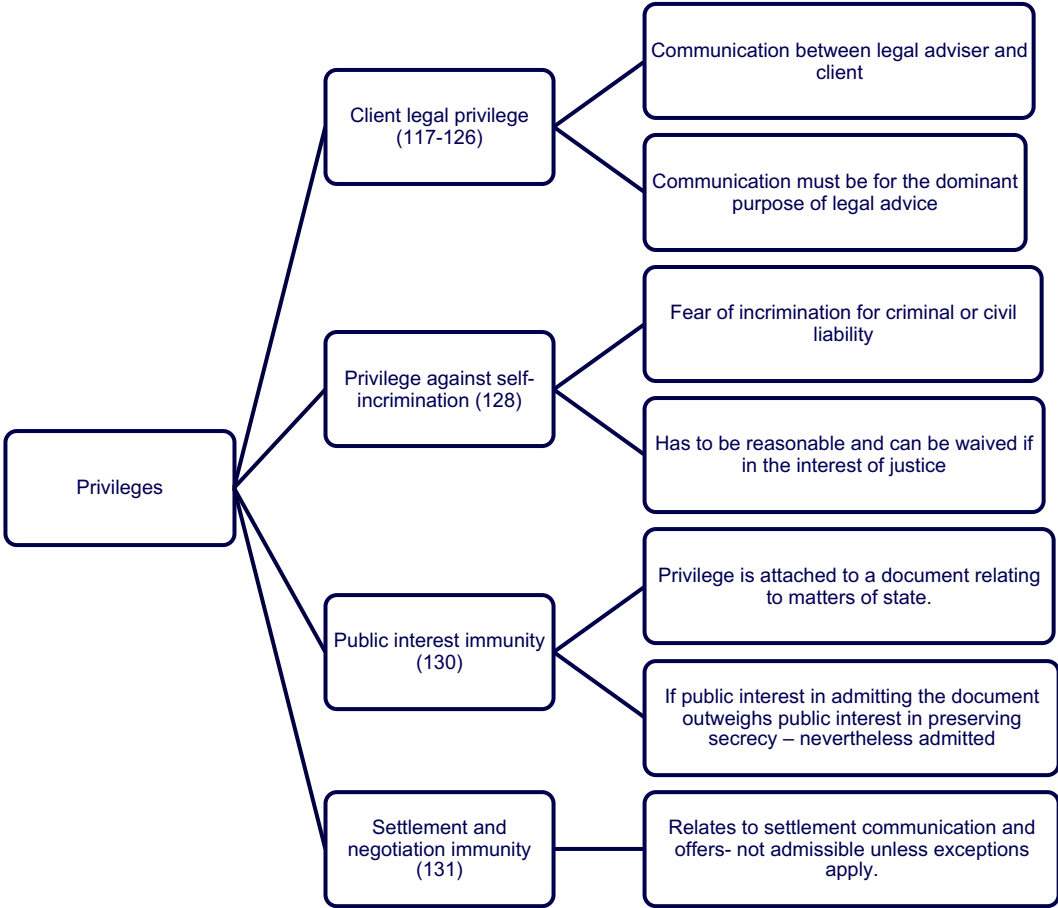


EVIDENCE (LAW2395) EXAM NOTES
Semester 1, 2025

TABLE OF CONTENTS

WEEK 1 — INTRODUCTION	2
WEEK 2 — RELEVANCE AND ADMISSIBILITY	8
WEEK 3 — COMPETENCE AND COMPELLABILITY/ WITNESS EXAMINATION	15 19
WEEK 4 — IDENTIFICATION EVIDENCE	23
WEEK 5 — HEARSAY	32
WEEK 6 — RIGHT TO SILENCE AND ADMISSIONS	44
WEEK 7 — IMPROPERLY OBTAINED EVIDENCE AND OTHER DISCRETIONS TO EXCLUDE	50
WEEK 8 — CHARACTER AND CREDIBILITY	56
WEEK 9 — TENDENCY AND COINCIDENCE EVIDENCE	67
WEEK 10 — OPINION EVIDENCE	76
WEEK 11 — PRIVILEGES	83

WEEK 11- PRIVILEGES

<p>Privileges</p>	<p>Legal privileges can exempt a compellable witness from giving evidence about a specific topic. Importantly, the court must ensure the witness is aware of their right to the privilege (s 132).</p> <p>Privilege is an exemption given by law to a person from answering questions which would result in the disclosure of information protected by the privilege. A privilege is a right to resist disclosure that is otherwise mandatory.</p> <ul style="list-style-type: none"> • Legal privileges can exempt a compellable witness from giving evidence about a specific topic. • Privilege is justified on public policy grounds – certain information, regardless of its probative value, cannot be compelled as its non-disclosure outweighs the public interest in ensuring all relevant information is before the court (formerly known as ‘Crown privilege’) • Courts must ensure that witnesses are aware of their right to the privilege (s 132). • The court determines whether to uphold claims of privilege. • Fact-finder cannot draw inferences from a witness who claims privilege (<i>Dolan v Australian & Overseas Telecommunications Corp; C v T</i>)  <pre> graph LR A[Privileges] --> B[Client legal privilege
(117-126)] A --> C[Privilege against self-incrimination
(128)] A --> D[Public interest immunity
(130)] A --> E[Settlement and negotiation immunity
(131)] B --> B1[Communication between legal adviser and client] B --> B2[Communication must be for the dominant purpose of legal advice] C --> C1[Fear of incrimination for criminal or civil liability] C --> C2[Has to be reasonable and can be waived if in the interest of justice] D --> D1[Privilege is attached to a document relating to matters of state.] D --> D2[If public interest in admitting the document outweighs public interest in preserving secrecy – nevertheless admitted] E --> E1[Relates to settlement communication and offers- not admissible unless exceptions apply.] </pre>
<p>Client legal privilege</p>	<p>Written out: They may have a client legal privilege, coming under the definition of a client (s 117). The party claiming privilege bears the onus of stating why communication/document is privileged, the burden then shifts to the other party to argue why it is not privileged (<i>Domain Paper v Galloway</i>).</p> <p>Client legal privilege ➤ The most commonly relied upon privilege. Under ss 117-126.</p>

- Based on the public policy principle that it is desirable for the administration of justice that clients can make full disclosure to their legal representatives.
- Also necessary to ensure lawyer has all relevant information.
- Legal advice privilege and litigation privilege.
- Client holds the privilege.

SECT 117

Definitions

"**client**" a person or body who engages a lawyer to provide legal services or who employs a lawyer.

"**confidential communication**" means a communication made in such circumstances that, when it was made the person who made it/ to whom it was made was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

"**confidential document**" means a document prepared in such circumstances that, when it was prepared the person who prepared it/ for whom it was prepared was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

"**lawyer**" an Australian or foreign lawyer, or their employee or agent.

"**party**" includes an employee or agent of a party .

A reference in this Division to the commission of an act includes a reference to a failure to act.

SECT 118

Outlines that evidence should not be presented **if it would reveal confidential communications between a client and a lawyer**, between multiple lawyers representing the client, or the contents of a confidential document. This restriction applies if the purpose was for the lawyer(s) to provide legal advice to the client.

Legal advice

(1) Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the

client, lawyer or another person—

For the **dominant purpose** of the lawyer, or one or more of the lawyers, providing legal advice to the client. (Key issue is dominant purpose test).

Written out: Under **section 118**, upon objection by a client, evidence is inadmissible if it would reveal confidential communications between a client and a lawyer, between multiple lawyers representing the client, or the contents of a confidential document. There is the requirement that the document/ communication is for the dominant purpose of the lawyer/s providing legal advice to the client.

SECT 119

States that evidence should not be presented if it would disclose confidential communications between the client or a lawyer and another person, or the contents of a confidential document, all created with the **dominant purpose of providing professional legal services** for an ongoing or anticipated legal proceeding.

Litigation

(1) Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared—

For the **dominant purpose** of the client being provided with professional legal services relating to court proceedings or anticipated (*ACCC v Safeway*)

- Note that litigation needs to be anticipated, not just apprehended, reasonable probability not possibility.

- Can apply to communications with certain third parties, such as expert witnesses (see *Tirango Nominees v Dairy Vale Foods*).
- Unrepresented parties can also have privilege (see s 120).

Written out: Under section 119, upon objection by a client, evidence is inadmissible if it would reveal confidential communications between a client or a lawyer and third part, or the contents of a confidential document. There is the requirement that the document/ communication is for the dominant purpose of providing professional legal services for an ongoing or anticipated legal proceeding. Litigation needs to be reasonably anticipated not merely apprehended, here there is a reasonable probability (*ACCC v Safeway*).

SECT 120

Stipulates that evidence should not be presented if it would unveil confidential communications **between a party (not represented by a lawyer) and another person**, or the contents of a confidential document prepared by the party, all with the primary intent of preparing for or conducting the legal proceeding.

Unrepresented parties

(1) Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of—

- (a) a confidential communication between the party and another person; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared,

either by or at the direction or request of, the party—

For the **dominant purpose** of preparing for or conducting the proceeding.

PARTY CLAIMING PRIVILEGE BEARS ONUS

Must provide an affidavit stating why document is privileged then shift onus to other party to argue why document should no be privileged.

Domain Paper v Galloway

‘Among other things, they or their legal representatives could have put on an affidavit identifying the documents over which privilege was claimed and setting out: (a) the circumstances and context in which the documents were brought into existence; (b) the purposes of the person who authored the documents or procured their creation; or (c) the nature of the documents supported by argument.’

DOMINANT PURPOSE TEST

- Means the ‘prevailing or paramount purpose’.
- For a communication or document to be considered privileged under client legal privilege, its dominant purpose must be for legal advice or litigation.
- More narrow ‘sole purpose’ test overturned in favour of ‘dominant purpose’ test: *Esso*

Key issue is the dominant purpose test in ss 118-119

- Ask what the document was intended to be used for and why it was created. Would the communication have been made or the document prepared if the suggested dominant purpose had not existed: *Esso*
- If the document would have been prepared irrespective of the intention to obtain professional legal services, then it will not satisfy the test.
- It is a question of fact, determined objectively however, it concerns the substance of the communication rather than the form (aka even if confidential stamp, look at content): *Commissioner of Australian Federal Police v Propend Finance*.

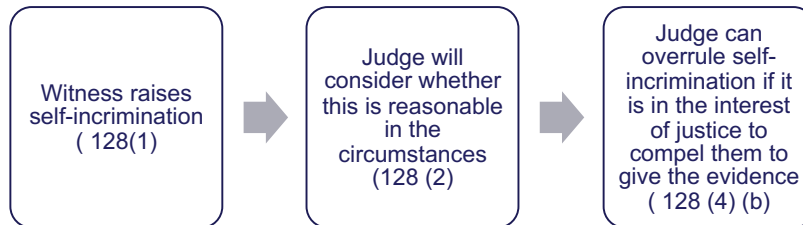
E.g. written discussion of another case in *Esso*: The report was prepared for two purposes: to assist the board to decide whether there was a need to revise safety and operational procedures; and to obtain legal advice in anticipation of litigation. The obtaining of legal advice or assistance was not the dominant, let alone the sole, purpose of bringing the documents into existence. It was well settled that it was the purpose of the report, not the motive of the individual who made it, that mattered.

	<p>PRIVILEGE AND ILLEGALITY</p> <p>What if the communications or documents were trusted with the legal advisor for an illegal purpose?</p> <p>Fraud and crime are exceptions to the legal privilege rule:</p> <p><i>A-G v Kearney</i>: it would be contrary to the public interest to allow it to be used to protect communications made to further a deliberate abuse of statutory power. The privilege protection, which is granted in the public interest, to secure justice, is displaced when a higher public interest requires it. Fraud extends to fraud on justice.</p> <p>Privilege cannot be claimed on evidence which has the purpose of promoting illegal acts:</p> <p><i>O'Donovan v Forsyth</i></p> <p>Test for displacing illegality was formulated in:</p> <p><i>Commissioner of Australian Federal Police v Propend</i>: onus rests on the party claiming legal professional privilege only if there is evidence which, if accepted, raises a prima facie case of illegal or other purpose falling outside the privilege. Test based on a strong probability that the privilege is claimed due to crime or fraud.</p>
<p>Loss of client legal privilege</p>	<p>LOSS OF CLIENT LEGAL PRIVILEGE (ss 121-126)</p> <p>At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement.</p> <p>SECT 121</p> <p>Contains exceptions to the above restrictions, permitting evidence relevant to intentions of a deceased person, necessary to enforce court order, and evidence affecting a person's rights.</p> <p>Loss of client legal privilege—generally</p> <ol style="list-style-type: none"> (1) Does not prevent the adducing of evidence relevant to a question concerning the intentions, or competence in law, of a client or party who has died. (2) Does not prevent the adducing of evidence if, were the evidence not adduced, the court would be prevented, or it could reasonably be expected that the court would be prevented, from enforcing an order. (e.g. whereabouts of child to make order for custody). (3) Does not prevent the adducing of evidence of a communication or document that affects a right of a person. <p>SECT 122</p> <p>Outlines circumstances where evidence can be presented despite objections, including if the client or party consents, or if their actions are inconsistent with the objection, such as voluntary disclosure or shared interests.</p> <p>Loss of client legal privilege—consent and related matters</p> <ol style="list-style-type: none"> (1) Does not prevent the adducing of evidence given with the consent of the client or party concerned. (2) Does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120. (3) A client or party is taken to have so acted if— <ol style="list-style-type: none"> (a) the client or party knowingly and voluntarily disclosed the information to another person; or (b) consented to the disclosure of the information of another person. <p>Subsection (2)</p> <p>Deemed to have waived privilege if you act in a manner inconsistent with the maintenance of the privilege. Privilege can be waived inadvertently: <i>Benecke v National Australia Bank</i>.</p> <p>Inconsistency can arise when:</p> <ul style="list-style-type: none"> ➤ Relying on a privileged document. ➤ Relying on expert witness reports. ➤ Using privileged documents to revive memory. ➤ Putting in issue a fact to which legal advice is relevant.

	<p>➤ Disclosing the substance of the evidence to another person.</p> <p>Mann v Carnell: had privilege been lost by disclosure of legal advice, inconsistency may bring about waiver of privilege. Inconsistency between the actions of the client and the maintenance of the confidentiality in the privileged communication will be the determinative factor. The existence and extent of such an inconsistency will be informed by the purpose of the privilege, the nature of any disclosure and considerations of fairness. Held there was nothing inconsistent with the maintenance of the confidentiality of the legal advice by the respondent in conveying the terms of the advice to a third party on a confidential basis for a limited and specific purpose.</p> <p>Divall v Mifsud: applied <i>Mann</i>, a witness was cross-examined on a privileged statement, privilege waived as the failure by counsel for Mr Divall to object to Mr Kent's evidence amounted to Mr Divall knowingly and voluntarily agreeing to Mr Kent giving the privileged evidence.</p> <p>SECT 123 In criminal proceedings, defendant is permitted to abduce privileged evidence already in their possession, unless it relates to confidential communications or contents of confidential documents about a co-defendant.</p> <p>Loss of client legal privilege—accused In a criminal proceeding, does not prevent an accused from adducing evidence unless it is evidence of— A confidential communication made between (a) or confidential document prepared by (b) an associated accused and a lawyer acting for that person in connection with the prosecution of that person (the co-accused).</p> <p>SECT 124 Loss of client legal privilege—joint clients This provision applies only in civil proceedings. Client legal privilege is lost if two or more parties have jointly retained a lawyer in relation to the same matter allowing evidence communications made by any one of the parties to the lawyer or contents of a confidential document prepared at the direction of any one of the parties.</p> <p>SECT 125 Provides an exception to the privilege, allowing evidence related to fraudulent activities, offenses, civil penalties, or deliberate abuses of power. Loss of client legal privilege—misconduct (1) Does not prevent the adducing of evidence of— (a) a communication made or the contents of a document in furtherance of the commission of a fraud (requires dishonestly) or other act rendering person liable to a civil penalty; or (b) a communication or the contents of a document knew or ought reasonably to have known was made or prepared in furtherance of a deliberate (they knew) abuse of a power. (2) Can make finding where fraud, offence or act or abuse of power is a fact in issue.</p> <p>SECT 126 Loss of client legal privilege—related communications and documents If evidence is admissible under sections 121-125, these sections do not prevent the presentation of other evidence that is necessary for a proper understanding of the original communication or document.</p>
<p>Privilege against self-incrimination</p>	<p>Written out: The privilege against self-incrimination may be claimed in civil and criminal proceedings. Under section 128, if a witness objects and raises the privilege on the grounds the evidence may tend to prove they have committed an offence or is liable to a civil penalty (s 128(1)), the judge will determine whether or not there are reasonable grounds for the objection (s 128(2)). The danger must be real and appreciable in respect of the crime or civil penalty (R v Boyes).</p> <p>Privilege against self-incrimination</p>

Can be claimed by a witness where the evidence they are asked to give 'may tend to prove' that the witness committed an offence. Claimable in civil and criminal proceedings.

E.g. can claim instead of answering did you give weapon to person who assaulted someone as would be complicit in the offense, or did you store drugs for someone.



SECT 128

Privilege in respect of self-incrimination in other proceedings

(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/ foreign law
- (b) is liable to a civil penalty (not damages).

(2) The court must determine whether or not there are reasonable grounds for the objection. Offence means civil penalty, criminal offence or penalties under the law of a foreign country. May tend to prove directly or circumstantially.

e.g. hypo breached his employment contract which is a civil penalty.

Court is required to determine if the objection is reasonable. The danger must be real and appreciable in respect of the crime or civil penalty: **R v Boyes**.

(3) 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 need not give the evidence unless required under (4). The court will give a certificate of immunity if the witness willingly gives the evidence without being required to do so or after being required under (4).

(4) If court finds the evidence may incriminate, it may still require the witness to give evidence '**if the interests of justice require**'.

Relevant considerations would include

- the importance of the evidence
- the likelihood that the evidence will be unreliable even if certificates given
- the nature of the offence the likely effects of requiring the evidence to be given
- the means to limit its publication, so if the answer can be suppressed without further consequences that would be taken into account and
- whether the substance of the evidence was already given

R v Mayhew: questions of evidence of drug taking was not required in the interest of justice to compel witness to answer question.

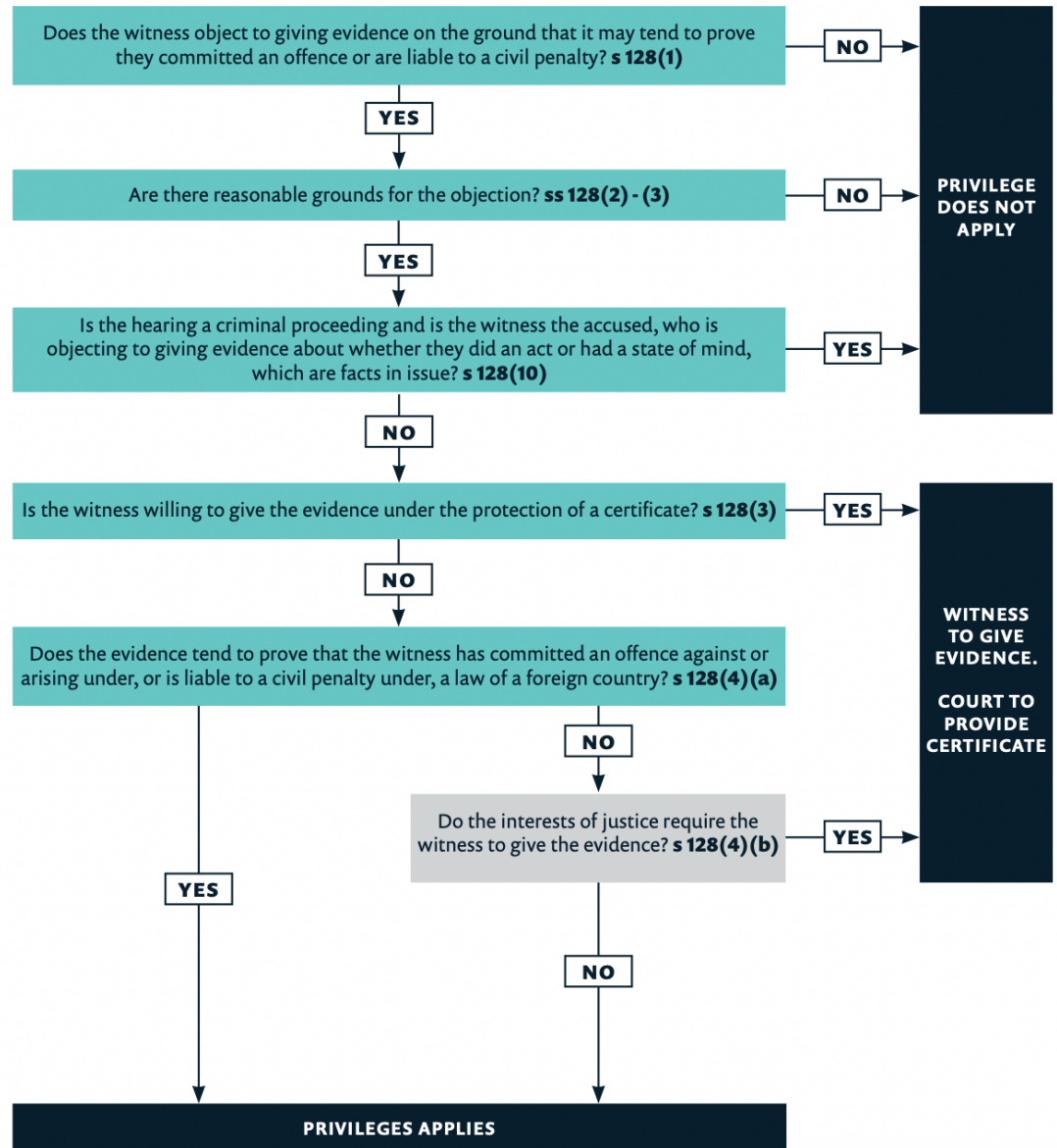
(10) If **defendant elects to give evidence** in criminal trial, they cannot raise the privilege to refuse to answer a question during their testimony.

Section **25(2)(k)** of the *Charter of Human Rights and Responsibilities 2006* (Vic) outlines privilege against self-incrimination as a fundamental right.

But note that *Charter* doesn't give power to invalidate legislation. Privilege can be abrogated by statute. s 128 violates right if it is in the interest of justice to compel the witness to incriminate themselves.

Two steps:

Has witness objected to giving particular evidence? s 128(1)
 Are there reasonable grounds for objection? s 128(2)
 The court may require the witness to give the evidence if it is satisfied that the interests of justice require the witness to give the evidence s 128(4)



Public interest immunity

Written out:

Public interest immunity attaches to the document not a person and thus cannot be waived.
Section 130 concerns matters of state, the court will refuse to admit evidence where the public interest in admitting the information/ document is outweighed by the public interest in preserving secrecy or confidentiality.
 As stated in *AB v CD* it is generally of the utmost importance and there is a clear public interest in maintaining the anonymity of a police informers.

Public interest immunity

Unique because:

- It attaches to the document, not a person, so cannot be waived; and
- The court determines whether the public interest in admitting the document outweighs the public interest in preserving confidentiality.

The provision is concerned with high level government documents, such as cabinet minutes and government correspondence.

Note: just because a document relates to a matter of state, doesn't mean that it will be protected. Section 130 concerns matters of state. Public interest in admitting the documents should be weighed against the public interest in preserving secrecy or confidentiality.

SECT 130

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.

Subsection 4 is a preliminary step after which the court performs its weighing exercise.

(4) A **document** may be taken for the purposes of subsection (1) **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;
- (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.

Subsection 5 gives further content to the matters that are to be considered in the **weighing exercise**.

- (5) The court 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.

Sankey v Whitlam: High Court discussed the two potentially conflicting sides of the “public interest”: First, that harm should not be done to the government or public service by disclosure of certain documents. Secondly, a Court of justice, in performing its functions, should not be denied access to relevant evidence.

AB v CD (revealing the identity of Nicola Gobbo): The disclosure of information about a police informer, lawyer x, raised public interest immunity. Held that the public interest in disclosing the identity of the informant, despite the risks to her safety and the potential deterrence of future informers, outweighed the interest in maintaining confidentiality.

‘Generally speaking, it is of the utmost importance that assurances of anonymity of the kind that were given to EF are honoured. If they were not, informers could not be protected and persons would be unwilling to provide information to the police which may assist in the prosecution of offenders. **That is why police informer anonymity is ordinarily protected by public interest immunity.** But where, as here, **the agency of**

	<p>police informer has been so abused as to corrupt the criminal justice system, there arises a greater public interest in disclosure to which the public interest in informer anonymity must yield. If EF chooses to expose herself to consequent risk by declining to enter into the witness protection program, she will be bound by the consequences. If she chooses to expose her children to similar risks, the State is empowered to take action to protect them from harm’</p>
Settlement negotiation immunity	<p>Settlement negotiation immunity SECT 131 Exclusion of evidence of settlement negotiations</p> <p>(1) Evidence is not to be adduced of—</p> <p>(a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or</p> <p>(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.</p> <p>(2) Subsection (1) does not apply if—</p> <p>(a) the persons in dispute consent to the evidence being adduced in the proceeding.</p> <p>(b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute.</p> <p>(c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced.</p> <p>(d) included a statement to the effect that it was not to be treated as confidential.</p> <p>(e) the evidence tends to contradict or qualify evidence that has already been admitted about the course of an attempt to settle the dispute.</p> <p>(f) is a proceeding to enforce an agreement between the persons in dispute to settle the dispute.</p> <p>(g) evidence that has been adduced in the proceeding/ an inference, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence.</p> <p>(h) the communication or document is relevant to determining liability for costs.</p> <p>(i) making the communication, or preparing the document, affects a right of a person.</p> <p>(j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or act renders a person liable to a civil penalty.</p> <p>(k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.</p> <ul style="list-style-type: none"> • Settlements are essential to the functioning of the judicial system, and they would not be possible unless negotiations were privileged. • Privilege only applies if there is an ongoing dispute. • Communications only protected if made ‘in connection with an attempt to negotiate a settlement’. • ‘Without prejudice’ phrase often used in settlement negotiations, indicates the parties aren’t going to use evidence against each other. • This rule is based on the principle that settlements are essential to the functioning of the judicial system, and the privilege encourages parties to negotiate freely without fear that their communications will be used against them later in court. <p><i>Field v Commissioner for Railways:</i> The purpose is to enable parties engaged in an attempt to compromise litigation to communicate with one another freely and without the embarrassment which the liability of their communications to be put in evidence subsequently might impose upon them. Parties may properly give definition to the occasions when they are communicating in this manner by the use of the words “without prejudice”. Admissions during such negotiations must be</p>

taken to be made upon the tacit understanding that they are not to be used if the negotiations break down.

Summary privileges

