

COURT PROCESS, EVIDENCE, AND PROOF

The law of evidence regulates the proof of the facts in issue at a trial through the operation of various rules and principles

“Truth, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much.”
– Knight Bruce VC in *Pearse v Pearse* (1846)

Table of Contents

Contents

1. PRINCIPLES AND PROCESS	4
Fundamental Principles	4
What at the Fundamental Principles	4
How Have These Fundamental Principles Been Recognised?	4
Process	6
Charges	6
Pleadings	6
Responsibilities of Prosecutors	7
Challenges to Evidence	7
2. ADVERSARIALISM AND PROOF	8
Prosecutors and Adversarialism	8
Rules Governing Prosecution's Behaviour	8
The Jury, Judge, and Proof	10
Common Knowledge	10
Standard of Proof	11
Circumstantial Evidence	12
3. THE WITNESS IN THE BOX AND WITNESS QUESTIONING	13
Oaths and Affirmations	13
Competence and Compellability	13
Default Position	13
Exceptions	14
Evaluating the Witness	17
Cultural Considerations	17
Examination-in-Chief	18
Leading Questions (s. 37 UEA)	18
Refreshing Memory	19
The Unfavourable Witness	21
Cross-Examination	22
Improper Questioning	22
Leading Questions (s. 42)	24
Prior Inconsistent Statements	24
4. THE ACCUSED	25
The accused in Court	25
The Right to Silence	25
Judicial Comment vs Judicial Direction	26
Joint Trials/Multiple Accused	27
5. RELEVANCE	28
The Relevance Rule	28
6. DISCRETIONARY AND MANDATORY EXCLUSIONS	29
General Discretion to Exclude Evidence: s135	29
The Mandatory Exclusion: s137	30
Limitation on the Use of Evidence: s136	31
Illegally Obtained Evidence: s138	31
7. CREDIBILITY AND CHARACTER	33
Introduction	33
The Credibility Rule	34
Determining Relevance Solely to Credibility	35
Exceptions to the Credibility Rule	36
In Cross-Examination	36
In Re-Examination	42
Reopening of the Prosecution case	42

Other credibility provisions	43
8. HEARSAY	44
The Hearsay Rule	45
Exceptions to the Hearsay Rule	46
First Hand Hearsay	46
Maker Not Available	48
Maker Available	51
Additional Exception: Statements About Health, etc	53
Second-Hand and More Remote Hearsay	54
Dual Use of Hearsay Evidence	54
Other Matters	55
9. CHARACTER, TENDENCY AND COINCIDENCE	56
Character	56
Is It Character Evidence?	57
Has Character Intentionally Been Raised by Defence?	58
Rebuttal Must Match Scope	58
Co-Accused	59
Leave	59
Directions	59
Tendency and Coincidence	60
The Coincidence Rule	64
Evidence Not Involving Tendency or Coincidence Reasoning	67
Relationship evidence	67
Context evidence	67
10.OPINION EVIDENCE	69
Introduction	69
The Opinion Rule	70
Dual Relevance Exception	71
Lay Opinion Exception	71
Expert Opinion Exception	72
11. IDENTIFICATION EVIDENCE	75
Introduction	75
Is It Identification Evidence?	75
Visual Identification Evidence	76
Properly Conducted ID Parade	77
Picture Evidence	78
Special Need for Caution Direction	80
Other Kinds of 'Identification' Evidence	81
12.WARNINGS AND DIRECTIONS	82
Unreliable Evidence Warning	82
Delay and Forensic Disadvantage	84

1. Principles and Process

Fundamental Principles

What Are the Fundamental Principles?

- Accusatorial and **adversarial system**
- Crown accuses and **must prove their case**
 - Technically, the **defendant can be silent throughout** the entire proceeding and **require the Crown to prove their guilt** beyond reasonable doubt
 - In practice, the defendant's silence is more complex (addressed later)
- **Trier of fact** (judge or jury) – decides on the facts, and if elements of the offence are made out or not
- **Trier of law (judge)** – resolves legal issues that arise in the case
- Key common law **fundamental principles**:
 - **Right to a fair trial**
 - **Presumption of innocence**
 - **Right to remain silent**
 - **Right against self-incrimination**
- The fundamental principles lean in favour of accused due to power imbalance toward the State
- Evidence law is a form of **procedural law** through which the **substantive law** (eg tort, criminal, contract) is regulated

How Have These Fundamental Principles Been Recognised?

- Recognised throughout the *Evidence Act 1995* ('UEA') and *Criminal Procedure Act 1986*
- No constitutional recognition of the right to a fair trial in words but 'in spirit'
 - "In the same way as has occurred with the principle of open justice, **the principle of a fair trial has become so fundamental an axiom of Australian Law as to be entitled to constitutional significance.** ... The subject of constitutional law should not be limited solely to the exegesis of the terminology of a written document called 'The Constitution'. Our Constitution...includes a number of statutes and principles of the common law which are theoretically capable of amendment by Parliament. Nevertheless, the fundamental nature of these laws and principles, as well as the improbability of their substantial modification by legislation, is such to justify treating such laws and principles as part of our constitutional law in its broadest sense" - Justice Spigelman AC
- Blackstone's ratio - 'better that ten guilty persons escape punishment than one innocent person suffers'
- ICCPR (ratified although not specifically enacted in Australia via legislation):
 - 14.1. All persons shall be **equal** before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be

- entitled to a **fair and public** hearing by a **competent, independent and impartial tribunal** established by law...
 - 14.2. Everyone charged with a criminal offence shall have the right to be **presumed innocent** until proved guilty according to law...
- Although there is **no right to representation**, if the lack of representation will lead to **unfairness** the trial will be stayed until representation obtained: *Dietrich* [1992] HCA
- 'Bundle of rights' also recognised in *NSW Barristers' Rules*, including:
 - **Right to know the case to meet**, eg disclosure, sufficient pleadings
 - **Rules governing conduct of prosecution**
- Right to an **impartial adjudicator** recognised in case law:
 - *Cesan* (2008) HCA
 - *Cook v The Queen* (2016) VSC
- **Presumption of innocence** has also been recognised in case law:
 - ***Robinson v R* (1991) HCA**: judge directed jury to give 'more scrutiny' to accused's evidence – successfully challenged
 - ***Azzopardi v R* (2001) 205 CLR 50**: judge directed jury to take note of accused's silence – successfully challenged, gave rise to '*Azzopardi direction*' (discussed further below)
- Default position in NSW is **trial by jury**, unless applications made for a judge-alone trial: s132, 132A *Criminal Procedure Act NSW* (1986) ('CPA')
- Non-accusatorial proceedings ('commissions of inquiry') are inquisitorial creatures of statute and often try to 'work around' the fundamental provisions:
 - *ICAC Act 1988* (NSW) s30 – compulsory examinations; s37 – witness not entitled to refuse to answer questions or produce documents
 - *Royal Commission Act 1902* (Cth) s6A – refusal to answer a question on the grounds it may incriminate that person is not a reasonable excuse
 - *Australian Crime Commission Act 2002* (Cth) established the Australian Crime Commission (ACC) which was empowered to conduct 'compulsory examinations' (same powers also given to State crime commissions)
 - In *X7 v ACC* (2013) the HCA held the legislation did not show a clear intention to abrogate an accused's right to silence, so no compulsory examination prior to a pending criminal prosecution could legally take place – even if it is secret
 - In *Lee (No 1)* (2013) the HCA held (4:3) that the legislature was adequate in its clear treatment of accused rights (including the fact that criminal asset recovery occurs concurrently with criminal charges) and an SC judge had inherent power to protect the fairness of the processes
 - In *Lee (No 2)* (2014) a DPP solicitor asked the NSWCC for a transcript of Mr Lee's compulsory examination for a criminal case against him – the HCA decided that this

amounted to a removal of the privilege against self-incrimination and altered the trial in a fundamental respect

- In *AFP v Zhao* (2015) the HCA granted a stay in proceedings for recovery of proceeds of crime because if he defended it he compromised his defence in a criminal trial