

SVENSON
BARRISTERS



*Privileges Under the Evidence
Act 2008 in Crime and Admin
Law*

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Introduction

Structure

1. Self-incrimination
2. Client legal privilege
3. Public interest immunity

Self-incrimination privilege

Outline

1. Brief introduction and general observations
2. The text of s 128 of the *Evidence Act 2008*

Self-incrimination privilege

What is it?

- provides for a person to refuse to answer compulsory questions that are directed at obtaining answers about the issue of their guilt.
- general terms

Evidence Act 2008

- The introduction of *Evidence Act 2008* (VIC) altered the landscape with respect to the self-incrimination privilege – in relation to matters that come within its scope.
- Section 128 of the Act does not 'cover the field' for all instances where self-incrimination privilege may arise or come into play. As a result, there may be instances where the common law still applies.

Limits inherent in statutory text

Issues

- Limits and boundaries
- Where the EA and s 128 applies, it does not provide a complete immunity from prosecution and that the privilege applies only to living persons and cannot be claimed by corporations

The Legislation and s 128 of the Act

What does s 128 say?

- Provides a procedure which both protects the witness claiming the privilege and enables the proceeding in which the witness is called to have the benefit of his or her evidence.
- Empowerse the court to consider compelling a person to give evidence where that person would otherwise claim self-incrimination privilege.

Subsections 128(1) - (3) and the operation of the provisions

- Subsections 128(1) – (3) effectively set out the essence of self-incrimination privilege and provides a **gateway** to the operation of the evidence act provision and the certification process.

*(1) This section applies if a **witness objects** to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness--*

(a) has committed an offence against or arising under an Australian law or a law of a foreign country, or

*(b) is liable to a **civil penalty**.*

(2) The court must determine whether or not there are reasonable grounds for the objection.

A few observations about 128(1) and (2)

- The section will only apply if a witness **objects** to giving certain evidence.
- The ground for the objection is that it **may tend to prove the witness** has committed an offence (Australian/overseas) or is liable to a civil penalty.
- The Court's role under, is to determine **whether there are reasonable grounds** for the objection and the criteria above.
- Where it appears to the court that a witness or a party may have grounds for making an application or objection under s128 the court must satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision (s.132 EA).

Subsection 128(3)

- Subsection (3) sets out certain processes that **must** follow where a court determines that there are reasonable grounds for the objection:

*(4) Subject to subsection (4), if the court determines that there are reasonable grounds for the objection, **the court is not to require the witness to give the evidence,** and is to inform the witness--*

(a) that the witness need not give the evidence unless required by the court to do so under subsection (4), and

(b) that the court will give a certificate under this section if--

(i) the witness willingly gives the evidence without being required to do so under subsection (4), or

(ii) the witness gives the evidence after being required to do so under subsection (4), and of the effect of such a certificate.

Subsection 128(4)-(5) - criteria and issuing of the certificate

(4) The court may require the witness to give the evidence if the court is satisfied that—

(a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and

(b) the interests of justice require that the witness give the evidence.

(5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence.

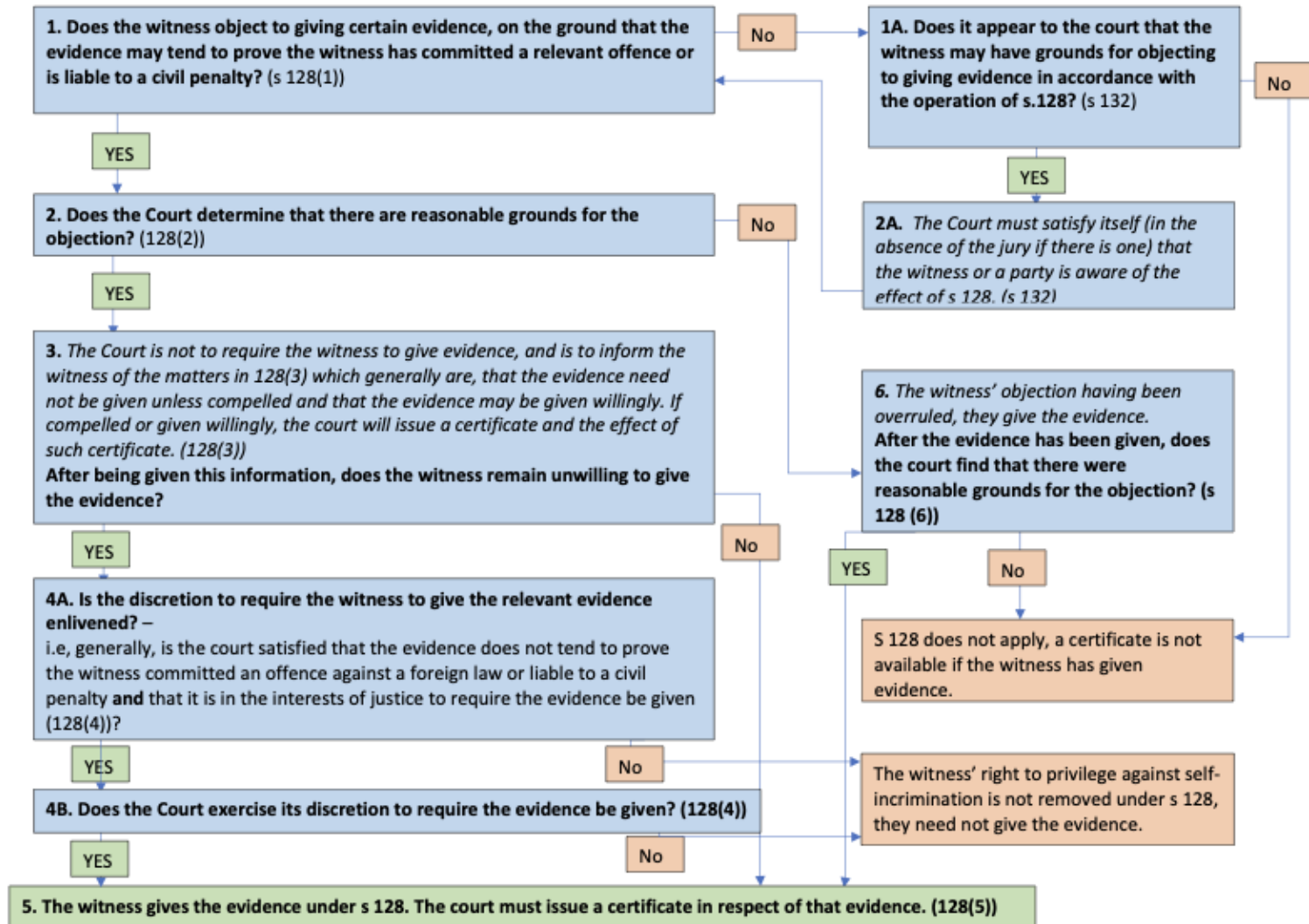
A few observations

- Paragraphs 128(4)(a) and (b) **must both** be met to enliven the power.
- Power is reliant on the exercise of a **judicial discretion** vested in the court.
- The **court must be satisfied** that the evidence being given is not only relevant but that the 'interests of justice require that the witness give the evidence'

Number of factors that may be considered

- the importance of the evidence,
- the nature of the offence to which the evidence relates,
- the nature of the proceedings where the evidence is sought to be adduced;
- whether compulsion will affect the witness being given a fair trial in future proceedings,
- amongst other things.

A diagram outlining aspects of the process



The Certificate

(5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence.

(6) The court is also to cause a witness to be given a certificate under this section if—

(a) the objection has been overruled; and

(b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.

*(7) In any proceeding in a Victorian court or **before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence—***

(a) evidence given by a person in respect of which a certificate under this section has been given; and

(b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence—

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

A few observations about the provisions

- A s128 certificate is different from an indemnity from prosecution. Witnesses who receive a certificate can still be prosecuted for offences disclosed during their evidence.
- The certificate merely provides use and derivative use immunity in respect of the witness' evidence, except in proceedings regarding the falsity of the evidence (*Spence v R* [2016] VSCA 113 at [68]).
- A judge should correct erroneous statements made by parties about the effect of a s128 certificate, such as a suggestion that the certificate means the witness is immune from prosecution, or could give false evidence with impunity (*Trudigan v WA* (2006) 33 WAR 163 at [29]- [30])

Deputy Commissioner of Taxation v Shi [2021] HCA 22

Gordon J

- The mere statement by the relevant person that they believe that disclosure of information will tend to incriminate them will rarely be sufficient to protect them
- In assessing whether there are reasonable grounds for the objection, the court must assess whether there is a "real and appreciable risk" *of prosecution* if the relevant information is disclosed

Deputy Commissioner of Taxation v Shi [2021] HCA 22

Edelman J

- s 128(2) did not alter the extent of the onus at common law
- The requirement that the grounds for objection be "reasonable" is concerned only with the grounds for the objection made by the party claiming the privilege, not with any ultimate conclusion.
- In *R v Bikic*[90], Giles JA observed that this onus of proof at common law, and contained in s 128(2), does not require a party asserting the privilege to establish the conclusion that the evidence may tend to prove that the witness has committed an offence. It suffices that there are reasonable grounds for an objection that this may be so.

The Accused in Criminal Proceedings and Facts in Issue

(10) In a criminal proceeding, this section does not apply in relation to the giving of evidence by an accused, being evidence that the accused—

(a) did an act the doing of which is a fact in issue; or

(b) had a state of mind the existence of which is a fact in issue.

(11) A reference in this section to doing an act includes a reference to failing to act.

Further Reading

- Section 128(12)-14 set out further provisions in relation to the operation of certificates and the provision in various jurisdictions.
- The provision, along with its commonwealth counterpart has recently been considered and there appears to be significant materials that set out its operation and certain limitations of the provision.

Cases that may be of interest include:

- *Deputy Commissioner of Taxation v Shi* [2021] HCA 22
- *DPP v Rubio Peters (a Pseudonym)* [2019] VSCA 193

Client legal privilege

Outline

1. Brief introduction and general observations
2. The text of ss 118 and 119 of the *Evidence Act 2008*

Careful!

Section 131A – preliminary matters

- s 131A does not apply where the person asserting the privilege is not the person producing the documents.
- This is important as the test for litigation privilege is more expansive under s 119 than at common law.

Cargill Australia Ltd & Ors v Viterra Malt Pty Ltd & Ors (No 8) [2018] VSC 193 at [42] (Macaulay J); *Alphington Developments Pty Ltd v Amcor Limited (No 2)* [2018] VSC 293 at [25]-[26] (Connock J).

Understanding ss 118 and 119

	Section 118 – Advice	Section 119 – Litigation
Confidential communication	between client-lawyer or lawyer-lawyer	between client-another or lawyer-another (incl. client)
Confidential document	prepared by client, lawyer or another	-
for the dominant purpose of	providing legal advice	providing professional legal services <ul style="list-style-type: none"> • relating to anticipated, pending, current • Australian or overseas proceedings • client is/was/could be a party

Dominant purpose test

AWB Limited v Cole (No 5) (2006) 155 FCR 30 [44]

- Party asserting bears the onus
- Not a question of motive – objective test (though subjective purpose often relevant)
- Evidence is required
- Court has power to inspect and examine

Issues

Issue waiver

- Where a party's state of mind is in issue
- The test is whether the party claiming privilege has acted in a way that is inconsistent with objecting to the production of the documents and usually those communications 'materially affecting or contributing to the relevant state of mind' will result in a waiver of privilege

Fraud and crime

- A document will not be privileged where it was made in furtherance of a fraud or a deliberate abuse of power (s 125)
- There must be an intention to facilitate a current or future wrongdoing through the communication or document.
- the definition of fraud extends to improper conduct falling short of criminal conduct - *Bolitho v Banksia Securities Ltd (No 8)* [2020] VSC 174

Setka v Dalton (No 2) (Legal professional privilege)

[2021] VSC 604

- “the nature and level of detail required to support claims for privilege is very situation specific”
- The evidence should be focused and specific
- A “bare or skeletal” claim should be avoided

Advice privilege can protect advice as to

- what evidence and submissions to be put,
- what could and should be prudently done or not done in a particular legal context
- and the exchange of information between a lawyer and a client for the purpose of ensuring they are both properly informed as to matters which will be the subject of legal advice.

Setka v Dalton (No 2) (Legal professional privilege) [2021] VSC 604

- the communications must be brought into existence for the dominant purpose of Boral obtaining or receiving legal *advice*.
- notably in assisting Boral with respect to its involvement in the ACCC proceeding, [law firm's] role appeared to be more of a **co-ordination role** rather than an advisory role
- Boral arguably retained lawyers to perform functions and tasks which went beyond providing legal advice, albeit in an adversarial context

Public interest immunity

Outline

1. Brief introduction and general observations
2. The text of s 130 of the *Evidence Act 2008*
3. Types of claims
4. Recent Court of Appeal judgment – *Zirilli*

Public interest immunity

What is it?

- a rule of evidence which operates to restrict the production/dissemination of otherwise relevant evidence in legal proceedings where its disclosure would be against the public interest

Confused?

- Non-publication, suppression, closed courts, other statutory schemes
- PII is *distinct*
- Parliament may legislatively abrogate PII by express words or necessary implication
- PII may be asserted where evidence is held by third parties and whether or not the State is a party to a proceeding
- Being an immunity based on public interest (and not the personal interest of a party), case law suggests that it cannot be waived

Section 130 (the PII section)

Exclusion of evidence of matters of state

(1) If the public interest in admitting into evidence information or a document that relates to **matters of state** is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.

Section 130 (the PII section)

Exclusion of evidence of matters of state

(4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would—

*(a) prejudice the **security, defence or international relations** of Australia; or*

(b) damage relations between the Commonwealth and a State or between 2 or more States; or

*(c) prejudice the **prevention, investigation or prosecution of an offence**; or*

(d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or

*(e) disclose, or enable a person to ascertain, the existence or identity of a **confidential source of information** relating to the enforcement or administration of a law of the Commonwealth or a State; or*

*(f) prejudice the **proper functioning of the government** of the Commonwealth or a State.*

Section 130 (the PII section)

Exclusion of evidence of matters of state

- (5) *Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters—*
- (a) *the **importance of the information or the document** in the proceeding;*
 - (b) *if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the information or document is an accused or the prosecutor;*
 - (c) *the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;*
 - (d) *the likely effect of adducing evidence of the information or document, and the means available to limit its publication;*
 - (e) *whether the substance of the information or document has already been published;*
 - (f) *if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is an accused—whether the direction is to be made subject to the condition that the prosecution be stayed.*

PII – Types of Claims

'class' claims

- production of that class of document would be injurious to public interest (e.g. Cabinet documents)

'content' claims.

- content claims is one for which an individual PII claim is made for a given document

Burden of proof

- party asserting a PII claim (ie normally the State) bears the burden of establishing that there is risk that production would be injurious to the public interest

See, Ryan v State of Victoria [2015] VSCA 353

Expansion under section 131A

This provision effectively expands the application of s 130 to circumstances where a process or order of the court requires the disclosure of a document and expressly sets out an inclusive list of instances that are covered by the provision:

[...]

(2) In this section, "disclosure requirement" means a process or order of a court that requires the disclosure of information or a document and includes the following—

- (a) a summons or subpoena to produce documents or give evidence;*
- (b) pre-trial discovery;*
- (c) non-party discovery;*
- (d) interrogatories;*
- (e) a notice to produce;*
- (f) a request to produce a document under Division 1 of Part 4.6;*
- (g) a search warrant.*

Recent Victorian Court of Appeal Judgments

- *Madafferi v The Queen* [2021] VSCA 1 (15 January 2021)
- *Zirilli v The Queen* [2021] VSCA 2 (15 January 2021)
- *Zirilli v The Queen* [2021] VSCA 305 (10 November 2021)

Criminal Procedure Act – s 317

Production of documents, exhibits or other things

For the purposes of this Part, the Court of Appeal may order the production of any document, exhibit or other thing connected with the proceeding if the Court of Appeal considers that it is in the interests of justice to do so.

A preliminary point – legitimate forensic purpose and ‘fishing’ expeditions

Back to basics

- What use can the party make of the material?

Zirilli v The Queen [2021] VSCA 2 at [84-98]

- The Court of Appeal in considers a line of authorities in which it was held that ‘on the cards’ means a **reasonable possibility** that it might be of substantial use to the party seeking production.
- Further it was accepted that the test should be applied flexibly and with common sense in order to give the accused a fair opportunity to test the Crown’s case and to take advantage of any applicable defences.

Zirilli v The Queen [2021] VSCA 305 [November 2021]

The judgment is illustrative of the Court's methodical and systematic approach to dealing with a number of claims for Public Interest Immunity and production for the purposes of a conviction appeal.

- E.g. Analysis and determination of the claims of PII made by the Commissioner of the AFP at paragraphs [46-60] of the judgment of Irving ASJ

Identifying the competing public interests

The competing public interests in Zirilli's case were expressed as:

- *[O]n the one hand, the public interest in protecting methods used by police to prevent, investigate and prosecute offences; and*
- *[O]n the other, the interest in disclosing information that a person asserts may assist them in seeking to quash a conviction.*

The Mandatory Considerations

After identifying the material over which the immunity was claimed, the court turns to consider the mandatory considerations set out in s 130(5) including

- The importance of the information or document in the proceeding;
- The fact that it was a convicted person seeking to appeal and overturn a conviction and lengthy sentence (including the seriousness and nature of the offences);
- The insight the materials would give into law enforcement processes;
- And that the information or its substance had otherwise not been published.

Balancing and Concluding

The court considered and weighed all the relevant, mandatory considerations and reached the conclusion in that case that:

- *Against these considerations, I am satisfied that disclosure would reveal sensitive police methodologies and there is a significant public interest weighing against disclosure of such information.*
- *The public interest factors favouring non-disclosure outweigh those in favour of disclosure. The AFP's PII claims in relation to the Full Disclosure Documents is upheld.*