

EVIDENCE

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INTRODUCTION TO EVIDENCE

Introduction

Evidence is largely ruled based with a focus on the **Evidence Act** and superior court decisions interpreting those acts. However always strong undercurrents of social issues that have an influence.

Sources of Law:

→ General Law:

- ◆ Common law and heritage of equity.
- ◆ Mainly looking to the basis this provides for principles for the law of evidence.
- ◆ Ultimately based on the inherent jurisdiction of courts to regulate their own court processes.

→ Uniform Evidence Scheme:

- ◆ a national scheme of state acts and a commonwealth act, and it purports to be a scheme, but it is not uniform at all.
 - **Evidence Act 1995 (Cth and NSW)**
 - Only QLD, SA and WA are not a part of this scheme.

- ◆ The Commonwealth evidence act does apply uniformly in federal court proceedings that are conducted across all of the states, including those not involved in the scheme.

Section 9 Application of Common Law and Equity:

- (1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.

Procedural and Substantive Law:

- Evidence law is procedural or adjectival law.
- 'Rules which are directed to governing or regulating the mode of conduct of court proceedings' (Mason CJ).
- Evidence law is the law of the court rather than the law of the 'place' (place = area like torts or contract).
- Fundamental importance of procedural law;
 - ◆ due process → We have clear and transparent rules, consistency of application of those rules, and our courts deal with open justice and fair trial
 - ◆ procedural fairness → knowing the case that has to be met by parties, being able to present that case, having full opportunity to put that case, being heard, etc., and
 - ◆ access to justice → not being limited in presenting your case by unreasonable time limitations, being able to access the evidence, having a cost-efficient system that's quick, etc., "Justice delayed is justice denied"
- Procedural law guarantees the protection of substantive legal rights.

Adversarial and Inquisitorial Systems:

- Australia uses an adversarial system that highlights the trial's significance, the centrality of oral evidence and elaborate evidentiary rules.
- Traditional stereotypes of the adversarial system as being based on common and case law, precedent, passive judiciaries and party-driven litigation.
- Discussions include increased cost for adversarial however, allow for increased individual autonomy and allow the approximate truth as self-interested parties will put their strongest points to the court.

Law of Evidence

Information that is available to a court to enable the court to decide upon disputes being heard in proceedings. The focus is on efficiency, reliability and justice.

Aims of Evidence Law:

- Truth – to ensure "the rectitude or righteousness of decision making" (Bentham)
- Discipline – to ensure veracity and reliability of evidence collection and gathering
- Protection – to ensure a fair trial and access to justice

Structure of **Evidence Act**:

- Adducing of evidence - the rules and principles relating to how evidence is presented in court, and the events that take place in the courtroom (Ch 2 of Act)
- Admissibility of evidence - the rules and principles for deciding what evidence can be taken into account by the fact finder (Ch 3 of Act)

	whether it is used as real evidence depends on its purpose for which the bottle is being adduced. Real evidence: → Also known as ‘other evidence’ and is evidence that the fact finder can observe for themselves.
Evidence Process	(1) If the evidence is relevant but subject to privilege or some other immunity (usually decided at pre-trial upon discovery etc) it is withheld and not available to the fact finder. (2) If there is no privilege issue, the question is whether the evidence is relevant (to a fact in issue). If it is not relevant, it is inadmissible. If it is relevant, then it must meet the third challenge. (3) The evidence must be adduced in accordance with the provisions of the EA and any common law principles or powers of the court and its rules. (4) Does the evidence fall foul of any of the main exclusionary rules (e.g. hearsay or credibility), and – if so – may it be admitted under any of the statutory exclusions to those rules (5) If it passes those hurdles and is otherwise admissible, the question then is whether the evidence is subject to a discretionary or mandatory exclusion. It may be admitted for the fact finder's consideration if it is not to be excluded for any reason. (6) The final question is whether (even though it is available for the fact finder's consideration) a warning should be given to the jury as to the reliability of the evidence. NOTE – it is after these steps that the fact finder decides the WEIGHT of the evidence. Evidence may be adduced and admitted and at the very end of the trial may be discounted for its insignificant weighting. Evidence that is available but not admitted must NOT be considered by the court. Sometimes this kind of evidence comes to the attention of the court, but the court makes a rational decision to ignore the evidence.

TRIALS; JUDICIAL POWERS AND DISCRETIONS

Trial Fundamentals	Overview of Trials: → Plaintiff/The Crown has the legal and evidentiary burden of proof. → Defendant bears the legal and evidentiary burden of proof when they choose to provide evidence. → Differences in Evidence in Civil and Criminal Cases: ◆ Civil: the standard of proof is on the balance of probabilities. ◆ Criminal: • The standard of proof is beyond reasonable doubt. • There are generally greater restrictions on the adducing and admissibility of evidence ○ generally more protections for the defendant, and there is greater scope for the exclusion of evidence and judicial warnings about evidence. → Role of Fact Finder:
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General Powers of the Court:

Section 11 General Powers of a Court:

- (1) The power of a court to control the conduct of a proceeding **is not affected by this Act**, except so far as this Act provides otherwise expressly or by necessary intendment.
- (2) In particular, the powers of a court with respect to **abuse of process** in a proceeding are not affected.

- The overarching responsibility of a court to control proceedings and to conduct a fair trial and to avoid abuse of process.
- The continuing presence of common law in coexistence with the evidence act.
- The power to control proceedings is not granted by the evidence act – it is described as being unaffected by the evidence act.
 - ◆ Thus, the power to control proceedings exist prior to the evidence act and is only acknowledged by the evidence act.
- [s 11\(1\)](#) - unless the act explicitly prevents it, a trial judge may exercise discretion where necessary in order to exercise the power to control proceedings in ways that the evidence act may not anticipate
 - ◆ e.g., common law powers or with the inherent powers of the court or with ways that judges may interpret these powers.
- [s 11\(2\)](#) - explicitly reminds a judge that they have overall responsibility to ensure there is no abuse of process.
 - ◆ Thus, should something arise at trial that might affect the conduct of proceedings, fairness of trial or abuse of process, a judge may resort to inherent powers that they have, unaffected by the evidence act as per [s 11](#).
- [Mooney v James \[1948\] VLR 22](#) - 'It's the duty of the judge to regulate and control proceedings so that issues for adjudication may be investigated fully and fairly'.

Court's Control Over Questioning of Witnesses:

Section 26 Court's Control Over Questioning of Witnesses:

The court may make such orders **as it considers just** in relation to:

- (a) the way in which witnesses are to be questioned, and
- (b) the production and use of documents and things in connection with the questioning of witnesses, and
- (c) the order in which parties may question a witness, and
- (d) the presence and behaviour of any person in connection with the questioning of witnesses.

- This provision indicates a considerable amount of judicial discretion but does not specifically include the calling of witnesses.
- Section is limited to the constraints of justice and procedural fairness
 - ◆ [JD v Director-General of YACS \[1998\] NSWSC 353](#):
 - Children's Court Magistrate saw that the case was going to take much longer and directed cross-examination to be limited to thirty minutes.
 - On appeal, this was held to be a denial of procedural fairness.

Leave, Permission or Direction may be Given on Terms:

Section 192 Leave, Permission or Direction may be Given on Terms:

- (1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given **on such terms as the court thinks fit**.
- (2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account--
 - (a) the extent to which to do so would be likely to **add unduly to, or to shorten, the length of the hearing**, and
 - (b) the extent to which to do so would be **unfair to a party or to a witness**, and
 - (c) the **importance of the evidence** in relation to which the leave, permission or direction is sought, and
 - (d) the **nature of the proceeding**, and
 - (e) the power (if any) of the court to **adjourn the hearing or to make another order or to give a direction** in relation to the evidence.

- Whenever leave, permission or direction is being sought, that leave, permission or direction may be given on terms by the judge and whether it is to be given and the terms it is given should be given or denied with the judge taking into account certain matters.
- **Stanoevski v The Queen (2001) 202 CLR 115:**
 - ◆ The accused raised a good character in her defence.
 - ◆ Prosecution sought leave to cross-examine her on an issue unrelated to the proceedings but could determine her good character. Leave granted.
 - ◆ HC held that the leave should not have been granted and was not strictly about a fact in issue and was more collateral and thus contravened s 192 (extra time, importance of evidence, unfairness to the accused, collateral issue carried little weight).
- **R v Reardon [2002] NSWCCA 203:**
 - ◆ Confirms that it is not necessary for a judge to expressly refer to s 192(2) when exercising their discretion.
 - ◆ Sets out a long list of circumstances where discretion could be used.

Exclusion of Evidence

General Discretion to Exclude Evidence:

Section 135 General Discretion to Exclude Evidence:

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**.

- Probative value refers to the extent to which evidence is relevant.
- Unfairly Prejudicial - **Papakosmas v The Queen (1999) 196 CLR 298** at [91]-[92]: