



Evidence Act 1995

No. 2 of 1995

TABLE OF PROVISIONS

CHAPTER 1—PRELIMINARY

INTRODUCTORY NOTE

Outline of this Act

Related legislation

PART 1.1—FORMAL MATTERS

Section

1. Short title
2. Commencement
3. Definitions

PART 1.2—APPLICATION OF THIS ACT

4. Courts and proceedings to which Act applies
5. Extended application of certain provisions
6. Territories
7. Act binds Crown
8. Operation of other Acts etc.
9. Effect of Act on other laws

TABLE OF PROVISIONS—*continued*

Section

- 10. Parliamentary privilege preserved
- 11. General powers of a court

CHAPTER 2—ADDUCING EVIDENCE

INTRODUCTORY NOTE

Outline of this Chapter

PART 2.1—WITNESSES

Division 1—Competence and compellability of witnesses

- 12. Competence and compellability
- 13. Competence: lack of capacity
- 14. Compellability: reduced capacity
- 15. Compellability: Sovereign and others
- 16. Competence and compellability: judges and jurors
- 17. Competence and compellability: defendants in criminal proceedings
- 18. Compellability of spouses and others in criminal proceedings generally
- 19. Compellability of spouses and others in certain criminal proceedings
- 20. Comment on failure to give evidence

Division 2—Oaths and affirmations

- 21. Sworn evidence of witnesses to be on oath or affirmation
- 22. Interpreters to act on oath or affirmation
- 23. Choice of oath or affirmation
- 24. Requirements for oaths
- 25. Rights to make unsworn statements unaffected

Division 3—General rules about giving evidence

- 26. Court's control over questioning of witnesses
- 27. Parties may question witnesses
- 28. Order of examination in chief, cross-examination and re-examination
- 29. Manner and form of questioning witnesses and their responses
- 30. Interpreters
- 31. Deaf and mute witnesses
- 32. Attempts to revive memory in court
- 33. Evidence given by police officers
- 34. Attempts to revive memory out of court
- 35. Effect of calling for production of documents
- 36. Person may be examined without subpoena or other process

Division 4—Examination in chief and re-examination

- 37. Leading questions
- 38. Unfavourable witnesses
- 39. Limits on re-examination

Division 5—Cross-examination

- 40. Witness called in error
- 41. Improper questions
- 42. Leading questions

TABLE OF PROVISIONS—*continued*

Section

- 43. Prior inconsistent statements of witnesses
- 44. Previous representations of other persons
- 45. Production of documents
- 46. Leave to recall witnesses

PART 2.2—DOCUMENTS

- 47. Definitions
- 48. Proof of contents of documents
- 49. Documents in foreign countries
- 50. Proof of voluminous or complex documents
- 51. Original document rule abolished

PART 2.3—OTHER EVIDENCE

- 52. Adducing of other evidence not affected
- 53. Views
- 54. Views to be evidence

CHAPTER 3—ADMISSIBILITY OF EVIDENCE

INTRODUCTORY NOTE

Outline of this Chapter

PART 3.1—RELEVANCE

- 55. Relevant evidence
- 56. Relevant evidence to be admissible
- 57. Provisional relevance
- 58. Inferences as to relevance

PART 3.2—HEARSAY

Division 1—The hearsay rule

- 59. The hearsay rule—exclusion of hearsay evidence
- 60. Exception: evidence relevant for a non-hearsay purpose
- 61. Exceptions to the hearsay rule dependent on competency

Division 2—“First-hand” hearsay

- 62. Restriction to “first-hand” hearsay
- 63. Exception: civil proceedings if maker not available
- 64. Exception: civil proceedings if maker available
- 65. Exception: criminal proceedings if maker not available
- 66. Exception: criminal proceedings if maker available
- 67. Notice to be given
- 68. Objections to tender of hearsay evidence in civil proceedings if maker available

Division 3—Other exceptions to the hearsay rule

- 69. Exception: business records
- 70. Exception: contents of tags, labels and writing
- 71. Exception: telecommunications
- 72. Exception: contemporaneous statements about a person’s health etc.
- 73. Exception: reputation as to relationships and age

TABLE OF PROVISIONS—*continued*

Section

- 74. Exception: reputation of public or general rights
- 75. Exception: interlocutory proceedings

PART 3.3—OPINION

- 76. The opinion rule
- 77. Exception: evidence relevant otherwise than as opinion evidence
- 78. Exception: lay opinions
- 79. Exception: opinions based on specialised knowledge
- 80. Ultimate issue and common knowledge rules abolished

PART 3.4—ADMISSIONS

- 81. Hearsay and opinion rules: exception for admissions and related representations
- 82. Exclusion of evidence of admissions that is not first-hand
- 83. Exclusion of evidence of admissions as against third parties
- 84. Exclusion of admissions influenced by violence and certain other conduct
- 85. Criminal proceedings: reliability of admissions by defendants
- 86. Exclusion of records of oral questioning
- 87. Admissions made with authority
- 88. Proof of admissions
- 89. Evidence of silence
- 90. Discretion to exclude admissions

PART 3.5—EVIDENCE OF JUDGMENTS AND CONVICTIONS

- 91. Exclusion of evidence of judgments and convictions
- 92. Exceptions
- 93. Savings

PART 3.6—TENDENCY AND COINCIDENCE

- 94. Application
- 95. Use of evidence for other purposes
- 96. Failure to act
- 97. The tendency rule
- 98. The coincidence rule
- 99. Requirements for notices
- 100. Court may dispense with notice requirements
- 101. Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

PART 3.7—CREDIBILITY

- 102. The credibility rule
- 103. Exception: cross-examination as to credibility
- 104. Further protections: cross-examination of accused
- 105. Further protections: defendants making unsworn statements
- 106. Exception: rebutting denials by other evidence
- 107. Exception: application of certain provisions to makers of representations
- 108. Exception: re-establishing credibility

PART 3.8—CHARACTER

- 109. Application
- 110. Evidence about character of accused persons
- 111. Evidence about character of co-accused
- 112. Leave required to cross-examine about character of accused or co-accused

TABLE OF PROVISIONS—*continued*

Section

PART 3.9—IDENTIFICATION EVIDENCE

- 113. Application of Part
- 114. Exclusion of visual identification evidence
- 115. Exclusion of evidence of identification by pictures
- 116. Directions to jury

PART 3.10—PRIVILEGES

Division 1—Client legal privilege

- 117. Definitions
- 118. Legal advice
- 119. Litigation
- 120. Unrepresented parties
- 121. Loss of client legal privilege: generally
- 122. Loss of client legal privilege: consent and related matters
- 123. Loss of client legal privilege: defendants
- 124. Loss of client legal privilege: joint clients
- 125. Loss of client legal privilege: misconduct
- 126. Loss of client legal privilege: related communications and documents

Division 2—Other privileges

- 127. Religious confessions
- 128. Privilege in respect of self-incrimination in other proceedings

Division 3—Evidence excluded in the public interest

- 129. Exclusion of evidence of reasons for judicial etc. decisions
- 130. Exclusion of evidence of matters of state
- 131. Exclusion of evidence of settlement negotiations

Division 4—General

- 132. Court to inform of rights to make applications and objections
- 133. Court may inspect etc. documents
- 134. Inadmissibility of evidence that must not be adduced or given

PART 3.11—DISCRETIONS TO EXCLUDE EVIDENCE

- 135. General discretion to exclude evidence
- 136. General discretion to limit use of evidence
- 137. Exclusion of prejudicial evidence in criminal proceedings
- 138. Discretion to exclude improperly or illegally obtained evidence
- 139. Cautioning of persons

CHAPTER 4—PROOF

INTRODUCTORY NOTE

Outline of this Chapter

PART 4.1—STANDARD OF PROOF

- 140. Civil proceedings: standard of proof
- 141. Criminal proceedings: standard of proof

TABLE OF PROVISIONS—*continued*

Section

142. Admissibility of evidence: standard of proof

PART 4.2—JUDICIAL NOTICE

143. Matters of law
144. Matters of common knowledge
145. Certain Crown certificates

PART 4.3—FACILITATION OF PROOF

Division 1—General

146. Evidence produced by processes, machines and other devices
147. Documents produced by processes, machines and other devices in the course of business
148. Evidence of certain acts of justices, lawyers and notaries public
149. Attestation of documents
150. Seals and signatures
151. Seals of bodies established under State law
152. Documents produced from proper custody

Division 2—Matters of official record

153. Gazettes and other official documents
154. Documents published by authority of Parliaments etc.
155. Evidence of official records
156. Public documents
157. Public documents relating to court processes
158. Evidence of certain public documents
159. Official statistics

Division 3—Matters relating to post and communications

160. Postal articles
161. Telexes
162. Lettergrams and telegrams
163. Proof of letters having been sent by Commonwealth agencies

PART 4.4—CORROBORATION

164. Corroboration requirements abolished

PART 4.5—WARNINGS

165. Unreliable evidence

PART 4.6—ANCILLARY PROVISIONS

Division 1—Requests to produce documents or call witnesses

166. Definition of request
167. Requests may be made about certain matters
168. Time limits for making certain requests
169. Failure or refusal to comply with requests

Division 2—Proof of certain matters by affidavits or written statements

170. Evidence relating to certain matters

TABLE OF PROVISIONS—*continued*

Section

- 171. Persons who may give such evidence
- 172. Evidence based on knowledge, belief or information
- 173. Notification of other parties

Division 3—Foreign law

- 174. Evidence of foreign law
- 175. Evidence of law reports of foreign countries
- 176. Questions of foreign law to be decided by judge

Division 4—Procedures for proving other matters

- 177. Certificates of expert evidence
- 178. Convictions, acquittals and other judicial proceedings
- 179. Proof of identity of convicted persons—affidavits by members of State or Territory police forces
- 180. Proof of identity of convicted persons—affidavits by members of the Australian Federal Police
- 181. Proof of service of statutory notifications, notices, orders and directions

CHAPTER 5—MISCELLANEOUS

- 182. Application of certain sections in relation to Commonwealth records
- 183. Inferences
- 184. Accused may admit matters and give consents
- 185. Faith and credit to be given to documents properly authenticated
- 186. Swearing of affidavits before justices of the peace, notaries public and lawyers
- 187. Abolition of the privilege against self-incrimination for bodies corporate
- 188. Impounding documents
- 189. *The voir dire*
- 190. Waiver of rules of evidence
- 191. Agreements as to facts
- 192. Leave, permission or direction may be given on terms
- 193. Additional powers
- 194. Witnesses failing to attend proceedings
- 195. Prohibited question not to be published
- 196. Proceedings for offences
- 197. Regulations

SCHEDULE

OATHS AND AFFIRMATIONS

DICTIONARY

| | |
|-----------------------------------|--------------------------------|
| ACT court | foreign court |
| admission | function |
| asserted fact | government or official gazette |
| associated defendant | hearsay rule |
| Australia | identification evidence |
| Australian court | investigating official |
| Australian law | joint sitting |
| Australian or overseas proceeding | judge |
| Australian Parliament | law |
| Australian Statistician | lawyer |
| business | leading question |

TABLE OF PROVISIONS—*continued*

Section

| | |
|-----------------------------------|---------------------------------|
| case | Legislative Assembly |
| child | member |
| civil penalty | offence |
| civil proceeding | official questioning |
| client | opinion rule |
| coincidence evidence | parent |
| coincidence rule | picture identification evidence |
| Commonwealth owned body corporate | police officer |
| Commonwealth record | postal article |
| confidential communication | previous representation |
| confidential document | prior consistent statement |
| credibility | prior inconsistent statement |
| credibility rule | probative value |
| criminal proceeding | public document |
| cross-examination | re-examination |
| cross-examiner | representation |
| de facto spouse | seal |
| document | tendency evidence |
| examination in chief | tendency rule |
| exercise | visual identification evidence |
| fax | witness |
| federal court | |

PART 1—DEFINITIONS

PART 2—OTHER EXPRESSIONS

1. References to businesses
2. References to examination in chief, cross-examination and re-examination
3. References to civil penalties
4. Unavailability of persons
5. Unavailability of documents and things
6. Representations in documents
7. Witnesses
8. References to documents
9. References to laws
10. References to children and parents



Evidence Act 1995

No. 2 of 1995

An Act about the law of evidence, and for related purposes

[Assented to 23 February 1995]

The Parliament of Australia enacts:

CHAPTER 1—PRELIMINARY

INTRODUCTORY NOTE

Outline of this Act

This Act sets out the federal rules of evidence. Generally speaking, the Act applies to proceedings in federal courts and ACT courts (see section 4), but some provisions extend beyond such proceedings (see Note 2 to subsection 4(1)).

Chapter 2 is about how evidence is adduced in proceedings.

Chapter 3 is about admissibility of evidence in proceedings.

Chapter 4 is about proof of matters in proceedings.

Chapter 5 deals with miscellaneous matters.

The Dictionary at the end of this Act defines terms and expressions used in this Act.

Evidence No. 2, 1995

Related legislation

This Act is in most respects uniform with the Evidence Act 1995 of New South Wales. The 2 Acts are drafted in identical terms except so far as differences are identified in the Acts by appropriate annotations to the texts, and except so far as minor drafting variations are required because one Act is a Commonwealth Act and one Act is a New South Wales Act.

If one Act contains a provision that is not included in the other Act, the numbering of the other Act has a gap in the numbering in order to maintain consistent numbering for the other provisions.

PART 1.1—FORMAL MATTERS

Short title

1. This Act may be cited as the *Evidence Act 1995*.

Commencement

2.(1) This Part and the Dictionary at the end of this Act commence on the day on which this Act receives the Royal Assent.

(2) Subject to subsection (3), the remaining provisions of this Act commence on a day or days to be fixed by Proclamation.

(3) If a provision referred to in subsection (2) does not commence under that subsection before 18 April 1995, it commences on that day.

Definitions

3.(1) Expressions used in this Act (or in a particular provision of this Act) that are defined in the Dictionary at the end of this Act have the meanings given to them in the Dictionary.

Note: Some expressions used in this Act are defined in the *Acts Interpretation Act 1901*, and have the meanings given to them in that Act.

(2) Notes included in this Act are explanatory notes and do not form part of this Act.

(3) Definitions in this Act of expressions used in this Act apply to its construction except insofar as the context or subject matter otherwise indicates or requires.

Note: Subsection (3) does not appear in section 3 of the NSW Act, because it is covered by section 6 of the Interpretation Act 1987 of New South Wales.

PART 1.2—APPLICATION OF THIS ACT

Courts and proceedings to which Act applies

4.(1) This Act applies in relation to all proceedings in a federal court or an ACT court, including proceedings that:

- (a) relate to bail; or
- (b) are interlocutory proceedings or proceedings of a similar kind; or

Evidence No. 2, 1995

- (c) are heard in chambers; or
- (d) subject to subsection (2), relate to sentencing.

Note 1: Section 4 of the NSW Act differs from this section. It applies that Act to proceedings in NSW courts.

Note 2: “ACT court” and “federal court” are defined in the Dictionary. The definitions include persons or bodies required to apply the laws of evidence.

Note 3: Some provisions of this Act extend beyond proceedings in federal courts or ACT courts. These provisions deal with:

- extension of specified provisions to cover proceedings in all Australian courts (section 5);
- faith and credit to be given to documents properly authenticated (section 185);
- swearing of affidavits for use in Australian courts exercising federal jurisdiction or similar jurisdiction (section 186);
- abolition of the privilege against self-incrimination for bodies corporate (section 187).

(2) If such a proceeding relates to sentencing:

- (a) this Act applies only if the court directs that the law of evidence applies in the proceeding; and
- (b) if the court specifies in the direction that the law of evidence applies only in relation to specified matters—the direction has effect accordingly.

(3) The court must make a direction if:

- (a) a party to the proceeding applies for such a direction in relation to the proof of a fact; and
- (b) in the court’s opinion, the proceeding involves proof of that fact, and that fact is or will be significant in determining a sentence to be imposed in the proceeding.

(4) The court must make a direction if the court considers it appropriate to make such a direction in the interests of justice.

(5) The provisions of this Act (other than sections 185, 186 and 187) do not apply in relation to:

- (a) an appeal from a court of a State, including an appeal from a court of a State exercising federal jurisdiction; or
- (b) an appeal from a court of the Northern Territory or an external Territory; or
- (c) on or after the day fixed by Proclamation under subsection (6)—an appeal from an ACT court; or
- (d) until the day fixed by Proclamation under subsection (6)—a review of a decision or order of a magistrate (other than a review of a decision or order of a magistrate of the Australian Capital Territory) and any appeal from such a review; or
- (e) on or after that day—a review of a decision or order of a magistrate and any appeal from such a review;

except so far as the provisions apply to proceedings in all Australian courts.

(6) On a day fixed by Proclamation, the provisions of this Act (other than sections 185, 186 and 187) cease to apply in relation to proceedings in an ACT court, except so far as the provisions apply to proceedings in all Australian courts.

Note: Subsections (5) and (6) are not included in section 4 of the NSW Act.

Extended application of certain provisions

5. The provisions of this Act referred to in the Table apply in relation to all proceedings in an Australian court, including proceedings that:

- (a) relate to bail; or
- (b) are interlocutory proceedings or proceedings of a similar kind; or
- (c) are heard in chambers; or
- (d) relate to sentencing.

TABLE

| Provisions of this Act | Subject matter |
|-------------------------------|---|
| Subsection 70(2) | Evidence of tags and labels in Customs prosecutions and Excise prosecutions |
| Section 143 | Matters of law |
| Section 150 | Seals and signatures |
| Section 153 | Gazettes and other official documents |
| Section 154 | Documents published by authority of Parliaments etc. |
| Section 155 | Official records |
| Section 157 | Public documents relating to court processes |
| Section 158 | Evidence of certain public documents |
| Section 159 | Official statistics |
| Section 163 | Proof of letters having been sent by Commonwealth agencies |
| Section 182 | Commonwealth records |

Note 1: "Australian court" is defined in the Dictionary to cover all courts in Australia. The definition extends to persons and bodies that take evidence or that are required to apply the laws of evidence.

Note 2: The NSW Act has no equivalent provision for section 5.

Territories

6. This Act extends to each external Territory.

Note: The NSW Act has no equivalent provision for section 6.

Act binds Crown

7. This Act binds the Crown in all its capacities.

Note: This section differs from section 7 of the NSW Act.

Operation of other Acts etc.

8.(1) This Act does not affect the operation of the provisions of any other Act, other than sections 68, 79, 80 and 80A of the *Judiciary Act 1903*.

(2) This Act does not affect the operation of regulations that:

- (a)** are made under an Act other than this Act; and
- (b)** are in force on the commencement of this section.

However, this subsection ceases to apply to a regulation once it is amended after that commencement.

(3) This Act has effect subject to the Corporations Law and the ASC Law.

(4) Until the day fixed by Proclamation under subsection 4(6), this Act does not affect the operation of the following:

- (a)** provisions of the Evidence Act 1971 of the Australian Capital Territory that are specified in the regulations;
- (b)** any other Act of the Australian Capital Territory;
- (c)** an Ordinance of the Australian Capital Territory;
- (d)** an Imperial Act or State Act in force in the Australian Capital Territory;
- (e)** regulations that:
 - (i)** are made under an Act or Ordinance of the Australian Capital Territory or under an Imperial Act or State Act in force in the Australian Capital Territory; and
 - (ii)** are in force on the commencement of this section.

(5) Paragraph (4)(e) ceases to apply to a regulation once it is amended after the commencement of this section.

(6) Subsection (4) does not apply:

- (a)** in relation to provisions of this Act that apply to proceedings in all Australian courts; or
- (b)** so far as the regulations provide otherwise.

Note: Subsection (1) differs from section 8 of the NSW Act. Subsections (2), (3), (4), (5) and (6) are not included in section 8 of the NSW Act.

Effect of Act on other laws

9.(1) For the avoidance of doubt, this Act does not affect an Australian law so far as the law relates to a court's power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding.

(2) For the avoidance of doubt, this Act does not affect a law of a State or Territory so far as the law relates to:

- (a) admission or use of evidence of reasons for a decision of a member of a jury, or of the deliberations of a member of a jury in relation to such a decision, in a proceeding by way of appeal from a judgment, decree, order or sentence of the relevant court; or
- (b) bail; or
- (c) any requirement for admission of evidence in support of an alibi.

(3) For the avoidance of doubt, this Act does not affect a law of a State or Territory so far as the law provides for:

- (a) the operation of a legal or evidential presumption (except so far as this Act is, expressly or by necessary intendment, inconsistent with the presumption); or
- (b) the admissibility of a document to depend on whether stamp duty has been paid; or
- (c) a requirement that notice must be given before evidence may be adduced; or
- (d) evidentiary effect to be given to a certificate or other document issued under that or any other law of the State or Territory; or
- (e) proof of title to property (other than by a means provided for by this Act that is applicable to proof of title to property).

Note: This section differs from section 9 of the NSW Act.

Parliamentary privilege preserved

10.(1) This Act does not affect the law relating to the privileges of any Australian Parliament or any House of any Australian Parliament.

(2) In particular, subsection 15(2) does not affect, and is in addition to, the law relating to such privileges.

General powers of a court

11.(1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.

(2) In particular, the powers of a court with respect to abuse of process in a proceeding are not affected.

CHAPTER 2—ADDUCING EVIDENCE

INTRODUCTORY NOTE

Outline of this Chapter

This Chapter is about ways in which evidence is adduced.

Evidence No. 2, 1995

Part 2.1 is about adducing evidence from witnesses.

Part 2.2 is about adducing documentary evidence.

Part 2.3 is about adducing other forms of evidence.

PART 2.1—WITNESSES

Division 1—Competence and compellability of witnesses

Competence and compellability

12. Except as otherwise provided by this Act:

- (a) every person is competent to give evidence; and
- (b) a person who is competent to give evidence about a fact is compellable to give that evidence.

Competence: lack of capacity

13.(1) A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give sworn evidence.

(2) A person who because of subsection (1) is not competent to give sworn evidence is competent to give unsworn evidence if:

- (a) the court is satisfied that the person understands the difference between the truth and a lie; and
- (b) the court tells the person that it is important to tell the truth; and
- (c) the person indicates, by responding appropriately when asked, that he or she will not tell lies in the proceeding.

(3) A person who is incapable of giving a rational reply to a question about a fact is not competent to give evidence about the fact, but may be competent to give evidence about other facts.

(4) A person is not competent to give evidence about a fact if:

- (a) the person is incapable of hearing or understanding, or of communicating a reply to, a question about the fact; and
- (b) that incapacity cannot be overcome.

(5) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.

(6) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.

(7) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit.

Compellability: reduced capacity

14. A person is not compellable to give evidence on a particular matter if the court is satisfied that:

- (a) substantial cost or delay would be incurred in ensuring that the person would be capable of hearing or understanding, or of communicating replies to, questions on that matter; and
- (b) adequate evidence on that matter has been given, or will be able to be given, from one or more other persons or sources.

Compellability: Sovereign and others

15.(1) None of the following is compellable to give evidence:

- (a) the Sovereign;
- (b) the Governor-General;
- (c) the Governor of a State;
- (d) the Administrator of a Territory;
- (e) a foreign sovereign or the Head of State of a foreign country.

(2) A member of a House of an Australian Parliament is not compellable to give evidence if the member would, if compelled to give evidence, be prevented from attending:

- (a) a sitting of that House or a joint sitting of that Parliament; or
- (b) a meeting of a committee of that House or that Parliament, being a committee of which he or she is a member.

Competence and compellability: judges and jurors

16.(1) A person who is a judge or juror in a proceeding is not competent to give evidence in that proceeding. However, a juror is competent to give evidence in the proceeding about matters affecting conduct of the proceeding.

(2) A person who is or was a judge in an Australian or overseas proceeding is not compellable to give evidence about that proceeding unless the court gives leave.

Competence and compellability: defendants in criminal proceedings

17.(1) This section applies only in a criminal proceeding.

(2) A defendant is not competent to give evidence as a witness for the prosecution.

(3) An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately from the defendant.

(4) If a witness is an associated defendant who is being tried jointly with the defendant in the proceeding, the court is to satisfy itself (if there is a jury, in the jury's absence) that the witness is aware of the effect of subsection (3).

Note: "Associated defendant" is defined in the Dictionary.

Compellability of spouses and others in criminal proceedings generally

18.(1) This section applies only in a criminal proceeding.

(2) A person who, when required to give evidence, is the spouse, de facto spouse, parent or child of a defendant may object to being required:

- (a)** to give evidence; or
- (b)** to give evidence of a communication between the person and the defendant;

as a witness for the prosecution.

(3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.

(4) If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.

(5) If there is a jury, the court is to hear and determine any objection under this section in the absence of the jury.

(6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:

- (a)** there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence; and
- (b)** the nature and extent of that harm outweighs the desirability of having the evidence given.

(7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following:

- (a)** the nature and gravity of the offence for which the defendant is being prosecuted;
- (b)** the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;
- (c)** whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor;
- (d)** the nature of the relationship between the defendant and the person;
- (e)** whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.

(8) If an objection under this section has been determined, the prosecutor may not comment on:

- (a) the objection; or
- (b) the decision of the court in relation to the objection; or
- (c) the failure of the person to give evidence.

Compellability of spouses and others in certain criminal proceedings

19. Section 18 does not apply in proceedings for an offence against or referred to in the following provisions:

- (a) an offence against a provision of Part III or IIIA of the Crimes Act 1900 of the Australian Capital Territory, being an offence against a person under the age of 16 years;
- (b) an offence against section 133, 134, 135, 139 or 140 of the Children's Services Act 1986 of the Australian Capital Territory;
- (c) an offence that is a domestic violence offence within the meaning of the Domestic Violence Act 1986 of the Australian Capital Territory or an offence under section 27 of that Act.

Note: This section differs from section 19 of the NSW Act.

Comment on failure to give evidence

20.(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 defacto spouse; 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 spouse, parent or child failed to give evidence because:

- (a) the defendant was guilty of the offence concerned; or
- (b) the spouse, defacto spouse, 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 spouse, 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).

Division 2—Oaths and affirmations

Sworn evidence of witnesses to be on oath or affirmation

21.(1) A witness in a proceeding must either take an oath, or make an affirmation, before giving evidence.

(2) Subsection (1) does not apply to a person who gives unsworn evidence under subsection 13(2).

(3) 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.

(4) The witness is to take the oath, or make the affirmation, in accordance with the appropriate form in the Schedule or in a similar form.

(5) Such an affirmation has the same effect for all purposes as an oath.

Interpreters to act on oath or affirmation

22.(1) A person must either take an oath, or make an affirmation, before acting as an interpreter in a proceeding.

(2) The person is to take the oath, or make the affirmation, in accordance with the appropriate form in the Schedule or in a similar form.

(3) Such an affirmation has the same effect for all purposes as an oath.

Choice of oath or affirmation

23.(1) A person who is to be a witness or act as an interpreter in a proceeding may choose whether to take an oath or make an affirmation.

(2) The court is to inform the person that he or she has this choice.

(3) The court may direct a person who is to be a witness to make an affirmation if:

(a) the person refuses to choose whether to take an oath or make an affirmation; or

(b) it is not reasonably practicable for the person to take an appropriate oath.

Requirements for oaths

24.(1) It is not necessary that a religious text be used in taking an oath.

(2) An oath is effective for the purposes of this Division even if the person who took it:

- (a) did not have a religious belief or did not have a religious belief of a particular kind; or
- (b) did not understand the nature and consequences of the oath.

Rights to make unsworn statements unaffected

25. This Act does not affect any right that a defendant in a criminal proceeding has under a law of a State or a Territory to make an unsworn statement.

Note: The NSW Act has no equivalent provision for section 25.

Division 3—General rules about giving evidence

Court's control over questioning of witnesses

26. The court may make such orders as it considers just in relation to:

- (a) the way in which witnesses are to be questioned; and
- (b) the production and use of documents and things in connection with the questioning of witnesses; and
- (c) the order in which parties may question a witness; and
- (d) the presence and behaviour of any person in connection with the questioning of witnesses.

Parties may question witnesses

27. A party may question any witness, except as provided by this Act.

Order of examination in chief, cross-examination and re-examination

28. Unless the court otherwise directs:

- (a) cross-examination of a witness is not to take place before the examination in chief of the witness; and
- (b) re-examination of a witness is not to take place before all other parties who wish to do so have cross-examined the witness.

Manner and form of questioning witnesses and their responses

29.(1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.

- (2) A witness may give evidence wholly or partly in narrative form if:
 - (a) the party that called the witness has applied to the court for a direction that the witness give evidence in that form; and
 - (b) the court so directs.

(3) Such a direction may include directions about the way in which evidence is to be given in that form.

(4) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

Interpreters

30. A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

Deaf and mute witnesses

31.(1) A witness who cannot hear adequately may be questioned in any appropriate way.

(2) A witness who cannot speak adequately may give evidence by any appropriate means.

(3) The court may give directions concerning either or both of the following:

- (a) the way in which a witness may be questioned under subsection (1);
- (b) the means by which a witness may give evidence under subsection (2).

(4) This section does not affect the right of a witness to whom this section applies to give evidence about a fact through an interpreter under section 30.

Attempts to revive memory in court

32.(1) A witness must not, in the course of giving evidence, use a document to try to revive his or her memory about a fact or opinion unless the court gives leave.

(2) Without limiting the matters that the court may take into account in deciding whether to give leave, it is to take into account:

- (a) whether the witness will be able to recall the fact or opinion adequately without using the document; and
- (b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that:
 - (i) was written or made by the witness when the events recorded in it were fresh in his or her memory; or
 - (ii) was, at such a time, found by the witness to be accurate.

(3) If a witness has, while giving evidence, used a document to try to revive his or her memory about a fact or opinion, the witness may, with the leave of the court, read aloud, as part of his or her evidence, so much of the document as relates to that fact or opinion.

(4) The court is, on the request of a party, to give such directions as the court thinks fit to ensure that so much of the document as relates to the proceeding is produced to that party.

Evidence given by police officers

33.(1) Despite section 32, in any criminal proceeding, a police officer may give evidence in chief for the prosecution by reading or being led through a written statement previously made by the police officer.

(2) Evidence may not be so given unless:

- (a) the statement was made by the police officer at the time of or soon after the occurrence of the events to which it refers; and
- (b) the police officer signed the statement when it was made; and
- (c) a copy of the statement had been given to the person charged or to his or her lawyer a reasonable time before the hearing of the evidence for the prosecution.

(3) A reference in this section to a police officer includes a reference to a person who, at the time the statement concerned was made, was a police officer.

Attempts to revive memory out of court

34.(1) The court may, on the request of a party, give such directions as are appropriate to ensure that specified documents and things used by a witness otherwise than while giving evidence to try to revive his or her memory are produced to the party for the purposes of the proceeding.

(2) The court may refuse to admit the evidence given by the witness so far as it concerns a fact as to which the witness so tried to revive his or her memory if, without reasonable excuse, the directions have not been complied with.

Effect of calling for production of documents

35.(1) A party is not to be required to tender a document only because the party, whether under this Act or otherwise:

- (a) called for the document to be produced to the party; or
- (b) inspected it when it was so produced.

(2) The party who produces a document so called for is not entitled to tender it only because the party to whom it was produced, or who inspected it, fails to tender it.

Person may be examined without subpoena or other process

36.(1) The court may order a person who:

- (a) is present at the hearing of a proceeding; and

(b) is compellable to give evidence in the proceeding;
to give evidence and to produce documents or things even if a subpoena or other process requiring the person to attend for that purpose has not been duly served on the person.

(2) A person so ordered to give evidence or to produce documents or things is subject to the same penalties and liabilities as if the person had been duly served with such a subpoena or other process.

(3) A party who inspects a document or thing produced to the court because of subsection (1) need not use the document in evidence.

Division 4—Examination in chief and re-examination

Leading questions

37.(1) A leading question must not be put to a witness in examination in chief or in re-examination unless:

- (a) the court gives leave; or
- (b) the question relates to a matter introductory to the witness's evidence;
or
- (c) no objection is made to the question and (leaving aside the party conducting the examination in chief or re-examination) each other party to the proceeding is represented by a lawyer; or
- (d) the question relates to a matter that is not in dispute; or
- (e) if the witness has specialised knowledge based on the witness's training, study or experience—the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given.

(2) Unless the court otherwise directs, subsection (1) does not apply in civil proceedings to a question that relates to an investigation, inspection or report that the witness made in the course of carrying out public or official duties.

(3) Subsection (1) does not prevent a court from exercising power under rules of court to allow a written statement or report to be tendered or treated as evidence in chief of its maker.

Note: "Leading question" is defined in the Dictionary.

Unfavourable witnesses

38.(1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:

- (a) evidence given by the witness that is unfavourable to the party; or

(b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence;
or

(c) whether the witness has, at any time, made a prior inconsistent statement.

(2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).

(3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

Note: The rules about admissibility of evidence relevant only to credibility are set out in Part 3.7.

(4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

(5) If the court so directs, the order in which the parties question the witness is to be as the court directs.

(6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account:

(a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave; and

(b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

(7) A party is subject to the same liability to be cross-examined under this section as any other witness if:

(a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person; and

(b) the party is a witness in the proceeding.

Limits on re-examination

39. On re-examination:

(a) a witness may be questioned about matters arising out of evidence given by the witness in cross-examination; and

(b) other questions may not be put to the witness unless the court gives leave.

Division 5—Cross-examination

Witness called in error

40. A party is not to cross-examine a witness who has been called in error by another party and has not been questioned by that other party about a matter relevant to a question to be determined in the proceeding.

Improper questions

41.(1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:

- (a) misleading; or
- (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

(2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:

- (a) any relevant condition or characteristic of the witness, including age, personality and education; and
- (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

Leading questions

42.(1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.

(2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:

- (a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness; and
- (b) the witness has an interest consistent with an interest of the cross-examiner; and
- (c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter; and
- (d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.

(3) The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used.

(4) This section does not limit the court's power to control leading questions.

Note: "Leading question" is defined in the Dictionary.

Prior inconsistent statements of witnesses

43.(1) A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not:

- (a) complete particulars of the statement have been given to the witness;
- or

(b) a document containing a record of the statement has been shown to the witness.

(2) If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner:

- (a) informed the witness of enough of the circumstances of the making of the statement to enable the witness to identify the statement; and
- (b) drew the witness's attention to so much of the statement as is inconsistent with the witness's evidence.

(3) For the purpose of adducing evidence of the statement, the party may re-open the party's case.

Previous representations of other persons

44.(1) Except as provided by this section, a cross-examiner must not question a witness about a previous representation alleged to have been made by a person other than the witness.

(2) A cross-examiner may question a witness about the representation and its contents if:

- (a) evidence of the representation has been admitted; or
- (b) the court is satisfied that it will be admitted.

(3) If subsection (2) does not apply and the representation is contained in a document, the document may only be used to question a witness as follows:

- (a) the document must be produced to the witness;
- (b) if the document is a tape recording, or any other kind of document from which sounds are reproduced—the witness must be provided with the means (for example, headphones) to listen to the contents of the document without other persons present at the cross-examination hearing those contents;
- (c) the witness must be asked whether, having examined (or heard) the contents of the document, the witness stands by the evidence that he or she has given;
- (d) neither the cross-examiner nor the witness is to identify the document or disclose any of its contents.

(4) A document that is so used may be marked for identification.

Production of documents

45.(1) This section applies if a party is cross-examining or has cross-examined a witness about:

- (a) a prior inconsistent statement alleged to have been made by the witness that is recorded in a document; or

(b) a previous representation alleged to have been made by another person that is recorded in a document.

(2) If the court so orders or if another party so requires, the party must produce:

(a) the document; or

(b) such evidence of the contents of the document as is available to the party;

to the court or to that other party.

(3) The court may:

(a) examine a document or evidence that has been so produced; and

(b) give directions as to its use; and

(c) admit it even if it has not been tendered by a party.

(4) Subsection (3) does not permit the court to admit a document or evidence that is not admissible because of Chapter 3.

(5) The mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document.

Leave to recall witnesses

46.(1) The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence concerned has been admitted and:

(a) it contradicts evidence about the matter given by the witness in examination in chief; or

(b) the witness could have given evidence about the matter in examination in chief.

(2) A reference in this section to a matter raised by evidence adduced by another party includes a reference to an inference drawn from, or that the party intends to draw from, that evidence.

PART 2.2—DOCUMENTS

Definitions

47.(1) A reference in this Part to a **document in question** is a reference to a document as to the contents of which it is sought to adduce evidence.

(2) A reference in this Part to a copy of a document in question includes a reference to a document that is not an exact copy of the document in question but that is identical to the document in question in all relevant respects.

Proof of contents of documents

48.(1) A party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods:

- (a) adducing evidence of an admission made by another party to the proceeding as to the contents of the document in question;
- (b) tendering a document that:
 - (i) is or purports to be a copy of the document in question; and
 - (ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents;
- (c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing)—tendering a document that is or purports to be a transcript of the words;
- (d) if the document in question is an article or thing on or in which information is stored in such a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it—tendering a document that was or purports to have been produced by use of the device;
- (e) tendering a document that:
 - (i) forms part of the records of or kept by a business (whether or not the business is still in existence); and
 - (ii) is or purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of such an extract or summary;
- (f) if the document in question is a public document—tendering a document that is or purports to be a copy of the document in question and that is or purports to have been printed:
 - (i) by the Government Printer or by the government or official printer of a State or Territory; or
 - (ii) by authority of the government or administration of the Commonwealth, a State, a Territory or a foreign country; or
 - (iii) by authority of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament.

(2) Subsection (1) applies to a document in question whether the document in question is available to the party or not.

(3) If the party adduces evidence of the contents of a document under paragraph (1)(a), the evidence may only be used:

Evidence No. 2, 1995

- (a) in respect of the party's case against the other party who made the admission concerned; or
- (b) in respect of the other party's case against the party who adduced the evidence in that way.

(4) A party may adduce evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by:

- (a) tendering a document that is a copy of, or an extract from or summary of, the document in question; or
- (b) adducing oral evidence of the contents of the document in question.

Note: Clause 5 of Part 2 of the Dictionary is about the availability of documents.

Documents in foreign countries

49. No paragraph of subsection 48(1) (other than paragraph 48(1)(a)) applies to a document that is in a foreign country unless:

- (a) the party who adduces evidence of the contents of the document in question has, not less than 28 days (or such other period as may be prescribed by the regulations or by rules of court) before the day on which the evidence is adduced, served on each other party a copy of the document proposed to be tendered; or
- (b) the court directs that it is to apply.

Proof of voluminous or complex documents

50.(1) The court may direct that a party may adduce evidence of the contents of 2 or more documents in question in the form of a summary if:

- (a) application is made to it by the party before the hearing concerned; and
- (b) it is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume and complexity of the documents in question.

(2) The court may only make such a direction if the party seeking to adduce the evidence in the form of a summary has:

- (a) served on each other party a copy of the summary that discloses the name and address of the person who prepared the summary; and
- (b) given each other party a reasonable opportunity to examine or copy the documents in question.

(3) The opinion rule does not apply to evidence adduced in accordance with a direction under this section.

Original document rule abolished

51. The principles and rules of the common law that relate to the means of proving the contents of documents are abolished.

Note: Section 182 gives the provisions of this Part a wider application in relation to Commonwealth records.

PART 2.3—OTHER EVIDENCE

Adducing of other evidence not affected

52. This Act (other than this Part) does not affect the operation of any Australian law or rule of practice so far as it permits evidence to be adduced in a way other than by witnesses giving evidence or documents being tendered in evidence.

Views

53.(1) A judge may, on application, order that a demonstration, experiment or inspection be held.

(2) A judge is not to make an order unless he or she is satisfied that:

- (a) the parties will be given a reasonable opportunity to be present; and
- (b) the judge and, if there is a jury, the jury will be present.

(3) Without limiting the matters that the judge may take into account in deciding whether to make an order, the judge is to take into account the following:

- (a) whether the parties will be present;
- (b) whether the demonstration, experiment or inspection will, in the court's opinion, assist the court in resolving issues of fact or understanding the evidence;
- (c) the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time;
- (d) in the case of a demonstration—the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated;
- (e) in the case of an inspection—the extent to which the place or thing to be inspected has materially altered.

(4) The court (including, if there is a jury, the jury) is not to conduct an experiment in the course of its deliberations.

(5) This section does not apply in relation to the inspection of an exhibit by the court or, if there is a jury, by the jury.

Views to be evidence

54. The court (including, if there is a jury, the jury) may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.

CHAPTER 3—ADMISSIBILITY OF EVIDENCE

INTRODUCTORY NOTE

Outline of this Chapter

This Chapter is about whether evidence adduced in a proceeding is admissible.

Part 3.1 sets out the general inclusionary rule that relevant evidence is admissible.

Part 3.2 is about the exclusion of hearsay evidence, and exceptions to the hearsay rule.

Part 3.3 is about exclusion of opinion evidence, and exceptions to the opinion rule.

Part 3.4 is about admissions and the extent to which they are admissible as exceptions to the hearsay rule and the opinion rule.

Part 3.5 is about exclusion of certain evidence of judgments and convictions.

Part 3.6 is about exclusion of evidence of tendency or coincidence, and exceptions to the tendency rule and the coincidence rule.

Part 3.7 is about exclusion of evidence relevant only to credibility, and exceptions to the credibility rule.

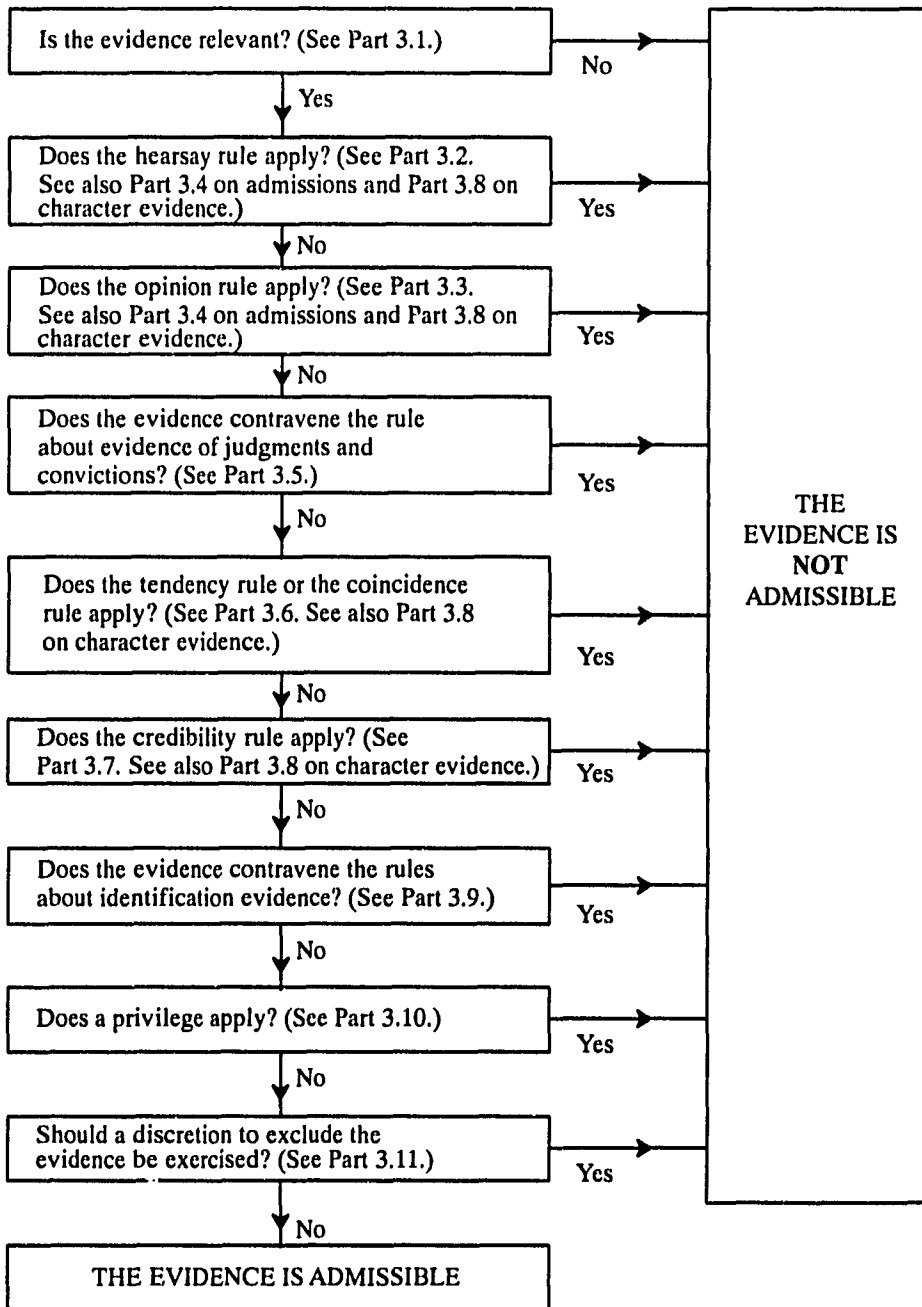
Part 3.8 is about character evidence and the extent to which it is admissible as exceptions to the hearsay rule, the opinion rule, the tendency rule and the credibility rule.

Part 3.9 is about the requirements that must be satisfied before identification evidence is admissible.

Part 3.10 is about the various categories of privilege that may prevent evidence being adduced.

Part 3.11 gives courts discretions to exclude evidence even if it would otherwise be admissible.

The following diagram shows how this Chapter applies to particular evidence:



PART 3.1--RELEVANCE

Relevant evidence

55.(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.

(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.

Relevant evidence to be admissible

56.(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.

Provisional relevance

57.(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.

Inferences as to relevance

58.(1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.

(2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

PART 3.2—HEARSAY

Division 1—The hearsay rule

The hearsay rule—exclusion of hearsay evidence

59.(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

(2) Such a fact is in this Part referred to as an **asserted fact**:

Note: Specific exceptions to the hearsay rule are as follows:

- evidence relevant for a non-hearsay purpose (section 60);
- first-hand hearsay:
 - civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64);
 - criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66);
- business records (section 69);
- tags and labels (section 70);
- telecommunications (section 71);
- contemporaneous statements about a person's health etc. (section 72);
- marriage, family history or family relationships (section 73);
- public or general rights (section 74);
- use of evidence in interlocutory proceedings (section 75);
- admissions (section 81);
- representations about employment or authority (subsection 87(2));
- exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));
- character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

Examples:

- (1) D is the defendant in a sexual assault trial. W has made a statement to the police that X told W that X had seen D leave a night club with the victim shortly before the sexual assault is alleged to have occurred. Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.
- (2) P had told W that the handbrake on W's car did not work. Unless an exception to the hearsay rule applies, evidence of that statement cannot be given by P, W or anyone else to prove that the handbrake was defective.
- (3) W had bought a video cassette recorder and written down its serial number on a document. Unless an exception to the hearsay rule applies, the document is inadmissible to prove that a video cassette recorder later found in D's possession was the video cassette recorder bought by W.

Exception: evidence relevant for a non-hearsay purpose

60. The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

Exceptions to the hearsay rule dependent on competency

61.(1) This Part does not enable use of a previous representation to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about the fact because he or she was incapable of giving a rational reply to a question about the fact.

(2) This section does not apply to a contemporaneous representation made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind.

Note: For the admissibility of such contemporaneous representations, see section 72.

(3) For the purposes of this section, it is presumed, unless the contrary is proved, that when the representation was made the person who made it was competent to give evidence about the asserted fact.

Division 2—“First-hand” hearsay

Restriction to “first-hand” hearsay

62.(1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.

(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

Exception: civil proceedings if maker not available

63.(1) This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to:

- (a)** oral evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
- (b)** a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Note 1: Section 67 imposes notice requirements relating to this subsection.

Note 2: Clause 4 of Part 2 of the Dictionary is about the availability of persons.

Exception: civil proceedings if maker available

64.(1) This section applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

- (2) The hearsay rule does not apply to:
- (a) oral evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
 - (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation;

if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

Note: Section 67 imposes notice requirements relating to this subsection. Section 68 is about objections to notices that relate to this subsection.

(3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

- (a) that person; or
- (b) a person who saw, heard or otherwise perceived the representation being made;

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(4) A document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note: Clause 4 of Part 2 of the Dictionary is about the availability of persons.

Exception: criminal proceedings if maker not available

65.(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:

- (a) made under a duty to make that representation or to make representations of that kind; or
- (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
- (c) made in circumstances that make it highly probable that the representation is reliable; or
- (d) against the interests of the person who made it at the time it was made.

Note: Section 67 imposes notice requirements relating to this subsection.

(3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:

- (a) cross-examined the person who made the representation about it; or
- (b) had a reasonable opportunity to cross-examine the person who made the representation about it.

Note: Section 67 imposes notice requirements relating to this subsection.

(4) If there is more than one defendant in the criminal proceeding, evidence of a previous representation that:

- (a) is given in an Australian or overseas proceeding; and
- (b) is admitted into evidence in the criminal proceeding because of subsection (3);

cannot be used against a defendant who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.

(5) For the purposes of subsections (3) and (4), a defendant is taken to have had a reasonable opportunity to cross-examine a person if the defendant was not present at a time when the cross-examination of a person might have been conducted but:

- (a) could reasonably have been present at that time; and
- (b) if present could have cross-examined the person.

(6) Evidence of the making of a representation to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the representation that is authenticated by:

- (a) the person to whom, or the court or other body to which, the representation was made; or
- (b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made; or
- (c) the person or body responsible for producing the transcript or recording.

(7) Without limiting paragraph (2)(d), a representation is taken for the purposes of that paragraph to be against the interests of the person who made it if it tends:

- (a) to damage the person's reputation; or
- (b) to show that the person has committed an offence for which the person has not been convicted; or
- (c) to show that the person is liable in an action for damages.

- (8) The hearsay rule does not apply to:
- (a) oral evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or
 - (b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Note: Section 67 imposes notice requirements relating to this subsection.

(9) If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:

- (a) is adduced by another party; and
- (b) is given by a person who saw, heard or otherwise perceived the other representation being made.

Note: Clause 4 of Part 2 of the Dictionary is about the availability of persons.

Exception: criminal proceedings if maker available

66.(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

- (a) that person; or
- (b) a person who saw, heard or otherwise perceived the representation being made;

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note: Clause 4 of Part 2 of the Dictionary is about the availability of persons.

Notice to be given

67.(1) Subsections 63(2), 64(2) and 65(2), (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence.

(2) Notices given under subsection (1) are to be given in accordance with any regulations or rules of court made for the purposes of this section.

(3) The notice must state:

- (a) the particular provisions of this Division on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence; and
- (b) if subsection 64(2) is such a provision—the grounds, specified in that provision, on which the party intends to rely.

(4) Despite subsection (1), if notice has not been given, the court may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.

(5) The direction:

- (a) is subject to such conditions (if any) as the court thinks fit; and
- (b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

Objections to tender of hearsay evidence in civil proceedings if maker available

68.(1) In a civil proceeding, if the notice discloses that it is not intended to call the person who made the previous representation concerned because it:

- (a) would cause undue expense or undue delay; or
- (b) would not be reasonably practicable;

a party may, not later than 21 days after notice has been given, object to the tender of the evidence, or of a specified part of the evidence.

(2) The objection is to be made by giving to each other party a written notice setting out the grounds on which the objection is made.

(3) The court may, on the application of a party, determine the objection at or before the hearing.

(4) If the objection is unreasonable, the court may order that, in any event, the party objecting is to bear the costs (ascertained on a solicitor and client basis) incurred by another party:

- (a) in relation to the objection; and
- (b) in calling the person who made the representation to give evidence.

Division 3—Other exceptions to the hearsay rule

Exception: business records

69.(1) This section applies to a document that:

- (a) either:
 - (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or
 - (ii) at any time was or formed part of such a record; and
 - (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.
- (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:
- (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
 - (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.
- (3) Subsection (2) does not apply if the representation:
- (a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or
 - (b) was made in connection with an investigation relating or leading to a criminal proceeding.
- (4) If:
- (a) the occurrence of an event of a particular kind is in question; and
 - (b) in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind;

the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.

(5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

Note 1: Sections 48, 49, 50, 146, 147 and subsection 150(1) are relevant to the mode of proof, and authentication, of business records.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records.

Exception: contents of tags, labels and writing

70.(1) The hearsay rule does not apply to a tag or label attached to, or writing placed on, an object (including a document) if the tag or label or writing may reasonably be supposed to have been so attached or placed:

- (a) in the course of a business; and

Evidence No. 2, 1995

- (b) for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object, or of the contents (if any) of the object.

Note: Section 182 gives this subsection a wider application in relation to Commonwealth records.

(2) This section, and any provision of a law of a State or Territory that permits the use in evidence of such a tag, label or writing as an exception to a rule of law restricting the admissibility or use of hearsay evidence, does not apply to:

- (a) a Customs prosecution within the meaning of Part XIV of the *Customs Act 1901*; or
- (b) an Excise prosecution within the meaning of Part XI of the *Excise Act 1901*.

Note 1: Subsection (2) does not appear in section 57 of the NSW Act.

Note 2: Section 5 extends the application of this subsection to proceedings in all Australian courts.

Exception: telecommunications

71. The hearsay rule does not apply to a representation contained in a document recording a message that has been transmitted by electronic mail or by a fax, telegram, lettergram or telex so far as the representation is a representation as to:

- (a) the identity of the person from whom or on whose behalf the message was sent; or
- (b) the date on which or the time at which the message was sent; or
- (c) the message's destination or the identity of the person to whom the message was addressed.

Note 1: Division 3 of Part 4.3 contains presumptions about telexes, lettergrams and telegrams.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records.

Exception: contemporaneous statements about a person's health etc.

72. The hearsay rule does not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

Exception: reputation as to relationships and age

73.(1) The hearsay rule does not apply to evidence of reputation concerning:

- (a) whether a person was, at a particular time or at any time, a married person; or
- (b) whether a man and a woman cohabiting at a particular time were married to each other at that time; or
- (c) a person's age; or
- (d) family history or a family relationship.

(2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by a defendant unless:

- (a) it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted; or
- (b) the defendant has given reasonable notice in writing to each other party of the defendant's intention to adduce the evidence.

(3) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

Exception: reputation of public or general rights

74.(1) The hearsay rule does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right.

(2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

Exception: interlocutory proceedings

75. In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source.

PART 3.3—OPINION

The opinion rule

76. Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

Note: Specific exceptions to the opinion rule are as follows:

- summaries of voluminous or complex documents (subsection 50(3));
- evidence relevant otherwise than as opinion evidence (section 77);
- lay opinion (section 78);
- expert opinion (section 79);
- admissions (section 81);
- exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));
- character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

Examples:

- (1) P sues D, her doctor, for the negligent performance of a surgical operation. Unless an exception to the opinion rule applies, P's neighbour, W, who had the same operation, cannot give evidence of his opinion that D had not performed the operation as well as his own.
- (2) P considers that electrical work that D, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, P cannot give evidence of her opinion that D does not have the necessary skills to do electrical work.

Exception: evidence relevant otherwise than as opinion evidence

77. The opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.

Exception: lay opinions

78. The opinion rule does not apply to evidence of an opinion expressed by a person if:

- (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and
- (b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

Exception: opinions based on specialised knowledge

79. If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

Ultimate issue and common knowledge rules abolished

80. Evidence of an opinion is not inadmissible only because it is about:

- (a) a fact in issue or an ultimate issue; or
- (b) a matter of common knowledge.

PART 3.4—ADMISSIONS

Note: "Admission" is defined in the Dictionary.

Hearsay and opinion rules: exception for admissions and related representations

81.(1) The hearsay rule and the opinion rule do not apply to evidence of an admission.

(2) The hearsay rule and the opinion rule do not apply to evidence of a previous representation:

- (a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and
- (b) to which it is reasonably necessary to refer in order to understand the admission.

Note: Specific exclusionary rules relating to admissions are as follows:

- evidence of admissions that is not first-hand (section 82);
- use of admissions against third parties (section 83);
- admissions influenced by violence etc. (section 84);
- unreliable admissions of accused persons (section 85);
- records of oral questioning of accused persons (section 86).

Example: D admits to W, his best friend, that he sexually assaulted V. In D's trial for the sexual assault, the prosecution may lead evidence from W:

- (a) that D made the admission to W as proof of the truth of that admission; and
- (b) that W formed the opinion that D was sane when he made the admission.

Exclusion of evidence of admissions that is not first-hand

82. Section 81 does not prevent the application of the hearsay rule to evidence of an admission unless:

- (a) it is given orally by a person who saw, heard or otherwise perceived the admission being made; or
- (b) it is a document in which the admission is made.

Exclusion of evidence of admissions as against third parties

83.(1) Section 81 does not prevent the application of the hearsay rule or the opinion rule to evidence of an admission in respect of the case of a third party.

(2) The evidence may be used in respect of the case of a third party if that party consents.

(3) Consent cannot be given in respect of part only of the evidence.

(4) In this section:

“**third party**” means a party to the proceeding concerned, other than the party who:

- (a) made the admission; or
- (b) adduced the evidence.

Exclusion of admissions influenced by violence and certain other conduct

84.(1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:

- (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
- (b) a threat of conduct of that kind.

(2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.

Criminal proceedings: reliability of admissions by defendants

85.(1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:

- (a) in the course of official questioning; or
- (b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

(2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

(3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:

- (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and
- (b) if the admission was made in response to questioning:
 - (i) the nature of the questions and the manner in which they were put; and
 - (ii) the nature of any threat, promise or other inducement made to the person questioned.

Exclusion of records of oral questioning

86.(1) This section applies only in a criminal proceeding and only if an oral admission was made by a defendant to an investigating official in response to a question put or a representation made by the official.

(2) A document prepared by or on behalf of the official is not admissible to prove the contents of the question, representation or response unless the defendant has acknowledged that the document is a true record of the question, representation or response.

(3) The acknowledgment must be made by signing, initialling or otherwise marking the document.

(4) In this section:

“document” does not include:

- (a) a sound recording, or a transcript of a sound recording; or
- (b) a recording of visual images and sounds, or a transcript of the sounds so recorded.

Admissions made with authority

87.(1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that:

- (a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter with respect to which the representation was made; or
- (b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person’s employment or authority; or
- (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.

(2) For the purposes of this section, the hearsay rule does not apply to a previous representation made by a person that tends to prove:

- (a) that the person had authority to make statements on behalf of another person in relation to a matter; or
- (b) that the person was an employee of another person or had authority otherwise to act for another person; or
- (c) the scope of the person's employment or authority.

Proof of admissions

88. For the purpose of determining whether evidence of an admission is admissible, the court is to find that a particular person made the admission if it is reasonably open to find that he or she made the admission.

Evidence of silence

89.(1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:

- (a) to answer one or more questions; or
- (b) to respond to a representation;

put or made to the party or other person in the course of official questioning.

(2) Evidence of that kind is not admissible if it can only be used to draw such an inference.

(3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.

(4) In this section:

“inference” includes:

- (a) an inference of consciousness of guilt; or
- (b) an inference relevant to a party's credibility.

Discretion to exclude admissions

90. In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:

- (a) the evidence is adduced by the prosecution; and
- (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

Note: Part 3.11 contains other exclusionary discretions that are applicable to admissions.

PART 3.5—EVIDENCE OF JUDGMENTS AND CONVICTIONS

Exclusion of evidence of judgments and convictions

91.(1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.

(2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.

Note: Section 178 (Convictions, acquittals and other judicial proceedings) provides for certificate evidence of decisions.

Exceptions

92.(1) Subsection 91(1) does not prevent the admission or use of evidence of the grant of probate, letters of administration or a similar order of a court to prove:

- (a) the death, or date of death, of a person; or
- (b) the due execution of a testamentary document.

(2) In a civil proceeding, subsection 91(1) does not prevent the admission or use of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence, not being a conviction:

- (a) in respect of which a review or appeal (however described) has been instituted but not finally determined; or
- (b) that has been quashed or set aside; or
- (c) in respect of which a pardon has been given.

(3) The hearsay rule and the opinion rule do not apply to evidence of a kind referred to in this section.

Savings

93. This Part does not affect the operation of:

- (a) a law that relates to the admissibility or effect of evidence of a conviction tendered in a proceeding (including a criminal proceeding) for defamation; or
- (b) a judgment *in rem*; or
- (c) the law relating to *res judicata* or issue estoppel.

PART 3.6—TENDENCY AND COINCIDENCE

Application

94.(1) This Part does not apply to evidence that relates only to the credibility of a witness.

(2) This Part does not apply so far as a proceeding relates to bail or sentencing.

(3) This Part does not apply to evidence of:

- (a) the character, reputation or conduct of a person; or
- (b) a tendency that a person has or had;

if that character, reputation, conduct or tendency is a fact in issue.

Use of evidence for other purposes

95.(1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.

(2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

Failure to act

96. A reference in this Part to doing an act includes a reference to failing to do that act.

The tendency rule

97.(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind, if:

- (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or
- (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Paragraph (1)(a) does not apply if:

- (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
- (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note: The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

The coincidence rule

98.(1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:

- (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or
- (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:

- (a) they are substantially and relevantly similar; and
- (b) the circumstances in which they occurred are substantially similar.

(3) Paragraph (1)(a) does not apply if:

- (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
- (b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note: Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

Requirements for notices

99. Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.

Court may dispense with notice requirements

100.(1) The court may, on the application of a party, direct that the tendency rule is not to apply to particular tendency evidence despite the party's failure to give notice under section 97.

(2) The court may, on the application of a party, direct that the coincidence rule is not to apply to particular coincidence evidence despite the party's failure to give notice under section 98.

(3) The application may be made either before or after the time by which the party would, apart from this section, be required to give, or to have given, the notice.

(4) In a civil proceeding, the party's application may be made without notice of it having been given to one or more of the other parties.

(5) The direction:

- (a) is subject to such conditions (if any) as the court thinks fit; and
- (b) may be given either at or before the hearing.

(6) Without limiting the court's power to impose conditions under this section, those conditions may include one or more of the following:

- (a) a condition that the party give notice of its intention to adduce the evidence to a specified party, or to each other party other than a specified party;
- (b) a condition that the party give such notice only in respect of specified tendency evidence, or all tendency evidence that the party intends to adduce other than specified tendency evidence;
- (c) a condition that the party give such notice only in respect of specified coincidence evidence, or all coincidence evidence that the party intends to adduce other than specified coincidence evidence.

Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

101.(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

(3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

PART 3.7—CREDIBILITY

The credibility rule

102. Evidence that is relevant only to a witness's credibility is not admissible.

Note: Specific exceptions to the credibility rule are as follows:

- evidence adduced in cross-examination (sections 103, 104 and 107);
- evidence in response to unsworn statements (section 105);
- evidence in rebuttal of denials (section 106);
- evidence to re-establish credibility (section 108);
- character of accused persons (section 110).

Other provisions of this Act, or of other laws, may operate as further exceptions.

Exception: cross-examination as to credibility

103.(1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value.

(2) Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:

- (a)** whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and
- (b)** the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

Further protections: cross-examination of accused

104.(1) This section applies only in a criminal proceeding and so applies in addition to section 103.

(2) A defendant must not be cross-examined about a matter that is relevant only because it is relevant to the defendant's credibility, unless the court gives leave.

(3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:

- (a) is biased or has a motive to be untruthful; or
- (b) is, or was, unable to be aware of or recall matters to which his or her evidence relates; or
- (c) has made a prior inconsistent statement.

(4) Leave must not be given for cross-examination by the prosecutor about any matter that is relevant only because it is relevant to the defendant's credibility unless:

- (a) evidence has been adduced by the defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character; or
- (b) evidence adduced by the defendant has been admitted that tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and that is relevant solely or mainly to the witness's credibility.

(5) A reference in paragraph (4)(b) to evidence does not include a reference to evidence of conduct in relation to:

- (a) the events in relation to which the defendant is being prosecuted; or
- (b) the investigation of the offence for which the defendant is being prosecuted.

(6) Leave is not to be given for cross-examination by another defendant unless:

- (a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine; and
- (b) that evidence has been admitted.

Further protections: defendants making unsworn statements

105.(1) This section applies only in a criminal proceeding in which a defendant has, under a law of a State or Territory, made an unsworn statement.

(2) Evidence that is relevant only to the defendant's credibility may be adduced from a person other than the defendant if:

- (a) the evidence has substantial probative value; and
- (b) subsection (4) or (5) applies.

(3) Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:

- (a) whether the evidence tends to prove that the defendant knowingly or recklessly made a false representation when the defendant was under an obligation to tell the truth; and
- (b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

(4) The evidence may be adduced if it is relevant to whether the defendant:

- (a) is biased or has a motive to be untruthful; or
- (b) is, or was, unable to be aware of or recall matters to which his or her statement relates; or
- (c) has made a prior inconsistent statement.

(5) The evidence may, if the court gives leave, be adduced if the defendant has:

- (a) suggested in his or her statement that he or she is of good character, either generally or in a particular respect; or
- (b) suggested in his or her statement that a witness called by the prosecutor has a tendency to be untruthful, and the suggestion is relevant solely or mainly to the witness's credibility.

(6) A reference in paragraph (5)(b) to a suggestion by the defendant does not include a reference to a suggestion about conduct relating to:

- (a) the events in relation to which the defendant is being prosecuted; or
- (b) the investigation of the offence for which the defendant is being prosecuted.

Note: The NSW Act has no equivalent provision for section 105.

Exception: rebutting denials by other evidence

106. The credibility rule does not apply to evidence that tends to prove that a witness:

- (a) is biased or has a motive for being untruthful; or
- (b) has been convicted of an offence, including an offence against the law of a foreign country; or
- (c) has made a prior inconsistent statement; or
- (d) is, or was, unable to be aware of matters to which his or her evidence relates; or
- (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth;

if the evidence is adduced otherwise than from the witness and the witness has denied the substance of the evidence.

Exception: application of certain provisions to makers of representations

107. If:

- (a) because of a provision of Part 3.2, the hearsay rule does not apply to evidence of a previous representation; and
- (b) evidence of the representation has been admitted; and
- (c) the person who made the representation has not been called to give evidence;

the credibility rule does not apply to evidence about matters as to which the person could have been cross-examined if he or she had given evidence.

Exception: re-establishing credibility

108.(1) The credibility rule does not apply to evidence adduced in re-examination of a witness.

(2) The credibility rule does not apply to evidence that explains or contradicts evidence adduced as referred to in section 105 or 107, if the court gives leave to adduce that evidence.

(3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:

- (a) evidence of a prior inconsistent statement of the witness has been admitted; or
- (b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion;

and the court gives leave to adduce the evidence of the prior consistent statement.

PART 3.8—CHARACTER

Application

109. This Part applies only in a criminal proceeding.

Evidence about character of accused persons

110.(1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.

(2) If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.

(3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect.

(4) A reference in this section to adducing evidence to prove a matter includes a reference to a defendant making an unsworn statement, under a law of a State or Territory, in which that matter is raised.

Note: Subsection (4) is not included in section 110 of the NSW Act.

Evidence about character of co-accused

111.(1) The hearsay rule and the tendency rule do not apply to evidence of a defendant's character if:

- (a) the evidence is evidence of an opinion about the defendant adduced by another defendant; and
- (b) the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and
- (c) the opinion is wholly or substantially based on that knowledge.

(2) If such evidence has been admitted, the hearsay rule, the opinion rule and the tendency rule do not apply to evidence adduced to prove that that evidence should not be accepted.

Leave required to cross-examine about character of accused or co-accused

112. A defendant is not to be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave.

PART 3.9—IDENTIFICATION EVIDENCE

Note: "Identification evidence" is defined in the Dictionary.

Application of Part

113. This Part applies only in a criminal proceeding.

Exclusion of visual identification evidence

114.(1) In this section:

"visual identification evidence" means identification evidence relating to an identification based wholly or partly on what a person saw but does not include picture identification evidence.

(2) Visual identification evidence adduced by the prosecutor is not admissible unless:

- (a) an identification parade that included the defendant was held before the identification was made; or
 - (b) it would not have been reasonable to have held such a parade; or
 - (c) the defendant refused to take part in such a parade;
- and the identification was made without the person who made it having been intentionally influenced to identify the defendant.

(3) Without limiting the matters that may be taken into account by the court in determining whether it was reasonable to hold an identification parade, it is to take into account:

- (a) the kind of offence, and the gravity of the offence, concerned; and
- (b) the importance of the evidence; and
- (c) the practicality of holding an identification parade having regard, among other things:
 - (i) if the defendant failed to cooperate in the conduct of the parade—to the manner and extent of, and the reason (if any) for, the failure; and
 - (ii) in any case—to whether the identification was made at or about the time of the commission of the offence; and
- (d) the appropriateness of holding an identification parade having regard, among other things, to the relationship (if any) between the defendant and the person who made the identification.

(4) It is presumed that it would not have been reasonable to have held an identification parade if it would have been unfair to the defendant for such a parade to have been held.

(5) If:

- (a) the defendant refused to take part in an identification parade unless a lawyer acting for the defendant, or another person chosen by the defendant, was present while it was being held; and
- (b) there were, at the time when the parade was to have been conducted, reasonable grounds to believe that it was not reasonably practicable for such a lawyer or person to be present;

it is presumed that it would not have been reasonable to have held an identification parade at that time.

(6) In determining whether it was reasonable to have held an identification parade, the court is not to take into account the availability of pictures or photographs that could be used in making identifications.

Exclusion of evidence of identification by pictures

115.(1) In this section:

“picture identification evidence” means identification evidence relating to an identification made wholly or partly by the person who made the identification examining pictures kept for the use of police officers.

(2) Picture identification evidence adduced by the prosecutor is not admissible if the pictures examined suggest that they are pictures of persons in police custody.

(3) Subject to subsection (4), picture identification evidence adduced by the prosecutor is not admissible if:

- (a) when the pictures were examined, the defendant was in the custody of a police officer of the police force investigating the commission of the offence with which the defendant has been charged; and
- (b) the picture of the defendant that was examined was made before the defendant was taken into that police custody.

(4) Subsection (3) does not apply if:

- (a) the defendant's appearance had changed significantly between the time when the offence was committed and the time when the defendant was taken into that custody; or
- (b) it was not reasonably practicable to make a picture of the defendant after the defendant was taken into that custody.

(5) Picture identification evidence adduced by the prosecutor is not admissible if, when the pictures were examined, the defendant was in the custody of a police officer of the police force investigating the commission of the offence with which the defendant has been charged, unless:

- (a) the defendant refused to take part in an identification parade; or
- (b) the defendant's appearance had changed significantly between the time when the offence was committed and the time when the defendant was taken into that custody; or
- (c) it would not have been reasonable to have held an identification parade that included the defendant.

(6) Subsections 114(3), (4), (5) and (6) apply in determining, for the purposes of paragraph (5)(c) of this section, whether it would have been reasonable to have held an identification parade.

(7) If picture identification evidence adduced by the prosecutor is admitted into evidence, the judge must, on the request of the defendant:

- (a) if the picture of the defendant was made after the defendant was taken into that custody—inform the jury that the picture was made after the defendant was taken into that custody; or
- (b) otherwise—warn the jury that they must not assume that the defendant has a criminal record or has previously been charged with an offence.

Note: Sections 116 and 165 also deal with warnings about identification evidence.

(8) This section does not render inadmissible picture identification evidence adduced by the prosecutor that contradicts or qualifies picture identification evidence adduced by the defendant.

- (9) This section applies in addition to section 114.
- (10) In this section:
 - (a) a reference to a picture includes a reference to a photograph; and
 - (b) a reference to making a picture includes a reference to taking a photograph.

Directions to jury

116.(1) If identification evidence has been admitted, the judge is to inform the jury:

- (a) that there is a special need for caution before accepting identification evidence; and
 - (b) of the reasons for that need for caution, both generally and in the circumstances of the case.
- (2) It is not necessary that a particular form of words be used in so informing the jury.

PART 3.10—PRIVILEGES

Division 1—Client legal privilege

Definitions

117.(1) In this Division:

“client” includes the following:

- (a) an employer (not being a lawyer) of a lawyer;
- (b) an employee or agent of a client;
- (c) an employer of a lawyer if the employer is:
 - (i) the Commonwealth or a State or Territory; or
 - (ii) a body established by a law of the Commonwealth or a State or Territory;
- (d) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client—a manager, committee or person so acting;
- (e) if a client has died—a personal representative of the client;
- (f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a confidential communication was made;

“confidential communication” means a communication made in such circumstances that, when it was made:

- (a) the person who made it; or
- (b) the person to whom it was made;

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law;

“confidential document” means a document prepared in such circumstances that, when it was prepared:

- (a) the person who prepared it; or
- (b) the person for whom it was prepared;

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law;

“lawyer” includes an employee or agent of a lawyer;

“party” includes the following:

- (a) an employee or agent of a party;
- (b) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a party—a manager, committee or person so acting;
- (c) if a party has died—a personal representative of the party;
- (d) a successor to the rights and obligations of a party, being rights and obligations in respect of which a confidential communication was made.

(2) A reference in this Division to the commission of an act includes a reference to a failure to act.

Legal advice

118. Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer;

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

Litigation

119. Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

Unrepresented parties

120.(1) Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication between the party and another person;
or

(b) the contents of a confidential document (whether delivered or not) that was prepared, either by or at the direction or request of, the party;

for the dominant purpose of preparing for or conducting the proceeding.

(2) In this section a reference to a party includes a reference to a person who is, in relation to the party, a person of a kind referred to, in relation to a client, in paragraphs (b), (d), (e) and (f) of the definition of “client” in subsection 117(1).

Loss of client legal privilege: generally

121.(1) This Division does not prevent the adducing of evidence relevant to a question concerning the intentions, or competence in law, of a client or party who has died.

(2) This Division does not prevent the adducing of evidence if, were the evidence not adduced, the court would be prevented, or it could reasonably be expected that the court would be prevented, from enforcing an order of an Australian court.

(3) This Division does not prevent the adducing of evidence of a communication or document that affects a right of a person.

Loss of client legal privilege: consent and related matters

122.(1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.

(2) Subject to subsection (5), this Division does not prevent the adducing of evidence if a client or party has knowingly and voluntarily disclosed to another person the substance of the evidence and the disclosure was not made:

(a) in the course of making a confidential communication or preparing a confidential document; or

(b) as a result of duress or deception; or

(c) under compulsion of law; or

- (d) if the client or party is a body established by, or a person holding office under, an Australian law—to the Minister, or the Minister of the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held.

(3) Subsection (2) does not apply to a disclosure by a person who was, at the time, an employee or agent of a client or party or of a lawyer unless the employee or agent was authorised to make the disclosure.

(4) Subject to subsection (5), this Division does not prevent the adducing of evidence if the substance of the evidence has been disclosed with the express or implied consent of the client or party to another person other than:

- (a) a lawyer acting for the client or party; or
- (b) if the client or party is a body established by, or a person holding an office under, an Australian law—the Minister, or the Minister of the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held.

(5) Subsections (2) and (4) do not apply to:

- (a) a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or
- (b) a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to a proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.

(6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in section 32 (attempts to revive memory in court) or 33 (evidence given by police officers).

Loss of client legal privilege: defendants

123. In a criminal proceeding, this Division does not prevent a defendant from adducing evidence unless it is evidence of:

- (a) a confidential communication made between an associated defendant and a lawyer acting for that person in connection with the prosecution of that person; or
- (b) the contents of a confidential document prepared by an associated defendant or by a lawyer acting for that person in connection with the prosecution of that person.

Note: "Associated defendant" is defined in the Dictionary.

Loss of client legal privilege: joint clients

124.(1) This section only applies to a civil proceeding in connection with which 2 or more parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter.

(2) This Division does not prevent one of those parties from adducing evidence of:

- (a) a communication made by any one of them to the lawyer; or
- (b) the contents of a confidential document prepared by or at the direction or request of any one of them;

in connection with that matter.

Loss of client legal privilege: misconduct

125.(1) This Division does not prevent the adducing of evidence of:

- (a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
- (b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.

(2) For the purposes of this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that:

- (a) the fraud, offence or act, or the abuse of power, was committed; and
- (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power;

the court may find that the communication was so made or the document so prepared.

(3) In this section:

“power” means a power conferred by or under an Australian law.

Loss of client legal privilege: related communications and documents

126. If, because of the application of section 121, 122, 123, 124 or 125, this Division does not prevent the adducing of evidence of a communication or the contents of a document, those sections do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

Note:

Example: A lawyer advises his client to understate her income for the previous year to evade taxation because of her potential tax liability “as set out in my previous letter to you dated 11 August 1994”. In proceedings against the taxpayer for tax evasion, evidence of the contents of the letter dated 11 August 1994 may be admissible (even if that letter would otherwise be privileged) to enable a proper understanding of the second letter.

Division 2—Other privileges

Religious confessions

127.(1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.

(2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.

(3) This section applies even if an Act provides:

- (a) that the rules of evidence do not apply or that a person or body is not bound by the rules of evidence; or
- (b) that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground.

(4) In this section:

“**religious confession**” means a confession made by a person to a member of the clergy in the member’s professional capacity according to the ritual of the church or religious denomination concerned.

Privilege in respect of self-incrimination in other proceedings

128.(1) This section applies if a witness objects to giving particular evidence on the ground that the evidence may tend to prove that the witness:

- (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
- (b) is liable to a civil penalty.

(2) Subject to subsection (5), if the court finds that there are reasonable grounds for the objection, the court is not to require the witness to give that particular evidence, and is to inform the witness:

- (a) that he or she need not give the evidence; and
- (b) that, if he or she gives the evidence, the court will give a certificate under this section; and
- (c) of the effect of such a certificate.

(3) If the witness gives the evidence, the court is to cause the witness to be given a certificate under this section in respect of the evidence.

(4) The court is also to cause a witness to be given a certificate under this section if:

- (a) the objection has been overruled; and
 - (b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.
- (5) If the court is satisfied that:
- (a) the evidence concerned may tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law; and
 - (b) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
 - (c) the interests of justice require that the witness give the evidence;
- the court may require the witness to give the evidence.
- (6) If the court so requires, it is to cause the witness to be given a certificate under this section in respect of the evidence.
- (7) In any proceeding in an Australian court:
- (a) evidence given by a person in respect of which a certificate under this section has been given; and
 - (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence;
- cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.
- (8) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:
- (a) did an act the doing of which is a fact in issue; or
 - (b) had a state of mind the existence of which is a fact in issue.
- (9) A reference in this section to doing an act includes a reference to failing to act.

Note 1: Bodies corporate cannot claim this privilege—see section 187.

Note 2: Clause 3 of Part 2 of the Dictionary sets out what is a civil penalty.

Division 3—Evidence excluded in the public interest

Exclusion of evidence of reasons for judicial etc. decisions

129.(1) Evidence of the reasons for a decision made by a person who is:

- (a) a judge in an Australian or overseas proceeding; or
- (b) an arbitrator in respect of a dispute that has been submitted to the person, or to the person and one or more other persons, for arbitration;

or the deliberations of a person so acting in relation to such a decision, must not be given by the person, or a person who was, in relation to the proceeding or arbitration, under the direction or control of that person.

(2) Such evidence must not be given by tendering as evidence a document prepared by such a person.

(3) This section does not prevent the admission or use, in a proceeding, of published reasons for a decision.

(4) In a proceeding, evidence of the reasons for a decision made by a member of a jury in another Australian or overseas proceeding, or of the deliberations of a member of a jury in relation to such a decision, must not be given by any of the members of that jury.

(5) This section does not apply in a proceeding that is:

(a) a prosecution for one or more of the following offences:

(i) an offence against or arising under Part III of the *Crimes Act 1914*;

(ii) embracery;

(iii) attempting to pervert the course of justice;

(iv) an offence connected with an offence mentioned in subparagraph (i), (ii) or (iii), including an offence of conspiring to commit such an offence; or

(b) in respect of a contempt of a court; or

(c) by way of appeal from, or judicial review of, a judgment, decree, order or sentence of a court; or

(d) by way of review of an arbitral award; or

(e) a civil proceeding in respect of an act of a judicial officer or arbitrator that was, and that was known at the time by the judicial officer or arbitrator to be, outside the scope of the matters in relation to which the judicial officer or arbitrator had authority to act.

Note: Paragraph (5)(a) differs from paragraph 129(5)(a) of the NSW Act.

Exclusion of evidence of matters of state

130.(1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.

(2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).

(3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.

(4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would:

- (a) prejudice the security, defence or international relations of Australia;
or
 - (b) damage relations between the Commonwealth and a State or between 2 or more States; or
 - (c) prejudice the prevention, investigation or prosecution of an offence;
or
 - (d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or
 - (e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or
 - (f) prejudice the proper functioning of the government of the Commonwealth or a State.
- (5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters:
- (a) the importance of the information or the document in the proceeding;
 - (b) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor;
 - (c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;
 - (d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication;
 - (e) whether the substance of the information or document has already been published;
 - (f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant—whether the direction is to be made subject to the condition that the prosecution be stayed.
- (6) A reference in this section to a State includes a reference to a Territory.

Exclusion of evidence of settlement negotiations

131.(1) Evidence is not to be adduced of:

- (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
 - (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.
- (2) Subsection (1) does not apply if:

- (a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent; or
 - (b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or
 - (c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or
 - (d) the communication or document included a statement to the effect that it was not to be treated as confidential; or
 - (e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or
 - (f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or
 - (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or
 - (h) the communication or document is relevant to determining liability for costs; or
 - (i) making the communication, or preparing the document, affects a right of a person; or
 - (j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
 - (k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.
- (3) For the purposes of paragraph (2)(j), if commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:
- (a) the fraud, offence or act was committed; and
 - (b) a communication was made or a document was prepared in furtherance of the commission of the fraud, offence or act;

the court may find that the communication was so made or the document so prepared.

- (4) For the purposes of paragraph (2)(k), if:
 - (a) the abuse of power is a fact in issue; and
 - (b) there are reasonable grounds for finding that a communication was made or a document was prepared in furtherance of the abuse of power;

the court may find that the communication was so made or the document was so prepared.

- (5) In this section:
 - (a) a reference to a dispute is a reference to a dispute of a kind in respect of which relief may be given in an Australian or overseas proceeding; and
 - (b) a reference to an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a criminal proceeding or an anticipated criminal proceeding; and
 - (c) a reference to a communication made by a person in dispute includes a reference to a communication made by an employee or agent of such a person; and
 - (d) a reference to the consent of a person in dispute includes a reference to the consent of an employee or agent of such a person, being an employee or agent who is authorised so to consent; and
 - (e) a reference to commission of an act includes a reference to a failure to act.

- (6) In this section:

“power” means a power conferred by or under an Australian law.

Division 4—General

Court to inform of rights to make applications and objections

132. If it appears to the court that a witness or a party may have grounds for making an application or objection under a provision of this Part, the court must satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision.

Court may inspect etc. documents

133. If a question arises under this Part in relation to a document, the court may order that the document be produced to it and may inspect the document for the purpose of determining the question.

Inadmissibility of evidence that must not be adduced or given

134. Evidence that, because of this Part, must not be adduced or given in a proceeding is not admissible in the proceeding.

PART 3.11—DISCRETIONS TO EXCLUDE EVIDENCE

General discretion to exclude evidence

135. The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

General discretion to limit use of evidence

136. The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.

Exclusion of prejudicial evidence in criminal proceedings

137. In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

Discretion to exclude improperly or illegally obtained evidence

138.(1) Evidence that was obtained:

- (a) improperly or in contravention of an Australian law; or
- (b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

- (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
- (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

Evidence No. 2, 1995

- (a) the probative value of the evidence; and
- (b) the importance of the evidence in the proceeding; and
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
- (d) the gravity of the impropriety or contravention; and
- (e) whether the impropriety or contravention was deliberate or reckless; and
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Note: The International Covenant on Civil and Political Rights is set out in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act 1986*.

Cautioning of persons

139.(1) For the purposes of paragraph 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:

- (a) the person was under arrest for an offence at the time; and
- (b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person; and
- (c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(2) For the purposes of paragraph 138(1)(a), evidence of a statement made or an act done by a person during official questioning is taken to have been obtained improperly if:

- (a) the questioning was conducted by an investigating official who did not have the power to arrest the person; and
- (b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence; and
- (c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(4) Subsections (1), (2) and (3) do not apply so far as any Australian law requires the person to answer questions put by, or do things required by, the investigating official.

(5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:

- (a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning; or
- (b) the official would not allow the person to leave if the person wished to do so; or
- (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

(6) A person is not treated as being under arrest only because of subsection (5) if:

- (a) the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth; or
- (b) the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions.

CHAPTER 4—PROOF

INTRODUCTORY NOTE

Outline of this Chapter

This Chapter is about the proof of matters in a proceeding.

Part 4.1 is about the standard of proof in civil proceedings and in criminal proceedings.

Part 4.2 is about matters that do not require proof in a proceeding.

Part 4.3 makes easier the proof of the matters dealt with in that Part.

Part 4.4 is about requirements that evidence be corroborated.

Part 4.5 requires judges to warn juries about the potential unreliability of certain kinds of evidence.

Part 4.6 sets out procedures for proving certain other matters.

PART 4.1—STANDARD OF PROOF

Civil proceedings: standard of proof

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.

Criminal proceedings: standard of proof

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 a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

Admissibility of evidence: standard of proof

142.(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.

PART 4.2—JUDICIAL NOTICE

Matters of law

143.(1) Proof is not required about the provisions and coming into operation (in whole or in part) of:

- (a)** an Act, a State Act, an Act or Ordinance of a Territory or an Imperial Act in force in Australia; 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 extends the operation of this provision to proceedings in all Australian courts.

Matters of common knowledge

144.(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.

Certain Crown certificates

145. 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.

PART 4.3—FACILITATION OF PROOF

Division 1—General

Evidence produced by processes, machines and other devices

146.(1) This section applies to a document or thing:

Evidence No. 2, 1995

- (a) that is produced wholly or partly by a device or process; and
- (b) that is tendered by a party who asserts that, in producing the document or thing, the device or process has produced a particular outcome.

(2) If it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document or thing on the occasion in question, the device or process produced that outcome.

Note:

Example: It would not be necessary to call evidence to prove that a photocopier normally produced complete copies of documents and that it was working properly when it was used to photocopy a particular document.

Documents produced by processes, machines and other devices in the course of business

147.(1) This section applies to a document:

- (a) that is produced wholly or partly by a device or process; and
- (b) that is tendered by a party who asserts that, in producing the document, the device or process has produced a particular outcome.

(2) If:

- (a) the document is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence); and
- (b) the device or process is or was at that time used for the purposes of the business;

it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document on the occasion in question, the device or process produced that outcome.

(3) Subsection (2) does not apply to the contents of a document that was produced:

- (a) for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or
- (b) in connection with an investigation relating or leading to a criminal proceeding.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

Evidence of certain acts of justices, lawyers and notaries public

148. It is presumed, unless the contrary is proved, that a document was attested or verified by, or signed or acknowledged before, a justice of the peace, lawyer or notary public, if:

- (a) an Australian law requires, authorises or permits it to be attested, verified, signed or acknowledged by a justice of the peace, a lawyer or a notary public, as the case may be; and
- (b) it purports to have been so attested, verified, signed or acknowledged.

Attestation of documents

149. It is not necessary to adduce the evidence of an attesting witness to a document (not being a testamentary document) to prove that the document was signed or attested as it purports to have been signed or attested.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

Seals and signatures

150.(1) If the imprint of a seal appears on a document and purports to be the imprint of:

- (a) a Royal Great Seal; or
- (b) the Great Seal of Australia; or
- (c) another seal of the Commonwealth; or
- (d) a seal of a State, a Territory or a foreign country; or
- (e) the seal of a body (including a court or a tribunal), or a body corporate, established by a law of the Commonwealth, a Territory or a foreign country; or
- (f) the seal of a court or tribunal established by a law of a State;

it is presumed, unless the contrary is proved, that the imprint is the imprint of that seal, and the document was duly sealed as it purports to have been sealed.

Note: This subsection differs from subsection 150(1) of the NSW Act.

(2) If the imprint of a seal appears on a document and purports to be the imprint of the seal of an office holder, it is presumed, unless the contrary is proved, that:

- (a) the imprint is the imprint of that seal; and
- (b) the document was duly sealed by the office holder acting in his or her official capacity; and
- (c) the office holder held the relevant office when the document was sealed.

(3) If a document purports to have been signed by an office holder in his or her official capacity, it is presumed, unless the contrary is proved, that:

- (a) the document was signed by the office holder acting in that capacity; and
- (b) the office holder held the relevant office when the document was signed.

(4) In this section:

“office holder” means:

- (a) the Sovereign; or
- (b) the Governor-General; or
- (c) the Governor of a State; or
- (d) the Administrator of a Territory; or
- (e) a person holding any other office under an Australian law or a law of a foreign country.

(5) This section extends to documents sealed, and documents signed, before the commencement of this section.

Note 1: Section 5 extends the application of this section to proceedings in all Australian courts.

Note 2: “Australian law” is defined in the Dictionary.

Seals of bodies established under State law

151.(1) If the imprint of a seal appears on a document and purports to be the imprint of the seal of a body (other than a court or a tribunal), or a body corporate, established by Royal Charter or a law of a State, it is presumed, unless the contrary is proved, that:

- (a) the imprint is the imprint of that seal; and
- (b) the document was duly sealed as it purports to have been sealed.

(2) This section extends to documents sealed before the commencement of this section.

Note: The NSW Act has no equivalent provision for section 151.

Documents produced from proper custody

152. If a document that is or purports to be more than 20 years old is produced from proper custody, it is presumed, unless the contrary is proved, that:

- (a) the document is the document that it purports to be; and
- (b) if it purports to have been executed or attested by a person—it was duly executed or attested by that person.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

Division 2—Matters of official record

Gazettes and other official documents

153.(1) It is presumed, unless the contrary is proved, that a document purporting:

- (a) to be any government or official gazette (by whatever name called) of the Commonwealth, a State, a Territory or a foreign country; or
- (b) to have been printed by the Government Printer or by the government or official printer of a State or Territory; or

Evidence No. 2, 1995

- (c) to have been printed by authority of the government or administration of the Commonwealth, a State, a Territory or a foreign country;

is what it purports to be and was published on the day on which it purports to have been published.

(2) If:

(a) there is produced to a court:

- (i) a copy of any government or official gazette (by whatever name called) of the Commonwealth, a State, a Territory or a foreign country; or
- (ii) a document that purports to have been printed by the Government Printer or by the government or official printer of a State or Territory; or
- (iii) a document that purports to have been printed by authority of the government or administration of the Commonwealth, a State, a Territory or a foreign country; and

(b) the doing of an act:

- (i) by the Governor-General or by the Governor of a State or the Administrator of a Territory; or
- (ii) by a person authorised or empowered to do the act by an Australian law or a law of a foreign country;

is notified or published in the copy or document;

it is presumed, unless the contrary is proved, that the act was duly done and, if the day on which the act was done appears in the copy or document, it was done on that day.

Note: Section 5 extends the operation of this provision to proceedings in all Australian courts.

Documents published by authority of Parliaments etc.

154. It is presumed, unless the contrary is proved, that a document purporting to have been printed by authority of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament:

- (a) is what it purports to be; and
- (b) was published on the day on which it purports to have been published.

Note 1: The NSW Act has no equivalent provision for section 154.

Note 2: Section 5 extends the application of this section to proceedings in all Australian courts.

Evidence of official records

155.(1) Evidence of a Commonwealth record or of a public record of a State or Territory may be adduced by producing a document that:

- (a) purports to be such a record and to be signed or sealed by:
 - (i) a Minister, or a Minister of the State or Territory, as the case requires; or

- (ii) a person who might reasonably be supposed to have custody of the record; or
- (b) purports to be a copy of or extract from the record that is certified to be a true copy or extract by:
 - (i) a Minister, or a Minister of the State or Territory, as the case requires; or
 - (ii) a person who might reasonably be supposed to have custody of the record.

(2) If such a document is produced, it is presumed, unless evidence that is sufficient to raise doubt about the presumption is adduced, that:

- (a) the document is the record, copy or extract that it purports to be; and
- (b) the Minister, Minister of the State or Territory or person:
 - (i) signed or sealed the record; or
 - (ii) certified the copy or extract as a true copy or extract;as the case requires.

Note 1: The NSW Act has no equivalent provision for section 155.

Note 2: Section 5 extends the application of this section to proceedings in all Australian courts.

Public documents

156.(1) A document that purports to be a copy of, or an extract from or summary of, a public document and to have been:

- (a) sealed with the seal of a person who, or a body that, might reasonably be supposed to have the custody of the public document; or
- (b) certified as such a copy, extract or summary by a person who might reasonably be supposed to have custody of the public document;

is presumed, unless the contrary is proved, to be a copy of the public document, or an extract from or summary of the public document.

(2) If an officer entrusted with the custody of a public document is required by a court to produce the public document, it is sufficient compliance with the requirement for the officer to produce a copy of, or extract from, the public document if it purports to be signed and certified by the officer as a true copy or extract.

(3) It is sufficient production of a copy or extract for the purposes of subsection (2) if the officer sends it by prepaid post, or causes it to be delivered, to:

- (a) the proper officer of the court in which it is to be produced; or
- (b) the person before whom it is to be produced.

(4) The court before which a copy or extract is produced under subsection (2) may direct the officer to produce the original public document.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

Public documents relating to court processes

157. Evidence of a public document that is a judgment, act or other process of an Australian court or a foreign court, or that is a document lodged with an Australian court or a foreign court, may be adduced by producing a document that purports to be a copy of the public document and that:

- (a) is proved to be an examined copy; or
- (b) purports to be sealed with the seal of that court; or
- (c) purports to be signed by a judge, magistrate, registrar or other proper officer of that court.

Note: Section 5 extends the operation of this provision to proceedings in all Australian courts.

Evidence of certain public documents

158.(1) If:

- (a) a public document, or a certified copy of a public document, of a State or Territory is admissible for a purpose in that State or Territory under the law of that State or Territory; and
- (b) it purports to be sealed, or signed and sealed, or signed alone, as directed by the law of that State or Territory;

it is admissible in evidence to the same extent and for that purpose in all courts:

- (c) without proof of:
 - (i) the seal or signature; or
 - (ii) the official character of the person appearing to have signed it;and
- (d) without further proof in every case in which the original document could have been received in evidence.

(2) A public document of a State or Territory that is admissible in evidence for any purpose in that State or Territory under the law of that State or Territory without proof of:

- (a) the seal or signature authenticating the document; or
- (b) the judicial or official character of the person appearing to have signed the document;

is admissible in evidence to the same extent and for any purpose in all courts without such proof.

(3) This section only applies to documents that are public records of a State or Territory.

Note 1: The NSW Act has no equivalent provision for section 158.

Note 2: Section 5 extends the operation of this provision to proceedings in all Australian courts.

Official statistics

159. A document that purports:

- (a) to be published by the Australian Statistician; and

(b) to contain statistics or abstracts compiled and analysed by the Australian Statistician under the *Census and Statistics Act 1905*; is evidence that those statistics or abstracts were compiled and analysed by the Australian Statistician under that Act.

Note: Section 5 extends the application of this section to proceedings in all Australian courts.

Division 3—Matters relating to post and communications

Postal articles

160.(1) It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address in Australia or in an external Territory was received at that address on the fourth working day after having been posted.

(2) This section does not apply if:

- (a) the proceeding relates to a contract; and
- (b) all the parties to the proceeding are parties to the contract; and
- (c) subsection (1) is inconsistent with a term of the contract.

(3) In this section:

“**working day**” means a day that is not:

- (a) a Saturday or a Sunday; or
- (b) a public holiday or a bank holiday in the place to which the postal article was addressed.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

Telexes

161.(1) If a document purports to contain a record of a message transmitted by telex, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the message:

- (a) was so transmitted; and
- (b) was sent by the person from whom or on whose behalf it purports to have been sent; and
- (c) was sent on the day on which, at the time at which and from the place from which it purports to have been sent; and
- (d) was received at the destination to which it purports to have been sent; and
- (e) was so received at the time at which its transmission to that destination was concluded.

(2) This section does not apply if:

- (a) the proceeding relates to a contract; and

- (b) all the parties to the proceeding are parties to the contract; and
- (c) subsection (1) is inconsistent with a term of the contract.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

Lettergrams and telegrams

162.(1) If a document purports to contain a record of a message transmitted by means of a lettergram or telegram, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the message was received by the person to whom it was addressed 24 hours after the message was delivered to a post office for transmission as a lettergram or telegram.

- (2) This section does not apply if:
 - (a) the proceeding relates to a contract; and
 - (b) all the parties to the proceeding are parties to the contract; and
 - (c) subsection (1) is inconsistent with a term of the contract.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

Proof of letters having been sent by Commonwealth agencies

163.(1) A letter from a Commonwealth agency addressed to a person at a specified address is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) to have been sent by prepaid post to that address on the fifth business day after the date (if any) that, because of its placement on the letter or otherwise, purports to be the date on which the letter was prepared.

(2) In this section:

“business day” means a day that is not:

- (a) a Saturday or a Sunday; or
- (b) a public holiday or bank holiday in the place in which the letter was prepared;

“Commonwealth agency” means:

- (a) a Department within the meaning of the *Public Service Act 1922*; or
- (b) a House of the Parliament; or
- (c) a person or body holding office, or exercising power, under or because of the Constitution or a law of the Commonwealth; or
- (d) a body or organisation, whether incorporated or unincorporated, established for a public purpose:
 - (i) by or under a law of the Commonwealth or of a Territory (other than the Australian Capital Territory, the Northern Territory or Norfolk Island); or
 - (ii) by the Governor-General; or
 - (iii) by a Minister;

“letter” means any form of written communication that is directed to a particular person or address, and includes:

- (a) any standard postal article within the meaning of the *Australian Postal Corporation Act 1989*; and
- (b) any envelope, packet, parcel, container or wrapper containing such a communication; and
- (c) any unenclosed written communication that is directed to a particular person or address.

Note 1: The NSW Act has no equivalent provision for section 163.

Note 2: Section 5 extends the operation of this section to proceedings in all Australian courts.

PART 4.4—CORROBORATION

Corroboration requirements abolished

164.(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.

PART 4.5—WARNINGS

Unreliable evidence

165.(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:

- (a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies;
- (b) identification evidence;
- (c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like;
- (d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding;
- (e) evidence given in a criminal proceeding by a witness who is a prison informer;

- (f) oral evidence of official questioning of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant;
- (g) in a proceeding against the estate of a deceased person—evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.

(2) If there is a jury and a party so requests, the judge is to:

- (a) warn the jury that the evidence may be unreliable; and
- (b) inform the jury of matters that may cause it to be unreliable; and
- (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in giving the warning or information.

(5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.

PART 4.6—ANCILLARY PROVISIONS

Division 1—Requests to produce documents or call witnesses

Note: Section 182 gives this Division a wider application in relation to Commonwealth records.

Definition of request

166. In this Division:

“request” means a request that a party (the **“requesting party”**) makes to another party to do one or more of the following:

- (a) to produce to the requesting party the whole or a part of a specified document or thing;
- (b) to permit the requesting party, adequately and in an appropriate way, to examine, test or copy the whole or a part of a specified document or thing;
- (c) to call as a witness a specified person believed to be concerned in production or maintenance of a specified document or thing;
- (d) to call as a witness a specified person in whose possession or under whose control a specified document or thing is believed to be or to have been at any time;
- (e) in relation to a document of the kind referred to in paragraph (b) or (c) of the definition of **“document”** in the Dictionary—to permit the requesting party, adequately and in an appropriate way, to examine and test the document and the way in which it was produced and has been kept;

- (f) in relation to evidence of a previous representation—to call as a witness the person who made the previous representation;
- (g) in relation to evidence that a person has been convicted of an offence, being evidence to which subsection 92(2) applies—to call as a witness a person who gave evidence in the proceeding in which the person was so convicted.

Requests may be made about certain matters

167. A party may make a reasonable request to another party for the purpose of determining a question that relates to:

- (a) a previous representation; or
- (b) evidence of a conviction of a person for an offence; or
- (c) the authenticity, identity or admissibility of a document or thing.

Time limits for making certain requests

168.(1) If a party has given to another party written notice of its intention to adduce evidence of a previous representation, the other party may only make a request to the party relating to the representation if the request is made within 21 days after the notice was given.

(2) Despite subsection (1), the court may give the other party leave to make a request relating to the representation after the end of that 21 day period if it is satisfied that there is good reason to do so.

(3) If a party has given to another party written notice of its intention to adduce evidence of a person's conviction of an offence in order to prove a fact in issue, the other party may only make a request relating to evidence of the conviction if the request is made within 21 days after the notice is given.

(4) Despite subsection (3), the court may give the other party leave to make a request relating to evidence of the conviction after the end of that 21 day period if it is satisfied that there is good reason to do so.

(5) If a party has served on another party a copy of a document that it intends to tender in evidence, the other party may only make a request relating to the document if the request is made within 21 days after service of the copy.

(6) If the copy of the document served under subsection (5) is accompanied by, or has endorsed on it, a notice stating that the document is to be tendered to prove the contents of another document, the other party may only make a request relating to the other document if the request is made within 21 days after service of the copy.

(7) Despite subsections (5) and (6), the court may give the other party leave to make a request relating to the document, or other document, after the end of the 21 day period if it is satisfied that there is good reason to do so.

Failure or refusal to comply with requests

169.(1) If the party has, without reasonable cause, failed or refused to comply with a request, the court may, on application, make one or more of the following orders:

- (a) an order directing the party to comply with the request;
- (b) an order that the party produce a specified document or thing, or call as a witness a specified person, as mentioned in section 166;
- (c) an order that the evidence in relation to which the request was made is not to be admitted in evidence;
- (d) such order with respect to adjournment or costs as is just.

(2) If the party had, within a reasonable time after receiving the request, informed the other party that it refuses to comply with the request, any application under subsection (1) by the other party must be made within a reasonable time after being so informed.

(3) The court may, on application, direct that evidence in relation to which a request was made is not to be admitted in evidence if an order made by it under paragraph (1)(a) or (b) is not complied with.

(4) Without limiting the circumstances that may constitute reasonable cause for a party to fail to comply with a request, it is reasonable cause to fail to comply with a request if:

- (a) the document or thing to be produced is not available to the party; or
- (b) the existence and contents of the document are not in issue in the proceeding in which evidence of the document is proposed to be adduced; or
- (c) the person to be called as a witness is not available.

(5) Without limiting the matters that the court may take into account in relation to the exercise of a power under subsection (1), it is to take into account:

- (a) the importance in the proceeding of the evidence in relation to which the request was made; and
- (b) whether there is likely to be a dispute about the matter to which the evidence relates; and
- (c) whether there is a reasonable doubt as to the authenticity or accuracy of the evidence that is, or the document the contents of which are, sought to be proved; and
- (d) whether there is a reasonable doubt as to the authenticity of the document or thing that is sought to be tendered; and
- (e) if the request relates to evidence of a previous representation—whether there is a reasonable doubt as to the accuracy of the representation or of the evidence on which it was based; and

Evidence No. 2, 1995

- (f) in the case of a request referred to in paragraph (g) of the definition of “request” in section 166—whether another person is available to give evidence about the conviction or the facts that were in issue in the proceeding in which the conviction was obtained; and
- (g) whether compliance with the request would involve undue expense or delay or would not be reasonably practicable; and
- (h) the nature of the proceeding.

Note: Clause 5 of Part 2 of the Dictionary is about the availability of documents and things, and clause 4 of Part 2 of the Dictionary is about the availability of persons.

Division 2—Proof of certain matters by affidavits or written statements

Note: Section 182 gives this Division a wider application in relation to Commonwealth records.

Evidence relating to certain matters

170.(1) Evidence of a fact that is, because of a provision of this Act referred to in the Table, to be proved in relation to a document or thing may be given by a person permitted under section 171 to give such evidence.

TABLE

| Provisions of this Act | Subject matter |
|-------------------------------|--|
| Section 48 | Proof of contents of documents |
| Sections 63, 64 and 65 | Hearsay exceptions for “first-hand” hearsay |
| Section 69 | Hearsay exception for business records |
| Section 70 | Hearsay exception for tags, labels and other writing |
| Section 71 | Hearsay exception for telecommunications |
| The provisions of Part 4.3 | Facilitation of proof |
| Section 182 | Commonwealth records |

(2) Evidence may be given by affidavit or, if the evidence relates to a public document, by a written statement.

Persons who may give such evidence

171.(1) Such evidence may be given by:

- (a) a person who, at the relevant time or afterwards, had a position of responsibility in relation to making or keeping the document or thing; or
- (b) except in the case of evidence of a fact that is to be proved in relation to a document or thing because of section 63, 64 or 65—an authorised person.

(2) Despite paragraph (1)(b), evidence must not be given under this section by an authorised person who, at the relevant time or afterwards, did not have a position of responsibility in relation to making or keeping the document or thing unless it appears to the court that:

- (a) it is not reasonably practicable for the evidence to be given by a person who had, at the relevant time or afterwards, a position of responsibility in relation to making or keeping the document or thing; or
- (b) having regard to all the circumstances of the case, undue expense would be caused by calling such a person as a witness.

(3) In this section:

“authorised person” means:

- (a) if the evidence is given at a place outside Australia—an Australian Diplomatic Officer within the meaning of the *Consular Fees Act 1955*, or an Australian Consular Officer within the meaning of that Act, exercising functions in that place; or
- (b) a member of the Australian Federal Police at or above the rank of sergeant; or
- (c) a staff member of the Australian Federal Police whose salary is at least equal to that of a sergeant in the Australian Federal Police; or
- (d) a person authorised by the Attorney-General for the purposes of this section.

Note: Subsection 169(3) of the NSW Act differs from subsection (3).

Evidence based on knowledge, belief or information

172.(1) Despite Chapter 3, the evidence may include evidence based on the knowledge and belief of the person who gives it, or on information that that person has.

(2) An affidavit or statement that includes evidence based on knowledge, information or belief must set out the source of the knowledge or information or the basis of the belief.

Notification of other parties

173.(1) A copy of the affidavit or statement must be served on each party a reasonable time before the hearing of the proceeding.

(2) The party who tenders the affidavit or statement must, if another party so requests, call the deponent or person who made the statement to give evidence but need not otherwise do so.

Division 3—Foreign law

Evidence of foreign law

174.(1) Evidence of a statute, proclamation, treaty or act of state of a foreign country may be adduced in a proceeding by producing:

- (a) a book or pamphlet, containing the statute, proclamation, treaty or act of state, that purports to have been printed by the government or official printer of the country or by authority of the government or administration of the country; or
- (b) a book or other publication, containing the statute, proclamation, treaty or act of state, that appears to the court to be a reliable source of information; or
- (c) a book or pamphlet that is or would be used in the courts of the country to inform the courts about, or to prove, the statute, proclamation, treaty or act of state; or
- (d) a copy of the statute, proclamation, treaty or act of state that is proved to be an examined copy.

(2) A reference in this section to a statute of a foreign country includes a reference to a regulation or by-law of the country.

Evidence of law reports of foreign countries

175.(1) Evidence of the unwritten or common law of a foreign country may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the unwritten or common law of the country.

(2) Evidence of the interpretation of a statute of a foreign country may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the interpretation of the statute.

Questions of foreign law to be decided by judge

176. If, in a proceeding in which there is a jury, it is necessary to ascertain the law of another country which is applicable to the facts of the case, any question as to the effect of the evidence adduced with respect to that law is to be decided by the judge alone.

Division 4—Procedures for proving other matters

Certificates of expert evidence

177.(1) Evidence of a person's opinion may be adduced by tendering a certificate (“**expert certificate**”) signed by the person that:

- (a) states the person's name and address; and
- (b) states that the person has specialised knowledge based on his or her training, study or experience, as specified in the certificate; and
- (c) sets out an opinion that the person holds and that is expressed to be wholly or substantially based on that knowledge.

(2) Subsection (1) does not apply unless the party seeking to tender the expert certificate has served on each other party:

- (a) a copy of the certificate; and
- (b) a written notice stating that the party proposes to tender the certificate as evidence of the opinion.

(3) Service must be effected not later than:

- (a) 21 days before the hearing; or
- (b) if, on application by the party before or after service, the court substitutes a different period—the beginning of that period.

(4) Service for the purposes of subsection (2) may be proved by affidavit.

(5) A party on whom the documents referred to in subsection (2) are served may, by written notice served on the party proposing to tender the expert certificate, require the party to call the person who signed the certificate to give evidence.

(6) The expert certificate is not admissible as evidence if such a requirement is made.

(7) The court may make such order with respect to costs as it considers just against a party who has, without reasonable cause, required a party to call a person to give evidence under this section.

Convictions, acquittals and other judicial proceedings

178.(1) This section applies to the following facts:

- (a) the conviction or acquittal before or by an applicable court of a person charged with an offence;
- (b) the sentencing of a person to any punishment or pecuniary penalty by an applicable court;
- (c) an order by an applicable court;
- (d) the pendency or existence at any time before an applicable court of a civil or criminal proceeding.

(2) Evidence of a fact to which this section applies may be given by a certificate signed by a judge, a magistrate or a registrar or other proper officer of the applicable court:

- (a) showing the fact, or purporting to contain particulars, of the record, indictment, conviction, acquittal, sentence, order or proceeding in question; and
- (b) stating the time and place of the conviction, acquittal, sentence, order or proceeding; and
- (c) stating the title of the applicable court.

(3) A certificate given under this section showing a conviction, acquittal, sentence or order is also evidence of the particular offence or matter in respect of which the conviction, acquittal, sentence or order was had, passed or made, if stated in the certificate.

(4) A certificate given under this section showing the pendency or existence of a proceeding is also evidence of the particular nature and occasion, or ground and cause, of the proceeding, if stated in the certificate.

(5) A certificate given under this section purporting to contain particulars of a record, indictment, conviction, acquittal, sentence, order or proceeding is also evidence of the matters stated in the certificate.

(6) In this section:

“acquittal” includes the dismissal of the charge in question by an applicable court;

“applicable court” means an Australian court or a foreign court.

Note: Section 91 excludes evidence of certain judgments and convictions.

Proof of identity of convicted persons—affidavits by members of State or Territory police forces

179.(1) This section applies if a member of a police force of a State or Territory:

- (a) makes an affidavit in the form prescribed by the regulations for the purposes of this section; and
- (b) states in the affidavit that he or she is a fingerprint expert for that police force.

(2) For the purpose of proving before a court the identity of a person alleged to have been convicted in that State or Territory of an offence, the affidavit is evidence in a proceeding that the person whose fingerprints are shown on a fingerprint card referred to in the affidavit and marked for identification:

- (a) is the person referred to in a certificate of conviction, or certified copy of conviction annexed to the affidavit, as having been convicted of an offence; and

- (b) was convicted of that offence; and
- (c) was convicted of any other offence of which he or she is stated in the affidavit to have been convicted.

(3) For the purposes of this section, if a Territory does not have its own police force, the police force performing the policing functions of the Territory is taken to be the police force of the Territory.

Proof of identity of convicted persons—affidavits by members of the Australian Federal Police

180.(1) This section applies if a member of the Australian Federal Police:

- (a) makes an affidavit in the form prescribed by the regulations for the purposes of this section; and
- (b) states in the affidavit that he or she is a fingerprint expert for the Australian Federal Police.

(2) For the purpose of proving before a court the identity of a person alleged to have been convicted of an offence against a law of the Commonwealth, the affidavit is evidence in a proceeding that the person whose fingerprints are shown on a fingerprint card referred to in the affidavit and marked for identification:

- (a) is the person referred to in a certificate of conviction, or certified copy of conviction annexed to the affidavit, as having been convicted of an offence; and
- (b) was convicted of that offence; and
- (c) was convicted of any other offence of which he or she is stated in the affidavit to have been convicted.

Proof of service of statutory notifications, notices, orders and directions

181.(1) The service, giving or sending under an Australian law of a written notification, notice, order or direction may be proved by affidavit of the person who served, gave or sent it.

(2) A person who, for the purposes of a proceeding, makes an affidavit referred to in this section is not, because of making the affidavit, excused from attending for cross-examination if required to do so by a party to the proceeding.

CHAPTER 5—MISCELLANEOUS

Application of certain sections in relation to Commonwealth records

182.(1) Subject to this section, the provisions of this Act referred to in the following Table apply in relation to documents that:

Evidence No. 2, 1995

- (a) are, or form part of, Commonwealth records; or
(b) at the time they were produced were, or formed part of, Commonwealth records;
- as if those sections applied to the extent provided for in section 5.

TABLE

| Provisions of this Act | Subject matter |
|--|--|
| Sections 47, 48, 49 and 51 Section 69 | Documentary evidence Hearsay exception for business records |
| Subsection 70(1) | Hearsay exception for tags, labels and other writing |
| Section 71 | Hearsay exception for telecommunications |
| Section 147 | Documents produced by processes, machines etc. in the course of business |
| Section 149 | Attestation of documents |
| Section 152 | Documents produced from proper custody |
| Section 156 | Public documents |
| Sections 160. 161 and 162 | Postal articles, telexes, lettergrams and telegrams |
| Division 1 of Part 4.6 | Requests to produce documents or call witnesses |
| Division 2 of Part 4.6 | Proof of certain matters by affidavit or written statements |
| Section 183 | Inferences about documents etc. |

(2) For the purposes of subsection (1), section 69, subsection 70(1) and section 71 apply in relation to proceedings, other than proceedings in a federal court or (until the day fixed by Proclamation under subsection 4(6)) an ACT court, as if the references in those sections to the hearsay rule were references to any rule of law restricting the admissibility or use of hearsay evidence.

(3) Subsection (1) applies to subsection 70(1) only in relation to tags or labels that may reasonably be supposed to have been attached to objects in the course of carrying on an activity engaged in by a body, person or organisation referred to in the definition of "Commonwealth record" in the Dictionary.

(4) For the purposes of subsection (1) in relation to the application of subsection 70(1):

- (a) the reference in subsection (1) to documents includes a reference to writing placed on objects; and
- (b) the reference in subsection (3) to tags or labels attached to objects includes a reference to writing placed on objects.

(5) This section does not derogate from the operation of a law of a State or Territory that enables evidence of a matter referred to in this section to be given.

Note 1: The NSW Act has no equivalent provision for section 182.

Note 2: Section 5 extends the operation of this provision to proceedings in all Australian courts.

Inferences

183. If a question arises about the application of a provision of this Act in relation to a document or thing, the court may:

- (a) examine the document or thing; and
- (b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

Accused may admit matters and give consents

184. In or before a criminal proceeding, a defendant may, if advised to do so by his or her lawyer:

- (a) admit matters of fact; and
- (b) give any consent;

that a party to a civil proceeding may make or give.

Faith and credit to be given to documents properly authenticated

185. All public acts, records and judicial proceedings of a State or Territory that are proved or authenticated in accordance with this Act are to be given in every court, and in every public office in Australia, such faith and credit as they have by law or usage in the courts and public offices of that State or Territory.

Note: The NSW Act has no equivalent provision for section 185.

Swearing of affidavits before justices of the peace, notaries public and lawyers

186.(1) Affidavits for use in:

- (a) an Australian court (other than a court of a Territory) in proceedings involving the exercise of federal jurisdiction; or
- (b) a court of a Territory in proceedings involving the exercise of jurisdiction conferred by an Act of the Parliament;

may be sworn before any justice of the peace, notary public or lawyer without the issue of any commission for taking affidavits.

(2) In this section:

“proceedings” includes proceedings that:

- (a) relate to bail; or
- (b) are interlocutory proceedings or proceedings of a similar kind; or
- (c) are heard in chambers; or
- (d) relate to sentencing.

Note: The NSW Act has no equivalent provision for section 186.

Abolition of the privilege against self-incrimination for bodies corporate

187.(1) This section applies if, under a law of the Commonwealth or the Australian Capital Territory or in a proceeding in a federal court or an ACT court, a body corporate is required to:

- (a) answer a question or give information; or
- (b) produce a document or any other thing; or
- (c) do any other act whatever.

(2) The body corporate is not entitled to refuse or fail to comply with the requirement on the ground that answering the question, giving the information, producing the document or other thing or doing that other act, as the case may be, might tend to incriminate the body or make the body liable to a penalty.

Impounding documents

188. The court may direct that a document that has been tendered or produced before the court (whether or not it is admitted in evidence) is to be impounded and kept in the custody of an officer of the court or of another person for such period, and subject to such conditions, as the court thinks fit.

The *voir dire*

189.(1) If the determination of a question whether:

- (a) evidence should be admitted (whether in the exercise of a discretion or not); or
- (b) evidence can be used against a person; or
- (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.

(2) If there is a jury, a preliminary question whether:

- (a) particular evidence is evidence of an admission, or evidence to which section 138 applies; or

- (b) evidence of an admission, or evidence to which section 138 applies, should be admitted;

is to be heard and determined in the jury's absence.

(3) In the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.

(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.

(5) Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account:

- (a) whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the defendant; and
- (b) whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question; and
- (c) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing).

(6) Subsection 128(8) does not apply to a hearing to decide a preliminary question.

(7) In the application of Chapter 3 to a hearing to determine a preliminary question, the facts in issue are taken to include the fact to which the hearing relates.

(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:

- (a) it is inconsistent with other evidence given by the witness in the proceeding; or
- (b) the witness has died.

Waiver of rules of evidence

190.(1) The court may, if the parties consent, by order dispense with the application of any one or more of the provisions of:

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

in relation to particular evidence or generally.

(2) In a criminal proceeding, a defendant's consent is not effective for the purposes of subsection (1) unless:

- (a) the defendant has been advised to do so by his or her lawyer; or
- (b) the court is satisfied that the defendant understands the consequences of giving the consent.

(3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1) do not apply in relation to evidence if:

- (a) the matter to which the evidence relates is not genuinely in dispute; or
- (b) the application of those provisions would cause or involve unnecessary expense or delay.

(4) Without limiting the matters that the court may take into account in deciding whether to exercise the power conferred by subsection (3), it is to take into account:

- (a) the importance of the evidence in the proceeding; and
- (b) the nature of the cause of action or defence and the nature of the subject matter of the proceeding; and
- (c) the probative value of the evidence; and
- (d) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

Agreements as to facts

191.(1) In this section:

“**agreed fact**” means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.

(2) In a proceeding:

- (a) evidence is not required to prove the existence of an agreed fact; and
- (b) evidence may not be adduced to contradict or qualify an agreed fact;

unless the court gives leave.

(3) Subsection (2) does not apply unless the agreed fact:

- (a) is stated in an agreement in writing signed by the parties or by lawyers representing the parties and adduced in evidence in the proceeding; or
- (b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.

Leave, permission or direction may be given on terms

192.(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:

- (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and
- (b) the extent to which to do so would be unfair to a party or to a witness; and
- (c) the importance of the evidence in relation to which the leave, permission or direction is sought; and
- (d) the nature of the proceeding; and
- (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

Additional powers

193.(1) The powers of a court in relation to:

- (a) the discovery or inspection of documents; and
- (b) ordering disclosure and exchange of evidence, intended evidence, documents and reports;

extend to enabling the court to make such orders as the court thinks fit (including orders about methods of inspection, adjournments and costs) to ensure that the parties to a proceeding can adequately, and in an appropriate manner, inspect documents of the kind referred to in paragraph (b) or (c) of the definition of “document” in the Dictionary.

(2) The power of a person or body to make rules of court extends to making rules, not inconsistent with this Act or the regulations, prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(3) Without limiting subsection (2), rules made under that subsection may provide for the discovery, exchange, inspection or disclosure of intended evidence, documents and reports of persons intended to be called by a party to give evidence in a proceeding.

(4) Without limiting subsection (2), rules made under that subsection may provide for the exclusion of evidence, or for its admission on specified terms, if the rules are not complied with.

Witnesses failing to attend proceedings

194. * * * * *

Note: The NSW Act includes a provision about the consequences of a witness failing to appear when called in any civil or criminal proceedings.

Prohibited question not to be published

195. A person must not, without the express permission of a court, print or publish:

- (a) any question that the court has disallowed under section 41; or
- (b) any question that the court has disallowed because any answer that is likely to be given to the question would contravene the credibility rule; or
- (c) any question in respect of which the court has refused to give leave under Part 3.7.

Penalty: 60 penalty units.

Proceedings for offences

196. * * * * *

Note: The NSW Act includes a provision about procedure for dealing with offences against the Act or regulations.

Regulations

197. The Governor-General may make regulations, not inconsistent with this Act, prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
-

SCHEDULE

Subsections 21(4) and 22(2)

OATHS AND AFFIRMATIONS

Oaths by witnesses

I swear (*or the person taking the oath may promise*) by Almighty God (*or the person may name a god recognised by his or her religion*) that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Oaths by interpreters

I swear (*or the person taking the oath may promise*) by Almighty God (*or the person may name a god recognised by his or her religion*) that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

Affirmations by witnesses

I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Affirmations by interpreters

I solemnly and sincerely declare and affirm that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

DICTIONARY

PART 1—DEFINITIONS

ACT court means the Supreme Court of the Australian Capital Territory or any other court of the Australian Capital Territory, and includes a person or body that, in performing a function or exercising a power under a law of the Australian Capital Territory, is required to apply the laws of evidence.

Note: The NSW Act does not include this definition.

admission means a previous representation that is:

- (a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and
- (b) adverse to the person's interest in the outcome of the proceeding.

asserted fact is defined in section 59.

associated defendant, in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been instituted, but not yet completed or terminated, for:

- (a) an offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose; or
- (b) an offence that relates to or is connected with the offence for which the defendant is being prosecuted.

Australia includes the external Territories.

Australian court means:

- (a) the High Court; or
- (b) a court exercising federal jurisdiction; or
- (c) a court of a State or Territory; or
- (d) a judge, justice or arbitrator under an Australian law; or
- (e) a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence; or
- (f) a person or body that, in exercising a function under an Australian law, is required to apply the laws of evidence.

Australian law means a law of the Commonwealth, a State or a Territory.

Note: See clause 9 of Part 2 of the Dictionary for the meaning of law.

Australian or overseas proceeding means a proceeding (however described) in an Australian court or a foreign court.

Australian Parliament means the Parliament, a Parliament of a State or a Legislative Assembly of a Territory.

Australian Statistician means the Australian Statistician referred to in subsection 5(2) of the *Australian Bureau of Statistics Act 1975*, and includes any person to whom the powers of the Australian Statistician under section 12 of the *Census and Statistics Act 1905* have been delegated.

DICTIONARY—continued

business is defined in clause 1 of Part 2 of this Dictionary.

case of a party means the facts in issue in respect of which the party bears the legal burden of proof.

child means a child of any age and includes the meaning given in subclause 10(1) of Part 2 of this Dictionary.

civil penalty is defined in clause 3 of Part 2 of this Dictionary.

civil proceeding means a proceeding other than a criminal proceeding.

client is defined in section 117.

coincidence evidence means evidence of a kind referred to in subsection 98(1) that a party seeks to have adduced for the purpose referred to in that subsection.

coincidence rule means subsection 98(1).

Commonwealth owned body corporate means a body corporate that, were the Commonwealth a body corporate, would, for the purposes of the Corporations Law, be:

- (a) a wholly-owned subsidiary of the Commonwealth; or
- (b) a wholly-owned subsidiary of another body corporate that is, under this definition, a Commonwealth owned body corporate because of the application of paragraph (a) (including the application of that paragraph together with another application or other applications of this paragraph).

Commonwealth record means a record made by:

- (a) a Department within the meaning of the *Public Service Act 1922*; or
- (b) the Parliament, a House of the Parliament, a committee of a House of the Parliament or a committee of the Parliament; or
- (c) a person or body other than a Legislative Assembly holding office, or exercising power, under or because of the Constitution or a law of the Commonwealth; or
- (d) a body or organisation other than a Legislative Assembly, whether incorporated or unincorporated, established for a public purpose:
 - (i) by or under a law of the Commonwealth or of a Territory (other than the Australian Capital Territory, the Northern Territory or Norfolk Island); or
 - (ii) by the Governor-General; or
 - (iii) by a Minister; or
- (e) any other body or organisation that is a Commonwealth owned body corporate;

DICTIONARY—continued

and kept or maintained by a person, body or organisation of a kind referred to in paragraph (a), (b), (c), (d) or (e), but does not include a record made by a person or body holding office, or exercising power, under or because of the Constitution or a law of the Commonwealth if the record was not made in connection with holding the office concerned, or exercising the power concerned.

confidential communication is defined in section 117.

confidential document is defined in section 117.

credibility of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence.

credibility rule means section 102.

criminal proceeding means a prosecution for an offence and includes:

- (a) a proceeding for the committal of a person for trial or sentence for an offence; and
- (b) a proceeding relating to bail;

but does not include a prosecution for an offence that is a prescribed taxation offence within the meaning of Part III of the *Taxation Administration Act 1953*.

cross-examination is defined in subclause 2(2) of Part 2 of this Dictionary.

cross-examiner means a party who is cross-examining a witness.

de facto spouse:

- (a) of a man, means a woman who is living with the man as his wife on a genuine domestic basis although not married to him; and
- (b) of a woman, means a man who is living with the woman as her husband on a genuine domestic basis although not married to her.

document means any record of information, and includes:

- (a) anything on which there is writing; or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph.

Note: See also clause 8 of Part 2 of this Dictionary on the meaning of document.

examination in chief is defined in subclause 2(1) of Part 2 of this Dictionary.

exercise of a function includes performance of a duty.

fax, in relation to a document, means a copy of the document that has been reproduced by facsimile telegraphy.

DICTIONARY—continued

federal court means:

- (a) the High Court; or
- (b) any other court created by the Parliament (other than the Supreme Court of a Territory);

and includes a person or body (other than a court or magistrate of a State or Territory) that, in performing a function or exercising a power under a law of the Commonwealth, is required to apply the laws of evidence.

Note: The NSW Act does not include this definition.

foreign court means any court (including any person or body authorised to take or receive evidence, whether on behalf of a court or otherwise and whether or not the person or body is empowered to require the answering of questions or the production of documents) of a foreign country or a part of such a country.

function includes power, authority or duty.

government or official gazette includes the *Gazette*.

Note: The NSW Act includes definitions of “Governor” and “Governor-General”. These definitions are not included in this Act because they are covered by sections 16A and 16B of the *Acts Interpretation Act 1901*.

hearsay rule means subsection 59(1).

identification evidence means evidence that is:

- (a) an assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where:
 - (i) the offence for which the defendant is being prosecuted was committed; or
 - (ii) an act connected to that offence was done;

at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw or heard at that place and time; or

- (b) a report (whether oral or in writing) of such an assertion.

investigating official means:

- (a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior); or
- (b) a person appointed by or under an Australian law (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of the prevention or investigation of offences.

DICTIONARY—continued

joint sitting means:

- (a) in relation to the Parliament—a joint sitting of the members of the Senate and of the House of Representatives convened by the Governor-General under section 57 of the Constitution or convened under any Act; or
- (b) in relation to a bicameral legislature of a State—a joint sitting of both Houses of the legislature convened under a law of the State.

judge, in relation to a proceeding, means the judge, magistrate or other person before whom the proceeding is being held.

law is defined in clause 9 of Part 2 of this Dictionary.

lawyer means a barrister or solicitor.

leading question means a question asked of a witness that:

- (a) directly or indirectly suggests a particular answer to the question; or
- (b) assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked.

Legislative Assembly means any present or former Legislative Assembly of a Territory, and includes the Australian Capital Territory House of Assembly.

member of the Australian Federal Police includes a special member or a staff member of the Australian Federal Police.

Note: The NSW Act includes a definition of “NSW court”.

offence means an offence against or arising under an Australian law.

official questioning means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence.

opinion rule means section 76.

parent includes the meaning given in subclause 10(2) of Part 2 of this Dictionary.

picture identification evidence is defined in section 115.

police officer means:

- (a) a member of the Australian Federal Police; or
- (b) a member of the police force of a State or Territory.

postal article has the same meaning as in the *Australian Postal Corporation Act 1989*.

previous representation means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.

prior consistent statement of a witness means a previous representation that is consistent with evidence given by the witness.

DICTIONARY—continued

prior inconsistent statement of a witness means a previous representation that is inconsistent with evidence given by the witness.

probative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

public document means a document that:

- (a) forms part of the records of the Crown in any of its capacities; or
- (b) forms part of the records of the government of a foreign country; or
- (c) forms part of the records of a person or body holding office or exercising a function under or because of the Constitution, an Australian law or a law of a foreign country; or
- (d) is being kept by or on behalf of the Crown, such a government or such a person or body;

and includes the records of the proceedings of, and papers presented to:

- (e) an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament; and
- (f) a legislature of a foreign country, including a House or committee (however described) of such a legislature.

re-examination is defined in subclauses 2(3) and (4) of Part 2 of this Dictionary.

representation includes:

- (a) an express or implied representation (whether oral or in writing); or
- (b) a representation to be inferred from conduct; or
- (c) a representation not intended by its maker to be communicated to or seen by another person; or
- (d) a representation that for any reason is not communicated.

seal includes a stamp.

tendency evidence means evidence of a kind referred to in subsection 97(1) that a party seeks to have adduced for the purpose referred to in that subsection.

tendency rule means subsection 97(1).

visual identification evidence is defined in section 114.

witness includes the meaning given in clause 7 of Part 2 of this Dictionary.

PART 2—OTHER EXPRESSIONS

References to businesses

1.(1) A reference in this Act to a **business** includes a reference to the following:

DICTIONARY—continued

- (a) a profession, calling, occupation, trade or undertaking;
 - (b) an activity engaged in or carried on by the Crown in any of its capacities;
 - (c) an activity engaged in or carried on by the government of a foreign country;
 - (d) an activity engaged in or carried on by a person holding office or exercising power under or because of the Constitution, an Australian law or a law of a foreign country, being an activity engaged in or carried on in the performance of the functions of the office or in the exercise of the power (otherwise than in a private capacity);
 - (e) the proceedings of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament;
 - (f) the proceedings of a legislature of a foreign country, including a House or committee (however described) of such a legislature.
- (2) A reference in this Act to a business also includes a reference to:
- (a) a business that is not engaged in or carried on for profit; or
 - (b) a business engaged in or carried on outside Australia.

References to examination in chief, cross-examination and re-examination

2.(1) A reference in this Act to **examination in chief** of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, not being questioning that is re-examination.

(2) A reference in this Act to **cross-examination** of a witness is a reference to the questioning of a witness by a party other than the party who called the witness to give evidence.

(3) A reference in this Act to **re-examination** of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, being questioning (other than further examination in chief with the leave of the court) conducted after the cross-examination of the witness by another party.

(4) If a party has recalled a witness who has already given evidence, a reference in this Act to re-examination of a witness does not include a reference to the questioning of the witness by that party before the witness is questioned by another party.

DICTIONARY—continued

References to civil penalties

3. For the purposes of this Act, a person is taken to be liable to a civil penalty if, in an Australian or overseas proceeding (other than a criminal proceeding), the person would be liable to a penalty arising under an Australian law or a law of a foreign country.

Unavailability of persons

4.(1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:

- (a) the person is dead; or
- (b) the person is, for any reason other than the application of section 16 (Competence and compellability: judges and jurors), not competent to give the evidence about the fact; or
- (c) it would be unlawful for the person to give evidence about the fact; or
- (d) a provision of this Act prohibits the evidence being given; or
- (e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or
- (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.

(2) In all other cases the person is taken to be available to give evidence about the fact.

Unavailability of documents and things

5. For the purposes of this Act, a document or thing is taken not to be available to a party if and only if:

- (a) it cannot be found after reasonable inquiry and search by the party; or
- (b) it was destroyed by the party, or by a person on behalf of the party, otherwise than in bad faith, or was destroyed by another person; or
- (c) it would be impractical to produce the document or thing during the course of the proceeding; or
- (d) production of the document or thing during the course of the proceeding could render a person liable to conviction for an offence; or
- (e) it is not in the possession or under the control of the party and:
 - (i) it cannot be obtained by any judicial procedure of the court; or

DICTIONARY—continued

- (ii) it is in the possession or under the control of another party to the proceeding concerned who knows or might reasonably be expected to know that evidence of the contents of the document, or evidence of the thing, is likely to be relevant in the proceeding; or
- (iii) it was in the possession or under the control of such a party at a time when that party knew or might reasonably be expected to have known that such evidence was likely to be relevant in the proceeding.

Representations in documents

6. For the purposes of this Act, a representation contained in a document is taken to have been made by a person if:

- (a) the document was written, made or otherwise produced by the person; or
- (b) the representation was recognised by the person as his or her representation by signing, initialling or otherwise marking the document.

Witnesses

7.(1) A reference in this Act to a witness includes a reference to a party giving evidence.

(2) A reference in this Act to a witness who has been called by a party to give evidence includes a reference to the party giving evidence.

(3) A reference in this section to a party includes a defendant in a criminal proceeding.

References to documents

8. A reference in this Act to a document includes a reference to:

- (a) any part of the document; or
- (b) any copy, reproduction or duplicate of the document or of any part of the document; or
- (c) any part of such a copy, reproduction or duplicate.

References to laws

9.(1) A reference in this Act to a law of the Commonwealth, a State, a Territory or a foreign country is a reference to a law (whether written or unwritten) of or in force in that place.

(2) A reference in this Act to an Australian law is a reference to an Australian law (whether written or unwritten) of or in force in Australia.

DICTIONARY—continued

References to children and parents

10.(1) A reference in this Act to a child of a person includes a reference to:

- (a) an adopted child and an ex-nuptial child of the person; or
- (b) a child living with the person as if the child were a member of the person's family.

(2) A reference in this Act to a parent of a person includes a reference to:

- (a) an adoptive parent of the person; or
- (b) if the person is an ex-nuptial child—the person's natural father; or
- (c) the person with whom a child is living as if the child were a member of the person's family.

*[Minister's second reading speech made in—
House of Representatives on 15 December 1993
Senate on 7 November 1994]*