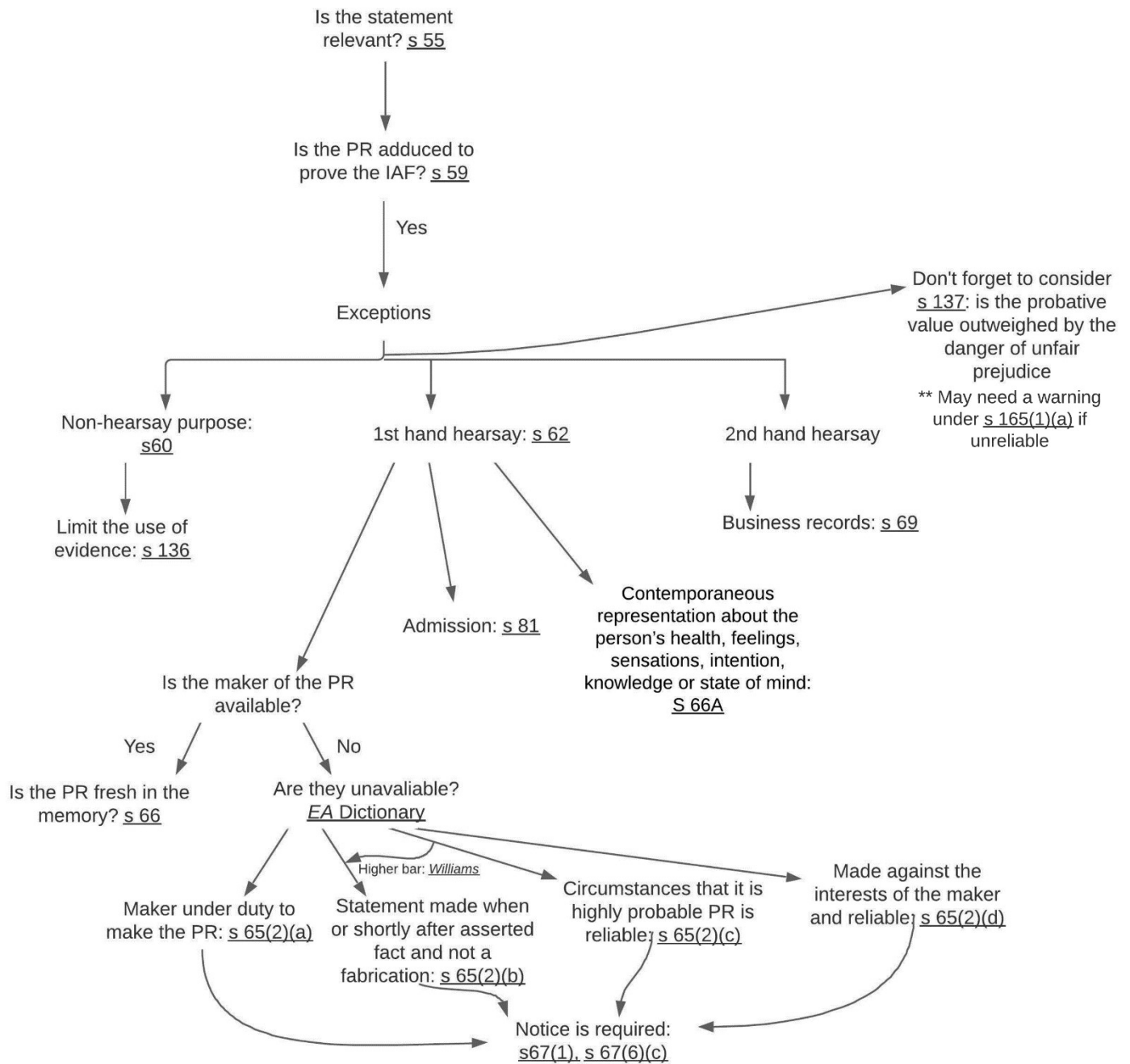


HEARSAY



1. GENERAL NOTES	5
2. RELEVANCE	6
a. Is the evidence relevant?	6
3. FACTS AND PROOF	8
A. Legal burden of proof	8
B. Proof of facts	9
2. ADDUCING EVIDENCE (competence and compellability)	10
Is X competent to give evidence?	10
Can X be compelled to give evidence	10
3. OPINION EVIDENCE	12
A. General Rule - s76(1)	12
B. Does an exception apply?	12
4. COMPARISON EVIDENCE	19
5. CREDIBILITY EVIDENCE	23
6. HEARSAY	29
7. TENDENCY AND COINCIDENCE	40
1. Is the evidence relevant for tendency and coincidence?	40
2. Can the evidence be used for tendency or coincidence?	40
3. Has notice been given if it is going to be used for a tendency / coincidence purpose?	40
4. Is there significant probative value?	41
5. In criminal proceedings, does the probative value of tendency / coincidence outweigh prejudicial effect on defendant?	46
8. ADMISSIONS	48
A. Was the statement an admission?	48
B. Admissions hearsay exception (s81)	48
C. Is it a first-hand admission? (s82)	49
D. Does a safeguard apply?	49
9. IDENTIFICATION EVIDENCE	57
10. CHARACTER EVIDENCE	63
11. DISCRETIONS AND WARNINGS	65
A. S135: General discretion to exclude evidence	65
B. S137: Where the risk of unfair prejudice outweighs the probative value	65
C. S138: Exclusion of evidence obtained improperly	68

2. RELEVANCE

- *This is the first thing to consider for ALL admissibility provisions - is the evidence relevant?*

Evidence that is relevant in a proceeding is admissible unless otherwise provided by the act (*s56(1) EA*).

Evidence that is not relevant is not admissible in the proceedings (*s56(2) EA*)

a. Is the evidence relevant?

Evidence is relevant in a proceeding if, if it were accepted, could rationally affect, either directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings (*s55(1) EA*)

Evidence is not merely irrelevant because it relates to:

- Only to the credibility of a witness (*s55(2)(a)*)
- The admissibility of other evidence (*s55(2)(b)*)
- Or a failure to adduce evidence (*s55(2)(c)*)

There needs to be a minimal logical connection between evidence and a fact in issue (*Smith*)

- **Very low threshold** = only needs to make fact in issue more or less probable than it would without it
 - Fact in issue = referring to the issues in the proceedings defined by substantive law and the pleadings (*ALRC 26, Vol 1 [641], n 3*)
- Evidence is generally admissible only if it tends to prove a fact in issue or a fact relevant to a fact in issue (*Goldsmith v Sandilands*)
 - Fact relevant to fact in issue = when it is so related to that fact...it proves or makes probable the past/present/future existence or non-existence of that other fact (*McHugh J in Goldsmith*)
- In determining this = A court assesses “the probability of the existence of a fact in issue” on the assumption that the evidence is reliable (*Papakosmas v The Queen*)
 - If the decision about whether evidence is relevant depends on a court finding, that evidence may be relevant if (*s57(1)*)
 - It is reasonably open to making a finding (*s57(1)(a)*); or
 - Subject to further evidence being admitted later that will make it reasonably open to make the finding (*s57(1)(b)*)

This assessment is to be undertaken that the evidence is credible and reliable (*Papakosmas: IMM*)

Smith v The Queen → Smith took place in a bank robbery and there was CCTV footage of a man robbing the bank. 2 police officers gave evidence that Smith was in the photos but no evidence that the police were in a better position than the jury to compare the image with the accused

- Held that the police evidence was **not relevant** → as the police assertion of identity was founded on material no different from the jury's the police evidence that he recognised the appellant is not evidence that could rationally affect the assessment by the jury of the question we have identified
- If the appearance of accused looks different to how the accused looks at the time of the trial then the evidence of how the accused looked at the time of the offence would not be irrelevant

Papakosmas v The Queen → Accused was convicted of sexually assaulting a fellow employee. 3 eyewitnesses gave evidence whereby complainant told them about the incident

- **Relevant** → the evidence, if accepted, could rationally affect the assessment of the probability of a fact in issue in the proceedings, the fact that the complainant did not have consent to have intercourse with the appellant and that the victim had complained about the assault at the first reasonable opportunity

Evans v The Queen → Armed robbery and involved security camera footage and they photographed man in sunglasses, balaclava and overalls. Appellant was asked to walk backwards and forwards in the overalls and say some of the words the robber said

- Gummow and Hayne JJ: not relevant → comparison could have been drawn without asking the appellant to dress up and this information could not rationally affect, directly or indirectly, the determination of any fact in issue
 - **It revealed nothing about the wearer and nothing about the appellant that was not already apparent to the jury observing him in the dock**
- Heydon and Crennan J: relevant → appearance of accused walking in overalls in front of the jury was capable of making an impression on jury that was both favourable and adverse to the accused
- Kirby J: relevant → in assessing probability one fact is whether the appellant was the offender who had committed the alleged crime
 - There were apparent similarities, in the jury's view, between appearance and conduct of the appellant and the earlier evidence and descriptions given
- **Note:** excluded evidence due to unfair prejudice for the accused

3. FACTS AND PROOF

- S4 EA - Act applies to all proceedings of in ACT courts including:
 - Bail
 - Interlocutory or similar proceedings
 - Chamber hearings
 - Sentencing proceedings (only if court directs: s4(2))

NOTE: all elements relating to the admissibility of evidence must be proved on the balance of probabilities (s 142(1))

A. Legal burden of proof

- Burden is not determined by evidence law, but by substantive law
- Legal burden in criminal cases
 - Prosecution bears the legal burden of proving each element of the offence in criminal cases ie there is a presumption of innocence (*Woolmington v DPP; s56 Criminal Code 2002*)
- Defences
 - Defendant has evidential burden to raise defences, but can also be sufficiently raised on prosecution's evidence
 - Evidential burden = burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter either exists or doesn't exist (*s558(7) CC*)

Proof in Civil Cases - Balance of Probabilities

- A court has to find that case of the party has been proved if it is satisfied on the balance of probabilities (*s140(1) EA*)
- Court can take in to account (*s140(2) EA*)
 - a) The nature of the cause of action of defence;
 - b) The nature of the subject matter of the proceedings; and
 - c) The gravity of the matters alleged
- The jury has to feel a sense of "actual or persuasion or its occurrence or existence before it can be found" (*Briginshaw v Briginshaw*)
 - *Briginshaw* → depends on the severity of the offence

Proof in Criminal Cases - Beyond Reasonable Doubt

- Court must not find case of the prosecution unless it is satisfied beyond reasonable doubt (*s 141*)
- Court cannot say anything beyond "a reasonable doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in circumstance" (*Green v The Queen*)
- Every element must be satisfied BRD, not every fact.

If there is a legal burden on defence