

Preview for Competence:

For [WITNESS] to give evidence, [HE/SHE] must be both competent and compellable.

Competence:

1. Whether w is competent/compellable to give evidence is determined through a **voir dire** (s 189(1)(c))
 - **Standard of proof** for preliminary questions is the **balance of probabilities.** (s 142(1) EA).
 - o **Burden of proof** on party arguing that w is not competent.
2. Except as provided in the EA, every person is presumed to be competent to give evidence (s 12(a) EA)
 - A competent witness is a witness who is able to give evidence.

Is the person the Defendant or an associated defendant ?

1. In a criminal proceeding (s 17(1) EA), the D is **not competent** to give evidence for the prosecution. (s 17(2) EA)
 - However, is competent for his/her own defence
 - o i.e. can give elect to give evidence after prosecution has closed its case

Re compellability:

2. Accused is not compellable to give evidence **for or against an associated accused** if they are tried jointly (s 17(3) EA)
 - Jointly: i.e. in a multi-accused trial, one accused cannot be forced to give evidence by the prosecution of another accused
3. However, D is compellable to give evidence for the prosecution or the associated accused in the associated accused's proceedings **if it is tried separately** (s 17(3) EA).

Rebutting the presumption:

1. A person is **not competent** to give evidence about a **fact** if, for any reason (including a **mental, intellectual** or **physical** disability) (S.13(1) EA)
 - o (a) the person does not have the capacity to **understand a question** about **the fact**; **or**
 - o (b) the person does not have the capacity to **give an answer that can be understood** to a question about the fact-
 - and that **incapacity cannot be overcome.**
2. When is this assessed?
 - At the time of giving evidence and not an earlier time *Hawker v R* [2012]
3. Can the **incapacity be overcome?**
 - **Deaf**
 - o A w who cannot **hear** adequately may be questioned in any appropriate way (s 31(1) EA)
 - **Mute:**
 - o A w who cannot **speak** adequately may give evidence by any appropriate means (s 31(2) EA)
 - **Interpreter:**
 - o W may give evidence about a fact through an interpreter (s 30 EA)
 - unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.
 - Consider the cost and delay associated, see compellability – may not be compellable. (s 14 EA)
4. Giving evidence about other facts:
 - If because of **subsection (1)**, they are not competent to give evidence about a fact, **they may be competent to give evidence about other facts** (s 13(2) EA)
 - **Example ALRC:** “a young child could be permitted to answer simple factual questions but be ruled to not be competent to answer abstract or inferential questions”

Can W give sworn evidence?

1. When don't you need to take an oath/affirmation?
 - **No need to take an oath/affirmation merely to produce a document or thing to the court (s 21(3) EA).**
2. To give **sworn evidence**, must understand they are under an obligation to give **truthful evidence**.
 - If a competent person does not have the capacity to understand they must be **truthful** in giving evidence, then they are not competent to give **SWORN** evidence about the fact (s 13(3) EA)
 - o The TJ must be **affirmatively satisfied** of this before proceeding to s13(5) to give unsworn evidence (right below) (R v GW (2016))
3. Can be competent to give **unsworn evidence** about the fact (s 13(4) EA)
 - Will be competent to give **unsworn evidence** if the court has told the w (**mandatory**) (s 13(5) EA)
 - o (a) that it is **important to tell the truth**; **and**
 - o (b) that he or she may be **asked questions** that he or she **does not know**, or cannot **remember**, the **answer to**, and that he or she **should tell the court if this occurs**; **and**
 - o (c) that he or she may be asked questions that **suggest** certain statements are true or untrue and that he or she should **agree with the statements** that he or she believes are true and should **feel no pressure** to agree with statements that he or she believes are untrue.
 - If there is a failure to give direction per s 13(5), it renders the evidence as inadmissible (SH v R [2012])
 - o **Facts: 10 year old** witness. Incompetent to give sworn. Gave unsworn. Judge did not say the 'no pressure' part. Counsel had made a comment, so the judge did not. **But it's the trial judges responsibility.**
4. In determining anything under s 13, court can inform itself as it thinks fit (s 13(8) EA)
 - This **includes** by obtaining information from a person with relevant specialised knowledge based on their training, study, or experience (s 13(8) EA)
 - o **Example:** expert witness, psychologist, psychiatrist

Exclude/directions:

5. **Can still exclude/limit/unreliability warning under ss 135-137, 32, 33, 165, 165A.**
 - However, note: 'unsworn evidence' is **not a category of unreliable evidence** just because it's unsworn (R v GW)
6. If a direction had been requested, no requirement to warn the jury that it may be unreliable

Process - oath/affirmation (sworn)

1. To give sworn evidence, W must take an oath or make an affirmation (s 21(1) EA)
 - No need when giving unsworn evidence under s 13 (21(2) EA)
 - **No need to take an oath/affirmation merely to produce a document or thing to the court (s 21(3) EA).**
2. What's the difference?
 - Affirmation has the same effect as an oath (s 21(5) EA)
3. How to make a choice?
 - Court must inform person of the choice, unless court satisfied person is informed/knows they have a choice (s 23(2) EA)
 - Must choose one (**note: interpreter must as well**) (s 23(1) EA).
4. What if they refuse to take an oath or affirmation?
 - Court may direct a person to make an affirmation (s 23(3)(a))
5. What if it's not reasonably practicable for them to take an oath?
 - Court may direct a person to make an affirmation (s 23(3)(b))
6. If **oath** taken, **no need to:**
 - swear on the bible or other religious text: s 24(1) EA
 - be religious: s 24(2)(a) EA
 - believe in a god: s 24A EA

- understand what it means to take the oath: s 24(2)(b).
7. Oath without reference to God;
- Oath does not need to include a reference to god (s 24A(2)(a); and
 - Oath can instead refer to the basis of the person's beliefs in accordance with a form prescribed by the regulations (s 24A(2)(b) EA)

Preview for topic 7: Accused's Right to Silence

Structure:

1. Is it civil or criminal proceeding?

Civil proceeding:

1. Rule in *Jones v Dunkel* applies

Criminal proceeding:

1. Pre-trial silence:

- Right to silence (s 464J Crimes Act)
- Should be informed of that right (s 464A(3) Crimes Act Vic)
- Cannot draw unfavourable inferences from the right to silence (s 89; *Petty v Maiden*)
- Cannot give less weight because defence raised for first time in trial (*Petty v Maiden*)
 - o But if they change their defence/new version, can give less weight (*Petty v Maiden*)

2. **At trial: re the accused**

- Accused's options (s 66 CPA)
- DEF counsel req for direction about right to silence (s 41(1) JDA)
- No one can make certain suggestions re: silence/not calling W (s 42(1) JDA)

3. At trial: re PROS

- Must call all available material witnesses *Dyers v R*
- DEF can request direction if not (s 43(1) JDA)

Civil proceedings

1. A party who **fails to call a particular witness** is **susceptible to having an adverse inference** drawn that the **witness's evidence would not have assisted their case.** (*Jones v Dunkel*)

Criminal proceedings

Pre-trial silence

Pre-trial right to silence:

1. Suspect has a right to refuse to answer questions or participate in investigation (pre-trial) (s 464J(a) Crimes Act)
 - Except as required under the Act/Commonwealth Act.

Caution/informing right to silence:

2. Before questioning/investigations commence, investigating official MUST inform person in custody they do not have to say/do anything, but anything they say/do may be given in evidence (s 464A(3) Crimes Act Vic)
 - This doesn't include a request for name and address

Cannot draw unfavourable inferences

Unfavourable inferences or adverse inferences cannot be drawn from an accused's right to silence such as by refusing to answer questions or respond to representations (s 89; *Petty v Maiden*)

1. **Common law:** In general, no adverse inference may be drawn from the exercise of an accused's right to silence (*Petty v Maiden*).
2. **Evidence Act:** in a **criminal proceeding**, unfavourable **inferences must not be drawn** from evidence that the party/another person **failed or refused** – (*Petty v Maiden*; s 89(1) EA)

- (a) to answer one or more questions; or
 - (b) to respond to a representation—
 - put to the party/other person, by an investigating official who was investigating the offence.
3. What does **inference** include?: (s 89(4) EA)
- (a) an inference of consciousness of **guilt**; or
 - (b) an inference relevant to a party's **credibility**.
4. **Less weight may not be given to a defence because it was raised for the first time in trial** (*Petty v Maiden*)
- However, see below if change in versions.
5. **This type of evidence is inadmissible if it can only be used to draw such an inference** (s 89(2) EA)
- HOWEVER, evidence can still be used **to prove that the party/person** failed/refused to answer/respond if the **failure or refusal is a fact in issue in the proceedings** (s 89(3) EA).

Did the ACCUSED CHANGE their defence?

1. **Less weight may not be given to a defence because it was raised for the first time in trial** (*Petty v Maiden*)
2. However, fact that a **different** version of events was given **pre-trial**, may be taken into account in determining the **weight** to be given to the account given at trial. (*Petty v Maiden*)
- **E.g.** in *Petty v Maiden*, at pre-trial M blamed P for the murder, but at trial, both claimed the death was accidental. **Held:** It was not a case of a right to pre-trial silence, as M had persisted with his account up to the time of trial.

At trial: RE the accused

Accused's options:

1. After the **close** of the case for the PROS, an **accused** is **entitled**— (s 66 CPA)
- (a) to make a submission that there is **no case** for the accused to answer; or
 - (b) to answer the charge by **choosing to give evidence** or **call other witnesses** to give evidence or **both**;
 - o **Advantage:** avoid cross examination
 - (c) **not to give evidence** or **call any witnesses**
 - o See below for a direction