UEA Governs the Trial Process

1. What is included in a trial?
   a. Preservation of the general powers of a court: s 11
      i. Subject to the other provisions of the UEA, s11 preserves the common law power of a court to control its own proceedings.
   b. Court's control over questioning witness: s 26
      i. s 26 confirms a judge's power to control the questioning of witnesses. It is specified in addition to the general power to control a proceeding (which is preserved by s11).
   c. Parties may question witnesses: s 27
      i. According to s 27, a party may question any witness, subject to the limitations imposed by the Act.
   d. Order of examination in chief, cross-examination and re-examination: s 28
      i. Subject to a direction by a court to the contrary, the UEA requires that:
         - cross-examination not take place before the examination in chief of the witness; and
         - re-examination not take place before all other parties who wish to do so have cross-examined the witness.
   e. Manner and form of questioning witnesses and their responses: s 29
      i. The UEA allows a party to question a witness in any way the party thinks fit, except as limited by Chapter 2 (Adducing Evidence) or as directed by the court (s29(1)).
      ii. A court, either of its own motion or on the application of the party calling the witness, may direct a witness to give evidence wholly or partially in narrative form (s29(2)).
      iii. Section 29(4), which permits evidence to be given in the form of charts, summaries and other explanatory material, also applies to evidence from 'evidence gatherers', experts and opinion givers.
2. Structure of the UEA
   a. Preliminary matters (Ch 1)
   b. Adducing Evidence (Ch 2) – How the evidence is to be presented to the court
   c. Admissibility (Ch 3) – What evidence can be adduced or taken into account
   d. Proof (Ch 4) – How the court, whether it be a judge or jury, decides the issues
3. Relationship between the UEA, the CL and other statutes
   a. Operation of other Acts: s 8
      i. Section 8 preserves the operation of the provisions of other Acts
         - So, all other statutory rules of evidence override the UEA, whether they were enacted before the Act or after it.
   b. Application of common law and equity: s9
      i. Section 9 preserves principles or rules of common law or equity relating to evidence in proceedings to which the Act applies, except if the Act provides otherwise (either expressly or by necessary intendment).
         - So the common law of evidence and procedure survives under the UEA.
         - Where the UEA makes express provision which varies from the common law, it is the language of the statute which determines the issue, and the meaning and effect of the provision is not to be determined in accordance with the pre-existing common law: Papakosmas v R (1999) — for example, "except as otherwise provided by this Act".
4. Trial within a trial — The voir dire
   a. "Preliminary questions" are determined on a voir dire: s 189.
      i. If the determination of a question whether: s 189(1)
         - evidence should be admitted; or
         - evidence can be used against a person; or
         - a witness is competent or compellable

      depends on the court finding that a particular fact exists,
      the question whether that fact exists is a **preliminary question**.
         - The existence of 'a fact in issue' in a particular hearing must be determined on the balance of probabilities (s142).
   b. Absence of jury
      i. Preliminary question as to admissibility of evidence of an admission or whether evidence has been legally or improperly obtained must be heard without the jury: s 189(2)
      ii. Jury generally not present at hearing of a preliminary question unless court otherwise orders: s 189(4).
   c. Evidence not otherwise admissible
      i. Evidence at preliminary question hearing not admissible in trial, unless: s 189(8)
         - it is inconsistent with other evidence given by witness in the proceeding; or
         - the witness has died.

Objection

- *Where the other party objects to the adducing/admissibility of evidence or to a direction being given.The Judge has to rule on that objection. If you succeed on the objection, it may be excluded. Even if you don't succeed, the objection is important because you can later appeal from it.*
- *In practice, it will often be necessary for a party to object to evidence or a question eliciting evidence before a court will ensure strict compliance with the provisions of the uniform evidence legislation.*
  - *In civil cases, a failure to object to evidence will usually prevent the point being raised on appeal as it has been waived.*
  - *In criminal appeals, rule 4 of the Criminal Appeal Rules (NSW) provides that there can be no appeal after a failure to object to evidence at trial without the leave of the Court of Criminal Appeal.*
- *On the other hand, leave to rely on failure to object will be granted only where the appellant can demonstrate that he or she has lost a real chance (or a chance fairly open) of being acquitted: Picken v The Queen.*

Calling a Witness

1. Who can call a witness?
   a. Judges
      i. Any common law powers the judge holds with respect to the examination of witnesses are preserved by s 11.
      ii. s 26 also confirms the power of the court to make such order "as it considers just in relation to", among other thing,
         - the way in which witnesses are to be questioned: (a)
         - the order in which parties may question a witness: (c).
      iii. Substantive law (case law):
         - In civil cases, a judge can not call a witness without the consent of both parties: Clark Equipment Credit v Como.
         - In criminal proceedings, save in the most exceptional circumstances, a trial judge should not himself call a person to give evidence: R v Kneebone
            - For example, unrepresented accused which the judge suspects that the accused has a mental problem (can call a psychologist as an expert witness) (Damic). – It's pretty rare.
   b. Prosecution
      i. General rule
         - In criminal proceedings, the Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown: R v Apostilides, R v Kneebone
            - The defendant is generally under no obligation to call evidence, or to testify himself because onus of proof resting on the prosecution.
         - The general rule is that all witness necessary for the presentation of the whole picture of a case, notwithstanding that they give accounts inconsistent with the Crown case, should be called by the prosecution unless valid reason exists, for example, that the interests of justice would be prejudiced: R v Kneebone, Velevski v The Queen.
            - This is because the prosecutor is bound to ensure that the prosecution case is presented with fairness to the accused.
         - In most cases where a prosecutor does not wish to lead evidence from a witness but the defendant wishes that person to be called, it will be sufficient for the prosecutor simply to call the person so that he may be cross-examined by the defendant and then, if necessary, be re-examined: R v Kneebone.
      ii. Where no need to call evidence
         - No need to call a witness, whose evidence he judges to be unreliable, untrustworthy or otherwise incapable of belief: R v Kneebone.
            - It is necessary for a prosecutor to point to identifiable factors which justify a decision not to call a material witness on the grounds of unreliability.
            - But mere a feeling or intuition, for example, suspicion, scepticism and errors on subsidiary matters will not suffice to constitute unreliability.
         - No need to tender equal numbers of expert witnesses for competing opinions, especially where the witness evidence has not already been in possession: Velevski v The Queen.
   c. Parties in civil cases

Sworn and Unsworn Evidence

- If witness is able to give sworn testimony, s 21 governs the making of sworn evidence – there must either be an oath or an affirmation.
  - However, a person who is called merely to produce a document or thing to the court need not take an oath or make an affirmation before doing so: s 21(2).
- If there is an interpreter involved, he or she too must take an oath/affirmation: s22.
  - Witness may give evidence of a fact through an interpreter if they do not understand and speak English sufficiently to make an adequate reply: s 30.
- The witness has a choice between the oath and the affirmation: s23.
  - An affirmation is a declaration that the witness will speak the truth and nothing but the truth.
- An oath doesn't require a religious text and the key requirement is that the witness feels bound by whatever oath is administered: s 24
  - Section 24A clarifies that a person may take an oath even if the person's religious or spiritual beliefs do not include the existence of a god. — no belief in religion necessary for oath.

Competence and Compellability of Witness

The availability of a person as a witness depends on the twin question of competence and compellability.

Competence

1. *All person must be competent to give evidence.*
   a. *Rebuttable* ***presumption***
      i. *There is a rebuttable presumption that every person has the mental, intellectual and physical capacity to give evidence (s12 and s13(6)).*
         - *The process to rebut the presumption (s 13(6) involves invoking the voir dire. Accordingly, the question of whether a person is competent to give evidence must be determined in the absence of any jury: s189(1).*
            - *The burden of proof will be on the party asserting that a witness is not competent.*
         - *The presumption of competency (s13(6)) means a court will not find a lack of competency because of a lack of capacity unless it is satisfied 'on the balance of probabilities' (s142) that there is a lack of capacity.*
   b. *When is the presumption rebutted? —* ***capacity***
      i. *A person will not be competent if despite understanding the obligation to give truthful evidence they suffer some mental, intellectual or physical disability. — following two tests: s 13(1) — If answer NO, presumption is rebutted, no capacity.*
         - *does the person have the capacity to understand a question about the fact?*
         - *does the person have the capacity to give an relevant answer?*
         - *In determining whether an incapacity can be overcome, it may be relevant to consider s30 (Interpreters) and s31 (Deaf and mute witnesses): SH v The Queen.*
         - *The two tests for determining incompetence are directed to the person's capacity in respect of individual questions. Therefore, it may be necessary to determine a person's capacity on multiple occasions.*
            - *This is because a person may be capable of giving evidence about certain facts but not about others (s13(2)).*
   c. *When is a person incapable of giving* ***sworn evidence?***
      i. *A person must understand the obligation to give truthful evidence in giving sworn evidence about a fact: s 13(3).*
   d. *A person incapable of giving sworn evidence may be able to give* ***unsworn evidence***
      i. *In such a case, the person may give unsworn evidence if the court has told the person: s 13(4) and (5)*
         - *it is important to tell the truth; and*
         - *he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this happens; and*
         - *he or she may be asked questions that suggest certain statements are true or untrue, and*
            - *that he or she should agree with the statements which he or she believes are true and should feel no pressure to agree with the statements which he or she believes are untrue.*
         - *The word "may" in sub-s (4) does not mean there is a discretionary power to refuse to allow a witness to give unsworn evidence: SH v R.*
         - *Strict compliance with sections 13(4) and (5) is a necessary precondition to the witness being permitted to give unsworn evidence.: SH v R.*
            - *Failure to determine whether the witness is competent to give sworn evidence or failure to give any part of the instruction will vitiate the trial process*
         - *For a witness to give unsworn evidence pursuant to s13(5), the requirements of s13(1) must be satisfied and the court must tell the person of the matters contained in s13(5)(a), (b) and (c). Once these requirements are satisfied, there is no discretion to refuse to allow the person to give unsworn evidence: SH v R. — element: s 13(1)+s 13(4) + s 13(5)*
         - *If there is a unsworn evidence, it may be necessary to warn the jury that the witness is incompetent to give sworn evidence.*
   e. ***Incompetent witness***
      i. *A defendant in criminal trial is not competent to give evidence as a witness for prosecution (against himself): s 17(2).*
      ii. *A person who is a judge or juror in a proceeding is not competent to give evidence in that proceeding: s 16(1).*
   f. *Consequence of death, or loss of competence, of a witness*
      i. *Evidence does not become inadmissible merely because the witness who gave it dies, or becomes incompetent, after starting to give evidence but before finishing (s13(7)).*
         - *However, the court may, in its discretion, exclude evidence in these circumstances.*
   g. *Court may "inform itself as it thinks fit"*
      i. *In determining a question about competence for lack of capacity, the court may 'inform itself as it thinks fit' and may obtain information from a person who has relevant specialised knowledge based on the person's training, study or experience: s13(8).*