

*This preview only contains small extracts from a few topics. The full set of notes contains every topic in complete form.*

## (2) ADDUCING EVIDENCE

### (1) Calling a witness

#### (A) Rules of calling witnesses

The EA does not deal with the calling of witnesses by a party or the Court. This is determined by common law rules.

#### (B) Can a trial judge call a witness?

##### Civil cases:

**Clark Equipment (NSWSC):** Judge in a civil case may not call a witness.

##### Criminal cases:

**Apostillides (HC):** Crown prosecutor bears responsibility for deciding whether to call a witness.

- A judge may only call witnesses in the “most exceptional circumstances”.
  - Example of a “most exceptional circumstance”
  - **R v Damic:** Accused was unrepresented and the trial judge on his own motion called psychiatric evidence which raised the defence of mental illness to a charge of murder.

#### (3) Can the Crown decide not to call a witness?

**Whitehorn (HC); Apostillides (HC):** A crown prosecutor must call all available witnesses necessary to unfold factual evidence (particularly eyewitness to events going to facts in issue). A failure to call an essential witness may give rise to a miscarriage of justice and successful appeal.

Exceptions where the Crown may avoid calling a witness who supports the defence without compromising the duty to ensure the Crown case is presented with fairness:

- Evidence that is unreliable (**Kneebone**)
- Evidence that is repetitious (e.g. assault in a crowded bar → dozens of witnesses → it is not necessary to call all witnesses) (**DPP Guidelines**)
- Expert opinion evidence (**Velevski** (HC split: unclear majority))
  - The prosecutor did not call expert witnesses who agreed with the defence expert.
  - Gleeson CJ and Hayne J distinguished the calling of expert witnesses from calling witnesses to give evidence of facts. They found that the prosecution was not bound to obtain opinions from the experts who agreed with the defence case.
  - Gummow and Callinan JJ held that the prosecution should have called all experts; however the trial judge's direction cured any disadvantage to the appellant.
  - Majority all seemed to agree that the prosecution is not required to call an equal number of expert witnesses to support the prosecution and the defence.

## (2) Competency and compellability

Under EA s12, every person is considered competent to give evidence and compellable to give it, except as otherwise provided by the EA.

However, per the High Court in GW, this presumption will be displaced where the court is satisfied on the balance of probabilities (EA s142) that a person is not competent to give evidence.

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## (2) ADMISSIBILITY OF EVIDENCE

### (1) Relevance

#### (1) Relevant evidence is prima facie admissible

Evidence must be sufficiently relevant to a main or collateral fact in issue to be admissible.

**EA s56(1):** Except as otherwise provided by the EA, evidence that is relevant in a proceeding is admissible in the proceeding.

**EA s56(2):** Evidence that is not relevant in the proceeding is not admissible.

**EA s142(1):** The burden is on the party adducing the evidence to demonstrate on the balance of probabilities that the evidence is relevant.

#### (2) What are the facts in issue?

The facts in issue are determined by the substantive law of the case.

- **CIVIL:** Factual elements of the cause of action or legal defence relied upon.
- **CRIMINAL:** Factual elements of the offence and any defence relied upon.

**Smith (HC):** These facts are the 'ultimate facts in issue', behind which there will often be many issues about facts relevant to the facts in issue.

#### (3) What is relevant evidence?

**EA s55(1):** Evidence that is relevant for 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.

- Evidence does not need to make the fact 'probable', just more or less probable than it would be without the evidence.

**Papakosmos (HC):** Relevance is determined on the assumption that the evidence is reliable: it does not involve considerations of the prejudicial effect of evidence.

**EA s55(2)** 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.
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## (2) Hearsay

### (1) The hearsay rule

As a general rule, **under EA s59(1)**, evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

To determine whether a previous representation is being admitted for a hearsay purpose, it is necessary to:

- (1) Identify the previous representation
- (2) Identify the intended asserted fact in the representation
- (3) Determine whether the previous representation is being tendered to prove the asserted fact in the previous representation

If (2) and (3) match → EA s59(1) applies and the evidence is inadmissible subject to the application of a relevant exception under the EA.

If (2) and (3) do not match → EA s59(1) does not apply. Rather, EA s60(1) is activated. The evidence can be used for all purposes including a hearsay purpose. [See evidence admitted for a non-hearsay purpose].

### Elements of hearsay:

#### (1) Previous representation:

##### (A) Meaning of representation:

'Previous representation' (EA dictionary): a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.

##### 'Representation' (EA dictionary):

- (a) an express or implied representation (oral or in writing);
- (b) a representation inferred from conduct;
- (c) a representation not intended by its maker to be communicated to or seen by another person;
- (d) a representation that for any reason is not communicated.

##### (B) A representation may arise from silence:

**Rose (NSWCCA)**: Whether a representation does arise from silence or non-action will depend upon the circumstances, and whether an inference can be drawn that the person by silence or non-action made a representation of fact, regardless of whether or not the person intended to convey the representation.

- Silence in the face of an allegation can amount to a representation that the allegation is true where in the circumstances it is reasonable to expect that the allegation would be answered by an explanation or denial; such an expectation would not be reasonable where the allegation is made to a suspect who has been warned that he has the right to remain silent.

#### (2) Made by a person:

**EA s59(1)** does not capture representations made by machines (e.g. cameras at traffic lights) or animals (e.g. dogs barking at time of a murder)

A human-machine composite statement (e.g. a computer printout that has been created on the basis of information that had been fed into it by a person) does constitute representation made by a person and will be captured by EA s59(1) (**R v Wood**)

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### (3) Credibility

**EA s101A:** Credibility evidence is evidence that is relevant only because it affects the assessment of the credibility of the witness or person.

Examples of matters that are relevant to the credibility of a witness:

- Truthfulness and honesty
- Motive to be untruthful
- Bias
- Prior inconsistent statements of a witness
- Capacity for accurate observation
- Powers of perception and memory

**EA s102:** Credibility evidence is not admissible, unless there is an applicable exception.

#### (1) Evidence admitted for a non-credibility purpose

**Adams (HC majority):** The EA s 102 prohibition on credibility evidence does not apply to **evidence admitted for a dual purpose** (a credibility and a non-credibility purpose, e.g. relevance to a fact in issue), where the evidence **is admissible for the non-credibility purpose**. Evidence is only excluded as credibility evidence where credibility is the sole admissible purpose for adducing the evidence.

E.g. Here, the evidence constitutes direct evidence of a fact in issue (goes towards the issue of whether D breached duty of care by dropping a brick on P's foot)

Therefore, the evidence does not constitute credibility evidence (EA s101A) and the credibility rule does not apply (EA s102). Can use this evidence to attack W's credibility.

#### (2) Evidence adduced in cross-examination (EA s103)

**EA s 103(1):** The credibility rule does not apply to evidence **adduced in cross-examination of a witness** if the evidence could **substantially affect the assessment of the credibility of the witness**.

**Elements:**

- (1) Adduced in cross-examination
- (2) The evidence must substantially affect the assessment of the credibility of the witness
  - **EA s 103(2):** For the purposes of EA s 103(1), the court may non-exhaustively consider
    - **(a)** Whether the evidence **tends to prove that the witness** knowingly or recklessly made a **false representation** when the witness was under an obligation to tell the truth; and
      - **STA v Brown (NSWCA):** The NSWCA held that evidence that P may have exaggerated and lied about damage to her teeth should have been admissible at trial, as it would have gone towards the issue of deception and potentially would have had substantial probative value as to P's credibility. If she had lied about the extent of damage to her teeth, she may have lied about the extent of her other injuries.

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### (3) DISCRETIONS / PROOF

#### (1) Judicial discretions

##### Overview

When evidence is relevant and does not violate another evidence rule, it still can be excluded (in part or whole) through EA ss135-137.

EA s135: general discretion to exclude

EA s136: general discretion to limit use

EA s137: exclusion where unfair prejudice outweighs probative value in criminal proceedings

EA s138: discretion to exclude improperly or illegally obtained evidence

EA s139: cautioning of persons

#### (A) General discretion to exclude

EA s135 applies to both civil and criminal proceedings.

EA s135: The court may refuse to admit evidence if its probative value is **substantially outweighed** by the danger that the evidence might:

(a) be **unfairly prejudicial** to a party, or

(b) be **misleading or confusing**, or

(c) cause or result in **undue waste of time**.

EA s142: The party seeking exclusion of the evidence bears the legal burden on the balance of probabilities.

Note: Courts should rarely invoke EA s135 to exclude evidence adduced by the accused in criminal proceedings (**Taylor, NSWCCA**).

#### (I) What is probative value?

##### (1) Meaning of probative value :

'**Probative value**' (EA Dictionary): Extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

**IMM (HC majority)**: In assessing the probative value of evidence for the purposes of EA ss135-137, a trial judge is required to take the evidence at its highest. As such, a court must presume that the evidence is credible (i.e. that it is truthful) and reliable.

##### (2) In assessing probative value, the TJ may consider the surrounding circumstances of the evidence:

**IMM (HC majority)**: However, the HC majority emphasised that this approach "does not distort a finding as to the real probative value of the evidence" and that the "circumstances surrounding the evidence may indicate that its highest level is not very high at all." The HC majority gave the example of an identification made very briefly in foggy conditions and in bad light by a witness who did not know the person identified. The HC majority held that it is possible to say that it is an identification but a "weak one because it is simply unconvincing".

Therefore, according to the **HC majority** in **IMM**, the trial judge may take into account the surrounding circumstances of the evidence to reach a conclusion that the probative value of the evidence is low.

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