THE AAT: "PUNITIVE" PRIVILEGE CLAIMS AS REASONABLE EXCUSE DEFENCES

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INTRODUCTION

The common law "punitive" privileges against self-incrimination and exposure to a penalty have received renewed attention in a series of decisions concerning their application in such highly visible and sensitive contexts as Royal Commissions of Inquiry;[1] investigation of corporate crime;[2] police misconduct[3] and economic regulation.[4] Possibly less dramatic but no less fundamentally at issue is their application to the wider spectrum of rights and interests arising from, and affected by, the extensive administrative and discretionary powers in the hands of the executive and government officials.

Central to "this fertile new province of the law"[5] is the Administrative Appeals Tribunal (henceforth referred to as the "Tribunal"). This appeal mechanism has been established at the Commonwealth level for the purpose of reviewing on the merits, decisions of administrators and thereby promoting fair and equitable decision-making principles. The important role of the Tribunal in the creation of a more encompassing and accessible administrative appeal structure cannot be underestimated in view of:

(i) its wide powers to review decisions of Ministers, officials and statutory bodies;[6]
(ii) the high volume of appeals coming before it;[7]
(iii) the continued growth of its jurisdiction, contributing to its evolution as a general appeals tribunal;[8]; eg the creation of two new Divisions of the Tribunal: Veterans' Appeals Division (1984); Taxation Appeals Division (1986).

In this context the applicability of the dual privileges is crucial both to a consideration of the powers and discretions of the Tribunal and to the rights and obligations of witnesses summoned to appear before it. This analysis may serve also as a model for the determination of "punitive" privilege claims

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[1] *Hammond* v *Commonwealth* (1982) 42 ALR 327; *Sorby* v *Commonwealth* (1983) 46 ALR 237.

[2] *Controlled Consultants* v *Commissioner for Corporate Affairs (Vic)* (1985) 57 ALR 751.

[3] *Police Service Board* v *Morris and Martin* (1985) 58 ALR 1.

[4] *Pyneboard Pty Ltd* v *Trade Practices Commission* (1983) 45 ALR 609.

[5] Address by Sir Harry Gibbs at the University of Queensland, quoted in the Administrative Review Council: Ninth annual Report, 1984-85, para 185.

[6] Administrative Review Council; *supra* n 5, Appendix 4; A Hall, "The Jurisdiction of the Administrative Appeals Tribunal in Customs Matters" (1986) 14 Australian Business Law Review 157-158.

[7] Administrative Review Council, *supra* n 5, Appendix 5.

[8] *Ibid* paras 16, 174, 187. Sales Tax Laws Amendment Act Administrative (Cth) 1985; Taxation Boards of Review (Transfer of Jurisdiction) Act 1986 (Cth).

[9] For a general historical and jurisprudential analysis see I Freckelton, "Witnesses and the Privilege against Self-Incrimination" (1985) 59 ALJ 204.

under other federal or state legislation which contains comparable review functions.[9]

(1) *The Administrative Appeals Tribunal Act: The Privileges as Reasonable Excuse Grounds?*

A witness appearing at a Tribunal hearing does not have an absolute obligation to answer questions or produce documents. Under s 40(1)(a) of the Administrative Appeals Tribunal Act (henceforth called the "AAT Act") the Tribunal is empowered to summon witnesses "to give evidence and to produce such documents (if any) as are referred to in the summons". This obligation is reinforced by s 62(b) and (c) which stipulate that a witness must comply with such a direction unless he has a "reasonable excuse" defence for refusing or failing to do so.[10] The AAT Act fails to identify the grounds of this defence. This raises the question whether privilege claims can be encompassed within the seemingly broad ambit of "reasonable excuse".[11] Neither the Tribunal nor the Federal Court has as yet been required to consider or rule upon these privilege claims. Accordingly the availability of the privileges under the AAT Act remains a compelling and unresolved issue.

(2) *Circumstances Attracting the Privileges*

The Tribunal has no inherent criminal jurisdiction[12] and a witness could not, by furnishing information, expose himself to a criminal sanction at its hands. However, a witness may seek to claim the self-incrimination privilege before the Tribunal where the information sought could be used in later and separate criminal proceedings.[13] Likely instances might be where the evidence sought by a witness at a Social Security or Taxation hearing of the Tribunal (its existing and potentially most important jurisdictions respectively) could be used to incriminate that witness in any subsequent criminal trial for possible social security fraud, or sales or income tax evasion.

While the Tribunal lacks an inherent criminal jurisdiction, it appears to have the capacity to impose penalties.[14] A witness could therefore raise the privilege against exposure to a penalty by reference either to particular penalty

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[10] There has been only one reported case on these sub-sections: *Re Spagnolo and the Minister for Immigration and Ethnic Affairs* (1980) 2 ALN No 125. In this case, the applicant sought review of a deportation order against him. He refused to answer a question concerning the supply of drugs, notwithstanding a direction pursuant to s 62 claiming that such information would endanger his life. The Tribunal found it unnecessary to determine the issue: "The question of reasonable cause [under s 62 of the AAT Act] was not considered and my direction leaves it open to the applicant to raise this defence;" *per* Fisher J.

[11] Other possible reasonable excuse grounds include legal professional privilege, professional confidentiality, lack of relevance of information sought, lack of legal or physical access to documents and lack of reasonable time to comply with a direction to produce documents.

[12] Where a breach of the AAT Act occurs (eg sections 62, 62A, 63) the matter would be remitted to the appropriate local court with Federal jurisdiction.

[13] In a number of the cases to be discussed, the self-incrimination privilege was invoked for the purpose of protecting the witness from criminal liability in external proceedings: eg *Mortimer* v *Brown* (1970) 122 CLR 493; *Re ABM Pastoral Company Pty Ltd* (1977) 3 ACLR 239; *Controlled Consultants* v *CCA* (1985) 57 ALR 751.

[14] See Part B: Meaning of the term "penalty".

powers of the Tribunal, or to the possibility of the evidence sought being used adversely in later separate proceedings that attract a penalty.[15]

(3) *Generic Basis of the Privileges*

Although the two privileges are discrete,[16] they have certain commonalities in their method and rules of application which have been more fully examined in the criminal context. Therefore it is logical to examine first the privilege against self-incrimination (Part A), before its counterpart penalty privilege (Part B). This will facilitate an analysis of the issues common to their operation (Part C).

1. PRIVILEGE AGAINST SELF-INCRIMINATION

At common law a witness cannot be compelled to provide information, if to do so would expose him to any criminal charge. This privilege from disclosure applies both to oral statements and documents: *Blunt* v *Park Lane Hotel Ltd*;[17] *Rochfort* v *TPC*;[18] *Sorby* v *Cth*;[19] *Controlled Consultants* v *CCA*.[20] The privilege is not confined to judicial hearings, but is inherently available in extra-curial proceedings such as quasi-judicial determinations and administrative enquiries and investigations: *Mitcham* v *O'Toole*;[21] *Hammond* v *Cth*;[22] *Police Service Board* v *Morris & Martin*.[23] It follows that the privilege is capable of application in the context of hearings before the Tribunal, it being a quasi-judicial, administrative body.

There is no general reference to the privilege or its exclusion in the AAT Act.[24] Accordingly, in the absence of express abrogation, the issue is whether the privilege remains available to Tribunal witnesses, or has been excluded by necessary implication. Conflicting views have been expressed as to what constitutes a sufficient expression of intention to remove the privilege, though recent case law provides more substantive guidance.

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[15] See *Birrell* v *ANA Commission* (1984) 55 ALR 211, 213 *per* Gray J: "Even where, as in the present case, the proceedings are not for the recovery of a penalty, but to prevent and redress civil injury, a party to litigation ought not to be compelled to provide information or produce documents . . . if the result will be to provide evidence against him which may be used to establish his liability to a penalty in other proceedings." See also *Mayor of the County Borough of Derby* v *Derbyshire County Council* [1897] AC 550, 552-553; *Navair Pty Ltd* v *Transport Workers Union of Australia* (1981) 52 FLR 177.

[16] *Mexborough (Earl of)* v *Whitwood UDC* [1897] 2 QB 111, 115 *per* Lord Esher; quoted by Brennan J (1983) 45 ALR 609, (1984) 624-625; 614 *per* Mason, Wilson and Dawson JJ followed in *Price* v *McCabe; ex parte Price* (1984) 55 ALR 319, 322; *Birrell* (1984) 55 ALR 211, 216.

[17] [1942] 2 KB 253, 257.

[18] (1982) 43 ALR 659, 666.

[19] (1983) 46 ALR 237.

[20] (1985) 57 ALR 751.

[21] (1977) 2 ACLR 471, 478.

[22] (1982) 42 ALR 327.

[23] (1985) 58 ALR 1.

[24] The only direct references to "privilege" are found in sections 36, 36A and 37(3) of the AAT Act. Sections 36 and 36A are concerned with claims of public interest privilege by the Attorney-General. Section 37 applies to the production of documents by the original decision-maker.

(1) *First Line of Authority: Express Abrogation only*

Under this line of authority, the privilege cannot be overturned except by unambiguous and compelling expression. In the early case of *R* v *The Associated Northern Collieries*[25] Isaacs J ruled that nothing short of clear and express legislative provision to the contrary could overcome this privilege "so deeply rooted and consistently enforced". In *Ex parte Grinham re Sneddon*[26] Herron J restated the reluctance of the Courts to find that the privilege had been removed, particularly where this conclusion would be based on implication rather than express statutory enactment. In *Rodgers* v *Jordan*[27] Barwic CJ ruled that the privilege could not be removed except by unequivocal statutory expression. The same approach was taken by the Full Court of the Victorian Supreme Court in *O'Toole* v *Mitcham*.[28] In that case, the Court rejected a claim that the privilege was overriden by necessary implication from the legislation, on the basis that this argument could not make up for the absence of clear abrogating language in the statute itself. This decision was upheld by the High Court on appeal, *Mitcham* v *O'Toole*.[29]

(2) *Second Line of Authority: Express and Implied Abrogation*

In contrast, a second line of authority has accepted that the privilege may also be impliedly, as well as expressly abrogated by reference to the policy of the legislation under review. In *Mortimer* v *Brown*[30] the High Court was required to consider whether the privilege applied to an investigative provision of the Companies Act regulating the public examination of persons associated with a company's affairs. The High Court looked at both the purpose of the provision and the public interest which it was intended to serve in concluding that to allow the privilege would render this investigative provision relatively valueless. The privilege was therefore excluded by necessary implication. A similar approach was adopted by the NSW Supreme Court in *Re ABM Pastoral Company Pty Ltd*,[31] a case dealing with the investigative powers of an inspector appointed under the Special Investigation provisions of the Companies Act. Rath J relied on policy considerations to justify his conclusion that the legislature must have intended, by necessary implication, to abrogate the common law privilege. The Court ruled that to allow the privilege to succeed in this case would obstruct the proper and reasonable investigation of the company's affairs.[32]

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[25] (1910) 11 CLR 738, 748.
[26] [1961] SR (NSW) 862, 871.
[27] (1965) 112 CLR 580, 585.
[28] (1977) 2 ACLR 471.
[29] (1977) 15 ALR 351; (1977) 2 ACLR 478.
[30] (1970) 122 CLR 493.
[31] (1977) 3 ACLR 239.
[32] An appeal from this decision was refused by the NSW Court of Appeal.

(3) *Recent High Court Judgments: A Functional Approach*

The High Court has considered the operation of the privilege in a series of recent cases. The privilege was held applicable in *Hammond* v *Cth*,[33] and in *Sorby* v *Cth*.[34] In *Hammond*, the court upheld the right of a witness to claim the privilege against self-incrimination when called to give evidence before a Royal Commission into malpractices in the meat industry. In *Sorby*, a witness at a Royal Commission into drug-dealing successfully claimed that the Commissioner did not have the power to compel him to provide potentially self-incriminating answers. By contrast, the privilege was excluded by necessary implication in *Pyneboard*[35] and *Controlled Consultants*.[36] In the former, a party unsuccessfully invoked the privilege claim when served with a notice to produce documents and furnish information pursuant to s 155(1) of the Trade Practices Act (Cth). In the latter case, a similar claim failed under s 8 of the Securities Industry Code. These cases indicate that in determining the application of the privilege, much will turn on the scope and purpose of the particular legislation under review, and the function being performed by the judicial or administrative body seeking to obtain access to the information.

The strongest support for the retention of the privilege is found in the various judgments of Murphy J in which he adopted the view that the privilege remains unless excluded by unmistakeable language in the statute:

> The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment that the privilege presents to judicial or other investigation.[37]

This position reinforces the first line of authority previously identified.

In contrast, Brennan J has expressed the opinion that the scope of the privilege against self-incrimination should be limited to judicial proceedings. His Honour has, however, recognized that this is a minority position, and has deferred to the view that the privilege is capable of application in extra-curial proceedings: *Controlled Consultants*.[38] In determining the legislative intention as to the availability of the privilege:

> the nature of the statutory power, the prescribed manner of its exercise and the purpose which this exercise is designed to achieve are the available, if uncertain, guides as to the legislative intention in the absence of express provision.[39]

This view is more consistent with the second line of authority, and has been further developed by the majority of the High Court in the joint judgments of Mason, Wilson and Dawson JJ in *Pyneboard* and *Sorby* and Gibbs

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[33] (1982) 42 ALR 327.
[34] (1983) 46 ALR 237.
[35] (1983) 45 ALR 609.
[36] (1985) 57 ALR 751.
[37] *Pyneboard* (1983) 45 ALR 609, 621; see also *Hammond* (1982) 42 ALR 327, 335; *Controlled Consultants* (1985) 57 ALR 751, 757.
[38] (1985) 57 ALR 751, 758.
[39] *Ibid.*

CJ, Mason and Dawson JJ in *Controlled Consultants*. In Pyneboard their Honours held that the privilege is inherently capable of application to administrative and investigative as well as judicial proceedings, but may be excluded impliedly, as well as expressly, by statute. The language of the provision(s), together with the purpose and character of the legislation must be examined to determine any implied abrogation:

> The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subjected to any qualification. This is so when the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation.[40]

It follows that where the purpose of a statute would be defeated by the maintenance of the privilege, the Court will construe the legislation as having intended its abrogation. This approach clearly adopts the second line of authority, and may be taken as the accepted view.[41]

Their Honours also observed in Pyneboard that the conclusion that the privilege is impliedly excluded

> . . . may be more readily drawn where the obligation to answer questions or provide information does not form part of an examination on oath . . . It will be less readily drawn in cases where the obligation to answer questions and produce documents is an element in an examination on oath before a judicial officer, whether or not an object of that examination is to ascertain whether an offence has been committed with a view to the institution of a prosecution for that offence.[42]

(4) *Functional Tests Identified: Application to AAT Act*

By focusing on the majority position adopted by Gibbs CJ, Mason, Wilson and Dawson JJ, in Pyneboard, Sorby and Controlled Consultants it is possible to isolate certain specific criteria which may be used in determining whether the privilege remains or is impliedly abrogated under the AAT Act. These criteria are:

(a) the character and purpose of the legislation;
(b) whether a witness is required to give evidence on oath;
(c) the language of the legislation.

(a) *Character and Purpose of the Legislation*

In those cases where the privilege has been impliedly abrogated, the Courts have been swayed by the argument that retention of the privilege would undermine implementation of the legislative policies under review. This is

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[40] (1983) 45 ALR 609, 618.

[41] The remaining High Court judge, Deane J declined to express an opinion in *Hammond* (1982) 42 ALR 327, 342. His Honour did not sit on the other High Court cases discussed.

[42] (1983) 45 ALR 609, 619, approved in *Sorby* (1983) 46 ALR 237, 258.

made clear, for instance, in *Mortimer* v *Brown*[43] and *Re ABM Pastoral Company Pty Ltd*, where retention of the privilege was seen as fundamentally impeding the investigative functions of the Companies legislation. Similarly in *Pyneboard*, the provision under consideration (s 155 of the Trade Practices Act (Cth)) had the apparent purpose of enabling the Trade Practices Commission to ascertain whether any contravention of the Act had taken place and to provide evidence in any prosecution for a subsequent contravention. The High Court ruled that this purpose would be defeated if the privilege was available. It would "so hobble investigation as to render much of Part IV [of the Trade Practices Act] unenforceable".[44] Again in *Controlled Consultants*, the High Court concluded that to allow the privilege would be fundamentally inconsistent with the exercise of the investigative powers under the Securities Industry Code.[45]

It is possible to distinguish between the character of the legislation in the above decisions and the operation of the Administrative Appeals Tribunal. The primary function of the Tribunal is to review administrative decisions concerning the denial or alteration of various administrative rights or benefits, rather than conduct investigations into possible contraventions of, or commission of offences under particular legislation.[46] These investigatory functions are performed rather by the relevant Commonwealth Departments; e.g. the Investigative Divisions of the Departments of Social Security and Taxation. The Tribunal does not have inherent investigative or enquiry functions similar to those under review in the above cases and therefore it is less arguable that the functions of the Tribunal would be "stultified", or its review made "valueless", if the privilege were retained. Accordingly, it may be submitted that the purposive considerations set out in the above cases would not constitute any persuasive argument for exclusion of the privilege by necessary implication under the AAT Act.

(b) *Witness Under Oath*

The majority view in *Pyneboard* was that abrogation of the privilege would be less readily drawn in cases where the obligation to answer questions and to produce documents was an element in an examination on oath before a judicial officer. Since the Tribunal has the power under s 40(1)(a) "to take evidence on oath or affirmation", this may be taken as some indication that the privilege remains on foot. However in isolation this would hardly seem persuasive.

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[43] See Kitto J (1970) 122 CLR 493, 496; approved in *Pyneboard* (1983) 45 ALR 609, 619 and *Price* v *McCabe; ex parte Price* (1984) 55 ALR 319, 322.

[44] (1983) 45 ALR 609, 630.

[45] See also *Price* v *McCabe; ex parte Price.* (1984) 55 ALR 319, 324.

[46] As pointed out in the ARC Report No 22: *The Relationship between the Ombudsman and the AAT* (May 1985), the role of the AAT is "primarily an adjudicative process" to determine what should be the "correct or preferable decision" of an administrator. This contrasts with the investigative role and use of investigative techniques by the Ombudsman. See further ARC Ninth Annual Report *supra* n 5. Further, as stated in *Re A and Dept of Transport* (1978) 2 ALD 98, it is not a function of the AAT to itself seek evidence from any person to support the applicant's case.

(c) *Language of the Act*

An important additional criterion emphasized by the High Court is the identification of specific provisions of the legislation under review as either supporting or impliedly negating the privilege.[47] In the context of the AAT Act, the following sections may be identified:

(i) s 60(3): protection of witnesses;
(ii) s 62: reasonable excuse;
(iii) s 35(2); s 66: protective mechanisms;
(iv) s 37(3): express reference to privilege;
(v) s 33(1)(c): rules of evidence.

(i) *Protection of Witnesses (s 60(3))*

Section 60(3) of the AAT Act provides that "a person summoned to attend or appearing before the Tribunal as a witness has the same protection . . . as a witness in proceedings in the High Court". Such witnesses retain their common law rights[48] which would appear to encompass the privilege against self-incrimination. Protective provisions similar to s 60(3) of the AAT Act have been referred to in *Sorby* v *Cth* and *Price* v *McCabe; ex parte Price*,[49] but these cases provide little or no guidance. Until this matter is more fully explored, it would appear still open to a person seeking to claim the privilege to invoke this provision of the AAT Act.

(ii) *Reasonable Excuse (s 62)*

Section 62 provides that:

> A person appearing as a witness before the Tribunal shall not, without reasonable excuse –
> (b) refuse or fail to answer a question that he is required to answer by the member presiding at the proceeding; or
> (c) refuse or fail to produce a document that he was required to produce by a summons under this Act served on him as prescribed.

The use of the phrase "reasonable excuse" in this section could be taken as either denoting of itself, the retention of the privilege, or making stronger the claim that the privilege remains available. This construction is supported by Gibbs CJ in *Sorby* in the significance he attaches to the same phrase in the Commissions of Inquiry Act 1950 (Qld):

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[47] By way of example the High Court in *Controlled Consultants* examined the wording of various provisions of the Securities Industry Code, (including ss 8(1)-(2), 8(6)(a)(ii), 8(6)(b)(i) and (ii), 8(1A), 9(1)-(4), 10 (1), 10(5)) in determining whether these provisions could be taken as excluding the privilege by necessary implication.

[48] Section 80 Judiciary Act 1903 (Cth): "So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State in which the court in which the jurisdiction is exercised is held shall, so far as is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all courts exercising federal jurisidiction in the exercise of their jurisdiction in civil and criminal matters".

[49] (1984) 55 ALR 319.

> Indeed the argument that the privilege has not been abrogated is, if anything, stronger in relation to the Queensland statute . . . because s 10(4) recognises that a witness may have a reasonable excuse for refusing to answer a question.[50]

Brennan J, in the same case, was even more definite on this point:

> There is no express reference to a privilege against self-incrimination but it is embraced by the reference to "reasonable excuse" in s 10(4) . . . s 10(4) imports that privilege as a defence to an allegation of contempt of the Commission.[51]

However it would be erroneous to elevate these statements to the status of guiding principles. More significant appears to be the legislative context in which the phrase appears. As shown in cases subsequent to *Sorby*, the privilege has been excluded by necessary implication, notwithstanding the existence of a "reasonable excuse" provision in the relevant legislation. In *Controlled Consultants* a majority of the High Court (Gibbs CJ, Mason and Dawson JJ (Brennan J concurring)) ruled that "reasonable excuse" was directed not to the privilege but to other matters such as the physical or practical difficulties that might be involved in producing the books concerned.[52] The Court reasoned that the relevant (investigative) provisions would be rendered valueless if the obligation to comply was subject to the privilege.

The same approach was adopted in *Price* v *McCabe*, a decision of the Full Court of the Queensland Supreme Court. The Court ruled that the Health Insurance Act 1973 (C'th) impliedly abrogated the privilege despite the provision in the Act that a practitioner might refuse to produce a document required by summons if he had a reasonable excuse for non-compliance. The Queensland Court was not prepared to give the words "without reasonable excuse" an interpretation that necessarily attracted the privilege:

> Whilst the offence is subject to the qualification embodied in the words "without reasonable excuse", there is ample scope for their operation outside the question of privilege, eg incapacity, unforeseen delay, lack of time or opportunity or the like.[53]

Admission of the privilege would have defeated the purpose of the legislative by stultifying the investigative procedure.

It may therefore be concluded that in view of the differing approaches taken towards the phrase "reasonable excuse", it is difficult to assume that these words are in themselves conclusive of any legislative intention concerning the privilege. More important is the general legislative context in which they appear. To the extent that the reasoning in *Controlled Consultants* and *Price* v *McCabe* (both of which exclude the privilege) rests on the investigative aspects of the legislation under review, these cases may be distinguished from the AAT Act which lacks an equivalent investigatory function. However it

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[50] (1983) 46 ALR 237, 250-251. Section 10(4) Commissions of Inquiry Act 1950 (Qld) provides: "An act or omission by a witness . . . shall not be punished under this section . . . as contempt of the Commission . . . where that witness . . . satisfies the [Commission] . . . of a reasonable excuse for his act or omission."

[51] (1983) 46 ALR 237, 269-270.

[52] (1985) 57 ALR 751, 755.

[53] (1984) 55 ALR 319, 323.

would be wrong to thereby assume that the converse proposition applies, namely that the privilege is thereby automatically retained.

(iii) *Protective Mechanisms (s 35(2); s 66)*

Legislation which expressly abrogates the privilege against self-incrimination often contains a balancing mechanism whereby witnesses are granted an immunity. It is common to provide that the self-incriminating information supplied will not be admissible in criminal (and sometimes civil) proceedings, except in suits for contempt or perjury against that witness.[54] In *Price* v *McCabe*, the Queensland Supreme Court held that the existence of such an immunity provision may be taken as a further indication of a legislative intention to abrogate the privilege.[55]

The AAT Act contains no express immunity provision(s). The more relevant question in this context is whether the converse proposition applies, namely whether lack of any explicit statutory safeguard of this nature can be taken as some indication that the privilege remains. This issue was raised in *Controlled Consultants*. The High Court held that the absence of any relevant immunity provision does not necessarily indicate retention of the common law privilege; indeed in the context of the legislation under review (the investigative provisions of the Securities Industry Code): "The absence of any (immunity) provision . . . is a clear indication to exclude the privilege completely".[56]

It appears to follow from these cases that whilst existence of a statutory safeguard would make it clearer that the privilege is excluded, lack of any explicit statutory safeguard, of itself, does not necessarily reinforce the argument that the privilege remains on foot. Equally important is the legislative context.

The AAT Act does, however, contain certain discretionary protective mechanisms which may, indirectly, introduce an immunity against self-incrimination. Section 35(2) provides that the Tribunal, at its discretion, may conduct hearings in private and give directions prohibiting or restricting the publication of evidence given before it. Further the Tribunal will be required to conduct taxation hearings in private, unless otherwise requested by the applicant.[57] Section 66(1)(a) and (2)(a) provide that any confidential information, given pursuant to a s 35(2) order, shall not be disclosed by any member or officer of the Tribunal to any court of law.

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[54] *Hammond* (1982) 42 ALR 327, 332; *Sorby* (1983) 46 ALR 237, 259; Companies Act 1981 (Cth) ss 14(6), 296(7), 541(12); Securities Industry Act (C'th) ss 10(5), 19(9); National Companies and Securities Commission Act (Cth) s 39(5); Trade Practices Act 1974 (Cth) ss 155(7), 159. See also I Freckelton, *supra* n 9, 209-210; I Temby "Immunity from Prosecution and the Provision of Witness Indemnities" (1985) 59 ALJ 501. The immunity usually attaches to oral statements, but less often to documents supplied.

[55] (1984) 55 ALR 319, 323-324. This is an example of the immunity applying to documents.

[56] (1985) 57 ALR 751, 755. At issue here was the production of certain documents. The immunity provision in the Securities Industry Act 1980 (Cth) s 10(5), *Supra* n 54, applied only to oral statements, not to the production of documents.

[57] Taxation Boards of Review (Transfer of Jurisdiction) Act 1986 (Cth) s 14ZF.

It may be possible for these powers to be utilized by the Tribunal to protect a witness from the consequences in other proceedings of disclosing self-incriminating information. This discretionary power could be characterised as a balancing mechanism and may form the basis of an argument that the privilege has been impliedly abrogated by these sections.[58]

This argument should not be overstated however, as with the possible exception of the taxation jurisdiction, these sections do not apply automatically, but only at the Tribunal's discretion. They cannot therefore be taken as a general implied abrogation of the privilege. At best, the privilege may be excluded in those instances where the sections are either invoked for the specific purpose of protecting a witness against the consequences of self-incrimination in other proceedings, or have the effect of so doing.

(iv) *Express Reference to Privilege (s 37(3))*

Section 37(3) of the AAT Act denies to an administrative officer whose decision is under review, the right to argue "any rule of law relating to privilege" when called upon to produce documents before the Tribunal. This direct recognition of the existence of common law privileges, and their express abrogation, indicates that the legislature was cognizant of possible claims of privilege and could have introduced a similar abrogation provision applying to Tribunal witnesses. The absence of any equivalent language is one argument in support of the retention of the privilege against self-incrimination, though it could hardly be treated as conclusive. It is based upon the maxim of statutory interpretation, *expressio unius est exclusio alterius,* which the courts have applied with great caution.[59] Its adoption in the AAT Act context cannot therefore be assumed.

(v) *Rules of Evidence s 33(1)(c)*

Section 33(1)(c) of the AAT Act provides:

> The Tribunal is not bound by the rules of evidence but may inform itself of any matter in such a manner as it thinks appropriate.

This evidential and procedural flexibility given to the Tribunal is characteristic of many administrative tribunals.[60] Given this freedom from eviden-

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[58] A contrary view was stated by Gibbs CJ in *Hammond* (1982) 42 ALR 327, 333 who upheld the application of the privilege notwithstanding that the hearing in question was in private.

[59] D C Pearce, *Statutory Interpretation in Australia* (2nd ed 1981) 44-46 and cases cited therein.

[60] However as pointed out in the case law, there are limits to the flexibility of s 33(1)(c) of the AAT Act. The Tribunal is required to decide an application on its merits and inform itself of all relevant information: *Re Lister and Minister for Health* (1978) 1 ALD 130, 134. Furthermore it is obliged to make its decisions on the basis of evidence which is relevant, reliable and logically probative: *Minister for Immigration and Ethnic Affairs* v *Pochi* (1980) 4 ALD 139, affirming (1979) 2 ALD 33, 40-41 per Brennan J. See also generally *Mahon* v *Air New Zealand* (1983) 50 ALR 193, 206; *Bercove* v *Hermes (No 3)* (1983) 51 ALR 109, 118-119. Whilst the Tribunal is not strictly bound by the rules of evidence, it should be strongly guided by the principles underlying these rules: *Re Kevin and Minister for the ACT* (1979) 2 ALD 238, 241-243; *Re Pouki* (1984) 1 AAR 481, 484; *Langham* v *Commonwealth* (1984) 5 FCR 284, 294. See generally J B Kluver and R M Woellner, *Powers of Investigation in Revenue, Companies and Trade Practices Law* (1983) 223, 237; A Hall and R Todd, "Administrative Review before the Administrative Appeals Tribunal – A Fresh Approach to Dispute Resolution?" (1981) 12 FL Rev 71.

tial constraints, the question is whether this can be taken as any indication that the privilege has been impliedly negated. None of the cases on the interpretation of s 33(1)(c) is directly in point, and therefore it is necessary to apply general principles. The question of privilege turns on whether or not it may be characterized as a rule of evidence. To confine the privilege to a mere rule of evidence and henceforth potentially abrogated by the extended language of s 33(1)(c), is contrary to accepted authority which has regarded the privilege as based on a more fundamental right of protection against self-incrimination. As recognized by the majority in *Pyneboard*, self-incrimination is "too fundamental a bulwark of liberty to be characterized simply as a rule of evidence".[61] This view was further reiterated in *Sorby*[62] and by Dawson J in *Baker* v *Campbell*.[63]

The privilege is independent of the application of the rules of evidence. Therefore, it is not possible to argue that the effect of s 33(1)(c) of the AAT Act is to negate the privilege.

(5) *Summary: Retention of the Privilege?*

On the balance of the existing authority, it would appear that it is still open to argue that the common law privilege entitling a person to refuse to answer questions or produce documents on the grounds of possible self-incrimination remains available to witnesses appearing before the Tribunal. The case law is not decisive on this point, but as has been shown does not clearly rule out such a claim.

2. PRIVILEGE AGAINST EXPOSURE TO A PENALTY

The general nature of the privilege against exposure to a penalty has been examined by the High Court in *Pyneboard* and in *Police Service Board*, as well as by the Full Court of the Queensland Supreme Court in *Price* v *McCabe*. It was clearly recognized by the High Court in *Pyneboard* that this privilege is a discrete privilege, though often associated with self-incrimination:

> Though the privilege against self-incrimination is sometimes expressed to include the privilege against exposure to a penalty, the two privileges are in truth different grounds of excuse for not answering questions or not producing documents.[64]

The majority of the High Court (Murphy J dissenting) determined in *Pyneboard*, and confirmed in *Police Service Board*, that this privilege is not limi-

[61] (1983) 45 ALR 609, 617.
[62] (1983) 46 ALR 237, 258.
[63] (1983) 49 ALR 385, 442. In *Re Pouki and Australian Telecommunications Commission* (1984) 1 AAR 481, 483. Deputy President Thompson applied *Baker* v *Campbell* (1983) 49 ALR 385 in ruling that substantive legal rights of non-disclosure are not affected by s 33(1)(c) of the AAT Act.
[64] (1983) 45 ALR 609, 624-625.

ted to judicial proceedings. It is inherently capable of application to an administrative hearing where any penalty may be involved.[65].

The issue therefore, is whether the privilege against self exposure to "anything in the nature of a penalty"[66] is available as a separate reasonable excuse ground for witnesses appearing before the Tribunal.

(1) *The Term "Penalty": An Unsettled Concept*

It is difficult to determine from the case law a clear and consistent meaning of this term. A narrow view posits the notion of penalties as "obsolete" outside the criminal context except in common informer[67] and taxation cases.[68] A broader view was adopted by the UK Court of Appeal in *Re Westinghouse Electric Corporation (No 1)*.[69] The Court ruled that a fine enforceable by civil procedure constituted a penalty and attracted the privilege to it. It was not prepared to limit the term "civil penalties" to revenue penalties, but failed to provide any more precise definition.

The Australian cases on penalties have been mainly within the context of civil actions under the Trade Practices Act (Cth),[70] or proceedings pursuant to industrial[71] and revenue legislation.[72] It follows from these decisions that in exercising its powers pursuant to s 193 of the Income Tax Assessment Act, the Tribunal has the capacity to impose penalties. However, the Courts in these cases have not attempted to provide any overall interpretation of the term "penalty".

The most recent anlysis of this term has been by the High Court in *Police Service Board*. In this case, members of the Victorian police force asserted the common law privilege against exposure to a penalty as justification for refusing to answer questions asked of them by a senior officer who was conducting an enquiry into the performance of their duties. The Court had to determine whether the various disciplinary powers given to the Victorian Police Board constituted penalties for the purpose of invoking the common law privilege. The Board could, at its discretion:

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[65] (1985) 45 ALR 609; (1985) 58 ALR 1, 4, 7, 8, 10; see also *Birrell* (1984) 55 ALR 211, 212; *Refrigerated Express Lines Pty Ltd* v *Australian Meat and Live Stock Corporation* (1979) 42 FLR 204, 207-208.

[66] (1985) 58 ALR 1, 4 *per* Gibbs CJ.

[67] *Cross on Evidence* (2nd Australian ed) 265; *A-G* v *Riach* [1978] VR 301, 306-307 *per* Kaye J; *Pyneboard* (1983) 45 ALR 609, 621 and *Police Service Board* (1985) 58 ALR 7 per Murphy J (dissenting). I Freckelton *supra* n 9, 206, has drawn upon these cases to argue that "the common law status of the privilege in relation to non-criminal penalties must be in some doubt". See however the comment of Brennan J in *Police Service Board* (1985) 58 ALR 12. See also S McNicol, *A Non-Curial Privilege Against Self-Incrimination* (1984).

[68] UK Law Reform Committee: 16th Report: Privilege in Civil Proceedings Cmnd 3472 (1967) para 13.

[69] [1977] 3 All ER 703, 710-712, 716.

[70] *Pyneboard* (1983) 45 ALR 609; *TPC* v *George Weston Foods Limited* (1980) ATPR 40-150; *TPC* v *TNT Management Pty Ltd* (1984) 53 ALR 214; (1984) 56 ALR 647. These cases involved statutory pecuniary penalties enforceable by civil procedure: see Trade Practices Act 1974 (Cth) ss 76-78.

[71] *Gapes* v *CBA Limited* (1979) 27 ALR 87; *Birrell* (1984) 55 ALR 211.

[72] In *Walsh* v *DCT (NSW)* (1982) 14 ATR 50, Sudano DCJ was "inclined" to hold that liability to pay an amount of additional tax for failing to furnish a return amounted to a penalty.

place the offending police officer on a good behaviour bond;
reprimand the offending member;
impose a monetary penalty;
reduce the member in rank, or;
dismiss the member from the force.
The court ruled, by majority, that

> although the penalties provided in [the Act] are disciplinary penalties, they are nonetheless penalties, and it is old law, confirmed by modern authority, that a person cannot be compelled to answer a question whenever the answer would tend to expose him "to any kind of punishment" – "anything in the nature of a penalty".[73]

This conclusion is consistent with a broader view of the term penalty.

It seems clear from this High Court judgment that the exercise of disciplinary discretions constitutes penalties for the purpose of raising the privilege. Since the Tribunal's jurisdiction covers similar disciplinary penalties under various professional registration ordinances,[74] it would, within this context, have the capacity to impose penalties.

Further guidance as to the meaning of the term penalty is found in the judgment of Gibbs CJ in *Police Service Board*. His Honour distinguished between penalties and civil sanctions for breach of contract, and indicated that civil remedies such as compensation and damages do not amount to penalties.[75] From this distinction it may be argued that a court or tribunal can impose penalties where it is empowered to affect rights, or impose liabilities or detriments other than by means of ordinary civil remedies. Accordingly, many of the other powers exercisable by the Tribunal would fall within the definition of penalties e.g. suspension or cancellation of licences, bounties or allowances; forfeiture of goods; non-remission of pecuniary penalties or charges under the various Levy Collection Acts; withdrawal of pensions or other income support benefits under its Social Security jurisdiction,[76] and so arm the Tribunal with the power to impose penalties. It follows, on this analysis that the privilege against exposure to a penalty is inherently capable of application to Tribunal hearings.

In addition, the privilege has a wider application. It is not confined to instances where the Tribunal itself can impose penalties, but extends to where information provided to the Tribunal might subject the witness to a penalty in separate civil proceedings.

Granted the inherent applicability of the privilege, it now remains to be determined whether the privilege has been expressly or impliedly abrogated.

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[73] (1985) 58 ALR 1, 4 *per* Gibbs CJ; Wilson and Dawson JJ concurring at 7-8; contrast *Riach* [1978] VR 301, 307.

[74] Refer to Schedule 1 of the AAT Act and see generally GA Flick, *Federal Administrative Law* (Loose Leaf) 601-635.

[75] (1985) 58 ALR 1, 4; see also *Pyneboard* (1983) 45 ALR 609, 621 *per* Murphy J.

[76] *Supra* n 74. For a general discussion of the jurisdiction of the AAT in customs matters see A Hall *supra* n 6 157-192.

(2) *The Penalty Privilege: Standing under the AAT Act*

In ascertaining whether the privilege remains available to Tribunal witnesses, a number of criteria may be identified, some of which closely parallel those previously discussed in the context of self-incrimination:
(a) language of the Act;
(b) character and purpose of the legislation;
(c) difficulties in determining a privilege claim.

(a) *Language of the Act*

The statutory provisions identified and examined in the context of the self-incrimination privilege appear equally applicable to the penalty privilege. None of these provisions were found to unequivocally oust the self-incrimination privilege and a similar conclusion could here be drawn. However, it may be necessary to place some qualification on this conclusion in view of the implied suggestion by the High Court in *Pyneboard*[77] that as the consequences of exposure to a penalty are less serious than exposure to self-incrimination, it may be easier to imply an intention to abrogate the penalty privilege. However as further pointed out in the subsequent case of *Price* v *McCabe* this is merely "one factor to be taken into consideration in the construction of the statute".[78] It is therefore necessary to look further at the character and purpose of the AAT Act.

(b) *Character and Purpose of the Legislation*

In *Police Service Board*, the High Court ruled that the character and object of the relevant legislation (Police Regulation Act 1958 (Vic)) provided a sufficient indication that the penalty privilege did not apply. The High Court emphasised considerations specific to the internal operation of the police force in reaching this conclusion:

> It is essential to bear in mind that the Act and Regulations here are dealing with a disciplined force, the members of which voluntarily undertake the curtailment of freedoms which they would otherwise enjoy. It is in that context that it may be necessary to draw the implication that the privilege is excluded by a provision designed to further the effectiveness of an organisation based upon obedience to command.[79]

The Court also emphasized that to allow the privilege could fundamentally undermine public confidence in the police force.[80]

The marked contrast between the character and purpose of the Disciplinary Code of the Police Regulation Act, and the review functions of the Tribunal, would not warrant the same arguments in favour of abrogation of the privilege before the Tribunal. On this basis, *Police Service Board* may

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[77] (1983) 45 ALR 609, 620; see also *Birrell* (1984) 55 ALR 211, 216; *Price* v *McCabe* (1984) 55 ALR 319, 322.
[78] (1984) 55 ALR 319, 322.
[79] (1985) 58 ALR 1, 8 *per* Wilson and Dawson JJ; 5 *per* Gibbs CJ.
[80] *Ibid* 5, 9.

be distinguished and fails to provide compelling authority for the proposition that the privilege is unavailable under the AAT Act.

In *Commissioners of Customs and Excise* v *Ingram*[81] Lord Goddard CJ spoke strongly in favour of an implied exclusion of the privilege where the purpose of the legislation involves protection of the public revenue. This policy approach was adopted by the Full Court of the Queensland Supreme Court in *Price* v *McCabe*[82]. This case examined the powers of the Medical Service Committee of Enquiry (constituted under the Health Insurance Act, 1973, (Cth)) which was set up to investigate over-servicing. The Queensland Court believed that where the main purpose of the legislation under review was the protection of the public revenue, this may in itself be sufficient to show a legislative intention to impliedly exclude the privilege. The Court reasoned that without this abrogation, the main purpose of such provisions would be stultified. The Court relied upon, *inter alia*, the potential abuse of the public purse to abrogate the privilege. This case is therefore some authority for the proposition that the privilege against exposure to a penalty may be incapable of application where the principal purpose of the legislation relates to the recovery of public moneys.

This raises the question whether the functions of the Tribunal can be characterised as protective of the public revenue and accordingly, to have excluded the privilege by necessary implication. The Tribunal has numerous jurisdictional heads of power, only some of which, eg review under the Audit Act 1901 (Cth); Sales Tax Assessment Act 1930 (Cth); Income Tax Assessment Act 1936 (Cth); could be described as protecting the public purse. In these contexts, it may be possible to argue, on the basis of *Price* v *McCabe*, that the privilege has been impliedly excluded. However, this leaves open the other jurisdictional heads under the AAT Act where for example the primary role of the Tribunal is regulatory, as in the granting or revocation of licences, and any revenue implications are only incidental.

An alternative approach is to attempt an overall characterisation of the jurisdiction of the Tribunal under its various enabling statutes and to consider the question of privilege within that broader framework. On this basis, it may be argued, using the phraseology adopted in *Price* v *McCabe*, that the "primary" function of the Tribunal is to safeguard or protect the rights of individual citizens against incorrect, unfair or arbitrary decisions of government administration. The protection of the public revenue, where applicable, is only "secondary" or "tertiary" to this function. On this view, neither *Commissioners of Customs and Excise* v *Ingram* nor *Price* v *McCabe*, can be used as authority that the privilege against exposure to a penalty is excluded under the AAT Act by necessary implication.

(c) *Difficulties in Determining a Privilege Claim*

The High Court in *Pyneboard* and *Police Service Board* recognized that there may be practical difficulties in determining when, and by whom the

[81] [1948] 1 All ER 927, 929.
[82] (1984) 55 ALR 319.

privilege should be determined.[83] Where it falls to a person unqualified in law to determine the claim, this may be taken as some indication that the privilege was not intended to apply.[84]

These practical difficulties may arise in hearings before the Tribunal. The membership of the Tribunal includes, but is not confined to, judges and legal practitioners: AAT Act s 7. In the exercise of its powers the Tribunal may be constituted exclusively by non-legally qualified persons: AAT Act s 21(1)(c)(d); s 22(1), who may be called upon to determine this question: AAT Act s 42(2).[85]

This ancilliary criterion raises some argument for the exclusion of the privilege, though as pointed out by Dawson and Wilson JJ in *Police Service Board* "such a consideration must seldom be determinative".[86]

(3) *Summary: Retention of the Privilege?*

On the basis of the above analysis the following propositions may be put forward:
the privilege against exposure to a penalty is inherently capable of application to Tribunal hearings;
the privilege is applicable unless abrogated expressly or by necessary implication;
the identified criteria provide no unequivocal indication that the privilege has been excluded on either basis;
those cases where the privilege has been impliedly negated may be distinguished on policy grounds from the powers and functions of the Tribunal.

Accordingly, on the balance of existing authority, a witness attending before the Tribunal may have a "reasonable excuse" for refusing or failing to answer questions or produce documents on the grounds of possible exposure to "anything in the nature of a penalty".

3. OPERATIONAL PRINCIPLES IN THE EXERCISE OF THE "PUNITIVE" PRIVILEGES

Assuming the availability of the common law privileges, it is necessary to consider the circumstances in which a witness may have recourse to them. The operational principles to be discussed have been developed in the case-

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[83] These same practical difficulties were recognised by the High Court in *Baker* v *Campbell* (1983) 49 ALR 385 in the context of legal professional privilege. Refer also to *A and S Europe Ltd* v *Commission of the European Communities* [1983] 3 WLR 17, 63-64.

[84] *Pyneboard* (1983) 45 ALR 609, 617; *Police Service Board* (1985) 58 ALR 1, 5-6, 10.

[85] As pointed out in the ARC, Ninth Annual Report *supra* n5, 43, in practice the Tribunal President prefers that three members sit whenever possible, but in some areas of jurisdiction (eg ACT rating and Isolated Patients Travel and Accommodation Assistance) it is preferrable to increase efficiency and to reduce expense by sitting a single member. For similar reasons only single member tribunals travel to country areas. Also there is no equivalent of the AAT Act, s 36A(5) which provides that where the Tribunal must determine a public interest privilege claim by the Attorney-General this power may be exercised only by a presidential member who is a Judge of the Federal Court. However under s 21A(1) of the AAT Act, a party to the proceedings may make application to the Tribunal requesting its reconstitution.

[86] (1985) 58 ALR 1, 10.

law on the privilege against self-incrimination. It is evident however from the High Court judgments in *Pyneboard* and *Police Service Board* that the operation of the privilege against exposure to a penalty is governed by these same principles, and this may be assumed throughout the following discussion.

(1) *Information Falling Within the Privileges*

The privileges are available not only for documents and statements directly incriminating or penalising a witness, but also where the information would form "a link in the chain" of such evidence. This extension of the privilege(s) was recognized in *Sorby* where Mason, Wilson and Dawson JJ in their joint judgment, held that the immunity may attach both to information which is of itself incriminating and information which may lead to the discovery of incriminating evidence:

> ... the privilege protects the witness not only from incriminating himself directly under a compulsory process, but also from making a disclosure which may lead to incrimination or the discovery of real evidence of an incriminating character.[87]

This point was also made by the Full Court of the Queensland Supreme Court in *Price* v *McCabe:*

> Nor must it be forgotten that the privilege may be attracted to a fact, innocent on its face, which may, however, help to form the chain of proof against a witness in a subsequent prosecution.[88]

The sequential operation of the privileges as recognized in these cases could be invoked by a witness appearing before the Tribunal.

(2) *Extended Application of the Privileges*

The penalty privilege applies where admission of the information may lead the witness to expose himself to a penalty at the hands of the Tribunal. However, as previously indicated, the privileges are not confined to Tribunal proceedings, but extend to a witness placing himself in jeopardy in any other proceedings.[89] This potential extension of liability may be argued before the Tribunal itself as grounds for withholding the evidence.

Some qualification, however, may arise from the conjunction of s 35 and s 66 of the AAT Act. As previously stated, s 35(2) provides that the Tribunal may at its discretion conduct hearings in private and prohibit or restrict publication of evidence given before it. Section 66 stipulates that a member or officer of the Tribunal shall not be required to give evidence to a court where

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[87] (1986) 46 ALR 237, 259. This overrides the more restrictive view adopted by Kaye J in *Riach* [1978] VR 301, 310-311. See also *Sorby* (1983) 46 ALR 237, 244.

[88] (1984) 55 ALR 319, 325.

[89] *Mayor of the County Borough of Derby* v *Derbyshire County Council* [1897] AC 550, 552-553; *Navair* (1981) 52 FLR 177; *Birrell* (1984) 55 ALR 211, 213; see also *supra* nn12, 13, 15.

this would be contrary to an order of the Tribunal in force under s 35(2) of the AAT Act. These sections, if invoked by the Tribunal, may provide some protection against confidential information being used in other proceedings and so vitiate any claim for privilege based on this extended ground.

(3) *Invoking the Privileges*

Given the potentially broad ambit of the privilege claims, the Courts have been concerned to ensure that they are not frivolously or improperly invoked. Accordingly, a witness must establish that the information would incriminate or penalise him personally. It would not be sufficient to claim that the information would incriminate or penalise others: *Rochfort*;[90] *Pyneboard*.[91] Furthermore, a witness must establish that there would be reasonable grounds to support such fears. This apprehension must be "real and appreciable" rather than remote or insubstantial.[92] In *Jackson* v *Gamble*[93] the Full Court of the Victorian Supreme Court confirmed that a mere statement by a witness that his answers might tend to incriminate him was not sufficient. The Court must be satisfied that an objection is made bona fide, and that there are reasonable grounds to fear that his answer would have the claimed effect. Futhermore the Victorian Court distinguished between questions which are in themselves "incriminating on their face" and questions "innocent on their face" but which seek after information which may form a "link in a chain" of incriminating material.

In the former instance, a witness would not usually have to provide any material to establish the basis for the claim. However, in the latter instance, the witness must be able to point to material which indicates the incriminating character of the information sought.[94]

These general principles have equal application to Tribunal hearings. Accordingly an obligation would lie upon a Tribunal witness claiming the privilege to establish a reasonable apprehension of self-incrimination or exposure to a penalty.

(4) *Appeal Rights*

The question of the availability of the privileges is not yet authoratively settled. Therefore it remains open to the Tribunal to take the view that either or both privileges have been abrogated or alternatively, that whilst generally applicable, a privilege claim has not been successfully made out in the particular instance.

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[90] (1982) 43 ALR 659, 666, 670.

[91] (1983) 45 ALR 609, 612-613; see also *Controlled Consultants* (1985) 57 ALR 751, 757.

[92] *R* v *Boyes* (1861) 121 ER 730, 738; *Re Westinghouse Electric Corp (No 2)* [1977] 3 All ER 717, 721; *British Steel Corp* v *Granada Television Ltd* [1981] 1 All ER 417; *Kahan* v *Kahan* [1982] 2 All ER 64; *Hammond* (1982) 42 ALR 327, 331, 334; *Sorby* (1983) 46 ALR 237; *Controlled Consultants* [1984] VR 137, 151; *Price* v *McCabe; ex parte Price* (1984) 55 ALR 319, 324-325; *Scanlan* v *Swan* [1984] 1 Qd R 21.

[93] [1983] 2 VR 334.

[94] See also *Price* v *McCabe* (1984) 55 ALR 319, 325; *Scanlan* v *Swan* [1984] 1 Qd R 21.

In either case, a witness could appeal from this ruling to the Federal Court under s 44 or s 45 of the AAT Act,[95] stating the question of law to be whether s 62(b), (c) of the Act have been correctly applied by the Tribunal.[96]

CONCLUSION

The complex and uncertain[97] analysis required in determining the availability of the "punitive" privileges as reasonable excuse grounds for refusing to answer questions or produce documents, is only too evident from the above discussion. These complexities and uncertainties would confront both witnesses in determining their rights to claim the privileges and the Tribunal in adjudicating upon those claims. Furthermore, the Tribunal is under no statutory obligation to inform witnesses of the existence of these reasonable excuse "defences". As a result, what may be important rights available to Tribunal witnesses could be easily ignored or disregarded, particularly where witnesses are not legally represented.[98]

It is suggested that these problems could best be resolved by amendment to the AAT Act to provide for:

An express statement in the Act as to the availability or abrogation of the privileges against self-incrimination and exposure to a penalty as "reasonable excuse" grounds.[99]

In the event of the express application of the privilege(s):

Statutory guidance as to the circumstances in which the Tribunal can impose "penalties".

A statutory obligation on the Tribunal to acquaint witnesses with their right to claim the privilege(s).

Statutory machinery for determining the validity of the claim(s).

In the event of express abrogation of the privilege(s):

Statutory immunity provisions to protect witnesses from the consequences of production of information.[100]

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[95] s 44(1): "A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia on a question of law, from any decision of the Tribunal in that proceeding". Alternatively the Tribunal, of its own motion or at the request of a party, may refer a question of law to the Federal court: s 45(1).

[96] *cf McMullen* v *Commissioner for Superannuation* (1985) 3 AAR 358; (1985) 61 ALR 189. As to what constitutes a question of law see generally GA Flick *supra* n 74, 293, 1548-1549, for analogous provisions see AAT Act sections 36(6)(8), 36A(3)(6).

[97] *Supra* n 39.

[98] AAT Act s 40(4). A person summoned to appear before the Tribunal may request representation by counsel, but this may be declined at the discretion of the Tribunal.

[99] A precedent for express abrogation is found in s 6A of the *Royal Commission Act* (1902) (Cth), as quoted in *Sorby* (1983) 46 ALR 237, 246.

[100] Eg as in the Companies and Securities and Trade Practices legislation, *supra* nn54-56. Query whether the immunity should apply to documents as well as oral statements.