

# Evidence Notes

LAWS5013

## Contents

Introduction .....	10
S189 - Voir Dire “hearing within a hearing” to establish preliminary questions.....	10
S192 - Leave Permission on Terms .....	11
S192A - Advance Ruling.....	12
The Trial Process .....	12
Burden of Proof.....	12
Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation (1985).....	12
Standard of Proof.....	13
S140 – Civil Proceedings: Standard of Proof .....	13
S141 – Criminal Proceedings: Standard of Proof.....	13
S142 – Admissibility of Evidence: Standard of Proof.....	13
Qantas Airways Ltd v Gama (2008) .....	14
Bibby Financial Services Australia Pty Ltd v Sharma [2014] .....	14
Green v The Queen [1971] .....	<b>Error! Bookmark not defined.</b>
Shepherd v The Queen [1990] .....	<b>Error! Bookmark not defined.</b>
Prima facie case.....	<b>Error! Bookmark not defined.</b>
May v O’Sullivan (1995).....	<b>Error! Bookmark not defined.</b>
Doney v The Queen .....	<b>Error! Bookmark not defined.</b>
Calling a witness.....	<b>Error! Bookmark not defined.</b>
The court’s power to control its own proceedings not generally affected – s 11...	<b>Error! Bookmark not defined.</b>
Court’s control of questioning of witness – s26 .....	<b>Error! Bookmark not defined.</b>
Civil Proceedings .....	<b>Error! Bookmark not defined.</b>
Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd (1988) .....	<b>Error! Bookmark not defined.</b>
Obaleco Pty Ltd v Taveraft Pty Ltd (1986) 10 FCR 518 .....	<b>Error! Bookmark not defined.</b>
Sharp v Rangott (2008) 167 FCR 225 .....	<b>Error! Bookmark not defined.</b>
Criminal Proceedings.....	<b>Error! Bookmark not defined.</b>
R v Apostilides (1984) 154 CLR .....	<b>Error! Bookmark not defined.</b>
R v Kneebone (1999) 47 NSWLR 450.....	<b>Error! Bookmark not defined.</b>
Velevski v The Queen .....	<b>Error! Bookmark not defined.</b>
Competence and Compellability .....	<b>Error! Bookmark not defined.</b>
S12 – Competence and compellability .....	<b>Error! Bookmark not defined.</b>
S13 – Competence: Lack of Capacity.....	<b>Error! Bookmark not defined.</b>
SH v R [2012] NSSCCA 79.....	<b>Error! Bookmark not defined.</b>
The Queen v GW [2016] HCA 6 .....	<b>Error! Bookmark not defined.</b>

S17 – Competence and compellability: Defendants in criminal proceedings ...	<b>Error! Bookmark not defined.</b>
“associated defendant” – Definition – Dictionary cl4(1)(b) .....	<b>Error! Bookmark not defined.</b>
Phan v Regina referring to R v Middis .....	<b>Error! Bookmark not defined.</b>
S18 – Compellability of spouses and others in criminal proceedings	<b>Error! Bookmark not defined.</b>
Dictionary definitions of Children, Parents and De Facto .....	<b>Error! Bookmark not defined.</b>
R v Khan (unreported, NSW Supreme Court, Hidden J, 22 November 1995)....	<b>Error! Bookmark not defined.</b>
Australian Crime Commission v Stoddart and Anor (2011) 282 CLR 620 .....	<b>Error! Bookmark not defined.</b>
S20 – Comment on failure to give evidence.....	<b>Error! Bookmark not defined.</b>
S21 – Sworn evidence to be on oath or affirmation .....	<b>Error! Bookmark not defined.</b>
S22 – Interpreters.....	<b>Error! Bookmark not defined.</b>
S23- Choice of oath or affirmation .....	<b>Error! Bookmark not defined.</b>
S24 – Requirements for oaths.....	<b>Error! Bookmark not defined.</b>
Examination-in-chief .....	<b>Error! Bookmark not defined.</b>
S27 – Parties may question witnesses: .....	<b>Error! Bookmark not defined.</b>
S29 – Manner and Form of Questioning .....	<b>Error! Bookmark not defined.</b>
GPI Leisure Corp Ltd v Herdman Investments (1990)NSWLR 15 .....	<b>Error! Bookmark not defined.</b>
R v Esposito (1998) 45 NSWLR 442.....	<b>Error! Bookmark not defined.</b>
Ryland v QBE Insurance (Australia) Ltd [2013] NSWCA 120.....	<b>Error! Bookmark not defined.</b>
S37 – Leading Questions .....	<b>Error! Bookmark not defined.</b>
Leading Question – Dictionary .....	<b>Error! Bookmark not defined.</b>
S32 – Reviving memory in court.....	<b>Error! Bookmark not defined.</b>
S33 – Evidence given by police officers.....	<b>Error! Bookmark not defined.</b>
Dodds v R [2009] NSW CCA 78 .....	<b>Error! Bookmark not defined.</b>
S34 – Attempts to revive memory out of court .....	<b>Error! Bookmark not defined.</b>
S38 – Unfavourable witnesses .....	<b>Error! Bookmark not defined.</b>
What is unfavourable / inconsistent .....	<b>Error! Bookmark not defined.</b>
R v Hogan [2001] NSWCA 292 .....	<b>Error! Bookmark not defined.</b>
R v Le (2002) 54 NSWLR 474 .....	<b>Error! Bookmark not defined.</b>
Cross-examination of witnesses.....	<b>Error! Bookmark not defined.</b>
S40 – Witness called in error.....	<b>Error! Bookmark not defined.</b>
s41 – Improper Questions .....	<b>Error! Bookmark not defined.</b>
Libke v The Queen .....	<b>Error! Bookmark not defined.</b>
S42 – Leading Questions .....	<b>Error! Bookmark not defined.</b>
Leading Question – Dictionary: .....	<b>Error! Bookmark not defined.</b>
S43 – Prior Inconsistent Statements .....	<b>Error! Bookmark not defined.</b>

S44 – Prior Representations of other persons .....	<b>Error! Bookmark not defined.</b>
S45 – Production of Documents.....	<b>Error! Bookmark not defined.</b>
The Rule in Browne v Dunn .....	<b>Error! Bookmark not defined.</b>
Browne v Dunn (1894) 6 Reports 67 .....	<b>Error! Bookmark not defined.</b>
Precision Plastics Pty Ltd v Demir (1975) 132 CLR 362.....	<b>Error! Bookmark not defined.</b>
Payless Superbarn (NSW) Pty Ltd v O’Gara (1990) 19 NSWLR 551 ....	<b>Error! Bookmark not defined.</b>
R v Birks (1990) 19 NSWLR 667 .....	<b>Error! Bookmark not defined.</b>
MJW v The Queen (2005) 80 ALJR 329* .....	<b>Error! Bookmark not defined.</b>
Khamis v The Queen [2010] NSWCCA 179 .....	<b>Error! Bookmark not defined.</b>
R v S W C (2007) 175 A Crim R 71* .....	<b>Error! Bookmark not defined.</b>
Re-examination and re-opening a case.....	<b>Error! Bookmark not defined.</b>
S39 – Limits on re-examination .....	<b>Error! Bookmark not defined.</b>
Re-examination – Dictionary .....	<b>Error! Bookmark not defined.</b>
Rule against prosecution splitting its case .....	<b>Error! Bookmark not defined.</b>
R v Chin (1985) 157 CLR 671.....	<b>Error! Bookmark not defined.</b>
Urban Transport Authority of NSW v Nweiser (1992) 28 NSWLR 471	<b>Error! Bookmark not defined.</b>
Documents .....	<b>Error! Bookmark not defined.</b>
S47 – Definitions .....	<b>Error! Bookmark not defined.</b>
S48 – Proof of contents of documents.....	<b>Error! Bookmark not defined.</b>
S49 – Documents in foreign countries .....	<b>Error! Bookmark not defined.</b>
S50 – Proof of voluminous of complex documents.....	<b>Error! Bookmark not defined.</b>
S58 – inferences as to relevance .....	<b>Error! Bookmark not defined.</b>
Australian Competition and Consumer Commission v Air NZ Ltd (No 1) [2012] FCA 1355.....	<b>Error! Bookmark not defined.</b>
Real Evidence .....	<b>Error! Bookmark not defined.</b>
S52 – Adducing other evidence not affected .....	<b>Error! Bookmark not defined.</b>
S53 – Views .....	<b>Error! Bookmark not defined.</b>
S54 – Views to be evidenced.....	<b>Error! Bookmark not defined.</b>
R v Milat (unreported, NSWSC 12 April 1996).....	<b>Error! Bookmark not defined.</b>
Evans v The Queen (2007) 235 CLR 521 .....	<b>Error! Bookmark not defined.</b>
R v Bilal Skaf (2004) NSWCCA 37 .....	<b>Error! Bookmark not defined.</b>
Kozul v R (1981) 147 CLR 221 .....	<b>Error! Bookmark not defined.</b>
Relevance .....	<b>Error! Bookmark not defined.</b>
S55 – Relevant Evidence.....	<b>Error! Bookmark not defined.</b>
S56 – Relevant evidence to be admissible .....	<b>Error! Bookmark not defined.</b>
Smith v The Queen (2001) 206 CLR 650 .....	<b>Error! Bookmark not defined.</b>
Papakosmas v The Queen (1999) 196 CLR 297 .....	<b>Error! Bookmark not defined.</b>
Evans v R (2007) 235 CLR 521.....	<b>Error! Bookmark not defined.</b>

S57 – Provisional Relevance .....	<b>Error! Bookmark not defined.</b>
S135 – General Discretion to Exclude Evidence .....	<b>Error! Bookmark not defined.</b>
Probative Value – Dictionary .....	<b>Error! Bookmark not defined.</b>
Orduyaka v Hicks [2000] NSWCA 180.....	<b>Error! Bookmark not defined.</b>
Ainsworth v Burden [2005] NSWCA 174* .....	<b>Error! Bookmark not defined.</b>
La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd (2001)	<b>Error! Bookmark not defined.</b>
<b>Bookmark not defined.</b>	
Misleading or Confusing:.....	<b>Error! Bookmark not defined.</b>
Undue Waste of Time: .....	<b>Error! Bookmark not defined.</b>
S137 – Exclusion of Prejudicial Evidence in Criminal Proceedings .....	<b>Error! Bookmark not defined.</b>
R v Shamouil [2006] NSWCCA 112 .....	<b>Error! Bookmark not defined.</b>
R v Sood [2007] NSWCCA 214 .....	<b>Error! Bookmark not defined.</b>
Dupas v The Queen [2012] VSCA 328.....	<b>Error! Bookmark not defined.</b>
Ma v The Queen [2013] VSCA 20* .....	<b>Error! Bookmark not defined.</b>
R v XY [2013] NSWCCA 121* .....	<b>Error! Bookmark not defined.</b>
IMM v The Queen [2016] HCA 14.....	<b>Error! Bookmark not defined.</b>
The Queen v Dickman [2017] HCA 24 .....	<b>Error! Bookmark not defined.</b>
Aytugrul v The Queen [2012] HCA 15.....	<b>Error! Bookmark not defined.</b>
R v Dann [2000] NSWCCA 185.....	<b>Error! Bookmark not defined.</b>
S136 – General Discretion to Limit Use of Evidence .....	<b>Error! Bookmark not defined.</b>
S138 – Exclusion of improperly or illegally obtained evidence .....	<b>Error! Bookmark not defined.</b>
DPP v Carr (2002) 127 A Crim R 151* .....	<b>Error! Bookmark not defined.</b>
Robinson v Woolworths [2005] NSWCA 426.....	<b>Error! Bookmark not defined.</b>
DPP v Marijancevic [2011] VSCA 355 .....	<b>Error! Bookmark not defined.</b>
S139 – Cautions .....	<b>Error! Bookmark not defined.</b>
S59 – The Hearsay Rule – Exclusion of Hearsay Evidence .....	<b>Error! Bookmark not defined.</b>
Subramaniam v Public Prosecutor [1056] 1 WLR 965 .....	<b>Error! Bookmark not defined.</b>
R v Lawson [2000] NSWCCA 214* .....	<b>Error! Bookmark not defined.</b>
Kamleh v The Queen (2005) 213 ALR 97 .....	<b>Error! Bookmark not defined.</b>
S60 – Exception Evidence Relevant for a Non-Hearsay Purpose.....	<b>Error! Bookmark not defined.</b>
Lee v The Queen (1998) .....	<b>Error! Bookmark not defined.</b>
Jango v Northern Territory of Australia (no 4) (2004).....	<b>Error! Bookmark not defined.</b>
Quick v Stoland (1998) 87 FCR 371 .....	<b>Error! Bookmark not defined.</b>
Exceptions to the hearsay rule:.....	<b>Error! Bookmark not defined.</b>
S61 – Exceptions to the hearsay rule, dependent on competency ....	<b>Error! Bookmark not defined.</b>
S62 – Restriction to “first-hand” hearsay .....	<b>Error! Bookmark not defined.</b>
S63 – Exception: Civil proceedings if maker not available: .....	<b>Error! Bookmark not defined.</b>
Dictionary Pt 2, 4 – Unavailability of persons.....	<b>Error! Bookmark not defined.</b>

S64 – Exception: Civil Proceedings if maker available.....	<b>Error! Bookmark not defined.</b>
Caterpillar Inc. v John Deere Limited (No 2) (2000) .....	<b>Error! Bookmark not defined.</b>
R v Suteski (2002) 56 NSWLR 192.....	<b>Error! Bookmark not defined.</b>
S67 – Notice to be given.....	<b>Error! Bookmark not defined.</b>
S68 – Objections to tender of hearsay evidence in civil proceedings if maker available .....	<b>Error! Bookmark not defined.</b>
The Council of the NSW Bar Association v Franklin [2014] NSWCA 329 .....	<b>Error! Bookmark not defined.</b>
Other examples of non-availability: .....	<b>Error! Bookmark not defined.</b>
S65 – Exception: Criminal Proceedings if maker not available.....	<b>Error! Bookmark not defined.</b>
Sio v The Queen [2016] HCA 32.....	<b>Error! Bookmark not defined.</b>
Williams v The Queen (2000) 119 A Crim R 490.....	<b>Error! Bookmark not defined.</b>
Harris v The Queen [2005] .....	<b>Error! Bookmark not defined.</b>
Webb v R [2012] NSWCCA 216* .....	<b>Error! Bookmark not defined.</b>
Munro v R [2014] ACTCA 11 .....	<b>Error! Bookmark not defined.</b>
Baker v The Queen [2012] HCA 27 .....	<b>Error! Bookmark not defined.</b>
S66 – Exception: Criminal Proceedings if Maker Available .....	<b>Error! Bookmark not defined.</b>
Graham v The Queen (1998) 195 CLR 606 .....	<b>Error! Bookmark not defined.</b>
R v XY [2010] NSWCCA 181 .....	<b>Error! Bookmark not defined.</b>
LMD v R [2013] VSCA 164.....	<b>Error! Bookmark not defined.</b>
ISJ v The Queen [2012] VSCA 321.....	<b>Error! Bookmark not defined.</b>
Clay v The Queen [2014] VSCA 269 .....	<b>Error! Bookmark not defined.</b>
S66A – Exception: contemporaneous statements about a person’s health etc	<b>Error! Bookmark not defined.</b>
Remote Hearsay Exceptions.....	<b>Error! Bookmark not defined.</b>
S69 – Exception: Business Records.....	<b>Error! Bookmark not defined.</b>
Lancaster v The Queen [2014] VSCA 333 .....	<b>Error! Bookmark not defined.</b>
Thomas v State of NSW [2008] NSWCA 316 .....	<b>Error! Bookmark not defined.</b>
Lithgow City Council v Jackson [2011] HCA 36 .....	<b>Error! Bookmark not defined.</b>
ACCC v Air NZ (No 1) (2012) 027 FCR 448 .....	<b>Error! Bookmark not defined.</b>
Vitali v Stachnik [2011] NSWSC 303* .....	<b>Error! Bookmark not defined.</b>
S70 – Exception: contents of tags, labels and writing .....	<b>Error! Bookmark not defined.</b>
S71 – Exception: Electronic Communications .....	<b>Error! Bookmark not defined.</b>
S72 – Exception: Aboriginal and Torres Strait Islander Traditional Laws and Customs .....	<b>Error! Bookmark not defined.</b>
S73 – Exception: Reputation as to Relationships and Age .....	<b>Error! Bookmark not defined.</b>
S74 – Exception: Reputation of Public or General Rights.....	<b>Error! Bookmark not defined.</b>
S75 – Exception: interlocutory proceedings.....	<b>Error! Bookmark not defined.</b>

Admission .....	<b>Error! Bookmark not defined.</b>
S81 – Hearsay and opinion rules: exception for admissions and related representations .....	<b>Error! Bookmark not defined.</b>
Types of admission: .....	<b>Error! Bookmark not defined.</b>
Fabrication of admissions: .....	<b>Error! Bookmark not defined.</b>
S88 – Proof of admission .....	<b>Error! Bookmark not defined.</b>
S86 – Exclusion of records of oral questioning (deals with unsigned records of interview) .....	<b>Error! Bookmark not defined.</b>
S281 of Criminal Procedure Act 1986 (NSW) – Admission by Suspects .....	<b>Error! Bookmark not defined.</b>
S165 – Unreliable Evidence – court can give warning as to the reliability of the evidence .....	<b>Error! Bookmark not defined.</b>
S82 – Exclusion of evidence of admissions that is not first-hand .....	<b>Error! Bookmark not defined.</b>
S83 – Exclusion of evidence of admissions as against 3 <sup>rd</sup> parties .....	<b>Error! Bookmark not defined.</b>
S84 – Exclusion of admissions influenced by violence and certain other conduct .	<b>Error! Bookmark not defined.</b>
R v Zhang [2000] NSWSC 1099 .....	<b>Error! Bookmark not defined.</b>
R v Sumpton [2014] NSWSC 1432 .....	<b>Error! Bookmark not defined.</b>
S85 – Criminal Proceedings: Reliability of admissions by defendants	<b>Error! Bookmark not defined.</b>
Kelly v The Queen .....	<b>Error! Bookmark not defined.</b>
S189 – Voir Dire – looking at s189(2) and (3) .....	<b>Error! Bookmark not defined.</b>
R v Zhang .....	<b>Error! Bookmark not defined.</b>
R v Moffat .....	<b>Error! Bookmark not defined.</b>
R v McLaughlin .....	<b>Error! Bookmark not defined.</b>
R v Singh [1999] ACTSC 27* .....	<b>Error! Bookmark not defined.</b>
S138 – Exclusion of Improperly or illegally obtained evidence .....	<b>Error! Bookmark not defined.</b>
S139 – Cautioning of persons .....	<b>Error! Bookmark not defined.</b>
R v Helmhout (2001) 125 Crim A R 257 .....	<b>Error! Bookmark not defined.</b>
S86 – Exclusion of Records of Oral Questioning .....	<b>Error! Bookmark not defined.</b>
S281 - Admissions by suspects (Criminal Procedure Act 1986 (NSW)) .....	<b>Error! Bookmark not defined.</b>
S87 – Admissions made with Authority .....	<b>Error! Bookmark not defined.</b>
S88 – Proof of Admission .....	<b>Error! Bookmark not defined.</b>
S90 – Discretion to Exclude Admissions .....	<b>Error! Bookmark not defined.</b>
Foster v The Queen (1993) 113 ALR 1 – Common Law Case .....	<b>Error! Bookmark not defined.</b>
R v Swaffield; Pavic v The Queen (1998) 192 CLR 159 .....	<b>Error! Bookmark not defined.</b>
Em v The Queen [2007] HCA 46 .....	<b>Error! Bookmark not defined.</b>
Police v Dunstall [2015] HCA 26 .....	<b>Error! Bookmark not defined.</b>
S89 – Evidence of Silence Generally .....	<b>Error! Bookmark not defined.</b>

S89A – Evidence of silence in criminal proceedings for serious indictable offences .....	<b>Error! Bookmark not defined.</b>
The right to silence and admissions in common law:.....	<b>Error! Bookmark not defined.</b>
Petty and Maiden v The Queen (1991) 173 CLR 95.....	<b>Error! Bookmark not defined.</b>
S89A is interpreted to say an unfavourable inference <b>cannot</b> be drawn unless: .	<b>Error! Bookmark not defined.</b>
Edwards v R (1993) 178 CLR 193 – Lies constituting an admission ....	<b>Error! Bookmark not defined.</b>
Credibility .....	<b>Error! Bookmark not defined.</b>
S102 – The Credibility Rule.....	<b>Error! Bookmark not defined.</b>
S101A – Credible Evidence .....	<b>Error! Bookmark not defined.</b>
Dictionary – Credibility .....	<b>Error! Bookmark not defined.</b>
Adam v The Queen (2001) 207 CLR 96 .....	<b>Error! Bookmark not defined.</b>
Palmer v The Queen (1998) 193 CLR 1 .....	<b>Error! Bookmark not defined.</b>
Assessing credibility: .....	<b>Error! Bookmark not defined.</b>
S103 – Exception: Cross-Examination as to Credibility .....	<b>Error! Bookmark not defined.</b>
S104 – Further Protections: Cross-Examination as to Credibility .....	<b>Error! Bookmark not defined.</b>
S106 – Exception: rebutting denials by other evidence .....	<b>Error! Bookmark not defined.</b>
Attacking credibility of other side’s witness .....	<b>Error! Bookmark not defined.</b>
State Rail Authority of NSW v Brown (2006) 66 NSWLR 540 .....	<b>Error! Bookmark not defined.</b>
Adam v The Queen .....	<b>Error! Bookmark not defined.</b>
Col v The Queen [2013] NSWCCA 302.....	<b>Error! Bookmark not defined.</b>
Supporting Credibility of Party’s Own Witness .....	<b>Error! Bookmark not defined.</b>
S108 – Exception: re-establishing credibility.....	<b>Error! Bookmark not defined.</b>
R v Ngo (2001) 122 A Crim R 467 .....	<b>Error! Bookmark not defined.</b>
Graham v The Queen (1998) .....	<b>Error! Bookmark not defined.</b>
R v Whitmore (1999) 109 A Crim R 51.....	<b>Error! Bookmark not defined.</b>
Nikolaidis v The Queen [2008] NSWCCA 323 .....	<b>Error! Bookmark not defined.</b>
*Papakosmas v The Queen (1999) 206 CLR .....	<b>Error! Bookmark not defined.</b>
S108A - Admissibility of evidence of credibility of person who has made a previous representation .....	<b>Error! Bookmark not defined.</b>
s108B - Further protections: previous representations of an accused who is not a witness....	<b>Error! Bookmark not defined.</b>
s108C - Exception: evidence of persons with specialised knowledge	<b>Error! Bookmark not defined.</b>
Dupas v The Queen (2012) 218 A Crim R 507 .....	<b>Error! Bookmark not defined.</b>
Ma v The Queen (2012) 226 A Crim R 575 .....	<b>Error! Bookmark not defined.</b>
De Silva v The Queen (2013) 236 A Crim R 214.....	<b>Error! Bookmark not defined.</b>
The Opinion Rule .....	<b>Error! Bookmark not defined.</b>
S76 – The Opinion Rule .....	<b>Error! Bookmark not defined.</b>



Definition - Opinion .....	<b>Error! Bookmark not defined.</b>
S77 - Exception: evidence relevant otherwise than as opinion evidence .....	<b>Error! Bookmark not defined.</b>
*R v Whyte [2006] NSWCCA 75.....	<b>Error! Bookmark not defined.</b>
S78 – Exception: Lay Opinions.....	<b>Error! Bookmark not defined.</b>
Lithgow City Council v Jackson [2011] HCA 36 .....	<b>Error! Bookmark not defined.</b>
S78A - Exception: Aboriginal and Torres Strait Islander traditional laws and customs.....	<b>Error! Bookmark not defined.</b>
S79 – Exception: Opinions based on Specialised Knowledge .....	<b>Error! Bookmark not defined.</b>
HG v The Queen (1999) 160 ALR 554 .....	<b>Error! Bookmark not defined.</b>
Honeysett v The Queen [2014] HCA 29.....	<b>Error! Bookmark not defined.</b>
Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588 .....	<b>Error! Bookmark not defined.</b>
Kyluk Pty Ltd v Chief Executive, Office of Environment and Heritage [2013] NSWCCA 114 .....	<b>Error! Bookmark not defined.</b>
s80 - Ultimate issue and common knowledge rules abolished .....	<b>Error! Bookmark not defined.</b>
Admissibility – Character of the Accused .....	<b>Error! Bookmark not defined.</b>
S109 – Application.....	<b>Error! Bookmark not defined.</b>
110 - Evidence about character of accused persons .....	<b>Error! Bookmark not defined.</b>
S111 – Evidence about character of co-accused .....	<b>Error! Bookmark not defined.</b>
S112 - Leave required to cross-examine about character of accused or co-accused.....	<b>Error! Bookmark not defined.</b>
R v Zurita [2002] NSWCCA 22.....	<b>Error! Bookmark not defined.</b>
Braysich v The Queen (2011) 243 CLR 434 .....	<b>Error! Bookmark not defined.</b>
Good Character Direction: .....	<b>Error! Bookmark not defined.</b>
Melbourne v The Queen (1999) 198 CLR 1 .....	<b>Error! Bookmark not defined.</b>
DPP v Newman (A Pseudonym) [2015] VSCA 25 .....	<b>Error! Bookmark not defined.</b>
Stanoevski v The Queen (2001) 202 CLR 115 .....	<b>Error! Bookmark not defined.</b>
Admissibility – tendency and coincidence evidence .....	<b>Error! Bookmark not defined.</b>
Pfennig v The Queen (1994) 182 CLR 462 - Common law test .....	<b>Error! Bookmark not defined.</b>
*Hoch v The Queen (1998) 165 CLR 293 .....	<b>Error! Bookmark not defined.</b>
S94 – Application.....	<b>Error! Bookmark not defined.</b>
S95 – Use of evidence for other purposes .....	<b>Error! Bookmark not defined.</b>
S96 – Failure to act.....	<b>Error! Bookmark not defined.</b>
S97 – The Tendency Rule .....	<b>Error! Bookmark not defined.</b>
“Significant probative value” .....	<b>Error! Bookmark not defined.</b>
*Luke Page (a pseudonym) v The Queen [2015] VSCA 357.....	<b>Error! Bookmark not defined.</b>
s98 - The coincidence rule.....	<b>Error! Bookmark not defined.</b>
*R v Smith (1915) 1 Cr APP R 229.....	<b>Error! Bookmark not defined.</b>

How to assess coincidence reasoning .....	<b>Error! Bookmark not defined.</b>
What is the difference between coincidence and tendency reasoning?	<b>Error! Bookmark not defined.</b>
Evidence that is neither coincidence or tendency evidence .....	<b>Error! Bookmark not defined.</b>
S99 – Requirements for notices .....	<b>Error! Bookmark not defined.</b>
S100 – Court may dispense with notice requirements .....	<b>Error! Bookmark not defined.</b>
s101 - Further restrictions on tendency evidence and coincidence evidence adduced by prosecution .....	<b>Error! Bookmark not defined.</b>
R v Ellis [2003] NSWCCA 319 .....	<b>Error! Bookmark not defined.</b>
R v AE [2008] NSWCCA 52 .....	<b>Error! Bookmark not defined.</b>
RHB v The Queen [2001] VSCA 295 .....	<b>Error! Bookmark not defined.</b>
DFJ v R; NS v The Queen [2012] NSWCCA 9 .....	<b>Error! Bookmark not defined.</b>
IMM v The Queen.....	<b>Error! Bookmark not defined.</b>
Velkoski v R [2014] VSCA 121 .....	<b>Error! Bookmark not defined.</b>
Saoud v The Queen [2014] NSWCCA 136 .....	<b>Error! Bookmark not defined.</b>
BC v R [2015] NSWCCA 327 .....	<b>Error! Bookmark not defined.</b>
Hughes v The Queen [2017] HCA 20 .....	<b>Error! Bookmark not defined.</b>
Jacara Pty Ltd v Perpetual Trustees WA Ltd (2000) 106 FCR 51 .....	<b>Error! Bookmark not defined.</b>
Admissibility – past sexual history of complainant in sexual assault cases.....	<b>Error! Bookmark not defined.</b>
s 293 - Admissibility of evidence relating to sexual experience .....	<b>Error! Bookmark not defined.</b>
Judicial Notice .....	<b>Error! Bookmark not defined.</b>
S143 – Matters of Law.....	<b>Error! Bookmark not defined.</b>
S144 – Matters of Common Knowledge.....	<b>Error! Bookmark not defined.</b>
S145 – Certain Crown Certificates.....	<b>Error! Bookmark not defined.</b>
Woods v Multisport Holdings Pty Ltd (2002) 76 ALJR 483 .....	<b>Error! Bookmark not defined.</b>
Aytugrul v The Queen [2012] HCA 15.....	<b>Error! Bookmark not defined.</b>
Maluka & Maluka [2011] FAMCAFC 72 .....	<b>Error! Bookmark not defined.</b>
Inferences.....	<b>Error! Bookmark not defined.</b>
Inference from absence of evidence.....	<b>Error! Bookmark not defined.</b>
Jones v Dunkel (1959) 101 CLR 298.....	<b>Error! Bookmark not defined.</b>
Weissensteiner v The Queen (1993) 178 CLR 217.....	<b>Error! Bookmark not defined.</b>
S20 – Comment on Failure to Give Evidence .....	<b>Error! Bookmark not defined.</b>
Azzopardi v The Queen (2001) 205 CLR 50 .....	<b>Error! Bookmark not defined.</b>
Dyers v The Queen (2002) 210 CLR 283 .....	<b>Error! Bookmark not defined.</b>
Inferences Propositions from Cases:.....	<b>Error! Bookmark not defined.</b>
Warnings .....	<b>Error! Bookmark not defined.</b>
S164 – Corroboration Requirements Abolished.....	<b>Error! Bookmark not defined.</b>
S165 – Unreliable evidence .....	<b>Error! Bookmark not defined.</b>

R v Flood [1999] NSWCCA 198 .....	<b>Error! Bookmark not defined.</b>
R v Stewart (2001) 52 NSWLR 301 .....	<b>Error! Bookmark not defined.</b>
Common Law Obligations .....	<b>Error! Bookmark not defined.</b>
Longman v The Queen (1989) .....	<b>Error! Bookmark not defined.</b>
Crofts v The Queen (1996) 186 CLR 427.....	<b>Error! Bookmark not defined.</b>
CMG v The Queen [2001] VSCA 416.....	<b>Error! Bookmark not defined.</b>
The Queen v GW [2016] HCA 6 .....	<b>Error! Bookmark not defined.</b>
S165B – Delay in Prosecution.....	<b>Error! Bookmark not defined.</b>
PT v The Queen [2011] VSCA 43.....	<b>Error! Bookmark not defined.</b>
Greensill v The Queen [2012] VSCA 306 .....	<b>Error! Bookmark not defined.</b>
Identification Evidence.....	<b>Error! Bookmark not defined.</b>
S113 – Application of Part .....	<b>Error! Bookmark not defined.</b>
S114 – Exclusion of Visual Identification Evidence.....	<b>Error! Bookmark not defined.</b>
s115 - Exclusion of evidence of identification by pictures .....	<b>Error! Bookmark not defined.</b>
S116 – Directions to Jury .....	<b>Error! Bookmark not defined.</b>
Alexander v The Queen (1981) 145 CLR 395 .....	<b>Error! Bookmark not defined.</b>

## Introduction

Evidence law are rules applied in courts relating to the receipt of material to prove facts.

- What material a court may consider in determining factual issues (admissibility)
- How that material can be presented in the court (adduced)
- How the court decides the factual issues on the basis of the evidence (proof)

Where is evidence law found now?

- Under s 79 of the Judiciary Act 1903 (Cth), the laws of each state or territory— including the laws relating to procedure, evidence, and the competency of witnesses— are binding on all courts exercising federal jurisdiction in that state or territory. The effect of this is that the courts of the states and territories, when exercising federal jurisdiction, apply the law of the state or territory rather than the Evidence Act 1995 (Cth), except for those provisions that have a wider reach.
- The passage of the Evidence Act 1995 (Cth) therefore has had the effect of achieving uniformity among federal courts wherever they are sitting, but there is no uniformity among the states or territories when exercising federal jurisdiction.

Relationship between EA, common law & other statutes

- The Act is not a code
- S8 - This Act does not affect the operation of the provisions of any other Act:  
Commonwealth provision is more complex
- S9 – does not affect operation of common law or equity unless done expressly or by necessary intendment
- S11 – Court has the power to control the conduct of proceedings
- S26 – the court has the power to control the questioning of witness

## Taking Objections

- Criminal Appeal Rule (NSW), Rule 4 – Exclusion of certain matters as grounds for appeal etc.
  - No direction, omission to direct, or decision as to the admission or rejection of evidence, given by the Judge presiding at the trial, shall, without the leave of the Court, be allowed as a ground for appeal or an application for leave to appeal unless objection was taken at the trial to the direction, omission, or decision by the party appealing or applying for leave to appeal.

## S189 - Voir Dire “hearing within a hearing” to establish preliminary questions

- (a) If the determination of a question whether:
- (a) evidence should be admitted (whether in the exercise of a discretion or not), or
  - (b) evidence can be used against a person, or
  - (c) a witness is competent or compellable,
- depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.
- (b) If there is a jury, a preliminary question whether:
- (a) particular evidence is evidence of an admission, or evidence to which section 138 (Discretion to exclude improperly or illegally obtained evidence) applies, or
  - (b) evidence of an admission, or evidence to which section 138 applies, should be admitted,
- is to be heard and determined in the jury’s absence.
- (c) In the hearing of a preliminary question about whether a defendant’s admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission’s truth or untruth is to be disregarded unless the issue is introduced by the defendant.
- (d) If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the court so orders.
- (e) Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account:
- (a) whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the defendant, and
  - (b) whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question, and
  - (c) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing).
- (f) Section 128 (10) does not apply to a hearing to decide a preliminary question.
- (g) In the application of Chapter 3 to a hearing to determine a preliminary question, the facts in issue are taken to include the fact to which the hearing relates.
- (h) If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a witness at the hearing unless:
- (a) it is inconsistent with other evidence given by the witness in the proceeding, or
  - (b) the witness has died.

- Note, in criminal proceedings jury not to be present if relates to an admission or potentially improperly obtained evidence –s189(2)
- In other cases, the jury is not to be present unless the court orders –s189(4), factors listed in s189(5)
- Can be used in both civil and criminal proceedings

- In other circumstances, common law determines when a voir dire can occur and the procedural matters not dealt with by s189

### S192 - Leave Permission on Terms

- (1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.
- (2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:
  - (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and
  - (b) the extent to which to do so would be unfair to a party or to a witness, and
  - (c) the importance of the evidence in relation to which the leave, permission or direction is sought, and
  - (d) the nature of the proceeding, and
  - (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

- Applies when a court is considering leave, permission or a direction and identical language is not necessary for the section to apply (e.g. “direction” includes “order”)
- These matters must be taken in to account, at least where they are material to the issue: *Staneovski v The Queen* (2001) 202 CLR 115
- But it has been held that ‘unless the contrary may be inferred from the circumstances or from what the judge does say, it should be assumed that a judge hearing a case will continually be having regard during the course of a hearing... to the matters in s192(2): *R v Reardon* (2002) 186 FLR 1
- But the opposite position has also been taken, requiring a judge to mention them, if only to say one or more are not relevant, and failing to do so is an error: *R v Esco*; *R v Sako* [2001] NSWCCA 415

### S192A - Advance Ruling

- Where a question arises in any proceedings, being a question about:
- (a) the admissibility or use of evidence proposed to be adduced, or
  - (b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced, or
  - (c) the giving of leave, permission or direction under section 192,
- the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.

### The Trial Process

- Pre-trial processes
  - To what hearings does the Evidence Act apply? – s4
  - To what extent does the Evidence Act apply to pre-trial processes? – s131A
- Jury only exists in Criminal cases

### Burden of Proof

- The UEL does not deal with the allocation of the burden of proof
- Civil
  - Plaintiff usually bears the evidentiary and legal burdens of proof
  - There are some exceptions (such contributory negligence) which are issues of substantive law. In that case, the defendant bears a legal burden of proof as well.

- Criminal
  - In criminal proceedings the prosecution bears the onus. In relation to most defences, the defendant bears an “evidentiary burden” of proof. And the prosecution bears the legal burden of proof
  - Evidential burden: the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist
  - If the evidential burden is discharged, the onus is on the prosecution to disprove the matter either beyond a reasonable doubt.
  - Most defences once raised evidentially must be countered as a part of the prosecution’s general burden to prove guilt beyond a reasonable doubt. E.g. self-defence.
  - Again there are exceptions: insanity, some statutory defences, which the defendant has to prove on a balance of probabilities – therefore has the legal burden of proof.

### Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation (1985)

#### Facts & issue:

- Defendant administered a statutory scheme for leave provisions for workers.
- There was concern that Apollo was in breach. It sought declaration that its workers were not within the statutory definition of “workers in the industry”

#### Court:

- Plaintiff had to prove a negative – i.e. class of work was not usually performed by a carpenter. Plaintiff must establish sufficient evidence from which the negative proposition can be inferred.
- Defendant will have an evidential burden to advance matters with which the plaintiff would have to deal in discharge of its overall burden of proof
- Plaintiff will have to overcome as part of its legal burden
- Similar to self-defence

## Standard of Proof

### S140 – Civil Proceedings: Standard of Proof

- (1) on the balance of probabilities
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
  - (a) the nature of the cause of action or defence
  - (b) the nature of the subject - *matter of the proceeding: the inherent unlikelihood of an occurrence of a given description: Briginshaw v Briginshaw*
  - (c) the gravity of the matters alleged.

### S141 – Criminal Proceedings: Standard of Proof

- (1) 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
- (2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

## S142 – Admissibility of Evidence: Standard of Proof

- (1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding:
- (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not, or
  - (b) any other question arising under this Act, have been proved if it is satisfied that they have been proved on the balance of probabilities
- (2) In determining whether it is so satisfied, the matters that the court must take into account include:
- (a) The importance of the evidence in the proceedings, and
  - (b) The gravity of the matters alleged in relation to the question.

- Direct Evidence: Submission to the court that “you should accept this event happened because a credible witness says that they saw it happen”; if accepted, it alone establishes guilt
- Circumstantial evidence: “you should accept that this event happened because the circumstances suggest that it must have happened”; evidence of a basic fact or facts from which the jury is asked to infer a further fact(s) to find the accused guilty
  - Guilt should not only be a rational conclusion but also the only rational conclusion that can be drawn from the circumstances
  - The jury must find the accused not guilty if there is an inference consistent with innocence, reasonably open on the evidence: *R v Knight (1992)*
  - The common law requires a direction (not shown in EA)

## Qantas Airways Ltd v Gama (2008)

### Facts and issue:

- Gama was aircraft engineer from India. Was subject to discriminatory remarks at work. Compensated \$71,692 for breach of discrimination acts. Appealed several times. One issue was the appropriate application of the civil standard of proof.
- Civil Standard of Proof – Briginshaw test from *Briginshaw v Briginshaw (193)*
  - The “Briginshaw test” does not create a third standard of proof between civil and criminal. It is still assessed on the balance of probabilities.
  - But the degree of satisfaction that is required in determining that the standard has been discharged may vary according to the seriousness of the allegations of misconduct

### Court:

- Full Court discouraged reference to “the onerous Briginshaw standard”. S 140(2) applies.
- The correct approach to the standard of proof in a civil proceeding under s 140 is, adopting the language of the HC in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*, one that recognizes that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved.
- Racial discrimination is not a serious allegation, because holding so would limit the scope of the entire Act.

## Bibby Financial Services Australia Pty Ltd v Sharma [2014]

### Facts:

- Sharma was employed as the Sales Director of Bibby from 2002 – February 2009. In accordance with the Sales Director's contract, the Sales Director was entitled to a one off "special bonus" of up to \$1.4m. However, shortly before the special bonus was due, Bibby fired him on the basis of serious misconduct relating to allegations of sexual harassment. The allegations included inappropriate touching, inappropriate comments and unwelcome attention.
- Bibby conducted an investigation into the allegations of sexual harassment which involved interviewing a number of employees in the Sales Director's team. None of the employees interviewed supported the claims of sexual harassment. Sharma was not told of this.
- After proceedings were initiated by the Sales Director, Bibby also sought to rely on conduct of the Sales Director that had been discovered post-termination. This conduct related to the taking of ecstasy tablets and failing to disclose a potential conflict of interest.

Court:

- Under Evidence Act, reference to Briginshaw is not an error
- Wrongful dismissal claims succeed, as sexual harassment allegation is sufficiently serious to bring Briginshaw principle into play: consider the nature of allegations, and consequences of adverse finding for employees.
- Distinguish Qantas case on the basis that the discrimination in Qantas was not intentional.
- The primary judge's citation of Briginshaw v Briginshaw was not inappropriate, or an indication of error, in circumstances where her Honour immediately referred to s 140(2)(c) of the Evidence Act. No submission was made in the present case that the observations of Dixon J in Briginshaw v Briginshaw did not elucidate the effect of s 140(2)(c) of the Evidence Act.