

EVIDENCE LAW SUMMARY



LAWSKOOL.COM.AU

LAWSKOOL PTY LTD

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF CASES 4

TABLE OF STATUTES 6

TOPIC 1: THE NATURE OF EVIDENCE AND PRELIMINARY ISSUES 7

 1.1 SOURCE OF EVIDENCE LAW AND APPLICATION 7

 1.1.1 *Legislative Changes* 8

 1.1.3 *Criminal versus civil proceedings* 8

 1.1.4 *General structure of the Evidence Act* 9

 1.2 FACTS WHICH CAN BE PROVED WITHOUT EVIDENCE 10

 1.2.1 *Waiver of rules of evidence* 10

 1.2.2 *Agreed facts and admissions* 11

 1.2.3 PRELIMINARY QUESTIONS 11

TOPIC 2: ADDUCING EVIDENCE 12

 2.1 TYPES OF EVIDENCE 12

 2.1.1 *Testimony evidence – oral evidence from witnesses* 12

 2.1.2 *Identification Evidence* 25

 2.1.3 *Documentary Evidence* 26

TOPIC 3: OTHER EVIDENCE – REAL EVIDENCE AND VIEWS 29

 3.1 REAL EVIDENCE 29

 3.2 VIEWS 30

TOPIC 4: PROOF 31

 4.1 BURDEN AND STANDARDS OF PROOF 31

 4.1.1 *The legal burden of proof* 31

 4.1.2 *The evidential burden of proof* 31

 4.1.3 *Standards of proof* 31

 4.2 PRESUMPTIONS, INFERENCES AND JUDICIAL NOTICE 32

 4.2.1 *Presumptions under common law* 32

 4.2.2 *Presumptions under the Act* 33

 4.2.3 *Inferences* 33

 4.2.4 *Judicial notice* 33

 4.3 JURY DIRECTIONS 36

 4.3.1 *Inferences from the absence of evidence – the rule in Jones v Dunkel* 37

 4.3.2 *Jury warnings about unreliable evidence* 37

 4.3.3 *Common law warnings* 38

 4.3.4 *Jury directions regarding standard of proof in criminal proceedings* 38

TOPIC 5: ADMISSIBILITY OF EVIDENCE	40
5.1 GENERAL STRUCTURE OF ENQUIRY AS TO ADMISSIBILITY OF EVIDENCE	40
5.2 RELEVANCE	43
5.3 THE HEARSAY RULE AND ITS EXCEPTIONS	44
5.3.1 <i>Exception under section 60: evidence relevant to a non-hearsay purpose</i>	45
5.3.2 <i>First hand hearsay: criminal proceedings if maker not available</i>	46
5.3.3 <i>First hand hearsay – representations which are fresh in the memory</i>	48
5.3.4 <i>Remote Hearsay Exceptions: Business Records</i>	49
5.3.5 <i>Contemporaneous statements about a person’s health, feelings, sensations, intention, knowledge or state of mind: section 66A</i>	50
5.3.6 <i>Hearsay in other types of proceedings</i>	50
5.3.7 <i>Lay Opinion</i>	50
5.4 EXPERT OPINION EVIDENCE: SECTION 79	52
5.5 ADMISSIONS	55
5.5.1 <i>Admissions made in the course of official questioning</i>	56
5.5.2 <i>The situation and circumstances surrounding the admission</i>	56
5.5.3 <i>Section 90 – discretion to exclude admissions</i>	57
5.6 TENDENCY AND COINCIDENCE EVIDENCE	57
5.6.1 <i>The Tendency Rule: section 97</i>	58
5.6.2 <i>The Coincidence Rule: section 98</i>	59
5.6.2.1 <i>Related events</i>	60
5.6.3 <i>Criminal proceedings and tendency and coincidence evidence</i>	60
5.7 THE CREDIBILITY RULE AND ITS EXCEPTIONS	61
5.7.1 <i>Interpretation of the credibility rule</i>	61
5.7.2 <i>Exceptions to credibility: cross-examination</i>	62
5.7.3 <i>Cross-examination of the accused</i>	63
5.7.4 <i>Character evidence about a defendant</i>	64
5.7.5 <i>Rebutting denials by other evidence</i>	64
TOPIC 6: EXCLUSION OF EVIDENCE THROUGH JUDICIAL DISCRETION	66
TOPIC 6. EXCLUSION OF EVDIENCE BY THE JUDICIARY	67
6.1 SECTION 135 – GENERAL DISCRETION TO EXCLUDE EVIDENCE	67
6.1.1 <i>Unfairly prejudicial</i>	67
6.1.2 <i>Misleading or confusing</i>	68
6.2 SECTION 136 – GENERAL DISCRETION TO LIMIT THE USE OF EVIDENCE	68
6.3 SECTION 137 – EXCLUSION OF PREJUDICIAL EVIDENCE IN CRIMINAL PROCEEDINGS	69
6.4 SECTION 138 – IMPROPERLY OR ILLEGALLY OBTAINED EVIDENCE	70
6.4.1 <i>What does ‘improperly’ mean?</i>	70
6.4.2 <i>Factors the court can take into account in balancing the considerations</i>	71
6.5 SECTION 192 – DISCRETION TO GIVE LEAVE	72

TOPIC 7: PRIVILEGE.....73

7.1 OVERVIEW73

7.2 CLIENT LEGAL PRIVILEGE73

7.3 RELIGIOUS CONFESSIONS74

7.4 PRIVILEGE RELATING TO SELF-INCRIMINATION IN OTHER PROCEEDINGS74

7.5 PUBLIC INTEREST EXCEPTIONS.....75

Sample

TABLE OF CASES
Cases

<i>Adam v The Queen</i>	22, 43, 61
<i>Allstate Life Insurance Co v ANZ Banking Group Ltd (No 5)</i>	50
<i>ASIC v Vines</i>	53
<i>Azzopardi v The Queen</i>	36
<i>Beaman v Bond & Anor (No.2) [2016] FCCA 3249 (23 December 2016)</i>	67
<i>Brown v Dunn</i>	23
<i>Commissioner for Railways (NSW) v Young</i>	26
<i>Coulstock</i>	70
<i>Daubert v Merrell Dow Pharmaceuticals</i>	53
<i>Dhanhoa v The Queen</i>	26
<i>Dragan Cvetkovic v R</i>	48
<i>Dyers v The Queen</i>	37
<i>Foster v The Queen</i>	57
<i>Gillett v Murphy</i>	30
<i>Graham v The Queen</i>	48, 65
<i>Green v The Queen</i>	38
<i>HG v The Queen</i>	52
<i>Howlett v Budd</i>	39
<i>Jacara Pty Ltd v Perpetual Trustees WA Ltd</i>	59
<i>Jones v Dunkel</i>	37
<i>Jones v The Queen</i>	38
<i>Jones v Toben</i>	35
<i>Kelly v The Queen</i>	56
<i>La Fontaine v R</i>	38
<i>Lee v Burn</i>	32
<i>Lee v The Queen</i>	45
<i>LS v DPP</i>	15
<i>Makita (Australia) Pty Ltd v Spowles</i>	54
<i>Mark Raymond Pollard v R</i>	69
<i>NAB v Rusu</i>	28
<i>Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)</i>	28
<i>Papakosmas v The Queen</i>	43, 67, 69
<i>Pollitt v The Queen</i>	38

<i>R v A2; R v KM; R v Vaziri (No. 21) [2016] NSWSC 24 (5 February 2016)</i>	18
<i>R v Adler</i>	25
<i>R v Barbaro</i>	49
<i>R v BD</i>	67
<i>R v BI (No 3) [2016] ACTSC 356 (12 December 2016)</i>	63
<i>R v Butera</i>	53
<i>R v Dalley</i>	71
<i>R v DGB</i>	38
<i>R v Gee</i>	49
<i>R v Hodge</i>	39
<i>R v Hogan</i>	22
<i>R v Leung</i>	54
<i>R v Lockyer</i>	59, 62
<i>R v Lozano</i>	22
<i>R v Magoulias</i>	35
<i>R v Munce</i>	56
<i>R v Rose</i>	25
<i>R v RPS</i>	62
<i>R v Sophear Em</i>	57
<i>R v Stewart</i>	37
<i>R v Suteski</i>	47
<i>R v Swaffield</i>	57
<i>R v Taylor</i>	56
<i>R v Vinh Le</i>	48
<i>Reading v ABC</i>	68
<i>Shepherd v The Queen</i>	39
<i>Smith v the Queen</i>	43
<i>Stanoevski v The Queen</i>	72
<i>Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd</i>	54
<i>TKWJ v The Queen</i>	72
<i>Townsend v Townsend</i>	59
<i>W v The Queen</i>	60
<i>Wakeley v The Queen</i>	20
<i>Weissensteiner v The Queen</i>	36
<i>Williams v The Queen</i>	47
<i>Wojcic v Incorporated Nominal Defendant</i>	24
<i>WSJ v R</i>	48

TABLE OF STATUTES

<i>Evidence (Children) Act 1997 (NSW)</i>	14
<i>Evidence (Records and Documents) Act 2015 (SA)</i>	9
<i>Evidence Act 1906 (WA)</i>	8
<i>Evidence Act 1929 (SA)</i>	8
<i>Evidence Act 1939 (NT)</i>	8
<i>Evidence Act 1971 (ACT)</i>	8
<i>Evidence Act 1995 (Commonwealth)</i>	8
<i>Evidence Act 1995 (Cth)</i>	8
<i>Evidence Act 1995 (NSW)</i>	8, 56, 79
<i>Evidence Act 1997 (Qld)</i>	8
<i>Evidence Act 2001 (Tas)</i>	8
<i>Evidence Act 2008 (Vic)</i>	8

Sample

TOPIC 1: THE NATURE OF EVIDENCE AND PRELIMINARY ISSUES

The laws of evidence consist of the rules and principles applied by courts in the process of fact-finding at a trial. The ‘facts in issue’ are those that the plaintiff or prosecutor and the defendant or accused must ultimately prove in order to be successful.¹

To determine what the ‘facts in issue’ are, first look at:

1. the substantive rules of law;
2. the pleading (in civil cases) or the charge and plea (in criminal cases); and then
3. the manner in which the case is conducted.

1.1 Source of evidence law and application

Evidence is determined by both the common law and the various evidence statutes in existence.² Every State and Territory is now a ‘uniform evidence legislation’ jurisdiction and is governed by evidence legislation that reflects the *Evidence Act 1995* (Commonwealth). We use the *Evidence Act 1995* (Commonwealth) [herein referred to as “Evidence Act”] as the model for our summary. Note that the Evidence Act applies only to matters within federal jurisdiction.³

For the Evidence Act to apply the proceeding must be in a federal court (that is, the High Court, Federal Court, Family Court or the Federal Magistrates Court).

¹ P Waight and B Williams *Evidence Commentary and Materials* Sixth Edition. Lawbook Co. Casebook. 2002 Pyrmont NSW.

² *Evidence Act 1971* (ACT); *Evidence Act 1995* (NSW); *Evidence Act 1939* (NT); *Evidence Act 1997* (Qld); *Evidence Act 1929* (SA); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic); *Evidence Act 1906* (WA).

³ However, note that section 4 of the *Evidence Act 1995* (Cth) states that the Act applies to all Federal Courts and tribunals as well as courts of the Australian Capital Territory. Section 8 provides that the Act does not affect the operation of any legislation or regulation in force in the ACT, including the *Evidence Act 1971* (ACT). Note also that section 5 provides a table of certain sections that have extended application to all proceedings in an Australian court.

In the ACT, Northern Territory, New South Wales, Tasmanian and Victorian the Evidence Acts generally mirror the Commonwealth Evidence Act and its admissibility requirements.

In other jurisdictions, the laws of evidence may vary. See the separate Acts in Queensland (Evidence Act 1977 (Qld)), South Australia (Evidence Act 1929 (SA)) and Western Australia (Evidence Act 1906 (WA)) for the comparable provisions contained herein.

1.1.1 Legislative Changes

- The *Evidence (Records and Documents) Act 2015* (SA) commenced on 4 April 2016 and applies to South Australia's use of electronic messages and records. According to the Hon Jon Rau in the *South Australia Parliamentary Debates* (House of Assembly, 23 September 2015, 2677-2678),
- *"This Bill will provide South Australia with a workable and effective framework for the use in court proceedings of this type of evidence and will bring South Australia in line with the law in other jurisdictions."*

1.1.3 Criminal versus civil proceedings

Note that certain provisions of the Evidence Act will only apply to criminal proceedings. For the purposes of the Evidence Act, a criminal proceeding is a prosecution for an offence – including bail hearings, committal hearings, and sentencing. A civil proceeding is anything other than a criminal proceeding.

Criminal provisions only:

- Section 17 – competence and compellability of defendants in criminal proceedings;
- Sections 18 and 19 - competence and compellability of spouses in criminal proceedings;
- Section 20 – comment on failure of criminal defendant to give evidence;
- Section 33 – evidence given by police officers in criminal proceedings;
- Sections 65 and 66 – first-hand hearsay in criminal proceedings;
- Section 85 – reliability of admission by criminal defendants;
- Sections 86, and 89 – 90 – information obtained in the course of official questioning;
- Section 101 – further restrictions on tendency and coincidence evidence tendered by prosecution;

- Section 104 – cross-examination of the accused;
- Parts 3.8 and 3.9 – character and identification;
- Section 137 – judicial discretion to exclude prejudicial evidence;
- Section 141 – criminal standard of proof; and
- Section 184 – admitting facts by accused.

1.1.4 General structure of the Evidence Act

The general structure of the Evidence Act is as follows:

- **Adducing evidence:** providing materials in a court to prove or disprove a fact in issue. The types of evidence that can be put before a court are: oral testimony of a witness; documentary evidence; and real evidence.
 - Part 2.1: Witnesses;
 - Part 2.2: Documents;
 - Part 2.3: Other evidence
- **Admissibility of evidence:** conditions for admissibility of the evidence and the restrictions on what evidence can be considered. Only evidence relevant to a proceeding and complying with the other rules of evidence is admissible in a proceeding.⁴ Relevance is the most important aspect and starting point of the law of evidence, as if evidence is considered irrelevant it will be inadmissible without the need to consider the other rules.

◆◆◆◆

**To order the complete version of the Lawskool Evidence Law
Summary please visit www.lawskool.com.au**

⁴ P Nygh and P Butt (general editors) *Butterworths Concise Australian Legal Dictionary*. Second edition, 1998.