Privilege against Self-Incrimination

&

Unavailable Witnesses

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This paper briefly examines the interpretation and application of the privilege against self-incrimination by comparing the jurisprudence of the Family Court of Australia with the recent decision of the Full Court of the Federal Court of Australia in Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner [2018] FCAFC 4. In addition, this paper will also address the practical aspects of dealing with the evidence of witnesses on affidavit who subsequently die prior to a final hearing.

What is the Privilege against Self-Incrimination?

1. The common law definition of the privilege against self-incrimination is a personal legal right[2] of an individual entitling them to refuse to answer any question or produce any document if the answer or production would tend to incriminate him or her.[3]

2. This "privilege" is divided into the following three distinct privileges:

    a. a privilege against self-incrimination in criminal matters;

    b. a privilege against self-exposure to a civil or administrative penalty, also known as "penalty privilege" (including any monetary penalty which might be imposed by a court or an administrative authority, but excluding private civil proceedings for damages); and

    c. a privilege against self-exposure to the forfeiture of an existing right (which is less commonly invoked).

3. The privilege arose from the common law maxim *nemo tenetur prodere seipsum,* meaning that people should not be compelled to betray themselves.[4]

4. Since the enactment of the *Evidence Act 1995* (Cth) (**Evidence Act**), this privilege has been statutorily enshrined and is found in section 128.[5]

5. The *Evidence Act* introduced a modification to the common law, mainly by the introduction of a certification procedure which provided, unlike

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[2] *Microsoft Corporation v CX Computer Pty Limited* (2002) 116 FCR 372 at 379.
[3] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335. Also see *Sorby v Commonwealth* (1983) 152 CLR 281 at 288.
[4] R. Helmholz, 'Introduction' in R. Helmoholz (ed), *The privilege against self-incrimination: its origins and development* (University of Chicago Press, 1997).
[5] See the annexure for an excerpt of the current version of section 128 of the *Evidence Act*.

under the common law, a court to require the giving of evidence absent the witnesses' consent.[6]

6. A copy of the current form of section 128 has been annexed to this paper. However, the key provisions are as follows:

    a. Section 128(1) is invoked if a witness objects to giving evidence on the grounds that the evidence may tend to prove that the witness has committed an offence under Australian law or the law of a foreign country;

    b. Once the objection has been raised by the witness, subject to section 128(4), the court is not to require the witness to give the evidence under section 128(3);

    c. The court may require the witness to give the evidence if it is satisfied that it does not tend to prove the witness has committed an offence or is liable to a civil penalty and the interests of justice require the witness to give the evidence (section 128(4));

    d. Pursuant to section 128(3)(b), if a witness either:

        i. willingly gives the evidence without being required to do so; or

        ii. gives the evidence after being required by the court to do so,

    the court must proceed to issue a certificate to the witness.

    e. Any evidence subject to a certificate, including any evidence of any information, document or thing obtained as a direct or indirect consequence, cannot be used against the witness. This does not apply to a criminal proceeding in respect of the falsity of the evidence (section 128(7)).

How and when to make an application for a certificate?

7. Since evidence from a witness arises in chief, cross-examination and re-examination, both solicitors and counsel need to be acutely attuned to the timing of when to make an application for a certificate. The issue for solicitors arises because evidence in the family law jurisdiction proceeds with an affidavit which contains the client's, and his or her witnesses, evidence-in-chief.

8. There seems to be three schools of thought surrounding the timing of seeking a certificate:

    a. **Oral Application –** A certificate may be sought prior to filing the affidavit by making an oral application at a directions hearing, first day of trial or mention.

    b. **Formal Application** – File an Application in a Case supported with an affidavit that does not contain the evidence you are seeking a certificate for, but instead depose that a certificate is sought. Suggested wording for the affidavit may include:

[6] *Evidence Act 1995* (Cth), s 128(4).

I refer to paragraph(s) X of the Affidavit of the Husband filed on 20 January 2020. In relation to the matters deposed therein, I am unwilling to respond to those matters without first obtaining a certificate pursuant to section 128 of the Evidence Act.

c. **Proof of Evidence –** Prepare a document containing the evidence you seek to be the subject of a certificate and provide a copy to your opponent indicating a certificate will be sought from the court.

9. There are two key elements to an application for a certificate. The first is that the witness must object to giving the evidence. Secondly, the witness must be compelled to give the evidence rather than volunteer the evidence because it provides them with some forensic advantage which they may ultimately benefit.

The meaning of "Object" and requirement for Compellability

10. As noted earlier, section 128 is not a new statutory right, rather, it is derived from the common law privilege against self-incrimination. Under the common law version of the privilege, a person who gave self-incriminating evidence was not protected against the use of that evidence in subsequent proceedings.[7] However, since section 128 arises as a modification of the common law, debate has raged as to whether that section goes beyond the protection originally provided by the common law.

11. There are presently two opposing intermediate appellate decisions on this issue emanating from the Full Courts of the Family Court in *Ferrall and McTaggart (trustees for Sapphire Trust) & Ors v Blyton*[8] and the Federal Court in *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner*.[9] Intervening these two decisions are two additional judgments of the High Court in *Cornwell v The Queen*[10] and the New South Wales Court of Appeal in *Song v Ying*[11] which shed further light on the proper construction of section 128. Each of these decisions will be considered below.

Ferrall and McTaggart (trustees for Sapphire Trust) & Ors v Blyton

12. The Full Court of the Family Court heard an appeal from a decision of O'Ryan J regarding the issuance of a certificate pursuant to section 128 of the *Evidence Act*. The facts of that case were as follows:

    a. Husband and Wife were married in 1991;

    b. The Husband had effective control of six out of eight major radio stations from the Southern Highlands of New South Wales to the Victorian boarder (**Radio Stations**) that were of significant value;

    c. In or about March 1997 the Husband's financial advisor and accountant (**Mr Garrot**) expressed concern to the Husband that his marriage was not going to last;

    d. The Husband and Wife separated in December 1997;

[7] *Ying v Song* [2009] NSWSC 1344 at [42].
[8] (2000) FLC 93-054.
[9] [2018] FCAFC 4.
[10] (2007) 231 CLR 260.
[11] (2010) NSWLR 442.

e. Mr Garrot devised a share issue scheme to “protect” the Husband from any order the Family Court may make against his assets in favour of the Wife;

f. In accordance with Mr Garrot’s advice, the Husband reduced his equity position in the Radio Stations from between 49%-54% to 8%;

g. Mr Garrot then appointed his son-in-law (**McTaggart**) and cousin (**Ferrall**) to positions of control of the Radio Stations;

h. The Husband raised concerns about being restored to his original position and was allegedly told by Mr Garrot that nothing was going to be altered until he settled his family law dispute with the Wife;

i. It became apparent to the Husband that Mr Garrot wanted to retain some control of this Husband’s interests in the Radio Stations for what he, Mr Garrot, described as “compensation for the personal stress and suffering”; and

j. The Husband was later informed that Mr Garrot and his son-in-law were offering the Radio Stations for sale.

13. In response to the proposed sale of the Radio Stations, the Husband issued an application for urgent interlocutory ex parte injunctions. In doing so, the Husband prepared an affidavit but sought, and was granted, a certificate. The affidavit contained admissions amounting to perjury including that:

    a. He had in previously sworn affidavits that wrongly denied the Wife’s assertion that the share issue was an attempt to reduce her equity in the Radio Stations;

    b. He underestimated his true financial worth which was $5,798,000.00; and

    c. He and Mr Garrot conspired to take steps to alter the parties’ financial position in an effort to defeat the legitimate claims of the Wife. Once defeated, the Husband expected to regain control from Mr Garrot.

14. The Husband sought, and obtained, the comprehensive injunctions against Ferrall and McTaggart which not only prevented the proposed sale of the Radio Stations but also limited their financial ability to deal with those entities. Ferrall and McTaggart appealed with Mr Garrot also seeking leave to appeal.

15. Ferrall and McTaggart sought, *inter alia*, that the certificate to the Husband should not have been granted on the following two grounds:

> [T]hat the question of whether a certificate should be granted arises only when the witness “objects" to giving evidence and in this regard they refer to the opening words of s 128(1) and the reference in s 128(4) to “overruling the objection''. They said that in this case, the husband sought to give evidence and was not objecting to doing so and that as a consequence the terms of the section were not satisfied.

> Secondly they said that no such certificate should have been granted until Notice had been given to the Attorney-General. They submitted that such a requirement arose because of the public interest in the granting of such a certificate and in this regard they relied upon the decision of Young J in *HPM Industries Pty Ltd v Graham* supra.[12]

16. In other words, the issues raised on behalf of the appellants were that the Husband did not object to giving the evidence which ultimately incriminated him and therefore he could not be said to have "objected" as required under section 128(1) of the *Evidence Act*. The Full Court disagreed, finding that:

> In the particular circumstances of the Family Court of Australia, evidence in chief is normally given by affidavit. We think that in the circumstances of the present case, the witness was objecting, in the sense required by s 128, by indicating that he would not file the affidavit unless a certificate was given. We see the situation as no different from that which would have been the case if he had been sworn in and asked to answer questions concerning the matter in evidence in chief, and had objected to doing so without the issue of such a certificate.
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> So far as the issue of Notice to the Attorney-General is concerned, we agree with the learned trial Judge that this must be a matter of discretion and in the circumstances of this case we were not shown any reason why O'Ryan J's discretion had miscarried.[13]

17. The Full Court found that the Husband's protestation to swearing and filing his affidavit was tantamount to an "objection" as required under section 128 of the *Evidence Act*. However, what the Full Court failed to consider was whether the Husband was required to give that evidence or whether it was done of his own volition.

Cornwell v The Queen

18. As noted above, the common law privilege against self-incrimination did not extend to witnesses who voluntarily gave evidence which was not provided under compulsion. The High Court considered this issue in *Cornwell v The Queen*. The facts in that are summarised as follows:

    a. Mr Cornwell was charged with conspiracy to import 120kg of cocaine and was committed to trial in the Supreme Court of New South Wales;

    b. During the trial, Mr Cornwell objected to answering a question on the basis that it may tend to incriminate him. The trial Judge indicated that he would require Mr Cornwell to answer the question but would, over an objection by the Crown, grant a certificate under section 128 of the *Evidence Act* subject to being provided with a draft certificate by his legal representatives. No draft certificate was provided nor issued at trial;

[12] *Ferrall v Blyton* (2000) FLC 93-054 at 87,883.
[13] Ibid.

c. The jury were unable to agree on a verdict and Mr Cornwell was committed to a second trial, this time, in the District Court of New South Wales;

d. The Crown sought to tender Mr Cornwell's evidence from the Supreme Court before the District Court. The trial Judge ruled that any certificate under section 128 would apply to the current proceedings. A certificate was then sought, and obtained, from the trial Judge in the Supreme Court;

e. The trial Judge in the District Court found that the certificate did not apply by reason of the exclusion in the, now, section 128(10) of the *Evidence Act*;

f. Mr Cornwell successfully appealed to the New South Wales Court of Criminal Appeal;

g. The Crown appealed to the High Court of Australia which by a majority of 4:1 allowed the appeal.

19. The High Court considered the meaning of "objects" in section 128(1) of the Evidence Act as follows:

> A civil defendant might wish to prove the extent of past earnings, being earnings derived from criminal conduct. **This raises a question whether witnesses who are eager to reveal some criminal conduct in chief, because it is thought the sting will be removed under sympathetic handling from their own counsel** or for some other reason, are to be treated in the same way as witnesses who, **after objection based on genuine reluctance**, give evidence in cross-examination about some crime connected with the facts about which evidence is given in chief.
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> The view that the accused's claim of privilege in all the circumstances answered the requirements of s 128(1) has difficulties**. It strains the word "objects" in s 128(1). It also strains the word "require" in s 128(5) –** for how can it be said that a defendant-witness is being "required" to give some evidence when his counsel has laid the ground for manoeuvres to ensure that the defendant-witness' desire to give the evidence is fulfilled?[14]

20. Although these comments are *obiter dicta*, they draw a distinction between evidence which a witness may be under compulsion to provide and evidence which may be adduced for a forensic advantage. Where the evidence falls into the latter category, the High Court seems to suggest any objection made by that witness for the purpose to derive the benefit of a certificate may fall short if such evidence is not given under compulsion (or threat of compulsion).

Song v Ying

21. The Full Court of the Family Court's decision in *Ferrall & Blyton* was considered by the New South Wales Supreme Court in *Song v Ying*:

    a. Mr Song and Mr Ying entered into various transactions of loans and directorships to create a false impression that Mr Ying had greater assets and business interests in Australia than he

[14] (emphasis added) *Cornwell v The Queen* (2007) 231 CLR 260 at 302.

actually did in order to influence the Department of Immigration to accept Mr Ying's permanent residency application.

b. Mr Song sought a certificate on the basis that his evidence regarding statutory declaration he signed in relation to those matters, may tend to incriminate him.

c. The trial Judge refused to issue a certificate and Mr Song appealed.

22. The issue before trial Judge was succinctly stated as follows:

> The question before me, therefore, is limited to whether s 128 applies in circumstances where a witness wishes to give particular evidence in chief but only if he or she is protected from the consequences of the giving of that evidence. In those circumstances, can the witness be said to "object" to giving particular evidence or evidence on a particular matter so as to enliven the operation of s 128?[15]

23. On appeal, Hodgson JA (with whom Giles and Bastan JJA agreed) made the following important observations:

> Plainly, in my opinion, if a witness gives evidence in chief because actually compelled to do so (by subpoena and threat of imprisonment), or because of the availability of such compulsion if he or she does not do so, there is no reason why that witness may not object to giving evidence in chief on the ground that that evidence may tend to incriminate. The question in my opinion is not whether the evidence is given in chief or in cross-examination, but rather whether an objection under s 128 is limited to an objection to giving evidence which the witness would otherwise be compellable to give.[16]
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> …
>
> When a witness is a party to the case, giving evidence in chief pursuant to questions asked by the witness' own counsel, there would rarely, if ever, be a question that the evidence in chief is given under compulsion or because of liability to compulsion.[17]
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> …
>
> A party giving evidence in chief, in response to questions from that party's own legal representative, is not generally giving evidence which that party is, in any real sense, compellable to give[18]
>
> …
>
> In all cases apart from a party giving evidence in chief or re-examination in response to questions from the party's own legal representative, witnesses are compellable to give evidence either at the instance of the party calling them, or the party directing questions in cross-examination, or the judge (if the judge asks questions). It is compellability of this nature that

[15] *Ying v Song* [2009] NSWCA 1344 at [7].
[16] *Song v Ying* (2010) NSWLR 442 at [20].
[17] Ibid at [24].
[18] Ibid at [26].

> gives sense to the word "objects" in s 128(1) and makes sense of the word "require" in s 128(4).[19]
>
> …
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> In my opinion, having regard to the wording of s 128 and the scope of the common law privilege which it displaced, it is not the case that a party to proceedings who is also a witness, giving evidence in chief in response to questions from the party's own legal representative, and who wishes to give that evidence but is not willing to do so except under the protection of a s 128 certificate, "objects" to giving that evidence within the meaning of s 128(1). **This is not because the witness subjectively wishes to give the evidence, but rather because there is no element of compulsion or potential compulsion which makes the expression "objects" apposite.[20]**

24. These observations illuminate the inquiry practitioners must undertake when examining their client's evidence, how such evidence is to be adduced and how to protect their client from possible prosecution where no certificate may be available. This decision suggests that the mere "objection" to the giving of particular evidence by a witness does not, of itself, invoke the privilege against self-incrimination unless that evidence was required to be adduced under some actual or threatened compulsion.

Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner

25. The disconnect between the jurisprudence of the Full Court of the Family Court in *Ferrall & Blyton* (supra) and the New South Wales Court of Appeal in *Song v Ying* (supra) was recently reviewed by the Full Court of the Federal Court in *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner*. The appeal arose from the following facts:

    a. It was alleged that Mr MacDonald, an officer of the Construction, Forestry, Mining and Energy Union (**CFMEU**) took unlawful action against a head contractor responsible for constructing a new Aldi supermarket at a site in Altona North, Victoria, by blockading the construction sites entrance with his vehicle.

    b. The head contractor alleged that Mr MacDonald's reason for blocking the construction site arose because of his failure to have made an enterprise agreement with the CFMEU or, in the alternative, that he had the intention of coercing the head contractor to make an enterprise agreement with the CFMEU.

    c. Mr MacDonald indicated, in the course of being examined-in-chief by his counsel that he was concerned about giving certain evidence because it might incriminate him.

    d. Mr MacDonald filed an amended defence admitting that he had blockaded the construction site but denied that he acted for the reasons or with the intent alleged by the Commissioner.

[19] Ibid at [27].
[20] Ibid at [28].

26. It is important to note that the facts of this case are nuanced because of the potential operation of section 361(1) of the *Fair Work Act 2009* (Cth). That section creates a reverse onus of proof on the employer rather than the employee to establish why a person was adversely affected in the workplace. It was because of the potential operation of this section, Mr MacDonald argued that he was essentially compelled to give evidence of his intent. The trial Judge rejected that argument:

> In that regard, it was observed by his Honour that Hodgson JA in *Song* had drawn a **distinction between the compellability** of a witness to answer questions at the instance of a party who had called the witness, or at the instance of a judge, **and the motivation** of a defendant to give evidence to avoid having a judgment entered against him or her. The latter was characterised as not amounting to relevant compellability.[21]

27. In synthesising its decision, the New South Wales Court of Appeal considered the antecedents of the privilege of the right against self-incrimination both by reference to an Australian Law Reform Commission Report that led to the introduction of the *Evidence Act*, including section 128 and the common law. Through that analysis, the Court found that:

> What was lost in the statutory bargain that was ultimately legislated for by the enactment of s 128 was, in the confined circumstances in which that provision applied, the right to remain silent. The introduction of a means of compelling the giving of evidence that would otherwise be covered by the privilege was to be compensated for by protection from the use of that evidence in subsequent proceedings… It was not a gain for the witness but, rather, a compensated loss.
>
> By contrast, to extend that statutory bargain to a party witness in the absence of compulsion would be to bestow a gain on an individual to advance his or her private interest in litigation, protected from the adverse consequences that might otherwise arise from use of that evidence. Such an outcome would be divorced from the clear historical roots of the privilege as an immunity from compulsion that is closely related to the right to silence, as opposed to a positive right to advance a forensic desire.[22]

28. Since there was no historical right for a witness to object to the giving of particular evidence (who was not otherwise compelled to) for the purpose of achieving some advantage, the Court found that no "new" right could be said to be bestowed by the legislature following the introduction of section 128 of the *Evidence Act*.

29. The Court then considered the decision of *Ferrall & Blyton* and made the following observations:

> It may be seen that the conclusion reached above entails a measure of circular reasoning. "*Objects*" and "*overruling the objection*" were effectively assumed to have the meaning that would be required for s 128 to apply to a party witness' evidence in chief. **No consideration was given to either the common law position that s 128 operated to modify, or to**

[21] *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2018] FCAFC 4 at [14].
[22] Ibid at [35]-[36].

> **the reasons for modifying that position. As was later observed by the New South Wales Court of Appeal in *Song*, the Court in *Ferrall* had no regard to the absence of compellability of a party witness called in their own case. The conclusion reached in *Ferrall* begs the question of the meaning of "*objects*"; it does not properly answer it.**
>
> The reasons in *Ferrall* for not wanting to disturb the grant of the s 128 certificate to the husband were clear in the circumstances**. It seems that, for entirely understandable reasons, a sense of justice and pragmatism prevailed.** However, the absence of any proper reasoning means that decision does not afford any true support for the construction adopted. As the following analysis seeks to demonstrate, *Ferrall* appears to be an exemplar of the old saying that bad cases make bad law. **When consideration is given to the analysis of the ALRC Report above and to the authority below, the conclusion reached in *Ferrall* cannot be accepted as being correct**.[23]

30. Reference to further authorities in the above quote are *Cornwell v The Queen* (supra) and *Song v Ying* (supra) which have already been considered earlier in this paper.

31. There is an argument that, in order to overcome this issue in family law proceedings, a party who is also a witness in the proceedings may rely on their obligation to provide "full and frank disclosure" which may be said to be tantamount to compulsion.[24]

32. However, that argument aside, it seems that the approach taken by the Full Court of the Family Court has been erroneous mainly because the jurisprudence which underpins the approach adopted in *Ferrall & Blyton* has failed to consider the issue of compulsion. This will have far reaching implications for practitioners providing advice to clients about the likely prospects of success in obtaining a certificate for their client.

Does a certificate provide a "Get out Jail Free Card"?

33. Certificates issued under section 128 will commonly arise for family law practitioners where there are possible tax or Centrelink consequences arising from their client's evidence. Assuming that a witness establishes that a certificate should be provided, the discretion to provide the certificate remains with the judge.

34. In *Vasilias & Vasilias*[25] Cronin J considered the dilemma presented where a party stands to benefit from their misconduct upon receiving a certificate under section 128:

> Notwithstanding the s 128 Certificate I have granted, I am left with an unusual dilemma which is that the parties have benefited from the Commonwealth unreasonably, inappropriately and presumably, illegally. I find therefore that directly or otherwise, the parties' current financial circumstances are such that they have assets which they may not otherwise have but for that inappropriate conduct. Leaving aside any question of criminal conduct and its consequences, I

[23] Ibid at [46]-[47].
[24] See for example, *Aitken & Murphy* [2011] FamCA 785.
[25] (2008) 217 FLR 134.

> am being asked to divide up the financial resources of the parties including an unquantifiable sum that should not belong to them. The husband's position was not to do anything about it because it was nothing to do with him. The wife's position was to urge me to do nothing because of the modest asset pool and the circumstances she urged me to find that gave rise to the parties obtaining the Commonwealth funds.[26]

35. His Honour considered previous authorities that have grappled with this issue. The "issue" arises because section 128(7)(a) of the *Evidence Act* precludes the evidence protected under the certificate from being adduced in any proceeding in an Australian court. The decisions reviewed by Cronin J are summarised below:

    a. ***HMP Industries Pty Ltd v Robert Graham***[27] - The New South Wales Supreme Court found that the prosecuting authorities should be provided with an opportunity to be heard, as *amicus curiae*, in relation to the proposed granting of a certificate under section 128;

    b. ***Durieu and Wiggins***[28] – In referring the matter to the Australian Taxation Office, Halligan JR made no findings of tax evasion and instead said "that it is a matter entirely for them [ATO] as to what they do, if anything, in relation to it;

    c. ***Malpass & Mayson***[29] - The Full Court of the Family Court found that, although the Court has the power to report an offence against a Commonwealth law to the relevant authorities, there is not always a duty to report a breach:

> Questions of degree must be relevant. There are many cases where minor irregularities are revealed in relation to taxation, social security and other issues. We think it unreasonable for the court to burden itself with a duty to report all of these matters. Different considerations may apply in relation to more blatant and substantial irregularities.

36. These authorities highlight that the trial Judge retains a discretion to report a witnesses' conduct protected under a certificate, but is by no means under any obligation to report such conduct. The "questions of degree" referred to in *Malpass & Mayson* highlight that this discretion may be exercised on a "sliding scale of gravity". An example of conduct that may lead a judge to exercise their discretion in favour of referring a matter to relevant authorities is where a party has engaged in "blatant tax" evasion.

37. In *T and T*[30] the Husband and Wife retained two sets of records showing the income of their butcher business. One record reflected the business' true earnings whilst the other recorded a substantially lower gross turnover. The trial Judge found that ``both parties had consistently evaded tax by deliberate understatement of income'' and referred the parties to the relevant authorities. On appeal, the Full Court found no appealable error in the approach adopted by the trial Judge and further observed that "[i]t might even be suggested, if his Honour had not

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[26] Ibid at [60].
[27] [1996] NSWSC 371.
[28] Unreported, 14 February 1997, Family Court of Australia.
[29] (2002) FLC 93-061. Also see *P and P [Tax evasion]* (1985) FLC 91-605 at 79,925.
[30] (1984) FLC 91-588.

brought such a blatant tax evasion to the notice of the authorities, that he had failed in his public duty."

38. In *Vasilias* (supra), Cronin J considered the following alternatives to reporting/referring matters to the relevant authorities, and found that he could either:

    a. quarantine an amount from the pool and direct that it be returned by the parties to Centrelink. In the circumstances of this case, such an order was inappropriate because the quantum (including penalties and interest) was unknown; or

    b. adjourn the proceedings to enable the issue to be clarified by the relevant Commonwealth authorities. Having regard to section 128(7)(b) of the *Evidence Act*, his Honour found that this would not be permissible because it would require the Court to some degree to ignore the certificate it had granted.

39. The point to take away from these decisions is that practitioners should be cautious about over promising and under delivering on the benefits of a client obtaining a certificate. It is within the discretion of the court to determine how to proceed once the request has been made for a certificate. Careful consideration must be given the evidence sought to be adduced and appropriately weighed against any possible future exposure to the client from prosecution.

Dead Witnesses

40. In the event a witness has sworn an affidavit and subsequently dies prior to the hearing of the matter, the evidence of the deceased is considered first-hand hearsay. Part 3.2, Division 2, of the *Evidence Act* addresses first-hand hearsay evidence.

41. Section 63 of the *Evidence Act* provides:

> **Exception: civil proceedings if maker not available**
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> (1) This section applies in a civil proceeding if a person who made a previous representation is not available[31] to give evidence about an asserted fact.
>
> (2) The hearsay rule does not apply to:
>
> (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
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> (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.
>
> Note 1: Section 67 imposes notice requirements relating to this subsection.
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> Note 2: Clause 4 of Part 2 of the Dictionary is about the availability of persons.

[31] Note that the definition of "unavailability of persons" is contained in Part 2, Clause 4 of the Dictionary in the *Evidence Act* 1995 (Cth).

42. A party relying on section 63 must provide "reasonable notice" to all other parties to the proceedings of their intention to adduce the evidence in accordance with this section.[32] The notice must include the particular provision relied upon. In the event a party fails to provide the other parties with the required notice, the court may, on the application of a party, permit the evidence to be adduced.

43. It is important to note that the court retains a discretion whether or not to admit the evidence. This is, in part, informed by section 135 of the *Evidence Act.* That section provides:

> **General discretion to exclude evidence**
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> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
>
> (a) be unfairly prejudicial to a party; or
>
> (b) be misleading or confusing; or
>
> (c) cause or result in undue waste of time.

44. The fact that the evidence sought to be adduced from the deceased may strongly prove the party's case who seeks to rely on the evidence is not, of itself, sufficient to seek that the evidence be excluded. In *Ainsworth v Burden*[33] Hunt AJA (Handley and McColl JJA agreeing) held that:

> The judge has wrongly interpreted what is comprehended by the expression "unfairly prejudicial" in s 135. It is not unfairly prejudicial to a party if the material tendered by his opponent merely proves or strongly supports the opponent's case. The phrase "unfairly prejudicial" or the cognate phrase "unfair prejudice" is used not only in s 135 but also in s 136 and s 137, and the meaning to be given to each of those phrases must be the same — whether or not a weighing exercise is contemplated … The prejudice to which each of the sections refers is *not* that the evidence merely tends to establish the case of the party tendering it; it means prejudice which is unfair to the other party because there is a real risk that the evidence will be misused by the jury in some unfair way.[34]

45. This statement was considered by Rees J in *Moshen & Collings.*[35] In that case her Honour suggested that the "real risk that the evidence will be misused" was somewhat ameliorated in civil proceedings tried by a judge alone because counsel would have an opportunity to make submissions about the weight to apply to the evidence.

46. The relevant considerations for determining whether evidence should be excluded include:

    a. The issue or issues to which the evidence relates[36];

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[32] *Evidence Act 1995* (Cth), s 67.
[33] [2005] NSWCA 174.
[34] Ibid at [99] (citations omitted).
[35] [2017] FAMCA 29.
[36] *Leybourne v Permanent Custodians Ltd* [2010] NSWCA 78 at [82].

b. The probative value of the unchallengeable evidence[37];

c. The importance of the evidence;[38]

d. The possible significance of cross-examination[39];and

e. Any other dangers of unfair prejudice which may be exacerbated by the lack of an opportunity to cross-examine[40].

47. Whether the evidence is "misleading or confusing" will usually only have significance in a jury trial rather than a judge alone civil trial. Indeed in *Re GHI (a Protected Person)*[41], Campbell J said "there is something bizarre in submitting to a judge sitting alone that he or she should reject evidence on the ground that it might mislead or confuse him or her."[42]

48. Finally, a judge may exclude the evidence of a deceased witness if it will otherwise "cause or result in undue waste of time". This provision is only raised in extreme cases and not simply where it is alleged that the introduction of the evidence will extend the hearing time which, in the opinion of the opposing party, would waste the court's time. Instead, this provision is more appropriately relied on in cases where it could be established that the evidence sought be adduced may add complexity to the litigation without assisting resolution of the facts in dispute.[43]

[37] Ibid.
[38] Ibid.
[39] *Pavicic v Webb* [2010] ACTSC 37 at [59].
[40] *Galvin v The Queen* (2006) 161 A Crim R 449 c.f. [28] and [40].
[41] [2005] NSWSC 466.
[42] Ibid at [8].
[43] *Drambo Pty Ltd v Westpac Banking Corp Ltd* (1996) 33 ATR 255 and *Koninklijke Philips Electronics NV v Remington Products Australia Pty Ltd* (2000) 100 FCR 90 at [21].

Annexure A

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 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.

(3) 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

(c) of the effect of such a 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.

(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 an Australian court:

(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.

(8) Subsection (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.

(9) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant for the same offence or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence.

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

(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.

(12) If a person has been given a certificate under a prescribed State or Territory provision in respect of evidence given by the person in a proceeding in a State or Territory court, the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.

(13) The following are prescribed State or Territory provisions for the purposes of subsection (12):

(a) section 128 of the *Evidence Act 1995* of New South Wales;

(b) a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision for the purposes of subsection (12).

(14) Subsection (12) applies to:

(a) a proceeding in relation to which this Act applies because of section 4; and

(b) a proceeding for an offence against a law of the Commonwealth or for the recovery of a civil penalty under a law of the Commonwealth, other than a proceeding referred to in paragraph (a).

Note 1: Bodies corporate cannot claim this privilege: see section 187.

Note 2: Clause 3 of Part 2 of the Dictionary sets out what is a civil penalty.

Note 4: Subsections (8) and (9) were inserted as a response to the decision of the High Court of Australia in *Cornwell v The Queen* [2007] HCA 12 (22 March 2007).