

SELF-INCRIMINATION (S 128)

1. Intro

- CL: Absolute right — ‘no one is bound to answer any question if the question thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for’ (Lord Goddard in *Blunt*)
- UEA preserves, but slightly modifies, CL privilege against self-incrimination
- Rationales:
 - Protection from the ‘cruel trilemma’ of testifying against oneself
 - Maintenance of the state / individual balance
 - Maintenance of the integrity of the adversarial system

2. Objection made?

- S 128 applies if a witness **objects** to giving particular evidence / evidence on a particular matter because doing so may tend to prove that he (s 128(1)):
 - (a) has **committed an offence** under Aus or foreign country law; OR
 - (b) is liable to a **civil penalty**
- Note: A party to a proceeding who wishes to give evidence but is unwilling unless granted a s 128 cert does not ‘object’ to giving evidence for the purposes of s 128 (*Song*)
- Note: Applies to **testimonial or documentary evidence**

3. Reasonable grounds?

- Court must determine whether there are ‘**reasonable grounds**’ for the objection (s 128(2))
 - There must be a real and appreciable danger, not imaginary or insubstantial (*Perry*)
 - Must be for a bona fide purpose, not some collateral purpose (*Perry*)
- If there are reasonable grounds, court must inform the witness (s 128(3)):
 - (a) he **NEED NOT** give the evidence unless required to do so under sub-s (4); AND
 - (b) the court will give a cert if:
 - (i) the witness **willingly gives the evidence** without being required to do so; OR
 - (ii) the witness **gives the evidence after being required** by the court to do so; AND
 - (c) the effect of the cert

4. Required to give evidence?

- Court may require the witness to give evidence if satisfied that (s128(4)):
 - (a) the evidence does not tend to prove the witness has committed an offence / is liable to a civil penalty under foreign country law; AND
 - (b) the **interests of justice** require that the witness give the evidence
- Factors relevant to the 'interests of justice' include (*Lodhi*):
 - Nature of the proceedings — civil or criminal
 - If criminal, whether the evidence is called by the prosecution or defence
 - Importance of the evidence
 - Whether the substance of the evidence has already been published
 - Likelihood that the evidence will be unreliable even if a cert is given
 - Nature to the offence / liability to which the evidence relates
 - Likelihood of prosecution / imposition of a penalty — how real is the danger?

5. Certificate

- Witness will be given a cert IF (ss 128(5), 128(6)):
 - He willingly gives the evidence; OR
 - He was required to give the evidence under sub-s (4); OR
 - His objection was overruled and after he gives the evidence, the court finds there were reasonable grounds for the objection
- Cert means the following CANNOT be used against the witness in a Vic court or tribunal (s 128(7)):
 - (a) evidence in respect of which the cert has been given; and
 - (b) any info, doc or thing obtained as a **direct or indirect consequence** of the witness giving such evidence
 - Note: Also applies in non-judicial proceedings and can only be abrogated by express or implied parliamentary intention
 - Note: Applies equally to derivative evidence (i.e. evidence obtained as an indirect result of the person having given evidence) (*Sorby*)
- Cert does NOT apply to **perjury proceedings** (s 128(7))
 - Sub-s (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned (s 128(8))
- Where a defendant in criminal proceedings is given a cert, sub-s (7) does not apply in a **retrial** for the same offence or an offence **arising out of the same facts** (s 128(9))
 - However, court held that retrials are not new proceedings, because if they were, sub-s (9) would allow the accused to arrange such mischief as to garner a retrial and then protect themselves (*Cornwell*)

6. Exceptions

- S 128 CANNOT be claimed by **corporations** (*Caltex*)
- S 128 does NOT apply in relation to a defendant in criminal proceedings giving evidence that he (s 128(10)):
 - (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
- Note: 'Fact in issue' is 'not limited to direct evidence that the defendant did the act or had the state of mind; they extend also to the giving of evidence by the defendant of facts from which the doing of the act or the having of the state of mind can be **inferred**' (*Cornwell*)