X7, Lee, *and Chancery's Treatment of Self-Incrimination in Insolvency Examination*

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Abstract

Two recent High Court cases considered whether a statute permitted the compulsory examination of a person about the subject matter of an offence for which they were awaiting trial. Three judges in those cases suggested that cases involving compulsory examination in bankruptcy and corporate insolvency were not helpful as a guide to interpreting the statutes under consideration because Chancery took a divergent view of the privilege against self-incrimination and because insolvency examination schemes did not directly affect the system of criminal justice in the same way. This article argues that Chancery and the common law courts did not differ in their approach to the interpretation of bankruptcy and insolvency statutes with regard to their effect on the privilege against self-incrimination. It also argues that examination in insolvency was and remains capable of directly affecting the system of criminal justice. The article concludes that insolvency cases and statutes should not be excluded from consideration when considering whether a new compulsory examination scheme permits the examination of persons awaiting trial about the subject matter of the offence. The presence, in the new scheme, of features found in insolvency examination schemes might indicate that the new scheme was intended to have a similar effect.

I Introduction

Statutory abrogation of the privilege against self-incrimination is common and has a long history. The oldest statutory exception to the privilege is the abrogation of the privilege in compulsory examination in bankruptcy. That exception was later incorporated into companies legislation. Over time it was settled that an examinee in insolvency proceedings[1] had to answer incriminating questions, even where those questions related to an offence for which the examinee was awaiting trial.

Despite that history, two recent Australian High Court cases have suggested that statutes and cases relating to insolvency examination are not helpful as a guide when considering whether a statute creating a compulsory examination scheme permits the questioning of a person who has been charged with an offence.

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1 In this article, the term 'insolvency' is used to cover bankruptcy and corporate insolvency proceedings.

In *X7 v Australian Crime Commission*,[2] the question arose in relation to the examination of a person facing trial for offences carrying a maximum sentence of life imprisonment under an examination scheme established to inquire into serious and organised crime. In *Lee v New South Wales Crime Commission*,[3] the question arose in relation to an examination scheme established to assist in the recovery of the proceeds of crime. Justices Hayne, Kiefel and Bell, in both cases, said that drafting similarities between the statutes under consideration[4] and insolvency statutes were not an indication of an intention to permit the compulsory examination of a person charged with an offence about the subject matter of the offence. Their Honours gave two reasons for that conclusion. First, the abrogation of the privilege in insolvency examination is 'an historical anomaly' arising out of Chancery's different approach to the privilege.[5] Second, insolvency statutes do not involve the fundamental principles of the accusatorial and adversarial system of criminal justice in the same way as the statutes in *X7* and *Lee*.[6] The relevance of insolvency statutes and cases arose in *X7* and *Lee* because the High Court had to consider the precedential value of *Hamilton v Oades*,[7] a case in which the High Court held that a corporate insolvency examination scheme permitted the compulsory examination of a person who had been charged with offences about the subject matter of those offences.

The major consequence of excluding insolvency cases and statutes from consideration is that the High Court cuts itself off from potentially helpful reasoning as to features of legislation that may indicate a legislative intention to abrogate the privilege. Courts may obtain guidance in the construction of one statute from the terms of another, even where the statutes do not address the same subject.[8] The corporations legislation considered in *Hamilton* shared a number of features with the legislation in *X7* and *Lee*.[9] There were also significant similarities between the facts of each case. Given those similarities, it might be thought that *Hamilton* was well placed to shed light on the statutes in *X7* and *Lee*.[10] To ignore insolvency cases and statutes as a class potentially deprives the High Court of material exploring strikingly similar issues. It is a significant step to exclude cases

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2 (2013) 248 CLR 92 ('*X7*').

3 (2013) 251 CLR 196 ('*Lee*').

4 The *Australian Crime Commission Act 2002* (Cth) ('*ACC Act*') in *X7* and the *Criminal Assets Recovery Act 1990* (NSW) ('*CAR Act*') in *Lee*.

5 *X7* (2013) 248 CLR 92, 154 [161] (Kiefel J); *Lee* (2013) 251 CLR 196, 288 [249] (Kiefel J).

6 *Lee* (2013) 251 CLR 196, 289 [252] (Kiefel J, Hayne J agreeing at 231 [58] and Bell J agreeing at 290 [255]).

7 (1989) 166 CLR 486 ('*Hamilton*').

8 John Bell and George Engle, *Statutory Interpretation* (Butterworths, 3rd ed, 1995), 151–2; see also J Anwyl Theobald, *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905), 55. In *Lee* (2013) 251 CLR 196, Kiefel J, 286 [243] and Gageler and Keane JJ, 319 [333] treated similarities between statutes as potentially instructive. In the United Kingdom, courts have often used similarities between statutes as a guide to a statute's intended effect on the privilege. See *Bank of England v Riley* [1992] Ch 475 (CA), 484; *R v Hertfordshire County Council; Ex parte Green Environmental Industries Ltd* [2000] 2 AC 412, 419–20. But see *R v Serious Fraud Office; Ex parte Smith* [1993] AC 1, 40–1, where Lord Mustill said that the unsystematic techniques employed by statutes interfering with the right of silence made it unhelpful to examine each statute when assessing the effect on the privilege of the statute under consideration in that case.

9 Discussed in Section IV B of this article.

10 French CJ and Crennan J treated it as such in *X7* (2013) 248 CLR 92, 121–2 [49]–[52].

and statutory precedents spanning more than 450 years when considering the position of an examinee facing pending criminal proceedings under a more recent compulsory examination scheme. Such a step arguably should not be taken without a compelling reason.

This article argues that the reasons put forward in *X7* and *Lee* for excluding insolvency statutes and cases from consideration are not persuasive. As discussed in Section III, examination in insolvency is not 'an historical anomaly'[11] arising from a 'divergent view'[12] taken by Chancery of the importance of the privilege. Section IV argues that examination in insolvency is also capable of directly affecting the fundamental principles at the heart of the accusatorial and adversarial system of criminal justice. It follows that insolvency cases and statutes should not be excluded from consideration when determining whether the legislature intended that a new compulsory examination scheme should permit the examination of a person charged with an offence about the subject matter of that offence.

II The View that Insolvency Cases and Statutes are Not Relevant

A *The Decisions in* X7 *and* Lee

The question in both *X7* and *Lee* was whether a statutory power of compulsory examination permitted the examiner to ask the examinee questions concerning the subject matter of a charge for which the examinee was awaiting trial. The cases are noteworthy because the High Court reached a different conclusion in each case, with the change being the result of the composition of the bench as opposed to any relevant differences in the legislation. In *X7*, the Court held 3–2 that a statute empowering the Australian Crime Commission to examine persons in relation to serious and organised crime did not permit questioning on the subject matter of a crime for which the examinee was awaiting trial. The majority (Hayne, Kiefel and Bell JJ) held that requiring a person to answer such questions would fundamentally alter the system of adversarial and accusatorial criminal justice.[13] Their Honours said that the statute, despite expressly abrogating the privilege against self-incrimination, did not show a clear enough intention to make an alteration to the justice system as fundamental as permitting the questioning of an accused on the subject matter of the offence.[14]

The minority (French CJ and Crennan J) held that the statute clearly intended that examinees should be required to answer potentially incriminating questions regarding the subject matter of offences for which they were awaiting trial.[15]

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11 Ibid 154 [161] (Kiefel J); *Lee* (2013) 251 CLR 196, 288 [249] (Kiefel J).
12 *X7* (2013) 248 CLR 92, 154 [161] (Kiefel J).
13 Ibid 131 [85], 140 [118] (Hayne and Bell JJ), 154 [162] (Kiefel J).
14 Ibid 148–50 [142]–[148] (Hayne and Bell JJ), 152–3 [157] (Kiefel J).
15 *X7* (2013) 248 CLR 92, 109–12 [24]–[30] (discussed in Section II B 2 of this article).

Two months later, in *Lee*, the *X7* majority found themselves in the minority when the Court held 4–3 that compulsory examination powers, conferred on the New South Wales Crime Commission for the purpose of identifying and recovering the proceeds of crime, permitted examination on the subject matter of an offence for which the examinee was awaiting trial. Chief Justice French and Crennan J employed a similar analysis to their reasons in *X7*, while the two additional judges, Gageler and Keane JJ, held that: the intention of the statute was clear; the principle of legality protected against inadvertent and collateral interference with common law rights and privileges; and the principle of legality has a limited application when the legislation has among its objects the abrogation or curtailment of the very right sought to be protected by the invocation of the principle.[16]

Justices Hayne, Bell and Kiefel held that the decision in *X7* governed the result in *Lee*,[17] with Hayne J (perhaps understandably) adding some remarks about the doctrine of precedent.[18]

B *The Treatment of Insolvency Cases and Statutes in* X7 *and* Lee

The question of the relevance of insolvency cases and statutes arose in *X7* and *Lee* because the Court had to consider the precedential value of *Hamilton*. In *Hamilton,* the High Court held that companies legislation permitted the examination of a person who had been charged with offences about the subject matter of those offences. The minority and majority judges in *X7* and *Lee* differed on whether *Hamilton* was useful as a guide to the construction and operation of the statutes under consideration.

1 *Hayne, Kiefel and Bell JJ: Insolvency Statutes and Cases are not Relevant*

In *X7*, Hayne and Bell JJ said that Mason CJ's reasons in *Hamilton* acknowledged that whether the statute authorised the examination of a person charged with an offence regarding the subject matter of those offences

> was to be judged in light of 'a long history of legislation governing examinations in bankruptcy and under the *Companies Acts* which abrogate or qualify the right of the person examined to refuse to answer questions on the ground that the answers may incriminate him'.[19]

Their Honours said that the decision in *Hamilton* and cases like it:

> necessarily depended on the historical pedigree of the legislation being construed. That is, each of those decisions answered particular questions about the construction of the relevant statute in light of the fact that the legislature had, for very many years, made special exceptions to the otherwise accusatorial process of the criminal law in respect of bankruptcy and companies examinations.

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16 Ibid 310 [313]–[314].
17 Ibid 233 [67] (Hayne J), 277 [213] (Kiefel J), 291 [260] (Bell J).
18 Ibid 231–3 [61]–[70].
19 *X7* (2013) 248 CLR 92, 148 [139], citing *Hamilton* (1989) 166 CLR 486, 494.

> It is then not to the point to seek to draw out whatever drafting similarities might be found between the legislation considered in the companies examination cases and the relevant provisions of the ACC Act. The question presented by the provisions of the ACC Act is whether those provisions make a *new* exception to the accusatorial process of the criminal law.[20]

Justice Kiefel, agreeing with Hayne and Bell JJ, said that insolvency cases must be:

> understood as the result of an historical anomaly, commencing with the divergent view taken by the Chancery Court from that of the common law and continuing through the series of legislation which preceded that dealt with in those cases.[21]

In *Lee,* Kiefel J (Hayne and Bell JJ agreeing) said that *Hamilton* was:

> not a warrant for extending the view of the operation of such legislation in these areas of the law to legislation operating in different spheres where the fundamental principle operates and the system of criminal justice is maintained.[22]

Her Honour reiterated that insolvency cases were 'the result of an historical anomaly', rightly held irrelevant in *X7*.[23] Kiefel J said *Hamilton* could only be explained by reference to the fact that the insolvency legislation had historically operated outside the system of criminal justice and without regard to the principle that the prosecution had to prove its case without the accused's assistance.[24] Her Honour said that drafting similarities in insolvency statutes were not relevant to interpreting legislation 'which may affect the criminal justice system'.[25]

Justice Hayne said that it was a 'basic and serious legal error' to identify drafting similarities and declare that the two statutes have the same effect.[26] Such an approach would fail to take statutory context into account by ignoring the 'long pedigree' of insolvency legislation and the novelty of the statute under consideration in *Lee*.[27]

2 *French CJ, Crennan, Gageler and Keane JJ: Insolvency Statutes and Cases can be Considered*

In *X7*, French CJ and Crennan J referred to bankruptcy and insolvency statutes[28] and said they were instances where the legislature had elevated public interest considerations over, or balanced them against, individual interests 'to enable true facts to be ascertained'.[29] In *Lee*, French CJ said that the abrogation of the privilege in insolvency examination schemes reflected a public policy choice to which effect

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20 Ibid 148 [140]–[141] (emphasis in original).
21 Ibid 154 [161].
22 *Lee* (2013) 251 CLR 196, 288 [249].
23 Ibid 288–9 [249], [252]. See also 433 [243].
24 Ibid 289 [252].
25 Ibid
26 Ibid 233–4 [72].
27 Ibid.
28 *X7* (2013) 248 CLR 92, 121–2 [49]–[51].
29 Ibid 111 [28] citing *Rees v Kratzmann* (1965) 114 CLR 36, 80 (Windeyer J).

must be given.[30] His Honour said that approach applied beyond the field of bankruptcy.[31] His Honour said that examination in insolvency reflected policy considerations which might be analogous to considerations leading to the creation of new forms of compulsory examination.[32] Justice Crennan referred to insolvency cases and legislation in her discussion of the significance of the presence of a 'direct use immunity' when considering the statute's effect on the privilege.[33]

Justices Gageler and Keane in *Lee* said that, while it was true that the history of examination in insolvency affected Mason CJ's interpretation of the statute in *Hamilton*, examination in insolvency was merely a historical example 'of legitimate legislative judgments that, for compelling reasons of public interest, some diminution in the procedural advantages enjoyed by an accused person must be accepted'.[34] Their Honours said that the statute's failure to distinguish between situations where charges had or had not been laid was a 'studied indifference' similar to that in the legislation considered in *Hamilton*.[35]

3 *Insolvency Cases and Statutes are 'an Historical Anomaly' not Directly Concerning the System of criminal justice*

It can be seen from the above discussion that Hayne, Kiefel and Bell JJ essentially gave two reasons as to why insolvency statutes and cases were not a helpful guide when assessing novel compulsory examination schemes. The first was that compulsory examination in insolvency developed in a particular historical context that makes it unhelpful as a guide to analysing statutes providing for compulsory examination in novel contexts. The basis of that position appears to be a view that Chancery took a different approach to the privilege from the common law courts. The second reason was Kiefel J's suggestion that insolvency proceedings do not affect the system of criminal justice in the same way as examination in crime commission investigations or asset recovery proceedings.

III Chancery's Approach to the Privilege against Self-Incrimination

This section examines Chancery's approach to the privilege against self-incrimination in its general jurisdiction and the statutory insolvency jurisdiction and concludes that Chancery did not take a view of the privilege that differed in substance from that taken in the common law courts. That conclusion undermines the primary reason given by Hayne, Kiefel and Bell JJ for excluding insolvency statutes and cases from consideration.

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30 *Lee* (2013) 251 CLR 196, 222 [38].
31 Ibid.
32 Ibid 228 [50].
33 Ibid 253–4 [135]–[136].
34 Ibid 312–3 [317].
35 Ibid 319 [333].

A *Chancery Procedure*

The view that Chancery did not share the common law's objection to compulsory interrogation seems to be based on Chancery's distinct procedure. From the 14th century, Chancery courts would summon defendants to attend court to answer a plaintiff's bill.[36] The first process served upon the defendant would be the *subpoena ad respondendum*, which required an answer in person on oath.[37] The bill would contain claims for discovery or the administering of interrogatories. The defendant was required to provide a full answer to the bill, including any interrogatories,[38] and to provide any documents referred to in the bill (provided that they related to the plaintiff's case or title).[39] As Story notes, every Chancery bill was effectively a bill of discovery 'since it asks from the defendant an answer upon oath as to all the matters charged in the Bill, and seeks from him a discovery of all such matters'.[40] To fail to provide an answer could lead to committal for contempt.[41] This practice existed at a time when the common law courts did not allow parties to give evidence in their own cause.[42] A common law plaintiff, whether the Crown or a private prosecutor, who wanted an order for discovery or to administer interrogatories would have to proceed in Chancery by way of a bill in equity.[43]

Although Chancery procedure involved what was effectively compulsory examination of defendants, a review of the principles applicable to the making of orders for discovery and interrogatories does not suggest that Chancery courts proceeded without regard to the privilege. Macnair cites cases from 1580 onwards where Chancery[44] refused to compel a defendant to answer an incriminating bill,[45] and says that the rule was settled practice in the equity courts by the Restoration.[46] From at least the 18th century, Chancery would not make orders for discovery or interrogatories[47] in actions that might result in the infliction of 'penal consequences', regardless of whether the proceedings were civil or criminal.[48]

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36 Joseph Story, *Commentaries on Equity Pleadings, and the Incidents Thereto* (Maxwell, 1838) 38 §45 ('*Equity Pleadings*'); FW Maitland, *Equity: A Course of Lectures* (Cambridge University Press, 2nd revised ed, 1936) 5. See also Michael RT Macnair, *The Law of Proof in Early Modern Equity* (Duncker & Humblot, 1999) 55–60 ('*Early Modern Equity*').

37 Macnair, *Early Modern Equity*, above n 36, 56.

38 Story, *Equity Pleadings*, above n 36, 538–9 §852–3; Joseph Story, *Commentaries on Equity Jurisprudence* (Stevens and Haynes, 2nd ed, 1839) vol 1, 24 §31 ('*Equity Jurisprudence*').

39 Story, *Equity Pleadings*, above n 36, 542 §848.

40 Ibid 208 §311; Story, *Equity Jurisprudence*, above n 38, 24 §31.

41 Henry Maddock, *A Treatise on the Principles and Practice of the High Court of Chancery* (J & WT Clarke, 3rd ed, 1837) vol 2, 337–40.

42 John McGhee (ed), *Snell's Equity* (Sweet & Maxwell, 32nd ed, 2010), 6 [1,008]. This prohibition was removed by s 1 of the *Evidence Act 1851*, 14 & 15 Vict, c 99.

43 *Naismith v McGovern* (1953) 90 CLR 336, 341; Story, *Equity Pleadings*, above n 36, 208 §311.

44 And other 'equity' courts like the Court of Exchequer.

45 MRT Macnair, 'The Early Development of the Privilege against Self-Incrimination' (1990) 10 *Oxford Journal of Legal Studies* 66, 73 ('*Self-Incrimination*'), citing *Fenton v Bloomer* (1580) Toth 72, where the 'court refused to make a defendant answer so as to expose himself to (criminal) liability for usury'.

46 Ibid 78.

47 No distinction was made in relation to the privilege against self-incrimination between requests for interrogatories and discovery: *Mexborough v Whitwood Urban District Council* [1897] 2 QB 111, 155.

48 *R v Associated Northern Collieries* (1910) 11 CLR 738.

It was enough that the proceedings could result in 'penal consequences'[49] for the defendant:

> a bill of discovery cannot be sustained in any case where the matter sought to be discovered may be made the subject of a criminal charge … In what way he would be so subject, whether by indictment, information, impeachment, or, if necessary, by a bill of pains and penalties, is immaterial. It is sufficient that he would be subject to penal consequences.[50]

Discovery would not be ordered in cases where the purpose of the action was to enforce a penalty or forfeiture, and in any event the defendant could demur to the bill because Chancery would not enforce penalties and forfeitures.[51] Where the objection related to specific questions, and not to the bill as a whole, the objection would be made in the affidavit given in response to the order for discovery or interrogatories and the defendant was obliged to answer the remainder of the bill.[52]

Based on the materials referred to above, it cannot be said that Chancery's procedure reflected a different approach to the privilege, or in some way endorsed compulsory interrogation that could lead to self-incrimination. As Story says:

> Chancery has always steadily refused to compel any man to criminate himself, and by analogy to disclose any fact which will subject him to a penalty or forfeiture; and it has thus assisted in carrying into complete effect the benign maxim of the common law … [the privilege] is fully recognised and acted on in Courts of Equity, that no person shall be obliged to discover what may tend to subject him to a penalty or punishment, or to that which is in the nature of a penalty or punishment.[53]

It follows that it is not correct to say that Chancery did not share the common law's opposition to forcing confessions out of parties. Although its procedure could compel a party to give evidence in answer to a claim, Chancery did not push the rights of the defendant to one side. The defendant was obliged to answer a bill fully and truthfully, but was not obliged to incriminate himself or herself, or subject himself or herself to penalties or forfeitures. It appears that the difference between Chancery and the common law in relation to 'compulsory interrogation' was merely a procedural one which reflected that the parties to an action were competent and compellable witnesses in equity but not at common law. Chancery practice certainly more closely resembled a judicial inquisition, but any inquiry was limited to discovering the defendant's answer to the plaintiff's

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49 'Penal consequences' include the possibility of being charged with a crime, subjected to penalties, or made liable to forfeiture of an estate: *Orme v Crockford* (1824) 13 Price 376; 147 ER 1022, 1026.

50 *Glynn v Houston* (1836) 1 Keen 329; 48 ER 333, 336. See also *Smith v Read* (1737) 1 Atk 526; 26 ER 332; *Harrison v Southcote* (1751) 1 Atk 528; 26 ER 333, 339–40; *Paxton v Douglas* (1809) 16 Ves 289; 33 ER 975, 976; *Thorpe v Macaulay* (1820) 5 Madd 218; 56 ER 877, 881–2; *Maccallum v Turton* (1828) 2 Y&J 183; 148 ER 883, 887–8; *Attorney–General v Lucas* (1843) 2 Hare 566; 67 ER 234, 235. An exception to the rule appears to have been applied in cases of contempt on oath, perjury and abuse of process in Chancery actions: Macnair, *Self-Incrimination*, above n 45, 74.

51 Story, *Equity Pleadings*, above n 36, 330 §521.

52 SE Williams and F Guthrie-Smith (eds), *Daniell's Chancery Practice* (Stevens and Sons, 8th ed, 1914) vol 1, 610–11; Story, *Equity Pleadings*, above n 36, 330–1 §522.

53 Story, *Equity Pleadings*, above n 36, 362 §576 (footnote omitted).

case. Judicial inquiry was not used where the plaintiff could show that there was a risk that answering would expose him to prosecution, penalties or forfeiture.

It is true that 'the right not to be interrogated',[54] insofar as such interrogation involves being 'compelled on pain of punishment to answer questions posed by other persons or bodies', is one of the privileges forming part of the 'right of silence'.[55] Chancery procedure did not reflect that rule. But Chancery respected the privilege against self-incrimination. It does not follow from the fact that Chancery procedure allowed compulsory discovery and interrogatories that Chancery had a less protective attitude towards the rights of parties. Its practice was a far cry from the oppressive techniques used by the Court of Star Chamber, which underpin the common law's objection to compulsory interrogation and self-incrimination.[56]

B *The Privilege in Chancery's Statutory Bankruptcy Jurisdiction*

Whatever may be said about Chancery procedure and its interaction with the privilege, it is important to remember that the jurisdiction to conduct and supervise bankruptcy examinations was conferred on the Lord Chancellor and his court by statute.[57] The statutes, from the very beginning, provided for the compulsory examination of persons on oath and, from 1603, provided for compulsory examination of the bankrupt.[58] The Court was required to interpret the statutes to determine the scope of the power given to it. A review of the cases shows that, when carrying out that task, the Court was aware of the importance of the privilege, but came to the conclusion that the purpose of the statute would be

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54 *Lee* (2013) 251 CLR 196, 286–7 [244] (Kiefel J).

55 *R v Serious Fraud Office; Ex parte Smith* [1993] AC 1, 30.

56 Ibid 31; *Rees v Kratzmann* (1965) 114 CLR 63, 80; *Lee* (2013) 251 CLR 196, 266–7 [178], 286–7 [244]; John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, (Little, Brown and Co, 1904) vol 3, 3080 §2250. Around 1600, Chancery ran in parallel to the property and contract jurisdiction of the Court of Common Pleas, while the Star Chamber ran parallel to the crime and tort jurisdiction of the Court of King's Bench: see Macnair, *Early Modern Equity,* above n 36, 30.

57 The power of compulsory examination was originally conferred on the Lord Chancellor, the Keeper of the Great Seal, the Lord Treasurer, the Lord President, the Lord Privy Seal, Privy Counsellors and the Chief Justices (*Statute of Bankrupts Act 1542*, 34 & 35 Hen VIII, c 4). From 1571, the statute provided that the Lord Chancellor could appoint commissioners whose powers included the power to examine persons suspected of holding the property of the bankrupt (*Bankrupts Act 1571*, 13 Eliz 1, c 7, s 5) and from 1603 the commissioners could examine the bankrupt (*Bankrupts Act 1603*, 1 Jac 1, c 15, s 6). Although the statutes did not expressly provide for it, the Lord Chancellor exercised a supervisory jurisdiction over the commissioners, which he exercised according to equitable principles (see George Young Robson, *A Treatise on the Law of Bankruptcy* (Butterworths, 4th ed, 1881), 2). From 1831, the supervisory jurisdiction of the Lord Chancellor was exercised by the Court of Review, which formed part of the newly established Court of Bankruptcy as a court administering law and equity (*Bankruptcy Court (England) Act 1831*, 2 Will 4, c 56, s 2). The Court of Review was subject to appeal to the Lord Chancellor on matters of law, equity and the admission of evidence (s 3). In 1847, the Court of Review was abolished and its powers were exercised by a Vice-Chancellor of the Chancery Court (*Bankruptcy Act 1847*, 10 & 11 Vict, c 102) and later the Court of Appeal in Chancery (*Court of Chancery Act 1851*, 14 & 15 Vict, c 83, s 7). The *Bankruptcy Act 1883*, 46 & 47 Vict, c 52, ss 92–3 merged the London Bankruptcy Court with the High Court, which continues to exercise the bankruptcy jurisdiction.

58 *Statute of Bankrupts Act 1542*, 34 & 35 Hen VIII, c 4, s 2 and *Bankrupts Act 1603*, 1 Jac 1, c 15, s 6.

frustrated if a bankrupt was entitled to refuse to answer questions on the basis that the answer might be incriminating. Cases like *Hamilton*,[59] *Re Atherton*[60] and *Re Heath*[61] demonstrate that that conclusion did not change in circumstances where the person had been charged with a crime.[62] Chancery's approach to the bankruptcy statutes (and later to corporations statutes), particularly when viewed in the light of the above discussion of the treatment of the privilege in relation to bills of equity, did not arise from some institutional 'blind spot' regarding the privilege. It seems that Chancery judges approached the interpretation of the statute well aware of the privilege, and did not take an approach that differed in substance to that taken by the common law courts.

1 *The Legislative Development of Compulsory Examination in Insolvency*

Compulsory examination came into existence with the very first bankruptcy legislation in 1542. The *Statute of Bankrupts Act 1542* provided that on application by an interested party, the Court had the power to summon persons known or suspected to have any of the property of the 'Offender' and to 'examine them and every of them as well by their Oaths'.[63] From 1603, the bankruptcy legislation empowered commissioners to examine the bankrupt with such questions 'as may tend to disclose his, her or their Estate, or their secret Grants, Conveyances, and eloining of his, her or their Lands, Tenements, Goods, Money and Debts'.[64] If the bankrupt refused to answer questions, the commissioners had the power to commit the bankrupt 'to some strait or close Imprisonment, there to remain until he, she or they shall better conform him or herself'.[65] From 1731, answers given in examination were committed to writing and signed by the examinee, and a failure to submit to examination was a felony.[66] By 1883, the bankruptcy law provided that the bankrupt had a duty to answer all questions and that a written record of his or her answers could 'thereafter be used in evidence against him'.[67]

Public examination of the bankrupt, although no longer mandatory, is provided for in Australia by s 81 of the *Bankruptcy Act 1966* (Cth) ('the 1966 Act'). Section 81 provides that the person may be examined publicly about their 'examinable affairs' and may not refuse to answer 'merely because to do so might tend to incriminate' them.[68] Section 81(17) of the 1966 Act provides that the transcript of the examination may be admitted in evidence in any proceedings under the Act, and it appears that records of bankruptcy examinations are still

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59 (1989) 166 CLR 486.
60 [1912] 2 KB 251.
61 (1833) 2 Deac & Chitt 214. See also the criminal case *R v Skeen* (1859) Bell CC 97; 169 ER 1182, where the defendants had been examined while charges were pending against them.
62 Although in *Re Atherton* [1912] 2 KB 251 Phillimore J said that the privilege did not extend to overseas crimes, his reasoning up to that point indicates his view that, even if the crimes in that case were triable in England, it would not have founded an objection.
63 34 & 35 Hen VIII, c 4, s 2.
64 *Bankrupts Act 1603*, 1 Jac 1, c 15, s 6.
65 Ibid ss 6–9.
66 *Bankrupts Act 1731*, 5 Geo 2, c 30, ss 1 and 16.
67 *Bankruptcy Act 1883*, 46 & 47 Vict, c 52, s 17(8).
68 *Bankruptcy Act 1966* (Cth) ss 81(10), (11), (11AA).

admissible in criminal proceedings against the examinee.[69] In the United Kingdom, r 6.175(5) of the *Insolvency Rules 1986* (UK)[70] provides that the written record of a public examination may be used in any proceedings as evidence of any statement made during the examination. Section 433 of the *Insolvency Act 1986* (UK) provides that any statement made as the result of a requirement of the Act is admissible in evidence against the person making it, but may not be admitted in criminal proceedings at the behest of the prosecution unless the person gives evidence of the statement or asks a question in relation to it.

The approach taken to compulsory examination in bankruptcy was adopted in the corporations context by the *Joint Stock Companies Winding Up Act 1844*.[71] From 1890, the corporations statute provided for public examination where the Official Receiver reported his opinion that fraud had been committed by any person involved in the promotion, formation or management of a company. The court was then empowered to summon such persons to be publicly examined as to the company's dealings and their own dealings with the company. The court was empowered to ask such questions it considered expedient, and the person was obliged to answer the questions and sign a record of the examination, which could then be used in evidence against him or her.[72] Examinees in a private examination (under s 115 of the *Companies Act 1862*[73] and its successors) were entitled to refuse to answer questions on the ground that the answer might incriminate them. In contrast, examinees in a public examination (under s 8 of the 1890 Act and its successors) were not entitled to the privilege.[74] Compulsory examination in corporate insolvency is provided for in Australia by ch 5 pt 5.9 div 1 of the *Corporations Act 2001* (Cth) ('the *Corporations Act*'). Section 597(12) of the *Corporations Act* provides that '[a] person is not excused from answering a question … on the ground that the answer might tend to incriminate the person or make the person liable to a penalty'. Section 597(12A) of the *Corporations Act* provides that a self-incriminating answer will not be admissible against the person in a criminal proceeding or a proceeding for a penalty if the person claims the privilege before providing the answer. In the United Kingdom, s 133 of the *Insolvency Act 1986* (UK) provides for public examination and s 268 provides for private examination. It has been held that the privilege does not apply in relation to either public or private examination.[75] The direct use immunity in s 433 of the *Insolvency Act 1986* (UK) also applies to answers given under ss 133 and 268.

2 *Chancery Cases Dealing with the Compulsory Examination Power*

A review of bankruptcy cases reveals that Chancery judges struggled with the question of whether the bankrupt could claim the privilege in an examination.

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69 *R v Zion* [1986] VR 609; *R v Owen* [1951] VLR 393; Lawbook Co, *Australian Bankruptcy Law and Practice*, vol 1, (at 18 July 2014) [81.11AA.05].

70 SI 1986/1925.

71 7 & 8 Vict, c 111, ss 13, 15.

72 *Companies (Winding-up) Act 1890*, 53 & 54 Vict, c 63, ss 8(2)–(3), (6)–(7) ('the 1890 Act').

73 25 & 26 Vict, c 89.

74 *Re Jeffrey S Levitt Ltd* [1992] 1 Ch D 457, 466–7.

75 *Bishopsgate Investment Ltd v Maxwell* [1993] 1 Ch D 1, 30–1.

Early 19th century cases show a divergence of views on the question. Even where the Court held that the bankrupt could not claim the privilege, the Court applied the exception to the privilege as narrowly as was consistent with the purpose of the examination.

Ex parte Cossens, decided in 1820, shows Lord Eldon LC speaking of the privilege as a 'most sacred' principle.[76] Nonetheless, Lord Eldon said that his understanding was that it did not apply in the bankruptcy jurisdiction '[b]ecause a bankrupt cannot refuse to discover his estate and effects, and the particulars relating to them, though … that information may tend to shew he has property which he has not got according to law'.[77] That statement conflicted with his earlier dictum in *Ex parte Oliver* that a bankrupt is 'not bound to answer Questions criminating himself'.[78] However, the privilege still affected the scope of permissible examination. Lord Eldon said that the petitioning creditors could ask the bankrupt whether he had received a particular sum from a particular person, but could not ask whether the sum was an illegal payment given in return for him resigning a public office.[79] The distinction appears to be that Lord Eldon would not permit directly incriminating answers, but would allow questions with a tendency to incriminate, provided that they could reveal something about the bankrupt's estate.[80]

Ex parte Kirby[81] shows that there was, even nine years after *Ex parte Cossens*, resistance to the idea that the statute compelled bankrupts to answer incriminating questions. Lord Lyndhurst LC said that a bankrupt was entitled to refuse to confirm the truth of a written statement detailing a transaction:

> even if it were likely to prove advantageous [to identifying the bankrupt's estate], there is not any authority to shew that the commissioners may dispense with the general rule of law, that no person can be compelled to criminate himself.[82]

Lord Lyndhurst said that in his view the authorities, including *Ex parte Cossens*, showed only that a bankrupt could be compelled to disclose information showing that he had committed an act of bankruptcy.[83] The bankrupt could not be asked whether he had obtained property through fraud.

In *Re Heath*,[84] a case in the Court of Review,[85] it was held that a bankrupt who had been indicted by his creditors for fraudulently concealing his goods (an offence under the statute) was obliged to answer questions directly related to whether he had concealed his goods, provided that the questions concerned his estate. Heath's counsel expressly argued that the privilege should not be abrogated

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76 (1820) Buck 531, 540.
77 Ibid 540.
78 (1813) 1 Rose 407, 414.
79 Ibid 545.
80 Ibid 543–4.
81 (1829) Mont & M 212.
82 Ibid 229–30.
83 *Ex parte Kirby* (1829) Mont & M 212, 229–30.
84 (1833) 2 Deac & Chitt 214.
85 See n 57.

in the absence of express words or necessary implication.[86] Chief Justice Erskine applied *Ex parte Cossens*.[87] The examinee could not be asked whether he had committed a robbery, but could be asked whether on a particular day he had 100 pounds and what he had done with that money. That was because the second question related to his estate whereas the first did not.[88] Sir George Rose said that he had no doubt that the bankrupt must answer, or be committed for failing to do so, provided that the question concerned his estate.[89] Sir John Cross doubted whether the examinee was unable to claim the privilege, but said that he did not think the pendency of the indictment was relevant to answering the question.[90] The report notes that the bankrupt was committed to Newgate Prison for refusing to answer the question, but later discharged after providing an answer.[91]

Another 1833 case, *Re Smith*,[92] involved a refusal by a bankrupt to answer a question intended to show that he had not made a full and complete discovery of his estate during his last examination. The bankrupt argued that the question was directly incriminating. Chief Justice Erskine said that he would not have allowed the question if it was not intended to discover his estate and effects.[93] Referring to *Ex parte Cossens*, Erskine CJ allowed the question because the statute required answers to questions which may '*tend* to a discovery of his effects'.[94] Sir George Rose said that the statute permitted questions which tended to show that the bankrupt had concealed his effects and that the question in this case was part of an inquiry intended to discover the bankrupt's estate and effects. Interestingly, His Honour said that if the bankrupt asserted that the previous concealment was fraudulent, then he would be entitled to claim the privilege, because the answer would show that he had concealed with an intent to defraud his creditors (an offence under the Act[95]). He referred to *Ex parte Kirby* and said that the answer to the question in that case was disallowed because it would directly incriminate the bankrupt in criminal proceedings which were pending at the time.[96] In dissent, Sir John Cross said the question should be disallowed because its only purpose was to show that the examinee had committed perjury, which was not a legitimate purpose.[97]

Re Atherton[98] demonstrates that by 1912 judges were taking a much stronger view of the extent to which the statute abrogated the privilege. The debtor was in gaol awaiting extradition for alleged crimes committed in Canada. He

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86 (1833) 2 Deac & Chitt 214, 215–6.
87 (1820) Buck 531.
88 *Re Heath* (1833) 2 Deac & Chitt 214, 222.
89 Ibid 224.
90 Ibid 223.
91 Ibid 226.
92 (1833) 2 Deac & Chitt 231.
93 Ibid 235.
94 *Re Smith* (1833) 2 Deac & Chitt 231, 236 (emphasis in original).
95 *Bankrupts (England) Act 1825* (UK) 6 Geo 4 c 16.
96 Ibid 238–9. Sir George Rose was counsel for the examiners in *Ex parte Kirby*, but nothing in the report of that case indicates that criminal proceedings had been commenced against the bankrupt at the time of the examination. The reported submissions point the other way (see (1829) Mont & M 212, 216).
97 Ibid 236–7.
98 [1912] 2 KB 251.

objected to answering a question relating to the circumstances of the alleged crimes. Justice Phillimore, sitting in King's Bench, but exercising the supervisory jurisdiction formerly exercised by the Lord Chancellor, said that the words in s 17 of the *Bankruptcy Act 1883* — 'it shall be his duty to answer all such questions as the Court may put or allow to be put to him'[99] — required the debtor to answer the question:

> Those words are in themselves wide enough for the purpose of the matter now before me, but I have also the authority of the cases of *In re a Solicitor*, *Reg. v. Erdheim*, and *Reg. v. Scott*, which decide that those words mean what they say, that a debtor is bound to answer all such questions as the Court may put or allow to be put to him, whether they tend to criminate him or not – even such a question as 'Have you committed a crime?'[100]

Justice Phillimore rejected the argument that the power to require answers to questions regarding criminal conduct was limited to offences under the Bankruptcy Act. His Honour acknowledged that it had been the practice of the courts to adjourn the examination if the debtor had been charged, but that the practice was 'only a rule of convenience and tenderness' which would be ignored where it might 'lead to mischief'.[101]

In *Re Paget*,[102] the debtor refused to disclose the name under which he had enlisted in the Army during the Great War. The Court held that he was obliged to answer the question, notwithstanding that the answer may incriminate him. The Court emphasised the public interest in obtaining full disclosure. Lord Hanworth MR said that public examination under s 14 of the *Bankruptcy Act 1914*[103] was

> not merely for the purpose of collecting the debts on behalf of the creditors or of ascertaining simply what sum can be made available for the creditors who are entitled to it, but also for the purpose of the protection of the public in the cases in which the bankruptcy proceedings apply, and that there shall be a full and searching examination as to what has been the conduct of the debtor in order that a full report may be made to the Court by those who are charged to carry out the examination of the debtor. To concentrate attention upon the mere debt collecting and distribution of assets is to fail to appreciate one very important side of bankruptcy proceedings and law.[104]

Further evidence that Chancery judges were alive to the importance of the privilege are the cases where witnesses (in contrast to bankrupts) were permitted to refuse to answer incriminating questions, even where such questions concerned the trade, dealings and estate of the bankrupt.[105]

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99 46 & 47 Vict, c 52.

100 *Re Atherton* [1912] 2 KB 251, 254 (footnotes omitted).

101 Ibid 255. The *Insolvency Rules 1986 (UK)* SI 1986/1925, r 6.175(6) provide that the public examination of a bankrupt may be adjourned if criminal proceedings have been instituted against the bankrupt and the court is of opinion that continuing the hearing would be calculated to prejudice a fair trial of those proceedings.

102 [1927] 2 Ch D 85.

103 4 & 5 Geo 5, c 59.

104 [1927] 2 Ch D 85, 87–8.

105 *Smith v Beadnell* (1807) 1 Campbell 30; 170 ER 865 (where the witness's answers exposed him to penalties under the Act); *Re Abithol; Ex parte Burlton* (1821) 1 Gl & J 30; *Re Firth; Ex parte Schofield (No 1)* (1877) 6 Ch D 230.

These cases show that, although it was clear that Chancery judges would, in some circumstances, require the bankrupt to answer incriminating questions, there does not appear to have been a uniform practice until late in the 19th century. As will be seen, it is arguable that the full scope of the abrogation of the privilege was only settled in a *common law* case in 1856.[106] Further, even if the examinee was required to answer incriminating questions, the Court exercised its supervisory role strictly to ensure that the incriminating questions were genuinely aimed at serving the purposes of the statute, being the discovery of the plaintiff's estate and dealings.[107] It appears that, even into the 20th century, when it was treated as settled that bankrupts were required to answer self-incriminating questions, examination was often deferred until after the criminal trial had been completed unless there was a compelling reason for not doing so.[108] Chancery also recognised the privilege, without any qualification, in relation to witnesses called to give evidence about the bankrupt's estate.

The above review of cases shows that the eventual conclusion of the Chancery judges that the bankruptcy statutes abrogated the privilege was not a result of a 'divergent view'[109] of the privilege and its importance. The conclusion that bankrupts were obliged to answer, even in circumstances where they were facing trial for matters which might be raised in the examination, followed from the Court's assessment of the purposes of the statute. Those purposes would be frustrated by permitting bankrupts to refuse to answer questions on the basis that the answer might expose them to penal consequences. Just as the purposes of the statute required that bankrupts must answer incriminating questions where necessary, the purposes of the statute also closely confined the duty to answer such questions. The bankrupt would only be compelled to answer potentially incriminating questions where the answer would further the purposes of the statute.[110]

3 *Common Law Cases on the Admissibility of Evidence Obtained During Compulsory Examination*

Assessing the claim that Chancery took a different approach to the privilege also requires an examination of the view taken by the common law courts. An analysis of criminal cases tried before the abolition of the Chancery court[111] shows that the common law courts also interpreted the bankruptcy statutes as abrogating the privilege. Indeed, it appears that the approach of the common law courts in criminal cases helped settle the law in Chancery.

The question of the construction of the bankruptcy statutes arose in criminal cases when the prosecutor sought to adduce evidence of the answers given by the

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106 See *R v Scott* (1856) Dears & B 47; 169 ER 909. See also Section III B 3 of this article.

107 The statement in *Re Atherton* [1912] 2 KB 251 that the bankrupt could be asked 'have you committed a crime?' indicates that any distinction between directly incriminating questions and questions tending to incriminate had broken down by 1912.

108 *Re Atherton* [1912] 2 KB 251.

109 *X7* (2013) 248 CLR 92, 154 [161] (Kiefel J).

110 For a detailed history of the treatment of the privilege in bankruptcy statutes and cases in the UK and Australia see *Griffin v Pantzer* (2004) 137 FCR 209, 234–53 [80]–[168].

111 *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66 and *Supreme Court of Judicature (Amendment) Act 1875*, 38 & 39 Vict, c 77. See McGhee, above n 42, 12 [1–016].

bankrupt during his examination. A decision admitting the accused's examination as evidence was upheld in 1838,[112] but the foundational case is the 1856 case, *R v Scott*.[113] A defendant charged with mutilating his trade books (an offence under the bankruptcy legislation) sought to exclude evidence from his trial which had been obtained during his public examination. The bankruptcy legislation at the time did not expressly provide that evidence from the examination could be used against the bankrupt. The Court (Coleridge J dissenting) strongly affirmed that the privilege against self-incrimination was not available where the questions concerned the bankrupt's 'trade, dealings or estate' and which did not have the 'direct object' of establishing that he had committed a criminal offence.[114] Regarding whether the answers could be admitted in the bankrupt's trial, the Court said that Parliament had 'overruled' the common law privilege.[115] The majority said that reading the examination power as impliedly preventing the use of answers as evidence in criminal proceedings

> may be more likely to defeat than to further the intention of the Legislature. Considering the enormous frauds practised by bankrupts upon their creditors, the object may have been, in an exceptional instance, to allow a procedure in England universally allowed in many highly civilized countries … When the Legislature compels parties to give evidence accusing themselves, and means to protect them from the consequences of giving such evidence, the course of legislation has been to do so by express enactment … We therefore think we are bound to suppose that in this instance, in which no such protection is provided, it was the intention of the Legislature to compel the bankrupt to answer interrogatories respecting his dealings and his conduct as a trader, although he might thereby accuse himself and to permit his answers to be used against him for criminal as well as civil purposes.[116]

In *R v Robinson*, Kelly CB said that *R v Scott* appeared to be at variance with the principle 'that no man is bound to criminate himself', but held that it was binding.[117] In that case, the Court rejected an argument by three defendants that transcripts of their compulsory examinations should not have been admitted in their trial for an offence under the bankruptcy legislation (although the appeal was allowed on another ground). Baron Martin, Byles J, and Shee J also applied *R v Scott*, with Shee J saying 'that the maxim that no man shall be compelled to criminate himself, has, in the case of the examination of bankrupts and others in bankruptcy, been annulled by the Bankrupt Acts'.[118]

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112 *Wheater's Case* (1838) 2 Lewin 157; 168 ER 1113. Although, in an 1833 assizes case the judge refused to admit a balance sheet obtained during examination: *R v Britton* (1833) 1 M & Rob 297; 174 ER 101.

113 (1856) Dears & B 47; 169 ER 909.

114 Ibid 912–3.

115 Ibid 914.

116 Ibid 914–5. Counsel for the Crown submitted: 'In the bribery and other statutes, where the intention of the Legislature was that parties under a compulsory examination should not be liable to have their evidence used against them, an express proviso is inserted to that effect': ibid 912.

117 (1867) LR 1 CCR 80, 84–5.

118 Ibid 87–8, 90.

In *R v Cherry*, it was held that answers given in a bankruptcy examination were admissible in a criminal trial notwithstanding a representation to the contrary made at the examination.[119] Baron Martin said that the situation would have been different if the statements were voluntary, but the defendant was obliged to submit to examination under the Act.[120]

In *R v Widdop*, the appellant complained that incriminating answers made in his bankruptcy examination were admitted against him in his criminal trial.[121] Baron Martin, in dismissing the complaint on the authority of *R v Scott*, said:

> The examination in this case appears to me to have been lawful both at Common Law and under the statute. The Court of Chancery has always exercised the power of compulsory examination, and the Common Law Courts now do the same by interrogatories. It has been the opinion of many Judges (and I do not know that the opinion has ever been overruled) that an interrogatory may be put, although it tend to criminate, leaving the person interrogated to object to answering it.[122]

Although in that case the examinee had not objected to the questions (and therefore the privilege was not technically triggered), Martin B said that the examination was in any event lawful under the statute.[123] Justice Brett also said that the case was governed by *R v Scott*.[124]

At the time the common law cases referred to above were decided, the bankruptcy statute did not expressly provide that answers given in compulsory examination could be used in evidence against the examinee. Nonetheless, the common law courts admitted self-incriminating statements on the basis that the statute had abrogated the privilege and that that abrogation meant that the statements could be used as evidence in a criminal trial. Similarly to the cases in Chancery, the judges emphasised the purpose of the statute as reflecting a policy choice made by Parliament in order to protect the public from fraud.

An objection to the above analysis may be that the question of the admission of evidence in a criminal trial is separate from the question of whether a statute requires a person facing charge to answer questions that might incriminate him. While that is undoubtedly so, the admissibility of the compulsorily-acquired evidence turned on the proper construction of the statute — specifically, whether it authorised the incriminating questions and compelled the incriminating answers. Incriminating answers are admissions and therefore the rules relating to the reception of admissions applied — the relevant rule in this case being whether or not such admissions were made voluntarily. In *R v Scott*, the Court held that statements made during a lawfully conducted examination were not 'involuntary' in the sense that would justify their exclusion:

> It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be

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119 (1871) 12 Cox CC 32.
120 Ibid 34.
121 (1872) LR 2 CCR 3.
122 Ibid 8.
123 (1872) LR 2 CCR 3.
124 Ibid 9.

> induced by improper threats or promises … Such an objection cannot apply to a lawful examination in the course of a judicial proceeding.[125]

As *R v Sloggett*[126] shows, this interpretation put the accused in a difficult position, because in the event that the examination went beyond the permitted scope of the Act, the accused would have been entitled to claim the privilege and refuse to answer. But that meant that answers given to improper questions were admissible because answers given in circumstances where the privilege was available but not claimed were voluntary and therefore admissible.[127] Presumably, an answer given to an unlawful question after claiming the privilege would be treated as involuntary.

The objection therefore is unpersuasive because the answer to the question of admissibility necessarily depended on the common law judges' view of whether the bankruptcy statute permitted the examination which was proposed to be admitted as evidence. The common law judges took the same, if not a stronger, view of the statute as the Chancery judges.

From 1883, the point was covered by a provision that expressly provided that examination transcripts were admissible as evidence against the accused.[128] The cases before 1883 support Wigmore's assertion that 'the English courts had apparently driven a coach-and-four through the privilege, long before the modern statute of 1883 had expressly nullified it'.[129] The above analysis shows that both the common law judges and Chancery judges were holding the reins.

The cases just referred to are significant because they show that, although the question in the common law courts concerned the admissibility, and not the compellability, of incriminating answers, the answer to the question of admissibility depended on a construction of the statute to discover its effect on the privilege against self-incrimination. Although the interpretation was being carried out for different purposes, the results reached by the two courts were identical and do not reflect any institutional differences regarding the privileges of examinees under the insolvency statutes.

As one would expect, the approach in common law cases did not change after the Chancery court was abolished. Incriminating statements made in bankruptcy proceedings continued to be admitted as evidence against the accused in criminal trials,[130] as well as in other non-bankruptcy proceedings.[131]

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125 (1856) Dears & B 47; 169 ER 909, 914.

126 (1856) Dears CC 656; 169 ER 885.

127 Ibid. But see *Commissioner for Customs and Excise v Harz* [1967] 1 AC 760, where answers — given in response to questions asked by officers acting without authority in circumstances where the defendants had been told they had a statutory duty to answer — were ruled inadmissible because they had been obtained by unlawful inducement.

128 *Bankruptcy Act 1883*, 46 & 47 Vict, c 52, s 17(7); *R v Erdheim* [1896] 2 QB 260, 269.

129 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence* (Little, Brown and Co, 3rd ed, 1940) vol 8, 357 §2260.

130 *R v Erdheim* [1896] 2 QB 260; *R v Pike* [1902] 1 KB 552 (statement of affairs admitted); *R v Dawson* [1960] 1 WLR 163, 174 (in that case the transcript was inadmissible by reason of a provision relating to offences under the *Larceny Act 1916,* 6 & 7 Geo 5, c 50); *R v Kansal* [1993] QB 244. See *Re Arrows Ltd* [1995] 2 AC 75 for a discussion of the admissibility of transcripts obtained in corporate insolvency examinations.

C *Discussion*

The review of equity and common law cases set out above casts doubt on the notion that the treatment of the privilege in Chancery was somehow unique to that court. The common law courts took the same approach to the bankruptcy statutes and received in criminal trials evidence of self-incriminating statements made by the accused during compulsory examination. That fact undercuts the suggestion in *X7*[132] and *Lee*[133] that there was some 'divergent view'[134] taken in Chancery that justifies excluding insolvency cases from consideration when interpreting statutes containing novel forms of compulsory examination. Nothing in the cases set out above indicates that the widely accepted 'exception' to the privilege recognised in the insolvency context had anything to do with institutional factors. The approach was the result of the interpretation placed on the statute by the judges tasked with applying it, whether in the insolvency or criminal context. That interpretation did not differ between the two courts. Further, nothing in the history of the procedure relating to bills of equity demonstrates an institutional attitude to the privilege that would provide a basis for ignoring the approach taken to compulsory examination in insolvency when interpreting statutes containing novel examination schemes.

As Hayne and Bell JJ said in *X7*, the question is whether the novel examination scheme 'make[s] a *new* exception to the accusatorial process of the criminal law'. [135] The fact that the approach in insolvency examination was not the result of some institutional aversion to the privilege against self-incrimination means that cases considering the insolvency statutes cannot easily be dismissed from consideration when answering that question. That question as posed implies that the insolvency cases create an exception to the accusatorial process of the criminal law (including its requirement that the prosecution prove its case without the accused's assistance) and not merely an exception to the privilege against self-incrimination. The relationship between insolvency cases and the system of criminal justice, including other privileges and immunities relating to the 'fundamental principle'[136] that the prosecution must prove its case without the accused's assistance, will be considered in the next section.

IV Relationship to the Criminal Justice Process and the Search for Legislative Intention

The questionable proposition that Chancery took a different view of the importance of the privilege against self-incrimination was not the sole reason given by Hayne, Kiefel and Bell JJ for excluding insolvency cases from consideration. Their Honours also said that there needed to be an intention to make the alteration to the accusatorial and adversarial nature of the system of criminal justice that would necessarily flow from requiring a person facing trial to answer questions about the

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131 *In re a Solicitor* (1890) 25 QBD 17.
132 (2013) 248 CLR 92, 154 [161] (Kiefel J)
133 (2013) 251 CLR 196, 286 [244] (Kiefel J).
134 *X7* (2013) 248 CLR 92, 154 [161] (Kiefel J).
135 (2013) 248 CLR 92, 148 [141] (emphasis in original).
136 *Lee* (2013) 251 CLR 196, 266 [176] (Kiefel J).

offence.[137] The alteration to the system of criminal justice included revoking the immunity of the accused from being interrogated after charge, which forms part of the broader 'right of silence'.[138] Justice Kiefel in *Lee* indicated that the fact that the examination might affect the system of criminal justice was a factor making it inappropriate to draw parallels between new examination schemes and insolvency examination schemes.[139] On this view, insolvency cases and statutes are not relevant because they do not directly affect the system of criminal justice. This section argues that examination in insolvency is capable of affecting the system of criminal justice in the same way as crime commission examinations. The section concludes by examining the similarities between *Hamilton*,[140] *X7*[141] and *Lee*.[142]

A *Connection to the System of Criminal Justice*

In *Lee*, Kiefel J said

> *Hamilton* is not a warrant for extending the view of the operation of such legislation in these areas of the law to legislation operating in different spheres where the fundamental principle operates and the system of criminal justice is maintained.[143]

The statutes in *X7* and *Lee* are more obviously linked to the system of criminal justice than insolvency statutes. In *X7*, the appellant was facing trial for charges carrying a maximum sentence of life imprisonment.[144] The very purpose of the examination scheme in *X7* was to investigate and discover serious and organised crime. The examination scheme in *Lee* was designed to assist in the recovery of the proceeds of crime and could involve questioning about the examinee's involvement in serious crime.[145] But it should not be forgotten that, although compulsory examination in insolvency is not directly concerned with the investigation of crime or the recovery of its proceeds, insolvency statutes nonetheless permitted the questioning of a person after they had been charged regarding the subject matter of the offence. They were therefore capable of having a similar impact on the accusatorial and adversarial system of criminal justice. Compulsory examination in those circumstances could prejudice the person in his or her defence of the criminal charge; a factor that was of particular significance to Hayne and Bell JJ.[146] Justices Hayne and Bell in *X7* acknowledge the connection of insolvency examination to the system of criminal justice, when they note that in insolvency 'the legislature had, for very many years, *made special exceptions to*

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137 *X7* (2013) 248 CLR 92, 132 [87] (Hayne and Bell JJ).
138 *R v Serious Fraud Office; Ex parte Smith* [1993] AC 1, 30–1. See also *R v Horncastle* [2010] 2 AC 373, 444 [62].
139 *Lee* (2013) 251 CLR 196, 289 [252].
140 (1989) 166 CLR 486.
141 (2013) 248 CLR 92.
142 (2013) 251 CLR 196.
143 Ibid 434 [249].
144 (2013) 248 CLR 92, 127 [67].
145 (2013) 251 CLR 196, 260–1 [158].
146 *X7* (2013) 248 CLR 92, 127 [70]–[71].

the otherwise accusatorial process of the criminal law in respect of bankruptcy and companies examinations'.[147]

The provision for public examination in the corporate insolvency scheme provides an instructive example. From 1890, the statute provided that the Official Receiver was to prepare a report for the court as to the affairs of the company. If, in the Official Receiver's opinion, the report disclosed a prima facie case of fraud committed by someone involved in the running of the company, he could submit a second report setting out the case against the person. The court was then empowered to examine publicly the person identified in the report. The examinee's answers could be used against him or her in any proceedings.[148] The purpose of the examination power was held to be 'manifestly to ascertain whether such fraud [identified in the Official Receiver's report] has been committed'.[149] The power to order the public examination required a specific finding of fraud by the Official Receiver reduced into a form in the report sufficient to allow the person to 'understand what it is from which he will have to exculpate himself, and with which it is sought to incriminate him'.[150] As Kitto J said in a case considering Australian provisions which were based on the public examination provisions in the 1890 Act:

> To read down the wide terms of the section so as to allow a danger of self-incrimination as a valid ground for refusing to answer a question would render the provision relatively valueless in the very cases which call most loudly for investigation. By providing … that notes of a person's examination may thereafter be used in evidence in any legal proceedings against him, the section shows that the possibility of self-incrimination is contemplated as being inherent in the kind of examination that is authorized.[151]

The example of public examination is instructive because the express purpose of the provision was to discover whether a fraud had been committed. A finding of fraud would more likely than not expose the person to penalties under the corporations legislation, disqualification as a director, or even criminal prosecution. It is not that questions would be asked on a topic that might indirectly reveal incriminating facts; the questions would be directly intended to expose fraud. Such questions would constitute interrogation after charge and, on Hayne and Bell JJ's analysis, could lead to the examinee being compromised in his defence. Similar considerations apply to examination in bankruptcy designed to expose secret transactions by the bankrupt, given that such questions would be likely to expose that the bankrupt had committed an offence under the relevant Act. These situations are not a world away from the examination in *X7*, the purpose of which was to discover information relating to 'federally relevant criminal activity'.[152]

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147 (2013) 248 CLR 92, 148 [140] (emphasis added).
148 *Companies (Winding-up) Act 1890*, 53 & 54 Vict, c 63, s 8.
149 *Re General Phosphate Corporation* [1895] 1 Ch D 3, 6. See also *Ex parte Barnes* [1896] AC 146.
150 *Re Civil, Naval and Military Outfitters Ltd* [1899] 1 Ch D 215, 240.
151 *Mortimer v Brown* (1970) 122 CLR 493, 496.
152 *ACC Act*, ss 7C(3), 24A.

It follows that examination in insolvency may intersect significantly with the administration of criminal justice in a way capable of having a significant effect on the adversarial and accusatorial system of criminal justice.

B Hamilton *and Drafting Similarities*

The issues of connection to the system of criminal justice and the effect on the privilege come together in *Hamilton*.[153] That is why Hayne, Kiefel and Bell JJ's decision to distinguish *Hamilton* was so significant within the context of *X7* and *Lee*. The case is capable of shedding light on many of the crucial issues raised in *X7* and *Lee*.

Hamilton involved public examination following a report by the liquidator identifying a prima facie case of fraud. It involved the examination of a company director who had been charged with offences relating to the affairs of two companies. The examination had been ordered under a provision of the *Companies (New South Wales) Code* (NSW), which was based on the public examination provision in the 1890 Act.[154] The Code provided that the liquidator, if satisfied that a person concerned in the management of the company had been guilty of 'fraud, negligence, default, breach of trust, breach of duty or other misconduct' in relation to the company, could apply to the court to have that person examined on oath in relation to the affairs of the company.[155] The person could be fined or imprisoned for refusing or failing to answer a question. The person could not refuse to answer a question on the ground that the answer might be incriminating, but if the person claimed the privilege the answer was not admissible against the person in criminal proceedings.[156] The High Court, dividing 3–2, held that the examination provisions permitted the examination of a person charged with an offence about the subject matter of that offence.

Although arising in an insolvency context, *Hamilton* directly affected the system of criminal justice in a way similar to the statutes considered in *X7* and *Lee*. As Mason CJ said, '[t]he very purpose of the section is to create a system of discovery, which may cause defences to be disclosed, for the purpose of bringing charges'.[157] The majority in *Hamilton* pointed to certain elements of the statutory scheme which led them to the conclusion that it permitted the questioning of a person awaiting trial. Those features included:

(1) the express abrogation of the privilege;
(2) a prohibition on the direct use of answers in criminal proceedings;
(3) a power given to the Court to give directions concerning the examination;[158]
(4) no distinction between pending and future criminal proceedings;[159] and

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153 (1989) 166 CLR 486.
154 The current provision is s 597 of the *Corporations Act 2001* (Cth).
155 *Companies (New South Wales) Code* (NSW), s 541(2)–(3).
156 *Companies (New South Wales) Code* (NSW), s 541(12).
157 *Hamilton* (1989) 166 CLR 486, 497.
158 Ibid 496 (Mason CJ), 508 (Dawson J), 515 (Toohey J).
159 Ibid 498 (Mason CJ), 512 (Toohey J).

(5) the retention of the Court's inherent power to protect the proper administration of justice.[160]

Chief Justice Mason also discussed the relevance of the absence of a prohibition on derivative use, noting that such protection tends to be ineffective due to the difficulty of proving that other evidence is derivative.[161]

The five features mentioned above were present to some extent in the legislation considered in *X7* and *Lee*. In *X7*, the statute contained an express abrogation of the privilege against self-incrimination,[162] a direct use immunity,[163] and did not distinguish between pending and future criminal proceedings. On the other hand, the examination was to be conducted by an Australian Crime Commission examiner and not the Court, although the examiner was required to make directions preventing or limiting the publication of evidence given before the examiner where the failure to do so might prejudice the examinee's safety or prejudice the fair trial of a person.[164] In *Lee*, the statute expressly abrogated the privilege;[165] contained a direct use immunity;[166] did not distinguish between examinees who had been charged with an offence and those who had not;[167] and provided that the examination was to take place before a court able to exercise its inherent power to prevent abuse of its process.[168]

While it is obvious that mere similarity between statutes will not be determinative, there will be cases where similarities will be instructive in ascertaining legislative intention. Where the two statutes relate to the same issue (in this case, the compulsory examination of a person charged with offences about the subject matter of those offences), similarities and differences may be helpful in determining whether the two statutes have a similar effect. For example, the later statute might adopt language used in an earlier statute.[169] The later statute might adopt features of the earlier statute that have been held to indicate a legislative intention to achieve a particular result. An example of such a similarity would be the fact that none of the statutes in *X7, Lee* or *Hamilton* makes any distinction between persons who have or have not been charged. Alternatively, the later statute might depart from the structure of the earlier one in a way that casts doubt on whether the legislature intended the later statute to have a similar effect. An example of such a departure is the fact that the statute in *X7* provided that the examination would take place in front of the crime commission and that any protection from direct use in a prosecution would be the result of directions made by the examiner restricting publication of the examinee's testimony. The central thesis of this article is that the

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160 Ibid 498–9.

161 Ibid 496 citing *Sorby v Commonwealth* (1983) 152 CLR 281, 312.

162 *ACC Act*, ss 24A, 30(2)(b), 30(4). In *Stoddart v Australian Crime Commission* (2011) 244 CLR 554, 620 [173] it was held that the examination scheme in the *ACC Act* abrogated the privilege.

163 *ACC Act*, ss 30(4)(c), (5).

164 Ibid s 25A(9).

165 *CAR Act*, s 31A(1).

166 Ibid s 31A(2)(a).

167 But did provide that '[t]he fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which the Supreme Court may stay proceedings under this Act that are not criminal proceedings': ibid s 63.

168 *Lee* (2013) 251 CLR 196, 223–4 [40]–[41] (French CJ).

169 As in *Bank of England v Riley* [1992] Ch 475 (CA).

similarities and differences between insolvency statutes and the statutes in *X7* and *Lee* cannot be excluded categorically from consideration on the basis that they are 'an historical anomaly'[170] or are not sufficiently connected with the system of criminal justice. The structure and features of the insolvency statutes may be useful as a guide to identifying the legislature's intention where the legislature creates new forms of compulsory examination in which the question of the privilege against self-incrimination may arise.

V Conclusion

Pointing to similarities between the statutes in *X7* and *Lee* and the statute in *Hamilton* does not demonstrate that Hayne, Kiefel and Bell JJ were wrong to hold that the statutes did not permit the examination of a person charged with an offence. Each statute must, of course, be interpreted by reference to its own terms, purpose and context.[171] A 'literal or mechanical approach' to identifying similarities and reaching conclusions about intention is not appropriate.[172] It may be that the purposes of the statute and examination scheme could still be achieved without abrogating the privilege against self-incrimination. Justices Hayne, Kiefel and Bell in *X7* said that allowing a person facing trial to claim the privilege would not frustrate the purpose of the examination provisions, which was to conduct investigations that would lead to the laying of charges. Allowing X7 to claim the privilege would not impede that purpose because he had already been charged.[173] However, it seems intuitive that where the question is whether a particular statute contains a sufficiently clear intention to require persons charged with an offence to answer questions about that offence, it will be instructive to look at cases and statutes directed towards the same question to see what features of a legislative scheme might indicate the presence or absence of such an intention. Although reference to insolvency cases and statutes may not be determinative, it may be helpful as a guide to factors that are significant when searching for the relevant legislative intention.

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170 *X7* (2013) 248 CLR 92, 154 [161] (Kiefel J); *Lee* (2013) 251 CLR 196, 288 [249] (Kiefel J).
171 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69].
172 *Lee* (2013) 251 CLR 196, 233–4 [72] (Hayne J).
173 *X7* (2013) 248 CLR 92, 150 [146]–[147].