



PRIVILEGE AGAINST SELF INCRIMINATION

s.128

Introduction

- s.128 provides another significant change to the law in respect to self incrimination.
- Under the common law a witness would refuse to answer questions.
- Under s.128 the witness may be compelled to answer in return for a certificate of protection.
- As under common law, corporations are not protected.



The Procedure

- If it appears to the Court that there are grounds, the Court must in the absence of the jury make the witness aware: s.132.
- The witness may object to giving evidence on the grounds of incrimination/civil penalty.
- The Court determines if there are reasonable grounds.
- If reasonable, the witness may give evidence, or the Court determines if it is in the interests of justice for the witness to do so.

The Procedure (cont)



- In either instance, a certificate is given to the witness.
- Note, if there is liability to incrimination under foreign law, the witness may refuse to answer the questions.

Application of the Section

- Only applies to proceedings to which the Act applies.
- Sentencing hearings depend on s.4.



To Whom Does it Apply?

- “Witness” includes a party to the proceedings (i.e. defendant).
- Note, a defendant who gives evidence in their own defence cannot claim the privilege in respect to facts in issue.

Reasonable Grounds

- The onus lies on the person seeking the protection.
- s.142: such applications are on the balance of probabilities.



The Interests of Justice

- Query the quality of the evidence received after a certificate.
- Factors that weigh on a decision on the interests of justice include;
 - The probative value of the evidence.
 - The nature of the proceeding.
- Consequences for the witness; i.e. penalty/charge to which they would be exposed? Likelihood? Harm to the witness if published?

The Protection

- The certificate affords a use and derivative protection.
 - Use of the evidence.
 - Any further evidence that derives from its revelation.
- Query retrials – *R v Cornwell* (2007) 231 CLR 260 suggests that a witness must apply for protection again in a retrial.
- A Commonwealth certificate protects in “all Australian Courts”.
- Check the evidence regulations for the extent of NT protection.