

The Bonfire of the Privileges?

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Abstract

Two key legal common law privileges – legal professional privilege and the privilege against self-incrimination – have existed for centuries and operated in our jurisprudence as pillars of essential legal protection for taxpayers and others. Nevertheless, these privileges have recently been under attack. While the erosion of legal professional privilege has arisen through the lack of clear, targeted legislation, the erosion of the privilege against self-incrimination has been driven primarily by the flood of federal Acts which may be seen cumulatively as impliedly abrogating the privilege. The article proposes a similar ‘remedy’ (legislative reform) to preserve each privilege – albeit a (very different) form of legislative reform for each.

Keywords: privilege, legal professional privilege, privilege against self-incrimination

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1. INTRODUCTION

Over the centuries, the common law has developed and refined a range of doctrines designed to ensure that citizens have basic liberties and rights. Two of the more significant doctrines are legal professional privilege and the privilege against self-incrimination.

Legal professional privilege (LPP) in general terms protects confidential communication between a lawyer and their client for the purpose of obtaining legal advice or assistance. It has been described as existing to serve the extremely important public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers, thus enabling the lawyer to provide accurate advice. The privilege against self-incrimination (PASI) protects people suspected of wrongdoing from being forced to incriminate themselves.¹

The advent of technology has revolutionised the operation of the privileges, albeit in different ways. In relation to LPP, overall it has operated appropriately and effectively for centuries – providing society and citizens with essential protection. However, in recent times, the Australian Taxation Office (ATO) has taken a more aggressive approach to what it sees as dubious claims for privilege and has successfully challenged some claims for LPP.

On the other hand, PASI protects a person from being required to incriminate themselves. It has been described among other things as ‘a cardinal principle of our system of justice’² and ‘a bulwark of liberty’³ which is ‘fundamental to a civilised legal system’.⁴ PASI is a basic and substantive common law right, not merely a rule of evidence.

Clearly, the two key legal privileges offer vital protection to citizens, and in light of their positive contributions, one might be forgiven for assuming that they would enjoy strong ongoing support.

However, recently, both privileges have been under challenge. The focus on LPP has followed revelations of alleged misuse of the privilege. In the case of PASI, it is well established that the privilege is not absolute, and in the absence of legislative or other protection, legislation can limit or abrogate PASI where the legislation expresses a clear intention to do so.⁵

¹ The basic doctrinal principles of the privileges have been examined in detail in previous articles by one of the present authors. For further information see, eg, Robin Woellner and Michael Bersten, ‘Legal Professional Privilege in the Australian Tax System: Back to the Future for Law Reform?’ (2022) 28 *James Cook University Law Review* 19 (‘Legal Professional Privilege’); Robin Woellner and Michael Bersten, ‘Quo Vadis Legal Professional Privilege – Wavering in the Multiverse?’ (2023) 38(4) *Australian Tax Forum* 543 (‘Quo Vadis’).

² *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (per Gibbs CJ) (‘*Sorby*’) and quoted in the report Queensland Law Reform Commission (Justice RG Atkinson, chair) (QLRC), *The Abrogation of the Privilege Against Self-Incrimination* (Report No 59, 2004) [1.6].

³ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 340 (per Mason ACJ, Wilson and Dawson JJ) (‘*Pyneboard*’), referring to this characterisation as the view taken in one of the two competing strands of authority discussed in the judgment; quoted in QLRC, above n 2, [1.6].

⁴ *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412, 420 (per Kirby P) quoted in QLRC, above n 2, [1.6].

⁵ QLRC, above n 2, [7.1], citing *Sorby*, above n 2, 289-290 (per Gibbs CJ).

In what McHugh J in *Malika Holdings Pty Ltd v Stretton (Malika)*⁶ described as the advent of the ‘regulatory state’, legislatures have enthusiastically taken up the opportunity to pass abrogating legislation, and the tendency for courts to interpret legislation as intended to abrogate or limit the privilege has become much more commonplace. That is, there has been a tendency for courts to favour ‘economic efficiency’ arguments. These come in the form of ever-increasing claims by government departments for unlimited access to information, on the basis that otherwise (it is claimed), the agency will not be able to operate effectively or, sometimes, would not be able to operate at all. As discussed below, these economic efficiency arguments – all too often without supporting evidence – have been allowed to override the countervailing values of human dignity, privacy, and freedom protected by the privilege, with the result that the scope of the privileges and the protection provided by the privileges have shrunk commensurately. The authors regard this trend as most unfortunate and damaging.

As a result, the scope of the protection afforded by the two privileges is now but a fraction of its former coverage. It is always a matter of striking a difficult balance, but have we got the balance wrong? Are we perhaps stumbling into a less protective and caring society? Or are we perhaps seeing early sparks from the Bonfire of the Privileges? Indeed, the situation provides some interesting echoes to Tom Wolfe’s 1980s classic work of fiction, *The Bonfire of the Vanities*.⁷

While both privileges are developments of the common law and offer vital protection to citizens, their development, rules and the current issues with each differ. However, despite these forensic differences between the privileges, and consequential problems with each, the authors propose a similar ‘remedy’ for each privilege – albeit a (very different) form of legislative reform tailored to the needs of each privilege.

It is important to note that this article was written against the backdrop of an ongoing joint review by the Attorney-General’s Department and Australian Treasury into the use of LPP in Commonwealth investigations, originally announced on 6 August 2023. The Attorney-General’s Department and Australian Treasury initially engaged with approximately 100 stakeholders on the review. In December 2024, the document *Review of the Use of Legal Professional Privilege in Commonwealth Investigations*⁸ (the 2024 Discussion Paper) was released, designed to present and test the key issues identified through the initial consultation and research undertaken to inform the review. Submissions on the discussion document closed on 28 February 2025. It was hoped that feedback received would lead to the public release in mid-2025 of a second and final Paper setting out possible reform options, and that this would prove more successful

⁶ *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 299 (per McHugh J) (*‘Malika’*).

⁷ The historical ‘Bonfire of the Vanities’ refers to the 1497 actions in Florence, Italy of the Dominican priest Girolamo Savonarola, who ordered the burning of a wide range of objects he considered sinful (vain), including books, art and mirrors. The bestselling book by Tom Wolfe, *The Bonfire of the Vanities* (Farrar, Straus and Giroux, 1987), is a biting socio-political satire set in New York chronicling the fall through lies and avarice of a successful bond trader who sees himself as a ‘Master of the Universe’ and the corruption of the resultant police investigation. At a level of abstraction, this article bears echoes to Tom Wolfe’s book. While this article may not have the ‘Bonfire’ drama of a fatal heart attack in an expensive French restaurant, with a haughty *maître d’* looking on, the modern damage from the erosion of the privileges is real and significant.

⁸ Attorney-General’s Department and Australian Treasury, *Review of the Use of Legal Professional Privilege in Commonwealth Investigations: Discussion Paper* (2024).

than the numerous earlier reviews and would not simply join prior reports in mouldering on dusty unused bookshelves. Unfortunately, as of March 2026, the final Paper had not been released, and when (or if) it is ultimately completed and released, it seems destined to follow the fate of previous reviews.⁹

2. LEGAL PROFESSIONAL PRIVILEGE: THE DOCTRINAL BACKGROUND

2.1 What is legal professional privilege?¹⁰

As noted, given the extensive analysis of LPP in prior articles, this article does not repeat those basic principles; rather it focuses more on PASI, though it is necessary to refer to some key LPP issues to provide context.

The judicial policy underlying LPP is to encourage clients to seek legal advice and to disclose fully all relevant circumstances to the lawyer, thus enabling the lawyer to provide informed and appropriate advice,¹¹ the concern being that the client might be unwilling to provide full and accurate information if they thought that their discussions with their legal adviser could subsequently be made public.¹² However, LPP only applies where the dominant purpose¹³ for creating the confidential communication was either to obtain legal advice¹⁴ from a lawyer (whether in the private or public sector, or in-house)¹⁵ acting in that capacity,¹⁶ or for use in pending or reasonably contemplated litigation.¹⁷ LPP belongs to the client, and the adviser must (generally) claim the privilege on behalf of the client.¹⁸ Significantly, LPP can be lost by express¹⁹ or implied²⁰ waiver.

Over the centuries, the courts have carefully developed and refined common law rules to resolve the inherent tension between the acknowledged need for investigators and decision-makers to have access to relevant information (albeit that the need for particular information should perhaps be more carefully tested than seems to be the case

⁹ See, eg, QLRC, above n 2; Australian Law Reform Commission (David Weisbrot, President) (ALRC), *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Report No 107, 2008) ('*Privilege in Perspective*').

¹⁰ For a more detailed legal treatment of LPP, see Woellner and Bersten, 'Legal Professional Privilege', above n 1.

¹¹ See the discussion of the judicial rationale for LPP in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 551-552 (per McHugh J), 584 (per Kirby J) ('*Propend*').

¹² *Glencore International AG v Federal Commissioner of Taxation* (2019) 265 CLR 646, 661-662 ('*Glencore*').

¹³ As to the test being for the dominant purpose, see *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 ('*Esso*'). The meaning of 'dominant' has been explained as the 'ruling, prevailing, paramount or most influential purpose': see for example *12 Years Juice Foods Australia Pty Ltd v Federal Commissioner of Taxation* [2015] FCA 741, [13] (Edmonds J) quoting *Federal Commissioner of Taxation v Pratt Holdings Pty Ltd* [2005] FCA 1247, [30].

¹⁴ 'Legal advice' extends beyond merely telling the client what the law is and extends to providing advice 'as to what a party should prudently or sensibly do in the relevant legal context': *AWB Ltd v Cole (No 5)* 155 FCR 30, [44] ('*AWB (No 5)*').

¹⁵ *Waterford v Commonwealth* (1987) 163 CLR 54.

¹⁶ *Lane v Admedus Regen Pty Ltd* [2016] FCA 864, [20] (McKerracher J), citing *Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2)* [2013] FCA 1098, [72]-[73].

¹⁷ Woellner and Bersten, 'Legal Professional Privilege', above n 1; *Glencore*, above n 12.

¹⁸ *Propend*, above n 11, 510; *Attorney-General (NT) v Maurice* (1986) 65 ALR 230, 235 (per Woodward J).

¹⁹ *Mann v Carnell* (1999) 201 CLR 1. *Mann* is the seminal authority on waiver.

²⁰ *Ibid.* For examples, see *Kirby v Centro Properties Ltd (No 2)* [2012] FCA 70; *AWB (No 5)*, above n 14, [128]-[163].

to date), and the need to protect confidential legal advice (and litigation-related materials) to promote the public interest in the proper administration of justice.²¹

2.2 The application of legal professional privilege to non-curial cases

In 1983 the courts extended LPP to tax investigations and other non-curial cases.²² It is now well established by decisions such as *Baker v Campbell (Baker)*²³ and *Glencore*,²⁴ that LPP is a substantive right rather than a mere rule of evidence or procedure in curial proceedings. Indeed, former Chief Justice French characterised it as a constitutional right.²⁵

However, (to date) the courts have not developed a parallel, coherent and effective system for dealing with privilege claims and disputes in such cases. This has resulted in the practical exercise of compulsory investigation powers becoming a matter for the administrative policy of Commonwealth agencies and the negotiation of guidelines with professional bodies, leaving an unfortunate gap that could most easily and appropriately be filled with an (updated) Australian Law Reform Commission (ALRC) recommendation.

2.3 The genesis of the ALRC 2008 Report

Notwithstanding its long history, disquiet about the claiming of LPP in relation to inquiries from a Royal Commission concerning the Australian Wheat Board led the then Attorney-General in late 2007 to refer to the ALRC the question of the application of LPP in respect of Commonwealth investigations.

The resulting ALRC Report²⁶ identified the practice and procedure problems that have bedevilled LPP, and the Report deserves close attention, particularly as the ALRC advisory panel comprised federal judges,²⁷ leading taxation experts and senior Commonwealth officers from the Commonwealth Director of Public Prosecutions (CDPP) and ATO.

The ALRC went on to put forward a number of specific recommendations,²⁸ with the first recommendation being for the federal government to effectively codify the law and practice of the privilege.²⁹ However, as of the date of writing, the recommendations of ALRC Report 107 had not been implemented, and it seems likely that, as with so many other reports, the valuable insights in the report are doomed to gather dust on government shelves.

²¹ *Propend*, above n 11.

²² The reference to 'non-curial' refers to matters arising outside a court (those within court processes being 'curial' matters) such as claiming LPP as a valid reason for resisting a valid exercise of the compulsory powers of the Commissioner of Taxation to produce documents or information or to answer a question when subject to examination.

²³ *Baker v Campbell* (1983) 153 CLR 52.

²⁴ The long and often contested history of LPP has been well covered in the decision of the High Court in *Glencore*, above n 12, and other materials such as the Australian Law Reform Commission (ALRC) Report, *Privilege in Perspective*, above n 9, itself.

²⁵ *Momcilovic v The Queen* (2011) 245 CLR 1, [43].

²⁶ ALRC, *Privilege in Perspective*, above n 9.

²⁷ Including then Justice French and then Justice Kiefel.

²⁸ ALRC, *Privilege in Perspective*, above n 9, 9-23.

²⁹ *Ibid*, Recommendations 5-1 to 5-3, 6-2 to 6-3.

3. IS THE LEGAL PROFESSIONAL PRIVILEGE SYSTEM FAILING? CURRENT AND FUTURE CHALLENGES

3.1 Background

To date, the courts and other key players, consistent with their responsibilities, have sought to do their best in ‘managing’ the problems thrown up by LPP. However, the courts can only decide the cases that come before them, and while cases on LPP issues continue to arise regularly, they generally concern practical and precise questions as to the boundaries of the privilege in a particular context, rather than more fundamental issues. Accordingly, the authors believe the only viable option to resolve the current (and future) problems is the introduction of comprehensive and carefully drafted federal legislation setting out the rules for claiming the LPP and dealing separately with the different nature of disputes.

Significantly, the High Court has aligned common law LPP in non-curial settings to the position under the privilege provisions in the *Evidence Act 1995* (Cth) (*Evidence Act*) by applying the legislative test of a ‘dominant purpose’,³⁰ rather than the ‘sole purpose’ test that applied at common law.³¹ In that sense, the courts have created a parallel (indeed duplicate) set of Rules for claiming the privilege at common law and under the *Evidence Act*.³² However, this parallel universe splinters when it comes to applying practice and procedure to situations involving curial versus non-curial privilege claims, because different agencies invariably apply differing administrative policies and procedures in dealing with the privilege in these contexts, creating a splintered privilege ‘universe’.³³ Against this background, it is important to examine why LPP in non-curial cases is the object of so much continuing tension and debate – particularly in relation to tax.

3.2 The alleged misuse of legal professional privilege to improperly resist ATO investigation

Clearly, access to relevant information remains a legitimate and key aspect of tax administration, and controversies arise regularly over information shortfalls, with the ATO concerned in recent years by its perception that some multinational enterprises (especially tech giants, among others) and their advisers have misused claims for LPP to create an artificial barrier in order to falsely justify refusing to comply with valid ATO requests for the provision of crucial information in a timely manner.

³⁰ *Esso*, above n 13.

³¹ *Grant v Downs* (1976) 135 CLR 674. Interestingly, the sole purpose test remains the applicable test for the ATO accountants and corporate board advice concessions: see ATO, ‘Limits to Our Formal Powers’ (last updated 1 May 2024) <<https://www.ato.gov.au/about-ato/commitments-and-reporting/information-and-privacy/information-management/our-approach-to-information-gathering/limits-to-our-formal-powers>> (accessed 31 May 2026).

³² Hon Justice TF Bathurst, Chief Justice of NSW, ‘Lawyer-Client Privilege in Litigation’ (College of Law Judges’ Series, 26 February 2020).

³³ With apologies to the Marvel Studios 2022 blockbuster *Doctor Strange in the Multiverse of Madness*: our thanks to Michael Bersten for this illuminating insight. As also noted by a reviewer the concept of the ‘multiverse’ has also been alluded to in popular culture (for example, *Spider-Man: No Way Home* (Columbia Pictures, Marvel Studios and Pascal Pictures, 2021) and *Everything Everywhere All at Once* (A24 Films, Gozie AGBO, Ley Line Entertainment, Year of the Rat and IAC Films, 2022)).

The issue ignited in 2016 when, in what has colloquially come to be known as the ‘enough is enough speech’, before a Senate Estimates Committee in February 2016, the Commissioner said:

Their clear tactic is to delay and obstruct. They game the system ... These companies have pushed the envelope on reasonableness. They play games. They string us along. They believe we can be stooged. However, enough is enough and no more of this.³⁴

It is not hard to understand the ATO’s chagrin. Again, in 2018 the ATO complained that it was: ‘seeing claims of privilege over thousands or even tens of thousands of documents’,³⁵ but when it ultimately obtained these documents ‘sometimes (presumably inadvertently) even in the same production process (for example, as attachments to other emails)’³⁶ the documents were in the ATO’s view ‘clearly never privileged’³⁷ and the ATO believed it was ‘seeing LPP being claimed using both industrial processes and on an industrial scale’.³⁸

3.3 The challenges of digital technology

In relation to the issues identified in section 3.2, not only has the use of electronic communication media seen the volume of allegedly privileged communications rise dramatically but the range of formats in which privileged communications may be recorded has also expanded, including collaboration software such as Zoom.³⁹ These developments raise further and new challenges for LPP, for example, ‘Can LPP be properly maintained when collaboration software is likely being used throughout the day for mixed purposes, including legal and non-legal purposes? Is LPP lost if various people have access to that software, including third party consultants?’⁴⁰

Without a coherent and strategic approach, there is a real risk that the digital world will tie up the courts, agencies (including the ATO) and LPP claimants in ever longer and costlier privilege claim exercises.

3.4 Grappling with the privilege multiverse

In the absence of a legislatively prescribed procedure for the determination of claims for LPP in non-curial settings, different procedures may be applied by various

³⁴ Senate, Economics Legislation Committee, *Additional Estimates 2015-16: Report to the Senate* (March 2016) [1.38], quoted in Neil Chenoweth, ‘ATO Head Chris Jordan’s Journey from Pariah to Unlikely Hero’, *Australian Financial Review* (7 July 2016) <<https://www.afr.com/policy/tax-and-super/ato-head-chris-jordans-journey-from-pariah-to-unlikely-hero-20160613-gphob4>>.

³⁵ ATO, *National Tax Liaison Group Key Messages: Attachment A Supplementary Information* (30 November 2018) 10. The ATO added: ‘This has led to serious consideration of the mechanisms to test LPP and/or the consequences for reckless claims’.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.* The 2024 Discussion Paper observes that ‘the large market segment of the Australian Taxation Office, as at the preparation of this paper, has around 27 active cases with unresolved LPP claims totalling around 133,000 claims. Approximately 75% of these active cases involve claims made over a year ago’: Attorney-General’s Department and Australian Treasury, above n 8, 6.

³⁹ Online tools include Zoom, Microsoft Teams and other video sharing systems.

⁴⁰ See Christine Wong and Brendan Donohue, ‘Should Your Business Worry About Microsoft Teams, Slack (etc) and Legal Professional Privilege? Answer: It Depends’, *Lexology* (28 October 2022) <<https://www.lexology.com/library/detail.aspx?g=7dfef7ce-5647-472a-b081-ed9e71c96cd3>>. See also Woellner and Bersten, ‘Quo Vadis’, above n 1.

administrative bodies such as the ATO, thus creating a parallel universe or splintered universe with different agencies and courts having their own unique policies and procedures for dealing with privilege claims.⁴¹ In the federal arena, a multiverse may also be created where privilege claims in a non-curial setting are governed by the common law and not the *Evidence Act*.⁴² These divergent approaches create uncertainty and increased costs, and are clearly sub-optimal.

In addition, as there is no mandated procedure tailored for dealing with the privilege claims, the burden falls on the parties to negotiate a sensible process (such as sampling from a large volume of documents as in the *PwC* case⁴³) and to seek judicial approval of that process. Otherwise they run the risk of dealing with the privilege in a way that may involve disputes over an unwieldy number of documents.

3.5 Legal professional privilege and multi-disciplinary firms

The rise and increase of multi-disciplinary professional firms that provide both legal and non-legal advice creates new challenges for the courts. As the 2024 Discussion Paper observed, clients may seek advice from several professional advisers (lawyers, accountants and consultants) in relation to a single issue. This ‘can result in the creation of communications that have a range of purposes, which can make it more difficult to assess whether the dominant purpose test for LPP is met’.⁴⁴

In this context, the most significant recent decision concerning LPP in that context is the *PwC* case,⁴⁵ where a range of legal and other advice was provided by a multi-disciplinary firm. In that case, the taxpayer declined to produce some 44,000 communications sought by the ATO under a section 353-10 notice, arguing that they were all protected by LPP, an assertion challenged by the ATO in respect of 15,500 of the communications. In the Federal Court, Moshinsky J took the very practical step of examining only a small sample of some 116 (less than 1 per cent) of the documents to determine which communications, if any, were privileged.⁴⁶ His Honour concluded that 49 of the documents were privileged, six were partly privileged, and 61 were not privileged. Moshinsky J also found that several documents had been prepared for the purpose of artificially attracting privilege.

The *PwC* decision demonstrates that the courts currently can, in some circumstances, deal effectively with claims of LPP in relation to multi-disciplinary firms and large volumes of digital communications within existing judicial principles, *provided* the

⁴¹ Bathurst, above n 32, [16].

⁴² Ibid [14].

⁴³ *Federal Commissioner of Taxation v PricewaterhouseCoopers* (2022) 114 ATR 335, [931] (Moshinsky J) (*‘PwC’*).

⁴⁴ Attorney-General’s Department and Australian Treasury, above n 8, 7.

⁴⁵ *PwC*, above n 43. The decision and its implications are discussed more fully in Woellner and Bersten, ‘Quo Vadis’, above n 1; see also Paul Latimer, ‘Legal Professional Privilege and the Fight Against Corporate Misconduct’ (2025) 56(1) *Australian Bar Review* 12.

⁴⁶ A similar approach was taken in *CUB Australia Holding Pty Ltd v Federal Commissioner of Taxation* (2021) 287 FCR 71. While acknowledging the sampling of communications can reduce volume related pressures, the 2024 Discussion Paper comments that ‘we have heard that there are limitations in the practice of selecting sample communications for the court to consider. One reason for this is that one party (the person claiming privilege) has access to all of the communications in dispute and the other (the Commonwealth agency) does not and may be required to select a sample without seeing the communications’. See Attorney-General’s Department and Australian Treasury, above n 8, 10 (footnote omitted).

parties agree to a scaled-down dispute process involving a sample of documents. However, it is also clear that if the parties cannot agree on such a process (especially in an increasingly digital world where there are large volumes of documents, both physical and increasingly digital), then the result may be that in a high-volume document case, the dispute process will quickly become unwieldy.⁴⁷ Indeed, in terms of the *PwC* case the firm chose to seek a declaration from the Federal Court in respect of an agreed sample of documents. In such a context, several questions arise:

[W]hat would have happened in the absence of agreement as to the sample? Would an application be made to the court in respect of all documents? Would the determination of Privilege arise in the defence of a prosecution for non-compliance with the Commissioner's exercise of power such as to produce documents? The answer is unclear.⁴⁸

4. ADDRESSING CURRENT ISSUES WITH LEGAL PROFESSIONAL PRIVILEGE

Some options to address the issues raised in this article are outlined below.

4.1 Procedures for making non-curial privilege claims

As noted, there is currently no procedure expressly created by legislation or court rules to judicially test non-curial privilege claims and accordingly, privilege claimants must rely on generally available procedures such as seeking a declaration, as in the *PwC* case.

However, there is a solution ready to hand. The ALRC in its 2008 Report recommended an approach, noting that the Federal Court has a longstanding legislatively mandated scheme for dealing with LPP in the judicial context – set out in the *Evidence Act* and procedures under the *Federal Court Act* and Rules.⁴⁹ In particular, Part 20 of the *Federal Court Rules* (FCR 20) sets out a code for discovery that relevantly requires the party or (more usually) their solicitor to file and serve an affidavit with a list of the documents over which LPP is claimed and verified, and the Court can require legal practitioners to lodge an affidavit certifying that the privilege claims made are proper and reasonable.

In the event of a dispute as to LPP in discovery or as to the admissibility of evidence in federal proceedings to which the *Evidence Act* applies,⁵⁰ the Act codifies the circumstances in which a party can lead evidence of communications for which privilege is claimed.⁵¹ Of significance to this article, the 2008 ALRC Report recommends a model based on the Federal Court discovery rules in FCR 20. This seems an eminently sensible approach.

The ALRC recommended the introduction of federal legislation based largely on the Federal Court rules, providing for a uniform mechanism for the making of a privilege

⁴⁷ See for example, *Federal Court Act 1976* (Cth) s 37M.

⁴⁸ Woellner and Bersten, 'Quo Vadis', above n 1, 557 (noting that the Commissioner's power to produce documents arises under s 353-10 of Sch 1 to the *Taxation Administration Act 1953* (Cth)). It could also be questioned whether, if an application was made in relation to all documents, the court could handle such applications. The fact that it is unclear whether the issue would arise in defence to a prosecution leaves LPP in an undesirable state of uncertainty.

⁴⁹ *Federal Court Rules 2011* (Cth) Pt 20.

⁵⁰ See *Evidence Act 1995* (Cth) Pt 1.2.

⁵¹ *Ibid* Pt 3.10.

claim in both curial and non-curial federal investigations.⁵² Under this recommendation, the main ‘rules’ would be:⁵³

- (1) Privilege claimants must have a reasonable opportunity to make a privilege claim. This would extend to situations where the federal body uses its compulsory powers to obtain access to privileged communications from a third party.⁵⁴
- (2) The claimant needs to specify the grounds and facts relied upon.
- (3) Each claimed document or bundle of documents must be described by date, nature of document and type of communication, the name and position of the author and recipients of the communication.
- (4) If required by the federal body, the particulars of the privileged documents and the basis of claims must be verified on oath or affirmation by the claimant or their legal representative. The ALRC also recommended that State and Territory legal profession associations should ensure that their professional conduct rules provide specific guidance on the legal and ethical obligations of lawyers in verifying LPP claims under the proposed procedure.⁵⁵
- (5) Provision of a description of documents would not per se amount to a waiver of LPP.
- (6) There should be clear timelines set for privilege claims.⁵⁶
- (7) There should be a clear procedure established for obtaining a declaration by a court in the event of privilege disputes.⁵⁷
- (8) Where a federal investigator lawfully copies or images an electronically stored communication, such copying does not cause a waiver of LPP.⁵⁸
- (9) A model of a quasi-privilege for accountants (the non-disclosure right for tax advice documents) should be adopted in respect of the legal analysis in a tax opinion, though the claimant would still be required to disclose the facts.⁵⁹

These principles appear to be sensible as the basis for a solution to the issues raised above.

In September 2021, the ATO released its (draft) *Legal Professional Privilege Protocol*, which sets out the ATO’s ‘recommended approach for identifying communications covered by LPP and making LPP claims to the ATO’.⁶⁰ Following feedback on the draft,

⁵² ALRC, *Privilege in Perspective*, above n 9, Recommendation 8-3.

⁵³ As summarised in Woellner and Bersten, ‘Quo Vadis’, above n 1, 559.

⁵⁴ ALRC, *Privilege in Perspective*, above n 9, Recommendation 8-9.

⁵⁵ Ibid Recommendations 9-1, 9-2.

⁵⁶ Ibid Recommendations 8-5, 8-15.

⁵⁷ Ibid Recommendations 8-6, 8-11.

⁵⁸ Ibid Recommendation 8-16.

⁵⁹ Ibid Recommendation 6-6. This approach is along the lines of the New Zealand model contained in ss 20B-20G of the *Tax Administration Act 1994* (NZ). See also Andrew Maples, ‘The Non-Disclosure Right in New Zealand – Lessons for Australia?’ (2008) 1(3) *Journal of the Australasian Law Teachers Association* 351.

⁶⁰ ATO, *Legal Professional Privilege Protocol* (September 2021).

the ATO released the finalised Protocol (Protocol) in June 2022.⁶¹ In response to concerns that compliance with its Protocol might require standards of particularisation in privilege claims beyond those required by the *Federal Court Rules* and could raise issues of implied waiver (see section 4.3 below), the ATO Protocol notes that there is no standard form of particulars and its approach would help resolve claims.⁶² However, it is significant that the ATO has to date not identified what – if anything – it sees as deficient in the current *Federal Court Rules* or the ALRC recommendation as a possible model for a national LPP regime.

As noted, the current lack of standardisation has the potential to create an unnecessary multitude of divergent standards that may apply inconsistent principles and procedures between the courts and different government agencies. By contrast, the *Federal Court Rules* have for many years applied a standard that serves the purposes of justice effectively and efficiently and should be appropriate for all Federal agencies.

Were the ALRC recommendation to now be freshly examined, especially in the light of artificial intelligence (AI) and other technology which has been developed since the ALRC Report, considerable insights could be gleaned that could significantly improve LPP practice and procedure. It will be of interest to observe the reform options arising in this space from the Attorney-General's Department and Australian Treasury review should a final Paper be released (which, as noted earlier, now appears doubtful).

4.2 Merging multiple agency approaches

To address the issue of multiple diverse agency guidelines – LPP parallel universes – the ALRC recommended that the Attorney-General's Department establish a common approach for LPP claims and disputes amongst federal investigators, including an independent review mechanism before a matter was referred to the courts.

This seems eminently sensible as there is no logical reason why different approaches should apply between the policies of various agencies when the *Federal Court Rules* provide established standards that could easily, simply and expeditiously be applied consistently, providing a standard process for making and determining all privilege claims.

Thus, in the context of tax matters, rather than lawyers having to navigate the ATO Protocol in isolation, the preferable and simplest approach is to determine a single standard and set of rules for the practice and procedure of the privilege in federal non-curial investigations, in particular in this case to adopt the pre-existing ALRC recommendations for a model based on the Federal Court discovery rules.

⁶¹ ATO, *Compliance with Formal Notices – Claiming Legal Professional Privilege in Response to Formal Notices, Legal Professional Privilege (LPP) Protocol* (June 2022) ('Protocol').

⁶² Ibid [8], [11], [33]; ATO, 'ATO Provides Certainty on Legal Professional Privilege Claims' (22 June 2022) <<https://www.ato.gov.au/media-centre/ato-provides-certainty-on-legal-professional-privilege-claims>> (accessed 1 June 2026); ATO, 'Compendium: Compliance with Formal Notices – Claiming Legal Professional Privilege in Response to Formal Notices', available at: <<https://www.ato.gov.au/law/view/document?DocID=SGM/LPPcpd>>, Issue numbers 1 to 3, 7 – ATO Response ('Compendium').

4.3 The issue of implied waiver

As noted below, in June 2022, following discussion with the Law Council of Australia the ATO released a final version of a Protocol designed to manage privilege claims in ATO investigations.⁶³ The ‘voluntary’ Protocol is detailed⁶⁴ and sets out the ATO’s preferred process for claiming LPP. It has been subject to some criticism, not least because the very detailed particulars of an LPP claim required by the ATO Protocol raised concerns about the risk of unintended waiver by applicants (‘the Implied Waiver problem’).⁶⁵ While the final version of the ATO Protocol included in an Addendum an opinion from the Australian Government Solicitor that suggested the risk of waiver was low in making claims in accordance with the Protocol, this opinion was vague and heavily qualified, and also provides little concrete guidance for applicants.⁶⁶ Accordingly, it seems that only the introduction of comprehensive federal legislative protection (as recommended by the ALRC) would put the issue beyond doubt, and it is submitted that this is, therefore, the approach to be preferred. It is unclear as to why such a simple and obvious solution has not been adopted.

4.4 Resolving complications from the digital environment

As already noted, this article argues that careful and comprehensive Commonwealth legislation based on the ALRC ‘rules’ (above), spelling out relevant practice and procedure is essential to ‘save’ LPP in the current digital environment. The growing volume of digital information and the expanding range of formats in which privileged communications occur will continue to raise further challenges for the courts, agencies (including the ATO) and LPP claimants, with the accompanying potential to lead to ever longer and costlier claim exercises.

Although it has largely created or exacerbated the problem, it is important to acknowledge that technology can potentially help to manage technology-based claims for LPP. The ATO has indicated that it would seek to understand how computer-assisted technology can assist it in determining whether to accept, review or challenge a claim.⁶⁷ The 2024 Discussion Paper acknowledged the potential opportunities afforded by AI tools to aid document review but qualifies its support, stating that: ‘While relying on AI and digital tools can make identifying privileged communications more efficient, without adequate oversight and appropriate review, it may result in improper LPP claims’.⁶⁸

⁶³ Law Council of Australia, ‘Protocol to Provide Balanced Framework for Legal Professional Privilege Claims’ (Media Release, 26 July 2019) <<https://www.lawcouncil.asn.au/media/media-releases/protocol-to-provide-balanced-framework-for-legal-professional-privilege-claims>> (accessed 1 June 2026); see ATO, *Protocol*, above n 61.

⁶⁴ As the ATO *Protocol* and its implications have been examined in more detail in other publications, these issues are not reprised again here.

⁶⁵ Law Council of Australia, above n 63.

⁶⁶ Memorandum of advice from Australian Government Solicitor to Australian Taxation Office, ‘ATO Draft LPP Protocol – Written Feedback on Waiver’ (9 May 2022), in ATO, *Protocol*, above n 61, Addendum 4. While ‘voluntary’, the Protocol states in [10] that ‘following the Protocol does not mean we will never have concerns about your LPP claims or challenge your claims ...’: see ATO, *Protocol*, above n 61.

⁶⁷ ATO, ‘Compendium’, above n 62, Issue numbers 70-74 – ATO Response.

⁶⁸ Attorney-General’s Department and Australian Treasury, above n 8, 7.

To reflect the potential opportunities that AI technology affords to the efficient resolution of LPP claims, the ALRC recommendations should be updated to specifically address the digital environment and be mandated/legislated across agencies to avoid agencies adopting their own processes and exacerbating the parallel universe/multiverse issues discussed above.

5. THE PRIVILEGE AGAINST SELF-INCRIMINATION: THE DOCTRINAL BACKGROUND

5.1 What is the privilege against self-incrimination?

The basic principles of PASI have been examined in detail in earlier studies;⁶⁹ these principles are summarised below.

Essentially, PASI – encapsulated in the maxim ‘*nemo tenetur accusare se ipsum*’ (‘no one is bound to incriminate himself’)⁷⁰ – has the effect that a person is not bound to answer any question or produce any document under compulsion if the answer or the document would tend to expose that person,⁷¹ either directly or indirectly, to a criminal charge, the imposition of a penalty⁷² or the forfeiture of an estate which is reasonably likely to be proffered or sued for. It is a basic and substantive common law right,⁷³ and not merely a rule of evidence.⁷⁴ It has been described as crucial in reducing the power imbalance between the citizen and the state,⁷⁵ preserving the presumption of innocence and ensuring the burden of proof remains on the prosecution.⁷⁶ However, PASI is limited in that the privilege is generally said to be ‘testimonial in nature’, that is, while protecting a witness from being ‘convicted out of his own mouth’, it does not protect non-testimonial evidence such as fingerprints, DNA, blood or breath samples, police line-ups or the like.⁷⁷

PASI has been described as ‘a cardinal principle of our system of justice’,⁷⁸ which ‘is based on the desire to protect personal freedom and human dignity’.⁷⁹ As the Queensland Law Reform Commission in its 2004 Report observes, ‘the courts have accordingly made it clear that the privilege should not be removed lightly’.⁸⁰

⁶⁹ For example, Woellner and Bersten, ‘Quo Vadis’, above n 1; Justice Robert McDougall, ‘The Privilege Against Self-Incrimination: A Time for Reassessment’ [2008] *New South Wales Judicial Scholarship* 24.

⁷⁰ QLRC, above n 2, 9.

⁷¹ Corporations and other entities cannot claim the privilege: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 500 (‘*Environment Protection Authority v Caltex Refining*’).

⁷² This article does not address the privilege against a penalty or forfeiture.

⁷³ Section 128 of the *Uniform Evidence Acts* provides a statutory version of the privilege which applies in federal court proceedings.

⁷⁴ ALRC (Rosalind Croucher, President), *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws: Final Report* (ALRC Report No 129, 2015) [11.9] (‘*Traditional Rights and Freedoms*’).

⁷⁵ Ibid [11.30], quoting Gleeson CJ in *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118, 127.

⁷⁶ Ibid [11.29], quoting Kirby J in *Cornwell v The Queen* (2007) 231 CLR 260, [176].

⁷⁷ In *Sorby*, Gibbs CJ observed that PASI ‘prohibits the compulsion of the witness to give testimony, but it does not prohibit the giving of evidence, against the will of a witness, as to the condition of his body’: *Sorby*, above n 2, 292; ALRC, *Traditional Rights and Freedoms*, above n 74, [11.16].

⁷⁸ *Sorby*, above n 2, 294 (per Gibbs CJ) and quoted in QLRC, above n 2, [1.6].

⁷⁹ Murphy J in *Pyneboard*, above n 3, 346; quoted in ALRC, *Traditional Rights and Freedoms*, above n 74, [11.31]. See also *Stergis v Boucher* [1989] FCA 120, [50]-[51] (‘*Stergis*’).

⁸⁰ QLRC, above n 2, [1.8] citing ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC Report 95, December 2002) [18.23]-[18.24].

However, perhaps surprisingly, despite its importance, PASI is not protected expressly or impliedly by the Australian Constitution, nor – unlike some overseas jurisdictions – does Australia have a Bill of Rights that might protect the privilege. Accordingly, PASI can be limited or abrogated by legislation which exhibits a clear intention to do so.⁸¹

While the advent of the ‘regulatory state’,⁸² where legislation reigns supreme, has seen the volume of legislation generally increase dramatically and, with it, legislation interpreted by the courts as abrogating or limiting PASI similarly increase – often the legislation itself has been silent or unclear on abrogating or limiting PASI. As a result,⁸³ this creates a vacuum, meaning that the fate of PASI and the protection it offers must be determined by the courts.

It is submitted that poor policy choices by the courts have over time resulted in PASI coming under severe pressure, causing its scope (and therefore its protection) to shrink.⁸⁴

As with LPP, PASI has no doubt sometimes been abused.⁸⁵ However, in the main, again as with LPP, PASI has operated appropriately and effectively over a very long period and offered important protection crucial to citizens’ rights. It might therefore be expected that PASI would enjoy unalloyed support.

5.2 The ongoing erosion of the privilege against self-incrimination

Traditional rationales supporting PASI⁸⁶ have been generally accepted (and the importance of the privilege recognised) over many years. However, the protection given by PASI is not absolute, and can be limited or abrogated by legislation showing a clear intent to do so. In addition, the context in which it operates has changed over time. Thus, courts today would (hopefully) not tolerate the use of torture to extract information or confessions from accused persons, accordingly, it is argued that the rationale for the privilege which relied on avoiding abuse of the state imbalance of power should be correspondingly of less weight than it might have been in the less enlightened past.⁸⁷

⁸¹ See, eg, *Malika*, above n 6, 298 (per McHugh J); ALRC, *Traditional Rights and Freedoms*, above n 74, ch 11.

⁸² *Malika*, above n 6, 299 (per McHugh J).

⁸³ For example, in the cases of LPP, the change from a sole purpose test to one of dominant purpose.

⁸⁴ See, eg, *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564 (‘*De Vonk*’); *Stergis*, above n 79.

⁸⁵ In the United States context, one of the most notable examples involved married couple Michael and Tareq Salahi, who attended a White House state dinner for the Indian Prime Minister in November 2009 without an invitation and met President Barack Obama. During a later hearing before the Committee on Homeland Security, the Salahis’ repeatedly invoked the Fifth Amendment to the United States Constitution – the functional equivalent to PASI – doing so more than 30 times in response to questioning: Ellen Brait ‘Pleading the Fifth: Five Notorious Times People Refused to Give Answers’, *The Guardian* (4 February 2016) <<https://www.theguardian.com/law/2016/feb/04/fifth-amendment-martin-shkreli-michael-tareq-salahi>>. Closer to home (in a case not involving a claim for privilege considered abusive), the High Court rejected a broad claim for PASI in *Deputy Commissioner of Taxation v Shi* (2021) 273 CLR 235. Following judgment against Mr Shi for substantial tax debts of AUD 42 million the Deputy Commissioner of Taxation was granted worldwide freezing orders and disclosure orders regarding the whereabouts of Shi’s assets. Relying on s 128A of the *Evidence Act 1995* (Cth) Shi objected to disclosure arguing it may tend to incriminate him under Australian law. In a decision also illustrating the narrowing of PASI, the High Court applied the exception to the privilege in s 128A(6) and ruled (by majority) that in the interests of justice Shi was not entitled to the privilege.

⁸⁶ McDougall, above n 69; ALRC, *Traditional Rights and Freedoms*, above n 74, [11.27]–[11.32].

⁸⁷ See for example QLRC, above n 2, [3.1]–[3.9].

However, it would be necessary to ask whether the scales have tipped too far. As the QLRC has stated: ‘in an era of increased legislative regulation and demands for greater investigative powers for regulatory authorities, there remains a need for protection against the way in which these powers may be exercised’.⁸⁸

The potential for misuse of governmental powers is clear from the Robodebt scandal and other recent examples, as is the need to ensure appropriate protection for citizens from such misuse, especially in a digital world, where actions and problems can spread across society and beyond with blinding speed.

Reflecting on the balance struck between the state’s power to prosecute and the position of an individual who stands accused in the criminal justice system, in *Lee v The Queen*,⁸⁹ the High Court stated that:

The principle of the common law is that the prosecution is to prove the guilt of an accused person. ... The principle is so fundamental that ‘no attempt to whittle it down can be entertained’, albeit its application may be affected by a statute expressed clearly or in words of necessary intendment.⁹⁰

Similarly, as noted by the ALRC, the High Court has observed that ‘important rights and freedoms should only be interfered with reluctantly – when truly necessary’.⁹¹ Accordingly, courts traditionally required very clear legislative direction before holding that legislation had abrogated a ‘fundamental’ common law principle or interfered with fundamental human rights. As McHugh J observed in *Malika*: ‘Clear and unambiguous language is needed before a court will find that the legislature has intended to repeal or amend these and other fundamental principles’.⁹² In recent times, the courts have lowered the bar for abrogation of PASI (and thus reduced the scope of the protection it affords to citizens) dramatically.

That is, regrettably, despite the courts’ very strong statements, there has in recent times been considerable ‘whittling’ down of PASI on bases that were not always well considered. This has now reached a point where the protections offered by PASI have been significantly eroded and diminished.

6. CAUSES OF THE ONGOING EROSION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE WAY FORWARD

The erosion of PASI over time primarily seems to have been due to two key factors – neither acting malevolently.

⁸⁸ Ibid [6.11].

⁸⁹ *Lee v The Queen* (2014) 253 CLR 455 (‘*Lee*’).

⁹⁰ Ibid 467 (footnotes omitted), cited in ALRC, *Traditional Rights and Freedoms*, above n 74, [11.28]. In *Stergis*, Hill J stated that ‘The genius of the common law lay in its ability to respond to the needs of the liberty of the subject’, and ‘The privilege against self-incrimination is deeply ingrained in the common law’: *Stergis*, above n 79, [50], [51] (citing *Sorby*, above n 2, 309, per Mason, Wilson and Dawson JJ), respectively.

⁹¹ See ALRC, *Traditional Rights and Freedoms*, above n 74, [1.15].

⁹² *Malika*, above n 6, 298.

6.1 The increasingly active role of Parliament

Although it is recognised as a crucial and substantive common law right, the privilege against self-incrimination is not absolute,⁹³ because it enjoys no specific legislative protection, nor does Australia have a Bill of Rights which might provide it protection. As noted above, it is well established therefore that Parliament can abrogate or restrict the privilege by passing legislation which is clearly intended to do so – and over time Parliament has taken up the opportunity to enact legislation designed to abrogate or limit PASI.⁹⁴ No doubt this was done with good intent, but the result has been extremely unfortunate.

It is significant, however, that not only does the number of abrogating Acts appear to have continually increased over time, but there also seems to have developed a tendency for the criterion applied by courts for finding implied abrogation to have changed from the traditional focus on human needs and protection of citizens' rights⁹⁵ to one focusing on the alleged needs of government (ie, a change from people to 'things', such as 'economic efficiency' arguments).⁹⁶ Sometimes this seems to occur without vigorous (or any) testing of parties' submissions. This is an alarming and unacceptable development.

In the past, was there was a default assumption that legislation was not intended to remove fundamental rights and, as a result, courts would only find that legislation overrode a fundamental right such as one of the privileges where the legislative intent to do so was 'clear and unambiguous'⁹⁷ or spoke with 'irresistible clearness'.⁹⁸ In 2004, the Queensland Law Reform Commission stated that: 'In the absence of express words of abrogation, the exclusion of the privilege against self-incrimination will depend on whether the provision in question sufficiently demonstrates the relevant intention by "necessary implication"',⁹⁹ a phrase it has been held 'imports a high degree of certainty as to legislative intention'.¹⁰⁰

The key preliminary issue in determining whether a piece of legislation abrogates or limits PASI is, therefore, to determine whether or not the particular principle or right in question is 'fundamental', because presumably a court would require clearer evidence of intention to abrogate a 'fundamental' principle than it would in the case of a 'basic' principle. This issue will be determined by reference to not only the language of the particular Act or principle in question, but also the purpose which the principle is designed to achieve. In earlier cases, there seemed to be general agreement on a relatively settled core of 'fundamental' principles. For example, in *Malika*, McHugh J identified as 'fundamental legal principles' such things as the requirement that a civil

⁹³ It is not protected by the Australian Constitution. See eg *Sorby*, above n 2, 308 (per Mason, Wilson and Dawson JJ).

⁹⁴ See ALRC, *Traditional Rights and Freedoms*, above n 74, ch 11. The ALRC report also lists six areas where Commonwealth laws exclude PASI: [11.71]-[11.110].

⁹⁵ See, eg, *Environment Protection Authority v Caltex Refining*, above n 71, 503 (per Mason CJ and Toohey J). See also *Sorby*, above n 2 (per Gibbs CJ); *Rees v Kratzmann* (1965) 114 CLR 63, 80 (per Windeyer J).

⁹⁶ See, eg, *De Vonk*, above n 84; *Stergis*, above n 79. See also arguments concerning stultification (section 6.3 of this article).

⁹⁷ *Malika*, above n 6, 298 (per McHugh J).

⁹⁸ Ibid 299 (quoting *Potter v Minahan* (1908) 7 CLR 277, 304).

⁹⁹ QLRC, above n 2, [7.3] citing *Sorby*, above n 2, 309 (per Mason, Wilson and Dawson JJ).

¹⁰⁰ *Hamilton v Oades* (1989) 166 CLR 486, 495 (per Mason CJ) ('*Hamilton*') cited in QLRC, above n 2, [7.3].

or criminal trial must be fair; and a criminal charge is to be proved beyond reasonable doubt.¹⁰¹

However, his Honour warned that care needs to be taken in declaring a principle to be ‘fundamental’, because: ‘times change. What is fundamental in one age or place may not be regarded as fundamental in another age or place’.¹⁰²

That is, his Honour was suggesting that in the ‘new regulatory world’, given the frequency with which the legislature now amends or abolishes rights, or departs from the general system of law, it is difficult to accept an initial presumption that the legislative intention is not to abrogate.

6.2 The corrosive role of the courts

There is now a significant and increasing number of federal Acts that may be seen as potentially abrogating the privilege against self-incrimination. Unfortunately, legislation to date has rarely abrogated the privilege expressly and is often silent or unclear on whether it is intended to impliedly abrogate or restrict the privilege in a particular situation. This creates a vacuum which means that the courts are required to resolve the uncertainty by engaging in the very difficult subjective exercise of determining whether the legislation has impliedly abrogated the privilege and if so, to what extent. It is relevant in this context to note that ‘the modern view of the privilege as a significant human right reinforces the argument that, if the right is to be abrogated, the abrogation should be clearly and unambiguously expressed’,¹⁰³ because an individual should be able to determine clearly whether or not they are entitled to rely on PASI.¹⁰⁴

The first issue for the court in this process will be to determine whether or not the principle in question is properly characterised as ‘fundamental’. As noted, this will generally be determined by the court in light of not only the language of the particular principle, but also the principle’s character and the purpose which it is designed to achieve.¹⁰⁵ This first step is crucial because presumably a court would require stronger evidence to justify finding a clear legislative intent to abrogate a ‘fundamental’ principle than if the principle in question is an ‘ordinary’ principle.

It is important to note that depending on how a court interprets and applies these criteria, the court’s decision will expand or contract the scope of (and therefore the protection afforded by) the privilege.

Assuming that the principle in question is characterised as ‘fundamental’, the second step will require the court to identify and balance the factors it will take into account in

¹⁰¹ *Malika*, above n 6, 298.

¹⁰² *Ibid.*

¹⁰³ QLRC, above n 2, [7.33].

¹⁰⁴ *Ibid* [7.31]-[7.32].

¹⁰⁵ *Ibid* [7.3]-[7.4] citing respectively *Hamilton*, above n 100, 495 per Mason CJ, and *Pyneboard*, above n 3, 341 (per Mason ACJ, Wilson and Dawson JJ). The QLRC noted that in 2002 the High Court had in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 (*‘Daniels’*) replaced the former test with a ‘considerably more stringent approach’ to the determination of implied abrogation and rejected the previously held view (in *Pyneboard*, above n 3) that an expression in a provision in general terms would be sufficient to impliedly abrogate a fundamental common law right such as PASI, on the basis that a power conferred in general terms would be unlikely to contain the necessary implication: QLRC, above n 2, [7.6]-[7.8].

reaching its decision on whether or not PASI has been impliedly abrogated or restricted. This difficult balancing process will often involve consideration of competing public and private interests,¹⁰⁶ and a determination of whether – in the court’s view – the identified public interests outweigh the ‘private’ interests of an individual or group. This exercise of balancing what are invariably amorphous and elusive policy factors can raise very difficult issues in an area such as this where there are no ‘bright line’ tests, and policy factors may be finely balanced.

On one side of the balance will generally be an array of ‘public interest’ factors. Some may be compelling, such as national security, or pandemic health crises. However, the public interest factors are not always of that ilk, and indeed the ‘weight’ of public interest factors seems to be diminishing over time.

For example, one ‘public interest’ factor which has been strongly argued in recent times as favouring abrogation is the claimed (and apparently insatiable) need for government agencies to have unrestricted access to (all) information – including privileged information – in order, it is claimed, to be able to operate effectively (the ‘economic efficiency’ argument). It is also often argued that this is a predominant factor, because – so it is said – unless government agencies (and others) have the power to compel the provision of incriminating information, the agency will be unable to perform its designated role effectively.

On the other side of the balance will often rest ‘individual’ interests and rights (such as human privacy and dignity).

As noted above, in approaching this balancing process, one of the problems is that the type of ‘public interest’ being relied upon as a justification for implied abrogation seems to have become much less compelling over time. Early justifications for abrogation generally targeted ‘first level’ issues such as the public interest in national security, serious risk or crime, and the like.¹⁰⁷ For example, the Law Council of Australia suggested that ‘an investigation into “major criminal activity, organised crime or official corruption” might justify an abrogation of the privilege, as would risks such as “danger to human life, serious personal injury or damage to human health”’¹⁰⁸ (in the context of its submission more broadly that abrogation should be based on an “assessment that the public benefit which will derive from negation of the privilege must decisively outweigh the resultant harm to the maintenance of civil rights”¹⁰⁹). The ACTU¹¹⁰ was more restrictive, taking the view that only the intention to avoid serious risk would justify abrogation and being critical of the inclusion of workplace relations as a criterion, on the basis that, unlike workplace health and safety, ‘no such pressing public

¹⁰⁶ Ibid [6.24] listed a series of factors (originally proposed in the New Zealand Law Commission, *The Privilege Against Self-Incrimination: Discussion Paper* (NZLC PP 25) (Wellington, 1996) 86-87, 91).

¹⁰⁷ Compare the examples provided by the Queensland Law Reform Commission: QLRC, above n 2, [6.18]-[6.21], and the observations in *Hamilton*, above n 100, 503 (per Deane and Gaudron JJ).

¹⁰⁸ ALRC, *Traditional Rights and Freedoms*, above n 74, [11.49], quoting Law Council of Australia, *Submission 75* (‘Submission 75’).

¹⁰⁹ ALRC, *Traditional Rights and Freedoms*, above n 74, [11.49], quoting Law Council of Australia, *Submission 75*, above n 108.

¹¹⁰ Australian Council of Trade Unions (ACTU), *Submission 44*, quoted in ALRC, *Traditional Rights and Freedoms*, above n 74, [11.50].

interest was at stake' though they went on to include lower-level factors, such as serious damage to property or the environment or significant economic detriment.¹¹¹

It would be difficult to argue against the first few of the above factors. However, factors such as damage to the environment or property, or 'significant' economic detriment¹¹² (an elusive and difficult criterion to determine), while no doubt important, are arguably of a lesser order of magnitude and focus on damage to 'things' rather than people, yet increasingly are being held to override humanist factors. For example, the Terms of Reference for the ALRC's *Traditional Rights and Freedoms* investigation specifically directed it to include in its analysis a consideration of Commonwealth laws in the areas of but not limited to: 'commercial and corporate regulation'; 'environmental regulation'; and 'workplace relations'.¹¹³

This inclusion of 'second level' factors as criteria justifying a finding of implied abrogation of PASI represents a serious weakening in the threshold PASI requirement of 'public interest'. This is significant, because the weaker the threshold or 'entry' requirements become, the wider the range of factors which can be considered as favouring abrogation, and thus the narrower the scope left to be covered by PASI protections, and the significant expansion in the range of unprotected citizens. That is not to argue that areas such as workplace relations are not important public interests, but they are arguably qualitatively different and of a lesser order of magnitude than issues such as the risk of death or injury and national security. Such secondary factors are also increasingly remote from the original humanist rationale for the privilege. That is, the focus seems to have shifted from the protection of people to the protection of 'things'. This is inappropriate but provides an interesting illustration of the way that the implied abrogation exemption is being expanded and the scope of the privilege's protection correspondingly eroded.¹¹⁴

The impact of this trend towards less stringent criteria was aptly summarised by McHugh J in *Malika* who observed: 'Such is the reach of the regulatory state that it is now difficult to assume that the legislature would not infringe rights or interfere with the general system of law'.¹¹⁵ McHugh J¹¹⁶ went on to cite with apparent approval the comments of the six Justices of the High Court in *Bropho v Western Australia*¹¹⁷ who observed that, if a principle ceases to be characterised as 'fundamental', 'the presumption that the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear'¹¹⁸ (as would the protection offered by the privilege). This reflects a complete 'about face' from the traditional view.

¹¹¹ Ibid [11.50], [11.107].

¹¹² Law Council of Australia, *Submission 75*, above n 108, quoted in ALRC, *Traditional Rights and Freedoms*, above n 74, [11.49].

¹¹³ ALRC, *Traditional Rights and Freedoms*, above n 74, 5-6. As noted above, the ACTU opposed the inclusion of workplace relations as a fundamental area: see ACTU, above n 110.

¹¹⁴ An exception is *De Vonk*, above n 84.

¹¹⁵ *Malika*, above n 6, 299.

¹¹⁶ Ibid.

¹¹⁷ *Bropho v Western Australia* (1990) 171 CLR 1. 18 (per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

¹¹⁸ Ibid and cited by McHugh J in *Malika*, above n 6, 299.

6.3 Abrogation of the privilege against self-incrimination and the argument of ‘stultification’

However, the courts seem to have been increasingly ready in recent times to treat PASI as impliedly abrogated, with this conclusion based (at least in part) on an argument of ‘stultification’ (ie, total frustration). Thus, in *Stergis*, which concerned whether applications to have a matter heard had been lodged within a reasonable time, Hill J concluded, in finding the privilege had been impliedly abrogated by a change in legislation, that it would be ‘stultifying the whole purpose’ of the *Income Tax Assessment Act 1936* (ITAA 1936) if the accused persons could claim the privilege, as it would be impossible for ATO investigators to operate effectively.¹¹⁹

Similar comments were made in *Commissioner of Taxation v De Vonk*.¹²⁰ That case concerned a notice served on De Vonk under the then section 264 of the ITAA 1936 (the predecessor to section 353-10 of Schedule 1 to the *Taxation Administration Act 1953* (Cth)) by the ATO, requiring him to attend and be examined in relation to certain activities of and distributions by a gold mining syndicate which related to criminal charges. On appeal, the Full Federal Court in *De Vonk* (Foster, Hill and Lindgren JJ), confirmed that PASI (and LPP) had been impliedly abrogated.¹²¹ The Court based this conclusion on a ‘stultification’ argument.

Hill and Lindgren JJ commented that:

If the argument were to prevail that the privilege against self-incrimination was intended to be retained in tax matters, it would be impossible for the Commissioner to interrogate a taxpayer about sources of income since any question put on that subject might tend to incriminate the taxpayer by showing that the taxpayer had not complied with the initial obligation to return all sources of income.¹²²

That is, the Court held that such an argument would ‘totally stultify’ the collection of income tax.¹²³ The correctness of such decisions is not beyond dispute, as considered below.

Nevertheless, the ‘stultification’ argument has grown apace. Indeed, McNicol argues that ‘it is clear that frustration of statutes has become the yardstick for determining whether there is a clear manifestation of a legislative intention to abrogate privilege by necessary implication’.¹²⁴ McNicol goes on to argue that it is rare now for the courts to find that the purpose of a piece of legislation would not be stultified if privilege were to apply. After *Daniels*¹²⁵ (see below), this may be a (slight) overstatement, as some of the High Court judges there expressed (*obiter*) a welcome scepticism with this argument.

¹¹⁹ *Stergis*, above n 79, [61] quoting Lord Goddard CJ in *Commissioners of Customs and Excise v Ingram* (1948) 1 All ER 927, 929. These comments were echoed by the Full Federal Court in *De Vonk*, above n 84, 582.

¹²⁰ Above n 84.

¹²¹ *Ibid*. The case turned primarily on the issue of whether the terms of the *Taxation Administration Act 1953* authorised the ATO to publish or disclose the transcripts of Mr De Vonk’s earlier compulsory questioning by the ATO.

¹²² *De Vonk*, above n 84, 583.

¹²³ *Ibid* 583, cited in ALRC, *Traditional Rights and Freedoms*, above n 74, [11.74].

¹²⁴ Suzanne B McNicol, ‘*Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another*’ (2002) 24(2) *Sydney Law Review* 281, 294.

¹²⁵ *Daniels*, above n 105.

Indeed, the validity of the ‘stultification’ argument, has been questioned. For example, in *Binetter v Deputy Commissioner of Taxation* (‘*Binetter*’),¹²⁶ the taxpayer argued that: ‘There is nothing to suggest that the offence provision that existed before 1984 stultified the operation of s 264, even though the privilege against self-incrimination apparently could then be claimed’.¹²⁷ While the Court in *Binetter* did not directly address the taxpayer’s arguments, it certainly did not reject them, deciding the case instead on the basis that the Court was obliged to follow the decision in *De Vonk*.

A question that must be asked is: what evidence is there that the ATO (or other government agencies) would be unable to function effectively if the ATO was unable to question taxpayers on privileged issues, and if this were the case, would it cripple an ATO investigation or its operations? There does not seem to be any reported case where the only evidence led by the ATO was a taxpayer (or other) confession, as distinct from the usual detailed analysis of box loads of extensive taxpayer and third-party documentation and communications gleaned from a range of sources.¹²⁸ That is, experience suggests that the stultification argument is based on a false premise – it is simply not true that the ATO, for example, would be unable to obtain adequate information if PASI applied – the ATO has numerous other sources of information available to it.

In *Daniels*, the High Court considered (tangentially) the stultification argument. *Daniels* was not directly on point, as it involved the question of whether section 155 of the *Trade Practices Act 1974* impliedly abrogated LPP (rather than the application of PASI). However, it is submitted that the base principles apply equally to PASI. In *Daniels*, the Full High Court of seven Justices (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) reinforced the principle that only very clear words in a statute would create an implied abrogation.¹²⁹ More significantly for present purposes, some judges in *Daniels* also expressed a degree of scepticism when dealing with the stultification argument.¹³⁰

Reflecting further on the stultification argument, there is an even more fundamental and important question that should be asked: on what basis should economic efficiency arguments such as that put forward in *De Vonk* and elsewhere be allowed to outweigh arguments based on human rights and the importance of a privilege which has been characterised as a ‘bulwark of liberty’¹³¹ and which protects citizens’ rights to dignity, privacy and freedom?

¹²⁶ *Binetter v Deputy Commissioner of Taxation* (2012) 206 FCR 37.

¹²⁷ Ibid [23] point (4); see also [23] point (5), [24].

¹²⁸ However, it is possible that a ‘confession’ or ‘admission’ could conceivably lead the ATO to, at least, take a closer look at some of these other sources.

¹²⁹ *Daniels*, above n 105, [100] (per Kirby J).

¹³⁰ Ibid [24]; for example, the plurality (Gleeson CJ, Gaudron, Gummow and Hayne JJ) commented that: ‘A communication the purpose of which is to “seek help to evade the law by illegal conduct” is not privileged. That being so, it is difficult to see that the availability of legal professional privilege to resist compliance with a notice under s 155(1) of the Act would result in any significant impairment of the investigation of contraventions of the Act, much less in the frustration of such investigations. At least, that conclusion is far less obvious than in the case of the privilege against exposure to penalties’ (footnote omitted).

¹³¹ *Pyneboard*, above n 3, 340, quoted in QLRC, above n 2, [1.6].

Is there a risk of unintentionally impacting some human rights – or perhaps seeing the first sparks from the Bonfire of the Privileges?

That is, we should be asking: on what basis has the (alleged) apparently endless claimed need of the ATO (and other investigative agencies) for information in the name of economic efficiency be elevated – in many cases without much apparent reflection or argument – over the important human rights fundamental to the traditional operation of PASI?

Certainly, such decisions involve a delicate and difficult balancing process, in which a range of factors must be taken into account.

However, economic efficiency arguments have been raised more often in recent cases and increasingly given predominant weight over ‘human’ factors. For example, Crosbie and Kumar¹³² note that clearly:

Statutory investigations are an increasingly important tool in modern administration and regulation. In the past year, governments have come under renewed pressure to strengthen the powers of regulatory and investigatory bodies. Terrorism and dramatic corporate collapses both here and overseas have led to fresh demands on regulatory bodies. Against this call for greater powers is an equally loud plea for a review of the way in which regulators exercise their powers. ... Inevitably a tension arises between the need to regulate and the very real prospect of diminished individual rights.¹³³

It must of course be conceded that gathering information for the purpose of investigation and related activities is important for investigative agencies, but is it really more important than the human values represented by PASI? We must ask whether a focus on economic efficiency is a more appropriate focus of PASI than its traditional ‘humanist’ concerns. The authors submit strongly that the answer should clearly be ‘no’ and submit that a much closer and better-informed analysis would be necessary before adopting this economic efficiency approach, particularly as the economic efficiency argument depends on an attractive but seductive ‘slippery slope’ argument.

If the economic efficiency argument continues to be applied and the range of agencies and departments claiming abrogation of the privilege continues to expand, there is a real risk that the areas covered by claimed economic efficiency arguments (where the privilege would be abrogated) could become virtually all-encompassing. Indeed, this process is arguably already in motion, as the numerous such agencies referred to by the ALRC Report¹³⁴ attest. If so, this could leave no space at all for the application of PASI and its important protections.

Could this exclusion of PASI leave some (potential) claimants feeling abandoned and unprotected, left to watch their hopes – and rights – slowly sink and drown unheeded in the weeds and mud at the bottom of the jurisprudential pool?

¹³² Fiona Crosbie and Ben Kumar, ‘Power versus Privilege: The Implications of Daniels v ACCC’ (2003) 31(1) *Australian Business Law Review* 7, cited in QLRC, above n 2, [1.7].

¹³³ *Ibid* 7.

¹³⁴ See for example as referred to in ALRC, *Traditional Rights and Freedoms*, above n 74.

It is important to recall that the test that courts generally apply for determining implied abrogation is one of ‘necessary implication’,¹³⁵ under which the court will not interfere with fundamental¹³⁶ rights or common law principles (such as PASI) unless Parliament makes it ‘unmistakably clear that it intended the statute to do so’.¹³⁷ This protection appears to be going out with the tide.

6.4 The way forward

The erosion of PASI has been driven primarily by the flood of legislation which (as interpreted by the courts) has sought generally to impliedly (rather than expressly) limit or abrogate the privilege and which leaves accused people uncertain of their position, and therefore exposed and vulnerable.

The erosion of PASI illustrates that unless legislation is accurately targeted and carefully drafted, and interpreted prudently by the courts, it can create a vacuum which generates uncertainty. It also highlights the corrosive effect of court decisions giving ‘economic efficiency’ arguments greater weight in the balancing process than the ‘humanist’ values on which PASI was based, and too often – apparently without proof or argument – elevate ‘stultification’ arguments over humanist factors. This shifts the balance too far in favour of governments and away from the original rationales of PASI and creates uncertainty for those trying to ‘read the judicial tea leaves’.

The present uncertainty is unnecessary, because, as the Queensland Law Reform Commission recommended, it could be removed comparatively simply by the introduction of general federal legislation stating expressly that in the absence of a ‘clear, express provision to the contrary’, a person can claim PASI.¹³⁸ This might at least force parliamentary drafters to consider the issue directly in each case, alert legislators to it, determine whether or not the legislators do intend the legislation to abrogate or restrict the privilege, and to then draft the legislation accordingly.

7. CONCLUSION

Privileges wavering in the diverse legislative universes or sinking in the weeds. The irony is overwhelming – LPP struggles because it lacks a comprehensive Commonwealth legislative framework; by contrast, PASI struggles with a surfeit of (poor) legislation.

The moral is that a legislative framework is essential, but unless it is carefully targeted and skilfully drafted, it can cause more problems than it solves.

This article has considered two key common law privileges – legal professional privilege and the privilege against self-incrimination. The first, LPP, exists to serve the

¹³⁵ QLRC, above n 2, [7.3] citing *Sorby*, above n 2, 309. As noted, it has been said that the term ‘necessary implication’ ‘imports a high degree of certainty as to legislative intention’: QLRC, above n 2, [7.3] citing *Hamilton*, above n 100, 495 (per Mason CJ).

¹³⁶ It is worth noting that in *Kassam v Hazzard* (2021) 106 NSWLR 520, 542, Bell P warned that outside the core areas, the rule ‘invites attention to ... the meaning of and manner in which “fundamental rights” are to be identified’ (reference omitted), going on to note the observations of McHugh J in *Malika*, above n 6, 298, ‘who urged caution in the identification of fundamental values and correlative fundamental rights in recognition of the fact that “in Australia today, few principles or rights can claim to be so fundamental that it is unlikely that the legislature would want to change them”’.

¹³⁷ ALRC, *Traditional Rights and Freedoms*, above n 74, [1.7].

¹³⁸ QLRC, above n 2, [7.33], see also [7.31]–[7.32], [7.35].

extremely important public interest in the administration of justice by encouraging full and frank disclosure by clients with their lawyers, thus enabling the lawyer to provide accurate legal advice. PASI protects a person from being required to incriminate themselves. It also acts as a significant protection for individuals in the modern computerised era which sees the state collecting and sharing considerable amounts of often confidential information about its citizens.

While both privileges offer vital protection to citizens, in non-curial cases both are under attack. Without oversimplifying the complex issues facing each privilege, at one level it is clear that a significant contributor to the issues discussed above is the inability of the common law to keep pace with developments impacting these privileges.

In relation to LPP (and other matters), the courts struggle to deal with ‘modern’ technology (and the exponential growth of modes of communication). There is also an organic problem with solely relying on the ATO or other agency guidelines on LPP when they are interested in the dispute over claims.

Taking all matters into account, there is an overwhelming case for implementing the recommendations of the (neutral) ALRC by extending the Federal Court discovery rules to non-curial cases, setting out the rules for claiming LPP and how to deal with disputes in respect of LPP claims. The recommendations in the 2008 ALRC Report provide a sound and ‘shovel-ready’ model for future legislation.

As part of this process, the current ALRC should be tasked with updating its 2008 recommendations to recognise the digital environment and development of AI technologies. The 2008 recommendations could be stripped of non-core elements such as the recommendation based on the New Zealand non-disclosure right for tax advice documents¹³⁹ so that the Commission could focus on the key areas where legislation is necessary, that is, to:¹⁴⁰

- (i) establish a whole federal government approach for non-curial LPP claims, drawing on the Federal Court discovery rules and embracing the discipline of lawyer affidavits to verify claims;
- (ii) avoid creating or perpetuating a privilege multiverse across federal agencies by establishing one set of rules for all federal agencies concerning LPP practice and procedure in curial and non-curial contexts alike, involving first an independent review mechanism and ultimately claims resolved in the Federal Court;
- (iii) legislate to guarantee that there is no ‘implied waiver’ when taxpayers, advisers or others make claims following the established LPP rules; and
- (iv) deal with increasing LPP claims for privilege in a digital universe and build in AI and similar technologies to support the making and resolution of the claims.

Ironically, while the erosion of LPP has arisen through the lack of clear, targeted legislation, the erosion of PASI has been driven primarily by the flood of federal Acts which may be seen as impliedly abrogating the privilege. Unfortunately, legislation to

¹³⁹ Maples, above n 59.

¹⁴⁰ Woellner and Bersten, ‘Quo Vadis’, above n 1, 567.

date has rarely abrogated the privilege expressly, and is often silent or unclear on whether it is intended to impliedly abrogate or restrict the privilege in a particular situation.

The stultification argument used increasingly often as the basis for abrogation was treated with scepticism by some judges in the High Court in *Daniels* – quite rightly. It is simply not true that the only source of information available to the ATO and other agencies is a confession by the taxpayer. Yet the courts seem (too often so far as appears from case reports) to accept this assertion (and the ‘economic efficiency’ arguments) without testing it.

The solution to this issue is comparatively simple. Drawing on the QLRC recommendation, the authors argue that greater certainty is easy to achieve through the introduction of general legislation stating expressly that in the absence of a ‘clear, express provision to the contrary’, a person can claim the privilege against self-incrimination.¹⁴¹ As noted this should at least mean the issue of privilege is considered by parliamentary drafters and the potential effect and downside of affected legislation is brought to the attention of legislators. More importantly, if the legislators, having considered the matter, do intend the legislation to abrogate or restrict the privilege, it must be drafted accordingly. Having the default statutory position that a person can claim the privilege also has the benefit, in the event the issue is not considered at the drafting stage, of erring on the side of protecting the citizen.

¹⁴¹ QLRC, above n 2, [7.33]; see also [7.31]–[7.32], [7.35].