Proof: Part 2

Judicial Notice

Evidence Act 1995 (NSW)	
s 143	**Matters of law** (1) Proof is not required about the provisions and coming into operation (in whole or in part) of: (a) an Act, an Imperial Act in force in Australia, a Commonwealth Act, an Act of another State or an Act or Ordinance of a Territory, or (b) a regulation, rule or by-law made, or purporting to be made, under such an Act or Ordinance, or (c) a proclamation or order of the Governor-General, the Governor of a State or the Administrator or Executive of a Territory made, or purporting to be made, under such an Act or Ordinance, or (d) an instrument of a legislative character (for example, a rule of court) made, or purporting to be made, under such an Act or Ordinance, being an instrument that is required by or under a law to be published, or the making of which is required by or under a law to be notified, in any government or official gazette (by whatever name called). (2) A judge may inform himself or herself about those matters in any way that the judge thinks fit. (3) A reference in this section to an Act, being an Act of an Australian Parliament, includes a reference to a private Act passed by that Parliament. Note: Section 5 of the Commonwealth Act extends the operation of the equivalent Commonwealth section to proceedings in all Australian courts.
s 144	**Matters of common knowledge** (1) Proof is not required about knowledge that is not reasonably open to question and is: (a) common knowledge in the locality in which the proceeding is being held or generally, or (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned. (2) The judge may acquire knowledge of that kind in any way the judge thinks fit. (3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.

	(4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.
s 145	**Certain Crown certificates** This Part does not exclude the application of the principles and rules of the common law and of equity relating to the effect of a certificate given by or on behalf of the Crown with respect to a matter of international affairs.

- Proof isn't required for knowledge that is not reasonably open to question and is either (s144)
    - Common local knowledge (e.g. the location of a local landmark)
    - Capable of verification by reference to a document whose authority cannot reasonably be questioned
- Courts can take judicial knowledge of official statistics (*Wood*), but probably not of academic research (*Aytugral*; *Maluka*)

Woods v Multi-Sport Holdings (2002)

- Two types of judicial notice: with and without inquiry
- Courts may take judicial notice with inquiry of published statistics (McHugh J)

Aytugral v The Queen [2012]

- Research indicated that different ways of expressing DNA statistics carry greater persuasive potential. The court couldn't take judicial notice of this, as it was not something where the authority could not reasonably be affected.

Maluka v Maluka [2011]

- Judge in family law case did his own research into domestic violence by reading academic papers. This was in error—could not take judicial notice of this.

Inferences from Absence of Evidence

- Where important evidence is not called, and there is no obvious explanation for this, then the court can draw an inference that the evidence, if called, would not have assisted the party (*Jones v Dunkel*)
- Inference can't be drawn where there is an obvious explanation for not calling the evidence (*Fabre v Arenales*)
    - E.g. plaintiff has no prima facie case, witness not available

Jones v Dunkel (1959)

- **Facts:** J sued for negligence--her husband was killed in a car accident by a truck. No witnesses, truck driver H was not called to give evidence
- **Question:** Could the court draw an adverse inference from the fact that a key witness was not called by the respondent?
- **Held:** (Menzies J). Absence of witness does not change onus of proof
    - Direct evidence which might have been contradicted by witness can be accepted more readily if they fail to give evidence
    - Where you might draw an inference from circumstantial evidence, the fact the witness disputing it might have proved the contrary but didn't, can be taken into account in deciding whether to draw the inference
- So lack of evidence can assist the plaintiff's case in accepting evidence and drawing inferences. You can draw an inference that the evidence, if called, would not have assisted the party's case.

Evidence Act 1995 (NSW)	
s 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).

- In a criminal trial for an indictable offence, any party other than the prosecutor can make a comment about the defendant's failure to give evidence (s20)
- But the comment may not be made to suggest the defendant's guilt, unless made by a co-defendant (s20(2))
- Practically s20 comments are very rarely made by judges (*Azzopardi*)

Weissensteiner v The Queen (1993)

- **Facts:** Couple disappeared on a boat, accused was the only possible witness but didn't give evidence
- **Question:** Should the trial judge make a comment on this?
- **Held:** Generally, there would be no reason to comment on silence of accused. But should comment where a hypothesis consistent with innocence ceases to be rational or reasonable in the absence of evidence to support it, and that evidence, if it exists, must be within the knowledge of the accused. The failure of the accused to give evidence is a circumstance that may bear on the probative value of the evidence that has been given.

Azzopardi v The Queen (2001)

- **Facts:** Trial judge gave a *Jones v Dunkel* style direction about the failure of the defendant to give evidence.
- **Question:** Was this a suggestion contrary to s20(2)?
- **Held:** HCA pointed out that *Weissensteiner* was particular to cases where the only direct evidence which could be given was by the accused, as the accused was the only one who had knowledge of the facts, and the accused didn't. This case wasn't that type of situation.
    - "Cases in which the judge may comment…are rare and exceptional". Should not comment just because "the defendant has failed to contradict some aspect of the prosecution case"

Dyers v The Queen (2002)

- *Azzopardi* also applies to a failure of defence to call witnesses—judge shouldn't give a *Jones v Dunkel* direction just because the defence fails to call a witness who might support the defendant's alibi.

Warnings about Potentially Unreliable Evidence

Evidence Act 1995 (NSW)	
s 164	**Corroboration requirements abolished** (1) It is not necessary that evidence on which a party relies be corroborated.

	(2) Subsection (1) does not affect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a similar or related offence. (3) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge: (a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect, or (b) give a direction relating to the absence of corroboration.