Submission

by

Business NZ

to the

Justice and Electoral Select Committee

on the

Evidence Bill

September 2005

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Evidence Bill

1. Recommendation

1. That the bill make clear that the privilege against self-incrimination applies both to civil as well as to criminal proceedings.

2. That the privilege against self-incrimination be retained for corporations and clause 56(4) be deleted.

2. Introduction

2.1 This submission is directed to one particular clause of this Bill, namely clause 56 which concerns the issue of self-incrimination.

2.2 Business New Zealand has a twofold interest:

a. In the possibility that in providing a specific statutory privilege against self-incrimination in cases punishable by a fine or imprisonment, the legislation might, at the same time, be taken to have the equal and opposite effect of denying the right to invoke the comparable common law privilege in civil proceedings.

b. In the proposed removal of the common law protection against self-incrimination currently available to corporations noting, in particular, the anomalies this would create.

3. The privilege against self-incrimination in civil proceedings

3.1 While it is arguable that by making provision for the privilege against self-incrimination to apply in criminal proceedings (clause 56(2)(a) and (b)), the bill does *not* remove the application of the common law privilege to civil proceedings, there is nevertheless a real possibility that in due course, if the bill becomes an Act, its specific application of the privilege will be found to have had this effect.

3.2 Currently, the privilege can apply not only to court proceedings but also outside them and is not limited to testimony and discovery in judicial proceedings. This was affirmed by the Court of Appeal in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR where, at page 398, Cooke J stated:

"The starting point for any attempt to explore [the privilege against self-incrimination] a little deeper must be the principle that, unless an Act of Parliament imposes or authorises the imposition of a duty to the contrary, every citizen has in general a right to refuse to answer questions from anyone, including an official."

3.3 And as McMullin J (the dissenting Judge in *Taylor*) confirmed in the later case of *NZ Apple and Pear Marketing Board v Master & Sons,* [1986] 1 NZLR 193:

"Unless an Act of Parliament proposes or authorises the imposition of a duty to the contrary, every citizen has in general a right to refuse to answer questions from anyone, including an official."

3.4 The privilege against self-incrimination (or the right to remain silent with which it is often confused) is not therefore, in relation to civil proceedings, something to be lightly discarded and certainly not by implication because a statute asserts its

existence for criminal proceedings but is silent as to its application to a civil action. It is Business New Zealand's belief that the legislation should make clear that the self-incrimination privilege applies equally whatever form of proceeding is involved.

4. Privilege against self-incrimination - Application to bodies corporate

4.1 Business New Zealand's concerns with the proposed legislation extend to the purported removal of the privilege against self-incrimination as it currently applies to corporations (s56(4)(a)). In the *Apple and Pear Marketing Board* case referred to above, the Court of Appeal specifically directed itself to the rule as applicable to corporations concluding (following a consideration of relevant authorities) that there seemed to be *"…. no policy reason why a corporation should not avail itself of the rule".*

4.2 Business New Zealand believes that in concluding as it did in the *Apple and Pear Marketing Board* case the Court of Appeal adopted the only acceptable approach to self-incrimination in a corporate setting.

4.3 Business New Zealand notes, however, that contrary to the view espoused by the Court of Appeal, the Law Commission, in its "*Preliminary Paper 25, The Privilege Against Self-Incrimination, A discussion paper"*, September 1996, recommended the abolition of a corporate body's ability to claim the privilege. The Commission placed considerable emphasis on the word "self" and essentially considered that there was a distinction between attaching the privilege to an individual and attaching it to someone speaking on "*another person's behalf".*

4.4 The discussion paper went on to state that the removal of the privilege for corporate *bodies "… may reduce the incidence of officers and employees sheltering behind the body's privilege and vice versa".* Such as statement is,

however, inherently self-contradictory, as is the subsequent assertion that "*Bodies corporate, as distinct from their officers, cannot be pressured into making unreliable statements nor do they suffer abuses of power of a direct or psychological nature".*

4.5 The inherent contradiction arises since, although a company is defined in s15 of the Companies Act 1993 as "…*a legal person in its own right separate from its shareholders …",* the reality is that it can operate only through individual persons. This is recognised, for example, in a section such as s136 of the Companies Act 1993 which deals with the duty of directors in relation to obligation. (*" A director of a company must not agree to the company incurring an obligation unless the director believes at the time on reasonable grounds that the company will be able to perform the obligation when it is required to do so.")*

4.6 Moreover, while a company may indemnify its directors or employees against costs incurred in certain proceedings (s162 of the Companies Act), it may not do so in respect to criminal liability (when, in terms of the bill, the privilege against self-incrimination would apply) or against a breach of the duty imposed on directors to act in good faith (when, pursuant to the bill, the privilege might not apply). Employees may not be indemnified for a breach of any fiduciary duty (and here, too, in terms of the bill, there would likely be no recourse to the privilege against self-incrimination).

4.7 What provisions of this kind indicate is that it is not possible to separate the actions of a company from those of its employees and directors. Consequently, except where, in specific circumstances, justification for its removal can be properly established, the privilege against self-incrimination should continue to be available to incorporated bodies as to individuals.

4.8 The above conclusion is particularly relevant in relation to very small companies where the company and the individual are frequently one and the same person.

4.9 However, the same conclusion applies equally to larger firms where something that might be seen as an attempt to lift the corporate veil would have the effect of undermining the raison d'être for incorporation.

4.10 The matter is the more concerning given the strict liability imposed under s53 of the Health and Safety in Employment Act 1992 where a lack of intention is not an element in any prosecution. That in itself constitutes a notable whittling away of the common law principle of innocent until proved guilty, particularly as most accidents to which the health and safety legislation applies are far from intentional. To remove from incorporated bodies the privilege against self-incrimination would be to diminish that inherent right even further.

4.11 As McMullin J said in the *Apple and Pear Marketing Board* case:

"The power to manage a company's affairs, including the power to make admissions, ordinarily resides in the board of directors and in any person or persons to whom the board might delegate powers such as a general manager.. . If then the prosecution may prove its case by the out of Court statements of its directors, it seems reasonable that the company should be entitled to claim self-incrimination when it speaks through them.

"There are sound practical reasons why this should be so. There are over 140,000 companies registered in New Zealand [in 1986], indicating the extent to which the commercial enterprise is carried on by them. One writer, somewhat extravagantly perhaps, has described the limited liability corporation as the greatest single discovery of modern times (cited in Sealy, "Company Law and Commercial Reality" (1984) at p1). Many small family businesses …. have a corporate status. It would be unrealistic to deny the directors and other officers of those companies the right to plead incrimination just because they have changed the legal status of the business for considerations which are irrelevant to the

issue of self-incriminating admissions. For these reasons we hold, as did Henry J, that a plea of self-incrimination is available to corporate bodies."

4.12 Business New Zealand is firmly of the view that the above considerations continue to apply and that corporations should not have the general privilege against self-incrimination taken from them by statute.

Business New Zealand

Business New Zealand is New Zealand's largest business advocacy body and encompasses four regional business organisations[1] as well as a 57-member Affiliated Industries Group (AIG). The AIG comprises most of the country's national industry associations and consequently enables Business New Zealand to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest, reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business New Zealand contributes to Government and tripartite working parties and to international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

Business New Zealand's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD, a high comparative OECD growth ranking being the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services. It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.

1 September 2005

[1](Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association).