

# CONTENTS

<i>Preface</i>	<i>page xv</i>
<i>Table of cases</i>	<i>xvii</i>
<i>Table of statutes</i>	<i>xxxiii</i>
<i>Acknowledgements</i>	<i>xliv</i>
<b>1 Introduction</b>	<b>1</b>
<b>1.1</b> Introduction	1
<b>1.2</b> What is evidence?	2
<b>1.2.1</b> Evidence law	3
<b>1.2.2</b> Principles versus rules	3
<b>1.3</b> Background to the Act	4
<b>1.3.1</b> Structure of the Act	5
<b>1.3.2</b> Practical effect of the Act	5
<b>1.4</b> Preliminary concepts	6
<b>1.4.1</b> Criminal versus civil proceedings	6
<b>1.4.2</b> Order of court proceedings	8
<b>1.4.3</b> Functions of judge and jury	9
<b>1.4.4</b> Burden and standard of proof: sections 140–2	10
Burden of proof	10
Standard of proof	10
A Victorian variation	12
<b>1.4.5</b> Judicial notice: sections 143–5	14
<b>1.4.6</b> Formal admissions: section 184	15
<b>1.4.7</b> Preliminary questions – the voir dire: section 189	16
<b>1.4.8</b> Waiver: section 190	17
<b>1.4.9</b> Judicial directions and leave: section 192	18
<b>1.4.10</b> Advance rulings and findings: section 192A	19
<b>1.4.11</b> Appeals	19
<b>1.5</b> Types and forms of evidence	20
Key points	21
Key terms and definitions	21
Further reading	22

<b>2</b>	<b>Adducing evidence</b>	<b>23</b>
2.1	Introduction	24
2.2	Calling a witness	24
2.3	Presumption of competence and compellability: section 12	25
2.4	Competence: section 13	26
2.4.1	Children and witnesses who are cognitively impaired	29
2.4.2	Alternative arrangements for giving evidence	32
	Adult complainants	32
	Children and complainants who are cognitively impaired	33
2.5	Compellability	36
2.5.1	Defendant: section 17	36
2.5.2	Defendant's family: section 18	37
	Exclusion of s 18	42
2.6	Oaths and affirmations: sections 21 and 23–4	42
2.7	Questioning of witnesses	45
2.7.1	Parties and the judge: sections 26–9	45
2.7.2	Counsel	46
2.8	Examination-in-chief	46
2.8.1	Prohibition of leading questions	46
2.8.2	Reviving memory: sections 32–5	48
	In court	48
	Police officers	51
	Out of court	53
2.8.3	Unfavourable witnesses: section 38	54
2.9	Cross-examination	66
2.9.1	Leading questions: section 42	67
2.9.2	Improper or disallowable questions: section 41	68
	Northern Territory and Victoria: improper questioning and vulnerable witnesses	69
2.9.3	The rule against prior consistent statements	75
2.9.4	Exceptions to the rule against prior consistent statements: section 108(3)	76
2.9.5	Prior inconsistent statements: sections 43–5	77
2.9.6	The rule in <i>Browne v Dunn</i>	79
2.10	Re-examination: section 39	81
2.10.1	Rebuttal and reopening	81
	Civil cases	82
	Criminal cases	82
2.11	Documents and adducing documents: section 48	83
	Key points	85
	Key terms and definitions	87

Further reading	88
Practice problem	89
<b>3 Relevance</b>	<b>90</b>
<b>3.1</b> Introduction	90
<b>3.2</b> Different types of relevance	91
<b>3.2.1</b> Directly relevant evidence	91
<b>3.2.2</b> Indirectly relevant evidence	91
<b>3.3</b> Defining relevance	100
<b>3.3.1</b> The common law	100
Legal relevance	100
<b>3.3.2</b> The Act: sections 55–6	102
Logical relevance	102
<b>3.3.3</b> Judicial discretions: sections 135–7	103
<b>3.4</b> Provisional evidence: sections 57–8	112
Key points	113
Key terms and definitions	114
Further reading	114
Practice problems	114
<b>4 Hearsay</b>	<b>116</b>
<b>4.1</b> Introduction	117
<b>4.2</b> The common law	118
<b>4.2.1</b> Express and implied assertions	118
<b>4.2.2</b> Non-hearsay purpose at common law	120
<b>4.3</b> The Act: section 59	121
<b>4.3.1</b> Representation	122
<b>4.3.2</b> Previous representation	122
<b>4.3.3</b> Asserted fact	123
<b>4.3.4</b> Made by a person	123
<b>4.3.5</b> Intended to assert	123
<b>4.4</b> Hearsay purpose	126
<b>4.4.1</b> Non-hearsay purpose: section 60	131
<b>4.5</b> Exceptions to the hearsay rule	136
<b>4.5.1</b> Competency: section 61	136
<b>4.5.2</b> First-hand hearsay: section 62	137
<b>4.5.3</b> Civil proceedings – maker of the statement is not available: section 63	138
<b>4.5.4</b> Civil proceedings – maker of the statement is available: section 64	139

<b>4.5.5</b>	Criminal proceedings – maker of the statement is not available:	
	section 65	140
	Made under a duty: section 65(2)(a)	140
	Made when or shortly after . . . unlikely that the representation is a fabrication: section 65(2)(b)	140
	Highly probable that the representation is reliable: section 65(2)(c)	143
	Against the interests of the person: section 65(2)(d)	146
	Previous representation adduced by a defendant: section 65(8)	154
	Evidence of a previous representation about a matter . . . adduced by a defendant: section 65(9)	157
<b>4.5.6</b>	Criminal proceedings – maker of the statement is available:	
	section 66	157
<b>4.6</b>	Contemporaneous mental and physical states	167
<b>4.6.1</b>	The common law	167
	Statements of intention	168
	State of mind	168
	Emotional state of mind	168
	Knowledge	169
<b>4.6.2</b>	The Act: section 66A	169
<b>4.7</b>	Business records: section 69	170
<b>4.7.1</b>	Tags, labels and writing: section 70	176
<b>4.7.2</b>	Electronic communications: section 71	177
	Key points	178
	Key terms and definitions	178
	Further reading	179
	Practice problems	179
<b>5</b>	<b>Opinion</b>	<b>181</b>
<b>5.1</b>	Introduction	181
<b>5.2</b>	Defining opinion evidence	182
<b>5.3</b>	The opinion rule: section 76	184
<b>5.4</b>	Exception – dual relevance: section 77	186
<b>5.5</b>	Exception – lay opinions: section 78	187
<b>5.6</b>	Exception – expert opinions: section 79	191
<b>5.6.1</b>	Basis rule	194
<b>5.6.2</b>	Expert opinion basis and hearsay	197
<b>5.6.3</b>	Procedural issues	198
<b>5.7</b>	Other admissible opinions	199

<b>5.8</b>	Scope of application – ultimate issue and common knowledge: section 80	200
	Key points	201
	Key terms and definitions	202
	Further reading	202
	Practice problems	202
<b>6</b>	<b>Admissions</b>	<b>204</b>
<b>6.1</b>	Introduction	205
<b>6.2</b>	What is an admission?	205
<b>6.2.1</b>	Exception to the hearsay and opinion rules: section 81	206
<b>6.2.2</b>	Personal knowledge: section 82	207
<b>6.2.3</b>	No application against third parties without consent: section 83	208
<b>6.3</b>	Admissions and confessions made in police custody	209
<b>6.3.1</b>	Electronic recording	209
<b>6.3.2</b>	In the course of official questioning	217
<b>6.4</b>	Voluntariness and reliability of admissions	218
<b>6.4.1</b>	The common law	218
<b>6.4.2</b>	The Act	219
	Violent, oppressive, inhuman or degrading conduct: section 84	219
	Reliability of admissions: section 85	220
	Exclusion of records of oral questioning: section 86	234
	Authority to make statements: section 87	234
	Proving admissions: section 88	236
<b>6.5</b>	Statements and conduct that amount to admissions	236
<b>6.5.1</b>	Implied admissions made in civil proceedings	237
<b>6.5.2</b>	Implied admissions made in criminal proceedings	238
	Pre-trial silence: section 89	238
	Silence at trial: section 20	241
	Jury directions in Victoria	242
<b>6.6</b>	Discretions to exclude admissions	244
<b>6.6.1</b>	The unfairness discretion: section 90	245
<b>6.6.2</b>	The case of <i>Haddara</i>	254
	Key points	256
	Key terms and definitions	256
	Further reading	257
	Practice problems	258

<b>7</b>	<b>Tendency and coincidence</b>	<b>259</b>
7.1	Introduction	260
7.2	When the rules do not apply	260
7.2.1	Non-application: section 94	260
	Evidence of credibility of witness	261
	Bail or sentencing	261
	Fact in issue	261
7.2.2	Use of evidence for other purposes: section 95	262
7.2.3	Use of evidence to prove good character	263
7.3	Formal requirements: sections 97–100	263
7.3.1	Purpose	263
	Tendency and/or coincidence purpose	263
	Tendency reasoning in civil cases	265
	Tendency reasoning in criminal cases	265
	Coincidence reasoning in civil cases	266
	Coincidence reasoning in criminal cases	267
7.3.2	Notice	267
7.3.3	Significant probative value	270
	A. How is 'significant probative value' assessed?	270
	B. Should the court assume the truthfulness and reliability of the evidence?	306
7.4	Further restrictions in criminal cases: section 101	307
7.4.1	Probative value versus prejudicial effect	307
7.4.2	Collusion, concoction or contamination	318
7.4.3	Prejudicial effect	320
7.5	Competing with other inferences	325
7.6	Judicial directions	325
7.6.1	Jury directions in Victoria	326
	Key points	328
	Key terms and definitions	329
	Further reading	329
	Practice problems	330
<b>8</b>	<b>Credibility</b>	<b>332</b>
8.1	Introduction	332
8.2	The collateral nature of credibility evidence	333
8.3	What is credibility evidence?	335
8.3.1	Current definition: section 101A	335
8.3.2	Redefining credibility evidence under the Act	337
8.4	The credibility rule: section 102	341

8.5	Exceptions to the credibility rule	342
8.5.1	Evidence adduced in cross-examination: section 103	342
8.5.2	Evidence adduced in cross-examination of an accused: section 104	345
8.5.3	Evidence in rebuttal of denials: section 106	347
8.5.4	Evidence to re-establish credibility: section 108	350
8.5.5	Expert opinion on a witness's credibility: section 108C	353
8.6	Credibility of non-witnesses	355
8.6.1	Evidence about a person who has made a previous representation: section 108A	355
8.6.2	Previous representations of an accused: section 108B	356
	Key points	358
	Key terms and definitions	358
	Further reading	359
	Practice problems	359
<b>9</b>	<b>Character</b>	<b>361</b>
9.1	Introduction	361
9.2	The common law and character	362
9.3	Credibility and character in the Act	364
9.4	Character evidence: section 110	364
9.4.1	Evidence of good character and judicial directions	366
9.4.2	Character in a particular respect	373
9.5	Rebuttal of evidence of good character	378
9.5.1	Evidence about character of co-accused: section 111	378
9.5.2	Leave to cross-examine about character of accused or co-accused: section 112	379
	Key points	384
	Key terms and definitions	384
	Further reading	385
	Practice problems	385
<b>10</b>	<b>Identification evidence</b>	<b>387</b>
10.1	Introduction	387
10.2	Defining identification evidence	388
10.2.1	Types of identification evidence	389
	Visual identification and picture identification	389
	In-court identification	389
	Out-of-court identification	389
	Formal identification procedures	390

<b>10.3</b>	The common law and identification parades	391
<b>10.4</b>	Visual identification evidence: section 114	394
<b>10.4.1</b>	Exclusion	396
<b>10.4.2</b>	The 'reasonableness' condition	396
<b>10.5</b>	Picture identification evidence: section 115	399
<b>10.5.1</b>	Pictures of people in police custody	400
<b>10.5.2</b>	Exclusion	401
<b>10.5.3</b>	Warnings	401
	Unreliability	401
<b>10.6</b>	Special caution: section 116	401
<b>10.6.1</b>	Jury directions in Victoria	403
<b>10.7</b>	The displacement effect	404
<b>10.7.1</b>	The role of section 137	406
	Key points	409
	Key terms and definitions	409
	Further reading	409
	Practice problem	410
<b>11</b>	<b>Privileges</b>	<b>411</b>
<b>11.1</b>	Introduction	412
<b>11.2</b>	Client legal privilege	413
<b>11.2.1</b>	The common law	414
<b>11.2.2</b>	Definitions: section 117	416
	'Lawyer'	417
	'Client'	422
	'Employee or agent'	422
	Confidentiality	423
<b>11.2.3</b>	Dominant purpose test	424
<b>11.2.4</b>	Legal advice privilege: section 118	428
	'Communication' and 'document'	428
	Copy documents	429
<b>11.2.5</b>	Litigation privilege: sections 119–20	430
<b>11.2.6</b>	Invoking client legal privilege	431
<b>11.2.7</b>	General loss of privilege: section 121	432
<b>11.2.8</b>	Waiver: section 122	433
<b>11.2.9</b>	Other causes of loss of privilege: sections 123–6	437
<b>11.3</b>	Professional confidential privilege: section 126B	438
<b>11.3.1</b>	Medical communications	439
<b>11.4</b>	Sexual assault communications privilege: sections 126H and 127B	441
<b>11.5</b>	Journalist privilege: section 126K	444
<b>11.6</b>	Religious confessions: section 127	446



<b>11.7</b>	Privilege against self-incrimination	446
	<b>11.7.1</b> The common law	446
	<b>11.7.2</b> The Act: sections 128–128A	449
<b>11.8</b>	Judicial reasons: section 129	453
<b>11.9</b>	Public interest immunity	454
	<b>11.9.1</b> The common law	454
	Class claims and contents claims	454
	<b>11.9.2</b> The Act: section 130	463
	<b>11.9.3</b> Matters of state	464
	Security, defence or international relations of Australia	465
	Investigation and prosecution	465
	Proper functioning of government	465
	Interest in disclosure	466
	Factors to take into account	466
<b>11.10</b>	Settlement negotiations	466
	<b>11.10.1</b> The common law	466
	<b>11.10.2</b> The Act: section 131	472
<b>11.11</b>	Pre-trial, trial and non-judicial proceedings: section 131A	474
<b>11.12</b>	General procedural issues	477
	Key points	477
	Key terms and definitions	478
	Further reading	479
	Practice problem	479
<b>12</b>	<b>Discretionary and mandatory exclusions</b>	<b>480</b>
<b>12.1</b>	Introduction	481
<b>12.2</b>	General discretion to exclude evidence: section 135	482
	<b>12.2.1</b> ‘Unfairly prejudicial’	483
	<b>12.2.2</b> ‘Misleading or confusing’	483
	<b>12.2.3</b> ‘Undue waste of time’	484
<b>12.3</b>	General discretion to limit the use of evidence: section 136	485
<b>12.4</b>	Mandatory exclusion of evidence in criminal proceedings: section 137	486
	<b>12.4.1</b> ‘Probative value’	487
	<b>12.4.2</b> ‘Unfair prejudice’	497
	Procedural unfairness	501
<b>12.5</b>	Discretion to exclude improperly or illegally obtained evidence	501
	<b>12.5.1</b> The common law	501
	<b>12.5.2</b> The Act	509

	Discretion to exclude improperly or illegally obtained evidence: section 138	509
	Cautioning of persons: section 139	515
<b>12.6</b>	Corroboration	516
	<b>12.6.1</b> The common law	516
	<b>12.6.2</b> The Act: section 164	518
<b>12.7</b>	Unreliable evidence	518
	<b>12.7.1</b> Warning in relation to unreliable evidence: section 165	518
	Warnings in relation to unreliable evidence in Victoria	519
	<b>12.7.2</b> Warnings in relation to children's evidence: section 165A	521
	Warnings in relation to children's evidence in Victoria	521
	<b>12.7.3</b> Delay in prosecution: section 165B	522
	Delay in prosecution in Victoria	523
	Key points	526
	Key terms and definitions	527
	Further reading	527
	Practice problem	528
<b>13</b>	<b>Facilitation of proof and ancillary matters</b>	<b>529</b>
	<b>13.1</b> Introduction	529
	<b>13.2</b> Facilitation of proof	529
	<b>13.2.1</b> The common law	530
	<b>13.2.2</b> General: sections 146–52	530
	<b>13.2.3</b> Matters of official record: sections 153–9	532
	<b>13.2.4</b> Post and communications: sections 160–3	532
	<b>13.3</b> Ancillary provisions	534
	<b>13.3.1</b> Requests: sections 166–9	534
	<b>13.3.2</b> Affidavits: sections 170–3	535
	<b>13.3.3</b> Foreign law: sections 174–6	535
	<b>13.3.4</b> Procedures for proving other matters: sections 177–81	537
	<b>13.4</b> Miscellaneous matters	538
	Key points	539
	Key terms and definitions	539
	Further reading	539
	Practice problem	539
<b>14</b>	<b>Putting it all together</b>	<b>541</b>
	<i>Suggested answers to practice problems</i>	546
	<i>Index</i>	560