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LEGAL PROFESSIONAL PRIVILEGE AND CORPORATE WRONGDOING

Abstract

This article analyses how legal professional privilege, which limits the disclosure of certain communications between a client and their lawyer, may be deployed by corporations in the face of public enforcement actions against them for suspected wrongdoing. It evaluates the merits of concerns regarding misuse in this context, and examines regulator responses in rhetoric, public enforcement actions, and litigation. It assesses whether and how legal professional privilege subverts the administration of justice in respect of suspected criminality by corporations, and challenges the human rights protection for corporations that accrues in this context. It concludes by considering a limitation of the privilege in respect of corporations, highlighting the need for further empirical research.

I Introduction

Corporate crime (which includes crime in, by, and for corporations) 'is estimated to cost Australia more than $8.5 billion per year', and may account for '40% of the total cost of crime in Australia'.[1] Though 'the extent and nature of corporate crime is largely unknown', it appears to be concentrated in specific industry sectors, with some recidivist corporate groups.[2] Thus, there is a longstanding yet urgent need to develop better ways of revealing and responding to corporate crime. This is exemplified by the Australian Law Reform Commission's

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1 Attorney-General's Department, Australian Government, *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia* (Public Consultation Paper, March 2017) 1.

2 David Bartlett et al, 'Corporate Crime in Australia: The Extent of the Problem' (Trends & Issues in Crime and Criminal Justice No 613, Australian Institute of Criminology, December 2020) 1, 10–11.

Corporate Criminal Responsibility report[3] and the hearings and reports of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* ('*Banking Royal Commission*').[4] These initiatives indicate the damage caused by corporate criminality in various domains — in communities, to the environment, and to commerce — and how the failure to respond adequately can undermine trust in the state as well as in markets. A significant challenge in regulation and enforcement lies in the fact that a lot of corporate crime goes undetected,[5] and that acquiring sufficient and admissible evidence of such criminality, when committed by corporations especially, is difficult. This is illustrated by the fact that the prosecution of organisations (as opposed to the individuals within them) remains rare — less than 1% of defendants in Australian criminal courts in the 2018–19 financial year were organisations.[6]

The potential harms in and of commercial enterprise are well-examined in legal and criminological research.[7] What is less studied is the control of information by corporations to prevent these harms being detected and/or proven to the requisite standard in litigated public enforcement actions. There are various potential strategies by corporates to limit such flows of information, this could be through the pursuit of potential whistle-blowers who might reveal compromising matters;[8] the use of public relations firms to manage the circulation and nature of information;[9] and/or through reliance on the concept of legal professional privilege ('LPP').

The focus of this article is the latter. This article analyses how LPP — which limits the disclosure of certain communications between a client and their lawyer — is relied on by corporations, and assesses whether its use can subvert the administration

3 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, April 2020).

4 See, eg, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1 ('*Banking Royal Commission*').

5 John Braithwaite and Gilbert Geis, 'On Theory and Action for Corporate Crime Control' (1982) 28(2) *Crime and Delinquency* 292, 294–5.

6 *Corporate Criminal Responsibility* (n 3) 97 [3.73].

7 See, eg: Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001); Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002); Steve Tombs and David Whyte, *The Corporate Criminal: Why Corporations Must Be Abolished* (Routledge, 2015); Jennifer Arlen (ed), *Research Handbook on Corporate Crime and Financial Misdealing* (Edward Elgar, 2018).

8 See generally Sulette Lombard and Vivienne Brand, 'External Regulation and Internal Whistleblowing Frameworks: An Australian Perspective' in Sulette Lombard, Vivienne Brand and Janet Austin (eds), *Corporate Whistleblowing Regulation: Theory, Practice, and Design* (Springer, 2020) 113.

9 David Whyte, 'It's Common Sense, Stupid! Corporate Crime and Techniques of Neutralization in the Automobile Industry' (2016) 66(2) *Crime, Law and Social Change* 165, 174.

of justice in respect of crime by corporations. Two decades ago, concerns about the misuse of LPP claims emerged in the British American Tobacco litigation[10] and the Australian Wheat Board Royal Commission,[11] while the privilege was abrogated in relation to the investigation into the manufacture of asbestos products by building materials company James Hardie Industries plc.[12] This article revisits and updates the debate that crystallised then.

This article examines how LPP may be used by corporations to limit the disclosure of information in a way that obstructs public enforcement actions. It examines LPP's complexion in jurisprudence, as well as the responses by regulators. More broadly, it assesses whether and how LPP subverts the administration of justice in respect of criminality by corporations, and challenges the human rights protection for corporations in this context.

In terms of structure, Part II outlines the meaning and scope of the privilege. Part III looks at concerns raised about LPP's apparent misuse, and the extent of empirical evidence on this phenomenon. Part IV focuses on the responses of regulators, as

10 This litigation began with a civil action taken by Rolah McCabe against British American Tobacco Australia Services Ltd ('BAT'), arguing that BAT 'had been negligent in its manufacturing and marketing of cigarettes, and that its negligence had caused her lung cancer': 'The McCabe Case', *McCabe Centre for Law & Cancer* (Web Page) <https://www.mccabecentre.org/about/the-mccabe-case>. Finding in McCabe's favour, the trial judge, Eames J, stated that 'the process of discovery in this case was subverted by the defendant and its solicitor … with the deliberate intention of denying a fair trial to the plaintiff, and the strategy to achieve that outcome was successful': *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73, [385] ('*McCabe*'). BAT sought to extend claims of privilege: at [20]; thousands of relevant documents had been destroyed: at [308]–[309]; with others 'warehoused' to put them beyond the scope of discovery: at [324]; and the Court was misled over what had happened to the documents: at [354]. This decision was overturned on appeal, with the Victorian Court of Appeal preferring an 'innocent' reading of BAT's 'document retention policy': *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524, 555 [73]. For further detail, see below Part III.

11 At the turn of the century, the Australian Wheat Board ('AWB') held a very large share of the Iraqi wheat market and was involved in the United Nations ('UN') humanitarian Oil-for-Food Programme, established to allow Iraq to sell oil on the world market in exchange for humanitarian goods: Terence RH Cole, *Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme* (Report, November 2006) vol 1, xiii ('*AWB Royal Commission*'). After the invasion of Iraq in 2003, a UN inquiry was launched, revealing that many companies involved in the Oil-for-Food Programme had paid kickbacks to the Iraqi regime to secure Iraqi business: see Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Manipulation of the Oil-For-Food Programme by the Iraqi Regime* (Report, 27 October 2005) 4–6. Following the UN's inquiry, the AWB Royal Commission was established — in which LPP was a major impediment. For further detail, see below Part III.

12 See below Part V.

regards policy and litigation practice. Part V assesses some avenues for reform. Part VI concludes by endorsing the restriction of LPP for corporations.

II The Meaning and Scope of the Privilege

LPP limits the disclosure of information or documents which would reveal communications between a client and their lawyer, where those communications were made for the dominant purpose of giving or obtaining legal advice or services, or in preparation for litigation.[13] Crucially, the privilege belongs to the client rather than the lawyer, and so is characterised as 'client legal privilege' in the Uniform Evidence Law.[14] Most fundamentally, recognition of the privilege is seen to be crucial to the rule of law.[15] LPP may be conceived of in an instrumental as well as in a deontological sense, that is, LPP encourages frank disclosure which: (1) is of practical benefit to the administration of justice; (2) encourages compliance with the law; and (3) safeguards rights of the individual against state power.[16] LPP 'exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers',[17] and is of 'great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law'.[18]

LPP is a substantive common law right,[19] and is also provided for by the Uniform Evidence Law.[20] These provisions apply to all Federal Court of Australia ('Federal Court') proceedings,[21] to the adducing of evidence at trial as well as to the pre-trial stage in the majority of Australian jurisdictions which adopt the Uniform Evidence Law privileges. The statutory Uniform Evidence Law provisions override the

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13 See, eg: *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552 [9] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) ('*Daniels*'); *Federal Commissioner of Taxation v Pratt Holdings Pty Ltd* (2003) 195 ALR 717, 726 [39]; *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, 440 [9].

14 See, eg, *Evidence Act 1995* (Cth) pt 3.10 div 1 ('*Cth Evidence Act*').

15 Justice Mark Weinberg, 'Some Recent Developments in Corporate Regulation: ASIC from a Judicial Perspective' (Seminar Paper, Monash University Law School, 16 October 2013) 11 [37].

16 See Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Report No 107, December 2007) 50–1 [2.10]–[2.14], 55–6 [2.36] ('*Privilege in Perspective*').

17 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 64 [35] (Gleeson CJ, Gaudron and Gummow JJ) ('*Esso*').

18 *A-G (NT) v Maurice* (1986) 161 CLR 475, 490 (Deane J) ('*Maurice*').

19 See: *Corporations and Securities Panel v Bristile Investments Pty Ltd* (1999) 152 FLR 469, 472 [11] ('*Bristile Investments*'); *Daniels* (n 13) 553 [11], quoted in *Watkins v Queensland* [2008] 1 Qd R 564, 594 [63] (Keane JA).

20 See, eg, *Cth Evidence Act* (n 14) ss 118–19.

21 Ibid s 4(1), Dictionary pt 1 (definition of 'federal court').

common law, where they apply. Otherwise, claims of privilege will be determined on common law principles.

LPP precludes the disclosure of certain communications between a lawyer and a client, when these communications are: (1) for the dominant purpose of seeking or providing legal advice; or (2) for use in 'actual or anticipated' (not merely possible) legal proceedings.[22] These subdivisions are referred to as 'advice privilege' and 'litigation privilege', respectively, where the former protects communications made for the dominant purpose of giving or obtaining legal advice and the latter pertains to communications that were created or undertaken for use in pending or contemplated litigation. Indeed, Australian courts have not kept the two heads of privilege as distinct as in England and Wales,[23] though the courts here do adopt the two categories to assess whether LPP can be claimed.[24]

LPP may be waived, either expressly or impliedly, by acting in a way that is inconsistent with the confidentiality of the communications.[25] For instance, in *Australian Securities and Investments Commission v RI Advice Group Pty Ltd* (*'ASIC v RI Advice*'), the Federal Court found that a privilege claim by RI Advice Group Pty Ltd ('RI Advice') over an internal report, which it said had been prepared at the direction of an in-house lawyer for the purposes of the lawyer giving legal advice, could not be upheld.[26] Previously RI Advice had produced copies of the report to the Australian Securities and Investments Commission ('ASIC') in response to notices issued under the *Australian Securities and Investments Commission Act 2001* (Cth), meaning that even if the report had been privileged, RI Advice would have waived its privilege by producing copies to ASIC without objection.[27] In contrast, in *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd [No 2]*, ASIC argued unsuccessfully that the Respondent had waived privilege by referring to the existence of legal advice in open correspondence.[28] The Court found that the letter touched on, but did not reveal, the substance of the advice, and accordingly, the claim was upheld.[29] Then, in *TerraCom Ltd v Australian Securities and Investments Commission*, the Federal Court considered whether a waiver of privilege over part of a privileged investigation report would result in privilege being waived

22 See: *Baker v Campbell* (1983) 153 CLR 52, 122–3 (Dawson J) ('*Baker*'); *Esso* (n 17) 64–5 [35]; *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332, 333 [3] (Callaway JA), 335–6 [8], 341 [19] (Batt JA, Charles JA agreeing at 333 [1]) ('*Mitsubishi*').

23 *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd [No 2]* (2009) 180 FCR 1, 4–5 [8].

24 Ronald J Desiatnik, *Legal Professional Privilege in Australia* (LexisNexis Butterworths, 3rd ed, 2017) 31.

25 *Maurice* (n 18) 497–8 (Dawson J); *Mann v Carnell* (1999) 201 CLR 1, 13 [28]–[29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

26 (2020) 148 ACSR 1, 6–7 [35], 10 [53] ('*ASIC v RI Advice*').

27 Ibid 11 [58].

28 [2020] FCA 1013.

29 Ibid [32]–[33].

over the entirety of the report.[30] The Court found that the company waived LPP attaching to a report prepared by PricewaterhouseCoopers ('PwC') by means of a letter to shareholders and an Australian Securities Exchange announcement which conveyed the proposed conclusion of the report's subject matter.[31]

Moreover, material already in the public domain is not privileged. On this point, in *Glencore International AG v Federal Commissioner of Taxation* ('*Glencore*'), companies within the Glencore plc group ('Glencore group') sought to restrain the Australian Taxation Office ('ATO') from using documents leaked in the so-called 'Paradise Papers',[32] through injunctive relief based on LPP.[33] In unanimously rejecting the Glencore group's claim, the High Court of Australia ('High Court') emphasised that LPP is an immunity rather than an actionable right;[34] in other words, a shield and not a sword. Here, the documents on which the ATO sought to rely were already available publicly (or at least had lost confidentiality), and so LPP could not operate to prevent the defendant's continued use of the documents.[35]

As for the extent of the advice privilege, in limited instances communications between a client or lawyer and a third party such as an accountant may be privileged, provided that the dominant purpose was for the client to receive legal advice.[36] This might include a situation where an accountant provides accounting records to a lawyer that enable the lawyer to provide legal advice to a client. Moreover, LPP protects communications with in-house counsel as long as that 'legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client'.[37]

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30 (2022) 401 ALR 143 ('*TerraCom*').

31 Ibid 155 [61]–[62], 156–7 [66]–[67].

32 The 'Paradise Papers' were 13.4 million confidential electronic documents relating to offshore investments and tax arrangements that were leaked to the International Consortium of Investigative Journalists and journalists globally by German newspaper Süddeutsche Zeitung, in late-2017: ICIJ, 'Offshore Trove Exposes Trump–Russia Links and Piggy Banks of the Wealthiest 1 Percent', *International Consortium of Investigative Journalists* (online, 5 November 2017) <https://www.icij.org/investigations/paradise-papers/paradise-papers-exposes-donald-trump-russia-links-and-piggy-banks-of-the-wealthiest-1-percent/>. See generally David Chaikin and Gordon Hook (eds), *Corporate and Trust Structures: Legal and Illegal Dimensions* (Australian Scholarly, 2018).

33 (2019) 265 CLR 646 ('*Glencore*').

34 Ibid 659–60 [21]–[25].

35 See Talitha Fishburn, 'Paradise Lost: Glencore Loses High Court Bid To Extend Legal Professional Privilege' [2019] (59) *Law Society Journal* 90, 90.

36 See, eg, *Pratt Holdings Pty Ltd v Federal Commissioner of Taxation* (2004) 136 FCR 357 ('*Pratt Holdings*'), where the Federal Court considered whether LPP extends to documents prepared by a firm of accountants for the client.

37 *Waterford v Commonwealth* (1987) 163 CLR 54, 95–6 (Dawson J) ('*Waterford*'). There is some circularity here: communications are regarded as confidential because privilege attaches to them, and vice versa.

In *Federal Commissioner of Taxation v PricewaterhouseCoopers* ('*PricewaterhouseCoopers*'),[38] the Federal Commissioner of Taxation ('Commissioner') asked the Federal Court to determine:

- whether the form of the engagements between multidisciplinary partnership, PwC, and certain Australian subsidiaries of JBS SA, a Brazilian multinational company, 'establish[ed] a relationship of lawyer and client sufficient to ground a claim for' LPP;[39]
- whether the services provided by PwC to certain Australian subsidiaries of JBS SA were 'provided pursuant to a relationship of lawyer and client sufficient to ground a claim for' LPP;[40] and
- whether the documents in dispute were 'made for the dominant purpose of giving or obtaining … legal advice from one or more lawyers' of PwC.[41]

Justice Moshinsky held that the form of the engagements established a relationship of lawyer and client sufficient to ground privilege claims,[42] and that the services were provided under a relationship of lawyer and client sufficient to ground such claims.[43] Furthermore, the Federal Court carried out a documentary analysis of a sample of 116 documents to ascertain if they were made for the dominant purpose of giving or obtaining legal advice.[44] The Court also appointed three amici curiae to assist it in relation to the sample documents.[45] Justice Moshinsky stated: 'Whether or not the Documents in Dispute are privileged is to be determined by reference to whether, as to each particular document, it constitutes or records a communication made for the dominant purpose of giving or obtaining legal advice.'[46] Moreover, the onus of proof was found to rest with the party claiming the privilege.[47]

Justice Moshinsky observed instances of 'non-legal advice being "routed" through' Glenn Russell, an Australian legal practitioner, 'in order to obtain the protection of legal professional privilege'[48] — noting that this does not attract the protection of LPP.[49] Notably, PwC requested an undertaking from the ATO that it would not recommend prosecution if PwC lost, such that neither the firm nor its personnel could be charged with 'tax crimes'. After initial refusal and lengthy discussions,

38 (2022) 114 ATR 335 ('*PricewaterhouseCoopers*').

39 Ibid 340 [8].

40 Ibid.

41 Ibid.

42 Ibid 386 [190].

43 Ibid 389 [207].

44 Ibid 341–2 [21]–[22].

45 Ibid 341 [14].

46 Ibid 388 [205].

47 Ibid 384 [178].

48 Ibid 444 [611], 446 [624], 460 [726], 462 [739].

49 Ibid 382 [170], citing *Baker* (n 22) 112 (Deane J) and *Pratt Holdings* (n 36) [46] (Finn J, Merkel J agreeing). For further discussion, see below Part II(A).

the ATO agreed that it was prepared to 'give comfort' to PwC that it would not prosecute.[50]

The privilege may be 'denied to a communication which is made for the purpose of frustrating the processes of the law itself, even though no crime or fraud is contemplated'.[51] Furthermore, LPP does not accrue where there is evidence of illegality or improper purpose by a party, such as involvement in fraud or other misconduct.[52] The question is whether the communication is on a prima facie basis 'made in furtherance of, or as a step preparatory to, the commission of the fraud or wrongdoing'.[53] The principles governing the crime or fraud exception were articulated helpfully by Matthews J in the context of s 125 of the *Evidence Act 2008* (Vic) in *Andrianakis v Uber Technologies Inc* ('*Andrianakis*').[54] Her Honour adopted the summary of the principles from *Talacko v Talacko*,[55] including: that the Court need only be satisfied that there are 'reasonable grounds' that the offence, fraud or penalty act was committed; that knowing involvement by the client in the offence, fraud or penalty act is required; that subsequent conduct may or may not be in furtherance of an offence; and that the legal advice sought about how to conceal the fraud is not privileged.[56]

A *The Dominant Purpose Test and Corporations*

A critical factor in determining whether LPP applies lies in the purpose for which communications were made or created. The party asserting privilege over a document or communication bears the onus of establishing that the dominant purpose was to receive or provide legal advice, or for use in litigation.[57] The word 'dominant' means 'the ruling, prevailing, or most influential purpose … clear paramountcy should be the touchstone'.[58] The dominant purpose test is germane to both the common law and statutory privilege.

There have been some significant jurisprudential shifts in respect of the relevant purpose test in Australia for a claim of privilege. In *Grant v Downs* ('*Grant*') a majority of the High Court (Stephen, Mason and Murphy JJ) preferred a sole purpose

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50 Spencer Fowler Steen, 'ATO Won't Promise Not To Prosecute PwC for Tax Offences', *Lawyerly* (online, 3 February 2021) <https://www.lawyerly.com.au/>; Miklos Bolza, 'ATO Prepared To Rule Out Prosecuting PwC for Tax Offences after Privilege Fight', *Lawyerly* (online, 16 April 2021) <https://www.lawyerly.com.au/ato-prepared-not-to-prosecute-pwc-for-tax-offenses-after-privilege-fight/>.

51 *A-G (NT) v Kearney* (1985) 158 CLR 500, 515 (Gibbs CJ).

52 See *R v Bell; Ex parte Lees* (1980) 146 CLR 141, 145 (Gibbs J).

53 *AWB Ltd v Cole [No 5]* (2006) 155 FCR 30, 89–90 [218].

54 [2022] VSC 196, [211] ('*Andrianakis*').

55 [2014] VSC 328.

56 *Andrianakis* (n 54) [211], quoting ibid [15].

57 See *Esso* (n 17) 64 [35].

58 *Mitsubishi* (n 22) 336–7 [10].

test (that is, the only/single purpose for the creation of the document or communication was to receive or provide legal advice),[59] with Barwick CJ preferring the dominant purpose test.[60] Thus, post-*Grant*, the common law deployed the sole purpose test, while the co-existing provisions in ss 118 and 119 of the *Evidence Act 1995* (Cth) ('*Cth Evidence Act*') hinged on the dominant purpose test.[61] As the sole purpose test is more amenable to disclosure than the dominant purpose test, this meant that there was a divergence depending on the nature of and forum for the proceedings.

Then, in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*, Esso Australia Resources Ltd commenced proceedings challenging assessments of income tax.[62] Esso Australia Resources Ltd claimed LPP regarding a number of documents on the basis that 'they had been prepared for the dominant purpose of giving or receiving legal advice'.[63] While the aforementioned statutory provisions centre on considering the dominant purpose of providing legal advice or services in connection with litigation, it was unclear whether this standard also extended to ancillary processes such as discovery and inspection.[64] The Full Court of the Federal Court considered which was the correct test for claiming privilege in relation to the production of discovered documents. The 'plain language' of ss 118 and 119 was deemed to provide that the 'dominant purpose' test applied in court, whereas the common law 'sole purpose' test applied to all processes ancillary to these proceedings.[65] Then, on appeal, the High Court set aside the orders of the Federal Court, and in their place ordered that the dominant purpose test was the correct test at common law for claiming LPP.[66] The High Court disputed the appearance of the sole purpose test as a 'bright-line test, easily understood and capable of ready application'.[67] Chief Justice Gleeson, Gaudron and Gummow JJ observed that the rigid application of this test would mean that 'one other purpose in addition to the legal purpose, regardless of how relatively unimportant it may be, and even though, without the legal purpose, the document would never have come into existence, will defeat the privilege'.[68] In the past, this had led to a less than strict application of the test, such as in *Waterford v Commonwealth* ('*Waterford*'), where Deane J in the High Court held that for a document to be protected 'the cause of its existence, in the sense of both causans and sine qua non, must be the seeking or provision of

59 (1976) 135 CLR 674, 688 ('*Grant*').

60 Ibid 677.

61 Section 118 provides for legal advice privilege and s 119 covers litigation privilege.

62 (1998) 83 FCR 511.

63 Ibid 514 (Black CJ and Sundberg J) (emphasis omitted).

64 Ibid 515.

65 Ibid 518–9; Suzanne B McNicol, '*Esso Australia Resources Ltd v Federal Commissioner of Taxation*' (1999) 21(4) *Sydney Law Review* 656, 657.

66 *Esso* (n 17).

67 Ibid 72 [58] (Gleeson CJ, Gaudron and Gummow JJ).

68 Ibid.

professional legal advice'.[69] Dilution of the sole purpose test led to a lack of clarity.[70] The majority of the court in *Esso* thus preferred the dominant purpose test, as it 'strikes a just balance … and it brings the common law of Australia into conformity with other common law jurisdictions'.[71]

Now the dominant purpose test applies across the board: in common law, in the Uniform Evidence Law, and in any legislation that does not expressly depart or allow departure from it. However, in a practical sense, an assertion of privilege or a pro forma statement on a document about this will not suffice; rather, the dominant purpose will be determined objectively by the court taking into account all relevant circumstances surrounding its creation and use.[72]

The use of the dominant purpose test in Australia, as well as the clarification of when litigation is deemed to be in contemplation, strengthens protection from disclosure of corporate documentation, and makes a real difference to decisions taken about production, in contrast to the sole purpose test.[73] Of course, many communications have multiple purposes, and this is particularly relevant in relation to corporations. Previously, under the sole purpose test, this aspect of documentation would have precluded a successful claim of privilege, but now there may be co-existing purposes. On this note, the Australian Law Reform Commission ('ALRC') highlighted the criticism that the sole purpose test discriminated unfairly against corporations, which, unlike natural persons, must communicate by written report.[74] In that respect, a secondary purpose — that of informing 'central management of the corporation with actual knowledge of what its agents have done' — would be enough to deny the privilege under the sole purpose test.[75]

Likewise, in *Esso* Callinan J considered that the sole purpose test disadvantaged corporations unfairly, given that documents prepared for several purposes — which is likely to be the case in relation to corporations that are required to communicate internally by written report — might not attract the privilege.[76] In contrast, Kirby J (in dissent), considered that the expansion of the privilege would be to unduly benefit corporations:

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69 *Waterford* (n 37) 85, discussed in ibid.

70 *Esso* (n 17) 72 [58].

71 Ibid 73 [61]. Justice Callinan also held that the dominant purpose test was appropriate: at 107 [173].

72 See: *Federal Commissioner of Taxation v Pratt Holdings Pty Ltd* (2005) 225 ALR 266, 278 [30]; *Barnes v Federal Commissioner of Taxation* (2007) 242 ALR 601, 605 [18].

73 See *Esso* (n 17) 76 [71] (McHugh J). For an example of the application of the dominant purpose test, see: *Green v AMP Life* [2005] NSWSC 95.

74 Australian Law Reform Commission, *Evidence* (Report No 26, 1985) vol 1, 251 [439].

75 *Grant* (n 60) 686–8.

76 See *Esso* (n 17) 103 [162].

> the dominant purpose test is, of its nature, more likely to advantage corporations and administration at the cost of ordinary individuals. … Any slippage from the sole purpose test potentially allows a very large amount of … material to be the subject of a claim for the privilege so as to exclude it from the purview of the opposite party and the ultimate decision-maker. In this way, as a matter of practicality, a larger privilege will typically be accorded to the corporation or administration than would ordinarily be accorded to the individual.[77]

Moreover, McHugh J observed that '[c]ourts will have less information before them. How much less is impossible to tell.'[78] This unquantifiable harm to the administration of justice in respect of addressing wrongdoing by corporations is compounded by the limitation on the availability of information for prosecutors. This has the concomitant effect of making the decision to prosecute or to agree to defer prosecution less informed, and, it would seem, less reliable. Given that prosecutorial discretion is a manifestation of a public interest,[79] it is hard to see how a prosecutor being more hamstrung can be seen as improving rule of law compliance.

Requiring the communication to be for the dominant purpose of legal advice or litigation means that mere transmission of the information through lawyers will not suffice for a claim of privilege.[80] However, as Andrew Higgins remarks, 'routing information through lawyers does make it easier for a party to prove' that the communication was made to obtain legal assistance, so one 'potential weakness of the dominant purpose test is that it allows corporations to legitimately structure their communications in a way that will protect significant parts of its operations from disclosure'.[81] This approach was exemplified in *PricewaterhouseCoopers*, outlined in Part II above, where communications were routed through a legal practitioner.[82] Moreover, echoing the sentiment of Kirby J in *Esso*, Higgins notes rightly that the dominant purpose test provides greater protection to corporations than to individuals, because of how the former interact with lawyers and use legal services.[83] Whereas individuals consult lawyers usually for legal advice only, corporate memoranda can have administrative, commercial and legal purposes. The increased use of lawyers

77 Ibid 91 [109].

78 Ibid 76 [71].

79 The Prosecution Policy of the Commonwealth Director of Public Prosecutions ('CDPP') lists a range of criteria that should be considered in deciding whether to prosecute, including whether there is a reasonable prospect of obtaining a conviction and whether the public interest requires the commencement of a prosecution: see Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (19 July 2021) 4 [2.5], 5–6 [2.8]–[2.12] ('*Prosecution Policy of the Commonwealth*').

80 *PricewaterhouseCoopers* (n 38) 382 [170], citing: *Baker* (n 22) 112 (Deane J); *Pratt Holdings* (n 36) [46] (Finn J, Merkel J agreeing).

81 Andrew Higgins, 'Legal Advice Privilege and Its Relevance to Corporations' (2010) 73(3) *Modern Law Review* 371, 395 (emphasis omitted).

82 See above n 48 and accompanying text.

83 Higgins (n 81) 395.

in other contexts may well provide protection to corporations regarding documents that would otherwise not have been created. As long as the legal purpose predominates, the document will qualify for privilege.[84]

This shows how the difference between the corporation and the natural person in the context of LPP is central. Though corporations may range from sole-director entities through to enormous multinationals, the benefits that accrue are significant, regardless of size. Corporations may grow exponentially; they endure beyond their members; they gather and communicate information through documentation; they rely on systems, processes and lawyers; and they have a far greater capacity for harm than humans. All of this is salient in relation to LPP.

B *Legal Professional Privilege and Other Privileges*

LPP is cognate to, but distinct from, the privilege against self-incrimination and the penalty privilege. The privilege against self-incrimination means 'that a person (not company) is not bound to answer any question or produce any document if the answer or the document would expose, or would have a tendency to expose, the person to conviction for a crime'.[85] As is evident from the preceding quotation, in Australia the privilege against self-incrimination extends to natural persons but not to corporations,[86] in contrast to LPP. This point will be returned to in Part V in the context of reform possibilities.

In *Environment Protection Authority v Caltex Refining Co Pty Ltd* ('*Caltex*'), a majority of the High Court (Mason CJ, Brennan, Toohey and McHugh JJ) held in three separate judgments that an incorporated company is not entitled to the privilege against self-incrimination.[87] Given the uncertain state of authority, the matter was determined by considering the history of, and rationale for, the privilege. The privilege against self-incrimination was noted to be a human right, which protects personal freedom and human dignity, and seeks to prevent torture and other inhumane treatment.[88] In contrast, their Honours agreed that corporations have no need for protection from such abuse of power and loss of dignity.[89] Moreover, McHugh J rejected the argument that the privilege is necessary nonetheless to protect individual members against the consequences of punishing the corporation, an especially pressing point in relation to small or sole-director companies:

> an individual witness is not entitled to the benefit of the privilege against self-incrimination if the only ground for the claim is that he or she will be adversely

84 Ibid.

85 *Griffin v Pantzer* (2004) 137 FCR 209, 227 [37] (Allsop J).

86 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 501, 504 (Mason CJ and Toohey J) ('*Caltex*').

87 Ibid.

88 Ibid 499–500 (Mason CJ and Toohey J).

89 Ibid 499–500 (Mason CJ and Toohey J), 548 (McHugh J).

> affected by the production of the evidence. Members of a corporation may be adversely affected by the conviction of a corporation, but they are not convicted. It is difficult to see why any adverse effect on the members should entitle the corporation to refuse to produce evidence.[90]

Confining the privilege against self-incrimination to natural persons was seen as warranted on the basis that 'a corporation is usually in a stronger position vis-à-vis the state', and also given the resources and advantages which corporations tend to enjoy.[91] The complexity of corporate conduct was noted also:

> Assessment of a corporation's conduct may only be possible through an examination of its documents. This is particularly so in cases where the alleged wrong is committed as a result of the failure of a system set up by a corporation. A true understanding of the corporation's procedures is likely to be gained only through evidence from the corporation itself, particularly from its records. The difficulty in obtaining independent evidence against corporations is sometimes exacerbated by the inability to identify a victim of corporate behaviour who can testify. Often, the victim is an 'amorphous entity such as a market'. Furthermore, corporations are often well equipped to cover up their activities and to fund their defences.[92]

Justice McHugh further spoke of 'the harm to the administration of justice resulting from allowing corporations to claim the privilege [against self-incrimination]'.[93]

In a joint dissenting judgment, the minority in *Caltex* (Deane, Dawson and Gaudron JJ) regarded the desire to deny corporations the privilege against self-incrimination as something 'dictated by pragmatism rather than principle'.[94] The minority found that there was 'no sufficient reason in principle for saying that the doctrine … has no application to corporations', and suggested that any denial of the privilege's application to corporations would be a matter for the legislature rather than the courts.[95] Following *Caltex*, s 187 of the *Cth Evidence Act* enacted the abolition of the privilege against self-incrimination for bodies corporate, with the provision being seemingly uncontroversial since.[96]

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90 Ibid 549 (citations omitted).

91 Ibid 500–1 (Mason CJ and Toohey J).

92 Ibid 554 (McHugh J) (citations omitted).

93 Ibid 553.

94 Ibid 534. See generally Jennifer Hill, 'Corporate Rights and Accountability: The Privilege against Self-Incrimination and the Implications of *Environment Protection Authority v Caltex Refining Co Pty Ltd*' (1994) 7(1) *Corporate and Business Law Journal* 127.

95 *Caltex* (n 86) 534.

96 Section 68 of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*') and s 1316A of the *Corporations Act 2001* (Cth) also abrogate privilege against self-incrimination for corporations.

Following the decision in *Caltex*, the Full Court of the Federal Court in *Trade Practices Commission v Abbco Iceworks Pty Ltd* ('*Abbco Iceworks*') held that a corporation is not entitled to the privilege against self-exposure to a penalty.[97] The penalty privilege is akin to the privilege against self-incrimination, although with some important differences, such as the penalty privilege arguably being restricted to civil judicial proceedings.[98] However, in *Pyneboard*, Mason ACJ, Wilson and Dawson JJ stated that their Honours were 'not prepared to hold that the [penalty] privilege is inherently incapable of application in non-judicial proceedings'.[99] Then, in *Meneses v Directed Electronics OE Pty Ltd* ('*Meneses*'), the Full Court of the Federal Court confirmed that the sole director of a corporation enjoyed the penalty privilege.[100] The Court observed that while 'there is a close affinity between the privilege against self-incrimination and the penalty privilege, they are distinct'.[101] Moreover, the Court reaffirmed that '[n]either of the privileges is available to a corporation',[102] unlike LPP.

III The Perceived Misuse of Legal Professional Privilege

Achieving accountability for corporate crime is a pervasive yet elusive concern globally, and is confounded by difficulties in detecting wrongdoing and then proving liability to the requisite standard. Strikingly, corporations often are the sources and gatekeepers of information on which public enforcement action would be predicated. One means of detection is through self-reporting — in other words, by the corporation divulging its own wrongful behaviour to the relevant authority or regulator. This voluntary disclosure is an idiosyncrasy of corporate regulation that is uncommon in other criminal justice contexts, but represents a central element of routine corporate compliance.[103] Revelations of non-compliance through to criminality by corporations may generate or assist with criminal investigations or charges, and often will result in settlements and/or leniency, such as is the case for guilty pleas by human offenders.[104]

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97 (1994) 52 FCR 96 ('*Abbco Iceworks*').

98 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 337–8 (Mason ACJ, Wilson and Dawson JJ) ('*Pyneboard*').

99 Ibid 341.

100 (2019) 273 FCR 638, 678 [152] ('*Meneses*').

101 Ibid 660 [87], citing: *Pyneboard* (n 98) 336–7 (Mason ACJ, Wilson and Dawson JJ); *Abbco Iceworks* (n 97) 111 (Burchett J, Black CJ and Davies J agreeing); *Daniels* (n 13) [12]–[13] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

102 *Meneses* (n 100) 660 [88].

103 See generally Nicholas Lord, 'Regulating Transnational Corporate Bribery: Anti-Bribery and Corruption in the UK and Germany' (2013) 60(2) *Crime, Law and Social Change* 127, 136–7. A self-reporting obligation is now contained within ss 912D and 912DAA of the *Corporations Act 2001* (Cth) which require Australian financial services licensees to lodge a report with ASIC in 'reportable situations' such as a significant breach of a 'core obligation'.

104 See, eg, *Crimes Act 1914* (Cth) ss 16A(2)(h), 16AC ('*Crimes Act*').

Thus, self-reporting's appeal, despite the apparent disclosure it entails, lies in the likely moderation of enforcement action by the state. Conversely, corporations demur from self-reporting if resisting investigation and/or contesting charges would be preferable strategically. All of this means that corporate control over the flow of information before and during any enforcement action is critical, both in terms of potential liability as well as for corporate reputational purposes.[105]

A key mechanism for controlling information is the use of LPP. The Australian Federal Police has indicated that 'blanket LPP claims can make it very difficult to obtain admissible evidence to support prosecutions' and that the resolution of LPP claims can take a 'significant period of time'.[106] Further, the ATO has indicated that '[r]eckless LPP claims over non-privileged documents unduly hinder ATO investigations and lead to extended disputes about information gathering, instead of focussing on the resolution of the substantive issue'.[107] While the number of spurious or false claims of LPP is unknown, the perception is that the situation is far from ideal. In mid-2019, it was reported that 24 multinational corporate groups responded to ATO audits with blanket LPP claims, constituting one in five large audits.[108] These issues are exemplified by cases like *PricewaterhouseCoopers*, with the 'routing' of communications through lawyers,[109] and the inquiry into The Star Casino in Sydney, New South Wales, where the casino was found to have had an 'immature' approach to anti-money laundering and counter-terrorism financing ('AML/CTF') with 'serious shortcomings' evident in its AML/CTF Program.[110] Further, The Star's most senior in-house lawyers had an 'unsatisfactory understanding of the circumstances in which legal professional privilege should be claimed'.[111]

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105 For an examination of how this was done by United States lawyers, see Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* (Yale University Press, 1985).

106 Attorney-General's Department, Submission No 32 to Senate Standing Committee on Economics, Parliament of Australia, *Inquiry into Foreign Bribery* (September 2015) 13. For a comparable United Kingdom position, see Stuart Alford, 'Enforcing the UK Bribery Act: The UK Serious Fraud Office's Perspective' (Speech, Anti-Corruption in Oil and Gas Conference, 17 November 2014).

107 Australia Taxation Office, 'ATO Provides Certainty on Legal Professional Privilege Claims' (Media Release QC 69918, 22 June 2022) <https://www.ato.gov.au/Media-centre/Media-releases/ATO-provides-certainty-on-Legal-Professional-Privilege-claims/>.

108 Tom McIlroy, 'Legal Privilege Claims in 20 Per Cent of ATO Multinational Cases', *The Australian Financial Review* (online, 26 June 2019) <https://www.afr.com/policy/tax-and-super/legal-privilege-claims-in-20-per-cent-of-ato-multinational-cases-20190626-p521h3>.

109 See above n 48 and accompanying text.

110 *Review of The Star Pty Ltd: Inquiry under Sections 143 and 143A of the Casino Control Act 1992 (NSW)* (Report, 31 August 2022) vol 1, 18 [88], 20 [102] ('*Star Inquiry*'). See also Liz Campbell, 'The Mis/Use of Client Legal Privilege: Obscuring Criminal Behaviour?' in Penny Crofts (ed), *Evil Corporations* (Routledge, forthcoming) ('Mis/Use of Client Legal Privilege').

111 *Star Inquiry* (n 110) 20 [101].

So, the reliance on LPP, though ostensibly about enabling the administration of justice, may in fact undermine or obstruct it,[112] by 'frustrating the court's search for truth'.[113] Moreover, concern about LPP is not limited to extra-judicial commentary. In *Commissioner of Australian Federal Police v Propend Finance Pty Ltd*, Kirby J expressed the view that

> a brake on the application of legal professional privilege is needed to prevent its operation bringing the law into 'disrepute', principally because it frustrates access to communications which would otherwise help courts to determine, with accuracy and efficiency, where the truth lies in disputed matters.[114]

In its 2007 report, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, the ALRC noted a common theme in submissions regarding the difficulty in establishing when an LPP claim amounts to abuse.[115] The ALRC concluded that while there was 'no clear evidence of chronic abuse of claims of client legal privilege, there is evident distrust on the part of federal investigatory bodies that claims are not being made legitimately in some cases'.[116] This is not to say that such claims are made in bad faith necessarily. The crux of the issue is that the very nature and purpose of LPP renders it difficult to gauge the extent of any abuse.[117]

Wrongdoing by corporations concealed behind LPP is a live problem in contemporary law, regulation, and corporate and public governance. This phenomenon incorporates the harms of wrongful or criminal behaviour as well as the misuse of LPP, and these distinct wrongs exacerbate each other. The misuse of LPP imposes profound costs on human individuals and the legitimacy of the regulatory and justice system, yet remains largely unexplored empirically. That said, there is some evidence that LPP is being used for the specific purpose of concealing wrongdoing, and that wrongdoing is indeed being concealed. This is exemplified by numerous cases over the past decades. For instance, the British American Tobacco litigation exposed 'warehousing' and destruction of documentation, on advice from leading law firm Clayton Utz.[118] Of course, the destruction of documents can be a routine and legal part of corporate document retention/house-keeping practices. This is in contrast to their destruction for the purposes of compromising foreseeable litigation

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112 Higgins (n 81) 393; Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 3rd ed, 2018) 298.

113 Ray Finkelstein, 'The Adversarial System and the Search for Truth' (2011) 37(1) *Monash University Law Review* 135, 144.

114 (1997) 188 CLR 501, 581 (citations omitted).

115 *Privilege in Perspective* (n 16) 494 [9.24].

116 Ibid 497 [9.35].

117 Ibid 497 [9.36].

118 *McCabe* (n 10) [20], [289], [324], [330]–[336]. See generally: Jonathan Liberman and Jonathan Clough, 'Corporations that Kill: The Criminal Liability of Tobacco Manufacturers' (2002) 26(4) *Criminal Law Journal* 223; Matthew Harvey and Suzanne LeMire, 'Playing for Keeps? Tobacco Litigation, Document Retention, Corporate Culture and Legal Ethics' (2008) 34(1) *Monash University Law Review* 163.

so that they can never be discovered — this is illegal and is fundamentally different in nature to claiming that a document which exists does not have to be produced because it is the subject of LPP (which is a legitimate claim to make). That said, both strategies were deployed in the British American Tobacco litigation,[119] one ostensibly legitimate and the other certainly not. In direct response to this case, the *Crimes Act 1958* (Vic) was amended to include the indictable offence of knowingly destroying or concealing documents or anything reasonably likely to be required in any ongoing or potential future legal proceedings with the intention of preventing such use in a legal proceeding.[120] No subsequent prosecution has been taken.[121]

Furthermore, LPP was a major impediment to the Royal Commission into the Australian Wheat Board's bribery in the United Nations' Oil-for-Food Programme and its breach of United Nations' sanctions. Commissioner Cole was faced with extensive claims to privilege and Federal Court proceedings challenging his right, as Commissioner, to determine privilege claims — leading to extensive delays.[122] LPP also appears to impose high costs on the community apart from the inefficiencies from the lack of trust in regulation and the law. As was revealed in the Paradise Papers and examined in *Glencore*,[123] LPP can shield tax avoidance, which increases social inequality at the national and global levels. The inquiry into The Star Casino provides another example of harms being concealed by LPP, as well as enforcement actions being delayed.[124]

The relationship between LPP, public enforcement, and crime by corporations in particular is not well-understood in Australia — no socio-legal scholarship yet examines empirically the interrelationship between LPP and crime by corporations, and how this privilege might affect enforcement actions in practice. Indeed, globally, there is very limited empirical analysis of the use of the privilege in the context of corporations, and its effects on corporate behaviour. In 1989, Vincent Alexander carried out 182 interviews in New York City, collecting data on 'the assumptions underlying the corporate privilege, the forms and processes of corporate attorney–client communications and the adjudication of privilege claims'.[125] This study suggested that the attorney–client privilege 'encourage[d] candor in communications between attorneys and corporate management', though it did not prove

119 Thousands of relevant documents were destroyed: *McCabe* (n 10) [308]–[309]; with other documents 'warehoused' to put them beyond the scope of discovery: at [324].

120 *Crimes Act 1958* (Vic) s 254, as inserted by *Crimes (Document Destruction) Act 2006* (Vic) s 3; Harvey and LeMire (n 118) 173–5. See also the offence for concealment and destruction of documents in s 67 of the *ASIC Act* (n 96).

121 Parker and Evans (n 112) 290.

122 *AWB Royal Commission* (n 11) vol 1, 183–9 [7.42]–[7.64].

123 *Glencore* (n 33).

124 Campbell, 'Mis/Use of Client Legal Privilege' (n 110).

125 Vincent C Alexander, 'The Corporate Attorney–Client Privilege: A Study of the Participants' (1989) 63(2) *St John's Law Review* 191, 193.

this decisively.[126] Alexander's study found that 'the circumstances in which the privilege plays a major role in influencing candor seem to be relatively rare'.[127] A related and more recent project is by Petter Gottschalk, who identified and assessed the information control strategies adopted by defence lawyers in Norwegian court cases involving white-collar crimes.[128] Such 'information control strateg[ies]' intersected with the use of LPP.[129] There is no comparable study of lawyers and in-house counsel in respect of LPP specifically in Australia,[130] meaning that claims about the privilege's use, value or misuse are anecdotal or conjectural. The lack of data does not imply the absence of a problem, however, as seen in The Star inquiry, and other cases outlined above.

IV Regulators' Responses

In this environment, regulators now are more proactive in confronting and disputing claims of LPP, with the ATO being described as 'bellicose'[131] and ASIC announcing that it is prepared to take court action to resolve 'inappropriate' claims.[132] Regulators and the Commonwealth Director of Public Prosecutions ('CDPP') are taking frequent legal action to push back against claims of privilege, and in doing so have delineated the scope of the privilege as well as their powers.

In terms of policy and operating legislative frameworks, ASIC and the Australian Competition and Consumer Commission ('ACCC') encourage but do not require the production of privileged communications:[133]

126 Ibid 414.

127 Ibid.

128 Petter Gottschalk, *Financial Crime and Knowledge Workers: An Empirical Study of Defense Lawyers and White-Collar Criminals* (Palgrave Macmillan, 2014).

129 Ibid 64.

130 Likewise, the New Zealand Law Commission has highlighted the absence of empirical data and the need for an empirical foundation for reform initiatives: see New Zealand Law Commission, *Evidence Law: Privilege* (Preliminary Paper No 23, May 1994) 6 [13], 20 [52]–[53].

131 Eu-Jin Teo, '"Under pressure"? Section 39 of the Legal Profession Uniform Law and the Federal Commissioner of Taxation' (2022) 37(2) *Australian Tax Forum* 273, 273.

132 Australian Securities and Investments Commission, 'AMP and Clayton Utz Surrender in ASIC Court Battle over Failure To Produce Documents' (Media Release 19-052MR, 11 March 2019) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-052mr-amp-and-clayton-utz-surrender-in-asic-court-battle-over-failure-to-produce-documents/>.

133 Australian Securities and Investments Commission, 'Claims of Legal Professional Privilege' (Information Sheet No 165, December 2012) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/claims-of-legal-professional-privilege/> ('ASIC Information Sheet No 165'). See Australian Competition and Consumer Commission, 'ACCC Cooperation Policy for Enforcement Matters' (Policy, July 2002) 2 <https://www.accc.gov.au/about-us/publications/accc-cooperation-policy-for-enforcement-

> ASIC believes there can be a public benefit in accepting privileged documents (or documents claimed to be privileged) … as it may assist in the effective and efficient conclusion of ASIC's investigation and determination of consequential steps (which might include no further regulatory action). It may also assist the parties to identify efficiently, and with precision, the critical issues to be addressed in an investigation. It will often be in the public interest for ASIC, in seeking to perform its regulatory functions, to have access to LPP material and it will often not be detrimental to the privilege holder for this to occur.[134]

Notably, ASIC's current practice is inconsistent with the decision in *Corporate Affairs Commission (NSW) v Yuill* ('*Yuill*')[135] and does not have any statutory backing.[136]

In *Australian Securities and Investments Commission, re Whitebox Trading Pty Ltd v Whitebox Trading Pty Ltd*, ASIC sought successfully to adduce in evidence otherwise privileged documents acquired through its compulsory information gathering powers.[137] Since criticism from the *Banking Royal Commission* about its enforcement practices,[138] ASIC has ramped up its use of its investigative powers. ASIC's intent has been characterised as forcing legal challenges regarding the scope of privilege claims.[139] This puts a fresh complexion on expectations regarding waiver of privilege, and shows the receptiveness of agencies to a more combative and contested approach early in the public enforcement process.[140]

Likewise, the ATO's appetite for challenging privilege claims is highlighted by cases outlined above such as *PricewaterhouseCoopers*,[141] as well as its drafting

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matters> ('ACCC Cooperation Policy'). This policy does not refer to LPP but rather to the disclosure of documents. See also Tom Middleton, 'The Role of Lawyers in the Context of ASIC's Investigative and Enforcement Powers' (2010) 28(2) *Company and Securities Law Journal* 107, 119–20.

134 'ASIC Information Sheet No 165' (n 133).

135 The High Court held in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 ('*Yuill*') that s 308 of the *Companies (New South Wales) Code 1981* (now s 69 of the *ASIC Act* (n 96)) by implication overrode the client's LPP in the context of ASIC's investigative powers. The decision in *Yuill* was followed in *Australian Securities Commission v Dalleagles Pty Ltd* (1992) 36 FCR 350 and *Bristile Investments* (n 19) 477 [27].

136 Middleton (n 133) 120.

137 [2017] FCA 324.

138 *Banking Royal Commission* (n 4) vol 1, 206 [4.1.2], 446, recommendation 6.2.

139 Tim Bednall, 'Understanding ASIC's New Thinking on Compulsory Powers', *The Australian Financial Review* (online, 5 February 2020) <https://www.afr.com/companies/financial-services/don-t-run-has-already-run-understanding-asic-s-new-thinking-on-compulsory-powers-20200204-p53xmo>.

140 See, eg: *ASIC v RI Advice* (n 26); *TerraCom* (n 30).

141 See above nn 38–49 and accompanying text.

of, and consultation on, its *LPP Protocol*.[142] In *CUB Australia Holding Pty Ltd v Federal Commissioner of Taxation*, the Federal Court decided that the ATO's statutory powers extend to seeking particulars of LPP claims, where CUB Australia Holding Pty Ltd sought to use the privilege to withhold requested documents during a tax audit.[143]

In terms of its *LPP Protocol*, the ATO articulated its concerns about:

- '[c]ommunications exclusively between non-legal persons in circumstances where the non-legal persons do not perform functions in furtherance of a solicitor-client relationship';
- '[c]ontrived arrangements or relationships which purport to attract LPP where there is a purpose of concealing communications from us' including 'where LPP is actively promoted as a feature of tax advice';
- '[r]outing advice through a lawyer merely for the purpose of obtaining privilege'; and
- '[l]egal engagements entered into after the substance of advice was provided by non-legal persons'.[144]

The *LPP Protocol* indicates approaches to privilege that are not recommended by the ATO, such as '[m]aking "blanket claims" across bundles of unreviewed documents or all documents on a computer or storage device' and '[u]sing assumptions or pre-determined judgements to assess if LPP applies without regard to the merits of each communication'.[145] Instead, according to the ATO, the recommended approach to making a claim of LPP is to evaluate whether the relevant 'overarching service, engagement or relationship' is 'capable of establishing the requisite lawyer-client relationship'.[146] The ATO was careful to characterise the *LPP Protocol* as aiming 'to support the provision of high-quality LPP claims' rather than seeking 'to create unintended waiver of LPP'.[147] Of course, the *LPP Protocol* represents the ATO's views on particular matters, and may be subject to challenge in the courts.

As for the ACCC, its Cooperation Policy states that '[l]eniency is most likely to be considered for a corporation which', amongst other factors, 'comes forward with valuable and important evidence of a contravention of which the Commission is otherwise unaware or has insufficient evidence to initiate proceedings' and which 'provides the Commission with full and frank disclosure of the activity and all

142 Australian Taxation Office, *Compliance with Formal Notices: Claiming Legal Professional Privilege in Response to Formal Notices* (Protocol, June 2022) ('*LPP Protocol*').

143 (2021) 385 ALR 731.

144 *LPP Protocol* (n 142) 16 [12].

145 Ibid 7.

146 Ibid 8 [22].

147 Ibid 17 [1].

relevant documentary and other evidence available to it, and cooperates fully with the Commission's investigation and any ensuing litigation'.[148]

The ACCC has an *Immunity and Cooperation Policy for Cartel Conduct* ('*Immunity Policy*'), which guides applications for immunity from proceedings initiated by the ACCC or the Office of the CDPP in relation to cartel conduct, and indicates 'how cooperation provided to the ACCC by cartel participants will be recognised'.[149] A reference to privilege is in the *ACCC Immunity and Cooperation Policy: Frequently Asked Questions* guide which considers whether the information provided by the applicant will be disclosed to the public, in which the ACCC states that it 'may be able to claim privilege … to protect confidential information from disclosure'.[150] In *Director of Public Prosecutions (Cth) v Citigroup Global Markets Australia Pty Ltd* ('*Citigroup*'), the Federal Court handed down an important decision concerning the ACCC's *Immunity Policy* and the impact on LPP,[151] given the tension for an immunity applicant between: (1) 'provid[ing] full, frank and truthful disclosure' and 'cooperat[ing] fully' with the ACCC so as to be eligible for conditional immunity under the *Immunity Policy*;[152] and (2) maintaining privilege over witness accounts provided to lawyers at an early stage in an investigation.[153] The Federal Court held that the dominant purpose of the internal review in this case was to provide confidential legal advice to the applicant, and accepted that the documents were

148 'ACCC Cooperation Policy' (n 133) 2.

149 Australian Competition and Consumer Commission, *ACCC Immunity and Cooperation Policy for Cartel Conduct* (Policy, October 2019) 2 [1] <https://www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct-october-2019> ('*Immunity Policy*'). See also Ayman Guirguis and Mei Gong, 'Piercing the Privilege Veil in Criminal Cartels in Australia: Practical Considerations for Immunity (and Leniency) Applicants in Seeking To Reconcile Their Disclosure Obligations', *Kluwer Competition Law Blog* (Blog Post, 15 July 2022) <https://competitionlawblog.kluwercompetitionlaw.com/2022/07/15/piercing-the-privilege-veil-in-criminal-cartels-in-australia-practical-considerations-for-immunity-and-leniency-applicants-in-seeking-to-reconcile-their-disclosure-obligations/>. See generally Brent Fisse, 'Australian Cartel Law: Recent Developments' (2023) 51(2) *Australian Business Law Review* 70.

150 Australian Competition and Consumer Commission, *ACCC Immunity and Cooperation Policy: Frequently Asked Questions* (Guide, May 2023) 12–13 <https://www.accc.gov.au/about-us/publications/accc-immunity-and-cooperation-policy-frequently-asked-questions>. LPP is also discussed in the context of full, frank and truthful disclosure: at 17.

151 [2021] FCA 511 ('*Citigroup*').

152 *Immunity Policy* (n 149) 5 [22].

153 See *Citigroup* (n 151) [155]. ASIC's *Immunity Policy*, which provides immunity to certain reporting individuals in connection with contraventions of pt 7.10 of the *Corporations Act 2001* (Cth), such as market manipulation, insider trading and dishonest conduct in the course of carrying on a financial services business, says nothing regarding LPP, though considers privacy and confidentiality: Australian Securities and Investments Commission, *ASIC Immunity Policy* (February 2021) <https://asic.gov.au/about-asic/dealing-with-asic/asic-immunity-policy/>.

privileged.[154] That said, the partial disclosure of the content of the documents to the CDPP by reading out passages of the outlines was inconsistent with the maintenance of confidentiality over the remainder of the content and the applicant thereby waived privilege over the whole of the documents (save for any legal advice).[155] The imposition of the condition by the ACCC and the CDPP, and the immunity applicant's acceptance of the condition that it provide 'full, frank and truthful disclosure and cooperation … including by withholding nothing of relevance', was not inconsistent with maintaining the confidentiality of the communications.[156]

The Court noted that 'the ACCC respected the existence of the privilege', indicating that doing so facilitated the reporting of cartel conduct to it.[157] Indeed, the privilege is not of use to private entities only — ASIC has successfully upheld claims of privilege over its own documents.[158]

Likewise, ASIC sets out the situations in which it would recommend leniency in sentencing for a defendant, including by voluntarily participating in ASIC's interviews, or volunteering information about contraventions of the law that result in the prosecution of another person.[159] Indeed, the fact that a person voluntarily provides such assistance may influence ASIC's decision about the type of enforcement proceedings it commences.[160] And the *Prosecution Policy of the Commonwealth* provides that whether the defendant 'co-operate[d] in the investigation or prosecution of others' may be relevant to the CDPP's prosecution decisions.[161]

154 *Citigroup* (n 151) [116], [121], [123], [125].

155 Ibid [175].

156 Ibid [194].

157 Ibid [192].

158 See, eg: *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd [No 2]* (2011) 283 ALR 299; *Bolton and Australian Securities and Investments Commission* [2018] AATA 4640; *Australian Securities and Investments Commission v Mitchell* [2019] FCA 1484. In relation to circumstances in which the CDPP can claim LPP, see Adam Murphy, 'Check Your Privilege: The Foundation of Legal Professional Privilege within the Commonwealth Director of Public Prosecutions' (2021) 45(3) *Criminal Law Journal* 153.

159 Australian Securities and Investments Commission, 'Cooperating with ASIC' (Information Sheet No 172, February 2021) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/cooperating-with-asic/>.

160 Australian Securities and Investments Commission, 'ASIC's Approach to Enforcement' (Information Sheet No 151, August 2023) <https://www.asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement>.

161 *Prosecution Policy of the Commonwealth* (n 79) 5–6 [2.10(r)].

On this, one indicator of genuine and proactive cooperation provided by a corporation during an investigation is 'taking a cooperative and practical approach' to any privilege claims, such as by obtaining independent verification of the claims or agreeing to the appointment of an independent expert to resolve any disputed claims.[162]

A comparable sentiment towards the waiver of LPP comes through in the now-stalled scheme of deferred prosecution agreements ('DPAs') for corporate crime. These are non-trial resolutions[163] which enable prosecutors to enter into agreements with corporations to defer or suspend criminal proceedings, despite the admission of wrongdoing.[164] DPAs were proposed by means of the now-lapsed Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) ('Combatting Corporate Crime Bill'), which emulated to a large extent the English scheme, in place since 2013.[165] If enacted, DPAs would not be available to individuals, and would apply to certain offences and prosecution agencies only.[166] Waiver of privilege, at least in part, forms a central component of what prosecutors in England and Wales and the United States consider full cooperation in order for a company to be eligible for a DPA.[167] In the same way, the draft Australian *Deferred Prosecution Agreement Scheme Code of Practice* stated that, in assessing whether it is in the public interest to agree to a DPA, '[c]orporations will not be expected to waive legitimate claims of legal professional privilege in order to demonstrate co-operation, but waiving

162 Australian Federal Police, Corporate Cooperation Guidance (Report, November 2021) 5, 12 <https://www.afp.gov.au/sites/default/files/PDF/AFPCorporateCooperationGuidance.pdf>.

163 See generally OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (Report, 2019) <https://www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm>.

164 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 sch 2 pt 3 ('Combatting Corporate Crime Bill').

165 See Liz Campbell, 'Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales' (2021) 43(2) *Sydney Law Review* 187 ('Revisiting and Re-Situating Deferred Prosecution Agreements').

166 Under sch 2 pt 1 of the Combatting Corporate Crime Bill (n 164) the CDPP could enter into a DPA with a person *other than an individual* for offences under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), offences of market misconduct and other prohibited conduct relating to financial products and financial services under the *Corporations Act 2001* (Cth), and various property offences under the *Criminal Code Act 1995* (Cth), such as theft, proceeds of crime offences, and bribery of a foreign official.

167 See generally: Lisa Kern Griffin, 'Compelled Cooperation and the New Corporate Criminal Procedure' (2007) 82(2) *New York University Law Review* 311; Cindy A Schipani, 'The Future of the Attorney–Client Privilege in Corporate Criminal Investigations' (2009) 34(3) *Delaware Journal of Corporate Law* 921; Campbell, 'Revisiting and Re-Situating Deferred Prosecution (n 165).

privilege may demonstrate a high degree of co-operation'.[168] Extant jurisprudence in England and Wales indicates that communications made for the purpose of considering whether it is appropriate to agree to a DPA 'rather than defend a prosecution, or for the purpose of avoiding prosecution by enhancing the likelihood that a DPA might be obtained', should 'be classified as falling within the ambit of the privilege'.[169] The benefit works in two ways: (1) these communications are protected by the privilege; and (2) the careful (and not comprehensive) waiver by corporations of the privilege is regarded positively by prosecutors, and then the court, in terms of the agreement to and approval of a DPA. This indicates the centrality of LPP and its use in relation to different mooted mechanisms against corporate crime.

V Reforming the Privilege

The preceding description of the law on LPP and its use by corporations suggests that further reflection on the scope of LPP is merited. Indeed, suggestions for reform[170] have gained little traction, though at the time of writing the Treasury and Attorney-General's Department announced a joint review of the use of LPP in Commonwealth investigations, 'to respond to concerns that some claims of privilege are being used to obstruct or frustrate investigations'.[171] Contemporary inquiries have not interrogated the relevance or impact of LPP in the context of the broad terrain of corporate accountability,[172] though it arises in specific instances already mentioned such as The Star inquiry.[173] Notably, law firms and professional bodies are united in its defence, despite (or perhaps because of) its impact on regulation and prosecution and its uneven impact on the different parties to whom/which it accrues. It is fair to say that removing privilege from all communications with

168 Attorney General's Department, *Deferred Prosecution Agreement Scheme Code of Practice* (Consultation Draft, May 2018) 21 [7.6]. For a critique of this in the United States, see: Earl J Silbert and Demme Doufekias Joannou, 'Under Pressure To Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System' (2006) 43(3) *American Criminal Law Review* 1225; John A Gallagher, 'Legislation Is Necessary for Deferred Prosecution of Corporate Crime' (2010) 43(2) *Suffolk University Law Review* 447.

169 Rebecca Mitchell and Michael Stockdale, 'Legal Professional Privilege in Corporate Criminal Investigations: Challenges and Solutions in the Modern Age' (2018) 82(4) *Journal of Criminal Law* 321, 325–6.

170 See *Privilege in Perspective* (n 16).

171 'Government Taking Decisive Action in Response to PwC Tax Leaks Scandal' (Media Release, Ministers Treasury Portfolio, 6 August 2023) <https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/government-taking-decisive-action-response-pwc-tax-leaks>.

172 There was no mention of the privilege in the *Banking Royal Commission* (n 4), and the account at 161–2 of *Corporate Criminal Responsibility* (n 3) does not critique its use.

173 Campbell, 'Mis/Use of Client Legal Privilege' (n 110).

corporate lawyers 'would encounter overwhelming opposition from the profession and would be politically lethal'.[174]

Beyond maintenance of the status quo with proactive and well-resourced regulators, options for reform include reversion to the sole purpose test for corporations; the abrogation of LPP for certain crimes/investigations; or, most radically, the removal of LPP for corporations, as is the case regarding the privilege against self-incrimination. A further option lies in providing the courts with the discretion to include privileged evidence as they see fit.

A *Reversion to the Sole Purpose Test*

One option for reform could be a reversion to the sole purpose test for corporations. As became apparent in the *Esso* judgment outlined in Part II(A) above, there is no ideal equilibrium in respect of corporations.[175] The sole purpose test seems too narrow, while the dominant purpose test is unduly advantageous to corporations when compared to individuals in rendering the privilege remarkably broad, given the multiple purposes for much corporate documentation.[176] Though deploying the sole purpose test could lead to a lack of clarity regarding the extent of the privilege, it would prevent its more egregious misuse at least, and require more cautious creation of documents by corporations and less expansive claims of privilege.

B *Abrogation of Legal Professional Privilege for Certain Crimes/Investigations*

Federal and state Parliaments may legislate to abrogate LPP in relation to a particular investigation or power where exceptional circumstances exist.[177] Such laws are rare, but the possibility of extending the use of this legislative ability should be considered.

Abrogation of LPP occurred in relation to James Hardie Industries plc ('JHIL'), which was involved in the manufacture and distribution of products containing asbestos until 1987.[178] These products caused diseases like mesothelioma and cancers,[179] and JHIL set up the Medical Research and Compensation Foundation Ltd ('Foundation') to meet consequent asbestos-related liabilities.[180] A public inquiry was set up in New South Wales to examine the creation of the Foundation,

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174 Joan Loughrey, *Corporate Lawyers and Corporate Governance* (Cambridge University Press, 2011) 264.

175 *Esso* (n 17) 91 [109] (Kirby J), 103 [162] (Callinan J).

176 See above nn 76–77 and accompanying text.

177 *Privilege in Perspective* (n 16) 9, recommendation 6–1.

178 DF Jackson, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (September 2004) 13.

179 Ibid 17.

180 Ibid 28–9.

its assets, and capacity to meet its liabilities,[181] and this in turn prompted the passing of the *James Hardie (Investigations and Proceedings) Act 2004* (Cth) ('*JH(IP) Act*') which abrogated LPP in certain circumstances. The *JH(IP) Act* allowed ASIC and the CDPP to obtain and use records produced to the inquiry and produced under ASIC's information-gathering powers.[182] The *JH(IP) Act* is historical and does not provide for a wider abrogation of the privilege.

A comparable example is evident at the Victorian state level in relation to the Crown Casino. In October 2021, the *Royal Commission into the Casino Operator and Licence* found Crown Melbourne Ltd unsuitable to hold Victoria's casino licence, and recommended Crown Melbourne be permitted to continue operating under stringent oversight conditions for two years during which period reform was required to be achieved.[183] LPP has been stripped from Crown Casino under specific legislation in some circumstances, though with a use immunity in terms of the evidence gathered being inadmissible in subsequent proceedings.[184] The limitation on LPP in this legislation was described as 'reasonable and demonstrably justified'.[185] Notably, both of these legal changes followed public inquiries into wrongdoing by JHIL and Crown, rather than being pre-emptive or general abrogations.

Beyond these examples of abrogation for certain specific investigations, the *Crimes Act 1914* (Cth) ('*Crimes Act*') includes powers to obtain documents relating to serious terrorism offences and relating to serious offences,[186] and a person is not excused from producing a document under these sections on the ground that doing so 'would disclose material that is protected against disclosure by legal professional privilege or any other duty of confidence'.[187] That said, any evidence obtained is not admissible against the person other than in proceedings for offences of providing false or misleading information or documents to the Commonwealth, or obstructing Commonwealth officials.[188] Moreover, there is residual default Commonwealth

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181 Ibid 1.

182 *James Hardie (Investigations and Proceedings) Act 2004* (Cth) s 4 ('*JH(IP) Act*').

183 *Royal Commission into the Casino Operator and Licence* (Report PP No 277, October 2021) vol 1, 4–5.

184 See *Casino and Gambling Legislation Amendment Act 2021* (Vic) ss 10, 18, inserting *Casino Control Act 1991* (Vic) ss 23(3B)–(3C), 36F(7).

185 See Victoria, *Parliamentary Debates*, Legislative Council, 19 November 2021, 4661 (Jaclyn Symes, Attorney-General).

186 *Crimes Act* (n 104) ss 3ZQN–3ZQO.

187 Ibid s 3ZQR(1)(c). As the ALRC highlights, the Explanatory Memorandum does not 'explain why the privilege was abrogated' in this instance: Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) 350 [12.57] ('*Traditional Rights and Freedoms*'). My more recent search of Hansard does not provide any more illumination.

188 *Crimes Act* (n 104) s 3ZQR(2). These are offences under ss 137.1, 137.2 and 149.1 of the *Criminal Code Act 1995* (Cth). Section 3ZX of the *Crimes Act* preserves LPP in the context of *Crimes Act* search warrants.

law on legal professional privilege in s 47(2) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) ('*Regulatory Powers Act*') which preserves the operation of LPP in the context of a regulator's investigative powers. Similarly, s 206 of the *Proceeds of Crime Act 2002* (Cth) ('*Proceeds of Crime Act*') overrides the privilege for the purpose of production orders issued under s 202, but this is not admissible in criminal proceedings against a natural person.[189]

Many crimes committed by corporations are comparable, in terms of gravity, sophistication, and harms caused, to other serious criminal offences, as well as throwing up the same difficulties in investigating and prosecuting them. It is not inconceivable to consider the replication of provisions such as those outlined in the *Crimes Act* and *Proceeds of Crime Act* for some corporate offences. Another possibility is a replication of the JHIL and Crown legislation in respect of certain specific investigations, though as noted these were predicated on initial exposure of wrongdoing in inquiries. Both of these options are proposed and endorsed here, as robust and workable limitations on LPP for entities that might otherwise evade justice. Undeniably, these mooted reforms would conflict with the current practice of regulators like ASIC, as well as provisions like s 47(2) of the *Regulatory Powers Act* and s 3ZX of the *Crimes Act* which preserve LPP in certain instances, but that is neither insoluble nor necessarily fatal to the proposals.

C *Removal of Legal Professional Privilege*

A more radical option for reform would be to remove LPP for corporations, mirroring the situation in respect of the privilege against self-incrimination and the penalty privilege outlined in Part II above. Though such a possibility has previously been dismissed out of hand,[190] this article proposes that extending the reasoning in *Caltex* to question the position of LPP for corporations is logical in both a pragmatic and principled sense.

LPP has instrumental as well as rights-based rationales, in encouraging frank disclosure in gaining legal advice and incentivising compliance with the law, as well as in protecting the individual party against state power.[191] Of course, the rationale that is relied upon for LPP has consequences when considering justifications for removing it.[192]

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189 Likewise, the ALRC draws attention to the lack of explanation in the Explanatory Memorandum of why the privilege was abrogated, or why in relation to civil proceedings only: *Traditional Rights and Freedoms* (n 187) 350 [12.58].

190 PA Keane, '"No Body To Be Kicked or Soul To Be Damned": The Limits of a Legal Fiction' (Harold Ford Memorial Lecture, Melbourne Law School, 17 May 2022) 12 <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/keanej/KeaneJ_17%20May2022.pdf>.

191 See above nn 16–17 and accompanying text.

192 *Traditional Rights and Freedoms* (n 187) 341 [12.22].

In terms of a rights-based approach, LPP is seen as a counterweight to the imbalance of power between the individual and the state. In this respect, there has been an evolution in the characterisation of LPP from something that protects rights, to a right in itself. In *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* ('*Daniels*'), the High Court considered the impact on LPP of s 155 of the *Trade Practices Act 1974* (Cth) ('*TPA*')[193] — now the *Competition and Consumer Act 2010* (Cth) ('*CCA*'). Section 155 allows the ACCC to issue a notice requiring a person to provide information or documents relating to a suspected contravention of the *CCA*. Refusing to comply with a s 155 notice can attract criminal penalties.[194] The High Court determined that s 155 of the *TPA* did not require the production of information to which LPP attached.[195] The majority stated that

> [l]egal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.[196]

This notion of an immunity was central for McHugh J:

> Legal professional privilege describes a person's immunity from compulsion to produce documents that evidence confidential communications about legal matters made between a lawyer and client or between a lawyer and a third party for the benefit of a client. The immunity also protects the disclosure of documents that record legal work carried out by the lawyer for the benefit of a client, such as research memoranda. The immunity embodies a substantive legal right.[197]

And it is notable that Kirby J described LPP as a right in itself, rather than as a protective device:

> this Court … has consistently emphasised the importance of the privilege as a basic doctrine of the law and a 'practical guarantee of fundamental rights', not simply a rule of evidence law applicable to judicial or quasi-judicial proceedings. It has been increasingly accepted that legal professional privilege is an important civil right to be safeguarded by the law. Of course, derogations appropriate to the needs of a democratic society may be contemplated. However, vigilance is required against accidental and unintended erosions of the right.[198]

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193 *Daniels* (n 13).

194 *Competition and Consumer Act 2010* (Cth) s 155(6A) ('*CCA*').

195 *Daniels* (n 13). In respect of the prior decision of the Federal Court, see Alex Bruce, 'The *Trade Practices Act 1974* (Cth) and the Demise of Legal Professional Privilege' (2002) 30(2) *Federal Law Review* 373, 377.

196 *Daniels* (n 13) 553 [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

197 Ibid 563 [44] (citations omitted).

198 Ibid 575–6 [85] (citations omitted).

Moreover, the High Court held that there was no indication that the retention of the privilege would significantly impair the functions of the ACCC or render s 155 practically useless, futile or inoperative.[199]

Justice Kirby observed that '[t]he entitlement to sound legal advice, immune from compulsory disclosure to investigating or prosecuting public authorities, is arguably necessary both for natural and artificial persons'.[200] His Honour differentiated between LPP and the privilege against self-incrimination on the basis of them 'rest[ing] upon different historical, legal and policy considerations', almost all of which 'related to individual human beings' in respect of protection from self-incrimination.[201]

The human rights framing of LPP brings the application of the doctrine to corporations into sharp relief, with Sue McNicol suggesting that such a rationale renders it less clear that corporations should be entitled to the privilege's benefit.[202]

Anna Grear describes the foundation of human rights as 'human embodied vulnerability', which must be a key qualifying feature of the human rights subject.[203] This would guard 'an ethically important space … between the corporation and the human being for the purposes of human rights attribution',[204] as opposed to the current 'corporate colonisation' of human rights.[205] The ALRC met this sort of observation head-on, concluding that any characterisation of the privilege as a right 'should be viewed more in terms of a right to access to a fair hearing or trial or access to legal advice', rather than one which can be ascribed to humans only.[206] That is fair, and indeed this article does not seek to engage in detail with the wider debate on whether corporate actors are moral agents, like humans, which enjoy corresponding rights and duties.[207] Rather, the suggestion is that if the privilege is a

199 See ibid 560 [35] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 563–4 [45], 567 [55] (McHugh J). Section 155(7B) of the *TPA* (now s 155(7B) of the *CCA*) was introduced after the decision in *Daniels* (n 13) and expressly provides that a person cannot be required to produce a document that would disclose information that is the subject of LPP.

200 *Daniels* (n 13) 581 [103].

201 Ibid.

202 Sue McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege: The Demise of Implied Statutory Abrogation?' in Peter Mirfield and Roger Smith (eds), *Essays for Colin Tapper* (LexisNexis UK, 2003) 48, 62–3.

203 Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan, 2010) 161.

204 Ibid 32.

205 Anna Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7(3) *Human Rights Law Review* 511, 513.

206 *Privilege in Perspective* (n 16) 104 [3.106].

207 See generally: Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993); Nick Friedman, 'Corporations as Moral Agents: Trade-Offs in Criminal Liability and Human Rights for Corporations' (2020) 83(2) *Modern Law Review* 255.

right, it is one which can be abrogated in respect of certain categories of offences or on a case-by-case basis, and is on less firm foundation in respect of corporate actors than individuals, due to their very ontology.

Limited abrogation of LPP in relation to certain crimes or particular investigations would not cause untoward negative impacts. The traditional conception of human rights, relating to the dynamic between the individual and the Leviathan state, is hard to reconcile with the reality of powerful multinational corporations. Contrary to the inequality of arms which the right to a fair trial seeks to mitigate, now the inequality of arms often arises from the state being outgunned by the resources of large corporations and their lawyers.[208] Relatedly, the perceived primacy of the privilege in accusatorial processes is confounded by the increasing tendency to negotiate with corporations, exemplified by the commitment in *Pricewaterhouse-Coopers* not to prosecute as well as the mooted DPA scheme.[209] Again, this does not render protections such as LPP redundant, but makes their entrenched status less robust, when corporations are benefiting from the capacity to negotiate and thereby extend control over the process, often from a position of significant power.

A co-existing or alternative rationale for LPP is an instrumental one, in its incentivising and enabling of full disclosure to lawyers who can provide competent and independent legal advice. This serves the 'broad public interest in the effective administration of justice'.[210] As Allsop J commented in *Kennedy v Wallace*: 'The purpose and rationale of the privilege is to enable persons in a civilised complex modern society to be able to conduct their affairs with the assistance of legal advice.'[211] This is true both in relation to civil and criminal matters.

On this point, McHugh J in *Caltex* compared the privilege against self-incrimination and LPP, the latter of which is

> privileged because the judgment of the common law is that the privilege of non-production … serves an aspect of the public interest which, on balance, is superior to the public interest in having available all probative evidence relevant to an issue to be tried in judicial proceedings.[212]

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208 See Michael Levi, 'Lawyers as Money Laundering Enablers? An Evolving and Contentious Relationship' (2022) 23(2) *Global Crime* 126, 136.

209 See generally: Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Palgrave Macmillan, 2018); Simon Bronitt, 'Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 211.

210 *Privilege in Perspective* (n 16) 235 [6.1].

211 (2004) 142 FCR 185, 221 [201]. See also *Baker* (n 22) 95 (Wilson J).

212 *Caltex* (n 86) 553–4.

While there is certainly a public interest in non-disclosure and the enabling of candour in certain instances, the enduring paucity of accountability for corporate wrongdoing[213] means that ongoing prioritisation of the public interest in non-disclosure of information is questionable.

Grounding the privilege in public policy in this way can be regarded as producing 'fragility',[214] due to the ability to calibrate and adjust the privilege against other imperatives and interests, and the nebulous nature of public interest/policy. While that is true, there is little evidence that this allows the undue dilution of the privilege, for corporations especially. In relation to corporate actors, the instrumental benefits from legal advice privilege in particular are to achieve legal compliance. Higgins argues persuasively that corporate advice privilege specifically is losing its rationale due to co-existing rules that require corporate agents to achieve compliance, thereby necessitating legal advice to ensure obligations such as directors' duties are fulfilled.[215] In many contexts, 'the privilege's role in encouraging corporate agents to comply with the law has been overtaken' by coexisting laws and policies designed to require and achieve compliance of directors and senior managers, meaning that far more legal advice about company affairs and compliance is sought and given, regardless of the privilege.[216] This is not to say that the privilege is superfluous, but that its role has been co-opted in certain respects by coexisting requirements. While this argument certainly has merit, it does not resolve the fact that the privilege is something that the company enjoys itself rather than the natural persons within it. Moreover, litigation privilege still serves a practical and strategic purpose for corporations, and so withstands this claim of redundancy. Therefore, though the instrumental rationale might indicate that abolition is feasible and would not be indiscriminate in its impact, this is a partial argument only.

Further, and undeniably, altering the law on corporate privilege would impact individuals. Forcing abrogation in certain contexts in respect of corporate communications may reveal information that would be detrimental to individual employees. One way to guard against this would be to preclude subsequent use in criminal proceedings against that person, though this would not remedy any non-legal or professional repercussions.

The decision of the Full Court of the Federal Court in *Meneses*, that sole directors enjoy the penalty privilege,[217] is salient here, and indicates that the removal of LPP for corporates is conceivable and workable in relation to its impact on individual directors to whom it would still accrue. The Court stressed that it was material

213 See Australian Law Reform Commission, *Corporate Criminal Responsibility: Individual Liability for Corporate Misconduct* (Update Report, March 2020) 9 [21].

214 Desiatnik (n 24) 90.

215 Higgins (n 81) 372–3.

216 See ibid.

217 See above n 100 and accompanying text; *Meneses* (n 100) 663–4 [95]–[96], discussing *Australian Securities and Investments Commission v Mining Projects Group Ltd [No 2]* [2008] FCA 951, [7].

that 'the privileges are against *self*-incrimination and *self*-exposure to a penalty'.[218] For one-person companies where that person could rely on the privileges to resist production of the documents, it is necessary to consider mechanisms by which the company could produce the documents (other than by the person doing so), such as the appointment of a receiver:

> It is important and necessary that such a mechanism exist; otherwise, a one-person company … would be effectively immune from producing documents in its control notwithstanding that it is not entitled to claim the privilege against self-incrimination or the penalty privilege.[219]

Beyond these considerations, whenever a corporation exercises LPP or waives it, an individual may be affected negatively.[220] For instance, where an internal investigation has taken place within a corporation and individual employees have given statements, the subsequent disclosure of this may be detrimental to them personally, professionally and/or in respect of litigation.[221] Furthermore, if individual employees know disclosure is likely, they may have an incentive to conceal the truth. So, standardised abrogation of corporate LPP in certain contexts may in fact be more certain and clearly defined than ad hoc waiver which may implicate or scapegoat certain employees. In this vein, Rebecca Mitchell, Edward Imwinkelried and Michael Stockdale contend rightly that

> [d]e-coupling waiver and cooperation … is in the interests of employees. … [This is because without the anxiety] that their statements to corporate counsel would always come into the possession of prosecutors investigating corporate misconduct, their statements would tend to be more truthful.[222]

D *Discretion for Courts*

An alternative or supplementary approach would be the possibility of giving courts 'discretion to admit privileged evidence, where the interests of justice require'.[223]

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218 *Meneses* (n 100) 661–2 [90] (emphasis in original), citing *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 392–3 (Gibbs CJ, Mason and Dawson JJ).

219 *Meneses* (n 100) 678–9 [153].

220 See also Aleksandra Jordanoska, 'Regulatory Enforcement against Organizational Insiders: Interactions in the Pursuit of Individual Accountability' (2021) 15(2) *Regulation and Governance* 298, 306.

221 See Leah Hengemuhle, 'Mea Culpa: Why Corporate Waivers of Attorney–Client Privilege Have Not Increased the Prosecution of Corporate Executives' (2019) 60(5) *Boston College Law Review* 1415, 1449.

222 Rebecca Mitchell, Edward Imwinkelried and Michael Stockdale, 'Deferred Prosecution Agreements and Legal Professional Privilege/Attorney–Client Privilege: English and US Experience Compared' (2021) 8(1) *Journal of International and Comparative Law* 283, 313.

223 Finkelstein (n 113) 144.

This sensible suggestion would apply in both the civil and criminal contexts, and would remedy the situation whereby contested litigation is obstructed or constrained by claims of privilege. That said, while this would resolve problems at the latter end of the litigation process, it would not address situations whereby investigations fail to 'get off the ground' due to claims of privilege, or where the significance of privileged material remains unknown. When this occurs, legal challenges from public enforcement entities are required (as now occur frequently with ASIC and the ATO) which certainly delay the process of investigation and enforcement and have significant resource implications. So, what is needed is a recalibration of the concept of the interests of justice towards more ready disclosure regarding corporations specifically.

VI Conclusion

This article has sought to examine the longstanding and unresolved debate around the use of LPP by corporations and to make some suggestions as to the need for reform. Critical empirical questions remain unanswered, and merit further study beyond this article — how often and in what ways are LPP claims being made by corporations in order to resist the production or use of documents in the course of public enforcement actions against crime by corporations? What types of, and how many, investigations are stymied in this way? And most importantly, what is the societal impact of the use of LPP in this manner?

In the absence of fuller empirical data which might warrant more radical change, this article proposes modest and incremental reforms to LPP, predicated on existing measures and practices. Resources should continue to be provided for regulators to pursue a risky and combative approach to testing claims of LPP, even if this may result in protracted and unsuccessful proceedings. Furthermore, the possibility of duplicating the legislative approach adopted regarding the JHIL investigation should be kept in mind, as should the use of the serious crime exception in respect of bribery and other corporate crimes.[224]

Reliance on LPP provides a veneer of commitment to the rule of law and the administration of justice while in fact hindering state intervention. Rather than enabling the public interest, there is a compromising of the state's ability to intervene against corporate wrongdoing and enable accountability. We can characterise the reliance on LPP in this way as a form of 'creative compliance', whereby lawyers 'us[e] the law to escape legal control without … violating legal rules'.[225] This insight brings a new dimension in understanding how compliance with the law itself can be subversive and inappropriate. As Doreen McBarnet and Christopher Whelan emphasise, law

224 See above Part V(B).

225 See Doreen McBarnet and Christopher Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54(6) *Modern Law Review* 848, 848.

is always two-sided, and acts both as a means of control and of escaping control.[226] They explain that '[r]ules are constructed not just by regulators but through the actions of the regulated … [through] acquiring legal opinions or initiating judicial limitation via carefully selected court cases'.[227]

Ultimately, the corporation as a 'creature of the State' and an 'artificial entity'[228] enjoys certain benefits of incorporation, namely separate legal personality and limited liability. The limitation of LPP for certain offences or investigations is 'not too great a price to pay for the prize of limited liability', given the need to intervene effectively in respect of large corporations with extensive economic power.[229] Abrogating privilege in a limited way would be a necessary and proportionate means of assisting in the detection and deterrence of crime by corporations, such as bribery, market abuse, and cartel conduct. As outlined above, the instrumental value of LPP for corporations is becoming unnecessary in certain contexts, and its human rights protection unwarranted, so reform is crucial. As Toohey J in *Carter v The Managing Partner, Northmore Hale Davey & Leake* reminds us: 'Important, indeed entrenched, as legal professional privilege is, it exists to serve a purpose, that is to promote the public interest by assisting and enhancing the administration of justice. It is not an end in itself.'[230]

226 Ibid.

227 Ibid 864.

228 *Caltex* (n 86) 491 (Mason CJ and Toohey J), 549, 553 (McHugh J).

229 Higgins (n 81) 392. For a general critique of limited liability, see Harry Glasbeek, *Class Privilege: How Law Shelters Shareholders and Coddles Capitalism* (Between the Lines, 2017).

230 (1995) 183 CLR 121, 147.