MLL334 EVIDENCE
CHAPTER 3
VERBAL EVIDENCE

- Verbal evidence is the most common evidence given in court
- Normally occurs with a person physically appearing in the courtroom and verbally expressing his/her comments about the relevant event
- The giving of evidence is very inconvenient for many witnesses, yet is so important that people can be forced to attend court
    - By process of subpoena
        - A document stamped by court and served on an individual, setting out the relevant court matter and date that they are required to attend
        - Contempt of court if fails to attend
- When an individual attends court and gives evidence, he/she is classified as a 'witness'
- Subpoena is not compulsory – many individuals attend willingly
    - Unless certain that a witness will attend – it is prudent to subpoena all witnesses.
    - Police and prosecution agencies, as a matter of policy, subpoena all witnesses
- In order to be relatively certain about the content of evidence that a witness will give in court, it is wise to collect a signed document called a statement
    - Sometimes witnesses renege on statement but it is rare
    - If this does occur, the written statement can be used to discredit the witness

COMPETENCE AND COMPELLABILITY

- Competence focuses on who is qualified to give evidence in court
- Compellability focuses on who can be forced to give evidence
    - Starting point is that all witnesses are competent and compellable
- There are some exceptions to this starting point:

13 Competence: lack of capacity

(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):

(a) the person does not have the capacity to understand a question about the fact, or

(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.

Note : See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.

(2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.

(3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

(4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.

(5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:

(a) that it is important to tell the truth, and

(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

(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.

(6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.

(7) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.

(8) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

- See p 39 Feld for discussion of this section
- Act does not suggest that unsworn evidence should or should not be given less weight
- GENERAL RULE RE COMPELLABILITY: All competent witnesses are compellable, however, there are several *minor* and two *major* exceptions
- **Minor** exceptions:

    - The Queen and her representative and the leaders of other countries, as well as members of Australian parliament, that if attending court to give evidence, would be prevented from attending a sitting of parliament: s 15
    - Judges and jurors are not competent in that proceeding, unless in the case of jurors, the matter could effect the conduct of the proceeding (e.g.. to ascertain if a juror is biased etc.): s 16
    - Where it is likely that a person could only have the capacity to give evidence after considerable cost or delay, and the subject matter of the evidence has already been obtained from another person: s 14
- **Major** exceptions:
    - **Family members of the accused** may make an application to the judge to be excluded from giving evidence: s 18
        - Family member is defined as spouse, de facto partner, parent, or child and extends to same-sex partnerships
        - Court will only grant application if it finds that there is a likelihood that harm would b caused to the prospective witness, or the relationship outweighs the desirability of the evidence being adduced to the court
        - There are 5 criteria that the court may take into account when determining this weighing-up process: s 18 (see p 41 Feld)
        - **NB** in the Commonwealth jurisdiction, s 18 has no application in relation to certain child-related offences: s 19 Cth Act.
        - See p 42 Feld for purpose and reasoning for this exception
    - **The accused** cannot be compelled to give evidence: s 17

Competence and compellability—accused in criminal proceedings

(1) This section applies only in a criminal proceeding.

(2) An accused is not competent to give evidence as a witness for the prosecution.

(3) An associated accused is not compellable to give evidence for or against an accused in a criminal proceeding, unless the associated accused is being tried separately from the accused.

(4) If a witness is an associated accused who is being tried jointly with the accused in the proceeding, the court is to satisfy itself (if there is a jury, in the jury's absence) that the witness is aware of the effect of subsection (3).

- See Feld p 44 for rationale

JURY DIRECTIONS ACT 2015 (NO. 14 OF 2015) - SECT 41

Direction on accused not giving evidence or calling witness

(1) If the accused does not give evidence or call a particular witness, defence counsel may request under section 12 that the trial judge direct the jury on that fact.

(2) In giving a direction referred to in subsection (1), the trial judge must explain—

(a) the prosecution's obligation to prove that the accused is guilty; and

(b) that the accused is not required to give evidence or call a witness (as the case requires); and

(c) that the jury should not guess or speculate about what might have been contained in—

(i) the evidence that was not given by the accused; or

(ii) the evidence that might have been given by a witness who was not called—

as the case requires; and

(d) that the fact that the accused did not give evidence or call a witness (as the case requires)—

(i) is not evidence against the accused; and

(ii) is not an admission by the accused; and

(iii) must not be used to fill gaps in the evidence adduced by the prosecution; and

(iv) does not strengthen the prosecution case.

EXAMINIATION IN CHIEF, CROSS-EXAMINATION AND RE-EXAMINATION

- Well-defined process for adducing evidence from a witness
    - Witness takes an oath or affirmation to tell the truth (unless unsworn evidence is to be given): s 21
    - Witness then gives his/her account (called the examination in chief)
    - The witness is then cross-examined, and sometimes re-examined: s 19
- Court has wide powers to control proceedings and is not limited by the Act, except as expressly set out to the contrary: s 11