

INDEX

- Aboriginal and Torres Strait Islander people
 oral evidence and, 60
 traditional laws and customs and, 204, 226, 228
- adducing evidence
 calling a witness, 27
 compellability. *See* compellability
 cross-examination. *See* cross-examination
 definition, 26
 of good character, 407–9
 oaths and affirmations, 57–9
 other evidence, 102
 proof of contents of documents, 99–101
 questioning of witnesses. *See* questioning of witnesses
 re-examination, 98–9
- admissions, 231
 ‘act of another person’, 253
 authority to make statements, 262–5
 circumstances in which admission was made, 253–61
 in the course of official questioning, 243–4
 definition, 231–2
 discretions to exclude, 277–8
 electronic recording while in police custody, 235–43
 exception to the hearsay and opinion rules, 232–4
 exclusion of records of oral questioning, 261
 formal admissions, 16–17
Haddara case, 292–3
 investigating official, 253
 no application against third parties without consent, 235
 personal knowledge, 234
 proving, 265
 reliability of, 246–53
 as result of violence or other conduct, 245–6
 statements and conduct amounting to
 admissions. *See* statements and conduct
 amounting to admissions
 unfairness discretion, 278–92
 voluntariness in common law, 244–5
 advance rulings and findings, 20–1, 428, 588
 affidavits, 584
- affirmative defences, 10–11
 alternative arrangements for giving evidence, 38
 adult complainants, 39
 children and cognitively impaired
 complainants, 39–42
- appeals, 21
- Browne v Dunn* rule, 94–7, 104
 civil cases, 95, 97
 criminal cases, 95, 97–8
 leave to recall witnesses, 98
 rebuttal and opening, 97
- Bunning v Cross* factors, 549, 556, 562
- burden of proof, 10–11
 evidential, 10
 legal, 10
- business records
 hearsay exceptions and, 192–9
- Calderbank* communications, 513, 519
- chain of rebuttals, 391, 402
- character evidence, 405–6
 about complainants and victims, 428–30
 meaning of, 406–7
 to prove good character, 302
- character evidence about the accused, 407
 adducing evidence of good character, 407–9
 character in general or in a particular aspect, 409–19
 evidence about character of co-accused, 422–8
 judicial directions and discretion, 419–22
 leave to cross-examine about character of
 accused or co-accused, 423–8
- children
 competence as witnesses, 31–8
- children’s evidence, 430, 569
 alternative arrangements for giving of, 39–42
 warnings in relation to, 571–2
- circumstantial evidence, 110, 367
- civil proceedings
 client legal privilege, 479
 failure to call witnesses or produce evidence in,
 267
Jones v Dunkel rule, 27

- civil proceedings (cont.)
 - standard of proof, 11
 - versus criminal proceedings, 7–8
- civil proceedings hearsay exceptions
 - maker of statement is available, 160–1
 - maker of statement not available, 160
- client legal privilege, 461–2
 - civil proceedings, 479
 - definition of client, 464
 - definition of confidentiality, 464–5
 - definition of employee or agent of a client, 464
 - definition of lawyer, 463–4
 - definitions, 462–3
 - dominant purpose test, 465–70
 - general loss of, 474–5
 - invoking client legal privilege, 473–4
 - other causes of loss of privilege, 479–80
 - waiver, 475–9
- cognitively impaired complainants
 - alternative arrangements for giving evidence, 39–42
- coincidence reasoning, 302, 306, 348, 351, 366, 368
 - admissibility of, 601
 - civil cases, 306–7
 - criminal cases, 307
- coincidence rule, 298–9, 306, 372
 - bail or sentencing and, 300
 - fact in issue and, 300
- collusion, concoction or contamination, 363–5
- communications
 - Calderbank* communications, 513, 518–19
 - electronic. *See* electronic communications
 - medical communications professional
 - confidential privilege, 482–4
 - sexual assault communications privilege, 484–8
 - ‘without prejudice’ communications, 512–14
- compellability, 42, 103
 - defendant, 43
 - defendant’s family, 43–9
 - exceptions to general rule, 28–9
 - presumption of, 28–9
 - silence at trial. *See* silence at trial
- competence, 29–31, 103
 - alternative arrangements for giving evidence.
 - See* alternative arrangements for giving evidence
 - children and cognitively impaired witnesses, 31–8
 - exceptions to general rule, 28–9
 - lack of capacity, 29–31
 - presumption of, 28–9
 - sworn and unsworn evidence and, 31
 - tests, 29
- contemporaneous mental and physical states
 - common law, 189–90
 - emotional state of mind, 191
 - evidence law and, 192
 - knowledge, 191
 - state of mind, 190
 - statements of intention, 190
- context evidence, 303
- corporations
 - privilege against self-incrimination and, 498
- corroboration
 - common law, 568–9
 - evidence law, 569
- counselling records
 - protection of, 485–6
- court proceedings
 - order of, 8
- credibility evidence, 91, 374–5
 - admissibility, 375, 378, 385
 - collateral nature of, 375–7
 - definition, 375, 377–9
 - evidence about a person who has made a
 - previous representation, 396–8
 - evidence adduced in cross-examination, 385–7
 - evidence adduced in cross-examination of an
 - accused, 387–9
 - evidence in rebuttal of denials, 389–93
 - evidence to re-establish credibility, 393–6
 - exceptions to credibility rule, 385–96
 - expert opinion on a witness’s credibility, 400–1
 - non-witnesses, 396–401
 - previous representations of an accused, 398–9
 - prior inconsistent statements and, 92, 375
- credibility rule, 152, 300, 384, 400, 402
 - exceptions to, 385–96
 - questions that discredit a witness and, 93, 104
- criminal proceedings
 - character evidence. *See* character evidence
 - mandatory exclusion of evidence in. *See* mandatory exclusion of evidence in
 - mandatory exclusion of evidence in
 - criminal proceedings
 - pre-trial silence in. *See* pre-trial silence in
 - pre-trial silence in
 - criminal proceedings
 - standard of proof, 11–12
 - tendency evidence. *See* tendency and coincidence
 - versus civil proceedings, 7–8
- criminal proceedings hearsay exceptions
 - against the interests of the person, 168–75
 - evidence of previous representation adduced
 - by a defendant, 178–9
 - highly probable that representation is reliable, 164–8
 - made under a duty, 162
 - made when or shortly after asserted fact
 - occurred, 162–4
 - maker of statement is available, 179–89

- maker of statement not available, 161–2
 - previous representation adduced by a
 - defendant, 175–8
- cross-examination, 82, 104
 - Browne v Dunn* rule. *See* *Browne v Dunn* rule
 - evidence adduced in, 385–7
 - evidence adduced in cross-examination of an accused, 387–9
 - improper or disallowable questions, 82–9
 - leading questions, 89–90, 104
 - leave to cross-examine about character of accused or co-accused, 423–8
 - prior consistent statements. *See* prior consistent statements
 - unfavourable witnesses, 588
- denials
 - evidence in rebuttal of, 389–93
- direct evidence, 21–2
- disciplinary principle, 4
- disclosure orders, 462, 497
- discretion to exclude illegally or improperly obtained evidence
 - common law, 548–56
 - evidence law, 556–7
 - ‘improper’ and ‘impropriety’, 557–66
- discretionary and mandatory exclusions, 526
 - corroboration. *See* corroboration
 - general discretion to exclude evidence, 526–8
 - general discretion to limit the use of evidence, 530–1
 - mandatory exclusion of evidence in criminal proceedings. *See* mandatory exclusion of evidence in criminal proceedings
 - misleading or confusing evidence, 528–9
 - ‘undue waste of time’, 529–30
 - ‘unfairly prejudicial’ evidence, 528
- displacement effect, 451–3
- documentary evidence, 22–3
- documents
 - copy documents, 472
 - counselling records, 485–6
 - of official record, 580–1
 - proof of contents of, 99–101
- dominant purpose test, 465–70
- electronic communications
 - facilitation of proof and, 581–3
 - hearsay exceptions and, 199–200
- evidence
 - adducing of. *See* adducing evidence
 - advantages and disadvantages of adversarial process and, 59–60
 - alternative arrangements for giving evidence. *See* alternative arrangements for giving evidence
 - character evidence. *See* character evidence
 - children’s evidence, 31–42
 - circumstantial evidence, 110, 367
 - coincidence evidence. *See* tendency and coincidence
 - coincidence
 - context evidence, 303
 - corroborating evidence. *See* corroboration
 - credibility evidence. *See* credibility evidence
 - definition, 2–3
 - direct evidence, 21–2
 - discretion to exclude illegally or improperly obtained evidence. *See* discretion to exclude illegally or improperly obtained evidence
 - discretionary and mandatory exclusions of. *See* discretionary and mandatory exclusions
 - documentary evidence, 22–3
 - hearsay evidence. *See* hearsay
 - indirect evidence, 22
 - lay opinions exception, 210–15
 - miscellaneous matters, 587–8
 - misleading or confusing evidence, 528–9
 - opinion evidence. *See* opinion evidence
 - oral evidence, 22, 26, 60
 - propensity evidence, 298
 - real evidence, 22
 - relationship evidence, 110
 - relevant evidence. *See* relevance
 - sworn and unsworn evidence, 31
 - tendency evidence. *See* tendency and coincidence
 - types and forms of, 21–3
 - ‘unfairly prejudicial’ evidence, 528
 - unreliable evidence. *See* unreliable evidence
 - visual identification evidence. *See* visual identification evidence
- evidence law, 3
 - background to the Act, 4–5
 - practical effect of the Act, 6
 - preliminary concepts. *See* preliminary concepts of evidence law
 - principles versus rules tension, 4, 548
 - structure of the Act, 5
- examination-in-chief, 60, 104
 - exceptions to prohibition of leading questions, 62
 - police officers, 65–7
 - prior inconsistent statements and, 104
 - prohibition of leading questions, 61–2, 104
 - reviving memory. *See* reviving memory
 - unfavourable witnesses, 68–81
- expert evidence
 - certificate of, 586–7
 - on witness credibility, 400–1

- expert opinions exception, 215–19
 - basis rule, 219–23
 - expert opinion basis and hearsay, 223–4
 - procedural issues, 224–5
- Facebook posts, 583
- facilitation of proof, 577–8
 - common law, 578
 - general, 578–80
 - matters of official record, 580–1
 - post and electronic communications, 581–3
 - request procedures, 583–4
- finality rule, 387, 391, 393, 402
 - exceptions, 391, 393
- foreign law
 - evidence of, 584–6
- formal admissions, 16–17
- good character.
 - adducing evidence of, 407–9
 - in general or particular, 409–19
 - use of evidence to prove, 302
 - See also* character evidence
- hearsay, 136–7
 - asserted fact, 143
 - contemporaneous mental and physical states.
 - See* contemporaneous mental and physical states
 - express and implied assertions, 137–9
 - intended to assert, 143–6
 - made by a person, 143
 - non-hearsay purpose at common law, 139–41
 - previous representation, 142–3
 - representation, 141–2
- hearsay exceptions, 157
 - business records, 192–9
 - civil proceedings. *See* civil proceedings hearsay exceptions
 - competency, 157
 - criminal proceedings. *See* criminal proceedings hearsay exceptions
 - electronic communications, 199–200
 - first-hand hearsay, 158–60
 - res gestae, 189–90
 - tags, labels and writing, 199
- hearsay purpose, 146–51
 - non-hearsay purpose, 151–7
- hearsay rule, 136–7, 141, 143–4, 156, 162, 179, 189–92, 199, 209, 216, 231, 233, 378, 383, 387
- identification evidence, 433–4
 - definition, 434–5
 - displacement effect, 451–3
 - exclusion of, 453–5
 - formal identification procedures, 436–7
 - identification parades and the common law, 437–41
 - in-court identification, 435–6
 - jury directions on. *See* jury directions on identification evidence
 - out-of-court identification, 436
 - picture identification evidence. *See* picture identification evidence
 - visual identification evidence. *See* visual identification evidence
- identification parades, 437–41
- improper or disallowable questions, 82–9
 - Northern Territory and Victoria, 82–5
- in-court identification, 435–6
- indirect evidence, 22
- interpreters
 - incompetent witnesses and, 30
- Jones v Dunkel* rule, 27, 103, 267
- journalist privilege, 488–9
- judicial directions, 19
 - character evidence about the accused, 419–21
 - tendency and coincidence, 368–71
 - Victoria, 369–71
- judicial discretion
 - character evidence about the accused and, 421–2
 - relevant evidence, 121–30, 132
- judicial leave, 19–20
- judicial notice, 15–16
- judicial reasons
 - privilege and, 498
- jury directions on identification evidence, 448–9
 - Victoria, 449–51
- lay opinions evidence, 210–15
- leading questions
 - cross-examination, 89–90, 104
 - exceptions to prohibition of, 62
 - prohibition of, 61–2
- legal advice privilege, 470
 - ‘communication’ and ‘document’, 470–2
 - copy documents, 472
- legal professional privilege. *See* client legal privilege
- legal relevance, 119–20
- litigation privilege, 470, 472
 - unrepresented parties, 473
- logical relevance, 120–1
- mandatory exclusion of evidence in criminal proceedings, 531–2
 - ‘probative value’, 532–43

- procedural fairness, 548
- 'unfair prejudice', 543–8
- matters of common knowledge, 15–16, 227–8
- matters of state
 - factors to take into account, 511
 - interest in disclosure, 510–11
 - investigation and prosecution, 510
 - proper functioning of government, 510
 - security, defence or international relations of Australia, 509
- medical communications
 - professional confidential privilege and, 482–4
- no-case submission, 10
- non-witnesses
 - credibility evidence, 396–401
- oaths and affirmations, 57–9, 103
- opinion evidence, 204–5
 - certificate of expert evidence, 586–7
 - defining opinion evidence, 205–7
 - dual relevance exception, 209–10
 - expert opinions, 215–19
 - lay opinions exception, 210–15
 - other admissible opinions, 225–6
 - procedures for proving other matters, 586
 - scope of application, 226–7
- opinion rule, 207–9, 231, 233, 378
 - exception to, 232–4
 - exceptions, 225
 - opinions based on specialised knowledge and, 215
- oral evidence, 22, 26
 - Aboriginal and Torres Strait Islander people and, 60
- out-of-court identification, 436
- Pfennig* test, 353
- photoboard, 448
- picture identification evidence, 434, 445–6
 - exclusion of, 447–8
 - unreliability of, 448
 - warnings to the jury, 448
- police custody
 - electronic recording in, 235–43
- police officers
 - examination-in-chief and, 65–7
- prejudicial effect, 123, 365–7
 - versus probative value, 351–63
- preliminary concepts of evidence law
 - advance rulings and findings, 20–1
 - appeals, 21
 - burden and standard of proof, 10–15
 - criminal versus civil proceedings, 7–8
 - formal admissions, 16–17
 - functions of judge and jury, 8–10
 - judicial directions and leave, 19–20
 - judicial notice, 15–16
 - order of court proceedings, 8
 - preliminary questions, 17–18
 - waiver, 18–19
- pre-trial silence in criminal proceedings, 267–70
 - consciousness of guilt, 270–1
 - inculpatory and exculpatory statements of the accused, 271–7
- previous representations, 90, 99, 104
 - hearsay and, 142–3
- prior consistent statements, 152, 393, 402
 - definition, 394
 - as evidence of truth, 396
 - exceptions to rule against, 91–2, 104
 - leave of the court and, 395
 - non-admitted, 394
 - 'recent invention' and, 395
 - re-establishment of credibility and, 394
 - rule against, 90–1, 104
- prior inconsistent statements, 70, 81, 93–4, 152, 388, 390, 394, 399, 418, 537
 - credibility evidence and, 92, 375
 - examination-in-chief and, 104
 - rebuttal and, 97
- privilege against self-incrimination
 - common law, 491–2
 - corporations and, 498
 - court certificate, 497
 - determination, 497
 - evidence law, 492–6
 - objection, 496
 - preliminary procedures, 497–8
- privileges, 459–60
 - definition, 459
 - general procedural issues, 521
 - journalist privilege, 488–9
 - judicial reasons, 498
 - legal advice privilege. *See* legal advice privilege
 - litigation privilege. *See* litigation privilege
 - public interest immunity. *See* public interest immunity
 - rationales of, 460
 - religious confessions, 489–91
 - settlement negotiations. *See* settlement negotiations
 - sexual assault communications privilege, 484–8
- probative value, 532–43
 - significant. *See* significant probative value
 - versus prejudicial effect, 351–63
- probative value test, 533
- professional confidential privilege, 480–2
 - medical communications, 482–4

- proof
 - beyond reasonable doubt, 13–15
 - burden of. *See* burden of proof
 - facilitation of. *See* facilitation of proof
 - of contents of documents, 99–101
 - standard of. *See* standard of proof
- propensity evidence, 298
- protective principle, 4
- public interest immunity
 - class claims and contents claims, 499–508
 - common law, 498–9
 - evidence law, 508
 - matters of state. *See* matters of state
- questioning of witnesses
 - counsel, 60
 - examination-in-chief. *See* examination-in-chief
 - improper or disallowable questions, 82–9
 - leading questions. *See* leading questions
 - official, admissions in the course of, 243–4
 - oral questioning, exclusion of records of, 261
 - parties and the judge, 59–60
 - questions that discredit a witness, 93, 104
- real evidence, 22
- re-examination, 98–9, 104
 - evidence to re-establish credibility, 393–6
- relationship evidence, 110
- relevance, 108–9
 - directly relevant evidence, 109
 - indirectly relevant evidence, 109–19
 - judicial discretions, 121–30, 132
 - legal relevance, 119–20
 - logical relevance, 120–1, 132
 - provisional relevance, 131–2
- reliability principle, 4
- religious confessions, 489–91
- request procedures, 583–4
- res gestae doctrine, 189–90
- reviving memory, 62–3, 104
 - in court, 63–5
 - out of court, 67–8
- Royal Commission into Institutional Responses to
 - Child Sexual Abuse, 39, 301, 327, 346, 363, 490
- self-incrimination
 - privilege against. *See* privilege against self-incrimination
- settlement negotiations
 - Calderbank* communications, 513, 518–19
 - common law, 511–16
 - evidence law, 517–19
 - exceptions to the privilege, 141
 - factors required to engage privilege, 511–12
 - pre-trial, trial and non-judicial proceedings, 519–21
 - ‘without prejudice’ communications, 512–14
 - sexual assault communications privilege, 484–8
 - significant probative value, 310
 - applying coincidence evidence, 348–50
 - applying tendency evidence, 316–48
 - assumption of truth and reliability of evidence by court, 311–16
 - differences between tendency and coincidence evidence, 350–1
 - how assessed, 310–11
 - silence at trial, 49
 - common law, 49–54
 - evidence law and, 54–5
 - jury directions in Victoria, 55–7
 - standard of proof, 11–12
 - admissibility of evidence, 12–13
 - civil proceedings, 11
 - criminal proceedings, 11–12
 - state of mind, 190
 - emotional state of mind, 191
 - statements and conduct amounting to admissions, 265–6
 - failure to call witnesses or produce evidence, 267
 - pre-trial silence in criminal proceedings. *See* pre-trial silence in criminal proceedings
 - sworn and unsworn evidence
 - competence and, 31
- tags, labels and writing
 - hearsay exceptions and, 199
- tendency and coincidence, 298–9
 - bail or sentencing and, 300
 - coincidence reasoning in civil cases, 306–7
 - coincidence reasoning in criminal cases, 307
 - coincidence rule. *See* coincidence rule
 - collusion, concoction or contamination, 363–5
 - competing with other inferences, 367–8
 - evidence of credibility of witnesses, 300
 - fact in issue, 300–1
 - formal requirements, 302
 - judicial directions, 368–71
 - non-application, 299–300
 - notice, 307–10
 - prejudicial effect, 365–7
 - probative value versus prejudicial effect, 351–63
 - significant probative value. *See* significant probative value
 - tendency and/or coincidence purpose, 302–4
 - use of evidence for other purposes, 301–2
 - use of evidence to prove good character, 302

- tendency reasoning, 12, 302, 351, 368
 - admissibility of, 601
 - assessing strength of, 317–18
 - civil cases, 304–5
 - criminal cases, 305–6
- tendency rule, 298–9, 302, 304, 306, 372, 539
- trial judge
 - exclusionary powers. *See* discretionary and mandatory exclusions
- unfair prejudice, 122
- unfairness discretion, 278–92
- unfavourable witnesses, 385
- unreliable evidence, 569–71
 - delay in prosecution, 572–4
 - warnings in relation to children’s evidence, 571–2
- visual identification evidence, 435, 441–2
 - exclusion of, 442
 - pictures of people in custody, 447
 - ‘reasonableness’ condition, 442–5
- voir dire, 17–18, 29, 46, 69, 245, 497, 587–8
- waiver, 18–19, 475–9
- Weissensteiner* direction, 50, 53
- witnesses
 - calling of, 27
 - children and cognitively impaired witnesses, 31–8
 - compellable, 28, 103
 - competence. *See* competence
 - competent, 28, 103
 - evidence of credibility of, 300
 - failure to call witnesses in civil proceedings, 267
 - incompetent, 30
 - leave to recall, 98
 - non-witnesses. *See* non-witnesses
 - prior consistent statements. *See* prior consistent statements
 - prior inconsistent statements, 93–4
 - privilege and, 28
 - questioning of. *See* questioning of witnesses
 - re-examination, 98–9
 - unfavourable, 68–81, 588
 - vulnerable, Northern Territory and Victoria, 82–5