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INTRODUCTION

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1.1 Introduction

The focus of this book is the uniform Evidence Act (referred to throughout as ‘the Act’ or ‘the Acts’).¹ The Act has not been introduced in Queensland, South Australia or Western Australia,

¹ *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

where each state's Evidence Act and the common law apply. However, the Act is still an important reference guide for those states due to the connection between the common law and the Act. Despite the differences between jurisdictions that have adopted the Act, there is a significant degree of uniformity. Accordingly, in this book the provisions that are extracted to indicate the rules in relation to the Act come from the Commonwealth Act. Any important jurisdictional differences are separately identified.

This chapter considers the legislative history and sets out some fundamental introductory concepts that are used frequently in evidence law and the trial process. This chapter is merely an introductory overview; specific topics are dealt with in substance in subsequent chapters.

1.2 What is evidence?

Evidence has been said to be 'any matter of fact, the effect, tendency, or design of which is, to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact'.²

Every day we are faced with ordinary notions of 'evidence'. Generally, humans desire to know truth from falsity. This happens in respect of so many things around us, from advertisements for goods or the assurances of a used car seller, through to statements and representations made at school, work or in social discourse. To determine the truth or falsity of representations and events, we often rely on information, documents and people who were with us at the time. For example, assume that on Saturday 30 September 2017 Harry went to the Australian Football League grand final at the Melbourne Cricket Ground ('MCG'). There are a number of sources we can use to *prove* that this is true. One is a direct statement from Harry, 'I went to the grand final on Saturday 30 September and saw it all'. Another is a statement from Harry's friend, George, that he went with Harry to the grand final. A third source is the grand final tickets purchased by Harry. Additional sources are the CCTV footage of Harry entering the gates of the MCG, and a text message from Harry to his mum stating that he is at the grand final.

Alternatively, there are a number of sources we can use to *disprove* that Harry attended the grand final. One is a statement from Harry's girlfriend that the two of them spent the day at home watching the match on TV. Another is a statement from an expert in identification that the person in the CCTV footage is not Harry. A further source is a statement from a neighbour who saw, through his lounge room window, Harry's car in the driveway all day and Harry watching TV. One more is a telephone record indicating that Harry made a call from his home at about 3 pm, which was during the time of the match. Therefore, even with everyday events, we use information that tends to prove or disprove a factual proposition. Consideration and analysis of this information tends to make us find something believable or not, and has the ability to demonstrate the truth of an assertion or proposition.

The term 'evidence' is not defined in the Act, but some dictionary definitions are as follows:

evidence *noun* 1. ground for belief; that which tends to prove or disprove something; proof . . . 3. *Law* the data, in the form of testimony of witnesses, or of documents or other objects (such as a photograph, a revolver, etc.) identified by witnesses, offered to the court or jury in proof of the facts at issue.³

2 *Cheney v Spooner* (1929) 41 CLR 532, 537 (Isaacs and Gavan Duffy JJ).

3 *Macquarie Dictionary Online*, www.macquariedictionary.com.au.

1.2.1 Evidence law

Criminal and civil court proceedings generally commence with the prosecution filing a criminal charge or the plaintiff filing a civil statement of claim. For the proceeding to succeed, the court must find that the charge or claim has been proven in respect of the issues to be determined. The actual elements to be satisfied depend upon the particular offence or cause of action and are a matter of substantive law (e.g. contract law, corporations law, taxation law or tort law).

To prove their case, each party presents to the court documentary or oral information, data or other evidence. Each party decides what evidence to present and the choice depends upon how well they consider each piece of evidence suits their case. Such evidence is intended to prove or disprove the disputed facts so that ultimately the charge or claim is proved according to law, or is dismissed.

The typical trial framework within which the parties operate is determined by the substantive law that applies in the particular case. For example, in a criminal matter (e.g. a murder trial) the prosecution must establish the victim's death, the defendant's act that caused the victim's death, the defendant's subjective intent at the relevant time, and that no lawful defence applies. In a civil matter (e.g. a negligence claim) the plaintiff must show that a duty of care was owed by the defendant to the plaintiff, the duty was breached by the defendant, the breach caused the injury or harm to the plaintiff, and the plaintiff suffered the injury or harm which was not too remote. Within each broad framework, the court will determine the relevant facts by considering the available evidence presented before it, and will apply the substantive law to those facts. This process enables the court to state the rights and liabilities of the parties.

The law of evidence is, therefore, a collection of procedural rules and principles that applies to litigation conducted in the courtroom. These rules can also be applied at the pre-trial stages. An example is the concept of *relevance* in pre-trial discovery in civil proceedings. Relevance should be borne in mind when preparing the case and asking 'How am I going to prove this point?'. These rules and principles are intended to promote accurate fact finding by the court in carrying out its important adjudicative function. They also regulate the process of fact finding in court. For example, some rules relate to what evidence the parties can present in order to prove or disprove the facts in issue in a case (e.g. rules relating to the *admissibility* of evidence); some rules determine how such evidence is presented; and other rules regulate what use can be made of such evidence by the court in making factual findings.

1.2.2 Principles versus rules

Whether evidence laws are merely procedural rules or whether they embody principles and rights, is an important tension to bear in mind. A practical approach would propose that the law of evidence is both a set of rules and a collection of principles. This approach invites consideration of certain concepts and principles. Three major principles are discussed here to guide an understanding of this interconnection: the reliability principle, the libertarian principle and the disciplinary principle.

The *reliability principle* is the utilitarian principle that all evidence brought before a court must be reliable, to achieve the right result at trial. Unreliable evidence should be treated cautiously and a court should be provided with as much relevant evidence as possible to determine the facts in issue accurately. The main objectives of applying this principle are to detect crime and to protect the innocent from wrongful punishment. An example of a rule that

reflects this principle is the rule against hearsay, which ensures that the decision by a jury depends upon the quality of the admissible evidence before it.

The *libertarian principle* is primarily the principle that each step in the criminal justice process should be judged against the way society expects individuals to be treated. Society demands that individuals are treated fairly and protected from prejudice. Similarly, a court should ensure that the parties and witnesses at trial are treated fairly and that any unjustifiable delay and expense is avoided. At the same time, fact finding must be rational, accurate and relevant. An example of a rule that reflects this principle is the accused's privilege against self-incrimination.

The *disciplinary principle* ensures that the values and rights of individuals are maintained by discouraging or penalising the use of improper methods by police, judges, solicitors and other persons who have a responsible role in society. The disciplinary principle seeks to promote observance of and compliance with the rule of law and to create a fair and safe society. An example of a rule that reflects this principle is the exclusion of illegally obtained evidence, sometimes stated as the court's refusal to 'eat the fruit of the poison tree'. The law ideally maintains that those who uphold the law should not breach the law.⁴

There is no reason why all three principles cannot in fact be followed in any one case. In Australian society it is assumed that we should want only relevant, reliable evidence so that a judge and jury can make the right decision. Lawfully obtained evidence that is admitted in court must be reliable and relevant so that individuals are treated fairly. One example of where all three principles may intersect is in the area of confessions and admissions.⁵

1.3 Background to the Act

Historically, the law of evidence was predominantly a product of the common law. Over time, the English courts developed a complex set of rules containing various principles and values. Increasingly, these rules were criticised as being overly technical, lacking in coherence and leading to injustices. In Australia, to alleviate this problem each jurisdiction introduced its own Evidence Act. Not surprisingly, over time, inconsistencies between jurisdictions caused considerable new difficulties for the parties and practitioners. Reform was required.

In 1979, the Commonwealth Attorney-General referred for review the laws of evidence and their operation in Australia to the Australian Law Reform Commission ('ALRC'). The ALRC produced a final report in 1987 recommending a uniform approach to evidence law across all jurisdictions.⁶ In 1995, the Commonwealth and New South Wales became the first jurisdictions to implement the uniform evidence law.⁷ Uniform evidence legislation commenced in Tasmania and Norfolk Island in 2002 and 2004, respectively.⁸

In July 2004, a subsequent reference was given to the ALRC to review the operation of the uniform Evidence Acts. The ALRC, in collaboration with the law reform commissions of New South Wales and Victoria, produced a joint report in December 2005.⁹ The report contained

4 *Ireland v R* (1970) 126 CLR 321; *Bunning v Cross* (1978) 141 CLR 54.

5 Discussed in Chapter 6.

6 ALRC, *Evidence (Interim)*, Report No. 26 (1985) vols 1, 2; ALRC, *Evidence*, Report No. 38 (1987).

7 *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW).

8 *Evidence Act 2004* (ND); *Evidence Act 2001* (Tas).

9 ALRC, *Uniform Evidence Law*, Report No. 102 (2005).

recommendations for significant amendments, and some jurisdictions adopted the recommendations.¹⁰ Uniform evidence legislation was enacted in Victoria in 2008,¹¹ and in the Australian Capital Territory¹² and the Northern Territory¹³ in 2011.

1.3.1 Structure of the Act

The Act is divided into five chapters. As the Act is not an exhaustive and exact codification of the common law of evidence, this book includes some additional topics that do not appear in the Act, as appropriate.

- Chapter 1 – ‘Preliminary’
This introduces preliminary matters, the scope of the Act and its effect on other laws.
- Chapter 2 – ‘Adducing evidence’
This explains how evidence is adduced in court, in contrast to its admissibility.
- Chapter 3 – ‘Admissibility of evidence’
This sets out rules determining the different types of evidence and what evidence may be admitted and taken into account in a court proceeding.
- Chapter 4 – ‘Proof’
This considers matters of proof in a proceeding.
- Chapter 5 – ‘Miscellaneous’
This deals with the voir dire, waiver of rules of evidence, granting of leave and giving of directions and advance rulings.

1.3.2 Practical effect of the Act

A number of issues have arisen as a result of adoption of the uniform evidence legislation. The Act expands, and sometimes overrides, the common law in many ways and over time courts have made less resort to earlier judgments. In one example, Parliament amended the statutory provisions on hearsay in response to the decision in *Lee v R* (1998) 195 CLR 594.¹⁴ The ALRC stated:

The High Court’s interpretation of the effect of s 60 [which is an exception to the hearsay rule where the evidence is relevant for a non-hearsay purpose] is contrary to the ALRC’s intention, and runs counter to the policy underlying the admissibility of evidence in the uniform Evidence Acts.¹⁵

Uniformity across jurisdictions is also not absolute, particularly in Victoria. In several areas of evidence law, Victoria has removed or significantly reformed whole areas of the Act. For example, s 20 concerns the extent of the ability of a judge or party to make comments in relation to the accused remaining silent; this is retained in the Commonwealth Act but has been removed from the Victorian Act. In addition, major changes have been made in respect of s 165 on unreliable

10 Implemented by the *Evidence Amendment Act 2008* (Cth), *Evidence Amendment Act 2007* (NSW) and *Evidence Amendment Act 2010* (Tas).

11 *Evidence Act 2008* (Vic) which came into force 1 January 2010.

12 *Evidence Act 2011* (ACT) which came into force March 2012.

13 *Evidence (National Uniform Legislation) Act 2011* (NT) which came into force 1 January 2013.

14 (1988) 195 CLR 594.

15 ALRC, *Uniform Evidence Law*, Report No. 102 (2005) 213 [7.100]. A similar response was made to the High Court’s interpretation of s 66 in *Grabam v R* (1998) 195 CLR 606 (discussed in Chapter 4).

evidence.¹⁶ Judicial interpretation of uniform evidence provisions has also created some jurisdictional divergence in regard to particular concepts (e.g. the assessment of ‘probative value’).¹⁷

These issues have also led to a question being frequently asked, namely whether the uniform evidence law can be considered to be a Code.¹⁸ This is unlikely, given that the Act makes specific reference to operating with other statutes.¹⁹ In contrast, codified law is a complete statement of the law on a particular subject with no reference to the common law.²⁰ Furthermore, definitions contained in the Act may require further clarification by judges. This will eventually create a distinct body of uniform evidence case law. Although the Act prevails, in some circumstances the common law will assist in understanding it or exist alongside the Act.²¹

Finally, the uniform evidence law excludes several topics traditionally linked to the law of evidence: the adducing of evidence from vulnerable witnesses (e.g. certain adult witnesses, children and people with a cognitive impairment) and a discussion of alternative arrangements for the giving of evidence by these witnesses. These topics are explored in Chapter 2. In other areas, an understanding of the common law approach is necessary to properly apply the current law.

1.4 Preliminary concepts

Several provisions in the Act separate civil from criminal proceedings and highlight the differences between the two. It is necessary to note these differences in order to understand the procedures and consequences that result from them.

1.4.1 Criminal versus civil proceedings

The procedural requirements for criminal and civil proceedings are very different. A ‘criminal proceeding’ is defined in the Act’s Dictionary as:

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*.²²

It includes a prosecution brought by the state (the police) against a defendant for offences committed against a person, property, animal or thing that could result in a penalty, ranging from community service orders to fines and terms of imprisonment.

16 Discussed in detail in Chapter 12.

17 The High Court in *IMM v R* (2016) 257 CLR 300 favoured the NSW approach in *R v Shamouil* (2006) 66 NSWLR 228 and *R v XY* (2013) 84 NSWLR 363 over the Victorian approach in *Dupas v R* (2012) 218 A Crim R 507 (discussed in Chapter 7 and Chapter 12).

18 *Telstra Corp v Australis Media Holdings (No. 2)* (1997) 41 NSWLR 346, 349; *McNeill v R* (2008) 168 FCR 198. Cf *Papakosmas v R* (1999) 196 CLR 297; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; *Haddara v R* [2014] VSCA 100.

19 See ss 8, 8A, 9.

20 J Anderson, *Uniform Evidence Law: Text and Essential Cases* (Federation Press, 3rd ed., 2016) 8.

21 See *Haddara v R* (2014) 43 VR 53 (discussed in Chapter 6).

22 Dictionary pt 1 (definition of ‘criminal proceeding’).

Certain provisions of the Act pertain solely to criminal proceedings. These include, but are not limited to, the following:

- Competency of the accused²³
The rule regarding competency is different in criminal proceedings because the defendant is not competent to give evidence for the prosecution.²⁴
- Compellability²⁵
Only the defendant's spouse, partner, parent or child may apply to the court if they object to giving evidence for the prosecution.²⁶ In criminal proceedings, there is protection from adverse inferences if the defendant or the defendant's spouse, partner, parent or child does not give evidence, as the prosecutor may not comment on this.²⁷
- Hearsay²⁸
The provisions regarding the rule against hearsay are clearly separated according to whether the matter is civil or criminal.²⁹
- Character³⁰
There are special rules in a criminal proceeding that allow a defendant to be cross-examined if they raise evidence of good character.³¹
- Eyewitness identification³²
A defendant is protected in regard to certain kinds of eyewitness identification.³³
- Standard of proof
The standard of proof in criminal cases is higher than the standard in civil cases.³⁴

A 'civil proceeding' is defined in the Act as 'a proceeding other than a criminal proceeding'.³⁵ It therefore includes a claim brought by a plaintiff against a defendant for some kind of injury, damage or harm, or economic or non-economic loss. Civil proceedings primarily result in compensatory damages and/or performance of a contract. The provisions that pertain to civil proceedings concern *reliability directions*³⁶ and *dispensing with requirements*. The need for a judge to warn a jury about the reliability of certain kinds of evidence is found in s 165.³⁷ In civil proceedings, the judge may dispense with certain rules of evidence.³⁸

23 Competence is discussed in Chapter 2.

24 Section 17(2).

25 Compellability is discussed in Chapter 2.

26 Section 18.

27 Section 18(8).

28 Hearsay is discussed in Chapter 4.

29 Sections 63–4 (civil proceedings) and 65–6 (criminal proceedings).

30 Character evidence is discussed in Chapter 9.

31 Sections 109–10.

32 Identification evidence is discussed in Chapter 10.

33 Part 3.9.

34 Sections 140–1.

35 Dictionary pt 1 (definition of 'civil proceeding').

36 Reliability directions are discussed in Chapter 12.

37 In Victoria, s 165 pertains only to civil proceedings, while s 32 of the *Jury Directions Act 2015* (Vic) applies the reliability warning to criminal proceedings.

38 Waiver is discussed in this chapter at 1.4.8.

1.4.2 Order of court proceedings

The similarities and differences between criminal and civil proceedings are summarised in Table 1.1. As the first step, assuming the case goes to trial, the case is called and the parties announce appearances.

Table 1.1 Similarities and differences between criminal and civil proceedings

Criminal	Civil
After a committal hearing, a plea is taken. If the defendant ('D') pleads guilty, the matter goes to sentencing – and is heard without a jury. If D pleads not guilty or refuses to plead, a plea of 'not guilty' is entered – and D is charged and sworn.	Not applicable
Judge alone, or judge and jury	Varies between states but generally the judge alone (in some cases, judge and jury)
Prosecution opens case and calls witnesses	Plaintiff opens case and calls witnesses
Examination-in-chief	Examination-in-chief
Cross-examination	Cross-examination
Re-examination	Re-examination
At the end of the prosecution case, D may make a no-case submission. If successful – it ends there. If unsuccessful – D's case will commence and be examined in the same way as the prosecution's.	At the end of the plaintiff's case, D may make a no-case submission. If successful – it ends there. If unsuccessful – D's case will commence and be examined in the same way as the plaintiff's case.
D calls witnesses	D calls witnesses
Same procedure as for prosecution	Same procedure as for plaintiff
At the end of D's case, the prosecution may make a no-case submission where D bears an evidential or legal burden of proof.	At the end of D's case, the plaintiff may make a no-case submission where D bears an evidential or legal burden of proof.
Each party makes a closing address.	Each party makes a closing address.
Where there is a jury – judge sums up the parties' cases and gives appropriate directions as to law. Where there is no jury – judge is the decision-maker as to both fact and law.	Where there is a jury – judge sums up the parties' cases and gives appropriate directions as to law. Where there is no jury – judge is the decision-maker as to both fact and law.
Verdict returned	Verdict returned
If guilty – judge proceeds to sentencing. If not guilty – D has been acquitted and is discharged.	If D is liable – judge will make orders reflecting the verdict, and rule on costs. If D is not liable – judge will make orders reflecting the verdict, and rule on costs.

1.4.3 Functions of judge and jury

In civil and criminal jury trials, the judge is the *tribunal of law*. The judge is responsible for deciding questions of law, and for deciding what evidence is admissible and inadmissible (a specific type of question of law). The judge also decides questions of fact that are relevant to determining admissibility questions (e.g. whether the accused's confession was induced by threats of violence). In addition, the judge directs the jury as to their fact-finding responsibilities. This involves the judge explaining the law (e.g. the elements of murder, who has the burden of proof and what standard of proof to apply); explaining how to use the evidence to determine the facts; and giving warnings about impermissible reasoning or use of the evidence.

The jury is the *tribunal of fact* or the 'fact finder'. This means the jury is responsible for deciding questions of fact based only on the evidence admitted at trial and subject to the judge's directions, and not the jury members' own inquiries. The jury is also responsible for deciding whether to accept or reject evidence, or how much weight to give it (i.e. whether and to what extent to accept the particular piece of evidence). Finally, the jury is responsible for returning a verdict. This implicitly involves a finding of the existence or non-existence of the essential allegations or elements.

In criminal trials, the jury usually comprises 12 laypersons, while in civil trials there are six. State and territory laws regulate the jury selection and empanelment process.³⁹ In civil and criminal trials or summary hearings without a jury, the judge or magistrate is the tribunal of law *and* the tribunal of fact, performing these two distinct tasks. It is important to consider how difficult this can be when the same person must disregard evidence they have ruled inadmissible.

Evidentiary issues can arise at various stages throughout litigation, and a party's objections before or during a trial can assist in ensuring fairness and compliance with the Act. There may be many reasons for a party's objection. For example, a party may propose to adduce particular evidence to prove a relevant fact, but the other party may object. An argument may be raised as to whether the evidence should be admitted for consideration and, if so, what use can be made of it.

If the evidence is relevant,⁴⁰ the judge has the following options. The first is to declare the evidence admissible if no evidential rule is violated. The second is to admit the evidence, but warn the jury about how the evidence should be considered in their deliberations.⁴¹ The third is to admit the evidence, but limit the use that may be made of it, and give directions to the jury to this effect. If an evidential rule is violated, the fourth is to declare the evidence inadmissible.

39 *Juries Act 1967* (ACT); *Jury Act 1977* (NSW); *Juries Act 1963* (NT); *Juries Act 2003* (Tas); *Juries Act 2000* (Vic).

40 Relevance is discussed in Chapter 3.

41 Sections 116 and 165. The Victorian equivalents have been repealed and the corresponding provisions are now ss 36 and 32 of the *Jury Directions Act 2015* (Vic).

1.4.4 Burden and standard of proof: sections 140–2

The trial judge will guide the jury as to the burden or *onus* of proof. This refers to which party must prove the existence of a particular issue that is central to the criminal or civil matter in question. The Act does not deal with the placement of burdens of proof, as the ALRC regarded this as a matter of substantive law.⁴² The jury will also be guided as to the standard of proof – in other words, to what degree the party carrying the onus must prove the facts and issues in dispute. The standard of proof is addressed in ss 140–2 of the Act.

Burden of proof

There are two burdens of proof: the legal and the evidential. The *legal* burden of proof is the obligation to *prove* a material allegation or element of an offence or claim. This involves asking which party has the onus of proof. The onus lies on the party asserting the matter. In criminal matters, this will be the Crown and in civil matters, the plaintiff.

The *evidential* burden of proof is the obligation to *adduce* evidence that prima facie establishes a material allegation, or an element of an offence or claim. In other words, the party that has the onus must establish a prima facie case using sufficient evidence.⁴³ Usually, at the close of the case by the prosecution or plaintiff, the defendant (the party not carrying the evidential burden) will submit to the trial judge that a prima facie case has not been made. This is called a ‘no-case submission’.

In civil proceedings, the plaintiff bears the legal and evidential burden of establishing a cause of action, while the defendant bears the legal and evidential burden of establishing affirmative defences. In criminal proceedings, the prosecution bears the legal and evidential burden of proving each offence or element, and the defendant is innocent until the prosecution proves the accused’s guilt.⁴⁴ Regarding general defences, the defence bears the evidential burden of establishing the defence, and the prosecution bears the legal burden. Regarding affirmative defences (e.g. mental impairment), the defence bears both the evidential and legal burden. Similarly, some statutory defences require the defence to carry both the legal and evidential burden.⁴⁵

Standard of proof

The standard of proof is the standard that is to be applied in determining whether the evidence adduced establishes a material allegation or element of the offence or claim. Which standard applies is a *legal* question, but applying the standard is a *factual* question for the tribunal of

⁴² ALRC, *Evidence (Interim)*, Report No. 26 (1985) vol. 1 [33].

⁴³ In *Braysich v R* (2011) 243 CLR 434 the High Court distinguished legal burden, which is ‘the burden . . . of establishing a case, whether by preponderance of evidence, or beyond a reasonable doubt’, from evidential burden, which is ‘the burden of proof in the sense of *introducing evidence*’: [33] (French CJ, Crennan and Kiefel JJ) (emphasis in original).

⁴⁴ *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey LC).

⁴⁵ For example, the statutory defence of diminished responsibility or impairment by abnormality of mind: *Crimes Act 1900* (NSW) s 23A.