Evidence Act 1995

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About this compilation

This compilation

This is a compilation of the *Evidence Act 1995* that shows the text of the law as amended and in force on 9 December 2017 (the ***compilation date***).

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. Any uncommenced amendments affecting the law are accessible on the Register (www.legislation.gov.au).

Application, saving and transitional provisions

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

Presentational changes

The *Legislation Act 2003* provides for First Parliamentary Counsel to make presentational changes to a compilation. Presentational changes are applied to give a more consistent look and feel to legislation published on the Register, and enable the user to more easily navigate those documents.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. Any modifications affecting the law are accessible on the Register.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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

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 (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.

Related legislation

This Act is in most respects uniform with the following State and Territory Acts:

(a) the *Evidence Act 1995* (NSW);
(b) the *Evidence Act 2001* (Tas.);
(c) the *Evidence Act 2008* (Vic.);
(d) the *Evidence Act 2011* (ACT);
(e) the *Evidence (National Uniform Legislation) Act 2011* (NT).

While these Acts are in most respects identical to this Act, there are differences. The explanatory memorandum to the Civil Law and Justice Legislation Amendment Bill 2014 includes a table setting out the differences as at 8 July 2014. An updated version of the table is maintained by the Attorney-General's Department on its website (http://www.ag.gov.au).

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Part 1.1—Formal matters

1 Short title

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

2 Commencement

(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.

3 Definitions

(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.

(1A) The Dictionary at the end of this Act is part of this 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.

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Part 1.2—Application of this Act

4 Courts and proceedings to which Act applies

(1) This Act applies to all proceedings in a federal 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) subject to subsection (2), relate to sentencing.

Note 2: ***Federal court*** is defined in the Dictionary. The definition includes persons or bodies required to apply the laws of evidence.

Note 3: Some provisions of this Act extend beyond proceedings in federal 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).

Note 4: See section 79 of the *Judiciary Act 1903* for the application of this Act to proceedings in a State court exercising federal jurisdiction.

(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:

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(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) Subject to subsection (5A), the provisions of this Act (other than sections 185, 186 and 187) do not apply 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 Australian Capital Territory, the Northern Territory or an external Territory; or

(e) 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.

(5A) Despite subsection (5), this Act applies to an appeal to the Family Court of Australia from a court of summary jurisdiction of a State or Territory exercising jurisdiction under the *Family Law Act 1975*.

5 Extended application of certain provisions

The provisions of this Act referred to in the Table apply 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.

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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 155A	Commonwealth documents
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, postal articles sent by Commonwealth agencies and certain Commonwealth documents

Note: ***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.

6 Territories

This Act extends to each external Territory.

7 Act binds Crown

This Act binds the Crown in all its capacities.

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8 Operation of other Acts etc.

(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 Act 2001* and the *Australian Securities and Investments Commission Act 2001*.

8A Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

9 Effect of Act on other laws

(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

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(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).

10 Parliamentary privilege preserved

(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.

11 General powers of a court

(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.

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Chapter 2—Adducing evidence

INTRODUCTORY NOTE

Outline of this Chapter

This Chapter is about ways in which evidence is adduced.

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

12 Competence and compellability

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.

13 Competence: lack of capacity

(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):

(a) the person does not have the capacity to understand a question about the fact; or

(b) the person does not have the capacity to give an answer that can be understood to a question about the fact;

and that incapacity cannot be overcome.

Note: See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.

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(2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.

(3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

(4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.

(5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:

(a) that it is important to tell the truth; and

(b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and

(c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

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

(7) 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.

(8) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

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14 Compellability: reduced capacity

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 have the capacity to understand a question about the matter or to give an answer that can be understood to a question about the 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.

15 Compellability: Sovereign and others

(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.

16 Competence and compellability: judges and jurors

(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.

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17 Competence and compellability: defendants in criminal proceedings

(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.

18 Compellability of spouses and others in criminal proceedings generally

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

(2) A person who, when required to give evidence, is the spouse, de facto partner, 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.

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(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.

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20 Comment on failure to give evidence

(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 had, or believed that he or she had, committed 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 de facto partner; 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 partner, parent or child failed to give evidence because:

(a) the defendant had committed the offence concerned; or

(b) the spouse, de facto partner, parent or child believed that the defendant had committed 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 partner, 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).

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Division 2—Oaths and affirmations

21 Sworn evidence of witnesses to be on oath or affirmation

(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 section 13.

(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.

22 Interpreters to act on oath or affirmation

(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.

23 Choice of oath or affirmation

(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.

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(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.

24 Requirements for oaths

(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.

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Division 3—General rules about giving evidence

26 Court's control over questioning of witnesses

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.

27 Parties may question witnesses

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

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

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.

29 Manner and form of questioning witnesses and their responses

(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 court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form.

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

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(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.

30 Interpreters

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.

31 Witnesses who cannot hear adequately or speak adequately

(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.

32 Attempts to revive memory in court

(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:

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(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.

33 Evidence given by police officers

(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 Australian legal practitioner or legal counsel 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.

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34 Attempts to revive memory out of court

(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.

35 Effect of calling for production of documents

(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.

36 Person may be examined without subpoena or other process

(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.

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Division 4—Examination in chief and re-examination

37 Leading questions

(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 an Australian legal practitioner, legal counsel or prosecutor; 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.

38 Unfavourable witnesses

(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:

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(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.

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39 Limits on re-examination

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.

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Division 5—Cross-examination

40 Witness called in error

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.

41 Improper questions

(1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a ***disallowable question***):

(a) is misleading or confusing; or

(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or

(d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

(2) Without limiting the matters 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 of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and

(b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject; and

(c) the context in which the question is put, including:

(i) the nature of the proceeding; and

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(ii) in a criminal proceeding—the nature of the offence to which the proceeding relates; and

(iii) the relationship (if any) between the witness and any other party to the proceeding.

(3) A question is not a disallowable question merely because:

(a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or

(b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

(4) A party may object to a question put to a witness on the ground that it is a disallowable question.

(5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

(6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

Note: A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section: see section 195.

42 Leading questions

(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

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(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.

43 Prior inconsistent statements of witnesses

(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, a party may re-open the party's case.

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44 Previous representations of other persons

(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.

45 Production of documents

(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.

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(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.

46 Leave to recall witnesses

(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.

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Part 2.2—Documents

47 Definitions

(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.

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

48 Proof of contents of documents

(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

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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:

(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

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(b) adducing from a witness evidence of the contents of the document in question.

Note 1: Clause 5 of Part 2 of the Dictionary is about the availability of documents.

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

49 Documents in foreign countries

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.

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

50 Proof of voluminous or complex documents

(1) The court may, on the application of a party, direct that the party may adduce evidence of the contents of 2 or more documents in question in the form of a summary if the court is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or 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.

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

51 Original document rule abolished

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 and certain Commonwealth documents.

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Part 2.3—Other evidence

52 Adducing of other evidence not affected

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.

53 Views

(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.

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(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.

54 Views to be evidence

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.

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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.

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Part 3.11 provides for the discretionary and mandatory exclusion of evidence even if it would otherwise be admissible.

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

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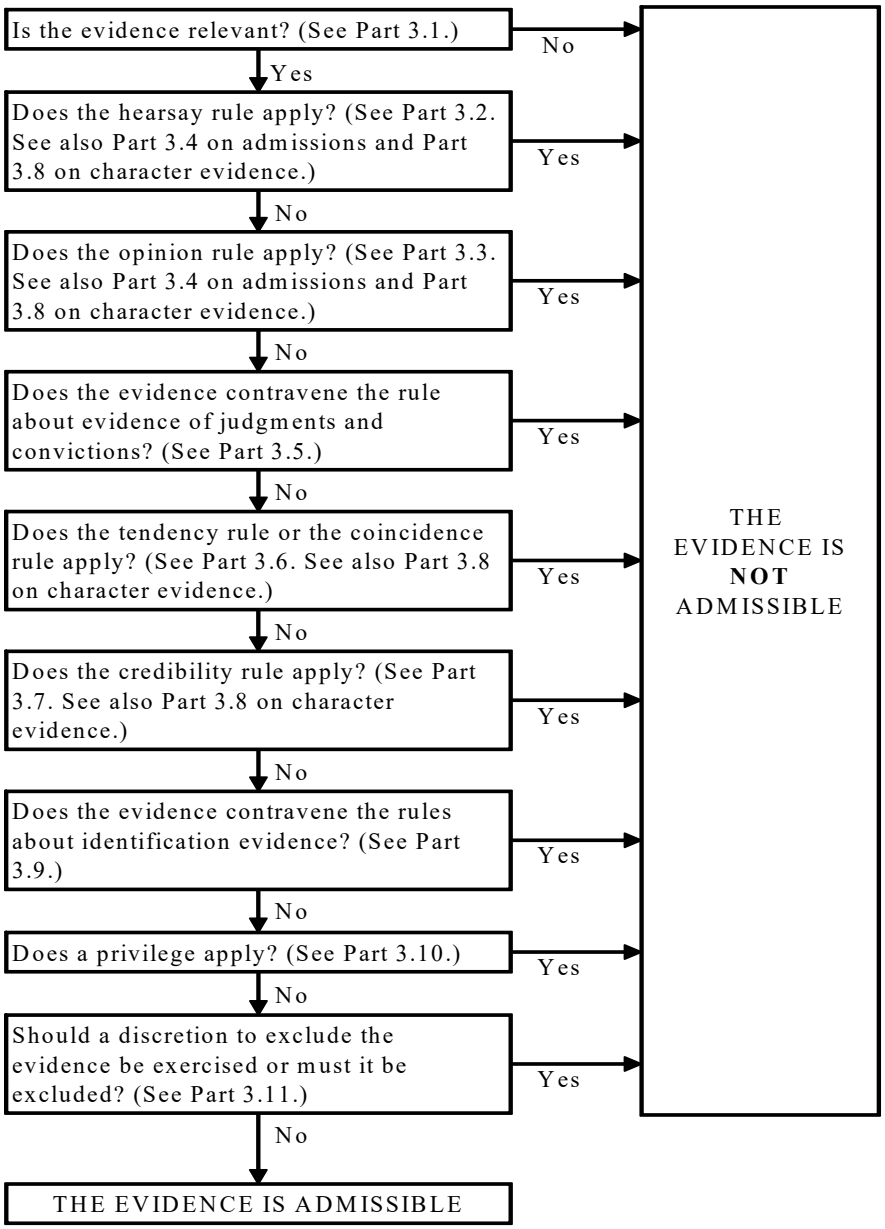

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Part 3.1—Relevance

55 Relevant evidence

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

(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.

56 Relevant evidence to be admissible

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

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

57 Provisional relevance

(1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant:
  (a) if it is reasonably open to make that finding; or
  (b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.

(2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in

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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.

58 Inferences as to relevance

(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.

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Part 3.2—Hearsay

Division 1—The hearsay rule

59 The hearsay rule—exclusion of hearsay evidence

(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

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

(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

Note: Subsection (2A) was inserted as a response to the decision of the Supreme Court of NSW in *R. v Hannes* (2000) 158 FLR 359.

(3) Subsection (1) does not apply to evidence of a representation contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

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);
- contemporaneous statements about a person's health etc. (section 66A);
- business records (section 69);
- tags and labels (section 70);
- electronic communications (section 71);

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- Aboriginal and Torres Strait Islander traditional laws and customs (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.

60 Exception: evidence relevant for a non-hearsay purpose

(1) 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 an asserted fact.

(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of subsection 62(2)).

Note: Subsection (2) was inserted as a response to the decision of the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594.

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(3) However, this section does not apply in a criminal proceeding to evidence of an admission.

Note: The admission might still be admissible under section 81 as an exception to the hearsay rule if it is "first-hand" hearsay: see section 82.

61 Exceptions to the hearsay rule dependent on competency

(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 of subsection 13(1).

(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 66A.

(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.

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Division 2—"First-hand" hearsay

62 Restriction to "first-hand" hearsay

(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.

(3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

63 Exception: civil proceedings if maker not available

(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) 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.

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64 Exception: civil proceedings if maker available

(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) 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.

(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.

65 Exception: criminal proceedings if maker not available

(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.

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(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:

(a) was made under a duty to make that representation or to make representations of that kind; or

(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or

(c) was made in circumstances that make it highly probable that the representation is reliable; or

(d) was:

(i) against the interests of the person who made it at the time it was made; and

(ii) made in circumstances that make it likely that the representation is reliable.

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.

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(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) 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

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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.

66 Exception: criminal proceedings if maker available

(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.

(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:

(a) the nature of the event concerned; and

(b) the age and health of the person; and

(c) the period of time between the occurrence of the asserted fact and the making of the representation.

Note: Subsection (2A) was inserted as a response to the decision of the High Court of Australia in *Graham v The Queen* (1998) 195 CLR 606.

(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

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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.

66A Exception: contemporaneous statements about a person's health etc.

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

67 Notice to be given

(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.

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(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.

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

(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.

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Division 3—Other exceptions to the hearsay rule

69 Exception: business records

(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;

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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.

70 Exception: contents of tags, labels and writing

(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

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

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71 Exception: electronic communications

The hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to:

(a) the identity of the person from whom or on whose behalf the communication was sent; or

(b) the date on which or the time at which the communication was sent; or

(c) the destination of the communication or the identity of the person to whom the communication was addressed.

Note 1: Division 3 of Part 4.3 contains presumptions about electronic communications.

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

Note 3: ***Electronic communication*** is defined in the Dictionary.

72 Exception: Aboriginal and Torres Strait Islander traditional laws and customs

The hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

73 Exception: reputation as to relationships and age

(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 2 people 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.

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(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.

74 Exception: reputation of public or general rights

(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.

75 Exception: interlocutory proceedings

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

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Part 3.3—Opinion

76 The opinion rule

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

(2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

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);
- Aboriginal and Torres Strait Islander traditional laws and customs (section 78A);
- 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.

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77 Exception: evidence relevant otherwise than as opinion evidence

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.

78 Exception: lay opinions

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.

78A Exception: Aboriginal and Torres Strait Islander traditional laws and customs

The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

79 Exception: opinions based on specialised knowledge

(1) 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.

(2) To avoid doubt, and without limiting subsection (1):

(a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and

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their development and behaviour during and following the abuse); and

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally;

(ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

80 Ultimate issue and common knowledge rules abolished

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.

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Part 3.4—Admissions

Note: ***Admission*** is defined in the Dictionary.

81 Hearsay and opinion rules: exception for admissions and related representations

(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.

82 Exclusion of evidence of admissions that is not first-hand

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

(a) it is given 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.

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Note: Section 60 does not apply in a criminal proceeding to evidence of an admission.

83 Exclusion of evidence of admissions as against third parties

(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.

84 Exclusion of admissions influenced by violence and certain other conduct

(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.

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85 Criminal proceedings: reliability of admissions by defendants

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

(a) to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence; or

(b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

Note: Subsection (1) was inserted as a response to the decision of the High Court of Australia in *Kelly v The Queen* (2004) 218 CLR 216.

(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.

86 Exclusion of records of oral questioning

(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.

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(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.

87 Admissions made with authority

(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

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(c) the scope of the person's employment or authority.

88 Proof of admissions

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.

89 Evidence of silence

(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 by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.

(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.

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90 Discretion to exclude admissions

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.

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Part 3.5—Evidence of judgments and convictions

91 Exclusion of evidence of judgments and convictions

(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.

92 Exceptions

(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.

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93 Savings

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.

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Part 3.6—Tendency and coincidence

94 Application

(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.

95 Use of evidence for other purposes

(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.

96 Failure to act

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

97 The tendency rule

(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 unless:

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(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the court thinks that the evidence will, 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.

98 The coincidence rule

(1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the court thinks that the evidence will, 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.

Note: One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

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

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(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.

99 Requirements for notices

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.

100 Court may dispense with notice requirements

(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:

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(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.

101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

(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.

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Part 3.7—Credibility

Division 1—Credibility evidence

101A Credibility evidence

Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that:

(a) is relevant only because it affects the assessment of the credibility of the witness or person; or

(b) is relevant:

(i) because it affects the assessment of the credibility of the witness or person; and

(ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

Note 1: Sections 60 and 77 will not affect the application of paragraph (b), because they cannot apply to evidence that is yet to be admitted.

Note 2: Section 101A was inserted as a response to the decision of the High Court of Australia in *Adam v The Queen* (2001) 207 CLR 96.

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Division 2—Credibility of witnesses

102 The credibility rule

Credibility evidence about a witness is not admissible.

Note 1: Specific exceptions to the credibility rule are as follows:
- evidence adduced in cross-examination (sections 103 and 104);
- evidence in rebuttal of denials (section 106);
- evidence to re-establish credibility (section 108);
- evidence of persons with specialised knowledge (section 108C);
- character of accused persons (section 110).

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

Note 2: Sections 108A and 108B deal with the admission of credibility evidence about a person who has made a previous representation but who is not a witness.

103 Exception: cross-examination as to credibility

(1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness.

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), 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.

104 Further protections: cross-examination of accused

(1) This section applies only to credibility evidence 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 to the assessment of the defendant's credibility, unless the court gives leave.

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(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 under subsection (2) unless evidence adduced by the defendant has been admitted that:
  (a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful; and
  (b) is relevant solely or mainly to the witness's credibility.

(5) A reference in subsection (4) 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.

106 Exception: rebutting denials by other evidence

(1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced otherwise than from the witness if:
  (a) in cross-examination of the witness:
    (i) the substance of the evidence was put to the witness; and

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(ii) the witness denied, or did not admit or agree to, the substance of the evidence; and

(b) the court gives leave to adduce the evidence.

(2) Leave under paragraph (1)(b) is not required if the evidence tends to prove that the 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.

108 Exception: re-establishing credibility

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

(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.

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Division 3—Credibility of persons who are not witnesses

108A Admissibility of evidence of credibility of person who has made a previous representation

(1) If:

(a) evidence of a previous representation has been admitted in a proceeding; and

(b) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding;

credibility evidence about the person who made the representation is not admissible unless the evidence could substantially affect the assessment of the person's credibility.

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:

(a) whether the evidence tends to prove that the person who made the representation knowingly or recklessly made a false representation when the person was under an obligation to tell the truth; and

(b) the period that elapsed between the doing of the acts or the occurrence of the events to which the representation related and the making of the representation.

108B Further protections: previous representations of an accused who is not a witness

(1) This section applies only in a criminal proceeding and so applies in addition to section 108A.

(2) If the person referred to in that section is a defendant, the credibility evidence is not admissible unless the court gives leave.

(3) Despite subsection (2), leave is not required if the evidence is about whether the defendant:

(a) is biased or has a motive to be untruthful; or

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(b) is, or was, unable to be aware of or recall matters to which his or her previous representation relates; or

(c) has made a prior inconsistent statement.

(4) The prosecution must not be given leave under subsection (2) unless evidence adduced by the defendant has been admitted that:

(a) tends to prove that a witness called by the prosecution has a tendency to be untruthful; and

(b) is relevant solely or mainly to the witness's credibility.

(5) A reference in subsection (4) 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) Another defendant must not be given leave under subsection (2) unless the previous representation of the defendant that has been admitted includes evidence adverse to the defendant seeking leave.

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Division 4—Persons with specialised knowledge

108C Exception: evidence of persons with specialised knowledge

(1) The credibility rule does not apply to evidence given by a person concerning the credibility of another witness if:

(a) the person has specialised knowledge based on the person's training, study or experience; and

(b) the evidence is evidence of an opinion of the person that:

(i) is wholly or substantially based on that knowledge; and

(ii) could substantially affect the assessment of the credibility of a witness; and

(c) the court gives leave to adduce the evidence.

(2) To avoid doubt, and without limiting subsection (1):

(a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse); and

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of that kind, a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally;

(ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

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Part 3.8—Character

109 Application

This Part applies only in a criminal proceeding.

110 Evidence about character of accused persons

(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.

111 Evidence about character of co-accused

(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

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(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.

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

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

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Part 3.9—Identification evidence

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

113 Application of Part

This Part applies only in a criminal proceeding.

114 Exclusion of visual identification evidence

(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:

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(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 an Australian legal practitioner or legal counsel 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 an Australian legal practitioner or legal counsel 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.

115 Exclusion of evidence of identification by pictures

(1) In this section:

picture identification evidence means identification evidence relating to an identification made wholly or partly by the person

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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.

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(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.

116 Directions to jury

(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.

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(2) It is not necessary that a particular form of words be used in so informing the jury.

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Part 3.10—Privileges

Division 1—Client legal privilege

117 Definitions

(1) In this Division:

client includes the following:

(a) a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service);

(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.

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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 means:

(a) an Australian lawyer; and

(b) an Australian-registered foreign lawyer; and

(c) an overseas-registered foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country; and

(d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c).

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.

118 Legal advice

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

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(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, lawyer or another person;

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

119 Litigation

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.

120 Unrepresented parties

(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.

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121 Loss of client legal privilege: generally

(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.

122 Loss of client legal privilege: consent and related matters

(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 the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

(3) Without limiting subsection (2), a client or party is taken to have so acted if:

(a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or

(b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.

(4) The reference in paragraph (3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the client or party or of a lawyer of the client or party unless the employee or agent was authorised by the client, party or lawyer to make the disclosure.

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(5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because:

(a) the substance of the evidence has been disclosed:

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

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

(iii) under compulsion of law; or

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

(b) of 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

(c) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the 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).

123 Loss of client legal privilege: defendants

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

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(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.

124 Loss of client legal privilege: joint clients

(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.

125 Loss of client legal privilege: misconduct

(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

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(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.

126 Loss of client legal privilege: related communications and documents

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.

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Division 1C—Journalist privilege

Note: There is no Division 1A or 1B in this Part. This gap is in order to maintain consistent numbering with the NSW Act, which includes Divisions 1A and 1B.

126J Definitions

(1) In this Division:

informant means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium.

journalist means a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium.

news medium means any medium for the dissemination to the public or a section of the public of news and observations on news.

126K Journalist privilege relating to identity of informant

(1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.

(2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs:

(a) any likely adverse effect of the disclosure on the informant or any other person; and

(b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

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(3) An order under subsection (2) may be made subject to such terms and conditions (if any) as the court thinks fit.

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Division 2—Other privileges

127 Religious confessions

(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.

128 Privilege in respect of self-incrimination in other proceedings

(1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, 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) The court must determine whether or not there are reasonable grounds for the objection.

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(3) Subject to subsection (4), if the court determines that there are reasonable grounds for the objection, the court is not to require the witness to give the evidence, and is to inform the witness:
  (a) that the witness need not give the evidence unless required by the court to do so under subsection (4); and
  (b) that the court will give a certificate under this section if:
    (i) the witness willingly gives the evidence without being required to do so under subsection (4); or
    (ii) the witness gives the evidence after being required to do so under subsection (4); and
  (c) of the effect of such a certificate.

(4) The court may require the witness to give the evidence if the court is satisfied that:
  (a) 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
  (b) the interests of justice require that the witness give the evidence.

(5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence.

(6) 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.

(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

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(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) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

(9) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant for the same offence or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence.

(10) 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.

(11) A reference in this section to doing an act includes a reference to failing to act.

(12) If a person has been given a certificate under a prescribed State or Territory provision in respect of evidence given by the person in a proceeding in a State or Territory court, the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.

(13) The following are prescribed State or Territory provisions for the purposes of subsection (12):

(a) section 128 of the *Evidence Act 1995* of New South Wales;

(b) a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision for the purposes of subsection (12).

(14) Subsection (12) applies to:

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(a) a proceeding in relation to which this Act applies because of section 4; and

(b) a proceeding for an offence against a law of the Commonwealth or for the recovery of a civil penalty under a law of the Commonwealth, other than a proceeding referred to in paragraph (a).

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.

Note 4: Subsections (8) and (9) were inserted as a response to the decision of the High Court of Australia in *Cornwell v The Queen* [2007] HCA 12 (22 March 2007).

128A Privilege in respect of self-incrimination—exception for certain orders etc

(1) In this section:

disclosure order means an order made by a federal court in a civil proceeding requiring a person to disclose information, as part of, or in connection with a freezing or search order, but does not include an order made by a court under the *Proceeds of Crime Act 2002*.

relevant person means a person to whom a disclosure order is directed.

(2) If a relevant person objects to complying with a disclosure order on the grounds that some or all of the information required to be disclosed may tend to prove that the person:

(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;

the person must:

(c) disclose so much of the information required to be disclosed to which no objection is taken; and

(d) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken (the

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privilege affidavit) and deliver it to the court in a sealed envelope; and

(e) file and serve on each other party a separate affidavit setting out the basis of the objection.

(3) The sealed envelope containing the privilege affidavit must not be opened except as directed by the court.

(4) The court must determine whether or not there are reasonable grounds for the objection.

(5) Subject to subsection (6), if the court finds that there are reasonable grounds for the objection, the court must not require the information contained in the privilege affidavit to be disclosed and must return it to the relevant person.

(6) If the court is satisfied that:

(a) any information disclosed in the privilege affidavit may tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law; and

(b) the information does not tend to prove that the relevant person 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 the information to be disclosed;

the court may make an order requiring the whole or any part of the privilege affidavit containing information of the kind referred to in paragraph (a) to be filed and served on the parties.

(7) If the whole or any part of the privilege affidavit is disclosed (including by order under subsection (6)), the court must cause the relevant person to be given a certificate in respect of the information as referred to in paragraph (6)(a).

(8) In any proceeding in an Australian court:

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(a) evidence of information disclosed by a relevant person in respect of which a certificate has been given under this section; and

(b) evidence of any information, document or thing obtained as a direct result or indirect consequence of the relevant person having disclosed that information;

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence concerned.

(9) Subsection (8) does not prevent the use against the relevant person of any information disclosed by a document:

(a) that is an annexure or exhibit to a privilege affidavit prepared by the person in response to a disclosure order; and

(b) that was in existence before the order was made.

(10) Subsection (8) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

(11) If a person has been given a certificate under a prescribed State or Territory provision in respect of information of a kind referred to in paragraph (6)(a), the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.

(12) For the purposes of subsection (11), a prescribed State or Territory provision is a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision for the purposes of that subsection.

(13) Subsection (11) applies to:

(a) a proceeding in relation to which this Act applies because of section 4; and

(b) a proceeding for an offence against a law of the Commonwealth or for the recovery of a civil penalty under a law of the Commonwealth, other than a proceeding referred to in paragraph (a) of this subsection.

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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.

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Division 3—Evidence excluded in the public interest

129 Exclusion of evidence of reasons for judicial etc. decisions

(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

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(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.

130 Exclusion of evidence of matters of state

(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

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(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.

131 Exclusion of evidence of settlement negotiations

(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

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(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

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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

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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.

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Division 4—General

131A Extended application of Division 1C

(1) This section applies if, in response to a disclosure requirement, a person claims that they are not compellable to answer any question or produce any document that would disclose the identity of the informant (within the meaning of section 126K) or enable that identity to be ascertained.

(1A) A party that seeks disclosure pursuant to a disclosure requirement may apply to the court for an order, under section 126K, that subsection 126K(1) does not apply in relation to the information or document.

(2) In this section, ***disclosure requirement*** means a court process or court order that requires the disclosure of information or a document and includes the following:

(a) a summons or subpoena to produce documents or give evidence;

(b) pre-trial discovery;

(c) non-party discovery;

(d) interrogatories;

(e) a notice to produce;

(f) a request to produce a document under Division 1 of Part 4.6.

131B Extended application of Division 1C etc. to all proceedings for Commonwealth offences

In addition to their application under section 4 to all proceedings in a federal court, Division 1C and section 131A apply to all proceedings in any other Australian court for an offence against a law of the Commonwealth, including proceedings that:

(a) relate to bail; or

(b) are interlocutory proceedings or proceedings of a similar kind; or

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(c) are heard in chambers; or

(d) relate to sentencing.

132 Court to inform of rights to make applications and objections

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.

133 Court may inspect etc. documents

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.

134 Inadmissibility of evidence that must not be adduced or given

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

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Part 3.11—Discretionary and mandatory exclusions

135 General discretion to exclude evidence

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.

136 General discretion to limit use of evidence

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.

137 Exclusion of prejudicial evidence in criminal proceedings

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.

138 Discretion to exclude improperly or illegally obtained evidence

(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

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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:

(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 *Australian Human Rights Commission Act 1986*.

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139 Cautioning of persons

(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 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.

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(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.

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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

140 Civil proceedings: standard of proof

(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.

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141 Criminal proceedings: standard of proof

(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.

142 Admissibility of evidence: standard of proof

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

(a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or

(b) any other question arising under this Act;

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

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

(a) the importance of the evidence in the proceeding; and

(b) the gravity of the matters alleged in relation to the question.

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Part 4.2—Judicial notice

143 Matters of law

(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.

144 Matters of common knowledge

(1) Proof is not required about knowledge that is not reasonably open to question and is:

(a) common knowledge in the locality in which the proceeding is being held or generally; or

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(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.

145 Certain Crown certificates

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.

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Part 4.3—Facilitation of proof

Division 1—General

146 Evidence produced by processes, machines and other devices

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

(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.

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

(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:

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(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 and certain Commonwealth documents.

148 Evidence of certain acts of justices, lawyers and notaries public

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, Australian 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, an Australian lawyer or a notary public, as the case may be; and

(b) it purports to have been so attested, verified, signed or acknowledged.

149 Attestation of documents

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.

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

150 Seals and signatures

(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.

(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:

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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.

151 Seals of bodies established under State law

(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.

152 Documents produced from proper custody

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 and certain Commonwealth documents.

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Division 2—Matters of official record

153 Gazettes and other official documents

(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

(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;

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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.

154 Documents published by authority of Parliaments etc.

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

155 Evidence of official records

(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:

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

155A Evidence of Commonwealth documents

(1) Evidence of a Commonwealth document may be adduced by producing a document that purports to be, or to be a copy of or extract from, the Commonwealth document that is certified to be the Commonwealth document, or to be a true copy or extract, as the case may be, by:

(a) a Minister; or

(b) a person who might reasonably be supposed to have custody of the Commonwealth document.

(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 Commonwealth document, or the copy of or extract from the Commonwealth document, that it purports to be; and

(b) the Minister or person certified the document as being the Commonwealth document or a true copy or extract, as the case requires.

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

156 Public documents

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

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(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.

157 Public documents relating to court processes

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

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(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.

158 Evidence of certain public documents

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

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159 Official statistics

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.

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Division 3—Matters relating to post and communications

160 Postal articles

(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 postal articles sent by a Commonwealth agency.

161 Electronic communications

(1) If a document purports to contain a record of an electronic communication other than one referred to in section 162, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the communication:
  (a) was sent or made in the form of electronic communication that appears from the document to have been the form by which it was sent or made; and
  (b) was sent or made by or on behalf of the person by or on whose behalf it appears from the document to have been sent or made; and

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(c) was sent or made on the day on which, at the time at which and from the place from which it appears from the document to have been sent or made; and

(d) was received at the destination to which it appears from the document to have been sent; and

(e) if it appears from the document that the sending of the communication concluded at a particular time—was received at that destination at that time.

(2) A provision of subsection (1) 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) the provision is inconsistent with a term of the contract.

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

162 Lettergrams and telegrams

(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.

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163 Proof of letters having been sent by Commonwealth agencies

(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.

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

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Part 4.4—Corroboration

164 Corroboration requirements abolished

(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.

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Part 4.5—Warnings and information

165 Unreliable evidence

(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 questioning by an investigating official 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.

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(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.

(6) Subsection (2) does not permit a judge to warn or inform a jury in proceedings before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child. Any such warning or information may be given only in accordance with subsections 165A(2) and (3).

165A Warnings in relation to children's evidence

(1) A judge in any proceeding in which evidence is given by a child before a jury must not do any of the following:

(a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses;

(b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults;

(c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child;

(d) in the case of a criminal proceeding—give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.

(2) Subsection (1) does not prevent the judge, at the request of a party, from:

(a) informing the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable; and

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(b) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it;

if the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.

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

165B Delay in prosecution

(1) This section applies in a criminal proceeding in which there is a jury.

(2) If the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.

(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 informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay.

(5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or to inform, the jury.

(6) For the purposes of this section:

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(a) delay includes delay between the alleged offence and its being reported; and

(b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.

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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 and certain Commonwealth documents.

166 Definition of request

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—

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to call as a witness a person who gave evidence in the proceeding in which the person was so convicted.

167 Requests may be made about certain matters

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.

168 Time limits for making certain requests

(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.

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(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.

169 Failure or refusal to comply with requests

(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:

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(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

(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.

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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 and certain Commonwealth documents.

170 Evidence relating to certain matters

(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.

171 Persons who may give such evidence

(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.

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(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:

(i) an Australian Diplomatic Officer, or an Australian Consular Officer, within the meaning of the *Consular Fees Act 1955*, exercising his or her function in that place; or

(ii) an employee of the Commonwealth, authorised under paragraph 3(c) of the *Consular Fees Act 1955*, exercising his or her function in that place; or

(iii) an employee of the Australian Trade and Investment Commission, authorised under paragraph 3(d) of the *Consular Fees Act 1955*, exercising his or her function in that place; or

(b) an AFP employee (within the meaning of the *Australian Federal Police Act 1979*); or

(c) a special member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); or

(d) a person authorised by the Attorney-General for the purposes of this section.

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172 Evidence based on knowledge, belief or information

(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.

173 Notification of other parties

(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.

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Division 3—Foreign law

174 Evidence of foreign law

(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.

175 Evidence of law reports of foreign countries

(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.

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176 Questions of foreign law to be decided by judge

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.

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Division 4—Procedures for proving other matters

177 Certificates of expert evidence

(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.

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(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.

178 Convictions, acquittals and other judicial proceedings

(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,

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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.

179 Proof of identity of convicted persons—affidavits by members of State or Territory police forces

(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.

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180 Proof of identity of convicted persons—affidavits by AFP employees or special members of the Australian Federal Police

(1) This section applies if an AFP employee (within the meaning of the *Australian Federal Police Act 1979*) or a special member of the Australian Federal Police (within the meaning of that Act):

(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.

181 Proof of service of statutory notifications, notices, orders and directions

(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.

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Chapter 5—Miscellaneous

182 Application of certain sections in relation to Commonwealth records, postal articles sent by Commonwealth agencies and certain Commonwealth documents

(1) Subject to this section, the provisions of this Act referred to in the following Table apply in relation to documents that:

(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	Documentary evidence
Section 69	Hearsay exception for business records
Subsection 70(1)	Hearsay exception for tags, labels and other writing
Section 71	Hearsay exception for electronic communications
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 161 and 162	Electronic communications, 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, as if the references in those sections to the

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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.

(4A) Section 160 applies in relation to postal articles sent by a Commonwealth agency as if that section applied to the extent provided for in section 5.

(4B) Sections 47, 48, 49, 51, 147, 149 and 152, Divisions 1 and 2 of Part 4.6 and section 183 apply in relation to a Commonwealth document that:

(a) is in the possession of a Commonwealth entity; or

(b) has been destroyed but was, immediately before its destruction, in the possession of a Commonwealth entity or someone else to whom it had been given by a Commonwealth entity for destruction;

as if the section or Division applied to the extent provided for in section 5.

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

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183 Inferences

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 and certain Commonwealth documents.

184 Accused may admit matters and give consents

(1) In or before a criminal proceeding, a defendant may:

(a) admit matters of fact; and

(b) give any consent;

that a party to a civil proceeding may make or give.

(2) A defendant's admission or consent is not effective for the purposes of subsection (1) unless:

(a) the defendant has been advised to do so by his or her Australian legal practitioner or legal counsel; or

(b) the court is satisfied that the defendant understands the consequences of making the admission or giving the consent.

185 Faith and credit to be given to documents properly authenticated

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.

186 Swearing of affidavits before justices of the peace, notaries public and lawyers

(1) Affidavits for use in:

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(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 Australian 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.

187 Abolition of the privilege against self-incrimination for bodies corporate

(1) This section applies if, under a law of the Commonwealth or in a proceeding in a federal 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.

188 Impounding documents

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

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of the court or of another person for such period, and subject to such conditions, as the court thinks fit.

189 The voir dire

(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

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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(10) 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.

190 Waiver of rules of evidence

(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.

Note: Matters related to evidence in child-related proceedings (within the meaning of section 69ZM of the *Family Law Act 1975*) are dealt with by that Act.

(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 Australian legal practitioner or legal counsel; or

(b) the court is satisfied that the defendant understands the consequences of giving the consent.

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(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.

191 Agreements as to facts

(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 Australian legal practitioners, legal counsel or prosecutors representing the parties and adduced in evidence in the proceeding; or

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(b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.

192 Leave, permission or direction may be given on terms

(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.

192A Advance rulings and findings

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

(a) the admissibility or use of evidence proposed to be adduced; or

(b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced; or

(c) the giving of leave, permission or direction under section 192;

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

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193 Additional powers

(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.

195 Prohibited question not to be published

(1) 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

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(c) any question in respect of which the court has refused to give leave under Part 3.7.

Penalty: 60 penalty units.

(2) Subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

197 Regulations

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.

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Schedule—Oaths and Affirmations

Subsections 21(4) and 22(2)

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.

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Dictionary

Section 3

Part 1—Definitions

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.

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Australian lawyer means a person who is admitted to the legal profession by a Supreme Court of a State or Territory under a law of a State or Territory specified in the regulations.

Australian legal practitioner means an Australian lawyer who holds a practising certificate under a law of a State or Territory specified in the regulations.

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 practising certificate means a practising certificate granted under a law of a State or Territory specified in the regulations.

Australian-registered foreign lawyer means a person who is registered as a foreign lawyer under a law of a State or Territory specified in the regulations.

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.

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.

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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 agency means:

(a) an Agency within the meaning of the *Public Service Act 1999*; 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.

Commonwealth document means:

(a) a document in the nature of a form, application, claim or return, or any document of a similar kind, that has, in accordance with a Commonwealth law, or in connection with the provision of money or any other benefit or advantage by the Commonwealth, been filed or lodged with a Commonwealth entity or given or sent (including sent by a form of electronic transmission) to a Commonwealth entity; and

(b) any of the following documents:

(i) a report of the passengers or crew on a ship or aircraft that has been communicated to the Department administered by the Minister administering Part XII of the *Customs Act 1901* under section 64ACA or 64ACB of the *Customs Act 1901*;

(ia) a report relating to the passengers or crew on an aircraft or ship that has been communicated to the Department administered by the Minister who administers the

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Migration Act 1958 under Division 12B of Part 2 of that Act;

(ii) a ship's inward cargo adjustment report delivered to an officer under subregulation 46(3) of the Customs Regulations;

(iii) an entry made under the *Customs Act 1901* or *Excise Act 1901* in relation to goods;

(iv) a form or statement given to a Collector under regulation 41 of the Customs Regulations;

(v) a passenger card given to an officer under subregulation 3.01(3) of the Migration Regulations;

(vi) a report referred to in section 46 or 46A of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* that has been given under that section to the Minister administering that Act;

(vii) any other document prescribed by the regulations for the purposes of this paragraph.

Commonwealth entity means:

(a) an Agency within the meaning of the *Public Service Act 1999*; 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.

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Commonwealth owned body corporate means a body corporate that, were the Commonwealth a body corporate, would, for the purposes of the *Corporations Act 2001*, 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) an Agency within the meaning of the *Public Service Act 1999*; 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;

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.

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credibility of a person who has made a representation that has been admitted in evidence means the credibility of the representation, and includes the person's ability to observe or remember facts and events about which the person made the representation.

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 evidence is defined in section 101A.

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 partner is defined in clause 11 of Part 2 of this Dictionary.

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.

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electronic communication has the same meaning as it has in the *Electronic Transactions Act 1999*.

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.

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.

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.*

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

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partly on what the person making the assertion saw, heard or otherwise perceived 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.

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.

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.

legal counsel means an Australian lawyer employed in or by a government agency or other body who by law is exempted from holding an Australian practising certificate, or who does not require an Australian practising certificate, to engage in legal practice in the course of that employment.

Note: Examples of legal counsel are in-house counsel and government solicitors.

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Legislative Assembly means any present or former Legislative Assembly of a Territory, and includes the Australian Capital Territory House of Assembly.

offence means an offence against or arising under an Australian law.

opinion rule means section 76.

overseas-registered foreign lawyer means a natural person who is properly registered to engage in legal practice in a foreign country by an entity in the country having the function, conferred by the law of the country, of registering persons to engage in legal practice in the country.

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 or special 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.

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.

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prosecutor means a person who institutes or is responsible for the conduct of a prosecution.

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.

registered, in relation to legal practice in a foreign country, means having all necessary licences, approvals, admissions, certificates or other forms of authorisation (including practising certificates) required by or under legislation for engaging in legal practice in that country.

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.

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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).

traditional laws and customs of an Aboriginal or Torres Strait Islander group (including a kinship group) includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group.

visual identification evidence is defined in section 114.

witness includes the meaning given in clause 7 of Part 2 of this Dictionary.

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Part 2—Other expressions

1 References to businesses

(1) A reference in this Act to a ***business*** includes a reference to the following:

(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 or body 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.

2 References to examination in chief, cross-examination and re-examination

(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.

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(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.

3 References to civil penalties

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.

4 Unavailability of persons

(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; or

(c) the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability; or

(d) it would be unlawful for the person to give the evidence; or

(e) a provision of this Act prohibits the evidence being given; or

(f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success; or

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(g) 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.

5 Unavailability of documents and things

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

(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.

6 Representations in documents

For the purposes of this Act, a representation contained in a document is taken to have been made by a person if:

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(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.

7 Witnesses

(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 clause to a party includes a defendant in a criminal proceeding.

8 References to documents

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.

8A References to offices etc.

In this Act:

(a) a reference to a person appointed or holding office under or because of an Australian law or a law of the Commonwealth includes a reference to an APS employee; and

(b) in that context, a reference to an office is a reference to the position occupied by the APS employee concerned.

9 References to laws

(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.

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(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.

10 References to children and parents

(1) A reference in this Act to a child of a person includes a reference to:
  (a) an adopted child or 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.

11 References to de facto partners

(1) A reference in this Act to a de facto partner of a person is a reference to a person who is in a de facto relationship with the person.

(2) A person is in a de facto relationship with another person if the two persons have a relationship as a couple and are not legally married.

(3) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as are relevant in the circumstances of the particular case:
  (a) the duration of the relationship;
  (b) the nature and extent of their common residence;
  (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
  (d) the ownership, use and acquisition of their property;
  (e) the degree of mutual commitment to a shared life;

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(f) the care and support of children;

(g) the reputation and public aspects of the relationship.

(4) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether two persons have a relationship as a couple.

(5) For the purposes of subclause (3), the following matters are irrelevant:

(a) whether the persons are different sexes or the same sex;

(b) whether either of the persons is legally married to someone else or in another de facto relationship.

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Endnotes

Endnote 1—About the endnotes

The endnotes provide information about this compilation and the compiled law.

The following endnotes are included in every compilation:

Endnote 1—About the endnotes
Endnote 2—Abbreviation key
Endnote 3—Legislation history
Endnote 4—Amendment history

Abbreviation key—Endnote 2
The abbreviation key sets out abbreviations that may be used in the endnotes.

Legislation history and amendment history—Endnotes 3 and 4
Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.

Editorial changes
The *Legislation Act 2003* authorises First Parliamentary Counsel to make editorial and presentational changes to a compiled law in preparing a compilation of the law for registration. The changes must not change the effect of the law. Editorial changes take effect from the compilation registration date.

If the compilation includes editorial changes, the endnotes include a brief outline of the changes in general terms. Full details of any changes can be obtained from the Office of Parliamentary Counsel.

Misdescribed amendments
A misdescribed amendment is an amendment that does not accurately describe how an amendment is to be made. If, despite the misdescription, the amendment

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Endnote 1—About the endnotes

can be given effect as intended, then the misdescribed amendment can be incorporated through an editorial change made under section 15V of the *Legislation Act 2003*.

If a misdescribed amendment cannot be given effect as intended, the amendment is not incorporated and "(md not incorp)" is added to the amendment history.

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Endnote 2—Abbreviation key

ad = added or inserted

am = amended

amdt = amendment

C[x] = Compilation No. x

ch = Chapter(s)

cl = clause(s)

cont. = continued

def = definition(s)

Dict = Dictionary

disallowed = disallowed by Parliament

div = Division(s)

ed = editorial change

exp = expires/expired or ceases/ceased to have effect

gaz = gazette

LA = *Legislation Act 2003*

LIA = *Legislative Instruments Act 2003*

(md) = misdescribed amendment can be given effect

(md not incorp) = misdescribed amendment cannot be given effect

mod = modified/modification

No. = Number(s)

Ord = Ordinance

orig = original

p = page(s)

para = paragraph(s)/subparagraph(s) /sub-subparagraph(s)

pres = present

prev = previous

(prev…) = previously

pt = Part(s)

r = regulation(s)/Court rule(s)

reloc = relocated

renum = renumbered

rep = repealed

rs = repealed and substituted

s = section(s)/subsection(s) /rule(s)/subrule(s)/order(s)/suborder(s)

sch = Schedule(s)

SLI = Select Legislative Instrument

SR = Statutory Rules

sub ch = Sub-Chapter(s)

sub div = Subdivision(s)

sub pt = Subpart(s)

underlining = whole or part not commenced or to be commenced

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Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
Evidence Act 1995	2, 1995	23 Feb 1995	s 4-197, sch: 18 Apr 1995 (s 2(3)) Remainder: 23 Feb 1995 (s 2(1))	
Family Law Reform (Consequential Amendments) Act 1995	140, 1995	12 Dec 1995	sch 2: 26 Dec 1995 (s 2(5))	—
Statute Law Revision Act 1996	43, 1996	25 Oct 1996	sch 2 (item 54): 18 Apr 1995 (s 2(2))	—
Law and Justice Legislation Amendment Act 1997	34, 1997	17 Apr 1997	sch 6: 17 Apr 1997 (s 2(1))	—
Law and Justice Legislation Amendment Act 1999	125, 1999	13 Oct 1999	sch 6: 13 Oct 1999 (s 2(1))	—
Public Employment (Consequential and Transitional) Amendment Act 1999	146, 1999	11 Nov 1999	sch 1 (items 434-437): 5 Dec 1999 (s 2(1), (2))	—
Corporate Law Economic Reform Program Act 1999	156, 1999	24 Nov 1999	sch 12 (items 1, 24): 24 Nov 2000 (s 2(4))	—
Australian Federal Police Legislation Amendment Act 2000	9, 2000	7 Mar 2000	sch 2 (items 29-32), sch 3 (items 20, 25, 34, 35): 2 July 2000 (s 2(1) and gaz 2000 No S328)	sch 3 (items 20, 25, 34, 35)

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Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001	24, 2001	6 Apr 2001	s 4(1), (2), sch 25: 24 May 2001 (s 2(1)(a))	s 4(1), (2)
Corporations (Repeals, Consequentials and Transitionals) Act 2001	55, 2001	28 June 2001	s 4-14, sch 3 (items 174, 175): 15 July 2001 (s 2(1), (3))	s 4-14
Border Security Legislation Amendment Act 2002	64, 2002	5 July 2002	sch 6 (items 16-18): 5 Jan 2003 (s 2(1) item 9)	—
Ozone Protection and Synthetic Greenhouse Gas Legislation Amendment Act 2003	126, 2003	5 Dec 2003	sch 1 (item 1): 5 Dec 2003 (s 2)	—
Law and Justice Legislation Amendment Act 2004	62, 2004	26 May 2004	sch 1 (item 17): 27 May 2004 (s 2(1) item 8)	—
Statute Law Revision Act 2005	100, 2005	6 July 2005	sch 1 (item 14): 6 July 2005 (s 2(1) item 10)	—
Family Law Amendment (Shared Parental Responsibility) Act 2006	46, 2006	22 May 2006	sch 3 (items 1, 8): 1 July 2006 (s 2(1) item 3)	sch 3 (item 8)
Evidence Amendment (Journalists' Privilege) Act 2007	116, 2007	28 June 2007	sch 1 (items 1, 2): 26 July 2007 (s 2(1) item 2)	—
Evidence Amendment Act 2008	135, 2008	4 Dec 2008	sch 1, 2 : 1 Jan 2009 (s 2(1) item 2)	sch 1 (items 95-99), sch 2 (item 13)
Customs Legislation Amendment (Name Change) Act 2009	33, 2009	22 May 2009	sch 2 (item 30): 23 May 2009 (s 2)	—

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Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
Disability Discrimination and Other Human Rights Legislation Amendment Act 2009	70, 2009	8 July 2009	sch 3 (item 32): 5 Aug 2009 (s 2(1) item 7)	—
Statute Law Revision Act 2010	8, 2010	1 Mar 2010	sch 1 (item 26): 1 Mar 2010 (s 2(1) item 2)	—
Evidence Amendment (Journalists' Privilege) Act 2011	21, 2011	12 Apr 2011	sch 1 (items 1-3): 13 Apr 2011 (s 2)	—
Acts Interpretation Amendment Act 2011	46, 2011	27 June 2011	sch 2 (item 566), sch 3 (items 10, 11): 27 Dec 2011 (s 2(1) item 3)	sch 3 (items 10, 11)
Clean Energy (Consequential Amendments) Act 2011	132, 2011	18 Nov 2011	sch 1 (item 260A): 1 July 2012 (s 2(1) item 3)	—
Customs and Other Legislation Amendment (Australian Border Force) Act 2015	41, 2015	20 May 2015	sch 5 (items 64, 65), sch 9 (items 1-9): 1 July 2015 (s 2(1) items 2, 7)	sch 5 (item 65), sch 9 (items 1-9)
as amended by				
Australian Border Force Amendment (Protected Information) Act 2017	115, 2017	30 Oct 2017	sch 1 (item 26): 1 July 2015 (s 2(1) item 2)	—
Civil Law and Justice Legislation Amendment Act 2015	113, 2015	17 Aug 2015	sch 5: 18 Aug 2015 (s 2(1) item 2)	sch 5 (item 63)
Civil Law and Justice (Omnibus Amendments) Act 2015	132, 2015	13 Oct 2015	sch 1 (items 26-33): 14 Oct 2015 (s 2(1) item 2)	—

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Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
Statute Law Revision Act (No. 1) 2016	4, 2016	11 Feb 2016	sch 4 (items 384, 385): 10 Mar 2016 (s 2(1) item 6)	—
Trade Legislation Amendment Act (No. 1) 2016	31, 2016	23 Mar 2016	sch 2 (item 13): 1 May 2016 (s 2(1) item 3)	—
Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment Act 2017	67, 2017	23 June 2017	sch 2 (items 50, 75, 76): awaiting commencement (s 2(1) item 3)	sch 2 (items 75, 76)
Marriage Amendment (Definition and Religious Freedoms) Act 2017	129, 2017	8 Dec 2017	sch 3 (items 7, 8), sch 4: 9 Dec 2017 (s 2(1) item 7)	sch 3 (item 8) and Sch 4

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Endnote 4—Amendment history

Provision affected	How affected
Chapter 1	
Introductory Note	am No 100, 2005; No 113, 2015
Part 1.1	
s 3	am No 46, 2011; No 113, 2015
Part 1.2	
s 4	am No 140, 1995; No 135, 2008; No 113, 2015
s 5	am No 125, 1999; No 135, 2008; No 113, 2015
s 6	am No 113, 2015
s 7	am No 113, 2015
s 8	am No 156, 1999; No 55, 2001; No 113, 2015
s 8A	ad No 24, 2001
	am No 113, 2015
s 9	am No 113, 2015
Chapter 2	
Part 2.1	
Division 1	
s 13	rs No 135, 2008
s 14	am No 135, 2008
s 18	am No 135, 2008
s 19	am No 135, 2008
	rep No 113, 2015
s 20	am No 34, 1997; No 135, 2008; No 4, 2016
Division 2	
s 21	am No 135, 2008
s 25	rep No 135, 2008
Division 3	
s 29	am No 135, 2008
s 31	am No 113, 2015

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Endnote 4—Amendment history

Provision affected	How affected
s 33	am No 135, 2008
Division 4	
s 37	am No 135, 2008
Division 5	
s 41	rs No 135, 2008
s 43	am No 34, 1997
Part 2.2	
s 47	am No 125, 1999
s 48	am No 125, 1999
s 49	am No 125, 1999
s 50	am No 125, 1999; No 135, 2008
s 51	am No 125, 1999
Chapter 3	
Introductory Note	am No 135, 2008
Part 3.2	
Division 1	
s 59	am No 125, 1999; No 135, 2008
s 60	am No 135, 2008
s 61	am No 135, 2008
Division 2	
s 62	am No 135, 2008
s 63	am No 125, 1999
s 64	am No 125, 1999; No 135, 2008
s 65	am No 125, 1999; No 135, 2008
s 66	am No 135, 2008
s 66A	ad No 135, 2008
s 68	am No 34, 1997; No 113, 2015
Division 3	
s 70	am No 34, 1997; No 113, 2015
s 71	rs No 135, 2008
s 72	rs No 135, 2008

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Endnote 4—Amendment history

Provision affected	How affected
s 73	am No 129, 2017
Part 3.3	
s 76	am No 125, 1999; No 135, 2008
s 78A	ad No 135, 2008
s 79	am No 135, 2008
Part 3.4	
s 82	am No 125, 1999; No 135, 2008
s 85	am No 135, 2008
s 89	am No 135, 2008
Part 3.5	
s 93	ed C31
Part 3.6	
s 97	am No 135, 2008
s 98	rs No 135, 2008
Part 3.7	
Division 1	
Division 1	ad No 135, 2008
s 101A	ad No 135, 2008
Division 2	
Division 2 heading	ad No 135, 2008
s 102	am No 34, 1997
	rs No 135, 2008
s 103	am No 135, 2008
s 104	am No 135, 2008
s 105	rep No 135, 2008
s 106	rs No 135, 2008
s 107	rep No 34, 1997
s 108	am No 34, 1997; No 135, 2008
Division 3	
Division 3 heading	ad No 135, 2008
s 108A	ad No 34, 1997

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Endnote 4—Amendment history

Provision affected	How affected
	am No 135, 2008
s 108B	ad No 135, 2008
Division 4	
Division 4	ad No 135, 2008
s 108C	ad No 135, 2008
Part 3.8	
s 110	am No 135, 2008
s 112	am No 135, 2008
Part 3.9	
s 114	am No 135, 2008
Part 3.10	
Division 1	
s 117	am No 135, 2008
s 118	am No 135, 2008
s 120	am No 34, 1997
s 122	rs No 135, 2008
Division 1C	
Division 1A heading	rep No 132, 2015
Division 1C heading	ad No 132, 2015
Division 1A	ad No 116, 2007
	rs No 21, 2011
s 126A	ad No 116, 2007
	rep No 21, 2011
s 126B	ad No 116, 2007
	rep No 21, 2011
s 126C	ad No 116, 2007
	rep No 21, 2011
s 126D	ad No 116, 2007
	rep No 21, 2011
s 126E	ad No 116, 2007
	rep No 21, 2011

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Endnote 4—Amendment history

Provision affected	How affected
s 126F	ad No 116, 2007
	rep No 21, 2011
s 126J (prev s 126G)	ad No 21, 2011
	renum No 132, 2015
s 126K (prev s 126H)	ad No 21, 2011
	renum No 132, 2015
Division 2	
s 128	am No 34, 1997
	rs No 135, 2008
	am No 113, 2015
s 128A	ad No 135, 2008
	am No 113, 2015
Division 3	
s 129	am No 113, 2015
s 130	am No 43, 1996
Division 4	
s 131A	ad No 116, 2007
	am No 21, 2011; No 132, 2015
s 131B	ad No 21, 2011
	am No 113, 2015; No 132, 2015
Part 3.11	
Part 3.11 heading	rs No 135, 2008
s 138	am No 70, 2009
s 139	am No 135, 2008
Chapter 4	
Part 4.3	
Division 1	
s 147	am No 125, 1999
s 148	am No 135, 2008
s 149	am No 125, 1999
s 150	am No 113, 2015

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Endnote 4—Amendment history

Provision affected	How affected
s 151	am No 113, 2015
s 152	am No 125, 1999
Division 2	
s 154	am No 34, 1997
s 155	am No 34, 1997; No 113, 2015
s 155A	ad No 125, 1999
	am No 113, 2015
s 158	am No 34, 1997
Division 3	
s 160	am No 125, 1999
s 161	rs No 135, 2008
s 163	am No 125, 1999; No 113, 2015
Part 4.5	
Part 4.5 heading	rs No 135, 2008
s 165	am No 135, 2008
s 165A	ad No 135, 2008
s 165B	ad No 135, 2008
Part 4.6	
Division 1	
Division 1	am No 125, 1999
Division 2	
Division 2	am No 125, 1999
s 170	am No 34, 1997; No 113, 2015
s 171	am No 9, 2000; No 62, 2004; No 113, 2015; No 31, 2016
Division 4	
s 180	am No 9, 2000
Chapter 5	
s 182	am No 125, 1999; No 135, 2008; No 113, 2015
s 183	am No 125, 1999
s 184	am No 135, 2008
s 185	am No 113, 2015

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Endnote 4—Amendment history

Provision affected	How affected
s 186	am No 135, 2008; No 113, 2015
s 187	am No 113, 2015
s 189	am No 8, 2010
	ed C31
s 190	am No 46, 2006; No 135, 2008
s 191	am No 135, 2008
s 192A	ad No 135, 2008
s 194	rep No 113, 2015
s 195	am No 24, 2001; No 113, 2015
s 196	rep No 113, 2015
Dictionary	
Dictionary	am No 34, 1997; No 125, 1999; No 146, 1999; No 9, 2000; No 55, 2001; No 64, 2002; No 126, 2003; No 135, 2008; No 33, 2009; No 132, 2011; No 41, 2015; No 113, 2015; No 67, 2017

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Endnote 5—Editorial changes

In preparing this compilation for registration, the following kinds of editorial change(s) were made under the *Legislation Act 2003*.

Paragraph 93(b) and section 189 (heading)

Kind of editorial change

Changes to typeface

Details of editorial change

This compilation was editorially changed to update one occurrence of the italicised words *in rem* to regular font in paragraph 93(b) and to remove the italics from the italicised words ***voir dire*** in the heading to section 189.

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