

1. Preliminary

- Act is not a code of the law of evidence and operates with other statutes and laws (EA s8, 8A and 9)
- It is incorrect to interpret the Act in light of, or consistent with common law (*Papakosmas v The Queen*)
- General powers of a court:
 - power to control its own proceedings (s11 EA)
 - power to control questioning of witnesses (s26 EA)
 - power to require production of a document or thing used in an attempt by a prospective witness to revive memory before giving evidence (s34 EA)
 - power to require a compellable person present at court to give evidence and produce documents or things (s36 EA)
 - power to require production of a document or evidence as to the contents of the document, and to take consequential action (s45 EA)
 - power to order production of a document, and inspect it, for the purpose of determining an issue of privilege (s133 EA)
 - power to direct that a document tendered or produced before the court be impounded (s188 EA)
 - powers in relation to discovery/inspection of documents and disclosure and exchange of evidence (s193 EA)

A. Taking objections:

- In practice, necessary for X to object before a court will ensure strict compliance
- TJ should rule upon the objection as soon as possible (*Dasreef*):
 - **Civil:** Failure to object is usually waiver - prevents the point being raised on appeal
 - **Criminal:** no appeal after a failure to object at trial without the leave of the CCA (CAR r4)
 - Mason P in *Picken v Regina*: rule is applied strictly
 - Granted only where appellant can demonstrate error led to a miscarriage of justice

B. Dispensing with provisions:

- With the consent of parties (s 190(1)) if criminal, accused must understand significance: s 190(2)
- In civil proceedings without the parties' consent if would cause undue delay/fact is not in dispute: s 190(3)

C. Voir Dire:

- If question depends on finding that a particular fact exists, fact can be determined in voir dire: s189(1)
 - Whether evidence should be admitted (in a discretion or not)
 - **Criminal:** disregard truth/untruth unless D introduces: s189(3)
 - Whether evidence can be used against a person
 - Whether witness is compellable
- Jury should not be present at hearing of prelim question: s189(4)
 - Unless court orders presence, taking into account: s189(5)
 - If likely to be prejudicial
 - If will be adduced during the hearing
 - Whether evidence will be admitted at another stage of hearing
- Standard of proof → balance of probability: s142

D. FACTORS WHEN SEEKING LEAVE: s192(2)

- The effect of the leave on the duration of the hearing: (a)
- The fairness to a party or a witness: (b)
- Importance of the evidence in relation to the leave sought (always going to be low): (c)
- Nature of the proceeding: (d)

2. Proof

A. Burden of Proof

- **Civil:** Plaintiff bears onus
 - Exceptions:
 - Issues that go beyond simple denial of P's claim
 - Contributory negligence
 - Volenti non fit injuria
 - Discharge by agreement or frustration
 - Negative proposition – P must establish evidence from which negative proposition can be inferred, then D has evidential burden to advance in evidence any particular matters with which the P would have to deal with in the discharge of the P's overall burden of proof: **Apollo**
- **Criminal:** Prosecution bears onus throughout: **Woolmington v DPP**
 - Exceptions:
 - Defence of insanity: **s23A(4) Crimes Act**
 - Proof of an exception to offence under Act: **s417(2) Crimes Act**

B. Standard of Proof

- **Civil:** **s140 EA**
 - Balance of probabilities (cause/subject/gravity): **Briginshaw v Briginshaw** - codified by **s142(2)**
- **Criminal:** **141 EA**
 - Prosecution: beyond reasonable doubt
 - Long explanation of BRD may be mistrial: **Green v The Queen**
 - **Circumstantial evidence:** evidence of basic fact from which the jury is asked to infer further facts. On this evidence guilt should be the only rational conclusion to be drawn.
 - In case resting on circumstantial evidence, not correct that jury may only properly draw an inference of guilt upon facts (individual items of evidence) BRD.
 - However if it is necessary for the jury to reach a conclusion of fact as an indispensable intermediate step in the reasoning process towards an inference of guilt, that conclusion must be established BRD: **Shepherd v The Queen**
 - **Testimonial evidence:** evidence of a person who witnessed the event sought to be proved
 - Defence: on the balance of probabilities

C. Prima facie case

- **Civil:** At close of P's case, D may submit there is no case to answer (failure to establish prima facie case)
- **Criminal:**
 - **PF case made out:** raising a PF case does not put onus on D to answer: **May v O'Sullivan**
 - **Submission of no case to answer:** On evidence could D be lawfully convicted? (Q of law): **May**
 - TJ duty to direct non-guilty verdict if no evidence upon which jury could convict: **Doney**
 - But tenuous, weak or vague evidence is enough to support guilty verdict: **Doney**

3. Adducing Evidence

Chapter 2 EA deals with how a party may introduce evidence into a court proceeding.

I. Can a witness be called?

- Court retains general power over conduct of proceedings despite EA: s11 EA

A. Civil:

- Party may call witness (s27EA) at discretion of parties: *Clark Equipment Credit of Australia v Como*
- Judge may not call witness without consent of both parties: *Clark*

B. Criminal:

- Party may call witness (s27 EA) at discretion of parties
- Exceptions:

1) Prosecutorial duty to call witnesses

- a. P must act with fairness and detachment; objective is arriving at whole truth/fair trial: *Velevski*
- b. Duty to call witnesses whose evidence is necessary to unfold narrative of events: *Kneebone*
 - i. All eye witnesses of any element in an event
 - ii. Witnesses which provide account inconsistent with the Crown's case
 - iii. Witnesses in D's camp/are close to D – unless so devoted they won't tell the truth

Excludes

- c. If P wishes to exclude evidence, necessary to show identifiable factors which justify decision not to call a material witness: *Kneebone*
 - i. **Witness who is unreliable, untrustworthy, or otherwise incapable of belief**
 1. Must point to identifiable factors – suspicion will not suffice
 - a. E.g perjured before, drunk, mental illness, inconsistent versions, would not speak to police
 2. Need proper consideration: conference to establish usefulness
 3. Even if essential to narrative: *Kneebone*
 - ii. **A number of witnesses who provide repetitive proof of the same matter**
- d. P's decision not to call a witness will constitute ground for setting aside conviction if, when viewed against the trial as whole, it is seen to give rise to a miscarriage of justice: *Kneebone*

Experts

- e. P must seek/adduce evidence of competing expert opinions: *Velevski* (per Gleeson CJ and Hayne J – cf. *Gummow and Callinan JJ*)
- f. Equal headcount not required, and no duty to call specific experts

2) Inherent power of TJ to call witness in 'exceptional circumstances': *The Queen v Apostilides*

Trial judge may:

- a. Question P to understand why witness has not been called
 - i. NOT question the sufficiency of reasons
- b. Invite P to reconsider the decision not to call a witness at the conclusion of case
 - i. NOT direct the Crown to call a witness
- c. Make remarks in summing up re: effect of failure to call witness
- d. Call witness in exceptional circumstances: E.g unrepresented D, TJ calls psychiatric evidence to raise defence of mental illness: *Damic*

II. Is the witness competent/compellable?

- Presumption that every person, except as otherwise provided in Act, is competent/compellable: s12(a) EA
- Questions of competence/compellability to be determined in voir dire in absence of jury: s189(4) unless court specifically orders presence having regard to s189(5):
 - If likely to be prejudicial
 - If will be adduced during the hearing
 - Whether evidence will be admitted at another stage of hearing