1968 (Qld)***

The purpose of the *Beach Protection Act 1968 (Qld)* is to regulate and to provide advice in relation to activities affecting the coast so as to minimise damage from erosion or encroachment by tidal water.

The Act establishes the Beach Protection Authority,¹¹⁸⁵ and gives it a number of functions including the carrying out of investigations, conducting of

¹¹⁸³ *Community Services (Aborigines) Act 1984 (Qld)* s 13(1); *Community Services (Torres Strait) Act 1984 (Qld)* s 11(1).

¹¹⁸⁴ Letter to the Commission from the Department of Aboriginal and Torres Strait Islander Policy dated 22 January 2003.

¹¹⁸⁵ *Beach Protection Act 1968 (Qld)* s 5(1).

experiments and giving of demonstrations with respect to coastal management.¹¹⁸⁶

In respect of any investigation the authority has all the powers, authority, protection and jurisdiction of a commission under the *Commissions of Inquiry Act 1950* (Qld).¹¹⁸⁷

The Environmental Protection Agency has advised the Commission that the commission of inquiry powers provide the Beach Protection Authority with a powerful tool in that the Authority can, in theory, compel people to assist in its enquiries. In the view of the Agency, this tool has a number of attributes. It quickly resolves issues of whether members of the public should co-operate with the Authority (regardless of whether they are at risk of self-incrimination); it frees people from exposure to liability that they might otherwise incur if they co-operated with the Authority (for example, for breach of confidence); and, in rare cases, it allows the Authority to compel possible defendants to answer questions that may be against their interests.¹¹⁸⁸

The Agency notes that, even where a person is required to provide the Authority with self-incriminating information, the maximum penalty for a contravention of the Act is fifty penalty units.¹¹⁸⁹ It is of the view that, having regard to the practices of the Magistrates Courts, it would be unlikely for a person who contravened the Act to be fined more than \$2000. It is not aware that anyone has in fact been fined under the Act, but considers that when the risk of a fine is compared with the value and importance of Queensland's coastline, it is not difficult to imagine why the provision was included.¹¹⁹⁰

(c) Department of Justice and Attorney-General

(i) *Appeal Costs Fund Act 1973* (Qld)

The *Appeal Costs Fund Act 1973* (Qld) provides for a party to an appeal to be granted, in certain circumstances, a certificate of indemnity in respect of legal costs incurred by the party in the appeal.¹¹⁹¹

1186 *Beach Protection Act 1968* (Qld) s 34(1)(b).

1187 *Beach Protection Act 1968* (Qld) s 34(2).

1188 Letter to the Commission from the Environmental Protection Agency dated 8 May 2003.

1189 The value of a penalty unit is, apart for an offence under the *Cooperatives Act 1997* (Qld), \$75: *Penalties and Sentences Act 1992* (Qld) s 5(1).

1190 Letter to the Commission from the Environmental Protection Agency dated 8 May 2003.

1191 *Appeal Costs Fund Act 1973* (Qld) Part 4.

The Act also establishes the Appeal Costs Board.¹¹⁹² The functions of the Board are to exercise and discharge the powers, authorities, duties, functions and obligations conferred or imposed on it by or under the Act,¹¹⁹³ and to advise the relevant Minister upon any matter submitted by the Minister to it relating to the operation of the Act.¹¹⁹⁴ The Board may issue certificates authorising payment out of the Appeal Costs Fund to a person who has been issued with an indemnity certificate.¹¹⁹⁵

The Act provides that, for the purposes of an inquiry under the Act, the Board has the powers of a commission of inquiry, and the provisions of the *Commissions of Inquiry Act 1950* (Qld) apply to any witness or person summoned by or appearing before the Board in any such inquiry.¹¹⁹⁶

The Department of Justice and Attorney-General has advised the Commission that it is unable to give a definitive answer as to why the provision in question was included in the *Appeal Costs Fund Act 1973* (Qld) since, at the time the legislation was passed, it was not the custom to prepare Explanatory Notes and the second reading speech dealing with the Bill is of little assistance.¹¹⁹⁷

However, the Department noted that the *Appeal Costs Fund Act 1973* (Qld) was enacted in response to the recommendations of this Commission in its *Report on a Bill to Establish an Appeal Costs Fund*.¹¹⁹⁸ In that Report, the Commission specifically recommended that there be a provision to the effect that the “provisions of the Commissions of Inquiry Acts 1950-1954 shall ... apply to and in respect of any witness or person summoned by or appearing before the Board”.¹¹⁹⁹

(ii) ***Judges (Salaries and Allowances) Act 1967* (Qld)**

The *Judges (Salaries and Allowances) Act 1967* (Qld) establishes the Salaries and Allowances Tribunal.¹²⁰⁰ The Tribunal must inquire into and report in writing to the relevant Minister on the changes (if any) that should be

1192 *Appeal Costs Fund Act 1973* (Qld) s 6(1).

1193 *Appeal Costs Fund Act 1973* (Qld) s 8(1).

1194 *Appeal Costs Fund Act 1973* (Qld) s 8(2).

1195 *Appeal Costs Fund Act 1973* (Qld) s 14(1).

1196 *Appeal Costs Fund Act 1973* (Qld) s 6(6).

1197 Letter to the Commission from the Department of Justice and Attorney-General dated 10 December 2002.

1198 Queensland Law Reform Commission, Report, *Report on a Bill to Establish an Appeal Costs Fund* (R 12, 1973).

1199 Id at 8. The commentary included in the Report does not contain any explanation for the inclusion of this provision.

1200 *Judges (Salaries and Allowances) Act 1967* (Qld) s 5(1).

made to the rates of salary and the allowances and rates of allowances payable to judicial officers in Queensland.¹²⁰¹

The Act provides that the Tribunal has all the powers, authorities, protection and jurisdiction of a commission of inquiry under the *Commissions of Inquiry Act 1950* (Qld).¹²⁰²

The Department of Justice and Attorney-General has advised the Commission that it is unable to give a definitive answer as to why the provision in question was included in the *Judges (Salaries and Allowances) Act 1967* (Qld) since, at the time the legislation was passed, it was not the custom to prepare Explanatory Notes and the second reading speech dealing with the Bill is of little assistance.¹²⁰³

(iii) **Law Reform Commission Act 1968 (Qld)**

The *Law Reform Commission Act 1968* (Qld) establishes the Queensland Law Reform Commission.¹²⁰⁴ The function of the Commission is to review Queensland laws with a view to their systematic development and reform.¹²⁰⁵

In carrying out this function, the Commission is to undertake the examination of particular branches of the law, and the formulation of recommendations for reform, consolidation or statute law revision.¹²⁰⁶ The Commission may, for its purposes under the Act, hold and conduct such inquiries as it thinks fit, and inform itself on any matter in such manner as it thinks fit.¹²⁰⁷

The Act provides that, for the purposes of any inquiry under the Act by the Commission, a member of the Commission shall have the powers, authorities, protections and immunities conferred on a commissioner by the *Commissions of Inquiry Act 1950* (Qld).¹²⁰⁸ It also provides that the provisions of the *Commissions of Inquiry Act 1950* (Qld) shall apply to any such inquiry and to any witness or person summoned by or appearing before the Commission.¹²⁰⁹

1201 *Judges (Salaries and Allowances) Act 1967* (Qld) s 12.

1202 *Judges (Salaries and Allowances) Act 1967* (Qld) s 13(3).

1203 Letter to the Commission from the Department of Justice and Attorney-General dated 10 December 2002.

1204 *Law Reform Commission Act 1968* (Qld) s 3.

1205 *Law Reform Commission Act 1968* (Qld) s 10(1).

1206 *Law Reform Commission Act 1968* (Qld) s 10(3)(d).

1207 *Law Reform Commission Act 1968* (Qld) s 10(3).

1208 *Law Reform Commission Act 1968* (Qld) s 11(1).

1209 *Law Reform Commission Act 1968* (Qld) s 11(2).

The Department of Justice and Attorney-General has advised the Commission that it is unable to give a definitive answer as to why the provisions in question were included in the *Law Reform Commission Act 1968* (Qld) since, at the time the legislation was passed, it was not the custom to prepare Explanatory Notes and the second reading speech dealing with the Bill is of little assistance.¹²¹⁰

The Commission itself is unaware whether its power to compel the provision of self-incriminating information has ever been invoked. It considers that the issue of whether it might need the power in the future would depend largely on the nature of the references it receives from the Attorney-General.

(d) Department of Local Government and Planning

(i) *City of Brisbane Act 1924* (Qld)

The purpose of the *City of Brisbane Act 1924* (Qld) is to provide for the good government of the City of Brisbane.

The Act creates a mechanism for an officer employed by the Brisbane City Council to appeal against the promotion of another officer,¹²¹¹ or against dismissal from employment or disciplinary measures.¹²¹² There is provision in the Act for the constitution of an appeal board¹²¹³ to hear and determine such appeals.¹²¹⁴

For the purposes of these appeals, the appeal board has and may exercise all or any of the powers, authorities, protections and jurisdictions of a commission or a commissioner within the meaning of the *Commissions of Inquiry Act 1950* (Qld).¹²¹⁵

The Department of Local Government and Planning has advised the Commission that the relevant provision was inserted into the *City of Brisbane Act 1924* (Qld) in 1973, and the reasons for its inclusion are not now known. According to the Department, it is understood that the Brisbane City Council is currently exploring the possibility of replacing the existing appeals regime with one established under its local laws. The Council has indicated to the

1210 Letter to the Commission from the Department of Justice and Attorney-General dated 10 December 2002.

1211 *City of Brisbane Act 1924* (Qld) s 25C(1).

1212 *City of Brisbane Act 1924* (Qld) s 25D(2).

1213 *City of Brisbane Act 1924* (Qld) Schedule 3 s 2.

1214 *City of Brisbane Act 1924* (Qld) Schedule 3 s 3.

1215 *City of Brisbane Act 1924* (Qld) Schedule 3 s 19.

Department that it would be desirable for the current provisions to be retained until another suitable regime is in place.¹²¹⁶

(ii) *Sewerage and Water Supply Act 1949* (Qld)¹²¹⁷

The *Sewerage and Water Supply Act 1949* (Qld) makes provision about sewerage, sanitary conveniences, stormwater drainage and water supply.

The Act establishes the Plumbers and Drainers Examination and Licensing Board,¹²¹⁸ which has power to grant various classes of licences to plumbers and drainers.¹²¹⁹ The Board may also conduct an inquiry, investigation or hearing into the question of whether an existing licence should be cancelled or suspended.¹²²⁰

In conducting such an inquiry, investigation or hearing the Board has all the powers, authorities and protection of a commission under the *Commissions of Inquiry Act 1950* (Qld).¹²²¹

However, the *Sewerage and Water Supply Act 1949* (Qld) is to be repealed by the *Plumbing and Drainage Act 2002* (Qld),¹²²² which is expected to come into operation in the second half of 2003.¹²²³ The new Act does not refer to the powers of a commission of inquiry.

(e) Department of Natural Resources and Mines

(i) *Petroleum Act 1923* (Qld)

The object of the *Petroleum Act 1923* (Qld) is to encourage and regulate the mining for petroleum and natural gas in Queensland and the conveying of petroleum and natural gas.

1216 Letter to the Commission from the Department of Local Government and Planning dated 7 May 2003.

1217 The *Sewerage and Water Supply Act 1949* (Qld) is administered jointly by the Department of Local Government and Planning and the Department of Natural Resources and Mines. The relevant provisions are administered by the Department of Local Government and Planning. See *Administrative Arrangements Order (No 1) 2003* (Qld) Schedule.

1218 *Sewerage and Water Supply Act 1949* (Qld) s 5.

1219 *Sewerage and Water Supply Act 1949* (Qld) s 13.

1220 *Sewerage and Water Supply Act 1949* (Qld) s 22(1).

1221 *Sewerage and Water Supply Act 1949* (Qld) s 22(2).

1222 *Plumbing and Drainage Act 2002* (Qld) s 147. The *Plumbing and Drainage Act 2002* (Qld) was assented to on 13 December 2002. It will come into effect on a date to be fixed by proclamation: *Plumbing and Drainage Act 2002* (Qld) s 2. If the Act has not been proclaimed within a year of the date of assent, it will commence automatically on the following day unless the commencement is postponed by regulation to a date no later than two years after the date of assent: *Acts Interpretation Act 1954* (Qld) s 15DA.

1223 Letter to the Commission from the Department of Local Government and Planning dated 7 May 2003.

The Act authorises the Governor in Council to appoint a Petroleum Advisory Board for the purpose of making any inquiry or investigation that may be deemed necessary or for such other purposes as the Governor in Council may see fit.¹²²⁴

For the purpose of such an inquiry or investigation, the Board and every member thereof has the same powers, authorities, and protection as a commission under the *Commissions of Inquiry Act 1950* (Qld).¹²²⁵

(f) Department of Primary Industries

(i) *Veterinary Surgeons Act 1936* (Qld)

The *Veterinary Surgeons Act 1936* (Qld) provides for the registration of veterinary surgeons and for the regulation and control of the practice of veterinary science.

The Act establishes the Veterinary Tribunal of Queensland,¹²²⁶ which has power to order that the name of a veterinary surgeon be removed from the register if the veterinary surgeon has been convicted of an offence of such a nature that it renders the veterinary surgeon unfit to practise as a veterinary surgeon.¹²²⁷ The Tribunal also has power to hear and determine charges of professional misconduct against a veterinary surgeon.¹²²⁸

For the purpose of conducting these investigations, the Tribunal is deemed to be a commission of inquiry under the *Commissions of Inquiry Act 1950* (Qld) and the provisions of that Act apply to the proceedings of the Tribunal.¹²²⁹

The Department of Primary Industries has advised the Commission that it is most important that the Tribunal maintain the ability to abrogate the privilege of a witness against self-incrimination. The Department noted that Tribunal proceedings often involve the welfare of an animal or animals and that, without the capacity to require a person to produce certain documents or to answer particular questions, the Tribunal may not be able to properly investigate the death or inappropriate treatment of an animal in suspicious circumstances. The Department also highlighted the importance of the role of

1224 *Petroleum Act 1923* (Qld) s 8(1).

1225 *Petroleum Act 1923* (Qld) s 8(3).

1226 *Veterinary Surgeons Act 1936* (Qld) s 15A.

1227 *Veterinary Surgeons Act 1936* (Qld) s 22C.

1228 *Veterinary Surgeons Act 1936* (Qld) s 22G.

1229 *Veterinary Surgeons Act 1936* (Qld) s 29.

the Tribunal in protecting the rights of animals that are unable to do so themselves.¹²³⁰

(g) Queensland Health

(i) *Health Act 1937* (Qld)

The *Health Act 1937* (Qld) is a consolidation of Queensland laws concerning public health.

The Act authorises the Minister for Health to initiate such inspections, investigations and inquiries as the Minister thinks fit in relation to any matters concerning public health. The Governor in Council may also direct the chief executive of Queensland Health to cause an inspection, investigation or inquiry to be made.¹²³¹

A person directed by the Governor in Council or by the Minister to undertake an inspection, investigation or inquiry has and may exercise, for the purposes of the inspection, investigation or inquiry, all the powers, authorities, and jurisdiction of a commission under the *Commissions of Inquiry Act 1950* (Qld).¹²³²

Queensland Health has advised the Commission that the *Health Act 1937* (Qld) is to be repealed and replaced by a new Act which is currently being drafted. The new Act is not expected to grant powers by reference to the *Commissions of Inquiry Act 1950* (Qld). However, the Department has expressed the view that it would be desirable to retain the current provision until the new legislation is enacted, rather than implementing a suite of interim investigative powers.¹²³³

(h) Office of State Development

(i) Development agreement Acts

The *Alcan Queensland Pty Ltd Agreement*, appended as a Schedule to the *Alcan Queensland Pty Ltd Agreement Act 1965* (Qld), establishes a Tribunal to decide matters arising under the agreement and further provides:¹²³⁴

1230 Letter to the Commission from the Department of Primary Industries dated 18 March 2003.

1231 *Health Act 1937* (Qld) s 15(1).

1232 *Health Act 1937* (Qld) s 15(4).

1233 Letter to the Commission from the Department of Health dated 30 January 2003.

1234 *Alcan Queensland Pty Ltd Agreement Act 1965* (Qld) Schedule (*Alcan Queensland Pty Ltd Agreement*) s 50(i).

The Tribunal shall be deemed to be a commission within the meaning of “*The Commissions of Inquiry Acts, 1950 to 1954*” and the provisions of such Acts shall apply to the Tribunal and all the proceedings thereof.

Similar provisions are found in the *Aurukun Associates Agreement Act 1975* (Qld),¹²³⁵ the *Central Queensland Coal Associates Agreement Act 1968* (Qld)¹²³⁶ and the *Queensland Nickel Agreement Act 1970* (Qld).¹²³⁷

According to the response from the Office of State Development to the Commission’s request for information:¹²³⁸

It is notable that the Tribunal provisions in the above Acts appear to have been a standard inclusion in these types of Acts in their particular time period. Later enacted, similar legislation - such as the *Gladstone Power Station Agreement Act 1993* - refers disputes arising from the execution of the agreement to a “Court of competent jurisdiction” (see section 24 of Schedule 1 of that Act).

...

Given the age of the legislation governing the Tribunals, there is no easily accessible information on whether or not the Tribunals were ever constituted or if so, how, or if “use immunity” or “derivative immunity” were exercised in any proceeding.

Given ... the relevant provisions/legislation pre-date the growth and sophistication of administrative law, it is suggested that, should a dispute arise today in connection with the terms and operation of the Agreements, the parties would refer the disputes to firstly commercial mediation and secondly, to a Court of competent jurisdiction in preference to the Tribunal function being exercised.

(ii) ***State Development and Public Works Organisation Act 1971 (Qld)***

The *State Development and Public Works Organisation Act 1971* (Qld) contains two provisions referring to the *Commissions of Inquiry Act 1950* (Qld).

The Act provides for the appointment of a Coordinator-General,¹²³⁹ whose functions and duties include various measures, including undertaking and commissioning investigations “to secure the proper planning, preparation, execution, coordination, control and enforcement of a program of works,

1235 *Aurukun Associates Agreement Act 1975* Schedule Part VIII cl 16.

1236 *Central Queensland Coal Associates Agreement Act 1968* (Qld) Schedule Part IX cl 6.

1237 *Queensland Nickel Agreement Act 1970* (Qld) Schedule Part VIII cl 5.

1238 Letter to the Chairperson of the Commission from the Office of State Development dated 10 September 2002.

1239 *State Development and Public Works Organisation Act 1971* (Qld) s 4(1).

planned developments and environmental coordination for the State”.¹²⁴⁰ The Coordinator-General is also to make to the relevant Minister such recommendations as the Coordinator-General thinks fit concerning any matter arising out of or connected with the performance of his or her functions and duties.¹²⁴¹

The Act authorises the Coordinator-General to institute and conduct an inquiry into any matter that, in the opinion of the Coordinator-General or the Minister, is one with which the Coordinator-General should be concerned in the proper performance of the Coordinator-General’s functions under any Act or that would further the purposes of the *State Development and Public Works Organisation Act 1971* (Qld).¹²⁴² The Governor in Council may, in relation to a particular inquiry to be conducted under the Act, declare that the inquiry be conducted as a commission of inquiry under the *Commissions of Inquiry Act 1950* (Qld)¹²⁴³ and, as a result, the Coordinator-General or his or her delegate who conducts the inquiry has the powers, authorities, protection and jurisdiction of a commission of inquiry.

The Office of State Development has advised the Commission that, according to the second reading speech and the “vigorous” parliamentary debate preceding the enactment of the legislation,¹²⁴⁴ the Act was drafted to give the Coordinator-General wide and broadly based powers, to ensure the Coordinator-General had sufficient flexibility to counteract the perceived “insular” and “uncooperative” approach of some local and regional councils to larger development projects regarded as of importance to the State’s future development.

The Office of State Development noted that the role of the Coordinator-General retains importance for the Government’s development strategies and implementations, and the exercise of the Coordinator’s functions is a significant component of the Office’s output. It is strongly of the view, on the basis that the potential of the Coordinator-General’s Office should not be constrained in any manner, that the inquiry power should be maintained.¹²⁴⁵

The *State Development and Public Works Organisation Act 1971* (Qld) also contains a procedure for determining disputes between the Coordinator-General and local authorities about public works. If the Coordinator-General recommends to the Minister that particular works should be undertaken by

1240 *State Development and Public Works Organisation Act 1971* (Qld) s 10(2).

1241 *State Development and Public Works Organisation Act 1971* (Qld) s 10(3).

1242 *State Development and Public Works Organisation Act 1971* (Qld) s 12(1).

1243 *State Development and Public Works Organisation Act 1971* (Qld) s 12(2).

1244 Queensland, *Parliamentary Debates*, Legislative Assembly, 9 November 1971 at 1576-1672.

1245 Letter to the Commission from the Office of State Development dated 17 December 2002.

any local body or bodies, the Minister, if the Minister approves the recommendation, submits the recommendation to the Governor in Council.¹²⁴⁶ A regulation may direct the local body or bodies concerned to undertake the works recommended.¹²⁴⁷ A local body must comply with the regulation and consult and cooperate with the Coordinator-General.¹²⁴⁸ In case of default, the Governor in Council may notify the local body that the Coordinator-General will be authorised to commence and/or complete the work.¹²⁴⁹ The local body may object in writing to the Minister.¹²⁵⁰ The Minister must submit the objection to the Governor in Council who may direct that the issue be heard by such person or persons as the Governor in Council appoints.¹²⁵¹ Such a hearing is to be deemed to be a commission of inquiry and to be conducted as a commission of inquiry under the *Commissions of Inquiry Act 1950* (Qld).¹²⁵²

The Office of State Development advised the Commission that this appeal mechanism was included in the legislation as a result of concern that the powers conferred by the Act on the Coordinator-General usurped the authority of the local and regional councils to govern at a local level. However, the Office also noted that the appeal rights conferred by the Act would now be subject to the operation of the *Judicial Review Act 1991* (Qld).

(i) Treasury

(i) *Casino Control Act 1982* (Qld)

The object of the *Casino Control Act 1982* (Qld) is to ensure that, on balance, the State and the community as a whole benefit from casino gambling.¹²⁵³ The Act establishes a system of regulation and control designed to protect players and the community through measures that include ensuring the integrity and fairness of games and ensuring the probity of those involved in the conduct of casino gambling.¹²⁵⁴

1246 *State Development and Public Works Organisation Act 1971* (Qld) s 99.

1247 *State Development and Public Works Organisation Act 1971* (Qld) s 100.

1248 *State Development and Public Works Organisation Act 1971* (Qld) s 102.

1249 *State Development and Public Works Organisation Act 1971* (Qld) s 104(1).

1250 *State Development and Public Works Organisation Act 1971* (Qld) s 104(2).

1251 *State Development and Public Works Organisation Act 1971* (Qld) s 104(3).

1252 *State Development and Public Works Organisation Act 1971* (Qld) s 104(4).

1253 *Casino Control Act 1982* (Qld) s 3(1).

1254 *Casino Control Act 1982* (Qld) s 3(2).

The Treasurer may appoint the chief executive or another officer of the Department to hold an inquiry into the operation of a casino.¹²⁵⁵ In holding such an inquiry, the appointed officer is to have all the powers, authorities, rights, privileges, protection and jurisdiction of a commission of inquiry under the *Commissions of Inquiry Act 1950* (Qld).¹²⁵⁶

The Under Treasurer has advised the Commission that the objective of the provision was to allow detailed investigations to be made in relation to casinos, for example in investigations of major fraud or practices that cannot be otherwise uncovered by the normal powers of an inspector. The provision was included so as not to restrict the powers of a person appointed to hold an inquiry into the operation of a casino. The provision is seen as essential to the operation of a “clean” casino, and its continued existence is regarded as necessary.¹²⁵⁷

(ii) *Petroleum Products Subsidy Act 1965* (Qld)

The purpose of the *Petroleum Products Subsidy Act 1965* (Qld) is to subsidise the distribution of certain petroleum products in certain country areas.

The Act provides for the appointment of authorised officers¹²⁵⁸ to receive claims for payment under the Act from registered distributors of eligible petroleum products.¹²⁵⁹ An authorised officer is to examine each claim for payment and, if satisfied that an amount is payable to the claimant, give a certificate in writing to that effect.¹²⁶⁰ Authorised officers also have power to enter the premises of a registered distributor of eligible petroleum products and may inspect any such products, take samples of any such products and inspect the accounts, books and documents relating to the sale, use and purchase of any such products.¹²⁶¹ The occupier of the premises must provide the authorised officer with all reasonable facilities and assistance for the effective exercise of the authorised officer’s powers¹²⁶² and it is an offence to obstruct, hinder or molest an authorised officer in the exercise of those powers.¹²⁶³

1255 *Casino Control Act 1982* (Qld) s 91.

1256 *Casino Control Act 1982* (Qld) s 91(2).

1257 Letter to the Chairperson of the Commission from the Under Treasurer dated 18 March 2003.

1258 *Petroleum Products Subsidy Act 1965* (Qld) s 5.

1259 *Petroleum Products Subsidy Act 1965* (Qld) s 6.

1260 *Petroleum Products Subsidy Act 1965* (Qld) s 7(1).

1261 *Petroleum Products Subsidy Act 1965* (Qld) s 11(1).

1262 *Petroleum Products Subsidy Act 1965* (Qld) s 11(2).

1263 *Petroleum Products Subsidy Act 1965* (Qld) s 11(3).

For the purposes of the Act, an authorised officer has and may exercise all the powers, authorities, protection and jurisdiction of a commission under the *Commissions of Inquiry Act 1950* (Qld).¹²⁶⁴

The Under Treasurer has advised the Commission that the Queensland Treasury's only role in respect of this legislation is:¹²⁶⁵

... to provide a post-box whereby moneys are paid on behalf of Commonwealth Government departments and refunded to Treasury by the Commonwealth Department of Finance.

The Under Treasurer suggested that a reason for the provision's continued existence would be to mirror the Commonwealth position.

3. OVERVIEW OF PROVISIONS

It can be seen that a significant number of bodies, merely by virtue of their status as a commission of inquiry, can hold an investigation where the privilege against self-incrimination does not apply for a witness required to provide information to that investigation. The bodies concerned are charged with a range of functions, including the provision of support for Aboriginal and Torres Strait Islander communities, beach protection, setting judicial salaries, appeals by local government officers against the promotion of other officers, the professional registration of veterinary surgeons, and control of casino operations.

1264 *Petroleum Products Subsidy Act 1965* (Qld) s 12.

1265 Letter to the Chairperson of the Commission from the Under Treasurer dated 11 March 2003.

CHAPTER 8

PROVISIONS THAT DO NOT EXPRESSLY ABROGATE THE PRIVILEGE

1. INTRODUCTION

As explained in Chapter 2,¹²⁶⁶ it is not necessary for a provision to include express words of abrogation for the privilege against self-incrimination to be excluded.¹²⁶⁷ However, because the privilege is considered to be such an important human right,¹²⁶⁸ courts will hold that legislation has abrogated the privilege only if the intention to do so is clearly apparent.¹²⁶⁹ Whether or not a particular provision has the effect of impliedly abrogating the privilege must be considered in the light of not only the language of the provision in question but also its character and purpose.

Until recently, the test adopted by the High Court of Australia to determine whether a provision has abrogated the privilege by implication was that:¹²⁷⁰

The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation.

However, the High Court has now reconsidered the issue of implied abrogation,¹²⁷¹ and has unanimously rejected the notion that an expression “in general terms” is sufficient to abrogate a fundamental common law right:¹²⁷²

1266 See pp 18-19 of this Discussion Paper.

1267 *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 289, and per Mason, Wilson and Dawson JJ at 309; *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 341.

1268 See p 10 of this Discussion Paper.

1269 *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 289-290.

1270 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 341.

1271 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561. Although the issue in the case was whether a provision had impliedly abrogated legal professional privilege, the observations of the court on the abrogation of fundamental common law rights indicate clearly the approach that the court would be likely to take in relation to the privilege against self-incrimination.

1272 *Id* per McHugh J at [39]. See also per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [32], per Kirby J at [90], [111] and per Callinan J at [134].

... courts do not read general words in a statute as taking away rights, privileges and immunities that the common law or the general law classifies as fundamental unless the context or subject matter of the statute points irresistibly to that conclusion.

The High Court's emphasis on the need for a clear and unambiguous statement of legislative intention to abrogate the privilege reflects a concern that words of generality in a statute might have consequences not considered by the legislature, and that judicial reliance on such words to take away or override a fundamental human right would create a risk of giving the legislation an operation that was not intended by the Parliament.¹²⁷³

The court adopted a considerably more stringent approach, requiring that retention of the privilege must "significantly impair" functions under the legislation in question¹²⁷⁴ or that the relevant provision would be "rendered inoperative" or "its object largely frustrated" if the privilege were to prevail over the legislation.¹²⁷⁵ It was observed that a power conferred in general terms would be unlikely to contain the necessary implication, since general words would almost always be able to be given some operation, even if that operation were limited in scope.¹²⁷⁶

The absence of express words of abrogation means that it is sometimes difficult to identify those provisions that have the effect of impliedly abrogating the privilege. However, the following provisions, which are currently in operation in Queensland, have come to the Commission's attention. The provisions are set out alphabetically according to the government department that administers them.

2. EXISTING PROVISIONS

(a) Environmental Protection Agency

(i) *Recreation Areas Management Act 1988 (Qld)*

The object of the *Recreation Areas Management Act 1988 (Qld)* is to provide for the establishment of a system of recreation areas throughout Queensland.¹²⁷⁷ In relation to those areas the Act is intended to provide, co-ordinate, integrate and improve recreational planning, recreational facilities and recreational management.¹²⁷⁸

1273 Id per Kirby J at [105]-[106] and per Callinan J at [134].

1274 Id per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [35].

1275 Id per McHugh J at [43].

1276 Id per McHugh J at [43] and per Callinan J at [134].

1277 *Recreation Areas Management Act 1988 (Qld)* s 3.

1278 *Recreation Areas Management Act 1988 (Qld)* s 3(a).

The Act provides for the appointment of authorised officers,¹²⁷⁹ who have certain powers,¹²⁸⁰ including the power to make such examination and inquiry as may be necessary to ascertain whether the provisions of the Act have been or are being complied with by any person or in respect of a recreation area;¹²⁸¹ to require the production of any certificate of exemption or permit or other authority granted, or agreement or contract made, under and for the purposes of the Act, or of any book, record or writing which, in the authorised officer's opinion, is material to such an inquiry;¹²⁸² and to question, with respect to matters under the Act, the owner or occupier of any place or a person who is in the place or has been employed at the place.¹²⁸³

Section 40(1) of the Act provides that a person shall not, when required to answer a question or to furnish any information to an authorised officer, fail to answer the question or to furnish the information.¹²⁸⁴ It further provides that a person shall not, without reasonable excuse, fail to produce specified documents that the person is required by an authorised officer to produce.¹²⁸⁵ There is no explanation as to what does or does not constitute a reasonable excuse.

Section 40(2) of the Act provides that if, prior to answering a question or giving information under the compulsion of the Act, a person objects to an authorised officer that doing so might incriminate the person in the commission of an offence under the Act, the answer or information is not admissible in evidence against the person on a charge of an offence against the Act other than an offence relating to the falsity of the answer or information.

Although section 40(2) purports to confer a use immunity in relation to certain information, it is not entirely clear whether the privilege against self-incrimination has been abrogated in respect of that information. There are no express words of abrogation in section 40(1). It could be argued that the inclusion of the immunity demonstrates an intention to abrogate the privilege. On the other hand, it could also be argued that, at least in relation to the specified documents, the recognition of the existence of a reasonable excuse for failing to comply with a requirement to produce supports the continuation of the privilege.¹²⁸⁶

1279 *Recreation Areas Management Act 1988* (Qld) s 22.

1280 *Recreation Areas Management Act 1988* (Qld) s 23.

1281 *Recreation Areas Management Act 1988* (Qld) s 23(1)(c).

1282 *Recreation Areas Management Act 1988* (Qld) s 23(1)(e).

1283 *Recreation Areas Management Act 1988* (Qld) s 23(1)(f).

1284 *Recreation Areas Management Act 1988* (Qld) s 40(1)(e).

1285 *Recreation Areas Management Act 1988* (Qld) s 40(1)(f).

1286 See for example *The Royal Commission Re a Brisbane Hotel No 2* [1964] QWN 29 per Gibbs J.

The work of the Environmental Protection Agency focuses on protecting the State's natural and cultural heritage, promoting sustainable use of natural capital, and ensuring a clean environment. The Agency has informed the Commission that its powers of compulsion serve three purposes: to allow the Agency to investigate and address conservation and environmental issues; to allow independent witnesses to freely provide information without fear of acquiring consequential liability; and to compel possible defendants to participate in a formal record of interview and answer all questions that do not give rise to a privilege against self-incrimination. The Agency observed that, in many cases, its objectives can be achieved by working with the community. In relation to the legislation that it administers, the Agency commented generally that the Agency's view is that, since it is often seeking information for non-prosecutorial purposes, it is not averse to widening the immunity conferred on information obtained as a result of powers of compulsion contained in that legislation.¹²⁸⁷ However, the Agency has also expressed the view that removal of compulsive powers would change the balance between the Agency and the public, making it potentially more difficult for the Agency to achieve its objectives. The Agency is therefore of the view that it should retain its compulsive powers.¹²⁸⁸

(b) Department of Industrial Relations

(i) *Industrial Relations Act 1999 (Qld)*

Another example of Queensland legislation where the privilege against self-incrimination may be impliedly abrogated is the *Industrial Relations Act 1999 (Qld)*. Section 371(2) of the Act imposes an obligation on employers to produce a time and wages record for inspection by an inspector authorised under the Act. If an employer does not comply with a request to produce the record, an inspector may, by notice, require the production of the record.¹²⁸⁹ An employer who fails, without reasonable excuse, to produce the record as required by the notice is deemed to have failed to keep the record¹²⁹⁰ and becomes liable to a penalty.¹²⁹¹ The section does not specify what constitutes a reasonable excuse for failing to produce the record.

Section 371 therefore gives rise to the questions of whether it would be a reasonable excuse for an employer to fail to comply with an order to produce because production of the record might tend to incriminate the employer, or

1287 Letter to the Chairperson of the Commission from the Director-General of the Environmental Protection Agency dated 8 October 2002.

1288 Letter to the Commission from the Environmental Protection Agency dated 24 February 2003.

1289 *Industrial Relations Act 1999 (Qld)* s 371(4).

1290 *Industrial Relations Act 1999 (Qld)* s 371(5).

1291 *Industrial Relations Act 1999 (Qld)* ss 366(1), 367(1).

whether the section has impliedly abrogated the privilege against self-incrimination.

On the one hand, there is no clear manifestation in the provision itself of an intention to exclude the privilege. It could be argued that the allowance for the possible existence of a reasonable excuse for failure to comply with the obligation is an apparent recognition of the continued existence of the privilege.¹²⁹²

On the other hand, a distinction may be drawn between section 371 and a number of other provisions of the Act, which specifically provide that it is a reasonable excuse for a person to fail to comply with an obligation imposed by the Act on the ground that compliance with the requirement might tend to incriminate the person.¹²⁹³ Given the existence of these provisions it could be argued that, in the context of the Act as a whole, the failure to include such a provision in section 371 provides sufficient indication of an intention that the privilege should not apply in that particular situation.

The Department of Industrial Relations, while acknowledging that section 371 may impliedly abrogate the privilege against self-incrimination, is of the view that the abrogation is necessary “to facilitate efficient and effective compliance monitoring by departmental inspectors”.¹²⁹⁴

(c) Queensland Police Service

(i) *Police Service Administration Act 1990 (Qld)*

The *Police Service Administration Act 1990* (Qld) provides an example of legislation that has been held to abrogate the privilege against self-incrimination without the use of express words of exclusion.

Section 4.9 of the Act enables the Commissioner of Police to give such directions to officers of the Police Service as the Commissioner considers necessary for the efficient and proper functioning of the Service.¹²⁹⁵ An officer to whom a direction of the Commissioner is addressed must comply with the

1292 See for example *The Royal Commission Re a Brisbane Hotel (No 2)* [1964] QWN 29 per Gibbs J.

1293 See for example *Industrial Relations Act 1999* (Qld) ss 356(4) (Failure to comply with a requirement to give an inspector information to help the inspector ascertain whether the Act or a relevant industrial instrument is being, has been or will be complied with), 557(4) (Failure of an officer of an organisation to comply with an order to give information about the organisation’s funds or accounts), 563(6) (Failure of an organisation, employee, member or officer to produce a document to an auditor), 572(3) (Failure to comply with an order to give information or provide documents).

1294 Letter to the Chairperson of the Commission from the Director-General of the Department of Industrial Relations dated 18 October 2002.

1295 *Police Service Administration Act 1990* (Qld) s 4.9(1).

direction in all respects.¹²⁹⁶ Under the *Police Service (Discipline) Regulation 1990* (Qld), contravention of, or failure to comply with, any direction, instruction or order given by the Commissioner is a ground for disciplinary action.¹²⁹⁷

Although the Queensland Act is silent with respect to the application of the privilege against self-incrimination in disciplinary proceedings, the High Court of Australia has considered the issue in the context of equivalent legislation in Victoria.¹²⁹⁸ It was held by a majority¹²⁹⁹ that, despite the absence of express words excluding the privilege, the character of the relevant provision indicated that the application of the privilege would be inappropriate. Gibbs CJ expressed the view that the provision was primarily designed not to compel the answering of questions, but rather to secure obedience to orders, and that the obligation to obey lawful orders was not intended to be subject to any unexpressed qualification.¹³⁰⁰ The remaining members of the majority also referred to the necessity for obedience to orders.¹³⁰¹

The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force, upon their assiduous performance of duty and upon the judicious exercise of their powers. Internal disciplinary authority over members of the police force is a means - the primary and usual means - of ensuring that individual police officers do not jeopardize public confidence by their conduct, nor neglect the performance of their police duty, nor abuse their powers. The purpose of police discipline is the maintenance of public confidence in the police force, of the self-esteem of police officers and of efficiency. It cannot be thought that the [relevant provisions] intend a police officer to be able to cloak with his silence activities that are prejudicial to the achievement of these purposes. To permit, under a claim of privilege, a subordinate officer to refuse to give an account of his activities whilst on duty when an account is required by his superior officer would subvert the discipline of the police force.

The Queensland Commissioner of Police has advised the Commission that the rationale of the High Court decision remains highly relevant and appropriate in terms of the maintenance of confidence by the public and officers alike in the police service. The abrogation of the privilege is limited to the purpose of ensuring the functioning of the Service as a disciplined organisation. It extends only to the disciplinary context. The Commissioner

1296 *Police Service Administration Act 1990* (Qld) s 4.9(3).

1297 *Police Service (Discipline) Regulation 1990* (Qld) s 9(c). Section 7.4(2) of the *Police Service Administration Act 1990* (Qld) provides that officers of the police service are liable to disciplinary action for misconduct or breach of discipline on such grounds as are prescribed by the regulations.

1298 *Police Service Board and Another v Morris and Martin* (1985) 156 CLR 397.

1299 Gibbs CJ, Wilson, Brennan and Dawson JJ, Murphy J dissenting.

1300 *Police Service Board and Another v Morris and Martin* (1985) 156 CLR 397 per Gibbs CJ at 404.

1301 *Id* per Brennan J at 412. See also per Wilson and Dawson JJ at 408-409 and at 410.

notes that the privilege is not abrogated in relation to criminal investigations conducted by police officers, even where the suspect may be a police officer.¹³⁰²

3. NAME AND ADDRESS PROVISIONS

Queensland Acts that establish a regulatory or investigative scheme often contain provisions enabling the appointment of inspectors or authorised officers and conferring on them powers to enable them to enforce compliance with the scheme. These powers generally include the power to require a person to give the inspector or authorised officer the person's name and address. Although the exact wording of the name and address requirement provisions varies slightly as a result of different drafting styles, many of them follow a similar pattern.

Typically, a name and address requirement provision:¹³⁰³

- enables an inspector or authorised officer to require a person to state the person's name and address if the inspector or authorised officer finds the person committing an offence against the Act in question; finds the person in circumstances that give rise to a reasonable suspicion that the person has just committed an offence against the Act; or has information that leads, on

1302 Letter to the Chairperson of the Commission from the Commissioner of Police dated 13 November 2002.

1303 See for example *Agricultural Standards Act 1994* (Qld) s 34; *Animal Care and Protection Act 2001* (Qld) ss 163, 164; *Casino Control Act 1982* (Qld) s 87A; *Charitable and Non-Profit Gaming Act 1999* (Qld) ss 140, 141; *Child Care Act 2002* (Qld) s 134; *Classification of Computer Games and Images Act 1995* (Qld) s 47; *Coal Mining Safety and Health Act 1999* (Qld) ss 152, 153; *Coastal Protection and Management Act 1995* (Qld) ss 73, 74; *Cooperatives Act 1997* (Qld) s 400; *Drugs Misuse Act 1986* (Qld) s 430; *Electrical Safety Act 2002* (Qld) s 157; *Environmental Protection Act 1994* (Qld) ss 464, 475; *Explosives Act 1999* (Qld) s 96; *Fossicking Act 1994* (Qld) s 90; *Fuel Subsidy Act 1997* (Qld) ss 87, 88; *Health Act 1937* (Qld) ss 153L, 153M; *Interactive Gambling (Player Protection) Act 1998* (Qld) ss 219, 220; *Introduction Agents Act 2001* (Qld) s 78; *Keno Act 1996* (Qld) ss 196, 197; *Land Act 1994* (Qld) ss 400T, 400U; *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) ss 278, 279; *Land Sales Act 1984* (Qld) s 30G; *Local Government Act 1993* (Qld) s 1090; *Lotteries Act 1997* (Qld) ss 182, 183; *Mining and Quarrying Safety and Health Act 1999* (Qld) ss 149, 150; *Mobile Homes Act 1989* (Qld) s 12G; *Pest Management Act 2001* (Qld) ss 83, 84; *Property Agents and Motor Dealers Act 2000* (Qld) s 555; *Queensland Building Services Authority Act 1991* (Qld) s 106; *Racing Act 2002* (Qld) ss 299, 300; *Residential Services (Accreditation) Act 2002* (Qld) s 132; *Tobacco and Other Smoking Products Act 1998* (Qld) s 38; *Transport Operations (Marine Pollution) Act 1995* (Qld) s 87; *Transport Operations (Marine Safety) Act 1994* (Qld) s 173; *Transport Operations (Passenger Transport) Act 1994* (Qld) s 127; *Transport Operations (Road Use Management) Act 1995* (Qld) s 48; *Travel Agents Act 1988* (Qld) s 45E; *Vegetation Management Act 1999* (Qld) ss 49, 50; *Wagering Act 1998* (Qld) ss 261, 262; *Water Act 2000* (Qld) ss 758, 759; *Workplace Health and Safety Act 1995* (Qld) s 120. There are also name and address requirements in health practitioner registration legislation: see *Chiropractors Registration Act 2001* (Qld) ss 165, 166; *Dental Practitioners Registration Act 2001* (Qld) ss 187, 188; *Dental Technicians and Dental Prosthetists Registration Act 2001* (Qld) ss 169, 170; *Medical Practitioners Registration Act 2001* (Qld) ss 226, 227; *Medical Radiation Technologists Registration Act 2001* (Qld) ss 180, 181; *Occupational Therapists Registration Act 2001* (Qld) ss 165, 166; *Optometrists Registration Act 2001* (Qld) ss 165, 166; *Osteopaths Registration Act 2001* (Qld) ss 165, 166; *Pharmacists Registration Act 2001* (Qld) ss 170, 171; *Physiotherapists Registration Act 2001* (Qld) ss 165, 166; *Podiatrists Registration Act 2001* (Qld) ss 165, 166; *Psychologists Registration Act 2001* (Qld) ss 181, 182; *Speech Pathologists Registration Act 2001* (Qld) ss 165, 166.

reasonable grounds, to a suspicion that the person has just committed an offence against the Act;¹³⁰⁴

- requires the inspector or authorised officer to warn the person that it is an offence to fail to state the person's name and address, unless the person has a reasonable excuse;
- enables the inspector or authorised person to require evidence of the correctness of a stated name or address if the inspector or authorised person suspects, on reasonable grounds, that the stated name or address is false;
- creates the offence that a person has failed, without reasonable excuse, to provide the person's name and address, or evidence of the person's name and address; and
- provides that the person does not commit an offence against the section if the inspector required the person to state the person's name and address on suspicion of the person having committed an offence against the Act, and the person is not proved to have committed the offence.¹³⁰⁵

Other name and address provisions do not contain the proviso that a person required to state his or her name on suspicion of having committed an offence against the relevant Act does not commit an offence against the name and address provision if the person is not proved to have committed the former offence.¹³⁰⁶ Some provisions, without any reference to grounds of excuse, simply authorise an inspector or authorised person to require a person, in specified circumstances, to state the person's name and address.¹³⁰⁷

Whatever form of expression is used, the name and address requirement provisions generally do not refer to the privilege against self-incrimination. However, although they contain no express words of abrogation, the effect of these provisions may be to impliedly abrogate the privilege.

With respect to those provisions that state that failure to comply with a name and address requirement is an offence unless the person has a reasonable excuse for not complying, the question arises as to what constitutes a reasonable excuse. The provisions themselves are silent on this issue.

1304 Some Acts also allow the inspector/authorised officer to demand a person's name and address if it is necessary for the purpose of the administration or enforcement of the Act: see for example *Liquor Act 1992* (Qld) s 182(1)(b); *Nursing Act 1992* (Qld) s 133(1)(c); *Wet Tropics World Heritage Protection and Management Act 1993* (Qld) s 74(1)(c). See also *Police Powers and Responsibilities Act 2000* (Qld) s 33, which prescribes the circumstances in which a police officer may require a person to state the person's name and address.

1305 See also *Police Powers and Responsibilities Act 2000* (Qld) s 32(3), (4). These subsections prescribe the extended circumstances in which a person does not commit the offence of failing to state the person's name and address.

1306 See for example *Industrial Relations Act 1999* (Qld) s 357.

1307 See for example *Fire and Rescue Service Act 1990* (Qld) s 57.

On the one hand, it could be argued that the allowance for the possible existence of a reasonable excuse for non-compliance is an apparent recognition of the continued existence of the privilege.¹³⁰⁸

On the other hand, however, in some of the Acts there are other information requirement provisions that specifically preserve the privilege by providing that self-incrimination is a reasonable excuse for failing to comply with the requirement.¹³⁰⁹ Where there are other provisions in the same Act that expressly state that self-incrimination is a reasonable excuse for failing to provide information, it might be argued that, in the context of the Act as a whole, the failure to include a similar provision in the name and address requirement is a sufficient indication that the privilege was not intended to apply to that requirement.

Moreover, in the context of a regulatory framework, it could be argued that, despite the lack of express abrogation, the High Court's test of implied abrogation is met.¹³¹⁰ It could be said that the functions of an inspector or authorised officer would be significantly impaired, and the object of the legislation largely frustrated, if the inspector or authorised officer were not able to demand that a person found contravening or suspected of having contravened the scheme provide the person's name and address. The compliance aspect of the scheme, without which the intended regulation would be ineffective, would be rendered inoperative if the enforcement provisions could not be used because the privilege against self-incrimination shielded the identity of a suspected offender.

1308 See for example *The Royal Commission Re a Brisbane Hotel No 2* [1964] QWN 29 per Gibbs J.

1309 See for example *Environmental Protection Act 1994* (Qld) ss 147(3), 152(5); *Industrial Relations Act 1999* (Qld) s 356(4).

1310 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561. See pp 165-166 of this Discussion Paper.

CHAPTER 9

JUSTIFICATIONS FOR THE ABROGATION OF THE PRIVILEGE

1. INTRODUCTION

The Commission's terms of reference require the Commission to examine the various Queensland statutory provisions abrogating the privilege against self-incrimination,¹³¹¹ to examine the bases for abrogating the privilege and to recommend whether there is ever justification for the abrogation of the privilege.¹³¹²

In this chapter, the Commission considers whether an analysis of the provisions discussed in the previous chapters of this Discussion Paper reveals any common underlying principle that explains why the privilege has been abrogated. The Commission also considers whether, in the light of the rationales for the existence of the privilege, its abrogation can ever, and if so on what grounds, be justified.

2. EXISTING PROVISIONS

There is no doubt that the current law permits the enactment of legislation which abrogates the privilege. In Queensland, the *Legislative Standards Act 1992* (Qld) recognises this situation. It provides that Queensland legislation should have sufficient regard to the rights and liberties of individuals, including “appropriate” protection against self-incrimination.¹³¹³

A review of the provisions set out in Chapters 4 to 8 of this Discussion Paper shows clearly that the matters that government departments have pointed to as justifying the abrogation of the privilege against self-incrimination vary widely. The circumstances in which the privilege has been abrogated include the investigation of organised¹³¹⁴ and serious¹³¹⁵ crime, the prevention of crime,¹³¹⁶ the protection of

1311 The relevant provisions are set out in Chapters 4 to 8 of this Discussion Paper.

1312 The full terms of reference are set out at p 1 of this Discussion Paper.

1313 *Legislative Standards Act 1992* (Qld) s 4(3)(f).

1314 *National Crime Authority (State Provisions) Act 1985* (Qld) s 19. See pp 138-139 of this Discussion Paper.

1315 *Crime and Misconduct Act 2001* (Qld) ss 185, 190. See p 89 of this Discussion Paper.

1316 *Criminal Proceeds Confiscation Act 2002* (Qld) ss 40(1)(a), 132(1)(a). See pp 79-80 of this Discussion Paper.

public health¹³¹⁷ and safety,¹³¹⁸ the protection of vulnerable individuals from abuse, neglect and exploitation,¹³¹⁹ consumer protection,¹³²⁰ environmental protection,¹³²¹ animal welfare,¹³²² the assessment, investigation and resolution of health service complaints,¹³²³ appeals by local government officers against the promotion of other officers or against dismissal from employment or disciplinary measures,¹³²⁴ the regulation of the supply of liquid fuel,¹³²⁵ professional registration¹³²⁶ and licensing,¹³²⁷ inquiries into judicial salaries,¹³²⁸ the preservation of the integrity of the administration of justice,¹³²⁹ the maintenance of the accountability of public administration,¹³³⁰ and the protection of revenue.¹³³¹

3. THE BALANCE BETWEEN COMPETING INTERESTS

In Chapter 1 of this Discussion Paper, reference was made to the tension which frequently arises between, on the one hand, the perceived need for investigative and regulatory powers to deal with issues of public importance and, on the other, the protection of an individual right.¹³³²

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- 1317 For example *Health Act 1937* (Qld) s 153O(2). See pp 53-54 of this Discussion Paper.
- 1318 For example *Explosives Act 1999* (Qld) s 100(3); *Fire and Rescue Service Act 1990* (Qld) s 58; *Transport Operations (Passenger Transport) Act 1994* (Qld) s 126M(4). See pp 41-42, 70-71, 141 of this Discussion Paper.
- 1319 *Guardianship and Administration Act 2000* (Qld) ss 137(4), (5), 188(2). See pp 122-124 of this Discussion Paper.
- 1320 For example *Business Names Act 1962* (Qld) s 13(3); *Fair Trading Act 1989* (Qld) s 88B(5); *Trade Measurement Act 1990* (Qld) s 66(1). See pp 105, 108-109, 114 of this Discussion Paper.
- 1321 For example *Environmental Protection Act 1994* (Qld) s 320(6); *Transport Operations (Marine Pollution) Act 1995* (Qld) s 101(3). See pp 71-72, 100-101 of this Discussion Paper.
- 1322 *Animal Care and Protection Act 2002* (Qld) s 139(3). See p 49 of this Discussion Paper.
- 1323 *Health Rights Commission Act 1991* (Qld) s 121(2). See pp 96-97 of this Discussion Paper.
- 1324 *City of Brisbane Act 1924* (Qld) Schedule 3. See p 156 of this Discussion Paper.
- 1325 *Liquid Fuel Supply Act 1984* (Qld) s 40(4). See p 116 of this Discussion Paper.
- 1326 See note 399 on p 54 of this Discussion Paper.
- 1327 *Queensland Building Services Authority Act 1991* (Qld) s 92(b). See p 74 of this Discussion Paper.
- 1328 *Judges (Salaries and Allowances) Act 1967* (Qld) s 13(3). See p 154 of this Discussion Paper.
- 1329 *Criminal Code* (Qld) s 644A(1); *Commissions of Inquiry Act 1950* (Qld) ss 14(1A), 14A(1). See pp 77, 76-77, 150-151 of this Discussion Paper.
- 1330 *Financial Administration and Audit Act 1977* (Qld) ss 85(5), 87(8); *Government Owned Corporations Act 1993* (Qld) s 142; *Local Government Act 1993* (Qld) s 696(14). See pp 94, 136-137, 115-116, 81-82 of this Discussion Paper.
- 1331 *Taxation Administration Act 2001* (Qld) s 124. See p 148 of this Discussion Paper.
- 1332 See pp 2-3 of this Discussion Paper.

Any attempt to justify the abrogation of the privilege against self-incrimination involves a balance between two competing interests:¹³³³

The courts have clearly expressed the view that the privilege against self-incrimination is an important human right. Yet the legislature must balance other public interest considerations against the protection of individual human rights. In the field of regulation, one crucial public interest is securing effective compliance or prosecutions. The policy question for the legislature is to decide in what circumstances public interest considerations should overrule human rights protection, and whether the regulation of particular activities mandates different considerations. [note omitted]

In general terms, the abrogation of the privilege against self-incrimination is usually said to be justified in circumstances where the public interest in obtaining information outweighs the public interest in upholding the privilege. The public interest in upholding the privilege against self-incrimination is based on the policies that underlie the privilege and on its significance as a human right. In order to weigh the importance of protecting the privilege against the need for stronger investigative powers, it is therefore necessary to consider the privilege in the context of the reasons for its original development and for its continued existence.

(a) The rationales for the privilege

It can be seen that, in view of the diversity of the situations in which the current Queensland abrogation provisions apply, it is difficult to discern any one coherent theme that could be said to underpin them.¹³³⁴ Chapter 2 of this Discussion Paper noted a number of different rationales that have been used to explain the theoretical basis of the privilege during the course of its history, and the shift in emphasis that has taken place in response to changing political and social conditions.¹³³⁵

As outlined in Chapter 2 of this Discussion Paper, the range of suggested rationales for the privilege includes:

- the assertion of personal liberty and privacy against unwanted inquiries;¹³³⁶
- concern about the potential for abuse of power by authorities with power to interrogate individuals;

¹³³³ Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at [18.21]. For a discussion of the privilege against self-incrimination as a human right, see p 10 of this Discussion Paper.

¹³³⁴ See pp 174-175 of this Discussion Paper.

¹³³⁵ See pp 9-11 of this Discussion Paper.

¹³³⁶ This rationale also underlies other immunities that, collectively, are commonly referred to as “the right to silence”. Some commentators contend that it has nothing directly to do with self-incrimination: see Sedley S, “Wringing out the Fault” *London Review of Books* 7 March 2002 at 27.

- the unfairness of placing an individual in the invidious position of having to choose between providing evidence of guilt, committing perjury or being punished for refusing to testify;
- the principle underpinning the accusatorial system of justice that those who allege the commission of a crime should have to satisfy the onus of proof and should not be able to compel the accused to provide evidence of his or her own guilt; and
- the risk that an accused will be convicted on the strength of an untrue extra-judicial confession that is the product of coercion.

(b) The balancing process

In the circumstances of a particular situation, one or more of the rationales for the existence of the privilege against self-incrimination may not be compelling.¹³³⁷

The privilege against self-incrimination arose in a time when the consequences of incrimination were harsh. Many current applications of the privilege have moved far from the historical roots of the privilege. ... there is a strained artificiality in modern applications of the privilege in which the potential detrimental effect of the incrimination involved is minimal.

For example, procedural and other safeguards may reduce the risks usually associated with abrogation of the privilege.

Where the privilege has been abrogated, additional provisions relating to procedural matters may lessen concerns about the threat to personal liberty and privacy and the potential for abuse of powers of interrogation. Procedural safeguards may include factors such as the need for a person to be given reasonable notice of the requirement to produce information, for the time and location for giving the information to be specified, and for the general nature of the required information to be identified.

The impact on the accusatorial system may be reduced by conferral of an immunity against the future use of the information.¹³³⁸ Since the effect of an immunity is that the information cannot be used to prove the guilt of the person who provided it, the onus of proof would thus remain unchanged.

Restraints on the future use of the information are also likely to relieve the person of the need to make the invidious choice between self-incrimination, perjury or the risk of punishment for refusing to provide the information.

¹³³⁷ Law Commission (NZ), Report, *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at 76.

¹³³⁸ Specific issues in relation to the provision of an immunity are considered in Chapter 10 of this Discussion Paper.

In some situations the public interest in obtaining particular information may justify an abrogation of the privilege, especially where the disclosure of incriminating information is an incidental by-product of an investigation directed at ascertaining facts, rather than securing evidence for use in a prosecution. For example, a statute may be concerned with ascertaining the causes of fires and with facilitating the prevention of fires, rather than with collecting information for prosecution purposes.¹³³⁹ The public interest in preventing fires may justify the abrogation of the privilege, particularly if a significant rationale for the privilege is preserved by an immunity against the use of information given under compulsion in subsequent criminal proceedings.

There may therefore be situations in which, when the public interest in obtaining information is weighed against the public interest in upholding the privilege against self-incrimination, the outcome of the balancing process may be a recognition that the nature and strength of the reasons for abrogation of the privilege make it impossible to say that the privilege should never be abrogated:¹³⁴⁰

... the privilege against self-incrimination is purposive, not doctrinal, and ... its legitimate use is a question of the proportionality of means to ends, not of rigid rules.

4. THE CIRCUMSTANCES IN WHICH ABROGATION MAY BE JUSTIFIED

If it is accepted that abrogation of the privilege against self-incrimination can sometimes be justified, it is then necessary to consider the circumstances in which it could be said that the need to obtain information is sufficiently strong to outweigh the rationales for the existence of the privilege and to justify the power of compulsion.

However, the range of rationales for the existence of the privilege and the variety of situations in which the privilege may be invoked make it difficult to express a simple formula about the circumstances in which its abrogation might be justified.

Justification for abrogating the privilege in a particular case would require an identification of the public interest at stake, consideration of any empirical evidence that abrogation of the privilege had been shown to in fact advance the public interest, and persuasion that there was no other effective means by which the information could be obtained.

Determination of whether abrogation can be justified may therefore involve a case by case assessment of issues such as:

1339 See *Fire and Rescue Services Act 1990* (Qld) s 58.

1340 Sedley S, "Wringing out the Fault" *London Review of Books* 7 March 2002 at 31.

- the rationales for the privilege in general, and the specific rationales that have relevance to the particular situation;
- the justification advanced for abrogating the privilege;
- whether the extent of the abrogation is no more than necessary to achieve the public interest supporting the abrogation; and
- whether adequate safeguards exist to minimise the potentially adverse effects of abrogation.

The New Zealand Law Commission proposed the following factors for consideration in determining whether removal or limitation of the privilege would be appropriate in a given context:¹³⁴¹

- the nature and the degree of the risk of self-incrimination in the particular circumstances;
- the necessity of the self-incriminatory disclosures for the effective performance of statutory functions or determination of material issues in proceedings;
- whether or not an alternative legal means of obtaining the necessary information (for example, the issue of a search warrant or the existence of real evidence) is available;
- whether or not the privilege provides important protections at the time when the disclosure is sought (for example, is there a prospect of abusive questioning techniques?), which an immunity cannot provide; and
- whether or not any immunity provided in place of the privilege (that is, a use immunity or a derivative use immunity) can guarantee sufficient protection to the person in the circumstances.¹³⁴²

In Queensland, the Scrutiny of Legislation Committee of the Queensland Parliament has developed criteria for determining whether proposed legislation contains “appropriate” protection against self-incrimination as required by the *Legislative Standards Act 1992* (Qld).¹³⁴³ In the view of the Committee, denial of the protection afforded by the privilege against self-incrimination is potentially justifiable only if.¹³⁴⁴

1341 Law Commission (NZ), Discussion Paper, *The Privilege against Self-Incrimination* (NZLC PP 25, 1996) at 91.

1342 Issues in relation to the provision of an immunity are considered in Chapter 10 of this Discussion Paper.

1343 *Legislative Standards Act 1992* (Qld) s 4(3)(f).

1344 Queensland Parliament, Scrutiny of Legislation Committee, *Report on the Queensland Building Tribunal Bill 1999* (Alert Digest No 13 of 1999 at 31-32); *Report on the Guardianship and Administration Bill 1999* (Alert Digest No 1 of 2000 at 7-8); *Report on the Coroners Bill 2002* (Alert Digest No 1 of 2003 at 7-8).

- the questions posed concern matters which are peculiarly within the knowledge of the persons to whom they are directed, and which it would be difficult or impossible to establish by any alternative evidentiary means; and
- the proposed legislation prohibits the use of information obtained in prosecutions against the person;¹³⁴⁵ and
- in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming the right).

5. ISSUES FOR CONSIDERATION

The Commission seeks submissions on the following issues:

1. **What is/are the rationale/rationales for the privilege against self-incrimination?**
2. **Are there any rationales that have particular relevance in the context of the abrogation provisions identified in Chapters 4 to 8 of this Discussion Paper?**
3. **Are there any rationales that have limited or no relevance in the case of particular provisions (for example, there is no appreciable risk of abuse of power because of the nature of the body that exercises the power, the forum in which it is exercised or the provision of safeguards against abuse)?**
4. **In relation to the abrogation provisions identified in Chapters 4 to 8 of this Discussion Paper, do the matters suggested by the various government departments justify the abrogation of the privilege?**
5. **Are there any other matters, for example the inclusion of procedural safeguards, that may justify the abrogation of the privilege?**

¹³⁴⁵

Issues in relation to the provision of an immunity are considered in Chapter 10 of this Discussion Paper.

CHAPTER 10

ISSUES ARISING FROM EXISTING PROVISIONS

1. INTRODUCTION

If it is accepted that the privilege against self-incrimination may be justifiably abrogated in some circumstances, it will then be necessary to consider possible ways of giving legislative expression to its abrogation. The Commission's terms of reference require it to "recommend an appropriate statutory formula which can be used to rationalise existing provisions and as a model for future provisions".¹³⁴⁶

The Australian Law Reform Commission has noted in relation to the privilege against self-incrimination in the federal sphere:¹³⁴⁷

The variance across different legislative and penalty schemes clearly demonstrates the need for consistency and a definitive statement of the nature and scope of application of the privilege.

A survey of current Queensland legislative provisions which abrogate the privilege confirms this view. The provisions identified in Chapters 4 to 8 of this Discussion Paper apply across a range of situations,¹³⁴⁸ which has increased significantly as the number of administrative agencies and investigative bodies with regulatory powers has been extended.

The existing provisions also reveal wide variations in their scope and effect. There does not appear to be any consistent pattern as to whether any limitation is imposed on the use of information obtained under a power of compulsion and, if so, the extent of the immunity conferred. Some provisions except certain information from the scope of the immunity while others do not. Inconsistent forms of expression may create uncertainty about whether or not the privilege has in fact been abrogated.

While some differences may be able to be explained simply by changes over time in legislative drafting styles and practices, there can be little doubt of the need to review the bases for abrogating the privilege and, in those circumstances where abrogation may be warranted, to attempt to overcome some of the inconsistencies and uncertainties arising from the existing legislation.¹³⁴⁹

1346 The full terms of reference are set out at p 1 of this Discussion Paper.

1347 Australian Law Reform Commission, Discussion Paper: *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation* (DP 65, April 2002) at [9.70].

1348 See pp 174-175 of this Discussion Paper.

1349 Saul B and McCabe M, "The privilege against self-incrimination in federal regulation" (2001) 78 *Reform* 54.

... the common law privilege is subject to seemingly arbitrary exclusion by a maze of express or implied legislative provisions. The inconsistent and contradictory nature of these provisions potentially undermines public confidence in equal treatment before the law, makes it difficult for individuals to comply with their legal obligations, and ultimately confuses and confounds the rule of law.

The Australian Law Reform Commission has also commented on the need for “consistency and a definitive statement of the nature and scope of application of the privilege”, particularly in view of the human rights justifications for the privilege and of the potentially serious consequences of self-incrimination.¹³⁵⁰

This chapter outlines some of the issues arising from the existing Queensland provisions.

2. THE TYPE OF FORUM WHERE THE PRIVILEGE MAY BE ABROGATED

As explained in Chapter 2 of this Discussion Paper,¹³⁵¹ the right to claim the privilege against self-incrimination is not confined to judicial proceedings. It has been held that, since it is a substantive human right and not merely a rule of evidence, it can apply in an extra-judicial context.¹³⁵² However, even though the privilege is capable of applying in non-judicial inquiries and investigations, it may be abrogated by legislation.¹³⁵³

The Commission’s terms of reference require it to consider the type of forum where, if it is accepted that there can be a justification for abrogating the privilege, abrogation may be justified.¹³⁵⁴

A review of the existing Queensland abrogation provisions reveals a wide variety of situations where people may be required to provide information and where the availability of the privilege has been removed. These include a coronial inquest,¹³⁵⁵

1350 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at [18.45].

1351 See pp 12-13 of this Discussion Paper.

1352 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 340. See also per Murphy J at 346.

1353 See pp 18-19 of this Discussion Paper.

1354 The full terms of reference are set out at p 1 of this Discussion Paper.

1355 See for example *Coroners Act 2003* (Qld) s 39. The *Coroners Act 2003* (Qld) was assented to on 9 April 2003. The sections referred to in this Discussion Paper will commence operation on a date to be fixed by proclamation: *Coroners Act 2003* (Qld) s 2(2). If the Act has not been proclaimed within a year of the date of assent, it will commence automatically on the following day unless the commencement is postponed by regulation to a date no later than two years after the date of assent: *Acts Interpretation Act 1954* (Qld) s 15DA.

a commission of inquiry,¹³⁵⁶ a public examination before a judicial officer,¹³⁵⁷ a public examination before a tribunal,¹³⁵⁸ an appearance before a board of inquiry,¹³⁵⁹ a requirement to produce a document to an inspector,¹³⁶⁰ a requirement to answer a question or provide information during the course of an investigation,¹³⁶¹ and a requirement to appear before an investigator to answer questions or to produce documents.¹³⁶²

3. THE EXTENT OF ABROGATION

The statutory formula most frequently used to abrogate the privilege against self-incrimination is that it is not a reasonable excuse for failing to comply with a requirement to provide information that complying with the requirement might tend to incriminate the person. The High Court has held that a provision of this kind not only expressly abrogates the privilege against self-incrimination but also abrogates, by implication, the penalty privilege:¹³⁶³

... it is irrational to suppose that Parliament contemplated that a person could be compelled to admit the commission of a criminal offence yet be excused from admitting a contravention of the Act sounding in a civil penalty.

In the light of this decision, it is unnecessary for a provision that expressly abrogates the privilege against self-incrimination to specifically refer to the privilege against exposure to a civil penalty in order to abrogate that privilege as well as the privilege against self-incrimination.

However, in Queensland, a significant number of provisions refer to the risk of both self-incrimination and exposure to a penalty as not being a reasonable excuse for failing to comply with such a requirement.¹³⁶⁴ Subsequently to the High Court decision, the existence of provisions that contain express words abrogating both

¹³⁵⁶ *Commissions of Inquiry Act 1950* (Qld) s 14(1A).

¹³⁵⁷ See for example *Criminal Proceeds Confiscation Act 2002* (Qld) ss 40(1)(a), 132(1)(a).

¹³⁵⁸ See for example *Commercial and Consumer Tribunal Act 2003* (Qld) s 112(4).

¹³⁵⁹ See for example *Transport Operations (Marine Safety) Act 1994* (Qld) s 147(1).

¹³⁶⁰ See for example *Explosives Act 1999* (Qld) s 100.

¹³⁶¹ See for example *Fire and Rescue Services Act 1990* (Qld) s 58.

¹³⁶² See for example *Financial Administration and Audit Act 1977* (Qld) s 87.

¹³⁶³ *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 345. See also per Murphy J at 347.

¹³⁶⁴ See for example *Business Names Act 1962* (Qld) s 13(3); *Criminal Proceeds Confiscation Act 2002* (Qld) s 40(1)(a); *Foreign Ownership of Land Register Act 1988* (Qld) s 24(3); *Government Owned Corporations Act 1993* (Qld) s 142(12); *Local Government Act 1993* (Qld) s 696(14); *Petroleum (Submerged Lands) Act 1982* (Qld) s 115(2); *Police Powers and Responsibilities Act 2000* (Qld) s 112(1)(a); *Tobacco Products (Licensing) Act 1988* (Qld) ss 34(9), 39(6); *Trade Measurement Act 1990* (Qld) s 66(1); *Water Act 2000* (Qld) s 617(13).

privileges creates an ambiguity in relation to provisions that refer only to the privilege against self-incrimination:¹³⁶⁵

It may be that the legislature intended to fully codify the privilege and thus by implication extinguish the wider privilege against self-exposure to a penalty. Conversely, perhaps there was no such intention or purpose, in which case the penalty privilege would survive and supplement the more limited statutory protection. Alternatively, it may be that a reference to 'incrimination' was intended to cover both branches of the privilege.

The Australian Law Reform Commission has recently recommended that any legislative scheme that seeks to abrogate or modify the privilege against self-incrimination or self-exposure to a non-criminal penalty must do so by express reference to the privilege or privileges that it seeks to abrogate or modify.¹³⁶⁶

4. FUTURE USE OF INFORMATION OBTAINED UNDER COMPULSION

As explained in Chapter 2 of this Discussion Paper,¹³⁶⁷ legislation that abrogates the privilege against self-incrimination may impose limits on what may be done with information obtained under a power of compulsion.

The grant of an immunity in relation to such information raises a number of issues. The first of these is whether it is in fact desirable for legislation to insist that a person provide a self-incriminatory answer or statement, or produce a self-incriminatory document or record, but to refuse to allow the information thus obtained to be used as evidence against the person in subsequent proceedings or, in some cases, as a tool for discovering further evidence. If an immunity is considered desirable, further questions arise in relation to its implementation.

A review of existing Queensland abrogation provisions reveals that there are no clearly identifiable factors for determining whether an immunity should be conferred and, if so, the extent of the protection to be offered, and the circumstances in which it should apply.

(a) Existing Queensland abrogation provisions

The *Legislative Standards Act 1992* (Qld) provides that Queensland legislation should have sufficient regard to the rights and liberties of individuals, including appropriate protection against self-incrimination.¹³⁶⁸ The consequence of this

¹³⁶⁵ Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at [18.29].

¹³⁶⁶ Id, Recommendation 18-2 at 662.

¹³⁶⁷ See pp 19-22 of this Discussion Paper.

¹³⁶⁸ *Legislative Standards Act 1992* (Qld) s 4(3)(f).

provision should be that, generally, legislation should not abrogate the privilege against self-incrimination without some kind of accompanying protection in relation to information obtained as a result of the abrogation.

However, not every provision which abrogates the privilege against self-incrimination imposes, by way of compensation for the loss of the privilege, restrictions on the use that may be made of information that has been obtained as a result of the abrogation.

Existing Queensland provisions that do not confer any immunity were outlined in Chapter 4 of this Discussion Paper.¹³⁶⁹ The kinds of situations covered by these provisions include the investigation of serious crime,¹³⁷⁰ the supervision of an investigatory body,¹³⁷¹ and the regulation of public health¹³⁷² and of activities such as the racing industry.¹³⁷³

Many of the provisions that do not confer an immunity abrogate the privilege in relation to the production of a document that a person must hold or keep under the legislation in question. Apart from this, there is no readily discernible pattern that would tend to indicate the existence of any objective test for determining whether or not an abrogation provision should include some kind of immunity or, if such a test exists, the criteria to be used.

(b) Whether an immunity is desirable

It is apparent that there has been an increasing legislative trend towards granting an immunity to incriminatory material obtained as a result of the abrogation of the privilege against self-incrimination. The purpose of the immunity is to provide some measure of compensation for the loss of the privilege.

In Queensland, one of the factors considered by the Scrutiny of Legislation Committee of the Queensland Parliament in determining whether proposed legislation provides appropriate protection against self-incrimination¹³⁷⁴ is whether the proposed legislation prohibits the use of information obtained in prosecutions against the person.¹³⁷⁵ The Australian Law Reform Commission has recently

1369 See pp 25-69 of this Discussion Paper.

1370 *Crime and Misconduct Act 2001* (Qld) ss 185, 190.

1371 *Crime and Misconduct Act 2001* (Qld) ss 317, 322.

1372 *Health Act 1937* (Qld) s 153O.

1373 *Racing Act 2002* (Qld) s 304.

1374 See *Legislative Standards Act 1992* (Qld) s 4(3)(f), which provides that Queensland legislation should have sufficient regard to the rights and liberties of individuals, including appropriate protection against self-incrimination.

1375 See for example Queensland Parliament, Scrutiny of Legislation Committee, *Report on the Queensland Building Tribunal Bill 1999* (Alert Digest No 13 of 1999 at 31-32); *Report on the Guardianship and Administration Bill 1999* (Alert Digest No 1 of 2000 at 7-8); *Report on the Coroners Bill 2002* (Alert Digest No 1 of 2003 at 7-8).

recommended the enactment of federal legislation to the effect that, in the absence of any clear, express statutory statement to the contrary, no evidence given by any individual that:

- would have been subject to the privilege against self-incrimination or privilege against self-exposure to a non-criminal penalty which has been abrogated or modified by statute, and
- was the subject of a claim for privilege,

may be used in any criminal or civil penalty proceedings against that individual, except in proceedings in respect of the falsity of the evidence itself.¹³⁷⁶

However, it has been suggested that the practice of compensating for the abrogation of the privilege by preventing the future use of the incriminating material is not, as commonly propounded, a just solution but, rather, an unhappy compromise.¹³⁷⁷

It has been argued that, on the one hand, abrogation of the privilege permits investigation without any accompanying guarantee of procedural safeguards, and that granting an immunity in relation to information obtained does nothing to protect the innocent from oppressive methods of obtaining that information. But on the other hand:¹³⁷⁸

... by shutting out every forensic use of incriminating answers obtained under legal compulsion, however careful and controlled the procedure by which they have been obtained, it protects the guilty from conviction.

To recognise the legitimacy of enabling regulatory regimes to insist on having answers to relevant questions, but to refuse to allow the use in court of a self-incriminating response has been described as:¹³⁷⁹

... the worst of all possible worlds - a world in which the best possible proof of criminality may be on the record and cannot be used because it has not been more circuitously and less reliably obtained.

In Queensland, there is presently no immunity unless it is expressly conferred by the legislation in question. Enactment of a default immunity provision of the kind recently recommended by the Australian Law Reform Commission¹³⁸⁰ would therefore result in a significant change to the existing situation.

¹³⁷⁶ Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) Recommendation 18-3 at 662.

¹³⁷⁷ Sedley S, "Wringing out the Fault" *London Review of Books* 7 March 2002 at 27.

¹³⁷⁸ Ibid.

¹³⁷⁹ Id at 30.

¹³⁸⁰ Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) Recommendation 18-3 at 662. See note 1375 above.

(c) The kind of immunity

Existing Queensland provisions that restrict the use that may be made of information provided as a result of the abrogation of the privilege against self-incrimination confer either a use or a derivative use immunity. The terms “use immunity” and derivative use immunity” are explained in Chapter 2 of this Discussion Paper.¹³⁸¹ Provisions which confer a mere use immunity are identified in Chapter 5 of this Discussion Paper¹³⁸² and provisions which confer a derivative use immunity are identified in Chapter 6.¹³⁸³

(i) The scope of the protection

The protection given by a derivative use immunity is considerably wider than that given by a mere use immunity. Subject to any statutory exceptions,¹³⁸⁴ a derivative use immunity prevents the admissibility in evidence in subsequent proceedings of not only the actual information provided, but also any other evidence obtained as a result of further investigations based on that information.

(ii) Issues in relation to derivative use immunity

A. The effect on investigations

There is a view that the scope of a derivative use immunity may be more likely to induce a person who is being questioned in the course of an investigation or inquiry to co-operate with the investigator and to volunteer helpful information.

However, concerns have been expressed that, although a derivative use immunity may induce a person to provide information, the effect of the immunity may in fact be to hamper investigative and prosecutorial powers conferred by the legislation in question.

It has been suggested that, in the context of corporate crime, examinees might have an ulterior motive for providing information which is subject to a derivative use immunity:¹³⁸⁵

1381 See pp 19-22 of this Discussion Paper.

1382 See pp 70-119 of this Discussion Paper.

1383 See pp 120-149 of this Discussion Paper.

1384 The question of statutory exceptions to a grant of immunity is considered at pp 190-191 of this Discussion Paper.

1385 Kluver J, *Report on Review of the Derivative Use Immunity Reforms* (1997) at 37-38. These comments were made in the context of a review of Commonwealth company and securities law.

... their purpose in co-operating might simply be to achieve a considerable forensic advantage for themselves, namely to ensure that any information, document or other thing derived or obtained, directly or indirectly, from the information they provided was thereby rendered inadmissible in any later criminal or penalty-exposing proceedings against them.

The forensic advantage provided by a derivative use immunity to a self-confessed wrongdoer has been described as “far in excess of what was ever contemplated under the common law privilege”,¹³⁸⁶ the result being that:¹³⁸⁷

It enables an examinee, in answering questions or making statements, to quarantine a potentially large amount of evidence against him or her. This outcome is not possible merely through the exercise of any right to refuse to answer questions.

The outcome for the planning and conduct of investigations could be that the information-gathering and enforcement process is delayed, rather than expedited, as investigators might be forced to use more circuitous, costly and less time-efficient methods of investigation.¹³⁸⁸

The counter-argument to this proposition is that a person alleged to have committed some corporate wrongdoing would be reluctant to volunteer anything that may be self-incriminating, even where a derivative use immunity is provided, because there may still be a risk of civil proceedings.¹³⁸⁹

There are also concerns that, in the context of some criminal prosecutions, a derivative use immunity could potentially thwart prosecutions by allowing the defendant to seek the exclusion of evidence on the basis that it was obtained as a result of information given at a prior examination. It has been suggested that refuting such a claim may be difficult without disclosing confidential sources or informants.¹³⁹⁰

B. Onus of proof

In the absence of any authoritative statement of the law in Australia, there is some doubt about the onus of proof in relation to a derivative use immunity.¹³⁹¹

1386 Id at 45.

1387 Id at 40.

1388 Id at 38.

1389 Law Commission (NZ), Discussion Paper, *The Privilege against Self-Incrimination* (NZLC PP 25, 1996) at [309], citing Cotton, “Company Directors and the Privilege Against Self-Incrimination in Civil Proceedings: Is Use Immunity the Answer? Part 2” (1994) 15 *The Company Lawyer* 131 at 132.

1390 See for example Explanatory Notes, *Criminal Proceeds Confiscation Bill 2002* (Qld) at 6.

1391 See pp 21-22 of this Discussion Paper.

Clearly, it would be incumbent upon the party opposing the admission of the evidence to object to it on the ground that it had been derived from information disclosed as a result of the abrogation of the privilege against self-incrimination. Like other issues of fact arising in relation to the admissibility of evidence, the question of whether the evidence which is sought to be admitted was derived from such information would generally be determined by the trial judge on a voir dire.¹³⁹² However, it is not clear whether, once the party seeking the admission of the evidence has made out a prima facie case that the evidence is not derived from the information, that party has the burden of proving that it is not so derived or whether the burden shifts to the party objecting to the admission of the evidence to show that it is derived from the information.

The latter approach would be consistent with the common law rule that a person who claims the privilege against self-incrimination must show that there are reasonable grounds for the claim.¹³⁹³ On the other hand, analogies with the admissibility of confessions, where the prosecution bears the onus of proving voluntariness on the balance of probabilities,¹³⁹⁴ and the competence of a prosecution witness, where the prosecution bears the burden of proof once the issue has been raised,¹³⁹⁵ suggest that once the issue of derivative use immunity has been raised, the party seeking to rely on the evidence would have the burden of proving that it was not derived from the disclosed information. This may be explained on the basis that the conditions of admissibility have to be established by those alleging that they exist.¹³⁹⁶ It would also seem fair that, since the party seeking the admission of the evidence presumably knows how it was obtained, that party should bear the onus of proof on the issue.

(d) Proceedings where an immunity should apply

Some Queensland provisions confer an immunity which applies in proceedings of all kinds. For example, the *Fire and Rescue Service Act 1990* (Qld) provides that the immunity applies "in proceedings".¹³⁹⁷ The *Crime and Misconduct Act 2001* (Qld)

1392 Butterworths, *Cross on Evidence* (Service 72) at 1040. A "voir dire" is sometimes described as a trial within a trial where, in a criminal proceeding, the judge decides a preliminary issue in the absence of the jury:

If the proof is by witnesses, [the judge] must decide on their credibility. If counter-evidence is offered, [the judge] must receive it before [the judge] decides; and [the judge] has no right to ask the opinion of the jury ...

See *Doe d Jenkins v Davies* (1847) 10 QB 314 per Lord Denman CJ at 322; 116 ER 122 at 125.

1393 *R v Boyes* (1861) 1 B & S 311 at 329-330; 121 ER 730 at 738.

1394 *Wendo v R* (1963) 109 CLR 559.

1395 *R v Yacoob* (1981) 72 Cr App R 313 at 317.

1396 Butterworths, *Cross on Evidence* (Service 74) at 11075.

1397 *Fire and Rescue Service Act 1990* (Qld) s 58.

provides that, subject to certain exceptions, if a witness is required to give self-incriminating evidence before the Crime and Misconduct Commission established by the Act, the person's evidence cannot be used in any civil, criminal or administrative proceedings.¹³⁹⁸

Other provisions, while conferring a general immunity, create exceptions where the information may be used.¹³⁹⁹

Still other provisions are more restricted and confer immunity only in specified proceedings - for example, criminal proceedings¹⁴⁰⁰ or proceedings for certain offences.¹⁴⁰¹

There do not appear to be any established criteria for determining, in relation to a provision that confers an immunity, the type of proceeding where the immunity should apply.

(e) Exceptions to the immunity

The extent of the protection provided by either a use or a derivative use immunity will depend to a large extent on the legislative exceptions to it.

The most common exception concerns proceedings for perjury,¹⁴⁰² or for making false or misleading statements to an inquiry or an investigation.¹⁴⁰³ Other exceptions may involve proceedings for offences under the legislation in question,¹⁴⁰⁴ or for other specified proceedings¹⁴⁰⁵ or offences.¹⁴⁰⁶

1398 *Crime and Misconduct Act 2001* (Qld) s 197.

1399 See for example *Health Rights Commission Act 1991* (Qld) s 96(5).

1400 See for example *Fair Trading Act 1989* (Qld) s 88B(6); *Mobile Homes Act 1989* (Qld) s 12F(5). The Australian Law Reform Commission has recently noted that some civil and administrative penalties carry consequences that are just as serious as traditional criminal punishments. It has suggested that readiness to remove the privilege more easily in relation to non-criminal penalties may require reassessment in the light of the convergence of the severity of criminal punishments and non-criminal penalties: Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at [18.20].

1401 See for example *Environmental Protection Act 1994* (Qld) s 320(7), which provides that the information may not be used in proceedings for an offence against the Act constituted by the conduct that caused or threatened the harm disclosed by the information. See also *Recreation Areas Management Act 1988* (Qld) s 40(2).

1402 "Perjury" is the act of "making on oath by a witness ... in a judicial proceeding of a statement material in that proceeding, which he knows to be false or which he does not believe to be true": Osborn's Concise Law Dictionary.

1403 See for example *Coal Mining Safety and Health Act 1999* (Qld) s 159(6); *Business Names Act 1962* (Qld) s 13(3); *Motor Accident Insurance Act 1994* (Qld) s 79.

1404 See for example *Local Government Act 1993* (Qld) s 696(15); *Liquid Fuel Supply Act 1980* (Qld) s 40(4).

1405 See for example *Health Rights Commission Act 1991* (Qld) s 95(5).

1406 See for example *Guardianship and Administration Act 2000* (Qld) s 137(6)(b), (c) and (d).

The Australian Law Reform Commission recently recommended the adoption of a default immunity provision, that, in the absence of an express provision to the contrary, would apply in all proceedings other than those with respect to the falsity of the information provided.¹⁴⁰⁷ However, that Commission did not identify the kinds of situations where it considered that it would be appropriate for the proposed default provision to be displaced by contrary legislation.

(f) Entitlement to the immunity

Some provisions which confer an immunity impose conditions which must be satisfied before the immunity will apply.

(i) The need to object to providing information

Some abrogation provisions require, in order for an immunity to attach to information provided under compulsion, that before providing the information the person object on the grounds of self-incrimination.¹⁴⁰⁸ Other provisions do not contain such a requirement.¹⁴⁰⁹

The need to claim the privilege gives rise to two concerns.

The first concern is that there are significant consequences for a person who is unaware of the need to object before providing information or who forgets to claim the privilege prior to answering.¹⁴¹⁰

Failure to claim the protection of the privilege before complying with a ... requirement [to provide information] means that the protection against subsequent use is irretrievably lost ...

The need for an objection is probably consistent with the common law, which requires a witness to claim the privilege. In court proceedings, the judge might, as a matter of practice, warn a witness that he or she does not have to answer incriminating questions. However, the judge is not obliged to do so. If

1407 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) Recommendation 18-3 at 662. See pp 185-186 of this Discussion Paper.

1408 See for example *Financial Administration and Audit Act 1977* (Qld) s 87(10); *Fire and Rescue Service Act 1990* (Qld) s 58; *Commercial and Consumer Tribunal Act 2003* (Qld) s 112(2); *Recreation Areas Management Act 1988* (Qld) s 40(2); *Water Act 2000* (Qld) s 617(14).

1409 In Queensland, one of the factors considered by the Scrutiny of Legislation Committee of the Queensland Parliament in determining whether proposed legislation provides appropriate protection against self-incrimination is whether the proposed legislation requires a person, in order to secure the restriction of the use of information provided, to fulfil any requirements, such as formally claiming the right to the privilege. See for example Queensland Parliament, Scrutiny of Legislation Committee, *Report on the Queensland Building Tribunal Bill 1999* (Alert Digest No 13 of 1999 at 31-32); *Report on the Guardianship and Administration Bill 1999* (Alert Digest No 1 of 2000 at 7-8); *Report on the Coroners Bill 2002* (Alert Digest No 1 of 2003 at 7-8).

1410 Woellner R, *The ASC's Investigative Powers - Some Practical Aspects*, 50th Anniversary Conference Australian Law Teachers' Association: Cross Currents: Internationalism, National Identity and Law, <<http://www.austlii.edu.au/au/special/alta/alta95/woellner1.html>>.

the witness provides incriminating evidence, his or her ignorance of the right to the privilege is irrelevant. Even if a witness is aware of the right to the privilege, he or she may not realise, in the absence of a warning, that a question is designed to elicit a self-incriminating answer. In any event, failure to claim the privilege amounts to a waiver, and the evidence can be used against the witness in the case in which it is given or in subsequent proceedings brought against the witness.¹⁴¹¹

In situations other than court proceedings ordinary citizens may be even less aware of the significance of claiming the privilege. The proliferation of regulatory legislation has resulted in the appointment of “authorised officers” who are armed with official identification and the power to demand information. A person confronted with such a demand may not be mindful of the need to object to providing the information in order to be entitled to an immunity.

Some of the legislation requiring a person to make an objection to the provision of information contains an accompanying obligation on the part of the investigator to warn a person that no immunity will attach to the information provided unless, before giving the information, the person has objected on the grounds of self-incrimination.¹⁴¹² Provisions of this kind go some way to ensuring that, having been deprived by legislation of the privilege against self-incrimination, a person is not also deprived of any immunity conferred by the legislation.

The second concern is that, where the need to claim the privilege is not expressly stated in the provision, an ambiguity can arise:¹⁴¹³

On one interpretation, a person who discloses incriminating information without first claiming privilege might subsequently be able to benefit from use immunity, which arguably extends to all information obtained in compliance with the relevant statutory provision. On another interpretation, a failure to claim privilege at the outset might be deemed to be a waiver of privilege, and thus of any subsequent use immunity.

The Australian Law Reform Commission, which recently recommended the adoption of a default immunity provision where the privilege against self-incrimination is abrogated, also recommended that the application of the provision should be subject to the need to claim the privilege.¹⁴¹⁴

1411 *R v Coote* (1873) LR 4 PC 599; [1861-73] All ER Rep 1113. See also Butterworths, *Cross on Evidence* (Service 72) at 25105.

1412 See for example *Coal Mining Health and Safety Act 1999* (Qld) s 155(3); *Motor Accident Insurance Act 1994* (Qld) s 79(2).

1413 Australian Law Reform Commission, Discussion Paper: *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation* (DP 65, April 2002) at [9.55].

1414 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) Recommendation 18-3 at 662. See pp185-186 of this Discussion Paper.

(ii) The need for the information to be self-incriminatory

Some legislation imposes as a further condition of entitlement to an immunity, not only that the person must object to providing the information on the grounds of self-incrimination, but also that the information must in fact tend to incriminate the person.¹⁴¹⁵ However, the legislation does not specify who is responsible for determining the factual tendency.

The imposition of an objective test is consistent with entitlement to the privilege at common law, where a claim by a witness that the answer to a question might be self-incriminatory does not of itself give rise to a privilege against self-incrimination. For the privilege to apply, the court must be able to see, from the circumstances of the case and the nature of the evidence that the witness is called to give, that there is reasonable ground to apprehend that, if the witness is required to answer, he or she will be in danger of incriminating himself or herself.¹⁴¹⁶

However, the situation is more problematic where the demand for information is made, not in court proceedings, but by an “authorised officer” with legislative powers of investigation and where the legislation fails to provide a mechanism for determining whether the information sought does in fact tend to incriminate the person:¹⁴¹⁷

These procedural ambiguities are significant because they lack the certainty of self-incrimination claim procedures in court and thus have the potential to adversely affect the rights of the regulated.

5. PROBLEMS OF EXPRESSION

(a) Inconsistency

The existing Queensland provisions that abrogate the privilege against self-incrimination employ a variety of forms of expression to give effect to the abrogation. Some of the differences are purely stylistic, the result of changes in legislative drafting techniques. Others, however, give rise to concern because of the degree of uncertainty they can create.

Many provisions are expressed in words to the effect that a person must provide information unless the person has a reasonable excuse. In the absence of any

1415 See for example *Financial Administration and Audit Act 1977* (Qld) ss 85(6), (7), 86(4), 87(9), (10); *Transport Infrastructure Act 1994* (Qld) s 126(2)(b).

1416 *R v Boyes* (1861) 1 B & S 311 at 329-330; 121 ER 730 at 738. See also *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 289.

1417 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at [18.42].

explanation as to what constitutes a reasonable excuse, it is unlikely that this wording would of itself be sufficient to abrogate the privilege, since it neither expressly abrogates the privilege nor reveals a clear intention to do so. It could even be argued that recognition of the possible existence of a reasonable excuse for failure to comply with an obligation to provide information is an apparent recognition of the continued existence of the privilege.¹⁴¹⁸

However, some provisions of this kind also provide that self-incrimination is or is not a reasonable excuse. Problems may arise where the inclusion of such a provision is not consistent throughout the legislation. For example, an Act may include several provisions specifically stating that self-incrimination is a reasonable excuse for failing to comply with an obligation to provide information. If the Act includes another provision that imposes an obligation to provide information but that fails to specify what, if anything, constitutes a reasonable excuse for non-compliance, the effect of such a provision is unclear.

(b) Provisions that are too broadly expressed

The extent to which the privilege against self-incrimination is abrogated by a legislative provision may depend on how broadly the provision is expressed to apply. It appears that, in some cases, the language used in the provision is much wider than needed to achieve the intended effect.

For example, an abrogation provision may be expressed to apply to a document required to be kept under the Act in question. However, it may be that the intention is to abrogate the privilege only in relation to documents required to be kept under a certain part of the Act.¹⁴¹⁹ Such a provision may be ambiguous and may give rise to uncertainty in its interpretation. Even where, in context, it is possible to determine the intended scope of operation of the provision, future amendments to the legislation could cause difficulty if they impose further document keeping requirements.

6. ABROGATION BY REFERENCE TO *COMMISSIONS OF INQUIRY ACT 1950 (QLD)*

In Chapter 7 of this Discussion Paper, provisions that abrogate the privilege against self-incrimination by reference to the *Commissions of Inquiry Act 1950 (Qld)* were identified.

These provisions cover a wide variety of situations.¹⁴²⁰

¹⁴¹⁸ See for example *The Royal Commission Re a Brisbane Hotel (No 2)* [1964] QWN 29 per Gibbs J.

¹⁴¹⁹ See for example *Public Trustee Act 1978 (Qld)* s 117M(2).

¹⁴²⁰ See p 164 of this Discussion Paper.

It would appear that, in the legislation containing these provisions, reference to the *Commissions of Inquiry Act 1950* (Qld) was used as a kind of drafting shortcut to avoid the need to specify the powers to be conferred by each individual Act. Whilst this approach to legislative drafting may promote a degree of uniformity, it fails to take into account the particular circumstances of each piece of legislation. In the context of this reference, it also generally fails to address the issue of whether, and to what extent, the abrogation of the privilege against self-incrimination is warranted.

There are, however, some provisions that, although conferring the powers of a commission of inquiry, specifically exclude from the operation of the provision the abrogation of the privilege against self-incrimination.¹⁴²¹

7. CORPORATIONS

At common law, a corporation cannot claim the privilege against self-incrimination. The High Court held in *Environment Protection Authority v Caltex Refining Co Pty Ltd* that, since neither the traditional nor the modern explanations for the existence of the privilege justifies its application to an artificial entity such as a corporation, a corporation is not entitled to rely on the privilege.¹⁴²²

The Australian Law Reform Commission, having initially proposed the enactment of legislation to clarify that the privilege against self-incrimination is not available to a corporation,¹⁴²³ has recently expressed the view that the unavailability of the privilege to corporations is an established area of law that does not require legislative restatement.¹⁴²⁴

However, some Queensland legislative provisions raise questions about the entitlement of a corporation to claim the privilege. There are many provisions that expressly retain the privilege by providing that it is a reasonable excuse for a “person” to refuse to answer a question or to produce a document because to do so might be self-incriminating. A reference in Queensland legislation to a “person” generally includes a reference to a corporation as well as to an individual.¹⁴²⁵

1421 See for example *Gaming Machine Act 1991* (Qld) s 335(2).

1422 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. See pp 16-18 of this Discussion Paper.

1423 Australian Law Reform Commission, Discussion Paper, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Legislation* (DP 65, April 2002) Proposal 9-2 at 331.

1424 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at [18.62].

1425 *Acts Interpretation Act 1954* (Qld) s 32D(1). Although the form of this provision has altered since its initial insertion in 1991, the subsequent amendments do not seem to have been intended to change its meaning. This provision is not displaced merely because there is an express reference to either an individual or a corporation elsewhere in the Act: *Acts Interpretation Act 1954* (Qld) s 32D(2).

It is clear that, with respect to provisions of this kind enacted before the *Caltex* decision, that decision had the effect of narrowing the meaning of the word “person” to exclude a corporation. However, the situation is less clear with respect to provisions enacted after the *Caltex* decision. It is arguable that, if a provision preserving the privilege by reference to a “person” has been enacted subsequently to and in the light of the High Court decision, that provision is intended to override the effect of the High Court decision, thus preserving the privilege for a corporation as well as for an individual, unless a contrary intention is evident from the legislation itself.

(a) Queensland provisions enacted since the *Caltex* decision

Provisions enacted in Queensland since the *Caltex* decision and preserving the privilege against self-incrimination fall into three principal categories. The following examples are illustrative only and are not intended to be exhaustive.

(i) Provisions that are expressed to apply only to individuals

Provisions in this category preserve the privilege by reference not to “a person” but to “an individual”.

The *Child Care Act 2002* (Qld), for example, is intended to protect, and promote the best interests of, children receiving child care.¹⁴²⁶ It is an offence under the Act for a “person” to conduct a child care service without a licence.¹⁴²⁷ The term “person” clearly includes a corporation.¹⁴²⁸

The Act imposes an obligation on licensees, including corporations, to provide certain information.¹⁴²⁹ It further provides that it is an excuse for an individual to refuse to provide the information on the ground of self-incrimination.¹⁴³⁰ It is clear from the express reference to “an individual” that the preservation of the privilege is not intended to extend to corporations.¹⁴³¹

(ii) Provisions that are capable of applying only to individuals

Provisions in this category preserve the privilege by reference to “a person”, without expressly stating whether the “person” is an individual or a

¹⁴²⁶ *Child Care Act 2002* (Qld) s 8.

¹⁴²⁷ *Child Care Act 2002* (Qld) s 16.

¹⁴²⁸ Section 19 of the Act, for example, provides that, if an applicant for a licence is a corporation, the application must include the name of the person proposed to be the nominee for the licence.

¹⁴²⁹ *Child Care Act 2002* (Qld) ss 80, 81.

¹⁴³⁰ *Child Care Act 2002* (Qld) ss 80(3), 81(3).

¹⁴³¹ Similarly, some provisions restrict the scope of the preservation of the privilege by referring to a “natural person”: see for example *Gas Pipeline Access (Queensland) Act 1998* (Qld) s 41(5).

corporation. However, when viewed in context, they appear capable of referring only to an individual.

For example, sections 184(2) of the *Queensland Competition Authority Act 1997* (Qld) and 24(2) of the *Land Title Act 1994* (Qld) both provide that it is a reasonable excuse for a person to refuse to answer a question or produce a document that the answer or document might tend to incriminate the person. Neither provision makes any distinction between an individual and a corporation for the purpose of claiming the privilege.

However, the former applies to a witness at a hearing under the Act and the latter to a person appearing as a witness at an inquiry held under the Act by the Registrar of Titles. Although the application of these provisions is not specifically expressed to be limited to individuals, the context excludes the possibility that the term “person” could be interpreted to include a corporation, since a corporation, which is an artificial entity, cannot be a witness.¹⁴³²

(iii) Provisions that are capable of applying to both individuals and corporations

Provisions in this category preserve the privilege by reference to “a person”, without expressly stating whether the “person” is an individual or a corporation. When viewed in context, they appear capable of referring to both.

A. *Electrical Safety Act 2002* (Qld)

This Act imposes electrical safety obligations on certain categories of persons.¹⁴³³ These categories include both corporations and individuals.

A “person” must not perform or supervise electrical work unless the person is the holder of an electrical work licence under the Act.¹⁴³⁴ Only an individual may be the holder of such a licence.¹⁴³⁵ A “person” must not conduct a business or undertaking that includes the performance of electrical work unless the person is the holder of an electrical contractor licence under the Act.¹⁴³⁶ This type of licence is not restricted to individual holders.

1432 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Brennan J at 513 and per Deane, Dawson and Gaudron JJ at 535.

1433 *Electrical Safety Act 2002* (Qld) s 26.

1434 *Electrical Safety Act 2002* (Qld) s 55(1).

1435 *Electrical Safety Act 2002* (Qld) s 55(2).

1436 *Electrical Safety Act 2002* (Qld) s 56(1).

There are also record-keeping requirements imposed by the Act.¹⁴³⁷

The Act provides for the appointment of inspectors¹⁴³⁸ who have certain powers under the Act. An inspector may enter a place¹⁴³⁹ and, for the purpose of monitoring and enforcing compliance with the Act, may make certain inquiries.¹⁴⁴⁰ The inspector may require a “person” at the place to give the inspector reasonable help to exercise these powers¹⁴⁴¹ or to answer questions to help the inspector ascertain whether the Act has been or is being complied with.¹⁴⁴² A “person” of whom such a requirement is made must comply with the requirement unless the person has a reasonable excuse.¹⁴⁴³ If the requirement is to be complied with by the person giving information, or producing a document, other than a document required to be kept by the person under the Act, it is a reasonable excuse for the person to fail to comply with the requirement that complying with the requirement might tend to incriminate the person.¹⁴⁴⁴

B. Fossicking Act 1994 (Qld)

This Act regulates recreational and tourist fossicking for minerals, gemstones and ornamental stones. It provides for various kinds of fossicking licence, including individual, family, club and commercial tour operator.

A “commercial tour operator” is defined as “a person who conducts, offers to conduct, agrees to conduct or arranges for someone else to conduct, a commercial tour”.¹⁴⁴⁵

The Act imposes certain obligations on licensees. For example, a licensee must not, in trade or commerce, sell material collected under a licence, or use the material in the production of something else for sale in trade or commerce.¹⁴⁴⁶ A licensee must not contravene a restriction prescribed by

1437 See for example *Electrical Safety Regulation 2002* (Qld) ss 15 (Certificate of testing and safety), 17 (Testing and maintenance of safety equipment), 126 (Hiring electrical equipment), 152 (Reconnection of electrical installation to electricity source), 159 (Certificate of testing and compliance), 162 (Keeping copy of report), 180 (Records of tests to be kept), 197 (Recording serious electrical incident or dangerous electrical event).

1438 *Electrical Safety Act 2002* (Qld) s 122.

1439 *Electrical Safety Act 2002* (Qld) s 137.

1440 *Electrical Safety Act 2002* (Qld) s 144(3)(e), (f).

1441 *Electrical Safety Act 2002* (Qld) s 144(3)(h).

1442 *Electrical Safety Act 2002* (Qld) s 144(3)(i).

1443 *Electrical Safety Act 2002* (Qld) s 144(5).

1444 *Electrical Safety Act 2002* (Qld) s 144(6).

1445 *Fossicking Act 1994* (Qld) s 3.

1446 *Fossicking Act 1994* (Qld) s 36.

regulation on the volume, weight or number of fossicking specimens an individual may collect.¹⁴⁴⁷

Under the Act, an authorised officer who enters a place or vehicle may require the occupier of the place, or a person in or on the place or vehicle to give the authorised officer reasonable help to exercise the powers conferred on the authorised officer by the Act.¹⁴⁴⁸ “Occupier”, in relation to a place, is defined to include “a person who reasonably appears to be the occupier, or in charge, of the place”.¹⁴⁴⁹ The occupier of a place could therefore be a commercial tour operator, as defined, which, in turn, could be a corporation.

A “person” of whom a help requirement is made must comply unless the person has a reasonable excuse.¹⁴⁵⁰ If the help required consists of answering a question or producing a document (other than a licence or permit) it is a reasonable excuse for the person to refuse to comply on the grounds of self-incrimination.¹⁴⁵¹

C. *Land Protection (Pest and Stock Route Management) Act 2002 (Qld)*

This Act regulates the management of particular pests on land.

The Act creates certain offences about declared pests. For example, a “person” must not introduce a declared pest other than under a declared pest permit.¹⁴⁵² The Act also imposes obligations in respect of land. For example, a land owner must take reasonable steps to keep land free of pests.¹⁴⁵³ In relation to freehold land, the “owner” is the registered proprietor.¹⁴⁵⁴

A person authorised under the Act may, for the purpose of monitoring or enforcing compliance with the Act, require the occupier of a place, or a person at the place, to give the authorised person reasonable help to exercise the authorised person’s powers or information to help the authorised person to ascertain whether the Act is being complied with.¹⁴⁵⁵

1447 *Fossicking Act 1994* (Qld) s 37.

1448 *Fossicking Act 1994* (Qld) s 86(1)(f).

1449 *Fossicking Act 1994* (Qld) s 3.

1450 *Fossicking Act 1994* (Qld) s 86(3).

1451 *Fossicking Act 1994* (Qld) s 86(4).

1452 *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) s 39. See also ss 41 (Keeping declared pest), 43 (Taking declared pest plant for commercial use), 44 (Supplying declared pest), 46 (Moving or transporting vehicles and other things on roads), 56 (Obstructing building, inspection or maintenance of a declared pest fence).

1453 *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) s 77.

1454 *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) Schedule 3.

1455 *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) s 263(3)(h).

A “person” required to give reasonable help or to provide information must comply with the requirement unless the person has a reasonable excuse.¹⁴⁵⁶ It is a reasonable excuse that complying with the requirement might tend to incriminate the person.¹⁴⁵⁷

D. *Education (Overseas Students) Act 1996 (Qld)*

This Act provides for the registration of persons providing courses to overseas students.

The Act provides that a “person” may apply for registration as a provider.¹⁴⁵⁸ “Person” includes corporate entities.¹⁴⁵⁹ If a “person” (the provider) who is not a registered provider is believed to be providing a course to an overseas student, the provider may be required to provide information or records relating to the identity of the student or the content or conduct of the course.¹⁴⁶⁰ The provider must comply with the requirement unless the provider has a reasonable excuse.¹⁴⁶¹ It is a reasonable excuse for a provider not to give information or records if giving the information or records might tend to incriminate the provider.¹⁴⁶²

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- 1456 *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) ss 264(1), 265(1).
1457 *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) ss 264(2), 265(2).
1458 *Education (Overseas Students) Act 1996* (Qld) s 7(1).
1459 *Education (Overseas Students) Regulation 1998* (Qld) s 4.
1460 *Education (Overseas Students) Act 1996* (Qld) s 30(2).
1461 *Education (Overseas Students) Act 1996* (Qld) s 30(3).
1462 *Education (Overseas Students) Act 1996* (Qld) s 30(4).

8. ISSUES FOR CONSIDERATION

The Commission seeks submissions on the following issues:

- 1. Is there any type of investigative forum where the statutory abrogation of the privilege against self-incrimination cannot be justified?**
- 2. Should legislation that seeks to abrogate the privilege against self-incrimination or against self-exposure to a civil penalty expressly refer to the privilege or privileges that it seeks to abrogate?**
- 3. Is it desirable for the statutory abrogation of the privilege against self-incrimination to be accompanied by an immunity restricting the use that may be made of incriminating material obtained as a result of the abrogation?**
- 4. If so, should the abrogation of the privilege against self-incrimination generally be accompanied by an immunity in relation to the use that can be made of the information obtained as a result of the abrogation of the privilege?**
- 5. If so, should Queensland legislation contain a default provision, so that, in the absence of an express statutory statement to the contrary, an immunity would apply to all information provided by a person in a situation where the privilege against self-incrimination had been abrogated?**
- 6. If not, in what circumstances should an immunity not be conferred?**
- 7. If an immunity is conferred, should it be a use immunity or a derivative use immunity?**
- 8. Should a provision which confers a derivative use immunity also provide who has the onus of proof in relation to the question of whether evidence in a subsequent proceeding has or has not been derived from material obtained as a result of the abrogation of the privilege?**
- 9. If so, should the onus of proof with respect to derivative use immunity be placed on the party seeking to have the evidence admitted or on the party who is objecting to its admission?**
- 10. Should the immunity apply in all subsequent proceedings?**
- 11. If not, what criteria should be used to determine the kind of proceeding in which the immunity should apply?**

12. Should proceedings for certain kinds of offences be excepted from the immunity?
13. Should a provision which confers an immunity require that, before being entitled to the immunity, a person must object to providing the information on the grounds of self-incrimination?
14. If so, should there be an obligation on the person demanding the information to inform the person about the need to object?
15. In court proceedings, should there be an obligation on the court to warn a witness that the witness need not answer self-incriminating questions?
16. Should a provision which requires a person to object to providing information on the grounds of self-incrimination in order to be entitled to an immunity also require that the information must in fact tend to incriminate the person?
17. If so, how should the issue of the factual tendency be decided?
18. Should a provision which requires a person to provide information unless the person has a reasonable excuse also provide whether self-incrimination is or is not a reasonable excuse for failing to provide the information?
19. Is it desirable that an abrogation provision should not be expressed in terms that might give it an effect wider than intended?
20. Should the privilege against self-incrimination be able to be abrogated by reference to the *Commissions of Inquiry Act 1950* (Qld)?
21. Are there any circumstances in which a corporation should be entitled to claim the privilege against self-incrimination? If so, what are those circumstances?
22. Should there be a legislative provision to the effect that, in the absence of an expressed intention to the contrary, a corporation is not entitled to claim the privilege against self-incrimination?
23. Are you aware of any other provisions, not referred to by the Commission in this Discussion Paper, that abrogate the privilege against self-incrimination?

APPENDIX 1

LETTER

12 August 2002

Dear

The Queensland Law Reform Commission has received a reference from the Attorney-General to conduct a review of the extent to which existing Queensland statutory provisions abrogate the privilege against self-incrimination.

When the privilege against self-incrimination is abrogated by statute, the provision generally restricts the use that can be made of material obtained under the provision. Sometimes the statutory provisions abrogating the privilege contain both use and derivative use immunities and on other occasions only a use immunity. Sometimes the immunity applies only to criminal proceedings and on other occasions to any proceedings.

An example of a use immunity is section 26(9) of the *Parliamentary Committees Act 1995* (Qld). Section 26 of that Act provides that, when a person is ordered by the Legislative Assembly to appear before a committee to answer a question or produce a document, the privilege against self-incrimination does not apply and the person must comply with the order. Section 26(9) further provides that, subject to certain exceptions:

Evidence may not be given in any proceeding of an answer given by a person before a committee or the fact that a person produced a document or other thing to the committee.

An example of a derivative use immunity is section 137(6) of the *Guardianship and Administration Act 2000* (Qld). Section 137 of that Act abrogates the privilege against self-incrimination for witnesses at a hearing of the Guardianship and Administration Tribunal. Section 137(6) further provides that, subject to certain exceptions:

... evidence of, or directly or indirectly derived from, a person's answer or production of a document or thing that might tend to incriminate the person is not admissible in evidence against the person in a civil or criminal proceeding ...

The Queensland Law Reform Commission has been requested to:

- Examine the various statutory provisions abrogating the privilege in Queensland.
- Examine the bases for abrogating the privilege.

- Recommend whether there is ever justification for the abrogation of the privilege and, if so, in what circumstances and before what type of forum.
- If there are circumstances and forums where the abrogation may be justified, recommend whether the abrogation be accompanied by both a use and a derivative use immunity, especially having regard to the limitations that a derivative use immunity may have on subsequent prosecutions.
- Recommend whether these immunities should apply to subsequent criminal proceedings only or to all subsequent proceedings (including any civil or disciplinary proceedings).
- If there are circumstances and forums where the abrogation may be justified, recommend an appropriate statutory formula which can be used to rationalise existing provisions and as a model for future provisions.

It would be helpful to the Commission in its conduct of this review if you could provide the following information in relation to legislation administered by your department:

- Any provisions which abrogate the privilege against self-incrimination.
- Whether those provisions confer:
 - a use immunity; or
 - a derivative use immunity.
- The nature of the proceedings to which the immunity applies.
- The reasons for:
 - abrogating the privilege against self-incrimination;
 - conferring an immunity of the kind in question.
- Whether the continued existence of the provisions is necessary and, if so, on what grounds.

The Commission seeks your co-operation in this matter and would greatly appreciate receiving the above information by Friday 11 October 2002.

If you would like any further information, please contact Penny Cooper, on 3247 4550.

Yours sincerely

Justice Roslyn Atkinson
Chairperson