

The Joys of Early Morning Evidence

Cairns FLPA presentation
25 October 2014

FLA s. 69ZT

- Certain provisions of EA do not apply to children's matters
- Divs 3, 4 & 5 of Pt 2.1 contain many usual expectations e.g. party's right to q witnesses, and prohibition on leading qq in EIC
- Parts 3.2-3.8 are quite broad ranging eg hearsay, lay opinion and ev as to a W's credibility

s. 69ZT *cont'd*

- Can apply one or more of provisions to an issue, but tendency to make broad order
- Need exceptional circs ++
- Exceptional circs hard to define: *Khalil* [2012] FamCAFC 68
- Growing no. of cases suggest sex abuse claim exceptional: *Maluka* [2012] FamCA 373, *Benton* [2014] FamCA 251

s.69ZT *cont'd*

- Either way, weight to be given to ev up to Ct (so what's all the fuss about???)
- NB s. 69V – even if rule ag hearsay applies, child's representations still admissible

s. 69ZT cont'd

- Most applications re s. 69ZT at first day of trial
- Parties should know before trial material prepared
- Difficulties in 69ZT(3)(b) criteria being considered too early
- Maybe safest course in sex cases to apply rules of ev

EA s. 128

- Allows certificate in relation to self- incriminating evidence
- Starting point is objection to giving evidence
- Extends to offences and civil penalty
- Arguably contravention may lead to civil penalty

EA s. 128 *cont'd*

- Certificate only if court requires giving of evidence
- Test is interests of justice
- Certificate doesn't protect persons other than the witness
- Differing judicial practices as to how orders framed

EA s. 128 *cont'd*

- Can a certificate apply to affidavit EIC?
- *Ferrall & Blyton* (2000) 27 FLR 178 says can
- High Court doubts in *Cornwall v R* (2007) 231 CLR 260
- NSW CA doubts in *Song v Ying* [2010] NSWCA 237

EA s. 128 *cont'd*

- Young J prefers *Song v Ying* in *Aitken & Murphy* [2011] FamCA 785
- FCt doesn't deal with problem in *Jarvis & Pike* [2013] FamCAFC 196
- I held bound by *Ferrall* in *C & R* [2014] FamCA 848 but prefer reasoning of NSW CA if not bound

EA s. 128 *cont'd*

- How apply in advance for certificate?
- Appln for cert, but affidavit needs careful drafting
- Cert necessarily would be wrt a topic, not actual evidence

CPA s. 186

- Ev of identity of CP notifier MUST NOT be given w/o leave
- W MUST NOT be asked q that might identify notifier
- No leave unless ev of critical importance AND compelling reason in public interest
- Or notifier agrees

CPA s. 186 *cont'd*

- In some cases if parent/family member notifier, may be critically important
- Problem is with compelling reason in the public interest ie., is potential harm to child sufficient? How grave does that risk have to be to satisfy the test?
- FLA s. 69ZK and 69 ZW also relevant, but State law applies *NT v GPAO* (1999) 196 CLR 553 (by s.79 *Judiciary Act*)