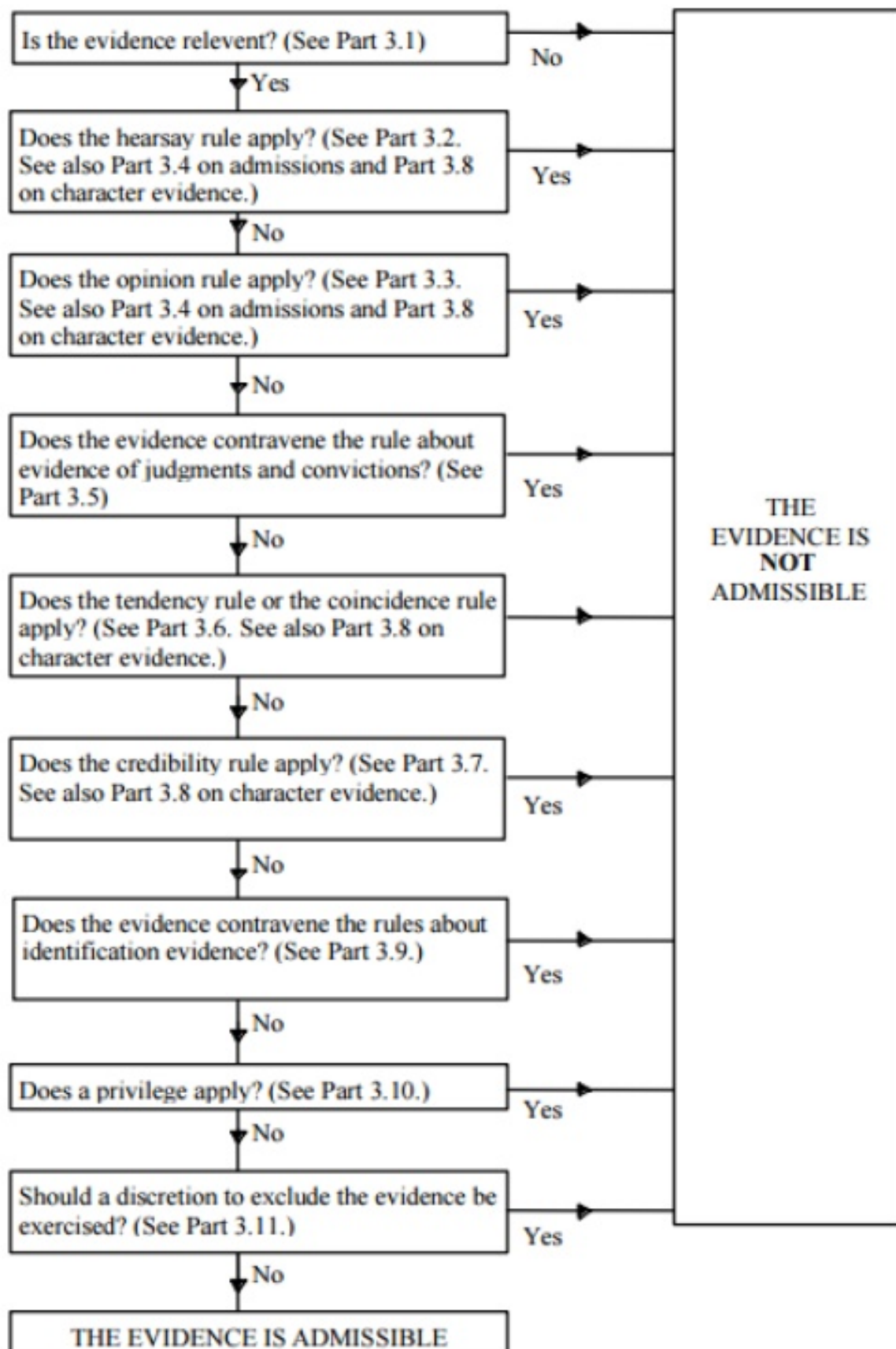


LAWS2351 Problem Question Notes



Background

Core Principles

1. **Has the accused raised an affirmative defence?**
 - a. **Burden of proof:** Is on the prosecution to prove guilt BRD (fundamental principle) and the defence does not need to do anything unless they raise an affirmative defence: **Lee (No 1) v NSW Crime Commissioner**
 - b. The prosecution must discharge its onus of proof without compelling the accused to give evidence: **Lee (No 1) v NSW Crime Commissioner**
 - i. A is not competent to give evidence for P: **s 17(2) UAE**
2. **Has the prosecution called all material witnesses?**
 - a. The prosecution must call all material witnesses even if they are not beneficial to the prosecution case: **Lee (No 1) v NSW Crime Commissioner**
 - b. Prosecution does not need to call a witness who is not a witness to the truth: **Apostilides**

Screening

Has the accused been charged with an indictable offence?

1. The charge will usually require a committal proceeding - this is a screening process to determine whether the prosecution case is strong enough to go to trial
 - a. **Court attendance notice:** This needs to be initiated through a CAN which must be presented to a magistrate
 - b. The accused is not to be called upon to plead
 - c. It is usual practice for the committal proceeding to be conducted without calling witnesses, and certainly not calling all witnesses
 - d. If the defence wishes to test the prosecution case it may request particular prosecution witnesses to be called for cross examination
 - i. A magistrate may only direct a witness to attend *'if satisfied that there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence'*
2. The NSW standard for committing to trial is whether *'there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused person of an indictable offence'*: **s 64 CPA**
3. The indictment will typically then be filed after a 'true bill' has been found at committal
4. **Ex officio indictment:** Or the prosecution may proceed with an indictment irrespective of a magistrate's determination but there still must have been a committal

Criminal Pleadings

1. **What are the pleadings that have been made?**
 - a. The indictment, the information, a CAN
 - b. Pleadings set the jurisdictional limits to hear and determine charges
 - c. To determine the legal and factual elements of the case that the prosecution must prove and the defence is on notice to meet
 - i. They must describe the time, the place and the manner in which the alleged offence took place
 - ii. They create the boundaries that apply to the admissibility of evidence

2. **Has there been a minor defect in the pleadings?** There is a broad scope to amend and waive minor defects
3. **Has there been a major defect in the pleadings?**
 - a. **Overview:** Because of the pivotal role of the charge in the trial, and as a fundamental aspect of a fair trial, there are baseline and often technical requirements of pleadings – If they are not met and as a result a pleading defect strikes at the heart of its validity both the pleading and prosecution will fail - because the court will have no jurisdiction to hear the case
 - b. **Principles**
 - i. **Specified by Statute:** Sometimes the statute that has created the offence also sets boundaries on the charging process, requiring strict compliance - errors here can result in a dismissal of summons: **Attorney General (NSW) v Built NSW Pty Ltd**
 - ii. **Generally:** Must describe sufficient factual information, the act or omission that constitutes the offence charged - as listed above - if this fails the court will hold that the pleadings lacked sufficient factual detail of the manner of the offence: **Kirk v Industrial Court (NSW)**
 - iii. **Avoid duplicity:** i.e. each charge must be for a single offence, irrespective of the initiating document
4. **What can be done after the realisation of a defect in pleading?**
 - a. Recharging may be possible
 - b. Major defects may deprive the court of jurisdiction to hear the case
 - c. If the pleadings relate to summary offences (that is they are CANs) they may be time barred and the prosecution not able to recommence
 - d. **Duplicity:** If the pleadings are held to be duplicitous (more than one offence in a charge) the prosecutor can elect to amend the charge or limit the evidence appropriately, to cure the problem. Otherwise the charge is bad

Double Jeopardy – The Rule Against Double Jeopardy

General principle: No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country: **ICCPR Article 14 (7)**

- Evidence will be inadmissible where if accepted it would overturn or tend to overturn a final acquittal
- **Practice:** It will operate as an estoppel
 - **Autrefois acquit:** Is a plea by which the crown is precluded from reasserting the guilt of the accused when that question has previously been determined against it. It is a plea that prevents the re-litigation of matters already determined in favour of the accused
 - **Autrefois convict:** Is a plea where the defendant is saying they have been charged and convicted of the offence already, so they cannot be charged or punished for it again

Prosecution & Defence Duties

Prosecutorial Discretion

1. When does the prosecution bring charges?

- a. **General principle:** It is for the prosecution, in its sole discretion to shape its charges and as a result to influence what may follow on
- b. **Factors relevant to determining whether to bring a charge**
 - i. The interests of the victim, the suspected offender, and the community at large
 - ii. Fairness and consistency
 - iii. Whether there is admissible, substantial and reliable evidence that a criminal offence has been committed by the accused
 - iv. **Public interest considerations including**
 1. Mitigating or aggravating circumstances
 2. Youth, age, intelligence etc of the accused, the victim or witnesses
 3. The availability and efficacy of alternatives to prosecution
 4. **Full list:** pg. 22 textbook

2. Can the court review the prosecution's discretion?

- a. The prosecutor alone is the one to determine prosecution decisions such as whether to prosecute, whether the charge includes aggravated elements, or is just the offence simpliciter, whether to withdraw charges, whether to proceed irrespective of a committal hearing, whether to accept a plea of guilty to a lesser offence or to have a change of the prosecutorial mind and withdraw acceptance of a plea: **Likiardopoulos**
- b. **Court's role is limited:** There is a very limited role for the courts in reviewing prosecutor decisions because they involve policy considerations that are beyond the scope of the judiciary and the courts must be seen to be maintaining their independence
- c. **Exception:** If there appears to be some irregularity or abuse of process the courts may be able to review a decision or particular course of action, particularly where there are multiple charges - courts can utilise sentencing policy to ensure the punishment fits the crime or they can stay proceedings that are an abuse of process if the multiplicity issue arises early
 - i. The court cannot act as a rubber stamp: **R v Maxwell**

Prosecution Disclosure Obligations

S 141 CPA – Mandatory pre-trial disclosure

(1) After the indictment is presented or filed in proceedings, the following pre-trial disclosure is required:

- (a) the prosecutor is to give notice of the prosecution case to the accused person in accordance with section **142**,
- (b) the accused person is to give notice of the defence response to the prosecution's notice in accordance with section **143**,
- (c) the prosecution is to give notice of the prosecution response to the defence response in accordance with section **144**.

(2) Pre-trial disclosure required by this section is to take place before the date set for the trial in the proceedings and in accordance with a timetable determined by the court.

Note: Practice notes issued by the court will guide determinations of the timetable for pre-trial disclosures and related matters.

(3) The court may vary any such timetable if it considers that it would be in the interests of the administration of justice to do so.

(4) The regulations may make provision for or with respect to the timetable for pre-trial disclosure.

1. **General principle:** The Prosecution must disclose all relevant information and evidence to the accused in line with the principles of fair trial: **Grey, Mallard**
 - a. **All material information must be disclosed:** Prosecution must disclose documents which are material; and the documents are material if they can be seen, on sensible appraisal by the prosecution: **Reardon (No 2)**
 - i. To be relevant or possibly relevant to an issue in the case
 - ii. To raise or possibly raise a new issue the existence of which is not apparent from the prosecution case or
 - iii. To hold out a real prospect of providing a lead on evidence going to either i or ii. The obligation is not limited to admissible evidence
 - b. **Disclosure is ongoing:** **s 147**
 - c. **Rationale:** *"the inequality of resources as between the crown and the accused is ameliorated by the obligation on the part of the prosecution to make available all material which may prove helpful to the defence"*: **Reardon (No 2)**
 - d. **Police:** Have duty to disclose all relevant info to DPP: **s 15A DPP Act**

2. What does the prosecution need to disclose?

a. Initial disclosure

s 142 CPA – Prosecution's notice

(1) For the purposes of section 141 (1) (a), the prosecution's notice is to contain the following:

- (a) a copy of the indictment,
- (b) a statement of facts,
- (c) a copy of a statement of each witness whose evidence the prosecutor proposes to adduce at the trial,
 - (c1) in accordance with Division 3 of Part 4B of Chapter 6, a copy of any recorded statement that the prosecutor intends to adduce at the trial,
- (d) a copy of each document, evidence of the contents of which the prosecutor proposes to adduce at the trial,
- (e) if the prosecutor proposes to adduce evidence at the trial in the form of a summary, a copy of the summary or, where the summary has not yet been prepared, an outline of the summary,
- (f) a copy of any exhibit that the prosecutor proposes to adduce at the trial,
- (g) a copy of any chart or explanatory material that the prosecutor proposes to adduce at the trial,
- (h) if any expert witness is proposed to be called at the trial by the prosecutor, a copy of each report by the witness that is relevant to the case,
- (i) a copy of any information, document or other thing provided by law enforcement officers to the prosecutor, or otherwise in the possession of the prosecutor, that would reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person,
- (j) a list identifying:

- (i) any information, document or other thing of which the prosecutor is aware and that would reasonably be regarded as being of relevance to the case but that is not in the prosecutor's possession and is not in the accused person's possession, and
- (ii) the place at which the prosecutor believes the information, document or other thing is situated,

(k) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness,

(l) a copy of any information, document or other thing in the possession of the prosecutor that would reasonably be regarded as adverse to the credit or credibility of the accused person,

(m) a list identifying the statements of those witnesses who are proposed to be called at the trial by the prosecutor.

(2) The regulations may make provision for or with respect to the form and content of a statement of facts for the purposes of this section.

(3) In this section,

"law enforcement officer" means a police officer, or an officer of one of the following agencies:

- (a) the Law Enforcement Conduct Commission,
- (b) the New South Wales Crime Commission,
- (c) the Independent Commission Against Corruption.

b. Second wave: After the defence has responded to the notice of the case for the prosecution a second wave of prosecution disclosure may be required

S 144 CPA – Prosecution response to defence response

For the purposes of section 141 (1) (c), the notice of the prosecution response to the defence response is to contain the following:

- (a) if the accused person has disclosed an intention to adduce expert evidence at the trial, notice as to whether the prosecutor disputes any of the expert evidence and, if so, in what respect,
- (b) if the accused person has disclosed an intention to tender any exhibit at the trial, notice as to whether the prosecutor proposes to raise any issue with respect to the continuity of custody of the exhibit,
- (c) if the accused person has disclosed an intention to tender any documentary evidence or other exhibit at the trial, notice as to whether the prosecutor proposes to dispute the accuracy or admissibility of the documentary evidence or other exhibit,
- (d) notice as to whether the prosecutor proposes to dispute the admissibility of any other proposed evidence disclosed by the accused person, and the basis for the objection,
- (e) a copy of any information, document or other thing in the possession of the prosecutor, not already disclosed to the accused person, that might reasonably be expected to assist the case for the defence,
- (f) a copy of any information, document or other thing that has not already been disclosed to the accused person and that is required to be contained in the notice of the case for the prosecution.

c. Credibility: Prosecutors are not required to disclose material relevant to the credibility of a defence witness: **Reardon (No 2)**

- d. Witness statement:** If the prosecution takes a witness statement they have to give that to the defence whether they are going to call them at trial or not

Defence Disclosure – Does the Defence Need to Disclose Anything?

General principle: **s 143 CPA** requires the accused to respond to s 142 of the prosecution's notice

- **Rationale:** It assists enhancing efficiency both during the trial and also in having the accused plead well before trial

S 143 CPA – Defence response

(1) For the purposes of section 141(1)(b), the notice of the defence response is to contain the following:

- (a)** the name of any Australian legal practitioner proposed to appear on behalf of the accused person at the trial,
- (b)** the nature of the accused person's defence, including particular defences to be relied on,
- (c)** the facts, matters or circumstances on which the prosecution intends to rely to prove guilt (as indicated in the prosecution's notice under section 142) and with which the accused person intends to take issue,
- (d)** points of law which the accused person intends to raise,
- (e)** notice of any consent that the accused person proposes to give at the trial under section 190 of the Evidence Act 1995 in relation to each of the following:
 - (i)** a statement of a witness that the prosecutor proposes to adduce at the trial,
 - (ii)** a summary of evidence that the prosecutor proposes to adduce at the trial,
- (f)** a statement as to whether or not the accused person intends to give any notice under section 150 (Notice of alibi) or, if the accused person has already given such a notice, a statement that the notice has been given,
- (g)** a statement as to whether or not the accused person intends to give any notice under section 151 (Notice of intention to adduce evidence of substantial mental impairment).

(2) The notice of the defence response is also to contain such of the following matters (if any) as the court orders:

- (a)** a copy of any report, relevant to the trial, that has been prepared by a person whom the accused person intends to call as an expert witness at the trial,
- (b)** if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused person proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,
- (c)** notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,
- (d)** if the prosecutor disclosed an intention to tender at the trial any transcript, notice as to whether the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,
- (e)** notice as to whether the accused person proposes to dispute the authenticity or accuracy of any proposed documentary evidence or other exhibit disclosed by the prosecutor,
- (f)** notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges,
- (g)** notice of any consent the accused person proposes to give under section 184 of the Evidence Act 1995

Note: These are the requirements that the defence response must contain. Refer to pg. 34 for other items the court may require disclosure of under **s 143(2)**

- **Note:** Court may order dispense of formal proof if **s 143** is not complied with

S 145 – Dispensing with formal proof

(1) If a fact, matter or circumstance was alleged in a notice required to be given to the accused person by the prosecutor in accordance with this Division and the accused person was required to give a defence response under section 143 but did not disclose in the response an intention to dispute or require proof of the fact, matter or circumstance, the court may order that:

- (a)** a document asserting the alleged fact, matter or circumstance may be admitted at the trial as evidence of the fact, matter or circumstance, and
- (b)** evidence may not, without the leave of the court, be adduced to contradict or qualify the alleged fact, matter or circumstance.

(2) If evidence was disclosed by the prosecution to the accused person in accordance with this Division and the accused person was required to give a defence response under section 143 but did not include notice in that response under section 143(1) (c) in relation to that evidence, the court may, by order, **dispense with the application of any one or more of the following provisions of the Evidence Act 1995** in relation to the adducing of the evidence at trial:

- (a)** Division 3, 4 or 5 of Part 2.1,
- (b)** Part 2.2 or 2.3,
- (c)** Parts 3.2-3.8.

(3) The court may, on the application of a party, direct that the party may adduce evidence of 2 or more witnesses in the form of a summary if the court is satisfied that:

- (a)** the summary is not misleading or confusing, and
- (b)** admission of the summary instead of evidence from the witnesses will not result in unfair prejudice to any party to the proceedings.

(4) The court may, in a direction under subsection (3), require that one or more of the witnesses whose evidence is to be adduced in the form of a summary are to be available for cross-examination.

(5) The opinion rule (within the meaning of the Evidence Act 1995) does not apply to evidence adduced in accordance with a direction under subsection (3).

(6) The provisions of this section are in addition to the provisions of the Evidence Act 1995, in particular, section 190.

Consequences of a Failure to Disclose – For Both Parties

S 146 CPA – Sanctions for non-compliance with pre-trial disclosure requirements

(1) Exclusion of evidence not disclosed. The court may refuse to admit evidence in proceedings that is sought to be adduced by a party who failed to disclose the evidence to the other party in accordance with requirements for pre-trial disclosure imposed by or under this Division.

(2) Exclusion of expert evidence where report not provided. The court may refuse to admit evidence from an expert witness in proceedings that is sought to be adduced by a party if the party failed to give the other party a copy of a report by the expert witness in accordance with requirements for pre-trial disclosure imposed by or under this Division.

(3) Adjournment. The court may grant an adjournment to a party if the other party seeks to adduce evidence in the proceedings that the other party failed to disclose in accordance with requirements for pre-trial disclosure imposed by or under this Division and that would prejudice the case of the party seeking the adjournment.

(4) Application of sanctions. Without limiting the regulations that may be made under subsection (5), the powers of the court may not be exercised under this section to prevent an accused person adducing evidence unless the prosecutor has complied with the requirements for pre-trial disclosure imposed on the prosecution by or under this Division.

(5) Regulations. The regulations may make provision for or with respect to the exercise of the powers of a court under this section (including the circumstances in which the powers may not be exercised).

When the defence fails to comply with pre-trial disclosure obligations (and the prosecution has complied (4): s 146A

- **1:** A court, or any other party with the leave of the court, may make such comment at the trial as appears proper and;
- **2:** The court and jury may then draw such unfavourable inferences as appears proper
- **3:** A direct inference of the accused guilt arising from its failure to comply with disclosure obligations cannot be the sole basis for finding them guilty

Prosecution Duties

Ultimately: The question is whether the breach of any of these obligations has created a miscarriage of justice: **Libke**

NSW Barristers Rules

- **r 82:** A prosecutor must **fairly assist the court to arrive at the truth**, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts
- **r 83:** A prosecutor **must not press the prosecution's case for a conviction beyond a full and firm presentation of that case**
- **r 84:** A prosecutor must not, by language or other conduct, **seek to inflame or bias** the court against the accused
- **r 85:** A prosecutor must not argue any proposition of fact or law which the prosecutor **does not believe on reasonable grounds to be capable of contributing** to a finding of guilt and also to carry weight
- **r 86:** Prosecutor must **disclose to opponent as soon as practicable all material available** which would constitute evidence relevant to case
 - Other than material covered by statutory material
 - Unless believes on reasonable grounds that disclosure would threaten the integrity of admin of justice
- **r 87:** Prosecutor who has chosen not to disclose material must decide whether
 - Whether charge against accused should be w/drawn
 - Accused should face lesser charge where material not relevant
- **r 88:** A prosecutor must call as part of the prosecution's case **all witnesses**
 - 1. Whose testimony is admissible and **necessary for the presentation of all of relevant circumstances** or;
 - 2. Whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence **relevant to any matter in issue**, unless:
 - The opponent consents to the witness not being called
 - Issue already dealt with
 - The point is already established by another witness
 - Prosecution believes the testimony is untruthful or unreliable
 - Interests of justice would be harmed if witness was called
- **r 88A:** The prosecutor must inform the opponent as soon as practicable of the identity of any witness **whom the prosecutor intends not to call on** any of the exceptions listed above and gives the reason for how the prosecutor has come to that decision
- **r 89:** A prosecutor who has reasonable grounds to believe that certain material available to the prosecution **may have been obtained unlawfully** must promptly:
 - 1. Inform the opponent if the prosecutor intends to use the material and;
 - 2. Make available to the opponent a copy of the material if it is in documentary form
- **r 90:** A prosecutor **must not confer with or interview any accused** except in the presence of the accused legal representative
- **r 91:** A prosecutor **must not inform** the court or opponent that the **prosecution has evidence supporting** an aspect of its case **unless the prosecutor believes on reasonable grounds that such evidence will be available** from material already available to the prosecutor
- **r 92:** A prosecutor who has **informed the court of matters within rule 91** and who has later learnt that such evidence will **not be available**, must **immediately inform** the opponent of that fact and must inform the court of it when the next case is before the court

Other Rules

- **Fairness:** The prosecution is to act as a minister of justice and lay before the jury all credible reliable evidence. The prosecution is not to pursue a guilty verdict at all cost: **Libke**

- **Avoid bias:** It is impermissible [for a Crown Prosecutor] to embark upon a course of conduct calculated to persuade the jury to a point of view by the introduction of factors of prejudice or emotion.”: **McCullough v The Queen**
- **Court’s duty:** Where the prosecutor’s address includes certain factors such as submissions not based on evidence, inflammatory comments that will tend to create prejudice in the jury or conveying the prosecutor’s opinion or ridiculing the accused case, there may need to be court censure: **Wood**
- **All material witnesses:** Prosecution must call all material witnesses - **CPA s 142; Solicitors Rules 39, Lee; Apostolides**
-

Standards of Proof

1. **Civil standard of proof:** On the balance of probabilities: **s 140(1) UEA**
2. **Criminal standard of proof:** Beyond reasonable doubt: **s 141(1) UEA**
3. **Is there a preliminary question (voir dire)?**
 - a. **S 189(1) UEA:** Finding ***whether a particular fact*** exists for a court’s determination of whether evidence should be admitted **(a)**, or evidence can be used against a person **(b)** or a witness is competent or compellable **(c)**
 - i. **S 189(2):** On voir dire witnesses can be called etc, but jury will usually not be in the courtroom in case the evidence is ruled to be inadmissible
 - b. **S 142 UEA:** To be established on the BoP
4. **Standard of proof for the admissibility of evidence?**
 - a. **Note:** The strength of the evidence necessary to establish a FII on the balance of probabilities will vary according to the nature of what is sought to be proved and the circumstances in which it is sought to be proved: **Briginshaw**

S 142 UEA – Admissibility of evidence: standard of proof

(1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding:

- (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or
- (b) any other question arising under this Act;

have been proved if it is satisfied that they have been proved on the **balance of probabilities**.

(2) In determining whether it is so satisfied, the matters that the court must take into account include:

- (a) the **importance of the evidence** in the proceeding; and
- (b) the **gravity of the matters** alleged in relation to the question.

5. Can a judge take judicial notice of facts?

- a. **Definition:** Allows a fact to be introduced into evidence if the truth of that fact is so notorious or well known, or so authoritatively attested, that it cannot reasonably be doubted
- b. **Answer:** Yes: **s 144(1) UEA; Farkas; Aytugrul**

- i. **Note:** A judge cannot draw on personal knowledge to establish a fact, must still acquire the knowledge: **s 144(2) UEA**

S 144 UEA – 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.

6. **What is the standard of proof of the charge?** To be proved BRD: **s 141(1) UEA**

- a. **Meaning of BRD:** Should be given its ordinary meaning so community standards are preserved: **NSWLRC**

7. **What is the standard of proof when the defence bears the legal burden of proof?**

- a. **Example:** Due to a statutory reversal of proof or to establish insanity
- b. Balance of probability standard applies: **s 141(2)**

8. **Is the court required to wait until evidence is adduced?**

- a. **Answer:** No

s 192A – Advanced rulings and findings

Where a question arises in any proceedings, being a question about:

- (a) the admissibility or use of evidence proposed to be adduced; or
- (b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced; or
- (c) the giving of leave, permission or direction under section 192;

the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.

Right to a Fair Trial

1. **What are the rights associated with a fair trial?**

- a. **Knowledge:** With respect to the criminal pleadings, an accused has the right to know the charges with sufficient particularity to meet those charges: **Walsh v Tattersall**
- b. **Tactics:** Courts have an obligation to ensure that a fair trial is not impeded by the charging practices of the prosecution: **Connelly v DPP**
- c. The common law provides disclosure rights regarding the prosecution case, supplemented in many jurisdictions by statute: **Grey**
- d. **Delay:** There is NO common law right to a speedy trial, but if delay prevents a fair trial, it will be stayed: **Jago v District Court of NSW**

- e. **Judge:** Accused has a right for the trial to be conducted in the presence of an impartial judge, who acts with detachment and appropriately and who assists unrepresented litigants and who directs the jury appropriately: *Bromley*
- f. **Fairness:** The prosecutor must act fairly in court, including putting the prosecution case fully: **Barristers Rules**, **Evans and Apostilides**
- g. **Representation:** Where an accused is to be tried on a serious offence, a court will stay proceedings unless there is legal representation: **Dietrich**
- h. **Interpreter:** The accused has the right to an interpreter if needed: **Hakimmi**
- i. In exceptional circumstances, a court will quash a conviction if defence counsel is flagrantly incompetent: **Nudd**

2. What is circumstantial evidence?

- a. Evidence which, if accepted, relies on an inference to connect it to a conclusion of fact: **Festa v R**
- b. **How should a jury use circumstantial evidence?** Where a jury must rely on circumstantial evidence alone, *"guilt should not only be a rational inference, but should be the only rational inference that can be drawn from the circumstances"*: **Shepherd v R**

Relevance (Starting Point)

Relevant Legislation

s 56 – Relevant evidence to be admissible

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

S 55 – Relevant evidence

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

NB (Probative value): The extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue (dictionary)

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

- (a) the credibility of a witness; or
- (b) the admissibility of other evidence; or

(c) a failure to adduce evidence.

S 57 – Provisional relevance

(1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant:

- (a) if it is reasonably open to make that finding; or
- (b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.

(2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy or otherwise), the court may use the evidence itself in determining whether the common purpose existed.

Application

‘...relevant/irrelevant according to s 55 and admissible/inadmissible under s 56’

Step 1 – Determine the Facts in Issue (FII)?

- a) **Fact in issue:** Elements of the offence that need to be proved by the prosecutor; or elements raised by the evidence that need to be proven: **Goldsmith**
 - a. Actus reus
 - b. Mens rea
 - c. Motive
 - d. Consent
 - e. Defence
- b) Not limited to the ultimate issues, but evidence may also be relevant to the facts relevant to those issues
- c) **There is difference between the FII and materials relevant to the FII: Cornwall** – *In a murder trial, the FII may be whether D shot the deceased. Evidence such as D’s motive/had a fully loaded gun before the time of death outside the room where the deceased was killed, etc. are matters relevant to the fact in issue (i.e. circumstantial evidence tending to establish the fact in issue), but are not facts in issue themselves*

Step 2 – Determine the type of evidence

- | | |
|---------------------------|---|
| 1. Direct Evidence | • Establishes FII without further inference required |
|---------------------------|---|

	<ul style="list-style-type: none"> • Examples <ul style="list-style-type: none"> ○ Victim saying, she did not consent in a rape trial ○ Witness saw the defendant shoot the deceased ○ Video showing the occurrence of the event
2. Circumstantial/ tendency and coincidence/ identification/ character (for the accused only)/ other	<ul style="list-style-type: none"> • Evidence that renders the FII more or less probable that it actually occurred • Examples <ul style="list-style-type: none"> ○ Witness saw the accused leave the house of the deceased on the night of the murder ○ Accused had traces of blood that matched that of the deceased on his clothing
3. Credibility	<ul style="list-style-type: none"> • Refer to credibility section. Has no bearing on the FII but on the reliability of the evidence given (<i>i.e. probability a witness is telling the truth</i>)
4. Background/ context	<ul style="list-style-type: none"> • Used to contextualise evidence
5. Hearsay and opinions	<ul style="list-style-type: none"> • General rule: Hearsay and opinion are generally NOT considered as <u>relevance</u> but are a mode of communication • Examples <ul style="list-style-type: none"> ○ The evidence goes to the FII because it is a confession, however it is expressed in a hearsay manner (<i>this is hearsay purpose</i>) ○ The evidence is for an identification purpose; however, it is expressed as an expert opinion

Evidence can be relevant for more than one purpose

FII	FII + Credibility	Credibility Only (s 102)
<u>s 55(1)</u>	<u>s 55(1)</u> <u>s 55(2)</u> <i>Do not go through credibility</i>	<u>s 103 - 108</u>

Step 3 – Determine whether evidence is relevant i.e. Can the evidence, *if it were accepted*, could rationally affect the assessment of the probability of the existence of a fact in issue:
s 55(1)

- Broad view:** Evidence should be admitted even if it has a minimal rational effect: **Smith**
 - Can either go towards proving or disproving the existence of the FII
- Start with the purpose of admitting the evidence:** This must be the basis of the test
- Unique perspective:** Relevant if W had knowledge beyond what jury could see for themselves: **R v Smith**
- If it were accepted:** Judge must assume that the jury would find the evidence reliable – **Papakosmas, IMM**
 - However:** If the evidence is so inherently fanciful, incredible or preposterous that it could not be accepted by a rational jury, the probative value would be nil and therefore, irrelevant: **IMM**
 - Exception (VIC):** Judge require to make an assessment of weight (*i.e. reliability*) jury is to place on the evidence: **Dupas v The Queen**
- Could rationally affect:** Based on logical, sound reasoning; there must be some logical connection between the evidence and the fact in issue → LOW THRESHOLD
 - Sexual interest in another man is irrelevant to any question concerning consent to sexual engagement as willingness to participate in sexual activity with one person does not connote willingness to participate in sexual activity with another: **Burton**

- i. Not relevant to D's knowledge of absence of consent, or any belief in her consent that he might assert
 - ii. **Think about any unstated premises/assumptions reasoning is based on** - in this case, it was that a person who engages sexually with another person is likely to, engage sexually with any other person
- f) **Assessment of the probability of the FII:** Must differentiate between the actual probative value and the potential probative value of evidence: **Burton**
 - a. **Rule:** The court only assesses the **potential** probative value at the stage of determining relevance/admissibility → likelihood (must increase or decrease, even if only marginally)
 - b. **Summary:** Judge = Potential probative value – Jury = Actual probative value
 - i. **Potential probative value (JUDGE):** The **capability (COULD???)** of the evidence to affect the assessment of the probability of the existence of the FII (*determined at the time the evidence is tendered*)
 - ii. **Actual probative value (JURY):** The **actual value** of the evidence in affecting the assessment of the probability of the existence of a FII, weighed up in light of all the evidence presented in the trial (*determined at the end of the trial*)
- g) **Interpretation:** Focus on the interpretation most favourable to the party tending the evidence, not the most benign one: **Burton**
- h) **Evidence must be used at its highest:** We must take the possible use of the evidence, or how it might be used, at its highest and apply the test in this context: **IMM**
 - a. Circumstances surrounding the evidence may indicate that its highest level may not be very high at all
 - b. Flaws in the evidence go to minimising the probative value of that evidence

Relevant Case Law

- **Graham:** Complainant delayed complaining for 6 years and HC held that the evidence of the complaint is not important and does not assist a jury in deciding whether the complainant had fabricated her story (irrelevant)
 - **Papakosmas:** Complaint was without delay and repeated to group of her friends was relevant to issue of consent
 - **Smith:** Evidence of 2 police officers that the defendant was the person depicted in a photograph, was not relevant
 - The police officers were in no better position than the jury to decide whether or not the defendant was the person in the photograph
 - The material is not different in any substantial way from what is available to the jury
 - If the police had an advantage to identify the accused that was not available to the jury, the evidence would be relevant
 - **Burton:** (*Sexual assault of a woman by a co-worker*): Evidence that the complainant showed sexual interest in another man was irrelevant to whether she consented to sex with the accused
 - **Evans:** A bank robbery case, prosecutor's request that the accused dress in disguise recovered from Evan's premises and parade in front of the jury saying words attributed to the robber then sit in the clothes was relevant per **Kirby, Heydon, Crennan JJ**, but irrelevant per **Gummow and Hayne JJ** (nevertheless excluded as prejudicial under **s 137**)
- Not relevant:** Wearing the same overalls