

TOPIC 3: COMPETENCE & COMPELLABILITY

- *In order for [witness] to give evidence, he/she must be both competent and compellable.*
- *Per s12 [witness] is prima facie assumed to be (a) competent and therefore (b) compellable to give ev*
- ****Unless an exception applies****
- Determination of whether [W] is competent/ compellable is a preliminary question for the judge done on *voir dire* (**189(1)**), and in assessing this judge may rely on expert ev (**13(8)**)

1. **IS [W] COMPETENT?**

Presumption

- *Per s13(6) [W] is presumed to be competent unless contrary proven*

Rebutting the Presumption:

- *However, [W] may rebut this presumption as it may be argued that [W's] [mental/intellectual/physical disability] renders them incompetent to give ev about a fact (s13(1)) because they:*
 - (a) Are **incapable of understanding** a question about the fact; or (**s13(1)(a)**)
 - (b) Lack **capacity to give an answer that can be understood** to a Q about the fact; (**s13(1)(b)**) AND
- This incapacity **cannot be overcome**
- Despite s13(1) applying, [W] may still be competent to give ev about **other facts** (**s13(2)**)

Can [W] Give Sworn Evidence?

- *Per s13(3), [W] cannot give sworn evidence about the fact if they do not have the capacity to understand their obligation to give truthful evidence*
 - 'Obligation' means to be **morally or legally bound** to give truthful ev (**GW**)
 - Not enough for [W] to **merely understand the difference** between truth and lies, or to claim to understand it (**GW**)
- *[W] arguably does not understand the obligation because [facts]. Nevertheless, [W] may give unsworn evidence if the court informs them of matters in ss13(4)-(5)*

If Competent to Give Sworn Evidence – Oath/ Affirmation

- If giving sworn ev, W must make an oath/ affirmation (**21(1)**) unless if merely producing a document or thing in court (**21(3)**)
 - Affirmation has same effect as an oath (**21(5)**)
 - W has choice b/w oath/affirmation (**23(1)**), must be informed of choice (**23(2)**) and may be directed to make affirmation if W refuses to choose/ not practicable to take oath (**23(3)**)
 - Oath remains legally effective, even if W is not religious (**24(2)(a)**), does not swear on religious text (**24(1)**) or understand what it means to take the oath (**24(2)(b)**)
 - W may also take an alternative oath if their beliefs/ oath don't include god (**24A**)
- If no oath is given, then they **cannot give sworn ev** and cannot be cross-examined

If NOT Competent to Give Sworn Ev - Unsworn Evidence?

- *If [W] is not competent to give sworn ev, they may be competent to give unsworn evidence (13(4))*
- To admit unsworn ev, Court **must** inform W that (**13(5)**)
 - (a) Important to tell the truth; and
 - (b) W may be asked Qs don't know/cannot remember, W should tell Ct if this occurs; and
 - (c) Agree with true statements and no pressure to agree if false
- **Judge must** inform W of matters in 13(5) and discharge their duty (not sufficient if Counsel does it), or W will be incompetent and the evidence is rendered **inadmissible** (**SH v R**)
 - No obligation to warn jury that unsworn ev is unreliable, not said in EA (**R v GW**)
 - Direction by judge that 'I'm not satisfied that she has the capacity' was still fine despite the wording of s13 suggesting that they must be affirmatively satisfied they do not have capacity; obviously still affirmatively satisfied she did not have competence (**R v GW**)

[NB: consider 165(2) unreliability warning]

Special Party: Is [W] the Defendant?

- W not competent to give ev for prosecution (17(2)), but competent to give ev for their own defence

Special Party: Children – FORBIDDEN WARNINGS

CIVIL PROCEEDINGS

- Where ev is given by child before jury, judge must not warn or suggest that (165A EA)
 - (a) Children as a class are unreliable witnesses; or
 - (b) Ev of children are inherently less credible/ reliable/ requires careful scrutiny compared to adults; or
 - (c) Unreliability of particular child's ev solely on account of age
- BUT does not prevent judge, at party's request from (165A(2))
 - (a) Informing jury that ev of a *particular* child may be unreliable & reasons why it may be; and
 - (b) Warning/ informing jury of need for *caution* in determining whether to accept the ev and weight to give to it
- IF party satisfied Court that there are circumstances **other than age** that affect reliability of child's ev, warranted a warning

CRIMINAL PROCEEDINGS

- TJ/Prosecution/Defence must not suggest that (33 JDA)
 - (a) Children as a class are unreliable witnesses; or
 - (b) Ev of children are inherently less credible/ reliable/ requires careful scrutiny compared to adults; or
 - (c) Unreliability of particular child's ev solely on account of age
 - (d) It would be dangerous to convict on uncorroborated ev of witness bc witness is a child
- Per 32(1) P or D can nonetheless request under s12 that TJ direct on **unreliable evidence**
 - Requests must specify (a) significant matters that make [ev] unreliable; or (b) if request concerns [ev] by child, the significant matters (other than just age) that could make [ev] unreliable

2. IS [W] COMPELLABLE?

→ As [W] is likely competent, they are presumed to be compellable and can be made to give ev about [fact] (12(b))

(1) EXCEPTION - DEFENDANT in Criminal Proceeding

- An **associate accused** is not compellable to give ev for/ against an accused (where tried jointly) unless they are being tried **separately** from accused (17(3))

(2) EXCEPTION – Defendant's SPOUSE or FAMILY

→ As W is the [spouse/ de facto partner/ parent/ child] of [D], and this is a criminal proceeding, [W] may object to (a) give ev or (b) to give ev of a particular communication between them and D as a witness for the prosecution (18(2))

- 'De facto' includes same-sex partner (Dictionary, EA)
- Relationship must exist at time of giving ev
- Does not include uncles, aunties, cousins etc
- If spouse they do not automatically have spousal privilege (**Stoddart**) – only recourse is through balancing act in s18

STEP 1: Objections

- Objection must be made **before** ev given or as soon as practicable after knowing the right (18(3))
- If appears to Ct W may have right of objection, must satisfy itself W is **aware** of this s18's effect (18(4))
- Objections determined voir dire (18(5))

STEP 2: Determine Likelihood of Harm

→ As [W] has objected, he/she must not be required to give ev if the court finds that (18(6))

- (a) A likelihood that **harm** would/may be caused (directly/indirectly) to them or their r/s with D if they were to give ev; AND
- (b) Nature & extent of harm **outweighs** desirability of having ev
 - Indirect = social/ financial dependence/ retribution/ psychological abuse, direct = physical

TOPIC 4: PRIVILEGE

→ *W, although C&C may refuse to give/produce ev if [info] is privileged and thus inadmissible (s134)*

- If it appears W has grounds for making an objection under privilege, Ct must be satisfied they are aware of their right to do so (**s132**)
 - Privilege must be claimed per piece of ev
 - Privilege extends to pre-trial communications/documents (discovery) EXCEPT PSI
- Rationale – (1) Protect against 'cruel trilemma' of testifying against oneself (2) Maintain balance b/w state & individual (3) Maintain integrity of adversarial system – for Crown to prove its case

PRIVILEGE AGAINST SELF-INCRIMINATION (PASI)

→ *W may claim that [ev] need not be given under PASI, a fundamental CL right (Sorby) since modified by Statute (s128)*

- ✓ Applies only to **testimonial or documentary ev**
- ✓ Applies to **derivative ev** (obtained as direct/indirect result of person giving ev – **Sorby**)
 - E.g. cannot force person to say if they have key to locker (would imply drugs are theirs)
 - May not itself incriminate but 'set in train a process' that leads to discovery of incriminating ev
- ✓ Applies in **non-judicial proceedings** (abrogated only by express/ implied parliamentary intention)
- X PASI cannot be claimed by corporations (187EA, **EPA v Caltex**) bc corps are not 'self'/people

PRE-TRIAL PROCEEDINGS

→ *As W is claiming privilege re a disclosure requirement, W will have to rely on the CL as statutory PASI does not apply here (131A)*

- **Disclosure Requirements 131A(2)** – a process or order of Ct requiring disclosure of (a) summons/ subpoena to produce docs/ give ev; (b) pre-trial discovery; (c) non-party disclosure (d) interrogatories; (e) notice to produce; (f) request to produce doc under Div 1 Pt 4.6 (g) search warrant

AT TRIAL

1. **Objection**

→ *W may object to giving ev of [X] as it may tend to prove that W*

- (a) Committed an offence against Aus/ foreign law (**128(1)(a)**); OR
- (b) Is liable to a civil penalty (**128(1)(b)**)

2. **Does Witness Object?** – *must be compulsion*

- Witness will **not be objecting** if
 - They are not compelled (they are willing to give ev); OR
 - They are unwilling to give ev *unless* given a s128 certificate of immunity (**Song v Ying**)
- A Defendant in a criminal trial **cannot object** to giving ev to (**128(10)**)
 - (a) An act by D, the doing of which is a FII; or
 - (b) D had a state of mind, the existence of which is a FII

3. **Reasonable Grounds for Objection?**

→ *Court must determine if there are reasonable grounds s=for objection (128(2))*

- Must be a bona fide **real or appreciable danger** of self-incrimination, a real (not fanciful) possibility of conviction (**Brebner**)
- **Brebner** - won't be reasonable grounds & thus W will still have to answer if W:
 - Is objecting for a collateral purpose (e.g. to protect a friend)
 - **Already given statement/** made admission to implicate themselves (not bonafide)
 - Refusing to answer Q re crime he cannot be convicted for (already acquitted etc)
 - Merely fears/ swears he believes answer will incriminate him

IF RG MADE OUT – Certificates

→ Per 128(3), if there are RG & Ct **must inform W**:

- (a) W need not give ev unless required under 128(4); AND
- (b) Court will give certificate if (i) W willingly gives ev despite not needing to per 128(4); (ii) W gives ev after being required; and
- (c) The effect of the certificate

4. **Overriding the Privilege – Is W required to give ev anyway? 128(4)**

→ Even if RG made out, Ct may still require W to give ev if satisfied per s128(4):

- (a) ev does **not tend to prove W** (not direct ev) has committed an offence/ liable for civil penalty of a foreign country; AND
- (b) **interests of justice** require it - [IOJ require examination of (Lodhi) factors]

Lodhi Factors

Nature of proceedings	- Greater public interest for criminal offences
If criminal – which party calls ev	- Defence – more desirable bc D needs to be equipped to defend
Importance of ev	- Does it bear on elements of offence? - Less important if Crown has robust case anyway & other ev available (Lodhi)
Nature of charges against accused	- More serious – keep privilege (e.g. terrorism in Lodhi) - Consider social consequences for W in community
Likelihood of prosecution/ penalty	- If high chance of being prosecuted, certificate won't protect them if they gave ev, so shouldn't require them to give ev - Certs don't extend to protect ppl from prof disciplinary proceedings
Interests of witness in getting fair trial	- Lodhi – W likely prejudice own interests if compelled since little other ev against him, likely to be cross-examined and exposed on that ev - Certificates not absolute protection – still prejudice standing in community etc
Reliability of ev	- See 32 JDA, even if ev forced, W's ev may be unreliable given interest in present self-incrimination. As conspirator, less reliable – points away from forcing

5. **If Ev Given Anyway, W can still get Certificate**

- 128(5) - W is given certificate if they **willingly** give ev, or required under 128(4)
- 128(6) - Court must also give certificate if (a) objection overruled; and (b) after giving ev, Ct finds there were reasonable grounds for objection

EFFECT OF CERTIFICATE

- 128(7) - Certificate has effect of **disallowing ev** that:
 - (a) Is given in respect of which a certificate is given; or
 - (b) Is any info/doc obtained directly or *indirectly* due to having given ev that was given by person **to be used against the person in a Victorian Court** (unless perjury)
- 128(8) – certificate will have effect despite any challenge, review, quashing or calling into Q to giving or validity of certificate – thus stands even if later thought to be given in error
- 128(9) – a D's certificate (in crim proceeding) will not have effect for any retrial or trial re another offence from same facts

6. **Conclude**

- Where compelled to testify, there will likely be a reliability warning (**Lodhi**, 31(c)&32 JDA EA)

Brebner v Perry – no PSI

Facts	<ul style="list-style-type: none"> - W involved in crim offence with Perry, W called by Crown to give ev against Perry - W had made admissions to police about his involvement, W invoked privilege to help friend
Held	<ul style="list-style-type: none"> - Not RG – was a collateral and not bona fide purpose – no real danger, damage already done

Lodhi – PSI

Facts	<ul style="list-style-type: none"> - Crown wanted W to give ev against L re involvement in terrorist acts, W argued PSI (pending own trial for receiving terrorist training)
Held	<ul style="list-style-type: none"> - Not required to give ev - ev tended to prove he committed offence against Pakistani law, or at least would come out under X-examination - Little strength of ev – it was purely circumstantial - Protection of certificate would be insufficient

Song v Ying – no PSI

Facts	<ul style="list-style-type: none"> - Y argued if he gave ev he will incriminate himself - Ev was that loans created false impression Y had greater assets in Aus than he really did
Held	<ul style="list-style-type: none"> - No element of compulsion/ potential compulsion - Claim of PSI must be true objection in face of compulsion - Y willing to give ev (but didn't want to answer some qs)- not objecting, privilege not claimed

Cornwell v The Queen – no PSI

Facts	<ul style="list-style-type: none"> - C charged with conspiring to import cocaine - Ev of listening device (convo b/w C and 2 others Ds) (probative and circumstantial ev) - C refused to answers q's about this ev & said it didn't go to a FII
Held	<ul style="list-style-type: none"> - A FII is not limited to direct ev that D did act/ had state of mind – FII extend to ev of facts which infer doing of act or having state of mind - 128(10) prevented C claiming PSI since ev was circumstantial/ derivative - Re 128(9) – retrial was not a new proceeding