NORTHERN TERRITORY OF AUSTRALIA

EVIDENCE (NATIONAL UNIFORM LEGISLATION) ACT 2011

As in force at 1 July 2026

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NORTHERN TERRITORY OF AUSTRALIA

As in force at 1 July 2026

EVIDENCE (NATIONAL UNIFORM LEGISLATION) ACT 2011

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

Chapter 1 Preliminary matters

Introductory Note

Outline of this Act

This Act sets out the rules of evidence for the Territory. Generally speaking, the Act applies to proceedings in Territory courts and before other persons or bodies required to apply the laws of evidence (see section 4).

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 *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW) and the *Evidence Act 2008* (Vic). These Acts are drafted in identical terms except so far as differences are identified by appropriate annotations to the texts, and except so far as minor drafting variations are required to accord with the drafting style of each jurisdiction.

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

Part 1.1 Formal matters

1 Short title

This Act may be cited as the *Evidence (National Uniform Legislation) Act 2011*.

2 Commencement

(1) This Part and the Dictionary at the end of this Act commence on the day on which the Administrator's assent to this Act is declared.

(2) The remaining provisions of this Act commence on the day fixed by the Administrator by *Gazette* notice.

2A Object of Act

The object of this Act is to make fresh provision for the law of evidence that is uniform with the following laws of the Commonwealth, New South Wales and Victoria:

(a) the *Evidence Act 1995* (Cth) (the ***Commonwealth Act***);

(b) the *Evidence Act 1995* (NSW) (the ***NSW Act***);

(c) the *Evidence Act 2008* (Vic) (the ***Victorian Act***).

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.

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

Notes for section 3

1 Some expressions used in this Act are defined in the Interpretation Act and have the meanings given to them in that Act.

2 The Commonwealth Act and NSW Act include an additional subsection (3) regarding definitions which is unnecessary in the Territory because of section 18 of the Interpretation Act.

Part 1.2 Application of Act

4 Courts and proceedings to which Act applies

(1) This Act applies to all proceedings in a Territory 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.

(2) If such a proceeding relates to sentencing:

(a) this Act applies only if the court directs that the law of evidence applies in the proceeding; and

(b) if the court specifies in the direction that the law of evidence applies only in relation to specified matters – the direction has effect accordingly.

(3) The court must make a direction if:

(a) a party to the proceeding applies for such a direction in relation to the proof of a fact; and

(b) in the court's opinion, the proceeding involves proof of that fact, and that fact is or will be significant in determining a sentence to be imposed in the proceeding.

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

(5) In this section, a proceeding that relates to sentencing includes a proceeding for an order under Part 5 of the *Sentencing Act 1995* or Part 5, Division 9 of the *Traffic Act 1987*.

Notes for section 4

1 Section 4 of the Commonwealth Act differs from this section. It applies that Act to proceedings in a federal court or an Australian Capital Territory court. Some provisions of the Commonwealth Act extend beyond proceedings in federal courts and Australian Capital Territory courts (see sections 5, 185, 186 and 187 of the Commonwealth Act).

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

3 The Commonwealth Act includes 2 additional subsections that exclude the application of that Act to appeals from a court of a State or Territory (including appeals from a court exercising federal jurisdiction) and certain other courts.

4 Provisions in other Territory Acts which relieve courts from the obligation to apply the rules of evidence in certain proceedings are preserved by section 8 of this Act. These include, for example:

- *section 39 of the Coroners Act 1993;*
- *section 93(2) of the Care and Protection of Children Act 2007;*
- *section 257(2) of the Electoral Act 2004;*
- *section 49(2) of the Ombudsman Act 2009;*
- section 60 of the *Independent Commissioner Against Corruption Act 2017.*

5 Subsection (5) is not included in the Commonwealth Act or NSW Act.

5 Extended application of certain provisions

Note for section 5

The Commonwealth Act includes a provision that extends the application of specified provisions of that Act to proceedings in all Australian courts.

6 Territories

Note for section 6

The Commonwealth Act includes a provision extending that Act to each external Territory.

7 Act binds Crown

This Act binds the Crown in right of the Territory and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities.

8 Operation of Acts

This Act does not affect the operation of the provisions of any other Act.

Note for section 8

The Commonwealth Act includes additional subsections relating to the operation of the Corporations Act 2001 (Cth), the Australian Securities and Investments Commission Act 2001 (Cth) and certain laws in force in the Australian Capital Territory. It also provides for the regulations to have continued effect (until amended) after the commencement of the Commonwealth section.

8A Application of Criminal Code

An offence against this Act is an offence to which Part IIAA of the Criminal Code applies.

Notes for section 8A

1 Part IIAA of the Criminal Code states the general principles of criminal responsibility, establishes general defences, and deals with burden of proof. It also defines, or elaborates on, certain concepts commonly used in the creation of offences.

2 Section 8A is not included in the NSW Act and Victorian Act.

9 Application of common law and equity

(1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.

(2) Without limiting subsection (1), this Act does not affect the operation of such a principle or rule so far as it relates to any of the following:

(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 a court;

(b) the operation of a legal or evidential presumption that is not inconsistent with this Act;

(c) a court's power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding.

Note for section 9

This section differs from section 9 of the Commonwealth Act. That section preserves the written and unwritten laws of States and Territories in relation to various matters.

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

10A Application of section 127A

Despite any provision to the contrary in this Act or in any other Act, section 127A applies to all proceedings before the court or a judicial entity, irrespective of whether the judicial entity is required to apply the rules or laws of evidence.

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.

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 for subsection (1)

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

(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 evidence on oath 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 evidence on oath about a fact may, subject to subsection (5), be competent to give evidence about the fact otherwise than on oath.

(5) A person who, because of subsection (3), is not competent to give evidence on oath is competent to give evidence otherwise than on oath 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.

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 the 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.

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 for subsections (3) and (4)

***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.

(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.

19 Compellability of spouses and others in certain criminal proceedings

Section 18 does not apply in a proceeding for any of the following offences:

(b) an offence against a law of the Territory where the alleged victim is a person under the age of 16 years;

(c) an offence that is a DVO contravention offence as defined in section 4 of the *Domestic and Family Violence Act 2007*;

(ca) an offence constituted by, or involving, conduct that is domestic violence as defined in section 5 of the *Domestic and Family Violence Act 2007*;

(d) an offence against section 43BI, or a provision in Part VIII, of the Criminal Code 1983 in relation to an offence mentioned in paragraph (b).

Note for section 19

This section differs from section 19 of the Commonwealth Act, NSW Act and Victorian Act.

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 was, or believed that he or she was, guilty of the offence concerned.

(3) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was:

(a) the defendant's spouse or 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 was guilty of the offence concerned; or

(b) the spouse, de facto partner, parent or child believed that the defendant was guilty of the offence concerned.

(5) If:

(a) 2 or more persons are being tried together for an indictable offence; and

(b) comment is made by any of those persons on the failure of any of those persons or of the spouse or de facto 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).

Division 2 Oaths

21 Evidence of witnesses to be on oath

(1) A witness in a proceeding must take an oath before giving evidence.

(2) Subsection (1) does not apply to a person who gives evidence otherwise than on oath under section 13.

(3) A person who is called merely to produce a document or thing to the court need not take an oath.

Note for section 21

This section departs from the corresponding provision in other jurisdictions because of the provisions in the Oaths, Affidavits and Declarations Act 2010.

22 Interpreters to act on oath

(1) A person must take an oath before acting as an interpreter in a proceeding.

(1A) An oath taken by a person before acting as an interpreter on a day is taken for the purposes of subsection (1) to be an oath taken by that person for the purposes of any subsequent proceedings in that court on that day in which the person acts as an interpreter.

Notes for section 22

1 The Commonwealth Act does not include subsection (1A).

2 This section departs from the corresponding provision in other jurisdictions because of the provisions in the Oaths, Affidavits and Declarations Act 2010.

23 Choice of oath or affirmation

Note for section 23

This section is not needed because of the provisions in the Oaths, Affidavits and Declarations Act 2010.

24 Requirements for oaths

Note for section 24

This section is not needed because of the provisions in the Oaths, Affidavits and Declarations Act 2010.

25 Rights to make unsworn statements unaffected

Note for section 25

The Commonwealth Act formerly included a provision that preserves any right that a defendant in a criminal proceeding has under a law of a State or Territory to make an unsworn statement. That provision has now been repealed.

Division 3 General rules about giving evidence

26 Court's control over questioning of witness

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.

(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 Interpreter

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 Deaf and mute witnesses

(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:

(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 the person's 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.

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.

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 for section 37

***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:

(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 for subsection (3)

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 the party's 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.

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.

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 may disallow an improper question or improper questioning put to a witness in cross-examination, or inform the witness that it need not be answered.

(2) The court must disallow an improper question or improper questioning put to a vulnerable witness in cross-examination, or inform the witness that it need not be answered, unless the court is satisfied that, in all the relevant circumstances of the case, it is

necessary for the question to be put.

(3) In this section:

improper question or ***improper questioning*** means a question or a sequence of questions put to a witness that:

(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).

(4) For the purposes of subsection (2), a witness is a ***vulnerable witness*** if the witness:

(a) is under the age of 18 years; or

(b) has a cognitive impairment or an intellectual disability; or

(c) is a witness whom the court considers to be vulnerable having regard to:

(i) 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

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

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

(A) the nature of the proceeding; and

(B) in a criminal proceeding – the nature of the offence to which the proceeding relates; and

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

(5) A question is not an improper 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.

(6) A party may object to a question put to a witness on the ground that it is an improper question.

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

(8) 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.

Notes for section 41

1 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.

2 Section 41 differs from the Commonwealth Act and NSW Act.

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

(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 for section 42

***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.

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.

(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.

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.

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 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 a person authorised by or on behalf of the Government to print the document or by the Government Printer of the Commonwealth or by the government or official printer of a State or another Territory; or

(ii) by the authority of the Government or administration of the Territory, the Commonwealth, a State, another 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 subsection (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

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

Notes for section 48

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

2 Section 182 of the Commonwealth Act gives section 48 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

49 Documents in foreign countries

No paragraph of section 48(1) (other than paragraph (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 for section 49

Section 182 of the Commonwealth Act gives section 49 of the Commonwealth Act 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.

(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 for section 51

Section 182 of the Commonwealth Act gives the provisions of Part 2.2 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

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.

(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.

Chapter 3 Admissibility of evidence

Introductory Note

Outline of this Chapter

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

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

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

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

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

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

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

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

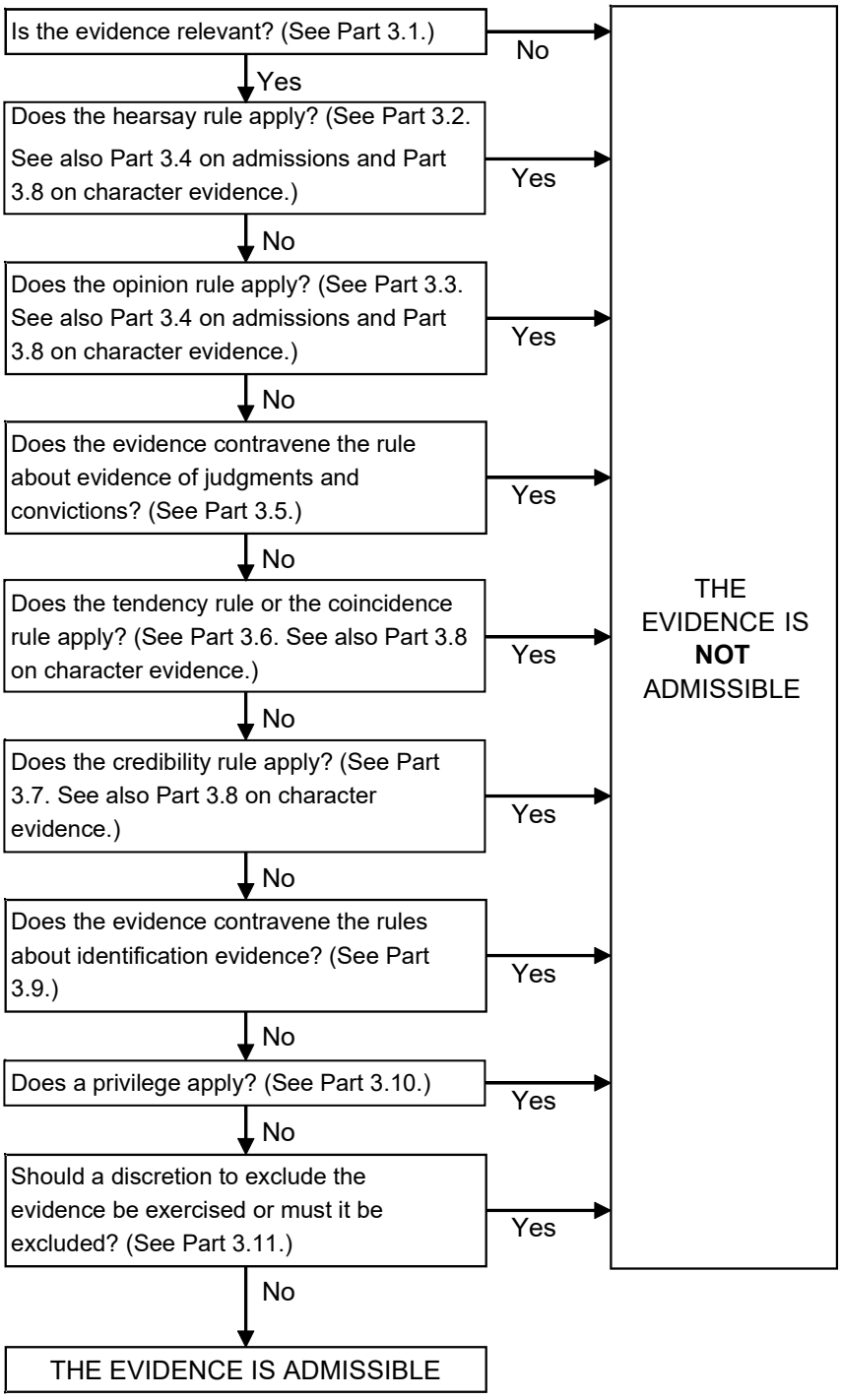
Part 3.8 is about character evidence and the extent to which it is admissible as exceptions to the hearsay rule, the opinion rule, the tendency rule and the credibility rule.

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

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

Part 3.11 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:


Is the evidence relevant? (See Part 3.1.)
No
Yes
Does the hearsay rule apply? (See Part 3.2. See also Part 3.4 on admissions and Part 3.8 on character evidence.)
Yes
No
Does the opinion rule apply? (See Part 3.3. See also Part 3.4 on admissions and Part 3.8 on character evidence.)
Yes
No
Does the evidence contravene the rule about evidence of judgments and convictions? (See Part 3.5.)
Yes
No
Does the tendency rule or the coincidence rule apply? (See Part 3.6. See also Part 3.8 on character evidence.)
Yes
No
Does the credibility rule apply? (See Part 3.7. See also Part 3.8 on character evidence.)
Yes
No
Does the evidence contravene the rules about identification evidence? (See Part 3.9.)
Yes
No
Does a privilege apply? (See Part 3.10.)
Yes
No
Should a discretion to exclude the evidence be exercised or must it be excluded? (See Part 3.11.)
Yes
No
THE EVIDENCE IS ADMISSIBLE
THE EVIDENCE IS **NOT** ADMISSIBLE

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 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.

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 for subsection (2A)

Subsection (2A) is inserted as a response to the decision of the Supreme Court of New South Wales 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.

Notes for subsection (3)

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, labels and writing (section 70)*
- *electronic communications (section 71)*
- *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 (section 87(2))*
- *exceptions to the rule excluding evidence of judgments and convictions (section 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 for section 59

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 section 62(2)).

Note for subsection (2)

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

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

Note for subsection (3)

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 dependant 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 section 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 subsection (2)

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.

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.

Notes for subsection (2)

1 Section 67 imposes notice requirements relating to this subsection.

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

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 for subsection (2)

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 for section 64

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.

(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 for subsection (2)

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 for subsection (3)

Section 67 imposes notice requirements relating to this subsection.

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

(a) is given in an Australian or overseas proceeding; and

(b) is admitted into evidence in the criminal proceeding because of subsection (3);

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

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

(a) could reasonably have been present at that time; and

(b) if present could have cross-examined the person.

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

(a) the person to whom, or the court or other body to which, the representation was made; or

(b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made; or

(c) the person or body responsible for producing the transcript or recording.

(7) Without limiting subsection (2)(d), a representation is taken for the purposes of that subsection 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 for subsection (8)

Section 67 imposes notice requirements relating to this subsection.

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

(a) is adduced by another party; and

(b) is given by a person who saw, heard or otherwise perceived the other representation being made.

Note for section 65

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 for subsection (2A)

Subsection (2A) is 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

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 for section 66

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) Sections 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 section 64(2) is such a provision – the grounds, specified in that provision, on which the party intends to rely.

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

(5) The direction:

(a) is subject to such conditions (if any) as the court thinks fit; and

(b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

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 incurred by another party:

(a) in relation to the objection; and

(b) in calling the person who made the representation to give evidence.

Note for subsection (4)

This subsection differs from section 68(4) of the Commonwealth Act because of the different way costs are ascertained by Territory courts.

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;

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).

Notes for section 69

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

2 Section 182 of the Commonwealth Act gives section 69 of the Commonwealth Act a wider application in relation to Commonwealth records.

70 Exception – contents of tags, labels and writing

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 for section 70

The Commonwealth Act has an additional subsection. It provides that the exception does not apply to Customs and Excise prosecutions. Section 5 of the Commonwealth Act extends the application of that subsection to proceedings in all Australian courts.

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.

Notes for section 71

1 Part 4.3, Division 3 contains presumptions about electronic communications.

2 Section 182 of the Commonwealth Act gives section 71 of the Commonwealth Act a wider application in relation to Commonwealth records.

*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.

Note for section 72

Section 72 formerly provided an exception for contemporaneous statements about a person's health etc. Such provision can now be found in section 66A.

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.

(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.

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.

Notes for section 76

Specific exceptions to the opinion rule are as follows:

- *summaries of voluminous or complex documents (section 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 (section 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 for section 76

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.*

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 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.

Part 3.4 Admissions

Note for Part 3.4

***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 for section 81

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 and certain other conduct (section 84)*
- *unreliable admissions of accused persons (section 85)*
- *records of oral questioning of accused persons (section 86)*.

Example for section 81

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.

Note for section 82

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.

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 for subsection (1)

Subsection (1) is 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.

(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 acknowledgement 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

(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.

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 for section 90

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

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 for section 91

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

92 Exceptions

(1) Section 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, section 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.

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.

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.

(4) To avoid doubt, any principle or rule of the common law or equity that prevents or restricts the admissibility of evidence about propensity or similar fact evidence in a proceeding is not relevant when applying this Part to tendency evidence or coincidence evidence about a defendant.

(5) In determining the probative value of tendency evidence or coincidence evidence for the purposes of section 97(1)(b), 97A(4), 98(1)(b) or 101(2), it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or contamination.

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:

(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) Subsection (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 for section 97

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.

97A Admissibility of tendency evidence in proceedings involving child sexual offences

(1) This section applies in a criminal proceeding in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue.

(2) It is presumed that the following tendency evidence about the defendant will have significant probative value for the purposes of sections 97(1)(b) and 101(2):

(a) tendency evidence about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest);

(b) tendency evidence about the defendant acting on a sexual interest the defendant has or had in children.

(3) Subsection (2) applies whether or not the sexual interest or act to which the tendency evidence relates was directed at a complainant in the proceeding, any other child or children generally.

(4) Despite subsection (2), the court may determine that the tendency evidence does not have significant probative value if it is satisfied that there are sufficient grounds to do so.

(5) The following matters (whether considered individually or in combination) are not to be taken into account when determining whether there are sufficient grounds for the purposes of subsection (4) unless the court considers there are exceptional circumstances in relation to those matters (whether considered individually or in combination) to warrant taking them into account:

(a) the sexual interest or act to which the tendency evidence relates (the ***tendency sexual interest or act***) is different from the sexual interest or act alleged in the proceeding (the ***alleged sexual interest or act***);

(b) the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred;

(c) the personal characteristics of the subject of the tendency sexual interest or act (for example, the subject's age, sex or gender) are different to those of the subject of the alleged sexual interest or act;

(d) the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act;

(e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act;

(f) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features;

(g) the level of generality of the tendency to which the tendency evidence relates.

(6) In this section:

child means a person under 18 years of age.

child sexual offence means each of the following offences (however described and regardless of when it occurred):

(a) an offence against, or arising under, a law of the Territory involving sexual intercourse with, or any other sexual offence against, a person who was a child at the time of the offence;

(b) an offence against, or arising under, a law of the Territory involving an unlawful sexual act with, or directed towards, a person who was a child at the time of the offence;

(c) an offence against, or arising under, a law of the Commonwealth that:

(i) if committed in the Territory – is an offence of a kind referred to in paragraph (a) or (b); or

(ii) if committed elsewhere – would be an offence of a kind referred to in paragraph (a) or (b);

(d) an offence against, or arising under, a law of another State, another Territory or a foreign country that, if committed in the Territory, would be an offence of a kind referred to in paragraph (a) or (b);

but does not include conduct of a person that has ceased to be an offence since the time when the person engaged in the conduct.

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 for subsection (1)

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.

(1A) To avoid doubt, subsection (1) includes the use of evidence from 2 or more witnesses claiming they are victims of offences committed by a person who is a defendant in a criminal proceeding to prove, on the basis of similarities in the claimed acts or the circumstances in which they occurred, that the defendant did an act in issue in the proceeding.

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

(a) the evidence is adduced in accordance with any directions made by the court under section 100; or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note for section 98

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:

(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 outweighs the danger of unfair prejudice to the defendant.

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

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

Part 3.7 Credibility

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.

Notes for section 101A

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.

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

Division 2 Credibility of witnesses

102 The *credibility rule*

Credibility evidence about a witness is not admissible.

Notes for section 102

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)*

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

3 Sections 108A and 108B deal with the admission of credibility evidence about a person who has made a previous representation but 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 as to credibility

(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.

(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.

105 Further protections – defendants making unsworn statements

Note for section 105

The Commonwealth Act formerly included a provision that only applied in proceedings in a federal court sitting in Norfolk Island. This provision has been repealed.

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

(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 subsection (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.

107 Exception – application of certain provisions to makers of representations

Note for section 107

This section has been repealed from the Commonwealth Act and NSW Act.

108 Exception – re-establishing credibility

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

Note for subsection (2)

The Commonwealth Act formerly included a subsection (2) referring to section 105 of that Act. That subsection has been repealed.

(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.

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

(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.

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 the 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.

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

(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.

Part 3.9 Identification evidence

Note for Part 3.9

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:

(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 who made the identification examining pictures kept for the use of police officers.

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

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

(a) when the pictures were examined, the defendant was in the custody of a police officer of the police force investigating the commission of the offence with which the defendant has been charged; and

(b) the picture of the defendant that was examined was made before the defendant was taken into that police custody.

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

(a) the defendant's appearance had changed significantly between the time when the offence was committed and the time when the defendant was taken into that custody; or

(b) it was not reasonably practicable to make a picture of the defendant after the defendant was taken into that custody.

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

(a) the defendant refused to take part in an identification parade; or

(b) the defendant's appearance had changed significantly between the time when the offence was committed and the time when the defendant was taken into that custody; or

(c) it would not have been reasonable to have held an identification parade that included the defendant.

(6) Section 114(3), (4), (5) and (6) apply in determining, for the purposes of subsection (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 for subsection (7)

Sections 116 (Directions to jury) and 165 (Unreliable evidence) 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.

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

Part 3.10 Privileges

Division 1 Client legal privilege

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.

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

(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

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.

Note for section 120

The Commonwealth Act, NSW Act and Victorian Act formerly contained a subsection (2) of this section. The subsection has been repealed.

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 subsection (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.

(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

(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 for section 123

***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

(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.

Example for section 126

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

Division 1A Professional confidential relationship privilege

Note for Part 3.10, Division 1A

The NSW Act includes this Division.

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.

127A Journalist privilege

(1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor the journalist's 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 or a judicial entity 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 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 and, accordingly also, in the ability of journalists to access sources of information.

(3) Without limiting the matters that may be taken into account by the court or judicial entity for the purposes of subsection (2)(b), it is to take into account:

(a) whether the information provided by the informant is a matter of public interest; and

(b) how the journalist used the information provided by the informant, including whether the journalist:

(i) verified the information before using the information (if reasonably practicable); and

(ii) used the information in a manner that minimised any undue harm to any person; and

(iii) used the information in a fair and accurate manner.

(4) An order under subsection (2) may be made subject to any conditions the court or judicial entity thinks fit.

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

(a) that the rules or laws of evidence do not apply or that a judicial entity is not bound by the rules or laws 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.

(6) In this section:

informant means a person who provides new or noteworthy information to a journalist for use in a news medium.

journalist means a person who:

(a) obtains new or noteworthy information about matters of public interest; and

(b) deals with the information by:

(i) preparing the information for a news medium; or

(ii) providing comment, opinion or analysis of the information for a news medium.

news medium means any medium for the dissemination of information to the public or a section of the public.

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.

(3) If the court determines that there are reasonable grounds for the objection, the court 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 a Territory court or before any person or body authorised by a law of the Territory, or by consent of parties, to hear, receive and examine evidence:

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

(b) 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.

Note for subsection (7)

This subsection differs from section 128(7) of the Commonwealth Act, NSW Act and Victorian Act in relation to the reference to a "Territory court".

(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.

Notes for section 128

1 Bodies corporate cannot claim this privilege. See section 187.

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

3 The Commonwealth Act includes additional subsections (12) to (15). The subsections give effect to certificates in relation to self-incriminating evidence under this Act in proceedings in federal and Australian Capital Territory courts and in Territory prosecutions for Commonwealth and Australian Capital Territory offences.

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) 271 CLR 260.

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

(1) In this section:

disclosure order means an order made by a Territory court in a civil proceeding requiring a person to disclose information, as part of, or in connection with, a freezing or search order under the Rules of the Supreme Court but does not include an order made by a court under the *Proceeds of Crime Act 2002* (Cth) or the *Criminal Property Forfeiture Act 2002*.

*Note for definition **disclosure order***

This definition differs from the NSW Act and Victorian Act.

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 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 referred to in subsection (6)(a).

(8) In any proceeding in a Territory court:

(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.

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) attempt to pervert the course of justice;

(ii) perverting the course of justice;

(iii) subornation of perjury;

(iv) embracery;

(v) bribery of public official;

(vi) misconduct in public office;

(vii) an offence against section 95, 96, 100, 103A, 109 and 204 of the Criminal Code;

(viii) an offence against section 49A of the *Juries Act 1962*;

(ix) an offence connected with an offence mentioned in subparagraphs (i) to (viii), including an offence of conspiring to commit such an offence; or

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

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

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

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

Note for subsection (5)(a)

Subsection (5)(a) differs from section 129(5)(a) of the Commonwealth Act, NSW Act and Victorian 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

(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

(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

(2) Subsection (1) does not apply if:

(a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent; or

(b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or

(c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or

(d) the communication or document included a statement to the effect that it was not to be treated as confidential; or

(e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or

(f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or

(g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or

(h) the communication or document is relevant to determining liability for costs; or

(i) making the communication, or preparing the document, affects a right of a person; or

(j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or

(k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

(3) For the purposes of subsection (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 document 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 subsection (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 document prepared in furtherance of the abuse of power;

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

(5) In this section:

(a) a reference to a dispute is a reference to a dispute of a kind in respect of which relief may be given in an Australian or overseas proceeding; and

(b) a reference to an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a criminal proceeding or an anticipated criminal proceeding; and

(c) a reference to a communication made by a person in dispute includes a reference to a communication made by an employee or agent of such a person; and

(d) a reference to the consent of a person in dispute includes a reference to the consent of an employee or agent of such a person, being an employee or agent who is authorised so to consent; and

(e) a reference to commission of an act includes a reference to a failure to act.

(6) In this section:

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

Division 4 General

131A Application of Division to preliminary proceedings of courts

(1) If:

(a) a person is required by a disclosure requirement to give information, or to produce a document, which would result in the disclosure of a communication, a document or its contents or other information of a kind referred to in Division 1, 1A or 3; and

(b) the person objects to giving that information or providing that document;

the court must determine the objection by applying the provisions of this Part (other than sections 123 and 128) with any necessary modifications as if the objection to giving information or producing the document were an objection to the giving or adducing of evidence.

(2) In this section:

disclosure requirement means a process or order of a court 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 Part 4.6, Division 1.

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 relating 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.

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 Exclusion of 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 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 for subsection (3)(f)

The International Covenant on Civil and Political Rights is set out in Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth).

139 Cautioning of persons

(1) For the purposes of section 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 section 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.

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

(a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning; or

(b) the official would not allow the person to leave if the person wished to do so; or

(c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

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

(a) the official is performing functions in relation to persons or goods entering or leaving Australia and the official does not believe the person has committed an offence against a law of the Commonwealth; or

(b) the official is exercising a power under an Australian law to detain and search the person or to require the person to provide information or to answer questions.

Chapter 4 Proof

Introductory Note

Outline of this Chapter

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

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

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

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

Part 4.4 is about requirements that evidence be corroborated.

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

Part 4.6 sets out procedures for proving certain other matters.

Part 4.1 Standard of proof

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.

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.

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, an Imperial Act in force in Australia, a Commonwealth Act, an Act of a State or an Act or Ordinance of a Territory; 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 for section 143

Section 5 of the Commonwealth Act extends the operation of the equivalent Commonwealth section 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

(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.

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.

Example for section 146

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:

(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 for section 147

Section 182 of the Commonwealth Act gives section 147 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

148 Evidence of certain acts of justices, Australian 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, Commissioner of Oaths, 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, Commissioner of Oaths, Australian lawyer or 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.

Note for section 149

Section 182 of the Commonwealth Act gives section 149 of the Commonwealth Act 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) the Public Seal of the Territory; or

(b) a Royal Great Seal; or

(c) the Great Seal of Australia; or

(d) another seal of the Commonwealth; or

(e) a seal of a State, another Territory or a foreign country; or

(f) the seal of a body (including a court or a tribunal), or a body corporate, established by or under Royal Charter or by an Australian law or the law of a foreign country;

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

Note for subsection (1)

The Commonwealth Act has a different subsection (1).

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

(a) the imprint is the imprint of that seal; and

(b) the document was duly sealed by the office holder acting in his or her official capacity; and

(c) the office holder held the relevant office when the document was sealed.

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

(a) the document was signed by the office holder acting in that capacity; and

(b) the office holder held the relevant office when the document was signed.

(4) In this section:

office holder means:

(a) the Sovereign; or

(b) the Governor-General; or

(c) the Governor of a State; or

(d) the Administrator of a Territory; or

(e) a person holding any other office under an Australian law or a law of a foreign country.

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

Notes for section 150

1 Section 5 of the Commonwealth Act extends the operation of this section of the Commonwealth Act to proceedings in all Australian courts.

2 ***Australian law*** *is defined in the Dictionary.*

151 Seals of bodies established under State law

Note for section 151

The Commonwealth Act includes a provision dealing with certain seals of bodies established by Royal Charter or a law of a State.

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 for section 152

Section 182 of the Commonwealth Act gives section 152 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

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 Territory, the Commonwealth, a State, another Territory or a foreign country; or

(b) to have been printed by the Government Printer of the Territory, or by the government or official printer of the Commonwealth or of a State or another Territory; or

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

(ii) a document that purports to have been printed by the Government Printer of the Territory, or by the government or official printer of the Commonwealth or of a State or another Territory; or

(iii) a document that purports to have been printed by authority of the government or administration of the Territory, the Commonwealth, a State or another Territory or a foreign country; and

(b) the doing of an act:

(i) by the Governor-General or by the Governor of a State or the Administrator of a Territory; or

(ii) by a person authorised or empowered to do the act by an Australian law or a law of a foreign country;

is notified or published in the copy or document;

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

Note for section 153

Section 5 of the Commonwealth Act extends the operation of section 153 of the Commonwealth Act 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.

155 Evidence of official records

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

(a) purports to be such a record or document and to be signed or sealed by:

(i) a Minister of the Commonwealth, or a Minister of the Territory, a State or another Territory, as the case requires; or

(ii) a person who might reasonably be supposed to have custody of the record or document; or

(b) purports to be a copy of or extract from the record or document that is certified to be a true copy or extract by:

(i) a Minister of the Commonwealth, or a Minister of the Territory, a State or another Territory, as the case requires; or

(ii) a person who might reasonably be supposed to have custody of the record or 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 record, public document, copy or extract that it purports to be; and

(b) the Minister of the Commonwealth, or the Minister of the Territory, the State or the other Territory, or the 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 for section 155

This section differs from section 155 of the Commonwealth Act. The Commonwealth provision refers to evidence of a "public record" of a State or Territory rather than evidence of a "public document" of a State or Territory.

155A Evidence of Commonwealth documents

Note for section 155A

The Commonwealth Act includes a provision that relates to evidence of Commonwealth documents.

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:

(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 for section 156

Section 182 of the Commonwealth Act gives section 156 of the Commonwealth Act 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

(c) purports to be signed by a judge, magistrate, registrar or other proper officer of that court.

Note for section 157

Section 5 of the Commonwealth Act extends the operation of section 157 of the Commonwealth Act 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 this or another Territory is admissible for a purpose in the 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 Territory 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 this or another 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 Territory courts without such proof.

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

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* (Cth);

is evidence that those statistics or abstracts were compiled and analysed by the Australian Statistician under that Act.

Note for section 159

Section 5 of the Commonwealth Act extends the operation of section 159 of the Commonwealth Act to proceedings in all Australian courts.

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 seventhworking 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 for section 160

Section 182 of the Commonwealth Act gives section 160 of the Commonwealth Act 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

(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 for section 161

Section 182 of the Commonwealth Act gives section 161 of the Commonwealth Act 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 for section 162

Section 182 of the Commonwealth Act gives section 162 of the Commonwealth Act a wider application in relation to Commonwealth records.

163 Proof of letters having been sent by Commonwealth agencies

Note for section 163

Section 5 of the Commonwealth Act extends the operation of section 163 of the Commonwealth Act to proceedings in all Australian courts.

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.

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) 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.

(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 section 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

(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.

Note for subsection (2)

Subsection (2) differs from the NSW Act.

(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:

(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.

(7) For the purposes of this section, the factors that may be regarded as establishing a ***significant forensic disadvantage*** include, but are not limited to, the following:

(a) the fact that any potential witnesses have died or are not able to be located;

(b) the fact that any potential evidence has been lost or is otherwise unavailable.

Part 4.6 Ancillary provisions

Division 1 Requests to produce documents or call witnesses

Note for Part 4.6, Division 1

Section 182 of the Commonwealth Act gives Part 4.6, Division 1 of the Commonwealth Act 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 the 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 section 92(2) applies – 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 a good reason to do so.

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

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

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

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

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

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 subsection (1)(a) or (b) is not complied with.

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

(a) the document or thing to be produced is not available to the party; or

(b) the existence and contents of the document are not in issue in the proceeding in which evidence of the document is proposed to be adduced; or

(c) the person to be called as a witness is not available.

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

(a) the importance in the proceeding of the evidence in relation to which the request was made; and

(b) whether there is likely to be a dispute about the matter to which the evidence relates; and

(c) whether there is a reasonable doubt as to the authenticity or accuracy of the evidence that is, or the document the contents of which are, sought to be proved; and

(d) whether there is a reasonable doubt as to the authenticity of the document or thing that is sought to be tendered; and

(e) if the request relates to evidence of a previous representation – whether there is a reasonable doubt as to the accuracy of the representation or of the evidence on which it was based; and

(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 for section 169

Clause 5 of Part 2 of the Dictionary is about the availability of documents and things, and clause 4 of Part 2 of the Dictionary is about the availability of persons.

Division 2 Proof of certain matters by affidavits or written statements

Note for Part 4.6, Division 2

Section 182 of the Commonwealth Act gives Part 4.6, Division 2 of the Commonwealth Act 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.

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

Provisions of this Act	Subject-matter
Section 70	Hearsay exception for tags, labels and other writing
Section 71	Hearsay exception for electronic communications
The provisions of Part 4.3	Facilitation of proof

Note for subsection (1)

The Table to section 170 of the Commonwealth Act includes a reference to section 182 (Commonwealth records) of that Act.

(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.

(2) Despite subsection (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) a person before whom an affidavit may be given on oath and taken in a country or place outside the Territory under section 7(2) of the *Oaths, Affidavits and Declarations Act 2010*; or

(b) a police officer of or above the rank of sergeant; or

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

Note for subsection (3)

The Commonwealth Act, NSW Act and Victorian Act contain a different definition of ***authorised person****.*

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.

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 the 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 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.

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.

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.

(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 registrar or other proper officer of the applicable court:

(a) showing the fact, or purporting to contain particulars, of the record, indictment, conviction, acquittal, sentence, order or proceeding in question; and

(b) stating the time and place of the conviction, acquittal, sentence, order or proceeding; and

(c) stating the title of the applicable court.

(3) A certificate given under this section showing a conviction, acquittal, sentence or order is also evidence of the particular offence or matter in respect of which the conviction, acquittal, sentence or order was had, passed or made, if stated in the certificate.

(4) A certificate given under this section showing the pendency or existence of a proceeding is also evidence of the particular nature and occasion, or ground and cause, of the proceeding, if stated in the certificate.

(5) A certificate given under this section purporting to contain particulars of a record, indictment, conviction, acquittal, sentence, order or proceeding is also evidence of the matters stated in the certificate.

(6) In this section:

acquittal includes the dismissal of the charge in question by an applicable court.

applicable court means an Australian court or a foreign court.

Note for section 178

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.

180 Proof of identity of convicted persons – affidavits by members of Australian Federal Police

(1) This section applies if a member of the Australian Federal Police:

(a) makes an affidavit in the form prescribed by the regulations for the purposes of this section; and

(b) states in the affidavit that he or she is a fingerprint expert for the Australian Federal Police.

(2) For the purpose of proving before a court the identity of a person alleged to have been convicted of an offence against a law of the Commonwealth, the affidavit is evidence in a proceeding that the person whose fingerprints are shown on a fingerprint card referred to in the affidavit and marked for identification:

(a) is the person referred to in a certificate of conviction, or certified copy of conviction annexed to the affidavit, as having been convicted of an offence; and

(b) was convicted of that offence; and

(c) was convicted of any other offence of which he or she is stated in the affidavit to have been convicted.

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.

Chapter 5 Miscellaneous matters

182 Application of certain sections in relation to Commonwealth records

Note for section 182

The Commonwealth Act includes a provision that extends the operation of certain provisions of the Commonwealth Act to Commonwealth records.

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 for section 183

Section 182 of the Commonwealth Act gives section 183 of the Commonwealth Act 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 the defendant's

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 Full faith and credit to be given to documents properly authenticated

Note for section 185

The Commonwealth Act includes a provision requiring full faith and credit to be given to the public acts, records and judicial proceedings of a State or Territory.

186 Swearing of affidavits

Note for section 186

The Commonwealth Act includes a provision about swearing of affidavits before justices of the peace, notaries public and lawyers for use in court proceedings involving the exercise of federal jurisdiction and in courts of a Territory.

187 No privilege against self-incrimination for bodies corporate

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

Note for section 187

This section differs from the Commonwealth Act, NSW Act and Victorian Act.

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 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 (Exclusion of improperly or illegally obtained evidence) applies; or

(b) evidence of an admission, or evidence to which section 138 applies, should be admitted;

is to be heard and determined in the jury's absence.

(3) In the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.

(4) If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the court so orders.

(5) Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account:

(a) whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the defendant; and

(b) whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question; and

(c) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing).

(6) Section 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) Part 2.1, Division 3, 4 or 5; or

(b) Part 2.2 or 2.3; or

(c) Parts 3.2 to 3.8;

in relation to particular evidence or generally.

(2) In a criminal proceeding, a defendant's consent is not effective for the purposes of subsection (1) unless:

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

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

(3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1) do not apply in relation to evidence if:

(a) the matter to which the evidence relates is not genuinely in dispute; or

(b) the application of those provisions would cause or involve unnecessary expense or delay.

(4) Without limiting the matters that the court may take into account in deciding whether to exercise the power conferred by subsection (3), it is to take into account:

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

(b) the nature of the cause of action or defence and the nature of the subject-matter of the proceeding; and

(c) the probative value of the evidence; and

(d) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

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

(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.

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 courts 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.

194 Witnesses failing to attend proceedings

(1) If, in a civil or criminal proceeding, a witness fails to appear when called and it is proved that the witness has been:

(a) bound over to appear; or

(b) duly bound by recognisance or undertaking to appear; or

(c) served with a summons or subpoena to attend and provided with a sum of money or its equivalent (such as prepaid travel) that is sufficient to meet the reasonable expenses of attending as required by the subpoena or summons;

the court may:

(d) issue a warrant to apprehend the witness and bring him or her before the court; or

(e) order the witness to pay a fine of not more than 5 penalty units; or

(f) take any other action against the witness that is permitted by law.

(2) If a subpoena or summons has been issued for the attendance of a witness on the hearing of a civil or criminal proceeding and it is proved, on application by the party seeking to compel his or her attendance, that the witness:

(a) is avoiding service of the subpoena or summons; or

(b) has been duly served with the subpoena or summons but is unlikely to comply with it;

the court may issue a warrant to apprehend the witness and bring the witness before the court.

(3) In issuing a warrant under this section, the court may endorse the warrant with a direction that the person must, on arrest, be released on bail as specified in the endorsement.

(4) An endorsement under subsection (3) must fix the amounts in which the principal and the sureties (if any) are bound and the amount of any money or the value of any security to be deposited.

(5) The person to whom the warrant to arrest is directed must cause the person named or described in the warrant when arrested:

(a) to be released on bail in accordance with any endorsement on the warrant; or

(b) if there is no endorsement on the warrant, to be brought before the court which issued the warrant; or

(c) to be discharged from custody on bail in accordance with the *Bail Act 1982*.

(6) Matters may be proved under this section orally or by affidavit.

(7) A witness, who under subsection (1)(e) has been ordered to pay a fine, is not exempted from any other proceedings for disobeying the subpoena or summons.

Note for section 194

This section differs from the NSW Act. The Commonwealth Act does not include an equivalent provision to section 194. There are provisions to the same effect in federal court rules and Australian Capital Territory legislation applying to proceedings before federal courts and Australian Capital Territory courts.

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 (Improper questions); or

(b) any question that the court has disallowed because any answer that is likely to be given to the question would contravene the credibility rule; or

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

Maximum penalty: 60 penalty units.

(2) An offence against subsection (1) is an offence of strict liability.

197 Regulations

(1) The Administrator may make regulations under this Act.

(2) A regulation may:

(a) for an offence against a regulation, prescribe a fine not exceeding 200 penalty units; or

(b) provide for an offence against a regulation to be an offence of strict or absolute liability but not with a penalty exceeding 100 penalty units.

Note for section 197

This section differs from the Commonwealth Act and NSW Act.

Chapter 6 Transitional matters for Evidence (National Uniform Legislation) Act 2011

198 Definitions

In this Chapter:

commencement day means the day on which section 4 commences.

199 Application of this Act on commencement day

(1) Except as otherwise provided by this Chapter, this Act applies to a proceeding commenced on or after the commencement day.

(2) Except as otherwise provided by this Chapter, if a proceeding commenced before the commencement day, this Act applies to that part of the proceeding that takes place on or after the commencement day, other than any hearing in the proceeding that commenced before the commencement day and:

(a) continued on or after the commencement day; or

(b) was adjourned until the commencement day or a day after the commencement day.

200 Application of section 128A

Section 128A does not apply in relation to an order made before the commencement day that would, if it were made after the commencement day, be a disclosure order as defined in that section.

201 Application of Part 3.10 to disclosure requirements

(1) Part 3.10 does not apply in relation to:

(a) a process or order of a court that requires the disclosure of information or a document issued or ordered before the commencement day that would, if it were issued or ordered after the commencement day, be a disclosure requirement as defined in section 131A; or

(b) a summons or subpoena issued on or after the commencement day to give evidence or produce documents at a hearing to which section 199(2)(a) or (b) applies.

(2) Despite subsection (1)(a), Part 3.10 applies to a summons or subpoena to give evidence issued before the commencement day if the evidence is to be given at a hearing to which this Act applies.

202 Identifications already carried out

(1) Section 114 does not apply in relation to an identification made before the commencement day.

(2) Section 115 does not apply in relation to an identification made before the commencement day.

203 Documents and evidence produced before commencement day by processes, machines and other devices

(1) Section 146 has effect on and after the commencement day in relation to the production of a document or thing that occurred before the commencement day.

(2) Section 147 has effect on and after the commencement day in relation to the production of a document that occurred before the commencement day.

204 Documents attested and verified before commencement day

(1) Section 148 has effect on and after the commencement day in relation to the attestation, verification, signing or acknowledgement of a document that occurred before the commencement day.

(2) Section 149 has effect on and after the commencement day in relation to the signing or attestation of a document that occurred before the commencement day.

205 Matters of official record published before commencement day

(1) Section 153 has effect on and after the commencement day in relation to the publication of a document referred to in that section that occurred before the commencement day.

(2) Section 154 has effect on and after the commencement day in relation to the publication of a document referred to in that section that occurred before the commencement day.

(3) Section 155 has effect on and after the commencement day in relation to the signing or sealing or certification of a document referred to in that section that occurred before the commencement day.

(4) Section 156 has effect on and after the commencement day in relation to the sealing or certification of a document referred to in that section that occurred before the commencement day.

(5) Section 157 has effect on and after the commencement day in relation to the sealing or signing of a document referred to in that section that occurred before the commencement day.

(6) Section 158 has effect on and after the commencement day in relation to the sealing or signing and sealing of a public document referred to in that section that occurred before the commencement day.

(7) Section 159 has effect on and after the commencement day in relation to the publication of a document referred to in that section that occurred before the commencement day.

206 Agreed facts

The reference in section 191(3)(a) to an agreement is taken on and after the commencement day to include a reference to an agreement entered into before the commencement day.

207 Application of Act to improperly or illegally obtained evidence

Section 139 does not apply in relation to a statement made or an act done before the commencement day.

208 Notification provisions

(1) If, before the commencement day, a document of a kind referred to in a notification provision is given or served:

(a) in the circumstances provided for in that provision; and

(b) in accordance with such requirements (if any) as would apply to the giving or serving of the document under that provision on and after its commencement;

on and after the commencement day the document is taken to have been given or served in accordance with that provision.

(2) The following sections are ***notification provisions*** for the purposes of subsection (1):

(a) section 33(2)(c);

(b) section 49(a);

(c) section 50(2)(a);

(d) section 67(1);

(e) section 68(2);

(f) section 73(2)(b);

(g) section 97(1)(a);

(h) section 98(1)(b);

(i) section 168(1), (3), (5) and (6);

(j) section 173(1);

(k) section 177(2) and (5).

209 Notice of intention to adduce hearsay evidence

If a notice given before the commencement day is taken, by the operation of section 208, to have been given under section 67(1), the period for an objection to be made under section 68 to the tender of evidence to which the notice relates is the later of the period ending:

(a) 7 days after the commencement day; or

(b) 21 days after the notice was given to the party concerned.

210 Notice of intention to adduce evidence as to tendency or coincidence

(1) References in sections 97(1)(a) and 98(1)(a) to giving notice are taken to include references to giving notice of the kind referred to in those sections before the commencement day.

(2) Despite section 208(1)(b), a notice of a kind referred to in section 97 or 98 given before the commencement day is taken to have been given in accordance with any regulations or rules made for the purposes for section 99.

211 Time limits for making requests

(1) A request made before the commencement day that would, if it were made after the commencement day, be a request under section 167 is taken to be such a request.

(2) If a notice given before the commencement day is taken, by the operation of section 208, to have been given under section 168(1) or (3), the period for a request to be made under section 168(1) or (3) is the later of the period ending:

(a) 7 days after the commencement day; or

(b) 21 days after the notice was given to the party concerned.

(3) If a copy of a document served before the commencement day is taken, by the operation of section 208, to have been served under section 168(5) or (6), the period for a request to be made under section 168(5) or (6) is the later of the period ending:

(a) 7 days after the commencement day; or

(b) 21 days after the document was served on the party concerned.

(4) If a request made under section 168 was received before the commencement day, in determining what is a reasonable time after receiving a request for the purposes of section 169(2), the court may take into account time passed before the commencement day.

212 Requests under section 173

A request made before the commencement day that would, if it were made after the commencement day, be a request under section 173(2) is taken to be such a request.

Chapter 7 Transitional matters for Evidence (National Uniform Legislation) Amendment Act 2013

214 Definitions

In this Chapter:

amending Act means the *Evidence (National Uniform Legislation) Amendment Act 2013.*

commencement day means the day on which section 5 of the amending Act commences.

215 Ongoing proceedings

Despite the amendments made to section 19 by the amending Act, that section continues to apply to a proceeding commenced before the commencement day as if the amendments had not been made.

Chapter 8 Transitional matters for Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Act 2018

216 Definitions

In this Chapter:

amending Act means the *Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Act 2018*.

commencement means the day on which the amending Act commences.

217 Application of section 127A

(1) Section 127A, as inserted by the amending Act, applies to information given by an informant before the commencement.

(2) However, section 127A does not apply in relation to a proceeding commenced before the commencement.

(3) In this section:

informant, see section 127A(6).

218 Application of section 160

Section 160, as amended by the amending Act, applies in relation to postal articles sent after the commencement.

Chapter 9 Transitional matters for Births, Deaths and Marriages Registration and Other Legislation Amendment Act 2018

219 Application of section 73

Section 73, as amended by the *Births, Deaths and Marriages Registration and Other Legislation Amendment Act*, applies in relation to evidence adduced in proceedings on or after the day on which this Part commences, whether the proceedings are instituted before or after that commencement.

Chapter 10 Transitional matters for Evidence (National Uniform Legislation) Amendment Act 2021

220 Definitions

In this Chapter:

amending Act means the *Evidence (National Uniform Legislation) Amendment Act 2021*.

commencement means the day on which section 4 of the amending Act commences.

221 Application of amendments to sections 94, 98 and 101

(1) Sections 94, 98 and 101, as amended by the amending Act, apply in relation to a proceeding in which the hearing commenced after the commencement.

(2) Sections 94, 98 and 101, as in force immediately before the commencement, continue to apply in relation to a proceeding in which the hearing commenced before the commencement.

222 Application of section 97A

(1) Section 97A, as inserted by the amending Act, applies in relation to a proceeding in which the hearing commenced after the commencement.

(2) However, section 97A does not apply in relation to a proceeding in which the hearing commenced before the commencement.

223 Notices given before commencement

The validity of a notice given under a provision of this Act immediately before the commencement is not affected by the commencement.

Chapter 11 Transitional matters for Justice Legislation Amendment (Domestic and Family Violence) Act 2023

224 Definitions

In this Chapter:

amending Act means the *Justice Legislation Amendment (Domestic and Family Violence) Act 2023*.

commencement means the commencement of Part 6 of the amending Act.

225 Application of amendment to section 19

(1) Section 19, as amended by the amending Act, applies only in relation to a proceeding in which the hearing commences after the commencement.

(2) Section 19, as in force immediately before the commencement, continues to apply in relation to a proceeding in which the hearing commenced before the commencement.

Schedule Oaths and affirmation

Note for Schedule

The Commonwealth Act, NSW Act and Victorian Act contain a schedule, which is not required for the Territory because of the provisions in the Oaths, Affidavits and Declarations Act 2010.

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, see 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 Territory.

Note for definition ***Australian law***

See clause 9 of Part 2 of this Dictionary for the meaning of a law of the Commonwealth, a State, a Territory or a foreign country. That clause also further defines Australian law.

Australian lawyer, see section 5(a) of the *Legal Profession Act 2006*.

Australian legal practitioner, see section 6(a) of the *Legal Profession Act 2006*.

Australian or overseas proceeding means a proceeding (however described) in an Australian court or a foreign court.

Australian Parliament means the Parliament of the Commonwealth or a State or the Legislative Assembly of a Territory.

Australian practising certificate, see section 4 of the *Legal Profession Act 2006*.

Australian-registered foreign lawyer, see section 4 of the *Legal Profession Act 2006*.

Australian Statistician means the Australian Statistician referred to in section 5(2) of the *Australian Bureau of Statistics Act 1975* (Cth), and includes any person to whom the powers of the Australian Statistician under section 12 of the *Census and Statistics Act 1905* (Cth) have been delegated.

business, see 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 clause 10(1) of Part 2 of this Dictionary.

civil penalty, see clause 3 of Part 2 of this Dictionary.

civil proceeding means a proceeding other than a criminal proceeding.

client, see section 117.

coincidence evidence means evidence of a kind referred to in section 98(1) that a party seeks to have adduced for the purpose referred to in that subsection.

coincidence rule means the provision contained in section 98(1).

Commonwealth Act, see section 2A.

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) a Department within the meaning of the *Public Service Act 1999* (Cth); or

(b) the Parliament of the Commonwealth, 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, this Territory or Norfolk Island); or

  (ii) by the Governor-General; or

  (iii) by a Minister of the Commonwealth; 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, see section 117.

confidential document, see section 117.

court means a Territory court.

Notes for definition ***court***

1 Territory court is defined in this Dictionary.

2 The Commonwealth Act does not include this definition.

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, see section 101A.

credibility rule means the provision contained in 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* (Cth).

cross-examination, see clause 2(2) of Part 2 of this Dictionary.

cross-examiner means a party who is cross-examining a witness.

de facto partner

Note for definition ***de facto partner***

This definition is not needed because of the definition of de facto partner in section 19A(3) of the Interpretation Act 1978.

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 for definition ***document***

See also clause 8 of Part 2 of this Dictionary on the meaning of ***document****.*

electronic communication, see section 5 of the *Electronic Transactions (Northern Territory) Act 2000*.

examination in chief, see clause 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

Note for definition ***federal court***

The Commonwealth Act includes a definition of this term.

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 and duty.

government or official gazette includes the Government Gazette.

Note for definition **government or official gazette**

The definition of this term in the Commonwealth Act and NSW Act differs from this definition.

Governor of a State includes any person for the time being administering the Government of the State.

Note for definition ***Governor of a State***

The Commonwealth Act does not include a definition of ***Governor of a State****. The definition is covered by section 16B of the Acts Interpretation Act 1901 (Cth).*

Governor-General means Governor-General of the Commonwealth and includes any person for the time being administering the Government of the Commonwealth.

Note for definition ***Governor-General***

The Commonwealth Act does not include a definition of ***Governor-General****. The definition is covered by section 16A of the Acts Interpretation Act 1901 (Cth).*

hearsay rule means the provision contained in section 59(1).

identification evidence means evidence that is:

(a) an assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where:

(i) the offence for which the defendant is being prosecuted was committed; or

(ii) an act connected to that offence was done;

at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, 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 of the Commonwealth – 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 Commonwealth Constitution or convened under any Act of the Commonwealth; 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.

judicial entity means the following:

(a) the Civil and Administrative Tribunal;

(b) any other person or body prescribed by the regulations.

law, see clause 9 of Part 2 of this Dictionary.

lawyer, see section 117.

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 for definition ***legal counsel***

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

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

member, of the Australian Federal Police, includes a special member or a staff member of the Australian Federal Police.

NSW Act, see section 2A.

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

opinion rule means the provision contained in section 76.

overseas-registered foreign lawyer, see section 170 of the *Legal Profession Act 2006*.

parent includes the meaning given in clause 10(2) of Part 2 of this Dictionary.

party, see section 117.

picture identification evidence, see section 115.

police officer means:

(a) a member of the Australian Federal Police; or

(b) a member of the police force of a State or Territory.

postal article, see section 3 of the *Australian Postal Corporation Act 1989* (Cth).

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.

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 Commonwealth 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, see clause 2(3) and (4) of Part 2 of this Dictionary.

representation includes:

(a) an express or implied representation (whether oral or in writing); or

(b) a representation to be inferred from conduct; or

(c) a representation not intended by its maker to be communicated to or seen by another person; or

(d) a representation that for any reason is not communicated.

seal includes a stamp.

tendency evidence means evidence of a kind referred to in section 97(1) that a party seeks to have adduced for the purpose referred to in that subsection.

tendency rule means the provision contained in section 97(1).

Territory court means:

(a) the Supreme Court; or

(b) any other court created by a law of the Territory; or

(c) any person or body (other than a court) that, in exercising a function under the law of the Territory, is required to apply the laws of evidence.

Note for definition ***Territory court***

The Commonwealth Act does not include this definition. The Commonwealth Act contains a similar definition of "ACT court". The NSW Act contains a similar definition of "NSW court". The Victorian Act contains a similar definition of "Victorian court".

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.

Victorian Act, see section 2A.

visual identification evidence, see section 114.

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

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 Commonwealth 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; and

(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.

(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

(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:

(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; and

(b) any copy, reproduction or duplicate of the document or of any part of the document; and

(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 within the meaning of the *Public Service Act 1999* (Cth); and

(b) in that context, a reference to an office is a reference to a position occupied by the APS employee concerned, and a reference to an officer includes a reference to a Secretary, or APS employee, within the meaning of the Act.

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.

(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; and

(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; and

(b) if the person is an ex-nuptial child – the person's natural father; and

(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

This clause is not needed because of the definition of de facto partner in section 19A(3) of the Interpretation Act 1978.

ENDNOTES

1 KEY

Key to abbreviations

amd = amended
app = appendix
bl = by-law
ch = Chapter
cl = clause
div = Division
exp = expires/expired
f = forms
Gaz* = *Gazette
hdg = heading
ins = inserted
lt = long title
nc = not commenced
od = order
om = omitted
pt = Part
r = regulation/rule
rem = remainder
renum = renumbered
rep = repealed
s = section
sch = Schedule
sdiv = Subdivision
SL = Subordinate Legislation
sub = substituted

2 LIST OF LEGISLATION

***Evidence (National Uniform Legislation) Act 2011* (Act No. 33, 2011)**

Assent date	15 November 2011
Commenced	1 January 2013 (*Gaz* G51, 19 December 2012, p 4)

***Evidence (National Uniform Legislation) (Consequential Amendments) Act 2012* (Act No. 23, 2012)**

Assent date	21 November 2012
Commenced	1 January 2013 (*Gaz* G51, 19 December 2012, p 4)

***Evidence (National Uniform Legislation) Amendment Act 2013* (Act No. 4, 2013)**

Assent date	14 March 2013
Commenced	2 April 2013 (*Gaz* S14, 2 April 2013)

***Local Court (Related Amendments) Act 2016* (Act No. 8, 2016)**

Assent date	6 April 2016
Commenced	1 May 2016 (s 2, s 2 *Local Court (Repeals and Related Amendments) Act 2016* (Act No. 9, 2016) and *Gaz* S34, 29 April 2016)

***Independent Commissioner Against Corruption (Consequential and Related Amendment) Act 2018* (Act No. 3, 2018)**

Assent date	21 February 2018
Commenced	30 November 2018 (s 2, s 2 *Independent Commissioner Against Corruption Act 2017* (Act No. 23, 2017) and *Gaz* S94, 30 November 2018

***Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Act 2018* (Act No. 7, 2018)**

Assent date	19 April 2018
Commenced	20 April 2018 (s 2)

***Births, Deaths and Marriages Registration and Other Legislation Amendment 2018* (Act No. 30, 2018)**

Assent date 5 December 2018
Commenced 6 December 2018 (s 2)

***Evidence (National Uniform Legislation) Amendment Act 2021* (Act No. 2, 2021)**

Assent date 5 March 2021
Commenced 1 April 2021 (*Gaz* G13, 31 March 2021, p 1)

***Statute Law Revision Act 2023* (Act No. 4, 2023)**

Assent date 2 March 2023
Commenced 3 March 2023 (s 2)

***Justice Legislation Amendment (Domestic and Family Violence) Act 2023* (Act No. 33, 2023)**

Assent date 6 December 2023
Commenced 25 March 2024 (*Gaz* S18, 22 March 2024)

Amending Legislation

***Justice and Other Legislation Amendment Act 2024* (Act No. 4, 2024)**

Assent date 14 March 2024
Commenced pt 5, div 1: 30 October 2023 (s 2(2));
pt 3, div 2: 25 March 2024 (s 2(3), s 2 *Sentencing and Other Legislation Amendment Act 2022* (Act No. 28, 2022) and *Gaz* S19, 22 March 2024);
pt 4: 25 March 2024 (s 2(4), s 2 *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023* (Act No. 20, 2023) and *Gaz* S20, 22 March 2024);
rem: 15 March 2024 (s 2(1))

***Attorney-General Legislation Amendment Act 2025* (Act No. 14, 2025)**

Assent date 6 June 2025
Commenced 1 August 2025 (*Gaz* G14, 10 July 2025, p 1)

***Criminal Procedure Legislation Amendment Act 2026* (Act No. 11, 2026)**

Assent date 28 May 2026
Commenced 1 July 2026 (*Gaz* S47, 22 June 2026)

3 GENERAL AMENDMENTS

General amendments of a formal nature (which are not referred to in the table of amendments to this reprint) are made by the *Interpretation Legislation Amendment Act 2018* (Act No. 22, 2018) to: ss 1, 4, 19, 21, 22, 23, 24, 128A, 129, 171 and 194 and sch and dict.

4 LIST OF AMENDMENTS

s 4	amd No. 3, 2018, s 107
s 10A	ins No. 7, 2018, s 4
s 19	amd No. 4, 2013, s 4; No. 33, 2023, s 55
s 73	amd No. 30, 2018, s 18
s 81	amd No. 14, 2025, s 33
s 94	amd No. 2, 2021, s 4
s 97A	ins No. 2, 2021, s 5

s 98	amd No. 2, 2021, s 6
s 101	amd No. 2, 2021, s 7
pt 3.10	
div 1A note	amd No. 7, 2018, s 6
s 127A	ins No. 7, 2018, s 5
s 160	amd No. 7, 2018, s 7
s 194	amd No. 11, 2026, s 39
s 196	rep No. 8, 2016, s 22
ch 6 hdg	ins No. 23, 2012, s 4
ss 198 – 212	ins No. 23, 2012, s 4
s 213	exp No. 23, 2012, s 213(5)
ch 7 hdg	ins No. 4, 2013, s 5
ss 214 – 215	ins No. 4, 2013, s 5
ch 8 hdg	ins No. 7, 2018, s 8
s 216	ins No. 7, 2018, s 8
	amd No. 4, 2023, s 23
ss 217 – 218	ins No. 7, 2018, s 8
ch 9 hdg	ins No. 30, 2018, s 19
s 219	ins No. 30, 2018, s 19
ch 10 hdg	ins No. 2, 2021, s 8
ss 220 – 223	ins No. 2, 2021, s 8
ch 11 hdg	ins No. 33, 2023, s 55
ss 224 – 225	ins No. 33, 2023, s 55
dict	amd No. 7, 2018, s 9