

1992

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**CORPORATIONS LEGISLATION (EVIDENCE) AMENDMENT BILL
1992**

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General,
the Hon. Michael Duffy, MP)



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OUTLINE

The proposed amendments to the *Australian Securities Commission Act 1989* and the Corporations Law contained in section 82 of the *Corporations Act 1989* arise from practical experience of the operation of the present provisions in the national scheme legislation for companies and securities which relate to the abrogation of the privilege against self-incrimination. Serious difficulties in investigations and prosecutions have been caused by the compensatory provision that neither a person's self-incriminatory statements, nor the signing of a record nor the fact of having produced a book ("use immunity"), nor any information of material derived from, or obtained as a result of, these statements or actions ("derivative use immunity") are admissible in evidence against the person in criminal proceedings and other proceedings for the recovery of a penalty.

The major problems are caused by:

- the derivative use immunity which places an excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that any item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity; and
- that aspect of the use immunity which prevents the admission into evidence of the fact that a person, having claimed that to do so might tend to be self-incriminatory, has produced a book (which is broadly defined to include virtually all business-related records). This immunity may prevent a person from being linked in the chain of evidence with the documents which establish the commission of a corporate offence, preventing any effective prosecution of that person.

The proposed amendments to the *Australian Securities Commission Act 1989* provide for the removal of the derivative use immunity available to witnesses giving evidence under compulsion in investigations under that Act, and, for witnesses who have produced a document under claim of potential self-incrimination, of the use immunity currently available in relation to the fact of that production. The proposed amendments would also deny to bodies

corporate the benefit of any use or derivative use immunity in proceedings under the Act., since these would be available only to natural persons.

The proposed amendments to section 597 of the Corporations Law (which relates to evidence given under compulsion in examinations before the Court) provide for the removal of the derivative use immunity available to witnesses under the existing subsection 597(12), leaving the use immunity intact. Neither the use immunity nor the derivative use immunity is to be available to bodies corporate.

Proposed section 1316A is inserted to ensure that in any Corporations Law criminal proceeding a body corporate, whether it is a defendant or not, may not refuse or fail to comply with a requirement to provide evidence on the ground that to do so might tend to be incriminating or to make the body liable to a penalty.

The proposed amendments are required to ensure that effective investigation and prosecution of corporate offences is not hindered by inappropriate evidentiary requirements in the particular circumstances of corporate crime. In such cases frequently the perpetrator is the only person having knowledge of the details of complex transactions by which an offence has been committed or concealed, and may consciously use the present immunities, provided by operation of statute, to make a full confession of crimes for which he or she may then not be prosecuted.

FINANCIAL IMPACT STATEMENT

The proposed amendments are not expected to have any financial impact on Government expenditure.

NOTES ON CLAUSES

Part 1 - PRELIMINARY

Clause 1 - Short Title

This clause provides for the Act to be cited as the *Corporations Legislation (Evidence) Amendment Act 1992*.

Clause 2 - Commencement

This clause provides that the proposed legislation shall come into operation on the day it receives the Royal Assent.

PART 2 - AMENDMENT OF THE AUSTRALIAN SECURITIES COMMISSION ACT 1989

Clause 3 - Principal Act

This clause is formal, identifying the *Australian Securities Commission Act 1989* ("the Act") as the Principal Act for the purposes of Part 2.

Clause 4 - Self-incrimination

Clause 4 amends the Principal Act by omitting subsections (2) and (3) of section 68, and inserting new subsections (2), (3), (4) and (5) in that section.

Proposed subsection 68(2) provides that proposed subsection 68(3) applies when a natural person is, under subsection 68(1) (having made a claim of possible self-incrimination or exposure to liability for a penalty) deprived of that claim of privilege against self-incrimination as a reasonable excuse for not complying with a requirement to give information, sign a record or produce a book for the purposes of Part 3, Division 3 of Part 10 or Division 2 of Part 11 of the Act, or of a corresponding law of another jurisdiction. By confining the application of the subsection to natural persons the intention is expressed that corporations may not claim the benefit of any use or derivative use immunity in proceedings under the Act, nor attract the provisions of subsection 68(3). The application of subsection 68(3) is also restricted to statements made or records signed under compulsory process. It does not extend to the production of books.

Proposed subsection 68(3) provides that, except in proceedings relating to the falsity of a relevant statement or record, a statement made or record signed by a natural person who has claimed potential self-incrimination is not admissible as evidence against that person in a criminal proceeding or a proceeding for the imposition of a penalty (use immunity). Such a person may no longer receive

the benefit of any derivative use immunity in relation to information derived from information given or records signed in proceedings under the Act.

Proposed subsection 68(4) provides that the proposed new subsections 68(2) and (3) will apply to requirements the making of statements or signing of records after the commencement of the proposed amendments.

Proposed subsection 68(5) ensures that these amendments have no retrospective effect by providing that existing subsections 68(2) and (3) are preserved in their application to requirements to make statements or sign records which were made before the commencement of the proposed amendments.

Clause 5 - Statements made at an examination: proceedings against examinee

This clause amends section 76 by substituting a new subsection 76(1)(a) to ensure consistency with the proposed new subsection 68(3) for the evidentiary use of statements made by a person in an examination under section 19 of the Act.

PART 3 - CHANGES TO THE CORPORATIONS LAW

Clause 6 - Corporations Law

This clause is a formal provision identifying the "Corporations Law" as being the Corporations Law contained in section 82 of the *Corporations Act 1989* for the purposes of Part 3.

Clause 7 - Examining a person about a corporation

This clause proposes to amend section 597 of the Corporations Law to remove the derivative use immunity, by omitting existing subsection 597(12) (under which both a use and a derivative use immunity are available to persons, who, having claimed that answering a question may tend to be incriminating, are not excused from answering that question), replacing it with proposed subsections 597(12) and (12A), and making a necessary consequential amendment to subsection 597(14).

Proposed subsection 597(12) provides that a claim of possible self-incrimination does not excuse a person from answering a question at an examination held under an order under subsection 597(3).

Proposed subsection 597(12A) provides that where a natural person makes a claim of self-incrimination before answering a question in an examination, the answer is not admissible against the person in criminal proceedings or

proceedings for the imposition of a penalty, other than in an examination under section 597 itself or a proceeding related to the falsity of the answer.

The proposed consequential amendment to subsection 597(14) preserves the use immunity in relation to a signed record or transcript of an examination under section 597, which may otherwise be used in evidence in any legal proceedings against the person.

Clause 8 - Privilege against self-incrimination not available to bodies corporate in Corporations Law criminal proceedings

This clause inserts proposed section 1316A into the Corporations Law, the effect of which is to deny to bodies corporate any claim to the privilege against self-incrimination in criminal proceedings under the Corporations Law.

Proposed subsection 1316A(1) comprehensively denies to a body corporate any right to refuse or fail to comply with a requirement in a Corporations Law criminal proceeding on the grounds of a tendency to incriminate it or make it liable to a penalty, whether in relation to the proceedings then on foot or not.

Proposed subsection 1316A(2) applies the provisions of subsection 1316A(1) whether or not the relevant body corporate is a defendant in the proceeding or in any other proceeding.

Proposed subsection 1316A(3) defines the term "Corporations Law" as having the same meaning as in Division 2 of Part 9 of the *Corporations Act 1989*, which relates to the operation of the vesting and cross-vesting of criminal jurisdiction provisions of the national corporations legislation. It also defines a "Corporations Law criminal proceeding" in terms of proceedings in courts exercising jurisdiction in respect of a criminal matter arising under the Corporations Law of this jurisdiction or of any jurisdiction.

Clause 9 - Insertion of new Division 4 - Changes resulting from the Corporations Legislation (Evidence) Amendment Act 1992

Proposed subsection 1370(1) provides that the proposed proposed amendments to section 597 will apply in relation to a question put at or after the commencement of the amending legislation at an examination under subsection 597(3) whether or not that examination had already begun at that time.

Proposed subsection 1370(2) ensures that these amendments have no retrospective effect by providing that existing subsection 597(12) is preserved in its application to a question in an examination under subsection 597(3) which is put before the commencement of the proposed amendments.

Proposed section 1371 provides that, even if a relevant proceeding had commenced before section 1316A came into operation, at or after the commencement of that provision, no claim of privilege in respect of self-incrimination is available to a body corporate.