Privilege Against Self-Incrimination

Summary

Witnesses should be aware of their right to claim the privilege against self-incrimination, and when and how it can be claimed. It is important to not inadvertently waive the privilege by voluntarily giving incriminating evidence.

ASIC examinations

When a person is compelled by the Australian Securities and Investments Commission (“ASIC”) to attend an examination, it is important to be aware of the right to claim the privilege against self-incrimination, and how to claim the privilege. It prevents ASIC from using the information against the person in future criminal proceedings. Even if the witness believes no crime has been committed, the safest course is to claim the privilege, as the witness’ personal opinion may be incorrect at law. A witness appearing before an ASIC examination ought to attend with a legal practitioner with experience in such examinations.

Section 128 certificate

Another context in which the privilege is important is when a person is requested to or required to give evidence in civil litigation. A Court may grant a certificate under s.128 of the Uniform Evidence Act (applicable in some states, including New South Wales and Victoria, and in the Federal jurisdiction) if a witness objects to giving particular evidence on the ground that the evidence may tend to prove that he/she has committed an offence, or is liable to a civil penalty.

The Court must determine whether there are reasonable grounds for the objection. The witness may still be required to give the evidence, but the certificate means the evidence cannot be used against the witness in subsequent proceedings.

An exception is if the evidence given under the protection of the certificate was false, then evidence can be used in prosecuting the witness for giving false evidence.

A s.128 certificate is only available if the witness objects to giving evidence. In Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd [2010] NSWSC 29 (5 February 2010), Barrett J held that where a witness voluntarily gives evidence (including affidavit evidence) without being
compelled to do so, he/she cannot be said to have objected to giving the evidence, and the protection under s.128 is not available.

It is important for witnesses to not inadvertently waive the privilege, and to seek legal advice before giving potentially incriminating evidence.

For example, if director A of a company is sued for breaches of director’s duties with potential criminality and asks director B to give evidence which potentially also discloses breaches of duties by director B, director B should not provide an affidavit as the privilege cannot be claimed at trial. Director A may subpoena director B if he/she believes director B’s evidence will assist. Director B should have legal representation present at the trial to seek orders for s.128 certificates where appropriate.

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