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Preliminary

Fair trial Principles

Golden Thread <ul style="list-style-type: none">- Presumption of innocence means the onus of proof is always on the crown to prove the accused persons guilty, the standard of proof to discharge this burden is beyond reasonable doubt. Woolmington v DPP- Cannot draw adverse inference against accused who puts the crown to proof. Azzopardi	<ul style="list-style-type: none">- The accused person/s may choose to remain silent during the trial and put the crown to proof. s 17(2)- Prosecution not to be heard on deals made on sentencing. Barbaro- Where an inference is being drawn, it MUST be the only reasonable inference to satisfy BRD.
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Duty to Disclose (Prosecution)

<ul style="list-style-type: none">- Prosecutors have a general and strict duty to disclose their case to the defendant AND to present and never suppress ALL relevant evidence.<ul style="list-style-type: none">o EVEN IF favourable to the defence.	<ul style="list-style-type: none">- Police have an obligation to disclose all evidence to the DPP- Defence has a limited obligation to respond to the case. Disclose requirement offends the principle of the presumption of innocence.
<ul style="list-style-type: none">- For breach of these rules to amount to a miscarriage of justice there must be unfairness AND a departure from the rules AND it must have prejudiced the defendant. Libke	

Other

The proviso - section 6 criminal appeal act 1912

(1) The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

Prasad Direction

- A trial judge may **ONLY** direct a jury to acquit where as a **matter of law** it is not open to convict on indictment.
- **NOT** where the judge believes the evidence cannot sustain a conviction.
- Prasad direction applies where the case is very weak; allows the case to go directly to the jury.
 - o Direction to the jury that at any time after the close of the prosecution case they can return a verdict of not guilty.

Section 90 - Admissions

In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:

- the evidence is adduced by the prosecution, and
- having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

Chapter 2 – Adducing Evidence

Part 2.1 Division 1 – Competence and Compellability

Section 12 – Competence and Compellability

Except as otherwise provided by this Act:

- (a) every person is competent to give evidence, and
- (b) a person who is competent to give evidence about a fact is compellable to give that evidence.

Section 17 – Competence and Compellability: Defendants in criminal proceedings

- (1) This section applies only in a criminal proceeding.
- (2) A defendant is not competent to give evidence as a witness for the prosecution.
- (3) An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately from the defendant.
- (4) If a witness is an associated defendant who is being tried jointly with the defendant 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).

Section 20 – Comment on Failure to Give Evidence

- (1) This section applies only in a criminal proceeding for an indictable offence.
- (2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.
- (3) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was:
 - (a) the defendant's spouse or de facto partner, or
 - (b) a parent or child of the defendant.
- (4) However, unless the comment is made by another defendant in the proceeding, a comment of a kind referred to in subsection (3) must not suggest that the spouse, de facto partner, parent or child failed to give evidence because:
 - (a) the defendant was guilty of the offence concerned, or
 - (b) the spouse, de facto partner, parent or child believed that the defendant was guilty of the offence concerned.
- (5) If:
 - (a) 2 or more persons are being tried together for an indictable offence, and
 - (b) comment is made by any of those persons on the failure of any of those persons or of the spouse or de facto partner, or a parent or child, of any of those persons to give evidence,
 the judge may, in addition to commenting on the failure to give evidence, comment on any comment of a kind referred to in paragraph (b).

Other provisions in this Section that may be Relevant

13 – Competence: Lack of Capacity	14 – Compellability: Reduced Capacity
18 – Compellability of Spouses in Criminal Proceedings	19 – Compellability of Spouses in Certain Criminal Proceedings

Part 2.1 Division 3 – Rules About Giving Evidence

Provisions in this Section that may be Relevant

26 – General control over questioning	27 – Parties May Question Witnesses
28 – Order of Questioning	29 – Manner & Form of Questioning
30 – Interpreters	32 – Attempts to Revive Memory in Court
33 – Evidence given by Police Officers	34 – Attempts to Revive Memory out of Court
35 – Effect of Calling for Production of Documents	36 – Person may be Examined Without Subpoena

Part 2.1 Division 4 – Examination in Chief and Re-Examination

Section 37 – Leading Questions

- (1) A leading question must not be put to a witness in examination in chief or in re-examination unless:
- (a) the court gives leave, or **[Section 192]**
 - (b) the question relates to a matter introductory to the witness’s evidence, or
 - (c) no objection is made to the question and (leaving aside the party conducting the examination in chief or re-examination) each other party to the proceeding is represented by an Australian legal practitioner, legal counsel or prosecutor, or **[Means the other party MUST object, otherwise question allowed]**
 - (d) the question relates to a matter that is not in dispute, or
 - (e) if the witness has specialised knowledge based on the witness’s training, study or experience—the question is asked for the purpose of obtaining the witness’s opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given. **[Expert propositions]**
- (2) Unless the court otherwise directs, subsection (1) does not apply in civil proceedings to a question that relates to an investigation, inspection or report that the witness made in the course of carrying out public or official duties.
- (3) Subsection (1) does not prevent a court from exercising power under rules of court to allow a written statement or report to be tendered or treated as evidence in chief of its maker.
- Note. Leading question is defined in the Dictionary.

Section 38 – Unfavourable Witness

- (1) A party who called a witness may, with the **leave** of the court, question the witness, as though the party were cross-examining the witness, about: **[see (6) & Section 192]**
- (a) evidence given by the witness that is unfavourable to the party, or
 - (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence, or
 - (c) whether the witness has, at any time, made a prior inconsistent statement.
- (2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).
- (3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness’s credibility.
- Note.** The rules about admissibility of evidence relevant only to credibility are set out in Part 3.7.
- (4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.
- (5) If the court so directs, the order in which the parties question the witness is to be as the court directs.
- (6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account:
- (a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave, and
 - (b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.
- (7) A party is subject to the same liability to be cross-examined under this section as any other witness if:
- (a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person, and
 - (b) the party is a witness in the proceeding.

- Procedural not admissibility rule.
- The Rule in *Browne v Dunn* can apply to unfavourable witnesses when cross examined by the crown.

Unfavourable

- Means evidence that is not favourable or goes against the party’s case, even if only part of otherwise favourable evidence.
Souleyman
- However, evidence that is neutral is not enough. **Klewer v Walton**

Section 39 – Limits on Re-Examination

On re-examination:

- (a) a witness may be questioned about matters arising out of evidence given by the witness in cross-examination, and
- (b) other questions may not be put to the witness unless the court gives leave.

Part 2.1 Division 5 – Cross Examination

Section 41 – Improper Questions

- (1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a disallowable question):
- (a) is misleading or confusing, or
 - (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
 - (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
 - (d) has no basis other than a stereotype (for example, a stereotype based on the witness’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability).
- (2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:
- (a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and
 - (b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and
 - (c) the context in which the question is put, including:
 - (i) the nature of the proceeding, and
 - (ii) in a criminal proceeding—the nature of the offence to which the proceeding relates, and
 - (iii) the relationship (if any) between the witness and any other party to the proceeding.
- (3) A question is not a disallowable question merely because:
- (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness, or
 - (b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.
- (4) A party may object to a question put to a witness on the ground that it is a disallowable question.
- (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.
- (6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

Principles

- Mandatory (1); Whether or not an objection has been raised (5)

- High bar – must be quite obvious that the section has been contravened.

Section 42 – Leading Questions

- (1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.
- (2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:
- (a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness, and
 - (b) the witness has an interest consistent with an interest of the cross-examiner, and
 - (c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter, and
 - (d) the witness’s age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness’s answers.
- (3) The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used.
- (4) This section does not limit the court’s power to control leading questions.

Section 43 – Prior Inconsistent Statements of Witnesses

- (1) A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not:
- (a) complete particulars of the statement have been given to the witness, or
 - (b) a document containing a record of the statement has been shown to the witness.
- (2) If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner:
- (a) informed the witness of enough of the circumstances of the making of the statement to enable the witness to identify the statement, and
 - (b) drew the witness's attention to so much of the statement as is inconsistent with the witness's evidence.
- (3) For the purpose of adducing evidence of the statement, a party may re-open the party's case.

- Precondition to admissibility

- Must then consider rules in Chapter 3

Section 44 – Previous Representations of Other Persons

- (1) Except as provided by this section, a cross-examiner must not question a witness about a previous representation alleged to have been made by a person other than the witness.
- (2) A cross-examiner may question a witness about the representation and its contents if:
- (a) evidence of the representation has been admitted, or
 - (b) the court is satisfied that it will be admitted.
- (3) If subsection (2) does not apply and the representation is contained in a document, the document may only be used to question a witness as follows:
- (a) the document must be produced to the witness,
 - (b) if the document is a tape recording, or any other kind of document from which sounds are reproduced—the witness must be provided with the means (for example, headphones) to listen to the contents of the document without other persons present at the cross-examination hearing those contents,
 - (c) the witness must be asked whether, having examined (or heard) the contents of the document, the witness stands by the evidence that he or she has given,
 - (d) neither the cross-examiner nor the witness is to identify the document or disclose any of its contents.
- (4) A document that is so used may be marked for identification.

Section 46 – Leave to Recall Witnesses

- (1) The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence concerned has been admitted and:
- (a) it contradicts evidence about the matter given by the witness in examination in chief, or
 - (b) the witness could have given evidence about the matter in examination in chief.
- (2) A reference in this section to a matter raised by evidence adduced by another party includes a reference to an inference drawn from, or that the party intends to draw from, that evidence.

Principles

- Cannot recall an accused person.

Rule in *Browne v Dunn*

- Must give notice to other party and witnesses of any imputation that is intended to be made about their conduct relevant to the case or to their credit.

Consequences for Breach of the Rule in *Browne v Dunn*

- Preventing and limiting the calling of contradictory evidence or addressing the court that the witness should be disbelieved.
- Limiting the evidence in breach of the rule.
- Permitting a witness to be recalled or a party to re-open their case.
- Providing directions or other comments to the jury regarding the breach.

Other Sections in this part

Section 40 – Witness Called in Error

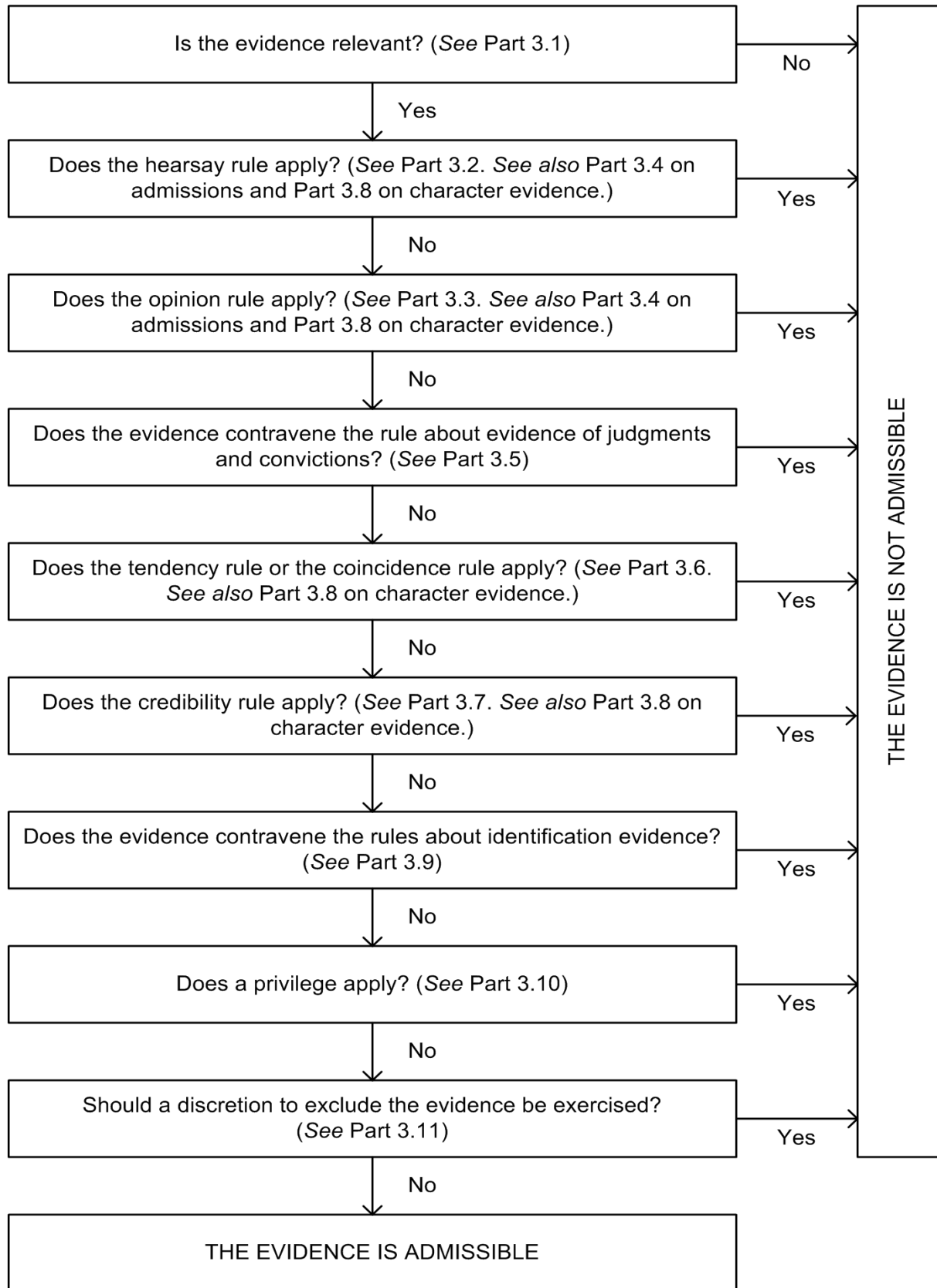
- Cannot be cross examined unless asked some questions relevant to a question to be determined in the proceeding.

Section 45 – Production of Documents

- Allows documents used under sections 43 & 44 to be examined and potentially admitted by the court.

Chapter 3 – Admissibility of Evidence

Overview Table



Is the evidence admissible?

Three Questions to Determine Admissibility

1. Is the evidence relevant to a fact in issue? [ss 55, 56]
2. What is the purpose/s for adducing the evidence? [Consider exclusionary rules: parts 3.2–3.3, 3.6–3.9]
3. Is there any reason why the mandatory or discretionary exclusions should/could apply? [ss 135-138]

Part 3.1 – Relevance

Section 55 – Relevant Evidence

- (1) The evidence that is relevant in a proceeding is evidence that, **if it were accepted, could rationally affect** (directly or indirectly) the **assessment of the probability** of the **existence of a fact in issue** in the proceeding.
- (2) In particular, evidence is not taken to be irrelevant only because it relates only to:
 - (a) the credibility of a witness, or
 - (b) the admissibility of other evidence, or
 - (c) a failure to adduce evidence

Section 56 – Relevant Evidence is Admissible

- (1) Except as otherwise provided by this Act, **evidence that is relevant in a proceeding is admissible** in the proceeding.
- (2) **Evidence that is not relevant in the proceeding is not admissible.**

Fact in Issue

- Those necessary to establish the cause of action or charge, also includes collateral issues (i.e. whether evidence is admissible in trial. **HML v R**)

Could Rationally Affect

- Does the evidence have the capability to affect ‘the assessment of the probability of the existence of a fact in issue’ in some way? **IMM v R**
- Mere possibility of the evidence being connected to a crime; **Chanthovixay**

If it were Accepted

- Evidence must be taken at its highest, no inquiries of reliability or credibility can be entered into to determine relevance under s 55. **IMM v R [39]; Papakosmos**
- Unless the evidence so fanciful or preposterous that it could not be accepted by a rational Jury, the effect of such evidence on ‘the assessment’ is nil and therefore it is not relevant. **IMM v R [39]**

Example 1

- Police evidence of the identification of a person in still video shots = not relevant; the jury had more exposure to the accused and could make a better judgement, the police evidence would not affect the assessment of the person’s ID at all. **Smith v R (Mundarra)**

Example 2

- The prosecution made an accused person put on the clothes found at his house which matched those of the person seen by witnesses at the scene.
- He was made to parade in front of the jury and say the words attributed to the wrongdoer = relevant, but prejudicial so should be excluded under s137. **Evans v R**

Other provisions in this part

Section 57 – Provisional relevance

- The court can deem the evidence provisionally relevant, subject to evidence to be adduced later at trial that will make it relevant. **(1)**
- Evidence of a common purpose can be used to determine whether that common purpose existed. **(2)**
- More likely if judge alone trial. **ASIC v Rich; R v KH**

Section 58 – Inferences

- The court may examine a document or thing and draw any reasonable inference from that inspection in order to determine relevance.
- Including drawing an inference as to its authenticity or identity (no need to prove the authenticity of every document).