

Evidence Notes

Topic 1: Intro

The Uniform Evidence Acts

The **2008 Victorian Evidence Act** is based on legislation that has been operational in NSW and Federal courts since 1995.

- It has been operational in Victoria since 2010.
- The Uniform Evidence Act extinguishes most of the common law rules with the goal of uniform evidential rules in all state, territorial and federal courts.
- There are many similarities between the common law evidential rules and the Legislative evidential rules that we look at.
- Since the NSW, the Commonwealth, the Tasmanian and the Victorian Evidence Acts are almost entirely uniform; it is acceptable to reference cases from any of the jurisdictions with the uniform legislation.

Evidence law: rules that determine the information that fact-finders can and cannot receive to resolve factual issues in dispute in civil and criminal proceedings

Evidence law in Victoria:

- **Evidence Act 2008 (Vic);**
- **Criminal Procedure Act 2009 (Vic);**
- **Evidence (Miscellaneous) Provisions Act 1958 (Vic);**
- **Case law**

Structure of the Act:

Part 1 = formal/preliminary matters

Part 2 = witnesses/documents/other evidence

Part 3 = rules about admissibility of evidence

Part 4 = issues re proving matters

UEA test of admissibility of evidence:

1. Is the witness competent?
2. Is the evidence relevant?
3. Is the evidence excluded by application of exclusionary rule or privilege?
4. Is the evidence excluded by operation of a discretion?

Objectives of Evidence Law (pg.3):

-Primary purpose is prompt, accurate and rational fact finding

Three relevant objectives:

1. Truth
2. Discipline
3. Protection

Criminal proceedings

State (prosecution/Crown) brings proceedings against individual (accused/defendant) who is suspected of committing crime with aim of vindication/punishment, and must adduce evidence to prove each element of charge and rebut defences

Civil proceedings

Plaintiff brings proceedings against defendant who it claims committed legal wrong with aim of redress for plaintiff, and must adduce evidence to prove each element of cause of action and rebut defences

'Rule in *Jones v Dunkel*'

If party, without giving satisfactory explanation, does not call witness who would reasonably be expected to give evidence, adverse inference can be drawn that witness's evidence would not have assisted party's case

- Prosecution has an obligation to call all relevant and credible witnesses
- Rule does not apply to the accused in criminal cases

Order of proceedings (pg. 22)

Examination in chief -> cross-examination -> re-examination

Voir dire (pg. 24)

Separate hearing from main trial (usually conducted without jury) for court to decide 'preliminary question', i.e. question of fact that judge must determine to decide whether evidence should be admitted, evidence can be used against a person, or witness is competent or compellable

-Usually conducted in absence of jury unless judge orders otherwise

-Trial within a trial

Section 189:

<p style="text-align: center;">Section 189 - The voir dire:</p> <p style="text-align: center;">(1) If the determination of a question whether—</p> <p>(a) Evidence should be admitted (whether in the exercise of a discretion or not); or</p> <p style="padding-left: 40px;">(b) Evidence can be used against a person; or</p> <p>(c) A witness is competent or compellable—depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.</p>
<p style="text-align: center;">Section 189(2): If there is a jury, a preliminary question whether—</p> <p>(a) Particular evidence is evidence of an admission, or evidence to which <u>section 138</u> (Discretion to exclude improperly or illegally obtained evidence) applies; or</p> <p>(b) Evidence of an admission, or evidence to which <u>section 138</u> applies, should be admitted— is to be heard and determined in the jury's absence.</p> <p>(4) If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the court so orders</p>
<p>Section 189(8): If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a witness at the hearing unless—</p> <p>(a) It is inconsistent with other evidence given by the witness in the proceeding; or</p> <p style="padding-left: 40px;">(b) The witness has died</p>

DPP v Zhang (pg. 24)

Party seeking voir dire must convince court to exercise discretion to grant it by establishing reasonable grounds, and court must identify party's objection to admission of evidence (which gives rise to voir dire) and the basis for it, and rule on whether the evidence has been admitted into the proceeding [*DPP v Zhang*]

-Crucial that the judge identifies the reason for the voir dire

Burden of proof (pg. 25)

-The **Evidence Act** does not regulate burden of proof, it is regulated by *common law principles*.

-As a general rule the party who makes the allegation must provide relevant evidence that supports it:

- Prosecution in **criminal proceedings**
- Plaintiff in **civil proceedings**

Legal and Evidential Burdens (pg. 26)

Evidential burden of proof: party must adduce sufficient evidence before fact-finder will be required to consider it (party must establish *prima facie* case)

-Court examines volume and weight of evidence

-Is there sufficient evidence to make out a case?

Legal/ultimate burden of proof: party must adduce evidence that is persuasive, i.e. persuades the fact-finder to reach particular conclusion

-Persuasive enough to rule in favour of a particular party

-Does the evidence yield a persuasive argument to prove the case?

Criminal proceedings: prosecution must discharge evidential and legal burden; defence only needs to discharge evidential burden if pleads insanity or raises defence

Civil proceedings: evidential and legal burden on party making a claim

Standard of proof (pg. 26-30)

Determines whether party has proven allegation

Criminal proceedings: prosecution must prove every element of charge that accused is guilty beyond reasonable doubt, and accused must only prove defence on balance of probabilities

Section 141: Criminal proceeding standard of proof (pg. 29)

Section 141:

- (1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.
- (2) In a criminal proceeding, the court is to find the case of an accused proved if it is satisfied that the case has been proved on the balance of probabilities

Civil proceedings: party must prove case on balance of probabilities

Section 140: Civil proceeding standard of proof (pg. 26-27)

Section 140

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account—
 - (a) The nature of the cause of action or defence; **and**
 - (b) The nature of the subject-matter of the proceeding; **and**
 - (c) The gravity of the matters alleged.

Require stronger evidence to prove fact on balance of probabilities in civil proceeding if allegation/consequences of matter disputed are particularly serious, but court need only be 'reasonably satisfied' : **Dixon J, *Briginshaw v Briginshaw***;

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission