

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
GAGELER, GORDON, EDELMAN AND GLEESON JJ

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DEPUTY COMMISSIONER OF TAXATION

APPELLANT

AND

ZU NENG SHI

RESPONDENT

*Deputy Commissioner of Taxation v Shi*  
[2021] HCA 22  
*Date of Hearing: 14 April 2021*  
*Date of Judgment: 4 August 2021*  
S211/2020

## ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders made by the Full Court of the Federal Court of Australia on 4 June 2020, and, in their place, order that:*
  - (a) *the appeal be allowed;*
  - (b) *order 2 of the orders made by the Federal Court of Australia on 24 July 2019 be set aside;*
  - (c) *subject to orders (d) and (e) below, the privilege affidavit delivered by Mr Shi pursuant to s 128A(2) of the Evidence Act 1995 (Cth) ("the Privilege Affidavit") be filed and served on the Deputy Commissioner of Taxation;*
  - (d) *order (c) be stayed pending the hearing and determination by a single judge of the Federal Court of Australia, pursuant to s 37AF of the Federal Court of Australia Act 1976 (Cth), whether suppression or non-publication orders should be made in relation to the Privilege Affidavit;*



- (e) *there be a hearing before a single judge of the Federal Court of Australia on a date to be fixed in respect of whether suppression or non-publication orders should be made in relation to the Privilege Affidavit pursuant to s 37AF of the Federal Court of Australia Act 1976 (Cth);*
- (f) *the Court grant a certificate pursuant to s 128A(7) of the Evidence Act 1995 (Cth) in respect of the Privilege Affidavit; and*
- (g) *Mr Shi pay the Deputy Commissioner of Taxation's costs of the appeal.*

On appeal from the Federal Court of Australia

**Representation**

S T White SC with T R Epstein for the appellant (instructed by Australian Government Solicitor)

T A Game SC with K J Edwards and W R Johnson for the respondent (instructed by Uther Webster & Evans)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **Deputy Commissioner of Taxation v Shi**

Evidence – Privilege against self-incrimination – Where appellant obtained ex parte orders freezing worldwide assets of respondent – Where disclosure orders made in connection with freezing orders required disclosure of worldwide assets – Where respondent objected to disclosure of certain information on basis that it may tend to self-incriminate – Where respondent prepared privilege affidavit under s 128A(2) of *Evidence Act 1995* (Cth) – Whether information in privilege affidavit could be disclosed to parties under s 128A(6) – Whether interests of justice required disclosure of information in privilege affidavit.

Words and phrases – "certificate", "commission of a foreign offence", "disclosure order", "freezing order", "interests of justice", "may tend to prove", "onus of proof", "privilege affidavit", "privilege against self-incrimination", "reasonable grounds for an objection".

*Evidence Act 1995* (Cth), ss 128, 128A.

*Federal Court Rules 2011* (Cth), rr 7.32, 7.33.



1 KIEFEL CJ, GAGELER AND GLEESON JJ. The Deputy Commissioner of Taxation appeals by special leave from a decision of the Full Court of the Federal Court<sup>1</sup> dismissing by majority (Lee and Stewart JJ, Davies J dissenting) an appeal by leave from a decision of a primary judge of the Federal Court<sup>2</sup> (Steward J) refusing to make an order under s 128A(6) of the *Evidence Act 1995* (Cth) that a privilege affidavit be filed and served on the Deputy Commissioner. The privilege affidavit was prepared by Mr Shi in support of an objection to compliance with a disclosure order made by another judge of the Federal Court<sup>3</sup> (Yates J) under r 7.33 of the *Federal Court Rules 2011* (Cth) ancillary to a freezing order under r 7.32 of the *Federal Court Rules* in a civil proceeding brought by the Deputy Commissioner against Mr Shi for the recovery of tax.

2 Section 128A of the *Evidence Act* relevantly provides:

"(2) If a relevant person [being a person to whom a disclosure order is directed] objects to complying with a disclosure order on the grounds that some or all of the information required to be disclosed may tend to prove that the person:

- (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;

the person must:

- (c) disclose so much of the information required to be disclosed to which no objection is taken; and
- (d) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken (the ***privilege affidavit***) and deliver it to the court in a sealed envelope; and
- (e) file and serve on each other party a separate affidavit setting out the basis of the objection.

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1 *Deputy Commissioner of Taxation v Shi* (2020) 277 FCR 1.

2 *Deputy Commissioner of Taxation v Shi [No 3]* [2019] FCA 945.

3 *Deputy Commissioner of Taxation v Shi* [2018] FCA 1915.

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...

- (4) The court must determine whether or not there are reasonable grounds for the objection.
- (5) Subject to subsection (6), if the court finds that there are reasonable grounds for the objection, the court must not require the information contained in the privilege affidavit to be disclosed and must return it to the relevant person.
- (6) If the court is satisfied that:
  - (a) any information disclosed in the privilege affidavit may tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law; and
  - (b) the information does not tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
  - (c) the interests of justice require the information to be disclosed;the court may make an order requiring the whole or any part of the privilege affidavit containing information of the kind referred to in paragraph (a) to be filed and served on the parties.
- (7) If the whole or any part of the privilege affidavit is disclosed (including by order under subsection (6)), the court must cause the relevant person to be given a certificate in respect of the information as referred to in paragraph (6)(a).
- (8) In any proceeding in an Australian court:
  - (a) evidence of information disclosed by a relevant person in respect of which a certificate has been given under this section; and
  - (b) evidence of any information, document or thing obtained as a direct result or indirect consequence of the relevant person having disclosed that information;

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence concerned."

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3 There is, and was before the Full Court, no dispute that making or refusing to make an order under s 128A(6) is a discretionary decision in respect of which the applicable standard of appellate review is that identified in *House v The King*<sup>4</sup>.

4 Within the context of s 128A as a whole, s 128A(5) makes clear that the discretion to make or refuse to make an order under s 128A(6) arises for consideration by a court only where the person to whom a disclosure order is directed has taken an objection to disclosure of information under s 128A(2) and only where the court has found under s 128A(4) that there are reasonable grounds for the objection that has been taken. Section 128A(6) in that context operates to permit the court to make an order requiring information that the court is satisfied under s 128A(6)(a) may tend to prove that the person has committed an offence against Australian law to be filed and served on the parties only if the court is also satisfied that both of the propositions in s 128A(6)(b) and (c) apply to that information.

5 Whether it is open to the court to be satisfied of the negative proposition in s 128A(6)(b) – that the information in the privilege affidavit does not tend to prove that the person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country – turns on inferences available to be drawn by the court in light of the objection the relevant person has taken under s 128A(2) and in light of the finding the court has made under s 128A(4) that the objection is on reasonable grounds.

6 The method by which the relevant person is required to take an objection to the disclosure of information under s 128A(2) can be seen to have two elements. In accordance with s 128A(2)(d), the person must prepare and deliver to the court in a sealed envelope a privilege affidavit containing the information that is the subject of the objection. In accordance with s 128A(2)(e), the person must file and serve a separate affidavit setting out the basis for the objection. Both elements are important.

7 For the person to comply with the requirement of s 128A(2)(e) that the separate affidavit set out the basis for the objection that is taken, the separate affidavit must indicate, at least in outline, the legal and factual foundation for that objection. For the court then to find under s 128A(4) that there are reasonable grounds for the objection taken, the court must be satisfied on the evidence before it that there is a legal and factual foundation for the objection that is sufficient for the court itself to conclude that the objection is reasonably maintained at the time

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4 (1936) 55 CLR 499.

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the court makes its decision<sup>5</sup>. Only where that conclusion has been reached by the court does the question arise as to whether the court is also to be satisfied of the negative proposition in s 128A(6)(b).

8       Where the person has set out in the separate affidavit filed and served in accordance with s 128A(2)(e) that a basis for the objection is that the information contained in the privilege affidavit may tend to prove that the person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and where the objection that has been made on that basis has been found by the court under s 128A(4) to be on reasonable grounds, the satisfaction of the court that the objection has a sufficient legal and factual foundation to allow the court itself to conclude that the objection is reasonably maintained necessarily means that the court will be unable to be satisfied of the negative proposition in s 128A(6)(b). The court acting rationally could not be satisfied under s 128(4) of the existence of reasonable grounds for the objection identified in accordance with s 128A(2)(e) and simultaneously be satisfied of the negative proposition in s 128A(6)(b).

9       Where the person has not set out in the separate affidavit filed and served in accordance with s 128A(2)(e) that a basis for the objection is that the information contained in the privilege affidavit may tend to prove that the person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, the position is the converse. The omission of any such basis for the objection set out in the separate affidavit filed and served in accordance with s 128A(2)(e) is a sufficient evidentiary foundation for the court, in the absence of evidence to the contrary, to be satisfied of the negative proposition in s 128A(6)(b).

10       As Gordon J comprehensively explains, the present case fits within that converse scenario. The separate affidavit sworn by Mr Shi's solicitor for the purpose of s 128A(2)(e) was perfunctory, the legal and factual foundation for his objection being outlined in the document headed "Open Annotation to Privileged Affidavit of [Mr Shi]". Treating the basis of the objection sought to be set out in the separate affidavit as that particularised in that document, it is apparent that Mr Shi made a choice, in setting out the legal and factual foundation of his objection, not to include any tendency of any information in his privilege affidavit to prove that he committed any offence against or arising under, or is liable to a civil penalty under, any Chinese law. Nor did he attempt, in his privilege affidavit or otherwise, to lead evidence capable of establishing that tendency. To the

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5       cf *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 445 [59].

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contrary, as the primary judge found<sup>6</sup>, the information in his privilege affidavit concerned matters in Australia and "[t]here was nothing to indicate that those Australian matters could give rise to any offence in China". The earlier finding of the primary judge that there existed reasonable grounds for Mr Shi's objection<sup>7</sup> must be read in that light as a finding that there existed reasonable grounds for the objection which in fact he took that the information contained in the privilege affidavit may tend to prove that he committed some or all of the offences against Australian law particularised in the document headed "Open Annotation to Privileged Affidavit of [Mr Shi]".

11 We also agree with Gordon J that the majority in the Full Court and the primary judge each took an irrelevant consideration into account in failing to be satisfied for the purpose of s 128A(6)(c) that the interests of justice required disclosure of the information in the privilege affidavit. The inquiry mandated by s 128A(6)(c) as to the interests of justice proceeds on the premise that, as part of or in connection with an extant freezing or search order in a civil proceeding, there is an extant disclosure order operating to require provision of the information. No part of the inquiry is to question whether information required to be provided in compliance with that extant disclosure order would more appropriately be obtained through invocation of some other compulsory process. The majority in the Full Court therefore erred in taking into account the possibility of the Deputy Commissioner obtaining information by conducting an examination under s 108 of the *Civil Procedure Act 2005* (NSW) in the same way as the primary judge erred in taking into account the possibility of the Deputy Commissioner obtaining information by serving a notice under s 353-10 of Sch 1 to the *Taxation Administration Act 1953* (Cth).

12 Evaluation of the interests of justice for the purpose of s 128A(6)(c) is informed primarily by balancing the public interest in the person to whom the extant disclosure order is directed complying with that disclosure order by disclosing information to the party to the civil proceeding in whose favour the order has been made against the potential detriment to the person that arises from the tendency of the information to prove that the person has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law. A court assessing that potential detriment must obviously take into account the prohibition in s 128A(8) on derivative use of the information disclosed. As recognised by the primary judge, and as explained by Gordon J, a court assessing

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6 *Deputy Commissioner of Taxation v Shi [No 3]* [2019] FCA 945 at [23]-[24].

7 *Deputy Commissioner of Taxation v Shi [No 3]* [2019] FCA 945 at [18].

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that potential detriment must also take account of constraints on the use and dissemination of the disclosed information that arise within the context of the civil proceeding in which the disclosure order has been made. Those constraints include the obligation of the party to whom disclosure is made, and of any other person to whom the disclosed information might be given, not to make any use of the information other than for the purpose of the civil proceeding without leave of the court<sup>8</sup>. They include too the availability of orders restricting the dissemination of the disclosed information, relevantly under s 37AF of the *Federal Court of Australia Act 1976* (Cth).

13 We agree with the orders proposed by Gordon J. The peculiar circumstance of the primary judge having made clear that he would have found that the interests of justice required disclosure of the information in the privilege affidavit but for the irrelevant consideration his Honour took into account makes it appropriate for this Court, standing in the shoes of the Full Court for the purpose of the appeal, to substitute the order under s 128A(6) that the primary judge would have made had the identified error of principle not occurred.

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8 See *Hearne v Street* (2008) 235 CLR 125 at 157-162 [105]-[113], discussing *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 and *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

14 GORDON J. The appellant, the Deputy Commissioner of Taxation ("the Commissioner"), obtained ex parte orders in the Federal Court of Australia freezing the worldwide assets of the respondent, Mr Zu Neng (Scott) Shi, up to the unencumbered value of A\$41,092,548.03 ("the Freezing Orders"). Ancillary orders required Mr Shi to disclose all of his worldwide assets, including their value, location and details, and the extent of his interest in the assets ("the Disclosure Order")<sup>9</sup>.

15 Where a disclosure order has been made by a federal court in a civil proceeding, as part of, or in connection with, a freezing order, s 128A of the *Evidence Act 1995* (Cth) provides for an individual who is the subject of the disclosure order to claim privilege against self-incrimination – to protect the individual from convicting themselves "out of [their] own mouth"<sup>10</sup>.

16 Section 128A(2) provides that if a person to whom a disclosure order is directed objects to complying with the order on the grounds of self-incrimination, the person must, among other things, prepare an affidavit containing the information to which objection is taken (a "privilege affidavit"). Where the court is satisfied that there are reasonable grounds for such an objection<sup>11</sup>, s 128A(5) provides that the court must *not* require the information in the privilege affidavit to be disclosed and must return it to the person.

17 Section 128A(6), however, provides an exception:

"If the court is satisfied that:

- (a) any information disclosed in the privilege affidavit may tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law; *and*
- (b) the information does *not* tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; *and*
- (c) the interests of justice require the information to be disclosed;

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9 *Deputy Commissioner of Taxation v Shi* [2018] FCA 1915.

10 *Hamilton v Oades* (1989) 166 CLR 486 at 496. See also *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 340; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 294; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 500.

11 *Evidence Act*, s 128A(4).

the court *may* make an order requiring the whole or any part of the privilege affidavit containing information of the kind referred to in paragraph (a) to be filed and served on the parties." (emphasis added)

18 Mr Shi objected under s 128A to complying with part of the Disclosure Order on the grounds of self-incrimination. The information he objected to disclosing was set out in a "Privilege Affidavit" provided to the Federal Court but not to the Commissioner. The Federal Court at first instance was satisfied that there were reasonable grounds for Mr Shi's objection on the basis that the information disclosed in the Privilege Affidavit may tend to prove that Mr Shi had committed an offence against or arising under an Australian law but held that because there were other means by which the Commissioner could obtain the information, the interests of justice did not require the Privilege Affidavit to be disclosed. On appeal, the Full Court of the Federal Court, by majority, upheld the primary judge's holding that the interests of justice did not require disclosure, taking into account other available ways that the information in the Privilege Affidavit could be obtained.

19 The Commissioner appeals to this Court on the grounds that the courts below erred in applying the exception in s 128A(6) and, in particular, in deciding that the interests of justice did not require the Privilege Affidavit to be disclosed. By a notice of contention, Mr Shi contends that the courts below should *not* have been satisfied that the information in the Privilege Affidavit did not tend to prove that Mr Shi had committed an offence against or arising under a law of a foreign country. As these reasons will explain, the appeal should be allowed.

20 In order to address the parties' submissions, it is necessary to consider the legislative framework and the proper construction of s 128A. Before turning to address those issues, it is necessary to say something about the nature and purpose of a freezing order and a disclosure order.

### **Freezing orders and ancillary orders**

21 The Federal Court may make a freezing order or an ancillary order, or both, against a judgment debtor or a prospective judgment debtor if the Court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or a prospective judgment will be wholly or partly unsatisfied because the judgment debtor or the prospective judgment debtor might abscond, or because the assets of the judgment debtor or the prospective judgment debtor might be removed from

Australia or from a place inside or outside Australia, or disposed of, dealt with or diminished in value<sup>12</sup>.

- 22 A freezing order, and an asset disclosure order, have the same fundamental purpose: "to prevent the abuse or frustration of [a court's] process in relation to matters coming within its jurisdiction"<sup>13</sup>. Freezing orders may be made, and may continue to operate, after final judgment to protect the efficacy of the execution<sup>14</sup>. And for freezing orders to be effective there needs to be timely disclosure of assets<sup>15</sup>. The utility in both orders lies in ensuring that the court's processes for enforcement of a judgment are not frustrated by assets being spirited away between the time of commencement of the proceedings and eventual enforcement.

### Legislative framework

- 23 Section 128A<sup>16</sup> deals with self-incrimination privilege in a particular context – compulsory disclosure of information because of an order ancillary to a freezing or search order<sup>17</sup>. The context is important – the disclosure of the information has been compelled by court order and, except by application to set aside or vary the making of, relevantly, one or both of the freezing order and the disclosure order, the basis for the making of the orders, as well as the reasons for the making of the orders, and the ambit of those orders, have been established. Consideration of any application for a claim of self-incrimination privilege under s 128A must proceed from the premises that the court has ordered disclosure of the

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12 *Federal Court Rules 2011* (Cth), rr 7.32, 7.33, 7.35(4) and 7.36. There are equivalent provisions in other court rules.

13 *Witham v Holloway* (1995) 183 CLR 525 at 535, quoting *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623. See also *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 321; *Federal Court Rules*, r 7.32.

14 *Federal Court Rules*, rr 7.35(1)(b), (3), (4), 7.36; *Jackson* (1987) 162 CLR 612 at 623.

15 *Bax Global (Australia) Pty Ltd v Evans* (1999) 47 NSWLR 538 at 544-545 [23]; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 228 ALR 174 at 181-182 [20]. See also *A v C* [1981] QB 956 at 959-960: "[w]ithout information about the state of each account it is difficult, if not impossible, to operate the *Mareva* jurisdiction properly".

16 Found in Div 2 of Pt 3.10 of Ch 3 of the *Evidence Act*, dealing with "Admissibility of evidence".

17 *Evidence Act*, s 128A(1) definition of "disclosure order".

information; the information is relevant to and necessary for the efficacy of the relevant freezing order; and the person subject to the orders has not successfully applied for the setting aside of those orders. The context in which issues of self-incrimination might arise at trial under s 128 of the *Evidence Act* is necessarily and markedly different.

24 The language used in s 128A is, in large part, the language of the common law<sup>18</sup>. This is not to say that the construction of s 128A may not develop over time. Section 128A is not frozen by reference to the common law. But the central idea captured in s 128A of the *Evidence Act*<sup>19</sup> – that individuals should not be compelled to incriminate themselves – is for present purposes sufficiently expressed in *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation*<sup>20</sup> and later authorities<sup>21</sup>.

25 This is not the case to chart the metes and bounds of s 128A. Section 128A provides, however, a framework in many cases, of which this is one, for considering the issues sequentially in the order in which the section is set out. When that is done in this case, the appropriate balance is struck between compliance with the compulsory disclosure order, a claim of self-incrimination privilege and the interests of justice.

26 Section 128A(2) expressly recognises that a person to whom a disclosure order is directed (a "relevant person"<sup>22</sup>) may object to complying with a disclosure order<sup>23</sup> on the grounds that "some or all of the *information* required to be disclosed" by that order "*may tend to prove*" that the person "(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" (emphasis added). In this case, Mr Shi is the relevant person.

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18 See, eg, *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547 at 647: "[a]ll that is necessary is that it should be reasonable to believe that production would 'tend to expose' (not 'would expose')".

19 And in s 128 of the *Evidence Act*.

20 [1978] AC 547.

21 See, eg, *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380; *Pyneboard* (1983) 152 CLR 328; *Sorby* (1983) 152 CLR 281.

22 *Evidence Act*, s 128A(1) definition of "relevant person".

23 A "disclosure order" is relevantly defined in s 128A(1) to mean "an order made by a federal court in a civil proceeding requiring a person to disclose information, as part of, or in connection with a freezing or search order".

27 If the relevant person objects on any of the grounds identified in s 128A(2)(a) or (b), the sub-section goes on to require that the relevant person do three things:

- "(c) disclose so much of the *information* required to be disclosed to which no objection is taken; and
- (d) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken (the *privilege affidavit*) and deliver it to the court in a sealed envelope; and
- (e) file and serve on each other party a separate affidavit *setting out the basis of the objection*." (emphasis added)

28 As is apparent, the basis for the objection must be that some or all of the information required to be disclosed *may tend to prove* that the person has committed an offence against or arising under an Australian law or a law of a foreign country or that the person is liable to a civil penalty. The person asserting the privilege bears the onus of establishing the factual basis for the privilege<sup>24</sup>.

29 In its terms, s 128A(2) does not require the relevant person to establish that disclosure of the information *will*, on the balance of probabilities<sup>25</sup>, prove that the person has committed an offence. Rather, the standard which the relevant person's objection must reach is that disclosure of the information "may tend to prove" that the person has committed an offence. Evidence "may tend to prove" the commission of an offence where the evidence affords "a link in the chain of evidence" and therefore becomes "a means of bringing home an offence"<sup>26</sup>.

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24 *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 at 422, 430; *Sadie Ville Pty Ltd (As Trustee for the Sadie Ville Superannuation Fund) v Deloitte Touche Tohmatsu (A Firm) [No 3]* (2018) 357 ALR 695 at 717-718 [99], 720 [113] (approved on appeal in *Deloitte Touche Tohmatsu (A Firm) v Sadie Ville Pty Ltd (As Trustee for Sadie Ville Superannuation Fund)* (2020) 144 ACSR 1, see especially at 4 [6]).

25 *Rio Tinto Zinc Corporation* [1978] AC 547 at 647; cf *Evidence Act*, ss 140-142 and *Gedeon v The Queen* (2013) 280 FLR 275, where the person asserting the privilege had been charged with an offence, and was awaiting trial, at the time of invoking the privilege in a separate proceeding.

26 *Ex parte P; Re Hamilton* (1957) 74 WN (NSW) 397 at 399, cited in *Application Concerning Section 80 of the Supreme Court Act and Sections 119 and 128 of the Evidence Act* [2004] NSWSC 614 at [35]-[36]. See also *Rio Tinto Zinc Corporation*

Information required to be disclosed because of a disclosure order "may tend" to prove the commission of an offence if disclosure of the relevant information might, or is likely to, "set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character"<sup>27</sup>.

30 What will be necessary to establish whether the information may tend to prove the commission of an offence will vary from case to case. The privilege may be claimed without requiring the person to explain fully how disclosure of the information would bring about the incriminating effect. To require the relevant person to go further would in at least some circumstances annihilate the protection that the section is designed to provide<sup>28</sup>. However, the mere statement by the relevant person that they believe that disclosure of information will tend to incriminate them will rarely be sufficient to protect them from complying with the disclosure order, and it will not do so when other circumstances are such as to induce the court to believe that disclosure of that information will not really have that tendency<sup>29</sup>.

31 Something further needs to be said about a relevant person objecting to a disclosure order on the grounds that some or all of the information required to be disclosed may tend to prove that the person has committed an offence against or arising under "a law of a foreign country". As was said in *Neilson v Overseas Projects Corporation of Victoria Ltd*<sup>30</sup>, "Australian courts know no foreign law". A bare general assertion that disclosure of the information may tend to prove the commission of a foreign offence, as with an offence under Australian law, will not be sufficient to engage s 128A(2). More will be required. That is not a new concept<sup>31</sup>. The relevant person must point to what foreign law may apply and

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[1978] AC 547 at 574; Taylor, *A Treatise on the Law of Evidence, as Administered in England and Ireland*, 8th ed (1885), vol II at 1247-1248.

27 *Rank Film Distributors* [1982] AC 380 at 443; see also *Sorby* (1983) 152 CLR 281 at 294.

28 *McFadden* (1993) 31 NSWLR 412 at 430. See also Taylor, *A Treatise on the Law of Evidence, as Administered in England and Ireland*, 8th ed (1885), vol II at 1247.

29 *McFadden* (1993) 31 NSWLR 412 at 430; Taylor, *A Treatise on the Law of Evidence, as Administered in England and Ireland*, 8th ed (1885), vol II at 1247-1248.

30 (2005) 223 CLR 331 at 370 [115].

31 See, eg, *United States of America v McRae* (1867) LR 3 Ch App 79 at 84-86.

what offence or class of offences under that law might be relevant<sup>32</sup>. That task is assisted by s 174 of the *Evidence Act*, a provision described as permissive and not exhaustive<sup>33</sup>. Section 174(1) provides, relevantly, that evidence of "a statute, proclamation, treaty or act of state of a foreign country" may be adduced in a proceeding by producing a book, pamphlet or other publication that "purports" to have been printed by the government or official printer of the country; or "appears to the court to be a *reliable source* of information" (emphasis added); or "would be used in the courts of the country to inform the courts" about the relevant law; or is an "examined copy" of the statute, proclamation, treaty or act of state. Where evidence is adduced which meets one of the conditions in s 174, a court is entitled to ascertain the content of the foreign law by reference to the material before it, in absence of expert evidence<sup>34</sup>. Of course, where none of the conditions in s 174 are engaged, proof of foreign law, through expert evidence, is required<sup>35</sup> unless the foreign laws in question are so well-known that their contents are "notorious"<sup>36</sup>.

32 In the present case, counsel for Mr Shi contended that Mr Shi's objection to complying with the Disclosure Order was made on grounds that the information may tend to prove the commission of an offence under an Australian law and under a law of a foreign country. But Mr Shi's objection<sup>37</sup> did not identify the law of a foreign country, did not seek to rely on s 174 of the *Evidence Act* and did not lead any expert evidence of any foreign law or the content of any such law. Nor did any of the additional material placed before the Federal Court on the hearing of

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32 See, eg, *R v Lodhi* (2006) 199 FLR 328 at 336-338 [29]-[39]; cf *Gedeon* (2013) 280 FLR 275 at 328 [310], see also at 316 [233]-[234], 321 [263]-[267].

33 *Mokbel v The Queen* (2013) 40 VR 625 at 634 [24].

34 See, eg, *VSAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 239 at [29]-[30], quoting *Applicants in V 722 of 2000 v Minister for Immigration and Multicultural Affairs* [2002] FCA 1059 at [33] (approved on appeal in *VHAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 80); *Re Tang* (2017) 52 VR 786 at 803-804 [64]-[65]; *Xu v Wang* (2019) 58 VR 536 at 554-555 [70].

35 *Mokbel* (2013) 40 VR 625 at 633 [22], 634 [24]-[26].

36 *Mokbel* (2013) 40 VR 625 at 634 [26], referring to *Saxby v Fulton* [1909] 2 KB 208.

37 In accordance with s 128A(2)(e), an affidavit was filed by Mr Shi's solicitor on 18 March 2019 setting out the basis of Mr Shi's objection to complying with the Disclosure Order.

Mr Shi's s 128A application<sup>38</sup>. In his written submissions before this Court, Mr Shi submitted that a court determining an objection under s 128A may, in the absence of evidence adduced to the contrary, adopt a rebuttable presumption that foreign law is the same as Australian law<sup>39</sup>. That submission was properly abandoned during the hearing. This is one instance where the court cannot assume the unproved foreign law is identical with the *lex fori*<sup>40</sup>. First, as the primary judge in this case and Bathurst CJ in *Gedeon v The Queen*<sup>41</sup> both observed, it is doubtful, or at least subject to real uncertainty, whether a presumption as to foreign law has any operation in the context of s 128A or s 128. The operation of a presumption would render the separate inquiry under s 128A(6)(a) and (b) redundant in its application to extraterritorial criminal offences. Why? Because the result would always be that information tending to prove the commission of an offence under an Australian law, by the operation of the presumption, would also tend to prove the commission of an offence under a law of a foreign country. To reason in such a way would be inconsistent with the text and structure of s 128A. Second, the presumption has limited use in the case of complex and technical issues<sup>42</sup> because courts are reluctant to pronounce judgments on hypotheses which are not correct<sup>43</sup>. And, in this case, as the primary judge observed, it would be inappropriate to make such an assumption about the content of foreign law (which may be wrong) where the issues were complex (and technical) and there was no evidence of the content of the foreign law.

33 Section 128A(4) then provides that it is for the court to determine whether or not there are reasonable grounds for the objection. The test is objective and

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38 Mr Shi prepared a confidential and open "annotation" as a guide to the contents of the Privilege Affidavit. The confidential and open annotations were before the Federal Court, the Full Court and this Court.

39 *Neilson* (2005) 223 CLR 331 at 370 [116], 372 [125].

40 *Damberg v Damberg* (2001) 52 NSWLR 492 at 505-506 [120], 522 [162]. See also, eg, *Neilson* (2005) 223 CLR 331 at 396 [203]; *PCH Offshore Pty Ltd v Dunn [No 2]* (2010) 273 ALR 167 at 182 [111]-[112]; *Severstal Export GmbH v Bhushan Steel Ltd* (2013) 84 NSWLR 141 at 159 [66]-[68]; *Benson v Rational Entertainment Enterprises Ltd* (2018) 97 NSWLR 798 at 817 [104].

41 (2013) 280 FLR 275 at 327 [305].

42 *Severstal Export* (2013) 84 NSWLR 141 at 159 [66]-[68].

43 *Benson* (2018) 97 NSWLR 798 at 817 [104], citing *Damberg* (2001) 52 NSWLR 492 at 522 [160], [162].

evaluative<sup>44</sup>. Once the privilege has been claimed, the question for the court is whether, in all the circumstances, reasonable grounds exist for apprehending danger to the relevant person from being compelled to comply with the disclosure order in relation to some or all of the information in the privilege affidavit.

34 In assessing whether there are reasonable grounds for the objection, the court must assess whether there is a "real and appreciable risk" of prosecution if the relevant information is disclosed<sup>45</sup>. The gist of the privilege is that disclosure of the information "would tend to expose the claimant to the apprehended consequence"<sup>46</sup>. The "reasonable grounds" inquiry requires the court to assess, having regard to the circumstances of the case and the nature of the information which the relevant person is required to disclose, whether there are reasonable grounds to apprehend danger to them from being compelled to disclose the information<sup>47</sup>. This requires consideration of whether information may tend to prove the commission of an offence, as well as the likelihood, or risk, of steps being taken to prosecute that offence. There must be some material upon which the court can be satisfied of these matters<sup>48</sup>. The court is not limited to information in the privilege affidavit or any other material filed by the relevant person.

35 There can be no real and appreciable risk of prosecution, and accordingly no reasonable grounds for invoking the privilege, where the limitation period for commencing a prosecution has expired<sup>49</sup>; where the person claiming the privilege has received a pardon or has already been convicted or acquitted of the crime<sup>50</sup>;

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44 See *Application Concerning Section 80 of the Supreme Court Act and Sections 119 and 128 of the Evidence Act* [2004] NSWSC 614 at [21].

45 *Rio Tinto Zinc Corporation* [1978] AC 547 at 574; *Sorby* (1983) 152 CLR 281 at 290; *Sadie Ville* (2018) 357 ALR 695 at 717-718 [99].

46 *Sadie Ville* (2018) 357 ALR 695 at 717 [98].

47 *Sorby* (1983) 152 CLR 281 at 289. It is to be accepted, however, that considerable latitude is to be afforded because information, though at first sight apparently innocent, may afford a link in a chain of evidence and thereby be a means of bringing home the offence to the relevant person.

48 *McFadden* (1993) 31 NSWLR 412 at 423; *Application Concerning Section 80 of the Supreme Court Act and Sections 119 and 128 of the Evidence Act* [2004] NSWSC 614 at [24].

49 *Sorby* (1983) 152 CLR 281 at 290; *Sadie Ville* (2018) 357 ALR 695 at 718 [100].

50 *Sorby* (1983) 152 CLR 281 at 290.

or where "the taking of the step in question [the disclosure] will not add to the individual's jeopardy"<sup>51</sup>. Further, where a court determines that the claim is not made bona fide or is made for an ulterior purpose, such as to protect persons other than the applicant, the court would likely determine that there were not reasonable grounds for the objection<sup>52</sup>.

36 If, however, the court finds that there are reasonable grounds for the objection, then, subject to s 128A(6), the court must *not* require the information contained in the privilege affidavit to be disclosed and must return the privilege affidavit containing the information to the relevant person<sup>53</sup>. Section 128A(6) provides the "exception" to a claim of self-incrimination privilege by permitting disclosure of the information. The exception is limited – the court must be satisfied of three matters, namely that:

- "(a) *any information* disclosed in the privilege affidavit may tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law; and
- (b) *the information* does *not* tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
- (c) the interests of justice require *the information* to be disclosed".  
(emphasis added)

And if the court is satisfied of those three matters, then "the court *may* make an order requiring the whole or any part of the privilege affidavit containing information of the kind referred to in paragraph (a) to be filed and served on the parties" (emphasis added). Disclosure is not automatic.

37 Particular aspects of s 128A(6) are significant. Its concern is with "any information disclosed in the privilege affidavit", being, of course, information disclosed and required to be disclosed by the disclosure order, but information which the relevant person objects to disclosing on any of the grounds identified in s 128A(2)(a) or (b). Absent such objection being raised by the relevant person under s 128A(2), there is nothing to which s 128A(6) can attach. Thus, it is the information (or part of the information) required to be disclosed under the disclosure order which the relevant person has objected to

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51 *Sadie Ville* (2018) 357 ALR 695 at 718 [101].

52 *McFadden* (1993) 31 NSWLR 412 at 430.

53 *Evidence Act*, s 128A(5).

disclosing under s 128A(2)(a) or (b), and to which the court has determined that the relevant person has reasonable grounds for objecting under s 128A(4), which the court must then be satisfied should be subject to the exception or carve out from that established claim of self-incrimination privilege. Section 128A(6)(a) and (b) do not impose a standard or burden on the party claiming privilege against self-incrimination additional to or higher than that imposed by s 128A(2) and (4). That conclusion is reinforced by the fact that the statutory phrase in s 128A(6)(b) is "does not *tend* to prove" (emphasis added). Where, as here, "tend to prove" is used in both ss 128A(6)(b) and 128A(2), which are cognate and related provisions of the *Evidence Act*<sup>54</sup>, that phrase is presumed to have the same meaning in both provisions.

38 The structure and content of s 128A(6) is important. Section 128A(6) presents a particular question which is more narrowly directed than the questions asked in the court's determination of the reasonable grounds inquiry in s 128A(4). Under s 128A(4), there will not be reasonable grounds for the objection if the information in question does not tend to prove commission of a relevant offence or liability to a civil penalty. But under s 128A(6), the more narrowly directed question is whether *any* information disclosed in the privilege affidavit may tend to prove that the relevant person has committed an offence under an Australian law and that *that* information does not tend to prove that the relevant person has committed an offence under a foreign law. It is a consequence of s 128A(5) and (6) that information that may tend to prove commission of an offence under foreign law will never be required to be disclosed. As will be explained, this reflects a legislative judgment that, as an Australian court cannot guarantee that a certificate providing derivative use immunity will be respected in a foreign country, a legitimate claim of self-incrimination privilege on grounds of foreign law should not be overruled<sup>55</sup>. But the inquiry under s 128A(6) also reflects the fact that information which may tend to prove the relevant person has committed an offence under an Australian law may also tend to prove the commission of an offence under a foreign law. Section 128A(6)(a) and (b) are directed at excluding from disclosure information which may tend to prove the commission of an offence under foreign law, regardless that it might also tend to prove the commission of an offence under

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54 See, eg, *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 643; *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (In liq)* (2015) 257 CLR 544 at 560 [27]; *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456 at 466-467 [21].

55 See Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law: Report* (2005) at 529-530 [15.104], making this point in relation to s 128, which operates in the same way.

an Australian law. Of course, it may be only some – a subset – of the information in the privilege affidavit.

39 The separation of s 128A(6)(a) and (b), and the reference in s 128A(6)(b) to the court being satisfied that the information referred to in para (a) – being information that may tend to prove the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law – does *not* tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, is unsurprising. The statutory protection for stripping someone of a claim of privilege against self-incrimination and requiring the whole or any part of the privilege affidavit to be disclosed is that "the court must cause the relevant person to be given a certificate in respect of *the information* as referred to in paragraph (6)(a)"<sup>56</sup> (emphasis added). Such a certificate can have no application, and therefore provides no protection, outside Australia<sup>57</sup>. To the extent that the court has determined that there are reasonable grounds for the relevant person's objection to disclosing some or all of the information falling within para (a) and that that information may *also* tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, the court cannot strip the relevant person of that self-incrimination claim.

40 Where there is information of the kind described in s 128A(6)(a) and (b) the court must be satisfied that the interests of justice require that *that* information be disclosed<sup>58</sup>. If so satisfied, the court may require the whole or any part of the privilege affidavit containing information of the kind referred to in s 128A(6)(a) to be filed and served on the parties.

41 What the interests of justice require in a particular case is to be weighed having regard to the proceeding in which the question arises<sup>59</sup>. Here, the proceeding involves the making of the Freezing Orders and the necessary ancillary relief in the form of the Disclosure Order in seeking to ensure that the Court's processes for enforcement of a judgment for substantial tax debts are not

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56 *Evidence Act*, s 128A(7).

57 *cf Application Concerning Section 80 of the Supreme Court Act and Sections 119 and 128 of the Evidence Act* [2004] NSWSC 614 at [37]-[38].

58 *Evidence Act*, s 128A(6)(c).

59 See *Lodhi* (2006) 199 FLR 328 at 338-339 [41]-[46]; *Gedeon* (2013) 280 FLR 275 at 324 [289]-[290]; *Australian Workers' Union v Registered Organisations Commissioner* [No 5] [2019] FCA 188 at [16].

frustrated by assets being spirited away before eventual enforcement. The factors to be balanced in determining whether the interests of justice require the information to be disclosed are not and cannot be prescribed but may include the nature of the information, the likelihood of an offence being prosecuted<sup>60</sup> and any resulting unfairness to a party.

42 At least in this case, the availability of alternative forms of information gathering is not a consideration of any moment. The information has been gathered. The information was required to be gathered and disclosed by the Disclosure Order, where the basis of, reasons for and extent of the Disclosure Order (and the Freezing Orders) remain extant. Pointing to other available *means* for gathering the same information suggests that the information both is required and should be made available. It supports, rather than detracts from, requiring disclosure of the material. In this case, the majority in the Full Court of the Federal Court, the primary judge and Mr Shi in this Court referred to other forms of procedure that the Commissioner might be able to use to gather the same information. Reference to those other procedures is both distracting and unhelpful. It is distracting because the processes which give rise to this appeal – the Freezing Orders and the Disclosure Order – have required the assembly of the relevant information. Asking whether other procedures might allow or require the assembly of the same information again and later is not to the point. Indeed, if some other procedures do allow the Commissioner to have access to the same information (a question that need not be decided), that might suggest that in the context of the extant Freezing Orders and Disclosure Order, the interests of justice require the immediate disclosure of the information to the Commissioner rather than deferring disclosure until those other procedures have been carried out. The possibility of obtaining the same evidence by alternative coercive means is not relevant.

43 On the other hand, the availability of *other* evidence that may tend to prove, to the same or some other degree, the information contained in the privilege affidavit – "alternative evidence" or an absence of "commonality" of evidence<sup>61</sup> – may indicate that it is not in the interests of justice that the information over which privilege is claimed be disclosed. If the information over which the privilege is claimed is common with information already available to the party with the benefit of the disclosure order, or if alternative information relevant to the efficacy of the freezing order is in the possession of the party with the benefit of the disclosure order, the interests of justice may not require the information to be disclosed because the relative importance of the information over

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60 cf *R v Simmons* [No 6] (2015) 250 A Crim R 65 at 70 [18], 74 [40].

61 *Australian Workers' Union v Registered Organisations Commissioner* [No 7] [2019] FCA 195 at [26]-[28]. See also, eg, *Lunt v Victoria International Container Terminal Ltd* [No 1] [2019] FCA 467 at [13]-[14].

which privilege is claimed is diminished. Similarly, if the information is not particularly important to the efficacy of the freezing order, the interests of justice are not advanced by compelling the person claiming the privilege to disclose the information.

44 Section 128A(7) and (8) recognise that there may be resulting unfairness to a party by a court making an order requiring that the whole or any part of the privilege affidavit be filed and served on the parties. As has been explained, where, despite a claim of privilege against self-incrimination having been made and the court being satisfied there are reasonable grounds for the objection, the court requires the whole or any part of the privilege affidavit to be disclosed, then s 128A(7) provides that the court must cause the relevant person to be given a certificate in respect of *the information* referred to in s 128A(6)(a). The operation of s 128A in this way provides "a procedure by which the evidence [sought by a disclosure order] may be secured without compromising the ability of the deponent to claim the privilege" and to "limit the court's ability to require disclosure to instances where the certificate procedure is able to provide either an absolute or a reasonable degree of protection"<sup>62</sup>. The effect of the certificate is addressed in s 128A(8), which provides that in any proceeding in an Australian court evidence of information disclosed by a relevant person in respect of which a certificate has been given, and evidence of any information, document or thing obtained as a direct result or indirect consequence of the relevant person having disclosed that information, cannot be used against the person<sup>63</sup>.

45 The resulting unfairness is also addressed, or at least potentially addressed, by two further matters. First, there is what is commonly described as the "*Harman* undertaking"<sup>64</sup>, which is *consistent* with the statutory protection against derivative use afforded by s 128A(8)<sup>65</sup>. Contrary to the submissions of Mr Shi, where a person is compelled to disclose information by court order, the party

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62 Victorian Law Reform Commission, *Implementing the Uniform Evidence Act: Report* (2006) at 35 [2.66].

63 This immunity does not apply to a criminal proceeding in respect of the falsity of the evidence concerned: *Evidence Act*, s 128A(8). Section 128A(8) 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: *Evidence Act*, s 128A(10).

64 Named after the case in which the principle was first described: *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.

65 cf *Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (In liq)* (2018) 260 FCR 272.

obtaining disclosure "cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence"<sup>66</sup>. The underlying principle is that a party who obtains the disclosure of information for a particular purpose cannot use the information for a "purpose different from that which was the only reason why, under a procedure designed to achieve justice in civil actions, [the solicitor or party] was accorded the advantage, which [they] would not otherwise have had, of having in [their] possession [that information]"<sup>67</sup>.

46 The principle extends to information compelled to be disclosed by a disclosure order and any order made under s 128A(6)<sup>68</sup>. Unless the privilege affidavit is "read or referred to in open court in a way that discloses its contents"<sup>69</sup> the *Harman* undertaking applies to it and the information contained in it, insofar as the information is sought to be used other than for the freezing orders. The purpose of the disclosure is to identify assets that are subject to or caught by the freezing orders and to permit the party with the benefit of the freezing orders to take steps, if necessary, to attach the freezing orders to the assets which are disclosed in the information and notify any affected third parties<sup>70</sup>.

47 Counsel for Mr Shi submitted in oral argument that, although a release from the *Harman* undertaking would be required before the information contained in the Privilege Affidavit could be used in other proceedings, the undertaking would not affect the use of that information as an investigative tool by the Commissioner or the Australian Federal Police ("the AFP") in relation to parallel or related criminal investigations. It was further submitted in oral argument that this was a case where the information contained in the Privilege Affidavit was to be disclosed to the same agency responsible for investigating allegations of criminality. These submissions were made in support of Mr Shi's contention that there is a risk of derivative use of the information and that this is a relevant factor weighing

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66 *Hearne v Street* (2008) 235 CLR 125 at 154-155 [96].

67 *Harman* [1983] 1 AC 280 at 302. See also, eg, *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 36.

68 *Hearne* (2008) 235 CLR 125 at 154-155 [96].

69 *Federal Court Rules*, r 20.03(1).

70 *A v C* [1981] QB 956 at 959-960; *Bax Global* (1999) 47 NSWLR 538 at 544-545 [23]; *Universal Music Australia* (2005) 228 ALR 174 at 181 [20]; cf *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155 at 164; *Jackson* (1987) 162 CLR 612 at 622-623.

against requiring disclosure. Those submissions should not be accepted. They are contrary to authority.

48 Giving information obtained in a proceeding to a third party, including journalists<sup>71</sup> or government officials<sup>72</sup>, contravenes the undertaking. Disclosing information to the press, even for the purpose of exposing an alleged wrongdoing, contravenes the undertaking, notwithstanding that there may be a strong public interest in disclosure of the information<sup>73</sup>. Use of information to further a criminal investigation against the party that provided the information contravenes the undertaking<sup>74</sup>. The information in this case was given for a particular purpose – in answer to a disclosure order as ancillary relief for a freezing order – and for no other purpose.

49 The *Harman* undertaking, however, is not unqualified. The undertaking does not apply to a document that has been "read or referred to *in open court in a way that discloses its contents*"<sup>75</sup> (emphasis added). The mere filing of an affidavit in the course of a proceeding does not mean that its contents have entered the public domain so as to no longer attract the protection of the *Harman* undertaking. At a minimum, it is necessary for the affidavit "to have been deployed in open court"<sup>76</sup>. Often, as in this case, counsel for the relevant person takes specific steps to ensure that an affidavit is not read or referred to in open court in a way that discloses its contents.

50 The undertaking also may be dispensed with or modified by the court in appropriate circumstances, although that dispensing power is "not freely

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71 See, eg, *Harman* [1983] 1 AC 280.

72 See, eg, *Hearne* (2008) 235 CLR 125.

73 See, eg, *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613.

74 See, eg, *Bailey v Australian Broadcasting Corporation* [1995] 1 Qd R 476; *Websyte Corporation Pty Ltd v Alexander* (2012) 95 IPR 344; cf *Rank Film Distributors* [1982] AC 380 at 447.

75 See, eg, *Federal Court Rules*, r 20.03(1). See also *Hearne* (2008) 235 CLR 125 at 155-156 [98].

76 *Deputy Commissioner of Taxation v Karas* [2012] VSC 143 at [50]. See also *Macquarie Radio Network Pty Ltd v Australian Broadcasting Authority* [2002] FCA 1408 at [21]; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd; Ex parte Merlin BV* (2008) 222 FCR 580 at 587 [43]-[44].

exercised"<sup>77</sup>. A party may be released from the undertaking with leave of the court provided the party shows "special circumstances"<sup>78</sup>. Contrary to the submissions made by counsel for Mr Shi, leave of the court is required before a party will be permitted to use material obtained in a civil proceeding in furtherance of a criminal investigation or to provide such material to an investigative agency<sup>79</sup>. Taking such steps without having sought and obtained leave of the court contravenes the *Harman* undertaking.

51 In making orders requiring disclosure under s 128A(6), the court also may consider making other orders of the kind made in dealing with confidential information, including by limiting disclosure of that information to identified persons for identified purposes<sup>80</sup>.

### **Factual background**

52 The Disclosure Order in issue in this appeal was ancillary to the Freezing Orders, which were obtained ex parte by the Commissioner in proceedings the Commissioner filed in the Federal Court against Mr Shi, his wife and his son seeking judgment to recover unpaid taxation liabilities, interest and penalties under the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth) and the *Taxation Administration Act 1953* (Cth). The Federal Court was satisfied on the evidence that there was a real danger that a judgment or prospective judgment obtained against Mr Shi might remain wholly or partly unsatisfied because assets might be removed from Australia or otherwise disposed of to the disadvantage or detriment of the Commonwealth. It is significant that at no time has Mr Shi applied for a discharge of the Freezing Orders or, alternatively, offered unencumbered assets as security for the judgment debt. And at no time has Mr Shi challenged the stated purpose of the Federal Court for making the Freezing Orders or sought to vary any aspect of the orders.

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77 *Esso Australia Resources* (1995) 183 CLR 10 at 37.

78 *Esso Australia Resources* (1995) 183 CLR 10 at 37; *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283 at 289-290 [31].

79 *Bailey* [1995] 1 Qd R 476 at 487; *Australian Trade Commission v McMahon* (1997) 73 FCR 211 at 217; *Websyte Corporation* (2012) 95 IPR 344 at 350-351 [17]-[18]; *Ashby v Slipper [No 2]* (2016) 343 ALR 351 at 355-356 [12]-[13]; *Sinnott v Chief of Defence Force* [2020] FCA 643 at [23]-[24].

80 *Federal Court of Australia Act 1976* (Cth), s 37AF. See also *HT v The Queen* (2019) 93 ALJR 1307 at 1323-1324 [76]-[77]; 374 ALR 216 at 236-237.

53 The Disclosure Order relevantly provided that Mr Shi was required:

- "(a) at or before the further hearing on the Return Date (or within such further time as the Court may allow) to the best of your ability inform the [Commissioner] in writing of all your assets world wide, giving their value, location and details (including any mortgages, charges or other encumbrances to which they are subject) and the extent of your interest in the assets;
- (b) within 14 working days after being served with this order, swear and serve on the [Commissioner] an affidavit setting out the above information."

54 That was subject to a further order which relevantly stated that if Mr Shi wished "*to object to complying ... on the grounds that some or all of the information required to be disclosed may tend to prove*" that he had "committed an offence against or arising under an Australian law or a law of a foreign country", then Mr Shi had to:

- "(i) disclose so much of the information required to be disclosed to which no objection is taken; and
- (ii) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken, and deliver it to the Court in a sealed envelope; and
- (iii) file and serve on each other party a separate affidavit setting out the basis of the objection."

As is self-evident, the form and content of that order reflected s 128A(2).

55 Mr Shi prepared two affidavits. His first affidavit, in answer to sub-para (i), disclosed assets with an estimated aggregated value of \$360,000.00. His second affidavit, in answer to sub-para (ii) – the Privilege Affidavit – set out various other assets not disclosed in the first affidavit. The Privilege Affidavit was delivered to the Court in a sealed envelope; it was not filed or served on the Commissioner.

56 A third affidavit, filed and affirmed by Mr Shi's solicitor in answer to sub-para (iii), relevantly stated Mr Shi objected to disclosure of the Privilege Affidavit "on the ground that it may include material relevant to whether [Mr Shi] has committed an offence under an Australian law or a law of a foreign company [sic], or is liable to a civil penalty". Mr Shi's solicitor's sworn evidence was that, having regard to the Commissioner's evidence in support of his application for the Freezing Orders and the Disclosure Order, a search warrant relating to premises associated with Mr Shi, and the Privilege Affidavit, she believed that the content of the Privilege Affidavit concerned the same subject matter as the search warrant and the Commissioner's evidence. Seven subject matters were then listed including

identified investigations relating to Mr Shi, his wife and his son by the AFP, and allegations of asset stripping, phoenix activity and systematic non-payment of taxation liabilities as well as fraud and evasion.

57 On 24 April 2019, judgment, by consent, was entered for the Commissioner against Mr Shi for \$42,297,437.65. That judgment debt has not been paid.

58 Before judgment was entered, Mr Shi filed an interlocutory application in the Federal Court seeking one of two orders: that the Privilege Affidavit be returned to him or his legal representative under s 128A(5) of the *Evidence Act*; alternatively, in the event that the Court made an order under s 128A(6) of the *Evidence Act* that Mr Shi file and serve the whole or part of the Privilege Affidavit upon the parties, Mr Shi be given a certificate of the kind described in s 128A(7) in respect of the information referred to in s 128A(6)(a).

59 Prior to the hearing of his application under s 128A, Mr Shi filed and served on the Commissioner a document headed "Open Annotation to Privileged Affidavit of [Mr Shi]" which was referred to in, and formed part of, Mr Shi's written submissions before the primary judge<sup>81</sup>. Under the heading "Introduction to grounds of objection", the document included statements that:

- "1. Mr Shi is suspected of having committed and conspired to commit tax fraud and related offences in respect of companies within the Shi Group of companies and in respect of his personal tax affairs during the period between 1 January 2010 and the present.
2. The unpaid primary tax liabilities of the Shi Group of companies exceed \$121 million.
3. Mr Shi is also suspected of having conspired to commit an offence contrary to sections 11.5(1) and 400.3(1) of the *Criminal Code* (Cth) which relates to dealing in proceeds of crime, 'by agreeing to use companies and other entities to receive, conceal and dispose of funds that were derived from the taxation fraud offences suspected [in the warrant]'.  
...
6. ... [T]he Commissioner asserts certain companies are, in effect, instruments of largescale tax fraud and evasion. Under these

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81 A confidential version of the document was also filed but was not served on the Commissioner.

circumstances information would tend to incriminate Mr Shi in the offence of dealing in proceeds of crime contrary to s 400.3(1). ...

7. In addition to the above, the *information in the Privileged Affidavit* may tend to prove that Mr Shi:
  - a. Conspired to dishonestly cause a loss to the Commonwealth contrary to s 135.4(3) of the *Criminal Code*;
  - b. Conspired to enter arrangements contrary to s 11.5(1) of the *Criminal Code* and s 5(1) of the *Crimes (Taxation Offences) Act 1980*;
  - c. Dishonestly obtained a financial advantage from the Commonwealth contrary to s 134.2 of the *Criminal Code*;
  - d. Conspired to deal in proceeds of crime contrary to s 11.5(1) and s 400.3(1) of the *Criminal Code*; and
  - e. Conspired to cause another to become a party to 2 or more non-reportable transactions contrary to s 11.5(1) of [the] *Criminal Code* and s 142(1) of the *Anti-Money Laundering Counter-Terrorism Financing Act 2006*." (footnotes omitted; emphasis added)

The balance of the document summarised aspects of the Privilege Affidavit. By way of example, it described several paragraphs of the Privilege Affidavit as "Mr Shi depos[ing] to circumstances surrounding certain payments which may tend to support an inference that he is the controller of [certain] entities". There was no reference to, or particularisation of, any offence against a law of a foreign country.

60 At the hearing of Mr Shi's interlocutory application under s 128A, the primary judge was satisfied that the Privilege Affidavit (which his Honour had read) disclosed reasonable grounds for the making of the claims against self-incrimination, and, further, that the information disclosed in the Privilege Affidavit may tend to prove that Mr Shi committed an offence against or arising under Australian law for the purposes of s 128A(6)(a) and that the information did *not* tend to prove that Mr Shi had committed an offence in China for the purposes of s 128A(6)(b).

61 The remaining question for the primary judge was whether, pursuant to s 128A(6)(c) of the *Evidence Act*, it was in the interests of justice that the Privilege Affidavit be disclosed to the Commissioner. The primary judge held that, subject to one matter, the interests of justice favoured disclosure. The primary judge considered that there was a public interest in ensuring that taxpayers pay the correct amount of tax based upon all relevant facts. But his Honour considered

that, when having regard to the interests of justice, he was also entitled to have regard to the consequences of the issue of a s 128A(7) certificate. The difficulty identified by his Honour was that he considered that the "consequence of disclosure with the issue of a certificate would be that much of the information contained in the [Privilege Affidavit] would not be able to be used against Mr Shi in any Australian Court" under s 128A(8), including "evidence of any information, document or thing obtained as a 'direct result or indirect consequence' of the disclosure". The concern of the primary judge was the consequences in any future criminal proceedings as well as any future tax appeal pursued by Mr Shi under Pt IVC of the *Taxation Administration Act*. The primary judge considered that it was open to the Commissioner to exercise the powers under s 353-10 of Sch 1 to the *Taxation Administration Act* to obtain the same information without the ability of Mr Shi to refuse production on the grounds of self-incrimination<sup>82</sup>. The primary judge ordered that the copy of the Privilege Affidavit be returned to Mr Shi.

62 By leave to appeal to the Full Court of the Federal Court, the Commissioner challenged the primary judge's consideration of the Commissioner's information gathering powers under s 353-10 of Sch 1 to the *Taxation Administration Act*. A majority of the Full Court (Lee and Stewart JJ, Davies J dissenting) dismissed the Commissioner's appeal. The majority considered that the Commissioner bore the onus of establishing all matters within s 128A(6). In relation to s 128A(6)(c), all judges of the Full Court accepted that the primary judge was wrong to take into account the Commissioner's compulsory examination powers under s 353-10 of Sch 1 to the *Taxation Administration Act*. However, the majority upheld a ground of a notice of contention filed by Mr Shi that the interests of justice did *not* require disclosure of the Privilege Affidavit to the Commissioner because, as this was a case in which judgment had already been entered for the Commissioner, disclosure of the Privilege Affidavit was solely for the purpose of assisting methods of execution; and if that was so, then it was relevant to consider whether there were other available ways that execution could be assisted, including the Commissioner's ability to examine Mr Shi as a judgment debtor under s 108 of the *Civil Procedure Act 2005* (NSW). In addition, Lee J considered that the derivative use immunity in s 128A(8) was very difficult to enforce and a certificate issued under s 128A(7) was not a complete answer to that difficulty.

### Appeal grounds

63 The Commissioner's grounds of appeal in this Court were directed at the third limb of s 128A(6) (para (c)), namely, whether "the interests of justice require[d] the information to be disclosed" and, in particular, whether the majority in the Full Court erred in considering s 108 of the *Civil Procedure Act* and the risk of derivative use in that context.

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82 See *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564.

64 By a notice of contention, Mr Shi submitted that the majority in the Full Court, having found for the purposes of s 128A of the *Evidence Act* that the onus was on the Commissioner (the party seeking disclosure) to satisfy the Court of the matters in s 128A(6), should have found that it was not open for the primary judge to have been satisfied of the negative proposition in s 128A(6)(b) – that the information in the Privilege Affidavit did not tend to prove that Mr Shi has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country.

65 Applying the provisions of s 128A to Mr Shi sequentially, for the purposes of s 128A(2), Mr Shi, as a "relevant person", did object to complying with the Disclosure Order on the grounds that all of the information in the Privilege Affidavit may tend to prove that he has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law, but did *not* object on the grounds that all or some of the information in the Privilege Affidavit may tend to prove that he has committed an offence against or arising under, or is liable to a civil penalty under, a foreign law. As the primary judge explained:

"Other than noting that [Mr Shi, his wife and his son] are Chinese nationals with 'strong ties to China' who had bank accounts in China, no material was specifically identified as tending to show the commission of a Chinese criminal offence. No Chinese criminal offences were ever identified. It was not contended that there were current criminal investigations in China. Mr Shi was not under arrest or facing criminal proceedings in China. ...

The information in the [Privilege Affidavit] concerned matters which had taken place in Australia which tended to incriminate Mr Shi. There was nothing to indicate that those Australian matters could give rise to any offence in China."

At best, Mr Shi's solicitor made a bare general assertion that disclosure of the information may tend to prove the commission of an offence against a law of a foreign country. That was the position also adopted by counsel for Mr Shi in this Court. Upon the proper construction of s 128A(2), that is not sufficient. Mr Shi's notice of contention must be dismissed.

66 Next, for the purposes of s 128A(4), there was no challenge to the finding of the primary judge (whether on appeal to the Full Court or in this Court) that there were reasonable grounds for Mr Shi's objection that disclosure of the Privilege Affidavit may tend to prove that he has committed an offence against or arising under an Australian law. It followed that, but for s 128A(6), the Court must not require the information in the Privilege Affidavit to be disclosed and must return the Privilege Affidavit to Mr Shi.

67 Here, where there is an unchallenged finding that the information in the Privilege Affidavit *may* tend to prove that Mr Shi has committed an offence against

or arising under an Australian law and Mr Shi has not objected on the grounds that that information may tend to prove that he has committed an offence against a law of a foreign country, the question for the Court under s 128A(6) is whether it is satisfied that the interests of justice require that the Privilege Affidavit be disclosed. A failure to object on the grounds of foreign law means that the question raised by s 128A(6)(b) does not arise.

68 The primary judge was of the "clear view" that, but for one consideration, the interests of justice favoured disclosure of the Privilege Affidavit. The one consideration identified was the availability of alternative mechanisms for gathering the information disclosed in the Privilege Affidavit, so as to avoid the "consequence of disclosure with the issue of a certificate", which his Honour observed would be that much of the information contained in the Privilege Affidavit would not be able to be used against Mr Shi in an Australian court. For the reasons stated earlier, that consideration – as well as the other alternative forms of information gathering identified by the majority in the Full Court – may be put to one side. They were not relevant.

69 The Commissioner's other appeal ground concerned the reliance by Lee J in the Full Court on the risk of derivative use of the information in the Privilege Affidavit. The risk of derivative use identified by Lee J was contrary to the proper construction of s 128A. The resulting unfairness to a relevant person of an order by a court under s 128A(6), including the risk of derivative use, is addressed by a number of measures in the court's determination of whether the interests of justice require the information to be disclosed: the certificate procedure in s 128A(7); the non-derivative use prescribed in s 128A(8); the *Harman* undertaking; and the ability of the court to craft the form of the orders made under s 128A(6) including, but not limited to, requiring only the part of the privilege affidavit containing information of the kind referred to in s 128A(6)(a) to be filed and served on the parties, as well as other orders limiting disclosure. In the present case, further orders under s 37AF of the *Federal Court of Australia Act 1976* (Cth) may be appropriate requiring that the Privilege Affidavit not be provided or disclosed to any person except the solicitors and counsel engaged by the Commissioner for the purpose of the conduct of the underlying tax debt proceedings and named officers of the Commissioner with responsibility for executing and implementing the Freezing Orders to enforce the judgment debt. The officers, of course, would need to be identified. In the circumstances, the order requiring that the Privilege Affidavit be served on the Commissioner should be stayed pending the Federal Court hearing and determining whether suppression or non-publication orders should be made in relation to the Privilege Affidavit under s 37AF of the *Federal Court of Australia Act*.

70 Finally, the premise for Mr Shi's notice of contention – that the majority in the Full Court was correct to find that the onus was on the party seeking disclosure to satisfy the court of the matters in s 128A(6)(a) and (b) – is contrary to the proper construction of s 128A. It is for the party making the claim for self-incrimination

privilege to make the claim and set out the basis for the objection and, as has been observed, s 128A(6)(a) and (b) do not impose a standard or burden on the party claiming privilege against self-incrimination additional to or higher than that imposed by s 128A(2) and (4).

### Conclusion and orders

71 In the present case, Mr Shi did not submit that if the appeal was allowed, the matter should be remitted to the court below to be reconsidered. The appeal should be allowed with costs. The orders made by the Full Court of the Federal Court should be set aside and, in their place, there should be the following orders:

- a. the appeal be allowed;
- b. order 2 of the orders made by the Federal Court of Australia on 24 July 2019 be set aside;
- c. subject to orders (d) and (e) below, the privilege affidavit delivered by Mr Shi pursuant to s 128A(2) of the *Evidence Act 1995* (Cth) ("the Privilege Affidavit") be filed and served on the Deputy Commissioner of Taxation;
- d. order (c) be stayed pending the hearing and determination by a single judge of the Federal Court of Australia, pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth), whether suppression or non-publication orders should be made in relation to the Privilege Affidavit;
- e. there be a hearing before a single judge of the Federal Court of Australia on a date to be fixed in respect of whether suppression or non-publication orders should be made in relation to the Privilege Affidavit pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth);
- f. the Court grant a certificate pursuant to s 128A(7) of the *Evidence Act 1995* (Cth) in respect of the Privilege Affidavit; and
- g. Mr Shi pay the Deputy Commissioner of Taxation's costs of the appeal.

EDELMAN J.

**The extent of the onus to establish a privilege against self-incrimination**

72 Suppose a person, who is a witness in civil or criminal proceedings<sup>83</sup> or to whom a disclosure order is directed<sup>84</sup>, objects to giving particular evidence or to complying with the disclosure order on the grounds that the evidence or information may tend to prove that the person has committed an offence under a foreign law. If the person can establish that they have reasonable grounds for that objection then, under ss 128(3) and 128A(5) of the *Evidence Act 1995* (Cth), the person has a prima facie privilege against self-incrimination. The onus of proof upon the person to establish the "reasonable grounds for the objection" is a very slight onus assessed at a high level of generality. Once it is established, the prima facie position is that the court "is not to require the witness to give the evidence" and "must not require the information contained in the privilege affidavit to be disclosed"<sup>85</sup>. This is a statutory instantiation of the fundamental and deeply rooted common law privilege against self-incrimination.

73 The issue raised by Mr Shi's notice of contention, which is anterior to the other issues on this appeal, concerns the statutory exceptions in ss 128(4) and 128A(6) to the privilege against self-incrimination. In particular, the issue is whether ss 128(4)(a) and 128A(6)(b), which express stricter requirements than are required for the prima facie privilege in ss 128(3) and 128A(5), have imposed additional burdens upon a person claiming privilege.

74 The centuries-old common law test is reflected in ss 128(3) and 128A(5) of the *Evidence Act*, which require a person claiming privilege to establish that (i) reasonable *grounds* exist, for (ii) an *objection*, that (iii) evidence or disclosure *may* tend to prove that the person has committed an offence. A stricter test in ss 128(4)(a) and 128A(6)(b) asks whether the evidence or disclosure of the information relevantly "does not tend to prove" the commission of an offence. There is a distinction experienced by many unsuccessful litigants between, on the one hand, whether a person has reasonable grounds to make a claim and, on the other hand, whether their claim is ultimately accepted. Parliament cannot have intended to create a redundant exception, abolishing this distinction, when it omitted words like "reasonable grounds" or "objection" or "may tend" from ss 128(4)(a) and 128A(6)(b). But it is not merely the established meaning of the words of those paragraphs that requires a stricter test. The existence of a stricter

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83 *Evidence Act 1995* (Cth), s 128.

84 *Evidence Act*, s 128A.

85 *Evidence Act*, ss 128(3), 128A(5).

test in ss 128(4)(a) and 128A(6)(b) is reinforced by the context, policy, and history of those paragraphs.

75 The issue arises on this appeal in the context of Mr Shi's objection to disclosing information on the basis of an asserted privilege, which included asserting reasonable grounds upon which it was said that the information may tend to prove a foreign law offence. At every stage of this litigation, including in this Court, it has been accepted by the parties that Mr Shi had raised such an objection based upon a foreign law offence. No submission was ever made, nor any question ever asked by any judge at any stage of this litigation, to suggest that his affidavit material had not sufficiently raised such an objection. Nor was any submission ever made, nor any question ever asked, to suggest that Mr Shi might have made a choice not to include in his filed material, or not to attempt to spell out in open court, the reasonable grounds for his objection that disclosure may tend to prove that he had committed a foreign offence. Indeed, even on the incomplete record in this Court there was considerable material from which such reasonable grounds were established, particularly in Mr Shi's confidential privilege affidavit. It has long been the case that a person claiming privilege against self-incrimination is not required to spell out to the court the precise nature of the offence that the person might have committed and all the facts upon which that offence depends. To so require could substantially undermine the privilege. Hence, in relation to the privilege to decline to answer a question, a "great latitude" was allowed to a witness "in judging for himself of the effect of any particular question"<sup>86</sup>.

76 The central dispute between the parties in this Court concerning the onus of proof in relation to s 128A(6)(b) only arose, and only could have arisen, against an assumption that an objection had been sufficiently taken by Mr Shi in relation to foreign law. If it had been submitted that such objection had not been properly taken by Mr Shi because some defect in the open affidavits he filed meant that he did not make it sufficiently clear that his objection related to foreign law or because the material in relation to foreign law had not been spelled out in sufficient detail (although presumably not to require Mr Shi to incriminate himself by chapter and verse) then the Deputy Commissioner of Taxation ("the Deputy Commissioner") could have objected on that basis and it would have been a simple matter for Mr Shi to file further affidavit evidence providing any necessary further information.

77 Mr Shi's submission on his notice of contention in this Court, consistently with his submission in the courts below, was that he had a prima facie entitlement to the privilege based upon his objection. He asserted two grounds for the privilege: the information tended to prove that he had committed both an Australian offence and a foreign offence. On Mr Shi's submission, s 128A(6)(b)

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86 *R v Boyes* (1861) 1 B & S 311 at 330 [121 ER 730 at 738].

placed the onus upon the Deputy Commissioner to negate his prima facie entitlement to the privilege and the Deputy Commissioner did not do so.

78 Mr Shi's submission should be accepted. Even without the benefit of all the material before the primary judge, the open material that Mr Shi filed, which was disclosed to the Deputy Commissioner, shows that his objection concerning foreign law was based on reasonable grounds; the material undisclosed to the Deputy Commissioner confirms that. Mr Shi satisfied the slight onus that he bore to establish reasonable grounds for his objection that the information may tend to prove a foreign offence. He was prima facie entitled to the privilege.

79 It will often be a difficult task for an opponent, without access to the relevant evidence or information, to negate the prima facie privilege by showing that the information does not tend to prove the commission of an offence. However, Parliament partly ameliorated that difficulty by s 128A(2)(e), which requires the person claiming the privilege to file and serve on the other party an affidavit setting out the basis of the objection. And other provisions of the *Evidence Act* simplify the process of proof of the facts of foreign law in some respects<sup>87</sup>. In any event, Mr Shi's privilege could not be negated by mere silence on the part of the Deputy Commissioner. The appeal should be dismissed.

### ***Evidence Act, s 128***

80 Although this appeal concerns s 128A, it is necessary to begin with the manner of operation of s 128. Section 128A was modelled upon s 128, replicating it in large part and extending its operation from evidence of a witness to disclosure of information.

#### *The first stage: Statutory additions to the privilege against self-incrimination*

81 Section 128 of the *Evidence Act* was introduced to ensure that relevant evidence could be led without stultifying a witness's basic privilege against self-incrimination. In the report which led to the enactment of the *Evidence Act*, the Australian Law Reform Commission observed that a provision concerning the privilege against self-incrimination could strike the appropriate balance between the rights of the individual and those of the State by a procedure whereby a witness could be encouraged to testify but the State would be prevented from using the evidence against that witness in later proceedings<sup>88</sup>.

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87 See *Evidence Act*, ss 174, 175.

88 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985) at 487 [860].

82 Sections 128(1), 128(2), and 128(3) followed this approach. They reiterated the core of the long-standing privilege against self-incrimination in two respects. First, subject to s 128(4), the court cannot require a witness to give evidence if the witness objects to giving particular evidence on reasonable grounds that the evidence may tend to prove that the witness either (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. Secondly, the court must inform the witness that, unless required to do so by s 128(4), the witness is not required to give the privileged evidence, but that if they do choose to give the evidence then the court will give the witness a certificate which has the effect that, in any proceeding in an Australian court, it is not permissible to use either the evidence which is the subject of the certificate, or evidence of any information, document, or thing obtained as a direct or indirect consequence of the evidence, against that person. Various statutory exceptions can be put to one side<sup>89</sup>.

83 In replicating the long-established position in relation to the privilege against self-incrimination, s 128(2) did not alter the extent of the onus at common law. The requirement that the grounds for objection be "reasonable" is concerned only with the grounds for the objection made by the party claiming the privilege, not with any ultimate conclusion. In *R v Bikic*<sup>90</sup>, Giles JA observed that this onus of proof at common law, and contained in s 128(2), does not require a party asserting the privilege to establish the conclusion that the evidence may tend to prove that the witness has committed an offence. It suffices that there are reasonable grounds for an objection that this may be so. This slight onus, contained in s 128(2), replicated the approach taken by the common law. As mentioned above, at common law, a "great latitude" was allowed to a witness "in judging for himself of the effect of any particular question"<sup>91</sup>. Hence, reasonable *grounds* were usually established unless "the Judge is perfectly certain that the witness is trifling with the authority of the Court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the privilege"<sup>92</sup>.

84 The slight nature of the onus was reinforced at common law and in s 128(2), read with s 128(1), by the doubly tentative language of "*may tend to prove*". This expression was adopted against a long history at common law. A "cloud of authorities" established that the test was satisfied by "*a single remote link* in the

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89 See *Evidence Act*, s 128(7), s 128(10), and s 128(11).

90 [2001] NSWCCA 537 at [13]-[15].

91 *R v Boyes* (1861) 1 B & S 311 at 330 [121 ER 730 at 738].

92 *Adams v Lloyd* (1858) 3 H & N 351 at 362 [157 ER 506 at 510].

chain of testimony, which *may* implicate [the witness] in a crime or misdemeanor"<sup>93</sup>, a link which Wigmore described as a "clue fact"<sup>94</sup>.

*The second stage: A radical addition*

85 A radical change to the operation of the common law privilege as reflected in s 128 of the *Evidence Act* is contained in s 128(4). Section 128(4) applies if, and only if, under s 128(2) the witness is entitled to the privilege against self-incrimination on the basis that the court is satisfied of the reasonable grounds for the objection. Section 128(4), which was amended for clarity in 2008<sup>95</sup>, now provides:

"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."

86 If the requirements of s 128(4) are met then the court can require the witness to give evidence, stripping the witness of the long-established, fundamental common law privilege, albeit providing the witness with a certificate under s 128(3). Importantly, the condition in s 128(2) for the privilege to be established is different from the condition in s 128(4) for the privilege to be abrogated. The former is concerned with reasonable *grounds* for an *objection* that the evidence *may* tend to prove that the witness has committed an offence against, or is liable to a civil penalty under, a law of a foreign country. In broad terms, the latter is concerned with negating those reasonable grounds by showing that the evidence does not actually tend to prove (not merely that it *may* tend to prove) that the witness has committed an offence, or is exposed to a penalty, under foreign law.

87 There is a basic difference between (i) a criterion that requires "reasonable grounds" for an "objection" that "may" achieve a result and (ii) a criterion that

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93 Taylor, *A Treatise on the Law of Evidence, as Administered in England and Ireland; with Illustrations from the American and other Foreign Laws* (1887), vol 2 at 1244 §1454 (emphasis in original).

94 Wigmore, *Evidence in Trials at Common Law*, McNaughton rev (1961), vol 8 at 369-378 §2260.

95 See *Evidence Amendment Act 2008* (Cth), Sch 1, item 63.

concerns the result itself. The difference is not drafting jargon to be disregarded as inconvenient surplusage. The choice of words in ss 128 and 128A reflects a very long-established, and fundamental, distinction in law between (i) having reasonable grounds to expect, or reasonable prospects of, a successful claim and (ii) having a successful claim. In *Degiorgio v Dunn [No 2]*<sup>96</sup>, Barrett J said that the expression "'without reasonable prospects of success' ... equates its meaning with 'so lacking in merit or substance as to be not fairly arguable'. The concept is one that falls appreciably short of 'likely to succeed'." The expression "reasonable grounds" for an objection in s 128(2) also reflects this entrenched understanding of the approach to privilege at common law where "reasonable ground[s] to apprehend danger to the witness from his being compelled to answer"<sup>97</sup> would be established if there was a degree of risk which "cannot be dismissed as tenuous or illusory or so improbable as to be virtually without substance"<sup>98</sup> or which could not be dismissed as having "reference to some extraordinary and barely possible contingency, so improbable that no reasonable [person] would suffer it to influence [their] conduct"<sup>99</sup>.

88 Parliament cannot be treated as having been ignorant of these basic distinctions when it chose to express the qualification upon the established, and now only prima facie, basis for privilege in terms that require the court's satisfaction that "the evidence *does not tend to prove*". To reiterate: reasonable grounds for an objection on the basis of that tendency is a very different thing from the tendency actually existing.

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96 (2005) 62 NSWLR 284 at 293 [28]. See also *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300 at 329-331 [131]-[132]; *Fowler v Toro Constructions Pty Ltd* [2008] NSWCA 178; *Keddie v Stacks/Goudkamp Pty Ltd* (2012) 293 ALR 764 at 775 [58]; *Newell*; *Muriniti v De Costi* (2018) 97 NSWLR 398 at 413 [57]-[58].

97 *R v Boyes* (1861) 1 B & S 311 at 330 [121 ER 730 at 738]. See also *Ex parte Reynolds*; *In re Reynolds* (1882) 20 Ch D 294; *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395 at 403-404; *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547 at 581, 612, 627, 647; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 289; *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459 at 474 [53].

98 *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547 at 581.

99 *R v Boyes* (1861) 1 B & S 311 at 330 [121 ER 730 at 738].

*The extent of the onus under s 128(4)*

89 There are some aspects of s 128(4) in which questions of onus do not arise. One circumstance where there is no role for any onus is in decisions concerning s 128(4)(b): "the interests of justice". In those circumstances, the issue will only be one of evaluation of the existing evidence and circumstances<sup>100</sup>. Another circumstance where there is no role for any onus is where the party claiming the privilege has not shown any reasonable grounds for an objection concerning foreign law, and only has reasonable grounds for an objection concerning Australian law. In those circumstances, a court will invariably be satisfied of the conclusion that the evidence does not tend to prove the commission of a foreign offence for the purposes of s 128(4)(a) and no issue of onus will arise.

90 By contrast, if a court has concluded under s 128(2) that the party claiming the privilege has established reasonable grounds for the objection concerning foreign law then the question is which party bears the onus of satisfying the court as to the matters in s 128(4)(a). There is an onus of persuasion, or "risk of nonpersuasion"<sup>101</sup>, concerning s 128(4)(a). That onus is a "very different thing[]"<sup>102</sup> from an onus to produce evidence. Nevertheless, the onus to produce evidence will commonly, at least initially, follow the onus of persuasion with the extent of that onus to produce evidence usually depending upon the power of the party to do so<sup>103</sup>.

91 If the onus of persuasion were upon the witness who had established an entitlement to a privilege under s 128(2) then s 128(4)(a) would operate, in effect, to require the witness to satisfy an additional hurdle before the privilege would arise. Hence, a witness who established reasonable grounds for an objection – that the evidence may tend to prove that the witness has committed an offence against

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100 Compare *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 437 [71], citing *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 727.

101 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1981), vol 9 at 283-287 §2485. See also James, "Burdens of Proof" (1961) 47 *Virginia Law Review* 51 at 51.

102 *Central Bridge Corporation v Butler* (1854) 2 Gray 130, cited in Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) at 355. See further Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) at 355-359; Malek (ed), *Phipson on Evidence*, 19th ed (2018) at 159 [6-02].

103 *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970]. See *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at 371-372; *G v H* (1994) 181 CLR 387 at 391-392; *Russo v Aiello* (2003) 215 CLR 643 at 647 [10]-[11].

a law of a foreign country – would be required also to satisfy the court that the evidence tended to prove that the witness has committed an offence arising under a law of a foreign country. In other words, the witness would be granted a prima facie privilege for no other reason than to require that witness to satisfy a further condition that would wholly subsume the test for the prima facie privilege. By contrast, if the onus is upon the person seeking to abrogate the prima facie privilege then s 128(4)(a) would operate to require that person to negate the reasonable grounds that have been established by satisfying the court that the evidence does not tend to prove that the witness has committed an offence arising under a law of a foreign country.

*The text of s 128(4) imposes any onus upon the party seeking to abrogate the privilege*

92 To the extent that an onus applies in s 128(4)<sup>104</sup>, the plain text of s 128(4)(a) imposes that onus upon the party seeking to abrogate the prima facie statutory privilege for two reasons. First, the provision is expressed in terms of negating the privilege: "the evidence does *not* tend to prove ...". Secondly, the provision only applies once the witness has established reasonable grounds for an objection claiming the privilege. That prima facie privilege is preserved, "[s]ubject to"<sup>105</sup> the discretion for the court to require the person to give the evidence if the court is "satisfied" of various matters<sup>106</sup>. The language of "satisfaction" in the *Evidence Act* is shorthand for "satisfied by the party so asserting". It is the language of onus, just as the expression "if the court finds" in s 128A(5) is well accepted to be the language of onus<sup>107</sup>. For instance, s 141 of the *Evidence Act* provides that in a criminal proceeding, the court is not to find the case of the prosecution proved "unless it is satisfied that it has been proved beyond reasonable doubt". The shorthand is for the court to be "satisfied by the argument and evidence led by the prosecution". The same is true of s 142, which provides that except as otherwise provided by the Act, a finding by the court that facts "have been proved" requires the court to be "satisfied that they have been proved on the balance of

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**104** See [89] above.

**105** *Evidence Act*, s 128(3).

**106** *Evidence Act*, s 128(4).

**107** See *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 at 422, 430.

probabilities". Again, "satisfied" is the language of the onus of proof<sup>108</sup>. It is shorthand for "satisfied by the party so asserting".

93 The operation of the onus in s 128(4)(a) requires the person seeking to negate the privilege to bear a persuasive onus to satisfy the court that, despite reasonable grounds for an objection that the evidence may tend to prove that the witness has committed a foreign offence, the evidence does not tend to prove this. Where the basis for the objection has been explained by affidavit to the other party, as was required and occurred in this case<sup>109</sup>, the person seeking to negate the privilege might lead evidence such as the "fact" of the relevant foreign law (it being well established that the state of foreign law is a fact to be proved<sup>110</sup>) or other relevant facts such as actual foreign immunity from a civil penalty, to show that despite reasonable grounds for the objection, the foreign law or the immunity of the witness does not tend to show the commission of a foreign offence.

*The policy of s 128(4) imposes any onus on the party seeking to abrogate the privilege*

94 Almost contemporaneously with the introduction of the *Evidence Act*, including s 128, four members of this Court had said of judicial attempts to ameliorate the privilege against self-incrimination that<sup>111</sup>:

"it is inimical to the administration of justice for a civil court to compel self-incriminatory disclosures, while fashioning orders to prevent the use of the information thus obtained in a court vested with criminal jurisdiction with respect to the matters disclosed. Nor is justice served by the ad hoc modification or abrogation of a right of general application, particularly not one as fundamental and as important as the privilege against self-incrimination."

95 The Australian Law Reform Commission proposal for the provision that became s 128 left to the party protected by the privilege the choice of whether to

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**108** *Gedeon v The Queen* (2013) 280 FLR 275 at 323 [285], citing Odgers, *Uniform Evidence Law*, 10th ed (2012) at [1.3.13060].

**109** Required in relation to s 128A by s 128A(2)(e) read with s 128A(2)(d).

**110** *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 370 [115]. See also 343 [15], 356 [60], 391 [185], 415 [261], 421 [283]; *Callwood v Callwood* [1960] AC 659 at 681.

**111** *Reid v Howard* (1995) 184 CLR 1 at 17.

abandon the privilege for the limited protection of a certificate<sup>112</sup>. In its response to the inclusion of a provision by which the court stripped the privilege<sup>113</sup>, the Commission observed that the "underlying policy of s 128 is that the privilege against self-incrimination should only be overridden when an immunity is available to the witness in relation to other proceedings"<sup>114</sup>.

96 It is well known that the protection afforded by a certificate granted under s 128(6) and (7) to the person whose privilege has been abrogated is less than absolute<sup>115</sup>. It would be naïve to assume that every recipient of the information will know of<sup>116</sup>, and will always strictly comply with, an obligation not to use the information for any collateral purpose, which includes an obligation not to reveal the information for use by any other person<sup>117</sup>. If the court requires the evidence to be given, the certificate is limited to any "proceeding in an Australian court". It does not apply to non-court tribunals. It does not apply to administrative enquiries. It does not apply to any foreign proceeding. Further, a Crown Prosecutor or counsel for a co-accused in a criminal proceeding might not always know if information in the brief had been obtained directly or indirectly from a disclosure that had been compelled by s 128(4). And, in a dispute about whether particular evidence had been obtained directly or indirectly as a consequence of the evidence required to be disclosed, it might be extremely difficult for the party objecting to prove that the evidence had been so obtained.

97 Since the protection is less than absolute, it is unsurprising that Parliament imposed conditions upon the discretionary power to abrogate the privilege in s 128(4), which include the court being satisfied of the conclusion that the evidence does not tend to prove the foreign offence. An interpretation of s 128(4)(a) that

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112 Australian Law Reform Commission, *Evidence*, Report No 38 (1987) at 33-34 [55], 241 [290]-[295]. See also Appendix A: Draft legislation, cl 110.

113 That provision being *Evidence Act*, s 128(4).

114 Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report (2005) at 529-530 [15.104]-[15.105].

115 *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436 at 450-451 [99]; *Pathways Employment Services Pty Ltd v West* (2004) 212 ALR 140 at 151 [33].

116 Compare, for instance, *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.

117 *Hearne v Street* (2008) 235 CLR 125 at 154-155 [96].

required the person claiming privilege to overcome a further hurdle would undermine this parliamentary compromise. By contrast, an interpretation that requires the party seeking disclosure to negate a prima facie privilege fits comfortably with the scheme of s 128(4), as it is a safety net before requiring disclosure with less than complete protection.

98 A further reason in support of an interpretation that treats s 128(4)(a) as a provision that must be negated by the party seeking disclosure is the principle of legality. The principle of legality is not a binary rule of interpretation. It is based upon basic and common expectations of justice that the more that an interpretation would result in impairment of rights or freedoms, and the more fundamental those rights or freedoms, the less likely it is that Parliament could have intended such a consequence<sup>118</sup>. It has been repeatedly acknowledged in this Court that the common law has long regarded as fundamental the privilege that a person has against self-incrimination<sup>119</sup>. The principle of legality thus provides strong support for an interpretation of s 128(4)(a) which gives the text its natural meaning and requires a person seeking to abrogate the statutory instantiation of this fundamental privilege – leaving the party entitled to the privilege with less than complete protection – to satisfy the court that 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. It might be difficult for the party seeking to abrogate the privilege to do so, especially armed only with information concerning the basis for the objection. But, the task is not impossible<sup>120</sup> and there are good and clear policy reasons for Parliament to have placed a significant obstacle to the abrogation of a fundamental privilege in relation to foreign law offences.

### ***Evidence Act, s 128A***

99 Prior to the introduction of s 128A, there was uncertainty about whether any procedures analogous to that in s 128 should apply in relation to orders for disclosure in connection with freezing orders or search orders in civil proceedings. A non-statutory procedure was fashioned in an attempt to strike a balance between

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**118** See *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 467-468 [101]-[102]; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 623 [159].

**119** *Sorby v The Commonwealth* (1983) 152 CLR 281 at 289, 309; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 340; *Reid v Howard* (1995) 184 CLR 1 at 11-12. See also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 527, 543.

**120** See [93] above.

the privilege against self-incrimination and the disclosure of information for the purpose of civil proceedings<sup>121</sup>. This entailed the court conducting a preliminary hearing following the swearing, but before the filing, of an asset disclosure affidavit. If an objection was taken at the preliminary hearing on the basis of privilege against self-incrimination, the parties and the Director of Public Prosecutions were heard on whether a s 128 certificate should be issued. Following disapproval of this procedure<sup>122</sup>, the Australian Law Reform Commission, the New South Wales Law Reform Commission, and the Victorian Law Reform Commission published a joint discussion paper<sup>123</sup> and then a joint report<sup>124</sup> proposing legislative reform by introduction of a new s 128A into the *Evidence Act*.

100 In a later report<sup>125</sup>, the Victorian Law Reform Commission drafted a refined form of s 128A. The report stated that the draft provision was designed in line with the operation of the privilege at trial under s 128, limiting the court's ability to require disclosure to instances where the certificate procedure is able to provide either an absolute or a reasonable degree of protection<sup>126</sup>. The Victorian Law Reform Commission noted that it was taking "an admittedly cautious approach to the abrogation of the privilege"<sup>127</sup>. This report, including the draft form of s 128A, was the basis for the *Evidence Amendment Act 2008* (Cth), which repealed s 128 in its previous form and introduced the clarified form of s 128 together with

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121 See *Bax Global (Australia) Pty Ltd v Evans* (1999) 47 NSWLR 538.

122 *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436. See also *Pathways Employment Services Pty Ltd v West* (2004) 212 ALR 140 at 148-154 [28]-[40].

123 Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC Discussion Paper No 69, NSWLRC Discussion Paper No 47, VLRC Discussion Paper (2005).

124 Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report (2005).

125 Victorian Law Reform Commission, *Implementing the Uniform Evidence Act*, Report (2006).

126 Victorian Law Reform Commission, *Implementing the Uniform Evidence Act*, Report (2006) at 35 [2.66].

127 Victorian Law Reform Commission, *Implementing the Uniform Evidence Act*, Report (2006) at 35 [2.67].

s 128A<sup>128</sup>. The new s 128A "clarifie[d] that the privilege against self-incrimination under the Act applies to disclosure orders"<sup>129</sup>.

101 In the operation of s 128A to strip a person of an established privilege, the Victorian Law Reform Commission followed the same pattern for disclosure orders, with generally the same wording, as s 128 took to evidence. Section 128A adopted the Commission's proposed definition of disclosure orders as<sup>130</sup> "order[s] made by a federal court in a civil proceeding requiring a person to disclose information, as part of, or in connection with a freezing or search order" but excluding orders under the *Proceeds of Crime Act 2002* (Cth). In common with the approach taken in s 128, under s 128A a court must not require information in a privilege affidavit to be disclosed if the court finds that there are reasonable grounds for an objection that information in it may tend to prove that the person has committed an offence against or arising under an Australian law or a law of a foreign country, or is liable to a civil penalty<sup>131</sup>. Again, in common with the approach taken in s 128, if a court makes an order stripping the person of the privilege then the person is to be given a certificate with the same protections against use or derivative use in an Australian court<sup>132</sup>. And in common with the approach taken in s 128, the court cannot exercise its discretion to permit disclosure unless it is satisfied of the following conditions<sup>133</sup>: the information does not tend to prove that the person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and the interests of justice require the information to be disclosed.

102 The approach of s 128A to protection of a person's privilege against self-incrimination in relation to disclosure of information that may tend to prove that the person has committed an offence against a law of a foreign country is in substance identical to that of s 128. The court's discretion to strip the person of that privilege requires it to be satisfied by the person seeking to abrogate the privilege

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128 *Evidence Amendment Act 2008* (Cth), Sch 1, item 63. See Australia, House of Representatives, *Evidence Amendment Bill 2008*, Explanatory Memorandum at 31-32 [190]-[191].

129 Australia, House of Representatives, *Evidence Amendment Bill 2008*, Explanatory Memorandum at 32 [191].

130 *Evidence Act*, s 128A(1).

131 *Evidence Act*, ss 128A(2), 128A(4).

132 *Evidence Act*, ss 128A(7), 128A(8).

133 *Evidence Act*, s 128A(6)(b), (c).

that, despite reasonable grounds for the objection (the basis of which s 128A(2)(e) requires to be provided to the person seeking to abrogate the privilege in an affidavit), the information does not tend to prove that the person has committed an offence arising under a law of a foreign country. Section 128A imposes no further obligation upon the person who, having established reasonable grounds for their objection, is *prima facie* entitled to the privilege.

### **The approach taken in this case**

103 In this Court, senior counsel for Mr Shi, who also appeared for Mr Shi in the courts below, said that Mr Shi's objection "went to both Australian and foreign law". The twofold nature of this objection, going to both Australian and foreign law, was not disputed at any stage during the hearings before the primary judge or before the Full Court of the Federal Court of Australia. Nor was it suggested at any stage that Mr Shi had failed to file and serve on the Deputy Commissioner an affidavit setting out the basis of his objection<sup>134</sup>, including an objection as to foreign law. In short, as senior counsel for Mr Shi submitted in this Court, the Deputy Commissioner "could have been in no doubt as to what we were talking about in terms of foreign offences". If the Deputy Commissioner had any doubt, it would have been, and remains, a simple matter for Mr Shi to resolve that doubt and to rectify his claim by filing a fresh affidavit in the Federal Court, which would clarify that he had brought an objection as to foreign law (as well as Australian law).

104 Before the primary judge, Mr Shi relied upon an affidavit filed by his solicitor in which the privilege was asserted by express reliance upon reasonable grounds on the basis of both Australian and foreign offences. The affidavit concluded with the statement below, including an obvious typographical error of a foreign "company" which should have been "country":

"By reason of the foregoing, the first respondent claims privilege over the [privilege affidavit] and objects [to] its disclosure; on the ground that it may include material relevant to whether the first respondent has committed an offence under an Australian law or a law of a foreign company, or is liable to a civil penalty."

105 The material upon which Mr Shi relied in support of his foreign law objection included the following: a privilege affidavit, which was not disclosed to the Deputy Commissioner but which Davies J, in the Full Court of the Federal Court, observed had raised an objection on the basis of foreign law<sup>135</sup>; two affidavits of Aris Zafiriou (which were not before this Court); two exhibits to those

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134 See *Evidence Act*, s 128A(2)(e).

135 *Deputy Commissioner of Taxation v Shi* (2020) 277 FCR 1 at 3 [2].

affidavits (which were also not before this Court); and a search warrant for the premises of Mr Shi seeking, amongst many other things, all documents and records relating to numerous individuals and companies, a number of which appear to be based in China, and offences including taxation offences, money laundering offences, secret commission offences, and migration offences.

106 The contents of Mr Shi's privilege affidavit were not disclosed to the Deputy Commissioner. But Mr Shi properly provided an open annotation to the privilege affidavit which explained, among other things under the heading of "Annotated grounds of objection", that: (i) very substantial amounts of money had been transferred to China by various entities within the date range of the suspected offences; (ii) there were circumstances surrounding certain payments which may tend to support an inference that Mr Shi is the controller of those entities; and (iii) payments made within the periods of the suspected offences to a recipient who is incarcerated in China with his assets having been seized by the Chinese government may tend to incriminate Mr Shi in the offence of dealing in proceeds of crime.

107 Although the record in this Court is not complete – including the absence of the transcript of the hearing before the primary judge and the absence of several affidavits that were before the primary judge – and although the point was never put to senior counsel for Mr Shi in this Court, it may be that before the primary judge Mr Shi did not specifically identify any Chinese offence, or class of Chinese offence. But, consistently with the slight nature of the onus in s 128A(2), there was no requirement for him to do so. This is so for three reasons. First, Mr Shi was not required to "go into detail – because that may involve his disclosing the very matter to which he takes objection"<sup>136</sup>. Secondly, issues of self-incrimination under s 128 (upon which s 128A was modelled) sometimes arise in the course of a fast-moving criminal trial where it could hardly have been the intention of Parliament that a witness would need to descend to the detail of describing the class of offence that might be involved in relation to the evidence to be given. Rather, and consistently with the common law rule, the objection is assessed by the judge in light of all the circumstances and the nature of the information. If reasonable grounds exist for "apprehending danger" based upon those circumstances and upon the nature of that information then objectors are given "considerable latitude" in judging for themselves "the effect of any particular question"<sup>137</sup>. Thirdly, in many cases it will

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**136** *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547 at 574; *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 at 430.

**137** *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 at 430; Taylor, *A Treatise on the Law of Evidence as Administered in England and Ireland; with Illustrations from the American and other Foreign Laws* (1887), vol 2

be easy to accept that there are reasonable grounds for an objection that evidence may tend to prove the commission of a foreign offence without knowing the nature or identity of that offence because the circumstances will indicate the general nature of the offence alleged. For instance, the international element of the money laundering offences alleged in the search warrant invited an obvious inference of allegations of possible criminality in China as well as in Australia.

108 In a section of his reasons entitled "Reasonable Grounds for the Objection – s 128A(4)", the primary judge concluded that there were "reasonable grounds for the making of the claims for the privilege against self-incrimination" in relation to the contents of the privilege affidavit<sup>138</sup>. His Honour did not specify whether the reasonable grounds concerned only offences under Australian law or whether the reasonable grounds concerned offences under both Australian and Chinese law. Although Mr Shi had relied on both grounds in affidavit evidence in support of his objection, it was not necessary for his Honour to descend to these specifics since the parties had agreed that if the primary judge was satisfied that there were reasonable grounds for Mr Shi's objection then it would suffice for his Honour simply to express his conclusion<sup>139</sup>.

109 Even without any reliance upon information in the privilege affidavit, and in light of the very slight onus upon Mr Shi at this stage of the statutory process, it suffices from the information in the open annotation to conclude that Mr Shi had reasonable grounds for his objection as to foreign law: his objection was not "so improbable as to be virtually without substance"<sup>140</sup>. Mr Shi's open annotation described payments between Australia and China with which it might be inferred that he was associated. The recipients of those payments included a person who was "incarcerated in China with his assets having been seized by the Chinese government". The open annotation also explained that the confidential privilege affidavit contained a translation of a Chinese criminal indictment against the person who had received the payments. If there were any doubt whether Mr Shi had established reasonable grounds, the material in that privilege affidavit provides further support for the objection, particularly both columns of the first item in the

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at 1246-1247 §1457. See also *In Marriage of Atkinson* (1997) 136 FLR 347 at 351, but compare at 377.

138 *Deputy Commissioner of Taxation v Shi [No 3]* [2019] FCA 945 at [18].

139 [2019] FCA 945 at [21].

140 *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547 at 581.

Table at para 12 when read with para "2)" of Annexure B on page 12 (immediately after point "3." on page 12).

110 Although, in light of the agreement between the parties, the primary judge did not set out in his reasons whether he had concluded that there were reasonable grounds for Mr Shi's objection, his Honour must have reached a conclusion that reasonable grounds existed because he went on to consider whether he was satisfied that those reasonable grounds had been negated because the information disclosed in the privilege affidavit did not tend to prove that Mr Shi has committed an offence in China<sup>141</sup>. For the reasons explained above, reasonable grounds existed in relation to both Australian law and Chinese law.

111 In a section of his reasons entitled "Tendency to Prove an Offence – s 128A(6)(a)" the primary judge said that he was satisfied that Mr Shi had failed to demonstrate that there was information which tended to prove that he had committed an offence under a foreign law and that "no material was specifically identified as tending to show the commission of a Chinese criminal offence"<sup>142</sup>. His Honour observed that there was nothing to indicate that the Australian matters – founding his Honour's satisfaction as to s 128A(6)(a) – could give rise to any offence in China or that Mr Shi was under investigation or had been charged<sup>143</sup>. The onus was placed on Mr Shi to establish the test set out in s 128A(6)(b)<sup>144</sup>.

112 Mr Shi's notice of contention in the Full Court of the Federal Court was on grounds which included that the Deputy Commissioner bore, and did not meet, the onus of satisfying the court as to the matters set out in s 128A(6)(b). A majority of the Full Court decided the appeal on different grounds from those relating to the issue of onus. On the ground concerning onus, Davies J considered that s 128A(6)(b) imposed the same test as the test of "reasonable grounds" in s 128A(4) and, hence, her Honour considered that Mr Shi bore the onus relevant to s 128A(6)(b), since he bore the onus to prove the same matters in relation to s 128A(4)<sup>145</sup>. By contrast, Lee and Stewart JJ accepted that Mr Shi did not bear the

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141 [2019] FCA 945 at [23]-[25].

142 [2019] FCA 945 at [23].

143 [2019] FCA 945 at [23]-[24].

144 [2019] FCA 945 at [23].

145 *Deputy Commissioner of Taxation v Shi* (2020) 277 FCR 1 at 19-20 [40].

onus in relation to s 128A(6)(b)<sup>146</sup>. But their Honours concluded that the primary judge had been affirmatively satisfied that the information did not tend to prove that Mr Shi committed an offence in China<sup>147</sup>.

113 For the reasons above, the proper approach to s 128A required the Full Court to recognise that: (i) Mr Shi had reasonable grounds for his objection that the information in his privilege affidavit may tend to prove that he had committed an offence under Chinese law; and (ii) the Deputy Commissioner, who had been passive on this issue, had not negated Mr Shi's prima facie claim to privilege in this respect under s 128A(6)(b). However, since, for different reasons, the Full Court reached the conclusion that Mr Shi's privilege should be maintained, the appeal should be dismissed.

### Conclusion

114 No person should be compelled to provide information that may tend to expose them to liability arising under foreign criminal or penal laws. Nor should they be required to provide chapter and verse of how they might have offended against a foreign law. Section 128A is carefully designed to avoid these consequences. All that a person is required to do is discharge the slight onus of showing reasonable grounds for an objection that the information may tend to prove an offence under foreign law.

115 The notice of contention in this Court was argued on an all-or-nothing basis. It was not submitted that the matter should be remitted to the Federal Court to consider the extent to which it was possible to separate the information as to which there were, from the information as to which there were not, reasonable grounds that it may tend to prove the commission of a foreign offence by Mr Shi. The submissions on the notice of contention should be accepted. The appeal should be dismissed with costs.

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**146** (2020) 277 FCR 1 at 31 [91], 36 [115].

**147** (2020) 277 FCR 1 at 32 [93].

