

**The removal of the right to silence and protection from self
incrimination. A legal analysis May 2011
Clause 172 of the Model Work Health and Safety Bill 2010 (Bill)**

**1. EXECUTIVE SUMMARY IN RELATION TO THE PROPOSED
ABROGATION OF THE RIGHT PRIVILEGE AGAINST SELF
INCRIMINATION.**

As is outlined in further detail below, the abrogation of the privilege against self-incrimination in clause 172 of the Bill, which is the purpose of the clause, is a matter of serious concern for three principal reasons:

- (a) The privilege against self-incrimination is a fundamental common law right and should not be undermined unless absolutely necessary. In the context of the Bill it is absolutely unnecessary;
- (b) The 'use immunity', which attempts to legitimise the abrogation of the privilege is ineffectual in protecting a witness' legitimate rights; and
- (c) The abrogation of the privilege and the ineffectual nature of the 'use immunity' is particularly concerning because individuals at all levels of a company (from senior management to the most junior employee) may be charged with a criminal offence following, and as a consequence of, a compelled interview.

We strongly recommend that the clause be re-drafted to either retain the privilege against self incrimination or ensure that the 'use immunity' is effective.

2. CLAUSE 172

2.1 Clause 172 of the Bill provides as follows:

"172 Abrogation of privilege against self-incrimination

- (1) *A person is not excused from answering a question or providing information or a document under this Part on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty.*
- (2) *However, the answer to a question or information or a document provided by an individual is not admissible as evidence against that individual in civil or criminal proceedings other than proceedings arising out of the false or misleading nature of the answer, information, document.*

Note

See the jurisdictional note in the Appendix.”

2.2 The Explanatory Memorandum (EM) to the Bill provides, in relation to clause 172:

“Clause 172 – Abrogation of privilege against self-incrimination

611. *The Bill seeks to ensure:*

- *that the strongest powers to compel the provision of information currently available to regulators across Australia are available for securing ongoing work health and safety, and*
- *that the rights of persons under the criminal law are appropriately protected.*

612. *Subclause 172(1) clarifies that there is no privilege against self-incrimination under the Bill, including under clauses 171 (Power to require production of documents and answers to questions) and 155 (Powers of regulator to obtain information).*

613. *This means that persons must comply with requirements made under these provisions, even if it means that they may be incriminated or exposed to a penalty in doing so.*

614. *These arrangements are proposed because the right to silence is clearly capable of limiting the information that may be available to inspectors or the regulator, which may compromise inspectors’ or the regulator’s ability to ensure ongoing work health and safety protections. Securing ongoing compliance with the Bill and ensuring work health and safety are sufficiently important objectives as to justify some limitation of the right to silence.*

615. *Subclause 172(2) instead provides for a ‘use immunity’ which means that the answer to a question or information or a document provided by an individual under clause 171 is not admissible as evidence against that individual in civil or criminal proceedings. An exception applies in relation to proceedings arising out of the false or misleading nature of the answer information or document.”*

2.3 Clause 172 of the Bill removes the privilege against self-incrimination and the right to silence. These protections are replaced with a ‘use immunity’, as referred to in paragraph 615 of the EM, to grant the regulator more power to investigate issues concerning workplace health and safety. Whilst it is necessary to create a system of workplace regulation to protect the health and safety of all persons, clause 172 of the Bill is fundamentally flawed as:

- (a) The circumstances of the abrogation do not justify overturning the strong legal and philosophical arguments in favour of the privilege against self-incrimination;
- (b) The practical operation of the ‘use immunity’ as a trade-off to the abrogation is ineffectual as it would, on the reading of the clause, create an anomalous situation where evidence compelled from

'Person A' could be used against 'Person B' and that a train of inquiry arising from the answers of Person A given under compulsion could lead a regulator to compel evidence from 'Person B' against 'Person A'. Therefore, 'Person A' is not protected from prosecution when compelled to give evidence to an inspector; and

- (c) The burden of proof in prosecution should lie with the regulator. Clause 172 allows for 'fishing expeditions' on the part of the regulator when they do not have enough evidence to otherwise conduct a prosecution, thus distorting the burden of proof.

The reasons for these objections are set out below.

- 2.4 There are other protections in the Bill, such as the requirement that investigators must take reasonable steps before coercive powers are used (clause 155(4)) and before questioning a witness, investigators must warn the witness of their power to compel answers to questions and the consequences if they do not comply (clause 173).
- 2.5 These are, however, inadequate protections in the context of the whole scheme of the Bill. For example, the 'use-immunity' only applies where a witness has made clear to the investigator that they intend to rely on the immunity and the investigator has made it clear that those particular questions are being asked under a coercive power. Clause 173(3) means that evidence 'voluntarily given' (i.e. given without the above situation made clear by both parties) is still admissible against the individual and does not even entertain the privilege against self-incrimination. It is not a far fetched possibility that when an investigator interrogates a witness, and when the witness is unaware of their rights (and having no right to legal counsel) then the situation can be abused. The 'protections' in the Bill are impotent in the face of this dangerous possibility.

3. IMPORTANCE OF THE RIGHT TO SILENCE AND PRIVILEGE AGAINST SELF-INCRIMINATION

- 3.1 As the Second Report to the Workplace Relations Ministers' Council in relation to the National Review into Model Occupational Health and Safety Laws (January 2009) (**WRMC Report**) noted that the right to silence "...has been described as a grouping together of a number of rights and privileges, including the privilege against self-incrimination..."¹ The right to silence, as acknowledged on page 522 of the WRMC Report has existed since 17th century England. It was designed to protect against the "...excesses of the Court of Star Chamber and the Court of High Commission in Ecclesiastical Causes, where an accused could be compelled by threat of punishment to swear on oath to tell the truth and then interrogated by the Court to determine whether or not an offence had been committed."²

Its modern incarnation has not substantively altered. The right to silence and its sub-variant, the privilege against self-incrimination, ensures³:

¹ Page 523 of WRMC Report

² Ibid at 522

³ The following bullet-points are extracted from pages 522-524 of the WRMC Report, which extracts the sources from *'The Abrogation of the Privilege Against Self-Incrimination'*, a

- ‘Fishing expeditions’ are avoided, where a regulator will “*try and produce evidence of some as yet undisclosed and unidentified criminality*”⁴;
- To prevent the abuse of power by the Crown in the examination of suspects or witnesses⁵;
- To prevent a conviction founded on a false confession or one which is made under duress and is likely to be unreliable;
- To protect the accusatorial system of justice, being the system by which the prosecution bears the onus of proving that an accused is guilty of an offence and the guilty is presumed to be innocent⁶;
- To protect the quality of evidence, as a person compelled to give self incriminating evidence may be tempted to lie in order to protect their own interests; and
- To protect human dignity and privacy, the invasion of which is said to occur in compulsory self incrimination⁷.

3.2 These are fundamental rights within our legal and political system which should not be abrogated without due cause. If they must be abrogated, they should be done in a manner that seeks to ensure the underlying protections in another way. The ‘use immunity’ included in clause 172 of the Bill does not do this.

3.3 The practical operation of clause 172 of the Bill is such that each of the rights and assurances listed above at 3.1 that should be protected are in fact violated.

4. INAPPROPRIATENESS OF ITS ABROGATION

4.1 Firstly, it must be noted that several state occupational health and safety Acts currently seek to protect the privilege against self-incrimination. In the OHS legislation in NSW, Queensland, South Australia and Victoria each statute allows a person to refuse to answer a question on the basis that it might be self-incriminating⁸.

4.2 In certain circumstances, the abrogation of the privilege against self-incrimination has been justified and has operated in such a manner as to best ensure the fundamental rights listed in 3.1 above.

4.3 The Australian Securities and Investments Commission (**ASIC**) under the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC**

December 2004 report by the Queensland Law Reform Commission. We rely on the underlying sources.

⁵ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 544

⁶ *Sorby & Or. v the Commonwealth of Australia & Ors.* (1983) 152 CLR 281 at 294; *Hammond v*

the Commonwealth of Australia & Ors. (1982) 152 CLR 188 at 201

⁷ *Accident Insurance Mutual Holdings Ltd v McFadden & Or.* (1993) 31 NSWLR 412 at 420

⁸ Section 65 of the *Occupational Health and Safety Act 2000* (NSW); Section 121 of the *Workplace Health and Safety Act 1995* (QLD); Section 54 of the *Occupational Health, Safety and Welfare Act 1986* (SA); Section 154 of the *Occupational Health and Safety Act 2004* (Vic)

Act) has the power to investigate breaches of corporations legislation, which includes the *Corporations Act 2001* (Cth) among others. Section 13 of the ASIC Act allows ASIC general powers of investigation, which may include compelling others to answer questions. However, the investigation regime established under the ASIC Act is subject to strict court supervision. A person subject to examination will be permitted the attendance of their lawyer, and if made clear at the outset of questioning, an examinee will (under section 68 of the ASIC Act) be allowed 'use immunity' for any statement they are compelled to make under the ASIC Act. The key difference with this situation, clearly, is the safeguards in place, namely the attendance of legal counsel and the court supervision of the regime. Neither of these are present under the Bill. Interrogations by OHS inspectors are often conducted at a workplace soon after an incident where a workmate of the interviewee may have been killed or seriously injured. The interviewee often has no knowledge of their own legal rights and absent support from their employer, little capacity to obtain legal advice.

4.4 By way of example and contradiction, section 17 of the *Crimes Act 1958* (Vic) (**Crimes Act**) provides that "*a person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence.*" Clause 31 of the Bill provides that a person commits a 'category 1' offence (a criminal penalty subject to a \$300,000 fine or 5 year imprisonment) "*if that person is reckless as to the risk to an individual of death or serious injury or illness*". The circumstances and substantive nature of the offences are identical. However, the situation concerning the abrogation of privilege is fundamentally different for two reasons:

- (a) In the case of the Crimes Act, an accused retains the right to remain silent. In the case of the Bill, the accused is compelled to answer any questions asked of him or her. Whilst evidence obtained in such circumstances cannot be used against that person, the ineffectual operation of the 'use immunity' undermines this protection; and
- (b) In any investigation or indictment under the Crimes Act, questioning of the nature contemplated here is performed by a police officer (in a recorded interview, with the right of having legal counsel present), by a Judge (in an open court) or a prosecutor (in an open court). Section 464C of the Crimes Act gives the accused the right to legal counsel. In the case of the Bill, clause 171(4) preserves the right for legal counsel, but it is not mandated. In the case of the Bill, such questioning would take place without any of the safeguards of the Crimes Act, and would be performed by regulators not entrusted with the carriage of justice.

This example highlights the grave concerns for the operation of clause 172 of the Bill.

4.5 Furthermore, it should be reiterated that clause 172 applies to all workers and any persons involved in a workplace, not simply members of a company's management or directors of a company. This is an important factor to note because:

- (a) Recently, OHS regulators have shown a willingness to prosecute individual "shop floor" workers as well as companies/senior

management.⁹ In reference again to the ASIC Act discussed above, ASIC does not have the power to prosecute 'regular' employees in the same manner as the regulator would be able to under this Bill;

- (b) Employers are not obligated to provide legal counsel on behalf of their employees. This may have grave consequences for lowly ranked employees as the cost of legal representation can be beyond the capacity of someone earning ordinary wages; and
- (c) Non-management employees will not usually have access to the insurance policies available to directors and senior management of large companies as a condition of their employment, making the risk of self-incrimination even higher as they may have to bear the cost of their own legal defence.

The importance of this point is that the abrogation of the privilege against self-incrimination is not simply an esoteric concern for lawyers. The situation described above, where an individual can be prosecuted for serious civil and criminal penalties, is exactly where such a privilege should be enshrined. To abrogate it, and provide an ineffective 'use immunity' as a replacement, not only destroys an important legal doctrine which has applied since the 17th century - it has the potential to compromise the practical and necessary rights of witnesses and accused in situations where there is the possibility of grave personal consequences.

5. CONCLUSION & RECOMMENDATION

- 5.1 Clause 172 of the Bill, as it currently stands, should not be enacted.
- 5.2 There are two possible alternatives to the current clause (in order of preference):
 - (a) The clause should be amended such that the privilege against self-incrimination is maintained, reflecting the current position in New South Wales, Queensland, South Australia and Victoria; or
 - (b) The 'use immunity' within the clause should be extended such that any evidence that has been acquired as a result of a train of inquiry that began with a witness being compelled to give evidence is inadmissible in the prosecution of the person from whom it was compelled. This would cure the anomalous situation where a regulator can compel evidence against Person A from Person B and vice versa; and
 - (c) Further if an inspector felt it necessary to require a witness to answer questions which might incriminate them, it should be conducted subject to relevant judicial supervision.

⁹ Consider the case of *Café Vamp* in the context of Victoria's OHS laws which demonstrates a willingness of OHS regulators to prosecute both senior and junior employees. (See *Worksafe v Map Foundation Pty Ltd*).